

THE DOCTRINE OF STRICT COMPLIANCE IN THE ITALIAN LEGAL SYSTEM

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I. INTRODUCTION¹

In recent years, courts all over the world have been called upon more and more often to resolve disputes involving transactions made through letters of credit.² This paper analyzes the doctrine of *strict compliance* in letters of credit in the Italian legal system in light of some decisions issued by Italian courts over the past fifty years. It is not the intent of this paper to explain in detail the “technical” function of letters of credit, since the mechanism underlying this trade tool is already known: the buyer of merchandise asks a bank (issuing bank) to issue a letter of credit payable to the seller of the merchandise (beneficiary) upon presentation of certain documents tendered by the seller to the issuing bank. In international transactions, a separate bank often confirms the obligation at the beneficiary’s place of business (confirming bank). When the required documents, complying on their face with the conditions of the credit, are tendered, the bank honors its undertaking.³ Due to its characteristics, the letter of credit is used for the most part among merchants residing in different countries.⁴

This paper analyzes the sources of law for documentary credit in the Italian legal system, including, among others, the Uniform Customs and Practices for Documentary Credits (also referred to as UCP) promulgated by the International Chamber of Commerce. Second, it examines the value of the UCP. Scholars have not yet reached an agreement on how to frame the UCP within the Italian legal system. Italy is a civil law country, where legislation is based upon written law rather than case law; court decisions are not a primary source of law and do not have the force of “precedent,” at least not in the same sense that “precedent” has force in common law countries. Nevertheless, judicial opinions do have their importance, as discussed in Section III.

Finally, this paper focuses on the meaning of *strict compliance* in the Italian legal system and its evolution over the past fifty years as illustrated in some significant court decisions. For each decision, the analysis centers on the issues that emerged case by case with reference to discrepancies in documents raised by

1. The integral version of the decisions studied in this paper, in their Italian version, will be available online in the database of the National Law Center for Inter-American Free Trade (NLCIFT), together with other relevant court decisions in the area of commercial transactions. The reader who might be interested in consulting additional material can check the NLCIFT website at: www.natlaw.com.

2. C. COSTA, RECENT DEVELOPMENTS IN ITALIAN JURISPRUDENCE, 1 [hereinafter COSTA, RECENT DEVELOPMENTS].

3. *Id.*

4. L. PONTIROLI, IL CREDITO DOCUMENTARIO 12 (Milano 2000).

the banks and the reactions of the courts. Especially in more recent cases, Italian courts have endeavored to justify their positions in light of the provisions of the UCP and of banking practice, also according to the International Standard Banking Practice for the Examination of Documents issued by the International Chamber of Commerce (also referred to as ISBP).

II. SOURCES OF LAW FOR LETTERS OF CREDIT IN THE ITALIAN LEGAL SYSTEM

Italian commercial law, like that of the United States, has legislative provisions dedicated to documentary credit.⁵ In the United States, article 5 of the Uniform Commercial Code (UCC) is dedicated to commercial credit and stand-by letters of credit. Article 1530 of the Italian Civil Code (or *Codice Civile*) is entitled “Payment against documents through a bank.”⁶ Unlike article 5 of the UCC, however, article 1530 regulates only some aspects of letter of credit transactions.⁷ The first subsection establishes that whenever payment is to be made through a bank, the seller can seek payment from the buyer only after the bank has refused it upon presentation of the documents, according to usages.⁸ The second subsection states that the bank which has confirmed the credit to the seller can only oppose defenses originating from incompleteness or irregularity of the documents and those relating to the confirmation of the credit itself.⁹ Thus, this provision embodies the principle of independence of credits from the underlying transactions.

Every other aspect of the transaction is ruled by the Uniform Customs and Practices of the International Chamber of Commerce (UCP), revision 1993, n.500.¹⁰ The UCP is a uniform code that is used by banks in more than 100 countries.¹¹ The origin of the UCP lies in traditional bank practice. The first set of uniform rules was adopted in 1920 by the Conference on Credit of New York bankers, whose example was followed by bankers of other countries over the next

5. *Id.* at 40.

6. In Italian: “Pagamento contro documenti a mezzo di banca.”

7. COSTA, *supra* note 2, at 3.

8. In Italian: “Quando il pagamento del prezzo deve avvenire a mezzo di una banca, il venditore non puo’ rivolgersi al compratore se non dopo il rifiuto opposto dalla banca stessa e constatato all’atto della presentazione dei documenti nelle forme stabilite dagli usi.”

9. In Italian: “La banca che ha confermato il credito al venditore puo’ opporgli solo le eccezioni derivante dall’incompletezza o irregolarita’ dei documenti e quelle relative al rapporto di conferma del credito.”

10. Uniform Customs and Practices for Documentary Credits, 1993 [hereinafter UCP 500 1993]. In Italian, the UCP is known as *Norme ed Usi Uniformi (NUU) della Camera di Commercio Internazionale (CCI), revisione 1993, pubblicazione 500.*

11. PONTIROLI, *supra* note 4, at 16.

several decades.¹² In 1933, the International Chamber of Commerce issued the “Vienna Rules,” which have since been adopted by most banks worldwide. A new version of the Vienna Rules, approved in 1951 at the Conference of Lisbon, was adopted by banks in fifty-one countries. In 1962 these rules were revised and their name changed to Uniform Customs and Practices for Documentary Credits.¹³ The International Chamber of Commerce published subsequent revisions in 1974, 1983, and 1993.¹⁴ The Banking Commission of the International Chamber of Commerce is currently revising the UCP and the new revision should be approved in the fall 2006. The standard practice continues, of course, to evolve.

III. HIERARCHY OF SOURCES OF LAW IN THE ITALIAN LEGAL SYSTEM

Italy is a civil law country. This means, among other things, that case law is not a source of law the same way it is in common law countries. Article 1 of the *Disposizioni sulla Legge in Generale*¹⁵ (i.e., Provisions on the Law in General [hereinafter *Preleggi*]) lists Italian sources of law in the following order: (1) laws (*leggi*); (2) regulations (*regolamenti*); (3) corporative rules¹⁶ (*norme corporative*); and (4) usages (*usi*).¹⁷ However, court decisions do have some relevance; when delivering a decision, the judge applies and interprets abstract

12. *Id.*

13. *Id.*

14. *Id.*

15. The *Disposizioni sulla Legge in Generale* (i.e., Provisions on the law in general), also called *Preleggi* (i.e., Pre-laws) or *Disposizioni preliminari al codice civile* (i.e., Preliminary provisions to the civil code) are an integral part of the Italian civil code; indeed, they were approved with the same decree that implemented the civil code (the royal decree n 262/1942). They provide a general framework of the Italian juridical system: articles 1-9 refer to sources of law, whereas articles 10-16 concern the application of law in general (i.e., interpretation of law, abrogation of laws, etc . . .). Originally, there were thirty-one articles, but articles 17-31 have been abrogated by law 218/1995 on the reformation of Italian system of International Private Law (particularly, articles 17-31 referred to international private law and contained provisions ruling issues like private relationships, i.e., contractual, domestic, etc, which had some points of contact with other countries, i.e., citizenship, etc . . .).

16. Corporative norms (in Italian, *norme corporative*) had been implemented during the fascist regime, and included, among other things, regulations referring to labor relationships within corporations (i.e., *corporazioni*), or decisions of Labor tribunals (*Magistratura del lavoro*), etc . . . (article 5 of *Preleggi* lists all corporative norms). In 1944, all fascist union organizations (*organizzazioni sindacali fasciste*) were suppressed, thus all related corporative norms shall be considered suppressed as well.

17. *Preleggi*, art. 1 (1942). In Italian, it provides the following: “Sono fonti del diritto: (1) le leggi; (2) i regolamenti; (3) le norme corporative; (4) gli usi.”

provisions from the various sources of law to the specific facts of the case.¹⁸ In other words, decisions, especially those from the higher courts, have a more persuasive value, but they do not have any binding effect on Italian courts. However, as stated by article 2909 of the Civil Code, a judge's decision, when final, is binding on the parties, and can be raised against third parties.¹⁹

IV. THE LEGAL NATURE OF USAGES IN THE ITALIAN LEGAL SYSTEM

Usages are defined as the uniform behavior, by a group of people (i.e., all the inhabitants of a city, or all the citizens of a country, or merchants belonging to the same industrial sector, etc . . .), repeated for a certain period of time, which leads to the belief that the behavior is legally permissible.²⁰ As noted *supra*, usages are considered as binding sources of law in the Italian civil system only after laws and regulations have been considered.²¹

Usages (without any further specification) are binding on the parties, as long as they are not *contra legem* (i.e., against the law),²² and in areas governed by particular laws and regulations, usages are effective only when explicitly called into play by those laws and regulations.²³ Usages are characterized by two elements: (i) an *objective* or *material* element, which is the general, constant, and uniform repetition of a behavior, and (ii) a *spiritual* or *psychological* element, or the belief that the members of a social group have to uniform to a juridical obligation. This psychological element is also known as *opinio juris ac necessitatis*.²⁴

Usages are non-codified sources of law, thus, in order to use them at trial, it is necessary to prove their existence. To help judges and parties prove the existence of a specific usage on a case-by-case basis (proof that sometimes might become problematic), usages are often put in writing and included in some "collection of usages."²⁵ Usually, these collections can be edited by Chambers of Commerce, in case of "local" usages, or by the *Ministero delle Attività Produttive* (i.e., Ministry for Industry and Trade), if the usages interest the whole nation.

18. T. MARTINES, *DIRITTO COSTITUZIONALE* 100 (IX ed., Giuffrè & Milano 1997).

19. In Italian: "L'accertamento contenuto nella sentenza passata in giudicato fa stato ad ogni effetto tra le parti, i loro eredi o aventi causa."

20. A. TORRENTE & P. SCHLESINGER, *MANUALE DI DIRITTO PRIVATO* 29 (XII ed., Giuffrè & Milano 1985).

21. See *Preleggi*, *supra* note 17, at art. 1.

22. TORRENTE & SCHLESINGER, *supra* note 20, at 29.

23. See *Preleggi*, *supra* note 17, at art. 8, 1 co.

24. TORRENTE & SCHLESINGER, *supra* note 20, at 29. See also MARTINES, *supra* note 18, at 90.

25. MARTINES, *supra* note 18, at 93.

These collections are periodically updated.²⁶ Usages contained in these collections are also called “trade” or “business” usages and may refer to different sectors of economic activities, such as sales transactions, lease of urban estate, insurance, etc²⁷

There are two main categories of usages under Italian law.²⁸ *Usi normativi, legali, o giuridici* (i.e., customary, legal, or juridical usages) are subsidiary sources of law in areas where there is no legislative ruling (usages *praeter legem*); however, in areas where there are legislative provisions, they are effective only if expressly called into play by the parties.²⁹ On the other hand, *usi interpretativi* (interpretative usages) help interpret the intent of the parties if it was ambiguously expressed and integrate the intent with clauses that, even if not specifically called into play by the parties, are presumed to be included if commonly used in the specific area where the contract was finalized or if commonly used by a specific category of economic operators.³⁰ Business practice is an example of interpretative usages.³¹ In other words, customary usages are effective when recalled by a law, in order to integrate it or to replace it when there are no other legislative provisions, while interpretative usages help to integrate and interpret the will of the parties, and they are effective even if not explicitly called into play by them.³²

Article 15 of the *Preleggi* further provides that a law can be abrogated only by a posterior law, thus impliedly saying that a law cannot be abrogated by usages.³³ As a general rule, customary usages (*usi normativi*) can be derogated, or modified, by the parties, except if they are usages *secundum legem* (i.e., usages according to the law), in which case they might become mandatory in nature.³⁴

Two other important provisions are those contained in articles 1341 and 1342 of the Italian Civil Code, referring respectively to (i) *condizioni generali di*

26. *Id.* at 93.

27. *Id.*

28. The distinction between customary and interpretative usages is a product of scholars' and judges' analysis. The *Preleggi* and the Civil Code refer to *usi* in general, without making any real classification.

29. A. TORRENTE ET AL., CODICE CIVILE ANNOTATO 11 (VI ed., Milano, 1973). See also TORRENTE & SCHLESINGER, *supra* note 20, at 30.

30. TORRENTE ET AL., *supra* note 29, at 11, 1264. See also Codice civile, arts. 1340, 1368. In particular, article 1340 provides that the *clausole d'uso* (i.e., customary clauses) are intended as inserted in a contract, unless the parties expressly stated otherwise. Article 1368 provides that ambiguous clauses shall be interpreted according to the general practice in the place where the contract was finalized. If one of the parties is a contractor, ambiguous clauses shall be interpreted according to the general practice of the place the enterprise is located.

31. TORRENTE ET AL., *supra* note 29, at 1264 (citing also a decision of the Italian Supreme Court). See Cass., 4 feb. 1954, n. 275, Foro It. I, Mass. 1954-1957.

32. TORRENTE ET AL., *supra* note 29, at 11.

33. TORRENTE & SCHLESINGER, *supra* note 20, at 30.

34. *Id.*

contratto (contractual terms), included in the so called *contratti per adesione* (contracts by adhesion); and (ii) *contratti conclusi mediante moduli e formulari* (pre-printed form contracts). In the first scenario, contractual terms are proposed by one of the parties, whereas in the second case the pre-printed forms are arranged to rule specific contracts in a uniform way.³⁵

Under article 1341, first subsection, contractual terms arranged by one of the parties are effective with regard to the other party if he knew or should have known them using ordinary diligence when the contract was concluded. The second subsection provides that the following clauses shall be specifically approved in writing in order to be enforced: (i) clauses that establish limitations of liability, possibility to withdraw from the contract or to suspend its execution in favor of the party that arranged the clauses themselves; (ii) clauses that establish for the counterpart limitations to the possibility to raise defenses, forfeitures, limitations to the contractual freedom with third parties, silent extension of the contract, arbitration clauses or derogations to the competence of the judiciary power (i.e., arbitration clauses).³⁶ The same rule applies to pre-printed form contracts, under article 1342, second subsection. The rationale of this provision is to make sure that, by specifically approving the burdening clause in writing, the party signing the pre-printed contract becomes acquainted with it, in spite of the lack of negotiations on the content of the contract.³⁷ Although the classification of usages explained above may sound quite clear, problems arise when scholars and judges attempt to fit specific sets of rules into one category or the other.

V. THE LEGAL FUNCTION OF THE UCP IN THE ITALIAN LEGAL SYSTEM

There has been much discussion about the need to define the exact role of the UCP within the Italian legal system; the discussion is still ongoing. Some scholars characterize the UCP as *clausole d'uso* (customary clauses) or *condizioni generali di contratto* (contractual terms) under articles 1340 and 1341 of the Italian Civil Code.³⁸ Other scholars consider the UCP to be *lex mercatoria* (merchant law), that is, independent law of the international community of

35. TORRENTE ET AL., *supra* note 29, at 1267. The authors also mention the following decision of the Court of Cassazione: Cass. 22 mar. 1949, n. 634, Foro It. I, Mass. 1949, 134.

36. The clauses listed in the second subsection of article 1341 are also known as *clausole vessatorie* (i.e., vexatious clauses), because of their characteristic of being particularly hard for the counterpart.

37. TORRENTE ET AL., *supra* note 29, at 1266. See also Cass., 27 giugno 1968, n. 2189, in Giust. Civ. II, Mass., 1968, 1121; Cass. 5 ottobre 1953, n. 3179, Foro It. I, Mass. 1953, 609 (both cited by the authors).

38. PONTIROLI, *supra* note 4, at 17. See also COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 3.

traders.³⁹ These are rules born of a presumed traders' juridical system, where a special system of rules is applied instead of ordinary law.⁴⁰

Italian jurisprudence regards the UCP as: (a) *usi contrattuali* (trade usages);⁴¹ (b) *usi normativi* (customary law) or *elementi d'uso* under article 1374 of the Civil Code;⁴² (c) *condizioni generali di contratto* (contractual terms);⁴³ or (d) *clausole d'uso* (customary clauses) integrating the intent of the parties under article 1340 of the Italian Civil Code; i.e., the rules must be intended as part of the agreement if the parties do not explicitly exclude their application.⁴⁴ This last position seems to be the most commonly sustained by Italian courts.⁴⁵ As for the *lex mercatoria* doctrine, Italian courts seem to have rejected it, at least in the field of letters of credit, arguing that the International Chamber of Commerce has no authority to legislate.⁴⁶ However, as mentioned before, the debate over the legal nature of the UCP is still open.

VI. THE EVOLUTION OF THE DOCTRINE OF STRICT COMPLIANCE

The doctrine of *strict compliance* basically refers to the fact that the documents tendered by the beneficiary to the bank shall on their face “strictly” comply with the terms and conditions stipulated in the documentary credit, so that even the smallest discrepancy can be sufficient for the banks to reject the documents tendered. This principle was first formulated in a 1927 decision handed down by an English court:

There is no room for documents which are almost the same, or which will do just as well . . . the bank which knows nothing officially of the details of the transactions financed cannot take

39. PONTIROLI, *supra* note 4, at 17 (citing Balossini). See also COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 3 (also citing Balossini).

40. C. COSTA, “ASTRATTEZZA” ED ECCEZIONI OPPONIBILI NEL CREDITO DOCUMENTARIO IRREVOCABILE, 43 (Milano 1989) [hereinafter COSTA, ASTRATTEZZA].

41. COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 3.

42. *Id.* (citing some decisions of the Italian jurisprudence, such as: Corte app. Milano, 1 luglio 1952, in *Banca, borsa e titoli di credito*, 1953, II, 45; Corte app. Milano, 11 gennaio 1980, in *Banca, borsa e titoli di credito*, 1981, II, 442).

43. COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 3.

44. *Id.*

45. See Cass., 22 feb. 1979, in *Banca, borsa e titoli di credito*, II, 1979, 258. The court of Cassazione also explains that the UCP cannot be considered as customary law (*usi giuridici o normativi*). This position was also confirmed by Corte app. Brescia, 24 mar. 1975, in *Banca, borsa e titoli di credito*, II, 1975, 61; Corte app. Bologna, 26 gennaio 1990, in *Banca, borsa e titoli di credito*, II, 1991, 613; Corte app. Firenze, 19 gennaio 1951, in *Banca, borsa e titoli di credito*, II, 1951, 175; Corte app. Milano, 11 gennaio 1980, in *Banca, borsa e titoli di credito*, II, 1981, 442.

46. COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 3.

upon itself to decide what will do well enough, and what will not. If it does as it is told it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk.⁴⁷

Undoubtedly, this approach to *strict compliance* is too strict and it has often been criticized because it allows bad faith behavior contrary to the expectations of the honest beneficiary.⁴⁸

There are, of course, many arguments both for and against the doctrine of *strict compliance*. There is a need to protect banks. Banks act on behalf of the buyer within the limits delineated in the credit. Whenever they go beyond these limits, the buyer can reject the bank's actions.⁴⁹ Banks deal in finance, not in goods, and therefore should not assume commercial risks they are not competent to undertake.⁵⁰ On the other hand, it is very easy to discover even minimal discrepancies between the credit and the documents; legitimizing the rigid *strict compliance* doctrine would allow banks to refuse *a priori* some payments and this might lead to abuses of the parties involved in the transaction.⁵¹

Some courts, especially those in common law countries, have proposed a different approach, that of so-called *non-strict* or *substantial compliance*.⁵² If the differences between the documents are insignificant, this approach protects the beneficiary. However, wide discretion in compliance control can lead to the opposite result and destroy the mechanism of letters of credit.⁵³ In other words, the doctrine of *strict compliance* can offer buyers an excuse to refuse documents that present even slight discrepancies with the terms of the letter of credit, while the doctrine of *substantial compliance* may lead banks to make an evaluation that the buyer could contest arbitrarily. In other words, *strict compliance* puts the risk of flawed documents upon the beneficiary, whereas *substantial compliance* transfers that risk to the bank, which then is compelled to make an assessment that goes beyond its normal capability.⁵⁴ In any event, the UCP allows the bank to approach the applicant for a waiver of the discrepancies, in cases when the bank determines that the documents do not appear on their face to be in compliance with the terms and conditions of the credit, but the discrepancies are deemed to be insignificant.⁵⁵ In this way, the bank is allowed to transfer some of the risk under the substantial compliance standard to the applicant.

47. *Equitable Trust Co. v. Dawson Partners Ltd.*, 27 Lloyds' List L.R. 49, 52 (H.L. 1927).

48. COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 8.

49. PONTIROLI, *supra* note 4, at 120.

50. *Id.*

51. *Id.*

52. COSTA, RECENT DEVELOPMENTS, *supra* note 2, at 8.

53. *Id.* at 9.

54. PONTIROLI, *supra* note 4, at 123.

55. *See* UCP 500 1993, *supra* note 10, at art. 14(c).

A. The Doctrine of Strict Compliance and the Power of Banks to Examine Documents

The acceptance or rejection of documents at the bank is a crucial moment in the letter of credit transaction. As recalled *supra*, article 1530 of the Italian Civil Code states that the bank that confirmed the credit to the seller can object only to problems originating from incompleteness or irregularity of documents, or relating to the confirmation of the credit.⁵⁶

Articles 13-18 of the UCP 500 define the standard banks must abide by in examining and evaluating documents.⁵⁷ In particular, article 13(a) of the UCP provides that:

Banks must examine all documents stipulated in the Credit with reasonable care, to ascertain whether or not they appear, on their face, to be in compliance with the terms and conditions of the Credit. Compliance of the stipulated documents on their face with the terms and conditions of the credit shall be determined by international standard banking practice as reflected in these articles.⁵⁸

It has been held that the wording used in the above cited UCP provision, in particular the reference to the *international standard banking practice*, should be interpreted as an “opening” of the International Chamber of Commerce to the *substantial compliance* doctrine,⁵⁹ although the UCP never expressly refers to the *strict compliance* or the *substantial compliance* doctrines.

B. The Doctrine of Strict Compliance in Italian Court Decisions

In general, the Italian approach of “facial” compliance obliges the bank to check the documents only externally to determine whether they comply with the terms and conditions expressed in the credit.⁶⁰ The documents may be accepted legitimately if the bank determines that any formal discrepancies are irrelevant to the validity of the credit.⁶¹ Additionally, the bank is not responsible for the discrepancies in the documents if these irregularities cannot be detected

56. See Codice civile, art. 1530, 2 sub.

57. PONTIROLI, *supra* note 4, at 117.

58. See UCP 500 1993, *supra* note 10, at art. 13(a).

59. PONTIROLI, *supra* note 4, at 118.

60. See Corte app. Firenze, 19 gennaio 1951, in *Banca, borsa e titoli di credito*, II, 1951, 166; Cass., 17 ottobre 1953, in *Banca, borsa e titoli di credito*, II, 1954, 139; *infra*.

61. Trib. Roma, 9 maggio 1981, in *Banca, borsa e titoli di credito*, II, 1982, 282 and *infra*; Cass., 17 ottobre 1953, in *Banca, borsa e titoli di credito*, 1954, II, 139.

during formal examination of the documents.⁶² The bank is not required to perform an exhaustive examination of the documents, but this check, though limited and external, must be extended to anything that would be immediately apparent upon examination.⁶³

The following are some decisions of Italian courts from the early 1950s to the late 1990s that show how the strict compliance doctrine has been approached over the years.

1. Decision #1

Credito Italiano v. Banco di Sicilia

Corte di Appello di Palermo – July 30, 1951

Corte di Cassazione – October 17, 1953

Initially, Italian jurisprudence favored the doctrine of *strict compliance*. More recently, however, Italian courts seem to prefer the “reasonable approach,” thanks to a decision of the *Corte di Cassazione*⁶⁴ in 1953,⁶⁵ which held that the bank’s examination of the documents must be intelligent, not automatic and that it must be based on a reasonable standard.⁶⁶

The case before the court dealt with the responsibility of a bank which, in a letter of credit transaction, paid the beneficiary upon presentation of documents that were not in conformity with the credit. There was a discrepancy between the letter of confirmation issued by the confirming bank and the certificate of analysis of the alcohol content of Marsala wine tendered by the beneficiary to the bank as part of the documents of the credit. The confirmation letter referred to the same terms as the purchase order issued by the customer to the beneficiary (the order referred to a certain amount of Marsala wine having a general alcohol content of seventeen percent), whereas the certificate of analysis specified an alcohol content of seventeen percent “al piccolo Malligand.”⁶⁷

The lower court held that the documents tendered by the beneficiary were formally regular. Nevertheless, the case was brought in front of the court of appeals. The claimant, Credito Italiano, asserted that the term specifying that the

62. Cass., 22 ottobre 1959, in *Banca, borsa e titoli di credito*, 1959, II, 477.

63. Cass., 12 apr. 1957, in *Banca, borsa e titoli di credito*, 1957, 332. In particular, the bank cannot be held responsible for a fraud which is not apparent and is referring to the truthfulness of the document. Nevertheless, the bank is responsible for a lack of formal control, if the fraud could be detected at naked eye.

64. In Italy, the Court of Cassazione is the highest level of court, similar to the U.S. Supreme Court

65. Cass., 17 ottobre 1953, in *Banca, borsa e titoli di credito*, 1954, II, 139.

66. *Id.* at 141.

67. The “Malligand” is a method used to determine the alcohol content of a specific beverage, and indicates the alcohol content by volume (as opposed to the methods that determine the alcohol percentage by weight).

Marsala wine was of seventeen percent “piccolo Malligand” implied not just a *formal* discrepancy in comparison to the order (which referred simply to Marsala seventeen percent), but also a *substantial* discrepancy, because the generic indication of alcohol content included in the order should use only the measurement system recognized by law, that is, measurement of alcohol content by volume.⁶⁸ On appeal, the court held that the discrepancy was irrelevant, and that the acceptance by the Banco di Sicilia of documents referring to “Marsala wine [seventeen] percent al piccolo Malligand” could be considered irregular only if the specific measurement method was not adequate to measure the alcohol content, which was not the case.⁶⁹ The duty of diligence of the banks was limited to the mere control of the *formal* regularity of the documents.⁷⁰ A mere literal discrepancy between the description of the goods as contained in the documents tendered by the beneficiary and what was requested by the buyer does not make the payment by the bank irregular if the descriptions in the two sets of documents can be considered equivalent.⁷¹

The court of Cassazione confirmed the holding, asserting that even if the method of analysis (the “volume” method versus the “Malligand” method) was not suitable for correct measurement of alcohol content, it was not acceptable for the bank to refuse documents and payment on the ground of such a discrepancy between title and document.⁷² In other words, what is required of banks in verifying documents is a standard of reasonable care (*una media ragionevole cura*), for instance the diligence of an average, diligent bank employee, which has nothing to do with an analysis of the merits of the document’s substance.⁷³ The court explained further that the bank’s duty is limited to that which is within the capacity of the average diligent bank employee who cannot be required to demonstrate specific knowledge in technical fields beyond his competence and expertise in the performance of his job.⁷⁴ Both the appellate court and the court of Cassazione confirmed the acceptance of the documents and rejected the claimant’s request.

The International Standard Banking Practice (ISBP) issued by the International Chamber of Commerce states that documents presented under a letter of credit must not be inconsistent with each other, meaning that the data do

68. Corte app. Palermo, 30 luglio 1951, in *Banca, borsa e titoli di credito*, 1951, II, 402.

69. For a technical discussion on the different ways to measure the alcohol content, see Corte app. Palermo, 30 luglio 1951, in *Banca, borsa e titoli di credito*, 1951, II, 405-06.

70. *Id.* at 404.

71. *Id.* at 399.

72. Cass., 17 ottobre 1953, in *Banca, borsa e titoli di credito*, 1954, II, 139.

73. PONTIROLI, *supra* note 4, at 127 (citing Balossini, *Astrattezza, formalismo e letteralità nel credito documentario e principio di buona fede*, in *Banca, borsa e titoli di credito*, 1982, II, 301).

74. Cass., 17 ottobre 1953, in *Banca, borsa e titoli di credito*, at 139.

not need to be identical, merely that the documents shall not be inconsistent.⁷⁵ Thus, the decision of the lower courts, confirmed by the court of Cassazione, can be considered in compliance with the ISBP. The two documents (the confirmation letter issued by the bank following the client's purchase order, and the certificate of analysis) are not inconsistent with each other. They are not identical, but a "mirror image" is not required.

2. Decision #2

Adriacommerce Koper v. Credito Italiano

Tribunale di Brescia – March 18, 1973

Corte d'Appello di Brescia – March 24, 1975

Corte di Cassazione – February 22, 1979

In 1970 Mr. Vittorio Legati, owner of a deli near the city of Brescia, asked Credito Italiano to open an irrevocable credit in favor of Adriacommerce Import-Export in Koper, in the amount of approximately Italian Lire (ITL) 30,000,000,⁷⁶ payable upon presentation of the following documents:⁷⁷

- Copy of the bill of lading for goods addressed to the forwarding agent Proglione in case of transportation by rail;
- *Lettre de voiture routière* for goods addressed to the forwarding agent Proglione in case of transportation by refrigerator truck;
- Statement of the forwarding agent Proglione confirming receipt of the goods; and
- Commercial invoice in three copies.

When Credito Italiano received the documents, it refused the documents because of the following discrepancies:⁷⁸

- a) The goods referring to bills of lading for trucks LJ 31349/1092 and LJ 31347/1091 had been shipped directly to the buyer, instead of to the forwarding agent;
- b) The documents were tendered with unjustified delay;
- c) The description of goods was non-conforming; and

75. See International Standard Banking Practice (ISBP) 2002, art. 24.

76. On January 1, 2002, with the introduction of the Euro (EUR), Italian Lire became obsolete and no longer legal tender. However, the official conversion rate with U.S. Dollar is 1 USD = 1,643 ITL (as of November 24, 2005). See www.xe.com.

77. Trib. Brescia, 18 mar. 1973, in *Banca, borsa e titoli di credito*, 1973, II, 441.

78. *Id.* at 442.

- d) The exporter of the goods mentioned in the bills of lading was non-conforming.

For these reasons, Credito Italiano refused to honor the credit. In the meantime, the Tribunale di Brescia declared the bankruptcy of Vittorio Legati, owner of Salumificio Bresciano.

In giving its opinion on the appropriateness of Credito Italiano's refusal to pay, the Tribunale di Brescia first recalled that, according to the 1962 version of the UCP, banks shall examine with reasonable care all documents tendered in order to ascertain that they conform facially to the conditions of the credit.⁷⁹ This examination is limited to the "external form" of the documents, and in its opinion, the Brescia court refers to the court of Cassazione's decision of October 17, 1953, which held that the determination of consistency between the documents and the credit shall be intelligent and not automatic.⁸⁰

Under this regime, the issuing bank checks that all the documents mentioned in the letter of credit have been tendered (quantitative examination) and verifies the conformity of their content with the conditions of the credit (qualitative examination).⁸¹ The Brescia court stated that the description of the goods, the quantity, and the price must be reported in the documents, at least in the essential ones, such as the invoice, bill of lading, etc . . .⁸²

As for the timing of presentation of the documents, article 41 of the 1962 UCP states that documents shall be tendered within a reasonable time from their issuance and that the bank has discretion to refuse them if they have been presented with unjustifiable delay.⁸³ The court also pointed out that, in its opinion, the documents referred to in article 41 of the 1962 UCP are all the essential ones (invoice, bill of lading, etc . . .); in other words, those documents that are necessary to establish the correspondence of the goods for quantity and quality with the conditions of the credit.⁸⁴

The Brescia court found in favor of the Credito Italiano. It held that the bank was justified in refusing both the documents and, as a consequence, payment to the beneficiary,⁸⁵ because real discrepancies between documents and credit did in fact exist. In detail, the court pointed out that:

1. in the invoice 131/42 the goods were identified not in conformity with the letter of credit. Indeed, the words "cow tongue" (*lingua bovina*), as appearing in the invoice, were

79. *Id.* at 446 (citing UCP 1962, art. 7, now UCP 500 1993, *supra* note 10, at art. 13).

80. *Id.*

81. *Id.*

82. *Id.*

83. Trib. Brescia, 18 mar. 1973, at 446.

84. *Id.* at 447.

85. *Id.*

different from “cow meat” (*carne bovina*), as appearing in the letter of credit. The lack of correspondence between the wordings in the documents justified the refusal of the issuing bank to honor its undertaking. Article 30 of the UCP rev. 1962 states that the description of the goods in the invoice shall correspond to the letter of credit, and this correspondence shall be rigorous;⁸⁶ and,

2. as for the delay in tendering the documents, the court confirmed that they had all been tendered with great delay (approximately twenty-five to thirty days from their issuance), and this delay was unjustified because it is common practice for the documents to be presented no later than three to four days from the issuance date.⁸⁷

The decision of the Brescia court is based on UCP dated 1962. However, the current version of the UCP (rev. 500) adopts the same rationale as to the acceptability of invoices, by saying that the description of the goods in the commercial invoice must correspond with the description in the documentary credit.⁸⁸ Also, UCP rev. 500 expressly requires that every credit that calls for transport documents shall stipulate a specific period of time after the date of shipment for the presentation of the documents; if this period of time is not determined, banks are not allowed to accept documents presented later than twenty-one days after the date of shipment.⁸⁹ Thus, the decision is in compliance also with UCP 500.

Although the rationale of the Brescia court appeared quite clear, the claimant appealed the decision. Nevertheless, the court of Appeals confirmed the lower court’s holding,⁹⁰ and backed up Credito Italiano’s refusal of the documents because of their discrepancies.⁹¹ The case was finally brought in front of the Court of Cassazione, whose decision became very important for the identification of the legal nature of the UCP.⁹²

As note 1 to the decision points out,⁹³ the debate is whether the provisions of the UCP fall within the framework of article 1374 of the Civil Code, being customary law (*usi normativi*), binding the parties on the same level as the

86. *Id.* at 448.

87. *Id.*

88. *See* UCP 500 1993, *supra* note 10, at art. 37(c).

89. *See id.* at art. 43.

90. Corte app. Brescia, 24 mar. 1975, in *Banca, borsa e titoli di credito*, II, 1975, 60.

91. *Id.* at 62.

92. *See* Cass., 22 feb. 1979, in *Banca, borsa, titoli di credito*, II, 1979, 257 & ff.

93. *Id.*

law by means of integration of legislative provisions,⁹⁴ or whether the UCP rules are identifiable as customary clauses (*clausole d'uso*) under article 1340 of the Civil Code, integrating the intent of the parties.⁹⁵ In other words, the Court had to determine whether the rules must be intended as part of the agreement if the parties do not explicitly exclude their application, or whether the provisions of the UCP are contractual terms (*condizioni generali di contratto*) under article 1341 of the Civil Code, thus applicable only if explicitly incorporated by the parties in their agreement.⁹⁶

The conclusion reached by the Court of Cassazione was that the UCP rules are *clausole d'uso* or customary clauses, under article 1340 of the Civil Code. They integrate the intent of the parties and shall be intended as inserted in the contract unless the parties have clearly rejected their application.⁹⁷ As a result, the interpretation of these rules given by the lower courts on the merits cannot be censured by the Supreme Court, if their interpretation was not vitiated.⁹⁸ The Court of Cassazione then rejected all the grounds for appeal brought by the appellant and confirmed the conclusions reached by the lower and appellate courts on the merits.

3. Decision #3

S.p.a. Riserie Virginio Curti v. BNL and Banque Nationale de Paris "Intercontinentale"

Tribunale di Roma – May 9, 1981

Corte di Appello di Roma – October 8, 1985

This case was first brought in front of the Tribunale di Roma on May 9, 1981. The case involved an Italian rice company, Riserie Virginio Curti (hereinafter Curti) that had entered into a contract with a Lebanese client to supply a certain quantity of rice. Payment was to be made by means of a letter of credit confirmed by an Italian bank, *Banca Nazionale del Lavoro* (hereinafter BNL). BNL confirmed the credit upon a request from the issuing bank (*Banque Nationale de Paris "Intercontinentale"* [hereinafter Nacinter]) and credited to

94. Codice civile, art. 1374 states that: “*Il contratto obbliga le parti non solo a quanto e' nel medesimo espresso, ma anche a tutte le conseguenze che ne derivano secondo la legge o, in mancanza, secondo gli usi e l'equita.*”

95. Under article 1340: “*Le clausole d'uso si intendono inserite nel contratto se non risulta che non sono state volute dalle parti.*”

96. Article 1341 provides that: “*le condizioni generali di contratto predisposte da uno dei contraenti sono efficaci nei confronti dell'altro se al momento della conclusione del contratto questi le ha conosciute o avrebbe dovuto conoscerle usando l'ordinaria diligenza.*”

97. Cass., 22 feb. 1979, at 258.

98. *Id.*

Curti the amount corresponding to two shipments. During negotiation of the bills of lading, BNL noted discrepancies in the documents, but considered them to be irrelevant and credited the money to Curti anyway. The discrepancies were as follows: (a) the bill of lading was issued “to the order of Nacinter,” instead of “endorsed to the order of Nacinter;” (b) the surveillance certificate (*certificato di sorveglianza*) contained information different from that in the L/C; (c) a copy of a telex referring to the message addressed to Rachibor Beirut did not report the shipping date; and (d) the description of the goods in the invoice did not accord with the description in the bill of lading.

Nacinter raised six objections to discrepancies in the arrangements: (a) partial shipments had been made at the same time on the same vessel, rather than through separate shipments; (b) eleven days term, rather than eight days term, had passed between the date of loading and the date of presentation of the documents; (c) the mention of “free zone” was done on the body of the document, rather than on the appropriate space; (d) the trip number was missing; (e) the telex did not mention the departure date of the vessel; and (f) the bills of lading were issued to the order of Nacinter, rather to the order of Riserie Virginio Curti and endorsed to Nacinter.⁹⁹ For these reasons, BNL informed Curti of the risk that all the credited sums should have been returned.

Curti sued BNL in order to establish its right to keep the money already credited since the discrepancies had been considered irrelevant. Nacinter intervened voluntarily in the proceedings.

The court, in order to decide whether the discrepancies in the documents could be considered substantial, first recalled article 1530 of the Italian Civil Code, under which the confirming bank can object only to those defenses arising from the incompleteness or irregularity of the documents and those referring to the confirmation of the credit.¹⁰⁰ According to article 1530, the incompleteness and irregularities must be evaluated according to the principle of good faith under article 1366 of the Italian Civil Code and the requirement of article 7 of the 1974 revision of the UCP¹⁰¹ (hereinafter UCP 1974) which states that banks shall examine the documents with reasonable care.¹⁰²

As for the fact that the bills of lading were issued directly to the order of Nacinter when the conditions in the credit required them to be issued to the order, and endorsed to Nacinter, the court held that this was a mere “formal” discrepancy, with no substantial interest, and could not be considered, alone, a legitimate reason for the bank to refuse to pay the beneficiary.¹⁰³ Indeed, such bills of lading did not diminish the guarantees of the bank; even if the bills of

99. *Id.* at 296-97. See also Corte app. Roma, 8 ottobre 1985, in *Rivista di Diritto Commerciale*, II, 1986, 368.

100. Trib. Roma, 9 maggio 1981, in *Banca, borsa e titoli di credito*, II, 1982, 303.

101. Now UCP 500 1993, art. 13.

102. Trib. Roma, 9 maggio 1981, in *Banca, borsa e titoli di credito*, at 303.

103. *Id.*

lading had been endorsed to Nacinter, it would not have received any major guarantee.¹⁰⁴

As for the surveillance certificate, the court held that it reported with sufficient completeness the necessary details of the L/C (credit number 625123 of Banque Nationale de Paris – Beyrouth).¹⁰⁵

With reference to the partial shipment and to the prohibited transshipment, the court observed that the bills of lading contained the clause of prohibited transshipment, and thereafter the conditions of the credit had been modified allowing partial shipments of the goods, but the punctuality of the shipments has not been demonstrated.¹⁰⁶

As for the disregard of the time limit governing the presentation of documents, the court noted that the credit did not specify anything about this. Article 41 of the UCP 1974 provides that in the absence of specific requirements in the L/C, documents shall be tendered within twenty-one days of the issuance of the bill of lading. This term was observed in the present case (bill of lading dated December 12, 1975 and presented on December 29, 1975, and bill of lading dated December 24, 1975 and presented on January 14, 1976).¹⁰⁷

Neither the fact that the bill of lading did not contain the statement “Beirut free zone” in the correct spot on the form, nor the fact that the bill of lading did not contain the trip number was a substantial enough discrepancy to diminish the value of the bills of lading as valid documents of title.¹⁰⁸ Finally, as for the content of the two telex messages that were incomplete according to the parties, the court found that they clearly contained sufficient reference to the shipment.¹⁰⁹

As a result, the court ordered BNL to reimburse Curti in the amount of Italian Lire¹¹⁰ (ITL) 94,812,540. In addition, BNL had to pay interest calculated from the day of the judicial motion. Nacinter, in turn, was ordered to refund the above mentioned sums to BNL.¹¹¹

On appeal, the appellate court affirmed the lower court’s ruling, and held, as a general rule, that a bank cannot give substantial relevance to discrepancies in the documents that are merely formal.¹¹²

The court considered the first discrepancy, the fact that the bills of lading had been issued directly to Nacinter even though the conditions in the documentary credit required them to be at the order and endorsed to the same bank, to be a merely “formal” discrepancy, without any “substantial” value.

104. *Id.* at 304.

105. *Id.*

106. *Id.*

107. *Id.* at 305.

108. Trib. Roma, 9 maggio 1981, in *Banca, borsa e titoli di credito*, at 305.

109. *Id.*

110. *See* note 56.

111. Trib. Roma, 9 maggio 1981, in *Banca, borsa e titoli di credito*, at 306.

112. Corte app. Roma, in *Rivista di Diritto Commerciale*, 1986, II, 367.

Under article 2012 of the Italian Civil Code,¹¹³ unless otherwise agreed, the endorser is not liable for the issuer's non performance; therefore it is not relevant that the above mentioned bank be not endorsee of the bills of lading.¹¹⁴

The partial shipments carried out at the same time on the same vessel rather than through separate trips were deemed irrelevant as well; the letter of credit did not specify that the shipments must take place on separate vessels or at separate times.¹¹⁵ The court also held irrelevant the fact that the ship's departure date was not included in the two telex messages detailing shipping information. Under article 40(a) of UCP 1974, the date the merchandise is loaded onto the ship is considered the official shipping date.¹¹⁶

The appellate court found the other discrepancies equally irrelevant. It affirmed the lower court's holding that document presented within twenty-one days as provided for in article 41 of the UCP 1974 are acceptable unless the letter of credit specifically requires presentation within a shorter time period.¹¹⁷ The court also confirmed that it was not material that the shipping number and the term "free zone" were not included in particular places in the shipping documents.¹¹⁸

Article 43 of the UCP 500 similarly states that banks are not allowed to accept documents presented later than twenty-one days after the date of shipment, unless a different period of time is specified in the credit. Thus, the rationale of both decisions of the courts is in conformity with the current version of the UCP.

4. Decision #4

Credito Italiano v. Societa' Palumbo

Tribunale di Napoli – May 23, 1983

Corte di Appello di Napoli – October 21, 1985

This decision deals with an agreement between the Italian company Palumbo and Daton Commodity Brokers of London for a sale of 6,000 cartons of tomato sauce. Payment was to be made through confirmed and irrevocable letter of credit.

The Italian bank Credito Italiano, local correspondent for the British State Bank of India, confirmed the credit in favor of Palumbo and paid the amount in U.S. dollars. However, Credito Italiano made the payment upon condition that the issuing bank (State Bank of India) did not find any irregularity and/or

113. In Italian, article 2012 Civil Code recites: "*Salvo diversa disposizione di legge o clausole contraria risultante dal titolo, il girante non e' obbligato per l'inadempimento della prestazione da parte dell'emittente.*"

114. Corte app. Roma, in *Rivista di Diritto Commerciale*, at 371.

115. *Id.* at 372.

116. *Id.*

117. Now UCP 500 1993, art. 43.

118. Corte app. Roma, in *Rivista di Diritto Commerciale*, at 373.

discrepancy in the documents.¹¹⁹ In other words, if the State Bank of India did not accept the documents, Palumbo was required to refund payment to Credito Italiano.¹²⁰

The State Bank of India found the following discrepancies in the documents: (a) the merchandise had not been shipped in accordance to “liner terms” (“liner terms” means that stowage and unloading are included in the freight¹²¹), as specified in the letter of credit; (b) the clause “free out” (“free out” means that unloading charges have to be borne by the recipient of the goods¹²²) included in the bill of lading was incompatible with the conditions under (a); and (c) one of the seal numbers attached to the container was not indicated.¹²³

The British bank rejected the documents. The vessel carrying the tomato sauce sank off the Gibraltar coast. Credito Italiano then demanded that Palumbo refund the sum of Italian Lire¹²⁴ (ITL) 32,186,425 to the bank, plus interest and expenses.¹²⁵ Palumbo refused to return the money, claiming that the Credito Italiano had accepted the documents without reservation; Palumbo further asserted that the “except acceptance” clause had been unilaterally included in the agreement and was therefore unlawful. The discrepancies, Palumbo further claimed, were irrelevant.¹²⁶

The court stated, as a general rule, that the presence of trivial discrepancies in the documents is not sufficient reason for the bank to refuse them. If the irregularities in the documents are not substantial and the obligations detailed in the L/C have in fact been met, the documents will be deemed acceptable. If the authorized bank accepts the documents without specific reservations regarding their regularity, any subsequent investigation into the documents shall be limited to their adequacy for purposes of proving acceptable delivery of the goods in question.¹²⁷

The court also found that the discrepancies that State Bank of India was objecting to were irrelevant. Missing seal numbers did not invalidate bills of

119. In Italian, the clause was: “*L'utilizzo del credito vi viene concesso sotto l'espressa riserva del buon fine dei documenti, per il caso in cui l'ordinante dovesse sollevare eccezioni per le irregolarità presentate dagli stessi. Poiché l'importo da noi riconosciuto vi viene rimborsato dalla banca estera in US\$ resta inteso che, qualora non ci pervenga dal nostro corrispondente esplicito benestare ai documenti, ci rimborserete il suindicato importo in US\$ nel controvalore in lire al cambio vigente il giorno dello storno.*” See Trib. Napoli, 23 maggio 1983, in *Banca, borsa e titoli di credito*, II, 1985, 526.

120. Trib. Napoli, 23 maggio 1983, in *Banca, borsa e titoli di credito*, at 525-26.

121. *Id.* at 530.

122. *Id.*

123. *Id.* at 526.

124. See note 56.

125. Trib. Napoli, 23 maggio 1983, in *Banca, borsa e titoli di credito*, at 525.

126. PONTIROLI, *supra* note 4, at 129.

127. Trib. Napoli, 23 maggio 1983, in *Banca, borsa e titoli di credito*, II, at 530.

lading or make impossible the correct shipment of goods.¹²⁸ The court considered that the appearance of the term “free out” in the bill of lading rather than “liner terms” as required by the letter of credit and detailed in the commercial invoices had been deemed irrelevant by the bank itself in terms of the validity of title and identification of goods.¹²⁹ Essentially, this court, too, ruled that in order to claim that documents tendered by the beneficiary are not in conformity it is not sufficient for a party merely to invoke an “external” discrepancy in the documents.¹³⁰ The party must offer concrete proof that the discrepancy actually affected the transaction negatively.¹³¹

The appellate court confirmed the lower court’s decision. In a confirmed letter of credit, said the appellate court, the confirming bank must reject documents which are not in conformity with agreed-upon conditions. If payment has been made, the bank cannot demand a refund, even if the payment was made on the condition that the issuing bank verifies the documents.¹³² This statement confirms the independent nature of the confirming and the issuing bank’s undertaking. Upon the beneficiary’s presentation of the documents, it is the bank’s duty under the UCP to take reasonable care in verifying the documents’ consistency with the terms of the agreement. If the documents conform, the bank must pay the credit; if a discrepancy is found, the bank may refuse payment.¹³³ *Credito Italiano*, upon receipt of the documents presented by Palumbo, checked them, found them conforming, and finally accepted them. Once documents have been accepted, the Court said, objections to their conformity cannot be made.¹³⁴

5. Decision #5

S.p.a. Fort di Eredi Berni v. Société Générale de Banque en Espagne

Tribunale di Reggio Emilia – July 7, 1986

Corte di Appello di Bologna – January 26, 1990

The case involved a deal between the Italian company Fort di Eredi Berni AG spa (Fort) and the Spanish company Diaz y Prieto S.A. Fort obtained two irrevocable letters of credit from the Spanish bank Société Générale de Banque en Espagne, one in the amount of Italian Lire¹³⁵ (ITL) 80,250,000 (139/83), and the other for ITL 72,800,000 (141/83). An Italian bank (Banca Nazionale del Lavoro or BNL) was appointed as advising bank. When the goods were delivered to the

128. *Id.*

129. *Id.*

130. PONTIROLI, *supra* note 4, at 130.

131. Trib. Napoli, 23 maggio 1983, in *Banca, borsa e titoli di credito*, at 531.

132. Corte app. Napoli, 21 ottobre 1985, in *Banca, borsa e titoli di credito*, II, 1987, 327.

133. *Id.* at 329.

134. *Id.*

135. *See* note 56.

Spanish client and the documents presented in order to obtain payment, the Spanish bank refused to proceed with payment and claimed discrepancies in the documents tendered by Fort.¹³⁶

For credit number 141/83, Société Générale claimed three discrepancies.¹³⁷ The first discrepancy claimed that while the amount specified in the credit was ITL 72,800,000, the commercial invoices were issued for ITL 78,693,755, an amount larger than the credit permitted. Under article 32(b) of the UCP revision 1983 (hereinafter UCP 1983) this would grant the issuing bank the right to refuse the documents.¹³⁸ The second discrepancy alleged that the shipping documents had been tendered for payment well after the term of twenty-one days permitted under article 41 of UCP 1983.¹³⁹ The third alleged discrepancy stated that the description of the goods in the credit was inconsistent with the description in the commercial invoices, a violation of article 32(c) of UCP 1983.¹⁴⁰

In credit number 139/83, the bank objected to these discrepancies:¹⁴¹ a) violation of article 32(c) UCP 1983;¹⁴² and b) violation of article 41 of UCP 1983.¹⁴³ Fort responded that the bank had refused the documents too late, in violation of article 8(d)-(e) of UCP 1983,¹⁴⁴ that the Spanish bank could refuse to pay only the amount in excess of the sum specified in the credit, not the entire amount, that the documents had indeed been presented within the time limit set out in the issuing of the credit, and that the goods had been accepted by the client, who had never presented any claim concerning nonconformity of the documents.¹⁴⁵ Fort asked the court to require Société Générale de Banque en Espagne to pay Italian Lire¹⁴⁶ (ITL) 153,050,000, plus depreciation and interests.¹⁴⁷

Regarding Fort's assertion that Société Générale had unreasonably delayed the refusal of the documents, the court first stated that the *reasonable time* the bank is allowed to check the documents must be counted from the date when the documents are received by the bank, not from the date they are sent. The court held that the issuing bank contested the validity of the documents within the *reasonable time* required by the UCP: for credit 141/83, the bank received the

136. Trib. Reggio Emilia, 7 luglio 1986, in *Banca, borsa e titoli di credito*, 1988, II, 262.

137. *Id.* at 263-64.

138. Now UCP 500 1993, art. 37(b).

139. Now UCP 500 1993, art. 43(a).

140. Now UCP 500 1993, art. 37(c).

141. Trib. Reggio Emilia, 7 luglio 1986, in *Banca, borsa e titoli di credito*, at 264.

142. Now UCP 500 1993, art. 37(c).

143. Now UCP 500 1993, art. 43.

144. Now UCP 500 1993, arts. 13(b), 14(d).

145. Trib. Reggio Emilia, 7 luglio 1986, in *Banca, borsa e titoli di credito*, at 264.

146. *See* note 56.

147. Corte app. Bologna, 26 gennaio 1990, in *Banca, borsa e titoli di credito*, II, 1991, 612.

documents on August 17 and transmitted its refusal on August 18, while for credit 139/83, documents were received on July 16 and communicated refusal on July 27.¹⁴⁸

The court found that the bank's refusal of the documents was itself legitimate because, as provided in article 41 of UCP 1983, the twenty-one-day time period in question is the maximum period of time allowed to pass between the issuing date indicated on the documents and their presentation for payment, unless otherwise agreed upon by the parties. The documents under credit 139/83 were presented fifty-two days after the date on the documents, and the documents relating to credit 141/83 were tendered after thirty-eight days. The bank's refusal to accept the documents was therefore legitimate under UCP article 41. If documents are presented after the time allowed has expired, the issuing bank can refuse them even if the buyer confirms their conformity; the time limit for presentation is set to protect the bank as well as the buyer.¹⁴⁹

The Reggio Emilia court did not rule on the conformity of the documents to the letter of credit, because the issue had already been solved on the ground of the late presentation of the documents.¹⁵⁰ The court rejected Fort's request and ordered it to pay expenses to Société Générale de Banque en Espagne.¹⁵¹

On appeal, the court first analyzed if Société Générale verified the documents within a reasonable time as required by article 8 of UCP 1983 and outlined that reasonable time shall be counted from the date the documents are received by the issuing bank (the Spanish bank, in the present case) and not by the advising bank (the Italian BNL).¹⁵² This solution appeared most reasonable; it is the issuing bank's duty to verify the documents, so it would make no sense for the "reasonable time" within which verification must take place to begin before the issuing bank even has the documents in hand.¹⁵³

But it is also very difficult to quantify this reasonable period of time.¹⁵⁴ The appellate court concluded that, although scholars usually considered as reasonable a maximum term of three days,¹⁵⁵ it is better to regard this as a general suggestion rather than a hard and fast rule, because of the many factors which may

148. Trib. Reggio Emilia, 7 luglio 1986, in *Banca, borsa e titoli di credito*, at 266.

149. *Id.* at 261.

150. *Id.* (noting PONTIROLI, FORMALISMO, E BUONA FEDE NEL CREDITO DOCUMENTARIO 261).

151. Corte app. Bologna, 26 gennaio 1990, in *Banca, borsa e titoli di credito*, at 614.

152. *Id.* at 615.

153. *Id.* at 623 (with note of C. Costa).

154. At least at the time the decision was issued, because now UCP article 13 clearly states that the reasonable period of time shall not exceed seven banking days following the day of receipt of the documents. See UCP 500 1993, *supra* note 10, at art. 13(b).

155. Corte app. Bologna, 26 gennaio 1990, in *Banca, borsa e titoli di credito*, at 622 (with note of C. Costa).

come into play in each individual transaction, e.g., the internal structure of banks and the type of documents to be checked.¹⁵⁶

As the lower court pointed out in this case, for credit number 141/83 there was no issue regarding on time notification of discrepancies: the Spanish bank received the documents on August 17 and on August 18 it gave notice of the non-conformity.¹⁵⁷ The same cannot be said for credit number 139/83: those documents were received by the issuing bank on July 16, and the notification was not forwarded until July 27, eleven days after receipt. This period of time could not be considered reasonable; the discrepancies were similar to those under credit 141/83 and very easily detectable.¹⁵⁸ The court concluded that because of this delay the issuing bank had lost its right to claim non-conformities in the documents for credit 139/83, and was still obligated to pay. It was therefore unnecessary for the appellate court to investigate whether the bank had a right to challenge the discrepancies.¹⁵⁹

The appellate court confirmed the lower court's holding regarding credit 141/83, that is, that the Spanish bank had a right to refuse the transport documents tendered because they had been presented after the twenty-one days from the issuing date, as required by UCP rev. 1974, article 41. But the client, Diaz y Prieto, had declared the conformity of the supplies and the documents; did the bank have a duty to proceed with the payment under good faith principles? In other words, once the client recognizes the regularity of the transaction, does the bank have a right to avoid its duties?¹⁶⁰

The appellate court did not require the bank to receive late documents and pay the beneficiary simply on the instructions of the buyer. Put differently, the court held that the buyer does not have the right to intervene between the bank and the beneficiary through instructions not previously agreed upon.¹⁶¹ The appellate court concluded that, because the buyer and the bank each have separate, independent obligations to the seller, the bank's ability to object to discrepancies in the documents must not be subject to the buyer's authorization or rejection. To give the buyer that power would interfere with the bank's rights and obligations towards the seller which are defined by law.¹⁶² The appellate court ordered the bank to refund to Fort the amount of ITL 79,025,360, the total amount of the supply relating to credit 139/1983, plus legal interest.¹⁶³

Nowadays, some of the issues discussed by the courts in this case would no longer pose any problem. The concept of reasonable period of time, and the *dies a quo* (i.e., the day from which the period of time at issue starts to be

156. *Id.* at 616.

157. *Id.*

158. *Id.*

159. *Id.* at 617

160. *Id.*

161. Corte app. Bologna, 26 gennaio 1990, in *Banca, borsa e titoli di credito*, at 624.

162. *Id.* at 618.

163. *Id.* at 620.

computed), have been defined by the UCP 500 as no more than seven banking days following the receipt of documents by the issuing bank.¹⁶⁴

Concerning delay in the presentation of documents, article 42(a) of UCP 500 states that all credits must stipulate an expiration date for the presentation of documents for payment and for negotiation, and documents must be presented on or before such expiry date.¹⁶⁵ Moreover, article 43(a) of UCP 500 adds that every credit calling for transport documents must also stipulate a period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the credit.¹⁶⁶ If no such period of time is stipulated, banks will not accept documents presented later than twenty-one days after the date of shipment. Finally, documents must be presented no later than the expiration date of the credit. So, the bank in this case was entitled to refuse the document and the court's ruling is consistent with the requirements of the UCP and the ISBP.

Neither the Reggio Emilia court, nor the court of Appeal of Bologna took into account the other discrepancies claimed; they based their decisions on other factors. However, in light of the current UCP 500 and ISBP, we can examine how such claims might be resolved. Concerning discrepancy in amounts between the invoice and the credit, article 37(b) of the UCP 500 states as a general rule that, unless otherwise stipulated in the credit, banks may refuse commercial invoices for amounts in excess of the amount permitted by the credit (as in the present case). The ISBP states that the amount must agree with that of the invoice, unless otherwise stated in the credit, or as a result of UCP sub-article 37(b).¹⁶⁷ The bank in this case could legitimately refuse the documents due to this discrepancy.

Second, as for the discrepancy between the description of the goods in the invoice and that in the credit, article 37(c) of the UCP 500 confirms that the descriptions in the invoice and the credit must correspond; if they do not, a bank may refuse the documents. In all other documents the goods may be described in general terms provided they are not inconsistent with the description of the goods in the credit. The ISBP confirms this requirement, specifying, however, that the UCP does not require a "mirror image" in the two descriptions.

6. Decision #6

Toscana Auto s.r.l. v. ICCREA s.p.a.

Corte di Cassazione – August 8, 1997

This decision deals with the standard of diligence banks must apply when controlling the documents.¹⁶⁸ An Italian car importer, Toscana Auto s.r.l., asked

164. See UCP 500 1993, *supra* note 10, at art. 13(b).

165. See UCP 500 1993, *supra* note 10, at art. 42(b).

166. See UCP 500 1993, *supra* note 10, at art. 43(a).

167. See International Standard Banking Practice (ISBP), *supra* note 75, at art. 54.

168. PONTIROLI, *supra* note 4, at 136.

an Italian bank, the Cassa Rurale ed Artigiana di Monteriggioni (CRAM) to issue an irrevocable credit in favor of a German car exporter, Auto-Export of Pier Luigi Paponi, in order to finance the purchase of a shipment of cars for a total amount of Germany Deutsche Mark¹⁶⁹ (DEM) 348,218.¹⁷⁰ The transaction was not successful; the cars were never delivered to the buyer, although the car exporter did in fact receive the money for the unsuccessful transaction. The importing company complained of a series of discrepancies in the documents which, in its opinion, had not been taken into account by the banks:¹⁷¹ (a) the commercial invoices tendered by Mr. Paponi had been issued to Auto Toscana (without any further specification), and not to Auto Toscana srl, which was the correct business name of the importer; (b) the T2 documents were irregular, because: (i) the client was named Auto Toscana and not Toscana Auto s.r.l.; (ii) the destination address was Arezzo, and not Monte San Savino; (iii) the origin of shipment was Krefeld and not Düsseldorf; (iv) the chassis number of one car was 7580 instead of 7380; and (v) there was no indication of the date of presentation of the documentary credit.

According to Toscana Auto, these discrepancies were material, and the banks should not have ignored them. Instead, CRAM charged the amounts of the transactions to Toscana Auto without claiming the discrepancies. The importer twice asked CRAM to credit the sums back to its account, but the bank did not proceed accordingly. Finally, Toscana Auto argued that under the UCP, the payment should not occur before the bank ascertains that the documents are in conformity with the conditions set out in the credit. Here, the banks should have examined the documents with reasonable care and CRAM should have contested the regularity of the payment because of the discrepancies.¹⁷² Additionally, Toscana Auto claimed that the banks acted negligently and sought to recover from both banks (CRAM and Istituto di Credito delle Casse Rurali ed Artigiane or ICCREA) the sums that had been debited from its account plus interest and monetary depreciation.¹⁷³

Both the lower and the appellate courts (Tribunale di Siena and Corte di Appello di Firenze, respectively) ruled that the discrepancies were irrelevant. The Tribunale di Siena rejected Toscana Auto's claim and ordered it to pay the procedural expenses incurred for both CRAM and ICCREA. ICCREA was also ordered to pay procedural expenses on behalf of Deutsche Bank. The lower court's rationale was that the bank should examine the documents with reasonable

169. As with Italian Lire, the introduction of the Euro (EUR) in 2002 made the German Deutsche Mark obsolete and no longer legal tender. See note 56. However, the exchange rate with U.S. Dollar is 1 USD = 1,66 DEM. See www.xe.com.

170. Cass., 8 agosto 1997, in *Banca, borsa e titoli di credito*, 1998, II, 237.

171. Upon request of opening the credit, CRAM asked ICCREA (Istituto di Credito delle Casse Rurali ed Artigiane) to open c/o a German bank (Deutsche Bank in Düsseldorf) the irrevocable credit.

172. Cass., 8 agosto 1997, in *Banca, borsa e titoli di credito*, at 238.

173. *Id.*

care in order to ascertain their conformity to the conditions of the credit, and that the checking should be limited to the exteriority of the documents. It reasoned that the court of Cassazione had adopted the criterion of reasonableness; therefore the examination of the documents should occur through an intelligent and non-automatic examination of the formal correspondence between titles and documents.¹⁷⁴

As for the discrepancies claimed, the lower court concluded that:¹⁷⁵ (a) the error in the buyer's name was not relevant since it was not essential to the exact identification by third parties; (b) the nature and quantity of the goods, and the price of the goods were correctly indicated; (c) the error in the chassis number was a mere typo, and what's more, because the information appeared only on a bill of lading rather than the invoice or the credit itself, an exact description of the goods was not required; (d) the missing date of presentation of the documentary credit was irrelevant since it was not required by the conditions of the credit; and (e) the indications of the places in document T2 referred to the places of customs clearance and not to the places of departure or arrival of the goods. Toscana Auto appealed the decision to the court of Appeals but the appellate court confirmed the Tribunale di Siena's holding.

The case was then brought before the court of Cassazione. Auto Toscana claimed that the appellate court had not respected the principle of formalism as it was required to do; i.e., the appellate court had not demanded strict correspondence between the documents mentioned in the credit and the documents actually presented by the seller/beneficiary to the bank for the payment.¹⁷⁶

In confirming the lower courts' opinions, the court of Cassazione referenced a previous decision that described the standard banks were required to adhere to in the examination of documents. In that decision, the court rejected a rigid application of the so-called "formalism" of the documentary credit; it stated that the checking process must be intelligent, not automatic, and shall be performed within the boundaries of everyday knowledge according to the dictates of common experience and practice.¹⁷⁷ Moreover, when article 7 of UCP rev. 1974¹⁷⁸ refers to "reasonable care," this means that the bank's examination should not be limited to a literal examination of the documents, but rather must be guided by the principle of reasonableness, and must take into account particular circumstances of the case at hand.¹⁷⁹

174. *Id.* at 239.

175. *Id.*

176. *Id.* at 240.

177. *Id.* at 243 ss (citing a decision from 1953: Cass., 17 ottobre 1953, in *Banca, Borsa e Titoli di Credito*, II, 1954, 139 ss).

178. Now UCP 500 1993, art. 13.

179. Cass., 8 agosto 1997, in *Banca, Borsa e Titoli di Credito*, at 243 ss.

The court of Cassazione affirmed the decisions issued by the lower courts, stating that the discrepancies were irrelevant. The claimant was ordered to make payment according to the original terms of the transaction and to pay procedural expenses.¹⁸⁰

The lower and appellate courts gave a number of reasons for rejecting Toscana Auto's claim. As for discrepancy (a), wrong indication of the name of the buyer "Auto Toscana" instead of "Toscana Auto srl," article 37 of UCP 500 requires that, unless otherwise stipulated in the credit, commercial invoices must appear on their face to be issued by the beneficiary named in the credit and must be made out in the name of the applicant.¹⁸¹ This article does not specify anything about the meaning of "name of applicant." More help is offered by ISBP, which recalls the UCP provision and explains that an invoice must be made out in the name of the applicant. Telex or fax numbers, etc., forming part of the address, need not be present, or, if stated, need not be identical to that in the credit.¹⁸² Although telex or fax numbers can be different from those stated in the credit, it still is not clear whether the "name of applicant" can also be different, yet still be acceptable. Italian judges considered the discrepancy irrelevant in this case because the address and all other data were correct and there was no doubt about the identification of the applicant.¹⁸³

The judges considered the difference in chassis number between the bill of lading and the invoice immaterial, first because it was clearly a typo, and second because the bill of lading is not required to be as detailed and exact as the invoice or the credit. Article 37(c) of UCP 500 states that the description of goods in the commercial invoice must correspond with the description in the credit, but in all other documents (and we assume that the bills of lading are included), goods may be described in general terms so long as they are not inconsistent with the description in the credit. Italian judges interpreted the error in the chassis number as part of a general description not inconsistent with the credit, and therefore acceptable under the UCP.

The ISBP requires the same standard of compliance as the UCP:¹⁸⁴ identical description of the goods in the invoice and in the credit, though this does not mean "mirror image." Interestingly enough, under ISBP article 24, though documents presented under a credit must not appear inconsistent with each other, identical data content is not required.¹⁸⁵ At the same time, ISBP article 28 allows misspelling or typing errors so long as they do not affect the meaning of a word or sentence. For example, although the use of "mashine" rather than "machine" would be acceptable, the ISBP points out that "model 123" instead of "model

180. *Id.* at 244.

181. *See* UCP 500 1993, *supra* note 10, at art. 37(a)(i)-(ii).

182. *See* International Standard Banking Practice (ISBP), *supra* note 75, at art. 61.

183. Cass., 8 agosto 1997, in *Banca, Borsa e Titoli di Credito*, at 238 ss.

184. *See* International Standard Banking Practice (ISBP), *supra* note 75, at arts. 62-63.

185. *See id.* at art. 24.

321” is a substantial enough difference that even if it were simply a typo it would constitute a discrepancy significant enough to justify rejection of the documents. Italian judges were right in asserting that only the invoice requires a detailed description of the goods, and other documents do not need to contain such detailed descriptions. However, can an error in chassis number be compared to a lack of detailed description? Or should it be considered a simple typo? Because, in this case, the approach would be different.

Finally, in spite of the discrepancies concerning incorrect or missing information in some of the documents, the Italian judges ruled that these documents should nevertheless be accepted under article 33 UCP, rev. 1974. UCP 500 under article 37 requires only that the invoice and credit correspond in their description of goods; in all other documents goods may be described as laid out above, that is, in general terms not inconsistent with the description in the credit. This is confirmed by ISBP articles 62 and 63.

VII. CONCLUSION

In general, it can be said that all the decisions analyzed in this article follow the same rationale, that is, they seem to adhere more to the “substantial compliance” doctrine in the document checking, rather than to the “strict compliance” approach as outlined in the *Equitable Trust* decision. In particular, the substantial compliance approach has been very well stated by the decision of the Court of Cassazione in 1953,¹⁸⁶ and that same logic has been applied in many other decisions that subsequently have been handed down. Therefore, the trend established by the Italian courts is in compliance with the current banking practice as reflected in the UCP and the ISBP.



186. *See supra* pages 10-12 and accompanying footnotes.