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UCP600: An Exercise in International Private Sector Self Regulation

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While there has been considerable attention given to the topic of private rulemaking[1], sometimes apparently driven by an anti governmental or anti regulatory bias[2], there is no consensus in commercial law as

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1) Daniela Caruso, *Private Law and State Making in the Age of Globalization*, 39 N.Y.U. J. Int'l L. & Pol. 1 (2006); David V. Snyder, *Private Lawmaking*, 64 Ohio St. L.J. 371 (2003); Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. Rev. 319 (2002); Lisa Bernstein, *Opting Out Of The Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Legal Stud. 115 (1992).

2) This is especially true of research influenced by the Law and Economics and libertarian doctrines. *See, e.g.*, L. Jacobo Rodriguez, *International Banking Regulation: Where's the Market Discipline in Basel II?*, Policy Analysis No. 455 (Cato Institute, Washington, D.C.), October 15, 2002; Gillian K. Hadfield, *Privatizing Commercial Law*, Regulation (Cato Institute, Washington, D.C.), Spring 2001, at 40; Charles J. Goetz and Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle*, 77 Colum. L. Rev. 504 (1980).

to the typology of customary law[3] and little serious dialogue at this level.

In this respect, the rules of practice for letters of credit, the Uniform Customs and Practice for Documentary Credits ("UCP"), offers a useful laboratory for studying the scope and limitations of self regulation[4]. Its almost universal success on a global stage gives it a perspective rarely available for self regulatory provisions. Moreover, there is ample experience of judicial review of it.[5]

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3) One of the most useful works in this field is that of Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 Colum. L. Rev. 833 (1964), distinguishing between "linguistic" and "additive" usages. The former involves defining words, phrases, or symbols in a special manner. The latter provisions "add something to the terms of the contract, some regular practice in a trade, locality, or class which implies an obligation to do or not to do something in a particular way." *Id.* at 848.

4) *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.

5) There are numerous cases interpreting the UCP. For example, the Annual Survey of LC Law and Practice, published by the Institute of International Banking Law and Practice since 1996, abstracts cases from around the world, many of which interpret the UCP. *See, e.g.*, Beam Technology (Mfg) Pte Ltd. v. Standard Chartered Bank Suit, No. 433 of 2001 (REGISTRAR'S APPEAL No. 169 of 2001) [Singapore]; Credit Industriel et Commercial v. China Merchants Bank, [2002] EWHC 973 (Q.B. Comm. 2002) [England]; DBJJJ, Inc. v. National City Bank,19 Cal.Rptr.3d 904 (Cal. Ct. App. 2004) [U.S.A.]; GNT Oil Co. Ltd. v. Hana Bank, 721 HKCU 1 (High Ct. 2005) [Hong Kong]; Korea First Bank v. Korean Export Insurance Corp., 2000 DA 63691 (Supreme Court, 3rd Div. 2002) [Korea]; Industrial Bank of Korea v. BNP Paribas, 2001 DA 68266 (Supreme Court, 2nd Div. 2003) [Korea]; and Voest_Alpine Trading USA Corp. v. Bank of China, 288 F.3d 262 (5th Cir. 2002) [U.S.A.].

The definitive study of the history of the UCP from the perspective of its achievements in the field of self regulation has yet to be written. The scope of this paper is much more modest. It is a study of select provisions of the latest iteration of the UCP, Publication No. 600 ("UCP600") from the perspective of their adequacy as an exercise in self regulation.[6]

I. Preliminary Categories and Criteria: Types of Private Rulemaking

Several categories of private rulemaking can be readily identified and located in the context of UCP600, namely, definitional rulemaking, default rules, procedural rules, substantive rules and remedies.[7]

A. Definitional Rulemaking

Perhaps the most common form of private rulemaking is definitional, namely attaching a stated meaning to a word or phrase. While such definitions are often based on how the term was originally used in the trade and continues to be (perhaps reflecting some evolution), definitions can also be artificial in the sense that they do not reflect actual practice. Artificial, or manufactured definitions, work best if a neutral term or phrase is used rather than one that already has currency in the trade. Defined terms can play either a passive or active role in rulemaking, merely recording a usage or shaping it. A combination of the two is an

6) For a general comparison of UCP600 and UCP500, see James Byrne, The Comparison of UCP600 & UCP500 (Institute of International Banking Law and Practice, 2007); Byrne, et al, UCP600: An Analytical Commentary (Institute of International Banking Law and Practice, 2007).

7) I do not essay to detail the characteristics of these distinctions; an exhaustive analysis of these distinctions awaits future inspiration and time.

attempt to refine and limit the use of a particular term, giving it a refined or redefined meaning. A less than successful attempt can lead to unforeseen complications.

Apart from the definition of "letter of credit" ("LC"), the UCP has not traditionally contained formal definitions prior to the formulation of UCP600. It did, however, contain informal descriptions or illustrations of terms that were often contained in a parenthetical.[8] In UCP600 a separate article, UCP600 Article 2 (Definitions), has been devoted to more formal definitions.[9] The definitions grouped here run the gamut from simple explanations[10] to substantive provisions[11] with some definitions even

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8) Some of the informal parenthetical definitions are to be found in the definition of "documentary credit" in UCP500 Article 2 (Meaning of Credit) was "... a customer (the "Applicant")...." Other informally defined terms in UCP500 include: i) "Issuing Bank" which "acting at the request and on the instructions of a customer (the 'Applicant'), or on its own behalf" issues a credit; ii) "Beneficiary" is described in terms of Issuer's obligation "to make payment to or to the order of a third party (the 'Beneficiary')...."; iii) "Credit" is "any arrangement, however named or described" whereby the "Issuing Bank" obligates itself to "make a payment...accept and pay bills of exchange...", "authorizes another bank to effect such payment, or to accept and pay such bills of exchange...", or "authorises another bank to negotiate, against stipulated document(s)..." provided there is a complying presentation; and iv) "bills of exchange" is equated, parenthetically, to "(Draft(s))".

9) Defined terms in UCP600 include: "Advising bank", "Applicant", "Banking day", "Beneficiary", "Complying presentation", "Confirmation", "Confirming bank", "Credit", "Honour", "Issuing Bank", "Negotiation", "Nominated bank", "Presentation", and "Presenter".

10) *E.g.*, UCP600 Article 2 (Definitions) ¶ 4 defines "Beneficiary" as "the party in whose favour the credit is issued."

11) The UCP600 Article 2 (Definitions) ¶ 1 definition of "Advising Bank" attempts to regulate practice by limiting the meaning to "the bank that advises the credit at the request of the issuing bank." The hidden effect of this seemingly innocuous provision is to create a distinction between an "advising bank" and a "second advising bank", a term that is not formally defined in UCP600 Article 2 but which is explained in UCP600 Article 9(c) (Advising of Credits and Amendments). Unfortunately, these distinctions leave uncertain the classification to be applied to a bank that is requested by the issuer to advise a credit advised by an advising bank. Strictly speaking, although the bank is the second to advise the credit, it would appear to constitute an "advising bank" since it has been requested to act by the issuer. Since

attempting to legislate letter of credit practice.[12]

For the purposes of this study, perhaps the most interesting definition in UCP600 Article 2 is ¶ 2 "Applicant", which is defined as "the party on whose request the credit is issued." Prior to UCP600, the UCP had tended to avoid treatment of the applicant in a formal manner since there was considerable doubt as to whether rules intended for letters of credit could regulate an entity who was not, strictly speaking, obligated by or entitled under the letter of credit and whose principal role related to the underlying transactions, the contract or the application for the letter of credit.

The UCP tended to focus on the credit itself and the obligations that arise from it. These obligations, however, inevitably touch on the obligations inherent in the transactions that give rise to the LC at some point. One of the borders between the two spheres is with respect to the party or parties at whose request the LC is issued. From various terms such as "customer" and "account party", the term "applicant" has emerged in the UCP. Who is an applicant depends, to some extent, on the context in which the word is used, the principal options being the party stated as "applicant" in the LC and the party to whom the issuer will look to enforce its right to reimbursement.

Although UCP600 Article 2 (Definitions) ¶ 2 ("Applicant") does not use the UCP500 Article 2 (Meaning of Credit) term "customer" and deletes the reference to providing instructions,[13] it makes no substantial change from

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there is no substantive difference between the two banks in the rules, the only motive for the distinction could have been clarity which appears to have not been an entirely successful exercise.

12) UCP600 Article 2 (Definitions) ¶ 11 defines "Negotiation" as "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." This definition resembles an attempt to legislate the meaning of a term that has a broad spectrum of usage in practice.

13) UCP500 Article 2 (Meaning of Credit) provides "[f]or the purposes of these Articles, the expressions "Documentary Credit(s)" and "Standby Letter(s) of Credit" (hereinafter referred to as "Credit(s)"), mean any arrangement, however named or

the words used in UCP500. The entity at whose request a bank issues a letter of credit is invariably a customer of the bank. Similarly, the person at whose request the bank issues an LC will have given "instructions" regarding the terms and conditions of the credit, making the reference to "instructions" redundant. Nonetheless, by creating a formal definition, the drafters have introduced problems that may not have been anticipated. The UCP600 definition, by not reducing its scope to the party stated to be the applicant in the LC, creates problems where documents that are presented state the name of an applicant not disclosed in the LC or an amendment.

The party that requests issuance of the credit. It is not limited to the party stated as the "applicant" in the LC.[14]

Neither the definition of "applicant" nor any other provision in UCP600 requires that there be only one applicant to the LC and the UCP600 definition can apply to situations where there are multiple applicants.[15] Multiple applicants may share in the underlying transaction or answer for the debt of one or more of the others. To determine their role, it is necessary to look outside the LC and to take into account agreements between the issuing bank and those requesting issuance of the LC. In effect, the UCP600 definition would encompass an entity to whom the issuer looks for reimbursement. Such an entity may undertake to reimburse for a drawing on the credit but not actually request its issuance. The entity requesting its issuance may not be obligated to reimburse the issuer in some situations. Any entity that is obligated to reimburse the issuer for payments

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described, whereby a bank (the "Issuing Bank") acting at the request and on the instructions of a customer (the "Applicant") or on its own behalf...."

14) In addition, the term "party" is not confined to parties to the letter of credit in UCP600, although it has been used more restrictively in the past. In UCP600, "party" is not defined but is used as a cipher without any particular meaning or obligation instead of "person" or "entity" and, as indicated in this definition, includes the applicant.

15) UCP600 Article 3 (Interpretations) ¶ 1 ("Plural/Singular") provides "[w]here applicable, words in the singular include the plural and in the plural include the singular." Presumably, the singular use of applicant in UCP600 Article 2 (Definitions) ¶ 2 ("Applicant") can be equally applied in a plural usage.

on the LC is an applicant whether or not it is so listed in the LC itself.

Neither the definition of "applicant" nor any other provision in UCP600 require that the applicant be stated in the LC nor that the entity stated as "applicant" in the LC actually be the party who requested the credit be issued. This observation is more likely to be true where there are multiple applicants. The party listed in the LC as "applicant" may be the buyer whereas the person at whose request the credit is issued may be a surety or accessory party. Presumably, the issuer would require a reimbursement undertaking from the entity listed as the applicant although it may primarily seek reimbursement from another party. It is, however, conceivable for various reasons relating to lending and other covenants that the issuer may eschew any reimbursement undertaking or obligation from the named "applicant" in the LC in which case it may be doubted whether that party is an "applicant" within the definition in UCP600.

While the difficulties with the UCP600 definition of "applicant" are most apparent for LC operations personnel in the context of documents containing the name of the applicant,[16] they are also present with respect to the right to reimbursement, consent to amendments, to whom documents are to be sent, waiver of discrepancies, and the status to obtain injunctive relief.

B. Default Rules

Reference to "default" rules in the context of private rulemaking may seem somewhat odd since, by their nature, private rules are variable and all such rules are, in a sense, default rules.[17] UCP600 Article 1 sentence 2

16) E.g. the commercial invoice under UCP600 Article 18 (Commercial Invoice)

17) On reflection, however, the notion is no odder than the converse notion of non mandatory positive rules of law which also can be varied or are, in effect, default rules. The chief obstacle to the enforcement of private rules in situations where there is no mandatory law is that of notice to the parties adversely affected by them. To an extent, this problem is thought to be addressed by expressly stating that an undertaking is subject to the rules. Prior versions of the UCP seemed premised on the proposition that the rules were applicable by fiat of the ICC

reaffirms this principle.[18] Nonetheless, there is considerable utility in having a reminder of variability, particularity where the users tend to regard the rules as sacrosanct. Stating that the rules may be varied only once avoids the constant repetition of the point.

The UCP has long used the device of default rules, a usage which continues into UCP600. The most notorious example was the provision that a letter of credit that was silent as to its revocability was revocable.[19] Since the market expectation was that credits were irrevocable, this rule worked mischief for naive beneficiaries and was met with hostility by courts who recognized that it was the bankers rather than the beneficiaries who were in the best position to guard against an inadvertent irrevocable LC.[20]

This rule was in place until UCP500, which reversed the default rule in UCP500 Article 6 (Revocable v. Irrevocable Credits).[21] UCP600 has carried

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Banking Commission. UCP500 Article1 (Application of UCP) went to the opposite extreme, stating that the rules shall apply "where they are incorporated into the text of the Credit." This formulation left open the question whether credits issued via SWIFT MT700 which at the time provided for UCP500 as a default rule were "incorporated". UCP600 Article 1 (Application of UCP) tracks the approach of ISP98 Rule 1, providing that its rules are "applicable when the text of the credit expressly indicates that it is subject to these rules." "Indicates" is a much softer term than "incorporates" although the effect of "expressly" is unclear in both ISP98 and UCP600.

18) UCP600 Article 1 (Application of UCP) provides "[UCP600 rules] are binding on all parties thereto unless expressly modified or excluded by the credit."

19) UCP400 Article 7, for example, provides "a. Credits may be either i revocable, or ii irrevocable. b. All credits, therefore, should clearly indicate whether they are revocable or irrevocable. c. In the absence of such indication the credit shall be deemed to be revocable." UCP290 Article 1 was identical to UCP400 Article 7. UCP222 Article 1, UCP151 Article 3, and UCP82 Article 3 provided the same in slightly different language.

20) *See, e.g.*, James Byrne, *Domestic and International Harmonization of Letters of Credit Law: UCP, UCC Article 5, and the UNCITRAL Convention - An Evaluation at Midstream*, Commercial Law Annual 1993 at 334-9 (Del Duca & Del Duca Eds, Clark Boardman Callaghan 1993).

21) UCP600 Article 6 (Availability, Expiry Date and Place for Presentation) provides "a. A Credit may be either i. revocable, or ii. irrevocable. b. The Credit, therefore, should clearly indicate whether it is revocable or irrevocable. c. In the absence of such indication the Credit shall be deemed to be irrevocable."

the rule to another level. Instead of a mere default rule, UCP600 Article 2 (Definitions) installs it as part of the definition of "Credit" which provides "[c]redit means any arrangement ... that is irrevocable and thereby constitutes a definite undertaking...."[22] Consequently, it is not exactly a default rule, as such. In order to issue a revocable credit, one must alter the definitions and the structure of the rules which are centered on letters of credit.

A revocable credit could be issued subject to UCP600. By expressly providing that it is revocable, the credit would have varied the provisions relating to irrevocability. Merely doing so, however, would not address other deficiencies and provisions regarding confirmations and amendments which are built into the infrastructure of UCP600. It would therefore be preferable to issue a revocable credit subject to UCP500 which was designed to accommodate them. Were a revocable credit to be issued subject to UCP600, UCP600 Article 3 ¶ 2 would have no meaning and provisions would need to be included in the credit addressing the issues treated in UCP500 Article 8 (Revocation of a Credit).

Another default rule involves a practical issue regarding presentation of the documents. The issue is whether an LC may require that a draft be drawn on the applicant and is closely connected with the ability of the beneficiary to be paid and the convenience with which payment is made. While UCP500 Article 9(a)(iv) & b(iv) (Liability of Issuing and Confirming

22) Interestingly, UCP600 provides for irrevocability in several other provisions. UCP600 Article 3 (Interpretations) ¶ 2 provides "[a] credit is irrevocable even if there is no indication to that effect." In the event that these provisions are overlooked, UCP600 Article 7(b) (Issuing Bank Undertaking) provides that "[a]n issuing bank is irrevocably bound to honour as of the time it issues the credit." Since the term "Credit" is probably confined to the undertaking of the issuing bank and not that of the confirming bank, UCP600 Article 8(b) (Confirming Bank Undertaking) provides "[a] confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit." UCP600 Article 10(a) (Amendments) provides that a credit cannot be amended nor cancelled without consent. UCP600 Article 11(b) (Teletransmitted and Pre-Advised Credits and Amendments) provides that a bank is irrevocably bound by a pre-advice. UCP600 Article 10(b) also provides for the irrevocability of proposed amendments to credits and confirmations.

Banks)[23] discouraged drafts drawn on the applicant, UCP600 Article 6(c) (Availability, Expiry Date and Place for Presentation)[24] prohibits it. Because these rules can be varied, a statement in the credit requiring a draft drawn on the applicant would constitute an express variation pursuant to UCP600 Article 1 (Application of UCP).[25]

Unfortunately, the useful default provisions in UCP500 with respect to how a draft drawn on the applicant should be treated are omitted from UCP600. It should, nevertheless, be apparent in a UCP600 credit that the requirement of a draft drawn on the applicant does not excuse the issuer or any confirmer from their letter of credit liability which is to honor without recourse documents complying with the terms and conditions of the credit. Whether or not the applicant accepts or otherwise acts on the draft drawn on it is irrelevant to the fulfillment of the issuer's LC obligation under the UCP and is not an excuse for the issuer's failure to honor.

An alternative interpretation of the prohibition of UCP600 Article 6(c) is that it refers only to a SWIFT MT700 Field 42a Drawee and that a draft on the applicant is otherwise permitted. SWIFT usage rules require that the drawee be a bank and provide that "if drafts on the applicant are required, they are to be listed as documents in Field 46A."[26] While this interpretation reflects SWIFT usage, it would be remarkable for a UCP rule

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23) UCP500 Article 9(a)(iv) (Liability of Issuing and Confirming Banks) provides "[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)."

24) UCP600 Article 6(c) (Availability, Expiry Date and Place for Presentation) provides "[a] credit must not be issued available by a draft drawn on the applicant."

25) UCP600 Article 1 (Application of UCP) provides "[t]he Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter fo credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit."

26) *SWIFT Standards Release Guide 2003, Category 7 Documentary Credits & Guarantees*, at 13 (November 2003).

to be structured on this usage in such general terms without any indication of the intended context. Were that interpretation intended, the qualification in UCP500 Article 9 (a)(iv) and (b)(iv) (Liability of Issuing and Confirming Banks) should have been clarified and not dropped. SWIFT Field 42a is optional. Where it is used and a draft on the applicant is also required, there will be two drafts, a practice that is sometimes followed, with the draft required in Field 46a being described as a "second draft".

Despite prohibiting drafts drawn on the applicant, UCP600 Article 2 (Definitions) ¶ 10[27] provides that an issuing bank can issue a credit on its own account. In such a situation, a draft drawn under that credit would be on the applicant as well as the issuer. Presumably, one is to overlook the applicant status and focus on that of the issuer.

The problem with the removal of the default provisions is that it leaves open the question of how to understand the import of the omission. Does it mean that this option set forth in UCP500 article 9 is not consistent with UCP600? If so, how should a draft drawn on the applicant be treated under UCP600? Although the formulation in UCP500 Article 9 was hardly the model of clarity, it is the approach that is most consistent with the independent obligation of an LC issuing bank. Omission of this default rule was, therefore, not helpful.

There is an added difficulty inherent in the restatement in rules of fundamental provisions. Technically, they can be varied as can any private rules but the question is what is the resulting undertaking. This dilemma is illustrated with respect to the impact of an attempt to change the rule by provisions in the LC. While the UCP can be varied as is reflected in UCP600 Article 1 (Application of UCP), some provisions are intended to be harder to vary or will have consequences that may be unexpected. For example, varying the non documentary provision of UCP600 Article 14(h) (Standard for Examination of Documents)[28] raises interesting questions. A

27) UCP600 Article 2 ¶ 10 provides "[i]ssuing Bank means the bank that issues a credit at the request of an applicant or on its own behalf."

variation of the rule that a non documentary provision be disregarded to require the bank to find the provision stated in a document, for example, would be permissible within the confines of LC practice and was one of the alternatives considered for the rule but discarded for practical reasons in the original drafting of the rule in UCP500. A provision that required the issuer to examine the non documentary condition, while it may be enforceable, would result in the undertaking being treated as a suretyship undertaking rather than as an independent undertaking.[29]

C. Procedural Rules

When customary rules contain procedural rules, they begin to resemble positive law. An example of a procedural provision is one that contains rules regarding giving due notice, such as those in the UCP regarding notice of refusal, notice of a confirming bank's election not to confirm an amendment, or notice from an advising bank of its election not to advise a credit or inability to satisfy itself as to the authenticity of a credit it receives.

The UCP has contained procedural rules since UCP151 (1951) with respect to the notice of refusal of documents due to discrepancies.[30] These

28) UCP600 Article 14(h) provides "[i]f a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it."

29) *See, e.g.*, Wichita Eagle & Beacon Publ'g Co. v. Pacific Nat'l Bank, 493 F.2d 1285, 1286 (9th Cir. 1974) (undertaking entitled "standby" was a suretyship guarantee because where "the substantive provisions require the issuer to deal not simply in documents alone, but in facts relating to the performance of a separate contract (the lease, in this case), all distinction between a letter of credit and an ordinary guaranty contract would be obliterated by regarding the instrument as a letter of credit."

30) UCP151 (1951) Article 10 provides that if a presentation does not comply "... notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the Bank demanding reimbursement and such notice must state that the documents are being held at the disposal of such Bank or are being returned thereto. The issuing Bank shall have a reasonable time to examine the documents."

rules are predicated on the principles of the necessity of notice for the avoidance of surprise, the ability to cure, and need for transparency to preserve the integrity of the LC institution. UCP600 Article 16 (Discrepant Documents, Waiver and Notice) continues this tradition.

Other provisions of the UCP also contain procedural provisions. One of its most important provisions relates to amendments. UCP600 contains a separate article dealing with amendments in to which many of these rules are gathered.[31] One of the fundamental provisions that they enshrine is that an irrevocable credit cannot be amended without the consent of the beneficiary and cannot affect a bank that is obligated without its consent. How that consent is manifested differs depending on the bank. In the case of the issuer, it is by issuing the amendment. In the case of the confirming bank, it is by confirming it.[32] In the case of the beneficiary, it is by accepting the amendment. How the beneficiary's acceptance is manifested is the subject of the procedural rules of UCP600 Article 10 (Amendments).

UCP600 Article 10 is similar to UCP500 Article 9(d) (Liability of Issuing and Confirming Banks). Several subarticles are reworded and new provisions introduced with respect to automatically effective amendments where there is no rejection and to advising banks informing banks of an acceptance or rejection. A major flaw in UCP500 Article 9(d) regarding implied acceptance by affirmative conduct is retained in UCP600 Article 10(c) without having been fixed.

In a new provision, UCP600 Article 10(f)[33] renders non effective a statement in an amendment that is effective unless the beneficiary rejects. This provision addresses attempts by some banks to force the beneficiary to signal its acceptance or rejection of an amendment by inserting a provision in the amendment making it automatically operative after a

31) *See* UCP600 Article 10 (Amendments).

32) Unlike a beneficiary which must manifest its consent to an amendment, the failure of a confirmer to state that it elects not to extend its confirmation to an amendment is deemed to constitute consent.

33) UCP600 Article 10(f) (Amendments) provides "[a] provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded."

given period of time.[34] Such an attempt alters the irrevocable character of the credit and could not itself operate unless it was accepted by the beneficiary. Therefore, this UCP provision states a fundamental principle of letter of credit law and practice and cannot be effectively modified in an amendment. Notably, the provision does not prohibit a provision in an amendment that causes the amendment to expire nor a provision in a credit that makes a proposed amendment automatically effective. The former provision is useful in the limited situations where the applicant requires a response within a time frame. The latter raises additional problems regarding the irrevocable character of the credit.

The need for a procedural rule in UCP600 is apparent in the provisions of UCP600 Article 35 (Disclaimer on Transmission and Translation) dealing with lost documents. Letter of credit practice depends to a considerable extent on the role of banks as intermediaries in the presentation of documents. Documents can be presented to nominated banks which then transmit the documents presented and various communications to the issuer and, ultimately, the applicant. It is necessary to allocate the risks that arise out of this role, including those resulting from delay, loss of the documents in transit, mutilation, and other errors. In particular, the consequences of documents lost in transit after presentation and before receipt by the issuer must be addressed.

In a new provision, UCP600 Article 35 ¶ 2 provides that the issuer or confirmer must honor, negotiate, or reimburse as the case may be in the situation where documents are lost in transit after having been presented.[35]

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34) Position Paper No. 1, contained in *LC Rules and Laws*, 3rd ed. at 105. It reflects the position taken in the ICC Banking Commission's position paper *Amendments, UCP 500 sub article 9(d)(iii)*.

35) UCP600 Article 35 ¶ 2 provides "[i]f a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank."

It is doubtful, however, that the nominated bank has a right to be reimbursed where it has not acted pursuant to its nomination, as is literally suggested, but it is likely that what is meant is that the beneficiary is entitled to honor or negotiation by the issuer or confirmer even though there has been no action by the nominated bank who has forwarded the documents as a collecting bank. Unfortunately, the provision does not address proof of loss and the need for the beneficiary or nominated bank to cooperate in reproducing the documents or obtaining the goods.

D. Substantive Rules

Rules of practice can also contain substantive rules that affect the obligations or entitlement of entities affected by the rules. UCP600 has many such provisions. Such provisions resemble positive law and are a considerable step beyond the definition of terms. Where there are non mandatory provisions of positive law that address the same issue, such rules would displace them.

1. Standard of Compliance

One of the critical substantive rules of letter of credit practice and law addresses the standard by which one determines whether or not documents that are presented under a letter of credit comply with its terms and conditions. This determination involves a formulation of the standard by which compliance is to be measured itself and its application to discrete problems or circumstances that commonly arise including the time within which examination must be made, whether extraneous factors may be taken into account apart from the data in the documents, the time for presentation of documents where there are transport documents indicating the shipment of goods, how the goods are to be described in documents other than the commercial invoice, rules for

documents not specifically treated in rules of practice, how to handle extraneous documents presented but not required by the credit, treatment of non documentary conditions in the credit, acceptable dates of documents, whether the addresses and contact details of the beneficiary and applicant indicated in the credit must be replicated in the documents presented, who can be designated as the shipper or consignor of goods in the documents presented, and whether a transport document can be issued by a freight forwarder. While the terms and conditions of the letter of credit control the question of compliance, many of those terms are in a short hand form that is more fully explained in the UCP or simply left to the UCP rules which operate as default rules for a given required document. While many of the rules of UCP600 address documentary requirements, unlike UCP500 Article 13 which merely contained a general formula regarding the standard of compliance, its successor in UCP600 Article 14 contains a series of compliance rules that are generally applicable. More importantly, most of the provisions by which compliance is to be measured are gathered together in this article. In UCP600, Article 14 is the starting place for the rules on the examination of documents.

Whether intended by its drafters or not, UCP600 Article 14 (Standard for Examination of Documents) expands UCP500 Article 13 (Standard for Examination of Documents), not only relocating compliance provisions from other articles, but stating a new and untried formulation of the standard of compliance. In addition to the formulations in UCP600 Article 14(a)[36] & (d)[37], UCP600 Article 14(b)[38] revises the approach to

36) UCP600 Article 14(a) (Standard for Examination of Documents) provides "[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."

37) UCP600 Article 14(d) (Standard for Examination of Documents) provides "[d]ata in a document, when read in context with a credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that documents, any other stipulated document or the credit."

and the time period for examination contained in UCP500 Article 13(b)[39] and contains a serious and potentially troublesome ambiguity as to whether it is a fixed period. A number of other organizational and substantive changes were introduced as well.[40]

UCP600 Article 14(d) expands the scope of the standard of examination by requiring that data be compared instead of a document as a whole. It also specifies that data must be compared to other data in the same document. Under UCP500, the rule was limited to another

38) UCP600 Article 14(b) (Standard for Examination of Documents) provides "[a] nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation."

39) UCP500 Article 13(b) provides "[t]he Issuing Bank, the Confirming Bank, of any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the 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."

40) Other provisions of UCP600 Article 14 include UCP600 Article 14(c) which clarifies the application of the 21 day default rule for the latest date for presentation of documents after issuance of a UCP transport document contained in UCP500 Article 43(a) (Limitation on the Expiry Date), UCP600 Article 14(e) which reinstates and clarifies the general rule regarding the description of the goods contained in UCP500 Article 37(c) (Commercial Invoices), UCP600 Article 14(f) which reformulates the general rule regarding other documents contained in UCP500 Article 21 (Unspecified Issuers or Contents of Documents), UCP600 Article 14(g) which states the rule regarding extraneous documents contained in UCP500 Article 13(a) (Standard for Examination of Documents) ¶1 Sentence 3, UCP600 Article 14(h) restates the non_documentary condition rule of UCP500 Article 13(a) ¶ 2, Sentences 4 & 5, UCP600 Article 14(i) which restates and expands the rule regarding dates of documents contained in UCP500 Article 22 (Issuance Date of Documents v. Credit Date), a new UCP600 Article 14(j) which states the rule regarding the correspondence of addresses and contact information of the beneficiary and applicant, a new UCP600 Article 14(k) which restates the rule that the shipper or consignor need not be the beneficiary contained in UCP500 Article 31(iii) ("On Deck", "Shipper's Load and Count", "Name of Consignor"), and UCP600 Article 14(l) which reformulates the rules regarding the issuer of a UCP600 transport document contained in UCP500 Article 30 (Transport Documents issued by Freight Forwarders).

document taken as a whole. This provision constitutes a major change when compared with the longstanding position of the ICC Banking Commission that compliance and consistency of documents turns on a comparison with the document as a whole and not isolated data in it.[41] No distinction is made in UCP600 Article 14(d) between data required by the credit and extraneous data either, apparently requiring that all data be examined, a major change from recent ICC Banking Commission opinions. The open ended formulation of this rule provides broader justification for refusals than does UCP500.

UCP600 Article 14(d) adopts a new and general formula for the required level of compliance, requiring that it "not be identical to, but must not conflict with" data in that or another required document or the credit. This formula appears to replace that of UCP500 Article 13(a) sentence 3 which evoked the notion of inconsistency but it would be a mistake to conclude that the word "inconsistent" was simply switched for "not conflict with". Whatever the drafters may have intended, they have provided a standard in a context that is much broader than the UCP500 reference to consistency.

It is unclear what "not conflict with" means. It could be an attempt to state the "not inconsistent" rule in terms not involving a negative in order to achieve a wider understanding of what was meant by the phrase. On the other hand, the use of that formula has been in place since UCP151 (1951)[42] and, more importantly, the term "inconsistent" is still used in UCP600 Article 11(a)[43] & (b)[44] (Teletransmitted and Pre

41) *See* ICC Official Opinion R.11. ("The Commission decided that the notion of "consistency" referred to in Article 7 should be understood as meaning that the whole of the documents must obviously relate to the same transaction, that is to say, that each should bear a relation (link) with the others on its face....").

42) UCP151 Article 18 sentence 4 provides "[u]nless otherwise specified in the credit or inconsistent with any of the documents presented under the credit, banks may honor documents stating that freight or transportation charges are payable on delivery."

43) UCP600 Article 11(a) (Teletransmitted and Pre Advised Credits and Amendments) provides "[a]n authenticated teletransmission of a credit or amendment will be

Advised Credits and Amendments). Presumably, if the word could not be translated, it would not have been used anywhere in UCP600. Therefore, the phrase "not conflict with" must have a different meaning than does "inconsistent".

In the absence of any ICC opinions or other direction, however, it is difficult to determine in what this difference consists. It has been informally suggested that the standard is intended to be more liberal, that is to make it more difficult to find discrepancies for purely technical reasons not related to the data in the document as a whole and its commercial purpose. Hence, the reference to "not identical", indicating that a literal replication was not required. Drawing on legal interpretation relating to conflict of law analysis, perhaps the best interpretation of the phrase is that it applies only to situations where there is a true as opposed to an apparent conflict and only to situations where the "conflict" is substantive in its impact on the document and not superficial and irrelevant to the role of the document and the data (if any) in the letter of credit. Taken alone, the phrase might have supported such an interpretation but when considered together with the expansion of the rule to cover all data instead of the document taken as a whole and apparently including extraneous data, any liberalization is likely to be lost in the expansion of the rule.

Similarly, UCP600 Article 14(e)[45] restates the provision in UCP500

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deemed to be the operative credit or amendment, and any subsequent mail or confirmation shall be disregarded. If a teletransmission states "full details to follow" (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit of amendment without delay in terms not inconsistent with the teletransmission."

44) UCP600 Article 11(b) provides "[a] preliminary advice of the issuance of a credit or amendment ("pre advice") shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre advice is irrevocably committed to issue the operative credit without delay, in terms not inconsistent with the pre advice."

45) UCP600 Article 14(e) (Standard for Examination of Documents) provides "[i]n

Article 37(c) sentence 2 regarding the description of the goods in documents other than the commercial invoice, making it clear that the description need not necessarily be present in all documents, a point that was unclear in UCP500, and replaces the UCP500 formula of "not inconsistent" with "not conflicting".

2. Reimbursement, Nominated Banks & Fraud

Another substantive rule in the UCP makes clear the obligation of an issuer or confirmer to reimburse a nominated bank which has acted pursuant to its undertaking even where LC fraud is subsequently discovered. UCP600 Article 7(c)[46] and 8(c)[47] provide that a nominated bank is entitled to purchase or prepay its obligation prior to maturity without jeopardizing its right to reimbursement.

UCP600 Articles 7(c) sentence 2 and 8(c) sentence 2 address the problems caused by the English decision in *Banco Santander* and its progeny that ruled that a confirming bank could not be reimbursed where it discounted its own undertaking if LC fraud was discovered

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documents other than the commercial invoice, the description of the goods, services or performance, is stated, may be in general terms not conflicting with their description in the credit."

46) UCP600 Article 7(c) (Issuing Bank Undertaking) provides "[a]n issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary."

47) UCP600 Article 8(c) provides (Confirming Bank Undertaking) "[a] confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary."

prior to maturity.[48] Rather than use the generic term "discount" which is not confined to a nominated bank, the provision uses the terms "purchase" and "prepay". "Purchase" is a term that was used in UCP290 (1974)[49] but "prepaid" is a term not used previously in the UCP. Neither term is defined. These terms were chosen instead of the generic term "discount" since one need not be nominated in order to discount and the focus in this provision was on the act of a nominated bank.

While a distinction between the two terms is not essential because the rule applies to both without distinction, "prepay" refers to discharge of one's own obligation and "purchase" refers to buying one's own obligation or the obligation of another but not discharging it until maturity. There is a suggestion in the definition of "Negotiation" in UCP600 Article 2 (Definitions) ¶ 11[50] that "purchase" means "advancing or agreeing to advance funds" but it is not clear whether this notion which applies to negotiation would also apply to deferred payment undertakings and acceptances. To some extent, what is done will turn on how a bank records its actions on its books. The rule states the right of a bank to obtain reimbursement at maturity where it prepays or purchases an acceptance or deferred payment undertaking, whether its own or that of another nominated bank, regardless of

48) *See* Banco Santander SA v. Banque Paribas, [2000] C.L.C. 906 (C.A.) (Court ruled issuer did not have to reimburse confirming bank that discounted because UCP500 does not authorize discounting of deferred payment obligations, and legal protection for discounting of acceptances does not apply to deferred payment obligations), abstracted at 2001 Annual Survey 194. *See also* Emirates Bank International PJSC v. Credit Lyonnais (Suisse) S.A., Swiss Supreme Court Reporter, Volume 130 Part III, p. 462 (2004), English translation printed in 2006 Annual Survey 477.

49) UCP290 (1974) Article 3 uses the phrase "purchase/negotiate" to describe negotiation.

50) UCP600 Article 2 ¶ 11 provides "[n]egotiation 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."

beneficiary letter of credit fraud. It does not refer to payment because there is no question of the right of an innocent nominated bank to reimbursement in that situation notwithstanding beneficiary fraud. Nor does it mention negotiation because the ability to purchase the obligation is the essence of negotiation.

Negotiation in LC practice encompasses two different notions. It is a means by which a confirming bank honors in the ordinary sense of the term, that is, fulfilling its letter of credit obligation where it undertakes to negotiate drafts drawn on or demands on the issuer or applicant. In the latter instance, it also would apply to an issuer. It also applies to a nominated bank other than the issuer who is nominated to negotiate. Such negotiation is without recourse. When such a negotiating bank negotiates it does so without fulfilling any letter of credit undertaking. In such a situation, recourse is available to the negotiating bank unless it is waived. While a bank that is not nominated can technically negotiate in the negotiable instruments sense of the term, its actions do not constitute "negotiation" in letter of credit law and practice and it would not be a negotiating bank.

Mere receipt, examination, or forwarding of documents does not constitute negotiation. 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.[51]

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.[52]

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51) To address this errant practice, negotiation was defined in UCP500 Article 10(b)(ii) (1983) 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 (1983) Article 10(c) continues "[m]ere examination of the documents without giving of value does not constitute a negotiation."

UCP600 Article 2 ¶ 11 defines "Negotiation" by use of the term "purchase", a word used in UCP290 (1974) Article 3 as being synonymous with negotiation. Since any bank can purchase a draft or documents presented under a credit, "negotiation" is limited in the context of UCP600 to purchase by a nominated bank. Since UCP600 "negotiation" encompasses the purchase by a nominated bank that is obligated on a credit and one that is not, "purchase" is not linked to an LC obligation.

UCP600 Article 12(b) (Nomination) uses the term "purchase" in another context. It 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. While a bank can purchase a draft or documents presented under an LC whether or not it is nominated and whether or not it is obligated on an LC, only a bank that is obligated can prepay its own obligation because prepayment signifies discharge of the obligation whereas an obligation that is purchased is not discharged by the purchase. A further step is required to discharge the obligation. While negotiation without recourse by a confirming bank discharges its obligation under a letter of credit, it is not "prepayment" because negotiation occurs when the documents are presented and negotiation is not a prepayment. That the negotiation is in advance of the time when reimbursement is due does not constitute "prepayment" for purposes of UCP600.

Neither UCP600 Article 2 (Definition) ¶ 11 (Negotiation) nor any other

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52) To address the considerable concern that had been voiced, ICC Banking Commission Position Paper No. 2, *Negotiation*, 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' ... or 'undertaking an obligation to make payment' ...." It is not suggested that the "undertaking an obligation to make payment" is a letter of credit promise. What is intended is a simple contractual promise, presumably one with conditions.

provision in UCP600 addresses the question of who is entitled to a protected status in the event of letter of credit fraud by the beneficiary. Nonetheless, negotiation does give rise to that status in a nominated negotiating bank that acts pursuant to its nomination. One of the important distinctions between a nominated bank and a collecting bank is that the former is protected from attribution of fraud, abusive drawing, or forged or false documents. This protected status is implicit in the concept of negotiation under standard international letter of credit practice and is reflected in UCP600 Article 34 (Disclaimer on Effectiveness of Documents) which disclaims all liability and responsibility of banks for the "genuineness, falsification ... of any document(s), or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the ... existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, ... performance ... of ... any other person."

While rules of practice cannot themselves create exceptions to the legal effect to be given to fraudulent or abusive drawings, they can allocate the risk of such actions and modern commercial law typically gives effect to such an allocation if it is commercially reasonable. Under standard international letter of credit practice, the risk of fraud or forgery is allocated to the applicant. If an issuer or nominated bank acts pursuant to its nomination, the risk of the consequences of the fraud of any other person is allocated to the applicant and the nominated bank is entitled to be reimbursed for any payment made pursuant to any obligation that occurred provided that the nominated bank has not itself been a party to the fraud, abuse, or forgery. While the test of the bank's good faith and the burden of proving it are procedural matters under local law, whether a bank is nominated to negotiate will be apparent from the face of the credit or amendments. If so and it has duly negotiated, it is entitled to be reimbursed unless the existence of fraud, abusive drawing, or forged or false documents is proven. The issue is

typically framed as to whether there is a colorable basis for the drawing or whether there has been material fraud. Whether it is entitled to a presumption that it has duly negotiated or not is a matter for local law.

A bank has not duly negotiated if it has notice of letter of credit fraud before doing so. While a mere accusation of LC fraud subsequent to the issuance or confirmation of the credit will not defeat the right of an issuer or confirmer to reimbursement since they are obligated to pay, a negotiating bank that has no obligation can refuse to negotiate if notified before it negotiates and bears the risk if LC fraud is proven.[53] On the other hand, notice of LC fraud after the negotiating bank duly negotiates does not affect its status.

It is generally agreed that an entity is not entitled to protected status unless it has given "value". UCP600 Article 2 (Definitions) ¶ 11 (Negotiation) does not use the UCP500 term "value" but does include a promise to advance funds as well as the actual advance of funds. There is a difference between legal systems with respect to the question of whether a simple promise that has not been fulfilled can constitute "value" that entitles an entity to the protected status of a holder in due course in the law of negotiable instruments. Under the English Negotiable Instruments Law, "Value" is defined as including "[a]ny consideration sufficient to support a simple contract". Under US law, however, a simple promise that is not performed does not enable the holder to qualify as a holder in due course since it can properly refuse to perform where there is LC fraud. It may be expected that US courts, at least, will refuse to accord protected status to a negotiating bank that merely promises to advance funds without having done so.

It is not unusual for local laws to require also that the bank have acted in good faith. While a nominated bank that is shown to have acted in bad faith should not be entitled to protected status, whether a bank has acted in good faith is a relatively simple question of whether

53) Left open is the question of what is sufficient to place a negotiating bank "on notice"

or not the bank has acted without actual knowledge of the fraud, abusive drawing, or forged or false documents. At most, a sworn statement by the bank detailing its actions in acting pursuant to its nomination should suffice.

E. Remedies

One of the unique features of the UCP among private rules of practice is that it provides remedial rules.[54] Its provision on the obligation of an advising bank demonstrates both the want and the need for such rules.

Typically, the issuer of a credit is not in the same location as the beneficiary. In order to provide beneficiaries with assurance regarding the authenticity of the credit, issuers have used correspondent banks. These banks, known as advising banks, have always played an important role in the authentication of letters of credit, providing the beneficiary with local assurance that the message being communicated to it has been independently verified.

UCP600 Article 9 (Advising of Credits and Amendments) expands and reformulates the treatment of the obligation of advising banks in UCP500 Article 7 (Advising Bank's Liability). Unlike UCP500, it expressly encompasses amendments as well as credits. It restates the standard by which apparent authenticity is measured, from using reasonable care to "satisfying itself" as to the apparent authenticity. UCP600 Article 9 introduces an additional formulation not expressed in UCP500 Article 7 that requires that the advice be an accurate reflection of the data received. UCP600 introduces the notion of a second advising bank and creates a parallel set of obligations for this entity. Given these expansions, additions, and changes, however, it is otherwise similar in substance to UCP500

54) For example, UCP600 Article 16 (f) (Discrepant Documents, Waiver and Notice) provides a draconian remedy for the failure to provide a proper notice of refusal. It provides "[i]f an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation."

Article 7, and, properly interpreted, the changes are not fundamental and can be implied or extrapolated from the text of UCP500.

UCP600 Article 9 omits mention of the standard of reasonable care with respect to authenticating the credit or amendment being advised. Nevertheless, this standard should still be applied unless there is a viable alternative. It would require more than the omission of this standard from this article to make advisers strictly liable, that is liable for the full amount of the credit where the advising bank has failed to satisfy itself as to the apparent authenticity of the credit or amendment. The adviser is not an insurer, assuming liability whether or not it exercises reasonable care. Nor is it required to take extraordinary efforts to determine the authenticity or accuracy of the advice. The advising bank is only liable for actual damages proven to result from its failure to use reasonable care to avoid an error. This standard would also apply to a misadvice with respect to the accuracy of a credit, a concept implied in the UCP500 notion of authentication. The advice, even if there is an error regarding authenticity or accuracy, is not a letter of credit and the adviser is not issuing one. If an advising bank establishes a standard with respect to how it can satisfy itself, that standard may be applied provided that it is more rigorous than the reasonable care standard. Otherwise, it is likely that a bank will be required to exercise reasonable care in advising a credit or amendment. Under this standard, the beneficiary may reasonably rely on the credit or amendment as advised. The same analysis would apply to the advice of a transfer.

F. Omnibus

The International Standard Banking Practice (ISBP 2003)[55] was drafted to

55) 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 UCP. International Standard Banking Practice (ISBP) for the

complement the Uniform Customs & Practice for Documentary Credits (1993 Revision) (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 and UCP600 Article 14(d). The ISBP was based on ICC Banking Commission Opinions and Decisions and its understanding of the practices reflected in the UCP. To complete it, practices were compiled from some 39 ICC national committees and a substantial number of individual banks. It was an attempt to provide an international formulation to various national statements of practice.

UCP600 Article 14(d) (Standard for Examination of Documents) restates the rule of UCP500 Article 13(a)[56] regarding international standard banking practice as a source of letter of credit practice by which the compliance of documents must be determined. UCP600 Article 13(a) states that it is a source within whose context the compliance of the data in a document must be determined. UCP600 happily abandons the bizarre and confusing formula tacked onto the UCP500 reference to standard international banking practice, "as reflected in these articles" which was, in any event, largely ignored.

While UCP600 Article 14(d) removes the awkward suggestion of UCP500 Article 13(a) that the source of standard international banking practice for

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Examination of Documents under Documentary Credits, ICC Publication No.645 (ICC Publishing S.A. 2003). It was revised to reflect UCP600 in 2007 and a new version published. The text of ISBP (2003) is reprinted in LC Rules and Laws 4th with annotations indicating the textual changes in ISBP (2007).

56) UCP500 Article 13(a) (Standard for Examination of Documents) provides "[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 witht 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 the 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."

interpreting the UCP is the UCP itself, it does not clarify the relationship between international standard banking practice and the International Standard Banking Practice, ISBP (2007), the document adopted by the ICC Banking Commission and re aligned with UCP600. Instead, the relationship is left to the similarity of the names and the statements contained in the Introduction to ISBP (2007). As reworked, this Introduction retreats from the fiction that the ISBP is a mere restatement of the UCP that was used to rationalize ISBP (2003). It represents an interpretation of the provisions of the UCP regarding documents. As can be seen by comparing ISBP (2003) and ISBP (2007), many of the provisions of the previous version have been elevated to UCP status in UCP600 and some provisions have been downgraded from UCP status to ISBP status.

Although it is uncommon (and is discouraged) for credits to be issued subject to the ISBP, the practices are generally applicable to credits subject to UCP500 and persuasive because they represent formal interpretations by the ICC Commission on Banking Technique & Practice. Because of the history, character, and organization of the UCP as a set of principles, it does not address the contents of each of the documents typically required by commercial letters of credit. Indeed, for documents other than transport, insurance, and commercial invoices, it is necessary to extrapolate from the UCP and standard practice in order to even identify the norms to be applied in the examination process. While the ISBP does not have the weight of the UCP, it is a useful compilation of norms which should assist beneficiaries and correspondent banks in document preparation and examination. As such, it is an extremely valuable contribution to the standardization and harmonization of letter of credit practice.

Since it is applicable to documentary credits, the ISBP would be applicable to UCP standbys, as well as commercial letters of credit.

It is likely that relevant provisions will be brought to the attention of judges. What effect it will have will depend on the particular issue involved. While most of its provisions are solidly based in the UCP and practice, a very few lack that foundation and it may be doubted whether

they could be enforced against beneficiaries where the LC is not issued subject to the ISBP.

Because the ISBP as originally issued was linked to UCP500 and some of its provisions were elevated in UCP600 and other provisions were aligned with the text in UCP500 that was changed, the ICC Banking Commission issued a Textual Revision, ISBP (2007). Although there are no major changes in the text of ISBP (2007), the status of text is enhanced by the various references to "international standard banking practice" in UCP600, particularly in UCP600 Article 14 (a) & (d) (Standard of Examination).

II. Sound Rulemaking

Apart from polemics grounded in suspicion of provide self regulation, there are limitations to rulemaking. These limitations are to be found in the relative role of law and practice. With respect to rules of practice, the proper role of law and, in particular, of the courts is to regulate private rulemaking to ensure its soundness. Where a rule of practice is unsound, it should not be given legal effect. What constitutes soundness requires some consideration.

It begins with a profound respect for the rules themselves where they represent a considered articulation of an industry and command general respect. In this regard, the UCP is a set of rules that is entitled to the presumption of respect.

What constitutes respect, however, may require some consideration. Some courts have such restrictive rules regarding the interpretation of rules of practice that, in effect, prohibit experts from testifying on that practice. At the same time, they allow counsel to express opinions regarding practice to which counsel has no basis or qualification. In my opinion, it is partially

because of this warped system that the English courts have produced a series of disastrous decisions regarding letter of credit practice.[57]

A. Respect for Practice

Where formulations of customary practice depart from fundamental principles inherent in the practice being regulated, they should not be enforced or they should be interpreted in a manner that produces a sound result. Such monitoring is the primary one for commercial law, namely discerning sound rules of practice. Thus, where rules of practice depart from standard international letter of credit practice, they raise serious questions as to their enforceability. While the provisions of UCP600, on the whole, reflect practice or do not seriously deviate from it, some of its regulatory provisions require interpretation to achieve a sound result. As a whole, however, despite its imperfections, UCP600 is a legitimate expression of standard international letter of credit practice. To some extent, the failure of the UCP to address issues of practice in a comprehensive manner is cushioned by its reference to "international standard banking practice" and the existence of an updated "International Standard Banking Practice" which is intended to benefit from the duality of nomenclature as a repository of this practice. UCP600 upgrades the status of this practice. In UCP500, it was the source of the UCP provisions.[58] In UCP600, the

57) *See* Glencore Int'l A.G. v. Bank of China, 1 Lloyd's Rep. 135 (C.A. Civ. 1996) (ruling that a wet ink signed document was not an original because it was not marked original); Kredietbank v. Midland Bank, PLC, [1999] All ER (D) 431 (C.A. Civ.) (ruling that an issuer was not entitled to reject a document that was clearly an original despite the fact that it was not marked as original); Credit Industriel et Commercial v. China Merchants Bank, [2002] EWHC 973 (Q.B.D. COMM. 2002) (declining to apply the decision of the intermediate appellate Glencore court); Jackson v. Royal Bank of Scotland, [2005] UKHL 3 (H.L. 2005) [England] (holding that an issuer is liable for breach of an obligation of confidence where the issuer forwards a transferee beneficiary's pricing information to applicant instead of substituting the beneficiary's documents under a transferable credit).

58) UCP500 Article 13(a) (Standard for Examination of Documents) sentence 2

standard by which documents are to be examined includes that practice as stated in UCP600 Article 14(a) and (d).[59]

The provision on amendments is a good example. A beneficiary should be entitled to rely on the provision in UCP600 Article 10(a) (Amendments) to the effect that a credit cannot be amended without the consent of the beneficiary.[60] Thus, when UCP600 Article 10(c) sentence 3 (Amendments) provides that conduct of the beneficiary can be deemed to constitute consent to a proposed amendment, it should be interpreted in a narrow manner. Where the conduct of the beneficiary in presenting documents unambiguously signifies consent, the conduct should be given effect. On the other hand, where the conduct is ambiguous in that it complies with the amended and unamended credit,[61] it should not be interpreted to amend the credit. While unambiguous rules of practice could so provide, this rule is not so clearly drafted as to effect such a result.[62] This

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provides "[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."

59) UCP600 Article 14(a) (Standard for Examination of Documents) provides "[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." UCP600 Article 14(d) provides "[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."

60) UCP600 Article 10(a) (Amendments) provides "[e]xcept as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary."

61) For example, if an LC were issued calling for delivery of 1000 tons of steel, partial shipments prohibited, with the latest date for shipment being 1 July and the LC was amended to change the latest date for shipment to 15 June, a presentation made on 5 June, where only 500 tons of steel were shipped June 1 would comply with both the amended and unamended credit as to the latest date for shipment, but not with the partial shipments prohibited term.

62) Charles Del Busto stated that "[t]his issue is addressed by stating in sub Article 9(d)(iii) that a conforming tender of documents with respect to both the terms in the original and the amended Credit will be deemed to be notification of

provision, when read in context with the fundamental principle regarding irrevocable credits, can only be properly interpreted to signify that it applies to unambiguous expressions of consent by conduct.

B. Contra Proferentem

Perhaps the most important principle to be borne in mind in interpreting UCP600 is that of contra proferentum, that is, to construe a text against the drafter in the event of ambiguities. In the case of a letter of credit, that rule would operate against the issuer.[63] The same principle should apply to the rules. Since they were drafted by bankers, they should operate against banks and bankers when they are ambiguous. This principle is not politically charged but one of neutrality. Where more than one reasonable interpretation is possible, the rules should be read to favor the interpretation reasonably given by the beneficiary.

The definition of "Applicant" in UCP600 Article 2 (Definitions) would include as an applicant an entity not so designated on the letter of credit. Were such an entity to be listed as applicant on the commercial invoice, the invoice could not be refused as discrepant because the provisions of UCP600 Article 18 (Commercial Invoice) do not qualify their reference to "applicant" to the entity so stated in the credit, as it easily could have.[64]

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acceptance of such amendment(s) by the Beneficiary and as of that moment the Credit will be amended unless at the time of the tender the Beneficiary gives notification of rejection of the amendments." UCP500 & UCP400 Compared, ICC Publication No. 511 (International Chamber of Commerce 1993).

63) In this respect, it is unfortunate that UCP600 dropped the provision of UCP500 Article 5(b) (Instructions to Issue/Amend Credits) which provided "[a]ll instructions for the issuance of a Credit and the Credit itself and, where applicable, all instructions for an amendment thereto and the amendment itself, must state precisely the document(s) against which payment, acceptance or negotiation is to be made." In light of its history, this provision placed on issuers the risk of ambiguous credits. Although not present in UCP600, the rule continues to operate.

64) UCP600 Article 18(a)(ii) (Commercial Invoices) requires that a commercial invoice "must be made out in the name of the applicant (except as provided

C. Incomplete Drafting

Courts tend to be reluctant to make agreements for parties who fail to do so.[65] Nonetheless, they tend to do so where is it apparent that the parties intended that there should be a binding undertaking and have commenced performance.[66]

The history of the UCP affords ample instances of inartful drafting and mis interpretations by courts. In this respect, UCP600 is no different. Addressing the text requires a recognition by courts that the UCP is not a legislative document with the presumption that it has received the considered attention of lawyers or scholars. In fact, it is an attempt by knowledgeable bankers to express their practices but bankers who are not lawyers or trained draftsmen. Where it is best, it expresses practice.

D. Inadequate Appreciation of Legal Issues

There are some provisions in UCP600 that reveal an inadequate appreciation of the legal dimensions of the rules. Examples abound but the most apparent is the removal of the provision regarding reasonable care in stating the obligation of an advising bank. Having decided to remove the provision on reasonable care from the issuer, a provision which was an anachronism, it appears as if a similar provision was removed from the statement of the duties of the advising bank without any appreciation that it was apt and necessary.

E. Neutrality

The chief reason for the success of the UCP has been its neutrality, providing rules of practice that were knowable and relatively balanced

in sub_article 38 (g))."

65) *See, e.g.*, The Hannah Blumenthal, [1983] 1 AC 834 (H.L.) [England].

66) P.S. Atiyah, An Introduction to the Law of Contract, 4th ed. at 98 (Clarendon Press 1989).

between the interests of the various parties to a letter of credit. On the whole, UCP600 maintains this balance.

The few exceptions are noteworthy, however. They have already been remarked. The provision in UCP600 Article 10(c) (Amendments) that would visit an amendment on a beneficiary that has presented documents that are ambiguous with respect to acceptance of an amendment should not be enforced because it unduly favors the issuing bank which has issued an amendment that can be accepted or rejected at the beneficiary's discretion and leisure over the beneficiary of an irrevocable promise. Likewise, the provisions that expand the standard of compliance are to be regretted to the extent that they can be used to justify rejections over trivial "conflicts" in data contained in documents and the credit and among documents themselves even where the documents comply with the credit. Coupled with rules that will act as traps for the unwary beneficiary where the beneficiary or applicant operates in a country different than the address stated in the credit[67] or with respect to the notify party,[68] UCP600 provides issuers who wish to escape poor credit decisions with a license to dishonor.

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67) UCP600 Article 14(j) (Standard for Examination of Documents) takes up an issue touched on in UCP500 Article 37(a)(ii) & (iii) and ISBP (2003) ¶s 60 & 61 with respect to commercial invoices, namely whether or not the addresses and contact details given in the credit for the beneficiary and the applicant must be replicated in the documents presented under the credit. It suggests that the data need not be present and that, if present, the address need not be the same but must be in the same country although what are described as "contact details", "telefax, telephone, email, and the like", are to be "disregarded".

68) UCP600 Article 14(j) (Standard for Examination of Documents) sentence 2 requires that the address and contact details in the credit regarding the consignee or notify party in a UCP600 transport document "be as stated in the credit", a standard more rigorous even than that applicable to the description of the goods in the commercial invoice under UCP600 Article 18(c) (Commercial Invoice). Until the significance of the standard "as stated in the credit" is understood, it should be assumed to require exact replication as a matter of caution.

III. Conclusion

As can be seen from this brief summary of the provisions of UCP600, it offers rich and varied insights into the possibilities and problems associated with private rulemaking in connection with commercial transactions. This study merely identifies some of the areas of interest. As the rules are applied and interpreted, it is hoped that further and continued work will be undertaken to identify the types of rulemaking involved and their relative success or failure and why.

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ABSTRACT

UCP600: An Exercise in International Private Sector Self Regulation

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The Uniform Customs and Practice for Documentary Credits ("UCP") may be treated as a useful laboratory for studying the scope and limitations of self regulation. This is due to its almost universal success on a global stage which provides it a perspective rarely available for self regulatory provisions and due to extensive experience of judicial review of it. In this sense, it is worthwhile to examine in brief the latest iteration of the UCP, Publication No. 600 ("UCP600").

This article describes and analyze some of core provisions of the UCP600 from the perspective of their adequacy as an exercise in self regulation. It is attempted first in view of several categories of private rulemaking; definitional rulemaking, default rules, procedural rules, and remedies. After that, it is examined second in view of sound rulemaking which is related to the relative role of law and practice. It points out rich and varied insights into the possibilities and problems associated with private rulemaking in connection with commercial transactions.

Key Words : UCP 600, Letter of Credit, Documentary Credits, Rulemaking, Self Regulation