UNIVERSITY OF NOTRE DAME

NOTRE DAME LONDON LAW CENTRE

AUTUMN 2018

INTERNATIONAL BUSINESS LAW

Course Information

Lecturer
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A. PURPOSE OF COURSE

This course provides students with an introduction to international business law. It begins with an examination of the concept of free trade and the international structures and organizations that have been created to foster the liberalization of international trade. The course highlights the importance of ethics in international business and introduces students to the OECD Convention on Combating Bribery of Foreign Public Officials, the Foreign Corrupt Practices Act 1977 (US) and the Bribery Act 2010 (UK). It then focuses on the United Nations Convention on Contracts for the International Sale Goods (CISG), followed by a consideration of International Commercial Terms (Incoterms 2000 and Incoterms 2010) and carriage of goods, especially carriage of goods by sea. The course then deals with the Uniform Customs and Practice for Documentary Credits (UCP600) and financing of exports. Finally, this course also provides students with an introduction to the World Trade Organization (WTO), including anti-dumping and countervailing duties law.

B. COURSE LECTURER AND CONTACT DETAILS

Professor Gabriël A. Moens, JD (Leuven), LLM (Northwestern), PhD (Sydney), GCEd (Queensland), MBA (Murdoch), MAppL (COL), FCIArb, CIArb, FAIM, FCL is an Emeritus Professor of Law at the University of Queensland and a Professor of Law at Curtin University. Prior to his current positions he served as Pro Vice Chancellor (Law, Business and Information Technology) and as a long-serving Dean and Professor of Law at Murdoch University. He also served as Professor of Law and Head, Graduate School of Law, The University of Notre Dame Australia and as Garrick Professor of Law and Director, The Australian Institute of Foreign and Comparative Law, The University of Queensland. Professor Moens is a past winner of a University of Queensland Excellence in Teaching Award. In 1999, he received the Australian Award for University Teaching in Law and Legal Studies. He is the Editor-in-Chief of *International Trade and Business Law Review*. In 2003, the Prime Minister of Australia awarded him the Australian Centenary Medal for services to education. In 1995-1996 he was a Visiting Professor of Law at J. Reuben Clark Law School, Brigham Young University, Utah. He served as a

Visiting Professor of Law at Loyola University, New Orleans School of Law in 2002-2003. He taught in the University of Notre Dame, London Law Centre Summer Program from 1991 to 2014. He is a Fellow (FCIArb) and Chartered Arbitrator (CArb) of the Chartered Institute of Arbitrators, London and Fellow, Australian Centre for International Commercial Arbitration (ACICA). Professor Moens is a *Membre Titulaire*, International Academy of Comparative Law, Paris, a Fellow of the Australian Institute of Management (AIM WA) and Chair of the Advisory Board of the Australian Institute of Higher and Further Education (AIHFE). He has taught extensively in the United Kingdom, Germany, Belgium, Italy, Austria, Australia, Indonesia, Thailand, Singapore, P R China, Hong Kong, Japan and the United States. He is co-author/co-editor of *The Constitution of the Commonwealth of Australia Annotated* (9th ed), LexisNexis Butterworths, 2016; *Arbitration and Dispute Resolution in the Resources Sector: An Australian Perspective*, Springer, 2015, *Jurisprudence of Liberty* (2nd ed), LexisNexis, 2011, *Commercial Law of the European Union*, Springer, 2010, and *International Trade and Business: Law, Policy and Ethics* (2nd ed), Routledge/Cavendish, 2006. The contact details of Professor Moens are:

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Email: g.moens@uq.edu.au or gabriel.moens@gmail.com

C. RECOMMENDED MATERIALS

Gabriël Moens & Peter Gillies, *International Trade and Business: Law, Policy and Ethics* (2nd ed.), London, Routledge-Cavendish, 2006

Note: students should read and study Chapter 1 (International Commercial Contracts), Chapter 3 (An Assessment of Incoterms 2000) and Chapter 6 (Financing of Exports: Letters of Credit). These chapters will be made available to students. Students do <u>not</u> need to purchase this book.

Or

Robin Burnett & Vivienne Bath, *Law of International Business in Australasia*, Sydney, The Federation Press, 2009

Note: this book is being updated/revised by Professor Moens. Relevant chapters of the revised book will be made available to students. Students do <u>not</u> need to purchase this book.

Or

Bryan Mercurio, Leon Trakman, Meredith Kolsky Lewis and Bruno Zeller, *International*

Business Law, Oxford University Press, 2010

Note: students might want to read and study part 3.4 of Chapter 3 (Special international trade terms: Incoterms) and Chapter 4 (Payment in international business transactions). Students do <u>not</u> need to purchase this book.

The following books and articles may be consulted to facilitate the study of International Business Law:

Roy Goode, Herbert Kronke & Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials* (2n ed). Oxford University Press, 2015

J. O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (3rd ed.), Deventer, Kluwer Law and Taxation Publishers, 1999

John O. Honnold & Curtis R. Reitz. *Sales Transactions: Domestic and International Law: Cases, Problems and Materials*, Foundation Press, 2006

M Rafiqul Islam, *International Trade Law and the WTO*, Oxford University Press, 2006

John Mo, *International Commercial Law* (4th ed), LexisNexis Butterworths, 2009

Gabriël Moens & John Trone, *Commercial Law of the European Union*, Springer 2010 (especially Chapter 5: Commercial Law and Policy)

Nicholas P Manganaro, "About-Face: The New Rules of Strict Compliance Under the Uniform Customs and Practice for Documentary Credits (UCP 600), vol. 14 *International Trade and Business Law Review* (2011), 273- 290 (Note: this article is appended to the study guide as **Appendix C**)

Carole Murray, David Holloway & Daren Timson-Hunt, *Schmitthoff's Export Trade: The Law and Practice of International Trade* (12th ed), London, Sweet & Maxwell, 2012

M. Pryles, J. Waincymer & M. Davies, *International Trade Law. Commentary and Materials* (2nd.), Lawbook Company, 2004

Ingeborg Schwenzer, Christiana Fountoulakis & Mariel Dimsey, *International Sales Law: A Guide to the CISG*, Oxford and Portland, Oregon, 2012

D. COURSE REQUIREMENTS

There are three different types of assessment.

1. Student Presentation/Participation (20%)

All students are expected to participate in formal and informal discussions/debates during the course. On Thursday, 17 August 2018 students are expected to participate in a discussion on a hypothetical WTO case which is appended to this outline as **Appendix A**. Information on how this will be done will be communicated to the students during the course. This assessment is worth 20% of the total marks available for this course.

2. Written Legal Submission (30%)

There are three questions below. These questions deal with the application of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and Incoterms 2000/Incoterms 2010. Students are required to answer any one (1) question. The total number of words (including footnotes, if any, but excluding bibliography) should be a minimum of 1000 words and a maximum of 1500 words. A hard copy should be given to Professor Moens on Thursday, 17 August during the allocated class meeting. This part of the assessment is worth 30% of the total marks available for this course.

Date due: Thursday, 17 August 2018 at 5 pm at the latest.
Format: Typed (not handwritten), single sided, 1.5 or 2 point line spacing.

Question One

Mr Albert Joumont (BUYER), a French businessperson whose place of business is in Marseille, France, negotiates with Mr Florimont Miller (SELLER), an American citizen and businessperson whose place of business is in South Bend, Indiana. Mr Miller manufactures quality 'Miller' sunglasses in factories owned by him and located in P R China and Australia. He travels to these countries from time to time to manage his factories and to check the manufacturing of 'Miller' sunglasses.

On February 16, 2018, Mr Joumont telephones Mr Miller to place an order for the manufacturing of 30,000 'Miller' pink sunglasses. In his order, he stipulates that the sunglasses must arrive in the port of Marseille, France, on or before May 15, 2018 in order to take advantage of the pre-summer sales period in Europe and to be able to display the sunglasses at a trade exhibition scheduled to be held in Paris on May 21, 2018. It is expected that most orders for the sunglasses would be placed by prospective customers during this trade exhibition.

During their telephone conversation, Mr Miller (SELLER) indicates that he is able to immediately send 10,000 sunglasses by air cargo from Australia where these sunglasses are stored in a warehouse. Mr Miller also promises that he would be able to manufacture the remaining 20,000 sunglasses in time for delivery on or before May 15, 2018. Mr Miller also mentions that 'mediation' is his preferred method of dispute resolution. Mr Joumont agrees to buy 30,000 sunglasses and responds by saying that he is not familiar with 'mediation' and that he prefers 'arbitration' as a method of dispute resolution. However, he points out that, in any event, he does not anticipate that disputes will occur.

On February 30, 2018, 10,000 sunglasses arrive from Australia but, upon inspection Mr Joumont discovers that the sunglasses are green instead of pink. He immediately advises

Mr Miller of this discrepancy by e-mail.

On March 30, 2018, Mr Miller sends an e-mail message to Mr Joumont to inform him of a strike in Australia and that manufacturing has stopped. Mr Miller indicates that he will be able to deliver 5,000 sunglasses on time because these had already been manufactured before the strike. Although he is unable to indicate when manufacturing of the remaining 15,000 sunglasses will resume, he envisages that he should have a clearer idea and more information on April 16, 2018 when a meeting of the Sunglasses Workers Union will be held. The 5,000 sunglasses that had already been manufactured before the strike arrive in Marseille from Australia on April 29, 2018. Upon inspection, Mr Joumont discovers that 215 of these sunglasses have been damaged in transit. Mr Joumont decides to avoid the contract and he emails Mr Miller to that effect on April 30, 2018.

Answer the following questions:

1. Has a contract for the international sale of goods been formed? If a contract for the international sale of goods has been formed, what substantive law will be applicable to the contract?
2. Does it matter that the contract is not in writing? Is the disagreement about the appropriate method of dispute resolution a relevant issue?
3. If a valid contract for the international sale of goods has been formed, under what circumstances would Mr Joumont (BUYER) be able to avoid the contract?
4. What are the consequences of avoidance under the United Nations Convention on Contracts for the International Sale of Goods (CISG)?
5. Would Mr Miller be able to rely on Article 79 CISG to resist Mr Joumont's decision to avoid the contract?
6. Does Article 79 CISG deal with 'hardship'? If not, what law would be applied by an arbitrator/judge to issues relating to 'hardship'?

Question Two

Arthur Bates (SELLER), whose place of business is in Perth, Australia, receives an e-mail message on 23 July 2017 from Peter Firth (BUYER), whose place of business is in South Bend, Indiana, USA. In the e-mail, Peter enquires whether Arthur would be able to sell four printing machines, model LX435, which are capable of printing 100 pages per minute. In his reply e-mail, Arthur indicates the conditions under which he is willing to sell four printing machines. He insists that the CIF term (Incoterms 2010) be incorporated in the contract. Arthur also points outs that arbitration is his preferred method of dispute resolution. He also refers Peter to Arthur's Website which details the technical specifications of the LX435 model. The Website indicates that the LX435 model prints up to a maximum of 100 pages per minute.

Nearly six months later, on January 18, 2018, Peter informs Arthur by e-mail that he (Peter) viewed Arthur's printing machine, model LX435, during an exhibition in Beijing, P R China. Peter now wants to place an order for four of these printing machines because he was impressed by the demonstration that he observed in Beijing. Arthur and Peter

enter into a contract for the sale and purchase of four printing machines, model LX435. The CIF (Incoterms 2010) term is incorporated in the contract. However, the contract does not mention the number of pages these machines are able to print per minute. Clause 14 of the contract does refer to Arbitration as the method of dispute resolution. Peter informs Arthur by e-mail that he does not understand arbitration, and would rather settle disputes by Negotiation, using the UNCITRAL Conciliation Rules as the relevant procedural rules. However, Peter goes on to say that he is not really concerned because they are both experienced and reputable business people and, therefore, he does not expect any disputes to occur.

The printing machines are shipped on March 3, 2018 and are successfully installed by Peter in his warehouse. Over the next fortnight, Peter discovers that the machines only print 85 pages per minute. In addition, Peter is wounded on his right arm when he tries to unblock a paper jam. In unblocking the jam, Peter followed the specifications detailed on Arthur's Website for 'Problem Solving'.

Peter has heard that you have studied International Business Law at the University of Notre Dame, London Law Centre. He seeks your advice. Answer the following questions.

(1) Has a contract for the international sale of goods been formed and, if so, what substantive law will be applicable to the contract? Is the disagreement about the appropriate method of dispute resolution a relevant issue?
(2) Is the LX435 model fit for the particular purpose made known by BUYER to SELLER? In this context, discuss the conformity requirements under the United Nations Convention on Contracts for the International Sale of Goods (CISG).
(3) Which remedies are available to Peter for non-conformity of goods under the CISG?
(4) Is the CISG applicable to the liability of the seller for the wounds sustained by Peter in the operation of the printing machine? Give reasons for your view.
(5) Under what circumstances would it be possible for Peter to avoid the contract under the CISG?
(6) What are the consequences of avoidance under the CISG?
(7) What are the obligations of the seller concerning the transfer of risk for loss of or damage to the goods from the seller to the buyer?

Question Three

John Evans (SELLER) owns a business in Chicago selling racing bicycles (also known as 'road bikes') to professional cyclists. Charles Pompidour (BUYER) is the Manager of an English cyclist team, located in London, UK. The team is in preparation for the Tour de France, the gruelling and most prestigious bike race in the world. BUYER emails a request to John (SELLER) to manufacture four hundred (400) racing bicycles, the frames of which combine riding comfort and light weight.

The request arrives in Chicago on January 29, 2018. On February 12, 2018 John

(SELLER) replies by email that "he can possibly manufacture the racing bicycles for US$1199.99 each by June 20, 2018." An order confirmation form is attached to the e-mail response. The confirmation form contained the following language (in bold face type on the front of the form):

> **The terms on the reverse side of this form are the only ones upon which we will accept orders. These terms supersede all prior written or oral undertakings, assurances and offers. Your attention is especially directed to the CIF trade term (INCOTERM 2010) which will be incorporated in any contract. The law applicable to all contracts entered into by us is American law Your attention is also drawn to the expectation that, in case of dispute, arbitration will be attempted under the AAA (American Arbitration Association) Arbitration Rules.**

On March 1, 2018 Charles (BUYER) advises that he accepts John's offer. However, in his purported acceptance he indicates that the bicycles must arrive in London on June 3, 2018 at the latest because his Tour de France team needs a minimum of four weeks to familiarize themselves with the road bikes before the Tour begins.

The bicycles are duly manufactured and sent to London where they arrive on June 15, 2018. Upon inspection, Charles discovers that the drop handlebars are positioned slightly higher than the saddle, which has the effect that the rider is no longer in the best aerodynamic posture. As Charles is certain that this will adversely affect his team's Tour de France preparations, he sends an e-mail to John indicating that (i) the bicycles did not arrive on time, and that (ii) there are serious problems with the positioning of the drop handlebars in relation to the saddle. He also advises John that he (Charles) is cancelling the contract and that the bicycles are available for collection by John (SELLER).

Answer the following questions:

(1) Has a contract for the international sale of goods been formed? What is the substantive law applicable to the contract? Give reasons.
(2) Explain the operation of Article 1(1)(b) CISG. Is this Article applicable to this case?
(3) What is the relevance and impact upon the formation of the contract of the order confirmation form?
(4) What is the meaning of the CIF trade term (INCOTERMS 2010) concerning the transportation and insurance of the racing bicycles? Discuss three main differences between the CIF trade term (INCOTERMS 2000) and the CIF trade term (INCOTERMS 2010).
(5) Is Charles entitled to avoid the contract in accordance with the applicable substantive law?
(6) Does the United Nations Convention on Contracts for the International Sale of Goods (CISG) impose any obligations upon Charles (BUYER) with regard to the preservation of goods? Give details of any such obligations.
(7) If the contract were to be avoided successfully by Charles, what would be the

status of the arbitration clause, which provides for the application of the AAA Arbitration Rules?

3. Take-home final examination (50%)

The **Take-home final examination** will consist of four questions and students will be expected to answer ***any*** two questions. The questions will deal with the United Nations Convention on Contracts for the International Sale of Goods (CISG), UCP600, Incoterms 2000 and 2010, carriage of goods, especially carriage of goods by sea, and bribery of foreign public officials.

Each answer should contain a minimum of 1000 words and a maximum of 1500 words (excluding footnotes and bibliography)

There are a variety of assessment objectives in this course. Underpinning all of these is the measure of a student's ability to interact ***critically*** with both the course material and related information - this means that analysis will score significantly higher than simple collation of information.

The examination will be designed to test knowledge and recall of relevant rules, principles, cases and legislation and the ability to apply them to given sets of facts.

Marks will be allocated for the identification and treatment of each issue relevant to the solution of the problem. With respect to each issue, the highest mark will be awarded to students who:

- Identify the issue and its connections to other issues;
- Identify, and relate to the issues, the relevant facts and/or factual assumptions;
- Identify the rules and/or principles relevant to answering the question;
- Apply accurately rules/principles to the factual situations; and
- Demonstrate the ability to organise the treatment of the several issues and conclusions clearly and coherently.

Date due: Monday, August 26, 2018 at 5 pm at the latest.
Format: Typed (not handwritten), single sided, 1.5 or 2 point line spacing.

D. COURSE OUTLINE AND TEACHING SCHEDULE

Day	Date and time	Content

1	Monday, 6 August 2018 (2pm-5pm)	Introduction to the salient features of International Business Law. The importance of ethics in international business: The Foreign Corrupt Practices Act 1977 (US), the Bribery Act 2010 (UK) and the OECD Convention of Bribery of Foreign Public Officials International Business Law structures and organisations Introduction to the United Nations Convention on Contracts for the International Sale of Goods (CISG)
2	Tuesday, 7 August 2018 (2pm-5pm)	United Nations Convention on Contracts for the International Sale of Goods (CISG)
3	Wednesday, 8 August 2018 (2pm-5pm)	United Nations Convention on Contracts for the International Sale of Goods (CISG) Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986 UNIDROIT Principles of International Commercial Contracts 2010 Principles of European Contract Law 2002
4	Thursday, 9 August 2018 (2pm-5pm)	International Commercial Terms (Incoterms 2000 and Incoterms 2010)
5	Friday, 10 August 2018 (2pm-5pm)	International Commercial Terms (Incoterms 2000 and Incoterms 2010) Bills of lading International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Hague Rules") (Brussels, 25 August 1924) and amended Hague Rules
6	Monday, 13 August 2018 (2pm-5pm)	Carriage of goods, especially carriage of goods by sea Documentary sales
7	Tuesday, 14 August 2018 (2pm-5pm)	ICC Uniform Customs and Practice for Documentary Credits (UCP600) Letters of credit Financing of exports
8	Wednesday,15August 2018 (2pm-5pm)	ICC Uniform Customs and Practice for Documentary Credits (UCP600) Bills of exchange Standby letters of credit (ISP98)

		Rules for Documentary Instruments Dispute Resolution Expertise (DOCDEX)
9	Thursday, 16 August 2018 (2pm-5pm)	The General Agreement on Tariffs and Trade 1994 and the World Trade Organization (WTO) Discussion of WTO scenario (**Appendix A**) and student presentations

E. TEACHING METHOD AND READING ASSIGNMENTS

D.1 Teaching Method

This course will adopt a variety of teaching methods, including seminars/debates and formal lectures. Students will be required to read prescribed texts as well as study materials in preparation for seminars. The teaching program will be designed to encourage active participation of students in the teaching process.

D2. Reading Assignments

Day 1 (6 August)

- Foreign Corrupt Practices Act 1977 (FCPA) (15 U.S.C.& 78 dd-1, et seq.)
- Bribery Act 2010 (UK)
- OECD Convention of Bribery of Foreign Public Officials
- Article 1, GATT (Most Favoured Nations Principle)

Day 2 (7 August)

- United Nations Convention on Contracts for the International Sale of Goods (CISG). The CISG is available on many websites (for example, the CISG may be downloaded from: www.uncitral.org: go to the English version of the website and click on "UNCITRAL Texts & Status").
- Chapter 1, Gillies and Moens, International Trade and Business: Law, Policy and Ethics (a PDF copy of this Chapter will be made available to the participating students)
- Chapter 1, The International Regime on Sale of Goods, Law of International Business in Australasia (a PDF copy of this Chapter will be made available to the participating students)
- Lisa Spagnolo, "The Last Outpost: Automatic CISG Opt Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers", Vol. 10(1) – May 2009, Melbourne Journal of International Law (available on the MJIL website)

Day 3 (8 August)

- Hague Convention on the Law Applicable to Contracts for the International Sale of Goods 1986
- UNIDROIT Principles of International Commercial Contracts 2010, especially Article 6

Day 4 (9 August)

- Incoterms 2000 and Incoterms 2010, especially FOB and CIF Rules. Incoterms 2000 is available on the UNCITRAL website (www.uncitral.org): go to the English version of the website and click on "Texts Endorsed by UNCITRAL". (A copy of Incoterms 2010 will be made available to the students).
- Standard Conditions and Trade Terms: This comprehensive article on Incoterms 2010 which is part of the revised edition of *Law of International Business in Australasia* will be made available to students

Day 5 (10 August)

- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading ("Hague Rules") (Brussels, 25 August 1924) and amended Hague Rules

Day 6 (13 August)

- The Ardennes [1951] 1KB 55

Day 7 (14 August)

- ICC Uniform Customs and Practice for Documentary Credits (UCP600). (A copy of the UCP600 may be obtained by googling)
- Nicholas P Manganaro, "About-Face: The New Rules of Strict Compliance under the Uniform Customs and Practice for Documentary Credits (UCP 600) (**Appendix C**)

Day 8 (15 August)

- Sztejn v. J. Henry Schroder Bank Corp, *177 Misc. 719, 31 N.Y.S.2d 631 (1941)* (**Appendix B**)
- Chapter 6, Gillies and Moens, International Trade and Business: Law, Policy and Ethics (a PDF copy of this Chapter will be made available to the participating students) (Note: this Chapter discusses the extensive jurisprudence on letters of credit law. While reading this Chapter, students should focus on the relevant case law).

Day 9 (16 August)

- General Agreement on Tariffs and Trade 1994 (GATT)
- Chapter 7, Gillies and Moens, International Trade and Business: Law, Policy and Ethics (a PDF copy of this Chapter will be made available to the participating students)

APPENDIX A: GATT/WTO SCENARIO

Oldland is a wine-drinking country and a member of the WTO. The Oldland government decides that the wine economy needs stimulating, so it introduces a new spending program called "Wine Ready Revolution" or WRR. The aim of WRR is to stimulate the production and consumption of wine and to distribute funds among the various levels of government, federal, state and local, for the improvement of public infrastructure which is needed by the wine industry.

To ensure that the stimulus is wide-ranging, the government imposes conditions on the various participating public agencies, and other parties as relevant:

(1) All wine products consumed by government employees must be sourced from local producers/vineyards and not importers;

(2) Beer imports for the coming financial year are to be limited to 40% of imports in the current financial year.

(3) Tariffs on imported beer are increased from 5% to 20%, except in the case of **Newland**, where they are left at 5%; Newland is not a member of the WTO and is a developing country that borders on Oldland (Newland is currently negotiating accession to the WTO);

(4) The Oldland government also imposes bans on the importation of soft drinks from Newland, claiming that soft drinks harbour diseases and contribute to high levels of obesity. Oldland also claims that the consumption of soft drinks will harm Oldlands' wine industry because this consumption is likely to decrease the amount of wine consumed;

(5) Oldland also bans the importation of apples from **Appleland**, another WTO member, claiming that these apples will be so much cheaper than locally produced apples;

(6) Oldland also prohibits the production of cider made from imported (as opposed to locally produced) apples. Oldland believes that the consumption of cider would decrease the consumption of wine;

(7) Oldland also requires that all beer and apples imported into Oldland be imported through two designated Oldlandian ports only. However, this requirement does not apply to Newland, a country currently negotiating accession to the WTO;

(8) The Oldland government enters into a "Free Trade Agreement" with Oceania, another WTO member, pursuant to which each state agrees to levy zero tariffs on

the importation of products (but excluding beer and cider) from the other member;

(9) Concurrently with these legislative WRR requirements, the government of Oldland complains that television manufacturers in **Teleland** (another WTO member) are exporting television sets to Oldland and selling them wholesale for 2000 Oldland dollars ("OD"), while they are wholesaling in Teleland for 3500 pesos which is the equivalent of 2,500 OD. The Teleland manufacturers claim that the freight charges and costs relating to internal distribution (trucking and warehousing) within Teleland are very much higher than in Oldland;

(10) Teleland retaliates with a complaint that the government of Oldland is subsidising the export of wine products to Teleland by the Oldland Wine Production Vineyard ("OWPV)") which is a prominent wine producer in Oldland. Specifically, Teleland alleges that the reduction in payroll tax given to wine producers in Oldland that export at least 2% of their production, has the effect that OWPV has benefited from a subsidy.

(11) The government of Oldland also bans the importation of bicycles manufactured in **South Rotopia** ("SR") on the ground that some parts of these bicycles violate he trademarks rights of Oldlandian manufacturers of bicycles.

Question: **Do any of the above eleven (11) fact situations reveal conduct that is in breach of** the **WTO, GATT and other WTO system agreements, and if so, what remedies are available to an aggrieved party?**

APPENDIX B: SZTEJN v. J. HENRY SCHRODER BANK CORP.

New York Supreme Court
177 Misc. 719, 31 N.Y.S.2d 631 (1941)

This is a motion by the defendant, the Chartered Bank of India, Australia and China, (hereafter referred to as the Chartered Bank), made pursuant to Rule 106(5) of the Rules of Civil Practice to dismiss the supplemental complaint on the ground that it fails to state facts sufficient to constitute a cause of action against the moving defendant. The plaintiff brings this action to restrain the payment or presentment for payment of drafts under a letter of credit issued to secure the purchase price of certain merchandise, bought by the plaintiff and his coadventurer, one Schwarz, who is a party defendant in this action. The plaintiff also seeks a judgment declaring the letter of credit and drafts thereunder null and void. The complaint alleges that the documents accompanying the drafts are fraudulent in that they do not represent actual merchandise but instead cover boxes fraudulently filled with worthless material by the seller of the goods. The moving defendant urges that the complaint fails to state a cause of action against it because the Chartered Bank is only concerned with the documents and on their face these conform to the requirements of the letter of credit.

On January 7, 1941, the plaintiff and his coadventurer contracted to purchase a quantity of bristles from the defendant Transea Traders, Ltd. (hereafter referred to as Transea) a corporation having its place of business in Lucknow, India. In order to pay for the bristles, the plaintiff and Schwarz contracted with the defendant J. Henry Schroder Banking Corporation (hereafter referred to as Schroder), a domestic corporation, for the issuance of an irrevocable letter of credit to Transea which provided that drafts by the latter for a specified portion of the purchase price of the bristles would be paid by Schroder upon shipment of the described merchandise and presentation of an invoice and a bill of lading covering the shipment, made out to the order of Schroder.

The letter of credit was delivered to Transea by Schroder's correspondent bank in India, Transea placed fifty cases of material on board a steamship, procured a bill of lading from the steamship company and obtained the customary invoices. These documents describe the bristles called for by the letter of credit. However, the complaint alleges that in fact Transea filled the fifty crates with cowhair, other worthless material and rubbish with intent to simulate genuine merchandise and defraud the plaintiff and Schwarz. The complaint then alleges that Transea drew a draft under the letter of credit to the order of the Chartered Bank and delivered the draft and the fraudulent documents to the 'Chartered Bank at Cawnpore, India, for collection for the account of said defendant Transea'. The Chartered Bank has presented the draft along with the documents to Schroder for payment. The plaintiff prays for a judgment declaring the letter of credit and draft thereunder void and for injunctive relief to prevent the payment of the draft.

For the purposes of this motion, the allegations of the complaint must be deemed established and 'every intendment and fair inference is in favor of the pleading' Madole v. Gavin, 215 App.Div. 299, at page 300, 213 N.Y.S. 529, at page 530; McClare v.

Massachusetts Bonding & Ins. Co., 266 N.Y. 371, 373, 195 N.E. 15. Therefore, it must be assumed that Transea was engaged in a scheme to defraud the plaintiff and Schwarz, that the merchandise shipped by Transea is worthless rubbish and that the Chartered Bank is not an innocent holder of the draft for value but is merely attempting to procure payment of the draft for Transea's account.

It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade. One of the chief purposes of the letter of credit is to furnish the seller with a ready means of obtaining prompt payment for his merchandise. It would be a most unfortunate interference with business transactions if a bank before honoring drafts drawn upon it was obliged or even allowed to go behind the documents, at the request of the buyer and enter into controversies between the buyer and the seller regarding the quality of the merchandise shipped. If the buyer and the seller intended the bank to do this they could have so provided in the letter of credit itself, and in the absence of such a provision, the court will not demand or even permit the bank to delay paying drafts which are proper in form. Of course, the application of this doctrine presupposes that the documents accompanying the draft are genuine and conform in terms to the requirements of the letter of credit.

However, I believe that a different situation is presented in the instant action. This is not a controversy between the buyer and seller concerning a mere breach of warranty regarding the quality of the merchandise; on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller. It is true that even though the documents are forged or fraudulent, if the issuing bank has already paid the draft before receiving notice of the seller's fraud, it will be protected if it exercised reasonable diligence before making such payment. However, in the instant action Schroder has received notice of Transea's active fraud before it accepted or paid the draft. The Chartered Bank, which under the allegations of the complaint stands in no better position than Transea, should not be heard to complain because Schroder is not forced to pay the draft accompanied by documents covering a transaction which it has reason to believe is fraudulent.

Although our courts have used broad language to the effect that a letter of credit is independent of the primary contract between the buyer and seller, that language was used in cases concerning alleged breaches of warranty; no case has been brought to my attention on this point involving an intentional fraud on the part of the seller which was brought to the bank's notice with the request that it withhold payment of the draft on this account. The distinction between a breach of warranty and active fraud on the part of the seller is supported by authority and reason. As one court has stated: "Obviously, when the issuer of a letter of credit knows that a document, although correct in form, is, in point of fact, false or illegal, he cannot be called upon to recognize such a document as

complying with the terms of a letter of credit." Old Colony Trust Co. v. Lawyers' Title & Trust Co., 2 Cir., 297 F. 152 at page 158, certiorari denied 265 U.S. 585, 44 S.Ct. 459, 68 L.Ed. 1192.

No hardship will be caused by permitting the bank to refuse payment where fraud is claimed, where the merchandise is not merely inferior in quality but consists of worthless rubbish, where the draft and the accompanying documents are in the hands of one who stands in the same position as the fraudulent seller, where the bank has been given notice of the fraud before being presented with the drafts and documents for payment, and where the bank itself does not wish to pay pending an adjudication of the rights and obligations of the other parties. While the primary factor in the issuance of the letter of credit is the credit standing of the buyer, the security afforded by the merchandise is also taken into account. In fact, the letter of credit requires a bill of lading made out to the order of the bank and not the buyer. Although the bank is not interested in the exact detailed performance of the sales contract, it is vitally interested in assuring itself that there are some goods represented by the documents.

On this motion only the complaint is before me and I am bound by its allegation that the Chartered Bank is not a holder in due course but is a mere agent for collection for the account of the seller charged with fraud. Therefore, the Chartered Bank's motion to dismiss the complaint must be denied. If it had appeared from the face of the complaint that the bank presenting the draft for payment was a holder in due course, its claim against the bank issuing the letter of credit would not be defeated even though the primary transaction was tainted with fraud. This I believe to the better rule despite some authority to the contrary.

The plaintiff's further claim that the terms of the documents presented with the draft are at substantial variance with the requirements of the letter of credit does not seem to be supported by the documents themselves.

Accordingly, the defendant's motion to dismiss the supplemental complaint is denied.

APPENDIX C

ABOUT-FACE: THE NEW RULES OF STRICT COMPLIANCE UNDER THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 600)

NICHOLAS P MANGANARO*

Abstract

Uniform Customs and Practice for Documentary Credits – UCP 600 – International Chamber of Commerce – Letter of Credit – Strict Compliance – UCP 500.

Letters of credit secure the payment process in an international sale of goods and thereby allow buyers and sellers to conduct trade under circumstances that would otherwise pose great risk. A letter of credit represents an assurance by the issuer that drafts accompanied by specified documents and presented in 'strict compliance' with the terms of the letter of credit will be honoured. That basic concept is roughly as old as the *lex mercatoria* itself, and in modern practice has been codified by the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP). UCP 600, effective as of 1 July 2007, represents a significant departure from what case law and previous versions of the UCP had construed as strict compliance in the presentation of such documents, and as such may be a watering down of what had been a time-tested criterion for evaluating discrepant documents. If so, buyer-applicants face increased risks under the revised rules and should conduct greater due diligence to ensure that a prospective trading partner can be trusted with the latitude the UCP now affords.

I INTRODUCTION

Letters of credit make economic globalization possible. By securing the payment process in an international sale of goods, letters of credit allow buyers and sellers to conduct trade under circumstances that would otherwise pose unmanageable risks with respect to financing, logistics, and communication.[1] As a result, new business relationships are

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1 This article focuses on commercial letters of credit, as distinguished from standby letters of credit, which are a payment or performance guarantee used primarily in the United States. Often called 'non-performing letters of credit', standby letters of credit are used as recourse in the event one party fails to pay or otherwise perform as agreed. Credit Research Foundation, *Understanding and Using Letters of Credit, Part I* <http://www.crfonline.org/orc/cro/cro-9-1.html>. Standby letters of credit are the equivalent of performance bonds, escrow agreements, and various forms of guaranty arrangements. James M Klotz, *International Sales Agreements* (Kluwer Law International, 2nd ed, 1998) 154-55.

forged, trade is enhanced, and international markets grow. Approximately 15 percent of today's global trade – roughly US$1 trillion annually – is financed through letters of credit.[2]

A letter of credit represents an assurance by the issuer (typically a bank) that drafts accompanied by specified documentation and presented in accordance with the terms of the letter of credit will be honoured.[3] To receive payment on such a draft, the beneficiary must present 'conforming' documents, or in other words, documents that 'strictly comply' with the terms and conditions of the letter of credit.[4] Presentation typically includes such documentation as commercial invoices, inspection certificates, bills of lading, warranties of title, and insurance certificates – in whatever combination specified by the letter of credit.[5] Documents that do not conform to the credit terms may be rejected by the issuer.[6] At the same time, however, failing to reject discrepant documents can expose the issuer to liability.[7] The International Chamber of Commerce (ICC) has codified these principles in the UCP.[8] Although voluntary as private international law, the UCP is almost universally adopted by way of incorporation into contracts among buyers and sellers engaged in international trade.[9]

Among these codified principles, the doctrine of strict compliance takes a pre-eminent role.[10] The doctrine protects the interests of all parties to the transaction, including the issuer.[11] As this paper aims to demonstrate, however, the UCP 600 (effective as of 1 July 2007) represents a considerable departure from what case law and previous versions of the UCP had construed as 'strict compliance' with respect to the presentation of documents.

Roughly half of all such presentations contain discrepancies, i.e., irregularities that render the documents noncompliant with respect to the strict terms of the letter of credit.[12]

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2 Estimates vary, most likely due to the decentralized and private nature of the use of letters of credit. See, Gary Collyer, 'Preface' in King Tak Fung, *Leading Court Cases on Letters of Credit* (ICC, Publication No 681, 2004). See also, T D Clark, *Revised Credit Rules Impact International Business* (16 January 2007) ThomasNet <http://news.thomasnet.com/IMT/archives/2007/01/revised_rules_on_letters_of_credit_ucp600__global_guidelines_practices.html> (reporting usage of approximately 14 per cent in 2006 and trade totalling almost US$1 trillion). Gulf-Daily-News.com, *Documentary Credits Worth $1.25 Trillion of Global Trade* (20 May 2007) <http://www.gulf-daily-news.com/printnews.asp?Article=182676> (reporting that HSBC Bank estimates letter-of-credit usage of greater than 10 per cent of global trade transactions).

3 Klotz, above n 1, 136.

4 Ibid.

5 Ibid 138.

6 Bruno Linden and Gertrud Roos, *Business Contracts in International Markets* (Studentlitteratur, 2005) 204.

7 Daniel Chow and Thomas Schoenbaum, *International Business Transactions* (Aspen Publishers, 2005) 251.

8 Ibid.

9 Linden and Roos, above n 6, 204.

10 Ibid.

11 Ibid 203.

12 Credit Research Foundation, above n 1.

Discrepancies range from obvious typographical errors to 'stale' dated documents.[13] A key document may be unsigned, incorrectly addressed, or missing altogether.[14] Even in the case of minor discrepancies, however, the requirements established in the letter of credit may not be waived or altered by the issuer without the express authorization of the applicant.[15] As a result, as much as 70 per cent of documents presented under letters of credit are rejected upon their first presentation.[16]

The drafters of the UCP have cited such trends and the negative impact they might ultimately have on the letter of credit's standing as a means of payment, specifically the serious implications for preserving its market share as a recognized means of settlement in international trade.[17] The revisions embodied in the UCP 600 come at a time when the use of letters of credit is decreasing worldwide, due in large part to increasing bank fees (including 'discrepancy fees'[18]) associated with documentary credits and the differing interpretations used by banks in examining presented documents for conformity.[19]

The question remains, however, with respect to the standard for examination of documents, whether the rules of the new UCP diminish what had been a time-tested criterion for evaluating discrepancies[20] or represent merely a clarification of what had been intended by the UCP drafters all along – that is, not a relaxation of the rules but only a renewed effort to bring greater uniformity to international banking practice.[21] Irrespective of the official commentary provided by the UCP Drafting Group, any decision to accept or reject presented documents must be based solely on the text of the letter of credit itself and the rules of the UCP 600.[22] The plain language of the UCP 600 reveals a clear relaxation of the rules for examination and allows for a 'contextual' inspection of presented documents rather than the strict 'facial' analysis of the previous UCP 500 and the level of scrutiny displayed in relevant case law.[23] As a result, the balance that had been maintained between the parties to a letter-of-credit transaction – the buyer, the seller, and the issuing bank – has suddenly been tipped in favour of expediency and market share. Banks are the clear winners, as their tolerance for error with respect to wrongful dishonour is greatly expanded. Sellers, as beneficiaries of letters of credit, may also gain, if not in the aggregate then at least on a case-by-case basis as 'dubious' or 'unsound' discrepancies are now less likely to trigger rejection.[24] Buyer-applicants,

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13 Ibid.
14 Ibid.
15 Ibid.
16 Gary Collyer, above n 2.
17 Ibid.
18 Ibid.
19 *Revised Rules on Letters of Credit Approved* (26 November 2006) Business Standard New Delhi <http://www.eepcindia.org/news/Revised-bs271106-04.pdf>.
20 Dr Jens Nielsen, *New Uniform Customs and Practices for Letters of Credit, UCP 600* (Letter of Credit Forum).
21 UCP 600 Drafting Group, *Commentary on UCP 600* (ICC, Publication No 680, 2007) 61.
22 The introduction to the official commentary on the UCP 600 indicates that the commentary reflects only the views of the Drafting Group and not necessarily those of the ICC Banking Commission, the UCP's governing body, and in fact, the commentary was not formally vetted or approved by the ICC.
23 Nielsen, above n 20.
24 Gary Collyer, above n 2.

however, face increased risks under the new rules and will have to conduct greater due diligence to ensure that a prospective trading partner can be trusted with such latitude.

II BACKGROUND

Letters of credit have a long history in the *lex mercatoria*, or law merchant, the system of customary law that developed in Europe from the 12th century and regulated the dealings of merchants in virtually every commercial country of the world until the 17th century.[25] At that time, merchants typically used credits in the form of bills of exchange in order to facilitate payment in international sales of goods.[26] The bill was a request or order for payment and addressed the risk of having to carry large amounts of currency across borders or over long distances.[27] The US Court of Appeals for the Second Circuit has traced the history of letters of credit back even further:

> There is evidence letters of credit were used by bankers in Renaissance Europe, Imperial Rome, ancient Greece, Phoenicia and even early Egypt. … These simple instruments survived despite their nearly 3,000-year-old lineage because of their inherent reliability, convenience, economy and flexibility.[28]

In modern commercial practice, letters of credit provide a mechanism of payment, and, in combination with a sales contract and contract of carriage, create a 'documentary' sales transaction, the preferred method of conducting an international sale of goods among merchants today.[29] The terms 'documentary credit' and 'letter of credit' are used interchangeably to refer to this aspect of financing international trade.[30]

The major risks in an international sale of goods are that the seller will not be paid after delivering the goods or that the buyer will not receive the goods after paying for them, particularly when the parties are dealing with each other for the first time, the goods must travel long distances, or the courts of the countries involved lack jurisdiction to resolve any disputes that might arise.[31] Under such circumstances, the simultaneous exchange of payment and goods becomes impractical.[32] Instead, letters of credit have become a way of minimizing the risks associated with international business transactions by 'surrogating' the credit of a financial institution for that of the buyer.[33] 'Interposing a known and solvent institution's ... credit for that of a foreign buyer in a sale of goods transaction' reduces the risk of non-payment in such cases.[34] Most companies, from small enterprises to large multinational corporations, use letters of credit when doing business

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25 Chow and Schoenbaum, above n 7, 251.
26 Chow and Schoenbaum, above n 7, 251.
27 Ibid.
28 *Voest-Alpine International Corp v Chase Manhattan Bank*, 707 F 2d 680, 682 (2nd Cir, 1983).
29 Chow and Schoenbaum, above n 7, 59; 251.
30 Gabriel Moens and Peter Gillies, *International Trade and Business: Law, Policy, and Ethics* (Routledge-Cavendish, 2nd ed, 2006) 301.
31 Linden and Roos, above n 6, 204.
32 Ibid.
33 Ibid.
34 *Voest-Alpine International Corp v Chase Manhattan Bank*, 707 F 2d 680, 682 (2nd Cir, 1983).

with a foreign party for the first time.[35]

A letter of credit represents an assurance by the issuer that drafts accompanied with specified documentation and presented in accordance with the terms of the letter of credit will be honoured.[36] In short, a letter of credit is 'nothing more and nothing less than a commitment to make a payment'.[37] In practice, a bank issues a letter of credit at the request of the applicant (typically the buyer), to pay the beneficiary (typically the seller) a specified amount on the condition that the beneficiary presents certain documents to the bank within a fixed period of time.[38] The documents evidence, *inter alia*, that the goods have been shipped.[39] The bank thus serves as an intermediary between the buyer and the seller, minimizing the risks of each party to the commercial transaction.[40] The seller is thereby guaranteed payment for the goods while the buyer is assured that no payment is made until the seller has complied with the terms of the documentary credit.[41] Moreover, the documentary credit generally satisfies the seller's desire for cash and the buyer's desire for credit.[42]

The following illustrates how a typical letter-of-credit transaction proceeds: [43]

1) A buyer in country B and a seller in country S agree to do business. The parties conclude a contract for a sale of goods that calls for payment by a letter of credit to be issued by a bank in country B and confirmed by a bank (the confirming bank) in country S.
2) The buyer (the applicant) applies to a bank in country B for a letter of credit in favor of the seller (the beneficiary), stating the amount to be paid, the goods to be shipped, the documents to be presented by the seller, and the expiration date, establishing the terms of the letter so as to conform with the requirements of the underlying sales contract. Upon the buyer depositing cash or obtaining a line of credit, the bank issues and forwards the credit to the confirming bank in country S.
3) The confirming bank not only notifies the seller of the establishment of the credit, and of the applicable terms and conditions with which the seller must comply, but adds its own undertaking to honor the seller's drafts drawn on that credit.[44]

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35 Klotz, above n 1, 136.
36 Ibid.
37 Peter H Weil, *Letters of Credit* (Practising Law Institute Commercial Law and Practice Handbook Series, PLI Order No 11262, 2007) 465.
38 Moens and Gillies, above n 30, 301.
39 Ibid.
40 Ibid.
41 Ibid.
42 Charles del Busto, *ICC Guide to Documentary Credit Operations for the UCP500* (ICC Publishing, 1994) 22.
43 Credit Research Foundation, above n 1; Klotz, above n 1, 136.
44 A buyer may request that the correspondent simply notify the seller that the letter of credit has been opened, in which case the correspondent bank is referred to as an 'advising bank' and is simply a 'conduit for the transmission of instructions' (Klotz, above n 1, 140). If for any reason the seller has concerns regarding the stability or reliability of the buyer's bank, however, the seller may request confirmation, as in this example. Confirmation fees range from 1 to 4 per cent of the total transaction

4) Once the seller learns that the letter of credit has been opened and confirmed, it will arrange for shipping and prepare the required documents, which most commonly include the commercial invoice,[45] the bill of lading,[46] and insurance certificates.
5) After shipping the goods, the seller will present the required documents to the confirming bank, which will then examine them for compliance with the terms and conditions of the letter of credit. If the documents are in order, the confirming bank will pay the seller upon the terms of the draft. The seller then endorses title upon receipt of the money and effectively drops out of the transaction. At this point, the confirming bank becomes 'owner' of the goods, and endorses and forwards the documents to the issuing bank.
6) The issuing bank notifies the buyer upon receipt of the documents and, subject to the issuing bank's own inspection of the documents for conformity, transfers the buyer's letter-of-credit account funds to the confirming bank.
7) Once the buyer has the documents in its possession, it may either contact the carrier of the goods and arrange for delivery or resell the goods to a third party. As the bill of lading can represent title to the goods (if so agreed by the parties), not only can the goods be sold sight unseen, but the ultimate consignee may be a party far removed from the original transaction.[47]

The court in *Voest-Alpine* summarized the letter-of-credit transaction and its advantages as follows:

> A typical letter of credit transaction ... involves three separate and independent relationships – an underlying sale of goods contract between buyer and seller, an agreement between a bank and its customer (buyer) in which the bank undertakes to issue a letter of credit, and the bank's resulting engagement to pay the beneficiary (seller) providing that certain documents presented to the bank conform with the terms and conditions of the credit issued on its customer's behalf. Significantly, the bank's payment obligation to the beneficiary is primary, direct and completely independent of any claims which may arise in the underlying sale of goods transaction.[48]

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costs, depending on the credit risk of the issuing bank, but can be much higher in the case of banks in high risk countries. Of course, refusal on the part of any bank to confirm a letter of credit issued by a foreign bank is a good indication of the issuer's lack of creditworthiness. (Klotz, above n 1, 144).

45 The commercial invoice is the billing for the goods and includes at least a general description of the merchandise, the price, origin, and the names and addresses of the buyer and seller. Credit Research Foundation, above n 1

46 A bill of lading, issued by a freight carrier or forwarder, may serve three functions: 1) proof of receipt of the goods for shipment, 2) proof of the contract of carriage, and 3) document of title to the goods. Chow and Schoenbaum, above n 7, 107.

47 Klotz, above n 1, 139.

48 *Voest-Alpine International Corp v Chase Manhattan Bank*, 707 F 2d 680, 682 (2nd Cir, 1983).

Letters of credit are the preferred mechanism for financing international business transactions largely because of their 'autonomy'.[49] The 'independence principle' holds that a letter of credit is independent from its underlying sales contract.[50] Neither the issuing bank nor any correspondent banks are concerned with the underlying sales contract or whether the terms therein have been satisfied.[51] Many of the disputes that arise in letter-of-credit transactions involve attempts by an applicant to prevent an issuing bank from honouring the letter of credit because of some issue with the sales contract.[52] Such an applicant may be motivated by any of a number of factors, from a sudden market fluctuation to buyer's remorse. Apart from a narrow fraud exception,[53] however, banks deal only in documents, not in goods.[54] To allow otherwise would expose banks to liability such that the costs associated with letters of credit (and, in turn, the costs passed on to applicants) would become prohibitive.[55] As a result, buyers and sellers would confront anew the age-old risks of international business transactions and trade would be hindered.

As noted, an issuing bank is required to honour the letter of credit and pay the beneficiary only upon delivery of the stipulated documents, provided those documents conform with the terms of the credit.[56] Such conformity is the cornerstone of the doctrine of 'strict compliance' and, in tandem with the independence principle, constitutes the basic principles of letter-of-credit law.[57]

III THE DOCTRINE OF STRICT COMPLIANCE

Under common law, the doctrine of strict compliance required that the documents presented by the beneficiary pursuant to a documentary credit conform precisely with the terms and conditions of that credit.[58] A bank has no duty to honour documents that do not so conform.[59] Conversely, if the bank refuses a demand for payment that complies with the terms of the letter of credit, the bank can be liable to the presenter for wrongful

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49 Moens and Gillies, above n 30, 301.
50 Chow and Schoenbaum, above n 7, 258.
51 Moens and Gillies, above n 30, 302.
52 Chow and Schoenbaum, above n 7, 258.
53 Ibid 269.
54 Article 4 of the *Uniform Customs and Practice for Documentary Credits* (UCP 600) provides:

> A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such [a] contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to [fulfil] any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, pro forma invoice and the like.

55 Chow and Schoenbaum, above n 7, 269.
56 Moens and Gillies, above n 30, 301-2.
57 Chow and Schoenbaum, above n 7, 258.
58 Moens and Gillies, above n 30, 314.
59 Ibid.

dishonour.[60] At the same time, however, if the issuing bank makes an improper payment, that is, pays the letter of credit against nonconforming documents, then the bank can lose its right to reimbursement from the applicant.[61]

The landmark case of *JH Rayner and Co Ltd v Hambros Bank Ltd* established the principle of strict compliance as it is now generally understood.[62] The dispute stemmed from a sale of 'Coromandel groundnuts' financed by a letter of credit.[63] Upon presentation by the seller of the stipulated documents, the issuing bank refused to pay on grounds that the bills of lading described the goods as 'machine shelled groundnut kernels'.[64] The court acknowledged that the two terms were 'universally' understood among members of the industry to refer to the same commodity, but held that the bank was entitled to deny payment on the ground that the presented documents did not comply precisely with the terms of the letter of credit.[65]

The court quoted Lord Sumner's opinion in *Equitable Trust Co of New York v Dawson Partners Ltd*:

> There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines ... If [the bank] does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.[66]

The court went on to explain that, to a bank, the argot of specialized merchants is irrelevant in the context of letter-of-credit transactions and compliant documentation: 'It would be quite impossible for business to be carried on, and for bankers to be in any way protected in such matters, if it were said that they must be affected by a knowledge of all details of the way in which particular traders carry on their business'.[67]

Although a bank may approach the applicant for a waiver of any discrepancies,[68] if documents fail to conform, the issuing bank would be wrong to then honour the letter of credit.[69] The obligation to pay the beneficiary of the letter of credit only under certain conditions does not typically appear in the agreements themselves, but is incorporated into the Uniform Customs and Practice for Documentary Credits (UCP), a body of

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60 Chow and Schoenbaum, above n 7, 252.

61 Ibid.

62 Ibid 281; *JH Rayner and Company Ltd v Hambros Bank Ltd* [1943] 1 KB 37.

63 *JH Rayner and Company Ltd v Hambros Bank Ltd* [1943] 1 KB 37, 39.

64 Ibid.

65 Ibid 39-40.

66 *JH Rayner and Company Ltd v Hambros Bank Ltd* [1943] 1 KB 37, 39-40 citing *Equitable Trust Company of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49, 52.

67 *JH Rayner and Company Ltd v Hambros Bank Ltd* [1943] 1 KB 37, 39-40.

68 UCP 600, art 16. But see, King Tak Fung, above n 2, 82:

> [T]he purpose of such [an] approach is limited to obtaining a waiver only, not to allow the applicant to examine the documents for the purpose of discovering further discrepancies. Document examination is the job of the bank alone. Releasing documents to the applicant for double checking with the purpose of identifying more discrepancies goes beyond the permissible ambit of the applicant's role.

69 Moens and Gillies, above n 30, 315.

private law that, over time, has come to govern documentary credits.[70]

IV THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS

There is no comprehensive multilateral treaty that operates as a source of law for letters of credit.[71] The primary sources of law for international letters of credit are, first, the Uniform Customs and Practice for Documentary Credits (UCP), issued by the International Chamber of Commerce (ICC), and second, in the United States, art 5 of the *Uniform Commercial Code* (UCC).[72] The UCP and UCC are in general agreement with respect to letters of credit.[73] Moreover, the widespread use of the UCP in international practice was an important factor in the revision of the UCC's original art 5.[74] The current version of art 5 generally codifies the basic principles of international practice in this area.[75]

The ICC is a nongovernmental, representative business organization that advocates on behalf of enterprises from virtually every industry sector and all parts of the world.[76] The fundamental mission of the ICC is to 'promote trade and investment across frontiers' as 'merchants of peace'.[77] Based on the firsthand knowledge and expertise of its membership, the ICC has excelled in making rules that govern the conduct of business across borders.[78] Although these rules – including the UCP – are voluntary, they are observed in thousands upon thousands of business transactions every day and have become part of the 'fabric of international trade'.[79] Perhaps not immodestly, then, the ICC refers to the UCP as the most successful body of private rules for trade ever developed.[80]

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70 Ibid.

71 Chow and Schoenbaum, above n 7, 251.

72 Ibid.

73 Ibid.

74 James G Barnes, James E Byrne and Amelia H Boss, *The ABCs of the UCC – Article 5: Letters of Credit* (American Bar Association, 1998) 12-14.

75 Ibid 14.

76 UCP 600 Drafting Group, *Commentary on UCP 600* (ICC, Publication No 680, 2007) 166.

77 Ibid.

78 Ibid.

79 Ibid. Other ICC-drafted rules cover such areas as arbitration, anti-corruption, banking and financial services, insurance, commercial law and practice, customs and trade regulations, corporate social responsibility, energy, information technology and e-commerce, intellectual property, marketing and advertising, transportation and logistics, and taxation. See, <http://www.iccwbo.org/id93/index.html>.

80 Guy Sebban, 'Forward' in *UCP 600* (ICC). Of course, in an electronic or 'paperless' world, transactions governed by *actual* documents may seem like an antiquated notion. The ICC has issued a supplement – the 'eUCP' – regarding electronic presentation of documents (for example, by way of the Society for Worldwide Interbank Financial Telecommunication or 'SWIFT' system), but has not formally merged those rules with the UCP 600. Rather, the eUCP exists as a 'bridge between the current UCP and the processing of the electronic equivalent of paper-based credits': *ICC Uniform Customs and Practice for Documentary Credits and Supplement for Electronic Presentation: UCP 500 + eUCP* (ICC, Version 1.0, 2002). The ICC recognises that electronic documents 'represent a rapidly growing presence in the market', but indicates that they are still not widely used in letter-of-credit transactions: *ICC Uniform Customs and Practice for Documentary Credits and Supplement for Electronic Presentation: UCP 500 + eUCP* (ICC, Version 1.0, 2002). Electronic communications have become quite common, however,

The first UCP was published in 1933 and has been revised periodically ever since.[81] The UCP 500 was first published in 1993.[82] The current version, the UCP 600, took effect on 1 June 2007.[83] The UCP applies to all credits when the parties so agree, that is, 'when the text of the credit expressly indicates' that it be subject to the UCP rules.[84] The rules are thus binding on the parties thereto unless 'expressly modified or excluded by the credit'.[85] The UCC recognizes that parties to a letter of credit that is otherwise governed by the UCC may exclude provisions of the UCC in favour of the UCP.[86] Specifically, UCC § 5-103(c) provides, subject to certain limitations: 'the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking'. As the UCP is intended for use with international letters of credit, most US credits that are not international are governed by the UCC.[87]

However, even where the UCP applies, there are important issues that must nevertheless be determined through the application of domestic law, that is, some issues are beyond the scope of the UCP, such as a claim of fraud as a defence of payment.[88] By contrast, the UCC has a detailed fraud provision and is supported by extensive case law.[89] A US court could then resort to the UCC in dealing with a matter of fraud in a letter-of-credit transaction that is otherwise governed by the UCP.[90]

In addition to the requirements of the UCP, and of the documentary credit itself, a presentation of documents must comply with international standard banking practice.[91] The first two sets of requirements are determined by reviewing the plain language of the rules themselves and the specific terms of the credit, respectively.[92] The third condition, however, reflects the idea that letters of credit and the UCP, even in combination, articulate only some of the procedures that banks follow in examining documents for compliance.[93] ICC Publication No 681, *International Standard Banking Practice for the Examination of Documents under Documentary Credits* (ISBP), outlines many of these practices.[94] While this publication has evolved into a 'necessary' companion to the UCP, and although it is the stated expectation of the ICC that application of the principles embodied in the ISBP will continue while the UCP 600 is in force,[95] as the ISBP is not an

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in bank-to-bank communications and in the initiation of letter-of-credit applications. See, Chow and Schoenbaum, above n 7, 283.

81 Barnes, Byrne and Boss, above n 74, 12.

82 Ibid.

83 Commentary on UCP 600, above n 76.

84 UCP 600, art 1.

85 Ibid.

86 Chow and Schoenbaum, above n 7, 251.

87 Ibid.

88 Ibid 252.

89 Ibid.

90 Ibid.

91 Commentary on UCP 600, above n 76. 16.

92 Ibid.

93 Ibid.

94 ICC Publication No 645.

95 Gary Collyer, 'Introduction' in *UCP 600* (ICC).

exhaustive study of these standard banking practices, the UCP definition and usage of the term 'complying presentation' does not specifically refer to the ISBP.[96]

Under UCP 500, the ISBP was considered a 'checklist' of items that those engaged in reviewing presented documents could consult to determine how the ICC's rules on documentary credits applied in day-to-day practice.[97] Developed by the same Drafting Group that created the UCP 600, the current ISBP was intended to help reduce the 'large percentage' of documents refused on first presentation for discrepancies.[98] While the standard practices documented in the ISBP are consistent with the UCP 600 and the opinions and decisions of the ICC Banking Commission, the ISBP in no way amends the UCP 600.[99] Rather, the ISBP explains how the UCP 600 is to be applied by letter-of-credit practitioners and, moreover, is intended to be read with the UCP in its entirety and not in isolation.[100] The ISBP reflects standard banking practice with respect to all parties to a letter of credit.[101] But since the rights, obligations, and available remedies of the parties depend in part on the undertaking with the issuing bank, the underlying transaction, and any other applicable law, letter-of-credit applicants cannot rely on the ISBP to potentially excuse their obligations to the issuing bank.[102] Nonetheless, the ICC Drafting Group discourages the incorporation of the ISBP into the terms of a documentary credit as the UCP 600 is intended to include the practices described in the ISBP.[103]

The ISBP's 'Preliminary Considerations' echo the fundamental principles of letter-of-credit law, particularly the independence principle, i.e., that the terms of the credit are independent of the underlying sales transaction even where a credit expressly refers to that transaction.[104] Moreover, the applicant bears the risk of any ambiguity in its instructions to issue a letter of credit, and an issuing bank may 'supplement or develop' the terms as necessary to permit the use of the credit.[105]

The ISBP's 'General Principles' set out those elements most relevant to document inspection and the doctrine of strict compliance.[106] For example, the use of 'generally accepted' abbreviations do not make a presented document discrepant.[107] Additionally, the ISBP states that a simple misspelling or typographical error that does not affect the meaning of a word or the sentence in which it occurs does not constitute a discrepancy.[108]

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96 Commentary on UCP 600, above n 76.
97 *International Standard Banking Practice for the Examination of Documents under Documentary Credits* (ICC, Publication No 681, 2007) 3.
98 Ibid.
99 Ibid 12.
100 Ibid.
101 Ibid.
102 Ibid.
103 Ibid.
104 Ibid 15, Application and Issuance of the Credit, [1].
105 Ibid 15, Application and Issuance of the Credit, [2].
106 Ibid 17, [6]-[42].
107 Ibid 17, [6].
108 Ibid 17, [25].

Article 13 of the UCP 500 set forth the elements of strict compliance, as recognized under that version of the rules, with respect to the standard for examination of documents.[109] Article 13(a) established that banks were to 'examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit'.[110] Additionally, documents that appeared 'on their face to be inconsistent with one another' were to be considered as 'not appearing on their face to be in compliance with the terms and conditions of the Credit'.[111]

In drafting the UCP 600, the ICC pointed to global statistics suggesting that 70 per cent of documents presented under letters of credit were rejected on first presentation due to discrepancies.[112] The ICC, fearing the letter of credit's status as a reliable means of payment could be in jeopardy, introduced, *inter alia*, art 14(d) of the UCP 600, which states that: 'Data in a document, when read in context with the credit, the document itself, and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit'.[113] Article 14(a) of the UCP 600 maintains the UCP 500 language regarding a facial inspection of documents, specifically that 'the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation,'[114] but as the official commentary makes clear, the 'new structure' of the UCP 600 modifies the 'well established' stance of the UCP 500 to incorporate the new term 'complying presentation,'[115] which is defined as 'a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice'.[116]

The Drafting Group's commentary goes on to note that the present concept of 'on their face' does not refer to a 'simple front versus the back of a document' but includes review of data within a document' to determine that a presentation is compliant.[117] Moreover, the data in a document, when examined in the context of the letter of credit, the document itself, and international standard banking practice, 'does not need to be identical, but must not conflict with data in the same document, any other stipulated document or the documentary credit'.[118]

As the Drafting Group noted, when document inconsistencies included simple typographical and grammatical errors, banks often cited a 'significant' number of unwarranted discrepancies.[119] The Drafting Group decided change was called for and

[109] Chow and Schoenbaum, above n 7, 270.
[110] UCP 500, art 13(a); Chow and Schoenbaum, above n 7, 270.
[111] Ibid.
[112] Collyer, above n 95.
[113] Ibid.
[114] UCP 600, art 14(a).
[115] Commentary on UCP 600, above n 76, 61.
[116] Ibid 13.
[117] Ibid 62.
[118] Ibid 63.
[119] Ibid 64.

intended that the phrase specifying that data must not 'conflict with' would be 'much narrower' than the previous one stating 'documents which appear on their face to be inconsistent with' and would require banks to make a determination 'based on the compliance of the data itself'.[120] The Drafting Group expressed its expectation that the change would result in a reduction of discrepancies and recognized that this 'new standard' would not require a 'mirror image' of data.[121]

The Drafting Group summarized what seems to be a more holistic approach to document examination as follows:

> The requirements of the documentary credit, the structure and purpose of the document itself and international standard banking practice need to be assessed, understood and be taken into consideration in determining compliance of a document. ... [T]he new standard of 'not conflict with' relates the data contained in the document to what was required by the documentary credit, to what is stated in any other stipulated document and to international standard banking practice.[122]

On the whole, this certainly appears to be a relaxation of the 'strict' compliance requirement under previous versions of the UCP,[123] but is consistent with calls within the letter-of-credit community of practitioners for a more transaction-friendly or 'practice oriented' view with respect to typographical errors.[124] What is less clear, however, is what such a change means for buyer-applicants with respect to their level of exposure.

These changes to the UCP reflect the current position of the UCC. While UCC §5-108 provides that an issuer 'shall honor a presentation that ... appears on its face strictly to comply with the terms and conditions of the letter of credit,' its accompanying commentary establishes that '[s]trict compliance does not mean slavish conformity to the terms of the letter of credit'.[125] The standard practice of issuers may justifiably recognize certain presentations as conforming that a layman would find discrepant.[126] To illustrate the point, the UCC notes that a document addressed by a 'foreign' individual to General Motors as 'Jeneral Motors' would be held to strictly conform (in the absence of other defects).[127] The UCC does stop short,[128] however, of allowing a standard of 'substantial compliance' like that of *Banco Espanol de Credito v State Street Bank and Trust Co*, which held that an inspection certificate submitted by the inspector 'under reserves' nevertheless satisfied the terms of a letter of credit calling for a certificate specifying that the goods were in conformity with the purchase order.[129]

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120 Ibid.
121 Ibid.
122 Ibid.
123 Nielsen, above n 20.
124 Chow and Schoenbaum, above n 7, 279; James G Barnes and James E Byrne 'Letters of Credit: 2000 Cases' (2001) 56 *Business Lawyer* 1805.
125 UCC § 5-108, Official Comment, note 1.
126 Ibid.
127 Ibid.
128 Ibid; Chow and Schoenbaum, above n 7, 281.
129 *Banco Espanol de Credito v State Street Bank and Trust Co*, 385 F 2d 230 (1st Cir, 1967).

The stated goal of the UCP 600 revision is identical to that of previous revisions, that is, 1) to take into account modern developments in banking, transportation, and insurance, and 2) to review the wording of the UCP to avoid differing interpretations and applications.[130] The ICC itself has labelled the current revision as 'the most comprehensive in the entire history of the rules'.[131] Comprehensiveness, however, did not otherwise lead to substantive changes.[132] The ICC has shortened the number of articles from 49 to 38, but that change appears to be largely cosmetic.[133]

Perhaps most notably, the standard regarding inconsistency of documents (art 13(a) of the UCP 500) has been substantially relaxed to read: 'Data in a document, when read in context with the credit, the document itself, and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document, or the credit'.[134] Additionally, the term 'to honour' has been newly introduced to obligate the issuing bank to comply with its payment obligations whether they are based on sight payment, deferred payment, acceptance, deferred payments, or negotiation.[135]

Although such relaxations would appear to be, on their face, an embrace of the more 'practice oriented' view critics of the rigidity of the *Hanil* ruling (discussed below) had been calling for,[136] some practitioners have called instead for a 'careful review' of the new letter-of-credit rules.[137] Moreover, the relevant case history must be re-evaluated in light of the UCP 600.

V CASE LAW PRIOR TO THE RELEASE OF UCP 600

Document examination and rejection is one of the most important issues concerning letter-of-credit law.[138] A majority of the disputes in this area involve document compliance and allegations of wrongful dishonour.[139] As the UCP and related rules do not have the force of law in and of themselves, judicial interpretation of the rules becomes all the more important.[140] Although practitioners may not always agree with court interpretations of the UCP, they are of course compelled to respect such determinations.[141] What had been firmly established as a uniform approach to matters of strict compliance has been cast into considerable doubt by the release of the UCP 600. The case law that developed under previous versions of the UCP must now be re-

130 Nielsen, above n 20.
131 Collyer, above n 95.
132 Nielsen, above n 20.
133 Ibid.
134 UCP 600, art 14(d).
135 Nielsen, above n 20.
136 Barnes and Byrne, above n 124.
137 David F Scranton 'New Letter of Credit Rules Call for Careful Review' (2007) 124 *Banking Law Journal* 126.
138 King Tak Fung, above n 2.
139 Ibid.
140 Ibid.
141 Ibid.

evaluated.

The case of *Beyene v Irving Trust Co*, decided by the US Court of Appeals for the Second Circuit in 1985, involved a defendant seeking damages for a bank's refusal to honour a letter of credit.[142] The court held that the misspelling of the name of the person to be notified upon arrival of the goods constituted a material discrepancy that relieved the confirming bank of its duty to honour the documentary credit.[143] Specifically, the bill of lading required by the letter of credit indicated 'Mohammed Soran' as the party to be notified by the shipping company instead of 'Mohammed Sofan' and the bank ultimately refused to pay on the sole ground of this misspelling.[144]

While the court recognized that some variations in a bill of lading might be so insignificant as not to relieve a bank of its obligation to pay, it held that the matter was not one in which 'the name intended [was] unmistakably clear despite what [was] obviously a typographical error, as might be the case if, for example, "Smith" was misspelled "Smithh"'.[145] The court also noted that the name was not 'inconsequential' to the document and that the record did not indicate that 'Soran' would be recognized as an obvious misspelling of Sofan in the Middle East, specifically Sofan's home of Yemen.[146] As such, the discrepancy was material and thus a failure on the part of the beneficiary to provide documents that strictly complied with the terms of the letter of credit, entitling the bank to refuse payment.[147]

In 2000, in the case of *Hanil Bank v PT Bank Negara Indonesia*, the US District Court for the Southern District of New York found a discrepancy similar to that in *Beyene* as a proper basis to reject a letter-of-credit presentation.[148] *Hanil* involved an Indonesian electronics company that had applied to PT Bank Negara Indonesia (BNI) for a letter of credit for the benefit of Sung Jun Electronics.[149] BNI issued the letter but misspelled the beneficiary as 'Sung Jin Electronics'.[150] The beneficiary reviewed the letter but did not request the appropriate name change.[151] The beneficiary later sold the letter of credit to Hanil Bank, but upon presentation of the stipulated documents BNI refused payment primarily on the basis of the 'Sung Jin' misspelling.[152]

The court noted that the UCP – at that time the UCP 500 – applied by way of its incorporation into the letter of credit and that, accordingly, '[t]he essential requirements of a letter of credit must be strictly complied with by the party entitled to draw against the letter of credit, which means that the papers, documents and shipping description must be

142 *Beyene v Irving Trust Co*, 762 F 2d 4 (2nd Cir, 1985).
143 Ibid 5.
144 Ibid 6.
145 Ibid.
146 Ibid 6-7.
147 Ibid 7.
148 *Hanil Bank v PT Bank Negara Indonesia*, (2000) WL 254007 (SDNY).
149 Ibid 1.
150 Ibid.
151 Ibid.
152 Ibid.

as stated in the letter'.[153] The court quoted *Beyene* in acknowledging that, even under the strict compliance rule, some variations might be so insignificant as not to relieve the issuing bank of its duty to pay, but held that the documents nonetheless improperly identified the beneficiary and that Sung Jin would not be recognized as an obvious spelling of Sung Jun.[154] The court was not swayed by the fact that the issuing bank itself had made the error and held that '[t]he beneficiary must inspect the letter of credit and is responsible for any negligent failure to discover that the credit does not achieve the desired commercial ends' as the beneficiary is in the best position to determine whether the letter meets the needs of the underlying transaction.[155]

The court concluded that BNI had properly refused payment and reaffirmed the independence principle in underscoring that banks must look solely at the letter of credit and at the documentation presented by the beneficiary to determine compliance and, as such, information in BNI's own files (including the original application for the letter of credit) that might have dispelled any confusion was irrelevant.[156] This holding is likely the high-water mark with respect to such a narrow and rigid approach to discrepancies, or what letter-of-credit practitioners viewed unfavourably as a less than 'practice oriented' view towards typographical errors in documentary credits.[157] The timing of the UCP 600's release suggests that decisions like *Hanil* were among the 'significant' number of unwarranted discrepancies that were of such concern to the Drafting Group.[158]

VI CASE LAW PRESAGING THE CHANGES IN THE UCP 600

US courts were not universally indifferent to the day-to-day realities of letter-of-credit practitioners. A number of decisions in both state and federal courts showed a willingness by some, at least with respect to typographical errors, to consider other documents and the transaction as a whole, perhaps even at the risk of skirting the independence principle.[159]

In *Voest-Alpine Trading USA Corp v Bank of China*, the beneficiary of a letter of credit sued the issuing bank for wrongful dishonour.[160] The buyer, a Chinese company, obtained a letter of credit through the defendant, Bank of China, to finance a purchase of styrene from a US seller, Voest-Alpine.[161] The letter indicated that the UCP rules (at the time, the UCP 500) were to apply, but contained numerous typographical errors, including 'Voest-Alpine USA Trading Corp' (instead of 'Voest-Alpine Trading USA

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153 Ibid 2-3, quoting *Marino Industries Corp v Chase Manhattan Bank*, 686 F 2d 112, 114 (2nd Cir, 1982); The court also noted that the New York Commercial Code provides that if a letter of credit is subject in whole or part to the UCP, the UCC does not apply, ibid 2.

154 *Hanil Bank v PT Bank Negara Indonesia*, (2000) WL 254007, [4] (SDNY).

155 Ibid, quoting *Mutual Export Corp v Westpac Banking Corp*, 983 F 2d 420 (2nd Cir, 1993).

156 *Hanil Bank v PT Bank Negara Indonesia*, (2000) WL 254007, [5] (SDNY).

157 Barnes and Byrne, above n 124.

158 Commentary on UCP 600, above n 76, 64.

159 Chow and Schoenbaum, above n 7, 279.

160 *Voest-Alpine Trading USA Corp v Bank of China*, 167 F Supp 2d 940 (D Tex, 2000), affirmed by *Voest-Alpine Trading USA Corp v Bank of China*, 288 F 3d 262 (5th Cir, 2002).

161 *Voest-Alpine Trading USA Corp v Bank of China*, 167 F Supp 2d 940, 942 (D Tex, 2000).

Corp') and, in one place, 'Zhangjiagng' (instead of Zhangjiagang, the destination port).[162] While the fact that the market price of styrene had dropped significantly below the contract price prior to shipment suggests there may have been more to Bank of China's review of Voest-Alpine's presentation than a simple examination of documents, the bank indicated its intent to deny payment on the basis of the above discrepancies, among others, and cited art 13 of the UCP 500 in its subsequent communications with Voest-Alpine.[163]

The court held that strict compliance under the UCP 500 did not require that presentation documents be a 'mirror image' of the terms of the letter of credit.[164] The court also noted the 'wide range of interpretations' regarding what standard banks should use in examining documentary credit presentations for compliance, and that, even where courts claimed to uphold strict compliance, the standard was hardly uniform.[165] Finding the 'mirror image' approach problematic because of its tendency to absolve the bank reviewing the documents of any responsibility to use 'common sense' in examining the documents, the court found that 'a moderate, more appropriate standard lies within the UCP 500 itself' and that a 'common sense, case-by-case approach' would allow minor typographical errors and the like because 'letter-for-letter correspondence between the letter of credit and the presentation documents is virtually impossible'.[166] The court avoided any concerns regarding the independence principle by stressing that 'the issuing bank is required to examine a particular document in light of all documents presented and use common sense but is not required to evaluate risks or go beyond the face of the documents'.[167] In finding for Voest-Alpine, the court concluded that the document in question, as a whole, bore an obvious relationship with the transaction and that the misspelling of the destination port was not a basis for dishonour of the credit where the rest of the document demonstrated 'linkage' to the transaction on its face.[168] In so ruling, the court was ahead of its time in determining what the UCP 600 now makes clear, that in matters of obvious typographical errors, 'common sense,' i.e., international standard banking practice, should apply.

The Court of Appeals of Texas ruled similarly in a case where an issuing bank filed suit to obtain judgment declaring that it had properly refused to honour a letter of credit.[169] The dispute boiled down to the difference between '86-122-S' (what appeared in the

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[162] Ibid.

[163] Ibid. The court found that Bank of China had failed to formally refuse the documents before the (then) seven-day deadline that precluded banks from claiming that presentation documents are not in compliance with the terms and conditions of the documentary credit, pursuant to art 14(e) of the UCP 500. The court noted that it could have properly conclude its analysis there, but chose to analyse the discrepancies listed by the defendant. Ibid.

[164] Ibid 946. The court also noted the vagueness of the UCP rules of the time, specifically that '[t]he UCP 500 does not provide guidance on what inconsistencies would justify a conclusion on the part of a bank that the documents are not in compliance with the terms and conditions of the letter of credit or what discrepancies are not a reasonable basis for such a conclusion'.

[165] Ibid.

[166] *Voest-Alpine Trading USA Corp v Bank of China*, 167 F Supp 2d 940, 946 (D Tex, 2000).

[167] Ibid.

[168] Ibid 949.

[169] *New Braunfels National Bank v Odiorne*, 780 S W 2d 313 (Tex Ct App, 1989).

original letter of credit) and '86-122-5' (what appeared on the beneficiary's presented documents.[170] While acknowledging that 'most commentators agree that maintaining the integrity of the strict compliance rule is important to the continued usefulness of letters of credit as a commercial tool' the court held that strict compliance did not demand an 'oppressive perfectionism'.[171] Citing scholarly support, the court reasoned:

> [I]t is not asking too much of the document examiner to exercise discretion *as a banker,* even though it is too much to ask a document examiner to exercise discretion on a commercial matter. Any reasonably prudent document examiner would recognize immediately that the discrepancies in question are *de minimis,* and courts should not hesitate to hold that they do not violate the strict-compliance standard.[172]

The court concluded that, in the case at bar, considering both the draft and the original letter of credit together, 'it would be obvious to any bank document examiner, prudent or otherwise, that the discrepancy ... was merely a typographical or clerical error and of no possible significance'.[173] The court was careful to limit its decision to non-commercial conditions, i.e., not holding that a beneficiary could satisfy non-commercial conditions in a documentary credit with only 'substantial compliance,' but only that for such conditions, strict compliance means 'something less than absolute, perfect compliance'.[174]

VII JUDICIAL INTERPRETATION

The harmonizing or clarifying intentions behind the UCP 600 are, of course, ultimately subject to the varying judicial interpretations of different jurisdictions. US and foreign courts differ in their approach to statutory interpretation such that the 'official' commentary of the UCP Drafting Committee will carry different weight with different courts. US courts, for example, are far more amenable to considering the legislative history of a statute or treaty than are their civil-law counterparts, which generally look only to the plain language of the text in question.[175] Section 113 of the *Restatement (Third) of the Foreign Relations Law of the United States* provides, in relevant part:

1) The determination or interpretation of international law or agreements is a question of law and is appropriate for judicial notice in courts in the United States without pleading or proof.
2) Courts may in their discretion consider any relevant material or source, including expert testimony, in resolving questions of international law.[176]

US Courts are far more willing than courts of civil law traditions to resort to *travaux preparatoires*[177] when dealing with ambiguous text.[178] As a result, a US court is more

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[170] Ibid 317.
[171] Ibid 316.
[172] Ibid 317, quoting J Dolan, *The Law of Letters of Credit* (AS Pratt & Sons, 1989) para 6.04[3], S6-8, S6-9 (footnotes omitted).
[173] Ibid 318.
[174] Ibid.
[175] *Restatement (Third) of the Foreign Relations Law of the United States*, §113.
[176] *Restatement (Third) of Foreign Relations Law* (1987) § 113.
[177] French for 'preparatory works', materials used in preparing the ultimate form of an agreement or statute, and especially an international treaty; also, the draft or legislative history of a treaty: *Black's*

likely to consult the Drafting Group's official commentary regarding the UCP 600 and international standard banking practice than would a civil-law court, or one strictly adhering to art 32 of the Vienna Convention. Any gap that may exist, then, between US and non-US courts with respect to the apparent embrace by US courts of a more 'practice oriented' view of strict compliance of letter-of-credit presentations is, in the author's view, likely to widen.

VIII AN OPPORTUNITY FOR DOCDEX

To avoid the costs, delays, and unpredictability of litigation, parties to letters of credit can submit their disputes to arbitration under the rules of an institution with demonstrated experience in the law of documentary credits.[179] The ICC offers a similar alternative to litigation in the form of 'resolution by experts'.[180] The Rules for Documentary Credit Dispute Resolution Expertise, established in 1997, provide the framework for the Documentary Instruments Dispute Resolution Expertise (DOCDEX), a dispute-resolution process administered by the ICC Centre for Expertise in conjunction with the ICC Banking Commission.[181] DOCDEX provides for review of any UCP dispute by a panel of three experts, but focuses solely on the documents in question.[182] The decision of the panel is reviewed by the technical adviser of the Banking Commission and ultimately issued by the Centre for Expertise.[183] A DOCDEX decision is not binding, however,

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Law Dictionary (8th ed 2004), 'travaux preparatoires'. *Restatement (Third) of Foreign Relations Law of the United States* (1987) §325 cmt (e): '*Recourse to travaux préparatoires*'. The Vienna Convention, in Article 32, requires the interpreting body to conclude that the 'ordinary meaning' of the text is either obscure or unreasonable before it can look to 'supplementary means'. Some interpreting bodies are more willing to come to that conclusion than others. (Compare, for example, the experience in the United States with the parol evidence rule in interpreting contracts.) Article 32 of the Vienna Convention reflects reluctance to permit the use of materials constituting the development and negotiation of an agreement (travaux préparatoires) as a guide to the interpretation of the agreement. The Convention's inhospitality to travaux is not wholly consistent with the attitude of the International Court of Justice and not at all with that of United States courts'. *Restatement (Third) of Foreign Relations Law of the United States* (1987) §325 cmt (g):

> This section suggests a mode of interpretation of international agreements somewhat different from that ordinarily applied by courts in the United States. Courts in the United States are generally more willing than those of other states to look outside the instrument to determine its meaning. In most cases, the United States approach would lead to the same result, but an international tribunal using the approach called for by this section might find the United States interpretation erroneous and United States action pursuant to that interpretation a violation of the agreement.

178 *Restatement (Third) of Foreign Relations Law of the United States* (1987) §325.

179 William W Park 'Arbitration in Banking and Finance' (1998) 17 *Annual Review of Banking Law* 213, 241. (Noting also that special care must be taken in drafting an arbitration clause for a letter of credit as the dispute may implicate more than two parties. '[I]f a controversy involves an applicant or beneficiary as well as the issuing and confirming banks, the arbitration clause should provide for consolidation of all claims before a single arbitral tribunal. Otherwise, a bank may be caught in the middle between inconsistent results of multiple arbitral and/or court decisions'.)

180 Ibid.

181 Ibid 179; ICC, *DOCDEX Dispute Resolution Services* <http://www.iccwbo.org/court/docdex>.

182 DOCDEX, above n 181. The experts are selected by the ICC from a list maintained by the Banking Commission.

183 Ibid.

unless the parties have agreed otherwise.[184]

The Banking Commission issues its own opinions in an advisory mode, that is, in response to general UCP-related questions from practitioners, bankers, exporters, and importers, in contrast to the 'live disputes' handled by DOCDEX.[185] While the Banking Commission has generally held that its opinions have no legal force, they have transformed from soft international law to legal rules of decision in many jurisdictions.[186] That prestige notwithstanding, however, the DOCDEX process was born out of the apparent frustrations of bankers that many judges, arbitrators, and lawyers failed to grasp the complexities of documentary credit practice.[187] In response, the Banking Commission maintains a pool of arbitrators with highly technical letter-of-credit expertise for DOCDEX purposes.[188]

The fact that DOCDEX opinions are generally not binding, that they are expert opinions rather than arbitral awards, blunts their potential impact as a force for change or uniformity in letter-of-credit law. Arbitration awards benefit from the network of enforcement provisions created by multinational treaties and national arbitration statutes. An expert's opinion, by contrast, can be enforced abroad only in a new action under the relevant foreign law, subject to whatever contract defences may be available.[189] Furthermore, arbitrators generally benefit from immunity from suit for errors or omissions, while experts do not.[190]

Given the current flux with respect to strict compliance under the revised UCP, the ICC has a unique opportunity to enhance the standing of DOCDEX and broaden its role within the ICC's dispute settlement services to provide for greater consistency in decisions regarding document examination.[191] By providing for formal arbitral proceedings in the DOCDEX context, the ICC would take advantage not only of the expertise of its own DOCDEX panels and the increasing popularity of alternative dispute

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184 Ibid.

185 Janet Kovin Levit 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30 *Yale Journal of International Law* 125, 138-39.

186 Ibid 141-42. Levit notes that:

> [the] climb from merely soft, practical standards to real, hard law is evident in the Banking Commission's evolving self-image. When it first published the UCP, the Banking Commission warned that its opinions had no binding legal effect and should not be cited in such a manner. Soon thereafter, the Commission retreated a bit, still conceding that its opinions had no legal force but nonetheless characterizing such opinions as authoritative. Recent volumes of Banking Commission opinions, however, do not address whether or not the opinions are legally binding; rather, they explain how and for what purpose the opinions should be used – namely for creating internationally uniform assessments of 'a set of documents' acceptability' to harmonize expectations and enhance market stability. In fact, the Banking Commission recently noted that courts use its official documents to resolve live disputes.

187 Ibid 139-40.

188 Ibid 140.

189 Park, above n 179, 242-43.

190 Ibid.

191 The ICC offers a range of dispute-settlement services, the crowing jewel being the International Court of Arbitration. See, <http://www.iccwbo.org/court/arbitration/id4398/index.html>.

resolution generally, but would also leverage the success and widespread recognition of the UCP. A failure to address the lingering frustrations associated with documentary credits risks jeopardizing the future of letters-of-credit as a key component in the sales of international goods and an engine of trade growth.

IX CONCLUSION

Irrespective of the comments of the ICC drafting group, the UCP 600's embrace of a more 'practice oriented' view has severely undercut the idea of strict compliance as established by nearly a century of practice and case law. Among the three principal actors in a typical letter-of-credit transaction – buyers, sellers, and banks – buyers carry significantly increased risk under the new rules.

Applicants for letters of credit must now assess what margin of error they can accept as, typographical errors aside, discrepancies that would not have been honoured before may now be overlooked under the concept of 'linkage' and the seemingly holistic approach of the UCP 600. Although banks may initially believe they have greater flexibility under the new rules, and thus less risk of wrongful dishonour, in their review of presented documents they must be cautious when dealing with terminology unique to a particular industry.

The ICC has a unique opportunity, if not an obligation, to leverage the success of the UCP and its accompanying body of ICC rules and opinions by utilizing the DOCDEX process to its full potential. Establishing formal arbitral procedures, akin to those of the International Court of Arbitration, which would cater to the unique needs of the letter-of-credit community would create an epicentre of jurisprudence that would ultimately influence judicial decisions regarding documentary credits worldwide.