

NEW RULES FOR COMMERCIAL LETTERS OF CREDIT UNDER UCP600

UCC L.J. 39 UCC L.J. 3 Art. 1- Fall 2007. Reprint with Permission.

by James E. BYRNE and Lee H. DAVIS*

Précis

The 2007 Revision of the Uniform Customs and Practices for Documentary Credits not only reorganizes the rules of practice for commercial letters of credit but introduces a new drafting style modeled somewhat on the International Standby Practices. It also introduces new terms and concepts and approaches traditional concepts with new terminology. As the letter of credit community makes the adjustments necessary to implement it by July 1, 2007, commercial lawyers will be called on by clients to advise them regarding its impact. This paper provides an introductory survey of the legal implications of UCP600. Part I describes the revision project, Part II provides an overview of UCP600, Part III draws on specific examples of UCP600 to illustrate the type of changes that it contains, Part IV considers its implications for credits that are subject to U.S. Revised UCC Article 5, and Part V suggests sources to which lawyers can look for a better understanding of the revision.

I. INTRODUCTION TO UCP600

II. OVERVIEW OF THE REVISIONS

III. SPECIFIC EXAMPLES OF THE CHANGES

1. Minor Changes Involving Moving Words and Provisions to Rewrite or Reorganize Without Having Any Significant Impact

2. Disappointing Failures to Address Problems in UCP500

3. Unsatisfactory Deletions

4. Significant Changes

a. ISBP Induced Provisions

b. ISP98 Induced Provisions

c. The Introduction of Formal Definitions

d. Interlocking Definitions, Redundancy, and Confusion

e. Positive Changes with Potential for Litigation

f. Playing LC Politics

g. Hints of Open Windows

h. Confusion Regarding "Standard International Banking Practice"

IV. RELATIONSHIP TO REVISED UCC ARTICLE 5

1. Nonvariable Provisions

2. Variance by UCP600 of Variable Revised UCC Article 5 Provisions

3. Problems Regarding Enforcement of UCP600 Provisions

4. The Alignment Between UCP600 and Revised UCC Article 5

5. UCP600 as a Usage of Trade

V. WHERE TO GO

VI. CONCLUSION

* Professor Byrne teaches law at George Mason University School of Law and directs the Institute of International Banking Law & Practice, Inc. He has played important roles in connection with the reform of letter of credit law and practice on the national and international levels, including the revision of UCC Article 5, the International Standby Practices, the International Standard Banking Practice, and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. He was a member of the ICC Consulting Group for UCP600. Lee H. Davis is the Senior Legal Counsel to the Institute of International Banking Law & Practice and a member of the New York Bar. Mr. Davis has collaborated with Professor Byrne extensively in his work on letter of credit law and practice. The support of George Mason University School of Law and its Law & Economics Center in the research necessary to prepare this paper is gratefully acknowledged.

I. INTRODUCTION TO UCP600

The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (UCP600) is the latest of a series of revisions of these rules that date from 1933 and have become the universal norm for commercial letters of credit.¹ Promulgated by the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC) headquartered in Paris, France, it has an “effective” date of July 1, 2007.² It articulates standard international commercial letter of credit practice.

1. See The Uniform Customs and Practice for Documentary Credits ICC Publication No. 600 (ICC Publishing S.A. 2007) (UCP600). UCP600 and the prior revision, The Uniform Customs and Practice for Documentary Credits, ICC Publication No. 500 (ICC Publishing S.A. 1993) (UCP500), are reprinted in *LC Rules & Laws: Critical Texts*, 4th ed. (Institute of International Banking Law & Practice 2007) (hereinafter *LC Rules & Laws*). Prior versions were issued in 1933 (UCP74), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), and 1983 (UCP400). There has been no consistency in the correlation between the date attributed by the ICC to the revision and its effective date. For example, UCP500, which is known as the 1993 revision, was adopted in 1993 with an effective date in 1994. On the other hand, UCP600 was adopted in 2006 with an effective date in 2007. The text of prior versions of the UCP are contained in appendices to Byrne et al, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2007). Although UCP500 has been translated into virtually every language in which international commerce is conducted, the official version is in English, and care must be taken with translations as it is reported that they are of uneven quality.

2. The notion of an “effective” date derives from the fiction indulged in by the ICC, a private international organization whose members are private national organizations, that its rules are quasigovernmental. In fact, the UCP as a private rule of practice can be incorporated into undertakings at will. In practice, however, there is considerable value to a coordinated launch date from the perspective of international banking systems. One interesting aspect of this date will be credits issued on July 1, 2007, in Australia with beneficiaries in North America, which will be operating under UCP500 for several more hours. The international banking operations community is aware of the problem and will address it. A more realistic global solution would have been to have made it operative at 12:00 midnight on 1 July Greenwich Mean Time.

3. The United Nations Convention on Independent Guarantees and Standby Letters of Credit (UN LC Convention), opened for signature in December 1995 by the U.N. General Assembly, was adopted by resolution on 26 January 1996 at its 50th session, signed by seven nations, including the United States, which signed it on December 11, 1997. It went into effect on January 1, 2000, and as of December 2006 has been adopted by Belarus, Ecuador, El Salva-

UCP600 is applicable to credits made subject to it. It may also apply as international custom to LCs that do not incorporate it. In formulating national LC law, courts have deferred to the UCP as a primary source of letter of credit practice and as an influential source of letter of credit law with few exceptions, although it is not uncommon for their interpretations to distort the practices that it articulates. Both statutory formulations of LC law, the UN LC Convention³ and U.S. Revised UCC Article 5,⁴ expressly defer to letter of credit practice as do the Chinese

dor, Gabon, Kuwait, Liberia, Panama, and Tunisia. The Convention has not been ratified by the United States of America. For the text of the UN LC Convention, see United Nations Convention on Independent Guarantees and Standby Letters of Credit, Dec. 11, 1995, U.N. Doc. A/RES/50/48, reprinted in *LC Rules & Laws and 1999 Annual Survey of Letter of Credit Law & Practice* at 175 (James E. Byrne ed., 1999). (The Annual Survey is a series of hardbound collections of all LC literature available in English, including abstracts of all reported decisions. Volumes are cited as [year] Annual Survey [page number]—thus 1999 Annual Survey 175.) For a review of the provisions of the UN LC Convention, see the Explanatory Note by the U.N. Secretariat, U.N. Doc. A/CN.9/431 (1996), reprinted in 1997 Annual Survey 127.

4. Uniform Commercial Code (UCC) Article 5 (Letters of Credit) was contained in the original Model UCC that was approved in 1952. In 1957, Model UCC Article 5 was revised extensively as a result of comments by the New York Law Revision Commission. See N.Y. Law Rev. Comm’n Rep. 11, 46 (1956). This version was eventually adopted by all 50 states. A nonconforming amendment, styled section 5-102(4), however, was adopted by Alabama, Arizona, Missouri, and New York that displaced UCC Article 5 where the letter of credit was determined to be subject to the UCP. A joint American Bar Association/Banking Industry Task Force recommended the revision of original UCC Article 5 in 1990. See The Task Force on the Study of U.C.C. Article 5, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 Bus. Law. 1527 (1990). Revised UCC Article 5, completed in October 1995, has been adopted by all 50 states, the District of Columbia, and Puerto Rico. For a table of dates of adoption, effective dates, and state citations, see *LC Rules & Laws*. For materials on Revised UCC Article 5, see Barnes & Byrne, *Revision of U.C.C. Article 5*, 50 Bus. Law. 1449 (1995); Barnes, Byrne, & Boss, *The ABCs of the UCC: Article 5* (ABA 1998); Kozolchik, *The Financial Standby: A Summary Description of Practice and Related Legal Problems*, 28 UCC L.J. 327 (1996); Schroeder, *The 1995 Revision to UCC Article 5, Letters of Credit*, 29 UCC L.J. 331 (1997), reprinted in 1998 Annual Survey 197; White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 Nw. J. Int’l L. & Bus. 215 (1995), reprinted in 1997 Annual Survey 7.

LC Rules promulgated by the Supreme People's Court of China.⁵

Although the International Standby Practices (ISP98) is designed for standby letters of credit,⁶ UCP600, which is not, does expressly indicate that its rules apply to any documentary credit, including standbys. For reasons discussed in this paper, UCP600 is less likely to be applied to standbys than was UCP500, which contained a similar provision.

UCP600 departs radically from the drafting style of prior revisions of the UCP and follows the style and approach of ISP98 to a considerable extent. It also absorbs some provisions of the 2003 version of the International Standard Banking Practice (ISBP)⁷ At its May 2000 meeting, the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC Banking Commission) established a task force to document international standard banking practice for the examination of documents presented under documentary credits issued

5. Rules of the Supreme People's Court Concerning Several Issues in Hearing Letter of Credit Cases, Fa Shi No.13 (2005) (Chinese LC Rules) was adopted at the 1368th Session of the Justice Committee of the Supreme People's Court of the People's Republic of China on 24 October 2005, promulgated by the Supreme People's Court of the People's Republic of China on 14 November 2005, and effective as of 1 January 2006. An English translation is contained in LC Rules & Laws and can be licensed from the Institute of International Banking Law and Practice at <http://www.iiblp.org>. Judge Gao Xiang has written a Commentary on the PRC LC Rules (Institute of International Banking Law & Practice 2007).

6. A separate set of rules for standby LCs, the International Standby Practices (ISP98), was formulated by the Institute of International Banking Law & Practice, Inc. (the Institute), completed in 1998, and effective 1 January 1999. The text has been endorsed by the UN Commission on International Trade Law and the International Chamber of Commerce and published as ICC Publication No. 590. It is reprinted in LC Rules & Laws. The ISP is explained in Byrne, *The Official Commentary on the International Standby Practices* (Institute of International Banking Laws & Practice 1998). See also Byrne, *Standby Rulemaking: A Glimpse at the Elements of Standardization and Harmonization of Banking Practice*, 1998 Annual Survey 96. The text of the ISP98 can be obtained from the Institute's website at http://iiblp.org/cart/store/comersus_viewItem.asp?idProduct=1193. Other educational tools may be obtained from the Institute as well, at <http://www.iiblp.org>.

7. At its May 2000 meeting, the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC Banking Commission) established a task force to document international standard banking practice for the examination of documents presented under documentary credits issued subject to the

subject to the UCP. International Standard Banking Practice (ISBP) for the Examination of Documents under Documentary Credits, ICC Publication No.645 (ICC Publishing S.A. 2003) (ISBP), reprinted in LC Rules & Laws, complements the UCP500, filling in gaps and explaining the practices that underline UCP500. It is a statement of the "standard banking practice" referenced in UCP500 Article 13(a) Sentence 2. The ISBP is based on ICC Banking Commission Opinions and Decisions and its understanding of the practices reflected in them and the ICC Decision on Originals.⁸

II. OVERVIEW OF THE REVISIONS

UCP600 (2007) is a candidate for the title of the most ambitious and extensive revision of the six versions of the UCP.⁹

As compared with UCP500 (1993), itself a significant revision of UCP400 (1983), the changes are massive. Some provisions are deleted,¹⁰ virtually ev-

UCP. International Standard Banking Practice (ISBP) for the Examination of Documents under Documentary Credits, ICC Publication No.645 (ICC Publishing S.A. 2003) (ISBP), reprinted in LC Rules & Laws, complements the UCP500, filling in gaps and explaining the practices that underline UCP500. It is a statement of the "standard banking practice" referenced in UCP500 Article 13(a) Sentence 2. The ISBP is based on ICC Banking Commission Opinions and Decisions and its understanding of the practices reflected in them.

8. ICC Banking Commission, *The Determination of an "Original" Document in the Context of UCP 500 Sub-Article 20(b)*, 12 July 1999, reprinted in LC Rules & Laws and available at <http://www.iccwbo.org/id415/index.html>.

9. Other candidates for this title are UCP222 (1962) and UCP500 (1993). The former represented a sea change in that it enabled the UK banks and their imperial network of correspondents to join the UCP system, making the UCP truly global. UCP500 represented a comprehensive attempt to capture the fundamental principles of LC practice in the rules. In neither were the changes as extensive as UCP600 (although UCP600 does not have the intellectual foundation of UCP500) nor the revolutionary character of UCP222 (although the change it inaugurated was not complete until UCP290 (1974), which carried out many of the changes initiated by UCP222). From a cosmetic perspective, however, UCP600 is clearly the most extensive revision.

10. See, e.g., UCP500 Articles 5 (Instructions to Issue/Amend Credits), 6 (Revocable v. Irrevocable Credits), 8 (Revocation of a Credit), 12 (Incomplete or Unclear Instructions), and 38 (Other Documents).

ery word has been moved, concepts are unbundled,¹¹ and similar matters are grouped together. There are new concepts and terms (some of which are identified and discussed subsequently in this paper), as well as new expressions of old concepts. For the first time, formal definitions and interpretations are introduced.¹² Following ISP98, the provisions of UCP600 are for the first time described as “rules.”¹³

The apparent intent of the drafters was to simplify the text and to add to the precision with which it addressed various aspects of letter of credit practice. In one sense, UCP600 has done so, reducing the number of articles from 49 to 39 and the number of words by approximately 1,500, leaving UCP600 at approximately 9,500 words.¹⁴ The 19th century style of writing carried forward into UCP500 from earlier revisions has virtually disappeared.¹⁵ Clauses that were technically unnecessary such as the constant repeti-

tion of the phrase “unless otherwise agreed” have been deleted in favor of one statement of the self-evident general principle that the rules may be varied.¹⁶ Defined words are also used to reduce repetition. For example, the phrase “complying presentation” is used in lieu of the traditional formula that a document must comply on its face with the terms and conditions of the credit (also a defined term).¹⁷

The upshot of these changes is that, unlike the transition from UCP400 to UCP500, those who are familiar with UCP500 will require a massive conceptual retooling.¹⁸ For letter of credit lawyers, this task will not be quite as challenging as it is for letter of credit bankers because the approach taken in UCP600 is superficially similar to that of contemporary commercial statutes. In fact, much of UCP600 appears to be modeled on the approach and organization of ISP98. As a result, expectations that words

11. Most notably, the treatment of the obligations of issuing banks in UCP600 Article 7, confirming banks in UCP600 Article 8, and amendments in UCP600 Article 10, all of which had been combined in UCP500 Article 9 (Liability of Issuing and Confirming Banks).

12. Starting with UCP82 (1933), the UCP contained proto-definitions such as that of “irrevocable credits” in UCP82 Article 5 (“Irrevocable credits are definite undertakings by a bank in favour of the beneficiary. They can neither be amended nor cancelled without the agreement of all concerned”). By UCP222 (1963), there was a section entitled “General Provisions and Definitions” that essayed a definition of “Documentary Credit” and that contained descriptive definitions of terms such as “beneficiary,” “issuing bank,” and “applicant,” signaling them with parentheticals. Although this approach increased in subsequent revisions, they were more descriptive and did not function formally as terms of art in the rules with the exception of the term “credit.” ISP98 introduced a formal collection of defined terms that were set aside for the first time. UCP600 has copied this approach.

13. UCP600 Article 1 (Application of UCP) provides that UCP600 “are rules.” Their formal designation as “Article ___” is retained as is the odd use of the plural to describe the entire product, as in “UCP600 are.” This usage is a vestige of the UK view that the product is just a collection of rules without any collective existence or coherence, each of which is to be viewed on its own. UCP600, if anything, stands in contrast to that notion.

14. Although one can determine numbers with precision from modern computer programs, UCP500 contains headings for groups of provisions in addition to the title of each article, which are not contained in UCP600. Given this lack of parallelism, the numbers are 9,424 words in UCP600 and 10,902 words in UCP500 including all titles and headings.

15. A classic example of this usage is the phrase “banks will accept,” which was a product of the drafting style of Bernard Wheble. It had five or six different meanings in UCP500 ranging from the thing indicated is optional to the thing indicated must appear in order for the document to comply. In UCP500 Article 23 (Marine/Ocean Bill of Lading), the phrase was used in two different senses, namely that the bill of lading must contain all the characteristics mentioned and in a permissive sense with respect to transshipment. Vestiges of the phrase still appear in UCP600, but where used it means that the document complies if it contains the thing indicated.

16. As it did in UCP500, the general principle is stated in UCP600 Article 1 (Application of UCP), but, following ISP98, UCP600 did not constantly reiterate the point. ISP98, however, did make the point in certain places for emphasis. See ISP98 Rule 1.11(d)(I) (Interpretation of these Rules), which provides that “[u]se of the phrase ‘unless a standby otherwise states’ or the like in a rule emphasizes that the text of the standby controls over the rule.”

17. It may be debated, however, whether the execution has achieved this objective. An entire article, UCP600 Article 15 (Complying Presentation), which is devoted to this task, is essentially redundant. The notion of “honour,” which is intended to make unnecessary the formulation of pay, incur a deferred payment undertaking (and pay), or accept (and pay), hardly prevents the repetition of each of these categories in UCP600 Articles 7 (Issuing Bank Undertaking) and 8 (Confirming Bank Undertaking).

18. There is a sense in which it might be said that those persons who have not worked with prior versions of the UCP may have more advantage in learning the revision than those whose approach and attitude are encumbered by familiarity with prior versions. Whether or not one is familiar with prior versions of the UCP, however, mastery of UCP600 is a daunting task.

used have defined meanings and that there is an element of precision in the drafting process will assist lawyers in working with this revision. The challenge for attorneys will be one of frustration as the lack of trained legal draftsmanship in the drafting becomes apparent, especially in contrast with ISP98.

Although lacking UCP500's useful groupings of articles with headings, the organization of UCP600 is roughly similar to that of UCP500 with the treatment of general provisions at the outset (UCP600 Articles 1 to 5); provisions regarding the obligations or liabilities of banks grouped secondly (UCP600 Articles 6 to 13); rules regarding examination of documents and refusal following (UCP600 Articles 14 to 17); followed by specific rules regarding specific documents (UCP600 Articles 18 to 28), miscellaneous provisions (UCP600 Articles 29 to 33), and disclaimers (UCP600 Articles 34 to 37). Transfer and assignment (UCP600 Articles 38 and 39) appear at the end as in UCP500.

The major organizational changes are the inclusion of UCP600 Article 2 (Definitions) containing formal definitions and the grouping together in UCP600 Article 3 (Interpretations) provisions that are either interpretations of UCP600 or of terms that commonly appear in letters of credit. These latter provisions, on the whole, are not new but are drawn from various parts of UCP500.

There is also a composite of provisions relating to the compliance of documents collected in UCP600 Article 14 (Standard for Examination of Documents), which replaces UCP500 Article 13 (Standard for Examination of Documents). Gathered here are those provisions that contained discreet rules regarding determination of compliance. Some of them were broken out of specific UCP500 articles, such as of the description of the goods from UCP500 Article 37(c) (Commercial Invoices). A separate article was inserted to address originality. The provisions containing disclaimers of liability were simplified and regrouped after the miscellaneous provisions instead of after the

provisions on liability in UCP500. The transport documents remain similar in organization, as do the miscellaneous provisions, save for those that have been regrouped under interpretations. Given this structure, there is a somewhat general resemblance between the organization of UCP500 and UCP600.

The attempt at a more systematic approach in drafting, however, is responsible for the more significant changes between the two versions. The drafting style, while attempting to copy ISP98, has been hindered by an inability or unwillingness to resolve fundamental policy disputes particularly with respect to questions of compliance. As will be illustrated subsequently, the result is a troubling ambiguity in some of the texts that set forth principles by which compliance is to be determined and that will pose a serious challenge in the interpretation and application of UCP600.

III. SPECIFIC EXAMPLES OF THE CHANGES

The revisions in UCP600 can be grouped together into various categories. At this stage of UCP600 jurisprudence and scholarship, it is premature to attempt a definitive catalogue of changes, but the following list, while to some extent overlapping and rough, provides a general vehicle by which the extent of the changes may be assessed.¹⁹ It also illustrates some of the problems that may be encountered.

1. Minor Changes Involving Moving Words and Provisions to Rewrite or Reorganize Without Having Any Significant Impact

Many of the changes in UCP600 fall within this category. At their best, the changes simplify and clarify the rules. However, it should be noted that clarity in restating the rules may not be optimal, particularly where the clarification runs contrary to assumptions that have been made under prior revisions.

19. We still await the definitive study of private rulemaking techniques in general or in terms of the UCP, which qualifies as the most successful instance of private rulemaking, being more successful in its impact than most international conventions.

Example (i): Counting Days in Which To Examine Documents. Under prior versions of the UCP, many banks assumed that the receipt of a presentation on a nonbanking day entitled them to count the first following banking day as the day of receipt. For example, where the documents are received on a Sunday that is a nonbanking day for the issuer, it would treat Monday, its next banking day, as the day of receipt and begin the countdown from Tuesday (assuming that it was a banking day). This implied assumption is expressly stated in ISP98 Rule 5.01(a)(iii) (Timely Notice of Dishonour), which provides, “[t]he time for calculating when notice of dishonour must be given begins on the business day following the business day of presentation.” However, the assumption is not expressly stated in UCP500 Article 13(b).²⁰ The repetition in UCP600 Article 16(d) (Discrepant Documents, Waiver, and Notice) of the formula “following the day of presentation” instead of “following the banking day of presentation,” however, leaves no room for such an implication. As a result, banks that have followed the practice stated above may be surprised to learn that they have one less day in which to determine whether or not to give notice of refusal than they had under UCP500.²¹

Note: The Presumption of Precision. Underlying many of these observations on UCP600 is a presumption that is difficult to articulate and even harder to fit into an organizational plan of a discussion of UCP600 changes (hence the designation “Note”). Past versions of the UCP were recognized as the work of bankers attempting to state practice. It was apparent to most lawyers from its organization, approach, and drafting style that the UCP was not to be

interpreted as if it was a statutory formulation and that it required interpretation in the context of standard international letter of credit practice. Nor was it a systematic formulation of that practice but rather a collection of ad hoc responses to specific issues that arose over the years. The major difference between UCP500 and ISP98 lay in the attempt in the latter to address standby practice in a unified and systematic manner. Therefore, there was an unstated presumption in the interpretation of the UCP that its provisions must be read in the context of an unstated practice. The failure to make that assumption is the root cause of most of the egregious LC decisions of the past decade, such as those involving originals.²²

This presumption should also obtain for UCP600. The work as a whole, however, is not a systematic or coherent formulation of commercial letter of credit practice, as can be seen from the continued need for the International Standard Banking Practice to supplement it, which will be apparent from the likely spate of ICC Banking Commission Opinions that will follow its introduction, in the judicial decisions which will inevitably emerge, and in the predictable scramble on the part of the ICC Banking Commission to defuse them.

It is, however, more difficult to make this presumption of imprecision because UCP600 has the veneer of organization and terminology of a more precisely drafted work. Moreover, certain of its provisions, typically those drafted by or copied from leading LC lawyers, do achieve the desired level of precision.²³ It is likely, therefore, that a presumption of precision will attach to UCP600.

20. UCP500 Article 13(b) (Standard for Examination of Documents) provides, “[t]he Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.”

21. This reduction will be aggravated by another change to the timing of examination and giving notice of refusal, namely the substitution in UCP600 Article 14(b) (Standard for Examination of Documents) of a period of “a maximum of five banking days” for “a reasonable time not to exceed seven banking days” that appeared in UCP500 Article 13(b) (Standard for Examination of Documents).

22. This problem arose when an English court gave a literal interpretation to UCP500 Article 20(b) (Ambiguity as to the Issuers of Documents) instead of following expert evidence as to how this provision was understood in letter of credit practice. See generally Byrne, *The Original Documents Controversy* (Institute of International Banking Law & Practice, 1999).

23. The treatment of originals in UCP600 Article 17 (Original Documents and Copies) reflects the provisions of ISBP ¶¶31-35 which were taken from the detailed analysis and drafting reflected in *The Determination of an “Original” Document in the Context of UCP 500 Sub-Article 20(b)*, reprinted in *LC Rules & Laws*, which, in turn, reflects the IFSA Statement Standard Banking Practice for the Examination of Documents, which is the work of Mr. James G.

Continued on next page . . .

2. Disappointing Failures to Address Problems in UCP500

After more than a decade of experience and in light of the drafting of ISP98 and two major statutory formulations, the weaknesses of the UCP500 system were readily apparent. UCP600, however, only selectively addressed problems, ignoring some and papering over others. Moreover, as indicated, its drafting also makes apparent problems or difficulties that otherwise would have been hidden or, to a certain extent, obscured.

Example (ii): Standby Letters of Credit. Instead of either omitting standbys or providing rules or subrules that ameliorate problems inherent in standbys subject to the UCP, UCP600 merely continued the inadequate provisions in UCP500.²⁴ UCP600 Article 1 states that it applies to standbys “to the extent to which they [the articles/rules] may be applicable.” This phrase was first inserted into UCP400 (1983) to clarify that the UCP could be used for standby letters of credit. It reveals the half-hearted acceptance of the standby letter of credit by the tra-

ditionalist commercial letter of credit community who at the time controlled the ICC Banking Commission. This attitude is illustrated by the title of an article by Bernard Wheble, then chair of the ICC Banking Commission and drafter of UCP400, entitled “Problem Children”—Standby Letters of Credit and Simple First Demand Guarantees.²⁵ The UCP formulation also reveals the inadequacy with which this reluctant acknowledgment of standbys was drafted since it raises the question as to what extent the several articles of the UCP are applicable to standbys, a question on 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.

It is not that some attempt at accommodation was not made at the time. It was recognized at the time that some adjustment of the UCP was necessary. Accordingly, modifications of several specific articles were inserted into UCP400 with the intention of accommodating standbys, chiefly by inserting the term “drawing” in various articles.²⁶ However, these adjustments created more problems than they solved.²⁷

Continued from previous page . . .

Barnes of Baker & McKenzie, one of the few lawyers who is a leading international letter of credit expert. Mr. Barnes’s hand is also present in the provisions of UCP600 Articles 12(b) (Nomination), 7(c) (Issuing Bank Undertaking), and 8(c) (Confirming Bank Undertaking), discussed subsequently, that resolved problems stemming from the failure to accord protection to confirmers that discounted their own undertakings in the face of supervening LC fraud prior to maturity. Interestingly, lawyers have played a far more direct role in the drafting of prior versions than they did in UCP600. The draftsman of the original versions of the UCP, UCP82 (1933) and UCP151 (1951) was Wilbert Ward, a banker who was trained as a lawyer. UCP500 had the advantage of the presence of two eminent lawyers, Professors Boris Kozolchyk and Salvatore MacCarone, but their role was more modest, attempting to capture the practices articulated by the bankers, and the revision itself was far more modest in scope. In contrast, it appears that UCP600 had no effective direct involvement by lawyers in its drafting.

24. There are two changes in UCP600 that have an indirect impact on standbys. The default rule on the latest date for presentation of documents following the date of the issuance of a transport document, contained in UCP600 Article 14(c) (Standard for Examination of Documents), was revised to make it clear that it only applied to original transport documents and not copies. This provision, which also resolved problems for commercial Lcs, was helpful to commercial standbys that often would require presentation of a copy of a transport document. Also, a new provision was inserted into UCP600 Article 4(b) (Credits v. Contracts) urging issuers to

discourage inclusion “as an integral part of the credit” documents related to the underlying transaction such as copies of the contract or pro forma invoices. Such documents are commonly required in standby letters of credit.

25. Wheble, “Problem Children” – Standby Letters of Credit and Simple First Demand Guarantees, 24 Arizona L. Rev. 301 (1982). From this traditionalist perspective, standbys are not really letters of credit but another type of financial instrument. This is demonstrated in the organization pattern of UK banks at the time, which separated documentary credits from what were regarded as guarantees or bank guarantees – independent guarantees – and handled in a different department.

26. See Wheble, UCP 1974/1983 Revisions Compared and Explained, at 72 (International Chamber of Commerce, 1984), which provides that “[t]he scope of this article has been extended to include ‘drawings’ also” to “reflect the situation in the case of stand-by letters of credit.”

27. For example, the word “drawing” was added to the rules on partial shipments and installments. UCP400 Article 44(a) provides, “[p]artial drawing and/or shipments are allowed, unless the credit stipulates otherwise.” UCP290 Article 35 states, “[p]artial shipments are allowed, unless the credit specifically states otherwise.” The effect of this change was the opposite of what was intended, however. While a partial shipment might well be a problem in a commercial transaction, it is rare that the applicant to a standby

Continued on next page . . .

These changes were retained in UCP500 (1993), and no other effort was made to accommodate standbys.

The question was asked at the time whether the application to standbys of certain inapt articles of the UCP could be avoided even if a standby did not expressly exclude them by taking the position that the specific article was to that “extent” not “applicable” within the sense of UCP Article 1. While superficially attractive, this approach would cause considerable uncertainty and difficulty in application since it would require an understanding of the motives and expectations of those requesting issuance of the standby and a further inquiry as to who was responsible for this request (which may well ultimately lead to the beneficiary, the person likely to be seeking the exclusion). 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 (so-called “commercial standbys”), it is difficult to determine which articles are applicable except in an ad hoc manner that will vary from standby to standby. Noting that UCP500 had not identified specific articles that might be inapplicable, Mr. Charles del Busto, the then Chair of the ICC Banking Commission, stated that:

[National Committees] 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.²⁸

Since UCP600 Article 1 also retains the phrase “to the extent to which they [the articles/rules] may be applicable” without identifying what articles are inapplicable to standbys, it must be concluded that the appropriate interpretation is that, while some articles will not be relevant to a particular standby, no provision that is not expressly excluded can be deemed inapplicable because of the phrase “to the extent applicable” in UCP600 Article 1.

The failure of UCP600 to accommodate standbys should not be problematic, however, because there are rules of practice designed for standbys and independent guarantees – ISP98. Moreover, because UCP600 is superficially modeled on ISP98, two of the chief objections that have been raised to the ISP by bankers are rendered moot, namely that it is too complicated and too different from the UCP500. It is no more complex than UCP600 and far more precise in its drafting. The introduction of UCP600 also provides an answer to the chief objection of most lawyers when faced with the possibility of using ISP98, namely that they do not want to spend the energy studying a different set of rules. Studying UCP600 will require as much if not more time than mastering ISP98.²⁹ The introduction of UCP600 presents users of standbys and their lawyers with an opportunity to

Continued from previous page . . .

would object to a drawing for less than the full amount of the credit. Likewise, it makes perfect commercial sense to conclude that where a credit is aligned with installments of delivery, that the failure to make a shipment signifies a failure of performance that should disentitle the beneficiary to make further drawings on the credit. In a standby, however, the opposite is the case. The drawing signifies a failure to pay by the applicant/buyer, and, in the ordinary course, one would expect there not to be a drawing. It is noteworthy that these rules are retained in substance in UCP600 Articles 31 (Partial Drawings or Shipments) and UCP500 Article 40 (Partial Shipments/Drawings). Anecdotally, it was suggested that the then U.S. delegate to the ICC Banking Commission, Mr. Charles del Busto (who later became Chair of the Commission), had threatened withdrawal by

U.S. banks from the UCP system if standbys were not accommodated. If true, the totally inadequate manner in which standbys were accommodated could be viewed as a form of revenge.

28. Del Busto, *UCP 500 & 400 Compared*, at 3 (ICC Publishing S.A. 1993). This was also expressed in ICC Banking Commission Opinion R303. “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.” ICC Banking Commission Opinions, 1998-1999, at 13 (ICC Publishing S.A. 1999).

29. The text of ISP98 is available at http://www.iiblp.org/cart/store/comersus_viewItem.asp?idProduct=1193.

revisit the question of what rules are appropriate for standbys.³⁰

3. Unsatisfactory Deletions

Several provisions that have long been retained in the UCP have been deleted from UCP600. In regard to them, it must be asked whether the deletions were wise. The fact that the problems rarely arise is hardly an answer since there is not yet a per word charge for the UCP and in light of the level of redundancy present in UCP600. To some extent, the approach taken was to resolve problems by deleting any reference to them (as if that were a solution) instead of tackling them and strengthening the UCP system.

Example (iii): Drafts on the Applicant. UCP600 Article 6(c) (Availability, Expiry Date and Place for Presentation) states that “[a] credit must not be issued available by a draft drawn on the applicant.” The concern about drafts drawn on the applicant arose as a result of claims made by some banks that they were not liable as an issuer where the draft was drawn on the applicant or accepted by the applicant. The ICC Banking Commission rejected this position, but the concern lingered.³¹

UCP500 Article 9(a)(iv) and (b)(iv) (Liability of Issuing and Confirming Banks) attempted to address the issue by discouraging drawing drafts on the applicant and provided that, where they were so drawn, “banks will consider such Draft(s) as an additional

document(s).”³² This verbiage is intended to signify that the issuer remains obligated under the LC regardless of the draft. The UCP600 prohibition is stronger than the statement of UCP500, but the prohibition is fatuous since it would be expressly varied by a term in the credit requiring the presentation of a draft drawn on the applicant. Therefore, the removal of the “additional document” clause and failure to clarify the direction of this rule regarding such a draft is regrettable since it postpones the difficulty to another day.³³

One of the increasingly troubling patterns of behavior manifested in this revision was the notion that problems in the UCP could be resolved by deleting references to them. At various times in the process removal of any reference was suggested for negotiation, nondocumentary conditions, and other areas that require considerable thoughtful patience. While not addressing a problem may be convenient, it is not good for the long term health of the LC, nor of the UCP. Whenever the Banking Commission has chosen to ignore major issues or paper over difficulties such as are found with deferred payment undertakings, there has been a heavy price to pay in the long run. One of the most important contributions of the UCP system is that it provides standardization for LC practices. When they take place, as they will, without such “cover,” problems will inevitably arise. The problem almost invariably is the lack of political will to enforce the discipline necessary to obtain a satisfactory solution.

30. It has been authoritatively stated that it would be professional negligence for beneficiary counsel for the indenture trustee in a bond transaction involving a standby to fail to advise clients of the advantages of ISP98 as applicable rules. With the increased acceptance of the ISP, this sentiment is growing regarding other types of transactions in which standbys are used.

31. See Del Busto, UCP 500 & 400 Compared, at 23 (ICC Publication No. 511) (ICC Publishing S.A., 1993), which states that references to drafts on the applicant the statement that “... or payment will be made” in UCP400 Articles 10(a)(I) and 10(a)(ii) were deleted because they “... defined a less certain and less reliable promise than the Issuing Bank or Confirming Bank’s irrevocable promise and primary liability ‘to pay’ A Beneficiary attempting to rely on such an undefined promise did not know who the primarily liable payor was, or when the bank’s liability to pay was en-

forceable.” See also, ICC Banking Commission Opinions, 95-96, at 24-26 (ICC Publishing S.A. 1999).

32. UCP500 Article 9(a)(iv) and (b)(iv) provide, “A Credit should not be issued available by Draft(s) on the Applicant. If the Credit nevertheless calls for Draft(s) on the Applicant, banks will consider such Draft(s) as an additional document(s).”

33. To be sure, the formulation of UCP500 Article 9(a)(iv) is clumsy and, as is typical with ICC drafting, approaches the problem obliquely. What is wanted is a statement that a bank that issues or confirms a credit requiring a draft (or demand) on the applicant incurs a deferred payment obligation and is obligated to pay at maturity regardless of whether or not the applicant accepts, incurs a separate obligation, or pays. If the bank is concerned about applicant paper floating, it should provide for its right to hold the paper pending its payment and cancel it on reimbursement in the LC.

4. Significant Changes

There are a number of new provisions in UCP600 that contain significant changes.

a. ISBP Induced Provisions

There are several provisions contained in the ISBP that were incorporated into UCP600. On the whole, because these provisions were given somewhat careful consideration and have had some opportunity to be utilized and scrutinized, these incorporations are likely to be positive.

Example (iv): Calculation of Maturity Date. UCP500 provided a rule interpreting the words “from” and “after” in UCP500 Article 47(a) and (b) (Date Terminology for Periods of Shipment). They provided that “a. The words ‘to’, ‘until’, ‘till’, ‘from’ and words of similar import applying to any date or period in the Credit referring to shipment will be understood to include the date mentioned. b. The word ‘after’ will be understood to exclude the date mentioned.” Although the title of this article indicates that it is limited in scope to periods of shipment, some LC users argued that it should inform the interpretation of these words in time drafts. Thus, following the rules for shipment, the calculation of a payment period “10 days from x date” would include the date mentioned, while “10 days after x date” would exclude the date mentioned.

However, standard international letter of credit practice was different. With respect to time drafts, the practice was that both “from” and “after” excluded the date mentioned. ISBP (2002) Paragraph 45(d) (under the category “Drafts and Calculation of Maturity Date” and the subheading “Tenor”) noted this bifurcated use of these terms in LC practice and observed that UCP Article 47 did not apply to the calculation of maturity dates.³⁴

34. ISBP (2002) Paragraph 45(d) states, “[t]he UCP provides no guidance where the words ‘from’ and ‘after’ are used to determine maturity dates of drafts. Reference to ‘from’ and ‘after’ in the UCP refers solely to date terminology for periods of shipment. Where the word ‘from’ is used to establish the maturity date, international standard banking practice would exclude the date mentioned, unless the credit specifically provides that ‘from’ is considered to include the date mentioned. Therefore, for the purposes of determining the

UCP600 Article 3 (Interpretations) ¶ 10 remedies this omission. It provides that “[t]he words ‘from’ and ‘after’ when used to determine a maturity date exclude the date mentioned.” Unlike the preceding UCP600 Article 3 (Interpretations) paragraph, ¶ 9 “Period of Shipment,” which is based on UCP500 Article 47(a), there is no linkage to a period of shipment.

UCP600 Article 3 ¶ 10 does not indicate that it is limited to drafts as did the ISBP rule. While it is apparent that it is applicable to sight and usance drafts whether or not accepted, it would also be applicable to the calculation of the maturity of deferred payment obligations whether they involve a draft, a demand, or simply the presentation of documents. Indeed, the UCP600 provision would apply to any LC condition that required calculation of a maturity date, although the term usually connotes a financial undertaking.

Despite this expansion of coverage, there remains an interstitial question. Where the words “from” or “after” are used in regard to something other than a shipping date or the maturity of an obligation, there is no guidance from the UCP as to its meaning.

b. ISP98 Induced Provisions

The approach undertaken in UCP600 could best be described as a somewhat general imitation of ISP98. This is most obvious with respect to organization but is also apparent in a number of discreet provisions where the terminology of ISP98 appears. While ISP98 has successfully withstood intense scrutiny, casual attempts to copy it or portions of it may encounter difficulties.

Example (v): Definition of “Presentation.” UCP600 Article 2 (Definitions) ¶13³⁵ defines “Presentation” as “either the delivery of documents un-

maturity date of a time draft, the words ‘from’ and ‘after’ have the same effect. Calculation of the maturity commences the day following the date of the document, shipment, or other event, i.e. 10 days after or from March 1 is March 11.”

35. Although the official text of UCP600 does not subdivide UCP600 Article 2 (Definitions), they are divided into paragraphs for greater ease of reference in this paper.

der a credit to the issuing bank or nominated bank or the documents so delivered.” This definition is based on ISP98 Rule 1.109(a) ¶10 (Defined Terms), which states “‘Presentation’ means, depending on the context, either the act of delivering documents for examination under a standby or the documents so delivered.” Both recognize the possible use of the word as a noun or a verb. ISP98, however, is much more modest and tentative in its approach to its definitions. It qualifies the definition of “presentation” doubly, in the introduction to the rule and with the clause “depending on the context.”³⁶

The UCP600 definition, however, is absolute. Moreover, its use is much broader than in ISP98 because UCP600 has given a formal definition to “complying presentation” and uses that term constantly throughout its text. Inevitably, there are situations where “complying presentation” means both the noun and the verb. However, a strict interpretation of the UCP600 definition (“either ... or”) would suggest that a discrete use of the term must be one or the other but not both and yet, given the convoluted usage of terms in UCP600, these are times when it means both. One instance is the phrase contained in UCP600 Article 7(a) (Issuing Bank Undertaking): “[p]rovided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation.” However, the issuer is obligated to pay not only if the documents are presented to it but also if they are presented to another nominated bank. To reach this interpretation,

36. ISP98 Rule 1.09 (Defined Terms) begins, “[i]n addition to the meanings given in standard banking practice and applicable law, the following terms have or include the meanings indicated below.”

37. A related problem arises over the use of “presentation” with respect to the delivery of documents. While it is apparent to a U.S. lawyer that “delivery” signifies “receipt” based on Prior UCC §1-201(14) and Revised UCC §1-201(15), ISP98 is careful to use the term “receipt” in its operative rules regarding presentation, ISP98 Rule 3.02 (What Constitutes a Presentation) and not just rely on the definition. UCP600 does not do so and questions have already been raised about the meaning of the word. As recently as the June 2006 Draft, this provision read “the act of delivering documents” instead of “delivery of documents,” which would have been hopelessly confusing and wrong to boot.

38. While not all of its definitions are contained in UCP600 Article 2 (Definitions), most are gathered in that provision. Except

one must, in effect, either import common sense or disregard the UCP600 definition as a formal definition.³⁷

c. The Introduction of Formal Definitions

Unlike prior versions of the UCP, UCP600 uses formal definitions that introduce a new facet into UCP jurisprudence.³⁸ While prior revisions contained informal definitions contained in parentheticals, these were clearly descriptions and not intended or on the whole taken to have the formal operative effect of a definition. Where the UCP600 “Definitions” innocuously state the obvious, they remain, in effect, descriptions and should cause no difficulty other than unnecessary reference back and forth. Others, however, are more substantive. Where they themselves introduce problems or carry over obscurities from prior general descriptions, they are likely to cause difficulties.

Example (vi): Definition of “Applicant.” UCP600 Article 2 (Definitions) ¶2 defines “Applicant” as “the party on whose request the credit is issued.” This definition focuses on those entities that request issuance of the LC.³⁹ If the definition is understood to include an entity obligated to reimburse the issuer,⁴⁰ Revised UCC §5-102(a)(2) combines both, defining an applicant as follows: “‘Applicant’ means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the

tions include “second advising bank” in Article 9(c), “pre-advice” in Article 11(b), “claiming bank” and “reimbursing bank” in Article 13(a), “charges” in Article 37(c), and terms related to transfer in Article 38.

39. UCP600 Article 2 ¶2 is the first formal attempt in UCP drafting to provide a definition of “Applicant” for the purpose of its use in UCP600. To the extent that the term was described in past versions, it was described as the “customer” at whose request and instructions the LC is issued since UCP222 (1962) and expanded to include issuance by a bank on its own behalf in UCP500 (1993).

40. Revised UCC § 5-102(a)(2) combines both, defining an applicant as follows: “‘Applicant’ means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.”

request undertakes an obligation to reimburse the issuer,” the UCP600 definition probably implies any situation where a reimbursement obligation exists including a suretyship undertaking.⁴¹

The status of an applicant arises not from the letter of credit but from a separate agreement with the issuer that may be manifested in or implied from an application, reimbursement agreement, contract, or other undertaking. Although the entity for whose account and at whose request the LC is issued is often one and the same and, where there are multiple applicants, all could be listed in the credit, UCP600 does not define “applicant” with reference to being listed in the letter of credit.⁴²

This disconnect can cause difficulties with the commercial invoice, which must be made out to the applicant. Where the beneficiary lists a party who satisfies the definition of “applicant” but is not listed as such on the credit, does the document comply?

41. A surety/accessory applicant can be directly or indirectly liable to the issuer depending on the terms of its obligation. Where the obligation of the surety is to reimburse the bank for the issuance of the LC, it is an applicant. Where the surety undertakes to reimburse if the applicant does not reimburse the issuing bank, its liability is indirect and it is less clear whether it would qualify as an applicant under UCP600. To an extent, it could be said that the credit has been issued at the request of the surety/accessory but this linkage is indirect. Where it so conditions its obligation, it is indirectly liable. It should be noted that the status of suretyship, sometimes mistakenly conceived as “secondary liability,” has nothing to do with the directness of the obligation to reimburse the issuer. The secondary character of the liability of a surety operates only as between itself and its principal debtor. As between these two, the principal debtor ought to pay. As to the creditor, who is obligated primarily and secondarily to it, it depends on the terms of the undertaking. See Restatement (Third) of Suretyship and Guaranty (American Law Institute 1996) §1 (Scope; Transactions Giving Rise to Suretyship Status).

42. Both the real applicant in interest and the surety/accessory could be listed as applicant in the LC. The real party in interest could be listed as the applicant and the surety/accessory applicant not shown on the face of the LC, or the LC could state that the surety is the applicant and omit the name of the real applicant in interest, e.g., the buyer in a commercial LC for whom the surety acts.

43. The most blatant example is the phrase “Complying Presentation,” which uses the word “Presentation,” which is itself defined and which is then addressed again in UCP600 Article 15 (Complying Presentation).

While the issuer may have the ability to make this determination, the confirmer will not. This definition will also impact issues related to reimbursement, such as agreeing to amendment or waiver.

d. Interlocking Definitions, Redundancy, and Confusion

Notwithstanding efforts to simplify the UCP, UCP600 contains some degree of redundancy. Particularly with respect to the definitions, there is a tendency to define a word by using other words that are themselves defined, which, at its worst, creates a circular pattern that is both frustrating and meaningless.⁴³ These interlocking definitions can also give rise to inconsistencies.

Example (vii): “Irrevocable” vs. “Definite.”

Following prior versions, UCP600 uses the word “definite” in connection with the definition of “Credit.” It does so, however, in a manner that significantly departs from prior versions.⁴⁴ Nowhere in the litera-

44. In its original context as used in UCP82 (1933) Article 9, “definite” signified that the undertaking had to be specific with respect to honoring the presentation of drafts and documents that complied and could not be an irrevocable credit if it were vague or general on this point. It appears consistently in connection with irrevocable letters of credit as opposed to revocable ones. UCP82 Article 9 states that an irrevocable credit “must ... constitute the definite engagement by the issuing Bank towards the beneficiary and holder in good faith to honour all drafts issued by virtue of and in conformity with the clauses and conditions contained in the document.” In this context, it is apparent that something more than “irrevocable” is intended. UCP82 assumed that the operative language of the LC obligation would be contained in the credit itself and not in the rules. Its role was, in a sense, to provide the standard by which these terms would be measured. UCP151 (1951) maintained this approach with respect to a credit but stated that the same definiteness would be implied for a confirmation. Since confirmations rarely expressed the undertaking of the confirmer with the same degree of detail and specificity as did a credit, this approach made sense. Beginning with UCP222 (1963) and more pronouncedly in UCP290 (1974), this approach shifted to state what constituted the undertaking in the rules themselves. The term “definite” was used in connection with the definition of “irrevocable credit” in UCP222 (1974) Article 3(a) & (b), UCP290 (1974) Article 3(a) & (b), UCP400 Article 10(a) & (b), and UCP500 Article 9(a) & (b). Nevertheless, the text did not equate “definite” with “irrevocable” and maintained the same approach reflected in UCP82, namely that the undertaking was specific, the only difference being that an irrevocable undertaking that was subject to the UCP was deemed to be such an undertaking. Reflecting these later versions of the UCP, UCP500 Article 9(a) states, “[a]n irrevocable

Continued on next page . . .

ture surrounding the UCP is there any suggestion that the term “definite” means “irrevocable,” and it is likely that a banker faced with a credit under any version prior to UCP600 that used the term “definite” and did not state that it was revocable would have considered the LC to be silent with respect to whether or not it was irrevocable.

As understood and used currently, “definite” means that the undertaking is of the type that would be commonly regarded as a letter of credit under standard international letter of credit practice, namely a promise directed to a discrete beneficiary for an amount that could be ascertained to be honored solely on the presentation of documents that can be identified. In UCP jurisprudence, “definite” signifies that a mere undertaking to pay against the presentation of documents or one that is vague and nonspecific should not be treated as an LC. It must also be an LC-type undertaking; that is, it must be specific, be understood as an LC because of its features and characteristics, and undertake to pay the issuer’s own funds or property as set forth in the LC separately and independently of the underlying transaction. An indefinite undertaking would not be a letter of credit under the UCP and probably would not be so regarded under applicable law. For example, UCC § 5-102(a)(10) (Definitions) “Letter of Credit” states that a Letter of Credit “means a definite undertaking.”⁴⁵

The UCP600 phrase “irrevocable and thereby constitutes a definite undertaking of the issuing bank” in the definition of “Credit” in UCP600 Article 2 (Definitions) ¶ 8 represents a serious misunderstanding and misstatement of the meaning of the word “definite” insofar as it is read to be equivalent to “irrevocable.” Here, the drafters combined poor his-

torical scholarship with weak analysis to obscure a potential tool by which ill-thought-out texts that are issued, typically as standbys, but that would not be so understood or treated could be excluded from classification as letters of credit in a principal manner without doing violence to LC law. The interpretation of “definite” as “irrevocable” would also make the term redundant in UCP600 Article 2 ¶ 8. Curiously, UCP600 does not maintain this approach in its definition of “Confirmation” in UCP600 Article 2 ¶ 6, which also uses “definite.”

An equally unacceptable interpretation would be that “irrevocable” means “definite,” which is also nonsense but is literally what is stated in the text.

e. Positive Changes with Potential for Litigation

Where there has been a major revision containing new or reformulated rules, there is the greatest potential for difficulties, even where the change is positive. What follows are brief comments on several worrisome aspects of UCP600.

Example (viii): Deletion of Reasonable Care Requirement for Advising Banks. UCP500 Article 7 (Advising Bank’s Liability) provided that the advising bank that advises must “take reasonable care to check the apparent authenticity of the credit which it advises.” UCP600 Article 9(b) (Advising of Credits and Amendments) provides that “[b]y advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the apparent authenticity of the credit or amendment and that the advice accurately reflects the terms and conditions of the credit or amendment received.”

Continued from previous page . . .

Credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with.” Moreover, all prior versions used the term “irrevocable” in a separate article and required that the credit state whether or not it was irrevocable, providing a default in the event that it did not.

45. Revised UCC §5-102 (Definitions) Official Comment 6 Paragraph 2 provides, “[t]he adjective ‘definite’ is taken from the UCP. It approves cases that deny letter of credit status to documents that are unduly vague or incomplete. See, e.g., *Transparent Products Corp. v. Paysaver Credit Union*, 864 F.2d 60 (7th Cir. 1988). Note, however, that no particular phrase or label is necessary to establish a letter of credit. It is sufficient if the undertaking of the issuer shows that it is intended to be a letter of credit. In most cases the parties’ intention will be indicated by a label on the undertaking itself indicating that it is a ‘letter of credit,’ but no such language is necessary.”

What is most striking in comparing these formulations is the phrase “that it has satisfied itself.” This phrase has no meaning in standard international letter of credit practice and raises serious questions regarding its meaning and interpretation. Is it to be interpreted in an objective or subjective manner? And if the latter, how if not by the standard of reasonable care as applied to letter of credit banks?

There is, however, a more serious question raised by the omission of the standard of reasonable care and the failure to replace it with a workable alternative such as commercial reasonableness. While the notion of reasonable care is inapt to describe the obligation of a person that is obligated on a credit,⁴⁶ it is a proper characterization of the obligation of an advising bank that is not strict. In the absence of such a provision, it is possible that a court could conclude that an advising bank that is found not to have satisfied itself as to the apparent authenticity of a credit that it has advised is liable for the full face amount of the credit as opposed to actual damages. While the UCP does not address damages, the use of the concept of reasonable care with respect to advising banks has served as a coded signal that what was at issue was not the face amount of the credit but actual damages and that the undertaking of the advising bank was not independent so that it could assert defenses based on the beneficiary’s reasonable expectations.

f. Playing LC Politics

As with any widely accepted document, UCP600 is, to an extent, a product of political compromise.

46. Accordingly, the removal of this provision from UCP500 Article 13(a) (Standard for Examination of Documents) was a positive contribution. That provision stated:

[b]anks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit. Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility.

The drafting was a highly controlled process in which questions were asked and answers taken selectively. Therefore, it is surprising to find that the balance that has been painfully achieved over the past decade under UCP500 with respect to the compliance of documents is seriously unsettled in UCP600’s treatment of issues related to the compliance of documents, the most critical issue for letter of credit users. Given the decline in the use of commercial letters of credit, one that is widely attributed to the lack of certainty of payment, such a sea change is shocking. The introduction of new terms alone would generate years of disputes until they are worked out. The use of terms that are ambiguous suggests that there will be no one answer to any question however much time passes.

While there are a number of discreet improvements with regard to commercial invoices, transport documents, insurance documents, and other issues, overall the standard of compliance is more confused under UCP600 Article 14 (Standard of Compliance) than under prior revisions. Moreover, the new text calls into question the applicability of prior interpretations rendered under the old text. As a result, the general scheme of compliance will be called into question judicially. At the end of the day, it is likely that those courts that have taken a reasonable approach to documentary compliance⁴⁷ will continue in that direction, but it is also likely that those courts seeking refuge in a mechanical approach will also find reinforcements. The result will be increased litigation in the short run and increased uncertainty in the long run.

UCP600 Article 14(a) (Standard for Examination of Documents) states, “[a] nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.” Because the liability of an issuer is, in effect, strict, the exercise of reasonable care is irrelevant to the question of whether the issuer is liable. Whether or not the issuer (or confirmer) exercised reasonable care, the only question is whether or not the documents complied on their face with the terms and conditions of the LC.

47. See *Voest-Alpine Trading Co. v. Bank of China*, 167 F. Supp. 2d 940, 46 U.C.C. Rep. Serv. 2d 808 (S.D. Tex. 2000), judgment aff’d, 288 F.3d 262, 47 U.C.C. Rep. Serv. 2d 693 (5th Cir. 2002) (where the court stated that a document examiner could have “looked

Continued on next page . . .

In all, the test of workability of any UCP revision is in the final instance with the courts who must interpret it in the context of disputes. As was apparent from UCP500, the language did not withstand close scrutiny either with respect to compliance or letter of credit fraud. These two areas represent and account for the bulk of litigation that occurs with respect to letters of credit, and it is with respect to them that any assessment must be waived.

Example (ix): Standard of Compliance. While UCP600 Article 14(a) (Standard for Examination of Documents) repeats the recital of the standard of compliance that has marked past versions, UCP600 Article 14(d) introduces an entirely new formulation of this standard. It provides that “[d]ata in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.”

This formulation can be read to support a rigid and wooden approach to compliance that requires literal exactitude, and it can be read equally to justify the opposite approach, looking to the commercial role of the data.

By departing from the standard of the document as a whole and focusing on data without excluding extraneous data not required by the credit or the nature of the document, the revision gives cover for every bank that has made a bad credit decision. The abuse of the inconsistency rule of UCP500 Article 13(a) (Standard for Examination of Documents), reportedly the most cited discrepancy, augurs poorly for this broader provision.⁴⁸ While the drafters hope that the use of “not conflict with” will reduce the scope

of this basis for refusal, the phrase has no basis in standard international letter of credit practice and how it will be interpreted is pure speculation. Here, what was called for is analysis rather than words. However, the drafters (and the ICC Banking Commission itself) probably do not have the political will to impose a rule that will limit this abuse in a principled and systematic manner. This failure is regrettable since it is the letter of credit itself that will suffer in the long run as businesses flock to alternative methods of payment, including ISP98 commercial standbys.

g. Hints of Open Windows

Although there are few new initiatives in UCP600, there is at least one open window and possibly more. Nothing is more politically sensitive with the leadership of the international banking operations community than so-called “silent conformations,” and yet there is an intriguing allusion to them, perhaps unintended, in UCP600.

Example (x): Undertaking to Negotiate. Following UCP500 Article (b), UCP600 Article 8 (Confirming Bank Undertaking) indicates that a confirmation is given by a “Confirming Bank” which is defined in UCP600 Article 2 (Definitions) ¶ 6 as being “upon the authorization or request of the Issuing Bank.” A person not authorized or requested to confirm cannot be a confirming bank under the UCP.

There is, however, a practice of so-called “silent confirmation” whereby a bank not authorized or requested by the issuer to confirm nonetheless indicates to the beneficiary that it confirms the issuer’s undertaking. This situation usually arises where the issuer is not prepared to incur additional obligations to another bank so as to control its foreign exchange or for other political or economic reasons but where the

Continued from previous page . . .

to the balance of information within the document and found that the document as a whole bears an obvious relationship to the transaction”); *All American Semiconductor, Inc. v. Wells Fargo Bank Minn., N.A.*, Nat. Ass’n, 105 Fed. Appx. 886 (8th Cir. 2004) (where a letter accompanying the presentation “did not unambiguously identify” beneficiary, the accompanying invoices “contain obvious links to the transaction to which the [LC] refers,” such that the presentation complied “when reviewed as a whole”).

48. UCP500 Article 13(a) Sentence 3 stated, “[d]ocuments which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit.” Some banks have attempted to expand this rule from its original narrow meaning that a document was inconsistent when, taken as a whole, the document did not appear to be related to the underlying transaction as reflected in the LC. See ICC Opinion R.11 (ICC Documents 470/328, 470/ 330 1978) in Decisions (1975-1979) of the ICC Banking Commission at 23-24 (ICC Publishing 1980).

beneficiary desires to have the obligation of a local bank in addition to that of the issuer. In response to this perceived need on the part of beneficiaries, some banks have created products that have generically been called “silent confirmations.” While these products are not uniform and suffer from lack of standardization, some of them entail a letter of credit type undertaking to honor on the presentation of documents.⁴⁹

A bank that makes such an undertaking does so at its own risk since it does not have the rights of a confirmer under the credit.⁵⁰ Provided that the LC is subject to UCP600 and otherwise constitutes a documentary undertaking similar to the terms and conditions of the letter of credit, such an undertaking, “however named or described,” is one to pay against the presentation of required documents and, as a result, constitutes a separate letter of credit undertaking that would fall within the definition of “Credit” in UCP600 Article 2 (Definitions) ¶ 8 and that of most local laws and judicial decisions. Where the bank giving the undertaking is nominated in the LC, it has certain protections.

It is in this context that the oblique reference to an undertaking to purchase by a nominated bank in UCP600 Article 12(b) should be understood. This undertaking resembles that of an issuing bank under UCP600 Article 7 (Issuing Bank Undertaking).

h. Confusion Regarding “Standard International Banking Practice”

Example (xi): isbp vs. ISBP. One of the most significant and positive developments under the UCP500 regime is the recognition that the standard by which compliance is to be measured is that of stan-

dard practice of letter of credit bankers. This notion originally surfaced in the work that led to the revision of UCC Article 5 and was further developed by the seminal work of Professor Boris Kozolchyk, who was largely responsible for its introduction into UCP500.⁵¹

UCP500 Article 13(a) provided in part that “[c]ompliance of the stipulated documents on their face with the terms and conditions of the Credit, shall be determined by international standard banking practice as reflected in these Articles.” Although this formulation was not perfect in that it qualified the concept with the mysterious phrase “as reflected in these articles,” it has significantly advanced the standardization of questions of compliance in an objective sense.

This development was furthered in the work of the ICC Banking Commission in the formulation of a series of opinions that have fostered an approach based on commercial reasonableness, looking to the role of the particular document in regard to the data contained in it. This approach is traditional in that it recognizes that different data can appear differently in different documents depending on the role of the document in the LC transaction.

Towards the end of the UCP500 regime, the ICC Banking Commission took this approach to another level in adopting a product that attempted to interpret the UCP in light of standard letter of credit practice. The document was entitled International Standard Banking Practice⁵² and was perceived to stabilize letter of credit practice. The ICC, however, has never been able to explain the role of the ISBP in the manner expressed above. Instead, it has maintained the fiction that the ISBP does not depart from the UCP

49. Byrne, An Overview of 12 C.F.R. 7.1016, in *Understanding the New OCC Interpretive Rulings* 12 C.F.R. §7.1016 and §7.1017, *Letters of Credit and Other Independent Undertakings* (Institute of International Banking Law & Practice 1996). Decisions such as *Dibrell Bros. Intern. S.A. v. Banca Nazionale Del Lavoro*, 38 F.3d 1571, 25 U.C.C. Rep. Serv. 2d 196 (11th Cir. 1994) and *W.L. Hamilton Eng'g, P.C. v. Bank Umum Servitia (PT)*, No. CV-99-02455-GHK (AJWx) (C.D. Cal 27 September 2000) are wrong in concluding that it is merely a bilateral contract and that the silent confirmer is subject to contract damage theory including consequential damages.

50. Wheble, *UCP 1974/1983 Revisions Compared and Explained*, at 23 (ICC Publishing 1984).

51. See The Task Force on the Study of U.C.C. Article 5, *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 *Bus. Law.* 1521 (June 1990). See also Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 *Brook. L. Rev.* 45 (Spring 1990).

52. See *supra* note 7.

itself. The introduction to the ISBP states that “[t]he international standard banking practices documented in this publication are 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.”⁵³ This rationale is absurd for a document that is not explained in any manner in the UCP and contains eight paragraphs about the draft and a paragraph entitled “Expressions Not Defined in the UCP.”

The problem is critical because most LCs are not issued subject to the ISBP, and, if the practices are to be applied to UCP credits, it must be as an interpretation of the UCP.⁵⁴ The failure to provide an adequate justification for the ISBP threatens its reception in the courts in situations where LCs are not issued subject to the ISBP.

Instead of laying a rational foundation for the ISBP, UCP600 chose to repeat the formulation of UCP500, referring to “standard international banking practice.” This reference raises the question of whether the International Standard Banking Practice is the complete and exclusive statement of international standard banking practice and, if not, where the ISBP fits in understanding isbp.⁵⁵

It therefore will remain to the courts to determine the weight and authority to be given to this document in cases where a letter of credit is not expressly made subject to it. Under UCP500, this confusion has already arisen in at least one case and is likely to continue under UCP600.⁵⁶ More importantly, the courts may be reluctant to refer to and use what could be an invaluable tool in understanding LC practice for want of a clear and comprehensible statement of what it is and how it relates to UCP600.

IV. RELATIONSHIP TO REVISED UCC ARTICLE 5

The relationship between UCP600 and Revised UCC Article 5 is of considerable importance to U.S. LC attorneys. While the definitive analysis of this relationship remains to be written, this paper surveys the critical issues.⁵⁷

Revised UCC Article 5 defers to standard international banking practice both with respect to the determination of the compliance of documents and in regard to other issues of letter of credit practice.⁵⁸ Although the text of Revised UCC § 5-116(c) (Choice of Law and Forum) mentions the UCP, it does not refer to any particular version. Consequently, this subsection would be applicable to any letter of credit

53. ISBP, at 8.

54. Indeed, the introduction to the ISBP discourages incorporation of the ISBP into LCs. Paragraph 5 states, “[t]he incorporation of this publication into the terms of a documentary credit should be discouraged, as the requirement to follow agreed practices is implicit in the UCP.” ISBP, at 8.

55. The ICC “International Standard Banking Practice” is to be revised effective at the same date as the effective date of UCP600. The revision, which supposedly only changed it to make it applicable to UCP600, will be voted on at the spring meeting of the ICC Banking Commission.

56. See *Blonder & Co., Inc. v. Citibank, N.A.*, 28 A.D.3d 180, 808 N.Y.S.2d 214 (1st Dep’t 2006).

57. For a partial treatment of this issue, see Byrne, *Contracting Out of Revised UCC Article 5 (Letters of Credit)*, 40 *Loy. L.A. L. Rev.* (forthcoming December 2006) (manuscript at 171, on file with author).

58. See Revised UCC §5-108(e) (Issuer’s Rights and Obligations), which provides, “[a]n 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 also section 5-116(c) (Choice of Law and Forum), which provides:

[e]xcept as otherwise provided in this subsection, 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. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

that incorporated UCP600. Under its rule, UCP600 would control wherever there was “conflict between [Revised UCC Article 5] and those rules as applied to that undertaking ... except to the extent of any conflict with the nonvariable provisions specified in section 5-103(c).”

In considering the relationship between the statute and the rules, it is useful, therefore, to consider its impact on the variable statutory provisions and any nonvariable rules that conflict with UCP600.

1. Nonvariable Provisions.

Of the nonvariable provisions set forth in UCC § 5-103(c)(Scope), there are only differences with regard to the definition of “Issuer” in Revised UCC § 5-102(a)(9) compared with the definition of “Issuing Bank” in UCP600 Article 2 (Definitions) ¶ 10 and of “Letter of Credit” in revised UCC § 5-102(a)(10) compared with the definition of “Credit” in UCP600 Article 2 ¶ 8.⁵⁹ Actually, UCP600 contains two definitions of “letter of credit.” The term is defined in UCP600 Article 1 (Application of UCP) as any documentary credit including a standby and in Article 2 (Definitions).

Under the UCC definition of “Issuer,” a consumer is excluded. Although the UCP600 definition does not refer to consumers, the premise of UCP600 is that letters of credit are undertakings issued by banks; hence the term “Issuing Bank.”⁶⁰ The UCC definition of “Letter of Credit” limits the situations in which a letter of credit can be issued on behalf of the issuer to those where the issuer is a financial institution. Although UCP600 contains no such limitation in its

definition of “credit” in UCP600 Article 2 ¶ 8,⁶¹ its restriction of issuance to banks would bring it within the limitation of the UCC definition. Therefore, there is no conflict regarding either of these definitions.

In addition, Revised UCC § 5-103(c) (Scope) states that except to the extent prohibited by Revised UCC § 1-302(b) with respect to the obligation of good faith or duties of diligence, reasonableness, or care prescribed by Revised UCC Article 5, the effect of the provisions of Revised UCC Article 5 may be varied.⁶² Revised UCC § 1-302(b) provides that “[t]he parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.”

The only provisions in UCP600 that expressly impact duties are the disclaimers contained in UCP600 Articles 34 to 37, but much of the overly broad language in the UCP500 disclaimers in UCP500 Articles 15 to 18 has been modified and reduced to provisions that are reasonable (or, at least, not manifestly unreasonable). Only one provision remains questionable as to its breadth, namely UCP600 Article 35 Paragraph 3 (Disclaimer on Transmission and Translation). It provides that “a bank assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit credit terms without translating them.” It is not entirely clear from this provision whether or not it is intended to protect the bank from the beneficiary, from other banks or the applicant, or all of them. To the extent that it could be interpreted to mean that a bank that translates the terms of a letter of credit that it issues or confirms is excused from liability for errors in the translation, it is

59. Actually, UCP600 contains two definitions of “letter of credit.” The term is defined in UCP600 Article 1 (Application of UCP) as any documentary credit including a standby and in Article 2 (Definitions).

60. UCP600 Article 2 (Definitions) ¶8 states, “Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.”

61. UCP600 Article 2 (Definitions) ¶10 states “Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.”

62. The original text of Revised UCC §5-103(c) (Scope) referred to Prior UCC §1-102(3). Since it was adopted, Model UCC Article 1 has been revised, and that section is now Revised UCC §1-302(b), which is substantially identical, the difference being merely grammatical. At the time of the writing of this paper, not all U.S. states have adopted Revised UCC Article 1. As it is adopted, the legislature adopts amendments to other articles to change cross citations. The citation in the Model Code is used here.

unlikely that the original terms would be enforced as against a beneficiary that complies with the translated terms unless the beneficiary was aware of the erroneous translation. The same would be true were the provision to be interpreted to apply to a translation of technical terms. The point is that, where the beneficiary presented documents that on their face complied with the terms and conditions of the credit as transmitted to it, it is entitled to have it honored notwithstanding any error on the part of the bank.

A more difficult matter arises with respect to the provision in UCP600 Article 10(c) (Sentences 3 & 4) (Amendments). This provision states that a beneficiary may be deemed to consent to an amendment where it presents documents that comply with the proposed amendment. It fails, however, to qualify this general formulation in the instance where the presented documents also comply with the credit as it would operate absent the proposed amendment. In such a situation, the conduct of the beneficiary as indicated in its documentary presentation is ambiguous. This failure to note an exception for an ambiguity in the beneficiary's presentation is contrary to the spirit of Revised UCC § 5-106(b) (Issuance, Amendment, Cancellation and Duration), which provides that "rights and obligations of a beneficiary ... are not affected by an amendment ... to which that person has not consented."⁶³ Moreover, Official Comment 2 to that section expressly indicates that amendment by implication can only operate where the documents tendered "conform to an amended Letter of Credit but not to the original Letter of Credit."

Taken at face value, in such a situation this provision of UCP600 contradicts a fundamental principle

of letter of credit law and practice, namely its irrevocable character. If the UCP600 provision is interpreted to apply to an ambiguous action of the beneficiary, its rights and entitlements would be altered without it having so consented by the mere fact of an amendment having been proposed.⁶⁴

There is no nonvariable provision in Revised UCC Article 5 that speaks to this provision, and, so, any provision in the UCC that would touch on this issue is varied by the UCP600 provision. However, because this interpretation of UCP600 Article 10(c) in such a situation works a fundamental injustice and is contrary to letter of credit policy, it is unlikely that courts will enforce it. The question is how they will justify such a refusal.

In this regard, it may be hoped that they will not turn to provisions of common law to override Revised UCC § 5-103 (Scope). General principles of common law should be sparingly applied to letter of credit problems since the field is so delicately balanced and specialized. If there is to be reliance on contradiction of general principles, they should be principles of letter of credit practice and law since it is those principles that are contradicted. Since Prior UCC § 1-205(2) and Revised UCC § 1-303(c) make the interpretation of a "trade code" (which would include UCP600) a question of law which is to be decided by the court,⁶⁵ the court could interpret UCP600 Article 10(c) as not applying to such a situation. Alternatively, it could make a determination that such an interpretation of the UCP600 provision would result in a manifestly unreasonable standard by which the obligations of good faith, reasonableness, or care of an issuer or confirmer could not be varied.

63. UCC §5-106(b) provides, "[a]fter a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent."

64. As to whether this interpretation is correct, it was pointed out to the drafters on several occasions during the comment period and they chose to ignore it.

65. Although a question of law, the parties are entitled to present expert evidence as to the practices reflected in the UCP and its interpretation in standard international letter of credit practice. See Revised UCC §5-108(e), which provides, "[a]n 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."

2. Variance by UCP600 of Variable Revised UCC Article 5 Provisions

There are two types of variable provisions of Revised UCC Article 5 that merit consideration in terms of the impact of UCP600, definitions other than those of “Issuer” and “Letter of Credit” and other provisions.

Since the definitions of Revised UCC Article 5 other than those of “Issuer” and “Letter of Credit” can technically be varied under Revised § 5-103(c), it is necessary to compare the UCC definitions with those of UCP600.

There are some differences between the two. The UCC definition of “adviser” differs from the UCP600 definition of “advising bank” in that the UCP definition would include the bank that affects the transfer.⁶⁶ The UCC definition of “applicant” is broader than that used in UCP600.⁶⁷ The Revised UCC definition of “beneficiary” is also broader than that used in UCP600 in that it includes a transferee beneficiary.⁶⁸

Despite these differences, the UCP600 definitions serve a similar purpose to the Revised UCC

Article 5 definitions. The UCP600 definitions address the meaning of the terms defined as they are used in UCP600 and those in Revised UCC Article 5 serve the same office for the statute. While it is theoretically possible that a creditor could change either set of definitions (except for the two nonvariable definitions of Revised UCC Article 5), the mere issuance of a credit subject to UCP600 does not create any conflict.

3. Problems Regarding Enforcement of UCP600 Provisions

Notwithstanding the rule of Revised UCC § 5-116(c) (Choice of Law and Forum) that the UCP rule governs a UCC rule which is variable when there is a conflict, there are three matters where U.S. courts are unlikely to give effect to the UCP600 rule. In two of these situations, UCP600 would impose a duty on an entity that did not undertake to act. UCP600 Articles 8(d) (Confirming Bank Undertaking) and 9(e) (Advising of Credits and Amendments) both seek to impose on a confirming and advising bank an obligation to give notice where they elect not to act pursuant to the request to confirm or advise.⁶⁹ These provisions run contrary to a fundamental legal principle that there can be no obligation except where it is un-

66. Revised UCC §5-102(a)(1) defines “Adviser” as follows: “‘Adviser’ means a person who, at the request of the issuer, a confirmer, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.” UCP600 Article 2 (Definitions) ¶1 defines “Advising Bank” as “the bank that advises the credit at the request of the issuing bank.” The UCP600 definition only encompasses a bank that advises at the request of the issuer. To address situations where a confirmer or another advising bank requests another bank to advise the credit, the new term “Second Advising Bank” is introduced in UCP600 Article 9(c) (Advising of Credits and Amendments). Although not formally defined in UCP600 Article 2 (Definitions) or referred to in prior versions of the UCP, UCP600 Article 9(c) provides “[a]n advising bank may utilize the services of another bank (‘second advising bank’) to advise the credit and any amendment to the beneficiary. By advising the credit or amendment, the second advising bank signifies that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the credit or amendment received.” Under the UCP600 definition of “Advising Bank” in Article 2 ¶1, a second advising bank that is not requested to advise by the issuing bank is not an “Advising bank.”

67. Revised UCC §5-102(a)(2) provides, “‘Applicant’ means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.” UCP600 Article 2 (Definitions) ¶2. “Applicant means the party on whose request the credit is issued.”

68. Revised UCC §5-102(a)(3) provides, “‘Beneficiary’ means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.” UCP600 Article 2 (Definitions) ¶4, on the other hand, provides, “Beneficiary means the party in whose favour a credit is issued.”

69. UCP600 Article 8(d) provides, “[i]f a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.” UCP600 Article 9(e) provides, “[i]f a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, without delay, the bank from which the credit, amendment or advice has been received.”

dertaken or where a member of a “closed system” agrees in advance to be so bound.⁷⁰ In the cases to which these provisions would be applicable, there is no agreement and the UCP, whatever it is, is not a “closed system” to which the parties consent in advance. Absent such an agreement, there can be no duty. Moreover, as a matter of interpretation, there is an internal contradiction with other provisions in UCP600 which indicate that the bank is not obligated if it chooses not to advise or confirm and these provisions.⁷¹ As a matter of interpretation, as indicated, is a matter of law for the court, it is likely that courts will conclude that these provisions represent hortatory provisions and good business practice but not enforceable obligations.⁷²

The third matter relates to protected parties in the event of letter of credit fraud. These issues are addressed by Revised UCC § 5-109, which is not included in the nonvariable provisions listed in Revised UCC § 5-103(c).

While most of the provisions of UCP600 are consistent with Revised UCC Article 5’s treatment of letter of credit fraud,⁷³ there is one that is not. The definition of “Negotiation” in UCP600 Article 2 (Definitions) ¶ 11 provides that negotiation entails “purchase.” It suggests that purchase is accomplished “by

advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.”⁷⁴ UCP600 Article 2 (Definitions) ¶ 11 “Negotiation” provides that it “means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.”

The UCP600 definition is a departure from the informal definition of UCP500 Article 10(b)(ii) (Types of Credit), which provided in part, “Negotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate.”⁷⁵

This change from “value” to “purchase” is useful to LC bankers who are concerned about when they can claim reimbursement as a negotiating bank.⁷⁶ It is less useful to lawyers who are concerned about when a bank is entitled to protection from beneficiary LC fraud by acting pursuant to its nomination to negotiate.

The UCP600 definition of “Negotiation” to the effect that it occurs “by advancing or agreeing to advance funds to the beneficiary on or before the

70. SWIFT is such a system, and its members are bound by its protocols and regulations. UCP600, on the other hand, is an open system as is evident by its provision that each undertaking must be made subject to it.

71. As to an advising bank, UCP600 Article 9(a) Sentence Two states, “[a]n advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.” A bank is not a confirming bank under UCP600 unless it adds its confirmation to the credit under UCP600 Article 2 (Definitions) ¶ 7 “Confirming Bank.”

72. See Prior UCC § 1-205(b) and Revised UCC § 1-303(c).

73. With respect to letter of credit fraud, the provisions of UCP600 regarding deferred payment undertakings and acceptances are a positive contribution. Prior irresponsibility on the part of the ICC Banking Commission in failing to address these issues in a forthright manner has been remedied. But even in this area, one can expect continued litigation, although in a narrower sphere regarding whether or not a negotiating bank is entitled to reimbursement.

74. UCP600 Article 2 (Definitions) ¶ 11 “Negotiation” provides that it “means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.”

75. The impulse to define “negotiation” arose from a concern about a practice that was deemed improper, namely claiming to be a negotiating bank without having negotiated but merely having forwarded the documents. To address this errant practice, negotiation was defined in UCP500 Article 10(b)(ii) (1993) as “giving of value for Draft(s) and/or document(s) by the bank authorized to negotiate.” Signaling the concern that led to the definition, UCP500 (1993) Article 10(b)(ii) continues, “[m]ere examination of the documents without giving of value does not constitute a negotiation.”

76. The term “purchase” was used in UCP290 (1974) Article 3 as being synonymous with it. Since any bank can purchase a draft or documents presented under a credit, in the context of UCP600 “negotiation” is limited to purchase by a nominated bank as a negotiating bank.

banking day on which reimbursement is due to the nominated bank” is not new. It was advanced in an authoritative interpretation of the ICC Banking Commission issued shortly after the effective date of UCP500 that stated that “giving of value” “may be interpreted as ... ‘undertaking an obligation to make payment.’”⁷⁷ The problem stems from the notion that there can be negotiation where there is a promise to advance funds.⁷⁸

The presence of an executory promise may suffice to justify a claim for reimbursement as a negotiating bank. However, it is likely to cause difficulties where a bank claims to be exempt from a beneficiary’s letter of credit fraud. While it may be understandable that the notion of value presented difficulties to banks in determining whether or not they had negotiated, the solution will raise difficulties at least in situations where the putative negotiating bank has only made an executory promise directly to the fraudster.

Revised UCC § 5-109 (a)(1)(i) (Fraud and Forgery) provides that an exception to the letter of credit fraud of the beneficiary is only available to “a nominated person who has given value.” Revised UCC § 5-102 (b) (Definitions) looks to UCC §§ 3-303 and 4-211 for the meaning of this term. UCC § 3-303 (a) provides that “an instrument is issued or transferred

for value if (1) the instrument is issued or transferred for a promise of performance, to the extent the promise has been performed.”⁷⁹

Therefore, under Revised UCC § 5-109 there is no protected status for a nominated bank that promises to negotiate but has not done so. If there is a demand for reimbursement by a bank that has made a simple executory promise to pay but has not done so in an instance where the promise is made to a beneficiary that has committed letter of credit fraud, will a U.S. court conclude that the provisions of UCP600 override those of variable Revised UCC § 5-109?

Unless the promise were in the form of a negotiable instrument that could be negotiated to innocent third persons or an irrevocable promise to an innocent person, the negotiating bank would have a complete excuse against a claim by the beneficiary to whom its promise to negotiate runs in such a situation since fraud unravels all in every modern system of commercial law. In such a situation, it is highly unlikely that the negotiating bank will be treated by courts as being entitled to claim reimbursement as having negotiated notwithstanding the definition.

How this result will be rationalized in view of the fact that Revised UCC § 5-109 is variable remains to

77. While the UCP500 definition of “negotiation” excluded practices that were agreed not to constitute “negotiation,” questions arose regarding the meaning of value. In particular, it was asked whether a promise to pay constituted “negotiation” or whether it was necessary to have actually advanced funds. To address the considerable concern that had been voiced, ICC Banking Commission Position Paper No. 2 was issued. Position Paper No. 2 states that “giving of value” in UCP500 Article 10(b)(ii) “may be interpreted as either ‘making immediate payment’ (e.g. by cash, by cheque, by remittance through a Clearing System or by credit to an account) or ‘undertaking an obligation to make payment’ (other than giving a deferred payment undertaking or accepting a draft).” See LC Rules & Laws. It is not suggested that “undertaking an obligation to make payment” is a letter of credit promise. What is intended is a simple contractual promise, presumably one with conditions. However, it may be asked what is the value of such a promise if one of the conditions is that the bank itself must first be reimbursed before the promise must be fulfilled.

78. There is an initial problem in interpreting the UCP600 provision. It may not mean that there is negotiation where there is a promise to advance funds that has not been fulfilled on or before

the banking day on which reimbursement is due or the actual advance must take place. Whatever the interpretation, it is apparent that an executory promise would qualify a bank as having negotiated pursuant to UCP600 at least where the LC fraud was discovered after having given the promise and before the day on which reimbursement is due.

79. Not all executory promises are excluded. Irrevocable promises or negotiable ones are deemed to be value since they can be enforced by third parties and the promisor should not be exposed to the possibility that a third person will make a claim against them. UCC §4-211 provides, “[f]or purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item, if the bank otherwise complies with the requirements of Section 3-302 on what constitutes a holder in due course.” There is an international dimension to this problem, as well. The UK Bills of Exchange Act defines “value” as “valuable consideration” and “consideration” includes an executory promise. Based on 19th century case law, the U.S. Negotiable Instruments Law deviated from this aspect of the UK statute. It appears that the issue has never arisen and it may be wondered if courts would enforce a promise to pay a fraudster.

be seen. It is to be hoped that courts will not do so on the basis of a public policy ground since that justification is vague and expansive. A better approach would be to note that the UCP600 definition cannot vary the UCC definitions, much less its operative provisions unless it expressly so provides. It is unlikely that any LC would make such a provision express and, were it to do so, the bank issuing it would deserve whatever result followed.

4. The Alignment Between UCP600 and Revised UCC Article 5

One of the unique features of Revised UCC Article 5 is that it was deliberately aligned with UCP500. In view of the changes in UCP600, it is useful to ask in what respects the alignment continues. This question is not simply academic. Although Revised UCC § 5-116(c) provides that the UCP will control where it is incorporated, it is possible for there to be confusion on the bench and bar if there are misalignments between the two.

With the exception of the provisions regarding the time for examination and refusal, most of the provisions that were aligned remain so.⁸⁰ Revised UCC Section 5-108(b) (Issuer's Rights and Obligations) was aligned with UCP500 Article 13(a) (Standard for Examination of Documents) in allowing a reasonable time not to exceed seven banking days within which to examine documents. UCP600 Article 14(b) adopts a new standard and approach. It provides that banks that examine documents under a credit "shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying." Under Revised UCC Section 5-103(c), the UCP600 provision controls in credits that are subject to it. While the change from seven to five bank-

ing days is readily understandable, the odd formula "a maximum of" invites courts that are so inclined to overlook the deletion of the reasonable time standard from UCP600 and to infer the same or a similar standard into deciding whether a bank has the maximum time or not. While the preclusion rule of UCP600 Article 16(f) (Discrepant Documents, Waiver and Notice) does not reach the time for examination of documents under UCP600, courts will certainly be able to fashion their own remedies in situations where it is found that a bank has deliberately delayed giving notice of refusal.

Indeed, in one important respect, UCP600 has aligned itself with Revised UCC Article 5, namely its treatment of the protection afforded to the claim to reimbursement of a confirming bank or issuing bank that discounts its acceptance or deferred payment undertaking. UCP600 Articles 7(c) (Issuing Bank Undertaking), 8(c) (Confirming Bank Undertaking), and 12(b) (Nomination) address the problem of the occurrence of letter of credit fraud after a bank has discounted its acceptance or deferred payment undertaking and prior to maturity.⁸¹ The failure of prior versions of the UCP to address adequately the extent of protection available to the reimbursement of a nominated bank in such a situation has led to considerable turmoil outside of the U.S. Happily, Revised UCC § 5-109(a)(1)(iv) (Fraud and Forgery) anticipated this problem and provided for it in the U.S. The alignment of UCP600 with this provision is a welcome change that will add to the stability and certainty of trade finance through letters of credit.

5. UCP600 as a Usage of Trade

Even where a letter of credit is not issued subject to UCP600, it is possible that a court may refer

80. UCP600 Article 14(h) regarding nondocumentary conditions remains aligned with Revised UCC §5-108(g); UCP600 Article 16 regarding preclusion remains aligned with revised UCC § 5-108(c); and provisions regarding accept and pay remain aligned.

81. The term "discount" is not used because any bank or person can discount an LC obligation. The protections extended under UCP600 Article 12 (Negotiation), however, are limited to nominated banks. Therefore, the rule states that nomination of a bank

to incur a deferred payment undertaking or to accept authorizes that bank "to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank." Although not explained, the two terms are quite different in their meaning and implications. Any nominated bank can purchase a draft or documents presented under an LC whether or not it is its own obligation. On the other hand, an obligation by a nominated bank can only be prepaid by the bank that makes the undertaking. The consequence of prepayment is that the obligation is discharged.

to its provisions in interpreting the terms of the letter of credit and performance under it. One justification for such an approach is Prior UCC § 1-205 (Course of Dealing and Usage of Trade) or Revised UCC § 1-303 (Course of Performance, Course of Dealing and Usage of Trade). Under these provisions, a usage of trade is “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” There is nothing in UCP600 that would alter the jurisprudence regarding the application of these provisions to it.

V. WHERE TO GO

This paper provides only an introductory survey of the legal implications of UCP600 with a focus on U.S. Revised UCC Article 5. It is neither complete nor extensive but intended to provide the LC lawyer with a useful start in assimilating UCP600. To competently work with UCP600, however, the LC lawyer will need to move beyond these reflections in order to assimilate and master the revision. Unfortunately, the tools available for an attorney to understand or work with UCP600 are relatively scarce during the introductory phase.

It is, of course, essential to have the text of the new rules. Although the text of the revision is available, access to it is carefully controlled by ICC Publishing. The text can be obtained at this time from ICC Publishing in Paris directly or through the U.S. member, the USCIB.⁸² In addition, the Institute of International Banking Law and Practice will publish its 4th edition of *LC Rules and Laws: Critical Texts*

(Institute of International Banking Law & Practice 2007) containing both the texts of UCP500 and UCP600 in April 2007.⁸³

There are some useful sources for interpretation of UCP600. Where its provisions are taken from the other sources, these sources may offer insight into their meaning. It is doubtful, however, that the various prior drafts of UCP600 will be particularly helpful in its interpretation since no definitive reason is given for the drafting additions, deletions, or corrections. While the “Commentary” by the Drafting Group may provide an interesting perspective into what the drafters intended and possibly insight into its meaning, it will not be able to correct omissions or fix errors in the text since it is the text itself that will control.⁸⁴

The Institute also will publish the *Comparison of UCP600 & UCP500*,⁸⁵ available in early Spring 2007, which will provide an annotated summary comparison of the changes and differences between the two versions.

The Institute’s *Analytical Commentary on UCP600*,⁸⁶ available in Spring 2007, will identify issues and offer a comprehensive interpretation of the text in light of letter of credit practice. It will be an essential element of every lawyer’s LC library.

After UCP600 is effective, articles will appear in journals and supplements to LC law treatises will be available.⁸⁷

While there will be live training courses offered during the introductory period, most are in select geo-

82. See <http://www.uscib.org>.

83. This volume will also contain all of the major texts related to LC law and practice, including, among others, the texts of ISP98, eUCP, ISBP, the UN LC Convention, Revised UCC Article 5, the Chinese LC Rules, URR525, the ICC Decision on Originals, and the U.S. Office of the Comptroller of the Currency’s Interpretive Rulings.

84. In the ICC frame of reference, “Commentary” means comments by the members of the drafting committee rather than a systematic analysis of the text.

85. Byrne, *The Comparison of UCP600 & UCP500* (Institute of International Banking Law & Practice 2007).

86. Byrne, et al, *Analytical Commentary on UCP600* (Institute of International Banking Law & Practice 2007). This study is hardbound and approximately 600 pages with a comprehensive index and appendices. It will be regularly updated.

87. See, e.g., Hawkland and Miller, *Hawkland & Miller UCC Series §-(Rev Art 5)* (1999).

graphical locations and virtually all are by and for bankers.⁸⁸ The Institute has made available programs specifically for attorneys via Webinar which can be obtained on DVD or Online Replay.⁸⁹

VI. CONCLUSION

There is no doubt that UCP600 poses significant challenges to letter of credit lawyers. Not only is it necessary to appreciate the changes that have been introduced by these rules, but it is also critical to address their implications for forms, procedures, risk

management, and systems. Ramifications of these changes will impact applicants, beneficiaries, and banks involved in the letter of credit process. Prior reforms of practice and law have virtually dried up LC litigation in the U.S. While UCP600 shuts down questions about reasonable time, it opens wide questions of compliance. The drought is over. Whether or not UCP600 proves to be worth all the expense and trouble attendant to creating and using it for bankers and users, there is little doubt that, whether intended or not, it will prove a boon to lawyers.

88. Several will be offered by the Institute of International Banking Law & Practice at various venues around the world, including several in the U.S. Information about these sessions can be found at <http://www.iiblp.org>.

89. Barnes and Byrne, UCP600 for Lawyers (Institute of International Banking Law & Practice 2007). The Webinar, held on 14-15 February 2007, is also available on DVD or Online Replay at <http://www.iiblp.org>.