

# Commentary on eUCP VERSION 2.0 eURC VERSION 1.0

Article-by-Article Analysis  
By David Meynell

UCP  
**600**

URC  
**522**

*Dedicated to*

*Bernard S. Wheble, Professor James E. Byrne, and Dan Taylor*

*Pioneers in the field of electronic documentary credits*

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**As an invaluable reference source, the ‘ICC Guide to the eUCP’ (ICC Publication No. 639) and the work of the authors, Professor James E. Byrne and Dan Taylor, is gratefully acknowledged.**

**The opportunity has been taken to update and revise the previous content in order to bring it in line with the latest drafting work.**

**E&OE**

## EXTRACTS FROM 2002 INTRODUCTION TO THE 'ICC GUIDE TO THE eUCP' (ICC PUBLICATION NO. 639)

Starting in the 1980s, the late Bernard Spencer Wheble, Chairman Emeritus of the Commission on Banking Technique and Practice of the International Chamber of Commerce, to whom this book is dedicated, often prophesied the coming of the “paperless credit”. He predicted that many traditional documents would cease to exist. He also noted problems related to the determination of the time and place of presentation and issues of “originality” that needed to be addressed. Mr Wheble believed that the future of the letter of credit industry was bound up with the “paperless credit”, indicated that the time for this process was literally “just around the corner”, and set in motion many of the thought processes that have emerged in the eUCP. His essays spell out these ideas, see e.g. Bernard S. Wheble, *Documentary Credits and UCP 500; Bankers' Letter of Credit Transactions: The Work of the International Chamber of Commerce*; and *Delivery and Payment, collected in the 20th Century Survey of Letter of Credit Law and Practice* (Institute of International Banking Law & Practice 2002). Unfortunately, Mr Wheble did not live to see his vision realized. However, those who knew him well believe that he would have been proud of the eUCP.

With the availability of the eUCP on 1 April 2002, the evolution of the commercial letter of credit into a fully electronic payment system has begun. While systems and processes need to be developed and refined to take full advantage of the presentation of electronic records under letters of credit, it is only a matter of time until the vast majority of presentations will be made electronically.

### IMPACT ON TRADE PAYMENT SYSTEMS AND FINANCE

Trade payment systems and finance have gone through many stages during the past hundred years. Letters of credit have been issued electronically since the advent of telegrams and cables. However, the most accelerated changes have taken place during the past 25 years with the advent of SWIFT, the computerization of letter of credit processing systems, and customer initiation of L/C issuance. Although traders have sought to increase the speed of their transactions over the years, little could be done until the presentation process was electrified. The implementation of eUCP is only the first step in this process. Electronic presentations are in the infancy stage of what is sure to become a totally electronic process. To fully appreciate many of the concepts of the eUCP, it is necessary to begin by visualizing its inevitable end, and work backwards from there. Its inevitable end is automated compliance checking allowing the letter of credit process to be “straight through processed”.

Formal steps to create the eUCP began in May 2000 when the ICC Banking Commission authorized the creation of a Working Group to formulate rules for the evolution from paper-based credits to electronic credits. The Working Group was comprised of knowledgeable letter of credit practitioners, attorneys, and representatives of the transport industry.

Working Group meetings began in July 2000 in London and were followed by meetings in Orlando, Istanbul, Toronto and Paris in addition to numerous conference calls. Over this period, the Working Group produced three drafts for comment and received more than 200 sets of suggestions.

The eUCP was approved in November 2001 at the ICC Banking Commission meeting in Frankfurt, Germany and became effective at 24:00 hours Greenwich Mean Time on 31 March 2002.

Since the practice in this area is rapidly developing, it was a difficult task for the Working Group to create functional rules that articulate these practices. After a thoughtful review, the Working Group initially determined that its principal task was to focus on the electronic presentation of documents under the UCP and not issuance. This decision was based on the fact that letters of credit had for many years been issued electronically and the conclusion was that there was little that could be done from the perspective of issuance to move further into the electronic world. Indeed, there was concern that further rules might encumber present practices of electronic issuance.

Secondly, the Working Group decided that the final product had to be technology neutral. It was concluded that the rules themselves should not be based on present processes that were tied to specific technologies. By avoiding technology-specific terminology or solutions, future practices could emerge in many different forms using new technologies within the framework of the rules. Nonetheless, future changes in technology will impact the eUCP, making inevitable revision of its rules to accommodate maturing practices and new technologies.

In drafting the eUCP, the Working Group debated the merits of creating rules that would apply when electronic records alone were presented. It concluded that rules for solely electronic presentations were premature. In order to accommodate current practice and technology and the continuing evolution toward total electronic presentation, the eUCP introduces the concept of a mixed presentation. Under the eUCP, presentations can be either all electronic records or a mixture of some paper documents and some electronic records. In order to accommodate the presentation of paper documents and electronic records, it was necessary to create some rules that add additional requirements for paper documents presented under an eUCP credit beyond the requirements that one would normally find under a paper-based UCP credit. These additional requirements are highlighted in the text of this commentary.

The relationship of these rules to the UCP also had to be considered. At an early stage, it was decided that the eUCP would be a supplement to UCP 500 and, as such, not operate as a stand-alone set of rules. Should UCP 500 be revised, it will be necessary to consider whether to incorporate the option of electronic presentation into the UCP or continue to have separate rules to accommodate these practices.

## **PRINCIPLES**

To some in the L/C community, the eUCP may appear to be untested theory, having yet to face the trial of real practice. In fact, however, the concepts behind these rules are grounded in principles of L/C practice, the limited existing practice surrounding present electronic presentations, and widely accepted principles of eCommerce. As a result, the rules of the eUCP are not untried theory but reflect letter of credit practice. The principles on which the eUCP has been based are the underlying principles in the UCP and standard practice currently existing for eCommerce transactions. Its roots are in the principles of standard banking practice grounded in the history and evolution of the UCP. In interpreting the eUCP, it is important that it be read in conjunction with UCP 500 and in light of standard international letter of credit practice contained both within the UCP and the eUCP. The eUCP reflects the evolving practices of banks in this field, with its roots in practices that developed from the use of telefax, telex and SWIFT. The eUCP draws on the principles of electronic issuance and analogizes from practice in the paper world in equivalent situations for electronic presentations.

As would be expected, most of these principles are reflected in the definitions contained in eUCP Article e3. The definitions provide a necessary tool for understanding and using the Articles of the eUCP and are a useful starting point for its concepts. The eUCP, however, is more than a new set of definitions to be read in conjunction with the UCP. It contains substantive rules that change underlying concepts of UCP 500. These new provisions will also change the processes and procedures that banks have been accustomed to using under the UCP.

In addition to its use with the traditional commercial credit, the eUCP can be used with standby credits subject to UCP 500 as provided in UCP 500 Article 1 (Application of UCP) which states in part that its rules "...shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit )...." It should be noted, however, that the rules drafted especially for standbys, the International Standby Practices (ISP98), already contain both normal rules and optional definitions for electronic presentations.

## **INDEPENDENCE PRINCIPLE**

The integrity of the letter of credit is grounded in the independence of the credit from the underlying transaction and its corollary that banks deal only in documents and not in goods or services. Many of the changes related to the presentation of electronic records may appear to impinge on these principles. An instance is the use by the examining bank of a hyperlink to get to an electronic record that is not directly presented to the bank, but must be examined for compliance with the credit. Another instance would be examining data contained in messages, or message envelopes regarding the transmission path, or authentication or dates for sending and receipt. While at first glance these examples may appear to impact the independence of the transaction, the examination is only of this data and not the realities that they represent and does not impact the independence of the credit. Specific examples and discussion of these issues are discussed in the treatment of individual Articles of the eUCP.

## **RISKS AND FRAUD**

Although the eUCP is based on the time-tested principles of the UCP and letter of credit practice, the presentation of electronic records raises new considerations for the safety and soundness of letter of credit practice. Whenever new processes are introduced into an operations environment, however, it is necessary to look closely at the new risks created. Banks will need to undertake a thorough analysis of the changes in operational risk related to the presentation of electronic records and create new procedures and risk guidelines for these practices.

Letter of credit practitioners have long been concerned with fraudulent transactions and presentations under credits. Fraud in the documents has been a concern but not an overwhelming problem for the industry. With the additional requirements for authentication of electronic records and today's technology related to digital signatures and message authentication, these issues should diminish. It would be far more difficult to have fraud in specific electronic records presented under an eUCP credit than in today's paper world, provided that adequate authentication practices are used. That is not to say that fraud can be eliminated from credit transactions simply by the use of electronic presentation, but only that the possibilities for fraud become more limited.

## **THE eUCP AND LETTER OF CREDIT LAW**

On the whole, letter of credit law is more capable of adaptation to electronic presentation of documents than is commercial law in general. For more than a century, the electronic issuance of letters of credit and amendments has been accepted without remark. Such undertakings have been given the same effect as if they were in a paper format and the authentication accepted as would be a signature.

Although there is no known case law on the electronic issuance of L/Cs, such issuance was contemplated in the only modern statutory codification of letter of credit law, the first version of Article 5 (Letters of Credit) of the US Uniform Commercial Code, issued in 1952. Section 5-106(2) (a) provided that "[a] telegram may be a sufficient signed writing if it identifies its sender by an authorized authentication which may be in code." UCC § 5-106(2)(a) (1952 Official Version).

Article 6(g) of the United Nations Convention on Independent Guarantees and Standby Letters of Credit, a more recent and international exercise, expressly encompasses electronic presentation of documents as well as electronic issuance. It defines "document" to include "a communication made in a form that provides a complete record thereof".

In addition, it must be noted that electronic presentation of documents is not new, particularly with respect to standbys. It is not uncommon for standbys to specify that the required documents may be sent by telefax, email, or SWIFT. Indeed, Rule 4.06 of the International Standby Practices (ISP98) allows electronic presentation unless expressly prohibited by the standby where the beneficiary is a financial institution. Only a demand is required, and the presentation is made through a closed secure communications network such as SWIFT. There have been no reported cases that raise any issues regarding the acceptability of such presentations.

Electronic presentation would certainly be encompassed by rules recently implemented in the US to facilitate electronic banking, such as 12 C.F.R § 7.1016, which permits a national bank to do anything electronically it could do in a paper mode. It is probable that most other bank regulators would take a similar position.

Despite this promethean attitude, it remains possible for judicial decisions to complicate electronification of letters of credit. For example, one of the more troubling aspects of the disappointing decision in *Banco Santander SA v. Banque Paribas*, [2000] 1 All ER (Comm) 766 [England], reprinted at *2001 Annual Survey of Letter of Credit Law & Practice*, 194, was its effective conclusion that a deferred payment undertaking was not the equivalent of a bankers' acceptance in providing a nominated bank that acted in good faith with immunity to a defence against beneficiary fraud. Such a decision will increase significantly the risk of engaging in trade finance for electronic L/Cs.

Nonetheless and with the exception of such aberrations, letter of credit law in general has deferred to the intent of the parties and to internationally accepted practices and the rules reflecting them. It has also given wide latitude to the intent of the parties and allowed them to define the scope of the conditions on which their undertakings are conditioned. As a result, a credit requiring or permitting electronic presentation of documents is likely to be given effect. Although the eUCP is new, it is based on internationally accepted principles and practices of letters of credit and electronic commerce. It may be expected that it will be accorded equal deference in situations where the undertaking is issued subject to it.

## **GENERAL COMMERCIAL LAW**

While letter of credit law is likely to be generally hospitable to electronic presentations, there has been widespread concern that commercial law in general may be less conducive to electronic agreements. As a result, there has been reform and enactment of statutory provisions embracing electronic commerce. Many of these provisions provide an overlay on general commercial law, addressing legal requirements that there be a "writing" or a "signature" or equivalent terms or concepts.

While these developments are, on the whole, not restrictive, they can cause confusion where, as is almost always the case, they contain statutory definitions of terms related to eCommerce. In drafting the eUCP, every effort was used to adopt terminology and definitions that were not innovative but that followed the concepts developed in eCommerce jurisprudence. However, in some cases, differences have emerged either because there is no consistency in usage between statutes or because letter of credit practice introduced issues not otherwise addressed in eCommerce law.

Many of these definitions used in eCommerce statutes are intended to override implied or express restrictions in other laws. As a result, the same term (e.g. "electronic record") may be defined in both the eUCP and local law and the definitions may differ. Such a situation does not signify a conflict between the two provisions because they only relate to each respective meaning of the term in its text, but does require that any interpretation keep the two meanings in perspective.

A more serious difficulty arises where the law imposes affirmative requirements that are greater than those that would otherwise be required by the eUCP or the terms and conditions of the credit. In such a situation, the bank may face the wrath of the beneficiary if it rejects based on a legal requirement contrary to the terms of the credit, and from the applicant if it seeks reimbursement based on a document that may be unenforceable under local law. In such a situation, the provision of UCP 500 sub-Article 18(d) (Disclaimer for Acts of Instructed Party), shifting the risk of compliance with laws other than those of the issuer, may be of some help but would not help in situations where the problems were created by the issuer's own law. Such a possibility should be addressed in the reimbursement agreement or the bank's general terms and conditions.

On the whole, there is no conflict between most eCommerce laws and the eUCP. The United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Electronic Commerce*, which is the most influential statute, would not create any problems with respect to the eUCP. GAOR, 51st Sess., U.N. Res. 51/162 UNCITRAL (1996). A number of statutes have been based on it. See Canada, *Uniform Electronic Commerce Act* (1999); Columbia, *Electronic Commerce Law 527*; India, *Electronic Commerce Act of 1998*; Singapore, *Electronic Transactions Act of 1998*; US, *Uniform Electronic Transactions Act* (1999). A comprehensive list of countries following the Model Law is contained on the UNCITRAL website at <http://www.uncitral.org/english/status-e.htm>; See also Baker & McKenzie, *E-Transaction Law Resources Legislation, Regulations and Policy – By Country* (Visited July 29 2002) <<http://www.bmck.com/e-commerce/intlegis-t.htm>>. The only difficulty that has surfaced to date would relate to requirements for a greater degree of security with regard to signatures than is imposed by the eUCP or the credit. It is possible that some interpretations of the European Union Directive on a Community framework for electronic signatures (EU Directive 1999/93/EC December 1999) could result in the imposition of such a requirement, and any applicable statute enacted to give effect to this directive should be carefully scrutinized.

## PREPARATIONS FOR USE OF THE eUCP

Listed below are some broad general categories of issues that should be considered in utilizing the eUCP. This list is not comprehensive and other matters may require attention.

### APPLICANT

As an applicant for an eUCP credit, there are a number of issues that must be considered. First, the determination to use a credit allowing presentation of electronic records must be made jointly with the beneficiary of the credit. The applicant must be sure that the beneficiary can present these electronic records in the format required and that this format is acceptable to the banks. The applicant must also be able to fulfil any requirements for authentication of electronic records or digital signatures and determine if its bank is prepared to issue a credit subject to eUCP and in formats that are mutually compatible. The applicant should review any changes relating to eUCP credits in the reimbursement agreement with the issuing bank. It is essential to ascertain that the electronic records required are sufficient to clear any merchandise and acceptable to the customs authorities.

### ISSUING BANKS

From the perspective of the issuing bank there are a number of aspects that need consideration when preparing to issue eUCP credits and process presentations of electronic records.

### SALES AND CUSTOMER RELATIONS

The issuer may wish to consider a specific strategy for approaching its customers as to their interest and preparedness for eUCP credits. If customers are prepared, the bank must insure that it has proper reimbursement agreements in place that cover such topics as formats for electronic records, authentication and digital signatures in addition to those areas addressed by the normal reimbursement agreements for paper-based credits.

### LEGAL

Legal counsel must be actively involved in the transition to electronic presentations under eUCP credits. Counsel should review the customer reimbursement agreements to ensure that areas such as formats for electronic records, authentication and digital signature requirements are met. They should be well versed in any local eCommerce law that would impact issuance of an eUCP credit.

### TECHNOLOGY

A large part of the transition to acceptance of eUCP credits will be the involvement of the technology area of the bank. It must provide the systems capability to deal with all aspects of eUCP credits. It must ensure that internal systems can process the formats required, authenticate



messages and electronic signatures. A complete analysis of system needs must be conducted, as well as a complete project plan for implementation of system changes to accommodate electronic presentations.

## **OPERATIONS**

Once the legal and systems work has been completed, all staff that will issue or process presentations under eUCP credits must be properly trained in the eUCP as well as system changes related to the processing of electronic records.

## **RISK MANAGEMENT**

A complete review of risk management policies should be completed to account for changes in processing practices for eUCP credits as well as any additional risks deemed relevant to transaction processing.

## **NOMINATED BANKS**

Depending on its role in an eUCP credit, a nominated bank (advisor, confirmer, other nominated bank) should ensure it is prepared to act in the nominated capacity under an eUCP credit. In particular, it is important to review the credit to ensure that the specified format and any authentication or digital signature requirements are feasible.

## **BENEFICIARIES**

Before agreeing to accept a credit subject to the eUCP, the beneficiary should agree with the applicant in the underlying credit regarding the electronic records to be submitted and the format for these records. They should be ones that the beneficiary can produce in the requisite format. The beneficiary should also ensure that the issuing bank can accept the electronic records in the specified format. The beneficiary should assure itself that any requirements for authentication of electronic records or digital signatures can be fulfilled. If it is not able to comply with any requirement for presentation of electronic records, the beneficiary should immediately take steps to have a credit amended.

# **WORKING GROUP ON THE UCP SUPPLEMENT FOR ELECTRONIC PRESENTATION (eUCP)**

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28 June 2002

# INTRODUCTION TO 2019 PUBLICATION

## BACKGROUND

On 6th June 2017, the ICC Banking Commission provided a press release announcing the launch of a Working Group to anticipate and accompany the digitalisation of trade finance. One core activity was to evaluate existing ICC rules in order to assess e-compatibility and ensure they are 'e-compliant', i.e. enabling banks to accept data vs. documents. It was identified that this was required in order to accommodate evolving practices and technologies.

A drafting Group was established, co-chaired by David Meynell and Gary Collyer, with the initial aim of reviewing the e-compatibility of existing ICC rules. The names of the members of the Drafting Group are provided in Appendix 5.

## GAP ANALYSIS

The gap analysis of existing ICC rules revealed the below:

UCP 600: no requirement to update for e-compatibility—the eUCP applies for electronic records.	ISBP 745: no standard practice and, therefore, no demand for a similar publication relating to eUCP. As practice evolves, this will, inevitably, lead to drafting of such a publication.
ISP98: e-compatible—documents and data acceptable. ISP98 provides basic definitions should a standby credit permit or require presentation of documents by electronic means.	URR 725: e-compatible (authenticated transmissions)—where applicable, both documents and data acceptable.
URDG78: e-compatible (refers to paper and electronic)—where applicable, both documents and data acceptable.	
URF 800: e-compatible—where applicable, both documents and data acceptable.	eUCP 1.1: e-compatible, however an update of the existing content required in order to ensure compatibility with digital data and to ensure in line with current/evolving market practice.
URBPO 750: e-compatible—but only in bank-to-bank space. New sub-stream established under e-compatibility stream to address next steps.	URC 522: not e-compatible, paper-based only—only documents acceptable, not data. New e-rules to be produced.

This analysis further identified a number of initial areas that required increased focus, including:

- Means of presentation with regard to the scope of eUCP
- Definition of the term 'corruption' when applied to an electronic record
- Definition of a 'data processing system'
- Clarification of the process of 're-presentation'
- Highlight that banks do not deal with the underlying goods or services
- Period of time for examination
- Disclaimers
- Absence of a 'Force Majeure' article

Subsequently, pursuant to initial comments from members of the drafting group, it became apparent that a number of 'knowledge gaps' existed in respect of existing eUCP wording. These included:

- Minimum standards
- Authentication of Electronic Records
- Notice of Completeness
- Electronic Address
- Period for notice of refusal
- Originality

**As a result of this review, a mandate was received from the ICC Banking Commission Executive Committee to:**

Update the existing 1.1 of eUCP in order to ensure continued digital compatibility. Goal of this update will be version 2.0.

Draft eURC in order to ensure continued digital compatibility for presentation of electronic records under Collections.

The eRules have been intentionally developed with version numbers in order that they can be updated regularly without impacting upon other existing ICC rules, thereby reducing the time required to develop any potential identified revision.

#### **DRAFTING**

The initial drafts of eUCP version 2.0 and eURC version 1.0 were sent to ICC National Committees (NC's) on 25th September 2017, with a deadline of 27th November 2017 for response. At the request of a number of ICC NC's, based upon a communications issue, it was decided to extend the deadline to 28th February 2018.

Pursuant to feedback on the original drafts, work commenced on a 2nd draft, which was subsequently distributed to ICC NC's on 20th March 2018, with a deadline of 25th May 2018 for response. A 3rd draft of the rules was sent out on 20th July 2018, providing a deadline of 28th September 2018 for response. The 4th of the rules was disseminated on 6th November 2018, indicating a deadline of 4th January 2019 for feedback.

At that stage, and following a thorough review of all comments received to date, it was considered to be an appropriate time to draft a final version of the rules. These were consequently sent to ICC NC's on 31st January 2019, specifying that the deadline for voting would be 22nd March 2019. It is worth commenting that this timeframe was only 16 months after distribution of the original drafts and included an enforced 3-month extension, as mentioned above.

During the course of the first four drafts, almost 2,000 comments were received from ICC NC's. For the purposes of transparency and clarity, every comment received an individual response. As a valuable reference source, the 'ICC Guide to the eUCP' (ICC Publication No. 639) and the work of the authors, Professor James E. Byrne and Dan Taylor, has been gratefully acknowledged.

## APPROVAL

For the first time in the history of the ICC Banking Commission, a new approach was introduced for the ICC rules voting process, via the Simply Voting platform. This initiative provided an online voting system to be used for the approval of the revised eUCP and new eURC rules.

Each NC was requested to choose one designated representative with the right to cast the vote on its behalf and the platform was opened for voting from 11th until 22nd March 2019. NC's were invited to vote on the revised eUCP and new eURC separately by choosing 'YES' or 'NO' to the following options:

- Does your National Committee approve the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentation (eUCP) Version 2.0?
- Does your National Committee approve the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (eURC) Version 1.0?

Voting result:

- Votes received from 49 NC's, plus one further NC vote after the voting deadline had passed.
- The eUCP received 100% approval with two countries abstaining.
- The eURC received 97.5% approval (on a weighted basis) with one county voting 'no' and two countries abstaining.
- Based upon the above, both sets of rules will come into force from 1st July 2019.

## DISCUSSION POINTS

A number of issues received specific attention during the course of the drafting, and a few of those of particular interest are outlined below.

### PRELIMINARY CONSIDERATIONS

The precedent for including 'Preliminary Considerations' was established in ISBP, and with the preamble to DOCDEX. The preliminary considerations are listed on a separate page to the rules in order to provide a distinction between the two.

### DEFINITIONS

The original aim was to align definitions with those used in local law. However, many legal definitions differ among themselves in formulation if not meaning. As a result, the definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, which is the most widely imitated in eCommerce legislation. The UNCITRAL Model Law on Electronic Transferrable Records were also used as a reference point.

### UNIVERSAL TIME COORDINATED (UTC)

During the course of the drafting, it was considered whether or not the eUCP should incorporate the concept of UTC, as referred to in the URBPO, in order to define the latest time that electronic records could be presented to a bank. However, there was no definitive majority response. As stated in the 'ICC Guide to the eUCP' (version 1.0), an issuer would be well advised to state the time for the close of business in an eUCP credit. In view of the fact that practice is still evolving in this field, it was recommended that the UTC concept would not, at this stage, be included within the eUCP rules. Should it be deemed necessary, the concept could be included in a future version of eUCP.

### ELECTRONIC RECORDS AND PAPER DOCUMENTS V. GOODS, SERVICES OR PERFORMANCE

This article was not included in previous versions of the eUCP and has been structured to align with the construction of UCP 600 article 5. UCP 600 article 5 does not address electronic records. The addition of "electronic records" in the eUCP is a key difference. Whilst it is acknowledged that the definition of "documents" includes "electronic records", it is considered

that this article provides clarity and transparency.

### **DATA PROCESSING SYSTEMS**

The rules do not provide guidelines on required data processing systems and focus principally on the electronic presentation of documents. As with all ICC rules, they cannot mandate which platforms/systems are acceptable—the rules must remain neutral in this respect. Any bank that engages in an eUCP or eURC transaction is responsible for maintaining a data processing system. This responsibility is a fundamental precondition for using the eUCP and the eURC. The term refers to any automated means (be it computerised, electronic, or any other) that is utilised for the processing and manipulation of data, for initiating an action, or for responding to data messages or performances either partially or in full.

### **FORMAT**

This article requires that the eUCP credit or eURC collection instruction state the format of a required or permitted electronic record. Should this not be the case, the relevant banks take on any resultant risk. In view of the fact that data processing systems are unlikely to be able to access all formats, it is essential that any data received is readable by the relevant data processing system(s). As a result, if a credit or collection instruction fails to specify the required format, then the electronic records can be presented in any format. The direct consequence of this situation would be that banks would be in a position to disallow a presentation on the basis that they are unable to read the format of the electronic records.

### **ELECTRONIC ADDRESS**

Although the eUCP and the eURC do not define or explain the meaning of 'electronic address', the term signifies the precise electronic location or a proprietary system to which an electronic record can be sent. It would include a URL, an email address, or an address on a dedicated system. It was decided that there was no need to provide a definition, as any relevant requirements would be within the terms of the credit or collection instruction.

### **AUTHENTICATION**

In the digital world, there is a greater deal of focus on the authentication of data.

Although used extensively throughout eUCP and eURC, it is deliberate that 'authentication' is not defined. The basis for this approach is the conviction that any purported definition would either unnecessarily duplicate the definition of 'electronic record' or, even worse, provide a specific link to existing technology. As referenced in the 'ICC Guide to the eUCP' (version 1.0), authentication is that process of screening incoming data as to identity, source, and error that is preliminary to it being deemed to have been presented.

### **NOTICE OF COMPLETENESS**

A presentation under the eUCP cannot be considered as having taken place until the presenter provides a notice of completeness to the nominated bank, confirming bank, if any, or to the issuing bank, where a presentation is made directly. Such notice can be provided by electronic record or paper document. It is important that the notice of completeness identifies the credit to which it relates. Whilst the notice of completeness is a pre-requisite for a presenter, it is not required when a nominated bank delivers electronic records to a confirming or issuing bank.

### **AMENDMENTS**

With respect to the treatment of documentary credit amendments in the digital world, evolving practice will decide the most valid approach. At this stage, the handing of amendments is defaulted to UCP 600. The position in UCP 600 is that amendments must be accepted or rejected.

### **ORIGINALITY**

When applied to electronic records, the concept of originality is basically out-dated and has no real meaning. Many documentary credits, for a myriad of (not always necessary) reasons, require

presentation of more than one copy of a document. Under an eUCP credit, such requirements are fulfilled by presentation of one required electronic record.

### **A SINGLE ISBP FOR UCP AND eUCP**

In the long run, this would be much preferable, and such a publication would provide immense guidance to practitioners. However, at this stage, there is no standard practice. As practice evolves, this will, inevitably, lead to drafting of such a publication.

## **BENEFITS**

It was recognised in the introduction to the initial ICC Guide to the eUCP (ICC Publication no. 639) that the likely end of the evolution to electronic presentations is automated compliance checking systems in the documentary credit field. This is all too apparent when looking at evolving technology and digital trade finance, with the advent of the Internet of Things, Distributed Ledger Technology, Smart Contracts, Artificial Intelligence, and Machine Learning.

As mentioned above, in June 2017, the ICC Banking Commission launched the “*Digitalisation in Trade Finance Working Group*”. The aim of the Group is to identify strategies to overcome the constraints of digitalising trade finance—such as a reliance on paper-based practices, a lack of recognition of the legal status of electronic documents, uncertainty over standards, and a general lack of clear legal and regulatory frameworks.

The Working Group will be the coordinating body on all work by the ICC Banking Commission related to digitalisation of Trade Finance with a mandate to identify ways to overcome the abovementioned obstacles. Main objectives include:

- Evaluate existing ICC rules in order to ensure they are ‘e-compliant’;
- Develop a set of minimum standards for the digital connectivity of service providers;
- Examine the legal and practical issues related to the validity and value of data and documents in digitised form.

The content of the eRules will be continually monitored in order to ensure applicability. The support of trade practitioners will be an essential element moving forward. These rules provide many benefits in advancing documentary credits and collections in a digital environment and ensuring the continued relevance of these valuable instruments in mitigating trade risk.

**Existing ICC rules, such as UCP 600 and URC 522, whilst being invaluable in a paper world, provide limited protection when applied to electronic transactions. It is inevitable that traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone.**

In this respect, it is important the market recognise that the new rules provide many benefits in advancing traditional trade solutions in a digital environment:

- Safeguarding applicability and guaranteeing relevance in a constantly evolving digital trade world
- Extending the mitigation of risk from a paper environment to the electronic milieu
- Explicitly and unambiguously supporting the usage of electronic records
- Conformity and congruence as opposed to divergent local, national and regional practice
- Shared understanding of terminologies and objectives
- Confidence in a set of independent and trusted contractual rules
- Uniformity, consistency and standardisation in customs and practice
- Enabling and supporting trade finance between regions and countries regardless of underlying economic and judicial structures

## CONCLUSION

Development of the eRules would have been impossible without the ongoing support of the ICC Banking Commission Secretariat and individual ICC National Committees. Thank you to all involved, with specific acknowledgement to David Bischof, Olivier Paul, and Laura Straube.

Particular thanks are given to the eRules Drafting Group, details of which are provided in Appendix 5.

I also extend my gratitude to my co-chair, Gary Collyer. Without his input, this work would not have proved possible.

Last, but far from least, a reminder that this publication would not be in existence were it not for the groundbreaking initial efforts of Jim Byrne and Dan Taylor.

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June 2019



**Part 1**  
**eUCP VERSION 2.0**  
article-by-article

## PRELIMINARY CONSIDERATIONS

*The mode of presentation to the nominated bank, confirming bank, if any, or the issuing bank, by or on behalf of the beneficiary, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.*

*The mode of presentation to the applicant, by the issuing bank, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.*

*Where not defined or amended in the eUCP, definitions given in UCP 600 will continue to apply.*

*Before agreeing to issue, advise, confirm, amend or transfer an eUCP credit, banks should satisfy themselves that they can examine the required electronic records in a presentation made thereunder.*

## CHANGES FROM eUCP VERSION 1.1

- Introduced in eUCP Version 2.0 for the first time

## COMMENTARY

The precedent for including 'Preliminary Considerations' was established in ISBP, and with the preamble to DOCDEX. The preliminary considerations are listed on a separate page to the rules in order to provide a distinction between the two.

For reasons of transparency and clarity, it is considered to be entirely appropriate to provide guidance within the rules in the form of preliminary considerations. An alternative would have been to include the text within a foreword or an introduction.

However, whilst it is recognised that all participants to a transaction will always take note of the rules themselves, this cannot be considered to be the same for forewords or introductions, which do not always receive the same level of attention as rules. Accordingly, these provisions are included as 'Preliminary Considerations'.

## MODE OF PRESENTATION

The mode of presentation to a bank for examination and the mode for delivery of that presentation to the applicant, once honour has occurred, are outside the scope of the rules.

## DEFINITIONS

This emphasises the statement within eUCP sub-article e1 (a) that the eUCP is a supplement to the UCP and provides clarification that that definitions given in UCP 600 will continue to be applicable.

## EXAMINATION

In order for banks to examine any electronic records, they must ensure that they have in place both the technological and operational capabilities to do so.

## CONSISTENCY

Similar preliminary considerations have been listed in the eURC Version 1.0 in order to create consistency between the two sets of rules.

## ARTICLE e1

### SCOPE OF THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 600) SUPPLEMENT FOR ELECTRONIC PRESENTATIONS (“eUCP”)

- a. *The eUCP supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision ICC Publication No. 600,) (“UCP”) in order to accommodate presentation of electronic records alone or in combination with paper documents.*
- b. *The eUCP shall apply where the credit indicates that it is subject to the eUCP (“eUCP credit”).*
- c. *This version is Version 2.0. An eUCP credit must indicate the applicable version of the eUCP. If not indicated, it is subject to the latest version in effect on the date the eUCP credit is issued or, if made subject to eUCP by an amendment accepted by the beneficiary, on the date of that amendment.*
- d. *An eUCP credit must indicate the physical location of the issuing bank. In addition, it must also indicate the physical location of any nominated bank and, if different to the nominated bank, the physical location of the confirming bank, if any, when such location is known to the issuing bank at the time of issuance. If the physical location of any nominated bank and/or confirming bank, is not indicated in the credit, such bank must indicate its physical location to the beneficiary no later than the time of advising or confirming the credit or, in the case of a credit available with any bank, and where another bank willing to act on the nomination to honour or negotiate is not the advising or confirming bank, at the time of agreeing to act on its nomination.*

### CHANGES FROM eUCP VERSION 1.1

- Heading re-worded in order to add the shorthand acronym ‘eUCP’
- Minor structural changes
- Clarification that if an eUCP credit does not indicate the applicable version of the eUCP, it is subject to the *latest* version
- Addition of the requirement to add a physical location of a bank

### COMMENTARY

The formal title is ‘Scope of the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentations (“eUCP”)’. Because of the length of the title, the shorthand acronym “eUCP” is appended.

This abbreviated form employs the usual prefix that is applied to electronic commerce whilst emphasising the connection with the Uniform Customs and Practice.

Although no specific form of reference to the eUCP is mandated, in fact any reference that clearly indicates the eUCP would be adequate, it is recommended that the term “eUCP” be used for reasons of transparency and clarity.

### SUPPLEMENTARY

As indicated by eUCP sub-article e1 (a), the eUCP acts as a supplement to UCP 600. Although the rules do not include a definition of the word ‘supplement’, the intent is that, in practice, they function by reference to UCP 600, and do not stand as a set of self-contained rules, such as ISP98 or URDG 758.

The eUCP contains only those requirements deemed necessary to expand or modify UCP 600 in order to facilitate the presentation of electronic records. Accordingly, it is an absolute necessity to read any eUCP article in combination with the analogous UCP 600 article.

eUCP sub-article e2 (b) (Relationship of the eUCP to the UCP) provides clear direction on the inter-relationship of both sets of rules when the content may differ.

### **TYPES OF PRESENTATIONS**

As stated in eUCP sub-article e1 (a), the rules will only apply when an electronic record is involved. This can be as part of a presentation consisting solely of electronic records, or as part of a mixed presentation with paper documents.

### **SUBJECT TO THE eUCP**

eUCP sub-article e1 (b) highlights that the eUCP applies when a documentary credit 'indicates that it is subject to the eUCP'. As such, it is expected that an appropriate reference to applicability be apparent.

### **VERSION NUMBER**

eUCP sub-article e1 (c) makes it clear that the eUCP is issued in versions, with the current version being Version 2.0. As a matter of good practice, it is always recommended that an eUCP credit indicate the exact applicable version, rather than leave it open to possible misinterpretation. Should a version number not be stated, sub-article e1 (c) clarifies that the credit would be subject to the latest version in effect on the date the eUCP credit is issued.

As further stated in this sub-article, in the event that a credit is made subject to the eUCP by means of an amendment, and such amendment has been accepted by all relevant parties, the credit would then be subject to the latest version of the eUCP in effect on the date of such amendment.

### **IMPLICATIONS OF AMENDMENT**

As stated above under 'Version number', the eUCP makes allowances for a situation wherein a credit subject to UCP 600 may be amended to be subject to eUCP in order to allow for the presentation of electronic records. As stated in the previous 'ICC Guide to the eUCP' (ICC Publication No. 639), it is possible that an issuing bank may make a simple statement that the condition of a credit being subject to UCP 600 is now replaced by subjectivity to eUCP Version 2.0.

However, any such amendment requires careful scrutiny of the credit before being issued. In view of the fact that the credit was originally issued subject to UCP 600, then it is consequential that the terms and conditions of the credit were originally mandated upon the presentation of paper documents. As such, the introduction of electronic records requires close assessment in order to ensure there are no potential negative impacts towards the applicant and the parties under the credit. It should also be borne in mind that UCP 600 sub-article 10 (e) (Amendments) remains applicable, with the result that partial acceptance of any amendment addressing a change to the applicable rules is not allowed.

### **SWIFT**

Prior to the effective date of the initial eUCP Version 1.0, SWIFT had amended its Handbook to anticipate issuance of credits subject to the eUCP.

### **MODIFICATION OR EXCLUSION OF UCP 600 ARTICLES**

In view of the fact that the eUCP is a supplement to the UCP, UCP 600 article 1 (Application of UCP) continues to apply, thereby allowing for modifications and exclusions to be made provided they are expressly stipulated in the credit. This means that there is no need for an equivalent article within the eUCP itself. Consequently, the content of eUCP can be modified or excluded in the text of the credit, but no provision in a credit should be deemed to modify or exclude an article in the eUCP unless the credit expressly so indicates.

## **APPLICATION OF eUCP**

UCP 600 article 1 (Application of UCP) stipulates that when the text of a credit expressly indicates that it is subject to UCP 600, the rules are binding on all parties thereto. Symmetrically the same applies for eUCP, in that the provisions of the eUCP in a credit that is subject to the eUCP would be applicable to any person or bank that acted on that credit to the extent of their nomination.

## **CONFIRMATION**

Experience to date has proved that the concept of 'confirmation' continues to apply for eUCP credits, as it does for UCP 600 credits. However, an additional reflection for any confirming party to consider with eUCP credits is that they must take cognisance of any related format and data processing requirements. Inability to comply with such requirements could negate the potential for a confirming party to be involved in an eUCP credit.

## **PHYSICAL LOCATION**

It is normal practice that, under UCP 600, a physical location for presentation will be stated within in the credit. While 'place of presentation' is not formally defined in UCP 600, it means the place where the beneficiary is required or permitted to present documents in order to satisfy the required conditions of the issuer or confirmer's documentary credit obligation. UCP 600 sub-article 6 (d) (ii) (Availability, Expiry Date and Place for Presentation) states that the place of the bank with which the credit is available is the place for presentation. Although not expressly stated, a physical address is implied.

The eUCP defines 'place for presentation' as an electronic address. Where an eUCP credit requires or permits presentation of electronic records, their place of presentation will typically be to an electronic address and not a physical one. As such, and in order to allow banks to ensure compliance with applicable regulatory and sanctions issues, it is essential that an eUCP credit also indicate the necessary physical location(s) as stated in sub-article e1 (d).

## ARTICLE e2

### RELATIONSHIP OF THE eUCP TO THE UCP

- a. *An eUCP credit is also subject to the UCP without express incorporation of the UCP.*
- b. *Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP.*
- c. *If an eUCP Credit allows the beneficiary to choose between presentation of paper documents or electronic records and it chooses to present only paper documents, the UCP alone shall apply to that presentation. If only paper documents are permitted under an eUCP Credit, the UCP alone shall apply.*

## CHANGES FROM eUCP VERSION 1.1

- Minor structural changes

## COMMENTARY

The interdependence between the eUCP and UCP 600 is clearly indicated in eUCP article 1 (Scope of the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentations (“eUCP”)).

As a consequence of this correlation, eUCP article e2 goes on to clarify how such interdependence will work in practice.

### RELATIONSHIP

As mentioned under article e1, the intent of the eUCP rules is that they function by reference to UCP 600, and do not stand as a set of self-contained rules, such as ISP98 or URDG 758. Sub-article e2 (a) provides that there is no need to expressly incorporate UCP 600 within an eUCP credit. Such credits are automatically also subject to UCP 600.

### IMPACT ON UCP 600 ARTICLE 1 (APPLICATION OF UCP)

In view of the above, i.e. no need to expressly stipulate UCP 600 in an eUCP credit, the content of UCP 600 article 1 additionally relates to an eUCP credit. Sub-article e2 (b) clarifies that, in these circumstances, the provisions of eUCP will prevail in the event of any ‘conflict’ with UCP 600.

### UCP 600 REFERENCE

Whilst the above makes it clear that there is no actual need to provide specific reference in an eUCP credit to UCP 600, it may well be considered as good practice and prudent to provide such reference, e.g. by stating that an eUCP credit is ‘also subject to UCP 600’. This would provide transparency to all parties concerned and ensure that there is no doubt of the continued pertinence of UCP 600.

### APPLICABILITY OF UCP 600 ALONE

The content of eUCP sub-article e2 (c) highlights two differing sets of circumstances wherein the eUCP would not apply, despite reference to the eUCP in the terms and conditions of the credit. In both sets of circumstances, this would be the case when only paper documents are presented without any electronic records. The eUCP can only apply to presentations containing electronic records. By default, if solely paper documents are presented, only UCP 600 will apply.

### **CONTINUED APPLICABILITY OF eUCP ARTICLE E8 (NOTICE OF REFUSAL)**

The above rationale for applicability of UCP 600 is subject to one limited, but important, qualification. The eUCP would continue to operate in a situation where the presenter presents an initial paper document to the issuing bank on day one, yet does not provide clarification that it is presenting the remaining documents solely in paper form until after five banking days following the initial presentation.

It is conceivable that, under such circumstances, the presenter could argue that the issuing bank would be precluded under UCP 600 sub-article 16 (d) (Discrepant Documents, Waiver and Notice) from raising any discrepancies because more than five banking days had passed. In fact, it is quite likely that the issuing bank would not even examine the presentation when the final paper document was presented, because it would still be awaiting the required notice of completeness.

Such a result would not be equitable to the issuing bank that, naturally and reasonably, relied upon the applicability of the eUCP. Despite eUCP sub-article e2 (c), eUCP sub-article e7 (a) (i) (Examination) would continue to be applicable in such a situation, thereby meaning that the time for examination would not commence until the presenter had made it clear that only paper documents would be presented.

As a point of clarification, the presenter need not necessarily do so by presenting a notice of completeness, but could cover such a situation in a cover letter accompanying the documents. However, the mere presentation of all the documents, absent some kind of notification, would not provide sufficient notice in this situation.

This situation could be easily be circumvented if, in an eUCP credit that allows for presentation of paper documents or electronic records, a condition was included expressly requiring the presenter to *always* present a notice of completeness when the presentation is complete. The issuing bank would then definitely receive notification that the presentation was complete and that the time for examination of the documents had commenced.

## ARTICLE e3

### DEFINITIONS

- a. Where the following terms are used in the UCP, for the purpose of applying the UCP to an electronic record presented under an eUCP Credit, the term:
- i. **Appear on their face** and the like shall apply to examination of the data content of an electronic record.
  - ii. **Document** shall include an electronic record.
  - iii. **Place for presentation** of an electronic record means an electronic address of a data processing system.
  - iv. **Presenter** means the beneficiary, or any party acting on behalf of the beneficiary who makes a presentation to a nominated bank, confirming bank, if any, or to the issuing bank directly.
  - v. **Sign** and the like shall include an electronic signature.
  - vi. **Superimposed, notation or stamped** means data content whose supplementary character is apparent in an electronic record.
- b. The following terms used in the eUCP shall have the following meaning:
- i. **Data corruption** means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part.
  - ii. **Data processing system** means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.
  - iii. **Electronic record** means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
    - a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
    - b. capable of being examined for compliance with the terms and conditions of the eUCP credit.
  - iv. **Electronic signature** means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.
  - v. **Format** means the data organisation in which the electronic record is expressed or to which it refers.
  - vi. **Paper document** means a document in a paper form.
  - vii. **Received** means when an electronic record enters a data processing system, at the place for presentation indicated in the eUCP credit, in a format capable of being accepted by that system. Any acknowledgment of receipt generated by that system does not imply that the electronic record has been viewed, examined, accepted or refused under an eUCP Credit.
  - viii. **Re-present or re-presented** means to substitute or replace an electronic record already presented.



## CHANGES FROM eUCP VERSION 1.1

- Minor structural changes
- Format of each term reflects that used in UCP 600
- Addition of “data processing system” to the “place for presentation”
- New definition for “Presenter”
- New definition for “Data corruption”
- New definition for “Data processing system”
- Definition of “Electronic record” expanded to include logically associated information
- Deleted the word “traditional” from the definition of “paper”
- Definition of “Received” now refers to a data processing system, and includes added reference to viewing and examination
- New definition for “Re-present” and “re-presented”

## COMMENTARY

This article comprises of a number of terms used in the eUCP. Some also appear in UCP 600, whilst others appear solely in the eUCP.

### UCP 600 TERMS

Article e3 is comprised of two distinct parts. In the first section, sub-article e3 (a), reference is made to terms that also appear in UCP 600, but have a different meaning when applied to an electronic record presented under an eUCP credit. These include ‘appear on their face’, ‘document’, ‘place for presentation’, ‘presenter’, ‘sign’, and ‘superimposed, notation or stamped’.

Owing to the interdependence between UCP 600 and eUCP, it was clear that these UCP 600 terms required ‘re-definition’ under the eUCP in order to remain applicable.

### eUCP TERMS

The second section, sub-article e3 (b), defines terms used solely in the eUCP. These include ‘data corruption’, ‘data processing system’, ‘electronic record’, ‘electronic signature’, ‘format’, ‘paper document’, ‘received’, and ‘re-present or re-presented’.

### RELATIONSHIP TO, AND IMPACT OF, LOCAL ELECTRONIC COMMERCE LAW

The statements in the previous ‘ICC Guide to the eUCP’ (ICC Publication No. 639), are equally applicable to eUCP Version 2.0, and are repeated below.

Not only are many of the terms that are defined in eUCP article e3 used in electronic commerce, they have also come to be used and even defined in the law relating to it. With respect to the law, as well as electronic commerce generally, there has been no intention to develop new doctrine or concepts. Any innovations in the definitions in the eUCP derive from the unique nature of the documentary credit.

While every attempt has been made to align the definitions in these rules with those used in local law, many of the legal definitions now extant differ among themselves in formulation if not meaning. As a result, the eUCP definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, which is the most widely imitated in electronic commerce legislation.

Therefore, in working with the eUCP, it is necessary to consider each applicable legal system with respect to the eUCP definitions to determine:

- whether local law defers to a system of private rules such as the eUCP where the undertaking is subject to them, and,
- whether this deference extends to the internal definitions used in the eUCP even if they differ from those used in the definitional section of the law, and,
- whether there is any substantive conflict between the eUCP definitions and those contained in the local law.

In most cases, the law of electronic commerce reflects modern commercial law in permitting private rules to utilise particular definitions internally. Where the same term has differing meanings or where the same concept is given two different names—one in the law and a different one in a private rule—there is more likely to be confusion than conflict in applying local law. The confusion would result where local law embraces one definition but defers to the eUCP and permits use of a different definition internally in applying that practice.

For example, the term ‘document’ may have a different meaning under local electronic commerce law than in the eUCP. When applying local electronic commerce law, its own definition must be used, whereas in interpreting and applying the eUCP, the eUCP definition must be used. The only area identified to date as one for possible concern regarding conflict between the eUCP and local electronic commerce law relates to the degree of authenticity required for electronic records and the meaning to be attached to a requirement for an electronic signature.

Where there is a mandatory requirement under local electronic commerce law for a higher degree of authenticity than would be required under the eUCP, local electronic commerce law may impose additional requirements on an electronic presentation.

As to the liability for variations of local law, UCP 600 sub-article 37 (d) (Disclaimer for Acts of an Instructed Party) provides that the applicant would be required to indemnify the bank against any risks arising from such a local law other than the law to which the bank itself is subject where the credit is not made subject to that law.

## **EUCP SUB-ARTICLE E3 (A) (I): “APPEAR ON THEIR FACE”**

### *eUCP Definition*

The term ‘appear on their face’ and the like shall apply to examination of the data content of an electronic record.

### *General*

eUCP sub-article e3 (a) (i) appends to the meaning of ‘appear on their face’ in UCP 600 sub-article 14 (a) (Standard for Examination of Documents).

### *Meaning of “Appear on their face” in UCP 600*

This term stresses that documents are examined on their face in order to ascertain if they constitute a complying presentation. The concept of ‘on their face’ does not refer to a simple front versus the back of a document, but extends to the review of data within a document in order to determine that a presentation complies with international standard banking practice and the principles contained in UCP. Banks are not obliged to go beyond the face of a document to establish whether or not a document complies with a requirement in a documentary credit or within any requirement in the UCP.

### *Concept in the eUCP*

The rationale for this concept is equally applicable to the eUCP. As with paper documents, electronic records are examined only for the data received and not the reality that such data represents. Although sub-article e7 (b) (Examination) allows banks to examine electronic records accessible via an external system, such examination is still limited to the data provided at that site or system and not of the underlying reality represented.

### Examination of data

However, the notion that examination of data is limited to what appears on its face cannot be equated with the examination only of the data that appears on the computer screen of the examiner. Examination of data is related to the content that is required in order to determine compliance with the terms and conditions of the credit. The format of a computerised program used to view an electronic record may hide certain data and only display the data that it is programmed to reveal. It is possible that elements of this suppressed data may necessitate examination for some purposes and not others. As an example, it may be expected that certain header and footer tags will be reviewed in the process of authenticating the transmission or in ascertaining the data sent or received. It is not expected, however, that any prior correction to the document that may be embedded in the message transmitted will be taken into account in determining compliance of the electronic record with the credit.

In order to avoid difficulties, a bank should give careful thought to the format in which the data is required to be presented and what data will be displayed by processing systems which will be sufficient to assure it that an examiner has all of the data that is relevant to an examination of the electronic record.

## **EUCP SUB-ARTICLE E3 (A) (II): “DOCUMENT”**

### eUCP Definition

The term ‘document’ shall include an electronic record.

### General

eUCP sub-article e3 (a) (ii) adds the term ‘electronic record’ to the meaning of ‘document’ as used in UCP 600, with respect to an eUCP credit.

### Meanings of ‘Document’ in UCP 600

The term can have a variation of inferences and has developed into a useful general usage term. In the paper world there was no need to distinguish between the various functions served by the term. The requirement to honour a documentary credit is predicated upon presentation of a document. Banks are not concerned with the realities that documents represent, merely concerning themselves with how they appear on their face.

### Paper

As used throughout UCP 600, the term ‘document’ suggests format in a paper medium. Unless specifically allowed under the terms and conditions of a UCP 600 credit, it is expected that all presentations under such a credit be in a paper format.

### ‘Document’ in electronic commerce law

It is important that the impact of applicable local electronic commerce law always be taken into account. However, based upon the fact that the eUCP definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, it is hoped that there will be no particular conflict with the eUCP definition.

### UNCITRAL

The UNCITRAL Guide to the Model Law on Electronic Commerce provides a number of references to ‘document’, and several pertinent extracts are stated below:

- Article 17 Transport Documents
  - Where the law requires that any action referred to in article 16 (Actions related to contracts of carriage of goods) be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.
  - If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is

met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.

- If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.
- Objectives
  - The objectives of the Model Law, which include enabling or facilitating the use of electronic commerce and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade.
- The “functional-equivalent” approach
  - The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to the possibility of dealing with impediments to the use of electronic commerce posed by such requirements in national laws by way of an extension of the scope of such notions as ‘writing’, ‘signature’ and ‘original’, with a view to encompassing computer-based techniques.
  - The Model Law thus relies on a new approach, sometimes referred to as the ‘functional equivalent approach’, which is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic commerce techniques. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on users of electronic commerce more stringent standards of security (and the related costs) than in a paper-based environment.
  - A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the ‘functional-equivalent’ approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a ‘threshold requirement’) is not to be confused with more stringent requirements such as ‘signed writing’, ‘signed original’ or ‘authenticated legal act’.
  - The Model Law does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function.

- Article 5 Legal Recognition of data messages
  - Article 5 embodies the fundamental principle that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents.

### **eUCP SUB-ARTICLE E3 (A) (III): “PLACE FOR PRESENTATION”**

#### eUCP Definition:

The term ‘place for presentation’ of an electronic record means an electronic address of a data processing system.

#### General

eUCP sub-article e3 (a) (iii) extends the phrase ‘place for presentation’ in UCP 600 to include an electronic address when referring to the place of presentation of an electronic record under an eUCP credit.

#### Meaning of ‘Place for Presentation’ in UCP 600

The place for presentation is the place where the documentary credit is available. If the credit is available with any bank, the place for presentation is at the bank to which presentation is made by the beneficiary or other presenter. A place for presentation stated in a credit is always in addition to the place of the issuing bank. In UCP 600, the term denotes an address at a physical location, as is implied by sub-article 6 (d) (ii) (Availability, Expiry Date and Place for Presentation).

#### Direct presentation

International standard banking practice does not deny the beneficiary the opportunity of presenting documents direct to an issuing or confirming bank. However, it should be borne in mind that, if a confirming bank exists in a specific transaction, then such bank would normally demand that documents are presented at its counters in order for the confirmation to be effective.

#### Consequences under UCP 600

Under UCP 600, presentation to the place indicated or permitted for presentation fixes the date of presentation against which any deadlines in the credit are to be measured and also fixes the running of time for expiration of the credit. It also partially fulfils the terms and conditions of the credit.

#### Transition to eUCP credits

Where the credit requires or permits presentation of electronic records, their place of presentation will typically be to an electronic address and not a physical one. However, the credit may require that the electronic record be contained on a portable storage medium, in which case the electronic record may be presented to a physical address.

#### Express reference

Although, as stated above, UCP 600 sub-article 6 (d) (ii) (Availability, Expiry Date and Place for Presentation) implies a physical location for presentation, it could be interpreted that it does also cover an electronic address. However, for purposes of transparency and clarity, as well as certainty, sub-article e3 (a) (iii) expressly refers to an electronic address.

#### Electronic address

Although there is no specific definition within the eUCP, the term ‘electronic address’ signifies the precise electronic location or proprietary system to which an electronic record can be sent. It could include, inter alia, a URL, an email address, or an address on a dedicated system.

#### Significance under an eUCP Credit

Under eUCP, although continuing as the place to which documents are to be presented, the mere presentation of any documents to that place does not postpone or defer any related deadlines or the date for expiry under the eUCP until the bank receives a notice of completeness. At that point, the time of presentation is fixed.

## **eUCP SUB-ARTICLE E3 (A) (IV): “PRESENTER”**

### eUCP Definition

The term ‘presenter’ means the beneficiary, or any party acting on behalf of the beneficiary who makes a presentation to a nominated bank, confirming bank, if any, or to the issuing bank directly.

### Meaning of ‘Presenter’ in eUCP

Although UCP 600 article 2 (Definitions) defines ‘Presenter’, it does so in a different context. In eUCP we are talking of a presentation made by a beneficiary, its banker (non-nominated bank) or, for example, an agent, directly to a nominated bank or issuing bank.

### Meaning of ‘Presenter’ in UCP 600

In UCP 600, the use of presenter goes wider. For example, in sub-article 16 (c) (Discrepant Documents, Waiver and Notice), ‘presenter’ could be a beneficiary, its banker, an agent or the nominated bank or confirming bank.

As stated in the ‘Commentary on UCP 600’ (ICC Publication No. 680), the term ‘presenter’ was introduced into UCP 600 to better define the party that actually makes a presentation of documents to the bank and to reference the party that presents the documents. The presenter may be either the beneficiary of the documentary credit, another bank or another party acting on behalf of the beneficiary.

## **eUCP SUB-ARTICLE E3 (A) (V): “SIGN”**

### eUCP Definition

The term ‘sign’ and the like shall include an electronic signature.

### General

eUCP sub-article e3 (a) (v) adds ‘electronic signature’ to the meaning of the term ‘sign’ or its variants as used in UCP 600 or in the credit in connection with an electronic record presented under the eUCP.

### Role of signature in documentary credit practice

A signature identifies the person assuming responsibility for the document and indicates some form of assent to its content. Signatures are regarded as adding assurance of authenticity to a document and of the veracity of the representations contained in it. By signing a document, the person signing is personally engaged to some extent in a moral, if not a legal, sense, in what the document represents.

### International standard banking practice

It is expected that certain documents will be signed notwithstanding the absence of a specific requirement in the credit. Whilst UCP 600 does not specifically define the meaning of a signature, UCP 600 article 3 (Interpretations) highlights that ‘a document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol, or any other mechanical or electronic method of authentication.’

### eUCP practice

In contrast, the eUCP does define an *electronic* signature as ‘a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record.’

### Electronic signatures and local law

In order to have validity under local law, it is often necessary for certain paper documents to be signed. Some laws also define terms such as ‘sign’ and ‘signature’.

This has advanced further in recent times with the formulation of electronic commerce laws, which now address electronic records and their method of authentication. As such, and in order to remain in line with existing law, most electronic commerce laws include definitions for terms

such as 'sign' and 'signature'.

It is important to note that the eUCP takes a technology-agnostic view with respect to the type of technology that may be used in this respect.

### UNCITRAL

The UNCITRAL Model Law on Electronic Signatures is intended to apply where electronic signatures are used in the context of commercial activities. The term 'commercial' is given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

The above indications, which may be particularly useful for those countries where there does not exist a discrete body of commercial law, are modelled, for reasons of consistency, on the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration.

As stated in article 7 (signature) of the UNCITRAL Model Law on Electronic Commerce, where the law requires a signature of a person, that requirement is met in relation to a data message if:

- a. a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and,
- b. that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement.

Article 7 is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the Model Law, the following functions of a signature were considered:

- to identify a person;
- to provide certainty as to the personal involvement of that person in the act of signing;
- to associate that person with the content of a document.

It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text; the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

Article 7 does not introduce a distinction between the situation in which users of electronic commerce are linked by a communication agreement and the situation in which parties had no prior contractual relationship regarding the use of electronic commerce. Thus, article 7 may be regarded as establishing a basic standard of authentication for data messages that might be exchanged in the absence of a prior contractual relationship and, at the same time, to provide guidance as to what might constitute an appropriate substitute for a signature if the parties used electronic communications in the context of a communication agreement. The Model Law is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of data messages entirely to the discretion of the parties and in a context where requirements for signature, which were usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

## **eUCP SUB-ARTICLE E3 (A) (VI): “SUPERIMPOSED”, “NOTATION”, OR “STAMPED”**

### eUCP Definition

The terms ‘superimposed’, ‘notation’ or ‘stamped’ mean data content whose supplementary character is apparent in an electronic record.

### General

eUCP sub-article e3 (a) (vi) uses the terms ‘superimposed’, ‘notation’, and ‘stamped’ to describe the addition of information to an electronic record after it has been created.

### Usage and meaning in UCP 600

The terms “superimposed”, “notation”, and “stamped” are not defined in UCP 600.

- The term “superimposed” appears in UCP 600 article 34 (Disclaimer on Effectiveness of Documents) to signify the imposition of conditions either physically on the document or by implication from the terms of another related document, contract, law, or custom.
- The term “notation” appears in UCP 600 sub-articles 19 (a) (ii) (Transport Document Covering at Least Two Different Modes of Transport), 20 (a) (ii) and (iii) (Bill of Lading), 21 (a) (ii) and (iii) (Non-Negotiable Sea Waybill), 22 (a) (ii) (Charter Party Bill of Lading), 23 (a) (iii) (Air Transport Document), 24 (a) (i) (Road, Rail or Inland Waterway Transport Document), article 27 (Clean Transport Document) and sub-article 28 (h) (Insurance Document and Coverage) to signify a physical addition to a document, commonly a reference to a date of receipt of goods in a transport document subsequent to the date of its issuance, or indications that there is a defective condition, or in an insurance document to indicate the scope of coverage. In the latter two situations, it is contrasted with a ‘clause’ that is in the document as issued. There is some usage in practice by which preprinted words on a bill of lading that is in a blank box and intended to be filled by handwriting are called a ‘notation’ even though not filled in, but this use does not signify an operative undertaking that the goods are laden on board under UCP 600.
- The term “stamped” or “stamp” appears in UCP 600 article 3 (Interpretations), sub-articles 17 (b) and 17 (c) (i) (Original Documents and Copies), sub-article 19 (a) (ii) (Transport Document Covering at Least Two Different Modes of Transport), sub-article 24 (a) (i) and (ii) (Road, Rail or Inland Waterway Transport Documents), sub-article 25 (a) (i) and (c) (Courier Receipt, Post Receipt or Certificate of Posting), sub-article 26 (c) (“On Deck”, “Shipper’s Load and Count”, “Said by Shipper to Contain” and Charges Additional to Freight), and sub-article 31 (c) (Partial Drawings or Shipments) to signify the physical addition of data in part by means of a mechanical device or fixed attachment of a piece of paper so firmly that it becomes a part of the original paper (“allonge”) which may also contain handwritten additions.

All three terms have very similar meanings and all relate to information that has been added after the creation of a document. The difference between the terms relates to the mode of addition and the customary context in which they are used and, in part, can be explained by the historical evolution of the UCP. It is, for example, possible to state, “The notation on a bill of lading was superimposed by a stamp” and to convey the meaning that a mechanical stamp was applied to the bill of lading that contained data of significance which was either added by the stamp or subsequently by handwriting. There is no significant difference between the terms.

### eUCP Electronic Records

With respect to electronic records, eUCP sub-article e3 (a) (vi) highlights that the terms only have meaning when their supplementary nature is apparent in the relevant electronic record.



## **eUCP SUB-ARTICLE E3 (B) (I): “DATA CORRUPTION”**

### eUCP Definition

The term ‘data corruption’ means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part.

### General

eUCP version 1.1 did not define ‘corruption’. As the heading of eUCP article 12 now refers to ‘Data Corruption of an Electronic Record’, it was considered appropriate to include a definition in the revised eUCP.

### Use in UCP 600

The term ‘data corruption’ is not used in UCP 600.

### Meaning of ‘data corruption’

Data can be corrupted after having been received from the presenter. As a result, there could be a degree of unease regarding the possibility of the loss of data by a bank after an electronic record has been presented. Any problem with the record prior to receipt is the responsibility of the presenter whose obligation is to present the data to the place of presentation in the format required by the credit.

## **eUCP SUB-ARTICLE E3 (B) (II): “DATA PROCESSING SYSTEM”**

### eUCP Definition

The term ‘Data processing system’ means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.

### General

eUCP version 1.1 article e12 referred to a ‘data process’ which was not defined. The revised article e13 (Additional Disclaimer of Liability for Presentation of Electronic Records under eUCP) now refers to a ‘data processing system’. Any bank that engages in an eUCP transaction is responsible for maintaining a data processing system. This responsibility is a fundamental precondition for using the eUCP.

### Use in UCP 600

The term ‘data processing system’ is not used in UCP 600.

### Meaning of ‘Data processing system’

The aim was to align definitions in eUCP with those used in local law. However, many legal definitions differ among themselves in formulation if not meaning. As a result, the eUCP definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, which is the most widely imitated in eCommerce legislation. In working with eUCP, it is necessary to consider each applicable legal system with respect to the eUCP definitions.

### UNCITRAL

The UNCITRAL definition of ‘automated data processing’ has been adapted for these rules. In addition, article 2 of the UNCITRAL Model Law on Electronic Commerce defines ‘information system’ as a system for generating, sending, receiving, storing or otherwise processing data messages. The definition of ‘information system’ is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of ‘information system’ could be indicating a communications network, and in other instances could include an electronic mailbox or even a telecopier. The Model Law does not address the question of whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Model Law.

## **eUCP SUB-ARTICLE E3 (B) (III). “ELECTRONIC RECORD”**

### eUCP Definition

The term ‘Electronic record’ means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:

- a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
- b. capable of being examined for compliance with the terms and conditions of the eUCP credit.

### General

eUCP sub-article e3 (b) (iii) defines “electronic record” as the term is used in the eUCP.

A digital record is one that exists in digitised form only, whereas an electronic record may also encompass a copy of an original document that is stored in electronic form e.g. a scanned copy. The eUCP definition of ‘electronic record’ does appear to include a digitised record (‘data created...by electronic means’) but is broader than that.

The commentary to the UNCITRAL Model Law on Electronic Transferable Records states that the definition of ‘electronic transferable records’ is meant to include both functional electronic equivalents of paper records and digitised records.

A similar approach applies for electronic vs. digital signatures. The key change from eUCP version 1.1 is the addition of ‘... including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not ...’. This is in line with the definition of ‘electronic record’ in article 2 (Definitions) of the UNCITRAL Model Law on Electronic Transferable Records.

### Electronic commerce

In electronic commerce, data is grouped together into a unit. Although these units are often provided with designations such as ‘messages’, ‘files’ and ‘documents’, the term ‘electronic record’ has emerged as a common label to identify a grouping of data in one message, file, or document and to distinguish it from a paper document.

### Document

Under the eUCP, an electronic record is a type of document as provided in eUCP sub-article e3 (a) (ii) (Document). It is separate from a paper document, which is implied in eUCP sub-article e3 (b) (vi) (Paper document) as the document presented under a UCP 600 credit. Under an eUCP credit, documents can consist of both paper documents and electronic records but must consist of at least one electronic record.

### Electronic

Although there is no definition of ‘electronic’ in the eUCP, such term would, by its nature, exclude paper documents. It is essential to also note that by using the generic term ‘electronic’, the rules avoid linkage with any specific technology or platform, thereby ensuring that the rules remain technology-agnostic. As outlined in the previous publication, ‘ICC Guide to the eUCP’ (ICC Publication No. 639), the term ‘electronic’ has generally been distinguished from imaging, which involves a different process. However, with technological advances, the distinctions have become blurred. More on this subject is outlined below.

### Telefaxes and Imaging

The eUCP makes no reference to telefaxes. It was once thought that telefaxes could not be electronic records both for technological reasons and because there was an original paper document that generated the telefax. With technological advances, it is possible to generate a telefax on a computer and send it to another computer as an image.

As a result, it is impossible to categorically determine whether or not a telefax is an electronic record. If the issuing bank specifies the format of required or permitted electronic records, the problem will be avoided. Such a specification is especially important when document examination is automated since it would be difficult, if not impossible, to use a system to determine all of the required data elements from an image. If it does not do so, the presenter would probably be justified in presenting required electronic records by means of telefax and it would remain with the issuing bank to convince a court that they were not electronic records.

#### Formatting and electronic records

eUCP article e5 (Format) requires an eUCP credit must indicate the format of each electronic record, and that if the format of an electronic record is not indicated, it may be presented in any format. Accordingly, it can be presumed that provided a document is presented in the format stipulated in the eUCP credit, such document constitutes an electronic record. If the issuing bank states a specific format for a document to be presented under an eUCP credit and it is not a paper document, the document should be regarded as an electronic record for purposes of interpreting the eUCP.

#### Authenticated, apparent identity, apparent source of data, integrity of data

The eUCP does not expressly define authenticate. It does, however, link the term to and embody its meaning for purposes of the eUCP in its definition of 'electronic record'.

eUCP Article e3 (b) (iii) indicates what it is necessary for transmitted electronic data to contain in order to become an electronic record under the eUCP. The data must not only be received into the system of the bank but also authenticated as to:

- the apparent identity of the sender; and,
- the apparent source of the data contained in the record; and
- is capable of being examined for compliance with the terms of the credit.

The eUCP does not require the electronic record to have been authenticated for it to become an electronic record, merely that it be capable of being authenticated. Whether it is actually authenticated is the responsibility of the bank. As long as the data is authenticatable, it is an electronic record for purposes of the eUCP. Because of the technology involved in transmitting electronic records, it is possible for them to become unscrambled in transition and not to be complete when received or for an error to be introduced. It is expected that the bank will check the integrity of an electronic message.

#### Methods for Authentication

Current and evolving technology allows for numerous commercially reasonable techniques in order to authenticate an electronic record whilst applying the criteria in eUCP sub-article e3 (b) (iii). The parties to the credit must decide the level and amount of security to be used in authenticating a message. The UNCITRAL Model Law on Electronic Commerce provides an excellent guide to this process. Various national laws may also impose specific requirements for an electronic record to be authenticated.

#### Technology Neutral

The method of authentication used in the eUCP is intended to be technology-agnostic and not to endorse any specific technology.

#### Capable of being examined

eUCP sub-article e3 (b) (iii) requires that, in order to qualify as an electronic record for purposes of the eUCP, data must be capable of being examined. This requirement is intrinsically linked with the requirement in eUCP article e5 (Format) that the issuing bank specify the required format. If it does so, then data sent in that particular format is assumed to be capable of being examined.

Accordingly, the requirement that data be capable of being examined is only relevant when the

issuing bank does not actually specify a format. In such circumstance, the presenter may send the data in any format, but must still ensure that it be capable of being examined. The presenter would not be able to claim that the presentation was effective if what was sent could not be read.

#### Obligation to maintain a data processing system

Although banks are not obligated to issue or act on credits subject to the eUCP, they are required to maintain a data processing system for the receipt, authentication, and identification of electronic records. Such a system need not be state of the art, but it should be capable of performing those minimal functions of authentication considered commercially acceptable. Given the rapid pace of technological development, maintaining such standard will require regular review, analysis, and investment as techniques evolve. In any event, it is assumed that this is a natural process for any bank involved in international trade.

#### Electronic commerce law

The term 'electronic record' has been widely used and defined in statutory provisions relating to electronic commerce. The definition used in the eUCP may differ in some respects from those used in these laws. To the extent that there may be any problem, it would centre on the concepts of 'electronic signature' and 'authentication', terms covered below, rather than the definition of the term 'electronic record' as it is used in the eUCP.

#### UNCITRAL

The UNCITRAL Model Law on Electronic Commerce defines a 'data message' as information generated, sent, received or stored by electronic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

The UNCITRAL Model Law on Electronic Transferable Records defines an 'electronic record' as information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not.

### **eUCP SUB-ARTICLE E3 (B) (IV): "ELECTRONIC SIGNATURE"**

#### eUCP Definition

The term 'electronic signature' means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.

#### General

eUCP sub-article e3 (b) (iv) defines 'electronic signature' as data attached to an electronic record with the intent of identifying the signer and authenticating the record.

#### Significance

As provided in eUCP sub-article e3 (b) (iv), signatures on required documents perform two separate functions in documentary credit practice:

- indicating the identity of the person signing, and,
- authenticating the document itself and the information contained in it.

#### Signatures under UCP 600

Whilst UCP 600 does not specifically define the meaning of a signature, UCP 600 article 3 (Interpretations) highlights that 'a document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol, or any other mechanical or electronic method of authentication.'

International standard banking practice expects that certain documents will be signed notwithstanding the absence of a requirement in the credit. UCP 600 requires that transport documents (articles 19-25) and insurance documents (article 28) be signed. It expressly provides that commercial invoices 'need not be signed' (sub-article 18 (a) (iv)), and sub-article

14 (f) (Standard for Examination of Documents) indicates that banks will accept documents as presented unless otherwise provided in the credit. The 'General Principles' in respect of signatures are outlined in Paragraphs A35, A36, A37 and A38 of ISBP 745 ("International Standard Banking Practice for the Examination of Documents under UCP 600").

#### Signature in an electronic record

An electronic signature in an electronic record can take place by indication of the name of the signer, a code, key or acceptable digital signatures and public key cryptography given in a manner that appears to be intended to authenticate.

While the method of authenticating the document differs when it is electronic, 'signing' an electronic message serves the same functions as does signing a paper document. Current and evolving technology allows for numerous commercially reasonable techniques for digital signatures. The UNCITRAL Model Law on Electronic Commerce provides an excellent guide to this process. Various national laws may also impose specific requirements for digital signatures.

#### Signature in the eUCP

The eUCP does not contain any substantive requirement that an electronic record contain an electronic signature. The only reference to 'electronic signature' is contained in the explanation of 'sign' in eUCP sub-article e3 (a) (v), which indicates that the term as it appears in UCP 600 also includes an electronic signature. The reference will impact those documents that require signing under UCP 600, documentary credit practice, or the terms of the credit.

#### Technology Neutral

The definition given for 'electronic signature' is intended to be technology neutral and not to endorse any specific technology.

#### Attached to or logically associated with an electronic record

eUCP sub-article e3 (b) (iv) requires that the data consisting of the electronic signature be attached to the electronic record or closely associated with it. In most cases the electronic signature is enclosed in the envelope of the message or embedded within the electronic record itself. It must be associated with the message in such a manner as to indicate the identity of the signer.

The reference in eUCP sub-article e3 (b) (iv) to the association or connection of the data with the electronic record in order to identify the signer and authenticate the record and its content goes only to the appearance of connectedness that can be implied from examining the electronic record on its face and not to the actual intention of the signer.

#### Electronic signatures and local law

Local law may contain requirements that certain documents be signed in order to be effective. Such law often defines the terms 'sign' or 'signature'.

One facet of the evolution of electronic commerce has been the extension of such laws to embrace electronic documents and to permit such documents to be authenticated in a manner that links with the nature of the document. As a result, many of electronic commerce laws contain a definition of these terms. Caution should be exercised in references to electronic signatures in law and practice to distinguish between a relatively simple 'electronic signature' and one with added precautions.

The latter has commonly been called a 'digital signature' for purposes of differentiation. When local law adopts the more restrictive notion of a digital signature, it may impose a requirement on an electronic signature not definitively contained in UCP 600 or the credit itself. Where the law is not that of the issuing bank, UCP 600 sub-article 37 (d) (Disclaimer for Acts of an Instructed Party) shifts any risk to the applicant. Unless the credit specifically provides, the use of the term 'electronic signature' in the eUCP does not signify the requirement that any signature be by means of digital signature.

## UNCITRAL

As stated by UNCITRAL, the increased use of electronic means improves the efficiency of commercial activities, including re-use and analysis of data, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development both domestically and internationally. However, certainty is needed as to the legal value of the use of those electronic means. In order to address that need, UNCITRAL has prepared a number of texts aimed at removing obstacles to the use of electronic means in commercial activities such as the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Model Law on Electronic Signatures and the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”).

The UNCITRAL Model Law on Electronic Signatures defines an ‘electronic signature’ as data in electronic form, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message.

It further defines ‘signatory’ as a person that holds signature creation data and acts either on its own behalf or on behalf of the person it represents.

The UNCITRAL Model Law on Electronic Transferable Records states that where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person’s intention in respect of the information contained in the electronic transferable record.

Article 7 of the UNCITRAL Model Law on Electronic Commerce is based on the recognition of the functions of a signature in a paper-based environment. In the preparation of the UNCITRAL Model Law on Electronic Commerce, the UNCITRAL Working Group discussed the following functions traditionally performed by handwritten signatures: to identify a person; to provide certainty as to the personal involvement of that person in the act of signing; to associate that person with the content of a document. It was noted that, in addition, a signature could perform a variety of functions, depending on the nature of the document that was signed. For example, a signature might attest to: the intent of a party to be bound by the content of a signed contract; the intent of a person to endorse authorship of a text (thus displaying awareness of the fact that legal consequences might possibly flow from the act of signing); the intent of a person to associate itself with the content of a document written by someone else; the fact that, and the time when, a person had been at a given place.

As observed by the UNCITRAL Model Law on Electronic Commerce, in most legal systems, the notion of ‘person’ is used to designate the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Consistent with the approach taken in the UNCITRAL Model Law on Electronic Commerce, any reference in the UNCITRAL Model Law on Electronic Signatures to a ‘person’ should be understood as covering all types of persons or entities, whether physical, corporate or other legal persons

## **eUCP SUB-ARTICLE E3 (B) (V): “FORMAT”**

### eUCP Definition

The term “format” means the data organisation in which the electronic record is expressed or to which it refers.

### General

eUCP sub-article e3 (b) (v) defines ‘format’, a concept vital to the examination of electronic records.

### Background

There is no uniform or standard system by which data is organised, nor does there exist a common protocol by which data can be read or identified by data processing systems. As a result,

it is only readable if the data processing system is able to recognise the manner in which the data is organised, or its format.

Not every data processing system can recognise every format into which data can be organised. Moreover, with the fast pace of technological development, many systems of organisation are regularly issued in successive versions. It is typical that the later versions are able to read earlier ones but that earlier ones are not able to read later ones.

#### Meanings of Format

The term 'format' is used in several senses. It can mean the protocol by which data is organised, the version of that format, or the shorthand name by which that protocol is recognised and described. There is no precise distinction between these approaches, and the manner in which it is intended they be used can normally be identified from the context in which they are used. Under the eUCP, the burden is on the issuing bank to indicate, with sufficient specificity, the format in which it desires data in the electronic record to be arranged.

#### Accessing data in readable form

The importance of a format lies in the ability of a data processing system to process data. If the format is not one that is recognised by the data processing system, the output is meaningless and said to be 'unreadable'. This term implies that the data processing system cannot properly format the data in a manner that would provide meaning to a reader.

#### Format in the eUCP

Questions relating to format have virtually no analogy to credits calling for paper documents under UCP 600, except possibly with respect to the language in which documents are written. In order to develop a new system for processing electronic records, it is necessary that the desired format be known to the presenter and nominated banks in order to avoid confusion and disputes. As a result, eUCP article e5 (Format) and sub-article e7 (c) (Examination) place the onus of stating a required format on the issuing bank and permits the presenter to present an electronic record in any format if none is specified in the eUCP credit.

### **eUCP SUB-ARTICLE E3 (B) (VI): "PAPER DOCUMENT"**

#### eUCP Definition

The term 'paper document' means a document in a paper form.

#### General

eUCP sub-article e3 (b) (vi) refers to a document in a paper medium, the type of document which is expected to be presented under UCP 600.

#### UCP 600

Unless otherwise stipulated, UCP 600 assumes that all 'documents' are in a paper medium. Provisions such as 'original', 'appear on their face', 'copies', and 'examine on their face' all presume the presentation of paper. However, as is often the case with UCP 600, this fundamental assumption is not stated expressly. Instead, the term 'document' is used.

#### Need for new term

By broadening the meaning of the term 'document' as it is used in UCP 600 and in eUCP sub-article e3 (a) (ii) (Document), it became necessary to identify another term that permitted the distinction between paper and electronic records for the eUCP. The term 'paper document' was chosen because it aptly and simply describes the traditional medium in which data was inscribed.

#### Paper

Printout from a computer, if presented, would be a paper document, whereas the presentation of a portable storage medium would not be. Consequently, the explanation of the sense in which the term 'paper' is used resorts to a reference to the 'paper form' in which the term was used and understood.

## **eUCP SUB-ARTICLE E3 (B) (VII): “RECEIVED”**

### *eUCP Definition*

The term “received” means when an electronic record enters a data processing system, at the place for presentation indicated in the eUCP credit, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system does not imply that the electronic record has been viewed, examined, accepted or refused under an eUCP credit.

### *General*

eUCP sub-article e3 (b) (vii) defines ‘received’ when used with respect to an electronic record.

### *Significance in practice*

Receipt is critical in documentary credit presentations. Documents are not presented until they are received. It is possible to speak in terms of the receipt of a particular document or of a presentation. In respect of paper documents where they are presented in one lot, the two notions occur simultaneously.

With respect to the presentation of paper, a paper document is ‘received’ when it comes into the control of the bank. This step can occur when it is delivered to a clerk or to the mailroom. Once the document comes into the bank’s control, presentation has taken place and the bank assumes the risk of loss of the document.

### *Receipt of electronic records*

Delivery of an electronic record will commonly be made electronically to the bank’s data processing system, so that the element of passing into the bank’s control is still present. There is, however, an additional element, namely that in order to meet the requirements of presentation the electronic record can be authenticated. In this case, mere acceptance into the bank’s system is not sufficient to constitute receipt of an electronic record that is transmitted electronically. As used in sub-article e3 (b) (vii) ‘acceptance’ means that the record can be authenticated, not merely that it has passed into the control of the bank’s system.

### *Notice of completeness*

There is an additional difference between receipt under presentation under UCP 600 and the eUCP, namely that the receipt of a paper document required by the credit constitutes presentation under the UCP 600, whereas receipt of a document, whether a paper document or electronic record, does not constitute presentation until the notice of completeness is received under the eUCP.

### *Non-receipt*

As with a paper document under the UCP 600, non-receipt of an electronic record means that it has not been presented. Non-receipt can occur if the record does not reach the bank’s systems or if it is not authenticated by those systems. As provided in eUCP sub-article e6 (f) (Presentation), such a record is deemed not to have been presented.

### *Acknowledgments*

Computer systems will, on occasion, automatically send out an acknowledgment to the sender that a message has entered the system. Such an acknowledgment does not necessarily imply that the electronic record has been received in the technical sense used in eUCP sub-article e3 (b) (vii) since authentication may not have occurred at that time. In the event of a dispute about whether an electronic record was received, it could be a factor for which the significance would have to be assessed under local law.



## **eUCP SUB-ARTICLE E3 (B) (VIII): “RE-PRESENT” OR ‘RE-PRESENTED’**

### eUCP Definition:

The terms ‘re-present’ or ‘re-presented’ mean to substitute or replace an electronic record already presented.

### General

The terms ‘re-present’ and ‘re-presented’ existed in eUCP Version 1.1, article e11 (Corruption of an Electronic Record after Presentation), but were not defined within the rules.

### Use in UCP 600

The terms ‘re-present’ and ‘re-presented’ are not used in UCP 600.

### Meaning of ‘re-present’ or ‘re-presented’

eUCP article e12 (Data Corruption of an Electronic Record) uses the term ‘re-presented’. In this context, the term means to substitute or replace – at the request of a nominated bank – an electronic record already presented. The term is also used in documentary credit practice to characterise the action of the presenter in making a subsequent presentation to cure a discrepant prior presentation.

The two actions should not be confused. Under the eUCP, the re-presentation is merely the replacement of a document already presented and its effect relates back to when it was originally presented; whereas when a non-conforming presentation is being cured by re-presentation, it takes effect as of the time of receipt of the re-presentation.

## **“AUTHENTICATE/AUTHENTICATION”**

### General

The terms ‘authenticate’ and ‘authentication’, while used in the eUCP, are not expressly defined.

### Significance in paper documents

Authentication in the paper world is the process by which the validity of the representations and the paper documents containing them are ascertained. There are, necessarily, various levels of authentication. In documentary credit practice, the level of authentication of paper documents is facial. The documents are examined on their face. If it is apparent on their face that they are patently false, the bank can refuse to honour on that basis, provided that it is able to prove that they are false, forged, or fraudulent.

### Significance in electronic commerce

Authentication has a very different significance in electronic commerce. Because of the possibility of greater levels of authentication than are feasible in the paper world, and because of the unwillingness of participants to accept levels of risk that they normally accept for equivalent documents in the world of paper, there has been considerable attention in electronic commerce to authentication of data. As a result, various levels of authentication have arisen, some tied to specific technologies.

### Uses of ‘authenticate’

The term ‘authenticate’ is not only used in the eUCP, but also in UCP 600 and in systems such as SWIFT that support documentary credit practice. Depending on the context, the expectations of the users, and what is commercially reasonable, the constitution of a minimally acceptable level of authentication not only varies, but also is linked to specific technologies.

### eUCP

The term ‘authenticate’ is used in the eUCP in two different senses:

- In eUCP sub-article e3 (b) (iii) (Electronic record), it means identifying the person sending a message and the source of the message.
- In eUCP sub-article e3 (b) (iv) (Electronic signature), it means associating the person authenticating with the content of the message authenticated.

### Authentication under local law

Many of the laws that address electronic commerce define authentication, and some even tackle the issue of when and at what level it is required. While most such laws are technology-neutral and do not require a higher degree of authentication than would be required for the equivalent information in a paper medium, there are some that impose mandatory requirements of authentication for certain types of documents that are more rigorous than is required by the eUCP.

It may be that such local laws will impact presentation under the eUCP. Where such laws are not those of the jurisdiction to which the issuing bank is subject, the issuing bank does not bear the risk imposed by them and the applicant undertakes to indemnify the issuer against any loss experienced as a result pursuant to UCP 600 Article 37 (Disclaimer for Acts of an Instructed Party).

### UNCITRAL

The UNCITRAL Model Law on Electronic Commerce is intended to provide useful guidance both in a context where national laws would leave the question of authentication of data messages entirely to the discretion of the parties and in a context where requirements for signature, which were usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

The Model Law on Electronic Signatures states that it should constitute a useful addition to the Model Law on Electronic Commerce and significantly assist States in enhancing their legislation governing the use of modern authentication techniques and in formulating such legislation where none currently exists.

## ARTICLE e4

### ELECTRONIC RECORDS AND PAPER DOCUMENTS V. GOODS, SERVICES OR PERFORMANCE

*Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.*

## CHANGES FROM eUCP VERSION 1.1

- New article

## COMMENTARY

This article was not included in previous versions of the eUCP. The format 'v' is used in order to maintain consistency with existing rules such as UCP 600 and URBPO 745.

### USE IN UCP 600

The structure of this article is aligned in order to follow the construction of UCP 600 article 5 (Documents v. Goods, Services or Performance).

### RATIONALE FOR INCLUSION WITHIN eUCP

UCP 600 article 5 does not address electronic records. The addition of 'electronic records' in the eUCP is a key difference. Whilst it is acknowledged that the definition of 'documents' includes 'electronic records', it is considered that this article provides further clarity and transparency.

## ARTICLE e5

### FORMAT

*An eUCP credit must indicate the format of each electronic record. If the format of an electronic record is not indicated, it may be presented in any format.*

## CHANGES FROM eUCP VERSION 1.1

- Minor structural changes

## COMMENTARY

Format means the method by which a data processing system organises and reads data. eUCP sub-article e3 (b) (v) (Definitions) defines the term 'format' as 'the data organisation in which the electronic record is expressed or to which it refers'. eUCP article e5 requires that the format of an electronic record be specified in a eUCP credit and states the consequences if not so indicated. In view of the fact that data processing systems are unable to recognise each and every format into which data may be organised, it is important that any data be in a format that is readable by the relevant data processing system. As a result, it is essential that any related eUCP credit (or relevant amendment) indicate the required format.

### SPECIFICATION OF FORMAT

The eUCP is technology neutral and does not specify the use of any particular format. The format is to be stated in the eUCP credit in a manner that is comprehensible to the presenter.

### FORMAT VERSION

With the ever-evolving change in technological development, many systems of organisation are regularly issued in successive versions. It is typical that the later versions are able to read earlier ones but that earlier ones are not able to read later ones. It is quite conceivable that an eUCP credit may indicate diverse formats for several documents. If the credit does not specify a format for a particular document, then such document may be presented in any format.

### FAILURE TO INDICATE A FORMAT

As mentioned above, it is essential that any related eUCP credit (or relevant amendment) indicate the required format. Should it not do so, then the presenter can present documents in any format. Such a circumstance may result in a situation wherein, whilst the issuing bank or any confirming bank would be unable to access the electronic records, they would still be liable to honour. Any ability to dishonour on the basis that a bank is unable to read the format in which data is presented would, under eUCP sub-article e7 (c) (Examination), not be feasible in such circumstances.

### CAPABLE OF BEING READ

The sanction embodied in eUCP article e5 and sub-article e7 (c) (Examination) is not applicable to the presentation of data in a format that is not readable at all. Under eUCP sub-article e3 (b) (iii) (Electronic record), any data that has been presented in such circumstances is not an electronic record that, inter alia, must be capable of being examined for compliance.

## ARTICLE e6

### PRESENTATION

- a.** *i.* An eUCP credit must indicate a place for presentation of electronic records.  
*ii.* An eUCP credit requiring or allowing presentation of both electronic records and paper documents must, in addition to the place for presentation of the electronic records, also indicate a place for presentation of the paper documents.
- b.** *Electronic records may be presented separately and need not be presented at the same time.*
- c.** *i.* When one or more electronic records are presented alone or in combination with paper documents, the presenter is responsible for providing a notice of completeness to the nominated bank, confirming bank, if any, or to the issuing bank, where a presentation is made directly. The receipt of the notice of completeness will act as notification that the presentation is complete and that the period for examination of the presentation is to commence.  
*ii.* The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates.  
*iii.* Presentation is deemed not to have been made if the notice of completeness is not received.  
*iv.* When a nominated bank, whether acting on its nomination or not, forwards or makes available electronic records to a confirming bank or issuing bank, a notice of completeness need not be sent.
- d.** *i.* Each presentation of an electronic record under an eUCP credit must identify the eUCP credit under which it is presented. This may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the covering letter or schedule that accompanies the presentation.  
*ii.* Any presentation of an electronic record not so identified may be treated as not received.
- e.** *i.* If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day for presentation, as the case may be, the bank will be deemed to be closed and the expiry date and/or last day for presentation shall be extended to the next banking day on which such bank is able to receive an electronic record.  
*ii.* In this event, the nominated bank must provide the confirming bank or issuing bank, if any, with a statement on its covering schedule that the presentation of electronic records was made within the time limits extended in accordance with sub-article e6 (e) (i).  
*iii.* If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunication or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.
- f.** *An electronic record that cannot be authenticated is deemed not to have been presented.*

### CHANGES FROM eUCP VERSION 1.1

- Structural and grammatical changes
- Amended 'beneficiary' to 'presenter'
- More precise explanation as to which banks are impacted
- Clarification that the notice of completeness acts as notification that the presentation is complete
- Clarification that the period for examination commences upon receipt of the notice of completeness
- A notice of completeness is not required in the forwarding of electronic records by a nominated bank to a confirming or issuing bank

- Additional methods are added in order to identify an eUCP credit
- In the event that the expiry date and/or last day for presentation are extended, it should be indicated in the covering schedule that this is in accordance with the rules

## COMMENTARY

The eUCP does not contain a definition of 'presentation'. When applied to UCP 600, it means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered. If presentation occurs prior to the expiry date of the credit, it is timely. If not, neither the issuing bank nor any confirmer banks have any obligation under the credit.

Presentation may also impact other deadlines such as the requirement of UCP 600 sub-article 14 (c) (Standard for Examination of Documents) for transport documents to be presented within 21 calendar days after the date of shipment.

### SINGLE MAILING

Although UCP 600 articles 14 (Standard for Examination of Documents) and 16 (Discrepant Documents, Waiver and Notice) do not expressly require that documents be presented in one lot, banks commonly expect presentation to be in one single mailing.

### PLACE OF PRESENTATION

eUCP sub-article e6 (a) repeats the requirement of UCP 600 sub-article 6 (d) (Availability, Expiry Date and Place for Presentation) that a credit must state the place for presentation. eUCP Article e6 (a) also distinguishes between the place where electronic records and paper documents are to be presented. As under UCP 600, it is implied that a paper document would be presented to a physical address.

### ELECTRONIC RECORD

The place for presentation of an electronic record would, in general, be an electronic address. However, there are situations where an electronic record could be sent to a physical address. For example, the data could be saved on a portable storage medium and mailed. The data is in the form of an electronic record but it is presented to a physical address.

### NO INDICATION OF A PLACE FOR PRESENTATION

In the rare event that an eUCP credit fails to indicate a place for presentation, neither UCP 600 nor eUCP sub-article e6 (a) indicate the consequence. In the paper world, the presenter would be entitled to make presentation to the address of the issuing bank stated in the credit or to any place at which the issuing bank or any confirming bank does business.

It is normal practice that, under UCP 600, a physical location will be stated within in the credit. The eUCP defines 'place for presentation' as an electronic address of a data processing system. As such, in order to ensure compliance with regulatory and sanctions issues, it is essential that an eUCP credit also indicate a physical location. Mailing a portable storage medium in the proper format to a physical address may also suffice.

### CLOSURE OF PLACE FOR PRESENTATION

eUCP sub-article e6 (a) does not address the situation where the electronic address has ceased to be functional even though the bank is able to receive electronic messages. In such a case, the provisions of eUCP sub-article e6 (e) regarding closure for electronic business would apply.

### DIRECT PRESENTATION TO ISSUING BANK

The eUCP does not address the question of whether or not the presenter may present an electronic record and paper documents directly to the issuer or confirmer even if a different place for presentation is given in the eUCP credit. Absent any express provision, there is no basis for

changing the practice under UCP 600 permitting the presenter the option of making presentation directly to any bank that is obligated under the credit. As a practical matter, however, the presenter may not have an electronic address to which presentation may be made unless it is stated in the credit.

### **NON-RECEIPT OF PRESENTATION**

As is the case with paper documents under UCP 600, the risk of non-receipt ultimately remains with the beneficiary. The issuing bank or any confirming banks obligation is predicated on the timely presentation of complying documents. It would be good practice for beneficiaries to monitor presentations of electronic records, particularly when utilising another party for full or partial presentation of the electronic records.

### **SEPARATE PRESENTATION OF ELECTRONIC RECORDS**

eUCP sub-article e6 (b) expressly provides that electronic records may be presented separately, reflecting the realities of electronic transmission. Even if the same sender sends electronic records at approximately the same time, it does not follow that they will be received simultaneously unless they are combined into one file.

Moreover, the issuing bank and applicant may prefer certain electronic records to be sent directly by the third party that creates them. As a result, a transmission receipt of documents under an eUCP credit will commonly be fragmentary. Electronic records will also be presented separately from any paper documents required or permitted by the eUCP credit.

### **PAPER DOCUMENTS UNDER AN eUCP CREDIT**

Although eUCP sub-article e6 (b) allows for separate presentation of electronic records, this does not apply to presentation of paper documents under an eUCP credit. Under such circumstances, UCP 600 would apply to the paper component.

When paper documents are to be presented in one lot, the issuing bank would probably expect the same transmission of paper documents under an eUCP credit as under a UCP credit. However, it should be borne in mind that there is less reason to insist on transmission of paper documents in one lot under the eUCP, owing to the fact that the time for examination will not commence until the notice of completeness has been received.

An issuing bank that does not wish to receive separate paper presentations under an eUCP credit should consider specifying in the eUCP credit that the presentation of any paper documents must be in one lot.

### **BANKING HOURS**

UCP 600 Article 33 (Hours of Presentation) provides that a bank 'has no obligation to accept a presentation outside of its banking hours'. This provision is understood to mean that a presentation received after the hours in which the documentary credit department is open is received the next banking day, unless the bank elects to treat it otherwise.

Although electronic records can be received 24 hours a day, seven days a week, this rule still remains in force. As a practical matter, only the notice of completeness will be affected. While the presenter is obligated to make presentation before the close of business on the expiry date, an issuer would be well advised to state the time for the close of business (e.g. "Before 1600 hours GMT on the expiry date") in the eUCP credit so as to avoid any misunderstanding due to differing expectations.

### **DOCUMENT MEDIUM NOT STATED**

When an eUCP credit states the name of a document without stating whether it should be in a paper or an electronic medium (or format), and requires at least one other electronic record, giving no other indication that other required documents are to be in a paper medium, the eUCP provides no express rule but presumes that, were an electronic record required, it would be express.

This presumption is based on the common UCP 600 practice of specifying an electronic record where one is required and simply indicating the name of the document where a traditional paper document is expected, assuming that a document will be in a paper medium unless otherwise stated. Therefore, if an eUCP credit indicates that specific documents are to be presented as electronic records but is silent about other documents, those documents must be presented in a paper medium.

This assumption that paper is a default medium in an eUCP credit is, however, rebuttable where there is ambiguity. For example, if the eUCP credit specifies that several documents are to be paper documents and several other documents are to be electronic records, but does not provide any actual indication as to the medium of the document at issue, that document could be presented either as a paper document or an electronic record.

### **NOTICE OF COMPLETENESS**

Many banks are not prepared to monitor the receipt of paper documents presented separately under UCP 600 credits because of the costs and risks involved. The processing necessary to make eUCP credits economically viable makes such personnel-intensive monitoring of separate documents under eUCP credits even less feasible.

To solve this problem, in eUCP sub-article e6 (c), the burden of determining whether presentation is completed under the eUCP is shifted to the presenter and, by default, ultimately to the beneficiary. It states that the presentation has not taken place until the presenter provides a notice of completeness. When the notice of completeness is received, the reasonable time within which to examine documents begins to run. Strictly speaking, it is incorrect to say that the presenter is 'required' to present a notice of completeness under the eUCP. It is no more 'required' to do so than it is required to present any document or record. However, its entitlement to honour is conditioned on presentation of the notice.

eUCP sub-article e6 (c) states that the notice of completeness must signify that the presentation is complete and 'identify the eUCP credit to which it relates'. It allows the notice of completeness to be provided either by electronic record or paper document unless the credit otherwise provides. Even if the credit requires that the notice of completeness be given as an electronic record, sub-article e6 (e) (iii) provides that it may be presented as a paper document in the event that the bank to which presentation is to be made is unable to receive an electronic presentation and the only remaining item to be presented is the notice.

Although not mandated by the eUCP, it would be good practice for a presenter to expressly label any such document as a notice of completeness, therein stating that the specified presentation under a referenced credit is now complete.

In addition, whilst it is not necessary for an eUCP credit to expressly include a requirement for a notice of completeness, it would constitute good practice if issuing banks stated within the credit that a notice of completeness must be given when the presentation is complete and that examination will not begin until that point.

In accordance with eUCP sub-article e6 (c) (iii), the lack of a notice of completeness deems that presentation has not been made.

### **NON-REQUIREMENT FOR NOTICE OF COMPLETENESS**

As evidenced in eUCP sub-article e6 (c) (iv), it is implied that the requirement for a notice of completeness only applies to the presentation by a presenter to the nominated bank, confirming bank, if any, or to the issuing bank.

It is the responsibility of the presenter, and ultimately the beneficiary, to ensure a complete presentation and to evidence such completeness by presenting the required notice. Any presentation by a nominated bank to a confirming or issuing bank is automatically considered to be complete and does not require a notice of completeness.



## IDENTIFICATION OF THE CREDIT

eUCP sub-article e6 (d) (i) requires that each separate presentation identify the eUCP credit under which it is presented. Even though it imposes a requirement that is not contained in the terms of the credit and would not normally be present in the document itself, this provision is necessary in order to avoid any potential confusion.

It should be noted that the eUCP does not require each paper document to identify the credit under which it is presented, only that a presentation do so. As a result, in the event of several paper documents being presented in one lot, it would be acceptable if the cover letter indicated the credit under which the documents are presented.

Similarly, if electronic records are batched together and sent in an electronic envelope, the credit may be identified in the message envelope. It should also be noted that eUCP sub-article e6 (d) does not require identification of the credit in any particular manner, such as by its number. Such a shorthand means of identification would naturally be the easiest means of identifying the credit. It could also, however, be identified by other means. For example, giving the confirmation number and the name of the issuer and the amount and date of the credit may enable identification even without the credit number. The crux is whether or not the bank would be able to identify the credit based upon the information provided in the normal course of its operations.

When a bank cannot link an electronic record to the credit to which it relates without further information from the presenter, eUCP sub-article e6 (d) (ii) provides that it 'may be treated as not received'. Although the bank is not required by the eUCP under such circumstances to ask the presenter to identify the credit, it is very likely to do so, and would constitute good practice. Such a query must solely be for information purposes and does not constitute an attempted notice of refusal for purposes of UCP 600 sub-article 16 (d) (Discrepant Documents, Waiver and Notice).

## ELECTRONIC CLOSURE

When a bank to which presentation of one or more electronic records is to be made is open for business but is unable to receive an electronic presentation, eUCP Article e6 (e) provides that certain deadlines 'shall be extended to the next banking day on which such bank is able to receive an electronic record'. To lessen the possibility of such electronic closure, banks should have back-up systems in place and may wish to indicate alternative electronic addresses.

It should be noted that the eUCP electronic closure rule does not apply to situations in which the bank to which presentation is to be made is physically closed for business nor does it apply to presentation of paper documents. In such situations, the rules of UCP 600 apply. If the place for presentation is closed in the ordinary course of business and not due to a *force majeure* event, UCP 600 article 29 (Extension of Expiry Date or Last Day for Presentation) would apply and the expiry date and the last date after the date of shipment will be extended to the first following banking day. However, if the place for presentation is closed due to a *force majeure* event as indicated in UCP 600 article 36 (Force Majeure), there will be no extension. Under UCP 600, this risk is borne by the beneficiary.

The eUCP rules regarding extension would not apply to presentation of paper documents under an eUCP credit even if the electronic address for presentation is unable to receive electronic records. As a result, the inability of the bank to receive an electronic record on a deadline will not excuse the presentation of a paper document if the place for presentation of the paper document is open for business. If it is not, an excuse must be found in UCP 600 and not in the eUCP. On the other hand, even if the bank is closed in the ordinary course of business or due to a *force majeure* event, its electronic place of presentation may be able to receive presentations. In such a case, the presentation would be timely.

## **COVERING SCHEDULE STATEMENT**

In line with the principles of UCP 600 sub-article 29 (b) (Extension of Expiry Date or Last Day for Presentation), eUCP sub-article e6 (e) (ii) provides that, in the event of an extension under sub-article e6 (e) (i), the nominated bank must provide the issuing bank or confirming bank, if any, with a statement on its covering schedule that the presentation of electronic records was made within the time limits extended in accordance with sub-article e6 (e) (i).

## **REMAINING ELECTRONIC RECORD NOTICE OF COMPLETION**

As stated in sub-article e6 (e) (iii), in a situation where the only electronic record remaining to be presented is the notice of completion, such notice may be given by telecommunication or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.

## **DEADLINES**

eUCP article e6 (e) does not apply to all deadlines. As with UCP 600 article 29 (Extension of Expiry Date or Last Day for Presentation), it applies only to the expiry date in the credit and to the last date of the period of time after the date of shipment for the presentation of documents.

## **AUTHENTICATION**

The eUCP requires a level of authentication of electronic records that differs from that required for paper documents. In neither case, however, is the bank required to look beyond the face of what is presented to ascertain the facts that are represented.

The nature of an electronic presentation requires a different manner of screening as to the apparent authenticity of the document. In the paper milieu, an examiner would look at the document on its face. Only if it were apparently irregular in a manner that was beyond doubt would the examiner be justified in questioning its authenticity. Even then, the examiner would not be justified in refusing it on the basis that it appeared to be false unless it was, in fact, proven to be false, fraudulent, or forged.

In an electronic environment, the processing system performs a screening function that filters electronic records with respect to the apparent sender and with respect to whether the message is received in its entirety and integrity. The nature of this authentication is intimately linked to the nature of an electronic record and is covered above in more detail in connection with the definition of 'electronic record' under eUCP sub-article e3 (b) (iii) (Definitions). eUCP sub-article e6 (f) provides that when an electronic record cannot be authenticated, it 'is deemed not to have been presented.' Indeed, in most such situations, the documentary credit department will not even be aware that a presentation has been attempted because the transmission will not be able to get beyond the bank's authentication systems.

## ARTICLE e7

### EXAMINATION

- a. i.** *The period for the examination of documents commences on the banking day following the day on which the notice of completeness is received by the nominated bank, confirming bank, if any, or by the issuing bank, where a presentation is made directly.*

**ii.** *If the time for presentation of documents or the notice of completeness is extended, as provided in sub-article e6 (e) (i), the time for the examination of documents commences on the next banking day following the day on which the bank to which presentation is to be made is able to receive the notice of completeness, at the place for presentation.*
- b. i.** *If an electronic record contains a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system, the electronic record at the hyperlink or the external system shall be deemed to constitute an integral part of the electronic record to be examined.*

**ii.** *The failure of the external system to provide access to the required electronic record at the time of examination shall constitute a discrepancy, except as provided in sub-article e7 (d) (ii).*
- c.** *The inability of a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank, to examine an electronic record in a format required by an eUCP credit or, if no format is required, to examine it in the format presented is not a basis for refusal.*
- d. i.** *The forwarding of electronic records by a nominated bank, whether or not it is acting on its nomination to honour or negotiate, signifies that it has satisfied itself as to the apparent authenticity of the electronic records.*

**ii.** *In the event that a nominated bank determines that a presentation is complying and forwards or makes available those electronic records to the confirming bank or issuing bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when a specified hyperlink or external system does not allow the issuing bank or confirming bank to examine one or more electronic records that have been made available between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.*

### CHANGES FROM eUCP VERSION 1.1

- Sub-articles moved from the previous Version 1.1 article e7 (Notice of Refusal)
- Minor structural changes
- Expansion to nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank
- Clarification that the forwarding of electronic records by a nominated bank indicates that it has satisfied itself as to the apparent authenticity of the records
- Addition of a sub-article to address the inability of an issuing bank or confirming bank to access electronic records already found compliant by a nominated bank

### COMMENTARY

eUCP article e7 addresses several issues concerning the examination of electronic or mixed presentations under the eUCP, including the examination of electronic records contained on external systems, the implications of the nomination of correspondent banks, and the inability of a bank to examine an electronic record presented in a required or permitted format.

## TIME

Under UCP 600, once presentation is made to an issuing or confirming bank, the time for examination commences. Presentation can also be used to refer to the presentation of an individual document or documents, but less than all those required by the credit; and is so used in the eUCP.

Under the eUCP, electronic records may be presented separately and, even if paper documents are presented in one lot, they must be coordinated with the electronic records. To monitor these documents and give notice within five days of the first document presented would create an onerous burden on banks, increase the costs and risks, and frustrate mass processing of electronic records. As a result, eUCP sub-article e6 (c) (Presentation) changes the point at which presentation occurs. It requires that the presenter notify the bank that presentation is complete by giving a notice of completeness. Accordingly, the time for the examination of documents under the eUCP does not commence until the notice of completeness is received as eUCP sub-article e7 (a) (i) provides.

eUCP sub-article e7 (a) (ii) highlights that if the time for presentation of documents or the notice of completeness is extended (as provided in sub-article e6 (e) (i), the time for examination commences on the next banking day following the day on which the bank to which presentation is to be made is able to receive the notice of completeness, at the place for presentation. Similarly, under UCP 600 article 29 (Extension of Expiry Date or Last Day for Presentation), there is an extension of the time for presentation in certain circumstances and it is assumed that examination would commence at the end of the extension period.

## EXTERNAL SYSTEMS

eUCP sub-article e7 (b) relates to external sources of documentary information. It:

- alerts banks using the eUCP that there can, in the ordinary course of examination under the eUCP, be a reference to an external source;
- provides that such a reference is not unusual and requires no special permission in an eUCP credit;
- implies that a bank must examine the external source indicated in a document in order to examine the presentation properly; and,
- indicates the consequences of the failure of the indicated source to provide access or the necessary information.

As outlined in the former 'ICC Guide to the eUCP' (ICC Publication No. 639), bankers trained in the UCP system may be hesitant to access external systems in examining documents because they have been trained to believe that references to external systems are contrary to documentary credit practice. Reference to an external system touches on the independent nature of the documentary credit undertaking which is intimately linked to the propositions that the credit transaction is separate from the underlying transaction that gives rise to it, that the parties are not concerned about performances, and that it is improper for a bank to base its refusal to honour on factors external to the documents presented as they appear on their face.

The conflict, however, is apparent rather than real. Despite appearances, references to external systems under the eUCP do not compromise the principles that underlie the doctrine of independence. As is indicated in eUCP article e13 (Additional Disclaimer of Liability for Presentation of Electronic Records under eUCP), an examination of an electronic record under the eUCP is an examination of the data as it appears. The notion does, however, introduce a new dimension to the understanding of independence. References to external systems are not departures from the doctrine of independence because the examination would still be of the data contained in this external system in the same manner as if it had been presented directly and not of the realities represented. While the external system may contain some features that improve the linkage between the representations given in the electronic records presented and

the realities that they represent, the examination will take what is stated in this source on its face without regard to its origin. What is still being examined is a representation rather than a reality.

The eUCP does not indicate which external systems may be used other than a reference to 'a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system'. This approach supports the need for the rules to be technology-neutral.

eUCP sub-article e7 (b) (i) highlights that when there is a reference to an external system in documents presented under an eUCP credit, the data at that source becomes the electronic record that is to be examined. It should be noted that the reference to this external system may either be by paper document or electronic record.

In view of the fact that an examiner must be in a position to access any external system indicated in a presentation in order to examine the documents, a presenter must provide accurate information about location and any necessary access information. eUCP sub-article e7 (b) (ii) warns that failure to 'provide access to the required electronic record at the time of examination shall constitute a discrepancy'" A failure to provide access can occur in two ways: it can result from the failure of the external system to operate or from the refusal of an operating system to allow the examiner to access the required data. Although the eUCP does not specifically state that providing improper access to information would constitute a discrepancy, this result is implied by the use of the phrase 'failure of the external system to provide access'. Assertion of either of these failures as a discrepancy raises issues of proof that must be carefully considered. The failure, of course, must not be due to inabilities of the bank's own systems. The only exception to this approach is stated in sub-article e7 (d) (ii).

## **COMPLIANCE**

Under an eUCP credit, a bank examines presented documents for compliance with the terms and conditions of a credit. Compliance under UCP 600 sub-article 14 (d) (Standard for Examination of Documents) does not require literal or mirror image compliance for most data in documents. Even the description of the goods need only 'correspond' as stated in UCP 600 sub-article 18 (c) (Commercial Invoice).

This principle also applies to the data in an electronic record. However, data clearly intended to be machine read, such as external source addresses or access codes is different. An error, even in the placing of a full stop or another keystroke, may be fatal in seeking a URL or other electronic address. The issuing bank is not required to guess as to where the error in such data might be.

## **EXCLUSION OR MODIFICATION OF SUB-ARTICLE E7 (b)**

It is possible that a bank may not want to access an external system in the course of examination, and will accordingly request exclusion or modification of eUCP sub-article e7 (b). However, it is doubtful that doing so would actually make a reference to an external system non-conforming unless the credit actually contained a term specifically prohibiting such reference.

It is far more appropriate if, before considering such a tactic, banks take cognisance of the benefits of using external systems. Such systems not only increase the reliability of an electronic presentation, but also potentially reduce the risk of fraud in the underlying transaction. Usage of such systems can be positive for all parties involved in a transaction.

If, however, a bank has a concern with regard to the limitation of its own systems to access certain types of external data, then it would be far more beneficial to provide any required specifications regarding the format of any external system, or the limitation of submission of electronic records by external systems, rather than a formal exclusion.

## **FORMAT**

eUCP sub-article e7 (c), by placing the risk of failure to specify a format on the issuing bank, follows from eUCP article e5 (Format) which provides that an eUCP credit 'must indicate the format of each electronic record'. Article e5 assumes that the issuing bank will designate a format that a bank is able to access. Sub-article e7 (c) so provides, indicating that the failure to indicate a format, or indication of a format that cannot be accessed is not a basis for refusal of the electronic record. This sub-article underlines the importance of giving due consideration in advance to the format to be required in the credit.

## **NOMINATED BANKS AND AUTHENTICATION**

eUCP sub-article e3 (b) (iii) (Definitions) provides that an 'electronic record' must be capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained within it and as to whether it has been received in complete and unaltered form.

eUCP sub-article e6 (f) (Presentation) provides that an electronic record that cannot be authenticated 'is deemed not to have been presented'. If a nominated bank forwards an electronic record, the issuing bank may be unable to authenticate it from its original source. It must, in that case, rely on the bank that has first received the electronic record to authenticate it. Sub-article e7 (d) (i) addresses this problem. Electronic records sent by a bank, whether or not it is acting on its nomination to honour or negotiate, to the issuing bank should also be authenticated between these two parties.

eUCP sub-article e7 (d) (i) provides that the forwarding of electronic records by a nominated bank, whether or not it is acting on its nomination to honour or negotiate, 'signifies that it has satisfied itself as to the apparent authenticity of the electronic records'. This provision does not change the rule of UCP 600 sub-article 12 (a) (Nomination), which provides that mere nomination does not constitute any undertaking by the nominated bank 'except when expressly agreed to by that nominated bank and so communicated to the beneficiary'.

Under the eUCP, however, if a nominated bank elects to forward the documents, its action does have the limited significance of indicating that the documents have been checked for apparent authenticity. The eUCP does not address the liability of the bank for failure to check the authenticity. Whether a nominated bank wishes to accept this responsibility must be considered. Should the nominated bank decide not to forward the electronic records and any paper documents, and instead either return them to the presenter or indicate that it is holding them, the time at which the notice of completeness was presented to the nominated bank will nonetheless be deemed the time of presentation for purposes of determining compliance with any deadlines in the UCP, eUCP, or the credit.

## **EXAMINING INFORMATION TRANSMITTED WITH AN ELECTRONIC RECORD**

The transmission of an electronic record may also include information that is not immediately apparent or visible on a screen. Described as 'message-related information', these can be the equivalent of a message envelope containing such items as headers and trailers, transmission path, and information related to the message authentication.

Such information may also indicate a history of changes that have been made to the data. For purposes of examining the data contained in the electronic record, the appearance of changes to the electronic record would not be a basis for refusal. The examination must be based on the data contained in the electronic record in the final form in which it has been transmitted and not on preparatory steps.

On the other hand, the bank may have other reasons to examine message-related information in the course of an examination. It may do so in order to determine the date that the electronic record was sent under eUCP article e10 (Date of Issuance), the person to whom to return the electronic record under UCP 600 sub-article 16 (c) (iii) (c) (Discrepant Documents, Waiver and Notice), and/or the address of the sender or information related to authentication. Having to

resort to message-related information does not violate the independence of the credit, because it does not involve examination of underlying facts related to the underlying transaction.

## **OTHER PROVISIONS IN THE eUCP IMPACTING EXAMINATION**

The eUCP contains other provisions that may have an impact on the examination of electronic records and documents presented. These include:

### *Inability to authenticate an electronic record or electronic notice of completeness*

While the issuer may know that an unauthenticated electronic notice of completeness or other electronic record has been sent, it is more likely that the documentary credit department will not even receive the document. If it did not receive an authenticated notice of completeness, the bank would have no obligation to commence examination under eUCP sub-article e6 (c) (iii). Even if it did receive an unauthenticated notice, the bank would not have received a proper notice. If a bank receives a notice of completeness but a required electronic record has not been authenticated, the discrepancy would be an 'unauthenticated record' if the documentary credit department knows of it or, if it does not, a missing required document. If an electronic record has not been authenticated, the bank has no obligation to examine it further, and should it contain other discrepancies, is not precluded from raising them if it should later be re-presented and authenticated. It would benefit the presenter to be sure that its communication 'system' is able to accurately identify messages that are not received in an acceptable form.

### *Failure to identify the eUCP credit*

If the issuing bank can identify the credit under which an electronic record or paper document is sent, it cannot claim that the presentation has not been received. On the other hand, it may choose to send a reply message to the presenter of the document asking to which credit the document relates, although such a reply is not required by the eUCP. The message is not to be construed as a notice of refusal or an acknowledgment or receipt of the referenced document for purposes of examination under the eUCP credit.

### *Expiry or other deadline extended*

When eUCP sub-article e6 (e) (Presentation) operates to extend a deadline with respect to an electronic record, a bank may not claim that the credit has expired or that the presentation is defective for that reason.

### *Wrong mode of notice of completeness*

When the credit requires that a notice of completeness be presented as an electronic record, the presentation of the notice as a paper document may not be a discrepancy and may not be defective even if received after the expiration of the credit if eUCP sub-article e6 (e) (Presentation) is applicable. Where the issuer is unable to receive the transmitted electronic record, sub-article e6 (e) (iii) permits the presenter to give the notice of completeness in a paper mode. This rule would apply even if the credit specified that the notice must be in an electronic record – unless the credit also expressly excludes this provision of sub-article e6 (e). The sub-article also provides that the paper substitute is timely if sent by the presenter (as opposed to received by the bank) before the presenter should know that the bank's systems are again operative.

### *Originals or copies*

A claim that one of a set of originals or copies is missing would not be a valid basis for dishonour under eUCP article e9 (Originals and Copies).

### *Dates*

An issuing bank would need to refer to eUCP article e10 (Date of Issuance) with respect to undated electronic records if their date of issuance was required or significant under UCP 600, the credit, or international standard banking practice.

### Dates of shipment on transport documents

An issuing bank would need to refer to eUCP article e11 (Transport) with respect to transport documents that do not indicate a date of shipment or dispatch or that bear a notation.

### Notations to transport records

When there is a notation to a transport record, an issuer would need to refer to eUCP article e11 (Transport) in addition to the applicable transport article of UCP 600.

## **TIME FOR EXAMINATION**

The eUCP does not contain a specific rule referencing the time within which examination of documents must occur. UCP 600 articles 14 (Standard for Examination of Documents) and 16 (Discrepant Documents, Waiver and Notice) remain applicable with respect to the time for examination. Under these articles, the bank has a maximum of five banking days following the day of presentation to determine if a presentation is complying.

## **COMPLIANCE DETERMINED BY A NOMINATED BANK**

Sub-article e7 (d) (ii) addresses a possible situation in which a nominated bank can access a specified hyperlink or external system, but the issuing bank or confirming bank is unable to access the same hyperlink or external system. In such circumstances, and when a nominated bank has determined that a presentation is complying and makes presentation of the electronic records to the issuing bank or confirming bank, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when a specified hyperlink or external system does not allow the issuing bank or confirming bank to examine one or more electronic records that have been made available between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

Sub-article e7 (d) (ii) provides a correlation with UCP 600 article 35 (Disclaimer on Transmission and Translation). In both UCP 600 and the eUCP, the inference is that if a presentation is considered to be complying by a nominated bank, but is not accessible to the issuing or confirming bank, then the issuing or confirming bank must still honour, negotiate or reimburse. UCP 600 article 35 does not expound upon the course of action to be pursued in the event of documents being lost in transit nor does it explain how to negate such a risk. This is a matter of practice, not for the rules to clarify, and is consequently left for the parties concerned to agree an appropriate approach. The same applies to an 'electronic record' scenario in a credit subject to the eUCP.

The underlying fact is that one party must bear the consequences and, in order to be consistent with UCP 600, it is considered that this is the correct approach both in intent and understanding. As is the case with UCP 600 article 35 (Disclaimer on Transmission and Translation), there is a need to establish the rights of a presenter that has presented a compliant presentation, but something goes awry after that presentation has been made. As with UCP 600 article 35, in view of the fact that the issuing bank is obligated to honour a complying presentation, it is immaterial whether or not a nominated bank has honoured or negotiated.

Unlike a presentation under the UCP, where copies of presented documents may be held with the nominated bank or obtainable from the presenter, this is not necessarily the case for electronic records. The wording of eUCP sub-article e7 (d) (ii) is reflecting a position if the issuing bank (or confirming bank) cannot access one or more electronic records. In practice, such events should be rare. However, it should also be noted that an issuing bank, when issuing its eUCP credit, should be aware of the entities that will be issuing or making available electronic records for review and use by an applicant. With this in mind, the issuing bank should be satisfying itself as to the platform, form of hyperlink or external system where the electronic records will be made available. If there is any doubt, the bank should not issue the eUCP credit in the form requested by the applicant.



## ARTICLE e8

### NOTICE OF REFUSAL

*If a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank, provides a notice of refusal of a presentation which includes electronic records and does not receive instructions from the party to which notice of refusal is given for the disposition of the electronic records within 30 calendar days from the date the notice of refusal is given, the bank shall return any paper documents not previously returned to that party, but may dispose of the electronic records in any manner deemed appropriate without any responsibility.*

## CHANGES FROM eUCP VERSION 1.1

- Minor structural changes
- Former sub-articles (a) (i) and (ii) moved for relevance to article e7 (Examination)

## COMMENTARY

The eUCP does not contain any specific rules concerning an approach by the issuing bank to the applicant in order to seek a waiver of discrepancies. In this respect, UCP 600 sub-article 16 (b) (Discrepant Documents, Waiver and Notice) continues to apply.

Furthermore, the notice process as outlined in UCP 600 sub-articles 16 (c) and (d) (Discrepant Documents, Waiver and Notice) remains applicable.

### ADDITIONAL REASONS FOR REFUSAL UNDER THE eUCP

In addition to the reasons for refusing a presentation under the terms of the credit and UCP 600, the eUCP provides potential further reasons for refusing to honour a presentation. Where applicable, these could include:

#### Wrong format (document unreadable)

The electronic record was not presented in the format required by the credit under eUCP article e5 (Format).

#### Electronic record not authenticated

The electronic record was not authenticated under eUCP sub-article e6 (f) (Presentation).

#### External source/hyperlink not accessible (identifying the source)

The external source referenced in the presentation was not accessible, except as provided in sub-article e7 (d) (ii).

### DISPOSITION OF DOCUMENTS

The return of electronic records creates a problem unparalleled in the paper world. In the paper world, there exists a unique piece of paper that can be held or returned. In the world of electronic records, the data remains with the bank even after it has been returned. Moreover, the electronic record is not unique because the presenter also has the data in its system even though it has been presented and, additionally, the beneficiary is likely to have it even though the data may have been sent by a third person presenter.

These considerations are compounded when the data is contained on an external system. As a result, there is not likely to be any unique value attached to the electronic record and less reason to place any emphasis on its return or to reinforce these rules with the threat of preclusion. To accommodate these differences, eUCP sub-article e8 provides that the bank need not hold or archive these records indefinitely. Unless the presenter provides other instructions within 30 calendar days from the date that the notice of refusal is given, the bank must return any paper documents and 'may dispose of the electronic records in any manner deemed appropriate

without any responsibility'. This rule places the onus of communicating instructions regarding the treatment of electronic records on the presenter.

### **IMPACT ON NOTICE OF REFUSAL**

eUCP sub-article e8 departs from the approach of UCP 600 article 16 (Discrepant Documents, Waiver and Notice) in that UCP 600 does not provide an express deadline for action, although banks are free under UCP 600 to return paper documents at any time.

As a result, it would be good practice, although not absolutely necessary, for a bank to include in its notice of refusal a statement with regard to eUCP article e8 and its policy with regard to the disposition of documents. Such a statement could provide that: *"Pursuant to eUCP article e8, we will return all electronic records to the electronic address from which you transmitted the documents to us, and will delete all records from our systems other than those related to the failure to comply, without responsibility on our part unless you provide us with instructions to the contrary within 30 calendar days from the date of this notice."*

Under UCP 600, the 'presenter' will normally be one entity, either the beneficiary or its agent or a nominated bank. Unless the issuing bank permits separate presentations of paper documents under the eUCP, there will only be one presenter of paper documents under the eUCP as well. However, with respect to electronic records, there may be multiple presenters. The eUCP does not require that the electronic records be returned at all, and if the issuing bank elects to return them after non-receipt of disposal instructions, the bank, at its option, may return them either to the presenter or to the beneficiary. If the beneficiary wishes to have the electronic records returned to a specific person other than the presenter, it should ensure it is so stated in any notice of completeness or in a timely response to the notice of refusal.

### **DISPOSAL OF DATA**

Decisions on the appropriate method of disposal of electronic records may be contingent upon the data itself and the circumstances. As used in article e8, 'dispose of' does not necessarily denote 'destroy' or 'delete'. In fact, such terms may not actually be feasible with an electronic record. In formulating its policy regarding the disposition of electronic records, a bank should take into account matters of proof in the event that its decision to refuse payment is challenged. Where a bank has dishonoured, it would be well advised to retain proof of the non-conformity of the presentation. Much like the paper environment where banks usually keep copies of paper documents, banks may also choose to archive the electronic records received.

## ARTICLE e9

### ORIGINALS AND COPIES

*Any requirement for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.*

## CHANGES FROM eUCP VERSION 1.1

- Minor structural changes

## COMMENTARY

Documentary credit practice pays particular attention to the originality of documents owing to the premise that originality is a source of assurance as to the legitimacy and validity of a document in a paper-based system. Issues have occasionally arisen under UCP 600 regarding whether or not documents are originals or copies and whether presentation of either or both is required. The notion of an original is intrinsically linked to the concept of paper.

The doctrine of uniqueness in an original document was addressed in an ICC Decision titled 'The determination of an 'Original' document in the context of UCP 500 sub-Article 20 (b)'. This decision was used as the basis for the revision of UCP 500 sub-article 20 (b). UCP 600 sub-articles 17 (b) and (c) reflect the incorporation of the essential positions of the Decision into UCP 600. UCP 600 only specifies that an original must be presented with respect to insurance documents in UCP 600 article 28 (Insurance Document and Coverage) and with respect to transport documents in UCP 600 article 19 (Transport Document Covering at Least Two Different Modes of Transport), article 20 (Bills of Lading), article 21 (Non-Negotiable Sea Waybill), article 22 (Charter Party Bill of Lading), and article 23 (Air Transport Document). Nevertheless, it is the expectation of the documentary credit community that every document presented will be an original unless otherwise provided in the terms and conditions of the credit.

eUCP article e9 facilitates the transition of these concepts into electronic presentations and interprets requirements for originals or copies when used with respect to electronic records. Within electronic commerce, the notion of originality has virtually no meaning.

### PRESUMPTION OF ORIGINALITY

Considering that many underlying transactions still require originals, total elimination of the concept makes no sense and would only add confusion.

As such, article e9 has taken the route of functional equivalency, meaning that any requirement for an original is satisfied by the presentation of one electronic record.

### FULL SET

As stated above, within electronic commerce, the notion of originality has virtually no meaning. The same consideration, for obvious reasons, applies to the concept of a full set of bills of lading. Within electronic commerce, such an approach is outmoded and archaic. Under eUCP article e9, any such requirement in an eUCP credit would be satisfied by the presentation of one required electronic record unless the credit expressly provided otherwise with sufficient specificity to indicate what was actually needed.

### REQUIREMENT FOR COPIES

It is well known that the requirement in many credits for multiple copies of certain documents is not always necessary and may have no actual business rationale.

Should an eUCP credit include such a requirement, the condition will be fulfilled by presentation of one electronic record.

## ARTICLE e10

### DATE OF ISSUANCE

*An electronic record must provide evidence of its date of issuance.*

## CHANGES FROM eUCP VERSION 1.1

- Change of emphasis in that an electronic record must now be dated

## COMMENTARY

eUCP article e10 provides a default rule that an electronic record must evidence the date of issuance.

### SIGNIFICANCE OF DATES

Dates are one means by which the representations and validity of documents are linked to the reality that they represent. The date of a document represents the date that the document is issued, effective, or both. Dates are significant for customs, taxation, determination of ownership, liability, insurance, transportation, and many other reasons. While usually not apparent to the banks involved in the credit, dates may also have significance to the commercial parties in the transaction.

### ROLE OF DATES IN DOCUMENTARY CREDIT PRACTICE

Dates also play an important part in the credit examination process. The only express requirement in UCP 600 that a document be dated is with respect to the identification of certain dates on transport and insurance documents. In addition, there are expectations that other documents, such as statements or certifications, must contain a date. ISBP 745 goes into more detail as to documentary requirements under UCP 600. Credits may also contain a specific requirement that a document be dated.

### eUCP

The amended wording in article e10 effectively dates electronic records, with the result that all such records must be dated under the eUCP. If there is to be any other way of determining the date of issuance then this will be for the eUCP credit itself to determine.

## ARTICLE e11

### TRANSPORT

*If an electronic record evidencing transport does not indicate a date of shipment or dispatch or taking in charge or a date the goods were accepted for carriage, the date of issuance of the electronic record will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. However, if the electronic record bears a notation that evidences the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage, the date of the notation will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. Such a notation showing additional data content need not be separately signed or otherwise authenticated.*

### CHANGES FROM eUCP VERSION 1.1

- Addition of 'taking in charge' and 'goods accepted for carriage'
- Minor structural changes

### COMMENTARY

The date of shipment or dispatch or taking in charge or accepted for carriage is critical in the examination of documents under documentary credits, because it may be necessary to use such date to determine whether or not the presentation of the document is within 21 days or the number of days indicated in the credit, and because it may be necessary to determine whether shipment or dispatch has taken place by the latest date indicated in the credit. UCP 600 contains elaborate rules for determining the date of shipment or dispatch that are individualised according to the type of transport document involved.

#### DATE OF SHIPMENT

eUCP article e11 addresses how to determine the date of shipment or dispatch when it is contained in a transport document transmitted in the form of an electronic record. 'Taking in charge' and 'goods accepted for carriage' have been added for compatibility with UCP 600.

It provides that the date of shipment is the date in the electronic transport record indicating shipment or dispatch or taking in charge or the goods were accepted for carriage. If there is no date indicating shipment or dispatch or taking in charge or goods accepted for carriage, the date of shipment or dispatch is the date of issuance of the electronic transport record unless there is a notation evidencing shipment or dispatch or taking in charge or goods accepted for carriage.

#### NOTATION

The practice of carriers with respect to electronic records is still evolving in line with technological advances, including the addition of a notation after issuance. In such an arrangement, there is a parallel to the paper practice of notations indicating shipment after the actual issuance of the electronic record.

In such circumstances, eUCP article e11 provides that the date of the notation will be deemed to be the date of shipment or dispatch or taking in charge or goods accepted for carriage. It is envisioned, in most cases, that a notation used in an electronic record will either be an addition to the electronic record itself, or a separate electronic record attached to the electronic record indicating transport. In these cases, data contained in these notations indicating a different date of shipment from the original record would be the date used in examination of the electronic records. In many cases, however, given the state of technology for transport-related documents, the issuer of the document can simply update the record prior to its transmission to the bank, and there would be no need for an additional notation.

eUCP article e11 also indicates that there is no need for a notation of shipment or dispatch or

taking in charge or goods accepted for carriage to be signed or authenticated separately from the authentication of the transport record itself. The transmission and authentication of the transmission is sufficient indication of the authenticity. This rule follows the UCP 600 Transport Articles.

Other provisions of UCP 600 relating to on board notations would continue to be applicable to an eUCP credit. Because the electronic notation may simply be an indication of additional data, this data may not appear in one place on the transport record as it would were a notation stamped on a paper document.

## ARTICLE e12

### DATA CORRUPTION OF AN ELECTRONIC RECORD

- a. *If an electronic record that has been received by a nominated bank acting on its nomination or not, confirming bank, if any, or the issuing bank appears to have been affected by a data corruption, the bank may inform the presenter and may request it to re-presented.*
- b. *If a bank makes such a request:*
  - i. *the time for examination is suspended and resumes when the electronic record is re-presented; and*
  - ii. *if the nominated bank is not a confirming bank, it must provide any confirming bank and the issuing bank with notice of the request for the electronic record to be re-presented and inform it of the suspension; but*
  - iii. *if the same electronic record is not re-presented within 30 calendar days, or on or before the expiry date and/or last day for presentation, whichever occurs first, the bank may treat the electronic record as not presented.*

## CHANGES FROM eUCP VERSION 1.1

- Title of article amended for preciseness
- Clarification of the role of the banks
- Minor structural changes

## COMMENTARY

There is no rule in UCP 600 for paper documents that are lost or rendered unreadable by a bank after they have been received. Because most banks have procedures in place that minimise the consequences of such loss, there is no perceived need for such a rule. These procedures involve refusing payment based on discrepancies in the documents that are present, requesting a substitute document, or indemnifying the applicant for any harm that may result from the lost document.

Whilst this works in the paper world owing to an understanding of the risks, there is not yet a similar comprehension in the electronic world. Accordingly, article e12 offers a method by which corrupted data may be re-presented.

A similarity can be recognised with the paper world, in that it is not unusual to approach the presenter for substitute paper documents. The process outlined by article e12 should prove beneficial to all parties, bearing in mind that it supports an efficient data substitution method.

The advantage of eUCP article e12 is that it operates without regard to fault or negligence and avoids entirely the difficult questions of liability and proof inherent in such concepts. As a result, it balances the interests of the bank and the presenter while extending the obligation of the bank and imposing a limited additional duty on the presenter in order to achieve a practical and relatively straightforward solution to an otherwise potentially burdensome problem.

It is worth noting that the provisions of this article are a matter of recommendation and optional only. This approach need not necessarily be utilised by a bank, and a bank remains free to take any other measures they may consider to be necessary in order to mitigate any perceived losses due to the corruption of data while the record is within its control.

If a bank elects to exercise its rights under eUCP article e12, it must deliver a request to the presenter and give notice to any other bank that is obligated under the credit. In addition, it

should notify the beneficiary if the presenter is not the beneficiary. The notice to the presenter suspends the time for examination, which resumes when the bank receives the substituted data. The replacement of the data is not a new presentation and any deadlines are calculated from the original presentation date, which will have taken place on the receipt of the notice of completeness.

eUCP article e12 is based on the assumption that all electronic records are replaceable.

### **AFTER PRESENTATION**

It must be clearly noted that this article only applies to the data corruption of an electronic record subsequent to presentation. Should a problem exist with an electronic record before presentation, this can only be the responsibility of the presenter to fix.

### **CORRUPTION**

Neither the eUCP nor article e12 define 'corruption'. The term is intended to encompass any distortion or loss of data that renders the electronic record as it was presented unreadable in whole or part due to the data having become scrambled in an unrecoverable manner.

### **ELECTRONIC RECORDS**

Although the eUCP permits mixed presentations of paper documents and electronic records, eUCP article e12 relates only to electronic records and not the loss or destruction of paper documents.

### **NOMINATED BANKS**

By its terms, eUCP article e12 is available to any bank nominated in an eUCP credit. However, in the event that a bank other than the issuing or confirming bank invokes the approach, sub-article e12 (b) (ii) requires that notice of the request for a substituted document be given to the issuing bank and any confirming bank.

Although a nominated bank is not obligated to examine documents or to act pursuant to its nomination under UCP 600 sub-article 12 (a) (Nomination), the election to invoke eUCP article e12 would signify an election to so act and require that the bank examine the documents under the rules of UCP 600 and act according to its nomination should they comply. Otherwise, the nominated bank will be responsible to the presenter for the lost data.

### **RE-PRESENTED**

eUCP article e12 uses the term 're-presented'. As stated in eUCP sub-article 3 (b) (viii) this term mean, 'to substitute or replace an electronic record already presented.'

The term is also used in documentary credit practice to characterise the action of the beneficiary in making a subsequent presentation to cure a discrepancy in a prior presentation. The two actions should not be confused.

Under the eUCP, the re-presentation is merely the replacement of a document already presented and its impact relates back to when it was originally presented; whereas when a non-conforming presentation is being cured by re-presentation, it takes effect as of the time of receipt of the re-presentation.

This article indicates that the request for replacement is to be sent to the presenter of the electronic record. In order to reflect good practice, it would also be optimal, in cases where the presenter is not the beneficiary, for notice to also be given to the beneficiary. This may help to accelerate matters to the benefit of all.



### **METHOD FOR RE-PRESENTATION REQUEST**

Although eUCP article e12 does not expressly state when or how the request for re-presentation be made, good practice in light of UCP 600 sub-article 16 (d) (Discrepant Documents, Waiver and Notice) would suggest that the request be made in the same manner as a notice of refusal, namely by telecommunication if available, and, if not, by other expeditious means and without delay once the corruption is discovered.

### **TIME FOR EXAMINATION**

eUCP sub-article e12 (b) (i) provides that the invocation of eUCP article e12 suspends the time for examination and giving any notice of refusal under UCP 600 articles 14 (Standard for Examination of Documents) and 16 (Discrepant Documents, Waiver and Notice).

Although the corruption of the data occurred when the electronic record was in the control of the bank, a request for replacement under eUCP article e12 has serious consequences for the beneficiary if the record is not replaced. eUCP sub-article e12 (b) (iii) provides that the failure to replace data within 30 calendar days after a request pursuant to eUCP article e12 has been made is deemed to be a failure to present the electronic record. Because of the seriousness of this consequence for the beneficiary, the time period is sufficiently reasonable to permit replacement, and banks should be cautious about reducing this period, which may raise questions about its reasonableness.

## ARTICLE e13

### ADDITIONAL DISCLAIMER OF LIABILITY FOR PRESENTATION OF ELECTRONIC RECORDS UNDER eUCP

- a. *By satisfying itself as to the apparent authenticity of an electronic record, a bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.*
- b. *A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.*

### CHANGES FROM eUCP VERSION 1.1

- Minor structural changes
- Reference to a 'data processing system'
- Banks are liable for their own data processing systems

### COMMENTARY

A disclaimer is a device by which risk is shifted from one entity to another. Where the disclaimer reflects the reasonable expectations of an industry, it is typically enforceable under applicable local law, even where it is stated in rules of practice as opposed to a bilateral contract. Due to the limited role of banks in documentary credit practice, disclaimers have been used to limit their liability from the actions or omissions of others.

Disclaimers have sometimes been asserted to excuse the responsibility of a bank for its own negligence. While modern commercial law allows parties to allocate the risk of negligence up to, but not including, so-called gross negligence or wilful disregard for the consequences of one's action or omission, most systems of local law require more specific and detailed provisions than those contained in UCP 600 to achieve this result. The liabilities disclaimed in the eUCP and UCP 600 are the result of external systemic or third party actions, inactions, or risk.

#### eUCP DISCLAIMER

eUCP article e13 disclaims banks' liability for any divergence from the realities represented in authenticated electronic records. Its effect is cumulative with those of UCP 600 Articles 34 (Disclaimer on Effectiveness of Documents), 35 (Disclaimer on Transmission and Translation), and 37 (Disclaimer for Acts of an Instructed Party), and emphasises the continued applicability of the independence principle reflected in various articles of UCP 600 with respect to electronic presentations under the eUCP.

#### UCP 600 DISCLAIMERS

UCP 600 contains several disclaimers that are relevant to an eUCP credit. eUCP article e13 by its title indicates that its disclaimer is additional to those contained in UCP 600.

##### UCP 600 article 34 (Disclaimer on Effectiveness of Documents)

Disclaims banks' liability for documents presented, the representations they contain, what they represent, and the actions or omissions of persons who present or issue them. This article is the linchpin in the UCP 600 formulation of the independence principle. It disclaims any liability or responsibility for the documents presented, their legality or legal effect, the representations contained in them, or the persons who made them. Under eUCP sub-article e3 (a) (ii) (Definitions), the term 'documents' would apply to an electronic record, making this disclaimer applicable to both paper documents and electronic records under the eUCP.

### UCP 600 article 35 (Disclaimer on Transmission and Translation)

Disclaims liability and responsibility for problems in forwarding data, including problems with telecommunication such as delay, mutilation, or error. This disclaimer disclaims any liability for the actions, failures, or omissions of third parties or their systems of transmission of messages. It would not excuse liability for consequences arising from the bank's own systems, whether maintained by the bank directly or through the agency of a third party.

### UCP 600 article 37 (Disclaimer for Acts of an Instructed Party)

Disclaims the responsibility of instructing banks for the failure of other banks to carry out the applicant's instructions, even where the other bank is selected at the initiative of the instructing bank. It also provides that the applicant is bound by and obligated to indemnify banks against the consequences of the application of foreign law and usages, shifting this responsibility to the applicant. Under the eUCP, this provision would apply, not only to documentary credit law and commercial law in general, but also to the law of electronic commerce and the impact of local law on the eUCP.

## **INDEPENDENCE PRINCIPLE**

Other provisions in UCP 600 detail aspects of the independence principle. They include:

- article 4 (Credits v. Contracts);
- article 5 (Documents v. Goods/Services or Performance);
- article 7 (Issuing Bank Undertaking);
- article 8 (Confirming Bank Undertaking);
- sub-article 14 (a) (Standard for Examination of Documents);
- sub-articles 16 (a) and (b) (Discrepant Documents, Waiver and Notice).

While no one article of UCP 600 alone articulates the independence principle in a systematic manner, the cumulative effect of these articles – taken together with UCP 600 article 34 (Disclaimer on Effectiveness of Documents), article 35 (Disclaimer on Transmission and Translation) and article 37 (Disclaimer for Acts of an Instructed Party) – provide an adequate treatment of the doctrine.

## **NEED FOR eUCP ARTICLE E13**

Given the system of disclaimers and the statement of independence in UCP 600, it could be queried why additional protection is required in the eUCP. Strictly speaking, the provisions of UCP 600, properly interpreted, would be sufficient to establish the independent character of an eUCP credit and the role of the banks with regard to it.

Nevertheless, the eUCP requires authentication of electronic records that is greater in degree, and arguably different in character, from the examination of a paper document, for example in:

- eUCP sub-article e6 (f) (Presentation) (implying that a bank will authenticate an electronic record that is sent to it) and,
- eUCP sub-article e3 (b) (iii) (Definition of Electronic record) (indicating that an electronic record must be capable of being authenticated as to the apparent identity of the sender, the apparent source of the data contained in it, and its integrity).

Since this level of authentication is already greater than that undertaken with paper documents, could be increased even more by requirements for more security in the eUCP credit, and could be increased still further in the future by technological developments, it was thought important to emphasise the role of authentication in the eUCP process.

## DATA PROCESSING SYSTEM

eUCP article e13 refers 'to the use of a data processing system for the receipt, authentication, and identification of electronic records'. In accordance with sub-article e3 (b) (ii), this means 'a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.' Any bank that engages in an eUCP transaction is responsible for maintaining a data processing system. This responsibility is a fundamental precondition for using the eUCP. A bank cannot excuse itself from responsibility for the failure to authenticate electronic records due to errors or inadequacies in its systems where those systems are not of the standard required to process such electronic records. This formulation also imposes on banks that engage in processing electronic documentary credits the burden of upgrading their systems to keep them current.

eUCP article e13 does not require a level of authentication that is extraordinary even if it were technically feasible. While some banks may choose to develop and market such systems, such a feature is a value-added aspect of their service and not a basis for the standard by which authentication is to be measured. The standard of eUCP article e13 is only designed to assure that the system used is not outmoded.

The liabilities disclaimed in the eUCP and UCP 600 are the result of external systemic or third party actions, inactions, or risk. Reflecting the content of URBPO 750 article 14 (Unavailability of a Transaction Matching Application), eUCP sub-article e13 (b) indicates that a bank **does** take on liability and responsibility for the unavailability of its own data processing system.

## ARTICLE e14

### FORCE MAJEURE

*A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.*

## CHANGES FROM eUCP VERSION 1.1

- New article

### COMMENTARY

eUCP version 1.1 did not include a “Force Majeure” article. The term ‘force majeure’ is French in origin, literally meaning ‘greater force’. It refers to unexpected events, outside the control of the parties to an agreement, which prevent performance of part or all of the required contractual obligations.

### USE IN UCP 600

States the force majeure events for which a bank assumes no liability or responsibility. UCP 600 article 36 (Force Majeure) refers to “Acts of God, riots, civil commotions, insurrections, wars, acts or terrorism, or by any strikes or lockouts or other causes beyond its control.”

Acts of God relate to events caused by natural forces including for instance, earthquakes, floods, tornadoes, snowstorms, hurricanes, etc. In other words, it refers to events which are caused without any human interference and which could not be prevented.

### APPLICABILITY TO eUCP VERSION 2.0

Reflects the additional text that was included in URBPO 750 article 13 (Force Majeure). The concept of force majeure is the same as in other ICC rules but is extended to cover the inability of a bank to access a data processing system, or a failure of equipment, software or communications network.

**Part 2**

# eURC VERSION 1.0

article-by-article

## **PRELIMINARY CONSIDERATIONS**

*The mode of presentation to the remitting bank, by or on behalf of the principal, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.*

*The mode of presentation to the drawee, by the collecting or presenting bank, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.*

*Where not defined or modified in the eURC, definitions given in URC 522 will continue to apply.*

## **COMMENTARY**

The precedent for including 'Preliminary Considerations' was established in ISBP, and with the preamble to DOCDEX. The preliminary considerations are listed on a separate page to the rules in order to provide a distinction between the two.

For reasons of transparency and clarity, it is considered to be entirely appropriate to provide guidance within the rules in the form of preliminary considerations. An alternative would have been to include the text within a foreword or an introduction.

However, whilst it is recognised that all participants to a transaction will always take note of the rules themselves, this cannot be considered to be the same for forewords or introductions, which do not always receive the same level of attention as rules. Accordingly, these provisions are included as 'Preliminary Considerations'.

## **MODE OF PRESENTATION**

The mode of presentation to a bank and the mode for delivery of that presentation to the drawee are outside the scope of the rules.

## **DEFINITIONS**

This emphasises the statement within sub-article e2 (a) that the eURC is a supplement to the URC and provides clarification that definitions given in URC 522 will continue to be applicable.

## **CONSISTENCY**

Similar preliminary considerations have been listed in the eUCP Version 2.0 in order to create consistency between the two sets of rules.

## ARTICLE e1

### APPLICATION OF THE eURC

- a. *A collection instruction should only indicate that it is subject to the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (“eURC”) where a prior arrangement exists between the remitting bank and the collecting or presenting bank, for the presentation of electronic records alone or in combination with paper documents.*
- b. *Such prior arrangement should include:*
  - i. *the format in which each electronic record will be issued and presented; and*
  - ii. *the place for presentation, to the collecting or presenting bank.*

## COMMENTARY

The eURC are rules that apply to an arrangement between the remitting bank and the collecting or presenting bank, for the presentation of electronic records alone or in combination with paper documents.

### PRIOR ARRANGEMENT

The rules are only workable if a prior arrangement has been put in place between the remitting bank and the collecting or presenting bank, for the presentation of electronic records alone or in combination with paper documents. This is an absolute pre-condition in order for the rules to be operative for an eURC collection instruction.

### PRE-CONDITIONS

It is essential that any prior arrangement between the banks describe the required format of each electronic record (article e6 Format) and includes the place for presentation (sub-article e4 (a) (iv) Definitions).

### APPLICATION OF EURC

URC 522 article 1 (Application of URC 522) stipulates that when the text of a collection instruction indicates that it is subject to URC 522, the rules are binding on all parties thereto. Symmetrically the same applies for eURC, in that the provisions of the eURC in a collection instruction that is subject to the eURC would be applicable to any person or bank that acted on that collection instruction to the extent of their role.



## ARTICLE e2

### SCOPE OF THE eURC

- a. *The eURC supplements the Uniform Rules for Collections (1995 Revision, ICC Publication No. 522) (“URC”) in order to accommodate presentation of electronic records alone or in combination with paper documents.*
- b. *The eURC shall apply where a collection instruction indicates that it is subject to the eURC (“eURC collection instruction”).*
- c. *This version is Version 1.0. An eURC collection instruction must indicate the applicable version of the eURC. If not indicated, it is subject to the version in effect on the date the eURC collection instruction is issued or, if made subject to the eURC by an amendment, the date of that amendment.*

### COMMENTARY

The formal title to this supplement is “Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (“eURC”)”. Because of the length of the title, the shorthand acronym “eURC” is appended.

This abbreviated form employs the usual prefix that is applied to electronic commerce whilst emphasising the connection with the Uniform Rules for Collection.

Although no specific form of reference to the eURC is mandated, in fact any reference that clearly indicates the eURC would be adequate, it is recommended that the term “eURC” be used for reasons of transparency and clarity.

**SUPPLEMENTARY.** As indicated by eURC sub-article e2 (a), the eURC acts as a supplement to URC 522. Although the rules do not include a definition of the word ‘supplement’, the intent is that, in practice, they function by reference to URC 522, and do not stand as a set of self-contained rules, such as ISP98 or URDG 758.

The eURC contains only those requirements deemed necessary to expand or modify URC 522 in order to facilitate presentation of electronic records. Accordingly, it is an absolute necessity to read any eURC article in combination with the analogous URC 522 article.

eURC sub-article e3 (b) (Relationship of the eURC to the URC) provides clear direction on the inter-relationship of both sets of rules when the content may appear to differ.

### SUBJECT TO THE EURC

eURC sub-article e2 (b) highlights that the eURC applies when a collection instruction ‘indicates that it is subject to the eURC’. As such, it is expected that an appropriate reference to applicability be apparent.

### VERSION NUMBER

eURC sub-article e2 (c) makes it clear that the eURC is issued in ‘versions’, with the current version being Version 1.0. As a matter of good practice, it is always recommended that an eURC collection instruction indicate the exact applicable version, rather than leave it open to possible misinterpretation. Should a version number not be stated, sub-article e1 (c) clarifies that the credit would be subject to the latest version in effect on the date the eURC collection instruction is issued.

As further stated in this sub-article, in the event that a collection instruction is made subject to the eURC by means of an amendment, and such amendment has been accepted by all relevant parties, the collection instruction would then be subject to the latest version of the eURC in effect on the date of such amendment.

## **IMPLICATIONS OF AMENDMENT**

As stated above under 'Version number', the eURC makes allowances for a situation wherein a collection instruction subject to URC 522 may be amended to be subject to eURC in order to allow for the presentation of electronic records. To amend the collection instruction a presenter may make a simple statement that the condition of a collection instruction being subject to URC 522 is now replaced by subjectivity to eURC Version 1.0.

However, any such amendment requires careful scrutiny of the collection instruction before being issued. In view of the fact that the collection instruction would have been drafted subject to URC 522, then it is consequential that the conditions of the collection instruction were originally mandated upon the presentation of paper documents. As such, the introduction of electronic records requires close assessment in order to ensure there are no potential negative impacts towards the parties under the collection instruction.

## **TYPES OF PRESENTATIONS**

As stated in eURC sub-article e2 (a), the rules will only apply when an electronic record is involved. This can be as part of a presentation consisting solely of electronic records, or as part of a mixed presentation with paper documents.

## **MODIFICATION OR EXCLUSION OF eURC ARTICLES**

In view of the fact that the eURC is a supplement to URC, URC 522 sub-article 1 (a) (Application of URC 522) continues to apply, thereby allowing for modifications and exclusions to be made provided they are expressly stipulated in the collection instruction. This means that there is no need for an equivalent article within the eURC itself. Consequently, the content of eURC can be modified or excluded in the collection instruction, but no provision in a collection instruction should be deemed to modify or exclude an article in the eURC unless the collection instruction expressly so indicates.

## ARTICLE e3

### RELATIONSHIP OF THE eURC TO THE URC

- a. *An eURC collection instruction is also subject to the URC without express incorporation of the URC.*
- b. *Where the eURC applies, its provisions shall prevail to the extent that they would produce a result different from the application of the URC.*
- c. *Where an eURC collection instruction is issued but the presentation consists of only paper documents, the URC alone shall apply.*

## COMMENTARY

The interdependence between the eURC and URC 522 is clearly indicated in eURC sub-article e2 (a) (Scope of the eURC).

As a consequence of this correlation, eUCP article e3 goes on to clarify how such interdependence will work in practice.

### RELATIONSHIP

As highlighted by eURC article e2, the intent of the eURC rules is that they function by reference to URC 522, and do not stand as a set of self-contained rules, such as ISP98 or URDG 758. Sub-article e3 (a) provides that there is no need to expressly incorporate URC 522 within an eURC collection instruction. Such collection instructions are automatically also subject to URC 522.

### IMPACT ON URC 522 ARTICLE 1 (APPLICATION OF URC 522)

In view of the above, i.e. no need to expressly stipulate URC 522 in an eURC collection instruction, the content of URC 522 article 1 additionally refers to an eURC collection instruction. Sub-article e3 (b) clarifies that, in these circumstances, the provisions of eURC will prevail in the event of any 'conflict' with URC 522.

### URC 522 REFERENCE

Whilst the above makes it clear that there is no actual need to provide specific reference in an eURC collection instruction to URC 522, it may well be considered as good practice and prudent to provide such reference, e.g. by stating that an eURC collection instruction is 'also subject to URC 522'. This would provide transparency to all parties concerned and ensure that there is no doubt of the continued pertinence of URC 522.

## ARTICLE e4

### DEFINITIONS

- a. Where the following terms are used in the URC, for the purpose of applying the URC to an electronic record presented under an eURC collection instruction, the term:
- i. **“advices”** includes electronic records originating from a data processing system;
  - ii. **“collection instruction”** shall include an instruction originating from a data processing system;
  - iii. **“document”** shall include an electronic record;
  - iv. **“place for presentation”** of an electronic record means an electronic address of a data processing system;
  - v. **“sign”** and the like shall include an electronic signature;
  - vi. **“superimposed”** means data content whose supplementary character is apparent in an electronic record.
- b. The following terms used in the eURC shall have the following meaning:
- i. **“data corruption”** means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part;
  - ii. **“data processing system”** means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part;
  - iii. **“electronic record”** means data created, generated, sent, communicated, received or stored by electronic means including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
    - a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
    - b. capable of being viewed to ensure that it represents the type and/or description of the electronic record listed on the eURC collection instruction;
  - iv. **“electronic signature”** means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record;
  - v. **“format”** means the data organisation in which the electronic record is expressed or to which it refers;
  - vi. **“paper document”** means a document in a paper form;
  - vii. **“presenter”** means the principal or a party that makes a presentation on behalf of the principal;
  - viii. **“received”** means when an electronic record enters a data processing system, at the agreed place for presentation, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system is not to be construed that the electronic record has been authenticated and/or viewed under the eURC collection instruction;
  - ix. **“re-present”** means to substitute or replace an electronic record already presented.

## COMMENTARY

This article comprises of a number of terms used in the eURC. Some also appear in URC 522, whilst others appear solely in the eURC.

### URC 522 TERMS

Article e4 is comprised of two distinct parts. In the first section, sub-article e4 (a), reference is made to terms that also appear in URC 522, but have a different meaning when applied to an electronic record presented under an eURC collection instruction. These include ‘advices’, ‘collection instruction’, ‘document’, ‘place for presentation’, ‘sign’, and ‘superimposed’.

Owing to the interdependence between URC 522 and eURC, it was clear that these URC 522 terms required ‘re-definition’ under the eURC in order to remain applicable.

### eURC TERMS

The second section, sub-article e4 (b), defines terms used solely in the eURC. These include ‘data corruption’, ‘data processing system’, ‘electronic record’, ‘electronic signature’, ‘format’, ‘paper document’, ‘presenter’, ‘received’ and ‘re-present’.

### RELATIONSHIP TO, AND IMPACT OF, LOCAL ELECTRONIC COMMERCE LAW

The statements in the previous ‘ICC Guide to the eUCP’ (ICC Publication No. 639), although mentioned in relation to the eUCP, are equally applicable to the eURC, and are repeated below:

*Not only are many of the terms that are defined in eUCP article e3 used in electronic commerce, they have also come to be used and even defined in the law relating to it. With respect to the law, as well as electronic commerce generally, there has been no intention to develop new doctrine or concepts. Any innovations in the definitions in the eUCP derive from the unique nature of the documentary credit. While every attempt has been made to align the definitions in these rules with those used in local law, many of the legal definitions now extant differ among themselves in formulation if not meaning. As a result, the eUCP definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, which is the most widely imitated in electronic commerce legislation.*

*Therefore, in working with the eUCP, it is necessary to consider each applicable legal system with respect to the eUCP definitions to determine:*

- whether local law defers to a system of private rules such as the eUCP where the undertaking is subject to them, and,
- whether this deference extends to the internal definitions used in the eUCP even if they differ from those used in the definitional section of the law, and,
- whether there is any substantive conflict between the eUCP definitions and those contained in the local law.

*In most cases, the law of electronic commerce reflects modern commercial law in permitting private rules to utilise particular definitions internally. Where the same term has differing meanings or where the same concept is given two different names—one in the law and a different one in a private rule—there is more likely to be confusion than conflict in applying local law. The confusion would result where local law embraces one definition but defers to the eUCP and permits use of a different definition internally in applying that practice.*

*For example, the term ‘document’ may have a different meaning under local electronic commerce law than in the eUCP. When applying local electronic commerce law, its own definition must be used, whereas in interpreting and applying the eUCP, the eUCP definition must be used. The only area identified to date as one for possible concern regarding conflict between the eUCP and local electronic commerce law relates to the degree of authenticity required for electronic records and the meaning to be attached to a requirement for an electronic signature.*

*Where there is a mandatory requirement under local electronic commerce law for a higher degree of authenticity than would be required under the eUCP, local electronic commerce law may impose additional requirements on an electronic presentation.*

*As to the liability for variations of local law, UCP 600 sub-article 37 (d) (Disclaimer for Acts of an Instructed Party) provides that the applicant would be required to indemnify the bank against any risks arising from such a local law other than the law to which the bank itself is subject where the credit is not made subject to that law.*

#### **eURP SUB-ARTICLE E4 (A) (I): “ADVICES”**

##### eURC Definition

The term ‘advices’ includes electronic records originating from a data processing system.

##### General

eURC sub-article e4 (a) (i) appends to the meaning of ‘advices’ in URC 522 article 26 (Advices).

#### **eURC SUB-ARTICLE E4 (A) (II): ‘COLLECTION INSTRUCTION’**

##### eURC Definition

*The term ‘collection instruction’ shall include an instruction originating from a data processing system.*

##### General

eURC sub-article e4 (a) (ii) appends to the meaning of ‘collection instruction’ in URC 522 article 4 (Collection Instruction).

#### **eURC SUB-ARTICLE E4 (A) (III): “DOCUMENT”**

##### eURC Definition

The term ‘document’ shall include an electronic record.

##### General

eURC sub-article e4 (a) (iii) adds the term ‘electronic record’ to the meaning of ‘document’ as it is used in URC 522 with respect to an eURC collection instruction.

##### Meaning of ‘document’ in URC 522

The term ‘document’ or a variation is used extensively in URC 522. The term ‘documents’ is defined in URC 522 sub-article 2 (b) and means ‘financial documents and/or commercial documents’ as further defined in URC 522 sub-articles 2 (b) (i) and (ii).

##### Paper

As used throughout URC 522, the term ‘document’ suggests format in a paper medium. Unless specifically allowed under the conditions of an eURC collection instruction, it is expected that all presentations under such a collection instruction be in a paper format.

##### Electronic Presentations

Many of the uses of the term ‘document’ in URC 522 are readily applicable to an electronic presentation because they focus on the data presented and not on the medium of presentation. As a result, extension of the term ‘document’ to an electronic record is relatively simple. The eURC sub-article e4 (a) (iii) approach does not, however, alter the fact under URC 522 that a paper document is required unless the collection instruction states otherwise where it is not supplemented by the eURC.

##### ‘Document’ in electronic commerce law.

It is important that the impact of applicable local electronic commerce law always be taken into account. However, based upon the fact that the eURC definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, it is hoped that there will be no particular conflict with the eURC definition.

## **eURC SUB-ARTICLE E4 (A) (IV): “PLACE FOR PRESENTATION”**

### eURC Definition

The term ‘place for presentation’ of an electronic record means an electronic address of a data processing system.

### General

eURC sub-article e4 (a) (iv) extends the phrase ‘place for presentation’ in URC 522 to include an electronic address when referring to the place of presentation of an electronic record under an eURC collection instruction.

### Meaning of ‘place for presentation’ in URC 522

URC 522 sub-article 4 (b) (iii) uses the phrase ‘domicile at which presentation is to be made’. Whilst this is not formally defined in URC 522, it implies the domicile or address of the drawee. URC 522 sub-article 4 (b) (iv) addresses the presenting bank. In URC 522, the phrase refers to an address at a physical location. URC 522 continues to apply. In respect of the place for presentation, the following sub-articles are applicable: URC 522 4 (b) (iv) (Collection Instruction), 4 (c) (i) (Collection Instruction), 5 (d) (Presentation), 5 (e) (Presentation), and 5 (f) (Presentation).

### Transition to eURC Collection Instructions

Where the collection instruction requires or permits presentation of electronic records, their place of presentation will typically be to an electronic address and not a physical one. However, the collection instruction may require that the electronic record be contained on portable storage medium, in which case the electronic record may be presented to a physical address. The requirement in the eURC is for the place for presentation to have been established by way of a prior agreement. The collection instruction, as part of the presentation, should then be made to that agreed place. A collection instruction should not be sent without such an agreement being in place and should not be sent to any other place than that which has been agreed.

### Electronic Address

Although there is no specific definition within the eURC, the term ‘electronic address’ signifies the precise electronic location or proprietary system to which an electronic record can be sent. It could include, inter alia, a URL, an email address, or an address on a dedicated system.

## **eURC SUB-ARTICLE E4 (A) (V): “SIGN”**

### eURC Definition

The term ‘sign’ and the like shall include an electronic signature.

### General

eURC sub-article e4 (a) (v) adds ‘electronic signature’ to the meaning of the term ‘sign’ or its variations when used in URC 522 or in the collection instruction in connection with an electronic record presented under the eURC.

### Role of Signature in Collection Practice

A signature identifies the person assuming responsibility for the document and indicates some form of assent to its content. Signatures are regarded as adding assurance of authenticity to a document and of the veracity of the representations contained in it. By signing a document, the person signing is personally engaged to some extent in a moral, if not a legal sense, in what the document represents. It should be noted that, under URC 522, the presenting bank is not responsible for the genuineness of any signature or for the authority of any signatory to sign.

### Signing an Electronic Record

Unlike URC 522, the eURC defines ‘electronic signature’ in eURC sub-article e4 (b) (iv). It is ‘a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record’. An electronic signature may be in the form of data that appears as the name of the signer, code, a key or acceptable digital signatures and public key cryptography.

### Electronic signatures and local law

In order to have validity under local law, it is often necessary for certain paper documents to be signed. Some laws also define terms such as ‘sign’ and ‘signature’.

This has further advanced in recent terms with the formulation of electronic commerce laws, which now address electronic records and their method of authentication. As such, and in order to remain in line with existing law, most electronic commerce laws include definitions for terms such as ‘sign’ and ‘signature’.

It is important to note that the eURC takes a technology-agnostic view with respect to the type of technology that may be used in this respect.

## **eURC SUB-ARTICLE E34 (A) (VI): “SUPERIMPOSED”**

### eURC Definition:

The term ‘superimposed’ means data content whose supplementary character is apparent in an electronic record.

### General

eURC sub-article e4 (a) (vi) uses the term ‘superimposed’ to describe the addition of information to an electronic record after it has been created.

### Use in URC 522

The term ‘superimposed’ is not defined in URC 522. The term appears in URC 522 article 13 (Disclaimer on Effectiveness of Documents) to signify the imposition of conditions either physically on the document or by implication from the terms of another related document, contract, law, or custom.

## **eURC SUB-ARTICLE E4 (B) (I): “DATA CORRUPTION”**

### eURC Definition

The term ‘data corruption’ means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part.

### Use in URC 522

The term ‘data corruption’ is not used in URC 522.

### Meaning of ‘data corruption’

Data can be corrupted after having been received from the presenter. As a result, there could be a degree of unease regarding the possibility of the loss of data by a bank after an electronic record has been presented. Any problem with the record prior to receipt is the responsibility of the presenter whose obligation is to present the data to the place of presentation in the format required by the collection instruction.

## **eURC SUB-ARTICLE E4 (B) (II): “DATA PROCESSING SYSTEM”**

### eURC Definition

The term ‘data processing system’ means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.



### General

Article e12 (Additional Disclaimer of Liability for Presentation of Electronic Records under eURC) refers to a 'data processing system'. Any bank that engages in an eURC collection instruction is responsible for maintaining a data processing system. This responsibility is a fundamental precondition for using the eURC.

### Use in URC 522

The term 'data processing system' is not used in URC 522.

### Meaning of 'data processing system'

The aim was to align definitions in eURC with those used in local law. However, many legal definitions differ among themselves in formulation if not meaning. As a result, the eURC definitions are modelled on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, which is the most widely imitated in electronic commerce legislation. In working with eURC, it is necessary to consider each applicable legal system with respect to the eURC definitions. The UNCITRAL definition of 'automated data processing' has been adapted for these rules.

## **eURC SUB-ARTICLE E4 (B) (III): "ELECTRONIC RECORD"**

### eURC Definition

The term 'electronic record' means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:

- a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
- b. capable of being viewed to ensure that it represents the type and/or description of the electronic record listed on the eURC collection instruction

### General

eURC sub-article e4 (b) (iii) defines "electronic record" as the term is used in the eURC.

A digital record is one that exists in digitised form only, whereas an electronic record also includes a copy of an original document that is stored in electronic form e.g. a scanned copy. The eURC definition of "electronic record" does appear to include a digitised record ('data created...by electronic means') but is broader than that.

The commentary to the UNCITRAL Model Law on Electronic Transferable Records states that the definition of 'electronic transferable records' is meant to include both functional electronic equivalents of paper records and digitised records.

### Electronic commerce

In electronic commerce, data is grouped together into a unit. Although these units are often provided with designations such as 'messages', 'files' and 'documents', the term 'electronic record' has emerged as a common label to identify a grouping of data in one message, file, or document and to distinguish it from a paper document.

### Document

Under the eURC, an electronic record is a type of document as provided in eURC sub-article e4 (a) (iii) (document). It is separate from a paper document, which is defined in eUCP sub-article e4 (b) (vi) (paper document). Under an eURC collection instruction, documents can consist of both paper documents and electronic records, but must consist of at least one electronic record.

### Electronic

Although there is no definition of 'electronic' in the eURC, such term would, by its nature, exclude paper documents. It is essential to also note that by using the generic term 'electronic', the rules avoid linkage with any specific technology or platform, thereby ensuring that the rules remain technology-agnostic. As outlined in a previous publication, 'ICC Guide to the eUCP' (ICC Publication No. 639), the term 'electronic' has generally been distinguished from imaging, which involves a different process. However, with technological advances, the distinctions have become blurred. More on this subject is outlined below.

### Telefaxes and Imaging

The eURC makes no reference to telefaxes. It was once thought that telefaxes could not be electronic records both for technological reasons and because there was an original paper document that generated the telefax. With technological advances, it is possible to generate a telefax on a computer and send it to another computer as an image.

As a result, it is impossible to categorically determine whether or not a telefax is an electronic record. If the issuing bank specifies the format of required or permitted electronic records, the problem will be avoided. Such a specification is especially important when document examination is automated since it would be difficult, if not impossible, to use a system to determine all of the required data elements from an image. If it does not do so, the presenter would probably be justified in presenting required electronic records by means of telefax and it would remain with the issuing bank to convince a court that they were not electronic records.

### Formatting and Electronic Records

eURC article e6 (Format) requires an eURC collection instruction must indicate the format of each electronic record, implying that if the format of an electronic record is not indicated, it may be presented in any format. Accordingly, it can be presumed that provided a document is presented in the format stipulated in the eURC collection instruction, such document constitutes an electronic record. If the presenter states a specific format for a document to be presented under an eURC collection instruction and it is not a paper document, the document should be regarded as an electronic record for purposes of interpreting the eURC.

### Authenticated, apparent identity, apparent source of data and integrity of the data

The eURC does not expressly define authenticate. It does, however, link the term to and embody its meaning for purposes of the eURC in its definition of 'electronic record'.

eURC Article e4 (b) (iii) indicates what it is necessary for transmitted electronic data to contain in order to become an electronic record under the eURC. The data must not only be received into the system of the bank but also authenticated as to:

- the apparent identity of the sender; and,
- the apparent source of the data contained in the record; and,
- is capable of being viewed to ensure that it represents the type and/or description of the electronic record listed on the eURC collection instruction.

The eURC does not require the electronic record to have been authenticated for it to become an electronic record, merely that it be capable of being authenticated. Whether it is actually authenticated is the responsibility of the bank. As long as the data is authenticatable, it is an electronic record for purposes of the eURC. Because of the technology involved in transmitting electronic records, it is possible for them to become unscrambled in transition and not to be complete when received or for an error to be introduced. It is expected that the bank will check the integrity of an electronic message.

### Methods for Authentication

Current and evolving technology allows for numerous commercially reasonable techniques in order to authenticate an electronic record whilst applying the criteria in eURC sub-article e4 (b) (iii). The parties to the collection instruction must decide the level and amount of security to be used in authenticating a message. The UNCITRAL Model Law on Electronic Commerce provides an excellent guide to this process. Various national laws may also impose specific requirements for an electronic record to be authenticated.

### Technology Neutral

The method of authentication used in the eURC is intended to be technology-agnostic and not to endorse any specific technology.

### Capable of being viewed

eURC sub-article e4 (b) (iii) requires that in order to qualify as an electronic record for purposes of the eURC, data must be capable of being viewed. This requirement is intrinsically linked by the requirement in eURC article e6 (Format) that the collection instruction indicate the required format. If it does so, then the data sent in that format is presumed to be capable of being viewed.

Accordingly, the requirement that data be capable of being examined is only relevant when the presenter does not actually specify a format. In such circumstance, data may be sent in any format, but it must still be capable of being viewed. It would not be possible to claim that the presentation was effective if what was sent could not be read.

### Obligation to maintain a data processing system

Although banks are not obligated to act on collection instructions subject to the eURC, they are required to maintain a data processing system for the receipt, authentication, and identification of electronic records. Such a system need not be state of the art, but it should be capable of performing those minimal functions of authentication considered commercially acceptable. Given the rapid pace of technological development, maintaining such standard will require regular review, analysis, and investment as techniques evolve. In any event, it is assumed that this is a natural process for any bank involved in international trade.

### Electronic commerce law

The term 'electronic record' has been widely used and defined in statutory provisions relating to electronic commerce. The definition used in the eURC may differ in some respects from those used in these laws. To the extent that there may be any problem, it would centre on the concepts of 'electronic signature' and 'authentication', terms covered below, rather than the definition of the term 'electronic record' as it is used in the eURC.

## **eURC SUB-ARTICLE E4 (B) (IV): "ELECTRONIC SIGNATURE"**

### eURC Definition

The term 'electronic signature' means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.

### General

eURC sub-article e4 (b) (iv) defines 'electronic signature' as data attached to an electronic record with the intent of identifying the signer and authenticating the record.

### Significance

As provided in eURC sub-article e4 (b) (iv), signatures on required documents perform two separate functions in documentary credit practice:

- indicating the identity of the person signing, and,
- authenticating the document itself and the information contained in it.

### Signatures under eURC

The eURC does not contain any substantive requirement that an electronic record contain an electronic signature. Its only reference to 'electronic signature' is contained in the explanation of 'sign' in eURC sub-article e4 (a) (v), which indicates that the term as it appears in URC 522 also includes an electronic signature.

### Signature in an electronic record

An electronic signature in an electronic record can take place by indication of the name of the signer, a code, key or acceptable digital signatures and public key cryptography given in a manner that appears to be intended to authenticate.

While the method of authenticating the document differs when it is electronic, 'signing' an electronic message serves the same functions as does signing a paper document. Current and evolving technology allows for numerous commercially reasonable techniques for digital signatures. The UNCITRAL Model Law on Electronic Commerce provides an excellent guide to this process. Various national laws may also impose specific requirements for digital signatures.

### Technology Neutral

The definition given for 'electronic signature' is intended to be technology neutral and not to endorse any specific technology. Under eURC sub-article e4 (b) (iv), the name of the signer at the end of the data message would constitute an electronic signature if it appeared to be used to identify the signer and to authenticate the electronic record and its content.

### Attached to or logically associated with an electronic record

eURC sub-article e4 (b) (iv) requires that the data consisting of the electronic signature be attached to the electronic record or closely associated with it. In most cases the electronic signature is enclosed in the envelope of the message or embedded within the electronic record itself. It must be associated with the message in such a manner as to indicate the identity of the signer.

The reference in eURC sub-article e4 (b) (iv) to the association or connection of the data with the electronic record in order to identify the signer and authenticate the record and its content goes only to the appearance of connectedness that can be implied from examining the electronic record on its face and not to the actual intention of the signer.

### Electronic signatures and local law

Local law may contain requirements that certain documents be signed in order to be effective. Such law often defines the terms 'sign' or 'signature'.

One facet of the evolution of electronic commerce has been the extension of such laws to embrace electronic documents and to permit such documents to be authenticated in a manner that links with the nature of the document. As a result, many of electronic commerce laws contain a definition of these terms. Caution should be exercised in references to electronic signatures in law and practice to distinguish between a relatively simple 'electronic signature' and one with added precautions.

The latter has commonly been called a 'digital signature' for purposes of differentiation. When local law adopts the more restrictive notion of a digital signature, it may impose a requirement on an electronic signature not definitively contained in URC 522 or the collection instruction. Unless the collection instruction specifically provides, the use of the term 'electronic signature' in the eURC does not signify the requirement that any signature be by means of digital signature.

## **eURC SUB-ARTICLE E4 (B) (V): “FORMAT”**

### eURC Definition

The term ‘format’ means the data organisation in which the electronic record is expressed or to which it refers.

### General

eURC sub-article e4 (b) (v) defines ‘format’, a concept vital to the processing of electronic records.

### Background.

There is no uniform or standard system by which data is organised, nor does there exist a common protocol by which data can be read or identified by data processing systems. As a result, it is only readable if the data processing system is able to recognise the manner in which the data is organised, or its format.

Not every data processing system can recognise every format into which data can be organised. Moreover, with the fast pace of technological development, many systems of organisation are regularly issued in successive versions. It is typical that the later versions are able to read earlier ones but that earlier ones are not able to read later ones.

### Meanings of Format

The term ‘format’ is used in several senses. It can mean the protocol by which data is organised, the version of that format, or the shorthand name by which that protocol is recognised and described. There is no precise distinction between these approaches, and the manner in which it is intended they be used can normally be identified from the context in which they are used. Under the eURC, the format of each electronic record must be as previously arranged between the remitting bank and the collecting or presenting bank, as required by sub-article e1 (b).

### Accessing data in readable form

The importance of a format lies in the ability of a data processing system to process data. If the format is not one that is recognised by the data processing system, the output is meaningless and said to be ‘unreadable’. This term implies that the data processing system cannot properly format the data in a manner that would provide meaning to a reader.

## **eURC SUB-ARTICLE E4 (B) (VI) “PAPER DOCUMENT”**

### eURC Definition

The term ‘paper document’ means a document in a paper form.

### General

eURC sub-article e4 (b) (vi) refers to a document in a paper medium, the type of document which is expected to be presented under URC 522.

### URC 522

URC 522 assumes that all ‘documents’ are in a paper medium.

### Need for new term

By broadening the meaning of the term ‘document’ as it is used in URC 522 and in eURC sub-article e4 (a) (iii) (“document”), it became necessary to identify another term that permitted the distinction between paper and electronic records for the eURC. The term ‘paper document’ was chosen because it aptly and simply describes the traditional medium in which data was inscribed.

### Paper

Printout from a computer, if presented, would be a paper document, whereas the presentation of a portable storage medium would not be. Consequently, the explanation of the sense in which the term ‘paper’ is used resorts to a reference to the ‘paper form’ in which the term was used and understood.

## **eURC SUB-ARTICLE E4 (B) (VII): “PRESENTER”**

### eURC Definition:

The term ‘received’ means the principal or a party that makes a presentation on behalf of the principal

### General

Presenter is used in article e11 (Data Corruption of an Electronic Record). Electronic records will be initially presented by the presenter (principal or a party on behalf of the principal) to the remitting bank, and then by the remitting bank to the collecting or presenting bank. The act of presentation on behalf of the principal to the remitting bank is already covered by URC 522 sub-article 3 (a) (ii).

## **eURC SUB-ARTICLE E4 (B) (VIII): “RECEIVED”**

### eURC Definition:

The term ‘received’ means when an electronic record enters a data processing system, at the agreed place for presentation, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system is not to be construed that the electronic record has been authenticated and/or viewed under the eURC collection instruction

### General

eURC sub-article e4 (b) (viii) defines ‘received’ when used with respect to an electronic record.

### Significance in practice

Receipt is critical in collection presentations. Documents are not presented until they are received. It is possible to speak in terms of the receipt of a particular document or of a presentation. In regard to paper documents where they are presented in one lot, the two notions occur simultaneously.

With respect to the presentation of paper, a paper document is ‘received’ when it comes into the control of the bank. This step can occur when it is delivered to a clerk or to the mailroom. Once the document comes into the bank’s control, presentation has taken place and the bank assumes the risk of loss of the document.

### Receipt of electronic records

Delivery of an electronic record will commonly be made electronically to the bank’s data processing system, so that the element of passing into the bank’s control is still present. There is, however, an additional element, namely that in order to meet the requirements of presentation the electronic record can be authenticated. In this case, mere acceptance into the bank’s system is not sufficient to constitute receipt of an electronic record that is transmitted electronically. As used in sub-article e4 (b) (viii) ‘acceptance’ means that the record can be authenticated, not that it has passed into the control of the bank’s system.

### Non-Receipt

As with a paper document under the URC 522 and eURC, non-receipt of an electronic record means that it has not been presented. Non-receipt can occur if the record does not reach the bank’s systems or if it is not authenticated by those systems. As provided in eURC sub-article e7 (c) (Presentation), such a record is deemed not to have been presented.

### Acknowledgments

Computer systems will, on occasion, automatically send out an acknowledgment to the sender that a message has entered the system. Such an acknowledgment does not necessarily imply that the electronic record has been received in the technical sense used in eURC sub-article e4 (b) (viii) since authentication may not have occurred at that time. In the event of a dispute about whether an electronic record was received, it could be a factor for which the significance would have to be assessed under local law.

## **eURC SUB-ARTICLE E4 (B) (IX): “RE-PRESENT”**

### eURC Definition:

The term ‘re-present’ means to substitute or replace an electronic record already presented.

### Use in URC 522

The term ‘re-present’ is not used in URC 522.

### Meaning of ‘re-present’

eURC article e11 (Data Corruption of an Electronic Record) uses the term ‘re-present’. In this context, the term means to substitute or replace an electronic record already presented.

## **“AUTHENTICATE/AUTHENTICATION”**

### General

The terms ‘authenticate’ and ‘authentication’, while used in the eURC, are not expressly defined.

### Significance in paper documents

Authentication in the paper world is the process by which the validity of the representations and the paper documents containing them are ascertained. There are, necessarily, various levels of authentication.

### Significance in electronic commerce

Authentication has a very different significance in electronic commerce. Because of the possibility of greater levels of authentication than are feasible in the paper world, and because of the unwillingness of participants to accept levels of risk that they normally accept for equivalent documents in the world of paper, there has been considerable attention in electronic commerce to authentication of data. As a result, various levels of authentication have arisen, some tied to specific technologies.

### Uses of ‘authenticate’

Depending on the context, the expectations of the users, and what is commercially reasonable, the constitution of a minimally acceptable level of authentication not only varies, but also is linked to specific technologies.

### eURC

The term ‘authenticate’ is used in the eURC in two different senses:

- In eURC sub-article e4 (b) (iii) (Electronic record), it means identifying the person sending a message and the source of the message.
- In eURC sub-article e4 (b) (iv) (Electronic signature), it means associating the person authenticating with the content of the message authenticated.

The eURC does not require the electronic record to have been authenticated for it to become an electronic record, merely that it be capable of being authenticated. Whether it is actually authenticated is the responsibility of the bank. As long as the data is authenticatable, it is an electronic record for purposes of the eURC. The eURC requires, in order to qualify as an electronic record for purposes of the eURC, that data must be able to be authenticated with respect to the apparent identity of the sender, must be able to be authenticated with respect to the apparent source of the data, and must be able to be authenticated with respect to its complete and unaltered character. As such, the parties to a collection instruction must decide on the level and amount of security used to authenticate the message. The UNCITRAL Model Law on Electronic Commerce, amongst others, provides a guide to this process. Various national laws may also impose specific requirements for an electronic record to be authenticated. As such, this should not be an issue for the rules.

### Authentication under local law

Many of the laws that address electronic commerce define authentication, and some even tackle the issue of when and at what level it is required. While most such laws are technology-neutral and do not require a higher degree of authentication than would be required for the equivalent information in a paper medium, there are some that impose mandatory requirements of authentication for certain types of documents that are more rigorous than is required by the eURC.

## ARTICLE e5

### ELECTRONIC RECORDS AND PAPER DOCUMENTS V. GOODS, SERVICES OR PERFORMANCE

*Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.*

## COMMENTARY

The format 'v' is used in order to maintain consistency with existing rules such as UCP 600 and URBPO 745.

### Use in URC 522

The structure of this article is aligned in order to follow the construction of URC 522 article 10 (Documents vs. Goods / Services / Performances).

### Rationale for inclusion within eURC

URC 522 article 10 does not address electronic records. The addition of 'electronic records' in the eURC is a key difference. Whilst it is acknowledged that the definition of 'documents' includes 'electronic records', it is considered that this article provides required clarity and transparency.



## ARTICLE e6

### FORMAT

- a. *An eURC collection instruction must indicate the format of each electronic record.*
- b.
  - i. *The format of each electronic record must be as previously arranged between the remitting bank and the collecting or presenting bank, as required by sub-article e1 (b).*
  - ii. *An electronic record received in a format that has not previously been agreed may be treated as not received, and the collecting or presenting bank must inform the remitting bank accordingly.*

### COMMENTARY

Format means the method by which a data processing system organises and reads data. eURC sub-article e4 (b) (v) (Definitions) defines the term 'format' as 'the data organisation in which the electronic record is expressed or to which it refers'. eURC article e6 requires that the format of an electronic record be specified in eURC collection instruction and states the consequences if not so indicated. In view of the fact that data processing systems are unable to recognise each and every format into which data may be organised, it is important that any data be in a format that is readable by the relevant data processing system. As a result, it is essential that any related eURC collection instruction (or relevant amendment) indicate the required format.

The format of each electronic record must be as previously arranged between the remitting bank and the collecting or presenting bank, as required by sub-article e1 (b) (i) which refers to the existence of a required prior arrangement which should include the format in which each electronic record will be issued and presented.

### SPECIFICATION OF FORMAT

The eURC is technology neutral and does not specify the use of any particular format. The format is to be stated in the eURC collection instruction in a manner that is readable by the data processing system to be used.

### FORM VS. FORMAT

Format should not be confused with the form in which a paper document is laid out or printed or data is visually organised on a screen or printout. Format means the method by which the data processing system organises and reads the data.

### FORMAT VERSION

With the ever-evolving change in technological development, many systems of organisation are regularly issued in successive versions. It is typical that the later versions are able to read earlier ones but that earlier ones are not able to read later ones. It is quite conceivable that an eURC collection instruction may indicate diverse formats for several documents. If the eURC collection instruction does not specify a format for a particular document, then such document may be presented in any format.

### FAILURE TO INDICATE A FORMAT

As mentioned above, it is essential that any related eURC collection instruction (or relevant amendment) indicate the required format. If not the, under eURC sub-article e6 (b) (ii), an electronic record received in a format that has not previously been agreed may be treated as not received. In addition to providing a sanction for failure to specify a format, the eURC implies that a bank must bear the risk of failure to read an electronic record presented in a required or permitted format.

## **INFORM REMITTING BANK**

In the event that an electronic record is received in a format that has not previously been agreed, the collecting or presenting bank must inform the remitting bank accordingly.

## **TELEFAX**

The eURC does not address the question of whether or not a transmission by telefax constitutes an electronic record. The question is too fact-specific to admit to a general answer. The technology originally behind telefaxes is not, strictly speaking, electronic communication of data but a system of imaging it. As a result, it would not be regarded as an electronic record.

More significantly, it would not be data that was originally formatted as an electronic record but that originated in a paper document that was imaged and transmitted, with the result that there existed a paper 'original' which may be accorded a certain priority.

However, technological developments have somewhat changed the scenario, and it is now possible to create an electronic record on a computer and to transmit it by telefax to another computer or to a telefax machine which prints on receipt. As a result, absent the characteristics of a given system, it is impossible to determine whether or not a telefax is an electronic record. Any confusion in an eURC collection instruction, however, would be avoided by specifying the format in which the electronic record must be presented. Such a specification would make it clear whether transmission by telefax was contemplated or feasible.

## ARTICLE e7

### PRESENTATION

- a. *When electronic records alone are presented under an eURC collection instruction, these must be accessible to a collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection*
- b. *When electronic records, in combination with paper documents, are presented by the remitting bank under an eURC collection instruction, all the electronic records referred to in the eURC collection instruction must be accessible to the collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction enclosing the paper documents.*
- c. *An electronic record that cannot be authenticated is deemed not to have been presented.*
- d.
  - i. *The remitting bank is responsible for ensuring that each presentation of an electronic record, and any presentation of paper documents, identifies the eURC collection instruction under which presentation is being made. For electronic records this may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the eURC collection instruction itself.*
  - ii. *Any electronic record or paper document not so identified may be treated as not received.*

### COMMENTARY

The eURC does not contain a definition of 'presentation'. When applied to URC 522, it means either the delivery of documents under a collection instruction or the documents so delivered.

#### SINGLE MAILING

In view of the fact that documents presented with an eURC collection instruction are not examined, the concept of a 'notice of completeness', as required by the eUCP, is not appropriate for the eURC. Accordingly, eURC sub-article e7 (a) is deemed to be necessary in order to allow the banks to consider what has been presented as forming the documents attached to a collection instruction.

#### MIXED PRESENTATION

In the event that electronic records are presented in combination with paper documents, the electronic records must be accessible at the same time as the collecting or presenting bank receives the eURC collection instruction enclosing the paper documents. In accordance with sub-article e7 (b) it is, therefore, the responsibility of the remitting bank to ensure that all the electronic records referred to in the eURC collection instruction must be accessible to the collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction enclosing the paper documents.

#### AUTHENTICATION

The eURC requires a level of authentication of electronic records that differs from that required for paper documents. In neither case, however, is the bank required to look beyond the face of what is presented to ascertain the facts that are represented.

The nature of an electronic presentation requires a different manner of screening as to the apparent authenticity of the document. In an electronic milieu, the processing system performs a screening function that filters electronic records with respect to the apparent sender and with respect to whether the message is received in its entirety and integrity. The nature of this authentication is intimately linked to the nature of an electronic record and is discussed above in more detail in connection with the definition of "electronic record" under eURC sub-article e4 (b) (iii) (Definitions). eURC sub-article e7 (c) provides that where an electronic record has not been authenticated, it 'is deemed not to have been presented.'

## **IDENTIFICATION OF THE COLLECTION INSTRUCTION**

eURC sub-article e7 (d) (i) requires that each separate presentation identify the eURC collection instruction under which it is presented. Even though it imposes a requirement that is not normally contained in a collection instruction and would not normally be present in the document itself, this provision is necessary in order to avoid any potential confusion.

It should be noted that the eURC does not require that each paper document identify the collection instruction under which it is presented, only that a presentation do so. As a result, in the event of several paper documents being presented in one lot, it would be acceptable if the cover letter indicated the collection instruction under which the documents are presented.

Similarly, if electronic records are batched together and sent in an electronic envelope, the collection instruction may be identified in the message envelope. It should also be noted that eURC sub-article e7 (d) (i) does not require identification of the collection instruction in any particular manner such as by its number. Such a shorthand means of identification would naturally be the easiest means of identifying the collection instruction. It could, however, also be identified by other means. For example, giving the amount and date of the collection instruction may enable identification even without the collection instruction number. The crux is whether or not the bank would be able to identify the collection instruction based on the information provided in the normal course of its operations.

With regard to electronic records, the identification of the eURC collection instruction may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the eURC collection instruction itself.

When a bank cannot link an electronic record to the collection instruction to which it relates without further information from the presenter, eURC sub-article e6 (d) (ii) provides that it 'may be treated as not received'. Although the bank is not required by the eURC under such circumstances to ask the presenter to identify the credit, it is very likely to do so, and would constitute good practice.

## **DIRECT COLLECTIONS**

URC 522 allows for direct collections. Provided the collection instruction meets the requirements of URC 522 sub-article 4 (b) (Collection Instructions), the collecting bank is required to either decline to act according to the collection instruction (according to URC 522 sub-article 1 (c)) or to act in accordance therewith, including instructions relating to release of documents and advice of non-payment. This is unchanged for electronic records.

## ARTICLE e8

### ADVICE OF NON-PAYMENT OR NON-ACCEPTANCE

*If a collecting or presenting bank receives an eURC collection instruction and issues an advice of non-payment and/or non-acceptance to the bank from which it received the collection instruction and does not receive instructions from such bank for the disposition of the electronic records, within 60 calendar days from the date the advice of non-payment and/or non-acceptance is given, the collecting or presenting bank may dispose of the electronic records in any manner deemed appropriate without any responsibility.*

### COMMENTARY

URC 522 sub-article 26 (a) covers 'Form of Advice'; sub-article 26 (b) covers 'Method of Advice'; sub-article 26 (c) (i) covers 'Advice of Payment'; sub-article 26 (c) (ii) covers 'Advice of Acceptance'; sub-article 26 (c) (iii) covers 'Advice of Non-Payment and/or Non-Acceptance'.

#### GENERAL

As with all of article 26 (Advices), the first two paragraphs of URC 522 sub-article 26 (c) (iii) also apply to the eURC rules, i.e.,

- 'The presenting bank should endeavour to ascertain the reasons for non-payment and/or non-acceptance and advise accordingly, without delay, the bank from which it received the collection instruction.' and,
- 'The presenting bank must send without delay advice of non-payment and/or advice of non-acceptance to the bank from which it received the collection instruction.'

#### DISPOSITION TIMEFRAME IN URC 522

In accordance with URC 522 sub-article 26 (c) (iii), if the presenting bank does not receive instructions from the remitting bank as to the further handling of the documents within 60 days after its advice of non-payment and/or non-acceptance, the documents may be returned to the bank from which the collection instruction was received without any further responsibility on the part of the presenting bank.

#### DISPOSITION TIMEFRAME IN eURC

In accordance with eURC article e8, if a collecting or presenting bank does not receive instructions from the bank from which it received the collection instruction as to the disposition of electronic records within 60 calendar days after the date of its advice of non-payment and/or non-acceptance, the collecting or presenting bank may dispose of the electronic records in any manner deemed appropriate without any responsibility.

## ARTICLE e9

### DETERMINATION OF A DUE DATE

*When settlement under an eURC collection instruction is due a number of days after the date of shipment or dispatch of the goods, or a number of days after any other date appearing in an electronic record, an eURC collection instruction must indicate the due date.*

## COMMENTARY

For reasons of clarity and transparency, an eURC collection instruction due a number of days after the date of shipment or dispatch of the goods, or a number of days after any other date appearing in an electronic record, must indicate the appropriate due date within the eURC collection instruction.

### DUE DATE UNDER URC 522

URC 522 article 6 (Sight/Acceptance) states that in the case of documents payable at a tenor other than sight, the presenting bank must, where acceptance is called for, make presentation for acceptance without delay, and where payment is called for, make presentation for payment not later than the appropriate maturity date.

## ARTICLE e10

### RELEASE OF ELECTRONIC RECORDS

- a. *An eURC collection instruction must indicate the manner in which electronic records may be accessed by the drawee.*
- b. *When electronic records are presented in combination with paper documents, and one of those paper documents is a bill of exchange that is to be accepted by the drawee, the electronic records and paper documents are to be released against acceptance of the bill of exchange (D/A) and the eURC collection instruction must indicate the manner in which those electronic records may be accessed by the drawee.*

## COMMENTARY

eURC article e10 outlines that a collection instruction must state the manner in which electronic records may be accessed by the drawee. The word 'manner' throughout these rules can be defined as the way in which something is done or happens.

### DELIVERY OF DOCUMENTS UNDER URC 522

URC 522 sub-article 2 (a) (Definition of Collection) states that a 'collection' means the handling by banks of documents as defined in sub-article 2(b), in accordance with instructions received, in order to:

- i.* obtain payment and/or acceptance, or,
- ii.* deliver documents against payment and/or against acceptance, or,
- iii.* deliver documents on other terms and conditions.

### DELIVERY OF DOCUMENTS AGAINST DEFERRED PAYMENT

During the drafting of the eURC rules it was debated whether or not to add a new delivery term D/DP (*'electronic records to be released against deferred payment'*). It was decided that such a term is already covered by URC 522 sub-article 2 (a) (iii) ('other terms and conditions') and that no further reference within the eURC rules is required.

### RELEASE OF COMMERCIAL DOCUMENTS UNDER URC 522

URC 522 article 7 (Release of Commercial Documents) states:

- 'that collections should not contain bills of exchange payable at a future date with instructions that commercial documents are to be delivered against payment' (sub-article 7 (a));
- 'that if a collection contains a bill of exchange payable at a future date, the collection instruction should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P)' (sub-article 7 (b));
- 'that if a collection contains a bill of exchange payable at a future date and the collection instruction indicates that commercial documents are to be released against payment, documents will be released only against such payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents' (sub-article 7 (c)).

### USAGE UNDER eURC

In order for electronic records to be accessed by the drawee, the collection instruction must indicate the manner in which the electronic records should be accessed.

## **BILL OF EXCHANGE**

In the event that electronic records are presented in combination with a paper bill of exchange that is to be accepted by the drawee, the electronic records and paper documents are to be released against acceptance of the paper bill of exchange.

The concept of an electronic bill of exchange/draft is still evolving and, as such, is not specifically covered by this version of the rules. However, it is intended that sub-article e10 (a) cover a presentation including an electronic bill of exchange, and sub-article e10 (b) cover the situation in which there is a paper bill of exchange.



## ARTICLE e11

### DATA CORRUPTION OF AN ELECTRONIC RECORD

- a. *If an electronic record that has been received by a bank appears to have been corrupted, the remitting bank may inform the presenter, or the collecting or presenting bank may inform the remitting bank, and may request it to re-present the electronic record.*
- b. *If a collecting or presenting bank makes such a request and the presenter or remitting bank does not re-present the electronic record within 30 calendar days, the collecting or presenting bank may treat the electronic record as not presented and may dispose of the electronic records in any manner deemed appropriate without any responsibility.*

### COMMENTARY

eURC article e11 provides an optional method by which a bank may recover data that has been corrupted after having been received. Electronic records will be initially presented by the presenter (principal or a party on behalf of the principal) to the remitting bank, and then by the remitting bank to the collecting or presenting bank. The rule reflects who should approach (inform) whom in this sequence of events. The chain of communication is that the collecting/presenting bank will communicate with the remitting bank. The remitting bank may be able to resolve the issue with or without the intervention of the principal.

There is no rule in URC 522 for paper documents that are lost or rendered unreadable by a bank after they have been received. Because most banks have procedures in place that minimise the consequences of such loss, there is no perceived need for such a rule. These procedures can involve requesting a substitute document, or indemnifying the applicant for any harm that may result from a lost or missing document.

Whilst this works in the paper world owing to an understanding of the risks, there is not yet a similar comprehension in the electronic world. Accordingly, article e11 offers a method by which corrupted data may be re-presented.

A similarity can be recognised with the paper world, in that it is not unusual to approach a presenter for substitute paper documents. The process outlined by article e11 should prove beneficial to all parties, bearing in mind that it supports an efficient data substitution method.

The advantage of article e11 is that it operates without regard to fault or negligence and avoids entirely the difficult questions of liability and proof inherent in such concepts.

As stated above, the provisions of this article are a matter of recommendation and optional only. This approach need not necessarily be utilised by a bank, and a bank remains free to take any other measures they may consider to be necessary in order to mitigate any perceived losses due to the corruption of data while the record is within its control. Article e11 is based on the assumption that all electronic records are replaceable.

## **AFTER PRESENTATION**

It must be clearly noted that this article only applies to the data corruption of an electronic record subsequent to presentation. Should a problem exist with an electronic record before presentation, this can only be the responsibility of the presenter to fix.

## **CORRUPTION**

Neither the eURC nor article e11 define 'corruption'. The term is intended to encompass any distortion or loss of data that renders the electronic record as it was presented unreadable in whole or part due to the data having become scrambled in an unrecoverable manner.

## **MODIFICATION, EXCLUSION, AND ALTERNATIVES**

A bank that does not wish to take the approach to corruption of data provided in eURC article e11 may modify the eURC collection instruction to expressly state an alternative in the eURC collection instruction. On the other hand, it may elect to exclude it. However, this is not recommended and should not be regarded as an optimal approach.

## **ELECTRONIC RECORDS**

Although the eURC permits mixed presentations of paper documents and electronic records, eUCP article e11 relates only to electronic records and not the loss or destruction of paper documents.

## **RE-PRESENT**

eURC article e11 uses the term 're-present'. As stated in eURC sub-article 3 (b) (ix), the term means: 'to substitute or replace an electronic record already presented.'

## **REQUEST FOR REPLACEMENT**

eURC sub-article e11 (a) indicates that the request for replacement should be directed by a remitting bank to the presenter of an electronic record, or by a collecting or presenting bank to the remitting bank. It implies that the request must have been received by the presenter or collecting or presenting bank in order for the suspension to operate.

While eURC article e11 does not indicate the format of the request, it should identify the eURC collection instruction, identify the electronic record, contain a request that it be replaced, and indicate that the request is being made under eURC article e11.

Furthermore, although eURC article e11 does not expressly state when or how the request for replacement should be made, good banking practice in light of URC 522 sub-article 12 (a) (Disclaimer on Documents Received) would suggest that the request be made in the same manner, namely by telecommunication if available, and, if not, by other expeditious means and without delay once the corruption is discovered.

## **FAILURE TO REPLACE**

Although the corruption of the data occurred when the electronic record was in the control of the bank, a request for replacement under eURC article e11 has serious consequences if the record is not replaced. eURC sub-article e11 (b) provides that the failure to replace data within 30 calendar days after a request pursuant to eURC article e11 has been made is deemed to be a failure to present the electronic record. Because of the seriousness of this consequence, the time period is sufficiently reasonable to permit replacement, and all parties should be cautious about lessening this period, which may raise questions about its reasonableness.

## ARTICLE e12

### ADDITIONAL DISCLAIMER OF LIABILITY FOR PRESENTATION OF ELECTRONIC RECORDS UNDER eURC

- a. By satisfying itself as to the apparent authenticity of an electronic record, a bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.
- b. A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.

## COMMENTARY

A disclaimer is a device by which risk is shifted from one entity to another. Where the disclaimer reflects the reasonable expectations of an industry, it is typically enforceable under applicable local law, even where it is stated in rules of practice as opposed to a bilateral contract. Due to the limited role of banks in collection practice, disclaimers have been used to limit their liability from the actions or omissions of others.

Disclaimers have sometimes been asserted to excuse the responsibility of a bank for its own negligence. While modern commercial law allows parties to allocate the risk of negligence up to but not including so-called gross negligence or wilful disregard for the consequences of one's action or omission, most systems of local law require more specific and detailed provisions than those contained in URC 522 to achieve this result. The liabilities disclaimed in the eURC and URC 522 are the result of external systemic or third party actions, inactions, or risk.

### eURC DISCLAIMER

eURC article e12 disclaims banks' liability for any divergence from the realities represented in authenticated electronic records. Its effect is cumulative with those of URC 522 article 11 (Disclaimer for Acts of an Instructed Party), article 12 (Disclaimer on Documents Received), article 13 (Disclaimer on Effectiveness of Documents) and article 14 (Disclaimer on Delays, Loss in Transit and Translation).

### URC 522 DISCLAIMERS

URC 522 contains several disclaimers that are relevant to an eURC collection instruction. eURC article e12 by its title indicates that its disclaimer is additional to those contained in URC 522.

#### URC 522 article 11 (Disclaimer For Acts of an Instructed Party)

URC 522 article 11 disclaims the responsibility of instructing banks for the failure of other banks to carry out the principal's instructions, even where the other bank is selected at the initiative of the instructing bank. It also provides that the instructing party is bound by and obligated to indemnify instructed parties against the consequences of the application of foreign laws and usages. Under the eURC, this provision would apply not only to collection law and commercial law in general, but also to the law of electronic commerce and the impact of local law on the eURC. For example, were the provisions of the eURC regarding the acceptability of a document as a 'writing' or of an authentication as a 'signature' not enforceable under local law, this risk would be borne by the principal and not the bank which is entitled to be indemnified by the principal for any damages as a result of the application of foreign laws and usages. The bank would be expected to assume the risk of the application of its own laws and usages, which would also include the law (or lack of it) of electronic commerce.

### URC 522 article 12 (Disclaimer on Documents Received)

URC 522 article 12 indicates that banks must carefully check that documents received are in line with those stated in the collection instruction and, if not, inform the sending entity without delay. If a remitting bank chooses not to list the documents, it will not be in a position to dispute with a collecting bank as to what was or was not enclosed with the collection instruction. Subject to URC 522 sub-articles 5 (c) (Presentation), 12 (a) and 12 (b) (Disclaimer on Documents Received), banks will present documents as received without further examination.

### URC 522 article 13 (Disclaimer on Effectiveness of Documents)

URC 522 article 13 disclaims banks' liability for documents presented, the representations they contain, what they represent, and the actions or omissions of persons who present or issue them. This article disclaims any liability or responsibility for the documents presented, their legality or legal effect, the representations contained in them, or the persons who made them. Under eURC sub-article e4 (a) (iii) (Definitions), the term 'documents' would apply to an electronic record, making this disclaimer applicable to both paper documents and electronic records under the eURC.

### URC 522 article 14 (Disclaimer on Delays, Loss in Transit and Translation)

URC 522 article 14 disclaims liability and responsibility for problems in forwarding data, including problems with telecommunication such as delay, mutilation, or error. This disclaimer disclaims any liability for the actions, failures, or omissions of third parties or their systems of transmission of messages. It would not excuse liability for consequences arising from the bank's own systems, whether maintained by the bank directly or through the agency of a third party.

## **NEED FOR eURC ARTICLE E12**

Given the system of disclaimers and the statement of independence in URC 522 article 10 (Documents vs. Goods / Services / Performances), it could be queried why additional protection is required in the eURC. Strictly speaking, the provisions of URC 522, properly interpreted, would be sufficient to establish the independent character of an eURC collection instruction and the role of the banks with regard to it.

Nevertheless, the eURC requires authentication of electronic records that is greater in degree, and arguably different in character, from a paper document, for example in:

- eURC sub-article e7 (c) (Presentation) (implying that a bank will authenticate an electronic record that is sent to it) and,
- eURC sub-article e4 (b) (iii) (Definition of "electronic record") (indicating that an electronic record must be capable of being authenticated as to the apparent identity of the sender, the apparent source of the data contained in it, and its integrity).

Since this level of authentication is already greater than that undertaken with paper documents, could be increased even more by requirements for more security in the eURC collection instruction, and could be increased further in the future by technological developments, it was thought important to emphasise the limited role of authentication in the eURC process.

## **DATA PROCESSING SYSTEM**

eURC article e12 refers to the use of a data processing system for the receipt, authentication, and identification of electronic records. In accordance with sub-article e4 (b) (ii), this means 'a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.' Any bank that engages in an eURC transaction is responsible for maintaining a data processing system. This responsibility is a fundamental precondition for using the eURC. A bank cannot excuse itself from responsibility for the failure to authenticate electronic records due to errors or inadequacies in its systems where those systems are not of the standard required to process such electronic records. This formulation also imposes on banks that engage in processing electronic collections the burden of upgrading their systems to keep them current.

eURC article e12 does not require a level of authentication that is extraordinary even if it were technically feasible. While some banks may choose to develop and market such systems, such a feature is a value-added aspect of their service and not a basis for the standard by which authentication is to be measured. The standard of eURC article e12 is only designed to assure that the system used is not outmoded.

The liabilities disclaimed in the eURC and URC 522 are the result of external systemic or third party actions, inactions, or risk. Reflecting the content of URBPO 750 article 14 (Unavailability of a Transaction Matching Application), eURC sub-article e12 (b) indicates that a bank does take on liability and responsibility for the unavailability of its own data processing system.

## ARTICLE e13

### FORCE MAJEURE

*A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.*

### COMMENTARY

The term ‘force majeure’ is French in origin, literally meaning ‘greater force’. It refers to unexpected events, outside the control of the parties to an agreement, which prevent performance of part or all of the required contractual obligations.

### USES IN URC 522

States the force majeure events for which a bank assumes no liability or responsibility. URC 522 article 15 (Force Majeure) refers to ‘Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.’

Acts of God relate to events caused by natural forces including for instance, earthquakes, floods, tornadoes, snowstorms, hurricanes, etc. In other words, it refers to events which are caused without any human interference and which could not be prevented.

### APPLICABILITY TO eURC

Reflects the additional text that was included in URBPO 750 article 13 (Force Majeure). The concept of force majeure is the same as in other ICC rules but is extended to cover the inability of a bank to access a data processing system, or a failure of equipment, software or communications network.

## Appendix 1

# UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP 600) SUPPLEMENT FOR ELECTRONIC PRESENTATIONS (“eUCP”)

eUCP Version 2.0

## PRELIMINARY CONSIDERATIONS

The mode of presentation to the nominated bank, confirming bank, if any, or the issuing bank, by or on behalf of the beneficiary, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.

The mode of presentation to the applicant, by the issuing bank, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.

Where not defined or modified in the eUCP, definitions given in UCP 600 will continue to apply.

Before agreeing to issue, advise, confirm, amend or transfer an eUCP credit, banks should satisfy themselves that they can examine the required electronic records in a presentation made thereunder.



## ARTICLE e1: Scope of the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentations (“eUCP”)

- a. The eUCP supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision, ICC Publication No. 600) (“UCP”) in order to accommodate presentation of electronic records alone or in combination with paper documents.
- b. The eUCP shall apply where the credit indicates that it is subject to the eUCP (“eUCP credit”).
- c. This version is Version 2.0. An eUCP credit must indicate the applicable version of the eUCP. If not indicated, it is subject to the latest version in effect on the date the eUCP credit is issued or, if made subject to the eUCP by an amendment accepted by the beneficiary, the date of that amendment.
- d. An eUCP credit must indicate the physical location of the issuing bank. In addition, it must also indicate the physical location of any nominated bank and, if different to the nominated bank, the physical location of the confirming bank, if any, when such location is known to the issuing bank at the time of issuance. If the physical location of any nominated bank and/or confirming bank is not indicated in the credit, such bank must indicate its physical location to the beneficiary no later than the time of advising or confirming the credit or, in the case of a credit available with any bank, and where another bank willing to act on the nomination to honour or negotiate is not the advising or confirming bank, at the time of agreeing to act on its nomination.

## ARTICLE e2: Relationship of the eUCP to the UCP

- a. An eUCP credit is also subject to the UCP without express incorporation of the UCP.
- b. Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP.
- c. If an eUCP credit allows the beneficiary to choose between presentation of paper documents or electronic records and it chooses to present only paper documents, the UCP alone shall apply to that presentation. If only paper documents are permitted under an eUCP credit, the UCP alone shall apply.

## ARTICLE e3: Definitions

- a. Where the following terms are used in the UCP, for the purpose of applying the UCP to an electronic record presented under an eUCP credit, the term:
  - i.* **Appear on their face** and the like shall apply to examination of the data content of an electronic record.
  - ii.* **Document** shall include an electronic record.
  - iii.* **Place for presentation** of an electronic record means an electronic address of a data processing system.
  - iv.* **Presenter** means the beneficiary, or any party acting on behalf of the beneficiary who makes a presentation to a nominated bank, confirming bank, if any, or to the issuing bank directly.
  - v.* **Sign** and the like shall include an electronic signature.
  - vi.* **Superimposed, notation** or **stamped** means data content whose supplementary character is apparent in an electronic record.

- b. The following terms used in the eUCP shall have the following meaning:
- i.* **Data corruption** means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part.
  - ii.* **Data processing system** means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.
  - iii.* **Electronic record** means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
    - a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
    - b. capable of being examined for compliance with the terms and conditions of the eUCP credit.
  - iv.* **Electronic signature** means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.
  - v.* **Format** means the data organisation in which the electronic record is expressed or to which it refers.
  - vi.* **Paper document** means a document in a paper form.
  - vii.* **Received** means when an electronic record enters a data processing system, at the place for presentation indicated in the eUCP credit, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system does not imply that the electronic record has been viewed, examined, accepted or refused under an eUCP credit.
  - viii.* **Re-present** or **re-presented** means to substitute or replace an electronic record already presented.

## ARTICLE e4: Electronic Records and Paper Documents v. Goods, Services or Performance

Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.

## ARTICLE e5: Format

An eUCP credit must indicate the format of each electronic record. If the format of an electronic record is not indicated, it may be presented in any format.

## ARTICLE e6: Presentation

- a.
  - i.* An eUCP credit must indicate a place for presentation of electronic records.
  - ii.* An eUCP credit requiring or allowing presentation of both electronic records and paper documents must, in addition to the place for presentation of the electronic records, also indicate a place for presentation of the paper documents.
- b. Electronic records may be presented separately and need not be presented at the same time.
- c.
  - i.* When one or more electronic records are presented alone or in
  - ii.* combination with paper documents, the presenter is responsible for providing a notice of completeness to the nominated bank, confirming bank, if any, or to the issuing bank, where a presentation is made directly. The receipt of the notice of completeness will act as notification that the presentation is complete and that the period for examination of the presentation is to commence.
  - iii.* The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates.
  - iv.* Presentation is deemed not to have been made if the notice of completeness is not received.
  - v.* When a nominated bank, whether acting on its nomination or not, forwards or makes available electronic records to a confirming bank or issuing bank, a notice of completeness need not be sent.
- d.
  - i.* Each presentation of an electronic record under an eUCP credit must identify the eUCP credit under which it is presented. This may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the covering letter or schedule that accompanies the presentation.
  - ii.* Any presentation of an electronic record not so identified may be treated as not received.
- e.
  - i.* If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day for presentation, as the case may be, the bank will be deemed to be closed and the expiry date and/or last day for presentation shall be extended to the next banking day on which such bank is able to receive an electronic record.
  - ii.* In this event, the nominated bank must provide the confirming bank or issuing bank, if any, with a statement on its covering schedule that the presentation of electronic records was made within the time limits extended in accordance with sub-article e6 (e) (i).
  - iii.* If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunication or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.
- f. An electronic record that cannot be authenticated is deemed not to have been presented.

## ARTICLE e7: Examination

- a.
  - i.* The period for the examination of documents commences on the banking day following the day on which the notice of completeness is received by the nominated bank, confirming bank, if any, or by the issuing bank, where a presentation is made directly.
  - ii.* If the time for presentation of documents or the notice of completeness is extended, as provided in sub-article e6 (e) (i), the time for the examination of documents commences on the next banking day following the day on which the bank to which presentation is to be made is able to receive the notice of completeness, at the place for presentation.

- b. i.** If an electronic record contains a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system, the electronic record at the hyperlink or the external system shall be deemed to constitute an integral part of the electronic record to be examined.
- ii.** The failure of the external system to provide access to the required electronic record at the time of examination shall constitute a discrepancy, except as provided in sub-article e7 (d) (ii).
- c.** The inability of a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank, to examine an electronic record in a format required by an eUCP credit or, if no format is required, to examine it in the format presented is not a basis for refusal.
- d. i.** The forwarding of electronic records by a nominated bank, whether or not it is acting on its nomination to honour or negotiate, signifies that it has satisfied itself as to the apparent authenticity of the electronic records.
- e. i.** In the event that a nominated bank determines that a presentation is complying and forwards or makes available those electronic records to the confirming bank or issuing bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when a specified hyperlink or external system does not allow the issuing bank or confirming bank to examine one or more electronic records that have been made available between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

## ARTICLE e8: Notice of Refusal

If a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank, provides a notice of refusal of a presentation which includes electronic records and does not receive instructions from the party to which notice of refusal is given for the disposition of the electronic records within 30 calendar days from the date the notice of refusal is given, the bank shall return any paper documents not previously returned to that party, but may dispose of the electronic records in any manner deemed appropriate without any responsibility.

## ARTICLE e9: Originals and Copies

Any requirement for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.

## ARTICLE e10: Date of Issuance

An electronic record must provide evidence of its date of issuance.

## ARTICLE e11: Transport

If an electronic record evidencing transport does not indicate a date of shipment or dispatch or taking in charge or a date the goods were accepted for carriage, the date of issuance of the electronic record will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. However, if the electronic record bears a notation that evidences the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage, the date of the notation will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. Such a notation showing additional data content need not be separately signed or otherwise authenticated.

## ARTICLE e12: Data Corruption of an Electronic Record

- a. If an electronic record that has been received by a nominated bank acting on its nomination or not, confirming bank, if any, or the issuing bank, appears to have been affected by a data corruption, the bank may inform the presenter and may request it to be re-presented.
- b. If a bank makes such a request:
  - i.* the time for examination is suspended and resumes when the electronic record is re-presented; and
  - ii.* if the nominated bank is not a confirming bank, it must provide any confirming bank and the issuing bank with notice of the request for the electronic record to be re-presented and inform it of the suspension; but
  - iii.* if the same electronic record is not re-presented within 30 calendar days, or on or before the expiry date and/or last day for presentation, whichever occurs first, the bank may treat the electronic record as not presented.

## ARTICLE e13: Additional Disclaimer of Liability for Presentation of Electronic Records under eUCP

- a. By satisfying itself as to the apparent authenticity of an electronic record, a bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.
- b. A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.

## ARTICLE e14: Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.

## Appendix 2

# UNIFORM RULES FOR COLLECTIONS (URC 522) SUPPLEMENT FOR ELECTRONIC PRESENTATION (“eURC”)

eURC Version 1.0

## **PRELIMINARY CONSIDERATIONS**

The mode of presentation to the remitting bank, by or on behalf of the principal, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.

The mode of presentation to the drawee, by the collecting or presenting bank, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.

Where not defined or modified in the eURC, definitions given in URC 522 will continue to apply.

## ARTICLE e1: Application of the eURC

- a. A collection instruction should only indicate that it is subject to the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (“eURC”) where a prior arrangement exists between the remitting bank and the collecting or presenting bank, for the presentation of electronic records alone or in combination with paper documents.
- b. Such prior arrangement should specify:
  - i. the format in which each electronic record will be issued and presented; and
  - ii. the place for presentation, to the collecting or presenting bank.

## ARTICLE e2: Scope of the eURC

- a. The eURC supplements the Uniform Rules for Collections (1995 Revision, ICC Publication No. 522) (“URC”) in order to accommodate presentation of electronic records alone or in combination with paper documents.
- b. The eURC shall apply where a collection instruction indicates that it is subject to the eURC (“eURC collection instruction”).
- c. This version is Version 1.0. An eURC collection instruction must indicate the applicable version of the eURC. If not indicated, it is subject to the version in effect on the date the eURC collection instruction is issued or, if made subject to the eURC by an amendment, the date of that amendment.

## ARTICLE e3: Relationship of the eURC to the URC

- a. An eURC collection instruction is also subject to the URC without express incorporation of the URC.
- b. Where the eURC applies, its provisions shall prevail to the extent that they would produce a result different from the application of the URC.
- c. Where an eURC collection instruction is issued but the presentation consists of only paper documents, the URC alone shall apply.

## ARTICLE e4: Definitions

- a. Where the following terms are used in the URC, for the purpose of applying the URC to an electronic record presented under an eURC collection instruction, the term:
  - i. “**advices**” includes electronic records originating from a data processing system;
  - ii. “**collection instruction**” shall include an instruction originating from a data processing system;
  - iii. “**document**” shall include an electronic record;
  - iv. “**place for presentation**” of an electronic record means an electronic address of a data processing system;
  - v. “**sign**” and the like shall include an electronic signature;
  - vi. “**superimposed**” means data content whose supplementary character is apparent in an electronic record.



- b. The following terms used in the eURC shall have the following meaning:
- i. “**data corruption**” means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part;
  - ii. “**data processing system**” means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part;
  - iii. “**electronic record**” means data created, generated, sent, communicated, received or stored by electronic means including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
    - a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
    - b. capable of being viewed to ensure that it represents the type and/or description of the electronic record listed on the eURC collection instruction;
  - iv. “**electronic signature**” means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record;
  - v. “**format**” means the data organisation in which the electronic record is expressed or to which it refers;
  - vi. “**paper document**” means a document in a paper form;
  - vii. “**presenter**” means the principal or a party that makes a presentation on behalf of the principal;
  - viii. “**received**” means when an electronic record enters a data processing system, at the agreed place for presentation, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system is not to be construed that the electronic record has been authenticated and/or viewed under the eURC collection instruction;
  - ix. “**re-present**” means to substitute or replace an electronic record already presented.

## ARTICLE e5: Electronic Records and Paper Documents v. Goods, Services or Performance

Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.

## ARTICLE e6: Format

- a. An eURC collection instruction must indicate the format of each electronic record.
- b.
  - i. The format of each electronic record must be as previously arranged between the remitting bank and the collecting or presenting bank, as required by sub-article e1 (b).
  - ii. An electronic record received in a format that has not previously been agreed may be treated as not received, and the collecting or presenting bank must inform the remitting bank accordingly.

## ARTICLE e7: Presentation

- a. When electronic records alone are presented under an eURC collection instruction, these must be accessible to a collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction.
- b. When electronic records, in combination with paper documents, are presented by the remitting bank under an eURC collection instruction, all the electronic records referred to in the eURC collection instruction must be accessible to the collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction enclosing the paper documents.
- c. An electronic record that cannot be authenticated is deemed not to have been presented.
- d. *i.* The remitting bank is responsible for ensuring that each presentation of an electronic record, and any presentation of paper documents, identifies the eURC collection instruction under which presentation is being made. For electronic records this may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the eURC collection instruction itself.
  - ii.* Any electronic record or paper document not so identified may be treated as not received.

## ARTICLE e8: Advice of Non-Payment or Non-Acceptance

If a collecting or presenting bank receives an eURC collection instruction and issues an advice of non-payment and/or non-acceptance to the bank from which it received the collection instruction and does not receive instructions from such bank for the disposition of the electronic records within 60 calendar days from the date the advice of non-payment and/or non-acceptance is given, the collecting or presenting bank may dispose of the electronic records in any manner deemed appropriate without any responsibility.

## ARTICLE e9: Determination of a Due Date

When settlement under an eURC collection instruction is due a number of days after the date of shipment or dispatch of the goods, or a number of days after any other date appearing in an electronic record, an eURC collection instruction must indicate the due date.

## ARTICLE e10: Release of Electronic Records

- a. An eURC collection instruction must indicate the manner in which electronic records may be accessed by the drawee.
- b. When electronic records are presented in combination with paper documents, and one of those paper documents is a bill of exchange that is to be accepted by the drawee, the electronic records and paper documents are to be released against acceptance of the bill of exchange (D/A) and the eURC collection instruction must indicate the manner in which those electronic records may be accessed by the drawee.

## **ARTICLE e11: Data Corruption of an Electronic Record**

- a.** If an electronic record that has been received by a bank appears to have been corrupted, the remitting bank may inform the presenter, or the collecting or presenting bank may inform the remitting bank, and may request it to re-present the electronic record.
- b.** If a collecting or presenting bank makes such a request and the presenter or remitting bank does not re-present the electronic record within 30 calendar days, the collecting or presenting bank may treat the electronic record as not presented and may dispose of the electronic records in any manner deemed appropriate without any responsibility.

## **ARTICLE e12: Additional Disclaimer of Liability for Presentation of Electronic Records under eURC**

- a.** By satisfying itself as to the apparent authenticity of an electronic record, a bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.
- b.** A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.

## **ARTICLE e13: Force Majeure**

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.

## Appendix 3

# ERULES DRAFTING GROUP

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## ABOUT THE AUTHOR

**David Meynell** is the founder of TradeLC Advisory, an advisory and consultancy service, and the co-owner of [www.tradefinance.training](http://www.tradefinance.training), an online training platform for all aspects of trade finance.

He previously worked for Deutsche Bank for over 30 years in a number of international locations, culminating in the position of Global Head Trade Product Management for Financial Institutions.

David is Senior Technical Advisor for the ICC Banking Commission and Chief Examiner for the Certificate in International Trade Finance (CITF®). He is a frequent coordinator and speaker at trade events globally providing workshops and training events.

### INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services.

ICC produces universally accepted rules and guidelines that help business, particularly small—and medium-sized companies (SMEs), access the financing they need to grow.

Banks and other financial institutions help companies engage in world trade, mitigating risks so that goods and services can flow across the globe in a smooth and secure manner. Trade finance is especially crucial for small—and medium-sized enterprises (SMEs), which may lack the resources to advance the necessary funds to import or export valuable goods on their own.

In order to ensure that companies are able to access the financing they need and level the playing field worldwide, ICC produces voluntary rules and guidelines for issues, such as documentary credits, forfaiting, demand guarantees, bank payment obligation and dispute resolution.

In providing this common framework, ICC allows companies and governments around the world to speak the same regulatory language without burdening banks with red tape that could keep them from financing valuable trade opportunities.

Bringing trade finance experts from over 70 countries together, ICC also serves as a forum for those who seek to develop common strategies and standards to free up financing for SMEs, especially in developing countries and emerging markets.

## **GLOBAL RULES**

Banking plays an undeniable role in making trade work for all, allowing even small businesses to take risks and conquer new international markets. Banks underpin more than a third of global trade transactions, representing trillions of dollars each year.

And if trade needs financing to flow smoothly around the world, banks in turn need common rules and guidelines to deal with their counterparts from other countries in order to avoid the confusion that comes with conflicting national rules.

Having companies across the globe voluntarily abide by the same guidelines also levels the playing field, making it easier for small—and medium-sized enterprises to integrate foreign markets and global value chains, and ensuring that trade is more inclusive.

ICC's global rules for documentary credits were established in the 1930s—a time of growing nationalism and protectionism—and have since become the most successful privately drafted rules for trade ever developed.

Every year, trade transactions of over US\$1 trillion are conducted on the basis of these ICC rules on documentary credits—now known as UCP600—yet international trade is constantly evolving. This leads ICC to continually adjust and overhaul our rules to reflect the changing nature of banking in trade.

ICC also develops guidelines for fields, such as forfaiting, demand guarantees and supply chain finance—all ways that banks work with companies to mitigate the risks involved in trade.

As disputes between companies and banks inevitably occur within this vast area of work, ICC's expertise is also used to help parties resolve their disagreements around trade finance documents quickly and without going to court.

When disputes around global trade finance rules are resolved in a rapid, fair and cost-effective manner, trade can avoid the slowdowns and hassle that stem from protracted international litigation. In this spirit, ICC has developed rules for documentary credit dispute resolution (DOCDEX), where parties are provided with a specially appointed panel of experts that deliver a decision within 30 days of receiving the necessary documents.

<https://iccwbo.org/global-issues-trends/banking-finance/global-rules/>