

The Power of arguments

- An analysis of UCP 600 article 20,a,iii versus UCP 500 article 23,a,ii

By Kim Christensen

Introduction

During September and October 2007 there were massive discussions in the LC Community regarding the practical application of UCP 600 sub-article 20,a,iii (and for that matter also UCP 600 sub-article 21,a,iii).

This article is an attempt to analyze the various arguments as balanced and objectively as possible – providing LC specialist and LC expert a full view of the arguments – and the history behind it.

Background

UCP 500ⁱ included the following wording:

If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading

The result of this provision is that when the bill of lading includes such “place of receipt different from the port of loading” then a so-called “Extended on-board notation” is required.

Examples:

The LC calls for a bill of lading showing shipment from UK to Hong Kong.

1) The presented Bill of lading was completed as follows:

“Shipped on board in apparent good order and condition ...”

Port of Loading: Southampton
Port of Discharge: Hong Kong

In this case no separate on board notation is required – and the issuance date will be deemed to be date of shipment.

2) The presented Bill of lading was filled out as follows:

“Shipped on board in apparent good order and condition ...”

Place of receipt: Birmingham
Port of Loading: Southampton
Port of Discharge: Hong Kong

In this case the “extended on-board notation” is required, also showing port of loading and vessel name.

The above lines from UCP 500 is not to be found in UCP 600. All you find there is the followingⁱⁱ:

“indicate shipment from the port of loading to the port of discharge stated in the credit”

The question is if the result of this provision is the same as under UCP 500 (reflected above) or different.

Gary Collyer – Chairman of the UCP 600 Drafting Group – argues that it should be the same, whereas a number of LC Experts have argued for a different “interpretation”.

Mr. Collyer has argued for this primarily in Coastline Solutions Newsletter - Issue 12ⁱⁱⁱ - but also in DC-Pro Focus^{iv} Discussion forum on two occasions, respectively 28 September 2007 and 2 October 2007. This article contains quotes from the 2 October posting – with kind permission from DC-Pro and Mr. Collyer.

ISBP – ICC Publication 645 (2003) versus ICC Publication 681 (2007)

Also to be taken into account is the ISBP^v. The 2003 version would include the following “practice”^{vi}:

If a Container Yard (CY) or Container Freight Station (CFS) is stated as the place of receipt and that place is the same as the stated port of loading (e.g. Place of Receipt: Hong Kong CY; Port of Loading: Hong Kong), these places are deemed to be the same, and therefore the specification of the port of loading and the name of the vessel in the "on board" notation are not necessary.

This practiced is based on an ICC Opinion from 1997^{vii}. The reason for asking this question is stated clearly in the opening of the Opinion:

Please provide us with your opinion as to the meaning of "taking in charge different from the port of loading". For example, if the place of receipt is indicated on a bill of lading as the "Hong Kong (CY)" with the port of

loading indicated as "Hong Kong Port" would this be considered as a different place bearing in mind that the Hong Kong Container Yard (CY) is a part of Hong Kong Port. In this example would the requirements of Sub-article 23 item (a) ii be applicable.

It is evident that this question has a crystal clear link to the lines quoted from UCP 500 sub-article 23,a,ii.

The arguments

The below collects the various arguments used in this case – and attempts to evaluate them as balanced and objectively as possible.

The arguments supporting a status quo in practice

Argument number 1pro:

My Collyer has argued that^{viii}:

In discussions with the ICC's Transport Commission it was decided that the structure of this article should reflect the role of a bill of lading i.e., to cover shipment from a port to a port. On this basis, the reference that appeared in UCP 500 sub-article 23 (a) (ii) to the 'on board' requirements where the bill of lading indicated a place of receipt different to the port of loading was seen to actually encourage a bill of lading to evidence pre-carriage (whereas if this were the intention, the credit should have called for a combined or multimodal type document).

Mr. Collyer has also formulated this as follows^{ix}:

The wording in UCP 500 sub-article 23 (a) (ii) was seen as encouraging a multimodal type shipment within the confines of a bill of lading.

Following that argument, the starting point would be that a “place” of receipt mentioned on a bill of lading would be something *different* from a “port”.

Argument number 2pro:

Mr. Collyer has stated that^x:

For example, a bill of lading recently seen stated that the shipped on board statement referred to the named vessel OR the conveyance carrying the cargo from the place of receipt (inland point) to the port of loading stated in the bill of lading. This clearly highlights the fact that not in all cases can an on board statement be seen as applying to the named vessel and port of loading.

So basically the argument is that one can never know if the “shipped on board statement” will refer to the “port of loading” field or the “place of receipt” field.

Argument number 3pro:

Further Mr. Collyer argues that this was driven by discussions with the ICC Transport commission – and it was never the purpose of the ICC National committees or the Drafting Group to change practice. Mr. Collyer notes^{xi}:

It should be noted that each release of a draft text included either a short commentary on the changes (where wording was changed from UCP 500 or where a position changed from a previous draft) or a marked up version showing the changes made from the previous draft.

Argument number 4pro:

Mr. Collyer is most likely the LC Experts who have been traveling most the last year. In his argumentation to this issue, he notes that this message has been send clearly – and there have been no dissenting views. Some quotes^{xii}:

I would also point out that in all of the sessions that I have conducted there has been no differing interpretation to that which I have expressed and which appears in the commentary as the views of the Drafting Group ...

And

As I have stated above, I have spoken in every continent of the world at well over 50 locations and in all of those workshops/seminars I have not come across any dissenting viewpoint to that expressed.

And

This issue was also fully covered in the 2 ICC seminars in Paris (October 2006 and January 2007) plus the event that followed the ICC Banking Commission in Singapore (April 2007).

Analyzing the arguments

The arguments 1Pro and 2Pro seems reasonable when separated. It seems however a bit odd, when bringing them together. In 1Pro the “place” is not a “port” – while in 2Pro it may be a “port”.

Further it seems clear that *in general* the shipped on board notation will refer to the “port of loading” field on the bill of lading. This is supported by the following^{xiii}:

According to the majority view, a bill of lading, designating as the beginning of the itinerary a place of receipt, is not considered, a maritime bill of lading for the shipment between place of receipt and place of loading, since it remains open, whether the goods were shipped by truck, rail, or feeder ship between the place of receipt and the place of loading.

There may however be practical differences to this – like the examples mentioned by Mr.

Collyer. One could however ask if such *exceptions* should form basis for this practice. Secondly one will of course appreciate arguments based on industry practice. One must argue however that this does not seem to be the guiding principle when drafting the UCP transport articles. There are numerous examples where the rules are clearly out of line with industry practice. “*Appendix 1*” below show some of those examples (*Please note that the sole purpose of these examples is to show that if shipping industry practice was the guiding principle, then many issues should have been handled differently*).

As for argument 3Pro it must be accepted that it has never been said directly, that this will in fact change practice. It seems obvious however that many LC Specialists have taken this change as a change in practice. This seemed clear during December 2006 – when final comments to the updated version of ISBP were submitted to the ICC. The ISBP draft would include paragraph 105 – being identical to Paragraph 82 quoted above. I know of National Committees who did comment to the Drafting Group that since UCP 600 does no longer include the special requirements regarding on board notations on bills of lading which indicate a place of receipt different from the port of loading – Paragraph 105 is superfluous and should be deleted.

The fact was – that Paragraph 105 (the “old” Paragraph 82) was deleted – leading to the general perception that practice had indeed changed.

Also supporting this view is the Chinese LC Expert Jia Hao who has said the following^{xiv}:

According to UCP600, if the field “port of loading” in the bills of lading presented indicated clearly the port of loading stipulated in the credit, even if the place of receipt indicates a place other than that port, the on board notation need not include the port of loading stipulated in the credit and the

name of the vessel on which the goods have been loaded.

Argument 4Pro is also interesting. It seems evident that no single person on this earth has attended all the UCP 600 seminars conducted by Mr. Collyer. For whatever it is worth the author of this article attended two of the three seminars mentioned^{xv}, and at least at the event in Singapore Mr. Pavel Andrlé^{xvi} addressed this matter, and raised strong concerns.

The arguments supporting a new practice

Argument number 1con:

Since the rule is removed – it is no longer there.

Argument number 2con:

If it was the intention of keeping practice “as is” – then why remove ISBP (2003) Paragraph 82? It seems to make no sense, since Mr. Collyer still refers to ICC Opinion R.282 – and even says that:

“This opinion will also apply in respect of UCP 600 sub-article 20 (a) (ii)”^{xvii}

The only logic step – should practice stay status quo – would be to keep Paragraph 82 – and perhaps even build the UCP 500 wording into the ISBP.

Argument number 3con:

Since it was evident from the comments on the ISBP draft in December 2006 – that some national committees took the new UCP 600 wording as a change in practice, this should have been communicated clearly to the Commission already in April 2007 – in order to make sure that this was absolutely clear when “implementing” the UCP 600.

Argument number 4con:

The view of the ICC Transport Commission should have been communicated clearly to the national committees.

Argument number 5con:

This rule has just been moved to the commentary – which makes no sense – since only few customers hold (or rather will hold^{xviii}) a copy of that one.

Argument number 6con:

This change has not been beneficial to the LC instrument. If you meet a customer who knows the rules, it will be very hard to argue in favor of this “*status quo interpretation*”. An LC customer may argue that this is opaque rules^{xix}.

Argument number 7con:

If it was really the intention to simplify and clarify the transport articles – then places should be clearly distinguished from places^{xx}. This also seems to be the prevailing principles when reading the transport articles – hence this “interpretation” breaks this clear and logic distinction.

Argument number 8con:

Since the clear UCP 500 rule has been substituted by a general UCP 600 rule – it has been opened to interpretations – i.e. various practices. It is now one year since the UCP 600 was approved – and during that time practice has evolved. As a consequence – what we have are some banks using the “old” interpretations – while others have adapted a new one.

Analyzing the arguments

It seems that arguments 1con, 2con and 3con are the strongest. One thing is removing the UCP 500 lines – another thing is removing

ISBP paragraph 82. The author has not been able to find on single – fact based – argument why this Paragraph has been removed. In this respect argument 1pro surely will not apply – as a “CY” does not (by definition) signify any kind of multimodal transport. So this could still easily be part of the bill of lading paragraphs in the ISBP – and even support the practice laid out by Mr. Collyer. Since it is (according to Mr. Collyer) practice to require an extended on board notation – then this would fit naturally into the ISBP. In any case it would seem better to have such practice in the ISBP – than in an ICC Opinion from 1997 – clearly linked to a UCP 500 wording not available in UCP 600.

So basically there are only two logic reasons why ISBP (2003) Paragraph 82 was removed:

1. By mistake
2. To underline a change in practice

One must assume it is the latter.

The arguments 4con and 5con may be true – but does not change anything.

Argument 6con seems important. In the daily business the LC officers must be in a position to explain their actions to the customers – e.g. why they refuse based on “*on board notation not mentioning port and vessel name*”.

Customers will have a very hard time to understand when the LC officer can not just accept the port stated in the port of loading field – as the port at which the goods are on board. If you add to that a customer that actually does know the changes made to UCP and ISBP – this status quo practice will foster many unfruitful discussions.

The basis for argument 7con is that the more logic, clear, clean and simple the rules are – the easier it is to understand and apply. Hence these kind of “exceptions” stated outside the rules (like in the “*UCP 600 Commentary*”) only give rise to more disputes – more discrepancies. The aim must be the opposite.

Argument 8con is correct – but unfortunately changes nothing. If however this UCP 600 Commentary – or for that matter some other “guidelines” from the ICC had been issued latest when the UCP 600 was in force^{xxi} – then most likely this could have been avoided. So if nothing else – there are many things to learn from this case.

Concluding

Above – the main arguments for and against a status quo interpretation of this principle has

been presented and analyzed. One must make up for one self what should be the correct “interpretation”. The sad thing is of course – that no matter how you twist this matter – it will end up as an interpretation.

The conclusion of the author is that the arguments in favor of keeping the UCP 500 practice are very weak – and if it was in fact the intention all along to keep this current practice – then this is surely not reflected in the changes made to UCP and ISBP.

Kim Christensen
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Appendix 1; Examples where UCP transport articles are out of line with industry practice

Shipments	In general “Shipment” is an “abstract” term in UCP context. It assumes a date where some action is carried out in relation to the goods. However in many cases – it merely indicates when the transport document has been issued. Article 19, 24 and 24
Article 21	The Non-negotiable sea waybill is drafted as port to port document – the rules governing the NNSW - “CIM Uniform Rules for Sea waybills” indicate that it covers a carriage “ <i>which is to be performed wholly or partly by sea</i> ”. This is therefore a multimodal transport – where at least one leg of the transport must be performed by sea.
Article 21	For a NNSWB one original is required. For this document it makes no sense – as is often <i>not</i> issued in “original” – but rather in electronic form; often as PDF files being circulated between the relevant parties via open e-mail.
Transshipment	Transshipment in real life means that goods are moved from one means of transport to another. However in LC transaction transshipment is often allowed even if prohibited by the LC – e.g. where goods are sent in containers.
“However named”	The “however named” principle is not the principle used by the transport industry. If the LC calls for a multimodal transport document – and such is presented – then it makes no sense to the transport company that the banker will refuse due to “only one mode of transport used”
AWB to order	ISBP (2007) Paragraph 143 discourages AWBs issued “to order” – but it does not prohibit it. In real life AWBs issued to order may result in the consignee not being able to claim the goods (TACT Rules for AWB's (6.1.6.d)) ^{xxii}
ISBP (2003) paragraph 82	This ISBP paragraph assumed that “Hong Kong CY” is not a place different from “Hong Kong Port”. This assumption is not correct.

ⁱ UCP 500, sub-article 23,a,ii

ⁱⁱ UCP 600, sub-article 20,a,iii

ⁱⁱⁱ At time of writing this, the newsletter is available at: <http://www.coastlinesolutions.com/News.htm>. It is expected however – the when a new one is released – this url will change. In such case search for “Coastline Solutions Newsletter - Issue 12” titled: “UCP 600 – two months old and modifications or exclusions are occurring”.

^{iv} <http://focus.dcpofessional.com>

^v International Standard Banking Practice (ISBP) for the examination of documents under documentary credits. Originally published in 2003 – but updated 2007 to be in line with UCP 600.

^{vi} ISBP (2003) paragraph 82

^{vii} ICC Opinion R.282 / TA.56 - Meeting 4 November 1997. ICC document 470/ 814

^{viii} Coastline Solutions Newsletter - Issue 12

^{ix} Posting 2 October in DC-Pro Focus Discussion Forum under topic “ARTICLE 20”.

^x Coastline Solutions Newsletter - Issue 12

^{xi} Posting 2 October in DC-Pro Focus Discussion Forum under topic “ARTICLE 20”.

^{xii} Ibid.

^{xiii} Requirements for the issuance of maritime bills of lading by non vessel owning carriers / available on: <http://letterofcreditforum.com/node/10>

^{xiv} Jia Hao: Comparing UCP 500 and UCP 600; Point 10. On board notation in case of place of receipt different from port of loading. Available on: <http://www.lcviews.com/Comparing.htm>

^{xv} In Paris October 2006 and in Singapore April 2007.

^{xvi} Secretary to the Banking Commission of ICC Czech Republic. Mr. Pavel Andrlé has gracefully accepted that he is mentioned in this context – and has approved the wording used.

^{xvii} Coastline Solutions Newsletter - Issue 12

^{xviii} The Commentary to UCP 600 is not released when publishing this article. It is still unknown when this will happen, although Mr. Collyer has recently referred to the “soon to be published commentary” (Posting 2 October in DC-Pro Focus Discussion Forum under topic “ARTICLE 20”)

^{xix} E.g. the “ironic” article by Mike Tress Chinn “*Poor Banker*” versus “*Smart Beneficiary*” on “*place of receipt different from port of loading*” available on: http://www.lcviews.com/art_20_place_of_receipt.htm

^{xx} The same principle that is behind SWIFTs changes to field 44: place of receipt, port of loading, port of discharge, and place of delivery.

^{xxi} 1 July 2007

^{xxii} See article. “*Two industries separated by common documents!*” By Kim Christensen – Expert view article on DC-Pro Focus.