I. THE DEVELOPMENT OF BROCHURE 222

In its Brochure No. 222, Uniform Customs and Practice for Documentary Credits, setting out a code of documentary credit practice that is currently applied by the banks of 179 countries, the International Chamber of Commerce has proved that "mighty oaks from little acorns grow."

The I.C.C.'s first venture into this field, its Uniform Regulations for Commercial Documentary Credits, was introduced in 1929 as the result of an earlier American initiative for the unification of "the commercial documentary credit Regulations previously adopted and published by banking associations in various countries."1 However, these Regulations were only introduced into banking practice in Belgium and France; banking associations in some other countries, although not adopting the Regulations officially, "frequently referr[ed] to them, and declar[ed] that they would be willing to apply them if certain amendments were made."2

Certain amendments were, therefore, made — taking note of alterations suggested, of business usage, and of the practice of sea, railway, and inland navigation carriers and insurers — producing what was said to form "an equitable basis for commercial documentary credit transactions,

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2. Id.
capable of general application in all countries,"³ the 1933 version of Uniform Customs and Practice for Commercial Documentary Credits. Yet even these "Customs and Practice," hailed as a "guide for use when the wishes of the principal were not clearly and explicitly specified in the instructions for opening a commercial documentary credit, or any documentary credits, or commercial letters of credit,"⁴ necessitated 13 amplifying footnotes and extensive explanatory notes and only received formal acceptance in some 40 countries.

This score was doubled when the 1951 Revision was published. It took note of "many new developments and some practices, either new or variations of the old, which have appeared, . . . codifying the Customs and Practice as they now exist." The real breakthrough to the achievement of a globally applied code of uniform practice came only with the drafting of the 1962 version of Uniform Customs and Practice for Documentary Credits, based on new principles, and on the presentation of those principles in such a manner as to secure universal adoption and ensure uniform interpretation.

The subject matter of the code was reviewed in the light of the fact that the credit and the rights and responsibilities arising from it stem from the mandate given by the applicant for the credit. It stressed the applicant's responsibility for giving clear and precise instructions and placed severe restrictions on the right of the banker to act on an "intelligent guess" as to what was really intended. This right was "weighted" in favor of the applicant on the grounds that in the long run it was his money that was being paid away.

To achieve uniformity of interpretation, a prerequisite of universal adoption, it further meant that this subject matter had to be expressed with precision of thought and speech. Thus there had to be uniformity of expression as well as simplicity and clarity, a standardization of wording of those phrases occurring in more than one Article, and a consistency in the actual use of words. Further, there had to be tidiness of thought, so that each vital point was covered fully within the confines of one Article, rather than being spread over several Articles or having one Article mix several such points. An orderly sequence of thought had to be followed, leading to a natural start and to an equally natural finish.

It also had to be kept in mind throughout that although a uniform code of custom and practice could remove disparities between banking practice in different countries and could speak the same language to all, it could not, and should not, be intended to give a precise answer to each

³. Id. at 8.
⁴. Id.
and every problem arising in practice. Despite their computers, banks are not robot institutions; and bankers worth their salt must be expected to apply their own intelligence and experience in the solution of the occasional essentially individual problem.

II. 1971 REVISION

It was felt, however, that with a correct purpose, correct subject matter, and correct expression of that subject matter universal adoption could be expected, uniform interpretation could be hoped for, and further review and revision could be a thing for the distant rather than for the near future, subject only to changes in international trading and transport procedures which might demand some modification at a later date.

But since the 1962 Revision, the outstanding (almost revolutionary) changes in international trading and transport, i.e., the change from sales on an f.o.b. or c.i.f. basis to sales on a "delivered to buyer's premises" basis and the change from traditional methods of transport to containerized or unit load combined transport by more than one mode, necessitate some changes, making this the appropriate time also to review the operation of the code over the past nine years and see whether anything further is needed.

Accordingly, the International Chamber of Commerce has decided, in addition to bringing its Uniform Customs and Practice for Documentary Credits up to date in respect to documentary and procedural changes resulting from combined transport developments, also to consider difficulties encountered in the use of the 1962 Brochure No. 222, reviewing:

(a) problems of known cause due to either:
   (i) the concept of Brochure 222 or
   (ii) the language used in Brochure 222;
(b) other problems or difficulties;
(c) changes necessitated by the probable new transport document likely to result from the present discussions on a combined transport convention.

This Revision, however, will be undertaken in a vastly different manner from that of 1962, where the big change from the past was the cooperation, for the first time, of the British banks. For the global acceptance of this code of practice means that there will quite properly be global desire for participation in the work of revision, i.e., not only by those countries which are the members of the International Chamber of Commerce but also by the wider circle of non-I.C.C. members who are nevertheless members of that truly world wide "club," the United Nations.

Arrangements have, therefore, been made by the International Chamber of Commerce whereby its own Working Party will include bankers from each of the five continents and whereby, in addition, the non-I.C.C. United Nations members will be able to cooperate through the
United Nations Commission on International Trade Law. Thus developing and less commercially experienced nations will be cooperating with developed and extremely experienced nations, and there may perhaps be a greater tendency to introduce points which should not truly be included. For this reason it is well to record something that was said about 18 months after Brochure No. 222 was put into practice, namely that:

The fact cannot be ignored that any international regulations, however well conceived, may sometimes give rise to faulty application by ill-informed agents, or to gradual distortion through wrong use. However, Uniform Customs and Practice cannot provide precise answers to all questions concerning documentary credits practice and handling, since no code, however well conceived, can provide solutions for all the cases peculiar to a specific country which may arise during documentary credit operations.5

III. PRACTICE UNDER BROCHURE NO. 222

A. PROBLEMS OF PRACTICE

The possibility of misapplication and distortion may well be illustrated by a brief consideration of certain problems which have been noted in practice during the past eight years.

1. Article 66

There is, for example, the type of credit, by no means a rarity, which states that information regarding the port of destination of the goods or the name of the vessel on which the goods are to be shipped will be supplied at a later date. In some countries it has been argued that this is an incomplete credit within the meaning of Article 6, justifying "preliminary notification" only, since the beneficiary cannot be paid until the applicant has supplied the bank with further information, whilst others have claimed that it is a valid credit. The raising of this problem would appear to overlook the fact that such a letter of credit may be fully in accordance with basic practice and also with the underlying purchase/sales contract and that there is nothing to prevent the opening of an irrevocable documentary credit in conditional form for payment.

5. Lecture given by author to a Local Center of the United Kingdom Institute of Bankers in 1964.

6. Article 6

If incomplete or unclear instructions are received to issue, confirm or advise a credit, the bank requested to act on such instructions may give preliminary notification of the credit to the beneficiary for information only and without responsibility; and in that case the credit will be issued, confirmed or advised only when the necessary information has been received. I.C.C. Brochure No. 222 (1962).
On the other hand, there have been a variety of problems arising from payment being made under reserve or against a guarantee or indemnity in cases where the documents presented have failed to comply in certain, often minor, respects with the terms of the credit. Here the complaint has been that the practices adopted by different banks, and in different countries, in making such “conditional payments” are not uniform in that:

(i) some banks merely inform the applicant for the credit that a conditional payment has been made;
(ii) other banks effect payment only after the applicant for the credit has sanctioned the acceptance of documents containing irregularities;
(iii) others send the documents to the applicant for the credit before he has sanctioned their acceptance, with the result that payment remains conditional until the goods have been received and examined;
(iv) and yet others more specifically draw attention to the fact that payment has been made subject to the issuing bank’s approval because of certain discrepancies (which are listed in detail), and request, if necessary after contacting the applicant for the credit in order to secure an immediate decision, prompt authority either to lift the reserves or return the indemnity, or cable advice of refusal to accept, holding the documents at the disposal of the presenting bank.

It has been suggested that this is a matter of sufficient importance for the inclusion in Uniform Customs and Practice of provisions specifically defining the relations of the parties in cases where conditional payments are made and imposing a time limit both for the examination of the documents and for the conditional status of the payment. There have been a range of detailed comments. One has been the mere opinion that “the system of honoring under reserve at the responsibility of the bank fulfills a valuable and practical function in international trade.”

Others have been more specific. One has suggested that documents for

7. Article 8

In documentary credit operations all parties concerned deal in documents and not in goods.

Payment, acceptance or negotiation against documents which appear on their face to be in accordance with the terms and conditions of a credit by a bank authorised to do so, binds the party giving the authorisation to take up the documents and reimburse the bank which has effected the payment, acceptance or negotiation.

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, that bank must determine, on the basis of the documents alone, whether to claim that payment, acceptance or negotiation was not effected in accordance with the terms and conditions of the credit.

If such claim is to be made, notice to that effect, stating the reasons therefor, must be given by cable or other expeditious means to the bank from which the documents have been received and such notice must state that the documents are being held at the disposal of such bank or are being returned thereto. The issuing bank shall have a reasonable time to examine the documents.

Id.

which payment has been made to the credit beneficiary against a letter of indemnity should not (save on the negotiating bank’s express instructions) be delivered to the applicant. He would merely be notified of the indemnity held or the reserve made by the negotiating bank and be required to approve the documents before they are released to him.

This point will obviously need to be considered when the revision is undertaken, but whether any modification of Uniform Customs and Practice is needed remains to be seen.

It certainly would not have made any difference in the Swiss Federal Court Case referred to in The United Kingdom Institute of Bankers Journal, April 1965, where, despite nonacceptance of the documents, even with a guarantee, the issuing bank failed to hold the documents at the disposal of the negotiating bank as required by Article 8 but used them to have the cargo transshipped from the destination called for by the credit and to have them warehoused at that fresh destination for the account of the negotiating bank. Here the Court made the following points:

1. The function of a documentary credit is to protect the parties to a sales contract by ensuring its correct fulfillment in that:
   a) the buyer, or the bank instructed by him to open the documentary credit, only pays against documents giving title to the goods and evidencing their existence and their conformity with the conditions of the contract;
   b) the seller only releases the documents when he is assured of payment.

2. Uniform Customs, 1951, Article 10, therefore imposes an obligation and confers a right, in that:
   a) the issuing bank is obliged to honor its credit undertaking to the seller when it takes up documents;
   b) the seller is entitled to receive these documents back in their original form and without any encumbrance if they are not taken up by the issuing bank, in order that he may then dispose of the goods himself.

3. Disposal, in any way, by an issuing bank of documents which it purports to reject as irregular (and, as a result, disposal of the goods to which these documents relate) deprives the seller of his ability to dispose of the goods himself. Such action must therefore be regarded as equivalent to acceptance of the documents and to approval of the irregularities in them.

4. Any contrary solution would destroy the commercial value of a documentary credit, because it would expose the seller to the risk of losing his right of disposal over the goods without necessarily receiving payment therefor.

3. Article 16

This first point made by the Swiss Courts might have been noted with

10. Article 16
   A clean shipping document is one which bears no superimposed clause or notation which expressly declares a defective condition of the goods and/or the packaging.
   Banks will refuse shipping documents bearing such clauses or notations unless the credit expressly states clauses or notations which may be accepted.
I.C.C. Brochure No. 222 (1962).
advantage by one particular beneficiary, who ignored Article 16—which makes it encumbant upon banks to refuse shipping documents expressly declaring a defective condition of the goods and/or packaging. Instead, he claimed that Uniform Customs and Practice insisted that the goods “must not suffer any damage in transit” (which Uniform Customs and Practice did not, and cannot, insist on). He argued that bills of lading, claused “spray wet” or “wetted by waves/rain water” and issued in open ports where goods are lightered from shore to ship, “should be treated as quite ordinary and no objections [should be] raised by the buyers, because such damage is fully recoverable under ordinary marine insurance.” It is a fact that the hazards of marine transport may result in a delivery of damaged goods under a sales contract; but “damaged documents” cannot be a good delivery under the banking contract set up by a letter of credit; and if such a transaction is “treated as quite ordinary,” then the buyers can give definite and appropriate instructions to the banks regarding documents to be received under the letter of credit.

In Accra, for example, where there is such a risk of damage in transit from shore to ship and ship to shore, the underwriters imposed limitations on the weight of a package and outer covering of packages. This made it possible for the applicant for the credit to authorize the acceptance of bills of lading claused “bales spray damaged,” subject also to presentation of a certificate showing that the “weights and packaging of the goods and water-proof lining of each package conform to insurance policy conditions.”

This is merely an exercise of rights under paragraph 2 of Article 16, whereby a credit may specifically permit acceptance of a bill of lading bearing a specified “unclean” superimposed clause, which does not make the bill of lading a “clean” one but merely makes it an “acceptable” one under that particular credit. On the other hand, a number of problems have arisen because of clauses on bills of lading which were not clauses expressly declaring a defective condition of the goods and/or the packaging—notably clauses such as:

(a) Devaluation Clauses
Freight if paid in sterling will be converted at the IMF (International Monetary Fund) parity rate ruling in accordance with tariff conditions. At present parity rate (Pound 1 = DLRS 2.50) the sterling payable will be . . .
In case of devaluation of the currency in which freight and charges are expressed, the corresponding amounts shown in the present Bill of Lading—both prepaid and payable at destination—shall be automatically and immediately increased equivalent to the extent of the said devaluation.

(b) Stowage of Goods Clauses
Free in and stowed, the shipper acknowledging that loading and stowing were effected by his stevedores, at shipper’s care, risk and expense, the Master having supervised the stowage exclusively for the proper trimming of the ship.

(c) Packing Clauses
Some bags second-hand and dry-stained.
Clauses such as these appear either to impose an additional expense
on the applicant for the credit or to *imply* a defective condition of the goods and/or the packaging. It is therefore of interest to recall the rejection, during the course of the 1962 Revision, of a proposal that an "unclean" clause should be one which "expressly or by *implication* declares a defective condition of the goods and/or the packaging, or *imposes an additional expense on the applicant for the credit." The words italicized do not, therefore, appear in Brochure No. 222, so that clauses of the type quoted cannot be regarded as "unclean" — although it is possible that they may be "unacceptable" under a particular credit, by reason of being in conflict with the specific wording of that credit.

**B. Conflicts of Law and Practice**

But whilst questions such as these, of apparent conflict between practice and Uniform Customs and Practice, may be answered by common sense thinking, problems of apparent conflict between law and Uniform Customs and Practice may pose more troublesome problems.

*Article 46*¹¹

Thus, a ruling in a Western German Federal Supreme Court¹² has

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11. Article 46

A transferable credit is a credit under which the beneficiary has the right to give instructions to the bank called upon to effect payment or acceptance or to any bank entitled to effect negotiation to make the credit available in whole or in part to one or more third parties (second beneficiaries).

A credit can be transferred only if it is expressly designated as "transferable" by the issuing bank. Terms such as "divisible", "fractionable", "assignable" and "transmissible" add nothing to the meaning of the term "transferable" and shall not be used.

A transferable credit can be transferred once only. Fractions of a transferable credit (not exceeding in the aggregate the amount of the credit) can be transferred separately, provided partial shipments are not prohibited, and the aggregate of such transfers will be considered as constituting only one transfer of the credit. The credit can be transferred only on the terms and conditions specified in the original credit, with the exception of the amount of the credit, of any unit price stated therein, and of the period of validity or period for shipment, any or all of which may be reduced or curtailed. Additionally, the name of the first beneficiary can be substituted for that of the applicant for the credit, but if the name of the applicant for the credit is specifically required by the original credit to appear in any document other than the invoice, such requirement must be fulfilled.

The first beneficiary has the right to substitute his own invoices for those of the second beneficiary, for amounts not in excess of the original amount stipulated in the credit and for the original unit prices stipulated in the credit, and upon such substitution of invoices the first beneficiary can draw under the credit for the difference, if any, between his invoices and the second beneficiary's invoices. When a credit has been transferred and the first beneficiary is to supply his own invoices in exchange for the second beneficiary's invoices but fails to do so on demand, the paying, accepting or negotiating bank has the right to deliver to the issuing bank the docu-
raised doubts as to the possibility of making a valid assignment of a claim to payment under a documentary credit when the documentary credit is not stated to be a transferable one. This could be a matter of importance to banks, since a bank having the beneficiary as a customer may provide him with the finance he needs to enable him to meet his sales contract commitments, relying for repayment of the banking advance on the monies to be received when presentation is made under the documentary credit and making sure that such monies are earmarked for the bank by having an assignment thereof.

As a result, it has been suggested that Uniform Customs and Practice should state that the right to assign the proceeds of a drawing under a credit is not excluded even when the credit is not stated to be transferable. It is, however, worth noting that the ruling in question was based upon a credit subject to the 1951 Revision of the Uniform Customs and Practice which, in its Article 49 (which, in a modified form, has become Article 46 of the 1962 Revision) specifically refers to "a transferable or assignable credit." It is also worth noting that in the course of the 1962 Revision there was an American proposal that the Article should include a statement that:

a transfer of the right to present documents and to receive payment or acceptance in accordance with the terms of a credit, or an assignment of the right to receive the monies due or to become due under a credit, is binding upon the banks involved only if it is effected as provided in this Article.

This proposal, however, was turned down; and Article 46 clearly states that:

terms such as ... 'assignable' ... add nothing to the meaning of the term 'transferable' and shall not be used.

The purpose of Article 46 is to prevent the applicant for the credit from having to tolerate the credit being availed of, without his prior

ments received under the credit, including the second beneficiary's invoices, without further responsibility to the first beneficiary.

The first beneficiary of a transferable credit can transfer the credit to a second beneficiary in the same country, but if he is to be permitted to transfer the credit to a second beneficiary in another country this must be expressly stated in the credit. The first beneficiary shall have the right to request that payment or negotiation be effected to the secondary beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the original credit, and without prejudice to the first beneficiary's right subsequently to substitute his own invoices for those of the second beneficiary and to claim any difference due to him.

The bank requested to effect the transfer, whether it has confirmed the credit or not, shall be under no obligation to make such transfer except to the extent and in the manner expressly consented to by such bank, and until such bank's charges for transfer are paid.

Bank charges entailed by transfers are payable by the first beneficiary unless otherwise specified.

Id.

consent, by a second beneficiary whose standing may not be known to him. At the same time, it safeguards the rights of either the first or the second beneficiary, if transferred, to claim payment if that beneficiary has met his obligations set out in the credit.

These interests would in no way be prejudiced if the payment due under the credit against fulfillment of the credit obligations were to be made to someone other than the beneficiary because that beneficiary had assigned his right to receive such payment to a third party — and certainly what happens to the payment when it is made in settlement of the beneficiary's claim has nothing to do with the credit as such, since any assignment of such payment is completely outside the contract between the applicant for the credit (and the issuing bank) and the beneficiary.

It would seem, therefore, that this is not a matter for Uniform Customs and Practice but depends upon the national law regarding the assignment of a possible right to receive a sum of money.

C. NEW PRACTICES

1. Deferred Credits

But whilst the practice of transferring credits and the practice of assigning rights to payments due under such credits are nothing new, new practices have developed since the last revision, notably in the use of a "deferred credit," which, although irrevocable, provides for partial deferment of payment.

The main feature of this credit is that the beneficiary does not receive the whole cost of the goods for which the credit is opened at one and the same time; he receives only part thereof at the time of presenting the documents, the balance being paid out over a period and in a manner specified in the instructions contained in the credit. These instructions differ from credit to credit and alter its nature as well as varying the liability of the bank concerned.

Thus, an irrevocable credit may be opened for the full amount of the contract but provide for, say, 10% of the cost of each consignment to be paid under the credit on presentation of the documents specified, with the remainder made payable by the beneficiary drawing tenor drafts on the applicant for the credit but without the issuing bank guaranteeing either acceptance or payment of such drafts. It is suggested that the terms and conditions of this type of credit are contradictory and that although it is supposed to be regarded as irrevocable in respect of the whole amount, the bank does not assume any obligation of payment of the "deferred" part of the sum.

This could call for further thought in the course of the current revision.
2. Production and Processing of Documents

At the same time it has been suggested that note should be taken of certain current trends in either the production or processing of the type of documents likely to be called for by a documentary credit, such as, for example:

(a) the issue of bills of lading in a set of one original only — which would help the banks in their handling of documents but would not necessarily meet the needs of merchants;

(b) the production of documents by some photostatic method, permitting the production of several different types of documents, for example, invoice, bill of lading, insurance certificate, and certificate of origin, in a "one run" process from one master document with the use of suitable masking, facilitating the checking of documents and presenting no problems if the documents are clearly "originals" but creating difficulties in certain countries which require certificates of origin to be made out on forms pre-printed by authorized printers only;

(c) the recognition of current developments in the field of automatic data processing, which may result in the present generation of manually produced documents, originating at the point of departure of the goods, being replaced by a computer print out of a "document" at the point of destination.

It is perhaps arguable as to whether any of these are points which should be legislated for in Uniform Customs and Practice, although the final one would certainly seem to require consideration by the experts in law.

IV. BROCHURE NO. 222 PROBLEMS

As against these "extraneous" problems which may possibly not need action by the International Chamber of Commerce, there are certainly others, more directly linked with Brochure No. 222 — either its basic concept or the language in which that concept has been expressed — which will demand consideration.

A. LANGUAGE OF BROCHURE NO. 222

It will, nevertheless, not be easy — even if it can be done at all — to make a clear-cut distinction between "concept" and "language" as the cause of a problem, although on an arbitrary basis it may be fair to regard certain problems as arising more from "words" than from "ideas."

1. Articles 8\textsuperscript{13} and 41\textsuperscript{14}

Thus, it has been claimed that the words "reasonable time" in the

\textsuperscript{13} Article 8, supra note 7.
\textsuperscript{14} Article 41
statement in Article 8 that
the issuing bank shall have a reasonable time to examine the documents
and in the requirement of Article 41 that
documents must be presented within a reasonable time after issuance
are "open to different interpretations" and have, in fact, given rise to
"a number of different opinions as to what is meant by them." Sugges-
tions for avoiding this "conflict of interpretations" and its conse-
quences, have ranged from a thoughtful statement that
a clarification of 'reasonable' would be appreciated to a less understanding demand for
a clear Article that negotiating banks are bound to honor all documents if the
same are presented to them within the validity date of the credit.
This latter proposal must definitely be regarded as a nonstarter, although there may be grounds for trying to find a clearer way of
drafting the basic idea underlying the expression "reasonable time," i.e.,
that it must be determined in each case by the facts of that particular
case. Failing clearer drafting, however, a partial solution in respect of Article 41 only would be for banks to press the applicant for the
credit to include in the credit a statement that documents must be pre-
sented within a specified time after their date of issue, i.e., a "presenta-
tion" date in addition to "shipment" and "expiry" dates.

2. Article 18

Difficulties have also arisen with respect to the Article 18 requirement
that bills of lading
must show that the goods are loaded on board
due to the variety of expressions used by shipping companies, including,
for example:
shipped per s/s . . .
shipped on board s/s . . .
shipped s/s . . .
shipped on board s/s . . . or substitute.

Documents must be presented within a reasonable time after issuance. Paying,
accepting or negotiating banks may refuse documents if, in their judgment, they are
presented to them with undue delay.
I.C.C. Brochure No. 222 (1962).
15. Comments received from the U.S.S.R. in February 1970.
16. Id.
17. Letter to the author.
18. Comments received from South Africa in September 1970.
20. Article 18

Unless otherwise specified in the credit, Bills of Lading must show that the goods
are loaded on board.

Loading on board may be evidenced by an on board Bill of Lading or by means of
a notation to that effect dated and signed or initialled by the carrier or his agent, and
the date of this notation shall be regarded as the date of loading on board and ship-
ment.
I.C.C. Brochure No. 222 (1962).
It has been suggested that "the commonsense interpretation of the 'on board' clause could well be incorporated in the new version."\textsuperscript{21}

The problem would then, however, be to determine what, indeed, was the "commonsense interpretation." Although reference to shipowners a year or so ago brought confirmation that they regarded the first three wordings given above as synonymous and indicating "loading on board," certain banks (including some in the United States) differentiate between the wording "shipped on" (or "shipped per") and "shipped." The additional words "or substitute" were viewed by some shipowners as "weakening the bill of lading as proof of the cargo having actually been loaded," and by others as merely "creating an ambiguity." Still a third section saw them as "superfluous" and "unnecessary" and not affecting the "on board" nature of the document.

This may be a case of both "concept" and "language" creating a problem, since the 1951 philosophy which authorized acceptance of both "received for shipment" and "on board" bills of lading was changed in 1962 to permit acceptance of "on board" bills of lading only, whilst the apparently repetitive formula of 1951, \textit{i.e.}, "shipped" and "on board," became a single expression, "on board," only in 1962.

3. \textit{Article 7}\textsuperscript{22}

In contrast to what is mainly a question of practice, comment has also been made on Article 7, which "contains one of the basic principles of bankers' credit agreement," attention being drawn to the different meanings attached to the words

appear on their face to be in accordance with the terms and conditions of the credit,

and to the fact that "some banks interpret Article 7 rather widely, and insist that the documents presented should not only be in accordance with the terms and conditions of the credit, but should also be completely consistent with one another, refusing, for example, to accept the documents if there are any differences in the description of the quality of the goods as between the commercial invoice and the certificate of quality, though both these documents may appear on their face to be entirely in accordance with the terms and conditions of the credit."

Without full details it is hard to reconcile the "differences" in the above example with its "entirely in accordance with" and to see it as justifying the request for the meaning of "on their face" to be more

\textsuperscript{21} Letter to the author.
\textsuperscript{22} Article 7

\begin{quote}
Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. I.C.C. Brochure No. 222 (1962).
\end{quote}
clearly defined, since it can hardly be what the issuing bank and the applicant for the credit want if one document says one thing and another document says something different.

4. **General Provisions (e)** and **Article 8**

However, respecting the “bank first entitled to avail itself of an option” of General Provisions and Definitions (e) and the “bank authorized to do so” (i.e., to pay, accept, or negotiate) of Article 8, the criticism has been of a slightly stronger nature, that the document, i.e., Uniform Customs and Practice, says nothing at all, in that it does not clearly state which is the bank “first entitled” and which is the bank “authorised to do so.”

Consideration of this matter by the Banking Commission of the International Chamber of Commerce in October 1968, led to approval of a report which, stressing

(a) that Uniform Customs and Practice for Documentary Credits, although voluntarily accepted throughout the world as a common code governing documentary credit operations, is, nevertheless, only a standardisation of current customs and practices relating to such credits, formulated by practical bankers with wide knowledge and experience of such customs and practices, and

(b) that in putting their knowledge on record these authors of Brochure 222 have sought to minimise disputes and misunderstandings by precision of thought and speech, and simplicity and clarity of language, even to the extent of standardising both the wording of phrases used, and the meaning given to words appearing in more than one Article, saw the answer in the “actual wording used” in the Brochure.

Thus, the bank “first entitled to avail itself of an option” (General Provisions (e)) was felt to be:

the bank indicated by the reference to ‘payment, acceptance or negotiation . . . by a bank authorised to do so’ in Article 8, paragraph 2,

because

(a) the specific words ‘the issuing bank’ would have been used (as in General Provisions (b), (d) and (f), Articles 3, 26 and 4, 27 and 8) if the intention had been that there could be only one bank, i.e., the issuing bank, so entitled;

(b) the specific word ‘first’ would have been discarded as superfluous and meaningless if the intention had not been to indicate that more than one bank might have the right to exercise an option, but that, as a matter of practical common-sense working, the decision of the bank ‘first in line’ was to be the effective one.

Further, in respect of this reference to Article 8, i.e., the words “a bank authorised to do so,” it was felt that there was no justification for differentiating between

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23. General Provisions (e)

When the bank first entitled to avail itself of an option it enjoys under the following articles does so, its decision shall be binding upon all the parties concerned. *Id.*

(a) credits which specifically name the bank at which payment will be made or drafts accepted, or which specifically restrict negotiation to a named bank, i.e., where the naming of such bank by the issuing bank serves specifically to authorise it to pay, accept or negotiate as the case may be and

(b) the so-called ‘open’ or ‘circular’ or ‘unrestricted’ credits, which do not restrict negotiation to a named bank, but which do, by implication, invite any bank willing to do so, to negotiate, i.e., where the acceptance of the issuing bank’s invitation by a bank willing to negotiate serves as authority for that bank to negotiate,

because

on the basis of the wording used the words ‘specifically authorised’ would have been

25. General Provisions (b), (d), (f)

b. For the purposes of such provisions, definitions and articles the expressions “documentary credit(s)” and “credit(s)” used therein mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and in accordance with the instructions of a customer (the applicant for the credit), is to make payment to or to the order of a third party (the beneficiary) or is to pay, accept or negotiate bills of exchange (drafts) drawn by the beneficiary, or authorises such payments to be made or such drafts to be paid, accepted or negotiated by another bank, against stipulated documents and compliance with stipulated terms and conditions.

d. Credit instructions and the credits themselves must be complete and precise and, in order to guard against confusion and misunderstanding, issuing banks should discourage any attempt by the applicant for the credit to include excessive detail.

f. A beneficiary can in no case avail himself of the contractual relationships existing between banks, or between the applicant for the credit and the issuing bank.

I.C.C. Brochure No. 222 (1962).

26. Article 3

An irrevocable credit is a definite undertaking on the part of an issuing bank and constitutes the engagement of that bank to the beneficiary or, as the case may be, to the beneficiary and bona fide holders of drafts drawn and/or documents presented thereunder, that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled, provided that all the terms and conditions of the credit are complied with.

An irrevocable credit may be advised to a beneficiary through another bank without engagement on the part of that other bank (the advising bank), but when an issuing bank authorises another bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming bank will negotiate drafts without recourse to drawer.

Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

Id.

27. Article 4

When an issuing bank instructs a bank by cable, telegram or telex to notify a credit and the original letter of credit itself is to be the operative credit instrument, the issuing bank must send the original letter of credit, and any subsequent amendments thereto, to the beneficiary through the notifying bank.

The issuing bank will be responsible for any consequences arising from its failure to follow this procedure.

Id.
used (as in Articles 17, 20, and 24) instead of 'authorised' if the intention had been that a bank authorised to (pay, accept or negotiate) had to be 'specifically' authorised to do so.

More importantly, however, it was felt that the real point at issue was not so much "which bank is entitled to exercise an option" as "how must that bank exercise the option in order thereby to bind all the other parties concerned." Comment was therefore made both on the nature of the option and the way in which it had to be exercised, the attention of banks also being drawn to:

(a) the fact that the wording of all the "option" articles except 41 makes it possible for the issuing bank so to word its credit as to remove the right of option (i.e., because of the wording in these articles 'unless otherwise specified in the credit', or words of similar import);
(b) the fact that in respect of Article 41 (although not provided for in the Article itself) the applicant for the credit can remove the risk of conflict over 'stale' documents by calling for the inclusion in the credit of some such wording for example, as 'documents to be presented (for payment, acceptance or negotiation as applicable) not later than x days after bill of lading date'.

B. Concept of Brochure No. 222

This, of course, is the basic approach of Brochure No. 222, that it is for the applicant for the credit, who knows what the bank cannot know, i.e., what the sales contract entitles him to call for in the credit and what he is prepared to take, to give "complete and precise" instructions.

28. Article 17
Unless specifically authorised in the credit, Bills of Lading of the following nature will be rejected:
(a) Bills of Lading issued by forwarding agents.
b) Bills of Lading which are issued under and are subject to the condition of a Charter-Party.
c) Bills of Lading covering shipment by sailing vessels.
   However, unless otherwise specified in the credit, Bills of Lading of the following nature will be accepted.
a) "Port" or "Custody" Bills of Lading for shipments of cotton from the United States of America.
b) "Through" Bills of Lading issued by steamship companies or their agents even though they cover several modes of transport.

Id.
29. Article 20
Banks will refuse a Bill of Lading showing the stowage of goods on deck, unless specifically authorised in the credit.

Id.
30. Article 24
Insurance documents must be as specifically described in the credit, and must be issued and/or signed by insurance companies or their agents or by underwriters.
   Cover notes issued by brokers will not be accepted, unless specifically authorised in the credit.

Id.
1. General Provisions and Definitions (d)\textsuperscript{32}

But “complete” is not synonymous with “replete,” a point made in General Provisions and Definitions (d), in the statement that banks should discourage any attempt by the applicant for the credit to include excessive detail.

Unfortunately, a mere statement cannot solve the practical problem of determining what is “excessive detail” — a matter on which applicant and bank may not think alike — any more than it can tell banks how to discourage attempts to include it. Even a recently proposed “revised version” reading

banks should be put in a position of refraining from undertaking to carry out orders containing excessive detail.

will not help, for banks already have the right to “refrain” — and rarely exercise it because of inter-bank competition for business.

This, therefore, is not so much a problem to be given a general “legal” solution through Uniform Customs as one to be solved by a “compromise” dictated by banking experience and commonsense.

2. Article 3\textsuperscript{33}

This suggestion of “compromise” cannot, however, be made in respect of a problem arising under Article 3 — and touching the very heart of documentary credits — \textit{i.e.}, the precise nature of the bank’s undertaking, whether it be the bank issuing an irrevocable credit or the bank adding its confirmation to such a credit, when the terms of the credit require a draft to be drawn either on a bank other than the issuing or confirming ones or, more importantly, on the applicant for the credit.

On the one hand, there is fairly widespread agreement that, by its very nature as a “bank credit,” the function of the irrevocable documentary credit is to guarantee payment, either at sight or at some future date. In other words, that the basic principle is a “direct and automatic undertaking towards the beneficiary on the part of the (issuing, or confirming) bank.” In support of this view it is argued that “there would be no commercial point or purpose in the bank intervening through the documentary credit if it were not thereby obliged to ensure payment of the draft, but could consider its responsibility, as issuing bank or as confirming bank, as ended once the draft had been accepted by the party on whom it was drawn.”

The contrary view, taken by a minority of banks in certain areas (including, it must be said, a number of experienced and sophisticated

\textsuperscript{32} General Provisions (d), \textit{supra} note 25.

\textsuperscript{33} Article 3, \textit{supra} note 26.
banks) is that the issuing, or the confirming, bank has no responsibility towards the beneficiary other than for securing the acceptance of the third party drawee, whether bank or applicant for the credit, the bank’s undertaking being solely “to pass the documents forward against acceptance of the draft by the third party drawee,” its liability ending once the drawee has accepted the draft.

Possibly, however, the problem is less one of Uniform Customs and Practice than of the credit itself, for Article 3 makes it clear that the “undertaking” is not that the draft will be accepted or will be paid but that

the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled.

Unfortunately these “provisions” are not always expressed in the credit itself with a precision and clarity which would avoid all possibility of misunderstanding and confusion, for if they were, it would indeed be an unworldly beneficiary who agreed to an irrevocable credit stipulating that the sole obligation of the bank was to present the draft to the applicant for acceptance. He could do this himself, by sending a documentary collection through his own bank, without any need for a documentary credit.

It has been suggested, therefore, that “a bank should not issue or advise a documentary credit which does not clearly state the nature of the obligation being accepted” and that if such clear statement is not given in the credit it should be treated as “incomplete” under Article 6.34

This would seem to be a workmanlike attitude and in line with the solution possibly provided by the International Chamber of Commerce Banking Commission in its most recent Brochure, Standard Forms for the Issuing of Documentary Credits, it being intended that the standard forms should incorporate “provisions for payment, acceptance or negotiation” as under:

(a) Irrevocable—negotiation of drafts on applicant for credit or other third party
   (i) Issuing bank’s undertaking
   We hereby engage with drawers and/or bona fide holders that drafts drawn and negotiated in conformity with the terms of this credit will be duly honored on presentation and that drafts accepted within the terms of this credit will be duly honoured at maturity.
   (ii) Confirming bank’s undertaking
   This credit bears our confirmation and we hereby engage to negotiate without recourse, on presentation to us, drafts drawn and presented in conformity with the terms of this credit.

(b) Irrevocable—tenor drafts on issuing or confirming banks
   (i) Issuing bank’s undertaking
   We hereby engage that drafts drawn in conformity with the terms of this credit will be duly accepted on presentation and duly honoured at maturity.

34. Article 6, supra note 6.
(ii) Confirming bank's undertaking

This credit bears our confirmation and we engage that drafts drawn in conformity with the terms of this credit will be duly accepted on presentation and duly honoured at maturity.

V. COMBINED TRANSPORT DOCUMENTS

A. PROBLEMS INVOLVED WITH COMBINED TRANSPORT DOCUMENTS

But even if the early acceptance by banks of these proposals for standardising the "document of payment" can perhaps remove the need for changes in Uniform Customs and Practice, appreciable amendments to Brochure No. 222 will still have to be considered on the eventual governmental adoption of current proposals for the creation of the new Document of Combined Transport, demanded by the recent development of unit load cargo movement (in containers, pallets, and the like) which has led to a vast increase in combined transport, the traditional port-to-port movement by one mode of transport being replaced by a through multi-mode movement from an inland point of departure to an inland point of destination.

Covering the whole journey, it will have to be issued by that one of the several different carriers who deals directly with the shipper, the so-called "combined transport operator," who may be the actual provider of all or part of the transport, i.e., a carrier in his own right, or who may be an arranger of the necessary transport, i.e., a forwarding agent or cargo consolidator.

Whether provider of transport or arranger of it, however, the combined transport operator will, by issuing the document, have to accept responsibility for arranging the whole through transport and also accept liability for any loss of or damage to the goods during such through journey, whether it occurred whilst the goods were actually being carried by him or whether it occurred whilst someone else was acting as the actual carrier. Also the document will have to be issued when the goods are first accepted into the "through transport system," i.e., when they are first taken in charge by the combined transport operator and not, for example, at the later time when they may actually have been loaded on board a named steamer.

Finally, when the goods subject to the combined transport are containerized cargo, the following additional conditions will apply:

(a) the document will have to satisfy the needs of the shipper, both when the container is filled with the goods of one shipper only, necessitating just one document, and also when the container is filled with "consolidated cargo," i.e., the combined goods of several different shippers, necessitating a separate document for each shipper relating to his own cargo only;

(b) it will be commercially desirable for the document to specify the goods rather than the "outer cover," i.e., the container only, although it may not be pos-
sible for the combined transport operator to vouch for either the contents of the container or their condition unless he, or his agent, actually packs the container;

(c) it might be difficult to prove when and where loss or damage occurred in the case of goods pre-packed into a locked and sealed container which is opened only on arrival at destination, a matter of importance since the carriers liability varies from mode to mode of transport;

(d) it would be impossible to show on the document issued at the time of “taking in charge” instead of at the time of “loading on board” whether a specific container has been loaded on deck or under deck.

B. Amendments to Brochure No. 222

These are all points which, although being considered by governments, are not likely to be greatly varied in substance.

It would, therefore, seem necessary to consider amendments to Uniform Customs and Practice so as to:

(i) permit what is now rejected by Article 17,35 i.e., “bills of lading issued by forwarding agents” — subject, however, to it being a “combined transport document” issued by a forwarding agent in the new capacity of “combined transport operator”;

(ii) make “taken in charge” by a combined transport operator the equivalent of the “on board” bill of lading specified in Article 18;36

(iii) adjust the “on deck” requirement of Article 2037 to the practicalities of combined transport — although this is a matter where the insurance world would of necessity have first say;

(iv) provide in Article 2438 for what may later develop as commercial practice, even though it has so far failed to get off the ground, i.e., the issue of a dual purpose document, serving both as a document of combined transport and as a certificate of full marine and war risk insurance cover on the goods, arranged and provided by the combined transport operator instead of, as is traditional, arranged by the shipper through his own insurance broker;

(v) make specific provision in Article 3339 to deal with the case where goods may fill one or more containers and also partly fill a further container completed with other “consolidated cargo,” so as to preclude the possibility, with no ship’s name on the document, of the consignment being carried as part shipments on more than one vessel;

(vi) modernize the “stale” documents article, Article 41,40 to take note of the possibility of a combined transport document issued when the goods are taken in charge at an inland point of origin being held back until the goods have reached the port of shipment and been loaded on board a container ship, so that the document can be “completed” with an “on board” endorsement.

35. Article 17, supra note 28.
36. Article 18, supra note 20.
37. Article 20, supra note 29.
38. Article 24, supra note 30.
39. Article 33
40. Article 41, supra note 14.
It may also be necessary to give further thought to the phrase in Article 16:\(^{41}\) which expressly declares a defective condition of the goods and/or the packaging.

It will be impossible to comment on the condition of goods "hidden" in a sealed container, and it may be unfair to treat as the "condition of the packaging" the external appearance of a container which, specifically designed for constant use over a period of years, will increasingly show signs of wear and tear, and possible rough handling, none of which may necessarily mean that its current contents have suffered harm or hurt.

VI. CONCLUSION

It may also be felt advisable to give thought to other matters than those touched on in this review — which essentially represents the personal thinking of its author — including, for example, the suggestion that, bearing in mind the status of Uniform Customs and Practice for Documentary Credits as "lex mercatoria" of international application and effect, wider publicity might well be given to the comments of its propounders, the members of the Banking Commission of the International Chamber of Commerce, on queries raised with them from time to time.

This would give added value to a further — and wise — suggestion that\(^{42}\)

International Chamber of Commerce brochures having a bearing on commercial law be sent to appropriate legal bodies, universities, etc., likely to be interested.

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42. Letter from Mr. Georges Roussos, Legal Counsellor, Greek Embassy, Paris, to the author, Nov. 9, 1970.