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7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 GOLDEN WEST REFINING
COMPANY, a California corporation,

12 Plaintiff,

13 vs.

14 SUNTRUST BANK, a Georgia state
15 chartered bank,

16 Defendant.
17

) CASE No. CV05 1550 NM (SHx)

) **BRIEF OF *AMICUS CURIAE***

) Date: March 6, 2006

) Time: 10:00 a.m.

) Place: Room 11
312 North Spring Street
Los Angeles, California

) Judge: The Honorable Nora Manella
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1 **BRIEF OF *AMICUS CURIAE* OF THE INSTITUTE OF**
2 **INTERNATIONAL BANKING LAW & PRACTICE**
3 **REGARDING REVISED UCC SECTION 5-106(d)**

4 1. The Institute of International Banking Law & Practice (“the Institute”)
5 submits this *Amicus Curiae* Brief in order to clarify issues of letter of credit law and
6 practice regarding expiration of standby letters of credit.

7 **I. Statement of Interest of the Institute of International Banking Law &**
8 **Practice, Inc. As *Amicus Curiae*.**

9 2. The Institute of International Banking Law & Practice, Inc., (hereinafter
10 “Institute”) is a not for profit educational organization located in Maryland with
11 offices in New York, Florida, and Singapore that is dedicated to the harmonization of
12 law and practice in the field of international banking operations.

13 3. Since 1986, the Institute has been at the forefront of every major
14 development in the revision and codification of letter of credit law and practice in the
15 US and globally. The Institute came into being from the collaboration of LC bankers,
16 lawyers, corporate users, and academics studying the possible revision of Prior UCC
17 Article 5.^{1/} What became apparent in this process was that where law and practice
18 supplemented one another in rulemaking the result was much more likely to meet the
19 reasonable expectations of the commercial community and to order them in an
20 efficient manner. The Institute’s goal was to continue and deepen the collaboration
21 between different disciplines in the reformation of letter of credit law and practice

25 ¹ This work contained in the Report of the Joint American Bar Association/US
26 Council on International Banking Task Force on the Revision of UCC Article 5 is
27 published at *An Examination of U.C.C. Article 5 (Letters of Credit)*, 45 Bus. Law.
28 1521 (1990). In the past two decades, the Institute has played a significant role in the
formulation of an international letter of credit convention, the revision of the
international rules of letter of credit practice, the revision of regulatory guidelines,
and the creation of rules of practice for standby letters of credit that have become the
global standard for rulemaking.

1 throughout the world.^{2/} Of particular significance to this case, it also played a leading
2 role in the revision of UCC Article 5, the model law dealing with letters of credit.^{3/}
3 The Institute is in a particularly apt position to comment on the meaning of Revised
4 UCC Article 5 since it was the principal bridge to all these inter-related efforts.

5 4. The Institute is not aligned with either party in this litigation. Its concern
6 is that the interpretation of Revised UCC § 5-106(d) be consistent with the purposes
7 that it was intended to accomplish and with sound letter of credit policy.

8 II. **Statement of the Relevant Facts of the Case**

9 5. The analysis and conclusions set forth in this Brief are based on the
10 following facts gathered from the pleadings: Crestar Bank, a predecessor of SunTrust
11 Bank (Issuer), issued its standby letter of credit No. 980521VA2138 (hereinafter “the
12 LC” or “the Crestar LC”) on which this action is based from its offices in Virginia in
13 favor of Golden West Refining Company (Beneficiary). It was dated 21 May 1998
14 and provided that it was subject to UCP500. Since the LC did not provide for
15 applicable law, it would be governed by the law of Virginia, which at the time of
16
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19 ² The Institute also surveys and monitors letter of credit case law and
20 developments in letter of credit practice in its publications, annual conferences, and
21 projects which are conducted with leaders of the international letter of credit
community in eight regional letter of credit centers around the world and its Regional
Advisory Council.

22 ³ In this process which ran from 1991 to 1995, the Institute coordinated the
23 involvement of the international banking operations community, regularly produced
24 position papers and analyses of topics of interest, and reported on it in its monthly
journal, *Letter of Credit Update* and its annual publications. It served as liaison with
25 the work of the United Nations Commission of International Trade Law
(UNCITRAL) on the drafting of a UN LC Convention. Two of its Directors and four
26 of its Fellows and Advisors were Advisors to the Drafting Group and six were Active
Participants as noted in the Official Prefatory Note to the Revision of UCC Article 5.
27 Mr. James G. Barnes, Chair of the Institute’s Legal Advisory Council served as
counsel for the international banking community and much of the drafting resulted
28 from bilateral negotiations between him and the reporter, Professor James J. White.
See James White, *The Impact of Internationalization of Transnational Commercial
Law: The Influence of International Practice on the Revision of Article 5 of the UCC*,
16 Nw. J. Int’l L. & Bus. 189, 194 (Winter 1995).

1 issuance was based on Revised UCC Article 5.^{4/}

2 6. By its terms, the letter of credit provided that it was available for drawing
3 for a period of one year’s duration from the time of its issuance with automatic
4 renewals thereafter unless the Beneficiary gave notice that the renewal of the LC was
5 not required at least 30 days prior to the renewal. Having not given notice to the
6 Issuer that it did not require the renewal of the LC, the Beneficiary presented
7 documents under the letter of credit to Issuer on or about 2 February 2005.

8 7. On 8 February 2005, Issuer sent a notice of refusal to Beneficiary.
9 Among other reasons, Issuer refused payment on the ground that the letter of credit
10 had terminated pursuant to Revised UCC § 5-106(d). Beneficiary subsequently filed
11 this action against Issuer for wrongful dishonor.

12 **III. Statement of Issues of Concern to the Institute**

13 8. In its Complaint, Beneficiary argues, among other things, that Revised §
14 5-106(d) is “clearly inapplicable” because the LC does not state that it is “perpetual”,
15 contains a stated expiration date, is automatically renewable, and is an “evergreen”
16 letter of credit.

17 9. The issue of concern to the Institute is whether a letter of credit that
18 contains an expiration date and provides for automatic renewal but does not provide a
19 means by which the issuer can terminate its obligation by giving a notice of non-
20 extension or by paying the amount due under the letter of credit is a perpetual letter of
21 credit for purposes of Revised § 5-106(d). To the Institute’s best knowledge, based on
22 diligent research, this issue is one of first impression.

23 ⁴ Under the choice of law rules of California, Cal. Com. Code § 5116, the law
24 of the place of issuance governs where no claim of the law is made. Virginia’s
25 version of the UCC is found at Va. Code Ann. § 8.5A-101 to 8.5A-118. For purposes
26 of this case, the provisions the Virginia and California enactments of Revised UCC
27 Article 5 are identical with one another and the Model Revised UCC Article 5. For
28 convenience, citations are to the Revised Model UCC Sections (e.g. Revised UCC §
5-106), reprinted at 111 of *LC Rules and Laws Critical Texts* (3rd. ed.) (Byrne,
Editor) (Institute of International Banking Law & Practice, 2004) (224 pages)
(hereinafter “*LC Rules & Laws*”) which is attached as Exhibit A. A copy of the
Virginia enactment of UCC Article 5 is attached as Exhibit B.

1 **IV. Summary of the Position of the Institute as *Amicus Curiae***

2 10. It is so obvious to letter of credit professionals that a fundamental
3 characteristic of letter of credit obligations is that they must have some limit and
4 cannot be eternal that the Institute has taken the extraordinary step of submitting this
5 *Amicus* Brief.

6 11. Under the current system of US letter of credit law and practice, this
7 fundamental policy is manifested in Revised UCC § 5-106 (c) and (d). These
8 subsections were deliberately coordinated with applicable rules of practice,
9 regulations, and international law to address two discrete situations, namely where a
10 credit was issued without a provision for expiration, a matter addressed in Subsection
11 (c), and where the credit operated without temporal limitation. This system was
12 structured so that no letters of credit issued by US banks or subject to US law or
13 regulations were unlimited in their duration. If a letter of credit did not contain a final
14 expiration date or a device by which it could be terminated by the issuer, the LC
15 would be given a final date of availability or expiration date of either one year or five
16 years by operation of law.

17 12. It is the concern of the Institute that the interpretation advanced by the
18 Beneficiary is hypertechnical and, were it accepted, would seriously contravene this
19 arrangement with significant negative regulatory and practical implications for US
20 letter of credit practice. It would also incidentally distort the application of the one
21 year period of Revised § 5-106(c) by requiring that it be applied to a situation to
22 which the five year period of § 5-106(d) ought to apply.

23 **V. Explanation of the Position of the Institute as *Amicus Curiae***

24 **A. There is a Fundamental Policy in Letter of Credit Law and Practice**
25 **Against Obligations that are Unlimited in Duration**

26 13. The notion of limitations on the duration of obligations is one of the basic
27 differences between pre-commercial societies and economies and modern commercial
28

1 societies.^{5/} Often associated generally with the doctrine of finality^{6/}, this concept
2 manifests itself in letter of credit practice and law in a variety of ways^{7/} and is
3 reflected in the fundamental policy that modern letters of credit have always had a
4 termination point that is determinable by the issuer.^{8/} A variety of considerations
5 support this policy, many of which are grounded in concerns regarding the safety and
6 soundness of the banking system but they are not limited to that concern. For a bank
7 responsibly to issue letters of credit, it is necessary that there be an assessment of the
8 credit risk which involves measuring the ability of the person at whose request the LC
9 was issued or its surety to reimburse the issuer. Such a determination cannot be
10 responsibly made for all future time.^{9/} Were eternal obligations to exist, considerable
11 pressure would be placed on banks to avoid paying them on technical grounds after
12 the passage of time especially where there is no possibility of reimbursement, placing

14 ⁵ Unlike an agrarian or pre-commercial society based on real property rights,
15 commercial obligations do not run from generation to generation until they are
16 fulfilled. See Boris Kozolchyk, *Transfer of Personal Property by a Nonowner: Its
Future in Light of its Past*, 61 Tul. L. Rev. 1453 (1987).

17 ⁶ It is apparent in a wide variety of forms such as legal rules (statutes of
18 limitations, prescription periods, and procedural time limits) and public policies that
are manifested in these rules (e.g., the notion that a debtor should be allowed a fresh
start by discharging obligations).

19 ⁷ E.g., the doctrine of preclusion in by which a bank is precluded from asserting
20 that documents are discrepant to the extent not stated in the first notice of refusal is a
dramatic instance of finality. See Revised UCC § 5-108(a) reprinted in *LC Rules &
Laws* (Exhibit A) at 126.

21 ⁸ Modern letters of credit date from the North Atlantic trade following the
22 Napoleonic Wars and are distinguished by being issued in favor of a named
beneficiary (special letters of credit) instead of being issued in favor of any bank or
23 person (general letters of credit). See Herman N. Finkelstein, *Legal Aspects of
Commercial Letters of Credit*, 4 (Columbia University Press 1930); see also Henry
24 Harfield, *Bank Credits and Acceptances*, (5th ed.) 179 (The Ronald Press Company
1974).

25 ⁹ In the *Report of the Working Group on the International Contract Practices
26 on the Work of its Thirteenth Session*, (New York, 8-18 January 1990), A/CN.9/330
(6 February 1990), it was noted at ¶24 that “[p]erpetual undertakings were regarded
27 as unsettling and commercially undesirable owing to their lack of finality. They also
raised regulatory concerns in view of their continuing liability and risk exposure.
28 Moreover, they created uncertainty in that they might be affected by a statute of
limitations of an applicable law which in itself might be difficult to determine.

1 a strain on the integrity of the instrument and the credibility and solvency of banks.

2 14. The wisdom of this policy for LCs is apparent from a comparison with a
3 similar bank instrument, the bank or first demand guarantee, an independent
4 undertaking that is primarily issued by European banks. Because this undertaking
5 historically was not treated by European banks as a letter of credit, these undertakings
6 were sometimes issued without expiration dates. As a result, a variety of technical
7 devices evolved by which banks sought to avoid these obligations. One such device
8 was a legal procedure in the guaranteeing bank's courts by which the bank could
9 denounce the obligation.^{10/}

10 **B. The Evolution of the Treatment of the Duration of Letters of Credit**

11 15. There has never been any doubt, however, that letters of credit always
12 must have an expiration date.

13 **1. The UCP**

14 16. This principle that letters of credit must be of limited duration was
15 manifested in the rules of practice applicable to letters of credit, the Uniform Customs
16
17
18

19 ¹⁰ This point was explained by Dean Rafael Illescas Ortega of the Law Faculty of
20 the University Carlos III de Madrid who served as the head of the Spanish delegation
21 to the UNCITRAL Working Group sessions, *Report of the Working Group on the*
22 *International Contract Practices on the Work of its Sixteenth Session, (Vienna, 4-15*
23 *November 1991), A/CN.9/358 (12 February 1992) at ¶152. In discussing ISP98 Rule*
24 *9.01 (Timing), The Official Commentary on ISP98, at 293, states that “even an*
25 *undertaking that appears on its face to be expressly ‘perpetual’ can be subject to*
26 *judicial procedures such as being ‘denounced’ which effectively terminates the*
27 *undertaking . Thus, in many cases even where a ‘perpetual’ undertaking appears to be*
28 *allowed, it is, in fact, illusory.” In reality, one of the unintended negative*
consequences of an infinite undertaking that cannot be terminated by the issuer is the
weakening of its independent nature. Although not fully appreciated doctrinally, a
finite undertaking can be truly independent of the transactions that give rise to it in
part because the assessment of the risk is manageable. By definition, the risk inherent
in an infinite undertaking cannot be managed or predicted. As a result, external
factors linked to the underlying transaction inevitably affect not only the judgment
and decisions of the issuing banks but also influence the treatment of these
undertakings by courts. Ultimately, this problem has contributed to the highly
charged atmosphere surrounding bank guarantees and the inability to develop
accepted rules of practice for them.

1 and Practice^{11/} for documentary credits, from its first version in 1933. Because the
2 contract for the purchase of goods from which commercial LCs arose was invariably a
3 short term obligation, no question regarding unlimited obligations ever arose. As
4 reflected in the current version, UCP500 Article 42(a), the UCP has always required
5 that “[a]ll Credits must stipulate an expiry date....”^{12/}

6 17. The UCP was drafted for commercial letters of credit, that is those letters
7 of credit by which a buyer pays for goods or services. Different considerations arose
8 in the post World War II era with the development of standby letters of credit which
9 were not necessarily linked to payment against documents of title that enabled a buyer
10 to obtain possession of goods. Obligations underlying standbys could extend over
11 considerable periods of time. Because standby letters of credit were invariably issued
12 subject to the version of the UCP in force at the time, they were required to have an
13 expiration date and, at the outset, all standby letters of credit did contain an expiration
14 date although the date would often be for a longer period of time than would be
15 typical of a commercial letter of credit. Although it was very unusual for a commercial
16 letter of credit to have an expiration date longer than a year after issuance, standby
17 letters of credit began to appear with dates of ten years or longer.

18 18. These long term expiration dates, however, gave rise to concerns about
19 their safety and soundness. These concerns resulted in the development of so-called
20 “evergreen” clauses by which the letter of credit would contain the required expiration
21 date but also provide for automatic renewal for a period of time unless the issuer gave

22 ¹¹ The Uniform Customs and Practice for Documentary Credits, International
23 Chamber of Commerce Publication No. 500 (hereinafter “UCP500”) (1993 Revision),
24 reprinted in *LC Rules & Laws* (Exhibit B) at 1.

25 ¹² UCP82 (1933) Article 38 provides: “The period for which all irrevocable
26 credits are to remain in force must be stipulated.”; UCP151 (1951) Article 33
27 provides: “irrevocable credits must stipulate an expiry date” UCP222 (1962)
28 Article 35 provides: “All irrevocable credits must stipulate an expiry date”;
UCP290 (1974) Article 37 provides: “All credits, whether revocable or irrevocable,
must stipulate an expiry date” ; UCP400 (1983) Article 46(a) provides: “All
credits must stipulate an expiry date”; the current draft of the next revision of the
UCP, UCP600 (Draft Nov05) Article X (previous drafts Article 4) (d) provides: “A
credit must stipulate an expiry date....”

1 notice of non-renewal within an indicated period of time, in which event the standby
2 would typically permit a drawing for that reason regardless of whether or not a
3 drawing would otherwise have been proper.^{13/} Unaddressed by specific rules in the
4 UCP other than the requirement of an expiration date or Prior UCC Article 5, the
5 operation of these devices depended on what was stated in the text of the LC itself.

6 **2. The Interpretative Rulings of the Office of the Comptroller of the** 7 **Currency**

8 19. By the early 1970s, US bank regulators had become concerned about
9 standby letters of credit and in 1972, the Comptroller of the Currency issued an
10 Interpretive Ruling applicable to national banks and federally insured banks that,
11 among other things, required that “the bank’s undertaking must contain a specific
12 expiration date or be for a definite term”.^{14/} An identical requirement was contained in
13 the 1977 revision of these regulations.^{15/}

14 20. When asked about the validity of “evergreen” clauses, the Comptroller of
15 the Currency opined that “[l]ongstanding OCC precedent permits national banks to
16 use ‘evergreen’ or ‘automatic extension’ clauses in their letters of credit provided that
17 the bank retains the right not to renew the letter of credit.”^{16/} This position is consistent
18

19 ¹³ The term “evergreen” clauses has no precise meaning. *E.g.*, the standard
20 rules for standby letters of credit (See below n.26) provides “the following terms have
21 no single accepted meaning...and shall be disregarded unless their context gives them
22 meaning;... ‘evergreen’” ISP98 Rule 1.10(c)(ii) reprinted in *LC Rules & Laws*
23 (Exhibit A) at 39. A typical “evergreen” clause contains a provision for automatic
24 renewal and a mechanism for non-renewal within the control of the issuing bank or a
25 final expiration date or both. Such a clause will also typically permit a drawing on the
26 basis of a notice of non-renewal being given.

27 ¹⁴ 12 CFR § 7.7016 (1972), 36 FR 17014 (1971).

28 ¹⁵ 12 CFR § 7.7016, 42 FR 24206 (1977).

¹⁶ 12 CFR Parts 7 and 31, 61 FR 4849 (1996). *See also* Unpublished OCC
Interpretive Letter, March 12, 1991 attached as Exhibit C (Stating that such clauses
were consistent with the requirement that there be an expiration date or a definite
term “if they provide for automatic extension for a stated period of time, and maintain
the bank’s right to not renew the letter of credit.”); OCC Interpretive Letter No. 477,
Fed. Banking L. Rep. (CCH) P83,027 (1989) (“The typical ‘evergreen’ SLOC

(continued...)

1 with safe and sound banking because it allows banks to assess their credit exposure on
2 a regular basis and, in the event of problems, effectively decide whether or not to cut
3 their losses by serving notice of non-renewal and seek reimbursement or move against
4 collateral.

5 21. In the early 1990s, a further evolution in practice occurred where some
6 banks issued letters of credit with no expiration date or notice of non-renewal
7 mechanism to certain beneficiaries such as clerks of court. However, these LCs
8 provided that the issuer could terminate its obligation unilaterally by paying the
9 proceeds of the LC into the registry of the court.

10 22. In the mid 1990s, the OCC revised its Interpretative Ruling in light of the
11 developments in standard international letter of credit practice and LC law mentioned
12 here including the revision of UCC Article 5 (finalized in 1995).^{17/} 12 CFR § 7.1016
13 (b)(1)(iii) provided that the undertaking should:

14 (A) Be limited in duration; or

15 (B) Permit the bank to terminate the undertaking either on a periodic basis
16 (consistent with the bank's ability to make any necessary credit
17 assessments) or at will upon either notice or payment to the beneficiary;
18 or

19 (C) Entitle the bank to cash collateral from the applicant on demand (with a
20 right to accelerate the applicant's obligations, as appropriate);
21

22 ¹⁶(...continued)

23 [Standby Letter of Credit] ... contains a provision requiring the bank to inform the
24 account party in advance of the end of the commitment period as to whether it will
25 renew the SLOC. If the bank decides not to renew, the beneficiary then has the right
26 ... to draw on the SLOC.”); OCC Interpretive Letter No. 239, Fed. Banking L. Rep.
27 (CCH) P85,403 (1982) (Although the letter of credit provides no precise expiry date
28 in the traditional sense, the bank’s ability to terminate its liability within a specified
period constitutes a “definite term” within the meaning of 12 C.F.R. 7.7016. This
conclusion is consistent with our previous interpretations allowing national banks to
use automatic renewal or “evergreen” clauses in letters of credit.”).

¹⁷ 12 CFR § 7.1016 (effective 1 April 1996) reprinted in *LC Rules & Laws*
(Appendix B) at 195.

1 23. In explaining this provision, the Comptroller’s Comments to the Final
2 Rule stated that

3 Long-standing OCC precedent permits national banks to use ‘evergreen’ or
4 ‘automatic extension’ clauses in their letters of credit provided that the bank
5 retains the right not to renew the letter of credit. Therefore, the final ruling adds
6 clarifying language expressly permitting a national bank to issue an undertaking
7 without an express expiration date, provided that the bank has the right to
8 cancel the undertaking upon notice to the parties.^{18/}

9 24. Thus, the Comptroller has consistently required that standbys be
10 terminable either by having a final expiration date or by having a device by which the
11 issuing bank could terminate its liability.

12 **3. The United Nations Convention on Independent Guarantees and Stand-by**
13 **Letters of Credit**

14 25. In one of the unique transnational drafting exercises in commercial law,
15 the UN Convention on Independent Guarantees and Stand-by Letters of Credit
16 (hereinafter “UN Convention”)^{19/} was drafted at the same time as the revision of UCC
17 Article 5 took place.^{20/} Many of the same persons and organizations took place in both
18 exercises, including the Institute, and a deliberate effort was made to coordinate and
19 harmonize the two drafts to the extent possible given the differences in approach and
20 circumstances.^{21/}

22 ¹⁸ 12 CFR Parts 7 and 31, 61 FR 4853 (1996). In a footnote, the interpretive
23 rulings specifically recognized that the application of Revised UCC Article 5 is an
acceptable means of making an undertaking independent, 12 CFR 7.1016 at n.1.

24 ¹⁹ The UN Convention was adopted and opened for signature by its resolution
25 50/48 of 11 December 1995. See A/RES/50/48. The UN Convention was reprinted in
LC Rules & Laws (Exhibit A) at 185.

26 ²⁰ Work on the UN Convention began in 1989 while work on Revised UCC
27 Article 5 began in 1991. They were both completed in 1995.

28 ²¹ James G. Barnes, *The Impact of Internationalization of Transactional
Commercial Law: Internationalization of Revised UCC Article 5 (Letters of Credit)*,

(continued...)

1 26. It was the goal of the UN Convention to harmonize international law
2 related to standbys and independent guarantees.^{22/} Therefore, its treatment of
3 expiration, an area where practice differed between standbys (which had an expiration
4 date or limitation mechanism) and independent guarantees (which could be perpetual
5 on their face^{23/}), is of particular interest. From its earliest deliberations on expirations,
6 the issue of indefiniteness was of concern. The term “perpetual”, a term that was
7 novel to LC practice in the US as a description of the phenomenon of undertakings
8 that were unlimited in duration, was first used in the deliberations that led to the UN
9 Convention^{24/} although phrases such as “a transaction of indefinite duration”^{25/} or
10 “unlimited duration”^{26/} were regularly used since there was no one term that had any
11 unique or particular meaning and all of these labels were regarded as fungible.

12 27. The proposal that there be a cut off period that could not be varied was
13 first raised as a proposal by the UN Secretariat in July 1990.^{27/} By the Working Group
14 session held from 14-25 February 1994, the prevailing view was in favor of an
15
16

17 ^{21/}(...continued)
18 16 J. Int'l L. Bus. 215, 216 (Winter 1995).

19 ²² Explanatory note by the UNCITRAL Secretariat on the United Nations
20 Convention on Independent Guarantees and Standby Letters of Credit, Comment 5.

21 ²³ See, e.g., *Report of the Working Group on the International Contract
22 Practices on the Work of its Thirteenth Session, (New York, 8-18 January 1990),
23 A/CN.9/330 (6 February 1990) at ¶24 (“It was noted that in practice guaranty letters
24 were found that did not specify a period of validity or effectiveness.”).*

25 ²⁴ *See id.*

26 ²⁵ *Report of the Working Group on the International Contract Practices on the
27 Work of its Sixteenth Session, (Vienna, 4-15 November 1991), A/CN.9/358 (12
28 February 1992) at ¶151.*

²⁶ *Report of the Working Group on the International Contract Practices on the
Work of its Nineteenth Session, (New York, 24 May - 4 June 1993), A/CN.9/374 (23
June 1993) at ¶57.*

²⁷ Note: Discussion of further issues of a uniform law: amendment, transfer,
expiry, obligations of a guarantor, liability, and exemption, A/CN.9/WG.II/WP.68
(31 July 1990) at ¶43.

1 absolute cutoff^{28/} as reflected in Article 12(c) of the UN Convention, containing a six
2 year cut off period after the date of issuance even when the undertaking attempts to
3 provide otherwise.^{29/} With this major accomplishment on the international level, it
4 became obvious that the revision of UCC Article 5 should contain a parallel provision.

5 **4. The International Standby Practices (ISP98)**

6 28. One of the consequences of the UN Convention and the work on the
7 revision of UCC Article 5 was the realization of the necessity for specific rules of
8 practice for standby letters of credit which resulted in the formulation of International
9 Standby Practices (“ISP98”).^{30/}

10 29. Consistent with the approach taken in the revision of the OCC
11 Interpretative Ruling, Revised UCC Article 5, and the UN Convention, ISP98
12 addressed the expiration of standby letters of credit in a more nuanced fashion than
13 did UCP500. ISP98 Rule 9. 01 provided that “A standby must: a. contain an expiry
14 date; or b. permit the issuer to terminate the standby upon reasonable prior notice or
15 payment”.^{31/} As explained in *The Official Commentary on the International Standby*
16 *Practices*, “This Rule is similar to and follows UCP 500 Art. 42(a) and modern
17 commercial law and practice in providing that a commercial undertaking such as a

19 ²⁸ *Report of the Working Group on the International Contract Practices on the*
20 *Work of its Twenty-First Session, (New York, 14-25 February 1994), A/CN.9/391 (24*
21 *March 1994). This Secretariat proposal was accepted and included in the draft for*
22 *discussion as an alternative. Report of the Working Group on the International*
23 *Contract Practices on the Work of its Fourteenth Session, (Vienna, 3-14 September*
24 *1990), A/CN.9/342 (27 September 1990) at ¶101. It was first reflected in Tentative*
25 *Draft, A/CN.9/WG.II/WP.73 (17 September 1991). This proposal was discussed in*
26 *subsequent meetings.*

27 ²⁹ UN Convention Article 12(c) provides “If the undertaking does not state an
28 expiry date, or if the act or event on which expiry is stated to depend has not yet been
established by presentation of the required document and an expiry date has not been
stated in addition, when six years have elapsed from the date of issuance of the
undertaking.” Reprinted in *LC Rules & Laws* (Appendix A) at 188.

³⁰ The International Standby Practices (ISP98), ICC Publication No. 590, was
drafted by the Institute itself and became effective 1 January 1999. It is reprinted in
LC Rules & Laws (Exhibit A) at 31.

³¹ See *LC Rules & Laws* (Appendix A) at 56.

1 standby must be limited in duration and rejects the notion that it can be perpetual.”^{32/}

2 **C. Doctrinal Evolution of Regarding Treatment of Standby Duration**

3 30. These developments represent a doctrinal evolution in letter of credit law
4 and practice.^{33/} The common denominator of these developments is that the issuing
5 bank is able to limit its temporal exposure by either a certain and final date, by giving
6 a notice that in effect creates such a date, or by making payment under the credit. In
7 all these circumstances, there is a limitation on the duration of the credit that is within
8 the control of the issuer.

9 **D. Revised UCC § 5-106**

10 31. It is in this uniform and consistent doctrinal and historical context that
11 Revised UCC § 5-106 must be understood.

12 **1. Policy Considerations**

13 32. The original version of UCC Article 5 did not address expiration of
14 letters of credit because when it was finalized in 1952, the rather straightforward
15 practice at the time was satisfactorily addressed by UCP151 (1951 Revision).^{34/}

18 ³² J. Byrne, *The Official Commentary on the International Standby Practices*, at
19 292 (J. Barnes, ed., Institute of International Banking Law & Practice 1998).

20 ³³ From a straightforward requirement that there be an expiration date, safe and
21 sound LC practice and regulation came to recognize that

22 i. Even if there was an expiration date or period of discretion, that date might
23 not be the final date on which the standby was available for drawing if the standby
24 would be renewed for another cycle.

25 ii. In a case such as that in (i) above, the standby could provide for a “final”
26 expiration date (or total number of renewals) after which no further renewals would
27 occur.

28 iii. In addition or as an alternative to (ii), the standby could provide for
unlimited renewals (that is, without an expiration date) provided that the issuer could
effectively end its obligation by giving a notice of non-renewal.

iv. Alternatively to (iii), the standby could provide for unlimited extensions
without any provision for a notice of non-renewal so long as the issuer was able to
terminate its liability by unilaterally making payment to the beneficiary.

³⁴ UCP151 (1951) Article 38 provided “All irrevocable credits must stipulate an
expiry date for payment, acceptance or negotiation notwithstanding the indication of
a date of shipment.”

1 33. At the time of the revision of UCC Article 5 in 1990, however, the
2 practice regarding standbys had changed, the doctrinal evolution described above had
3 taken place, and, in view of the absence of treatment in UCP500 of the nuances
4 introduced by standby letters of credit and the pending general permission for US
5 banks to issue independent guarantees,^{35/} it was decided that issues related to the
6 expiration of a letter of credit should be addressed in Revised UCC Article 5 in order
7 to supplement the applicable regulations and practice rules. This decision was made in
8 the context of the uniform and consistent policy that eternal undertakings or
9 obligations of unlimited duration would not be permitted.

10 **2. Revised UCC § 5-106 (c) and (d)**

11 34. Revised UCC § 5-106(c) and (d) provide:

12 (c) If there is no stated expiration date or other provision that determines its
13 duration, a letter of credit expires one year after its stated date of issuance
14 or, if none is stated, after the date on which it is issued.

15 (d) A letter of credit that states that it is perpetual expires five years after its
16 stated date of issuance, or if none is stated, after the date on which it is
17 issued.

18 35. These two subsections were designed to address two discrete aspects of
19 the duration of LCs, namely the situation where there was no device in the letter of
20 credit addressing duration and the situation where the LC may or may not have
21 addressed duration but provided for an unlimited obligation. These situations were
22 regarded as opposite sides of the spectrum that required different treatment.

23 36. In the situation covered by Subsection (c), it was assumed that the
24 absence of an expiration date or a device by which the duration of the issuer's
25

26 ³⁵ With the consent of the US State Department, the US delegation to the
27 UNCITRAL Working Group (led by representatives of the Institute) undertook to
28 seek an interpretative ruling from the OCC permitting US banks to issue independent
guarantees of the type addressed by the UN Convention. That effort resulted in the
provision 12 CFR § 7.1016 permitting US banks to issue such guarantees provided
that they were, in fact, truly independent undertakings.

1 obligation could be determined was inadvertent since it was recognized as unsafe and
2 unsound to issue a letter of credit under such circumstances. It was also assumed that
3 this situation was one that would usually arise as a result of a mistake by the issuing
4 bank in the context of a commercial letter of credit or a short term unlaywered standby
5 letter of credit. The reason for these assumptions is that where the beneficiary insists
6 on a standby of unlimited duration because it wishes assurance for a long term
7 obligation, it almost invariably provides the text which is typically scrutinized
8 carefully by its lawyers. In the context of a commercial LC or short term standby that
9 did not contain a renewal mechanism, however, a bank would without exception insist
10 on an expiration date or duration period. The failure to include one would be the
11 result of bank mistake. In such a situation, it was thought that a termination period of
12 one year would be generous since most commercial credits and unlaywered standbys
13 are intended to be in effect for a shorter period of time.

14 37. On the other hand, Subsection (d) was intended to address the situation
15 where there was a desire for a long term obligation under a standby expressed in the
16 terms of the standby which did not contain a final expiration date and did provide
17 terms under which the credit would continue to operate without a limit under the
18 control of the issuer. Because it is unimaginable that such provisions are inserted at
19 the instance of an issuing bank, these terms are, in effect, dictated by the beneficiary
20 and almost always with the advice of its counsel. Long term obligations invariably
21 require standby letters of credit rather than commercial letters of credit and no bank
22 should knowingly, unless by mistake, issue or draft a provision that provided for an
23 obligation without limitation that did not contain an evergreen clause providing for
24 termination by the bank at its option in the course of the renewal cycles, a final
25 expiration date, or a right to make payment.^{36/} In such a situation, it was concluded

26
27 ³⁶ In deciding to adopt a comprehensive and all-inclusive system that provided
28 limitations by operation of law where the LC did not do so, the possibility that such a
device might be used to trick a customer was dismissed for a variety of reasons. In the

(continued...)

1 that a longer expiration period than one year was warranted.

2 38. Although UN Convention Article 12(c), contains the period of six years,
3 a five year period was used in Revised UCC § 5-106(d), the figure that had been used
4 in the UNCITRAL drafts up to this time.^{37/} It was significant that this time period
5 provided the beneficiary with considerably longer protection than the one year period
6 of Revised UCC § 5-106(c).

7 39. It is the considered opinion of the Institute that the reference in Revised §
8 5-106(d) to a letter of credit “that states that it is perpetual” was not limited to letters
9 of credit that contain the word “perpetual”. This interpretation is supported by the text
10 of Revised § 5-106 as a whole, Official Comment 4, the context of the rule, letter of
11 credit practice, logical inferences from the language chosen, and contemporaneous
12 and subsequent interpretations of the text outside the context of this case.

13 **The Text**

14
15
16 ³⁶(...continued)
17 first place, these credits are invariably advanced by attorneys for the beneficiary;
18 second, even in a rare case when they are not, they are part of transactions in which
19 the beneficiary is represented by counsel; third, even if it is not represented by
20 counsel, it is invariably able to obtain such representation; fourth, a bank that was not
21 interested in paying a letter of credit would not issue the undertaking because it
22 would be in force for five years; fifth, if there is any trickery, its source would
23 invariably be the applicant. In the highly improbable situation where the beneficiary
24 had no reasonable opportunity to obtain the advice of counsel and reasonably relied
25 on the advice of the applicant or another, there are available legal remedies outside
26 letter of credit law. Because the parties to complex letters of credit involving
sophisticated renewal provisions are invariably represented by counsel, the more
likely scenario where a beneficiary is surprised by the application of a rule is an
action against its counsel for malpractice. The classic case is that of *Beathard v.*
Chicago Football Club, Inc., 419 F. Supp. 1133 (D. Ill. 1976) in which the football
player/beneficiary’s attorney drafted a standby subject to UCP400 (1974 Revision)
permitting payment for playing weekly football games by presenting newspaper
clippings reporting the game. Unfortunately for the beneficiary, his attorney failed to
insert the word “irrevocable” in the UCP400 LC with the result that it was deemed to
be revocable under these rules.

27 ³⁷ The decision to add an extra year, making the period six years, was made at
28 the 21st Session of the Working Group, *Report of the Working Group on the*
International Contract Practices on the Work of its Twenty-Seventh Session, (New
York 12-25 February 1994), A/CN.9/391 (24 March 1994) at ¶97. It first appears in
the draft circulated in A/CN.9/WG.II/WP.83 (18 July 1994).

1 40. Subsection (d) was added to the text in 1994.^{38/} At that time, it was
2 originally drafted as a second sentence in Subsection (c) and at a very late stage in the
3 process separated into a new Subsection (d).^{39/} Given this drafting history, the reason
4 for the use of the term “states” becomes clear. An attempt was being made to
5 distinguish certain types of LCs that contained renewal provisions from those that had
6 no stated expiration date. The literary device used to contrast and compare this group
7 from the group in which no expiration date was stated was a reference to an LC that
8 “states” that it is perpetual. The emphasis here was between ‘not stating’ an
9 expiration date and ‘stating’ provisions in the terms of the credit that operated to make
10 the LC perpetual.

11 41. If the text of Revised § 5-106(d) is isolated from its context and drafting
12 evolution, it can be argued that the verb “states” should be interpreted to mean that it
13 applies only to LCs that contain the term “perpetual”. Such a hypertechnical
14 interpretation would seriously distort the application of these provisions, unreasonably
15 pushing some LCs that do not contain an expiration date or duration period into the
16 shorter one year period^{40/} and leaving an opening in the scheme for giving legal effect
17 to other perpetual undertakings as long as they did not use the term “perpetual”.^{41/}

18 42. Indeed, in the context of letter of credit practice, a hypertechnical
19 interpretation would render Subsection (d) meaningless. This interpretation would
20 result in overlooking (and giving effect to) a letter of credit that used an express

21 ³⁸ The 19 February 1994 Official Discussion Draft contained only the text of
22 Subsection (c) with its references to LCs with no stated expiration date. At this stage,
23 the text was identical to Revised UCC § 5-106(c).

24 ³⁹ The 5 April 1994 Informal Draft reflects the introduction of what is
25 substantially the text of Subsection (d) as an additional sentence in Subsection (c).
By the 23 May 1994 Informal Draft, this sentence had been finalized and is separated
into a new Subsection (d).

26 ⁴⁰ For example, a standby that does not contain an expiration date or provide for
27 duration but contains renewal clauses without a mechanism to end the cycles and
does not use the term “perpetual”.

28 ⁴¹ For example, a standby with an expiration date and a limitless renewal cycle
that provided that it was “eternal”.

1 alternative term such as “eternal”, “enduring”, “unlimited”, “endless”, “infinite”, or
2 “continual”. If this hypertechnical interpretation of “stated” were expanded to
3 encompass such other similar terms, the justification could only be the illogic of
4 restricting the Subsection to situations where the word “perpetual” is used . Once the
5 application of the rule is expanded to include other similar terms, one must search for
6 a principled reason for not applying it to a provision that operates perpetually without
7 using a particular term. This observation is not merely a matter of *reductio ad*
8 *absurdum* because, prior to Revised UCC Article 5, there was no accepted term to
9 describe a provision that operated perpetually. In a sense, the term “perpetual” was
10 invented during the work on the UN Convention to address this situation.^{42/} It was not,
11 therefore, used in § 5-106(d) as a term that was expected to appear in the credit as
12 such but to describe a category of provisions that would have the effect of making the
13 LC “perpetual”. To treat it otherwise would place form over substance.

14 43. Indeed, the principal role of this word is to separate the situation in which
15 Subsection (d) operates from that in which Subsection (c) operates. It would be
16 unfortunate if the shorter one year limit of Subsection (c) were to be applied to
17 standbys that contained mechanisms intended to provide for eternal duration but did
18 not contain “a stated expiration date or other provision that determines its duration”
19 simply because they did not contain the term “perpetual”. Where there is an attempt at
20 stating a perpetual or eternal duration, the longer period should apply and it would be
21 overreaching to apply Subsection (c) to such a situation.

22 44. The importance of the policy considerations underlying the limitation of
23
24

25 ⁴² As indicated, (see note 23 ff, above) it was first used in discussions relating
26 to the UN Convention. The only possible justification for the literal interpretation
27 would be if there had been an accepted usage by which “perpetual” LCs were issued
28 (although it would not explain why other LCs that had the same effect should be
excused). The term “perpetual” virtually never appears in letters of credit. In dealing
with thousands of standby letters of credit over more than twenty years, the officials
and advisors of the Institute have never encountered a standby letter of credit that
stated that it was perpetual.

1 perpetual undertakings is highlighted by Revised § 5-103(c).^{43/} One of the
2 fundamental principles underlying the approach to the Uniform Commercial Code is
3 that of freedom of contract or party autonomy by which the parties are free to write
4 their own agreement. ^{44/} As a result, the rules of the UCC are almost always default
5 rules applicable unless the parties otherwise agree or there are considerations of public
6 policy involved. Notably, one of the few provisions of Revised UCC Article 5 that
7 cannot be varied is Revised § 5-106(d). The decision not to permit this section to be
8 varied reflects the importance attached to the policy against perpetual undertakings
9 that it represents.^{45/} If the credit could have been rendered perpetual merely by using a
10 different word with the same meaning or a device which achieved perpetuity without
11 using any particular word, then there would have been little significance to prohibiting
12 variance since the parties could have avoided the effect of § 5-106(d) by the simplest
13 of drafting techniques and there would have been no need to exclude the section. The
14 prohibition against variance was intended to reach the substance of perpetuity and not
15 the formal use of the “perpetual”, revealing the speciousness of the hypertechnical
16 interpretation of this provision.^{46/}

18 ⁴³ Revised § 5-103(c) provides “[w]ith the exception of this subsection,
19 subsections (a) and (d), § 5-102(a)(9) and (10), 5-106(d), and 5-114(d), and except to
20 the extent prohibited in § 1-102(3) and 5-117(d), the effect of this article may be
21 varied by agreement or by a provision stated or incorporated by reference in an
22 undertaking. A term in an agreement or undertaking generally excusing liability or
23 generally limiting remedies for failure to perform obligations is not sufficient to vary
24 obligations prescribed by this article.” The text of Revised UCC Article 5 is reprinted
25 in *LC Rules & Laws* (Exhibit A) at 118.

26 ⁴⁴ This principle is set forth in UCC § 1-102 (3) and (4) and its Official
27 Comments and reflected in Revised § 5-103(c).

28 ⁴⁵ There would have been no point in including Revised § 5-106(c) in this
prohibition against variance. If the parties varied it by inserting an expiration date or
provision regarding duration, the subsection would have been inapplicable and, more
importantly, from a policy perspective, the policy objective of avoiding perpetual
undertakings would have been realized.

⁴⁶ In a contemporaneous article to the adoption of Revised UCC Article 5,
Gerald T. McLaughlin and Neil B. Cohen wrote in *New Rules for Establishing Letters
of Credit*, NYLJ (Jan. 29, 1996) that “[f]inally, it should be noted that § 5-106(d) of

(continued...)

1 **Revised § 5-106 Official Comment 4**

2 45. Official Comment 4 to Revised § 5-106(d) Sentence 2 makes it apparent
3 that neither Subsections (c) nor (d) were meant to be read in a hypertechnical manner.
4 It provides that “a letter of credit that may be revoked or terminated at the discretion
5 of the issuer by notice to the beneficiary is not ‘perpetual’.”

6 46. By suggesting that those LCs that provide for revocation or termination
7 at the discretion of the issuer are not perpetual, Sentence 2 of Official Comment 4
8 implies that those LCs that have a renewal clause but do not provide for revocation or
9 termination at the discretion of the issuer are perpetual and fall within the limitation of
10 Subsection (d).

11 47. Another important insight to be gained from Sentence 2 of Official
12 Comment 4 is that not any automatic renewal or “evergreen clause” will satisfy the
13 concerns of limitation of duration embodied in Subsection (d). To escape the
14 limitation by operation of law imposed by Subsection (d), the evergreen clause must
15 also contain a provision within the discretion of the issuer that enables it to terminate
16 or revoke its obligation. A provision that is within the control of the beneficiary does
17 not meet this requirement and is perpetual for purposes of this Subsection.^{47/}

18 **Contemporaneous and Subsequent Interpretations of the Text**

19 48. While there has not been an exhaustive discussion of § 5-106(d) in the
20

21 ⁴⁶(...continued)
22 Article 5 revision *prevents* the issuance of ‘perpetual letters of credit.’”

23 ⁴⁷ The distinction is illustrated in *B.E.I. Int’l, Inc. v. The Thai Military Bank*,
24 978 F.2d 440, 442-3 (8th Cir. 1992), a decision under Prior UCC Article 5. The LC in
25 that case did not contain an expiration date but provided that it would be renewed
26 without limitation if the beneficiary gave notice that it was to be renewed. In response
27 to arguments by the beneficiary that evergreen clauses should be given effect, the
28 court noted the important distinction that while an evergreen clause “typically
provides that the credit is issued for one year but will be extended automatically from
year to year *unless the bank gives notice* that it elects not to renew. [Citation omitted.]
The parties here refer to the extension provision in [Issuer]’s letter of credit as an
evergreen clause, but that loose terminology tends to mask an important
distinction--[Issuer]’s credit expired on a specific date unless ‘automatically extended’
by notice from [Beneficiary] to [Issuer].”

1 decisions on the literature, the comments that have been made do not support a
2 hypertechnical interpretation of the text limited only to situations where the term
3 “perpetual” is used.^{48/}

4 49. Typically the commentaries are content to repeat the terms of the text
5 without any analysis but it is interesting to note how they restate the terms. Such a
6 restatement, for example, occurs in one of the texts published by the Institute, *The*
7 *Official Commentary on the International Standby Practices*, published in 1998. In
8 summarizing § 5-106 at 295, it stated “Section 5-106(d) stipulates that if a letter of
9 credit indicates that it is perpetual, then it will expire five years after the date stated for
10 issuance.”

11 **E. Application of This Analysis to the Crestar LC**

12 50. The Crestar LC provides that it is “IRREVOCABLE” and that it
13 “SHALL EXPIRE ONE YEAR FROM THE DATE HEREOF PROVIDED
14 HOWEVER, THAT IT SHALL BE DEEMED AUTOMATICALLY RENEWED
15 WITHOUT AMENDMENT FOR ADDITIONAL ONE YEAR PERIODS FROM
16 THE PRESENT OR ANY FUTURE EXPIRATION DATE HEREOF, UNLESS AT
17 LEAST 30 DAYS PRIOR TO ANY SUCH DATE(S), GOLDEN WEST REFINING
18 COMPANY SHALL HAVE SENT CRESTAR BANK NOTICE BY CERTIFIED
19 MAIL RETURN RECEIPT REQUEST, OR OVERNIGHT COURIER SERVICE,
20 THAT GOLDEN WEST REFINING COMPANY ELECTS NOT TO REQUIRE
21 THIS LETTER OF CREDIT RENEWED FOR ANY SUCH ADDITIONAL
22 PERIOD.”

23 51. That the LC provides that it is “irrevocable” is irrelevant since that term
24 only means that the undertaking cannot be revoked during the time when it is in effect.
25 The question is when is it in effect. Since the LC does contain a period of duration, it

26 ⁴⁸ James G. Barnes and James. E. Byrne wrote in *Revision of U.C.C. Article 5*,
27 50 Bus. Law. 1449, at n.16 (1995) that “Revised Article 5 provides for LC
28 definiteness in other ways. For example, it presumes a one-year expiry period for LCs
that are silent on expiry and imposes a five year expiry period on LCs that *purport* to
be perpetual. See Revised § 5-106(c), (d).”

1 does not fall within the scope of Revised UCC § 5-106(c).

2 52. Since the LC does contain a mechanism for automatic renewal but does
3 not provide a final expiration date, it has the possibility of being a perpetual
4 undertaking within the scope of Revised § 5-106(d) unless it provides an acceptable
5 mechanism by which it can be terminated.

6 53. The LC does contain a mechanism for its termination, namely “UNLESS
7 AT LEAST 30 DAYS PRIOR TO ANY SUCH DATES(S), GOLDEN WEST
8 REFINING COMPANY SHALL HAVE SENT CRESTAR BANK NOTICE ...
9 THAT GOLDEN WEST REFINING COMPANY ELECTS NOT TO REQUIRE
10 THIS LETTER OF CREDIT RENEWED FOR ANY SUCH ADDITIONAL
11 PERIOD.”

12 54. This clause is unique in the collective experience of the Institute and its
13 advisors. It leaves the termination of the LC totally within the control of the
14 beneficiary. As such, it could have the consequence of keeping the credit in effect
15 longer than otherwise.^{49/} The clause does not satisfy concerns regarding unlimited
16 obligations since its mechanism for termination is within the discretion of the
17 beneficiary and not of the issuer. Consistently, all references to “evergreen” clauses
18 that satisfy concerns about the unlimited duration of letters of credit are ones that
19 empower the issuer to terminate its liability. Because this LC does contains an
20 expiration date (taking it out of Subsection (c)) but does not have a final expiration
21 date or a mechanism within the control of the issuer to terminate its obligation, it is a
22 “perpetual” letter of credit within the scope of Revised § 5-106(d).

23 55. As issued, the Crestar letter of credit which is the subject of this case is a
24 perpetual undertaking within the scope of Revised UCC § 5-106(d). As such, it
25 expires or ceases to be available for drawing five years after its date of issuance by
26

27 ⁴⁹ For example, the request not to renew were received less than 30 days before
28 the renewal. Absent this clause, a cancellation by the beneficiary would have
terminated the issuer’s liability. This clause may extend it to the end of the new
yearly cycle.

1 operation of law.

2 **F. Conclusion**

3 56. Issues relating to the duration of the ability to draw on a letter of credit
4 are of central importance to the sound operation of the letter of credit as a dependable,
5 safe and sound instrument of finance. Revised UCC § 5-106 is an important
6 component of that mechanism.

7 57. In retrospect, it is unfortunate that the use of the term “stated” in Revised
8 § 5-106(d) opens the possibility of a hypertechnical interpretation of the statute which
9 contravenes its intended meaning and the policies that it was intended to support.^{50/}
10 However, no drafting exercise is proof against every untoward unexpected and anti
11 commercial interpretation. For that reason, it is the office of the courts to inquire into
12 legislative intent and, as between two or more technically plausible interpretations, to
13 give effect to the one that best effectuates the policies underlying the provision. As to
14 that policy, there can be no room for any doubt. Where a letter of credit states that it is
15 perpetual by the use of a mechanism that is unlimited, it should be deemed to expire in
16 five years whether or not it contains an expiration date. Where it contains no such
17 mechanism and no expiration date, it should be deemed to expire in one year.

18 58. This interpretation is compelled by the context of Revised § 5-106 (c)
19 and (d) taken as a whole, the universal policy against letter of credit undertakings that
20 are of unlimited duration, the absence of the use of the precise term “perpetual” as an
21 operative term in letters of credit, and the absurd result reached by a hypertechnical
22 interpretation that places form over substance, treating credits as limited to five years
23 where they use the term “perpetual” but not where they use synonyms such as
24 “eternal” or provide for perpetual existence with using any term.

25
26 ⁵⁰ See *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809; 109 S.Ct. 1500,
27 1504 (1989) (“Although the State’s hypertechnical reading of the nondiscrimination
28 clause is not inconsistent with the language of that provision examined in isolation,
statutory language cannot be construed in a vacuum. It is a fundamental canon of
statutory construction that the words of a statute must be read in their context and
with a view to their place in the overall statutory scheme.”).

