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The effectiveness of international legal harmonization through soft law (with a focus on the UCP 600)

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PART I

1. INTRODUCTION

This report is an overview of the law in the United Kingdom concerning letters of credit. It is not limited to doctrinal principles, however. Instead, it also considers practical aspects of Trade Finance in the United Kingdom (UK) including, for example, how specific financial institutions operate their letter of credit contracts. Furthermore, with the widespread incorporation of the Uniform Customs and Practice for Documentary credits (UCP 600)[1] issued by the International Chamber of Commerce (ICC) this report considers both the current use of the ICC rules in the UK but also the future issues likely to develop in this area, particularly the digitalization efforts of the UK government and effects of the COVID-19 pandemic. This report is not intended to be a comprehensive review of letter of credit operations in the UK, nor a thorough examination of the principles governing documentary credits and the UCP 600. Instead, it provides an introductory view of the landscape in this area and then zones in on specific current issues of interest that will, in all likelihood, feature as matters of concern for letter of credit lawyers in years to come.

1.1 PURPOSE AND SIGNIFICANCE

This report was initially commissioned as part of the International Academy of Comparative Law's General Congress, 2022, specifically dealing with the effectiveness of international legal harmonization through soft law, with a focus on the UCP 600. It therefore represents the United Kingdom's position on the UCP 600, both legally and practically, with the ultimate purpose of deciding whether the ICC rules are an effective method of legal harmonization through soft law. In other words, whether they have been successful in uniting international legal principles. The measure of their success, in this author's opinion, is the extent to which they are used in trade finance operations. Ultimately, how many financial institutions in the UK and worldwide, incorporate the UCP 600 into their letter of credit contracts. As the reader will discover, an incredibly high proportion of financial institutions incorporate the UCP 600 in their documentary credit contracts. Although the rules are not 'hard law' in the sense that they are not mandatorily applied through legislation to credits issued in the UK, they are none the less likely applicable through their incorporation into credit contracts by the overwhelming majority of UK financial institutions.

The use of SWIFT messaging between financial institutions (Society for Worldwide Interbank Financial Telecommunication)[2] as the global provider of secure financial messaging services is so extensive, used by more than 11,000 financial institutions in more than 200 countries and territories around the world, that the applicability of UCP is almost universal. SWIFT messages can either refer directly to the UCP[3], or even where they do not, commercial practice dictates that the use of SWIFT alone, incorporates the UCP[4]. Therefore, financial institutions using SWIFT, are understood to incorporate the UCP and if, as noted above, 11,000 institutions in 2000 territories use SWIFT, then all these incorporate the UCP into their credit contracts. The report therefore concludes that the UCP are indeed an excellent example of international legal harmonisation through soft law.

Furthermore, the last two years have seen unprecedented challenges faced by all countries in all areas of life, and trade finance is no exception. The UK government has accelerated investigations into digitalising aspects of Trade Finance, to combat the effects of the COVID-19 pandemic. These efforts have resulted in new legislation in the UK[5] and is an approach that has already been seen on an international level. In October 2021 the International Chamber of Commerce released the ICC's Uniform Rules for Digital Trade Transactions (URDTT)[6] envisioning a future where international trade transactions can be completed entirely electronically, including the documentary evidence required for payment.

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[1] International Chamber of Commerce, *ICC Uniform Customs and Practice for Documentary Credits, 2007 Revision, UCP 600*, Publication No. 600, Paris 2007.

[2] https://www.swift.com/about-us/swift-traffic-highlights

[3] See for example, MT 700, 710 and 720 as per International Chamber of Commerce, *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group,* ICC Publication No. 680, Paris 2007, p.12.

[4] International Chamber of Commerce, *More queries and responses to UCP 500: Opinions of the ICC Banking Commission,* Publication No. 596, Paris 1982, Opinion R 248 which states: 'Whilst credits issued using the SWIFT system (without mention of the UCP) would seem to be inconsistent with Article 1, it has long been accepted that these types of credits are subject to the UCP in operation on the day of issue. This has become a recognized practice'.

[5] Electronic Trade Documents Act 2023

[6] International Chamber of Commerce, *Uniform Rules for Digital Trade Transactions, Version 1.0, URDTT,* Publication No. KS102E, Paris 2021, available at: https://2go.iccwbo.org/uniform-rules-for-digital-trade-transactions-urdtt-version-1.html#details

These are issues that have been anticipated for a while, but the pandemic has forced businesses and governments to fast-track solutions. UK legislation came into force on 20 September 2023 and thus the issues covered in this report are highly relevant, incredibly pressing and of the utmost significance for the UK's future Trade Finance policy.

1.2 STRUCTURE

The structure of the report after this introduction is quite simple. First, the rest of Part I is an overview of the UK's jurisdiction, fundamental aspects of the structure of governance, how law is made and by whom. This is to assess whether the agencies involved in law making consider soft law instruments in their work in general. This leads us to Part II which provides an overview of letter of credit law in the UK including the banking and financial framework and now specifically considering whether the UCP600, as a soft law instrument, are successfully applied and utilised in the UK. Then, in Part III we move on to recurring difficulties and current developments in Trade Finance in the UK, zoning in on issues of key importance at this precise time that will influence the future of law and practice in this area. Lastly, we conclude in Part IV with a determination of whether the UCP is a successful example of effective international legal harmonization through soft law.

2. FUNDAMENTALS OF THE UNITED KINGDOM JURISDICTION

2.1. LEGAL SYSTEM AND LEGISLATIVE POWER

The United Kingdom is a constitutional monarchy;[7] while The Sovereign is Head of State, the ability to make and pass legislation resides with Parliament: 'the most fundamental rule of UK constitutional law is the Crown in parliament is sovereign, and that legislation enacted by the Crown with the consent of both Houses of Parliament, is supreme…Parliament can, by enactment of primary legislations, change the law of the land in any way it chooses'.[8] We therefore have the legislative supremacy of Parliament,[9] which has two chambers, the House of Commons and the House of Lords. Bills become Acts of Parliament when they have been approved by both houses and receive royal assent.[10]

Furthermore, the United Kingdom is often described as a unitary state, where the authority of the Crown and Parliament extends to all the UK.[11] However, three legal systems exist, each with its own courts and legal profession: England and Wales, Scotland and Northern Ireland. When Parliament legislates, it may do so for all the UK or separately for each of the nations within it. Certain legislative and executive powers of government are devolved to the Scottish Parliament, the Welsh Assembly and the Northern Irish Assembly, known as the devolved administrations, but ultimate authority for all the UK is retained by the Parliament and government in Westminster. The Supreme Court for the United Kingdom is the final court of appeal in all three jurisdictions, except for criminal cases in Scotland. The judicial structure within each nation differs but if we take England and Wales as an example, below the UK Supreme Court we find the Court of Appeal; below that, the High Court, and below that, the Crown Court which hears criminal cases, and the County Court which hears civil and family cases. There is a last layer, the Magistrates Courts and Tribunals.[12]

Interestingly, the United Kingdom does not have a written constitution;[13] instead, the two main sources[14] of constitutional law are legislation, such as Acts of Parliament, and judicial precedent,[15] in other words, case law. These are the decisions of the courts building up a body of common law and cases which interpret legislation. The United Kingdom is therefore a common law jurisdiction, whereby the decisions of superior courts, under the doctrine of precedent, are binding on inferior courts. The common law consists of rules and customs which are declared to be law by the judges in the deciding cases. Until October 2009 the final court of appeal was the House of Lords where the

[7] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, para. 1.12, 1.2-1.25.
[8] *R (Miller) v Secretary of State for Exiting the EU* [2017] 2 WLR 583 para. 20.
[9] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, Chapter 4.
[10] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, Chapter 8.
[11] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, Chapter 7.
[12] For the structure of the UK judicial system see Supreme Court guidance available at: https://www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf
[13] By this we mean one document codifying fundamentals rules of constitutional and administrative law.
[14] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, Chapters 8-12.
[15] For a full explanation see N. Papworth, *Constitutional and Administrative Law,* 11th ed, Oxford University Press, Oxford 2020, Chapter 11.

judges were called 'Law Lords' but since then, the twelve judges sitting in the final court are Justices of the Supreme Court for the United Kingdom. As the final court of appeal, these judges could, in exceptional circumstances, review and if necessary, alter the law laid down by their predecessors. To understand the authority of case law, one must remember that judicial decisions are the basis of principles such as the supremacy of Parliament and judicial review of executive action. Along with this rule-making power, courts of course also interpret statute law where the meaning of an Act of Parliament is disputed with 'the overriding aim…to give effect to the intention of Parliament as expressed in the words used'.[16]

2.2. RULE MAKING POWER

The UK is a common law jurisdiction and as such, the courts have rule-making power. In *Re Spectrum Plus Ltd*[17] Lord Nicholls stated: 'The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary'.[18] This is an independent source of law and particularly extensive in the area of private law, large parts of which are predominantly the product of judicial decisions. For example, the law of obligations, including contract, tort and unjust enrichment. In fact, the law on sale of goods was developed in a series of judicial decisions[19] before being codified in 1893. Although judges acknowledge that there must be a boundary to judicial law-making, there is no consensus as to where it is. For example, Lord Lowry in *C v Director of public Prosecutions*[20] gave a list of five aids for judges deciding whether to exercise their rule-making power, but Lord Walker only accepted[21] two of these aids without qualification. Lord Bingham on the other hand gave a list of five situations where most judges would be reluctant to make new law[22] but this too was questioned by Lord Dyson highlighting the temperament of the individual judge[23]. There is no unanimity and since the UK does not have a written constitution to refer to, there is no supreme piece of legislating dictating the position.

2.3. LEGISLATORS CONSIDERING SOFT LAW

Parliament in the United Kingdom does consider soft law in adopting or modifying substantive law. A good example of this happening recently is the Modern Slavery Act 2015 (MSA). This has been influenced a great deal by the United Nations Guiding principles of Business and Human Rights 2011 (UNGPs).[24] The UK government, in its public consultation paper[25] on the draft Bill, framed the objectives of some of the provisions, such as the proposed inclusion of a 'transparency in supply chains provision', within the context of the UNGP, referring to its 'essential elements'[26] of due diligence and reporting. Furthermore, s54(4) reflects key features of the UNGP and the guidance for the MSA[27] also expressly refers to the UNGP as a tool to assist organisations on implementation of the reports required under the MSA. The UK government has even expressly stated that it is implementing the UNGP in the revised National Action Plan on Business and Human Rights.[28] It confirms that they are adressing commitments to combat slavery 'through [their] work to implement the UNGPs and through the Modern Slavery Act and Modern Slavery Strategy'.[29] It is very

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[16] Per Lord Bingham *R v Environment Secretary, ex p Spath Holme Ltd* [2001] 2 AC 349, 388.
[17] *Re Spectrum Plus Ltd* [2005] 2 AC 680.
[18] *Re Spectrum Plus Ltd* [2005] 2 AC 680, para 32.
[19] *Nichol v Godts* (1854) 10 Ex. 191, *Jones v Just* (1867-68) L.R. 3 Q.B. 197, *Mody v Gregson* (1868-69) L.R. 4 Ex. 49 and *Drummond & Sons v Van Ingen & Co* (1887) 12 App. Cas. 284.
[20] *C v Director of public Prosecutions* [1996] AC 1, 28.
[21] R. Walker, 'How far should judges develop the common law?' *Cambridge Journal of International and Comparative Law* 2014, 3(1), pp. 124-135.
[22] T. Bingham, 'The Judge as Lawmaker: An English Perspective' in P. Rushworth (ed.) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thoroton,* Butterworths, Oxford 1997.
[23] Lord Dyson, 'The Limits of the Common' [2015] 27 *Singapore Academy of Law Journal*, pp. 271-285.
[24] This is an instrument of 31 principles implementing the UN 'Protect. Respect and Remedy' Framework 2010 on human rights and business, a global standard from preventing and addressing the risk of adverse impact on human rights from business activity. See: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
[25] Home Office, *Modern Slavery and Supply Chains Consultation,* UK Government, 12.02.2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448201/2015-02-12_TISC_Consultation_FINAL.pdf
[26] *Ibid* p.10.
[27] Home Office, *Transparency in Supply Chains etc. A practical guide*, 29.10.2016 available at: https://globalnaps.org/wp-content/uploads/2017/11/uk-2016.pdf
[28] HM Government, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights,* May 2016, available at: https://globalnaps.org/wp-content/uploads/2017/11/uk-2016.pdf
[29] *Ibid* p.3.

clear therefore, that there are circumstances where the legislator will not only consider soft law but implement certain aspects of it in domestic legislation. As the reader will see below, the recent Electronic Trade Documents project conducted by the UK Law Commission[30], which was assigned to them by the UK government, considered soft law in the research and recommendations and eventually resulted in new UK legislation[31]. Whether or not the UK adopted law that reflects the same position as the soft law is neither here nor there; the point is that the soft law has at least been considered.

2.4. COURTS CONSIDERING SOFT LAW

If the courts of the United Kingdom are interpreting substantive law such as Acts of Parliament, their 'task…is often said to be to ascertain the intention of Parliament expressed in the language under consideration'.[32] To do this, courts may use internal aids, found in the rest of the Act, or external aids. However, the task is to determine the intention of Parliament and therefore the external aids are more likely to be sources such as Hansard,[33] the official record of Parliamentary debates, so they can discover the meaning of the legislation. It is unlikely that courts would look to soft law for inspiration; their task is to interpret the statute and discover the meaning of the words used by Parliament by ascertaining its intentions. However, there could be situations as given above regarding the Modern Slavery Act 2015, where Parliament also used soft law as a basis for the statute. One must be careful here, the issue for the court is not to interpret the soft law, nor derive inspiration from it. The purpose remains ascertaining the intention of Parliament so unless Parliament transcribed like-for-like the entire soft law framework into a UK Act, the court will still be bound to interpret the legislation according to Parliament's intention, which may of course differ from the soft law position Parliament itself was considering.

2.5. LEGAL PRACTITIONERS AND SOFT LAW

Legal Practitioners do consider soft law when advising clients, drafting contracts or pleading before courts and arbitral tribunals. That is not to say that all areas of law will be treated in this way, but areas that are heavily reliant on soft law will be. For example, a new version of Incoterms[34] was released 2020 and although the UK has a plethora of common law on international sale contracts on shipment terms regulating for example CIF and FOB,[35] the ICC terms may have none the less been incorporated into English contracts. With the release of the new version, legal practitioners would need to advise clients as to the effect on existing contracts, whether new contracts need to be on the new terms based on the business's objectives and what any differences between the older versions and that of 2020 mean. Furthermore, in this example, the sale contract will likely be connected to several others, including carriage contracts, insurance contracts and of course finance in the form of a letter of credit. Legal practitioners may therefore need to advise on ancillary documents as well, even though the soft law in question may not have been directly applicable. Examples for Incoterms, being a recent update, can be found with leading firms in the UK such as Pinsent Masons[36] and Reed Smith.[37]

As a continuation of the example of the Modern Slavery Act 2015 we discussed above, there will be many legal practitioners that necessarily advise clients on the basis of the soft law on which it is based, the UNGPs, as it is recognized that despite being a 'non binding framework…they have also led to the introduction of a number of legal statues, one of the most prominent…has been…the [Modern Slavery] 2015 UK Act'[38]. James Wood, in *Soft law, hard sanctions*[39] discusses this point – that lawyers must be advising clients based on a plethora of soft law concerning human rights to make sure they meet their obligations under the Act.

2.6. DOCTRINAL AUTHORITIES AND SOFT LAW

[30] See https://www.lawcom.gov.uk/project/electronic-trade-documents/
[31] The Electronic Trade Documents Act 2023.
[32] Per Lord Nicholls, *R v Environment Secretary, ex p Spath Holme Ltd* [2001] 2 AC 349, 396.
[33] ICC Publication No. 723E, *Incoterms 2020: ICC Rules for the use of domestic and international trade terms*
[34] https://hansard.parliament.uk
[35] See for example, F. Lorenzon, *Sassoon on CIF and FOB Contracts*, 6th ed, Sweet and Maxwell, London 2017.
[36] See for example: https://www.pinsentmasons.com/out-law/guides/incoterms-for-commercial-contracts
[37] See for example: https://www.reedsmith.com/en/perspectives/2019/09/incoterms-2020-what-you-need-to-know
[38] J. Wood, 'Soft law, hard sanctions' in, *Insight: Business and Human Rights*, Autumn 2016 available at: https://www.inhouselawyer.co.uk/feature/soft-law-hard-sanctions/
[39] *Ibid.*

Given that Parliament may consider soft law when legislating, it must necessarily mean that doctrinal authorities are likely to consider soft law in their work too. The extent to which it is used varies but an excellent current example, taking a broad definition of soft law, is the Law Commission's[40] Electronic Transport Document project[41]. This compares several instruments as one aspect of inspiration for proposing legislation in the UK. These include the Rotterdam Rules 2008[42], the UNCITRAL[43] Model Law on Electronic Transferable Records (MLETR) 2017 and the Model Law on Electronic Commerce 1996. If we are to take a very broad view of soft law, they even consider the US's Uniform Commercial Code, which also has sources of soft law within it, as it incorporates[44] for example the UCP 600. The Law Commission proposals end with a draft new Bill[45], which resulted in the Electronic Transport Documents Act 2023. This is therefore an example of both doctrinal authorities, and eventually the legislator, considering soft law in their work. This example is further elaborated on in Part III as it concerns the digitalization aspect of letters of credit.

3. CONCLUSION

The reader is reminded, that in our quest to determine whether the UCP 600 are a successful example of effective international legal harmonisation through soft law, we needed to consider first, whether the United Kingdom as a jurisdiction, and the legal institutions within it, even acknowledge soft law in their work. The starting point therefore is to confirm that yes indeed, UK legislators, courts, practitioners, and doctrinal authorities do indeed consider soft law instruments when legislating, formulating legal principles or advising clients. Soft law may fill in a lot of gaps in the law, providing detail to the backbone legislation or indeed providing inspiration for the backbone itself. With confirmation that the UK system allows these institutions and groups to consider soft law, we now move on to assess how they deal with the UCP specifically.

PART II

1. INTRODUCTION

In our examination of the UCP 600 as a soft law instrument in the UK, we must first, in summary, review UK law on letters of credit. The confines of this report mean that this is an outline only, looking at some of the core principles rather than the entire system, but the purpose is to be able to evaluate how the UK utilises the UCP. This part therefore provides first an overview of letter of credit law, then moves on to the status of the UCP 600 in UK law and then considers how it is applied by financial institutions in the United Kingdom and the dispute resolution agencies including the UK courts. This part therefore evidences whether the UK places substantial consideration on the UCP 600 or not, despite it being simply soft law. If it does, this adds weight to the argument that the UCP are indeed a successful example of effective international legal harmonisation. Even though it is soft law, if courts, practitioners, and other dispute resolution agencies yield to the UCP 600 principles, then it can only mean that their status as central and essential law is confirmed. Therefore, they are effective, they are successful, and they are an excellent example of harmonization through soft law.

2. THE BANKING AND FINANCIAL LEGAL FRAMEWORK IN THE UK

2.1. LETTER OF CREDIT LAW IN THE UK

[40] The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed. See: https://www.lawcom.gov.uk

[41] See: https://www.lawcom.gov.uk/project/electronic-trade-documents/

[42] United Nations Convention on Contracts for the International Carriage of Goods by Wholly or partly by Sea 2008 (commonly referred to as the Rotterdam Rules.

[43] United Nations Commission on International Trade Law, established by the United Nations General Assembly in 1966 for the purpose of furthering harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. See: https://uncitral.un.org/en/content/homepage

[44] Article 5, Uniform Commercial U.S. Code.

[45] See the Law Commission, *Digital assets: electronic trade documents, A consultation paper,* No 234, 30 April 2021, p. 175 available at: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2021/04/Electronic-trade-documents-CP.pdf

There is no piece of legislation in the United Kingdom governing letters of credit; no Act of Parliament or statute giving a list of rules. Instead, as a common law jurisdiction, the body of case law that has evolved in the area governs the practice.[46] None the less, one must remember that letters of credit are, in legal terms, contracts. Although there is a unique mechanism by which they operate, at the root, it is contract law that would govern.[47] It just so happens that this particular type of contract,[48] does not have its own piece of legislation. As is well known, there is no commercial code in the United Kingdom so again the rules that would govern letters of credit from a contractual perspective, would originate in the common law.

With cases on letters of credit starting from the 1860's[49] it would be herculean task to give a complete overview of the body of case law now governing letters of credit in the UK but one can focus on a few essential elements necessary to their operation and for reasons of conciseness, the basics of documentary credits (the mechanism operation, the parties involved, the types of credit etc.) will not be addressed.[50] One should also note, that since the 1960s when UK banks routinely started to incorporate the UCP into credits,[51] much of the common law now turns to issues surrounding the UCP or to be determined by reference to the UCP. Thus, cases referring to the UCP will be mostly bypassed as a topic discussed further on in this work.

2.1.1. CORE PRINCIPLES

Documentary credits are most often used as payment methods for international trade transactions; there is therefore an underlying sale contract to which the credit relates. The credit contract and the sale contract however, are quite separate and the principle of autonomy has established that banks are in no way concerned with the underlying sale. They are neither party to it, nor do any disputes between buyer and seller under the sale affect the bank's obligation under the credit. As Hirst J stated in *Tukan Timber Ltd v Barclays Bank Plc*:[52] 'it is…clearly established by the authorities that a letter of credit is autonomous, that the bank is not in any way concerned with the merits or demerits of the underlying transaction'.[53] Nor can the terms of the sale, be read into the terms of the credit[54]. In connection with the autonomy principle, we find the principle that banks are concerned only with documents as established in *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd*[55] where the position of the bank was characterized as someone who had contracted to by shipping documents and who must accept and pay for them irrespective of any defense to claims under the sale contract.[56]

2.1.2. OPENING AND FORM OF CREDIT

For credits that support a sale contract, the time by which they must be opened is crucial – in CIF[57] sales the credit must be opened by the beginning of the shipment window agreed.[58] For FOB contracts there is some ambiguity, but it is either again at the start of the shipment window,[59] or a reasonable time before.[60] The form and conditions of the credit must also comply with the requirements in the sale contract and if not, the seller may treat this as a breach by

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[46] See C. Proctor, M. Waters and E. Ovey *Halsbury's Laws of England, Financial Institutions*, Volume 48 (2015) at para. 244 that states 'Commercial letters of credit almost invariable incorporate the [UCP]' and at footnote 1 of para. 244 that continues 'as the provisions of the [UCP] do not have the force of law, in the exceptional case where they are not incorporated, the position is governed by the common law'.

[47] Also noted in P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit*, Hart Publishing, Oxford 2010, p. 22.

[48] Other contracts of course do have statutes that govern their operation, for example, the Sale of Goods Act 1979 governing sale contracts, the Marine Insurance 1906 and Insurance Act 2015 governing insurance contracts and the Carriage of Goods by Sea Acts 1971 and 1992 governing carriage contracts. These too will be supplemented by the body of common law surrounding the Acts.

[49] See for example, *In re Agra & Masterman's Bank Ex p. Asiatic Banking Corp, Re* (1866-67) L.R. 2 Ch. App. 391 and *Barned's Banking Co, Re* (1869-70) L.R. 5 Ch. App. 167.

[50] See A. Malek and D. Quest, *Jack: Documentary Credits*, 4th ed, Tottel Publishing, 2009, Chapters 1 and 2 and P. Ellinger and D. Neo, *The Law and Practice of Documentary Letters of Credit*, Hart Publishing, Oxford 2010, Chapter 1.

[51] *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495 at 508. See also A. Malek and D. Quest, *Jack Documentary Credits*, 4th ed, Tottel Publishing, 2009, para. 1.20.

[52] *Tukan Timber Ltd v Barclays Bank Plc* [1987] 1 Lloyd's Rep 171.

[53] *Ibid* 174.

[54] *Bankers Trust Co v State Bank of India [*1991] 2 Lloyd's Rep 443.

[55] *Urquhart Lindsay & Co Ltd v Eastern Bank Ltd* [1922] 1 K.B. 318.

[56] The principle also referred to as 'trite law' by Lord Diplock in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168, 183.

[57] This is, Cost, Insurance, Freight and Free On Board – as to CIF and FOB contracts generally, see F. Lorenzon, *Sassoon on CIF and FOB contracts*, 6th ed, Sweet and Maxwell, London 2017.

[58] *Pavia & Co SpA v Thurmann-Nielson* [1952] 1 All ER 492.

[59] *Ian Stach Ltd. v Baker Bosley Ltd* [1958] 1 All ER 542.

[60] *Glencore Grain Rotterdam NV v Lebanese Organisation for International Commerce* [1997] 2 Lloyd's Rep 386.

the buyer which has repudiated the sale contract.[61] In other words, the terms of credit concerning the amount to be paid, its form, where it is to be available, the documents required to be presented under it, are all to be as per the agreement in the sale contract. In practice of course, the credit will almost always also then expressly incorporate the UCP.[62]

2.1.3. DOCUMENTARY COMPLIANCE

If the credit correctly reflects the documents required under the sale contract, it would usually at a minimum, require the bank to examine a transport document, an insurance document, and a commercial invoice, for these are the documents that evidence that the seller has fulfilled his obligations under the sale contract.[63] These documents must comply strictly with the terms of the credit[64] and must conform to accustomed shipping documents as to be reasonably fit to pass current in commerce[65] as well as being in good merchantable order so that if needed, the bank has realizable documents from which it can reimburse itself.[66] This requirement of the documents being 'usual' and 'merchantable' governs all the stipulated documents and is the default position where the credit instructions fail to address the specifics. Common law dictates some specific aspects for transport documents, for example, if a bill of lading is called for, it must be a clean[67] shipped bill[68] that covers transit from the port of origin to the port of destination[69] and if the credit stipulates a time of shipment, that must also be complied with.[70] Insurance policies must be on an 'all risks' basis if that is usual in the trade[71] and must relate solely to the goods referred to in the bill of lading and the invoice.[72] However, further detail as to the standard of documents is now quite scarce, particularly as so many credits will be subject to the UCP which provide a more specific 'check list' of what the documents must contain. In any case, once the documents are presented the bank must act promptly to determine compliance.[73]

In terms of this legal framework being integrated into the international banking system in the UK, one must remember that letters of credit are contracts, and financial institutions along with the sale parties involved in the credit, are big businesses which can negotiate and agree any terms to the contracts they wish. In this sense, the banking system leads the way, and the legal framework follows to support the transaction. The common law behind the credit, and even interpretation of the UCP in the UK, is in essence designed to uphold the realities of the international banking system – where there is ambiguity about a rule, the issue will be resolved in a manner consistent with the general position under maritime and commercial law.[74] Thus, it is not so much that the legal framework is integrated into the international banking system, but rather than the courts will always strive to uphold the commercial reality.

2.2. INCORPORATION OF UCP 600 INTO UK LAW

The UCP 600 are not formally incorporated into UK law (nor were earlier versions) and they are not considered law;[75] they will have legal effect only if they are incorporated into the terms of the credit and if so, will be binding[76] on the

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[61] *Ibid.*
[62] See for example, *Glencore International AG v Bank of China* [1996] 1 Lloyd's Rep 135, *Bayerische Vereinsbank Aktiengesellschaft v National Bank of Pakistan* [1997] 1 Lloyd's Rep. 59.
[63] See *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 1 QB 459 as to the CIF seller's physical and documentary duties under the sale contract. Even if the credit is silent as to the requirements of the documents, their acceptability is determined by whether they would be usual in the trade and if a sub-buyer would be compelled to accept them in a resale: *Hansson v Hamel & Horley Ltd* [1922] 2 AC 26. Thus, the bank in *Borthwick v Bank of New Zealand* (1900) 6 Comm Cas 95 was instructed to pay against a bill of lading, an insurance policy and an invoice. As to obligations of sale parties in a CIF sale, see generally C. Debattista and F. Hornyold-Strickland, *Debattista on Bills of Lading in Commodities Trade*, 4th ed, Bloomsbury Professional, Dublin 202 and M.G. Bridge, *The International Sale of Goods,* 4th ed, Oxford University Press, Oxford 2017, for information on sale contracts.
[64] *Equitable Trust Co of New York v Dawson Partn.ers Ltd* (1926) 27 Ll L Rep 49, *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd* [1983] 1 All ER 1137
[65] *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36.
[66] *Skandinaviska Akt v Barclays Bank* (1925) 22 Ll L Rep 523.
[67] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1980] 1 All ER 501.
[68] *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443.
[69] E Clemends Horst Co v Biddell Bros [1912] AC 18.
[70] *Stein v Hambro's Bank of Northern Commerce* (1922) 10 Ll L Rep 529.
[71] *Borthwick v Bank of New Zealand* (1900) 6 Comm Cas 95.
[72] *Hickox v Adams* (1876) 34 LT 404.
[73] *Hansson v Hamel and Horley Ltd* [1922] 2 AC 36.
[74] *M Golodetz & Co Inc v Czarnikow-Rionda Co Inc, The Galatia* [1980] 1 All ER 501.
[75] *Ibid.*
[76] R. King, *Gutteridge and Megrah's Law of Banker's Commercial Credits*, 8th ed, Europa Publications, London 2001, para 1.12.

credit parties unless any express alterations have been made. Lord Musthill, in *Royal Bank of Scotland v Cassa di Rispamario della Provincie Lombarde*,[77] put it best when he stated:[78]

> 'whilst not belittling the utility of the UCP, it must be recognized that their terms do not constitute a statutory code. As their title makes clear, they contain a formulation of customs and practices, which the parties to a letter of credit can incorporate into their contracts by reference. This being so…the obvious place to start, when searching for a contractual term material to a particular obligation, is the express agreement between the parties. If it is found that the parties have explicitly agreed such a term then the search need go no further, since any contrary provision in the UCP must yield to the parties' expressed intention'.

Since the 1960s financial institutions in the UK have invariably incorporated the rules into credits,[79] which means that a vast array of case law since that date, considers disputes where the UCP apply. As such, the common law post 1960 is very much consistent with the UCP rules. In fact, if one looks at Halsbury's Laws of England[80] it will be noticed that in the paragraphs dealing with letters of credit,[81] a large proportion of the legal principles are based on the UCP, and the reason for this is simply in recognition of the fact that an extremely large proportion of credits are now issued subject to UCP.[82] So, although the UCP are not law in the UK, they are now so universally applied that even Halsbury's, which is an authoritative statement of the law, makes extensive reference to them. Furthermore, the common law started taking a somewhat similar approach, elevating the importance of the UCP where, unless the credit stated otherwise, it was wrong to approach the construction of the credit by looking at the document first, without reference to the UCP.[83] They are therefore now considered an integral part of the system of rules governing the letter of credit contract and thus the UK position is generally consistent with them.

However, there have been circumstances where lack of a provision under the UCP has been litigated in an English Court, and the court decision has led to an alteration of an article in a newer version of the rules. The most recognizable example is *Banco Santander SA v Bayern Ltd.*[84] A short summary of the facts is as follows: under a credit subject to UCP 500, Bayern was the beneficiary of a 180-day deferred payment credit, issued by Banque Paribas and confirmed by Santander. Documents which appeared to comply, where presented to Santander in June 1998 who then became obliged to make payment (20.3 million USD) in November. As a common practice, Santander discounted the credit, paying Bayern 19.7 million USD just two days later. After a week passed however, Santander was informed the documents were forged. Had it waited to maturity, it could have utilized the fraud exception to deny payment. As it were, Santander argued that it had fulfilled its obligations correctly, paid prior to knowledge of the fraud and was thus entitled to reimbursement from Paribas as issuing bank. The court disagreed; unless there was an express clause in the contract authorizing the confirming bank to discount credits, it did so at its own risk. The practice of discounting is common, so alarm bells started ringing across the banking community. To combat the situation, the UCP 600 now includes Article 12.b, where a nominated bank is expressly authorized by the issuing bank to make prepayment under a deferred payment credit. If Article 12.b was not included, or the credit is not subject to UCP 600, the common law position remains that of *Banco Santander v Bayfern*. There could therefore be circumstances where the UCP and common law do not match.

There are also circumstances where the lack of clarification in a UCP Article seems to produce a different result to the position under UK law. The best example is *The Galatia*[85] which is discussed in further detail below. For now, it is enough to point the reader to the fact that whereas Article 27 of the UCP 600 does not incorporate a time aspect to transport documents being clean, the common law does give a time element. This minor detail means that a transport document with a notation that goods were damaged after shipment would, under the UCP, be considered claused and thus non-compliant with the credit terms, but that same document under common law would be considered clean and payment rightly due.

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[77] *Royal Bank of Scotland v Cassa di Rispamario della Provincie Lombarde* [1992] 1 Bank LR. 251.
[78] *Ibid* pp. 255-256
[79] In essence it was with the ICC's 1962 Revision of the rules (publication number 222) that UK banks started to incorporate the UCP. See A. Malek and D. Quest, *Jack Documentary Credits*, 4th ed, Tottel Publishing 2009, para. 1.20 and *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495, 508.
[80] Halsbury's Laws of England is a comprehensive, summarized but authoritative encyclopaedia and statement of the law of England and Wales, separated into volumes by subject.
[81] C. Proctor, M. Waters and E. Ovey, *Halsbury's Laws of England, Financial Institutions*, Volume 48 (2015), section on *Letters of Credit and Performance Bonds* paras. 242-283.
[82] This is stated by the authors themselves: *Ibid* at para. 244B 'In practice, documentary credits are almost always issued and made by their terms expressly subject to the code entitled the UCP'.
[83] *Forestal Mimosa Ltd v Oriental Credit Ltd* [1986] 2 All ER 400.
[84] *Banco Santander SA v Bayfern Ltd* [2000] 2 All ER (Comm).
[85] *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495.

We can conclude that there will always be areas where the UK national law and the UCP position may differ, but we must also agree that overall, the success of the UCP rules in being so universally adopted by banks means that even if they do not have the force of law in the UK, they are none the less of fundamental importance.

2.3. FINANCIAL INSTITUTIONS AND THE UCP 600

Financial institutions in the United Kingdom have a varied approach to incorporation of the UCP 600 in documentary credits and if incorporated, they may be through a variety of methods. For example, the Royal Bank of Scotland (RBS) expressly incorporates the UCP 600 into all credits via their Trade Services Terms[86] which are attached to the credit application and apply as standardized terms to all RBS credits. Lloyd's Bank similarly incorporates the UCP 600, in its Terms and Conditions for Import Letters of Credit, or any 'successor publication'.[87] Barclays Bank takes a slightly different approach; although there is an express clause[88] in their standardized terms and conditions for all credits, it incorporates 'the revision of ICC publication "Uniform Customs and Practice for Documentary Credits (UCP)" current at the date of issue of the Letter of Credit'. This allows for any updated version to the UCP to apply. However, the beginning of this clause also states: 'Unless otherwise agreed by you and the Bank'. It is therefore possible for the bank and the applicant to agree that either no other external terms be incorporated, or an earlier version of the rules to apply instead. Should the parties agree that different rules are to apply, this would be a specifically negotiated express term that takes precedence over the standardized term incorporating the UCP. HSBC UK follows a similar approach: its Standard Trade Terms[89] state that 'Unless the [c]ustomer otherwise requests (and HSBC agrees with such request)'[90] all credits issued will be subject to UCP600. The clause also recognizes that the credit is subject to the ICC rules 'as revised from time to time…and the rights and obligations of the [c]ustomer will be subject to the applicable ICC rules in addition to [the T]erms'. However, it is also stated[91] that if there is a conflict between any ICC Rules and the rest of the bank's Standard Trade Terms, the Terms will prevail.

This brings us on to an interesting point that should be noted for purposes of clarity. The letter of credit agreement between the bank and its customer is best thought of comprising of a series of 'layers' in the UK. For example, terms of the contract may be included in the application for the credit,[92] in standardized terms incorporated[93] and attached to the application, in the UCP 600 if incorporated, and indeed in any other oral or written terms considered part of the contract. Which clauses or representations are legally part of that contract and considered terms, how they are to be interpreted, and which should prevail in cases of conflict, will be determined through contact law and is a matter of contract formation and construction.[94] The law here is on the one hand complex, as determining the precise terms of the contract in any case can be difficult, when one considers that contracts in the UK can be valid even if made orally[95] and can contain terms from several official and unofficial documents.[96] On the other hand the law is also flexible, recognizing that the whole contract needs to be considered,[97] there seems to be no strictly defined approach to interpreting terms but also if there is more than one interpretation of the words or terms in the contract, then it will

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[86] Royal Bank of Scotland plc, *Corporate and Commercial Banking Trade Services Terms,* Clause 2.4 available at: https://terms.rbs.com/rbs/pdf/T-TST0710.pdf

[87] Lloyd's Bank, *Terms and Conditions for Import Letter of Credit,* Clause 4, available at: https://www.lloydsbank.com/business/corporate-banking/commercial-terms/terms-and-conditions/international-trade/trade-services/uk-customers/terms-and-conditions-for-import-letter-of-credit.html

[88] Barclays Bank plc, *Barclays Terms and Conditions for Issuance of Import Letter of Credit,* Clause 6.13 available at: https://www.barclayscorporate.com/general-info/t-and-cs-for-issuance-of-an-import-letter-of-credit/

[89] HSBC UK Bank PLC and HSBC Bank PLC, *Standard Trade Terms,* 20.05.2020, available, for a variety of jurisdictions, including the UK, at https://www.gbm.hsbc.com/gtrfstt

[90] *Ibid* Clause 2.1.

[91] *Ibid* Clause 2.2.

[92] The signature of the customer here will mean they are bound by the terms of the application document: *AF Colverd & Co Ltd v Anglo Overseas Transport Co Ltd* [1961] 2 Lloyd's Rep 352.

[93] The standardized terms may be incorporated by making appropriate reference to them in the application itself. Indeed, it is likely that banks will make the application explicitly subject to their standard terms and this will be stated just before the customer's signature. This is irrespective of whether the customer has read them: *Davis Contractors Ltd v Fareham UDC* [1956] 2 All ER 145, with limited exceptions.

[94] For a general overview of the law in this area see E McKendrick, *Contract Law*, 14th ed, Macmillan Education UK, London 2021, particularly Chapters 8-10.

[95] A contract in the UK does not need to be made in any particular form and can be quite informal: *Beckham v Drake* (1841) 9 M & W 79. There are some exceptions to this rule and of importance in trade finance are bills of exchange and promissory notes as per the Bills of Exchange Act 1882 ss 3(1) and 17(2).

[96] The law requires a clear intention of the parties that the terms contained in those other documents are to be incorporated into their agreement: *MacLeod Ross & Co Ltd v Cie d'Assurances Generales L'Helvetia of St Gall* [1952] 1 Lloyd's Rep 12.

[97] *Glynn v Margetson* [1893] AC 351.

yield to business common sense.[98] Negotiated terms will prevail over any incorporated standard terms[99] subject to any overriding provision in standard terms.[100]

2.4. THE UCP 600 AS TRADE 'USAGES' AND 'CUSTOMS'

UK courts will not automatically apply the UCP as trade usages or customs, unless the letter of credit agreement itself incorporates the UCP rules. They are not considered applicable by reason of mercantile usage and they do not have the force of law.[101] In fact, there are circumstances where the UCP rule differs substantially from the UK national law. In *The Galatia*[102] parties to a sale contract were disputing whether a bill of lading with a notation as to the cargo being fire damaged after shipment, was legally clean or claused. Payment was via letter of credit, back-to-back credits in fact, as the sellers had procured the cargo from a third party and the buyers had also sold to a sub-buyer, with one credit subject to UCP and the other not. Justice Donaldson recognized that: 'Since 1962, virtually all banks have accepted [the UCP]'[103] but goes on to state that the UCP rule concerning clean shipping documents[104] 'fails to specify the time'[105] to which the notation clausing the document refers. The failure of the UCP, leaves open the possibility that a notation stating goods were damaged after shipment, would render the bill claused. Justice Donaldson decided this is not the position under UK law – bills are claused only if the notation refers to damage caused on or before shipment. He stated further that '[it] has not [been] found that it was a custom of the trade, and the contract does not provide, that the documents shall be such as to satisfy the UCP rules as to 'clean' bills of lading, which rules do not have the force of law. Furthermore, if there is ambiguity as to the meaning of those rules, that ambiguity should if possible be resolved in a way which results in the rules reflecting the position under general maritime and commercial law'[106].

Although lawyers representing the parties could use the UCP as persuasive material to support an argument being made, as was done in *The Galatia*, this could only be successful if the argument was based on a principle of national law, or another term of the contract itself. If the UCP are not incorporated, they would not be used as a method of establishing legal principles unless there is also a root in UK law or commercial practice. A more recent example of this is *Tecnicas Reunidas Saudia v. The Korea Development Bank*[107] which concerns a demand guarantee dispute and non-documentary conditions. Counsel for the defendant, when presenting an argument concerning the URDG,[108] referred the judge to passages in a textbook analysing non-documentary conditions under the UCP600 - the judge acknowledged that 'there was a similar provision there, though not identical'[109] and discussed both the textbook passages and the relevant cases on UCP 600. One can understand that the reason the judge acknowledged the UCP 600, was not because he was applying them as trade 'usages' or 'customs', but because the root of the legal point was a contractual term, in this case a rule in the URDG. This happened to be similar to a UCP rule, and thus the judge was willing to analyse the relevant UCP cases to aide in his decision regarding the URDG. It is noteworthy however, that the judge raised the following point: 'not simply regarding them as ordinary terms and conditions, and attributing to them the importance which is warranted. Here we are dealing with international rules which govern all relevant demand guarantees and where they are the same rules for all of them. That is as true for the URDG as it is for the UCP'[110]. Therefore, judges will not automatically or routinely apply the UCP as customs or usages. They will consider them as terms of the letter of credit contract if they have been formally incorporated into it.

2.5. DISPUTE RESOLUTION: ARBITRATION AND DOCDEX

It is possible to resolve documentary credit disputes by arbitration in the United Kingdom.[111] It is not clear whether this is relatively rare; although arbitration is faster and private, possibly more cost effective, most UK banks seem to

[98] *Antaios Compania Naviera SA v Salen Rederirna AB* [1985] AC191.
[99] *Adamastos Shipping Co v Anglo-Saxon Petroleum* [1958] 1 All ER 725; *Bayoil SA v Seawind Tankers Corpn, The Leonidas* [2001] 1 All ER (Comm) 392; *Homnurg Houtimport BV v Agrosin Pte Ltd, The Starsin* [2003] UKHL 12.
[100] *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2009] EWHC 3272 (TCC).
[101] *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495.
[102] *Ibid.*
[103] *Ibid* p. 508.
[104] This was rule 16 of the 1974 version of the rules, UCP 290. In the current rules, this is article 27 and concerns Clean Transport Documents.
[105] *M. Golodetz & Co. Inc. v Czarnikow-Rionda Co. Inc. (The Galatia)* [1980] 1 W.L.R. 495, 508.
[106] *Ibid* p. 509.
[107] *Tecnicas Reunidas Saudia for Service and Contracting Co. Ltd. v The Korea Development Bank* [2020] EWHC 968 (TCC).
[108] ICC Uniform Rules for Demand Guarantees (URDG 758) 2010 Revision, Publication No. E758E, ISBN: 978-9284202270.
[109] *Tecnicas Reunidas Saudia for Service and Contracting Co. Ltd. v The Korea Development Bank* [2020] EWHC 968 (TCC) para. 55.
[110] *Ibid* para. 56.
[111] See for example, *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64.

submit to the English courts' jurisdiction in the Governing Law and Jurisdiction Clauses of their standard contract terms.[112] None the less, it is evident that other dispute resolution methods are used by UK parties, depending on the complexity of the issue. UK parties have referred disputes to the ICC's DOCDEX process[113] and of course to arbitration. Arbitral tribunals will likely take a similar approach to the UCP as the English courts – if the rules are incorporated into a credit they will be applied and interpreted as other contract terms[114] and if they have not been incorporated, they will not be applied as 'trade usages' or 'customs'. Like the courts, tribunals will likely strive for a commercially realistic view of the issues before them and resolve them in a manner consistent with banking practice, but this does not necessarily mean that the UCP will be 'applied'. If a trade usage is to be applied, it must have achieved a certain level of notoriety and certainty and although this may be the case for individual aspects of commercial law, it is certainly by no means considered true for the entire list of UCP rules. Therefore, arbitrators will not apply the UCP as a 'trade usage' code automatically. As Professor Bridge has stated:[115] 'These usages do not have a supranational binding force in their own right, but are ultimately of binding force between the parties as a matter of implied agreement between them'.[116]

3. CONCLUSION

What the above Part II proves, is that the UCP 600 are integral to letter of credit operations in the UK. This is evidenced by the incorporation of the terms in the credit contracts of UK financial institutions. It also proves that much weight is placed on the UCP 600 and although not hard law, they are so universally applied that even authoritative texts such as Halsbury's Law of England, extensively refer to them as law. Furthermore, where they are applicable, considerable importance is placed upon them by the UK courts and they are recognised as governing principles. However, it is also clear that the UCP do not have the force of law, nor will they automatically apply as trade usages or customs. There needs to be a root in UK contract law for principles to develop in this area. This may match the UCP or it may not. The position seems to be simply, that because of the incorporation of the UCP in the vast majority of UK letters of credit, their application is almost universal. Their rules are so well known, so commonly used that their status is elevated to one of a similar standing to hard law. For example, if 99% financial institutions incorporate the UCP, then all 99% will need to refer to the UCP as governing rules in their disputes. Effectively, it doesn't matter that they are not officially 'law' – they are so universally applied by businesses that the industry itself has dictated that these are *the* [emphasis added] terms under which they operate. This recognition by the industry and by the courts is a deciding factor for determining whether they are successful, and it must mean that they are. We can conclude therefore, that the UCP 600 specifically, despite being a soft law instrument, are extremely effective as an example of international legal harmonization. Their universal application by the industry, leading to the frequent consideration by the courts must mean that they are successfully effective.

PART III

1. INTRODUCTION

With the issue of how the UK utilises the UCP 600 and the status of the rules confirmed, we now move on to specific current issues and developments. First, our attention turns to the recurring issues in letter of credit disputes of the past decade as well as to the issue of fraud which has been ongoing. We assess whether these matters are resolved in a manner consistent with the UCP 600. Second, we turn to new developments, specifically current attempts to digitised Trade Finance and to the effects of the COVID-19 pandemic. This part discusses the United Kingdom's position in these areas to determine whether these current and future problems are resolved in a manner consistent with the UCP 600. As we shall see, if they are, again it adds weight to our argument that the UCP are a successful effective example of international legal harmonisation.

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[112] See for example, Barclays Bank plc, *Barclays Terms and Conditions for Issuance of Import Letter of Credit,* Clause 6.20 available at: https://www.barclayscorporate.com/general-info/t-and-cs-for-issuance-of-an-import-letter-of-credit/ and Royal Bank of Scotland plc, *Corporate and Commercial Banking Trade Services Terms,* Clause 18.2 available at: https://terms.rbs.com/rbs/pdf/T-TST0710.pdf

[113] See for example, ICC Services Publication No. @18Bul2, *ICC Dispute Resolution Bulletin,* 2018, Issue 2, Extract, Dispute Resolution Publication Services, available at: https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf at p. 65 that confirms the use of DOCDEX by United Kingdom parties in 2017.

[114] *Royal Bank of Scotland v Cassa di Rispamario della Provincie Lombarde* [1992] 1 Bank LR. 251.

[115] In relation to the CISG and Incoterms, but the statement is equally correct here: MG. Bridge, *The International Sale of Goods,* 4th ed, Oxford University Press, Oxford 2017.

[116] *Ibid* para. 10.63.

2. RECURRING DISPUTES AND CURRENT DEVELOPMENTS IN TRADE FINANCE

2.1. RECURRING DISPUTES IN DOCUMENTARY CREDITS

Though fraud continues to be a recurring theme in court cases in the United Kingdom, when one looks at the most frequent types of disputes of the last decade, it is striking to note that issues surrounding the identity and relationship of the participating banks in a letter of credit transaction dominate. Invariably this is because there is a dispute concerning reimbursement as in *Deutsche Bank AG London v CIMB Bank Berhad*[117] and *Bank of Ireland v State Bank of India*[118] but there are also several cases dealing with the status of banks,[119] determining whether they are an issuing bank,[120] whether a bank is merely acting as advising bank or whether its status is elevated to confirming[121] and generally the relationship and obligations between the banks.[122] As to the status of banks, it is interesting to note that their position under transport documents has also been a topic, in particular the circumstances in which they can become a bill of lading holder.[123] A necessary step if a bank is looking to recoup losses once stuck with the shipping documents. One will also find several cases dealing with the intricacies of examination of documents under the credit,[124] including whether stamps are sufficiently satisfactory as signatures,[125] the period of presentation of documents,[126] the definition of transport document[127] and of course discrepant documents and the process of refusal of payment.[128] Lastly, though not directly concerning the documentary credit itself, there are disputes concerning injunctions to restrain banks from making payments under credits.[129]

Turning now to the issue of fraud and forgeries, though the main elements of the law in this area where decided some time ago in *The American Accord*[130] and the series of cases that followed,[131] the problem continues to raise questions in this last decade as shown by *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [132] and *Barclays Pharmaceuticals Ltd v Waypharm LP.*[133] Although *Sinocore* related to enforcement of a foreign arbitration award, the dispute between the parties was rooted in forged bills of lading being presented, stating an untrue date of shipment. In *Barclays Pharmaceuticals,* the dispute was again presenting fraudulent documentation under a letter of credit, this time invoices for goods that had never been ordered, as well as a false freight forwarder's receipt. It seems to be that the difficulty with documentary credits that gives rise to a steady flow of fraud disputes, is the susceptibility of hard copy documents. As we shall see below on the digitalization issue, perhaps this can be partly combated with increased use of electronic documents, where it could be more difficult for someone to manipulate their content.

2.1.1. RESOLUTION OF DISPUTES AND CONSISTENCY WITH UCP 600

[117] *Deutsche Bank AG London v CIMB Bank Berhad* [2017] EWHC 1264 (Comm).
[118] *Bank of Ireland v State Bank of India* [2011] NIQB 22 (though in this case the issue before the court concerned the correct forum for the dispute, the dispute itself concerned reimbursement).
[119] *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Iraq* [2017] UKSC 64.
[120] *Yunchai Dongte Special Purpose Automobile Co Ltd v Suisse Credit Capital* [2018] EWHC 2580 (Comm).
[121] *Fortis Bank SA/NV v Indian Overseas Bank* [2009] EWHC 2303 (Comm) and *Den Danske Bank A/S v Surinam Shipping Ltd* [2014] UKPC 10.
[122] *Societe General SA v Saad Trading* [2011] EWHC 2424 (Comm).
[123] *Standard Chartered Bank V Dorchester LNG (2)* [2014] EWCA Civ 1382.
[124] *Abani Trading Pte Ltd v BNP Paribas* [2014] SGHC 111.
[125] *Deutsche Bank AG London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm).
[126] *Ibid.*
[127] *Swotbooks.com Ltd v Royal Bank of Scotland Plc* [2011] EWHC 2025 (QB).
[128] *Bulgrains & Co Ltd v Shinhan Bank [*2013] RWHC 2498 (QB) and Fortis [2011] EWCA Civ 58.
[129] *Salam Air SAOC v Latam Airlines Groups SA* [2020] EWHC 2414 (Comm) and *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco SA* [2017] EWCA Civ 32.
[130] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168.
[131] See, for example, *Rafsanjan Pistachio Producers Co-operative v Bank Leumi (UK) plc* [1992] 1 Lloyd's Rep 513; *Czarnikow-Rionda v Standard Bank* [1999] 2 Lloyd's Rep 187*; United Trading Corp SA v Allied Arab Bank* [1985] 2 Lloyd's Rep 554; *Solo Industries Ltd v Canara Bank* [2001] EWCA Civ 1059; *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] EWCA Civ 1954; *Mahonia Limitd v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm); *Sirius Insurance Co v Fai General Insurance Ltd* [2003] EWCA Civ 470; *Banque Saudi Fransi v Lear Sigler Services Inc* [2006] EWCA Civ 1130.
[132] *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2017] EWHC 251 (Comm). See also RBRG Trading (UK) Ltd v Sinocore International Co Ltd [2018] EWCA Civ 838.
[133] *Barclays Pharmaceuticals Ltd v Waypharm LP* [2012] EWHC 306 (Comm). *See also Alternative Power Solutions Ltd v Central Electricity Board* [2014] UKPC 31.

If the UCP are incorporated into the credit, a court will strive to resolve the dispute in a manner consistent with the UCP. For example, in *Fortis Bank SA/NV v Indian Overseas Bank*[134] the court stated:

> 'In my view, a court must recognise the international nature of the UCP and approach its construction in that spirit…It is intended to be a self-contained code for those areas of practice which it covers and to reflect good practice and achieve consistency across the world. Courts must therefore interpret it in accordance with its underlying aims and purposes reflecting international practice and the expectations of international bankers and international traders so that it underpins the operation of letters of credit in international trade. A literalistic and national approach must be avoided.'[135]

Thus, where the UCP are applicable, across all the areas of difficulty identified above, the courts will strive to resolve the matter in a manner consistent with UCP and their underlying purpose, reflecting international standard banking practice. This is true of the arbitral tribunals as well. If the UCP are not applicable, the courts will turn to the common law, and as has been established earlier in this work, there may be situations where the UCP and common law position differ, in which case the matter is not resolved in a manner consistent with the UCP. However, central to both cases is giving effect to the commercial reality of the banking business, and since that it true of the UCP and true of UK contract law, one assumes that the two sources of law will overall, be mostly compatible with one another.

2.1.2. RESOLUTION OF DISPUTES AND CONSISTENCY WITH ICC RECOMMENDATIONS

It has been acknowledged that even when the UCP apply to a credit, they do not contain all the answers to potential disputes that may arise, particularly when considering the intention of the parties.[136] However, the approach by English courts to the supporting ICC documents (whether the Commentary[137], ISBP[138], DOCDEX decisions[139] or Banking Commission opinions[140]) for answers to disputes has been varied. For example, in *Fortis Bank S/NV v Indian Overseas Bank*[141] Hamblen J stated 'The [UCP600] commentary is a discussion of UCP 600 provided by those involved in its drafting. The comments made are of interest, but I do not consider that they have evidential status'.[142] On the other hand, Teare J in *Societe Generale SA v Saad Trading*[143] makes reference to the commentary in the course of his findings[144] and seems to take this into account. As it happens, in the same period Teare J in *Standard Chartered Bank v Dorchester LNG (2) Ltd* [145] also made reference to DOCDEX decision 303[146] when discussing article 16 of the UCP 600 despite neither party raising the decision. DOCDEX decision 303 was also extensively discussed by Judge Gore in *Bulgrains & Co Limited v Shinhan Bank*[147] as was DOCDEX decision 296[148] and utilized in the judge's reasoning. It is therefore possible to say that yes indeed, in the English courts (and, it can be assumed, that arbitral tribunals follow a similar approach) do indeed interpret and apply the UCP in a manner consistent with ICC recommendations. This is evidenced further by *Credit Industriel v China Merchant Bank*[149] where Justice David Steel extensively discusses[150] the ICC Banking Commission consultation on original documents which led to a policy statement released

[134] *Fortis Bank SA/NV v Indian Overseas Bank* [2010] Bus. L.R. 835.
[135] *Ibid* para. 29.
[136] See Lord Muskhill in *Royal Bank of Scotland plc v Cassa di Risparmio delle Provincie Lombarde* [1992] Bank L.R. 251, 256.
[137] International Chamber of Commerce, *Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group,* ICC Publication No. 680, Paris 2007.
[138] International Chamber of Commerce, *International Standard Banking Practice for the Examination of Documents under UCP 600 – ISBP,* Publication No.745E, Paris 2013.
[139] The DOCDEX system was established by the ICC in 1997 and provides a panel of three ICC experts to render decisions on documents submitted by disputing parties on documentary credits, collections and demand guarantees. It is a dispute resolution process resolving disputes arising under ICC rules governing letters of credit, collections and demand guarantees. These decisions are released periodically in volumes by the ICC for example, *Collected DOCDEX Decisions 2009-2012,* Publication No. 739E, Paris 2013.
[140] Similar to DOCDEX, the ICC Banking Commission issues opinions on queries presented to it concerning letters of credit, also issued periodically in volumes by the ICC for example, *ICC Banking Commission Opinions 2009-2011,* ICC Publication No. 732E, Paris 2012.
[141] *Fortis Bank SA/NV v Indian Overseas Bank* [2011] EWHC 538 (Comm); [2010] Bus. L.R. 835.
[142] *Fortis Bank SA/NV v Indian Overseas Bank* [2010] Bus. L.R. 835, para. 44.
[143] *Societe Generale SA v Saad Trading* [2011] EWHC 2424 (Comm); [2012] Bus. L.R. D29.
[144] *Societe Generale SA v Saad Trading* [2012] Bus. L.R. D29, para. 47.
[145] See *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2013] EWHC 808 (Comm); [2013] 1 C.L.C. 797.
[146] See *Standard Chartered Bank v Dorchester LNG (2) Ltd* [2013] 1 C.L.C. 797 at para. 62 where the judge refers to DOCDEX decision 303.
[147] *Bulgrains & Co Limited v Shinhan Bank* [2013] EWHC 2498 (QB) paras. 34-42.
[148] *Ibid* paras. 45-52.
[149] *Credit Industriel v China Merchant Bank*]2002] EWHC 973 (Comm).
[150] *Ibid* paras. 59-64.

on the issue.[151] The judge accepted that this reflected international standard banking practice and took guidance from a further Banking Commission paper on examination and waiver of documents.[152]

As to the ISBP, only a few cases have raised this. In *Fortis Bank SA/NV v Indian Overseas Bank*[153] it was raised by the claimants in presenting an argument about strict compliance[154] but not particularly discussed by the judge. By contrast, in *Deutsche Bank AG, London Branch v CIMB Bank Berhad*[155] the ISBP is raised by expert witnesses and counsel[156] but also extensively considered and discussed by Justice Andrew Baker[157] as are several Banking Commission opinions.[158] Despite it seldom being mentioned in the cases, there are academics who argue that although 'to date the status and effect of ISBP have not been examined in any reported decisions and therefore remain to be authoritatively determined'[159] it is simultaneously acknowledged that a similar approach to the Banking Commission opinions and policy statements will be taken: 'as time goes on it seems increasingly likely that English courts will regard them as having considerable weight.'[160] We can conclude therefore that once the UCP are applicable, adjudicating bodies in the UK may also consider the accompanying ICC documentation in interpreting the rules.

2.1.3. RESOLUTION OF FRAUD DISPUTES IN THE UNITED KINGDOM

Fraud has been a common issue across many jurisdictions for a while. It therefore requires a separate discussion to the other disputes noted above and we thus turn to it now.

The fraud exception in the UK has evolved from the American case *Sztejn v J Henry Schroder Banking Corp*[161] with the leading UK case on the issue being *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord).*[162] Here Lord Diplock stated the exception as follows: 'to this general statement of principle [autonomy] … there is one established exception: that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the bank … documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue.'

The essential elements that need to be established are what the court considers 'fraud' and the standard of proof required for the exception to operate.[163] There are two reasons why these elements are the most important. The first, is that letters of credit are the lifeblood of international commerce, a phrase often used to describe them in the English courts,[164] and as such, the courts are very reluctant to interfere with the operating integrity of the credit. The primary purpose of the credit is to provide assurance to international trading parties that payment is almost as good as guaranteed, should compliant documents be presented. The courts are unwilling to question this integrity, bar incredibly specific situations where important public policy considerations override the operation of credits, in case the valve allowing the lifeblood to flow should close. The second, is that even though there is an established exception in the law, to maintain the integrity of the credit, it must be seldom used. One way of ensuring its infrequent use, is by placing the standard of proof high, so that the exception cannot be used on a whim.

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[151] ICC Commission on Banking Technique and Practice, *The determination of an "Original" document in the context of UCP500 sub-Article 20(b),* 12.07.1999, available at: https://library.iccwbo.org/tfb/ps/The-determination-of-an-Original-document-in-the-context-of-UCP-500-sub-Article-20b.pdf

[152] This resulted in the ICC Banking Commission Recommendation *Discrepant Documents, Waiver and Notice,* 09.04.2002 available at: https://library.iccwbo.org/tfb/ps/Examination-of-Documents-Waiver-of-Discrepancies-and-Notice.pdf

[153] *Fortis Bank SA/NV v Indian Overseas Bank* [2009] EWHC 2303 (Comm).

[154] *Ibid* at para. 19 in relation to ISBP Publication No. 681.

[155] *Deutsche Bank AG, London Branch v CIMB Bank Berhad* [2017] EWHC 3380 (Comm).

[156] *Ibid* para.14.

[157] *Ibid* paras. 21-35.

[158] Opinion R718 (in *ICC Banking Commission Opinions 2009 - 2011*, ICC Publication No. 732E) and R599 (in *ICC Banking Commission Unpublished Opinions 1995 – 2004*, ICC Publication No. 660).

[159] M. Brindle and R. Cox *Law of Bank Payments* 5th ed, Sweet & Maxwell 2017, para. 7-006.

[160] *Ibid.*

[161] *Sztejn v Henry Schroder Banking Corp* 31 NYS 2d 631 (1941).

[162] *United City Merchants (Investments) Ltd v Royal Bank of Canada (The American Accord)* [1983] 1 AC 168.

[163] For a comprehensive overview of the law in this area see N. Enonchong, *The Independence Principle of Letters of Credit and Demand Guarantees,* Oxford University Press, Oxford 2011.

[164] See for example, Kerr L.J. in *R.D. Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146 , Griffiths L.J. in *Power Curber International Ltd v National Bank of Kuwait* [1981] 2 Lloyd's Rep. 394, p. 400, Donaldson L.J. in *Intranco Ltd v Notis Shipping Corp of Liberia* [1981] 2 Lloyd's Rep 256, p. 257, and Stephenson L.J. in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1981] 2 WLR 242, p. 253.

The standard of proof needed to evidence forgery is thus quite high and may differ according to the proceedings; at trial there must be 'particularly cogent evidence'[165] or 'strong corroborative evidence' upon which the court's 'only realistic inference to draw is that of fraud'.[166] For an interim injunction it must be seriously arguable that on the material available, the only realistic inference is fraud[167] although there are cases which have called for a higher degree of fraud, namely established fraud.[168] In any case, the criterion is high. As to the definition of fraud, if we return to Lord Diplock's statement, one is reminded that the exception applies where the beneficiary fraudulently presents documents that contain material representations of fact that to his knowledge are untrue. We are looking therefore, for a material misrepresentation[169] which can be in the documents or in the transaction and the beneficiary's knowledge of the fraud is also required, at the time documents are presented. So, even if the bank was aware of the fraud, it could not reject the documents. The key is whether the beneficiary was aware of the fraud at the time of presentation. Therefore, what a bank can and cannot do where fraud is alleged, depends more on the knowledge of the beneficiary than on its own.

To combat this position, banks may take it upon themselves to regulate the consequences within their credit terms. For example, HSBC Standard Trade Terms state[170] that if it is acting as confirming bank and has paid the beneficiary, if it is not reimbursed by the issuing bank in the transaction due to fraud, whether alleged or actual, then it must be reimbursed by the customer (applicant). A pre-condition of course, is that the customer is also required to promptly inform HSBC if they become aware of any fraud in relation to the goods or documents.[171] There is no mention however, as to its position if it were acting as issuing bank. RBS, in its Trade Services Terms states[172] its position bluntly: 'you will be liable to pay the bank even if a [c]laim is false or fraudulent' and 'all documents you present must be valid, genuine and not tainted by fraud'.[173] Barclays on the other hand, in its Terms and Conditions for Import Letters of Credit says nothing about fraud,[174] presumably leaving it up to the court to deal with the situation entirely. This is a delicate situation, if an issuing bank decides not to pay, it will have to establish fraud at trial when sued by the beneficiary, and actual fraud is required, not simply that the bank inferred fraud.[175]

We can conclude that disputes involving fraud are difficult to determine; the standard of proof is very high, and the exception has not been successfully used. The UK courts maintain the integrity of the credit and will only be convinced to accept non-payment by the bank in extremely rare circumstances. The law on the exception is there, but it is seldom used.

2.2. DIGITALIZATION OF TRADE FINANCE IN THE UNITED KINGDOM

Another issue of prime importance in the current climate is the UK and international attempts to digitise trade finance. The UCP 600 have been incredibly successful for paper-based letters of credit, but electronic alternatives have been an issue for a while, and the Covid-19 pandemic has brought this to the forefront. The ICC had considered the possibility of electronic aspects to trade finance when drafting the UCP 600 and included at the end a version for electronic presentation called the eUCP[176], envisioning at least part electronic presentation of documents under the credit. These have been updated[177] but even so the extent of digitalization in the banking and finance industry in the UK, in connection to letters of credit, is best described as varied. Although some banks are attempting to at least include electronic elements in their credit transactions as standard, others do not refer to the eUCP at all in their standard services terms.

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[165] *Enka Insaat Ve Sanayi AS v Banca Popolare Dell'Alto Adige SPA* [2009] EWHC 2410 (Comm), para 25.
[166] Per Ackner L.J. in *United Trading Corp SA v Allied Arab* Bank [1985] 2 Lloyd's Rep 554, 561.
[167] *Ibid.*
[168] For example, *Solo Industries Ltd v Canara Bank* [2001] EWCA Civ 1059; *Montrod Ltd v Grundkotter Fleischvertriebs GmbH* [2001] EWCA Civ 1954.
[169] *Pankhania v Hackney LBC* [2002] EWHC 2441 (Ch).
[170] HSBC UK Bank PLC and HSBC Bank PLC, *Standard Trade Terms,* 20.05.2020, available, for a variety of jurisdictions, including the UK, at https://www.gbm.hsbc.com/gtrfstt Clause 3.16.
[171] *Ibid* Clause 18.2 (j).
[172] Royal Bank of Scotland plc, *Corporate and Commercial Banking Trade Services Terms,* Clause 4.3 available at: https://terms.rbs.com/rbs/pdf/T-TST0710.pdf
[173] *Ibid* Clause 14.1.
[174] Barclays Bank plc, *Barclays Terms and Conditions for Issuance of Import Letter of Credit,* available at: https://www.barclayscorporate.com/general-info/t-and-cs-for-issuance-of-an-import-letter-of-credit/
[175] *Society of Lloyd's v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep 579.
[176] These are the *Supplement for Electronic Presentation Version 1.1– eUCP* included in ICC Publication No. 600, Paris 2007. 2023 saw the release of an updated eUCP, Version 2.1, ICC Publication No. 823E.
[177] Version 2.0 released in 2019: https://iccwbo.org/content/uploads/sites/3/2019/06/icc-uniform-customs-practice-credits-v2-0.pdf and Version 2.1 in 2023, ICC Publication No. 823E.

For example, HSBC in the bank's Standard Trade Terms[178] both refers to the eUCP as applicable rules: 'all [d]ocumentary [c]redits…will be issued subject to the [UCP]…and if required by HSBC, the [eUCP]'[179] and dedicates an entire clause[180] to electronic platforms which covers both electronic communication but also any documents provided to HSBC though such platform or other electronic means. The clause is quite extensive and deals both with the bank's relationship with its customer but also its relationship to any party providing documentation as an affiliate of the customer, notably dealing with excluding or limiting its liability if losses arise. This position is to be contrasted with Barclays Bank[181] and the Royal Bank of Scotland[182] for example, neither of which refers to the eUCP in their letter of credit terms and conditions and refer only to electronic communication[183] rather than anticipating electronic documents or platforms. Although the standard terms of these banks may not as a norm consider electronic aspects of letters of credit, it does not mean that the banks are not considering electronic aspects on a practical basis and implementing these transactions on an infrequent basis. Barclays for example claimed[184] in September 2016 to be the first organization, along with the start-up company Wave, to execute a global trade transaction, a letter of credit, using blockchain technology. In November 2020 Barclays further announced[185] that it is working with CGI to implement the CGI Trade360 platform which will provide end-to-end global trade finance solutions for its UK and world clients. In May 2018 HSBC and ING similarly announced a live trade finance transaction on blockchain platform.[186] Banks are therefore embracing innovative technology in this field and digitalization is clearly coming. What seemed to be the issue causing delay was the lack of a legal framework in the UK to support these electronic transactions. With that in place, and the technology working effectively and efficiently, one would assume that the use of electronic documentation and the eUCP would become widespread, and it would be commonplace to see this in the banks' standard terms and conditions as the normal practice.

To this end, there is a deliberate and strategic effort in the UK to support digitalization in the trade finance arena. The Law Commission[187] was asked by the Government to make recommendations for reform of the law, allowing legal recognition of electronic trade documents such as bills of lading. The Commission acknowledged[188] that it is increasingly feasible for trade to take place through electronic means because of the development of technologies supporting the transaction in this form. However, if the law was not reformed, then its continued focus on tangible documents would mean that it lags behind technology. The Commision's paper not only included provisional proposals to allow electronic documents to have the same effect in law as their paper equivalents, but also provided a standalone draft Bill[189] which after debate in Parliament and several amendments, became law in the UK as the Electronic Trade documents Act 2023, in force on 20 September 2023. The issues are too complex to outline concisely in the present report, but the crux of the matter is that for electronic documents to be routinely and widely adopted in trade, they must be possessable and that means that:

- it is a document commonly used in trade, transport, or the finance thereof; examples listed in the Act are bills of lading; bills of exchange; promissory notes; ship's delivery orders; warehouse receipts; marine insurance policies; cargo insurance certificates; and warehouse receipts;
- the document and the system on which it is held has the ability to be exclusively controlled by one person at any one time and
- this control must be fully divested on transfer.

[178] HSBC UK Bank PLC and HSBC Bank PLC, *Standard Trade Terms,* 20.05.2020, available, for a variety of jurisdictions, including the UK, at https://www.gbm.hsbc.com/gtrfstt
[179] *Ibid* Clause 2.1.
[180] *Ibid* Clause 20.
[181] Barclays Bank plc, *Barclays Terms and Conditions for Issuance of Import Letter of Credit,* available at: https://www.barclayscorporate.com/general-info/t-and-cs-for-issuance-of-an-import-letter-of-credit/
[182] Royal Bank of Scotland plc, *Corporate and Commercial Banking Trade Services Terms,* available at: https://terms.rbs.com/rbs/pdf/T-TST0710.pdf
[183] *Ibid* for RBS Clause 15.2.4 with regards to notices and Clause 17.8 for marketing and for Barclays Bank see *Barclays Terms and Conditions for Issuance of Import Letter of Credit,* available at: https://www.barclayscorporate.com/general-info/t-and-cs-for-issuance-of-an-import-letter-of-credit/ Clauses 5.2 and 5.3 on electronic messaging systems which refers to electronic documents but the clause itself is about notices, communications and documents.
[184] See https://www.barclayscorporate.com/insights/innovation/blockchain-revolution-in-trade-finance/
[185] See https://home.barclays/news/press-releases/2020/11/barclays-announces-new-trade-finance-platform-for-corporate-clie/
[186] See https://www.hsbc.com/news-and-media/media-releases/2018/hsbc-trade-blockchain-transaction-press-release
[187] See https://www.lawcom.gov.uk
[188] See https://www.lawcom.gov.uk/project/electronic-trade-documents/
[189] *Ibid* p.175.

The anticipated benefits are, lower operating costs for the parties involved allowing greater access to finance for SMEs, greater efficiency in trade processes due to decrease in the time required for paper equivalents, increased security and compliance due to greater transparency and traceability of electronic documents and the obvious environmental advantage with reduction of paper use.[190]

Thus, through a combination of the banking industry's desire to incorporate innovative technological solutions into their business, and the law finally catching up with this desire in the UK, it is suggested that despite talking about electronic documents for some decades, the idea has finally become a reality, and that their widespread use is likely to be the next stage of development. Lloyd's Banking Group claimed[191] the first digital trade transaction under the Act on 20 September 2023 on behalf of Matalan Retail Ltd via Enigio's trace:original solution. This was a 'digital promissory note…issued by Matalan to accept liability when settling a documentary collection for the purchase of garments from one of its suppliers'.

We must also note that on an international level, considerable progress has been made by the ICC when it released, in October 2021, the Uniform Rules for Digital Trade Transactions (URDTT)[192]. These envision an electronic only version of trade transactions, transactions that are totally digitized[193] (whereas the eUCP envision a hybrid electronic-paper transaction). They are neutral to the type of technology used[194] and are similar to the UCP 600 in that they are applicable if incorporated[195]. They are somewhat of a cross between the ICC's Incoterms and the UCP 600 in the sense that they refer to the trade transaction as a whole, both aspects of sale and aspects of finance[196]. Although again, it is not possible to evaluate these new rules extensively in the current report, it is important to note that the industry is seeing a great push by legislators and regulators, both in terms of hard law and soft law, to move this issue forward. If the URDTT are universally applied and have the same success at the UCP, these too would be an example of soft law being effective at harmonising legal principles.

2.3. THE COVID-19 PANDEMIC EFFECT ON UCP 600 ISSUES

Even before the COVID-19 pandemic, and as we saw above, banks were beginning to adjust to the digital world. Even so, the vast majority of letters of credit depended on the existence of physical documents so when the pandemic started, the question became: how to conclude a trade transaction if you cannot meet parties face to face and cannot access physical documents? Suddenly, digitization in the industry became a priority – the three main aspects of concern in the UK are likely to be force majeure (UCP Article 36), signatures for documents (Article 3) and of course delivery of documents (Article 35) but as expected, there are very few cases dealing with the covid fallout. Overall, however, the issue the industry had was how to move quickly to a fully digital system, particularly as there is a lack of standardization of electronic documents and no interconnecting system across the electronic platforms. Convergence of the physical, financial and informational supply chains is needed, bringing together the parties involved in the trade transaction (traders, insurer, transporters and banks) and solidifying them in a coherent system. The pandemic forced the issue, and this had led to banks actively searching for digital solutions,[197] the government taking steps to ensure the flow of trade[198], and policy makers making sure the law is keeping pace.[199]

One case of note is *Salam Air SAOC v Latam Airlines Groups SA.*[200] Although not the traditional letter of credit set up, the case is none the less important. Under a lease agreement, a passenger airline company had leased three aircraft from a company and provided letters of credit to secure the payment of rent. The obligation to pay was 'absolute and unconditional irrespective of any contingency whatever'. Due to covid-19, passenger flights were prohibited, the

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[190] *Ibid* p.139.
[191] https://www.lloydsbankinggroup.com/media/press-releases/2023/lloyds-bank-2023/lloyds-bank-completes-first-digital-trade-transaction-under-new-.html
[192] International Chamber of Commerce, *Uniform Rules for Digital Trade Transactions, Version 1.0, URDTT,* ICC Publication No. KS102E, Paris 2021.
[193] International Chamber of Commerce, *Uniform Rules for Digital Trade Transactions, Version 1.0, URDTT,* ICC Publication No. KS102E, Paris 2021, p.4.
[194] *Ibid.*
[195] URDTT 2021, Article 1c.
[196] URDTT 2021, Articles 4 and 5.
[197] An indication of which is of course the ICC's Guidance paper on the impact of COVID-19 on trade finance transactions issued subject to ICC rules available at https://iccwbo.org/content/uploads/sites/3/2020/04/2020-10-the-impact-of-covid-19.pdf
[198] See for example the UK Government response in July 2020 in *The Covid-19 pandemic and international trade* available at https://publications.parliament.uk/pa/cm5801/cmselect/cmintrade/286/28602.htm
[199] For example, the Law Commission's project on Electronic Transport Documents available at: See https://www.lawcom.gov.uk/project/electronic-trade-documents/
[200] *Salam Air SAOC v Latam Airlines Groups SA* [2020] EWHC 2414 (Comm).

airline company stopped paying rent and returned the aircraft. They then applied for an injunction to stop the aircraft provider from making a demand under the credits. It was decided that the lease agreements have not been frustrated by covid-19 and because the provision to pay was absolute and unconditional, the restrictions of air travel did not terminate the leases. The judgment evidences how reluctant courts are to interfere with the integrity of the credits, even though the root of the dispute is the lease agreements. The lesson to be learnt here, is that solutions to unexpected problems are to be found in the contract themselves. Article 36 of the UCP on force majeure has a role to play here. It states that a bank assumes no liability or responsibility for the consequences arising out of interruption of its business by Acts of God – the question becomes whether the pandemic is considered such an event and could potentially lead to the credit expiring before the bank is able to resume business. This is coupled with Article 35 where the bank assumes no liability for the consequences of the delay of delivery of documents. How does this affect the expiry of the credit or its time limit to examine documents under Article 14 or indeed its responsibility to return documents under Article 16? The crux of the matter is, that once we have a default under one article, we will start having defaults under others as well, as the obligations are interconnected. Thus, an event such as the pandemic must either obliterate all responsibilities, or in the alternative, the credit must carry on as usual.

What the pandemic has taught us, is that we need rules that are flexible, giving parties options as to what they can do when unexpected events take place. This is perhaps something missing from the UCP – their effectiveness and success in the current climate would be elevated if these new, unprecedented circumstances were further considered, evaluated and solutions incorporated.

3. CONCLUSION

We have seen that despite the success of the UCP, there continue to be recurring issues. The fact that they are recurring likely means that we do not yet have a satisfactory solution to them. We must therefore question whether a revision of the UCP can and should incorporate such solutions. If so, and again if universally applied, this would add weight to the argument that the UCP are an effective example of legal harmonization. Furthermore, we considered the current topical issues of digitalization and effects of the Covid-19 pandemic. These issues are linked. As the industry and regulators, both in the UK and internationally are formulating rules to allow for purely electronic trade transactions, we must question the future of the UCP, which rely on paper-based documents. Although new law on this is in force in the UK, we must acknowledge that the purpose of a letter of credit is to facilitate an *international* [emphasis added] trade transaction. It is of vital importance therefore, that the international trading parties and financial institutions agree on what is or is not permissible in terms of digital processes. The scenario would also ideally require the laws of the nations involved to be uniform. This is the reason the UCP are successful – they provide uniform rules for an international transaction conducted by international parties. Electronic alternatives must do the same and the URDTT are a first step in making that a reality. Nonetheless, the transition to a fully digital transaction, as explained above, is varied. So, the UCP 600 continue to play a vital role in regulating letters of credit currently. How fast the industry will move is anyone's guess; Covid-19 has caused concerns; the industry is adjusting and the UK government has provided legal solutions to aid this adjustment. However, the future continues to be uncertain. We go through periods of relative calm with the pandemic and then aggressive peaks when new variants arise. Similar future issues may be on the horizon, and we need a system that can absorb the knocks and push forward. We can therefore conclude that although the UCP 600 are an effective example of harmonized legal principles through soft law, to maintain this success they must be updated to make sure that they consider the new reality in which businesses are operating.

PART IV

1. CONCLUSION: THE UCP AS AN EXAMPLE OF EFFECTIVE LEGAL HARMONIZATION THROUGH SOFT LAW

We come now to the concluding part of this report to consider whether the above information convincingly determines that the UCP is a successful example of effective legal harmonization.

In the opinion of the author, the UCP are perhaps the best example of effective international legal harmonization through soft law. There are several reasons for this, but the most prominent should be how extensively they have been

adopted by financial institutions across the globe.[201] Then in turn, whether adopted as part of national law or not, they are so frequently referred to in case law that they can be seen as a universal symbol of legal harmonization. Linked to the widespread use is the fact that they are drafted by a body compromising of professionals in the field, on a practical level, including bankers, traders and lawyers. This means that they are highly accessible by the parties using them, so of course they should be widely adopted. The author has often stated the incredible position of the UCP in prior research and even boldly suggested that the rules are so effective, that they should regulate exceptions to autonomy.[202] In fact, this research has gone so far as to suggest that despite protestations that the rules do not deal with fraud, Article 34 seems to suggest otherwise and this is a positive development if accepted:

> 'Instead of searching on a case-by-case basis for the exceptions, accepting the UCP [Article 34] direction will provide a main legislative framework from which the courts can extend, clarify and amplify the requirements. It is not submitted that the UCP is the be all and end all; simply that it is a good starting point and most importantly, will result in a unified and coherent approach to all letters of credit no matter the jurisdiction'.[203]

The author has also argued that to maintain letters of credit as the 'lifeblood of international commerce' they must run 'on up-to-date and harmonised rules [which] is what pumps the blood of international commerce.'[204] In other words, if credits are the lifeblood of international commerce, they can only run successfully if they run on a basis of harmonised rules, and this is provided to us in the form of the UCP. These go hand in hand; we should not see letters of credit without seeing the UCP, and in the rare scenario that they are not applicable, that is an exceptional event. The UCP are not merely an example of effective legal harmonisation, they are much more than that. They are the cornerstone of international trade. Without the money in place, goods will not be traded. If we were to rank the contracts, the credit comes first – if the credit is not opened, the seller is under no obligation to procure goods.[205] That means, that the regulation of credits through the UCP is paramount – trade depends on finance, and therefore the UCP are the key to effective international trade.

As we have seen above, the opinion is supported by key institutions in the UK. Courts regularly refer to the UCP and indeed to the supporting ICC documentation, when determining disputes. Although the UCP do not have the force of law, they are so widely incorporated into letters of credit that the courts and arbitral tribunals find that they must refer to the rules because they form part of the contract. We have also seen that doctrinal authorities and indeed Parliament can refer to soft law when legislating or proposing legislation, which means that it is permissible in this jurisdiction to form legislation based on soft law or influenced by soft law. This has not happened in the case of the UCP specifically, but in truth, it is argued that it did not need to happen. Since the financial industry itself has overwhelmingly embraced the UCP, they are applicable whether law or not. We can only conclude, that the UCP have been extraordinarily successful as an effective example of international legal harmonization.

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[201] The use of SWIFT (Society for Worldwide Interbank Financial Telecommunication see: https://www.swift.com/about-us/swift-traffic-highlights) as the global provider of secure financial messaging services is so extensive, used by more than 11,000 financial institutions in more than 200 countries and territories around the world, that the applicability of UCP is almost universal.

[202] A.M. Antoniou, 'Fraud, exceptions to autonomy and the UCP 600', *Journal of International Banking Law and Regulation*, 2013, 28(9), pp. 339-346.

[203] *Ibid* p. 346

[204] A.M. Antoniou, 'New rules for letters of credit: time to update the UCP 600', *Journal of International Banking Law and Regulation*, 2017, 32(4), pp. 128-140 at p. 139.

[205] The buyer's duty to open the letter of credit is a condition precedent to the seller's obligation to ship goods: *Trans Trust SPRL V Danubia Trading Co* [1952] 2 QB 297 and *Soproma SpA v Marine and Animal By-Products Corp* [1966] 1 Lloyd's Rep 367.