Commodities Finance
Impact of UCP 600

A guide to the new rules

Reed Smith
Richards Butler

Contents of guide

THE UCP 600: A guide to the new rules

On 25 October 2006, the Banking Commission of the International Chamber of Commerce formally adopted the latest edition of the Uniform Customs and Practice for Documentary Credits, the UCP 600, by a unanimous vote. This is the sixth revision of these invaluable Rules since they were first promulgated in 1933 and they will be available for incorporation into letters of credit as from **1 July 2007**. One of the stated aims is to reduce unnecessary rejections of documentary tenders.

The purpose of this Guide is to provide users with a route-map through the new Rules, highlighting the major changes to the previous version, the UCP 500, and, where appropriate, advising traders as to terms which they may wish to include either in their trading contracts regarding letters of credit to be opened by the buyer or in applications for the opening of letters of credit. Reed Smith Richards Butler is very grateful for the input and comments from Professor Charles Debattista of the University of Southampton in relation to this UCP 600 Guide. Charles Debattista was a member of the UCP 600 "Consulting Group" appointed by the ICC and the ICC UK National Banking Committee.

This Guide is divided into six parts:

1. Why a revision?

We start first with a brief introduction about the objectives and process of the revision to the Rules.

2. The structure of the UCP 600

3. Applying for the letter of credit

We shall then look at those Articles which traders need to bear in mind when, as buyer, they apply for the opening of a letter of credit and/or when, whether as seller or buyer, they agree the terms of the letter of credit to be opened by the buyer.

4. Examination of documents

Next, we shall look at those Articles which establish the criteria against which the banks will examine documents tendered under letters of credit governed by the new Rules. We shall here be looking at the basic principles of tender and rejection and at the requirements for the tender of particular shipping documents under the UCP 600. In particular, we will look at the new '5 banking days' rule and new rule on inconsistent documents.

5. Other Issues

Next, we will look at other issues within the new Rules, such as Force Majeure, Disclaimers and Amendments.

6. Suggested letter of credit clauses

Finally, we will make some suggestions for proforma letter of credit clauses in sale contracts.

While we shall, in this Guide, set out our views concerning particular Articles in the new Rules, users are advised to obtain their own copy of the Rules and to familiarise themselves with the actual text of the new Rules.

The UCP 600 can be obtained in paper and electronic formats from ICC National Committees or from ICC's headquarters in Paris. Contact details can be viewed on ICC's website at **www.iccwbo.org**

1. Why a revision?

The revision commenced in May 2003. The stated aim of the new revision has been, as with earlier revisions, “to address developments in the banking, transport and insurance industries.” This particular revision has also sought to improve the drafting of the UCP in order to facilitate consistent application and interpretation of the Rules. Certainly these Rules are more user friendly both in terms of language and structure. The Definitions and Interpretation Articles (2 and 3) are a welcome addition. In broader terms, the aim of ICC was to enhance the reputation of letters of credit as the settlement means of choice among international traders. Part of this aim involves reducing documentary rejections, which surveys indicate may be as high as 70% of first presentations.

Whilst the intention was not to have a line by line revision, in practice there are many changes. However, the overall effect is one of clarification and consolidation not radical rethought.

2. The structure of the UCP 600

The UCP 600 are not divided into the same seven sections as the UCP 500 which were lettered A to G and headed in turn: General Provisions and Definitions; Form and Notification of Credits; Liabilities and Responsibilities; Documents; Miscellaneous Provisions; Transferable Credit and finally Assignment of Proceeds.

Despite the fact that the UCP 600 do not expressly follow this allocation of Articles by subject-matter, it is still possible to divide the Articles up as follows:

General Provisions and Definitions	art	1-3
Form and Notification of Credits	art	9-11
Liabilities and Responsibilities	art	4-8; 14-16
Nominated Banks	art	12-13
Documents	art	17-28
Miscellaneous Provisions	art	29-37
Transferable Credit	art	38
Assignment of Proceeds	art	39

As this Guide is addressed mainly at users rather than at providers of letters of credit, at traders rather than bankers, we shall be concentrating here on those Articles which relate to the opening of letters of credit and to the tender of documents. A trader regularly being paid – or paying through – a letter of credit needs, therefore, to familiarise himself most thoroughly with the following Articles:

4-8; 14-16 and 1-3: these Articles set out the basic responsibilities of the banks when examining documents tendered for payment under letters of credit governed by the UCP 600

17-28: these Articles set out the specific requirements of the UCP 600 regarding particular types of documents tendered for payment, e.g. multi-modal transport documents, bills of lading etc.

29-37: these Articles set out particular documentary requirements which apply to several types of documents which might be tendered under letters of credit.

The new Rules have not effected substantive changes in all of these Articles. This Guide will therefore concentrate on highlighting those parts of these Articles where substantive change has occurred.

There are a number of Articles in the UCP 600 – as there were under the UCP 500 – which regulate exclusively the relationship between the banks themselves, i.e. the rights and responsibilities as between issuing, confirming and nominated banks. Very useful clarification is given in these Articles concerning the rights and

obligations of Advising, Confirming, Issuing and Nominated Banks. Given the main purpose of this Guide, we shall not here be setting out the terms of these banker-orientated Articles.

It should be remembered that the UCP 600 will be supplemented by:

- ISBP (International Standard Banking Practice), ICC No.645. This is due for updating to bring it into line with UCP 600 and will be published March/April 2007.
- Commentary to UCP 600, being drafted by the UCP 600 Drafting Group and likely to be available in 2007.
- ICC Banking Commission Opinions many of which, (although issued under UCP 400 and 500) will still be relevant. There are as many as 570 Opinions, and there is no guidance on how many and importantly which ones, will still be applicable for UCP 600.

The Position Papers for UCP 500 will not be still relevant and are superseded by UCP 600.

3. Applying for the letter of credit

There are three points at which a seller of goods needs to pay particular attention to the letter of credit through which he expects to get paid by his buyer:

(i) when he concludes the contract of sale:

(ii) when he receives his letter of credit from the advising or confirming bank; and

(iii) when he tenders the shipping documents for payment.

Traders focus very intently on the letter of credit at points [ii] and [iii]. Every seller knows that whether he gets paid promptly is going to depend on whether he can tender documents which conform to the letter of credit – point [iii]. Likewise, every seller knows that whether he will be able to tender such documents is going to depend on how difficult the documentary requirements of the letter of credit are – point [ii]. It is obviously in the buyer's interest to make those requirements as stringent as possible – and whether or not he can do so will depend on what the seller and the buyer have agreed in their sale contract about the letter of credit or about the tender of documents for payment and this is the point frequently ignored at the early stage of the negotiation of the sale contract. It is consequently in the seller's interests to have clear terms in his sale contract about the type of letter of credit which the buyer can apply for and about the documents which the letter of credit will require for prompt payment. In effect, the seller will get the letter of credit he bargains for in the sale contract.

In the context of the UCP 600, there are four sets of Articles which a well-advised seller will have particular regard to when agreeing what type of letter of credit the buyer will open; and which a well-advised buyer will have particular regard to when applying for that letter of credit. These sets of Articles relate to the following matters:

(a) Do the UCP 600 apply to the letter of credit? – Article 1

(b) Is the letter of credit to be revocable or irrevocable? – Articles 2 and 3

(c) How clear and complete should the documentary instructions in the credit be?

(d) What is the bank to do with non-documentary requirements? – Articles 14 and 4(b)

(a) Does the UCP 600 apply to the letter of credit?

There are three points to make here, viz. incorporation, derogation and governing law and jurisdiction.

Incorporation

The UCP never have been – and the UCP 600 are not – a legal regime automatically applicable to all letters of credit. They are a voluntary self-regulatory regime devised by ICC for express incorporation into letters of credit: Article 1 of the UCP 600 states that the Rules will only apply "when the text of the credit expressly indicates that it is subject to these rules."

The major advantage of incorporation for a seller is that, where the Rules are incorporated, he will know in advance the criteria against which the banks will examine the shipping documents in deciding whether or not to pay under the credit. The major advantage of incorporation for a buyer is that he will know in advance the criteria against which the price for the goods will be paid against tender of documents. However, for the buyer to be under an obligation to open a letter of credit governed by the UCP 600, the sale contract needs to have an express term imposing such an obligation on the buyer. Only with such a term in place can the seller object if the buyer were to open a letter of credit which is not governed by the UCP e.g. *"Payment by irrevocable letter of credit, incorporating UCP 600, to be opened latest …"*.

UCP 600 are only available for incorporation into Letters of credit from 1st July 2007. We would expect there to be a short change-over period July onwards where some banks still incorporate UCP 500 because they are not yet fully ready for the change. Experience with the change from UCP 400 to 500 indicates that this period will be fairly short.

Letters of credit opened prior to 1st July 2007 will continue to be governed by UCP 500 and it is unlikely that they will be amended to change to UCP 600. Certainly there is no "automatic" change. Therefore both banks and users will have to operate both UCP 500 and 600 regimes for a period.

Derogation

Where the UCP 600 are incorporated into the letter of credit, it is still open to the applicant, i.e. typically the buyer, to exclude the application of any part of the UCP 600. Thus, for example, Article 20(d) requires a bank simply to disregard clauses in a bill of lading which give the carrier a liberty to tranship the goods. If a buyer of goods wishes specifically to exclude the tender of bills of lading containing such a liberty, it is open to the buyer when applying for a letter of credit (assuming he has agreed as much in the purchase contract) specifically to exclude the application of Article 20(d): Article 1 makes the UCP 600 where incorporated "binding on all parties thereto *unless expressly modified or excluded by the credit*."

There has been an important stylistic change in this regard. Whereas the UCP 500 repeatedly reminded bankers and users that the practices set out in the Rules were subject to contrary stipulation in the credit, the new Rules now make the point only once, in Article 1, with the intention that the liberty to deviate from the Rules applies

throughout. This is a point worth remembering when seller and buyer negotiate in the contract of sale the terms upon which the buyer must open a letter of credit.

Governing law and jurisdiction

Where the UCP 600 are incorporated, this simply means that the contract between, say, the beneficiary and the confirming bank or that between the buyer and the issuing bank contains the terms of the UCP 600. It does not mean that disputes arising under those contracts are subject to any particular law or that they must be resolved within any particular jurisdiction. These questions are decided not by the UCP 600 but by those rules of law which the court in which the dispute is raised uses in order to establish its own jurisdiction and the law which it will apply to the resolution of the dispute. This position has not changed with the introduction of UCP 600. However, in recent years there have been many more court cases and disputes relating to the issue of proper law/jurisdiction for letters of credit. It is therefore an area of uncertainty which UCP 600 might have dealt with but has not.

If traders – sellers or buyers – wish to establish in advance which courts will have jurisdiction over any disputes which may arise under their letters of credit and which law will govern such disputes, they could consider a choice of jurisdiction and choice of law clause for inclusion into their letters of credit. However, this is presently highly unusual in sale contracts, i.e. a term expressly requiring the letter of credit opened with it to have a governing law and jurisdiction clause.

(b) Is the letter of credit to be revocable or irrevocable? – Articles 2 and 3

One of the main differences between the UCP 500 and the UCP 600 is that the default type of credit envisaged in the UCP 600 is an irrevocable credit.

From a seller's point of view the advantage of an irrevocable credit is clear that the issuing bank's undertaking to pay the sum of the credit cannot be revoked by that bank – or by that bank at the behest of the buyer. The UCP 500 had clearly envisaged, in Article 6, that credits could be either revocable or irrevocable and, in Article 8, had established that a revocable credit could be amended or cancelled at any time and without notice to the seller. The UCP 500 did favour, it must be said, irrevocable over revocable credits, in that if the credit did not specify which type it was, then the assumption was that it was irrevocable. By expressly flagging the notion of revocable credits, however, the UCP 500 increased the perils for sellers that buyers might (in the absence of an agreement to the contrary in the sale contract) be tempted to open a revocable credit, thus hedging their bets against payment depending, say, on what happened to the market value of the goods between sale and shipment of the goods. Thus, sale contracts often (and prudently) stated *"Payment by irrevocable letter of credit …"*.

The UCP 600 have moved firmly away from revocable credits. There is no equivalent of the old Article 6 which expressly gave buyers the choice of applying

for a revocable credit. Article 2 now defines a credit as "any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation." Moreover, Article 3, headed "Interpretations", states that a credit is irrevocable even if there is no indication to that effect. Finally, Article 10 makes it clear that a credit cannot be cancelled without the agreement of the beneficiary. These three Articles further consolidate the preference of the UCP for irrevocable credits: what had been in the UCP 500 an expressed assumption has now become a tacit – and therefore stronger – default position favouring the interests of sellers as beneficiaries.

Two points of caution need, however, to be made. First, while the UCP 600 clearly favour irrevocable over revocable credits, there is no similar assumption in favour of confirmed credits. From a seller's perspective, of course, a confirmed credit brings the advantages of "a definite undertaking of the confirming bank, *in addition to that of the issuing bank*": "confirmation" is thus defined in Article 2 without assuming that all credits will be confirmed where they do not say otherwise. Consequently, as before, if a seller wants to impose upon his buyer an obligation to organise the opening of a confirmed letter of credit, he must impose such an obligation in the sale contract (e.g. "*Payment by irrevocable letter of credit to be confirmed by first class New York bank acceptable to the Sellers*…") and – when he receives the letter of credit – to make sure that it has been confirmed by an acceptable confirming bank.

Secondly, going back to revocable credits, although the UCP 600 have clearly, in the manner we have described, veered sharply in favour of irrevocable credits, the new Rules have not made it impossible for revocable credits to be opened. It must be remembered that Article 1 of the UCP 600 allows parties to credits (and the parties who first generate the credit are, of course, the buyer as applicant and the issuing bank) to modify or exclude any part of the Rules. It is consequently still possible for a buyer to apply for the opening of a *revocable* credit and there is nothing in the UCP 600 which makes that credit inoperable. It remains prudent, therefore, for sellers to continue to stipulate in their sale contracts that the buyer will open an irrevocable letter of credit – and, of course, to make sure when the credit arrives that it incorporates UCP 600 or expressly describes itself as irrevocable.

(c) How clear and complete should the documentary instruction in the credit be?

The UCP 500 had contained, in Article 5, helpful advice to buyers when applying for the opening of a letter of credit: to give complete and precise instructions to the issuing bank, to avoid excessive detail in those instructions, and to avoid opening one credit by referring to instructions given in an earlier one. There is now no equivalent of Article 5 in the UCP 600. This is in keeping with a general move in the new Rules towards retaining only those Articles which actually impose a duty or lay down a principle, omitting Articles which simply set out best practice.

Does the omission of the old Article 5 mean that the advice there given is any less helpful to the smooth running of credits? The answer is that this advice is still worth following. Instructions need to be clear without being too detailed. The more cluttering detail in the letter of credit, the more likely it will become a mechanism for delaying rather than facilitating payment. However, traders must remember that banks do not look at the commercial value of the documents: thus a credit requiring simply an "Inspection Certificate" is satisfied by an Inspection Certificate recording the goods to be unfit for human consumption! The credit must therefore call for "An Inspection Certificate confirming the goods are fit for human consumption" or "An Inspection Certificate confirming that goods comply with the following specifications … " if the credit is to protect the buyer.

(d) What is the bank to do with non-documentary requirements? – Articles 14 and 4(b)

Talk of the instructions initially given to the issuing bank by the buyer as applicant for the credit brings us to the difficult issue of non-documentary conditions. It is a common occurrence for credits to contain instructions which are not expressly attached to a document which needs to be tendered: thus, for example, if the credit stipulates for shipment on a vessel of a particular class, but not requiring the tender of a classification certificate, is the bank under an obligation to inquire of the beneficiary as to the age of the vessel named in the bill of lading tendered for payment?

This issue was discussed at length in the revision process and the overwhelming majority of ICC National Committees favoured retaining the wording of the UCP 500, viz that such conditions will be disregarded: see Article 14(h) of the UCP 600.

The consequence is that if a buyer is particularly anxious to ensure that payment is only made if the bank is satisfied, say, that the vessel carries a particular classification, he should:

- stipulate in the sale contract for the tender of a copy of classification certificate under the letter of credit; and
- stipulate for the tender of the same document in the letter of credit.

Only thus could the buyer ensure, first, that the seller cannot complain that the letter of credit requires more documents than does the sale contract and, secondly, that the seller will only be paid on tender of a conforming classification certificate.

In the meantime, of course, the seller needs to consider, when agreeing the terms of the sale contract with his buyer, whether he will be in a position to satisfy the obligation which the buyer is seeking to impose upon him – for example, can he accommodate within his CIF price any additional freight he will need to pay to ship the goods on a vessel of the stipulated class? If he is sub charterer or buying in string, how easy will it be for him in fact to get hold of a copy of the classification certificate?

This degree of forethought by both parties is even more necessary under the UCP 600 than it was under the UCP 500. The rule in the UCP 500 that the banks would ignore non-documentary conditions was somewhat tempered (although some would say unnecessarily complicated) by Position Paper No 3 which stated that only those non-documentary conditions which could not be implicitly connected to a document listed for tender were to be disregarded by the banks. The Introduction to the UCP 600 makes it clear that the Position Papers issued under the UCP 500 will not be applicable under the UCP 600. **The intention in this regard, therefore, is that the banks will now disregard all non-documentary requirements**. The consequence is that parties will need to exercise greater care in formulating their documentary requirements.

4. Examination of documents

We come now to those Articles in the new UCP 600 which, from a seller's perspective as beneficiary, are the most important in the sense that they establish the criteria against which his entitlement to payment will be judged: what documents will or will not pass muster with the banks when he tenders them for payment?

We shall be looking at these Articles under the following three headings:

(a) the basic principles for the examination of documents – Article 14

(b) original documents and their issuers – Articles 14 and 17

(c) particular documents:

- bills of lading – Article 20
- charterparty bill of lading – Article 22
- non-negotiable sea waybill – Article 21
- transport document covering at least two different modes of transport - Article 19
- freight-forwarder bills of lading – Article 14
- insurance documents – Article 20

(a) The basic principles for the examination of documents – Article 14

Article 14 does in the UCP 600 what the old Article 13 did in the UCP 500 – it establishes the basic responsibility of the banks to examine documents tendered under letters of credit. We shall be concentrating here on three aspects of this duty which have in some way been altered by the new Rules:

(i) the basic duty to examine the documents on their face – Article 14(a)

(ii) the time allowed to the banks to examine the documents – Article 14(b)

(iii) linkage/consistency between the documents tendered – Article 14 (d) and (e).

(i) The basic duty to examine the documents on their face – Article 14(a)

Article 14(a) imposes on the banks a duty to examine documents in order "to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation". Two points need to be made about this newly drafted part of Article 14(a).

First, the phrase "with reasonable care", which was used in the old Article 13(a) of the UCP 500, has been omitted. It is not anticipated, however, that this omission will lead to any substantive difference in the way this duty will be construed by the banks in the exercise of their duty to examine the documents. Given that the duty always was – and remains – to ascertain whether the documents *appear* to conform, it must follow that the banks are under a duty to exercise reasonable care rather than any stricter duty of examination.

Secondly, the duty is to examine "whether or not the documents appear on their face" to comply. There was much discussion during the revision process whether the words "on their face" added anything of substance to the word "appear" and although there was clear agreement that they did not, there was no agreement as to whether the words "on their face" should be deleted. The rather untidy compromise reached was that the words were deleted in all the Articles dealing specifically with particular transport documents but retained in the key Article 14 setting down the banks' basic duty of examination. The important thing for users, particularly buyers, to remember is that the banks are still bound – and entitled – to rely only on what the documents say rather than on whether what they say is in fact accurate.

(ii) The time allowed to the banks to examine the documents – Articles 14(b) and 16(d)

This is clearly a vitally important Article for all sellers. The old Article 13(b) of the UCP 500 gave each bank involved in the credit a **"reasonable time, not to exceed seven banking days** following the day of receipt of the documents" to examine the documents. Acceptance or rejection of the document was therefore required within this period. Different constructions in different Courts of how many days under seven constituted a "reasonable time" led an overwhelming majority of ICC National Committees to recommend the deletion of this phrase and to give each bank a **fixed maximum number of days** in which to examine the documents. The period chosen from a number of suggested options was **five banking days** following the day of presentation: see Articles 14(b) and 16(d) of the UCP 600.

The old formulation of "reasonable time" led to a number of disputes, a whole range of factors which needed to be considered and very significant uncertainty. The new "maximum of five banking days" is therefore to be welcomed, although note that a "banking day" is now defined in Article 2 not as simply a day the bank is open, but "regularly open at the place at which an act subject to these rules is to be performed". This definition of a banking day is not, we would suggest, a very precise one.

While omission of the phrase "reasonable time" may have resolved some differences of interpretation, the new so-called "safe haven" of "a maximum of five banking days" may give rise to a new set of problems.

Thus, for example, what if a bank decides on the second day that the documents are compliant? Can the seller insist on payment on that second day or must he wait until the fifth day for payment? Article 14(b) gives the bank five banking days "to determine if a presentation is complying". Article 15(a), however, says that "*when* (emphasis added) an issuing bank determines that a presentation is complying, it must honour" and Article 15(b) and (c) apply the same rule to confirming and nominated banks. Moreover, Article 16(d) states that the notice of its refusal to pay must be given "by telecommunication or, if that is not possible, by other expeditious means no later than (again, emphasis added) the close of the fifth banking day following the day of presentation."

We therefore think that while Article 14(b) gives each bank five banking days to decide whether to pay, Article 15 says that it must pay ("honour") or give notice of refusal immediately it comes to that decision. A seller intent on ensuring payment within the five days (or indeed a shorter period) should stipulate in the sale contract that a specific term will be in the credit opened by his buyer, e.g. *"Payment by confirmed irrevocable letter of credit, incorporating UCP 600, providing for payment within 3 banking days of presentation of the following documents …"..*

The same issue may cause problems for the buyer. If the bank were to pay on the second day, and if the goods are lost or damaged on the fourth day in a sale contract concluded on a "delivered" basis, is it open to the buyer to complain that the bank had paid the sum under the credit before it was obliged to – and that therefore the bank should indemnify the buyer for the costs of recovering the price from the seller in a foreign jurisdiction? Alternatively, the bank giving notice of refusal on the second day may thereby give an opportunity for the seller to re-present documents before the expiry of the credit, whereas had the bank waited the full 5 days, the credit would have expired. We think the buyer cannot complain: it is probable that Article 14(b) does not require the bank to wait five days: it simply gives it five days to examine the documents if it needs five days. The consequence would be that a bank is entitled, as far as the buyer is concerned, to pay on the second day if it rightly decides then that the documents comply or to reject on the second day.

The benefit of the new 5 banking days rule in 14(b) is certainty in place of previous uncertainty. Given that large numbers of presentations are discrepant, it also enables a seller to know that a presentation 6/7/8 or more banking days prior to expiry of the credit leaves open the possibility of re-presentation of documents if rejected.

Article 16(c) then clearly sets out what must be contained in the single notice to be given by the bank in refusing to honour and Article 16(b) makes it clear that any application for a waiver does not extend the 5 banking days limit. The likelihood therefore is that banks will refuse to honour and issue a notice under Article 16(c)(iii)(b) that the bank is holding the documents until it receives a waiver or further instructions from the presenter.

(iii) Linkage between the documents tendered – Article 14 (d) and (e).

This is an important issue. We think it the single most important issue for users rather than providers. It caused great debate during the revision process. The question is the degree to which **inconsistencies** between the documents tendered was to constitute a discrepancy preventing payment. This came to be to known in the revision process as the **"linkage"** issue.

The UCP 500 had been somewhat light of touch on linkage, dealing with inconsistency regarding the description of the goods in Article 37(c) and with inconsistency in general in Article 13(a). In practice, however, a large number of rejections of documents were based on inconsistency between documents. For example, some of the data in the Quality Certificate (while in compliance with the document any requirements for the Quality Certificate) was inconsistent with the Phytosantary certificate or minor weight differences between bill of lading, weight or other certificates – although all within the tolerance in the credit. The problem was related to sellers' lack of control over the issuers of many of the required documents which led to inconsistencies between documents. The issue was usually of no real consequence in relation to the goods, but nevertheless led to many rejections.

The old Article 37(c) now appears without any substantive change, at Article 14(e) of the UCP 600.

The change comes in the old Article 13(a) of the UCP 500. That Article stated that documents appearing "on their face to be inconsistent with one another" were to be considered discrepant. This part of Article 13 has been replaced by a new form of words in Article 14(d): ***"Data in a document, when read in context with the credit, the document itself and international standard practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit."***

The new wording attracted enormous support from ICC National Committees although the UK Committee worked hard to try to remove "other stipulated documents". It must be said that there are two views about this new Article. The first is that the new wording simply explains but does not extend the purpose and effect of the old Article 13, and may (because of the wording "not identical" and reference to international standard practice) lead to less rejections.

The second is that there must have been a purpose to such a detailed change in the wording and that the effect must be that the banks are now entitled and obliged to be far **more rigorous** in scrutinising the data in each document tendered. When the Article says, for example, that the banks must compare data in each document with data "in the credit", does this mean that data in a document conflicting with a non-documentary requirement in the credit would make the document discrepant? Logically, yes. But this is wholly inconsistent with Article 14(h) requiring the banks to disregard non-documentary requirements. Thus, for example, would a reference

to the age of the vessel as 17 years used in one of the documents tendered render a presentation discrepant if the credit contained a non-documentary requirement that the vessel be under 15 years of age?

This is one of the least happy alterations to the old version of the Rules and it is hoped that the Commission and courts called upon to construe the new Article 14(d) will interpret it as an explanation rather than an extension of the old Article 13(a), in keeping with the aim stated in the Introduction to the UCP 600 to reduce unnecessary rejections of documentary tenders.

In the meantime, sellers may wish to reduce the possibility of discrepancies being fabricated on the strength of the new Article 14(d) and could agree with their buyers on the insertion of terms in the letter of credit which exclude its possible effects. This could be done, for example, simply by repeating the words of the old Article 13(a) of the UCP 500 into the application for the credit and in the credit itself and excluding 14(d), e.g. in the sale contract: "*Letter of Credit will incorporate UCP 500 13(a) and will exclude UCP 600 14(d)*". The better alternative from a seller's point of view would be to require a letter of credit to exclude parts of 14(d), e.g. a sale contract term stating "*Letter of Credit opened by Buyers to incorporate UCP 600, but exclude 14(d) and will provide that data in documents need not be identical to data in that document, in any other stipulated document or the credit*".

(b) Original documents and their issuers – Articles 14 and 17

Whether the banks were entitled to insist on original documents – and what originals *were* – were questions which raised considerable trouble under the UCP 500, revolving largely around the precise interpretation of Article 20(b) of the UCP 500 which defined what an "original" was. The UCP 600 seeks to resolve these difficulties in the new Article 17.

This Article starts by laying down the principle that at least one original of each stipulated document must be tendered. It must be recalled in this regard that it is always open to the parties to depart from the UCP 600 by agreement (see Article 1) and that consequently where a seller knows that the tender of an original of any particular document is likely to prove difficult, he should expressly agree with the buyer in the sale contract that the letter of credit will be opened in terms which allow the tender of a copy of that particular document.

Article 17 also seeks to define with greater precision than did its predecessor Article 20(b) of the UCP 500, what counts as an original document. The combined effect of Articles 17 (b) and (c) is that the following documents will count as originals unless the document itself indicates that it is not an original:

- Any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document;
- Any document which appears to be written, typed, perforated or stamped by the issuer's hand;

- Any document which appears to be on the issuer's original stationery;
- Any document which states that it is original, thus the "original" stamp is still a useful tool in every sellers' office and document issuers should be asked to expressly state that the document is "original".

This follows ICC policy paper on original documents issued under UCP 500, which seemed to solve the uncertainty over the "original" issue.

(c) Particular documents – Articles 14 and 19-22

Whereas the UCP 500 started with marine/ocean bills of lading when setting out the criteria against which the banks would examine particular transport documents, the UCP 600 starts with transport documents covering at least two different modes of transport, doubtless in deference to the greater use of such documents thanks to the relentless rise of containerisation. We shall be looking at these Articles in the following order, responding rather more specifically to the documents in use in the commodity trades:

(i) bills of lading – Article 20;

(ii) charterparty bill of lading – Article 22;

(iii) non-negotiable sea waybill – Article 21;

(iv) transport document covering at least two different modes of transport – Article 19;

(v) freight-forwarder bills of lading – Article 14;

(vi) freight collect transport documents;

(vii) "clean" documents Article 27;

(viii) insurance documents – Article 20.

(i) Bills of lading – Article 20

The Article setting out the criteria for the tender of bills of lading has been simplified. In broad terms, there is **little difference** in practice between the requirements of the old Article 23 of the UCP 500 and those listed in the new Article 20 of the UCP 600, apart from the position regarding transhipment, to which we shall come presently.

First, however, a word about the requirements of signature. All bills of lading require signature. Article 23(a) of UCP 500 said "signed or otherwise authenticated". The phrase "*or otherwise authenticated*" has been deleted from UCP 600 Article 20: this does not, however, mean that signature is the only way in which a bill of lading can be authenticated under the UCP 600. The relevant part of Article 3, entitled *Interpretations*, states that a document may be signed by any other mechanical or electronic means of authentication.

Secondly, the position regarding transhipment is now as follows:

- The starting point is that the bill of lading must indicate shipment from the port of loading to the port of discharge stated in the credit (see Article 20(a)(iii)).

- Clauses giving the carrier a **liberty to tranship** are to be disregarded (see Article 20(d). Consequently, a bank cannot reject a bill of lading simply because of a liberty to tranship. So long as, according to Article 20(a)(iii), the ports of loading and discharge stated in the credit are indicated on the bill of lading, the bank cannot reject a bill of lading with a liberty to tranship. Such a bill of lading may contain, in addition to the liberty to tranship, a term disclaiming the carrier's liability after transhipment, a term which may have an impact on any cargo claims which the buyer may wish to bring against the carrier. If a buyer has particular cause to ensure that a bill of lading giving the carrier a liberty to tranship is rejected, he must, given the terms of Article 20(d) of the UCP 600, expressly instruct the issuing bank on the exclusion of that Article, and should include a term in the sale contract permitting such exclusion.

- A bill of lading stating that **the goods <u>will</u> be transhipped** is also acceptable *"provided that the entire carriage is covered by one and the same bill of lading".* It is not entirely clear what this wording, which can also be found in Article 23(c) of the UCP 500, means.

  If these words mean simply that the bill must indicate shipment from the port of loading to the port of discharge despite the fact that it also states that the goods will be transhipped, then it is difficult to see what these words add to Article 20(a)(iii).

  If, on the other hand, these words mean that the bill of lading must not contain a clause <u>disclaiming</u> the carrier's liability after transhipment (because the carriage is no longer "<u>covered</u>" by the same bill of lading) then it is difficult to see how this can be consistent with the terms of Article 20(v), which states that the contents of terms and conditions of carriage will not be examined.

  It is to be hoped that, in the interests of promoting greater and more efficient acceptability of documents, the first, minimalist, construction of the words is preferred over the second.

  Again, of course, a buyer anxious to exclude the tender of bills of lading stating that the goods will be transhipped, for example where the sale contract provides for "direct shipment", would be well-advised when applying for the credit, expressly to exclude the application of Article 20(c)(i).

- Finally, **where goods are shipped in a container, trailer or lash barge** and are stated as having been so shipped in the bill of lading, then a bill of lading stating that the goods will be transhipped is acceptable *even if the credit prohibits transhipment*: see Article 20(c)(ii). As there is no provision saving

this Article from the effects of Article 20(a)(iii) set out above, it presumably follows that the bill must still indicate shipment from the port of loading to the port of discharge stated in the credit.

It must follow from this Article (the only place in the Rules where the banks are ordered by the Rules to ignore a specific instruction in the credit) that it is not open despite the general ambit of Article 1 of the Rules – to exclude the application of this Article. The justification for this exceptional position would appear to be that transhipment forms such an integral part of the container trade that an exclusion of transhipment bills in the container trade would simply make no commercial sense.

(ii) Charterparty bill of lading – Article 22

Article 25 of UCP 500 made no attempt at defining what a charter party bill of lading was. There is now some attempt at a definition: the new Article 22 defines a charterparty bill as one, "*however named, containing an indication that it is **subject** to a charterparty.*" This is mirrored by Article 20(a)(v) which states that an Article 20 Bill of Lading must "*contain no indication that it is subject to a charter party*".

The difficulty with this "definition" is that the phrase could include two quite different types of document:

- It would clearly include a bill of lading covering the shipment of a commodity on a chartered vessel where the bill of lading is, say, a Genconbill marked as being intended for use with charterparties.
- Would it, however, include an ordinary full form bill of lading which contains somewhere on the front page of the bill a *reference* to a charterparty, e.g. "freight as per charterparty". Would this be a "charterparty bill of lading" covered by the new Article 22?

The phrases "charterparty bill of lading" and "an indication that it is subject to a charterparty" are normally taken to refer, at any rate in the shipping market, to the first type of bill of lading but not the second. If this interpretation were (sensibly) adopted in interpreting Articles 20 and 22 of the UCP 600, a document checker faced with the first type of bill of lading would look to Article 22. If faced with the second type of bill of lading, he would look to Article 20, where he would find that such a bill would be acceptable because Article 20(a)(v) expressly allows the tender of bills of lading "making reference to another source containing the terms and conditions of carriage." On this interpretation, Article 20(a)(vi) would not operate to reject such a bill of lading because there is no indication on the bill of lading that it is "subject to a charterparty" within Article 20(a)(vi).

There have been two marked improvements in the context of charterparty bills of lading. First, the UCP 600 now envisages a charterparty bill being signed by the master, the owner or their agents (as did the UCP 500) or by the charterer of his

agent: see Article 22(i). Secondly, the new Article 22(a)(iii) now envisages a credit – and a charterparty bill – showing a range of discharge ports as the port of discharge.

There remains one issue which needs to be considered by sellers and buyers when agreeing on the terms of the credit in the contract of sale – and, consequently, for the buyer to consider when he organises the credit. Should the credit expressly say "charterparty bills allowed" or is it safe for the credit to give no indication as to whether charterparty bills can be tendered? Under UCP 500 it was necessary to expressly provide for charterparty bills to be allowed.

The issue arises because of a small change to the old Article 25 of the UCP 500. The initial words of that Article, "If a credit calls for or permits a charter party bill of lading…" have been omitted: what is the effect? Can a charterparty bill of lading be tendered even in the absence of requirement or permission in the credit? There are diverging views on this. At a panel discussion at the ICC Conference in London on 6th December, even the distinguished and knowledgeable speakers disagreed. One view was that a letter of credit calling for simply "a Bill of Lading" would not cover a charterparty bill of lading. The opposite view was the omission of the old opening words meant that either an Article 20 or an Article 22 Bill of Lading would be acceptable, thus including a charter party bill of lading.

It may take some time before practice or judicial decisions establish which is the position. In the meantime, to return to the practical question, ***should the credit expressly say "charterparty bills allowed" or is it safe for the credit to give no indication as to whether charterparty bills can be tendered?***

The position appears to us to be as follows:

(i) if the credit expressly prohibits charterparty bills, then a document checker must reject a charterparty bill of lading – and is likely (in our view wrongly) to reject even a bill of lading containing a reference to a charterparty.

(ii) if the credit simply asks for a bill of lading without saying anything about charterparty bills, then a document checker is likely to reject (in our view wrongly) a charterparty bill of lading, because of Article 20(a)(vi) and will fail to travel the distance to Article 22 to find that the charterparty bill can be tendered under *that* Article. **For this reason, we would strongly recommend that sellers wishing to ensure that they can successfully tender charterparty bills of lading should stipulate in their sale contract for the opening of a letter of credit stating "charterparty bills allowed" and should make sure when they receive the letter of credit that the credit so allows.**

(iii) Non-negotiable sea waybill – Article 21

A sea waybill is a receipt for goods, but is not a bill of lading because it is not a document of title to the goods. Non-negotiable sea waybills are not commonly used in the trading of commodities. Suffice it to say, therefore, that this Article largely mirrors Article 20 on bills of lading.

(iv) Transport document covering at least two different modes of transport – Article 19

Where a transport document, however named, covers at least two different modes of transport, the requirements for tender are set out at Article 19 which is based on Article 20 with appropriate amendments necessitated by the fact that this document envisages the use of more than one means of transport.

(v) Freight-forwarder bills of lading – Article 14(l)

There is no longer a specific Article in the UCP providing for the tender of transport documents issued by freight forwarders – see Article 30 of the UCP 500. Such documents are still, however, acceptable under the UCP 600 through a very much more economical Article, namely Article 14(l) which states quite simply that a transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of the Rules. As long, therefore, as, say, a bill of lading issued by a freight-forwarder satisfies the requirements of Article 20, the fact that the bill has been issued by a freight-forwarder does not make the bill of lading unacceptable.

(vi) Freight collect transport documents

It should be observed that there is no equivalent in the UCP 600 of the old Article 33 of the UCP 500. This Article, it will be recalled, allowed the tender of freight collect transport documents "unless otherwise stipulated in the credit or inconsistent with any of the documents in the credit." This Article was commonly understood to mean that a freight collect bill of lading was acceptable if the credit did not require a freight prepaid bill *and* if the invoice tendered under the credit made a deduction on account of the freight yet to be paid by the buyer.

There is no equivalent in the UCP 600. It is not clear whether the effect of this omission is that freight collect bills are no longer acceptable under letters of credit governed by the UCP 600. This seems unlikely. However, in order to avoid the uncertainty caused by this omission, a seller trading in circumstances where tender of a freight collect bill of lading is likely should stipulate with their buyer in the sale contract that the credit opened by the buyer should expressly allow the tender of such bills. All that is required is "*Freight collect B/Ls allowed*" in the letter of credit clause of the sale contract, and then in the credit itself.

(vii) "clean" transport documents – Article 27.

The old Article 32 is now found in Article 27, slightly amended but essentially the same. A bank will only accept clean transport documents. A clean document does not need the word "clean" but must not have any clause or notation "expressly declaring a defective condition" of the goods or packaging.

(viii)Insurance documents – Article 28

The provisions in relation to insurance documents have been condensed from Articles 34 36 in UCP 500 to Article 28 in UCP 600. The changes are insubstantial. Cover notes are now excluded although there may be some practical difficulties in distinguishing a cover note and a certificate. Originals are required (Article 28b). An insurance certificate, policy or declaration under an open policy is required. Signatures by agents or 'proxies' must expressly state whether the agent or proxy signs for insurer.

As before, banks will not reject insurance documents on the basis of exclusions on the certificates/policies (Articles 28j and h) even if insurance is required to be "*all risks*". This is an important point since the insurance may in practice be worth little, even if marked as "*all risks*" because of substantial and far reaching exclusions.

A new addition is express acceptance of insurance documents with a deductible, excess or franchise (Article 28j). It remains a requirement that the insurance cover by 110% of the CIF or CIP value. The date of the insurance must be prior to shipment or expressly cover from a date not later than the date of shipment.

Article 28(g) states that a credit should specify "the type of insurance required", but in practice this is worth little because of the allowance of exclusion clauses without limitation.

5. Other issues and changes

(a) Force Majeure

This was in Article 17, now in Article 36. The wording is largely the same except there is now express reference to Terrorism. As before, the expiry date of the credit is not extended as a result of Force Majeure so the credit will (unfairly for the beneficiary) simply expire even though presentation may be prevented by Force Majeure. The beneficiary should note that a credit is always available for presentation at the Issuing bank (as well as any nominated bank) – see Article 6a. This may assist if the nominated bank is affected by force majeure.

(b) Disclaimers

These are now found in Articles 34 (Effectiveness of Documents), 35 (Transmission and Translation) and 37 (Acts of an Instructed Party). The general effect is still that banks are not liable if things go wrong and have no responsibility for acts of other banks (confirming, advising, nominated) even if chosen by them.

(c) Standby letters of credit

The UCP 600 will (as 500 did) apply to Standby letters of credit. There therefore remains two alternative sets of rules to cover such letters of credit – UCP 600 or ISP98.

(d) Timing

How banks will calculate time is set out in Article 3 (Interpretations) (to, until, between, before, beginning, middle, end, first half and so on). Traders must be familiar with these terms. It is important to note the strange treatment of "from"

- If a period of shipment, "from" will include the date mentioned;
- If a maturity date, "from" will exclude the date mentioned.

(e) Discounting Article 12(b)

The early payment of deferred payment undertakings (discounting) by a nominated bank is now expressly recognised and permitted (Article 12b). The Issuing bank must reimburse the nominated bank on maturity (Article 7c) whether or not the nominated bank has paid early. This fills a gap in UCP 500 which failed to acknowledge discounting, leading to discussion in cases concerning whether discounting was permitted under UCP 500. The overall effect is to move risks of something going wrong (e.g. fraud) from the discounting bank back to the applicant for the credit during the deferred payment period.

(f) Amendments Article 10

Article 9(d) of UCP 500 dealing with amendments is reproduced in Article 10 of UCP 600. The position remains that amendments are not effective for the beneficiary "until the beneficiary communicates its acceptance" although an issuing bank is bound from time of issue of the amendment. Traders should note that a presentation complying with the amendment will be deemed acceptance of that amendment. This remains a trap for the unwary. Traders should therefore consider all amendments and expressly accept or reject rather than ignore.

A new and useful addition is 10f which provides that any time limit for acceptance specified in the amendment or deemed acceptance if not rejected shall "be disregarded". This was missing from UCP 500, but was set out in a Position Paper.

6. Sale Contract Letter of Credit Clauses

As we have analysed the changes made in UCP 600, we have suggested possible clauses for the sale contract to 'meet' some of the issues. A model letter of credit clause in a sale contract should at least, we would suggest, deal with the following issues:

- Irrevocable
- Subject to UCP 600 [Any exclusions required? e.g. Article 14(d)]
- Confirmed by first class bank [Place of confirming Bank] [acceptable to seller]
- Payable on sight/deferred payment. Consider including "*providing for payment within 5 banking days of presentation*"
- Opened , fully workable and advised/confirmed to seller latest [Date] [May wish for provisions in relation to late L/C]
- Payable against [list of documents - state original or copy, state acceptable issuers of documents]
- Provision re expiry date of credit e.g. "*L/C shall be valid for presentation not less than 21 days after expiry of shipment period including any contractual extension*"
- Consider what forms of transport documents are allowed: "*Bills of Lading*" may not allow tender of a charterparty bill or through transport document; include "charterparty bills of lading allowed"
- Consider whether stale documents, partial shipments/partial drawings/transhipment/freight collect B/Ls are allowed
- Consider requiring L/C to be subject to a particular law and jurisdiction
- Who shall pay bank charges e.g. "*All charges of the L/C shall be for buyers' account*"
- Consider a provision expressly providing that the letter of credit and any amendments will not alter/add/amend the sale contract
- Provision requiring the credit to cover contractual quality plus tolerance or any contractual shipment extension
- Consider an express provision that buyer will make payment for goods delivered and accepted even if the letter of credit does not pay.

These are general suggestions. Of course, parties with particular requirements should take appropriate legal advice in relation to what should be provided in the sale contract.

Conclusions

The UCP 600 revision is to be welcomed and will be easier to use for banks and traders. The Interpretations and Definitions are helpful and there is greater simplicity and clarity in the drafting. Time will tell whether documentary rejections are reduced. Traders are advised to make their sale contracts clear and specific in relation to the letter of credit requirements to minimise the chance of rejections. Consideration should be given to amending or excluding Article 14(d) on inconsistent documents.

A general destination table showing where every Article of the UCP 500 now appears in the UCP 600 is set out at appendix 1 at the back of this Guide.

Further advice and assistance

We have within our International Trade and Commodity and Trade Finance Group wide experience of the issues that can arise in relation to Letters of Credit. We are able to assist our clients in preparing for and meeting the new requirements to be implemented under UCP 600.

Contacts

Diane Galloway	+44 (0)20 7772 5884 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5115 fax dgalloway@reedsmith.com
Suzanne Bainbridge	+44 (0)20 7772 5991 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5353 fax sbainbridge@reedsmith.com
Kyri Evagora	+44 (0)20 7772 5896 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5220 fax kevagora@reedsmith.com
Siân Fellows	+44 (0)20 7772 5806 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5767 fax sfellows@reedsmith.com
Richard Swinburn	+44 (0)20 7772 5887 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5304 fax rswinburn@reedsmith.com
Paul Dillon	+44 (0)20 7772 5899 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5130 fax pdillon@reedsmith.com
Nola Beirne	+44 (0)20 7772 5901 direct +44 (0)20 7772 6555 main +44 (0)20 7539 5359 fax nbeirne@reedsmith.com
Celia Gardiner	+44 (0)20 7772 5933 direct +44 (0)20 7772 6555 main +44 (0)20 7539 3360 fax cgardiner@reedsmith.com

Destination Table UCP 500 – UCP 600

Subject Matter	UCP 500	UCP 600
Application of UCP	Art 1	Art 1
Meaning of Credit	Art 2	Art 2, 3,
Credits v. Contract	Art 3	Art 4
Documents v. Goods/Services/Performances	Art 4	Art 5
Instructions to Issue/Amend Credits	Art 5	No direct equivalent
Revocable v. Irrevocable Credits	Art 6	Art 2
Advising Bank's Liability	Art 7	Art 9
Revocation of a Credit	Art 8	Removed
Liability of Issuing and Confirming Banks	Art 9	Art 7 Art 8 ++++
Types of credit	Art 10	Art 6, 8
Teletransmitted and Pre-Advised Credits	Art 11	Art 11
Incomplete or Unclear Instructions	Art 12	No direct equivalent
Standard for Examination of Documents	Art 13	Art 14
Discrepant Documents and Notice	Art 14	Art 14, 15 Art 16
Disclaimer on Effectiveness of Documents	Art 15	Art 34
Disclaimer on Transmission of Documents	Art 16	Art 35
Force Majeure	Art 17	Art 36
Disclaimer for Acts of an Instructed Party	Art 18	Art 37
Bank-to-Bank Reimbursement Arrangements	Art 19	Art 13
Ambiguity as to the Issuers of Documents	Art 20	Art 3, 17,
Unspecified Issuers or Contents of Documents	Art 21	Art 14
Issuance Date of Documents v. Credits	Art 22	Art 14(i)
Marine/Ocean Bill of Lading	Art 23	Art 20
Non-Negotiable Sea Waybill	Art 24	Art 21
Charter Party Bill of Lading	Art 25	Art 22
Multimodal Transport Document	Art 26	Art 19
Air Transport Document	Art 27	Art 23
Road, Rail or Inland Waterway Transport Documents	Art 28	Art 24

Courier and Post Receipts	Art 29	Art 29
Transport Documents issued by Freight Forwarders	Art 30	No equivalent
On Deck, Shippers Load and Count, Name of Consignor	Art 31	Art 26
Clean Transport Documents	Art 32	Art 27
Freight Payable/Prepaid Transport Documents 26(c) 33(d).	Art 33	Art 25(b) only is the same as 33(b). Art is the same as
Insurance Documents	Art 34	Art 28
Type of Insurance Cover	Art 35	Art 28
All-Risks Insurance Cover	Art 36	Art 28
Commercial Invoices	Art 37	Art 18
Other Documents	Art 38	No direct equivalent
Allowances in Credit Amount, Quantity and Unit Price	Art 39	Art 30
Partial Shipments/Drawings	Art 40	Art 31
Instalment Shipments/Drawings	Art 41	Art 32
Expiry Date and Place for Presentation of Documents	Art 42	Art 6
Limitation on the Expiry Date	Art 43	Art 14
Extension of Expiry Date	Art 44	Art 29
Hours of Presentation	Art 45	Art 33
General Expressions as to Dates for Shipment	Art 46	Art 3
Date Terminology for Periods of Shipment	Art 47	Art 3
Transferable Credit	Art 48	Art 38
Assignment of Proceeds	Art 49	Art 39

Notes

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Telephone: + 44 (0)20 7247 6555
Facsimile: + 44 (0)20 7247 5091

www.reedsmith.com

Reed Smith
Richards Butler

NEW YORK
LONDON
CHICAGO
PARIS
LOS ANGELES
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