DOCUMENTARY COMPLIANCE UNDER UCP: 
A FAULT FINDING MISSION OR 
A MERE GUESSING EXERCISE?

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Introduction

International letter of credit practice has been standardised by the International Chamber of Commerce ('ICC'). The latest revision of the Uniform Customs and Practice for Documentary Credits ('UCP 500') was approved on 10 March 1993 by the ICC through its Commission on Banking Technique and Practice. It came into force on 1 January 1994. It is the universally recognised set of rules governing letters of credit and is widely regarded as the most successful act of commercial harmonisation in the history of world trade. The UCP is indispensable to letter of credit operation. Most of the banks adopt the UCP in the letters of credit that they issue. In recent years, the judicial guidelines pertinent to the interpretation of the UCP 500 have been developed and further refined by the judges in a number of major litigation involving letters of credit. This lecture aims to examine critically the latest judicial development in the documentary compliance and the legal aspects of discrepancy in documents under the UCP 500.

The de minimis rule and the sufficient linkage test: 'substantial compliance', 'strict compliance' or 'absolute compliance'?

Art 13(a) and 14 of the UCP 500 state that upon receipt of the documents, the issuing bank and/or correspondent bank must determine on the basis of the documents alone whether or not they appear on their face to be in compliance with the terms and conditions of the credit. The

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1 The first adopted version of the UCP was published in 1929. Subsequent revisions of the UCP were made in 1933, 1962, 1974, 1983 and 1994. The 1983 version of the UCP is also known as 'UCP 400'.
bank is not required to make inquiries as to any ambiguities or discrepancy. The ‘strict compliance’ rule has long prevailed in English law. Lord Sumner’s classic statement in Equitable Trust Co of New York v Dawson Partner (1927) 27 Lloyd’s Rep 49 is often quoted: ‘There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines (p 52).’ An American court has stated the substance of Lord Sumner’s statement in equally convincing language: ‘Compliance with the terms of a letter of credit is not like pitching horseshoes. No points are awarded for being close.’ (Fidelity National Bank v Dade County 371 So 2d 545 at p 546). The doctrine of strict compliance is further illustrated in the classic case JH Rayner & Co Ltd v Hambro’s Bank Ltd [1943] KB 37. The credit described the goods as ‘Coromandel groundnuts’. The sellers had tendered a bill of lading referring to the goods as ‘machine-shelled kernels’. The Court of Appeal held that the bank was entitled to reject the documents and refuse payment, even though it was well known in the trade that the two terms are one and the same:

It was quite impossible to suggest that a banker is to be affected with knowledge of the customs and customary terms of every one of the thousands of trades for whose dealings he may issue a letter of credit.

There is no room for a de minimis effect, as decided by the English Court of Appeal in the more recent case Seaconsar Far East v Bank Markazi Jomhouri Islami Iran [1993] 1 Lloyd’s Rep 236. The plaintiff agreed to sell a large quantity of artillery shells to the Iranian Ministry of Defence for US$193m. Payment was to be by letter of credit. The letter of credit stipulated, inter alia, that all documents presented to the bank should carry the credit number and the buyer’s name. One of the documents tendered omitted to state the credit number and the buyer’s name. The Court of Appeal held that the tender was bad. The bank was right to reject the documents even though the discrepancy might be trivial. Lloyd LJ stated:

2 On appeal this point was not discussed in the House of Lords: [1993] 3 WLR 756. The House of Lords reversed the decision of the Court of Appeal on some other grounds and granted leave to serve the proceedings out of jurisdiction on the defendant bank.
[The plaintiff's counsel] argues that the absence of the letter of credit number and the buyer's name was an entirely trivial feature of the document. I do not agree. I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. It would not help, I think, to attempt to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example, *Bankers Trust Co v. State Bank of India* [1991] 2 Lloyd's Rep 443 where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in the present case is not of that order (at p 240).

Previously in *Hing Yip Hing Fat Co Ltd v The Daiwa Bank Ltd* [1991] 2 HKLR 35, Kaplan J of the Hong Kong High Court held that the use of the word 'industrial' in the documents presented to the advising bank was an obvious typographical error from the word 'industries'. It was not a discrepancy upon which the defendant can rely. Such an error could easily occur in a society where English is not the first language for 98 per cent of the population. With due respect, it is submitted that in the light of *Seaconsar*, bankers and their legal advisors must exercise utmost care if they discover some possible 'typographical errors' contained in the documents required by the credit. An omission or mistake caused by a typographical error may possibly be considered to be fatal to the beneficiary's entitlement under the credit if the omission or error is in connection with something which the credit specifically requires. In my own view, the court may not easily regard a typographical error as 'trivial' on every occasion, bearing in mind that the banks are not expected to test the materiality of the information or particulars required under the credit.

The plaintiff's counsel in *Seaconsar* further argued before the Court of Appeal that the discrepancy, even if it cannot be regarded as trivial, can be cured by reference to the other documents, such as the certificate of inspection and the certificate of quality. He relied on the opinion expressed by Parker J in *Banque de l'Indochine et de Suez S.A. v J.H. Rayner Ltd* [1982] 2 Lloyd's Rep 476 where he said (at p 482):

I have no doubt that so long as the documents can be plainly seen to be linked with each other, are not inconsistent with each other or
with the terms of the credit, do not call for inquiry and between them state all that is required in the credit, the beneficiary is entitled to be paid.

The Court of Appeal, however, took the view that Parker J was not saying that a deficiency in one document could be cured by reference to another. There was an express requirement that the documents should be linked in the sense that each of them should contain the letter of credit number and the name of the buyer. Whatever the reason for that, the requirement was clear. Lloyd LJ continued:

I do not see how Bank Melli could ignore that requirement. It may be that the proces verbal in fact related to the same goods, and that one can see this by inference from the other documents. But the absence of the letter of credit number and the name of [the buyer] on the proces verbal called for some explanation. The bank was therefore entitled to reject …. To hold that it is even arguable that the documents as presented were a valid tender under the credit would, I suspect, cause surprise among bankers, and risk upsetting the ordinary course of business. In my judgment the tender was clearly bad.

What is the precise scope of banks' duties in connection with the examination of documents stipulated in a letter of credit? In what circumstances can the documents be regarded as sufficiently linked with each other? According to Article 14(b) of UCP 500, on receipt of the documents, the bank(s) concerned must determine on the basis of documents alone whether they appear on their face to be in compliance with the terms and conditions of the credit. Just looking at the first part of this provision, one might be under the impression that a bank is required to determine the conformity or non-conformity of the documents

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3 The letter of credit in Seasonstar was expressed to be subject to UCP of 1983 (i.e. 'UCP 400'). The wordings of Article 16(b) of UCP 400 are slightly different from that of Article 14(b) of UCP 500:

If, upon receipt of the documents, the issuing bank considers that they appear on their face not to be in accordance with the terms and conditions of the credit, it must determine, on the basis of the documents alone, whether to take up such documents, or to refuse them and claim that they appear on their face not to be in accordance with the terms and conditions of the credit.
without making any reference to the terms and conditions of the credit. Confusingly, however, the latter part of Article 14(b) states that:

If the documents appear on their face not to be in compliance with the terms and conditions of the credit, such banks may refuse to take up the documents (emphasis added).

The word 'may' suggests a degree of discretion that a bank may exercise. In exercising the discretion, the bank shall take notice of the above common law guidelines. The bank has to cautiously consider whether a potentially discrepant document is sufficiently 'linked' to the other conforming documents. If not, the discrepancy cannot be cured even if reference is made to the other documents presented.

The subject of whether a document 'appears on its face' to be in compliance was canvassed recently in a Hong Kong case Southland Rubber Co Ltd v Bank of China [1997] 3 HKC 569. The case turns on the construction of Art 13(a) and Art 23(a)(i) of the UCP 500. The only issue was whether the bill of lading presented by the plaintiff beneficiary appeared on its face to indicate the name of the carrier and to have signed by the master or a named agent of the master. The bill of lading in question did not contain the word 'carrier' anywhere but bore the name of the shipping company in the letterhead. The court dismissed the beneficiary's claim and held that the name of the carrier had to appear as such, so that anything short of using the actual word 'carrier' would not be sufficient to identify the party acting as carrier. Pang J said:

The overriding concern in the minds of the panel of experts must be that the institution that has been presented with the bill of lading must not be placed in a position whereby they had to speculate or make an educated guess of the identity of the carrier .... I consider one of the fundamental principles in any transaction involving documentary credit to be that of certainty of the identity of the parties involved in the contract of carriage.

4 '... Any signature or authentication of the carrier or master must be identified as a carrier or master, as the case may be. An agent signing or authentication for the carrier or master must also indicate the name the capacity of the party, i.e. carrier or master, on whose behalf the agent is acting ...'
Must a notice of rejection be given by telecommunication?

In *Seaconsar*, the House of Lords held that the plaintiff should have leave to serve the proceedings out of the jurisdiction. As discussed, the documentation presented to the defendant bank on behalf of the plaintiff (the beneficiary of the credit) contained discrepancies. The bank sought to reject the documents orally, a rejection that the plaintiff argued was invalid in terms of Article 16 of UCP 400. Both UCP 400 and UCP 500 stipulate that if a bank decides to refuse the documents, it must give notice to that effect by telecommunication or, if not possible, by other expeditious means. The plaintiff's contention was rejected by the trial judge below. The plaintiff appealed, arguing that the use of some other expeditious means was only permissible if 'telecommunication' was impossible. It was not impossible in the instant case as the defendant bank had been given a telephone number and two telex numbers of the plaintiff. The English Court of Appeal dismissed the appeal (see [1999] 1 Lloyd's Rep 36). The trial judge's conclusion was upheld on the basis that notice was not required to be given by telecommunication if a senior official of the beneficiary was present at the bank to receive notice. Sir Christopher Staughton said:

As a matter of construction of the Uniform Customs, we do not consider that they require notice to be given by telecommunication if a senior official of the beneficiary (or the remitting bank, as the case may be), under whose aegis the documents were presented, is present at the bank to receive notice. It must surely be an implied term that notice can then and there be given *viva voce*, rather than to another person who is some distance away (p 39).

Several practical difficulties in applying this test can be identified. Who is a 'senior official' of a corporate beneficiary of a letter of credit? In some companies, all the directors devote their whole time and

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5 See Note 2 above. The House of Lords held that the plaintiff had established that there was a serious issue to be tried in that there was a substantial question of fact or law or both arising on the facts disclosed by the affidavits that the plaintiff bona fide desired to have tried. Leave was granted under Order 11 of the Rules of the Supreme Court.

6 Article 14(d)(i) of UCP 500.

7 [1997] 2 QB 89.
attention to the company's affairs. In other companies, the directors divide the various sectors of management between themselves. For instance, the full-time executive directors may be responsible for the day-to-day management of the company while other part-time non-executive directors may only contribute their skill and experience in some of the major decisions made by the board of directors. In addition, the senior managers or consultants of a company may be given wide powers by the board of directors to run the company, even though they are only employees under service contracts with the company. The uncertainty as to whether a person is a 'senior official' is more apparent in the situation of partnership and sole proprietorship.

**Does the concept of ‘reasonable time’ of rejection still exist under UCP 500? Which party shall be responsible for determining whether the documents are discrepant: the issuing bank, the confirming bank or the applicant?**

Article 14(d)(i) of UCP 500 provides:

> If the issuing bank ... decides to refuse the documents, it must give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, without delay but no later than the close of the seventh banking day following the day of receipt of the documents ....

The prior version\(^8\) merely required that notice must be given 'without delay'. Some legal commentators\(^9\) took the view that UCP 500 stipulated a time limit for the rejection of documents in the place of reasonable time. In other words, the reasonable time stands for seven banking days. The concept of 'reasonable time' has been abandoned and the banks are granted a flat period of seven banking days regardless of

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\(^8\) Article 16(d) of UCP 400

circumstances. On the other hand, there is a different school of thought held by other commentators. They believe that the concept of reasonable time has not been abandoned. A reasonable time is still to be considered as a reasonable time, whether one hour or several days, depending on the individual transaction. The seven banking day period is only intended to be a maximum.

This uncertain legal issue finally came before the English Commercial Court in the case of Bayerische Vereubsbank v. Bank of Pakistan [1997] 1 Lloyd's Rep 59. A letter of credit was issued by the defendant bank to cover the price of a shipment of cotton. The plaintiff was the paying bank. The letter of credit was expressly subject to the UCP 500. The beneficiary presented the required documents to the plaintiff. The plaintiff accepted the document and effected payment (by negotiating the bill of exchange). The plaintiff passed the documents onto the defendant and sought reimbursement. The defendant received the documents on 9 August 1994 and immediately passed the same onto the applicant, but the applicant rejected the documents and alleged that the weight certificates were not in the correct form. The defendant then forwarded the applicant's written objections together with the documents to the plaintiff by courier, and was received by the plaintiff on 17 August 1994 which was within seven banking days of the receipt of the documents. The court awarded the plaintiff the damages claimed and held that the defendant was precluded under Article 14 of UCP 500 from claiming that the documents were not in compliance with the terms of the credit. Mance J clearly drew a distinction between a reasonable period of time and the seven banking day maximum:

The objection ... which reached the plaintiffs on 17 August 1994 was within seven banking days following the defendants' receipt of the documents, but the plaintiffs submit it was not sent ... within a reasonable period of time (p 68).

His honour accepted that submission. What is the implication of this ruling? Apparently, even though Article 14(d) states that documents

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can be rejected ‘no later than the close of the seventh banking day following the day of receipt of the documents’, this is by no means an inflexible rule. Even a bank takes less than seven banking days to examine the documents and decide to reject or accept, circumstances may be such that the court would still find the time taken to be unreasonable. In exercising his discretion, the judge will take into account factors such as the complexity of circumstances, the nature of the documents required, the volume of documents involved and other circumstances.

In Bayerische, the court strictly scrutinised the circumstances surrounding the delay. The defendant (the issuing bank) completely failed to exercise its own judgment. It simply handed over to its customer responsibility for determining whether the documents were discrepant. It did not make up its own mind in the first instance to identify the discrepancies and to promptly approach the applicant to seek instructions regarding the waiver of compliance. Because of that, the whole process took more than the ‘reasonable time’ allowed by Article 13(b) and the defendant had failed to act ‘without delay’ as required by Article 14(d):

I also find that, if the defendants had formed their own independent judgment, and if they had referred to [the applicant] only for a waiver of discrepancies which the defendants had discovered, matters would in probability have proceeded considerably quicker than they did.

The notice of rejection was sent to the plaintiff by courier. The court had to consider whether the objection was sent ‘by telecommunications or, if that was not possible, by other expeditious means, without delay’. The court held that the use of a courier by the defendant instead of using facsimile or telex was not reasonable given that both the plaintiff and defendant had access to facsimile machines. Hence, the notice was not given without delay. However, it is worth noting that under English and Hong Kong law, the UCP do not have the force of law or the status of a trade custom. They apply only if the parties have incorporated them into their letter of credit. Hence, a bank may try to obtain an agreement

11 Article 1 of UCP 500
from the applicant to alter the UCP provisions by allowing a longer maximum period. This is important because the paying or issuing bank may reasonably need more than seven days to inspect the documents if the documents required for presentation are complicated and voluminous.

Conflicting interpretations: whether documents produced by computers or photocopying are in compliance?

In Glencore International A.G. v Bank of China [1996] 1 Lloyd's Rep 135, the English Court of Appeal was required to consider a contract of sale for aluminium ingots between the Swiss sellers Glencore International and the Chinese buyers Shan He Trade Company Ltd. dated 24 May 1995. Payment was to be by an irrevocable letter of credit issued by the Bank of China payable on presentation of various documents including the buyer's certificate of receipt. Glencore duly presented the documents under the credit to the negotiating bank Vereinsbank who agreed to discount them for their own account and then rendered them to the Bank of China for reimbursement. The credit was expressed to be subject to UCP 500. Article 20(b) of UCP 500 clearly reads:

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

The beneficiary Glencore, in accordance with its normal practice, printed the certificate from its computer system. Glencore had ordinary word processing equipment and a printer. The printer produced the document which was then photocopied by a high quality photocopier for the requisite number of copies (needed for internal or external purposes) on the same paper as that used by the printer for the original document. No headed or embossed Glencore paper was used. It was impossible by the ordinary eye to distinguish the printed and the photocopied versions. One document was then signed in ball-point pen by Mr. Strickler on behalf of Glencore for the purpose of submission under the letter of credit. The Bank of China rejected the certificates on the ground that
they were neither original documents nor, as required by UCP 500 Article 20(b), marked as 'original'. The Court of Appeal upheld the decision of the trial judge. They came to the unanimous conclusion that a document produced by a word processor or photocopier, no matter what the quality of the finished product, can only be accepted as an 'original' if marked as such. Sir Thomas Bingham MR (at p 152) said that:

An originally handwritten or originally typed document must, on any test, be an original and there is no reason why it should be marked as an original unless the letter of credit so stipulates.

The court was of the clear opinion that when UCP 500 was incorporated into the letter of credit the specific wording of UCP 500 could not be overridden by any banking practice to the contrary:

There is abundant room to debate what, in the context of modern technology, is an original. A handwritten or typed document plainly is, but other documents can also be plausibly said to be so. Article 20(b) is, as it seems to us, designed to circumvent this argument by providing a clear rule to apply in the case of documents produced by reprographic, automated or computerised systems ....

But a signature on a copy does not make an original, it makes an authenticated copy; and art. 20(b) does not treat a signature as a substitute for a marking as 'original', merely as an additional requirement for some cases ....

To have marked the certificates 'original', as other of the tendered documents were marked, would have been simple and without cost. We can see no escape from what seems to us the plain language of the sub-article (p 153).

In this example, the rejected documents were not marked as original, yet they were clearly hand-signed. The Court of Appeal made it clear that the effect of the signature, in the absence of the 'original' endorsement, was merely to make the document an authenticated copy. It is widely believed that the practice of distinguishing between copies labelled 'original' and those which are not, for the purposes of commercial dealings, is often artificial. In fact the trial judge Rix J stated that the
Bank of China’s arguments were ‘very technical’ and ‘without merit’. Nevertheless the clear advice to the beneficiary, unless it is totally clear that the document is an original, is to print the word ‘original’ on to the document and certificate in some obvious place.

The Court of Appeal decision in Glencore International was considered by the English High Court in the more recent case Karaganda Ltd. v Midland Bank plc [1998] Lloyd’s Rep Bank 173. Midland Bank, at the request of a Jersey company named Karaganda Limited, issued a letter of credit expressed to be subject to UCP 500, payable against documents from the beneficiary, a Swedish company called Michael Goldstein. The credit provided for payment against presentation of various documents including an original insurance policy. Midland Bank rejected the insurance policy presented by the beneficiary. Midland Bank argued that:

- The insurance policy was produced on a word processor by a computerised system.
- Article 20(b) of UCP 500 requires such a document to be ‘marked’ as original.
- The insurance policy was not ‘marked’ as original.

The court held that the insurance policy was produced by a computerised system and that documents so produced must be marked as original in accordance with Article 20(b). However, based on the evidence, the court held that the requirement for marking was satisfied where other markings on the document clearly indicate that it was the original and there could be no doubt about it being original. The court relied on three features from the evidence of this case:

- The original and duplicate policies were presented under the credit. Each page of the original policy was on Thilly Van Eessel notepaper which bore the company’s logo in blue ink and was watermarked. The original was signed on behalf of Thilly Van Eessel in blue ink.
• There were two versions of the policy presented. The duplicate was a photocopy of the original. It was stamped in blue bold print 'duplicate' and was also signed in blue ink.
• The policy issued by Thilly Van Eessel contained a clause stating, 'This policy is issued in original and duplicate, one of which to be accomplished, the other to stand void.'

Diamond J said:

It seems to me that the insurance policy in this case was sufficiently marked as original by reason of the three features I have mentioned. In my judgment the requirement that a document produced by a computerised system must be 'marked as original' is satisfied if either the document is expressly marked with the word 'required' or if it is a necessary implication from the terms and marks on the particular document, or (in the case of bills of lading and insurance policies) the set of documents, that the document or documents are original (p 183).

Diamond J took the view that a banker's approach to document verification should be functional rather than literal or rigid. If there is real doubt or ambiguity as to the compliance of a stipulated document, there is force in the view that the doubt or ambiguity should be resolved in favour of giving effect to the overall purpose of the transaction.

Prudent bankers, beneficiaries and their legal advisors have to take special care. As the technology advances, hand-written or typed documents are becoming rare. In this modern era of electronic commerce (e-commerce), the contents and even the companies' logos on most of the certificates, insurance policies and bills of lading are produced or appearing to have been produced by reprographic, automated or computerised systems. In practice, the bankers and the beneficiaries shall make sure that the documents for presentation under letters of credit be marked 'original' by the issuers of the documents in order to secure their position under UCP 500, unless by the terms of the credit those documents are permitted to be copies.
Does a bank owe any duty to the beneficiary after the expiry of the credit? What are the legal implications for an applicant to instruct the issuing or confirming bank to accept the documents ‘on a collection basis’?

Whether a bank owes any duty to the beneficiary after the expiry of the credit depends largely on whether the presentation of the future documents does constitute a binding agreement under the letter of credit. The surrounding circumstances have to be construed in the context of the letter of credit transaction in determining whether the presentation was made under or outside the letter of credit.

*Harlow & Jones Ltd v American Express Bank Ltd* [1990] 2 Lloyd’s Rep 343 is a good illustration of this issue. An Indian buyer wished to purchase a substantial quantity of steel from the plaintiff. They entered into a contract for the sale of steel. The contract provided that payment was to be by irrevocable letter of credit. The credit was issued by the defendant bank’s Calcutta branch. The plaintiff (i.e. the seller of the cargo and the beneficiary of the credit) delivered to the negotiating bank a set of discrepant documents after the expiry of the credit. Consequently, the documents were forwarded to the issuing bank in Calcutta under cover of a letter suggesting that they be handled on a ‘collection basis’. A representative of the Indian buyer called on the defendant bank and delivered a letter stating that it had been decided to accept the documents, enclosing *inter alia* the three bills of exchange duly accepted. The defendant bank handed over the shipping documents to the buyer. The bills matured on a later date but they were dishonoured by non-payment. The plaintiff/beneficiary brought an action to recover the amount of the documentary credit from the issuing bank, claiming in the alternative for a remedy based on that bank’s release of the documents to the beneficiary against acceptance instead of payment. The court gave judgment for the beneficiary on both grounds. Gatehouse J held that the discrepant documents, though dispatched to the issuing bank on a ‘collection basis’, were still tendered under the documentary credit. If the issuing bank decided to accept the documents, they were under a duty to make payment under the credit. His Honour said:
The expert witnesses for all parties were agreed that the words ‘on collection basis’ or ‘for collection’ are equivocal and must take their meaning from their context. The experts were also agreed that that it is common practice that documents which are discrepant, including documents which are presented after the expiry date of the letter of credit, are sent to the issuing bank for collection or on a collection basis under the Letter of Credit which will be expressly or impliedly extended if, after inspection, the opener and his bank decided to accept the documents and thus waive the discrepancies.

Article 16(f) of UCP 400 and article 14(f) of UCP 500 both provide that:

If the remitting bank draws the attention of the issuing bank to any discrepancies in the documents or advises the issuing bank that it has paid ... or negotiated under reserve or against an indemnity ... the issuing bank shall not be thereby relieved from any of its obligations under any provision of this article.

Gatehouse J’s decision extends this principle to cases involving the handling of discrepant documents on a collection basis. Hence, the issuing bank may remain liable even if it is advised that the negotiating bank has obtained an indemnity or has acted under a reserve. This case confirmed the banking practice that the use of words ‘on collection basis’ was not inconsistent with the presentation of documents under the letter of credit.

However, according to the recent Hong Kong case Rudolph Robinson Steel Co v Nissho Iwai Hong Kong Corp Ltd & Anor [1998] 2 HKC 462, a distinction has to be drawn between instructing a bank to arrange for collection under a letter of credit and forwarding documents simply on a collection basis outside a letter of credit. If an applicant instructs the issuing/confirming banks to accept the documents ‘on a collection basis’ under the credit and thus waive the discrepancies, it probably constitutes a renegotiation of the credit. The issuing/confirming banks’ decision to accept the documents invoked the banks’ duties to make payment under the documentary credit. On the other hand, if the documents are simply accepted ‘on a collection basis’ outside the letter of credit, it may not
amount to a renegotiation of the credit. The bank would collect the amount from the applicant if it could but without responsibility if it could not.12 Whether the instruction to accept the documents ‘on a collection basis’ is to be regarded as under or outside the credit will depend chiefly on the construction of the relevant documents and the surrounding circumstances. In Rudolph, the Court of First Instance held that there was no renegotiation of the letter of credit in the circumstances, and therefore the issuing bank Sanwa Bank (the second defendant) was not liable to pay the beneficiary. Cheung J said:

If one examines the common practice referred to by the experts in Harlow & Jones, one can see that the practice is rather narrow in scope. It refers to discrepant documents, including documents presented after the expiry day of a letter of credit, sent to the issuing bank for collection or on a collection basis ....

In the present case, the document which was required to be presented on a collection basis was the report. This was not a document which was covered by the letter of credit. The presentation of this document could not be regarded as the presentation of a discrepant document or a document under the letter of credit because its existence was simply not required under the terms of the letter of credit. It is difficult to rationalise the situation as a renegotiation of the letter of credit (at p 474).

Nevertheless in some situation the parties involved may encounter practical difficulties in applying this test. For example, it may happen that an ocean bill of lading is originally required under the credit. Due to shortage of cargo space provided by the liner services, the beneficiary has to deliver the cargo by air in order to supply the goods at the right time. The applicant instructs the issuing/confirming bank to accept the airway bill ‘on a collection basis’ even though the credit has already expired. The airway bill may not be one of the documents covered by the credit. However, the existence of a transport document, no matter an ocean bill of lading or an airway bill, is plainly required under the terms of the credit. This transport document is the central document indicating that the goods were received by the carrier in apparent good order and

12 Note 26 above, p 473
condition. It also stipulates the contractual rights of the consignee or the holder of the document against the carrier. It is not entirely certain whether the applicant’s acceptance of this document on a collection basis in this situation will lead to a renegotiation of the credit.

The ICC International Standby Practices which came into force on 1 January 1999

A standby letter of credit is a document in which the issuer is usually a bank. At the request of the applicant, the bank agrees that the beneficiary will be paid, before the expiry of the credit, upon the beneficiary’s presentation of its demand for payment or any documents evidencing the applicant’s non-performance or default. It is akin to the ordinary letter of credit in that payment is triggered by the presentation of documents in accordance with the requirements of the credit. An ordinary letter of credit usually requires the production of the transport document, invoice, insurance policy and other specified documents in connection with the sale and carriage of the goods. The standby letter of credit, however, is usually activated by the tender of a written demand for payment or a certificate of default without the issuing bank being concerned with actual default. The essence of a standby documentary letter of credit is that the issuer will ‘stand by’ to perform in the event of the applicant’s non-performance. In *Hongkong and Shanghai Banking Corporation v Kloeckner & Co* [1990] 2 QB 514, the London branch of Hongkong Bank provided a standby letter of credit in favour of the defendant (beneficiary) in respect of liabilities of an applicant to the defendant on dry cargo transactions. The court held that the defendant beneficiary was entitled to some US$10 million under the standby credit upon the presentation of the specified documents by the beneficiary.

A recent example of injunction against honour of a standby letter of credit is *Kraerner John Brown Ltd v Midland Bank plc & PT Polyprima Karyareksa* [1998] CLC 446. Polyrima and the plaintiff entered into a contract for the supply of plant and materials and the provision of certain services. As part of the arrangements, Midland issued a standby letter of

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13 See *Republic National Bank of Dallas v Northwest National Bank of Fort Worth* 578 SW 2d 109 at p 113 (Texas 1979) and *Bossier Bank & Trust Co v Union Planter’s National Bank* 550 F 2d 1077, at p 1079-81
credit in favour of Polyrima. The standby credit provided that any demand must be accompanied by a written statement certifying that:

- The plaintiff had failed to comply with its obligations under the agreement.
- Polyrima had given the plaintiff a written notice of Polyrima's intent to require drawdown under the standby letter of credit at least fourteen days prior to such drawdown.

A demand was served by Polyprima on Midland and this was accompanied by a written certificate which stated that: 'Polyrima has given [the plaintiff] the notice required in accordance with article 8.3 of the Agreement'. The plaintiff successfully obtained an injunction restraining Midland from paying Polyrima certain sums under the standby credit. The court was not satisfied that Polyrima could honestly claim that they had served a written notice on the plaintiff when they plainly had not done so. The demand made by Polyrima was fraudulent because it had no right to make the demand and had no genuine belief that it had the right to make the demand.

A standby credit performs the similar function of a guarantee in that it enables the beneficiary to obtain money from the issuing or confirming bank upon the default on the part of the other contracting party. However, many issuing banks still choose to incorporate UCP 500 into their standby letter of credits. As a result, the beneficiary is also subject to the rule of strict compliance under Art 13(a) and 14 of UCP 500.

Flawed presentation of the documents can cause problems for beneficiaries seeking to collect payment under the standby letters of credit. The ICC recently issued the International Standby Practices ("ISP"). It came into force on 1 January 1999. One of the purposes of the new ISP is to make the standby credit more dependable when a drawing or honour is questioned. Similar to UCP, ISP does not have the force of law or the status of a trade custom. A standby letter of credit will be covered by the ISP only if the parties have incorporated it into their contract. Rule 4.09 ISP provides that:

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14 Professor Schmitthoff stated: 'The standby letter of credit is thus often functionally similar in effect to a bank guarantee.' Export Trade: The Law and Practice of International Trade (London: Sweet & Maxwell, 9th ed 1993), p 430
(a) If a standby requires ... specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, then typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby.

(b) If a standby requires ... a statement without specifying precise wording, then the wording of the document presented must appear to convey the same meaning as that required by the standby.

The rigors and stringency of the strict compliance rule seem to have been softened by the ISP. Under the ISP, if the asserted deviations from the conditions of the standby credit are slight or insubstantial as set out in 4.09, the beneficiary's entitlement under the credit may not be jeopardised. The bank may be more concerned with the substantial compliance of the condition of the credit such as whether the document indicating the default on the part of the principal has been tendered as required. Since the ISP is very new, it is difficult to predict how the rules will be interpreted by the courts. The bankers and commercial parties must understand their corresponding rights and liabilities under a standby credit governed by the ISP as regards the presentation and examination of the documents. In my own opinion, the courts may not go too far and declare that the strict compliance approach to documentary inspection has been completely abolished by the ISP. The document presented may still need to comply strictly with the terms of the credit, although the doctrine of strict compliance will be sensibly construed by the courts in the context of the transaction and circumstances. For instance, a discrepancy caused by the alleged ‘typographical error’ may be regarded by the court as sufficiently significant that it could have resulted from a possible fraud by the beneficiary. The courts may need to draw inferences from the nature of the transaction as shown on the face of the documents. Hence, a discrepancy should not automatically warrant dishonour unless it reflects a real likelihood of the non-occurrence of the relevant default or even fraud on the part of the beneficiary.