SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT, STATE OF NEW YORK

BLONDER & CO., INC.,	)	
Plaintiffs-Appellants,	)	**BRIEF OFAMICI CURIAE THE**
	)	**INTERNATIONAL FINANCIAL**
-against-	)	**SERVICES ASSOCIATION AND**
	)	**INSTITUTE OF INTERNATIONAL**
CITIBANK, N.A.	)	**BANKING LAW AND PRACTICE**
Defendants-Respondents.	)	
	)	5170-5171 Index 604642/01

BRIEF OF AMICI CURIAE THE INTERNATIONAL FINANCIAL SERVICES ASSOCIATION AND THE INSTITUTE OF INTERNATIONAL BANKING LAW & PRACTICE

1. The International Financial Services Association (hereinafter the " IFSA") and the Institute of International Banking Law & Practice (hereinafter the "Institute") submit this Brief of Amici Curiae to clarify the applicability and relevance of Revised UCC Article 5 to this case, the appropriate standard of compliance under the Reimbursement Agreement, and the use of expert witnesses in the interpretation of the Uniform Customs and Practice and other rules of international letter of credit practice.

I. Statement of Interest of the International Financial Services Association and the Institute of International Banking Law & Practice, Inc. as Amici

Curiae.

2. The IFSA is a non-profit association whose 187 members are primarily domestic and foreign banks engaged in international banking operations in the US, including letters of credit, international collections, and funds transfer operations throughout the world. They account for a considerable portion of the letters of credit issued throughout the world, including over 90 percent of the letters of credit outstanding in the United States, virtually all international collections, and a sizable portion of the US$ 3-4 trillion sent by funds transfer daily.

3. Since its establishment in 1924, the IFSA (including its predecessor organizations, the Council on International Banking and, later the U.S. Council on International Banking) has played a leading role in the articulation of law and practice relating to international banking operations.

4. The Institute of International Banking Law & Practice, Inc., is a not for profit educational organization dedicated to the harmonization of law and practice in the field of international banking operations throughout the world.

5. The Institute was formed in 1987 as a result of the collaboration of letter of credit bankers, lawyers, corporate users, and academics studying the

possible revision of Prior UCC Article 5. The Institute's goal is to continue and deepen that collaboration between different disciplines in the reformation and rationalization of letter of credit law and practice throughout the world.

6. The IFSA and the Institute have been at the forefront of the every major development in the revision and codification of letter of credit law and practice in the US and globally. Both organizations have played a leading role in the revision of UCC Article 5, the formulation of the UN Convention on Independent Guarantees and Standby Letters of Credit, the International Standby Practices (ISP98), revisions of the Uniform Customs and Practice (UCP) of the ICC, and various other rules of practice.

7. Having been involved in the formulation of rules of letter of credit practice, both organizations are concerned that the interpretation of these rules be consistent with the understanding of the international operations community and the practices that it articulates. To assure this interpretation, the IFSA and the Institute are concerned with letter of credit law and practice as applied in the courts, as well as at bank counters. To this end, the IFSA and the Institute have expressed themselves in several cases either as an Amicus Curiae in appellate cases or with respect to discrete issues of practice at the

trial level.

8. The IFSA and the Institute have each established strict criteria governing their intervention in litigations. In order for either to intervene, the issue must significantly impact the integrity of the letter of credit and there must be consensus among their technical authorities regarding the position taken. To assure that these requirements are met, the IFSA vets each possible intervention through an ad hoc task force and the relevant technical committee. The Institute similarly vets possible interventions through an ad hoc task force.

9. Although Citibank, N.A., is a member of the IFSA, neither the IFSA nor the Institute are aligned with either party in this litigation. The purpose of this Brief is to call the attention of this Court to overbroad language in its Opinion of 31 January 2006 that is capable of causing significant future confusion in New York letter of credit jurisprudence and that warrants clarification and further explanation.[1]

II. Statement of the Relevant Facts of the Case

10. This action is a claim by Blonder & Co., Inc., the applicant for a letter of

[1] This Brief of Amici Curiae is based solely on the Motion Court and Appellate Division opinions. Neither the IFSA nor the Institute have seen or had access to any of the documents underlying the transaction in this case, such as the letter of credit, Reimbursement Agreement, or the documents presented under the letter credit.

credit (hereinafter Applicant) against the issuing bank, Citibank, N.A. (hereinafter Issuer). Applicant entered into a Reimbursement Agreement with Issuer on 14 November 2000 which resulted in the issuance of the letter of credit on 28 November 2000. When Issuer honored a presentation under the letter of credit and charged Applicant's account, this action for wrongful honor followed.

11. The Supreme Court, New York County, Lowe, J., (hereinafter Motion Court) granted Issuer's motion to dismiss the action based on documentary evidence. On appeal, the majority of this Court affirmed in an opinion by Andrias, J., in which Saxe, Marlow, and Nardelli, JJ. joined with Tom, J.P., dissenting.

III. Statement of Issues of Concern to the Institute

12. It is the position of the IFSA and the Institute that the opinions of the Motion Court and Appellate Division incorrectly state the applicable law, the appropriate standard of compliance under the Reimbursement Agreement, and the standard by which expert testimony can be used to interpret the Uniform Customs and Practice, other rules of international letter of credit practice, and the practices that they reflect.

1. The Letter of Credit in this Case is Subject to Revised UCC Article 5

13. The Motion Court notes in its opinion that the letter of credit in this case was issued on 28 November 2000. This date is subsequent to the effective date of Revised UCC Article 5 (Letters of Credit), N.Y. U.C.C. Law Article 5 (McKinney 2000), namely 1 November 2000.[2] Therefore, the New York version of Revised UCC Article 5 would have been applicable to the letter of credit at issue in this case. Nonetheless, the Motion Court applied Prior NY Subsection 5-102(4)[3] in concluding that

> When, as here, the Credit is governed by the UCP, Article 5 of the Uniform Commercial Code (UCC) does not apply (*see e.g. Oei v Citibank*, N.A., 957 F Supp at 512; *Fertico Belgium S.A. v Phosphate Chems. Export Assn*., 100 AD2d 830, 831 (1st Dept. 1976]). However, "'New York courts will turn to (UCC) Article 5 to the extent that the UCP ... [is] silent' [citation omitted]" (*Mennen v. J.P. Morgan & Co.*,

[2] The Model Code version of Uniform Commercial Code Article 5 (Letters of Credit) is contained in *LC Rules and Laws: Critical Texts*, (3rd ed.), (Byrne., ed., Institute of International Banking Law & Practice, 2004) at page 111 (hereinafter "*LC Rules and Laws*"). This book accompanies this brief as Exhibit A. Where the version of Revised UCC Article 5 adopted by New York differs from the Model Code regarding a cited provision, it will be noted in this Brief.

[3] N.Y. U.C.C. Law § 5-102(4) (McKinney 1962). Prior NY UCC § 5-102(4) states "[u]nless otherwise agreed, this Article 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits [footnote omitted] fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce."

91 NY2d at 22).

14. The reference here is to Prior NY UCC Subsection 5-102(4) which was a non-conforming amendment to the original UCC Article 5 (hereinafter Prior UCC Article 5). It was the product of concerns at that time by the letter of credit banking community centered in New York that the domestic codification of letter of credit law was incompatible with the international rules of practice embodied in the UCP.[4] One of the principal achievements of the revision of UCC Article 5 was to bridge these concerns of the letter of credit banking community and to achieve a product that harmonized letter of credit law with international letter of credit practice.

15. By referring to the non-applicability of UCC Article 5, the Motion Court opinion either fails to recognize that Revised UCC Article 5 does not retain the rule of Prior NY Subsection 5-102(4) or, even worse, suggests that this division between the UCC and the UCP is retained under Revised UCC Article 5.[5]

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[4] See James E. Byrne, *The Revision of U.C.C. Article 5: A Strategy for Success*, 56 Brook. L. Rev. 13, 17 (1990) attached as Exhibit B.

[5] The Motion Court opinion does contain one reference to Revised UCC Article 5, namely Revised Section 5-109(b), which can be found in *LC Rules and Laws* (Exhibit A) at 132. N.Y. U.C.C. Law § 5-109(b) (McKinney 2000). It states "[i]f fraud in the transaction is alleged, the bank's customer, or the bank, may apply to a court for relief under UCC 5-109 (b) (formerly UCC 5-144 [sic] [2]), which permits a court to issue a temporary or permanent injunction enjoining the bank form honoring a presentation under the letter of credit, even if the UCP

16. This error was not corrected in the Appellate Division opinion which did not refer to the statute at all.

17. The perpetuation in the Motion Court opinion, implicit in the Appellate Division Opinion, of this anachronistic dichotomy between letter of credit law and practice and the case law developed under it with respect to a transaction that is subject to Revised UCC Article 5 is most unfortunate. Revised UCC Article 5 and its Official Comments provide an important perspective with regard to the questions of letter of credit law and practice that are at issue here. Had the approach and perspective of Revised UCC Article 5 guided the formulation of the decision in this case, it is likely that the overbroad language of the opinion of concern to the IFSA and the Institute could have been avoided.

2. The Appropriate Standard of Compliance

18. By focusing on the presentation of documents under the letter of credit rather than the Issuer's entitlement to reimbursement, the Appellate Division Opinion failed to appreciate that the standard of compliance at issue related

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governs the letter of credit itself ...." While "fraud in the transaction" is a term from Prior UCC Article 5-114, N.Y. U.C.C. Law § 5-114 (McKinney 1962), not used in Revised UCC Article 5, the citation is to the fraud provision of Revised UCC Article 5. This citation suggests that the Motion Court was aware that the Revision applied but unaware of the differences between the Prior version and the Revision.

to the latter rather than the former. Although nominally recognizing that the standard of compliance adopted in the Reimbursement Agreement was that of substantial compliance, both the Motion Court and the Appellate Division in their opinions measured the compliance of the documents with the terms and conditions of the letter of credit under the strict compliance standard as if they were being judged on presentation rather than under a reimbursement claim subject to the standard of substantial compliance. Although the opinions could have properly measured compliance by the strict standard, suggesting that by having met the more rigorous standard the documents clearly met the less rigorous one, they did not do so. Reading them, one has the impression that the standards are the same.

19. In effect, the opinions conflate the two standards. Strict compliance is the standard of compliance that is reflected in the UCP and adopted by Revised UCC Subsection 5-108(a).[6] The standard of strict compliance applies unless another standard is adopted. As it was in the Reimbursement Agreement in this case, a different standard, that of substantial compliance, is almost

[6] N.Y. U.C.C. Law § 5-108(a) (McKinney 2000). Revised UCC § 5-108(a) states "[e]xcept as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply." *LC Rules and Laws* (Exhibit A) at 126.

always adopted with regard to the obligation of the applicant to reimburse an issuer that has honored a presentation under a letter of credit.[7] Use of the substantial compliance standard regarding reimbursement claims is reasonable under the circumstances since the applicant selects its counter party, knows the goods and transaction, knows what documents it needs and what they need to state, understands what discrepancies are significant to the actual state of the goods and which are not, and is in a better position to make the determination of whether the documents are satisfactory than the issuer or another bank which operates solely on a documentary level.

20. Substantial compliance differs from strict compliance. As indicated in Official Comment 1, ¶ 2 to Revised UCC Section 5-108,

> This section does not impose a bifurcated standard under which an issuer's right to reimbursement might be broader than a beneficiary's right to honor. However, the explicit deference to standard practice in

[7] For example, in credits supporting margin calls on commodity exchanges which must be honored within hours, agreements are made empowering the issuing bank to pay without examining the documents at all. In most reimbursement agreements, however, the standard is that of substantial compliance. As stated in James Barnes, James Byrne and Amelia Boss, *The ABCs of the UCC, Article 5: Letters of Credit*, 35-6 (American Bar Association 1998), "Article 5 recognizes, however, that standard practice, as well as issuer-applicant agreements, may expand the issuer's rights against the applicant, binding the applicant to reimburse or indemnify the issuer even if an honored presentation could have been rightfully dishonored. In this regard, for their own convenience and protection, issuers regularly obtain advance permission from applicants to honor documents that do not strictly comply."

> Section 5-108(a) and (e) and elsewhere expands issuers' rights of reimbursement where that practice so provides. Also, issuers can and often do contract with their applicants for expanded rights of reimbursement. Where that is done, the beneficiary will have to meet a more stringent standard of compliance as to the issuer than the issuer will have to meet as to the applicant. Similarly, a nominated person may have reimbursement and other rights against the issuer based on this article, the UCP, bank-to-bank reimbursement rules, or other agreement or undertaking of the issuer. These rights may allow the nominated person to recover from the issuer even when the nominated person would have no right to obtain honor under the letter of credit. *LC Rules and Laws* (Exhibit A) at 127.

The inference from this Official Comment is that substantial compliance is less rigorous than strict compliance, but there has been little analysis in court opinions or the literature as to its meaning.

21. Substantial compliance encompasses any permitted exercise of discretion by the issuer or any nominated bank under the strict compliance standard, but

goes further.[8] Under the substantial compliance standard, reimbursement is required unless the failure to note the discrepancy caused the loss experienced by the beneficiary with respect to the goods.[9]

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[8] For example, where a packing list or invoice contains calculations, the issuer can determine whether or not the calculations are detailed. If it makes a good faith determination that the calculations are detailed, it need not check them and may rely on the total given. This situation is particularly addressed in the *International Standard Banking Practice (ISBP) for the examination of documents under documentary credits*, ICC Publication No.645 (International Chamber of Commerce 2003) (hereinafter ISBP) ¶ 27 which provides "Detailed mathematical calculations in documents will not be checked by banks. Banks are only obliged to check total values against the credit and other required documents." The ISBP is reprinted in *LC Rules and Laws* (Exhibit A) at 69 and ¶ 27 is at 74. In addition, the issuer may defer to any exercise of judgment by any nominated bank. If a bank nominated to confirm and acting in good faith determines that a calculation is detailed, it need not make it. Finally, what would constitute a discrepancy under the strict compliance standard is measured by a different standard. Even if the decisions in *Beyene v. Irving Trust Co.*, 762 F.2d 4 (2d Cir.1985), (listing notify party in a bill of lading as "Soran" rather than "Sofan" was sufficient basis for refusal), and *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 612 F.Supp. 1533 (S.D.N.Y.1985), (omitting "Ltd." from corporate name justified rejection), were justified under the rule of strict compliance, a proposition which the IFSA and the Institute think is doubtful, they would not be under that of substantial compliance.

[9] Under substantial compliance, whether or not there is compliance is determined in light of the actual performance of the underlying transaction and not on the level of representations contained in the documents presented in the letter of credit on which strict compliance operates. For example, if the description of the goods in the letter of credit calls for "black" leather jackets and the documents indicate that the jackets are "blue", it is discrepant. If the issuer pays notwithstanding this discrepancy, it may nonetheless be entitled to reimbursement under the substantial compliance standard in the reimbursement agreement. If the jackets are actually black as ordered but the description in the documents saying that they are blue is an error, there would be no right to refuse reimbursement since the applicant received what was indicated in the credit. Moreover, if the contract did not specify color but the letter of credit contained a restriction regarding color, the applicant had no right to insist on this condition in the letter of credit and cannot refuse to reimburse the issuer based on a failure to insist on in if the issuer pays notwithstanding a discrepancy where the applicant had no right to goods of that quality (where the contract gave it no rights to black jackets, just jackets). In effect, it is necessary that the discrepant representation have violated the contract that gave rise to the letter of credit providing the issuer with a subrogation of the applicant's claim against the beneficiary in the event it is not reimbursed by the applicant.

22. Under the substantial compliance standard, an allegation that there was wrongful honor because there was documentary fraud or material fraud in the goods would not be a basis for liability of the issuer unless it acted in collusion with the beneficiary. In the case of letter of credit fraud, the alleged discrepancy would not have caused the loss to the applicant. With or without the discrepancy, the fraud would exist. Moreover, a beneficiary that is prepared to commit fraud can readily "create" or "fix" discrepant documents since it is unhindered by the reality of the underlying transaction or the representations in the documents. In such a case, the underlying transaction will remain fraudulent.

23. Instead of focusing on the character of the substantial compliance test adopted in the Reimbursement Agreement, the opinions of the Motion Court and the Appellate Division in this case assess the alleged discrepancies in light of the standards of UCP500 and its strict compliance test. Although the application of the substantial compliance test would not have changed the result and, indeed, would have compelled it, the effective resort by the courts

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These inconsistencies also affect damages. *See* Revised Official Comment 2 ¶ 1 to UCC § 5-111 which states "[w]hat damages 'result' from improper honor is for the courts to decide. Even though an issuer pays a beneficiary in violation of Section 5-108(a) or of its contract with the applicant, it may have no liability to the applicant. If the underlying contract has been performed, the applicant may not have been damaged by the issuer's breach."

to the strict compliance standard when the substantial compliance test should have been applied is a serious potential source for future confusion in reimbursement cases.

3. The Interpretation of the UCP and Standard Letter of Credit Practice

24. In the opinion of the IFSA and the Institute, the aspect of the opinions of the Motion Court and Appellate Division with the most potential for future mischief is their approach to the interpretation of standard international letter of credit practice and to the relevance of expert testimony regarding that practice.

25. In interpreting the terms of the letter of credit and UCP500 to which it was subject, the Appellate Division disregarded the proffered interpretation of Applicant's expert. While the Motion Court may have been justified in disregarding this proffered expert opinion, it did so in terms that suggest that any expert opinion is irrelevant to the process of interpretation of standard international letter of credit practice and the UCP and that could be understood to suggest that standard international letter of credit is irrelevant to interpreting the UCP.

26. In its opinion, the Appellate Division noted that the Applicant challenged the Motion Court's decision dismissing its action for wrongful dishonor on the

ground that “the court erred by substituting its own interpretation of what constitutes international standard banking practice for that of plaintiff's expert with 30 years’ experience in the field. It claims that while international standard banking practice cannot contradict the UCP, the UCP does not exclude those items of custom and practice in international banking that are consistent with the UCP but not specifically spelled out therein.”

The Appellate Division rejected this objection. In doing so, it

a. recited the principle of contract interpretation that an agreement that is clear and unambiguous must be given effect “‘... as indicated by the language used without regard to extrinsic evidence (*Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 157 [1983] [citation omitted]’ such as the opinion of [Applicant’s] expert.”

b. stated that “just as a court cannot impose upon the parties to a letter of credit any conditions not contained in the letter, neither can plaintiff do so in the guise of expert testimony.”

c. noted that Applicant’s expert had urged the existence of a usage of trade regarding the consignee of a bill of lading and stated that “[w]hile the existence and scope of such a usage ordinarily present factual issues, where such a usage is embodied in a trade code such as

the UCP or other writing, 'the interpretation of the writing is for the court' (UCC 1-205[2]). Thus, any interpretation of the UCP was properly made by the motion court, which properly refused to allow the expert to usurp its function as the sole determiner of law (*see Buchholz v. Trump 767 Fifth Ave., LLC*, 4 A.D.3d 178, 179 (NY 2004) *aff'd* 5 NY3d 1 [2005])."

d. stated "[a]s the motion court noted in its opinion, '[a]lthough [Applicant] and its expert capitalize International Standard Banking Practice,' as if it were a separate document or agreement, it is not.' The UCP requires that banks must examine documents 'with reasonable care' in order to determine whether the documents 'on their face' appear to comply with the letter of credit. As correctly found by the motion court, '[t]hat determination must be made in accordance with international standard banking practice as reflected in these Articles' (emphasis added [by the Motion Court]). [Applicant's] omission of that last phrase, its capitalization of the term, and [Applicant's] insistence that the Bank fail[ed] to meet its initial burden' on its motion . . . because it did not submit evidence concerning International Standard Banking Practice,' demonstrate that

[Applicant's] argument is completely without merit.'"

27. There is other language in the Appellate Division opinion which suggests that its remarks are confined to the particular proffered opinion of this expert. The Appellate Division

a. stated that "The conclusory affidavit of plaintiff's expert ... is insufficient to create an issue of fact as to whether such a usage of trade exists."

b. noted that there were opinions issued by the ICC Banking Commission that led to a contrary result than that proposed by Applicant's expert.

c. noted that Applicant's expert in part based his opinion on a condition regarding the bill of lading that was not contained in the letter of credit or in the UCP.

d. noted that Applicant's expert had engaged in conjecture without any basis in the letter of credit or the applicable document.

28. These statements could justify two contradictory interpretations of the rule of the case with respect to expert testimony, either that expert testimony was not relevant to the explanation or interpretation of the standard international letter of credit practice reflected in the UCP or that the testimony of this

expert either was not qualified or his opinion was not relevant or did not qualify as expert opinion. While it is the opinion of the IFSA and the Institute that the latter interpretation is preferable, the statements of the Appellate Division noted above will be used to discourage and undermine relevant and qualified expert testimony and may encourage courts to rely on their own skills or general knowledge in interpreting its provisions and standard international letter of credit practice.

29. The proper interpretation and discernment of standard international letter of credit practice is critical to the efficient operation of the letter of credit and the international banking operations system that supports it. While the letter of credit instrument itself could conceivably express all relevant practices, such an approach would make it cumbersome and expensive. It would be equivalent to attempting to state all of the aspects of the check collection process in a check. As a result, formulations of standard practices emerged and became the Uniform Customs and Practice for Documentary Credits (hereinafter UCP).[10] An accurate understanding of standard international

[10] Shortly after New York assumed its role as the world's financial capital during World War I, New York bankers began to formulate standardized rules regarding documents to be presented under letters of credit. These rules evolved into the Uniform Customs and Practice, were embraced by the International Chamber of Commerce, and have become universal with subsequent revisions. *See* Dan Taylor, *The History of the UCP*, Documentary Credit World December 1999, p.11, reprinted in the *2000 Annual Survey of Letter of Credit Law and Practice*

letter of credit practice is especially important in the evolution of letter of credit law. Because letters of credit are not contracts, resemble pre Modern contract law in many respects, and are often counter-intuitive to trained commercial lawyers, neither judges nor general commercial lawyers typically understand the implications of the UCP for letter of credit law.

30. The UCP, therefore, occupies a unique role in letter of credit law. While it is in one sense a part of the letter of credit undertaking, in another sense the letter of credit is issued subject to its terms and conditions except where the letter of credit expressly provides otherwise.[11] Because it is an international

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(Institute of International Banking Law & Practice) at 201. As is the letter of credit in this case, virtually all commercial letters of credit are issued subject to the current version of the UCP, ICC Publication No. 500 (1993 Revision) (hereinafter "UCP500") (contained in *LC Rules & Laws* (Exhibit A) at 1). Since its formulation in 1999, standby letters of credit are increasingly issued subject to ISP98 (*see supra* note 9), rules that are specific to standbys, although some standbys are issued subject to the UCP.

[11] Note that the UCP is treated in Revised UCC Article 5 as a so-called "contract term" but also as an applicable source of letter of credit law. *See* Revised UCC § 5-116(c) which provides

> Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Subsection 5-103(c). N.Y. U.C.C. Law § 5-116(c) (McKinney 2000). *LC Rules and Laws* (Exhibit A) at 145.

standard, the uniformity of its interpretation is essential to the integrity of letter of credit law and practice.

31. Revised UCC Article 5 recognizes the importance of standard international letter of credit practice with respect to the issuer's obligation under a letter of credit.[12] Official Comment 1 ¶ 5 to Revised UCC Section 5-108 states that

> Identifying and determining compliance with standard practice are matters of interpretation for the court, not for the jury.[13]

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[12] *See* Subsection 5-108(a) (*supra.*, at fn. 6). Revised UCC Subsection 5-108(e) provides "[a]n issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice." *LC Rules & Laws* (Exhibit A) at page 126. The New York enactment of UCC Subsection 5-108(e), N.Y. U.C.C. Law § 5-108(e) (McKinney 2000), deleted the final two sentences in the Model UCC Article 5 on the recommendation of the New York Law Revision Commission. *See* N.Y. State Law Revision Commission, *Report on the Proposed Revised Article 5–Letters of Credit–of the Uniform Commercial Code,* at 72 & n.32 (1998). These recommendations were the result of constitutional concerns as to the second sentence and as to the third sentence that it was "unnecessary explicitly to provide that the parties can present evidence of standard practice–an axiomatic principle of procedure." Richard F. Dole, Jr., *The Essence of a Letter of Credit Under Revised U.C.C. Article 5: Permissible and Impermissible Nondocumentary Conditions Affecting Honor,* 35 Hous. L. Rev. 1079, n. 51 (Houston Law Review 1998). Pennsylvania was the only other state that deleted the final two sentences of UCC Subsection 5-108(e) while New Jersey reformulated it. The constitutional argument has not received critical acceptance among legal scholars. *See generally* James Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to the Courts*, 29 UCC L.J. 419 (1997), attached as Exhibit C.

[13] The comment continues: "[a]s with similar rules in Sections 4A-202(c) and 2-302, it is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if the responsibility for determining the nature and scope of standard practice is granted to the court, not to a jury. Granting the court authority to make these decisions will also encourage the salutary practice of courts' granting summary judgment in circumstances where there are no

32. While the interpretation of a trade code such as the UCP is a matter of law in the sense that it is a matter for the court rather than for a jury, this rule has its roots in the common law procedural system of formulary pleading rather than in the relatively modern procedural notion of summary disposition which creates the possibility of confusion regarding the appropriateness of testimony regarding the meaning of a trade code. This confusion is compounded by the fact that expert testimony is frequently used by parties in an attempt to suggest that an issue of fact exists in opposing a motion for summary disposition. Given that interpretation as a matter of law differs from the standard for summary judgment, a court is fully entitled to hear testimony and receive other evidence in making its decision regarding the

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significant factual disputes. The statute encourages outcomes such as *American Coleman Co. v. Intrawest Bank*, 887 F.2d 1382 (10th Cir. 1989), where summary judgment was granted." *LC Rules and Laws* (Exhibit A) at 128. The Appellate Division reached a similar conclusion in noting that UCC § 1-205 (2) states that where a usage of trade is embodied in a trade code or other writing, "the interpretation of the writing is for the court." N.Y. U.C.C. Law § 1-205(2) (McKinney 1962), although it did not cite either the statute or its Official Comments. UCC Subsection 1-205(2) provides

> A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

This provision merely states the traditional Common Law rule regarding contractual interpretation. *See Automation Source Corporation v. Korea Exchange Bank*, 670 N.Y.S. 2d 847 (N.Y. App. Div. 1998).

proper interpretation. Nor does the existence of differing expert opinions prevent a court from making an interpretation as a question of law unless there is a question of fact as to the existence of the practice as opposed to its meaning or the meaning of the terms expressing it.[14] In the former case, a question of fact exists which is not one of interpretation and not appropriate for determination as a matter of law.

33. Based on the practices of courts in interpreting contract clauses, it should be apparent that the status of interpretation as a matter of law does not deny to a court the tools necessary to make the interpretation. Where the terms are general ones of common usage used in a general way, these tools are relatively straightforward and can include a dictionary or other commonly used reference tools.[15] Where the terms of the trade code relate to an esoteric

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[14] *See* James Byrne, *Revised UCC Section 5-108(e): A Constitutional Nudge to the Courts*, *supra* at n.12, 1998 Annual Survey 87 (Exhibit C). "What constitutes a particular trade custom or practice would generally be thought to be an issue of fact for the jury. Where the practice is formulated in a written body of rules, however, there is no longer a question as to what a practice is (a question of fact) but what it means and how it applies to a given situation. Such an interpretation is generally thought to be a matter of law for the court to determine."

[15] *See R/S Associates v. New York Job Development Authority*, 98 N.Y.2d 29,33 (N.Y., 2002), (The court looked to the *Oxford English Dictionary* to define "effective" as "actual" or "existing in fact".); *West Valley Nuclear Services Co. Inc. v. Tax Appeals Tribunal of State of New York*, 264 A.D.2d 101, 102 (N.Y.A.D. 2000) *leave to Appeal Denied by* 95 N.Y.2d 760 (N.Y. 2000), (The court stated "[a]lthough the term 'resale' is not specifically defined in the statute, assigning the term its 'usual and commonly understood meaning' (McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 232), it is evident that it would amount to '[t]he act of selling again' (Webster's Third New International Dictionary 1929 [unabridged 1981]").

field such as letters of credit and combine issues of law and practice in a manner that is overlapping, however, reference to specialized tools of letter of credit interpretation including expert opinion is essential.

34. The interpretation of the UCP is difficult and even what may seem to have a "plain meaning" does not. Where courts have treated the UCP as if it were a statute rather than an attempt by the banking community to articulate its own practices, the results have been even more confusing. For example, the UCP does not expressly state that originals of any document other than a transport document and an insurance document must be presented but it is implied that a bank will not honor presentation of a copy or a telefax. An interpretation of the language of the UCP concluding that every required document must be an original (which is practice but unstated in the UCP) but that an original must be expressly marked as such (which is a plausible reading of UCP500 Article 21(b) but is not practice) would distort the practice reflected in the UCP.[16]

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[16] UCP500 Article 20(b) states

> Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:
>
> **i.** by reprographic, automated or computerized systems;
>
> **ii.** as carbon copies;
>
> provided that it is marked as original and, where necessary, appears to be signed.
> A document may be signed by handwriting, by facsimile signature, by perforated signature,

35. For these reasons, the UCP presents a significant challenge to anyone seeking to interpret it. Many of its terms are archaic, dating to the pre-ICC versions, using 19th century terms, only addressing certain issues that have been problematic and making fundamental assumptions.[17] Since the UCP was drafted by bankers for bankers, these characteristics should be no surprise. It is not a systematic codification of letter of credit practice.[18] Nor

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by stamp, by symbol, or by any other mechanical or electronic method of authentication.

LC Rules and Laws (Exhibit A) at 10. This point is illustrated by the infamous "Originals Controversy" engendered by the English courts. *Glencore International AG v. Bank of China*, [1996] 1 Lloyd's Rep. 135 (C.A. Civ.), (Ruling that a wet ink signed document was not an original because it was not marked original), began the controversy. The position of the *Glencore* court was qualified seriously in *Kredietbank v. Midland Bank, PLC*, [1999] All ER (D) 431 (C.A. Civ.), (Ruling that an Issuer was not entitled to reject a document that was clearly an original despite not being marked as original). The *Kredietbank* decision was influenced by the decision of the ICC Banking Commission entitled *The Determination of an "Original" document in the context of UCP 500 sub-Article 20(b)* (12 July 1999), (*LC Rules and Laws* (Exhibit A) at 95), made in response to the *Glencore* opinion. By the decision of *Credit Industriel et Commercial v. China Merchants Bank*, [2002] EWHC 973 (QBD COMM. 2002), a decision in which an English trial court took the extraordinary step of declining to apply the decision of the intermediate appellate *Glencore* court, the English courts had signaled that they had accepted the ICC interpretation as controlling. This controversy is detailed in *The Original Documents Controversy: From Glencore to the ICC Decision*, by James E. Byrne (Institute of International Banking Law & Practice, Inc. 1999).

[17] Like a thrifty householder who never throws away anything even if it is useless, the UCP retained the "reasonable care" language mentioned in the previous footnote even though it had become vestigial since the only test was whether or not the documents complied and not how much care the bank had used in making this determination. Bankers reading the UCP understand this principle intuitively and simply ignore the phrase. Without guidance, lawyers and courts could possibly take it seriously and arrive at a result different from the practice being expressed regarding compliance.

[18] By contrast, the codification of letter of credit practice with regard to standby letters of credit, International Standby Practices, ICC Publication No. 590 (Institute of International Banking Law & Practice 1998), (hereinafter "ISP98"), is a systematic codification of practice

is it a statute to which traditional rules of statutory interpretation should be applied. What it constitutes is an articulation of standard international letter of credit practice. As a result, its provisions require interpretation especially for non-letter of credit bankers.[19]

36. Indeed,UCP500 has been regularly interpreted by the ICC Banking Commission itself which has regularly opined on the meaning of various provisions of the UCP in a series of Opinions and Decisions,[20] by other organizations involved in letter of credit practice, in treatises, and by experts in letter of credit practice. UCP500 Article 13(a) itself obliquely indicates that compliance of documents is to be "determined by international standard

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written by lawyers in cooperation with bankers.

[19] While UCP500 does not contain a rule of interpretation, that of ISP98 Rule 1.03 (Interpretive Principles) offers useful guidance. It provides

> **Interpretative Principles**
> These Rules shall be interpreted as mercantile usage with regard for:
> a. integrity of standbys as reliable and efficient undertakings to pay;
> b. practice and terminology of banks and businesses in day-to-day transactions;
> c. consistency within the worldwide system of banking operations and commerce; and
> d. worldwide uniformity in their interpretation and application.

LC Rules and Laws (Exhibit A) at 35.

[20] The ICC Banking Commission has issued over 500 opinions. While these opinions are based on the terminology of the UCP, many of them address issues not addressed in the UCP itself. A recent example is the ICC Opinion on the issuance of letters of credit by non-bank issuers. Commission on Banking Technique and Practice, *When a non-bank issues a letter of credit*, (30 October 2002), *at* http://www.iccwbo.org/id525/index.html

banking practice" although this reference is followed by the odd phrase "as reflected in these Articles."[21] Indeed, the Appellate Division opinion itself referred to ICC Banking Commission Opinions in its interpretation.

37. Recognizing the important role of "international standard banking practice" in the interpretation of the UCP provisions related to the compliance of documents, the ICC Banking Commission formally issued a document entitled the International Standard Banking Practice, or ISBP.[22] This document is a comprehensive interpretation of the UCP and is entitled to considerable weight.[23] Unfortunately, the Motion Court and Appellate

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[21] *See LC Rules & Laws* (Exhibit A) at page 7. This point is itself a lesson in the complexity of UCP interpretation. The Motion Court, as quoted by the Appellate Division, noted this final clause of UCP500 Article 13(a), indicating "banks must examine documents 'with reasonable care' in order to determine whether the documents 'on their face' appear to comply with the letter of credit. ... 'That determination must be made in accordance with international standard banking practice as reflected in these Articles' (emphasis added [by the Motion Court])." In fact, the clause was inserted as a compromise with German bankers who expressed a concern that was unique to Germanic legal systems related to the phrase "international standard banking practice". Standard international banking practice is reflected in the articles of the UCP but the UCP is not the source nor is it the exclusive statement of that practice. The ongoing interpretations of the ICC Banking Commission make it apparent that the UCP requires interpretation in light of the practice that it seeks to articulate. In the current draft (March 2006) of the revision of UCP500 currently underway this bizarre formulation has been shortened to "standard international banking practice".

[22] ICC Publication No. 645 (International Chamber of Commerce, 2003) is reprinted in *LC Rules & Laws* (Exhibit A) at 69. The ISBP is based in many ways on *Standard Practice for the Examination of Documents* drafted by the IFSA's predecessor the US Council on International Banking, Inc., and first published in 1996, reprinted in the *1998 Annual Survey of Letter of Credit Law and Practice* (Institute of International Banking Law & Practice) at 386.

[23] The introduction to the ISBP states "[t]he international standard banking practices documented in this publication [the ISBP] are consistent with the UCP and the Opinions and

Division opinions criticize references to "International Standard Banking Practice".[24] The Motion Court and Appellate Division were obviously unaware of this publication which, in fact, had not been published at the time of the Motion Court's opinion, but had been in effect for over two years at the time of the Appellate Division opinion. Apparently the parties did not clarify this point on appeal. Were the statements denigrating the "International Standard Banking Practice" to be misunderstood in the future to refer to the ICC publication which is so named and to doubt its value or legitimacy, New York courts would be deprived of a valuable tool in the interpretation of the UCP with respect to issues of compliance.[25]

38. Apart from the arguments of the parties to a lawsuit which are often

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Decisions of the ICC Banking Commission. This document does not amend UCP. It explains how the practices articulated in the UCP are to be applied by documentary practitioners." *LC Rules & Laws* (Exhibit A) at 71.

[24] *See supra*, at ¶ 26(d).

[25] In addition to formal rules, various publications have emerged which attempt to explain various letter of credit practices and various bodies have maintained groups of experts that meet regularly to consider and reflect on issues of letter of credit law and practice. Both the IFSA and the Institute regularly participate in and sponsor such activities. As a result, there exists a considerable body of letter of credit expertise which, on the whole, is consistent and uniform and which supplements and is the source of letter of credit practice as expressed in various rules and opinions. Such an infrastructure is essential for the vitality and relevance of rules of practice since the field of letters of credit must be as flexible as are the demanding situations for which they are issued. For example, with radical shifts in commodity prices such as oil, new forms of letters of credit such as those with variable price rates evolve. *See Mizuho Corporate Bank Ltd. v. Cho Hung Bank*, [2004] SLR 67 (High Court of Singapore), abstracted in *2006 Annual Survey of Letter of Credit Law and Practice* (Institute of International Banking Law & Practice) at 403.

generated by attorneys who are not experts in letter of credit practice and often letter of credit law, there are two principal vehicles by which the attention of the court can be drawn to the understanding of the letter of credit community regarding particular provisions of applicable rules in a neutral and authoritative manner, namely through Amicus Briefs such as this one and the testimony of expert witnesses.

4. Duly Qualified Expertise and Opinion of Proffered Expert

39. Although letter of credit cases regularly refer to expert testimony, there has been little considered judicial opinion on the role of experts in letter of credit cases or on the ability of a court to interpret the UCP contrary to uncontradicted expert opinion.

40. It is well recognized that where expert opinion is unsupported, the court can disregard it.[26] Even if the opinion is supported, the court can find that the opinion is not persuasive either because it is contradicted by a more persuasive opinion of another expert or by some other aspect of letter of

[26] *See Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 (N.Y. 2002), ("Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment."); *Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 533-534 n. 2 (N.Y. 1991), ("[W]here the expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever ... [and, i]ndeed, no reason is apparent why his testimony should not simply be stricken.").

credit practice before the court. If the court were to have found the expert unpersuasive, it might be because it concluded that he or she was not an expert or that the opinion proffered was not persuasive. Even if the court found the expert opinion to state practice, it might disregard it because it was irrelevant because the opinion does not address the matters at issue in the case.

41. Where the court has before it a relevant and exhaustive opinion by a person who qualifies as an expert, that opinion must be given due deference, however.[27] Where there is disagreement between experts the court must judge which interpretation is most consistent with the relevant principles of letter of credit practice. Where there is no conflicting expert opinion, disregard of that opinion based on court's own interpretation of letter of credit practice or its own expertise has been found to be reversible error.[28] In

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[27] *See Selkowitz v. Nassau County*, 45 N.Y.2d 97, 408 N.Y.S.2d 10 (N.Y. 1978), *aff'g* 396 N.Y.S.2d 885 (N.Y.A.D. 1977), ("Whether or not expert testimony is admissible on a particular point is a mixed question of law and fact addressed primarily to the discretion of the trial court. As a general rule the expert should be permitted to offer an opinion on an issue which involves 'professional or scientific knowledge or skill not within the range of ordinary training or intelligence' (*Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757, 759). For that reason expert testimony has been held to be admissible not only to explain highly technical medical or surgical questions (e. g., *Meiselman v. Crown Hgts. Hosp.*, 285 N.Y. 389, 34 N.E.2d 367), but has also been found appropriate to clarify a wide range of issues calling for the application of accepted professional standards.").

[28] *See Banca del Sempione v. Provident Bank of Maryland*, 75 F.3d 951 (4th Cir. 1996), *rev'g summary judgment in favor of issuer* 852 F.Supp. 417 (D.Md. 1994), *judgment in favor of*

such a situation, there is a very limited scope for the application by a court of the hoary interpretative doctrines of "plain meaning" as a basis for the court to introduce its own interpretation based on its own expertise in letters of credit contravening the duly qualified opinion of a duly qualified expert. The "plain" meaning (i.e. non-specialized) of such a term used in this context would not necessarily be controlling were the term was a term of art used in the specialized sense.[29]

42. It is not the opinion of the IFSA or the Institute that the Motion Court or the Appellate Division erred in disregarding the proffered expert opinion in this case. Based on the descriptions of the expert affidavit, the courts appear to have been justified in not taking the opinion into account for these reasons:

a. From the statements of both the Motion Court and the Appellate Division, it is not clear that this person has the requisite expertise to

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beneficiary on remand Civ. No. B-91-3179 (D. Md. 21 April 1997) printed at *1998 Annual Survey of Letter of Credit Law and Practice* (Institute of International Banking Law and Practice) at 406, *aff'd on appeal after remand* 160 F.3d 992 (4th Cir. 1998), (The 4th Circuit held that a summary judgment ruling as to whether the letters constituted amendments or side agreements was inappropriate because expert testimony revealed both genuine issues of material fact disregarded by the trial court which indicated that the terms of the letter of credit were ambiguous at best.).

[29] Although the UCP should not be treated as a statute, one principle of statutory interpretation is relevant, namely that "[w]ords of technical or special meaning are construed according to their technical sense, in the absence of anything to indicate a contrary legislative intent". N.Y. Stat. § 233 (McKinney 2006), (Words of technical or special meaning.).

testify in this matter.

b. Moreover, the court noted that the proffered opinion was based on conclusory statements. It is the office of an expert to explain the practice at issue and to link it to its rational underpinnings which are either historical or based on some practical necessity. While these underpinnings are often supported by the literature, they can also be supported by the circumstances related to the evolution of the practice. The absence of such explanations would justify the disregard of an expert opinion.

c. While it appears that the testimony addressed the applicable standard, namely that of substantial compliance, but failed to relate it to its sole source, the Reimbursement Agreement. It appears that the result that should have followed under this standard was improperly attributed to the UCP, the "ISBP", and standard letter of credit practice as reflected in the UCP which do not support it.

d. The Motion Court and Appellate Division were also negatively impressed by the references to "International Standard Banking Practice". As indicated, this phrase is the name of a publication that was subsequently issued by the International Chamber of Commerce.

Apparently, the expert whose opinion was issued prior to its release was unaware of this publication which, in any event, does not speak to the issues in this case or, if he was aware of it, was unable to explain it to the court or to the lawyers prosecuting the appeal.[30] This reference obviously generated scepticism which was, in the event, justified.

e. In addition, the courts took issue with the expressed opinion regarding the compliance of a bill of lading that did not name a consignee. Apart from the fact that the issue is one of substantial compliance and not, as treated, one of strict compliance, the courts noted that the expert failed to address the required terms and conditions of the letter of credit. What the expert probably meant to express was the expectation of most letter of credit bankers that a bill of lading issued under a letter of credit would name a consignee. Where the letter of credit did not require that the bill of lading be consigned to the order of a named person, however, the frustration of this expectation is not a basis for

[30] The Expert Affidavit was issued prior to the release of the ISBP which was in October 2002. The drafting process, however, began in May 2000 and during this period several drafts were released to the National Committees of the ICC for comment. Had the expert participated in this process, he should have been able to explain its significance and meaning. In any event, the ISBP was formally adopted by the ICC prior to the Appellate Division opinion and, by that time, the expert should have been able to inform the attorneys who retained him of its proper meaning. It should be noted, additionally, that the ISBP is irrelevant to the issues discussed in the Motion Court opinion.

refusal, even under the strict compliance standard, because this expectation does not amount to a practice that can be used as a basis for refusal where the letter of credit was not more specific. Under the standard of substantial compliance, an issue to which the expert opinion apparently did not address itself, there can be little doubt that this aspect of the document substantially complied under standard international letter of credit practice.

43. It is the opinion of the IFSA and the Institute that duly qualified and expressed expert opinion is important to a court in the interpretation of the terms and conditions of a letter of credit in light of standard international letter of credit practice including applicable rules of practice such as the UCP. If the Motion Court and Appellate Division failed to give due deference to this opinion, it was because the expert was not duly qualified or the opinion duly expressed and the opinions should have made this basis for the rejection of the proffered opinion clear.

IV. Conclusion

44. It is the position of the IFSA and the Institute that the general and unqualified dismissal of the proffered opinion of an expert may chill the ability of parties to introduce expert opinions and cause courts to be

reluctant to rely on them. Moreover, the Amici are of the opinion that the applicability of Revised UCC Article 5, the significance and meaning of the substantial compliance rule to this case, and the status of the International Standard Banking Practice (ISBP) should be clarified. Since these issues are important to letter of credit practice, the organizations urge that leave to appeal to the Court of Appeals be granted so that they can be addressed and the problematic language of the Appellate Division decision clarified.

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