

### From the editor



There is one song whose lyrics I tend to return to more and more; the Bob Dylan song 'The Times They Are A-Changin.' The times are certainly changing and it is as if everything is in the midst of a huge transition. I will indeed be interesting to see where everything lands.

This is the first issue for the new year and we have made some changes to the magazine. First of all we have introduced a new structure for the country correspondent discussions. The aim is to present the discussions in a more concise form by not showing each detail and turn of the discussion, but rather by trying to capture the various main angles and arguments presented. All of this of course will depend on the topic at hand and the discussion that take place. This issue of the newsletter presents

four discussions in this new form. Any comment you may have on this is of course appreciated, just as we appreciate any sort of feedback, comments, and questions in general.

Another change is that we have introduced a new section called 'News Flash' where we present some news from the world of trade services. A bit of 'news' revealed here is that the banking commission will meet end March in Doha.

All for now – I thank you for your support, and hope you will enjoy this changed issue of the LCM Newsletter.

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# TRADE SERVICES UPDATE

Volume 14, Issue 1, January – February 2012

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## TRADE SERVICES UPDATE

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### The editorial board expands

This time it is my pleasure to announce the appointment to the editorial board of

A small portrait photograph of Mr. Bob Ronai, a man with glasses and a light-colored shirt.	<p><b>Mr. Bob Ronai</b></p> <p>As Contributing Editor</p> <p>See bio at: <a href="http://tradeservicesupdate.com/editor_bob">http://tradeservicesupdate.com/editor_bob</a></p>
	<p><b>Mr. Wu Yihai</b></p> <p>As Contributing Editor</p>

Best regards  
Kim Sindberg

## Are Bankers Placing Too Much Emphasis on Port-to-Port shipments?

By Glenn D. Ransier



Glenn Ransier is Senior Director, Global Trade Products Operations for American Express Bank Ltd.

Bio: [http://tradeservicesupdate.com/editor\\_ransier](http://tradeservicesupdate.com/editor_ransier)

In April 2010, the ICC published ‘Recommendations of the Banking Commission in Respect of the Requirements for an On Board Notation.’ The link is:

[http://www.iccwbo.org/uploadedFiles/ICC/policy/banking\\_technique/Statements/1128%20rev%20FINAL\\_ON%20BOARD%20NOTATION%20PAPER%20\(Clean%20version\).pdf](http://www.iccwbo.org/uploadedFiles/ICC/policy/banking_technique/Statements/1128%20rev%20FINAL_ON%20BOARD%20NOTATION%20PAPER%20(Clean%20version).pdf)

Embedded in this document (pages 4-5) is the question and answer to: ‘Which article of UCP 600 is applicable for the examination of a transport document.’ The beginning of the stated response is: ‘Transport documents must be examined under the article that is applicable to the conditions stated in the credit. These conditions included: the type of document that is to be presented **AND** (emphasis added) the details given in respect to the shipment of the goods, e.g., those shown in fields 44A, E, F, or B of the MT700, 710, or 720.’ It goes on to state: ‘For avoidance of any doubt, any document called for by a credit containing the phrase ‘bill of lading’ **AND** (emphasis added) asking for port to port shipment ... is to be examined against Article 20, not Article 19.’

Issuers (and presumably applicants) were again reminded that they should pick the appropriate transport document for each LC with a clear understanding that in today’s world most shipments have an element of combined transport occurring. In fact, the use of SWIFT fields 44A, 44E, 44F, or 44B are discussed: LCs requiring only SWIFT fields 44E and 44F are seeking the now somewhat elusive port-to-port shipment. Use of SWIFT fields 44A and 44B only mandate a multimodal or combined transport document. Any use of three or four of the four SWIFT fields requires a multimodal or combined transport document.

Apparently, not all issuers are getting the information. Sadly, LCs continue to be issued with contradicting instructions. For example:

LC requires:

‘ 44A Des Moines, Iowa  
44B Miami, Florida  
44F Rio de Janeiro, Brazil

Full Set of Clean on Board Ocean Bills of Lading consigned to:’

Given the April 10 recommendation document, this LC should have required a combined transport document. In addition, where either SWIFT field 44E or 44F is not a seaport then again the appropriate document is a combined transport document. However, as questions still arise from our correspondents, and as questions on this nature are still being forwarded to the ICC for an opinion, it’s apparent that the message is not being heard. I wonder how many of us have educated our clients and/or even changed our LC Application form?

The question now becomes that if LCs are issued in this manner should an examiner review them against the requirements of article 19 or article 20? Clearly, based on the recommendation paper, I would have presumed that article 19 was the appropriate UCP article. However, after the recommendation document came into effect, ICC Opinion TA735rev (unpublished) was issued. This opinion offered a similar set of LC provisions but ultimately indicated that Article 20 is the



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appropriate article because the LC required a bill of lading. It also noted that the LC should have required a combined transport document. This can only lead to confusion.

For fun, I used Google's search engine to lookup 'Multimodal Transport' and received a long list of results. From Wikipedia we learn that: 'Multimodal transport (also known as combined transport) is the transportation of goods under a single contract, but performed with at least two different means of [transport](#); the carrier is liable (in a legal sense) for the entire carriage, even though it is performed by several different modes of transport (by rail, sea, and road, for example). The carrier does not have to possess all the means of transport and in practice usually does not; the carriage is often performed by sub-carriers (referred to in legal language as "actual carriers"). The carrier responsible for the entire carriage is referred to as a multimodal transport operator, or MTO.'

I performed a similar search for port-to-port shipping and port-to-port transport and port-to-port bills of lading. The result was not what you might expect. In fact, the BusinessDictionary.com defined multimodal but only had this to say for 'port to port bill of lading' as: 'Which is not a multimodal bill of lading.'

The UCP allows bankers to accept article 20 bills of lading and/or article 19 transport documents 'however named.' Clearly the title of a document is not the driver as to what is acceptable. I then reviewed a BL covering a port-to-port shipment. It had this to say: 'Port of Discharge' means a port or place so named overleaf or any other port where the goods are discharged from the Vessel in accordance with Clause 6 or discharged from the Vessel as a disposal ...'

Given this, I have to ask, is the UCP concept of a port-to-port bill of lading still needed? Are we, as bankers, placing too much emphasis on the port-to-port or the bill of lading concepts? Given the ICC documents contained herein, will a court substantiate the refusal of a document for examining it against article 20 versus article 19 and vice versa?

## An Evolution of Problems with of Non Documentary Conditions & their Possible Solutions

By A.T.M Nesarul Hoque



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### Introduction:

The practice of incorporating non-documentary conditions has caused deep concern to the documentary credit world from the early 1980s. From the time of the UCP 400 onwards, the banking commission has left no stone unturned to eradicate this 'totally wrong practice.' In a major development, the Banking Commission has made its position clear before the court that no reasonable documentary proof is required to be presented in order to satisfy a non-documentary condition under a documentary credit. But the ultimate objective, that is to deter the issuer from incorporating non-documentary conditions, has yet to be satisfactory. The objective of this article is to analyse the issue from a historical perspective in order to find out the root cause of it and its possible solutions.

### Position under the UCP 400:

Although there was a provision in the UCP 400, sub-article 22(a), that a credit or any amendment must state precisely the document(s) against which payment, acceptance, or negotiation is to be made, bankers all over the world have frequently incorporated non-documentary conditions in documentary credits. During this time, the English courts construed non-documentary terms in a documentary credit as requiring the production of a reasonable document evidencing its satisfaction.<sup>1</sup> This approach was evolved in the leading case of *Banque de l'Indochine et de Suez SA v JH Rayner (Mincing Lane) Ltd.*<sup>2</sup> The plaintiff bank confirmed a documentary credit opened by a Djibouti bank in favour of the defendant beneficiary. A clause in the documentary credit stated: '**Shipment to be effected on vessel belonging to shipping company, member of an International Shipping Conference.**' In the course of delivering the main judgment of the Court of Appeal, **Sir John Donaldson M.R.**, in relation to the credit's requirement quoted above, observed:

*'What the letter of credit should have done was to call for a specific document which was acceptable to the buyer [account party] and his bank evidencing the fact that the vessel was owned by a member of a conference. It did not do so and as, accordingly, the confirming bank had to be satisfied of the fact, it was entitled to call for any evidence establishing that fact.'*

Despite describing the above non-documentary condition as an unfortunate one, the courts adhered strictly to the acceptance of any evidence establishing that fact.

Later on in a meeting on 17 January 1984, The Banking Commission commented on a similar query<sup>3</sup> made by the Indian Banking Association, where a documentary credit stipulated the following condition: '**Shipment should be made by first class non-overflow vessel duly certified by Lloyds, London, and documentary evidence to this effect should accompany documents**' followed by an amendment which only mentioned '**Vessel certified by Lloyds.**' The negotiating bank accepted

<sup>1</sup> 'Non-documentary requirements in letters of credit transactions: what is the bank's obligation today?' By Ebenezer Adodo in 2008, *Journal of Business Law*.

<sup>2</sup> *Banque de l'Indochine v JH Rayner* [1983] Q.B. 711

<sup>3</sup> ICC Official opinion R-111, *Opinions of the ICC Banking Commission 1984-1986*, ICC publication no. 434.

a certificate issued by the shipping company to the effect that the vessel in question was a **‘first class non-coverage vessel duly certified by Lloyds, London.’**

Subsequently the issuing bank rejected the presentation on the plea that the stated certificate was not issued by Lloyds. While responding to the above query, the Banking Commission had the following comments:

- That English Court had recently decided in a similar case that a document of some type was required in these circumstances.
- ‘...credits should stipulate by whom certain documents are to be issued and their wording or data content. If the credit does not so stipulate, the Bank will accept such a document as is presented, provided that their data content relates the goods and/or services referred to therein to those referred to in the commercial invoice(s) presented or to those referred to in the credit ...’

Hence, the position of UCP 400 regarding the non-documentary conditions issue is that the beneficiary had to present reasonable documentary proof in order to comply with a non-documentary condition in the credit.

The main problem with the above position is that the requirement of reasonable documentary proof gives banks some degree of discretion in deciding what kind of document is sufficient to fulfil the non-documentary condition, which gives rise to uncertainty and unfairness to the parties seeking to comply with the credit requirement.<sup>4</sup>

#### Position of the UCP 500:

For the above reason the UCP 500 drafting group shifted from its old position by incorporating sub-article 13(c), i.e.:

*‘If a credit contains conditions without stating the document(s) to be presented in compliance herewith, banks will deem such conditions as not stated and will disregard them.’*

While explaining the above sub-article, former chairmen of ICC Charles del Busto explicitly mentioned in an interview in *DCInsight* [Volume 1 No 1 Winter 1995] that responsibility for fulfilment of non-documentary conditions must be on issuer’s shoulder, i.e.:

*‘...nebulous conditions are the responsibility and the liability of the authors of the credit. And who are the authors of the credit? The authors of the credit are the applicant and the issuing bank. It is their duty to protect their interests, and to define in the instruction to issue and in the credit itself what evidence they require to substantiate certain conditions on a credit. It is not for a bank or a beneficiary to guess what the intent is. And in order to protect a beneficiary and any bank that wishes to negotiate or pay, as the case may be, we are putting the responsibility where it rests, with the authors of the credit.’*

Unfortunately the problem remained unsettled as the applicant and the issuing bank continuously stipulated a condition without calling for specific documentary evidence. Consequently on 1 September 1994 the ICC decided to promulgate a position paper [position paper no.3] in order to make its position clear on the **‘Non- Documentary Conditions’** issue. In that position paper the ICC not only explained what a documentary condition is and how to develop it as a condition in a documentary credit, but also addressed the non-documentary conditions in a documentary credit as a **‘totally wrong practice.’**<sup>5</sup> The banking commission stated that there were two ways to achieved documentary conditions in a credit, i.e.:

- **Directly asking for a document:** commercial invoice, packing list, bill of lading, etc.
- **Linkage formula:**

A condition appears in a documentary credit that can be clearly linked to a document stipulated in that documentary credit. Such a condition is not then deemed to be a non-documentary condition. For example: if a condition in the documentary credit states that the goods are to be of German origin and no Certificate

<sup>4</sup> *The Law and Practice of Documentary Letters of Credit* by Peter Ellinger and Dora Neo, Page no. 238

<sup>5</sup> *In Position Paper 3, Non-Documentary Conditions.*

of Origin is called for, the reference to 'German origin' would be deemed to be a non-documentary condition and disregarded in accordance with UCP 500, sub-Article 13(c). If, however, the same documentary credit stipulated a Certificate of Origin, then this would not be a non-documentary condition as the Certificate of Origin would evidence the German origin.

Unfortunately the '**linkage formula**' gave rise to confusion among trade practitioners during the lifetime of the UCP 500. If the condition in a credit was not explicitly referred by a particular document, it caused debate as to whether it was a documentary or a non-documentary condition.

## Position of the UCP 600:

In order to remove the confusion caused by the '**linkage formula**,' during the course of the revision, the drafting group proposed several alternatives to ICC national committees for the treatment of non-documentary conditions. The group aimed at a wording different from that in UCP 500 which would allow for a different interpretations and applications; however, none of these was considered to be preferable to the existing rule.<sup>6</sup> As a result, the drafting group decided to maintain language similar to sub-article 13(c) of the UCP-500 in sub-article 14(h) of the UCP 600:

*'If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.'*

Thus the position of the UCP 600 is a bit narrower compared with the UCP 500,<sup>7</sup> that is, if a documentary credit stipulates a condition without indicating the document required for compliance, the bank should simply treat the condition as if it did not exist and disregard it. To avoid this happening, instead of stating '**Shipment by conference line vessel**', the documentary credit might state, '**Shipping company certificate stating the goods are shipped on a conference line vessel**' or '**Bill of lading to indicate shipment by conference line vessel.**'

## Unresolved issue:

In order to analyse the issue we seek the help of ICC Official Opinion R-631 where

'Credits received include a condition stipulating details of transport to and from and latest shipment date but without stipulating the requirement for presentation of a document indicating compliance with the condition.'

In this regard the ICC Banking Commission opined that the data mentioned in the credit may be disregarded for the purpose of determining a complying presentation and need not be stated in any other stipulated document presented. However, if the data mentioned in the credit appeared on any other stipulated documents it will still be subject to review under sub-article 14 (d).

But the banking commission has not provided any guidelines regarding the following question:

- What if the beneficiary presents a bill of lading [as documentary evidence to comply with a non-documentary condition, even if not called for by the respective DC] in compliance with the above condition:
  - Do we treat the bill of lading as an extraneous document?
    - If the answer is yes, will the court uphold the same position?
    - If the answer is no, can we confined our examination basis only on sub-article 14(d) rather than extending to respective sub-article [in our case Article 20]
    - Will the discrepancy in the presented document [other than sub-article 14(d)] jeopardize the issuing bank reimbursement from the applicant?

<sup>6</sup> Commentary of UCP 600, Pages 44-5

<sup>7</sup> Ibid.

## Conclusion:

In order to remove the non-documentary conditions problem from the documentary credit world, we would recommend the following two approaches:

### 1. Policy-related recommendation:

- From the historical analysis [from the UCP400 to the UCP600], it has been revealed that the UCP changes its stand from one version to another. Lack of consistency in the application the non-documentary conditions thwarts the ability of the trade practitioner to gain experience in this area.
- Trade practitioners need some guidelines in the upcoming ISBP regarding this unresolved issue.

### 2. Practice - related recommendation:

A combined approach by the different banks involved in a documentary credit might bring a very satisfactory result on the non-documentary condition issue. In this regard, I would like to conclude my article with a remark from Justice Raymond Jack<sup>8</sup>:

*‘The alternative which was considered and rejected was that a bank might accept any documentary proof which it deemed sufficient where there was a non-documentary condition. The problem of non-documentary conditions is a real one, to which the article [sub-article 13(c) of UCP 500] may provide a solution. The only satisfactory solution, however, is that banks should not accept instructions to issue or to confirm credits containing non-documentary conditions.’*

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<sup>8</sup> *Documentary Credits*, Raymond Jack, 2nd edition, page 149



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## TRADE SERVICES UPDATE

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### Accelerating global trade finance

By André Casterman

André Casterman is Head of Banking and Trade at SWIFT and Co-Chair of the BPO Project at the International Chamber of Commerce (ICC)

#### Accelerating global trade finance

The partnership between the ICC and SWIFT will revolutionise global trade finance practices by leveraging electronic transaction data available from dematerialised business-to-business processes and by establishing paperless inter-bank practices

*Brussels, January 18<sup>th</sup> 2012*

#### A unique partnership to achieve an ambitious goal

In my initial Opinion Piece entitled “Collaborative supply chain finance - A few more steps to go” published in SWIFT’s Dialogue magazine of October 2010, I advocated that the time had come for “*the International Chamber of Commerce (ICC) to embrace the BPO rules, and help the industry establish best practices in supply chain finance*”. I also suggested that “*a set of ICC rules governing collaborative supply chain finance will be a key milestone for the trade banks as such rules will offer a legally binding, valid and enforceable risk mitigation instrument for financing open account transactions*”.

One year on, at Sibos in Toronto, the ICC and SWIFT confirmed their joint ambition and action plan to provide the global trade industry with new rules and tools in support of the development of international trade in the 21st century.

The ICC was established in 1919 to facilitate the flow of international trade. It was in that spirit that the Uniform Customs & Practice for Documentary Credits (UCP) were first introduced in 1933 to alleviate the confusion caused by individual countries’ promoting their own national rules on letter of credit practice. The objective was to create a set of contractual rules that would establish uniformity. The ICC rules on documentary credits, UCP 600, are the most successful privately drafted rules for trade ever developed.

SWIFT is a member-owned cooperative through which the financial world conducts its business operations. SWIFT provides a worldwide communications platform, products and services that allow customers to connect and exchange financial information securely and reliably. SWIFT also acts as a catalyst to bring the financial community together to collaboratively shape market practices, define standards such as the ISO 20022 financial messaging standards and develop global technology solutions such as SWIFTNet messaging and transaction matching services.

The recently signed partnership is now well underway with an ambitious timetable aiming to establish the new “Bank Payment Obligation” rules by Q2 2013. The goal of both industry-owned organisations is to enable banks to extend the benefits of the letter of credit to the Open Account world by re-using electronic transaction data available from their corporate customers. Using the BPO, sellers will benefit from timely payments whereas buyers will be able to support pre-shipment finance of their strategic suppliers without conceding advance payments.

#### The opportunity for the trade finance industry

The physical supply chain has significantly increased efficiency through the use of new technologies and business models. By doing so, trading counterparties have accelerated their industry-specific processes, reduced handling costs and inventories, increased visibility and improved forecasting and planning. Some industries have succeeded to shorten order and delivery processes from an average 20-plus days to same-day execution. However on the banking side, most of the supporting global trade finance processes have not been optimised sufficiently due to e.g., paper-based practices slowing down key processes such as discrepancies handling.

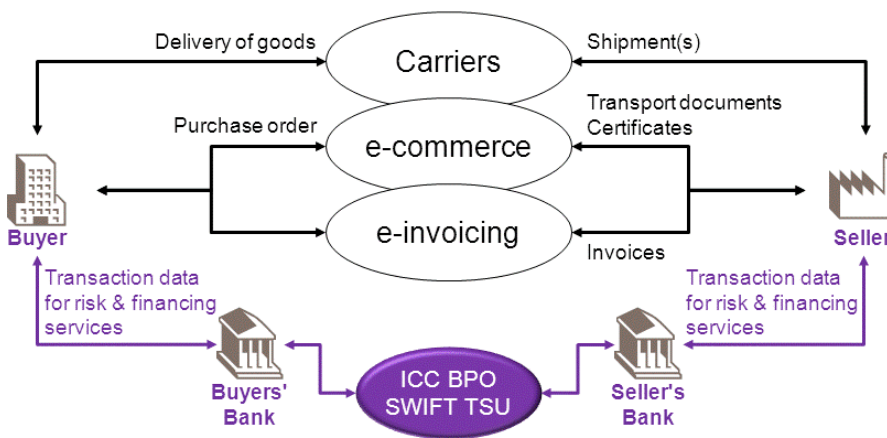
The time has now come for the trade finance industry to link the delivery of financial services to what is actually happening in the physical supply chain in a more efficient way, i.e., using electronic transaction data. The emergence of trading hubs (e.g., South Korea, Taiwan, Hong Kong) and business-to-business e-commerce/e-invoicing platforms (e.g., Ariba, GXS, PayModeX, Peppol, Tradeshift) has significantly increased the dematerialisation of business-to-business processes such as sourcing, negotiation, quotation, ordering, shipping, invoicing, ... Such new electronic business-to-business processes have created a new paperless world where efficiency gains and cost reduction are achieved to the benefits of both buyers and sellers. Buyers and sellers now expect their banking partners to follow suit.

## The ICC BPO leverages electronic transaction data

The dematerialised business-to-business processes offer banks the opportunity to extend today's paper-based trade finance services to new services based on electronic transaction data.

The co-operation between the ICC and SWIFT is delivering a complete package made of new rules (the Bank Payment Obligation) as well as new messaging standards (ISO 20022 standards) and a new SWIFT cloud application for supply chain finance (Trade Services Utility or TSU). The new rules and messaging standards enable banks to leverage electronic transaction data available from the business-to-business world. Using data representing the purchase order, the invoice, the certificates and the transport documents offers banks the ability to accelerate global trade finance processes as well as increase visibility on transaction details (e.g., line items) in order to better mitigate risk and finance transactions.

Figure 1: ICC BPO Rules and SWIFT's TSU



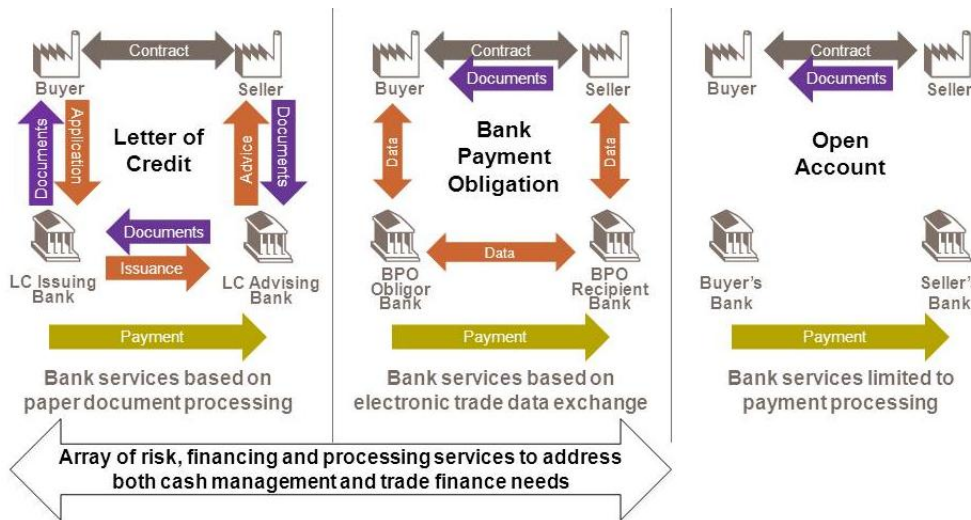
Source: SWIFT

## The ICC BPO offers a modern instrument

There has never been an equivalent instrument to enable an exporter to trade on Open Account (OA) terms with the same degree of confidence that a payment will be executed in accordance with the terms of a letter of credit. The BPO is an irrevocable undertaking given by one bank to another bank that payment will be made on a specified date, after a specified event has taken place. This "specified event" is evidenced by feeding the relevant data elements taken from a range of associated OA documentation such as purchase orders, commercial invoices, advanced shipment notices, bills of lading, etc into a shared matching application which then generates a "match" report to show that the description of goods shipped matches precisely the description of goods ordered. The BPO places a legal obligation on the issuing bank to pay the recipient bank subject to the successful matching of compliant data. In short, the BPO delivers business benefits and security equivalent to those previously obtained through a commercial letter of credit, whilst at the same time eliminating the drawbacks of manual processing typically associated with traditional trade finance.

Certainty of payment not only facilitates access to flexible forms of financing but also supports the more efficient management of working capital, enabling the release of substantial volumes of cash which might otherwise be trapped in the supply chain. Whereas banks have attempted in part to plug the gap, for example through the issuance of conditional payment guarantees or standby letters of credit, the BPO acts as an electronic inter-bank conditional promise to pay offering a comprehensive and cost-effective risk mitigation and financing tool to all trading counterparties.

Figure 2: BPO Brings Benefits of L/C to Open Account Market



Source: SWIFT

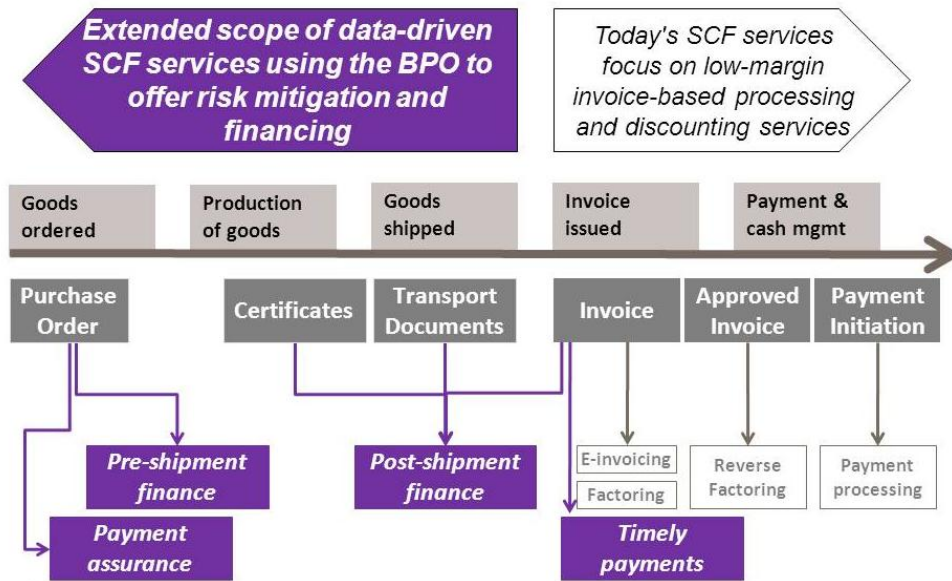
### The ICC BPO extends the scope of SCF using electronic data

Although data-driven supply chain finance (SCF) solutions are widely available from large banks and from some third-party vendors, most are limited to the last mile of the transaction, i.e. using the invoice approved by the buyer to finance the supplier's receivables. Although addressing suppliers' working capital issues, this type of offering only represents a small – yet relevant – step when considering the real potential of supply chain finance across the full transaction lifecycle.

With the BPO, banks are involved as from the very early stage of the trade transaction, i.e., the raising of the purchase order, and at every stage of the transaction lifecycle. This is a key difference for banks that wish to provide, for example, payment risk mitigation and/or pre-shipment finance in a secure, efficient and collaborative way. Such services represent much higher value for corporates. Both large and mid-caps sellers will enjoy timely payments when dealing on OA terms since payment will be done by their own bank independently of effective payment by the buyers. When needed, buyers with strong credit ratings will be able to facilitate pre-shipment finance to support their critical suppliers whilst not using their own capital as it is often the case today.

Contrary to today's reverse factoring services which are driven by large buyers, the BPO is offering an industry-wide multi-bank instrument relevant to any type of corporate in any industry.

Figure 3: BPO Extends SCF Services to Higher value Risk and Financing Services



Source: SWIFT

## Conclusion

Both the ICC and SWIFT believe that by working together and leveraging their respective positions in the trade finance community, the BPO will have an important role to play in supporting the development of international trade in the 21st century in addressing cost pressures in the face of increased automation and changes in the regulatory environment. By using electronic transaction data, the banking industry is preparing itself to better respond to the desire of their corporate clients to accelerate financial processes and optimise working capital.

The time has now come for banks to prepare for this innovation and start extending their supply chain finance services from invoice-based processing services (e.g., e-invoicing, factoring and reverse factoring) to PO-based services such as payment assurance, risk mitigation, pre-shipment and post-shipment finance. Banks will be able to better respond to key issues for sellers such as delayed payments whether dealing on letters of credits or open accounts. They will also be able to speed up processing and enable buyers to optimise credit lines and to reduce handling costs and inventories. Finally, buyers will be able to avoid supplier defaults by facilitating pre-shipment finance without using their own capital.

Some 19 banks have understood the opportunity offered by the BPO and confirmed last year their decision to adopt the BPO. As corporates will discover the benefits of the BPO in 2012/2013, they will be expecting their banking partners to react quickly. Waiting for the ICC publication of Q2 2013 and missing the opportunity to get ready in 2012 is – in my view – a mistake banks ought to avoid making.

## List of banks adopting the Bank Payment Obligation (January 2012)

- Banco do Brasil
- Bank of China
- Bank of Communications
- Bank of Tokyo-Mitsubishi
- BMO Capital Markets
- BNY Mellon
- China Citic Bank
- China Minsheng Bank
- Commercial Bank of Dubai
- Commerzbank



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- Deutsche Bank
- First National Bank
- Hua Nan Bank
- JP Morgan
- Kasikornbank
- Korea Exchange Bank
- National Bank of Greece
- Standard Bank of South Africa
- Standard Chartered Bank



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### UCP 600 – Article by Article (article 28)

Following the tradition of the newsletter Trade Services Update we provide article-by-article comments on the UCP 600. The next one up for discussion is article 28:

#### *Insurance Document and Coverage*

The content of article 28 is similar to UCP 500 article 34 through 36.

Some headlines include:

There are still requirements as to how an insurance document must be issued and signed. New to the article is the addition of 'Proxy.' An insurance document must appear to be issued and signed by an insurance company, an underwriter, or their agents or proxies. In a case where it is signed by an agent or proxy that party must indicate that it has signed for or on behalf of the insurance company or underwriter. The rule is less rigid than the rule regarding how a transport document must be signed. See for example ICC Opinion TA.591, which indicates that an insurance document signed by 'TRYG' is acceptable because the footer indicates. 'Tryg Forsikring A/S (plus address, phone, fax and e-mail).' 'Forsikring' means 'Insurance' in Danish.

All originals must be presented. Where there are issued/presented more than one original then the document must state how many originals have been issued.

Where the LC calls for an insurance certificate it is acceptable to present an insurance policy, but not visa versa.

Cover must be effective from a date not later than date of shipment. At the outset this means that the insurance document must be issued prior to date of shipment, but the same can be achieved by a statement on the document as to the effective date. It may also be achieved by an insurance documents issued on a warehouse to warehouse basis (see ICC Opinion TA709rev).

Insurance cover must be in same currency as on the LC.

A requirement in the LC for certain insurance coverage is understood as the 'minimum' insurance coverage. If the LC is silent on this matter then a minimum of CIP/CIF value plus 10 per cent is required.

The insurance must cover goods at least between the ports/places stipulated in the LC.

An insurance document may contain reference to an exclusion clause and it may indicate that cover is subject to a franchise or excess (deductible). If a credit requires the insurance cover to be irrespective of percentage, the insurance document must not contain a clause stating that the insurance cover is subject to a franchise or an excess deductible (ISBP paragraph 177).

For further information on insurance documents, see ISBP paragraphs 170 – 180.

## Various Discrepancies

A debate among the country correspondents

The country correspondents have been presented with the following ‘discrepancies’ in documents presented under an LC:

LC requirement :	Document evidence :	Discrepancy raised :	Reasons we rejected the discrepancies:
1: Under goods description: CFR Algiers port”  Under additional conditions: ‘BL bearing additional freight charges mentioned in article 26(c) of UCP 600 prohibited.’	BL evidence ‘all destination charges are for the account of the consignee.’	‘B/L shows additional charges’	Delivery condition is CFR Algiers port, which means the seller must pay the costs and freight necessary to bring the goods to the named port of destination. Expenses/charges at port of destination are not charges additional to the freight under CFR delivery condition.
2: Under 46A: Copy conform to the original of control of quality of goods certificate	Document presented: photocopy of the original document	‘Control of quality of goods: copy does not certify conform to the original”’	The LC does not ask for this document be marked ‘copy conform to the original’ or certified to be so. The LC only asks for presentation of ‘copy conform to the original..’
3: Under 46A: ‘Copy EUR1’  Under 47A: ‘documents must be presented in English and/or French language’	Photocopy of EUR1 pre-printed form in Romanian language and filled out in English language	‘EUR1: The printed form not in English /French language’	According to European council regulation concerning procedure for completion of movement certificate EUR1: ‘EUR1 shall be completed in one of the official languages of the parties or in English in accordance with the provisions of the law of the exporting party.’ Romanian law (law of the exporting party) stipulates that EUR1 must be pre-printed in Romanian language. Consequently and having in view EUR1 is filled out in English and French languages, the EUR1 complies.

The country correspondents have expressed the following views:

On a general note Pradeep Taneja (Bahrain) states that: ‘It appears that the issuing bank is a bank in Algeria. The discrepancies are no doubt invalid but there is a wider issue involved here. Based on my own experience with some banks in Algeria, sometimes it is difficult to argue with them and convince them that the discrepancies are invalid. They will accept documents only when the discrepancies are waived by applicants.

I know that as per a regulatory requirement in Algeria, all imports in Algeria have to be necessarily effected under letters of credit (I heard last week that now the Central Bank of Algeria is considering some imports on documentary collection basis) but the issues, while dealing with Algerian banks are:

- 1) Lack of knowledge about ICC Banking Commission opinions.
- 2) Poor English and poor drafting of LC clauses, which sometimes leaves scope for misinterpretation as to what exactly the requirement of the LC is.
- 3) Some Algerian banks reject documents even where they have issued shipping guarantees against indemnity from applicants that the documents will be accepted irrespective of discrepancies. They first reject documents and then take up and pay the presenting banks after the deduction of the discrepancy fee. Their argument is, 'If they don't reject first, how will they collect the discrepancy fee?'
- 4) Many times discrepancies will be raised for reasons not even listed in the LCs. For example, 'Bill of Lading does not indicate import license number.' When the presenting bank argues that such a requirement was not listed in the LC, the issuing bank's response is that as a regulatory requirement in Algeria, the BL must mention import license number and the beneficiary should have known this. Further arguments evoke no response from the issuing bank until the discrepancy is waived by applicant.
- 5) Last but not the least, it is an practice in Algeria to exclude Art.37 (c). I know of some confirming banks who could not recover their confirmation commission when presenting banks presented documents directly to issuing banks in Algeria by-passing the confirming banks outside Algeria.'

This view is confirmed by Emile Rummens (Belgium) who adds that, 'The best tactic is to keep repeating your counter-arguments, send reminders, and to wait, wait, and wait ... In this respect I would like to add that despite the many rejections and problems in Algeria we fortunately experience that 99 per cent of all these rejections are finally paid (however, sometimes after a long time, and without delay interest).'

#### **Discrepancy number 1 - BL evidence 'all destination charges are for the account of the consignee.'**

Two country correspondents (Hasan Apaydin (Turkey) and Oliver Spitz (Germany)) do not consider this a valid discrepancy.

However, Daniel Devahive (Switzerland) states that: 'I'm not so sure that it is not a discrepancy. CFR has nothing to do with the determination of compliance. ALL DESTINATION CHARGES may mean charges according to par. 113 ISBP CFR or not.'

#### **Discrepancy number 2 - Document presented: photocopy of the original document.**

Three country correspondents (Hasan Apaydin (Turkey), Oliver Spitz (Germany), and Daniel Devahive (Switzerland)) do not consider this a valid discrepancy. Hasan Apaydin (Turkey) adds that 'the photocopy is the copy of the original one and should be deemed to conform to the original in respect of the data.'

#### **Discrepancy number 3 - Photocopy of EUR1 pre-printed form in Romanian language and filled out in English language**

Three country correspondents (Hasan Apaydin (Turkey), Oliver Spitz (Germany) and Daniel Devahive (Switzerland)) do not consider this a valid discrepancy.

It is suggested that it may not be a good idea to reject the discrepancy by invoking the European council regulation. It is better to use existing ICC queries – e.g., ICC Opinion R654/TA647 rev 2005-2008.

## Transshipment effected

A debate among the country correspondents.

The country correspondents have been presented with the following query:

### Quote

An LC includes the following requirements:

43P: NOT ALLOWED  
43T: NOT ALLOWED  
44E: ANY SEAPORT IN ITALY  
44F: APAPA SEAPORT, NIGERIA  
42C: SIGHT  
44C:061111

In the third week of October the applicant contacted the issuing bank demanding that payment under the LC should not be made as supplier has 'breached the terms and condition as indicated under field 43T of the LC.' The applicant claimed that through information received from the International Maritime Bureau (IMB) he was informed that the container was discharged in Morocco waiting to be reloaded onto another vessel bound for the port of discharge.

Through its own investigation (and also using the services of the IMB) the issuing bank discovered that TRANSHIPMENT actually took place in Morocco and that the reloading was delayed due to strike action there.

During the first week of November the issuing bank received a MT750 from the confirming bank stating the following discrepancy and requesting that the issuing bank approach the applicant for a waiver:

1) Late presentation - document not presented within 21 days of the date of shipment 19 Sep. 2011.

The issuing bank approached the applicant for a waiver but the applicant refused to waive the discrepancy.

The confirming bank forwarded the documents to the issuing bank for approval. On the face of the bill of lading there were no indication that transshipment was to take place. The issuing bank refused the documents citing the discrepancy mentioned above.

### Questions:

(1) In view of UCP article 5 and 16(b) should the bank go ahead and authorize payment?

(2) Can banks and parties rely on the services of the IMB to make a decision regarding not honouring their obligations under an LC?

3) In accordance with UCP 600 article 20(c)(i) (ii), can transshipment occur without being indicated on the bill of lading?

There are answers from Radek Dobáš (Czech Republic), Daniel Devahive (Switzerland), Xavier Fornt (Spain), Hasan Apaydin (Turkey), Abrar Ahmed (UK), Bogdan Ilie (Romania), Andreu Vilà (Spain), Hari Janakiraman (Australia and New Zealand), Glenn Ransier (USA), Danielle Austin (USA), Vasanth Shanbag, Rupnarayan Bose (India), and Kim Sindberg (Denmark).

In general the country correspondents were in agreement about this case – and the following arguments were expressed:

1) If there were in fact a valid discrepancy in the late presentation, there is no need to go any further in this specific case. Regardless of whether the transshipment took place or not, the documents are discrepant. Any of the banks that are under obligation may refuse documents. The issuing bank may refuse the documents and return them to the presenter; it need not even contact the applicant if it elects to act in such a way (even the confirming bank may return documents 'for good').



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2) On the other hand, what if the discrepancy were not valid? Was the issuing bank authorized to look beyond the documents to find out whether there was in fact transshipment?

Banks deal with documents and document compliance is based on the documents alone (article 5 and 14(a)). A refusal cannot be based on a report from the IMB. If there is fraud, then the applicant should present proof of that to a judge, who (if convinced) should issue a stop payment order against the issuing bank. The IMB may give indication that something is wrong but it cannot stand alone. Or putting it another way: There is no support from the various rule sets if you refuse payment based on this. You will be on our own!

3) The fact that transshipment in reality occurred cannot be considered as fraud. In any case the issue of fraud and court injunctions would be outside the scope of the LC.

4) From the information at hand it is clear that the goods were shipped in containers. So even if the BL stated that transshipment shall in fact occur, there would be no reason for refusal under UCP 600, sub-article 20 (c) (ii). The only grounds under which it would have been possible to refuse the presentation based on transshipment would have been if the LC had specifically excluded the application of 20 (c) (ii), and the BL had evidenced transshipment. The case of container shipment is paradigmatic. Containerization is a multimodal practice, and multimodalism contains transshipment as water contains oxygen. The only exception where a container is not necessarily transhipped is in a door-to-door truck shipment.

5) In most cases the carrier will reserve the right to tranship, for example in case of need (i.e., in order to take situations like this one into account). The banks have no right to seek information on whether and why transshipment in fact occurred.

6) As regards the citation of sub-article 16 (b) as a basis for disregarding the applicant's refusal to grant waiver and for the issuing bank to honour the presentation is a misinterpretation of the sub-article. This sub-article does not provide the bank with a licence to unilaterally waive discrepancies without consulting the applicant. Rather, it allows the bank a licence to refuse the documents, but without any obligation to obtain a waiver from the applicant, or accept such waiver, if sought, and given.

7) If the buyer is afraid of the risks (loss or damage) involving an unexpected transshipment taking place somewhere in the middle of a sea leg (as seems to be the case), the buyer should buy F-term (if a container shipment: FCA, not FOB), so that they choose and engage a carrier on their side. The buyer then may look for a good and professional carrier and obtain insurance with the insurer of their liking, a good and professional insurer that includes an effective transshipment clause.

8) If the one who is afraid of those risks is the seller, then a C-term (if a container: CIP/CPT, not CIF/CFR) or even a D-term may be used. In this case the carrier (and even insurer) is engaged by the seller.

## For or on Behalf Of

A debate among the country correspondents.

The country correspondents have been presented the following query:

### Quote

What is the difference between an ‘agent for’ and an ‘agent on behalf of’ under UCP 600 transport articles 19 to 25?

Legally speaking, are they the same person or two different persons? Experts of ICC Iran believe that legally, they are two different entities and therefore an agent acting for a carrier is different from an agent who is acting on behalf of a carrier.

Answers are provided from Xavier Fornt (Spain), Hasan Apaydin (Turkey), Daniel Devahive (Switzerland) and Kim Sindberg (Denmark).

In general the country correspondents were in agreement about this case – and the following arguments were expressed:

- (Xavier) The UCP 600 does not distinguish between FOR or ON BEHALF OF. Please see art.20 (a) i, art. 21 (a) i, art 22. a i, art 23 (a) i, and art 24 (a) i.
- (Hasan and Daniel) There is an ICC Opinion confirming the view expressed by Xavier: TA 171 in Unpublished Opinions 1995-2004, p. 123.
- (Kim) This question arises from the ‘typical clash’ between LC practice and law. I feel certain (the vague opening to indicate that I am not a lawyer :-)) that there is a legal difference between signing ‘for’ and signing ‘on behalf of’ a certain party. I am not the right person to describe this difference. However, the UCP 600 formulation is a ‘catch all’ phrase to allow both types of signing and to ensure that the document examiner need not consider the legal implications of the signing of the document; rather (s)he simply needs to check that, from the face of the document, the signing appears to comply with the relevant UCP 600 requirements.

## The Negotiability of Bills of Lading and Drafts

A debate among the country correspondents.

The country correspondents have been presented the following query:

‘I have read that: With a draft, the title is free from any defect provided it is passed to a holder who has given value in good faith and without knowledge of any defect in the title. In contrast, the negotiability of bill of lading is subject to any previous defect in title.

Could you please explain to me the differences between the negotiability of the bill of lading and the draft?/

There are answers from Daniel Devahive (Switzerland), Bob Ronai (Australia), Marianne Wabnik (Sweden), Pradeep Taneja (Bahrain), Xavier Fornt (Spain), and T.O. Lee (Canada).

Below is a summary of the views expressed:

### Daniel:

Some people say that certain documents are negotiable and others, transmissible or quasi-negotiable.

If you are robbed and your banknotes are remitted to a third party by the robber, you can sue the robber but not the third party as a banknote is negotiable. If it was a bill of lading you can also sue the third party as the bill of lading is only transmissible.

### Bob:

The draft is a financial instrument whereas the negotiable BL is a document of title for goods shipped. It is like comparing apples and oranges.

### Pradeep:

Clearly the negotiability of a bill of exchange is different from that of a bill of lading. While drafts or bills of exchange are governed by the relevant bills of exchange/negotiable instruments acts/laws, bills of lading are not. The specific types of instruments covered under the bills of laws are ‘financial instruments,’ i.e., bills of exchange (or drafts), cheques, and promissory notes whereas bills of lading are not included therein because as ‘transport documents’ they are ‘not negotiable.’ In the case of a bill of lading, better title is not passed on to the endorsee, which is unlike a financial negotiable instrument that achieves negotiability or transfer of title by ‘endorsement’ and ‘delivery,’ key components of negotiability.

The ‘bonafide holder’ or ‘holder for value’ of a financial negotiable instrument, who is deemed to have acquired such an instrument for ‘value or ‘consideration’ and in ‘good faith,’ has a better title thereto as against a BL. Although a BL can be negotiated by being endorsed and delivered, such endorsement and delivery does not confer a better title to the endorsee.

That is why the limited transferability or negotiability of the BL renders it a ‘qasi-negotiable’ instrument. Other than for fraud, in case of a BL, the endorsee cannot sue the endorser or previous endorser (who had better title) in his own right for non-delivery. He can claim damages or sue for fraud when it is conclusively established that the BL was fraudulently procured or in the case where it is found that the endorser had defective title to the BL or had no title thereto in the first instance. But better title to the goods, represented by the BL does not pass on to the endorsee and the shipping company is accountable to the real owner of the goods.

In contrast to financial instruments, which are governed by the relevant bills of exchange laws, bills of lading might be governed by the provisions of the international conventions or rules such as ‘International Convention for the Unification of Certain Rules of Law relating to Bills of Lading,’ as amended vide Brussels Protocol (i.e., Hague-Visby rules) or the more recent United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (‘Rotterdam Rules’), as the case may be, by explicit incorporation in the contract of carriage.

## T.O. Lee

I would like to make some personal comments (not even opinions) on this. I must admit that I am not a maritime lawyer, although I do study common and civil trade laws in order to do a better job as an expert witness. My comments below are simply from the position of a trade consultant adopting a simple common sense point of view and nothing more.

Before we can compare the draft with a bill of lading (BL) on the issue of ‘negotiability’ and the consequences thereof, we have to understand the basic differences between the two, as apples and oranges as Bob calls them.

The draft as a bill of exchange:

A draft is an instrument dealing with a payment obligation and the ‘negotiability’ deals with the right of a holder to demand payment on maturity.

The BL:

A BL is more complicated. It deals with (i) receipt of goods, (ii) evidence of contract of carriage, and (iii) title attached to the goods. ‘Negotiability’ should cover all three functions. We have to deal with them one by one.

A) For the first function, a BL is a prima facie evidence in favour of an endorsee that the quantity of goods alleged to have been shipped has, in fact, been shipped as adjudicated in the landmark case in UK: *Smith & Co. v Bedouin Steam Navigation Co. Ltd.* [1896] A. C. 70.

B) For the second function, a BL is a very good evidence of the contract of carriage, but it is NOT the contract of carriage itself as ruled by the famous UK case: *The ‘Ardennes’* (cargo owner) v the ‘Ardennes’ (ship owners) [1950] 2 All E.R. 517 in which Lord Goddard C. J. adjudicated: ‘The contract has come into existence before the bill of lading is signed.’ In practice the shipper and the carrier may have entered into a contract of carriage verbally or otherwise before the BL is issued.

C) The third function could open a Pandora’s box and create business for a lawyer, consultant, or expert witness:-)

First let us look at the draft regarding ‘negotiability.’

- 1 It is a FULLY negotiable instrument, not a quasi-negotiable instrument like a BL.
- 2 It is clearly governed by the Bills of Exchange Act 1882 (BOEA), The Geneva Conventions 1930, UNCITRAL Convention on International Bills of Exchange, and International Promissory Notes or revisions thereof.
- 3 The BOEA has been modeled in many legislations around the world to enable universal application of the same doctrine.
- 4 The original of the draft intent is to provide the utmost protection to the innocent third party as a holder so that the it can be passed on freely from one person to another in the market place as a means of providing financing. Under the absolute protection of the BOEA, all parties are comfortable dealing with total strangers. This makes the draft an effective financing tool globally.
- 5 A holder’s rights and obligations under ‘negotiability’ are classified in three levels (i) holder in due course, (ii) holder for value, and (iii) holder without value (obtain it as a gift without paying any ‘consideration’).
- 6 The financial obligation of the drawee is always there. It cannot relinquish it as with the title in a BL. Please refer to second part for details.

Now let us look at the BL regarding 'negotiability.'

- 1 The BL is only a QUASI-NEGOTIABLE instrument as described in many textbooks on sea carriage.
- 2 As a result, the maritime legislations and conventions cannot govern 'negotiability' to the extent of the BOEA. To put it simple, a draft is the whole apple but a BL is only half of the an apple.
- 3 Hence 'negotiability' issues (such as the right of the innocent holder in due course of a BL to sue the third party as the endorser, etc.) do not exist in half of the apple, the BL. It can only be found in the whole apple, the draft. The maritime legislations and conventions quoted by Pradeep (COGSA, Hamburg Rules etc.) cover only half the apple. We cannot squeeze apple juice from the missing half that contains this goodie, it's a mission impossible.
- 4 For a BL covering comingle goods (regarded as 'unascertained goods' in UKtitle laws,such as hydrocarbons stowed in the same hold in a tanker with similar goods owned by other shippers, there is no title until the hydrocarbons are separated into distinct tanks, according to the UK title laws on 'unascertained goods.' Hence there is no issue of 'negotiability' when the BL carries no title for these goods" as evidenced by the landmark cases from the UK: *McDougall v Aeromarine of Emsworth Ltd. [1958] Q.B.* and *Blyth Shipbuilding and Dry Dock Co. [1926] C. A. and Wait [1927] C.A.*
- 5 Similarly if the goods covered by a BL have been destroyed by a fire, turning into ashes, the title will be gone even if the BL is still intact. Again there is no issue of 'negotiability' when the title is relinquished due to a peril of the seas.
- 6 In numbers 4 and 5, if half the apple has been eaten by a mouse, there is no apple left any more. There also goes the apple juice ('negotiability').
- 7 Therefore we should not try to dovetail the BOEA concepts to the BL as far as 'negotiability' is concerned. Similarly we cannot dovetail LC practices to fit in the legal context. This is another subject worth detailed discussions.

For more information on these, please visit [www.tolee.com](http://www.tolee.com)

## News Flash

### ICC Banking Commission

The ICC Banking Commission will meet in Doha 25-29 March 2012. It is the first time the Banking Commission meets in Qatar and the second time in the Middle East. The agenda includes the following topics:

- A Conversation on the Changing Landscape of Banking
- The 2012 Global Outlook from ICC Market Intelligence
- What is the Business Model in Trade Finance for the Future?
- The Path of Change in the MENA Region
- Doing Business in Qatar
- A Banking Supervision Regulatory Roundtable
- Anti-Money Laundering (Aml)/Economic and Trade Sanctions (ETS) Compliance
- An Update on Key ICC Projects (Supply Chain Finance, ICC Register, ICC New Arbitration Rules, and DOCDEX, BPO, AML/KYC Repository Project.)
- Draft Official Opinions of the Banking Commission and the latest DOCDEX Decisions
- The ISBP Revision
- Forfeiting Rules

### GTC's @GlobalTrade Multi-bank Trade Finance Platform Selected by Safran

GlobalTrade Corporation (GTC) has announced today that Safran, a leading international high-technology group and a Tier-1 supplier of systems and equipment for aerospace, defense, and security has selected GTC's @GlobalTrade Multi-bank Trade Finance Platform for monitoring issued and received bank guarantees and documentary credits. GTC's software will enable Safran to connect to its multiple banks through SWIFTNet using MT 798 messages and will be interfaced with Safran's internal systems.

'GTC has gained our confidence thanks to its professional and pragmatic approach as well as its reputation built through previous references within the same industry,' said Carine Aujay, head of structured finance at the Safran group.

'Safran ran a very professional and detailed selection process. They looked at all aspects of the software including technology, functionality, security, ability to work with SWIFT, and competing solutions on the market,' said Jacob Katsman, GTC's CEO. 'We are very pleased that GTC has been selected for this project and look forward to working with the Safran team.'

'@GlobalTrade system will allow Safran to achieve end-to-end automation of trade finance activities while complying with its stringent security policies,' explained Nick Pachnev, GTC's CTO. 'The highly configurable and modular design of @GlobalTrade system provides standard solutions for such critical requirements as centralized user identity management, flexible authorization processes and electronic multibank connectivity.'

### ISBP Draft 3 is Out for Comments

A new draft of the ISBP (Draft 3) has been circulated to national committees and groups for comments. The draft reflects the continuing work of the ISBP Drafting Group and ISBP Consulting Group. This draft includes the changes that have been made based on comments received from the national committees on Draft 2. Draft 3 incorporates the Drafting and Consulting Group's suggested changes to the sections covering transport documents and insurance documents.



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### ICC Draft Opinions for March 2012 Meeting Out for Comments

The ICC Banking Commission has sent national committees and groups its set of draft opinions, which will be discussed at their meeting in Doha, Qatar (see above for more details).

One draft opinion involves a query regarding the issue of sanctions. This was originally submitted for the previous meeting, but was withdrawn from the meeting in Beijing pending further input from the Anti-Money Laundering (AML) Task Force. The four remaining draft opinions address alleged discrepancies.

### Trade Finance Predictions

*New ICC-IMF Market Snapshot:* New research by the International Chamber of Commerce (ICC) and the International Monetary Fund (IMF) has revealed a largely pessimistic outlook for the demand for trade finance products in 2012.

Based upon inputs received from 337 financial institutions responding to a joint ICC-IMF survey, the findings also show a two-speed financial system: For emerging Asia the outlook is the strongest, while the Euro area is the weakest.

More information here: <http://www.iccwbo.org/policy/banking/index.html?id=47132>

*HSBC Global Connections:* HSBC Global Connections have issued a trade forecast that predicts the future of trade globally and in Asia.

Key findings:

- China will become the world's leading trading nation by 2016
- Vietnam, Bangladesh, and Peru are Asia's top emerging trade partners
- Global trade will accelerate sooner than expected – from 2014, rather than from 2015
- World trade will grow by 86% in the next 15 years (2012-2026)

More information here: <http://tradeconnections.corporate.hsbc.com/en/News-and-Opinion/trade-growth-boost-expected.aspx>



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### Famous last word

‘The key to change ... is to let go of fear.’  
Rosanne Cash

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