The UCP as a Choice of Non-State Law in International Commercial Contracts

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Abstract

The article analyses the UCP as a form of non-State law. It demonstrates that in some courts the UCP may inadvertently be applied as the governing law of the agreement instead of as contractual terms. The article proceeds to analyse the UCP against Article 3 of the *Hague Principles on Choice of Law in International Commercial Contracts* as well as along a set of criteria, developed by the author, that endeavours to provide certainty in the choice of non-State law. Based on the application of the above criteria the article concludes that the UCP would be suitable as a choice of governing law of the agreement.

Keywords

Choice of law; non-State law; documentary credits; *lex mercatoria*; applicable law; *Hague Principles on Choice of Law in International Commercial Contracts*; governing law of the agreement; private international law.

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1 Introduction

In 1994 Charl Hugo wrote an article on the nature of the *Uniform Customs and Practice for Documentary Credits* (UCP) wherein he considered whether the UCP formed part of international customary law (the *lex mercatoria*).[1] Prof Hugo told me about this article on one of our many runs through Emmarentia and in some ways the article became the basis for my PhD thesis while the runs became the foundation of a much-treasured friendship by the present author. The present author considers the points discussed in this paper as constituting somewhat of an extension of the thinking considered in Hugo's 1994 paper, but from the perspective of private international law. In his article in 1994 Hugo clearly demonstrates the importance of party autonomy in giving effect to the provisions of the UCP and its application as either law or contractual terms. This paper has the same foundational element in consideration of the UCP as a form of non-State law.

Although this article is allied to the same line of thought, the focus of this article is not whether the UCP forms part of international customary law but whether the UCP when chosen constitutes a valid choice of non-State law. A comparative perspective on the application of the UCP is considered in the courts of certain countries that are prominent in international trade to provide a positivistic perspective on the application of the UCP and non-State law. The article then turns its focus to the characteristics of non-State law and considers whether the UCP should be allowed as a valid choice of non-State law.

The article begins with a consideration of the International Chamber of Commerce and its development and then proceeds to consider the manner of the application of the UCP in England and the United States, South Africa and China.

2 The UCP, its history and origin

The International Chamber of Commerce (ICC) describes itself as a world business organisation. It has since 1919 left an indelible mark on world trade,[2] and continues to do so today.[3] The ICC was formed after World War I by entrepreneurs who believed that the rules, standards and regulations for

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1 Hugo 1994 *SA Merc LJ*.

2 ICC date unknown https://iccwbo.org/about-us/who-we-are/history/.

3 The ICC was in 2016 granted observer status at the United Nations General Assembly, which is a significant marker of the role it plays on the international stage.

business were best set by business itself.[4] In the years since its inception the ICC has been a leading organisation in promoting world trade and investment. Three of its biggest successes have been the rules of the *Uniform Customs and Practice for Documentary Credits* (UCP) in 1933,[5] the *Rules for the Use of Domestic and International Trade Terms* (Incoterms) of 1936 (which continue to be extensively used in international commercial contracts),[6] and the creation of the International Court of Arbitration which was established in 1923 and has one of the highest rates of registered annual arbitration disputes among international arbitration forums.[7]

The UCP was drafted in 1933 by the ICC. It was introduced by Professor Boris Kozolchyk at the United Nations Commission for International Trade Law in 1991 as follows:

> No other set of international customary rules is as universally observed as the Uniform Customs and Practice for documentary credits (UCP): banks, applicants and beneficiaries in more than 150 nations adhere to it; carriers, freight forwarders and insurers draft their documents to comply with its specifications; legislatures model their statutes after it and courts treat it as a source of law whose misinterpretations cause quick reversal.
>
> The reason why the UCP has inspired such widespread observance is not hard to surmise: It is the living law of documentary credits. By 'living law' I mean the law that not only adjudicates disputes but also governs every aspect of the everyday 'healthy' (unlitigated or undisputed) letter of credit transactions. The UCP, then, is a law invoked in the courtroom as well as applied in practice. As is characteristic of living law, the UCP contains didactic principles that instruct bankers on the basics of documentary credit business.[8]

The UCP is a codification of the rules applicable to documentary credits as a form of payment.[9] The letter of credit is the most widely used form of payment in international commercial transactions, and probably also the most important.[10] According to a recent survey conducted by the ICC, as much as 38% of international commercial transactions, according to the banks included in the survey, were financed by letters of credit.[11] The letter

4 ICC date unknown https://iccwbo.org/about-us/who-we-are/history/.

5 *Uniform Customs and Practice for Documentary Credits* first published in 1933.

6 *ICC Rules for the Use of Domestic and International Trade Terms: Incoterms* first published in 1936 and since then updated regularly.

7 According to 2016 statistics, the ICC's International Court of Arbitration registered the second highest number of new arbitrations. See Altenkirch and Frohloff 2017 https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/#_ftn8.

8 These are quotations from a lecture by Professor Boris Kozolchyk at the United Nations Commission for International Trade Law in Vienna on 14 November 1991. The quotations were captured by Dan Taylor (see Taylor *The Complete UCP* 7).

9 Rodrigo 2011 *Murdoch University Electronic Journal of Law* 2.

10 Hugo 1993 *SA Merc LJ* 44; Van Niekerk and Schulze *South African Law of International Trade* 262, 249; Schulze 2009 *SA Merc LJ* 228-230.

11 ICC Banking Commission 2016 https://cdn.iccwbo.org/content/uploads/sites/3/2016/10/ICC-Global-Trade-and-Finance-Survey-2016.pdf.

of credit thus remains one of the most commonly used means of effecting payment in a cross-border sale. That the letter of credit will be subject to the UCP is almost certain. The UCP is unique insofar as banks themselves have played the most significant role in developing the practices and standards applicable to letters of credit.[12] It is precisely because of this that the UCP plays a pivotal role in the study of non-State law. The UCP is a soft law instrument, drafted by an independent private body. However, its acceptance is so widespread that it has taken on the characteristics of a binding law.[13] Appreciating the reasons behind its success can be critical in the understanding of non-State law more generally.

Since it was first drafted,[14] the UCP has undergone many revisions (in 1951, 1962, 1974, 1983, 1993). The latest revision, which was implemented in 2007, is the UCP 600.[15] The methodology employed in drafting and revising the UCP is almost exclusively practice orientated. It centres on a trial and error method in which every revision attempts to improve upon or clarify issues that were experienced in the intervening years.[16] During the first

12 See Hugo 1994 *SA Merc LJ* 143; Rodrigo 2011 *Murdoch University Electronic Journal of Law* 2; Schulze 2009 *SA Merc LJ* 228-230.

13 A good example of the central role that the UCP plays in documentary letters of credit can be found in the Provisions of the Supreme People's Court on some Issues Concerning the Trial of Cases of Disputes over Letters of Credit where Article 2 states: "When the people's court hears a case of dispute over letter of credit, if any stipulation is made by the parties concerned that the relevant international practices or other provisions should be applicable in the case of dispute over letter of credit, such stipulation shall prevail; if no stipulation is made by the parties concerned, the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce and other relevant international practices shall be applicable to the case". See Supreme People's Court 2005 http://www.asianlii.org/cn/legis/cen/laws/potspcosicttocodoloc1163.

14 Rodrigo 2011 *Murdoch University Electronic Journal of Law* 2.

15 ICC 2009 https://iccwbo.org/media-wall/news-speeches/unendorses-icc-documentary-credit-rules/.

16 For instance, the stipulated purpose of the first revision that took place after World War II in 1951 was to adapt the UCP to reflect current customs and practice. No revolutionary changes were made to the UCP during this revision. Under the 1963 revision, the outer form of the UCP was changed for the first time. Changes made also for the first time included a definition of the term "documentary credit". The British influence on the UCP was felt in this revision. The requirements for Bills of Lading and Insurance Documents were adapted to British practice. The British influence also stressed the role of the applicant in proceedings as opposed to the role of the bank. This point was addressed again in the 1974 revision where the discretion of the bank to accept or reject documents was curtailed. The 1970s also saw the rise of containerisation in the transportation of goods. As the UCP was not initially designed for this form of transportation, its provisions had to be adapted. The 1983 revision occurred nine years after the 1973 revision came into operation. The primary reasons for this revision were advances in technological developments, especially in transport, communication and data transmission. New forms of documentary credits were also included in this revision such as stand-by credits and deferred payment credits, in particular. The ICC Commission on Banking Technique and Practice also revealed difficulties in the interpretations of several provisions. See

three decades of the UCP's existence, the banks of Britain and the Commonwealth (which included South Africa), did not adhere to the rules of the UCP.[17] This changed with the 1963 revision, which was accepted by the ICC's Banking Commission on 1 July 1963.[18] The hesitant reaction to harmonisation of the British banks mirrors the sentiments sometimes expressed today. The reticence of the British banks was a matter of ideals which stemmed from two issues: 1) letters of credit in their current format are a practice created in London, and British banks were fully able to manage the needs of clients without the help of an international code,[19] and 2) British banks felt that their clients would be better served if the banks retained total freedom in the drafting of credits.[20] It was, however, the needs of the Commonwealth that appeared to impact on the decision-making of the British in co-operating fully with the ICC.[21] Although British banks were capable of conducting documentary credit business without the aid of the UCP, the same was not true for the developing countries of the Commonwealth which lacked experience and expertise.[22] This lack of expertise affected their trade. In retrospect, the widespread use of the UCP demonstrates that it was a successful endeavour, not only for the developing world but also for the "developed" world. It is also noteworthy that the conditions set by the British for their participation were to "begin again at the beginning", although this hardly proved necessary. While several changes was made to the 1951 version, a major overhaul was not necessary.[23] The revision of the UCP 500 (1993) and its culmination in the UCP 600 (2007) demonstrates the manner in which the UCP is now updated. Over 5,000 comments were received by the drafting group during the revision process.[24] Among the issues under consideration were whether the words "on their face" should remain part of the UCP as well as the issue of whether a majority of the banking commission would be in favour of including a rule covering the ability of a nominated bank to pre-pay or purchase an accepted or deferred payment it incurred.[25] Once the drafting group had finally revised the UCP, a final version was sent to the Banking Commission for approval. The Banking Commission is appointed based on interest and expertise. Although it is dominated by bankers, it also includes

Hugo 1993 *SA Merc LJ* 56-77 for a thorough exposition on the material changes to all the revisions prior to the UCP 500.

17 Hugo 1993 *SA Merc LJ* 58.
18 Hugo 1993 *SA Merc LJ* 58.
19 Hugo 1993 *SA Merc LJ* 59.
20 Hugo 1993 *SA Merc LJ* 59.
21 Hugo 1993 *SA Merc LJ* 59.
22 Hugo 1993 *SA Merc LJ* 59.
23 Taylor *The Complete UCP* 82.
24 ICC *Commentary on UCP 600* 7.
25 ICC *Commentary on UCP 600* 7.

academics, lawyers, consultants and transport specialists.[26] The Banking Commission appoints a working group or taskforce,[27] which then, once the substantive text has been drafted, refer the text back to the Commission. The Commission makes decisions by voting on a country-by-country basis.[28] This includes the banking associations of more than 170 countries worldwide.[29]

To understand the rules of the UCP and how they operate, a brief description of the traditional functioning of a letter of credit is necessary. When an international contract is concluded, the parties usually agree on the method of payment. As indicated above, in many cases the parties may choose a documentary letter of credit as the method of payment. In its most basic structure, the transaction usually includes three parties – the buyer (importer), which is the party that applies for the credit; the seller (exporter), which is the beneficiary of the credit; and the issuing bank, which undertakes to pay the credit on behalf of the seller.[30] The importer requests its bank to issue a letter of credit in favour of the exporter.[31] The bank considers the credit standing of its client and, should it find it to be positive, the bank issues a letter of credit. The terms of the credit usually specify the terms on which the bank pays out the credit. This usually includes the payment against the presentation of certain documents, examples of which would be bills of lading, insurance documents and invoices.[32] Once in possession of the documentary credit, the exporters are now secure in the knowledge that they will be paid for their goods. The exporters harbour no hesitation in shipping the goods and presenting the requisite documents to the bank for payment.[33] This transaction gives rise to a series of contractual relationships. The first is known as the underlying agreement – the contract that gives rise to the need for the credit. This can be a contract of sale, lease or any other type of agreement. The second contractual relationship is the contract between the buyer and the issuing bank. The third is the relationship between the issuing bank and the seller. There may be other parties which could also be involved in the transaction such as an advising bank, a nominating bank, a confirming bank or possibly a collecting bank. The structure of these relationships will not be discussed. The complexity of

26 Berman 2005 *Colum J Transnat'l L*.
27 Berman 2005 *Colum J Transnat'l L*.
28 Berman 2005 *Colum J Transnat'l L*. The delegations have weighted votes with the weight depending on the contribution they make to the ICC. For instance, countries like France, Germany, the United States and the United Kingdom have three votes each. The number of members sent by a country to ICC meetings has no bearing on the eventual outcome as all delegates must vote the same way.
29 Van Niekerk and Schulze *South African Law of International Trade* 249.
30 Van Niekerk and Schulze *South African Law of International Trade* 244.
31 Hugo 1993 *SA Merc LJ* 46.
32 Hugo 1993 *SA Merc LJ* 46.
33 Hugo 1993 *SA Mer cLJ* 46.

the relationships that may arise from a letter of credit transaction are therefore apparent. These complexities are exacerbated by the fact that the parties are situated in different States. The issue of the rules that govern these relationships is therefore critical. The UCP, when it is selected, would be applicable but it is applicable subject to one or other domestic law's applying to the contractual relationship by virtue of the rules of private international law.[34] The situation is further complicated by the fact that many countries do not have domestic laws that cater for these letter of credit transactions.[35] For instance, South Africa would have to rely on its English inheritance coupled with its basic law of contract, which would necessitate the contract's being categorised as a nominate contract (it is uncertain whether the essential terms for a contract being categorised as letter of credit have been crystallised in South African law). If a letter of credit is indeed a nominate contract, the different contractual terms that apply to the contract would then have to be taken into consideration, such as the natural and incidental terms.[36]

3 Positive law application of the UCP

3.1 South Africa

The UCP holds a special place in the world of international trade.[37] It is possible that in some instances the UCP is unwittingly being applied as the governing law of the contract. This is dependent, however, on the viewpoint of the courts of the State involved. This can be determined based on whether the provisions of the soft law instrument do, in their own right, override the applicable law. If they do, a case may be made that their application is as governing law rather than as contractual terms.

The first case that addresses the issues of letters of credit in South African law is *Phillips v Standard Bank of South Africa*.[38] In this case Goldstone J remarked that although letters of credit had been used over many years in South Africa, there was no precedent on their legal effect and consequences.[39] The court established their legal effect and consequences

34 Fredericks and Neels 2003 *SA Merc LJ* 63-64.

35 Many of the major trading nations have not enacted provisions specifically on documentary credits. Amongst these countries are Australia, Belgium, Denmark, France, India, Japan, the Netherlands, Pakistan, Portugal, Spain, Sweden, and Taiwan. The USA, on the other hand, does have provisions dealing with documentary credits in art 5 of the *Uniform Commercial Code*. In the European Union, only Greece has enacted specific legislation on Documentary Credits. See Schulze 2009 *SA Merc LJ* 228-230.

36 Van Niekerk and Schulze *South African Law of International Trade* 248.

37 See the discussion on the UCP above.

38 *Phillips v Standard Bank of South Africa* 1985 3 SA 301 (W) (hereinafter the *Phillips* case).

39 *Phillips* case para 67.

on the basis of two pivotal cases in the US and English law of documentary credits,[40] and on that basis set out the autonomy principle.[41] In the last paragraph of the judgment the court referred to the UCP as a product of the ICC and as an instrument that was applicable to the letter of credit. The court went on to state that since counsel had not invoked any of the provisions of the instrument, it was not necessary to refer to them.[42] The implication of this is that in 1985, when establishing the law applicable to letters of credit in South Africa, the court relied on judgments in other countries to which South Africa has traditionally looked when developing its laws; it therefore did not refer directly to the UCP as applying as an international customary law of sorts.

Ten years later the *Phillips* case was followed by the *Ex parte Sapan* case.[43] Several statements of the court in this case are of interest for the purposes of this discussion. The court begins by referring to the judgment of the court *a quo*. The 1983 revision of the UCP was referred to by the court (it is unclear whether the parties chose the UCP as being applicable or if the court referred to it; in any event, it was outside of party choice).[44] The court *a quo* did, however, come to its decision partly on the basis of the provisions of Articles 3 and 4 which categorised the letter of credit as irrevocable. This meant that the buyer could not stop the payment on any ground beside fraud,[45] and certainly not on the ground that the buyer was attempting, in this case, to found jurisdiction. The basis of the court's dismissing the application was that it would contravene the principle of autonomy of the documentary letter of credit that was set out in the *Phillips* case.[46] In this case the appeal court came to the same conclusion although it did not rely on the UCP. On the basis of the *Phillips* case along with English authority, and in order to give practical voice to the principle of autonomy the court

40 *Phillips* case para 67. The cases that are referred to are *Sztejn v Henry Schroder Banking Corporation* 31 NYS 2d 631 (1941) and *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 (HL) 18. Both cases are fundamental cases on choice of law and are referred to throughout the Commonwealth. See the comments of Van Niekerk and Schulze *South African Law of International Trade* 248.

41 The autonomy principle that is referred to for letters of credit is not to be confused with party autonomy. The autonomy principle in letter of credit law refers to the credit being non-accessory to the underlying obligation. See Van Niekerk and Schulze *South African Law of International Trade* 248 for further discussion of this principle. Also see Art 3 of the UCP under the heading "Credits vs Contracts".

42 *Phillips* case para 68.

43 *Ex Parte Sapan Trading (Pty) Ltd* 1995 1 SA 218 (W) (hereinafter *Ex Parte Sapan Trading*).

44 *Ex Parte Sapan Trading* para 222. The court of appeal considered that the court *a quo* did not think that it could assume that the UCP applied but referred to it anyway. It is not certain why the court referred to it in this manner.

45 *Loomcraft Fabrics CC v Nedbank Ltd* 1996 1 SA 812 (A) (hereinafter the *Loomcraft Fabrics* case) 817-819.

46 *Phillips* case para 67.

opted instead to read a provision into the agreement which was considered to form part of the agreement by implication.[47] According to this provision, the letter of credit contract was irrevocable, and an attachment to found or confirm jurisdiction could not be used to circumvent payment of the credit.[48]

The UCP displays no particular prominence in this case. It was certainly not applied as the governing law of the contract. It is curious that the court relied on its provisions to come to the same conclusion, relying on Articles 3 and 4 with reference to the autonomy principle. This may very well be because the court did not consider the UCP applicable because the parties had not chosen it. This would therefore demonstrate that South African courts do not consider the UCP to be binding customary international law.

A more recent South African judgment on the application of letters of credit and the UCP is *Casey v First Rand Bank Ltd.*[49] The majority judgment rendered by Swain AJA, as in the cases discussed above, centered on the autonomy principle. In the case at hand the underlying obligation had prescribed, and the argument of the appellants was that due to this prescription, the letter of credit was no longer enforceable or itself had prescribed.[50] The credit was subject to the 1993 revision of the UCP.[51] The main point of contention was the accessory or non-accessory nature of the letter of credit, the argument being that since the underlying debt prescribed, so did the letter of credit. That the letter of credit is autonomous is supported by Article 3 of the UCP under the heading "Credits vs Contracts", which states:

> Credits by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and or to fulfill any other obligation under the Credit, is not subject to claims or deference by the applicant resulting from his relationship with the Issuing Bank or Beneficiary.

The question that must then be asked in this regard is how the terms of a contract can elevate the contract itself beyond the rules of the otherwise applicable law. The letter of credit agreed to between the debtor and the bank is a contractual arrangement like any other. The applicable law in the letter of credit – which in this case happens to be between a South African person and the Bank of America – would appear to be South African law, although no reference is made to this in the case.[52] If South African law

47 *Ex Parte Sapan Trading* para 227.
48 *Ex Parte Sapan Trading* para 227.
49 *Casey v First Rand Bank Ltd* 2014 2 SA 374 (SCA) (hereinafter the *Casey* case).
50 *Casey* case para 1.
51 *Casey* case para 3.
52 *Casey* case para 2.

were the applicable law, then it is South African law which should identify and categorise the contract – and not the contract itself. The elements of a suretyship under South African law would ostensibly appear to have been reached in this agreement, namely that the parties had capacity, that there was consensus between the party to be bound and the creditor, that there was intention to be bound for the debt of another, and that the formalities necessary in South African law,[53] such as the agreement being in writing and signed had been fulfilled.[54] The UCP alone, applying as the terms of a contract, cannot therefore affect the underlying agreement, i.e. the debt; nor can it dictate the way that the terms should be construed. The only way this would be possible would be if the UCP were in fact not applicable simply as the terms of the agreement but as the applicable law itself, at least as far as the issue of payment is concerned. Were it not for the fact that Swain AJA referred to both the decisions in *Loomcraft,* which relies on the earlier cases of *Phillips*[55] and *Ex Parte Sapan,* this may indeed have been sufficiently convincing to make the determination that the UCP was being applied as the applicable law. As for now, the question remains unclear but the indications – based on the cases above – would be that in South African law, the UCP is not being applied as the applicable law.

As a last note on the application of non-State law in South Africa, it is worth considering the opinions of prominent authors in the field. In the opinion of Van Niekerk and Schulze, any choice of law must be of an ascertainable system of law or set of rules.[56] They further assert that under South African private international law a South African court may give effect to well-known sets of rules or principles such as the *UNIDROIT Principles of International Commercial Contracts* (the UPICC) or the *United Nations Convention on Contracts for the International Sale of Goods* (the CISG).[57] As South Africa is not party to the CISG, this Convention is considered non-State law from a South African perspective. Wethmar-Lemmer agrees that South African courts could apply the CISG based on the parties' choice.[58] However, she states that the true source of the parties' ability to select the CISG would be the rules of South African private international law. No definitive answer on the position can be ascertained, as a South African court has not yet been called on to decide the matter.

53 See Sharrock *Business Transactions Law* 804-805.
54 Section 6 of the *General Law Amendment Act* 50 of 1956.
55 *Casey* case para 12.
56 Van Niekerk and Schulze *South African Law of International Trade* 63.
57 Van Niekerk and Schulze *South African Law of International Trade* 63.
58 Wethmar-Lemmer 2008 *De Jure* 424.

3.2 England and the United States (US)

In England there is a developed letter of credit law and so the construction given to the UCP in case law is clearly only as contractual terms.[59] The position in the US and England would appear to be similar, and would appear to be the average common law position.[60] In case law in the US it has been suggested that the UCP should not be construed at the same level of strictness that would be attributed to a statute, but should rather be interpreted as a contractual document prepared by businessmen.[61] In the English case of *Co-Operative Centrale Raiffeisen-Boerleenbank BA ("Rabobank Nederland") v The Sumitomo Bank Limited*[62] a similar construction is given to the UCP. Ellinger and Neo make the convincing argument that the liberal interpretation given to Article 8(e) of the 1976 revision of the UCP demonstrates that the courts do not view it as binding law. The matter turned on whether the confirming bank had complied with the terms of a rejection in Article 8(e) of the UCP by sending a telex to the negotiating bank, advising it that the documents would be held at the disposal of the negotiating bank until the instructions of the clients had been received.[63] The relevant provision of the UCP required that any communication rejecting the documents had to stipulate that the documents were either being held at the disposal of the presentor or were being returned to him. The court on appeal accepted the wording by the confirming bank as complying with Article 8(e) and therefore validly rejecting the presentation. The allusion to waiting for the clients further instructions was, according to Lord Lloyd, simply an expression of hope that the parties would be able to reach some sort of agreement.[64] The lucid argument made by the learned authors, Ellinger and Neo, was that if the provision had been a statute that had set out certain imperative language that was to be used in order to reject a presentation, a court would not lightly disregard the imperative language.[65]

3.3 China

As a global trading power China is also worth considering in its consideration of the UCP as the governing law of the contract. The case of *Lianyungang Koufu Food Co Ltd v Industrial Bank of Korea Seoul and Bank*

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59 Ellinger and Neo *Law and Practice of Documentary Letters of Credit* 47.

60 Ellinger and Neo *Law and Practice of Documentary Letters of Credit* 47.

61 *Maritime Midlands Grace Trust Co v Banco del Pais* 261 F Supp 884 (SDNY 1966) 889.

62 *Co-operative Centrale Raiffeisen-Boerleenbank BA ("Rabobank Nederland") v The Sumitomo Bank Ltd* 1988 WL 62281 (hereinafter the *Rabobank Nederland* case).

63 *Rabobank Nederland* case para 2.

64 *Rabobank Nederland* case para 4.

65 Ellinger and Neo *Law and Practice of Documentary Letters of Credit* 47.

of China[66] bears mention in this regard. It was decided under the UCP 500, as the UCP 500 had been chosen by the parties as the *governing law* of the contract.[67] One of the principle issues that arose in the case was whether the presentation of the ante-dated bill of lading constituted fraud.[68] The issues with regard to the applicable law revolved around the fact that the UCP 500 did not deal with fraud; nor did it provide remedies in the event of fraud. Thus, even though the UCP was considered by the court to be the governing law of the contract, it was necessary for the gap that was left by the UCP to be addressed by another law. The court classified the matter as a tort, although it is not immediately clear why the claim would be classified as delictual as opposed to contractual.[69] Consequently the court enquired of the parties which law was to be applied and both parties predictably chose the laws of their home States. In order to resolve this dilemma, the court considered the application of Article 146 of the Civil Law of China and made a determination that on the fact that all the documents under the letter of credit were issued in China,[70] China was the place where the tort was committed.[71] As it stood, the court considered the UCP as the governing law of the contract and the law where the infringement was committed (which was Chinese law) as the law to be applied in the case of a gap. Liang argues that even though the court refers to the term *governing law* (*zhun ju fa*), this is not necessarily the interpretation that should be given to the term, at least not in the private international law sense.[72] An indicator that the court did not mean the governing law in the private international law sense was, according to Liang, the fact that the court made use of private

66 *Lianyungang Koufu Food Co Ltd v Industrial Bank of Korea Seoul and Bank of China* 30 December 2002, Nanjing Intermediate People's Court; 23 December 2003 Jiangsu Higher People's Court. This case was not available to me in English, and I have had to rely on the interpretation and summary provided by Liang *Party Autonomy and Contractual Choice of Law* 114.

67 Liang *Party Autonomy and Contractual Choice of Law* 114.

68 Liang *Party Autonomy and Contractual Choice of Law* 114.

69 This is probably spelled out with greater fluency in the original text, but it is difficult to determine from the translated summary.

70 *General Principles of the Civil Law of the People's Republic of China*, 1986, in which Art 146 states: "The law of the place *where an infringing act is committed* shall apply in handling compensation claims for any damage caused by the act. If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied. An act committed outside the People's Republic of China shall not be treated as an infringing act if under the law of the People's Republic of China it is not considered an infringing act."

71 Liang *Party Autonomy and Contractual Choice of Law* 114.

72 Liang *Party Autonomy and Contractual Choice of Law* 114. This assertion would be correct in terms of Art 10 of the Chinese *Conflicts Law Statute*, 2010, which states: "The foreign law applicable to a foreign-related civil relation will be ascertained by the relevant people's court, arbitration institution or the administrative agency. Where the parties have chosen a foreign law to be applicable, they shall adduce the law of that country. Where the foreign law cannot be ascertained or the law of that country does not have a relevant provision, the PRC law shall be applied."

international law connecting factors in order to determine the applicable law. He argues that if it were being applied as the governing law of the contract and there was a gap in the law, then Chinese law should have been directly applied.[73]

An interesting facet of the Chinese legal system that should not be overlooked on this point is the Interpretations of the Supreme People's Court with reference to Letters of Credit.[74] Article 2 of these Interpretations states:

> When the people's court hears a case of dispute over letter of credit, if any stipulation is made by the concerned that the relevant international practices or other provisions should be applicable in the case of dispute over letter of credit, such stipulation shall prevail; if no stipulation is made by the parties concerned, the Uniforms Customs for Documentary Credits of the International Chamber of Commerce and other relevant international practices shall be applicable to the case.

Liang refers to this provision as a clear stipulation that parties may incorporate international practice (this can also be read as non-State law) into their contract. The present author, however, disagrees with this interpretation. With reference to the conclusions reached in Chapter 2, it could be argued that the fact the interpretation clearly refers to the term "prevails" would be an indication that these international practices are chosen not merely as contractual terms but as the governing law of the contract. These practices (or non-State laws) do not specifically reference the UCP, as is the case in the next sentence. This may be an indication that the non-State laws which the parties could choose in this regard are wider than would be the UCP only. Notionally it would then appear that courts in China would be amenable to applying non-State law as the governing law of the contract if this interpretation were to be extended to apply outside of letters of credit.

4 The UCP as a choice of non-State law

4.1 Substantive content of the UCP

On what basis should rules of law such as the UCP be considered as applicable as non-State law? This section of the article posits a set of criteria against which non-State rules of law can be assessed. The UCP 600 consists of 39 articles. It is a comprehensive set of rules as far as payment by letters of credit is concerned. The working group of the UCP 600 also released a commentary that provides an article-by-article explanation.[75] The UCP covers most issues that could arise in the case of the payment of a

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73 Liang *Party Autonomy and Contractual Choice of Law* 115. Also see Art 10 of the *Conflicts Law Statute*, 2010.

74 Supreme People's Court 2005 http://www.asianlii.org/cn/legis/cen/laws/potspcosicttocodoloc1163/.

75 ICC *Commentary on UCP 600* 7.

letter of credit. Article 1 states that the UCP 600 are "rules that apply to any documentary credit when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit". As a soft law instrument the UCP cannot dictate its own application. These rules are applied to contracts based on party autonomy. The parties expressly select them to apply to a certain aspect of performance of the contract. Article 2 identifies the different parties in a letter of credit transaction and provides definitions of common terms used in the UCP. The various articles cover issues such as the well-known doctrine of autonomy in letters of credit[76] and the doctrine of documents and strict conformity.[77] In many countries these two overarching doctrines would form part of substantive law even if the UCP were not applied for one reason or another.[78] However, the UCP gives substance to these principles in terms of black letter rules which can be applied to letters of credit, even if the domestic law of the countries on letters of credit were not formulated or not clearly formulated. It provides set criteria that allow the parties dealing with these methods of payment to understand the extent of their obligations. The conformity and certainty provided by the UCP can be illustrated in terms of the provisions of Article 14 and the debate which centered on the meaning of the words "on their face". The phrase was amended to provide more clarity in the UCP 600.[79] This was done because some banks interpreted the phrase to mean that the bank was required only to look at the first page of the presentation in making its decision on whether

76 This principle essentially states that the letter of credit is independent of the underlying agreement with the effect that any deficiencies in the underlying agreement have no impact on the letter of credit agreement, Art 4 (Credits vs Contracts). See further Oelofse *Law of Documentary Letters of Credit* 354.

77 The doctrine of documents stipulates that banks deal with documents and not with actual performance. This doctrine consists of two parts: Art 5 (Documents vs Goods, Services or Performance), the second of which stipulates that there must be strict compliance with the terms set out in the letter of credit; and Art 14 (Standard for Examination of Documents) (Schulze 2009 *SA Merc LJ* 239).

78 In English case law, these principles have been endorsed on many occasions. For instances, see the cases of *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1979] 1 Lloyd's Rep 267 and [1979] 2 Lloyd's Rep 498 (Queen's Bench) and *Power Curber International Ltd v National Bank of Kuwait* [1981] 1 WLR 124. In Canadian law, see *Bank of Nova Scotia v Angelica-Whitewear Ltd et al* 36 DLR (4th) 161 (1987). In American law, see *First City, Texas-Houston NA v Gnat Robot Corporation* 813 SW 2d 230 (1991). In Dutch law, the leading judgment of the Dutch Hoge Raad, 1977 NJ No 209, on the principle of independence. In German law, these doctrines are also generally accepted; see BGH 1992 WM 927 (German Federal Court) 928. For an exposition on the law of documentary letters of credit in South Africa, see the *Phillips* case 304H-I; *Ex Parte Sapan Trading;* the *Loomcraft Fabrics* case; *Union Carriage and Wagon Co Ltd v Nedcor Bank Ltd* 1996 CLR 724 (W); *Vereins-und Westbank AG v Veren Investments* 2000 4 SA 238 (W); *Transcontinental Procurement Services cc v ZVL & ZKL International AS* 2000 CLR 67 (W); *Vereins-und Westbank AG v Veren Investments* 2002 4 SA 421 (SCA).

79 Schulze 2009 *SA Merc LJ* 241-243.

the documents were conforming. However, the idea of the drafting group in including this phrase was that the bank should not look beyond the documents. Article 14(a) now reads "… must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation". The detailed rules that are made use of by the UCP are further demonstrated in a more basic provision like Article 18 which states:

> A commercial invoice:
>
> i) must appear to have been issued by the beneficiary;
>
> ii) must be made out in the name of the applicant;
>
> iii) must be made out in the same currency as the credit;
>
> iv) need not be signed.

The specificity and certainty provided by the UCP forms an integral part of the role played by the UCP in regulating letter of credit transactions globally.

4.2 Choice of non-State law

From a private international law perspective, party autonomy is the key that allows for the use of non-State rules. The parties choose the normative or legal system that should apply to their contract. A normative system would refer to a governing law that is not the law of a particular country, but which may still govern a (commercial) community. In private international law the options available to parties in this regard are vast.[80] There is a broader single international business community,[81] and in this community there are many smaller, more specialised communities. Sports federations would be examples of smaller communities within the larger international business community.[82] An international field could be the international financing industry, of which the rules of the UCP may provide an example. Further examples could perhaps be international sales, where the CISG (in as far as it is not made part of State law) or the UPICC may play a part. Moore states that a community must create rules and it must have the ability to induce compliance with these rules.[83]

In considerations of non-State law, the international business community – also known as the *societas mercatorum* – becomes imperative as it is in this community that these rules apply.[84] The concept of the international

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80 See Tamanaha's concept of the different types of normative orders that can apply above. Tamanaha 2008 *Syd LR*.

81 See Adams 2020 *AIAJ* 144-145 for a more in-depth definition of what consitutes the international business community.

82 For examples of sports federations that would meet this definition see Adams 2021 *TSAR* 62.

83 Moore *Law as Process* 57.

84 Toth *New Lex Mercatoria* 63.

business community that is propagated by Goode and Toth is that the community consists only of humans. By this is meant that others are excluded.[85] Formulating agencies and international organisations such as the ICC and UNIDROIT could therefore not form part of the *societas mercatorum*. The present author is prepared to accept that these organisations may not form part of the international business community in their own right, but it often occurs that these organisations (especially in the case of formulating agencies) act to organise merchants or persons with an interest in international trade into groups which develop the rules that would apply to the community. By choosing these rules in their contracts the merchants accept them. One cannot exclude the impact that these agencies have on the international business community, as it is ultimately the merchants themselves who give power to these rules by accepting or rejecting them in their agreements. What is the role of the State in this formulation? States themselves are definitively not merchants and could therefore not form part of the *societas mercatorum.* Conventions created by States assist the international business community where relevant but do not form part of it. It is merchants themselves that exercise the last say by accepting State norms into their contracts.

The three criteria that we see evolving from this concept of non-State law are therefore: (i) the existence of an international community; (ii) a set of rules that applies to the community; and (iii) the ability to induce compliance with these rules.

Article 3 of the *Hague Principles on Choice of Law in International Commercial Contracts* (the Hague Principles) also provides a set of criteria which can be evaluated as a starting point.[86] Article 3 states that:

> The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

The elements that constitute Article 3 of the Hague Principles can be broken down into "general acceptance" on an "international, supranational and regional level" and a "balanced and neutral set of rules". Each one of these criteria has been critically analysed in an article by the current author.[87]

The present author agrees with the fundamental elements of Article 3 of the Hague Principles but submits the following modifications to the criteria, which would enhance the certainty of any choice. They may be referred to

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85 Goode 1997 ICLQ 1-2; Toth *New Lex Mercatoria* 63. See also Mustill 1988 *Arb Int'l* 86-92.

86 *Hague Principles on Choice of Law in International Commercial Contracts* (2015).

87 Adams 2021 *TSAR* 66-67; also see Michaels "Non-State Law in the Hague Principles" 50.

as "certainty criteria".[88] It is submitted that for rules of law to be selected as the governing law of an agreement they should conform to the following criteria:[89]

i) The rules should be drafted by a body which has standing in the relevant community: One of the central ideas underlying this article is the idea of an international community. The rules that may be chosen derive their authority from the community by which they are produced and for which they are produced. If there is an organisation that can demonstrate persuasive force in the field in which it operates, this would be a good indicator of the validity of the rules. This criterion is very closely related to ideas on demonstrating the acceptance of the rules. How widely used the rules are in both court practice and arbitration and what the feeling towards the rules is can be gauged from academic writing and the knowledge or awareness of practitioners in the field concerned.[90] This criterion is not drafted in peremptory terms to allow for the possibility that a body of rules may have been created by a community without that community necessarily having been formalised or led by a particular institution or organisation. The fact that a body has standing in the relevant community will, however, be a good indicator of the quality of the rules produced and their possible application as the governing law of the agreement.

ii) The parties must intend these rules to be applicable as the governing law of their agreement: One of the foundational concepts in this ideology is party autonomy, which is demonstrated through consensus. Party autonomy is remarkable in the sense that it is one of the few instances where instead of determining the laws and statutes that are applicable to a given situation, parties are instead able to select the law which they wish to govern their contract. The complexities of these criteria arise because the bodies that create these rules, unlike government-sanctioned bodies, do not have the

88 See Adams 2021 *TSAR* 66-67. The criteria referred to in this article are based on the certainty criteria developed by Adams in an earlier article, again with modifications. The criteria in that article are as follows: i) The rules must be applicable within a certain industry or field that creates rules on behalf of the parties and is able to exercise coercive or persuasive power over the parties. ii) The parties must signal an intention to be bound to the group or to be bound by these rules. This requirement is usually met through the means of party autonomy. iii) The rules must be generally accepted on an international, regional or supranational level. They may not be national rules only. iv) The rules must be comprehensive enough to address satisfactorily the particular aspect with which they are concerned.

89 See the discussion on *Shamil Banking of Bahrain v Beximco Pharmaceuticals Ltd* [2004] App LR 01/28, where the court prescribes that terms that are incorporated by reference should be adhered to (para 51).

90 Empirical studies can also be very important in demonstrating this.

inherent authority to regulate a particular situation, while in many instances the *de facto* situation may be that they do indeed govern a certain area. The only way a non-sanctioned body can regulate an area of the law is in situations where the parties have agreed to be a member of this body or demonstrate in some way an intention to be bound by the rules of the body.[91]

iii) The rules must be generally accepted on an international, supranational or regional level.[92]

iv) The rules must be comprehensive enough to satisfactorily address the particular aspect with which they are concerned.[93]

v) Where the rules are drafted by a particular body or institute the rules must be intended for application as the governing law of the agreement. The body that creates the rules must be respected as providing a quasi-legislative function. If the body considers the rules drafted by it as suitable for the governance of a certain aspect of the contract, it should state this. Often this is not the intention of the drafters of rules, and in these instances the intention of the drafters should likewise be respected.[94]

4.3 Evaluation criteria for rules of law

The discussion above allows for the identification of two elements. The first is the acknowledgement of the community and the second is the rules that are applicable in this community.[95] The concepts applied to the different norm-creating communities demonstrate that in international commerce States are not the only "communities" that exercise norm-making powers.[96] The traditional notions of private international law should therefore evolve to accommodate these communities.[97] A measure of control that can be introduced is to ensure that non-State rules that are chosen are subject to criteria that ensure that they are effectively regulated by another community. Where the State allows for the choice of non-State law certain criteria can be insisted on so that the goals both of harmonisation and of effective regulation can be reached.

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91 See the discussion in Adams 2021 *TSAR* 66.
92 See the discussion on "General Acceptance" in Michaels "Non-State Law in the Hague Principles" 50. Also see Saumier 2014 *Brooklyn J Int'l L* 533.
93 See the discussion in Adams 2021 *TSAR* 67
94 See the discussion in Adams 2021 *TSAR* 67.
95 See Adams 2020 *AIAJ* 141-143.
96 See Adams 2020 *AIAJ* 141-143.
97 See Adams 2020 *AIAJ* 145-146.

4.4 Application of the "certainty criteria" to the UCP

i) The rules should be drafted by a body which has standing in the relevant community: The history and methodology of the UCP displays how significant the rules have become to the community in which they function in their almost 90 years of existence.[98] The UCP forms part of the social field construct that has risen in the international business community. Of this there can be no doubt. However, there is more significance to the social field of the UCP than only the broader international business community; the UCP and the banking commissions that are involved in its adoption and development form a sub-stratum or a special social field in the larger international sphere. This sphere is that of the international banking industry, which can be considered the relevant business community. The participation of the banking commissions of most of the world's countries, in the processes of the ICC, and in the formation of the UCP, reflect the faith that is placed in both the organisation and the instrument.[99]

ii) The parties must intend the rules to be applicable as the governing law of their agreement: If parties intend for the UCP to apply as the governing law of their agreement they must choose it either expressly or tacitly.[100]

iii) The rules must be generally accepted on an international, supranational or regional level: The number of cases throughout the world in which the UCP has been applied and interpreted demonstrates the scope of its reach. The general acceptance of the UCP on an international level can clearly be seen through these cases as well as the academic interest devoted to the UCP over the last 90 years.[101]

iv) The rules must be comprehensive enough to cover the particular aspect with which they are concerned. The UCP canvasses the area of letters of credit in great depth, and regarding that particular aspect of the contract it is holistic. It answers many questions that may arise from the application of the credit, and in this regard the UCP is indeed comprehensive.[102]

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98 See para 2 above for the history of the UCP and as a demonstration of the prominent role played by the rules in the international business community.

99 See para 2 above for a detailed discussion on the methodology of drafting the UCP.

100 For an exposition of the application of party autonomy in relation to the choice of law see Mills *Party Autonomy* 313-388.

101 As an example, see the discussion on the cases from South Africa, England, and the US as well as China above in para 3.

102 See para 4.1 on the substantive content of the UCP.

v) Where the rules are drafted by a particular body or institution the rules must be intended for application as the governing law of the agreement.

The UCP 600 states at Article 1:

> **Application of UCP**
>
> The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

This is comparable to the text of Article 1 of the previous version of the UCP (500) which stated that the rules were applicable when they were "incorporated" into the text of the credit as opposed to the article which now states that “the text of the credit expressly indicates that it is subject to these rules”. The change in the phrasing and the usage of the words demonstrates that the ICC has in mind that the rules may be applicable as the governing law of the agreement.

The analysis above would therefore indicate that the UCP would be suitable as a choice of governing law.

5 Conclusion

The article analyses the UCP as a form of non-State law. It demonstrates that in some courts the UCP may inadvertently be applied as the governing law of the agreement instead of as contractual terms. The article analyses this from the perspective of several jurisdictions – South Africa as the home state of the present author, England and the United States as example of the common law, and China, which is a major global trading power. The analysis determines that in jurisdictions that are based on the common law, such as South Africa, England and the United States, the evidence, based on a study of sample cases, suggests that the UCP is not being applied as the governing law of the agreement but merely as contractual terms. In the analysis of English law and the law of the United States this is manifestly clear. In the analysis of South African law there is some doubt that remains, but it seems likely that the UCP is also being applied as contractual terms. The analysis of Chinese law provides the strongest evidence that the UCP can be applied as the governing law of the agreement. This argument is made primarily based on the UCP’s overriding the otherwise applicable Chinese law. The Chinese example demonstrates that there may be a need, in the consideration of the broader impact of non-State law, to have a set of criteria by which a set of rules can be determined to be either suitable or unsuitable. The article attempts to do this through analysing the UCP and

considering its suitability as the governing law of the agreement based on Article 3 of the Hague Principles, together with a set of criteria that were developed by the present author. The formulation of the criteria to be applied to the UCP is an attempt to provide certainty generally in the choice of non-State law. Based on the application of the above criteria the article concludes that the UCP would be suitable as a choice of governing law of the agreement.

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List of Abbreviations

AIAJ	Asian International Arbitration Journal
Arb Int'l	Arbitration International
Brooklyn J Int'l L	Brooklyn Journal of International Law
CISG	United Nations Convention on Contracts for the International Sale of Goods
Colum J Transnat'l L	Columbia Journal of Transnational Law
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly

SA Merc LJ	South African Mercantile Law Journal
Syd LR	Sydney Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UCP	Uniform Customs and Practice for Documentary Credits
UNIDROIT	International Institute for the Unification of Private Law
UPICC	UNIDROIT Principles of International Commercial Contracts
US	United States of America