

Winter Trade Finance Conference

We report on ICC's conference in London chaired by John Turnbull (Sumitomo Mitsui Banking Corporation Europe).

The ICC's recent conference covered a number of important areas including key issues in letter of credit transactions such as discrepant presentations, linkage and UCP 600, and the forthcoming ISBP revision and ebills of lading.

(The Conference took place on Wednesday 15 December 2010 at the offices of Holman Fenwick Willan. This article has been distilled from a lengthier article that appeared in 3(4) Bankers' Law and covers the sections of the conference of more interest to the shipping market.)

DISCREPANT PRESENTATIONS

i) Practical Experience

An experienced letter-of-credit expert from the trading community said that over the last 20 years "the discrepancy rates had not come down but remained stubbornly high at 50-70 per cent". He then provided a couple of practical examples of issues that he had experienced in relation to the interpretation of UCP/ISBP:

- "Did the phrase '600,000 *barrels* crude oil' refer to a measurement so that the tolerance in Article 30 (b) should apply or should "barrels" be interpreted as packing units or individual items which did not attract the tolerance?" The consensus in the audience was that, as he suggested, the tolerance did apply as the oil was pumped rather than physically provided in barrels.
- "Did the unfortunate use of the phrase min/max 10,000MT gasoil mean that partial shipments were allowed pursuant to Article 31(a)?" He thought that partial shipments were permitted in this scenario.

He mentioned some of the problems:

- Sometimes certain banks were unfamiliar with oil

industry terminology and rejected documents as inconsistent because they were not aware of certain oil industry standard abbreviations.

- Certain banks did not follow ISBP para 41 and treated as discrepant documents that had different titles but were clearly in substance the same e.g. certificate of quality/certificate of analysis.
- Typographical errors, which certain beneficiaries refused to accept, despite ISBP para 25 that made clear that misspelling or typing errors that do not affect the meaning of a word or sentence do not make the document discrepant. (Although John Turnbull (Chairman) did suggest, in the subsequent Question and Answer session that "the distinction between typing error and inconsistency could be a grey area for some.")

In order to avoid unnecessary discrepancies, the industry expert said that his company had developed standard letter of credit applications which were routinely used. Generally, the company preferred to use standby letters of credit because they were relatively uncomplicated and provided protection should a customer default.

LINKAGE AND UCP 600

Professor Bennett (University of Nottingham) examined Linkage under UCP 600. The issue was "to what extent must all the presented documents demonstrably relate in some way to the same underlying transaction". For example, in the case of a bill of lading and certificate of inspection, must it be clear that the inspected goods are the goods that have actually been shipped?

Before considering the effect of UCP 600 he considered earlier versions of UCP, decisions of the ICC Banking

Commission, and the decision of the Court of Appeal in *Banque de l'Indochine v. Rayner* (1974). It was clear that UCP provisions regarding description of the goods did not require linkage. However, the ICC Banking Commission had connected linkage to the general requirement of consistency, and in *Rayner* Lord Donaldson MR had stated: "However general the description, the identification must ... be unequivocal. Linkage between the documents is not, as such, necessary, provided that each directly or indirectly refers unequivocally to 'the goods'." It was however unclear whether Lord Donaldson MR considered the requirement of linkage to arise from the wording of the UCP or to constitute an independent principle of the common law.

Professor Bennett then considered UCP 600. Previous references to "consistency" had been removed in favour of a requirement under Article 14(d) that data must not "conflict" with the credit or any other stipulated document. In his view this wording "could not support any linkage requirement." He also referred to the "residual article", Article 14 (f). A document falling within this article will be accepted as presented if its content appears to fulfil the function of the required document and there is no Article 14(d) conflict of data. The question was whether the requirement of "appearing to fulfil the function" imported linkage. Professor Bennett considered that ISBP 2007 paragraph 183 (relating to a certificate of origin) provided the best guidance in this area. According to paragraph 183, a certificate of origin had to "appear to relate to the invoiced goods", wording that could be interpreted as importing linkage. However, the paragraph further provides that this requirement would be satisfied by a non-conflicting description phrased in general terms, which clearly did not require linkage. If linkage was not required of a certificate of origin it was difficult to see why it should be required of any other document.

Professor Bennett concluded that there was no basis in the express wording of UCP 600 for a requirement of unequivocal linkage. Moreover, there would be "great difficulty in implying such a requirement under UCP as this risked undermining the harmonisation of documentary credit law achieved by UCP and would be inconsistent with UCP's detailed prescription for compliance" in relation to transport documents and certain others. If the parties wanted unequivocal linkage then this should be expressly stated in the credit.

At the conclusion of Professor Bennett's paper, a number of banking industry experts commented on linkage. John Turnbull expressed the hope that the "market would not be caught out if unequivocal linkage became a serious problem again." Gary Collyer said that there had been strong resistance within the UCP 600 Drafting Group to including the concept of linkage in UCP. At the time, only a very small number of

ICC national committees had suggested that linkage should be included in UCP 600. Roger Jones, commenting on linkage, said that UCP 600 represented a compromise in the final analysis and that the Banking Commission had been "totally split" on how to approach this issue. He had described, previously, the wording of the linkage provisions in UCP 600 as "convoluted" and in his view Article 14(d) is one of, if not the most disappointing part of UCP 600. He reported that when this issue was discussed at the Banking Commission meeting in Vienna during the drafting process there were different schools of thought ranging from those members "who did not want to check anything to those that wanted to check every last detail of a document required under a LC" plus various shades of opinion in between. This meant that unambiguous drafting became almost impossible in the absence of a clear agreement as to what the parties wanted to achieve.

ISBP REVISION

Gary Collyer, Chair of the ISBP Drafting Group and Chair of the UCP 500 Revision, explained that the revision of ISBP was still at a very early stage, with the Banking Commission meeting in Zurich in March 2011 the next step. "What the Drafting Group and Consulting Group [which he reported John Turnbull has recently joined as co-chair] need as a starting-point is a list of items setting out what the ICC national committees would like to see in the revised publication. Ultimately it is down to these national committees as to what matters will ultimately be covered in the ISBP revision."

Overall, Gary Collyer wanted to see "ISBP changed from a bank-centric document, which beneficiaries around the world often did not possess, to a document that would also be seen by beneficiaries to provide assistance to them in the presentation of compliant documents."

Gary Collyer said that an important issue in the revision process would be how to create the relationship between the revised ISBP and UCP 600. "The problem has always been that whilst most banks abide by ISBP, some only use it when it suits them - there needs to be suitable practices and rules that apply to all." In Gary Collyer's view another important issue would again be linkage. In his view it was important to avoid introducing linkage - "this must be left to express agreement in the credit." However, the revised ISBP, by covering more documents that are seen in documentary credits should aid better understanding of sub-article 14 (f) and the meaning of fulfilling the function. This topic "arose in most workshops". He said this provision was important "because it meant that the content must reflect the title or intent of the document and document checkers cannot turn a blind eye to a document

ESS-Databridge™ Welcome **Walter Grepp** Bauhaus Trading Goup Inc - Team Refined

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Inbox Drafts Filed

CargoDocs Create New

Clear Customer Ref. Vessel Name BL Date Consignor Consignee Loadport Discharge Port Cargo Name Status Type Search

Customer Ref	Vessel Name	BL Date	Consignor	Consignee	Loadport	Destination	Cargo Name	Quantity	Status	Type	Sender
3111UO	British Navigator	13 Jul 10	Stark Industria	Bauhaus Trading Goup Inc	Rotterdam	Oslo	Jetfuel 71	48520.000 BBL	Title Held	eSet	Rotterdam Terminal 64
371912	SS Lunar (445667)	10 Jul 10	Nih Ltd	Bauhaus Trading Goup Inc	Singapore	Amsterdam	Petroleum	50000.000 BBL	Title Held	eSet	Singa Terminal
EEE-1723 (6588945)	Solas	4 Jul 10					Uni Gas 95	32485.000 BBL		LOP	LA Port 2 Terminal
EEE-1723 (6588945)	Solas	1 Jul 10					Uni Gas 95	32485.000 BBL		SA	Forland Terminal
EEE-1723 (6588945)	Solas	24 Jun 10	Nor Trading AS	PnomPen Ltd	Stavanger	Vancouver	Uni Gas 95	32485.000 BBL	Title Held	eSet	PnomPen Ltd
ERP 23212 (3784894)	DD Developer	19 Jun 10	First Oil UK	Bauhaus Trading Goup Inc	Los Angeles	Tokyo	Diesel	30,542 BBL	Title Held	eSet	LA Terminal 5
23426R	Copa (78554)	8 Jun 10					UNI GAS 95	10200.000 BBL		SA	Heissen Terminal
83FF	SS Rataplan (1235487)	28 May 10	Bauhaus Trading Goup Inc	Nor Trading AS	New Orleans	Valdus	UNI GAS 95	23200.000 BBL	Requested Amendment	eSet	Wiking Terminal Ltd
4893	Voss (8756546)	21 May 10					UNI GAS 95	54000.000 BBL		LOP	B&F Seattle Terminal
JUHLLK	British Seagull (8872521)	17 May 10					UNI GAS 95	61500.000 BBL		SA	Stevenson & Partners
JUHLLK	British Seagull (8872521)	17 May 10	Stevenson & Partners	Bauhaus Trading Goup Inc	Boston	Hong Kong	UNI GAS 95	61500.000 BBL	Title Held	eSet	Stevenson & Partners

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eSet Folder Manage eSet Preview Certified Copies

Transfer Produce Return Other Actions Send eSDS

ERP 23212

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ESS #8837

First Oil

Tank Ship Bill of Lading

1 The cargo described below has been shipped in apparent good order and condition by
 2 First Oil UK
 3 in the Tank Ship called the DD Developer
 4 at the port of LA Terminal 5
 5 Grade and quantity as furnished by shipper PARCEL: ERP 23212

Diesel	Barrils	Cubic Metres	Metric Tonnes	Long Tons
GROSS	160	260	60	80,435
NET	30,542	20,123,123	303,453	404,534

6 This cargo shall be delivered in the like good order and condition at the port of Tokyo Refinery 837
 7 unto: Bauhaus Trading Goup Inc
 8 ("Consignee") or to its or their Assigns or Order, subject to the following terms and conditions:

9 **CLAUSE PARAMOUNT**
 10 (1) This Bill of Lading shall have effect subject to any national law making the International Convention for the unification of certain
 11 rules of law relating to bills of lading signed at Brussels on 28th August 1924 (the Hague Rules) or the Hague Rules as amended by the
 12 Protocol signed at Brussels on 23rd February 1968 (the Hague/Visby Rules) compulsorily applicable to this Bill of Lading. If any term
 13 of the Bill of Lading be repugnant to that legislation to any extent, such term shall be void to that extent but no further. Neither the
 14 Hague Rules nor the Hague/Visby Rules shall apply to this Bill of Lading where the goods carried hereunder consist of live animals or
 15 cargo which by the Bill of Lading is stated as being carried on deck, and is so carried.
 16 (2) Save where the Hague or Hague/Visby Rules apply by reason of (1) above, this Bill of Lading shall take effect subject to any
 17 national law in force at the port of shipment or place of issue of the Bill of Lading, making the United Nations Convention on the
 18 Carriage of Goods by Sea 1978 (the Hamburg Rules) compulsorily applicable to this Bill of Lading in which case this Bill of Lading
 19 shall have effect subject to the Hamburg Rules which shall nullify any stipulation derogating therefrom to the detriment of the shipper or
 20 consignee.
 21 (3) Where the Hague, Hague/Visby or Hamburg Rules are not compulsorily applicable to this Bill of Lading, the carrier shall be entitled
 22 to the benefits of all privileges, rights and immunities conferred by articles 1 to 17 of the Hague/Visby Rules.
 23 (4) Nothing in this Bill of Lading shall be construed as in any way restricting, excluding or waiving the right of any relevant party or
 24 person to limit his liability under any available legislation and/or law.
 25 **LIBERTY** The vessel shall have liberty to proceed towards or to call at any port(s) or place(s) in any order for loading or discharging
 26 cargo (including cargo other than that carried under this Bill of Lading), for taking fuel, to load or be towed, to assist vessels or aircraft in
 27 distress, to deviate for the purposes of saving life or property or of landing any sick or injured person on board or for any other purpose
 28 whatsoever, and any use of the aforesaid liberties shall be deemed to be a part of the contract voyage. This Clause shall not be
 29 considered as restricted by any provision of this Bill of Lading whether express or implied or construed by reference to whether any use
 30 of the said liberties would or would not frustrate the object of this Bill of Lading or the contract evidenced hereby.
 31 **DISCLAIMER** The weights, volumes, quantities and/or grades stated herein are Shipper's weights, volumes, quantities and grades and
 32 the accuracy thereof is unknown to the Carrier. If any term in this Bill of Lading be repugnant to any extent to the Rules applicable
 33 pursuant to the Clause Paramount, such term shall be void to that extent but no further.
 34 **INCORPORATION**, Clauses 1 to 5 inclusive on the reverse side of this Bill of Lading are incorporated herein and form part of
 35 this Bill of Lading.
 36 IN WITNESS whereof the Master or Agent of the said vessel has signed One (1) Original Bills of Lading, all of this tenor
 37 and date, one of which being accomplished the others will be void

B/L clauses

38 ISSUED at LA Terminal 5 this Nineteenth day of June 2010 of Registry: Shanghai
 John Smith Master or Agent
 Electronically signed by John Smith
 for and on behalf of Filippa Shipping
 Ship Name: DD Developer
 Port of Registry: Shanghai
 3784894
 35,000
 Engine Power: MAN B&W 6S 80 MC

Title Held

Transaction Information

Endorsement Type: To Order
 Endorsed To: eExchange3
 Sent To: eExchange3
 Endorsed From: eExchange7
 Endorsement Date: 6 Aug 2010 15:08

- Complete List of Documents**
- B/L Bill of Lading
 - COCOP Certificate of Quality and Origin (P)
 - TS Timesheet
 - DEFI Documents Enclosure
 - ROS Receipt of Samples
 - CM P Cargo Manifest (P)

correct in title but not in content”.

The recent ICC recommendation paper in relation to on board notations would be incorporated into the revised ISBP, Gary Collyer confirmed.

FUTURE DEVELOPMENTS - E-BILLS OF LADING

Cynthia Worley (ESS) spoke on ebills of lading. She provided a practical on-screen demonstration of CargoDocs, ESS's exchange for electronic bills of lading. A striking feature was the extent to which ESS had strived to make the electronic bills of lading look like a traditional bill of lading (see above). For example, the terms and conditions appeared as if they were

on the reverse side of the electronic bill and the logo of an oil company was recreated. It is because of a perceived human need for continuity rather than any actual legal requirement.

CargoDocs claims to provide time and cost savings to each party in the trade chain. Cynthia Worley suggested that banks “could save time which was presently wasted on manually matching paper shipping documents with electronic or paper letters of credit”. CargoDocs also assists with another problem associated with paper-based systems, the “inability to authenticate that parties have signing authority and a loss of business to open account trading due to paper inefficiencies.” She said that ESS had calculated that the total time spent on a typical crude oil, paper bill of lading transaction was 4 1/2 days over the course of several months, whereas CargoDocs



Photo: Mitsui O.S.K Lines has been using its international trade capability to assist with containership and ferry support following the recent tsunami and earthquake disaster in Japan.

allowed the same process to be completed within 65 minutes, in the course of a single day.

Cynthia Worley explained how CargoDocs is to be rolled out by using terminals as central hubs. Following several of their counterparts in the UK, Exxon's Baton Rouge Refinery recently moved to electronic bills of lading (November, 2010). Cynthia Worley said that the different receiving ports, with which vessels from Baton Rouge traded, could be "treated

differently, depending on the circumstance. And in some cases, if necessary, the electronic bill could be converted to paper via the CargoDocs exchange." She announced that CargoDocs would soon be expanding into Russia at the request of the Primorsk Oil Terminal.

(For further information on this area: see "Making Electronic Bills of Lading a reality" 8(1) *Shipping & Transport International*. at p. 13.)

