THE INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS,

ICC Publ. Nr. 645

("ISBP")

The role of the ISBP in the world of documentary credits

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM Degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM Degree dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

I dedicate my thesis to Emma and Tom and thank my supervisor Professor Richard Christie.

1 INTRODUCTION, METHODOLOGY OF RESEARCH AND STRUCTURE OF THIS PAPER

1.1 General introductory remarks

The heart of this paper deals with the so-called “International Standard Banking Practice” (ISBP), its role in the world of documentary credits and in banking and trading business as a whole, its legal standing and its content.[1]

Despite the fact that the ISBP is expected to play an important role in the legal area of documentary credits, the ISBP has not yet been legally commented on in recognized academic legal circles.

It is however an area that is significantly important enough to warrant examination and critique. This thesis is an attempt to make a contribution in this respect.

1.2 Methodology of research

The ISBP is a very recent document, which was only published in the beginning of the year 2003. Accordingly the research sources for this paper originate largely from the internet. They are primarily found on the website of DC-PRO, an International Chamber

[1] “The International Standard Banking Practice for the Examination of Documents under Documentary Credits, ICC Publ. Nr. 645”.

of Commerce (ICC) initiative to provide the reference materials for documentary credit practitioners.[2]

Concerning the legal background and framework in which the ISBP is embedded, and its interconnection with existing provisions of national and international law, as well as national jurisdiction and international arbitrational jurisdiction, academic articles, literature and legislation were also consulted and drawn on.

1.3 The Structure of this Paper

The first part of the paper will provide basic legal information on the area of documentary credit transactions dealing with this form of payment in international trade in its simplest form and the relationship of the parties involved. This rudimentary understanding of documentary credit transactions is a precondition to discussing the main topic of this paper, namely the "International Standard Banking Practice".

Part two of the paper is concerned with the examination of the documents and the principle of strict compliance. As the examination of the documents by the banks is where the ISBP comes into play directly, this area will be looked at in greater detail so as to provide a direct transition to the discussion of the main topic, covered in part three. A brief comment on the reason for the need for clarification and specification follows.

[2] This website is located at the URL http://www.dcprofessional.com. The majority of the documents referenced in this paper are found more specifically at http://focus.dcprofessional.com.

The ISBP is covered in detail in the third part of the paper.

First, a short historical outline is given. The legal nature of the publication is then explained and the direct derivation from sub-Article 13(a) of the UCP is dealt with. Thereafter the provisions of the ISBP are examined in detail. Attention is focused on particular items of the ISBP, selected for their importance, in order not to exceed the frame of this paper.

The paper concludes with some thoughts on the expected future relevance of the ISBP to the world of documentary credits.

2 BASIC LEGAL OVERVIEW OF DOCUMENTARY CREDIT TRANSACTIONS

2.1 The Instrument of Documentary Credits

The documentary credit is an instrument of payment primarily used in international trade.

The main concern of the exporting party in an international trade agreement is to secure the receipt of payment in due time. The primary interest of the importing party is to ensure the timely receipt of the ordered goods or other performance agreed on in the compliant condition.

In international business transactions, the parties involved are confronted with additional, higher risks than those faced in "normal" national transactions. These risks may be related to the foreign business partners themselves,[3] the economical and political situation of the importing country, the available exchange reserve of this country, or the available means of transport. It is therefore of great importance that the parties take early, precautionary measures to safeguard themselves against these potential risks as far as possible.

To minimize the risks inherent in an international transaction the parties of the underlying contract will frequently agree that payment is to be made by means of a documentary credit.[4] Compared to other means of payments available for use in international trade, such as advance payment,[5] clean payment,[6] payment by means of a bill of exchange,[7] documentary collection,[8] where the risks are unequally divided between the parties, documentary credit payment provides that the risks are well-balanced between the parties of the underlying contract. In practice, the decision as to which payment form is agreed upon between parties depends additionally on the relevant market-condition, the competition and the respective negotiating position and skills of the parties involved.

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[3] In particular the creditworthiness of the importing party.

[4] The underlying contract will often be a contract of sale, but may also be any other nongratuitous agreement. For the purpose of this paper, reference will be made mainly to underlying contracts of sale.

[5] With this form of payment, the buyer must pay the purchase price before the goods are shipped to him.

[6] The sale is on open account and on consignment, meaning that the seller has to perform in advance, shipping the goods on credit terms.

[7] The bill may be either a sight or a term bill. The seller who receives the bill has an additional right against the buyer to payment separate from his claim in terms of the underlying contract.

[8] In a simple form, under means of payment by documentary collection the seller presents documents to the bank, which will only release the documents to the buyer on simultaneous payment. However, the seller does not obtain an independent right to payment against the bank.

Virtually all of today's documentary credit transactions are subject to the Uniform Customs and Practice for Documentary Credits (UCP), drawn up by the International Chamber of Commerce (ICC).[9] The ICC has issued these rules with a view to ensuring uniformity regarding the process of documentary credit transactions. To date, banks have adopted these rules almost worldwide.[10]

According to Article 2 of the UCP a documentary credit is defined as

> "any arrangement ... whereby a bank ('Issuing Bank'), acting at the request and on the instructions of a customer ('the Applicant') or on its own behalf,
>
> i. is to make a payment to or to the order of a third party ('the beneficiary'), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary, or
> ii. authorises another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)), or
> iii. authorises another bank to negotiate, against stipulated document(s), provided that the terms and conditions of the Credit are complied with."

To establish a basis for the discussion about the ISBP one has to first understand the course of the transaction under a documentary credit. In this context one can confine to dealing with the simplest form of a documentary credit transaction, described below.

A seller in country A and a buyer in country B enter into a contract of sale agreeing that payment is to be made by means of documentary credit. The buyer/applicant must

[9] The current revised version of the UCP is the UCP 500. The UCP 500 came into effect on 1 January, 1994. Concerning the legal qualification of the UCP, see below at paragraph 4.1.2.
[10] The banks adopt the UCP rules by incorporating a clause in their application forms for the issuing of a credit providing for the application of the UCP.

accordingly request its bank,[11] the issuing bank to issue a credit. By issuing the credit and advising the particulars thereof to the seller/beneficiary, the issuing bank undertakes to pay the beneficiary against delivery of documents stipulated in the credit.[12] The beneficiary must present the documents, required by the credit and conforming with the stipulations in the credit, to the issuing bank before expiry of the credit. If the documents are in order, the beneficiary will be paid by the bank. The issuing bank will then deliver the documents to the applicant, who will in turn reimburse its bank, the issuing bank.

On review of this basic model one can already identify various key advantages of this method of payment. Firstly the beneficiary receives payment from the issuing bank, detached from its relationship to the buyer, against submission of the compliant documents. Payment is thus independent from the inability or reluctancy of the applicant to make payment. Secondly, the applicant designates which documents have to be produced by the beneficiary to the issuing bank. The applicant accordingly benefits from the fact that payment by its bank, the issuing bank, is only effected after the stipulated documents authorising the disposal of the goods and/or supply proof of the orderly condition of the goods have been presented.

The relationship between the applicant, the beneficiary and the issuing bank will now be discussed in greater detail.

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[11] The gender-neutral terminology is used throughout the paper.

[12] The UCP uses the terms "applicant", "beneficiary" and "issuing bank" when referring to the buyer, the seller and the bank which issues the credit. See, for example, UCP Article 2, quoted above.

2.2 The Relationship between the parties

In its simplest form, as described above, only three parties are involved in the documentary credit transaction: the applicant (buyer), the beneficiary (seller) and the issuing bank.[13] Their relationships have different legal grounds and must accordingly be examined seperately.

2.2.1 The Relationship between Applicant (Buyer) and Beneficiary (Seller)

The applicant and the beneficiary will necessarily conclude a contract of sale.[14] Their contractual relationship is governed by the contract and the applicable law.

Typically, the two parties will include a clause in this contract providing for payment to be made by means of documentary credit.

> "The beneficiary's right to demand a letter of credit, and the nature and terms of the credit are all derived from the so-called 'documentary-credit clause' of the contract of sale. Insofar as the contract of sale does not expressly stipulate the terms of the credit fully, such terms may clearly be incorporated either tacitly or ex lege where applicable."[15]

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[13] Note that several additional parties in various capacities (mainly banks) can be and usually are involved in the transaction. However, for the purpose of understanding the role of the ISBP in documentary credit transactions, the discussion of these additional parties is redundant.

[14] The contract between the applicant and the beneficiary may also be another type of international trade agreement.

[15] Hugo C *Documentary Credits* (1996) at 21.

2.2.2 The Relationship between Applicant and its bank (Issuing Bank)

To comply with the documentary-credit clause the applicant has to enter into a contractual relationship with a bank. The applicant will request its bank, the issuing bank, to issue a letter of credit. The relationship between the applicant and the issuing bank is governed by a contract of mandate between them.

> "The contract of mandate can be described as a contract in terms of which the mandatary (in this case the issuing bank) undertakes to perform a commission or task for the mandator (in this case the applicant), either gratuitously or for reward."[16]

Normally, the applicant will submit a standard application form indicating to the issuing bank, among other possible contents, the beneficiary, the amount of the credit (and currency), the nature of the credit, the expiry of the credit, the description of the goods, the documents to be tendered by the beneficiary, and shipment and insurance details. The standard application form will also contain a clause incorporating the UCP which therefor forms part of the binding content of the contract between the applicant and the issuing bank.

The issuing bank, as mandatary, has a duty to give advice regarding content and risks of a documentary credit to its unacquainted customer, the applicant.

Having accepted the application, several duties arise for the issuing bank.

> "The bank undertakes to issue the credit timeously in accordance with the client's instructions, to receive and inspect the documents tendered by the beneficiary, to reject non-conforming documents, to accept and to pay against conforming

documents, and to present the received documents to the client against payment by the client."[17]

The applicant has to pay the issuing bank's fee for the proper performance of the mandate, namely issuing the credit and proceeding according to the terms of its client's mandate. Furthermore, the applicant undertakes to accept conforming documents and to pay the amount of the credit (reimbursement of the mandatary's expenses) to the issuing bank against submission of the required documents.

2.2.3 The Relationship between Issuing Bank and Beneficiary

According to Article 9 of the UCP an irrevocable credit constitutes a definite undertaking on the part of the bank to pay, accept and pay a bill drawn in terms of the credit, or to negotiate a bill drawn in terms of the credit, provided the stipulated documents are presented and the terms and conditions of the Credit are complied with.

The issuing bank's obligation towards the beneficiary is abstract and independent from the relationships between the applicant and beneficiary (determined by the underlying contract of sale) and between itself and the applicant (contract of mandate). This so-called "principle of independence" is perhaps the most important principle of documentary credit transactions under the UCP. It can be derived from Articles 3 and 4 of the UCP.[18]

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[16] Oelofse A *The Law of Documentary Credits in Comparative Perspective* (1998) at 112 n 2, 3.
[17] Hugo op cit n 15 at 31 n 153.
[18] UCP Article 3 states that "a. Credits, by their nature, are separate transactions from the sales of other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit.

The issuing bank is bound by its relationship with the beneficiary from the time of "issuance" of the credit.[19]

The nature of the theoretical legal foundation of the relationship between the issuing bank and the beneficiary is addressed variously in different jurisdictions and can be disregarded in the discussion of the ISBP. Rather, one has to emphasize the fact that the undertaking of the issuing bank is "conditional in the sense that the bank is only obliged to perform against presentation of conforming documents."[20] The beneficiary must comply strictly with the requirements of the letter of credit in order to be entitled to payment thereunder. This is the core statement of this principle of strict compliance discussed in the following section.

Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary. b. A Beneficiary can in no case avail himself of the contractual relationships existing between the banks or between the Applicant and the Issuing Bank." UCP Article 4 stipulates that "[i]n Credit operations all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate."

[19] The precise meaning of the unclear term "issuance" is yet to be interpreted by the courts.

[20] Hugo op cit n 15 at 31.

3 THE EXAMINATION OF THE DOCUMENTS AND THE PRINCIPLE OF STRICT COMPLIANCE

3.1 The process when documents are presented to the Issuing Bank

UCP Articles 13 and 14 detail the steps to be taken when the stipulated documents are presented by the beneficiary under a letter of credit. They further detail the actions that must be taken by the bank.

Firstly the bank has to examine the documents. It is required to inspect the documents and check them against the requirements – if necessary as interpreted – set out in the letter of credit. The documents must be examined within a reasonable time (after receipt), which may not exceed seven banking days. If a notice of refusal is to be sent, this must also be carried out within that reasonable time.

Once the documents have been examined, the bank has to determine whether or not they appear on their face to be in compliance with the terms and conditions of the credit. If the bank determines that the documents do comply with the terms and conditions of the credit, it is obligated to take up the documents and effect settlement. If, however, the bank considers the documents to be non-conforming, it may either refuse the documents and provide notice of refusal to the beneficiary, or seek the applicant's waiver of the discrepancies. Even if the applicant conveys the waiver of discrepancies, the bank is still entitled to decide not to waive the discrepancies and to refuse the documents.

3.2 Principle of strict compliance

It is a basic rule of the law of letters of credit that the documents presented under the credit have to comply strictly with the requirements set out in the credit.[21] This fundamental principle governs the relationship between the applicant and the bank, between the bank and the beneficiary and the inter-bank relationship. Only if the produced documents comply strictly, is bank the obliged to make payment to the beneficiary and entitled to reimbursement from the applicant.

The principle of strict compliance can be found in Article 13(a) of the UCP which will be discussed in detail below.[22]

3.3 The need for clarification and specification

The number of equiries raised to the International Chamber of Commerce regarding the interpretation of UCP articles had been increasingly growing during the years preceding the publication of the ISBP. This reflected the lack of guidance for the participants of letter of credit transactions. Undoubtedly the usage of the UCP requires knowledge additional to that referred to in the UCP rules themselves. In particular, a number of terms of the UCP are open to interpretation, such as the term "international standard banking practice" used in UCP sub-Article 13(a). Different interpretation will always lead to nonuniform results depending on the interpreting party, court or arbitrator involved.

[21] Oelofse op cit n 16 at 271.
[22] See paragraph 4.1.3 below.

More than 70 percent of all documents originally presented under a letter of credit had been found discrepant before the publishing of the ISBP. As this could be largely traced to the variety of interpretations of UCP articles, it was evident that the market required some educational guidance in this area. As the ICC is the drafting institution of the UCP, it is logical to look to this body for assistance with dealing with the UCP in practice. This assistance emerged in the form of the ISBP, as discussed below in some detail.

4 THE ISBP

4.1 The nature and justification of the ISBP

4.1.1 Development of the ISBP

In 1996 the International Financial Services Association (IFSA), a trade association in the United States dedicated to the international transactions processing areas of banks and other financial institutions, published a document called "Standard Banking Practices for the examination of Letter of Credit Documents". The great success of this publication in reducing the number of disputes in letter of credit transactions between banks in North America and their correspondent banks around the world gave impetus to the ICC to developing a publication that would be used worldwide.

In the year 2000 a task force of the ICC Banking Commission was established to document international standard practice for the examination of documents presented under documentary credits.[23] To this end national committees and ICC members were asked to submit checklists on how they examined documents in their banks. The ISBP is also a summary of all important past Decisions of the ICC Banking Commission on discrepancies and incorporates ICC Opinions,[24] DOCDEX cases[25] and ICC Banking Commission Policy Statements.[26] Court decisions which were not specific to a unique set of circumstances were also taken account of.

Once drawn up, the ISBP was subsequently approved by the Banking Commission at its meeting in October 2002. It was published at the beginning of the year 2003.

The task force had to proceed diligently to ensure that the ISBP-publication would be consistent with the UCP as well as the Opinions and Decisions of the ICC Banking Commission.

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[23] Known as the "ICC Commission on Banking Technique and Practice".

[24] Official ICC Opinions are responses of officers of the ICC Banking Commission to questions and issues raised by bankers, exporters, importers, shipping companies, freight forwarders, and lawyers that are subsequently ratified at ICC Banking Commission meetings and published in journal form as well as on-line (at http://focus.dcprofessional.com).

[25] DOCDEX is an ICC dispute resolution system. DOCDEX decisions are decided by ICC expert panels. They have not been formally approved by the ICC Banking Commission and do not have the force of law. These decisions can be accessed on the URL http://focus.dcprofessional.com.

[26] The ISBP's reliance on these Policy Statements is evidenced in, for example, Provision 35, which contains the express recommendation to have regard to a specific ICC Banking Commission Policy Statement. Provision 35 reads "[t]he ICC Banking Commission Policy Statement, document 470/871(Rev), titled 'The determination of an "Original" document in the context of UCP sub-Article 20(b)' is recommended for further guidance on originals versus copies." See also below at paragraph 4.4.14, where this Provision is revisted.

4.1.2 Legal Nature of the ISBP

> "The ISBP, as it is more commonly called, is a practical complement to UCP 500, ICC's universally used rules on documentary credits. Although it does not amend the UCP, it explains, in explicit detail, how the rules are to be applied on a day-to-day basis. As such it fills a needed gap between the general principles announced in the rules and the daily work of the documentary credit practitioner."[27]

As the ICC has no legislative power neither the UCP nor the ISBP can be regarded as legal statutes. The UCP is rather regarded as a set of model contractual terms comparable to terms and conditions which become binding only when the parties agree to make them part of their contract.[28]

The ISBP is an official ICC publication. It can be viewed as an expert opinion on the question of what amounts to international standard banking practice, as referred to in the UCP. Due to the fact that the ICC Banking Commission is widely accepted as an expert authority in this area of law, the publication can be regarded as far more than mere guidelines or comments for educational purposes. The ISBP represents official ICC policy.

[27] Foreword to the ISBP by Maria Livanos Cattaui, Secretary General of the ICC.
[28] UCP Article 1 "The Uniform Customs and Practice for Documentary Credits ... shall apply to all Documentary Credits ... where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit."

4.1.3 The ISBP and Sub-Article 13(a) of the UCP

The ISBP derives directly from UCP sub-Article 13(a), which attempts to standardize the examination of documents in all countries.

Sub-Article 13(a) dealing with the "Standard for Examination of Documents" reads as follows:

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

In terms of this provision the bank must inspect the presented documents and check them against the requirements of the letter of credit. In doing this it is required to act with reasonable care. The ISBP is intended to assist with determining the scope within which reasonable care is to be applied.

The decision as to whether the beneficiary's documents comply with the terms and conditions of the letter of credit is based on the bank's understanding of the UCP. The terminology of the UCP can lead to vagueness, ambiguity and misinterpretation. Ideally, the ISBP will eliminate or assist in alleviating such problems.

4.2 Concurrence of the UCP and the ISBP

As noted above, the ISBP is designed to be read in conjunction with the UCP.
In particular, Articles 20 through 47 of the UCP constitute a checklist of documentary examination practices, while part D of the UCP is devoted to the topic of "Documents". Part E, entitled "Miscellaneous Provisions", contains provisions on the meaning of certain words and expressions used in the letter of credit itself.

Reflecting the fact that the two documents should be read as one, the ISBP contains specific reference to a number of the provisions contained in the UCP. In Provision 3, it states that:

> "The applicant should be aware that the UCP contains Articles such as Articles 13, 20, 21, 23, 24, 26, 27, 28, 39, 40, 46 and 47 that define terms in a manner that may produce unexpected results unless the applicant fully acquaints itself with these provisions. For example, a credit requiring presentation of a marine bill of lading and containing a prohibition against transhipment will, in most cases, have to exclude sub-Article 23(d) to make the prohibition against transhipment effective."

4.3 Structure and overview of the content of the ISBP

The ISBP is a lengthy document, consisting of 200 paragraphs arranged in eleven sections. These are briefly outlined below in turn:

"Preliminary Considerations" deal with the application and issuance of the credit;[29]

"General Principles" contain provisions on abbreviations, certifications and declarations, corrections and alterations, dates, documents for which the UCP transport articles do not apply, expressions not defined in UCP, inconsistency in the documents, issuer of documents, language, mathematical calculations, misspellings or typing errors, multiple pages and attachments or riders, originals and copies, shipping marks, signatures, title of documents and combined documents;[30]

"Drafts and Calculation of maturity date" includes measures on tenor, maturity date, banking days, grace days, delays in remittance, endorsement, amounts, how the draft is drawn, drafts on the applicant, corrections and alterations;[31]

"Invoices", which contains provisions on definitions of invoice, name and address, description of the goods and other general issues related to invoices;[32]

"Ocean/Marine Bills of Lading (covering port-to-port shipment)" detailing the application of UCP Article 23, full set of originals, signing of bills of lading, on board notations, ports of loading and ports of discharge, consignee, order party, shipper and endorsement, notify party, transhipment and partial shipment, clean bills of lading, goods description,

[29] ISBP Provisions 1-5.
[30] ISBP Provisions 6-44.
[31] ISBP Provisions 45-58.
[32] ISBP Provisions 59-72.

corrections and alterations, freight and additional costs, and goods covered by more than one bill of lading;[33]

"Charter Party Bills of Lading" dealing with the application of UCP Article 25, full set of originals, signing of charter party bills of lading, on board notations, ports of loading and ports of discharge, consignee, order party, shipper and endorsement, notify party, partial shipment, clean charter party bills of lading, goods description, corrections and alterations, freight and additional costs;[34]

"Multimodal Transport Documents" containing measures concerning the application of UCP Article 26, full set of originals, signing of multimodal transport documents, on board notations, place of taking in charge, dispatch, loading on board and destination, consignee, order party, shipper and endorsement, notify party, transhipment and partial shipment, clean multimodal transport documents, goods description, corrections and alterations, freight and additional costs, and goods covered by more than one multimodal transport document;[35]

"Air Transport Documents" providing for the application of UCP Article 27, original air transport documents, signing of air transport documents, goods accepted for carriage, date of shipment, and requirement for an actual date of dispatch, airports of departure and destination, consignee, order party and notify party, transhipment and partial shipment, clean air transport documents, goods description, corrections and alterations, freight and additional costs;[36]

"Road, Rail or Inland Waterway Transport Documents" detailing the application of UCP Article 28, original and duplicate of road, rail or inland waterway transport documents,

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[33] ISBP Provisions 73-99.
[34] ISBP Provisions 100-119.
[35] ISBP Provisions 120-143.
[36] ISBP Provisions 144-169.

carrier and signing of road, rail or inland waterway transport documents, order party and notify party, partial shipment, goods description, corrections and alterations, freight and additional costs;[37]

"Insurance Documents" covering the application of UCP Articles 34-36, issuers of insurance documents, risks to be covered, dates, currency and amount, insured party and endorsement;[38] and

"Certificates of Origin", containing measures on basic requirements, issuers of certificates of origin, and contents of certificates of origin.[39]

On reading the ISBP it would appear that its content serves merely as a guideline or a source of suggestions of procedure to practitioners dealing with documentary credit transactions. This perception is supported by the use of examples in the provisions and the regular use of the term "should". Cumulatively, this might lead the reader to the conclusion that the ISBP is only a list of recommendations.

In practice, this does not seem to be the case, however, and surely was not the intention of the drafters. According to Martin Shaw, consultant and a member of the ICC Banking Commission,

> "it seems likely that any future court cases will use ISBP as an important statement and measure of best practices in L/C business, though it may well be that the circumstances of a particular dispute may not be adequately dealt with by ISBP, or even not dealt with at all. This publication contains far more than mere ,guidelines' or comments for 'educational purposes'. True, the ISBP contents are not the UCP

[37] ISBP Provisions 170-182.
[38] ISBP Provisions 183-195.
[39] ISBP Provisions 196-200.

Articles themselves, but they draw their existence so directly and clearly from the UCP Articles and ICC Opinions that it will be a brave or foolhardy bank which in future takes no account of ISBP or specifically acts against its contents."[40]

Furthermore, where the ISBP provides examples, these should not be regarded as an exhaustive, closed list, but rather for the purpose of illustration.

4.4 Preliminary Considerations and General Principles, provisions 1 to 44

The remainder of this paper is dedicated to a detailed examination of various provisions of the ISBP. The discussion is divided into 17 sub-sections on the topics covered by ISBP sections "Preliminary Considerations" and "General Principles", Provisions 1-44, corresponding with the order used in the ISBP, and 5 sub-sections covering selected representative items dealt with in ISBP Provisions 45-200.

In each sub-section the relevant, corresponding UCP rule is outlined, the arising interpretation problems are elaborated, answers given by courts or the ICC experts prior to the publication of the ISBP are dealt with, and finally the text contained in the ISBP is discussed.

[40] Shaw M in "Three bankers judge the document on standard banking practice" (2003) (9) (1) *Documentary Credits Insight* January-March 2003. Accessed at http://focus.dcprofessional.com. Martin Shaw is a consultant and a member of the ICC Banking Commission

4.4.1 The application and issuance of the credit

Provisions 1 through 5 of the ISBP deal with the application and issuance of a credit.

In part, these provisions merely repeat principles and rules already expressly stated in the UCP. For example, the principle that "the terms of the credit are independent of the underlying transaction even if a credit expressly refers to that transaction"[41] is extracted from UCP Articles 3 and 4.[42]

Provision 3 simply reminds the practitioner that the ISBP is to be read in conjunction with the provisions of the UCP concerning the presentation and examination of the documents highlighted by a demonstrative example.[43]

In addition to reinforcing UCP principles, these first provisions further provide recommendation to the applicant and the beneficiary concerning the advisable or inadvisable content of the credit application and the underlying transaction contract. This is illustrative of the fact that the ISBP is thus also intended to be used as a tool by the applicant and the beneficiary when entering the purchase deal and setting the conditions for the documentary credit. For example, the second sentence of Provision 1 provides advice to the applicant and beneficiary as to what to consider regarding the required documents in the early stage of negotiation of the credit clause.[44]

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[41] ISBP Provision 1.

[42] See also above at paragraph 2.2.3.

[43] See also above at paragraph 4.2.

[44] ISBP Provision 1 "To avoid unnecessary costs, delays, and disputes in the examination of documents, however, the applicant and beneficiary should carefully consider which documents should be required, by whom they should be produced, and the time frame for presentation."

Provision 5 provides general advice, warning that careful attention should be paid to detail when setting the content of the contract and credit application.

According to Provision 4, "a credit should not require presentation of documents that are to be issued and/or countersigned by the applicant." The reason for this advice is that the beneficiary would otherwise be dependent on an action by its contractual partner and would thereby loose one of the major advantages provided to it by the documentary credit payment, namely the possibility of receiving payment of the purchase price from a third party, the bank, detached from the will of the applicant.

The UCP contain rules for "instructions to issue/amend Credits".[45] Simply put, these rules state that the instructions must be complete and precise and that banks should discourage any attempt to include excessive detail or to refer in the instructions to previously issued credits which have been subject to amendments. In addition, all instructions must state precisely the documents against which payment, acceptance or negotiation is to be made.

According to Oelofse, Article 5

> "... is one of those provisions of the UCP which is an admonition to the parties rather than a term of their contract. Clearly the provision entitles the bank to refuse to carry out unclear, ambiguous or inclomplete instructions, but it does not state the position if the bank nevertheless acts on the instructions in some or other way."[46]

ISBP Provision 2 now provides that under international standard banking practice

[45] See UCP Article 5.
[46] Oelofse op cit n 16 at 116.

> "... the applicant bears the risk of any ambiguity in its instructions to issue or amend a credit. Unless expressly stated otherwise, a request to issue or amend a credit authorizes an issuer to supplement or develop the terms in a manner necessary or desirable to permit the use of the credit."

4.4.2 Abbreviations

The letter of credit details the required documents, their obligatory content and the issuers of the documents to be produced to the bank by the beneficiary. A question frequently raised was whether strict compliance had been fulfilled in instances where abbreviations were used in the presented documents whereas the credit stated the unabbreviated form.

Before the ISBP was published the ICC Banking Commission had already answered queries regarding the use of abbreviations to the effect that commonly used abbreviations do not constitute a discrepancy. Examples of answers to these queries included:

> " 4. Use of "Ltd" instead of "Limited" does not constitute a discrepancy. The absence of word(s) to the effect of the meaning of "Ltd" in the name of the consignee would constitute a discrepancy...";[47]

and

> "... [t]he freight forwarder's name was that stated in the credit. The difference being that this was followed by the inclusion of the letters 'S.R.L.' whereas the credit specified 'S.P.A'. These abbreviations , whilst having the same effect as 'company' and 'limited', etc. can have a different connotation as to the standing of the issuer and

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[47] Official ICC Banking Commission Opinions, R455 from the 2000-01 Queries (http://focus.dcprofessional.com).

the acceptability under a letter of credit. An FCR issued by XXX S.R.L. would be considered discrepant in respect of a credit requiring it be issued by XXX S.P.A."[48]

The ISBP now expressly states in Provision 6 that the use of generally accepted abbreviations does not render a document discrepant. It further provides the reader with examples of generally accepted abbreviations.[49] Since these examples are not exhaustive, it remains the task of the courts and arbitrators to determine whether or not other abbreviations are to be regarded as generally accepted. The examples provided by the ISBP nevertheless give the practitioner a sense of the type of abbreviations that the ICC considers to be acceptable.

According to Provision 7 the use of slash marks should be avoided due to possible ambiguity.

4.4.3 Certifications and declarations

While the UCP contains provisions regarding certain specific documents, such as different types of bills of lading, several other transport documents, and insurance documents,[50] there are no particular provisions concerning certifications and declarations.[51]

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[48] Official ICC Banking Commission Opinions, R431 from the 2000-01 Queries (http://focus.dcprofessional.com).

[49] ISBP Provision 6 "... for example 'Ltd.' instead of 'Limited', 'Int'l' instead of 'International', 'Co.' instead of 'Company', 'kgs' or 'kos.' instead of 'kilos', 'Ind' instead of 'Industry', 'mfr' instead of 'manufacturer' or 'mt' instead of 'metric tons' – or vice versa ..."

[50] See UCP Articles 23 to 37.

[51] Other than UCP Article 38 ("Other Documents"), which grants the general permission to use weight stamps or declerations of weight superimposed on the transport document by the carrier or his agent for an attestation or certification of weight in case of transport other than sea.

In Provision 8 the ISBP clarifies that any certification or declaration appearing on another signed and dated document does not require a separate signature or date if the certification or declaration appears to have been given by the same entity that issued and signed the document. Furthermore the ISBP contains specific provisions on the certificate of origin.[52]

4.4.4 Corrections and alterations to a document

The question of what constitutes an acceptable form of corrections and alterations to documents was submitted to the Banking Commission several times. In Document 470/505 the Opinion of the Banking Commission is reported as stating that:

> "[c]orrections or alterations on a transport document must be authenticated by a correction stamp as well as by a signature or initials. It should be clear who has corrected the document and on what authority. Such documents are only acceptable if this procedure is, in fact, followed."[53]

The ISBP provides answers to the questions of when and how alterations and corrections must be authenticated.

The core statement of provision 9 is that

> "corrections and alterations of information or data in documents, other than documents created by the beneficiary, must appear to be authenticated by the party who issued the document or by a party authorized by the issuer to do so",

and that

[52] ISBP Provisions 196-200. See also below at paragraph 4.5.5.
[53] Available at http://focus.dcprofessional.com.

"the authentication must show by whom the authentication has been made and include that party's signature or initials".

Special provisions of the ISBP for certain documents name the persons by whom the corrections and alterations must appear to have been authenticated.[54] For example, corrections and alterations on a bill of lading must appear to have been made by the carrier, master (captain), or any of their agents (who may be different from the agent that may have issued or signed the bill), provided they are identified as an agent of the carrier or the master (captain).[55]

According to Provision 10,

> "corrections and alterations in documents issued by the beneficiary itself, except drafts, which have not been legalized, visaed or the like, need not be authenticated ..."

In case of multiple corrections, according to Provision 12, each correction must be authenticated separately. It is also acceptable if the authentication is linked to all corrections in an appropriate way.

4.4.5 Dates

Problems could emerge from the application of local law when determining whether or not a certain document needs to be dated and how this requirement may be fulfilled. Some

[54] See, for example, ISBP Provisions 57 (drafts); 94 and 95 (clean bills of lading); 115 and 116 (clean charter party bills of lading); 138 and 139 (clean multimodal transport documents); 164 and 165 (clean air transport documents) and 179 and 180 (UCP Article 28 transport documents).

documents require dating by their nature and content,[56] but the UCP contains no express provisions on the requirement of dating.

Provision 13 of the ISBP provides some guidance on dating. It stipulates which documents must be dated under the UCP according to standard banking practice and how this requirement is complied with. Specifically, it dictates that drafts, transport documents and insurance documents must be dated in any case. A credit may also expressly require other documents to be dated, in which case this requirement "may be satisfied by reference in the document to the date of another document forming part of the same presentation." Provision 13 further states that the requirement of certificates or declarations in a separate document to be dated depends on the type of document, as well as the required and the actual wording within that certificate or declaration. This can be illustrated by giving the following example:

> "... suppose a shipping company's certificate is required to certify that the ship is not older than 25 years. This certificate must be dated , as it has to show that the ship is not older than 25 years when the shipment is effected. However, if a shipping company's certificate is required to certify that the ship was built in 1990, this certificate may not be dated as it has certified the fact that the ship was built in 1990."[57]

The ISBP also gives further clarification as to at what time a document in relation to shipment of the goods may be dated. According to provision 14, any document may also

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[55] ISBP Provision 94.
[56] See ISBP Provision 13, which states that "[w]hether other documents require dating will depend on the nature and content of the document in question."

be dated after the date of shipment.[58] A document evidencing a pre-shipment event but dated after the date of shipment must somehow indicate that the event took place prior to shipment. A requirement for an "inspection certificate" does not constitute a requirement to evidence a pre-shipment event.

Provision 15 says that if the date of preparation of the documents and the date of signing is indicated on a document, the date of signing determines the date of issuance.

Provision 16 highlights the fact that the scope of application of UCP sub-Article 43(a)[59] is limited to *original* transport documents in terms of UCP Articles 23-29, a viewpoint already expressed in an unpublished Official Opinion of the ICC Banking Commission.[60] Provision 16 closes with the statement that "in any event documents must be presented not later than the expiry date of the credit", thereby making clear that this rule also applies to copies.

In provisions 17 and 18, the ISBP refers to several time-related phrases, such as "within 2 days after", "not later than 2 days after", "at least 2 days before", "within 2 days of", and

[57] Soh Chee Seng in "Implications and impacts of the ISBP" (2003) (9) (2) *Documentary Credits Insight* April-June 2003. Accessed at http://focus.dcprofessional.com. Soh Chee Seng is independent consultant and technical adviser on trade finance issues to the Association of Banks in Singapore.

[58] In this context also note UCP Article 46 defining the meaning of certain general expressions as to dates of shipment.

[59] The refered article provides that when there is lack of stipulation in the credit, the presentation of transport documents later than 21 days after the date of shipment will be rejected.

[60] Official Opinion, unpublished, on the query titled "Where a schedule is dated after the latest permitted date of presentation and/or expiry date". Accessed at http://focus.dcprofessional.com. The Opinion states that "... if the credit ... calls for a copy of a transport document to be presented, this sub-Article (43 (a)) is not to be considered as being applicable. This sub- Article (43 (a)) applies where an original transport document is to be presented."

"'within' when used in connection with a date", often used to signify time on either side of a date or event.[61]

The following statement by the ICC Banking Commission in response to a query in 1995, is indicative of its approach to the acceptability of different date-formats on documents:

> "The indication in documents of a date in different formats, whether it is European and/or American and/or any other format such as 95/08/07 (i.e. 1995 August 7th) is no reason for rejection based on UCP 500 sub-Article 13(a), as long as there is no doubt that it is the same date, or, in case of doubt, there is other indication in the documents or in the presentation of documents that leaves no doubt that only one interpretation of the date is possible."[62]

Provision 19 of the ISBP confirms this view, stating that any format of expressing a date is acceptable as long as the date intended can be determined from the presented document(s).

4.4.6 Documents for which the UCP Transport Articles do not apply

Articles 23 through 29 of the UCP 500 define different transport documents, stipulating requirements of content and form in order for these documents to be accepted by banks. The common characteristic shared by these documents is that they all reflect a contract of carriage.

[61] See also UCP Article 47 dealing with "Date terminology for periods of shipment".
[62] Official ICC Banking Commission Opinions, R210 from the 1995-96 Queries (http://focus.dcprofessional.com).

Provision 20 of the ISBP makes clear that documents not reflecting a contract of carriage are not seen as transport documents in terms of the UCP. Examples of such documents, predominantly those commonly used in relation to the transportation of goods, are provided.[63]

It is self-explanatory that other articles of the UCP dealing with tranport documents do not apply to these documents. The latter are covered by UCP articles referring to documents in general.[64]

The applicant may stipulate that certain documents may be presented in the form of a copy.

According to ISBP Provision 21, "[c]opies of transport documents are not transport documents for the purpose of UCP Articles 23-29 and 43..." Consequently, the requirements of content and form of a transport document in terms of the UCP are irrelevant for the acceptability of these copies. Rather

> "... where a credit allows for the presentation of a copy(ies) rather than an original(s), the credit must explicitly state the details to be shown. Where copies (non-negotiable) are presented, they need not evidence signature, dates, etc."[65]

<u>4.4.7 Expressions not defined in the UCP</u>

[63] Examples listed in ISBPProvision 20 include: Delivery Order, Forwarder's Certificate of Receipt, Forwarder's Certificate of Shipment, Forwarder's Certificate of Transport, Forwarder's Cargo Receipt and Mate's Receipt.

[64] ISBP Provision 20 "... As such, UCP Article 43 would not apply to these documents. Therefore, these documents will be examined in the same manner as other documents for which there are no specific provisions in the UCP, i.e. under UCP Article 21..."

Some expressions that are typically used by the parties in international trade, and therefore frequently found in credits, are not defined in the UCP.

The ISBP advises against making use of expressions undefined by the UCP, such as “shipping documents”, “stale documents acceptable”, “third party documents acceptable”, and “exporting country”. If such terms are nevertheless used in a credit and the meaning is not made apparent, ISBP Provision 22 imposes a certain interpretation on these expressions.[66]

Furthermore, according to Article 46 of the UCP, dealing with expressions as to dates of shipment,

> “expressions such as ‘prompt’, ‘immediately’, ‘as soon as possible’, and the like should not be used. If they are used banks will disregard them.”

According to Provision 23 this rule applies to the use of such expressions in any context.

4.4.8 Inconsistency in documents

[65] ISBP Provision 21, sentences 2 and 3.

[66] ISBP Provision 22 reads “a) ‘shipping documents’ - all documents (not only transport documents), except drafts, required by the credit. b) ‘stale documents acceptable’ - documents presented later than 21 days after the date of shipment are acceptable as long as they are presented within the validity of the credit. c) ‘third party documents acceptable’ - all documents, excluding drafts but including invoices, may be issued by a party other than the beneficiary. If the issuing bank’s intent is that the transport document(s) may show a shipper other than the beneficiary, the clause is not necessary because it is already permitted by UCP sub-Article 31(iii). d) ‘exporting country’ - the country where the beneficiary is domiciled, and/or the country of origin of the goods, and/or the country of receipt by the carrier and/or the country from which shipment or dispatch is made.”

The problem of inconsistency of presented documents with one another is addressed in sub-Article 13(a) of the UCP.[67]

The legal consequence is that inconsistent documents are to be considered by the bank as non-compliant with the terms of the credit. The principle that documents must not appear to be inconsistent with one another is reinforced by UCP Article 21, which regulates the data content of documents other than transport documents, insurance documents and commercial invoices, and further confirmed e.g. in UCP sub-Article 37(c), concerning the description of goods in commercial invoices.[68]

Provision 24 of the ISBP explains that the phrase "must not appear to be inconsistent with each other" should not be restrictively interpreted to mean that the data content of the documents must be identical.

This is also emphasized by special provisions concerning the "goods description" in various specific types of documents.[69]

These provisions confirm that the goods description in these documents need not be identical to that stated in the letter of credit. It is sufficient that the goods description appears in general terms that are not inconsistent with that stated in the credit. It appears,

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[67] See above at paragraph 4.1.3.

[68] UCP Article 21 reads " [w]hen documents other than transport documents, insurance documents and commercial invoices are called for, the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated document presented." UCP sub-Article 37(c) states that "[t]he description of the goods in the commercial invoice must correspond with the description in the Credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the Credit."

however, that these special provisions are redundant in light of the fact that they merely reiterate what is contained in UCP sub-Article 37(c) regarding all documents other than commercial invoices.[70]

Problematic is the fact that no general definition of "consistency/inconsistency" is contained in the provisions of either the UCP or the ISBP. The ICC has offered an exaplanation, stating that

> "the meaning of 'consistency' referred to in sub-Article 13(a) and Article 21 should be interpreted as meaning that the whole of the documents must obviously relate to the same transaction, i.e., there should be a sufficient link between the data content of each document."[71]

4.4.9 Issuer of documents

The UCP regulates by whom certain documents, namely the transport document,[72] insurance documents,[73] and commercial invoices,[74] must "appear on their face to be issued".

Regarding other documents, UCP Article 21 advises that "the Credit should stipulate by whom such documents are to be issued ..."

[69] See ISBP Provisions 93 (goods description in a bill of lading), 114 (charter party bill of lading), 137 (multimodal transport document), 163 (air transport document), 178 (road, rail or inland waterway transport document), and 198 (certificate of origin) as examples of these special provisions.
[70] Op cit n 69.
[71] DOCDEX Decision on UCP Article 21, sub-Articles 37(c) and 13(a). Accessed at http://focus.dcprofessional.com.
[72] UCP Articles 23-29.
[73] UCP Article 34.

If the credit stipulates that the document is to be issued by a named person or entity, the question arises how this requirement can be satisfied.

This issue was addressed in the context of a question regarding a certificate of origin issued by a chamber of commerce. The ICC Banking Commission explained in its analysis that

> "[t]he condition is satisfied if the document is issued by a chamber of commerce, i.e. on its letterhead or specified form even though the detail(s) may have been completed by the beneficiary and the chamber merely signs, or on 'neutral' paper if within the body there is evidence of completion and/or signature of a chamber of commerce."[75]

The ISBP takes the view expressed in this opinion further, stating in provision 25 that the document

> "may appear to be issued by a named person or entity by use of its letterhead, or, if there is no letterhead, the document appears to have been completed and/or signed by, or on behalf of, the named person or entity."

The topic of "the issuer of a document" is closely connected to that of "signatures". The latter is covered by provisions 39 through 42 of the ISBP and discussed in detail below.[76]

4.4.10 Language

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[74] UCP Article 37.

[75] Official ICC Banking Commission Opinions, R448 from the 2000-01 Queries (http://focus.dcprofessional.com).

[76] See, for example, ISBP Provision 42, which states that "a signature on a company's letterhead paper will be taken to be the signature of that company, unless otherwise stated. The company's name need not be repeated next to the signature."

A credit may dictate which languages utilised in documents are acceptable. The request within a credit for documents to be issued in a certain language enables the bank to determine compliance of the documents, on their face, in a language that it is able to understand, without requiring a translation before review of the documents.

In light of the potential problems faced by banks when required to deal with presented documents in unfamiliar languages, the ISBP states in provision 26 that

> "under international standard banking practice, it is expected that documents issued by the beneficiary will be in the language of the credit"

and that

> "when a credit states that documents in two or more languages are acceptable, a nominated bank may, in its advice of the credit, limit the number of acceptable languages as a condition of its engagement in the credit or confirmation."

4.4.11 Mathematical calculations

The ICC Banking Commission has been approached numerous times with the query of whether the bank is under an obligation to carry out detailed mathematical calculations to establish compliance of the documents produced. It has opined that the banks is under no such obligation, stating that

> "...banks do not have a duty to carry out mathematical calculations or compute lists of individual items, weights or measurements to ensure consistency with other

documents. If totals are shown on documents, then these should be in agreement with those declared on other documents presented."[77]

It has further noted that

> "... where a credit incorporates such excessive detail, the negotiating bank or the issuing bank is under no obligation to carry out detailed mathematical calculations to establish compliance. The total amounts that are shown or the totals of individual breakdowns, i.e. the FOB, freight and insurance costs - where they are quoted separately in the credit - is the degree to which banks must or must not operate."[78]

In this context, the ICC Banking Commission also recommends that

> "... issuing banks should refrain from incorporating descriptions of goods which, on their face, require them and the negotiating bank to provide a review of all calculations."[79]

Consequently, the ISBP has given expression to this expert opinion, reflecting it in the text of Provision 27, which states that

> "[d]etailed mathematical calculations in documents will not be checked by banks. Banks are only obliged to check total values against the credit and other required documents."

4.4.12 Misspellings or typing errors

[77] See, for example Official ICC Banking Commission Opinions, R447 from the 2000-01 Queries (http://focus.dcprofessional.com).
[78] Official ICC Banking Commission Opinions, R391 from the 2000-01 Queries (http://focus.dcprofessional.com).
[79] Compare this with UCP sub Article 5(a), which states that "[i]nstructions for the issuance of a Credit, the Credit itself, instructions for an amendment thereto, and the amendment itself, must be complete and precise. In order to safeguard against confusion and misunderstanding, banks should discourage any attempt: i. to include excessive detail in the Credit or in any amendment thereto ..."

The nature and extent of the problem of "misspelling or typing errors" in documents required by a credit relates to the issue of how severe the misspelling or a typing error is. On the one hand, how severe must the error be in order for it to constitute a discrepancy and therefore amount to a sufficient ground to justify dishonour by a bank. On the other hand, how simple is the spelling or typing error required to be in order to be considered obvious and harmless and to thus not warrant the refusal of payment by the bank.

This dilemma is a common area of referral to the Banking Commission. The Commission has determined that whether or not a document which contains a spelling or typographical error should be considered compliant or non-compliant is dependent upon the context in which the error is made. In the view of the Commision,

> "[t]he mere fact that there is a spelling or typographical error should not be automatic grounds for the document(s) to be rejected."[80]

It is also of great importance for the banks engaged with the examination of the presented documents to be able to judge from the documents alone, without any knowledge of the underlying transaction whether an error in spelling or typing constitutes a discrepancy.[81] The UCP do not address this problem expressly, but the ISBP provides some guidance in this regard.

The main criteria set out by the ISBP in Provision 28 are that the meaning of the word or sentence must not be affected by the misspelling or typing error.[82]

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80 Official ICC Banking Commission Opinions, R442 from the 2000-01 Queries (http://focus.dcprofessional.com).

81 As UCP sub-Article 3(a) ("Credits v Contracts") states, "[c]redits, by their nature, are separate transactions from the sales of other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s)..." UCP sub-Article 4 further notes that "...all parties concerned deal with documents, and not with goods, services and/or other performances to which the documents may relate."

For the purpose of illustration, Provision 28 gives examples of harmless typing errors/misspellings that do not render a document discrepant. These include a description of the merchandise as "mashine" instead of "machine", "fountan pen" instead of "fountain pen" or "modle" instead of "model". Examples of what should be regarded as material errors constituting a discrepancy are likewise provided, such as the description of an item as "model 123" instead of "model 321".

4.4.13 Multiple pages and attachments or riders

In order to examine the documents and decide whether to accept or reject them, the document examiners of the banks require knowledge regarding how to treat multiple pages and attachments in documents produced to them.

The legal consequences flowing from the use of multiple pages and attachments differ according to whether the multiple pages are cumulatively regarded as one complete document or whether they are viewed as a number of separate, individual documents. If, for example, an "attachment" is considered to be a separate document but is not stipulated in the credit, it will not be examined by the bank at all.[83] If the "attachment" is regarded as part of a stipulated document, however, it will be examined and needs to fulfil all requirements for compliance under the rules of the UCP. The UCP is silent on this issue and one thus need to look elsewhere for guidance on this matter.

[82] ISBP Provision 28 "Misspellings or typing errors that do not affect the meaning of a word or the sentence in which it occurs, do not make a document discrepant. ... "
[83] See UCP sub-Article 13(a) "... Documents not stipulated in the Credit will not be examined by banks. If they receive such documents, they shall return them to the presenter or pass them on without responsibility."

The experts of the ICC Banking Commission, faced with a query concerning whether or not attachments to a (marine/ocean) bill of lading need to be signed in addition to the first page, stated that

> "[i]f a bill of lading consists of more than one page, (addenda or attachments), each of such pages must include reference to being an attachment to and/or an integral part of B/L No. ... (or similar wording): in which case the signature on the first page would suffice."[84]

Provision 29 of the ISBP now clearly stipulates that

> "where a document consists of more than one page, it must be possible to determine that the pages are part of the same document"

and permits the assumption that

> "pages which are physically bound together, sequentially numbered or contain internal cross references, however named or entitled, are to be examined as one document, even if some of the pages are regarded as an attachment."

According to provision 30, an obligatory signature or endorsement may appear anywhere on a document consisting of more than one page unless the credit or the document itself indicates precisely where a signature or endorsement is to appear.[85]

4.4.14 Original document, copies

[84] Official ICC Banking Commission Opinions, R279 from the 1997 Queries (http://focus.dcprofessional.com).

Numerous court cases world-wide and queries raised with the ICC Banking Commission have been dealing with the determination of an "original" document under a letter of credit, as referred to in UCP sub-Article 20(b). The referring text of sub-Article 20(b) reads as follows:

> "Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:
>
> i. by reprographic, automated or computerised systems;
>
> ii. as carbon copies;
>
> provided that it is marked as original and, where necessary, appears to be signed."

The documentary credit community has for a long time regarded it as a fundamental rule that unless otherwise stipulated in the credit, the documents presented to the bank must be originals in order to be acceptable. While this is not reflected in the UCP, it has been confirmed as a rule by the ICC in Provision 32 of the ISBP.[86]

In their day-to-day practice banks clerks in charge of the examination of the documents have to decide whether to identify a document as an original or a copy in terms of the UCP. Modern methods of producing document, including computer technology, high quality printers, and copy-machines have rendered it an almost impossible task to distinguish the document originally issued from reproductions thereof.

[85] The requirement of a signature on a document can be stated in the credit itself, based on the provisions of the UCP or extracted from ISBP Provision 39 onwards. See also below at paragraph 4.4.16 for a discussion on these provisions.

[86] ISBP Provision 32 reads "[e]ach required document must be presented in at least one original, unless the credit allows for presentation of documents as copies. The number of originals to be presented must be at least the number required by the credit, the UCP, or, where the document itself states how many originals have been issued, the number stated on the document."

Only after the document examiner has identified a document to be an original by nature or a document produced by the methods listed in UCP sub-Article 20(b), will he/she know whether the requirement of "marking it as original" has to be applied. Once the document examiner has come to the conclusion that the presented document is not an obvious original by its nature, he/she has to determine if the document was produced as described in sub-Article 20(b). According to the content of this article, banks will also accept as an original, a document "appearing to have been produced" by the cited methods. The document clerk therefore is not obliged to make extensive investigations as to how a document was produced.

The question of whether an original signature itself renders a document an original and automatically fulfils the requirement of being marked an original was dealt with in *Glencore International AG and another v Bank of China*.[87] This matter concerned the status of one of several print outs of a certificate generated by the beneficiary's word processing system and photocopies thereof, which bore an original signature, but was not marked "original". Both the court a quo and the Court of Appeal determined that the original signature per se does not result in a print out or copy of a document amounting to an original of that document. With reference to sub-Article 20(b) of the UCP, the Courts confirmed that the reproduced documents could only qualify as originals for the purposes of the UCP if they also bore the mark of "original".

Another example of a court case dealing with the topic of "original" documents is *Kredietbank Antwerp v Midland Bank Plc*.[88] Here, the court a quo held that in this

[87] [1996] 1 Lloyd's Rep 135.
[88] CA [1999] 1 Comm All ER 801.

particular case the marking of "duplicate"on an insurance policy was sufficient and satisfied the requirement of "marking as original". The Court of Appeal held that sub-Article 20(b) did not have to be applied as the disputed document was an obvious original.

These cases, among others, together with the great number of queries raised with the ICC experts on this matter gave rise to the publication by the ICC Banking Commission of an "ICC Banking Commission Policy Statement".[89] This document provides guidance on the determination of originals versus copies. This matter is also also dealt with in Provision 35 of the ISBP.

Read together, this Statement and Provisions 31 through 35 of the ISBP on "originals and copies" illustrate that the ICC Banking Commission's interpretation of UCP sub-Article 20(b)[90] is less strict than that of prior court rulings.[91]

The following excerpts of the Statement give evidence hereof:

> "... [f]or example, a document printed on plain paper from electronically stored text is acceptable, without regard to 20(b), if it appears to be an original"

and

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[89] Document 470/871 (Rev) "The determination of an 'Orgininal' document in the context of the UCP sub-Article 20(b)".
[90] Note that the ICC Banking Commission concludes the statement claiming that "... the statements ... above reflect international standard banking practice in the correct interpretation of UCP 500 sub-Article 20(b)."
[91] Compare the *Glencore International AG and another v Bank of China* ruling on original signatures on photocopies (op cit n 87) to the wording of the mentioned Policy Statement - "[c]onsistent with sub-paragraph (a) above, banks treat as original any document that appears to be hand signed by the issuer of the document. For example, a hand signed draft or commercial invoice is treated as an original document, whether or not some or all other constituents of the document are preprinted, carbon copied, or produced by reprographic, automated, or computerized systems."

"[s]ub-Article 20(b) does not apply to documents that appear to be only partially produced by ... the methods cited in this article".

Also indicative of this broad interpretation is the following extract:

"[t]he 'marked as original' proviso in sub-Article 20(b) is satisfied by any marking on a document or any recital in the text of a document that indicates that the issuer of the document intends it to be treated as an original rather than a copy"

and

"[b]anks treat as original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not original."

Besides the reference to the Official Statement, the other provisions of the ISBP relating to the topic "originals and copies" add clarification to further issues. For example, according to Provision 31, markings such as "Original", "Duplicate", "Triplicate", "First Original", and "Second Original" do not disqualify the document as an original in cases where the credit requires multiple documents.[92]

Via use of examples, Provision 33 offers interpretation guidance in instances where the terminology in the credit concerning the requirement of originals or copies is ambiguous. It states that, for example, "Invoice in 1 copy" calls for an original invoice, while the requirement for "One copy of Invoice" is satisfied by the presentation of a copy.

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[92] Regarding the requirement of "multiple documents", see also UCP sub-Article 20(c)(ii) "[c]redits that require multiple document(s) such as 'duplicate', 'two fold', 'two copies' and the like, will be

The ISBP further states that unless the credit prohibits an original, it is always accepted in lieu of a copy.[93]

4.4.15 Shipping marks

As explained in Provision 36 of the ISBP, "the purpose of a shipping mark is to enable identification of a box, bag or package." This is important to identify the goods from those of other shippers.

The content of shipping marks may vary depending on the means of transport, the packaging or the goods themselves. It is quite common to include excess information which does not serve the original purpose of identification, such as weight of the goods or warning as to the handling of the goods, in the shipping marks.

Long before the publication of the ISBP, the experts of the ICC Banking Commission already stated that

> "...if a credit stipulates markings, it should also clearly state whether only such markings are acceptable. If it does not so state, then banks would accept any additional markings."[94]

satisfied by the presentation of one original and the remaining number in copies except where the document itself indicates otherwise."

[93] See ISBP Provision 33(c). Also relevant is UCP sub-Article 20(c), which states that "...banks will accept as a copy(ies), a document(s) either labelled copy or not marked as an original..."

[94] ICC Publication No. 434, R88, Opinions of the Banking Commission 1984-1986 (available at http://focus.dcprofessional.com).

The ISBP incorporates the core of this statement in Provisions 36 through 38, including the citation of examples. It also clarifies that it is acceptable that documents of one presentation show different degrees of detail, as long as there is no inconsistency among one another and with the credit terms.[95]

4.4.16 Signatures

The UCP rules on specific documents provide that they have to appear on their face to have been signed or otherwise authenticated by (marine/ocean bills of lading,[96] non-negotiable sea waybills,[97] charter party bills of lading,[98] multimodal transport documents,[99] air transport documents,[100] road, rail or inland waterway transport documents,[101] and transport documents issued by freight forwarders[102]), to have been stamped, signed or otherwise authenticated by (courier or expedited delivery service receipts[103]) or to be issued and signed by (insurance documents[104]) a specific party/ies and provide expressly that commercial invoices need not be signed.[105]

Some documents by their nature require a signature. The ICC expert panels have expressed this in relation to, for example, certificates of origin, where it stated that

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95 Provision 36 provides that "... additional information is acceptable provided it is not inconsistent with the credit terms." Provision 37 states "... [t]he fact that some documents show such additional information, while others do not, is not a discrepancy." Provision 38 provides "... [o]ther documents that show a detailed marking will not be considered to be inconsistent for that reason."
96 UCP Article 23.
97 UCP Article 24.
98 UCP Article 25.
99 UCP Article 26.
100 UCP Article 27.
101 UCP Article 28.
102 UCP Article 30.
103 UCP sub-Article 29(b).
104 UCP Article 34.
105 UCP Article 37.

"... it is recognised under international standard banking practice that a certificate, by its nature, should be signed even if a credit does not specifically require it to be so."[106]

The ISBP further notes that under standard banking practice "drafts, certificates and declarations by their nature require a signature."

Unless stipulated in the credit, documents other than those mentioned above need not be signed.[107] Furthermore, according to Provision 40 of the ISBP, the mere fact that a document has a box or space for a signature does not necessarily mean that it is required to be signed.[108]

Provision 40 adds, however that if a document itself contains the requirement of signing in order to be valid, it must be signed.

Provision 41 of the ISBP deals with the permissible manners in which a document may be signed. Apart from handwritten signatures,

"facsimile signatures, perforated signatures, stamps, symbols (such as chops) or any electronic or mechanical means of authentication are sufficient."

If the credit requires a document to be "signed and stamped" or similarly marked, this condition may also be fulfilled "by a signature and the name of the party typed, or

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[106] DOCDEX Decision on Article 21; sub-Article 13(a). Accessed at http://focus.dcprofessional.com.

[107] Official ICC Banking Commission Opinions, R274 from the 1997 Queries states that "... [u]nless the nature of the document and/or the credit states otherwise, a document need not be signed." (http://focus.dcprofessional.com).

stamped, or handwritten, etc." A company may also sign on its letterhead paper not having to add the company's name next to the signature.[109]

4.4.17 Title of documents and combined documents

The question whether a title of a presented document that is different to the description of the document used in the credit leads to a discrepancy and therefore entitles the bank to reject the presentation is covered by provision 43 of the ISBP.

The answer to this question can be found in the application of the "falsa demonstration non nocet" maxim.[110]

UCP Articles 23 through 29 on transport documents use the terminology "however named"[111] to express that the classification of a document as a transport document (as defined by the UCP) does not depend on the title given the document by the issuer.

In several Official Opinions, the ICC Banking Commission has reiterated that

> "the words 'however named' make it clear that the title of the document is immaterial. What matters is the content of the document."[112]

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[108] Official ICC Banking Commission Opinions, R371 from the 1998-99 Queries stipulates that "... [t]he mere fact that a document such as a CMR may have a box for signature by the shipper does not infer that it should be completed unless so specified in the credit." (http://focus.dcprofessional.com).
[109] See ISBP Provision 42.
[110] Translated as "A false or mistaken description does not vitiate".
[111] See, for example, UCP sub-Article 23(a) "[i]f a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the Credit, accept a document, however named..."

The ISBP reflects this approach, stating in Provision 43 that "documents may be titled as called for in the credit, bear a similar title, or be untitled" and that "the content of a document must appear to fulfil the function of the required document." Several sections of the ISBP dealing with specific documents also contain provisions to this effect.[113]

Provision 44 addresses the question whether the bank must accept the combination of individual independent documents called for in the letter of credit in one single document. The UCP only regulates the case where a weight stamp or declaration of weight appears to have been superimposed on a transport document in case of transport other than by sea and provides that, unless the credit calls for the attestation/certification of weight by means of a separate document, this combined form will be accepted by the bank (UCP Article 38). Otherwise the UCP is silent on the topic of "combined documents", neither expressly forbidding nor allowing the presentation of two or more stipulated documents in a combined form. From the fact that UCP Article 38 only permits a certain combination (weight stamp/certificate on non-sea transport document) in one single document one can conclude that it was the intention of the drafters not to allow other combinations. Provision 44 supports this conclusion stating that "documents listed in a credit should be presented as separate documents." Though, it expressly allows the presentation of a combined packing and weight list when presented as two original copies.

[112] Official ICC Banking Commission Opinions, R219 and R230 from the 1995/96 Queries (http://focus.dcprofessional.com). See also Official ICC Banking Commission Opinions, R456 from the 2000/01 Queries which states that "... [t]here is no requirement in Article 23 for the bill of lading that is presented to be titled 'Ocean or Marine Bill of Lading'. The Article makes it quite clear that a document is acceptable however named subject to it complying with the conditions of Article 23 and the letter of credit requirements ... " (http://focus.dcprofessional.com).

4.5 Specific provisions 45 to 200; selected items

Paragraphs 45 to 200 of the ISBP pertain to specific documents and supplement Articles 20 to 47 of the UCP.

4.5.1 Drafts and calculation of maturity date

The credit can constitute four different ways of satisfying the beneficiary's claim against the bank.[114] According to the UCP "[a]ll Credits must clearly indicate whether they are available by sight payment, by deferred payment, by acceptance or by negotiation."[115]

An acceptance credit is

> "one under which the issuing bank and confirming bank undertake to accept and pay, or that some other drawee bank will accept and pay, a bill of exchange payable at a future date."[116]

By accepting the bill ("draft"), the bank undertakes to pay the face value on maturity to the party presenting it.[117]

In case of a negotiation credit, the bank undertakes to negotiate, rather than accept, the beneficiary's draft. According to UCP sub-Article 10(b)(ii), "[n]egotiation means the giving of value for Draft(s) and/or document(s) by the bank authorised to negotiate."

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[113] See, for example, ISBP Provisions 74, 101, 121, and 145.
[114] See UCP Articles 2 and 9.
[115] UCP sub-Article 10(a).
[116] Hapgood M *Paget's Law of Banking* (1996) at 657.

The above illustrates the role that a draft might play in a document credit transaction. The UCP however does not contain rules regulating drafts.

The ISBP contain statements concerning some requirements of drafts and "date" issues relating to the maturity of drafts. These are found in Provisions 47 onward.

These provisions stipulate, for example, that under standard banking practice drafts must be drawn by the beneficiary,[118] and on the party stated in the credit.[119] Drafts drawn on the applicant will be considered additional documents in terms of UCP Article 21.[120] The amount of the draft (face value) must generally agree with that of the invoice.[121]

It is understood that the tenor of drafts must be in accordance with the terms of the credit, as stated in Provision 45.

Drafts can become due at sight, a defined period after sight or at another determinable date. In the latter case, "it must be possible to establish the maturity date from the data in the draft itself."[122] The ISBP illustrates this by providing examples of how the tenor could be indicated if the credit calls for a draft at a tenor x days after the bill of lading date.[123]

It further states that in respect of the establishment of the maturity date, the on board date is deemed to be the bill of lading date,[124] explains the meaning of the words "from" or

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[117] Note that the presenting party need not be the beneficiary. Once the bill of exchange (draft) has been accepted by a bank the beneficiary can (already before maturity) discount it in the money market.

[118] ISBP Provision 55.

[119] ISBP Provision 54.

[120] ISBP Provision 56.

[121] "... [u]nless otherwise stated in the credit or as a result of UCP sub-Article 37(b)"(ISBP Provision 53).

[122] See ISBP sub-Provision 45(a).

[123] See ISBP sub-Provision 45(b)(i)-(v). All given examples referring to bills of lading dates apply to all transport documents (ISBP Provision 46).

[124] See ISBP sub-Provision 45(c).

"after" when used to determine the maturity date of a draft,[125] deals with the situation when multiple on notations are shown in a bill of lading and the goods were shipped from ports within a permitted area,[126] and ascertains that in case of multiple sets of bills of lading the date of the last bill of lading will be used to calculate the maturity date.[127]

Sub-Provision 48(b) of the ISBP provides for the situation where the bank refuses first presentation of a draft drawn at a certain period after sight, due to non-conformity but approves the subsequent presentation of the (corrected) document. In such instances the maturity date is established

> "...at the latest XXX days after the date of acceptance of the draft by the drawee bank. The date of acceptance of the draft must be no later than the date of approval of the documents."

The ISBP also make clear that "in all cases the drawee bank must advise the maturity date to the presenter."[128]

4.5.2 Invoices

In international business one comes across different types of invoices. The specific type of invoice utilised will depend on the function the invoice serves.

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[125] According to ISBP sub-Provision 45(d) the calculation commences the day following the event referred to. Note also UCP sub-Article 47(a), which provides that as for dates or periods referring to shipment "the words ... 'from' ... will be understood to include the date mentioned."
[126] See ISBP sub-Provision 45(e).
[127] See ISBP sub-Provision 45(f).
[128] See ISBP Provision 49.

The UCP only deals with commercial invoices, as detailed in Article 37. This article regulates the requirements as to the issuer,[129] the addressee,[130] and the description of the goods.[131] Furthermore it is not a requirement that the commercial invoice be signed.[132] Sub-Article 37(b) further allows – but does not oblige - the bank to refuse commercial invoices issued for amounts in excess of the amount permitted in the credit. It is self-evident that the bank must not effect payment of this excess amount.[133]

The ISBP deals with issues related to invoices in Provisions 59 to 72.

It stipulates that if the credit requires a commercial invoice, not allowing any other type of invoice to be presented, it must expressly stipulate so. However, if the credit simply calls for an "invoice", any type of invoice, other than provisional, pro-forma or the like is acceptable according to Provision 59.

Provisions 60 onwards stipulate that the requirements contained in UCP Article 37 concerning the issuer, the addressee and the description of goods in relation to commercial invoices must be applied to all types of invoices (except the pro-forma invoices and the like).[134] Additionally, the ISBP provide further clarity on these and other matters:

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[129] UCP sub-Article 37(a)(i) requires the commercial invoice to be issued by the beneficiary unless it is a transferable credit in terms of Article 48.

[130] UCP sub-Article 37(b)(ii) requires the invoice to be made out in the name of the applicant unless the name of the first beneficiary is substituted for that of the applicant under a transferable credit, as provided for in sub-Article 48(h).

[131] UCP sub-Article 37(c) calls for a description in the commercial invoice corresponding with the description in the credit. Note that in other documents the description may be described in general terms as long as it is not inconsistent with the description in the credit. See also above at paragraph 4.4.8.

[132] UCP sub-Article 37(a)iii.

[133] UCP sub-Article 37(b).

[134] Compare ISBP Provision 69 to UCP sub-Article 37(a)(i), ISBP Provision 61 to UCP sub-Article 37(a)(ii), ISBP Provision 62 to UCP sub-Article 37(c), and ISBP Provision 66 to UCP sub-Article 37(a)(iii).

Provisions 60 and 61 provide that a lack of or difference in telex or fax numbers, etc. forming part of the beneficiary's or applicant's address on an invoice does not constitute a discrepancy.

The ISBP further states in Provision 63 that the requirement of corresponding descriptions of goods must not be too strictly interpreted as requiring a mirror image. In any case the description must reflect what goods have actually been shipped.

4.5.3 Provisions on transport documents in general and the ocean/marine bill of lading in particular

Transport documents and related issues under a documentary credit are covered in Articles 23 to 33 of the UCP. In this important section of the UCP, documents for all modes of transportation are dealt with specifically, they are the marine/ocean bill of lading (Article 23), the non-negotiable sea waybill (Article 24), the charter party bill of lading (Article 25), the multimodal transport document (Article 26), the air transport document (Article 27), the road, rail or inland waterway transport document (Article 28), the courier and post receipts (Article 29) and the transport documents issued by freight forwarders (Article 30). UCP Articles 31 to 33 regulate general issues, to be regarded when concerned with transport documents.[135]

The order in which the ISBP deals with the transport documents reflects that of the UCP.

[135] UCP Article 31 deals with "On deck", "Shipper's Load and Count", and "Name of Consignor", Article 32 concerns "Clean Transport Documents", and Article 33 regulates "Freight Payable/Prepaid Transport Documents".

In part, the relating provisions of the ISBP simply emphazise certain aspects of the UCP rules by repetition thereof. They also, however, provide guidance as to how certain terms utilised in the UCP rules must be interpreted and how requirements may be fulfiled. In addition, they cover a few issues that are not expressly dealt with by the UCP.

For the purpose of demonstrating the structure of the relevant ISBP provisions and how the ISBP must be read in conjunction with the UCP, one can use as an example the first type of transport document dealt with in the UCP as well as in the ISBP, namely the ocean/marine bill of lading. The provisions on the other transport documents (charter party bills of lading,[136] multimodal transport documents,[137] air transport documents,[138] and road, rail or inland waterway transport documents)[139] roughly follow the same structure and deal with identical or similar issues. They are accordingly not examined here.

The requirements for a marine/ocean bill of lading under the UCP are set out in UCP Article 23.

Marine/ocean bills of lading are transport documents covering port-to-port shipment.[140] The maxim "falsa demonstratio non nocet" applies.[141]
Marine/ocean bills of lading are to be examined in terms of an open-ended list of criteria, set out in the UCP and partly specified in the ISBP. The various criteria are identified and discussed in turn below.

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136 UCP Article 25, ISBP Provisions 100-119.
137 UCP Article 26, ISBP Provisions 120-143.
138 UCP Article 27, ISBP Provisions 144-169.
139 UCP Article 28, ISBP Provisions 170-182.
140 See sub-UCP Article 23(a), ISBP Provision 73.

- Does the bill of lading appear on its face to indicate the name of the carrier and to have been signed or autheticated by the carrier, the master or an agent?

UCP sub-Article 23(a)(i) provides for the marine/ocean bill of lading to appear on its face to indicate the name of the carrier and to have been signed or authenticated by the carrier, the master or an agent for either. The agent must disclose that he/she is acting as an agent, and the name and capacity of the party on whose behalf the agent is signing, must be identified or at least determinable on the face of the bill of lading.[142]

- How must a bill of lading issued by a freight forwarder be signed in order to be acceptable?

Under the UCP, a bill of lading may only be issued by a freight forwarder in its capacity as a forwarder, if the credit expressly states so. Otherwise a freight forwarder can only issue and sign the bill as carrier, multimodal transport operator or as the agent of either. The specific requirements therefor are set out in UCP Article 30.

ISBP Provision 77 explains that use of the wording "Freight Forwarder's Bill of Lading is acceptable" in a credit means that it is expressly permitted that the freight forwarder issues and signs the bill of lading in the capacity of a freight forwarder. In such a case, the bill of lading is not even required to show the name of the carrier.

- Has the required number of originals been presented?

According to UCP sub-Article 23(a)(iv), the presented marine/ocean bill of lading "consists of a sole original bill of lading, or, if issued in more than one original, the full set

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[141] See UCP sub-Article 23(a) "... however named ...", ISBP Provision 74 "... need not use the term 'marine' or 'ocean' in order to comply ...". See also above at paragraph 4.4.17.

as so issued" is to be accepted by the bank. ISBP Provision 75 clarifies this, stating that the bill of lading must indicate the number of originals that have been issued. As already explained in Provision 31, markings such as "Original", "Duplicate", "Triplicate", "First Original", and "Second Original" do not disqualify a document as an original.[143] ISBP Provision 75 expressly reiterates this, stating that transport documents marked with the above-mentioned expressions are originals.

- Is there an indication that the goods have been loaded or shipped on a named vessel?

The marine/ocean bill of lading must furthermore in terms of the UCP indicate that the goods have been loaded, or shipped on a named vessel.[144] According to this provision, the requirement can be met via the use of pre-printed wording on the bill of lading.

The ISBP elaborates on this, stating that such wording must incorporate words such as "shipped" or "on board" in order to satisfy this requirement. Examples of such phrases complying with this requirement are provided in ISBP Provisions 78 and 79.[145]

In the case of exclusive use of such pre-printed phrases to indicate the events of loading on board or shipment, the issuance date of the bill of lading will be deemed to be the date of loading on board and the date of shipment.[146] If no pre-printed wording is used, the UCP rule requires the use of an on board notation evidencing when the goods have been loaded on board. The date stipulated in the on board notation (also when used in addition to a pre-printed phrase) will then be deemed to be the shipment date.

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[142] See UCP-Article 23(a)(i) in conjunction with ISBP Provision 76.
[143] See also above at paragraph 4.4.14.
[144] See UCP sub-Article 23(a)(ii).
[145] "Shipped on board", "Shipped in apparent good order", "Laden on board", "clean on board".

- Are the ports of loading and discharge indicated on the bill of lading?

UCP sub-Article 23(b)(iii) respectively ISBP Provisions 80 through 83 deal with the requirement of indicating the port of lading and the port of discharge in the bill of lading. The UCP provides that the indication of the ports of loading and discharge are a compulsory component of the bill of lading, notwithstanding any other extra information that may be included in the bill, such as a separate place of taking in charge or of final destination.

According to ISBP Provisions 80 and 81, provided that there is an on board notation clearly stipulating that the goods were loaded on the named vessel at the port of loading identified in the credit, respectively that they were discharged at the port stipulated in the credit, these ports may also appear in the fields "Place of receipt" respectively "Place of final destination" or like fields.

UCP sub-Article 23(a)(ii) provides that

> "[i]f the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also indicate the port of loading stipulated in the credit and the name of the vessel on which the goods have been loaded ..."

This is to ensure that the document accurately reflects the stipulation in the credit that the goods are on board a vessel departing from the port from which shipment has been requested.

Consequently, where the place of receipt or taking in charge is not different from the port of loading, this provision of sub-Article 23(a)(ii) is not applicable.

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[146] See UCP sub-Article 23(a)(ii) and ISBP Provision 78.

In this regard, the ICC experts were addressed with the question of whether the requirements of sub-Article 23(a)(ii) were applicable in an instance where the place of receipt was indicated on a bill of lading as the 'Hong Kong (CY)' with the port of loading indicated as 'Hong Kong Port', bearing in mind that the Hong Kong Container Yard (CY) is a part of Hong Kong Port. The ICC experts concluded that in this case the place of receipt and the port of loading were to be deemed one and the same place and therefore not subject to the provisions of sub-Article 23(a)(ii).[147]

The ISBP reflects this conclusion in Provision 82, where it is stated that

> "... if a Container Yard (CY) or Container Freight Station (CFS) is stated as the place of receipt and that place is the same as the stated port of loading ..., the specification of the port of loading and the name of the vessel in the 'on board' notation are not necessary."

- Is the consignment of the bill of lading conforming with that required by the credit?

The UCP do not contain rules on "straight" consignments, consignments "to order", or consignments "to order of a named person or entity".

ISBP Provision 84, however, states that in the case of "straight" consignments, the words "to order" or "to order of" must not precede the name of the named consignee, and vice versa the bill of lading must not indicate straight consignment if the credit calls for a consignment to order or to order of a named party.

[147] Official ICC Banking Commission Opinions, R282 from the 1997 Queries (http://focus.dcprofessional.com).

According to Provision 85, "if a bill of lading is issued to order, or to order of the shipper, it must be endorsed by the shipper" and "an endorsement indicating that it is made for or on behalf of the shipper is acceptable."

- Has transhipment been carried out, and if so, was transhipment allowed under the credit?

"Transhipment", in terms of the UCP, is defined in sub-Article 23(b) as

> "unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit."[148]

Transhipment is not prohibited by the UCP as long as the entire ocean carriage is covered by one and the same bill of lading.[149]

In case the parties want the credit to prohibit transhipment, Provision 88 reminds the parties to also expressly exclude the application of UCP sub-Article 23(d) which sets out the circumstances in which transhipment is accepted notwithstanding a prohibition thereof in the credit.

- Were the goods transported in partial shipment, and if so, was partial shipment allowed under the credit?

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[148] See also ISBP Provision 87.
[149] See UCP sub-Article 23(c).

UCP sub-Article 40 permits partial shipment.[150] It further stipulates that no partial shipment is given when "shipment has been made on the same means of conveyance and for the same journey, provided they indicate the same destination."[151]

- Is the presentation of more than one set of original bills of lading acceptable, and which date of shipment has to be looked at to determine compliance with the stipulations of the credit?

Provision 89 of the ISBP lays down that more than one set of original bills of lading covering shipment from one or more ports of loading are acceptable, provided that they cover the shipment of goods on the same vessel and same journey and are destined for the same port of discharge. Accordingly, shipment is not qualified as partial shipment in terms of UCP Article 40. The latest date of shipment contained in these sets of bills of lading is referred to for the purpose of determining compliance with the latest acceptable date stipulated in the credit and for the calculation of any presentation period.[152]

- Is the bill of lading "clean"?

A "clean" bill of lading, in terms of UCP sub-Article 32(a), is one that "bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging."[153]

ISBP Provision 90 emphasises that only "express" declarations of a defective condition are harmful, as opposed to non-express declarations.

[150] UCP sub-Article 40(a).
[151] UCP sub-Article 40(b).
[152] ISBP Provision 89.
[153] UCP sub-Article 32(a) regulates this for all transport documents. Note that US law, for example, recognizes a second meaning for a clean bill of lading, confirming that the goods are safely and

Unless otherwise stipulated in the credit, only "clean" bills of lading are acceptable according to UCP sub-Article 32(a). However, there is no requirement under the UCP for the word "clean" to appear on a bill of lading. This can be derived from UCP sub-Article 32(c), which requires only that its terms and those of the relating UCP article on the referring transport document be met. This is expressly confirmed in ISBP Provision 91.[154] Even the deletion of the word "clean" does not render the document "unclean", according to the ICC experts.[155] This is noted in Provision 92 of the ISBP.

- Is the goods description in the bill of lading consistent with that stated in the credit?

Provision 93 of the ISBP concerning the goods description in the bill of lading can only be seen as a reminder for the documentary credit practitioner that the "goods description in the bill of lading may be shown in general terms not inconsistent with that stated in the credit." The UCP already provide expressly that in all documents other than the commercial invoice, the goods may be described in general terms not inconsistent with the description in the credit.[156]

- Have corrections and alterations on the bill of lading been duly authenticated?

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properly stowed under deck. See also *Tiposan Harf Ve Matbaa Gerecleri A.S. v Masonite Corporation et al.* 1998 U.S. App. Lexis 18560 (4th Cir. 1998).

[154] ISBP Provision 91 reads "[t]he word 'clean' need not appear on a bill of lading even though the credit may require a 'clean on board bill of lading' or one marked 'clean on board'."

[155] As expressed in Case Study 122 "cleanblackout" (http://focus.dcprofessional.com), where it was stated that "[t]he fact that the word 'clean' was apparently deleted by the issuers of the document does not, in our opinion, constitute a discrepancy."

[156] See UCP sub-Article 37(c) and above at paragraph 4.4.8.

Concerning corrections and alterations on a bill of lading covered by ISBP Provisions 94 and 95 one can also refer to the information given in Provisions 9 through 12 dealing with this topic relating to documents in general.[157]

Before the publication of the ISBP, the ICC Banking Commission had been addressed with this issue. It stated in opinion R.344 of ICC Publication No. 613, that

> "[a]n authentication to an alteration on a bill of lading may be made by any agent of the carrier/master without limitation as to whether that party signed the bill of lading and/ or authenticated any other alteration within that document."

Provision 95, stating that

> "non-negotiable copies of bills of lading do not need to include any signature on, or authentication of any alterations or corrections that may have been made on the original",

reflects the Opinion of the ICC Banking Commission on this topic expressed when addressed with the query whether a non-negotiable copy of a bill of lading needs to be signed. The experts dtermined that

> "a non-negotiable bill of lading should 'mirror' an original bill of lading to the extent of content - including any alterations thereon. Only the original bill of lading is required to be signed and/or initialled by the carrier or his agent. Any alterations made to the non-negotiable copy (ies) need not be signed or initialled."[158]

- Are the UCP rules concerning the payment of freight and/or additional costs, and the indication thereof on the bill of lading complied with?

[157] See above at paragraph 4.4.4.
[158] Official ICC Banking Commission Opinion R337 from the 1998-99 Queries (http://focus.dcprofessional.com).

Freight can be prepaid or may be payable at destination.[159] According to UCP Article 33(a) transport documents can state that freight has still to be paid, unless otherwise stipulated in the credit. UCP sub-Article 33(b) provides that if the credit requires the document to indicate freight payment or prepayment, this fact must be clearly indicated on the document.

This rule of marking a transport accordingly is repeated in ISBP Provision 96 in regard of ocean/marine bills of lading, stating that

> "if a credit requires that a bill of lading show that freight has been paid or is payable at destination, the bill of lading must be marked accordingly."

The ISBP advises in Provision 97 on the need to be specific when stipulating the requirement of documents to show whether freight is to be prepaid or collected.

If the credit does not prohibit reference to costs additional to freight, such reference on a transport document is acceptable according to the UCP.[160] Consequently, if the credit prohibits such reference, there must not be a respective marking on the document.

Provision 98 provides examples of frequently used shipment terms which refer to additional costs associated with the loading or unloading of goods. These include "Free In" (FI), "Free Out" (FO), "Free In and Out" (FIO) and "Free In and Out Stowed" (FIOS). More interestingly, Provision 98 also explains that

> "a reference in the transport document to costs which may be levied as a result of a delay in unloading the goods or after the goods have been unloaded, e.g. costs covering the late return of containers, is not considered to be an indication of additional costs in this context."

[159] According to UCP sub-Article 33(a), "freight" means freight or transportation charges.

- Is a bill of lading stating that the goods in a container are covered by that and additional bills of lading, or similar, acceptable?

The UCP does not contain rules dealing with a situation where a bill of lading states that the goods in a container are covered by that and additional bills of lading, or similar. In such a case, the container will only be released to the consignee if all the bills of lading related to that container are presented.

ISBP Provision 99 touches on the matter, stating that

> "such a bill of lading is not acceptable unless all the bills of lading form part of the same presentation under the same credit."

4.5.4 Insurance documents

The requirements for insurance documents to be accepted by banks under a documentary credit are set out in Articles 34 through 36 of the UCP.

ISBP Provisions 183 through 195 provide clarification to the related issues "issuance and signing", "risks to be covered", "date of issuance", "expiry date", "currency and amount", "insured party" and "endorsement".

UCP sub-Article 34(a) provides that "[i]nsurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents."

According to sub-Article 34(b), in the case of multiple originals, all of the originals need to be presented.

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[160] See UCP sub-Article 33(d).

ISBP Provision 184 adds that if required by the insurance document itself or by the credit, all originals must appear to have been countersigned.

Provision 185 of the ISBP further states that the issuance of an insurance document on a broker's stationary has no deleterious effect regarding its acceptability provided that one of the parties listed in UCP sub-Article 34(a) has signed the document. The broker can also sign when acting as an agent in terms of this article. This view had also been expressed by the ICC Banking Commission when addressed with this issue prior to the publication of the ISBP.[161]

The credit should be explicit with regard to the risks to be covered. According to UCP Article 35, if the credit lacks specific stipulations or includes imprecise terms in this regard, the banks may accept such insurance documents without any responsibility for risks not being covered.

ISBP Provision 186 states that if the credit explicitly stipulates the risks to be covered, the insurance document must not show any exclusions with respect to those risks. It furthermore explains that the indication of covering Institute Cargo Clauses (A) fulfills the requirement of an "all risks" notation or clause in terms of UCP Article 36.[162] According to Provision 187, insurance documents for partial cover of the same risks for the same shipment are only acceptable, if each of the insurance documents

[161] The ICC Banking Commission concluded in their Official Opinion R278 from the 1997 Queries, that "the insurance document to which this query relates would seem to be signed by the brokers as agents of the named insurance company, ABC Ltd, as leading insurer also for and on behalf of the co-insurers, and implies their joint liability. The insurance certificate presented is acceptable." See also ICC Banking Commission Official Opinion R232 from the 1995-96 Queries and Official Opinion R233 from the 1995-96 Queries (all available at http://focus.dcprofessional.com).

[162] UCP Article 36 provides that "...where a Credit stipulates 'insurance against all risks', banks will accept an insurance document which contains any 'all risks' notations or clause, whether or not bearing

"reflect, by percentage or otherwise, the value of each insurer's cover and that each insurer will bear their share of the liability severally and without pre-conditions relating to any other insurance cover that may have been effected for that shipment."

If there are no specific stipulations in the credit, Provision 188 provides that the insurance document must show risk-coverage at least between the point of shipment/dispatch/taking in charge and the point of discharge/final destination.[163]

An insurance document bearing an issuance date later than the date of loading/dispatch/taking in charge is only acceptable if it appears from that document that the insurance cover is effective at the latest from the date of loading/dispatch/taking in charge. This rule is contained in the UCP in sub-Article 34(e) and is repeated in ISBP Provision 189. It is necessary that the document provides adequate evidence that the insurance is effective as of that date. For example, the inclusion of a "sailing date" does not provide such adequate evidence.[164]

According to Provision 190 of the ISBP, an expiry date incorporated in an insurance document must clearly relate to the latest date that loading/dispatch/taking in charge is to occur, as opposed to the presentation of claims under the insurance.

the heading 'all risks', even if the insurance document indicates that certain risks are excluded, without responsibility for any risk(s) not being covered."

[163] See also the conclusion of the ICC Banking Commission to Question 4 in Official Opinion R468 in the 2000-01 Queries, where it was stated that "[u]nless otherwise stipulated in the credit, the insurance document must cover the entire journey between the place from which the credit stipulates the goods are to be shipped or dispatched and the place to which the credit stipulates the goods are to shipped/delivered." (available at http://focus.dcprofessional.com).

[164] Official ICC Banking Commission Opinion R290 from the 1997 Queries (available at http://focus.dcprofessional.com).

UCP sub-Article 34(f) together with ISBP Provisions 191 through 193 deal with the currency and the minimum amount for which insurance cover is to be effected. They provide that unless otherwise stipulated in the credit, the insurance document must be issued in the currency of the credit.[165]

Where the credit is silent as to the amount of coverage, UCP sub-Article 34 (f)(ii) states that the insurance document must be issued for a minimum of 110% of the CIF or CIP value. The ICC Banking Commission had expressed in an Official Opinion that banks that issue credits with a clause such as 'Insurance for 110% invoice value'

> "generally are looking for a minimum coverage rather than an exact one. If a bank requires the insurance document to be issued for exactly X% or X amount or words to similar effect, then the credit must expressly state this requirement."[166]

ISBP Provision 191 reflects this statement.

If the invoice does not reflect the total gross value of the goods, the calculation of the insurance cover must not be based on the amount represented in the invoice but rather on the actual full gross value of the goods.[167] This opinion of the ICC Banking Commission is now reflected in ISBP Provision 193.

UCP sub-Article 35(c) states that banks will accept insurance documents that indicate that the cover is subject to a franchise or an excess. ISBP Provision 192 reduces this acceptability by providing that the insurance document must not contain such a clause if the credit calls for an insurance cover irrespective of percentage.

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[165] UCP sub-Article 34(f)(i) and ISBP Provision 191.

[166] Official ICC Banking Commission Opinion R468 from the 2000-01 Queries (available at http://focus.dcprofessional.com).

The main statement of the ISBP dealing with the endorsement of an insurance document is that "a document issued to bearer is acceptable where the credit requires an insurance document endorsed in blank and vice versa."[168]

Furthermore, according to Provision 195,

> "if a credit is silent as to the insured party, an insurance document evidencing that claims are payable to the order of the shipper or beneficiary would not be acceptable unless endorsed."

Provision 195 also recommends that

> "an insurance document should be issued or endorsed so that the right to receive payment under it passes upon, or prior to, the release of the documents."

4.5.5 Certificate of origin

Whereas the UCP do not contain specific provisions on certificates of origin, the ISBP incorporates a section on this type of document. ISBP Provisions 196 through 200 deal with the basic requirement, issuers and contents of a certificate of origin.

According to Provision 196, a certificate of origin must be signed, dated and must certify the origin of the goods.

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[167] See Official ICC Banking Commission Opinion R468 from the 2000-01 Queries (available at http://focus.dcprofessional.com).

[168] ISBP Provision 194.

Provision 197 deals with three different cases in regard to the issuer of a certificate of original. If the credit specifies the issuer, the document has to be issued by that party. If the credit is silent as to who is to issue the certificate, the certificate can be signed by any party.[169] In the instance where the credit requires the certificate of origin to be issued by the beneficiary, the exporter or the manufacturer, the ISBP provides that a certificate issued by a chamber of commerce is also acceptable provided it identifies the party who was supposed to issue the document according to the credit.

Concerning the contents of certificates of origin, the ISBP provides in Provision 198 that the certificate must relate to the invoiced goods. This requirement can be met by a goods description shown in general terms not inconsisitent with that stated in the credit,[170] or by any other reference indicating a relation to the goods in a required document. Of course the certificate must also provide a clear indication of the origin of goods.[171]

Provision 199 reflects the opinion of the ICC Banking Commission that

> "in circumstances where the credit requires a bill of lading to be issued to order and blank endorsed, it is not unreasonable to expect that the consignee would be shown as the applicant of the letter of credit, or any other name shown in the credit as the ultimate receiver of the goods. Where a credit requires the bill of lading to be issued to order of the issuing bank, it would not, once again, be unreasonable to expect the certificate of origin to show the ultimate receiver of the goods as the consignee."[172]

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[169] See also UCP Article 21 dealing with unspecified issuers of documents, where it is stipulated that "...the Credit should stipulate by whom such documents are to be issued and their wording or data content. If the Credit does not so stipulate, banks will accept such documents as presented ..."

[170] Note that this is provided in UCP sub-Article 37(c). See also above at paragraph 4.4.8.

[171] See ISBP Provision 196 "...that certifies to the origin of the goods."

[172] Official ICC Banking Commission Opinion R276 from the 1997 Queries (http://focus.dcprofessional.com). ISBP Provision 199 specifies the issuance "to order", "to the order of shipper", "to order of the issuing bank", or "consigned to the issuing bank".

According to this provision the name of the first beneficiary under a transferred credit as consignee would also be acceptable.

Finally, Provision 200 of the ISBP allows the consignor shown on the certificate of origin to be a party other than the beneficiary of the credit or the shipper on the transport document.[173]

5 Conclusion and Outlook

Overall the ISBP can be regarded as a particularly useful document. It is a valuable interpretative tool for the participants of a documentary credit transaction, in particular for the bank's document examiners, offering guidance in seemingly unclear or disputable situations.

For example, the ISBP can be used as an assisting checklist not only by the documentary credit banker for compliance examination, but also by the exporter for compliance preparation and payment dispute management.

The ISBP does not and cannot be expected to offer solutions to all potential problems that may be encountered by the participants of documentary credit transactions concerning documents presented by the beneficiary to the bank. It can nevertheless offer valuable assistance in answering numerous questions in this regard. It is envisioned that the ISBP will thereby contribute toward a uniform approach to the handling and consideration of presented documents worldwide. The importance of the ISBP and its potential positive

[173] UCP sub-Article 31(iii) provides similarly for transport documents that a document will be accepted "which indicates as the consignor of the goods a party other than the Beneficiary of the Credit."

impact in the sphere of documentary credit transactions has been expressed by many bankers worldwide.

In order for the impact of the ISBP to reach its full potential it is necessary that the trading parties be made aware of the existence and content of this relatively young publication. It is furthermore imperative that all document examiners of the banks receive effective training on the ISBP and its contents. In so doing the ISBP will improve bankers' and traders' skills in documentary credit matters.

The ISBP is not, however, above criticism. From a technical drafting viewpoint, it is evident that the drafters attempted to make the provisions as readily accessible to practitioners as possible and that they sought to facilitate their effective implementation of the UCP rules. Most sections of the ISBP covering a specific topic accordingly commence with an introductory remark stating the obvious or at times merely repeating what is already expressly noted in the UCP. While this is of assistance to the practitioner using the ISBP as a guide, it at the same time creates the risk that a practitioner, when confronted with a specific problem, will solely rely on the explanatory provisions of the ISBP. This is undesirable as the actual applicable rules are contained in the UCP. One must always bear in mind that the ISBP is not a primary legal document, but merely an interpretative instrument on what is considered to be international standard banking practice in terms of the UCP. It is imperative to always refer to the actual rules of the UCP in the first instance and to use the ISBP for further clarification and interpretation aid only.

At last, it has to be mentioned that the ICC Banking Commission has decided in its meeting in Rome in 2002 to begin a review of the UCP Articles. UCP Drafting and Consultation Groups have already been appointed to work on a successor to UCP 500. In addition to examining provisions currently in the UCP, the drafters will need to take account of other ICC rules as well as the ISBP and decide whether they should be incorporated into the revision.[174]

It can be foreseen, however, that the completion of this revision of the UCP cannot be expected for several years to come. Until then, the participants of documentary credit transactions have to revert to the existing rules of UCP 500 and the interpretative provisions of the ISBP.

[174] Other ICC rules relating to the topic of documentary credits are, for example, the URR 525 (Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits, ISP98 (The International Standby Practices) and the eUCP (Supplement to UCP 500 for Electronic Presentation).

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ACRONYMS UTILISED

ICC	International Chamber of Commerce
ISBP	International Standard Banking Practice for the Examination of Documentary Credits
UCP	The Uniform Customs and Practice for Documentary Credits