Soft Law in International Trade Finance

*A Comparative Analysis of the Harmonizing Effect of the UCP National Report – Sweden**

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1 Part I

1.1 Introduction

It is generally acknowledged that several areas of commercial law are not comprehensively regulated by law in a strict, state-centered, sense. Instead, national legislators have to a large extent relied upon the parties' right to use the freedom of contract and courts to exercise their power to decide cases. There are numerous more or less comprehensive frameworks emanating from non-state institutions, such as standard contracts, model contracts, collections of general principles etc., aimed at producing rules or regulatory frames related to various kinds of legal situations. Some of these instruments, which are not an effect of national legislators or state authorities, are often described as *soft law*. Soft law in this sense can affect the relationship between parties to commercial contracts in various ways. The parties might, for example, expressly incorporate a particular instrument into their contract and thereby, by exercising their freedom of contract, make it applicable in their legal relationship. Moreover, such instruments might influence the legislators and courts in various jurisdictions and might then affect the law. Furthermore such soft law instruments may become usage then being of a kind that courts will have to follow.

One such soft law instrument, The ICC's *Uniform Customs and Practices for Documentary Credits* (in the latest version UCP 600), has for a long time served an important function when it comes to harmonizing the legal treat-

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ment of letters of credits in international trade. The following text is aimed at describing and evaluating to what extent the Swedish legal system and Swedish legal practice are open to influences from soft law, and, in particular, to what extent the legislation, legal decision making, and legal practice in Sweden is in convergence with the UCP (and accompanying instruments from the ICC, such as ISBP 745).

The text is structured as follows. First, we give a general description of the Swedish legal system (section 1.2). After that, we discuss whether and to what extent soft law is and can be used by the Swedish legislator, by the Swedish courts, by Swedish legal scholars and in Swedish legal practice (Part II). Part III aims to describe and evaluate the standing of UCP in the Swedish legal system and in Swedish legal practice. Finally, we make some concluding remarks with respect to the efficiency of the UCP as an instrument for legal harmonization (Part IV).

1.2 Fundamentals of the Swedish Legal System

Swedish law (as well as the other Nordic legal systems) has been described as a blend between civil and common law. There is no civil code with the ambition to cover overall central private law issues or even the most important ones. Instead, the legislation is specific and focused on questions that have been deemed important by the legislator, while many questions – in particular when it comes to private law and commercial law – are left unregulated by statute, to be handled by the courts. Other features are that the existing legislation constitutes a mixture of old legislation, based upon the code from 1734, and new legislation, and what has been described as a lack of systematicity when it comes to the particular questions, which the legislator has chosen to direct its attention to, and then also a resulting need for analogies from the existing legislation. This legislative model has sometimes been described as an example of 'Nordic legal pragmatism'.[1] In the last decades, the legislation has to a very large extent been influenced and affected by Sweden being a member of the European Union, and the legislative acts emanating from the union, which may in various ways mean a deviation from the Swedish legal tradition.[2]

[1] See B. Flodgren, 'Civilrätten i ett framtidsperspektiv' [2016] *Svensk Juristtidning 100 år*, p. 9, 28.

[2] Legislative acts from the European Union are given force in Swedish law according to act (1994:1500) on the occasion of Sweden's membership in the European Union, lag (1994:1500) med anledning av Sveriges anslutning till Europeiska unionen, according to

The court system is basically divided into general courts and special courts. The general courts are divided into courts dealing with private law matters and matters of criminal law nature and administrative courts dealing with public law matters. With respect to private law issues, the court system is based on several local courts (tingsrätter), seven Courts of Appeal (hovrätter) and one Supreme Court (Högsta domstolen), while issues related to public law are handled by administrative local courts (förvaltningsrätter), four administrative Courts of Appeal (kammarrätter) and the Supreme Administrative Court (Högsta förvaltningsdomstolen).[3] Special courts, such as the Labour Court (Arbetsdomstolen) and the Patents and Market Courts (including the Patents and Market High Court), exercise jurisdiction in relation to specific types of disputes.[4] There is no constitutional court in Sweden. Instead, the constitutional control of the law is in the form of judicial review, according to which any court or public authority that finds that a rule conflicts with the constitution or any other superior statute, or that the required procedure was in some important respect disregarded when the rule was adopted, shall refrain from applying that rule.[5] Then such judgment by a lower court may in the end be appealed to the Supreme Court. It also has to be recognized that Swedish legislation or case law regarded to be in conflict with EU law may be brought before the Court of the European Union for further consideration with respect to the EU law perspective.

Leave to appeal from a Court of Appeal is, as a main rule, required to have a case tried by the Supreme Court. Leave to appeal to the Supreme Court may be granted only if it is regarded to be of importance with respect to a guiding nature regarding the application of law. It is then up to the Supreme Court to consider whether there is a ground for appeal also taking into regard if there are extraordinary reasons for such a determination. This may be the case if there would be found a basis for relief in case of substantive defects, such as a grave procedural error or a gross oversight or gross mistake made by the Court of Appeal.[6] The decision by a Swedish court is rendered as a majority opinion in case all judges are not in agreement. Dissenting opinions

which, with some simplification, the fundamental treaties and acts and decisions based on those treaties are binding in Sweden.

3 See chapter 11 § 1 Instrument of Government, regeringsformen (1974:152).

4 See the Statute on the Trial in Work Related Disputes, lag (1974:371) om rättegången i arbetstvister, and the Statute on Patent and Market Courts, lag (2016:188) om patent- och marknadsdomstolar, respectively.

5 Chapter 11 § 14 Instrument of Government, regeringsformen (1974:152).

6 Chapter 54 § 11 Code of Judicial Procedure, rättegångsbalken (1942:740).

will also be set out in the judgement. In precedents from the Supreme Court it is also fairly common that individual judges give their own opinions, in which they may elaborate on one or several questions related to the case.

Disputes amenable to out-of-court settlement may be resolved by arbitration proceedings, which are then regulated in the Arbitration Act.[7] An arbitration award is binding on the parties, and the grounds on which the award can be held invalid or on which it can be appealed are very limited.[8] Arbitration awards are enforceable in the same way as judgements from a court.[9] The Arbitration Act also contains rules on the recognition and enforcement of foreign arbitral awards, which are based on the New York Arbitration Convention.[10] It should be noted that several B2B contracts refer to dispute resolution by arbitration.

Insofar as private commercial law is concerned, a number of acts from the first part of the 20th century, covering central issues regarding private law, apart from serving as sources of law, were also used as a basis for analogies, acknowledged as expressing general legal principles.[11] Gradually, with the increasing amount of specific regulations regarding different types of contracts and other special questions regarding private law issues of various kinds, such as rules for the protection of consumers, traveling agents etc. (with important influences from the European Union), the role of the mentioned acts as sources for analogies was not regarded to be as clear as was once contemplated, a development famously described by the former judge of the Supreme Court and civil law professor, Bertil Bengtsson, as the *fragmentation of the civil law*. For example, while it was once recognized that the Sales Act from 1905 was the natural basis for analogies when deciding questions regarding other types of contracts, it is not clear, and a matter of debate, to what extent the Sales Act now in force, köplagen (1990:931), will be used in

7 Lag (1999:116) om skiljeförfarande.

8 33–34 §§ Arbitration Act, lag (1999:116) om skiljeförfarande.

9 Chapter 3 § 1 Execution Act, utsökningsbalken (1981:774).

10 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, cf. §§ 52–60 Arbitration Act, lag (1999:116) om skiljeförfarande.

11 See in particular the Contracts Act, lag (1015:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, the now replaced Sales Act, köplagen (1905:38 s. 1), the Act on Instruments on Debt, skuldebrevslag (1936:81), and the now replaced Act regarding Factors, Commercial Agents and Commercial Travelers, lag (1914:45) om kommission.

a similar manner. The present Sales Act, as mentioned is based on the CISG Convention and it is thus more precisely geared at sales transactions.[12]

In a comparative perspective, a peculiar feature of Swedish law is the importance attached to preparatory works for legislation as a source of law. As mentioned, however, a substantial part of the commercial law is not regulated in legislation, and absent legislation there is thus no directly applicable guidance to be found in preparatory works for the judge when deciding a case.

It is generally accepted that case law, including precedents by the Supreme court, is not a "binding" source of law, while it is a matter of debate what this entails, more specifically. In our opinion, it is clear that statements regarding the contents of law made by a superior court, for example, the Supreme Court – at least if the case is published in the journal NJA (section I) – is *authoritative* in the sense that such a statement provides a strong independent reason for holding that the law is to be constructed in accordance with what follows from the Supreme Court judgment.[13]

In reaching a judgment, a court may have to consider a variety of sources. According to the prohibition of *deni de justice*, a court is obliged to reach a conclusion and to provide grounds for its decision. This applies even if the variety of legal sources does not produce a decisive answer to the question at hand. The solution reached by the court may be expressed as the result of a rule, which was not previously part of the legal order. The statement by the court can be considered authoritative if the judgement emanates from the Supreme Court (or another superior court). In this sense, the Supreme court but also other superior courts have a rule-making power. The exercise of this power is also a part of the function of the Supreme Court in providing guidance with respect to the application of law. This does not, however, mean that a precedent is considered *binding* in the sense that it must be followed,

[12] B. Bengtsson, 'Om civilrättens splittring' in L. Gorton, J. Ramberg and J. Sandström (eds), *Festskrift till Kurt Grönfors* (1991), Norstedts, Stockholm 1991, pp. 29–46, cf. B. Flodgren, 'Civilrätten i ett framtidsperspektiv' [2016] *Svensk Juristtidning 100 år*, p. 9, 28, and J. Herre, 'Köprättens divergerande innehåll' [2016] *Svensk Juristtidning 100 år*, p. 53, 57.

[13] Cf., for example, 1 LU 1947:1 p. 4 (statement by the Law Committee of the Swedish Parliament), L. Heuman, 'Högsta domstolens prejudikatnedbrytande verksamhet' in L. Heuman (ed.), *Festskrift till Per Olof Bolding* (1992), Norstedts, Stockholm 1992, p. 209, and A. Peczenik, *Juridikens metodproblem. Rättskällelära och lagtolkning*, Almqvist & Wiksell, Stockholm 1980, p. 122.

but lower courts would regularly follow it.[14] It is rare that lower courts would not follow a precedent from the Supreme Court.

Of course, there are also limitations in the rule-making power thus vested in a court, in the sense that the court, for example, cannot choose to deviate from what follows from legislation without very strong reasons. The Supreme Court has at times also found that even though a particular solution would be desirable, it is a 'matter for the legislator', and refrained from exercising its rule-making power.[15] It is sometimes claimed, however, that the Supreme Court has become more proactive in recent years.[16]

2 Part II

2.1 Soft Law in Swedish Law and Swedish Legal Practice

2.1.1 The Legislator Considering Soft Law

As already mentioned, the Swedish legislation related to private law and in particular to commercial law is not comprehensive. Several legislative initiatives from the last decades in such matters thus emanate from directives from the European Union or follow from European Union regulations, and the legislator is then usually focused on implementing the rules rather than on considering their relation to soft law regimes. In certain parts of law (e.g. the law of sales and maritime law) international conventions have played an important role in achieving legal harmonization.

It also has to be recognized that law may consider issues such as the lex mercatoria but also various customs developed in certain trades regarded to be recognized as important measures in the legal development. This is thus a development that may take place in an international environment but also in more narrow contexts. In a Swedish law perspective the recognition of usage and customs has a long history and was also explicitly taken into

[14] Supreme Court Justice Petter Asp discusses and criticizes the notion of the 'binding' nature of precedents (as well as other sources of law) in Swedish law in P. Asp, 'Skäl, slut och skiljaktighet – noteringar kring svensk prejudikatlära' (2021) 5 *Svensk Juristtidning* 444.

[15] Cf. for example certain statements by the Supreme Court in NJA 1993 s. 41, and several dissenting opinions, where it was argued that the question was a matter for the legislator rather than the court, see Justice Callissendorff's dissenting opinion in NJA 2014 s. 323, Justice Lambertz' in NJA 2010 s. 58 and Justice Thorsson's in NJA 2012 s. 211.

[16] B. Flodgren, 'Civilrätten i ett framtidsperspektiv' (2016), *Svensk Juristtidning 100 år*, 9, 42.

consideration in e.g. the Contract Act as well as the Sales Act from the early 20th century.

The legislator may fall back on various considerations when adopting or modifying substantive law. Hence, there is nothing preventing the legislator from having regard to soft law in this procedure, including such instruments as the Unidroit Principles of Commercial Law (UPICC) or the Draft Common Frame of Reference (DCFR), as well as other soft law products. A similar observation may be made regarding the tasks of the courts.

Here, but also when considering to what extent courts may be influenced by soft law of different kinds, a distinction may be made between international influences as such (comparative reasoning and awareness of regulation in other states) and influences from soft law instruments as such, even though this distinction is to some extent blurred by the fact that soft law instruments (such as DCFR, UPICC etc.) can be viewed as expressions of what constitutes internationally accepted solutions to legal problems, and used as such by a court. In the proposal for the new Commission Act, kommissionslagen (2009:865), the legislator explicitly notes the importance of the Swedish legislation being "in pace" with what applies in comparable jurisdictions, without, however, including any specific references to soft law instruments.[17] This statement, exemplifies the legislator's – perhaps growing – ambition to take into account the increasingly international aspects of the modern economy.

There are also examples of the Swedish legislator taking soft law regulations of various kinds into consideration when adopting new legislation. One example is found in the implementation of the directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement. Directive 2007/36/EC concerns the exercise of certain rights of shareholders in listed companies and applies to companies that have their registered office in a Member State and whose shares are admitted to trading on a regulated market situated or operating within a Member State, art. 1.1. According to the new art. 9 (c) of directive (2007/36/EC) Member States shall, i.a., ensure that companies publicly announce material transactions with related parties at the latest at the time of the conclusion of the transaction and ensure that material transactions with related parties

[17] Proposition 2008/09:55 p. 25.

are approved by the general meeting or by the administrative or supervisory body of the company, see art. 9 (c) 2 and art. 9 (c) 4 respectively.

Failing statutes regarding these matters rules have previously been developed within the stock market self-regulation, in the shape of rulings by The Swedish Securities Council, which has the purpose of promoting good practice in the Swedish stock market exchange through rulings, advice and information, and whose rulings can be considered an example of soft law.[18] The Council had ruled on the matter concerning related party transactions before art. 9 (c) of directive 2007/37/EC was introduced.[19]

The Member States may, according to art. 9 in the directive, provide for shareholders in the general meeting to have the right to vote on material transactions with related parties which have been approved by the administrative or supervisory body of the company, art. 9 (c) 4. Accordingly, the Member States shall also, having certain considerations in mind, define the concept of material transaction for the purposes of art. 9 (c), art. 9 (c) 1, by setting one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company or take into account the nature of the transaction and the position of the related party. Within these limits, it is, therefore, a matter for each Member State to specify the concept of material transaction to be applied in that Member State. In working out the definition of 'väsentlig transaktion' (corresponding to the term material transaction in the directive) the legislator noted that the rulings of the Swedish Securities Council could 'to some extent' provide guidance regarding the definition. The legislator also noted that the definition laid down by the Council, based on concepts such as value, turnover and return of the transferred business in relation to that in the company's, was complicated and might be difficult to apply in some cases. Instead, the legislator opted for a definition based on the relation between transaction value and company value.[20]

The details are not what matters in this context, of course. What is worth noting, however, is that this illustrates, firstly that the legislator (at least in this context) chose to consider the self-regulation in place when making decisions regarding the contents of Swedish legislation and, secondly, that the guidance provided was limited to providing 'inspiration' to the legislator.

[18] Aktiemarknadsnämnden, The Swedish Securities Council, available at: http://www.aktiemarknadsnamnden.se/startpage__3662.

[19] See, more specifically, the ruling AMN 2012:05.

[20] Proposition 2018/19:56 p. 86.

2.1.2 Courts Considering Soft Law

Courts might 'consider', and have, in fact, 'considered' methods whereby extralegal measures have been recognized as principles to be applied. There are thus various kinds of soft law instruments taken into consideration in their legal decision making, but also customs of different kinds, which may or may not be expressed in standard contracts.

The notion of courts 'considering' soft law is, however, not very precise, and arguably also somewhat ambiguous, and therefore in need of some initial clarification. In the context of courts' decisions and their consideration of different kinds of sources a few distinctions need to be introduced. This relates to an ongoing discussion regarding the concept of a 'source of law', which has made traces in Swedish legal doctrine for the last decades and which illustrates – in this context – important differences regarding terminology. According to one view, which might be described as the traditional view, any source (or at least more or less any source; the limits are usually left unexplicated) that affects or might affect the outcome in a case can be referred to as a source of law.[21] According to another view, which can, in contrast, be described as the strict view, only sources which are considered authoritative are to be considered sources of law. A source is authoritative in so far as it provides an independent reason for legal decision-making. In this latter sense, statutes and precedents provide examples of sources of law. This view recognizes that non-authoritative sources, even though they are not (in the strict sense) to be considered *sources of law*, may very well affect the law and contribute to its development, as well as affect the outcome in particular cases. These different views, or the distinction between them, is in part blurred by disagreement regarding which sources are to be considered *authoritative*. It is then for example a matter of discussion, whether or not, and if so, to what extent, legal doctrine is to be considered authoritative or not, and, hence (depending on the view one takes), whether or not legal doctrine is to be considered a *source of law*.[22]

[21] See, in particular, A. Peczenik, *Juridikens metodproblem. Rättskällelära och lagtolkning*, Almqvist & Wiksell, Stockholm 1980, pp. 47–53. A more recent example can be found in C. Ramberg et al., *Rättskällor – en introduktion i kritiskt tänkande*, Norstedts, Stockholm 2018, p. 13.

[22] Cf. C. Dahlman, 'Begreppet rättskälla' in C. Dahlman and L. Wahlberg (eds), *Juridiska grundbegrepp*, Studentlitteratur, Lund 2019, pp. 65–73, on the one hand, and remarks by J. Munukka, '*David Dryselius. Avtalsviten – effekter och rättsverkningar (ak. avh.). Lund 2019, 387 s.*' [2020–21] *Juridisk Tidskrift vid Stockholms universitet* 228, 231–232, on the other.

Leaving that discussion aside, there is nevertheless an important distinction to be made between authoritative and non-authoritative sources for legal decision-making. There is also an important distinction to be made between sources referred to by a court and sources used by the court in its legal decision-making. Not all sources referred to or 'considered' by a court need be referred to *as arguments* forming a basis for the legal decision. The fact that a court mentions a particular soft law instrument (or doctrinal statement) does not necessarily mean that that instrument (or statement) is used as a reason for the decision. At times courts include references to (i.a.) legal literature in order to give the reader references for further reading, rather than using statements in that literature as reasons for their decisions.[23] What is stated in legal literature is not in any way binding as a source of law but will rather be used as food for thought.

It is also important to note the position of commercial practices and customs under Swedish law. Commercial practices and customs are, as a matter of principle, binding on parties to commercial contracts and on courts dealing with such matters in force of law. The basic principle is expressed in several statutes, of which § 3 of the Sales Act can serve as an example: according to § 3 the provisions in the act do not apply to the extent it deviates from the parties agreement, from a practice which has evolved between the parties or from commercial practice or other custom which must be considered binding on the parties.[24] In this sense a custom is binding on the court, in the same way as a statute is, on the condition that the custom does not conflict with mandatory rules and can be viewed as acceptable from a perspective of reasonableness and fairness. It is, of course, possible that the custom or usage in question is also expressed in some soft law instrument, such as a standard contract, but that is not necessary. Swedish law is – it has been said – rather

[23] Cf. T. Håstad, 'DCFR Rules in the Swedish Supreme Court', in T. Håstad (ed), *The Nordic Contracts Act: Essays in Celebration of it One Hundredth Anniversary*, DJØF Publishing, Copenhagen 2015, pp. 179–184, 183–184.

[24] See U. Bernitz, 'Commercial Norms and Soft Law' in P. Wahlgren (ed), *Soft law*, *Scandinavian studies in law*, vol. 58, Stockholm 2013, pp. 29–45, p. 31, and N. Arvidsson, 'Begreppet sedvana', in C. Dahlman and L. Wahlberg (eds), *Juridiska grundbegrepp*, Studentlitteratur, Lund 2019, pp. 193–238. See also similar rules expressed in § 1 Contracts Act, lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område, and § 2 in the Commission Act, kommissionslagen (2009:865). In this sense, it can be discussed to what extent usage and custom can be considered soft law or whether it is, rather, to be considered 'hard law', see L. Gorton, 'Global Business: National Law, EU Law and International Customs and Contracts', [2016] 27 *European Business Law Review* 421–458, 430.

reluctant to treat even well-established and widely used standard contracts as expressions of commercial practices or customs.[25] However, as we will see, courts might be influenced by soft law instruments, including standard contracts, even if the instrument in question cannot be considered to express a custom in this sense.

Having this in mind, courts (including the Supreme Court) have made references to different kinds of soft law instruments at several occasions. The soft law instrument which has perhaps been given the most attention by the Supreme Court is the DCFR. In the case NJA 2009 s. 672, the Supreme Court, for the first time, made a reference to that instrument. The case concerned whether a distributor, in the absence of specific regulation in the contract, could terminate the contract immediately or only after a reasonable termination period. The court stated that consideration should be given to the fact that contracts concerning distribution are often 'international' and went on to investigate potential sources of analogy within the Swedish legislation, previous case law, rules in some other jurisdictions (Belgium and the US) and wide spread standard contracts for distribution agreements, after which, finally, the relevant rules in DCFR (IV.E. – 2:302) were cited. On this basis, the court concluded that a party terminating a distribution agreement must apply a reasonable period of notice, unless the parties have agreed otherwise. More specifically, when it comes to the kinds of circumstances taken into account when deciding what is to be considered a reasonable period, the Supreme Court stated that 'guiding for the decision of what is to be considered a reasonable period of notice is mainly those kinds of circumstances mentioned in IV.E – 2:302 DCFR'.[26]

Since then, the Supreme Court has made references to the DCFR in several cases, while the exact motive and manner of making the references has differed. In some cases the reference is made in regard of a statement about

[25] U. Bernitz, 'Commercial Norms and Soft Law' in P. Wahlgren (ed), *Soft law*, *Scandinavian studies in law*, vol. 58, Stockholm 2013, pp. 29–45, p. 42. In a Supreme Court judgment, NJA 2022 s. 574, the majority of the Court held that NSAB 2015 (the Nordic Conditions for freight forwarders, based on their international counterpart the FIATA conditions) were to be regarded as custom and binding between the parties without reference having been made to them. The minority considered parts of the standard conditions to be binding custom but found that a certain part of the contract was not, at least not yet, established as a custom.

[26] See T. Håstad, 'DCFR Rules in the Swedish Supreme Court', in T. Håstad (ed), *The Nordic Contracts Act: Essays in Celebration of its One Hundredth Anniversary*, DJØF Publishing, Copenhagen 2015, pp. 179–184.

what holds 'internationally', that is, the reference to DCFR is used as a 'short cut' to a claim regarding the contents of other legal orders, seemingly inspiring the solution of the case at hand. Sometimes the DCFR is referred to in combination with statements about the contents of some other legal orders and usually in combination with references to legal literature.[27] In other cases a reference is made without an explicit motivation, DCFR being mentioned 'for comparison'.[28] The DCFR also figures in several addendums and in a few minority votes in cases from the Supreme Court.[29]

It should also be observed, however, that there are cases where the DCFR is not mentioned by the court, even though the case concerns a question which is regulated by that instrument; this is perhaps more common than the court making a reference to DCFR. In contrast to the case mentioned above (NJA 2007 s. 692) the case NJA 2018 s. 19 merits mentioning in the present context. It concerned among other things the same question as NJA 2007 s. 692, namely what constitutes a reasonable period of termination of a distribution contract. The Supreme Court, in this case, did not mention the DCFR and did not, as far as can be seen in the judgement, take any impression from DCFR, but instead relied on the contents of legislation applicable to similar long term contractual relationships, the contents of a standard contract for exclusive distribution agreements (EÅ 04) and Danish law.

Other soft law instruments have figured as references in Supreme Court cases as well, albeit not to the same extent. Both UPICC and the Principles of European Contract Law (PECL) are mentioned in NJA 2017 s. 113 and in a few addendums and in a minority opinion.[30]

[27] NJA 2010 s. 629, NJA 2012 s. 452, NJA 2013 s. 659, NJA 2016 s. 945 and NJA 2017 s. 113. See in this regard J. Munukka, 'Transnational Contract Law Principles in Swedish Case Law' in P. Wahlgren (ed), *Commercial Law*, *Scandinavian studies in law*, vol. 57, Stockholm 2012, pp. 229–252, 238. It deserves to be mentioned that in most of the cases including references to DCFR, justice T. Håstad or justice J. Herre, both participating in the work with DCFR, has taken part in the decision.

[28] NJA 2012 s. 597, NJA 2013 s. 491, NJA 2014 s. 272, NJA 2014 s. 465, NJA 2017 s. 9.

[29] See e.g. Justice S.O. Johansson's addendum in NJA 2013 s. 1190, justice T. Håstad's addendum in NJA 2008 s. 733 and the minority opinion in NJA 2019 s. 23. Regarding different ways in which the Supreme Court has made use of DCFR, see T. Håstad, 'DCFR Rules in the Swedish Supreme Court', in T. Håstad (ed), *The Nordic Contracts Act: Essays in Celebration of it One Hundredth Anniversary*, DJØF Publishing, Copenhagen 2015, pp. 179–184, 183–184.

[30] See Justice T. Håstad's addendums in NJA 2006 s. 638, NJA 2008 s. 733 and NJA 2010 s. 467 and the minority opinion in NJA 2000 s. 747. UPICC also figures in NJA 2017 p. 113 and in a few addendums, see Justice T. Håstad's addendums in NJA 2006 s. 638, NJA 2008 s. 733 and NJA 2010 s. 467.

Also international standard contracts of different kinds may be referred to as a kind of soft law instrument, and they may in a number of cases be regarded as international custom or usage. As a contract, it has the practical advantage of being flexible and reasonably easy to amend, when the need occurs.[31] In so far as the parties to a contract have incorporated the standard contract into their agreement, the standard contract is binding upon the parties (within the limits set by mandatory rules), but they may also be recognized as custom without being explicitly referred to and thus binding upon the parties. Standard contracts have figured as sources of inspiration for courts, even in the absence of an agreement to that effect, and even though the contracts in question might not have the position of reflecting a commercial practice or custom. This applies at least when the contract in question is a so called agreed document, that is, when it has been drafted by organizations representing parties on both sides of the type of agreement. The Supreme Court has, for example, in NJA 2018 s. 19 made references to EÅ 04, ICC Model Distributorship Contract and Orgalime Model Form of an Exclusive Contract with a Distributor Abroad, concerning the question regarding a reasonable period of termination and the right to compensation in connection with a termination of the agreement. In NJA 2010 s. 629 the court made references to several other standard contracts (NL 09 och NLM 10, Orgalime S2000, AB 04 and ABT 06), in regard to the question whether or not clauses providing for a fixed damage in case of breach of contract excludes the right to compensation for additional damage or not. The Supreme Court has also in one case stated that widely used standard terms can be viewed as *expressing principles of law* in the field of law in question (loss of profits insurance).[32]

It seems fair, therefore, to conclude that courts have – to a varying extent and in different ways – considered soft law in handling commercial law cases, even if the references to these sources do not in all their aspects seem to reflect a principled approach. However, there is a huge leap between saying that a source is being 'considered' and saying that it is considered authoritative. There is also a leap between saying that something is 'considered' (in the sense of being mentioned by the court) and saying that it is being used as a source of legal decision making. While it is safe to say that soft law has been considered by courts, there is no indication that such instruments or texts

[31] L. Gorton, 'Global Business: National Law, EU Law and International Customs and Contracts', [2016] 27 *European Business Law Review* 421–458, 442–444.

[32] NJA 1998 s. 448.

have been considered authoritative. Nevertheless, soft law instruments, at least when viewed as expressing or reflecting international tendencies, have been allowed to have an impact on the development of specific commercial legal issues dealt with by the Supreme Court.

Arbitral tribunals may, as well, let soft law affect their reasoning, especially if the parties have agreed that a particular soft law instrument is to regulate their relationship, but also if the parties have referred to some 'anational' body of rules or to *lex mercatoria*.[33] To what extent such principles are possible to identify and apply is difficult to assess, and it seems likely that the solution to the particular case will be influenced by the arbitrators' background and knowledge.[34]

2.1.3 Soft Law in Legal Practice and Doctrine

Legal practitioners may also use soft law of various kinds in advising clients, drafting contracts and pleading before courts or arbitral tribunals, but the way of reasoning is dependent on the individual question, and what is to be achieved. It is clear, given that the Supreme Court have in some cases referred to soft law instruments of various kind, that parties have incentives to produce arguments based on the contents of such instruments before courts. To our knowledge the contents of various soft law instruments are used as arguments in relation to disputes, when the opportunity arises, not least in the field of letters of credits and demand guarantees.

Soft law instruments are given a fair amount of attention in the legal literature, in connection with various commercial law matters, whether in relation to trade finance, carriage or insurance or other subject matters. The DCFR has been extensively discussed, both its general nature and standing as a source for legal decision making, and in relation to particular legal issues.[35]

[33] Both UPICC and PECL assumes that the respective instrument can be applied when parties have made references in the contract to i.a. *lex mercatoria*, see UPICC (the preamble) and art. 1:101 PECL. See L. Gorton, 'Global Business: National Law, EU Law and International Customs and Contracts', [2016] 27 *European Business Law Review* 421–458, 435, with further references to literature.

[34] L. Gorton, 'Global Business: National Law, EU Law and International Customs and Contracts', [2016] 27 *European Business Law Review* 421–458, 428.

[35] See i.a. J. Herre, 'DCFR och svensk rätt' [2012] 10 *Svensk Juristtidning* 933–940, M. Hansson, 'En kommentar till privaträttsliga diskrimineringsförbud med utgångspunkt i DCFR bok II kapitel 2' [2012] 10 *Svensk Juristtidning* 941–961, J. Samuelsson, 'Avtalstolkning på europeiska. Del I: Systemet' [2012] 10 *Svensk Juristtidning* 962–985, J. Samuelsson, 'Avtalstolkning på europeiska. Del II: Reglerna' [2012] 10 *Svensk Juristtid-*

Many works relating to contracts in general make references to or include (parts of) soft law instruments.[36] Some authors recognize and advocate a use of, for example, DCFR (and other instruments) as a gap-filling instrument, while others are more cautious.[37] References to soft law instruments are common in treatises and articles on various topics. In relation to letters of credit and guarantees various standard contracts, including the Uniform Customs and Practices for Documentary Credits, 2007 revision (UCP), its predecessors and related instruments (such as the Uniform Rules for Demand Guarantees 2010, URDG), and other kinds of soft law instruments are regularly observed and discussed.[38]

3 Part III

3.1 Letters of Credits and UCP in Swedish Law and Swedish Legal Practice

3.1.1 The Regulation of Letters of Credit in Swedish Legislation

In Swedish law there is, with very few exceptions, no legislation directly relating to letters of credit and related instruments and Swedish law does incorporate the UCP or any other specific instrument concerning letters of credit. The exceptions, when it comes to legislation concerning letters of credit, consist of two paragraphs. In § 48 in the Act of Sales it is stipulated that the buyer's duty to pay includes measures necessary to make payment possible, including the issuance of letters of credit, bank guarantees or other safety measures stipulated in the contract.[39] In regulation concerning banks

ning 986–1012, C.M. Gölstam, 'DCFR och franchising' [2012] 10 *Svensk Juristtidning* 1013–1033 and T. Ingvarsson, 'Borgen och självständiga garantier' [2012] 10 *Svensk Juristtidning* 1034–1061.

36 See i.a. A. Adlercreutz, L. Gorton and E. Lindell-Frantz, *Avtalsrätt I*, 14th ed., Juristförlaget, Lund 2016 and J. Ramberg and C. Ramberg, *Allmän avtalsrätt*, 11th ed., Norstedts, Stockholm 2019.

37 Cf. C. Ramberg, 'Mot en gemensam europeisk civilrättslagstiftning' [2004] 5–6 *Svensk Juristtidning* 459–474, M. Schultz, 'Europeiska civilrättsprinciper' [2009] 6 *Tidskrift utgiven av Juridiska Föreningen i Finland* 762–793, and several of the texts mentioned previsously.

38 See for example T. Håstad, 'Något om on demand-garantier' in E. Lindell-Frantz et al. (eds), *Festskrift till Lars Gorton*, Juristförlaget, Lund 2007, pp. 185–200, T. Ingvarsson, 'Borgen och självständiga garantier' [2012] 10 *Svensk Juristtidning* 1034–1061 and J. Adestam, *Den dokumentvillkorade garantin*, Karnov, Stockholm 2014, passim.

39 Art. 54 CISG, which is binding in Sweden, does not make an explicit reference to letters of credit and bank guarantees, but the buyer's obligation to pay includes such measures

and financial institutions it is made clear that financial institutions can issue guarantees and letters of credit.[40] Of course, the law regarding letters of credit has also, at least to some extent, developed in case law, even though there are only few cases from Swedish courts concerning letters of credit, as we will describe below.[41]

On the other hand, questions concerning letters of credit, are subject to the more general framework applicable to all (or most) types of contracts or promises under Swedish law, and hence subject to general principles, such as the principle of the binding force of contracts (*pacta sunt servanda*), general rules regarding validity of contracts, principles regarding the interpretation of contracts etc. In the field of letters of credit and in so far as questions of the relations between the different parties to a letter of credit transaction is concerned, there are few mandatory rules limiting the parties' autonomy. Questions regarding letters of credit therefore often turn on the contents of the contracts in the individual case and the interpretation of such contracts. The prevailing terminology used in an international context, of which definitions in generally applied standard contracts can serve as evidence, is important when it comes to questions of interpretation in this context.[42] An important limitation to the parties' autonomy is provided by the over-arching § 36 of the Contracts Act, which gives courts the power to adjust contracts on the basis of fairness. According to certain statements by the Supreme Court, that paragraph can be used to prevent fraud in guarantee transactions.[43]

In this context it should be noted that parts of the UCP and, for that matter, the URDG, are strictly speaking prescribing legal effects which are direct consequences of the contractual content which constitutes a letter of credit. In particular, the 'independence principle', involving that 'banks deal in documents' (art. 4 and 5 UCP, cf. art. 5 and 6 URDG), is a direct consequence of the contents of the undertaking by a bank issuing a letter of credit,

also under that article, see J. Herre and J. Ramberg, *Internationella köplagen (CISG): En kommentar*, 4th ed., Norstedts, Stockholm 2016, section 9.3.1.

40 Chapter 7 § 1 of the Act on banking and financing business, lag (2004:297) om bank- och finansieringsrörelse.

41 In his study on letters of credit, *Rembursträtt*, Norstedts, Stockholm 1980, L. Gorton discussed whether the UCP might be regarded as custom, see i.a. pp. 32 et seq. and 41 et seq. Practically it may not be important since all letters of credit specifically set out that they are subject to UCP.

42 Cf. NJA 2002 s. 244 and J. Adestam, *Den dokumentvillkorade garantin*, Karnov, Stockholm 2014, p. 32.

43 36 § lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område. See below, section 3.1.7.

regardless of whether or not the UCP or another standard contract regarding letter of credit or guarantee transactions has been incorporated or not, and regardless of any 'international principles' to that effect.[44] This follows from the general understanding of a letter of credit constituting an undertaking to honour against conforming documents. In so far as the undertaking deviates in this respect it is arguably not a letter of credit.

The rules in UCP are not likely to conflict with rules of Swedish law, in the sense that a court would refrain from applying them. However, the rules in UCP do not cover all questions which may arise in respect of a letter of credit and needs to be supplemented in regard of questions relating to i.a. interpretation of contracts, conflicts between rights of creditors and insolvency and bankruptcy issues, and the right to compensation for damage as a consequence of breach of contract.[45]

The integration of the Swedish law into the international banking system, when it comes to questions about letters of credits and documentary guarantees, can thus be said to rely more or less exclusively on the exercise of the parties' contractual autonomy, which is given effect in accordance with general principles of contract under Swedish law.

3.1.2 Financial Institutions and the UCP 600

The above-mentioned absence of express regulation concerning letters of credit, and the Swedish legal systems' reliance on the party autonomy, comes in combination with a general acceptance of the use of the UCP. It is our impression that letters of credit are regularly made subject to the UCP in their latest official version. As we have pointed out, however, this is dependent upon the acceptance of the parties involved in the transaction. A bank in Sweden would probably not accept to handle a commercial documentary credit if it did not explicitly state that it was subject to UCP latest version, or eUCP, if it involved presentation of electronic documents, or some alterna-

[44] This, of course, also depends on more precisely which legal effects one is inclined to include in or ascribe to the independence principle. If, for example, besides from what follows from the immediate wording of art. 5 UCP, the independence principle is taken to include procedural legal effects, concerning for example the right to attachment in the beneficiary's right towards an issuing bank, this can not be regarded as an immediate consequence of the content of the undertaking.

[45] See L. Gorton, 'Överlåtelse av rembursfordran före konkurs – rättsverkningar och giltighet' [2006–07] *Juridisk Tidskrift vid Stockholms universitet* 677–686, 683–684, and L. Gorton, 'Garantiregler och rembursregler' [1993–94] *Juridisk Tidskrift vid Stockholms universitet* 38–60, 40.

tive set of rules. The International Standby Practices (ISP98) has since long been considered an acceptable alternative set of rules in case the credit by its nature is intended to be treated as a standby letter of credit.

The majority of the banks and financial institutions in Sweden issuing documentary credits are connected to the SWIFT system and are using the predefined SWIFT message types and standards used for issuing and transmitting documentary credits, MT700. This standard requires applicable rules to be stated as mandatory information. It is possible to include a reference to some rules other than UCP in the SWIFT message, but information about the chosen set of rules can not be omitted in the form. Nor is it in practice acceptable to expressly exclude reference to UCP without stating which alternative set of rules will apply to the credit.

In practice both the SWIFT MT700, labeled 'Issue of Documentary Credit', and the MT760 under the label 'Guarantee/Standby Letter of Credit' have been message types relevant for issuing standby letters of credit subject to UCP in their latest version or ISP 98. The SWIFT MT760 with its updated title 'Issuance of Demand Guarantee/Standby Letter of Credit' acts as the proper message type for issuing Standby Letter of Credits when using the SWIFT network. The MT760 message type includes a mandatory field for stating applicable rules, which can be UCP, ISP98, URDG or some other identified set of rules, and there is an option to state that the undertaking is not subject to any rules. However, it is can reasonably be expected that most banks and financial institutions would not agree to issue a standby letter of credit that explicitly states that it is not subject to any rules.

3.1.3 The UCP 600 in Case Law

It is generally believed that UCP may be applied as customs or usages, but this is something which Swedish courts have not yet had reason to decide. There is no case law immediately dealing with these matters.[46] There are few cases from the Supreme Court and, as far as we are aware, from other courts, dealing with questions concerning letters of credit or documentary guarantees and the few existing cases reaches over a wide temporal span. Cases relating to letters of credit or documentary guarantees in Swedish case law have broadly speaking been related to questions of reimbursement[47],

[46] Cf. L. Gorton, 'Global Business: National Law, EU Law and International Customs and Contracts', [2016] 27 *European Business Law Review* 421–458, 451–453.

[47] NJA 1948 s. 127, NJA 1972 s. 1.

questions of attachment in the beneficiary's right to payment[48], questions of documentary compliance,[49] questions of interpretation and, to some extent, questions of fraud.[50]

The letters of credit which have been the subject of court decisions have, as we mentioned earlier, all incorporated the version of the Uniform Customs and Practices for Documentary Credits in force at the time. The case NJA 1948 s. 127, for example, deals with art. 14 in the 1933 version of the Customs and Practices, which was expressly incorporated into the credit, and it was, in accordance with that article, held that the issuing bank was entitled to reimbursement from the buyer even though the advising bank had paid the seller against non-conforming documents and debited the issuing bank's account by the advising bank. The same applies to subsequent cases which have involved letters of credit, such as NJA 1978 s. 560, NJA 1978 s. 728 and NJA 2002 s. 412, which have all concerned questions related to letters of credit incorporating some version of the Customs and Practices and a few questions regarding the interpretation of the instrument in question.

In the case NJA 2002 s. 244 the Supreme Court, arguably obiter dicta, made statements concerning the so-called 'independence principle' in the context of interpretation of a guarantee. More specifically, the statements concerned questions of interpretation of a general reference to the agreement between the parties to the underlying transaction in what could be interpreted as an independent (on demand) guarantee. The Court observed the attempts to introduce a connection between the underlying relationship and the guarantee relationship made by the ICC and UNCITRAL, but also that these attempts served to underline the fact that 'pure' demand guarantees were to be interpreted as wholly independent of the underlying relationship.

While references to general international or transnational codifications are not uncommon, there is little trace in case law that the Supreme Court has treated the UCP, its predecessors or other similar instruments, such as ISP 98, in a similar manner. This, however, can probably be regarded as a consequence of the general lack of case law relating to the subject, and can not be taken as an unwillingness on behalf of courts to take these standard contracts into account, should the opportunity arise. Also, failing an alternative, it is believed that UCP, or at least certain parts of it, may be regarded

48 NJA 1978 s. 728 and NJA 1978 s. 760.

49 RH 2007:41.

50 NJA 2002 s. 244 and the judgement of 22 October 1999 in case T 129-98 from the Court of Appeal for Skåne and Blekinge.

as trade usage, but there is no case law setting out specifically that this is the case. Regardless of the extent to which the UCP can be considered to reflect a trade usage or custom it is likely that courts will have regard to the UCP as an inspiration, in the same way as other standard forms have sometimes been used as a reference by the Supreme Court, when dealing with questions covered by the UCP. However, it is difficult to assess to what extent the UCP would be used as a source for legal decision making in this sense.

3.1.4 Alternative Dispute Resolution: Arbitration and Docdex

Commercial documentary credits rarely dictate a predefined method of dispute resolution in their terms. There are very few cases to draw conclusions from but it appears that banks acting under Swedish legislation prefer to have disputes settled in court rather than by arbitration. ICC's DOCDEX procedure serves as an alternative. However, it is our understanding that DOCDEX is not well known by parties other than banks active in the area of trade finance and is, regardless of this, not in general a preferred choice for settling disputes. Banks and financial institutions will stretch far to try to settle disagreements without relying on court proceedings or arbitration. Asking for an official ICC Opinion from an ICC group of experts is sometimes used by banks in order to sort out who is right or wrong in a dispute which is not yet subject to legal proceedings, and the disagreeing parties may choose to close or settle the dispute between themselves based on the opinion given, in order to avoid expensive and time-consuming legal disputes.

3.1.5 Resolution of Disputes and Consistency with UCP 600

As we mentioned above, there are only few court cases concerning letters of credit, and even fewer which directly concerns questions addressed in the UCP (or one of its predecessors). It is our general impression, however, that courts handle such questions in accordance with the applicable version of the UCP. A few examples can be mentioned.

The case NJA 1948 s. 127, mentioned above, concerns the application of art. 14 of the Customs and Practices in their original version (from 1933), according to which '[b]anks utilising the services of another Bank assume no liability or responsibility towards their principal (unless they are themselves at fault) should the instructions they transmit not be carried out exactly …'. A corresponding bank had paid against non-conforming documents and debited the issuing bank's account by the corresponding bank. The issuing

bank debited the buyer's account by the issuing bank, after which the buyer claimed to have the amount returned, on the ground that payment had been made against non-conforming documents and that the issuing bank should have taken further measures to have the amount returned from the corresponding bank. According to the buyer, the issuing bank should, in turn, have debited the corresponding bank's account by the issuing bank. The issuing bank denied the claim, on the ground that even though the corresponding bank should not have paid the seller, the issuing bank had fulfilled its obligations according to the art. 14. The Supreme Court, accepting the judgement of the Court of Appeal, was of the opinion that the issuing bank, by informing the corresponding bank that the documents were not accepted and by protesting against the corresponding bank's debiting of the issuing bank's account, had properly fulfilled its obligations. In our opinion, this is consistent with what follows from the UCP, cf. art. 20 UCP.

Proposed interpretations of earlier versions of the Customs and Practices have also been used as arguments before courts even though the case has not immediately turned on the interpretation of a specific article in those rules. An example of this is to be found in NJA 2002 s. 412, which concerned the question whether an advising bank which had received money from an issuing bank and – possibly – paid the amount to the wrong party, was on that ground liable to pay the amount to the right party (the beneficiary). An argument was brought by the bankruptcy estate of the beneficiary that it followed from art. 20 (b) of UCP 500, according to which a bank requesting the services of another bank does not take responsibility for its instructions not being followed, that the estate would not be able to seek payment from the issuing bank (which had paid the advising bank). The Supreme Court, however, did not find support in art. 20 for that conclusion and did not find that UCP supported the suggestion that an advising bank having received the amount from the issuing bank was on that ground liable towards the beneficiary, a suggestion which also did not find support in Swedish law (more specifically in principles regarding the rights of third parties). This interpretation is, in our opinion, in line with what follows from the UCP.

3.1.6 Resolution of Disputes and Consistency with ICC Recommendations

To our knowledge there is no Swedish court case in which an explicit reference has been made to the UCP 600 Commentary or ISBP 745 (or its predecessor ISBP 681). However, there is nothing that prevents a court from

taking such material into consideration. Certainly, lawyers can refer to such material before courts and the court involved would then take such material into consideration, even if these instruments are not to be regarded as sources of law in the strict sense (see above, Part II).

However, the Supreme Court has, in another context, made general remarks regarding the relevance of official commentaries to jointly agreed standard documents (NJA 2018 s. 301). The case concerned the interpretation of NSAB 2000, a standard contract regarding freight forwarding services. The parties who have designed NSAB have expressed that the commentary constitutes an expression of their mutual agreement. The Supreme Court was, under such circumstances, willing to let the commentary influence the interpretation of the individual agreement (which incorporated NSAB 2000). It is not unlikely that the Commentary to the UCP would be treated in the same or a similar manner, should a question regarding the interpretation of the UCP arise before the Supreme Court.

It can also be mentioned that in a case predating both ISBP 745 and its predecessor (ISBP 681), a court of appeal held that an inspection certificate issued in Arabic fulfilled the requirements for an inspection certificate in the letter of credit. While the court based this conclusion on art. 15 in UCP 400, it can be noted that the conclusion is consistent with rule A21 in ISBP 745, according to which documents may be issued in any language if the credit is silent with respect to the language of the documents to be presented.[51]

3.1.7 Resolution of Fraud Disputes in Sweden

To our knowledge it occurs, although not frequently, that a supplier tries to convince a bank not to pay to the beneficiary or a corresponding party abroad or seeks a court order forbidding the bank to pay. Such measures are usually temporary and ususally the bank, after discussion with its correspondent party, pays (if the conditions in the undertaking are fulfilled). The situation typically includes arguments regarding the fulfillment of the conditions for payment as well, the supplier in Sweden arguing that the conditions have not been fulfilled. The general impression is, thus, that issuing banks will be cautious in deciding to refuse or delay payment when questions of fraud arise unless it is reasonably clear that there is such an issue at stake.

In Swedish case law from the Supreme Court there is only one case which touches upon the question of fraud in letter of credit and guarantee trans-

[51] RH 2004:21.

actions, NJA 2002 s. 244. The case concerned a guarantee, arguably an on demand guarantee. The outcome was decided on the basis that the bank employee issuing the guarantee on behalf of the bank had not had the power to do so, while the remarks regarding fraud in the context of an independent guarantee was arguably obiter dicta.[52] The Supreme Court noticed that fraud (or clear cases of fraud) in other jurisdictions has been found to deprive the beneficiary of its right to payment according to the guarantee, and stated that the same exception could, under Swedish law, be made by applying § 36 of the Contracts Act.

In the literature regarding fraud in cases regarding documentary instruments it has been argued that fraud is best viewed as a concept *sui generis* (particular to documentary instruments), which is not covered by the existing rules of fraud in relation to validity of contracts or the above mentioned § 36 of the Contracts Act (the latter claim thus being in opposition to the obiter by the Supreme Court in NJA 2002 s. 244). Fraud deprives the beneficiary of its right to payment even if the conditions in the undertaking are fulfilled. According to the proposed definition the concept of fraud in relation to documentary instruments are twofold. First, the beneficiary is acting fraudulently if he demands payment even though it is obvious to him that no risk factor covered by the purpose of the instrument (as viewed from the perspective of the parties to the underlying transaction) has occurred. This is, of course, of practical relevance particularly in relation to documentary guarantees. Second, the beneficiary is acting fraudulently if he demands payment despite knowledge that the presented documents contain material statements which are untrue. This, by contrast, is of practical importance particularly in relation to letters of credit.[53] It must be observed, however, that such questions have not been subject to court decisions.

3.1.8 Digitalization of Trade Finance in Sweden

Digitalization is currently on top of the agenda for most banks and financial institutions handling documentary credits, worldwide as well as in Sweden.

[52] T. Håstad, 'Något om on demand-garantier' in E. Lindell-Frantz et al. (eds), *Festskrift till Lars Gorton*, Juristförlaget, Lund 2007, pp. 185–200, 188–189.

[53] See about the discussion regarding fraud in relation to letter of credit and guarantee transactions i.a. J. Adestam, *Den dokumentvillkorade garantin*, Karnov, Stockholm 2014, pp. 380–429, S. Lindskog, 'Garantier med dokumentvillkor – kommentarer med anledning av en avhandling' [2014–15] *Juridisk tidskrift vid Stockholms universitet* 829–872, 853–854 and L. Gorton, *Rembursrätt*, Norstedt, Stockholm 1980, pp. 291–305.

The Covid-19 pandemic acted as a wake-up call for the need to go from paper to digital at a faster pace. There is much rethinking to do, for banks and practitioners, putting the eUCP into practice and understanding the practicalities and legalities as well as the security aspects in handling information in digital form and the questions about the acceptability of and requirements related to electronic documents, electronic bills of lading, negotiable instruments etc.

The SWIFT format and the standards relating to using SWIFT messaging have since long been accepted as a universal standard for communicating the content of the documentary credit and providing the framework for what is mandatory to include in the documentary credit information. New digital solutions using blockchain technology are being developed, and we have yet to see what impact these new solutions may have on existing rules and practice.

3.1.9 The COVID-19 Pandemic Effect on UCP 600 Issues

The negative effects on transportation, delayed delivery of documents, and temporary closing of premises resulting from the actions related to the Covid-19 pandemic put focus on the interpretation of art. 35 UCP. During the initial stages of the crisis, most banks and financial institutions, however, did not blindly rely on the possible protection provided to them by that particular article of UCP. Nominated banks, confirming banks and issuing banks in cases known to us acted to find ways to cooperate and jointly overcome obstacles of delays and non-delivery of documents, going to great lengths to avoid ending up in legal disputes.

4 Part IV

4.1 Conclusion: the UCP as an Example of Effective Legal Harmonization through Soft Law

Before commenting on to what extent the UCP 600 can be considered an effective legal harmonization, we would like to emphasize that the notion of efficiency is a relational concept; it denotes the relation between a *means* and an *end*. It is therefore important to be clear about the purpose of the instrument in question before it is possible to evaluate its efficiency. Further, an assessment of to what extent a particular instrument can be considered effective in relation to the end to be achieved requires knowledge of the

effects the instrument has in practice. From a more general perspective such assumptions are difficult to make, and often require an economic or sociological analysis.

Whether or not, and if so, to what extent, the UCP or, for that matter, other standard contracts or other soft law instruments, constitutes an effective harmonization therefore depends on the ends intended to be achieved and assumptions about its effects. The first version of the UCP was issued already in the early 1920's, and the customs and practices have at least from 1962 been a standard in use worldwide. In the sense that UCP is to a very high degree being used in practice, through incorporation by parties to particular letters of credit, it is undoubtedly effective (while it remains to be seen to what extent the same can be said about the URDG). However, the end to be achieved by harmonization can also be viewed in a broader and more over-arching perspective: the question, then, is whether or not and to what extent the use of the soft law instrument in question promotes predictability and, in a broader sense, legal certainty in the field of law in question, which, in turn, reduces costs of conducting international business. Often, an assumption is made that uniformity in the applicable regulative text itself (whether or not this is found in an applicable statute or in a contractually binding text) promotes legal certainty. We wish to point out, however, that to what extent this is actually the case must depend on several factors which cannot easily be ascertained or evaluated and is itself a debated question.

In the context of letters of credit one can, however, observe that large parts of UCP (and ISBP 745) serve the function of coordinating behaviour, in the sense that the instruments regulate questions of documentary compliance, that is, under what conditions documents are to be accepted by a bank. It can certainly be argued that it is of great importance that these questions are dealt with in the same manner in different jurisdictions. Documents are supposed to pass through the hands of different actors in different jurisdictions, and differences in the standards for determining whether or not a presentation is conforming or not can cause difficulties for the involved parties.[54] On this basis, we believe that UCP 600 and ISBP 745 can also from an over-arching perspective to a large extent be viewed as an effective instrument for harmonization.

[54] J. Adestam, *Den dokumentvillkorade garantin*, Karnov, Stockholm 2014, pp. 179–180, and L. Gorton, *Remburs*rätt, Norstedt, Stockholm 1980, p. 248.