

# Electronic Records in Letters of Credit

Dr Alan Davidson

## Abstract

The 2007 revision of the *Uniform Customs and Practice for Documentary Credits* by the ICC meets the practical and legitimate concerns of commercial parties involved in international trade and commerce. The ISP98 concisely addresses the need for the increasing use of standby letters of credit, whilst preserving the underlying principle of autonomy and doctrine of strict compliance. Nevertheless, the emergence of electronic commerce, particularly the use of electronic documents has presented dilemmas requiring due attention and consideration by bankers, merchants and law makers. New factual variations are constantly arising. Technology changes the nature and extent of electronic documents and electronic mail, with sobering regularity.

Where disputes arise in the use of Documentary Credits, the parties have the dilemma of proving Electronic Records of varying description. The Bill of Lading with its quasi-negotiable nature presents a particularly thorny problem. In addition, where parties make use of printouts, which are a hardcopy of an electronic document, they run the real risk of rejection by the courts applying rules of evidence typically founded at a time when the norm was the use of the quill and parchment. Bankers in the handling of documents in international trade have become entrenched in form and rote use in their own attempt to alleviate risk.

The history of mercantile law and practice shows us that either by stealth or by trial and error, the commercial parties make a due assessment of the risk at all levels and proceed onto their perceived respective commercial advantages. The management of international business is nothing more or less than the management of international risk.

It may be one or two decades before all interested parties adequately and satisfactorily integrate and merge customs and practices associated with electronic commerce into applicable law.

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# Electronic Records in Letters of Credit<sup>1</sup>

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## Introduction

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The letter of credit has a long and illustrious history,<sup>2</sup> used by Kings and Presidents and well as merchants.<sup>3</sup> In the age of electronic commerce and the Internet, this venerable instrument has undergone a reluctant facelift. Aspects of proving electronic documents and transactions clash head on with the traditional approach of examination undertaken by bankers on the presentation of documents.

This paper considers problems associated with using and proving the validity of electronic documents in the context of documentary credits. The law of evidence emerged with concepts such as documents, original and copy all referring to hardcopies, namely paper of parchment, at a time when copies were hand made. Copies are now digital and indistinguishable from the original. Indeed, where documents originate electronically, courts have refused to accept paper printouts as equivalent.

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<sup>2</sup> See R.J. Trimble, "The Law Merchant and the Letter of Credit", (1948) *61 Harv LR*. 981; F R Sanborn, *Origins of the Early English Maritime and Commercial Law*, New York, 1930; Alan Davidson, "Developments in the Utilisations of Letters of Credit Transactions", *Journal of International Banking and Financial Law*, (1995) Volume 10, 328; Alan Davidson, "The Evolution of the Letter of Credit Transaction", *Journal of International Banking and Financial Law*, (1995) Volume 10, 128; "The commercial letter of credit has a long mercantile history. It has a much shorter legal history", W McCurdy, "Commercial Letters of Credit", (1922) 35 *Harvard Law Review* 539. The first lawsuit involving a letter of credit was *Pillans v Van Miero* (1765) 3 Burr 1663; 97 ER 1035.

<sup>3</sup> In the thirteenth century King John sent two representatives to Rome armed with a letter in which he undertook to honour drafts drawn by merchants drawn on the King, see F R Sanborn, *Origins of the Early English Maritime and Commercial Law*, New York, 1930, 347. In 1803 US President Jefferson gave Captain Meriweather Lewis, of Lewis and Clark, a "letter of general credit" stating "I solemnly pledge the faith of the United States that these draughts shall be paid punctually at the date they are made payable". The original is held by the Missouri Historical Society. A facsimile copy is contained in John F Dolan, *The Law of Letters of Credit - Commercial and Standby Credits* 2nd edition, Warren, Gorham & Lamont, Boston, 1991, Appendix A-91.

## Introduction

The letter of credit has undergone a renaissance in the last sixteen years. International Bankers in more than 175 countries operate letters of credit under the *Uniform Customs and Practice for Documentary Credits* (UCP) sponsored by the International Chamber of Commerce (ICC). The UCP has been developed by the ICC in response to the needs, practices and usages of the commercial parties involved and has gone through six thorough revisions, the latest culminating in the UCP600 in 2007.

Since January 1999 the International Standby Practices (ISP98) conceived and written by the Institute of International Banking Law and Practice and adopted by the ICC have provided a distinctive, realistic and practical and optional set of rules for bankers issuing standby letters of credit. The Council for the ISP (CISP) is drafting forms and an Official Commentary.<sup>4</sup> In addition Article 5 of the US Uniform Commercial Code dealing with letters of credit was revised in 1995 and has been adopted by the majority of US states. The United Nations Convention on Independent Guarantees and Standby Letters of Credit was acceded to or ratified by the required minimum number of member nations and commenced on 1 January 2000.

Historically the merchants rather than the law have developed particular methods of payment in an attempt to reconcile the various economic interests of the parties. The law has followed the lead of the merchants and given force to their practice. The courts take particular note of the *lex mercatoria* and international practice to treat certain documents and transactions like cash and notably often exclude the application of certain usual legal principles.<sup>5</sup>

Banks are frequently interposed on specific instructions, relying on the principle of autonomy of the letter of credit and the doctrine of strict performance. The purpose of utilising banks is to secure:

mutual advantage to both parties - of advantage to the seller in that ... he is given what has been called in the authorities a 'reliable paymaster' ... whom he can sue, and of advantage to the buyer in that he can make arrangement with his bankers<sup>6</sup>

The principle of the autonomy is now enshrined in the neoteric letter of credit rules such as the UCP, UCC article 5, ISP98 and the United Nations Convention. According to Lord Denning:<sup>7</sup>

It is vital that every bank which issues a letter of credit should honour its obligations. The bank is in no way concerned with any dispute that the buyer

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<sup>4</sup> The writer is a member of CISP.

<sup>5</sup> For example, in negotiable instruments the modification of *nemo dat quod non habet*.

<sup>6</sup> McNair J. in *Soproma S.p.A. v. Marine & Animal By-Products Corporation* [1966] 1 Lloyd's Rep 367, 385.

<sup>7</sup> *Power Curber International Ltd v. National Bank of Kuwait* [1981] 1 WLR 1233, 1241.

may have with the seller ... It ranks as cash and must be honoured.

The management of international business is nothing more or less than the management of international risk. The development of the various steps and methods in the financing of international business has been directed with this "risk" concept in the minds of the merchants.

The UCP500 has been regarded as the most successful international attempt at unifying law. The UCP has substantially universal acceptance and effect, and has grown "from a set of practices followed only by the most important banks in western countries to a *truly universal normative usage*".<sup>8</sup>

The UCP was designed for paper-based documents.<sup>9</sup> The emergence of electronic means of communication and electronic commerce, particularly in banking has had its impact on documentary credits<sup>10</sup> and correspondingly on the way in which commercial parties approach the financing of trade. The efficiencies of electronics, computerisation and communications have led to the streamlining and rationalisation of the credit process. In turn this has caused an analysis and re-evaluation of the terms of letters of credit and the appropriateness of their application to electronic documents, electronic issue and electronic presentation.<sup>11</sup>

The rapid development and utilisation of the electronic messages has reduced and will continue to reduce the number of banks used in the credit process. The need for the Advising Bank and Negotiating Bank will disappear.<sup>12</sup> Where presentation can be made effectively in an instant,

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<sup>8</sup> Boris Kozolchik, "Bernard Spencer Wheble (1904-1998) In Memoriam" *1999 Annual Survey of Letter of Credit Law and Practice*, Institute of International Banking Law & Practice Inc, Montgomery Village, MD, 1999, 18, 21, emphasis added.

<sup>9</sup> The UCP 500 makes no representation that it is limited to paper based documents. However, it was drafted during the early 1990s before electronic documentation became common. In response to the question, "Does the UCP accommodate ecommerce?" Gary Collyer, ICC Technical Advisor to the ICC and Banking Commission member, responded, "no, it is meant for paper based documents", made to the 2000 Annual Survey on Letter of Credit Law and Practice, New York, March 2000. At the same session Dan Taylor, Vice President ICC Banking Commission and member of the Working Group, responded in the negative to the question, "Can you present electronically under the UCP?" The UCP 500 was intended to follow letter of credit practice; in the years leading to the final draft, 1989-93, there was no practice in electronic letters of credit.

<sup>10</sup> See generally Ch'ng Huck Yong, "International Trends in Documentary Transactions", (1993) 14 *Sing L.R.* 171, 212-216; F Swank, "Electronic Documentary Credits and Guarantees: Emerging Legal Problems" (1988) Volume 7 *IBL* 19; United Nations Commission on International Trade Law, Working Group on Electronic Commerce, Thirty-seventh session, Draft Guide to Enactment of the UNCITRAL Uniform Rules on Electronic Signatures, Vienna, August 2000; United Nations Commission on International Trade Law, Working Group on Electronic Commerce, Thirty-eighth session, Draft Guide to Enactment of the UNCITRAL Model Law on Electronic Signatures, New York, March, 2001.

<sup>11</sup> See page 327 on the ICC's eUCP, the UCP Supplement for Electronic Presentation. See also Lazar Sarna, "Letters of Credit: Electronic Credits and Discrepancies" (1990) 4 *Banking and Finance Law Review* 149, 154 et al.

<sup>12</sup> For example, comments made to the 2001 Annual Survey on Letter of Credit Law and Practice, Washington DC, 8-9 March 2001, eUCP Session, by Dan Taylor, Vice President ICC Banking Continued...

the need for an intermediary bank, which largely acts as a courier, is superfluous. As the role of the Advising Bank diminishes then correspondingly there will be less demand for the Negotiating Bank to discount or purchase a draft. However, the Beneficiary's concerns in relation to requiring a Confirming Bank, particularly a trustworthy local bank, are not diminished by an electronic presentation. The underlying credit worthiness of the bank as the intermediary remains fundamental to the Beneficiary regardless of the type of documents, the issue and presentation. Nevertheless it is fair to comment that the Internet has changed the entire architecture of the letter of credit transaction.

In an attempt to address the technological changes, the United Nations Convention on Independent Guarantees and Standby Letters of Credit (the Convention) describes itself as "flexible and forward-looking". The Convention avoids referring to the written form and instead uses the expression "records". The Convention accommodates issuance in a non-paper based medium, such as electronic data interchange, by referring to issuance in any form that preserves a complete record of the text of the undertaking and provides a generally acceptable or specifically agreed means of authentication.<sup>13</sup>

## **eUCP**

In May 2000 in Paris the International Chamber of Commerce's (ICC) Task Force on the Future of the Commission on Banking Technique and Practice (Banking Commission) identified the need to address emerging electronic trade issues. The Banking Commission resolved to redress the expanding gap between the UCP500 and the practices escalating with respect to electronic substitutions for documents, the issuing of electronic letters of credit and the electronic presentation of documents. The Banking Commission described the "current evolution from paper credits to electronics" as the catalyst for its motivation. The Banking Commission reports that the action is in response to developments in the market place, which has demonstrated a "steady replacement of paper documents by electronic presentations". It is industry that has expressed the desire for "guidance and rules like the UCP for the electronic equivalents of paper credits."<sup>14</sup>

From May 2000 until early 2002 the ICC undertook a supplementary revision to incorporate unique nuances raised by electronic commerce. This was the only time since 1929 when the first UCP was issued<sup>15</sup> that the ICC issued a supplement to the UCP. The revision is abbreviated to eUCP and commenced on 1 April 2002.

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Commission and member of the Working Group, in response to the question, "Will we be losing the negotiating bank?" Mr Taylor responded, "Within 3 to 4 years we will not see an advising bank nor a negotiating bank."

<sup>13</sup> See the Convention Explanatory Note and sub-article article 7(2).

<sup>14</sup> Notes from the ICC Banking Commission First Working Party Draft eUCP, 15 December 2000 and the Revised Working Party Draft eUCP.

<sup>15</sup> In 1929 the ICC issued the Uniform Regulations for Commercial Credits. It was renamed the Uniform Customs and Practice for Documentary Credits (UCP) in 1933.

According to Jean-Charles Rouher, the Secretary General of the ICC, "(i)n a world of fast-changing technology and rapidly improving communications, periodic review of ICC rules for trade facilitation is inevitable."<sup>16</sup> In relation to the eUCP the ICC has stated that eUCP amounts "to nothing less than a revolution in trade finance".<sup>17</sup>

The Banking Commission resolved to accomplish their aim by preparing a supplement to the UCP dealing with the specific issues of electronic issuance and presentation. The Banking Commission set up a working group consisting of experts on the UCP, electronic trade, legal aspects and related industries to prepare the supplement to the UCP. The official name for the work is UCP Supplement for Electronic Presentation with the acronym "eUCP".

Initially the Working Group thought that it would be possible to merely make changes to the definitions.<sup>18</sup> However, the early analysis revealed that certain substantive changes and consequential effects needed to be addressed. These issues include the timing and nature of presentation, the effect on the preclusion rule, examination and originals. The Working Group has considered that it is not necessary to address electronic issuance or advice as current market practice and the UCP500 allow for credits to be issued and advised electronically.<sup>19</sup> The title demonstrates that it is the Working Group's intention to address electronic presentation alone. The eUCP permits pure electronic presentation or a mixture of paper documents and electronic presentation. The articles of the eUCP are designed to be consistent with the UCP except as they relate specifically to electronic presentation.

The ICC is accomplishing precisely what legislatures have been recently addressing, which is bringing century old laws and concepts into the electronic commerce world. In 1996 UNCITRAL issued the Model Law on Electronic Commerce (Model Law),<sup>20</sup> intended to be a template for national legislatures. 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.<sup>21</sup> The Model Law relies on an approach which it refers to as functional equivalence. The new approach is based on an analysis of the purposes and functions of the traditional paper based requirements and extrapolating how those purposes or functions could be fulfilled through electronic commerce techniques. For

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<sup>16</sup> Forward to the UCP 500, 1993.

<sup>17</sup> Quote by the International Chamber of Commerce from the ICC web page at: [www.iccwbo.org/home/news\\_archives/2000/e\\_supplement.asp](http://www.iccwbo.org/home/news_archives/2000/e_supplement.asp)

<sup>18</sup> Reported by Professor James Byrne to the 2001 Annual Survey on Letter of Credit Law and Practice, Washington DC, 8-9 March 2001.

<sup>19</sup> In the general comments to both the original draft and second draft the Working Group stated "The Working Group has not seen the necessity to address any issues relating to the issuance or advice of credits electronically since current market practice and the UCP allow for credits to be issued and advised electronically"; see ICC Banking Commission First Working Party Draft eUCP, 15 December 2000 and the Revised Working Party Draft eUCP, 2 April 2001; see Appendix B.

<sup>20</sup> See [www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

<sup>21</sup> See Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce paragraphs 15-19, [www.uncitral.org/pdf/english/texts/electcom/05-89450\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf)

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.<sup>22</sup>

The official UNCITRAL view is that in respect of all of these stated functions of paper, electronic records can provide the same level of security 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."

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 met, enable such electronic records to enjoy the same level of legal recognition as corresponding paper documents performing the same function. The functional equivalent approach can be evidenced in articles 6 to 8 of the Model Law with respect to the concepts of "writing", "signature" and "original". A substantial number of countries have used the Model Law as the basis for legislation including Australia, the United States, Great Britain and Canada.<sup>23</sup>

The preparation of the eUCP by the ICC was exceeding swift in contrast to the review and preparation of other similar publications. The haste is a direct response to both the electronic revolution and the resultant uncertainty expressed by international traders. It was considered too important to wait for the full revision of the entire UCP.

Professor James Byrne, the chair and reporter of the International Standby Practices Steering Committee (ISP98) initially the ISP committee was considering a similar supplement,<sup>24</sup> however, a full revision is now being undertaken which will include considerations of electronic documents and electronic presentation.

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<sup>22</sup> Ibid.

<sup>23</sup> Legislation implementing provisions of the Model Law has been adopted in Australia (1999), Colombia (1999), Dominican Republic (2002), Ecuador (2002), France (2000), India (2000), Ireland (2000), Jordan (2001), Mauritius (2000), Mexico (2000), New Zealand (2002), Pakistan (2002), Panama (2001), Philippines (2000), Republic of Korea (1999), Singapore (1998), Slovenia (2000), South Africa (2002), Thailand (2002) and Venezuela (2001). The Model Law has also been adopted in the Bailiwick of Guernsey (2000), the Bailiwick of Jersey (2000) and the Isle of Man (2000), all Crown Dependencies of the United Kingdom of Great Britain and Northern Ireland; in Bermuda (1999), Cayman Islands (2000), and the Turks and Caicos Islands (2000), overseas territories of the United Kingdom of Great Britain and Northern Ireland; and in the Hong Kong Special Administrative Region of China (2000). Uniform legislation influenced by the Model Law prepared in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and Canada.

<sup>24</sup> Reported to the 2001 Annual Survey on Letter of Credit Law and Practice, Washington DC, 8-9 March 2001.

Notwithstanding the occasional statement which professes that the UCP has kept abreast of the changing technologies,<sup>25</sup> the reality is that the UCP, which is reviewed once a decade, cannot withstand the cataclysmic change of pace that electronic commerce has produced. Some even question whether the letter of credit will survive "in a world of eCommerce".<sup>26</sup> Even the latest revision of the UCP, in 2007, did not deal with electronic letters of credit or electronic presentation.

### **Scope of the eUCP**

Article e1<sup>27</sup> states that the intention of the eUCP is to accommodate the presentation of electronic records alone or in combination with paper documents. However, the body of the eUCP takes its application further, to examination, notice of refusal, the distinction between original and copies, and disclaimer aspects in relation to electronic records. The article features the same principle as the UCP in requiring specific incorporation in the letter of credit. The eUCP may be incorporated by a subsequent amendment to a Credit.

Article e1 distinguishes between paper documents and electronic records thereby avoiding the mixed expression electronic document. The article permits a mixture of both media for the letter of credit transaction. Electronic record is defined in article e3.<sup>28</sup> The "documentary credit" of the past may be the "electronic record credit" of the future.

### **The Dilemma of Proving Electronic Records in Documentary Credits**

Documentary credit users should take heed to retain documents in the form in which the documents are issued or presented, electronic or otherwise, or risk admissibility problems should such documents be required as evidence in court.

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<sup>25</sup> "The rules have been revised from time to time to accommodate changing market practice and the introduction of new technologies", Charles del Busto (editor), *Case Studies on Documentary Credits under the UCP 500*, ICC Publication number - 535, ICC Publishing SA, Paris, 1995, 3.

<sup>26</sup> For example, Professor Byrne, "(a)t the bridge of the 20th and 21st Centuries, the question for the letter of credit community is whether this work-horse of trade and commerce ... whose foundations are in a world of paper-based obligations will survive in a world of eCommerce and, if so in what form"; James E Byrne "Overview of Letter of Credit Law & Practice in 2000", *2001 Annual Survey of Letter of Credit Law and Practice*, Institute of International Banking Law & Practice Inc, Montgomery Village, Maryland, 2001, 3, 3.

<sup>27</sup> To avoid confusion in citation, the letter "e" precedes the article numbers of the eUCP.

<sup>28</sup> eUCP article e3 ... "electronic record" means

- data created, generated, sent, communicated, received, or stored by electronic means
- that is 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
- is capable of being examined for compliance with the terms and conditions of the eUCP Credit."



The first legal difficulty to immediately emerge in the use of electronic communications is the applicability of the law of evidence. The law has failed to keep pace with the trade, custom and usage of the merchants. Although electronic communications may be admitted as evidence in the courts, the weight attached to it may vary. Common Law jurisdictions attempt to classify electronic messages and communications in terms of the tangible "hard copy" or by the continued use of expressions such as "document". The deeming, by UCP that certain electronic communications are sufficient, as "telecommunications", may not be enough to make the transmissions admissible at law. Ch'ng Huck Yong quite properly remarks "the courts should take judicial notice of (the electronic communications') commercial advantages and its widespread use and accept them just as the use of the ordinary telephone".<sup>29</sup>

Electronic communications involving financial transactions are well into the trillions of dollars per annum. Authentication of electronic messages has become important for traders, bankers and lawyers not only for the content and financial consequences, but also for subsequent evidentiary purposes. Evidence legislation does not address all aspects of email communications.<sup>30</sup> The courts will need to be satisfied regarding the authenticity of transmissions.

In the early days of computers used for commercial purposes, meaning the 1970s and 1980s, computer space was expensive and computer specialists urged and advised users to "clean out" the computer space for premium efficiency. This concern for the precious resource of computer space led the early programmers to cut corners, for example, by abbreviating dates.<sup>31</sup> In the 21st century computer space is cheap. However, many professionals retain the practice of deleting files on a regular basis. The retention of this practice is an unnecessary hangover. Some parties, which are conscious of retaining records, may print out hard copies before deleting the files. Such practice may result in unintentional and undesirable consequences, including the inability to prove the document in a court of law.<sup>32</sup> Today's photocopy machines make superb copies, but each copy is a degradation of the original. Electronic copies of documents are digital, and so byte by byte at identical to the original.

Courts are not free to amass information as evidence. In applying the "best evidence" principle the courts are often obligated to disregard otherwise relevant material. The two main exclusionary rules are the rule against hearsay and the rule as to secondary evidence of the contents of a document. The former excludes certain relevant information as untested and unreliable. Both rules include several exceptions. However, it is the latter rule which is less than satisfactory when applied to electronic records. The rule is sometimes referred to as the "best

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<sup>29</sup> Ch'ng Huck Yong, "International Trends in Documentary Transactions", (1993) 14 *Sing L.R.* 171, 213-4.

<sup>30</sup> The UNCITRAL Model Law of Electronic Commerce and the many international *Electronic Transactions Acts* partly resolves some of these issues.

<sup>31</sup> This practice gave rise the Y2K crisis which cost the financial industry billions of dollars. See Alan Davidson, "Y2K Update for Lawyers", (1999) 3 *Proctor*, 31.

<sup>32</sup> Alan Davidson, "Retaining Electronic Mail for Evidentiary Purposes", (1999) 6 *Proctor* 30.

evidence" rule. In 1745 Lord Harwicke in *Omychund v Barker*<sup>33</sup> stated that no evidence was admissible unless it was "the best that the nature of the case will allow". The general rule is that secondary evidence will be inadmissible if the primary document is available. When a party requires a document in the possession of another to be admitted into evidence, that party may issue a Notice to Produce, a subpoena for documents. A copy of the original may be admitted as evidence if the party served with a Notice to Produce fails to produce the original. In the absence of the Notice to Produce the original document is admissible and the copy is not.

The English common law courts developed the secondary evidence rule in relation to documents as early as the 16th century. However the application of this rule to electronic records is fraught with danger. The courts need to determine whether electronic records on such media as video tapes, audio tapes, CDs, DVDs, data on a computer's hard disk, data on a floppy disk and electronic messages, are documents for the purpose of the rule. In relation to electronic messages debate rages over which version is the original and which is the copy. It has been argued that at least eight "copies" of an electronic message come into existence from creation to receipt.<sup>34</sup> The debate has not been resolved as to which are admissible and which are not. Many argue that the original electronic message is the version created in the sender's premises and that the recipient only acquires a copy. Others would argue that the "electronic record" as received forms the original, especially where it is changed along the path by, for example, data fluctuations altering a few characters. With paper documents, the recipient is typically in possession of the original. In Australia most States and Territories, apply the secondary evidence rule. In Queensland the *Evidence Act 1977* (Qld) provides for an overly complicated mechanism for adducing evidence of electronic records. The section has been criticised by many commentators.<sup>35</sup> For a successful application of the equivalent UK provisions see *R v Shephard*.<sup>36</sup>

The majority of the High Court of Australia in *Butera v Director of Public Prosecutions for the State of Victoria*<sup>37</sup> considered that the best evidence rule should not apply to exclude copied audio tapes "provided the provenance of the original tape, the accuracy of the copying process and the provenance of the copy tape are satisfactorily proved". The High Court wrestled with the problematic consequences of a rule formulated as early as the 16th century, in its application to an electronic record. The effect of the High Court decision is to sidestep the rule and permit consideration of all the circumstances. In other words, the court gave back discretion to itself to consider the weight to be attributed to the evidence, something which the original rule was at pains to remove. However, the rule was formulated at a time when making a copy meant the physical individual transcription from one parchment to another where the possibility of error was real. The rule should be modified for modern forms of electronic records, particularly digital records such as computer files and data, where the copying process is rarely, if at all,

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<sup>33</sup> (1745) 1 Atk, 21, 49; 26 ER 15, 33.

<sup>34</sup> Alan Davidson, "Retaining Electronic Mail for Evidentiary Purposes", (1999) 6 *Proctor* 30, 30.

<sup>35</sup> For example the Queensland Law Reform Commission Issues Paper, "The Receipt Of Evidence By Queensland Courts: Electronic Records", WP N° 52, 58; [www.qlrc.qld.gov.au/wp52.html](http://www qlrc.qld.gov.au/wp52.html)

<sup>36</sup> [1993] AC 380.

<sup>37</sup> (1987) 164 CLR 180, 186.

called into question. Indeed if the modern photocopier were available when the rule was formulated, the rule might never have existed. Although the courts have the capacity to develop new principles, it is undesirable to leave all the questions to litigants to find solutions ad hoc whilst leaving the law in a state of uncertainty. As new forms of records emerge, it would remain unsatisfactory to sustain a state of uncertainty waiting for the courts to extend its exceptions or modify its application.

In some jurisdictions the problem is further complicated by the abolition of the secondary evidence rule.<sup>38</sup> Instead the word "document" is given an expanded meaning and provision is made for methods of adducing evidence. As a result all documents, including copies and electronic, are admissible. The key is that it is left to the courts to consider the appropriate weight to be given. Dawson J in *Butera's* case in relation to electronic records stated "some modes of proof are better than others, but that ... goes to weight rather than admissibility." As with a personal testimony, the fact that certain evidence is admissible does not mean that it will be accepted by the court, or even given the same weight throughout.

### **Rejection of Hard Copies of Electronic Records as Evidence**

A second example of the dilemma of proving electronic records is the rejection of hard copies of electronic records as evidence. It has been the practice of many organisations to print out emails that are considered important as a "permanent" record, and then to delete the electronic version.

In the US case of *Armstrong v Executive of the President*<sup>39</sup> involved the status of a printout of an email. The court concluded that the printed version of contained less information than the electronic version. The missing information included the date of the transmission, the date of receipt, detailed list of recipients and linkages between messages sent and replies received.

Should such a document be called into question it is clear that in jurisdictions where the secondary evidence rule has been abolished greater weight would and should be given to the electronic document. A reasonable inquiry for the court may be to question why the "original" document was destroyed. The court may at the very least consider that the electronic version contained information which would have assisted the court in substantiating its originality and accuracy.

Whether commercial parties should retain emails in electronic form or as printouts has connections to the role of President Reagan in the Iran-Contra affair in the 1980s. The requirement that documents be kept for set periods of time, such as seven years, applies equally to electronic documents. Merchants and banks risk professional negligence if they delete the electronic form of their emails and only retain a hard copy printout.

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<sup>38</sup> For example the Commonwealth *Evidence Act* 1995 as well as New South Wales, Tasmania and the Australian Capital Territory. The relevant provision states "Original document rule abolished - The principles and rules of the common law that relate to the means of proving the contents of documents are abolished."

<sup>39</sup> 810 F Supp (1993).

In 1986 Oliver North and national security adviser John Poindexter electronically erased thousands of their e-mail messages on their way out of the National Security Council (NSC). However, the system's back-up tapes allowed investigators to recover these messages and use them as legal evidence. Journalist Scott Armstrong and others sought NSC records. The Executive Office of the President argued that the entire NSC was exempt from Freedom of Information legislation. The subsequent lawsuit *Armstrong v Executive Office of the President*<sup>40</sup> was brought to prevent the backup records from being erased. Researchers were using the records to piece together the controversial arms sales to Iran and funding of Nicaraguan rebels.

The Reagan Administration planned to delete the back-ups. Court rulings established that the records laws for the retention of documents apply to email. Subsequently the Bush Administration staged a midnight raid on Inauguration Eve in January 1993 to put the tapes beyond the law.

In *Armstrong's case* Justice Richey stated pointed out that a paper copy of the electronic material does not contain all of the information included in the electronic version. Judge Richey stated, "paper and the computer versions of these electronic records are different". "A note distributed over these computer system includes information that is not reproduced on the paper copy regarding who has received the information and when the information was received, neither of which is reproduced on the paper copy." "Material must be saved in a way that includes all the pertinent information contained therein... paper copies of these materials do not include all of the relevant information".

### *Original and Copy*

The secondary evidence rule operates to exclude certain relevant information as less reliable. Notwithstanding a number of exceptions, this rule is less than satisfactory when applied to electronic records. Who has the original when an email is sent? This is a much more complicated question. There are a number of complicating factors.

First, there are multiple copies of the email created and copied. The sender has a copy in RAM space, temporary space and permanent space. On sending the e-mail is copied to the Internet service provider, several routers on the Internet, the recipients Internet service provider and finally the recipients RAM space, temporary space and permanent space.

Second, the recipient actually receives a different document to that sent. Hidden from the reader is additional information identified in *Armstrong's case*. The missing information included the date of the transmission, the date of receipt, detailed list of recipients and linkages between messages sent and replies received. It is clear that some of this information was not available at the time that the e-mail was sent. Clearly that the final copied differs from that sent.

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<sup>40</sup> 1 F 3d 1274 (DC Cir 1993).

Third, is it the intention of the sender that the entire electronic record forms the communication, or only the "text"? However, is this a valid question? Surely the recipient cannot depend upon the subjective intention of the sender. Should a dispute arise both parties would be in a much stronger position if they retain the full electric version of, for example, the email, as recognised in *Armstrong's case*.

Fourth, many professional firms and banks prefer their communications to be more formal than email. Some have adopted the practice of preparing a formal letter, letterhead and all, and attaching it to the electronic communication which may simply state that the "document" is attached. Some will argue that the email would now operate in the same manner as an envelope perhaps corroborating the time and place of the communication. Several questions arise from this scenario. Should the attachment be kept in its original electronic form or can it be printed out? It may appear to be the intention of the sender that the sender prefers the appearance of a formal letter. However, assuming that the attachment was a simple Microsoft Word file, several more complicating factors arise. Microsoft Word files contain a significant amount of information in addition to the text. Such information includes the date the file was created, the number of revisions, date and times of revisions and in some cases prior drafts. This additional information could corroborate claims made by one party or the other regarding a particular statement of affairs. The nature and extent of other formats exacerbate such considerations.

Fifth, should the accompanying email be retained? The answer to this question may be the same for the question about retaining envelopes for standard letters.

Sixth, much of the discussion has failed to recognise the distinction between analogue and digital data. Data recorded onto audio and video tapes is typically analogue. Computer data recorded by the duplication of bits and bytes is precisely duplicated when copied. A copy of analogue data may, for example, render some data indistinguishable from background noise. Correspondingly, copies of analogue data ought to be regarded with greater suspicion than digital copies, putting aside the question of tampering.

Commercial parties including bankers rely on electronic communications to conduct business. Such systems are used to create, send and store letters, memoranda, schedules, transfer funds and conduct a myriad of business transactions. Many records are now only available in electronic formats. Additionally electronic mail discussion lists and conferences are used as substitutes for meetings.

In jurisdictions applying the secondary evidence rule courts must rule the printout as an inadmissible copy. There are exceptions to this rule. For example courts will admit copies where the original is lost or destroyed. However, courts have a discretion not to admit evidence where the loss or destruction was a deliberate act of the party relying on the copy.<sup>41</sup>

In jurisdictions where the secondary evidence rule has been abolished greater weight would and should be given to the electronic document. A reasonable inquiry for the court may be to

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<sup>41</sup> See R A Brown, *Documentary Evidence in Australia*, 2nd edition, LBC Information Services, Sydney, 1996, 128-129.

question why the "original" electronic document was destroyed. The court may at the very least consider that the electronic version contained information, which would have assisted the court in substantiating its originality and accuracy. Destroying the electronic record in preference to a printed hard copy risks the "document" being inadmissible or being attributed less weight.

The message for documentary credit users is that documents must be retained in the form in which the documents are issued or presented. Attempting to change the medium may have unpredictable consequences. Recently documentary credits underwent a controversy and rethinking in relation to original documents.

UCP500 sub-article 20(b) permitted, as an original document, a document produced or appearing to have been produced by reprographic, automated or computerised systems, or as carbon copies, provided that it is marked as original and where necessary, appears to have been signed. The English Court of Appeal in *Glencore International v Bank of China*<sup>42</sup> placed an unreasonable literal interpretation on the sub-article ignoring both common sense and international banking practice. The Court of Appeal refused to treat as an original a document which appeared to be copied, but which nevertheless had a "wet" signature.<sup>43</sup> UCP600 Article 17 deals with "Original Documents and Copies" but still assumes the use of hardcopy.

Original or not, electronic or otherwise, the document should be tendered in evidence as received.

## Summary

The 2007 revision of the UCP and the eUCP meet the practical and legitimate concerns of commercial parties and that as a fluid and functional commercial document the UCP must be reviewed at regular intervals with vigilance by the ICC to ensure that the needs of the commercial parties remain paramount for the commercial good of not only the parties but also the community. The ISP98 concisely addresses the need for the increasing use of standby letters of credit, whilst preserving the underlying principle of autonomy and doctrine of strict compliance.

Nevertheless, the emergence of electronic documents has presented dilemmas requiring due attention and consideration by bankers, merchants and law makers. New factual variations are constantly arising. Technology changes the nature and extent of electronic documents and electronic mail with sobering regularity.

The history of mercantile law and practice shows us that either by stealth or by trial and error,

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<sup>42</sup> [1996] 1 Lloyd's Rep 135.

<sup>43</sup> See generally James E Byrne, *The Original Documents Controversy - From Glencore to the ICC Decision*, Institute of International Banking Law and Practice Inc, Montgomery Village, Maryland, 1999; James E Byrne, "Overview of Letter of Credit Law & Practice in 1998", *1999 Annual Survey of Letter of Credit Law and Practice*, Institute of International Banking Law & Practice Inc, Montgomery Village, Maryland, 1999, 3, 8-10; and James E Byrne, "What's an Original?", (1998) October *Documentary Credit World*, 42.

the commercial parties make a due assessment of the risk at all levels and proceed onto their perceived respective commercial advantages. The management of international business is nothing more or less than the management of international risk

It may be one or two decades before all interested parties adequately and satisfactorily integrate and merge customs and practices associated with electronic commerce into applicable law.

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