

# GOING BEYOND THE FOUR CORNERS: REFLECTIONS ON TEACHING LETTERS OF CREDIT AS A SUBSET OF INTERNATIONAL BANKING LAW

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*(Below are footnotes to this 2014 article written by Professor James E. Byrne. For text of the article, see the 2018 DCW tribute issue to Professor Byrne.)*

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1. This Article was originally presented to the Transnational Commercial Law Teacher's Conference at the University of Washington School of Law in Seattle, Washington on 19-20 November 2012. It was subsequently presented in modified form at the "Transactional Lawyering: Theory, Practice & Pedagogy" symposium panel discussion entitled "Business Planning and Legal Drafting Pedagogy" at American University on April 5, 2013 in Washington, D.C. This Article represents a revision of these presentations.

2. Because the utility and purpose of this Article relates to its efficacy as a teaching tool, the author will keep much of the substantive legal instruction on letter of credit law and practice confined to the footnotes. The idea is to keep the reader focused on the teaching lessons by not getting bogged down with LC details. However, these details are in the footnotes for those who are interested.

3. In the United States, letters of credit are governed by UCC Article 5. U.C.C. Article 5 (Letters of Credit) was contained in the original Model U.C.C. that was approved in 1952. In 1957, Model U.C.C. Article 5 was revised extensively as a result of comments by the New York Law Revision Commission. See N.Y. LAW REV. COMM'N REP. 11, 46 (1956); see also Robert Braucher, *The 1956 Revision of the Uniform Commercial Code*, 2 VILL. L. REV. 3, 4-6, 11-12 (1956). This version was eventually adopted by all 50 states. A non-conforming amendment, styled Section 5-102(4), however, was adopted by Alabama, Arizona, Missouri and New York that displaced U.C.C. Article 5 where the letter of credit was determined to be subject to the Uniform Customs and Practices for Documentary Credits (UCP) published by the International Chamber of Commerce (ICC). See ALA. CODE § 7-5-102 (1966); ARIZ. REV. STAT. ANN. § 47-5102 (1984); MO. REV. STAT. § 400.5-102 (1965); N.Y. U.C.C. LAW § 5-102 (McKinney 1962); U.C.C. § 5-102(4) (1995). A joint American Bar Association/Banking Industry Task Force recommended the revision of original U.C.C. Article 5 in 1990. See Stanley F. Farrar et al., *An Examination Of U.C.C. Article 5 (Letters of Credit)*,

45 BUS. LAW 1521, 1536–37 (1990). The revision of U.C.C. Article 5, completed in October 1995, has been adopted by all 50 states, the District of Columbia, and Puerto Rico. See INSTITUTE OF INTERNATIONAL BANKING LAW & PRACTICE, LC RULES & LAWS: CRITICAL TEXTS FOR INDEPENDENT UNDERTAKINGS (James E. Byrne ed., 6th ed. 2014) [hereinafter LC RULES & LAWS] (offering a table of dates of adoption, effective dates, and state citations). For a summary of revised U.C.C., see generally James G. Barnes & James E. Byrne, *Letters of Credit: 1995 Cases*, 51 BUS. LAW. 1417 (1996) AND JAMES G. BARNES, JAMES E. BYRNE & AMELIA H. BOSS, *THE ABCS OF THE UCC. ARTICLE 5, LETTERS OF CREDIT* (Am. Bar Ass'n ed., 1998). This Article refers to the 1957 version of the Model Code as “Prior U.C.C. Article 5” and the 1995 version (including Article 9 amendments) as “Revised U.C.C. Article 5.”

4. UCP600 defines “Credit” as “means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.” *The Uniform Customs and Practice for Documentary Credits (UCP600)*, Int'l Chamber of Com. Publ'n No. 600 art. 2 (July 1, 2007) [hereinafter UCP600] (Definitions). Revised U.C.C. Article 5 defines “letter of credit” as “a definite undertaking that satisfies the requirements of Section 5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value. Revised U.C.C. § 5-102(a) (Definitions). ISP98 defines “standby letter of credit” as “an irrevocable, independent, documentary, and binding undertaking when issued and need not so state.” *The International Standby Practices 1998 (ISP98)*, Int'l Chamber of Com. Publ'n No. 590 R. 1.06(a) (Jan. 1, 1999) [hereinafter ISP98] (Nature of Standbys). The UN LC Convention defines “undertaking” as “an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.” Convention on Independent Guarantees and Stand-by Letters of Credit, art. 2(1), Dec. 11, 1995, 2169 U.N.T.S. 190, 35 I.L.M. 735 [hereinafter UN LC Convention] (Undertaking). URDG 758 defines “Demand guarantee” as “means any signed undertaking, however named or described, providing for payment on presentation of a complying demand. *The Uniform Rules for Demand Guarantees (URDG 758)*, Int'l Chamber of Com. Publ'n No. 758 art. 2 (2010) [hereinafter URDG 758] (Definitions).

5. The term “documentary” applied to the species instead of the genus is a misnomer since all types of letters of credit are documentary in the sense that they are conditioned on the presentation of a required document. The use of the term “letter of credit” embroils one in a problem of classification because in one sense, “letter of credit” is a name of an independent undertaking, where letters of credit are the best known species of this genus of independent undertakings. However, in a more limited sense, the term is associated with commercial or documentary credits or can include independent guarantees and standbys. Revised U.C.C. § 5-103(a) states that it applies to “letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.” Revised U.C.C. § 5-103(a) (1995). This definition includes standby letters of credit, independent guarantees, transferred credits, pre-advices, and reimbursement undertakings under the ICC Uniform Rules for Reimbursement Article 2(g) (Definitions), and an irrevocable undertaking to purchase documents by a nominated bank. Included within the scope of Revised U.C.C. Article 5, but different from “letters of credit”, are obligations such as advices, actions of nominated banks, to an extent the agreement with the applicant, and other undertakings that are not issued by the issuer or do not otherwise fall within the definition of “letter of credit.” There is no formal definition of “commercial letter of credit”, “standby”, or “Independent Demand Guarantee” that distinguishes one undertaking from another. See JAMES E. BYRNE, *HAWKLAND UNIFORM COMMERCIAL CODE SERIES, VOLUME 6B, [REV.] ARTICLE 5 LETTERS OF CREDIT § 5-102 [REV]* (Frederick H. Miller ed., 2010) [hereinafter HAWKLAND].

6. A commercial letter of credit is a definite documentary undertaking given by the issuer to a beneficiary that undertakes to honor a presentation of “live” commercial documents as a means of payment for the recent sale of goods or services. It is also sometimes misnamed a “documentary credit”, used to represent the contemporaneous delivery of goods. Historically, “documentary credit” signified an undertaking to pay only against documents of title, but since the acceptance of standbys by the UCP system, this term has come to signify any undertaking to pay

against documents, regardless of whether or not they are commercial documents. The definition of “letter of credit” in Revised U.C.C. § 5-102(a)(10) does include a commercial letter of credit. See Revised U.C.C. § 5-102(a)(10) (1995); HAWKLAND, *supra* note 5, at § 5-102 [Rev].

7. Standby letters of credit are definite documentary undertakings by an issuer to honor the presentation of documents that do not represent a demand for immediate payment for a transaction in goods or services. Standbys are not necessarily default undertakings, and are seen with a variety of different terms such as a direct pay element that may be seen in a financial standby, or a standby that functions to ensure payment under a contract for the sale of goods in the event that the buyer fails to pay, distinguishing them from a commercial letter of credit. Under the ISP98, the term “standby” encompasses even “clean” (i.e. demand only) letters of credit, and the Revised U.C.C. Article 5 definition includes standby letters of credit. See ISP98, *supra* note 4; Revised U.C.C. § 5-102 (1995). There is no legal distinction between standby letters of credit and any other type of letter of credit. More colloquial classifications are made between “commercial standbys,” “insurance (or reinsurance) standbys,” “bid/tender bond” standbys or (independent) guarantees, “performance bond” standbys or (independent) guarantees, “supersedeas bond” standbys, and “advance payment” standbys or (independent) guarantees. In the United States, banks are required by regulators to maintain capital based on risk weighting aligned with categorization as a commercial letter of credit, a performance standby, or a financial standby under the Basel I and Basel II risk rating system. HAWKLAND, *supra* note 5, at § 5-101:17 [Rev]. Under this system, the risk of a commercial letter of credit involving goods and assumed to be self-liquidating is perceived to be less than the risk of a standby assuring performance. Moreover, a standby assuring performance is perceived to be less risky than a financial letter of credit in which the obligation is simply the payment of money. While it is possible to distinguish performance and financial standbys predicated on the demand for payment being the trigger, i.e. payment of money or something else, these distinctions are theoretically unsatisfactory and not truly distinguishable in application. See *id.*

8. “Independent guarantees are definite documentary undertakings by a guarantor to honor the presentation of documents that do not represent immediate payment for a transaction in goods or services.” HAWKLAND, *supra* note 5, at § 5-102:126 [Rev]. Like standbys, independent guarantees can be issued under the ISP98, and do not necessarily fall into the category of default undertakings since they can have direct pay elements, although they rarely do. Abstractly, if an independent guarantee is subject only to local law or rules like URDG 758, the independent guarantee is functionally equivalent to a standby LC with some possible differences in practice and party expectations; however, if the independent guarantee is fully independent, there is no difference between the guarantee and a standby. Since the Revised U.C.C. definition of “letter of credit” includes independent guarantees, there is no legal distinction under the U.C.C. between independent guarantees and any other type of letter of credit. See Revised U.C.C. § 5-102(a)(10); HAWKLAND, *supra* note 5, at § 5-102:126 [Rev].

9. UCP600 defines “confirmation” as “a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.” UCP600, *supra* note 4, at art. 2 (Definitions). ISP98 defines “confirmer” as “a person who, upon an issuer’s nomination to do so, adds to the issuer’s undertaking its own undertaking to honor a standby.” ISP98, *supra* note 4, at art. 1.09(a) (Definitions). A bank that is nominated as confirmer is not a confirmer until it adds its confirmation, that is to say, when it acts on the nomination. The definition of “confirmer” in Revised U.C.C. indicates that only when a confirmer so acts does it become a confirmer. U.C.C. § 5-102(a)(4). A confirmer adds its undertaking to that of the issuer and is obligated on the letter of credit to the extent of its confirmation. Its obligation, therefore, must be understood from the perspective of the obligation to the beneficiary and its rights against the issuer. Without confirmation, a beneficiary assumes the risk that the issuer will be solvent when a complying presentation is made, that the issuer will respect letter of credit practice, will not seek to avoid its obligations by raising technical arguments, and that the country where the issuer is located will not interfere with payment. Usually an issuer nominates a bank to confirm in the credit itself, an amendment, or some other communication by authorizing or requesting the bank to do so as a way for a beneficiary to mitigate risks by requiring that a letter of credit be confirmed by a bank that is local to the beneficiary and, presumably, subject to jurisdiction in a place that is accessible to or comfortable to the beneficiary. While risks can also be set off by insurance, confirmation is often a simpler way for a beneficiary to make sure its presentation will be honored. Nomination is usually contained in a credit or amendment; it can be contained in another communication or a combination of them.

While a confirmation is similar to the undertaking of an issuer, however, it is not necessarily identical, an aspect of confirmations that is not made explicit and which must be determined from the terms and conditions of the confirmation itself. In addition, a confirmation, while similar to the undertaking of and for the account of the issuer, differs in that the beneficiary must present documents to the confirmer in order to trigger its undertaking unless the confirmation or applicable practice rules provide otherwise. Confirmation in standbys involves different issues than in Commercial LCs. See, e.g., ISP98, *supra* note 4, Model Forms 7, 8, (allowing for the beneficiary, effectively, to look only to the confirmer). See HAWKLAND, *supra* note 2, at § 5-107:17 [Rev]; INTERNATIONAL CHAMBER OF COMMERCE, COMMENTARY ON UCP 600, ARTICLE-BY-ARTICLE ANALYSIS OF THE UCP 600 DRAFTING GROUP, ICC Publ'n No. 680 at 91–92 (2007); JAMES E. BYRNE, ISP98 & UCP500 COMPARED 42 (2000).

10. See *infra* note 25.

11. See *infra* note 30.

12. The Restatement (Third) of Suretyship and Guaranty specifically states that while “suretyship law is a potential source of generally appropriate analogies[.]” the Restatement does not apply to letters of credit of any type. RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 4 cmt. c (1996). The practical reason for this exclusion is that the law and practice rules governing letters of credit are well-developed, and “[n]o good purpose would be served by disturbing [this] state of affairs.” *Id.* Section 4(d) makes it clear that “instruments analogous to letters of credit[.]” like independent guarantees, are also “beyond the scope” of the restatement. *Id.* at § 4 cmt. d. The basic difference between a suretyship guarantee and a letter of credit is that in a suretyship, any defenses asserted by the primary obligor, even in the underlying transaction may be asserted by the guarantor. In letters of credit, the applicant cannot prevent or assert defenses against the beneficiary in order to prevent the issuer from honoring a complying presentation. The independence principle, that the undertaking by the issuer to pay against a complying presentation is a separate undertaking independent of any underlying contract, is unique to letter of credit practice. See U.C.C. § 5-101 official cmt. (“The objects of the original and revised Article 5 are best achieved by defining the peculiar characteristics of a letter of credit that distinguish it and the legal consequences of its use from other forms of assurance such as secondary guarantees, performance bonds and insurance policies, and from ordinary contracts, fiduciary engagements, and escrow arrangements . . .”).

13. “As is the case with much of letter of credit law, it is futile to look to general principles of contract or commercial law for antecedents to the law of letter of credit fraud. Its origin lies as much in the mercantile character of the letter of credit as it does in law. It is *sui generis*.” HAWKLAND, *supra* note 5, at § 5-109:5 [Rev]. Letters of credit developed not out of contract law *per se*, but rather as a mercantile specialty. Early English cases have had little impact on the development of letters of credit in business. “[English] [c]ase law proved a particularly inapt method to address the fundamental doctrinal questions and challenges that letters of credit presented to the relatively primitive doctrines of bilateral contracts applied to questions such as consideration, characterization, enforceability, mutuality, offer and acceptance, what constitutes a confirmation, and the like.” *Id.* at § 5-101:1 [Rev]. Letters of credit do not create fiduciary relationships, and the issuer only takes on an obligation to pay according to the terms of the credit. It is up to the applicant to set for the terms of the agreement, what practice rules govern the undertaking, and no terms are truly “bargained for.” If the letter of credit were subjected to traditional bilateral contracts, it is unlikely that such promises made by the applicant/issuer would be enforceable because the traditional law of bilateral contracts has its own formality requirements and also would require that the contract be supported by consideration. Furthermore, letters of credit do not have a requirement that the beneficiary “accept” in the traditional sense of contract formation for the LC to become operative. Some legal systems feel the need to create a fiction of “beneficiary acceptance” because they erroneously believe that the LC is a traditional bilateral contract; however, no such fiction is necessary under Revised U.C.C. Article 5, Prior U.C.C. Article 5, or U.S. common law. HAWKLAND, *supra* note 5, at §§ 5-101:1 [Rev], 5-102:39 [Rev]; see, e.g., *Eastland Bank v. Massbank for Sav.*, 749 F. Supp. 433 (D.R.I. 1990) (determining whether court could exercise personal jurisdiction over out-of-state LC beneficiary; judge opining that it was inappropriate to compare the relationship between beneficiary and issuing bank with that of two parties in contract).

14. The Official Comment to the Revised U.C.C. § 5-101 (Short Title) describes a letter of credit as an “idiosyncratic form of undertaking that supports performance of an obligation” and seeks to define “the peculiar characteristics . . . that distinguish it and the legal consequences of its use from other forms of assurance . . . .” Revised U.C.C. § 5-101 (1995). What distinguishes letters of credit is that it is a voluntary obligation, and as such is distinguished from other types of obligations that are imposed by the law like torts. Also, because of a letter of credit’s tripartite nature and the independence of an issuer’s undertaking, it does not fit well within the framework of traditional bilateral contract or any other category of law. The issuer deals “at arm’s length” and is obligated to pay only according to the terms of the letter of credit. The issuer is not a fiduciary for either the beneficiary or the applicant. The relationship is governed by rules of practice and local law, like Revised U.C.C. Article 5. The responsibility to the applicant is set forth in the parties’ agreement, which is how the relationship and terms of payment will be determined. “Because letters of credit are not well understood by lawyers or judges, it is common for judicial opinions to provide a brief introduction to the transaction and the law, often as a preface to explaining the doctrine of independence.” HAWKLAND, *supra* note 5, at §§ 5-101:9, 5-103:13; *see also* Confeccoes Texteis De Vouzela, LDA v. Riggs Nat’l Bank of Washington D.C., 944 F.2d 851 (D.C. Cir. 1993) (confirming bank in letter of credit transaction cannot be sued in tort by account party); *In re* B.C. Rogers Poultry, Inc., 455 Bankruptcy Reporter 524, 564–65 (Bankr. S.D. Miss. 2009) (describing an LC as a three party arrangement); *Caroline Apartments v. M&I Bank*, 334 Wis. 2d 808 (Wis. Ct. App. 2011) (unpublished) (finding that LCs form a unique legal relationship among the parties, without consideration and mutual obligation, and citing *Bank of Cochin, Ltd. v. Manufacturers Hanover Trust Co.*, 612 F. Supp. 1533, 1537 (S.D.N.Y. 1985), which was decided under Prior U.C.C. Article 5, for the proposition that an LC is a relationship with no perfect analogies but nevertheless a well-defined set of rights and obligations); *see also* *Alhadeff v. Meridian on Bainbridge Island, LLC*, 220 P.3d 1214, 1217–23 (Wash. 2009) (applying Washington U.C.C. Art. 5 [Rev] and providing a diagram of a four party LC).

15. As indicated in Chapter 15 of the Restatement 2d of the Law: Contracts, Chapter 15 (Assignment and Delegation), transfer of contractual rights is distinguished between “assignment” of rights and “delegation” of duties. RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981). Both of these actions can be loosely referred to as a “transfer.” The Introductory Note to the Chapter explains that the two topics are “part of the larger subject of the transfer of intangible property.” RESTATEMENT (SECOND) OF CONTRACTS, Ch.15 Introductory Note (1981).

16. *See* Revised U.C.C. § 5-112; UCP600, *supra* note 4, at art. 38 (Transferable Credits); UN Convention *supra* note 4, at art. 9 (Transfer of Beneficiary’s Right to Demand Payment); URDG 758, *supra* note 4, at art. 33 (Transfer of Guarantees and Assignment of Proceeds); ISP98, *supra* note 4, at R. 6 (Transfer, Assignment, and Transfer by Operation of Law).

17. *See* UCP600, *supra* note 4, at art. 39 (Assignment of Proceeds); ISP98, *supra* note 4, at R. 6 (Transfer, Assignment, and Transfer by Operation of Law); UN LC Convention, *supra* note 4, at art. 10 (Assignment of Proceeds); URDG 758, *supra* note 4, at art. 33 (Transfer of Guarantee and Assignment of Proceeds); *see also* Revised U.C.C. § 5-114 (Assignment of Proceeds) (generally following the approach with a limited exception where the assignee holds the original LC).

18. At common law, choses in action, including contract rights were not transferrable because debts were believed to be personal to the party that incurred it. If a contract were to be assigned, it was seen as “maintenance-as tending to encourage litigation” much like the modern view of assignment of tort. E. A. FARNSWORTH, CONTRACTS § 11.2 (4th ed. 2004). In the words of Lord Coke, assignment of rights “would be the occasion of multiplying contentions and suits.” *Id.* Contracts were based on the mutual agreement of both parties and consent to create a contract based on free choice. The sanctity of the contract would be broken if one party could pass its obligation onto another. Later modifications at common law still viewed assignment as giving the assignee just power of attorney as an agent of the assignor, but only to pay the debts of the assignor. In the 1800s, with the advent of code pleading, individuals who could prove that they were a “real party in interest” could sue on the contract, starting the new trend of free assignability.

Likewise, there is no room in letters of credit for a substantial performance. Substantial performance standards are most often applied in construction and land transfer contracts, and while these transactions may underlie a letter of credit transaction, the independence principle separates the two transactions. Given the development of the UCP of what is required for a transport document, it is difficult to imagine where “idiosyncratic differences” of the parties would ever become an issue. Either a party submits the required documents under a credit or it does not. Either the issuer examines the documents for compliance or is precluded. To include a substantial performance standard in letter of credit practice would remove the element of certainty that makes letters of credit attractive payment methods in the first place. See P. S. ATIYAH, *INTRODUCTION TO THE LAW OF CONTRACT* 1–36 (5th ed. 1995); FARNSWORTH, *supra* note 18, at §§ 8.12, 11.2.

19. The ISP98, UCP600, and UCC all include preclusion rules. Revised U.C.C. § 5-108(c) (1995) (Issuer’s Rights and Obligations); URDG 758, *supra* note 4, at art. 24(d)–(f) (Non Complying Demand, Waiver and Notice); ISP98, *supra* note 4, at R. 5.03 (Failure to Give Timely Notice of Dishonour); UCP600, *supra* note 4, at art. 16(c), (f) (Discrepant Documents, Waiver and Notice). Preclusion operates as a way to provide certainty and finality with letter of credit practice, and also as a way to ensure rigor and instill confidence. It operates to assure a beneficiary that an issuer will not be complacent with the applicant, and will give the beneficiary “prompt notice of refusal detailing discrepancies and that the [issuer will not wait for] market movements that might be more favorable before taking a position on the presentation.” See HAWKLAND, *supra* note 5, at § 5-108:8 [Rev]. Preclusion applies both to the failure to examine the documents within a reasonable time, as well as failure to give timely notice of refusal. A bank is not expected to give notice instantaneously, but it may not deliberately delay. The practice rules largely dictate what an issuer must do to give timely notice of dishonor, from calculation of the time to dishonor, with what specificity a notice must contain of discrepancies, and in what medium the notice must come in. At a minimum, the notice must not be ambiguous as to why the presentation is being refused, or provide information on how to cure it. Deference is also given to practice as to what is considered timely and reasonable standards. The practice rules and laws operate without regard to the curability of the discrepancies; however, the notice has at least some relevance to the beneficiary’s ability to cure discrepancies. Failure to state a reason for dishonor will preclude the issuer from asserting the defect at a later date. One of the reasons that the concept has proven difficult for lawyers and courts is that it appears to be contrary to the banks’ interest in that it holds them to their first expression of their response within a relatively narrow time frame and visits on them what appear to be draconian penalties even in situations where any omission or deficiency on the bank’s part could not cause harm because the discrepancy could not be cured. It is also important to note that for public policy reasons both the failure to notify of the expiry of the credit or of letter of credit fraud are outside of the preclusion rule. See *id.*; JAMES E. BYRNE, VINCENT M. MAULELLA, SOH CHEE SENG & ALEXANDER ZELENOV, *UCP600: AN ANALYTICAL COMMENTARY* 597–600, 752–56 (2010) [hereinafter UCP600 Commentary].

20. The notion of curability is linked to the concept of separateness of presentation. ISP98 Rule 3.07 (Separateness of Presentation), and URDG Article 18(a) (Separateness of Each Demand) both contain provisions stating that unless the undertaking expressly states, a beneficiary may make multiple presentations under a letter of credit so long as it has not expired. ISP98, *supra* note 2, at R. 3.07; URDG 758, *supra* note 2, at art. 18(a). In theory, a beneficiary could attempt to cure any discrepancies that were the basis for the original dishonor by the bank, and still receive the amount available under the credit. The UCP does not expressly so state, but the ability to cure has been recognized by the ICC. See *Decisions (1975–79) of the ICC Banking Commission*, ICC Publ’n No. 371 R. 13. Preclusion, however, is not based primarily on the right to cure discrepancies but on the importance of forcing an issuer or confirmer to make a timely and complete statement of the grounds for refusal so as to prevent it from raising discrepancies in a piecemeal fashion or from delaying refusal pending shifts in the market price of goods. See JAMES E. BYRNE, *THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES* 113–14 (James G. Barnes, ed., 1998).

21. See, e.g., *Torco Oil Co. v. Innovative Thermal Corp.*, 763 F. Supp. 1445, 1445–46 (N.D. Ill. 1991) (denying motions for judgment notwithstanding verdict or new trial and overlooking the significance of UCC Section 2-325 (“Letter of Credit” Term; “Confirmed Credit”) for the significance of the term “Letter of Credit” in a contract).

22. The author has spent more than 15 years writing summaries of international letter of credit cases in the Annual Survey of Letter of Credit Law & Practice (IIBLP) (1996–2009), the Annual Review of International Banking Law & Practice (2010–present), and as co-author of the American Bar Association's Business Law Section's Business Lawyer UCC Survey. This opinion of judicial decisions involving letters of credit derives from that experience and from working with bankers and lawyers around the world in annual sessions in the Americas, Europe, the Middle East, and Asia under the auspices of the Institute of International Banking Law & Practice. It should be noted, however, that under a well-drafted and explained statutory scheme, these estimates improve considerably, based on the experience of courts in the US before a statutory scheme (pre U.C.C. Article 5, pre 1956), under a skeletal and premature scheme (Prior U.C.C. Article 5 – 1956 to 1998), and under a modern, sophisticated, systematic statute with commentary (Revised U.C.C. Article 5 – post 1998). See generally James E. Byrne, *The Revision of U.C.C. Article 5: A Strategy for Success*, 56 *Brook. L. Rev.* 13, 13 (1991).

23. See, e.g., James E. Byrne, *Introduction to Demand Guarantees & Standbys* (2012).

24. See E.P. Ellinger, *The Doctrine of Strict Compliance: Its Development and Current Construction* (2000), reprinted in INSTITUTE OF INTERNATIONAL BANKING LAW & PRACTICE, ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 64 (2001).

25. Bank-to-bank reimbursement is a mechanism by which an issuer can encourage a nominated bank to act on a nomination by indicating a bank to which it can turn for reimbursement. UCP600, *supra* note 4, art. 13 (Bank-to-Bank Reimbursement Arrangements) (providing basic rules for such reimbursements). The Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (URR725) provide comprehensive rules for bank-to-bank reimbursements. *The Uniform Rules for Bank-to-Bank Reimbursements*, Int'l Chamber of Com. Publ'n No. 725 (2008) [hereinafter URR725]. URR725 Article 2(g) (Definitions) defines "reimbursement undertaking" as "a separate irrevocable undertaking of the reimbursing bank, issued upon the authorization or request of the issuing bank, to the claiming bank named in the reimbursement authorization, to honour that bank's reimbursement claim, provided the terms and conditions of the reimbursement undertaking have been complied with." *Id.* art. 2(g). Revised U.C.C. § 5-108(i)(1) and (2) set forth the rights of an issuer or confirmer to obtain reimbursement after honoring a complying presentation. Revised U.C.C. § 5-108(i)(1), (2). ISP98 Rule 8.04 (Bank-to-Bank Reimbursement) incorporates the current version of the URR by reference. Most often, these obligations arise when the issuing or corresponding bank does not have a correspondent relationship with a bank that acts in according to terms of the LC. ISP98, *supra* note 4, at R. 8.04. Reimbursement undertakings are important to letter of credit practice because they provide the "necessary lubricant in correspondent banking relationships permitting banks which do not have an account relationship to act on behalf of other banks with the knowledge that they can claim reimbursement from a local bank with which they have a relationship."— BYRNE, *supra* note 20, at 289; see generally DAN TAYLOR, ICC GUIDE TO BANK TO BANK REIMBURSEMENTS UNDER DOCUMENTARY CREDITS (1997).

26. The 1995 revision of the Uniform Rules for Collections ("URC522") is a revision of the URC322, published in 1978. *The Uniform Rules for Collections (URC522)*, Int'l Chamber of Com. Publ'n No. 522 (1995); *The Uniform Rules for Collections (URC322)*, Int'l Chamber of Com. Publ'n No. 322 (1978). These rules guide the practice of handling of collections (sometimes referred to as "documentary collections" and "clean collections"), and they are completely different from handling of presentations under an LC, even when waiver of discrepancies is sought. Bank collections are handled under U.C.C. Article 4.

27. SWIFT/S.W.I.F.T. stands for "Society for Worldwide Interbank Financial Telecommunication." After the completion of Revised U.C.C. Article 5, the periods between the letters were dropped and the name is now "SWIFT." SWIFT is a financial industry owned, cooperative network that supplies secure, standardized messaging services and interface software, servicing more than 10,000 financial institutions in more than 212 countries. Swift, [http://www.swift.com/about\\_swift/index](http://www.swift.com/about_swift/index) (last visited Nov. 12, 2013). SWIFT's worldwide community is made up of banks, broker/dealers, investment managers, and market infrastructures in payments, securities, treasury and trade. SWIFT, [http://www.swift.com/about\\_swift/community/swift\\_user\\_categories](http://www.swift.com/about_swift/community/swift_user_categories) (last visited Nov. 12, 2013).. It is estimated that more than 90 percent of their commercial LCs by major LC banks are issued via SWIFT MT 700.

André Casterman, *ICC Survey 2012, Swift Trade Traffic-2011 Statistics*, ICC BANKING COMMISSION 20 (Mar. 27, 2012), available at [http://www.iccwbo.org/Data/Documents/Banking/SWIFT-Trade-Traffic-Stats\\_Andre-Casterman&ei=2sqDUtDCK-6t4AOEk4DADw&usg=AFQjCNGEUYzBlj2HgUOY9zPErdMEf1ag&sig2=IUDC01Ce8Hzc2\\_MSZH9PYw&bvm=bv.56343320,d.dmg](http://www.iccwbo.org/Data/Documents/Banking/SWIFT-Trade-Traffic-Stats_Andre-Casterman&ei=2sqDUtDCK-6t4AOEk4DADw&usg=AFQjCNGEUYzBlj2HgUOY9zPErdMEf1ag&sig2=IUDC01Ce8Hzc2_MSZH9PYw&bvm=bv.56343320,d.dmg). Information about SWIFT can be obtained at [www.swift.com](http://www.swift.com).

28. Authentication is the method by which a document may be signed, and also confirming the identities of an issuer, beneficiary or confirmer. The authentication must show who made the authentication and include that party's signature or initials. If the authentication appears to have been made by a party other than the issuer of the document, the authentication must clearly show what capacity that party had to authenticate the correction or alteration. Under UCP600 Article 3 (Interpretations), it can be understood as an alternative to a "signed" document as long as it proves that the document is legitimately verified. See UCP600, *supra* note 4, at art. 3. Under UCP600 Article 9(b), (c), & (f) (Advising of Credits and Amendments), in the process of advising a credit with respect to the sender and the integrity of the transmission, a certain level of formality is implicit. *Id.* at art. 9(b), (c), (f). Revised U.C.C. § 5-104 requires that a credit or similar undertaking be "authenticated." Revised U.C.C. § 5-104. While this term is not defined in U.C.C. Article 1, Official Comment 2 to Revised U.C.C. § 5-104 states that it refers to the "authentication only of the identity of the issuer, confirmer, or adviser." Revised U.C.C. § 5-104 cmt. 2. "The statute indicates two means by which the record may be authenticated, namely: (1) signature or (2) 'in accordance with the agreement of the parties or the standard practice referred to in Section 5-108.'" HAWKLAND, *supra* note 5, at § 5-104:8 [Rev]. Where a signature is not authentic, the bank or person purportedly having signed it is not obligated but the person actually signing it would be liable. The reference to standard LC practice is to the practice of "financial institutions that regularly issue letters of credit." Revised U.C.C. § 5-108(e). "In effect, this provision defers to the practices of bankers with respect to authentication, recognizing the high degree of sophistication that has evolved in providing secured means of authentication." *Id.* at § 5-104:8 [Rev]. It is important to note, however, that authentication is not used to determine whether the documents or signatures are indeed genuine. Issuers take the documents on their face value. See *id.*; INSTITUTE OF INTERNATIONAL BANKING LAW & PRACTICE, 2007 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 183-84 (James E. Byrne & Christopher S. Byrnes eds., 2007) (discussing *Hilton Group, PLC v. Branch Banking & Trust Co. of South Carolina*, No. 2:05-937-DCN (D.S.C. Nov. 15, 2006) (unpublished), a rare case of an LC where the signature of the issuer is forged). In recent times, the systems of authentication are sufficiently effective that the problem of a forged LC rarely arises. The use of banks as advisers and the widespread use of the SWIFT system have effectively eliminated these issues. See UCP600 COMMENTARY, *supra* note 19, at 221–23, 1275, 1440.

29. LCs are not negotiable instruments. However, there are some credits under which negotiation, i.e. the transfer from one bank to another, occur. See James E. Byrne, *Negotiation in Letter of Credit Practice and Law: The Evolution of the Doctrine*, 42 TEX. INT'L L.J. 561 (2007).

30. Pre-advice is provided for in UCP600 Article 11 (Teletransmitted and Pre-Advised Credits and Amendments). UCP600, *supra* note 4, at art. 11. The need for pre-advice arises in a commercial transaction where the beneficiary requires an LC for financing to produce the product but the details of transportation are not available. Were the credit issued without these details, the issuer would have to consent to any amendment; a pre-advice is an obligation of the issuer to issue a similar credit which is not inconsistent, permitting omitted details to be inserted. UCP600 Article 11 (Teletransmitted and Pre-Advised Credits and Amendments) defines "pre-advice," which is a practice in commercial LCs where a bank will issue an advice, indicating that it will, under certain indicated terms, issue a credit on certain indicated terms. *Id.* While the definition of "credit" in UCP600 Article 2 does not expressly refer to a pre-advice, if read with Article 11, Article 2's definition certainly does encompass a pre-advice. *Id.* at arts. 2, 11. Under the UCP, this advice is effectively equated to an LC because the issuer is irrevocably obligated to issue a credit under its specified terms without "delay." These types of undertakings are vulnerable to misuse. The definition of "credit" in Revised U.C.C. § 5-102(a)(10) raises a question about whether a pre-advice is truly an LC because the pre-advice is not the operative credit instrument. Revised U.C.C. § 5-102(a)(10). Nevertheless, this type of obligation is the functional equivalent of an LC and should be regarded as such. See HAWKLAND, *supra* note 5, at § 5-102:127 [Rev]; UCP600 Commentary, *supra* note 19, at 119; see also *Bouzo v. Citibank, N.A.*, 96 F.3d 51 (2d Cir.

1996) (making summary judgment in favor of alleged issuer who promised in writing to “issue an unconditional, irrevocable bank pay order” reversed because terms were ambiguous; purported beneficiary had argued, *inter alia*, that the undertaking was a pre-advice although this theory was not mentioned in the appellate decision).

31. Occasionally, such topics can be addressed in required graded papers, assignments, or with each student reporting to the class on his or her assigned topic.

32. The exceptions include LC fraud or abuse (although there are practice issues grounded in the correspondent banking network that give rise to exceptions for protected persons or the equivalent of good-faith purchasers with qualifications), formality, and the power to issue LC-type undertakings. See, e.g., *Consol. Aluminum Corp. v. Bank of Va.*, 704 F.2d 136 (4th Cir. 1983) (discussing the power to issue undertakings and issues regarding formality).

33. The UN LC Convention opened for signature in December 1995 by the U.N. General Assembly; it was adopted by resolution on 26 January 1996 at its fiftieth session; and it was signed by seven nations, including the United States, which signed on 11 December 1997. UN LC Convention, *supra* note 4. It went into effect on 1 January 2000 and has been adopted by Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, and Tunisia. The Convention has been signed but not ratified by the United States of America as of 1 January 2014. The UN LC Convention was drafted by the United Nations Commission on International Trade Law (UNCITRAL) in the six official languages of the UN. For the text of the UN LC Convention and a list of the countries which have ratified the Convention, see [www.uncitral.org](http://www.uncitral.org). The text and explanatory note are also reprinted in LC RULES & LAWS, *supra* note 3.

34. See Revised U.C.C. § 5 (1995); LC RULES & LAWS, *supra* note 3.

35. Fa Shi No. 13 [Provisions of the Supreme People’s Court on Certain Issues Concerning Trial of Cases Involving Letter of Credit Disputes] (promulgated by the Sup. People’s Ct., Nov. 14, 2005, effective Jan. 1, 2006) (China), translated in LC RULES & LAWS, *supra* note 3, at 305. Also, the Supreme People’s Court Provisions Concerning Jurisdiction over Foreign-Related Civil and Commercial Cases, No. 22 was adopted at the 1203rd Session of the Judicial Committee of the Supreme People’s Court on 25 December 2001, promulgated by the Supreme People’s Court of the People’s Republic of China on 25 February 2002, and effective as of 1 March 2002. An English translation is contained in LC RULES AND LAWS, *supra* note 3, at 308.

36. The current version of the UCP600 became effective 1 July 2007 and was promulgated by the Commission on Banking Technique & Practice of the International Chamber of Commerce (ICC Banking Commission). See *generally* UCP600, *supra* note 4. For studies of the UCP600, see James Byrne, *THE COMPARISON OF UCP600 & UCP500* (2007); UCP600 COMMENTARY, *supra* note 19; *Commentary on UCP600*, *supra* note 9. Useful articles include James Byrne & Lee H. Davis, *New Rules for Commercial Letters of Credit Under UCP600*, 39 UCC L.J. 3 (2007) and E.P. Ellinger, *The UCP-500: Considering A New Revision*, 2004 LLOYD’S MAR. & COM. L. Q. 30 (2004). Prior versions were issued in 1933 (UCP82), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), 1983 (UCP400), and 1993 (UCP500). The official text is the English text. UCP600, *reprinted* in LC RULES & LAWS, *supra* note 3, at 1. Although UCP600 has been or will be translated into virtually every language in which international commerce is conducted, the only official translation is French. *Id.* Therefore, care must be taken with translations of the official English version as they are only as good as the person or persons translating them and the review process instituted by the various ICC national committees. *Id.* For studies in the evolution of the UCP, see James E. Byrne, *Ten Major Stages In The Evolution of Letter of Credit Practice*, DOCUMENTARY CREDIT WORLD, Nov./Dec. 2003, at 28; Dan Taylor, *The History of the UCP*, DOCUMENTARY CREDIT WORLD, Dec. 1999, at 11. Mr. Taylor has usefully collected all prior versions of the UCP into one volume. DAN TAYLOR, *THE COMPLETE UCP: UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS: TEXTS, RULES AND HISTORY 1920–2007* (2008).

37. The International Standby Practices (ISP98), was completed in 1998. The text was endorsed by BAFT/IFSA (formerly the U.S. Council on International Banking), the United Nations Commission on International Trade Law, and

by the International Chamber of Commerce in 1998, and became effective on 1 January 1999. ISP98 is published as ICC Publication No. 590 and is generally cited as ISP98 (ICC No. 590). The rules are explained in THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES, *supra* note 20. The ISP98 has been supplemented by the ISP98 Model Forms. The ISP98 Model Forms are attached as Appendix C. They may also be found online at [www.iiblp.org/ISPForms](http://www.iiblp.org/ISPForms). Additional information on the text of the ISP98 and educational tools may be obtained from the Institute of International Banking Law & Practice, Inc., P.O. Box 2235, Montgomery Village, MD 20886 or at <http://www.iiblp.org>. The full text of ISP98 has been reprinted in LC RULES & LAWS, *supra* note 3.

38. URDG 758, *supra* note 4; *see generally* DR. GEORGES AFFAKI & SIR ROY GOODE, GUIDE TO ICC RULES FOR DEMAND GUARANTEES URDG 758 (2011); “The URDG 758 Compared with ISP98 and UCP600: Part Three of the CSGP Training Program” (Institute of International Banking Law & Practice CD-ROM rel. 2013).

39. At its May 2000 meeting the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC Banking Commission) established a task force to document international standard banking practice for the examination of documents presented under documentary credits issued subject to the UCP. The ICC’s International Standard Banking Practice (ISBP) for the Examination of Documents under Documentary Credits complements the UCP500, filling in gaps and explaining the practices that underline UCP500. INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS (2003); *see Uniform Customs & Practice for Documentary Credits*, Int’l Chamber of Comm., Publ’n No. 500 art. 2 (Jan 1, 1994) [hereinafter UCP500]. It is a statement of “standard banking practice” referenced in UCP500 Article 13(a) Sentence 2. The ISBP is based on ICC Banking Commission Opinions and Decisions, and its understanding of the practices reflected in them. To complete it, practices were compiled from some 39 ICC national committees and a substantial number of individual banks. It was an attempt to provide an international formulation to various national statements of practice, most notably the Standard Practice for the Examination of Documents promulgated by IFSA with the American Bankers Association. This ISBP was aligned with the UCP600 in 2007 (ISBP 2007) and extensively updated as ISBP 2013. *See* INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS (2007) , reprinted in LC RULES AND LAWS, *supra* note 3, at 161; INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER UCP 600 (2013) , reprinted in LC RULES AND LAWS, *supra* note 3, at 101.

40. The ICC Banking Commission regularly issues opinions interpreting the UCP and addressing questions raised by its regional committees. They are collected regularly by ICC Publishing. *See, e.g.*, INTERNATIONAL CHAMBER OF COMMERCE, ICC BANKING COMMISSION COLLECTED OPINIONS 1995–2001 (Gary Collyer & Ron Katz eds., 2002).

41. These reflections assume that at least one semester hour (approximately 15 class hours) is devoted chiefly to letters of credit either as the only topic being taught or as a unit in a commercial transactional law course.

42. The list is set forth in Appendix A.

43. IIBLP, which owns the copyright to ISP98, was forced to charge for its rules in order to obtain ICC endorsement but licenses the text to teachers without charge or provides pamphlets of ISP98 at cost.

44. An annotated bibliography of these materials is contained in Appendix A.

45. *See* James E. Byrne, THE ORIGINAL DOCUMENTS CONTROVERSY: FROM GLENCORE TO THE ICC DECISION 1–33 (Christopher S. Byrnes et al. eds., 1st ed. 1999).