

*613 ORIGINAL DOCUMENTS IN LETTERS OF CREDIT IN THE ERA OF HIGH-QUALITY PHOTOCOPIERS AND PRINTERS

Koji Takahashi [FN1]

In this article, the author puts forward a proposal for amending Article 20(b) of the UCP 500 with a view to providing bankers with a clear guidance for distinguishing original documents from copies under a letter of credit.

Under a letter of credit, the documents presented must be originals. Thus under UCP 500, [FN1] originals are called for with respect to marine ocean bills of lading (Article 23), non-negotiable sea waybills (Article 24), charter party bills of lading (Article 25), multimodal transport documents (Article 26), air transport documents (Article 27), and insurance documents (Article 34). Other documents presented under letters of credit are also expected to be originals unless otherwise provided in the terms and conditions of the credit. [FN2]

Traditionally, most documents were hand-written or typed and it was not too difficult to distinguish originals from photocopies. Today, almost all documents are prepared by computers and generated from printers. [FN3] Coupled with the advent of high-quality photocopiers, it has become increasingly difficult to distinguish originals from non-originals. As will be examined below, the UCP 500 contains a provision (Article 20(b)) for facilitating the task of distinguishing originals. But it gave rise to diverse interpretations and the one suggested by the ICC Policy Statement does not easily square with the text of the provision. The purpose of this article is to put forward a proposal for amending Article 20(b) with a view to providing clear guidance to bankers.

ARTICLE 20(B) OF THE UCP 500

To respond to technological developments, a new provision for facilitating the task of distinguishing original documents was introduced in the UCP 400 [FN4] at the time of the 1983 revision. [FN5] In the 1993 revision, the same provision was reproduced, with minor changes, as Article 20(b) in the UCP

500. It reads:

Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:

- i. by reprographic, automated or computerized systems;
- ii. as carbon copies;

provided that it is marked as original and, where necessary, appears to be signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.

At first glance, it may be thought that this provision applies to all documents produced by reprographic, automated or computerized systems. But in practice those documents are often not marked as original as required by this provision. That has led to a debate whether all of those documents are subject to this provision.

***615 GLENCORE INTERNATIONAL A.G. V. BANK OF CHINA [FN6]**

In this case, the document in question was a beneficiary's certificate attesting that certain documents had been sent to the buyer on time. It was initially composed on a word processor and generated from a laser printer. It was then photocopied by a high-quality photocopier to produce copies. To the naked eye, the photocopies were indistinguishable from the original printout. One document, probably one of the photocopies, was then signed with a ball point pen and submitted under a letter of credit. The bank rejected it on the ground that it was not marked as original and a dispute was brought before an English court whether the rejection was lawful.

The Court of Appeal, affirming the ruling of first instance, held that the document had been properly rejected. The court took the view that with the introduction of Article 20(b) into the UCP, any document produced by reprographic means or automated or computerized system had to be marked as original to be treated as such no matter whether it would have been so treated before. According to this interpretation, the word "also" in Article 20(b) would mean "in addition to handwritten or typed documents" since those two types of documents are in any view originals. [FN7]

This interpretation has the merit of making the bankers' task of distinguishing originals easy but imposes on the issuers of documents an inflexible routine of marking as original the documents produced on a computer despite that it is now the most common method of document production.

In fact, it is said that until the Glencore decision, a large number of banks were happy to accept documents produced on a computer without requiring them to be marked as original. [FN8] It is also said that even after the Glencore decision, only a few banks changed that practice and others ignored the decision as taking an incorrect interpretation or as inapplicable to their countries. [FN9] Thus Boueki to Shinyojo, [FN10] a guide on letters of credit often referred to in Japan, does not mention the Glencore decision but states that Article 20(b) does not have to be interpreted as requiring documents, such as invoices and packing lists, which are only meant to convey the information contained therein, to be marked as original, though such markings would be needed for the documents, such as bills of lading and insurance policies, for which such markings are significant when the possessor exercises the right embodied in *616 the documents and for the documents which the law requires to be marked as original.

KREDIETBANK ANTWERP V. MIDLAND BANK PLC [FN11]

Several years after the Glencore decision, the Court of Appeal gave a ruling which interpreted Article 20(b) restrictively. In this case, an insurance policy was produced by a laser printer onto a watermarked headed paper bearing the name and blue logo of the insurer. It was then photocopied by a high-class photocopier. The copy was marked "duplicate" but the original printout bore no equivalent marking. Both documents were signed and were submitted under a letter of credit. The bank rejected the original printout on the ground that it was not marked as original as required by Article 20(b) and a dispute was brought before an English court as to whether the rejection was lawful. It was common ground that before the introduction of UCP 400 in 1983, the document would have been regarded as an original document.

The Court of Appeal, affirming the ruling of first instance, held that the documents could not be properly rejected. It took the view that Article 20(b)

did not apply to a clearly original document, unless it either was or might be a copy of another document such as a photocopy or carbon copy. The court observed that the document at issue was clearly an original document as it contained an obviously original colored logo and an apparently original signature and was accompanied by a document marked as duplicate. This decision did not seek to articulate exactly what documents fell within Article 20(b). It might have taken the view that only documents apparently photocopied or carbon copied were subject to that provision. It might as well have taken the view that Article 20(b) applied to the documents which would have been rejected as non-originals prior to UCP 400, though it did not clarify what exactly those documents were. This decision therefore offered little predictability as to how Article 20(b) would apply though it was more appreciative of the modern method of document production than the Glencore decision.

*617 ICC POLICY STATEMENT

After the Glencore decision, the issuers of documents were sometimes taking the trouble of stamping documents "original" as a precaution. This has led the ICC to feel it necessary to clarify the meaning of Article 20(b). [FN12] It issued a policy statement just after the Kredietbank decision and suggested the following interpretation: [FN13]

... unless a document indicates otherwise, it is treated as original if it:

(A) appears to be written, typed, perforated, or stamped by the document issuer's hand; or

(B) appears to be on the document issuer's original stationery; or

(C) states that it is original, unless the statement appears not to apply to the document presented (e.g. because it appears to be a photocopy of another document and the statement of originality appears to apply to that other document).

The annotation which follows says that documents which appear to be hand signed by the issuer are treated as original documents in accordance with sub-paragraph (A) above even if they are produced by reprographic, automated, or computerized systems. It also says that documents appearing to have been photocopied are nevertheless treated as original documents in accordance with sub-paragraph (B), if the text appears to have been

photocopied onto original stationery of the issuer rather than onto blank paper. It also cites as examples of statements indicating originality a statement that the document is a "duplicate original" or the "third of three" and a statement that the document is void if another document of the same tenor and date is used. On the other hand, a statement that the document is a true copy of another document or that another document is the sole original are cited as examples indicating non-originality. It notes that a statement in a document that it is the "customer's copy" or "shipper's copy" neither disclaims nor affirms originality.

According to this policy statement, only a narrow category of documents such as those which appear to have been produced by photocopying onto blank paper and which have not been completed by hand are subject to *Incoterms* 618 *m*Article 20(b) and accordingly need to be marked as original to be so treated. This ICC statement offers a clearer and more specific criterion than the *Kredietbank* decision and has been endorsed by some courts. [FN14] Though the statement does not seek to amend Article 20(b) but purports merely to indicate the correct interpretation, how it squares with the text of Article 20(b) is not easy to see.

ISP 98

Documents presented under a standby letter of credit must also be originals. Standby letters of credit used to be subject to the UCP. But more recently, a specific set of rules, the ISP (International Standby Practices) 98, was created by the Institute of International Banking Law and Practice and endorsed by the ICC. Rule 4. [FN15] of the ISP 98 confirms in paragraph (a) that presented documents must be originals and provides in paragraph (c):

- i. A presented document is deemed to be an original unless it appears on its face to have been reproduced from an original.
- ii. A document which appears to have been reproduced from an original is deemed to be an original if the signature or authentication appears to be original.

This criterion is not as specific as the ICC Policy Statement but since it deems all but some documents to be originals, it will facilitate the bankers' task of examining documents.

PROPOSED TEXT FOR AMENDING ARTICLE 20(B)

As the cases such as Glencore and Kredietbank illustrate, the present text of Article 20(b) has given rise to difficult interpretive questions and is not providing a clear guidance to the practice. The ICC Policy Statement, though intended to indicate the correct interpretation of Article 20(b), is difficult to square with the text of that provision. It is therefore submitted that Article 20(b) should be amended to read as follows:

*619

- i. A presented document is deemed to be an original unless it:
 - appears clearly to have been reproduced from another document or;
 - is produced by the bank on a telefax, telex, e-mail, or other system that prints out messages received by the bank or;
 - contains statements indicating that it is a non-original.
- ii. Statements in documents which indicate that they are non-originals include, inter alia:
 - a statement that another document is the sole original and;
 - a statement that it is a copy of another document.
- iii. A statement in a document that it is the "customer's copy" or "shipper's copy" shall not be considered to indicate that the document is a non-original.
- iv. A document which appears clearly to have been reproduced from an original is nevertheless deemed to be an original:
 - if the document issuer's signature or other authentication appears clearly to be original or;
 - if it appears clearly to have been reproduced on the document issuer's original stationery or;
 - if it is marked as "original," "duplicate original," "third of three" or with words of similar effect or;
 - if it contains a statement that it will stand void if its duplicate is accomplished.

What follows will explain the thinking behind the proposed text.

COMPREHENSIVE AND SPECIFIC DEFINITION

The proposed text seeks to build upon the respective strength of the ICC Policy Statement and ISP 98. Thus while the present text of Article 20(b) deals only with certain categories of documents which were narrowly interpreted by the ICC Policy Statement, the proposed text, like Rule 4.15 of the ISP 98, seeks to provide a comprehensive definition of original documents. But it is more specific than the ISP 98, incorporating elements of the ICC Policy Statement.

MARKING AS "ORIGINAL"

The proposed text, unlike the present text, does not require documents to be marked as original. This is not in fact a significant departure from the present regime since the Kredietbank decision and the ICC Policy Statement narrowly circumscribed the categories of documents subject to Article 20(b). But in order to decide whether to abolish the marking requirement all together, it is necessary to consider why original documents are called for in the first place. The reasons seem to stem from the inadequacy of copies on the following three points:

1. Copies may contain errors introduced while copying the original.
2. Copies may contain alterations unauthorised by the issuer.
3. Copies of documents of title (such as bills of lading) do not embody the relevant rights.

On the first point, a copy is as good a document as its original if it is marked as original attesting that no error was introduced while copying the original. Marking as original would therefore have been meaningful in the days when copies were usually made manually. But with the arrival of photocopying machines, accurate copying has become possible and it is no longer necessary to provide this assurance by marking as original. This is one of the reasons the proposed text does not make originality depend upon marking.

Today the second point is more important as the progress of the photocopying technology has made unauthorised alterations increasingly easy. However, on this point, unlike the first point, marking as original would not make a copy as good a document as its original. Since marking is normally effected by stamping the word "original," it is just as easily done by the perpetrator as the issuer. [FN15] It will be

recalled that stamping a document with the word 'original' was described by Judge Diamond QC in the Kredietbank case [FN16] as being merely an "empty ritual." This is another reason why the proposed text does not make marking as an essential requirement for original documents. On the other hand, a statement in a document indicating that the document is a non-original would not be inserted for fraudulent purposes and could be trusted. The proposed text therefore treats documents containing such indications as non-originals.

On the third point, a copy is as good a document as its original if it is marked as original attesting the issuer's intention to affix the relevant rights to the document. Thus bills of lading are often issued in a set of three originals. Two of them will be made from the first original by copying it and marking them as original. The third point may therefore provide a good reason to make marking as original a prerequisite for originals in so far as documents of title are concerned. But it is not relevant to documents which do not embody rights such as weight certificates, quantity certificates, quality certificates, inspection reports, and insurance certificates. In this regards, it should be noted that with respect to road, rail or inland waterway transport documents, Article 28(b) of the UCP 500 expressly treats marking as originals as irrelevant to the originality of the documents. For the forgoing reasons, the proposed text does not require marking as original as a prerequisite for original documents.

SIGNATURE

Signature does not serve exactly the same functions as original documents. Thus when the UNCITRAL drafted the Model Law on Electronic Commerce, it considered what requirements had to be established in the electronic commerce in order to achieve the same functions as served by various requirements established for the paper transactions. It has decided to treat signature as a separate requirement from the requirement of originals. Thus, under Article 8 of the Model Law, the requirement of original documents is considered to safeguard the integrity of the content of documents, while under Article 7, the requirement of a signature is considered to serve the purposes of identifying the author of a document and confirming that *622 the author approved the content of that document.

Article 20(b) of the UCP 500 calls for a signature only "where necessary." This may reflect the understanding that signature does not serve exactly the same functions as original documents. The UCP 500 contains separate provisions requiring some documents such as shipping documents and insurance policies to be signed. It is therefore not necessary for provisions defining original documents to call for a signature even only in the cases "where necessary." The proposed text makes this clear by not making a signature an essential requirement for original documents in any case.

If, however, there is a signature, it certifies the issuer's approval of the content of the document and therefore means that the document is not tampered with at least when signed. And even after a signature is applied, as long as the original signature remains intact, it will be hard to falsify the rest of the document even with the help of a high-quality photocopier. For that reason, the proposed text deems a document containing an apparently original signature to be an original even if the document itself appears to have been reproduced from an original.

PRESUMPTION OF ORIGINALITY

As Article 14(b) of the UCP 500 provides, banks are supposed to examine documents only on their face. They do not therefore undertake to determine whether a document is original in fact. Moreover, as Sir Thomas Bingham M.R. has pointed out in the *Glencore* case, banks, jealous of their reputation in the international market place, are generally careful not to reject documents on grounds of non-conformity unless the non-conformity is clear. [FN17] In view of the nature of the bank's duty to examine documents and the increasing difficulty of distinguishing originals due to the advanced photocopying technology, it would seem inappropriate to demand banks to positively identify original documents. That is why the proposed text, like the ISP 98, deems documents to be originals save certain exceptions, thereby facilitating the bank's task of examining documents.

The presumption may operate to broaden the category of documents deemed to be originals and, if so, that might be considered to be unwarranted given that, with the advent of high-quality photocopiers, there is now a *623 greater need to insist upon original documents to counter unauthorised alterations. But it is implicitly acknowledged under the UCP 500 that

requiring originals does not ensure a perfect protection against unauthorised alterations since Article 15 provides that banks are not responsible for the genuineness or falsification of any document. We should therefore be content if unauthorised alterations are avoided to the extent possible by the means of requiring originals and to the extent originals are distinguishable in accordance with the banks' responsibility to examine documents. It is worth noting that if documents are presented electronically, unauthorised alterations may be avoided more directly and effectively by authenticating the electronic data [FN18] than by requiring original documents in the paper environment.

RELIANCE ON APPEARANCE

Presumptive provisions generally work most effectively if their exceptions are defined clearly and exhaustively. The proposed text does not entirely achieve this as it relies upon appearance of documents in defining the exceptional categories of copies. This is necessitated as the bank's responsibility for checking documents is limited to examination on the face of the documents. In this regard, the present text of Article 20(b) uses the expression "produced or appearing to have been produced" but to demand banks to determine whether documents are in fact "produced" seems contrary to the nature of banks' responsibility.

It is true that reliance on appearance gives rise to the possibility of inconsistent judgments between the confirming and issuing banks. Thus the document accepted by the confirming bank as apparently an original may be rejected by the issuing bank as apparently a copy. This, however, seems to be a problem inherent in the nature of the bank's responsibility of examining documents.

The proposed text seeks to avoid inconsistent judgments as much as possible by requiring a copy to appear clearly to have been reproduced from another document, failing which the document is deemed to be an original. Thus a document which looks equally like a computer printout and a photocopy will be deemed to be an original. This would be an entirely appropriate result given that the printing out of computer generated text is the normal *624 method of creating documents today and the documents so produced are not susceptible to greater risk of unauthorised alterations than hand-written

documents.

When paragraph four of the proposed text deems to be an original the document which appears clearly to have been reproduced, it requires the appearance to be clear that the issuer's signature or other authentication is original or that the document was copied onto the issuer's stationery. This, too, is to avoid inconsistent judgments between the confirming and issuing banks as much as possible.

CONCLUSION

In the future, documents will be presented more commonly by electronic means. The ICC has created a set of rules, the eUCP, [FN19] to deal with issues which might arise from electronic presentation. The eUCP is applicable when the credit indicates it is subject to eUCP. [FN20] Though Article e12 of the eUCP, in common with Article 15 of the UCP, requires banks to check only apparent authenticity, the eUCP contains provisions which are based upon the assumption that electronic messages could be more securely protected against unauthorised alterations by systems of authentication than by requiring original documents in the paper environment. Thus Article e3(b)(i) defines "electronic record" to indicate that it must be capable of being authenticated and Article e5(f) provides that an electronic record that cannot be authenticated is deemed not to have been presented. Article e6(b) further provides that the forwarding of electronic records by a nominated bank pursuant to its nomination signifies that it has examined the apparent authenticity of the electronic records. This may be contrasted with the position in the paper environment, in which the forwarding of documents is merely a mechanical act. [FN21] Though it is true that electronic presentation is susceptible to methods of falsification unique to electronic environment, technological developments may improve the reliability of systems of authentication and thus provide an effective solution to the difficulty caused in the paper environment by the advent of high-quality photocopiers. But it will be long before electronic presentation becomes common. In the meantime, the UCP has to provide a clear guidance as to what documents must be *625 accepted as originals. It is hoped that the draft text proposed in this article will prove to be a useful contribution to the ongoing discussion for revising the UCP 500.

[FN_a1]. The author is an Associate Professor at Doshisha University Law School in Japan. This article is based upon his presentation at the Academy for International Business Transactions on March 13, 2004 in Japan. The author would like to thank the members of the audience who commented upon the proposed draft, in particular Professor Koji Tsubaki, who acted as the commentator for his presentation.

[FN1]. ICC publication number 500/B.

[FN2]. Byrne & Taylor "ICC Guide to the eUCP" (ICC publication number 639) p 121.

[FN3]. Credit Industriel et Commercial v. China Merchants Bank [2002] EWHC 973 (Comm) at para 53, Steel J. speaking of "the almost total demise of the typewriter and the use of computers for all forms of printing."

[FN4]. ICC publication number 400.

[FN5]. Article 22(c) of UCP400.

[FN6]. [1996] 1 Lloyd's Rep. 135 (CA).

[FN7]. See e.g. Glencore International AG v. Bank of China [1996] 1 Lloyd's 135 at 153 (CA) Sir Thomas Bingham M.R. stating 'a handwritten or typed document plainly is [original]'.
[FN8]. The discussion paper of the ICC's Department of Policy and Business Practice in Paris in April 1999 (cited in Alexia Ganotaki "Originals sin" posted 24 Jan 2003 in volume 6 issue 4 of Trade & Forfaiting Review (<http://www.tfreview.com/archive.asp>_
[FN9]. Ibid.
[FN10]. Bank of Tokyo Research International (ed) (1999) p 130 (in

Japanese).

[FN11]. [1999] Lloyd's Rep. Bank. 219_(CA).

[FN12].

[_http://www.iccwbo.org/home/news_archives/1999/original_document_language_in_ucp_500.asp](http://www.iccwbo.org/home/news_archives/1999/original_document_language_in_ucp_500.asp) <accessed at the time of writing (March 2004)>.

[FN13]. Policy Statement 'The determination of an "Original" document in the context of UCP 500 sub-Article 20(b)' Commission on Banking Technique and Practice, 12 July 1999 (Document number 470/871 Rev., 29 July 1999, http://www.iccwbo.org/home/statements_rules/statements/1999/the_determination_of_an_original_document.asp <accessed at the time of writing (March 2004)>).

[FN14]. e.g. *Credit Industriel et Commercial v. China Merchants Bank* [2002] EWHC 973 (Comm); *Voest-Alpine Trading USA Corps v. Bank of China* 167 F. Supp. 2d 940 (2000).

[FN15]. In *Western Int'l Forest Prods v. Shinhan Bank*, 860 F. Supp. 151 (S.D.N.Y. 1994), the beneficiary of a letter of credit, though not for fraudulent purposes, stamped "original" an inspection certificate received by fax from the issuer of the document.

[FN16]. [1998] Lloyd's Rep. Bank 173.

[FN17]. *Glencore International AG v. Bank of China* [1996] 1 Lloyd's Rep 135 at 148.

[FN18]. For more details, see conclusion below.

[FN19]. ICC publication number 500/2.

[FN20]. Article e1(b).

[FN21]. Byrne & Taylor "ICC Guide to the eUCP" (ICC publication number 639)_p 105.