V. Incoterms and the UCP

The UCP

58."

The Position with respect to the UCP is different from that of Incoterms. The UCP are not adopted in any country by way of a statute. Their contractual nature is built into their own regulation. Article 1, second sentence, of the 1983 Revision provides that they: "shall be incorporated into each documentary credit by wording in the credit indicating that such credit is issued subject to Uniform Customs and Practice for Documentary Credits 1983, Revision, ICC Publications No. 400."

59."

But this is not the end of the matter. There are strong indications in favour of the view that the UCP should be recognised as a universally accepted trade usage which would have normative character. This view is advocated by eminent authorities, viz. Harfield and Eisemann-Eberth. Harfield suggests that the UCP should be regarded as trade usage which applies, even if not expressly agreed upon, if they are used regularly in similar transactions and their application Gould justifiably be expected. Eisemann and Eberth are likewise of the opinion that the UCP has normative effect, "unabhängig von der Parteireinbarung"; they continue:

"Auf der Grundlage dieser Erkenntnis kann das Wesen der Einheitlichen Richtlinien auch nur dann richtig erfasst werden, wenn man berücksichtigt, dass sie eine übergreifende Ordnung verkörpern, die auf weltweite Geltung angelegt ist."

The view of Harfield and of Eisemann-Eberth is confirmed by the important decision of the French Cour de Cassation of October 14, 1981 in the affaire Discount Bank C. Téboul; in this case the French supreme Court founded itself on both Article 1134 of the Civil Code and Article 3 of the UCP and attributed to both the same normative effect. Professor Michel Vasseur comments on this decision:

"Ainsi, les "Règles et usances" d'origine conventionnelle, sont placées sur le même plan que l'un des prestigieux articles du code civil. C'est la première fois, semble-t-il, que la Cour de cassation les vise de la sorte."
In Belgium the Tribunal de Commerce of Brussels held in a judgment of November 16, 1978 that the UCP applied, even without express agreement, to the relationship between the applicant of the credit and the bank because "il faut admettre aujourd'hui que ces règles ont valeur d'un véritable usage commercial." 60.

The UCP have achieved universal recognition. It has been said:79

"As banks in more than 170 countries operate letters of credit under this document, the Uniform Customs and Practice for Documentary Credits has become world law."

**Incoterms and the UCP in the wider perspective**

61.

When viewed from a wider perspective the preceding observations allow the following conclusions.

**Form and observance**

62.

It is thought that the conventional approach which centres an the issue whether an international trade usage is normative or contractual, although of considerable legal consequence, does not reveal the true character of the usage. It goes to the form rather than the substance. More important is the observance of the usage in practice. Has the international business community accepted it and is it applied widely or has the formulation remained a well-intentioned academic exercise?

In practice it appears to make little difference whether the usage is merely contractual. This is shown by the UCP which generally is regarded as contractual although, as we have seen, the French Cour de Cassation in the affaire Téboul, the Brussels Tribunal de Commerce and some enlightened jurists have penetrated beyond the form and recognised the true nature of this formulation. The fact that the UCP is contractual has not prevented its universal acceptance. Similar is the Position with respect to Incoterms. Of course, if a legal system attributes normative character to them, as e.g. Spanish law does, the legal situation is more certain and that helps those engaged in international trade. But in the many countries in which Incoterms are regarded as being of contractual nature, this has not prevented their wide use by Business.

It is the wide acceptance of these formulations which reveals their true character. This significant feature makes it clear that, in truth, we are dealing here with manifestations of the modern lex mercatoria.80

In the present context it is sufficient to state that even in the jurisdictions which accord only contractual character to Incoterms and the UCP many jurists consider them as being an incipient normative usage and think that they will assume this character fully in due course.

[...]

**IV. Interpretation of International Trade Usages**

[...]

**The Uniform Interpretation of International Conventions**

[...]

**Some rules of the autonomous lex mercatoria**
If, as I believe, the lex mercatoria has acquired, in the last twenty years, the character of an autonomous legal system, or a universal trade usage, it must have developed definite rules of law. It is not intended to attempt in this Report a full account of these rules but a few examples may be given.

The first is the principle that merchants in their international dealings shall observe the demands of good faith. Secondly, the principle that contracts have to be performed unless there is a valid excuse for non-performance (pacta sunt servanda) is a clear rule of the lex mercatoria. Thirdly, the rules of interpretation ut res magis valeat quam pereat and contra preferentem fall into this category. Fourthly, the rule of estoppel or venire contra factum proprium has to be mentioned. Fifthly, there may be a principle of "equilibrium of reciprocal undertakings".\textsuperscript{106}

Allowing, of course, the parties to contract out if they so desire.\textsuperscript{73}

\textsuperscript{73} H. Harfield, Letters of Credit, 1979, 3.
\textsuperscript{74} R.T. Raith, Das Recht des Dokumenten Akkreditivs in den USA und in Deutschland, 1985, 38.
\textsuperscript{75} F. Eisemann and R. Eberth "Das Dokumenten-Akkreditiv im Internationalen Handelsverkehr, 2nd ed., 1979, 48.
\textsuperscript{76} Recueil, Sirey-Dalloz, 1982, 301.
\textsuperscript{77} Revue de la Banque, 1980. I am grateful to Professor E. Wymeersch, of the University of Ghent, for giving me this information. In this judgment the court supported its conclusions by references to the literature, particularly Eisemann et Bontoux. The court held that the UCP applied to business people who, like the plaintiff, habitually made use of letters of credit. However, in Belgium this decision of the Tribunal of Commerce is controversial.
\textsuperscript{79} See para. 64, post.
\textsuperscript{80} Invoked as a rule of the lex mercatoria in an ICC award of 1976; see Berthold Goldman, op. cit. in n. 96 [Lex Mercatoria, Forum international, Lecture No. 3, November 1983], ante, 9.

Referring Principles:

- I.1.1 - Good faith and fair dealing in international trade
- I.1.2 - Prohibition of inconsistent behavior
- IV.1.2 - Sanctity of contracts
- IV.5.3 - Interpretation in favor of effectiveness of contract
- IV.5.4 - Interpretation against the party that supplied the term
- IV.5.6 - Rights and duties of the parties under "FOB" and "CIF"
- V.2.5 - Payment of contract price through documentary credit