Hieraus ergeben sich daher erhebliche Argumente für eine unabhängige Ausgestaltung der Bankenaufsicht. Allerdings sieht das Grundgesetz gerade im Hinblick auf die Weisungsfreiheit von Behörden erhebliche Einschränkungen vor. Wenngleich der Verfassung solche ministerialfreien Räume nicht gänzlich unbekannt sind, wie neben der Bundesbank auch das Beispiel des Bundesrechnungshofs zeigt (Art. 114 Abs. 2 GG), stellen dies doch nur Ausnahmefälle dar. Im Grundsatz gebieten sowohl das Ressortprinzip (Art 65 S. 2 GG) als auch schon das Demokratieprinzip des Art 20 II GG eine entsprechende Rückkoppelung der exekutiven Gewalt.[55] Welche Anforderungen an weitere Ausnahmen hiervon zu stellen sind, ist äußerst umstritten.[56] Eine verfassungsrechtlich zuverlässige Begründung eines weisungsfreien Bereichs für die Bankenaufsicht würde aber letztlich eine Rechtfertigung über konkurrierende Verfassungsgüter erfordern. Solche sind derweil insoweit nicht ersichtlich.[57] Auch ist dem Grundgesetz das anglo-amerikanische Modell der *accountability* fremd und eine entsprechende persönliche Berichterstattungspflicht würde keineswegs verfassungsrechtlich als Surrogat für die Weisungsgebundenheit gereichen. In dieser Hinsicht erscheint eine weitergehende Unabhängigkeit der Bankenaufsicht im Ergebnis daher schwerlich realisierbar. Beschränkte Optimierungspotentiale ergeben sich lediglich hinsichtlich weiterer untergeordneter Einflussmöglichkeiten des Ministeriums. So ist weder die Entsendung ministerieller Vertreter in den Verwaltungsrat der BaFin noch die Einwirkung auf deren interne Organisation über den Erlass der Geschäftsordnung verfassungsrechtlich zwingend erforderlich.[58]

55 Vgl. insgesamt *Oebbecke* (Fn. 29), S. 24ff, 67ff.; *Ibler*, in: Maunz/Dürig (Fn. 26), Art. 86 Rn. 58; *Waechter* (Fn. 29), S. 168.

56 Vgl. etwa *Müller*, JuS 1985, 497(504); *Oebbecke* (Fn. 29), S. 64f.; *Klein*, Die verfassungsrechliche Problematik des ministerialfreien Raumes, S. 202ff.

57 Auch wird der Bankenaufsicht keine mit Art. 88 oder 114 GG vergleichbare Sonderstellung eingeräumt, vgl. auch *Schäfer*, Bankenaufsichtsrecht in Deutschland, dem Vereinigten Königreich und den Vereinigten Staaten, S. 135f.

58 Vgl. auch *Hagemeister* (Fn. 3), S. 1778; weitere Möglichkeiten für eine Stärkung der Stellung der BaFin ergeben sich im Hinblick auf die ihr zur Verfügung stehende Instrumente, die nicht Gegenstand dieser Darstellung sind, so wäre etwa weitergehende Subdelegation von Rechtsverordnungsbefugnissen denkbar, vgl. hierzu *Schäfer*, Bankenaufsichtsrecht in Deutschland, dem Vereinigten Königreich und den Vereinigten Staaten, S. 297ff.

III. Fazit

Die rechtsvergleichende Betrachtung der amerikanischen Bankenaufsicht erweist sich im Ergebnis für die deutsche Reformdiskussion damit durchaus als erkenntnisreich, in positiver wie auch negativer Hinsicht. Dabei belegen die hier herausgearbeiteten Aspekte, dass durchaus Ansatzpunkte für eine Optimierung der institutionellen Ausgestaltung der deutschen Aufsicht bestehen, hierbei jedoch erhebliche verfassungsrechtliche Beschränkungen zu berücksichtigen sind.

*William Banks Sutton**

The Documentary Credit Phoenix

UCP 600 Boasts Fair Rules for Trade Customers, Hard Rules for Banks

The Uniform Customs and Practices for Documentary Credits (UCP) version 600[1], as published by the Paris-based International Chamber of Commerce (ICC), came into effect on July 1, 2007. Since 1933, the UCP has been used by banks around the world in trade transactions, and up until the UCP 500, in effect from January 1994, was the deciding set of privately published banking regulations for the handling of documentary letters of credit for many international trade transactions worldwide. The purpose of these rules is to help facilitate trade transactions by eliminating the stresses of incongruent payment risks for trade customers and banks alike. However, it is increasingly evident that the newest versions of these rules favor trade customers over banks, thus leading to a lessened use of the rules by banks, in comparison to previous versions.

I. Documentary Credits

Described by English judges as "the life blood of international commerce"[2], a documentary letter of credit permits a buyer in a transaction to substitute its financial integrity with that of a stable credit source, usually a bank.[3] The procedure involved in the negotiation of a contract using a credit is as follows[4]:

The sales contract concluded by the buyer and seller stipulates the use of a documentary credit. The buyer or a named applicant instructs a bank to issue a credit for the benefit of the seller or a named beneficiary. The credit specifies that the bank will pay a named sum of money for the delivery of goods according to specified terms expressly stated in the credit. The applicant specifies which documents will be required. This issuing bank issues the credit based on this

* Dr. jur. William Banks Sutton is a managing partner at Safkhet Publishing LLP, an independent trade book publisher based in London, UK and Wilhelmshaven, Germany, and teaches law and business management in Cambridge, England.

1 Uniform Customs and Practice for Documentary Credits, ICC Publication No. 600, 2007 ed. [UCP 600].

2 *Kerr* in RD *Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] Q.B. 146 at 155; *Hirst* in *Hong Kong and Shanghai Banking Corporation v Kloekner & Co AG* [1989] 2 Lloyd's Rep. 323 at 330; *Donaldson* in *Intraco Ltd v Notis Shipping Corporation of Liberia: The Bhoja Trader* [1981] 2 Lloyd's Rep. 256 at 257; *Griffiths* in *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 2 Lloyd's Rep. 394 at 400; *Ackner/Stephenson* in *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1982] Q.B. 208 at 222; see also *Murray/ Holloway,/Timson-Hunt*, Schmitthoff's Export Trade: The Law and Practice of International Trade, 11th ed., London: Sweet & Maxwell (2007), § 11-001.

3 *Alaska Textile Co, Inc v Chase Manhattan Bank, N.A..,* 982 F.2d 813, 815 (2d Cir.1992); *Banco General Runinahui Sa v Citibank International Na Rm*, 97 F.3d 480 (11th Cir. 1996).

4 *Hill,* International Business: Competing in the Global Marketplace (2009), p. 551; this method also described in *Murray/Holloway/Timson-Hunt*, (Fn. 2) § 11-005.

application. This credit includes all instructions for the seller relating to the shipment.

The issuing bank sends the credit to a confirming bank designated by the seller or a bank selected by the issuing bank for confirmation. The confirming bank then receives the credit, examines it to make sure it is compliant with the sales contract, and forwards the credit to a bank nominated by the seller for the payment of the credit upon fulfillment of the terms of the credit (nominated bank). The confirming bank then notifies the seller that he may effect shipment according to the terms and conditions of the credit.

The seller effects shipment of the goods according to the credit. Should the seller not be able to effect shipment according to the credit, he must have the credit sent back to the issuing bank for amendment according to what he is capable of performing. Assuming all is acceptable with the credit and the shipment of the goods, the seller presents all the required documents to the nominated bank for credit compliance.

When the credit and the documents comply with each other, the nominated bank honors or negotiates the credit according to the terms of the credit, and sends the documents to the issuing bank for examination and reimbursement. The issuing bank examines the documents and reimburses the nominated bank. After the issuing bank has examined and accepted the documents, they are delivered to the buyer who finally pays on the credit. The buyer may then forward the documents to the carrier to effect delivery of the goods to him.[5]

Due to the complexity of the transaction, the threat of fraud or non-compliance by the parties involved, the introduction of other financial parties and banks, and reliance on these documentary credits incited all parties involved to garner assistance in the regulation of said credits. The UCP 600 and all previous versions thereof are the result of this effort to write a set of rules that would govern the handling of these sensitive documents.

II. A Necessary Revision

Throughout trade history, trade rules passed by governments and non-governmental organizations, such as the ICC, have been carefully tailored over time to favor banks over trade customers. The publication of the UCP 500, with its complex and difficult-to-interpret wording, was the pinnacle of this effort by the ICC and its Commission of Banking Technique and Practice (Banking Commission). So complex and open to interpretation was the UCP 500 that courts were torn on proper and universal interpretation rules for its use, thus deciding to use their own national interpretations for the rules when implementing judgments. However, the ICC realized this problem and attempted to solve this complex issue by streamlining and simplifying the rules with the release of the UCP 600.

There are three reasons for which the UCP was revised. Firstly, the revision addresses modern developments in the banking, transport, and insurance industries. Secondly, "there was a need to look at the language and style used in the UCP to remove wording that could lead to inconsistent application and interpretation."[6] Finally, there was a desperate need to quell the number of discrepancy rejections of presentation, which were unbelievably high at seventy percent of first presentations. This figure and the fact that rejection occurrences had "a negative effect on the letter of credit being seen as a means of payment, [which] could have serious implications for maintaining or increasing its market share as a recognized means of settlement in international trade,"[7] led to the desire to revise the rules managing credits, so that banks would not have such ease in rejection of presentation. One reason for so many rejections was the introduction of a discrepancy fee by banks, which encouraged banks to make unreasonable, questionable, or unsound rejections solely to collect this fee.[8]

The current version of the UCP is not as widely utilized as the UCP 500 used to be, owing to a hypothesis that the UCP 600 favors trade customers over banks, who use the UCP to issue credits for these respective trade transactions. Even though the language of the UCP 600 is inherently clear, only an estimated 10 percent of international trade transactions use the UCP 600 to regulate the handling of documentary credits. This is partially due to the fact that the UCP 600 is not law and therefore not enforceable over existing national laws, regardless of its inclusion in issued credits. However, since most countries acknowledge the sanctity of the written contract, the inclusion of a clause in the contract binding the parties to the UCP is sufficient for courts to accept the enforceability of the UCP in those contracts, with obvious deference to public policy issues or existing codes.

Although there are many elements of the new UCP that show the favoring of trade customers over banks, the two most important points to acknowledge are that the rules are voluntarily incorporated into the credit and can be expressly modified or excluded by contract.[9]

III. Voluntary Incorporation

Trade customers are favored over banks in UCP credit transactions because the customers can choose whether their documentary credits are regulated by the UCP. The ICC established the UCP as a voluntarily-adopted, self-regulatory set of rules that only applies to documentary credit if it is expressly stated in the text of the credit.[10] This is a key consideration for trade customers when deciding how to monetarily cover their transactions. The incorporation of these rules is advantageous for a seller because at the outset of the transaction, he will know what criteria the banks will consider in the examination of shipping documents when determining whether to pay on a credit or not. The incorporation is also advantageous for buyers because from the outset of the transaction, the buyers will know what criteria are required for payment of the price of goods against the tender of documents.[11]

As with previous versions of the UCP, the rules must be expressly incorporated in the text of the credit in order for them to be binding on the parties. However, they are not mandatory or automatically applicable just because the sale contract specifies a documentary credit. Prior to the publication of the UCP 600, the articles of the UCP had no formal status. Courts deferred to the UCP when credit issues were brought up before them, provided that either the UCP had been accepted as law in the country in question, such as in the United States'

5 *Hill* at 551; compare ICC Publication No. 515, p. 96; *A Basic Guide to Exporting* (2008), p. 179-81.

6 UCP 600 Introduction.

7 *Id*.

8 *Id*.; Long, R. B., III, "User friendly letters of credit: are bankers killing the golden goose?", *Business Credit* (1996); "10 lessons learned one year after UCP 600", *UCP 600* (April 2009); Taneja, P., *UCP 600: "A document restoring the credibility of L/Cs"* (undated).

9 *Murray/Holloway/Timson-Hunt*, (Fn. 2) § 11-004.

10 UCP 600 Article 1; *Murray/Holloway/Timson-Hunt* (Fn. 2) § 11-004.

11 *Debattista*, The new UCP 600 - changes to the tender of the sellers' shipping documents under letters of credit, J.B.L. 329 (2007), p. 333.

Uniform Commercial Code § 5 and § 9[12], or that the contract specifically and expressly stated that the parties had submitted themselves to the control of the articles under the UCP for regulation of the specifics of the credit.[13] Courts also followed industry custom[14] when making decisions regarding credits and credit transactions.

There are many judicial cases where the courts deferred to the UCP when the contract between the parties so stated.[15] In these jurisdictions, *leges scriptae*[16] either had no applicable statute or incorporated the UCP as code. In cases where the UCP conflicted with the jurisdiction's laws, the forum laws applied as a matter of public policy. In the United States, rules passed by an NGO not regulated by US jurisdiction or by the US Constitution never preempt US Federal or State laws, unless those rules have been accepted on the functional level of treaties, or are accepted by courts as a matter of trade or industry standard.[17]

Courts generally accept the articles of the UCP to be non-persuasive arguments towards the outcome of the judgment. Issues are decided based on the laws of the forum jurisdiction, with deference to the rules when no corresponding regulation existed in that country's laws. In addition, in common law countries, another hurdle for the application and enforceability of the rules is simply interpretation. It is difficult to find a standardized interpretation of the application of the articles in any given situation; judges' decisions differ on a case-by-case basis.

The UCP requires an express indication that a credit is to be issued subject to the rules. If no such indication is given and no other rules are indicated, banks may use the rules in determining guidelines for customary or trade practices regarding documentary credits.[18]

IV. Express Modification

The second most important point of acknowledgement and the most worrisome part of Article 1 is that the rules may be expressly modified or excluded by the credit.

A primary reason for the lack of trust in the UCP 500 was that industry experts wished to facilitate the transaction system to make such transactions less open to individual interpretation by banks. By "equalizing the playing field" in normalizing the rules, the UCP essentially forces the banks' contract drafters into accepting an "all or nothing" approach to the UCP. However, in an attempt to encourage drafters to use the UCP, regardless of this "all or nothing" approach, the Banking Commission undercut the overall validity of the UCP with the inclusion of the Article 1 clause on express modification, which states that the UCP rules "may be expressly modified or excluded in the credit." This completely voids the stability of the "all or nothing" approach to inclusion of rules and essentially nullifies the sovereignty of the entirety of the rules, by allowing credits to be controlled by selective or rewritten articles of the regulation. Now, a contractor can simply rewrite the UCP to serve his own needs, and this would be acceptable, provided the other parties agree to the revisions.

A bank could, for example, change the number of banking days that a nominating bank, confirming bank or issuing bank has to respond to the presentation of documents to whatever fits their bank policy, rather than accepting the *five banking days* standard established by Article 14.[19] Of course, as per the rules, the modification has to be expressly made in the credit, and should be indicated in large clear print, so that the modification is easy to identify and cannot get lost in the fine print of the credit contract. However, consider: if the issuing bank that changes the credit in this way is the only reasonable bank that the seller can use without incurring economic detriments, then the parties may be put at a disadvantage in presentation of documents. If the parties incorporate such a change in the rules, the bank must be notified of the change so that the credit can be properly issued to reflect the changes.

Few governmental legislators or parliaments pass laws, which allow modification or exclusion of the law itself by non-legislative parties expressly or impliedly. Certain laws may be modified by contracting parties unless it is a general principle of law in the country that may not be modified because it would destroy the purpose or infringe the rights of those that the law was designed to protect. To do so would undermine the sanctity of the laws and the trust that the parties place in the hands of the government to preserve rights and responsibilities in all cases for all parties involved. It is not reasonable to allow parties to change laws whenever they see fit, as this eliminates the courts' persuasive power to regulate the contract and protect the parties' rights based on the enforcement of established and sound laws.

In general, most countries have not specifically passed a set of laws that govern documentary credits. A few countries, such as the Czech Republic, Bahrain, and Kuwait, have general statutory provisions on the subject.[20] England and the United States, both common law countries, have incorporated some form of statute that monitors documentary credit issues, but the UCP is not held over the law in these countries.[21]

Primarily though, with the inclusion of this clause, non-bank parties are now able to exclude or modify the rules that the banks adhere to, thus strengthening trader's ability to circumvent problem spots in the rules that they have identified, and which make their trade business more difficult. Recent general advice from trade professionals is to modify any article that specifically hinders any party.[22]

12 Uniform Commercial Code §§ 5, 9.

13 In the USA, *3Com Corporation v Banco de Brasil, S.A.*, 97 Civ 3819 (S.D.N.Y April 3, 1998), and in the UK, *Banco Santander SA v Bayfern Ltd* [1999] 2 All ER (Comm) 18.

14 Custom is the practice that has been performed throughout history in the industry in question. For the banking industry, custom determines the methods in which credits are drafted, negotiated, and examined. German law allows the use of custom to determine the outcome of its judicial decisions, when that custom has its bases in history, and does not conflict with public policy.

15 *Effros*, Current Legal Issues Affecting Central Banks (1998), p. 126; *AMF Head Sportswear Inc v Ray Scott's All American Sports Club*, 448 F Supp 222 (1978); *Fertigo Belg SA v Phosphate Chemical Exports Assoc*, 100 AD 2d 165 (1984); *Harlow and Jones Ltd v American Express Co Ltd* [1990] 2 Lloyd's Rep 343; *Rules of the Supreme People's Court on Hearing Letter of Credit Dispute*, No. 1368 Session of the Adjudication Committee of the Supreme People's Court (October 24, 2005), Fa Shi [2005] No. 13.

16 *leges scriptae* = written or statutory law.

17 *Seyoum*, Export-Import Theory, Practices, and Procedures (2000) p. 205.

18 Commentary on UCP 600, Article-by-Article Analysis by the UCP 600 Drafting Group, ICC Publication No. 680, 2007 ed., p. 12.

19 UCP 600 Article 14.

20 These countries have directly accepted the UCP rules as law.

21 *Murray/Holloway/Timson-Hunt* § 11-004; *Royal Bank of Scotland v Cassa di Risparmio delle Province Lombard* [1992] 1 Bank L.R. 251.

22 *Bertrams*, Bank Guarantees in International Trade (2004), p. 35; *Oelofse,* The Law of Documentary Letters of Credit in Comparative Perspective (1997), p. 11.

V. The Sanctity of Rules

Throughout history, from the beginnings of civilization, trade laws were written to facilitate and improve exchange between individuals, businesses, nations, and societies. Trade laws began with the basic fulfillment of contracts and the exchange of goods and services. These laws have changed in form and content in the last 7000 years, but not in intent. In general, every industry makes regulations to protect itself from fraud, mismanagement, and corruption. Trade rules strengthen the institutions of the trade industry, which revises and improves the rules, in order to protect and strengthen itself. For the banking industry, trade laws and regulations have been primarily designed to protect financial institutions' interests, so that their investments in the economy can keep the industry moving.

Every set of trade rules, regulations, laws or agreements passed and ratified has clarified and delineated the methods by which trade customers manage their business relationships with each other. Following the last two great wars and the period of economic depression between them, the banking, transport and trade industries of the world have cooperated to produce a concise and specific set of rules that would protect their own interests in the face of fluctuating markets and risk of fraud, mismanagement or corruption. Thus, the last five versions of the UCP tended to favor banks and the larger institutions of the banking, transport and trade industries. The last version, the UCP 600, however, deviates from this trend of internal protection, in that it was written in a way that limited banks' rights and exhaustively delineated banks' duties in the management of documentary credits.

Courts acknowledge that the UCP, although not having the force of law, is contractually accepted by trade customers and banks involved in credit transactions. Thus, courts interpret the UCP in light of national law for their decisions, or they rely on interpretations and advice given by the ICC Banking Commission or by customary practice. Historically, this was never a problem for the banking industry, as the UCP rules were written in favor of banks, and not trade customers. Previous versions of the rules were obscure or complicated, leaving trade customers, courts and banks to their own interpretations as to the content and intent of the UCP. When trade customers needed advice as to the interpretations of the UCP, they relied on the banks and the courts (which, in turn, relied on the banks) to clarify their rights and duties.

The UCP 600 has considerably streamlined the rules by which documentary credits are regulated. It has, indeed, "equalized the playing field" by clearly defining rights and duties of trade customers and banks in credit transactions. Private interpretations of the UCP are no longer at issue, since the UCP 600 has been written in an easy-to-follow, concise fashion, as illustrated in the following summary:

The rights and duties of trade customers as well as banks are clear with a literal examination of the articles. The parties to the credit transaction can voluntarily accept the UCP 600 for the regulation of the credit. If this is not sufficient, the parties can modify the rules to fit their interests. Classically ambiguous terms and interpretations are clarified in short and simple language. Credit transactions are deliberately separated from documents in the trade transaction itself, so that banks are not involved with the sales contract in any fashion. The duties of all banks involved in the credit transaction are specifically outlined so as to leave no question or error. Documents are required to be analyzed in a substantially compliant fashion, so that the trade transaction, from which the credit transaction is derived, can be completed unhindered by the bank. The bank should, after all, be acting as the agent of the trade customer, not vice versa. If all the documents are in order, the bank must pay on the credit. If the documents are not in order, the bank may reject the payment, but must notify the parties to allow for repair or waiver of the presentation by the trade customers. The requirements for transport documents under the UCP are straightforward and clear. The rules for the issuance of insurance documents are also straightforward and clear. Banks' liabilities and disclaimers are clarified for trade customers so that the trade customers know what to expect. Finally, credits can be transferred to another party, so that the trade customer can use the credit as a negotiable instrument in a separate transaction unrelated to the primary trade transaction.

However, the UCP 600 is not the perfect answer to the credit transaction. There are still conflicts between trade customers and banks as to the most appropriate interpretation of the rules. Some definitions have to be sought out in the text of the UCP, even though UCP Article 2 makes a half-hearted attempt at a clear definitions article. Some of the sub-articles conflict with national laws, thus making an acceptance of the entirety of the UCP into law difficult. The inclusion of the "express modification rule" under Article 1 was necessary to allow the trade customers and banks the ability to customize the rules, so as to encourage the use of the UCP in credit transactions. It has, however, also opened the proverbial floodgates by allowing the applicant or banks to radically change the rules regarding credit transactions, essentially undermining the effect and strength of the UCP as a whole.

VI. Rising from the Ashes

The UCP 600 is a newborn phoenix in international trade. Born from the ashes of the UCP 500, the 2007 revision has blazed into the trade and banking industry with relief and appreciation on all sides of the trade transaction. Opinions on and clarifications of some of the articles of the UCP and their problems, in certain circumstances, have already been issued by the ICC Banking Commission. On the whole and regardless of its fallacies, the UCP 600 is a sound set of regulations.

However, in order for the trade industry to benefit the most from the rules, banks and trade customers should adopt the UCP in the manner, spirit and intent in which it was approved. They should not try to circumvent the rules by modification or exclusion, nor should they establish outrageous, impossible or unclear conditions on the credit so as to foil the attempts of trade customers in the satisfaction of trade transactions. It stands to hope that reason and the desire to improve, strengthen and protect the rights of all the participating parties of the trade industry provides the incentive to use the UCP 600 as it was intended: a current practice for the documentary credit and a future solution for international credit and trade transactions.