

## Comments to “Commentary on UCP 600”

- a critical review

By Kim Christensen

### Introduction

It was indeed strange starting to read the “*Commentary on UCP 600*”. Rarely have an LC book been anticipated as much as this one. It is published almost exactly one year after the UCP 600 was approved – and close to 4 months after the implementation date of the UCP 600.

Many discussion, disputes, concerns have concluded that “*this will be solved by the commentary*”. So it is hard indeed to read it “neutral” – as every reader will have some expectations as to what it will include.

This review tries to evaluate the publication as it is. What is good? What is bad?

It is best read in conjunction with the paper titled “*Article by article – a critical walkthrough the “Commentary on UCP 600”*” – focusing on the practical guidance (or lack of practical guidance) provided by the “Commentary on UCP 600”.

### A book of dilemmas and guidance

The “Commentary on UCP 600” contains many dilemmas but also much guidance.

First of all it claims to be made “by the UCP 600 Drafting Group” – but the only name mentioned in the book is that of Gary Collyer. The group of authors is in other words not mentioned – which seems a bit strange.

The advertisement for this commentary says that it is for “*lawyers, traders and practitioners*”. In addition Mr. Gary Collyer says that “*The aim has been to provide a Commentary that enlightens practitioners as to the thought processes behind the changes in each article and to explain why a change was introduced and, in some cases, why no change was made.*”

This seems actually to be very precise. One gets the clear impression that the purpose is to show – at least some of – the process in making the UCP 600.

With that in mind there are some vital questions that need to be asked.

- Is this what the “market” was expecting?
- Has the market been waiting eagerly for information *on the drafting process* for more than one year?

I dare not say – but personally I had been hoping for a reference book – giving clear insight to the practical application of the 39 articles of the UCP 600. History is history – and it may be nice information, but what is needed is guidance.

There are of course some practical guidelines in the book – but somehow it is overshadowed by information as to the process.

One example is in article 21 – where it is described how the drafting group had at some point in the process combined the “Non-negotiable sea waybill” and the “Bill of lading”. This was however not

done – as “ICC national committees” asserted that it was unwise”. No real reason/argument is given as to why this was considered unwise. This leaves such statements hanging in the air – and adds no real value to the reader.

The book contains a section for each UCP 600 article titled “*Changes from UCP 500*”. This is a list of bullet points apparent showing the “changes” made to a certain article. This section however contains some strange comments – like in article 14 where a bullet point is worded as follows:

*“Sub-article 14 (h) of the UCP 600 refers to UCP 500 sub-article 13 (c) and includes the concept contained in UCP 500 sub-article 5 (b), which is no longer explicitly stated”.*

To the non-LC specialist such sentence makes no apparent sense. Adding to this that only the text of UCP 600 is included – and not UCP 500 – this would effectively rule out the traders. Such sentence would only be understood by experienced LC specialists/experts – or perhaps Lawyers specializing in LC matters.

With that in mind it is interesting to evaluate what the real gain is for the experienced LC specialist/expert. As far as I can see – the examples showing changed practice are only few – or at least fewer than I had hoped for. One example to that effect is sub-article 14 (h) (*non-documentary conditions*). There is a logic reference to Position Paper No. 3 – and it is stated that even though the wording of this article is identical to UCP 500 – practice has changed. In that context it would have been helpful to follow the example given in Position Paper No. 3:

*For example, if a condition in the documentary credit states that the goods are to be of German origin and no Certificate 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 there would not be a non-documentary condition as the Certificate of Origin would have to evidence the German origin.*

I.e. would that still be applicable under UCP 600 or not? What the commentary has to say is the following:

*“.. the bank should simply treat the condition as if it did not exist and disregard it”*

Sounds like clear talk; however it goes on by saying that

*“The data in documents will still be subject review under sub article 14 (d) to ensure that any data is not conflicting”*

Sub-article 14(d) reads:

*Data in a document, when read in context **with the credit**, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.*

So the data in a document should be read in context with (amongst other things) the credit – which would in this case include the “non-documentary condition”. So perhaps better not to “*completely*” disregard it!!

Here as in other places examples are needed to clarify the point being made.

For the sake of good order it should be noted that the commentary does actually contain some good and educational examples. As far as I can see some of the best are found in article 14 (e.g. the “Weight list example” on page 65).

As all ICC publications it well written – with a nice and fluent language. There is however one aspect in that respect that annoys a bit – and that is the repeated phrase “*The drafting group decided*”. First of all one could argue that *technically* the drafting group “*suggested*” and it was the ICC National committees that “*decided*”. More important however is, that it seems superfluous; what is in the rules is there because it was “*decided*” – and what has not been inserted into to the rules is also the result of a decision.

Commenting rules is an art, and there is a dangerous “trap” in just rephrasing the rule – only creating doubt as to what the rule is all about. A few times the Drafting Group is just about to fall into that trap – like on page 62 which includes an alternative wording a to how “Complying presentation” is defined.

Throughout the rules there is reference to “industry practice”. It seems however this – from the perspective of arguments – is applied rather “loose”:

- Article 21; “Non-negotiable sea waybill”. It is stated that (page 99) that after a number a communications with the ICC Transport commission it was agreed that a “Non-negotiable sea waybill” covers shipment from port of loading to port of discharge – i.e. that it is a “port-to-port document” – and therefore article 21 should reflect that.  
The reference to “industry practice” seems a bit odd since the “*CIM Uniform Rules for Sea waybills*” – Rule 2 states that:  
*“Contract of carriage” shall mean any contract of carriage subject to these Rules which is to be performed wholly or partly by sea*” i.e. a multimodal transport – including at least one sea-leg!
- Article 20; Transshipment”. In explaining the somewhat strange situation that even though the LC prohibits transshipment, it is often allowed – e.g. where goods are shipped in containers – the Drafting group used the following argument:  
*“Sub-article (c)(ii) recognizes the shipping industry practice that transshipment often occurs when goods are shipped in containers, trailers or LASH barges by stating that it is allowed even if prohibited by the documentary credit”*.  
It is one thing that the banks consider this a “handy” rule; but it does seem a bit bold to tie it up to industry practice. In the shipping world “transshipment” means that goods are moved from one means of transport to another – regardless if it is shipped in containers.
- Article 28; “The transit clause”. During the revision it was mentioned that the issuance date of an insurance documents did not in fact indicate from which date the insurance was effective. These comments were however not taken into account by the drafting group. In the commentary they seems to acknowledge this (page 132, top) – but goes on by saying:  
*“However, the principle of examining a presentation to determine, on the basis of the documents alone, whether or not they appear on their fact to constitute a complying*

*presentation, applies. In respect of sub-article (e), a document examiner is not to check details of the specific Institute Cargo Clauses to ascertain the effective date of cover”*  
Or in other words: We choose to disregard industry practice, as it does not fit into our principles.

There are many of those examples – and it seems that the “weight” industry practice is given in the specific issues is determined based on what end-result they are arguing for. The important part however – given the examples above – is that the reader should take great care in just accepting these arguments, as that often does not provide the whole truth.

### **Concluding**

It goes without saying that enormous effort has been put into this publication by the UCP 600 Drafting Group. Due to the amount of time that the LC market has been waiting for this publication – the expectations are extreme. In general the result is okay. Not great – but okay. In many cases it does in fact provide some additional insight as to the application of a UCP 600 article; especially if you are an LC specialist/expert that have followed the revision process (see also the paper “*Article by article – a critical walkthrough the “Commentary on UCP 600”*”).

Personally I had hoped for more; more examples – and more will to go beyond the existing text and address the really hard questions that will eventually arise.

Kim Christensen  
TF Business & Product Specialist  
Vice President at Nordea

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