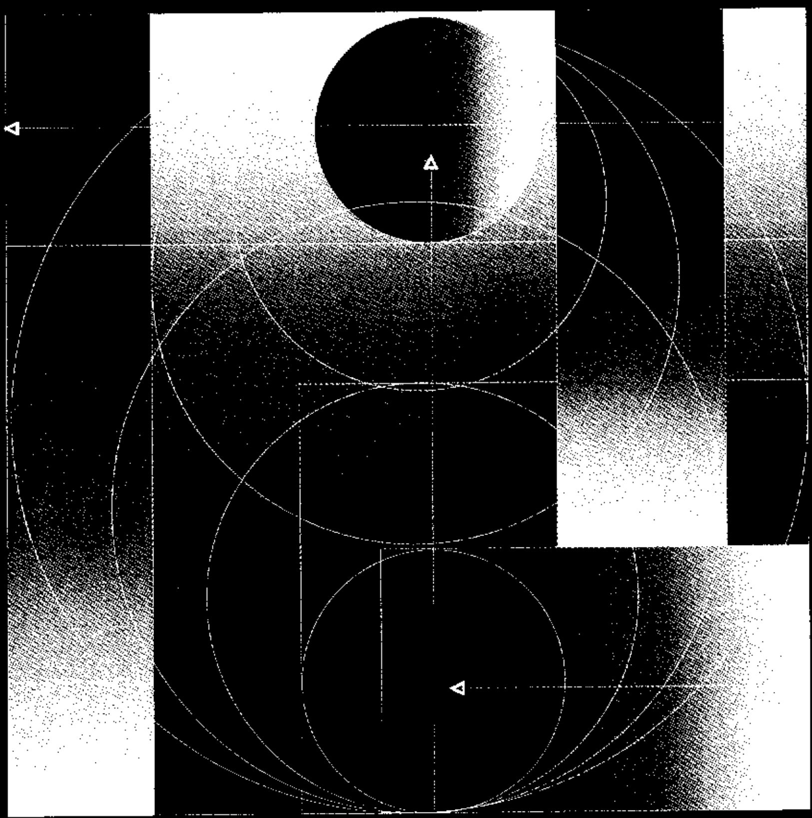
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

LEGAL ASPECTS OF INTERNATIONAL TRADE



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Legal aspects of international trade

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EXECUTIVE SUMMARY

This report focuses on the legal framework underlying export-import transactions and examines the risks inherent in international trade and the means by which they can be contained. It reviews the most frequent legal problems that arise from the sale of goods when the seller and the buyer are based in different countries.

After the provisions governing the international sales of goods have been introduced, the nature and functions of international commercial terms, or "Incoterms", are discussed. These are internationally standardized definitions setting out the rights and responsibilities of the exporter and the importer regarding the arrangements and payment for the delivery of goods in international transactions. The report then describes the different ways of ensuring that the main contractual obligations under the sale transaction are respected and, in particular, that the promised goods and services are delivered by the seller and the agreed payment is made by the buyer. The principal instruments to secure payment (documentary credits and documentary collections) and performance of the contract (bank guarantees) are therefore described.

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INTRODUCTION

1. A typical trade transaction starts with a contract of sale. A seller and a buyer agree a price for a specified quantity and type of goods to be purchased under specified terms and conditions. From the buyer's point of view the legal objective of such a contract is to obtain ownership of the goods, and from the seller's to receive the price. Thus the essence of the contract is the transfer of property in goods for financial consideration.[1]

2. Like any other contract, a contract of sale depends on an agreement—between the seller and the buyer—which is usually shown by the acceptance of an offer.[2] The contract of sale of goods is characterized in a majority of countries by the principle of "freedom of contract": the parties are free to fix the terms and conditions of the contract of sale—what prices will be charged, how payment will be handled, who will bear which costs of delivery, who will support which risks—subject to the general principles of law and to domestic legislation governing unfair contract terms.

3. The contract of sale has been characterized as the "master" contract[3] since the series of contractual arrangements which follow—as regards transport, insurance and payment—should accord with its provisions. Thus to avoid unwanted disputes and litigation it is essential that the contract of sale is carefully drafted and that specific reference is made to existing trade terms, like the current Incoterms (see chapter II), when stipulating the delivery point and the allocation of rights and responsibilities between the buyer and the seller. Moreover, if payment is to be by letter of credit (see chapter III), the requirements under the credit need to be clearly spelt out.

4. International sales of goods differ from domestic sales in a number of ways: they generally involve long distances—during which the goods are in the custody of the carrier—the risks involved in such transit are greater, and the transaction is normally irreversible, in that the physical return of the goods to the seller is in practice unlikely to be a realistic option. Furthermore, because of its nature, the transaction might be subject to a number of different jurisdictions with diverse legal systems. To cope with these problems, the business community has developed a number of standard contracts[4] and rules which cater for the peculiar needs of international commerce.[5]

5. It is the purpose of this report to familiarize readers with some of the most important tools used in international trade to:

(*a*) Allocate the rights and responsibilities of exporters and importers regarding the arrangements and payment for the delivery of the goods (chapter II);

(*b*) Secure the payment by the buyer of the merchandises contracted (chapter III);

(*c*) Protect the buyer against the non-performance of the contractual obligations by the seller (chapter IV).

6. The information provided in this report is not easily accessible to many developing countries and countries with economies in transition. It is believed that awareness of the legal aspects involved in international transactions will assist these countries in conducting international trade more efficiently. Other important issues such as transport and insurance will be dealt with in the second part of this report by the UNCTAD secretariat.

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[1] An exchange of goods is not therefore a contract for the sale of goods but a barter. Likewise a gift for no consideration is not a contract of sale. See P. Sellman, *Law of International Trade*, 7th ed., HLT Publications, 1996, p. 2, London.

[2] The rules as regards the making and communication of offer and acceptance and the revocation and termination of offers are common to all contracts, and may be found in general works on the law of contracts. See, for example, Benjamin, *The Sale of Goods*, Sweet and Maxwell, 1981, p. 22, London.

[3] G. Jiménez, *ICC guide to export-import basics*, Paris, ICC Publication No. 543, 1997, p. 34.

[4] One of the most recent standard contracts is the ICC Model International Sale Contract (1997 edition) for the sale of manufactured goods intended for resale.

[5] C. Debattista, *Sale of Goods Carried by Sea*, Butterworths, 1990, p. 1, London.

Chapter I

INTERNATIONAL SALE OF GOODS

7. Contracts of sale are governed by either national law—the law of the domicile of the seller or the buyer—or by an international treaty, the United Nations Convention on Contracts for the International Sale of Goods (CCISG—described below). Since the CCISG and most national laws are based on the customs of the business community (the *lex mercatoria*[6]) it is not surprising that they exhibit a great degree of similarity. It is precisely for this reason that we will briefly review the main provisions of the Convention.[7]

A. International regulation of the sale of goods

8. Preparation of a uniform law for the international sale of goods began in 1930 at the International Institute for the Unification of Private Law (UNIDROIT) in Rome. It was felt at the time that it would be of great value to the international business community to unify the law relating to international sales, to avoid providing different answers to questions such as when an offer or acceptance becomes effective, when possession, property or risk in the goods sold passes, what the rights of a buyer are when goods not conforming to the contract are tendered, and similar questions.[8] After a long interruption in the work as a result of the Second World War, a draft was finally submitted to a diplomatic conference in The Hague in 1964, which adopted two conventions, the Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.

9. Almost immediately upon the adoption of the two conventions, there was widespread criticism of their provisions as reflecting primarily the legal traditions of continental western Europe. One of the first tasks undertaken by the United Nations Commission on International Trade Law (UNCITRAL) upon its establishment in 1968 was to study the two conventions to ascertain which modifications might render them capable of wider acceptance by countries of different legal, social and economic systems. The result of this study was the adoption by diplomatic conference on 11 April 1980 of the United Nations Convention on Contracts for the International Sale of Goods,[9] which combines the subject matter of the two prior conventions.[10]

B. Application of the United Nations Convention on Contracts for the International Sale of Goods

10. Six forms of sale are excluded from the Convention according to article 2, the so-called "consumer contract" (goods bought for personal, family or household use), unless the seller at any time before, or at the time of, the conclusion of the contact neither knew, nor ought to have known, that the contract was a consumer contract. Also excluded are sales by auction and on execution or otherwise by authority of law. The nature of the goods is the basis for three further exclusions: the sale of securities, the sale of ships and aircraft, and the sale of electricity.[11]

11. Article 1 (1) provides for the Convention to apply to contracts of sales of goods between parties whose places of business are in different States when either both of those States are contracting States or the rules of private international law lead to the law of a contracting State. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be

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[6] Among the most authoritative definitions of the *lex mercatoria* are the following: "A set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular system of law" (B. Goldman, *Contemporary Problems in International Arbitration*, 1983, p. 116); "A single autonomous body of law created by the international business community", (B. M. Cremades and S. L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions", *1984, Boston University, International Law Journal*, p. 324). See also Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, Liber Amicorum for the Rt. Hon. Lord Wilberforce, edited by M. Bos and I. Brownlie, Oxford, Clarendon Press, 1987, pp. 149-183.

[7] Cf. footnote 4 above. Failing contrary agreement between the parties, the ICC Model International Sale Contract subjects the transaction to the CCISG, which, for ease of reference, is appended to the model contract as annex 1. By means of this incorporation of the CCISG into the model contract, the Convention will apply whether or not the countries of the seller and buyer have ratified the Convention.

[8] C. M. Schmitthoff, *The Law and Practice of International Trade* (9th ed.), Stevens and Sons, 1990, p. 240, London.

[9] The CCISG came into force on 1 January 1988. As at 1 January 1998 the Convention applied in 51 States in different parts of the world and with different economic and legal systems. According to the "Shipping, Transport, Marine Insurance and International Trade Newsletter" of Dibb Lupton Alsop, (March 1998), the States which have adopted the Convention to date are responsible for more than 60 per cent of the total volume of worldwide trade.

[10] See explanatory note by the UNCITRAL secretariat on the United Nations Convention on Contracts for the International Sale of Goods (http://www.un.org@UNCITRAL).

[11] H. van Houtte, *The Law of International Trade*, London, Sweet and Maxwell, 1995, p. 126.

taken into consideration in determining the application of the Convention.

12. According to article 6, the parties may exclude the application of the CCISG or derogate or vary its effect. Parties may also negotiate different clauses in their contract. Moreover, usages which are customary between the parties and any practices which have developed in their relationship take precedence over the rules of the CCISG.[12] Even usages which reasonable people would normally consider to be part of their contract take precedence over the provisions of the Convention.[13]

13. Parties may furthermore agree that the CCISG shall only apply in part and that they will derogate from some other CCISG provisions or alter their legal effect. The basic principle of the Convention is that, subject to one exception, the parties should be free to exclude its terms in whole or in part (article 6). The exception relates to the requirement of writing. The Convention provides that a contract does not have to be concluded, evidenced or varied in writing (article 12).[14] Article 96, however, allows a State whose laws do have such a requirement to make a declaration that this rule is not to apply when any party to the contract has his place of business in that State. In that case, the requirement of writing cannot be excluded.[15]

14. Finally, the CCISG is not applicable to the capacity of the parties, the formal validity of the contract, the transfer of ownership and the legal effects of the contract in respect of third parties.[16]

15. Pursuant to article 92, contracting States may exclude the application of part II (formation of an international contract of sale) or part III (substantive rules).[17]

C. Formation of the contract

16. Part II of the CCISG defines how and when an international contract of sale comes into existence. Thus, in accordance with article 23: "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention".

1. *Offer*

17. An "offer" is a statement intended to result in a binding contract if duly accepted by the offeree. It is defined in the Convention as: "a proposal for concluding a contract addressed to one or more specific persons . . . if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price." (article 14 (1)) Thus the seller should make certain that the essential elements of the contract are clearly stated in the communications exchanged by the parties. The sending of price lists, catalogues and so on are in principle not offers.

18. The offer is effective as soon as it reaches the offeree (article 15 (2)). The offeror may still withdraw his offer if the withdrawal reaches the offeree before or at the same time as the offer (article 15.2). After the offer has reached the offeree, but before the acceptance has been dispatched, the offer may still be revoked, unless it was irrevocable, or could be considered by the offeree to be irrevocable (article 16).

19. An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror (article 17).

2. *Acceptance*

20. An "acceptance" is defined as a statement made by, or other conduct of, the offeree that indicates assent to an offer. Actions of the acceptor, such as dispatch of goods or payment of the price, may indicate an implied acceptance. Silence or inactivity does not in itself amount to acceptance (article 18). Article 19 deals with the so-called "battle of forms" between the offeror and offeree, when there is a discrepancy between the conditions offered and those accepted. The article reads as follows:

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

D. Obligations and remedies of seller and buyer

21. Part III of the CCISG regulates the respective rights and obligations of buyers and sellers. A fundamental breach of contract is defined in the Convention (article 25) as a breach that results in such a detriment to the other

[12] When the seller and the buyer have agreed on a trade term, such as free on board (FOB) or cost, insurance and freight (CIF), the regulation intended by that term takes precedence over the provisions of the Convention. Further, the Convention does not prevent the parties from agreeing on a uniform interpretation of the trade terms by embodying into their contract Incoterms or a similar text. See C. Schmitthoff, op. cit., pp. 245-246.

[13] The standard contracts of the Federation of Oils, Seeds and Fats Associations (FOSFA) and the Grain and Feed Trade Association (GAFTA) include the following clause: "The following shall not apply to this contract: (*a*) the uniform law on sales (. . .); (*b*) the United Nations Convention on Contracts for the International Sale of Goods (. . .)". (Van Houtte, op. cit., p. 127.)

[14] To warn traders of the dangers of contracts based on a "handshake" or a "gentlemen's agreement" the following humorous definition is provided of a gentlemen's agreement: "An unwritten agreement, not a contract, between two parties—neither of which may be a gentleman—under which each party believes the other side is fully bound, while its own performance is strictly optional" (Jiménez, op. cit., p. 33).

[15] Clifford Chance, "The UN Convention on Contracts for the International Sale of Goods", *Maritime Review*, October 1991, No. 8, p. 18.

[16] Van Houtte, op. cit., pp. 127-128.

[17] Ibid., p. 128.

party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

1. *Obligations of the seller*

22. The basic obligation of the seller, as set out in article 30, is "to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this convention". In general, the seller must deliver goods that are of the quantity, quality and description required by the contract and that are contained or packaged in the manner agreed.

23. The Convention provides supplementary rules (in the absence of contractual agreement) as to when, where and how the seller must perform its obligations. One set of rules of particular importance involves the seller's obligation to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property.

24. In connection with the seller's obligations in regard to the quality of the goods, the Convention contains provisions on the buyer's obligation to inspect the goods. He must give notice of any lack of their conformity with the contract within a reasonable time after he has discovered it or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee (article 39).[18]

2. *Remedies available to the buyer*

25. If the seller fails to perform any of his obligations the buyer may, depending on the circumstances, resort to the following remedies:[19]

(a) *Request for specific performance*: as provided for in article 46, the buyer may require performance by the seller of his obligations or, if the goods do not conform with the contract, the buyer may require delivery of substitute goods (but only if the lack of conformity constitutes a fundamental breach of contract);

(b) *Time extension and right to cure*: the buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. The buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance (article 47);

(c) *Avoidance of the contract*: as provided for in article 49, the buyer may declare the contract avoided: (*a*) if the failure by the seller to perform any of his obligations under the contract amounts to a fundamental breach of contract, or (*b*) in case of non-delivery of the goods;

(d) *Reduction of the price*: as provided for in article 50, if the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time.[20]

3. *Obligations of the buyer*

26. The basic obligation of the buyer is (*a*) to pay the price for the goods and (*b*) take delivery of them as required by the contract (article 53).

(*a*) The obligation to pay covers three elements:[21]

- (i) *The determination of the price*: although in principle the price is determined in the contract, in the absence of the same, the parties are considered to have made an implied reference to the price generally charged at the time of conclusion of the contract for such goods sold under comparable circumstances in the trade concerned (article 55);
- (ii) *The place of payment*: the price must be paid at the seller's place of business or if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place (article 57);
- (iii) *The moment of payment*: in the absence of an agreed time for payment the buyer must pay the price at the moment the seller places either the goods or documents controlling their disposition at the buyer's disposal (article 58 (1)). If the contract involves the carriage of goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price (article 58 (2)) unless the contract states otherwise the buyer is not bound to pay the price until he has had the opportunity to examine the goods (article 58 (3)).

(*b*) *Taking delivery*: article 60, specifically provides that the buyer's obligation to take delivery consists in (*a*) doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery, and (*b*) taking over the goods. If the buyer does not take delivery he breaches the contract, which may make him liable for any damage to the goods.

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[18] See explanatory note by the UNCITRAL secretariat on the United Nations Convention on Contracts for the International Sale of Goods, op. cit., p. 57.

[19] By exercising his right to other remedies, the buyer is not deprived of any right he may have to claim damages (article 45 (2)). *The whole thrust of the Convention is on preserving the contract, and not permitting one party or the other to set the contract aside for a relatively minor breach.* This is achieved by disregarding the common law distinction between conditions and warranties. The right of one party or the other to avoid the contract depends particularly upon there having been a fundamental breach. See Clifford Chance. op. cit., p. 20.

[20] This remedy is new to common law. Its advantage is said to be that it enables the buyer to resolve his problem without the need to resort to a court. In many cases, however, this will not be practicable. If payment is made against an irrevocable letter of credit, it will be impossible to reduce the price before payment. Payment will have to be made under protest and reclaimed later (ibid., p. 21).

[21] See Van Houtte, op. cit., pp. 141-142.

4. *Remedies available to the seller*

27. The general pattern of remedies is the same as those available to the buyer: he may require the performance of an obligation, declare the contract avoided and claim damages.[22]

(a) *Request for specific performance*: pursuant to article 62, the seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement. The seller may allow the buyer an additional period of time of reasonable length for performance by the buyer of his obligations (article 63 (1)).

(b) *Avoidance of the contract*: the seller may declare the contract avoided (article 64) (*a*) if the failure by the buyer to perform any of his obligations amounts to a fundamental breach of contract, or (*b*) if the buyer does not, within the additional period of time fixed by the seller perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

E. Passing of risk

28. A question of risk will arise when the goods which have been agreed to be sold are lost, damaged, destroyed or deteriorated and it is necessary to decide whether the seller or the buyer shall bear the loss.[23]

29. Pursuant to article 66 of the Convention:

> Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

30. Parties may stipulate a specific clause for the passing of risk in the contract or they may include it implicitly by referring to an Incoterm. If nothing has been agreed, the supplementary rules of the Convention will apply.[24]

31. The general rule under the Convention is that except for contracts of sales involving carriage the risk passes to the buyer upon delivery when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery. However, if the buyer is bound to take over the goods at a place other than the place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place (article 69 (2)). If the contract relates to goods not then identified the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract (article 69 (3)). For a contract of sale involving carriage the following rules apply (articles 67 and 68):

> (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.
>
> (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.
>
> The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

F. Common provisions for seller and buyer

1. *Anticipatory breach*

32. If, after concluding the contract of sale, it appears that a party will be unable to perform a substantial part of his obligations, the other party may:

(a) *Suspend the performance*: a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (i) a serious deficiency in his ability to perform or in his creditworthiness, or (ii) his conduct in preparing to perform or in performing the contract (article 71). A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

(b) *Avoid the contract*: if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided. If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance (articles 72 and 73).

2. *Damages*

33. Damages are due when there is:

(*a*) a breach of contract;

[22] Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. See articles 74 to 77 of the CCISG and footnote 19, above.

[23] As a general rule the risk of the loss is, prima facie, in the person in whom the property is "res peri domino". (See Benjamin, op. cit., p. 402).

[24] Van Houtte, op. cit., p. 144.

(*b*) a loss suffered by the other party; and

(*c*) a causal link between the breach of the contract and the loss.[25]

34. Damages for breach of contract include the loss of profit. Such damages may not exceed the loss which the party in breach foresaw, or should have foreseen, at the time of the conclusion of the contract (article 74). The party claiming damages must take all reasonable measures to mitigate the loss (article 77).

3. *The exemption of* force majeure

35. A party is not liable for failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control. The impediment should be unforeseeable at the time of the conclusion of the contract (article 79 (1)). The exemption is only temporary: it only applies during the time the impediment exists (article 79 (3)).

4. *Preservation of goods*

36. The Convention imposes on both parties the duty to preserve any goods in their possession belonging to the other party. Such a duty is of great importance in an international sale of goods where the other party is from a foreign country and may not have agents in the country where the goods are located. Under certain circumstances the party in possession of the goods may sell them. A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them and must account to the other party for the balance.[26]

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[25] Van Houtte, op. cit., p. 146.

[26] See explanatory note by the UNCITRAL secretariat of the United Nations Convention on Contracts for the International Sale of Goods, op. cit., p. 60.

Chapter II

INCOTERMS

37. Those engaged in international trade and commerce prefer standardization of their contract provisions. By doing so, costs and risks can be calculated more accurately and easily, and the number of disputes inherent in any business transaction reduced to a minimum. The techniques and methods adopted to achieve this have varied and have ranged from the formulation of standard contracts affecting only a particular industry or trade,[27] sometimes categorized as "vertical standardization", to standardization of terms that affect the entire business irrespective of the commodity traded, or "horizontal standardization".[28] The latter type of standardization has primarily taken place in the area of trade terms.

38. Trade terms are primarily designed to define the method of delivery of the goods sold and to delimit the rights and duties of seller and buyer with regard to the following:

(*a*) Who will arrange and pay for the carriage of the goods from one point to another?

(*b*) Who will bear the risk if these operations cannot be carried out?

(*c*) Who will bear the risk of loss of or damage to the goods in transit?

All of these questions are concerned with actually getting the goods from the seller to the buyer.

39. Although universally recognized, trade terms might be interpreted differently in various countries and their meaning may be modified by agreement of the parties, the custom of a particular trade or the usage prevailing in a particular port.

40. Incoterms (international commercial terms) are among the most important and universally recognized international trade terms. Incoterms are internationally standardized definitions that have been prepared by the International Chamber of Commerce (ICC), setting out the rights and responsibilities of exporters and importers regarding the arrangements and payment for the delivery of the goods in international sales.

[27] C. Schmitthoff, "The unification or harmonization of law by means of standard contracts and general conditions", *International and Comparative Law Quarterly*, vol. 17, July 1968, pp. 551-570.

[28] This classification was first suggested by Eisemann. See F. Eisemann, "Incoterms and the British export trade", *Journal of Business Law*, 1965, pp. 114-116, and D. M. Sassoon "Trade terms and the container revolution", *Journal of Maritime Law and Commerce*, October 1969, vol. 1, No. 1, p. 73.

41. Incoterms do not cover all possible legal or transport issues arising out of an international sale, but are a sort of contractual shorthand which allows the parties to easily specify their undertaking as to:

(*a*) The transport costs which the seller will cover;

(*b*) The point at which risk of loss will be transferred from seller to buyer;

(*c*) Who must handle customs formalities and pay duties;

(*d*) Insurance coverage, if any.

42. The purpose of Incoterms is therefore to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree.[29]

A. Development of Incoterms

43. The history of Incoterms[30] dates all the way back to the 1920s, when the ICC noticed with concern that FOB in one country did not mean the same thing in another country. The ICC began to research these different interpretations and discovered that despite the differences, there was a great deal of agreement. Common trade terms were standardized in 1936 with the first edition of *Incoterms*, which was subsequently revised in 1953, 1967, 1976, 1980 and 1990.

44. It was not until 1980 that the ICC changed its approach of merely revising the existing terms and practices to seek the common denominator in the interpretation of the terms. Since 1980, new terms as well as amendments to existing terms have been included in *Incoterms* to suit changing circumstances in different trades, such as the trend towards an increase of cargo unitization compared with traditional cargo handling at the ship's side.[31] It was precisely this trend that made certain traditional practices obsolete. Thus, the ship's rail—once the traditional "critical point" under the FOB, CFR (cost and freight) and CIF terms—was no longer suitable as the point for the division

[29] ICC, *Incoterms 1990*, Paris, ICC Publication No. 460, p. 6.

[30] See F. Eisemann and Y. Derains, *La pratique des Incoterms: objet et histoire des Incoterms*, ICC Publication No. 453, 1988, pp. 3-9.

[31] The 1980 edition of *Incoterms* contained two new terms: "Free carrier" [named point] and "Freight or Carriage and Insurance paid to" (ICC, "Revision of Incoterms", ICC Document No. 460/234, 1978).

of functions, costs and risks between sellers and buyers.[32] Costs relating to the time after the receipt by the carrier and before the loading of the cargo will normally be included in the freight and, therefore, it becomes more or less impossible to identify precise cost distribution at the ship's rail. In addition since a key function of the transport document is to evidence the "good order and condition" of the goods, it should be issued at a point where the carrier has reasonable means of conducting a check. In modern transport operations this point has shifted from the ship's rail to seaport or inland terminals, where the goods are frequently stowed in containers or trailers, or on flats or pallets. As a result, a "received for shipment" type of document was developed as an alternative to the traditional on-board bill of lading. The new transportation techniques and the changed documentary practices received special attention in the 1980 revision of *Incoterms*.[33]

45. In order to bring the rules in line with current international trade practice, *Incoterms* was last revised in 1990. The main reason for this revision was the desire to adapt terms to the increasing use of electronic data interchange (EDI) and changed transportation techniques, particularly the unitization of cargo in containers, multimodal transport and roll-on/roll-off traffic with road vehicles and railway wagons in short sea maritime transport. In connection with the substantive changes made, the terms have been grouped in four basically different categories for easier reading and understanding.[34]

B. The legal nature of Incoterms

46. Incoterms are contractual trade usages,[35] universally accepted by all trading countries and derived from the *lex mercatoria*.[36] They are not statutory trade usages which have force of law by virtue of a national enactment or a measure of delegated legislation. That is the reason by which merchants wishing to use them should specify that their contracts be governed by *Incoterms 1990* or by the latest Incoterms version. Furthermore, it should be kept in mind that Incoterms do not exist in a vacuum; although they provide a skeleton of terms, these terms can only survive within the body of a contract of sale.

47. Incoterms are not the only example of standardized trade terms. In fact, rules of interpretation similar to those contained in Incoterms have been established in different countries and regions of the world. The most relevant ones are the following:

(a) *The American Foreign Trade Definitions* that appeared in the United States in 1919 and which were last revised in 1941. The definitions do not have the status of law but sellers and buyers may adopt them as part of their contracts of sale. These trade definitions have apparently not been used by the trade organizations of the United States since 1980.

(b) *The Rules of Warsaw and Oxford* that were proposed by the International Law Association in 1932.

(c) *The General Conditions for Delivery of Merchandise* which were developed in 1968 in the Council for Mutual Economic Assistance (for the former Soviet Union and some countries in Eastern Europe) and revised on 1 January 1976.

(d) *Combiterms*,[37] which were proposed in 1969 to simplify the division of costs and risks between the parties, by introducing code numbers for the cost units contained in the trade terms. Under each trade term it is then resolved which of the seller and the buyer shall bear each cost unit. This was deemed to be particularly important for the traffic of consignments insufficient to make up a full load for a wagon, truck or container and which therefore had to be grouped together with other consignments belonging to different shippers or consignees (cargo consolidation). The advantages of this system are obvious, since the placing of the cost units on either the seller or the buyer is determined in advance and there is no room for a subsequent dispute between the seller and the buyer provided, of course, that all costs arising are correctly included in the cost units.[38]

C. The current Incoterms

48. The 1990 version of the Incoterms has introduced a very clear and easy to understand presentation called the "mirror-method". This means that every responsibility of the buyer is placed next to the corresponding responsibility of the seller. These responsibilities or obligations are grouped under 10 numbered articles, divided into two parallel series, one for the seller's responsibilities, and one for the buyer's responsibilities (see table 1).

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[32] According to Lord Devlin, "Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail" (*Pyrene Co. Ltd.* v. *Scindia Navigation Co. Ltd.* (1954) 2QB 402, p. 419).

[33] ICC, *Guide to Incoterms: The Impact of Modern Transport* (1980 edition) ICC Publication No. 354, pp. 8-9.

[34] ICC, *Incoterms 1990: why new Incoterms?* ICC Publication No. 460, p. 6.

[35] Although there is not a single definition of "trade usage", research carried out in 1980 by the ICC Institute of International Business Law and Practice on the interpretation and application of international trade usages, revealed a considerable degree of unanimity in the understanding of this term, Thus it is thought that the uniformly accepted features of a trade usage are as follows: "A trade usage is a method of dealing or a way of conduct generally observed in a particular line of business with such regularity that it is accepted as binding by those engaged in that line of business". For a comprehensive classification of international trade usages see C. M. Schmitthoff, "International trade usages", *Newsletter of the Institute of International Business Law and Practice*, September 1987, ICC Publication No. 440/4, pp. 26-30.

[36] The *lex mercatoria* has been defined as "a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law" and "a single autonomous body of law created by the international business community" (Lord Justice Mustill, op. cit., p. 151). See also B. Goldman, "The applicable law: general principles of law—the lex mercatoria", *Contemporary Problems in International Arbitration*, Dordrecht, Martinus Nijhoff, 1987, pp. 113-125.

[37] See ICC, *Guide to Incoterms*, ICC Publication No. 354, p. 9.

[38] A chart of combiterms is included in annex III.

TABLE 1: Seller's and buyer's responsibilities

	A—Seller's responsibilities		*B—Buyer's responsibilities*
A1	Providing the goods in conformity with the contract	**B1**	Payment of the price
A2	Licences and other certificates	**B2**	Licences, authorizations and formalities
A3	Contracts of carriage and insurance	**B3**	Contract of carriage
A4	Delivery of the goods	**B4**	Taking delivery
A5	Transfer of risk of loss or damage	**B5**	Transfer of risks
A6	Division of costs and taxes	**B6**	Division of costs
A7	Notice to the buyer	**B7**	Notice to the seller
A8	Proof of delivery, transport documents or equivalent electronic message	**B8**	Proof of delivery, transport documents
A9	Checking, packing and marking	**B9**	Inspection of goods
A10	Providing additional assistance and information	**B10**	Other obligations

49. Each of the 13 Incoterms has a precise definition, but they can be grouped into the following four basic categories (for explanation of abbreviations and for definitions, see annex I):

(a) *E-term* (EXW): where goods are made available to the buyer at the seller's premise;

(b) *F-terms* (FCA, FAS, FOB): where the seller is required to deliver the goods to a carrier appointed by the buyer;

(c) *C-terms* (CFR, CIF, CPT, CIP): where the seller has to contract for carriage, but without assuming the risk of loss or of damage to the goods or additional costs due to events occurring after shipment or dispatch;

(d) *D-terms* (DAF, DES, DEQ, DDU, DDP): where the seller has to bear all costs and risks needed to bring the goods to the country of destination.

D. Particular considerations

1. *Shipment contracts and arrival contracts*

50. With the exception of the EXW term, all the other terms can be divided into what are known as "shipment contracts" and "arrival contracts". There is an important difference between these types of contracts.

51. Under the arrival contracts, the seller is responsible for the goods all the way to their arrival in the country of destination. Only the so-called D-terms (DAF, DES, DEQ, DDU and DPP) will turn a contract into an arrival contract. With all the other terms (the shipment contracts, such as FOB and CIF), the seller fulfils his delivery obligation at the point of shipment, irrespective of the fact that the cost of transport and insurance might have been paid by the seller. This is the key distinction between the C-terms, like CIF and CIP, and the D-terms. Thus the C-terms provide not only for one critical point but for two critical points: the point of division of risks (e.g. the ship's rail) and the point for division of costs, which is the destination point. In the case of the D-terms (arrival contracts), both of these crucial points coincide in the destination point. The distinction between the two types of contracts is essential, since the solution given in the case of goods lost or damaged in transit will be completely different, depending upon whether the contract is a shipment contract or an arrival contract. If it is a shipment contract, the responsibility for recovering the cargo loss or damage will lie with the buyer, since the risk has already been transferred to him, whilst in the case of an arrival contract the seller may be liable for breach of contract, since he has not fulfilled his delivery obligation under the contract.

52. A buyer will be better protected by a D-term, whereby the seller has to bear all the costs and risks needed to bring the goods to the buyer's country of destination, than by a CIF Incoterm, since in the latter case the only recourse available to the buyer is the insurance coverage, as the seller does not assume the risk of loss or damage to the goods after shipment. It follows that, in the case of shipment contracts, if the goods are shipped and lost during ocean transit the seller is still entitled to tender the proper shipping documents to the buyer and to claim the purchase price. That is the reason why terms like DDU or DPP mean greater risk for the seller and involve higher prices.[39]

[39] Delivered terms have become more popular in international trade over the past decades. In addition to the advantage of optimizing transport economy, D-terms allow for greater control by the seller of the quality of transport. In the case of high-value manufactured goods, it may be very important for the seller to be in a position to assure that the goods arrive in time and in good condition. Control of the entire transport chain is facilitated for a seller under D-terms (see Jiménez, op. cit., p. 89).

2. *Contract of carriage*

53. Although Incoterms only regulate certain aspects of the legal relationship between seller and buyer and are kept apart from the legal relationship between the parties to the contract of carriage, there is a definite need to consider a synchronization between the two contracts (sale and transport), so as to avoid unnecessary administrative expense and legal pitfalls.

54. The contract of carriage is relevant to all the terms of sale contained in Incoterms, albeit to varying degrees. Thus each Incoterm will allocate the costs and risks of carriage to one or other of the parties to the contract of sale. The various carriage duties are imposed in particular by articles A3 (*a*), A4, A6, A7 and A8 of *Incoterms 1990.* These carriage obligations can be grouped under four headings relating respectively to the terms of the contract of carriage, the shipment of the goods, the route of shipment and the discharge of the goods.

55. It is absolutely essential that commercial parties take into account the type of transport envisaged when choosing an Incoterm. Thus, to select CIF for a contract involving multimodal transport will certainly make it difficult for the seller to comply with his obligation to tender a document stating that the goods have actually been shipped on board, since the multimodal transport document is nearly always a "received for shipment" document, where the carrier takes over the goods long before they are loaded on to the means of transport.[40]

56. For Incoterms in which the seller has to procure and pay for the transport (those of group C), there is a duty to provide the buyer with continuous documentary cover. Thus where a sale contract on CIF terms incorporates *Incoterms 1990* and the goods are delivered to the carrier at an inland depot in a container, the seller will be in breach of his sale contract if he tenders a bill of lading imposing responsibility on the carrier only from port to port. Such a bill of lading will prevent the buyer from making any claim against the carrier if the goods are damaged between the inland point and the loading port. In such cases, the choice of the CIP Incoterm will avoid the problems caused by using the CIF Incoterm for this type of transport.[41]

57. To avoid unnecessary disputes, it is strongly recommended that the parties should clarify the type of contract of carriage which the seller must tender to the buyer when using Incoterms of group C (CFR, CIF, CPT, CIP).[42]

3. *Insurance*

58. The purpose of cargo insurance is to protect goods against the perils of physical loss or damage in transit. Only two (CIF and CIP) of the 13 Incoterms stipulate the obligation to contract insurance coverage. However, the absence of requirements concerning insurance coverage for 11 Incoterms should not be interpreted as meaning that cargo insurance is unnecessary. Their absence merely allows the seller and buyer to decide at their discretion about insurance and its extent. The wording of the insurance requirements (article A3 (*b*)) for the CIF and CIP Incoterms is identical, with only the provisions governing the insurance period diverging.[43] In essence, they provide as follows:

(*a*) The seller shall obtain marine cargo insurance at his own expense; it is irrelevant whether the seller takes out a separate policy for the specific shipment or just obtains a certificate for the buyer confirming that the shipment is insured under the seller's open cover;

(*b*) The buyer or another person having an insurable interest in the goods shall be entitled to raise a claim directly against the insurer. For this purpose the seller shall provide the buyer with the separate insurance policy or the certificate of insurance if protection is provided under an open cover;

(*c*) Failing express agreement to the contrary, the insurance shall be in accordance with the minimum cover provided by the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. This is so because all-risk cover is simply not customary for quite a variety of cargo (e.g. sand, gravel, asphalt, oil, live animals or any goods transported unpacked or in bulk, such as scrap metal, coal, chemical, fertilizers and cereals). Furthermore, as all-risk policies cover the risks of theft, pilferage and robbery, it would be unreasonable if CIF and CIP terms imposed a general obligation on the seller to insure these risks, that he might be unable to insure for certain parts of the world. This requirement is in compliance with the philosophy behind the Incoterms of only defining minimum obligations;

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[40] With the advent of the "container revolution" in the 1960s and other modern cargo unitization devices, there was a gradual switch from the customary "port to port" type of sea transport to a new "door to door" combined transport concept (involving several means or modes of transport and different carriers). One of the problems raised by the new combined transport concept related to the documentary aspect of the CIF term and the inability to satisfy the bill of lading requirements of the transaction (see D. M. Sassoon, "CIF and FOB contracts: The container revolution", *British Shipping Laws*, vol. V, 1975, p. 19).

[41] See C. Debattista, *Incoterms in practice: Incoterms and the contract of carriage*, Paris, ICC Publication No. 505, 1995, pp. 14-15.

[42] Even when the parties use F-terms, in which case the seller is under no obligation to contract the transport (article A3), it may be important for the buyer to provide clear instructions to the seller as to the way of effecting the on-carriage. Thus, in the case of refrigerated cargo, it would be important to assure that the cargo is transported in "refrigerated containers" during the on-carriage, prior to the cargo being delivered to the main carrier named by the buyer.

[43] Rule A3 of the CIF Incoterm reads as follows:

The seller must obtain at his own expense cargo insurance as agreed in the contract, that the buyer, or any other person having an insurable interest in the goods shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.

The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of insurance cover shall be in accordance with B5 and B4 ("Transfer or Risks" and "Taking Delivery"). When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurances if procurable. The minimum insurance shall cover the price provided in the contract plus 10 per cent (i.e. 110 per cent) and shall be provided in the currency of the contract. (*Incoterms 1990*, ICC Publication No. 460, pp. 50-51).

(*d*) If nothing has been agreed between the seller and the buyer, the Incoterms stipulate that the minimum cover will be the price provided in the contract plus 10 per cent (i.e. 110 per cent) provided in the currency of the contract.

59. The purpose of requesting coverage amounting to 10 per cent over the price provided in the contract goes back to the 1906 Marine Insurance Act.[44] This excess insurance is a general custom in certain trades and countries, and was incorporated in the first edition of *Incoterms* in 1936. There is nothing in *Incoterms 1990* that prevents the parties from agreeing coverage higher or lower than 110 per cent (e.g. for the cocoa trade the custom is to cover the invoice price plus 12.5 per cent). It should be underlined however, that the assured will only receive an indemnity for the profit share exceeding 10 per cent if he is able to prove this higher profit.[45]

60. In practice, exporters often take insurance for an amount somewhat higher than their actual value, to offset losses that are not recoverable under the insurance policy, such as indirect damage or loss resulting from delays in the dispatch or arrival of goods, currency fluctuations or storage expenses.[46]

61. With the exception of EXW, DDU and DDP Incoterms, all Incoterms provide for a transfer of risk from seller to buyer at some point during transportation (articles A5 and B5). When loss or damage occurs, the insurer will examine in which phase of the transport the loss or damage occurred, and whether an insurable interest[47] of the claimant existed at the time of the occurrence. Without insurable interest there will be no obligation on the part of the insurer to indemnify. It is customary in international trade to assign the insurance policy[48] at any time even after a loss has occurred,[49] but the assignment is not valid if it takes place after the assured has parted with his insurable interest in the goods, except where the terms of sale indicate an intention to assign the policy or certificate, in which case the policy or certificate can be assigned at any time.[50]

62. From a practical point of view and notwithstanding that for certain Incoterms the seller is bearing the risk during the pre-carriage to the port of shipment and the buyer is assuming the risk from that point onwards, it is recommended that one of the parties insure the complete transport (warehouse to warehouse) with one insurer. This will facilitate any claims recoveries against the insurer.[51] Furthermore, it is strongly recommended to specify in the contract the scope of cover agreed by the seller and buyer. The following format has been suggested:

> Insurance cover on the basis of (clearly identified) conditions:
>
> *from ... (place of commencement of insurance).*
>
> *to ... (place of termination of insurance).*
>
> *Plus: ... days of storage at insured option ... % anticipated profit.*
>
> *... (if percentage higher or lower than 10% is desired).*
>
> *... (named) currency (if not the currency of the contract).*
>
> *... (other particularities).*[52]

4. *Property and risk*

63. The primary legal objective of a contract for the sale of goods is to transfer ownership from the seller to the buyer; if all goes well the precise stage during the performance of the contract at which this occurs may be relatively unimportant. As long as the buyer receives physical delivery of the goods when he wants them and ultimately obtains ownership of them, he is unlikely to be worried. Where, however, things do go wrong, the precise timing of the transfer may become crucial. Firstly, if the seller or buyer goes into liquidation while the goods are in transit, the creditors of the insolvent party will wish to know whether the goods are owned by that party since this may determine whether the goods will form part of his estate . . . Secondly, the seller's right to demand the price may depend upon whether property has passed. Thirdly, the buyer's right to sue the carrier for loss or damage to the goods may depend upon establishing ownership.[53]

64. Incoterms do not regulate the important issue of transfer of property, since the law on transfer of property rights differs from country to country. The 1980 Convention on Contracts for the International Sales of Goods, in article 4, specifically states that:

> This convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this convention, it is not concerned with:
>
> ... (*b*) the effect which the contract may have on the property in the goods sold.

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[44] Section 16 (3) of the English Marine Insurance Act of 1906.

[45] See K. B. Winkler, *Incoterms in practice: Incoterms and insurance*, Paris, ICC Publication No. 505, pp. 87-89, and K. B. Winkler, "Incoterms and insurance", paper presented at the ICC Seminar on Multimodal Transport, Hamburg, 8 September 1994.

[46] D. Chevalier, "Insuring your export shipment", *International Physical Distribution. International Trade Forum*, October-December 1989, p. 29.

[47] Sections 5 and 6 of the English Marine Insurance Act of 1906 define the concept of "insurable interest" and the "time when interest must attach".

[48] Section 50-2 of the English Marine Insurance Act (1906) reads as follows: "Where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected".

[49] Sections 50-51 of the English Marine Insurance Act of 1906. Where the goods are damaged before shipment, a CIF buyer may sue on the policy, provided it has been assigned to him, although he has no insurable interest in the goods at the time (see D. M. Sassoon, "CIF and FOB contracts", *British Shipping Laws*, vol. 5 (2nd ed.), 1975, pp. 136-137.

[50] R. H. Brown and J. J. Novitt, *Marine Insurance, Vol. 2—Cargo Practice*, "Assignment of Policies", London, Witherby, 1985, pp. 89-90.

[51] Under the current Institute Cargo Clauses of 1982 (clause 8, on "duration"), the goods are covered from the time they leave the warehouse at the place named in the policy for commencement of the transit until delivery to the consignees or other final warehouse at destination named in the policy, provided that in no case the period of cover after completion of discharge overside of the goods shall extend beyond 60 days.

[52] K. B. Winkler, op. cit. p. 86.

[53] Clifford Chance, "The passing of ownership and risk in international commodity contracts", *Maritime Review*, No. 10, June 1992, p. 10.

65. In order to determine the moment at which the property is transferred, it is therefore first necessary to determine what national law will be applied for questions of property in an export transaction. In the majority of legal systems, the moment at which the property passes is entirely a question of intention to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case.

66. The passing of ownership must be distinguished from the allocation of risk between seller and buyer. The passing of risk means the transfer from seller to buyer of the responsibility for loss, deterioration or damage to the goods occurring without the fault of either party. Although as a general rule the property and the risk pass at the same time, in international trade, risk will often pass before ownership is allocated. The transfer of risks from seller to buyer is regulated in Incoterms under article A5. The risk passes from the seller to the buyer when the seller fulfills his obligation of delivering the goods. If the buyer does not take delivery as agreed or fails to instruct the seller—with respect to time for shipment and/or place for delivery—the passing of risk may occur even before delivery. The two notions which are most fundamental to the passage of property in goods[54] and commodities are "ascertainment" and "appropriation".[55]

67. The Convention on Contracts for the International Sale of Goods of 1980 regulates the subject in chapter IV, entitled "Passing of risk".[56] The following cases are differentiated:

(*a*) In cases where the sale involves carriage of the goods (article 67), the risk passes to the buyer when the goods are handed over to the first carrier, in accordance with the contract of sale, provided the goods are clearly identified;

(*b*) In cases where the goods are sold in transit, the risk passes to the buyer from the time of the conclusion of the contract (article 68);

(*c*) In all other cases (article 69), the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to accept the delivery. The goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

68. The above-mentioned provisions pursuant to article 9 of the Convention only apply if the parties have not incorporated Incoterms in their contracts of sale. It has to be underlined that these provisions are of a less exhaustive nature than the solutions proposed by Incoterms but are not conflicting with them.

5. *Cost distribution*

69. The general rule is that the obligation to bear the costs relating to the goods passes from the seller to the buyer when the seller has fulfilled his obligation to deliver the goods. Thus, "delivery" constitutes the borderline between seller and buyer as regards cost distribution.[57] As pointed out above, cost units are attached to the various trade terms. The advantage of Combiterms is that the placing of the cost units on either the seller or the buyer is determined in advance and there is no room for a subsequent dispute between the seller and the buyer provided, of course, that all costs arising are correctly included in the cost units. Unfortunately, Combiterms do not entirely reflect Incoterms, since they were basically prepared for freight forwarders. Thus the costs of verification and package of the merchandise, which should be borne by the seller according to Incoterms, do not appear in Combiterms.

70. It is important to note that some ports have now succeeded in imposing a different allocation of costs in their efforts to attract new customers.[58] This has traditionally been the case of the port of Antwerp, Belgium, where for an FOB contract it is not requested of the shipper, in fulfilling his delivery obligations, that the goods pass the bulwark of the ship, but it is sufficient that the seller places the goods at the quay (the place designated by the shipowner or his representative) or the "ship's perimeter" (when there are no express instructions regarding the point of delivery by the seller and the point of reception by the buyer). Thus the Antwerp operators have imposed on shipowners the same standard handover point for the attribution of costs in shipping agreements, with the general use of "liner terms from quayside". This means that freight covers the taking-over of goods on the quay, and that loading costs are on the shipowners' account. Since 31 May 1996, the port of Dunkirk, France, on account of its proximity to Antwerp and in order to counterbalance its disadvantageous commercial position, has passed a resolution (at the Dunkirk Chamber of Commerce and Industry) adopting a new FOB Dunkirk according to which the seller fulfils his obligations when he delivers the conventional goods at the place designated by the maritime carriers or within the ship's perimeter (that is, within 120 m of the quay's edge). This new definition of FOB

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[54] The following general rules are listed by Tetley:

(i) The dominant rule has been that property in the goods passes when the parties intend it to pass.

(ii) If the intention of the parties is not clear, the property in specific goods in a deliverable state passes to the buyer at the moment the contract is made.

(iii) In the sale of unascertained goods, property may not pass until the goods have become ascertained under the contract. However, once there is an unconditional appropriation of the goods to the contract, agreed to by both parties, the property in the goods passes."

W. Tetley, "Who May Claim or Sue for Cargo Loss or Damage", *Journal of Maritime Law and Commerce*, vol. 17, No. 3, July 1986, p. 416.

[55] For a detailed study see C. Debattista, "Transferring Property in International Sales: Conflicts and Substantive Rules under English Law". *Journal of Maritime Law and Commerce*, vol. 26, No. 2, April 1995, pp. 273-291.

[56] See "La Convention de Vienne sur la Vente Internationale et les Incoterms: Actes du Colloque du 1 et 2 décembre 1989", Centre de Droit des obligations de l'Université de Paris I, 1990, pp. 128-140.

[57] Article A4 of *Incoterms 1990* determines when delivery takes place and article A6 ("Division of costs") establishes that the seller should pay all costs relating to the goods until they are delivered in accordance with article A4.

[58] This is based on the prerogative granted by *Incoterms 1990* (article A4), according to which, for Incoterms involving maritime transport, delivery takes place "in the manner customary at the port". These customs are the result of port techniques. The seller is not always allowed to deliver the goods alongside the ship (FAS) or on board the seagoing vessel (e.g. FOB and CIF), since handling and loading operations are the task of the competent port authorities to whom the goods are to be handed over.

Dunkirk has been forwarded to the commercial court for recommendation to trading parties.[59]

71. In practice, FOB Dunkirk became FCA in *Incoterms 1990,* under which the seller fulfils his obligations to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point.

72. Another important area that deserves special attention is the cost distribution of what are known as "terminal handling charges", these refer to all charges related to the handling of cargo at the terminal of loading or discharging, operated by or for the account of the carrier.[60] Such charges may be part of the freight agreed upon between shipper and carrier, or the carrier may choose to bill all or part of them separately. In order to prevent conflicts in the final distribution of costs between seller and buyer—as regards transport of break bulk goods—the Finnish forestry industry took the first initiative in 1994 to define and develop standard shipping terms. The Finnish National Committee of the ICC undertook further work on the subject, and in 1996 the Board of the Finnish Section approved the first comprehensive, agreed, national standard of shipping terms. The Finnish Standard Shipping Terms of 1996 are in full compliance with *Incoterms 1990,* insofar as the obligations of the buyer and the seller refer to the customs of the port.[61] The shipping terms define the obligations of the parties in the port of loading and the port of discharge.

6. *Miscellaneous*

(a) *Customs clearances and formalities*

73. As explained in the introduction to Incoterms,[62] "it is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf. Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import".

74. Commercial parties should take particular care whenever they choose an Incoterm like EXW and FAS, where the buyer undertakes to clear the goods for export in the seller's country, or DEQ and DDP, where the seller undertakes to clear the goods for import into the buyer's country.[63]

75. As explained below, it is possible for the seller whose obligation of carriage extends to the buyer's premises in the country of import, to include some variations in Incoterms of group D, such as "DDU cleared", when the seller takes care of the customs formalities without paying the duties. Other frequent variations are "DDP, value-added tax (VAT) unpaid" and "DEQ, duty unpaid".

(b) *Notice provisions*

76. Under articles A7 and B7 the seller's and buyer's responsibilities are as follows:

(i) The seller must give notice to the buyer as to:

—when and where the goods will be placed at his disposal (EXW);

—when and where the goods have been delivered into the custody of the carrier (received for shipment/on board) (F- and C-terms);

—when and where the goods are expected to arrive (D-terms).

(ii) The buyer must give notice to the seller as to:

—the time and place to take delivery (EXW and D-terms);

—the vessel name, loading point and required delivery time (F-terms);

—the time for dispatching the goods and the destination (C-terms).

(c) *Checking, packaging/marking and inspection of goods*

77. Pursuant to article A9, the seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of placing the goods at the disposal of the buyer.

78. Concerning packaging, the seller must provide at his own expense any packaging which is appropriate for the type of goods and the type of transport intended. Under EXW or F-terms, where the seller may not know what the type or conditions of international transport will be, the seller will only be required to provide appropriate packaging to the extent that these circumstances are made known to him before the contract of sale is concluded.[64]

79. As to the inspection of the goods, a "pre-shipment inspection"[65] is often requested by the buyer in order for the goods to be inspected before or at the time they are handed over by the seller for carriage. Unless the contract

[59] Source: "Le Port de Dunkirk", bulletin, No. 10, December 1996.

[60] Terminal handling charges have been defined as "charges payable to a shipping line either for receiving a full container load at the container terminal, storing it and delivering it to the ship at the load port or for receiving it from the ship at the discharge port, storing and delivering it to the consignee" (P. R. Brodie, *Dictionary of Shipping Terms,* London, Lloyds of London Press, 1985, p. 137).

[61] "Standard Shipping Terms 1996", Finnish Section of the ICC, February 1996.

[62] ICC Publication No. 460, p. 9.

[63] One possible precaution, it is suggested, is to include in the sales contract the following two provisions: (1) the right to terminate the contract in the event that customs clearance is impossible due to quotas or prohibitions, and (2) an extension of the time for delivery should customs clearance be delayed (Jiménez, op. cit., p. 84).

[64] Article 35 of the Convention on Contracts for the International Sale of Goods provides that the goods delivered by the seller will not conform with the contract unless they "are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods". The only exception to this rule is provided in sub-article 3 that excludes the liability of the seller "if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity" of the packaging.

[65] A "pre-shipment inspection" is an inspection of contract goods prior to shipment to ascertain their quality, quantity or price. Importers may insist on a pre-shipment inspection, requiring the exporter to furnish a certificate of inspection (commonly, issued by neutral, internationally respected firms such as SGS or Bureau Veritas), so that the importer is assured of receiving goods of the specified quality and quantity. Government agencies may require inspection certificates as regards price, so as to prevent parties from under- or over-invoicing in an attempt to pay lower customs duties or evade foreign-exchange restrictions (Jiménez, op. cit, p. 224).

stipulates otherwise, the buyer has to pay the cost of such inspection when it is made in his own interest. If the inspection is required by the authorities of the country of exportation, then the seller will normally bear the cost, unless otherwise specified in the contract (article 9B).

(d) *Other obligations*

80. As a general rule (see articles A10 and B10), the seller and the buyer must render each other any assistance necessary for obtaining the necessary documentation and/or for performing their contractual obligations under the respective Incoterms. The costs and charges incurred in doing so should be paid by the party requesting such assistance.

E. Standard variants on Incoterms

81. Although one of the main objectives of using Incoterms is to allow the seller and the buyer to know in advance each other's obligations in terms of costs, risks and formalities with sufficient accuracy, the meaning of Incoterms, as has been illustrated, may be modified by agreement of the parties, the customs of a particular trade or the usage prevailing in a particular port. Parties may adopt Incoterms as a general basis for their contract but may also specify variations or additions to them so that they match the particular trade or their particular needs. This flexibility is very important for traders who might wish to increase or decrease the buyer's or seller's obligations (e.g. requiring a CIF seller to provide more extensive insurance cover).

82. As has been underlined, the concept of "delivery" is crucial for the purposes of the division of costs and risks (articles A4 and B4 of *Incoterms 1990*). As the definition of delivery in article A4 is not sufficiently detailed for all circumstances, it might need to be qualified to suit the particular circumstances.[66]

[66] A. Raty, *Incoterms in practice*, pp. 152-163.

F. The golden rules of Incoterms[67]

83. The following rules should be taken into account when selecting an Incoterm:

(*a*) Use FAS, FOB, CFR, CIF, DES and DEQ only for traditional maritime transport (goods lifted over ship's side);

(*b*) Use FCA, CIP, CPT, DAF, DDU and DDP for all modes of transport, including maritime transport, unless you are shipping bulk commodity cargoes by sea;

(*c*) Specify how delivery will take place, and specifically who must load and who must discharge;

(*d*) Specify how much insurance coverage you want, especially if you want maximum insurance, and the geographical and time extent of the insurance (where and when coverage begins and ends);

(*e*) Remember that Incoterms are meant for use in the contract of sale between buyer and seller, which should not be confused with the related contract of carriage between the shipper and carrier. Traders should give precise directions to their transporters as to the Incoterm they have chosen in a particular contract of sale; this will ensure that the contract of carriage is in conformity with the contract of sale;

(*f*) Specify any necessary limitations on what kind of transport is appropriate (i.e. refrigerated containers, not carried on deck, etc.);

(*g*) Make sure that your contract contains *force majeure*, exoneration or time-extension clauses if you are responsible for customs clearance or foreign delivery;

(*h*) Explicitly incorporate Incoterms into your sales contracts, by specifically mentioning "FCA ... Incoterms 1990": always include the words "Incoterms 1990" in your contracts;

(*i*) Bear in mind that CIF, CFR, CIP and CPT are not arrival contracts but shipment contracts.

[67] Based on Jiménez, op. cit., pp. 90-91.

Chapter III

PAYMENT METHODS IN INTERNATIONAL TRADE

A. Payment in advance

84. Payment in advance takes place when the buyer places the funds at the disposal of the seller prior to shipment of the goods or provision of services. While this system is of great advantage to the seller, it does not provide assurance to the buyer that the goods or services contracted will be supplied.

B. Open account

85. An open account can be defined as an arrangement between the buyer and seller whereby the goods are manufactured and delivered before payment is required.[68] Open account sales are fairly common in domestic sales, but are less common in international transactions because they substantially increase the risk for the seller of non-payment for the goods delivered to the buyer. In principle, the open account system should only be used when the seller has complete confidence and trust in the buyer as well as in the stability of the buyer's country and its import regulations. This type of payment is very advantageous for the buyer who pays for the goods or services only when they are received or inspected, but does not provide any assurance to the seller that he will be paid.

C. Documentary credits

1. *Definition*

86. A documentary credit is a written undertaking by a bank (issuing bank) given to the seller (beneficiary) at the request and on the instructions of the buyer (applicant) to pay at sight or at a determinable future date up to a stated sum of money, within a prescribed time limit and against stipulated documents.[69]

87. The main object of the documentary credit is to provide a means of payment for goods and services supplied by a seller to a buyer. It facilitates dealings between merchants domiciled in different countries by ensuring payment to the seller for the contract goods or services on the one hand and their delivery to the buyer on the other. [70]

88. The documentary credit system represents a real balance of interest between the buyer and the seller and, by reliance on the legal nature of documents such as the bill of lading and the insurance policy, enables banks to provide considerable credit on the security of the documents while the goods are at sea and necessarily of no immediate physical use to their buyer or seller. As such it has been described as a "watertight system of checks and balances: the high water mark of finance in international trade".[71]

2. *Parties to a documentary credit*

89. The following are the parties to a documentary credit:

(a) *The beneficiary* is the seller/exporter who receives payment from the letter of credit;

(b) *The opener/applicant* is the buyer/importer of goods, who instructs his bank (the issuing bank) to issue a credit in favour of the seller (beneficiary);

(c) *The issuing bank* is the bank which receives the importer's application and agrees to "issue" the credit. The issuing bank is commonly located in the buyer's country. By issuing the credit, the bank is making an irrevocable undertaking to pay the beneficiary the value of the draft and/or other documents, provided that the terms and conditions of the credit are complied with;[72]

(d) *The nominated bank* is the bank which is stipulated in the credit as authorized to pay, negotiate, issue a deferred payment undertaking or accept drafts. A nominated bank is not normally bound to pay under the credit, unless it has added its confirmation to the credit and become a "confirming" bank; [73]

(e) *The advising bank* is the bank that undertakes the transmission of the credit, and that advises the exporter/beneficiary that a credit has been opened in his favour. The advising bank does not take further risk, and only has the responsibility to take reasonable care to check the apparent authenticity of the credit which it advises;[74]

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[68] *ICC guide to documentary credit operations for the UCP 500.* ICC Publication No. 515, June 1994, pp. 19-20.

[69] See *Guide to documentary credit operations*, ICC Publication No. 415, and article 2 of the ICC *Uniform Customs and Practice for Documentary Credits* (UCP 500).

[70] H. C. Gutteridge and M. Megrah, *The Law of Bankers' Commercial Credits*, London, Europa Publications, 1984, p.1.

[71] *Urquhart Lindsay and Co. v. Eastern Bank Ltd.* (1921) A.C. 99.

[72] Jiménez, op. cit., p. 134.

[73] Ibid., p. 134.

[74] Article 7 of the *Uniform Customs and Practices for Documentary Credits*, 1993 Revision (UCP 500) (ICC Publication No. 500, 1993).

(*f*) *The confirming bank* is the bank (normally the advising bank) which adds its own irrevocable undertaking in addition to the one given by the issuing bank. A confirmation constitutes a definite undertaking of the confirming bank, in addition to that of the issuing bank, provided that the stipulated documents are presented to the confirming bank and that the terms of the credit are complied with.[75]

(*g*) *The negotiating bank* is the bank which examines the documents presented by the exporter and then negotiates the credit. The negotiation is usually done "with recourse", unless the negotiating bank is the confirming bank; this means that if the issuing bank fails to reimburse the negotiating bank, the negotiating bank will recover the funds advanced to the beneficiary.[76]

3. *The stages of a documentary credit*

90. The procedure for a basic documentary credit is as follows:

(*a*) The buyer and the seller conclude a sales contract providing for payment by documentary credit;

(*b*) The buyer instructs his bank (the issuing bank) to issue a credit in favour of the seller (the beneficiary);

(*c*) The issuing bank asks an intermediary bank—usually in the country of the seller—to advise and/or confirm the credit;

(*d*) Advising/confirming bank informs the seller of the issuing of the documentary credit;

(*e*) As soon as the seller is satisfied that he can meet the terms and conditions of the letter of credit he can dispatch the goods to the buyer;

(*f*) The seller presents the documents evidencing the shipment to the bank where the credit is available;

(*g*) The bank checks the documents against the credit: if the documents meet the requirements of the credit, the bank will pay, accept or negotiate according to the terms of the credit;

(*h*) The advising/confirming bank sends the documents to the issuing bank;

(*i*) The issuing bank pays/reimburses his correspondent bank (i.e. the advising/confirming bank);

(*j*) The documents are released to the buyer upon payment of the amount due;

(*k*) The buyer sends the transport document to the carrier, who will then proceed to deliver the goods (if the document is a document of title).

4. *Uniform Customs and Practice for Commercial Documentary Credits*

91. Before the First World War, trade was largely carried on by trading partners who knew and trusted each other. When the war broke out, the old trading contacts were broken and it was necessary to look for new partners elsewhere. It was a question of dealing with firms one did not know and therefore could not trust. It was in these circumstances that the documentary credit came into being.[77] Attempts to harmonize the law and practice of documentary credits commenced after the First World War. The first efforts were all made on a national basis, and it was not until 1993 [78] that the Uniform Customs and Practice for Commercial Documentary Credits (hereinafter UCP) were first formulated by the International Chamber of Commerce. [79] Revised versions of the UCP were issued in 1951, 1962, 1974, 1983 and 1993.[80] The UCP is a set of standard terms that only applies if incorporated into a documentary credit by reference to the UCP. As of today, it is estimated that some 95 per cent of credits worldwide are issued subject to the UCP.[81]

92. Originally, the UCP was neither designed nor intended to be law. It was prepared as a "set of standard terms drafted by bankers for bankers"[82] to be incorporated by reference into letters of credit. As pointed out by Kozolchy: "the draftsmen of the UCP had a realistic and modest goal. The intent was not to codify all the relevant rules of law, customary or otherwise, but rather to compile international banking customs and other rules that facilitate banking functions." This modest goal has been overtaken by events in recent years as a result of the near universal adoption of the UCP.[83]

93. Opinions differ as to the legal status of the UCP. They range from the viewpoint that the Uniform Customs and Pratice "constitute an entity drawn up unilaterally by the bankers and which do not have the weight of customary practice because they were not established by common agreement between all the parties concerned", to the opinion that the UCP must be seen as a "system if not autonomous then at least specific, of legal rules demanding uniform interpretation and application on an interna-

[75] Ibid., article 9 (*b*).

[76] Jiménez, op. cit., p. 135.

[77] For a detailed study of the historical developments (see F. P. de Rooy, *Documentary Credits,* Dordrecht, Kluwer, 1984, pp. 1-20, and E. P. Ellinger, "The Uniform Customs and Practice for Documentary Credits—the 1993 revision", *Lloyd's Maritime and Commercial Law Quarterly*, Part 3, August 1994, pp. 377-381.

[78] It was not until the second revision in 1962 that the UCP became universally accepted by all previous participants as well as by the bankers in the United Kingdom and the Commonwealth of Nations (see Ellinger, op. cit., p. 378).

[79] To keep the UCP rules up to date, the ICC Commission on Banking Technique and Practice renders expert opinions on practical issues involving UCP raised by commercial parties. While these opinions do not have legal force, they are widely read and noted by the judiciary. They are often explanatory of the thinking behind the UCP and they illustrate banking practice. See *Decisions (1975-1979), of the ICC Banking Commission*, ICC Publication No. 371; *Opinions (1980-1981), (1984-1986), (1987-1988), (1989-1991)* of the ICC Banking Commission, ICC Publications Nos. 399, 434, 469 and 494 respectively; *Case studies on documentary credits*, ICC Publications Nos. 459 and 489.

[80] The 1993 revision came into effect on 1 January 1994 (see *ICC Uniform Customs and Practice for Documentary Credits (1993)*, ICC Publication No. 500).

[81] P. Todd, *Bills of lading and bankers's documentary credits*, London (1993), Lloyds of London Press Ltd., quoted in R. P. Buckley, "The 1993 revision of the Uniform Customs and Practice for Documentary Credits", *The George Washington Journal of International Law and Economics*, vol. 28, No. 2, 1995, p. 266.

[82] Buckley, op. cit., p. 267.

[83] C. Schmitthoff, "International trade usages", op. cit., pp. 39-40.

tional level".[84] It seems, however, that most authors agree that the UCP should be recognized as universally accepted trade usage of a normative character.[85] As eloquently pointed out by Schmitthoff, "As banks in more than 170 countries operate letters of credit under this document, the Uniform Customs and Practice for Documentary Credits has become world law".[86]

5. *Basic types of documentary credit*

(a) *Revocable credit*

94. According to article 8 of the UCP, a credit is said to be revocable when it may be amended or cancelled by the issuing bank at any moment and without prior notice to the beneficiary.

95. The issuing bank guarantees payment upon presentation of the proper documents. If a sight credit is involved, the bank may not revoke the credit after payment or make any changes affecting the payment. The important factor is not the time of the document's delivery, but whether payment has already been made. In the case of deferred payment, the issuing bank cannot amend its later payment commitment once the documents have been taken up, that is, after the bank has examined the documents and found them to be correct.[87]

96. The commercial value of a credit of this kind is considerably impaired, since the issuing bank may cancel the credit when it pleases and is under no legal duty to give prior notice either to the beneficiary or to anyone else.[88] Although it is the practice of banks to give notice of the intention to cancel the credit, this is an act of courtesy and no liability is imposed on the bank when, by reason of some oversight or otherwise, the notice is omitted.[89]

97. In the absence of the indication that the credit is revocable, the credit is deemed irrevocable (article 6 (*c*) of the UCP).

(b) *Irrevocable credit*

98. A credit is said to be irrevocable when the issuing bank gives a binding undertaking to the beneficiary that it will pay against documents or that all bills drawn in compliance with the terms of the credit will be honoured. Thus, under article 9 (*a*) of the UCP:

> An irrevocable credit constitutes a definite undertaking of the Issuing Bank, provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the credit are complied wit . . .

99. Hence, once a bank accepts instructions from a buyer to open an irrevocable credit, the buyer is powerless to prevent payment being made under it in the normal course of business regardless of any misperformance or non-performance by the seller. The effect of an irrevocable credit is to substitute the issuing bank for the buyer as the person who undertakes to "buy" the shipping documents, and this is an undertaking which is absolute[90] in the sense that so long as the documents of title to the goods which the seller tenders to the bank are in order, in the sense of being those prescribed in the credit, the bank must accept them regardless of any controversy between the seller and the buyer[91] as to whether the contract of sale has been performed.[92]

(c) *Confirmed and unconfirmed credits*

100. The role of the correspondent bank could be twofold, depending upon whether the issuing bank requests it to "add its own confirmation" or merely "to advise" the beneficiary.

(i) *Confirmed credit*

101. Where the correspondent bank adds its own confirmation, this constitutes a definite undertaking by the correspondent bank to make payment or accept drafts in accordance with the terms of the credit, providing the correct documents are presented to it. Article 9 (*b*) of the UCP defines such an undertaking as follows:

> A confirmation of an irrevocable credit by another bank (the "Confirming Bank") upon the authorization or request of the Issuing Bank constitutes a definite undertaking of the Confirming Bank, in addition to that of the Issuing Bank, provided that the stipulated documents are presented to the Confirming Bank or to any other Nominated Bank and that the terms and conditions of the credit are complied with . . .

102. Thus, in the case of an irrevocable confirmed credit, the beneficiary enjoys two independent recognitions of liability: one on the part of the issuing bank and one on the part of the confirming bank.

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[84] De Rooy, op. cit., pp. 15-16.

[85] The United States Council on International Banking (USCIB) has said that "while the UCP is partly standard contract language, it is also recognized by the markets and the courts throughout the world as the de facto law which defines and regulates the interlocking relationships [involved in documentary credits]" (USCIB study of fundamental problems with the seventh draft, 31 March 1993).

[86] C. Schmitthoff, *Commercial Law in a Changing Economic Climate* (2nd ed.), Stevens and Sons, London, 1981, p. 28.

[87] Union Bank of Switzerland (UBS), *Guide to Documentary Transactions in Foreign Trade* (2nd ed.), Zurich, UBS Publication, January 1995, pp. 16-17.

[88] According to Boudinot, "without prior notice", means that the beneficiary does not have to give his prior agreement but the issuing bank has to inform the beneficiary of any amendment or cancellation (A. Boudinot, *Pratique du crédit documentaire*, Editions Sirey, Paris, 1979, p. 31).

[89] Gutteridge and Megrah, op. cit., pp. 18-19.

[90] In *Stein* v. *Hambros Bank* (1921) (9 LL. Rep. 433) Rowlatt said: "... the obligation of the bank is absolute and is meant to be absolute, that when the documents are presented they have to accept the bill. That is the commercial meaning of it."

[91] The principle was already underlined in *Hamzeh Malas and Sons* v. *British Imex Industries Ltd.* (1957) (2 Lloyd's Rep. 549), where a large quantity of steel was sold on CIF terms to be delivered in two instalments; each instalment was to be paid for by an irrevocable credit. The first delivery was made and the credit was duly paid. The buyer, however, alleged that the goods were in many ways defective and sought to prevent payment being made for the second instalment by seeking an injunction to prevent the bank from honouring its credit. It was held that no injunction could be granted; once the credit was opened in this form, the bank had no alternative but to act in accordance with it provided the correct documents were presented.

[92] Gutteridge and Megrah, op. cit. p. 22.

103. Through the mechanism of confirmation, the beneficiary is relieved of the problem of the risk of non-payment by the issuing bank and any political and transfer difficulties that may arise (the so-called "country risk"). The "sovereign risk", so-called political and transfer risk and the risks coupled with mailing the documents are also eliminated. The confirming bank gives an independent undertaking to the beneficiary so that the beneficiary may have the right to look to both the issuing bank and confirming bank.[93] Confirmation offers the beneficiary another security, that of "having a debtor in his own country".[94]

104. To sum up, it can be said that a confirmed documentary credit offers the greatest degree of security available under the documentary credit system.

(ii) Unconfirmed credit

105. In the case of unconfirmed credit, the issuing bank stipulates that the credit is available at the counters of a bank (advising bank) established in the country of the beneficiary. The so-called "advisory bank", without any engagement on its part, will advise the beneficiary that the credit has been issued. Article 10 (*b*) (i) of the UCP reads as follows: "unless the credit stipulates that it is available only with the Issuing Bank, all credits must nominate the bank (the "Nominated Bank") which is authorized to pay, to incur a deferred payment undertaking, to accept draft(s) or to negotiate."

(d) *Transferable and non-transferable credit*

106. The main purpose of making an irrevocable credit transferable to a third party is to enable the beneficiary to acquire and pay for the contract goods which he cannot supply himself and may therefore have to get from elsewhere.[95] Article 48 of the UCP deals with transferable credit, described in paragraph (*a*) in the following terms:

> A transferable credit is a credit under which the beneficiary (first beneficiary) may request the bank authorized to pay, incur a deferred payment undertaking, accept or negotiate (the "transferring bank"), or in the case of a freely negotiable credit, the bank specifically authorized in the credit as a Transferring Bank, to make the credit available in whole or in part to one or more other Beneficiary(ies) (Second Beneficiary(ies)).

107. A credit can only be transferred if it is expressly designated as "transferable" by the issuing bank (article 48 (*b*)). Sub-article (i) provides that:

> The first Beneficiary has the right to substitute his own invoice(s) (and draft(s)) for those of the second Beneficiary(ies), for amounts not in excess of the original amount stipulated in the credit and for the original unit prices if stipulated in the credit, and upon such substitution of invoice(s) (and draft(s)) the first Beneficiary can draw under the credit for the difference, if any, between his invoice(s) and the second Beneficiary's(ies') invoice(s).

> When a credit has been transferred and the first Beneficiary is to supply his own invoice(s) (and draft(s)) in exchange for the second Beneficiary's(ies') invoice(s) (and draft(s)) but fails to do so on first demand, the Transferring Bank has the right to deliver to the Issuing Bank the documents received under the transferred credit, including the second Beneficiary's(ies') invoice(s) (and draft(s)) without further responsibility to the first Beneficiary.

108. This type of credit can only be transferred once (sub-article (*g*)) unless otherwise agreed. Thus the second beneficiary(ies) cannot transfer to a third beneficiary. The transfer must be effected in accordance with the terms of the original credit, subject to the following exceptions (sub-articles (*h*) and (*i*)):

- —The name and address of the first beneficiary may be substituted for that of the applicant for the credit;
- —The first beneficiary has the right to substitute his own invoices for those of the second beneficiary(ies);
- —The amount of the credit and any unit price may be reduced;
- —The period of validity (the expiry date), the last date for presentation of documents in accordance with article 43, and the period for shipment may be shortened;
- —The percentage for which insurance cover must be effected may be increased in such a way as to provide the amount of cover stipulated in the original credit.

109. The first beneficiary gives instructions to the bank which agrees to the transfer and advises the second beneficiary that a documentary credit has been transferred in his favour. The transfer of a documentary credit authorizes its utilization by the second beneficiary.

110. Transferable credits are particularly well adapted to the requirements of international trade. A trader (middleman) who receives payment from a buyer in the form of a transferable documentary credit can use that credit to pay his own supplier. In doing so the trader has the right to substitute his own invoice for that supplier, so that the final purchaser is prevented from discovering the trader's profit margin, and the identity of the supplier.[96]

6. *Special forms*

(a) *Revolving credit*

111. A revolving credit (revocable or irrevocable) is one in which the amount remains constant for a given period, so that whenever during the period it is drawn upon it becomes automatically available again for the full amount either immediately or, perhaps, as soon as advice is received that earlier drafts have been paid.[97]

112. Revolving credits can be used when goods are to be delivered in instalments at specified intervals. The amount available at any one time is equivalent to the value

[93] See UBS *Guide to Documentary Transactions in Foreign Trade*, UBS Publication, op. cit., p. 18.

[94] De Rooy, op. cit., p 37.

[95] Gutteridge and Megrah, op. cit., p. 99.

[96] See Crédit Suisse Publication, *Documentary Credits, Documentary Collections, Bank Guarantees*, March 1994, pp. 34-35.

[97] Gutteridge and Megrah, op. cit., p. 15.

of one partial delivery, e.g. "Credit amount $100,000, revolving 11 times up to a total amount of $1,200,000". After utilization of the first $100,000, the next portion becomes available automatically, and so on up to the total of $1,200,000. The revolving clause also specifies the intervals at which the credit may be utilized.

113. A revolving credit can be cumulative or non-cumulative. If it is cumulative, amounts from unused or incompletely used portions can be carried forward to a subsequent period. If it is non-cumulative, portions not used in the prescribed period cease to be available.[98]

114. A credit for the full value of the goods to be shipped but requiring specific quantities to be shipped weekly or monthly, and allowing part-shipments is not a revolving credit, but a credit available by instalments as envisaged in article 41 of the UCP.

(b) *Back-to-back credit*

115. A "back-to-back" credit is an ancillary credit which arises where the beneficiary uses the credit granted to him by the issuing bank to support another credit granted by the beneficiary's bank to his supplier. [99] The back-to-back credit is used in the same situations as the transferable credit and has an identical economic function. It is often used when the seller is unable to supply the goods and needs to purchase them from, and make payment to, another supplier, without the credit being transferable. Under this type of credit, the seller, as beneficiary of the first credit, might offer it as "security" to the advising bank for the issuance of the second credit. As applicant for this second credit the seller is responsible for reimbursing the bank for payments made under it, regardless of whether or not he himself is paid under the first credit. The two credits are autonomous, and therefore entirely independent of each other. In the case of a "counter credit", the procedure is the same except that the seller requests his own bank to issue the second credit as a counter to the first one.

116. In the cases of both back-to-back and counter credit, the second credit should be worded so as to produce the documents (apart from the commercial invoice) required by the first credit and to produce them within the time limits set by the first credit in order that the seller, as beneficiary under the first credit, may be entitled to be paid.[100] Under this arrangement, the beneficiary of the second credit obtains greater protection than he would under an assignment of proceeds.

(c) *Red clause credit*

117. This is a special form of credit in which the issuing bank authorizes the advising (or confirming) bank to pay a certain sum to the beneficiary as an advance[101] before the beneficiary presents the stipulated documents. The clause in the credit containing such authorization is called the "red clause"[102] because it was originally customary for such a clause to be written on the credit in red ink.

118. The red clause documentary credit is often used as a method of providing the seller with funds prior to shipment. Therefore it is of value to middlemen who require a form of pre-financing.[103]

119. A red clause may be worded as follows: "under this credit advance payment up to ...% of the credit amount is permitted before shipment against beneficiaries' receipt, accompanied by their signed declaration stating that the shipping documents prescribed under this credit will be delivered in good order and within the validity of this credit. This advance must be deducted from your payment to beneficiaries against the prescribed documents."[104]. This kind of arrangement places the burden of final repayment on the applicant, who would be liable for repayment of the advances if the beneficiary failed to present the documents called for under the documentary credit.[105]

(d) *Standby letter of credit*

120. The standby credit is a documentary credit or similar arrangement, however named or described, which represents an obligation to the beneficiary on the part of the issuing bank to:

(*a*) Repay money borrowed by the applicant, or advanced to or for the account of the applicant;

(*b*) Make payment on account of any indebtedness undertaken by the applicant; or

(*c*) Make payment on account of any default by the applicant in the performance of an obligation.[106]

121. Standby letters of credit are included in the 1993 revision of the UCP. The rules apply to all documentary credits (including to the extent to which they may be applicable to standby letters of credit) where they are incorporated into the text of the credit.

122. Standby letters of credit differ from the conventional documentary credit in the type of documents which are stipulated. In documentary credit, the documents stipulated generally relate to a commercial transaction (in-

[98] Crédit Suisse, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 31.

[99] Gutteridge and Megrah, op. cit., p. 14.

[100] ICC, *Guide to documentary credit operations*, ICC Publication No. 415, 1985, p. 35.

[101] De Rooy proposes to use the term "anticipatory credit" to refer to any credit under which the beneficiary can obtain an advance in any way before presenting his documents (De Rooy, op. cit., p. 48).

[102] There is a distinction to be made between a "red clause" and a "green clause". "Green clause" credits are those in which a security is required against the advance, while "red clause credits" are credits unsecured, ibid., p. 48.

[103] The origin of the red clause is thought to be in the trade with China. American skin traders applied for credits for large consignments of skins which the beneficiaries (often agents of the American trader) would buy from many different traders in the interior of China. Such sellers would sell only if they received payment in cash. So the beneficiary needed to have cash on hand and he was therefore enabled to draw a certain sum as an advance. (see De Rooy, op. cit.. p. 48, quoting H. Harfield *Bank Credits and Acceptances* (5th ed.), New York, 1974, p. 184). According to other sources the red clause was first developed in the Australian wool trade.

[104] De Rooy, op. cit., pp. 48-49.

[105] See *ICC guide to documentary credit operations, for the UCP 500*, op. cit., p. 49.

[106] Ibid., p. 48. This definition coincides with the American definition laid down in Regulation H of the Board of Governors of the Federal Reserve System.

voices, bills of lading, etc.), since a standby letter of credit is in effect an abstract guarantee.

123. According to White and Summer,[107] "the standby letter of credit is a credit under which the issuer is to pay only if papers certifying default of the customer are presented". Standby credits can be used to structure many kinds of transactions. Under such arrangements, the bank promises to make payment upon the beneficiary's certification that certain events have, or have not, happened. Typically, the beneficiary merely certifies that a specified obligation has not been paid when due. The bank is then obliged to pay the beneficiary against its demand, without consideration of the underlying transaction.[108]

124. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit,[109] by establishing a harmonized set of rules, attempts to provide greater legal certainty in the use of standby credits. Thus, an "undertaking" is defined in article 2 of the Convention as: "an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ('guarantor/issuer') to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person."

125. In the undertakings covered by the Convention, the guarantor/issuer promises to pay the beneficiary upon demand for payment. The demand may, depending upon the terms of the undertaking, be either a "simple" demand or one having to be accompanied by the other documents called for in the guarantee or standby letter of credit. The guarantor/issuer's obligation to pay is triggered by the presentation of a demand for payment in the form, and with any supporting documents, required by the independent guarantee or standby letter of credit. The guarantor/issuer is not called on to investigate the underlying transaction, but merely has to determine whether the documentary demand for payment conforms on its face to the terms of the guarantee or standby letter of credit. Because of this characteristic, the instruments covered by the Convention are referred to commonly as being "independent" and "documentary" in nature.[110]

7. *Method of payment*

126. Article 10 (*a*) of the UCP provides that all credits must clearly indicate whether they are available by sight payment, by deferred payment by acceptance or by negotiation. This means that a credit has to make clear how the paying bank is to effect payment to the correspondent bank. There are several possible methods to effect payment under a letter of credit, as described below.

(a) *Payment credit*

127. Under such an arrangement, the nominated bank is required to pay to the beneficiary either by:

(a) *Sight payment*, which is essentially "cash against documents". The beneficiary receives the proceeds of the credit upon presentation and examination of the documents. The bank is given reasonable time, not exceeding seven banking days following the day of receipt of the documents, to examine the same; or

(b) *Deferred payment*, whereby the seller has to ship in advance of payment. The seller is paid some time after the shipment of the goods (i.e. 30/60/90 days). The contract generally specifies payment at a future date (without a bill of exchange). After presentation of the documents, the amount due under the credit may be obtained in the form of an advance (less current account interest).

(b) *Acceptance credit*

128. Under this type of payment the beneficiary (seller) of the credit draws a time draft either on the issuing or confirming bank, or on another bank, depending on the credit terms. If everything is in order, the accepting bank will accept the bill and may pass it back to the beneficiary, to enable him to discount it in the market, thus obtaining immediate payment of the value of the bill, less interest and charges.

(c) *Negotiation credit*

129. The negotiation of drafts/documents means that the negotiating bank gives value for the drafts/documents less interest calculated from the time of negotiation until receipt of reimbursement from the issuing bank. If the negotiating bank has confirmed the letter of credit the negotiation will be made without recourse, otherwise it will be made with recourse.

8. *Basic principles*

130. Before the exporter presents the documents to his bank, he must ensure that they fully meet the requirements laid down in the credit. All the documents called for must be present (*completeness*); they must not contravene any stipulation of the credit (*correctness*); and they must not be at variance with each other (*consistency*).[111] The bank's decision on whether or not to accept the documents

[107] J. White and R. Summer, *Handbook of the Law under the Uniform Commercial Code*, (2nd ed.), St. Paul, MN, West Publishing Co., 1980, p. 713.

[108] See J. H. Levie and A. M. Christenfield, "Recent cases undermining the standby letter of credit", *1997 Annual Survey of Letter of Credit Law and Practice*, Institute of International Banking Law and Practice, Gaithersburg, MD, pp. 148-154.

[109] The Convention was prepared by UNCITRAL and was adopted on 11 December 1995. The deliberations of UNCITRAL on the draft convention are reflected in the report on the work of its twenty-eighth session (Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17, paras. 11-201), annex I of which contains the draft convention as submitted by UNCITRAL to the General Assembly.

[110] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (op. cit., para. 3, p. 14).

[111] Article 13 (*a*) of the UCP.

will be based strictly on the principle that the documents themselves and the timing of their presentation must comply with the terms of the credit.[112]

(a) *Compliance with documentary requirements*

131. The bank must check the presented documents carefully against the wording of the terms of the credit. This has led to the so-called doctrine of "strict compliance":[113] either the documents are in order or they are not. Documents which, although different, amount to the same thing, do not meet the requirements laid down by the documentary credit. If the documents submitted are not in order, the bank can do one of four things:[114]

(*a*) Refuse payment;

(*b*) Pay and take an indemnity from the beneficiary (the seller) in respect of any loss or damage resulting from the deficiency in the documentation;

(*c*) Pay the beneficiary "under reserve";

(*d*) Seek waivers of discrepancies by applicants.

132. According to article 13 (*a*) of the UCP, "*banks must examine all documents stipulated in the credit with reasonable care to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the credit.*" Thus the bank need not ask itself whether the documents may perhaps be false, or whether the goods declared to have been shipped have in fact been shipped, or whether the document may have become worthless at the moment it was issued.[115] A crucial question affecting documentary credits is how strictly the documents must conform to the terms of the credit. Is the standard a strict standard, so that even the most minor deviations entitle/oblige the bank to refuse payment or is it a substantial compliance standard, under which deviations that the bank has no reason to believe are of commercial significance are ignored? Or does the law adopt a bifurcated approach, under which the bank is entitled to invoke a strict standard of compliance against the beneficiary, but is entitled to the benefit of a more relaxed standard vis-à-vis its customer in choosing to pay despite minor deviations?

133. Most jurisdictions appear to adopt a strict standard of compliance[116] that disregards obvious typographical errors,[117] in which case it seems that the banks have a choice whether to pay or to refuse payment.[118]

134. The standard for bank examination of documents is defined in the second part of article 13 of the UCP as follows: "compliance of the stipulated documents ... shall be determined by international standard banking practice as reflected in these articles. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the credit." To determine the exact meaning of "international banking practice" remains one of the most difficult issues in this field. The evidence that somewhere between one-half and two-thirds of documentary presentations[119] contain discrepancies when first tendered[120] is proof that the present standards for document verification are not functional.

135. The reference to "international standard banking practice" was added in the 1993 revision of the UCP to address problems identified in these terms:

> Currently, the notion of reasonable care is usually applied by courts ... in conjunction with the doctrine of "strict compliance". Yet, as any experienced banker knows, a word-by-word, letter-by-letter correspondence between the documents and the credit terms is a practical impossibility. Thus, courts wedded to a "mirror image" version of strict compliance and reasonable care have failed to provide a functional standard of document verification. Conversely, courts that interpret strict compliance as allowing deviations—that do not cause ostensible harm to the Applicant, or that do not violate the courts' own version of "reasonableness", "equity", "good faith", or "boni mores" have equally failed to provide a functional standard ... Not having such a functional standard ... has resulted in a proliferation of credit litigation and in costly

[112] Crédit Suisse, *Documentary Credits, Documentary Collections, Bank Guarantees: Guide to Safer International Trading*, op. cit., p. 58.

[113] The position has been summed up by Lord Summer in a well-known English case: "There is no room for documents which are almost the same, or which will do just as well" (*Equitable Trust Co.* v. *Dawson* (1926) 27 LL.L. Rep. 49).

[114] See W. Hedley, *Bills of Exchange and Bankers' Documentary Credits:* London, Lloyds of London Press, 1986, pp. 234-236.

[115] De Rooy, op. cit., p. 121.

[116] Some commentators have remarked that the documents should be checked to see that every "i" is dotted and every "t" crossed and, somewhat more unkindly, that if bankers could read there would be no problems with documentary credits (D. Powles, "Shipping law into the 90s", British Council Course 833, 28 June-9 July 1988, Cardiff, p. 55).

[117] The following case from Hong Kong, China, is illustrative of the principle: In a documentary credit, the name "Cheergoal Industries Limited" was incorrectly reproduced as "Cheergoal Industrial Limited". The bank paid despite the error and the court held that it was entitled to do so, the error being purely typographical. (*Hing Yip Hing Fat Co. Ltd.* v. *Daiwa Bank Ltd.* (1991) 2, H.K.L.R. 35 (High Court)). It is reasonable to suppose that the bank would have been within its rights in rejecting the documents, for how could it be sure that there was not a separate company "Cheergoal Industrial Limited"?

[118] Roy Goode, "Abstract payment undertakings in international transactions", in *1997 Annual Survey of Letter of Credit Law and Practice*, Institute of International Banking Law and Practice, Inc., Gaithersburg, MD, 1997, pp. 92-97.

[119] About a quarter of all discrepancies relate to the beneficiary's inability to comply with the time parameters of the credit. Almost a half of all discrepancies are related to presentation of incorrect invoices and transport documentation, with probably a fairly similar proportion for each. It is surprising that the invoice, the production of which is entirely in the hands of the seller, should be such a major cause of discrepancies (J. Turnbull, "Payment under documentary credits", two-day course on bills of lading, London, 6-7 December 1988, Legal Studies and Services Ltd., p. 11).

[120] Expert testimony given in 1996 in *Bankers Trust Co.* v. *State Bank of India* (1991) (2 Lloyd's Rep. 443), indicated that discrepancies are discovered in nearly one-half of all documentary presentations tendered under credits in England. Burnett has estimated that about 45 per cent of presentations are discrepant (R. Burnett, "Documentary credit operations", (unpublished paper) presented at an ICC seminar entitled "ICC Uniform Customs and Practice for Documentary Credits: 1993 Revision—UCP 500", held in Sydney, Australia, 10 November 1993).

uncertainty throughout the Documentary Credit World.[121]

136. This new provision added in the 1993 revision reflects the trend not to consider every minor mistake in a document, such as a misprint or typographical error, as a discrepancy.[122]

(i) Bank's duty to raise all discrepancies

137. Upon receipt of the documents tendered under the credit by the issuing and/or confirming bank, the relevant bank must examine the documents to determine whether they conform to the terms of the credit, and it must decide what to do if discrepancies are found.

138. Pursuant to article 14 (*e*) of the UCP, a bank, which does not state all the discrepancies upon which it subsequently seeks to rely is precluded from later raising those extra discrepancies as grounds for rejection. This provision allows a beneficiary which has received a notice stating discrepancies to be sure that no other grounds for dishonour will be raised against it in the future, and that if it can cure the discrepancies identified, the credit will be honoured.[123]

(ii) Time period for bank examination of documents

139. The 1993 Revision of the UCP stipulates for the first time the maximum number of days for banks to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly. Article 13 (*b*) provides that:

> The issuing bank, the confirming bank, if any, or a nominated bank on their behalf, shall *each* have a reasonable time, not to exceed seven banking days following the day of receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly.

140. This rule has brought certainty into the system, although it has been criticized by some commentators for the long period of time it allows banks to examine documents. Before the 1993 revision, an issuing bank had a "reasonable time"[124] to examine the documents and then had to give its notice of rejection, if any, without delay. Now, while a bank still has a reasonable time to examine the documents and still has to give its notice without delay, the examination and the giving of the notice are together subject to a limit of seven banking days. This limit, as rightly pointed out by a well-known author, should be interpreted as "merely the maximum possible reasonable time, available only in cases of the utmost complexity".[125]

(iii) Waiver of discrepancies

141. As has already been pointed out, discrepancies in the documents tendered are found in up to half of all credits. Assuming the issuing bank's examination reveals some discrepancies, the question then arises as to whether it may consult the applicant for the credit at all and, if so, to what extent, as part of the process of determining what course of conduct to take. Article 14 (*c*) of the UCP provides that:

> If the Issuing Bank determines that the documents appear on their face not to be in compliance with the terms and conditions of the credit, it may in its sole judgement approach the applicant for a waiver of the discrepancy(ies). This does not, however, extend the period mentioned in sub-article 13 (*b*).

142. There is much commercial sense in this article, that permits consultation between the issuing bank and the applicant which could help to avoid the needless rejection of documents. It emerged from the expert evidence in the Banker's Trust case (see footnote 124) that in the vast majority of cases where the tendered documents are found to contain discrepancies, the applicants are prepared to accept the same.

(b) *The principle of independence of the credit and the underlying contract*

143. The independent nature of the credit[126] is expressly declared by article 3 (*a*) of the UCP, according to which:

> Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credit. Consequently, the undertaking of a bank to pay, accept and pay draft(s) or negotiate and/or to fulfil any other obligation under the credit, is not subject to claims or defences by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.

144. Therefore, when the conditions of the credit are complied with, the bank cannot dishonour the draft on extraneous grounds relating to the performance of the commercial transaction. As pointed out in a famous English case:[127]

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[121] ICC, *"UCP 500 & 400 compared"*, ICC Publication No. 511, 1993, p. 39. The preface of ICC Publication No. 500, *ICC uniform customs and practice for documentary credits*, makes it very clear that the 1993 revision attempts to improve the functioning of the UCP, since "some surveys indicate that approximately 50 per cent of the documents presented under the documentary credit are rejected because of discrepancies or apparent discrepancies".

[122] See Ellinger, op. cit., p. 391.

[123] See Buckley, op. cit., p. 269.

[124] In *Banker's Trust Co. v. State Bank of India* (1991) (2 Lloyd's Rep. 443), the United Kingdom Court of Appeal, in a case concerning an extremely complicated documentary credit transaction comprising a total of 967 sheets of paper relating to four separate shipments of steel, considered what would be a reasonable time for the examination of documents generally and of the documents in question. Evidence was given that normal practice for United Kingdom clearing banks was to examine and arrive at a determination within three working days of receipt of documents. According to Mr. Daniel Devahive from Warburg Dillon Read, the "reasonable time" for examination of documents in Geneva is 48 hours.

[125] "In cases of normal complexity the actual time required to check the documents is usually only an hour or two" (Buckley, op. cit., p. 277).

[126] "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" (Judge Shientag in *Sztejn* v. *J. Henry Schroder Banking Corporation* (1941), 31 N.Y.S. 2d. 631, p. 633).

[127] J. Jenkins in *Hamzeh Malas & Sons* v. *British Imex Industries Ltd.* (1958) (2 Q B 127).

. . . the opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods, which imposes upon the banker an absolute obligation to pay, irrespective of any dispute there may be between the parties as to whether the goods are up to contract or not.

(c) *Compliance with time limits*

145. The expiry date and latest shipping dates specified in the credit must be strictly complied with. If the documents are presented too late, the bank is not allowed to honour them. Article 42 of the UCP dealing with expiry date and place for presentation of documents reads:

(*a*) All credits must stipulate an expiry date and a place for presentation of documents for payment, acceptance, or with the exception of freely negotiable credits, a place for presentation of documents for negotiation. An expiry date stipulated for payment, acceptance or negotiation will be construed to express an expiry date for presentation of documents.

(*b*) Except as provided in sub-article 44 (*a*),[128] documents must be presented on or before such expiry date.

(*c*) If an issuing bank states that the credit is to be available "for one month" "for six months", or the like, but does not specify the date from which the time is to run, the date of issuance of the credit by the Issuing Bank will be deemed to be the first day from which such time is to run. Bank should discourage indication of the expiry date of the credit in this manner.

146. Another important time to bear in mind when presenting documents in addition to stipulating an expiry date as set out in article 42, concerns what are known as "stale bills". Thus, pursuant to sub-article 43 (*a*) of the UCP, every credit which calls for a transport document should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the credit. The reason for this provision is to ensure that the transport document(s) reach the consignee before the arrival of the goods to which they relate. This practice is based on the belief that the issuing bank is under a duty to the consignee to see, as far as possible, that the consignee is not put to any expense as the result of the arrival of the goods before the documents. Questions have arisen as to the date from which the 21 days are to run in certain cases. Where, for instance, an "on board" bill of lading is called for and a "received for shipment" bill is tendered with an "on board" notation dated subsequently to the date of what may be termed first issue, it is said that the first issue date should be taken; it may be, however, that the later date is the correct one for this purpose, for the "received for shipment" bill would have been unacceptable under the credit were it not for the "on board" notation. This is the case in commodity contracts (e.g. CIF contracts), where it is clear that provisions as to the time of shipment prevail under law.[129]

(d) *The exception of fraud*

147. It is a common feature of all systems of law to refuse the aid of the courts to persons seeking it in order to carry out or profit from a fraudulent transaction.

148. The effect of the tender of a false document to an issuing bank under its irrevocable documentary credit depends on a number of factors, including the nature of the document and of the particular falsity, the state of knowledge of the issuing bank, the time of tender and the knowledge of the seller-beneficiary.[130]

149. In principle, a banker can allege the exception of fraud as entitling him to dishonour the draft, since the customer cannot be deemed to have authorized him to pay against documents which are known to be forged and, on the other hand, such payment would deprive the banker of any real security by means of the documents for his advances.

150. Both the principle and the exception were clearly set out by Lord Diplock in the United City Merchants case:[131]

If on their face the documents presented to the confirming bank by the seller conform with the requirements of the credit as notified to him by the confirming bank, that bank is under a contractual obligation to the seller to honour the credit, notwithstanding that the bank has knowledge that the seller at the time of presentation of the conforming documents is alleged by the buyer to have, and in fact has already, committed a breach of his contract with the buyer for the sale of the goods to which the documents appear on their face to relate, that would have entitled the buyer to reject the goods and refuse to pay the seller the purchase price. The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade is to give the seller an assured right to be paid before he parts with control of the goods that does not permit of any dispute with the buyer as to the performance of the contract of sale being used as a ground for non-payment or reduction or deferment of payment.

151. As was held by the United Kingdom House of Lords in the *American Accord case*,[132] the fraud exception is very narrow and the bank is bound to pay unless fraud on the part of the seller is proved. Due to the public policy doctrine, if the seller himself is committing a fraud, he can bring no action against the bank: "*ex turpi causa non oritur actio*" (no action arises from the plaintiff's wrong-

[128] Sub-article 44 (*a*) deals with cases in which the last day for presentation of documents falls on a day on which the bank is closed—*force majeure* not included—in which case the period is extended to the first following day on which such bank is open.

[129] Gutteridge and Megrah, op. cit., pp. 153-154.

[130] For a detailed study of the subject, see Gutteridge and Megrah, op. cit., pp. 179-189.

[131] *United City Merchants Ltd. and Glass Fibres and Equipments Ltd.* v. *Royal Bank of Canada, Vitrorefuerzos S.A. and Banco Continental S.A.* (1981), Lloyd's Rep. 604.

[132] In the *American Accord case* (1983) Law Reports Appeal Cases Series 168 machinery had been shipped aboard the m.v. *American Accord* after the contract date, but the date on the bill of lading was falsified to make it appear that they were shipped according to contract: though there may have been fraud, it was not shown that the seller was fraudulent (see P. Todd, *Modern Bills of Lading*, London, Collins Professional and Technical Books, 1986, pp. 67-68).

doing). Thus, it must be the seller's fraud, otherwise the bank must pay.

152. The decision taken in this case has been criticized by some leading scholars on different grounds. Thus, Goode discusses the position of the bona fide plaintiff, as follows:

> Is a plaintiff who seeks to enforce a letter of credit affected by forgery of the documents or other fraud in the transaction if he himself acted in good faith? There is a remarkable dearth of authority on this question. Let us start with the beneficiary. He himself has a duty to tender documents which are in order, and the fact that he acted in good faith in tendering forged documents is thus irrelevant. This fundamental point appears to have been overlooked by Mr. Justice Mocatta in *The American Accord* when he held that the beneficiary was entitled to collect payment despite the insertion of a fraudulent shipping data on the bill of lading, since the fraud had been committed by the loading broker who was the agent of the carrier, not of the seller/beneficiary. But this, with respect, is not to the point. The beneficiary under a credit is not like a holder in due course of a bill of exchange; he is only entitled to be paid if the documents are in order. A fraudulently completed bill of lading does not become a conforming document merely because the fraud is that of a third party.[133]

9. *Payment under reserve or indemnity*

(a) *Payment under reserve*

153. If the documentary irregularities are not of a fundamental nature the bank will often be prepared to pay under reserve. This implies that it reserves the right to recover the amount it has paid if the applicant for the credit were to refuse the documents on the grounds of the irregularities discovered.[134]

154. Payment under reserve is an instrument which generally exists when there is a relationship of trust between the bank and the beneficiary and will therefore chiefly be used when the beneficiary is a customer of the remitting bank or a well-known company with an undisputed reputation.

155. There are two variants of payment under reserve depending upon whether the reserve is notified or not to the issuing bank:[135]

(a) *Internal reserve*: in case of minor irregularities which can be assumed not to offer sufficient grounds for refusal, the notification of the reserve is not passed on to the issuing bank by the remitting bank;

(b) *External reserve:* when the irregularity is undeniable but nevertheless so slight that in the remitting bank's opinion it will not lead to refusal, and the reserve is notified to the issuing bank by the remitting bank.

156. For obvious reasons, payment under internal reserve has significant advantages for the beneficiary over payment under external reserve. Thus, if payment has been made under internal reserve, the remitting bank will behave towards the issuing bank as if the credit had been settled normally. It is then up to the issuing bank to ascertain the irregularity in question and to refuse to settle the credit.

(b) *Payment against indemnity*

157. If the bank does not know the beneficiary, or if the amount to be paid is very large, taking into account the financial position of the beneficiary, the bank will prefer to pay the beneficiary only against an indemnity[136] in which the irregularities are noted and in which the beneficiary agrees to repay the sum paid to him to the bank immediately, if the documents were refused because of the said irregularities.[137]

10. *Documents*

158. According to article 4 of the UCP, "In credit operations all parties concerned deal with *documents*, and not with goods, services and/or other performances to which the documents may relate". Thus it is essential for parties wishing to use the system to have a clear understanding of the main features of the documents commonly requested under a letter of credit.

159. Articles 20 to 38 of the UCP deal with the various documents often requested by the buyer as a condition for his bank making payment. Article 5 of the UCP in order to protect the banks and commercial parties involved in the transaction, states in subparagraph (*a*) that "*In order to guard against confusion and misunderstanding, banks should discourage any attempts to include excessive detail in the credit or in any amendment thereto*". The underlying philosophy—that can be traced back to the 1951 revision—is that the requirements spelt out in the UCP as regards the different types of documents are not imperative. They apply only in the absence of stipulation to the contrary in the credit. Thus even in the case of a provision of cardinal importance, such as article 32 (2), which requires banks to reject an "unclean" transport document, the parties are free to stipulate that certain notations on the document are acceptable and, hence, do not render it unacceptable.[138]

160. The number and type of documents requested, to effect payment and give the necessary security to the buyer, will in practice depend upon the Incoterm selected,

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[133] R. M. Goode, "Reflections on letters of credit", *Centre Point.*

[134] The Court of Appeal in the case *Banque de l'Indochine et de Suez* v. *J. H. Rayner (Mincing Lane) Ltd.* (1983) (1 Lloyd's Rep. 228), stated: "The effect of the payment from the confirming bank to the sellers being made 'under reserve' was that the sellers were obliged to repay the money to the confirming bank on demand if the issuing bank rejected the tendered documents on its own initiative or on the buyer's instructions for the same reason that the confirming bank had originally rejected them. Since the issuing bank had rejected the documents for reasons which included at least one of the discrepancies relied on by the confirming bank in making payment to the sellers conditional on the payment being under reserve, it followed that the confirming bank was entitled to demand repayment from the sellers as soon as the issuing bank rejected the documents."

[135] De Rooy, op. cit., pp. 151-155.

[136] In practice the bank will request that such an indemnity should be issued by a bank.

[137] De Rooy, op. cit., p. 155. See also W. Hedley, op. cit., pp. 236-238, and Gutteridge and Megrah, op. cit., pp. 196-204.

[138] See Ellinger, op. cit., p. 393.

the applicable government regulations and the nature of the transaction.

161. The following documents will be examined here:

(*a*) Commercial invoice;

(*b*) Certificate of origin;

(*c*) Insurance document;

(*d*) Inspection certificate;

(*e*) Certificates of weight and quantity;

(*f*) Transport documents;

(*g*) Provisions relating to transport documents generally:

(i) Carriage on deck;

(ii) Shipper's load and count;

(iii) Clean transport document;

(*h*) Specific transport documents:

(i) Marine/ocean/port-to-port bill of lading;

(ii) Non-negotiable sea waybill;

(iii) Charter party bill of lading;

(iv) Multimodal transport document;

(v) Air transport document;

(vi) Road, rail or inland waterway transport document;

(vii) Courier and post receipt;

(viii) Transport document issued by freight forwarders.

(a) *Commercial invoice*

162. One of the most important credit documents is, without doubt, the commercial invoice. By describing the goods exactly as they are stated in the credit, the seller confirms that they have been delivered as contracted. Thus, by tendering the invoice, the seller declares:

(*a*) That he has sold goods to the buyer;

(*b*) The type of goods sold; and

(*c*) The price of the goods.

163. In certain countries—often for customs clearance and for exchange restrictions—the beneficiary is required to present a consular invoice. This is an invoice authenticated by the consulate of the importer's country, confirming that the invoice amount represents the actual value of the goods.

164. Article 37 of the UCP provides that:

(*a*) Unless otherwise stipulated in the credit, commercial invoices:

(i) must appear on their face to be issued by the beneficiary named in the credit (except as provided in article 48[139]), and

(ii) must be made out in the name of the applicant (except as provided in sub-article 48 (*h*), and

(iii) need not be signed.

(*b*) Unless otherwise stipulated in the credit, banks may refuse commercial invoices issued for amounts in excess of the amount permitted by the credit. Nevertheless, if a bank authorized to pay, incur a deferred payment undertaking, accept Draft(s), or negotiate under a credit accepts such invoices, its decision will be binding upon all parties, provided that such bank has not paid, incurred a deferred payment undertaking, accepted Draft(s) or negotiated for an amount in excess of that permitted by the credit.

(*c*) The description of the goods in the commercial invoice must correspond with the description in the credit. In all other documents, the goods may be described in general terms not inconsistent with the description of the goods in the credit.

165. As pointed out in subparagraph (*c*), the description of the goods in the invoice must correspond with their description in the credit while in all other documents the goods may be described in general terms not inconsistent with the terms of the credit.[140]

166. The following case serves to illustrate the importance attached to the description of the goods in the commercial invoice. Bank Melli Iran issued a credit for the supply of trucks in favour of a British seller on behalf of an Iranian buyer. The credit was made available at the counters of Barclays Bank in England and the description of the goods in the credit stated "new trucks". In the invoices which the beneficiary presented to Barclays Bank together with the other stipulated documents, the description of the goods was worded "trucks in new condition (100 new, good Chevrolet M.6, 4x4 trucks)". Barclays Bank accepted the documents, paid the beneficiary and reimbursed itself on Bank Melli Iran. In a dispute which arose some time afterwards (it was found that although the trucks had never been used, they had been standing exposed in the open air for a winter, as a result of which they were beginning to rust), the judge decided that: "I feel no doubt at all that the phrase 'in new condition' is not or may not be synonymous with the term 'new'. It is, of course, true that the term 'new' is capable of different meanings in relation to different subject-matters. For example, the term 'new' when applied to wine, as in the phrase 'putting new wine into old bottles' has clearly a different meaning from that it bears when applied to a motor-car; but 'in new condition' in relation to a motor vehicle seems to me to be essentially different from 'new'."[141]

(b) *Certificate of origin and other documents other than transport documents, insurance documents and commercial invoices*

167. "A certificate of origin is a statement signed by the appropriate authority, as required by the Documentary Credit, providing evidence of the origin of the goods".[142]

[139] Article 48 of the UCP refers to "transferable credits".

[140] "A less precise description is not admissible, but a more precise description is" (De Rooy, op. cit., pp. 131-134).

[141] *Bank Melli Iran* v. *Barclays Bank* (1951), 2 Lloyd's Rep. 367. Case reported by De Rooy, op. cit., p. 132, and Gutteridge and Megrah, op. cit., p. 176.

[142] *ICC guide to documentary credit operations for the UCP 500*, op. cit., p. 66.

Although the UCP does not regulate the specific requirements for a certificate of origin to be considered as a valid tender, article 21 ("unspecified issuers or contents of documents") provides as follows:

> When documents other than transport documents, insurance documents and commercial invoices are called for, the credit should stipulate by whom such documents are to be issued and their wording or data content. If the credit does not so stipulate, banks will accept such documents as presented, provided that their data content is not inconsistent with any other stipulated documents presented.

168. The sentence in article 21 that "banks will accept such documents as presented" should be interpreted in a restrictive manner. Thus, the bank will still be required to carry out a twofold examination: to check whether the document is made out in the "usual form" and whether it is consistent with the other documents stipulated under the credit.[143] Thus if, for example, a bill of lading shows that the goods were loaded on board on 1 November, a certificate of analysis dated 10 November cannot be accepted unless it is clear from the certificate that samples were taken before 1 November but the results of the analysis were not known until later.

(c) *Insurance documents*

169. Articles 34, 35 and 36 of the UCP spell out in detail the requirements for insurance documents to be accepted under a documentary credit. Article 34 reads as follows:

(*a*) Insurance documents must appear on their face to be issued and signed by insurance companies or underwriters or their agents.

(*b*) If the insurance document indicates that it has been issued in more than one original, all the originals must be presented unless otherwise authorized in the credit.

(*c*) Cover notes issued by brokers will not be accepted, unless specifically authorized in the credit.

(*d*) Unless otherwise stipulated in the credit, banks will accept an insurance certificate or a declaration under an open cover pre-signed by insurance companies or underwriters or their agents. If a credit specifically calls for an insurance certificate or a declaration under an open cover, banks will accept, in lieu thereof, an insurance policy.

(*e*) Unless otherwise stipulated in the credit, or unless it appears from the insurance document that the cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, banks will not accept an insurance document which bears a date of issuance later than the date of loading on board or dispatch or taking in charge as indicated in such transport document.

(*f*) (i) Unless otherwise stipulated in the credit, the insurance document must be expressed in the same currency as the credit.

(ii) Unless otherwise stipulated in the credit, the minimum amount for which the insurance document must indicate the insurance cover to have been effected is the CIF [(cost, insurance and freight (..."named port of destination")] or CIP [(carriage and insurance paid to (..."named place of destination")] value of the goods, as the case may be, plus 10 per cent, but only when the CIF or CIP value can be determined from the documents on their face. Otherwise, banks will accept as such minimum amount 110 per cent of the amount for which payment, acceptance or negotiation is requested under the credit, or 110 per cent of the gross amount of the invoice, whichever is the greater.

170. Subparagraph (*d*) constitutes an important change as compared with the situation under the UCP 1983 revision (article 38 (*b*)). The object of this provision is to ensure that, unless a documentary credit expressly stipulates an insurance policy, banks will accept an insurance certificate or a declaration under open cover pre-signed by insurance companies or underwriters as a valid insurance document. Cover notes issued by brokers will not be accepted by the banks unless specifically authorized by the credit.

171. As already underlined in the chapter on Incoterms, and as requested in subparagraph (*e*), there is a need for continuous insurance coverage from the date of loading on board or dispatch or taking in charge of the goods. Furthermore, the insurance document must be consistent with the other documents in its identification of the voyage and description of the goods (subparagraphs 13 (*a*) and 37 (*c*) of the UCP).

172. Concerning the "type of insurance cover" and the meaning of "all risks insurance cover", articles 35 and 36 provide as follows:

(*a*) Credits should stipulate the type of insurance required and, if any, the additional risks which are to be covered. Imprecise terms such as "usual risks" or "customary risks" shall not be used; if they are used, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

(*b*) Failing specific stipulations in the credit, banks will accept insurance documents as presented, without responsibility for any risks not being covered.

(*c*) Unless otherwise stipulated in the credit, banks will accept an insurance document which indicates that the cover is subject to a franchise or an excess (deductible). [Article 35].

Where a credit stipulates "insurance against all risks", banks will accept an insurance document which contains any "all risks" notation or clause, whether or not bearing the heading "all risks", even if the insurance document indicates that certain risks are excluded, without responsibility for any risk(s) not being covered. [Article 36].

(d) *Inspection certificate*

173. The buyer having to rely exclusively on the documents when acquiring and paying for the goods will, in most cases, require to know, prior to the goods being shipped, that they are up to the specification laid down in the contract of sale. Very often there is a requirement incorporated in the letter of credit that the seller should tender an inspection certificate issued by an independent inspection company contracted for either by the buyer or by the seller, as stipulated in the credit. As always, it is for the

[143] De Rooy, op. cit., pp. 148-149.

parties to agree what exactly is to be certified, and by whom, and then see to it that the terms are incorporated in the credit. For certain commodities or for certain countries, such inspection certificates must be issued by a government entity.

174. The inspection certificate (also known as a pre-shipment—inspection certificate, or PSI) contains details of the shipment to which it relates, states the result of the inspection, and bears the signature, the stamp or the seal of the inspecting entity.[144]

(e) *Certificates of weight and quantity*

175. These are certificates given, usually by independent inspectors to verify the amount of goods shipped. When the goods being bought are bulk (e.g. grain or coal) or where the goods are bought by reference to a unit or unit price, the parties should always agree a weight or unit tolerance within which the bulk quantity will be acceptable when delivered. It is usual to fix the price for shipment in advance of knowing exactly what the shipped amount will be so as to arrange the terms of credit by agreeing a price pro rata with a maximum value of the credit. The credit will then be paid once the bulk is established, and providing it is within the tolerance agreed in the main contract.[145]

176. Article 38 of the UCP provides that: "If a credit calls for an attestation or certification of weight in the case of transport other than by sea, banks will accept a weight stamp or declaration of weight which appears to have been superimposed on the transport document by the carrier or his agent unless the credit specifically stipulates that the attestation or certification of weight must be by means of a separate document." The allowances permitted in credit amount, quantity and unit price are set out in article 39 of the UCP as follows:

(*a*) The words "about", "approximately", "circa" or similar expressions used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a difference not to exceed 10 per cent more or 10 per cent less than the amount or the quantity of the unit price to which they refer.

(*b*) Unless a credit stipulates that the quantity of the goods specified must not be exceeded or reduced, a tolerance of 5 per cent more or 5 per cent less will be permissible, always provided that the amount of the drawings does not exceed the amount of the credit. This tolerance does not apply when the credit stipulates the quantity in terms of a stated number of packing units or individual items.

(*c*) Unless a credit which prohibits partial shipments stipulates otherwise, or unless sub-article (*b*) above is applicable, a tolerance of 5 per cent less in the amount of the drawing will be permissible, provided that if the credit stipulates the quantity of the goods, such quantity of goods is shipped in full, and if the credit stipulates a unit price, such price is not reduced. This provision does not apply when expressions referred to in sub-article (*a*) above are used in the credit.

177. Thus "about", "approximately", "circa" and similar expressions are construed as allowing a difference of up to 10 per cent where they refer to the amount of the credit, to a unit price or to quantity. Where no such expression is used, a tolerance of up to 5 per cent in the quantity of the goods is permissible, provided that the drawing does not exceed the amount of the credit and it falls within the purview of article 39 (*b*) of the UCP.

(f) *Transport documents*

178. These are the documents which evidence that the goods are in the hands of a carrier for transportation to the buyer and, to that end, that they have left the control of the seller. Transport documents are defined in the UCP as "Documents indicating that goods have been loaded on board, dispatched, taken in charge, accepted for carriage or received for dispatch".

(g) *Provisions relating to transport documents generally*

179. The following provisions might apply to the various transport documents irrespectively of the mode of transport used:

(i) Carriage on deck

180. Unless the credit provides otherwise, where the credit includes carriage by sea, a positive statement in a transport document that goods will be carried on deck makes the document unacceptable, but one which refers to only that possibility is acceptable. Article 31 (i) of the UCP provides:

> Unless otherwise stipulated in the Credit, banks will accept a transport document which:
>
> (i) Does not indicate, in the case of carriage by sea or by more than one means of conveyance including carriage by sea, that the goods are or will be loaded on deck. Nevertheless, banks will accept a transport document which contains a provision that the goods may be carried on deck, provided that it does not specifically state that they are or will be loaded on deck.

181. The reason for such a provision is that on-deck cargo has always been looked on as requiring special attention because of the dangers to which this gives rise by exposing the goods to hazards not faced by goods loaded below deck.[146]

(ii) Shipper's load and count

182. A transport document which is claused "shipper's load and count" or "said by shipper to contain" or suchlike

[144] The following definition is provided in the *ICC guide to documentary credit operations for the UCP 500* (op. cit., p. 70): "An inspection certificate is a statement issued and signed by the appropriate authority, either a governmental entity or a private inspection company, providing evidence that the goods were inspected and detailing the results of such inspection."

[145] W. Hedley, *Bill of Exchange and Bankers' Documentary Credits*, op. cit., pp. 224-225.

[146] Article 1 (*c*) of the 1968 Hague-Visby Rules states: "'goods' includes goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

is acceptable unless the credit provides otherwise. Article 31 (ii) provides:

> Unless otherwise stipulated in the Credit, banks will accept a transport document which:
>
> (ii) bears a clause on the face thereof such as "shipper's load and count" or "said by shipper to contain" or words of similar effect.

183. The effect of such a phrasing is that the carrier is not bound by the quantity or weight declared to him by the consignor and which he would otherwise acknowledge by the bill of lading. The need to be able to clause bills in this way is greatly increased by the use of containers: unless the carrier has put the goods into the container it is only in exceptional circumstances that he will check the contents. Bills of lading frequently contain a printed clause stating "weight, measure, quantity, contents and value unknown". This does not render the bill unclean.[147]

(iii) Clean transport documents

184. It is well known that one of the important functions of transport documents is to serve as evidence of the receipt of the goods by the carrier. Thus transport documents provide information as to the identity, quantity and state of the goods on shipment. In order to protect himself from undue claims, the carrier—who is prima facie liable for loss or damage to cargo received in good order and released to the consignee short or in bad order—will issue a receipt for the consignment as it appears to him at the time of reception. Any discrepancy noticed by the carrier between the description of the goods and packaging on the transport document and the external appearance of the goods and packaging as they are actually received should be noted on the transport document by the carrier. It is these reservations and comments that give rise to disputes as to whether or not a transport document is "clean".[148]

185. Article 32 of the UCP defines a clean transport document as follows:

(*a*) A clean transport document is one which bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging.

(*b*) Banks will not accept transport documents bearing such clauses or notations unless the Credit expressly stipulates the clauses or notations which may be accepted.

(*c*) Banks will regard a requirement in a Credit for a transport document to bear the clause "clean on board" as complied with if such transport document meets the requirements of this article and of articles 23, 24, 25, 26, 27, 28 or 30.

186. As described by article 32, the statement concerning the "apparent good order and condition of the goods" at the time of taking in charge or loading the goods onto the means of transport by the carrier issuing the documents play a very important role in documentary credits transactions.[149] Where this statement is unqualified by reservations indicating a defect in the apparent condition or packaging of the goods, the transport document is said to be "clean"; where it is so qualified, it is said to be "dirty" or "unclean".[150]

187. Any clause or notation which does not relate or refer to "defective condition of goods and/or packaging" (subparagraph (*a*) of article 32) will not render the transport document unclean. Nor would notations such as "shipper's load and count" or loading or discharging comments make the transport document unclean.[151] However, the inclusion of "wet packaging", "wet package" or "wet" on a bill of lading falls into the category of a declaration of defective condition.[152]

188. Due to the lack of merchantability of the unclean or dirty transport documents, shippers/consignors are often prepared to offer an indemnity (a "letter of indemnity") to the carrier in return for leaving the document clean. The acceptance of the indemnity involves the suppression on the transport document of material facts which the consignee has a right to know. In various jurisdictions, courts have ruled this practice to be illegal and void. The official ICC position is as follows:

> ICC opposes the practice of attempting to give indemnities to carriers for the purpose of omitting from the transport document any qualifying remarks on the condition of the goods and/or the packaging. As a general rule such letters of indemnity should not be used and only in very few limited cases of bona fide dispute, where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance, might a letter of indemnity be commercially justified.[153]

189. Article 17 of the 1978 United Nations Convention on the Carriage of Goods by Sea ("Hamburg Rules") regulates the practice of issuing a letter of guarantee or indemnity. Subparagraph (3) states that the letter of guarantee or indemnity is valid as against the shipper, but only if "by omitting the reservation the carrier or person acting on his behalf did not intend to defraud a third party, including a consignee, who acted in reliance on the absence of such reservation and thus on the description of goods as contained in the bill of lading".

190. The problem in applying such a provision is that it is difficult to draw the line between genuine doubt on the part of the carrier as to the need for a reservation, and acceptance that what is being done is wrong.[154]

[147] R. Jack, *Documentary Credits*, London, Butterworths, 1993, p. 191.

[148] See ICC, *Clean transport documents*, ICC Publication No. 473, September 1989.

[149] In the case of containerized cargo, the "apparent condition" relates to what is apparent to the carrier on taking over the goods.

[150] C. Debattista, *Sale of Goods Carried by Sea*, op. cit., pp. 130-134.

[151] ICC, *Clean transport documents*, op. cit., p. 9.

[152] Opinions of the ICC Banking Commission, document 470.TA.7 of 24 February 1997.

[153] ICC, *Clean transport documents*, op. cit., p. 8.

[154] See F. J. J. Cadwallader, "Unclean bills of lading—banking problems and legal consequences", in P. Koh Soon Kwang (ed.), *Carriage of Goods by Sea*, Singapore, Butterworths 1986, pp. 82-99.

(h) *Specific transport documents*

191. Many of the problems in documentary credits are associated with the transport documents.[155] Some of the problems arise when parties agree to use a certain Incoterm, requesting a transport document not suitable for the mode, or modes, of carriage which will be used (e.g. using a CIF term for multimodal transport).[156] In the UCP the various kinds of transport documents are cited in separate articles (articles 23 to 29). We shall therefore look at these documents individually.

(i) Marine/ocean bill of lading

192. When bills of lading are tendered under a documentary credit, the bank will carry out a twofold examination. Firstly it will check whether the document meets the requirements imposed on a bill of lading by law, and, secondly, if the result of that examination is positive it will check whether the document satisfies the requirements concerning the bill of lading as provided for in the UCP and in the relevant credit.[157]

Requirements imposed on a bill of lading by law

193. Although bills of lading are regulated by a variety of statutory laws,[158] there is a large degree of uniformity as to the requirements imposed on a bill of lading. These requirements have been set out in consideration of the traditional functions of a bill of lading as:

(*a*) A receipt by a carrier (commonly a shipowner) to show that an identifiable consignment has been received by him for shipment ("received for shipment" bill of lading) or actually loaded on board his ship ("on board" bill of lading) to a stated destination. It typically contains statements as to the quantity, apparent quality, etc.;

(*b*) Evidence of the contract of carriage, repeating in detail or by reference ("short form" type of document) the terms of the contract, which was in fact concluded prior to the signing of the bill of lading;

(*c*) A document of title to the goods (as long as it is expressly made negotiable by the shipper) and as such enabling the consignee to dispose of the goods by endorsement and delivery of the bill of lading.[159]

[155] It is interesting to note that out of 292 queries relating to the UCP and considered by the group of experts of the ICC Commission on Banking Technique and Practice between October 1984 when the 1984 revision came into force and December 1990, 41 per cent related to the documents to be presented, in particular to transport documents (R. Jack, op. cit., p. 10).

[156] See paras. 55 and 56.

[157] De Rooy, op. cit., p. 134.

[158] Nine main different combinations of statutory laws governing bills of lading are listed in W. Tetley "The Hague, Hague/Visby and Hamburg Rules of the Conflict of Laws" paper delivered at the Canadian Maritime Law Association Toronto, 20 January 1994.

[159] Despite the emphasis on negotiability, the bill of lading has not evolved into what is technically known as a "negotiable instrument" but is considered as a "quasi-negotiable" document, since it cannot transfer to the consignee a better title than that of the transferor (e.g. a buyer cannot claim property in the goods merely by virtue of holding a bill of lading if it transpires that the seller did not have good title to pass to him) (P. Todd, *Modern Bills of Lading*, op. cit., p. 14).

Requirements imposed on a bill of lading by the UCP

194. The requirements are set out in article 23 of the UCP, which reads as follows:

(*a*) If a Credit calls for a bill of lading covering a port-to-port shipment, banks will, unless otherwise stipulated in the credit, accept a document, however named, which:

(i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

—the carrier or a named agent for or on behalf of the carrier, or

—the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier or master must be identified as carrier or master, as the case may be. An agent signing or authenticating for the carrier or master must also indicate the name and the capacity of the party, i.e. carrier or master, on whose behalf that agent is acting,

and

(ii) indicates that the goods have been loaded on board, or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel", or similar qualification in relation to the vessel, loading on board a named vessel must be evidenced by an on board notation on the bill of lading which, in addition to the date on which the goods have been loaded on board, also includes the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named as the "intended vessel".

If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading,

and

(iii) indicates the port of loading and the port of discharge stipulated in the Credit, notwithstanding that it:

a. indicates a place of taking in charge different from the port of loading, and/or a place of final destination different from the port of discharge, *and/or*

b. Contains the indication "intended" or similar qualification in relation to the port of loading and/ or port of discharge, as long as the document also states the ports of loading and/or discharge stipulated in the Credit,

and

(iv) consists of a sole original bill of lading or, if issued in more than one original, the full set as so issued,

and

(v) appears to contain all the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the bill of lading (short form/blank back bill of lading); banks will not examine the contents of such terms and conditions,

and

(vi) Contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

(vii) in all other respects meets the stipulations of the Credit.

(*b*) For the purpose of this article, transshipment means unloading and reloading from one vessel to another vessel during the course of ocean carriage from the port of loading to the port of discharge stipulated in the Credit.

(*c*) Unless transshipment is prohibited by the terms of the Credit, banks will accept a bill of lading which indicates that the goods will be transshipped, provided that the entire ocean carriage is covered by one and the same bill of lading.

(*d*) Even if the Credit prohibits transshipment, banks will accept a bill of lading which:

(i) indicates that transshipment will take place as long as the relevant cargo is shipped in Container(s), Trailer(s) and/or "LASH" barge(s) as evidenced by the bill of lading, provided that the entire ocean carriage is covered by one and the same bill of lading,

and/or

(ii) incorporates clauses stating that the carrier reserves the right to transship.

195. The main requirements are thus as follows:

(*a*) Article 23 (*a*) (i) requires a marine bill of lading to name the carrier and to be signed/authenticated either by the carrier or the master or by a named agent for the carrier or for the master. Such an agent must, however, indicate on whose behalf he is acting;

(*b*) The bill of lading must indicate that the goods have been shipped on board a named vessel. Loading on board may be evidenced either by a pre-printed clause or by a notation to this effect. In addition, when the bill of lading indicates an "intended vessel", the on-board notation must specify the name of the vessel on which the goods have been loaded, even when they have been loaded on the intended vessel;

(*c*) Bills of lading must indicate the ports of loading and discharge stipulated in the credit; bills of lading that indicate "intended" ports of loading or discharge are not acceptable;

(*d*) The tender must include either the sole original bill issued or the full set;

(*e*) The bill of lading must either contain all the terms of carriage or must identify them by reference to a source document other than the bill itself.

(*ii*) *Non-negotiable sea waybill*

196. The basic difference between a waybill and a bill of lading is that a waybill is not a negotiable document. This means that it need not be presented at the port of destination as a condition for receiving the goods. Without waiting for the document to arrive, the carrier delivers the goods to the party named as consignee in the waybill on production of proof of identity by the consignee or its authorized agent without any documentary formalities.[160]

197. The use of non-negotiable sea waybills is particularly recommended when the seller and the buyer are well-established trading partners and when there is no intention to resale the goods afloat.[161]

198. Article 24 of the UCP covers in detail the requirements of a non-negotiable sea waybill covering a port-to-port shipment for presentation under a documentary credit.

199. The main problem when using non-negotiable sea waybills in documentary credits arises because the shipper cannot consign the goods "to order" and leave the bill blank endorsed, as is common practice when using bills of lading. One way to overcome this problem and to provide the banks with the security they require is to nominate the bank in question as a consignee of the sea waybill; however, banks are often reluctant to become part of the contract of carriage.[162]

(*iii*) *Charter party bill of lading*

200. Article 25 of the UCP reads as follows:

[160] The Baltic and International Marine Council (BIMCO) Blank Back Form of Non-Negotiable Liner Waybill introduced in 1980, reads: "The goods shipped under this liner waybill will be delivered to the party named as consignee or its authorized agent, on production of proof of identity without any document formalities".

[161] During the early 1970s containerization, faster vessels, fewer ports of call and improved terminal facilities greatly reduced transit time, but often the processing of bills of lading failed to match this. The result was (and still is) that many consignments arrive at their destination before the necessary documentation. To solve this problem the non-negotiable sea waybill was introduced in the mid 1970s as an alternative to the traditional bill of lading to try to avoid the problems of delayed documents and their direct consequences: (cost of demurrage or shed rent waiting for them, or the cost of getting a bank-supported indemnity to enable the carrier to deliver without the bill of lading, pending its arrival). For a detailed description, see W. Tetley, "Waybills: the modern contract of carriage of goods by sea", *Journal of Maritime Law and Commerce*, Parts I and II, Vol. 14, No. 4, October 1983, pp. 465-511, and Vol. 15, No. 1, January 1984, pp. 41-68.

[162] The United Kingdom Carriage of Goods by Sea Act of 1992, that repealed the Bills of Lading Act of 1855 and has been in force since 16 September 1992, provides in article 2 (1) (*b*) that the consignee, or any other person to whom the carrier is duly instructed to deliver under the terms of the sea waybill, is entitled to sue on the contract of carriage, without prejudice to the rights of the original shipper. See also International Maritime Committee (CMI), "CMI Uniform Rules for Sea Waybills", CMI document, Paris II, 1990, pp. 202-207.

(*a*) If a Credit calls for or permits a charter party bill of lading, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

(i) contains any indication that it is subject to a charter party,

and

(ii) appears on its face to have been signed or otherwise authenticated by:

—the master or a named agent for or on behalf of the master, or

—the owner or a named agent for or on behalf of the owner.

Any signature or authentication of the master or owner must be identified as master or owner as the case may be. An agent signing or authenticating for the master or owner must also indicate the name and the capacity of the party, i.e. master or owner, on whose behalf that agent is acting,

and

(iii) does or does not indicate the name of the carrier,

and

(iv) indicates that the goods have been loaded on board or shipped on a named vessel.

Loading on board or shipment on a named vessel may be indicated by pre-printed wording on the bill of lading that the goods have been loaded on board a named vessel or shipped on a named vessel, in which case the date of issuance of the bill of lading will be deemed to be the date of loading on board and the date of shipment.

In all other cases loading on board a named vessel must be evidenced by a notation on the bill of lading which gives the date on which the goods have been loaded on board, in which case the date of the on board notation will be deemed to be the date of shipment.

and

(v) indicates the port of loading and the port of discharge stipulated in the Credit,

and

(vi) consists of a sole original bill of lading or, if issued in more than one original the full set as so issued,

and

(vii) contains no indication that the carrying vessel is propelled by sail only,

and

(viii) in all other respects meets the stipulations of the Credit.

(*b*) Even if the Credit requires the presentation of a charter party contract in connection with a charter party bill of lading, banks will not examine such charter party contract, but will pass it on without responsibility on their part.

Thus, it contains the same terms as for the port-to-port bill of lading in article 23 of the UCP, except that a document of this kind is subject to a charter party, does not need to indicate the name of the carrier.[163] must be signed/authenticated either by the master or the owner or by a named agent for the master or owner. Even if the credit requires the presentation of a charter party in connection with a charter party bill of lading, banks will not examine such charter party, but will pass it on without responsibility on their part. Thus, banks are relieved of any duty to examine the terms of the charter party.

(iv) Multimodal transport document

201. At the very early stages of multimodal transport, what primarily concerned bankers was that the traditional bill of lading, which through customs and by law had come to be recognized as a document of title representing the underlying goods, would, as a result of combined transport, be replaced by another document or other documents of doubtful value.[164] This was especially the case as regards security for any advances they might be called upon to make. The Hague Rules and The Hague-Visby Rules, which had been internationally agreed upon and given the force of law in many countries, related to carriers' liabilities, but their application related solely to the time during which the goods were on board a vessel and was obligatory only when a bill of lading was issued.[165]

202. From a commercial and banking point of view there was a need for one document to cover the whole of the transport process which would be acceptable to both shippers and bankers, and which would enjoy international legal recognition.[166]

203. As of today, banks negotiating shipping documents under letters of credit are quite willing to accept and pay against tender of combined transport documents. Article 26 of the UCP covers in detail the requirements of a transport document covering at least two different modes of transport, is as follows:[167]

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[163] "Charter parties are usually negotiated between sophisticated entities with considerable knowledge of the contract's actual terms. In this context, it is clearly unnecessary to require the carrier to be identified or the bank to scrutinize the terms of the charter party." (Buckley, op. cit., p. 286).

[164] Until the 1960s most commercial letters of credit, reflecting documentary sales terms, called for payment against presentation of negotiable ocean bills of lading endorsed to the issuing or confirming bank (see B. Kzolchyk, "Evolution and present state of the ocean bill of lading from a banking law perspective", *Journal of Maritime Law and Commerce*, vol. 23, No. 2, April 1992).

[165] The use of a single document to cover the entire process of multimodal transport—signed by the multimodal transport operator, in his capacity as a carrier—gives rise to considerable legal problems, due to the fact that only a few countries dispose of national legislation regulating multimodal transport contracts, and that the United Nations Convention on International Multimodal Transport of Goods (1980) has not yet entered into force. As a result, the multimodal transport operation as a whole and the document issued by the multimodal transport operator in particular have in most cases only a contractual status. Because of this contractual status, the multimodal transport contract is in principle governed by the different mandatory rules pertaining to each mode of transport (J. Ramberg, "UNCTAD/ICC Rules for Multimodal Transport Documents: origins and contents", ICC Symposium on Multimodal Transport, Barcelona, 2-3 April 1992).

[166] See L. A. Barlow, "Banking and combined transport documents", paper delivered at a Seminar on "Through transport: problem areas, documentation and insurance", organized by Lloyds of London Press, London, 15-16 June 1978.

[167] See Debattista, *Sale of Goods Carried by Sea*, op. cit., p. 227.

(*a*) If a Credit calls for a transport document covering at least two different modes of transport (multimodal transport), banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

(i) appears on its face to indicate the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by:

—the carrier or multimodal transport operator or a named agent for or on behalf of the carrier or multimodal transport operator, or

—the master or a named agent for or on behalf of the master.

Any signature or authentication of the carrier, multimodal transport operator or master must be identified as carrier, multimodal transport operator or master, as the case may be. An agent signing or authenticating for the carrier, multimodal transport operator or master must also indicate the name and the capacity of the party, i.e. carrier, multimodal transport operator or master, on whose behalf that agent is acting,

and

(ii) indicates that the goods have been dispatched, taken in charge or loaded on board. Dispatch, taking in charge or loading on board may be indicated by wording to that effect on the multimodal transport document and the date of issuance will be deemed to be the date of dispatch, taking in charge or loading on board and the date of shipment. However, if the document indicates, by stamp or otherwise, a date of dispatch, taking in charge or loading on board, such date will be deemed to be the date of shipment,

and

(iii) a. indicates the place of taking in charge stipulated in the Credit which may be different from the port, airport or place of loading, and the place of final destination stipulated in the Credit which may be different from the port, airport or place of discharge,

and/or

b. contains the indication "intended" or similar qualification in relation to the vessel and/or port of loading and/or port of discharge,

and

(iv) consists of a sole original multimodal transport document or, if issued in more than one original, the full set as so issued,

and

(v) appears to contain all of the terms and conditions of carriage, or some of such terms and conditions by reference to a source or document other than the multimodal transport document (short form/blank back multimodal transport document); banks will not examine the contents of such terms and conditions,

and

(vi) contains no indication that it is subject to a charter party and/or no indication that the carrying vessel is propelled by sail only,

and

(vii) in all other respects meets the stipulations of the Credit.

(*b*) Even if the Credit prohibits transshipment, banks will accept a multimodal transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same multimodal transport document.

This article is the mirror image of article 23 dealing with ocean bills of lading, subject to the following major distinctions:

(*a*) Under article 26 (*a*) (i), the document may be signed not only by the carrier, the master or their respective agent but also by a multimodal transport operator or his named agent;

(*b*) The document need not evidence shipment. As in the case of an ocean bill of lading, it may, instead, indicate that the goods have been dispatched or been taken in charge ("received for shipment" document) (subparagraph (*a*) (ii));

(*c*) Even if the credit prohibits transshipment, banks will accept a multimodal transport document which indicates that transshipment will or may take place, provided the entire voyage is covered by one and the same multimodal transport document;

(*d*) Banks will accept a document which "indicates the place of taking in charge stipulated in the Credit which may be different from the port, airport or place of loading, and a place of final destination stipulated in the Credit which may be different from the port, airport or place of discharge" (subparagraph (iii) (*a*)).

(v) Air transport document

204. The "air consignment note" is the document constituting prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.[168] The note is made out in three original parts:[169]

(*a*) The first part is for the issuing carrier and is signed by the consignor;

(*b*) The second part is for the consignee, and is signed by the consignor and by the carrier and accompanies the goods; and

(*c*) The third part is for the consignor, and is signed by the carrier and handed by him to the consignor after the goods have been accepted. If the tender of an air consignment note is stipulated under a documentary credit, the beneficiary will be required to present the third part.[170]

205. The credit should not require an air transport document to be presented in more than one original. Nor

[168] Article 11, paragraph 1, of the 1929 Warsaw Convention.

[169] Ibid., article 6.

[170] See P. De Rooy, op. cit., pp. 143-144.

should it call for a full set of original air waybill/consignment notes. Furthermore, since the air transport document is not a negotiable document, and must name a consignee, it should not be required to be issued "to order" or "to be endorsed".[171]

206. Article 12 (3) of the Warsaw Convention contains a provision that offers an important protection to an applicant for credit who stipulates the tender of an air consignment note in his documentary credit: "If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note."

207. When the beneficiary has presented to the bank that part of the air consignment note issued to him (the third part), and it has been examined and found to be in order, the applicant for the credit will not run the risk that the beneficiary may have altered the destination of the goods after receipt of the air consignment note. If he wishes to do so, he will have to return his part of the air consignment note to the carrier. Thus the Convention provides protection for the applicant.[172]

208. Article 27 of the UCP states:

(*a*) If a Credit calls for an air transport document, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:

(i) appears on its face to indicate the name of the carrier and to have been signed or otherwise authenticated by:

—the carrier, or

—a named agent for or on behalf of the carrier.

Any signature or authentication of the carrier must be identified as carrier. An agent signing or authenticating for the carrier must also indicate the name and the capacity of the party, i.e. carrier, on whose behalf that agent is acting,

and

(ii) indicates that the goods have been accepted for carriage,

and

(iii) where the Credit calls for an actual date of dispatch, indicates a specific notation of such date, the date of dispatch so indicated on the air transport document will be deemed to be the date of shipment.

For the purpose of this article, the information appearing in the box on the air transport document (Marked "For Carrier Use Only" or similar expression) relative to the flight number and date will not be considered as a specific notation of such date of dispatch. In all other cases, the date of issuance of the air transport document will be deemed to be the date of shipment,

and

(iv) indicates the airport of departure and the airport of destination stipulated in the Credit,

and

(v) appears to be the original for consignor/shipper even if the Credit stipulates a full set of originals, or similar expressions,

and

(vi) appears to contain all of the terms and conditions of carriage, or some of such terms and conditions, by reference to a source or document other than the air transport document; banks will not examine the contents of such terms and conditions,

and

(vii) in all other respects meets the stipulations of the Credit.

(*b*) For the purpose of this article, transshipment means unloading and reloading from one aircraft to another aircraft during the course of carriage from the airport of departure to the airport of destination stipulated in the Credit.

(*c*) Even if the Credit prohibits transshipment, banks will accept an air transport document which indicates that transshipment will or may take place, provided that the entire carriage is covered by one and the same air transport document.

The article thus covers in detail the requirements for an air transport document to be tendered under a documentary credit. Subparagraph (*a*) (iii) of this article provides that the date of the issuance of the document is deemed the date of shipment, but where the credit calls for an actual date of despatch, the date has to be indicated by a specific notation on the document.

(vi) Road, rail or inland waterway transport

209. Article 28 of UCP covers in detail the requirements of a road, rail or inland waterway transport document for presentation under a documentary credit. The principles applied are the same as the ones developed in respect of marine bills of lading (article 23) but with the following major modifications:

(*a*) The document must indicate that the goods have been received for shipment, despatch or carriage (subparagraph (*a*) (ii)); and

(*b*) In the absence of any indication on the transport document as to the numbers issued, banks will accept the transport document(s) presented as constituting a full set.

210. Pursuant to article 1 (1) of the 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR),[173] the consignment note (the CMR document) is the document which constitutes prima facie evi-

[171] See ICC, *The new standard documentary credit forms for the UCP 500*, ICC Publication No. 516, 1993, pp. 32-33.

[172] From De Rooy, op. cit., p. 144.

[173] The CMR applies mandatorily to a contract for the carriage of goods by road where goods are carried on wheels across national borders, whether by sea (i.e. roll-on/roll-off) or on land, where either the place of commencement of carriage or the place of delivery is in a country which is party to the CMR.

dence of the making of the contract of carriage, the conditions of the contract and the receipt of the goods by the carrier.

211. The consignment note is made out in three originals signed by the sender and the carrier. The first copy is for the sender, the second copy is for the consignee (it accompanies the goods) and the third copy is for the carrier (article 5 (1) of the CMR). If the tender of a CMR consignment note is stipulated under a documentary credit, the beneficiary will be required to present the first copy.

212. The CMR offers the applicant of the credit similar protection to that provided by the Warsaw Convention. Thus, it is provided in article 12 (5) of the CMR that the exercise of the right of disposal of the goods is dependent upon the presentation of the first copy of the consignment note. Therefore the applicant for the credit has the security that the destination of the goods cannot be changed after the first copy of the consignment note has been presented to the bank.[174] Thus the copy for the consignor should be required in a documentary credit.

(vii) Courier and post receipts

213. The requirements for a post receipt or certificate of posting are covered in article 29 of the UCP. Pursuant to this provision, banks will accept such a document, which evidences the respective dispatch by post or by a courier as required and discloses the date of dispatch.

214. The article provides as follows:

> (*a*) If a Credit calls for a post receipt or certificate of posting, banks will, unless otherwise stipulated in the Credit, accept a post receipt or certificate of posting which:
>
> (i) appears on its face to have been stamped or otherwise authenticated and dated in the place from which the Credit stipulates the goods are to be shipped or dispatched and such date will be deemed to be the date of shipment or dispatch,
>
> *and*
>
> (ii) in all other respects meets the stipulations of the Credit.
>
> (*b*) If a Credit calls for a document issued by a courier or expedited delivery service evidencing receipt of the goods for delivery, banks will, unless otherwise stipulated in the Credit, accept a document, however named, which:
>
> (i) appears on its face to indicate the name of the courier/service, and to have been stamped, signed or otherwise authenticated by such named courier/service (unless the Credit specifically calls for a document issued by a named Courier/Service, banks will accept a document issued by any Courier/Service),
>
> *and*
>
> (ii) indicates a date of pick-up or of receipt or wording to this effect, such date being deemed to be the date of shipment or dispatch,
>
> *and*
>
> (iii) in all other respects meets the stipulations of the Credit.

(viii) Transport documents issued by freight forwarders

215. Under the 1983 revision of the UCP, bills of lading issued by freight forwarders were unacceptable unless permitted by the credit or issued by the forwarder as an agent for a carrier or issued in the Combined Transport Form of the International Federation of Freight Forwarders Associations (the FIATA Combined Transport Bill of Lading, sanctioned as a good tender under article 25 (*d*) of the 1983 revision).[175]

216. Transport documents issued by freight forwarders are now dealt with separately in article 30 of the UCP, as follows:

> Unless otherwise authorized in the Credit, banks will only accept a transport document issued by a freight forwarder if it appears on its face to indicate:
>
> (i) the name of the freight forwarder as a carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as carrier or multimodal transport operator,
>
> *or*
>
> (ii) the name of the carrier or multimodal transport operator and to have been signed or otherwise authenticated by the freight forwarder as a named agent for or on behalf of the carrier or multimodal transport operator.

The transport documents issued by freight forwarders are acceptable if the document otherwise complies with the terms of the relevant transport article and is either: (*a*) authorized in the credit, or (*b*) issued and signed by the forwarder as a carrier or multimodal transport operator or as an agent for or on behalf of a carrier or multimodal transport operator.

217. Although transport documents issued by freight forwarders will continue to require enhanced care and scrutiny, particularly to ascertain their form, function and proper categorization, the practice of a forwarder issuing a transport document in the capacity of a carrier is now clearly acceptable under article 30 (i) of the UCP.[176]

11. *Authentication of original documents*

218. Article 20 of the UCP addresses the problem of original documents as follows:

> (*b*) Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:
>
> (i) by reprographic, automated or computerized systems;
>
> (ii) as carbon copies;

[174] See De Rooy, op. cit., pp. 144-145.

[175] The express reference to a FIATA document has been deleted due to the emergence of other freight forwarders' associations (ICC brochure No. 511, p. 87).

[176] Buckley, op. cit., pp. 286-287.

provided that it is marked as original and, where necessary, appears to be signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

(*c*) (i) Unless otherwise stipulated in the Credit, banks will accept as a copy(ies), a document(s) either labelled copy or not marked as an original—a copy(ies) need not be signed.

(ii) Credits that require multiple document(s) such as "duplicate", "two fold", "two copies" and the like, will be satisfied by the presentation of one original and the remaining number in copies except where the document itself indicates otherwise.

(*d*) Unless otherwise stipulated in the Credit, a condition under a Credit calling for a document to be authenticated, validated, legalized, visaed, certified or indicating a similar requirement, will be satisfied by any signature, mark, stamp or label on such document that on its face appears to satisfy the above condition.

219. Due to the limited capacity of banks to verify the authenticity of documents within the available time, this is an area where the provisions are still quite weak from a buyer's perspective.[177]

D. Documentary collection

220. A documentary collection is an operation in which a bank collects payment on behalf of the seller (the principal) by delivering documents to the buyer.[178] The documents presented are proof of the actual delivery of a product or service rendered by the seller.

221. A documentary collection provides a greater degree of security than payment on an open account, because the importer (in the case of a negotiable document such as a negotiable bill of lading) cannot take possession of the goods without either making payment or accepting a bill of exchange. The documentary collection, as compared with the documentary credit system, involves a prior performance on the part of the seller: the manufacture and dispatch of the goods or the rendering of services before securing payment.[179] The advantages of the documentary collection are that it offers simple and inexpensive handling, as well as the possibility of handing over documents to the buyer against simultaneous payment of the amount owed or against acceptance of a draft. The risk involved is that if the buyer refuses to honour the documents, the seller is obliged to return the merchandise or to find a substitute buyer for it.

222. The documentary collection system is often governed by a set of voluntary rules of practice adopted under the auspices of the ICC and approved by the banking system and known as the ICC Uniform Rules for Collections.[180] The ICC Uniform Rules apply by being incorporated into the text of the "collection instruction". Article 2 of the Rules defines "collection" and "documents" as follows:

(*a*) "Collection" means the handling by banks of documents as defined in sub-article 2 (*b*), in accordance with instructions received, in order to:

(i) obtain payment and/or acceptance,

or

(ii) deliver documents against payment and/or against acceptance,

or

(iii) deliver documents on other terms and conditions.

(*b*) "Documents" means financial documents and/or commercial documents:

(i) "Financial documents" means bills of exchange, promissory notes, cheques, or other similar instruments used for obtaining the payment of money;

(ii) "Commercial documents", means invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.

(*c*) "Clean collection" means collection of financial documents not accompanied by commercial documents.

(*d*) "Documentary collection" means collection of:

(i) Financial documents accompanied by commercial documents;

(ii) Commercial documents not accompanied by financial documents.

223. There are generally four parties involved in a documentary collection:

(*a*) The "principal", who is the party entrusting the handling of a collection to a bank, and who is usually the seller/exporter who hands over the documents to his bank together with a corresponding collection order;

(*b*) The "remitting bank", which is the bank to which the principal entrusts the handling of a collection;

(*c*) The "collecting bank", which is any bank, other than the remitting bank, involved in processing the collection; and

(*d*) The "drawee", who is the buyer or importer to whom the collection documents are presented.

1. *Stages of a documentary collection*

224. A basic documentary collection involves three stages:

(*a*) The buyer and seller agree in the contract of sale to effect payment by documentary collection;

(*b*) The seller dispatches the goods directly to the address of the buyer or to the presenting bank (the collecting bank making presentation to the drawee). At the same time he assembles all the necessary documentation (in-

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177 Ibid., pp. 291-292.

178 See *Documentary Credits, Documentary Collections, Bank Guarantees*, Crédit Suisse Publication, 1994, pp. 79-91.

179 See *Documentary Credits, Documentary Collections, Bank Guarantees*. UBS Publication, pp. 74-81.

180 ICC Publication No. 522, 1995 revision in force as from 1 January 1996.

voice, transport document, insurance certificate, certificate of origin) and sends them to his own bank (the remitting bank) together with the "collection order". The remitting bank then sends the documents, together with the necessary instructions to the collecting bank;

(*c*) The collecting bank informs the buyer of the arrival of the documents and notifies him of the terms of their release. The buyer makes payment, or accepts the bill of exchange and in return receives the documents. The collecting bank then transfers the collected amount to the remitting bank, which credits it to the exporter's account.[181]

2. *Basic forms of documentary collections*

225. The basic forms of documentary collections are as follows:

(*a*) Documents against payment or cash against documents

226. This is the form of documentary collection when the collecting bank is only authorized to release the documents to the drawee against immediate payment. In commercial practice, "immediate" has been interpreted as meaning not later than the arrival of the goods. If the seller does not wish to wait for his money until the arrival of the goods, he must include in the collection order a clause stipulating "payment on first presentation of the documents".[182]

[181] UBS. *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., pp. 81-82.

[182] Ibid., p. 83. According to article 5 (*b*) of the URC ICC Publication No. 522, the collection instruction should state the exact period of time within which the drawee must take up the documents or fulfil other conditions.

(*b*) Documents against acceptance

227. In this case, the collecting bank releases the documents to the buyer against his acceptance of a bill of exchange, which is usually payable 30-180 days after sight or at a fixed future date. Under this form of arrangement, the buyer gains possession of the goods before payment is made; by reselling the goods immediately, he is able to raise the necessary funds to pay the draft on its due date. Once the documents have been released, the seller's only security is the bill of exchange accepted by the buyer.[183]

(*c*) Release of documents against letter of undertaking

228. Under this type of documentary collection the collecting bank releases the documents to the buyer against a "letter of undertaking", the exact wording of which is determined by the buyer or the remitting bank.[184]

(*d*) Collection with acceptance: release of documents only against payment

229. Although not very much used in practice, this type of documentary collection entails the buyer gaining possession of the goods only after the bill of exchange has been paid.

[183] UBS. *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 83, and Crédit Suisse, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit, p. 75.

[184] Ibid., op. cit., p. 76.

Chapter IV

BANK GUARANTEES AS A PROTECTION AGAINST NON-PERFORMANCE OF THE CONTRACTUAL OBLIGATIONS BY THE SELLER

230. The purpose of this type of guarantee is to protect the buyer against non-performance of the contract by the seller. The common element in the various guarantees of this type is that the commitment made by the guarantor (usually a bank) is legally independent (autonomous) of the underlying commercial contract (under the principle of independence of the guarantee). Under this type of guarantee, the guarantor undertakes to be answerable for the payment of a debt or the fulfilment of an obligation in the event of default by the party primarily responsible.[185] It is often called a "collateral contract", as it is collateral to the contract providing the primary liability which is guaranteed.[186]

231. There are two basic kinds of guarantees/bonds in international trade:

(a) *Demand guarantees*, which represent instant cash for the beneficiary, who only has to make a demand;

(b) *Suretyship guarantees*, which establish an accessory or conditional obligation towards the creditor, subject to the existence of the principal debtor's obligation.[187]

A. Demand guarantees

232. Under this type of guarantee, the guarantor must pay on first demand as long as the claims submitted meet the formal conditions laid down in the guarantee. Under this type of guarantee, the guarantor does not examine the material justification of the claim but will make payment merely against presentation of proper documents. Once again, the principle of autonomy, as in the case of documentary credits, plays an important role. The beneficiary is relieved not only of the risk of the principal becoming insolvent but also of the risk of having to obtain a judgement or award before the guarantee is executed. The rule is "pay first, sue later".[188]

233. Demand guarantees are often subject to the ICC Uniform Rules for Demand Guarantees.[189] Under these rules, banks and issuing guarantors will only make payment against presentation of proper documents.[190] The beneficiary of such a guarantee could obtain payment without having to prove any breach of contract, do or establish that it had suffered any damages. The use of de-

[185] Crédit Suisse, *Documentary Credits, Documentary Collections, Bank Guarantees*. op. cit., p. 94. In the *Documentary Credits, Documentary Collections, Bank Guarantees* (op. cit., p. 86) a bank guarantee is defined as follows: "The irrevocable obligation of a bank to pay a sum of money in the event of non-performance of a contract by a third party. The guarantee is a separate obligation independent of the principal debt or the contractual relationship between the creditor and the principal debtor. Under the terms of the guarantee the bank has to pay on first demand provided that the conditions contained in the guarantee are fulfilled." UBS, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 86.

[186] See Jack, op. cit., p. 261.

[187] See *ICC guide to export-import basics*, op. cit., pp. 154-162, and UBS, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., pp. 94-106.

[188] Ibid., p. 95.

[189] The current version is from 1992, in force as from 1 January 1993 (ICC Publication No. 458).

[190] Article 2 of the 1992 ICC Uniform Rules for Demand Guarantees ("Definitions and general provisions"), reads as follows:

a. For the purpose of these Rules, a demand guarantee (hereinafter referred to as "Guarantee") means any guarantee, bond or other payment undertaking, however named or described, by a bank, insurance company or other body or person (hereinafter called "the Guarantor") given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) (for example, a certificate by an architect or engineer, a judgement or an arbitral award) as may be specified in the Guarantee, such undertaking being given

i. at the request or on the instructions and under the liability of a party (hereinafter called "the Principal"); or
ii. at the request or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter "the Instructing Party") acting on the instructions of a Principal to another party (hereinafter the "Beneficiary").

b. Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based, and Guarantors are in no way concerned with or bound by such contract(s), or tender conditions, despite the inclusion of a reference to them in the Guarantee. The duty of a Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee.

c. For the purpose of these Rules, "Counter-Guarantee" means any guarantee, bond or other payment undertaking of the Instructing Party, however named or described, given in writing for the payment of money to the Guarantor on presentation in conformity with the terms of the undertaking of a written demand for payment and other documents specified in the Counter-Guarantee which appear on their face to be in accordance with the terms of the Counter-Guarantee. Counter-Guarantees are by their nature separate transactions from the Guarantees to which they relate and from any underlying contract(s) or tender conditions, and Instructing Parties are in no way concerned with or bound by such Guarantees, contract(s) or tender conditions, despite the inclusion of a reference to them in the Counter-Guarantee.

d. The expressions "writing" and "written" shall include an authenticated teletransmission or tested electronic data interchange ("EDI") message equivalent thereto.

mand guarantees under the ICC Uniform Rules provides the beneficiary with an instrument similar to an irrevocable letter of credit pursuant to which it can, at any time, up to the expiry date of that instrument, draw down a sum up to the bond amount without any further proof or condition—and despite any contestation or dispute on the part of the principal—merely upon presentation of a demand in the correct form accompanied by such documents as may be specified.[191]

234. Article 20 of the ICC Uniform Rules sets forth the formal requirement for payment under this type of guarantee. It requires that the demand for payment shall be in writing, and be supported by a written statement stating:

(*a*) That the principal is in breach of his obligation(s) under the underlying contract(s); and

(*b*) The respect in which the principal is in breach.

235. It is important to note that the statement of breach does not need to be provided by a neutral third party unless, of course, this is expressly stipulated in the guarantee. The beneficiary's own statement is sufficient. In practice, although a demand guarantee can be given for any percentage of the value of the underlying contract, because of its unconditional nature it is rare for principals to agree to demand guarantees for more than a small fraction (generally between 5 and 10 per cent) of the total contract value.[192]

B. Suretyship guarantees

236. These guarantees are also known as "conditional guarantees", since the delegations of the guarantor are accessory to and co-extensive with the obligations of the principal under the contract to which the relevant bond relates. Under suretyship guarantees, the beneficiary must prove a breach of contract and establish that it has suffered damages before it is entitled to payment; "the obligation of the guarantor is triggered by the actual default or contractual breach of the principal as evidenced in a document such as a court judgement or arbitral award against the principal".[193]

237. Since suretyship guarantees provide a greater measure of protection for the principal than demand guarantees, it is not unusual for the amounts guaranteed to be higher with this type of guarantee (between 30 and 40 per cent of the contract value).

238. To regulate the provisions of suretyship guarantees, the ICC adopted, on 23 April 1993, the ICC Uniform Rules for Contract Bonds.[194]

239. The Rules were drafted to be used in connection with contracts where the beneficiary requires a bond as security for the performance of contractual obligations by the principal. The Rules treat the liability of the guarantor as accessory to that of the principal. The primary liability for any default under a contract is that of the principal. If, however, the principal fails to remedy any default or make payment of any damages or financial compensation due in respect of that default, the secondary obligations of the guarantor are available as security for the beneficiary.[195]

240. As contract bonds involve the guarantor in an assessment of allegations of breach or default affecting the underlying contract, banks do not generally wish to become involved in issuing this type of guarantee. Contract bonds will ordinarily be issued by insurance companies having the necessary expertise to become involved in determining whether or not a proper claim has arisen or a default has given rise to payment.[196]

241. Article 7 (*j*) of the Uniform Rules provides detailed procedures for ascertaining whether a default has arisen, as follows:

> Notwithstanding any dispute or difference between the Principal and the beneficiary in relation to the performance of the contract any Contractual Obligation, a Default shall be deemed to be established for the purposes of these Rules:
>
> (i) upon issue of a certificate of Default by a third party (who may without limitation be an independent architect or engineer or a Pre-Arbitral referee of the ICC) if the Bond so provides and the service of such certificate or a certified copy thereof upon the guarantor, or
>
> (ii) if the Bond does not provide for the issue of a certificate by a third party, upon the issue of a certificate of default by the Guarantor, or
>
> (iii) by the final judgement, order or award of a court or tribunal of competent jurisdiction,

and the issue of a certificate of Default under paragraph (i) or (ii) shall not restrict the rights of the parties to seek or require the determination of any dispute or difference arising under the Contract or the Bond or the review of any certificate of default or payment made pursuant thereto by a court or tribunal of competent jurisdiction.

C. Main uses of guarantees

242. The most important types of guarantees encountered in international trade are as follows:

1. *Tender bonds*

243. Tender bonds (or bid bonds) are used to secure performance in contracts awarded by competitive bidding.[197] Tender bonds are designed to deter companies from mak-

[191] *Draft explanatory guide to the ICC Uniform Rules*, ICC Publication No. 524, revised 27 June 1996 and amended 30 January 1997, p. 2.

[192] *ICC guide to export-import basics*, op. cit., p. 157.

[193] Ibid., p. 158.

[194] ICC Publication No. 524; the Uniform Rules came into effect on 1 January 1994.

[195] Article 3 (*b*) of the Uniform Rules provides as follows:

> The liability of the Guarantor to the Beneficiary under the Bond is accessory to the liability of the Principal to the beneficiary under the Contract and shall arise upon Default. The Contract is deemed to be incorporated into and form part of the Bond. The liability of the Guarantor shall not exceed the Bond Amount.

[196] *Draft explanatory guide to the ICC Uniform Rules for Contract Bonds*, ICC Publication No. 524, pp. 3-4.

[197] *ICC guide to export-import basics*, op. cit., p. 161.

ing a tender and then rejecting the contract when it is awarded to them. Tender bonds are usually issued for a period of three to six months, until the signing of the contract or the issue of a performance bond. The amount secured by the bond ranges from 1 to 5 per cent of the tender price.

244. A claim can be made under a tender bond if the tenderer:

(*a*) Withdraws the tender before the expiry date;

(*b*) Refuses to accept the awarded contract;

(*c*) Is unable or unwilling to provide the required performance bond.[198]

2. *Performance bonds*

245. These guarantees cover the risk that the exporter or contractor will fail to adequately perform the contract or fail to perform in due time. The guarantee amount is generally a stated percentage of the contract price, commonly up to 10 per cent.[199] A performance bond is essentially a reinforcement of the contractual relationship between buyer and seller.[200]

3. *Advance payment*

246. The basic purpose of an advance payment guarantee is to ensure that the money advanced by the buyer to the supplier (seller) for the purchase of materials and for the cost of production is affected to such use. The buyer will only agree to such a down payment after receipt of an advance payment guarantee, which ensures repayment of the advance by the seller in the event of non-performance of his contractual delivery obligations. The advance payment guarantee is usually provided for the same amount as the advance payment. It often includes a clause whereby the guarantee amount is automatically reduced in proportion to the value of any part shipments made.[201]

4. *Payment guarantee in case of non-payment*

247. This type of guarantee is mainly used for the securing of payments made on an "open account" basis, but it may be used for several purposes, including as security for the full payment of the delivery of goods or services. The payment of a claim under a payment guarantee is usually made against the beneficiary's written declaration that he has delivered the goods but has not received payment at maturity.[202]

5. *Retention bonds*

248. These are commonly used in contracts involving goods and services. They replace the retention of funds during a certain period of time as a sort of security against defects which are not immediately apparent. This type of guarantee is commonly used in construction projects.[203]

6. *Maintenance bonds*

249. These guarantees are commonly used to secure the warranty obligations of equipment suppliers throughout the period of the supplier's liability for defects.[204]

[198] *Documentary Credits, Documentary Collections, Bank Guarantees*, Crédit Suisse Publication, op. cit., p. 100, and *Documentary Credits, Documentary Collections, Bank Guarantees*, UBS Publication, op. cit., p. 87.

[199] *ICC guide to export-import basics*, op. cit., p. 159.

[200] See Crédit Suisse Publication, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 102, and UBS Publication, *Documentary Credits, Documentary Collections, Bank Guaranteees*, op. cit., p. 87.

[201] See UBS Publication, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 87 and Crédit Suisse Publication, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 104.

[202] UBS Publication, *Documentary Credits, Documentary Collections, Bank Guarantees*, op. cit., p. 88.

[203] See *ICC guide to export-import basics*, op. cit., p. 161.

[204] Ibid., p. 161.

ANNEXES

Annex I

INCOTERMS

ICC 1990 version

Group	*Abbrev.*	*Description*	*Mode*	*Contract*
E	EXW	Ex-works	All modes	Shipment
F	FCA	Free Carrier	All modes	Shipment
	FAS	Free alongside ship	Sea only	Shipment
	FOB	Free on board	Sea only	Shipment
C	CFR	Cost and freight	Sea only	Sea only
	CIF	Cost, insurance and freight	Sea only	Shipment
	CPT	Carriage paid to	All modes	Shipment
	CIP	Carriage and insurance paid to	All modes	Shipment
D	DAF	Delivered at frontier	Land only	N/A
	DES	Delivered ex-ship	Sea only	Arrival
	DEQ	Delivered ex-quay	Sea only	Arrival
	DDU	Delivered duty unpaid	All modes	Arrival
	DDP	Delivered duty paid	All modes	Arrival

Definitions (as revised on 1 July 1990)

Incoterm	*Definition*	*International code*
Ex-Works [named place]	"Ex-works" means that the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer. In particular, he is not responsible for loading the goods on the vehicle provided by the buyer or for clearing the goods for export, unless otherwise agreed. The buyer bears all costs and risks involved in taking the goods from the seller's premises to the desired destination. This term should not be used when the buyer cannot carry out directly or indirectly the export formalities. In such circumstances, the FCA term should be used.	**EXW**
Free Carrier [named place]	"Free carrier" means that the seller fulfils his obligation to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may choose within the place or range stipulated where the carrier shall take the goods into his charge. When, according to commercial practice, the seller's assistance is required in making the contract with the carrier (such as in rail or air transport), the seller may act at the buyer's risk and expense.	**FCA**

This term may be used for any mode of transport, including multimodal transport. "Carrier" means any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage by rail, road, sea, air or inland waterway or by a combination of such modes. If the buyer instructs the seller to deliver the cargo to a person, e.g. a freight forwarder who is not a carrier, the seller is deemed to have fulfilled his obligation to deliver the goods when they are in the custody of that person.

"Transport terminal" means a railway terminal, a freight station, a container terminal or yard, a multi-purpose cargo terminal or any similar receiving point.

"Container" includes any equipment used to unitize cargo (e.g. all types of containers and/or flats), whether ISO accepted or not, trailers, swap bodies, ro-ro equipment and igloos, and applies to all modes of transport.

Free alongside Ship [named port of shipment] **FAS**

"Free alongside ship" means that the seller fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment.

The FAS term requires the buyer to clear the goods for export. It should not be used when the buyer cannot carry out directly or indirectly the export formalities.

This term can only be used for sea or inland waterway transport.

Free on Board [named port of shipment] **FOB**

"Free on board" means that the seller fulfils his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point.

The FOB term requires the seller to clear the goods for export.

This term can only be used for sea or inland waterway transport. When the ship's rail serves no practical purposes, such as in the case of roll-on/roll-off or container traffic, the FCA term is more appropriate to use.

Cost and Freight [named port of destination] **CFR**

"Cost and freight" means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional cost due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment.

The CFR term requires the seller to clear the goods for export.

This term can only be used for sea and inland waterway transport. When the ship's rail serves no practical purpose, such as in the case of roll-on/roll-off or container traffic, the CPT term is more appropriate to use.

Cost, Insurance and Freight [named port of destination] **CIF**

"Cost, insurance and freight" means that the seller has the same obligations as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.

The buyer should note that under the CIF term the seller is only required to obtain insurance on minimum coverage.

The CIF term requires the seller to clear the goods for export.

This term can only be used for sea and inland waterway transport. When the ship's rail serves no practical purposes such as in the case of roll-on/roll-off or container traffic, the CIP term is more appropriate to use.

Carriage paid to [named place of destination]	"Carriage paid to ..." means that the seller pays the freight for the carriage of the goods to the named destination. The risk of loss of or of damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered to the carrier, is transferred from the seller to the buyer when the goods have been delivered into the custody of the carrier. "Carrier" means any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage, by rail, road, sea, air or inland waterway or by a combination of such modes. If subsequent carriers are used for the carriage to the agreed destination, the risk passes when the goods have been delivered to the first carrier. The CPT term requires the seller to clear the goods for export. This term may be used for any mode of transport, including multimodal transport.	**CPT**
Carriage and Insurance paid to [named place of destination]	"Carriage and insurance paid to ..." means that the seller has the same obligations as under CPT but with the addition that the seller has to procure cargo insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium. The buyer should note that under the CIP term the seller is only required to obtain insurance on minimum coverage. The CIP term requires the seller to clear the goods for export. This term may be used for any mode of transport, including multimodal transport.	**CIP**
Delivered at Frontier [named place]	"Delivered at frontier" means that the seller fulfils his obligation to deliver when the goods have been made available, cleared for export, at the named point and place at the frontier, but before the customs border of the adjoining country. The term "frontier" may be used for any frontier, including that of the country of export. Therefore, it is of vital importance that the frontier in question be defined precisely by always naming the point and place in the term. The term is primarily intended to be used when the goods are to be carried by rail or road, but it may be used for any mode of transport.	**DAF**
Delivered ex-ship [named port of destination]	"Delivered ex-ship" means that the seller fulfils his obligation to deliver when the goods have been made available to the buyer on board the ship uncleared for import at the named port of destination. The seller has to bear all the costs and risks involved in bringing the goods to the named port of destination. This term can only be used for sea or inland waterway transport.	**DES**
Delivered ex-quay [named port of destination]	"Delivered ex-quay (duty paid)" means that the seller fulfils his obligation to deliver when he has made the goods available to the buyer on the quay (wharf) at the named port of destination, cleared for importation. The seller has to bear all risks and costs including duties, taxes and other charges of delivering the goods thereto. This term should not be used if the seller is unable directly or indirectly to obtain the import licence. If the parties wish the buyer to clear the goods for importation and pay the duty, the words "duty unpaid" should be used instead of "duty paid". If the parties wish to exclude from the seller's obligations some of the costs payable upon importation of the goods, such as value added tax (VAT), this should be made clear by adding words to this effect: "Delivered ex-quay, VAT unpaid [named port of destination]." This term can only be used for sea or inland waterway transport.	**DEQ**

Delivered duty unpaid [named place of destination]	"Delivered duty unpaid" means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the costs and risks involved in bringing the goods thereto (excluding duties, taxes and other official charges payable upon importation, as well as the costs and risks of carrying out customs formalities). The buyer has to pay any additional costs and to bear any risks caused by his failure to clear the goods for import in time. If the parties wish the seller to carry out customs formalities and bear the costs and risks resulting therefrom, this has to be made clear by adding words to this effect.	**DDU**
Delivered duty paid [named place of destination]	If the parties wish to include in the seller's obligations some of the costs payable upon importation of the goods (such as VAT), this should be made clear by adding words to this effect: "Delivered duty unpaid, VAT paid, [named place of destination]". This term may be used irrespective of the mode of transport. "Delivered duty paid" means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the risks and costs, including duties, taxes and other charges, of delivering the goods thereto, cleared for importation. Whilst the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation. This term should not be used if the seller is unable directly or indirectly to obtain the import licence. If the parties wish the buyer to clear the goods for importation and to pay the duty, the term DDU should be used. If the parties wish to exclude from the seller's obligations some of the costs payable upon importation of the goods (such as VAT), this should be made clear by adding words to this effect: "Delivered duty paid, VAT unpaid [named place of destination]". This term may be used irrespective of the mode of transport.	**DDP**

Source: ICC, Incoterms 1990, Paris, ICC Publication No. 460.

Annex II

BRITISH MARINE INSURANCE COVERAGE

Type of risk		*Coverage*				
		Clause A	*Clause B*	*Clause C*	*War Clause*	*Strike Clause*
1.	Fire or explosion					
2.	Stranding, wreck, capsizing					
3.	Overturning, derailment of land vehicle					
4.	Collision of ship					
5.	Discharge of cargo at port of refuge					
6.	Earthquake, volcanic eruption, lightning					
7.	General average sacrifice					
8.	(*a*) Jettison					
	(*b*) Carrying away by sea					
9.	Entry of sea, lake or river water					
10.	Total loss of package during cargo handling					
11.	"Sue and labour clause" (protective measures)					
12.	Theft, looting, non-delivery					
13.	Damage due to condensation or heat					
14.	Contamination of other goods					
15.	Leakage					
16.	Breaking and other particular average					
Exclusions:						
	1. Negligence of the insured					
	2. Normal wear and tear, age					
	3 Insufficient or improper packaging					
	4. Inherent defect or nature of the goods insured					
	5. Delay					
	6. Insolvency of shipowner					
	7. Use of atomic weapon					
	8. Wrongful act					
	9. War					
	10. Strikes					

Source: D. Chevalier, "International Trade Forum", October-December 1989, p. 26.

Annex III

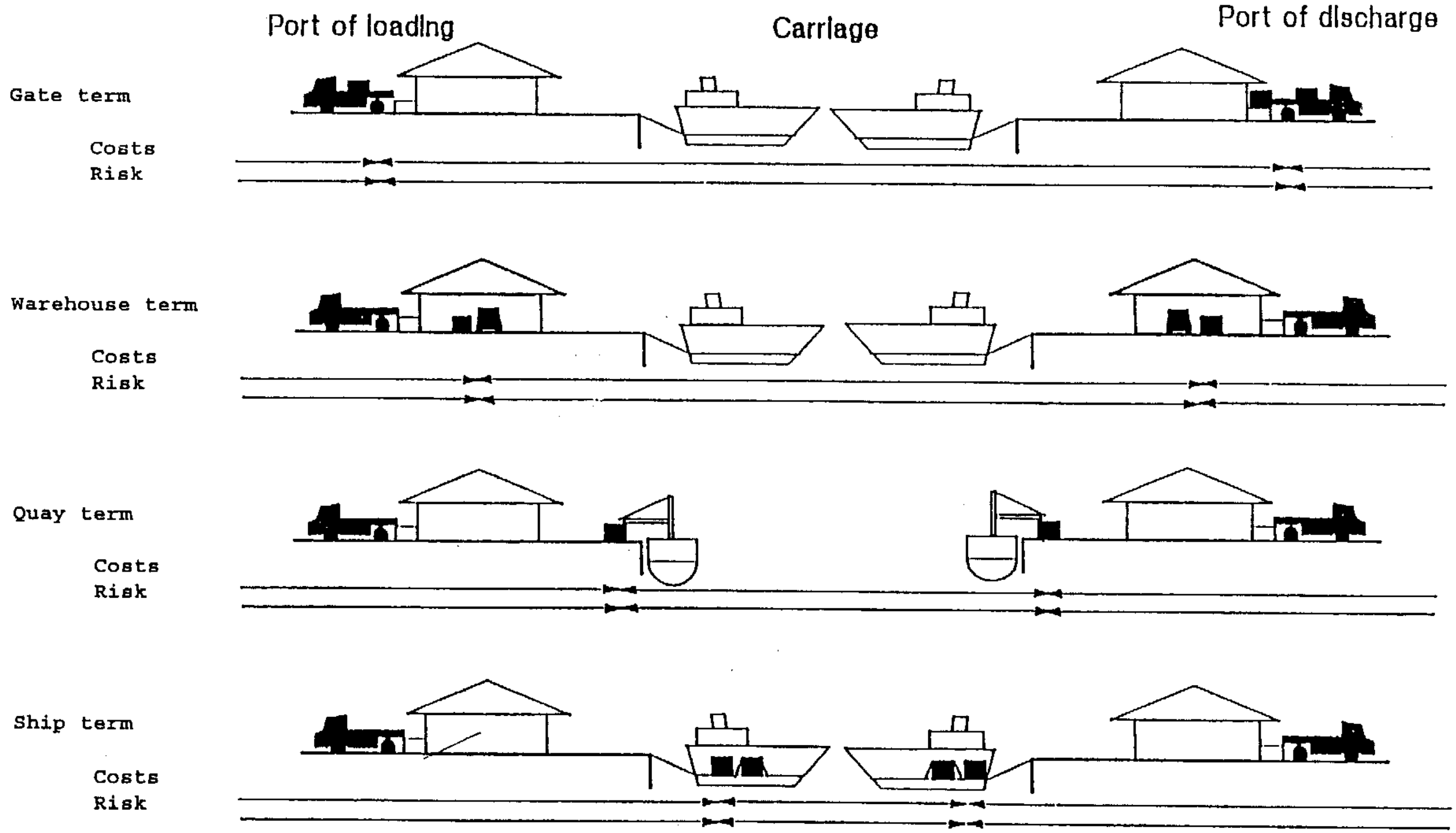
COMBITERMS: COST DISTRIBUTION BETWEEN SELLER AND BUYER

Code	Trade term	Description	Loading at seller's premises	Domestic precarriage/local cartage	Contract of carriage and dispatch	Trade documentation in country of exportation	Customs clearance in country of exportation	Export charges	Loading at carrier's terminal	Transportation equipment and accessories	Transport (cargo) insurance	International main carriage	Unloading at terminal (quay, wharf or port warehouse)	Trade documentation in country of transit/importation	Customs clearance in country of importation	Import charges	Local cartage/domestic on-carriage	Unloading at buyer's premises	Other costs
001	EXW	Ex-works [named place]	B	B	B	B	B	B	B	B		B	B	B	B	B	B	B	
002	FCA	Free carrier seller's premises	S	B	S	S	S	S	B	B		B	B	B	B	B	B	B	
003	FAS	Free alongside ship [named port of shipment]	S	S	B	B	B	B	B	B		B	B	B	B	B	B	B	
004	FOB	Free on board [named port of shipment]	S	S	S	S	S	S	B	B		B	B	B	B	B	B	B	
005	FCA	Free carrier [named terminal 1]	S	S	S	S	S	S	B	B		B	B	B	B	B	B	B	
006	CPT	Carriage paid to [named frontier point in country of dispatch]	S	S	S	S	S	S	S	S		S/B	B	B	B	B	B	B	
007	CIP	Carriage and insurance paid to [named frontier point in country of dispatch]	S	S	S	S	S	S	S	S	S	S/B	B	B	B	B	B	B	
008	CFR	Cost and freight [named port of destination]	S	S	S	S	S	S	S	S		S	S	B	B	B	B	B	
009	CIF	Cost, insurance and freight [named port of destination]	S	S	S	S	S	S	S	S	S	S	S	B	B	B	B	B	
010	CPT	Carriage paid to [named frontier point in country of destination]	S	S	S	S	S	S	S	S		S/B	B	B	B	B	B	B	
011	CIP	Carriage and insurance paid to [name of frontier point in country of destination]	S	S	S	S	S	S	S	S	S	S/B	B	B	B	B	B	B	
012	CPT	Carriage paid to [named terminal 2]	S	S	S	S	S	S	S	S		S	S	B	B	B	B	B	
013	CIP	Carriage and insurance paid to [named terminal 2]	S	S	S	S	S	S	S	S	S	S	S	B	B	B	B	B	
014	CPT	Carriage paid to buyer's premises	S	S	S	S	S	S	S	S		S	S	B	B	B	S	B	
015	CIP	Carriage and insurance paid to buyer's premises	S	S	S	S	S	S	S	S	S	S	S	B	B	B	S	B	
016	DES	Delivered ex-ship [named port of destination]	S	S	S	S	S	S	S	S		S	B	B	B	B	B	B	
017	DEQ	Delivered ex-quay [named port of destination], duty unpaid	S	S	S	S	S	S	S	S		S	S	B	B	B	B	B	
018	DAF	Delivered at frontier [named terminal 2]	S	S	S	S	S	S	S	S		S	S	B	B	B	B	B	
019	DDU	Delivered duty unpaid [named terminal 2]	S	S	S	S	S	S	S	S		S	S	B	B	B	B	B	
020	DEQ	Delivered ex-quay named port of destination], duty paid, exclusive of [named tax]	S	S	S	S	S	S	S	S		S	S	S	S	S	B	B	
021	DDP	Delivered duty paid [named terminal 2], exclusive of [named tax]	S	S	S	S	S	S	S	S		S	S	S	S	S	S	B	
022	DDU	Delivered duty unpaid buyer's premises	S	S	S	S	S	S	S	S		S	S	S	S	B	S	B	
023	DDP	Delivered duty paid, buyer's premises, exclusive of [named tax]	S	S	S	S	S	S	S	S		S	S	S	S	S	S	B	

Source: J. Ramberg, *ICC Guide to Incoterms*, Paris, January 1991.

Annex IV

STANDARD SHIPPING TERMS



Annex V

DISTRIBUTION OF COSTS AND RISKS PURSUANT TO INCOTERMS

■ Seller's risks and costs □ Buyer's risks and costs		Packing and checking	Loading	Inland transport	Export clearance	Handling	Main transport	Cargo insurance	Handling	Import clearance	Inland transport	Unloading	Mode of transport a/
Incoterms	Code												
Ex-works	EXW	■	□	□	□	□	□	□	□	□	□	□	MT
Free carrier [named place]	FCA	■	■	■	■	□	□	□	□	□	□	□	MT, AT, RT
Free alongside ship [named port of shipment]	FAS	■	■	■	□	□	□	□	□	□	□	□	ST
Free on board [named port of shipment]	FOB	■	■	■	■	■ □	□	□	□	□	□	□	ST
Cost and freight [named port of destination]	CFR	■	■	■	■	■	■	□	□	□	□	□	ST
Cost, insurance and freight [named port of destination]	CIF	■	■	■	■	■	■	■	□	□	□	□	ST
Carriage paid to [named place of destination]	CPT	■	■	■	■	■	■	□	□	□	□	□	MT
Carriage & insurance paid to [named place of destination]	CIP	■	■	■	■	■	■	■	□	□	□	□	MT
Delivered at frontier [named place]	DAF	■	■	■	■	■	■ □	■ □	□	□	□	□	MT
Delivered ex-ship [named port of destination]	DES	■	■	■	■	■	■	■	□	□	□	□	MT
Delivered ex-quay [named port of destination]	DEQ	■	■	■	■	■	■	■	■	■	□	□	ST
Delivered duty unpaid [named place of destination]	DDU	■	■	■	■	■	■	■	■	□	■	■	ST
Delivered duty paid [named place of destination]	DDP	■	■	■	■	■	■	■	■	■	■	■	MT

[a] MT: any mode, including multimodal AT: air transport RT: rail transport ST: sea and inland waterway transport

Annex VI

INTERNATIONAL USAGE OF TRADE PAYMENT TERMS

Payment terms across international trade routes

Routes	Payment terms (%) Open account	Letters of credit	Collections	Advance payments
Exports from the European Union[a]				
European Union	72	8	9	11
North America	70	10	8	12
Central and South America	18	48	12	22
Africa	22	46	8	12
Far East	28	45	15	12
Middle East	32	42	11	15
Asia	24	46	8	24
Imports to the European Union[a]				
European Union	73	8	12	7
North America	76	7	10	7
Central and South America	76	7	11	6
Africa	36	33	13	18
Far East	22	39	22	16
Middle East	28	42	18	12
Asia	20	26	24	12
United States exports to[b]				
European Union	76	7	10	7
Canada	60	30	5	5
South America	45	35	10	10
Africa	45	40	5	10
Far East	45	40	10	5
Middle East	75	15	5	5
Oceania	60	30	5	5
United States imports from[b]				
European Union	70	10	8	12
Canada	60	30	5	5
South America	60	30	5	5
Africa	50	40	5	5
Far East	40	45	10	5
Middle East	60	20	10	10
Oceania	50	35	10	5
Far East exports to[b]				
European Union	23	39	22	16
North America	35	55	5	5
South America	35	55	5	5
Africa	25	60	10	5

Middle East	45	45	5	5
Oceania	40	45	10	5
Far East imports from [b]				
European Union	28	45	15	12
North America	40	45	10	5
South America	45	35	10	5
Africa	45	45	5	5
Middle East	55	35	5	5
Oceania	50	40	5	5

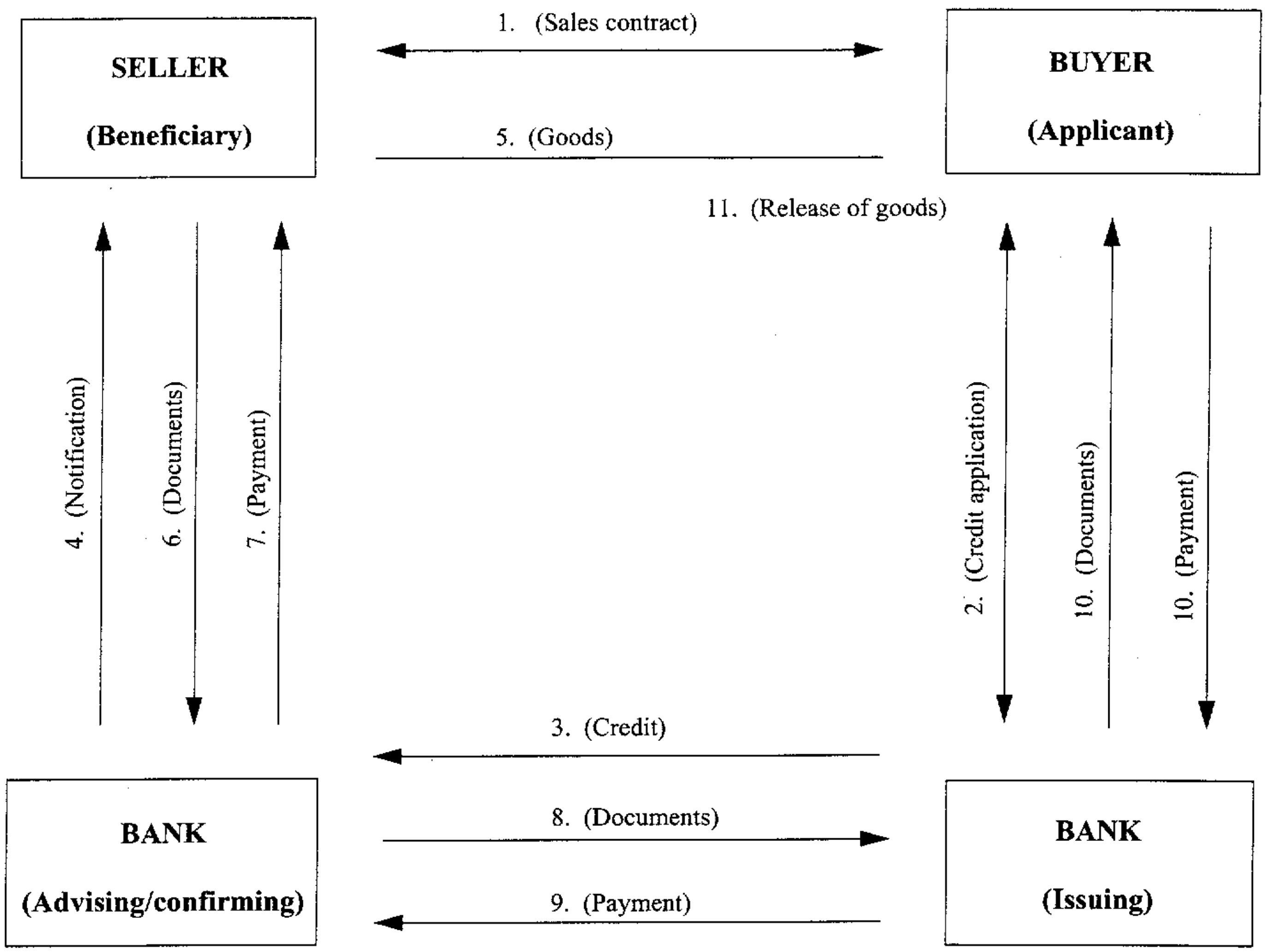
Source: Through Transport Mutual Insurance Association Ltd. and SWIFT s.c. The Bolero Project: used by permission.

[a] Information provided by the United Kingdom, Central Statistical Office and Department of Trade and Industry, 1994.

[b] Reproduced by kind permission of the Bank Relationship Consultancy, 1997.

Annex VII

THE STAGES OF A DOCUMENTARY CREDIT



Annex VIII

CHECKLIST FOR DOCUMENTARY CREDITS

A. Checklist for the seller after the issuance of the documentary credit

General points

- Does the documentary credit correspond with the contract, especially in connection with
  —the amount/unit price?
  —the period of validity/time limit for shipment?
  —the terms of delivery?
  —the description and origin of the merchandise?
- Is the documentary credit revocable, irrevocable/unconfirmed or confirmed?
- Is it transferable, if necessary?
- Where and how is the credit available?
- If unconfirmed or confirmed by a bank abroad, how do you assess
  (*a*) the credit risk (creditworthiness of the bank)?
  (*b*) the conditions in the buying country (political and transfer risk)?
  (*c*) the mailing risk (if credit is available abroad)?
- Are the names and addresses of the applicant and the beneficiary correct?
- Is the documentary credit subject to the ICC's currently valid Uniform Customs and Practice for Documentary Credits?
- Is there sufficient time available to complete attestation and authentication procedures?
- Are declarations requested in the documents which cannot be made?
- Are documents stipulated which are contradictory to the terms of delivery?
- Does the credit stipulate documents which need to be drawn up or countersigned by the buyer or his bank? (In such a case, the utilization of the credit depends to a large extent on the goodwill of the buyer.)
- Can the required number of specified documents be furnished?

Deadlines and shipment of goods

- Can the shipment deadline be met?
- Are the terms regarding the place where the goods are to be taken into possession and the points of departure and arrival feasible?
- Are part-shipments and trans-shipments prohibited contrary to the terms of contract?
- Can the prescribed marks and modes of transport be provided?
- Can the documents be presented in the desired form by the dates specified in the credit? (If the credit stipulates a transport document, the documents have to be presented at the bank not later that 21 days after the date of shipment unless the credit stipulates another time limit.)
- Are you familiar with the expressions of time utilized in the credit?

Draft

- Are you absolutely certain about the way the draft should be made out?

Invoice

- Can the description of the goods in the invoice be taken word for word from the documentary credit?

Transport documents in general

- Are you aware that if the transport document is not described precisely, banks do not accept any document that

  (*a*) is subject to a charter party (only in the case of seaborne transport),

  (*b*) designates loading on deck (only in the case of seaborne transport),

  (*c*) stipulates carriage by sailing ship,

  (d) is issued by a freight forwarder, unless such document is signed by the freight forwarder in capacity of the carrier or multimodal transport operator or as a named agent on behalf of a carrier or multimodal transport operator whose name is to be indicated on the document?

- Are you aware that if goods are exported through the intermediary of a company domiciled abroad (a subsidiary), in some countries the value of the merchandise has to be stated in the transport documents. Does this value correspond to the amount and the currency in your invoice?
- Rail freight: can the duplicate of the railway bill be obtained?

Marine/ocean bill of lading

- Does the freight forwarder who will issue the bill of lading act as carrier or as agent of an expressly named carrier?
- Is the bill of lading to be issued to order of the buyer or is it to be made out in his name? In both events it will be extremely difficult to arrange any return of the goods. This point should be taken into full account.
- Do the prescribed freight notations conform to the terms of delivery?

Charter party bill of lading

- Does the credit call for such document or allow that a charter party bill of lading is acceptable?

Multimodal transport document

- If goods must be dispatched by more than one mode of transport, does the credit call for a multimodal transport document?

Air transport document

- Does the freight forwarder who will issue the air transport document act as carrier or as agent for an expressly named carrier?

Insurance documents

- Can the terms of insurance be fulfilled?
- Will you be able to cover accurately the risks described in the credit? (Avoid imprecise formulations such as “customary risks”, etc.)
- Does the insurance cover exceed the requirements stipulated in the contract?

- Is it clear whether a policy or a certificate is required? (Broker's cover notes will not be accepted by the bank unless expressly permitted in the credit.)

Certificate of origin

- Are the Chamber of Commerce and a consulate willing to attest or authenticate the statements required to appear on the certificate of origin?
- If legalization is necessary, does the respective country maintain a consulate where needed?
- Can a certificate of origin issued in the country of origin be furnished in time?
- Can the legalization be effected in time?

B. Checklist for the seller for the verification of the documents prior to presentation to the bank

General points

- Is the credit still valid and have the shipment dates been adhered to?
- Are the documents all present in the prescribed form and number? Can they be presented at the bank within the prescribed period after the date of shipment? If no such condition is stipulated in the credit, a period of 21 days is valid according to article 43 (a) of the UCP.
- Are the data in the documents consistent with each other?
- Are the attestation and legalization procedures completed?
- Have, contrary to the terms of the credit, part-shipments or partial utilizations been effected?

Draft (bill of exchange)

- Does the form of the draft meet the legal requirements?
- Does the draft, if made out to the order of the beneficiary, bear an endorsement?
- Does the draft contain all the clauses required in the credit?

Invoice

- Is the invoice signed in the event that it is stipulated in the credit or in case the invoice includes any certificates, affidavits, etc.?
- Unless otherwise stipulated in the credit, is the invoice made out in the name of the applicant of the credit (article 37 (a) (i) of the UCP)?
- Do the currency and the amount stated in the invoice as well as the individual items correspond to the terms of the credit?
- Does the description of the goods correspond exactly to the description in the credit (article 37 (c) of the UCP)? We recommend that this is rendered word for word.
- Are the terms of delivery, price and, if stipulated, customs tariff and licence numbers, etc., specified?
- Are any additional goods or costs listed in the invoice which are not stipulated in the documentary credit or implied in its delivery terms?

Transport documents in general

Documents which evidence shipment on board or dispatch or taking in charge or acceptance for carriage or receipt for dispatch

- Is the document issued by a freight forwarder not acting as carrier or agent of an expressly mentioned carrier?

- Is the transport document "clean", that is, without bearing a clause or notation which expressly declares a defective condition of the goods and/or the packaging?
- Did you ensure that in the case of seaborne transport, the transport document is not subject to a charter party or does not stipulate loading on deck?
- Are the goods, contrary to the terms of the credit, to be trans-shipped (see articles 23, 24, 26, 27 and 28 of the UCP)?

Marine/ocean bill of lading

If, as transport document, a bill of lading covering port-to-port shipment is stipulated:

- Does it indicate the name of the carrier and is it signed by the carrier or the master, or named agent on behalf of the carrier/master?
- Does it stipulate that the goods have been shipped on board an expressly mentioned vessel?
- Has the full set of originals been handed over?
- Is it marked "charter party" or were the goods transported on deck?
- Does the word "intended" or a similar expression appear in connection with the vessel or the port of loading or discharge? The notation "intended" is only permitted under certain conditions (see article 23 (a) (ii) and (iii) of the UCP).
- Are goods, contrary to the terms of the credit, to be trans-shipped (see article 23 (b), (c) and (d) of the UCP)?
- Did you make certain that it was not issued by a freight forwarder (unless the freight forwarder is acting as carrier or agent of an expressly named carrier - see article 30 of the UCP)?
- Is the merchandise consigned as stipulated (bearer, to order of a named consignee or direct to a named consignee without a "to order" notation)?
- Is the "notify address" correct?
- Are the original bills of lading properly signed, and endorsed if necessary?
- Do all the bills of lading show the number of originals issued?
- Is the bill of lading "clean", that is, without bearing a clause or notation which expressly declares a defective condition of the goods and/or the packaging?
- Are all alterations on the bill of lading properly countersigned?

Charter party bill of lading

- Does it contain an indication that it is subject to a charter party?
- Is it signed by the master or owner, or by a named agent for the master/owner?

Multimodal transport document

- Does it indicate the name of the carrier or multimodal transport operator?
- Is it signed by the carrier or multimodal transport operator or master, or by a named agent for one of the three parties?

Courier and post receipts

- Is the receipt of goods for delivery stamped or signed by a named courier service and does it indicate the date of pick-up or of receipt?
- Is the postal receipt issued or stamped at the same place stipulated in the credit as being the place of dispatch?

Air transport document

- Does the air transport document indicate the name of the carrier and is it stamped and/or signed by the carrier or a named agent on behalf of the carrier? (Air transport documents issued by freight forwarders will not be accepted by the bank unless the freight forwarder is acting as carrier or agent for an expressly named carrier.)
- Is the original air transport document to be submitted to the bank the so-called "original for consignor/shipper"?
- Whenever stipulated in the credit, does the air transport document, in addition to the date of issuance, bear separately the actual date of dispatch? The information appearing in the box on the air transport document (marked "for carrier use only" or similar expression) relative to the flight number and date will not be considered as a specific notation of such date of dispatch.
- Is the air transport document "clean", that is, without bearing a clause or notation which expressly declares a defective condition of the goods and/or the packaging?
- Are the consignee's name and address in agreement with the terms of the credit?

Insurance documents

- Is the insurance document of the right type (i.e. is it a policy or a certificate, etc.)? Brokers' cover notes are not accepted by the bank unless expressly permitted in the credit.
- Are the specified risks covered?
- Has the document
  - been submitted in a full set?
  - been endorsed, if necessary?
  - not been dated later than the date of dispatch? (if not, the document must expressly state that insurance cover is effective at the latest from the date of loading on board or dispatch or taking in charge of the goods, according to article 34 (e) of the UCP.)
  - been issued in the same currency as the credit and for the specified amount, or at least for the CIF or CIP value plus 10 per cent? (If the CIF/CIP value cannot be determined, 110 per cent of either the amount drawn under the credit or the gross amount of the relative commercial invoice, whichever is greater, applies.)

Certificate of origin

- Has it been attested/authenticated by the required authorities?
- If necessary, has it been issued in the country of origin of the goods?

Weight list

- Are the exact gross and net weights specified? Do they correspond to those shown in the other documents?
- If the credit stipulates a certificate of weight, has this document been signed?

Packing list

- Does the packing list contain the necessary details such as total number of units, number of units in each package, container breakdown, etc.?
- Are the marks consistent with those on the transport document?

Certificates of analysis and survey

- Were they issued and signed by the required companies?
- Are the results of the analysis consistent with the terms of the credit and do they correspond with the data in the other documents?

Consular invoice

- Is the consular invoice "customary in trade", i.e., does it conform to the regulations of the importing country?
- Have the attestation regulations been fulfilled?
- If a breakdown of the CIF invoice amount in FOB plus freight plus insurance costs has been stipulated, are those details consistent with the other documents?

Source: Union Bank of Switzerland (January 1994).

Annex IX

SPECIMEN OF IRREVOCABLE STANDBY LETTER OF CREDIT

From,

To (Beneficiary's Bank)

Test on CHF

, - our ref. SPECIMEN

attn.

IRREVOCABLE STANDBY LETTER OF CREDIT No. SPECIMEN

We hereby issue our Irrevocable Standby Letter of Credit as per following specifications:

Form of Credit:	Irrevocable
Credit Number:	SPECIMEN
Reference pre-advice:	
Date of issue of credit:	
Date and place of expiry:	( )/
Issuing Bank:	Bank
Applicant:	
Beneficiary:	
Currency/Amount:	CHF (Swiss Francs)
Available with:	
by:	Payment. We shall effect payment to a bank account of your choice with a deferred value date of banking days after receipt of your duly encoded telex or cable or swift confirming that you have taken up and despatched to our address documents strictly complying with the terms and conditions of this Irrevocable Standby Letter of Credit.
Partial drawings:	allowed
Covering/relating to:	
Documents:	Beneficiary's duly signed statement that applicant , ... (e.g. has failed to fulfil his contractual obligations ...).
Additional conditions:	
Commission and charges:	All commission and charges outside Switzerland are for beneficiary's account.
Period for Presentation of documents:	Within credit validity
Confirmation instructions:	Add your confirmation
Operative instrument:	Yes

We hereby undertake that payment will be effected if documents tendered comply with the credit terms and if all other conditions of this credit are fulfilled.

This credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1993 revision, ICC Publication No. 500.

Documents to be sent to us by registered airmail/by courier service in one lot to the following address:

Bank

Document

Source: UBS (1998)

Annex X

SPECIMEN OF PERFORMANCE BOND

PERFORMANCE BOND No. SPECIMEN

Dear Madams, dear Sirs

You have concluded on with Messrs , a contract No. for at a price of CHF . As security for the due performance of the contract, an indemnity by a bank shall be furnished.

At the request of Messrs , we, the BANK , herewith irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above-mentioned contract and waiving all rights of objection and defence arising therefrom, any amount up to

CHF *(Swiss Francs)*

upon receipt of your duly signed request for payment stating that Messrs , have failed to fulfil their contractual obligations.

The total amount of this indemnity will be reduced by any payment effected hereunder.

For the purpose of identification, your request for payment in writing has to be presented to us through the intermediary of a first rate bank confirming that the signatures thereon are legally binding upon you.

Your claim is also acceptable if transmitted to us in full by duly encoded telex/cable/swift through a first rate bank confirming that your original claim has been sent to us by registered mail and that the signatures thereon are legally binding upon you.

Your claim will be considered as having been made once we are in possession of your written request for payment or the telex or cable or swift to this effect at our above address.

Our indemnity is valid until

______________ ( )

and expires in full and automatically if your claim has not been made on or before that date, regardless of such date being a banking day or not.

This indemnity is governed by Swiss law, place of jurisdiction is Geneva.

Document

Source: UBS (1998)

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