Reducing Ambiguity or Increasing Contracting Costs? Interpreting UCP 600 Article 16 Obligations and *Fortis Bank v. Indian Overseas*

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**Introduction**

Research done by the International Chamber of Commerce (ICC) in recent years suggests that as many as 70% of documents presented as letters of credit (LCs) were found discrepant, or exhibited inconsistencies from negotiated terms and deemed insufficient to allow payment to proceed.1 This finding spurred the ICC to include more detailed directives regarding discrepant documents in their sixth, most recent revision, to international LC transaction guidelines.2 In a unanimous vote on October 25, 2006, the Banking Commission of the ICC adopted the newest edition of the Uniform Customs and Practice for Documentary Credits, the UCP 600.3 The new language of the UCP 600 addressed the developments in the banking,

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1 For published references to this discrepancy issue in the years immediately preceding the issuance of new UCP 600, see International Chamber of Commerce, *ICC Response to the Basel Committee Consultative Document on “Strengthening the Resilience of the Banking System,”* annex 1(A), ICC Document No. 470/1139 (April 16, 2010) at 4, available at http://www.iccwbo.org/uploadedFiles/ICC/policy/banking_technique/Statements/1139%20ICC%20Position%20Paper_Basel%20Committee%20Consultation.pdf; Gary Collyer, *Introduction to UCP 600,* Commentary of Corporate Director ABN AMRO Bank N.V., and Technical Adviser to the ICC Commission on Banking Technique and Practice at 2 (2007) (noting that when work “on the revision [of UCP 500] started a number of global surveys indicated that, because of discrepancies, approximately 70% of documents presented under letters of credit were being rejected on first presentation”), available at http://www.internetc.com/TradeRefs/UCP600text.pdf. *See also* Martin Shaw, *Martin Shaw Claims There Are Better Ways to Reduce Discrepancies and That the ICC Should Take Advantage of Them, Documentary Credits Insight,* Spring 1999 at 11 (reporting views of “observers” that at least “50% - some say up to 60% or even 70% of presentations do not comply”).


3 International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits (UCP 600),* ICC Publication No. 600 (July 1, 2007) [hereinafter UCP 600].
transport, and insurance industries. Moreover, to achieve the “loftier goal of enhancing the reputation of LC’s,” the drafters of the UCP 600 aimed to reduce the number of documents found discrepant on first presentation.

The UCP 600 purports to alleviate many of the interpretation problems that existed under the UCP 500. These problems included the varying understandings of what discrepancies warranted dishonor—the refusal by one party to the LC to furnish payment. In addition, there has been substantial debate regarding the replacement of the “reasonable time” provision (indicating how long banks could delay notice of discrepant documents) with a maximum limit. LC commentators had predicted how courts would respond to the new UCP 600 documents, but until *Fortis Bank v. Indian Overseas*, commentators were left wondering exactly how courts would interpret the changes.

This note focuses on the implications of the UCP 600 interpretive principles employed by Judge Hamblen in *Fortis Bank*, including his reliance on an “implicit obligation” within the UCP 600. This obligation—that rejecting banks must act in strict accord with their Return Notices—and the remedy of preclusion may operate to disadvantage multinational companies seeking the use of LCs. It will discuss whether any “implicit obligation” should be read into an international code relying on local customs and common law.

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4 *International Chamber of Commerce, Commentary on UCP 600 Article-by-Article Analysis by the UCP 600 Drafting Group, ICC Publication No. 680 (Oct., 2007).*

5 See infra text accompanying note 51.

6 *International Chamber of Commerce, The Uniform Customs and Practice for Documentary Credits (UCP500), ICC Publication No. 500 (Jan. 1, 1994) [hereinafter UCP 500].*

7 See infra text accompanying note 44.


9 [2010] EWHC 84 (Comm) (Eng.).


11 UCP 600, *supra* note 3, art. 16 [hereinafter Article 16].
Part I of this note introduces LC jurisprudence, notes the specific changes brought about through the adoption of the UCP 600, and presents an overview of Fortis Bank. Part II will first indicate the problems faced by judges in interpreting UCP 500 provisions regarding discrepant documents and the new interpretive principles Judge Hamblen offers in Fortis Bank. Next, it will explore the problems faced by the interpretive principles employed in Fortis Bank, including the draconian measure of the preclusion doctrine and implications of local customs in regards to Judge Hamblen’s implicit obligation that banks act with “reasonable promptness” upon issuance of an Article 16 return notice. Part III will conclude with a discussion of the economic costs imposed when incorporating the UCP 600 into LCs and discuss the potential long-term contracting costs of Judge Hamblen’s interpretation.

I. Background

The Fortis case involves a basic letter of credit transaction and interpretation of the UCP 600. First, this section provides an overview of basic LC law, including the parties to the transaction and how litigation can arise. Second, this section addresses the construction of the UCP and outlines the changes that were made in the most recent version.

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12 Fortis Bank, [2010] EWHC 84 (Comm) at [74].

13 As the first case to interpret UCP 600 interpretations of Fortis Bank focuses substantially on the changes between the UCP 500 and UCP 600. This note does not discuss the changes relating to the right of reimbursement owed by an Issuing Bank to a Nominated or Confirming bank in respect to a negotiated or honored LC codified in Articles 7, 8, 13 and 16. For a discussion of issues surrounding this aspect of Fortis Bank see Edwin Borrini, David Fricker & Amy Kho, UCP 600: Confirming Banks and Nominated Banks, Jones Day Commentary, Nov. 4, 2009, at 2-3, available at http://www.martindale.com/members/Article_Attachment.aspx?od=93563&id=833158&filename=asr-833198.UCP600.pdf.

14 This note will focus primarily on only those changes that are applicable to Fortis Bank. For a discussion of all the subsequent changes see Richard Dole, The Effect of UCP 600 Upon U.C.C. Article 5 With Respect to Negotiation Credits and the Immunity of Negotiating Banks from Letter-Of-Credit Fraud, 54 WAYNE L. REV. 735, 763 (2008).
A. Overview of a Letter of Credit Transaction

Fortis Bank provides a traditional example of LC litigation and the following provides background for such transactions.\textsuperscript{15}

1. What is a Letter of Credit?

A typical LC arises in an international commercial transaction and involves three contractual obligations and three separate parties.\textsuperscript{16} First, a seller may wish to sell goods to a buyer in another country.\textsuperscript{17} Because he does not know the buyer, a seller may have concerns that the buyer may become insolvent or refuse to pay for the goods which would leave the seller with the burden of retrieving the goods (or even initiating a lawsuit) in a foreign jurisdiction.\textsuperscript{18} Likewise, a buyer may similarly not trust a seller’s solvency or reliability resulting in a bilateral monopoly between the parties.\textsuperscript{19} The issue could be resolved if the parties had some form of assurance that they will receive payment or shipment for the goods they are requesting.\textsuperscript{20} A commercial LC\textsuperscript{21} will serve this end by substituting the credit of the bank for that of the buyer.\textsuperscript{22} The first underlying contractual obligation is that between the buyer and seller.\textsuperscript{23} Second, there exists a contractual agreement between an issuing bank\textsuperscript{24} and its customer (typically the buyer of goods in the underlying contract), referred to as the applicant.\textsuperscript{25}


\textsuperscript{16} Id. at 100-01.

\textsuperscript{17} U.C.C. § 5-102(a)(10) (1995).

\textsuperscript{18} Xiang & Buckley, supra note 15, at 92.

\textsuperscript{19} Id.

\textsuperscript{20} Id. at 93-97.

\textsuperscript{21} This note addresses only commercial LCs. For description and full historical significance of the commercial letter of credit and standby letter of credit distinction see Xiang & Buckley, supra note 15, at 100-01.

\textsuperscript{22} See id. at 110-13.

\textsuperscript{23} Id.

\textsuperscript{24} U.C.C. § 5-102(a)(9) (1995).

\textsuperscript{25} U.C.C. § 5-102(a)(2) (1995).
Finally, there exist the obligations created by the commercial LC\textsuperscript{26} itself whereby the issuer undertakes to pay the beneficiary, upon a complying presentation\textsuperscript{27} of required documents.\textsuperscript{28}

This LC is a distinct transaction from the underlying contract between the buyer and seller.\textsuperscript{29} Notably, the LC operates independent of any underlying contractual obligations.\textsuperscript{30} This arrangement is beneficial to international commercial activity, since neither party controls both the goods and money at the same time, reducing the chance of misrepresentations by contracting parties.\textsuperscript{31} In addition, beneficiaries are required to produce complying documents to the issuing bank before payment by the applicant is sent.\textsuperscript{32} The potential risk surrounding these types of transactions is effectively reduced.\textsuperscript{33}

Although LCs tend to reduce transaction costs and risk inherent in international commercial trade, they occasionally create problems. LCs create obligations that are documentary in nature, and banks have unique requirements under an LC regarding the presentation and acceptance of LC documents.\textsuperscript{34} The issuing bank only has an obligation to pay once the beneficiary has presented documents under the LC which comply with its terms and conditions.\textsuperscript{35} There may also exist a confirming bank\textsuperscript{36} which, on

\textsuperscript{26} This note will address specifically commercial LCs. For a discussion of standby LCs and discrepant document return see id. at 100-01.

\textsuperscript{27} See infra, text accompanying note 50.


\textsuperscript{29} Xiang & Buckley, supra note 15, at 100-03.


\textsuperscript{31} See Xiang & Buckley, supra note 15, at 110-13.


\textsuperscript{33} Although the seller may face a decreased risk, the increase in claims of discrepant documents and potential obligations this creates, as discussed herein may mitigate these benefits.

\textsuperscript{34} See Xiang & Buckley, supra note 15, at 100.

\textsuperscript{35} Id.
authorization or request of the issuing bank, may honor an LC upon presentation by the beneficiary.\textsuperscript{37} The UCP directs that if an issuing bank determines that the presentation is compliant, it must honor the LC.\textsuperscript{38} If the presentation does not comply, then the bank may ask the applicant for a waiver of the discrepancies\textsuperscript{39} or give notice of dishonor.\textsuperscript{40} This notice must state that the bank is refusing to honor or negotiate,\textsuperscript{41} list each discrepancy that justifies dishonor,\textsuperscript{42} and describe what the issuing bank intends to do with the documents themselves.\textsuperscript{43} If a confirming bank is involved, it will forward documents to the issuing bank once documentary conditions are met by the beneficiary.\textsuperscript{44} Subsequently, upon certification both the applicant and beneficiary are directed to proceed with the underlying transaction.\textsuperscript{45}

2. What governs Letter of Credit litigation?

There are two major sources of law governing LCs: Article 5 of the Uniform

\begin{itemize}
    \item \textsuperscript{36} U.C.C. § 5-102 (a)(4) (1995).
    \item \textsuperscript{37} Xiang & Buckley, supra note 15, at 100.
    \item \textsuperscript{38} UCP 600, supra note 3, art. 15(a).
    \item \textsuperscript{39} UCP 600, supra note 3, art. 16(b).
    \item \textsuperscript{40} UCP 600, supra note 3, art 16.
    \item \textsuperscript{41} UCP 600, supra note 3, art. 16(c)(i).
    \item \textsuperscript{42} UCP 600, supra note 3, art. 16(c)(ii).
    \item \textsuperscript{43} UCP 600, supra note 3, art. 16(c)(iii).
    \item \textsuperscript{44} This note will only address the time frame surrounding presentation, notice of refusal, and return of the documents. For a thorough discussion of the historic use of rejection notices and conformity of presentations see Elizabeth Adodo, Conformity of Presentation Documents and Rejection Notice in Letters of Credit Litigation: A Tale of Two Doctrines, 36 HONG KONG L.J. 309, 322, 334 (2006) (discussing the principle of strict compliance in relation to document presentation and the subsequent validity of a rejection notice and the corrosive effect the tolerance by banks in regards to examination time frames may have).
    \item \textsuperscript{45} For a full introduction to the origin of LC law see Xiang & Buckley, supra note 15, at 92-108.
\end{itemize}
Commercial Code ("UCC") and the Uniform Customs and Practice for Documentary Credits.\(^{46}\) In the U.S., LC transactions are governed by the UCC,\(^{47}\) but international customs and practices reflected in the UCP are sometimes referenced (and in fact were explicitly incorporated in the latest version of UCC Article 5).\(^{48}\) Additionally, parties may mutually agree to have the LC governed by the UCP.\(^{49}\) This note will focus on contracts that have incorporated by reference the UCP through an LC’s terms and conditions, as these are the majority of LCs.\(^{50}\)

3. **What is a discrepant document and how does this impede an LC transaction?**

As discussed above, a document may be declared discrepant when it does not comply with contractual terms or international business practice.\(^{51}\) When a bank declares a document discrepant, it is required under the UCP to give prompt notice of dishonor and to specify the exact provisions on which it is relying in dishonoring an LC ("return notice").\(^{52}\) If a bank fails to specify a discrepancy in a return notice, then it is estopped from later

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\(^{47}\) See generally id. at 103-07.

\(^{48}\) U.C.C. § 5-116(c) (1995) ("except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for documentary Credits").

\(^{49}\) U.C.C. § 5-116(a) (1995); See also Atari, Inc. v. Harris Trust & Sav. Bank, 599 F. Supp 592, 594 (N.D. Ill, 1984) (noting that since the parties had expressly adopted the 1974 revision of the UCP in the letter of credit the UCP would control where the UCP was in conflict with other statutory interpretation).

\(^{50}\) For a comparison of court’s interpretation under the UCP and the UCC and the potential effect the UCP 600 will have on such reliance on international banking standards see Dole, *supra* note 14, at 763.

\(^{51}\) UCP 600, *supra* note 3, art. 2 ("Complying presentation" means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice).

\(^{52}\) UCP 600, *supra* note 3, art. 16; see also Offshore Trading Co., Inc. v. Citizens Nat. Bank of Fort Scott, Kan., 650 F. Supp. 1487, 1494 (D. Kan. 1987) (applying Kansas law) (citing to UCP 500 art. 16(e), noting that if the notice of dishonor did not state the discrepancies the issuer was precluded from claiming that the documents were nonconforming).
asserting the discrepancy. Thus, failure to promptly issue a return notice may result in the bank’s obligation to honor a disputed LC and remit payment.

Courts have construed the UCP 500 to require strict compliance with the underlying contractual terms and conditions. Strict compliance means that minor misspellings or typographical error within the LC warrants dishonor by the other party to the LC. The UCP 600 diverges from this strict compliance principle by explicitly stating that minor errors such as a mistake in the address line (except the country) are not dishonorworthy discrepancies. Although the change was intended to streamline the process and incorporate what most banks were already doing, the result was mixed.

53 UCP 600, supra note 3, art. 16(f) (“If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation”).

54 Id.

55 See (compliance) Crocker Commercial Services v. Countryside Bank, 538 F. Supp 1360, 1376 (N.D. Ill. 1981) (applying Illinois law) (holding that an inconsistency between a document required by the credit and a document not required by the credit could not produce a discrepancy that would justify dishonoring the LC); Integrated Measurement Systems, Inc. v. Int’l Commercial Bank of China, 757 F. Supp. 938, 946 (N.D. Ill 1991) (applying Illinois law) (noting that a one digit difference between the description of the goods in the invoice and that in the LC did not justify the bank’s refusal of the documents). See also (promptness) Agri Export Corp. v. Universal Sav. Ass’n 767 F. Supp. 824, 838 (SD Tex. 1991) (applying Texas law) (holding that the preclusive provision of UCP art 16(e), which barring the issuer from later raising discrepant claims, had been enacted by the issuer’s failure to comply with its obligation under Article 16(d) to “promptly” notify the beneficiary of the discrepancies on which it based refusal).


57 UCP 600, supra note 3, art. 14(j) (noting that “when the addresses of the beneficiary and applicant appear in any stipulated document they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit”).

58 International Chamber of Commerce, Commentary on UCP 600, supra note 3, art 14.

59 Discussed infra, at Section II.
B. Changes in the UCP 600 Article 16

To overcome the rise in discrepant documents and to account for more recent international practices regarding LCs, the UCP 600 included several changes to the handling of and responsibilities regarding discrepant documents.\(^\text{60}\) This section proceeds by describing the relevant UCP provisions, including Article 14 of the UCP 500,\(^\text{61}\) and the changes to the language through Article 16 of the UCP 600.\(^\text{62}\)

1. Article 14 of the UCP 500

UCP 500 Article 14, entitled “Discrepant Documents and Notice,” provides that banks may dishonor documents if they appear to not be in compliance with terms and conditions of the LC.\(^\text{63}\) Furthermore,

If the Issuing Bank and/or Confirming Bank, if any, or a Nominated Bank acting on their behalf, 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. ii. Such notice must state all discrepancies in respect of which the bank refuses the documents and must also state whether it is holding the documents at the disposal of, or is returning them to the presenter.\(^\text{64}\) (emphasis added)

This bright-line rule requires the bank to issue a notice of return within seven business days, but the rule omits the obligation of the issuing bank claiming discrepancy to physically return the documents, and any time

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\(^{60}\) These changes are codified in the UCP 600, supra note 3, art. 7, 8, 12, 14, 16.

\(^{61}\) UCP 500, supra note 6, art. 14.

\(^{62}\) UCP 600, supra note 3, art. 16.

\(^{63}\) UCP 500, supra note 6, art. 14(B). In full UCP 500 art. 14(B) states:

upon receipt of the documents the Issuing Bank and/or Confirming Bank acting on their behalf must determine on the basis of the documents alone whether or not they appear of their face to be in compliance with the terms and conditions of the Credit. 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. Id.

\(^{64}\) UCP 500, supra note 6, art. 14(D)(i).
frame for such return. The UCP 500 did not state any timeframe for this unstated obligatory return of discrepant documents.\(^{65}\)

2. **Article 16 of the UCP 600**

UCP 500 Article 14 was replaced by UCP 600 Article 16, entitled “Discrepant Documents, Waiver and Notice,” which alleviated some of the specific problems associated with UCP 500 Article 14 but failed to address the issuing bank’s obligation regarding physical return of the disputed documents.\(^{66}\) It did, however, provide some clarity in return notices:

   c. When a [bank] decides to refuse to honor or negotiate, it must give a single notice to that effect to the presenter. The notice must state a) that the bank is holding the documents pending further instructions from the presenter; or b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; c) or that the bank is returning the documents; or d) that the bank is acting in accordance with instructions previously received from the presenter.\(^{67}\)

The UCP 600 is silent with regard to the amount of time allowed between issue of a return notice and the physical return of the disputed documents. Both the UCP 500 and UCP 600 offer preclusion as the remedy when a bank “fails to act in accordance with provisions of this article.”\(^{68}\) Although both the UCP 500 and 600 provide a guideline for banks and courts in determining discrepant documents, they fail to articulate additional obligations that may arise, such as an obligation to remit payment once an LC is issued.\(^{69}\)

\(^{65}\) *Id.*

\(^{66}\) UCP 600, *supra* note 3, art. 16.

\(^{67}\) *Id.* art. 16(c)(i), 16(c)(iii).

\(^{68}\) *Compare id.* art. 16(f), *with* UCP 500, *supra* note 6 art. 14(E).

\(^{69}\) *Id.*
C. Statement of the Case

Because Fortis Bank represented the first judicial interpretation of the UCP 600, the professional business world monitored its progress through the English courts. This section first outlines the facts of the case, the arguments made by each party, and the reasoning by which Judge Hamblen construes an “implicit obligation” into the UCP 600 Article 16. Then it discusses Judge Hamblen’s use of preclusion as the remedy for a violation of this new “implicit obligation.”

1. Fortis Bank v. Indian Overseas

An applicant requested Indian Overseas Bank (“IOB”), to issue LCs in connection with certain purchase contracts between the applicant and a third party. Each LC was subject to the UCP 600 and contained a request from IOB to Fortis Bank (“Fortis”) to advise the beneficiary and stated that Fortis could add its confirmation (thereby making it the confirming bank). IOB rejected the majority of the documents presented and refused to pay the beneficiary. IOB issued notice of return under UCP 600 Article 16(c)(iii) and subsequently Fortis requested that IOB return the documents. After various exchanges between the banks, Fortis finally requested that IOB return the documents immediately. Eventually each of the documents was returned by IOB, but not before 89 to 104 days had passed.

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70 Several firm websites and business journals reported on the impact Fortis Bank would have on their own practices. See, e.g., Edwin Borrini, David Fricker & Amy Kho, UCP 600: Confirming Banks and Nominated Banks, Jones Day Commentary, Nov. 4, 2009, at 2-3 available at http://www.martindale.com/members/Article_Attachment.aspx?od=93563&id=833158&filename=asr-833198.UCP600.pdf. See also Collyer, supra note 1, at 3.

71 Fortis Bank v. Indian Overseas Bank, [2010] EWHC 84, 8-13 (Comm) (Eng.).

72 This was a new use of the UCP 600 language relating to the right of reimbursement owed by an issuing bank to a nominated or confirming bank in respect of a negotiated or honored credit. For a discussion of the issues Fortis Bank brought to the forefront regarding this right of reimbursement see Borrini, Fricker & Kho, supra note 70, at 2-3.

73 All subsequent discrepancies except one were found invalid, but nonetheless the preclusion principle was applied. For a discussion of why this creates a stricter interpretation of UCP 600 than what was previously used under the UCP 500 see id. at 4.

74 Discussed infra at 22.


76 Id. at 6-29.
passed since the first set of documents was rejected, and 34 days after the second set Fortis had requested returned.\textsuperscript{77} The issue facing the court was whether the preclusion principle\textsuperscript{78} applied in relation to a bank’s inaction subsequent to the issuance of a compliant return notice.\textsuperscript{79} In other words, is there an inherent obligation that IOB act in accordance with its disposal notice and to do so with “reasonable promptness?”\textsuperscript{80}

IOB contended that the drafters of the UCP 600 intended to restrict preclusion only to acts banks make prior to the issuance of a disposal notice, and that acts following this issuance fell outside the scope of Article 16(f).\textsuperscript{81} It further submitted that there is no need to make compliance a contractual obligation since, as a general matter, banks do act as stated.\textsuperscript{82}

Fortis countered that IOB was obligated to return the documents within a “reasonable time” and that not creating an inherent obligation would defeat the purpose of the UCP to create certainty and uniformity.\textsuperscript{83} It also argued that international banking practice required that in this context, “reasonable time” meant “reasonable promptness.”\textsuperscript{84} In addition, Fortis contended that IOB’s interpretation would prejudice a beneficiary’s ability to promptly protect its own interests, by eliminating its ability to re-present new, compliant documents.\textsuperscript{85}

Judge Hamblen agreed with Fortis that a contractual requirement to issue a return notice necessarily involves an obligation to comply with such notice.\textsuperscript{86} In regards to the changes to the UCP 600, the court noted that IOB lacked a sufficient banking reason to explain why the new rules should be

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} UCP 600, \textit{supra} note 3, art. 16(f).

\textsuperscript{79} The court found that the Return Notice issued by Fortis bank had fully complied with UCP 600, \textit{supra} note 3, art. 16(c)(iii). \textit{See Fortis Bank}, [2010] EWHC 84 (Comm) at 6-29.

\textsuperscript{80} \textit{Id.} at 23-54.

\textsuperscript{81} \textit{Id.} at 6-29.

\textsuperscript{82} \textit{Id.} at 65.

\textsuperscript{83} \textit{Id.} at 10-25.

\textsuperscript{84} \textit{Fortis Bank}, [2010] EWHC 84 (Comm) at 30.

\textsuperscript{85} \textit{Id.} at 31-39.

\textsuperscript{86} \textit{Id.} at 48-59.
interpreted differently. Ultimately, the court was persuaded by the argument of detriment to beneficiary’s rights if the bank failed to deal with the presented documents in a timely manner. Judge Hamblen reached this result by implying a term into UCP 600 that a bank is obligated to act in accordance with the disposal statement it has made in its Article 16 return notice and to return documents with “reasonable promptness.” Applying the English common law standard in construing implicit obligations, Judge Hamblen held that:

1) It is both reasonable and equitable to require an issuing bank to act in accordance with the mandatory disposal statement it has made under the contract;

2) This is necessary to complete contractual circle and create an enforcement mechanism for this standard of conduct;

3) It is so obvious “it goes without saying” that when an issuing bank makes a disposal statement it must actually do what it says it will do;

4) It is easy to clearly express “and the bank must act in accordance with such statement” by adding it to the end of Article 16(c)(iii);

5) There is no contradiction between this implied wording and the expressed wording.

Furthermore, Judge Hamblen explicitly rejected IOB’s argument that a term could only be implied if IOB could satisfy the strict test for implication from usage or custom, and instead relied on background to

87 Id.
88 Id.
89 Id. at 67, 71.
90 These considerations are 1) it must be reasonable and equitable; 2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; 3) it must be so obvious that ‘it goes without saying”; 4) it must be capable of clear expression; 5) it must not contradict any express term of the contract. See BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [1977] 180 CLR 266, 282-83.
91 Fortis Bank, [2010] EWHC 84 (Comm) at 64-66.
establish reasonable expectations of the parties.\textsuperscript{92} He avoided the “overly compartmentalized” approach of construing one section of the UCP and construed strict timely performance as an integral part of the UCP and Article 16 as a whole.\textsuperscript{93} In particular he noted that the five-day\textsuperscript{94} maximum for review before a return notice would be meaningless if there was no time constraint on subsequent actions.\textsuperscript{95} This overcame IOB’s contention that local conditions or customs may make prompt action difficult or impossible, and that if something were to arise which created a force majeure event, then UCP 600 Article 36 could be relied upon.\textsuperscript{96}

2. **Fortis Bank’s Remedy: The Preclusion Principle**\textsuperscript{97}

The UCP 600 is not without an enforcement mechanism. Article 16(f) states “if an issuing bank or a confirming bank fails to act in accordance with the provision of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.”\textsuperscript{98} Ultimately, per the implicit obligation, Judge Hamblen wrote into Article 16(c)(iii) an obligation to act with reasonable promptness upon issuance of a return notice.\textsuperscript{99} Therefore IOB was precluded from relying on any relevant discrepancy.\textsuperscript{100} The preclusion provision of Article 16(f) has been

\begin{itemize}
  \item \textsuperscript{92} Id. at 69-70.
  \item \textsuperscript{93} Id. at 66.
  \item \textsuperscript{94} A shorter time than the seven days allowed under the UCP 500, supra note 6, art. 14.
  \item \textsuperscript{95} *Fortis Bank*, [2010] EWHC 84 (Comm) at 72. Judge Hamblen goes on to explain that this is congruent with a finding by the ICC DOCDEX Decision No. 242 with regards to a documentary credit under UCP 500. In that case the experts settling the dispute noted that an obligation to return documents without delay and be expeditious means was a “minimal standard.” He further notes that were this case to be decided under the UCP 500 a court would conclude in line with ICC DOCDEX Decision No. 242 that there was an implicit obligation to return documents in accordance with a return notice in a reasonable time frame. He notes that the same analysis must apply to the obligation which he just held exists in UCP 600.
  \item \textsuperscript{96} *Fortis Bank*, [2010] EWHC 84 (Comm) at 76.
  \item \textsuperscript{97} This note will only address the preclusion principle outlined in the UCP 600. Similar principles are outlined in the U.C.C. § 5-108:8 and UCP 500, supra note 6, art. 14(E).
  \item \textsuperscript{98} UCP 600, supra note 3, art. 16(f).
  \item \textsuperscript{99} *Fortis Bank*, [2010] EWHC 84 (Comm) at 76.
\end{itemize}
interpreted as amounting to an enforcement mechanism for an issuer’s failure to timely meet its obligations under the letter of credit.\textsuperscript{101}

Applying the preclusion principle to neglecting implicit obligations is not new. In \textit{Petra International Banking Corp. v. First American Bank of Virginia}\textsuperscript{102} the Fourth Circuit noted that “the right to reject is accompanied by the obligation to return the documents, as received, to the bank.”\textsuperscript{103} The court in this case had considered what remedies a customer has when an issuing bank inadvertently accepts nonconforming documents under an LC.\textsuperscript{104} The court held that failing to object to the documentary discrepancies in timely fashion waived an issuing bank’s right to subsequently rely on such a claim.\textsuperscript{105} Therefore, the Fourth Circuit attached preclusion as the remedy for the unstated but implicit obligation to return documents in a “timely fashion.”\textsuperscript{106}

Both \textit{Fortis Bank} and \textit{Petra} indicate that courts are likely to preclude reliance on discrepancy claims when not asserted within a reasonable time frame.\textsuperscript{107} These implicit obligations, as \textit{Fortis Bank} intimates, may become more widespread under the UCP 600.

\section*{III. Analysis}

Judge Hamblen’s interpretation does not seem a far reach from a customary implicit obligation, but it does create several disadvantages this

\textsuperscript{100} \textit{Id.} at 88-92; \textit{See also} UCP 600, supra note 3, art. 16(f) (“If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation”).

\textsuperscript{101} \textit{See} Clarendon, Ltd. v. State Bank, 77 F.3d. 631, 637 (2nd Cir. 1996) (noting that if an issuing bank failed to act in accordance with obligations under UCP 500 art. 16(d) then it was precluded from claiming the documents were not in accordance with terms and conditions of the credit, even where the beneficiary knowingly presented deficient documents).

\textsuperscript{102} 758 F. Supp. 1120 (4th Cir. 1991).

\textsuperscript{103} \textit{Id.} at 1134 (citing Dorf Overseas, Inc. v. Chemical Bank, 91 A.D.2d 895 (N.Y. 1983)) (the bank was subsequently precluded from relying on claims that the LC was discrepant).

\textsuperscript{104} \textit{Id.} at 1128.

\textsuperscript{105} \textit{Id.} at 1129.

\textsuperscript{106} \textit{Id.} at 1128.

\textsuperscript{107} \textit{Id; Fortis Bank}, [2010] EWHC 84 (Comm) at 76.
for multinational corporations who rely on LCs to contract with companies in foreign countries. The UCP utilizes clear language to create clarity in the field of LC law. If judges continue to infer other implicit obligations and attach the preclusion principle to such obligations, they might create more uncertainty regarding parties’ obligations in LC transactions. Additionally, the “reasonable promptness” standard strays from the more common “reasonable time” interpretations used previously in LC case law and could make banks tentative in dealing with stranger companies or entering an LC transaction—something the UCP 600 attempts to mitigate.

A. Timeline of Obligation Under the UCP

Under the UCP 500 banks were given a “reasonable time” to examine documents to determine discrepancies before returning them to the beneficiary. This ambiguity created litigation around the issuance of notices of return. Unlike the UCP 500, the UCP 600 includes no reasonable time provision and instead sets a maximum of five banking days to review documents before they are required to issue Article 16 return notices. Nowhere does UCP 600 use the term “reasonable promptness,” though punctual payment is a stated goal of the UCP 600. As discussed

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108 This note focuses on the ramifications of merely the ‘reasonable promptness’ implicit obligation that is apparent in Fortis Bank, and leaves open the possibility that other courts could utilize this interpretation method in construing implicit obligations in other areas.

109 UCP 500, supra note 6, art. 14.

The Issuing Bank, the Confirming Bank, if any, or a Nominated Bank acting on their behalf, shall each have a reasonable time, not to exceed seven banking days following the day of the receipt of the documents, to examine the documents and determine whether to take up or refuse the documents and to inform the party from which it received the documents accordingly. Id. (emphasis added).

110 See Pietrzak, supra note 10, at 186-95 (reviewing the case law involved in determining ambiguities from “reasonable time not to exceed seven business days”).

111 UCP 600, supra note 3, art. 14(B).

A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation. Id.

112 See UCP 600, supra note 3, Introduction. In fact, the restriction to five banking days regarding time of review may indicate the desire of the drafters to increase promptness and elevate this goal.
supra, the UCP 600 does not mention any subsequent obligations on banks who have issued return notices to act within any time period to comply with such notices—neither “reasonable time” nor a bright-line rule.\textsuperscript{113}

Any obligation regarding a specific time frame for return of documents disadvantages those companies who may find minor discrepancies under the stated terms of the LC but who fail to return the documents within an unknown timeframe which will be based on the future interpretation of local judges. These companies are then precluded from relying on even valid discrepancies.\textsuperscript{114}

B. \textit{Fortis Bank} and Article 16 Interpretation

It is clear that Judge Hamblen’s inclusion of an implicit obligation of “reasonable promptness” is an addition to the UCP 600 as written. Such additional obligations diverge from interpretation principles which rely solely on the UCP 600 language.\textsuperscript{115} Instead, Judge Hamblen relied on common law and stated banking practices to construe this “reasonable promptness” timeframe.\textsuperscript{116} This could be problematic in future construction of the UCP 600, as it may allow local banking customs, in a possibly non-mutual forum, to control questions of interpretation.


In construing a new document like the UCP 600, judges often revert to an earlier version of the document to understand the purpose of any changes made.\textsuperscript{117} Courts also use commentary to inform their decisions. However, it is strange that a court would look strictly to words from the UCP 500 and then to local customary law regarding “implicit obligations” to construe the “promptness” requirement as an implicit obligation.\textsuperscript{118}

\textsuperscript{113} See supra text accompanying note 64.

\textsuperscript{114} See supra text accompanying note 52.

\textsuperscript{115} UCP 600, supra note 3, art. 16(c)(iii) (articulating the exact time frame and what is to be included in a return notice).

\textsuperscript{116} Fortis Bank, [2010] EWHC 84 (Comm) at 64-80.

\textsuperscript{117} Dole, supra note 14, at 763.

\textsuperscript{118} Fortis Bank, [2010] EWHC 84 (Comm) at 36-45.
First, Judge Hamblen looks to the words of the UCP 500 noting that Article 14(e) states that if an issuing bank or confirming bank “fails to hold the documents at the disposal of, or return them to the presenter” then the preclusion principle is applicable to claims of discrepancy.\(^{119}\) The problem with this approach is that the drafters of the UCP 600 intentionally did not include this statement, possibly to create more flexibility in the receiving bank’s ability to properly handle documents. In addition, the LC at issue incorporated the terms of the UCP 600, not 500, and if the precedent is to continually look to the UCP 500 for interpretative guidance then the UCP 600’s power to streamline LC transactions may be undermined.\(^{120}\)

Second, Judge Hamblen turns to English law regarding implying obligations into contracts. Specifically, he cites cases which denote that England is prepared to imply English law principles into international codes.\(^{121}\) This will disadvantage foreign banks who contract around LC terms and conditions, particularly those LCs which articulate specific forum and choice of law.\(^{122}\) This introduces uncertainty into these negotiations by creating different legal obligations for UCP incorporated contracts, and this uncertainty could potentially impact the way banks negotiate an LC. In addition, these banks must factor into their costs the fear of preclusion, the contractual remedy for this new non-contractual obligation.

2. Extra-contractual Obligations and Contractual Enforcement Mechanisms: Non-compliance and Preclusion

In utilizing the preclusion principle of Article 16, Judge Hamblen ignores IOB’s objection to the use of such a draconian remedy and instead

\(^{119}\) Id. at 22.

\(^{120}\) Although it is not new to look to previous versions of the UCP for interpretative guidance it may not be the wisest approach. See George P. Graham, *International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV. 201, 214-20 (2001).

\(^{121}\) *Fortis Bank*, [2010] EWHC 84 (Comm) at 22 (citing Seaconsar v. Bank Markazi, 1 Lloyd’s Rep 36, 39 [1999] (Eng.)).

cites the historic use of preclusion under the UCP for justification of such a measure.\textsuperscript{123} Although it is logical that an obligation should be followed by some sort of remedy to ensure compliance, it is not clear that the UCP 600 was intended to rely exclusively on preclusion as a remedy for non-compliance with non-contractual obligations.\textsuperscript{124} In fact, UCP 600 is silent regarding whether its five-day deadline for examination of documents can give rise to preclusion.\textsuperscript{125} Past interpretations of the UCP 500, which implicate preclusion of claims, has utilized a strict interpretation of any articulated obligation within the UCP.\textsuperscript{126} Judge Hamblen makes a two-step jump. First, he imposes an obligation from local law into an international code, where none is expressly contained. Second, he employs the contractual remedy articulated in the international code to enforce this implicit obligation.\textsuperscript{127} This kind of analysis could complicate LC contracts particularly for multinational corporations and impact their ability to predict and negotiate around assumed obligations arising under an LC. If judges enforce local custom with international law, then banks must contract around the possibility of these new obligations.\textsuperscript{128}

\textbf{C. \hspace{1em} Local Interpretation and a “Reasonable Promptness” Timeframe}

Having raised some issues that arise out of the “implicit obligation” construed by Judge Hamblen, this note will discuss how his requirement of “reasonable promptness” rather than the traditional “reasonable time” will serve to inject further uncertainty into future LC transactions.

\textsuperscript{123} \textit{Fortis Bank}, [2010] EWHC 84 (Comm) at 18-26, 54.

\textsuperscript{124} \textit{See} Integrated Measurement Sys., Inc. \textit{v} Int’l Commercial Bank, 757 F. Supp. 938, 946 (N.D. Ill. 1991), later proceeding 1991 WL 136010 (N.D. Ill.) (applying Illinois law) (construing UCP 400 art. 16 and holding that Article 16 required that a bank dishonoring a credit must give notice without delay, stating the discrepancies and describing why the bank refuses the documents and is precluded from claiming the documents are discrepant if it fails to do so).

\textsuperscript{125} \textit{See} Dole, \textit{supra} note 14, at 763.

\textsuperscript{126} \textit{See} Petra Int’l Banking Corp. \textit{v.} First Am. Bank of Va., 758 F. Supp. 1120, 1134 (4th Cir. 1992) (holding that the preclusion principle was triggered by the issuer’s violations of its Article 16(d) obligations).


\textsuperscript{128} \textit{See} discussion \textit{supra}, at 14.
1. Discussion of “reasonable promptness”

Fortis contended that in construing an obligation to act in accordance with a return notice, the court should utilize a “reasonable promptness” standard since this is what was meant by “reasonable time” in this context. Judge Hamblen substantiated this claim with reference to the UCP 500 noting,

Given that it is established banking practice to act promptly in such circumstances, and given the obvious importance of priority processing of documents following a return notice or instruction, a reasonable time in this context means with reasonable promptness.

He further reasoned that such a standard would be able to account for local conditions which may make prompt action difficult, and noted force majeure clauses will contain an “escape hatch” when action is impossible. He rested his new “reasonable promptness” standard on the use of such a standard in international banking practices and held that the “number of weeks” following IOB’s delay in returning the documents violates “reasonable promptness.”

This interpretation is problematic for two reasons. First he relied on international banking practice, but then made assumptions about local conditions, thereby leaving contracting parties unclear about which—the international standard, or specific local conditions—will control. Second, he gives no guidance regarding the case-by-case analysis implied in a “reasonable promptness” standard.

By construing a “reasonable promptness” standard in accord with international banking law, Judge Hamblen has incorporated additional language that the UCP (all versions) regarding purpose of such a document. However, it is unclear that the drafters intended this standard


130Specifically Judge Hamblen references the ICC DOCDEX Case Decision No. 242, infra note 95.

131Fortis Bank, [2010] EWHC 84 (Comm) at 75 (emphasis added).

132Id.

133Id. at 84.

134International Chamber of Commerce, Commentary on UCP 600, supra note 3, at 3.
to be “read” into the UCP. In fact, nearly every document regarding LCs uses “reasonable time” as the standard and refuses to infer a stricter standard. 135 Although Judge Hamblen referred to the prompt five-day length of time allowed for issuance of a return notice within the Article 14, that standard may not have been intended for subsequent actions by banks beyond issuance notice.

However, the crux of Judge Hamblen’s opinion articulates a UCP 500 interpretation in which “reasonable time” in the words of the text was interpreted to mean “reasonable promptness.” 136 Relying on interpretive methods used for UCP 500, may result in incompatible results considering the numerous revisions to the UCP 600. 137 In other words, if courts simply rely on their own interpretative methods developed under UCP 500 contracts, the purpose of UCP 600, in implementing new international banking standards, will be undermined.

2. Application in LC Context: Outside the Article 16 Parameters

This principle, whereby courts simply revert back to UCP 500 obligations where the UCP 600 is unclear, will make corporations weary of future LC-contracting, something the UCP was designed to avoid. 138 In addition, Judge Hamblen’s application of the Article 16 preclusion principle to outside implicit obligations is troublesome. What follows are two areas of the UCP 600 in which uncertainty in underlying “implicit obligations” may increase contracting costs: foreign banks may be uncertain of unwritten contractual terms; and the timeframe for negotiations may increase. 139

135 See U.C.C. § 5-108 (noting that an “issuer has reasonable time after presentation…” and is “precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given”) (emphasis added); UCP 500 supra note 6, art. 13(B) (noting that banks’ shall have “reasonable time not to exceed seven banking days” to inform the party from which t received the documents about claimed discrepancies) (emphasis added). See also Pietrzak, supra note 10, at 186-95 (discussing use of intentionally vague “reasonable time” standards to allow for case-by-case flexibility and to avoid strict bright line rules which would disadvantage banks by restricting their discrepancy claims to arise to quickly).

136 Fortis Bank, [2010] EWHC 84 (Comm) at 74-76 (after analogizing the case at hand to ICC DOCDEX Decision No. 242, Judge Hamblen proceeds to assume that a similar analysis under UCP 600 would result in this same “reasonable promptness” standard).

137 See supra text accompanying notes 67, 68.

138 See International Chamber of Commerce, Commentary on UCP 600, supra note 3, at 3.

139 Id.
One ambiguous area is under Article 14’s examination of document’s provisions whereby 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.” \(^{140}\) Two parts of this new standard may be implicated under Judge Hamblen’s analysis regarding the UCP 600. First, “international standard banking practice” may be construed, at least in England, as incorporating English common law. Second, “not in conflict with” may revert back to UCP 500 analysis, whereby stricter interpretations for discrepancy than those intended by the UCP 600 were utilized to define when a document did not comply. \(^{141}\)

Another area of the UCP 600 which may suffer from Judge Hamblen’s analysis is Article 15 in regards to complying presentations. Article 15 states that “when an issuing bank determines that a presentation is complying, it must honor.” \(^{142}\) If there is confusion surrounding the compliant document, in regards to which international banking standard, or particular venue’s common law applies, then this will increase uncertainty in the field. This provision in particular is important since the UCP 600 was the first to define “honor” and to use it as a substantial requirement on banks and not merely a descriptive term for payment under another LC obligation. \(^{143}\)

Although not exclusive, these areas demonstrate potential issues of UCP 600 interpretation if courts are to use Judge Hamblen’s common law obligation and UCP 500 approach to construing the new terms. \(^{144}\)

**IV. LCs and Recognizing Local Custom: Future Contracting Costs**

The ICC seeks to increase the use of LCs in international transactions. \(^{145}\) This goal stems from the desire to reduce uncertainty and

\(^{140}\) *Id.* art. 14(d).

\(^{141}\) *See id.*

\(^{142}\) UCP 600, *supra* note 3, art. 15 (a) goes on to prescribe the same obligations for confirming and nominated banks insofar as they must forward the documents to the issuing bank when compliance is determined. *See also id.* art. 15(c).

\(^{143}\) *See Dole,* *supra* note 14, at 742 (discussing the new term honor, and the issuer’s duty under these obligations).

\(^{144}\) *See supra* text accompanying note 35.
increase the effective use of LCs in facilitating international trade.\textsuperscript{146} With this end in mind, the UCP is created for use by courts to construe international banking standards in a uniform way to increase predictability and reduce negotiating costs regarding incorporation of agreed upon standards into a contract.\textsuperscript{147} Under UCP 500, courts tended to lean towards a strict compliance principle, where LCs were dishonored at the slightest variation from stated terms and conditions.\textsuperscript{148} However, adoption of a case-by-case reasonableness analysis, coupled with the UCP 600 broader terms, could shift courts towards a system in which the international banking standards play a more predominate role in court interpretations of UCP principles.\textsuperscript{149} Directing courts to a case-by-case reasonableness analysis requires that courts imply local customs into the explicit terms of the UCP, and as demonstrated by \textit{Fortis}, may result in unanticipated—and non-negotiated—implicit obligations.\textsuperscript{150} Such implicit obligations could have the detrimental effects of increasing contracting costs and uncertainty regarding the underlying obligations, thereby contributing to the unraveling of LC law.

\textbf{A. The Goals of the UCP: International Commercial Norms}

Did \textit{Fortis} adequately incorporate international banking practices in construing the UCP 600? Judge Hamblen’s reliance on local common law to construe “implicit obligations,” indicates that it did not. However, this raises the question of how international norms are to be used in interpreting a codified international code such as the UCP. Viewing the UCP as a “bottom up” approach to law-making may be the first step towards understanding how to construe ambiguities such an instrument may


\textsuperscript{147} \textit{Id}.

\textsuperscript{148} See Pietrzak, \textit{supra} note 10, at 187.

\textsuperscript{149} \textit{Id} at 188-94.

\textsuperscript{150} See discussion \textit{supra} at 15.
“Bottom up” refers to an approach whereby rules and regulations are created by the members of a trade or practice intimately familiar with its inner workings. This may be contrasted with a “top down” approach employed in much of international law, whereby laws are created by policy makers and may not reflect the informal normative development in which community-based norms become the governing framework for a particular trade. Janet Levit, the first to interpret the “bottom up” approach in the context of the UCP, has provided a framework whereby the UCP—through the frequency with which banks adhere to its regulations as well as incorporate explicitly the rules of the UCP into their contractual negotiations—has become hard law. Levit opines that the rules created by private actors and public technocrats enforce a body of law that better reflect and shape the practice of international financial parties.

When considering this bottom-up view, it is difficult to see where local common law, such as that utilized by Judge Hamblen, has a place in interpreting the UCP. The legitimacy of the UCP depends not on the ratification by the independent parties, but through the courts use of such designated customs. A better way to incorporate these customs would seem to be references to the ICC Opinions, which can be used to assess whether an international custom exists. By not referring back to local customary law, a judge would strengthen the “international banking practice” that is itself codified in the UCP and promoted throughout its judicial opinions.


For an in-depth discussion of how letters of credit law, including the UCP, plays an imperative role in the transnational legal landscape see id. at 133-36; Levit, supra note 31, at 1214-22.

Levit, supra note 31, at 1214-22.

Levit, supra note 151, at 141.

Id. at 209.

Id. at 215.

These opinions articulated by the drafters of the UCP articulate the specific “international business practices” which are codified in the UCP itself. As a member of the ICC these are available at http://www.iccwbo.org/id6042/index.html#Longlife.
B. Transaction Costs in LC Negotiations

Future cases outside of Fortis Bank will indicate whether the UCP 600 drafters left too many ambiguities that leave room for judges to incorporate local customs and common law into the UCP itself. However, if Judge Hamblen’s interpretation proves to be consistent with the future interpretations, then significant transaction costs may be imposed on contracting parties. With uncertainty surrounding the use of international custom versus local common law, banks will be encouraged to contract more precisely into one or the other — a step beyond just incorporating the UCP 600 as the banks did in Fortis Bank. This entails an increase in contract costs as “battle of the form” style contracting ensues.

Despite this initial increase in negotiating costs, it is foreseeable that utilizing a bottom-up law making approach, such as the ICC does, these newly developed norms would be codified in any subsequent version of the UCP, thereby mitigating these costs. However, this benefit of the bottom-up approach seems to come at a cost. The legitimacy the UCP 600 strived for in increasing effective use of LCs in international transactions may be undermined by local custom and common law being utilized by courts for interpretation of UCP terms.

Conclusion

The ICC’s previous production of several versions of the UCP led to the ease of international transactions, but also the rise in interstate litigation regarding the mechanics of LCs. This included debate over what constituted a “reasonable time” as well as litigation surrounding what

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158 This may include incorporating specific provisions regarding time frame on return of documents, especially since the UCP 600 allows banks to expressly exclude certain provisions and manifest include their own provisions. See UCP 600, supra note 3. The need for banks to therefore be clear in the negotiating phase regarding these time frames will increase the cost of negotiating.

159 For a discussion surrounding LC transaction and contracting costs generally see William Fox, INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING, NEGOTIATING AND RESOLVING DISPUTES 5-33 (Kluwer Law International) (2009).

160 See Levit, supra note 151, at 140-56.

161 International Chamber of Commerce, Commentary on UCP 600, supra note 4.

162 See Levit, supra note 32, at 1168-72.

163 See Pietrzak, supra note 10, at 186-87; Levit, supra note 32, at 1214-22.
constituted the “international banking standards” the UCP was meant to codify. The new UCP 600 promised better incorporated norms of international practice and indeed provided a much improved set of guidelines to navigate the identification and handling of discrepant documents. Beyond the explicit obligations, the “implicit obligation” that Judge Hamblen prescribed to banks to act in accordance with their Article 16 return notice may unnecessarily burden banks during contract negotiations. These kinds of uncertainties were not intended by the drafters under the UCP 600.

In addition to the obvious imposition of further obligations on contracting parties, the use of English common law and UCP 500 interpretative principles will further complicate future UCP 600 usage. In addition, the use of local common law and customs places unique emphasis on contracting around forum selection and choice of law clauses, and will further burden contracting parties.

The analysis performed by Judge Hamblen will create ambiguities in interpreting and applying the UCP 600, and will ultimately increase initial contracting costs. By relying on local custom, Fortis Bank differs significantly from its predecessors that interpreted the UCP 500. This reliance will ultimately undermine the stated purpose of the UCP 600—to streamline and increase the use of LC transactions. Judge Hamblen’s interpretation disadvantages multi-national corporations in initial contract negotiations and could create uncertainty in LC law, which the UCP 600

164 See Dole, supra note 14, at 742; International Chamber of Commerce, Commentary on UCP 600, supra note 4, at 27.

165 UCP 600, supra note 3, art. 14-16.

166 See supra text accompanying note 120.

167 See Dole, supra note 14, at 747; International Chamber of Commerce, Commentary on UCP 600, supra note 4, at 27-28.


169 Id. at 77.


171 See International Chamber of Commerce, Commentary on UCP 600, supra note 4, at 5.
was designed to mitigate.\textsuperscript{172} New obligations based on local custom and enforced utilizing the internationally recognized ICC rules could potentially affect many areas of multinational contract negotiation and become costly for banks and companies alike who operate utilizing LCs to facilitate trade in an ever-growing international marketplace.

\textsuperscript{172} Id.