

LC Rules & Laws: The Blue Book

**Rules for Demand Guarantees, Standbys, and
Commercial Letters of Credit**

8th Editon

Edited by

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**Institute of International Banking
Law & Practice, Inc.**

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This volume replaces all prior versions of LC Rules & Laws: Critical Texts for Independent Undertakings.

Preface

The 20th and early 21st Centuries have witnessed the evolution of trade finance and trade compliance law and practice from unwritten but agreed-upon principles and expectations to well-documented rules and statutes. In 1900, there were no formulated rules of practice or law for LC-type undertakings at all, but by 2022, we have sets of rules for every trade circumstance there is, plus many more laws or guidelines from enforcement bodies to follow.

As a result, international trade has become more an art of reading and interpretation of these rules and laws versus one of handing down experience and practice from recognized “elders” in your financial institution. In other industries, it is the documenting of these practices into easily understood and acted-upon rules and laws that has allowed the industry to grow. Trade finance is no exception.

While the current texts are not comprehensive, they have become essential to any banker, corporate user, or lawyer working with LCs. Moreover, the lines between law and practice have blurred. No banker can ignore the impact of law and regulation and no lawyer can understand LC law without paying careful attention to LC practice. And no banker or lawyer can be a part of a transaction that involves sending goods to sanctioned countries or individuals.

Consequently, the ability to be aware of and to access these texts is critical to all members of the trade finance community. For a variety of historical and practical reasons, LC texts have been issued in a piecemeal form, necessitating a collection of small pamphlets of different size and arrangement. LC Rules & Laws (known in many circles as “The Blue Book”) is meant to address this problem by making the critical LC texts available in a convenient and readily accessible volume.

In selecting which texts to include, attention was given to the size of the book, the frequency of use of the various texts, and the royalties that must be paid to reprint them here. We have left out prior editions of all the rules, opting to include only the most current versions. In other instances, where the sheer size of the rules made inclusion all but impossible, attempts have been made to point readers to appropriate websites while summarizing them here.

As always, the Institute is indebted to our many friends who make the work we do possible. We certainly must begin with a thank you to Professor James E. Byrne, the founding Executive Director of the IIBLP and teacher to so many of today’s top experts for his unwavering commitment to the field. Thank you dad!

James G. Barnes, of Baker McKenzie, for his unfailing wisdom and assistance must be recognized. Appreciation is also expressed to our Associate Directors, Vincent O’Brien of ICC-UAE, and SOH Chee Seng of ABS for their invaluable

direction and advice. Thanks are also expressed to Christopher S. Byrnes, Executive Editor of DCW; James E. Byrne, Jr., who designed this book, and Matthew J. Kozakowski (IIBLP Associate Counsel) for identifying additional rules to include.

The list of IIBLP staff who have helped with previous editions would take up half of the book, so I whole heartedly thank all of them for their time and energy to this and prior volumes. It is with considerable pride that I note that these persons have continued their careers to more prestigious positions in more significant organizations. And sometimes, they remained in the field and I have the honor of continuing to work with them.

Michael P. Byrne, CEO
30 March 2022

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Uniform Customs & Practice for Documentary Credits (UCP600)

Editor's Overview

The 2007 Revision of the Uniform Customs and Practice for Documentary Credits (ICC Publication No. 600) (UCP600) was promulgated by the Commission on Banking Technique and Practice of the International Chamber of Commerce headquartered in Paris, France. It articulates standard international commercial letter of credit practice. UCP600 had an “effective” date of 1 July 2007. Prior versions were issued in 1933 (UCP82), 1951 (UCP151), 1962 (UCP222), 1974 (UCP290), 1983 (UCP400), and 1993 (UCP500).

UCP600 is applicable to credits made subject to it. It may also apply under local law to LCs that do not incorporate it as custom or standard international letter of credit practice. With few exceptions, courts have deferred to the UCP as a primary source of letter of credit practice and as an influential source of letter of credit law. Both statutory formulations of LC law, the UN LC Convention and US Revised UCC Article 5, expressly defer to the UCP as do the Chinese LC Rules promulgated by the Supreme People’s Court of China.

Although ISP98 is designed for standby letters of credit, UCP600, which is not, does expressly indicate that its rules include standbys “to the extent to which they may be applicable”.

UCP600 departs from the drafting style of prior revisions of the UCP and follows the style and approach of ISP98 to a considerable extent. UCP600 is complemented by the 2013 Version of the International Standard Banking Practice (ISBP) and the ICC Decisions on Originals (appearing in this volume page [REVIST]). In addition to the deleting of some provisions from UCP500, UCP600 contains formal definitions (UCP600 Article 2) and interpretations (UCP600 Article 3). It also unbundles some articles from prior versions and introduces new terms and concepts such as “Second Advising Bank”, “prepaid”, and “purchase”. The eUCP 2.0, which became effective 1 July 2019, accommodates electronic presentations and appears earlier in this volume page.

*Where its provisions are taken from the other sources, these sources may offer insight into their meaning. It is doubtful, however, that the drafts of UCP600 will be particularly helpful in its interpretation since no definitive reason is given for the drafting additions, deletions, or corrections. Byrne, *The Comparison of UCP600 & UCP500* (250 pages, paperback, IIBLP 2007) is a comprehensive comparison of the two rules. While the Commentary by the Drafting Group provides insight into what the drafters intended, it is the text itself that will control. The Institute’s *UCP600: An Analytical Commentary* (1,462 pages, hardcover, IIBLP 2010) attempts to identify issues and offer a comprehensive interpretation of the text in light of the LC practice. Since publication of the *Analytical Commentary* in 2010, the Institute has published accompanying supplements, the most recent being the *Analytical Commentary: 2018 Supplement* (242 pages, paperback, IIBLP 2018).*

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***Uniform Customs and Practice
for Documentary Credits
2007 Revision in force as of July 1, 2007
ICC Publication No. 600***

ARTICLE 1

Application of UCP

The *Uniform Customs and Practice for Documentary Credits, 2007 Revision*, ICC Publication No. 600 (“UCP”) are rules that apply to any documentary credit (“credit”) (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

ARTICLE 2

Definitions

For the purpose of these rules:

Advising bank means the bank that advises the credit at the request of the issuing bank.

Applicant means the party on whose request the credit is issued.

Banking day means a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed.

Beneficiary means the party in whose favour a credit is issued.

Complying presentation means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.

Confirming bank means the bank that adds its confirmation to a credit upon the issuing bank's authorization or request.

Credit 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.

Honour means:

- a. to pay at sight if the credit is available by sight payment.
- b. to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment.
- c. to accept a bill of exchange (“draft”) drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

Issuing bank means the bank that issues a credit at the request of an applicant or on its own behalf.

Negotiation means the purchase by the nominated bank of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank.

Nominated bank means the bank with which the credit is available or any bank in the case of a credit available with any bank.

Presentation means either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered.

Presenter means a beneficiary, bank or other party that makes a presentation.

ARTICLE 3

Interpretations

For the purpose of these rules:

Where applicable, words in the singular include the plural and in the plural include the singular.

A credit is irrevocable even if there is no indication to that effect.

A document may be signed by handwriting, facsimile signature, perforated signature, stamp, symbol or any other mechanical or electronic method of authentication.

A requirement for a document to be legalized, visaed, certified or similar will be satisfied by any signature, mark, stamp or label on the document which appears to satisfy that requirement.

Branches of a bank in different countries are considered to be separate banks.

Terms such as “first class”, “well known”, “qualified”, “independent”, “official”, “competent” or “local” used to describe the issuer of a document allow any issuer except the beneficiary to issue that document.

Unless required to be used in a document, words such as “prompt”, “immediately” or “as soon as possible” will be disregarded.

The expression “on or about” or similar will be interpreted as a stipulation that an event is to occur during a period of five calendar days before until five calendar days after the specified date, both start and end dates included.

The words “to”, “until”, “till”, “from” and “between” when used to determine a period of shipment include the date or dates mentioned, and the words “before” and “after” exclude the date mentioned.

The words “from” and “after” when used to determine a maturity date exclude the date mentioned.

The terms “first half” and “second half” of a month shall be construed respectively as the 1st to the 15th and the 16th to the last day of the month, all dates inclusive.

The terms “beginning”, “middle” and “end” of a month shall be construed respectively as the 1st to the 10th, the 11th to the 20th and the 21st to the last day of the month, all dates inclusive.

ARTICLE 4

Credits v. Contracts

- a. A credit by its nature is a separate transaction from the sale or other contract on which it may be based. Banks are in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in the credit. Consequently, the undertaking of a bank to honour, to negotiate or to fulfil any other obligation under the credit is not subject to claims or defences by the applicant resulting from its relationships with the issuing bank or the beneficiary. A beneficiary can in no case avail itself of the contractual relationships existing between banks or between the applicant and the issuing bank.
- b. An issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, proforma invoice and the like.

ARTICLE 5

Documents v. Goods, Services or Performance

Banks deal with documents and not with goods, services or performance to which the documents may relate.

ARTICLE 6

Availability, Expiry Date and Place for Presentation

- a. A credit must state the bank with which it is available or whether it is available with any bank. A credit available with a nominated bank is also available with the issuing bank.
- b. A credit must state whether it is available by sight payment, deferred payment, acceptance or negotiation.
- c. A credit must not be issued available by a draft drawn on the applicant.
- d.
 - i. A credit must state an expiry date for presentation. An expiry date stated for honour or negotiation will be deemed to be an expiry date for presentation.
 - ii. The place of the bank with which the credit is available is the place for presentation. The place for presentation under a credit available with any bank is that of any bank. A place for presentation other than that of the issuing bank is in addition to the place of the issuing bank.
- e. Except as provided in sub-article 29 (a), a presentation by or on behalf of the beneficiary must be made on or before the expiry date.

ARTICLE 7

Issuing Bank Undertaking

- a. Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:
 - i. sight payment, deferred payment or acceptance with the issuing bank;
 - ii. sight payment with a nominated bank and that nominated bank does not pay;

- iii. deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
 - iv. acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
 - v. negotiation with a nominated bank and that nominated bank does not negotiate.
- b. An issuing bank is irrevocably bound to honour as of the time it issues the credit.
- c. An issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.

ARTICLE 8

Confirming Bank Undertaking

- a. Provided that the stipulated documents are presented to the confirming bank or to any other nominated bank and that they constitute a complying presentation, the confirming bank must:
 - i. honour, if the credit is available
 - by
 - a) sight payment, deferred payment or acceptance with the confirming bank;
 - b) sight payment with another nominated bank and that nominated bank does not pay;
 - c) deferred payment with another nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;
 - d) acceptance with another nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;
 - e) negotiation with another nominated bank and that nominated bank does not negotiate.
 - ii. negotiate, without recourse, if the credit is available by negotiation with the confirming bank.

b. A confirming bank is irrevocably bound to honour or negotiate as of the time it adds its confirmation to the credit.

c. A confirming bank undertakes to reimburse another nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the confirming bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not another nominated bank prepaid or purchased before maturity. A confirming bank's undertaking to reimburse another nominated bank is independent of the confirming bank's undertaking to the beneficiary.

- d. If a bank is authorized or requested by the issuing bank to confirm a credit but is not prepared to do so, it must inform the issuing bank without delay and may advise the credit without confirmation.

ARTICLE 9

Advising of Credits and Amendments

- a. A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment without any undertaking to honour or negotiate.
- b. By advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the apparent authenticity of the credit or amendment and that the advice accurately reflects the terms and conditions of the credit or amendment received.
- c. An advising bank may utilize the services of another bank ("second advising bank") to advise the credit and any amendment to the beneficiary. By advising the credit or amendment, the second advising bank signifies that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the credit or amendment received.
- d. A bank utilizing the services of an advising bank or second advising bank to advise a credit must use the same bank to advise any amendment thereto.
- e. If a bank is requested to advise a credit or amendment but elects not to do so, it must so inform, without delay, the bank from which the credit, amendment or advice has been received.
- f. If a bank is requested to advise a credit or amendment but cannot satisfy itself as to the apparent authenticity of the credit, the amendment or the advice, it must so inform, without delay, the bank from which the instructions appear to have been received. If the advising bank or second advising bank elects nonetheless to advise the credit or amendment, it must inform the beneficiary or second advising bank that it has not been able to satisfy itself as to the apparent authenticity of the credit, or the amendment or the advice.

ARTICLE 10

Amendments

- a. Except as otherwise provided by article 38, a credit can neither be amended nor cancelled without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary.
- b. An issuing bank is irrevocably bound by an amendment as of the time it issues the amendment. A confirming bank may extend its confirmation to an amendment and will be irrevocably bound as of the time it advises the amendment. A confirming bank may, however, choose to advise an amendment without extending its confirmation and, if so, it must inform the issuing bank without delay and inform the beneficiary in its advice.

- c. The terms and conditions of the original credit (or a credit incorporating previously accepted amendments) will remain in force for the beneficiary until the beneficiary communicates its acceptance of the amendment to the bank that advised such amendment. The beneficiary should give notification of acceptance or rejection of an amendment. If the beneficiary fails to give such notification, a presentation that complies with the credit and to any not yet accepted amendment will be deemed to be notification of acceptance by the beneficiary of such amendment. As of that moment the credit will be amended.
- d. A bank that advises an amendment should inform the bank from which it received the amendment of any notification of acceptance or rejection.
- e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.
- f. A provision in an amendment to the effect that the amendment shall enter into force unless rejected by the beneficiary within a certain time shall be disregarded.

ARTICLE 11

Teletransmitted and Pre-Advised Credits and Amendments

- a. An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded.
If a teletransmission states “full details to follow” (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission.
- b. A preliminary advice of the issuance of a credit or amendment (“pre-advice”) shall only be sent if the issuing bank is prepared to issue the operative credit or amendment. An issuing bank that sends a pre-advice is irrevocably committed to issue the operative credit or amendment, without delay, in terms not inconsistent with the pre-advice.

ARTICLE 12

Nomination

- a. Unless a nominated bank is the confirming bank, an authorization to honour or negotiate does not impose any obligation on that nominated bank to honour or negotiate, except when expressly agreed to by that nominated bank and so communicated to the beneficiary.
- b. By nominating a bank to accept a draft or incur a deferred payment undertaking, an issuing bank authorizes that nominated bank to prepay or purchase a draft accepted or a deferred payment undertaking incurred by that nominated bank.
- c. Receipt or examination and forwarding of documents by a nominated bank that is not a confirming bank does not make that nominated bank liable to honour or negotiate, nor does it constitute honour or negotiation.

ARTICLE 13

Bank-to-Bank Reimbursement Arrangements

- a. If a credit states that reimbursement is to be obtained by a nominated bank (“claiming bank”) claiming on another party (“reimbursing bank”), the credit must state if the reimbursement is subject to the ICC rules for bank-to-bank reimbursements in effect on the date of issuance of the credit.
- b. If a credit does not state that reimbursement is subject to the ICC rules for bank-to-bank reimbursements, the following apply:
 - i. An issuing bank must provide a reimbursing bank with a reimbursement authorization that conforms with the availability stated in the credit. The reimbursement authorization should not be subject to an expiry date.
 - ii. A claiming bank shall not be required to supply a reimbursing bank with a certificate of compliance with the terms and conditions of the credit.
 - iii. An issuing bank will be responsible for any loss of interest, together with any expenses incurred, if reimbursement is not provided on first demand by a reimbursing bank in accordance with the terms and conditions of the credit.
 - iv. A reimbursing bank’s charges are for the account of the issuing bank. However, if the charges are for the account of the beneficiary, it is the responsibility of an issuing bank to so indicate in the credit and in the reimbursement authorization. If a reimbursing bank’s charges are for the account of the beneficiary, they shall be deducted from the amount due to a claiming bank when reimbursement is made. If no reimbursement is made, the reimbursing bank’s charges remain the obligation of the issuing bank.
- c. An issuing bank is not relieved of any of its obligations to provide reimbursement if reimbursement is not made by a reimbursing bank on first demand.

ARTICLE 14

Standard for Examination of Documents

- a. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.
- b. A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.
- c. A presentation including one or more original transport documents subject to articles 19, 20, 21, 22, 23, 24 or 25 must be made by or on behalf of the beneficiary not later than 21 calendar days after the date of shipment as described in these rules, but in any event not later than the expiry date of the credit.
- d. Data in a document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.

-
- e. In documents other than the commercial invoice, the description of the goods, services or performance, if stated, may be in general terms not conflicting with their description in the credit.
 - f. If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, banks will accept the document as presented if its content appears to fulfil the function of the required document and otherwise complies with sub-article 14 (d).
 - g. A document presented but not required by the credit will be disregarded and may be returned to the presenter.
 - h. If a credit contains a condition without stipulating the document to indicate compliance with the condition, banks will deem such condition as not stated and will disregard it.
 - i. A document may be dated prior to the issuance date of the credit, but must not be dated later than its date of presentation.
 - j. When the addresses of the beneficiary and the applicant appear in any stipulated document, they need not be the same as those stated in the credit or in any other stipulated document, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address will be disregarded. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.
 - k. The shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.
 - l. A transport document may be issued by any party other than a carrier, owner, master or charterer provided that the transport document meets the requirements of articles 19, 20, 21, 22, 23 or 24 of these rules.

ARTICLE 15

Complying Presentation

- a. When an issuing bank determines that a presentation is complying, it must honour.
- b. When a confirming bank determines that a presentation is complying, it must honour or negotiate and forward the documents to the issuing bank.
- c. When a nominated bank determines that a presentation is complying and honours or negotiates, it must forward the documents to the confirming bank or issuing bank.

ARTICLE 16

Discrepant Documents, Waiver and Notice

- a. When a nominated bank acting on its nomination, a confirming bank, if any, or the

issuing bank determines that a presentation does not comply, it may refuse to honour or negotiate.

- b. When an issuing bank determines that a presentation does not comply, it may in its sole judgement approach the applicant for a waiver of the discrepancies. This does not, however, extend the period mentioned in sub-article 14 (b).
- c. When a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank decides to refuse to honour or negotiate, it must give a single notice to that effect to the presenter.
The notice must state:
 - i. that the bank is refusing to honour or negotiate; and
 - ii. each discrepancy in respect of which the bank refuses to honour or negotiate; and
 - iii. a) that the bank is holding the documents pending further instructions from the presenter; or
 - b) that the issuing bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, or receives further instructions from the presenter prior to agreeing to accept a waiver; or
 - c) that the bank is returning the documents; or
 - d) that the bank is acting in accordance with instructions previously received from the presenter.
- d. The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.
- e. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may, after providing notice required by sub-article 16 (c) (iii) (a) or (b), return the documents to the presenter at any time.
- f. If an issuing bank or a confirming bank fails to act in accordance with the provisions of this article, it shall be precluded from claiming that the documents do not constitute a complying presentation.
- g. When an issuing bank refuses to honour or a confirming bank refuses to honour or negotiate and has given notice to that effect in accordance with this article, it shall then be entitled to claim a refund, with interest, of any reimbursement made.

ARTICLE 17

Original Documents and Copies

- a. At least one original of each document stipulated in the credit must be presented.
- b. A bank shall treat as an original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not an original.
- c. Unless a document indicates otherwise, a bank will also accept a document as original if it:
 - i. appears to be written, typed, perforated or stamped by the document issuer's hand;

- or
- ii. appears to be on the document issuer's original stationery; or
 - iii. states that it is original, unless the statement appears not to apply to the document presented.
- d. If a credit requires presentation of copies of documents, presentation of either originals or copies is permitted.
- e. If a credit requires presentation of multiple documents by using terms such as "in duplicate", "in two fold" or "in two copies", this will be satisfied by the presentation of at least one original and the remaining number in copies, except when the document itself indicates otherwise.

ARTICLE 18

Commercial Invoice

- a. A commercial invoice:
 - i. must appear to have been issued by the beneficiary (except as provided in article 38);
 - ii. must be made out in the name of the applicant (except as provided in sub-article 38 (g));
 - iii. must be made out in the same currency as the credit; and
 - iv. need not be signed.
- b. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.
- c. The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

ARTICLE 19

Transport Document Covering at Least Two Different Modes of Transport

- a. A transport document covering at least two different modes of transport (multimodal or combined transport document), however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.
 Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.
 - ii. indicate that the goods have been dispatched, taken in charge or shipped on board at the place stated in the credit, by:
 - pre-printed wording, or
 - a stamp or notation indicating the date on which the goods have been dispatched, taken in charge or shipped on board.

- The date of issuance of the transport document will be deemed to be the date of dispatch, taking in charge or shipped on board, and the date of shipment. However, if the transport document indicates, by stamp or notation, a date of dispatch, taking in charge or shipped on board, this date will be deemed to be the date of shipment.
- iii. indicate the place of dispatch, taking in charge or shipment, and the place of final destination stated in the credit, even if:
 - a) the transport document states, in addition, a different place of dispatch, taking in charge or shipment or place of final destination, or
 - b) the transport document contains the indication "intended" or similar qualification in relation to the vessel, port of loading or port of discharge.
 - iv. be the sole original transport document or, if issued in more than one original, be the full set as indicated on the transport document.
 - v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back transport document). Contents of terms and conditions of carriage will not be examined.
 - vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance (whether or not in different modes of transport) during the carriage from the place of dispatch, taking in charge or shipment to the place of final destination stated in the credit.
- c. i. A transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.
ii. A transport document indicating that transhipment will or may take place is acceptable even if the credit prohibits transhipment.

ARTICLE 20

Bill of Lading

- a. A bill of lading, however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.
 - Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.
 - Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.
 - ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
 - pre-printed wording, or
 - an on board notation indicating the date on which the goods have been shipped on board.
- The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.
- If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

- iii. indicate shipment from the port of loading to the port of discharge stated in the credit.
If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication “intended” or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.
 - iv. be the sole original bill of lading or, if issued in more than one original, be the full set as indicated on the bill of lading.
 - v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back bill of lading). Contents of terms and conditions of carriage will not be examined.
 - vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.
- c. i. A bill of lading may indicate that the goods will or may be transshipped provided that the entire carriage is covered by one and the same bill of lading.
ii. A bill of lading indicating that transhipment will or may take place is acceptable, even when the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the bill of lading.
- d. Clauses in a bill of lading stating that the carrier reserves the right to tranship will be disregarded.

ARTICLE 21

Non-Negotiable Sea Waybill

- a. A non-negotiable sea waybill, however named, must appear to:
 - i. indicate the name of the carrier and be signed by:
 - the carrier or a named agent for or on behalf of the carrier, or
 - the master or a named agent for or on behalf of the master.
 Any signature by the carrier, master or agent must be identified as that of the carrier, master or agent.
Any signature by an agent must indicate whether the agent has signed for or on behalf of the carrier or for or on behalf of the master.
 - ii. indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
 - pre-printed wording, or
 - an on board notation indicating the date on which the goods have been shipped on board.
 The date of issuance of the non-negotiable sea waybill will be deemed to be the date of shipment unless the non-negotiable sea waybill contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.
If the non-negotiable sea waybill contains the indication “intended vessel” or

- similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.
- iii. indicate shipment from the port of loading to the port of discharge stated in the credit.
If the non-negotiable sea waybill does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the non-negotiable sea waybill.
 - iv. be the sole original non-negotiable sea waybill or, if issued in more than one original, be the full set as indicated on the non-negotiable sea waybill.
 - v. contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage (short form or blank back non-negotiable sea waybill). Contents of terms and conditions of carriage will not be examined.
 - vi. contain no indication that it is subject to a charter party.
- b. For the purpose of this article, transhipment means unloading from one vessel and reloading to another vessel during the carriage from the port of loading to the port of discharge stated in the credit.
- c. i. A non-negotiable sea waybill may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same non-negotiable sea waybill.
ii. A non-negotiable sea waybill indicating that transhipment will or may take place is acceptable, even when the credit prohibits transhipment, if the goods have been shipped in a container, trailer or LASH barge as evidenced by the non-negotiable sea waybill.
- d. Clauses in a non-negotiable sea waybill stating that the carrier reserves the right to tranship will be disregarded.

ARTICLE 22

Charter Party Bill of Lading

- a. A bill of lading, however named, containing an indication that it is subject to a charter party (charter party bill of lading), must appear to:
 - i. be signed by:
 - the master or a named agent for or on behalf of the master, or
 - the owner or a named agent for or on behalf of the owner, or
 - the charterer or a named agent for or on behalf of the charterer.
- Any signature by the master, owner, charterer or agent must be identified as that of the master, owner, charterer or agent.
- Any signature by an agent must indicate whether the agent has signed for or on behalf of the master, owner or charterer.
- An agent signing for or on behalf of the owner or charterer must indicate the name of the owner or charterer.
- ii. indicate that the goods have been shipped on board a named vessel at the port of

loading stated in the credit by:

- pre-printed wording, or
- an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the charter party bill of lading will be deemed to be the date of shipment unless the charter party bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

- iii.** indicate shipment from the port of loading to the port of discharge stated in the credit. The port of discharge may also be shown as a range of ports or a geographical area, as stated in the credit.
 - iv.** be the sole original charter party bill of lading or, if issued in more than one original, be the full set as indicated on the charter party bill of lading.
- b.** A bank will not examine charter party contracts, even if they are required to be presented by the terms of the credit.

ARTICLE 23

Air Transport Document

- a.** An air transport document, however named, must appear to:
 - i.** indicate the name of the carrier and be signed by:
 - the carrier, or
 - a named agent for or on behalf of the carrier.
 Any signature by the carrier or agent must be identified as that of the carrier or agent.
 - ii.** indicate that the goods have been accepted for carriage.
 - iii.** indicate the date of issuance. This date will be deemed to be the date of shipment unless the air transport document contains a specific notation of the actual date of shipment, in which case the date stated in the notation will be deemed to be the date of shipment.

Any other information appearing on the air transport document relative to the flight number and date will not be considered in determining the date of shipment.
 - iv.** indicate the airport of departure and the airport of destination stated in the credit.
 - v.** be the original for consignor or shipper, even if the credit stipulates a full set of originals.
 - vi.** contain terms and conditions of carriage or make reference to another source containing the terms and conditions of carriage. Contents of terms and conditions of carriage will not be examined.
- b.** For the purpose of this article, transhipment means unloading from one aircraft and reloading to another aircraft during the carriage from the airport of departure to the airport of destination stated in the credit.
 - c. i.** An air transport document may indicate that the goods will or may be transshipped, provided that the entire carriage is covered by one and the same air transport document.
 - ii.** An air transport document indicating that transhipment will or may take place is acceptable, even if the credit prohibits transhipment.

ARTICLE 24

Road, Rail or Inland Waterway Transport Documents

- a. A road, rail or inland waterway transport document, however named, must appear to:
 - i. indicate the name of the carrier and:
 - be signed by the carrier or a named agent for or on behalf of the carrier, or
 - indicate receipt of the goods by signature, stamp or notation by the carrier or a named agent for or on behalf of the carrier.
 - Any signature, stamp or notation of receipt of the goods by the carrier or agent must be identified as that of the carrier or agent.
 - Any signature, stamp or notation of receipt of the goods by the agent must indicate that the agent has signed or acted for or on behalf of the carrier.
 - If a rail transport document does not identify the carrier, any signature or stamp of the railway company will be accepted as evidence of the document being signed by the carrier.
- b. i. A road transport document must appear to be the original for consignor or shipper or bear no marking indicating for whom the document has been prepared.
 - ii. A rail transport document marked "duplicate" will be accepted as an original.
 - iii. A rail or inland waterway transport document will be accepted as an original whether marked as an original or not.
- c. In the absence of an indication on the transport document as to the number of originals issued, the number presented will be deemed to constitute a full set.
- d. For the purpose of this article, transhipment means unloading from one means of conveyance and reloading to another means of conveyance, within the same mode of transport, during the carriage from the place of shipment, dispatch or carriage to the place of destination stated in the credit.
- e. i. A road, rail or inland waterway transport document may indicate that the goods will or may be transhipped provided that the entire carriage is covered by one and the same transport document.
 - ii. A road, rail or inland waterway transport document indicating that transhipment will or may take place is acceptable, even when the credit prohibits transhipment.

ARTICLE 25

Courier Receipt, Post Receipt or Certificate of Posting

- a. A courier receipt, however named, evidencing receipt of goods for transport, must appear to:
 - i. indicate the name of the courier service and be stamped or signed by the named courier service at the place from which the credit states the goods are to be shipped; and

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- ii. indicate a date of pick up or of receipt or wording to this effect. This date will be deemed to be the date of shipment.
 - b. A requirement that courier charges are to be paid or prepaid may be satisfied by a transport document issued by a courier service evidencing that courier charges are for the account of a party other than the consignee.
 - c. A post receipt or certificate of posting, however named, evidencing receipt of goods for transport, must appear to be stamped or signed and dated at the place from which the credit states the goods are to be shipped. This date will be deemed to be the date of shipment.

ARTICLE 26

“On Deck”, “Shipper’s Load and Count”, “Said by Shipper to Contain” and Charges Additional to Freight

- a. A transport document must not indicate that the goods are or will be loaded on deck. A clause on a transport document stating that the goods may be loaded on deck is acceptable.
- b. A transport document bearing a clause such as “shipper’s load and count” and “said by shipper to contain” is acceptable.
- c. A transport document may bear a reference, by stamp or otherwise, to charges additional to the freight.

ARTICLE 27

Clean Transport Document

A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging. The word “clean” need not appear on a transport document even if a credit has a requirement for that transport document to be “clean on board”.

ARTICLE 28

Insurance Document and Coverage

- a. An insurance document, such as an insurance policy, an insurance certificate or a declaration under an open cover, must appear to be issued and signed by an insurance company, an underwriter or their agents or their proxies.
Any signature by an agent or proxy must indicate whether the agent or proxy has signed for or on behalf of the insurance company or underwriter.
- b. When the insurance document indicates that it has been issued in more than one original, all originals must be presented.
- c. Cover notes will not be accepted.
- d. An insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover.

- e. The date of the insurance document must be no later than the date of shipment, unless it appears from the insurance document that the cover is effective from a date not later than the date of shipment.
- f.
 - i. The insurance document must indicate the amount of insurance coverage and be in the same currency as the credit.
 - ii. A requirement in the credit for insurance coverage to be for a percentage of the value of the goods, of the invoice value or similar is deemed to be the minimum amount of coverage required.
If there is no indication in the credit of the insurance coverage required, the amount of insurance coverage must be at least 110% of the CIF or CIP value of the goods. When the CIF or CIP value cannot be determined from the documents, the amount of insurance coverage must be calculated on the basis of the amount for which honour or negotiation is requested or the gross value of the goods as shown on the invoice, whichever is greater.
 - iii. The insurance document must indicate that risks are covered at least between the place of taking in charge or shipment and the place of discharge or final destination as stated in the credit.
- g. A credit should state the type of insurance required and, if any, the additional risks to be covered. An insurance document will be accepted without regard to any risks that are not covered if the credit uses imprecise terms such as “usual risks” or “customary risks”.
- h. When a credit requires insurance against “all risks” and an insurance document is presented containing any “all risks” notation or clause, whether or not bearing the heading “all risks”, the insurance document will be accepted without regard to any risks stated to be excluded.
 - i. An insurance document may contain reference to any exclusion clause.
 - j. An insurance document may indicate that the cover is subject to a franchise or excess (deductible).

ARTICLE 29

Extension of Expiry Date or Last Day for Presentation

- a. If the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed for reasons other than those referred to in article 36, the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.
- b. If presentation is made on the first following banking day, a nominated bank must provide the issuing bank or confirming bank with a statement on its covering schedule that the presentation was made within the time limits extended in accordance with sub-article 29 (a).
- c. The latest date for shipment will not be extended as a result of sub-article 29 (a).

ARTICLE 30**Tolerance in Credit Amount, Quantity and Unit Prices**

- a. The words “about” or “approximately” used in connection with the amount of the credit or the quantity or the unit price stated in the credit are to be construed as allowing a tolerance not to exceed 10% more or 10% less than the amount, the quantity or the unit price to which they refer.
- b. A tolerance not to exceed 5% more or 5% less than the quantity of the goods is allowed, provided the credit does not state the quantity in terms of a stipulated number of packing units or individual items and the total amount of the drawings does not exceed the amount of the credit.
- c. Even when partial shipments are not allowed, a tolerance not to exceed 5% less than the amount of the credit is allowed, provided that the quantity of the goods, if stated in the credit, is shipped in full and a unit price, if stated in the credit, is not reduced or that sub-article 30 (b) is not applicable. This tolerance does not apply when the credit stipulates a specific tolerance or uses the expressions referred to in sub-article 30 (a).

ARTICLE 31**Partial Drawings or Shipments**

- a. Partial drawings or shipments are allowed.
- b. A presentation consisting of more than one set of transport documents evidencing shipment commencing on the same means of conveyance and for the same journey, provided they indicate the same destination, will not be regarded as covering a partial shipment, even if they indicate different dates of shipment or different ports of loading, places of taking in charge or dispatch. If the presentation consists of more than one set of transport documents, the latest date of shipment as evidenced on any of the sets of transport documents will be regarded as the date of shipment.
A presentation consisting of one or more sets of transport documents evidencing shipment on more than one means of conveyance within the same mode of transport will be regarded as covering a partial shipment, even if the means of conveyance leave on the same day for the same destination.
- c. A presentation consisting of more than one courier receipt, post receipt or certificate of posting will not be regarded as a partial shipment if the courier receipts, post receipts or certificates of posting appear to have been stamped or signed by the same courier or postal service at the same place and date and for the same destination.

ARTICLE 32**Instalment Drawings or Shipments**

If a drawing or shipment by instalments within given periods is stipulated in the credit and any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment.

ARTICLE 33

Hours of Presentation

A bank has no obligation to accept a presentation outside of its banking hours.

ARTICLE 34

Disclaimer on Effectiveness of Documents

A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any document, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other person.

ARTICLE 35

Disclaimer on Transmission and Translation

A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit. If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

A bank assumes no liability or responsibility for errors in translation or interpretation of technical terms and may transmit credit terms without translating them.

ARTICLE 36

Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.

A bank will not, upon resumption of its business, honour or negotiate under a credit that expired during such interruption of its business.

ARTICLE 37

Disclaimer for Acts of an Instructed Party

- a. A bank utilizing the services of another bank for the purpose of giving effect to the instructions of the applicant does so for the account and at the risk of the applicant.

- b.** An issuing bank or advising bank assumes no liability or responsibility should the instructions it transmits to another bank not be carried out, even if it has taken the initiative in the choice of that other bank.
- c.** A bank instructing another bank to perform services is liable for any commissions, fees, costs or expenses (“charges”) incurred by that bank in connection with its instructions. If a credit states that charges are for the account of the beneficiary and charges cannot be collected or deducted from proceeds, the issuing bank remains liable for payment of charges.
A credit or amendment should not stipulate that the advising to a beneficiary is conditional upon the receipt by the advising bank or second advising bank of its charges.
- d.** The applicant shall be bound by and liable to indemnify a bank against all obligations and responsibilities imposed by foreign laws and usages.

ARTICLE 38

Transferable Credits

- a.** A bank is under no obligation to transfer a credit except to the extent and in the manner expressly consented to by that bank.
- b.** For the purpose of this article:
Transferable credit means a credit that specifically states it is “transferable”. A transferable credit may be made available in whole or in part to another beneficiary (“second beneficiary”) at the request of the beneficiary (“first beneficiary”).
Transferring bank means a nominated bank that transfers the credit or, in a credit available with any bank, a bank that is specifically authorized by the issuing bank to transfer and that transfers the credit. An issuing bank may be a transferring bank.
Transferred credit means a credit that has been made available by the transferring bank to a second beneficiary.
- c.** Unless otherwise agreed at the time of transfer, all charges (such as commissions, fees, costs or expenses) incurred in respect of a transfer must be paid by the first beneficiary.
- d.** A credit may be transferred in part to more than one second beneficiary provided partial drawings or shipments are allowed.
A transferred credit cannot be transferred at the request of a second beneficiary to any subsequent beneficiary. The first beneficiary is not considered to be a subsequent beneficiary.
- e.** Any request for transfer must indicate if and under what conditions amendments may be advised to the second beneficiary. The transferred credit must clearly indicate those conditions.
- f.** If a credit is transferred to more than one second beneficiary, rejection of an amendment by one or more second beneficiary does not invalidate the acceptance by any other second beneficiary, with respect to which the transferred credit will be amended accordingly. For any second beneficiary that rejected the amendment, the transferred credit will remain unamended.

g. The transferred credit must accurately reflect the terms and conditions of the credit, including confirmation, if any, with the exception of:

- the amount of the credit,
- any unit price stated therein,
- the expiry date,
- the period for presentation, or
- the latest shipment date or given period for shipment,

any or all of which may be reduced or curtailed.

The percentage for which insurance cover must be effected may be increased to provide the amount of cover stipulated in the credit or these articles.

The name of the first beneficiary may be substituted for that of the applicant in the credit.

If the name of the applicant is specifically required by the credit to appear in any document other than the invoice, such requirement must be reflected in the transferred credit.

h. The first beneficiary has the right to substitute its own invoice and draft, if any, for those of a second beneficiary for an amount not in excess of that stipulated in the credit, and upon such substitution the first beneficiary can draw under the credit for the difference, if any, between its invoice and the invoice of a second beneficiary.

i. If the first beneficiary is to present its own invoice and draft, if any, but fails to do so on first demand, or if the invoices presented by the first beneficiary create discrepancies that did not exist in the presentation made by the second beneficiary and the first beneficiary fails to correct them on first demand, the transferring bank has the right to present the documents as received from the second beneficiary to the issuing bank, without further responsibility to the first beneficiary.

j. The first beneficiary may, in its request for transfer, indicate that honour or negotiation is to be effected to a second beneficiary at the place to which the credit has been transferred, up to and including the expiry date of the credit. This is without prejudice to the right of the first beneficiary in accordance with sub-article 38 (h).

k. Presentation of documents by or on behalf of a second beneficiary must be made to the transferring bank.

ARTICLE 39

Assignment of Proceeds

The fact that a credit is not stated to be transferable shall not affect the right of the beneficiary to assign any proceeds to which it may be or may become entitled under the credit, in accordance with the provisions of applicable law. This article relates only to the assignment of proceeds and not to the assignment of the right to perform under the credit.

The Supplement to the Uniform Customs and Practice for Documentary Credits for Electronic Presentation (eUCP)

Editor's Overview

Faced with increasing emphasis in commercial circles on the utilization of electronic data in lieu of paper documents, the letter of credit community, acting through the ICC Commission on Banking Technique and Practice formulated a supplement to the Uniform Customs and Practice for Documentary Credits to accommodate electronic presentations. Because Version 1.0 was aligned with UCP500, eUCP, Version 1.1 was updated to align it with UCP600 (effective as of 1 July 2007). After receiving overwhelming approval from ICC National Committees, eUCP Version 2.0 came into effect 1 July 2019. Version 2.0 was intended, in part, to address evolving market practices in trade and compatibility of the rules with digital data.

The rules, known as the “eUCP”, themselves incorporate UCP600 and supplement its rules and definitions with respect to electronic presentations under credits that are expressly issued subject to the eUCP. Where the two sets of rules conflict, the eUCP rules control to the extent that they would produce a result different from UCP600. It should be noted that issuing a credit subject to UCP600 does not entail application of the eUCP, unless it is expressly cited.

In addition to supplementing or modifying definitions contained in the UCP, the eUCP defines terms such as “electronic record” which is the term used for authenticable data presented in an electronic format and capable of examination. The eUCP addresses presentations exclusively in an electronic modality or combined presentations of electronic records and paper documents.

It also contains operational rules that require a notice of completeness before the examination of documents commences. Although the eUCP requires a greater level of authentication for electronic records than that required for paper documents, any assumption of liability as to the identity of the sender, the source of the data, or its unaltered character other than that apparent by the use of a commercially acceptable data process for the receipt of data is disclaimed.

Supplement to the UCP600 for Electronic Presentation (eUCP)

Version 2.0 (2019 Revision)

Introduction eUCP Version 2.0

On 6th June 2017, the ICC Banking Commission provided a press release announcing the launch of a Working Group to anticipate and accompany the digitalisation of trade finance. One core activity was to evaluate existing ICC rules in order to assess e-compatibility and ensure they are ‘e-compliant’, i.e. enabling banks to accept data vs. documents. It was identified that this was required in order to accommodate evolving practices and technologies.

A Drafting Group was established, co-chaired by David Meynell and Gary Collyer, with the initial aim of reviewing the e-compatibility of existing ICC rules. As a result of this review, a mandate was received from the ICC Banking Commission Executive Committee to:

- Update the existing version 1.1 of eUCP in order to ensure continued digital compatibility.
- Draft eURC in order to ensure continued digital compatibility for presentation of electronic records under Collections.

The eRules have been intentionally developed with version numbers in order that they can be updated regularly without impacting upon other existing ICC rules, thereby reducing the time required to develop any potential identified revision.

The initial drafts of eUCP version 2.0 and eURC version 1.0 were sent to ICC National Committees (NC’s) on 25th September 2017, with a deadline of 27th November 2017 for response. At the request of a number of ICC NC’s, based upon a communications issue, it was decided to extend the deadline to 28th February 2018. Pursuant to feedback on the original drafts, work commenced on a 2nd draft, which was subsequently distributed to ICC NC’s on 20th March 2018, with a deadline of 25th May 2018 for response. A 3rd draft of the rules was sent out on 20th July 2018, providing a deadline of 28th September 2018 for response. The 4th of the rules was disseminated on 6th November 2018, indicating a deadline of 4th January 2019 for feedback. At that stage, and following a thorough review of all comments received to date, it was considered to be an appropriate time to draft a final version of the rules. These were consequently sent to ICC NC’s on 31st January 2019, specifying that the deadline for voting would be 22nd March 2019. It is worth commenting that this timeframe was only 16 months after distribution of the original drafts and included an enforced 3-month extension, as mentioned above. During the course of the first four drafts,

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almost 2,000 comments were received from ICC NC's. For the purposes of transparency and clarity, every comment received an individual response. As a valuable reference source, the 'ICC Guide to the eUCP' (ICC Publication No. 639) and the work of the authors, Professor James E. Byrne and Dan Taylor, has been gratefully acknowledged.

For the first time in the history of the ICC Banking Commission, a new approach was introduced for the ICC rules voting process, via the Simply Voting platform. This initiative provided an online voting system to be used for the approval of the revised eUCP and new eURC rules.

Each NC was requested to choose one designated representative with the right to cast the vote on its behalf and the platform was opened for voting from 11th until 22nd March 2019. NC's were invited to vote on the revised eUCP and new eURC separately by choosing 'YES' or 'NO' to the following options:

- Does your National Committee approve the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentation (eUCP) Version 2.0?
- Does your National Committee approve the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (eURC) Version 1.0?

Voting result:

- Votes received from 49 NC's, plus one further NC vote after the voting deadline had passed.
- The eUCP received 100% approval with two countries abstaining.
- The eURC received 97.5% approval (on a weighted basis) with one country voting 'no' and two countries abstaining.
- Based upon the above, both sets of rules will come into force from 1st July 2019.

It was recognised in the introduction to the initial ICC Guide to the eUCP (ICC Publication no. 639) that the likely end of the evolution to electronic presentations is automated compliance checking systems in the documentary credit field. This is all too apparent when looking at evolving technology and digital trade finance, with the advent of the Internet of Things, Distributed Ledger Technology, Smart Contracts, Artificial Intelligence, and Machine Learning.

The content of the eRules will be continually monitored in order to ensure applicability. The support of trade practitioners will be an essential element moving forward. These rules provide many benefits in advancing the documentary credit in a digital environment and ensuring the continued relevance of this valuable instrument in mitigating trade risk.

Existing ICC rules, such as UCP 600 & URC 522, whilst being invaluable in a paper world, provide limited protection when applied to electronic transactions. It is inevitable that traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone.

In this respect, it is important the market recognise that the new rules provide many benefits in advancing traditional trade solutions in a digital environment:

- Safeguarding applicability and guaranteeing relevance in a constantly evolving digital trade world
- Extending the mitigation of risk from a paper environment to the electronic milieu
- Explicitly and unambiguously supporting the usage of electronic records
- Conformity and congruence as opposed to divergent local, national and regional practice
- Shared understanding of terminologies and objectives
- Confidence in a set of independent and trusted contractual rules
- Uniformity, consistency and standardisation in customs and practice
- Enabling and supporting trade finance between regions and countries regardless of underlying economic and judicial structures

Development of the eRules would have been impossible without the ongoing support of the ICC Banking Commission Secretariat and individual ICC National Committees. Thank you to all involved, with specific acknowledgement to David Bischof, Olivier Paul, and Laura Straube. Particular thanks are given to the eRules Drafting Group, details of which are provided below. I also extend my gratitude to my co-chair, Gary Collyer. Without his input, this work would not have proved possible. Last, but far from least, a reminder that this publication would not be in existence were it not for the groundbreaking initial efforts of Jim Byrne and Dan Taylor.

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May 2019

**UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY
CREDITS FOR ELECTRONIC PRESENTATION (eUCP)
VERSION 2.0**

Preliminary Considerations

The mode of presentation to the nominated bank, confirming bank, if any, or the issuing bank, by or on behalf of the beneficiary, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.

The mode of presentation to the applicant, by the issuing bank, of electronic records alone or in combination with paper documents, is outside the scope of the eUCP.

Where not defined or modified in the eUCP, definitions given in UCP 600 will continue to apply.

Before agreeing to issue, advise, confirm, amend or transfer an eUCP credit, banks should satisfy themselves that they can examine the required electronic records in a presentation made thereunder.

Article e1: Scope of the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentations (“eUCP”)

The eUCP supplements the Uniform Customs and Practice for Documentary Credits (2007 Revision, ICC Publication No. 600) (“UCP”) in order to accommodate presentation of electronic records alone or in combination with paper documents.

The eUCP shall apply where the credit indicates that it is subject to the eUCP (“eUCP credit”).

This version is Version 2.0. An eUCP credit must indicate the applicable version of the eUCP. If not indicated, it is subject to the latest version in effect on the date the eUCP credit is issued or, if made subject to the eUCP by an amendment accepted by the beneficiary, the date of that amendment.

An eUCP credit must indicate the physical location of the issuing bank.

In addition, it must also indicate the physical location of any nominated bank and, if different to the nominated bank, the physical location of the confirming bank, if any, when such location is known to the issuing bank at the time of issuance. If the physical location of any nominated bank and/or confirming bank is not indicated in the credit, such bank must indicate its physical location to the beneficiary no later than the time of advising or confirming the credit or, in the case of a credit available with any bank, and where another bank willing to act on the nomination to honour or negotiate is not the advising or confirming bank, at the time of agreeing to act on its nomination.

Article e2: Relationship of the eUCP to the UCP

An eUCP credit is also subject to the UCP without express incorporation of the UCP.

Where the eUCP applies, its provisions shall prevail to the extent that they would produce a result different from the application of the UCP.

If an eUCP credit allows the beneficiary to choose between presentation of paper documents or electronic records and it chooses to present only paper documents, the UCP alone shall apply to that presentation. If only paper documents are permitted under an eUCP credit, the UCP alone shall apply.

Article e3: Definitions

- a. Where the following terms are used in the UCP, for the purpose of applying the UCP to an electronic record presented under an eUCP credit, the term:
 - i. **Appear on their face** and the like shall apply to examination of the data content of an electronic record.
 - ii. **Document** shall include an electronic record.
 - iii. **Place for presentation** of an electronic record means an electronic address of a data processing system.
 - iv. **Presenter** means the beneficiary, or any party acting on behalf of the beneficiary who makes a presentation to a nominated bank, confirming bank, if any, or to the issuing bank directly.
 - v. **Sign** and the like shall include an electronic signature.
 - vi. **Superimposed, notation or stamped** means data content whose supplementary character is apparent in an electronic record.
- b. The following terms used in the eUCP shall have the following meaning:
 - i. **Data corruption** means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part.

- ii. **Data processing system** means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part.
- iii. **Electronic record** means data created, generated, sent, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
 - capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
 - capable of being examined for compliance with the terms and conditions of the eUCP credit.
- iv. **Electronic signature** means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person's authentication of the electronic record.
- v. **Format** means the data organisation in which the electronic record is expressed or to which it refers.
- vi. **Paper document** means a document in a paper form.
- vii. **Received** means when an electronic record enters a data processing system, at the place for presentation indicated in the eUCP credit, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system does not imply that the electronic record has been viewed, examined, accepted or refused under an eUCP credit.
- viii. **Re-present or re-presented** means to substitute or replace an electronic record already presented.

Article e4: Electronic Records and Paper Documents v. Goods, Services or Performance

Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.

Article e5: Format

An eUCP credit must indicate the format of each electronic record. If the format of an electronic record is not indicated, it may be presented in any format.

Article e6: Presentation

- a. i. An eUCP credit must indicate a place for presentation of electronic records.
- ii. An eUCP credit requiring or allowing presentation of both electronic records and paper documents must, in addition to the place for presentation of the electronic records, also indicate a place for presentation of the paper documents.
- b. Electronic records may be presented separately and need not be presented at the same time.
- c. i. When one or more electronic records are presented alone or in combination with paper documents, the presenter is responsible for providing a notice of completeness to the nominated bank, confirming bank, if any, or to the issuing bank, where a presentation is made directly. The receipt of the notice of completeness will act as notification that the presentation is complete and that the period for

- examination of the presentation is to commence.
 - ii. The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates.
 - iii. Presentation is deemed not to have been made if the notice of completeness is not received.
 - iv. When a nominated bank, whether acting on its nomination or not, forwards or makes available electronic records to a confirming bank or issuing bank, a notice of completeness need not be sent.
 - d. i. Each presentation of an electronic record under an eUCP credit must identify the eUCP credit under which it is presented. This may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the covering letter or schedule that accompanies the presentation.
 - ii. Any presentation of an electronic record not so identified may be treated as not received.
 - e. i. If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day for presentation, as the case may be, the bank will be deemed to be closed and the expiry date and/or last day for presentation shall be extended to the next banking day on which such bank is able to receive an electronic record.
 - ii. In this event, the nominated bank must provide the confirming bank or issuing bank, if any, with a statement on its covering schedule that the presentation of electronic records was made within the time limits extended in accordance with sub-Article e6 (e) (i).
 - iii. If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunication or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record
 - f. An electronic record that cannot be authenticated is deemed not to have been presented.

Article e7: Examination

- a. i. The period for the examination of documents commences on the banking day following the day on which the notice of completeness is received by the nominated bank, confirming bank, if any, or by the issuing bank, where a presentation is made directly.
 - ii. If the time for presentation of documents or the notice of completeness is extended, as provided in sub-Article e6 (e) (i), the time for the examination of documents commences on the next banking day following the day on which the bank to which presentation is to be made is able to receive the notice of completeness, at the place for presentation.
 - b. i. If an electronic record contains a hyperlink to an external system or a presentation indicates that the electronic record may be examined by reference to an external system, the electronic record at the hyperlink or the external system shall be deemed to constitute an integral part of the electronic record to be examined.
 - ii. The failure of the external system to provide access to the required electronic record at the time of examination shall constitute a discrepancy, except as provided in sub-Article e7 (d) (ii).
 - c. The inability of a nominated bank acting on its nomination, a confirming bank, if any,

or the issuing bank, to examine an electronic record in a format required by an eUCP credit or, if no format is required, to examine it in the format presented is not a basis for refusal.

- d. i. The forwarding of electronic records by a nominated bank, whether or not it is acting on its nomination to honour or negotiate, signifies that it has satisfied itself as to the apparent authenticity of the electronic records.
ii. In the event that a nominated bank determines that a presentation is complying and forwards or makes available those electronic records to the confirming bank or issuing bank, whether or not the nominated bank has honoured or negotiated, an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when a specified hyperlink or external system does not allow the issuing bank or confirming bank to examine one or more electronic records that have been made available between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.

Article e8: Notice of Refusal

If a nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank, provides a notice of refusal of a presentation which includes electronic records and does not receive instructions from the party to which notice of refusal is given for the disposition of the electronic records within 30 calendar days from the date the notice of refusal is given, the bank shall return any paper documents not previously returned to that party, but may dispose of the electronic records in any manner deemed appropriate without any responsibility.

Article e9: Originals and Copies

Any requirement for presentation of one or more originals or copies of an electronic record is satisfied by the presentation of one electronic record.

Article e10: Date of Issuance

An electronic record must provide evidence of its date of issuance.

Article e11: Transport

If an electronic record evidencing transport does not indicate a date of shipment or dispatch or taking in charge or a date the goods were accepted for carriage, the date of issuance of the electronic record will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. However, if the electronic record bears a notation that evidences the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage, the date of the notation will be deemed to be the date of shipment or dispatch or taking in charge or the date the goods were accepted for carriage. Such a notation showing additional data content need not be separately signed or otherwise authenticated.

Article e12: Data Corruption of an Electronic Record

- a. If an electronic record that has been received by a nominated bank acting on its nomination or not, confirming bank, if any, or the issuing bank, appears to have been affected by a data corruption, the bank may inform the presenter and may request it to be re-presented.

- b. If a bank makes such a request:
 - i. the time for examination is suspended and resumes when the electronic record is re-presented; and
 - ii. if the nominated bank is not a confirming bank, it must provide any confirming bank and the issuing bank with notice of the request for the electronic record to be re-presented and inform it of the suspension; but
 - iii. if the same electronic record is not re-presented within 30 calendar days, or on or before the expiry date and/or last day for presentation, whichever occurs first, the bank may treat the electronic record as not presented.

Article e13: Additional Disclaimer of Liability for Presentation of Electronic Records under eUCP

- a. By satisfying itself as to the apparent authenticity of an electronic record, a bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.
- b. A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.

Article e14: Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.

International Standby Practices (ISP98)

Editor's Overview

The International Standby Practices (ISP) was developed under the auspices of the Institute of International Banking Law & Practice, Inc. The current version abbreviated as "ISP98", has been endorsed by the International Chamber of Commerce (designated as ICC Publication No. 590) and the United Nations Commission on International Trade Law which commanded "use by the parties ... in international trade and financing transactions." It articulates standard international standby letter of credit practice.

The current version, which is the first, became effective on 1 January 1999. Its official language is English, and as of January 2018, the ISP has been translated into Bulgarian, Chinese, Chinese (Taiwan), French, Greek, Hebrew, Italian, Japanese, Korean, Portuguese, Russian, Spanish, and Turkish.

ISP98 provides standby users with an alternative to the UCP for standbys. Although standbys had been issued under the UCP, considerable care had to be exercised to avoid difficulties created by the orientation of the UCP towards payment for the sale of goods. The ISP avoids these problems and anticipates issues that commonly arise under standby practice. ISP98 is also used for demand guarantees.

As indicated in the Preface and in ISP98 Rule 1.03, the ISP must be interpreted in light of standard international standby practice. To assist in its interpretation, the Institute has published The Official Commentary on the International Standby Practices and has established the Council on International Standby Practices that issues official interpretations. The Institute has also released the ISP98 Model Forms which are available on www.IIBLP.org. A selection of ISP98 Model Forms are reprinted in this volume. As of January 2018, the ISP has been addressed in a few judicial decisions, receiving favorable treatment by the courts who have considered it. See, e.g., Team Telecom International v. Hutchison 3G UK Ltd., 2003 EWHC 762 (Q.B. Div'l Ct.) [England].

ISP98 was drafted as a unified and systematic whole. It was designed not only for bankers who already knew the practices being articulated, but also for lawyers and corporate users who may not be intimately familiar with them. Its provisions are denominated "rules". ISP98 Rule 1.01(c) provides that undertakings subject to the rules may modify or exclude its provisions.

ISP98 permits electronic presentation of demands not requiring additional documents and provides definitions that can be used in connection with standbys permitting electronic presentation. ISP98 Rule 8.04 expressly mandates that reimbursements are to be subject to the current version of ICC Rules for Bank-to-Bank Reimbursements under Documentary Credits (ICC Publication No. 725).

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International Standby Practices (ISP98)

ICC Publication No. 590

In force as of 1 January 1999

Preface

The International Standby Practices (ISP98) reflects generally accepted practice, custom, and usage of standby letters of credit. It provides separate rules for standby letters of credit in the same sense that the Uniform Customs and Practice for Documentary Credits (UCP) and the Uniform Rules for Demand Guarantees (URDG) do for commercial letters of credit and independent bank guarantees.

The formulation of standby letter of credit practices in separate rules evidences the maturity and importance of this financial product. The amounts outstanding of standbys greatly exceed the outstanding amounts of commercial letters of credit. While the standby is associated with the United States where it originated and where it is most widely used, it is truly an international product. Non-U.S. bank outstandings have exceeded those of U.S. banks in the United States alone. Moreover, the standby is used increasingly throughout the world.

Standbys are issued to support payment, when due or after default, of obligations based on money loaned or advanced, or upon the occurrence or non-occurrence of another contingency.

For convenience, standbys are commonly classified descriptively (and without operative significance in the application of these Rules) based on their function in the underlying transaction or other factors not necessarily related to the terms and conditions of the standby itself. For example:

A “Performance Standby” supports an obligation to perform other than to pay money, including for the purpose of covering losses arising from a default of the applicant in completion of the underlying transactions.

An “Advance Payment Standby” supports an obligation to account for an advance payment made by the beneficiary to the applicant.

A “Bid Bond/Tender Bond Standby” supports an obligation of the applicant to execute a contract if the applicant is awarded a bid.

A “Counter Standby” supports the issuance of a separate standby or other undertaking by the beneficiary of the counter standby.

A “Financial Standby” supports an obligation to pay money, including any instrument evidencing an obligation to repay borrowed money.

A “Direct Pay” Standby supports payment when due of an underlying payment obligation typically in connection with a financial standby without regard to a default.

An “Insurance Standby” supports an insurance or reinsurance obligation of the applicant.

A “Commercial Standby” supports the obligations of an applicant to pay for goods or services in the event of non-payment by other methods.

In the past, many standbys have been issued subject to the UCP even though it was

intended for commercial letters of credit. The UCP reinforced the independence and documentary character of the standby. It also provided standards for examination and notice of dishonor and a basis to resist market pressures to embrace troublesome practices such as the issuance of standbys without expiration dates.

Despite these important contributions, it has long been apparent that the UCP was not fully applicable nor appropriate for standbys, as is recognized in UCP 500 Article 1 which provides that it applies “to the extent to which they may be applicable.” Even the least complex standbys (those calling for presentation of a draft only) pose problems not addressed by the UCP. More complex standbys (those involving longer terms or automatic extensions, transfer on demand, requests that the beneficiary issue its own undertaking to another, and the like) require more specialized rules of practice. The ISP fills these needs.

The ISP differs from the UCP in style and approach because it must receive acceptance not only from bankers and merchants, but also from a broader range of those actively involved in standby law and practice—corporate treasurers and credit managers, rating agencies, government agencies and regulators, and indenture trustees as well as their counsel. Because standbys are often intended to be available in the event of disputes or applicant insolvency, their texts are subject to a degree of scrutiny not encountered in the commercial letter of credit context. As a result, the ISP is also written to provide guidance to lawyers and judges in the interpretation of standby practice.

Differences in substance result either from different practices, different problems, or the need for more precision. In addition, the ISP proposes basic definitions should the standby permit or require presentation of documents by electronic means. Since standbys infrequently require presentation of negotiable documents, standby practice is currently more conducive to electronic presentations, and the ISP provides

definitions and rules encouraging such presentations. The development of S.W.I.F.T. message types for the ISP is anticipated.

The ISP, like the UCP for commercial letters of credit, simplifies, standardizes, and streamlines the drafting of standbys, and provides clear and widely accepted answers to common problems. There are basic similarities with the UCP because standby and commercial practices are fundamentally the same. Even where the rules overlap, however, the ISP is more precise, stating the intent implied in the UCP rule, in order to make the standby more dependable when a drawing or honor is questioned.

Like the UCP and the URDG, the ISP will apply to any independent undertaking issued subject to it. This approach avoids the impractical and often impossible task of identifying and distinguishing standbys from independent guarantees and, in many cases, commercial letters of credit. The choice of which set of rules to select is, therefore, left to the parties—as it should be. One may well choose to use the ISP for certain types of standbys, the UCP for others, and the URDG for still others. While the ISP is not intended to be used for dependent undertakings such as accessory guarantees and insurance contracts, it may be useful in some situations in indicating that a particular undertaking which might otherwise be treated as dependent under local law is intended to be independent.

For the ISP to apply to a standby, an undertaking should be made subject to these Rules by including language such as (but not limited to):

This undertaking is issued subject to the
International Standby Practices 1998.
or
Subject to ISP98.

Although the ISP can be varied by the text of a standby, it provides neutral rules acceptable in the majority of situations and a useful starting point for negotiations in other situations. It will save parties (including banks that issue, confirm, or are beneficiaries

of standbys) considerable time and expense in negotiating and drafting standby terms.

The ISP is designed to be compatible with the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (which represents a useful and practical formulation of basic standby and independent guarantee law) and also with local law, whether statutory or judicial, and to embody standby letter of credit practice under that law. If these rules conflict with mandatory law on issues such as assignment of proceeds or transfer by operation of law, applicable law will, of course, control. Nonetheless, most of these issues are rarely addressed by local law and progressive commercial law will often look to the practice as recorded in the ISP for guidance in such situations, especially with respect to cross border undertakings. As a result, it is expected that the ISP will complement local law rather than conflict with it.

The ISP is intended to be used also in arbitration as well as judicial proceedings (such as the expert based letter of credit arbitration system developed by the International Center for Letter of Credit Arbitration (ICLOCA) Rules or general commercial ICC arbitration) or with alternative methods of dispute resolution. Such a choice should be made expressly and with appropriate detail. At a minimum, it can be made in connection with the clause relating to ISP98 - e.g., This undertaking is issued subject to ISP98, and all disputes arising out of it or related to it are subject to arbitration under ICLOCA Rules (1996).

Although translations of the ISP into other languages are envisioned and will be monitored for integrity, the English text is the official text of the ISP in the event of disputes.

The ISP is the product of the work of the ISP Working Group under the auspices of the Institute of International Banking Law & Practice, Inc. which interacted with hundreds of persons over a five year period, and has benefited from comments received from individuals, banks, and national and

international associations. In particular, the participation of the International Financial Services Association (formerly the USCIB) and the Ad Hoc Working Group under the chairmanship of Gary Collyer (which led to its endorsement by the ICC Banking Commission) is gratefully recognized. In addition, the sponsorship and support of Citibank N.A., The Chase Manhattan Bank, ABN AMRO, Baker & McKenzie, and the National Law Center for Inter-American Free Trade is acknowledged. Perhaps the greatest significance of the ISP is that its creation marks a new chapter in the collaboration between the international banking operations community and the legal community at an international level. In this respect, the active role played in this process by the Secretariat of the United Nations Commission on International Trade Law has been invaluable.

The ISP is drafted as a set of rules intended for use in daily practice. It is not intended to provide introductory information on standbys and their uses. While it is recognized that specific rules would benefit from explanatory comments, such comments are not appended to the ISP because the resulting work would be too cumbersome for daily use. Instead, introductory materials and Official Comments are available in *The Official Commentary on the International Standby Practices (ISP98)*. For further information on support materials and developments on the ISP and to pose queries, consult the Institute of International Banking Law & Practice's website: www.iiblp.org

To address inevitable questions, to provide for official interpretation of the rules, and to assure their proper evolution, the Institute of International Banking Law & Practice, Inc. has created a Council on International Standby Practices which is representative of the several constituencies which have contributed to the ISP and has charged it with the task of maintaining the integrity of the ISP in cooperation with the Institute, the ICC Banking Commission, the IFSA, and various supporting organizations.

James G. Barnes Baker & McKenzie Vice Chair ISP Working Group	Professor James E. Byrne Director, Institute of International Banking Law & Practice, Inc. Chair & Reporter ISP Working Group	Gary W. Collyer Chair, ICC Ad Hoc Working Group & Technical Adviser to the ICC Banking Commission
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RULE 1: GENERAL PROVISIONS

SCOPE, APPLICATION, DEFINITIONS, AND INTERPRETATION OF THESE RULES

1.01 Scope and Application

- a. These Rules are intended to be applied to standby letters of credit (including performance, financial, and direct pay standby letters of credit).
- b. A standby letter of credit or other similar undertaking, however named or described, whether for domestic or international use, may be made subject to these Rules by express reference to them.
- c. An undertaking subject to these Rules may expressly modify or exclude their application.
- d. An undertaking subject to these Rules is hereinafter referred to as a “standby”.

1.02 Relationship to Law and Other Rules

- a. These Rules supplement the applicable law to the extent not prohibited by that law.
- b. These Rules supersede conflicting provisions in any other rules of practice to which a standby letter of credit is also made subject.

1.03 Interpretative Principles

- These Rules shall be interpreted as mercantile usage with regard for:
- a. integrity of standbys as reliable and efficient undertakings to pay;
 - b. practice and terminology of banks and businesses in day-to-day transactions;

- c. consistency within the worldwide system of banking operations and commerce; and
- d. worldwide uniformity in their interpretation and application.

1.04 Effect of the Rules

Unless the context otherwise requires, or unless expressly modified or excluded, these Rules apply as terms and conditions incorporated into a standby, confirmation, advice, nomination, amendment, transfer, request for issuance, or other agreement of:

- i. the issuer;
- ii. the beneficiary to the extent it uses the standby;
- iii. any advisor;
- iv. any confirmor;
- v. any person nominated in the standby who acts or agrees to act; and
- vi. the applicant who authorises issuance of the standby or otherwise agrees to the application of these Rules.

1.05 Exclusion of Matters Related to Due Issuance and Fraudulent or Abusive Drawing

These Rules do not define or otherwise provide for:

- a. power or authority to issue a standby;
- b. formal requirements for execution of a standby (e.g. a signed writing); or
- c. defenses to honour based on fraud, abuse, or similar matters.

These matters are left to applicable law.

GENERAL PRINCIPLES

1.06 Nature of Standbys

- a. A standby is an irrevocable, independent, documentary, and binding undertaking when issued and need not so state.
- b. Because a standby is irrevocable, an issuer's obligations under a standby cannot be amended or cancelled by the issuer except as provided in the standby or as consented to by the person against whom the amendment or cancellation is asserted.
- c. Because a standby is independent, the enforceability of an issuer's obligations under a standby does not depend on:
 - i. the issuer's right or ability to obtain reimbursement from the applicant;
 - ii. the beneficiary's right to obtain payment from the applicant;
 - iii. a reference in the standby to any reimbursement agreement or underlying transaction; or
 - iv. the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction.
- d. Because a standby is documentary, an issuer's obligations depend on the presentation of documents and an examination of required documents on their face.
- e. Because a standby or amendment is binding when issued, it is enforceable against an issuer whether or not the applicant authorised its issuance, the issuer received a fee, or the beneficiary received or relied on the standby or the amendment.

1.07 Independence of the Issuer-Beneficiary Relationship

An issuer's obligations toward the

beneficiary are not affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, or law.

1.08 Limits to Responsibilities

An issuer is not responsible for:

- a. performance or breach of any underlying transaction;
- b. accuracy, genuineness, or effect of any document presented under the standby;
- c. action or omission of others even if the other person is chosen by the issuer or nominated person; or
- d. observance of law or practice other than that chosen in the standby or applicable at the place of issuance.

TERMINOLOGY

1.09 Defined Terms

In addition to the meanings given in standard banking practice and applicable law, the following terms have or include the meanings indicated below:

a. Definitions

"Applicant" is a person who applies for issuance of a standby or for whose account it is issued, and includes (i) a person applying in its own name but for the account of another person or (ii) an issuer acting for its own account.

"Beneficiary" is a named person who is entitled to draw under a standby. See Rule 1.11(c)(ii).

"Business Day" means a day on which the place of business at which the relevant act is to be performed is regularly open; and **"Banking Day"** means a day on which the relevant bank is regularly open at the place at which the relevant act is to be performed.

"Confirmor" is a person who, upon an issuer's nomination to do so, adds to the issuer's undertaking its own undertaking to honour a standby. See Rule 1.11(c)(i).

"Demand" means, depending on the

context, either a request to honour a standby or a document that makes such request.

“Document” means a draft, demand, document of title, investment security, invoice, certificate of default, or any other representation of fact, law, right, or opinion, that upon presentation (whether in a paper or electronic medium), is capable of being examined for compliance with the terms and conditions of a standby.

“Drawing” means, depending on the context, either a demand presented or a demand honoured.

“Expiration Date” means the latest day for a complying presentation provided in a standby.

“Person” includes a natural person, partnership, corporation, limited liability company, government agency, bank, trustee, and any other legal or commercial association or entity.

“Presentation” means, depending on the context, either the act of delivering documents for examination under a standby or the documents so delivered.

“Presenter” is a person who makes a presentation as or on behalf of a beneficiary or nominated person.

“Signature” includes any symbol executed or adopted by a person with a present intent to authenticate a document.

b. Cross References

“Amendment” - Rule 2.06

“Advice” - Rule 2.05

“Approximately” (“About” or “Circa”) - Rule 3.08(f)

“Assignment of Proceeds” - Rule 6.06

“Automatic Amendment” - Rule 2.06(a)

“Copy” - Rule 4.15(d)

“Cover Instructions” - Rule 5.08

“Honour” - Rule 2.01

“Issuer” - Rule 2.01

“Multiple Presentations” - Rule 3.08(b)

“Nominated Person” - Rule 2.04

“Non-documentary Conditions” - Rule 4.11

“Original” - Rule 4.15(b) & (c)

“Partial Drawing” - Rule 3.08(a)

“Standby” - Rule 1.01(d)

“Transfer” - Rule 6.01

“Transferee Beneficiary” - Rule 1.11(c)(ii)

“Transfer by Operation of Law” - Rule 6.11

c. Electronic Presentations

The following terms in a standby providing for or permitting electronic presentation shall have the following meanings unless the context otherwise requires:

“Electronic Record” means:

- i. a record (information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form);
- ii. communicated by electronic means to a system for receiving, storing, re-transmitting, or otherwise processing information (data, text, images, sounds, codes, computer programs, software, databases, and the like); and
- iii. capable of being authenticated and then examined for compliance with the terms and conditions of the standby.

“Authenticate” means to verify an electronic record by generally accepted procedure or methodology in commercial practice:

- i. the identity of a sender or source, and
- ii. the integrity of or errors in the transmission of information content.

The criteria for assessing the integrity

of information in an electronic record is whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage, and display.

“Electronic signature” means letters, characters, numbers, or other symbols in electronic form, attached to or logically associated with an electronic record that are executed or adopted by a party with present intent to authenticate an electronic record.

“Receipt” occurs when:

- i. an electronic record enters in a form capable of being processed by the information system designated in the standby, or
- ii. an issuer retrieves an electronic record sent to an information system other than that designated by the issuer.

1.10 Redundant or Otherwise Undesirable Terms

Terms

- a. A standby should not or need not state that it is:
 - i. **unconditional or abstract** (if it does, it signifies merely that payment under it is conditioned solely on presentation of specified documents);
 - ii. **absolute** (if it does, it signifies merely that it is irrevocable);
 - iii. **primary** (if it does, it signifies merely that it is the independent obligation of the issuer);
 - iv. **payable from the issuer’s own funds** (if it does, it signifies merely that payment under it does not depend on the availability of applicant

funds and is made to satisfy the issuer’s own independent obligation);

- v. **clean or payable on demand** (if it does, it signifies merely that it is payable upon presentation of a written demand or other documents specified in the standby).
- b. A standby should not use the term **“and/or”** (if it does it means either or both).
- c. The following terms have no single accepted meaning:
 - i. and shall be disregarded: **“callable”**, **“divisible”**, **“fractionable”**, **“indivisible”**, and **“transmissible”**.
 - ii. and shall be disregarded unless their context gives them meaning: **“assignable”**, **“evergreen”**, **“reinstate”**, and **“revolving”**.

1.11 Interpretation of these Rules

- a. These Rules are to be interpreted in the context of applicable standard practice.
- b. In these Rules, **“standby letter of credit”** refers to the type of independent undertaking for which these Rules were intended, whereas **“standby”** refers to an undertaking subjected to these Rules.
- c. Unless the context otherwise requires:
 - i. **“Issuer”** includes a **“confirmor”** as if the confirmor were a separate issuer and its confirmation were a separate standby issued for the account of the issuer;
 - ii. **“Beneficiary”** includes a person to whom the named

- beneficiary has effectively transferred drawing rights (“**transferee beneficiary**”);
 - iii. “**Including**” means “including but not limited to”;
 - iv. “A or B” means “A or B or both”; “either A or B” means “A or B, but not both”; and “A and B” means “both A and B”;
 - v. Words in the singular number include the plural, and in the plural include the singular; and
 - vi. Words of the neuter gender include any gender.
- d. i. Use of the phrase “unless a standby otherwise states” or the like in a rule emphasizes that the text of the standby controls over the rule;
- ii. Absence of such a phrase in other rules does not imply that other rules have priority
- iii. over the text of the standby;
 - iv. Addition of the term “expressly” or “clearly” to the phrase “unless a standby otherwise states” or the like emphasizes that the rule should be excluded or modified only by wording in the standby that is specific and unambiguous; and
 - iv. While the effect of all of these Rules may be varied by the text of the standby, variations of the effect of some of these Rules may disqualify the standby as an independent undertaking under applicable law.
 - e. The phrase “**stated in the standby**” or the like refers to the actual text of a standby (whether as issued or effectively amended) whereas the phrase “**provided in the standby**” or the like refers to both the text of the standby and these Rules as incorporated.

RULE 2: OBLIGATIONS

2.01 Undertaking to Honour by Issuer and Any Confirmor to Beneficiary

- a. An issuer undertakes to the beneficiary to honour a presentation that appears on its face to comply with the terms and conditions of the standby in accordance with these Rules supplemented by standard standby practice.
- b. An issuer honours a complying presentation made to it by paying the amount demanded of it at sight, unless the standby provides for honour:
 - i. by acceptance of a draft drawn by the beneficiary on the issuer, in which case the issuer honours by:
 - (a) timely accepting the draft; and

- (b) thereafter paying the holder of the draft on presentation of the accepted draft on or after its maturity.
 - ii. by deferred payment of a demand made by the beneficiary on the issuer, in which case the issuer honours by:
 - (a) timely incurring a deferred payment obligation; and
 - (b) thereafter paying at maturity.
 - iii. by negotiation, in which case the issuer honours by paying the amount demanded at sight without recourse.
- c. An issuer acts in a timely manner if it pays at sight, accepts a draft,

or undertakes a deferred payment obligation (or if it gives notice of dishonour) within the time permitted for examining the presentation and giving notice of dishonour.

- d. i. A confirmor undertakes to honour a complying presentation made to it by paying the amount demanded of it at sight or, if the standby so states, by another method of honour consistent with the issuer's undertaking.
- ii. If the confirmation permits presentation to the issuer, then the confirmor undertakes also to honour upon the issuer's wrongful dishonour by performing as if the presentation had been made to the confirmor.
- iii. If the standby permits presentation to the confirmor, then the issuer undertakes also to honour upon the confirmor's wrongful dishonour by performing as if the presentation had been made to the issuer.
- e. An issuer honours by paying in immediately available funds in the currency designated in the standby unless the standby states it is payable by:
 - i. payment of a monetary unit of account, in which case the undertaking is to pay in that unit of account; or
 - ii. delivery of other items of value, in which case the undertaking is to deliver those items.

2.02 Obligation of Different Branches, Agencies, or Other Offices

For the purposes of these Rules, an issuer's branch, agency, or other office acting or undertaking to act under a standby in a capacity other than as

issuer is obligated in that capacity only and shall be treated as a different person.

2.03 Conditions to Issuance

A standby is issued when it leaves an issuer's control unless it clearly specifies that it is not then "issued" or "enforceable". Statements that a standby is not "available", "operative", "effective", or the like do not affect its irrevocable and binding nature at the time it leaves the issuer's control.

2.04 Nomination

- a. A standby may nominate a person to advise, receive a presentation, effect a transfer, confirm, pay, negotiate, incur a deferred payment obligation, or accept a draft.
- b. Nomination does not obligate the nominated person to act except to the extent that the nominated person undertakes to act.
- c. A nominated person is not authorised to bind the person making the nomination.

2.05 Advice of Standby or Amendment

- a. Unless an advice states otherwise, it signifies that:
 - i. the advisor has checked the apparent authenticity of the advised message in accordance with standard letter of credit practice; and
 - ii. the advice accurately reflects what has been received.
- b. A person who is requested to advise a standby and decides not to do so should notify the requesting party.

2.06 When an Amendment is Authorised and Binding

- a. If a standby expressly states that it is subject to "**automatic amendment**" by an increase or decrease in the amount available,

- an extension of the expiration date, or the like, the amendment is effective automatically without any further notification or consent beyond that expressly provided for in the standby. (Such an amendment may also be referred to as becoming effective “**without amendment**”.)
- b. If there is no provision for automatic amendment, an amendment binds:
- i. the issuer when it leaves the issuer’s control; and
 - ii. the confirmor when it leaves the confirmor’s control, unless the confirmor indicates that it does not confirm the amendment.
- c. If there is no provision for automatic amendment:
- i. the beneficiary must consent to the amendment for it to be binding;
 - ii. the beneficiary’s consent must be made by an express communication to the person advising the amendment unless the beneficiary presents documents which comply with the standby as amended and which would not comply with the standby prior to such amendment; and
- iii. an amendment does not require the applicant’s consent to be binding on the issuer, the confirmor, or the beneficiary.
- d. Consent to only part of an amendment is a rejection of the entire amendment.

2.07 Routing of Amendments

- a. An issuer using another person to advise a standby must advise all amendments to that person.
- b. An amendment or cancellation of a standby does not affect the issuer’s obligation to a nominated person that has acted within the scope of its nomination before receipt of notice of the amendment or cancellation.
- c. Non-extension of an automatically extendable (renewable) standby does not affect an issuer’s obligation to a nominated person who has acted within the scope of its nomination before receipt of a notice of non-extension.

RULE 3: PRESENTATION

3.01 Complying Presentation under a Standby

A standby should indicate the time, place and location within that place, person to whom, and medium in which presentation should be made. If so, presentation must be so made in order to comply. To the extent that a standby does not so indicate, presentation must be made in accordance with these Rules in order to be complying.

examination for compliance with the terms and conditions of the standby even if not all of the required documents have been presented.

3.03 Identification of Standby

- a. A presentation must identify the standby under which the presentation is made.
- b. A presentation may identify the standby by stating the complete reference number of the standby and the name and location of the issuer or by attaching the original or a copy of the standby.
- c. If the issuer cannot determine

3.02 What Constitutes a Presentation

The receipt of a document required by and presented under a standby constitutes a presentation requiring

from the face of a document received that it should be processed under a standby or cannot identify the standby to which it relates, presentation is deemed to have been made on the date of identification.

3.04 Where and to Whom Complying Presentation Made

- a. To comply, a presentation must be made at the place and any location at that place indicated in the standby or provided in these Rules.
- b. If no place of presentation to the issuer is indicated in the standby, presentation to the issuer must be made at the place of business from which the standby was issued.
- c. If a standby is confirmed, but no place for presentation is indicated in the confirmation, presentation for the purpose of obligating the confirmor (and the issuer) must be made at the place of business of the confirmor from which the confirmation was issued or to the issuer.
- d. If no location at a place of presentation is indicated (such as department, floor, room, station, mail stop, post office box, or other location), presentation may be made to:
 - i. the general postal address indicated in the standby;
 - ii. any location at the place designated to receive deliveries of mail or documents; or
 - iii. any person at the place of presentation actually or apparently authorised to receive it.

3.05 When Timely Presentation Made

- a. A presentation is timely if made at any time after issuance and before expiry on the expiration date.

- b. A presentation made after the close of business at the place of presentation is deemed to have been made on the next business day.

3.06 Complying Medium of Presentation

- a. To comply, a document must be presented in the medium indicated in the standby.
- b. Where no medium is indicated, to comply a document must be presented as a paper document, unless only a demand is required, in which case:
 - i. a demand that is presented via S.W.I.F.T., tested telex, or other similar authenticated means by a beneficiary that is a S.W.I.F.T. participant or a bank complies; otherwise
 - ii. a demand that is not presented as a paper document does not comply unless the issuer permits, in its sole discretion, the use of that medium.
- c. A document is not presented as a paper document if it is communicated by electronic means even if the issuer or nominated person receiving it generates a paper document from it.
- d. Where presentation in an electronic medium is indicated, to comply a document must be presented as an electronic record capable of being authenticated by the issuer or nominated person to whom it is presented.

3.07 Separateness of Each Presentation

- a. Making a non-complying presentation, withdrawing a presentation, or failing to make any one of a number of scheduled or permitted presentations does not waive or otherwise prejudice the right to make another timely presentation or a

- timely re-presentation whether or not the standby prohibits partial or multiple drawings or presentations.
- b. Wrongful dishonour of a complying presentation does not constitute dishonour of any other presentation under a standby or repudiation of the standby.
 - c. Honour of a non-complying presentation, with or without notice of its non-compliance, does not waive requirements of a standby for other presentations.

3.08 Partial Drawing and Multiple Presentations; Amount of Drawings

- a. A presentation may be made for less than the full amount available (“**partial drawing**”).
- b. More than one presentation (“**multiple presentations**”) may be made.
- c. The statement “partial drawings prohibited” or a similar expression means that a presentation must be for the full amount available.
- d. The statement “multiple drawings prohibited” or a similar expression means that only one presentation may be made and honoured but that it may be for less than the full amount available.
- e. If a demand exceeds the amount available under the standby, the drawing is discrepant. Any document other than the demand stating an amount in excess of the amount demanded is not discrepant for that reason.
- f. Use of “**approximately**”, “**about**”, “**circa**”, or a similar word permits a tolerance not to exceed 10% more or 10% less of the amount to which such word refers.

3.09 Extend or Pay

A beneficiary’s request to extend the expiration date of the standby

or, alternatively, to pay the amount available under it:

- a. is a presentation demanding payment under the standby, to be examined as such in accordance with these Rules; and
- b. implies that the beneficiary:
 - i. consents to the amendment to extend the expiry date to the date requested;
 - ii. requests the issuer to exercise its discretion to seek the approval of the applicant and to issue that amendment;
 - iii. upon issuance of that amendment, retracts its demand for payment; and
 - iv. consents to the maximum time available under these Rules for examination and notice of dishonour.

3.10 No Notice of Receipt of Presentation

An issuer is not required to notify the applicant of receipt of a presentation under the standby.

3.11 Issuer Waiver and Applicant Consent to Waiver of Presentation Rules

In addition to other discretionary provisions in a standby or these Rules, an issuer may, in its sole discretion, without notice to or consent of the applicant and without effect on the applicant’s obligations to the issuer, waive

- a. the following Rules and any similar terms stated in the standby which are primarily for the issuer’s benefit or operational convenience:
 - i. treatment of documents received, at the request of the presenter, as having been presented at a later date (Rule 3.02);
 - ii. identification of a presentation to the standby under which it is presented (Rule 3.03(a));

- iii. where and to whom presentation is made (Rule 3.04(b), (c), and (d)), except the country of presentation stated in the standby; or
- iv. treatment of a presentation made after the close of business as if it were made on the next business day (Rule 3.05(b)).
- b. the following Rule but not similar terms stated in the standby:
- a required document dated after the date of its stated presentation (Rule 4.06); or
 - the requirement that a document issued by the beneficiary be in the language of the standby (Rule 4.04).
- c. the following Rule relating to the operational integrity of the standby only in so far as the bank is in fact dealing with the true beneficiary:
acceptance of a demand in an electronic medium (Rule 3.06(b)).

Waiver by the confirmor requires the consent of the issuer with respect to paragraphs (b) and (c) of this Rule.

assurances from nominated persons that no payment has been made.

CLOSURE ON EXPIRY DATE

3.13 Expiration Date on a Non-Business Day

- If the last day for presentation stated in a standby (whether stated to be the expiration date or the date by which documents must be received) is not a business day of the issuer or nominated person where presentation is to be made, then presentation made there on the first following business day shall be deemed timely.
- A nominated person to whom such a presentation is made must so notify the issuer.

3.14 Closure on a Business Day and Authorization of Another Reasonable Place for Presentation

- If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.
- Upon or in anticipation of closure of the place of presentation, an issuer may authorise another reasonable place for presentation in the standby or in a communication received by the beneficiary. If it does so, then
 - presentation must be made at that reasonable place; and
 - if the communication is received fewer than thirty calendar days before the last day for presentation and for

that reason presentation is not timely made, the last day for presentation is automatically

extended to the day occurring thirty calendar days after the last day for presentation.

RULE 4: EXAMINATION

4.01 Examination for Compliance

- a. Demands for honour of a standby must comply with the terms and conditions of the standby.
- b. Whether a presentation appears to comply is determined by examining the presentation on its face against the terms and conditions stated in the standby as interpreted and supplemented by these Rules which are to be read in the context of standard standby practice.

4.02 Non-Examination of Extraneous Documents

Documents presented which are not required by the standby need not be examined and, in any event, shall be disregarded for purposes of determining compliance of the presentation. They may without responsibility be returned to the presenter or passed on with the other documents presented.

4.03 Examination for Inconsistency

An issuer or nominated person is required to examine documents for inconsistency with each other only to the extent provided in the standby.

4.04 Language of Documents

The language of all documents issued by the beneficiary is to be that of the standby.

4.05 Issuer of Documents

Any required document must be issued by the beneficiary unless the standby indicates that the document is to be issued by a third person or the document is of a type that standard standby practice requires to be issued by a third person.

4.06 Date of Documents

The issuance date of a required document may be earlier but not later than the date of its presentation.

4.07 Required Signature on a Document

- a. A required document need not be signed unless the standby indicates that the document must be signed or the document is of a type that standard standby practice requires be signed.
- b. A required signature may be made in any manner that corresponds to the medium in which the signed document is presented.
- c. Unless a standby specifies:
 - i. the name of a person who must sign a document, any signature or authentication will be regarded as a complying signature.
 - ii. the status of a person who must sign, no indication of status is necessary.
- d. If a standby specifies that a signature must be made by:
 - i. a named natural person without requiring that the signer's status be identified, a signature complies that appears to be that of the named person;
 - ii. a named legal person or government agency without identifying who is to sign on its behalf or its status, any signature complies that appears to have been made on behalf of the named legal person or government agency; or
 - iii. a named natural person,

legal person, or government agency requiring the status of the signer be indicated, a signature complies which appears to be that of the named natural person, legal person, or government agency and indicates its status.

4.08 Demand Document Implied

If a standby does not specify any required document, it will still be deemed to require a documentary demand for payment.

4.09 Identical Wording and Quotation Marks

If a standby requires:

- a. a statement without specifying precise wording, then the wording in the document presented must appear to convey the same meaning as that required by the standby;
- b. specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, then typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby; or
- c. specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, and also provides that the specified wording be "exact" or "identical", then the wording in the documents presented must duplicate the specified wording, including typographical errors in spelling, punctuation, spacing and the like, as well as blank lines and spaces for data must be exactly reproduced.

4.10 Applicant Approval

A standby should not specify that a required document be issued, signed, or counter-signed by the applicant. However, if the standby includes such a requirement, the issuer may not waive the requirement and is not responsible for the applicant's withholding of the document or signature.

4.11 Non-Documentary Terms or Conditions

- a. A standby term or condition which is non-documentary must be disregarded whether or not it affects the issuer's obligation to treat a presentation as complying or to treat the standby as issued, amended, or terminated.
- b. Terms or conditions are non-documentary if the standby does not require presentation of a document in which they are to be evidenced and if their fulfillment cannot be determined by the issuer from the issuer's own records or within the issuer's normal operations.
- c. Determinations from the issuer's own records or within the issuer's normal operations include determinations of:
 - i. when, where, and how documents are presented or otherwise delivered to the issuer;
 - ii. when, where, and how communications affecting the standby are sent or received by the issuer, beneficiary, or any nominated person;
 - iii. amounts transferred into or out of accounts with the issuer; and
 - iv. amounts determinable from a published index (e.g., if a standby provides for determining amounts of interest accruing according to published interest rates).

- d. An issuer need not re-compute a beneficiary's computations under a formula stated or referenced in a standby except to the extent that the standby so provides.

4.12 Formality of Statements in Documents

- a. A required statement need not be accompanied by a solemnity, officialization, or any other formality.
- b. If a standby provides for the addition of a formality to a required statement by the person making it without specifying form or content, the statement complies if it indicates that it was declared, averred, warranted, attested, sworn under oath, affirmed, certified, or the like.
- c. If a standby provides for a statement to be witnessed by another person without specifying form or content, the witnessed statement complies if it appears to contain a signature of a person other than the beneficiary with an indication that the person is acting as a witness.
- d. If a standby provides for a statement to be counter-signed, legalized, visaed, or the like by a person other than the beneficiary acting in a governmental, judicial, corporate, or other representative capacity without specifying form or content, the statement complies if it contains the signature of a person other than the beneficiary and includes an indication of that person's representative capacity and the organization on whose behalf the person has acted.

4.13 No Responsibility to Identify Beneficiary

Except to the extent that a standby requires presentation of an electronic record:

- a. a person honouring a presentation has no obligation to the applicant to ascertain the identity of any person making a presentation or any assignee of proceeds;
- b. payment to a named beneficiary, transferee, an acknowledged assignee, successor by operation of law, to an account or account number stated in the standby or in a cover instruction from the beneficiary or nominated person fulfills the obligation under the standby to effect payment.

4.14 Name of Acquired or Merged Issuer or Confirmor

If the issuer or confirmor is reorganized, merged, or changes its name, any required reference by name to the issuer or confirmor in the documents presented may be to it or its successor.

4.15 Original, Copy, and Multiple Documents

- a. A presented document must be an original.
- b. Presentation of an electronic record, where an electronic presentation is permitted or required, is deemed to be an "original".
- c.
 - i. A presented document is deemed to be an original unless it appears on its face to have been reproduced from an original.
 - ii. A document which appears to have been reproduced from an original is deemed to be an original if the signature or authentication appears to be original.
- d. A standby that requires presentation of a "copy" permits presentation of either an original or copy unless the standby states that only a copy be presented or otherwise addresses the disposition of all originals.

- e. If multiples of the same document are requested, only one must be an original unless:
 - i. “duplicate originals” or “multiple originals” are requested in which case all must be originals; or
 - ii. “two copies”, “two-fold”, or the like are requested in which case either originals or copies may be presented.

STANDBY DOCUMENT TYPES

4.16 Demand for Payment

- a. A demand for payment need not be separate from the beneficiary's statement or other required document.
- b. If a separate demand is required, it must contain:
 - i. a demand for payment from the beneficiary directed to the issuer or nominated person;
 - ii. a date indicating when the demand was issued;
 - iii. the amount demanded; and
 - iv. the beneficiary's signature.
- c. A demand may be in the form of a draft or other instruction, order, or request to pay. If a standby requires presentation of a “draft” or “bill of exchange”, that draft or bill of exchange need not be in negotiable form unless the standby so states.

4.17 Statement of Default or Other Drawing Event

If a standby requires a statement, certificate, or other recital of a default or other drawing event and does not specify content, the document complies if it contains:

- a. a representation to the effect that payment is due because a drawing event described in the standby has occurred;
- b. a date indicating when it was issued; and
- c. the beneficiary's signature.

4.18 Negotiable Documents

If a standby requires presentation of a document that is transferable by endorsement and delivery without stating whether, how, or to whom endorsement must be made, then the document may be presented without endorsement, or, if endorsed, the endorsement may be in blank and, in any event, the document may be issued or negotiated with or without recourse.

4.19 Legal or Judicial Documents

If a standby requires presentation of a government-issued document, a court order, an arbitration award, or the like, a document or a copy is deemed to comply if it appears to be:

- i. issued by a government agency, court, tribunal, or the like;
- ii. suitably titled or named;
- iii. signed;
- iv. dated; and
- v. originally certified or authenticated by an official of a government agency, court, tribunal, or the like.

4.20 Other Documents

- a. If a standby requires a document other than one whose content is specified in these Rules without specifying the issuer, data content, or wording, a document complies if it appears to be appropriately titled or to serve the function of that type of document under standard standby practice.
- b. A document presented under a standby is to be examined in the context of standby practice under these Rules even if the document is of a type (such as a commercial invoice, transport documents, insurance documents or the like) for which the Uniform Customs and Practice for Documentary Credits contains detailed rules.

4.21 Request to Issue Separate Undertaking

If a standby requests that the beneficiary of the standby issue its own separate undertaking to another (whether or not the standby recites the text of that undertaking):

- a. the beneficiary receives no rights other than its rights to draw under the standby even if the issuer pays a fee to the beneficiary for issuing the separate undertaking;
- b. neither the separate undertaking nor any documents presented under it need be presented to the issuer; and
- c. if originals or copies of the separate undertaking or documents

presented under it are received by the issuer although not required to be presented as a condition to honour of the standby:

- i. the issuer need not examine, and, in any event, shall disregard their compliance or consistency with the standby, with the beneficiary's demand under the standby, or with the beneficiary's separate undertaking; and
- ii. the issuer may without responsibility return them to the presenter or forward them to the applicant with the presentation.

RULE 5: NOTICE, PRECLUSION, AND DISPOSITION OF DOCUMENTS

5.01 Timely Notice of Dishonour

- a. Notice of dishonour must be given within a time after presentation of documents which is not unreasonable.
 - i. Notice given within three business days is deemed to be not unreasonable and beyond seven business days is deemed to be unreasonable.
 - ii. Whether the time within which notice is given is unreasonable does not depend upon an imminent deadline for presentation.
 - iii. The time for calculating when notice of dishonour must be given begins on the business day following the business day of presentation.
 - iv. Unless a standby otherwise expressly states a shortened time within which notice of dishonour must be given, the issuer has no obligation to accelerate its examination of a presentation.
- b. i. The means by which a notice of dishonour is to be given

is by telecommunication, if available, and, if not, by another available means which allows for prompt notice.

- ii. If notice of dishonour is received within the time permitted for giving the notice, then it is deemed to have been given by prompt means.
- c. Notice of dishonour must be given to the person from whom the documents were received (whether the beneficiary, nominated person, or person other than a delivery person) except as otherwise requested by the presenter.

5.02 Statement of Grounds for Dishonour

A notice of dishonour shall state all discrepancies upon which dishonour is based.

5.03 Failure to Give Timely Notice of Dishonour

- a. Failure to give notice of a discrepancy in a notice of dishonour within the time and

- by the means specified in the standby or these rules precludes assertion of that discrepancy in any document containing the discrepancy that is retained or represented, but does not preclude assertion of that discrepancy in any different presentation under the same or a separate standby.
- b. Failure to give notice of dishonour or acceptance or acknowledgment that a deferred payment undertaking has been incurred obligates the issuer to pay at maturity.

5.04 Notice of Expiry

Failure to give notice that a presentation was made after the expiration date does not preclude dishonour for that reason.

5.05 Issuer Request for Applicant Waiver without Request by Presenter

If the issuer decides that a presentation does not comply and if the presenter does not otherwise instruct, the issuer may, in its sole discretion, request the applicant to waive non-compliance or otherwise to authorise honour within the time available for giving notice of dishonour but without extending it. Obtaining the applicant's waiver does not obligate the issuer to waive non-compliance.

5.06 Issuer Request for Applicant Waiver upon Request of Presenter

If, after receipt of notice of dishonour, a presenter requests that the presented documents be forwarded to the issuer or that the issuer seek the applicant's waiver:

- a. no person is obligated to forward the discrepant documents or seek the applicant's waiver;
- b. the presentation to the issuer remains subject to these Rules unless departure from them is expressly consented to by the presenter; and

- c. if the documents are forwarded or if a waiver is sought:
 - i. the presenter is precluded from objecting to the discrepancies notified to it by the issuer;
 - ii. the issuer is not relieved from examining the presentation under these Rules;
 - iii. the issuer is not obligated to waive the discrepancy even if the applicant waives it; and
 - iv. the issuer must hold the documents until it receives a response from the applicant or is requested by the presenter to return the documents, and if the issuer receives no such response or request within ten business days of its notice of dishonour, it may return the documents to the presenter.

5.07 Disposition of Documents

Dishonoured documents must be returned, held, or disposed of as reasonably instructed by the presenter. Failure to give notice of the disposition of documents in the notice of dishonour does not preclude the issuer from asserting any defense otherwise available to it against honour.

5.08 Cover Instructions/Transmittal Letter

- a. Instructions accompanying a presentation made under a standby may be relied on to the extent that they are not contrary to the terms or conditions of the standby, the demand, or these Rules.
- b. Representations made by a nominated person accompanying a presentation may be relied upon to the extent that they are not contrary to the terms or conditions of a standby or these Rules.
- c. Notwithstanding receipt of instructions, an issuer or

- nominated person may pay, give notice, return the documents, or otherwise deal directly with the presenter.
- d. A statement in the cover letter that the documents are discrepant does not relieve the issuer from examining the presentation for compliance.
- c. Failure to give a timely notice of objection by prompt means precludes assertion by the applicant against the issuer of any discrepancy or other matter apparent on the face of the documents received by the applicant, but does not preclude assertion of that objection to any different presentation under the same or a different standby.

5.09 Applicant Notice of Objection

- a. An applicant must timely object to an issuer's honour of a noncomplying presentation by giving timely notice by prompt means.
- b. An applicant acts timely if it objects to discrepancies by

RULE 6: TRANSFER, ASSIGNMENT, AND TRANSFER BY OPERATION OF LAW

TRANSFER OF DRAWING RIGHTS

the transfer requested by the beneficiary.

6.01 Request to Transfer Drawing Rights

Where a beneficiary requests that an issuer or nominated person honour a drawing from another person as if that person were the beneficiary, these Rules on transfer of drawing rights ("transfer") apply.

6.02 When Drawing Rights are Transferable

- a. A standby is not transferable unless it so states.
- b. A standby that states that it is transferable without further provision means that drawing rights:
- may be transferred in their entirety more than once;
 - may not be partially transferred; and
 - may not be transferred unless the issuer (including the confirmor) or another person specifically nominated in the standby agrees to and effects

6.03 Conditions to Transfer

An issuer of a transferable standby or a nominated person need not effect a transfer unless:

- it is satisfied as to the existence and authenticity of the original standby; and
- the beneficiary submits or fulfills:
 - a request in a form acceptable to the issuer or nominated person including the effective date of the transfer and the name and address of the transferee;
 - the original standby;
 - verification of the signature of the person signing for the beneficiary;
 - verification of the authority of the person signing for the beneficiary;
 - payment of the transfer fee; and
 - any other reasonable requirements.

6.04 Effect of Transfer on Required Documents

Where there has been a transfer of drawing rights in their entirety:

- a. a draft or demand must be signed by the transferee beneficiary; and
- b. the name of the transferee beneficiary may be used in place of the name of the transferor beneficiary in any other required document.

6.05 Reimbursement for Payment Based on a Transfer

An issuer or nominated person paying under a transfer pursuant to Rule 6.03(a), (b)(i), and (b)(ii) is entitled to reimbursement as if it had made payment to the beneficiary.

ACKNOWLEDGMENT OF ASSIGNMENT OF PROCEEDS

6.06 Assignment of Proceeds

Where an issuer or nominated person is asked to acknowledge a beneficiary's request to pay an assignee all or part of any proceeds of the beneficiary's drawing under the standby, these Rules on acknowledgment of an assignment of proceeds apply except where applicable law otherwise requires.

6.07 Request for Acknowledgment

- a. Unless applicable law otherwise requires, an issuer or nominated person
 - i. is not obligated to give effect to an assignment of proceeds which it has not acknowledged; and
 - ii. is not obligated to acknowledge the assignment.
- b. If an assignment is acknowledged:
 - i. the acknowledgment confers no rights with respect to the standby to the assignee who is only entitled to the proceeds assigned, if any, and whose rights may be

- affected by amendment or cancellation; and
- ii. the rights of the assignee are subject to:
 - (a) the existence of any net proceeds payable to the beneficiary by the person making the acknowledgment;
 - (b) rights of nominated persons and transferee beneficiaries;
 - (c) rights of other acknowledged assignees; and
 - (d) any other rights or interests that may have priority under applicable law.

6.08 Conditions to Acknowledgment of Assignment of Proceeds

An issuer or nominated person may condition its acknowledgment on receipt of:

- a. the original standby for examination or notation;
- b. verification of the signature of the person signing for the beneficiary;
- c. verification of the authority of the person signing for the beneficiary;
- d. an irrevocable request signed by the beneficiary for acknowledgment of the assignment that includes statements, covenants, indemnities, and other provisions which may be contained in the issuer's or nominated person's required form requesting acknowledgment of assignment, such as:
 - i. the identity of the affected drawings if the standby permits multiple drawings;
 - ii. the full name, legal form, location, and mailing address of the beneficiary and the assignee;
 - iii. details of any request affecting the method of

- payment or delivery of the standby proceeds;
- iv. limitation on partial assignments and prohibition of successive assignments;
 - v. statements regarding the legality and relative priority of the assignment; or
 - vi. right of recovery by the issuer or nominated person of any proceeds received by the assignee that are recoverable from the beneficiary;
- e. payment of a fee for the acknowledgment; and
 - f. fulfillment of other reasonable requirements.

6.09 Conflicting Claims to Proceeds

If there are conflicting claims to proceeds, then payment to an acknowledged assignee may be suspended pending resolution of the conflict.

6.10 Reimbursement for Payment Based on an Assignment

An issuer or nominated person paying under an acknowledged assignment pursuant to Rule 6.08(a) and (b) is entitled to reimbursement as if it had made payment to the beneficiary. If the beneficiary is a bank, the acknowledgment may be based solely upon an authenticated communication.

TRANSFER BY OPERATION OF LAW

6.11 Transferee by Operation of Law

Where an heir, personal representative, liquidator, trustee, receiver, successor corporation, or similar person who claims to be designated by law to succeed to the interests of a beneficiary presents documents in its own name as if it were the authorised transferee of the beneficiary, these Rules on transfer by operation of law apply.

6.12 Additional Document in Event of Drawing in Successor's Name

A claimed successor may be treated as if it were an authorised transferee of a beneficiary's drawing rights in their entirety if it presents an additional document or documents which appear to be issued by a public official or representative (including a judicial officer) and indicate:

- a. that the claimed successor is the survivor of a merger, consolidation, or similar action of a corporation, limited liability company, or other similar organization;
- b. that the claimed successor is authorised or appointed to act on behalf of the named beneficiary or its estate because of an insolvency proceeding;
- c. that the claimed successor is authorised or appointed to act on behalf of the named beneficiary because of death or incapacity; or
- d. that the name of the named beneficiary has been changed to that of the claimed successor.

6.13 Suspension of Obligations upon Presentation by Successor

An issuer or nominated person which receives a presentation from a claimed successor which complies in all respects except for the name of the beneficiary:

- a. may request in a manner satisfactory as to form and substance:
 - i. a legal opinion;
 - ii. an additional document referred to in Rule 6.12 (Additional Document in Event of Drawing in Successor's Name) from a public official;
 - iii. statements, covenants, and indemnities regarding the status of the claimed successor as successor by operation of law;

- iv. payment of fees reasonably related to these determinations; and
 - v. anything which may be required for a transfer under Rule 6.03 (Conditions to Transfer) or an acknowledgment of assignment of proceeds under Rule 6.08 (Conditions to Acknowledgment of Assignment of Proceeds); but such documentation shall not constitute a required document for purposes of expiry of the standby.
- b. Until the issuer or nominated person receives the requested documentation, its obligation to honour or give notice of dishonour is suspended, but any deadline for presentation of required documents is not thereby extended.

6.14 Reimbursement for Payment Based on a Transfer by Operation of Law

An issuer or nominated person paying under a transfer by operation of law pursuant to Rule 6.12 (Additional Document in Event of Drawing in Successor's Name) is entitled to reimbursement as if it had made payment to the beneficiary.

RULE 7: CANCELLATION

7.01 When an Irrevocable Standby is Cancelled or Terminated

A beneficiary's rights under a standby may not be cancelled without its consent. Consent may be evidenced in writing or by an action such as return of the original standby in a manner which implies that the beneficiary consents to cancellation. A beneficiary's consent to cancellation is irrevocable when communicated to the issuer.

7.02 Issuer's Discretion Regarding a Decision to Cancel

Before acceding to a beneficiary's authorization to cancel and treating the standby as cancelled for all purposes, an issuer may require in a manner satisfactory as to form and substance:

- a. the original standby;
- b. verification of the signature of the person signing for the beneficiary;
- c. verification of the authorization of the person signing for the beneficiary;
- d. a legal opinion;
- e. an irrevocable authority signed by the beneficiary for cancellation that includes statements, covenants, indemnities, and similar provisions contained in a required form;
- f. satisfaction that the obligation of any confirmor has been cancelled;
- g. satisfaction that there has not been a transfer or payment by any nominated person; and
- h. any other reasonable measure.

RULE 8: REIMBURSEMENT OBLIGATIONS

8.01 Right to Reimbursement

- a. Where payment is made against a complying presentation in accordance with these Rules, reimbursement must be made by:
 - i. an applicant to an issuer requested to issue a standby; and
 - ii. an issuer to a person nominated to honour or otherwise give value.
- b. An applicant must indemnify the issuer against all claims, obligations, and responsibilities (including attorney's fees) arising out of:

- i. the imposition of law or practice other than that chosen in the standby or applicable at the place of issuance;
 - ii. the fraud, forgery, or illegal action of others; or
 - iii. the issuer's performance of the obligations of a confirmer that wrongfully dishonours a confirmation.
- c. This Rule supplements any applicable agreement, course of dealing, practice, custom or usage providing for reimbursement or indemnification on lesser or other grounds.

8.02 Charges for Fees and Costs

- a. An applicant must pay the issuer's charges and reimburse the issuer for any charges that the issuer is obligated to pay to persons nominated with the applicant's consent to advise, confirm, honour, negotiate, transfer, or to issue a separate undertaking.
- b. An issuer is obligated to pay the charges of other persons:
 - i. if they are payable in

accordance with the terms of the standby; or

- ii. if they are the reasonable and customary fees and expenses of a person requested by the issuer to advise, honour, negotiate, transfer, or to issue a separate undertaking, and they are unrecovered and unrecoverable from the beneficiary or other presenter because no demand is made under the standby.

8.03 Refund of Reimbursement

A nominated person that obtains reimbursement before the issuer timely dishonours the presentation must refund the reimbursement with interest if the issuer dishonours. The refund does not preclude the nominated person's wrongful dishonour claims.

8.04 Bank-to-Bank Reimbursement

Any instruction or authorization to obtain reimbursement from another bank is subject to the International Chamber of Commerce standard rules for bank-to-bank reimbursements.

RULE 9: TIMING

9.01 Duration of Standby

A standby must:

- a. contain an expiry date; or
- b. permit the issuer to terminate the standby upon reasonable prior notice or payment.

an action must be taken under these Rules begins to run on the first business day following the business day when the action could have been undertaken at the place where the action should have been undertaken.

- b. An extension period starts on the calendar day following the stated expiry date even if either day falls on a day when the issuer is closed.

9.02 Effect of Expiration on Nominated Person

The rights of a nominated person that acts within the scope of its nomination are not affected by the subsequent expiry of the standby.

9.03 Calculation of Time

- a. A period of time within which

9.04 Time of Day of Expiration

If no time of day is stated for expiration, it occurs at the close of business at the place of presentation.

9.05 Retention of Standby

Retention of the original standby does not preserve any rights under

the standby after the right to demand payment ceases.

RULE 10: SYNDICATION / PARTICIPATION**10.01 Syndication**

If a standby with more than one issuer does not state to whom presentation may be made, presentation may be made to any issuer with binding effect on all issuers.

in the issuer's rights against the applicant and any presenter and may disclose relevant applicant information in confidence to potential participants.

10.02 Participation

- a. Unless otherwise agreed between an applicant and an issuer, the issuer may sell participations

- b. An issuer's sale of participations does not affect the obligations of the issuer under the standby or create any rights or obligations between the beneficiary and any participant.

ISP98 Forms: Introduction

In order to increase the adoption and ease of use of ISP98, the IIBLP published nine ISP98 Model Forms to be used by standby LC practitioners to simplify a transaction. Below is a list of the nine forms, and cover the most common situations the standby LC practitioner will face in a typical transaction.

The principal drafter was James G. Barnes of Baker McKenzie LLP, and Professor James E. Byrne was the Editor. The ISP98 Forms were the product of 5 years of discussions with multiple drafts that were vetted in meetings held around the world, at Institute programmes, and in meetings of its Advisory Councils.

The currently published ISP98 Forms are

- 1 – Model Standby Incorporating Annexed Form of Payment Demand with Statement
- 2 – Model Standby Providing for Extension and Incorporating Annexed Form of Payment Demand with Alternative Non-Extension Statement
- 3 – Model Standby Providing for Reduction and Incorporating Annexed Form of Reduction Demand
- 4 – Model Standby Providing for Transfer and Incorporating Annexed Form of Transfer Demand
- 5 – Simplified Demand Only Standby
- 6 – Model Counter Standby with Annexed Form of Local Bank Undertaking
- 7 – Model Standby Requiring Confirmation
- 8 – Model Confirmation of Standby
- 11.1 – Model Government Standby Form

These ISP98 Forms are intended primarily for standby users to enable them to provide counter parties and their banks with an appropriately structured and worded independent undertaking (whether called a standby letter of credit or a demand guarantee) to be issued subject to ISP98. Each ISP98 Form includes extensive endnotes that explain each provision, explain why a particular text was chosen, refer to the applicable ISP98 rule (and related UCC Rev. Art. 5 sections), and identify alternative approaches and additional matters to be considered, sometimes offering alternative or supplemental model text.

The basic form of standby is ISP98 Form 1. Much of the text of this model standby (but not its explanatory endnotes) is repeated in the other ISP98 Forms. ISP98 Form 2 provides for automatic extension. ISP98 Forms 3 & 4 focus on model standby provisions for reduction on demand, and transfer on demand. ISP98 Forms 6-8 provide a model counter standby and a model standby with confirmation of the standby. The endnotes to ISP98 Forms 2-9 address the matters added to the basic ISP98 Form 1. Model ISP98 Form 11.1 is specifically tailored for use by government beneficiaries, whether federal, state or local, and is intended to support a variety of underlying obligations owed to government beneficiaries while providing for terms reasonably acceptable to applicants and issuers.

Although the ISP98 Forms are freely available at <http://iiblp.org/banking-law-resources/isp-forms/>, Forms 1, 2 and 11.1 are included here for convenience. They are useable for all purposes except publication for a charge to a purchaser or subscriber.

ISP98 Form 1

Model Standby Incorporating Annexed Form of Payment Demand with Statement*

[name and address of beneficiary]

[date of issuance]

Issuance. At the request and for the account of [name and address of applicant] (“Applicant”),¹ we [name and address of issuer at place of issuance] (“Issuer”) issue² this irrevocable³ standby letter of credit number [reference number] (“Standby”)⁴ in favour of [name and address of beneficiary] (“Beneficiary”)⁵ in the maximum aggregate amount⁶ of [currency/amount].

Undertaking. Issuer undertakes to Beneficiary⁷ to pay⁸ Beneficiary’s demand for payment in the currency and for an amount available under this Standby⁹ and in the form of the Annexed Payment Demand completed as indicated¹⁰ and presented¹¹ to Issuer at the following place for presentation: [address of place for presentation],¹² on or before the expiration date.¹³

Expiration. The expiration date of this Standby is [date].¹⁴

[Payment. Payment against a complying presentation shall be made within 3 business days¹⁵ after presentation at the place for presentation or by wire transfer to a duly requested account of Beneficiary. An advice of such payment shall be sent to Beneficiary’s above-stated address.]¹⁶

[Drawing. Partial and multiple drawings are permitted.]¹⁷

[Reduction. Any payment made under this Standby shall reduce the amount available under it.]¹⁸

ISP98. This Standby is issued subject to the International Standby Practices 1998 (ISP98) (International Chamber of Commerce Publication No. 590).¹⁹

[Communications. Communications other than demands may be made to Issuer by telephone, telefax, or SWIFT message, to the following: [numbers/addresses]. Beneficiary requests for amendment of this Standby, including amendment to reflect a change in Beneficiary’s address, should be made to Applicant, who may then request Issuer to issue the desired amendment.]²⁰

[Issuer’s name]

[signature]

Authorized Signature

Annexed Payment Demand

[INSERT DATE]²¹

[name and address of Issuer or other addressee at place of presentation as stated in standby]²²

Re: Standby Letter of Credit No. [reference number], dated [date], issued by [Issuer's name] ("Standby")²³

The undersigned Beneficiary demands payment of [INSERT CURRENCY/AMOUNT] under the Standby.²⁴

Beneficiary states²⁵ that Applicant²⁶ is obligated²⁷ to pay to Beneficiary the amount demanded[, which amount is due and unpaid²⁸] under[or in connection with] the agreement²⁹ between Beneficiary and Applicant³⁰ titled [agreement title] and dated [date].

[Beneficiary further states that the proceeds³¹ from this demand will be used to satisfy³² the above-identified obligations and that Beneficiary will account to Applicant for any proceeds that are not so used.]

Beneficiary requests that payment be made by wire transfer to an account of Beneficiary as follows: [INSERT NAME, ADDRESS, AND ROUTING NUMBER OF BENEFICIARY'S BANK, AND NAME AND NUMBER OF BENEFICIARY'S ACCOUNT].³⁴

[Beneficiary's name and address]³⁵

By its authorized officer:

[INSERT ORIGINAL SIGNATURE]³⁶

[INSERT TYPED/PRINTED NAME AND TITLE]

[Before the standby is issued, all text in [bold] should be completed, and optional text in [italics] should be included or deleted (or redrafted). Text in the annexed demand form preceded by "INSERT" (or other ALL CAPITALS guidance) and in [ALL CAPITALS UNDERLINED] is to be completed as indicated when the beneficiary prepares and presents a demand.]

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This ISP98 Form 1 model standby includes terms that ISP98 indicates should be included in a standby. It includes terms that restate other ISP98 rules for the avoidance of doubt, e.g., that the standby is irrevocable and permits partial demands. It uses words, phrases, and spellings that are used in ISP98. It also includes optional terms that are specific about when and how payment will be made.

This ISP98 Form 1 incorporates an annexed model form of payment demand that includes terms that ISP98 indicates should be included when making a presentation. This demand

form also includes beneficiary statements of a type the applicant or beneficiary may desire in order to identify the underlying obligation(s) to be supported by the standby (and to be satisfied upon honour of the standby).

The annexed demand form may also be used as a precedent by a beneficiary preparing a demand to be presented under an ISP98 standby that does not specify the entire form of demand to be presented. See ISP98 Form 5 (Simplified Demand Only Standby).

This ISP98 Form 1 is intended to be self-contained and, absent special circumstances, useable without extended reference to the text of ISP98.

The endnotes to this form include alternative and other optional terms, as well as references to relevant ISP98 rules. Other ISP98 model standby forms vary this form, e.g., by adding text and annexes (with relevant endnotes) that focus on expiration, reduction, transfer, confirmation, and counter standby support.

This form is published for educational purposes and not as legal or professional advice. Potential users should consult with their own advisers in the drafting or use of a standby letter of credit. ISP98 and letter of credit educational and training materials, including The Official Commentary on the International Standby Practices containing official interpretations of ISP98, are available from IIBLP at www.iiblp.org.

1. Applicant. As noted in ISP98 Rule 1.09(a) (Definitions), the “applicant” is the person who applies for issuance or for whose account the standby is issued. Typically, the applicant stated in the standby is the person whose underlying obligation is supported by the standby. The standby’s terms should be appropriate to support those underlying obligations, and the underlying documentation should appropriately provide for the standby and for the use of funds paid under the standby.

Where a standby is issued on the application of a correspondent bank from whom the issuer expects reimbursement, consideration should be given to an alternative clause: “At the request and for the account of [name of correspondent bank], (“Applicant”) acting at the request and for the account of its customer, [XYZ]...”. Similarly, where a standby is issued on the application of a parent company, consideration should be given to an alternative clause: “At the request and for the account of [Parent] (“Applicant”) acting at the request and for the account of its subsidiary [name]...”.

This standby form adds “(“Applicant”)” after the name of the applicant, and that defined term is used in the annexed model demand form. If this parenthetical definition (or the parenthetical definition for the issuer or the beneficiary) is not wanted, appropriate adjustments should be made in the standby, including in any statement required to be included with any beneficiary demand. If an adjustment is made because the applicant is not also the underlying obligor (or the beneficiary is not also the underlying obligee), then the adjustments should be made in the standby and also in the documentation underlying the standby. See endnote 30.

Except for endnotes 1 and 30, these endnotes do not address issues that may arise where the applicant is not the underlying obligor or where there are multiple applicants.

2. Issuance. The name of the issuer and the place(s) of issuance and presentation should be indicated in the standby. The indicated place of issuance is significant in determining what law governs the issuer's obligations. Absent an indication of the place of issuance in the standby, it may prove difficult to determine a single place of issuance, even with full knowledge of the process resulting in sending the standby to the beneficiary. This form, including endnotes, does not address the possibility, briefly addressed in ISP98 Rule 10 (Syndication/Participation), of multiple issuers or of participating interests in a single issuer's standby facility.

Rule 2.03 (Conditions to Issuance) provides generally that a standby is issued when it leaves the issuer's control, and Rule 3.05 (When Timely Presentation Made) allows presentation any time after issuance (and before expiry). It is customary for a standby to recite the issuance date either at the top of the undertaking or in the first paragraph of the text (or both).

3. Irrevocability. It is unnecessary to state that an ISP98 standby is irrevocable. See ISP98 Rule 1.06(a) and (b) (Nature of Standbys). However, because of the contrary rule in UCP82 (1933) until UCP500 (1993), some letter of credit users expect or require inclusion of the word "irrevocable".

4. Name of undertaking. While this form of undertaking is named a "standby letter of credit", the name is not determinative of its character as an undertaking within the scope of ISP98 or as an independent undertaking under applicable law. As provided in ISP98 Rule 1.01(b) (Scope and Application), it could be called an independent guarantee, bank guarantee, bond, or any other name.

5. Beneficiary. The beneficiary named in a standby is the person to whom the issuer's obligation is owed. Typically, there is one named beneficiary of the issuer's undertaking, who is also the obligee of the applicant's obligation that is supported by the standby. This standby form, including endnotes, does not address issues that may arise where the named beneficiary is not the underlying obligee or where there are multiple beneficiaries.

6. Amount available. A standby should expressly state the amount available under the standby. Standbys commonly add that the stated amount of a standby is the "maximum" (or "full" or "not to exceed") "aggregate" amount. These are unnecessary additions because ISP98 Rule 3.08 (Partial Drawings & Multiple Presentations; Amount of Drawings) permits presentations for less, but not more, than the amount available under a standby.

Under ISP98 Rule 3.08(e) (Partial Drawings & Multiple Presentations; Amount of Drawings), a drawing that exceeds the amount available under the standby is discrepant. To override that rule and require the issuer to pay the full amount available under the standby against a presentation that would comply but for the "credit overdrawn" discrepancy, the following clause may be added: "If a demand exceeds the amount available, but the presentation otherwise complies, Issuer undertakes to pay the amount available."

7. Undertaking to the beneficiary only. It is unnecessary to state that an issuer's payment obligation is made "to Beneficiary". Except as otherwise stated in the standby or mandated by applicable law, a standby that names a beneficiary and does not identify any other person as having rights under the standby obligates the issuer solely to the named beneficiary. ISP98 Rule 2.04 (Nomination) provides for the possibility that a standby nominates another person to confirm the issuer's undertaking or otherwise to give value against the named beneficiary's

complying demand. ISP98 Rule 6 (Transfer, Assignment, and Transfer by Operation of Law) provides for the possibility that an issuer is requested to acknowledge a person claiming to be a transferee beneficiary or an assignee of standby proceeds or a successor beneficiary. ISP98 Form 4 (Model Standby Providing for Transfer and Incorporating Annexed Form of Transfer Demand) focuses on transfer of drawing rights by beneficiary demand and other standby terms affecting a claimed transferee beneficiary, assignee of standby proceeds, or successor beneficiary.

8. Honour by payment. An issuer may undertake to honour a letter of credit other than by sight payment. Under ISP98 Rule 2.01 (Undertaking to Honour by Issuer and Any Confirmor to Beneficiary) an issuer may undertake to honour by non-recourse negotiation (purchase) of the documents presented or by acceptance of a time draft or incurrence of a deferred payment undertaking, followed by payment at maturity. Also, an issuer may undertake to honour by the delivery of an item of value, such as gold, in which case the issuer must be able to deliver the specified item. These other forms of honour are not covered in this form because they are much less common for standbys than honour by sight payment.

9. Presentation of standby. An issuer's obligation is not dependant on the beneficiary's holding or presenting the standby, unless the standby so provides. See ISP98 Rule 2.03 (Conditions to Issuance). This form, like most standbys, does not require presentation of the standby with a payment demand. Any such requirement exposes the beneficiary to the risk that a demand may be rightfully refused if the standby is lost or otherwise cannot be timely presented. It also exposes the issuer to disputes over the issuer's receipt, handling, or return of the standby. There are other ways to avoid payment against a forged demand, e.g., by providing in the standby that payment must be made to a specified beneficiary account.

Under ISP98 Rule 3.12 (Original Standby Lost, Stolen, Mutilated, or Destroyed), an issuer is entitled to enforce a requirement that the standby be presented with a demand. However, the rule also gives an issuer considerable discretion to excuse or remedy a beneficiary's failure to present the standby. If greater certainty is desired, then the standby could add the following or a variation: "Issuer undertakes to exercise its discretion under ISP98 Rule 3.12 to waive the requirement to present this Standby (or to replace it) against Beneficiary's representations and indemnities (including third party indemnities deemed appropriate by Issuer) in favor of Issuer and Applicant that are reasonably satisfactory to Issuer." The representations and indemnities should run to the applicant as well as the issuer. Although the issuer would determine what is reasonable at the time of taking any representations or indemnities, the applicant would bear the ultimate risk of payment against a forged demand.

The term "this Standby" in this ISP98 Form 1, like the term "original standby" in ISP98 Rule 3.12 (and Rule 6.03 (Conditions to Transfer)), refers to the originally signed/authenticated undertaking that evidences the issuer's obligation. Unless the issuer sends a signed/authenticated undertaking directly to the beneficiary, it may be desirable to clarify in the standby what must or may be presented as, or in lieu of, the issuer's undertaking in the form it left the issuer's control. If the standby was sent by an authenticated SWIFT message from an issuing bank to an advisor, the document to be presented would be the advisor's signed/authenticated message to the beneficiary annexing, or reproducing the text of, the SWIFT message sent by the issuer. There may be no unique undertaking for the beneficiary to present. If, for example, a standby was sent to a beneficiary in an electronic medium, its presentation to the issuer in an electronic medium or as a paper printout would serve merely to identify the standby to be transferred.

The terms "this standby" and "original standby" do not necessarily refer also to amendments. Some standbys state that all amendments must also be presented, and some also require a statement from the beneficiary as to whether it has consented (or not) to each amendment issued by the issuer. Neither should be necessary. An issuer should be able to determine from its own records whether amendments are binding on the issuer and the beneficiary, but it may nonetheless be desirable to address the status of amendments in any standby term requiring presentation of the standby.

10. Form of payment demand. This ISP98 Form 1 standby incorporates an annexed model form of payment demand to be completed and presented by the beneficiary. Annexing the desired form of payment demand (with any desired beneficiary statement) to a standby is unnecessary but promotes the efficient use of standbys. Requiring a "draft" (or bill of exchange) drawn at sight by the beneficiary on the issuer is neither necessary nor efficient under a standby that undertakes to pay at sight.

A standby that specifies wording in an annexed form of demand is subject to ISP98 Rule 4.09(b) (Identical Wording and Quotation Marks). That subsection requires or permits the beneficiary to complete blank lines or spaces and to correct apparent typographical errors and the like. It is intended to cover practically all circumstances in which a form of beneficiary demand and statement is annexed to the standby.

If more flexibility is desired, Rule 4.09(a) should be consulted, but flexibility is better introduced by adding alternative wording to the annexed form of demand or otherwise indicating in the annexed form of demand how blank spaces may be completed. If no flexibility whatsoever is desired (e.g., because the demand or statement must be delivered to a third person in a precisely specified form), then Rule 4.09(c) should be consulted, with the understanding that it should be invoked rarely, that it requires use of the word "exact" or "identical" in the standby, and that its use may lead to unintended consequences for the issuer, applicant, or beneficiary.

The phrase "completed as indicated" assumes that the annexed form of demand adequately indicates how it is to be completed (e.g., by the inclusion of instructions and blank lines) and that it is to be dated and signed by the beneficiary. It does not add that the demand be "apparently" signed by the beneficiary or the beneficiary's "purported" representative, because such additions are more likely to confuse than clarify the allocation of risks under ISP98 and applicable law of payment or non-payment of a forged demand.

ISP98 Rule 4.08 (Demand Document Implied) requires presentation of a documentary demand for payment. ISP98 itself does not require the named beneficiary to present any beneficiary statement.

Some standbys state that they are available by "one or more demands" or by "demand(s)", rather than by "demand" in the singular. This is unnecessary for the reasons indicated in endnote 17.

11. Manner of presentation. This standby form is based on the usual practice of sending original documents, sometimes including the original standby, in a package by courier to the issuer's indicated place of presentation. Presentations by telefax and the like are prohibited unless expressly permitted in the standby or unless the beneficiary is a SWIFT participant or bank sending a demand using SWIFT or other similar authenticated means. See ISP98 Rule

3.06 (Complying Medium of Presentation). ISP98 Rule 1.09(c) (Electronic Presentations) includes defined terms that may be used in a standby that permits electronic presentation.

12. Place of Presentation. ISP98 Rule 3.01 (Complying Presentation under a Standby) provides that a standby should indicate the place, the location within that place, and the person to whom presentation should be made. ISP98 Rule 3.04 (Where and to Whom Complying Presentation Made) provides default rules. The indicated place of presentation is significant in determining whether a complying demand is timely presented.

Standbys frequently include a requirement that the presentation be addressed to the attention of the Standby Letter of Credit Department or the like, which may prove critical on a last minute presentation. Some standbys also include in the address for presentation a specific floor or office, which, if it is not accessible to the beneficiary, may prove contentious in the case of a last minute presentation. Beneficiaries and issuers both should avoid testing the limits of such requirements.

A standby may require presentation to the issuer to be made at a place that is not the place of issuance, e.g., to and at the address of a processing agent for the issuer (which could be an affiliate or another bank). A standby may also nominate another branch or bank to receive a presentation and act on that nomination. This standby form does not include any nomination or address issues which arise from a nomination. See ISP98 Rule 2.04 (Nomination).

13. Time of presentation. ISP98 Rule 3.05 (When Timely Presentation Made) provides that presentation must be made before expiry on the expiration date and that a presentation after business hours is treated as made the next business day. Rule 9.04 (Time of Day of Expiration) provides that expiry occurs at the close of business at the place of presentation.

14. Expiration. Standbys must contain an expiration date under ISP98 Rule 9.01 (Duration of Standby) and likely also under applicable commercial law and banking regulations. This standby form is based on the common practice of stating a specific calendar date. The stated date should be set sufficiently after the underlying obligation becomes due to allow for drawing after refusal of an initial drawing. If payment of the underlying obligation may be made outside of the standby, the stated date should be set to allow also for drawing after any possible rescission of an outside payment made by an insolvent payor.

Many issuers are subject to laws, regulations, or internal policies that limit their incurrence of obligations that are indefinite or long term. A common response is to set a one year expiration date and allow for automatic annual extensions unless the issuer sends or the beneficiary receives advance notice of non-extension. ISP98 Rule 2.06(a) (When an Amendment is Authorized and Binding) makes “automatic amendments”, including extensions of the expiration date, effective without further notification or consent, if the automatic amendment is expressly stated in a standby. ISP98 Form 2 (Model Standby Providing for Extension) focuses on annual automatic extension and other alternatives to a single fixed expiration date.

The expiration date stated in a standby is not necessarily the last day on which a complying presentation may be made under the standby. ISP98 Rules 3.13 (Expiration Date on a Non-Business Day) and 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) extend the expiration date where it falls on a non-business day or on a day the bank is closed for any other reason.

15. Three days to examine and pay a presentation. ISP98 Rules 2.01(c) (Undertaking to

Honour by Issuer and Any Confirmor to Beneficiary) and 5.01 (Timely Notice of Dishonour) provide for the time an issuer has to honour or dishonour and include a safe-harbor of three business days after presentation. The three day period begins on the business day following the business day of presentation. This optional standby text converts that 3-day safe harbor period in ISP98 into a timing requirement for payment of a complying presentation.

Many so-called financial standbys state a shorter period within which a complying presentation must be paid, and some also state that the shortened period also applies to the time allowed for the issuer to avoid preclusion by giving a notice of dishonour. For example, a standby payable against a simple demand to be presented by a bank beneficiary might state: "Payment of a complying presentation shall be made[, or in the case of a non-complying presentation a notice of dishonour shall be given,] on the first banking day following the banking day on which Issuer receives a presentation from Beneficiary[, if received before noon,][by SWIFT/telefax message at Issuer's following SWIFT address/telefax number]..."

Some standbys permit a longer period for payment, e.g., 30 days after presentation or 10 days after a presentation is determined to comply. Lengthening the time for honour would not, without more, lengthen the timing requirements of ISP98 Rule 5.01 (Timely Notice of Dishonour) for giving a notice of dishonour or for precluding defenses under ISP98 Rule 5.03 (Failure to Give Timely Notice of Dishonour).

16. Place and method of payment. If a standby, including an annexed form of demand, does not state the method of payment, then an issuer may voluntarily follow the presenter's request. ISP98 Rule 5.08 (Cover Instructions/Transmittal Letter) permits an issuer to deal with the presenter and to follow instructions accompanying a presentation. Similarly, ISP98 Rule 6.10 (Reimbursement for Payment Based on an Assignment) protects an issuer's reimbursement rights in cases of payment to an acknowledged assignee of standby proceeds. ISP98 Rule 2.01(e) (Undertaking to Honour by Issuer and Any Confirmor to Beneficiary) provides that honour by payment is to be made in immediately available funds. This optional standby text facilitates payment by wire transfer in response to a request duly made by the beneficiary.

Unless the standby otherwise states, an issuer is not required to pay anyone other than a beneficiary, a nominated person, or an acknowledged assignee of standby proceeds and is not required to pay anywhere other than at the place of presentation. See ISP98 Rule 6 (Transfer, Assignment, and Transfer by Operation of Law). Payment may be made at the place of presentation by sending a bank check to the order of the beneficiary or by initiating a wire transfer.

If payment by check is the sole desired method of honour, the following may be substituted: "Payment shall be made by Issuer's check payable to Beneficiary sent to Beneficiary's above-stated address by registered mail or [inter]nationally recognized courier or other means of receipted delivery to Beneficiary."

If payment by wire transfer is the sole desired method of honour, the following standby text may be substituted: "Payment shall be made by wire transfer to an account of Beneficiary as follows: [name, address, and routing number of Beneficiary's bank, and name and number of Beneficiary's account] or to such other bank account of Beneficiary as Beneficiary may duly request of Issuer". An issuer's response to a beneficiary request may be affected by regulatory requirements limiting payment to a permissible account at a permissible financial institution located in a permissible country. The annexed form of demand and statement

incorporated into this ISP98 Form 1 standby contains model wording for a beneficiary's request for payment by wire transfer. Including a detailed method of payment in a standby may deter forged beneficiary demands, as well as avoid delays resulting from the issuer's receipt of an inadequate request as to the method of payment.

No matter what a standby, demand form, or separate request for routing payment may state, applicable law, e.g., a court or government agency order, may block payment. Applicable law may also allocate the risks of loss in case of payment to the wrong person.

17. More than one drawing. It is unnecessary to state that a beneficiary may make multiple drawings or drawings for less than the full amount available. A standby that undertakes to honour "a demand" (in the singular) does not affect the beneficiary's right to present more than one demand under standard practice applicable to standby (and commercial) letters of credit. ISP98 Rule 3.08 (Partial Drawings & Multiple Presentations; Amount of Drawings) permits both partial and multiple drawings unless prohibited in the standby. If a standby is to be honoured once only, then the standby should state that affirmatively or, as indicated in ISP98 Rule 3.08(d), state "multiple drawings prohibited".

18. Reduction by honour. It is unnecessary to state that the amount available under a standby is reduced by the amount of any drawing that is honoured. This is because honour discharges (rather than amends or cancels) the issuer's obligations and because ISP98 Rule 1.10(c)(ii) (Redundant or Otherwise Undesirable Terms) presumes that reinstatement is not intended. ISP98 Form 3 (Model Standby Providing for Reduction and Incorporating Annexed Form of Reduction Demand) focuses on reduction, including reduction to zero, by beneficiary demand and by other optional terms permitting or requiring reductions in the amount available under a standby.

19. Incorporation of ISP98; law, court, arbitration, and sanctions. Incorporation of ISP98 into an undertaking that is payable against the presentation of documents should qualify the undertaking as independent under applicable law. ISP98 invokes letter of credit law by emphasizing the letter of credit aspects of a standby and its independence in ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of the Issuer-Beneficiary Relationship). See Team Telecom Int'l v. Hutchison 3G UK Ltd, 2003 EWHC 762 (Q.B. Div'l Ct.) [England], abstracted at 2004 Annual Survey of Letter of Credit Law & Practice 335 (bond subject to ISP98 is an independent undertaking).

It is unnecessary for a standby to recite that it is independent or that it is enforceable without regard to the validity of any claim of performance or non-performance in the underlying transaction. It is unnecessary for a standby to add a recital (including an "integration" or "merger" clause) that would deny or limit the effect of any document or other matter mentioned in the standby or of any negotiations leading up to or following standby issuance. Such clauses and recitals risk limiting the various ISP98 rules that provide for the standby's independence.

Where a choice-of-law clause is included in a standby, most courts will give effect to it. Otherwise, a court will likely apply its own conflict-of-laws' rules. Conflict-of-laws' rules affect the legal standards for compliance of any presentation, for the scope of any fraud/abuse exception, for the availability of any excuse based on government sanctions, etc. Under many legal systems, the conflict-of-laws' rules provide that the law at the place of issuance of the standby (or confirmation) should govern the issuer's (or confirmor's) obligations.

See, e.g., the UN Convention on Independent Guarantees and Standby Letters of Credit, Articles 21 (Choice of applicable law) and 22 (Determination of applicable law). However, courts may hear a wrongful dishonour claim filed other than where the issuer (or confirmor) is located, may apply different conflict-of-laws' rules, and may determine, e.g., that the law of the place where the beneficiary is located should govern.

As indicated, most courts will respect a choice-of-law clause and a choice-of-exclusive-forum clause in a standby (or confirmation of a standby). Including a choice of law clause or an exclusive forum clause or both fosters certainty. E.g.: "Issuer's obligations under this Standby are governed by the laws of [State]. The courts located in [State] shall have exclusive jurisdiction over any action to enforce Issuer's obligations under this Standby."

The Preface to ISP98 includes a suggested arbitration clause: "This Standby [undertaking] is issued subject to ISP98, and all disputes arising out of it or related to it are subject to arbitration under ICLOCA Rules (1996)." (The ICLOCA Rules, which are based on the UNCITRAL Rules of Arbitration, are available at www.icloca.org. The International Center for Letter of Credit Arbitration is located in metropolitan Washington, D.C., at 20405 Ryecroft Court, Montgomery Village, MD 20886 USA.)

Particularly if the standby does not choose applicable law, the issuer may wish to consider including a "sanctions" clause covering sovereign compulsion excusing the issuer, e.g.: "Issuer disclaims liability for delay, non-return of documents, non-payment, or other action or inaction compelled by a judicial order or government regulation applicable to Issuer."

A standby consists of obligations of the issuer limited by its terms and conditions. Accordingly, a choice of law or forum or both in a standby applies to those issuer obligations and not to the obligations of any confirmor or other person. There is no problem under a straight standby that states that "this standby is governed" by the chosen law or that any litigation under it is limited to the chosen court, but this same wording might prove confusing when included in a standby that nominates another person to advise, confirm, or otherwise act on the standby.

20. Communications. This optional clause or a variation of it is particularly apt for a standby that is long term or that provides for communications from or to the beneficiary (apart from payment demands). If a beneficiary requires greater certainty that its request to amend its address will be given effect, then the standby should expressly provide for automatic amendment against presentation of a complying beneficiary demand for an address change. Standby language with a demand form for this purpose may be adapted from ISP98 Forms 3 and 4 providing for reduction and transfer on demand by the beneficiary.

21. Demand Date. ISP98 Rule 4.16(b)(ii) (Demand for Payment) provides that a demand must contain an issuance date, and ISP98 Rule 4.06 (Date of Documents) provides that its issuance date may not be later than the date of its presentation. To override that rule, e.g., to permit post-dated documents, the following clause may be added to the Standby text: "The issuance date or any other date on any document, including the required demand, may be a date on, before, or after the date the document is presented under this Standby."

22. Addressee. The information in the text of the standby indicating where, how, and to whom a presentation is to be made under the standby should be repeated in the demand form. See ISP98 Rules 3.01 (Complying Presentation under a Standby), 3.04 (Where and

to Whom Complying Presentation Made), and 3.06 (Complying Medium of Presentation). Particular attention should be given to the possibility that a standby may require presentation at an address that differs from the issuer's letterhead address.

23. Standby identification. A demand form should identify the standby by including the information in the standby text that identifies it, particularly the issuer's reference number. See ISP98 Rules 3.01 (Complying Presentation under a Standby) and 3.03 (Identification of Standby).

24. Demand. This model form of annexed demand should satisfy the requirements of ISP98 Rules 4.16 (Demand for Payment) and 4.17 (Statement of Default or other Drawing Event), so that, when the beneficiary completes it as indicated, it will include a demand for payment of a stated amount, be dated and signed, and contain any required beneficiary statements.

25. Beneficiary statements. Standbys commonly require presentation of beneficiary statements and commonly combine them with the required form of demand for payment. Words other than "states", such as "certifies", "represents", "warrants", "promises", or a combination of those words, are also used and may be preferable in the context of the underlying transaction. Any such word of assurance, when required to be included in a document presented under a standby, may give rise to a claim against the beneficiary who obtains payment under the standby. The nature and sufficiency of such claim may depend on the precise wording included in the demand, the identity of the claimant, and the status of any related claims based on the obligations intended to be supported by the standby.

The applicant or issuer or both may prefer a combination of specific representations and undertakings from the beneficiary. The beneficiary may prefer no such wording or only conclusory wording qualified by the beneficiary's reference to "good faith" belief or the like. The applicant or issuer or both may prefer that the beneficiary make its statements expressly to the applicant or issuer or both.

ISP98 Rule 4.12 (Formality of Statements in Documents) provides guidance on standby requirements for statements that are to be "sworn to", "witnessed", "legalized", or the like.

It should be unnecessary to include in a demand form that the amount demanded is available under the standby, because that amount should be determinable without dependence on any such statement.

26. "Applicant" as underlying obligor. This demand form uses "Applicant", which is a defined term in the text of the standby, and assumes that the applicant and beneficiary are parties to an underlying agreement that establishes the obligations to be supported by the standby. See endnotes 1 and 30.

27. Obligated/in default. This statement indicates that the applicant is "obligated to pay" the amount demanded, not that there is a "default". A default statement is inapt where the amount demanded is payable on the date demanded without regard to the occurrence or continuance of a default or where "default" is not adequately defined in the documentation for the underlying obligations or where "default" may require that an action be taken that may be prohibited under laws triggered by the insolvency of the applicant or other party.

28. Unpaid. The term "unpaid" in the optional "due and unpaid" recital may raise a question

where the applicant has made a direct payment to the beneficiary but the funds paid are subject to recapture by an insolvency representative of the applicant. It should be possible for a beneficiary in that context to state, without running afoul of a fraud or abuse exception under applicable letter of credit law, that the underlying obligation remains unpaid where a direct payment has been received subject to a credible claim that the direct payment is voidable and must be returned.

29. Underlying obligation. Although some standbys are payable on simple demand, the applicant, beneficiary, or issuer may insist that a demand under a standby identify the underlying obligation, obligor, and obligee, particularly where there may be no single underlying agreement between the applicant and beneficiary that establishes the underlying obligations and provides that those obligations be supported by a standby.

30. Applicant-beneficiary relationship. This model form of annexed demand assumes that the standby supports one or more obligations of the applicant to the beneficiary. Under commercial and regulatory laws, the issuer, any nominated bank, the applicant and beneficiary, and, where different, the underlying obligor and obligee may need to identify the underlying obligations intended to be supported by the standby and to be satisfied or secured by the proceeds of a drawing under the standby. Accordingly, this form of demand should be redrafted if, e.g., the applicant is a surety for the underlying obligor or the beneficiary is a creditor of the underlying obligee. Additionally, the underlying documentation should be drafted to provide for the pre- and post-honour obligations of the applicant and beneficiary (and, where different, of the underlying obligor and obligee) to each other, particularly if the named applicant has or intends to claim the rights of an ordinary guarantor or surety. In this regard, it may be desirable for the beneficiary's statement to refer expressly to the underlying obligations, as they may be amended by the obligor and obligee, without (or with) the further consent of the applicant.

31. Use of proceeds. This optional beneficiary statement is unnecessary if the underlying agreement adequately provides for the use of all proceeds from a drawing under the standby and if the applicant reimburses the issuer. Otherwise, some mention in the form of demand of the relationship of any standby proceeds to the underlying obligation is helpful in answering post-honour questions about the disposition of any excess standby proceeds. Absent such a provision, the "independence" of the standby obligation may hinder appropriate post-honour accounting for the use of funds received under a standby.

32. Proceeds as cash collateral. Where the proceeds cannot or might not be used to "satisfy" the applicant's obligations, the demand form should indicate that the proceeds will be used to "secure" them. This consideration is important under standbys that are intended to be used, at least in some circumstances, to fund the applicant's underlying obligation to provide cash collateral. The most common circumstance involves standbys that may expire before the underlying obligations become fully due and payable.

33. Accounting to issuer for unused proceeds. The issuer may want to take a security interest in the applicant's rights to unused proceeds and/or require the beneficiary to state, e.g., "...and that Beneficiary will account to Issuer or Applicant, as their interests may appear, for any proceeds that are not so used."

34. Request for wire transfer to beneficiary's account. This term in the demand form is unnecessary if the text of the standby includes satisfactory wire transfer information for

payment to the beneficiary. See endnote 16.

Issuers are not required to pay wherever, however, or whomever the beneficiary requests, unless the standby so states. Under ISP98 Rule 5.08 (Cover Instructions/Transmittal Letter), issuers are permitted to follow a request to pay by wire transfer to the beneficiary's account, subject to timely receipt of customary account information and deduction of customary wire transfer charges and due consideration of any regulations or bank policies affecting wire transfer of funds to the requested country, bank, and account.

A request to pay to another's account is a request for acknowledgement of an assignment of proceeds, which is subject to the special rules in ISP98 Rules 6.06-6.10 (Acknowledgement of Assignment of Proceeds), as well as laws protecting issuers and applicants and other laws regulating money laundering, etc.

To deter forged demands, and to address anti-money-laundering concerns, this model form of request for payment by wire transfer states that payment is to be made to the named beneficiary at a specified beneficiary account at a specified bank location.

35. Signer authentication. This demand form requires the signer to indicate in the signature line that the demand and statement are made by the named beneficiary located at the address stated in the standby. Accordingly, the beneficiary's name and address should be stated in this demand form when the standby incorporating it is issued.

36. Original signature. What is an original signature depends on the mode of communication. See ISP98 Rules 1.09(a) (Defined Terms) ("Signature") and 3.06(d) (Complying Medium of Presentation).

[IIBLP as of 10 May 2012]

ISP98 Form 2

Model Standby Providing for Extension and Incorporating Annexed Form of Payment Demand with Alternative Non-Extension Statement*

[name and address of beneficiary]

[date of issuance]

Issuance. At the request and for the account of [name and address of applicant] ("Applicant"), we [name and address of issuer at place of issuance] ("Issuer") issue this irrevocable standby letter of credit number [reference number] ("Standby") in favour of [name and address of beneficiary] ("Beneficiary") in the maximum aggregate amount of [currency/amount].

Undertaking. Issuer undertakes to Beneficiary to pay Beneficiary's demand for payment in the currency and for an amount available under this Standby and in the form of the Annexed Payment Demand completed as indicated and presented to Issuer at the following place for presentation: [address of place for presentation], on or before the expiration date.

Expiration. The expiration date of this Standby is [date].

Extension. The expiration date of this Standby shall be automatically extended for successive one year periods, unless Issuer notifies Beneficiary by registered mail or other receipted means of delivery sent to Beneficiary's above-stated address [30] or more days before the then current expiration date that Issuer elects not to extend the expiration date. The expiration date is not subject to automatic extension beyond [date], and any pending automatic one-year extension shall be ineffective beyond that date. [*The expiration date may also be extended in accordance with the terms of an amendment issued by Issuer to which Beneficiary consents and in accordance with ISP98 rules on closure of the place for presentation on the expiration date.*]

[Payment. Payment against a complying presentation shall be made within 3 business days after presentation at the place for presentation or by wire transfer to a duly requested account of Beneficiary. An advice of such payment shall be sent to Beneficiary's above-stated address.]

[Drawing. Partial and multiple drawings are permitted.]

[Reduction. Any payment made under this Standby shall reduce the amount available under it.]

ISP98. This Standby is issued subject to the International Standby Practices 1998 (ISP98) (International Chamber of Commerce Publication No. 590).

[Communications. Communications other than demands may be made to Issuer by telephone, telefax, or SWIFT message, to the following: [numbers/addresses]. Beneficiary requests for amendment of this Standby, including amendment to reflect a change in Beneficiary's address, should be made to Applicant, who may then request Issuer to issue the desired amendment.]

[Issuer's name]

[signature]
Authorized Signature

Annexed Payment Demand

[INSERT DATE]

[name and address of Issuer or other addressee at place of presentation as stated in standby]

Re: Standby Letter of Credit No. [reference number], dated [date], issued by [Issuer's name] ("Standby")

The undersigned Beneficiary demands payment of [INSERT CURRENCY/AMOUNT] under the Standby.

Beneficiary states that

[INSERT ONE OF THE FOLLOWING ALTERNATIVE STATEMENTS :

Applicant is obligated to pay to Beneficiary the amount demanded[, which amount is due and unpaid] under[or in connection with] the agreement between Beneficiary and Applicant titled [agreement title] and dated [date]. [Beneficiary further states that the proceeds from this demand will be used to satisfy the above-identified obligations and that Beneficiary will account to Applicant for any proceeds that are not so used.]

or

the Standby is set to expire fewer than [30] days from the date hereof, because Issuer has given a notice of non-extension of the Standby, and the amount demanded is required as cash collateral to secure the unmatured or contingent obligations of Applicant under[or in connection with] the agreement between Beneficiary and Applicant titled [agreement title] and dated [date]. Beneficiary further states that the proceeds from this demand will be used to secure the above-identified obligations and then to satisfy them as they become absolute and due and that Beneficiary will account to Applicant for any proceeds that are not so used.]

Beneficiary requests that payment be made by wire transfer to an account of Beneficiary as follows: [INSERT NAME, ADDRESS, AND ROUTING NUMBER OF BENEFICIARY'S BANK, AND NAME AND NUMBER OF BENEFICIARY'S ACCOUNT].

[Beneficiary's name and address]

By its authorized officer:

[INSERT ORIGINAL SIGNATURE]

[INSERT TYPED/PRINTED NAME AND TITLE]

[Before the standby is issued, all text in [bold] should be completed, and optional text in [italics] should be included or deleted (or redrafted). Text in the annexed demand form preceded by "INSERT" (or other ALL CAPITALS guidance) and in [ALL CAPITALS UNDERLINED] is to be completed as indicated when the beneficiary prepares and presents a demand.]

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This ISP98 Form 2 model standby repeats the text of ISP98 Form 1. It adds a provision for automatic extension and incorporates a model form of payment demand that adds an alternative beneficiary statement demanding payment because of the issuer's action resulting in non-extension of the expiration date of the standby. Like ISP98 Form 1, this Form 2 is intended to be self-contained and, absent special circumstances, useable without extended reference to the text of ISP98.

The endnotes to this standby include alternative and other optional terms of particular relevance to standbys providing for automatic amendment of an expiration date, as well as references to relevant ISP98 rules. See the ISP98 Form 1 endnotes for explanation of wording that is common to ISP98 Forms 1 and 2 and for alternative and optional wording for general terms common to both forms. (There are more than 30 endnotes to Form 1 that are not repeated in this Form 2.)

This form is published for educational purposes and not as legal or professional advice. Potential users should consult with their own advisers in the drafting or use of a standby letter of credit. ISP98 and letter of credit educational and training materials, including The Official Commentary on the International Standby Practices containing official interpretations of ISP98, are available from IIBLP at www.iiblp.org.

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1. Expiration. ISP98 Rule 9.01 (Duration of Standby) provides that "A standbys must: (a) contain an expiration date or (b) permit the issuer to terminate the standby upon reasonable prior notice or payment". Commercial law and banking regulations are likely to impose similar requirements. As reflected in ISP98 Form 1, a standby may set an expiration date and leave the possibility of shortening or extending that date to future amendment(s) issued by the issuer to which the beneficiary consents, as provided in ISP98 Rule 2.06(b)-(d) (When an

Amendment is Authorised and Binding). Also, a beneficiary may seek the issuer's consent to an amendment of the expiration date by requesting the amendment or by making an extend or pay demand.

2. Automatic amendment. Many issuers are subject to laws, regulations, or internal policies that limit their incurrence of obligations that are indefinite or long term. A common response to an applicant's request for a medium or long term standby is to set a one year expiration date and then state in the standby that it automatically extends for successive one-year periods unless the issuer sends, or the beneficiary receives, advance notice of non-extension, as provided in ISP98 Rule 2.06(a) (When an Amendment is Authorised and Binding). This ISP98 Form 2 reflects that common response.

Alternative responses include the following model clause for automatic early termination of the standby based on the issuer's giving advance notice to the beneficiary, e.g.: "The expiration date of this Standby is [date]. The expiration date shall be automatically amended to an earlier date if Issuer notifies Beneficiary of the proposed earlier expiration date by registered mail or other received means of delivery sent to Beneficiary's above-stated address [30] or more days before the proposed earlier expiration date stated in the notice."

Another alternative is based on early payment, e.g., "The expiration date of this Standby is [date]. The expiration date shall be automatically amended to an earlier date if Issuer notifies Beneficiary by registered mail or other received means of delivery sent to Beneficiary's above-stated address that Issuer elects to terminate this Standby with Issuer's payment to Beneficiary of the full amount available under this Standby and payment is made to Beneficiary, whereupon this Standby shall expire." See ISP98 Rule 9.01(b) (Duration of Standby).

ISP98 Rule 2.06(a) (When an Amendment is Authorized and Binding) makes "automatic amendments" effective without further notification or consent if the automatic amendment is expressly stated in a standby. Accordingly, it is desirable to include the word "automatic" in any standby clause intended to make an amendment effective based on the terms of the standby and not by obtaining the beneficiary's consent. It is unnecessary to recite that an automatic extension is "without amendment" or that an automatic extension clause is a "condition".

3. Automatic extension. The words "extend" and "non-extension" are used, rather than "renew" and "non-renewal", to avoid any doubt that the intent is to amend, rather than replace, the standby.

It is not desirable to include the word "evergreen" in an automatic extension clause. The word "evergreen" is popularly used to refer to automatic extension clauses, such as the one included in this ISP98 Form 2. However, this word cannot substitute for, or usefully supplement, an automatic extension clause. See ISP98 Rule 1.10(c)(ii) (Redundant or Otherwise Undesirable Terms).

4. Send/receive. Automatic extension clauses vary in the extent to which they spell out where and how a notice of non-extension must or may be sent to, or be received by, the beneficiary in order to establish an expiration date that is not subject to further automatic extension. For alternative wording, consider: "...is sent to Beneficiary's above-stated address by registered mail or by [inter]nationally recognized courier or is received by Beneficiary

at Beneficiary's above-stated or current address...." Under ISP98 Rule 4.11(c)(ii) (Non-Documentary Terms or Conditions), standby requirements based on when, where, and how issuer notices are sent or received by the issuer or beneficiary are effective. However, there may be practical difficulties in proving when an issuer's non-extension notice was sent to or received by the beneficiary. Strict compliance concepts applicable to beneficiary presentations under a standby are sometimes applied to issuer notices to a beneficiary. Some standbys address these concerns by providing alternative beneficiary addresses or by providing that timely actual receipt of notice by the beneficiary is sufficient.

If notice by e-mail, telefax, or the like is also to be permitted, then the automatic extension clause should state the alternative, e.g. "Such notice may also be given by [e-mail] [telefax] [authenticated SWIFT message] sent to the following Beneficiary [address][number]...."

5. 30 days/one year. A 30-day period for giving or receiving a notice of non-extension is common, but shorter (e.g., 15 days) and longer (e.g., 60 days) periods are also common. Although unnecessary, "calendar day" may be substituted for "day" to emphasize the distinction between "business day" and "banking day" which are defined in ISP98 Rule 1.09(a) (Definitions) and "day" which is not defined. The length of the period is affected by the length of time expected for (i) the issuer to re-approve the applicant's credit, (ii) the beneficiary to draw as permitted by the standby and the underlying transaction, and (iii) the applicant to replace the standby.

A one-year period for setting the initial expiration date and for the duration of automatic extension periods is very common. It is based on the common practice of bank issuers that annually re-evaluate applicant credit-worthiness.

6. Retraction of non-extension notice. Standby operations personnel may not receive credit approval for extension before the date required to initiate sending a timely non-extension notice and, as a result, may issue a notice of non-extension and later receive credit approval for extension. The following optional model clause would permit a full right of retraction: "At any time before the next expiration date Issuer may retract its notice of non-extension and thereby automatically extend the expiration date as if its notice of non-extension had not been sent or received and may treat any pending (unhonoured) demand for payment based on non-extension as automatically retracted by Beneficiary."

7. Final expiration date. An end date for automatic extensions, even if it is set many years out, is desirable for record keeping purposes, particularly to avoid having to retain indefinitely proof that a standby was terminated by expiration following an effective notification of non-extension (or was honoured or otherwise reduced to zero).

8. Extension under ISP98 Rules 3.13 (Expiration Date on a Non-Business Day) and 3.14 (Closure on Expiry Date). The initial or automatically extended expiration date stated in a standby may not be the last day on which a presentation may be made. ISP98 provides for extensions for a presentation that is received during a weekend or holiday or that is attempted during a business day at a place of presentation that is closed for any reason. Separately, ISP98 Rule 9.03(b) (Calculation of Time) provides that an extension period starts on the calendar day following a stated expiration date that falls on a day when the issuer is closed. (This rule is intended to keep the same calendar date as the expiration date under an annually extended standby.)

9. Communications. See ISP98 Form 1 endnote 20. This optional clause is particularly apt for a standby that is long term or otherwise more complex than most standbys, such that communication from or to the beneficiary (apart from payment demands) may be expected. An issuer may wish to expand this clause or the clause on giving notice of non-extension to the beneficiary, to assure that effect will be given to a notice duly sent but not (provably) received by the beneficiary, “A notice shown to have been delivered to the Beneficiary’s above address by mail or courier certificate, invoice, or the like shall be deemed received by Beneficiary and effective not later than 5 Business Days after the date of delivery shown thereon.”

10. Alternative Statements. Depending on the terms of the underlying obligation, an issuer’s non-extension notice may entitle the beneficiary to a payment either that satisfies the underlying obligation or serves as cash collateral for an underlying obligation or that is not yet due. ISP98 Form 2 contemplates that the beneficiary will present separate demands and statements if the beneficiary is entitled to make partial demands of both types.

11. First alternative statement (drawing to satisfy underlying obligation). The first alternative beneficiary statement is substantially the same as the beneficiary statement in ISP98 Form 1. This first alternative statement might be apt for a drawing made after sending/receipt of a non-extension notice, particularly if the underlying agreement entitled the beneficiary to accelerate an underlying debt obligation upon the imminent expiration of standby support. Any such underlying agreement could limit the beneficiary’s right to accelerate to situations in which there was no retraction of the non-extension notice sent/received and no substitute standby was issued.

12. Second alternative statement (drawing to cash collateralize underlying obligation). The second alternative statement would be apt for a drawing made after sending/receipt of a non-extension notice, particularly if the first alternative statement requires a statement that the amount demanded is due and if the underlying agreement does not treat imminent expiration of the standby as accelerating the underlying payment obligations.

13. Extend or pay demands. ISP98 Rule 3.09 (Extend or Pay) provides that an “extend or pay” demand must be examined for compliance with the standby’s terms and conditions for honouring payment demands. Imminent expiration would not excuse compliance with a requirement that a payment demand state that the underlying obligation is in default or the like. It would not excuse compliance with a requirement that a payment demand state that the issuer has sent a notice of non-extension. Accordingly, if the standby is to facilitate extend or pay demands, the standby text and the required form of payment demand in this model ISP98 Form 2 should be re-worded.

14. No retraction or standby substitution. The required beneficiary statement might here add a statement that no retraction of the non-extension notice has been timely sent/received and that no permitted substitute standby (or other equivalent security) has been timely sent/received. In such case, the 30 day period stated in the automatic extension clause in this ISP98 Form 2 should be reduced, e.g., to 15 days, to allow time for retraction or permitted standby substitution. It is possible to include all of the features of a permitted standby substitution (or for the tender of permitted equivalent security), but ordinarily what is permissible should be spelled out in the underlying agreement and cross referenced in the beneficiary’s statement.

15. Proceeds as cash collateral. Where the proceeds cannot or might not be used to “satisfy” the Applicant’s obligations, it may be appropriate to state that the proceeds are being used to “secure” them. The terms permitting a drawing and then holding of cash collateral should be stated in an underlying agreement between the applicant and beneficiary, particularly if the cash collateral is to be held in an interest bearing or other special account. Such terms may be stated also in the required form of beneficiary statement regarding the basis for the drawing and subsequent use of standby proceeds as security.

16. Accounting for proceeds. As noted in ISP98 Form 1, the issuer may wish that the demand form state that the beneficiary must account to the issuer for any unused proceeds resulting from a drawing based on the issuer’s advance notice of non-extension and to take further steps to protect its interest in such unused proceeds.

[IIBLP as of 27 June 2012]

This ISP98 Form 11.1 Model Government Standby Form is for federal, state, and local governments in the United States to use in updating and improving their required or permitted forms of standby letters of credit that support underlying obligations to the government.

ISP98 Form 11.1 [U.S.] Model Government Standby Form*

[Before a standby is issued, all text in **bold** in any annex as well as in the body of the standby should be completed as indicated, and optional text in *italics* should be included or deleted (or redrafted). Text in **ALL CAPITALS UNDERLINE** should be completed as indicated when the beneficiary prepares a demand for presentation.]

Standby Letter of Credit

[name and address of beneficiary]¹

[date of issuance]

Issuance. At the request and for the account of [name and address of applicant]² (“Applicant”), we [name and address of issuer at place of issuance]³ (“Issuer”) issue this irrevocable⁴ independent⁵ standby letter of credit number [reference number] (“Standby”) in favor of [name and address of beneficiary] (“Beneficiary”) in the maximum aggregate amount of USD [amount].⁶

Undertaking. Issuer undertakes to Beneficiary to pay Beneficiary’s demand for payment for an amount available⁷ under this Standby and in the form of Annex A (Payment Demand)⁸ [*or Annex B (Payment Demand after Notice of Non-extension)*]⁹ completed as indicated¹⁰ and presented¹¹ to Issuer at the following place for presentation: [address of place for presentation],¹² at or before the close of business¹³ on the expiration date.¹⁴

Overdrawing. If a demand exceeds the amount available, but the presentation otherwise complies, Issuer undertakes to pay the amount available.¹⁵

Expiration. The expiration date of this Standby is [specific calendar date, e.g., the date one year after issuance date].¹⁶

Automatic Extension. The expiration date of this Standby shall be automatically extended¹⁷ for successive one-year periods, unless [30]¹⁸ or more calendar days before the then current expiration date Issuer gives written notice to Beneficiary that Issuer elects¹⁹ not to extend the expiration date. Issuer’s written notice must be sent²⁰ [*by registered, certified, or priority express mail or nationally recognized overnight courier*] to Beneficiary’s above-stated address [*and to the attention of [office, officer, or other attention party] or, alternatively, be received by Beneficiary’s attention party*] [30] or more calendar days before the then current expiration date. The expiration date is not subject to automatic extension beyond [specific calendar date, e.g., the date five years after issuance date], and any pending automatic one-year extension shall be ineffective beyond that date.²¹

Payment. Payment against a complying presentation shall be made within three business days after presentation²² at the place for presentation or by wire transfer to a duly requested

account of Beneficiary.²³

ISP98. This Standby is issued subject to the International Standby Practices 1998 (ISP98) (International Chamber of Commerce Publication No. 590).²⁴

Issuer's Charges and Fees. Issuer's charges and fees for issuing, amending, or honoring this Standby are for Applicant's account and shall not be deducted from any payment Issuer makes under this Standby. [Issuer undertakes to Beneficiary to pay the charges and fees of any bank nominated in this Standby to advise [and confirm] this Standby for acting on such nomination.]²⁵

[Communications. Communications other than demands may be made to Issuer in the manner and at the place for presentation and also as follows: **[addresses for mailed, couriered, telephone, telefax, or electronic communications]**. Communications other than for notices of non-extension may be made to Beneficiary at Beneficiary's above-stated address and also as follows: **[addresses for mailed, couriered, telephone, telefax, or electronic communications]**.]²⁶

[Issuer's name]

[signature]
Authorized Signature

Annex A: Payment Demand

[INSERT DATE]²⁷

[name and address of Issuer or other addressee at place of presentation as stated in standby]

Re: Standby Letter of Credit No. [reference number], dated [date], issued by [Issuer's name] ("Standby").²⁸

The undersigned Beneficiary demands payment of USD [INSERT AMOUNT] under the Standby.

Beneficiary states²⁹ that Applicant³⁰ is obligated³¹ to pay to Beneficiary the amount demanded as provided in [the contract, regulation, or other document that identifies the underlying obligations to the government beneficiary].³²

Beneficiary requests that payment be made by wire transfer to an account of Beneficiary as follows: [INSERT NAME, ADDRESS, AND ROUTING NUMBER OF BENEFICIARY'S BANK, AND NAME AND NUMBER OF BENEFICIARY'S ACCOUNT].³³

[Beneficiary's name and address]³⁴

By its authorized officer:

[INSERT ORIGINAL SIGNATURE]³⁵
[INSERT TYPED/PRINTED NAME AND TITLE]

[Annex B: Payment Demand after Notice of Non-extension]³⁶

[INSERT DATE]

[name and address of Issuer or other addressee at place of presentation as stated in standby]

Re: Standby Letter of Credit No. [reference number], dated [date], issued by [Issuer's name] ("Standby").

The undersigned Beneficiary demands payment of USD [INSERT AMOUNT] under the Standby.

Beneficiary states that the Standby is set to expire fewer than [30] days from the date hereof because Issuer has given a notice of non-extension of the Standby[, no retraction of the non-extension notice or satisfactory replacement standby has been timely received,] ³⁷ and the amount demanded is required to secure the obligations of Applicant as provided in [the contract, regulation or other document that identifies the underlying obligations to the government beneficiary].

Beneficiary requests that payment be made by wire transfer to an account of Beneficiary as follows: [INSERT NAME, ADDRESS, AND ROUTING NUMBER OF BENEFICIARY'S BANK, AND NAME AND NUMBER OF BENEFICIARY'S ACCOUNT].

[Beneficiary's name and address]

By its authorized officer:

[INSERT ORIGINAL SIGNATURE]

[INSERT TYPED/PRINTED NAME AND TITLE]]

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General Comments on ISP98 Form 11.1

Many government agencies require or permit standby letters of credit to be issued in their favor to support a variety of underlying obligations. Many do so under statutes, regulations, contracts, or guidelines that indicate who may issue a standby in favor of the government and what the standby should provide, typically by requiring that the standby be substantially in the form of a standby text set out in the government's regulation or contract. The general comments and endnotes to this ISP98 Form 11.1 refer to such standbys as a "government standby" and to such sources of government standby requirements as a government "regulation" or "contract".

Government regulations and contracts typically require that a standby be either issued or confirmed by a bank acceptable to the government and include the required form of standby and confirmation. Confirmation is a parallel independent undertaking to honor. The IIBLP intends to develop a model government confirmation form based on the acceptability to

the government beneficiary of the confirmor (rather than the acceptability of the standby issuer). The IIBLP also intends to develop a model text for use in a government regulation, contract, or cover letter to applicants providing for an acceptable standby or confirmation in favor of the government.

This ISP98 Form 11.1, including its extensive endnotes, is intended to help a government beneficiary develop new standby forms or improve and update existing forms and to incorporate those forms into regulations and underlying contracts. This form should promote clarity and efficiency for all concerned and be reasonably acceptable to applicants and issuers, as well as protect the interests of government beneficiaries. The endnotes explain the text of the form and provide alternative and additional standby wording. They also explain why some wording commonly found in standbys has been omitted as unnecessary or undesirable. This form incorporates ISP98, the only practice rules developed specifically for standby letters of credit. ISP98 was produced by an Institute of International Banking Law and Practice (“IIBLP”) working group, endorsed and published by the International Chamber of Commerce (“ICC”) as ICC Publication No. 590, and also endorsed by the United Nations Commission on International Trade Law. See http://www.uncitral.org/pdf/english/texts_endorsed/ISP98_e.pdf. This form is based on ISP98 Forms 1 (Model Standby Incorporating Annexed Form of Payment Demand with Statement) and 2 (Model Standby Providing for Extension and Incorporating Annexed Form of Payment Demand with Alternative Non-Extension Statement), the first two of many standby forms that are now freely available on the IIBLP website at <http://www.iiblp.org> under ISP Forms. This ISP98 Form 11.1 focuses on drafting issues that are of particular interest to government beneficiaries and to issuers and applicants for government standbys.

This form includes terms that ISP98 indicates should be included in a standby, and it restates other ISP98 rules for the avoidance of doubt, e.g., it recites that the standby is irrevocable and independent. It focuses on standbys that are issued from the United States and therefore governed by the applicable state version of the Uniform Commercial Code, Article 5—Letters of Credit (“UCC Article 5” or “ UCC § 5-101” et seq)³⁸ and affected by applicable bank regulations such as the Office of the Comptroller of the Currency (“OCC”) regulation 12 C.F.R. § 7.1016 (Independent undertakings to pay against documents).³⁹ See *LC Rules & Laws: Critical Texts* (IIBLP), which reproduces 12 C.F.R. § 7.1016, as well as UCC Article 5 and the Official Comments to it (with a listing of the dates of each state’s enactment and of significant state variations) and ISP98 and certain ISP98 Forms.

This form is intended to be self-contained, and, absent special circumstances, useable without extended reference to the text of ISP98 or to other ISP98 Forms or their endnotes or to UCC Article 5. This form incorporates annexed forms of payment demand which provide maximum clarity as to what the beneficiary must present to the issuer in order to obtain payment under the standby. It assumes that a government beneficiary starting with this form as a model will redraft this form before approving it for general use and that its approved form will allow for some variation as well as insertion of details when a particular standby is issued.

This form is intended to satisfy requirements in U.S. banking regulations as well as letter of credit law and practice as to what constitutes an “independent” undertaking. It also takes into account the OCC’s safety and soundness considerations in 12 C.F.R. § 7.1016(b)(3) that an issuing bank “should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities.” In light of the differences in standby expertise among bank issuers and the likelihood that regulation of standbys will continue to

evolve, this form has been developed to permit government agencies as beneficiaries to allow for standbys to be issued by credit-worthy banks that may lack the experienced operations' capabilities of the major bank letter of credit issuers.

Because many government standbys support underlying obligations that are expected to run for more than one year, this form includes standby text providing for automatic one-year extensions. The duration, as well as amount, of bank exposure under a standby providing for automatic extensions raises bank safety and soundness issues, and therefore the extent of operations' expertise required of any particular bank. Uncertainty as to the duration of a standby is one of several safety and soundness concerns with many existing government standby forms. Another such concern is with non-documentary conditions, which undercut the independence of a standby and introduce uncertainty in the interpretation of its requirements. See endnote 5 (Independence) on standby text recognizing, e.g., a beneficiary's "assigns" without specifying the documents to be presented to evidence the status of a claimed assignee.

Although this form is for use with ISP98 in the United States under UCC Article 5, it could be readily adapted for other uses, e.g., as a model ISP98 government standby or demand guarantee form for use in other countries. See endnote 24 (Incorporation of ISP98; optional choice of law and forum).

This ISP98 Form 11.1 is published for educational purposes and not as legal or professional advice. Potential users should consult with their own advisers in the drafting or use of a standby letter of credit. ISP98 and letter of credit educational and training materials, including *The Official Commentary on the International Standby Practices* containing official interpretations of ISP98 and *LC Rules & Laws: Critical Texts*, are available from IIBLP at www.iiblp.org.

[IIBLP as of 5 November 2014]

Table of Endnotes

1. Name and address of beneficiary
2. Applicant
3. Date and place of issuance
4. Irrevocability
5. Independence
6. Nomination
7. Amount available
8. Annexed form of payment demand
9. Annexed form or payment demand after notice of non-extension
10. Annexes to be completed as indicated
11. Manner of presentation
12. Place of presentation
13. Presentation during business hours
14. Presentation of the original standby not required
15. Overdrawing
16. Expiration
17. Automatic extension
18. One year; 30 days
19. Retraction of non-extension notice
20. Send or receive
21. Final expiration date
22. Three days to examine and pay a presentation
23. Place and method of payment
24. Incorporation of ISP98; optional choice of law and forum
25. Charges and fees for issuance, advice, and confirmation
26. Communications
27. Demand issuance date
28. Information to be inserted in annexed demand form before standby is issued
29. Beneficiary statements
30. "Applicant" as underlying obligor
31. Obligated/default
32. Identification of underlying obligations; use of proceeds
33. Request for wire transfer to beneficiary's account
34. Signer authentication
35. Original signature
36. Annex B endnotes
37. Retraction or replacement standby
38. References to UCC Article 5
39. Banking regulations

Endnotes

1 Name and address of beneficiary. This ISP98 Form 11.1 assumes that the beneficiary will be a government entity using its legal name. The beneficiary's address should include a street address and the name or title of the person or department to whose attention the standby is directed (attention party). These details will facilitate written communications to be made through a courier as well as mail. A post office box number or other artificial address will not suffice. See endnotes 20 (Send or receive) and 26 (Communications).

Naming more than one beneficiary is unusual (except where the beneficiaries are joint obligees of the applicant) and requires beneficiary, applicant, and issuer attention to the allocation of beneficiary rights to draw, to consent to amendment or cancellation of the standby, and to request acknowledgement of a requested transfer or assignment of proceeds.

If a government beneficiary undergoes a name change, with or without reorganization, then UCC § 5-113 (Transfer by Operation of Law) entitles the legal successor to draw either in its own name or in the name of the predecessor government beneficiary. ISP98 Rules 6.11—6.14 (Transfer by Operation of Law) facilitate both types of drawing.

The ability of an entity other than the named beneficiary or its legal successor to draw depends on ISP98 Rules 6.01 – 6.05 (Transfer of Drawing Rights) and UCC § 5-112 (Transfer of Letter of Credit). Unless expressly permitted in the standby, these provisions prohibit transfers of drawing rights. They do so for the protection of named beneficiaries as well as applicants and issuers. See ISP98 Form 4 (Model Standby Providing for Transfer and Incorporating Annexed Form of Transfer Demand) endnotes 1-3 on the special treatment of transferees at the time of standby issuance and of any attempted transfer by the beneficiary or attempted drawing by a claimed transferee.

If the beneficiary requests the issuer to pay to a third party part or all of any honored presentation, then that request is for an assignment of proceeds rather than a transfer of drawing rights. Assignments of letter of credit proceeds are governed by ISP98 Rules 6.06—6.10 (Acknowledgement of Assignment of Proceeds) and UCC § 5-114 (Assignment of Proceeds). (They are also subject to secured transactions laws.) They are less exceptional than transfers of drawing rights. See ISP98 Form 4 endnote 1 on the differences between transfers and assignments under the special laws and practices applicable to letters of credit.

Assignments of proceeds require some individualized treatment either at the time of issuance or, more typically, at the time of a request for acknowledgement of an attempted assignment of proceeds to a named assignee. An issuer's acknowledgement may be provided in a separate acknowledgement form that protects the issuer against any additional risks associated with paying someone other than the named beneficiary. Many issuers regularly acknowledge assignments of proceeds on standard assignment forms with standard screening of the proposed assignee and for a modest fee. Endnotes 23 (Place and method of payment) and 33 (Request for wire transfer to beneficiary's account) include optional standby text that would acknowledge an assignment of proceeds made by the beneficiary's presentation of a complying demand that included a request to pay proceeds to an identified account of an identified third party.

A standby that undertakes to pay the named beneficiary's "successors" or "assigns", without more, does not add to the rights of the named beneficiary or its claimed legal successors,

transferees, or assignees of proceeds or otherwise circumvent the limitations imposed under ISP98 and UCC Article 5. Only a legal successor covered by UCC § 5-113 (Transfer by Operation of Law) and ISP98 Rules 6.11—6.14 (Transfer by Operation of Law) would be protected (with or without a reference to successors or assigns in the standby). Any other type of claimed successor, transferee, or assignee would need the issuer's acknowledgement of its claimed status.

Similarly, a standby that engages with “drawers, endorsers, and bona fide holders” would be using an outmoded form of nominating other banks to negotiate complying drafts under a UCP commercial letter of credit (see Official Comment 7 to UCC § 5-102). It would not satisfy ISP98 requirements for nomination or excuse a claimed bona fide holder from having to obtain the issuer's acknowledgement of its status. See endnote 5 (Independence) on the separate need to satisfy ISP98 Rule 4.11 (Non-Documentary Terms or Conditions) as applied to a term like “bona fide holder”.

2 Applicant. The applicant named in a standby is typically the person whose underlying obligations to the government beneficiary are supported by the standby. See endnote 30 (“Applicant” as underlying obligor). For issues that may arise where the applicant is not the underlying obligor or where there are multiple applicants, see ISP98 Form 1 endnotes 1 and 30.

3 Date and place of issuance. Standbys commonly recite the issuance date and the place of issuance) at the top of the undertaking or in the first paragraph of the text (or both).

The indicated place of issuance is significant in determining what law governs the issuer's obligations. Absent an indication of the place of issuance in the standby, it may prove difficult to determine a single place of issuance, even with full knowledge of the process resulting in sending the standby to the beneficiary. See endnote 12 (Place of presentation), which may differ from the place of issuance.

4 Irrevocability. It is unnecessary to state that an ISP98 standby is irrevocable. See ISP98 Rule 1.06(a) and (b) (Nature of Standbys) and UCC § 5-106(a) (Issuance, Amendment, Cancellation, and Duration). This ISP98 Form 11.1 includes the word “irrevocable” for comfort.

5 Independence. It is unnecessary to state that an ISP98 standby issued in the U.S. is independent. The obligation of the issuer to honor a complying presentation is independent from the applicant-beneficiary and applicant-issuer relationships as a matter of law, as well as practice rule. See ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of the Issuer-Beneficiary Relationship) and UCC § 5-103(d) (Scope). This central feature of a letter of credit distinguishes it from ordinary guarantees and suretyship promises. This ISP98 Form 11.1 includes the word “independent” for comfort.

ISP98 Rule 4.11 (Non-Documentary Terms or Conditions), like UCC § 5-108(g) (Issuer's Rights and Obligations), provides that non-documentary conditions in a standby must be disregarded. This rule is intended to protect the independence of an undertaking issued subject to ISP98 (or UCC Article 5). Common examples of non-documentary conditions include standby provisions that payment or termination of the underlying obligation will reduce or accelerate expiration or otherwise affect the standby issuer's obligations. They tend to mislead applicants who do not appreciate that the issuer must ignore them. Similarly,

rights under a standby extended to “bona fide holders of complying drafts” or to “assigns” of the named beneficiary are unenforceable unless the standby clarifies whether nomination, transfer of drawing rights, or assignment of proceeds is intended and then also how such intended rights may be invoked by the presentation of documents that are specified in the standby text or ISP98 Rule 6 (Transfer, Assignment, & Transfer by Operation of Law). Some government standby forms run undue risks under the “non-documentary conditions must be disregarded” rule. This ISP98 Form 11.1 does not.

It is undesirable to state that a standby is “unconditional”, “primary”, or “absolute”. See ISP98 Rule 1.10(a) (Redundant or Otherwise Undesirable Terms). A standby is by legal and practice rule definition a conditional undertaking, conditioned on the timely presentation of complying documents. As such, its undertaking to pay is not “unconditional” or “absolute” when issued (although it may become such after a complying presentation is made). The term “primary” has no meaning in letter of credit law or practice and confuses letters of credit with suretyship undertakings.

It is unnecessary to include any so-called integration or merger clause (e.g., “This letter of credit sets forth in full issuer’s undertaking, and such undertaking shall not in any way be modified, amplified or amended by reference to any document, instrument, agreement or note referred to herein and any such reference shall not be deemed to be incorporated herein by reference to any such document, instrument, agreement or note.”). No such recital can usefully supplement any standby subject to ISP98 (or governed by UCC Article 5). Such clauses should be avoided because they might detract from the more authoritative and better worded statements of standby independence in ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of the Issuer-Beneficiary Relationship) and UCC § 5-103(d) (Scope). Such clauses should also be avoided because they invite application of contract law principles relevant to a bargain between the issuer and beneficiary, rather than letter of credit law principles relevant to an independent undertaking of the issuer. See ISP98 Form 5 (Simplified Demand Only Standby) endnote 1.

Similarly, it is unnecessary for a standby to recite that payment under it will be made from the issuer’s own funds. The independence of the issuer’s obligation as a matter of law assures that the issuer’s payment discharges the issuer’s obligation without regard to the effect of that payment on the applicant’s underlying obligations. An “own funds” recital does not and cannot protect a beneficiary against claims from an applicant (or a bankrupt applicant’s representative) based on the underlying applicant-beneficiary relationship.

6 Nomination. This ISP98 Form 11.1 does not include a request that it be advised to the government beneficiary through another bank. Advice signifies that the advisor has checked the apparent authenticity of the standby and accurately advised what it has received. See ISP98 Rule 2.05 (Advice of Standby or Amendment) and UCC § 5-107(c) (Confirmier, Nominated Person, and Adviser). Use of an advising bank is a simple and inexpensive way to reduce the beneficiary’s risk of relying on a forged standby. (The terms “advisor”, “adviser”, and “advising bank” are used interchangeably to refer to these limited functions, and use of the term “bank” recognizes that nomination is almost invariably of a bank and not of any limitation on non-banks acting under ISP98.)

This form could provide for advice by addressing the standby to the advisor and adding a new second paragraph, e.g.: “Advisor: [name and address(es) of beneficiary’s bank] is requested to advise Beneficiary of the issuance of this Standby. Issuer undertakes to route any

amendment, notice of non-extension, or other communication affecting this Standby through Advisor to advise Beneficiary thereof [and to receive communications from Advisor as authentic communications from the indicated officer or other representative of Beneficiary].”

A government beneficiary may wish to consider requiring that one or more banks chosen by it be nominated in substantially all standbys issued in its favor to advise them. This step would provide a valuable check of the authenticity of the standby and might facilitate record keeping for the government on issuances, amendments, notices of non-extension, etc., as well as timely presentation of the government beneficiary’s demands. See endnote 6 (Nomination).

The suggested text above could be expanded to provide for presentation to the issuer by authenticated SWIFT inter-bank message quoting the beneficiary’s demand rather than by courier delivery of the beneficiary’s originally signed demand.

Nomination of another bank in a standby could be expanded to provide for confirmation (see the General Comments) or to authorize giving value against a complying presentation, which is beyond the scope of this ISP98 Form 11.1. As stated in ISP98 Rule 2.04 (Nomination), nominated banks are not bound by the issuer’s nomination or authorized to bind the issuer, nor are they governed by the same laws. See endnotes 24 (Incorporation of ISP98; optional choice of law and forum) and 25 (Charges and fees for issuance, advice, and confirmation).

7 Amount available. ISP98 Rule 3.08 (Partial Drawings & Multiple Presentations; Amount of Drawings) permits presentations for less than the amount available under a standby. See ISP98 Form 3 (Model Standby Providing for Reduction and Incorporating Annexed Form of Reduction Demand) on the possibility of reducing the amount available other than by honoring a payment demand.

It is unnecessary to state in a standby, or in a demand form, that the amount demanded must be, or is, available under the standby. The amount available is determinable without dependence on any such statement. See endnote 15 (Overdrawing).

8 Annexed form of payment demand. ISP98 Rule 4.08 (Demand Document Implied) requires presentation of a documentary demand for payment. Each requirement for the presentation of a document should appear in the standby text specifying the document(s) to be presented and not merely as a recital in an annexed form of demand or required beneficiary statement.

This ISP98 Form 11.1 does not require presentation of a “draft” but instead requires a demand. Requiring a draft, whether or not as the only document to be presented, is neither necessary nor efficient under a standby that undertakes to pay at sight. (ISP98 Rule 4.16(c) (Demand for Payment) provides that a “draft” need not be in negotiable form.)

This ISP98 Form 11.1 incorporates an annexed model form of payment demand to be completed and presented by the beneficiary. Annexing the desired form of payment demand (with any desired beneficiary statement) is not required by ISP98 but promotes the efficient use of standbys. Annex A satisfies the requirements of ISP98 Rule 4.16 (Demand for Payment), so that, when the government beneficiary completes the annexed form as indicated, it will include a demand for payment of a stated amount under an identified standby, be properly addressed, dated, and signed, and contain any required beneficiary statement.

While not optimal, Annex A could be deleted as a self-contained demand form and merged into the body of the standby with additional wording that would require that the demand be presented to the issuer's indicated address, mention the standby reference number, be dated and signed by the beneficiary, and include the beneficiary statements that are now included in Annex A. A statement included in blocked wording or quotation marks in the body of a standby, like a statement included in an attached form such as Annex A, would be covered by ISP98 Rule 4.09(b) (Identical Wording & Quotation Marks). See endnote 29 (Beneficiary statements) on the ISP98 standards for determining whether a beneficiary statement complies with the requirements of the standby.

Annex A includes a beneficiary statement that the applicant is obligated to pay the amount demanded as provided in an identified underlying contract, without further indicating the source or nature of the underlying payment obligations.

The underlying contract should be identified in Annex A when the standby is issued. While some standbys call for a draft only or for a payment demand that does not identify the underlying obligations intended to be supported by the standby, increasing concern regarding anti-money laundering has caused banks to press for the inclusion of such information. In this regard, government beneficiaries should set an example in their forms. Separately, there is the chance of dispute as to which particular underlying obligations are or are not to be satisfied or secured by any particular drawing under a particular standby. UCC §§ 5-110 (Warranties) and 5-117 (Subrogation of Issuer, Applicant, and Nominated Person) provide post-honor warranty and subrogation rights and remedies, which, together with the law applicable to the government beneficiary's relationship with the applicant, allow for an extended inquiry into the intentions of the parties regarding whether a payment received under a standby should be returned or differently applied.

Assuming that the applicable regulation or contract requires that the applicant provide and maintain acceptable standby support, it should also require that the imminent failure to maintain acceptable standby support will require timely payment either to satisfy or secure the underlying payment obligations supported by the standby. The beneficiary may then make the statement required in the Annex A form of payment demand, whether the problem is that the standby is set to expire too soon or the issuer or confirmor ceases to be acceptable to the government beneficiary.

The standards by which bank acceptability (notably creditworthiness) are to be measured are best addressed in the government's underlying contract or regulation. Attempting to address bank acceptability in the text of the standby or confirmation is problematic and is resisted by many banks.

9 Annexed form of payment demand after notice of non-extension. Optional Annex B should be included if the standby provides for automatic extension and if the applicable government regulation or contract does not provide any basis for using Annex A to demand payment because the issuer has given a notice of non-extension. It is simpler and more efficient to provide in the applicable regulation or contract that any failure to maintain a sufficient standby entitles the government to payment before the standby terminates either by acceleration of the underlying obligations or by triggering an underlying obligation to cash collateralize any underlying payment obligations that are still contingent or unmatured. Following this approach in the underlying documentation would make it unnecessary to include an Annex B (or to add to Annex A an alternative beneficiary statement in lieu of a

separate Annex B).

10 Annexes to be completed as indicated. The phrase “completed as indicated” assumes that the annexed form of demand adequately indicates how the beneficiary is to complete it before presenting it. This form includes instructions to complete text in **[bold]** before issuance and instructions for the beneficiary to complete text in [ALL CAPITALS UNDERLINED] before presentation.

Consistent with ISP98 Rule 4.16 (Demand for Payment), the annexed forms of demand require dating and signing. Neither the standby text nor any annexed demand form purports to permit “purported” signatures, an adjective which obscures the allocation of risks for forged demands under UCC § 5-108(i)(5) (Issuer’s Rights and Obligations) to the possible disadvantage of the true beneficiary. See ISP98 Form 1 endnote 10.

11 Manner of presentation. This ISP98 Form 11.1 provides for presentation by delivery of documents in a paper form, commonly by courier, as does ISP98 Rule 3.06 (Complying Medium of Presentation) with the exception of a standby to a beneficiary that is a SWIFT participant and that requires only a demand, an exception not typically applicable to a government beneficiary.

Presentation by telefax is commonly expressly permitted in standbys as an alternative to physical presentation of original paper documents. With telefax presentation a scan of a paper document is transmitted to a specified telephone number that is accessible and, preferably, controlled by standby operations’ personnel. Whether and how standby issuers may permit telefax presentation varies considerably. Express provision in the standby for such presentations is required, but there is no standard text. The following may be considered as a starting point for the development of standby text permitting presentation by telefax: “Presentation of any demand under this Standby may also be made by telefax sent from **[Beneficiary’s telephone number(s)]** to **[Issuer’s telephone number(s)]** with a cover sheet marked ‘URGENT. FAX PRESENTATION UNDER STANDBY LETTER OF CREDIT **[REFERENCE NO.]**’, and the document(s) received and printed out by Issuer shall be deemed to be original under ISP98 Rule 4.15 (Original, Copy, and Multiple Documents). Beneficiary is requested to telephone Issuer at **[telephone number(s)]** and to identify this Standby and Beneficiary’s presentation being telefaxed that same business day, as a courtesy and not as a condition limiting Issuer’s obligations.” Some standbys add wording on the disposition of any original paper documents, e.g., requesting that they also be presented to the issuer as a courtesy or disclaiming responsibility for examining them whether received before or after an honored fax presentation.

Electronic presentation, e.g., by message with pdf attachment to an issuer’s e-mail address, is not common. Many issuers do not permit this manner of presentation. Those that do, do so in limited circumstances and on their own individualized terms. ISP98 rules would facilitate the drafting of an issuer’s individualized clause permitting electronic presentation. See ISP98 Rule 1.09(c) (Defined Terms (“Electronic Record”, “Authenticate”, “Electronic Signature”, and “Receipt”)).

12 Place of presentation. ISP98 Rule 3.01 (Complying Presentation under a Standby) provides that a standby should indicate the place, the location within that place, and the person to whom presentation should be made. ISP98 Rule 3.04 (Where and to Whom Complying Presentation Made) provides default rules. The indicated place of presentation is significant

in determining whether a complying demand is timely presented.

This ISP98 Form 11.1 provides for presentation to the issuer at a specified place, which might be an operations' office of the issuer with a name or address that differs from the name or address given for the issuer at the place of issuance or as the location of the particular branch of the bank that issued the standby. Many issuers limit presentation to one place or only a few places where they maintain standby operations, and in some cases those operations' centers are bank affiliates that specialize in letter of credit operations.

Bank security measures typically do not permit attempted presentation by in-person delivery to a bank's standby operations' personnel. Standbys typically require that any presentation be addressed to a street address and to the attention of the Standby Letter of Credit Department or the like. These requirements are intended to accommodate presentation of paper documents by mail or courier and to facilitate internal routing of incoming mailed or couriered packages from a mail room at the stated street address to standby operations' personnel. Providing for presentation "at the counters" of the issuer is as outmoded as it is imprecise.

This ISP98 Form 11.1 does not provide for the possibility of presenting at an alternative address of the issuer or of any nominated bank.

13 Presentation during business hours. ISP98 Rule 3.05 (When Timely Presentation Made) provides that presentation must be made before expiry on the expiration date and that a presentation after business hours is treated as made the next business day. Although Rule 9.04 (Time of Day of Expiration) provides that expiry occurs at the close of business at the place of presentation, this phrase is included in this ISP98 Form 11.1 for the avoidance of doubt.

14 Presentation of the original standby not required. An issuer's obligation is not dependent on the beneficiary's holding or presenting the "original" standby, unless the standby so provides. See ISP98 Rule 2.03 (Conditions to Issuance). This ISP98 Form 11.1, like most standbys, does not require presentation of the standby with a payment demand. Any such requirement exposes the government beneficiary to the unnecessary risk that a demand may be rightfully refused if the standby is lost or otherwise cannot be timely presented. It also exposes the issuer to disputes over the issuer's receipt, handling, or return of the standby. The typical justification for such a requirement is to deter forged demands, but there are other better ways to deter forged demands, e.g., by providing in the standby that payment must be made to a specified bank for credit to a specified government beneficiary's account. See ISP98 Form 1 endnote 9.

If despite this recommendation the standby text is redrafted to require presentation of the standby (e.g., by adding: "and accompanied by the original standby"), then any annexed demand form should add corresponding text. In that event, consideration should also be given to adding a provision in the standby text requiring the reasonable exercise of issuer discretion under ISP98 Rule 3.12 (Original Standby Lost, Stolen, Mutilated, or Destroyed), e.g.: "Issuer undertakes to exercise its discretion under ISP98 Rule 3.12 to waive the requirement to present this Standby (or to replace it) against assurances and indemnities that are satisfactory to Issuer and made in favor of Issuer and Applicant." Under this clause the issuer would determine what is satisfactory, but the applicant would bear the ultimate risk of payment against a forged demand.

15 Overdrawing. This sentence supersedes ISP98 Rule 3.08(e) (Partial Drawing and Multiple Presentations; Amount of Drawings) which provides that a drawing that exceeds the amount available under the standby is discrepant. This superseding sentence requires the issuer to pay the full amount available under the standby against a presentation that would comply but for the overdrawning. Inclusion of this sentence should be reconsidered if the standby requires presentation of a valuable document that the beneficiary might prefer be returned rather than delivered for less than the amount demanded.

This sentence could be enhanced by adding the phrase “notwithstanding ISP98 Rule 3.08(e)”, but such an addition is unnecessary and might put into question other standby provisions that supersede other ISP98 rules. This ISP98 Form 11.1 does not recite the exclusion or modification of an ISP98 rule where the wording in the standby is “specific and unambiguous”. See ISP98 Rule 1.11(d)(iii) (Interpretation of these Rules). The undertaking “to pay the amount available” is sufficiently specific and unambiguous to supersede ISP98 Rule 3.08(e) as to the effect of an overdrawning.

16 Expiration. This ISP98 Form 11.1 is based on the common practice of stating a specific calendar date for expiry. See ISP98 Rule 9.01 (Duration of Standby), UCC § 5-106 (Issuance, Amendment, Cancellation, and Duration), and OCC regulation 12 C.F.R. § 7.1016(b)(1) (iii).

The stated expiration date should be set sufficiently after the underlying obligation becomes due to allow for obtaining internal authorization to make a drawing, to satisfy any timing or other requirement for drawing provided in the relevant government regulation or contract, and to make a curative drawing after any refusal of an initial drawing. If payment of the underlying obligation may be made outside of the standby, the stated expiration date should be set to allow for drawing after any possible rescission of an outside payment made by an insolvent payer.

The expiration date stated in a standby is not necessarily the last day on which a complying presentation may be made under the standby. ISP98 Rule 3.13 (Expiration Date on a Non-Business Day) automatically extends a weekend expiration date to the next business day. ISP98 Rule 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) extends by at least 30 days an expiration date that occurs on a business day when the issuer is closed for any reason (including force majeure).

ISP98 Rule 3.14 may be restated in standby text, e.g.: “If on the last business day for presentation the place for presentation stated in this Standby is for any reason closed and Beneficiary does not make timely presentation because of the closure, then the last day for presentation is automatically extended to the day occurring 30 calendar days after that place for presentation re-opens for business or, if earlier, 30 calendar days after Issuer gives Beneficiary a written notice in which Issuer authorizes another reasonable place for presentation and that place is open for business on the last day for presentation and on each of the preceding 15 business days.”

ISP98 Rule 3.14(a) does not apply where the issuer is open on the expiration date but closed in the days preceding the expiration date. The above provision could be expanded, e.g.: “If on the last business day for presentation or on any of the preceding 15 business days . . .”

17 Automatic extension. This paragraph on automatic extension should be included only in standbys that are outstanding long enough to require automatic extension of the stated expiration date.

Automatic extension provisions in standbys have arisen out of regulatory, commercial law, and practical business concerns about indefinite or overlong exposure under bank letters of credit. In addition to safety and soundness considerations, UCC § 5-106 (Issuance, Amendment, Cancellation, and Duration) limits the duration of letters of credit that are indefinite to one year and those that purport to be perpetual to five years. Moreover, prudent banking practices would suggest an annual re-evaluation of the applicant's credit standing. These considerations have resulted in standby provisions that set the expiration date at one year after issuance and then provide for automatic one-year extensions, subject to the issuer's giving a notice of non-extension allowing for a drawing before the standby expires. ISP98 Rule 2.06(a) (When an Amendment is Authorised and Binding) makes "automatic amendments" effective without further notification or consent if the automatic amendment is expressly stated in the standby. Accordingly, it is desirable to include the word "automatic" in any standby clause intended to make an amendment effective based on the terms of the standby and not by obtaining the beneficiary's consent. It is unnecessary to recite that an automatic extension is "without amendment" or that an automatic extension clause is a "condition".

This ISP98 Form 11.1 uses the words "extend" and "non-extension", and not "renew" or "non-renewal" or "reinstate", to make clear that the intent is to amend, and not replace, the standby and not to affect the amount available.

The word "evergreen" is popularly used to refer to automatic extension clauses; however, this word cannot substitute for, or usefully supplement, an automatic extension clause. See ISP98 Rule 1.10(c)(ii) (Redundant or Otherwise Undesirable Terms).

An automatic extension clause does not render a standby perpetual. Official Comment 4 to UCC § 5-106 (Issuance, Amendment, Cancellation, and Duration) makes clear that an automatically extending letter of credit is not perpetual if it may be terminated in the issuer's discretion by notice to the beneficiary. See also 12 C.F.R. § 7.1016(b)(1)(iii)(B) (terms should permit national bank to terminate the undertaking either on a periodic basis or at will upon either notice or payment to the beneficiary).

18 One year; 30 days. The period of one year is the standard time frame for successive automatic extensions to facilitate annual credit reviews by U.S. bank issuers of their applicants. This sentence sets as the expiration date the same calendar month and date for each succeeding one-year period in accordance with standby practice and ISP98 Rule 9(b) (Timing).

A 30-day period for giving or receiving a notice of non-extension is common, but a longer period (e.g., 60 days) may be appropriate. The length of that period is affected by the length of time expected for (i) the issuer to re-approve the applicant's credit, (ii) the applicant to replace the standby, and (iii) the government beneficiary to draw as permitted by the standby and the underlying transaction. The government's regulation or contract should address requirements for satisfactory replacement. See endnote 37 (Retraction or replacement standby).

19 Retraction of non-extension notice. Standby operations' personnel may not receive credit approval for extension before the date required to initiate sending a timely non-extension notice and, as a result, may issue an effective notice of non-extension and later receive credit approval for extension. While the Annex B demand form includes an optional reference to retraction, this ISP98 Form 11.1 does not authorize the issuer to give a notice of retraction. To authorize an effective retraction, the following clause should be considered for insertion in the standby text: "At any time before the next expiration date Issuer may retract its notice of non-extension by giving Beneficiary a written notice of retraction in the same manner as giving notice of non-extension and thereby automatically extend the expiration date."

Retraction and replacement are best addressed in the underlying regulation or contract, because it is difficult for standby text to cover all of the variations that may arise, including treatment of any demands made after a notice of non-extension is given.

20 Send or receive. Automatic extension clauses differ in the extent to which they spell out where and how a notice of non-extension must or may be sent to, or be received by, the beneficiary in order to establish an expiration date that is not subject to further automatic extension. Given the “independent” and formal relationship of an issuer to a beneficiary, there are considerable practical difficulties in determining or proving whether and when a notice has been given by an issuer to a beneficiary. They are multiplied for all concerned if a notice must also be given to the applicant or other party, as well as the beneficiary. See ISP98 Form 2 (Model Standby Providing for Extension) endnote 4.

Some courts apply strict compliance concepts to issuer notices to a beneficiary. Any clause on giving a non-extension notice should provide for a workable limitation on a standby’s duration by the giving of advance notice and should be supplemented by a final expiry date so as to avoid uncertainty as to the duration of the standby and avoid any need for indefinite retention of proof of due expiry. This ISP98 Form 11.1 requires that a non-extension notice be in writing and given to the beneficiary by means which allow for tracking delivery by mail or courier service to the beneficiary ‘s address as stated in the standby. This form also provides for an alternative of giving an effective notice by proving actual timely receipt by the beneficiary in the absence of proof of delivery by mail or courier.

21 Final expiration date. If a standby provides for automatic extensions, then an end date for automatic extensions, even if it is set many years in the future, is highly desirable. Such a final date is important for bank safety and soundness reasons, as well as issuer’s and confirmor’s record-keeping purposes, particularly to avoid having to retain indefinitely proof that a standby was terminated by expiration following an effective notification of non-extension (or was honored or otherwise reduced to zero).

This ISP98 Form 11.1 suggests a final expiration date set five years after standby issuance based on the five-year limitation on “perpetual” letters of credit in UCC § 5-106(d) (Issuance, Amendment, Cancellation, and Duration) discussed in endnote 17 (Automatic extension).

Assuming that the underlying government regulation or contract provides that a required standby must remain outstanding as long as the underlying obligations are outstanding and that imminent expiry will entitle the beneficiary to claim payment before expiry (see endnote 8 (Annexed form of payment demand)), the government beneficiary would have sufficient leverage to obtain either a timely extension of the final expiration date or payment before expiry. The final expiration date of the standby can always be extended by amendment in the usual way, i.e., by the issuer’s issuance of an amendment that satisfies the signed writing requirement of UCC § 5-104 (Formal Requirements) to which the beneficiary consents as required by ISP98 Rule 2.07 and UCC § 5-106(d).

22 Three days to examine and pay a presentation. ISP98 Rules 2.01(c) (Undertaking to Honour by Issuer and Any Confirmor to Beneficiary) and 5.01 (Timely Notice of Dishonour) provide for the time an issuer has to honor or dishonor and include a safe-harbor of three business days after presentation. That three-day period begins on the business day following the business day of presentation. This standby text converts that three-day safe harbor period in ISP98 into a timing requirement for payment of a complying presentation. This standby

text would supersede the ISP98 rule, and both would supersede the “reasonable time” provision in UCC § 5-108(b) (Issuer’s Rights and Obligations).

23 Place and method of payment. If a standby does not state an exclusive place or method of payment, then an issuer may voluntarily follow the presenter’s request. See ISP98 Rule 5.08 (Cover Instructions/Transmittal Letter). Annexes A and B in this ISP98 Form 11.1 include a provision to be completed by the beneficiary to request payment by wire transfer. This provision requires that the beneficiary’s demand for payment identify the beneficiary’s bank and the beneficiary’s account to be credited by that bank. (Under UCC § 4A-406 acceptance by the beneficiary’s bank of a funds transfer for credit to the beneficiary’s account satisfies the issuer’s payment obligation.) See endnote 33 (Request for wire transfer to beneficiary’s account), which notes that a request to pay an entity other than the beneficiary is an attempt to assign proceeds.

Including the method of payment in the text of a standby when issued may deter forged beneficiary demands, as well as avoid delays resulting from the issuer’s receipt of an inadequate request as to the method of payment. If payment by wire transfer is desired, the following standby text may be substituted (and completed before the standby is issued): “Payment shall be made by wire transfer to an account of Beneficiary as follows: [name, address, and routing number of Beneficiary’s bank, and name and number of Beneficiary’s account] or to such other bank account of Beneficiary as Beneficiary may duly request of Issuer”. If payment by check is desired, the following standby text may be substituted: “Payment shall be made by Issuer’s check payable to Beneficiary sent to Beneficiary’s above-stated address by nationally recognized overnight courier.”

If an assignment of proceeds is contemplated, one way to provide for it and to limit the issuer’s discretion to decline to acknowledge it would be to add to the standby text here: “or of Beneficiary’s assignee of proceeds identified in Beneficiary’s demand with the assignee’s name and address, the name and routing number of the assignee’s bank in the United States, and the name and number of the assignee’s account to be credited. Issuer shall acknowledge any such request for an assignment of proceeds, subject only to compliance with mandatory applicable law.” This additional standby text, with a corresponding addition in Annex A (and in any other form of assignable payment demand) would constitute the issuer’s advance acknowledgement of a possible future assignment of proceeds to an assignee adequately identified in a beneficiary’s complying demand directing payment to the beneficiary’s named assignee. Accordingly, the issuer (as well as the government beneficiary) might want to include a beneficiary statement that, e.g., the assignee will be using the standby proceeds for a purpose required or permitted by the underlying contract or regulation or will be holding proceeds as a trustee, custodian, or the like representing one or more third parties with government recognized claims against the applicant. See ISP98 Rule 6.08 (Conditions to Acknowledgement of Assignment of Proceeds), listing conditions that an issuer might consider before agreeing in advance to acknowledge an assignment of standby proceeds.

An issuer’s response to a beneficiary’s request may be affected by regulatory requirements limiting wire transfers to a permissible financial institution for credit to a permissible account in a permissible country. No matter what a standby, demand form, or separate request for routing payment may state, applicable law, e.g., a court or government order, may block payment.

Issuers rarely undertake to send an advice of payment to beneficiaries. In the unusual case where beneficiaries lack access to reports that their requested wire transfers were received

and credited by their banks, the following clause might be added: “A notice of such payment shall be sent to Beneficiary’s above-stated address.”

24 Incorporation of ISP98; optional choice of law and forum. UCC § 5-116(c) (Choice of Law and Forum) provides that incorporated “rules of custom or practice” will govern an issuer’s liability and will supersede conflicting UCC Article 5 provisions, except for the few that are non-variable under UCC § 5-103(c) (Scope). Neither ISP98, which postdates UCC Article 5, nor the standby text provided in this ISP98 Form 11.1, including endnotes, conflicts with any of the non-variable UCC provisions.

UCC § 5-116 expressly refers to the Uniform Customs and Practice for Documentary Credits (“UCP”) as an example of incorporated practice rules. Before 1998 many domestic standbys were issued subject to a version of the UCP. Many government standbys are still issued subject to UCP500 or UCP600 because government agencies have been slow to update their forms, i.e., to recognize the superiority of UCP600 over UCP500 and of ISP98 over both UCP500 and UCP600 as applied to standbys. This ISP98 Form 11.1 could be adapted for standbys to be issued subject to UCP, with particular attention paid to the UCP’s articles on force majeure closure and installment drawings and on the treatment of conflicting data in a presentation. This form could also be adapted for standbys to be issued without incorporating any published practice rules, with the effect of obligating a U.S. bank issuer to observe standard standby practice as well as the specific gap-filling provisions of UCC § 5-108 (Issuer’s Rights and Obligations) on compliance, preclusion, and non-documentary conditions. These endnotes do not further address adapting this form for U.S. government standbys issued subject to other practice rules or no practice rules.

This ISP98 Form 11.1 does not include a choice of law or forum clause, relying on UCC § 5-116(b) to apply UCC Article 5 as enacted in the state where the issuer is located. Many standbys issued by U.S. banks to U.S. beneficiaries are silent on applicable law and forum.

Those standbys issued by U.S. banks that do choose law typically restate UCC § 5-116, e.g.: “This standby is issued subject to ISP98 and, as to matters not covered by ISP98, is governed by the law of [**name of the state where the issuer is located**].” A common addition is: “and applicable federal law”. There is no need to exclude any state’s conflict-of-laws rules; UCC § 5-116(a) as enacted in every state makes the choice of law in a letter of credit absolutely enforceable.

If the standby also includes a forum clause, it typically refers to the same state as that chosen as applicable law, e.g.: “The courts located in [**state**] shall have exclusive jurisdiction over any action to enforce Issuer’s obligations under this Standby.” UCC § 5-116(e) as enacted in every state makes the choice of forum in a letter of credit absolutely enforceable.

A government beneficiary should consider not only its preferences but also the preferences of otherwise acceptable banks that may resist a choice-of-law or forum clause that chooses a state that has enacted a materially varied version of UCC Article 5 or that has problematic letter of credit case law. Some banks will refuse to issue standbys under such legal regimes, prejudicing applicants’ abilities to obtain cost-effective standbys from the bank or banks with which they maintain credit lines and government beneficiaries’ abilities to obtain standbys from banks with operational expertise. Some banks will issue standbys subject to the law of one of only a few approved states.

Although state variations in the adoption of UCC Article 5 are relatively few and generally concern remedy issues, whenever UCC Article 5 in a particular state is at issue, consideration should be given to the possibility that there may be a relevant state variation in UCC Article 5. See endnote 38 (References to UCC Article 5). Material state variations of UCC Article 5 are noted in *LC Rules & Laws*.

A standby constitutes the obligations of its issuer. Accordingly, a choice-of-law or forum clause would not necessarily apply to the obligations of a nominated bank and particularly a confirmor, which, in the case of a U.S. bank confirmor would be treated as the issuer of a parallel independent undertaking from a state that may be different from the standby issuer's state.

25 Charges and fees for issuance, advice, and confirmation. The obligations of an issuer (and confirmor) to honor a complying demand do not allow for deduction or delay unless the standby otherwise states or applicable law otherwise mandates. ISP98 Rule 8 (Reimbursement Obligations) obligates applicants to reimburse issuers and obligates issuers to reimburse nominated banks for their fees and charges; it imposes no such obligations on beneficiaries. Accordingly, this paragraph is included for comfort.

This ISP98 Form 11.1 does not authorize another person to advise, receive presentation, give value, or confirm. The optional sentence referring to the fees and charges of any such "nominated person" should be included only if the standby nominates another to act. See endnote 6 (Nomination) and ISP98 Rule 2.04 (Nomination).

If a beneficiary uses an advising bank to undertake other functions, such as to monitor the standby for imminent expiry or to forward a presentation of documents, those other functions would not be covered by an issuer's undertaking to pay fees for advising the standby.

26 Communications. This optional clause is included because many bank issuers include in their standbys a standard provision on communications to them (and frequently with a reminder to use the issuer's standby reference number when communicating about the standby). A government beneficiary may wish to develop its own standard provision for communications from issuers to it.

This ISP98 Form 11.1 does not provide for automatic amendment upon notified change of addresses (telephone and electronic as well as physical office addresses, including attention party information). Changing the beneficiary's address may be facilitated by adding "or such other address as Beneficiary may specify in a written notice given to Issuer in the manner required to present a payment demand" or, more formally, by adding the following text and annex: "unless Beneficiary makes a demand in the form of Annex C (Demand for Change of Beneficiary's Address), completed as indicated and presented to Issuer, whereupon Beneficiary's address shall be automatically amended in accordance with Beneficiary's demand."

Annex C: Demand for Change of Beneficiary's Address

[INSERT DATE]

[name and address of Issuer or other addressee at place of presentation as stated in standby]

Re: Standby Letter of Credit No. [reference number], dated [date], issued by [Issuer's name] ("Standby").

The undersigned Beneficiary demands that its address for sending all communications related to the Standby be changed from [INSERT PRIOR ADDRESS] to [INSERT NEW ADDRESS], effective on the later of Issuer's receipt or [INSERT DATE].

[Beneficiary's name]

By its authorized officer:

[INSERT ORIGINAL SIGNATURE]
[INSERT TYPED/PRINTED NAME AND TITLE]

No similar provision is needed for changes in the address of the issuer because ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) provides a mechanism for the issuer automatically to indicate a change of the address to which presentation must be made, provided notice thereof is timely received by the beneficiary.

27 Demand issuance date. ISP98 Rule 4.16(b)(ii) (Demand for Payment) provides that a demand must contain an issuance date, and ISP98 Rule 4.06 (Date of Documents) provides that its issuance date may not be later than the date of its presentation.

28 Information to be inserted in annexed demand form before standby is issued. The information in bold type at the top of Annex A (addressee and standby identification) should appear in the demand form when the standby is issued and be consistent with the information in the text of the standby. See ISP98 Rules 3.01 (Complying Presentation under a Standby) and 3.03 (Identification of Standby), 3.04 (Where and to Whom Complying Presentation Made), and 3.06 (Complying Medium of Presentation). If these data fields are blank or if there is no annexed demand form, then the beneficiary should provide this information in any demand.

29 Beneficiary statements. Standbys commonly require presentation of beneficiary statements and commonly combine them with the required form of demand for payment. Words other than "states", such as "certifies", "represents", "warrants", "promises", or a combination of those words, can also be used in the applicable government regulation or contract, in which case the required standby form should also use those words.

A standby that requires a statement from the beneficiary and specifies the precise wording is subject to ISP98 Rule 4.09(b) (Identical Wording and Quotation Marks). That rule applies ISP98 Rule 4.01 (Examination for Compliance) so as to excuse the beneficiary from having to reproduce apparent typographical errors and the like in the standby and to excuse apparent typographical errors and the like that may be included in the documents presented. Excusable errors are those apparent when the standby and the documents presented are "read in context", the context being an examination for compliance under ISP98 and not an examination of the underlying transaction.

If the standby does not specify the precise wording, then ISP98 Rule 4.09(a) should be consulted. It allows a presented demand to use any words that “appear to convey the same meaning”. Flexibility may also be introduced by adding alternative wording to the annexed form of demand or otherwise generally indicating in the annexed form of demand how blank spaces may be completed.

If no flexibility whatsoever is desired (e.g., because the demand or statement must be delivered to a third person in a precisely specified form), then ISP98 Rule 4.09(c) should be consulted, with the understanding that it should be invoked rarely, that it requires use of the word “exact” or “identical” in the standby, and that its use may lead to unintended consequences for the issuer, applicant, or beneficiary.

30 “Applicant” as underlying obligor. This demand form uses “Applicant”, which is a defined term in the text of the standby, and assumes that the applicant and beneficiary are parties to the underlying agreement that establishes the obligations to be supported by the standby. If this defined word is omitted from this demand form (as it should be if the “Applicant” is not the counter party to the government beneficiary), the name of the party to the underlying transaction should be inserted here. See endnote 2 (Applicant).

The following text covering defined terms may be appropriately added: “This demand is made in accordance with the terms and conditions, including defined terms, of the Standby and ISP98.”

31 Obligated/default. This beneficiary statement indicates that the applicant is “obligated to pay” the amount demanded, not that there is a “default”. A default statement is inapt where the amount demanded is payable on the date demanded without regard to the occurrence or continuance of a default or where “default” is not adequately defined in the underlying contract or regulation or where “default” may require that an action be taken that may be prohibited under laws triggered by the insolvency of the applicant or other party. This model demand form avoids use of and reliance on the word “default”.

32

Identification of underlying obligations; use of proceeds. This demand form includes a reference, which could be general or specific, to the underlying obligations of the applicant to the government beneficiary as provided in the underlying contract or regulation. This approach is desirable for the reasons indicated in endnote 8 (Annexed form of payment demand). As is the case throughout this ISP98 Form 11.1, the government beneficiary is expected to draft model text for its model form with standard references to itself and its regulation, etc., and later to develop with the particular applicant the details for the particular contract to be supported by the standby.

This demand form does not include a beneficiary statement regarding use of any payment received from a drawing under the standby. See ISP98 Form 1 endnotes 31-33 on the optional “use of proceeds” text in Annex A of Form 1. Annex A (and B) of this ISP98 Form 11.1 could usefully add, after an adequate identification of the underlying obligations: “Beneficiary further states that the proceeds from this demand will be used to satisfy or secure the above-identified obligations and that Beneficiary will account to Applicant for any proceeds that are not so used.”

33 Request for wire transfer to beneficiary’s account. This term in the demand form implements the payment term in the standby. It may be unnecessary if the text of the standby

includes satisfactory wire transfer information for payment to the beneficiary. See endnote 23 (Place and method of payment).

If the standby text provides for a possible assignment of proceeds to be made in the beneficiary's demand (see endnotes 1 (Name and address of Applicant) and 23 (Place and method of payment)), then the annexed demand form could add, e.g.: "Alternatively, if this demand does not provide account information for Beneficiary, Beneficiary requests that payment be made to Beneficiary's assignee of proceeds, as follows: [INSERT NAME AND ADDRESS OF BENEFICIARY'S ASSIGNEE] by wire transfer to an account of Beneficiary's assignee of proceeds, as follows: [INSERT NAME, ADDRESS, AND ROUTING NUMBER OF ASSIGNEE'S BANK, AND NAME AND NUMBER OF ASSIGNEE'S ACCOUNT TO BE CREDITED BY ITS BANK.]" As noted in endnote 23, this added text could also include a beneficiary statement that, e.g., the assignee will be using the standby proceeds for a purpose required or permitted by the underlying contract or regulation or will be holding proceeds as a trustee, custodian, or the like representing one or more third parties with government recognized claims against the applicant. As also noted in endnote 23, an issuer's acknowledging or effecting an assignment of proceeds is subject to laws regulating money laundering, sanctions, and other matters that apply to issuers requested or required to effect payment to an assignee.

34 Signer authentication. This demand form requires the signer to indicate in the signature line that the demand and statement are made by the named beneficiary located at the address stated in the standby. Accordingly, the beneficiary's name and address should be stated in this demand form when the standby incorporating it is issued. If desired, the title(s) or names(s) of the beneficiary's permitted signers may also be specified in the demand form when the standby is issued.

35 Original signature. Assuming that Annex A is to be presented as a paper document, when presented it should bear an original signature of an individual with the signer's printed name and officer title below. See ISP98 Rules 1.09(a) (Defined Terms ("Signature")), 3.06(d) (Complying Medium of Presentation), and 4.07 (Required Signature on a Document).

36 Annex B endnotes. The endnotes for Annex B address only those few aspects that are unique to the Annex B form of demand. Otherwise, it is modeled on Annex A, the endnotes for which are not repeated.

37 Retraction or replacement standby. The applicable government regulation or contract may permit the applicant to arrange for a timely retraction of the notice of non-extension or for a replacement standby. If the standby also permits retraction of a non-extension notice, as suggested in endnote 19 (Retraction of non-extension notice), the required beneficiary statement might add that no retraction of the non-extension notice and no permitted replacement standby (or other equivalent security) has been timely provided.

38 References to UCC Article 5. All references in these endnotes to UCC Article 5 are to the official text of Article 5 which was substantially revised in 1995 and promulgated by the Uniform Law Commissioners and the American Law Institute. Although all states and the District of Columbia have enacted a substantially identical version of UCC Article 5, some state enactments have re-numbered or re-lettered its sections and some have omitted or altered particular subsections. Where the law of a particular state is at issue, the version enacted in that state should be consulted before relying on the section cited in these endnotes. See http://topics.law.cornell.edu/wex/table_ucc.

39 Banking Regulations. The U.S. Office of the Comptroller of the Currency (“OCC”) is an independent bureau of the U.S. Department of the Treasury established in 1863. It regulates and supervises national banks and Federal savings associations to ensure that they operate in a safe and sound manner and in compliance with all applicable laws.

Over the years, the OCC has issued extensive rulings on bank letters of credit. In 1996, after the 1995 revision of UCC Article 5, the OCC promulgated a comprehensive version of its interpretive ruling, which was designated as 12 C.F.R. § 7.1016, replacing earlier versions in the Code of Federal Regulations dating back to 1971. 12 C.F.R. § 7.1016 has been further amended several times to expressly recognize developments in practice rules, including ISP98.

Although not imposing requirements on the enforceability of a letter of credit, through 12 C.F.R. § 7.1016 the OCC has imposed safety and soundness standards for letters of credit. The regulation indicates that its scope applies to all independent undertakings, focusing on their documentary character and requiring that they be definite, limited in amount and duration, and that the issuer or confirmor be able to be reimbursed. It also addresses undertakings to honor by delivering an item of value, automatic extensions, undertakings for a bank’s own account, requisite operational expertise, and documentation.

While 12 C.F.R. § 7.1016 is by its terms applicable only to national banks, its principles frequently appear in rules applied to financial institutions chartered under different authority. For example, under 12 C.F.R. § 28.13, a Federal branch or agency of a foreign bank is generally subject to the same regulations as if it were a national bank. Federal and state savings associations are subject to the OCC’s regulation 12 C.F.R. § 160.120 and the Federal Deposit Insurance Corporation’s regulation 12 C.F.R. § 390.267, respectively, both of which essentially track 12 C.F.R. § 7.1016.

Bank issued standby letters of credit are thus subject to regulatory restraints that have evolved to assure the safety and soundness of the banking system. Banking regulations are likely to evolve to address and sometimes prohibit or limit practices that are becoming or have become unsound. In developing requirements for standby letters of credit, government agencies should take bank regulatory restraints into account and avoid standby requirements that bank regulators might consider unsafe or unsound for bank issuers.

INCOTERMS 2020

Editor's Overview

INCOTERMS® are produced by the International Chamber of Commerce. They are an example of the most basic type of practice rules or usages of trade, namely definitions of terms. First published in 1936, INCOTERMS® are generally updated every decade. The most recent revision of the terms is INCOTERMS® 2020 (ICC Publication No. 723). Since there have been significant changes in each iteration of the terms, it is important to indicate the year of INCOTERMS in the contract and not simply state that its terms are defined by INCOTERMS. INCOTERMS® 2020 is published by ICC Publishing Paris, France, which claims a copyright even though it is debatable whether internationally accepted practices can be copyrighted.

In a contract for the sale of goods, the obligation of the seller under UCC section 2-301 (General Obligations of the Parties) is to deliver the goods as agreed and to transfer title to them. Article 30 of the UN Contracts Convention (CISG) states that the seller “must deliver the goods, hand over any documents relating to them, and transfer the property in the goods, as required by the contract and this Convention.” In addition to providing terms and defining the delivery obligations of the parties, INCOTERMS® 2020 provides supplemental rules regarding notice and obligations related to import and export obligations such as clearances, insurance, etc. It should be noted that certain INCOTERMS only apply to certain modes of transport. Some INCOTERMS are to be used only with sea and inland waterway transport, while others are multi-modal.

There are important differences between the prior INCOTERMS® 2010 and 2020. The former term DAT (Delivered at Terminal) has been renamed to DPU (Delivered at Place Unloaded) to better capture that delivery may occur at any place, not just a “terminal” and, unlike the term DAP (Delivered at Place), the seller unloads the goods under DPU; under DAP, the seller does not unload goods. INCOTERMS® 2020 also updated the term FCA (Free Carrier) to provide for circumstances where one party requests a bill of lading with an on board notation; parties may agree for the buyer to request the carrier to issue an on board B/L to the seller once the goods are loaded. The B/L is then tendered from seller to buyer, typically through the seller’s bank. Each term now lists costs under “Allocation of Costs” sections to alleviate confusion such as shifting carrier pricing structures and back charged terminal handling fees. INCOTERMS® 2020 allows for buyers to use their own forms of transport under FCA terms, and for sellers to do the same under D terms. Clear security allocation requirements have been added to A4 and A7 of each term, with necessary costs included in A9 / B9. Finally, each term has expanded explanatory notes to assist users and prevent misinterpretation and / or misuse of the 2020 terms.

To limit the size of this volume, only the Article-by-Article Text of Rules for INCOTERMS 2020® has been reprinted. The full document introduces each INCOTERM through illustrative diagrams and is followed by “Explanatory Notes for Users” with further delineations of Seller and Buyer obligations under the A1-A10 and B1-B10 headings, respectively. The text of each INCOTERM is reprinted in this volume as well as the Seller and Buyer obligations under the 10 respective A and B headings,

namely: (1) General Obligations; (2) Delivery; (3) Transfer of Risks; (4) Carriage; (5) Insurance; (6) Delivery/Transport Document; (7) Export/Import Clearance; (8) Checking/Packaging/Marking; (9) Allocation of Costs; and (10) Notices.

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INCOTERMS 2020

Article-by-Article Text of Rules

A1 GENERAL OBLIGATIONS

EXW (Ex Works)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FCA (Free Carrier)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CPT (Carriage Paid To)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CIP (Carriage and Insurance Paid To)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DAP (Delivered at Place)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DPU (Delivered at Place Unloaded)

The seller must provide the goods and the commercial invoice in conformity with

the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DDP (Delivered Duty Paid)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FAS (Free Alongside Ship)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FOB (Free on Board)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CFR (Cost and Freight)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CIF (Cost Insurance and Freight)

The seller must provide the goods and the commercial invoice in conformity with the contract of sale and any other evidence of conformity that may be required by the contract.

Any document to be provided by the seller may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

B1 GENERAL OBLIGATIONS

EXW (Ex Works)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FCA (Free Carrier)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CPT (Carriage Paid To)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CIP (Carriage and Insurance Paid To)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DAP (Delivered at Place)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DPU (Delivered at Place Unloaded)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

DDP (Delivered Duty Paid)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FAS (Free Alongside Ship)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

FOB (Free on Board)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CFR (Cost and Freight)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

CIF (Cost Insurance and Freight)

The buyer must pay the price of the goods as provided in the contract of sale.

Any document to be provided by the buyer may be in paper or electronic form as agreed or, where there is no agreement, as is customary.

A2 DELIVERY

EXW (Ex Works)

The seller must deliver the goods by placing them at the disposal of the buyer at the agreed point, if any, at the named place of delivery, not loaded on any collecting vehicle. If no specific point has been agreed within the named place of delivery, and if there are several points available, the seller may select the point that best suits its purpose. The seller must deliver the goods on the agreed date or within the agreed period.

FCA (Free Carrier)

The seller must deliver the goods to the carrier or another person nominated by the buyer at the named point, if any, at the named place, or procure goods so delivered.

The seller must deliver the goods

1. on the agreed date or
2. at the time within the agreed period notified by the buyer under B10(b)
or,
3. if no such time is notified, then at the end of the agreed period. Delivery is completed either:
 - a) If the named place is the seller's premises, when the goods have been loaded on the means of transport provided by the buyer;
 - b) In any other case, when the goods are placed at the disposal of the carrier or another person nominated by the buyer on the seller's means of transport ready for unloading.

If no specific point has been notified by the buyer under B10(d) within the named place

of delivery, and if there are several points available, the seller may select the point that best suits its purpose.

CPT (Carriage Paid To)

The seller must deliver the goods by handing them over to the carrier contracted in accordance with A4 or by procuring the goods so delivered. In either case the seller must deliver the goods on the agreed date or within the agreed period.

CIP (Carriage and Insurance Paid To)

The seller must deliver the goods by handing them over to the carrier contracted in accordance with A4 or by procuring the goods so delivered. In either case the seller must deliver the goods on the agreed date or within the agreed period.

DAP (Delivered at Place)

The seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination or by procuring the goods so delivered. In either case the seller must deliver the goods on the agreed date or within the agreed period.

DPU (Delivered at Place Unloaded)

The seller must unload the goods from the arriving means of transport and must then deliver them by placing them at the disposal of the buyer at the agreed point, if any, at the named place of destination or by procuring the goods so delivered. In either case the seller must deliver the goods on the agreed date or within the agreed period.

DDP (Delivered Duty Paid)

The seller must deliver the goods by placing them at the disposal of the buyer on the arriving means of transport ready for unloading at the agreed point, if any, at the named place of destination or by procuring the goods so delivered. In either case the seller must deliver the goods on the agreed date or within the agreed period.

FAS (Free Alongside Ship)

The seller must deliver the goods either by placing them alongside the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered.

The seller must deliver the goods

1. on the agreed date or
2. at the time within the agreed period notified by the buyer under B10 or,
3. if no such time is notified, then at the end of the agreed period and
4. in the manner customary at the port.

If no specific loading point has been indicated by the buyer, the seller may select the point within the named port of shipment that best suits its purpose.

FOB (Free on Board)

The seller must deliver the goods either by placing them on board the vessel nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment or by procuring the goods so delivered.

The seller must deliver the goods

1. on the agreed date or
2. at the time within the agreed period notified by the buyer under B10
or,
3. if no such time is notified, then at the end of the agreed period and
4. in the manner customary at the port.

If no specific loading point has been indicated by the buyer, the seller may select the point within the named port of shipment that best suits its purpose.

CFR (Cost and Freight)

The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.

CIF (Cost Insurance and Freight)

The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.

B2 TAKING DELIVERY

EXW (Ex Works)

The buyer must take delivery of the goods when they have been delivered under A2 and notice given under A10.

FCA (Free Carrier)

The buyer must take delivery of the goods when they have been delivered under A2.

CPT (Carriage Paid To)

The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named place of destination or if agreed, at the point within that place.

CIP (Carriage and Insurance Paid To)

The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named place of destination or if agreed, at the point within that place.

DAP (Delivered at Place)

The buyer must take delivery of the goods when they have been delivered under A2.

DPU (Delivered at Place Unloaded)

The buyer must take delivery of the goods when they have been delivered under A2.

DDP (Delivered Duty Paid)

The buyer must take delivery of the goods when they have been delivered under A2.

FAS (Free Alongside Ship)

The buyer must take delivery of the goods when they have been delivered under A2.

FOB (Free on Board)

The buyer must take delivery of the goods when they have been delivered under A2.

CFR (Cost and Freight)

The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named port of destination.

CIF (Cost Insurance and Freight)

The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named port of destination.

A3 TRANSFER OF RISKS

EXW (Ex Works)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstance described in B3.

FCA (Free Carrier)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

CPT (Carriage Paid To)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstance described in B3.

CIP (Carriage and Insurance Paid To)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstance described in B3.

DAP (Delivered at Place)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

DPU (Delivered at Place Unloaded)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

DDP (Delivered Duty Paid)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

FAS (Free Alongside Ship)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

FOB (Free on Board)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstances described in B3.

CFR (Cost and Freight)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstance described in B3.

CIF (Cost Insurance and Freight)

The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A2, with the exception of loss or damage in the circumstance described in B3.

B3 TRANSFER OF RISKS

EXW (Ex Works)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If the buyer fails to give notice in accordance with B10, then the buyer bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.

FCA (Free Carrier)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to nominate a carrier or another person under A2 or to give notice in accordance with B10; or
- b) the carrier or person nominated by the buyer under B10(a) fails to take the goods into its charge,

then, the buyer bears all risks of loss of or damage to the goods:

- (i) from the agreed date, or in the absence of an agreed date,
- (ii) from the time selected by the buyer under B10(b); or, if no such time has been notified,
- (iii) from the end of any agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

CPT (Carriage Paid To)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If the buyer fails to give notice in accordance with B10, then the buyer bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.

CIP (Carriage and Insurance Paid To)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If the buyer fails to give notice in accordance with B10, then the buyer bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery, provided that the goods have been clearly identified as the contract goods.

DAP (Delivered at Place)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to fulfil its obligations in accordance with B7, then it bears all resulting risks of loss of or damage to the goods; or
- b) the buyer fails to give notice in accordance with B10, then it bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

DPU (Delivered at Place Unloaded)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to fulfil its obligations in accordance with B7, then it bears all resulting risks of loss of or damage to the goods; or
- b) the buyer fails to give notice in accordance with B10, then it bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

DDP (Delivered Duty Paid)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to fulfil its obligations in accordance with B7, then it bears all resulting risks of loss of or damage to the goods; or
- b) the buyer fails to give notice in accordance with B10, then it bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

FAS (Free Alongside Ship)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to give notice in accordance with B10; or
- b) the vessel nominated by the buyer fails to arrive on time to enable the seller to comply with A2, fails to take the goods, or closes for cargo earlier than the time notified in accordance with B10;

then the buyer bears all risks of loss of or damage to the goods:

- (i) from the agreed date, or in the absence of an agreed date,
- (ii) from the date selected by the buyer under B10, or, if no such date has been notified,

(iii) from the end of any agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

FOB (Free on Board)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If:

- a) the buyer fails to give notice in accordance with B10; or
- b) the vessel nominated by the buyer fails to arrive on time to enable the seller to comply with A2, fails to take the goods, or closes for cargo earlier than the time notified in accordance with B10;

then the buyer bears all risks of loss of or damage to the goods:

- (i) from the agreed date, or in the absence of an agreed date,
- (ii) from the date selected by the buyer under B10, or, if no such date has been notified,
- (iii) from the end of any agreed period for delivery,

provided that the goods have been clearly identified as the contract goods.

CFR (Cost and Freight)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If the buyer fails to give notice in accordance with B10, then it bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

CIF (Cost Insurance and Freight)

The buyer bears all risks of loss of or damage to the goods from the time they have been delivered under A2.

If the buyer fails to give notice in accordance with B10, then it bears all risks of loss of or damage to the goods from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

A4 CARRIAGE

EXW (Ex Works)

The seller has no obligation to the buyer to make a contract of carriage. However, the seller must provide the buyer, at the buyer's request, risk and cost, with any information in the possession of the seller, including transport-related security requirements, that the buyer needs for arranging carriage.

FCA (Free Carrier)

The seller has no obligation to the buyer to make a contract of carriage. however, the seller must provide the buyer, at the buyer's request, risk and cost, with any information in the possession of the seller, including transport-related security requirements, that the buyer needs for arranging carriage. If agreed, the seller must contract for carriage on the usual terms at the buyer's risk and cost.

The seller must comply with any transport-related security requirements up to delivery.

CPT (Carriage Paid To)

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named place of destination or, if agreed, any point at that place. The contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route in a customary manner of the type normally used for carriage of the type of goods sold. If a specific point is not agreed or is not determined by practice, the seller may select the point of delivery and the point at the named place of destination that best suit its purpose.

The seller must comply with any transport-related security requirements for transport to the destination.

CIP (Carriage and Insurance Paid To)

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named place of destination or, if agreed, any point at that place. The contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route in a customary manner of the type normally used for carriage of the type of goods sold. If a specific point is not agreed or is not determined by practice, the seller may select the point of delivery and the point at the named place of destination that best suit its purpose.

The seller must comply with any transport-related security requirements for transport to the destination.

DAP (Delivered at Place)

The seller must contract or arrange at its own cost for the carriage of the goods to the named place of destination or to the agreed point, if any, at the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination that best suits its purpose.

The seller must comply with any transport-related security requirements for transport to the destination.

DPU (Delivered at Place Unloaded)

The seller must contract or arrange at its own cost for the carriage of the goods to the named place of destination or to the agreed point, if any, at the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination that best suits its purpose.

The seller must comply with any transport-related security requirements for transport to the destination.

DDP (Delivered Duty Paid)

The seller must contract or arrange at its own cost for the carriage of the goods to the named place of destination or to the agreed point, if any, at the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination that best suits its purpose.

The seller must comply with any transport-related security requirements for transport to the destination.

FAS (Free Alongside Ship)

The seller has no obligation to the buyer to make a contract of carriage. however, the seller must provide the buyer, at the buyer's request, risk and cost, with any information in the possession of the seller, including transport-related security requirements, that the buyer needs for arranging carriage. If agreed, the seller must contract for carriage on the usual terms at the buyer's risk and cost.

The seller must comply with any transport-related security requirements up to delivery.

FOB (Free on Board)

The seller has no obligation to the buyer to make a contract of carriage. however, the seller must provide the buyer, at the buyer's request, risk and cost, with any information in the possession of the seller, including transport-related security requirements, that the buyer needs for arranging carriage. If agreed, the seller must contract for carriage on the usual terms at the buyer's risk and cost.

The seller must comply with any transport-related security requirements up to delivery.

CFR (Cost and Freight)

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold.

The seller must comply with any transport-related security requirements for transport to the destination.

CIF (Cost Insurance and Freight)

The seller must contract or procure a contract for the carriage of the goods from the agreed point of delivery, if any, at the place of delivery to the named port of destination or, if agreed, any point at that port. The contract of carriage must be made on usual terms at the seller's cost and provide for carriage by the usual route in a vessel of the type normally used for the transport of the type of goods sold.

The seller must comply with any transport-related security requirements for transport to the destination.

B4 CARRIAGE

EXW (Ex Works)

It is up to the buyer to contract or arrange at its own cost for the carriage of the goods from the named place of delivery.

FCA (Free Carrier)

The buyer must contract or arrange at its own cost for the carriage of the goods from the named place of delivery, except when the contract of carriage is made by the seller as provided for in A4.

CPT (Carriage Paid To)

The buyer has no obligation to the seller to make a contract of carriage.

CIP (Carriage and Insurance Paid To)

The buyer has no obligation to the seller to make a contract of carriage.

DAP (Delivered at Place)

The buyer has no obligation to the seller to make a contract of carriage.

DPU (Delivered at Place Unloaded)

The buyer has no obligation to the seller to make a contract of carriage.

DDP (Delivered Duty Paid)

The buyer has no obligation to the seller to make a contract of carriage.

FAS (Free Alongside Ship)

The buyer must contract at its own cost for the carriage of the goods from the named port of shipment, except when the contract of carriage is made by the seller as provided for in A4.

FOB (Free on Board)

The buyer must contract at its own cost for the carriage of the goods from the named port of shipment, except when the contract of carriage is made by the seller as provided for in A4.

CFR (Cost and Freight)

The buyer has no obligation to the seller to make a contract of carriage.

CIF (Cost Insurance and Freight)

The buyer has no obligation to the seller to make a contract of carriage.

A5 INSURANCE

EXW (Ex Works)

The seller has no obligation to the buyer to make a contract of insurance. however, the seller must provide the buyer, at the buyer's request, risk and cost with information in the possession of the seller that the buyer needs for obtaining insurance.

FCA (Free Carrier)

The seller has no obligation to the buyer to make a contract of insurance. however, the seller must provide the buyer, at the buyer's request, risk and cost, with information in the possession of the seller that the buyer needs for obtaining insurance.

CPT (Carriage Paid To)

The seller has no obligation to the buyer to make a contract of insurance. however, the seller must provide the buyer, at the buyer's request, risk and cost, with information in the possession of the seller that the buyer needs for obtaining insurance.

CIP (Carriage and Insurance Paid To)

Unless otherwise agreed or customary in the particular trade, the seller must obtain, at its own cost, cargo insurance complying with the cover provided by Clauses (A) of the Institute Cargo Clauses (ImA/IUA) or any similar clauses as appropriate to the means of transport used. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer.

When required by the buyer, the seller must, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's cost any additional cover, if procurable, such as cover complying with the Institute War Clauses and/or Institute Strikes Clauses (ImA/IUA) or any similar clauses (unless such cover is already included with the cargo insurance described in the preceding paragraph).

The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e. 110%) and shall be in the currency of the contract.

The insurance shall cover the goods from the point of delivery set out in A2 to at least the named place of destination.

The seller must provide the buyer with the insurance policy or certificate or any other evidence of insurance cover. moreover, the seller must provide the buyer, at the buyer's request, risk and cost, with information that the buyer needs to procure any additional insurance.

DAP (Delivered at Place)

The seller has no obligation to the buyer to make a contract of insurance.

DPU (Delivered at Place Unloaded)

The seller has no obligation to the buyer to make a contract of insurance.

DDP (Delivered Duty Paid)

The seller has no obligation to the buyer to make a contract of insurance.

FAS (Free Alongside Ship)

The seller has no obligation to the buyer to make a contract of insurance. however, the

seller must provide the buyer, at the buyer's request, risk and cost, with information in possession of the seller that the buyer needs for obtaining insurance.

FOB (Free on Board)

The seller has no obligation to the buyer to make a contract of insurance. however, the seller must provide the buyer, at the buyer's request, risk and cost, with information in the possession of the seller that the buyer needs for obtaining insurance.

CFR (Cost and Freight)

The seller has no obligation to the buyer to make a contract of insurance. however, the seller must provide the buyer, at the buyer's request, risk and cost, with information in the possession of the seller that the buyer needs for obtaining insurance.

CIF (Cost Insurance and Freight)

Unless otherwise agreed or customary in the particular trade, the seller must obtain, at its own cost, cargo insurance comply- ing with the cover provided by Clauses (C) of the Institute Cargo Clauses (ImA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer.

When required by the buyer, the seller must, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's cost any additional cover, if procurable, such as cover complying with the Institute War Clauses and/or Institute Strikes Clauses (ImA/IUA) or any similar clauses (unless such cover is already included with the cargo insurance described in the preceding paragraph).

The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e. 110%) and shall be in the currency of the contract.

The insurance shall cover the goods from the point of delivery set out in A2 to at least the named port of destination.

The seller must provide the buyer with the insurance policy or certificate or any other evidence of insurance cover. moreover, the seller must provide the buyer, at the buyer's request, risk and cost, with information that the buyer needs to procure any additional insurance.

B5 INSURANCE

EXW (Ex Works)

The buyer has no obligation to the seller to make a contract of insurance.

FCA (Free Carrier)

The buyer has no obligation to the seller to make a contract of insurance.

CPT (Carriage Paid To)

The buyer has no obligation to the seller to make a contract of insurance.

CIP (Carriage and Insurance Paid To)

The buyer has no obligation to the seller to make a contract of insurance. however, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer under A5.

DAP (Delivered at Place)

The buyer has no obligation to the seller to make a contract of insurance. however, the buyer must provide the seller, at the seller's request, risk and cost, with information that the seller needs for obtaining insurance.

DPU (Delivered at Place Unloaded)

The buyer has no obligation to the seller to make a contract of insurance. however, the buyer must provide the seller, at the seller's request, risk and cost, with information that the seller needs for obtaining insurance.

DDP (Delivered Duty Paid)

The buyer has no obligation to the seller to make a contract of insurance. however, the buyer must provide the seller, at the seller's request, risk and cost, with information that the seller needs for obtaining insurance.

FAS (Free Alongside Ship)

The buyer has no obligation to the seller to make a contract of insurance.

FOB (Free on Board)

The buyer has no obligation to the seller to make a contract of insurance.

CFR (Cost and Freight)

The buyer has no obligation to the seller to make a contract of insurance.

CIF (Cost Insurance and Freight)

The buyer has no obligation to the seller to make a contract of insurance. however, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer under A5.

A6 DELIVERY/TRANSPORT DOCUMENT

EXW (Ex Works)

The seller has no obligation to the buyer.

FCA (Free Carrier)

The seller must provide the buyer at the seller's cost with the usual proof that the goods have been delivered in accordance with A2.

The seller must provide assistance to the buyer, at the buyer's request, risk and cost, in obtaining a transport document.

Where the buyer has instructed the carrier to issue to the seller a transport document under B6, the seller must provide any such document to the buyer.

CPT (Carriage Paid To)

If customary or at the buyer's request, the seller must provide the buyer, at the seller's cost, with the usual transport document[s] for the transport contracted in accordance with A4.

This transport document must cover the contract goods and be dated within the period agreed for shipment. If agreed or customary, the document must also enable the buyer to claim the goods from the carrier at the named place of destination and enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.

When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.

CIP (Carriage and Insurance Paid To)

If customary or at the buyer's request, the seller must provide the buyer, at the seller's cost, with the usual transport document[s] for the transport contracted in accordance with A4.

This transport document must cover the contract goods and be dated within the period agreed for shipment. If agreed or customary, the document must also enable the buyer to claim the goods from the carrier at the named place of destination and enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.

When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.

DAP (Delivered at Place)

The seller must provide the buyer, at the seller's cost, with any document required to enable the buyer to take over the goods.

DPU (Delivered at Place Unloaded)

The seller must provide the buyer, at the seller's cost, with any document required to enable the buyer to take over the goods.

DDP (Delivered Duty Paid)

The seller must provide the buyer, at the seller's cost, with any document required to enable the buyer to take over the goods.

FAS (Free Alongside Ship)

The seller must provide the buyer, at the seller's cost, with the usual proof that the goods have been delivered in accordance with A2.

Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer's request, risk and cost, in obtaining a transport document.

FOB (Free on Board)

The seller must provide the buyer, at the seller's cost, with the usual proof that the goods have been delivered in accordance with A2.

Unless such proof is a transport document, the seller must provide assistance to the buyer, at the buyer's request, risk and cost, in obtaining a transport document.

CFR (Cost and Freight)

The seller must, at its own cost, provide the buyer with the usual transport document for the agreed port of destination.

This transport document must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.

When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.

CIF (Cost Insurance and Freight)

The seller must, at its own cost, provide the buyer with the usual transport document for the agreed port of destination.

This transport document must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer or by notification to the carrier.

When such a transport document is issued in negotiable form and in several originals, a full set of originals must be presented to the buyer.

B6 DELIVERY / TRANSPORT DOCUMENT

EXW (Ex Works)

The buyer must provide the seller with appropriate evidence of having taken delivery.

FCA (Free Carrier)

The buyer must accept the proof that the goods have been delivered in accordance with A2.

If the parties have so agreed, the buyer must instruct the carrier to issue to the seller, at the buyer's cost and risk, a transport document stating that the goods have been loaded (such as a bill of lading with an onboard notation).

CPT (Carriage Paid To)

The buyer must accept the transport document provided under A6 if it is in conformity with the contract.

CIP (Carriage and Insurance Paid To)

The buyer must accept the transport document provided under A6 if it is in conformity with the contract.

DAP (Delivered at Place)

The buyer must accept the document provided under A6.

DPU (Delivered at Place Unloaded)

The buyer must accept the document provided under A6.

DDP (Delivered Duty Paid)

The buyer must accept the document provided under A6.

FAS (Free Alongside Ship)

The buyer must accept the proof of delivery provided under A6.

FOB (Free on Board)

The buyer must accept the proof of delivery provided under A6.

CFR (Cost and Freight)

The buyer must accept the transport document provided under A6 if it is in conformity with the contract.

CIF (Cost Insurance and Freight)

The buyer must accept the transport document provided under A6 if it is in conformity with the contract.

A7 EXPORT/IMPORT CLEARANCE

EXW (Ex Works)

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all export/transit/import clearance formalities required by the countries of export/transit/import, such as:

- ▶ export/transit/import licence;
- ▶ security clearance for export/transit/import;
- ▶ pre-shipment inspection; and
- ▶ any other official authorisation.

FCA (Free Carrier)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-shipment inspection, needed by any country of transit or the country of import.

CPT (Carriage Paid To)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-shipment inspection, needed by any country of transit or the country of import.

CIP (Carriage and Insurance Paid To)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-shipment inspection, needed by any country of transit or the country of import.

DAP (Delivered at Place)

- a) Export and transit clearance

Where applicable, the seller must carry out and pay for all export and transit clearance formalities required by the country of export and any country of transit (other than the country of import), such as:

- export/transit licence;
 - security clearance for export/transit;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all import clearance formalities, including security requirements and pre-shipment inspection, needed by the country of import.

DPU (Delivered at Place Unloaded)

- a) Export and transit clearance

Where applicable, the seller must carry out and pay for all export and transit clearance formalities required by the country of export and any country of transit (other than the country of import), such as:

- export/transit licence;
- security clearance for export/transit;
- pre-shipment inspection; and
- any other official authorisation.

- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all import clearance formalities, including security requirements and pre-shipment inspection, needed by the country of import.

DDP (Delivered Duty Paid)

Where applicable, the seller must carry out and pay for all export/transit/import clearance formalities required by the countries of export, transit and import, such as:

- export/transit/import licence;
- security clearance for export/transit/import;
- pre-shipment inspection; and
- any other official authorisation.

FAS (Free Alongside Ship)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

- export licence;
- security clearance for export;
- pre-shipment inspection; and
- any other official authorisation.

- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/import clearance formalities, including security requirements and pre-shipment inspection, needed by any country of transit or the country of import.

FOB (Free on Board)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-ship- ment inspection, needed by any country of transit or the country of import.

CFR (Cost and Freight)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-ship- ment inspection, needed by any country of transit or the country of import.

CIF (Cost Insurance and Freight)

- a) Export clearance

Where applicable, the seller must carry out and pay for all export clearance formalities required by the country of export, such as:

 - export licence;
 - security clearance for export;
 - pre-shipment inspection; and
 - any other official authorisation.
- b) Assistance with import clearance

Where applicable, the seller must assist the buyer, at the buyer's request, risk and cost, in obtaining any documents and/or information related to all transit/ import clearance formalities, including security requirements and pre-ship- ment inspection, needed by any country of transit or the country of import.

B7 EXPORT/IMPORT CLEARANCE**EXW (Ex Works)**

Where applicable, it is up to the buyer to carry out and pay for all export/transit/import clearance formalities required by the countries of export/transit/import, such as:

- export/transit/import licence;
- security clearance for export/transit/import;
- pre-shipment inspection; and
- any other official authorisation.

FCA (Free Carrier)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

CPT (Carriage Paid To)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

CIP (Carriage and Insurance Paid To)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

DAP (Delivered at Place)

- a) Assistance with export and transit clearance
Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export/transit clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export and any country of transit (other than the country of import).
- b) Import clearance
Where applicable, the buyer must carry out and pay for all formalities required by the country of import, such as:
 - import licence;
 - security clearance for import;
 - pre-shipment inspection; and
 - any other official authorisation.

DPU (Delivered at Place Unloaded)

- a) Assistance with export and transit clearance
Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export/transit clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export and any country of transit (other than the country of import).
- b) Import clearance
Where applicable, the buyer must carry out and pay for all formalities required by the country of import, such as:
 - import licence;
 - security clearance for import;
 - pre-shipment inspection; and
 - any other official authorisation.

DDP (Delivered Duty Paid)

- Where applicable, the buyer must assist the seller, at the seller's request, risk and cost in obtaining any documents and/or information related to all export/transit/import clearance formalities required by the countries of export/transit/import, such as:
- export/transit/import licence;
 - security clearance for export, transit and import;
 - pre-shipment inspection; and
 - any other official authorisation.

FAS (Free Alongside Ship)

- a) Assistance with export clearance
Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.
- b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

FOB (Free on Board)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

CFR (Cost and Freight)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

CIF (Cost Insurance and Freight)

a) Assistance with export clearance

Where applicable, the buyer must assist the seller at the seller's request, risk and cost in obtaining any documents and/or information related to all export clearance formalities, including security requirements and pre-shipment inspection, needed by the country of export.

b) Import clearance

Where applicable, the buyer must carry out and pay for all formalities required by any country of transit and the country of import, such as:

- import licence and any licence required for transit;
- security clearance for import and any transit;
- pre-shipment inspection; and
- any other official authorisation.

A8 CHECKING / PACKAGING / MARKING**EXW (Ex Works)**

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

FCA (Free Carrier)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

CPT (Carriage Paid To)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

CIP (Carriage and Insurance Paid To)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

DAP (Delivered at Place)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular

trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

DPU (Delivered at Place Unloaded)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

DDP (Delivered Duty Paid)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

FAS (Free Alongside Ship)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

FOB (Free on Board)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

CFR (Cost and Freight)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

CIF (Cost Insurance and Freight)

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) that are necessary for the purpose of delivering the goods in accordance with A2.

The seller must, at its own cost, package the goods, unless it is usual for the particular trade to transport the type of goods sold unpackaged. The seller must package and mark the goods in the manner appropriate for their transport, unless the parties have agreed on specific packaging or marking requirements.

B8 CHECKING / PACKAGING / MARKING

EXW (Ex Works)

The buyer has no obligation to the seller.

FCA (Free Carrier)

The buyer has no obligation to the seller.

CPT (Carriage Paid To)

The buyer has no obligation to the seller.

CIP (Carriage and Insurance Paid To)

The buyer has no obligation to the seller.

DAP (Delivered at Place)

The buyer has no obligation to the seller.

DPU (Delivered at Place Unloaded)

The buyer has no obligation to the seller.

DDP (Delivered Duty Paid)

The buyer has no obligation to the seller.

FAS (Free Alongside Ship)

The buyer has no obligation to the seller.

FOB (Free on Board)

The buyer has no obligation to the seller.

CFR (Cost and Freight)

The buyer has no obligation to the seller.

CIF (Cost Insurance and Freight)

The buyer has no obligation to the seller.

A9 ALLOCATION OF COSTS

EXW (Ex Works)

The seller must pay all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9.

FCA (Free Carrier)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- c) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- d) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

CPT (Carriage Paid To)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) transport and all other costs resulting from A4, including the costs of loading the goods and transport-related security costs;
- c) any charges for unloading at the agreed place of destination but only if those charges were for the seller's account under the contract of carriage;
- d) the costs of transit that were for the seller's account under the contract of carriage;
- e) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- f) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- g) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

CIP (Carriage and Insurance Paid To)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) transport and all other costs resulting from A4, including the costs of loading the goods and transport-related security costs;

- c) any charges for unloading at the agreed place of destination but only if those charges were for the seller's account under the contract of carriage;
- d) the costs of transit that were for the seller's account under the contract of carriage;
- e) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- f) the costs of insurance resulting from A5;
- g) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- h) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

DAP (Delivered at Place)

The seller must pay:

- a) all costs relating to the goods and their transport until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) any charges for unloading at the place of destination but only if those charges were for the seller's account under the contract of carriage;
- c) the cost of providing the delivery/transport document under A6;
- d) where applicable, duties, taxes and any other costs related to export and any transit clearance under A7(a); and
- e) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B5 and B7(a).

DPU (Delivered at Place Unloaded)

The seller must pay:

- a) all costs relating to the goods and their transport until they have been unloaded and delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the cost of providing the delivery/transport document under A6;
- c) where applicable, duties, taxes and any other costs related to export and any transit clearance under A7(a); and
- d) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B5 and B7(a).

DDP (Delivered Duty Paid)

The seller must pay:

- a) all costs relating to the goods and their transport until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) any charges for unloading at the place of destination but only if those charges were for the seller's account under the contract of carriage;
- c) the cost of providing the delivery/transport document under A6;
- d) where applicable, duties, taxes and any other costs related to export, transit and import clearance under A7; and
- e) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B5 and B7.

FAS (Free Alongside Ship)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- c) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- d) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

FOB (Free on Board)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- c) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- d) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

CFR (Cost and Freight)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the freight and all other costs resulting from A4, including the costs of loading the goods on board and transport-related security costs;
- c) any charges for unloading at the agreed port of discharge that were for the seller's account under the contract of carriage;
- d) the costs of transit that were for the seller's account under the contract of carriage;
- e) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- f) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- g) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

CIF (Cost Insurance and Freight)

The seller must pay:

- a) all costs relating to the goods until they have been delivered in accordance with A2, other than those payable by the buyer under B9;
- b) the freight and all other costs resulting from A4, including the costs of loading

- the goods on board and transport-related security costs;
- c) any charges for unloading at the agreed port of discharge that were for the seller's account under the contract of carriage;
- d) the costs of transit that were for the seller's account under the contract of carriage;
- e) the costs of providing the usual proof to the buyer under A6 that the goods have been delivered;
- f) the costs of insurance resulting from A5;
- g) where applicable, duties, taxes and any other costs related to export clearance under A7(a); and
- h) the buyer for all costs and charges related to providing assistance in obtaining documents and information in accordance with B7(a).

B9 ALLOCATION OF COSTS

EXW (Ex Works)

The buyer must:

- a) pay all costs relating to the goods from the time they have been delivered under A2;
- b) reimburse all costs and charges incurred by the seller in providing assistance or information under A4, A5, or A7;
- c) pay, where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon export; and
- d) pay any additional costs incurred by failing either to take delivery of the goods when they have been placed at its disposal or to give appropriate notice in accordance with B10, provided that the goods have been clearly identified as the contract goods.

FCA (Free Carrier)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A4, A5, A6 and A7(b);
- c) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- d) any additional costs incurred, either because:
 - (i) the buyer fails to nominate a carrier or another person under B10, or
 - (ii) the carrier or person nominated by the buyer under B10 fails to take the goods into its charge,

provided that the goods have been clearly identified as the contract goods.

CPT (Carriage Paid To)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the costs of transit, unless such costs were for the seller's account under the contract

- of carriage;
- c) unloading costs, unless such costs were for the seller's account under the contract of carriage;
 - d) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A5 and A7(b);
 - e) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
 - f) any additional costs incurred if it fails to give notice in accordance with B10, from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

CIP (Carriage and Insurance Paid To)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the costs of transit, unless such costs were for the seller's account under the contract of carriage;
- c) unloading costs, unless such costs were for the seller's account under the contract of carriage;
- d) the costs of any additional insurance procured at the buyer's request under A5 and B5;
- e) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A5 and A7(b);
- f) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- g) any additional costs incurred if it fails to give notice in accordance with B10, from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

DAP (Delivered at Place)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2;
- b) all costs of unloading necessary to take delivery of the goods from the arriving means of transport at the named place of destination, unless such costs were for the seller's account under the contract of carriage;
- c) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A7(b);
- d) where applicable, duties, taxes and any other costs related to import clearance under B7(b); and
- e) any additional costs incurred by the seller if the buyer fails to fulfil its obligations in accordance with B7 or to give notice in accordance with B10, provided that the goods have been clearly identified as the contract goods.

DPU (Delivered at Place Unloaded)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2;
- b) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A7(b);
- c) where applicable, duties, taxes and any other costs related to import clearance under B7(b); and
- d) any additional costs incurred by the seller if the buyer fails to fulfil its obligations in accordance with B7 or to give notice in accordance with B10, provided that the goods have been clearly identified as the contract goods.

DDP (Delivered Duty Paid)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2;
- b) all costs of unloading necessary to take delivery of the goods from the arriving means of transport at the named place of destination, unless such costs were for the seller's account under the contract of carriage; and
- c) any additional costs incurred by the seller if the buyer fails to fulfil its obligations in accordance with B7 or to give notice in accordance with B10, provided that the goods have been clearly identified as the contract goods.

FAS (Free Alongside Ship)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A4, A5, A6 and A7(b);
- c) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- d) any additional costs incurred, either because:
 - (i) the buyer has failed to give notice under B10, or
 - (ii) the vessel nominated by the buyer under B10 fails to arrive on time, fails to take the goods, or closes for cargo earlier than the time notified in accordance with B10,

provided that the goods have been clearly identified as the contract goods.

FOB (Free on Board)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A4, A5, A6 and A7(b);
- c) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- d) any additional costs incurred, either because:
 - (i) the buyer has failed to give notice under B10, or
 - (ii) the vessel nominated by the buyer under B10 fails to arrive on time, fails to

take the goods, or closes for cargo earlier than the time notified in accordance with B10,
provided that the goods have been clearly identified as the contract goods.

CFR (Cost and Freight)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the costs of transit, unless such costs were for the seller's account under the contract of carriage;
- c) unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller's account under the contract of carriage;
- d) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A5 and A7(b);
- e) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- f) any additional costs incurred if it fails to give notice in accordance with B10, from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

CIF (Cost Insurance and Freight)

The buyer must pay:

- a) all costs relating to the goods from the time they have been delivered under A2, other than those payable by the seller under A9;
- b) the costs of transit, unless such costs were for the seller's account under the contract of carriage;
- c) unloading costs including lighterage and wharfage charges, unless such costs and charges were for the seller's account under the contract of carriage;
- d) the costs of any additional insurance procured at the buyer's request under A5 and B5;
- e) the seller for all costs and charges related to providing assistance in obtaining documents and information in accordance with A5 and A7(b);
- f) where applicable, duties, taxes and any other costs related to transit or import clearance under B7(b); and
- g) any additional costs incurred if it fails to give notice in accordance with B10, from the agreed date or the end of the agreed period for shipment, provided that the goods have been clearly identified as the contract goods.

A10 NOTICES

EXW (Ex Works)

The seller must give the buyer any notice needed to enable the buyer to take delivery of the goods.

FCA (Free Carrier)

The seller must give the buyer sufficient notice either that the goods have been delivered

in accordance with A2 or that the carrier or another person nominated by the buyer has failed to take the goods within the time agreed.

CPT (Carriage Paid To)

The seller must notify the buyer that the goods have been delivered in accordance with A2.

The seller must give the buyer any notice required to enable the buyer to receive the goods.

CIP (Carriage and Insurance Paid To)

The seller must notify the buyer that the goods have been delivered in accordance with A2.

The seller must give the buyer any notice required to enable the buyer to receive the goods.

DAP (Delivered at Place)

The seller must give the buyer any notice required to enable the buyer to receive the goods.

DPU (Delivered at Place Unloaded)

The seller must give the buyer any notice required to enable the buyer to receive the goods.

DDP (Delivered Duty Paid)

The seller must give the buyer any notice required to enable the buyer to receive the goods.

FAS (Free Alongside Ship)

The seller must give the buyer sufficient notice either that the goods have been delivered in accordance with A2 or that the vessel has failed to take delivery of the goods within the time agreed.

FOB (Free on Board)

The seller must give the buyer sufficient notice either that the goods have been delivered in accordance with A2 or that the vessel has failed to take the goods within the time agreed.

CFR (Cost and Freight)

The seller must notify the buyer that the goods have been delivered in accordance with A2.

The seller must give the buyer any notice required to enable the buyer to receive the

goods.

CIF (Cost Insurance and Freight)

The seller must notify the buyer that the goods have been delivered in accordance with A2.

The seller must give the buyer any notice required to enable the buyer to receive the goods.

B10 NOTICES

EXW (Ex Works)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place, give the seller sufficient notice.

FCA (Free Carrier)

The buyer must notify the seller of

- a) the name of the carrier or another person nominated within sufficient time as to enable the seller to deliver the goods in accordance with A2;
- b) the selected time, if any, within the period agreed for delivery when the carrier or person nominated will receive the goods;
- c) the mode of transport to be used by the carrier or the person nominated including any transport-related security requirements; and
- d) the point where the goods will be received within the named place of delivery.

CPT (Carriage Paid To)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time for dispatching the goods and/or the point of receiving the goods within the named place of destination, give the seller sufficient notice.

CIP (Carriage and Insurance Paid To)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time for dispatching the goods and/or the point of receiving the goods within the named place of destination, give the seller sufficient notice.

DAP (Delivered at Place)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place of destination, give the seller sufficient notice.

DPU (Delivered at Place Unloaded)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place of destination, give the seller sufficient notice.

DDP (Delivered Duty Paid)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time within an agreed period and/or the point of taking delivery within the named place of destination, give the seller sufficient notice.

FAS (Free Alongside Ship)

The buyer must give the seller sufficient notice of any trans- port-related security requirements, the vessel name, loading point and, if any, the selected delivery date within the agreed period.

FOB (Free on Board)

The buyer must give the seller sufficient notice of any trans- port-related security requirements, the vessel name, loading point and, if any, the selected delivery date within the agreed period.

CFR (Cost and Freight)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time for shipping the goods and/or the point of receiving the goods within the named port of destination, give the seller sufficient notice.

CIF (Cost Insurance and Freight)

The buyer must, whenever it is agreed that the buyer is entitled to determine the time for shipping the goods and/or the point of receiving the goods within the named port of destination, give the seller sufficient notice.

URDTT 1.0

ICC Uniform Rules for Digital Trade Transactions

Version 1.0

Editor's Overview

The Uniform Rules for Digital Trade Transactions (ICC Publication No. KS102E) (URDTT) Version 1.0 became effective 1 October 2021. The URDTT aim to be a modern framework for rules, obligations, and standards for digitalisation of trade transactions. The structure of the rules contemplates a fully digital environment and are unbiased regarding technology platforms and messaging standards. Moreover, the rules are written to be compatible with UNCITRAL Model Laws such as Electronic Commerce, Electronic Signatures and Electronic Transferable Records. Additionally, the rules were drafted not only for banks but for use by non bank entities offering financial services as well as for corporates.

As a general matter, a Digital Trade Transaction (DTT), is a representation of an underlying agreement between a buyer and seller and constitutes the procedure by which contract terms are recorded and carried out. A DTT is distinguishable from the underlying commercial contract: conforming to DTT terms means proper tender of electronic documents (and an electronic payment mechanism), whereas satisfaction of the contract means actual performance. As the URDTT has only recently been promulgated, the breadth, effectiveness, potential creative application to modern trade transactions involving digital data, and overall utility remain to be seen.

Uniform Rules for Digital Trade Transactions (URDTT)
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ICC Uniform Rules for Digital Trade Transactions (URDTT)

Version 1.0

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Introduction

Out of necessity, the digital transformation of trade requires a new way of thinking, affecting both market conventions and classifications. Rapid evolutions in new technology are changing how we view trade and supply chain finance. Businesses are looking for solutions that will deliver greater control and visibility within their supply chain ecosystem. Financiers are looking for tools that will support regulatory compliance and optimise the use of capital. A variety of technologies are being proactively introduced from Optical Character Recognition (OCR) and Artificial Intelligence (AI) to Distributed Ledger (DLT) and smart contracts. Solutions can be configured to be fully automated end-to-end without requiring human interaction.

The approach taken to the drafting of the URDTT has been to produce rules that are agnostic as to the medium used to perform the underlying trade transaction as a Digital Trade Transaction save that it would be conducted using Electronic Records and not paper documents. The structure of the rules is one of an underlying physical transaction for a sale and purchase or for the provision of services that the Principal Parties have agreed to evidence electronically, including a payment method that is itself electronic.

The ICC Banking Commission has already approved and issued electronic rules to advance the digitalisation of trade finance practices, releasing electronic supplements to the existing Uniform Rules for Collections (URC 522) and Uniform Customs and Practice for Documentary Credits (UCP 600) rules. The eURC and eUCP establish rules for electronic records associated with existing, well established, trade finance products. These rules, however, are not fully digitalised owing to an ongoing reliance on manual reconciliation processes. The URDTT on the other hand envisage transactions that are evidenced in a manner that is totally digitised.

The URDTT should be regarded as an over-arching set of rules under which other rulebooks may co-exist and the trade transaction may be documented. This recognises the prior existence of industry terms and conditions, proprietary rulebooks pertaining to individual service providers, as well as the existence of rulebooks developed in conjunction with distributed ledger projects. However, the URDTT may in some cases eventually remove the need for duplicate/repetitive clauses in user agreements and/or proprietary rulebooks.

In order to appreciate the true value of the URDTT we need to think beyond traditional instruments; think beyond traditional rule-making; think beyond existing ways of doing business. The URDTT is not just a set of rules for banks; the rules extend into the corporate world and to the growing community of non-bank service providers as well. The URDTT are intended to govern across a digital landscape, taking into account recent developments, not only in distributed ledger technology but also the use of artificial intelligence, natural language processing, machine learning, data analytics, smart contracts, smart objects and the Internet of Things, all of which will have a material impact on the ways in which we do business in future.

The Drafting Group that brought this important text to fruition deserves special mention. Their names are listed below:

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Article 1: Scope of the Uniform Rules for Digital Trade Transactions (URDTT) Version 1.0

- a. The Uniform Rules for Digital Trade Transactions (URDTT) provide a framework that applies to each Party or Person that participates in a Digital Trade Transaction.
- b. A Digital Trade Transaction is a process, as agreed between the Principal Parties, whereby Electronic Records are used to evidence the underlying sale and purchase of goods or services, and the incurring of a Payment Obligation.
- c. The URDTT shall apply when the terms and conditions of a Digital Trade Transaction specify that it is subject to these rules. The URDTT are binding on each Party or Person unless and to the extent expressly modified or excluded by the terms and conditions of that Digital Trade Transaction.
- d. This version is Version 1.0. If the terms and conditions of a Digital Trade Transaction do not indicate the applicable version of the URDTT, it will be subject to the latest version in effect on the date such Digital Trade Transaction is first agreed by the Principal Parties.

Article 2: Definitions

For the purpose of these rules:

Addressee means the Party or Person that receives or is granted access to an Electronic Record by the Submitter.

Beneficiary means the Seller or any other Party or Person that has acquired the rights and benefits of a Payment Obligation, in whole or in part, as a transferee.

Business Day means a day on which a Party or Person is regularly open at the place at which an act subject to these rules is to be performed by such Party or Person.

Buyer means a purchaser of goods or services.

Data Corruption means any distortion or loss of data that renders an Electronic

Record, as submitted, unreadable in whole or in part, as determined by the Addressee.

Data Processing System means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages in whole or in part.

Electronic Record means data created, generated, sent, communicated, Received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:

- capable of being authenticated as to the apparent identity of a Submitter and the apparent source of the data contained in it and as to whether it has remained complete and unaltered; and
- capable of being examined for compliance with the terms and conditions of a Digital Trade Transaction.

Electronic Signature means a data process attached to or logically associated with an Electronic Record and executed or adopted by a Party or Person in order to identify that Party or Person and to indicate authentication of the Electronic Record by that Party or Person.

Financial Services Provider (FSP) means a financial institution or a Person, other than a Principal Party.

FSP Payment Undertaking means an irrevocable undertaking of a Financial Services Provider to effect payment at sight or on a fixed or determinable future date to the Beneficiary of a Payment Obligation.

Obligor means a Buyer that incurs a Payment Obligation or any Financial Services Provider that adds its FSP Payment Undertaking to a Payment Obligation.

Party means a Principal Party or a Financial Services Provider.

Payment Obligation means an irrevocable obligation, incurred by a Buyer, that constitutes a definite undertaking to effect payment at sight, or on a fixed or determinable future date, to the Beneficiary.

Person means any type of person or entity, whether physical, corporate or other legalperson or entity.

Principal Party means a Buyer or a Seller.

Received means the process by which an Electronic Record enters the Data Processing System of an Addressee in a format capable of being accepted by that Data Processing System and being examined by that Addressee for compliance with the terms and conditions of a Digital Trade Transaction.

Seller means a seller of goods or services.

Submitter means a Party or Person that sends, or makes available, an Electronic Recordto an Addressee.

Transfer means the transferring of the rights and benefits of a Payment Obligation (in whole or in part) and, where added, an FSP Payment Undertaking (in whole or in part)by the Beneficiary to one or more transferees.

UTC means Universal Time Coordinated, the international time scale defined by the International Telecommunications Union used by electronic computing and data management equipment, and the technical equivalent of Greenwich Mean Time (GMT).

Article 3: Interpretations

For the purpose of these rules:

- a. Where applicable, words in the singular include the plural and in the plural include the singular.
- b. Unless the context otherwise requires, “A or B” means “A or B or both”, and “A and B” means “both A and B”.

- c. Use of the words “include”, “includes” and “including” is by way of illustration or emphasis only and should not be construed as, nor should take effect as, limiting the generality of any subsequent words.

Article 4: Principal Party

For the purpose of these rules:

- a. The role of a Seller includes:
 - i. the delivery of goods or the supply of services in accordance with the terms and conditions of a Digital Trade Transaction;
 - ii. providing information required to enable the delivery of goods or the supply of services; and
 - iii. providing any additional information as may be required including Electronic Records of certificates of inspection and insurance.
- b. The role of a Buyer includes:
 - i. taking delivery of goods or receiving services that comply with the terms andconditions of the Digital Trade Transaction; and
 - ii. upon compliance with the terms and conditions of the Digital Trade Transaction by the Seller, incurring an unconditional Payment Obligation and effecting payment in accordance with that Payment Obligation.

Article 5: Financial Services Provider

For the purpose of these rules:

- a. The role of a Financial Services Provider includes:
 - i. providing finance or risk mitigation to a Beneficiary or Buyer or other FinancialServices Provider; or
 - ii. effecting payment to a Beneficiary; or
 - iii. if requested by a Principal Party or any other Beneficiary, and such request is accepted, adding its FSP Payment Undertaking to a Payment Obligation and effecting payment thereunder at sight or on a fixed or

- determinable future date according to the terms and conditions of its FSP Payment Undertaking.
- b. A Financial Services Provider does not deal with the goods or services to which an Electronic Record submitted under a Digital Trade Transaction may refer.
 - c.
 - i. Other than in respect of the submission by it of an Electronic Record, a Financial Services Provider assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any Electronic Record, or for the general or particular conditions stipulated in an Electronic Record; nor does it assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance represented by any Electronic Record, or for the good faith or acts or omissions, solvency, performance or standing of the consignor, the carrier, the forwarder, the consignee or the insurer of the goods or any other Person.
 - ii. Notwithstanding sub-article 5 (c) (i), if a Financial Services Provider, as Addressee of an Electronic Record, acts subsequently as a Submitter of the same Electronic Record, it assumes liability and responsibility for that Electronic Record and any additional information that it then attaches to that Electronic Record.
 - d. When a Financial Services Provider adds its FSP Payment Undertaking to a Payment Obligation, it is bound by the same version of the URDTT that is applicable to the Principal Parties, including any modification or exclusion thereto that was agreed in the terms and conditions of the Digital Trade Transaction.

Article 6: Submitter and Addressee

- a. A Submitter has responsibility to ensure the authenticity, accuracy and completeness of an Electronic Record or as a result of applicable law or regulations.
- b. An Addressee has no responsibility for the accuracy and completeness of an Electronic Record, as Received from a Submitter, except when subsequently acting as a Submitter for that Electronic Record.
- c. Each Submitter and Addressee assumes no liability or responsibility for the consequences arising out of the unavailability of a Data Processing System other than its own.

Article 7: Electronic Records

- a. A Digital Trade Transaction must specify the terms and conditions by which compliance of an Electronic Record will be determined.
- b. All data relating to a Digital Trade Transaction must be associated with, and be submitted by, a Submitter to an Addressee, in the form of an Electronic Record.
- c. Any requirement for submission of one or more originals or copies of an Electronic Record is satisfied by the submission of one Electronic Record.
- d. An Electronic Record submitted but not required by the terms and conditions of a Digital Trade Transaction may be disregarded and disposed of by an Addressee in any manner deemed by it to be appropriate without any responsibility.
- e. Unless applicable law requires otherwise, a requirement that information should be in writing is satisfied when an Electronic Record containing such information is accessible to an Addressee and is not affected by any Data Corruption.
- f. Where the applicable law requires or permits delivery, transfer or possession of an Electronic Record, that requirement or permission is met

by the transfer of that Electronic Record to the exclusive control of the Addressee.

Article 8: Non-Compliance of an Electronic Record

- a. If an Electronic Record does not comply with the terms and conditions of a Digital Trade Transaction or sub-article 7 (b), the Addressee must inform the Submitter, by means of a single notice, stating each reason for non-compliance of that Electronic Record. The notice must be sent no later than 23.59.59 UTC on the second Business Day following the date such Electronic Record is Received.
- b. In this event, and unless otherwise provided in the Digital Trade Transaction, the Digital Trade Transaction cannot be completed until the earliest to occur of the following:
 - i. the Submitter replaces the non-compliant Electronic Record with a compliant Electronic Record no later than 23.59.59 UTC on the latest date for submission of an Electronic Record specified in the Digital Trade Transaction; or
 - ii. the Principal Parties, any other Obligor and any other Beneficiary, amend the terms and conditions of the Digital Trade Transaction as set out in Article 14, resulting in the Electronic Record being compliant; or
 - iii. the Principal Parties, any other Obligor and any other Beneficiary accept the non-compliant Electronic Record or agree that the requirement for such Electronic Record may be removed from the terms and conditions of the Digital Trade Transaction.
- c. If an Addressee does not inform the Submitter by 23.59.59 UTC on the second Business Day following the date an Electronic Record is Received that it is non-compliant, that Electronic Record shall be considered as having been accepted by that Addressee.

Article 9: Data Corruption

- a. If an Electronic Record appears to have been affected by Data Corruption, the Addressee may inform the Submitter and may request that it be re-submitted.
- b. If an Addressee does not inform the Submitter by 23.59.59 UTC on the second Business Day following the date an Electronic Record is Received that it appears to have been affected by Data Corruption, that Electronic Record shall be considered as being in compliance with the terms and conditions of the Digital Trade Transaction.
- c. If, following receipt of an advice of Data Corruption from the Addressee, the Submitter does not resubmit the Electronic Record by 23.59.59 UTC on the latest date for submission of an Electronic Record specified in the Digital Trade Transaction, the Addressee may treat the Electronic Record as not submitted and may dispose of it in any manner deemed by it to be appropriate without any responsibility.

Article 10: Electronic Signature

Where an Electronic Signature of a Party or Person is used, it is to be in compliance with any conditions specific to that Electronic Signature in the Digital Trade Transaction.

Article 11: Data Processing System

Any acknowledgement of receipt generated by a Data Processing System does not imply that an Electronic Record has been viewed, examined or determined to be compliant or non-compliant by an Addressee.

Article 12: Payment Obligation

- a. A Payment Obligation is incurred by the Buyer upon compliance with the terms and conditions of the Digital Trade Transaction by the Seller.
- b. When a Payment Obligation is stated to be conditional, the obligation of the Buyer is to pay upon compliance with the terms and conditions of the Digital Trade Transaction by the Seller. As of that moment, the Payment Obligation

- is automatically amended to become unconditional and independent.
- c. A Payment Obligation must include the following data elements:
- i. a unique reference linking the Payment Obligation to the Digital Trade Transaction;
 - ii. the name and address of the Principal Parties and any other Beneficiary;
 - iii. the currency and amount;
 - iv. if the amount is subject to payment of interest, this must be specified together with the basis on which interest is to be calculated and apportioned;
 - v. the date it is incurred;
 - vi. the latest date for submission of Electronic Records;
 - vii. the payment terms:
 - a) payable at sight; or
 - b) the fixed or determinable future date or the basis for determining the payment date in accordance with the Payment Obligation and the Electronic Records themselves;
 - viii. whether the Payment Obligation is conditional or unconditional and, if conditional, its conditions are to be set out in the Digital Trade Transaction; and
 - ix. the applicable law.
- d. A Payment Obligation may specify in its terms and conditions that it is transferable.
- e. A Payment Obligation may only be amended or cancelled by a Principal Party with the agreement of the other Principal Party, any Financial Services Provider that has added its FSP Payment Undertaking, and any other Beneficiary.
- f. Beneficiary.
- b. When a Financial Services Provider adds its FSP Payment Undertaking to a Payment Obligation, it undertakes to effect payment at sight or on a fixed or determinable future date to the Beneficiary of that Payment Obligation.
- c. If a Financial Services Provider is requested to add its FSP Payment Undertaking to a Payment Obligation but is not prepared to do so, it must inform the requesting Principal Party or other Beneficiary without delay.
- d. An FSP Payment Undertaking added in respect of a Payment Obligation that is unconditional, is separate from, and independent of, the Digital Trade Transaction, even if any reference to the Digital Trade Transaction is included in the FSP Payment Undertaking. The Buyer remains liable under the Payment Obligation unless otherwise agreed by each Principal Party and any other Beneficiary.
- e. There may be more than one FSP Payment Undertaking added to a Payment Obligation. In this event, each Financial Services Provider will be severally and individually liable to the extent of its FSP Payment Undertaking.
- f. When a Principal Party or any other Beneficiary makes a request to a Financial Services Provider for an FSP Payment Undertaking to be added to a Payment Obligation and the Financial Services Provider agrees to that request, the Principal Party or that other Beneficiary must, at the time the FSP Payment Undertaking is added, inform the other Principal Party and any other Beneficiary of the name and address of the Financial Services Provider together with details of any limitation as to the liability of that Financial Services Provider, the amount of its FSP Payment Undertaking and, where the Payment Obligation specifies that it is transferable, whether the FSP Payment Undertaking can be transferred and, if so, any conditions that have been

Article 13: FSP Payment Undertaking

- a. A Financial Services Provider may, at any time, add its FSP Payment Undertaking to a Payment Obligation, in whole or in part, if requested to do so by a Principal Party or any other

- imposed by the Financial Services Provider in respect of any such transfer.
- g. An Electronic Record submitted but not required by the terms and conditions of a Payment Obligation to which an FSP Payment Undertaking has been added or where it is not required by the terms and conditions of an FSP Payment Undertaking, may be disregarded and disposed of by a Financial Services Provider in any manner deemed by it to be appropriate without any responsibility.
 - h. An FSP Payment Undertaking may only be amended or cancelled with the agreement of each Principal Party and any other Beneficiary. As of that moment the FSP Payment Undertaking will be amended or cancelled.

Article 14: Amendments

- a. An amendment to the terms and conditions of a Digital Trade Transaction requires the agreement of each Principal Party, each Financial Services Provider that has issued an FSP Payment Undertaking and any other Beneficiary. As of that moment the Digital Trade Transaction will be amended.
 - b. The terms and conditions of a Digital Trade Transaction, a Payment Obligation or an FSP Payment Undertaking are amended by the submission of a new Electronic Record, that incorporates the amended criteria, to the Addressee of the existing Electronic Record.
 - c. Once submitted under a Digital Trade Transaction, a Payment Obligation or an FSP Payment Undertaking, an Electronic Record cannot be amended or deleted with the exception of Electronic Records submitted as referred to in sub-articles 7 (d) and 13 (g).
- specified to be transferable, a Seller or any other Beneficiary, as transferor, may effect a Transfer in accordance with that Payment Obligation and, where added, an FSP Payment Undertaking and, in both cases, the applicable law. Upon such Transfer, each transferee becomes a Beneficiary under that Payment Obligation and, where added, an FSP Payment Undertaking and retains rights of recourse against the transferor, unless such rights are explicitly waived when the Transfer is effected.
- b. i. If the rights and benefits of a Payment Obligation and, where added, an FSP Payment Undertaking have been transferred, the transferor must, at the time the Transfer is made, advise the Buyer or Financial Services Provider, respectively, of the name and address of each transferee, together with details of the amount transferred to each transferee, and whether the transferee has waived its rights of recourse to the transferor or to any prior transferee.
 - ii. When an FSP Payment Undertaking has been added to a Payment Obligation that indicates that it is transferable, the FSP Payment Undertaking must state whether any Transfer is subject to the prior agreement of the Financial Services Provider.
 - c. Any Transfer shall include the transfer of the rights and benefits of any FSP Payment Undertaking that has been added in respect of that Payment Obligation, unless precluded by the Financial Services Provider. If the Transfer of an FSP Payment Undertaking has been precluded by a Financial Services Provider then no Transfer of that Payment Obligation can be made unless that FSP Payment Undertaking has been amended or cancelled.

Article 15: Transfer

- a. Where a Payment Obligation and, where added, an FSP Payment Undertaking is

Article 16: Force Majeure

- a. The Seller or any other Beneficiary assumes no liability or responsibility for the consequences arising out of the interruption of its business, including its inability to access a Data Processing System other than its own, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications network, plague, epidemic, natural disaster or extreme natural event beyond their control.
- b. Notwithstanding the provisions of sub-article 16 (a):
 - i. a Buyer that has incurred a Payment Obligation or any Financial Services Provider that has provided its FSP Payment Undertaking to a Payment Obligation will, upon resumption of its business, remain liable to fulfil any Payment Obligation or FSP Payment Undertaking that became due during such interruption of its business within thirty (30) calendar days following such resumption; and
 - ii. the Seller or any other Beneficiary will, upon resumption of its business, remain liable to fulfil any obligation that became due during such interruption of its business within thirty (30) calendar days following such resumption.

Article 17: Applicable Law

- a. The applicable law shall be as specified in the terms and conditions of the Digital Trade Transaction.
- b. The URDTT supplement the choice of the applicable law agreed between the Principal Parties to the extent not prohibited by, and not in conflict with, that applicable law or any applicable regulation.
- c. A Principal Party or, a Financial Services Provider or any other Beneficiary is not required to comply with its obligations under a Digital Trade Transaction, a Payment Obligation or an FSP Payment Undertaking and assumes no liability or responsibility for any consequences in respect of such non-compliance to the extent prohibited by applicable law.

Uniform Rules for Demand Guarantees (ICC Publication No. 758)

Editor's Overview

The revision of the Uniform Rules for Demand Guarantees (ICC Publication No. 758) (URDG 758) became operative on 1 July 2010, superseding URDG 458 (1992). The 1978 Uniform Rules for Contract Guarantees (ICC Publication No. 325) is no longer in effect. URDG 758 does not merely update URDG 458, but clarifies the rules, rendering them more comprehensive. Despite the sparse use in practice of the original version, the revision has attracted considerable attention. Indeed, URDG 758 offers a serious alternative as a candidate for rules applicable to independent performance guarantees. The goal of URDG 758 is to provide a rule-based framework that attempts to comprehensively codify independent guarantee practice. Demand guarantees have not been exclusively issued under the URDG. Anecdotal evidence suggests that there is widespread use of the Uniform Customs and Practice for Documentary Credits (UCP600) for demand guarantees and some use of the International Standby Practices (ISP98). It is, therefore, against these rules that URDG 758 must be measured.

With these options, it is important for users to heed the differences between the rules and banks need to determine whether they are prepared to accommodate use of all of them and to determine what changes and precautions are needed in order to do so and to avoid confusion between the different practices that they represent.

This task is made more complex by the fact that URDG 758 has copied selectively from UCP600, ISP98, retained certain features of its predecessor, and introduced rules that differ from all of them. Overall, URDG 758 favors the applicant or instructing party over the beneficiary and, in some instances, over the guarantor. Its implied requirements and numerous notice rules operate to make it easier for an instructing party, in responses to an unwanted drawing, to obtain a court freeze order or effectively threaten to withhold reimbursement. The scope of situations for which URDG 758 is appropriate is narrower than that of ISP98, given that it does not cover such issues as confirmation and transfer by operation of law and was designed for performance guarantees in which a statement of default is the triggering mechanism. Nevertheless, URDG 758 is a significant improvement over its predecessors and represents an impressive step in the evolution of independent guarantee rules of practice.

On 31 March 2021, The ICC Banking Commission approved the International Standard Demand Guarantee Practice (ISDGP) (ICC Publication No. @814E), which was drafted to complement the Uniform Rules for Demand Guarantees 758, filling in gaps and explaining best practices that underline the URDG. It is a statement of the “international standard demand guarantee practice” referenced in URDG 758 Article 2 (Definitions) under the term “complying presentation.” ISDGP is the first authoritative expression of standard practice when applying URDG 758. Importantly, however, the ISDGP does not amend nor can it conflict with the URDG. As section A: Application of ISDGP makes clear, the expressions of best practice “highlight[] how the URDG are to be interpreted and applied in a guarantee in which they are incorporated by reference, apply as trade usage, or are established from a consistent course of dealing between the parties. Accordingly, the ISDGP need neither be incorporated in the guarantee nor expressly referred to therein.” The ISDGP appears later in this volume.

Professor Roy Goode and Georges Affaki have written The Guide to ICC Uniform Rules for Demand Guarantees URDG 758 (2011).

A definitive comparison of the three sets of practice rules and their application to standbys and demand guarantees is contained in Professor James E. Byrne, Standby & Demand Guarantee Practice: Understanding UCP600, ISP98, and URDG 758 (IIBLP, 2014) available at www.iiblp.org.

Uniform Rules for Demand Guarantees

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Uniform Rules for Demand Guarantees

(ICC Publication No. 758)

ARTICLE 1: APPLICATION OF URDG

- a. The Uniform Rules for Demand Guarantees (“URDG”) apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them.
- b. Where, at the request of a counter-guarantor, a demand guarantee is issued subject to the URDG, the counter-guarantee shall also be subject to the URDG, unless the counter-guarantee excludes the URDG. However, a demand guarantee does not become subject to the URDG merely because the counter-guarantee is subject to the URDG.
- c. Where, at the request or with the agreement of the instructing party, a demand guarantee or counter-guarantee is issued subject to the URDG, the instructing party is deemed to have accepted the rights and obligations expressly ascribed to it in these rules.
- d. Where a demand guarantee or counter-guarantee issued on or after 1 July 2010 states that it is subject to the URDG without stating whether the 1992 version or the 2010 revision is to apply or indicating the publication number, the demand guarantee or counter-guarantee shall be subject to the URDG 2010 revision.

ARTICLE 2: DEFINITIONS

In these rules:

Advising party means the party that advises the guaranteee at the request of the guarantor;

Applicant means the party indicated in the guaranteee as having its obligation under the underlying relationship supported by the

guarantee. The applicant may or may not be the instructing party;

Application means the request for the issue of the guarantee;

Authenticated, when applied to an electronic document, means that the party to whom that document is presented is able to verify the apparent identity of the sender and whether the data received have remained complete and unaltered;

Beneficiary means the party in whose favour a guaranteee is issued;

Business day means a day on which the place of business where an act of a kind subject to these rules is to be performed is regularly open for the performance of such an act;

Charges mean any commissions, fees, costs or expenses due to any party acting under a guaranteee governed by these rules;

Complying demand means a demand that meets the requirements of a complying presentation;

Complying presentation under a guaranteee means a presentation that is in accordance with, first, the terms and conditions of that guaranteee, second, these rules so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guaranteee or these rules, international standard demand guaranteee practice;

Counter-guarantee means any signed undertaking, however named or described, that is given by the counter-guarantor to another party to procure the issue by that other party of a guaranteee or another counter-guarantee, and that provides for payment upon the presentation of a complying demand under the counter-guarantee issued in favour of that party;

Counter-guarantor means the party issuing a counter-guarantee, whether in favour of a guarantor or another counter-guarantor, and includes a party acting for its own account;

Demand means a signed document by the beneficiary demanding payment under a guarantee;

Demand guarantee or guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand;

Document means a signed or unsigned record of information, in paper or electronic form, that is capable of being reproduced in tangible form by the person to whom it is presented. In these rules, a document includes a demand and a supporting statement;

Expiry means the expiry date or the expiry event or, if both are specified, the earlier of the two;

Expiry date means the date specified in the guarantee on or before which a presentation may be made;

Expiry event means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:

- a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or
- b. if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records.

Guarantee, see demand guarantee;

Guarantor means the party issuing a guarantee, and includes a party acting for its own account;

Guarantor's own records means records of the guarantor showing amounts credited to or debited from accounts held with the guarantor, provided the record of those credits or debits enables the guarantor to identify the guaranteee to which they relate;

Instructing party means the party, other than the counter-guarantor, who gives instructions to issue a guarantee or counter-guarantee and is responsible for indemnifying the guarantor or, in the case of counter-guarantee, the counter-guarantor.

The instructing party may or may not be the applicant;

Presentation means the delivery of a document under a guarantee to the guarantor or the document so delivered. It includes a presentation other than for a demand, for example, a presentation for the purpose of triggering the expiry of the guarantee or a variation of its amount;

Presenter means a person who makes a presentation as or on behalf of the beneficiary or the applicant, as the case may be;

Signed, when applied to a document, a guarantee or a counter-guarantee, means that an original of the same is signed by or on behalf of its issuer, whether by an electronic signature that can be authenticated by the party to whom that document, guarantee or counter-guarantee is presented or by handwriting, facsimile signature, perforated signature, stamp, symbol or other mechanical method;

Supporting statement means the statement referred to in either article 15 (a) or article 15 (b);

Underlying relationship means the contract, tender conditions or other relationship between the applicant and the beneficiary on which the guarantee is based.

ARTICLE 3: INTERPRETATION

In these rules:

- a. Branches of a guarantor in different countries are considered to be separate entities.
- b. Except where the context otherwise requires, a guarantee includes a counter-guarantee and any amendment to either, a guarantor includes a counter-guarantor, and a beneficiary includes the party in whose favour a counter-guarantee is issued.
- c. Any requirement for presentation of one or more originals or copies of an electronic document is satisfied by the presentation of one electronic document.
- d. When used with a date or dates to determine the start, end or duration of any period, the terms:

- i. “from”, “to”, “until”, “till” and “between” include; and
- ii. “before” and “after” exclude, the date or dates mentioned.
- e. The term “within”, when used in connection with a period after a given date or event, excludes that date or the date of that event but includes the last date of that period.
- f. Terms such as “first class”, “well-known”, “qualified”, “independent”, “official”, “competent” or “local” when used to describe the issuer of a document allow any issuer except the beneficiary or the applicant to issue that document.

ARTICLE 4: ISSUE AND EFFECTIVENESS

- a. A guarantee is issued when it leaves the control of the guarantor.
- b. A guarantee is irrevocable on issue even if it does not state this.
- c. The beneficiary may present a demand from the time of issue of the guarantee or such later time or event as the guarantee provides.

ARTICLE 5: INDEPENDENCE OF GUARANTEE AND COUNTER-GUARANTEE

- a. A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.
- b. A counter-guarantee is by its nature independent of the guarantee, the underlying relationship, the application and any other counter-guarantee to which it relates, and the counter-

guarantor is in no way concerned with or bound by such relationship. A reference in the counter-guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the counter-guarantee. The undertaking of a counter-guarantor to pay under the counter-guarantee is not subject to claims or defences arising from any relationship other than a relationship between the counter-guarantor and the guarantor or other counter-guarantor to whom the counter-guarantee is issued.

ARTICLE 6: DOCUMENTS v. GOODS, SERVICES OR PERFORMANCE

Guarantors deal with documents and not with goods, services or performance to which the documents may relate.

ARTICLE 7: NON-DOCUMENTARY CONDITIONS

A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee.

ARTICLE 8: CONTENT OF INSTRUCTIONS AND GUARANTEES

All instructions for the issue of guarantees and guarantees themselves should be clear and precise and should avoid excessive detail. It is recommended that all guarantees specify:

- a. The applicant;
- b. The beneficiary;
- c. The guarantor;
- d. A reference number or other information

- e. identifying the underlying relationship;
- e. A reference number or other information identifying the issued guarantee or, in the case of a counter-guarantee, the issued counter-guarantee;
- f. The amount or maximum amount payable and the currency in which it is payable;
- g. The expiry of the guarantee;
- h. Any terms for demanding payment;
- i. Whether a demand or other document shall be presented in paper and/or electronic form;
- j. The language of any document specified in the guarantee; and
- k. The party liable for the payment of any charges.

ARTICLE 9: APPLICATION NOT TAKEN UP

Where, at the time of receipt of the application, the guarantor is not prepared or is unable to issue the guarantee, the guarantor should without delay so inform the party that gave the guarantor its instructions.

ARTICLE 10: ADVISING OF GUARANTEE OR AMENDMENT

- a. A guarantee may be advised to a beneficiary through an advising party. By advising a guarantee, whether directly or by utilizing the services of another party (“second advising party”), the advising party signifies to the beneficiary and, if applicable, to the second advising party, that it has satisfied itself as to the apparent authenticity of the guarantee and that the advice accurately reflects the terms and conditions of the guarantee as received by the advising party.
- b. By advising a guarantee, the second advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and conditions of the guarantee as received by the second advising party.
- c. An advising party or a second advising

- party advises a guarantee without any additional representation or any undertaking whatsoever to the beneficiary.
- d. If a party is requested to advise a guarantee or an amendment but is not prepared or is unable to do so, it should without delay so inform the party from whom it received that guarantee, amendment or advice.
- e. If a party is requested to advise a guarantee, and agrees to do so, but cannot satisfy itself as to the apparent authenticity of that guarantee or advice, it shall without delay so inform the party from whom the instructions appear to have been received. If the advising party or second advising party elects nonetheless to advise that guarantee, it shall inform the beneficiary or second advising party that it has not been able to satisfy itself as to the apparent authenticity of the guarantee or the advice.
- f. A guarantor using the services of an advising party or a second advising party, as well as an advising party using the services of a second advising party, to advise a guarantee should whenever possible use the same party to advise any amendment to that guarantee.

ARTICLE 11: AMENDMENTS

- a. Where, at the time of receipt of instructions for the issue of an amendment to the guarantee, the guarantor for whatever reason is not prepared or is unable to issue that amendment, the guarantor shall without delay so inform the party that gave the guarantor its instructions.
- b. An amendment made without the beneficiary’s agreement is not binding on the beneficiary. Nevertheless the guarantor is irrevocably bound by an amendment from the time it issues the amendment, unless and until the beneficiary rejects that amendment.
- c. Except where made in accordance with the terms of the guarantee, the

- beneficiary may reject an amendment of the guarantee at any time until it notifies its acceptance of the amendment or makes a presentation that complies only with the guarantee as amended.
- d. An advising party shall without delay inform the party from which it has received the amendment of the beneficiary's notification of acceptance or rejection of that amendment.
 - e. Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment.
 - f. A provision in an amendment to the effect that the amendment shall take effect unless rejected within a certain time shall be disregarded.
- ARTICLE 12: EXTENT OF GUARANTOR'S LIABILITY UNDER GUARANTEE**
- A guarantor is liable to the beneficiary only in accordance with, first, the terms and conditions of the guarantee and, second, these rules so far as consistent with those terms and conditions, up to the guarantee amount.
- ARTICLE 13: VARIATION OF AMOUNT OF GUARANTEE**
- A guarantee may provide for the reduction or the increase of its amount on specified dates or on the occurrence of a specified event which under the terms of the guarantee results in the variation of its amount, and for this purpose the event is deemed to have occurred only:
- a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or
 - b. if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records or from an index specified in the guarantee.
- ARTICLE 14: PRESENTATION**
- a. A presentation shall be made to the guarantor:
- i. at the place of issue, or such other place as is specified in the guarantee, and
 - ii. on or before expiry.
- b. A presentation has to be complete unless it indicates that it is to be completed later. In that case, it shall be completed on or before expiry.
 - c. Where the guarantee indicates that a presentation is to be made in electronic form, the guaranteee should specify the format, the system for data delivery and the electronic address for that presentation. If the guaranteee does not so specify, a document may be presented in any electronic format that allows it to be authenticated or in paper form. An electronic document that cannot be authenticated is deemed not to have been presented.
 - d. Where the guaranteee indicates that a presentation is to be made in paper form through a particular mode of delivery but does not expressly exclude the use of another mode, the use of another mode of delivery by the presenter shall be effective if the presentation is received at the place and by the time indicated in paragraph (a) of this article.
 - e. Where the guaranteee does not indicate whether a presentation is to be made in electronic or paper form, any presentation shall be made in paper form.
 - f. Each presentation shall identify the guarantee under which it is made, such as by stating the guarantor's reference number for the guarantee. If it does not, the time for examination indicated in article 20 shall start on the date of identification. Nothing in this paragraph shall result in an extension of the guarantee or limit the requirement in article 15 (a) or (b) for any separately presented documents also to identify the demand to which they relate.
 - g. Except where the guarantee otherwise provides, documents issued by or

on behalf of the applicant or the beneficiary, including any demand or supporting statement, shall be in the language of the guarantee. Documents issued by any other person may be in any language.

ARTICLE 15: REQUIREMENTS FOR DEMAND

- a. A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.
- b. A demand under the counter-guarantee shall in any event be supported by a statement, by the party to whom the counter-guarantee was issued, indicating that such party has received a complying demand under the guarantee or counter-guarantee issued by that party. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.
- c. The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent that the guarantee or counter-guarantee expressly excludes this requirement. Exclusion terms such as "The supporting statement under article 15[(a)] [(b)] is excluded" satisfy the requirement of this paragraph.
- d. Neither the demand nor the supporting statement may be dated before the date when the beneficiary is entitled to present a demand. Any other document may be dated before that date. Neither the demand, nor the supporting statement, nor any other document may be dated later than the date of its presentation.

ARTICLE 16: INFORMATION ABOUT DEMAND

The guarantor shall without delay inform the instructing party or, where applicable, the counter-guarantor of any demand under the guarantee and of any request, as an alternative, to extend the expiry of the guarantee. The counter-guarantor shall without delay inform the instructing party of any demand under the counter-guarantee and of any request, as an alternative, to extend the expiry of the counter-guarantee.

ARTICLE 17: PARTIAL DEMAND AND MULTIPLE DEMANDS; AMOUNT OF DEMANDS

- a. A demand may be made for less than the full amount available ("partial demand").
- b. More than one demand ("multiple demands") may be made.
- c. The expression "multiple demands prohibited" or a similar expression means that only one demand covering all or part of the amount available may be made.
- d. Where the guarantee provides that only one demand may be made, and that demand is rejected, another demand can be made on or before expiry of the guarantee.
- e. A demand is a non-complying demand if:
 - i. it is for more than the amount available under the guarantee, or
 - ii. any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded.

Conversely, any supporting statement or other document indicating an amount that is more than the amount demanded does not make the demand a non-complying demand.

ARTICLE 18: SEPARATENESS OF EACH DEMAND

- a. Making a demand that is not a complying demand or withdrawing a

demand does not waive or otherwise prejudice the right to make another timely demand, whether or not the guarantee prohibits partial or multiple demands.

- b. Payment of a demand that is not a complying demand does not waive the requirement for other demands to be complying demands.

ARTICLE 19: EXAMINATION

- a. The guarantor shall determine, on the basis of a presentation alone, whether it appears on its face to be a complying presentation.
- b. Data in a document required by the guarantee shall be examined in context with that document, the guarantee and these rules. Data need not be identical to, but shall not conflict with, data in that document, any other required document or the guarantee.
- c. If the guarantee requires presentation of a document without stipulating whether it needs to be signed, by whom it is to be issued or signed, or its data content, then:
 - i. the guarantor will accept the document as presented if its content appears to fulfil the function of the document required by the guarantee and otherwise complies with article 19 (b), and
 - ii. if the document is signed, any signature will be accepted and no indication of name or position of the signatory is necessary.
- d. If a document that is not required by the guarantee or referred to in these rules is presented, it will be disregarded and may be returned to the presenter.
- e. The guarantor need not re-calculate a beneficiary's calculations under a formula stated or referenced in a guarantee.
- f. The guarantor shall consider a requirement for a document to be legalized, visaed, certified or similar as satisfied by any signature, mark, stamp

or label on the document which appears to satisfy that requirement.

ARTICLE 20: TIME FOR EXAMINATION OF DEMAND; PAYMENT

- a. If a presentation of a demand does not indicate that it is to be completed later, the guarantor shall, within five business days following the day of presentation, examine that demand and determine if it is a complying demand. This period is not shortened or otherwise affected by the expiry of the guarantee on or after the date of presentation. However, if the presentation indicates that it is to be completed later, it need not be examined until it is completed.
- b. When the guarantor determines that a demand is complying, it shall pay.
- c. Payment is to be made at the branch or office of the guarantor or counter-guarantor that issued the guarantee or counter-guarantee or such other place as may be indicated in that guarantee or counter-guarantee ("place for payment").

ARTICLE 21: CURRENCY OF PAYMENT

- a. The guarantor shall pay a complying demand in the currency specified in the guarantee.
- b. If, on any date on which a payment is to be made under the guarantee:
 - i. the guarantor is unable to make payment in the currency specified in the guarantee due to a impediment beyond its control; or
 - ii. it is illegal under the law of the place for payment to make payment in the specified currency.
 - iii. the guarantor shall make payment in the currency of the place for payment even if the guarantee indicates that payment can only be made in the currency specified in the guarantee. The instructing

- party or, in the case of a counter-guarantee, the counter-guarantor, shall be bound by a payment made in such currency. The guarantor or counter-guarantor may elect to be reimbursed either in the currency in which payment was made or in the currency specified in the guarantee or, as the case may be, the counter-guarantee.
- c. Payment or reimbursement in the currency of the place for payment under paragraph (b) is to be made according to the applicable rate of exchange prevailing there when payment or reimbursement is due. However, if the guarantor has not paid at the time when payment is due, the beneficiary may require payment according to the applicable rate of exchange prevailing either when payment was due or at the time of actual payment.
- ARTICLE 22: TRANSMISSION OF COPIES OF COMPLYING DEMAND**
- The guarantor shall without delay transmit a copy of the complying demand and of any related documents to the instructing party or, where applicable, to the counter-guarantor for transmission to the instructing party. However, neither the counter-guarantor nor the instructing party, as the case may be, may withhold payment or reimbursement pending such transmission.
- ARTICLE 23: EXTEND OR PAY**
- a. Where a complying demand includes, as an alternative, a request to extend the expiry, the guarantor may suspend payment for a period not exceeding 30 calendar days following its receipt of the demand.
- b. Where, following such suspension, the guarantor makes a complying demand under the counter-guarantee that includes, as an alternative, a request to extend the expiry, the counter-guarantor may suspend payment for a period not exceeding four calendar days less than the period during which payment of the demand under the guarantee was suspended.
- c. The guarantor shall without delay inform the instructing party or, in the case of a counter-guarantee, the counter-guarantor, of the period of suspension of payment under the guarantee. The counter-guarantor shall then inform the instructing party of such suspension and of any suspension of payment under the counter-guarantee. Complying with this article satisfies the information duty under article 16.
- d. The demand for payment is deemed to be withdrawn if the period of extension requested in that demand or otherwise agreed by the party making that demand is granted within the time provided under paragraph (a) or (b) of this article. If no such period of extension is granted, the complying demand shall be paid without the need to present any further demand.
- e. The guarantor or counter-guarantor may refuse to grant any extension even if instructed to do so and shall then pay.
- f. The guarantor or counter-guarantor shall without delay inform the party from whom it has received its instructions of its decision to extend under paragraph (d) or to pay.
- g. The guarantor and the counter-guarantor assume no liability for any payment suspended in accordance with this article.

ARTICLE 24: NON-COMPLYING DEMAND, WAIVER AND NOTICE

- a. When the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand or, in its sole judgement, approach the instructing party, or in the case of a counter-guarantee, the counter-guarantor, for a waiver of the discrepancies.
- b. When the counter-guarantor determines that a demand under the counter-guarantee is not a complying demand, it may reject that demand or, in its sole

- judgement, approach the instructing party for a waiver of the discrepancies.
- c. Nothing in paragraphs (a) or (b) of this article shall extend the period mentioned in article 20 or dispense with the requirements of article 16. Obtaining the waiver of the counter-guarantor or of the instructing party does not oblige the guarantor or the counter-guarantor to waive any discrepancy.
 - d. When the guarantor rejects a demand, it shall give a single notice to that effect to the presenter of the demand. The notice shall state:
 - i. that the guarantor is rejecting the demand, and
 - ii. each discrepancy for which the guarantor rejects the demand.
 - e. The notice required by paragraph (d) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.
 - f. A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand.
 - g. The guarantor may at any time, after providing the notice required in paragraph (d) of this article, return any documents presented in paper form to the presenter and dispose of the electronic records in any manner that it considers appropriate without incurring any responsibility.
 - h. for the purpose of paragraphs (d), (f) and (g) of this article, guarantor includes counter-guarantor.
- b. Whether or not the guarantee document is returned to the guarantor, the guarantee shall terminate:
- i. on expiry;
 - ii. when no amount remains payable under it, or
 - iii. on presentation to the guarantor of the beneficiary's signed release from liability under the guarantee.
- c. If the guarantee or the counter-guarantee states neither an expiry date nor an expiry event, the guarantee shall terminate after the lapse of three years from the date of issue and the counter-guarantee shall terminate 30 calendar days after the guarantee terminates.
- d. If the expiry date of a guarantee falls on a day that is not a business day at the place for presentation of the demand, the expiry date is extended to the first following business day at that place.
- e. Where, to the knowledge of the guarantor, the guarantee terminates as a result of any of the reasons indicated in paragraph (b) above, but other than because of the advent of the expiry date, the guarantor shall without delay so inform the instructing party or, where applicable, the counter-guarantor and, in that case, the counter-guarantor shall so inform the instructing party.

ARTICLE 26: FORCE MAJEURE

- a. The amount payable under the guarantee shall be reduced by any amount:
- i. paid under the guarantee,
 - ii. resulting from the application of article 13; or
 - iii. indicated in the beneficiary's signed partial release from liability under the guarantee.

- b. In this article, "force majeure" means acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupt its business as it relates to acts of a kind subject to these rules.
- Should the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure:
- i. each of the guarantee and any counter-guarantee shall be extended for a period of 30 calendar days from the date on which it would otherwise have expired, and the guarantor shall

- as soon as practicable inform the instructing party or, in the case of a counter-guarantee, the counter-guarantor of the force majeure and the extension, and the counter-guarantor shall so inform the instructing party;
- ii. the running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the guarantor's business; and
 - iii. a complying demand under the guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that guarantee has expired, and in this situation the guarantor shall be entitled to present a demand under the counter-guarantee within 30 calendar days after cessation of the force majeure even if the counter-guarantee has expired.
- c. Should the counter-guarantee expire at a time when presentation or payment under that counter-guarantee is prevented by force majeure:
- i. the counter-guarantee shall be extended for a period of 30 calendar days from the date on which the counter-guarantor informs the guarantor of the cessation of the force majeure. The counter-guarantor shall then inform the instructing party of the force majeure and the extension;
 - ii. the running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the counter-guarantor's business; and
 - iii. a complying demand under the counter-guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that counter-guarantee has expired.
- d. The instructing party shall be bound by any extension, suspension or payment under this article.
- e. The guarantor and the counter-guarantor assume no further liability for the consequences of the force majeure.
- ARTICLE 27: DISCLAIMER ON EFFECTIVENESS OF DOCUMENTS**
- The guarantor assumes no liability or responsibility for:
- a. The form, sufficiency, accuracy, genuineness, falsification, or legal effect of any signature or document presented to it;
 - b. The general or particular statements made in, or superimposed on, any document presented to it;
 - c. The description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance or data represented by or referred to in any document presented to it; or
 - d. The good faith, acts, omissions, solvency, performance or standing of any person issuing or referred to in any other capacity in any document presented to it.
- ARTICLE 28: DISCLAIMER ON TRANSMISSION AND TRANSLATION**
- a. The guarantor assumes no liability or responsibility for the consequences of delay, loss in transit, mutilation or other errors arising in the transmission of any document, if that document is transmitted or sent according to the requirements stated in the guarantee, or when the guarantor may have taken the initiative in the choice of the delivery service in the absence of instructions to that effect.
 - b. The guarantor assumes no liability or responsibility for errors in translation or interpretation of technical terms and

may transmit all or part of the guarantee text without translating it.

ARTICLE 29: DISCLAIMER FOR ACTS OF ANOTHER PARTY

A guarantor using the services of another party for the purpose of giving effect to the instructions of an instructing party or counter-guarantor does so for the account and at the risk of that instructing party or counter-guarantor.

ARTICLE 30: LIMITS ON EXEMPTION FROM LIABILITY

Articles 27 to 29 shall not exempt a guarantor from liability or responsibility for its failure to act in good faith.

ARTICLE 31: INDEMNITY FOR FOREIGN LAWS AND USAGES

The instructing party or, in the case of a counter-guarantee, the counter-guarantor shall indemnify the guarantor against all obligations and responsibilities imposed by Foreign laws and usages, including where those Foreign laws and usages impose terms into the guarantee or the counter-guarantee that override its specified terms. The instructing party shall indemnify the counter-guarantor that has indemnified the guarantor under this article.

ARTICLE 32: LIABILITY FOR CHARGES

- a. A party instructing another party to perform services under these rules is liable to pay that party's charges for carrying out its instructions.
- b. If a guarantee states that charges are for the account of the beneficiary and those charges cannot be collected, the instructing party is liable to pay those charges. If a counter-guarantee states that charges relating to the guarantee are for the account of the beneficiary and those charges cannot be collected, the counter-guarantor remains liable to the guarantor, and the instructing party to the counter-guarantor, to pay those charges.
- c. Neither the guarantor nor any advising party should stipulate that the guarantee, or any advice or amendment of it, is conditional upon the receipt by the guarantor or any advising party of its charges.

ARTICLE 33: TRANSFER OF GUARANTEE AND ASSIGNMENT OF PROCEEDS

- a. A guarantee is transferable only if it specifically states that it is "transferable", in which case it may be transferred more than once for the full amount available at the time of transfer. A counter-guarantee is not transferable.
- b. Even if a guarantee specifically states that it is transferable, the guarantor is not obliged to give effect to a request to transfer that guarantee after its issue except to the extent and in the manner expressly consented to by the guarantor.
- c. A transferable guarantee means a guarantee that may be made available by the guarantor to a new beneficiary ("transferee") at the request of the existing beneficiary ("transferor").
- d. The following provisions apply to the transfer of a guarantee:
 - i. a transferred guarantee shall include all amendments to which the transferor and guarantor have agreed as of the date of transfer; and
 - ii. a guarantee can only be transferred where, in addition to the conditions stated in paragraphs (a), (b) and (d)(i) of this article, the transferor has provided a signed statement to the guarantor that the transferee has acquired the transferor's rights and obligations in the underlying relationship.
- e. Unless otherwise agreed at the time of transfer, the transferor shall pay all charges incurred for the transfer.
- f. Under a transferred guarantee, a demand and any supporting statement shall be signed by the transferee. Unless the guarantee provides otherwise, the

- name and the signature of the transferee may be used in place of the name and signature of the transferor in any other document.
- g. Whether or not the guarantee states that it is transferable, and subject to the provisions of the applicable law:
- i. the beneficiary may assign any proceeds to which it may be or may become entitled under the guarantee;
 - ii. however, the guarantor shall not be obliged to pay an assignee of these proceeds unless the guarantor has agreed to do so.
- b. Unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the counter-guarantee.

ARTICLE 34: GOVERNING LAW

- a. Unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee.

ARTICLE 35: JURISDICTION

- a. Unless otherwise provided in the guarantee, any dispute between the guarantor and the beneficiary relating to the guarantee shall be settled exclusively by the competent court of the country of the location of the guarantor's branch or office that issued the guarantee.
- b. Unless otherwise provided in the counter-guarantee, any dispute between the counter-guarantor and the guarantor relating to the counter-guarantee shall be settled exclusively by the competent court of the country of the location of the counter-guarantor's branch or office that issued the counter-guarantee.

URF 1.0

ICC Uniform Rules for Forfaiture

Editor's Overview

The Uniform Rules for Forfaiting (UFR800) (ICC Publication No. 800E) became effective 1 January 2013. UFR800 is the result of cooperation between the International Chamber of Commerce and the International Forfaiting Association (IFA). The annual forfaiting market value is estimated to be over USD 300 billion. Generally, under a forfaiting arraignment the sales agreement relates to goods that are commodities, capital goods, or items of higher value. Also, the tenor of the extension of credit is longer, usually more than six months. Often, a negotiable financial instrument is involved in the transaction, and the receivables purchase is made on a non-recourse basis.

In contrast, factoring agreements relate to accounts that represent short term obligations (often 30-180 days) for ordinary goods sold in (international) trade. Forfaiting or factoring enable the seller (exporter of goods) to acquire payment earlier than initially envisioned, and thus improve its cash flow in open account transactions. Both methods involve the purchase of a seller's receivables at a discount, that is at a rate lower than the book value of the debt.

These finance techniques are similar and are sometimes interchanged. Depending on the jurisdiction and industry involved, such finance transactions may be defined differently. Therefore, transactions relating to the purchase of receivables – referred to as factoring, forfaiting or similar terms – must be individually analysed and understood properly to avoid unforeseen consequences and pitfalls. The UFR800 is an attempt to establish standard definitions and practices to harmonize international forfaiting operations, avoid confusion and to facilitate dispute settlements. UFR800 includes definitions and model forms to further aid in the effective application of the rules to trade transactions.

Uniform Rules for Forfaiting

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Article 1 - Application of URF

The Uniform Rules for Forfaiting (“URF”) are rules that apply to a forfaiting transaction when the parties expressly indicate that their agreement is subject to these rules. They are binding on all parties thereto except so far as modified or excluded by agreement.

Article 2 - Definitions

For the purpose of these rules:

availability date means the last day on which the seller must deliver to the buyer satisfactory documents and satisfy any other condition. If the availability date is described in the forfaiting confirmation or forfaiting agreement as ‘immediately available’ or similar terms, that means the day falling 10 business days after the trade date;

business day means, in relation to an act to be performed under these rules, a day on which the place of business where that act is to be performed is regularly open for the performance of that type of act;

buyer means the party purchasing the payment claim;

condition means, in the primary market, a condition set out in the forfaiting agreement and, in the secondary market, a condition set out in either the secondary sale terms or the forfaiting confirmation or both;

credit support document means any document evidencing an obligation of a person other than the primary obligor to make payment in respect of the payment claim;

forfaiting agreement means the written agreement signed by the primary forfaiter and the initial seller setting out the terms of the forfaiting transaction;

forfaiting confirmation means the secondary market document signed or to be signed by the seller and buyer setting out the secondary sale terms;

forfaiting transaction means the sale by the seller and the purchase by the buyer of the payment claim on a without recourse basis on the terms of these rules;

initial seller means:

- a. the seller that first sells the payment claim to the primary forfaiter; or
- b. a primary obligor that creates the payment claim and transfers it to the primary forfaiter;

obligor means any of:

- a. the primary obligor; and
- b. any person that has an obligation under a credit support document;

parties means the parties to the forfaiting transaction;

payment claim means:

- a. the obligation of the primary obligor to make payment of a specified amount on a specified date or on demand; and
- b. all the rights, title and interest to receive or recover payment from the primary obligor;

points of reserve means, where payment has been made under reserve, those obligations of the seller that the parties have agreed must be satisfied for payment to become final;

primary forfaiter means the party that first purchased the payment claim from the initial seller;

primary market means the market where the payment claim is purchased by the primary forfaiter from the initial seller;

primary obligor means each person that has a primary obligation to make payment under the payment claim;

purchase price means the amount (which may be calculated using an agreed formula) agreed between the seller and the buyer to be paid for a payment claim;

repurchase terms means the terms on which the seller must repurchase any payment claim from the buyer if the points of reserve are not satisfied by the reserve date;

required documents means, in respect of the forfaiting agreement or the forfaiting confirmation:

- a. the document evidencing the payment claim, together with any document issued by the primary obligor to supplement or accompany the payment claim;
- b. documents evidencing the authenticity and binding nature of the signatures of the obligors and the seller;
- c. any document that is, as at the settlement date, required to:
 - i. transfer the payment claim and all rights under any credit support document; or
 - ii. be presented when enforcing or exercising rights to receive payment under the payment claim or any credit support document;
- d. any credit support documents;
- e. any other document specified in the forfaiting agreement or the forfaiting confirmation, which may include documents relating to the underlying transaction; and
- f. any document the buyer is entitled to request, for a forfaiting transaction in the:
 - i. primary market, under article 7e.
or
 - ii. secondary market, under article 10f.

reserve date means the date by which the points of reserve must be satisfied by the seller;

satisfactory documents means required documents that are satisfactory in accordance with the forfaiting agreement

or forfaiting confirmation as determined in accordance with article 7c. or article 10c., as applicable;

secondary market means the market where the payment claim is purchased by the buyer from the primary forfaiter or another seller;

secondary sale terms means the terms of a forfaiting transaction agreed in the secondary market, orally or in writing or both, between the seller and the buyer on the trade date;

seller means the party selling the payment claim;

settlement date means the date agreed by the seller and the buyer for payment of the purchase price or, in the absence of agreement, the date falling three business days after determination by the buyer that it has received satisfactory documents or, where the buyer is precluded from claiming that it has not received satisfactory documents in accordance with article 10g, three business days after the day preclusion takes effect;

trade date means:

- a. for a primary market forfaiting transaction, the date of the forfaiting agreement; or
- b. for a secondary market forfaiting transaction, the date on which the seller and buyer agree the secondary sale terms;

under reserve means any payment made or to be made by the buyer that is specified as being conditional upon points of reserve;

underlying transaction means the transaction pursuant to which the payment claim arises.

Article 3 - Interpretations

For the purpose of these rules:

- a. where applicable, words in the singular

- a. include the plural and in the plural include the singular;
- b. all rules apply to the primary market and the secondary market except where they expressly provide otherwise;
- c. the word “person” includes any individual, firm, company, corporation, government, state or agency of a state, or any association, trust, joint venture, consortium or partnership (whether or not having separate legal personality);
- d. the word “signed” (and its derivations), when applied to a document, means that an original of that document is signed by or on behalf of its issuer, whether by an electronic signature that can be authenticated by the party to whom that document is presented or by handwriting, facsimile signature, perforated signature, stamp, symbol or other mechanical method.
- e. the words “after”, and “within” when used to determine a period of time exclude the date mentioned;
- f. the word “transfer” (and its derivations) includes issue, assign, novate, endorse and, in the case of an initial seller that is a primary obligor, includes to become indebted.

Article 4 - Without recourse

- a. On the settlement date, the seller sells to the buyer and the buyer purchases from the seller the payment claim without recourse. The buyer will have no claim against the seller or any prior seller for the non-payment of any amount due in respect of the payment claim except as provided under article 13 or article 4b.
- b. If the seller is an obligor under the payment claim or any credit support document, nothing in these rules will affect the seller’s obligations in its capacity as obligor.

Article 5 - Forfaiting agreements in the primary market

- a. To create a forfaiting transaction in

the primary market, there must be an agreement on the trade date between the primary forfaiter and the initial seller to sell the payment claim.

- b. It is recommended that the forfaiting agreement contains:
 - i. details of the payment claim and any credit support documents including the amount, currency, due date and obligors;
 - ii. a list of the required documents known by the parties at the date of the forfaiting agreement;
 - iii. the availability date;
 - iv. the purchase price;
 - v. the settlement date or an anticipated settlement date; and
 - vi. its governing law and jurisdiction provisions.

Article 6 - Conditions in the primary market

- a. Each party must satisfy all conditions applicable to it in accordance with the forfaiting agreement no later than the availability date.
- b. If any condition remains or will remain unsatisfied on the availability date the parties may agree to postpone the availability date.
- c. If the conditions are not satisfied in accordance with the forfaiting agreement on or before the availability date, the forfaiting agreement shall terminate. Any such termination of the forfaiting agreement will not prejudice either party’s rights under the forfaiting agreement or applicable law.

Article 7 - Satisfactory documents in the primary market

- a. The initial seller must deliver the required documents to the primary forfaiter no later than the availability date.
- b. The primary forfaiter:
 - i. must examine the documents

- delivered by the initial seller to determine whether they constitute the required documents; and
- ii. may disregard and return to the initial seller any document delivered that is not a required document.
- c. The primary forfaiter must:
- i. examine the required documents in accordance with market practice; and
 - ii. determine whether they constitute satisfactory documents.
- d. In making its determination under article 7c. ii. the primary forfaiter is entitled to take into account, without limitation, whether:
- i. the required documents are supported by satisfactory evidence as to their authenticity;
 - ii. each of the payment claim and the obligations in any credit support document is a legal, valid, binding and enforceable obligation of the relevant obligor;
 - iii. payment of the payment claim will be made on the due date in full in the relevant currency without set-off or counterclaim or any deduction or withholding for tax or otherwise;
 - iv. the payment claim and the rights under the credit support documents are freely transferable; and
 - v. the required documents conform to the terms of the forfaiting agreement.
- e. If the primary forfaiter determines, in accordance with market practice, that:
- i. the documents delivered and examined are not satisfactory documents; or
 - ii. additional documents are required, it must notify the initial seller of this, providing brief details of the grounds for its determination and state any additional documents required.
- f. The primary forfaiter must notify the initial seller when it has determined
- that it has received satisfactory documents. Payment of the purchase price constitutes notice unless payment is made under reserve.
- g. Any determination or payment of the purchase price by the primary forfaiter is without prejudice to the liability of the initial seller under article 13.

Article 8 - Forfaiting confirmations in the secondary market

- a. To create a forfaiting transaction in the secondary market there must be an agreement on the trade date between the primary forfaiter or a subsequent buyer and another buyer to sell the payment claim.
- b. The seller must deliver to the buyer a signed forfaiting confirmation within two business days of the trade date. If the seller fails to deliver the forfaiting confirmation within that period, the buyer may, in its sole discretion, not proceed with the forfaiting transaction by notice to the seller. If the buyer does this, it will not prejudice the buyer's rights under the secondary sale terms or applicable law.
- c. The forfaiting confirmation must set out the secondary sale terms as such terms may have been amended after the trade date.
- d. The buyer must, within two business days of receipt of the forfaiting confirmation, either:
 - i. sign and return it to the seller; or
 - ii. notify the seller of its disagreement with the terms of the forfaiting confirmation including details of the points of disagreement.
- e. If the buyer fails to comply with article 8d. above, the seller may, in its sole discretion, not proceed with the forfaiting transaction by notice to the buyer. If the seller does this, it will not prejudice its rights under the secondary sale terms or applicable law.
- f. If:
 - i. the buyer notifies the seller under

- ii. article 8d. ii. above; and
 - ii. the parties fail to agree a revised forfaiting confirmation within two business days of the seller's receipt of the buyer's notice, the forfaiting transaction will not proceed. Any such failure of the forfaiting transaction to proceed will not prejudice either party's rights under the secondary sale terms or applicable law.
 - g. The parties may satisfy article 8 at any time by signing a forfaiting confirmation.
- Article 9 - Conditions in the secondary market**
- a. Each party must satisfy all conditions in accordance with the forfaiting confirmation no later than the availability date.
 - b. If any condition remains or will remain unsatisfied on the availability date, the parties may agree to postpone the availability date.
 - c. If the conditions are not satisfied in accordance with the forfaiting confirmation on or before the availability date, the forfaiting confirmation shall terminate. Any such termination of the forfaiting confirmation will not prejudice either party's rights under the forfaiting confirmation or applicable law.
- Article 10 - Satisfactory documents in the secondary market**
- a. The seller must deliver the required documents to the buyer no later than the availability date.
 - b. The buyer:
 - i. must examine the documents delivered by the seller to determine whether they constitute the required documents; and
 - ii. may disregard and return to the seller any document delivered that is not a required document.
- The buyer must**
- i. examine the required documents in accordance with market practice; and
 - ii. determine whether they constitute satisfactory documents.
- d. In making such determination under article 10c.ii. the buyer may only take into account whether or not:
- i. the required documents are supported by satisfactory evidence as to their authenticity;
 - ii. each of the payment claim and the obligations contained in any credit support document is a legal, valid, binding and enforceable obligation of the relevant obligor;
 - iii. payment of the payment claim will be made on the due date in the relevant amount and currency in full without set-off or counterclaim or any deduction or withholding for tax or otherwise;
 - iv. the payment claim and the rights under the credit support documents are freely transferable; and
 - v. the required documents conform to the terms of the forfaiting confirmation.
- e. The seller may notify the buyer requiring it to finish its examination within a stated period, which must end at least five business days after the date of receipt of the notice.
- f. If, based solely on the factors in article 10d. the buyer determines, in accordance with market practice, that:
- i. the documents delivered and examined are not satisfactory documents; or
 - ii. additional documents are required, it must notify the seller of this, providing brief details of the grounds for its determination and state any additional documents required.
- g. If:
- i. the seller has delivered a notice

- under article 10e. and
- ii. the buyer does not deliver a notice under this article by the end of the period the seller specifies in its notice under article 10e. from the end of that period the buyer will be precluded from claiming that the documents delivered are not satisfactory documents.
- h. The buyer must notify the seller when it has determined that it has received satisfactory documents. Payment of the purchase price constitutes notice unless payment is made under reserve.
- i. Any determination or payment of the purchase price by the buyer, or preclusion of the buyer under article 10g, is without prejudice to the liability of the seller pursuant to article 13.

Article 11 - Payment

- a. The buyer must pay the purchase price to the seller on the settlement date.
- b. Payment must be made in the currency specified in the forfaiting agreement or forfaiting confirmation without deduction or counterclaim.
- c. Payment must be made in immediately available funds at the place stated in the forfaiting agreement or forfaiting confirmation, provided the due date for payment is a business day in that place. If the due date for a payment is not a business day, payment must be made on the first business day in that place after its due date.

Article 12 - Payment under reserve

- a. If the parties agree that payment by the buyer may be made under reserve, the forfaiting agreement or the forfaiting confirmation must specify or be amended to specify:
 - i. the points of reserve;
 - ii. the reserve date; and
 - iii. the repurchase terms, using the

- rate determined under the original sale terms.
- b. The seller must satisfy the points of reserve by the reserve date.
- c. If by the end of the reserve date:
 - i. the points of reserve are not satisfied; and
 - ii. the parties have not agreed to postpone the reserve date,the buyer will be entitled to require the seller to repurchase on the repurchase terms by notice to the seller.
- d. If the buyer requires the seller to repurchase in accordance with article 12c, the seller must, within five business days of receipt of the buyer's notice, complete the repurchase on the repurchase terms and pay the relevant amount to the buyer in accordance with articles 11b. and 11c.
- e. Within five business days of receipt of payment from the seller, the buyer must:
 - i. return to the seller all documents received from the seller; and
 - ii. take all actions and sign all documents necessary to ensure that the rights to the payment claim, the credit support documents and other required documents are re-transferred to the seller.

Article 13 - Liabilities of the parties

- a. Each party is liable to the other party if either of the following events happens:
 - i. it does not have the authority to execute and perform its obligations under the forfaiting agreement, the secondary sales terms or the forfaiting confirmation or has failed to take such action as is necessary to ensure proper execution and performance;
 - ii. its obligations under or in connection with the forfaiting agreement, the forfaiting confirmation or, prior to signature of the forfaiting confirmation, the

- secondary trade terms, do not constitute its legal, valid, binding and enforceable obligations.
- b. In addition to article 13a. an initial seller is also liable to the primary forfaiter if any one or more of the following events happens:
- i. it knew or ought to have known on the settlement date of any event or circumstance relating to the payment claim, any credit support document or the underlying transaction that could affect:
 - a) the existence of the payment claim on its due date; or
 - b) the existence of any rights and obligations under any credit support document,
 and did not disclose this to the primary forfaiter before the trade date;
 - ii. when it transfers the payment claim and the rights under any credit support document to the buyer, it is not the sole legal and beneficial owner of the payment claim and those rights, which in both cases must be free from third party claims or rights;
 - iii. the payment claim and the rights under any credit support documents have not been irrevocably and unconditionally transferred to the primary forfaiter on or before the settlement date;
 - iv. it has not, whether before or after the settlement date, complied with or has breached any obligation binding on it under the payment claim, any credit support document or the underlying transaction that affects the existence of the payment claim on its due date, or the existence of any rights and obligations under any credit support documents;
 - v. there has been, whether before or after the settlement date, a fraud in relation to either the payment
- c. claim or the underlying transaction that affects the existence of the payment claim or the existence of any obligation under any credit support document.
- d. In addition to article 13a., a primary forfaiter is also liable to its buyer if any one or more of the following events happens:
- i. it did not disclose on or before the trade date any information received from the initial seller relating to the payment claim, the credit support documents or the underlying transaction about an event or circumstance that affects the existence of the payment claim, or the existence of the rights and obligations under the credit support documents;
 - ii. when it transfers the payment claim and the rights under any credit support document to the buyer, it is not the sole legal and beneficial owner of the payment claim and those rights, which in both cases must be free from third party claims or rights;
 - iii. the payment claim and the rights under the credit support documents have not been irrevocably and unconditionally transferred to the buyer on or before the settlement date;
 - iv. when it purchased the payment claim, it did not take appropriate steps in accordance with market practice to determine that the payment claim and any credit support document is legal, valid, binding and enforceable against the relevant obligor and that the payment claim and the rights under the credit support documents are capable of being irrevocably and unconditionally transferred;
 - v. when it purchased the payment claim, it did not take appropriate steps in accordance with market

- practice to determine that the required documents reflect the underlying transaction.
- d. In addition to article 13a., a seller in the secondary market that is not a primary forfater is also liable to its buyer if any one of more of the following events happens:
- i. it did not disclose on or before the trade date any information received from its seller relating to the payment claim, the credit support documents or the underlying transaction about an event or circumstance that affects the existence of the payment claim, or the existence of the obligations under the credit support documents;
 - ii. when it transfers the payment claim and the rights under any credit support document to the buyer, it is not the sole legal and beneficial owner of the payment claim or the rights under the credit support documents, which in both cases must be free from third party claims or rights;
 - iii. either the payment claim or the rights under the credit support documents have not been irrevocably and unconditionally transferred to the buyer on or before the settlement date.
- e. The parties may agree to modify or exclude any of the liabilities in article 13.
- f. A seller is only liable to its immediate buyer but it may agree that it shall be liable to subsequent buyers in respect of all or any of the above agreed events either by stating that liability for such events are for the benefit of such future buyers or by permitting assignment of the liability for such events or by any other legally effective means.

Article 14 - Notices

- a. Any notice or document in respect of the forfaiting transaction may be delivered by agreed electronic means, fax or letter to the relevant contact numbers and addresses set out in the forfaiting agreement or the forfaiting confirmation.
- b. Any notice or document sent, including any forfaiting confirmation, shall be deemed to have been received:
 - i. if sent electronically when it enters the information system of the applicable recipient in a form capable of being accepted by that system;
 - ii. if sent by fax, with a confirmed receipt of transmission from the sending machine, on the day on which transmitted; and
 - iii. if sent by mail, on actual delivery.
- c. A notice or document delivered in accordance with article 14b. but received on a day that is not a business day or after normal business hours in the place of receipt shall be deemed to have been received on the next business day.
- d. Any receipt or acknowledgement of receipt does not imply acceptance or refusal.

Uniform Rules for Collections (URC 522)

Editor's Overview

Bank “collection” of documents, sometimes called “documentary collection”, is an alternative to letters of credit as a means of trade facilitation. In it, banks also serve as intermediaries for buyers and sellers of goods, but without themselves making any engagement or promise to pay the seller against receipt of the commercial documents related to the transaction. The obligation to pay remains that of the buyer. Unlike payment in advance, however, the buyer will not receive the documents that control possession of the goods from the buyer’s bank to which they are sent unless payment is made or promised according to the terms of the collection. Unlike an open account sale, the seller retains control of the goods through control of the documents until the collection instructions are followed.

The URC codifies the practices of bank-to-bank collections. While some national laws address collections between banks (Notably U.S. UCC Article 3, Section 3-501), most of these rules apply to domestic collections or are otherwise not widely used by banks. As a result, the URC represents the only meaningful expression of bank collection practice and would constitute that practice even if the collection is not expressly rendered subject to the rules as provided by URC Article 1 (Application of URC522).

In a sale of goods transaction, the seller is the principal who entrusts documents accompanied by a collection instruction to its bank, the remitting bank, to be forwarded often through an intermediary or collecting bank to the buyer’s bank, the presenting bank, for “presentation” (that is, tender) to the buyer, who is the drawee or person to whom the collection instruction is addressed. The obligation of the presenting bank is to exercise reasonable care in following the instructions contained in the collection letter. Other than checking to see that it contains the number of documents stated in the collection letter accompany it, the only obligation of the remitting and presenting banks relates to the instructions contained in the collection instruction.

While the presenting bank can permit the drawee (buyer) to inspect the documents forwarded to it, it cannot release the documents to the buyer except under the terms of the collection instructions. These instructions will indicate whether or not documents are to be released against payment (“D/P”) or against acceptance of drafts drawn on the buyer (“D/A”) as provided in URC522 Article 7 (Release of Commercial Documents). While providing that the banks must act in good faith and exercise reasonable care, URC522 contains numerous disclaimers of liability and has specific rules regarding allocation of costs and interest.

While collections are widely used in connection with the sale of goods, they can also be used in other contexts to send any document such as a financial document. One such use is the so-called “clean” collection by which a draft or check is forwarded via the bank collection process subject to URC. This route is an alternative to collection through a central bank clearing process or system which is subject to recourse or charge back for various reasons. URC collections are final and, accordingly, offer advantages particularly where the item is for a large amount. An excellent explanation of the differences is contained in SCADIF, S.A. v. First Union National Bank, 344 F.3d 1123 (11th Cir. 2003), summarized in 2003 Annual Survey of LC Law & Practice, 264.

URC522 (in force as of 1 January 1996) is a 1995 revision of URC322 (effective 1 January 1979) which replaced the Uniform Rules for the Collection of Commercial Paper (ICC Publication No. 254) which was introduced in 1967. After receiving

overwhelming approval from the National Committees, eURC Version 1.0 (in force as of 1 July 2019) allows for electronic records to be submitted under a collection instruction. Collection practice is explained in the Commentary on the URC522 (ICC Publication No. 550), an unofficial explanation of the rules by The chair of the Working Party that drafted the URC 522 revision, Lakshman Y. Wickremaratne, ICC Guide to Collection Operations (ICC Publication No. 522).

ICC Uniform Rules for Collections – 1995 Revision

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Uniform Rules for Collections

1995 Revision in force as of January 1, 1996

A GENERAL PROVISIONS AND DEFINITIONS

Article 1

Application of URC 522

- a The *Uniform Rules for Collections*, 1995 Revision, ICC Publication No. 522, shall apply to all collections as defined in Article 2 where such rules are incorporated into the text of the “collection instruction” referred to in Article 4 and are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from.
- b Banks shall have no obligation to handle either a collection or any collection instruction or subsequent related instructions.
- c If a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.

Article 2

Definition of Collection

For the purpose of these Articles:

- a “Collection” means the handling by banks of documents as defined in Sub-Article 2b in accordance with instructions received, in order to:
 - 1. obtain payment and/or acceptance, or
 - 2. deliver documents against payment and/or against acceptance,
- or

- 3. deliver documents on other terms and conditions.

- b “Documents” means financial documents and/or commercial documents:

- 1. “Financial documents” means bills of exchange, promissory notes, cheques, or other similar instruments used for obtaining the payment of money;
- 2. “Commercial documents” means invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.

- c “Clean collection” means collection of financial documents not accompanied by commercial documents.

- d “Documentary collection” means collection of:

- 1. Financial documents accompanied by commercial documents;
- 2. Commercial documents not accompanied by financial documents.

Article 3

Parties to a Collection

- a For the purpose of these Articles the “parties thereto” are:

- 1. the “principal” who is the party entrusting the handling of a collection to a bank;
- 2. the “remitting bank” which is the bank to which the principal has entrusted the handling of a collection;
- 3. the “collecting bank” which is any bank, other than the remitting bank, involved in processing the collection.

4. the “presenting bank” which is the collecting bank making presentation to the drawee.
- b The “drawee” is the one to whom presentation is to be made in accordance with the collection instruction.

B FORM AND STRUCTURE OF COLLECTIONS

Article 4 Collection Instruction

- a 1. All documents sent for collection must be accompanied by a collection instruction indicating that the collection is subject to URC 522 and giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection instruction, and in accordance with these Rules.
2. Banks will not examine documents in order to obtain instructions.
3. Unless otherwise authorised in the collection instruction, banks will disregard any instructions from any party/bank other than the party/bank from whom they received the collection.
- b A collection instruction should contain the following items of information, as appropriate.
1. Details of the bank from which the collection was received including full name, postal and SWIFT address, telex, telephone, facsimile numbers and reference.
 2. Details of the principal including full name, postal address, and if applicable telex, telephone and facsimile numbers.
 3. Details of the drawee including full name, postal address, or the domicile at which presentation is to be made and if applicable telex, telephone and facsimile numbers.
 4. Details of the presenting bank, if any, including full name, postal address, and if applicable telex, telephone and facsimile numbers.
 5. Amount(s) and currency(ies) to be collected.
6. List of documents enclosed and the numerical count of each document.
7. a Terms and conditions upon which payment and/or acceptance is to be obtained.
b Terms of delivery of documents against:
 - 1) payment and/or acceptance
 - 2) other terms and conditions.
- It is the responsibility of the party preparing the collection instruction to ensure that the terms for the delivery of documents are clearly and unambiguously stated, otherwise banks will not be responsible for any consequences arising therefrom.
8. Charges to be collected, indicating whether they may be waived or not.
9. Interest to be collected, if applicable, indicating whether it may be waived or not, including:
 - a rate of interest
 - b interest period
 - c basis of calculation (for example 360 or 365 days in a year) as applicable
10. Method of payment and form of payment advice.
11. Instructions in case of non-payment, non-acceptance and/or non-compliance with other instructions.
- c 1. Collection instructions should bear the complete address of the drawee or of the domicile at which the presentation is to be made. If the address is incomplete or incorrect,

the collecting bank may, without any liability and responsibility on its part, endeavour to ascertain the proper address.

2. The collecting bank will not be liable or responsible for any ensuing delay as a result of an incomplete/incorrect address being provided.

C FORM OF PRESENTATION

Article 5 Presentation

- a For the purpose of these Articles, presentation is the procedure whereby the presenting bank makes the documents available to the drawee as instructed.
- b The collection instruction should state the exact period of time within which any action is to be taken by the drawee. Expressions such as "first", "prompt", "immediate", and the like should not be used in connection with presentation or with reference to any period of time within which documents have to be taken up or for any other action that is to be taken by the drawee. If such terms are used banks will disregard them.
- c Documents are to be presented to the drawee in the form in which they are received, except that banks are authorized to affix any necessary stamps, at the expense of the party from whom they received the collection unless otherwise instructed, and to make any necessary endorsements or place any rubber stamps or other identifying marks or symbols customary to or required for the collection operation.
- d For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise the bank nominated by the principal as the collecting bank. In the absence of such nomination, the remitting bank will utilize any bank of its own, or another bank's choice in the country of payment or acceptance or in the country where other terms and conditions have to be complied with.

- e The documents and collection instruction may be sent directly by the remitting bank to the collecting bank or through another bank as intermediary.
- f If the remitting bank does not nominate a specific presenting bank, the collecting bank may utilize a presenting bank of its choice.

Article 6 Sight/Acceptance

In the case of documents payable at sight the presenting bank must make presentation for payment without delay. In the case of documents payable at a tenor other than sight the presenting bank must, where acceptance is called for, make presentation for acceptance without delay, and where payment is called for, make presentation for payment not later than the appropriate maturity date.

Article 7 Release of Commercial Documents

Documents Against Acceptance (D/A)
vs.

Documents Against Payment (D/P)

- a Collections should not contain bills of exchange payable at a future date with instructions that commercial documents are to be delivered against payment.
- b If a collection contains a bill of exchange payable at a future date, the collection instruction should state whether the commercial documents are to be released to the drawee against

acceptance (D/A) or against payment (D/P).

In the absence of such statement commercial documents will be released only against payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

- c If a collection contains a bill of exchange payable at a future date and the collection instruction indicates that commercial documents are to be released against payment, documents will be released only against such payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

Article 8 Creation of Documents

Where the remitting bank instructs that either the collecting bank or the drawee is to create documents (bills of exchange, promissory notes, trust receipts, letters of undertaking or other documents) that were not included in the collection, the form and wording of such documents shall be provided by the remitting bank, otherwise the collecting bank shall not be liable or responsible for the form and wording of any such document provided by the collecting bank and/or the drawee.

D LIABILITIES AND RESPONSIBILITIES

Article 9 Good Faith and Reasonable Care

Banks will act in good faith and exercise reasonable care.

Article 10 Documents vs. Goods/Services/ Performances

- a Goods should not be dispatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank.

Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.

- b Banks have no obligation to take any action in respect of the goods to which

a documentary collection relates, including storage and insurance of the goods even when specific instructions are given to do so. Banks will only take such action if, when, and to the extent that they agree to do so in each case. Notwithstanding the provisions of Sub-Article 1 c this rule applies even in the absence of any specific advice to this effect by the collecting bank.

- c Nevertheless, in the case that banks take action for the protection of the goods, whether instructed or not, they assume no liability or responsibility with regard to the fate and/or condition of the goods and/or for any acts and/or omissions on the part of any third parties entrusted with the custody and/or protection of the goods. However, the collecting bank must advise without delay the bank from which the collection instruction was received of any such action taken.
- d Any charge and/or expenses incurred by banks in connection with any action taken to protect the goods will be for the account of the party from whom they received the collection.

- e 1. Notwithstanding the provisions of Sub-Article 10 a, where the goods are consigned to or to the order of the collecting bank and the drawee has honoured the collection by payment, acceptance or other terms and conditions, and the collecting bank arranges for the release of the goods, the remitting bank shall be deemed to have authorised the collecting bank to do so.
- 2. Where a collecting bank on the instructions of the remitting bank or in terms of Sub-Article 10 e (1) above arranges for the release of the goods, the remitting banks shall indemnify such collecting bank for all damages and expenses incurred.
- b If the documents do not appear to be listed, the remitting bank shall be precluded from disputing the type and number of documents received by the collecting bank.
- c Subject to Sub-Article 5 c and Sub-Article 12 a and 12 b above, banks will present documents as received without further examination.

Article 11

Disclaimer For Acts of an Instructed Party

- a Banks utilising the services of another bank or other banks for the purpose of giving effect to the instructions of the principal, do so for the account and at the risk of such principal.
- b Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).
- c A party instructing another party to perform services shall be bound by and liable to indemnify the instructed party against all obligations and responsibilities imposed by foreign laws and usages.

Article 12

Disclaimer on Documents Received

- a Banks must determine that the documents received appear to be as listed in the collection instruction and

must advise by telecommunication or, if that is not possible, by other expeditious means, without delay, the party from whom the collection instruction was received of any documents missing, or found to be other than listed.

Banks have no further obligation in this respect.

- b If the documents do not appear to be listed, the remitting bank shall be precluded from disputing the type and number of documents received by the collecting bank.
- c Subject to Sub-Article 5 c and Sub-Article 12 a and 12 b above, banks will present documents as received without further examination.

Article 13

Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular condition stipulated in the document(s) or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.

Article 14

Disclaimer on Delays, Loss in Transit and Translation

- a Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or

document(s), or for delay, mutilation or other error(s) arising in transmission of any telecommunication or for error(s) in translation and or interpretation of technical terms.

- b Banks will not be liable or responsible for any delays resulting from the need to obtain clarification of any instructions received.

Article 15 Force Majeure

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.

E PAYMENT

Article 16 Payment Without Delay

- a Amounts collected (less charges and/or disbursements and/or expenses where applicable) must be made available without delay to the party from whom the collection instruction was received in accordance with the terms and conditions of the collection instruction.
- b Notwithstanding the provisions of Sub- Article 1 c and unless otherwise agreed, the collecting bank will effect payment of the amount collected in favour of the remitting bank only.

of payment (foreign currency), the presenting bank must, unless otherwise instructed in the collection instruction, release the documents to the drawee against payment in the designated foreign currency only if such foreign currency can immediately be remitted in accordance with the instructions given in the collection instruction.

Article 19 Partial Payments

- a In respect of clean collections, partial payments may be accepted if and to the extent to which and on the conditions on which partial payments are authorised by the law in force in the place of payment. The financial document(s) will be released to the drawee only when full payment thereof has been received.
- b In respect of documentary collections, partial payments will only be accepted if specifically authorised in the collection instruction. However, unless otherwise instructed, the presenting bank will release the documents to the drawee only after full payment has been received, and the presenting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.
- c In all cases partial payments will be accepted only subject to compliance with the provisions of either Article 17

Article 17 Payment in Local Currency

In the case of documents payable in the currency of the country of payment (local currency), the presenting bank must, unless otherwise instructed in the collection instruction, release the documents to the drawee against payment in local currency only if such currency is immediately available for disposal in the manner specified in the collection instruction.

Article 18 Payment in Foreign Currency

In the case of documents payable in a currency other than that of the country

or Article 18 as appropriate.

Partial payment, if accepted, will be

dealt with in accordance with the provisions of Article 16.

F INTEREST, CHARGES AND EXPENSES

Article 20 Interest

- a If the collection instruction specifies that interest is to be collected and the drawee refuses to pay such interest, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting such interest, unless Sub-Article 20 c applies.
- b Where such interest is to be collected, the collection instruction must specify the rate of interest, interest period and basis of calculation.

- c Where the collection instruction expressly states that interest may not be waived and the drawee refuses to pay such interest the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of documents(s). When payment of interest has been refused, the presenting bank must inform by telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.

Whenever collection charges and/or expenses are so waived they will be for the account of the party from whom the collection was received and may be deducted from the proceeds.

- b Where the collection instruction expressly states that charges and/or expenses may not be waived and drawee refuses to pay such charges and/or expenses, the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of the documents(s). When payment of collection charges and/or expenses has been refused the presenting bank must inform by telecommunication, or, if that is not possible, by other expeditious means without delay the bank from whom the collection instruction was received.

- c In all cases where in the express terms of a collection instruction or under these Rules, disbursements and/or expenses and/or collection charges are to be borne by the principal, the collecting bank(s) shall be entitled to recover promptly outlays in respect of disbursements, expenses and charges from the bank from which the collection instruction was received, and the remitting bank shall be entitled to recover promptly from the principal any amount so paid out by it, together with its own disbursements, expenses and charges, regardless of the fate of the collection.

- d Banks reserve the right to demand payment of charges and/or expenses in advance from the party from whom the collection instruction was received, to cover costs in attempting to carry out any instructions, and pending receipt of such payment, also reserves the right not to carry out such instructions.

Article 21 Charges and Expenses

- a If the collection instruction specifies that collection charges and/or expenses are to be for account of the drawee and the drawee refuses to pay them, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting charges and/or expenses, unless Sub-Article 21 b applies.

G OTHER PROVISIONS

Article 22 Acceptance

The presenting bank is responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct, but is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.

Article 23 Promissory Notes and Other Instruments

The presenting bank is not responsible for the genuineness of any signature or for the authority of any signatory to sign a promissory note, receipt, or other instruments.

Article 24 Protest

The collection instruction should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-payment or non-acceptance.

In the absence of such specific instructions, the banks concerned with the collection have no obligation to have the documents(s) protested (or subjected to other legal process in lieu thereof) for non-payment or non-acceptance.

Any charges and/or expenses incurred by banks in connection with such protest, or other legal process, will be for the account of the party from whom the collection instruction was received.

Article 25 Case-of-Need

If the principal nominates a

representative to act as case-of-need in the event of non-payment and/or non-acceptance the collection instruction should clearly and fully indicate the powers of such case-of-need. In the absence of such indication banks will not accept any instructions from the case-of-need.

Article 26 Advices

Collecting banks are to advise fate in accordance with the following rules:

- a Form of Advice
 - All advices or information from the collecting bank to the bank from which the collection instruction was received, must bear appropriate details including in all cases, the latter bank's reference as stated in the collection instruction.
- b Method of Advice
 - It shall be the responsibility of the remitting bank to instruct the collecting bank regarding the method by which the advices detailed in c (1.), c (2.) and c (3.) are to be given. In the absence of such instructions, the collecting bank will send the relative advices by the method of its choice at the expense of the bank from which the collection instruction was received.
- c 1. Advice of Payment
 - The collecting bank must send without delay advice of payment to the bank from which the collection instruction was received, detailing the amount or amounts collected, charges and/or disbursements and/or expenses deducted, where appropriate, and method of disposal of the funds.
- 2. Advice of Acceptance
 - The collecting bank must send without delay advice or acceptance to the bank from which

- the collection instruction was received.
- 3 Advice of Non-Payment and/or Non-Acceptance
The presenting bank should endeavour to ascertain the reasons for non-payment and/or non acceptance and advise accordingly, without delay, the bank from which it received the collection instruction.
The presenting bank must send without delay advice of non-payment and/or advice of non-acceptance to the bank from which it received the collection instruction.
- On receipt of such advice the remitting bank must give appropriate instructions as to the further handling of the documents. If such instructions are not received by the presenting bank within 60 days after its advice of non-payment and/or non-acceptance, the documents may be returned to the bank from which the collection instruction was received without any further responsibility on the part of the presenting bank.



eURC 1.0

ICC Uniform Rules for Collections

Supplement for Electronic Presentation

INTRODUCTION

On 6th June 2017, the ICC Banking Commission provided a press release announcing the launch of a Working Group to anticipate and accompany the digitalisation of trade finance. One core activity was to evaluate existing ICC rules in order to assess e-compatibility and ensure they are ‘e-compliant’, i.e. enabling banks to accept data vs. documents. It was identified that this was required in order to accommodate evolving practices and technologies.

A Drafting Group was established, co-chaired by David Meynell and Gary Collyer, with the initial aim of reviewing the e-compatibility of existing ICC rules. As a result of this review, a mandate was received from the ICC Banking Commission Executive Committee to:

- Update the existing version 1.1 of eUCP in order to ensure continued digital compatibility.
- Draft eURC in order to ensure continued digital compatibility for presentation of electronic records under Collections.

The eRules have been intentionally developed with version numbers in order that they can be updated regularly without impacting upon other existing ICC rules, thereby reducing the time required to develop any potential identified revision.

The initial drafts of eUCP version 2.0 and eURC version 1.0 were sent to ICC National Committees (NC’s) on 25th September 2017, with a deadline of 27th November 2017 for response. At the request of a number of ICC NC’s, based upon a communications issue, it was decided to extend the deadline to 28th February 2018. Pursuant to feedback on the original drafts, work commenced on a 2nd draft, which was subsequently distributed to ICC NC’s on 20th March 2018, with a deadline of 25th May 2018 for response. A 3rd draft of the rules was sent out on 20th July 2018, providing a deadline of 28th September 2018 for response. The 4th of the rules was disseminated on 6th November 2018, indicating a deadline of 4th January 2019 for feedback. At that stage, and following a thorough review of all comments received to date, it was considered to be an appropriate time to draft a final version of the rules.

These were consequently sent to ICC NC’s on 31st January 2019, specifying that the deadline for voting would be 22nd March 2019. It is worth commenting that this timeframe was only 16 months after distribution of the original drafts and included an enforced 3-month extension, as mentioned above. During the course of the first four drafts, almost 2,000 comments were received from ICC NC’s. For the purposes of transparency and clarity, every comment received an individual response. As a valuable reference source, the ‘ICC Guide to the eUCP’ (ICC Publication No. 639) and the work of the authors, Professor James E. Byrne and Dan Taylor, has been gratefully acknowledged.

For the first time in the history of the ICC Banking Commission, a new approach was introduced for the ICC rules voting process, via the Simply Voting platform. This initiative provided an online voting system to be used for the approval of the revised eUCP and new eURC rules.

Each NC was requested to choose one designated representative with the right to cast the vote on its behalf and the platform was opened for voting from 11th until 22nd March 2019. NC's were invited to vote on the revised eUCP and new eURC separately by choosing 'YES' or 'NO' to the following options:

- Does your National Committee approve the Uniform Customs and Practice for Documentary Credits (UCP 600) Supplement for Electronic Presentation (eUCP) Version 2.0?
- Does your National Committee approve the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (eURC) Version 1.0?

Voting result:

- Votes received from 49 NC's, plus one further NC vote after the voting deadline had passed.
- The eUCP received 100% approval with two countries abstaining.
- The eURC received 97.5% approval (on a weighted basis) with one country voting 'no' and two countries abstaining.
- Based upon the above, both sets of rules will come into force from 1st July 2019.

It was recognised in the introduction to the initial ICC Guide to the eUCP (ICC Publication no. 639) that the likely end of the evolution to electronic presentations is automated compliance checking systems in the documentary credit field. This is all too apparent when looking at evolving technology and digital trade finance, with the advent of the Internet of Things, Distributed Ledger Technology, Smart Contracts, Artificial Intelligence, and Machine Learning.

The content of the eRules will be continually monitored in order to ensure applicability. The support of trade practitioners will be an essential element moving forward. These rules provide many benefits in advancing the documentary credit in a digital environment and ensuring the continued relevance of this valuable instrument in mitigating trade risk.

Existing ICC rules, such as UCP 600 & URC 522, whilst being invaluable in a paper world, provide limited protection when applied to electronic transactions. It is inevitable that traditional trade instruments will, over time, inexorably move towards a mixed ecosystem of paper and digital, and, ultimately, to electronic records alone.

In this respect, it is important the market recognise that the new rules provide many benefits in advancing traditional trade solutions in a digital environment:

- Safeguarding applicability and guaranteeing relevance in a constantly evolving digital trade world
- Extending the mitigation of risk from a paper environment to the electronic milieu
- Explicitly and unambiguously supporting the usage of electronic records
- Conformity and congruence as opposed to divergent local, national and regional practice
- Shared understanding of terminologies and objectives
- Confidence in a set of independent and trusted contractual rules
- Uniformity, consistency and standardisation in customs and practice
- Enabling and supporting trade finance between regions and countries regardless of underlying economic and judicial structures

Development of the eRules would have been impossible without the ongoing support of the ICC Banking Commission Secretariat and individual ICC National Committees. Thank you to all involved, with specific acknowledgement to David Bischof, Olivier Paul, and Laura Straube. Particular thanks are given to the eRules Drafting Group, details of which are provided below. I also extend my gratitude to my co-chair, Gary Collyer. Without his input, this work would not have proved possible. Last, but far from least, a reminder that this publication would not be in existence were it not for the groundbreaking initial efforts of Jim Byrne and Dan Taylor.

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May 2019

PRELIMINARY CONSIDERATIONS

The mode of presentation to the remitting bank, by or on behalf of the principal, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.

The mode of presentation to the drawee, by the collecting or presenting bank, of electronic records alone or in combination with paper documents, is outside the scope of the eURC.

Where not defined or modified in the eURC, definitions given in URC 522 will continue to apply.

Article e1: Application of the eURC

- a. A collection instruction should only indicate that it is subject to the Uniform Rules for Collections (URC 522) Supplement for Electronic Presentation (“eURC”) where a prior arrangement exists between the remitting bank and the collecting or presenting bank, for the presentation of electronic records alone or in combination with paper documents.
- b. Such prior arrangement should specify:
 - i. the format in which each electronic record will be issued and presented; and
 - ii. the place for presentation, to the collecting or presenting bank.

Article e2 Scope of the eURC

- a. The eURC supplements the Uniform Rules for Collections (1995 Revision, ICC Publication No. 522) (“URC”) in order to accommodate presentation of electronic records alone or in combination with paper documents.
- b. The eURC shall apply where a collection instruction indicates that it is subject to the eURC (“eURC collection instruction”).
- c. This version is Version 1.0. An eURC collection instruction must indicate the applicable version of the eURC. If not indicated, it is subject to the version in effect on the date the eURC collection instruction is issued or, if made subject to the eURC by an amendment, the date of that amendment.

Article e3: Relationship of the eURC to the URC

- a. An eURC collection instruction is also subject to the URC without express incorporation of the URC.
- b. Where the eURC applies, its provisions shall prevail to the extent that they would produce a result different from the application of the URC.
- c. Where an eURC collection instruction is issued but the presentation consists of only paper documents, the URC alone shall apply.

Article e4: Definitions

- a. Where the following terms are used in the URC, for the purpose of applying the URC to an electronic record presented under an eURC collection instruction, the term:
 - i. “advices” includes electronic records originating from a data processing system;
 - ii. “collection instruction” shall include an instruction originating from a data processing system;
 - iii. “document” shall include an electronic record;
 - iv. “place for presentation” of an electronic record means an electronic address of a data processing system;
 - v. “sign” and the like shall include an electronic signature;
 - vi. “superimposed” means data content whose supplementary character is apparent in an electronic record.

- b. The following terms used in the eURC shall have the following meaning:
- i. “data corruption” means any distortion or loss of data that renders the electronic record, as it was presented, unreadable in whole or in part;
 - ii. “data processing system” means a computerised or an electronic or any other automated means used to process and manipulate data, initiate an action or respond to data messages or performances in whole or in part;
 - iii. “electronic record” means data created, generated, sent, communicated, received or stored by electronic means including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not, that is:
 - a. capable of being authenticated as to the apparent identity of a sender and the apparent source of the data contained in it, and as to whether it has remained complete and unaltered, and
 - b. capable of being viewed to ensure that it represents the type and/or description of the electronic record listed on the eURC collection instruction;
 - iii. “electronic signature” means a data process attached to or logically associated with an electronic record and executed or adopted by a person in order to identify that person and to indicate that person’s authentication of the electronic record;
 - iv. “format” means the data organisation in which the electronic record is expressed or to which it refers;
 - v. “paper document” means a document in a paper form;
 - vi. “presenter” means the principal or a party that makes a presentation on behalf of the principal;
 - vii. “received” means when an electronic record enters a data processing system, at the agreed place for presentation, in a format capable of being accepted by that system. Any acknowledgement of receipt generated by that system is not to be construed that the electronic record has been authenticated and/or viewed under the eURC collection instruction;
 - viii. “re-present” means to substitute or replace an electronic record already presented.

Article e5: Electronic Records and Paper Documents v. Goods, Services or Performance

Banks do not deal with the goods, services or performance to which an electronic record or paper document may relate.

Article e6: Format

- a. An eURC collection instruction must indicate the format of each electronic record.
- b. i. The format of each electronic record must be as previously arranged between the remitting bank and the collecting or presenting bank, as required by sub-article e1 (b).
ii. An electronic record received in a format that has not previously been agreed may be treated as not received, and the collecting or presenting bank must inform the remitting bank accordingly.

Article e7: Presentation

- a. When electronic records alone are presented under an eURC collection instruction, these must be accessible to a collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction.

- b. When electronic records, in combination with paper documents, are presented by the remitting bank under an eURC collection instruction, all the electronic records referred to in the eURC collection instruction must be accessible to the collecting or presenting bank at the time the collecting or presenting bank receives the eURC collection instruction enclosing the paper documents.
- c. An electronic record that cannot be authenticated is deemed not to have been presented.
- d.
 - i. The remitting bank is responsible for ensuring that each presentation of an electronic record, and any presentation of paper documents, identifies the eURC collection instruction under which presentation is being made. For electronic records this may be by specific reference thereto in the electronic record itself, or in metadata attached or superimposed thereto, or by identification in the eURC collection instruction itself.
 - ii. Any electronic record or paper document not so identified may be treated as not received.

Article e8: Advice of Non-Payment or Non-Acceptance

If a collecting or presenting bank receives an eURC collection instruction and issues an advice of non-payment and/or non-acceptance to the bank from which it received the collection instruction and does not receive instructions from such bank for the disposition of the electronic records within 60 calendar days from the date the advice of non-payment and/or non-acceptance is given, the collecting or presenting bank may dispose of the electronic records in any manner deemed appropriate without any responsibility.

Article e9: Determination of a Due Date

When settlement under an eURC

collection instruction is due a number of days after the date of shipment or dispatch of the goods, or a number of days after any other date appearing in an electronic record, an eURC collection instruction must indicate the due date.

Article e10: Release of Electronic Records

- a. An eURC collection instruction must indicate the manner in which electronic records may be accessed by the drawee.
- b. When electronic records are presented in combination with paper documents, and one of those paper documents is a bill of exchange that is to be accepted by the drawee, the electronic records and paper documents are to be released against acceptance of the bill of exchange (D/A) and the eURC collection instruction must indicate the manner in which those electronic records may be accessed by the drawee.

Article e11: Data Corruption of an Electronic Record

- a. If an electronic record that has been received by a bank appears to have been corrupted, the remitting bank may inform the presenter, or the collecting or presenting bank may inform the remitting bank, and may request it to re-present the electronic record.
- b. If a collecting or presenting bank makes such a request and the presenter or remitting bank does not re-present the electronic record within 30 calendar days, the collecting or presenting bank may treat the electronic record as not presented and may dispose of the electronic records in any manner deemed appropriate without any responsibility.

Article e12: Additional Disclaimer of Liability for Presentation of Electronic Records under eURC

- a. By satisfying itself as to the apparent authenticity of an electronic record, a

bank assumes no liability for the identity of the sender, source of the information, or its complete and unaltered character other than that which is apparent in the electronic record received by the use of a data processing system for the receipt, authentication, and identification of electronic records.

- b. A bank assumes no liability or responsibility for the consequences arising out of the unavailability of a data processing system other than its own.

Article e13: Force Majeure

A bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.

A. General Provisions and Definitions

Article 1: Application of URC 522

- a. The Uniform Rules for Collections, 1995 Revision, ICC Publication No. 522, shall apply to all collections as defined in Article 2 where such rules are incorporated into the text of the «collection instruction» referred to in Article 4 and are binding on all parties thereto unless otherwise expressly agreed or contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from.
- b. Banks shall have no obligation to handle either a collection or any collection instruction or subsequent related instructions.
- c. If a bank elects, for any reason, not to handle a collection or any related instructions received by it, it must advise the party from whom it received the collection or the instructions by telecommunication or, if that is not possible, by other expeditious means, without delay.

Article 2: Definition of Collection

For the purposes of these Articles:

- a. «Collection» means the handling by banks of documents as defined in sub-Article 2(b), in accordance with instructions received, in order to:
- obtain payment and/or acceptance, or

- deliver documents against payment and/or against acceptance, or
 - deliver documents on other terms and conditions.
- b. «Documents» means financial documents and/or commercial documents:
- «Financial documents» means bills of exchange, promissory notes, cheques, or other similar instruments used for obtaining the payment of money;
 - «Commercial documents» means invoices, transport documents, documents of title or other similar documents, or any other documents whatsoever, not being financial documents.
- c. «Clean collection» means collection of financial documents not accompanied by commercial documents.
- d. «Documentary collection» means collection of:
- Financial documents accompanied by commercial documents;
 - Commercial documents not accompanied by financial documents.

Article 3: Parties to a Collection

- a. For the purposes of these Articles the «parties thereto» are:
- the «principal» who is the party

- entrusting the handling of a collection to a bank;
 - ii. the «remitting bank» which is the bank to which the principal has entrusted the handling of a collection;
 - iii. the «collecting bank» which is any bank, other than the remitting bank, involved in processing the collection;
 - iv. the «presenting bank» which is the collecting bank making presentation to the drawee.
- b. The «drawee» is the one to whom presentation is to be made in accordance with the collection instruction.

B. Form and Structure of Collections

Article 4: Collection Instruction

- [sic]i. All documents sent for collection must be accompanied by a collection instruction indicating that the collection is subject to URC 522 and giving complete and precise instructions. Banks are only permitted to act upon the instructions given in such collection instruction, and in accordance with these Rules.
- ii. Banks will not examine documents in order to obtain instructions.
- iii. Unless otherwise authorised in the collection instruction, banks will disregard any instructions from any party/bank other than the party/bank from whom they received the collection.

c.[sic]A collection instruction should contain the following items of information, as appropriate.

- i. Details of the bank from which the collection was received including full name, postal and SWIFT addresses, telex, telephone, facsimile numbers and reference.
- ii. Details of the principal including full name, postal address, and if applicable telex, telephone and facsimile numbers.
- iii. Details of the drawee including full name, postal address, or the domicile at which presentation is to be made and if applicable telex, telephone and facsimile numbers.
- iv. Details of the presenting bank, if any, including full name, postal address, and if applicable telex,

- telephone and facsimile numbers.
- v. Amount(s) and currency(ies) to be collected.
- vi. List of documents enclosed and the numerical count of each document.
- vii. a. Terms and conditions upon which payment and/or acceptance is to be obtained.
- b. Terms of delivery of documents against:
 - 1. payment and/or acceptance
 - 2. ther [sic] terms and conditions

It is the responsibility of the party preparing the collection instruction to ensure that the terms for the delivery of documents are clearly and unambiguously stated, otherwise banks will not be responsible for any consequences arising therefrom.

- viii. Charges to be collected, indicating whether they may be waived or not.
- ix. Interest to be collected, if applicable, indicating whether it may be waived or not, including:
 - a. rate of interest
 - b. interest period
 - c. basis of calculation (for example 360 or 365 days in a year) as applicable.
- x. Method of payment and form of payment advice.
- xi. Instructions in case of non-payment, non-acceptance and/or non-compliance with other instructions.
- c. i. Collection instructions should bear the complete address of the drawee or of the domicile at which the

presentation is to be made. If the address is incomplete or incorrect, the collecting bank may, without any liability and responsibility on its part, endeavour to ascertain the proper address.

ii. The collecting bank will not be liable or responsible for any ensuing delay as a result of an incomplete/incorrect address being provided.

C. Form of Presentation

Article 5: Presentation

- a. For the purposes of these Articles, presentation is the procedure whereby the presenting bank makes the documents available to the drawee as instructed.
- b. The collection instruction should state the exact period of time within which any action is to be taken by the drawee. Expressions such as «first», «prompt», «immediate», and the like should not be used in connection with presentation or with reference to any period of time within which documents have to be taken up or for any other action that is to be taken by the drawee. If such terms are used banks will disregard them.
- c. Documents are to be presented to the drawee in the form in which they are received, except that banks are authorised to affix any necessary stamps, at the expense of the party from whom they received the collection unless otherwise instructed, and to make any necessary endorsements or place any rubber stamps or other identifying marks or symbols customary to or required for the collection operation.
- d. For the purpose of giving effect to the instructions of the principal, the remitting bank will utilise the bank nominated by the principal as the collecting bank. In the absence of such nomination, the remitting bank will utilise any bank of its own, or another bank's choice in the country of payment or acceptance or in the country where other terms and conditions have to be complied with.
- e. The documents and collection instruction may be sent directly by the remitting bank to the collecting bank or

through another bank as intermediary.

- f. If the remitting bank does not nominate a specific presenting bank, the collecting bank may utilise a presenting bank of its choice.

Article 6: Sight/Acceptance

In the case of documents payable at sight the presenting bank must make presentation for payment without delay.

In the case of documents payable at a tenor other than sight the presenting bank must, where acceptance is called for, make presentation for acceptance without delay, and where payment is called for, make presentation for payment not later than the appropriate maturity date.

Article 7: Release of Commercial Documents

Documents Against Acceptance (D/A) vs. Documents Against Payment (D/P)

- a. Collections should not contain bills of exchange payable at a future date with instructions that commercial documents are to be delivered against payment.
- b. If a collection contains a bill of exchange payable at a future date, the collection instruction should state whether the commercial documents are to be released to the drawee against acceptance (D/A) or against payment (D/P).
In the absence of such statement commercial documents will be released only against payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.
- c. If a collection contains a bill of

exchange payable at a future date and the collection instruction indicates that commercial documents are to be released against payment, documents will be released only against such payment and the collecting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.

Article 8: Creation of Documents

Where the remitting bank instructs that either the collecting bank or the drawee is to create documents (bills of exchange, promissory notes, trust receipts, letters of undertaking or other documents) that were not included in the collection, the form and wording of such documents shall be provided by the remitting bank, otherwise the collecting bank shall not be liable or responsible for the form and wording of any such document provided by the collecting bank and/or the drawee.

D. Liabilities and Responsibilities

Article 9: Good Faith and Reasonable Care

Banks will act in good faith and exercise reasonable care.

Article 10: Documents vs. Goods/ Services/Performances

- a. Goods should not be despatched directly to the address of a bank or consigned to or to the order of a bank without prior agreement on the part of that bank.

Nevertheless, in the event that goods are despatched directly to the address of a bank or consigned to or to the order of a bank for release to a drawee against payment or acceptance or upon other terms and conditions without prior agreement on the part of that bank, such bank shall have no obligation to take delivery of the goods, which remain at the risk and responsibility of the party despatching the goods.

- b. Banks have no obligation to take any action in respect of the goods to which a documentary collection relates, including storage and insurance of the goods even when specific instructions are given to do so. Banks will only take such action if, when, and to the extent that they agree to do so in each case. Notwithstanding the provisions of sub- Article 1(c), this rule applies even

in the absence of any specific advice to this effect by the collecting bank.

- c. Nevertheless, in the case that banks take action for the protection of the goods, whether instructed or not, they assume no liability or responsibility with regard to the fate and/or condition of the goods and/or for any acts and/or omissions on the part of any third parties entrusted with the custody and/or protection of the goods. However, the collecting bank must advise without delay the bank from which the collection instruction was received of any such action taken.
- d. Any charges and/or expenses incurred by banks in connection with any action taken to protect the goods will be for the account of the party from whom they received the collection.
- e. i. Notwithstanding the provisions of sub-Article 10(a), where the goods are consigned to or to the order of the collecting bank and the drawee has honoured the collection by payment, acceptance or other terms and conditions, and the collecting bank arranges for the release of the goods, the remitting bank shall be deemed to have authorised the collecting bank to do so.
- ii. Where a collecting bank on the instructions of the remitting bank or in terms of sub- Article 10(e)

i, arranges for the release of the goods, the remitting bank shall indemnify such collecting bank for all damages and expenses incurred.

Article 11: Disclaimer For Acts of an Instructed Party

- a. Banks utilising the services of another bank or other banks for the purpose of giving effect to the instructions of the principal, do so for the account and at the risk of such principal.
- b. Banks assume no liability or responsibility should the instructions they transmit not be carried out, even if they have themselves taken the initiative in the choice of such other bank(s).
- c. A party instructing another party to perform services shall be bound by and liable to indemnify the instructed party against all obligations and responsibilities imposed by foreign laws and usages.

Article 12: Disclaimer on Documents Received

- a. Banks must determine that the documents received appear to be as listed in the collection instruction and must advise by telecommunication or, if that is not possible, by other expeditious means, without delay, the party from whom the collection instruction was received of any documents missing, or found to be other than listed.
Banks have no further obligation in this respect.
- b. If the documents do not appear to be listed, the remitting bank shall be precluded from disputing the type and number of documents received by the collecting bank.
- c. Subject to sub-Article 5(c) and sub-Articles 12(a) and 12(b) above, banks

will present documents as received without further examination.

Article 13: Disclaimer on Effectiveness of Documents

Banks assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s), or for the general and/or particular conditions stipulated in the document(s) or superimposed thereon; nor do they assume any liability or responsibility for the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods represented by any document(s), or for the good faith or acts and/or omissions, solvency, performance or standing of the consignors, the carriers, the forwarders, the consignees or the insurers of the goods, or any other person whomsoever.

Article 14: Disclaimer on Delays, Loss in Transit and Translation

- a. Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in transmission of any telecommunication or for error(s) in translation and/or interpretation of technical terms.
- b. Banks will not be liable or responsible for any delays resulting from the need to obtain clarification of any instructions received.

Article 15: Force Majeure

Banks assume no liability or responsibility for consequences arising out of the interruption of their business by Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.

E. Payment

Article 16: Payment Without Delay

a. Amounts collected (less charges and/or disbursements and/or expenses where applicable) must be made available without delay to the party from whom the collection instruction was received in accordance with the terms and conditions of the collection instruction.

b. Notwithstanding the provisions of sub-Article 1(c) and unless otherwise agreed, the collecting bank will effect payment of the amount collected in favour of the remitting bank only.

foreign currency only if such foreign currency can immediately be remitted in accordance with the instructions given in the collection instruction.

Article 19: Partial Payments

- a. In respect of clean collections, partial payments may be accepted if and to the extent to which and on the conditions on which partial payments are authorised by the law in force in the place of payment. The financial document(s) will be released to the drawee only when full payment thereof has been received.
- b. In respect of documentary collections, partial payments will only be accepted if specifically authorised in the collection instruction. However, unless otherwise instructed, the presenting bank will release the documents to the drawee only after full payment has been received, and the presenting bank will not be responsible for any consequences arising out of any delay in the delivery of documents.
- c. In all cases partial payments will be accepted only subject to compliance with the provisions of either Article 17 or Article 18 as appropriate. Partial payment, if accepted, will be dealt with in accordance with the provisions of Article 16.

F. Interest, Charges and Expenses

Article 20: Interest

- a. If the collection instruction specifies that interest is to be collected and the drawee refuses to pay such interest, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting such interest, unless sub-Article 20(c) applies.
- b. Where such interest is to be collected, the collection instruction must specify

the rate of interest, interest period and basis of calculation.

- c. Where the collection instruction expressly states that interest may not be waived and the drawee refuses to pay such interest the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of document(s). When payment of interest has been refused, the presenting bank must inform by

telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.

Article 21: Charges and Expenses

- a. If the collection instruction specifies that collection charges and/or expenses are to be for account of the drawee and the drawee refuses to pay them, the presenting bank may deliver the document(s) against payment or acceptance or on other terms and conditions as the case may be, without collecting charges and/or expenses, unless sub- Article 21(b) applies. Whenever collection charges and/or expenses are so waived they will be for the account of the party from whom the collection was received and may be deducted from the proceeds.
- b. Where the collection instruction expressly states that charges and/or expenses may not be waived and the drawee refuses to pay such charges and/or expenses, the presenting bank will not deliver documents and will not be responsible for any consequences arising out of any delay in the delivery of the document(s). When payment of collection charges and/or expenses has
- c. In all cases where in the express terms of a collection instruction or under these Rules, disbursements and/or expenses and/or collection charges are to be borne by the principal, the collecting bank(s) shall be entitled to recover promptly outlays in respect of disbursements, expenses and charges from the bank from which the collection instruction was received, and the remitting bank shall be entitled to recover promptly from the principal any amount so paid out by it, together with its own disbursements, expenses and charges, regardless of the fate of the collection.
- d. Banks reserve the right to demand payment of charges and/or expenses in advance from the party from whom the collection instruction was received, to cover costs in attempting to carry out any instructions, and pending receipt of such payment also reserve the right not to carry out such instructions.

G. Other Provisions

Article 22: Acceptance

The presenting bank is responsible for seeing that the form of the acceptance of a bill of exchange appears to be complete and correct, but is not responsible for the genuineness of any signature or for the authority of any signatory to sign the acceptance.

Article 23: Promissory Notes and Other Instruments

The presenting bank is not responsible for the genuineness of any signature or for the authority of any signatory to sign a promissory note, receipt, or other instruments.

been refused the presenting bank must inform by telecommunication or, if that is not possible, by other expeditious means without delay the bank from which the collection instruction was received.

- Article 24: Protest**
The collection instruction should give specific instructions regarding protest (or other legal process in lieu thereof), in the event of non-payment or non- acceptance.
In the absence of such specific instructions, the banks concerned with the collection have no obligation to have the document(s) protested (or subjected to other legal process in lieu thereof) for non-payment or non-acceptance.
Any charges and/or expenses incurred by banks in connection with such protest, or other legal process, will be for the account of

the party from whom the collection instruction was received.

Article 25: Case-of-Need

If the principal nominates a representative to act as case-of-need in the event of non-payment and/or non-acceptance the collection instruction should clearly and fully indicate the powers of such case-of-need. In the absence of such indication banks will not accept any instructions from the case-of-need.

Article 26: Advices

Collecting banks are to advise fate in accordance with the following rules:

a. Form of Advice

All advices or information from the collecting bank to the bank from which the collection instruction was received, must bear appropriate details including, in all cases, the latter bank's reference as stated in the collection instruction.

b. Method of Advice

It shall be the responsibility of the remitting bank to instruct the collecting bank regarding the method by which the advices detailed in (c)i, (c)ii and (c) iii are to be given. In the absence of such instructions, the collecting bank will send the relative advices by the method of its choice at the expense of the bank from which the collection instruction was received.

e.[sic]i. ADVICE OF PAYMENT

The collecting bank must send without delay advice of payment to the bank from which the collection instruction was received, detailing the amount or amounts collected,

charges and/or disbursements and/or expenses deducted, where appropriate, and method of disposal of the funds.

i. [sic]ADVICE OF ACCEPTANCE

The collecting bank must send without delay advice of acceptance to the bank from which the collection instruction was received.

i. [sic]ADVICE OF NON-PAYMENT AND/OR NON-ACCEPTANCE

The presenting bank should endeavour to ascertain the reasons for non-payment and/or non-acceptance and advise accordingly, without delay, the bank from which it received the collection instruction.

The presenting bank must send without delay advice of non-payment and/or advice of non-acceptance to the bank from which it received the collection instruction.

On receipt of such advice the remitting bank must give appropriate instructions as to the further handling of the documents. If such instructions are not received by the presenting bank within 60 days after its advice of non-payment and/or non-acceptance, the documents may be returned to the bank from which the collection instruction was received without any further responsibility on the part of the presenting bank.

ICC Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR 725)

Editor's Overview

The Uniform Rules for Bank-to-Bank Reimbursement under Documentary Credits is issued by the Committee on Banking Technology and Principles of the International Chamber of Commerce. It states standard international practice regarding bank-to-bank reimbursements of payments under letters of credit. The current version, was adopted in 2008 and is numbered ICC Publication No. 725. To a considerable extent, the rules were based on the BAFT International Financial Services Association (formerly the U.S. Council on International Banking) Guidelines originally issued in 1981 (and revised in 1990). The ICC issued the first version of its bank-to-bank reimbursements under Documentary Credits (URR) as ICC Publication No. 525. The official language is English.

The rules expand the basic provisions in UCP600 Article 13 (Bank-to-Bank Reimbursement Arrangements) and its predecessors, providing important default rules and, where incorporated, control over the UCP provisions.

Although URR725 Article 1 provides that the rules shall apply where they are incorporated into the reimbursement authorization, the rules generally state standard international reimbursement practice.

The URR represents a comprehensive collection of the rules relating to bank-to-bank reimbursements. It focuses on the reimbursement authorization by the issuer and also provides for a "reimbursement undertaking" by which a nominated reimbursing bank makes an irrevocable commitment to honor a reimbursement claim by a claiming bank that is named in the reimbursement undertaking.

The rules are contained in "articles" which are grouped into the following units: General Provisions and Definitions; Liabilities and Responsibilities; Form and Notification of Authorization, Amendments and Claims; and Miscellaneous Provisions. The articles can be varied by the terms of the reimbursement undertaking or a reimbursement amendment.

Since the Bank-to-Bank Reimbursement rules are designed for a specialized relationship, the rules must be interpreted in the context of the practice of international banks. Interpretations can be given by the Banking Commission. URR 525 was explained in a Commentary reflecting the opinions of the Working Party that drafted them and a Guide by Dan Taylor, its Chair. There is no similar publication for URR 725 as of 1 March 2022.

Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits (URR 725)

A. GENERAL PROVISIONS AND DEFINITIONS

ARTICLE 1

Application of URR

The *Uniform Rules for Bank-to-Bank Reimbursements under Documentary Credits* ("rules"), ICC Publication No. 725, shall apply to any bank-to-bank reimbursement when the text of the reimbursement authorization expressly indicates that it is subject to these rules. They are binding on all parties thereto, unless expressly modified or excluded by the reimbursement authorization. The issuing bank is responsible for indicating in the documentary credit ("credit") that reimbursement is subject to these rules.

In a bank-to-bank reimbursement subject to these rules, the reimbursing bank acts on the instructions and under the authority of the issuing bank.

These rules are not intended to override or change the provisions of the *Uniform Customs and Practice for Documentary Credits*.

ARTICLE 2

Definitions

For the purpose of these rules, the following terms shall have the meaning specified in this article and may be used in the singular or plural as appropriate:

- a. "Issuing bank" means the bank that has issued a credit and the reimbursement authorization under that credit.
- b. "Reimbursing bank" means the bank instructed or authorized to provide reimbursement pursuant

to a reimbursement authorization issued by the issuing bank.

c. "Reimbursement authorization" means an instruction or authorization, independent of the credit, issued by an issuing bank to a reimbursing bank to reimburse a claiming bank or, if so requested by the issuing bank, to accept and pay a time draft drawn on the reimbursing bank.

d. "Reimbursement amendment" means an advice from the issuing bank to a reimbursing bank stating changes to a reimbursement authorization.

e. "Claiming bank" means a bank that honours or negotiates a credit and presents a reimbursement claim to the reimbursing bank. "Claiming bank" includes a bank authorized to present a reimbursement claim to the reimbursing bank on behalf of the bank that honours or negotiates.

f. "Reimbursement claim" means a request for reimbursement from the claiming bank to the reimbursing bank.

g. "Reimbursement undertaking" means 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.

h. "Reimbursement undertaking"

amendment” means an advice from the reimbursing bank to the claiming bank named in the reimbursement authorization stating changes to a reimbursement undertaking.

- i. For the purpose of these rules, branches of a bank in different countries are considered to be separate banks.

ARTICLE 3 Reimbursement Authorizations Versus Credits

A reimbursement authorization is separate from the credit to which it refers, and a reimbursing bank is not concerned with or bound by the terms and conditions of the credit, even if any reference whatsoever to it is included in the reimbursement authorization.

B. LIABILITIES AND RESPONSIBILITIES

ARTICLE 4 Honour of a Reimbursement Claim

Except as provided by the terms of its reimbursement undertaking, a reimbursing bank is not obligated to honour a reimbursement claim.

ARTICLE 5 Responsibility of the Issuing Bank

The issuing bank is responsible for providing the information required in these rules in both the reimbursement authorization and the credit, and is responsible for any consequences resulting from non-compliance with this provision.

C. FORM AND NOTIFICATION OF AUTHORIZATIONS, AMENDMENTS AND CLAIMS

ARTICLE 6 Issuance and Receipt of a Reimbursement Authorization or Reimbursement Amendment

- a. All reimbursement authorizations and reimbursement amendments must be issued in the form of an authenticated teletransmission or a signed letter.

When a credit or amendment thereto which has an effect on the reimbursement authorization is issued by teletransmission, the issuing bank should advise its reimbursement authorization or reimbursement amendment to the reimbursing bank by authenticated teletransmission. The teletransmission will be deemed the operative reimbursement authorization or reimbursement amendment, and

any subsequent mail confirmation shall be disregarded.

- b. An issuing bank must not send to a reimbursing bank:
 - i. a copy of the credit or any part thereof, or a copy of an amendment to the credit in place of or in addition to the reimbursement authorization or reimbursement amendment. If such copies are received by the reimbursing bank, they shall be disregarded.
 - ii. multiple reimbursement authorizations under one teletransmission or letter, unless expressly agreed to by the reimbursing bank.
- c. An issuing bank shall not require a certificate of compliance with the terms and conditions of the credit in the reimbursement authorization.

- d. A reimbursement authorization must (in addition to the requirement of article 1 for incorporation of reference to these rules) state the following:
 - i. credit number;
 - ii. currency and amount;
 - iii. additional amounts payable and tolerance, if any;
 - iv. claiming bank or, in the case of a freely available credit, that claims can be made by any bank. In the absence of any such indication, the reimbursing bank is authorized to pay any claiming bank;
 - v. parties responsible for charges (claiming bank's and reimbursing bank's charges) in accordance with article 16 of these rules.
- e. If the reimbursing bank is requested to accept and pay a time draft, the reimbursement authorization must indicate the following, in addition to the information specified in (d) above:
 - i. tenor of draft to be drawn;
 - ii. drawer;
 - iii. drawee of draft, if other than the reimbursing bank;
 - iv. party responsible for acceptance and discount charges, if any.

A reimbursement amendment must state only the relative changes to the above and the credit number.

- f. Any requirement for:
 - i. pre-notification of a reimbursement claim to the issuing bank must be included in the credit and not in the reimbursement authorization.

A reimbursement amendment must state the relative changes to the above.

An issuing bank should not require a sight draft to be drawn on the reimbursing bank.

- ii. pre-debit notification to the issuing bank must be indicated in the credit.
- g. If the reimbursing bank is not prepared to act for any reason whatsoever under the reimbursement authorization or reimbursement amendment, it must so inform the issuing bank without delay.
- h. In addition to the provisions of articles 3 and 4, the reimbursing bank is not responsible for the consequences resulting from non-reimbursement or delay in reimbursement of reimbursement claims when any provision contained in this article is not followed by the issuing bank or claiming bank.

ARTICLE 7

Expiry of a Reimbursement Authorization

Except to the extent expressly agreed to by the reimbursing bank, the reimbursement authorization should not be subject to an expiry date or latest date for presentation of a claim, except as indicated in article 9.

A reimbursing bank will assume no responsibility for the expiry date of a credit and, if such date is provided in the reimbursement authorization, it will be disregarded.

The issuing bank must cancel its reimbursement authorization for any unutilized portion of the credit to which it refers, informing the reimbursing bank without delay.

ARTICLE 8

Amendment or Cancellation of a Reimbursement Authorization

Except where the issuing bank has authorized or requested the reimbursing bank to issue a reimbursement undertaking as provided in article 9, and the reimbursing bank has issued a reimbursement undertaking:

- a. the issuing bank may issue a reimbursement amendment or cancel a reimbursement authorization at any time upon sending notice to that effect to the reimbursing bank.
 - b. the issuing bank must send notice of any amendment to a reimbursement authorization that has an effect on the reimbursement instructions contained in the credit to the nominated bank or, in the case of a freely available credit, the advising bank. In case of cancellation of the reimbursement authorization prior to expiry of the credit, the issuing bank must provide the nominated bank or the advising bank with new reimbursement instructions.
 - c. the issuing bank must reimburse the reimbursing bank for any reimbursement claims honoured or draft accepted by the reimbursing bank prior to the receipt by it of a notice of cancellation or reimbursement amendment.
 - ii. currency and amount;
 - iii. additional amounts payable and tolerance, if any;
 - iv. full name and address of the claiming bank to which the reimbursement undertaking should be issued;
 - v. latest date for presentation of a claim, including any usance period;
 - vi. parties responsible for charges (claiming bank's and reimbursing bank's charges and reimbursement undertaking fee) in accordance with article 16 of these rules.
- c. If the reimbursing bank is requested to accept and pay a time draft, the irrevocable reimbursement authorization must also indicate the following, in addition to the information contained in (b) above:
- i. tenor of draft to be drawn;
 - ii. drawer;
 - iii. drawee of draft, if other than the reimbursing bank;
 - iv. party responsible for acceptance and discount charges, if any.

ARTICLE 9

Reimbursement Undertaking

- a. In addition to the requirements of sub-articles 6 (a), (b) and (c) of these rules, a reimbursement authorization authorizing or requesting the issuance of a reimbursement undertaking must comply with the provisions of this article.
 - b. An authorization or request by the issuing bank to the reimbursing bank to issue a reimbursement undertaking is irrevocable ("irrevocable reimbursement authorization") and must (in addition to the requirement of article 1 for incorporation of reference to these rules) contain the following:
 - i. credit number;
 - ii. currency and amount;
 - iii. additional amounts payable and tolerance, if any;
 - iv. full name and address of the claiming bank to which the reimbursement undertaking should be issued;
 - v. latest date for presentation of a claim, including any usance period;
 - vi. parties responsible for charges (claiming bank's and reimbursing bank's charges and reimbursement undertaking fee) in accordance with article 16 of these rules.
- An issuing bank should not require a sight draft to be drawn on the reimbursing bank.
- d. If the reimbursing bank is authorized or requested by the issuing bank to issue its reimbursement undertaking to the claiming bank but is not prepared to do so, it must so inform the issuing bank without delay.
 - e. A reimbursement undertaking must indicate the terms and conditions of the undertaking and:
 - i. the credit number and name of the issuing bank;
 - ii. the currency and amount of the reimbursement authorization;
 - iii. additional amounts payable

- and tolerance, if any;
- iv. the currency and amount of the reimbursement undertaking;
 - v. the latest date for presentation of a claim, including any usance period;
 - vi. the party to pay the reimbursement undertaking fee, if other than the issuing bank. The reimbursing bank must also include its charges, if any, that will be deducted from the amount claimed.
- f. If the latest date for presentation of a claim falls on a day when the reimbursing bank is closed for reasons other than those referred to in article 15, the latest date for presentation of a claim will be extended to the first following banking day.
- g. A reimbursing bank is irrevocably bound to honour a reimbursement claim as of the time it issues the reimbursement undertaking.
- h. i. A **n irrevocable** reimbursement authorization cannot be amended or cancelled without the agreement of the reimbursing bank.
- ii. When an issuing bank has amended its irrevocable reimbursement authorization, a reimbursing bank that has issued its reimbursement undertaking may amend its undertaking to reflect such amendment.
If a reimbursing bank chooses not to issue its reimbursement undertaking amendment, it must so inform the issuing bank without delay.
- iii. An issuing bank that has issued its irrevocable reimbursement authorization amendment shall be irrevocably bound as of the time of its advice of the irrevocable reimbursement authorization amendment.
- iv. The terms of the original irrevocable reimbursement authorization (or an authorization incorporating previously accepted irrevocable reimbursement authorization amendments) will remain in force for the reimbursing bank until it communicates its acceptance of the amendment to the issuing bank.
 - v. A reimbursing bank must communicate its acceptance or rejection of an irrevocable reimbursement authorization amendment to the issuing bank. A reimbursing bank is not required to accept or reject an irrevocable reimbursement authorization amendment until it has received acceptance or rejection from the claiming bank of its reimbursement undertaking amendment.
- i. i. A reimbursement undertaking cannot be amended or cancelled without the agreement of the claiming bank.
- ii. A reimbursing bank is irrevocably bound as of the time it issues the reimbursement undertaking amendment.
- iii. The terms of the original reimbursement undertaking (or a reimbursement undertaking incorporating previously accepted reimbursement amendments) will remain in force for the claiming bank until it communicates its acceptance of the reimbursement undertaking amendment to

- the reimbursing bank.
- iv. A claiming bank must communicate its acceptance or rejection of a reimbursement undertaking amendment to the reimbursing bank.
- ARTICLE 10**
Standards for a Reimbursement Claim
- a. The claiming bank's claim for reimbursement:
 - i. must be in the form of a teletransmission, unless specifically prohibited by the reimbursement authorization, or an original letter.

A reimbursing bank has the right to request that a reimbursement claim be authenticated and, in such case, the reimbursing bank shall not be liable for any consequences resulting from any delay incurred.

If a reimbursement claim is made by teletransmission, no mail confirmation is to be sent. In the event such a mail confirmation is sent, the claiming bank will be responsible for any consequences that may arise from a duplicate reimbursement;

 - ii. must clearly indicate the credit number and the issuing bank (and reimbursing bank's reference number, if known);
 - iii. must separately stipulate the principal amount claimed, any additional amount due and charges;
 - iv. must not be a copy of the claiming bank's advice of payment, deferred payment, acceptance or negotiation to the issuing bank;
 - v. must not include multiple reimbursement claims under one teletransmission or letter;
 - vi. must, in the case of a reimbursement undertaking, comply with the terms and conditions of the reimbursement undertaking.
- b. When a time draft is to be drawn on the reimbursing bank, the claiming bank must forward the draft with the reimbursement claim to the reimbursing bank for processing and include, where appropriate, the following in its claim:
 - i. general description of the goods, services or performance;
 - ii. country of origin;
 - iii. place of destination or performance.

and if the transaction covers the shipment of merchandise:

 - iv. date of shipment;
 - v. place of shipment.
 - c. A reimbursing bank assumes no liability or responsibility for any consequences that may arise out of any non-acceptance or delay of processing should the claiming bank fail to follow the provisions of this article.

ARTICLE 11
Processing a Reimbursement Claim

- a. i. A reimbursing bank shall have a maximum of three banking days following the day of receipt of the reimbursement claim to process the claim. A reimbursement claim received outside banking hours will be deemed to be received on the next following banking day. If a pre-debit notification is required by the issuing bank, this predebit notification

- period shall be in addition to the processing period mentioned above.
- ii. If the reimbursing bank determines not to reimburse, either because of a non-conforming claim under a reimbursement undertaking or for any reason whatsoever under a reimbursement authorization, it shall give notice to that effect by telecommunication or, if that is not possible, by other expeditious means, no later than the close of the third banking day following the day of receipt of the claim (plus any additional period mentioned in sub-article (i) above). Such notice shall be sent to the claiming bank and the issuing bank and, in the case of a reimbursement undertaking, it must state the reasons for non-payment of the claim.
 - b. A reimbursing bank will not process a request for back value (value dating prior to the date of a reimbursement claim) from the claiming bank.
 - c. When a reimbursing bank has not issued a reimbursement undertaking and a reimbursement is due on a future date:
 - i. the reimbursement claim must specify the predetermined reimbursement date;
 - ii. the reimbursement claim should not be presented to the reimbursing bank more than ten banking days prior to such predetermined date. If a reimbursement claim is presented more than ten banking days prior to the predetermined date, the reimbursing bank may disregard the reimbursement
- claim. If the reimbursing bank disregards the reimbursement claim, it must so inform the claiming bank by teletransmission or other expeditious means without delay.
- iii. If the predetermined reimbursement date is more than three banking days following the day of receipt of the reimbursement claim, the reimbursing bank has no obligation to provide notice of non-reimbursement until such predetermined date, or no later than the close of the third banking day following the receipt of the reimbursement claim plus any additional period mentioned in (a) (i) above, whichever is later.
 - d. Unless otherwise expressly agreed to by the reimbursing bank and the claiming bank, a reimbursing bank will effect reimbursement under a reimbursement claim only to the claiming bank.
 - e. A reimbursing bank assumes no liability or responsibility if it honours a reimbursement claim indicating that a payment, acceptance or negotiation was made under reserve or against an indemnity, and shall disregard such indication.

ARTICLE 12

Duplication of a Reimbursement Authorization

An issuing bank must not, upon receipt of documents, give a new reimbursement authorization or additional instructions unless they constitute an amendment to, or a cancellation of, an existing reimbursement authorization. If the issuing bank does not comply with the above and a duplicate reimbursement is made, it is the responsibility

of the issuing bank to obtain the return of the amount of the duplicate reimbursement. The reimbursing bank assumes no liability or

responsibility for any consequences that may arise from any such duplication.

D. MISCELLANEOUS PROVISIONS

ARTICLE 13 Foreign Laws and Usages

The issuing bank shall be bound by and liable to indemnify the reimbursing bank against all obligations and responsibilities imposed by foreign laws and usages.

ARTICLE 14 Disclaimer on the Transmission of Messages

A reimbursing bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages, delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, reimbursement authorization or reimbursement claim, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit, reimbursement authorization or reimbursement claim. A reimbursing bank assumes no liability or responsibility for errors in translation or interpretation of technical terms.

ARTICLE 15 Force Majeure

A reimbursing bank assumes no liability or responsibility for the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or by any strikes or lockouts or any other causes beyond its control.

ARTICLE 16 Charges

a. A reimbursing bank's charges are

- for the account of the issuing bank.
- b. When honouring a reimbursement claim, a reimbursing bank is obligated to follow the instructions regarding any charges contained in the reimbursement authorization.
- c. If a reimbursement authorization states that the reimbursing bank's charges are for the account of the beneficiary, they shall be deducted from the amount due to a claiming bank when reimbursement is made. When a reimbursing bank follows the instructions of the issuing bank regarding charges (including commissions, fees, costs or expenses) and these charges are not paid, or a reimbursement claim is never presented to the reimbursing bank under the reimbursement authorization, the issuing bank remains liable for such charges.
- d. All charges paid by the reimbursing bank will be in addition to the amount of the authorization, provided that the claiming bank indicates the amount of such charges.
- e. If the issuing bank fails to provide the reimbursing bank with instructions regarding charges, all charges shall be for the account of the issuing bank.

ARTICLE 17 Interest Claims/Loss of Value

Any claim for loss of interest, loss of value due to any exchange rate fluctuations, revaluations or devaluations are between the claiming bank and the issuing bank, unless such losses result from the non-performance of the reimbursing bank under a reimbursement undertaking.



URBPO

ICC Uniform Rules for Bank Payment Obligations

ICC Publication No. 750E

Editor's Overview

The ICC Uniform Rules for Bank Payment Obligations Version 1.0 (ICC Publication No. 750E) were adopted by the ICC Banking Commission in April 2013. They were drafted to accompany SWIFT's Bank Payment Obligation, ISO 20022 standards for supply chain finance. The goal of this effort is to reintroduce banks into the supply chain process from which they have been increasingly excluded by open account transactions.

While the BPO is described as a bank to bank transaction, it is intended to benefit the seller and to provide indirect assurance of payment as a result of an electronic matching of data related to the sale.

The URBPO were developed to provide a framework of practice rules for this product. They contain definitions and operative rules.

It is premature to predict the success of the product. One outstanding question is its relationship to the commercial letter of credit. At the least, it provides a parallel product. How it will be treated legally also remains an outstanding question which only time will tell.

For the official guide to the URBPO, please read ICC Guide to the Uniform Rules for Bank Payment Obligations by David J. Hennah (ICC Publication No. 751, 2013 Edition).

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URBPO

ICC Uniform Rules for Bank Payment Obligations

ARTICLE 1

Scope

- a. The ICC Uniform Rules for Bank Payment Obligations (URBPO) provide a framework for a Bank Payment Obligation (BPO). A BPO relates to an underlying trade transaction between a buyer and seller with respect to which Involved Banks have agreed to participate in an Established Baseline through the use of the same Transaction Matching Application (TMA).
- b. The URBPO do not provide the basis for determining whether a Data Match or Data Mismatch has occurred. This is determined by the functionality of the applicable TMA and the terms and conditions applying to that TMA as subscribed to by each Involved Bank.

ARTICLE 2

Application

- a. The URBPO are rules that apply to a BPO when the Payment Obligation Segment within an Established Baseline expressly states that it is subject to these rules or when each Involved Bank agrees in a separate agreement that a BPO is subject to these rules. They are binding on each Involved Bank unless expressly modified or excluded by the Established Baseline or by the separate agreement.
- b. i) If an Established Baseline or separate agreement does not indicate the applicable version of URBPO, the BPO will be subject to the latest version in effect when the Baseline is established in accordance with sub-article 9 (d).

ii) This is URBPO Version 1.0.

- c. i) The URBPO require use of the appropriate ISO 20022 Trade Services Management (TSMT) messages registered with the International Standards Organisation (ISO). Use of any other message type means that the transaction is out of scope of these rules.
- ii) Only those TSMT messages that are applicable to a BPO are referred to in these rules.

ARTICLE 3

General Definitions

For the purpose of these rules:

“Bank Payment Obligation” or “BPO” means an irrevocable and independent undertaking of an Obligor Bank to pay or incur a deferred payment obligation and pay at maturity a specified amount to a Recipient Bank following Submission of all Data Sets required by an Established Baseline resulting in a Data Match or an acceptance of a Data Mismatch pursuant to sub-article 10 (c).

“Banking Day” means a day on which an Involved Bank is regularly open at the place at which an act subject to these rules is to be performed by such Involved Bank.

“Baseline” means data in respect of an underlying trade transaction submitted to a Transaction Matching Application by a Buyer’s Bank or a Seller’s Bank.

“Buyer’s Bank” means the bank of the buyer. The Buyer’s Bank may also be an Obligor Bank.

“Data Match” means a comparison of all required Data Sets with an Established Baseline resulting in Zero Mismatches as specified in a Data Set Match Report.

“Data Mismatch” means a comparison of all required Data Sets with an Established Baseline resulting in one or more mismatches as specified in a Data Set Match Report.

“Data Set” means any of the categories (for example, ‘commercial’, ‘transport’, ‘insurance’, ‘certificate’ or ‘other certificate’) included in a Data Set Submission sent to a Transaction Matching Application by an Involved Bank for comparison with an Established Baseline.

“Established Baseline” means a Baseline from the time when a Transaction Matching Application sends a Baseline Match Report containing Zero Mismatches and with the status ‘established’.

“Involved Bank” means a Seller’s Bank or Recipient Bank (depending upon its role at any given time), a Buyer’s Bank, an Obligor Bank or a Submitting Bank.

“Obligor Bank” means the bank that issues a BPO.

“Payment Obligation Segment” means the part of a Baseline designated as ‘payment obligation’ that incorporates the terms of the BPO including the terms on which payment is to be made.

“Recipient Bank” means the bank that is the beneficiary of a BPO. The Recipient Bank is always the Seller’s Bank.

“Seller’s Bank” means the bank of the seller. The Seller’s Bank will be indicated as the Recipient Bank in the Payment Obligation Segment of an Established Baseline.

“Submission” means (i) the act of a Buyer’s Bank or Seller’s Bank presenting data by submitting a Baseline to a Transaction

Matching Application, or the Baseline so submitted, as the context requires, or (ii) the act of an Involved Bank presenting data to an Obligor Bank by means of submitting one or more Data Sets to a Transaction Matching Application, or the Data Sets so submitted, as the context requires.

“Submitting Bank” means an Involved Bank whose only role is to submit one or more Data Sets required by an Established Baseline.

“Trade Services Management (TSMT) messages” or “TSMT message” means ISO 20022 message types as published under the trade services management business area by the International Standards Organisation (ISO).

“Transaction Matching Application” or “TMA” means any centralised data matching and workflow application, whether or not proprietary to an Involved Bank, which provides the service of processing TSMT messages received from Involved Banks, the automatic comparison of the data contained in such messages, and the subsequent sending of all related TSMT messages to each Involved Bank.

“Universal Time Coordinated” or “UTC” means the international time scale defined by the International Telecommunications Union used by electronic computing and data management equipment, and the technical equivalent of GMT, Greenwich Mean Time, and is the applicable time scale for a BPO.

“Zero Mismatches” means that the data represented in one Baseline match the data represented in a corresponding Baseline or, as the context may indicate, that all required Data Sets match the data required by an Established Baseline.

ARTICLE 4

Message Definitions

“Amendment Acceptance” means a TSMT

message sent to a TMA by a Buyer's Bank, a Seller's Bank or a Recipient Bank (as applicable) accepting a Baseline Amendment Request.

"Amendment Acceptance Notification" means a TSMT message sent by a TMA to a Buyer's Bank, a Seller's Bank or a Recipient Bank (as applicable) notifying it of the acceptance of a Baseline Amendment Request.

"Amendment Rejection" means a TSMT message sent to a TMA by a Buyer's Bank, a Seller's Bank or a Recipient Bank (as applicable) rejecting a Baseline Amendment Request.

"Amendment Rejection Notification" means a TSMT message sent by a TMA to a Buyer's Bank, a Seller's Bank or a Recipient Bank (as applicable) notifying it of the rejection of a Baseline Amendment Request.

"Baseline Amendment Request" means a TSMT message sent to a TMA by a Buyer's Bank, a Seller's Bank or a Recipient Bank (as applicable) requesting an amendment to an Established Baseline.

"Baseline Match Report" means a TSMT message sent by a TMA to each Involved Bank, (except an Obligor Bank other than the Buyer's Bank), after Submission of a Baseline, indicating an Established Baseline or that mismatches have been found between two Baselines.

"Data Set Match Report" means a TSMT message sent by a TMA to each Involved Bank after Submission of all Data Sets required by an Established Baseline and the automatic comparison of such Data Sets with that Established Baseline, advising it of either a Data Match or a Data Mismatch.

"Data Set Submission" means a TSMT message sent to a TMA by an Involved Bank

that contains one or more categories of Data Set for data comparison.

"Full Push Through Report" means a TSMT message sent by a TMA to each Involved Bank advising of a proposed Baseline, an Established Baseline or a proposed amendment to an Established Baseline.

"Mismatch Acceptance" means a TSMT message sent to a TMA by a Buyer's Bank accepting a Data Mismatch.

"Mismatch Acceptance Notification" means a TSMT message sent by a TMA to each Involved Bank notifying it of the acceptance of a Data Mismatch by a Buyer's Bank.

"Mismatch Rejection" means a TSMT message sent to a TMA by a Buyer's Bank rejecting a Data Mismatch.

"Mismatch Rejection Notification" means a TSMT message sent by a TMA to each Involved Bank notifying it of the rejection of a Data Mismatch by a Buyer's Bank.

"Role and Baseline Acceptance" means a TSMT message sent to a TMA by a Submitting Bank, or an Obligor Bank other than the Buyer's Bank, accepting such bank's role as specified in the Baseline contained in a Full Push Through Report.

"Role and Baseline Acceptance Notification" means a TSMT message sent by a TMA informing each other Involved Bank that a Submitting Bank, or an Obligor Bank other than the Buyer's Bank, has sent a Role and Baseline Acceptance in response to a Full Push Through Report.

"Role and Baseline Rejection" means a TSMT message sent to a TMA by a Submitting Bank, or an Obligor Bank other than the Buyer's Bank, rejecting such bank's role as specified in the Baseline contained in a Full Push Through Report.

“Role and Baseline Rejection Notification” means a TSMT message sent by a TMA informing each Involved Bank that a Submitting Bank, or an Obligor Bank other than the Buyer’s Bank, has sent a Role and Baseline Rejection in response to a Full Push Through Report.

“Special Notification” means a TSMT message sent by a TMA to an Involved Bank notifying it of a Special Request made by another Involved Bank.

“Special Request” means a TSMT message sent to a TMA by (i) a Submitting Bank advising a reason that prevents it from being able to submit a Data Set, or (ii) an Involved Bank withdrawing from its role in an Established Baseline due to force majeure (subject to article 13).

ARTICLE 5 Interpretations

For the purpose of these rules:

Where applicable, words in the singular include the plural and in the plural include the singular.

Branches of an Involved Bank in different countries are considered separate banks.

ARTICLE 6 Bank Payment Obligations v. Contracts

- a. A BPO is separate and independent from the sale or other contract on which the underlying trade transaction may be based. An Involved Bank is in no way concerned with or bound by such contract, even if any reference whatsoever to it is included in an Established Baseline. Consequently, the undertaking of an Obligor Bank is not subject to claims or defences by the buyer resulting from its relationship with an Involved Bank or the seller.

- b. A Recipient Bank can in no case avail itself of the contractual relationship existing between the buyer and the Buyer’s Bank or an Obligor Bank other than the Buyer’s Bank.

ARTICLE 7

Data v. Documents, Goods, Services or Performance

An Involved Bank deals with data and not with documents, or the goods, services or performance to which the data or documents may relate.

ARTICLE 8 Expiry Date of a BPO

- a. An Established Baseline must state an expiry date for the Submission of Data Sets.
- b. All Data Sets required by an Established Baseline must be received by a TMA no later than 23:59:59 UTC on such expiry date.
- c. A data comparison will only occur after the Submission of all Data Sets required by an Established Baseline. A TMA will then send a Data Set Match Report to each Involved Bank advising it of either a Data Match or Data Mismatch.

ARTICLE 9 Role of an Involved Bank

- a. When a TSMT message is received by an Involved Bank on a day that it is closed for reasons other than those referred to in article 13, the TSMT message will be deemed to have been received on the first following Banking Day.
- b. When an Involved Bank is required to act upon a message sent by a TMA it must do so without delay.

- c. An Involved Bank is required to ensure that any data submitted by it to a TMA accurately reflects the data it has received from a buyer or seller of goods, services or performance in connection with an underlying trade transaction.
- d. A Baseline incorporating a BPO will only become an Established Baseline after each Involved Bank has accepted its role:
- i) **When the Buyer's Bank is the only Obligor Bank:** when a TMA sends a Baseline Match Report with Zero Mismatches confirming that the Baseline submitted by a Buyer's Bank matches the Baseline submitted by a Seller's Bank or Recipient Bank (as applicable); or
 - ii) **When an Obligor Bank, other than the Buyer's Bank, is the only Obligor Bank:** when a TMA sends a Role and Baseline Acceptance Notification confirming that such Obligor Bank and, if applicable, a Submitting Bank, has accepted its role as specified in the Baseline Submission of both the Buyer's Bank and the Seller's Bank or Recipient Bank (as applicable). The sending of such a notification will follow a TMA sending a Baseline Match Report with Zero Mismatches; or
 - iii) **When there is more than one Obligor Bank that may include the Buyer's Bank:** when a TMA sends a Role and Baseline Acceptance Notification confirming that each Obligor Bank and, if applicable, a Submitting Bank, has accepted its role as specified in the Baseline Submission of both the Buyer's Bank and the Seller's Bank or Recipient Bank (as applicable). The sending of such a notification will follow a TMA sending a Baseline Match Report with Zero Mismatches.
- Submission of both the Buyer's Bank and the Seller's Bank or Recipient Bank (as applicable). The sending of such a notification will follow a TMA sending a Baseline Match Report with Zero Mismatches.
- ARTICLE 10**
Undertaking of an Obligor Bank
- a. An Obligor Bank is irrevocably bound in accordance with a BPO:
- i) **when a BPO is incorporated in an Established Baseline at the time of its establishment:** as of the time a TMA has sent either a Baseline Match Report with Zero Mismatches or a Role and Baseline Acceptance Notification with the status 'established' to each Involved Bank pursuant to sub-article 9 (d); or
 - ii) **when a BPO is incorporated by an amendment to an Established Baseline:** as of the time a TMA has sent either an Amendment Acceptance Notification or a Role and Baseline Acceptance Notification to each Involved Bank pursuant to sub-article 11 (c).
- b. A BPO always relates to a single Established Baseline. An Established Baseline may contain more than one BPO and each BPO is the obligation of one Obligor Bank.
- c. An Obligor Bank must pay or incur a deferred payment obligation and pay at maturity a specified amount to a Recipient Bank in accordance with the payment terms specified in the Payment Obligation Segment of an Established Baseline if, following the Submission of all Data Sets required by an

Established Baseline on or before the expiry date of the BPO specified in the Established Baseline and following a data comparison:

- i) **there is a Data Match;** or
 - ii) **there is a Data Mismatch and the Buyer's Bank is the only Obligor Bank:** when a TMA acknowledges the Mismatch Acceptance of the Buyer's Bank by sending a MismatchAcceptance Notification to a Recipient Bank; or
 - iii) **there is a Data Mismatch and an Obligor Bank, other than the Buyer's Bank, is the only Obligor Bank:** when the Obligor Bank and, if applicable, a Submitting Bank has affirmed its role by sending a Role and Baseline Acceptance to a TMA and a TMA acknowledges it by sending a Role and Baseline Acceptance Notification to each Involved Bank. The sending of such a notification will follow a TMA acknowledging the Mismatch Acceptance of the Buyer's Bank by sending a MismatchAcceptance Notification to each Involved Bank; or
 - iv) **there is a Data Mismatch and there is more than one Obligor Bank that may include the Buyer's Bank:** when
 - a) a TMA acknowledges the Mismatch Acceptance of the Buyer's Bank by sending a Mismatch Acceptance Notification to each Involved Bank; and
 - b) the Obligor Bank and, if applicable, a Submitting Bank, has affirmed its role by
- d. i) The total amount due by an Obligor Bank to a Recipient Bank shall not exceed the amount of its BPO.
- ii) When a Submission relates to a partial shipment or partial provision of services or performance, the amount due under a BPO by an Obligor Bank to a Recipient Bank in respect of such Submission shall be proportional, subject to sub-article 10 (d) (iii), to the value of such Submission in relation to the total value reflected in the Established Baseline. In no event shall the amount due exceed the remaining amount of the BPO.
- iii) When an Established Baseline incorporates more than one BPO, the amount due by each Obligor Bank to a Recipient Bank in respect of a Submission shall be proportional to the amount of its BPO in relation to the total value reflected in the Established Baseline.
- iv) When an Established Baseline incorporates more than one BPO, no joint and several obligations are created between Obligor Banks.
- e. Performance of an Obligor Bank's obligations under a BPO does not depend on its right or ability to obtain reimbursement from any other party.
- f. A BPO remains in effect until the earliest to occur of the following:

- i) the BPO expires prior to the Submission of all Data Sets required by an Established Baseline resulting in a Data Match or a Mismatch Acceptance pursuant to sub-article 10 (c), or
 - ii) the Established Baseline is amended to release the Obligor Bank from its undertaking, or
 - iii) the BPO has been fully paid in accordance with its terms.
- g. An Obligor Bank is not required to pay or incur a deferred payment obligation to pay at maturity if a data comparison results in a Data Mismatch that is rejected by the Buyer's Bank or another Obligor Bank other than the Buyer's Bank.

ARTICLE 11 Amendments

- a. An amendment to an Established Baseline that incorporates a BPO or an amendment to incorporate a BPO in an Established Baseline requires the agreement of each Involved Bank.
- b.
 - i) A Seller's Bank or Recipient Bank (as applicable) or a Buyer's Bank may request an amendment to an Established Baseline by sending a Baseline Amendment Request. The Seller's Bank or Recipient Bank (as applicable) or a Buyer's Bank, as applicable, may accept the Baseline Amendment Request by sending an Amendment Acceptance; and
 - ii) After such acceptance, a TMA will send a Full Push Through Report to each Obligor Bank and, if applicable, a Submitting Bank, requesting it to confirm its role in the transaction by sending a Role and Baseline Acceptance message to the TMA.
- c. An amendment to an Established Baseline that incorporates a BPO or an amendment to incorporate a BPO in an Established Baseline is effective:
 - i) **When the Buyer's Bank is the only Obligor Bank:** when a TMA sends an Amendment Acceptance Notification to it in response to an Amendment Acceptance.
 - ii) **When an Obligor Bank, other than the Buyer's Bank, is the only Obligor Bank:** when a TMA sends a Role and Baseline Acceptance Notification to each Involved Bank confirming that such Obligor Bank and, if applicable, a Submitting Bank, has accepted its role as specified in the Baseline contained in a Full Push Through Report.
 - iii) **When there is more than one Obligor Bank that may include the Buyer's Bank:** when a TMA sends a Role and Baseline Acceptance Notification to each Involved Bank in response to a Full Push Through Report acknowledging that each Obligor Bank and, if applicable, a Submitting Bank, has affirmed its role following an Amendment Acceptance.
- d. An Established Baseline will remain unchanged when any Involved Bank rejects a proposed amendment to the Established Baseline by sending an Amendment Rejection or a Role and Baseline Rejection (as applicable) and a TMA sends an Amendment Rejection Notification or a Role and Baseline Rejection Notification (as applicable) to each other Involved Bank.

ARTICLE 12

Disclaimer on Effectiveness of Data

An Involved Bank does not assume any liability or responsibility for: (i) the source, accuracy, genuineness, falsification or legal effect of any data received from the buyer or seller; (ii) the documents, or the description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance, to which such data relates; or (iii) the good faith or acts or omissions, solvency, performance or standing of the consignor, carrier, forwarder, consignee or insurer of the goods or any other person referred to in any data.

ARTICLE 13

Force Majeure

- a. An Involved Bank assumes no liability or responsibility for the consequences arising out of the interruption of its business, including its inability to access a TMA, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.
- b. Notwithstanding the provisions of sub-article 13 (a), an Obligor Bank will, upon resumption of its business, remain liable to pay or to incur a deferred payment obligation and pay at maturity a specified amount to a Recipient Bank in respect of a BPO that expired during such interruption of its business and for which there has been the Submission of all Data Sets required by an Established Baseline on or before the expiry date of the BPO resulting in a Data Match or a Mismatch

Acceptance pursuant to sub-article 10 (c).

- c. In the event of force majeure, a Submitting Bank or (subject to sub-article 13 (b)) another Involved Bank may terminate its role in an Established Baseline by sending a Special Request to a TMA, following which a TMA will send a Special Notification to each Involved Bank.

ARTICLE 14

Unavailability of a Transaction Matching Application

An Involved Bank assumes no liability or responsibility for the consequences arising out of the unavailability of a TMA for any reason whatsoever.

ARTICLE 15

Applicable Law

- a. The governing law of a BPO will be that of the location of the branch or office of the Obligor Bank specified in the Established Baseline.
- b. URBPO supplements the applicable law to the extent not prohibited by that law.
- c. An Obligor Bank is not required to comply with its obligations under a BPO and assumes no liability or responsibility for any consequences if it would be restricted from doing so pursuant to applicable law or regulatory requirements.

ARTICLE 16

Assignment of Proceeds

- a. A Recipient Bank has the right to assign any proceeds to which it may be or may become entitled under a BPO, in accordance with the provisions of the applicable law. This article relates only to the assignment of

proceeds and not to the transfer of the Recipient Bank role under the Established Baseline to another bank (which would require an amendment to the Established Baseline in

accordance with article 11).

- b. An Obligor Bank is not required to recognise such assignment of proceeds until it provides its consent.

International Standard Banking Practice for the examination of documents under documentary credits

ISBP 681 (2007) & ISBP 745 (2013)

Editor's Overview

The International Standard Banking Practices (ISBP) were drafted to complement the Uniform Customs & Practice for Documentary Credits, filling in gaps and explaining the practices that underline the UCP. It is a statement of the “international standard banking practice” referenced in UCP600 Article 14(d) (Standard for Examination of Documents). The ISBP was based on ICC Banking Commission Opinions and Decisions and its understanding of the practices reflected in the UCP.

Because of the history, character, and organization of the UCP as a set of principles, it does not address the contents of each of the documents typically required by commercial letters of credit. Indeed, for documents other than transport, insurance, and commercial invoices, it is necessary to extrapolate from the UCP and standard practice in order to even identify the norms to be applied in the examination process. While the ISBP does not have the weight of the UCP, it is a useful compilation of norms which should assist beneficiaries and correspondent banks in document preparation and examination. As such, it is an extremely valuable contribution to the standardization and harmonization of letter of credit practice. It is less authoritative where it expands beyond the text of the UCP with specific requirements that are based solely on the notion of “standard practice”.

The ISBP was originally released in 2003 under UCP500. In the revision which resulted in UCP600, some of its provisions were elevated to be included in UCP600. Other provisions in ISBP 2003 that were aligned with the text in UCP500 that was changed were also changed in ISBP 681 (2007). In Spring 2013, the ICC Banking Commission adopted ISBP 745 (2013). This version represents a much more ambitious expansion and reorganization of the document and contains many provisions which more properly belong in the UCP itself. An added difficulty is that ISBP 745 (2013) was said to have been effective retroactively to 1 July 2007, the date that UCP600 became effective. This fiction falls particularly short where the text of ISBP 745 (2013) differs from or reverses that of ISBP 681 (2007).

It is uncommon (and is discouraged) for credits to be issued “subject to the ISBP”. Many of the practices stated in it are generally applicable to credits subject to UCP600 and persuasive because they represent formal interpretations by the ICC Commission on Banking Technique & Practice. It is likely that relevant provisions will be brought to the attention of judges. What effect it will have will depend on the particular issue involved. While most of its provisions are solidly based in the UCP and practice, some lack that foundation and it may be doubted whether they could be enforced against beneficiaries where the LC is not issued subject to the ISBP. They are more likely to be enforceable against correspondent banks. Whether they can be used by or against applicants with respect to reimbursement will depend on the terms of the reimbursement agreement that is in place.

Since it is applicable to documentary credits, ISBP 745 (2013) would be applicable to UCP600 standbys, as well as commercial letters of credit, which may cause additional difficulties for UCP600 standbys.

ISBP 745 (2013) is organized into three parts: (I) Preliminary Considerations, whose paragraphs are headed by lower case roman numerals; (II) General Principles, which are contained in numbered paragraphs starting with the letter "A"; and (III) Documents, each in chapters designated by letters "B" to "Q" with the omission of the letters "I" and "O". Within each of these chapters, the material is divided into numbered paragraphs, thus Paragraph A5, etc.

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International Standard Banking Practice for the examination of documents under documentary credits

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International Standard Banking Practices

ICC Publication 745 (2013)

PRELIMINARY CONSIDERATIONS

SCOPE OF THE PUBLICATION

- i. This publication is to be read in conjunction with UCP 600 and not in isolation.
- ii. The practices described in this publication highlight how the articles of UCP 600 are to be interpreted and applied, to the extent that the terms and conditions of the credit, or any amendment thereto, do not expressly modify or exclude an applicable article in UCP 600.

THE CREDIT AND AMENDMENT APPLICATION, THE ISSUANCE OF THE CREDIT AND ANY AMENDMENT THERETO

- iii. The terms and conditions of a credit and any amendment thereto are independent of the underlying sale or other contract even if the credit or amendment expressly refers to that sale or other contract. When agreeing the terms of the sale or other contract, the parties thereto should be aware of the ensuing implications for the completion of the credit or amendment application.
- iv. Many of the problems that arise at the document examination stage could be avoided or resolved by the respective parties through careful attention to detail in the credit or amendment application and issuance of the credit or any amendment thereto. The applicant and beneficiary should carefully consider the documents required for presentation, by whom they are to be issued, their data content and the time frame in which they are to be presented.
- v. The applicant bears the risk of any ambiguity in its instructions to issue or amend a credit. An issuing bank may, unless the applicant expressly instructs to the contrary, supplement or develop those instructions in a manner necessary or desirable to permit the use of the credit or any amendment thereto. An issuing bank should ensure that any credit or amendment it issues is not ambiguous or conflicting in its terms and conditions.
- vi. The applicant and issuing bank should be fully aware of the content of UCP 600 and recognize that articles such as 3, 14, 19, 20, 21, 23, 24, 28 (i), 30 and 31 define terms in a manner that may produce unexpected results. For example, a credit requiring presentation of a bill of lading and containing a prohibition against transhipment will, in most cases, have to exclude UCP 600 sub-article 20 (c) to make the prohibition against transhipment effective.
- vii. A credit or any amendment thereto should not require presentation of a document that is to be issued, signed or countersigned by the applicant. If, nevertheless, a credit or amendment is issued including such a requirement, the beneficiary should consider the appropriateness of such a requirement and determine its ability to comply with it, or seek a suitable amendment.

A. GENERAL PRINCIPLES

ABBREVIATIONS

- A1 Generally accepted abbreviations, such as, but not limited to, “Int’l” instead of “International”, “Co.” instead of “Company”, “kgs” or “kos” instead of “kilograms” or “kilos”, “Ind.” instead of “Industry”, “Ltd” instead of “Limited”, “mfr” instead of “manufacturer” or “mt” instead of “metric tons” may be used in documents in substitution for a word or vice versa. A credit that includes an abbreviation in its text allows a document to show the same abbreviation or any other abbreviation that has the same meaning, or to show the complete spelling of the word or vice versa.
- A2 a. Virgules (i.e., slash marks “/”) may result in different meanings and should not be used as a substitute for a word. If, nevertheless, a virgule is used and no context is apparent, this will allow the use of one or more of the options. For example, a condition in a credit
- b. The use of a comma when indicating a range of data in a credit such as ports of loading or discharge or countries of origin, may result in different meanings and should not be used as a substitute for a word. If, nevertheless, a comma is used and no context is apparent, this will allow the use of one or more of the options. For example, when a credit allows partial shipment and indicates the port of loading information as “Hamburg, Rotterdam, Antwerp” with no further clarification, this will mean only Hamburg or only Rotterdam or only Antwerp or any combination of them.

CERTIFICATES, CERTIFICATIONS, DECLARATIONS AND STATEMENTS

- A3 When a certificate, certification, declaration or statement is required by a credit, it is to be signed.
- A4 Whether a certificate, certification, declaration or statement needs to be dated will depend on the type of certificate, certification, declaration or statement that has been requested, its required wording and the wording that appears within the document.
- For example, when a credit requires the presentation of a certificate issued by the carrier or its agent stating that the vessel is no more than 25 years old, the certificate may evidence compliance by indicating:
- a. the date or year the vessel was built, and such date or year is no
- b. the wording as stated in the credit, in which case a date of issuance is required, thereby certifying that as of that date the vessel was not more than 25 years old.

- A5 When a certification, declaration or statement is to appear in a document which is to be signed and dated, it does not require a separate signature or date when the certification, declaration or statement appears to have been given by the same entity that issued and signed the document.

COPIES OF TRANSPORT DOCUMENTS COVERED BY UCP 600 ARTICLES 19-25

- A6 a. When a credit requires the presentation of a copy of a transport document covered by UCP 600 articles 19-25, the relevant article is not applicable, as these articles only apply to original transport documents. A copy of a transport document is to be examined only to the extent expressly stated in the credit, otherwise according to UCP 600 sub-article 14 (f).
- b. Any data shown on a copy of a transport document, when read in context with the credit, the document itself and international standard banking practice, need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.
- c. Copies of transport documents covered by UCP 600 articles 19-25 are not subject to the default presentation period of 21 calendar days stated in UCP 600 sub-article 14 (c) or any presentation period stated in the credit, unless the credit explicitly states the basis for determining such presentation period. Otherwise, a presentation may be made at any time, but in any event no later than the expiry date of the credit.

CORRECTION AND ALTERATION (“CORRECTION”)

- A7 a. i. Any correction of data in a document issued by the beneficiary, with the exception of drafts (see paragraph B16, need not be authenticated.
- ii. When a document issued by the beneficiary has been legalized, visaed, certified, etc., any correction of data is to be authenticated by at least one of the entities that legalized, visaed or certified, etc., the document. Such authentication is to be authenticated by at least one to indicate the name of the entity authenticating the correction either by use of a stamp incorporating its name, or by the addition of the name of the authenticating entity accompanied by its signature or initials.
- b. i. Any correction of data in a document, other than in a document issued by the beneficiary, is to appear to have been authenticated by the issuer or an entity acting as agent, proxy or for [or on behalf of] the issuer. Such authentication is to indicate the name of the entity authenticating the correction either by use of a stamp incorporating its name, or by the addition of the name of the authenticating entity accompanied by its signature or initials. In the case of authentication by an agent or proxy, the capacity of acting as agent or proxy for [or on behalf of] the issuer is to be stated.
- ii. When a document other than one issued by the beneficiary has been legalized, visaed, certified, etc., any correction of data is, in addition to the requirements of paragraph A7 (b) (i), to be authenticated

by at least one of the entities that legalized, visaed or certified, etc., the document. Such authentication is to indicate the name of the entity authenticating the correction either by use of a stamp incorporating its name, or by the addition of the name of the authenticating entity accompanied by its signature or initials.

- c. Any correction of data in a copy document need not be authenticated.

A8 When a document other than one issued

by the beneficiary contains more than one correction, either each correction is to be authenticated separately, or one authentication is to indicate that it applies to all the corrections. For example, when a document issued by XXX shows three corrections numbered 1, 2 and 3, one statement such as "Correction numbers 1, 2 and 3 authenticated by XXX" or similar, together with the signature or initials of XXX, will satisfy the requirement for authentication.

- A9 The use of multiple type styles, font sizes or handwriting within the same document does not, by itself, signify a correction.

COURIER RECEIPT, POST RECEIPT AND CERTIFICATE OF POSTING IN RESPECT OF THE SENDING OF DOCUMENTS, NOTICES AND THE LIKE

A10 When a credit requires the presentation of a document as evidence of sending documents, notices and the like to a named or described entity, in the form of a courier receipt, post receipt or

certificate of posting, such document is to be examined only to the extent expressly stated in the credit, otherwise according to UCP 600 sub-article 14 (f) and not under UCP 600 article 25.

DATES

A11 a. Even when a credit does not expressly so require:

- i. drafts are to indicate a date of issuance;
- ii. insurance documents are to indicate a date of issuance or effectiveness of the insurance coverage as reflected in paragraphs K10 (b) and K11; and
- iii. original transport documents, subject to examination under UCP 600 articles 19-25, are to indicate a date of issuance, a dated on board notation, a date of shipment, a date of receipt for shipment, a date

of dispatch or carriage, a date of taking in charge or a date of pick up or receipt, as applicable.

- b. A requirement that a document, other than a draft, insurance document or original transport document, be dated will be satisfied by the indication of a date of issuance or by reference in the document to the date of another document forming part of the same presentation (for example, by the wording "date as per bill of lading number xxx" appearing on a certificate issued by a carrier or its agent) or a date appearing on a stipulated document indicating the occurrence of an event (for

example, by the date of inspection being indicated on an inspection certificate that otherwise does not contain a date of issuance).

- A12 a. A document, such as, but not limited to, a certificate of analysis, inspection certificate or fumigation certificate, may indicate a date of issuance later than the date of shipment.
- b. When a credit requires a document to evidence a pre-shipment event (for example, “pre-shipment inspection certificate”), the document, either by its title, content or date of issuance, is to indicate that the event (for example, inspection) took place on or prior to the date of shipment.
- c. When a credit requires a document such as, but not limited to, an “inspection certificate”, this does not constitute a requirement that the document is to evidence a pre-shipment event, and it need not be dated prior to the date of shipment.

A13 A document indicating a date of issuance and a later date of signing is deemed to have been issued on the date of signing.

- A14 a. When a credit uses phrases to signify time on either side of a date or an event, the following shall apply:
- i. “not later than 2 days after (date or event)” means a latest date. If an advice or document is not to be dated prior to a specified date or event, the credit should so state.
- ii. “at least 2 days before (date or event)” means that an act

or event is to take place not later than 2 days before that date or event. There is no limit as to how early it may take place.

- b. i. For the purpose of calculation of a period of time, the term “within” when used in connection with a date or event excludes that date or the event date in the calculation of the period. For example, “within 2 days of (date or event)” means a period of 5 days commencing 2 days prior to that date or event until 2 days after that date or event.
- ii. The term “within” when followed by a date or a reference to a determinable date or event includes that date or event date. For example, “presentation to be made within 14 May” or “presentation is to be made within credit validity (or credit expiry)” where the expiry date of the credit is 14 May, means 14 May is the last day upon which presentation is allowed, provided that 14 May is a banking day.

A15 The words “from” and “after” when used to determine a maturity date or period for presentation following the date of shipment, the date of an event or the date of a document, exclude that date in the calculation of the period. For example, 10 days after the date of shipment or 10 days from the date of shipment, where the date of shipment was 4 May, will be 14 May.

A16 Provided that the date intended can be determined from the document or

from other documents included in the presentation, dates may be expressed in any format. For example, the 14th of May 2013 could be expressed as 14 May 13, 14.05.2013, 14.05.13,

2013.05.14, 05.14.13, 130514, etc. To avoid any risk of ambiguity, it is recommended that the month be stated in words.

DOCUMENTS AND THE NEED FOR COMPLETION OF A BOX, FIELD OR SPACE

A17 The fact that a document has a box, field or space for data to be inserted does not necessarily mean that such box, field or space is to be completed. For example, data are not required in the box titled “Accounting Information” or “Handling

Information” commonly found on an air waybill. Also see paragraph A37 in respect of the requirements for a signature to appear in any box, field or space.

DOCUMENTS FOR WHICH THE UCP 600 TRANSPORT ARTICLES DO NOT APPLY

A18 a. Documents commonly used in relation to the transportation of goods, such as but not limited to, Delivery Note, Delivery Order, Cargo Receipt, Forwarder’s Certificate of Receipt, Forwarder’s Certificate of Shipment, Forwarder’s Certificate of Transport, Forwarder’s Cargo Receipt and Mate’s Receipt are not transport documents as defined in UCP 600 articles 19-25. These documents are to be examined only to the extent expressly stated in the credit, otherwise according to UCP 600 sub-article 14 (f).

b. i. For documents referred to in paragraph A18 (a), a condition of a credit that presentation is to occur within a certain number of days after the date of shipment will be disregarded, and presentation may be made at any time, but in any

event no later than the expiry date of the credit.

- ii. The default presentation period of 21 calendar days stated in UCP 600 sub-article 14 (c) only applies to a presentation including one or more original transport documents covered by UCP 600 articles 19P25.
- c. For a presentation period to apply to a document referred to in paragraph A18 (a), the credit should specify that presentation is to be made within a certain number of days after the issuance date of the respective document, or a date that is to be mentioned in the document (for example, when a credit requires the presentation of a document titled cargo receipt, “documents to be presented no later than 10 days after the date of the cargo receipt”).

EXPRESSIONS NOT DEFINED IN UCP 600

A19 The expressions “shipping documents”, “stale documents acceptable”, “third party documents acceptable”, “third party documents not acceptable”, “exporting country”, “shipping company” and “documents acceptable as presented” should not be used in a

credit, as they are not defined in UCP 600. If, nevertheless, they are used, and their meaning is not defined in the credit, they shall have the following meaning under international standard banking practice:

- a. “shipping documents” – all documents required by the credit, except drafts, teletransmission reports and courier receipts, postal receipts or certificates of posting evidencing the sending of documents.
- b. “stale documents acceptable” – documents may be presented later than 21 calendar days after the date of shipment as long as they are presented no later than the expiry date of the credit. This will also apply when the credit specifies a period for presentation together with the condition “stale documents acceptable”.
- c. “third party documents acceptable” – all documents for which the credit or UCP 600 do not indicate an issuer, except drafts, may be issued by a named person or entity other than the beneficiary.
- d. “third party documents not acceptable” – has no meaning and is to be disregarded.
- e. “exporting country” – one of the following: the country where the beneficiary is domiciled, the country of origin of the goods, the
- f. “shipping company” - when used in the context of the issuer of a certificate, certification or declaration relating to a transport document – any one of the following: carrier, master or, when a charter party bill of lading is presented, the master, owner or charterer, or any entity identified as an agent of any one of the aforementioned, regardless of whether it issued or signed the presented transport document.
- g. “documents acceptable as presented” – a presentation may consist of one or more of the stipulated documents provided they are presented within the expiry date of the credit and the drawing amount is within that which is available under the credit. The documents will not otherwise be examined for compliance under the credit or UCP 600, including whether they are presented in the required number of originals or copies.

ISSUER OF DOCUMENTS

A20 When a credit requires a document to be issued by a named person or entity, this condition is satisfied when the document appears to be issued by the named person or entity by use

of its letterhead, or when there is no letterhead, when the document appears to have been completed or signed by, or for [or on behalf of], the named person or entity.

LANGUAGE

- A21 a. When a credit stipulates the language of the documents to be presented, the data required by the credit or UCP 600 are to be in that language.
- b. When a credit is silent with respect to the language of the documents to be presented, the documents may be issued in any language.
- c. i. When a credit allows two or

more acceptable languages, a confirming bank or a nominated bank acting on its nomination may restrict the number of acceptable languages as a condition of its engagement in the credit, and in such a case the data contained in the documents are only to be in the acceptable language or languages.

- ii. When a credit allows a document to contain data in two or more acceptable languages and a confirming bank or a nominated bank acting on its nomination does not restrict the language or the number of acceptable

languages as a condition of its engagement in the credit, it is required to examine the data in all of the acceptable languages appearing in the documents.

- d. Banks do not examine data that have been inserted in a language that is additional to that required or allowed in the credit.
- e. Notwithstanding paragraphs A21 (a) and (d), the name of a person or entity, any stamps, legalization, endorsements or similar, and the pre-printed text shown on a document, such as, but not limited to, field headings, may be in a language other than that required in the credit.

MATHEMATICAL CALCULATIONS

A22 When the presented documents indicate mathematical calculations, banks only determine that the stated total in respect of criteria such as amount, quantity,

weight or number of packages, does not conflict with the credit or any other stipulated document.

MISSPELLINGS OR TYPING ERRORS

A23 A misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs does not make a document discrepant. For example, a description of the goods shown as “mashine” instead of “machine”, “fountan pen” instead of “fountain pen” or “modle” instead of

“model” would not be regarded as a conflict of data under UCP 600 sub-article 14 (d). However, a description shown as, for example, “model 123” instead of “model 321” will be regarded as a conflict of data under that sub-article.

MULTIPLE PAGES AND ATTACHMENTS OR RIDERS

A24 When a document consists of more than one page, it must be possible to determine that the pages are part of the same document. Unless a document provides otherwise, pages which are physically bound together, sequentially numbered or contain internal cross references, however named or titled, will meet this requirement and are to be examined as one document, even if

some of the pages are regarded as an attachment or rider.

A25 When a signature or endorsement is required to be on a document consisting of more than one page, and the credit or the document itself does not indicate where a signature or endorsement is to appear, the signature or endorsement may appear anywhere on that document.

NON-DOCUMENTARY CONDITIONS AND CONFLICT OF DATA

A26 When a credit contains a condition without stipulating a document to indicate compliance therewith ("non-documentary condition"), compliance with such condition need not be evidenced on any stipulated document. However, data contained in a stipulated document are not to be in conflict

with the non-documentary condition. For example, when a credit indicates "packing in wooden cases" without indicating that such data is to appear on any stipulated document, a statement in any stipulated document indicating a different type of packing is considered to be a conflict of data.

ORIGINALS AND COPIES

A27 A document bearing an apparently original signature, mark, stamp or label of the issuer will be considered to be an original unless it states that it is a copy. Banks do not determine whether such a signature, mark, stamp or label of the issuer has been applied in a manual or facsimile form and, as such, any document bearing such method of authentication will satisfy the requirements of UCP 600 article 17.

A28 Documents issued in more than one original may be marked "Original", "Duplicate", "TriPLICATE", "First Original", "Second Original", etc. None of these markings will disqualify a document as an original.

A29 a. The number of originals to be presented is to be at least the number required by the credit or UCP 600.

b. When a transport document or insurance document indicates how many originals have been issued, the number of originals stated on the document is to be presented, except as stated in paragraphs H12 and J7 (c).

c. When a credit requires presentation of less than a full set of original transport documents, (for example, "2/3 original bills of lading"), but does not provide any disposal instructions for the

remaining original bill of lading, a presentation may include 3/3 original bills of lading.

d. When a credit requires, for example, presentation of:

i. "Invoice", "One Invoice", "Invoice in 1 copy" or "Invoice – 1 copy", it will be understood to be a requirement for an original invoice.

ii. "Invoice in 4 copies" or "Invoice in 4 fold" will be satisfied by the presentation of at least one original invoice and any remaining number as copies.

iii. "photocopy of invoice" or "copy of invoice" will be satisfied by the presentation of either a photocopy, copy or, when not prohibited, an original invoice.

iv. "photocopy of a signed invoice" will be satisfied by the presentation of either a photocopy or copy of the original invoice that was apparently signed or, when not prohibited, a signed original invoice.

A30 a. When a credit prohibits the presentation of an original

document by stating, for example, “photocopy of invoice – original document not acceptable in lieu of photocopy” or the like, only a photocopy of an invoice or an invoice marked copy is to be presented.

- b. When a credit requires the presentation of a copy of a transport document and indicates a disposal instruction for all

originals of that document, a presentation is not to include any original of such document.

- A31 a. Original documents are to be signed when required by the credit, the document itself (except as stated in paragraph A37) or UCP 600.
b. Copies of documents need not be signed nor dated.

SHIPPING MARKS

A32 When a credit specifies the details of a shipping mark, documents mentioning the shipping mark are to show those details. The data in a shipping mark indicated on a document need not be in the same sequence as those shown in the credit or in any other stipulated document.

A33 A shipping mark indicated on a document may show data in excess of what would normally be considered a “shipping mark”, or which is specified in the credit as a “shipping mark”, by the addition of information such as, but not limited to, the type of goods, warnings concerning the handling of fragile goods or net and gross weight

of the goods.

- A34 a. Transport documents covering containerized goods often only show a container number, with or without a seal number, under the heading “Shipping mark” or similar. Other documents that show a more detailed marking will not be in conflict for that reason.
b. The fact that some documents show additional information as mentioned in paragraphs A33 and A34 (a), while others do not, will not be regarded as a conflict of data under UCP 600 sub-article 14 (d).

SIGNATURES

- A35 a. A signature, as referred to in paragraph A31 (a), need not be handwritten. Documents may also be signed with a facsimile signature (for example, a pre-printed or scanned signature), perforated signature, stamp, symbol (for example, a chop) or any mechanical or electronic method of authentication.
b. A requirement for a document to be “signed and stamped” or a similar requirement is satisfied by

a signature in the form described in paragraph A35 (a) and the name of the signing entity typed, stamped, handwritten, pre-printed or scanned on the document, etc.

- c. A statement on a document such as “This document has been electronically authenticated” or “This document has been produced by electronic means and requires no signature” or words of similar effect does not, by itself, represent an electronic method of

- authentication in accordance with the signature requirements of UCP 600 article 3.
- d. A statement on a document indicating that authentication may be verified or obtained through a specific reference to a website (URL) constitutes a form of electronic method of authentication in accordance with the signature requirements of UCP 600 article 3. Banks will not access such websites to verify or obtain authentication.
- A36 a. A signature on the letterhead paper of a named person or entity is considered to be the signature of that named person or entity unless otherwise stated. The named person or entity need not be repeated next to the signature.
- b. When a signatory indicates it is signing for [or on behalf of] a
- branch of the issuer, the signature will be considered to be that of the issuer.
- A37 The fact that a document has a box, field or space for a signature does not in itself mean that such box, field or space is to be completed with a signature. For example, a signature is not required in the space titled “Signature of shipper or their agent” commonly found on an air waybill or “Signature of shipper” on a road transport document. Also see paragraph A17 in respect of the requirements for data to appear in a box, field or space.
- A38 When a document includes wording such as “This document is not valid unless countersigned [or signed] by (name of the person or entity)” or words of similar effect, the applicable box, field or space is to contain a signature and the name of the person or entity that is countersigning the document.

TITLE OF DOCUMENTS AND COMBINED DOCUMENTS

- A39 Documents may be titled as called for in the credit, bear a similar title or be untitled. The content of a document must appear to fulfil the function of the required document. For example, a requirement for a “Packing List” will be satisfied by a document containing packing details whether it is titled “Packing List”, “Packing Note”, “Packing and Weight List”, etc., or bears no title.
- A40 Documents required by a credit are to be presented as separate documents. However, and as an example, a requirement for an original packing list and an original weight list will also be satisfied by the presentation of two original combined packing and weight lists, provided that such documents state both packing and weight details.
- A41 A document required by a credit that is to cover more than one function may be presented as a single document or separate documents that appear to fulfil each function. For example, a requirement for a Certificate of Quality and Quantity will be satisfied by the presentation of a single document or by a separate Certificate of Quality and Certificate of Quantity provided that each document appears to fulfil its function and is presented in the number of originals and copies as required by the credit.

B. DRAFTS AND CALCULATION OF MATURITY DATE

BASIC REQUIREMENT

- B1 a. A draft, when required, is to be drawn on the bank stated in the credit.
- b. Banks only examine a draft to the extent described in paragraphs B2-B17.

TENOR

- B2 a. The tenor stated on a draft is to be in accordance with the terms of the credit.
- b. When a credit requires a draft to be drawn at a tenor other than sight or a certain period after sight, it must be possible to establish the maturity date from the data in the draft itself.
- For example, when a credit calls for drafts at a tenor 60 days after the bill of lading date, and when the date of the bill of lading is 14 May 2013, the tenor is to be indicated on the draft in one of the following ways:
- i. “60 days after bill of lading date 14 May 2013”, or
 - ii. “60 days after 14 May 2013”, or
 - iii. “60 days after bill of lading date” and elsewhere on the face of the state “bill of lading date 14 May 2013”, or
 - iv. “60 days date” on a draft dated the same day as the date of the bill of lading, or
 - v. “13 July 2013”, i.e., 60 days after the bill of lading date.
- c. When the tenor refers to, for example, 60 days after the bill of lading date, the on board date is deemed to be the bill of lading date even when the on board date is prior to or later than the date of issuance of the bill of lading.
- d. The words “from” and “after” when used to determine maturity dates of drafts signify that the calculation of the maturity date commences the day following the date of the document, shipment or the date of an event stipulated in the credit, for example, 10 days after or from 4 May is 14 May.
- e. i. When a credit requires a bill of lading and drafts are to be drawn, for example, at 60 days after or from the bill of lading date and a bill of lading is presented evidencing unloading and reloading of the goods from one vessel to another, and showing more than one dated on board notation and indicating that each shipment was effected from a port within a permitted geographical area or range of ports, the earliest of these dates is to be used for the calculation of the maturity date. For example, a credit requires shipment from any European port, and the bill of lading evidences on board vessel “A” from Dublin on 14 May, with transhipment effected on board vessel “B” from Rotterdam on 16 May. The draft should reflect 60

days after the earliest on board date in a European port, i.e., 14 May.

- ii. When a credit requires a bill of lading and drafts are to be drawn, for example, at 60 days after or from the bill of lading date, and a bill of lading is presented evidencing shipment of goods on the same vessel from more than one port within a permitted geographical area or range of ports, and shows more than one dated on board notation, the latest of these dates is to be used for the calculation of the maturity date. For example, a credit requires shipment from any European port, and the bill of lading evidences part of the goods loaded on board

vessel "A" from Dublin on 14 May and the remainder on board the same vessel from Rotterdam on 16 May. The draft should reflect 60 days after the latest on board date, i.e., 16 May.

- iii. When a credit requires a bill of lading and drafts are to be drawn, for example, at 60 days after or from the bill of lading date, and more than one set of bills of lading is presented under one draft, the on board date of the latest bill of lading will be used for the calculation of the maturity date.

- B3 While the examples in paragraphs B2 (e) (i-iii) refer to bill of lading dates, the same principles apply to any basis for determining a maturity date.

MATURITY DATE

- B4 When a draft states a maturity date by using an actual date, that date is to reflect the terms of the credit.

- B5 For drafts drawn, for example, "at 60 days sight", the maturity date is established as follows:

- a. in the case of a complying presentation, the maturity date will be 60 days after the day of presentation to the bank on which the draft is drawn, i.e., the issuing bank, confirming bank or a nominated bank that agrees to act on its nomination ("drawee bank").

- b. in the case of a non-complying presentation:

- i. when such drawee bank has not provided a notice of refusal, the maturity date will be 60 days after the day of presentation to it;

- ii. when the drawee bank is the issuing bank and it has provided a notice of refusal at the latest 60 days after the date the issuing bank accepts the waiver of the applicant;

- iii. when the drawee bank is a bank other than the issuing bank and it has provided a notice of refusal, at the latest 60 days after the date of the acceptance advice of the issuing bank. When such drawee bank does not agree to act on the acceptance advice of the issuing bank, the undertaking to honour on the due date is that of the issuing bank.

- c. The drawee bank is to advise or confirm the maturity date to the presenter.

- B6 The method of calculation of tenor and maturity dates, as shown above, also applies to a credit available by deferred payment or, in some cases, negotiation, i.e., when there is no requirement for a draft to be presented by the beneficiary.

BANKING DAYS, GRACE DAYS, DELAYS IN REMITTANCE

- B7 Payment is to be made in immediately available funds on the due date at the place where the draft or documents are payable, provided that such due date is a banking day in that place. When the due date is a non-banking day, payment is due on the first banking day following the due date. Delays in the remittance of funds, for example grace days, the time it takes to remit funds, etc., are not to be in addition to the stated or agreed due date as defined by the draft or documents.

DRAWING AND SIGNING

- B8 a. A draft is to be drawn and signed by the beneficiary and to indicate a date of issuance.
- b. When the beneficiary or second beneficiary has changed its name, and the credit mentions the former name, a draft may be drawn in the name of the new entity provided that it indicates "formerly known as (name of the beneficiary or second beneficiary)" or words of similar effect.
- that nominated bank (which is not a confirming bank), and it decides not to act on its nomination, the beneficiary may choose to:
- i. draw the draft on the confirming bank, if any, or request that the presentation be forwarded to the confirming bank in the form as presented;
 - ii. present the documents to another bank that agrees to accept a draft drawn on it and thereby act on its nomination (applicable only when the credit is available with any bank); or
 - iii. request that the presentation be forwarded to the issuing bank in the form as presented with or without a draft drawn on the issuing bank.
- B9 When a credit indicates the drawee of a draft by only stating the SWIFT address of a bank, the draft may show the drawee with the same details or the full name of the bank.
- B10 When a credit is available by negotiation with a nominated bank or any bank, the draft is to be drawn on a bank other than the nominated bank.
- B11 When a credit is available by acceptance with any bank, the draft is to be drawn on the bank that agrees to accept the draft and is thereby willing to act on its nomination.
- B12 When a credit is available by acceptance with:
- a. a nominated bank or any bank, and the draft is to be drawn on

AMOUNTS

B13 A draft is to be drawn for the amount demanded under the presentation.

B14 The amount in words is to accurately reflect the amount in figures when both

are shown, and indicate the currency as stated in the credit. When the amount in words and figures are in conflict, the amount in words is to be examined as the amount demanded.

ENDORSEMENT

B15 A draft is to be endorsed, if necessary.

CORRECTION AND ALTERATION (“CORRECTION”)

B16 Any correction of data on a draft is to appear to have been authenticated with the addition of the signature or initials of the beneficiary.

B17 When no correction of data is allowed in a draft, an issuing bank should have included a suitable stipulation in its credit.

DRAFTS DRAWN ON THE APPLICANT

- B18 a. A credit must not be issued available by a draft drawn on the applicant.
- b. However, when a credit requires the presentation of a draft drawn

on the applicant as one of the required documents, it is to be examined only to the extent expressly stated in the credit, otherwise according to UCP 600 sub-article 14 (f).

C. INVOICES**TITLE OF INVOICE**

- C1 a. When a credit requires presentation of an “invoice” without further description, this will be satisfied by the presentation of any type of invoice (commercial invoice, customs invoice, tax invoice, final invoice, consular invoice, etc.). However, an invoice is not to be identified as “provisional”, “pro-forma” or the like.
- b. When a credit requires presentation of a “commercial invoice”, this will also be satisfied by the presentation of a document titled “invoice”, even when such document contains a statement that it has been issued for tax purposes.

ISSUER OF AN INVOICE

- C2 a. An invoice is to appear to have been issued by the beneficiary or, in the case of a transferred credit, the second beneficiary.
- b. When the beneficiary or second beneficiary has changed its name and the credit mentions the former name, an invoice may be issued in the name of the new entity provided that it indicates “formerly known as (name of the beneficiary or second beneficiary)” or words of similar effect.

DESCRIPTION OF THE GOODS, SERVICES OR PERFORMANCE AND OTHER GENERAL ISSUES RELATED TO INVOICES

- C3 The description of the goods, services or performance shown on the invoice is to correspond with the description shown in the credit. There is no requirement for a mirror image. For example, details of the goods may be stated in a number of areas within the invoice which, when read together, represent a description of the goods corresponding to that in the credit.
- C4 The description of goods, services or performance on an invoice is to reflect what has actually been shipped, delivered or provided. For example, when the goods description in the credit indicates a requirement for shipment of "10 trucks and 5 tractors", and only 4 trucks have been shipped, an invoice may indicate shipment of only 4 trucks provided that the credit did not prohibit partial shipment. An invoice indicating what has actually been shipped (4 trucks) may also contain the description of the goods stated in the credit, i.e., 10 trucks and 5 tractors.
- C5 An invoice showing a description of the goods, services or performance that corresponds with that in the credit may also indicate additional data in respect of the goods, services or performance provided that they do not appear to refer to a different nature, classification or category of the goods, services or performance.
- For example, when a credit requires shipment of "Suede Shoes", but the invoice describes the goods as "Imitation Suede Shoes", or when the credit requires "Hydraulic Drilling Rig", but the invoice describes the goods as "Second Hand Hydraulic Drilling Rig", these descriptions would represent a change in nature, classification or category of the goods.
- C6 An invoice is to indicate:
- the value of the goods shipped or delivered, or services or performance provided.
 - unit price(s), when stated in the credit.
 - the same currency as that shown in the credit.
 - any discount or deduction required by the credit.
- C7 An invoice may indicate a deduction covering advance payment, discount, etc., that is not stated in the credit.
- C8 When a trade term is stated as part of the goods description in the credit, an invoice is to indicate that trade term, and when the source of the trade term is stated, the same source is to be indicated. For example, a trade term indicated in a credit as "CIF Singapore Incoterms 2010" is not to be indicated on an invoice as "CIF Singapore" or "CIF Singapore Incoterms". However, when a trade term is stated in the credit as "CIF Singapore" or "CIF Singapore Incoterms", it may also be indicated on an invoice as "CIF Singapore Incoterms 2010" or any other revision.
- C9 Additional charges and costs, such as those related to documentation, freight or insurance costs, are to be included within the value shown against the stated trade term on the invoice.
- C10 An invoice need not be signed or dated.
- C11 Any total quantity of goods and their weight or measurement shown on the invoice is not to conflict with the same data appearing on other documents.

C12 An invoice is not to indicate:

- a. over-shipment (except as provided in UCP 600 sub-article 30 (b)), or
- b. goods, services or performance not called for in the credit. This applies even when the invoice includes additional quantities of goods, services or performance as required by the credit or samples and advertising material and are stated to be free of charge.

C13 The quantity of goods required in the credit may be indicated on an invoice within a tolerance of +/-5%. A variance of up to +5% in the quantity of the goods does not allow the amount

demanded under the presentation to exceed the amount of the credit. The tolerance of +/-5% in the quantity of the goods will not apply when:

- a. a credit states that the quantity is not to be exceeded or reduced; or
- b. a credit states the quantity in terms of a stipulated number of packing units or individual items.

C14 When no quantity of goods is stated in the credit, and partial shipments are prohibited, an invoice issued for an amount up to 5% less than the credit amount will be considered to cover the full quantity and not a partial shipment.

INSTALMENT DRAWINGS OR SHIPMENTS

- C15 a. i. When a drawing or shipment by instalments within given periods is stipulated in the credit, and any instalment is not drawn or shipped within the period allowed for that instalment, the credit ceases to be available for that and any subsequent instalment. Given periods are a sequence of dates or timelines that determine a start and end date for each instalment. For example, a credit requiring shipment of 100 cars in March and 100 cars in April is an example of two periods of time that start on 1 March and 1 April and end on 31 March and 30 April respectively.
- ii. When partial drawings or shipments are allowed, any number of drawings or shipments is permitted within

each instalment.

- b. When a credit indicates a drawing or shipment schedule by only indicating a number of latest dates, and not given periods (as referred to in paragraph C15 (a) (i)):
- i. this is not an instalment schedule as envisaged by UCP 600, and article 32 will not apply. The presentation is to otherwise comply with any instructions in respect of the drawing or shipment schedule and UCP 600 article 31;
 - ii. when partial drawings or shipments are allowed, any number of drawings or shipments is permitted on or before each latest date for a drawing or shipment to occur.

D. TRANSPORT DOCUMENT COVERING AT LEAST TWO DIFFERENT MODES OF TRANSPORT (“MULTIMODAL OR COMBINED TRANSPORT DOCUMENT”)

APPLICATION OF UCP 600 ARTICLE 19

- D1 a. A requirement in a credit for the presentation of a transport document, however named, covering movement of goods utilizing at least two different modes of transport means that UCP 600 article 19 is to be applied in the examination of that document.
- b. i. A multimodal or combined transport document is not to indicate that shipment or dispatch has been effected by only one mode of transport, but it may be silent regarding some or all of the modes of transport utilized.
- ii. A multimodal or combined transport document is not to contain any indication of a charter party as described in paragraphs G2 (a) and (b).
- c. When a credit requires the presentation of a transport document other than a multimodal or combined transport document, and it is clear from the routing of the goods stated in the credit that more than one mode of transport is to be utilized, for example, when an inland place of receipt or final destination are indicated, or the port of loading or discharge field is completed but with a place which is in fact an inland place and not a port, UCP 600 article 19 is to be applied in the examination of that document.
- D2 In all places where the term “multimodal transport document” is used within this publication, it also includes the term “combined transport document”. The transport document presented need not be titled “Multimodal transport document” or “Combined transport document” or words of similar effect even when the credit so names the required document.

ISSUANCE, CARRIER, IDENTIFICATION OF THE CARRIER AND SIGNING OF A MULTIMODAL TRANSPORT DOCUMENT

- D3 a. A multimodal transport document may be issued by any entity other than a carrier or master (captain) provided it meets the requirements of UCP 600 article 19.
- b. When a credit indicates “Freight Forwarder’s Multimodal Transport Document is acceptable” or “House Multimodal Transport Document is acceptable” or words of similar effect, a multimodal transport document may be signed by the issuing entity without it being necessary to indicate the capacity in which it has been signed or the name of the carrier.
- D4 A stipulation in a credit that “Freight Forwarder’s Multimodal Transport Documents are not acceptable” or “House Multimodal Transport Documents are not acceptable” or words of similar effect has no meaning

in the context of the title, format, content or signing of a multimodal transport document unless the credit provides specific requirements detailing how the multimodal transport document is to be issued and signed. In the absence of these requirements, such a stipulation is to be disregarded, and the multimodal transport document presented is to be examined according to the requirements of UCP 600 article 19.

- D5 a. A multimodal transport document is to be signed in the form described in UCP 600 sub-article 19 (a) (i) and to indicate the name of the carrier, identified as the carrier.
- b. When a multimodal transport document is signed by a named branch of the carrier, the signature is considered to have been made by the carrier.
- c. When an agent signs a multimodal transport document for [or on behalf of] the carrier, the agent is to be named and, in addition,

to indicate that it is signing as “agent for (name), the carrier” or as “agent on behalf of (name), the carrier” or words of similar effect. When the carrier is identified elsewhere in the document as the “carrier”, the named agent may sign, for example, as “agent for [or on behalf of] the carrier” without naming the carrier again.

- d. When the master (captain) signs a multimodal transport document, the signature of the master (captain) is to be identified as the “master” (“captain”). The name of the master (captain) need not be stated.
- e. When an agent signs a multimodal transport document for [or on behalf of] the master (captain), the agent is to be named and, in addition, to indicate that it is signing as “agent for the master (or captain)” or as “agent on behalf of the master (or captain)” or words of similar effect. The name of the master (captain) need not be stated.

ON BOARD NOTATION, DATE OF SHIPMENT, PLACE OF RECEIPT, DISPATCH, TAKING IN CHARGE, PORT OF LOADING OR AIRPORT OF DEPARTURE

- D6 The issuance date of a multimodal transport document will be deemed to be the date of receipt, dispatch, taking in charge or shipment on board and the date of shipment, unless it bears a separate dated notation evidencing receipt, dispatch, taking in charge or shipment on board from the place, port or airport stated in the credit. In the latter event, such date will be deemed to be the date of shipment whether that date is before or after the issuance date of the multimodal transport document. A separate dated notation may also be indicated in a designated field or box.

- D7 When a credit requires shipment to commence from a port, i.e., when the first leg of the journey, as required by the credit, is by sea, a multimodal transport document is to indicate a dated on board notation, and in this event paragraph E6 (b-d) will also apply.

- D8 In a multimodal transport document, when a credit requires shipment to commence from a port, the named port of loading should appear in the port of loading field. However, it may also be stated in the field headed “Place of receipt” or words of similar effect,

provided there is a dated on board notation evidencing that the goods were shipped on board a named vessel at the port stated under "Place of receipt" or words of similar effect.

D9 A multimodal transport document is to indicate the place of receipt, dispatch, taking in charge, port of loading or airport of departure stated in the credit. When a credit indicates the place of receipt, dispatch, taking in charge, port of loading or airport of departure by also stating the country in which the place, port or airport is located, the name of the country need not be stated.

D10 When a credit indicates a geographical area or range of places of receipt,

dispatch, taking in charge, ports of loading or airports of departure (for example, "Any European Country" or "Hamburg, Rotterdam, Antwerp Port"), a multimodal transport document is to indicate the actual place of receipt, dispatch, taking in charge, port of loading or airport of departure, which is to be within that geographical area or range of places. A multimodal transport document need not indicate the geographical area.

D11 Terms such as "Shipped in apparent good order", "Laden on board", "Clean on board" or other phrases that incorporate "shipped" or "on board" have the same effect as the words "Shipped on board".

PLACE OF FINAL DESTINATION, PORT OF DISCHARGE OR AIRPORT OF DESTINATION

D12 a. In a multimodal transport document, when a credit requires shipment to be effected to a port, the named port of discharge should appear in the port of discharge field.

b. However, the named port of discharge may be stated in the field headed "Place of final destination" or words of similar effect provided there is a notation evidencing that the port of discharge is that stated under "Place of final destination" or words of similar effect. For example, when a credit requires shipment to be effected to Felixstowe, but Felixstowe is shown as the place of final destination instead of the port of discharge, this may be evidenced by a notation stating "Port of discharge Felixstowe".

D13 A multimodal transport document is to indicate the place of final destination, port of discharge or airport of destination stated in the credit. When a credit indicates the place of final destination port of discharge or airport of destination by also stating the country in which the place or port is located, the name of the country need not be stated.

D14 When a credit indicates a geographical area or range of places of final destination, ports of discharge or airports of destination (for example, "Any European Country" or "Hamburg, Rotterdam, Antwerp Port"), a multimodal transport document is to indicate the actual place of final destination, port of discharge or airport of destination, which is to be within that geographical area or range of places. A multimodal transport document need not indicate the geographical area.

ORIGINAL MULTIMODAL TRANSPORT DOCUMENT

- D15 a. A multimodal transport document is to indicate the number of originals that have been issued.
- b. Multimodal transport documents marked “First Original”, “Second Original”, “Third Original”, or “Original”, “Duplicate”, “TriPLICATE” or similar expressions are all originals.

CONSIGNEE, ORDER PARTY, SHIPPER AND ENDORSEMENT, AND NOTIFY PARTY

- D16 When a credit requires a multimodal transport document to evidence that goods are consigned to a named entity, for example, “consigned to (named entity)” (i.e., a “straight” multimodal transport document or consignment) rather than “to order” or “to order of (named entity)”, it is not to contain the expressions “to order” or “to order of” preceding the named entity, or the expression “or order” following the named entity, whether typed or pre-printed.
- D17 a. When a multimodal transport document is issued “to order” or “to order of the shipper”, it is to be endorsed by the shipper. An endorsement may be made by a named entity other than the shipper, provided the endorsement is made for [or on behalf of] the shipper.
- b. When a credit requires a multimodal transport document to evidence that goods are consigned “to order of (named entity)”, it is not to indicate that the goods are straight consigned to that named entity.
- D18 a. When a credit stipulates the details of one or more notify parties, a multimodal transport document may also indicate the details of one or more additional notify parties.
- b. i. When a credit does not stipulate the details of a notify party, a multimodal transport document may indicate the details of any notify party and in any manner (except as stated in paragraph D18 (b) (ii)).
- ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on a multimodal transport document, and these details include the applicant’s address and contact details, they are not to conflict with those stated in the credit.
- D19 When a credit requires a multimodal transport document to evidence goods consigned to or to the order of “issuing bank” or “applicant” or notify “applicant” or “issuing bank”, a multimodal transport document is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or any contact details that may be stated in the credit.
- D20 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

TRANSHIPMENT, PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION PERIOD WHEN MULTIPLE SETS OF MULTIMODAL TRANSPORT DOCUMENTS ARE PRESENTED

D21 In multimodal transport transhipment will occur. Transhipment is the unloading and reloading of goods from one means of conveyance to another means of conveyance (whether or not in different modes of transport) during the carriage of those goods from the place of receipt, dispatch or taking in charge, port of loading or airport of departure to the place of final destination, port of discharge or airport of destination stated in the credit.

D22 Shipment on more than one means of conveyance (more than one truck [lorry], vessel, aircraft, etc.) is a partial shipment, even when such means of conveyance leaves on the same day for the same destination.

D23 a. When a credit prohibits partial shipment, and more than one set of original multimodal transport documents are presented covering receipt, dispatch, taking in charge or shipment from one or more points of origin (as specifically allowed, or within a geographical area or range of places stated in the credit), each set is to indicate that it covers the carriage of goods on the same means of conveyance and same journey and that the goods are destined for the same destination.

- b. When a credit prohibits partial shipment, and more than one set of original multimodal transport documents are presented in accordance with paragraph D23) (a) and incorporate different dates of receipt, dispatch, taking in charge, or shipment, the latest of these dates is to be used for the calculation of any presentation period and must fall on or before the latest date of receipt, dispatch, taking in charge or shipment stated in the credit.
- c. When partial shipment is allowed, and more than one set of original multimodal transport documents are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of receipt, dispatch, taking in charge or shipment, on different means of conveyance, the earliest of these dates is to be used for the calculation of any presentation period, and each of these dates must fall on or before the latest date of receipt, dispatch, taking in charge or shipment stated in the credit.

CLEAN MULTIMODAL TRANSPORT DOCUMENT

D24 A multimodal transport document is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging.

For example:

- a. A clause on a multimodal transport document such as “packaging is not sufficient for the sea journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.

- b. A clause on a multimodal transport document such as “packaging may not be sufficient for the sea journey” or words of similar effect does not expressly declare a defective condition of the packaging.
- D25 a. It is not necessary for the word “clean” to appear on a multimodal
- transport document even when the credit requires a multimodal transport document to be marked “clean on board” or “clean”.
- b. Deletion of the word “clean” on a multimodal transport document does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

D26 A goods description indicated on a multimodal transport document may be in general terms not in conflict with the goods description in the credit.

INDICATION OF NAME AND ADDRESS OF DELIVERY AGENT AT DESTINATION

D27 When a credit requires a multimodal transport document to indicate the name, address and contact details of a delivery agent or words of similar effect, at or for the place of final destination or port of discharge, the address need not be one that is located at the place of destination or port of discharge or within the same country as that of the place of final destination or port of discharge.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

D28 Any correction of data on a multimodal transport document is to be authenticated. Such authentication is to appear to have been made by the carrier, master (captain) or any one of their named agents, who may be different from the agent that may have issued or signed a multimodal transport document, provided they are identified as an agent of the carrier or master (captain).

D29 Non-negotiable copies of a multimodal transport document need not include authentication of any corrections that may have been made on the original.

FREIGHT AND ADDITIONAL COSTS

D30 A statement appearing on a multimodal transport document indicating the payment of freight need not be identical to that stated in the credit, but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires a multimodal transport document to be marked “freight payable at destination”, it may be marked “freight collect”.

D31 a. When a credit states that costs

additional to freight are not acceptable, a multimodal transport document is not to indicate that costs additional to the freight have been or will be incurred.

- b. An indication of costs additional to freight may be made by express reference to additional costs or by the use of trade terms which refer to costs associated with the loading or unloading of goods,

such as, but not limited to, Free In (FI), Free Out (FO), Free In and Out (FIO) and Free In and Out Stowed (FIOS).

- c. Reference in a multimodal transport document to costs which may be levied, for example, as a

result of a delay in unloading the goods, or after the goods have been unloaded (demurrage costs) or costs covering the late return of containers (detention costs) is not an indication of costs additional to freight.

RELEASE OF GOODS WITH MORE THAN ONE MULTIMODAL TRANSPORT DOCUMENT TO BE SURRENDERED

D32 A multimodal transport document is not to expressly state that goods covered by that multimodal transport document will only be released upon its surrender together with one or more other multimodal transport documents, unless all of the referenced multimodal transport documents form part of the same presentation under the same credit.

For example, “Container XXXX is covered by B/L No. YYY and ZZZ, and can only be released to a single merchant upon presentation of all multimodal transport documents of that merchant” is considered to be an express statement that one or more other multimodal transport documents, related to the referenced container or packing unit, must be surrendered prior to the goods being released.

E. BILL OF LADING

APPLICATION OF UCP 600 ARTICLE 20

- E1 a. A requirement in a credit for the presentation of a transport document, however named, only covering a port-to-port shipment, i.e., a credit that contains no reference to a place of receipt or taking in charge or place of final destination means that UCP 600 article 20 is to be applied in the examination of that document.
- b. A bill of lading is not to contain any indication of a charter party as described in paragraphs G2)(a) and (b).
- E2 A bill of lading need not be titled “marine bill of lading”, “ocean bill of lading”, “port-to-port bill of lading” or words of similar effect even when the credit so names the required document.

ISSUANCE, CARRIER, IDENTIFICATION OF THE CARRIER AND SIGNING OF A BILL OF LADING

- E3 a. A bill of lading may be issued by any entity other than a carrier or master (captain), provided it meets the requirements of UCP 600 article 20.
- b. When a credit indicates “Freight Forwarder’s Bill of Lading is acceptable” or “House Bill of Lading is acceptable” or words of similar effect, a bill of lading may be signed by the issuing entity without it being necessary to indicate the capacity in which it has been signed or the name of the carrier.

- E4 A stipulation in a credit that “Freight Forwarder’s Bills of Lading are not acceptable” or “House Bills of Lading are not acceptable” or words of similar effect has no meaning in the context of the title, format, content or signing of a bill of lading unless the credit provides specific requirements detailing how the bill of lading is to be issued and signed. In the absence of these requirements, such a stipulation is to be disregarded, and the bill of lading presented is to be examined according to the requirements of UCP 600 article 20.
- E5 a. A bill of lading is to be signed in the form described in UCP 600 sub-article 20 (a) (i) and to indicate the name of the carrier, identified as the carrier.
- b. When a bill of lading is signed by a named branch of the carrier, the signature is considered to have been made by the carrier.
- c. When an agent signs a bill of lading for [or on behalf of] the carrier, the agent is to be named and, in addition, to indicate that it is signing as “agent for (name), the carrier” or as “agent on behalf of (name), the carrier” or words of similar effect. When the carrier is identified elsewhere in the document as the “carrier”, the named agent may sign, for example, as “agent for [or on behalf of] the carrier” without naming the carrier again.
- d. When the master (captain) signs a bill of lading, the signature of the master (captain) is to be identified as the “master” (“captain”). The name of the master (captain) need not be stated.
- e. When an agent signs a bill of lading for [or on behalf of] the master (captain), the agent is to be named and, in addition, to indicate that it is signing as “agent for the master (or captain)”, or as “agent on behalf of the master (or captain)” or words of similar effect. The name of the master (captain) need not be stated.

ON BOARD NOTATION, DATE OF SHIPMENT, PRE-CARRIAGE, PLACE OF RECEIPT AND PORT OF LOADING

- E6 a. When a pre-printed “Shipped on board” bill of lading is presented, its issuance date will be deemed to be the date of shipment unless it bears a separate dated on board notation. In the latter event, such date will be deemed to be the date of shipment whether that date is before or after the issuance date of the bill of lading. The on board date may also be indicated in a designated field or box.
- b. Notwithstanding that a credit may require a bill of lading to evidence a port-to-port shipment:
- i. when a bill of lading indicates a place of receipt that is the same as the port of loading, for example, place of receipt Rotterdam CY and the port of loading Rotterdam, and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field); or
- ii. when a bill of lading indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and port of loading Rotterdam,

- and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), then:
- (a) when a bill of lading is pre-printed “shipped on board”, the date of issue will be deemed to be the date of shipment, and no further on board notation is required.
 - (b) when a bill of lading is pre-printed “received for shipment”, a dated on board notation is required, and the date appearing in the notation will be deemed to be the date of shipment. The on board date may also be indicated in a designated field or box.
- c. Notwithstanding that a credit may require a bill of lading to evidence a port-to-port shipment, when a bill of lading:
- i. indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and port of loading Rotterdam, and there is an indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), regardless of whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
 - ii. indicates a means of pre-carriage (either in the pre-carriage field or the place of receipt field), no matter if no place of receipt is stated or whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- d. When a bill of lading indicates wording such as “When the place of receipt box has been completed, any notation on this bill of lading of “on board”, “loaded on board” or words of similar effect shall be deemed to be on board the means of transportation performing the carriage from the place of receipt to the port of loading” or words of similar effect, and if, in addition, the place of receipt box is completed, a bill of lading is to bear a dated on board notation. The dated on board notation is also to indicate the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- e. The named port of loading, as required by the credit, should appear in the port of loading field on a bill of lading. However, it may also be stated in the field

- headed “Place of receipt” or words of similar effect, provided there is a dated on board notation evidencing that the goods were shipped on board a named vessel at the port stated under “Place of receipt” or words of similar effect.
- f. A bill of lading is to indicate the port of loading stated in the credit. When a credit indicates the port of loading by also stating the country in which the port is located, the name of the country need not be stated.
- g. When a credit indicates a geographical area or range of ports of loading (for example, “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a bill of lading is to indicate the actual port of loading, which is to be within that geographical area or range of ports. A bill of lading need not indicate the geographical area.
- h. When a bill of lading indicates more than one port of loading, it is to evidence an on board notation with the relevant on board date for each port of loading, regardless of whether it is pre-printed “received for shipment” or “shipped on board”. For example, when a bill of lading indicates that shipment has been effected from Brisbane and Adelaide, a dated on board notation is required for both Brisbane and Adelaide.
- E7 Terms such as “Shipped in apparent good order”, “Laden on board”, “Clean on board” or other phrases that incorporate “shipped” or “on board” have the same effect as the words “Shipped on board”.
- PORT OF DISCHARGE**
- E8 a. The named port of discharge, as required by the credit, should appear in the port of discharge field within a bill of lading. by a notation stating “Port of discharge Felixstowe”.
- b. However, the named port of discharge may be stated in the field headed “Place of final destination” or words of similar effect provided there is a notation evidencing that the port of discharge is that stated under “Place of final destination” or words of similar effect. For example, when a credit requires shipment to be effected to Felixstowe, but Felixstowe is shown as the place of final destination instead of the port of discharge, this may be evidenced
- E9 A bill of lading is to indicate the port of discharge stated in the credit. When a credit indicates the port of discharge by also stating the country in which the port is located, the name of the country need not be stated.
- E10 When a credit indicates a geographical area or range of ports of discharge (for example, “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a bill of lading is to indicate the actual port of discharge, which is to be within that geographical area or range of ports. A bill of lading need not indicate the geographical area.

ORIGINAL BILL OF LADING

- E11 a. A bill of lading is to indicate the number of originals that have been issued.
- b. Bills of lading marked “First Original”, “Second Original”, “Third Original”, or “Original”, “Duplicate”, “Triplicate” or similar expressions are all originals.

CONSIGNEE, ORDER PARTY, SHIPPER AND ENDORSEMENT, AND NOTIFY PARTY

- E12 When a credit requires a bill of lading to evidence that goods are consigned to a named entity, for example, “consigned to (named entity)” (i.e., a “straight” bill of lading or consignment) rather than “to order” or “to order of (named entity)”, it is not to contain the expressions “to order” or “to order of” preceding the named entity, or the expression “or order” following the named entity, whether typed or pre-printed.
- E13 a. When a bill of lading is issued “to order” or “to order of the shipper”, it is to be endorsed by the shipper. An endorsement may be made by a named entity other than the shipper, provided the endorsement is made for [or on behalf of] the shipper.
- b. When a credit requires a bill of lading to evidence that goods are consigned “to order of (named entity)”, it is not to indicate that the goods are straight consigned to that named entity.
- E14 a. When a credit stipulates the details of one or more notify parties, a bill of lading may also indicate the details of one or more additional notify parties.
- b. i. When a credit does not stipulate the details of a notify party, a bill of lading may indicate the details of any notify party and in any manner (except as stated in paragraph E14 (b) (ii)).
- ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on a bill of lading, and these details include the applicant’s address and contact details, they are not to conflict with those stated in the credit.
- E15 When a credit requires a bill of lading to evidence goods consigned to or to the order of “issuing bank” or “applicant” or notify “applicant” or “issuing bank”, a bill of lading is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or any contact details that may be stated in the credit.
- E16 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

TRANSHIPMENT, PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION PERIOD WHEN MULTIPLE SETS OF BILLS OF LADING ARE PRESENTED

- E17 Transhipment is the unloading and reloading of goods from one vessel to another during the carriage of those goods from the port of loading to the

port of discharge stated in the credit. When a bill of lading does not indicate unloading and reloading between these two ports, it is not transhipment in the context of the credit and UCP 600 sub-articles 20 (b) and (c).

E18 Shipment on more than one vessel is a partial shipment, even if each vessel leaves on the same day for the same destination.

E19 a. When a credit prohibits partial shipment, and more than one set of original bills of lading are presented covering shipment from one or more ports of loading (as specifically allowed, or within a geographical area or range of ports stated in the credit), each set is to indicate that it covers the shipment of goods on the same vessel and same journey and that the goods are destined for the same port of discharge.

b. When a credit prohibits partial shipment, and more than one set of original bills of lading are presented in accordance with paragraph E19 (a) and incorporate different dates of shipment, the latest of these dates is to be used for the calculation of any presentation period and must fall on or before the latest shipment date stated in the credit.

c. When partial shipment is allowed, and more than one set of original bills of lading are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of shipment, on different vessels or the same vessel for a different journey, the earliest of these dates is to be used for the calculation of any presentation period, and each of these dates must fall on or before the latest shipment date stated in the credit.

CLEAN BILL OF LADING

E20 A bill of lading is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging. For example:

- a. A clause on a bill of lading such as “packaging is not sufficient for the sea journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.
- b. A clause on a bill of lading such as “packaging may not be sufficient for the sea journey” or words of

similar effect does not expressly declare a defective condition of the packaging.

E21 a. It is not necessary for the word “clean” to appear on a bill of lading even when the credit requires a bill of lading to be marked “clean on board” or “clean”.

b. Deletion of the word “clean” on a bill of lading does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

E22 A goods description indicated on a bill of lading may be in general terms not

in conflict with the goods description in the credit.

**INDICATION OF NAME AND ADDRESS OF DELIVERY
AGENT AT PORT OF DISCHARGE**

E23 When a credit requires a bill of lading to indicate the name, address and contact details of a delivery agent or words of similar effect, at or for the port of

discharge, the address need not be one that is located at the port of discharge or within the same country as that of the port of discharge.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

E24 Any correction of data on a bill of lading is to be authenticated. Such authentication is to appear to have been made by the carrier, master (captain) or any one of their named agents, who may be different from the agent that may have issued or signed a bill of lading,

provided they are identified as an agent of the carrier or the master (captain).

E25 Non-negotiable copies of a bill of lading need not include authentication of any corrections that may have been made on the original.

FREIGHT AND ADDITIONAL COSTS

E26 A statement appearing on a bill of lading indicating the payment of freight need not be identical to that stated in the credit, but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires a bill of lading to be marked “freight payable at destination”, it may be marked “freight collect”.

reference to additional costs or by the use of trade terms which refer to costs associated with the loading or unloading of goods, such as, but not limited to, Free In (FI), Free Out (FO), Free In and Out (FIO) and Free In and Out Stowed (FIOS).

E27 a. When a credit states that costs additional to freight are not acceptable, a bill of lading is not to indicate that costs additional to the freight have been or will be incurred.

b. An indication of costs additional to freight may be made by express

c. Reference in a bill of lading to costs which may be levied, for example, as a result of a delay in unloading the goods, or after the goods have been unloaded (demurrage costs) or costs covering the late return of containers (detention costs) is not an indication of costs additional to freight.

**RELEASE OF GOODS WITH MORE THAN ONE
BILL OF LADING TO BE SURRENDERED**

E28 A bill of lading is not to expressly state that goods covered by that bill of lading will only be released upon its surrender together with one or more other bills of lading, unless all of the referenced bills of lading form part of the same

presentation under the same credit.

For example, “Container XXXX is covered by B/L No. YYY and ZZZ and can only be released to a single merchant upon presentation of all

bills of lading of that merchant” is considered to be an express statement that one or more other bills of lading,

related to the referenced container or packing unit, must be surrendered prior to the goods being released.

F. NON-NEGOTIABLE SEA WAYBILL

APPLICATION OF UCP 600 ARTICLE 21

- F1 a. A requirement in a credit for the presentation of a non-negotiable sea waybill, covering a port-to-port shipment only, i.e., a credit that contains no reference to a place of receipt or taking in charge or place of final destination means that UCP 600 article 21 is to be applied in the examination of that document.
- b. A non-negotiable sea waybill is not to contain any indication of a charter party as described in paragraphs G2) (a) and (b).

ISSUANCE, CARRIER, IDENTIFICATION OF THE CARRIER AND SIGNING OF A NON-NEGOTIABLE SEA WAYBILL

- F2 a. A non-negotiable sea waybill may be issued by any entity other than a carrier or master (captain) provided it meets the requirements of UCP 600 article 21. stipulation is to be disregarded, and the non-negotiable sea waybill presented is to be examined according to the requirements of UCP 600 article 21.
- b. When a credit indicates “Freight Forwarder’s non-negotiable sea waybill is acceptable” or “House non-negotiable sea waybill is acceptable” or words of similar effect, a non-negotiable sea waybill may be signed by the issuing entity without it being necessary to indicate the capacity in which it has been signed or the name of the carrier.
- F3 A stipulation in a credit that “Freight Forwarder’s non-negotiable sea waybill is not acceptable” or “House non-negotiable sea waybill is not acceptable” or words of similar effect has no meaning in the context of the title, format, content or signing of a non-negotiable sea waybill unless the credit provides specific requirements detailing how the non-negotiable sea waybill is to be issued and signed. In the absence of these requirements, such a F4 a. A non-negotiable sea waybill is to be signed in the form described in UCP 600 sub-article 21 (a) (i) and to indicate the name of the carrier, identified as the carrier.
- b. When a non-negotiable sea waybill is signed by a named branch of the carrier, the signature is considered to have been made by the carrier.
- c. When an agent signs a non-negotiable sea waybill for [or on behalf of] the carrier, the agent is to be named and, in addition, to indicate that it is signing as “agent for (name), the carrier” or as “agent on behalf of (name), the carrier” or words of similar effect. When the carrier is identified elsewhere in the document as the “carrier”, the named agent may sign, for example, as “agent for [or on behalf of] the carrier” without naming the carrier again.

- d. When the master (captain) signs a non-negotiable sea waybill, the signature of the master (captain) is to be identified as the “master” (“captain”). The name of the master (captain) need not be stated.
- e. When an agent signs a non-

negotiable sea waybill for [or on behalf of] the master (captain), the agent is to be named and, in addition, to indicate that it is signing as “agent for the master (or captain)”, or as “agent on behalf of the master (or captain)” or words of similar effect. The name of the master (captain) need not be stated.

ON BOARD NOTATION, DATE OF SHIPMENT, PRE-CARRIAGE, PLACE OF RECEIPT AND PORT OF LOADING

F5 a. When a pre-printed “Shipped on board” non-negotiable sea waybill is presented, its issuance date will be deemed to be the date of shipment unless it bears a separate dated on board notation. In the latter event, such date will be deemed to be the date of shipment whether that date is before or after the issuance date of the non-negotiable sea waybill. The on board date may also be indicated in a designated field or box.

b. Notwithstanding that a credit may require a non-negotiable sea waybill to evidence a port-to-port shipment:

i. when a non-negotiable sea waybill indicates a place of receipt that is the same as the port of loading, for example, place of receipt Rotterdam CY and the port of loading Rotterdam, and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field); or

ii. when a non-negotiable sea waybill indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and

port of loading Rotterdam, and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), then:

(a) when a non-negotiable sea waybill is pre-printed “shipped on board”, the date of issue will be deemed to be the date of shipment, and no further on board notation is required.

(b) when a non-negotiable sea waybill is pre-printed “received for shipment”, a dated on board notation is required, and the date appearing in the notation will be deemed to be the date of shipment. The on board date may also be indicated in a designated field or box.

c. Notwithstanding that a credit may require a non-negotiable sea waybill to evidence a port-to-port shipment, when a non-negotiable sea waybill:

i. indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and port of loading Rotterdam,

- and there is an indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), regardless of whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- ii. indicates a means of pre-carriage (either in the pre-carriage field or the place of receipt field), no matter if no place of receipt is stated or whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- d. When a non-negotiable sea waybill indicates wording such as “When the place of receipt box has been completed, any notation on this non-negotiable sea waybill of “on board”, “loaded on board” or words of similar effect shall be deemed to be on board the means of transportation performing the carriage from the place of receipt to the port of loading” or words of similar effect, and if, in addition, the place of receipt box is completed, a non-negotiable sea waybill is to bear a dated on board notation. The dated on board notation is also to indicate the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- e. The named port of loading, as required by the credit, should appear in the port of loading field on a non-negotiable sea waybill. However, it may also be stated in the field headed “Place of receipt” or words of similar effect, provided there is a dated on board notation evidencing that the goods were shipped on board a named vessel at the port stated under “Place of receipt” or words of similar effect.
- f. A non-negotiable sea waybill is to indicate the port of loading stated in the credit. When a credit indicates the port of loading by also stating the country in which the port is located, the name of the country need not be stated.
- g. When a credit indicates a geographical area or range of ports of loading (for example, “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a non-negotiable sea waybill is to indicate the actual port of loading, which is to be within that geographical area or range of ports. A non-negotiable sea waybill need not indicate the geographical area.
- h. When a non-negotiable sea

waybill indicates more than one port of loading, it is to evidence an on board notation with the relevant on board date for each port of loading, regardless of whether it is pre-printed “received for shipment” or “shipped on board”. For example, when a non-negotiable sea waybill indicates that shipment has been effected

from Brisbane and Adelaide, a dated on board notation is required for both Brisbane and Adelaide.

- F6 Terms such as “Shipped in apparent good order”, “Laden on board”, “Clean on board” or other phrases that incorporate “shipped” or “on board” have the same effect as the words “Shipped on board”.

PORT OF DISCHARGE

- F7 a. The named port of discharge, as required by the credit, should appear in the port of discharge field within a non-negotiable sea waybill.
- b. However, the named port of discharge may be stated in the field headed “Place of final destination” or words of similar effect provided there is a notation evidencing that the port of discharge is that stated under “Place of final destination” or words of similar effect. For example, when a credit requires shipment to be effected to Felixstowe, but Felixstowe is shown as the place of final destination instead of the port of discharge, this may be evidenced by a notation stating “Port of discharge Felixstowe”.
- F8 A non-negotiable sea waybill is to indicate the port of discharge stated in the credit. When a credit indicates the port of discharge by also stating the country in which the port is located, the name of the country need not be stated.
- F9 When a credit indicates a geographical area or range of ports of discharge (for example “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a non-negotiable sea waybill is to indicate the actual port of discharge, which is to be within that geographical area or range of ports. A non-negotiable sea waybill need not indicate the geographical area.

ORIGINAL NON-NEGOTIABLE SEA WAYBILL

- F10 a. A non-negotiable sea waybill is to indicate the number of originals that have been issued.
- b. Non-negotiable sea waybills marked “First Original”, “Second Original”, “Third Original”, or “Original”, “Duplicate”, “Triplicate” or similar expressions are all originals.

CONSIGNEE, ORDER PARTY, SHIPPER, AND NOTIFY PARTY

- F11 a. When a credit requires a non-negotiable sea waybill to evidence that goods are consigned to a named entity, for example, “consigned to (named entity)”, it is not to contain the expressions “to order” or “to order of” preceding the named entity, or the expression “or order” following the named entity, whether typed or pre-printed.

- b. When a credit requires a non-negotiable sea waybill to evidence that goods are consigned “to order of (named entity)”, it may indicate that the goods are consigned to that entity, without mentioning “to order of”.
 - c. When a credit requires a non-negotiable sea waybill to evidence that goods are consigned “to order” without naming the entity to whose order the goods are to be consigned, it is to indicate that the goods are consigned to either the issuing bank or the applicant, without the need to mention the words “to order”.
- F12 a. When a credit stipulates the details of one or more notify parties, a non-negotiable sea waybill may also indicate the details of one or more additional notify parties.
- b. i. When a credit does not stipulate the details of a notify party, a non-negotiable sea waybill may indicate the details of any notify party and in any manner (except
- as stated in paragraph F12 (b) (ii)).
 - ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on a non-negotiable sea waybill, and these details include the applicant’s address and contact details, they are not to conflict with those stated in the credit.
- F13 When a credit requires a Non-negotiable sea waybill to evidence goods consigned to “issuing bank” or “applicant” or notify “applicant” or “issuing bank”, a Non-negotiable sea waybill is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or any contact details that may be stated in the credit.
- F14 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

TRANSHIPMENT, PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION PERIOD WHEN MULTIPLE SETS OF NON-NEGOTIABLE SEA WAYBILLS ARE PRESENTED

- F15 Transhipment is the unloading and reloading of goods from one vessel to another during the carriage of those goods from the port of loading to the port of discharge stated in the credit. When a non-negotiable sea waybill does not indicate unloading and reloading between these two ports, it is not transhipment in the context of the credit and UCP 600 sub-articles 21 (b) and (c).
- F16 Shipment on more than one vessel is a partial shipment, even if each vessel leaves on the same day for the same destination.
- F17 a. When a credit prohibits partial shipment, and more than one set of original non-negotiable sea waybills are presented covering shipment from one or more ports of loading (as specifically allowed, or within a geographical area or range of ports stated in the credit), each set is to indicate that it covers the shipment of goods on the same vessel and same journey and that

- the goods are destined for the same port of discharge.
- b. When a credit prohibits partial shipment, and more than one set of original non-negotiable sea waybills are presented in accordance with paragraph F17(a) and incorporate different dates of shipment, the latest of these dates is to be used for the calculation of any presentation period and must fall on or before the latest shipment date stated in the credit.
- c. When partial shipment is allowed, and more than one set of original non-negotiable sea waybills are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of shipment, on different vessels or the same vessel for a different journey, the earliest of these dates is to be used for the calculation of any presentation period, and each of these dates must fall on or before the latest shipment date stated in the credit.

CLEAN NON-NEGOTIABLE SEA WAYBILL

F18 A Non-negotiable sea waybill is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging. For example:

- a. A clause on a Non-negotiable sea waybill such as “packaging is not sufficient for the sea journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.
- b. A clause on a Non-negotiable sea waybill such as “packaging may not be sufficient for the sea journey” or words of similar

effect does not expressly declare a defective condition of the packaging.

- F19 a. It is not necessary for the word “clean” to appear on a Non-negotiable sea waybill even when the credit requires a Non-negotiable sea waybill to be marked “clean on board” or “clean”.
- b. Deletion of the word “clean” on a Non-negotiable sea waybill does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

F20 A goods description indicated on a Non-negotiable sea waybill may be in

general terms not in conflict with the goods description in the credit.

INDICATION OF NAME AND ADDRESS OF DELIVERY AGENT AT PORT OF DISCHARGE

F21 When a credit requires a Non-negotiable sea waybill to indicate the name, address and contact details of a delivery agent or words of similar effect, at or for

the port of discharge, the address need not be one that is located at the port of discharge or within the same country as that of the port of discharge.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

- F22 Any correction of data on a Non-negotiable sea waybill is to be authenticated. Such authentication is to appear to have been made by the carrier, master (captain) or any one of their named agents, who may be different from the agent that may have issued or signed a Non-negotiable sea waybill, provided they are identified as an agent of the carrier or the master (captain).
- F23 Copies of a Non-negotiable sea waybill need not include authentication of any corrections that may have been made on the original.

FREIGHT AND ADDITIONAL COSTS

- F24 A statement appearing on a Non-negotiable sea waybill indicating the payment of freight need not be identical to that stated in the credit, but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires a Non-negotiable sea waybill to be marked “freight payable at destination”, it may be marked “freight collect”.
- F25 a. When a credit states that costs additional to freight are not acceptable, a non-negotiable sea waybill is not to indicate that costs additional to the freight have been or will be incurred.
- b. An indication of costs additional to freight may be made by express reference to additional costs or by the use of trade terms which refer to costs associated with the loading or unloading of goods, such as, but not limited to, Free In (FI), Free Out (FO), Free In and Out (FIO) and Free In and Out Stowed (FIOS).
- c. Reference in a Non-negotiable sea waybill to costs which may be levied, for example, as a result of a delay in unloading the goods, or after the goods have been unloaded (demurrage costs) or costs covering the late return of containers (detention costs) is not an indication of costs additional to freight.

G. CHARTER PARTY BILL OF LADING

APPLICATION OF UCP 600 ARTICLE 22

- G1 When there is a requirement in a credit for the presentation of a charter party bill of lading, or when a credit allows presentation of a charter party bill of lading and a charter party bill of lading is presented, UCP 600 article 22 is to be applied in the examination of that document.
- G2 a. A transport document, however named, containing any indication that it is subject to, or any reference to, a charter party is deemed to be a charter party bill of lading.
- b. A transport document, however named, indicating expressions such as “freight payable as per charter party dated (with or without mentioning a date)”, or “freight payable as per charter party”, will be an indication that it is subject to a charter party.

G3 A transport document, however named, containing a code name or form name usually associated with a charter party bill of lading, for example, "Congenbill" or "Tanker Bill of

Lading" without any further indication or reference to a charter party, is not by itself an indication of, or reference to, a charter party.

SIGNING OF A CHARTER PARTY BILL OF LADING

G4 a. A charter party bill of lading is to be signed in the form described in UCP 600 sub-article 22 (a) (i).

b. When the master (captain), owner or charterer signs a charter party bill of lading, the signature of the master (captain), owner or charterer is to be identified as "master" ("captain"), "owner" or "charterer".

c. When an agent signs a charter party bill of lading for [or on behalf of] the master (captain), owner or charterer, the agent is to be named and, in addition, to indicate that it is signing as agent

for [or on behalf of] the master (captain), owner or charterer as the case may be.

i. When a charter party bill of lading is signed by an agent for [or on behalf of] the master (captain), the name of the master (captain) need not be stated.

ii. When a charter party bill of lading is signed by an agent for [or on behalf of] the owner or charterer, the name of the owner or charterer is to be stated.

ON BOARD NOTATION, DATE OF SHIPMENT, PRE-CARRIAGE, PLACE OF RECEIPT AND PORT OF LOADING

G5 a. When a pre-printed "Shipped on board" charter party bill of lading is presented, its issuance date will be deemed to be the date of shipment unless it bears a separate dated on board notation. In the latter event, such date will be deemed to be the date of shipment whether that date is before or after the issuance date of the charter party bill of lading. The on board date may also be indicated in a designated field or box.

b. Notwithstanding that a credit may require a charter party bill of lading to evidence a port-to-port shipment:

i. when a charter party bill of lading indicates a place

of receipt that is the same as the port of loading, for example, place of receipt Rotterdam CY and the port of loading Rotterdam, and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field); or

ii. when a charter party bill of lading indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and port of loading Rotterdam, and there is no indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), then:

- (a) when a charter party bill of lading is pre-printed “shipped on board”, the date of issue will be deemed to be the date of shipment, and no further on board notation is required.
- (b) when a charter party bill of lading is pre-printed “received for shipment”, a dated on board notation is required, and the date appearing in the notation will be deemed to be the date of shipment. The on board date may also be indicated in a designated field or box.
- c. Notwithstanding that a credit may require a charter party bill of lading to evidence a port-to-port shipment, when a charter party bill of lading:
- i. indicates a place of receipt different from the port of loading, for example, place of receipt Amsterdam and port of loading Rotterdam, and there is an indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field), regardless of whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
 - ii. indicates a means of pre-
- carriage (either in the pre-carriage field or the place of receipt field), no matter if no place of receipt is stated, or whether it is pre-printed “shipped on board” or “received for shipment”, it is to bear a dated on board notation which also indicates the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- d. When a charter party bill of lading shows wording such as “When the place of receipt box has been completed, any notation on this charter party bill of lading of “on board”, “loaded on board” or words of similar effect shall be deemed to be on board the means of transportation performing the carriage from the place of receipt to the port of loading” or words of similar effect, and if, in addition, the place of receipt box is completed, a charter party bill of lading is to bear a dated on board notation. The dated on board notation is also to indicate the name of the vessel and the port of loading stated in the credit. Such notation may also appear in a designated field or box. The date appearing in the on board notation or designated field or box will be deemed to be the date of shipment.
- e. The named port of loading, as required by the credit, should appear in the port of loading field on a charter party bill of lading. However, it may also be stated in the field headed “Place

of receipt” or words of similar effect, provided there is a dated on board notation evidencing that the goods were shipped on board a named vessel at the port stated under “Place of receipt” or words of similar effect.

- f. A charter party bill of lading is to indicate the port of loading stated in the credit. When a credit indicates the port of loading by also stating the country in which the port is located, the name of the country need not be stated.
- g. When a credit indicates a geographical area or range of ports of loading (for example, “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a charter party bill of lading is to indicate the actual port or ports of loading, which are to be within that geographical area or range of

ports. A charter party bill of lading need not indicate the geographical area.

- h. When a charter party bill of lading indicates more than one port of loading, it is to evidence an on board notation with the relevant on board date for each port of loading, regardless of whether it is pre-printed “received for shipment” or “shipped on board”. For example, when a charter party bill of lading indicates that shipment has been effected from Brisbane and Adelaide, a dated on board notation is required for both Brisbane and Adelaide.

- G6 Terms such as “Shipped in apparent good order”, “Laden on board”, “Clean on board” or other phrases that incorporate “shipped” or “on board” have the same effect as the words “Shipped on board”.

PORT OF DISCHARGE

- G7 a. The named port of discharge, as required by the credit, should appear in the port of discharge field within a charter party bill of lading.
- b. However, the named port of discharge may be stated in the field headed “Place of final destination” or words of similar effect provided there is a notation evidencing that the port of discharge is that stated under “Place of final destination” or words of similar effect. For example, when a credit requires shipment to be effected to Felixstowe, but Felixstowe is shown as the place of final destination instead of the port of discharge, this may be evidenced by a notation stating “Port of discharge Felixstowe”.
- G8 A charter party bill of lading is to indicate the port of discharge stated in the credit. When a credit indicates the port of discharge by also stating the country in which the port is located, the name of the country need not be stated.
- G9 When a credit indicates a geographical area or range of ports of discharge (for example, “Any European Port” or “Hamburg, Rotterdam, Antwerp Port”), a charter party bill of lading may indicate the actual port of discharge, which is to be within that geographical area or range of ports, or it may show the geographical area or range of ports as the port of discharge.

ORIGINAL CHARTER PARTY BILL OF LADING

- G10 a. A charter party bill of lading is to indicate the number of originals that have been issued.
- b. Charter party bills of lading marked "First Original", "Second Original", "Third Original", or "Original", "Duplicate", "TriPLICATE" or similar expressions are all originals.

CONSIGNEE, ORDER PARTY, SHIPPER AND ENDORSEMENT, AND NOTIFY PARTY

- G11 When a credit requires a charter party bill of lading to evidence that goods are consigned to a named entity, for example, "consigned to (named entity)" (i.e., a "straight" charter party bill of lading or consignment) rather than "to order" or "to order of (named entity)", it is not to contain the expressions "to order" or "to order of" preceding the named entity or the expression "or order" following the named entity, whether typed or pre-printed.
- G12 a. When a charter party bill of lading is issued "to order" or "to order of the shipper", it is to be endorsed by the shipper. An endorsement may be made by a named entity other than the shipper, provided the endorsement is made for [or on behalf of] the shipper.
- b. When a credit requires a charter party bill of lading to evidence that goods are consigned "to order of (named entity)", it is not to indicate that the goods are straight consigned to that named entity.
- G13 a. When a credit stipulates the details of one or more notify parties, a charter party bill of lading may also indicate the details of one or more additional notify parties.
- b. i. When a credit does not stipulate the details of a notify party, a charter party bill of lading may indicate the details of any notify party and in any manner (except as stated in paragraph G13 (b) (ii)).
- ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on a charter party bill of lading, and these details include the applicant's address and contact details, they are not to conflict with those stated in the credit.
- G14 When a credit requires a charter party bill of lading to evidence goods consigned to or to the order of "issuing bank" or "applicant" or notify applicant" or "issuing bank", a charter party bill of lading is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or contact details that may be stated in the credit.
- G15 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION PERIOD WHEN MULTIPLE SETS OF CHARTER PARTY BILLS OF LADING ARE PRESENTED

G16 Shipment on more than one vessel is a partial shipment, even if each vessel leaves on the same day for the same destination.

- G17 a. When a credit prohibits partial shipment, and more than one set of original charter party bills of lading are presented covering shipment from one or more ports of loading (as specifically allowed, or within a geographical area or range of ports stated in the credit), each set is to indicate that it covers the shipment of goods on the same vessel and same journey and that the goods are destined for the same port of discharge, geographical area or range of ports.
- b. When a credit prohibits partial shipment, and more than one set of original charter party bills of lading are presented in accordance with paragraph G17 (a) and incorporate different dates of

shipment, or one set of original charter party bills of lading is presented indicating different dates of shipment, the latest of these dates is to be used for the calculation of any presentation period and must fall on or before the latest shipment date stated in the credit.

- c. When partial shipment is allowed, and more than one set of original charter party bills of lading are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of shipment, on different vessels or the same vessel for a different journey, the earliest of these dates is to be used for the calculation of any presentation period, and each of these dates must fall on or before the latest shipment date stated in the credit.

CLEAN CHARTER PARTY BILL OF LADING

G18 A charter party bill of lading is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging. For example:

- a. A clause on a charter party bill of lading such as “packaging is not sufficient for the sea journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.
- b. A clause on a charter party bill of lading such as “packaging may not be sufficient for the sea journey”

or words of similar effect does not expressly declare a defective condition of the packaging.

- G19 a. It is not necessary for the word “clean” to appear on a charter party bill of lading even when the credit requires a charter party bill of lading to be marked “clean on board” or “clean”.
- b. Deletion of the word “clean” on a charter party bill of lading does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

G20 A goods description indicated on a charter party bill of lading may be in general terms not in conflict with the goods description in the credit.

G21 A charter party bill of lading may indicate that the goods are part of a larger consignment loaded onto the named vessel by reference to “without segregation”, “commingled” or words of similar effect.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

G22 Any correction of data on a charter party bill of lading is to be authenticated. Such authentication is to appear to have been made by the master (captain), owner, charterer or any one of their named agents, who may be different from the agent that may have issued or signed a charter party bill of lading,

provided they are identified as an agent of the master (captain), owner or charterer.

G23 Non-negotiable copies of a charter party bill of lading need not include authentication of any corrections that may have been made on the original.

FREIGHT AND ADDITIONAL COSTS

G24 A statement appearing on a charter party bill of lading indicating the payment of freight need not be identical to that stated in the credit but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires a charter party bill of lading to be marked “freight payable at destination”, it may be marked “freight collect”.

b. An indication of costs additional to freight may be made by express reference to additional costs or by the use of trade terms which refer to costs associated with the loading or unloading of goods, such as, but not limited to, Free In (FI), Free Out (FO), Free In and Out (FIO) and Free In and Out Stowed (FIOS).

G25 a. When a credit states that costs additional to freight are not acceptable, a charter party bill of lading is not to indicate that costs additional to the freight have been or will be incurred.

c. Reference in a charter party bill of lading to costs which may be levied, for example, as a result of a delay in unloading the goods or after the goods have been unloaded (demurrage costs) is not an indication of costs additional to freight.

RELEASE OF GOODS WITH MORE THAN ONE CHARTER PARTY BILL OF LADING TO BE SURRENDERED

G26 a charter party bill of lading is not to expressly state that goods covered by that charter party bill of lading will only be released upon its surrender together with one or more other charter

party bills of lading, unless all of the referenced charter party bills of lading form part of the same presentation under the same credit.

For example, “[Cargo XXXX] is covered by B/L No. YYY and ZZZ, and can only be released to a single merchant upon presentation of all charter party bills of lading of that merchant” is considered to be an

express statement that one or more other charter party bills of lading, related to the referenced cargo, must be surrendered prior to the goods being released.

CHARTER PARTY CONTRACTS

G27 Unless UCP 600 sub-article 22 (b) is specifically excluded and the credit specifically indicates the data that are to be examined and to what extent, banks

do not examine any content of a charter party contract, even when such contract is required as a stipulated document under the credit.

H. AIR TRANSPORT DOCUMENT

APPLICATION OF UCP 600 ARTICLE 23

- H1 A requirement in a credit for the presentation of an air transport document, however named, covering an airport-to-airport shipment means that UCP 600 article 23 is to be applied in the examination of that document.
- H2 An air transport document need not be titled “air waybill”, “air consignment note” or words of similar effect even when the credit so names the required document.

ISSUANCE, CARRIER, IDENTIFICATION OF THE CARRIER AND SIGNING OF AN AIR TRANSPORT DOCUMENT

- H3 a. An air transport document may be issued by any entity other than a carrier provided it meets the requirements of UCP 600 article 23.
- b. When a credit indicates “Freight Forwarder’s air waybill is acceptable” or “House air waybill is acceptable” or words of similar effect, an air transport document may be signed by the issuing entity without it being necessary to indicate the capacity in which it has been signed or the name of the carrier.
- H4 A stipulation in a credit that “Freight Forwarder’s air waybill is not acceptable” or “House air waybill is not acceptable” or words of similar effect has no meaning in the context of the title, format, content or signing of an air transport document unless the credit provides specific requirements detailing how the air transport document is to be issued and signed. In the absence of these requirements, such a stipulation is to be disregarded, and the air transport document presented is to be examined according to the requirements of UCP 600 article 23.
- H5 a. An air transport document is to be signed in the form described in UCP 600 sub-article 23 (a) (i) and to indicate the name of the carrier, identified as the carrier.
- b. When an air transport document is signed by a named branch of the carrier, the signature is considered to have been made by the carrier.

- c. The carrier is to be identified by its name instead of an IATA airline code, for example, British Airways instead of BA, Lufthansa instead of LH.
- H6 When an agent signs an air transport document “for [or on behalf of] the carrier”, the agent is to be named and, in addition, to indicate that it is signing as “agent for (name), the carrier” or as “agent on behalf of (name), the carrier” or words of similar effect. When the carrier is identified elsewhere in the document as the “carrier”, the named agent may sign, for example, as “agent for [or on behalf of] the carrier” without naming the carrier again.

GOODS ACCEPTED FOR CARRIAGE, DATE OF SHIPMENT AND REQUIREMENT FOR AN ACTUAL DATE OF SHIPMENT

- H7 An air transport document is to indicate that the goods have been accepted for carriage or words of similar effect, after the issuance date of the air transport document.
- H8 a. An air transport document is to indicate a date of issuance. This date will be deemed to be the date of shipment unless an air transport document contains a specific notation of the actual date of shipment. In the latter event, the date stated in the notation will be deemed to be the date of shipment whether that date is before or b. In the absence of a specific notation containing the actual date of shipment, any other information appearing on an air transport document relative to this information (including, for example, in a box labeled “For Carrier Use Only”, “Required Flight Date” or “Routing and Destination”) is to be disregarded in the determination of the date of shipment.

AIRPORTS OF DEPARTURE AND DESTINATION

- H9 An air transport document is to indicate the airport of departure and airport of destination stated in the credit. When a credit indicates either of these airports by also stating the country in which the airport is located, the name of the country need not be stated.
- H10 The airport of departure and airport of destination may also be indicated by the use of IATA codes instead of evidencing the airport name in full (for example, LAX instead of Los Angeles).
- H11 When a credit indicates a geographical area or range of airports of departure or destination (for example, “Any Chinese Airport” or “Shanghai, Beijing, Guangzhou airport”), an air transport document is to indicate the actual airport of departure or destination, which is to be within that geographical area or range of airports. An air transport document need not indicate the geographical area.

ORIGINAL OF AN AIR TRANSPORT DOCUMENT

H12 an air transport document is to appear to be the original for consignor or shipper. When a credit requires a full set of originals, this is satisfied by

the presentation of an air transport document indicating that it is the original for consignor or shipper.

CONSIGNEE, ORDER PARTY AND NOTIFY PARTY

H13 a. When a credit requires an air transport document to evidence that goods are consigned “to order of (named entity)”, it may indicate that the goods are consigned to that entity, without mentioning “to order of”.

and in any manner (except as stated in paragraph H14 (b) (ii)).

b. When a credit requires an air transport document to evidence that goods are consigned “to order” without naming the entity to whose order the goods are to be consigned, it is to indicate that the goods are consigned to either the issuing bank or the applicant, without the need to mention the words “to order”.

ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on an air transport document, and these details include the applicant’s address and contact details, they are not to conflict with those stated in the credit.

H14 a. When a credit stipulates the details of one or more notify parties, an air transport document may also indicate the details of one or more additional notify parties.

H15 When a credit requires an air transport document to evidence goods consigned to “issuing bank” or “applicant” or notify “applicant” or “issuing bank”, an air transport document is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or any contact details that may be stated in the credit.

b. i. When a credit does not stipulate the details of a notify party, an air transport document may indicate the details of any notify party

H16 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

TRANSHIPMENT, PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION PERIOD WHEN MULTIPLE AIR TRANSPORT DOCUMENTS ARE PRESENTED

H17 Transhipment is the unloading and reloading of goods from one aircraft to another during the carriage of those goods from the airport of departure to the airport of destination stated in the credit. When an air transport document does not indicate unloading

and reloading between these two airports, it is not transhipment in the context of the credit and UCP 600 sub-articles 23 (b)T and (c).

H18 Dispatch on more than one aircraft is a partial shipment, even if each aircraft

leaves on the same day for the same destination.

- H19 a. When a credit prohibits partial shipment, and more than one air transport documents are presented covering dispatch from one or more airports of departure (as specifically allowed, or within a geographical area or range of airports stated in the credit), each air transport document is to indicate that it covers the dispatch of goods on the same aircraft and same flight and that the goods are destined for the same airport of destination.
- b. When a credit prohibits partial shipment, and more than one air transport documents are presented in accordance with paragraph

H19 (a) and incorporate different dates of dispatch, the latest of these dates is to be used for the calculation of any presentation period and must fall on or before the latest shipment date stated in the credit.

- c. When partial shipment is allowed, and more than one air transport documents are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of dispatch or different flights, the earliest of these dates is to be used for the calculation of any presentation period, and each of these dates must fall on or before the latest shipment date stated in the credit.

CLEAN AIR TRANSPORT DOCUMENT

H20 An air transport document is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging.

For example:

- a. A clause on an air transport document such as “packaging is not sufficient for the air journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.
- b. A clause on an air transport document such as “packaging

may not be sufficient for the air journey” or words of similar effect does not expressly declare a defective condition of the packaging.

- H21 a. It is not necessary for the word “clean” to appear on an air transport document even when the credit requires an air transport document to be marked “clean”.
- b. Deletion of the word “clean” on an air transport document does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

H22 a goods description indicated on an air transport document may be in general

terms not in conflict with the goods description in the credit.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

H23 Any correction of data on an air transport document is to be authenticated. Such authentication is to appear to have been made by the carrier or any one of its named agents, who may be different from the agent that may have issued or signed the air transport document,

provided they are identified as an agent of the carrier.

H24 Copies of an air transport document need not include authentication of any corrections that may have been made on the original.

FREIGHT AND ADDITIONAL COSTS

H25 a statement appearing on an air transport document indicating the payment of freight need not be identical to that stated in the credit, but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires an air transport document to be marked “freight collect”, it may be marked “freight payable at destination”.

b. When a credit requires an air transport document to show that freight is to be collected or paid at destination, this will also be fulfilled by an indication of the freight charges under the heading “Freight Charges Collect” or words of similar effect.

H26 an air transport document may contain separate boxes, which by their pre-printed headings indicate that they are for freight charges “pre-aid” and for freight charges “collect”.

H27 a. When a credit states that costs additional to freight are not acceptable, an air transport document is not to indicate that costs additional to the freight have been or will be incurred.

a. When a credit requires an air transport document to show that freight has been pre-aid, this will also be fulfilled by an indication of the freight charges under the heading “Freight Charges Pre-aid” or words of similar effect.

b. Reference in an air transport document to costs which may be levied, for example, as a result of a delay in unloading the goods or after the goods have been unloaded, is not an indication of costs additional to freight.

J. ROAD, RAIL OR INLAND WATERWAY TRANSPORT DOCUMENTS

APPLICATION OF UCP 600 ARTICLE 24

J1 A requirement in a credit for the presentation of a transport document covering movement of goods by either

road or rail or inland waterway means that UCP 600 article 24 is to be applied in the examination of that document.

CARRIER, IDENTIFICATION OF THE CARRIER AND SIGNING OF A ROAD, RAIL OR INLAND WATERWAY TRANSPORT DOCUMENT

- J2 a. A road, rail or inland waterway transport document is to be signed in the form described in UCP 600 sub-article 24 (a) (i) and to indicate the name of the carrier, identified as the carrier (except as stated in paragraph J4 (b)).
- b. When a road, rail or inland waterway transport document is signed by a named branch of the carrier, the signature is considered to have been made by the carrier.
- c. The term "carrier" includes terms such as "issuing carrier", "actual carrier", "succeeding carrier" and "contracting carrier".
- J3 Any signature, stamp or notation of receipt of the goods is to appear to indicate that it has been made by:
- a. the carrier, identified as the carrier; or
- J4 a. The term "carrier" need not appear on the signature line provided the transport document appears to be signed by the carrier or a named agent for [or on behalf of] the carrier, and the carrier is otherwise identified elsewhere in the transport document as the "carrier".
- b. A rail transport document may bear a date stamp by the railway company or railway station of departure without indicating the name of the carrier or a named agent signing for [or on behalf of] the carrier.

PLACE OF SHIPMENT AND PLACE OF DESTINATION

- J5 A road, rail or inland waterway transport document is to indicate the place of shipment and place of destination stated in the credit. When a credit indicates either of these places by also stating the country in which the place is located, the name of the country need not be stated.
- J6 When a credit indicates a geographical area or range of places of shipment or destination (for example, "China" or "Shanghai, Beijing or Guangzhou"), a road, rail or inland waterway transport document is to indicate the actual place of shipment or destination, which is to be within that geographical area or range of places. A road, rail or inland waterway transport document need not indicate the geographical area.

ORIGINAL AND DUPLICATE OF A ROAD, RAIL OR INLAND WATERWAY TRANSPORT DOCUMENT

- J7 a. A rail or inland waterway transport document is to be considered as an original whether or not it is so marked.
- b. A road transport document is to indicate that it is the original for consignor or shipper (copy for sender) or bear no marking

indicating for whom the document has been prepared.

- c. Presentation of the original for consignor or shipper (copy for sender) of a road transport document or duplicate rail transport document shall suffice even when the credit requires
- d. A duplicate (often a carbon copy) of a rail transport document, authenticated by the signature or stamp of the railway company or the railway station of departure, is considered to be an original.

CONSIGNEE, ORDER PARTY AND NOTIFY PARTY

- J8 a. When a credit requires a road or rail transport document to evidence that goods are consigned “to order of (named entity)”, it may indicate that the goods are consigned to that entity, without mentioning “to order of”.
- b. When a credit requires a road or rail transport document to evidence that goods are consigned “to order” without naming the entity to whose order the goods are to be consigned, it is to indicate that the goods are consigned either to the issuing bank or the applicant, without the need to mention the words “to order”.
- c. When a credit requires an inland waterway transport document, paragraphs J8 (a) and (b) will apply except when the document is issued in the form of a bill of lading. In such event, the consignee field is to be completed according to the requirements of the credit.
- J9 a. When a credit stipulates the details of one or more notify parties, a road, rail or inland waterway transport document may also indicate the details of one or more additional notify parties.
- b. i. When a credit does not stipulate the details of a notify party, a road, rail or inland waterway transport document may indicate the details of any notify party, inland waterway transport document may indicate the details of any notify party and in any manner (except as stated in paragraph J9 (b) (ii)).
- ii. When a credit does not stipulate the details of a notify party, but the details of the applicant appear as notify party on a road, rail or inland waterway transport document, and these details include the applicant’s address and contact details, they are not to conflict with those stated in the credit.
- J10 When a credit requires a road, rail or inland waterway transport document to evidence goods consigned to or to the order of “issuing bank” or “applicant” or notify “applicant” or “issuing bank”, a road, rail or inland waterway transport document is to indicate the name of the issuing bank or applicant, as applicable, but need not indicate their respective addresses or any contact details that may be stated in the credit. A road or rail transport document need not also indicate “to order of”, as stated in paragraph J8 (a).
- J11 When the address and contact details of the applicant appear as part of the consignee or notify party details, they are not to conflict with those stated in the credit.

**TRANSHIPMENT, PARTIAL SHIPMENT AND DETERMINING THE PRESENTATION
PERIOD WHEN MULTIPLE ROAD, RAIL OR INLAND WATERWAY
TRANSPORT DOCUMENTS ARE PRESENTED**

J12 Transhipment is the unloading and reloading of goods from one means of conveyance to another within the same mode of transport (truck [lorry], train, barge, etc.,) during the carriage of those goods from the place of shipment, dispatch or carriage to the place of destination stated in the credit. When a road, rail or inland waterway transport document does not indicate unloading and reloading between these two places, it is not transhipment in the context of the credit and UCP 600 sub-articles 24 (d) and (e).

J13 Shipment on more than one means of conveyance (more than one truck [lorry], train, barge, etc.,) is a partial shipment, even when such means of conveyance leaves on the same day for the same destination.

J14 a. When a credit prohibits partial shipment, and more than one road, rail or inland waterway transport documents are presented covering shipment from one or more places of shipment, dispatch or carriage (as specifically allowed, or within a geographical area or range of places stated in the credit), each road, rail or inland waterway transport document is to indicate that it covers the shipment, dispatch or carriage of goods on

the same means of conveyance and same journey and that the goods are destined for the same place of destination.

- b. When a credit prohibits partial shipment, and more than one road, rail or inland waterway transport documents are presented in accordance with paragraph J14 (a) and incorporate different dates of shipment, the latest of these dates is to be used for the calculation of any presentation period, and must fall on or before the latest shipment date stated in the credit.
- c. When partial shipment is allowed, and more than one road, rail or inland waterway transport documents are presented as part of a single presentation made under one covering schedule or letter and incorporate different dates of shipment, on different means of conveyance or the same means of conveyance for a different journey, the earliest of these dates is to be used for the calculation of any presentation period and each of these dates must fall on or before the latest shipment date stated in the credit.

CLEAN ROAD, RAIL OR INLAND WATERWAY TRANSPORT DOCUMENT

J15 A road, rail or inland waterway transport document is not to include a clause or clauses that expressly declare a defective condition of the goods or their packaging.

For example:

- a. A clause on a road, rail or inland waterway transport document such as “packaging is not sufficient for the journey” or words of similar effect is an example of a clause expressly declaring a defective condition of the packaging.

- b. A clause on a road, rail or inland waterway transport document such as “packaging may not be sufficient for the journey” or words of similar effect does not expressly declare a defective condition of the packaging.
- J16 a. It is not necessary for the word “clean” to appear on a road, rail or inland waterway transport document even when the credit requires a road, rail or inland waterway transport document to be marked “clean” or “clean on board”.
- b. Deletion of the word “clean” on a road, rail or inland waterway transport document does not expressly declare a defective condition of the goods or their packaging.

GOODS DESCRIPTION

- J17 A goods description indicated on a road, rail or inland waterway transport document may be in general terms not in conflict with the goods description in the credit.

CORRECTIONS AND ALTERATIONS (“CORRECTIONS”)

- J18 Any correction of data on a road, rail or inland waterway transport document is to be authenticated. Such authentication is to appear to have been made by the carrier or any one of its named agents, who may be different from the agent that may have issued or signed the transport document, provided they are identified as an agent of the carrier.
- J19 Copies of a road, rail or inland waterway transport document need not include any authentication of any corrections that may have been made on the original.

FREIGHT

- J20 a. A statement appearing on a road, rail or inland waterway transport document indicating the payment of freight need not be identical to that stated in the credit, but is not to conflict with data in that document, any other stipulated document or the credit. For example, when a credit requires a road, rail or inland waterway transport document to be marked “freight collect”, it may be marked “freight payable at destination”.
- b. When a credit requires a road, rail or inland waterway transport document to indicate that freight has been prepaid or freight is to be collected at destination, this will also be fulfilled by the completion of boxes marked “Franco” (freight prepaid) or “Non-Franco” (freight to be collected).

K. INSURANCE DOCUMENT AND COVERAGE

APPLICATION OF UCP 600 ARTICLE 28

K1 A requirement in a credit for the presentation of an insurance document, such as an insurance policy, insurance certificate or declaration under an open

cover, means that UCP 600 article 28 is to be applied in the examination of that document.

ISSUER, SIGNING AND ORIGINAL OF AN INSURANCE DOCUMENT

K2 a. An insurance document is to appear to have been issued and signed by an insurance company or underwriter or their agent or proxy. For example, an insurance document issued and signed by “AA Insurance Ltd” appears to have been issued by an insurance company.

b. When an issuer is identified as “insurer”, the insurance document need not indicate that it is an insurance company or underwriter.

K3 An insurance document may also be issued on an insurance broker’s stationery, provided the insurance document has been signed by an insurance company or underwriter or their agent or proxy. An insurance broker may sign an insurance document as agent or proxy for [or on behalf of] a named insurance company or named underwriter.

K4 An insurance document signed by an agent or proxy is to indicate the name of the insurance company or underwriter for [or on behalf of] which the agent or proxy is signing, unless the insurance company or underwriter name has been identified elsewhere in the document. For example, when “AA Insurance Ltd” has been identified as the insurer, the document may be signed “John Doe (by proxy) on behalf of the insurer” or “John Doe (by proxy) on behalf of AA Insurance Ltd”.

K5 When an insurance document requires a countersignature by the issuer, the assured or a named entity, it must be countersigned.

K6 An insurance document may show only the trading name of the insurance company in the signing field, provided it is identified as the insurance company elsewhere on the document, for example, when an insurance document is issued and signed “AA” in the signing field but shows “AA Insurance Ltd” and its address and contact information elsewhere in the document.

K7 a. An insurance document that indicates that cover is provided by more than one insurer may be signed by a single agent or proxy on behalf of all insurers or be signed by an insurer for [or on behalf of] all co-insurers. An example of the latter will be when an insurance document is issued and signed “AA Insurance Ltd, leading insurer for [or on behalf of] the co-insurers”.

b. Notwithstanding the provisions in paragraphs K2, K3 and K4, an insurance document which indicates that cover is provided by more than one insurer need not show the names of each insurer or the percentage of cover of each insurer.

K8 When a credit requires the insurance document to be issued in more than one original, or when the insurance document indicates that it has been

issued in more than one original, all originals are to be presented and are to appear to have been signed.

DATES

K9 An insurance document is not to indicate an expiry date for the presentation of any claims thereunder.

K10 a. An insurance document is not to indicate that cover is effective from a date later than the date of shipment.

b. When an insurance document indicates a date of issuance later than the date of shipment (as defined in UCP 600 articles 19-25), it is to clearly indicate by addition or note that coverage is effective from a date not later than the date of shipment.

c. An insurance document that indicates coverage has been effected from "warehouse-to-warehouse" or words of similar effect, and is dated after the date of shipment, does not indicate that coverage was effective from a date not later than the date of shipment.

K11 In the absence of any other date stated to be the issuance date or effective date of insurance coverage, a countersignature date will be deemed to be evidence of the effective date of the insurance coverage.

AMOUNT OF COVER AND PERCENTAGE

K12 When a credit does not indicate an amount to be insured, an insurance document is to be issued in the currency of the credit and, as a minimum, for the amount indicated under UCP 600 sub-article 28 (f) (ii). There is no maximum percentage of insurance coverage.

K13 There is no requirement for insurance coverage to be calculated to more than two decimal places.

K14 An insurance document may indicate that cover is subject to a franchise or excess (deductible). However, when a credit requires the insurance cover to be irrespective of percentage, the insurance document is not to contain a clause stating that the insurance cover is subject to a franchise or an excess (deductible). An insurance document need not state "irrespective of percentage".

K15 When it is apparent from the credit or from the presentation that the amount demanded only represents a certain part of the gross value of the goods (for example, due to discounts, pre-payments or the like, or because part of the value of the goods is to be paid at a later date), the calculation of insurance cover is to be based on the full gross value of the goods as shown on the invoice or the credit and subject to the requirements of UCP 600 sub-article 28 (f) (ii).

K16 Insurance covering the same risk for the same shipment is to be covered under one document unless more than one insurance document is presented indicating partial cover, and each document clearly reflects, by percentage or otherwise:

a. the value of each insurer's cover;

- b. that each insurer will bear its share of the liability severally and without pre-conditions relating to any other insurance cover that may have been effected for that shipment; and
- c. the respective coverage of the documents, when totalled, equals at least the insured amount required by the credit or UCP 600 sub-article 28 (f) (ii).

RISKS TO BE COVERED

- K17 a. An insurance document is to cover the risks required by the credit.
- b. Even though a credit may be explicit with regard to risks to be covered, there may be a reference to exclusion clauses in the insurance document.
- K18 When a credit requires “all risks” coverage, this is satisfied by the presentation of an insurance document evidencing any “all risks” clause or notation, whether or not it bears the heading “all risks”, even when it is indicated that certain risks are excluded. An insurance document indicating that it covers Institute Cargo Clauses (A) or Institute Cargo Clauses (Air), when dispatch is effected by air satisfies a condition in a credit calling for an “all risks” clause or notation.

INSURED PARTY AND ENDORSEMENT

- K19 An insurance document is to be in the form required by the credit and, where necessary, be endorsed by the entity to whose order or in whose favour claims are payable.
- K20 a. A credit should not require an insurance document to be issued “to bearer”, or “to order”. A credit should indicate the name of an insured party.
- b. When a credit requires an insurance document to be issued “to order of (named entity)” the document need not indicate “to order” provided that the named entity is shown as the insured party or claims are payable to it, and assignment by endorsement is not expressly prohibited.
- K21 a. When a credit is silent as to the insured party, an insurance document is not to evidence that claims are payable to the order of, or in favour of, the beneficiary or any entity other than the issuing bank or applicant, unless it is endorsed by the beneficiary or that entity in blank or in favour of the issuing bank or applicant.
- b. An insurance document is to be issued or endorsed so that the right to receive payment under it passes upon, or prior to, the release of the documents.

GENERAL TERMS AND CONDITIONS OF AN INSURANCE DOCUMENT

- K22 Banks do not examine general terms and conditions in an insurance document.

INSURANCE PREMIUM

K23 Any indication on an insurance document regarding payment of an insurance premium is to be disregarded unless the insurance document indicates

that it is not valid unless the premium has been paid and there is an indication that the premium has not been paid.

L. CERTIFICATE OF ORIGIN

BASIC REQUIREMENT AND FULFILLING ITS FUNCTION

- L1 When a credit requires the presentation of a certificate of origin, this will be satisfied by the presentation of a signed document that appears to relate to the invoiced goods and certifies their origin.
- L2 When a credit requires the presentation of a specific form of certificate of origin such as a GSP Form A, only a document in that specific form is to be presented.

ISSUER OF A CERTIFICATE OF ORIGIN

- L3 a. A certificate of origin is to be issued by the entity stated in the credit.
- b. When a credit does not indicate the name of an issuer, any entity may issue a certificate of origin.
- c. i. When a credit requires the presentation of a certificate of origin issued by the beneficiary, the exporter or the manufacturer, this condition will also be satisfied by the presentation of a certificate of origin issued by a Chamber of Commerce or the like, such as, but not limited to, Chamber of Industry, Association of Industry,
- ii. When a credit requires the presentation of a certificate of origin issued by a Chamber of Commerce, this condition will also be satisfied by the presentation of a certificate of origin issued by a Chamber of Industry, Association of Industry, Economic Chamber, Customs Authorities and Department of Trade or the like.
- Economic Chamber, Customs Authorities and Department of Trade or the like, provided it indicates the beneficiary, the exporter or the manufacturer as the case may be.

CONTENT OF A CERTIFICATE OF ORIGIN

- L4 A certificate of origin is to appear to relate to the invoiced goods, for example, by:
- a. a goods description that corresponds to that in the credit or a description shown in general terms not in conflict with the goods description in the credit; or
- b. referring to a goods description appearing in another stipulated document or in a document that is attached to, and forming an

- integral part of, the certificate of origin.
- L5 Consignee information, when shown, is not to conflict with the consignee information in the transport document. However, when a credit requires a transport document to be issued "to order", "to the order of shipper", "to order of issuing bank", "to order of nominated bank (or negotiating bank)" or "consigned to issuing bank", a certificate of origin may show the consignee as any entity named in the credit except the beneficiary. When a credit has been transferred, the first beneficiary may be stated to be the consignee.
- L6 A certificate of origin may indicate as the consignor or exporter an entity other than the beneficiary of the credit
- or the shipper as shown on any other stipulated document.
- L7 When a credit indicates the origin of the goods without stipulating a requirement for the presentation of a certificate of origin, any reference to the origin on a stipulated document is not to conflict with the stated origin. For example, when a credit indicates "origin of the goods: Germany" without requiring the presentation of a certificate of origin, a statement on any stipulated document indicating a different origin of the goods is to be considered a conflict of data.
- L8 A certificate of origin may indicate a different invoice number, invoice date and shipment routing to that indicated on one or more other stipulated documents, provided the exporter or consignor shown on the certificate of origin is not the beneficiary.

M. PACKING LIST, NOTE OR SLIP ("PACKING LIST")

BASIC REQUIREMENT AND FULFILLING ITS FUNCTION

- M1 When a credit requires the presentation of a packing list, this will be satisfied by the presentation of a document titled as called for in the credit, or bearing a similar title or untitled, that fulfils its function by containing any information as to the packing of the goods.

ISSUER OF A PACKING LIST

- M2 A packing list is to be issued by the entity stated in the credit.
- M3 When a credit does not indicate the name of an issuer, any entity may issue a packing list.

CONTENT OF A PACKING LIST

- M4 When a credit indicates specific packing requirements, without stipulating the document to indicate compliance with these requirements, any data regarding the packing of the goods mentioned on a packing list, if presented, are not to conflict with those requirements.
- M5 A packing list may indicate a different invoice number, invoice date and shipment routing to that indicated on one or more other stipulated documents, provided the issuer of the packing list is not the beneficiary.

- M6 Banks only examine total values, including, but not limited to, total quantities, total weights, total measurements or total packages, to ensure that the applicable total does not conflict with a total shown in the credit and on any other stipulated document.

N. WEIGHT LIST, NOTE OR SLIP (“WEIGHT LIST”)

BASIC REQUIREMENT AND FULFILLING ITS FUNCTION

- N1 When a credit requires the presentation of a weight list, this will be satisfied by the presentation of a document titled as called for in the credit, or bearing a similar title or untitled, that fulfils its function by containing any information as to the weight of the goods.

ISSUER OF A WEIGHT LIST

- N2 A weight list is to be issued by the entity stated in the credit.
- N3 When a credit does not indicate the name of an issuer, any entity may issue a weight list.

CONTENT OF A WEIGHT LIST

- N4 When a credit indicates specific weight requirements, without stipulating the document to indicate compliance with these requirements, any data regarding the weight of the goods mentioned on a weight list, if presented, are not to conflict with those requirements.
- N5 A weight list may indicate a different invoice number, invoice date and shipment routing to that indicated on one or more other stipulated documents, provided the issuer of the weight list is not the beneficiary.
- N6 Banks only examine total values, including, but not limited to, total quantities, total weights, total measurements or total packages, to ensure that the applicable total does not conflict with a total shown in the credit and on any other stipulated document.

P. BENEFICIARY’S CERTIFICATE

BASIC REQUIREMENT AND FULFILLING ITS FUNCTION

- P1 When a credit requires the presentation of a beneficiary’s certificate, this will be satisfied by the presentation of a signed document titled as called for in the credit, or bearing a title reflecting the type of certification that has been requested or untitled, that fulfils its function by containing the data and certification required by the credit.

SIGNING OF A BENEFICIARY’S CERTIFICATE

- P2 A beneficiary’s certificate is to be signed by, or for [or on behalf of], the beneficiary.

CONTENT OF A BENEFICIARY'S CERTIFICATE

- P3 Data mentioned on a beneficiary's certificate are not to conflict with the requirements of the credit; to clearly indicate that the requirement prescribed by the credit has been fulfilled;
- P4 The data or certification mentioned on a beneficiary's certificate:
- need not be identical to that required by the credit, but are b. need not include a goods description or any other reference to the credit or another stipulated document.

Q. ANALYSIS, INSPECTION, HEALTH, PHYTOSANITARY, QUANTITY, QUALITY AND OTHER CERTIFICATES ("CERTIFICATE")

BASIC REQUIREMENT AND FULFILLING ITS FUNCTION

- Q1 When a credit requires the presentation of such a certificate, this will be satisfied by the presentation of a signed document titled as called for in the credit, or bearing a similar title or untitled, that fulfils its function by certifying the outcome of the required action, for example, the results of the analysis, inspection, health, phytosanitary, quantity or quality assessment.
- a. an issuance date that is no later than the date of shipment; or
- b. wording to the effect that the action took place prior to, or on the date of, shipment, in which event, when an issuance date is also indicated, it may be subsequent to the shipment date but no later than the date of presentation of the certificate; or
- c. a title indicating the event, for example, "Pre-shipment Inspection Certificate".
- Q2 When a credit requires the presentation of a certificate that relates to an action required to take place on or prior to the date of shipment, the certificate is to indicate:

ISSUER OF A CERTIFICATE

- Q3 A certificate is to be issued by the entity stated in the credit.
- Q4 When a credit does not indicate the name of an issuer, any entity including the beneficiary may issue a certificate.
- Q5 When a credit makes reference to an issuer of a certificate in the context of its being "independent", "official", "qualified" or words of similar effect, a certificate may be issued by any entity except the beneficiary.

CONTENTS OF A CERTIFICATE

- Q6 A certificate may indicate:
- that only a sample of the required goods has been tested, analyzed or inspected;

- b. a quantity that is greater than that stated in the credit or on any other stipulated document; or
- c. more hold, compartment or tank numbers than that stated on the bill of lading or charter party bill of lading.
- Q7 When a credit indicates specific requirements with respect to analysis, inspection, health, phytosanitary, quantity or quality assessment or the like, with or without stipulating the document to indicate compliance with these requirements, the data regarding the analysis, inspection, health, phytosanitary, quantity or quality assessment or the like mentioned on the certificate or any other stipulated document are not to conflict with those requirements.
- Q8 When a credit is silent as to the specific content to appear on a certificate, including, but not limited to, any required standard for determining the results of the analysis, inspection or quality assessment, the certificate may include statements such as “not fit for human consumption”, “chemical composition may not meet required needs” or words of similar effect, provided such statements do not conflict with the credit, any other stipulated document or UCP 600.
- Q9 Consignee information, when shown, is not to conflict with the consignee information in the transport document. However, when a credit requires a transport document to be issued “to order”, “to the order of shipper”, “to order of issuing bank”, “to order of nominated bank (or negotiating bank)” or “consigned to issuing bank”, a certificate may show the consignee as any entity named in the credit except the beneficiary. When a credit has been transferred, the first beneficiary may be stated to be the consignee.
- Q10 A certificate may indicate as the consignor or exporter an entity other than the beneficiary of the credit or the shipper as shown on any other stipulated document.
- Q11 A certificate may indicate a different invoice number, invoice date and shipment routing to that indicated on one or more other stipulated documents, provided the exporter or consignor shown on the certificate is not the beneficiary.

ISDGP

International Standard Demand Guarantee Practice for URDG 758

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Introduction

The International Standard Demand Guarantee Practice for URDG 758 (ISDGP) is a companion document to the ICC Uniform Rules for Demand Guarantees 758 (URDG). It supplements the URDG by identifying and recording best practice in relation to the URDG rules and beyond.

While international standard practice in demand guarantees—which the ISDGP is intended to represent—is referred to in article 2 of the URDG in relation to the determination of a complying presentation, it may be used as a useful guide beyond the mere examination of documents, to cover all the stages in the lifecycle of a demand guarantee and counter-guarantee. Collected during over a decade of the application of the URDG in thousands of transactions identified by ICC members as international best practice in demand guarantees, but also from mishaps that led to costly court proceedings, the ISDGP offers an unparalleled insight into the correct application of the URDG in a practical context. Its authority stems primarily from the participative process of its drafting. Seventy-two sets of national comments received from 27 ICC national committees on five continents, and countless individual comments from practitioners across the world, have permitted a collaborative drafting of the ISDGP that is truly representative of international guarantee practice. The standards listed in this publication span all types of demand guarantees, domestic and international, in all the sectors of trade and industry.

The ISDGP is a statement of best practice when applying the URDG; it is not an amendment of the URDG, nor can it conflict with their rules. It offers guidance as to how rules and practices codified in the URDG are to be applied regardless of the applicable law, the mandatory rules of which will always prevail. Accordingly, the ISDGP must be read in conjunction with the URDG, not alone. Where examples are given in the ISDGP, these are solely for the purpose of illustration and are not exhaustive. The ISDGP may also be used as an aid for the interpretation of URDG 458 where the relevant rule in URDG 458 does not contradict the revision in URDG 758.

Over the past 30 years, courts and arbitral tribunals have been regularly referring to the URDG as a compendium of customs and usage in demand guarantees, even where the guarantee in dispute did not incorporate the URDG. In the same vein, it is expected that the ISDGP shall also offer guidance on best practice in demand guarantees even where the URDG are not specifically incorporated.

The listing of best demand guarantee practice in the ISDGP is not exhaustive, nor is it ever expected to become so. Other international standard demand guarantee practices under the URDG may be identified on a case-by-case basis. Those additional, uncodified practices may apply alongside or instead of the ISDGP where both their relevance to the case in hand and their international and widespread character are evidenced. Official Opinions of the ICC Banking Commission naturally add to and supplement the ISDGP even if those opinions are not listed in this publication or any addenda that may later be published. In contrast, local practice, however widespread in the relevant country, should not be held to amount to international standard demand guarantee practice under the URDG.

For the avoidance of repetitions, terms used in the ISDGP carry the meaning ascribed to them in the URDG. In particular, “guarantee” means a demand guarantee and includes a counter-guarantee, and “guarantor” includes a counter-guarantor, unless otherwise stated in the relevant practice. Reference in the ISDGP to “article” followed by its number refers to the corresponding rule in the URDG unless otherwise indicated.

In this publication, the practices are classified in accordance with the successive steps of the lifecycle of a demand guarantee. An index at the end of the publication links each listed practice with the relevant articles of the URDG.

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A. Application of ISDGP

1. *International Standard Demand Guarantee Practice* (ISDGP) represents best practice in relation to guarantees governed by the *Uniform Rules for Demand Guarantees*, ICC Publication No. 758 (URDG), including guarantees issued before the ISDGP has been published. It highlights how the URDG are to be interpreted and applied in a guarantee in which they are incorporated by reference, apply as trade usage, or are established from a consistent course of dealing between the parties. Accordingly, the ISDGP need neither be incorporated in the guarantee nor expressly referred to therein.
2. The ISDGP is designed to be consistent with the URDG. It does not amend, and should be read in conjunction with the URDG.
3. Like the URDG, the ISDGP is subject to the overriding mandatory rules of the applicable law.
4. The practices listed in the ISDGP do not exhaustively codify international standard demand guarantee practice under the URDG. Other practices may be identified in particular cases and may apply to the relevant guarantee if they reflect international standard practice in demand guarantees.
5. The Official Opinions and Decisions of the ICC Banking Commission in relation to the URDG supplement the ISDGP.
6. The practices in the ISDGP that relate to a rule of the URDG that has been excluded in the guarantee do not apply to that guarantee, and those that relate to a rule modified in the guarantee apply only if they are consistent with the modified rule.
7. In the interpretation of the ISDGP, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international demand guarantee practice.

8. Similar to the case for the URDG, the authentic language of the ISDGP is English. In case of an inconsistency with a translation, the English version of the ISDGP shall prevail.

B. Definitions**Applicant**

9. The applicant is the party to the underlying relationship with the beneficiary, irrespective of the term used in that relationship to refer to the applicant. The applicant may also be the instructing party. Where they are different, the instructing party may be the parent or an affiliate of the applicant or another person with an interest in seeing the guarantee issued to permit the performance of an obligation in the underlying relationship.
10. Demand guarantees may be issued for more than one applicant, such as in the case of unincorporated partnerships or consortia where the partners jointly act as the applicant. Where the multiple applicants also act as the instructing parties, a guarantor may require all the instructing parties jointly and severally to undertake to indemnify the guarantor.

Application

11. The application does not necessarily form the entire agreement between the applicant or instructing party and the guarantor for the purpose of defining their reciprocal rights and obligations in relation to the guarantee. The application may be issued on a standalone basis, fall under a master agreement for the issue of several guarantees, or be part of general terms and conditions that apply to the broader business relationship between the applicant or the instructing party and the guarantor.
12. The application may take the form of a tripartite agreement between the applicant, the instructing party and the guarantor, or take any other form that

- evidences the applicant's consent for the use of its name in the guarantee upon the instructions of the instructing party.
13. The beneficiary is not a party to the application and is not bound thereby notwithstanding that it may be referred to in the application or be conferred a role or a responsibility for any purpose, such as the liability for the payment of charges.
14. It is the responsibility of the instructing party to insert in, or append to, the application the terms it requires the guarantee to contain. A guarantor has no duty to control, interpret or otherwise investigate those terms unless it specifically so agrees.

Authenticated

15. "Authenticated", as defined in the URDG, means any process of verification assuring that an electronic document, record or data set is complete and unaltered, and is sent by the person that purports to be the sender. The URDG and the ISDGP do not express a preference for, or prohibit the use of, a particular electronic or digital means of exchange of documents or data.
16. Where a guarantee requires a presentation to be made electronically, such as by email, SWIFT or through other proprietary information technology systems, without requiring a specific verification process to meet the authentication requirement in the URDG, the presentation is deemed to be authenticated if it permits the guarantor to achieve all the following requirements:
- verify the apparent identity of the sender;
 - read the presentation in its totality;
 - determine that the document/data transmission received through the presentation are complete and unaltered; and
 - ascertain the moment in time

of sending and/or receipt of the document or data.

17. The term "authenticated" may carry different meanings according to the applicable law or the standards of the particular messaging system used. The ISDGP is only concerned with the standard defined in article 2 for electronic documents under the heading 'Authenticated'. The apparent authentication of paper documents is a matter for the parties' agreement or the applicable law.

Beneficiary

18. Demand guarantees may be issued in favour of more than one beneficiary. An example is where a guarantee is issued in favour of unincorporated partnerships or consortia where each partner is to be considered a beneficiary. A guarantor may require the beneficiaries to agree on the appointment of one of them as agent or trustee on behalf of all the beneficiaries for all purposes relating to the guarantee, including a release of the guarantor, the acceptance of an amendment, or the presentation of a demand, whereupon the guarantee should identify that agent or trustee and define its role.
19. Guarantees that refer to a class of an unspecified number of beneficiaries that are not individually named, such as "the minority shareholders of company X" are uncommon and do not reflect best practice in demand guarantees. Where such a situation arises, an agent or trustee should be appointed to represent the class.

Business day/business hours

20. Business day should not be confused with calendar day. A business day refers to a day when a guarantor is regularly open for business for the acts of processing guarantees. If a guarantor is open on other days to perform non-guarantee-related business, those days do not count as business days as defined

by the URDG.

21. A business day is determined by the local law and practice at the place of business where an act of a kind subject to the URDG is to be performed. Where the guarantee is issued by a branch of the guarantor, the law at the place of business of that branch shall determine what a business day is. If the guarantee provides that an act of a kind subject to the URDG, such as a presentation, shall happen at a place other than the guarantor's or the issuing branch's place of business, then that other place shall be considered for the purpose of determining a business day.
22. If the processing of guarantees is outsourced to a place other than the place of business of the guarantor without, however, indicating that presentation shall happen at that outsourced place, only the place of business of the guarantor, or the issuing branch, shall be considered for the purpose of determining a business day.
23. The URDG do not define business hours. Unless a guarantee indicates the business hours of a guarantor during which an act indicated in the guarantee is to take place, including a presentation, a business day is considered a standard 24-hour period, e.g. 00:00:00 to 23:59:59, in the time zone of the guarantor.
24. Where a guarantee permits electronic presentations without indicating that a demand must be presented a specific number of days or hours before the expiry date, a demand may be presented electronically until 23:59:59, in the time zone of the guarantor, of the day specified in the guarantee as the expiry date.
25. If the guarantee requires presentations in paper form or is silent about the form, the beneficiary bears the risk that the guarantor's office may be closed outside of business hours.
26. In the URDG, charges is a term used to cover any commissions, fees, costs, expenses, however they may be referred to in the guarantee where they accrue in relation to services provided by a guarantor, a counter-guarantor, an advising party or a second advising party in relation to a guarantee. Although the definition of 'Charges' in article 2 refers generically to "any party acting under a guarantee", the URDG are not meant to apply to charges that may be due to a presenter, even if the guarantee or the application refers to such charges.
27. It is best practice that the party which is liable for the charges is identified in the guarantee. Absent an agreement otherwise, article 32(b) applies.
28. Charges should be claimed, settled or set off without delay, unless a deferred date is agreed between the party owing the charges and its creditor. Claiming charges owed under the guarantee within 60 days following the day of the termination or expiry of the guarantee is consistent with international standard practice in demand guarantees. Claiming charges beyond such a period is not necessarily in conflict with such international standard practice, but may lead to unnecessary delays and internal costs for the charge debtor.
29. A party which is owed charges in relation to an act that it had accepted to undertake under a guarantee should not withhold the performance of that act pending the settlement of those charges.

Complying presentation

30. A complying presentation is not limited to a demand. It also includes all presentations made under a guarantee. Examples include a presentation to decrease the guarantee amount or to trigger effectiveness or expiry.

Counter-guarantee

31. Multiple, successive counter-guarantees may be issued back-to-back as may be necessary to cover and indemnify a guarantor that is instructed to issue a guarantee. Each counter-guarantee in the connected chain is a “counter-guarantee” as defined in article 2, is independent of the other counter-guarantees, and is subject to its own terms.
32. There is no requirement that the issue of a counter-guarantee subject to the URDG is restricted to a situation where it is preceded or followed in the counter-guarantee chain by another counter-guarantee or guarantee also subject to the URDG. The preceding counter-guarantee or the following counter-guarantee or guarantee may be an independent guarantee that is not subject to the URDG, an accessory suretyship, or a standby letter of credit. The issue of back-to-back counter-guarantees and guarantee that are not all independent guarantees is not best practice in demand guarantees.
33. The incorporation in a counter-guarantee of a set of rules other than the URDG, such as the *Uniform Customs and Practice for Documentary Credits* (UCP) or of the *International Standby Practices* (ISP), is deemed to be an exclusion of the URDG in that counter-guarantee. In such a situation, article 1(b) shall not apply and the counter-guarantee shall not become subject to the URDG as a result of the counter-guarantor requesting the guarantor to issue a guarantee subject to the URDG. The issue of back-to-back counter-guarantees and guarantee that are not uniformly governed by the same set of rules should be carefully considered as it may lead to an inconsistent treatment of each guarantee.

Demand

34. A demand includes any document, however titled, signed by the

beneficiary that permits to infer that the beneficiary is demanding payment under the guarantee. To be considered a complying demand, a demand must in addition meet the requirements of a complying presentation.

Guarantor

35. Any legal or natural person may issue a guarantee under the URDG, for any purpose, and in consideration of any underlying international or domestic relationship. Issues of licensing and authority are matters for the applicable law and outside the scope of the URDG.
36. A guarantee may be issued by multiple guarantors, whereupon best practice should lead to the identification in that guarantee of one of the guarantors to act as agent or trustee of all the guarantors and to the definition of its role.

Guarantor's own records

37. The definition of ‘Guarantor’s own records’ in article 2 is confined to records of amounts credited to or debited from accounts held with the guarantor, including its branches in the same country. Records of other operations involving the guarantor or its branches do not fall within the scope of a ‘Guarantor’s own records’, as defined in the URDG, even if the guarantee refers to those other operations. An example is where the guarantee refers to its coming into effect upon the issue of a letter of credit. This situation would not fall within the scope of ‘Guarantor’s own records’, as defined in the URDG, even if the guarantor, or one of its branches, is issuing, confirming or advising that credit.
38. Amounts credited to or debited from accounts held with branches of the guarantor within the same country fall within the definition of the guarantor’s own records. Conversely, branches in different countries are deemed to be separate entities as indicated in article 3(a). Records showing movements

on an account held with a branch abroad do not fall within the scope of a ‘Guarantor’s own records’ even if the guarantor has a centralised data system permitting the control of all credits and debits involving its branches abroad.

Instructing party

39. The interaction between the applicant and the instructing party is outside the scope of the URDG. If the applicant is not the instructing party, the guarantor is expected to follow the instructions of the instructing party for all purposes relating to the guarantee, unless the guarantor, the instructing party and the applicant have agreed otherwise.
40. Where the guarantee is issued upon the instructions of more than one instructing party, such as in the case of unincorporated partnerships or consortia, the guarantor should consider requiring the multiple instructing parties to enter into an agreement appointing one of them to act as agent or trustee on behalf of all of them for all purposes relating to the guarantee, including the waiver of discrepancies in a presentation.

Presenter

41. A presenter of a document required in the guarantee need not be the applicant or the beneficiary nominated in that guarantee. The presenter could include the applicant or a subsidiary or an agent thereof, the beneficiary or a subsidiary or an agent thereof, a bank, an insurance company, or any other nominated person.
42. Where the guarantee nominates a specific person for the purpose of making a presentation, the guarantor shall determine whether the person making the presentation appears to be the nominated presenter from the face of the documents presented. The URDG do not require the guarantor to verify the authority of the presenter to act on behalf of the applicant or the

beneficiary.

43. A presenter on behalf of the applicant or the beneficiary does not become a party to the guarantee by the mere act of making the presentation.

Signed

44. “Signed” is broadly defined in the URDG, covering various forms of signature in paper form and an electronic signature that can be authenticated. For example, in the case of a presentation in electronic form, an authenticated SWIFT message shall be deemed to be a signed document for the purpose of the URDG.
45. Absent a specific requirement in the guarantee, the URDG only require the following documents to be signed: the guarantee, any amendment, any demand (including an extend or pay demand), any of the statements required under article 15, a release from liability, and the transferor’s statement that the transferee has acquired the transferor’s rights and obligations in the underlying relationship. A guarantee may require other documents to be signed, whereupon the definition of “signed” in article 2 shall apply, unless indicated otherwise.

Other terms not defined in the URDG

46. Confirmation of guarantees is not standard practice in demand guarantees. The URDG provide no rules in relation to confirmation. Where confirmation of a guarantee is sought, the guarantor should provide terms in the guarantee determining the entire process of confirmation.
47. “Unconditional” is sometimes used in practice to emphasise the rigour of the guarantor’s undertaking to pay on demand. It is an ambiguous term and is technically incorrect where guarantees subject to the URDG are concerned. This is because every guarantee requires one condition at a minimum, namely, that a complying

demand is presented before expiry. When used, the term “unconditional” should be considered as synonymous with “independent” as defined in article 5, unless the context of the particular guarantee permits to infer otherwise.

48. “Without delay” and “Immediately” are terms used, but not defined, in the URDG. These terms should be understood in their normal meaning of an act being performed without an undue lapse of time.

C. Drafting the guarantee

General drafting considerations

49. The terms recommended in article 8 for drafting guarantees are not a prerequisite failing which the guarantee becomes invalid or unenforceable.
50. References in the guarantee to the definitions provided in the underlying contract for the purpose of giving similar terms in the guarantee the same meaning ascribed to them in the contract should be avoided, as they risk establishing an accessory connection with that contract. It is better practice for those terms to be defined in the guarantee itself even if identical terms are used.
51. The majority of guarantees are issued for a determined amount, generally expressed as a maximum amount. Guarantees providing for the guarantor to perform an obligation other than one consisting of making payment, such as replacing the defaulting contractor in the completion of the works or procuring a replacing contractor, are not guarantees within the scope of the URDG, even if they are stated to be “on demand” or subject to the URDG.

Reference to the underlying relationship

52. As is recommended in article 8, and drafted in both the *Form of Demand Guarantee under URDG 758* and the *Form of Counter-Guarantee under URDG 758* appended to the URDG, it is best practice in demand

guarantees that the guarantor refer in the guarantee to the underlying contract(s) in consideration of which the guarantee is issued. Amongst many reasons making that reference compelling, it enables a guarantor or counter-guarantor who has issued two or more guarantees to the same party to identify the instrument under which the demand is made and avoids the risk of an inadvertent or unfair demand being prompted by a breach by the applicant under a different contract.

53. A reference to the underlying relationship in the guarantee does not affect the independence of that guarantee as affirmed in article 5. However, references made in the guarantee to the underlying relationship in terms such that any operative part of the guarantee becomes predicated on the occurrence of an event under the underlying relationship should be avoided as they may lead to the recharacterisation of the demand guarantee as an accessory suretyship. That would be the case where terms are drafted in the guarantee to the effect of conditioning (a) payment upon establishing a breach in the underlying relationship, or (b) expiry upon the satisfactory performance of the underlying relationship.

Use of generic terms to describe an issuer of a document

54. Generic terms used to describe an issuer of a document are imprecise and may be misunderstood. For example, references to a “first class bank” or a “well-known international bank” are subjective references. They do not necessarily entail that the relevant bank is solvent or credit-worthy. It is best practice that they are avoided. If they are used, article 3(f) applies with the result that any bank can issue the required document. It is better for guarantors to indicate the function of the issuer of the document, e.g. law

firm, inspection company, and the like, whereupon the guarantor only needs to verify that the document refers on its face to that function.

Expiry terms

55. When the Parties contemplate including multiple expiry possibilities in the guarantee, it is critical to define a precise order of priority amongst the listed expiry possibilities.

In the following example:

“Expiry shall occur:

- a) If the applicant is the successful bidder, upon our receipt of copies of XXX documents; or
- b) If the applicant is not the successful bidder as stated in the beneficiary’s notification to the applicant of the result of the bidding process, upon the earlier of:
 - (i) Our receipt of a copy of the beneficiary’s notification to the applicant of the result of the bidding process, or
 - (ii) 28 days after the end of the bid validity, i.e. [insert the exact calendar date],

a demand could be presented indicating that “the applicant is the successful bidder” after the guarantee has expired due to the provision cited in (b)(ii) in the example. A better drafting would take the following form:

“This guarantee shall expire upon the earlier of:

- a) our receipt of copies of XXX documents; or
- b) our receipt of a copy of the beneficiary’s notification to the applicant of the result of the bidding process indicating that the applicant’s bid was not selected; or
- c) on [insert the exact calendar date].”

56. National laws and local practices may ascribe a different meaning to numeric date formats. For instance, “4/5/ [xxxx]” could mean 4 May or

5 April according to the country. It is recommended to write dates in numeric and in word form, e.g. “4 May [xxxx].”

57. The URDG do not address the issue of the release by the guarantor of collateral procured from the instructing party, following the beneficiary’s release of the guarantor for all or part of its liability. This is a matter left to the parties’ agreement or to the applicable law.

Governing law

58. The URDG are standard terms of contract. They are not a law; they apply alongside the national law or laws, or the non-statutory rules of law, chosen by the parties in the guarantee or determined pursuant to article 34. Absent a choice of the governing law by the Parties, that law shall be determined pursuant to article 34.

59. Because the guarantee is independent of the counter-guarantee, the law governing one of them cannot automatically be deemed to also apply to the other. Article 34 offers the parties the possibility to choose the same national law, or rules of law, in the guarantee and in any counter-guarantee. The governing law chosen by the parties could be the law of any party in the chain of guarantee/counter-guarantees, that of a party to the underlying relationship, that of a third country, or the general principles of law.

60. Where the law of the location of the guarantor’s branch or office that issued the guarantee applies pursuant to article 34, that law should apply throughout the lifecycle of the guarantee unless otherwise amended. In instances where a guarantor relocates its premises to a different location where the applicable law differs from that of the place of issue, the law of the place of issue remains applicable unless the guarantee is amended to adjust the governing law to the new location of the guarantor.

Jurisdiction

61. A choice of the law governing the guarantee does not subsume a choice of the competent jurisdiction. The court with jurisdiction shall be determined pursuant to the parties' choice in the guarantee or, absent a choice, pursuant to article 35.
62. Because the guarantee is independent from the counter-guarantee, the court or arbitral tribunal with jurisdiction on one of them cannot be deemed also to have jurisdiction on the other.
63. For the sake of consistency of the remedies throughout the chain of guarantee/counter-guarantees in case of a dispute at any level, article 35 offers the parties the possibility to choose the same competent court, or arbitration system, in the guarantee and in any counter-guarantee. That court could be the court of the place of business of any party in the chain of guarantee/counter-guarantee(s), that of a party to the underlying relationship, or that of a third country. It can also be any arbitration system, wherever the place of arbitration may be.
64. When a guarantor issues a guarantee that does not specifically confer jurisdiction on a specific court but, instead, relies on article 35 to confer jurisdiction upon the competent court in the country of the location of the guarantor's branch which issued the guarantee, that competent court remains unchanged throughout the lifecycle of the guarantee unless otherwise amended. In instances where a guarantor relocates its premises to a different location outside the territorial jurisdiction of the initial court, the competent court of the place of issue retains its jurisdiction on the guarantee unless it is amended to change jurisdiction to another court or to opt for arbitration.

Exclusions

65. The URDG are conceived as a balanced set of rules. The exclusion of an article

of the URDG or of any part thereof may affect the application of the rest of the rules. When the parties have resolved to exclude an article of the URDG, it is recommended that they expressly so indicate in the guarantee.

66. If an article of the URDG is excluded and the guarantee remains silent regarding the replacement intended by the parties, the opposite of the excluded article's default position shall be deemed to apply where it can be readily determined. For example, if a guarantee indicates that it is subject to the URDG except for article 17(b) and is otherwise silent, the presumption is that the beneficiary can only present one complying demand, whether for all or part of the available amount.

D. Issuing the guarantee**When is a guarantee 'issued'?**

67. The creation of the guarantee in the guarantor's internal system and its signing by any authorised signatory does not mean that the guarantee is issued, for it has not left the control of the guarantor.
68. Once a guarantee has left the control of the guarantor, it is deemed to have been irrevocably issued, even if the guarantor has mistakenly allowed it to leave its control by any means or if its issue does not comply with the internal hierarchical approval process according to the guarantor's internal control system.
69. A guarantee shall not be deemed to be issued if the beneficiary has obtained a copy thereof from the applicant or from any other person before the guarantor has issued the original, signed guarantee.
70. For the purpose of article 4(a), control is not restricted to the physical possession of the guarantee. The guarantor's transmission of the original, signed guarantee in paper form to its agent, with instructions for transmission to the beneficiary, does not meet the

requirement for issue, as the agent acts under the guarantor's control. Unless otherwise specified in the guarantee, external legal counsel representing the guarantor and courier companies entrusted with the delivery of the guarantee are generally deemed to be an agent of the guarantor, whilst the applicant or the instructing party is not the guarantor's agent.

71. In accordance with article 15 and article 4(c), a beneficiary is permitted to present a demand from the time when the guarantee leaves the guarantor's control.

E. Advising a guarantee

72. If the advising party nominated in the application is not a correspondent of the guarantor, the guarantor may:
- Elect to transmit the guarantee to that advising party by requesting the services of a first advising party which is a correspondent of the guarantor. In that case, the guarantor would instruct the first advising party to advise the guarantee to the beneficiary through the second advising party named in the application; or
 - Request that the instructing party amend the application to permit the guarantor to choose the advising party.
73. A person requested to advise a guarantee is not required to act accordingly unless it has agreed to do so. However, when that person accepts to advise the guarantee, it is best practice for it to inform the guarantor without delay when it has advised the guarantee to the beneficiary.
74. An advising party advising a guarantee directly to the beneficiary or, if so authorised by the guarantor, by instructing another advising party to do so, must not change any terms of the guarantee.
75. In accordance with article 10(c), there is no duty for any advising party to

review the terms of the guarantee for the purpose of ensuring effectiveness, coherence, enforceability, the absence of conflicting terms, or the like, or to address matters such as the credit standing of the guarantor.

76. A bank-to-bank type instruction that may be contained in the request for advice of a guarantee need not be advised to the beneficiary, for such an instruction is not considered to be part of the guarantee. Examples include the authorisation of the guarantor to debit a counter-guarantor's account; instructions on how to forward a guarantee. Any variation of those terms is a matter for the banks, and the beneficiary need not consent thereto.
77. Where an advising party no longer wishes to continue in that role, it should inform the guarantor, whereupon the guarantor may either:
- Send a copy of the guarantee and, whenever possible, all previous amendments to a person other than the advising party with a request for that person to become the new advising party, and shall thereafter transmit any amendments through that party; or
 - Send future amendments directly to the beneficiary indicating that the advising party is no longer acting in that role in respect of the guarantee.

F. Amendments

78. Any change made to the terms of the guarantee is deemed an amendment, regardless of the title used or the purpose of the change.
79. If the guarantor proposes an amendment to the beneficiary without being instructed by the instructing party, the amendment is binding on the guarantor and shall be effective if it is accepted by the beneficiary, but may affect the guarantor's recourse against the instructing party. This is not changed by the amendment being either prompted

by the guarantor's choice or duty to comply with a law applicable to it, or by the amendment benefiting the position of the instructing party.

80. Where a guarantee provides for an automatic amendment in its terms upon the advent of a date or the occurrence of an event, such as in the case of a reduction clause or of the automatic extension of the validity period, article 11(b) shall be superseded and the amendment shall take effect automatically without the need to seek the beneficiary's agreement.
81. If a beneficiary is simultaneously notified of multiple separate amendments, each amendment stands as a separate amendment, and the beneficiary may accept or reject any amendment, in its totality, in any order of the notified amendments that the beneficiary may choose. The guarantor's consecutive numbering of the successively- issued amendments to the guarantee is consistent with international standard practice in demand guarantees.

G. Presentation

Premature presentation

82. A demand that is presented before the occurrence of a date or event indicated in the guarantee pursuant to article 4(c) is untimely. If such a demand is presented, it must be rejected pursuant to the process set out in article 24.

To whom presentations may be made?

83. A presentation may be made only to the guarantor. A presentation made to an advising party or to a second advising party does not comply with the requirements of article 14(a). However, a presentation may be transmitted to the guarantor through an advising party or second advising party, whereupon it shall be deemed to be made upon its receipt by the guarantor.

Presentations in electronic/digital form

84. Digital and electronic records may be considered as different. A digital record is one that exists only in a digitised form, such as a SWIFT message, whereas an electronic record may additionally encompass a copy of a paper document that is stored in an electronic form, such as a scanned copy. The reference in the URDG to electronic presentation or document must be read as also encompassing digital records unless the guarantee indicates otherwise.
85. The guarantee should state the name/type/version of system/platform/technology to be used and the electronic address to which the electronic presentation is to be delivered.
86. The data messaging rules published by SWIFT do not modify or override the URDG or the terms of guarantees that are issued through SWIFT. In particular, the use of a SWIFT message type outside the intended purpose assigned by SWIFT to that category of message type does not have, as far as the URDG are concerned, any detrimental effect on the undertaking of the guarantor which has issued its guarantee through the SWIFT system.
87. A guarantee that requires or permits presentations to be made using a SWIFT message should specify the guarantor's SWIFT address.
88. A guarantee that requires or permits a presentation to be made using an authenticated SWIFT message, but without excluding the use of any particular SWIFT message type, allows the presenter to use any message type stated by SWIFT to be an authenticated message type if that message is delivered to the correct recipient on or before any required due date.
89. Where the guarantee requires the use of a specific authenticated SWIFT message type, only that message type may be used in connection with the

- guarantee, unless, at the time when the presentation is to be made, that message type is no longer available for use for the purpose for which the requirement was made, whereupon any other authenticated message type may be used.
90. If, outside SWIFT, a bank has provided access to the beneficiary to use the bank's own proprietary system to upload the required data, the guarantee should specify the name of the system and, if relevant, its version number.
- Original/Copy of a document**
91. Guarantees seldom require the presentation of original documents other than the supporting statement under article 15(a) or (b). The URDG do not define when a document constitutes an original or a copy of an original. A guarantee requesting a copy of an original document is deemed to allow the presentation of an undated or unsigned document, including unsigned copies, and/or photocopies of signed or unsigned original documents, faxes or e-mail printouts.
92. If a guarantee requires the presentation of an original document without defining that term, the guarantor shall treat as an original any document bearing an apparently original signature, mark, stamp, label of the issuer of the document or another characteristic feature of an original document, unless the document itself indicates that it is not an original. The guarantor shall also accept a document as original if it:
- i. appears to be written, typed, perforated or stamped by the document issuer's hand; or
 - ii. appears to be on the document issuer's original stationery; or
 - iii. states that it is an original document, unless the statement appears not to apply to the document presented.
93. Guidance in relation to what constitutes an 'original document' may also be found in the official opinions issued by the ICC Banking Commission under the Uniform Customs and Practice (UCP) from which the ISDGP draws the standards for original documents.
94. If a guarantee requires presentation of copies of originals, presentation of either originals or copies of originals is permitted.
95. If a guarantee requires presentation of multiple documents by using terms such as "in duplicate", "in two fold" or "in two copies", this shall be satisfied by the presentation of at least one original document and the remaining number in copies.
96. The URDG do not require that the original guarantee issued in paper form be presented to the guarantor for expiry or in support of a demand, nor should the guarantee so require. If the guarantee so requires, the original letter of guarantee that had been delivered in paper form to the beneficiary must be presented, with no copy of that original guarantee being substitutable thereto. In that case, there is no need for any amendments to be presented in original or in a copy unless so required in the guarantee.
97. If the guarantee requires the presentation of the original letter of guarantee in paper form and that original is no longer available to the beneficiary for any reason, the guarantor should issue a duplicate original upon the request of the beneficiary, and is entitled to require an indemnity from that beneficiary in terms acceptable to the guarantor. It is best practice that the duplicate guarantee indicate that it is a duplicate original and that the original copy is null and void.
98. Where a guarantee requires that presentations shall be made in electronic form and shall include an original of the letter of guarantee, without indicating that the presentation of the paper original of that letter of guarantee is required, the beneficiary satisfies its

- obligation where an electronic copy of the guarantee is presented to the guarantor by any means that meets the requirements for authentication as set out in article 2.
99. Any requirement for submission of one or more originals or copies of an electronic record is satisfied by the submission of one electronic record.
100. The transmission of a copy of a complying demand to the counter-guarantor under article 22 is neither a presentation for the purpose of article 14 nor a demand under the counter-guarantee. Accordingly, the guarantor is permitted to transmit in electronic form a copy of the beneficiary's complying demand under article 22 even if the guarantee indicates that a presentation or demand is to be made in paper form. Identification of guarantee under which a presentation is made
101. To avoid delaying the time for the start of the examination of a presentation indicated in article 20, a presentation shall identify the guarantee under which it is made.

Documents to be approved or countersigned by an applicant

102. Terms in the guarantee requiring that a document must be approved or countersigned by the applicant for entry into effect, increase of amount, or payment purposes, do not reflect international standard practice in demand guarantees and should be avoided. If such terms are provided in the guarantee, they must be complied with.

H. Demands

Supporting statement(s) under article 15(a) or (b)

103. A statement presented for the purpose of article 15(a) or (b) may be inserted within the text of the demand or be provided in a separate document accompanying the demand.

104. A demand and any separate statement must be signed by the beneficiary. When the demand and the supporting statement are combined, the document requires only a single signature.
105. Unless the guarantee requires specific terms to be used in the statement required in article 15(a), the beneficiary has the discretion to use any terms that convey the nature of the breach in the underlying relationship.
106. Article 15(a) does not provide any limitation of the detail required for a supporting statement. It is best practice that the supporting statement is precise and concise.
107. Where a counter-guarantee does not vary the effect of article 15(b), the guarantor need not provide a statement of breach with its demand under the counter-guarantee; it only needs to indicate in its demand that it has received from the beneficiary a complying demand under its guarantee. The guarantor's duty to transmit to the counter-guarantor a copy of the beneficiary's complying demand and of the statement of breach is separate, arises under article 22, and has no influence on the counter-guarantor's determination of the compliance of the demand under the counter-guarantee and ensuing payment obligation.
108. If, in addition to its demand under the counter-guarantee, the guarantor transmits to the counter-guarantor pursuant to article 22 a copy of the beneficiary's demand before the earlier of:
- the counter-guarantor's determination that the demand under the counter-guarantee is complying, and
 - the expiry of the time period in article 20(a), the counter-guarantor shall also examine the beneficiary's demand as transmitted. Where the counter-guarantor finds that, contrary to the guarantor's statement under article

- 15(b), the beneficiary's demand is not a complying demand, it shall reject the demand under the counter-guarantee although it appears on its face to be a complying demand. The counter-guarantor shall not be prevented from refusing to make payment under the counter-guarantee although it may have determined the guarantor's demand to be complying or that the time period in article 20(a) has expired.
109. The exclusion terms proposed in article 15(c) are an example. If a guarantee does not expressly exclude article 15(a) and requires the presentation of a "demand in writing accompanied by a written statement stating that the Applicant is in breach of its obligations under the Contract, without the need for the beneficiary to prove or to show grounds for its demand or the sum specified therein", the exclusion is effective and the supporting statement need not indicate in what respect the applicant is in breach of its obligations under the underlying relationship.
110. Article 15(a), but not the rest of the URDG, should be excluded where the payment of a guarantee is not predicated upon an applicant's breach, even where no evidence of such a breach is required. That might be the case in so-called "direct-pay" undertakings, sometimes used in support of the issue of securities, where the guarantor undertakes to redeem the securities at maturity without the need for the issuer first to default.
111. Demands may be issued by the beneficiary in any form with or without a title, or without including the word "demand" if another similar term conveying the meaning of demanding payment is used. In addition to any other requirements in the guarantee, a demand must satisfy the following conditions to be a complying demand:
- be an original and signed by the beneficiary or another person who establishes to the guarantor its entitlement to act as the beneficiary's agent;
 - be dated on or after the date the beneficiary has become entitled to present the demand pursuant to article 4(c);
 - include or be accompanied by the statement required in article 15(a) or (b) as may be the case, unless the statement requirement is excluded pursuant to article 15(c); and
 - indicate the amount claimed.
112. The amount claimed in the demand may be written in numbers and/or in words. Where a demand includes numbers and words, the amounts must be consistent. In case of an inconsistency, the demand is non-complying.
113. A demand should indicate the full bank account details on which the beneficiary requests that payment be made by the guarantor. If those details are missing or incomplete, the time period for payment mentioned in paragraph 160 below will be delayed.

Date of demand

114. If the guarantee provides that a demand may only be presented after a set period has elapsed after the breach, the demand and the statement must only be presented, and dated, after that period has elapsed. For the calculation of that period, the guarantor shall rely on the date of the breach indicated in the demand or in the supporting statement.
115. No demand or statement may be presented on a date earlier than the date of issue of that demand or statement as indicated on their face. If such a demand is presented, it is non-complying and the rejection process set out in article 24 shall apply. A guarantor that agrees to keep such a demand in trust beyond

five business days following the day of presentation, until the date marked on its face as the date of issue occurs, is at risk of being precluded from rejecting the demand pursuant to article 24(f).

Partial demand and multiple demands; amount

116. It is recommended to issue guarantees allowing for partial demands. Article 17(a) makes this the default position. Where a partial complying demand is made, other demands may be made for the remainder of the guarantee amount. However, where the guarantee prohibits multiple demands, no further demands may be made for the remainder of the guarantee amount.
117. When multiple demands are made in a single presentation, each demand must be accompanied by its ascribed supporting statement and any other required documents, whereupon each demand shall be examined separately within the time period stated in article 20(a) to determine if it is a complying demand.
118. Where the amount indicated in the demand, and potentially in the statement under article 15, is higher than the amount stated in another required document, such as a copy of an unpaid invoice, the demand is a non-complying demand and must be rejected pursuant to the process set out in article 24. In particular, the guarantor has no authority to elect to pay the lesser amount even if so requested by the beneficiary and regardless of whether the guarantee permits partial demands. Conversely, a demand made for an amount less than the amount stated in a required document is not, for that reason alone, a non-complying demand.

Corrected presentations, including demands

119. When a demand is rejected as a non-

complying demand, the beneficiary is allowed to correct the presentation by presenting a new demand before expiry, even if the guarantee excludes article 17(b).

120. The presentation of a new demand correcting the discrepancies in the initial demand does not extend the validity period of the guarantee. A new examination period of five business days shall commence on the day following the day of the new presentation.
121. If, before the guarantor has determined whether a demand is a complying demand, the beneficiary presents a new demand purporting to correct discrepancies it has identified in its initial demand:
- i. If the new demand indicates that it replaces the initial demand, the guarantor shall only examine the new demand, and may return any documents presented in paper form with the initial demand and dispose of the electronic records in any manner that it considers appropriate without incurring any responsibility;
 - ii. If the new demand does not indicate that it replaces the initial demand, the guarantor shall examine separately each of those two demands within five business days following the day of presentation of each demand. If the guarantor determines that the first demand is a complying demand, it need not continue its examination of the subsequent demand if payment of the first demand exhausts the available guarantee amount. The same applies if the new demand is received after the guarantor has examined the first demand and determined both that it is a complying demand and that its payment exhausts the available guarantee amount.

I. Extend or pay demand

122. An extend or pay demand must include a complying demand for payment for the guarantor to be compelled to make payment if the extension requested by the beneficiary is not granted upon the expiry of the suspension period. To that end, the extend or pay demand must be accompanied by the statement required in article 15 and any other documents specified in the guarantee.
123. An extend or pay demand should indicate the precise period for which an extension is requested. If it does not, the guarantor, having determined that the demand is a complying demand and decided to suspend payment pursuant to article 23(a), should query with the beneficiary the duration of the requested extension. Absent a reply by the beneficiary indicating the requested extension period, the guarantor may approach the instructing party or, in the case of a counter-guarantee, the counter-guarantor, for instructions as to the extension period. If, by the end of the suspension period, the guarantor has not been informed by the beneficiary, the instructing party or counter-guarantor of the extension period requested by the beneficiary, the guarantor may treat the demand as being made for payment only.
124. A beneficiary is not entitled to present a demand offering the guarantor the option between making payment or holding the claimed amount for value. “Hold for value” options are generally considered to mean that the beneficiary has crystallised its entitlement to the guarantee amount by presenting a complying demand, but has elected to keep the amount in trust with the guarantor. This practice or guarantee term is outside the scope of the URDG.
- amount, the guarantor must determine whether the demand is a complying demand within five business days following the day of presentation.
126. The suspension period provided in article 23(a) commences on the day following the day of presentation of the extend or pay demand to the guarantor, not from the determination that the demand is complying.
127. It is best practice in demand guarantees that the guarantor inform the beneficiary that it has elected to suspend the payment of the complying extend or pay demand for the period indicated in article 23(a).
128. A beneficiary cannot condition its extend or pay demand upon an extension being granted within a time period different from the one indicated in article 23(a), unless the guarantee provides otherwise. The same applies to a guarantor presenting an extend or pay demand under a counter-guarantee.
129. The reference to ‘calendar days’ in article 23(a) means that the 30-day suspension period may start to run or end on a non-business day at the place of issue. However, if the suspension ends on a non-business day, it shall be extended to the first following business day.
130. Whenever the guarantor determines that an extend or pay demand is not a complying demand, it must provide its notice of rejection in accordance with article 24.

Repeating a demand during the suspension period

131. When a complying extend or pay demand has been presented for the available guarantee amount and the guarantor has elected to suspend payment pursuant to article 23(a), the beneficiary cannot make a new demand for payment or one with a different extension option; it must await the decision of the guarantor whether to grant the requested extension.

Examination and suspension

125. When the beneficiary makes a demand that includes a request to extend the guarantee or to pay all or part of its

132. Notwithstanding the prohibition of multiple demands in a guarantee, if the guarantee is extended following the presentation of a complying extend or pay demand, the beneficiary may present a new, separate demand for payment, or one with an extension option, at any time, prior to the new expiry date.

133. Where the guarantee does not exclude article 17(a), the presentation of a complying extend or pay demand for less than the full available guarantee amount does not prevent the beneficiary from presenting another demand for the rest of the available guarantee amount without the need to wait for the decision of the guarantor on the first demand, unless the guarantee prohibits multiple demands. That additional demand may be either another extend or pay demand or a demand for payment.

Suspension period by counter-guarantor

134. In line with the rationale underlying article 22, article 23(b) does not permit the counter-guarantor to require the transmission of a copy of the extend or pay demand received by the guarantor in order for the counter-guarantor to decide whether to suspend the counter-guarantee and, if so, the duration of the suspension period.

135. When presenting a demand pursuant to article 23(b), the guarantor should inform the counter-guarantor of the period for which it suspended payment under the guarantee pursuant to article 23(a). If it does not, the counter-guarantor should query that information with the guarantor. The guarantor's omission to inform the counter-guarantor of that period cannot be a basis for a refusal of either the extension or the payment of a complying extend or pay demand under the counter-guarantee.

No need to repeat or update demand

136. If, after suspension, the guarantor does not extend the guarantee for the period requested in the extend or pay demand, payment must be made for the full amount of the demand. It follows that the beneficiary need not reiterate its demand, present a fresh demand, or provide an update of any statement or document attached thereto, even if the document was issued for a limited period that expired by the end of the suspension period, such as an official certification valid for a limited period.

No interest on suspension period

137. The beneficiary is not entitled to interest or similar delayed payment compensation during the suspension of payment period decided by the guarantor pursuant to article 23(a).

J. Examination Standard for determination of compliance

138. To determine whether a presentation is complying, a guarantor must examine the presentation against the three standards set out in the definition of complying presentation in article 2, in the order in which they appear in that definition. Accordingly, no presentation shall be deemed a non-complying presentation for inconsistency with the URDG or international standard demand guarantee practice if it complies with the express terms of the guarantee. Article 15(c) and article 25(c) prevail over conflicting terms in the guarantee unless those articles are expressly excluded in the guarantee.

139. In determining compliance, a guarantor may not rely on resources or verify facts other than those specifically provided in the guarantee or from the guarantor's own records or an index specified in the guarantee as indicated in article 7.

140. Article 7 requires that non-documentary conditions shall be deemed as not

stated and shall be disregarded. That requirement is not overridden by the statement in article 12 that the guarantor is liable in accordance with the terms of the guarantee, including any non-documentary conditions therein included.

141. The definition of “complying presentation” in article 2 does not require literal compliance when examining a presentation. An apparent difference between a presentation and the terms of the guarantee does not automatically make that presentation a non-complying presentation when the terms used in the presentation appear on their face to convey the same meaning as that required in the guarantee. For example, the requirement for a statement in article 15(b) is satisfied where the party to whom the counter-guarantee was issued supports its demand with a statement indicating that the demand it has received contains no discrepancies.
142. Should a guarantee require the presentation to contain specific terms by quoting those terms between quotation marks or referring to an attached form, the terms in the presentation must reproduce the terms required in the guarantee. The beneficiary’s adding terms or figures in any spaces included for completion purposes in the area between the quotations or in the attached form does not make the presentation a non-complying presentation.
143. A guarantor cannot imply into the terms of the guarantee requirements for the compliance of a presentation that are additional to those terms. For example, where a guarantee refers to the underlying contract by date and number for identification purposes and, in the demand section, requires that a statement be presented stating: “The applicant is in breach of its payment obligation(s) under the contract for the deliveries during the period from

1st April until 20th August and the beneficiary fulfilled its delivery obligations during that period”, the guarantor may not reject as a non-complying document a statement that complies with the terms that appear in the guarantee between quotation marks but does not quote the contract’s date or its reference number.

Presenting non-required information in a required document / Presenting a non-required document

144. Information or documents in a presentation that are not required in a guarantee need not be examined for the purpose of determining whether the presentation is complying. The guarantor is required to examine all other documents required in the guarantee and included in the same presentation.
145. Where a required document includes non-required information that conflicts with the terms of the guarantee, the presentation is a non-complying presentation, even if the conflict arises with a non-documentary condition in the guarantee. For example, if a guarantee states a non-documentary condition as follows: “This guarantee is issued in consideration of contract No. 12345”, that term serves to identify the underlying relationship but is to be disregarded for examination purposes. However, where a presentation includes data referring to a different contract number in a document or statement required in that guarantee, e.g. the statement of breach presented by the beneficiary states that the demand for payment is in accordance with the terms of contract number 55555, the presentation is a non-complying presentation pursuant to article 19(b).

Recalculations

146. Where a guarantee provides that its amount shall vary according to a

specific index, article 19(e) shall be superseded by article 13(b), with the result that the guarantor shall perform or control the calculations to determine the variation of the amount. Once the guarantor has determined the new amount reflecting the variation, any presentation must not exceed that amount.

Typographical errors

147. Typographical errors which do not materially change the meaning of a term used in a presentation do not render the presentation non-complying. For example, a statement stating “fnal acceptance certificate” instead of “final acceptance certificate” should not be rejected for the missing “i” alone. However, not all typographical inconsistencies are immaterial. For instance, when a guarantee requires a document to state a contract number(s), the contract number is expected to appear on the face of the required document as stated in a guarantee.
148. The use of certain fonts may cause confusion, especially in the case of an electronic examination process, e.g. a number “1” may be confused with a letter “I”, or the letter “O” could be confused for the number “0”. In such a situation, the presentation should not be rejected as non-complying, outside specific circumstances such as the use of alphanumerical product codes, such as ‘132I’, which requires strict compliance.

Abbreviation of corporate forms

149. The use of abbreviations for words or company names, such as “Inc.” for Incorporated, “Ltd.” for Limited, “S.A.” for Société Anonyme, or “S.p.A.” for Società per Azioni, do not make a presentation non-complying.

Punctuation marks in a document

150. Missing or changing punctuation such as a period/full stop, comma, colon,

etc. does not constitute a discrepancy, for example, where the guarantee quotes the precise wording/ text of a required statement and the text between quotation marks adds or omits a punctuation mark, unless such an omission or change alters the meaning of a word or introduces ambiguity or changes the value of an amount, e.g. “14” cannot be used to represent 1/4 when the “/” is missing.

Document issuers

151. Other than a demand and a supporting statement which must be issued by the beneficiary in accordance with the standards set out in the URDG, the onus is on the guarantor, pursuant to the application, to provide in the guarantee the required content of any document and whether and by whom it has to be signed.
152. When a guarantee requires a document to be issued by a specific person, the document must appear on its face to be issued by that person. This may be evidenced by, amongst other indications, the document letterhead showing its provenance and the signature of the required person appearing on the document. When the document issuer required in the guarantee is a legal person, the requirement is satisfied when the document appears to have been completed or signed by, for, or on behalf of, the named person or entity.
153. It is better that guarantees abstain from requiring a named person to issue a required document, for there is a risk that the nominated individual might pass away or that the specified entity might cease to exist or lose its licence empowering it to undertake the activity permitting the issue of the document, with the result that the document becomes impossible to issue.
154. If the guarantee refers to a generic category of document, but is silent as to which specific type of document is

required, any document falling within the generic category is acceptable. In the case of an invoice for example, any commercial invoice shall be acceptable, but an invoice marked as proforma or provisional shall not be acceptable.

Signatories

155. Where a guarantee requires the presentation of a signed document, a guarantor shall verify that the presented document is signed, but shall not verify any of the signature features listed in article 27(a).

Countersignature by beneficiary's bank / Authentication of beneficiary signatures

156. The URDG do not require that the beneficiary's signature is countersigned, certified or attested by any bank. Accordingly, the guarantor can only require that additional bank's countersignature, certification or attestation of a signature if the guarantee expressly so provides.

157. When the bank of the beneficiary countersigns or otherwise certifies in any form the signature of the beneficiary, that bank should not be deemed to certify the authority of the signatory to present a demand on behalf of the beneficiary. Rather, the countersigning or certification only indicates that the bank has satisfied itself as to the apparent identity of the person who signed the document.

Examination timeline

158. Article 20(a) is to be read in conjunction with articles 14(b) and 14(f). The time period of five business days following the day of presentation therein specified is a fixed period regardless of the number or the complexity of the documents presented and of the proximity of the date of presentation to the guarantee's expiry date.

159. Any day on which the guarantor is

regularly open for business for an act of a kind subject to the URDG constitutes a business day even if the business is open only for part of a day. Thus, if the guarantor was open for guarantee business for a half day, e.g. 09:00–13:00, that half day would be considered as one of the five business days to which article 20(a) and article 24(e) refer.

K. Payment

Date of payment

160. Best practice in demand guarantees requires that payment of a complying demand must take place without delay. To that end, payment within three business days following the day of determination that a demand is complying is consistent with international standard practice in demand guarantees.

161. A guarantor informing the instructing party or the counter-guarantor of the receipt of a demand or of the guarantor's determination that the demand is a complying demand cannot delay the guarantor's duty to make payment without delay, regardless of the terms of the application or of any other agreement between the instructing party and the guarantor.

Set-off

162. Pursuant to article 5, the guarantor cannot assert against the beneficiary's complying demand a set-off defence that would be available either to the applicant under any relationship with the beneficiary or to the guarantor under the application. This does not prevent the guarantor from setting off the beneficiary's entitlement to payment under the guarantee pursuant to a complying demand against any debt owed by that beneficiary to the guarantor under any relationship between the guarantor and that beneficiary, unless agreed otherwise in the guarantee. However, and subject to the provisions

of the applicable law, no set-off shall be permitted where it concerns a debt arising from the underlying relationship that has been assigned by the applicant to the guarantor for the purpose of permitting its application against the beneficiary's entitlement under the guarantee.

163. If the amount of the beneficiary's debt owed to the guarantor arising out of a relationship extrinsic to the guarantee, or under the guarantee itself, is equal to or exceeds the amount of the complying demand, the guarantor need not make any payment to the beneficiary or the assignee of the proceeds. However, this does not limit its recourse against the instructing party for the amount of the complying demand and any charges.

Currency of payment

164. Where the guarantee provides for a multi-currency payment option, the beneficiary can present a demand in any of those currencies. Absent such an option, a demand can only be presented in the currency of payment specified in the guarantee, and can only be paid in that currency.
165. A demand presented in a currency other than the currency of payment specified in the guarantee is a non-complying demand, even if the currency of payment indicated in the guarantee is not convertible. It is only in the two situations listed in article 21(b)(i) and (ii) that the guarantor is authorised to make payment in the currency of the place for payment if it does not coincide with the currency of the guarantee.
166. An agreement between the guarantor and the beneficiary that a complying demand presented in the currency of the guarantee should be paid in equivalent value in another currency is not an infringement of the URDG. Foreign exchange fees potentially charged by the guarantor to the beneficiary as a result of a currency conversion requested by the beneficiary do not

fall within the definition of charges in the URDG. Regardless of the currency in which payment is made pursuant to that agreement, the guarantor can only claim payment from the instructing party in the currency of the guarantee or pursuant to any other payment modality agreed in the application or in any other document.

Subrogation

167. The URDG do not address whether a guarantor that has paid the beneficiary pursuant to a complying demand is subrogated in that beneficiary's rights against the applicant under the underlying relationship as a consequence of that payment extinguishing the applicant's debt towards the beneficiary. The matter is left to the applicable law.

Payment without a demand

168. Practice in certain regions reveals guarantee terms granting the guarantor the discretion to pay the beneficiary the guarantee amount without a complying demand being presented. The purpose is to permit the guarantor to bring the guarantee to an end before the stipulated expiry. Payment of a guarantee without the presentation of a complying demand is not covered by the URDG. It does not reflect international standard practice in demand guarantees either.
169. A counter-guarantor which decides in its discretion to pay the counter-guarantee to bring it to an end pursuant to a term therein stipulated to that effect, notwithstanding the absence of a demand from the guarantor, may pay the counter-guarantee even if the guarantor is not seeking to end its guarantee. In that case, the amount paid under the counter-guarantee shall be held in trust by the guarantor and shall be refunded to the counter-guarantor absent the payment by the guarantor of a complying demand presented by the beneficiary before expiry of the

guarantee. No interest shall be due on the refunded amount unless agreed otherwise.

L. Non-complying demand, waiver and notice

Notice of rejection / Waiver

170. In accordance with article 24(a), a guarantor has the option of either rejecting a non-complying presentation and providing its notice of rejection or, at its discretion, approaching the instructing party for a waiver of the discrepancies. Electing to approach an instructing party does not extend the five business day period provided in article 24(e) for the issue of the notice of rejection. The same applies in the case of a counter-guarantor choosing to exercise its option under article 24(b).
171. A guarantor which determines a demand to be a non-complying demand, should not approach an instructing party or counter-guarantor for a waiver unless it has, at that time, the intention of accepting and acting upon a waiver that may be provided.
172. A notice of rejection shall be provided to the presenter, whether that presenter is the beneficiary or a person acting on its behalf.

Rejection terms

173. The term "reject" does not need to be used specifically when sending a notice of rejection to the presenter provided that a similar verb, such as dishonour or refuse, is used in the notice. The mere listing of discrepancies without an indication that the guarantor is rejecting the demand does not comply with article 24(d).
174. A notice of rejection must state, in the same message, all the discrepancies for which the guarantor rejects the demand. No effect shall be given to an additional rejection notice purporting to supplement an initial list of discrepancies in relation to the same

presentation.

Corrections to a non-complying demand

175. The beneficiary may before expiry make a correction to its demand which has been the object of a notice of rejection.
176. A guarantor that had found a document to be complying in the initial non-complying demand cannot, in the new demand in which the beneficiary has cured the other discrepancies, find that same document to be non-complying if that document has undergone no change. However, if the correction carried out to cure any discrepancies results in the presentation of additional or different data in a document required by the guarantee that conflict with data in any required document or the guarantee, the new presentation is non-complying.

M. Reduction and expiry of a guarantee

Payment reductions

177. Unless the guarantee is issued for a revolving amount, which is a case not covered in the URDG, partial demands paid under the guarantee reduce the amount of the guarantee by up to the amount paid.
178. A demand, including a partial demand, that has been presented and rejected as non-complying does not reduce the amount of the guarantee.

Total or partial release

179. A signed release of liability issued by the beneficiary to the guarantor shall supersede the expiry term in the guarantee, whether that term is an expiry date or an expiry event.
180. A partial release of liability shall decrease the amount available under the guarantee regardless of the reduction mechanism provided in the guarantee. Where the partial release leaves an

amount payable under the guarantee, any reduction mechanism provided in the guarantee remains applicable for the guarantee amount that is not covered by the partial release.

181. For the purpose of communicating to the guarantor its signed release in an electronic form under article 25(a)(iii) and article 25(b)(iii), the beneficiary may use any authenticated communication means that complies with the terms of the guarantee or, absent a specific format or system specified therein, with article 14(c). The beneficiary may also use a paper form.
182. The beneficiary may choose to transmit the release through the advising or second advising party that advised the guarantee.

Article 25: overriding termination terms

183. Article 25(b)(i)-(iii) lists three events the happening of the earlier of which automatically triggers the termination of the guarantee.
184. A guarantee that provides that the guarantor's liability shall cease upon the beneficiary's release of the guarantor shall terminate upon the earlier of either the presentation to the guarantor of the beneficiary's signed release from liability under the guarantee or the lapse of three years from the date of issue pursuant to article 25(c).
185. A guarantee which provides that the guarantor's liability shall cease upon:
 - i. the beneficiary releasing the guarantor by means of issuing a signed letter of release from liability or an authenticated SWIFT message or the like, or
 - ii. the return by the beneficiary of the original letter of guarantee issued in paper form, is an undertaking providing for an expiry event of a documentary nature. As a consequence, article 25(c) shall not apply and the guarantee shall expire upon the presentation of

the required document or when no amount remains payable under the guarantee as provided in article 25(b).

Automatic extension of guarantees

186. Guarantees have been reported sometimes to provide for their required extension upon a discretionary request by the beneficiary or automatically upon the occurrence of a set date unless the guarantor has given notice to the beneficiary, within a specified period, that the guarantee will no longer be extended. This is neither covered in the URDG nor reflects international standard practice in demand guarantees, as terms of that sort result in an open risk for the guarantor and a potential difficulty in managing the collateral. Nevertheless, if automatic extension terms are provided in the guarantee, they must be granted effect.
187. Requirements for extension of the type referred to in the above paragraph 186 are not extend or pay demands covered by article 23, and therefore need not comply with the requirements for a demand. However, the beneficiary's request for extension must be received before expiry, for once a guarantee has expired, it ceases to exist and cannot be put back in effect. Where the guarantor extends an expired guarantee, it is deemed to have issued a new guarantee in the same terms as those of the expired guarantee, regardless of the identical or different identification number that the new guarantee may be given.

N. Force majeure

188. Article 26 sets out the requirement for determination of force majeure, namely that it should be a cause beyond the guarantor's control, leading to the interruption, in the sense of the temporary cessation of the guarantee-related business of the guarantor in its totality. The applicable law or the terms of the guarantee may add

- further requirements for an event to be characterised as force majeure.
189. To fall within the scope of article 26, the event must interrupt guarantee-related business of the guarantor. This does not necessarily equate with physical closure of the guarantor's premises, especially where business continues through remote access. Rather, interruption should be understood in the sense of the event preventing presentation, examination, payment, or notification of rejection of presentation by rendering them impossible to make, not merely more onerous.
190. The situations listed in article 26(a) are examples and do not form an exhaustive list. A pandemic for instance may amount to force majeure under article 26 if it also leads to the interruption of the guarantor's guarantee-related business. Conversely, events that are beyond the guarantor's control and that render the payment of the guarantee impossible do not fall into the scope of article 26 if they do not lead to the interruption of the guarantor's guarantee-related business. That is generally the case of multilateral or unilateral economic sanctions if they only prevent the guarantor from making payment or from extending the guarantee, but do not prohibit presentations being made or their examination. Their effect on the guarantee would therefore depend on the applicable law, not on the URDG.
191. Deciding whether a particular event amounts to force majeure is a matter that falls within the jurisdiction of the competent court to determine in case of a dispute. The mere declaration by an authority or a government that an event or a type of event is a force majeure does not necessarily lead to the application of article 26.
192. If force majeure extends beyond the 30 calendar day extension provided in article 26(b), thus preventing the guarantor from resuming its business, the guarantee shall expire and the guarantor shall be released of its undertaking, notwithstanding that the beneficiary was in a position to present a complying demand but for the force majeure.
193. A guarantee requiring presentations in paper form may at any time before expiry be amended to permit an electronic presentation, thus facilitating the making of the presentation, whereupon article 14(c) shall apply.
194. The disclaimer in article 28 of the guarantor's liability for the delay in the transmission of a document sent in accordance with the terms of the guarantee, extends to situations where the guarantor is not able to transmit the document to the instructing party or to the counter-guarantor, as the case may be, because the courier or postal service provider nominated in the application or in the counter-guarantee does not accept, collect or deliver the document, or because, where no courier or postal service provider has been specifically nominated in the guarantee, no courier or postal service provider accepts, collects or delivers at the time the guarantor had determined that a complying presentation has been made. In both cases, the guarantor is expected to have made reasonable efforts to find a courier or postal service provider that could accept or collect and thereafter deliver the relevant documents.
195. If the beneficiary requests a presenter, including an advising or second advising party, to forward its demand in paper form to the guarantor, but the presenter is unable to do so, e.g. due to the courier service not being able either to accept the document for delivery to the guarantor or to deliver it, the presenter may choose to assist the beneficiary by contacting the guarantor to seek an alternative delivery option.

O. Transfers

Amount of transfer

196. Each transfer must be for the full

guarantee amount available at the time of transfer. Partial transfers are outside the scope of the URDG and would need to be expressly stated in the guarantee. However, there may be successive transfers for the full amount.

Transfers of amended guarantees

197. A guarantee shall be transferred as amended by any amendment that became effective in accordance with article 11.
198. Upon the transfer being made, the guarantor should inform the transferee of any amendments that have been issued by the guarantor but not yet accepted by the beneficiary.
199. Amendments that have been rejected and amendments that have not yet been accepted by the beneficiary do not modify the guarantee. Accordingly, the guarantee shall be transferred without taking into account those amendments.

Transferee beneficiary to present the documents

200. Following the transfer of a guarantee, it is the transferee, not the transferor, which must sign a demand and any supporting statement under article 15(a). The transferee shall also sign any additional documents required to be signed by the transferor, even if the name of the transferor is specifically quoted in the guarantee, and the guarantor cannot consider the change in the beneficiary's name to be a discrepancy.
201. References to the initial beneficiary stated in the guarantee to be a mandatory requirement in any statement or document, such as a reference to the underlying contract as concluded between the applicant and the initial beneficiary, shall be satisfied by the presentation by the transferee of the document with the required statement without the need to substitute its name for that of the transferor.

Transfers by operation of law

202. Transfers by operation of law, where all the assets and liabilities of the transferor are transferred by law to the transferee, with the transferor then ceasing legally to exist, such as in the case of a succession, an absorption or another type of corporate restructuring, are not covered in article 33. If the applicable law mandates that the transferee succeeds to the transferor by operation of law, the transfer shall occur without the process provided in article 33 applying. International standard practice in demand guarantees would require in such a case that the transferee by operation of law evidences to the guarantor its entitlement under the guarantee by presenting any document that the guarantor may reasonably require. Alternatively, the guarantor may choose to refer the matter to the instructing party for a potential waiver or for further instructions.
203. If the guarantor determines that the person presenting the demand is not authorised to act for the beneficiary or to succeed to the beneficiary, it may reject the demand.
204. A transfer by operation of law does not lead of itself to the suspension of the examination period defined in article 20(a).

P. Assignment of proceeds

205. A notification of an assignment of proceeds by the beneficiary or the assignee to the guarantor does not compel the guarantor to pay the proceeds of the guarantee in the hands of the assignee unless the guarantor has so agreed or the applicable law so requires, whereupon article 33(g)(ii) is superseded.
206. Even where acknowledged by the guarantor, an assignee of the proceeds does not become a party to the guarantee. Only the beneficiary is entitled to accept amendments and to

- present demands and the supporting statements.
207. The enforceability of a clause in the guarantee limiting the effect of, or prohibiting an assignment of proceeds by the beneficiary, is a matter for the applicable law.
208. Practice sometimes shows that the terms “transfer” and “assignment” are used interchangeably. Where a guarantee refers to “transfer”, “assignment” or the like, it is recommended that the guarantee clarify whether the transfer or assignment refers to the transfer of the beneficiary’s drawing rights under the guarantee, i.e. the entitlement to present a demand, or merely to the assignment of the right to be paid the proceeds after the beneficiary identified in the guarantee has presented a complying demand.
- Q. Miscellaneous Fraud**
209. Improper demands, including fraudulent, illegal and unfair demands, are outside the URDG. Their characterisation and legal implications are a matter for the applicable law. Regard may be had to article 19 of the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit as an authoritative codification of the standard of fraudulent or otherwise improper demands in guarantees.
210. The disclaimers provided in URDG articles 27 to 29 provide useful guidance as to the limits of the liability of the guarantor in the event of a fraud in the demand.

Provisional court measures

211. If a guarantor is notified of a court order preventing the payment of the guarantee, and complies therewith by suspending the payment of a complying demand, that guarantor should inform the beneficiary without delay and transmit to that beneficiary a copy of the court order as may be available. In doing so, the guarantor need not

translate the order or express any views or comments. The guarantor should keep the beneficiary informed of the progress of the court proceedings. The guarantor’s compliance with the court order shall not extend the period specified in article 20(a) for the examination of the demand and the period specified in article 24(e) for the sending of the notice of rejection.

212. While a guarantor may not act contrary to an injunction issued by a court with jurisdiction, the guarantor should seek to resist the imposition of such an injunction or, if an injunction has already been obtained, seek to have it lifted if no manifest and clear fraud or other impropriety is established to the guarantor.
213. Guarantors should abstain from including terms in their guarantee providing for an undertaking to make payment notwithstanding a court order. Such undertakings do not reflect international standard practice in demand guarantees, are non-documentary conditions and, as such, are deemed as not stated and shall be disregarded. Whether the guarantor’s duty to comply with a competent court’s provisional measure prevails over its duty to honour its undertaking pursuant to the presentation of a complying demand is a matter for the applicable law.

Sanctions clauses

214. Bank guarantors have sometimes been reported to include sanctions clauses in their guarantees. Through those clauses, guarantors purport to withhold the payment of a complying demand or the extension of a guarantee if they determine that sanctions regulations that they deem to be applicable prevent that payment or extension. ICC discourages the use of sanctions clauses in guarantees, as it does in documentary and standby letters of credit and in documentary collections.¹

The use of sanctions clauses may put into question the irrevocable character of the undertaking and may be considered as a non-documentary condition. Sanctions clauses are at best a repetition of overriding mandatory rules applicable to the guarantee regardless of its terms or the applicable law, whereupon those clauses would be redundant and unnecessary. In certain situations, they may also raise issues of liability of the guarantor for violation of anti-discrimination laws and counter-measures. Drafting sanctions clauses in

guarantees can under no circumstances be considered as international standard practice in demand guarantees.

215. Guarantors should be aware that, by taking the initiative of adding a sanctions clause into a guarantee the terms of which had been agreed between the applicant and the beneficiary, they risk causing the beneficiary's rejection of the guarantee and the applicant potentially to be excluded from a bidding process for non-compliance with the bidding terms.

1. *Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments subject to ICC Rules*, ICC Document No.470/1238, November 2014, and the Addendum issued in May 2020, as those documents may be revised and amended by ICC from time to time.

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The Determination of an “Original” Document in the Context of UCP 500 Sub-Article 20(b)

Editor’s Overview

Until the English case of Glencore Int’l AG v. Bank of China, Court of Appeal (Civil Division) [1996] Lloyd’s Rep 135, it was standard international either of credit protection that a document that appeared on its face to be an original did not have to be otherwise marked in order to indicate its originality. With its wooden interpretation of UCP500 Article 20(b) (ambiguity as to issues of documents) contrary to standard international letter of credit practice, that decision caused considerable confusion throughout the world that led to bizarre conduct on the part of banks and commercial parties and which cheapened the dignity and, ultimately the credibility, of the letter of credit as a reliable means of payment in international commerce.

In this formal pronouncement issued on 12 July 1999, the ICC Banking Commission provides the official interpretation of UCP500 Article 20 with respect to documents presented. This interpretation has already received recognition in at least two court decisions: Voest-Alpine Trading USA Corp. v. Bank of China, 2000 U.S. Dist. LEXIS 8223 (S.D. Tex. 13 March 2000); and Glencore International AG v. Bank of China, [1996] 1 Lloyd’s Rep. 135 (CA). The UK courts appear to have finally laid to rest the legacy of Glencore with the decisions in Kredietbank v. Midland Bank PLC, [1999] All ER (D)431 [UK] and Credit Industriel et Commercial v. China Merchants Bank, [2002] EWHC 973 (Comm), [2002] All ER (Comm) 427 [UK] which recognize the ICC decision as determinative. The Decision simply restates standard practice as reflected in the UCP but in areas controlled by English law, however, it may be prudent to expressly refer to the decision in the text of the credit. This issue has been subsumed in ISBP Paragraphs 31-35 and UCP600 Article 17 (Original Documents and Copies). The problem of originals is discussed in Byrne, The Original Documents Controversy (IBLP 1999).

A Decision prepared by the ICC Commission on Banking Technique and Practice

This Decision emphasizes the need to correctly interpret and apply sub-Article 20(b) of UCP 500. Consequently, ICC national committees and associated organizations are strongly urged to distribute this Decision as widely as possible to help ensure the correct interpretation in the evaluation of documents issued under letters of credit. This Decision does not amend sub-Article 20(b) of UCP 500 in any way, but merely indicates the correct interpretation thereof which has been adopted unanimously by the ICC Commission on Banking Technique and Practice on 12 July 1999.

1. Background

Over a period of several years there have been a number of queries raised with the ICC Banking Commission as to the deter-

mination, by banks, of what is an “original” document under a letter of credit and the necessity, if any, for such a document to be so marked.

For ease of reference the text of sub-Article 20(b) reads:

“Unless otherwise stipulated in the Credit, banks will also accept as an original document(s), a document(s) produced or appearing to have been produced:

- i. by reprographic, automated or computerized systems;
 - ii. as carbon copies;
- provided that it is marked as original and, where necessary, appears to be signed.

A document may be signed by handwriting, by facsimile signature, by perforated signature, by stamp, by symbol, or by any other mechanical or electronic method of authentication.”

2. Determination of Originality

In documentary credit operations, the document checker is faced with a number of issues pertaining to originality including:

Apparent originality

Banks undertake to determine whether a document appears on its face to be an original document, as distinguished from a copy. Except as expressly required by a letter of credit including an incorporated term – such as UCP 500 sub-Articles 23(a) (iv) or 34(b) – banks do not undertake to determine whether an apparent original is the sole original. Banks rely on the apparent intent of the issuer of the document that it be treated as an original rather than a copy.

In this regard, a person sending a telefax or making a photocopy on plain paper or pressing through carbon paper presumably intends to produce a copy. On the other hand, a person printing a document on plain paper from a text that that person created and electronically stored presumably intends to produce an original. Accordingly, documents bearing facsimile signatures or printed in their entirety (even including the issuer's letterhead and/or signature) from electronically stored text are presumably intended by the document issuer to be original and in

practice are accepted by banks as original.

Documents that appear to be original but are not

Banks do not undertake to determine whether a document is original in fact. Under UCP 500 Article 15, banks are not responsible for the genuineness or falsification of any document. If a document appears to be original or to have been marked as original but is in fact not original, then its presentation may give rise to exceptional defences, rights, or obligations under the law applicable to forged or fraudulent presentations and is beyond the scope of UCP 500.

UCP 500 requirements:

- (1) The UCP neither requires nor permits an examination beyond the face of a document to determine how the document was in fact produced, unless the document was produced by the bank, e.g. on a telefax, telex, e-mail, or other system that prints out messages received by the bank. The “produced or appearing to have been produced” language in sub-Article 20(b) does not override UCP 500 sub-Articles 13(a), 13(c), or 14(b), or other practice and law that prohibit issuers and confirmers from determining compliance on the basis of extrinsic facts.
- (2) As indicated by inclusion of the word “also” (“... banks will also accept as original(s) ...”), sub-Article 20(b) is neither comprehensive nor exclusive in its provisions that distinguish originals from copies. For example, a document printed on plain paper from electronically stored text is acceptable, without regard to 20(b), if it appears to be an original.
- (3) Sub-Article 20(b) does not apply to documents that appear to be only partially produced by reprographic, automated, or computerized systems or as carbon copies. In this regard, a photocopy ceases to be “reprographically produced” within the meaning of sub-Article 20(b) when it is also manually stamped, dat-

- ed, completed, or signed by the issuer of the document.
- (4) The “marked as original” proviso in sub-Article 20(b) is satisfied by any marking on a document or any recital in the text of a document that indicates that the issuer of the document intends it to be treated as an original rather than a copy. Accordingly, a document that appears to have been printed on plain paper from electronically stored text is “marked as original” under sub-Article 20(b) if it also states that it is original or includes letterhead or is hand marked.

Sub-Article 13(a) of UCP 500 refers to compliance of the presented documents being determined by international standard banking practice as defined in the articles of UCP. International standard banking practice in relation to determination of “original” documents could be described as follows:

3. Correct Interpretation of Sub-Article 20(b)

3.1 General approach

Banks examine documents presented under a letter of credit to determine, among other things, whether on their face they appear to be original. Banks treat as original any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself indicates that it is not original. Accordingly, unless a document indicates otherwise, it is treated as original if it:

- (A) appears to be written, typed, perforated, or stamped by the document issuer’s hand; or
- (B) appears to be on the document issuer’s original stationery; or
- (C) states that it is original, unless the statement appears not to apply to the document presented (e.g. because it appears to be a photocopy of another document and the statement of originality appears to apply to that other document).

3.2 Hand signed documents

Consistent with sub-paragraph (A) above, banks treat as original any document that appears to be hand signed by the issuer of the document. For example, a hand signed draft or commercial invoice is treated as an original document, whether or not some or all other constituents of the document are preprinted, carbon copied, or produced by reprographic, automated, or computerized systems.

3.3 Facsimile signed documents

Banks treat a facsimile signature as the equivalent of a hand signature. Accordingly, a document that appears to bear the document issuer’s facsimile signature is also treated as an original document.

3.4 Photocopies

Banks treat as non-original any document that appears to be a photocopy of another document. If, however, a photocopy appears to have been completed by the document issuer’s hand marking the photocopy, then, consistent with sub-paragraph (A) above, the resulting document is treated as an original document unless it indicates otherwise. If a document appears to have been produced by photocopying text onto original stationery rather than onto blank paper, then, consistent with sub-paragraph (B) above, it is treated as an original document unless it indicates otherwise.

3.5 Telefaxed presentation of documents

Banks treat as non-original any document that is produced at the bank’s telefax machine. A letter of credit that permits presentation by telefax waives any requirement for presentation of an original of any document presented by telefax.

3.6 Statements indicating originality

Consistent with either or both of sub-paragraphs (A) and (C) above, a document on which the word “original” has been stamped is treated as an original document. A statement in a document that it is a “duplicate

original” or the “third of three” also indicates that it is original. Originality is also indicated by a statement in a document that it is void if another document of the same tenor and date is used.

3.7 Statements indicating non-originality

A statement in a document that it is a true copy of another document or that another document is the sole original indicates that it is not original. A statement in a document that it is the “customer’s copy” or “shipper’s copy” neither disclaims nor affirms its originality.

4. What is not an “Original”?

A document indicates that it is not an original if it

- a) appears to be produced on a telefax machine;

- b) appears to be a photocopy of another document which has not otherwise been completed by hand marking the photocopy or by photocopying it on what appears to be original stationery; or
- c) states in the document that it is a true copy of another document or that another document is the sole original.

5. Conclusion

Based upon the comments received from ICC national committees, members of the ICC Banking Commission and other interested parties, the statements in clauses 3 and 4 above reflect international standard banking practice in the correct interpretation of UCP 500 sub-Article 20(b).

Non Bank Issuance of A Letter of Credit: An ICC Banking Commission Opinion

Editor's Overview

Because of widespread interest in this subject, on 30 October 2002 the ICC Commission on Banking Technique and Practice issued its opinion on “When a non-bank issues a letter of credit”. This official Opinion on non-banks and letters of credit is posted on the ICC web site. The title of the Opinion includes the statement (deleted in this reprint) “Articles 1 and 2 of UCP 500”. However this Opinion and its recognition of the practice of non-bank issuance of letters of credit is applicable to all versions of the UCP, including UCP600, and is evidence of international standard banking practice. Interestingly, early drafts of UCP600 included, in Article 2 “Interpretations”, the statement that “[t]he term ‘bank’ includes, but is not limited to, entities traditionally known as a bank or other financial institution.” This statement was removed in the June 2006 draft of UCP600. Despite the removal of the statement addressing non-bank issuance from UCP600, the proposition stated in this opinion that letters of credit may be issued by entities other than “banks” and UCP600 remains current.

Because of concerns regarding advice of a non-bank LC via SWIFT messages designed for advice of an LC issued by a bank, SWIFT has changed the titles of MT710 and 711 to “Advice of a Third Bank’s or a Non-Bank’s Documentary Credit” and required a choice between new Field 50B “Non Bank Issuer of Documentary Credit” and Field 52A “Issuing Bank” in MT710 and MT720. Thus, if a non-bank issued LC is advised or transferred via SWIFT, it will be clear whether the issuer is a bank or not.

Query

We have been receiving a significant number of enquiries about letters of credit which are advised by some banks in the usual way, but are actually issued by a corporate, or the finance arm of the corporate and not a Bank.

These predominantly corporate L/Cs from Country U are “advised” by banks on their letterhead in a SWIFT MT 700 format, and to all intents and purposes appear to be bank issued L/Cs, with the requirement to present documents to the advising or transferring bank, where documents will be processed and payment made after receipt of funds from the “issuer”.

Invariably they incorporate clauses to the effect that the L/C is subject to the UCP, and that where the UCP refers to “issuing bank” then the issuer is to be construed as acting in all respects as the “issuing bank”.

Notwithstanding the fact that legally any entity can issue a letter of credit, our understanding is that the UCP only contemplates as issuers banks, on the basis that the issuing bank is undertaking a third party, independent guarantee of payment to the seller (beneficiary). It is this independence of a banker’s letter of credit that is key to the payment undertaking.

The requirement by the seller for a letter of credit is two-fold: first that he has a guarantee of payment, and second that he can use the credit to raise pre-shipment finance from his banker.

In the case of the corporate L/C as we understand it, the guarantee of payment is not normally by an independent third party, and, as such, the credit risk is that of the corporate entity issuing the credit. Similarly when documents are presented under the L/C for negotiation, that negotiation if any,

is based on the risk of the issuing entity, i.e. is corporate, not bank risk.

We would be grateful if the ICC Commission on Banking Technique and Practice would advise on the following:

1. Is it acceptable practice for a bank to advise a corporate letter of credit in the same way as a bank-issued letter of credit without drawing attention to the “non-bank” nature of the issuing entity? Does the Commission consider appropriate guidelines should be published? If so what will these say?

2. What is the position if the corporate issuer were to apply for liquidation, bankruptcy, or protection from creditors (e.g. file for Chapter 11), and how different is the position to that of when a bank is unable to meet its obligations?

Analysis

The UCP reflects that state of practice, namely a situation where the issuer or other actor on a letter of credit is a bank. As a result, although there is no affirmative rule in the UCP prohibiting entities that are not banks from issuing, confirming, paying, negotiating, or advising letters of credit, its vocabulary (“issuing bank”, “confirming bank”, etc.) assumes that these entities are banks.

This assumption is based on the recognition that there are three principal advantages to bank issuance and handling of letters: namely that banks have the operational expertise to handle issuance and presentation under letters of credit in a professional manner, that they have the tradition of independence from the underlying transaction which is the basis of the commercial reputation of the letter of credit, and that in virtually all countries banks are specially regulated with a view toward protecting those who rely on their undertakings.

These matters are of considerable importance to the integrity of the letter of credit as an instrument of commerce and to its dependability as an instrument of payment.

However, neither the Commission on Banking Technique and Practice nor the UCP can determine who is empowered to issue letters of credit under local law nor who may issue its undertakings subject to the UCP. That restriction on the issuance of letters of credit is a regulatory matter under local law should be obvious. In some countries, non-banks can issue letters of credit, although there may be limitations where they are used in consumer situations. In other countries, issuance is limited to financial institutions, but it is less clear that only banks constitute financial institutions. As a result, non-banks that are financial institutions, such as insurance companies, can issue letters of credit in some countries.

It may be less apparent that the UCP cannot itself limit the scope of its application. The UCP is a set of voluntary rules of practice. The rules can be modified or excluded by the undertaking that is issued subject to them as is recognized in UCP 500 Article 1 (Application of UCP) (The provisions “are binding on all parties thereto, unless otherwise expressly stipulated in the Credit”). Issuance by a non-bank constitutes such a modification. Even if the UCP expressly prohibited issuance by a non-bank, this prohibition could be modified because the UCP is not a legislative act that can restrict the manner in which it can be applied.

Where a letter of credit is issued by a non-bank, the non-bank issuer should be held to the same obligation and standard of care as would a bank. In either case, the obligation is to pay against the presentation of documents that comply with the terms and conditions of the credit and that determination is to be made based solely on the documentary presentation and not on the

status of reimbursement obligations or the underlying transaction, and local law should apply the same principles to an independent undertaking regardless of who makes it.

Having concluded that a credit can be issued subject to the UCP by a non-bank, however, does not mean that it is prudent for a beneficiary to accept such a credit. Issuance through an advising bank does mitigate the issue of whether the credit is authentic and presentation of documents to a bank does reduce some operational risks. There is, nonetheless, the risk of the creditworthiness of the issuer and country risk. These risks apply equally whether the issuer is or is not a bank and a beneficiary should always assess whether it is prepared to accept the credit and country risk associated with the issuer. If not, it should require confirmation by an entity with which it is comfortable.

There remains, however, an additional risk that may not be apparent to beneficiaries, namely the risk of neutrality of the issuer. This risk is somewhat more intangible but is very important. It is the risk that, when presented with documents, the issuer may be influenced by factors other than whether they comply on their face with the terms and conditions of the credit and may exercise certain discretionary judgments in examining documents against the beneficiary where it would not otherwise do so if external factors were different. While this risk is not confined to non-banks, the reputation of individual banks for integrity is well known in the letter of credit community and one which most banks that regularly engage in letter of credit practice work hard to maintain. It is less apparent that when faced with a poor credit decision, an insurance company will approach the problem in the same way as would a letter of credit banker rather than as an insurer, which may be inclined to reject all arguable claims and engage in litigation to settle any colourable dispute.

Similar concerns would apply to corporate issuers on behalf of themselves or

affiliated companies, even though two-party letters of credit are recognized by UCP 500 Article 2 (Meaning of Credit) (“and on the instructions of a customer (the ‘Applicant’) or on its own behalf”).

For these reasons, it is in the interest of banks generally to inform corporate letter of credit users of the advantages of having a bank’s obligation, either as the issuer of a credit or as the confirmor of a credit issued by a non-bank. There would be no objection under standard international letter of credit practice to informing specifically the beneficiary of such a credit as to the nature of the issuer in addition to emphasizing that the advising bank assumes no liability, although in the absence of agreed standards such a decision should rest with the individual bank involved.

Of course, where the manner of issuance misleads the beneficiary into believing that the issuer is a bank, the advising bank may expose itself to liability. Ultimately, however, the decision as to whether or not to accept the risks associated with a non-bank issuance rests with the beneficiary.

Conclusion

1. It does not “violate” the UCP for a non-bank to issue a credit subject to the UCP even though such issuance is not contemplated in the rules. The UCP does not specifically provide for bank advice of non-bank issued letters of credit. Such an advice should accurately identify the issuer and indicate the advising bank’s limited role. If the form of advice refers to the “issuer” as “issuing bank” or otherwise gives the impression that it is a bank, it is recommended that the advice affirmatively disclose the non-bank status of the issuer in order to correct any mistaken impression caused by such reference.

2. The consequences of insolvency are a matter for local law, whether the insolvency is that of a bank or non-bank issuer. In either case, however, the beneficiary

assumes the risk of the creditworthiness of
the issuer unless it is offset by obtaining

confirmation or credit insurance.

Rome, 30 October 2002

ICC Paper on On Board Notations

Introduction

At the ICC Banking Commission meeting held in Dubai in March 2009, it was agreed that the UCP 600 Drafting Group would prepare a document outlining the requirements for an on board notation in respect of transport documents presented for examination under Articles 19, 20, 21 or 22 of UCP600.

It has also been made clear by several national committees that there is a desire for this paper to become an official publication of the ICC.

This document provides the unanimous views of the UCP 600 Drafting Group and is presented to the ICC Banking Commission for agreement as an official ICC document that is reflective of practice in respect of the requirement for an on board notation.

Once approved, the contents will form part of the soon to be revised International Standard Banking Practice for the Examination of Documents under Documentary Credits.

Requirements for an on board notation in respect of a transport document presented for examination under Articles 19, 20, 21 or 22 of UCP 600

- **Overview**

Background and Introduction

1.1 From the first ICC Banking Commission meeting following the implementation of UCP 500, the ICC has been asked to respond to requests for opinions on the subject of on board notations i.e., in the context of when they are required and what form they should take, given a particular set of circumstances. This trend has continued following the implementation of UCP 600 in July 2007.

1.2 This document will:

- aid beneficiaries in instructing carriers and logistics companies of the requirements for any on board notation;
- provide carriers and logistics companies with clear guidelines as to when an on board notation will be required to appear on a transport document and its data components; and
- guide banks in the correct interpretation and application of the UCP in relation to on board notations for bills of lading, sea waybills and charter party bills of lading, and for multimodal or combined transport documents, where the first part of the carriage (as required by the credit) is by sea.

1.3 This document refers to the ‘on board notation’ requirements of a Transport Document Covering at Least Two Different Modes of Transport (i.e., Multimodal or Combined Transport Document), Bills of Lading, Sea Waybills and Charter Party Bills of Lading. To avoid repetitive text and duplication of consistent requirements, this document focuses on bills of lading, the transport document with the most requests for an ICC Opinion. Whilst an on board notation may be required on any of these documents, the addition of a notation does not change the nature of such document as an Article 19, 20, 21 or 22 type of document. The on board notation requirements in relation to all the referenced transport documents appear in section 5.

1.4 For ease of review and applying the requirements of this document, a simple flowchart (appearing in section 6) explains when an on board notation

- is required and the form that it is to take. Sections 2-4 give the background to the requirements of UCP and ISBP and the basis for how the conclusions, in section 5, have been drawn.
- **ICC Opinions already given under UCP 600**
 - 1.5 Since October 2007, the first Banking Commission meeting following the implementation of UCP 600, ICC has responded to seven requests for Opinions on the subject of on board notations. ICC Opinions R.648 (TA.635rev) Query 3, R.644 (TA.665rev), R.645 (TA.667rev) and TA.679 have focussed on issues relating to bills of lading, whilst Opinions R.641 (TA.650rev), R.642 (TA.666rev) and TA.682 have been in respect of Multimodal or Combined Transport Documents.
 - 1.6 The analysis and conclusions to Opinions R.644, R.645 and R.648 indicate that an on board notation will be required if the place of receipt was different to the port of loading “unless it is evident from the bill of lading that the shipped on board statement applies to the named vessel and the port of loading stated in the credit.” These opinions place the burden on the wording in the bill of lading to determine whether the on board notation requires more than just a date.
 - 1.7 The conclusion to TA.679 was slightly different to that referred to above owing to the wording of the bill of lading (see section 2.6 for the wording). The conclusion in question stated: “If the bill of lading evidences an inland place of receipt, the bill of lading will require a dated on board notation bearing the name of the vessel and port of loading stated in the credit, even if the bill of lading is pre-printed ‘shipped on board in apparent good order and condition’ or similar.”
 - 1.8 In order to fully understand the issues pertaining to these Opinions, and the content of the analysis and conclusion given, their full transcript should be reviewed.
- **Bills of Lading and the need for an on board notation**
 - **UCP and ISBP provisions**
- 2.1 During the revision of UCP 500, communications were sent between the Drafting Group and members of the ICC Transport Commission. As a result it was agreed that the bill of lading is a transport document covering shipment from a port of loading to a port of discharge and that the rules should reflect that position. It should be noted that ICC Publication No.680 “Commentary on UCP 600” refers to Article 20 in the following manner: “[T]his Article applies when the documentary credit requires presentation of a bill of lading covering transport by sea from one port to another port.” Additionally, ISBP Publication 681, at paragraphs 91 and 92 states “[I]f a credit requires presentation of a bill of lading (“marine”, “ocean” or “port-to-port” or similar) covering sea shipment only, UCP 600 Article 20 is applicable.” and “[T]o comply with UCP 600 Article 20, a bill of lading must appear to cover a port-to-port shipment but need not be titled “marine bill of lading”, “ocean bill of lading”, “port-to-port bill of lading” or similar.”
- 2.2 The main problems with on board notations arise when the bill of lading indicates place of receipt and/or pre-carriage details and the place of receipt is different to the port of loading stated in the credit, and therefore the question arises of whether or not there is a need for an on board notation showing the name of the vessel and the port of loading, even if they are the same

- details as shown in the respective fields on the bill of lading. An element of confusion initially arose through the UCP 600 not incorporating the wording that appeared in UCP 500 sub-Article 23 (a) (ii) i.e., "If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading, and."
- 2.3 The inclusion, in UCP 600 sub-Article 20 (a) (ii) "indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit" still requires a document examiner to be satisfied that the on board notation relates to the goods being on board the named vessel and not by any other means of conveyance for the pre-carriage (between a place of receipt and the port of loading).
- 2.4 It is often the case that the contract of carriage concluded between the carrier and shipper is not in line with the requirements for shipment expressed in the credit. The shipper may contract for the goods to be collected from an inland point for delivery to the port of loading for loading onto the vessel, but the letter of credit only refers to shipment from port to port. The bill of lading may consequently evidence a place of receipt that is different to the port of loading, and where there is a dated on board notation added to the bill of lading, or the bill of lading is pre-printed, shipped on board in apparent good order and condition ... the issue for the document checker is to determine whether or not the on board notation can be understood to 'indicate that the goods are on board the named vessel at the port of loading stated in the credit'.
- Does "on board" always mean on board the named vessel?
- 2.5 Whilst a number of carriers, and their agents, specify verbally that they will not release a bill of lading unless the goods are actually loaded on board the vessel named in the bill of lading, this may not always be evident from the bill of lading itself and sub-Article 14 (a) requires that a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation (**emphasis added**).
- 2.6 Banks may encounter bills of lading containing specific wording as to the place to which the on board notation will apply. One such example has been given in ICC Opinion TA.679. This request for an Opinion highlighted the following wording that had been seen in a bill of lading: "[W]hen the place of receipt of the goods is an inland point and is so named herein, any notation of "on board", "shipped on board" or words to like effect on this BL, shall be deemed to mean on board the truck, rail car, aircraft or other inland conveyance... from the place of receipt of the goods to the port of loading". When incorporated into the pre-printed text on the bill of lading, the use of this form of wording clearly indicates that "shipped on board" or similar terms does not equate to 'shipped on board a named vessel at the port of loading stated in the credit' (as required by sub-Article 20 (a) (ii)).
- 2.7 Wording of similar effect has been found on the face of other bills of lading such as "[W]hen the place of receipt box has been completed, any notation on this bill of lading of "on board",

"loaded on board" or words to like effect, shall be deemed to be on board the means of transportation performing the carriage from the place of receipt to the port of loading."

- 2.8 This raises the questions: should a document examiner be required to examine pre-printed text on the face of the bill of lading to determine whether shipped on board really means shipped on board the vessel (at the port of loading) and under what circumstances can a document examiner reasonably be expected to apply an on board notation to the named vessel and port of loading? Document examiners must recognise that in reviewing a pre-printed shipped on board statement i.e., "shipped on board in apparent good order and condition" the wording that follows thereafter determines the effect and application of that shipped on board statement and must be read. If, as indicated above, the wording indicates that 'on board' means on board the conveyance from the place of receipt to the port of loading stated in the credit, then the document examiner must refuse the documents for absence of an on board notation in relation to the vessel and the port of loading. Document examiners should only read the pre-printed text as far as is necessary to determine the place of loading "on board" the conveyance for the sea journey.
- 2.9 Subject to a bill of lading not incorporating wording to the effect shown above, it is the opinion of the ICC Banking Commission that a distinction can be drawn between bills of lading that evidence a place of receipt and a means of pre-carriage or those that only evidence a means of pre-carriage and those that only evidence a place of receipt – whether the place of receipt is the same as the port of loading or different. If the bill of lading only shows a place of receipt, with no reference to the means of pre-carriage,

in the pre-carriage or place of receipt fields, an on board notation, or pre-printed wording to that effect can only be seen to apply to the named vessel and port of loading. Where a place of receipt and/or a means of pre-carriage is shown, there is doubt as to whether the on board notation or pre-printed wording refers to the named vessel and port of loading.

- **Which Article of UCP 600 is applicable for examination of a transport document?**

Transport documents must be examined under the Article that is applicable to the conditions stated in the credit. These conditions include: the type of document that is to be presented and the details given with respect to the shipment of the goods e.g., those shown in fields 44A, E, F or B of the MT700, 710 or 720. Transport documents are not examined under the Article applicable to the type of document that has been presented. For example, an MT700 is issued requiring presentation of a bill of lading with field 44E showing Rotterdam and field 44F showing Hong Kong. A transport document that is presented showing as place of receipt Paris, port of loading Rotterdam and port of discharge Hong Kong will be examined under Article 20 and not Article 19. For avoidance of doubt, any document called for by a credit containing the phrase "bill of lading" and asking for port to port shipment (i.e., meeting the requirement of Article 20 reading "A bill of lading, however named") is to be examined against Article 20, not Article 19.

Note the following description for the SWIFT fields quoted above:

44A Place of Taking in Charge/Dispatch from .../Place of Receipt

44E Port of Loading/Airport of Departure

44F Port of Discharge/Airport of Destination

44B Place of Final Destination/For Transportation to .../Place of Delivery

- Selecting the appropriate transport document**

This is a key issue and one that banks should pay particular attention to. By selecting the transport document that reflects the correct routing and appropriate means of conveyance, many of the issues seen today can be avoided.

The structure of UCP 600, in particular in changing the order of the transport documents, was to emphasise that in most shipments today there is an element of multimodal or combined transport and that, perhaps, applicants should be calling for more multimodal or combined transport documents than bills of lading.

Banks are invited to educate their customers in selecting the correct transport document for the carriage that is being undertaken and that where transport by more than one means of conveyance will occur, to request the presentation of a multimodal or combined transport document instead of a bill of lading. This process can be aided significantly by the incorporation of SWIFT fields 44A, E, F and B into LC application forms. The correct completion of these fields, by the applicant and/or the issuing bank, will identify the suitable form of transport document e.g.

Fields 44E and F only = Bill of Lading, Sea Waybill, Charter Party Bill of Lading or Air Waybill

Fields 44A and B only = Multimodal or Combined Transport Document, Road, Rail or Inland Waterway or Post / Courier

Any 3 fields from 44A, E, F or B (or all of them) = Multimodal or Combined Transport Document

The recommendation for incorporation of these fields into the LC application form also pre-supposes that the form allows for the applicant to select from a range of transport documents and not only from a bill of lading or air waybill.

(3) Requirements of UCP 600 (in respect of bills of lading)

- The pertinent rules in Article 20 are:**

Sub-Article 20 (a) (ii):

- indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:
- pre-printed wording, or
- an on board notation indicating the date on which the goods have been shipped on board.

The date of issuance of the bill of lading will be deemed to be the date of shipment unless the bill of lading contains an on board notation indicating the date of shipment, in which case the date stated in the on board notation will be deemed to be the date of shipment.

If the bill of lading contains the indication "intended vessel" or similar qualification in relation to the name of the vessel, an on board notation indicating the date of shipment and the name of the actual vessel is required.

Sub-Article 20 (a) (iii):

- indicate shipment from the port of loading to the port of discharge stated in the credit.

If the bill of lading does not indicate the port of loading stated in the credit as the port of loading, or if it contains the indication "intended" or similar qualification in relation to the port of loading, an on board notation indicating the port of loading as stated in the credit, the date of shipment and the name of the vessel is required. This provision applies even when loading on board or shipment on a named vessel is indicated by pre-printed wording on the bill of lading.

(4) Selected wording from the ICC Publication No. 680 "Commentary on UCP 600"

- **Commentary on UCP 600 Pages 89-92**

Article 20

This Article applies when the documentary credit requires presentation of a bill of lading covering transport by sea from one port to another port. As a bill of lading covers shipment from a port to a port, the wording that appeared in UCP 500 sub-Article 23 (a) (ii) was seen to encourage the presentation of a document that covered pre-carriage of the goods to the port of loading. The wording of this sub-Article reads: "If the bill of lading indicates a place of receipt or taking in charge different from the port of loading, the on board notation must also include the port of loading stipulated in the Credit and the name of the vessel on which the goods have been loaded, even if they have been loaded on the vessel named in the bill of lading. This provision also applies whenever loading on board the vessel is indicated by pre-printed wording on the bill of lading."

Where pre-carriage by road, rail or air and shipment by sea is envisaged, the parties should ensure that the credit allows for a transport document to be presented that would be subject to examination under UCP 600 Article 19.

The Drafting Group recognized that whilst UCP 600 conveys that the bill of lading is a port-to-port document, there will be occasions when the shipping company or its agent will include reference to a place of receipt or taking in charge that is different from the port of loading. To cover this eventuality, the content of sub-Article 20 (a) (ii) reads: "indicate that the goods have been shipped on board a named vessel at the port of loading stated in the credit by:". The emphasis in this condition is that the document checker must be able to determine

that the bill of lading appears to indicate that the shipped on board statement (pre-printed wording or by a separate notation) relates to loading on board the named vessel at the port of loading stated in the credit and not to any pre-carriage of the goods between a place of receipt or taking in charge and the port of loading. Unless it is evident from the bill of lading that the shipped on board statement applies to the vessel and the port of loading, the bill of lading will require, as was the case in UCP 500, an on board notation showing the port of loading and the name of the vessel, even if the goods are loaded on the vessel named in the bill of lading. [emphasis added]

Sub-Article (a) (iii) states that if a bill of lading does not indicate the port of loading stated in the documentary credit as the port of loading, it must contain an on board notation which indicates the port of loading stated in the documentary credit, the date of shipment and the name of the vessel. The same criteria apply if the bill of lading indicates the qualification "intended" or similar in respect of the port of loading.

An example of where a bill of lading does not indicate the port of loading stated in the documentary credit as the port of loading would be when the port of loading stated in the documentary credit is shown as the place of receipt, since in the field "port of loading" it shows the port where transhipment is to occur. The documentary credit requires shipment from Rotterdam to Hong Kong. Sub-Article (a) (iii) requires the bill of lading to indicate shipment from the port of loading to the port of discharge stated in the credit. The bill of lading shows:

Pre-carriage	Moon Lagoon
Place of receipt	Rotterdam
Ocean Vessel	Sun Lagoon
Port of Loading	Dubai
Port of Discharge	Hong Kong

The bill of lading will require, according to sub-Article (a) (iii), an on board notation showing the vessel Moon Lagoon, the port of loading Rotterdam and the on board date.

(5) Conclusions

The opinion of the ICC Banking Commission is as follows:

- **Bills of Lading**

- (a) where the bill of lading indicates a place of receipt that is the same as the port of loading, for example, place of receipt Rotterdam CY and port of loading Rotterdam BUT there is NO indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field) then:
 - (i) if the bill of lading is pre-printed shipped on board, the date of issue will be deemed to be the date of shipment and no further on board notation is required;
 - (ii) if the bill of lading is pre-printed received for shipment, a dated on board notation will be required and the date appearing in the notation will be deemed to be the date of shipment.
- (b) where the bill of lading indicates a place of receipt that is different from the port of loading i.e., place of receipt Amsterdam and port of loading Rotterdam BUT there is NO indication of a means of pre-carriage (either in the pre-carriage field or the place of receipt field) then:
 - (i) if the bill of lading is pre-printed shipped on board, the date of issue will be deemed to be the date of shipment and no further on board notation is required;
 - (ii) if the bill of lading is pre-printed received for shipment, a dated on board notation will be required and the date appearing in the notation will be deemed to be the date of shipment.
- (c) where the bill of lading indicates a place of receipt that is different from the port of loading i.e., place of receipt Amsterdam and port of loading Rotterdam AND there is an indication

of a means of pre-carriage (either in the pre-carriage field or the place of receipt field) then:

- (i) if the bill of lading is pre-printed shipped on board, a dated on board notation will be required indicating the name of the vessel and the port of loading. The date of the notation will be deemed to be the date of shipment;
- (ii) if the bill of lading is pre-printed received for shipment, a dated on board notation will be required indicating the name of the vessel and the port of loading. The date of the notation will be deemed to be the date of shipment.

The exception to the above is where the bill of lading contains wording such as that quoted in section 2.6 or 2.7 of this paper. Where such wording is incorporated into the pre-printed wording, a dated on board notation will be required that also indicates the name of the vessel and the port of loading.

As a result of the contents of this document, the conclusion given to Opinion R.644 will be replaced by that under (b) above.

In the context of this document, ‘pre-carriage’ refers to the carriage between a stated place of receipt and the stated port of loading on a transport document.

The flowchart in section 6 explains the requirements for an on board notation in relation to the data content of the bill of lading as may be presented.

- **Sea Waybills**

Same position as for bills of lading.

- **Multimodal or Combined Transport Documents**

Article 19 provides for an indication of the goods being dispatched, taken in charge or shipped on board. The applicable wording will depend upon the mode of conveyance for the first leg of the carriage. It should be

noted that Article 19 does not require an on board notation as a default position for most of the time. However, in line with ICC Opinion R. 641 (TA.650rev), a dated on board notation is clearly required when the credit so requests. It is also required when the credit requires shipment to be effected from a port to the place of final destination i.e. the first leg of the journey, as required by the credit, is by sea. If a multimodal or combined transport document nonetheless evidences a place of receipt that is different to the place stated in the credit, and that place stated in the credit is a port, the dated on board notation will require the addition of the name of the vessel and port of loading, unless the transport document evidences that

the on board notation or pre-printed shipped on board wording applies to the named vessel and port of loading. The key, therefore, is for the credit either:

- (a) to expressly require an on board notation, or absent that;
- (b) to make clear whether the place from which the goods are to be taken in charge by the carrier is a sea port.

- **Charter Party Bills of Lading**

The content of the flowchart in section 6 will apply where the bill of lading contains an indication that it is subject to a charter party (charter party bill of lading).

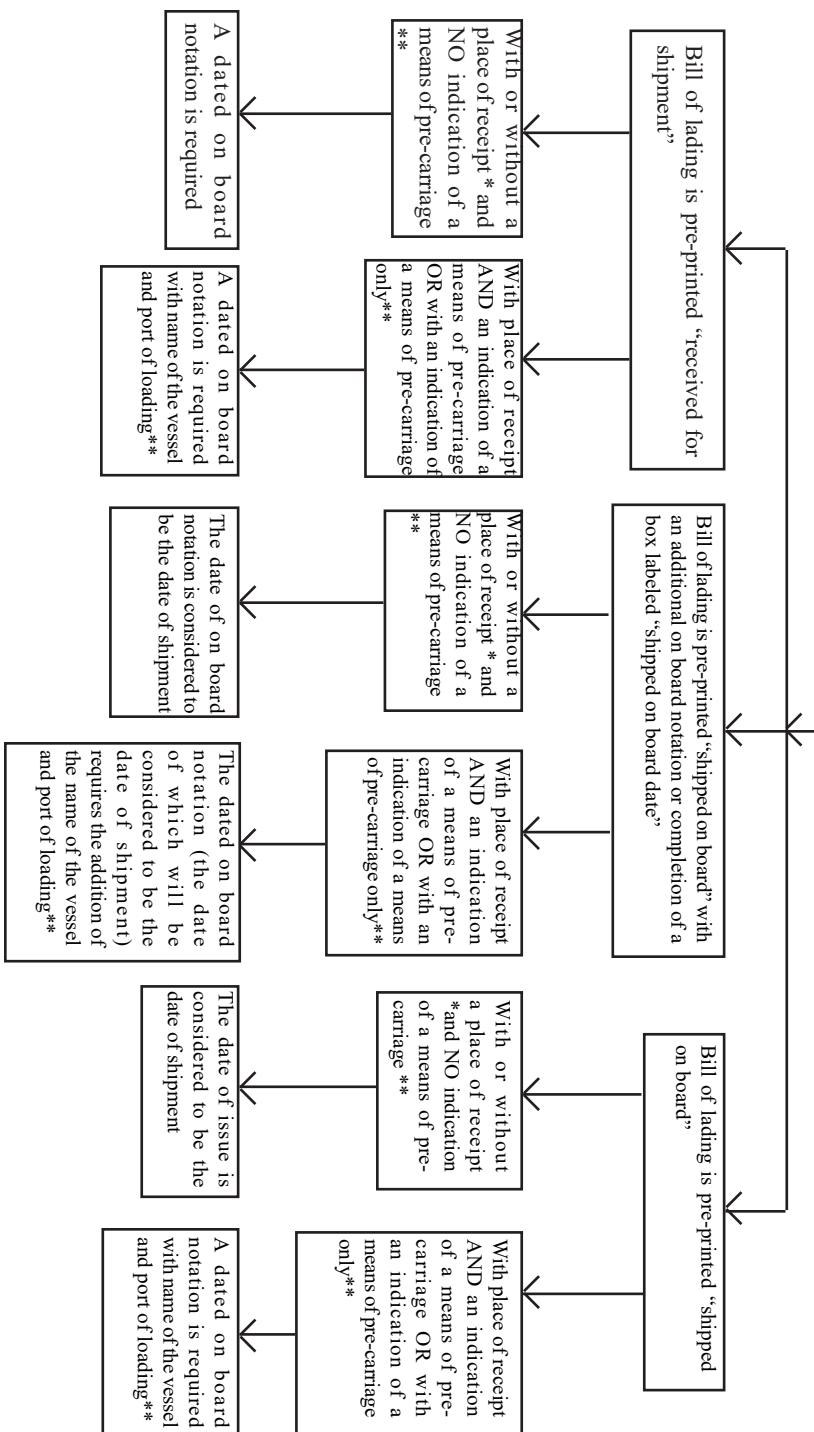
(6) Bill of Lading Flowchart

(See next page for chart)

Footnotes/Guidance:

1. "With or without place of receipt" if only a place of receipt is shown, it can be the same place or a different place *provided there is no mention of a means of pre-carriage in the pre-carriage or place of receipt fields on the document*.
2. "Indication of a means of pre-carriage" – where an indication of the means of pre-carriage is given i.e., by truck or rail, the bill of lading will require an on board notation indicating the name of the vessel and the port of loading, whether or not a place of receipt field is completed.
3. An on board notation is also required where the ocean vessel and/or port of loading are stated to be "intended". In this event, the on board notation is to include the name of the vessel and/or the port of loading. Alternatively, the word "intended" may be deleted and the deletion authenticated by the carrier or their agent.
4. Where the port of loading stated in the credit is shown as the place of receipt (the ocean vessel and port of loading fields, in this case, are reflecting the transhipment details) with shipment by sea from that port, a dated on board notation is required evidencing the port of loading stated in the credit and the vessel that is leaving that port.
5. Where the bill of lading indicates the place of receipt as the same as the port of loading, for example, place of receipt Rotterdam CY and port of loading Rotterdam but there is no indication of the means of pre-carriage, the date of a pre-printed shipped on board bill of lading will be deemed to be the date of shipment. If the bill of lading is pre-printed received for shipment, a dated on board notation will be required and that date will be deemed to be the date of shipment.
6. The exception to the above is where the bill of lading contains wording such as that quoted in section 2.6 or 2.7 of this paper. Where such wording is incorporated into the pre-printed wording, a dated on board notation will be required that also indicates the name of the vessel and the port of loading.

Does L/C require a port-to-port shipment with presentation of a bill of lading?



For further information, see:

Sindberg, Kim. UCP 600 TRANSPORT DOCUMENTS. (2nd Ed., 2015), Institute of International Banking Law & Practice.

Notes on the Principle of Strict Compliance Issues Paper

Prepared by the Executive Committee of the ICC Banking Commission

NOTES ON THE PRINCIPLE OF STRICT COMPLIANCE

The issue of “strict compliance” has continually surfaced with respect to the examination of documents presented under documentary credits. Over the last couple of years, several discussions have been generated on Internet forums and in trade finance journals in respect of the interpretation and application of this doctrine. This has also been reflected in the challenging discussions behind numerous ICC Official Opinions.

With this in mind, the Executive Committee of the Banking Commission tasked David Meynell, Senior Technical Advisor, with drafting a paper to reflect the issues.

This paper represents the position of the Executive Committee.

Comments and feedback should be sent to David Meynell at davidmeynell@aol.com

INTRODUCTION

Over the last couple of years, several discussions have been generated on Internet forums and in trade finance journals in respect of the interpretation and application of “strict compliance” with regard to the examination of documents presented under documentary credits. This has also been reflected in the challenging discussions behind numerous ICC Official Opinions.

The question of “strict compliance” has often been raised with regard to documents presented under documentary credits and a significant number of ICC Opinions and DOCDEX decisions have dealt with this issue. As mentioned in one of the most authoritative textbooks on the subject, “*Jack: Documentary Credits*”, the documents must strictly comply with the requirements of the credit.

Nevertheless, it is important to note that circumstances can change with each individual query and much depends on the actual context.

As highlighted by David Meynell and Gary Collyer in their blog of 9th November 2015 - <https://www.tradefinance.training/blog/articles/strict-compliance/> - checking documents, at least in the paper world, is not a matter of applying a computer algorithm or mathematical formula. It goes beyond strict compliance and, in certain circumstances, requires judgement based on experience.

Applying common sense is an essential factor in protecting the integrity of the documentary credit. However, pinpointing a defined understanding of “strict compliance” in this perspective is not easily achievable: it is certainly not explicitly clear from a reading of UCP or ISBP.

ICC Publication no. 399 (Opinions 1980-1981) included the comment that banks could not act like robots, but had to check each case individually and use their judgement.

The fundamental question remains: exactly how strict must compliance be and can it be defined?

RELEVANT ICC RULES AND PRACTICES

Underlying the question are various related ICC rules and practices. The below are not all-inclusive and particular attention must be paid to all of the General Principles of ISBP 745. UCP 600 sub-article 14 (a): A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

UCP 600 sub-article 14 (d): Data in a document, when read in context with the credit, the document itself and international standard banking practice, **need not be identical to, but must not conflict with, data in that document, any other stipulated document or the credit.**

UCP 600 sub-article 14 (e): In documents other than the commercial invoice, the description of the goods, services or performance, if stated, **may be in general terms not conflicting with their description in the credit.**

UCP 600 sub-article 14 (f): If a credit requires presentation of a document other than a transport document, insurance document or commercial invoice, without stipulating by whom the document is to be issued or its data content, **banks will accept the document as presented if its content appears to fulfil the function of the required document** and otherwise complies with sub-article 14 (d).

UCP 600 sub-article 14 (j): When the addresses of the beneficiary and the applicant appear in any stipulated document, **they need not be the same as those stated in the credit or in any other stipulated document**, but must be within the same country as the respective addresses mentioned in the credit. Contact details (telefax, telephone, email and the like) stated as part of the beneficiary's and the applicant's address **will be disregarded**. However, when the address and contact details of the applicant appear as part of the consignee or notify party details on a transport document subject to articles 19, 20, 21, 22, 23, 24 or 25, they must be as stated in the credit.

ISBP 745 Paragraph A23: **A misspelling or typing error that does not affect the meaning of a word or the sentence in which it occurs does not make a document discrepant.** For example, a description of the goods shown as "mashine" instead of "machine", "fountain pen" instead of "fountain pen" or "modle" instead of "model" would not be regarded as a conflict of data under UCP 600 sub- article 14 (d). However, a description shown as, for example, "model 123" instead of "model 321" will be regarded as a conflict of data under that sub-article.

DOCDEX DECISIONS AND ICC OFFICIAL OPINIONS

A very large proportion of both DOCDEX decisions and ICC Official Opinions have dealt with, in one way or another, "strict compliance". I have therefore restricted the following only to those wherein the analysis or conclusion mentions the term "strict compliance".

DOCDEX Decision No. 202

It was stated that the issue was to assess whether absolute reliance on the doctrine of strict compliance for two of the three stated discrepancies would be suffice to reach a sound decision and, if relied upon, whether it would prove to be working against the intended contribution of the documentary credit system and the UCP to the banking industry.

Discrepancies had been raised in respect of a third party issuing a packing list and a certificate of quality being issued by a third party instead of a beneficiary's certificate. There was no indication in the credit as to the issuing entity of the packing list; therefore it was considered as compliant. Additionally, there was no indication in the credit as to the title or issuing entity of the relevant certificate; therefore it was considered as compliant.

It was concluded that the issues raised by the Respondent as discrepancies should not seek and find shelter under the doctrine of strict compliance and could not be justified.

DOCDEX Decision No. 221

An issuing bank raised a discrepancy that description of goods on the bill of lading contained a typographical error. The negotiating bank contended that the goods description was not in general terms inconsistent with the credit. The issuing bank still refused on the grounds that strict compliance was required. Furthermore, they provided an "Expert's Report" which alluded to fraud, negligence, full compliance, additional discrepancies and a number of other issues.

It was concluded that it was extremely unlikely that a typographical error of the nature of that included in the bill of lading (the misspelling of the word "clutch" as "clutoh") would have any material bearing and documents should be considered as compliant. With regard to the "Expert's Report", banks deal in documents and other external factors should not be considered in the absence of exceptional circumstances, e.g. when a bank is aware, at the relevant time, of fraudulent activities.

It was also noted that the compliance standard under UCP 500 Article 13 was to "be determined by international standard banking practice" and that there was no reference in UCP 500 to the "strict compliance" standard.

DOCDEX Decision No. 249

An issuing bank amended a credit by adding the following condition: "Typographical and/or spelling errors, not be considered as discrepancies except in value, unit price, goods description and quantity. But for bills of lading, certificates of origin and all certificates issued by S.G.S. or beneficiary is prohibited showing any typing error." The issuing bank, on the grounds of a number of typographical errors, rejected a subsequent presentation of documents.

It was decided that the discrepancies raised by the issuing bank were fully valid because the strict and clear wording of the amendment did not leave room for any different interpretation and conduct by the issuing bank.

The analysis included the statement that as the amendment entailed a precise condition for the document checking to be inserted into the credit, with the consequences that the documents - if the amendment was accepted by the beneficiary - were to be checked in strict compliance with the terms of the amendment, which became a formal and fully effective credit condition.

DOCDEX Decision No. 337

An issuing bank refused two sets of documents presented under a credit due to a number of discrepancies including incorrect CIF value on invoice and packing list. It was concluded that none of the discrepancies was valid and that the issuing bank was obliged to reimburse the nominated bank.

In the analysis, it was stated that both the invoice and the packing list were in strict compliance with the credit.

Official Opinion R197

According to the terms of the credit, a ‘certificate duly signed by the captain’s vessel stating the cleanliness of the tank steamer’ had been requested. The document received ‘for approval’ was an inspection report.

It was concluded that since a report instead of a certificate was presented, there was justification for claiming a discrepancy under the doctrine of strict compliance.

Official Opinion R277

The issue was whether a misspelling of the beneficiary’s name as shipper on the bill of lading and the applicant’s as notify party would constitute a discrepancy under UCP 500 Article 21. It was concluded that the discrepancies were not valid.

However, a statement was made that in a doctrine of strict compliance, such discrepancies could provide banks with reasons for rejection.

Official Opinion R289

An issuing bank refused documents on the basis that the railway bills did not show the credit number. The analysis stated that it had been the previous opinion of the ICC that the requirement for a credit number was only to assist in tracing documents should they go astray. Since the issuing bank received the documents, the absence of the reference number, which in itself neither added nor detracted from the purpose of the document, was seen as an irrelevance and not valid grounds for rejection.

In the conclusion it was mentioned that the ICC had on numerous occasions stated that it disapproved of such a discrepancy, especially where transport documents were concerned, and once again reiterated this view. However, a comment was added that this might be a matter for local law, particularly where the law observed a standard of strict compliance.

Whilst not directly referencing the term “strict compliance”, it is worthwhile mentioning some more recent relevant Official Opinions.

Official Opinion R408

A beneficiary certificate contained a typographical error when stating the name of the vessel. This was considered as additional information not required by the credit and therefore not a discrepancy.

Official Opinion R559/TA548rev

A container number, although not required by the credit, was included on a commercial invoice. This number included one incorrect figure. This was considered as a typographical error and not a discrepancy.

Official Opinion R757/TA708rev

A contract number was quoted twice on a commercial invoice, one of which included an additional character. This was seen as superfluous and did not render the document discrepant.

Official Opinion TA.810rev

A copy of a shipment advice was to be sent to an insurance company. The invoice amount on the shipment advice was quoted incorrectly and was an obvious typographical error. However, because the advice did not fulfil its function by providing correct information for insurance purposes, it was considered as a discrepancy.

Official Opinion TA.811rev

Documents were refused due to differing purchase order numbers being quoted on the invoice and packing list. It was opined that, in view of the fact that the credit did not stipulate a purchase order number, both numbers could actually be valid. Accordingly a conflict of data could not be determined and the documents were compliant.

Official Opinion TA.815rev4

An invoice was presented referring to the designated currency as “\$”. This was considered by the issuing bank to be a discrepancy on the grounds that the actual currency was not specified. UCP and ISBP specify that an invoice must be in the same currency as the credit. It was decided that provided a beneficiary is not in a country other than the USA that uses “\$” to describe or reflect its base currency and, on the basis that there was no data in the invoice or any other document implying that “\$” referred to a currency other than “USD”, then the invoice complied and the discrepancy was invalid.

Official Opinion TA.817rev

The credit required the bill of lading to show shipment effected in FCL container. The presented bill of lading stated CY/CY and not FCL, which was mentioned as a discrepancy by the issuing bank and disputed by the nominated bank. Ultimately it was considered that a document examiner should not be expected to understand such terms. As such, the document is considered to be discrepant, as it did not make express reference to a FCL shipment.

Official Opinion TA.818rev

Documents were presented including an invoice that, whilst it did not specifically identify the applicant as such, included the correct full name and address of the applicant under a header “Customer”. The issuing bank raised a discrepancy that there was no indication of the applicant on the invoice i.e., implying that the invoice should have a header “applicant”. As stated in the analysis, there was nothing in either UCP 600 or ISBP 745 that required the name and address of the applicant to appear in a specific place within an invoice. Provided the name of the applicant appeared somewhere on the invoice, it was compliant with UCP 600 sub-article 18 (a) (ii).

Official Opinion TA.828rev

A certificate of origin referred to the attached packing list / weight memo as “rev03”: the presented packing list / weight memo stated “rev04”. It was concluded that in view of the fact each individual document complied with the terms and conditions of the credit and that the credit itself included no requirement for a particular revision number to be stated, then no discrepancy could be identified. It must be noted that this decision is predicated upon the conclusion that the wording “rev” must be an abbreviation for the word “revision”.

Official Opinion TA.833rev

An issuing bank refused documents on the basis that all documents showed a net weight greater than the gross weight, which they considered to be illogical. The reasoning provided by the nominated bank was that the weight in question was actually ADMT (air dry weight), which can be greater than the gross weight due to included moisture. The Opinion highlighted that although this is information not likely to be known by a document examiner, use of the words “net weight” in conjunction with “ADMT” weight did not make the documents discrepant.

Official Opinion TA.837rev

An issuing bank refused documents presented under a credit on the basis that within the name of the applicant the abbreviation “Ind” had been used to represent “Industries”. This, in its opinion, was not acceptable. Although ISBP 745, paragraph A1, lists a number of acceptable abbreviations, this is not all-inclusive, and other types of abbreviation can be acceptable. From the perspective of this specific query, the use of the word “Ind” was not viewed as a discrepancy.

LEGAL PERSPECTIVE: INTERPRETATION IN THE COURTS

Whilst it can certainly be argued that the overall prevailing viewpoint from the courts has been that ascertaining the correctness of tendered documents must be on the basis of “strict compliance”, exceptions do exist.

The definitive legal statement came from Lord Sumner in *Equitable Trust Company of New York v Dawson Partners Ltd. (1927)*. This has been a reference point for many courts ever since: the following paragraph is an abstract from the ruling:

It is both common ground and common sense that in credit transactions, the accepting bank can only claim reimbursement if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly observed. There is no room for documents which are almost the same, or which will do just as well. The bank cannot take upon itself to decide what documents will do well enough and what will not. If it departs from the conditions laid down in the credit, it acts at its own risk. The documents tendered were not exactly the documents which the defendants had promised to take up, and *prima facie* they were right in refusing to take them.

In actual fact this was an endorsement of an earlier ruling by Bailhache J., in *English, Scottish & Australia Bank Ltd. v. Bank of South Africa (1922)*.

It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened.

An additional early ruling also appeared to support the doctrine of strict compliance in *Skandinaviska Aktiebolaget v Barclays Bank Ltd (1925)*.

The documents ought to be completely in order.

In more recent times, this was strongly supported by *Philadelphia Gear Corporation v Central Bank (1983)*.

The rejection of strict compliance as a doctrine would vitiate the economic value of a credit transaction; for not only would the issuer be compelled to assume the risks of the underlying contract’s non-performance, it would be required to assume the additional risks of judicial realignment of its obligations under the credit.

Strong support to this rationale was provided in *United Bank Ltd. v Banque Nationale de Paris (1992)*.

On these authorities it seems reasonably clear that any discrepancy, other than obviously typographical errors, will entitle either the negotiating or the issuing bank to reject. It is tempting to say that whether a bank is entitled to reject must surely depend on whether the discrepancy is really material. But why should a bank assume the responsibility of determining the question of materiality and take the risk of it, if it goes wrong. As is so clearly stated in the UCP, documentary credit transactions are concerned with documents.

This was again sustained in *Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islaim Iran (1993)*.

I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires.

It was stated in *Glencore International AG v Bank of China* [1996] that,

The duty of the issuing bank is, and is only, to make payment against documents which comply strictly with the terms of the credit.

With regard to minimal differences, it was expounded in *Moralice (London) Ltd v E.D. and F. Man (1954)* that the principle of “*de minimis non curat lex*” (i.e. the rule of “insignificance”) does not apply to the presentation of documents under documentary credits.

It is probably true to say that when a contract provides that payment shall be by means of presentation of documents against an irrevocable credit, that necessarily involves, not only, in the contract between the confirming bank and the seller, but that the documents must be such as will strictly comply with the terms of the credit.

Nonetheless, some courts have shown a willingness to move towards a doctrine of substantial compliance, as can be seen in *Gian Singh & Co. Ltd. v. Banque de l'Indochine (1974)*.

In the ordinary case, visual inspection of the actual documents presented is all that is called for. The relevance of minor variations depends on whether they are sufficiently material to disentitle the issuing bank from saying that in accepting the certificate it did as it was told.

This was further addressed in *Banque de l'Indochine et de Suez SA v. J. H. Rayner (Mincing Lane) Ltd. (1982)*.

Lord Sumner’s statement in *Equitable Trust Company of New York v Dawson Partners Ltd. (1927)* cannot be taken as requiring rigid meticulous fulfilment of precise wording in all cases. Some margin must and can be allowed.

Additional support for this approach can be seen in *Bank of Nova Scotia v. Angelica-Whitewear Ltd. (1985)*.

The rule of strict documentary compliance requires not only that the tendered documents appear on their face, upon reasonably careful examination, to conform to the terms and conditions of the letter of credit but that they also appear to be consistent with one another, particularly in the sense that they refer to the same shipment of goods. The rule of strict documentary compliance does not extend to minor variations or discrepancies that are not sufficiently material to justify a refusal of payment.

This case went to appeal and the following comments were made:

While the English and Canadian courts have not adopted a rule of substantial documentary compliance there has apparently been recognition that there must be

some latitude for minor variations or discrepancies that are not sufficiently material to justify a refusal of payment.

In line with this attitude, it was stated in *Astro Exito Navegacion SA v. Chase Manhattan Bank NA (1986)*:

Minuscule difference does not by any stretch of imagination render the documents inconsistent with one another.

In the case *Kredietbank Antwerp v. Midland Bank plc (1998)*, two separate judges mentioned a standard lower than strict compliance.

The requirement of strict compliance is not equivalent to the test of exact literal compliance in all circumstances and as regard all documents. To some extent, therefore, the banker must exercise his own judgment whether the requirement is satisfied by the documents presented to him.

Where the credit requirements are ambiguous, it is permissible and essential for a banker to adopt a reasonable interpretation of those requirements. It is in this sense that a banker's approach to document verification should be functional rather than literal or rigid.

EXPERT PERSPECTIVE: REFERENCE BOOKS

Professor Boris Kozolchyk highlighted an interesting perspective in DCInsight, Vol. 5 No. 4 (1999). He mentioned that during the lifetime of UCP 400, there was a steep upward trend in the number of reported appellate cases which was due in part to the American propensity to litigate and to the increasing number of letter of credit cases taken on by plaintiffs' lawyers on a "contingent fee" basis. These lawyers were prepared to accept cases on a contingency fee basis only because the concept of "strict compliance" was judicially interpreted in accordance with the "mirror image" principle as meaning that no discrepancy was insignificant, and because this situation ensured that it was easy for judges, jurors and banks to find discrepancies presented under credits. He pointed out that UCP 500 helped reverse this trend because it made strict compliance an increasingly objective determination based on international standard banking practice, which most courts have interpreted as the standard banking practice that prevails in the nation or region involved. As standard practice began replacing legal counsel's or court opinions concerning which document complied, many of the same attorneys who used to take documentary credit cases on a contingency basis refused to do so.

Furthermore, Professor Kozolchyk, in "*Strict Compliance and the Reasonable Document Checker*" (1990), a precursor to the ICC International Standard Banking Practice publication, made reference to a court-inspired, overly strict standard of compliance.

In DCInsight Vol. 8 No.3 (2002), John F. Dolan stated that high discrepancy rate figures had prompted some to question the letter of credit law's strict compliance rule. If beneficiaries could not comply with the strict rule in more than half the cases, these critics asked, has the strict compliance rule become a device that commercial banks use to pay when the applicant

wants the goods and to dishonour when he does not want them? The critics proposed that the law fashion an exception to the strict compliance rule that would deny an issuer the right to dishonour discrepant documents when the real reason for the dishonour lay, not in the discrepancies, but in the weakness of the issuer's reimbursement claim. His response to this issue stressed that proper analysis of the discrepancy rate data suggested that the critics' question was off the mark and that the better question was to ask: "Given the fact that they cannot or do not comply with documentary conditions, why do sellers ask buyers to post letters of credit?"

In his article in DCInsight Vol. 6 No. 2 (2002), Paul Todd argued that there was a more fundamental reason for caution when considering relaxation of strict compliance. The international sales that are the underlying basis of many documentary credits are merely parts of a wider transaction, as multiple re-sales while the goods are at sea are commonplace. Since it is impossible to inspect the goods while they are at sea, even a buyer (who unlike a bank may well be presumed to have expertise in the goods themselves) can only form a judgment on the basis of inspection of documents.

Ali Malek QC and David Quest, in the previously mentioned textbook '*Jack: Documentary Credits*' (2009) have argued that there is reluctance by judges to take the principle of strict compliance to absurd lengths: when it can be plainly seen that the divergence is of no possible importance, the court may look for a way round, or ignore it where it is almost imperceptible.

In Gutteredge and Megrah's '*Law of Bankers' Commercial Credits*' (2001), they highlight that strict compliance does not extend to the dotting of i's and the crossing of t's, or to obvious typographical errors either in the credit, or the documents. It is impossible to generalise and each case has to be considered on its own merits.

"*The Law of Letters of Credit and Bank Guarantees*" (2003) by Agasha Mugasha points out that it is generally accepted that the standard provided for by the UCP does not reject the traditional strict compliance standard as exemplified by *Equitable Trust Co of New York v Dawson Partners Ltd.*

Rather, it gives banks more discretion in deciding whether the documents comply or not and mandates the courts not to take a mechanistic approach.

In "*New problems of Strict Compliance in Letters of Credit*" (1988), Professor EP Ellinger observed that practical experience with the examination of documents carried out each day by banks all over the world backed the argument that strict compliance had become a somewhat unrealistic doctrine.

Ebenezer Adodo in "*Letters of Credit: The Law and Practice of Compliance*" (2014) mentions that the strict documentary compliance rule applies to the documents tendered by an issuing bank to an applicant as it does to those tendered by a beneficiary to an issuing or nominated bank, and by a nominated bank to an issuing bank. He reflects that literal, mirror image application of the rule of strict documentary compliance has drawn fierce criticism over the years. In particular, it has been felt that the courts' approach effectively turns banks' checking of documents for conformity under a credit into an extremely exacting proofreading exercise.

In "*UCP 600: An Analytical Commentary*" (2010) by Professor James Byrne, it is stated that the UCP has never used the notion of "strict compliance": it is a legal conception that, in the

common law, is applied to the fulfilment of express conditions and certain other contractual obligations. The principle is that an express conditional obligation must be strictly fulfilled but that where the condition is implied it can be substantially fulfilled by a performance that is substantially the same.

CONCLUSION: IS THERE A DEFINED APPROACH?

We cannot find the answer in UCP; as pointed out by Professor James Byrne, UCP has never included a definition of this term; it is a legal principle derived from contract law that has been applied by courts to documentary credits. The fact that UCP remains silent means that interpretation has been left to the courts.

So, should we look at strict compliance or substantial compliance? Or is it appropriate to take the “middle” way as mentioned by Gutteridge and Megrah; specifically “it is impossible to generalise and each case has to be considered on its own virtues”.

Whilst this does not provide us with perfect guidance, it does actually reflect the fact that the conclusions in many past ICC Official Opinions have not always been based on the exact same rationale, for the simple reason that there is no one answer. Each case can only be decided upon the presented facts and depending on context.

The introduction to UCP 600 stated:

During the revision process, notice was taken of the considerable work that had been completed in creating the International Standard Banking Practice for the Examination of Documents under Documentary Credits (ISBP), ICC Publication 645. This publication has evolved into a necessary companion to the UCP for **determining compliance of documents** with the terms of letters of credit.

ISBP, particularly the latest version ISBP 745, has made a significant impact in lessening the exactitude of the doctrine of strict compliance. In fact, it is arguable whether or not strict compliance even exists any more. A review of the General Principles section of ISBP 745 highlights numerous aspects of the document examination process that reduce the need for a literal application.

Obviously there still exists certain situations that do not readily conform to established ICC rules. A recent ICC Draft Opinion, TA832, graphically exemplifies the difference of opinion that can still exist between practitioners. However, opinions such as these can be used as indicators of international standard banking practice for future editions of ISBP.

In conclusion, I see no merit in attempting a definition of this multifaceted subject. Developments in the past have proved that, as time goes by, it is customs and practice that will provide the required clarity. And once such customs and practice have become commonplace, they will form part of a future revision of ISBP.

David Meynell March 2016

The International Chamber of Commerce (ICC)

ICC is the world business organization, whose mission is to promote open trade and investment and help business meet the challenges and opportunities of an increasingly integrated world economy.

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Guidance Paper on the Impact of COVID-19 on Trade Finance Transactions Issued Subject to ICC Rules

DISCLAIMER

ICC endorses no responsibility in this guidance paper which is aimed only at sharing practical views and guidance from experts in the management of Trade Finance transactions during this exceptional period of time.

All decisions taken with regard to a trade finance transaction that follows this guideline will be understood to be taken under the full responsibility and agreement of the parties involved.

1. EXECUTIVE SUMMARY

- (i) Up until recently, as with the volcanic eruption in Iceland of 2010, banks and guarantors (collectively described herein as “Bank” or “Banks”) have, to varying degrees, remained open for business, with the result that the question of whether or not force majeure could be applied, as a defence to non-performance, had not been considered. However, as the situation continues to evolve, it appears that some Banks are in the process of being closed or operating under reduced working hours and/or reduced staffing levels.
- (ii) Banks in a number of countries have started to ask whether the novel coronavirus (“COVID-19”) may be considered to be an interruption of its business or an event that is beyond the control of Banks, *as is referenced in the force majeure provisions of UCP, eUCP, URDG, URC, eURC, URR and URBPO (collectively described herein as “ICC rules”).*

The stance taken in ISP98 is referred to separately in this paper and in the context of the issue under discussion.

- (iii) The answer to the question in (ii) is: *even where a trade finance transaction is made subject to ICC rules, depending on the applicable law it will require a court or tribunal with jurisdiction, or a government or regulatory authority to make a decision as to whether an event of force majeure is to be declared.*

In the event of such a decision being taken it must be communicated to all parties in the transaction according to the applicable law.

It is not for ICC to pronounce whether any particular set of event(s) amount to a force majeure event. In this respect, attention is drawn to the content of paragraph 2 (v). This paper does, however, give indications, in relation to ICC rules only, on the factors which may be relevant in arriving at such a conclusion.

- (iv) In order to adapt to the current extraordinary circumstances, it is quite feasible that all parties could agree to modify specific articles of the ICC rules. However, it is strongly

recommended that careful attention is paid, and professional advice is sought, as to the implications of any proposed change(s) in the rules and any such modifications should only be implemented while circumstances dictate. It should not be forgotten that a very simple way to resolve most issues is to encourage and promote dialogue between the commercial parties, as well as between the issuing bank and the nominated/confirming bank, or the counter-guarantor and the guarantor.

- (v) Questions have also been raised on many associated issues including, but not limited to, delivery and examination of documents, liaison with applicants and beneficiaries, different places for presentation, document examination period, definition of a banking or business day, events covered by ‘interruption of business’ under force majeure provisions, etc. It is evident that clarification and direction on these and many other topics has created a global requirement for consistent information and guidance. Answers to, or guidance on, these questions can be found in the remainder of this guidance paper.
- (vi) It remains the core purpose of the ICC rules—and of industry practice—to facilitate and enable good-faith trade, and it is clear that the continuing flow of trade is critical during the COVID-19 pandemic. Accordingly, all parties are encouraged to continue to interact on this basis and to leverage rules as well as sound commercial practice to find solutions to the current situation.

We would emphasise that any changes to the mode or location for the delivery of the documents, or any alternate solutions for the handling of a trade finance transaction subject to ICC rules will require the express agreement of the parties to the relevant undertaking: issuing bank and nominated/confirming bank or counter-guarantor and guarantor; and the applicant or instructing party and the beneficiary (as applicable); or the parties to a documentary collection: principal, remitting bank, collecting or presenting bank; and the drawee (if applicable).

When any alternate solution has been agreed, it is advisable that the terms and conditions of that solution are clearly documented to avoid any potential dispute(s) at a later date.

It should be noted that for a standby letter of credit issued subject to ISP98, and where, on the last business day for presentation, the place for presentation is for any reason closed and a timely presentation cannot be made, rule 3.14 allows for the expiry date to be extended for 30 calendar days after the place for presentation re-opens and for an issuer of a standby letter of credit to authorise another reasonable place for presentation. This is further referred to in paragraph 3 (v).

2. ICC STATEMENT

- (i) As mentioned in a joint statement by ICC and the World Health Organization related to the COVID-19 situation worldwide: “as an immediate priority, businesses should be developing or updating, readying or implementing business continuity plans.”¹
- (ii) In line with that recommendation, and as a response to increasing requests for guidance,

¹ <https://iccwbo.org/media-wall/news-speeches/icc-who-covid19/>

this guidance paper provides practical advice and highlights best practices in the handling of trade finance transactions that are subject to ICC rules. It is expected that, as circumstances evolve, further guidance on trade finance transactions will need to be produced in reaction to new developments and market needs, and this will be in the form of a regularly updated FAQ section that will be added to the ICC website.

- (iii) The scope of this guidance paper is strictly focused on the application of ICC rules and, in particular, the force majeure provisions within those rules.
- (iv) Many practitioners will recall the events of 2010 when a volcanic eruption in Iceland caused severe delays in the presentation of documents under numerous trade finance transactions. As a result, the ICC Banking Commission released a statement highlighting the impact on transactions that were issued subject to UCP 600, URDG 458 (the precursor to URDG 758), and URC 522. It is worth recalling what was stated at that time:

“It must be noted that this is not an event that is covered by the force majeure rules of UCP 600 (article 36), URDG 458 (article 13) and URC 522 (article 15). The concerned banks, guarantors and instructing parties are still open for business; it is the documents that are being delayed in transit to them.”

- (v) As the situation is similar to that experienced in 2010, i.e. Banks are generally open for business (despite being at reduced strength/capacity), the same conclusion should apply although, as stated above, this is ultimately dependent on the facts and an issue that can only be decided by a court or tribunal with jurisdiction, or a government or regulatory authority.

3. FORCE MAJEURE

- (i) The ICC has crafted a contractual force majeure for use in commercial contracts. In general terms the wider general legal concept of “Force Majeure” means the occurrence of an event or circumstance (“Force Majeure Event”) that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that the party affected by the impediment (“the Affected Party”) proves:
 - a. that such impediment is beyond its reasonable control; and
 - b. that it could not reasonably have been foreseen at the time of the conclusion of the contract; and
 - c. that the effects of the impediment could not reasonably have been avoided or overcome by the Affected Party.

The above reflects the concept of force majeure as proposed by the ICC Force Majeure Clause for the parties to agree in their contract. Absent an agreement, the applicable law may have different requirements as explained below.

- (ii) Commercial contracts often include general Force Majeure clauses setting out requirements for establishing the existence of a Force Majeure Event. ICC has developed general considerations to be taken into account for users involved in commercial

contractual relations that are applicable in the context of the COVID-19 pandemic.

- (iii) It should be noted that while the general concept of force majeure is known by most legal systems, the principles developed in national laws may imply substantial differences.² While most common law countries require a contractual force majeure provision for it to be raised as a defence, in many civil law countries, force majeure provisions are not required in contracts as the statutory law, generally the civil code, provides for default rules in that respect.
- (iv) Each of the ICC rules contain an article on the concept of force majeure. A summary of the pertinent details are as follows:
- > **UCP 600 Article 36** - events such as those arising out of the interruption of a bank's business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.
 - > **URDG 758 article 26** - events such as Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupt its business as it relates to acts of a kind subject to these rules. This article also provides for an extension of 30 calendar days if the guarantee expires at a time when presentation or payment under that guarantee is prevented by force majeure.
 - > **URC 522 article 15** - events such as the interruption of a bank's business by Acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes or lockouts.
 - > **URR 725 article 15** - events such as the interruption of the reimbursing bank's business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or by any strikes or lockouts or any other causes beyond its control.
 - > **eUCP Version 2.0 article e14 and eURC Version 1.0 article e13** - for the consequences arising out the interruption of a bank's business, including but not limited to its inability to access a data processing system, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.
- or any other causes, including failure of equipment, software or communications networks, beyond its control.
- > **URBPO 750 article 13** - for the consequences arising out the interruption of an involved bank's business, including its inability to access a TMA, or a failure of equipment, software or communications network, caused by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, cyberattacks, or by any strikes or lockouts or any other causes, including failure of equipment, software or communications networks, beyond its control.

The commonality in all of the force majeure provisions in the ICC rules set out above, is that the Bank is unable to fulfil its obligations due to certain events that are deemed to be beyond its control. This has led to the question as to whether or not the

² See International Chamber of Commerce, ICC Force Majeure and Hardship Clauses (March 2020).

COVID-19 pandemic could be considered a force majeure event under ICC rules. As noted previously, this will be dependent on the facts and will ultimately be decided by a court or tribunal with jurisdiction, a government or regulatory authority.

- (v) ISP98 does not contain a rule specifically titled ‘Force Majeure’. It provides a general rule, in 3.14, titled “Closure on a Business Day and Authorisation of Another Reasonable Place for Presentation”:
 - a. If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides.
 - b. Upon or in anticipation of closure of the place of presentation, an issuer may authorise another reasonable place for presentation in the standby or in a communication received by the beneficiary. If it does so, then
 - i) presentation must be made at that reasonable place; and
 - ii) if the communication is received fewer than thirty calendar days before the last day for presentation and for that reason presentation is not timely made, the last day for presentation is automatically extended to the day occurring thirty calendar days after the last day for presentation.
- (vi) Where, as outlined in the Executive Summary, a court or tribunal with jurisdiction, a government or regulatory authority decides that an event or circumstance can be characterised as force majeure that bars a claim for damages or for additional costs, or the application of a penalty in a trade finance transaction that is subject to ICC rules, such a decision may lead to the non-performance of certain obligations of Banks to be excused during the force majeure period. But it must be cautioned that such an excuse may not be upheld if a court finds, in the particular fact situation in hand, that the Bank could have performed its document examination duty, issued a refusal notice (if applicable) or honoured or negotiated according to the requirements of the applicable ICC rules.
- (vii) It should be further noted that force majeure provisions in sale contracts or contracts of carriage are not an issue for ICC rules, as reflected, for example, in (i) UCP 600 article 4 wherein it is stated that banks “are in no way concerned with or bound by such [sale or other] contract, even if any reference whatsoever to it is included in the credit”, and (ii) URDG 758 article 5 wherein it is stated that a guarantee “is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship”.

While collections are not independent of the export contract, the collecting bank is not a party to that contract and would normally not be bound by a force majeure clause stated therein.

ISP98 rule 1.08 states that an issuer is not responsible for performance or breach of any underlying transaction.

(viii) The mere fact that force majeure is declared by a government or regulatory authority, does not, as such, necessarily amount to the application of the provision on the force majeure provision in ICC rules. Conversely, where a court or tribunal with jurisdiction finds that a set of facts or circumstances amount to force majeure under a particular set of ICC rules, then the relevant provision in those rules will apply. If the performance of an obligation or act is not impossible (as is meant by the reference to ‘interruption’), but has only become more difficult, complex or expensive (for instance hiring additional employees to replace sick employees), the force majeure provision in ICC rules may not be triggered. Business continuity plans of Banks should be implemented and may include, for example, engaging a back-up site, notifying clients and/or courier companies of a new address, etc.

4. MODIFICATION OF ICC RULES

- (i) Where a trade finance transaction is issued subject to a set of ICC rules, such rules allow for their modification or exclusion. This is the consequence of the contractual nature of ICC rules which permits the parties to vary them by contract. For example, UCP 600 article 1 states: “*... binding on all parties thereto unless expressly modified or excluded by the credit.*”, whilst URDG 758 sub-article 1 (a) states: “*... binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them.*”.

As such, and in order to adapt to the current extraordinary circumstances, it is open to all parties to potentially agree to modify specific articles of the ICC rules within the individual trade finance instruments used. Examples include:

- > Extending the five-banking/business day examination period imposed by UCP 600 sub-article 14 (b) or URDG 758 sub-article 20 (a) in order to make allowance for any possible delay in the handling of documents or demands. Should this be the case, all parties under the documentary credit, counter-guarantee or guarantee must provide their agreement in order to avoid potential future problems. This can be implemented for existing transactions by an amendment acceptable to all parties, as well as in any new transactions.
 - > Extending the five-banking/business day period in which a notice of refusal must be provided as stated in UCP 600 sub-article 16 (d) or URDG 758 sub-article 24 (e). This can be implemented for existing transactions by an amendment acceptable to all parties, as well as in any new transactions.
- (ii) It is strongly recommended that careful attention is paid, and professional advice be sought where appropriate, as to the implications of any proposed change(s) in the rules, including amendments to existing transactions. Any such modifications should only be implemented while current circumstances dictate.

- (iii) The following should also be noted:

- > To emphasise the point made in the Executive Summary, it should not be forgotten that a very simple way to resolve most issues is to encourage and promote dialogue between the applicant and the beneficiary, as well as between the issuing bank and the nominated/confirming bank or the counter-guarantor and the guarantor, to the extent that the applicant will have to instruct the Bank on the necessary amendment(s) and the beneficiary will need to accept the amendment to become

effective. This may, for example, include notifications regarding changes to working hours.

- > It must be stressed that no revision of ICC rules is currently proposed. It is important for Banks to develop alternate solutions rather than rely upon rule revisions. Any such solutions should be transparent and straight forward. It can be defined simply as “what is in my control?” and “what is not in my control?”. For the latter, it is then an additional question of what do I need to do to bring it under my control?
- > Due diligence in the handling of all aspects of a trade finance transaction is still key in order to avoid any potential for fraudsters to take advantage of the current situation.
- > In answer to questions concerning what constitutes a banking day for the purpose of ICC rules, this has been addressed in ICC opinions R265 and R325.

In R265, the question was based around a correspondence department that operated 24/7 but the bank's official working hours on a Saturday were 09:00-13:00.

Documents were presented to the correspondence department at 13:30 on a Saturday and were signed for that day. The conclusion was that the examination period commenced on that day i.e., 7 banking days following the day of presentation (this was a credit subject to UCP 500).

In R325, the question was quite similar but focussed on where a bank was open for a half day on a Saturday i.e., 09:00–13:00 would this be considered as one of the banking days. The conclusion was yes. This conclusion reflects that any hours that are worked would be taken into account in determining the banking days for examination and refusal.

The above opinions offer guidance to the transposition into the situation of ‘business days’ under the URDG.

5. POSSIBLE ALTERNATE SOLUTIONS THAT INVOLVE THE USE of ‘Electronic documents, scanned, faxed or emailed images’

- (i) There is no doubt that the increased use of digitalised documents, as has been the experience in recent years, has highlighted that many of the problems currently faced in the paper world, in respect of the physical transmission and delivery of paper documents, would be avoided. However, on a global basis, and in the context of current transactions where goods have already been shipped and/or where documents remain undelivered, this cannot be considered to be an immediate solution. Nevertheless, that does not mean that certain options cannot be considered, under certain levels of risk tolerance for transactions where shipments are still to be made, or where new transactions are initiated. Any such arrangement will require the express agreement of all parties.
- (ii) One possible solution would be for a nominated bank (whether or not it has added its confirmation) to send scanned, faxed or emailed images of paper documents to the issuing bank, together with a copy of the nominated bank's covering schedule listing the name of each document and the number of originals and copies received. This

sending should be supplemented by a SWIFT message, sent by the nominated bank to the issuing bank, confirming the action taken and the completeness of the scanned, faxed or emailed images. This would allow issuing banks to be in a position to make their own determination of whether an otherwise complying presentation had been made. The issuing bank may then be in a position to arrange the issuance of delivery orders and shipping guarantees (also referred to as letters of indemnity (LOI)) for the release of any goods that were consigned to the applicant or the issuing bank, and the honour of an otherwise complying presentation.

Similarly, discrepant documents could be handled quickly and efficiently to obtain an applicant's waiver that would be acceptable to the issuing bank, so that honour, negotiation or reimbursement could be effected or authorised.

The documents forming the presentation made by, or on behalf of, the beneficiary would remain held with the nominated bank under the responsibility of the issuing bank, until the issuing bank can determine a new location for delivery or the courier service resumes. This would act as a modification of UCP 600 sub-article 7 (c) and article 8, and would require the agreement of all parties.

- (iii) Notwithstanding the possible solution described above, it should be borne in mind that when documents are forwarded and cannot be delivered due to the shutdown of delivery services in particular areas or countries, with the outcome that the carrier will not waive the requirement of the surrender of an original bill of lading, the issuing bank may be unable to issue a delivery order or shipping guarantee (LOI) due to insufficient credit facilities or cash collateral from the applicant.
- (iv) As a separate and ongoing exercise, ICC will continue to promote the broader use of ICC eRules i.e., eUCP Version 2.0 & eURC Version 1.0, URBPO, and the UNCITRAL Model Laws on Electronic Commerce, Electronic Transferable Records, and Electronic Signatures. Practitioners should strongly consider implementing the ICC eRules in their future transactions.
- (v) For existing credits subject to UCP 600, if all parties intend to change from paper documents to electronic records, they may do so by agreeing an amendment of the credit from UCP 600 to eUCP Version 2.0. Scanned documents will fall within the definition of an 'electronic record' in eUCP Version 2.0, but would need to meet the requirements for authentication as mentioned in eUCP sub-article e6. Similarly, electronic records could be agreed for use with eURC Version 1.0 for documentary collections, but would need to meet the requirements for authentication as mentioned in eURC sub-article e7.
- (vi) A digital record is one that exists in digitised form only, whereas an electronic record may also encompass a copy of an original document that is stored in electronic form e.g. a scanned copy. It should be noted that some documents may only be effective in paper form, or may require pre-agreement by all parties in order to be digitalised.

6. SCENARIOS CURRENTLY EXPERIENCED IN THE DELIVERY OF DOCUMENTS

One of the main areas of concern that has been expressed is the inability to deliver documents to a bank, or bank to bank, or guarantor to counter-guarantor, or from bank or guarantor to an applicant or instructing party. The same problem may also arise between remitting banks and collecting or presenting banks.

The relevant articles within the ICC rules are:

- > **UCP 600 article 35** – “*A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.”*
- > **URDG 758 sub-article 28 (a)** – “*The guarantor assumes no liability or responsibility for the consequences of delay, loss in transit, mutilation or other errors arising in the transmission of any document, if that document is transmitted or sent according to the requirements stated in the guarantee, or when the guarantor may have taken the initiative in the choice of the delivery service in the absence of instructions to that effect.*”
- > **URC 522 sub-article 14 (a)** – “*Banks assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any message(s), letter(s) or document(s), or for delay, mutilation or other error(s) arising in transmission of any telecommunication or for error(s) in translation and/or interpretation of technical terms.*”

For documentary credits and standby credits issued subject to UCP 600, there are 4 main relationships in the presentation, handling, examination, settlement and/or refusal of documents:

- A. Interaction between the beneficiary and a nominated bank that has not added its confirmation, a confirming bank or the issuing bank

This scenario relates to the delivery of documents by, or on behalf of, the beneficiary to the nominated, confirming or issuing bank, the examination and handling thereof, and any possible honour or negotiation, or the advising of discrepancies.

- (i) It should be noted that the delivery of documents by, or on behalf of, a beneficiary is outside the scope of the UCP 600.
- (ii) While a nominated, confirming or issuing bank may have indicated its office's address and the manner of delivery to its office, which could include the use of a specific courier company, if it is known that delivery cannot occur at that location or can only occur on certain days or between certain hours, such bank should be informing the beneficiary, at the earliest opportunity of alternative arrangements which would invariably include a different location.

- (iii) Notwithstanding the above, beneficiaries should consider checking with the nominated, confirming or issuing bank as to the status for delivery of documents, prior to making or arranging a presentation and, where appropriate, obtain alternative delivery instructions or an amendment to the delivery instructions in the credit. For credits that expire at the counters of the issuing bank, a beneficiary would be well advised to seek an amendment that would change the expiry place to be its own country (or at least remove reference to expiry at the issuing bank's office or country) and for the credit to be available with a bank in its own country by honour or negotiation.
- (iv) For the issuance of new credits, a beneficiary could consider requesting that the credit be made available with more than one named nominated bank by payment, acceptance, deferred payment or negotiation, thus affording the beneficiary a choice of options when presenting its documents. For regulatory reasons, some banks will not handle a credit that is stated to be available with any bank.
- (v) It should be noted by beneficiaries that a nominated bank has no obligation to receive or examine documents unless it has agreed to act on its nomination or has confirmed the credit. This may result in the beneficiary being required to arrange delivery directly to the issuing bank. Where a nominated bank has agreed to examine documents, it has no obligation to honour or negotiate (as mentioned in UCP 600 sub-article 12 (c)). However, where the nominated bank has agreed to act on its nomination to honour or negotiate, it should comply with the requirements of UCP 600 sub-articles 14 (b) and 16 (d) (see below), but no preclusion will apply for any failure to comply therewith. The nominated bank should also act according to any regulatory requirements.
- (vi) Where documents have been presented to a confirming or issuing bank, these banks have an obligation to examine and to honour or negotiate a complying presentation, subject to regulatory compliance. The content of UCP 600 sub-articles 14 (b) and 16 (d) will apply to these banks, with preclusion applying if the content of UCP 600 article 16 is not complied with.

UCP 600 sub-article 14 (b) “A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation.”

UCP 600 sub-article 16 (d) “The notice required in sub-article 16 (c) must be given by telecommunication or, if that is not possible, by other expeditious means no later than the close of the fifth banking day following the day of presentation.”

- (vii) As mentioned earlier in this paper, modification of these two rules, in the terms and conditions of the credit, is possible but should be undertaken only on a strict case of need basis, and on the basis of professional advice.
- (viii) Honour or negotiation, where effected, should be made in accordance with the terms and conditions of the respective credit and the requirements of UCP 600 article 15.

- (ix) Any refusal notice should be sent to the beneficiary according to the requirements expressed in UCP 600 article 16.
- (x) ISP98 contains the following rules that are in the same context as the content of (v) and (vi):
- > ISP98 rule 2.04 (b) "*Nomination does not obligate the nominated person to act except to the extent that the nominated person undertakes to act.*"
 - > ISP98 rule 5.01 (a) (i) "*Notice given within three business days is deemed to be not unreasonable and beyond seven business days is deemed to be unreasonable.*" and 5.01 (b) (i) "*The means by which a notice of dishonour is to be given is by telecommunication, if available, and, if not, by another available means which allows for prompt notice.*"
- B. Interaction between a non-confirming nominated bank that has no responsibility to examine, honour or negotiate, and a confirming / issuing bank

This scenario relates to the delivery of documents from the nominated bank to a confirming or issuing bank where a complying presentation has been made, or where the nominated bank simply acts as an intermediary between the beneficiary and the confirming or issuing bank, and to requests for acceptance of documents despite identified discrepancies.

GENERAL NOTES APPLICABLE TO EACH SCENARIO:

Please note that what follows does not address the issues of liability between nominated, confirming and issuing banks arising out of delay in delivery, loss of documents or inability to deliver these documents, arising out of the current extraordinary circumstances, which depend on the applicable law.

Each nominated bank:

- > may wish to consider (if practical, and if not currently completed for all transactions) to examine all presentations to determine compliance, thus affording the protection of UCP 600 article 35 in the event the courier company loses any documents held by it in the intervening time.
- > should, even if not mentioned in a credit, consider sending a message to the confirming or issuing bank informing them that complying documents have been received and give brief details such as the amount, due date (if applicable), details of the shipment (by sea, air, road or rail) and, if documents have been sent, details of the courier name and air waybill number/courier receipt number.
- > should retain copies of all documents and, if agreed between the banks, implement the suggestion in paragraph 5 (ii) regarding the sending of scanned, faxed or emailed images, or act according to any other solution agreed by all parties.
- > should note that where the reimbursement under the credit is subject to the issuing bank determining that a complying presentation has been made, alternative delivery arrangements for the documents may be required to be in place before it agrees to act any further under the credit.

(i) ***Nominated bank (NB) hands documents over to courier, courier cannot deliver anywhere in destination country.***

NB is covered by UCP 600 article 35 as the documents have been handed over to the courier—it is not responsible for any delay in delivery.

Documents remain with courier company. NB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this.

However, the routing of documents is at the request of the issuing bank (in their credit —usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

(ii) ***NB hands over documents to courier, courier can deliver into destination country but not to designated address.***

NB is covered by UCP 600 article 35 as the documents have been handed over to the courier—it is not responsible for any delay in delivery.

Documents remain with courier company. NB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this.

However, the routing of documents is at the request of the issuing bank (in their credit —usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

(iii) ***NB is unable to hand over to any courier service as they are unable to deliver and will not accept any package for delivery.***

NB is covered by UCP 600 article 35 as the documents could have been handed over to the courier, but the courier service cannot collect or deliver—it is not responsible for any delay in delivery.

Documents remain with NB. NB should contact the issuing bank to seek new routing instructions for the documents.

(iv) ***LC requires documents by courier service and nominates a specific courier service, but that courier service cannot collect or deliver.***

NB is covered by UCP 600 article 35 as the documents could have been handed over to the specified courier, but the courier service cannot collect or deliver—it is not responsible for any delay in delivery.

Documents remain with NB. NB should contact the issuing bank to seek new routing instructions for the documents.

(v) ***LC requires documents by courier service and does not nominate the courier service, the contacted courier service can accept but not deliver.***

NB is covered by UCP 600 article 35 if documents ARE or ARE NOT handed over—it is not responsible for any delay in delivery.

If documents ARE handed over, NB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this. Documents remain with courier company.

However, the routing of documents is at the request of the issuing bank (in their credit—usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

If documents are NOT handed over due to knowledge of non-delivery, documents remain with NB. NB should contact the issuing bank to seek new routing instructions for the documents.

(vi) *Documents have been collected by a courier service but returned to the nominated bank as it is unable to deliver them*

NB is covered by UCP 600 article 35 as documents were handed over, even though subsequently returned to them—it is not responsible for any delay in delivery.

Documents remain with NB. NB should contact issuing bank advising it that on [date] the documents were collected by the courier service and on [date] they have been returned to the nominated bank as the courier service is unable to deliver them and seek new routing instructions for the documents.

Other considerations applicable to scenarios (i)-(vi):

1. The responses to the various scenarios would also apply to documents that are to be sent by registered airmail or similar.
2. When documents are refused by a confirming or issuing bank, the option of returning the documents to the nominated bank should only be used where delivery instructions have been requested and/or obtained from the nominated bank. This will be even more relevant where it is known by the issuing bank that the discrepant documents will not be accepted by the applicant and that they are to be returned.
3. Honour or negotiation, where effected by the nominated bank, should be in accordance with the terms and conditions of the respective credit and the requirements of UCP 600 sub-article 15 (c).
4. A confirming or issuing bank is required to reimburse or arrange reimbursement, for a complying presentation, in accordance with the conditions stated in the respective credit.
5. Delayed payment

When documents are received by a nominated bank that agrees to act on its nomination, the confirming or issuing bank prior to the interruption of the bank's business, and found to be a complying presentation, payment must be timely made in accordance with the terms of the credit. Where payment is delayed due to the closure of the confirming or issuing bank's office, the issue of whether the confirming or issuing bank is liable for interest for late payment is outside the scope of UCP 600 and is to be settled between the concerned parties or according to the applicable law.

C. Interaction between a confirming bank and the issuing bank

This scenario relates to the delivery of documents from the confirming bank to the issuing bank where a complying presentation has been made and to requests for acceptance of documents despite identified discrepancies.

GENERAL NOTES APPLICABLE TO EACH SCENARIO:

Please note that what follows does not address the issues of liability between confirming and issuing banks arising out of delay in delivery, loss of documents or inability to deliver these documents, arising out of the current extraordinary circumstances, which depend on the applicable law.

Each confirming bank:

- > should, even if not mentioned in a credit, consider sending a message to the issuing bank informing them that complying documents have been received and give brief details such as the amount, due date (if applicable), details of the shipment (by sea, air, road or rail) and, if documents have been sent, details of the courier name and air waybill number/courier receipt number.
- > should retain copies of all documents and, if agreed between the banks, implement the suggestion in paragraph 5 (ii) regarding the sending of scanned, faxed or emailed images, or act according to any other solution agreed by all parties.
- > should note that where the reimbursement under the credit is subject to the issuing bank determining that a complying presentation has been made, CB may wish to contact the issuing bank to determine whether or not the documents can be delivered or to seek an alternate solution so that reimbursement may be effected timely for a complying presentation.

(i) *Confirming bank (CB) hands documents over to courier, courier cannot deliver anywhere in destination country.*

CB is covered by UCP 600 article 35 as the documents have been handed over to the courier—it is not responsible for any delay in delivery.

Documents remain with courier company. CB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this.

However, the routing of documents is at the request of the issuing bank (in their credit—usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

(ii) *CB hands over documents to courier, courier can deliver into destination country but not to designated address.*

CB is covered by UCP 600 article 35 as the documents have been handed over to the courier—it is not responsible for any delay in delivery.

Documents remain with courier company. CB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this.

However, the routing of documents is at the request of the issuing bank (in their credit—usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

(iii) *CB is unable to hand over to any courier service as they are unable to deliver and will not accept any package for delivery.*

CB is covered by UCP 600 article 35 as the documents could have been handed over

to the courier, but the courier service cannot collect or deliver—it is not responsible for any delay in delivery.

Documents remain with CB. CB should contact the issuing bank to seek new routing instructions for the documents.

(iv) *LC requires documents by courier service and nominates a specific courier service, but that courier service cannot collect or deliver.*

CB is covered by UCP 600 article 35 as the documents could have been handed over to the specified courier, but the courier service cannot collect or deliver—it is not responsible for any delay in delivery.

Documents remain with CB. CB should contact the issuing bank to seek new routing instructions for the documents.

(v) *LC requires documents by courier service and does not nominate the courier service, the contacted courier service can accept but not deliver.*

CB is covered by UCP 600 article 35 if documents ARE or ARE NOT handed over—it is not responsible for any delay in delivery.

If documents ARE handed over, CB should inform the issuing bank of the inability of the courier company to deliver the documents, as soon as the courier company informs it of this. Documents remain with courier company.

However, the routing of documents is at the request of the issuing bank (in their credit—usually in field 78). It is, therefore, also incumbent upon the issuing bank to advise its advising/confirming banks when it is aware that deliveries cannot be made and to offer alternative delivery options or solutions.

If documents are NOT handed over due to knowledge of non-delivery, documents remain with CB. CB should contact the issuing bank to seek new routing instructions for the documents.

(vi) *Documents have been collected by a courier service but returned to the confirming bank as it is unable to deliver them.*

CB is covered by UCP 600 article 35 as documents were handed over, even though subsequently returned to them—it is not responsible for any delay in delivery.

Documents remain with CB. CB should contact issuing bank advising it that on [date] the documents were collected by the courier service and on [date] they have been returned to the nominated bank as the courier service is unable to deliver them and seek new routing instructions for the documents.

Other considerations applicable to scenarios (i)-(vi):

1. The responses to the various scenarios would also apply to documents are to be sent by registered airmail or similar.
2. When documents are refused by an issuing bank, the option of returning the documents to the confirming bank should only be used where delivery instructions have been requested and/or obtained from the confirming bank. This will be even more relevant where it is known that the discrepant documents will not be accepted by the applicant and that they are to be returned.
3. Honour or negotiation, where effected by the confirming bank, should be in accordance with the terms and conditions of the respective credit and the requirements of UCP 600 sub-article 15 (b).

4. An issuing bank is required to reimburse or arrange reimbursement, for a complying presentation, in accordance with the conditions stated in the respective credit.
5. Delayed payment

When documents are received by the confirming or issuing bank prior to the interruption of the bank's business, and found to be a complying presentation, payment must be timely made in accordance with the terms of the credit. Where payment is delayed due to the closure of the confirming or issuing bank's office, the issue of whether the confirming or issuing bank is liable for interest for late payment is outside the scope of UCP 600 and is to be settled between the concerned parties or according to the applicable law.

D. Interaction between the issuing bank and the applicant

This scenario relates to the delivery of the documents where a complying presentation has been made or where details of discrepancies have been advised to the applicant with a view to obtaining an acceptable waiver.

- (i) It should be noted that the delivery of documents to the applicant, by the issuing bank, is outside the scope of the UCP 600.
- (ii) An issuing bank should liaise with its customer (the applicant) to determine the best way to deliver the documents. This may, for example, involve delivery of certain documents to the customer's freight forwarder, or the carrier or its agent, to facilitate the release of the underlying goods from the customs area or port/airport facility or warehouse.
- (iii) The relationship between the customer and the issuing bank is the most important at times such as these. The customer's agreement to modify rules in the terms and conditions of its credit, identify different locations for the delivery of documents, and/or offer different solutions that will facilitate the release of goods, and/or agreeing to the acceptability of scanned, faxed or emailed documents (pending resumption of courier services) and/or the payment thereof, are paramount as it may affect the indemnity agreement with the bank.
- (iv) Any alternate solutions that are agreed between the parties, should be reflected in the customer reimbursement agreements or produced as an addendum to such agreement.
- (v) The quick turnaround of the applicant's instructions that provide an acceptable waiver to discrepancies identified in documents, will also play an important part in the flow of documents from beneficiary to applicant.

E. Other trade products

DOCUMENTARY COLLECTIONS

- (i) Collecting and presenting banks are only in a position to act from the time when they receive the collection instruction from the remitting bank. Principals and remitting banks should consider selecting a collecting or presenting bank on the basis of their close proximity to the importer so as to facilitate the obtaining of a payment or acceptance instruction and delivery of the documents.

Prior to sending any collection instruction, the remitting bank should contact the chosen collecting bank to confirm whether documents can be delivered, on what basis and to where.

A remitting bank that is not able to forward the collection instruction to a collecting bank, should revert to the principal to seek new instructions which could include sending scanned, faxed or emailed images of the documents to the collecting or presenting bank, with the original and copy documents being held by the remitting bank pending receipt of delivery details for the collecting or presenting bank, or the resumption of courier delivery. The original and copy documents will be held by the remitting bank under the responsibility of the principal.

DEMAND GUARANTEES

(i) *Delivery of a demand by the beneficiary to a guarantor*

The comments made above in respect of the “Interaction between the beneficiary and a nominated bank that has not added its confirmation, a confirming bank or the issuing bank” will equally apply here. Beneficiaries should also take note of the content of URDG 758 sub-article 14 (d).

A guarantor should examine the demand in accordance with the requirements of URDG 758 article 20 and, if the demand complies, make payment. In the event of any refusal of that demand, the guarantor is to act in accordance with URDG 758 article 24.

(ii) *Delivery of a demand by the beneficiary to a guarantor via an advising party*

URDG 758 sub-article 10 (c) states “*An advising party or a second advising party advises a guarantee without any additional representation or any undertaking whatsoever to the beneficiary.*” The advising party, therefore, has no obligation to forward a demand to the guarantor. Therefore, if the beneficiary requests the advising party to forward its demand in paper form to the guarantor, but the advising party is unable to do so, e.g., due to the courier service not being able to accept it for delivery, or to deliver it, to the guarantor, the advising party may assist the beneficiary, for example, through the initiation of a dialogue with the guarantor to seek an alternative option(s), but it does not have an obligation to do so.

(iii) *Interaction between a guarantor and a counter-guarantor*

URDG 758 article 22 will allow for the transmission of copies of a complying demand to a counter-guarantor in an electronic form e.g., scanned, faxed or emailed. A guarantor should also ensure that the counter-guarantor is advised of the details of any demand as required by article 16.

(iv) *Interaction between the counter-guarantor or guarantor and the instructing party*

URDG 758 article 22 will allow for the transmission of copies of a complying demand to an instructing party in an electronic form e.g., scanned, faxed or emailed. A counter-guarantor or guarantor should also ensure that the instructing party is advised of the details of any demand as required by article 16. Any extend or pay demands should be handled with minimal delay, and always within the timeframe set out in URDG 758 article 23, as this may help to reduce the number of demands that may need honouring.

(v) *Delayed payment*

When a demand, and any supporting documentation (if any), are received by the guarantor prior to the interruption of the guarantor’s business, and found to be a complying

presentation, payment must be timely made in accordance with the terms of the guarantee. Where payment is delayed due to the closure of the guarantor's office, the issue of whether it is liable for interest for late payment is outside the scope of URDG 758 and is to be settled between the beneficiary and guarantor or according to the applicable law.

ICC Guidance Paper on UCP600 Art. 35 Banking Commission

The ICC Banking Commission refers to the “Guidance paper on the impact of COVID-19 on trade finance transactions subject to ICC rules” that it released on 6 April 2020 and, in particular, to sections B (iii)-(v) and C (iii)-(v).

That Guidance paper is not an official publication of the ICC Banking Commission. It is a paper that the Banking Commission released in relation to the application of its rules consistent with its tradition of clarifying their proper interpretation and application when it determines that there is a need to do so.

Practitioners globally have generally indicated their agreement to the content of the above sections in the Guidance paper. Nevertheless, some doubts have been raised from a legal perspective as to whether the inability of a bank to transmit or send letters or documents in paper form between a nominated bank, confirming bank and issuing bank, in the manner required by a documentary credit, due to events such as (but not limited to) those experienced during the COVID-19 pandemic, would prevent an application of the principles set out in those sections applying a literal reading of UCP 600 article 35 which, when applicable, qualifies the requirements to forward documents set out in UCP 600 sub-articles 7 (c), 8 (c), 15 (b) and/or 15 (c).

To provide further clarity, the ICC Banking Commission issues the following Interpretative Paper

Interpretative Paper on the correct interpretation of the first paragraph of UCP 600 article 35

Article 35 of UCP 600 provides in its first paragraph:

“A bank assumes no liability or responsibility for the consequences arising out of delay, loss in transit, mutilation or other errors arising in the transmission of any messages or delivery of letters or documents, when such messages, letters or documents are transmitted or sent according to the requirements stated in the credit, or when the bank may have taken the initiative in the choice of the delivery service in the absence of such instructions in the credit.”

For the avoidance of any doubt, the ICC Banking Commission confirms that, in its true interpretation, article 35 of UCP 600 should be read also to apply to the case where the nominated bank or the confirming bank is not able to transmit or to send letters or documents in paper form (collectively “Documents”) in accordance with the requirements stated in the documentary credit because:

- the courier or postal service provider nominated in the documentary credit does not accept, collect or deliver the Documents, or
- where no courier or postal service provider has been nominated in the documentary credit, no such service provider accepts, collects or delivers the Documents at the time the nominated bank or the confirming bank is to send the Documents to the confirming bank or issuing bank,

provided that, in both cases, the nominated bank or the confirming bank has first made reasonable efforts to (a) find a courier or postal service provider that would accept or collect and thereafter deliver the Documents and (b) obtain the consent of, or instructions from, the issuing bank approving delivery in that manner.

This Interpretative Paper applies generically to all situations involving the application of UCP 600, including to documentary credits that are outstanding at the time of its publication. It does not amend Article 35 of UCP 600, but merely states its correct interpretation.

Where operational problems arise or are anticipated, it is recommended that all banks involved in the documentary credit are encouraged to liaise without delay to seek to agree on a mutually acceptable solution.

Summary of Risk-Based Capital Adequacy: Basel I, II, & III

In response to internationally expressed concern regarding the impact of off-balance sheet obligations on the safety and soundness of banks, the regulators of major financial countries, acting through the Basel Committee on Banking Supervision of the Bank of International Settlements, formulated a framework for adequate capitalization of banks, now known as “Basel I,” issued July 1988. This framework has been implemented by the central banking authorities of most financial-center countries. Therefore, the capital adequacy requirements in force in one country may differ in some regards from those put in place by other countries.

Basel I. Under Basel I, banks are expected to meet a minimum target ratio of capital-to-risk-weighted assets of 8%. Half of the capital must be in the form of Tier 1, or “core” capital, which is equity and post-tax earnings. Tier 2, or supplementary capital, consists of undisclosed reserves, debt capital instruments and subordinated debt. The risk-based capital ratio is calculated by dividing qualifying capital by total risk-weighted assets. Assets and credit equivalent amounts are assigned to one of four broad risk-weight categories (0, 20, 50, and 100%), based on the relative credit risk of the type of obligor. The currency value of the amount in each category is multiplied by the risk weight associated with that category. The resulting risk-weighted values for each of the risk categories are added together, comprising the denominator of the risk-based capital ratio. Off-balance sheet items (including letters of credit) must first be converted to a credit equivalent, calculated by multiplying the amount of the credit exposure by a credit conversion factor. Then the exposure is treated like an on-balance sheet asset. The credit conversion factors are 100% for instruments that substitute for loans, such as standby LCs and independent guarantees where the bank is covering a definite financial obligation of the applicant; 50% for transaction-related contingencies, such as performance standby LCs; and 20% for short-term, self-liquidating trade-related contingent liabilities, such as commercial LCs.

Basel II. Basel I was not designed as an all-encompassing system and, after more than a decade of experience, there was agreement that it should be refined, which resulted in Basel II. Basel II is a more comprehensive approach to capital adequacy requirements that provides banks an opportunity to analyze their lending based on specific risk ratings of each obligor rather than general risk weightings as used in Basel I. Although this approach is more complex and costly, it will lower the capital requirements for many banks. Basel II utilizes three pillars to analyze capital adequacy.

The first pillar consists of credit, operational, and market risk. Basel II allows banks to analyze credit risk with the Standardized Approach or the Internal Ratings Based (IRB) Approach. There are two levels of IRB, Foundation and Advanced, and both attempt to analyze each asset with the bank’s own assessment of the risk rating of each creditor. US banks who move to Basel II are only allowed to use the Advanced IRB Approach.

The standardized method is comparable Basel I in that it assigns three broad categories of borrowers (sovereign, bank and corporate) and the credit risk of each type is evaluated according to ratings given by external credit assessment institutions, like Moody’s and Standard and Poor’s.

The Foundation IRB Approach allows each bank to create its own Probability of Default for each asset, but must use the regulator-supplied terms for each of the Exposure at Default, Loss Given Default (LGD) and the Maturity of the asset. The LGD for off-balance sheet engagements, preset at 45%, is modified by a Credit Conversion Factor.

The Advanced IRB Approach allows the bank to calculate all the factors for each line of credit it extends, pending review by the local regulatory agency. The Advanced IRB requires 5-7 years of data (a full economic cycle) on the Probability of Default, Exposure at Default, and Loss Given Default to be able to comply with the requirements of most regulators. Sophisticated banks that already have been calculating these risks are well-positioned to use the Advanced IRB Approach. Small to mid-size banks that elect this method will have to track that data for a full economic cycle before implementing the Advanced IRB Approach.

Operational risk is a new element in Basel II, providing for an additional capital charge. It requires analysis of the risk of loss due to internal, operational processes within a bank or certain external events. There are three options for analysis of operational risk, the Basic Indicator Approach, Standardized Approach, and the Advanced Measurement Approach (AMA), but only the latter is available to US banks that implement Basel II. The Basic Indicator Approach uses the gross income of an institution as an indicator for the institution's overall exposure to operational risk. The Standardized Approach allows a bank to analyze each business unit separately for operational risk, using standardized risk indicators for each type of business unit, and then aggregates them. The Advanced Measurement Approach uses internally developed models to assess operational risk, pending review by the local regulatory agency. Under the AMA, insurance coverage is a mitigating factor to lessen the capital charge for operational risk, if it is deemed adequate by local regulators. The final element of the first pillar, market risk, focuses on the concentration of business and whether the risks are well diversified.

The second pillar of Basel II is internal supervisory review, intended to be a form of self-regulation, suggesting that bank managers should implement risk management techniques and internal controls to maintain proper levels of capital adequacy. The third pillar, market discipline, is an extensive disclosure requirement, requiring banks to demonstrate to regulators that they are adequately funded and to develop more transparent credit risk analyses.

Application to Letters of Credit. LCs are not explicitly mentioned in Basel II, however they are grouped under Credit Derivatives and off-balance sheet items. Off-balance sheet items that are direct credit substitutes, such as standby LCs covering definite financial obligations, transaction-related contingencies such as performance-related standby LCs, and self-liquidating, trade related contingencies such as commercial LCs, are converted to credit risk equivalents by multiplying the principal amount by a credit conversion factor, which is then risk-weighted based on the credit rating of the counterparty. This applies to both the issuer and confirmor.

Commercial LCs and other forms of trade finance fall under one of the new categories of specialized lending, "Commodities Finance." Trade finance debt for commercial transactions has low risk because there can be a security interest in the goods. This is accordingly given strong consideration as a mitigating factor under Basel II, as there are four different categories indicating the strength of the commodities exposure. Many parties to trade finance would otherwise have weak credit on their own, which is precisely why documentary credits are

used. Time of maturation in the IRB approach has certain minimums, but it is possible that commercial LCs will be exempt from using the mandatory minimum because they are so limited in the time outstanding.

Standby LCs are not necessarily accompanied by a security interest in goods; rather the risk may be unsecured, on the corporate entity that is the applicant or the issuer. Standbys have longer time periods of exposure and, although they are more profitable extensions of credit from the perspective of processing costs, they will be subjected to a higher capital charge, depending on the risk rating of the borrower. To take advantage of the benefits of the flexible, self-regulatory approach under Basel II it will be beneficial for banks to look for ways to secure themselves against goods and use commodities finance as a mitigating factor.

Basel III. As a result of the 2008 financial crisis, it was concluded that liquidity risk was not adequately covered by Basel II since the balance sheets of banks were not sufficient to counter the consequences of this crisis, and many banks had to seek government support. As a result, the Basel committee began work on Basel III. Basel III was intended to strengthen the Basel II rules for Balance Sheet Optimisation, requiring minimums for Capital and ratios, such as the Liquidity Coverage Ratio, Leverage Ratio, and Net Stable Funding Ratio.

Basel III set the rules for calculating these ratios using banks' balance sheets with minimums to ensure the strength of such balance sheets. Since many banks' engagements are off the balance sheet, it was thought to be necessary to establish conversion factors, called 'Credit Conversion Factors' (CCF), to integrate off balance sheet undertakings (OBUs) into the calculations of these ratios. Common examples of OBUs are Credit Default Swaps (CDS), various instruments used with Financial Markets. In addition to these exotic undertakings, they also include commercial letters of credit, standby letters of credit and demand guarantees. As originally proposed, Basel III set the CCF for the calculation of, for example, the Leverage Ratio for all OBUs at 100%.

As a result, commercial letters of credit would have the same conversion weight as, for example, CDSs for the calculation of the Leverage Ratio, which has a negative impact on this Ratio (Capital divided by total of Assets). In the opinion of the LC community, the converted OBUs for commercial letters of credit results in an unnecessarily high increase in the total of assets.

A CCF for commercial LCs of 50% or even 20% would, it was argued, be more appropriate. Indeed, payment on a commercial LC is never triggered by events such as defaults of counterparties but solely by the shipment of the underlying goods and the presentation of documents. On the other hand, other OBUs can be triggered by defaults, and the amount of the obligation can become even higher than the initial engagement due to these external circumstances. This is not the case with commercial letters of credit, and therefore the use of a CCF of 100% is distorting.

Basel III also does not recognise that commercial letters of credit have little influence on the liquidity position of a bank. Typically, the payment of most commercial LCs is "cash out - cash in", sometimes with a period of settlement of a few days, so that no extensive funding is needed unless there is a time payment or trade finance in which case the transaction would be treated as a loan.

In October 2011, after extensive lobbying by the LC Community, the Basel Committee decided that the exact maturity can be used for the calculation of RWA under Internal Ratings Based under Basel II with a minimum of one day instead of one year for trade letters of credit. Specialists have calculated that this will mean a significant decrease of about 15 to 20% of the required economic capital for trade letters of credit.

Additional advocacy by the LC Community may be required before the final implementation of the rules in 2018. Otherwise, Basel III will have a negative influence on trade volumes and pricing will increase because of the (unnecessary) extra need for Economic Capital, and it will be more difficult for trading parties all over the world to have access to these instruments

Basel II: International Convergence of Capital Measurement and Capital Standards: A Revised Framework, Comprehensive Version (BCDA) (June 2006 Revision): <http://www.bis.org/publ/bcbs188.pdf>

Basel III: Capital rules: <http://www.bis.org/publ/bcbs189.pdf>; Liquidity Rules: <http://www.bis.org/publ/bcbs188.pdf>

United Nations LC Convention

Editor's Overview

The United Nations Convention on Independent Guarantees and Standby Letters of Credit was adopted by the UN General Assembly in 1995 and became effective on 1 January 2000. As of January 2018, it had been ratified by Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, and Tunisia. It has also been signed, but not yet ratified by the United States.

The Convention was the product of five years of work by the United Nations Commission on International Trade Law. It harmonizes national laws regarding independent undertakings and bridges the laws applicable to different standby letters of credit and independent guarantees although it can be made applicable to commercial letters of credit. At the abstract level of law, it provides a framework for these different products.

Of special significance is its framing of the independence doctrine, its deference to standard international practice, and its formulation of a clear and workable standard to be applied to abusive or fraudulent drawings.

It is the only international codification of letter of credit law and, as such, deserves careful consideration even in jurisdictions where it has not yet been adopted since it provides a conceptual structure for the evolution of judge-made law which is more reliable and consistent with the international character of the letter of credit than is national case law. An Explanatory Note by the Secretariat follows. Although the English text is given here, the Convention was drafted in the six official languages of the UN, available at www.uncitral.org.

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UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STANDBY LETTERS OF CREDIT

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

(3) The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph (1) of this article.

Article 2. Undertaking

(1) For the purposes of this Convention, an

undertaking is 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 (“guarantor/issuer”) 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.

(2) The undertaking may be given:

(a) At the request or on the instruction of the customer (“principal/applicant”) of the guarantor/issuer;

(b) On the instruction of another bank, institution or person (“instructing party”) that acts at the request of the customer (“principal/applicant”) of that instructing

party; or

(c) On behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) Payment in a specified currency or unit of account;

(b) Acceptance of a bill of exchange (draft);

(c) Payment on a deferred basis;

(d) Supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not:

(a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent

guarantees to which confirmations or counter-guarantees relate); or

(b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

Article 4. Internationality of undertaking

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit.

Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "Undertaking" includes "counter-

guarantee" and "confirmation of an undertaking";

(b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";

(c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment 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 under that other undertaking has been demanded from,

or made by, the person issuing that other undertaking;

(d) "Counter-guarantor" means the person issuing a counter-guarantee;

(e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmor instead of from the guarantor/issuer, upon simple demand

or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(f) "Confirmor" means the person adding a confirmation to an undertaking;

(g) "Document" means a communication made in a form that provides a complete record thereof.

CHAPTER III. FORM AND CONTENT OF UNDERTAKING

Article 7. Issuance, form and irrevocability of undertaking

(1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(2) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

(3) From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

amendment if the amendment has previously been authorized by the beneficiary.

(3) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph (2) of article 7.

(4) An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmor of the undertaking unless such person consents to the amendment.

Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 8. Amendment

(1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the

Article 10. Assignment of proceeds

(1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph (2) of article 7, of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the undertaking.

Article 11. Cessation of right to demand payment

(1) The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph (2) of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

(2) The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent

to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph (1) of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph (1) of this article preserve any rights of the beneficiary under the undertaking.

Article 12. Expiry

The validity period of the undertaking expires:

(a) At the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an act or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an 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.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 13. Determination of rights and obligations

(1) The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking or by the provisions of this Convention, regard shall be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice.

Article 14. Standard of conduct and liability of guarantor/issuer

(1) In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

(2) A guarantor/issuer may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 15. Demand

(1) Any demand for payment under the undertaking shall be made in a form referred to in paragraph (2) of article 7 and in conformity with the terms and conditions of the undertaking.

(2) Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be

made, to the guarantor/issuer at the place where the undertaking was issued.

(3) The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 are present.

Article 16. Examination of demand and accompanying documents

(1) The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph (1) of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

(a) Examine the demand and any accompanying documents;

(b) Decide whether or not to pay;

(c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

Article 17. Payment

(1) Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(2) Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal/applicant.

no conceivable basis,

the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

(2) For the purposes of subparagraph (c) of paragraph (1) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

(3) In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph (1) of this article, the principal/applicant is entitled to provisional court measures in accordance with article 20.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 20. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the

circumstances referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19 is present, the court, on the basis of immediately available strong evidence, may:

(a) Issue a provisional order to the effect that the beneficiary does not

receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or

(b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) The court, when issuing a provisional

order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(3) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph (1) of article 19, or use of the undertaking for a criminal purpose.

CHAPTER VI. CONFLICT OF LAWS

Article 21. Choice of applicable law

The undertaking is governed by the law the choice of which is:

(a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

Article 22. Determination of applicable law

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

CHAPTER VII. FINAL CLAUSES

Article 23. Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

with the Secretary-General of the United Nations.

Article 24. Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until 11 December 1997.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited

Article 25. Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 26. Effect of declaration

(1) Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

Article 27. Reservations

No reservations may be made to this Convention.

Article 28. Entry into force

(1) This Convention enters into force on the first day of the month following the

expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph (1) of article 1.

Article 29. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December one thousand nine hundred and ninety-five, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.

Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Standby Letters of Credit*

Introduction

1. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit was adopted and opened for signature by the General Assembly by its resolution 50/48 of 11 December 1995¹. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL)².

2. The Convention is particularly designed to facilitate the use of independent guarantees and stand-by letters of credit where only one or the other of those instruments is traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and

the stand-by letter of credit. In order to emphasize the common umbrella of rules provided for both independent guarantees and stand-by letters of credit and to overcome divergences that may exist in terminology, the Convention uses the neutral term "undertaking" to refer to both types of instruments.

3. Independent undertakings covered by the Convention are basic tools of international commerce. They are used in a variety of situations. For example, they are used to secure performance of contractual obligations including construction, supply and commercial payment obligations; to secure repayment of an advance payment in the event that such repayment is required; to secure a winning bidder's obligation

* This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for informational purposes. It is not an official commentary on the Convention.

1. The draft Convention was prepared by the Working Group on International Contract Practices at its thirteenth to twenty-third sessions. (For the reports of those sessions, see the following volumes of the UNCITRAL Yearbook: Yearbook, Volume XXI: 1990 (United Nations publication, Sales No. E.91. V.6), document A/CN.9/330; Yearbook, Volume XXII: 1991 (United Nations publication, Sales No. E.93. V.2), documents A/CN.9/342 and A/CN.9/345; Yearbook, Volume XXIII: 1992 (United Nations publication, Sales No. E.94.V.7), documents A/CN.9/358 and A/CN.9/361; Yearbook, Volume XXIV: 1993 (United Nations publication, Sales No. E.94.V.16), document A/CN.9/374 and Corr.1; Yearbook, Volume XXV: 1994 (United Nations publication, Sales No. E.95.V.20), documents A/CN.9/388 and A/CN.9/391; and "Yearbook, volume XXVI: 1995" (to be issued subsequently as a United Nations sales publication), documents A/CN.9/405 and A/CN.9/408.) The deliberations of UNCITRAL on the draft Convention are reflected in the report on the work of its twenty-eighth session (1995) (Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 11-201), annex I of which contains the draft Convention as submitted by the Commission to the General Assembly.

2. UNCITRAL is an intergovernmental body of the General Assembly that prepares international commercial law instruments designed to assist the international community in modernizing and harmonizing laws dealing with international trade. Other legal instruments prepared by UNCITRAL include the following: United Nations Convention on Contracts for the International Sale of Goods (Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March-11 April 1980 (United Nations publication, Sales No. E.82.V.5), part I); Convention on the Limitation Period in the International Sale of Goods, 1974 (New York) (Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods, New York, 20 May-14 June 1974 (United Nations publication, Sales No. E.74.V.8), part I); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (Official Records of the United Nations Conference on the Carriage of Goods by Sea, Hamburg, 6-31 March 1978 (United Nations publication, Sales No. E.80.VIII.1), document A/CONF.89/13, annex I); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (A/CONF.152/13, annex); UNCITRAL Arbitration Rules (Official Records of the General Assembly, Thirty-first Session, Supplement No. 17(A/31/17), para. 57); UNCITRAL Notes on Organizing Arbitral Proceedings ("Yearbook, volume XXVII: 1996" (to be issued subsequently as a United Nations sales publication), document A/CN.9/423); UNCITRAL Conciliation Rules (Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17(A/35/17), para. 106); Model Law on International Commercial Arbitration (1985) (Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17, annex I); United Nations Convention on International Bills of Exchange and International Promissory Notes (General Assembly resolution 43/165, annex, of 9 December 1988); Model Law on International Credit Transfers (1992) (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17(A/47/17); annex I); UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) (Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1), annex I); and UNCITRAL Model Law on Electronic Commerce (Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), annex I).

to enter into a procurement contract; to ensure reimbursement of payment under another undertaking; to support issuance of commercial letters of credit and insurance coverage; and to enhance creditworthiness of public and private borrowers. Yet familiarity with one or the other instrument covered by the Convention is not universal; there is an absence of legislative provisions dealing with them, practices concerning the two types of instruments have differed in certain respects, and important questions confronting users, practitioners and courts in the daily life of these instruments are beyond the power of the parties to settle contractually.

4. By establishing a harmonized set of rules for the two types of instruments covered, the Convention will provide greater legal certainty in their use for day-to-day commercial transactions, as well as marshal credit for public borrowers. Also, by making a single legal regime available to both independent guarantees and stand-by letters of credit, the Convention will facilitate the issuance of both instruments in combination with each other, for example, the issuance of a stand-by letter of credit to support the issuance of a guarantee, or the reverse case. The Convention will further facilitate “syndications” of lenders, by allowing them to combine more easily both types of instruments. Lenders participating in a syndication can spread credit risk among themselves, which enables them to extend larger volumes of credit.

5. The Convention gives legislative support to the autonomy of the parties to apply agreed rules of practice such as the Uniform Customs and Practice for Documentary Credits (UCP), formulated by the International Chamber of Commerce (ICC), or other rules that may evolve to deal specifically with stand-by letters of credit, and the Uniform Rules for Demand Guarantees (URDG, also formulated by ICC). In addition to being essentially consistent with the solutions found in rules of practice, the Convention supplements their

operation by dealing with issues beyond the scope of such rules. It does so in particular regarding the question of fraudulent or abusive demands for payment and judicial remedies in such instances. Furthermore, the deference of the Convention to the specific terms of independent guarantees and stand-by letters of credit, including any rules of practice incorporated therein, enables the Convention to work in tandem with rules of practice such as UCP and URDG.

6. It should be noted that, strictly speaking, an independent guarantee or stand-by letter of credit is an undertaking given to a beneficiary. Accordingly, the focus of the Convention is on the relationship between the guarantor (in the case of an independent guarantee) or the issuer (in the case of a stand-by letter of credit) (hereinafter referred to as “guarantor/issuer”) and the beneficiary. The relationship between the guarantor/issuer and its customer (the principal, in the case of an independent guarantee, or the applicant, in the case of a stand-by letter of credit, hereinafter referred to as “principal/applicant”) largely falls outside the scope of the Convention. The same may be said of the relationship between a guarantor/issuer and its instructing party (the instructing party being, for example, a bank, requesting, on behalf of its customer, the guarantor/issuer to issue an independent guarantee).

7. Provided below is a summary of the main features and provisions of the Convention.

I. SCOPE OF APPLICATION

A. Types of instruments covered

8. The scope of application of the Convention is confined to instruments of the type understood in practice as independent guarantees (referred to as, e.g. “demand”, “first demand”, “simple demand” or “bank” guarantees) or stand-by letters of credit (article 2(1)). Those instruments can be covered by the umbrella of the Convention

because they share a wide area of common use. Both types of instruments, which are payable upon presentation of any stipulated documents, are used to secure against the possibility that some contingency may occur (e.g. a breach of a contract). It may be noted that another major use in particular of stand-by letters of credit is as an instrument to effectuate payment of mature indebtedness (“financial” or “direct pay” stand-by letters of credit).

9. In the undertakings covered by the Convention the guarantor/issuer promises to pay the beneficiary upon a demand for payment. The demand may, depending upon the terms of the undertaking, be either a “simple” demand or one having to be accompanied by the other documents called for in the guarantee or stand-by letter of credit. The guarantor/issuer’s obligation to pay is triggered by the presentation of a demand for payment in the form, and with any supporting documents, as may be required by the independent guarantee or stand-by letter of credit. The guarantor/issuer is not called on to investigate the underlying transaction, but is merely to determine whether the documentary demand for payment conforms on its face to the terms of the guarantee or stand-by letter of credit. Because of this characteristic the instruments covered by the Convention are referred to commonly as being “independent” and “documentary” in nature.

10. Reflecting practice, various types of scenarios are envisaged in which an undertaking may be given, including at the request of the customer (“principal/applicant”), on the instruction of another entity or person (“instructing party”) acting at the request of the customer of the instructing party, or on behalf of the guarantor/issuer itself (article 2(2)).

11. Full freedom is given to the parties to exclude completely the coverage of the Convention (article 1), with the result that another law becomes applicable. Since the Convention, if it is applicable, is to a large

extent suppletive rather than mandatory, wide breadth is given to exclude or alter the rules of the Convention in any given case.

B. Coverage of counter-guarantees and confirmations

12. The Convention is designed to include coverage of the “counter-guarantee”. A counter-guarantee is defined in the Convention (article 6(c)) in the same essential terms as the basic notion of “undertaking”, namely, as an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking (counter-guarantee).

13. Apart from this general treatment of counter-guarantees as “undertakings”, the Convention provides a specific provision on counter-guarantees in the context of fraudulent or abusive demands for payment; in that context counter-guarantees may raise questions distinct from those raised by other undertakings covered by the Convention (see paragraph 48, below).

14. The Convention also includes in its scope confirmations of undertakings, i.e. an undertaking added to that of, and authorized by, the guarantor/issuer. A confirmation gives the beneficiary an option of demanding payment from the confirmer as an alternative to demanding payment from the guarantor/issuer. By requiring authorization of the guarantor/issuer, the Convention does not recognize as confirmations “silent” confirmations, i.e. confirmations added without the assent of the guarantor/issuer.

C. Instruments outside scope of Convention

15. The Convention does not apply to “accessory” or “conditional” guarantees, i.e. guarantees in which the payment obligation of the guarantor involves more than the mere

examination of a documentary demand for payment. Thus, the Convention does not annul or affect such other instruments in any way, nor does it regulate or discourage their use in any way. Whether it would be preferable to use in any given case an independent undertaking of the type covered by the Convention, or another type of instrument, would depend on the commercial circumstances at play and the particular interests of the parties involved.

16. Letters of credit other than stand-by letters of credit are not covered by the Convention. However, the Convention does recognize a right of parties to international letters of credit other than stand-by letters of credit to "opt into" the Convention (article 1(2)). That provision has been included in particular because the Convention provides a set of rules that parties to commercial letters of credit may wish in their own judgement to take advantage of, in view of the broad common ground between commercial and stand-by letters of credit, and in view of the occasional difficulties in determining whether a letter of credit is of a stand-by or commercial variety.

D. Definition of "independence"

17. While it is widely recognized that undertakings of the type covered by the Convention are "independent", there has been a lack of uniformity internationally in the understanding and recognition of that essential characteristic. The Convention will promote such uniformity by providing a definition of "independence" (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.

18. In addition, to fall within the scope

of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the "sphere of operations" of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator.

E. "Documentary" character of undertakings covered

19. As an adjunct to being "independent" from the underlying transaction, the undertakings covered by the Convention possess a "documentary" character. This means that the duties of the guarantor/issuer when faced with a demand for payment are limited to examining the demand for payment and any supporting documents to ascertain whether the demand and other documents submitted conform "facially" with what is called for under the terms of the independent guarantee or stand-by letter of credit. The effect of this rule is that undertakings possessing "non-documentary conditions" are outside the scope of the Convention. The only conditions which would not have to be documentary in nature would relate to acts or events within the sphere of operations of the guarantor/issuer. A simple example of the latter would be a determination by the guarantor/issuer as to whether a required monetary deposit had been made in a designated account maintained with that guarantor/issuer.

F. Definition of internationality

20. The Convention limits its application to undertakings that are international. Internationality is determined on the basis of the places of business, as specified in the undertaking, of any two of the following

being in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmor (article 4(1)). Special rules are provided for the case of an undertaking listing more than one place of business for a party, as well as for the case of a party not having a “place of business” as such, but only a habitual residence (article 4(2)).

G. Connecting factors for application of the Convention

21. The Convention applies to international undertakings in either one of two ways. The first way is linked to the location of the guarantor/issuer in a State party to the Convention (“Contracting State”) (article 1(1)(a)). The second way in which the Convention applies is if the rules of private international law lead to the application of the law of a Contracting State (article 1(1)(b)).

22. The Convention provides an additional layer of harmonization of law in this field, in that its chapter VI (Conflict of laws, articles 21 and 22) supplies the rules to be followed by courts of Contracting States in identifying in any given case the law applicable to an independent guarantee or a stand-by letter of credit. Those rules apply whether or not in a particular case it turns out that the Convention is the applicable substantive law for the independent guarantee or stand-by letter of credit in question (see paragraphs 52 and 53, below).

II. INTERPRETATION

23. The Convention contains a general rule that interpretation of the Convention should be with a view to its international character and the need to promote uniformity in its application (article 5). In addition, interpretation is to have regard for the observance of good faith in international practice. Abstracts of any court decisions or arbitral awards applying and interpreting a provision of the Convention will be included

in the case collection system called case law on UNCITRAL texts (CLOUD).

III. FORM AND CONTENT OF UNDERTAKING

24. The Convention provides rules on several aspects of the form and content of undertakings, as summarized below.

A. Issuance

25. On the question of the point of time and place of issuance (i.e. when and where the obligations of the guarantor/issuer to the beneficiary become operative), the Convention promotes certainty in an area traditionally of some uncertainty owing to the existence of differing notions. The Convention rule is that issuance occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer (e.g. when it is sent to the beneficiary) (article 7(1)). In addition, the Convention defines issuance in terms of its practical effect. Once issued, the undertaking is available for payment in accordance with its terms and is irrevocable.

26. As is customary in legal texts of UNCITRAL, the Convention establishes a flexible and forward-looking form requirement for issuance. By requiring a form that preserves a complete record of the text of the undertaking, rather than referring to “written” form, the Convention accommodates issuance in a non-paper-based medium (e.g. by means of electronic data interchange). It does so by referring to issuance in any form that preserves a complete record of the text of the undertaking and provides a generally acceptable or specifically agreed means of authentication (article 7(2)).

27. The Convention does not deal with the question of capacity to issue undertakings (i.e. who is permitted to be a guarantor/issuer). That question, which raises regulatory or other legal implications that differ from country to country, is left to national law.

B. Amendment

28. Legislative recognition is given by the Convention to the rule of practice that amendment of an undertaking requires acceptance by the beneficiary in order to take effect, unless it is otherwise stipulated (article 8(3)). The Convention takes cognizance of the possibility that an amendment might be authorized in advance by the beneficiary. In such cases, the amendment takes effect upon issuance (article 8(2)).

29. In one of the few provisions of the Convention that directly addresses the relationship between the principal/applicant and the guarantor/issuer, it is made clear that an amendment has no effect on the rights and obligations of the principal/applicant, or for that matter of an instructing party or of a confirmor, unless such other person consents to the amendment (article 8(4)).

C. Transfer and assignment

30. The Convention reflects the distinction drawn in practice between, on the one hand, transfer to another person of the original beneficiary's right to demand payment and, on the other hand, assignment of the proceeds of the undertaking, if payment is made. In the case of assignment of proceeds, as contrasted with transfer, the right to demand payment remains with the original beneficiary, the assignee being given only the right to receive the proceeds of payment if such payment occurs.

31. Regarding transfer, the Convention endorses the dual requirement, found in UCP, that the undertaking itself must state that it is transferable, and that, in addition, any actual transfer must be consented to by the guarantor/issuer (article 9). The rationale is that a change in the person who is to present the demand for payment and any accompanying documents may increase the risk assumed by the guarantor/issuer (e.g. if the guarantor/issuer would feel that the proposed transferee was less reliable or familiar than the originally designated

beneficiary). For that reason guarantor/issuers are given the opportunity to consent to any given transfer.

32. Regarding assignment of proceeds, the beneficiary of the undertaking may, unless otherwise stipulated in the undertaking or elsewhere agreed, assign the proceeds (article 10(1)). If the beneficiary assigns the proceeds and if the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, payment to the assignee discharges the obligor, to the extent of its payment, from liability under the undertaking (article 10(2)).

D. Cessation of right to demand payment

33. The Convention gives legislative effect to notions of cessation of the right to demand payment that are widely followed in practice, though not yet universally recognized in national laws or judicial precedents. Under the Convention (article 11), the events that trigger cessation include: a statement by the beneficiary releasing the guarantor/issuer; a termination of the undertaking agreed by the guarantor/ issuer; full payment of the amount stipulated in the undertaking, unless the undertaking provided for automatic renewal or increase of the amount available; expiry of the validity period of the undertaking. By affirming that the presentation of the demand for payment has to occur prior to the expiry of the undertaking, the Convention will help to overcome any remaining uncertainty as to that question.

34. A degree of uncertainty still surrounds, in some jurisdictions, the question of the effect of retention of the instrument embodying the undertaking as regards definitive cessation of the right to demand payment. The Convention, in line with what is regarded widely as the best practice, provides that in no case does retention of the instrument prolong the right to demand payment if the amount available has

already been paid or if the undertaking has expired (article 11(2)). Apart from those two contexts, the parties remain free to stipulate a requirement of return of the undertaking in order to terminate the right to demand payment.

E. Expiry

35. The Convention provides (article 12) that the validity period of an undertaking expires in the following ways: at the expiry date, which may be a fixed date or the last day of a fixed period stipulated in the undertaking; if expiry is linked to the occurrence of an act or event, upon presentation of the document called for in the undertaking to indicate the occurrence of the act or event, or, if no such document is called for, by presentation by the beneficiary of certification for that purpose; or after six years from issuance, if no expiry date has been stipulated or if a stipulated expiry act or event has not occurred.

IV. RIGHTS, OBLIGATIONS AND DEFENCES

A. Determination of rights and obligations

36. The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions of the undertaking (article 13(1)). Express reference is made in the Convention to rules of practice, general conditions or usages (e.g. UCP, URDG) to which the undertaking is specifically made subject. This is in line with a main purpose of the Convention, to give legislative support to the right of commercial parties to incorporate such rules of practice, conditions or usages. That approach ensures that the Convention will remain a living instrument, sensitive to developments in practice, including future revisions of rules of practice such as UCP and URDG and the development of other international rules of practice.

37. The flexible linking of the Convention to the needs and evolving usages and standards of commercial practice is also referred to elsewhere in the Convention. For example, in the interpretation of the terms and conditions of an undertaking and in settling questions not addressed by the Convention, regard is to be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice (article 13(2)).

38. Similarly, the standard of conduct of the guarantor/issuer, based on good faith and the exercise of reasonable care, is to be defined by reference to generally accepted standards of international practice of independent guarantees and stand-by letters of credit (article 14(1)). While the Convention leaves open the possibility of stipulating a standard somewhat lower than the generally applicable standard of care, it clearly prohibits any exemption of the guarantor from liability for lack of good faith or gross negligence.

B. Demand by beneficiary

39. As regards the beneficiary, the process of demanding and obtaining payment involves presenting a demand for payment and any accompanying documents in accordance with the terms of the undertaking. In view of the documentary character of the demand, the form requirements of the Convention applicable to the undertaking itself (see paragraph 27, above) apply to the demand (article 15(1)). The place of presentation is at the counters of the guarantor/issuer at the place of issuance, unless some other place or person is stipulated for payment purposes (article 15(2)).

40. In addition, the Convention provides (article 15(3)) that by virtue of making a demand the beneficiary implicitly certifies that the demand is not made in bad faith and that none of the circumstances exist that would justify non-payment in accordance with the provisions of the Convention on fraudulent or abusive demands for payment

(see paragraphs 47 and 48, below).

C. Examination of demand and payment

41. The duty of the guarantor/issuer is to examine the demand and any accompanying documents to determine whether they are in facial conformity with the terms and conditions of the undertaking and consistent with one another (article 16(1)). That determination is to have due regard to the applicable standard of international practice, a formulation that ensures that the Convention takes account of developments in practice as regards the notion of facial conformity.

42. In a provision expressly subject to variation by the terms of the undertaking, the guarantor/issuer is given a “reasonable time”, up to a maximum of seven days, to examine the demand and to decide whether to pay (article 16(2)). Thus, what is deemed a “reasonable time” may well be less than seven days, but in no case more than seven days, unless some different period is stipulated. This takes into account that the time needed for examination of the demand would depend upon the nature of each case (e.g. volume and complexity of documents to be examined).

43. If a decision is taken not to pay, the guarantor/issuer is required to promptly so notify the beneficiary, indicating the grounds therefore (article 16(2)). If the demand is determined to be conforming, payment is to be made promptly, or at any later time stipulated in the undertaking.

44. The Convention recognizes that the guarantor/issuer may, unless the undertaking provides otherwise, discharge the payment obligation by exercising a right of set-off that is generally available under the applicable law (article 18). However, the Convention does not recognize any such right of set-off with respect to claims assigned by the principal/applicant or instructing party, as such a possibility would risk undermining the purpose of the undertaking.

D. Fraudulent or abusive demands for payment

45. A main purpose of the Convention is to establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees and stand-by letters of credit. That has been a particularly troublesome and disruptive area in practice because allegations of fraud have a tendency to arise when there is a dispute as to the performance of an underlying contractual obligation. That difficulty and the resulting uncertainty have been compounded further because of the divergent notions and ways with which such allegations have been treated both by guarantor/issuers and by courts approached for provisional measures to block payment.

46. The Convention helps to ameliorate the problem by providing an internationally agreed general definition of the types of situations in which an exception to the obligation to pay against a facially compliant demand would be justified (article 19(1)). The definition encompasses fact patterns covered in different legal systems by notions such as “fraud” or “abuse of right”. The definition refers to situations in which it is manifest and clear that any document is not genuine or has been falsified, that no payment is due on the basis asserted in the demand or that the demand has no conceivable basis.

47. For additional precision, the Convention provides illustrative examples of cases in which a demand would be deemed to have no conceivable basis (article 19(2)); e.g. the underlying obligation has been undoubtedly fulfilled to the satisfaction of beneficiary; the fulfilment of the underlying obligation clearly has been prevented by wilful misconduct of beneficiary; in the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the

counter-guarantee relates).

48. The Convention, by entitling but not imposing a duty on the guarantor/issuer, as against the beneficiary, to refuse payment when confronted with fraud or abuse (article 19(1)), strikes a balance between different interests and considerations at play. By allowing discretion to the guarantor/issuer acting in good faith, the Convention is sensitive to the concern of guarantor/issuers over preserving the commercial reliability of undertakings as promises that are independent from underlying transactions.

49. At the same time, the Convention affirms that the principal/applicant, in the situations referred to, is entitled to provisional court measures to block payment (article 19(3)). This recognizes that it is the proper role of courts, and not of guarantors/issuers, to investigate the facts of underlying transactions. Furthermore, the Convention does not annul any rights that the principal/applicant may have in accordance with its contractual relationship with the guarantor/issuer to avoid reimbursement of payment made in contravention of the terms of that contractual relationship.

V. PROVISIONAL COURT MEASURES

50. Apart from entitling a principal/applicant or an instructing party to provisional court measures blocking payment or freezing proceeds of an undertaking in the types of cases referred to above, the Convention establishes a standard of proof to be met in order to obtain such provisional measures (article 20(1)). That standard refers to ordering of provisional measures on the basis of immediately available strong evidence of a high probability that the fraudulent or abusive circumstances are present. Reference is also made to consideration of whether the principal/applicant would be likely to suffer serious harm in the absence of the provisional measures and to the

possibility of the court requiring security to be posted.

51. While authorizing provisional court measures in the cases concerned, the Convention minimizes the use of judicial procedures to interfere in undertakings by limiting the granting of provisional court measures to those types of cases, with one additional type of case. Provisional court orders blocking payment or freezing proceeds are also authorized in the case of use of an undertaking for a criminal purpose (article 20(3)).

VI. CONFLICT OF LAWS

52. As noted above (paragraph 22), the Convention contains in chapter VI conflict of law rules to be applied by the courts of Contracting States in order to identify the law applicable to international undertakings as defined in article 2, regardless of whether in any given case the Convention itself would prove to be the applicable law. Those conflict of laws rules recognize a choice of law stipulated in the undertaking or demonstrated by its terms or conditions, or agreed elsewhere by the guarantor/issuer and the beneficiary (article 21).

53. In the absence of a choice of law as described above, the Convention provides for application to the undertaking of the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued (article 22).

VII. FINAL CLAUSES

54. The final clauses (articles 23-29) contain the usual provisions relating to the Secretary-General of the United Nations as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that have signed it by 11 December 1997, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

55. In view of its largely suppletive character, as well as of the right of parties to exclude the Convention in its entirety, no reservations are permitted. The Convention

enters into force one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

* * *

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For further information, see:

Byrne, James E. and Harold Burman. *Introduction to UN Convention on Independent Guarantees and Stand-by Letters of Credit*. 1997 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 26.

Byrne, James E. *Domestic and International Harmonization of Letters of Credit: UCP, UCC Article 5, and the UNCITRAL Convention—An Evaluation at Midstream*. 1993 COMMERCIAL LAW ANNUAL 325.

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UNCITRAL Model Law on Electronic Transferable Records (MLETR)

The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Electronic Transferable Records (MLETR) on 13 July 2017. On 7 December 2017, the UN General Assembly adopted a resolution acknowledging MLETR and requested the Secretary-General to publish, along with an explanatory note, the model law in the 6 official languages of the United Nations to be broadly distributed to Governments and other interested parties. The intent of the MLETR is to provide a legal mechanism for the use of electronic transferable records for domestic and cross-border transactions so as to be functionally equivalent to transferable documents or instruments (e.g. Bills of lading, warehouse receipts, drafts or bills of exchange and promissory notes, among others). The model law provides that an electronic record may obtain functional equivalence to a transferable document where the electronic record contains the requisite information of such a document and reliable means are used to (1) identify the electronic record as an electronic transferable record; (2) render the electronic record with the ability to be subject to control from its time of creation until it ceases to have effect or validity; and (3) ensure that the integrity of the record is maintained. The MLETR handles the concept of control, fundamental to the function equivalence of possession, by requiring that a reliable method is used to (1) establish exclusive control of the electronic transferable document for the duration of its validity by a person; and (2) identify the person in control as such. Helpfully, the MLETR also provides an extensive Article-by-article Commentary to extrapolate on and clarify each provision of the model law as well as to explain MLETR's relationship to other UN Model Laws such as the Model Law on Electronic Commerce and the Model Law on Electronic Signatures. As of February 2022, Bahrain, Belize, the Republic of Kiribati, Paraguay, Singapore and the Abu Dhabi Global Market of the United Arab Emirates have adopted the MLTER. To learn more on this model law and others, visit the UNCITRAL website at <https://uncitral.un.org/en>.

UNCITRAL Model Law on Electronic Transferable Records (MLETR)

Chapter I. General provisions

Article 1. Scope of application

1. This Law applies to electronic transferable records.
2. Other than as provided for in this Law, nothing in this Law affects the application to an electronic transferable record of any rule of law governing a transferable document or instrument including any rule of law applicable to consumer protection.
3. This Law does not apply to securities, such as shares and bonds, and other investment instruments, and to [...].¹

Article 2. Definitions

For the purposes of this Law:

“*Electronic record*” means information generated, communicated, received or stored by electronic means, including, where appropriate, all information logically associated with or otherwise linked together so as to become part of the record, whether generated contemporaneously or not;

“*Electronic transferable record*” is an electronic record that complies with the requirements of article 10;

“*Transferable document or instrument*” means a document or instrument issued on paper that entitles the holder to claim the performance of the obligation indicated in the document or instrument and to transfer

the right to performance of the obligation indicated in the document or instrument through the transfer of that document or instrument.

Article 3. Interpretation

1. This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin and to the need to promote uniformity in its application.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 4. Party autonomy and privity of contract

1. The parties may derogate from or vary by agreement the following provisions of this Law: [...].²
2. Such an agreement does not affect the rights of any person that is not a party to that agreement.

Article 5. Information requirements

Nothing in this Law affects the application of any rule of law that may

1. The enacting jurisdiction may consider including a reference to: (a) documents and instruments that may be considered transferable, but that should not fall under the scope of the Model Law; (b) documents and instruments falling under the scope of the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 1931); and (c) electronic transferable records existing only in electronic form.
2. The enacting jurisdiction may consider which provisions of the Model Law, if any, the parties may derogate from or vary by agreement.

require a person to disclose its identity, place of business or other information, or relieves a person from the legal consequences of making inaccurate, incomplete or false statements in that regard.

Article 6. Additional information in electronic transferable records

Nothing in this Law precludes the inclusion of information in an electronic transferable record in addition to that contained in a transferable document or instrument.

Article 7. Legal recognition of an electronic transferable record

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

2. Nothing in this Law requires a person to use an electronic transferable record without that person's consent.

3. The consent of a person to use an electronic transferable record may be inferred from the person's conduct.

Chapter II. Provisions on functional equivalence

Article 8. Writing

Where the law requires that information should be in writing, that requirement is met with respect to an electronic transferable record if the information contained therein is accessible so as to be usable for subsequent reference.

Article 9. Signature

Where the law requires or permits a signature of a person, that requirement is met by an electronic transferable record if a reliable method is used to identify that person and to indicate that person's intention in respect of the information contained in the electronic transferable record.

Article 10. Transferable documents or instruments

1. Where the law requires a transferable document or instrument, that requirement is met by an electronic record if:

(a) The electronic record contains the information that would be required to be contained in a transferable document or

instrument; and

(b) A reliable method is used:

(i) To identify that electronic record as the electronic transferable record;

(ii) To render that electronic record capable of being subject to control from its creation until it ceases to have any effect or validity; and

(iii) To retain the integrity of that electronic record.

2. The criterion for assessing integrity shall be whether information contained in the electronic transferable record, including any authorized change that arises from its creation until it ceases to have any effect or validity, has remained complete and unaltered apart from any change which arises in the normal course of communication, storage and display.

Article 11. Control

1. Where the law requires or permits the possession of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used:

(a) To establish exclusive control of that electronic transferable record by a person; and

- (b) To identify that person as the person in control.
2. Where the law requires or permits transfer of possession of a transferable

document or instrument, that requirement is met with respect to an electronic transferable record through the transfer of control over the electronic transferable record.

Chapter III. Use of electronic transferable records

Article 12. General reliability standard

For the purposes of articles 9, 10, 11, 13, 16, 17 and 18, the method referred to shall be:

(a) As reliable as appropriate for the fulfilment of the function for which the method is being used, in the light of all relevant circumstances, which may include:

- (i) Any operational rules relevant to the assessment of reliability;
 - (ii) The assurance of data integrity;
 - (iii) The ability to prevent unauthorized access to and use of the system;
 - (iv) The security of hardware and software;
 - (v) The regularity and extent of audit by an independent body;
 - (vi) The existence of a declaration by a supervisory body, an accreditation body or a voluntary scheme regarding the reliability of the method;
 - (vii) Any applicable industry standard; or
- (b) Proven in fact to have fulfilled the function by itself or together with further evidence.

Article 13. Indication of time and place in electronic transferable records

Where the law requires or permits the indication of time or place with respect to a transferable document or instrument, that requirement is met if a reliable method is used to indicate that time or place with respect to an electronic transferable record.

Article 14. Place of business

1. A location is not a place of business merely because that is:

(a) Where equipment and technology supporting an information system used by a party in connection with electronic transferable records are located; or

(b) Where the information system may be accessed by other parties.

2. The sole fact that a party makes use of an electronic address or other element of an information system connected to a specific country does not create a presumption that its place of business is located in that country.

Article 15. Endorsement

Where the law requires or permits the endorsement in any form of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if the information required for the endorsement is included in the electronic transferable record and that information is compliant with the requirements set forth in articles 8 and 9.

Article 16. Amendment

Where the law requires or permits the amendment of a transferable document or instrument, that requirement is met with respect to an electronic transferable record if a reliable method is used for amendment of information in the electronic transferable record so that the amended information is identified as such.

Article 17. Replacement of a transferable document or instrument with an electronic transferable record

1. An electronic transferable record may replace a transferable document or instrument if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the electronic transferable record.

3. Upon issuance of the electronic transferable record in accordance with paragraphs 1 and 2, the transferable document or instrument shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

Article 18. Replacement of an electronic transferable record with a transferable document or instrument

1. A transferable document or instrument may replace an electronic transferable record if a reliable method for the change of medium is used.

2. For the change of medium to take effect, a statement indicating a change of medium shall be inserted in the transferable document or instrument.

3. Upon issuance of the transferable document or instrument in accordance with paragraphs 1 and 2, the electronic transferable record shall be made inoperative and ceases to have any effect or validity.

4. A change of medium in accordance with paragraphs 1 and 2 shall not affect the rights and obligations of the parties.

Chapter IV. Cross-border recognition of electronic transferable records

Article 19. Non-discrimination of foreign electronic transferable records

1. An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it was issued or used abroad.

2. Nothing in this Law affects the application to electronic transferable records of rules of private international law governing a transferable document or instrument.

Explanatory Note to the UNCITRAL Model Law on Electronic Transferable Records

I. Introduction

A. Purpose of this explanatory note

1. In preparing and adopting the UNCITRAL Model Law on Electronic Transferable Records (hereinafter referred to as “the Model Law”), the United Nations Commission on International Trade Law (UNCITRAL) was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information were provided. This Explanatory Note, drawn from the *travaux préparatoires* of the Model Law, is intended to be helpful to legislators, to providers and users of services related to electronic transferable records, as well as to academics.

2. In the preparation of the Model Law, it was assumed that it would be accompanied by explanatory materials. For example, it was decided in respect of certain issues not to settle them in the Model Law but to address them in the explanatory materials so as to provide guidance to States enacting the Model Law. Such information might also assist States in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

B. Objectives

3. The increased use of electronic means improves the efficiency of commercial activities, including by allowing reuse and analysis of data, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development both

domestically and internationally. However, certainty is needed as to the legal value of the use of those electronic means. In order to address that need, UNCITRAL has prepared a number of texts aimed at removing obstacles to the use of electronic means in commercial activities such as the UNCITRAL Model Law on Electronic Commerce,¹ the UNCITRAL Model Law on Electronic Signatures² and the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”).³ Those texts have been adopted in a large number of jurisdictions so that a uniform law of electronic commerce has effectively been established.

4. Transferable documents and instruments are essential commercial tools. Their availability in electronic form may be greatly beneficial for facilitating electronic commerce in international trade as this could allow for their faster and more secure transmission, among other benefits. Electronic equivalents of transferable documents and instruments may be particularly relevant for certain business areas such as transport and logistics, and finance. The introduction of electronic transferable records may also offer an opportunity to review existing commercial practices and introduce new ones. Moreover, a fully paperless trade environment may not be established without their use. At the same time, the dematerialization of transferable documents and instruments may pose peculiar challenges given the established practice of employing various paper-

1. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (New York, 1999), United Nations Publication, Sales No. E.99.V.4.

2. UNCITRAL Model Law on Electronic Signatures with Guide to Enactment (New York, 2002), United Nations Publication, Sales No. E.02.V.8.

3. General Assembly resolution 60/21, annex.

based precautions in order to reduce risks associated with the unauthorized duplication of those documents and instruments.

5. UNCITRAL dealt with the subject of transferable documents and instruments in electronic forms before the adoption of the Model Law. Article 14, paragraph 3, of the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”)⁴ may be interpreted as implying the possible use of electronic bills of lading. Articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce provide rules on actions related to contracts of carriage of goods and to transport documents that enable the dematerialization, among others, of documents incorporating a claim to delivery of goods.⁵ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”)⁶ devotes a chapter to electronic transport records. In particular, article 8 of the Rotterdam Rules provides for the use and effect of electronic transport records, article 9 indicates the procedures for the use of negotiable electronic transport records and article 10 sets out rules for the replacement of negotiable transport documents with negotiable electronic transport records and vice versa. Moreover, the Rotterdam Rules define both the notion of electronic transport record (article 1, paragraph 18)⁷ and that of negotiable electronic transport record (article 1, paragraph 19).⁸

6. Unlike those instruments, the Electronic Communications Convention excludes from its scope of application “bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money” (article 2, paragraph 2). That exclusion was based on the view that finding a solution to the challenges posed by the potential consequences of unauthorized duplication of those documents and instruments required a combination of legal, technological and business solutions, which had not yet been fully developed and tested.⁹

7. In 2011, when the Commission decided to undertake work in the field of electronic transferable records, support was expressed for that work in light of benefits that the formulation of uniform legal standards in that field could bring to the promotion of electronic communications in international trade generally as well as to the implementation of the Rotterdam Rules and to other areas of transport business specifically.¹⁰ UNCITRAL decided to prepare a model law to enable the use of electronic transferable records on the basis of their functional equivalence with transferable documents or instruments, building upon the fundamental principles underlying existing UNCITRAL texts in the area of electronic commerce, namely non-

4. United Nations, *Treaty Series*, vol. 1695, No. 29215, p. 3.

5. Those provisions have been enacted in national laws. However, details on their application in business practice are not available.

6. General Assembly resolution 63/122, annex.

7. Rotterdam Rules, article 1, paragraph 18: “Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that: (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and (b) Evidences or contains a con-tract of carriage.

8. Ibid., article 1, paragraph 19: “Negotiable electronic transport record” means an electronic transport record: (a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and (b) The use of which meets the requirements of article 9, paragraph 1.

9. *Official Records of the General Assembly*, Sixtieth Session, Supplement No. 17 (A/60/17), para. 27.

10. Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 235.

discrimination against the use of electronic communications, functional equivalence and technological neutrality.

8. Facilitating the cross-border use of electronic transferable records is of significant practical importance. In that respect, it should be noted that national legislation predating the adoption of the Model Law and dealing with specific types of electronic transferable records did not address cross-border aspects. Moreover, to the extent that that legislation adopted specific models and technologies, the use of those models and technologies could create additional obstacles to the crossborder use of electronic transferable records. The Model Law aims at facilitating the cross-border use of transferable documents and instruments by providing not only a uniform and neutral text for adoption by all jurisdictions, but also a dedicated provision addressing cross-border aspects of electronic transferable records.

9. UNCITRAL intends to continue monitoring the technical, legal and commercial developments that underline the Model Law. It may decide, if advisable, to add new provisions to the Model Law or modify the existing ones.

C. Scope

10. The Model Law applies to electronic transferable records that are the functional equivalent of transferable documents or instruments. Transferable documents or instruments are paper-based documents or instruments that entitle the holder to claim the performance of the obligation indicated therein and that allow the transfer of the claim to that performance by transferring the document or instrument. The law of each jurisdiction will determine which documents or instruments are transferable. The Model Law does not apply to electronic transferable records existing

only in electronic form, as those records do not need a functional equivalent to operate in the electronic environment. The Model Law does not affect the medium-neutral substantive law applicable to electronic transferable records.

11. The Model Law does not aim to affect in any manner existing law applicable to transferable documents or instruments, which is referred to as “substantive law” and includes rules on private international law.

D. Structure

12. The Model Law consists of four chapters. The first chapter contains general provisions relating to the scope of application of the Model Law and to certain general principles. The second chapter contains provisions on functional equivalence. The third chapter contains provisions on the use of electronic transferable records. The fourth chapter deals with the cross-border recognition of electronic transferable records.

E. Background and drafting history

13. The possibility of future work by UNCITRAL with regard to issues of negotiability and transferability of rights in goods in an electronic environment was first mentioned at the Commission’s twenty-seventh session, in 1994,¹¹ and subsequently discussed in various sessions of the Commission and its working groups, in particular in the context of electronic commerce and transport law.¹² In that framework, two documents have dealt in depth with substantive aspects of the topic:

- (a) Document A/CN.9/WG.IV/WP.69 discussed both paper-based and electronic bills of lading and other maritime transport documents. In particular, that document provided an overview of the attempts to deal with bills of lading in the electronic

11. *Ibid.*, Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

12. *Ibid.*, Fifty-sixth Session, Supplement No. 17 (A/56/17), paras. 291-293. See also A/CN.9/484, paras. 87-93. For an historical record of previous sessions, see A/CN.9/WG.IV/WP.90, paras. 1-4.

environment, and made suggestions for model legislative provisions which were eventually adopted as articles 16 and 17 of the UNCITRAL Model Law on Electronic Commerce. Furthermore, that document contained a preliminary analysis of the conditions for establishing the functional equivalence of electronic and paper-based bills of lading. In this respect, it highlighted as a key issue the possibility of identifying with certainty the holder of the bill that would be entitled to delivery of the goods. That issue brought into focus the need to ensure the uniqueness of the electronic record incorporating the title to the goods;¹³ and

- (b) Document A/CN.9/WG.IV/WP.90 discussed in general legal issues relating to transfer of rights in tangible goods and other rights. It offered a comparative description of the methods used for the transfer of property interests in tangible property and for the perfection of security interests, and of the challenges posed by the transposition of those methods to the electronic environment. It also provided an update on efforts aimed at enabling the use of electronic means in the transfer of rights in tangible goods. With respect to documents of title and negotiable instruments, that document stressed the desirability of ensuring control over the electronic transferable record in a manner equivalent to physical possession, and suggested that a combination of a registry system and adequately secure technology could assist in addressing issues relating to

the singularity and authenticity of the electronic record.¹⁴

14. At its forty-first (2008) and forty-second (2009) sessions, the Commission received proposals from States for work on electronic transferable records.¹⁵ After preparatory work,¹⁶ the Commission mandated Working Group IV to undertake work in the field of electronic transferable records.¹⁷

15. The Working Group worked in that field from its forty-fifth session (Vienna, 10-14 October 2011) to its fifty-fourth session (Vienna, 31 October-4 November 2016).¹⁸ At its forty-seventh session (New York, 13-17 May 2013), the Working Group reached the general understanding that its work should be guided by the principles of functional equivalence and technological neutrality, and should not deal with matters governed by substantive law.¹⁹ At its fiftieth session (Vienna, 10-14 November 2014), the Working Group agreed to proceed with the preparation of a draft model law on electronic transferable records²⁰ with priority given to the preparation of provisions dealing with electronic equivalents of paper-based transferable documents or instruments.²¹ At its fifty-fourth session (Vienna, 31 October-4 November 2016), the Working Group completed its work on the preparation of a draft model law on electronic transferable records with accompanying explanatory materials. It authorized the transmission of the text (a) for comments by Governments and international organizations invited to sessions of the Working Group and (b) to the Commission for consideration at

13. A/CN.9/WG.IV/WP.69, para. 92.

14. A/CN.9/WG.IV/WP.90, paras. 35-37.

15. *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 335; and *ibid., Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 338.

16. *Ibid., Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 245-247 and 250; and *ibid., Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 232-235.

17. *Ibid., Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

18. For the reports of the Working Group on the work of those sessions, see A/CN.9/737, A/CN.9/761, A/CN.9/768, A/CN.9/797, A/CN.9/804, A/CN.9/828, A/CN.9/834, A/CN.9/863, A/CN.9/869 and A/CN.9/897.

19. A/CN.9/768, para. 14.

20. A/CN.9/828, para. 23.

21. A/CN.9/828, para. 30.

its fiftieth session, in 2017, together with any comments from Governments and international organizations.²²

16. At its forty-fifth (2012) to forty-ninth (2016) sessions, the Commission considered the progress report of the Working Group, reaffirming its mandate and endorsing its decision to prepare a model law with explanatory materials.²³ At its forty-ninth session (2016), the Commission noted that the draft model law being prepared by the Working Group focused on domestic aspects of the use of electronic transferable records equivalent to paper-based transferable documents or instruments, and that international aspects of the use of those records, as well as the use of transferable records existing only in

electronic form, would be addressed at a later stage.²⁴

17. At its fiftieth session, in 2017, the Commission had before it: (a) the report of Working Group IV (Electronic Commerce) on the work of its fifty-fourth session (Vienna, 31 October-4 November 2016);²⁵ (b) a draft model law on electronic transferable records with explanatory notes;²⁶ (c) a compilation of comments by Governments and international organizations on the draft model law and explanatory notes;²⁷ and (d) a note by the Secretariat on proposed amendments to the draft explanatory notes and additional issues for consideration by the Commission.²⁸ After deliberations, the Commission adopted the Model Law²⁹ and approved its Explanatory Note.³⁰

22. A/CN.9/897, para. 20.

23. *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 90; *ibid.*, *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 230; *ibid.*, *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 149; *ibid.*, *Seventieth Session, Supplement No. 17* (A/70/17), para. 231; and *ibid.*, *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.

24. *Ibid.*, *Seventy-first Session, Supplement No. 17* (A/71/17), para. 226.

25. A/CN.9/897.

26. A/CN.9/920.

27. A/CN.9/921 and Add.1-3.

28. A/CN.9/922.

29. *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* (A/72/17), annex I.

30. *Ibid.*, chapter III, section A.92-1-133861-4

U.S. Uniform Commercial Code

Revised Article 5 - Letters of Credit

Editor's Overview

The Uniform Commercial Code (UCC) is an integrated model law for adoption by U.S. states. Its articles address various commercial law matters including UCC Article 5 which provides a systematic framework for letters of credit. Jointly sponsored by the Uniform Law Commissioners and the American Law Institute, the UCC has been adopted in some version in all fifty U.S. states, the Commonwealth of Puerto Rico, the District of Columbia, other U.S. territories, and has been regarded by federal courts as declaratory of federal common law.

Original UCC Article 5 was the first modern statutory treatment of LCs. Although originally resisted by some bankers, it has promoted use of LCs by making the legal community familiar with their legal structure. Its most important contribution, however, was to provide a rational basis for addressing LC fraud. Despite these advantages, it was in many respects irrelevant to LC practice and law.

Original UCC Article 5 came to be adopted in all U.S. states, although several, notably New York, adopted it with a non-conforming amendment that deferred to the UCP in every situation where there was overlap. After several decades, UCC Article 5 was revised with the support and cooperation of U.S. LC bankers and formally released in 1995. As of 2012, it has been adopted by the District of Columbia, the U.S. Virgin Islands, and all U.S. states. A table of adoptions with the effective date and relevant citation in the state code is contained in this book. The revision was aligned to the UN LC Convention (contained in this book), harmonized with LC practice, and addresses important legal issues in a realistic fashion.

Because state legislatures can vary their version through additions, changes, and non-conforming amendments, the actual text of the applicable state should be examined instead of relying on the model text. Some amendments have resulted in substantive changes in the Code while others do not affect the legal meaning of the Code.

Listed after each section are only the substantive amendments that actually change or that may be interpreted to change the meaning of Revised UCC Article 5. Non-substantive changes are not included. Some examples of non-substantive changes that are not included here are:

- *Changes that result from the organizational and numbering principles of the state statutory scheme. For example, Nevada's version of UCC 5-108(b)(1) is Nev. Rev. Stat. 104.5108(2)(a). Where a different term for "Article" is used (e.g. "Chapter", "Division"), the difference is noted.*
- *Minor variations in the text that apparently are inserted for clarification without intending to change the substance of the provision. For example, Alaska varied Section 5-108(b)(1) from "to honor" to "to honor the presentation". Since the précis of the provision refers to the presentation, "to honor" can only refer to the presentation. Therefore, the variation is not substantive.*
- *Alterations in the wording in ways that do not change the substantive meaning. For example, in UCC 5-108(c), Nevada changed the clause "if timely notice is not given" to "if notice is not given in a timely manner" in Nev. 104.5108(3). Although the wording is different, the meaning remains the same, and the variation is not substantive.*

It is, therefore, not included.

- *Changes in section titles; and*
- *Provisions regarding repeal of the prior Article 5, applicability, and savings clauses.*

Some of the general definitions in UCC Article 1 are applicable to Revised UCC Article 5 and are included here.

Revised UCC Article 9 regarding security interests in personal property which has been adopted by every state and the District of Columbia contained provisions affecting security interests in letters of credit and LC proceeds and involved further revision of Revised UCC Article 5. As part of this revision, a new provision was added to the revised model law as Section 5-118.

For an analysis of Revised UCC Article 5, see James E. Byrne, Revised Article 5: Letters of Credit, Vol. 6B Hawkland Uniform Commercial Code Series (Thomson Reuters).

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UNIFORM COMMERCIAL CODE

REVISED UCC ARTICLE 5. LETTERS OF CREDIT

1995 OFFICIAL TEXT
WITH COMMENTS

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by
THE AMERICAN LAW INSTITUTE
and
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

SECTION 5-101. SHORT TITLE. This article may be cited as Uniform Commercial Code—Letters of Credit.**Official Comment**

The Official Comment to the original Section 5-101 was a remarkably brief inaugural address. Noting that letters of credit had not been the subject of statutory enactment and that the law concerning them had been developed in the cases, the Comment stated that Article 5 was intended “within its limited scope” to set an independent theoretical frame for the further development of letters of credit. That statement addressed accurately conditions as they existed when the statement was made, nearly half a century ago. Since Article 5 was originally drafted, the use of letters of credit has expanded and developed, and the case law concerning these developments is, in some respects, discordant.

Revision of Article 5 therefore has required reappraisal both of the statutory goals and of the extent to which particular statutory provisions further or adversely affect achievement of those goals.

The statutory goal of Article 5 was originally stated to be: (1) to set a substantive theoretical frame that describes the function and legal nature of letters of credit; and (2) to preserve procedural flexibility in order to accommodate further development of the efficient use of letters of credit. A letter of credit is an idiosyncratic form of undertaking that supports performance of an obligation incurred in a separate financial, mercantile, or other transaction or arrangement. The objectives of the original and revised Article 5 are best achieved (1) 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; and (2) by preserving flexibility through variation by agreement in order to respond to and accommodate developments in custom and usage that are

not inconsistent with the essential definitions and substantive mandates of the statute. No statute can, however, prescribe the manner in which such substantive rights and duties are to be enforced or imposed without risking stultification of wholesome developments in the letter of credit mechanism. Letter of credit law should remain responsive to commercial reality and in particular to the customs and expectations of the international banking and mercantile community. Courts should read the terms of this article in a manner consistent with these customs and expectations.

The subject matter in Article 5, letters of credit, may also be governed by an international convention that is now being drafted by UNCITRAL, the draft Convention on Independent Guarantees and Standby Letters of Credit. The Uniform Customs and Practice is an international body of trade practice that is commonly adopted by international and domestic letters of credit and as such is the “law of the transaction” by agreement of the parties. Article 5 is consistent with and was influenced by the rules in the existing version of the UCP. In addition to the UCP and the international convention, other bodies of law apply to letters of credit. For example, the federal bankruptcy law applies to letters of credit with respect to applicants and beneficiaries that are in bankruptcy; regulations of the Federal Reserve Board and the Comptroller of the Currency lay out requirements for banks that issue letters of credit and describe how letters of credit are to be treated for calculating asset risk and for the purpose of loan limitations. In addition there is an array of anti-boycott and other similar laws that may affect the issuance and performance of letters of credit. All of these laws are beyond the scope of Article 5, but in certain circumstances they will override Article 5.

SECTION 5-102. DEFINITIONS.

- (a) In this article:
- (1) "Adviser" means a person who, at the request of the issuer, a confirmor, or another adviser, notifies or requests another adviser to notify the beneficiary that a letter of credit has been issued, confirmed, or amended.
 - (2) "Applicant" means a person at whose request or for whose account a letter of credit is issued. The term includes a person who requests an issuer to issue a letter of credit on behalf of another if the person making the request undertakes an obligation to reimburse the issuer.
 - (3) "Beneficiary" means a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.
 - (4) "Confirmor" means a nominated person who undertakes, at the request or with the consent of the issuer, to honor a presentation under a letter of credit issued by another.
 - (5) "Dishonor" of a letter of credit means failure timely to honor or to take an interim action, such as acceptance of a draft, that may be required by the letter of credit.
 - (6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in Section 5-108(e) and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.
 - (7) "Good faith" means honesty in fact in the conduct or transaction concerned.
 - (8) "Honor" of a letter of credit means performance of the issuer's undertaking in the letter of credit to pay or deliver an item of value. Unless the letter of credit otherwise provides, "honor" occurs
 - (i) upon payment,
 - (ii) if the letter of credit provides for acceptance, upon acceptance of a draft and, at maturity, its payment, or
 - (iii) if the letter of credit provides for incurring a deferred obligation, upon incurring the obligation and, at maturity, its performance.
 - (9) "Issuer" means a bank or other person that issues a letter of credit, but does not include an individual who makes an engagement for personal, family, or household purposes.
 - (10) "Letter of credit" means 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.
 - (11) "Nominated person" means a person whom the issuer (i) designates or authorizes to pay, accept, negotiate, or otherwise give value under a letter of credit and (ii) undertakes by agreement or custom and practice to reimburse.
 - (12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.
 - (13) "Presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person.

- (14) “Record” means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form.
 - (15) “Successor of a beneficiary” means a person who succeeds to substantially all of the rights of a beneficiary by operation of law, including a corporation with or into which the beneficiary has been merged or consolidated, an administrator, executor, personal representative, trustee in bankruptcy, debtor in possession, liquidator, and receiver.
- (b) Definitions in other Articles applying to this article and the sections in which they appear are:
- | | |
|--------------------------|-----------------------|
| “Accept” or “Acceptance” | Section 3-409 |
| “Value” | Sections 3-303, 4-211 |
- (c) Article 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this article.

Official Comment

1. Since no one can be a confirmer unless that person is a nominated person as defined in Section 5-102(a)(11), those who agree to “confirm” without the designation or authorization of the issuer are not confirmers under Article 5. Nonetheless, the undertakings to the beneficiary of such persons may be enforceable by the beneficiary as letters of credit issued by the “confirmer” for its own account or as guarantees or contracts outside of Article 5.

2. The definition of “document” contemplates and facilitates the growing recognition of electronic and other nonpaper media as “documents,” however, for the time being, data in those media constitute documents only in certain circumstances. For example, a facsimile received by an issuer would be a document only if the letter of credit explicitly permitted it, if the standard practice authorized it and the letter did not prohibit it, or the agreement of the issuer and beneficiary permitted it. The fact that data transmitted in a nonpaper (unwritten) medium can be recorded on paper by a recipient’s computer printer, facsimile machine, or the like does not under current practice render the data so transmitted a “document.” A facsimile or S.W.I.F.T. message received directly by the issuer is in an electronic medium when it crosses the boundary of the issuer’s place of business. One wishing to make

a presentation by facsimile (an electronic medium) will have to procure the explicit agreement of the issuer (assuming that the standard practice does not authorize it). Where electronic transmissions are authorized neither by the letter of credit nor by the practice, the beneficiary may transmit the data electronically to its agent who may be able to put it in written form and make a conforming presentation.

3. “Good faith” continues in revised Article 5 to be defined as “honesty in fact.” “Observance of reasonable standards of fair dealing” has not been added to the definition. The narrower definition of “honesty in fact” reinforces the “independence principle” in the treatment of “fraud,” “strict compliance,” “preclusion,” and other tests affecting the performance of obligations that are unique to letters of credit. This narrower definition — which does not include “fair dealing” — is appropriate to the decision to honor or dishonor a presentation of documents specified in a letter of credit. The narrower definition is also appropriate for other parts of revised Article 5 where greater certainty of obligations is necessary and is consistent with the goals of speed and low cost. It is important that U.S. letters of credit have continuing vitality and competitiveness in international transactions.

For example, it would be inconsistent with the “independence” principle if any of

the following occurred: (i) the beneficiary's failure to adhere to the standard of "fair dealing" in the underlying transaction or otherwise in presenting documents were to provide applicants and issuers with an "unfairness" defense to dishonor even when the documents complied with the terms of the letter of credit; (ii) the issuer's obligation to honor in "strict compliance in accordance with standard practice" were changed to "reasonable compliance" by use of the "fair dealing" standard, or (iii) the preclusion against the issuer (Section 5-108(d)) were modified under the "fair dealing" standard to enable the issuer later to raise additional deficiencies in the presentation. The rights and obligations arising from presentation, honor, dishonor and reimbursement, are independent and strict, and thus "honesty in fact" is an appropriate standard.

The contract between the applicant and beneficiary is not governed by Article 5, but by applicable contract law, such as Article 2 or the general law of contracts. "Good faith" in that contract is defined by other law, such as Section 2-103(1)(b) or Restatement of Contracts 2d, § 205, which incorporate the principle of "fair dealing" in most cases, or a State's common law or other statutory provisions that may apply to that contract.

The contract between the applicant and the issuer (sometimes called the "reimbursement" agreement) is governed in part by this article (e.g., Sections 5-108(i), 5-111(b), and 5-103(c)) and partly by other law (e.g., the general law of contracts). The definition of good faith in Section 5-102(a)(7) applies only to the extent that the reimbursement contract is governed by provisions in this article; for other purposes good faith is defined by other law.

4. Payment and acceptance are familiar modes of honor. A third mode of honor, incurring an unconditional obligation, has legal effects similar to an acceptance of a time draft but does not technically constitute an acceptance. The practice of making letters of credit available by "deferred payment undertaking" as now provided in

UCP 500 has grown up in other countries and spread to the United States. The definition of "honor" will accommodate that practice.

5. The exclusion of consumers from the definition of "issuer" is to keep creditors from using a letter of credit in consumer transactions in which the consumer might be made the issuer and the creditor would be the beneficiary. If that transaction were recognized under Article 5, the effect would be to leave the consumer without defenses against the creditor. That outcome would violate the policy behind the Federal Trade Commission Rule in 16 CFR Part 433. In a consumer transaction, an individual cannot be an issuer where that person would otherwise be either the principal debtor or a guarantor.

6. The label on a document is not conclusive; certain documents labelled "guarantees" in accordance with European (and occasionally, American) practice are letters of credit. On the other hand, even documents that are labelled "letter of credit" may not constitute letters of credit under the definition in Section 5-102(a). When a document labelled a letter of credit requires the issuer to pay not upon the presentation of documents, but upon the determination of an extrinsic fact such as applicant's failure to perform a construction contract, and where that condition appears on its face to be fundamental and would, if ignored, leave no obligation to the issuer under the document labelled letter of credit, the issuer's undertaking is not a letter of credit. It is probably some form of suretyship or other contractual arrangement and may be enforceable as such. See Sections 5-102(a)(10) and 5-103(d). Therefore, undertakings whose fundamental term requires an issuer to look beyond documents and beyond conventional reference to the clock, calendar, and practices concerning the form of various documents are not governed by Article 5. Although Section 5-108(g) recognizes that certain nondocumentary conditions can be included in a letter of credit without denying the undertaking the status of letter

of credit, that section does not apply to cases where the nondocumentary condition is fundamental to the issuer's obligation. The rules in Sections 5-102(a)(10), 5-103(d), and 5-108(g) approve the conclusion in *Wichita Eagle & Beacon Publishing Co. v. Pacific Nat. Bank*, 493 F.2d 1285 (9th Cir. 1974).

The adjective "definite" is taken from the UCP. It approves cases that deny letter of credit status to documents that are unduly vague or incomplete. See, e.g., *Transparent Products Corp. v. Paysaver Credit Union*, 864 F.2d 60 (7th Cir. 1988). Note, however, that no particular phrase or label is necessary to establish a letter of credit. It is sufficient if the undertaking of the issuer shows that it is intended to be a letter of credit. In most cases the parties' intention will be indicated by a label on the undertaking itself indicating that it is a "letter of credit," but no such language is necessary.

A financial institution may be both the issuer and the applicant or the issuer and the beneficiary. Such letters are sometimes issued by a bank in support of the bank's own lease obligations or on behalf of one of its divisions as an applicant or to one of its divisions as beneficiary, such as an overseas branch. Because wide use of letters of credit in which the issuer and the applicant or the issuer and the beneficiary are the same would endanger the unique status of letters of credit, only financial institutions are authorized to issue them.

In almost all cases the ultimate performance of the issuer under a letter of credit is the payment of money. In rare cases the issuer's obligation is to deliver stock certificates or the like. The definition of letter of credit in Section 5-102(a)(10) contemplates those cases.

7. Under the UCP any bank is a nominated bank where the letter of credit is "freely negotiable." A letter of credit might also nominate by the following: "We hereby engage with the drawer, indorsers, and bona fide holders of drafts drawn under and in compliance with the terms of this credit

that the same will be duly honored on due presentation" or "available with any bank by negotiation." A restricted negotiation credit might be "available with x bank by negotiation" or the like.

Several legal consequences may attach to the status of nominated person. First, when the issuer nominates a person, it is authorizing that person to pay or give value and is authorizing the beneficiary to make presentation to that person. Unless the letter of credit provides otherwise, the beneficiary need not present the documents to the issuer before the letter of credit expires; it need only present those documents to the nominated person. Secondly, a nominated person that gives value in good faith has a right to payment from the issuer despite fraud. Section 5-109(a)(1).

8. A "record" must be in or capable of being converted to a perceivable form. For example, an electronic message recorded in a computer memory that could be printed from that memory could constitute a record. Similarly, a tape recording of an oral conversation could be a record.

9. Absent a specific agreement to the contrary, documents of a beneficiary delivered to an issuer or nominated person are considered to be presented under the letter of credit to which they refer, and any payment or value given for them is considered to be made under that letter of credit. As the court held in *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813, 820 (2d Cir. 1992), it takes a "significant showing" to make the presentation of a beneficiary's documents for "collection only" or otherwise outside letter of credit law and practice.

10. Although a successor of a beneficiary is one who succeeds "by operation of law," some of the successions contemplated by Section 5-102(a)(15) will have resulted from voluntary action of the beneficiary such as merger of a corporation. Any merger makes the successor corporation the "successor of a beneficiary" even though

the transfer occurs partly by operation of law and partly by the voluntary action of the parties. The definition excludes certain transfers, where no part of the transfer is “by operation of law”— such as the sale of assets by one company to another.

11. “Draft” in Article 5 does not have the same meaning it has in Article 3. For example, a document may be a draft under Article 5 even though it would not be a negotiable instrument, and therefore would not qualify as a draft under Section 3-104(e). As amended in 2003.

Actions in Adopting Jurisdictions

Connecticut

In subsection (a)(7) “Good Faith”, adds “...and the observance of reasonable commercial standards of fair dealing.”

Iowa

In subsection (a), states “In this article unless the context otherwise requires....” UCC simply states, “In this article....”

Louisiana

Deletes definition of “Good Faith”, deferring to 1-209(19).

Maine

In subsection (1)(f), it does not state that a document may not be oral

In subsection (a), states “As used in this article, unless the context otherwise indicates, the following terms have the following meanings.” The UCC simply states “In this article.”

Nevada

Substitutes “a natural person” for “an individual”.

North Carolina

In subsection (b), the second section cross referenced with regard to value is “4-209” instead of “4-211” and is probably a mistake.

North Dakota

In subsection (f)(i), in the definition of “Document”, N.D. replaces “by the standard practice referred to in Section 5-108(e)” with quotation from 5-108(a).

Utah

Omits 5-102(b) and 5-102(c)

Washington

In subsection (a), the introductory paragraph provides “The definitions in this section apply throughout this Article unless the context clearly requires otherwise.”

SECTION 5-103. SCOPE.

- (a) This article applies to letters of credit and to certain rights and obligations arising out of transactions involving letters of credit.
- (b) The statement of a rule in this article does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this article.
- (c) With the exception of this subsection, subsections (a) and (d), Sections 5-102(a)(9) and (10), 5-106(d), and 5-114(d), and except to the extent prohibited in Sections 1-302 and 5-117(d), the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this article.
- (d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies

it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary.

Official Comment

1. Sections 5-102(a)(10) and 5-103 are the principal limits on the scope of Article 5. Many undertakings in commerce and contract are similar, but not identical to the letter of credit. Principal among those are “secondary,” “accessory,” or “suretyship” guarantees. Although the word “guarantee” is sometimes used to describe an independent obligation like that of the issuer of a letter of credit (most often in the case of European bank undertakings but occasionally in the case of undertakings of American banks), in the United States the word “guarantee” is more typically used to describe a suretyship transaction in which the “guarantor” is only secondarily liable and has the right to assert the underlying debtor’s defenses. This article does not apply to secondary or accessory guarantees and it is important to recognize the distinction between letters of credit and those guarantees. It is often a defense to a secondary or accessory guarantor’s liability that the underlying debt has been discharged or that the debtor has other defenses to the underlying liability. In letter of credit law, on the other hand, the independence principle recognized throughout Article 5 states that the issuer’s liability is independent of the underlying obligation. That the beneficiary may have breached the underlying contract and thus have given a good defense on that contract to the applicant against the beneficiary is no defense for the issuer’s refusal to honor. Only staunch recognition of this principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit. To that end, it is important that the law not carry into letter of credit transactions rules that properly apply only to secondary guarantees or to other forms of engagement.

2. Like all of the provisions of the Uniform Commercial Code, Article 5

is supplemented by Section 1-103 and, through it, by many rules of statutory and common law. Because this article is quite short and has no rules on many issues that will affect liability with respect to a letter of credit transaction, law beyond Article 5 will often determine rights and liabilities in letter of credit transactions. Even within letter of credit law, the article is far from comprehensive; it deals only with “certain” rights of the parties. Particularly with respect to the standards of performance that are set out in Section 5-108, it is appropriate for the parties and the courts to turn to customs and practice such as the Uniform Customs and Practice for Documentary Credits, currently published by the International Chamber of Commerce as I.C.C. Pub. No. 500 (hereafter UCP). Many letters of credit specifically adopt the UCP as applicable to the particular transaction. Where the UCP are adopted but conflict with Article 5 and except where variation is prohibited, the UCP terms are permissible contractual modifications under Sections 1-302 and 5-103(c). See Section 5-116(c). Normally Article 5 should not be considered to conflict with practice except when a rule explicitly stated in the UCP or other practice is different from a rule explicitly stated in Article 5.

Except by choosing the law of a jurisdiction that has not adopted the Uniform Commercial Code, it is not possible entirely to escape the Uniform Commercial Code. Since incorporation of the UCP avoids only “conflicting” Article 5 rules, parties who do not wish to be governed by the nonconflicting provisions of Article 5 must normally either adopt the law of a jurisdiction other than a State of the United States or state explicitly the rule that is to govern. When rules of custom and practice are incorporated by reference, they are considered to be explicit terms of the agreement or undertaking.

Neither the obligation of an issuer under

Section 5-108 nor that of an adviser under Section 5-107 is an obligation of the kind that is invariable under Section 1-102(3). Section 5-103(c) and Comment 1 to Section 5-108 make it clear that the applicant and the issuer may agree to almost any provision establishing the obligations of the issuer to the applicant. The last sentence of subsection (c) limits the power of the issuer to achieve that result by a nonnegotiated disclaimer or limitation of remedy.

What the issuer could achieve by an explicit agreement with its applicant or by a term that explicitly defines its duty, it cannot accomplish by a general disclaimer. The restriction on disclaimers in the last sentence of subsection (c) is based more on procedural than on substantive unfairness. Where, for example, the reimbursement agreement provides explicitly that the issuer need not examine any documents, the applicant understands the risk it has undertaken. A term in a reimbursement agreement which states generally that an issuer will not be liable unless it has acted in “bad faith” or committed “gross negligence” is ineffective under Section 5-103(c). On the other hand, less general terms such as terms that permit issuer reliance on an oral or electronic message believed in good faith to have been received from the applicant or terms that entitle an issuer to reimbursement when it honors a “substantially” though not “strictly” complying presentation, are effective. In each case the question is whether the

disclaimer or limitation is sufficiently clear and explicit in reallocating a liability or risk that is allocated differently under a variable Article 5 provision.

Of course, no term in a letter of credit, whether incorporated by reference to practice rules or stated specifically, can free an issuer from a conflicting contractual obligation to its applicant. If, for example, an issuer promised its applicant that it would pay only against an inspection certificate of a particular company but failed to require such a certificate in its letter of credit or made the requirement only a nondocumentary condition that had to be disregarded, the issuer might be obliged to pay the beneficiary even though its payment might violate its contract with its applicant.

3. Parties should generally avoid modifying the definitions in Section 5-102. The effect of such an agreement is almost inevitably unclear. To say that something is a “guarantee” in the typical domestic transaction is to say that the parties intend that particular legal rules apply to it. By acknowledging that something is a guarantee, but asserting that it is to be treated as a “letter of credit,” the parties leave a court uncertain about where the rules on guarantees stop and those concerning letters of credit begin.

4. Section 5-102(2) and (3) of Article 5 are omitted as unneeded; the omission does not change the law. As amended in 2001.

Actions in Adopting Jurisdictions

Idaho

In subsection (3), the first sentence there is a reference to “subsections (1) and (2)”. The reference to subsection (2) is an error in the original enactment and should read (4), (d) in the UCC, instead.

Indiana

States “IC 26-1-8.1 applies”. The Editors believe that this may be a

typographical error and should actually read “IC 26-1-5.1 applies”.

Texas

In subsection (c), the non-Code additional subsection (c) to Texas’ version of UCC Revised § 5-110 (see below) is added to the list of subsections that cannot be varied by agreement.

SECTION 5-104. FORMAL REQUIREMENTS. A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be issued in any form that is a record and is authenticated (i) by a signature or (ii) in accordance with the agreement of the parties or the standard practice referred to in Section 5-108(e).

Official Comment

1. Neither Section 5-104 nor the definition of letter of credit in Section 5-102(a)(10) requires inclusion of all the terms that are normally contained in a letter of credit in order for an undertaking to be recognized as a letter of credit under Article 5. For example, a letter of credit will typically specify the amount available, the expiration date, the place where presentation should be made, and the documents that must be presented to entitle a person to honor. Undertakings that have the formalities required by Section 5-104 and meet the conditions specified in Section 5-102(a)(10) will be recognized as letters of credit even though they omit one or more of the items usually contained in a letter of credit.

2. The authentication specified in this section is authentication only of the identity of the issuer, confirmor, or adviser.

An authentication agreement may be by system rule, by standard practice, or by direct agreement between the parties. The reference to practice is intended to incorporate future developments in the UCP and other practice rules as well as those that may arise spontaneously in commercial practice.

3. Many banking transactions, including the issuance of many letters

of credit, are now conducted mostly by electronic means. For example, S.W.I.F.T. is currently used to transmit letters of credit from issuing to advising banks. The letter of credit text so transmitted may be printed at the advising bank, stamped "original" and provided to the beneficiary in that form. The printed document may then be used as a way of controlling and recording payments and of recording and authorizing assignments of proceeds or transfers of rights under the letter of credit. Nothing in this section should be construed to conflict with that practice.

To be a record sufficient to serve as a letter of credit or other undertaking under this section, data must have a durability consistent with that function. Because consideration is not required for a binding letter of credit or similar undertaking (Section 5-105) yet those undertakings are to be strictly construed (Section 5-108), parties to a letter of credit transaction are especially dependent on the continued availability of the terms and conditions of the letter of credit or other undertaking. By declining to specify any particular medium in which the letter of credit must be established or communicated, Section 5-104 leaves room for future developments.

SECTION 5-105. CONSIDERATION. Consideration is not required to issue, amend, transfer, or cancel a letter of credit, advice, or confirmation.

Official Comment

It is not to be expected that any issuer will issue its letter of credit without some form of remuneration. But it is not expected that the beneficiary will know what the issuer's remuneration was or whether in fact there was any identifiable remuneration in a given case. and it might be difficult

for the beneficiary to prove the issuer's remuneration. This section dispenses with this proof and is consistent with the position of Lord Mansfield in *Pillans v. Van Mierop*, 97 Eng. Rep. 1035 (K.B. 1765) in making consideration irrelevant.

SECTION 5-106. ISSUANCE, AMENDMENT, CANCELLATION, AND DURATION.

- (a) A letter of credit is issued and becomes enforceable according to its terms against the issuer when the issuer sends or otherwise transmits it to the person requested to advise or to the beneficiary. A letter of credit is revocable only if it so provides.
- (b) After a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmor, and issuer are not affected by an amendment or cancellation to which that person has not consented except to the extent the letter of credit provides that it is revocable or that the issuer may amend or cancel the letter of credit without that consent.
- (c) If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance or, if none is stated, after the date on which it is issued.
- (d) A letter of credit that states that it is perpetual expires five years after its stated date of issuance, or if none is stated, after the date on which it is issued.

Official Comment

1. This section adopts the position taken by several courts, namely that letters of credit that are silent as to revocability are irrevocable. See, e.g., *Weyerhaeuser Co. v. First Nat. Bank*, 27 UCC Rep. Serv. 777 (S.D. Iowa 1979); *West Va. Hous. Dev. Fund v. Sroka*, 415 F.Supp. 1107 (W.D. Pa. 1976). This is the position of the current UCP (500). Given the usual commercial understanding and purpose of letters of credit, revocable letters of credit offer unhappy possibilities for misleading the parties who deal with them.

2. A person can consent to an amendment by implication. For example, a beneficiary that tenders documents for honor that conform to an amended letter of credit but not to the original letter of credit has probably consented to the amendment. By the same token an applicant that has procured the issuance of a transferable letter of credit has consented to its transfer and to performance under the letter of credit by a person to whom the beneficiary's rights are duly transferred. If some, but not all of the persons involved in a letter of credit transaction consent to performance that does not strictly conform to the original letter of credit, those persons assume the risk that other nonconsenting persons may insist on strict compliance with the original letter of credit. Under subsection (b) those not consenting are not bound. For example,

an issuer might agree to amend its letter of credit or honor documents presented after the expiration date in the belief that the applicant has consented or will consent to the amendment or will waive presentation after the original expiration date. If that belief is mistaken, the issuer is bound to the beneficiary by the terms of the letter of credit as amended or waived, even though it may be unable to recover from the applicant.

In general, the rights of a recognized transferee beneficiary cannot be altered without the transferee's consent, but the same is not true of the rights of assignees of proceeds from the beneficiary. When the beneficiary makes a complete transfer of its interest that is effective under the terms for transfer established by the issuer, adviser, or other party controlling transfers, the beneficiary no longer has an interest in the letter of credit, and the transferee steps into the shoes of the beneficiary as the one with rights under the letter of credit. Section 5-102(a)(3). When there is a partial transfer, both the original beneficiary and the transferee beneficiary have an interest in performance of the letter of credit and each expects that its rights will not be altered by amendment unless it consents.

The assignee of proceeds under a letter of credit from the beneficiary enjoys no such expectation. Notwithstanding an assignee's notice to the issuer of the assignment of

proceeds, the assignee is not a person protected by subsection (b). An assignee of proceeds should understand that its rights can be changed or completely extinguished by amendment or cancellation of the letter of credit. An assignee's claim is precarious, for it depends entirely upon the continued existence of the letter of credit and upon the beneficiary's preparation and presentation of documents that would entitle the beneficiary to honor under Section 5-108.

3. The issuer's right to cancel a revocable letter of credit does not free it from a duty to reimburse a nominated person

who has honored, accepted, or undertaken a deferred obligation prior to receiving notice of the amendment or cancellation. Compare UCP Article 8.

4. Although all letters of credit should specify the date on which the issuer's engagement expires, the failure to specify an expiration date does not invalidate the letter of credit, or diminish or relieve the obligation of any party with respect to the letter of credit. A letter of credit that may be revoked or terminated at the discretion of the issuer by notice to the beneficiary is not "perpetual."

Actions in Adopting Jurisdictions

Alabama

Subsection (d) omitted from Alabama Code.

Arkansas

In subsection (e), it states that the provisions of subsections (c) and (d) of this section shall not apply to letters of credit issued at any time to the Worker's Compensation Commission.

SECTION 5-107. CONFIRMER, NOMINATED PERSON, AND ADVISER.

- (a) A confirmer is directly obligated on a letter of credit and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the letter of credit at the request and for the account of the issuer.
- (b) A nominated person who is not a confirmer is not obligated to honor or otherwise give value for a presentation.
- (c) A person requested to advise may decline to act as an adviser. An adviser that is not a confirmer is not obligated to honor or give value for a presentation. An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of the letter of credit, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise. Even if the advice is inaccurate, the letter of credit, confirmation, or amendment is enforceable as issued.
- (d) A person who notifies a transferee beneficiary of the terms of a letter of credit, confirmation, amendment, or advice has the rights and obligations of an adviser under subsection (c). The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by the letter of credit, confirmation, amendment, or advice received by the person who so notifies.

Official Comment

- 1. A confirmer has the rights and obligations identified in Section 5-108. Accordingly, unless the context otherwise requires, the terms "confirmer" and "confirmation" should be read into this article wherever the terms "issuer" and

"letter of credit" appear.

A confirmer that has paid in accordance with the terms and conditions of the letter of credit is entitled to reimbursement by the issuer even if the beneficiary committed fraud (see Section 5-109(a)(1)(ii)) and, in that sense, has greater rights against the issuer than the beneficiary has. To be entitled to reimbursement from the issuer under the typical confirmed letter of credit, the confirmer must submit conforming documents, but the confirmer's presentation to the issuer need not be made before the expiration date of the letter of credit.

A letter of credit confirmation has been analogized to a guarantee of issuer performance, to a parallel letter of credit issued by the confirmer for the account of the issuer or the letter of credit applicant or both, and to a back-to-back letter of credit in which the confirmer is a kind of beneficiary of the original issuer's letter of credit. Like letter of credit undertakings, confirmations are both unique and flexible, so that no one of these analogies is perfect, but unless otherwise indicated in the letter of credit or confirmation, a confirmer should be viewed by the letter of credit issuer and the beneficiary as an issuer of a parallel letter of credit for the account of the original letter of credit issuer. Absent a direct agreement between the applicant and a confirmer, normally the obligations of a confirmer are to the issuer not the applicant, but the applicant might have a right to injunction against a confirmer under Section 5-109 or warranty claim under Section 5-110, and either might have claims against the other under Section 5-117.

2. No one has a duty to advise until that person agrees to be an adviser or undertakes to act in accordance with the instructions of the issuer. Except where there is a prior agreement to serve or where the silence of the adviser would be an acceptance of an offer to contract, a person's failure to respond to a request to advise a letter of credit does not in and of itself create any liability, nor does it establish a relationship of issuer and

adviser between the two. Since there is no duty to advise a letter of credit in the absence of a prior agreement, there can be no duty to advise it timely or at any particular time. When the adviser manifests its agreement to advise by actually doing so (as is normally the case), the adviser cannot have violated any duty to advise in a timely way. This analysis is consistent with the result of *Sound of Market Street v. Continental Bank International*, 819 F.2d 384 (3d Cir. 1987) which held that there is no such duty. This section takes no position on the reasoning of that case, but does not overrule the result. by advising or agreeing to advise a letter of credit, the adviser assumes a duty to the issuer and to the beneficiary accurately to report what it has received from the issuer, but, beyond determining the apparent authenticity of the letter, an adviser has no duty to investigate the accuracy of the message it has received from the issuer. "Checking" the apparent authenticity of the request to advise means only that the prospective adviser must attempt to authenticate the message (e.g., by "testing" the telex that comes from the purported issuer), and if it is unable to authenticate the message must report that fact to the issuer and, if it chooses to advise the message, to the beneficiary. by proper agreement, an adviser may disclaim its obligation under this section.

3. An issuer may issue a letter of credit which the adviser may advise with different terms. The issuer may then believe that it has undertaken a certain engagement, yet the text in the hands of the beneficiary will contain different terms, and the beneficiary would not be entitled to honor if the documents it submitted did not comply with the terms of the letter of credit as originally issued. On the other hand, if the adviser also confirmed the letter of credit, then as a confirmer it will be independently liable on the letter of credit as advised and confirmed. If in that situation the beneficiary's ultimate presentation entitled it to honor under the terms of the confirmation but not under those in the original letter of credit, the confirmer

would have to honor but might not be entitled to reimbursement from the issuer.

4. When the issuer nominates another person to “pay,” “negotiate,” or otherwise to take up the documents and give value, there can be confusion about the legal status of the nominated person. In rare cases the person might actually be an agent of the issuer and its act might be the act of the issuer itself. In most cases the nominated person is not an agent of the issuer and has no authority to act on the issuer’s behalf. Its “nomination” allows the beneficiary to present to it and earns it certain rights to payment under Section 5-109 that others do not enjoy. For example, when an issuer issues a “freely

negotiable credit,” it contemplates that banks or others might take up documents under that credit and advance value against them, and it is agreeing to pay those persons but only if the presentation to the issuer made by the nominated person complies with the credit. Usually there will be no agreement to pay, negotiate, or to serve in any other capacity by the nominated person, therefore the nominated person will have the right to decline to take the documents. It may return them or agree merely to act as a forwarding agent for the documents but without giving value against them or taking any responsibility for their conformity to the letter of credit.

Actions in Adopting Jurisdictions

Arizona

Section is titled “Confirmer; nominated person”. Does not include “Adviser” like UCC 5-107.

Georgia

In subsection (c), substitutes “required” for “requested” in the first sentence.

SECTION 5-108. ISSUER’S RIGHTS AND OBLIGATIONS.

- (a) Except as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.
- (b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of documents:
 - (1) to honor,
 - (2) if the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation, or
 - (3) to give notice to the presenter of discrepancies in the presentation.
- (c) Except as otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.
- (d) Failure to give the notice specified in subsection (b) or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Section 5-109(a) or expiration of the letter of credit before presentation.
- (e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer’s observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

- (f) An issuer is not responsible for:
- (1) the performance or nonperformance of the underlying contract, arrangement, or transaction,
 - (2) an act or omission of others, or
 - (3) observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).
- (g) If an undertaking constituting a letter of credit under Section 5-102(a)(10) contains nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.
- (h) An issuer that has dishonored a presentation shall return the documents or hold them at the disposal of, and send advice to that effect to, the presenter.
- (i) An issuer that has honored a presentation as permitted or required by this article:
- (1) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;
 - (2) takes the documents free of claims of the beneficiary or presenter;
 - (3) is precluded from asserting a right of recourse on a draft under Sections 3-414 and 3-415;
 - (4) except as otherwise provided in Sections 5-110 and 5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and
 - (5) is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

Official Comment

1. This section combines some of the duties previously included in Sections 5-114 and 5-109. Because a confirmer has the rights and duties of an issuer, this section applies equally to a confirmer and an issuer. See Section 5-107(a).

The standard of strict compliance governs the issuer's obligation to the beneficiary and to the applicant, by requiring that a "presentation" appear strictly to comply, the section requires not only that the documents themselves appear on their face strictly to comply, but also that the other terms of the letter of credit such as those dealing with the time and place of presentation are strictly complied with. Typically, a letter of credit will provide that presentation is timely if made to the issuer, confirmer, or any other nominated person prior to expiration of the letter of credit. Accordingly, a nominated person that has honored a demand or otherwise given

value before expiration will have a right to reimbursement from the issuer even though presentation to the issuer is made after the expiration of the letter of credit. Conversely, where the beneficiary negotiates documents to one who is not a nominated person, the beneficiary or that person acting on behalf of the beneficiary must make presentation to a nominated person, confirmer, or issuer prior to the expiration date.

This section does not impose a bifurcated standard under which an issuer's right to reimbursement might be broader than a beneficiary's right to honor. However, the explicit deference to standard practice in Section 5-108(a) and (e) and elsewhere expands issuers' rights of reimbursement where that practice so provides. Also, issuers can and often do contract with their applicants for expanded rights of reimbursement. Where that is done, the beneficiary will have to meet a more

stringent standard of compliance as to the issuer than the issuer will have to meet as to the applicant. Similarly, a nominated person may have reimbursement and other rights against the issuer based on this article, the UCP, bank-to-bank reimbursement rules, or other agreement or undertaking of the issuer. These rights may allow the nominated person to recover from the issuer even when the nominated person would have no right to obtain honor under the letter of credit.

The section adopts strict compliance, rather than the standard that commentators have called “substantial compliance,” the standard arguably applied in *Banco Español de Credito v. State Street Bank and Trust Company*, 385 F.2d 230 (1st Cir. 1967) and *Flagship Cruises Ltd. v. New England Merchants Nat. Bank*, 569 F.2d 699 (1st Cir. 1978). Strict compliance does not mean slavish conformity to the terms of the letter of credit. For example, standard practice (what issuers do) may recognize certain presentations as complying that an unschooled layman would regard as discrepant. by adopting standard practice as a way of measuring strict compliance, this article indorses the conclusion of the court in *New Braunfels Nat. Bank v. Odiorne*, 780 S.W.2d 313 (Tex.Ct.App. 1989) (beneficiary could collect when draft requested payment on ‘Letter of Credit No. 86-122-5’ and letter of credit specified ‘Letter of Credit No. 86-122-S’ holding strict compliance does not demand oppressive perfectionism). The section also indorses the result in *Tosco Corp. v. Federal Deposit Insurance Corp.*, 723 F.2d 1242 (6th Cir. 1983). The letter of credit in that case called for “drafts Drawn under Bank of Clarksville Letter of Credit Number 105.” The draft presented stated “drawn under Bank of Clarksville, Clarksville, Tennessee letter of Credit No. 105.” The court correctly found that despite the change of upper case “L” to a lower case “l” and the use of the word “No.” instead of “Number,” and despite the addition of the words “Clarksville, Tennessee,” the presentation conformed. Similarly a document addressed by a foreign person to

General Motors as “Jeneral Motors” would strictly conform in the absence of other defects.

Identifying and determining compliance with standard practice are matters of interpretation for the court, not for the jury. As with similar rules in Sections 4A-202(c) and 2-302, it is hoped that there will be more consistency in the outcomes and speedier resolution of disputes if the responsibility for determining the nature and scope of standard practice is granted to the court, not to a jury. Granting the court authority to make these decisions will also encourage the salutary practice of courts’ granting summary judgment in circumstances where there are no significant factual disputes. The statute encourages outcomes such as *American Coleman Co. v. Intrawest Bank*, 887 F.2d 1382 (10th Cir. 1989), where summary judgment was granted.

In some circumstances standards may be established between the issuer and the applicant by agreement or by custom that would free the issuer from liability that it might otherwise have. For example, an applicant might agree that the issuer would have no duty whatsoever to examine documents on certain presentations (e.g., those below a certain dollar amount). Where the transaction depended upon the issuer’s payment in a very short time period (e.g., on the same day or within a few hours of presentation), the issuer and the applicant might agree to reduce the issuer’s responsibility for failure to discover discrepancies. by the same token, an agreement between the applicant and the issuer might permit the issuer to examine documents exclusively by electronic or electro-optical means. Neither those agreements nor others like them explicitly made by issuers and applicants violate the terms of Section 5-108(a) or (b) or Section 5-103(c).

2. Section 5-108(a) balances the need of the issuer for time to examine the documents against the possibility that the examiner (at the urging of the applicant or

for fear that it will not be reimbursed) will take excessive time to search for defects. What is a “reasonable time” is not extended to accommodate an issuer’s procuring a waiver from the applicant. See Article 14c of the UCP.

Under both the UCC and the UCP the issuer has a reasonable time to honor or give notice. The outside limit of that time is measured in business days under the UCC and in banking days under the UCP, a difference that will rarely be significant. Neither business nor banking days are defined in Article 5, but a court may find useful analogies in Regulation CC, 12 CFR 229.2, in state law outside of the Uniform Commercial Code, and in Article 4.

Examiners must note that the seven-day period is not a safe harbor. The time within which the issuer must give notice is the lesser of a reasonable time or seven business days. Where there are few documents (as, for example, with the mine run standby letter of credit), the reasonable time would be less than seven days. If more than a reasonable time is consumed in examination, no timely notice is possible. What is a “reasonable time” is to be determined by examining the behavior of those in the business of examining documents, mostly banks. Absent prior agreement of the issuer, one could not expect a bank issuer to examine documents while the beneficiary waited in the lobby if the normal practice was to give the documents to a person who had the opportunity to examine those together with many others in an orderly process. That the applicant has not yet paid the issuer or that the applicant’s account with the issuer is insufficient to cover the amount of the draft is not a basis for extension of the time period.

This section does not preclude the issuer from contacting the applicant during its examination; however, the decision to honor rests with the issuer, and it has no duty to seek a waiver from the applicant or to notify the applicant of receipt of the documents. If the issuer dishonors a

conforming presentation, the beneficiary will be entitled to the remedies under Section 5-111, irrespective of the applicant’s views.

Even though the person to whom presentation is made cannot conduct a reasonable examination of documents within the time after presentation and before the expiration date, presentation establishes the parties’ rights. The beneficiary’s right to honor or the issuer’s right to dishonor arises upon presentation at the place provided in the letter of credit even though it might take the person to whom presentation has been made several days to determine whether honor or dishonor is the proper course. The issuer’s time for honor or giving notice of dishonor may be extended or shortened by a term in the letter of credit. The time for the issuer’s performance may be otherwise modified or waived in accordance with Section 5-106.

The issuer’s time to inspect runs from the time of its “receipt of documents.” Documents are considered to be received only when they are received at the place specified for presentation by the issuer or other party to whom presentation is made.

Failure of the issuer to act within the time permitted by subsection (b) constitutes dishonor. Because of the preclusion in subsection (c) and the liability that the issuer may incur under Section 5-111 for wrongful dishonor, the effect of such a silent dishonor may ultimately be the same as though the issuer had honored, i.e., it may owe damages in the amount drawn but unpaid under the letter of credit.

3. The requirement that the issuer send notice of the discrepancies or be precluded from asserting discrepancies is new to Article 5. It is taken from the similar provision in the UCP and is intended to promote certainty and finality.

The section thus substitutes a strict preclusion principle for the doctrines of waiver and estoppel that might otherwise apply under Section 1-103. It rejects the reasoning in *Flagship Cruises Ltd. v. New England Merchants’ Nat. Bank*, 569 F.2d

699 (1st Cir. 1978) and *Wing On Bank Ltd. v. American Nat. Bank & Trust Co.*, 457 F.2d 328 (5th Cir. 1972) where the issuer was held to be estopped only if the beneficiary relied on the issuer's failure to give notice.

Assume, for example, that the beneficiary presented documents to the issuer shortly before the letter of credit expired, in circumstances in which the beneficiary could not have cured any discrepancy before expiration. Under the reasoning of *Flagship* and *Wing On*, the beneficiary's inability to cure, even if it had received notice, would absolve the issuer of its failure to give notice. The virtue of the preclusion obligation adopted in this section is that it forecloses litigation about reliance and detriment.

Even though issuers typically give notice of the discrepancy of tardy presentation when presentation is made after the expiration of a credit, they are not required to give that notice and the section permits them to raise late presentation as a defect despite their failure to give that notice.

4. To act within a reasonable time, the issuer must normally give notice without delay after the examining party makes its decision. If the examiner decides to dishonor on the first day, it would be obliged to notify the beneficiary shortly thereafter, perhaps on the same business day. This rule accepts the reasoning in cases such as *Datapoint Corp. v. M & I Bank*, 665 F. Supp. 722 (W.D. Wis. 1987) and *Esso Petroleum Canada, Div. of Imperial Oil, Ltd. v. Security Pacific Bank*, 710 F. Supp. 275 (D. Ore. 1989).

The section deprives the examining party of the right simply to sit on a presentation that is made within seven days of expiration. The section requires the examiner to examine the documents and make a decision and, having made a decision to dishonor, to communicate promptly with the presenter. Nevertheless, a beneficiary who presents documents shortly before the expiration of a letter of credit runs the risk that it will never have the opportunity to cure

any discrepancies.

5. Confirmers, other nominated persons, and collecting banks acting for beneficiaries can be presenters and, when so, are entitled to the notice provided in subsection (b). Even nominated persons who have honored or given value against an earlier presentation of the beneficiary and are themselves seeking reimbursement or honor need notice of discrepancies in the hope that they may be able to procure complying documents. The issuer has the obligations imposed by this section whether the issuer's performance is characterized as "reimbursement" of a nominated person or as "honor."

6. In many cases a letter of credit authorizes presentation by the beneficiary to someone other than the issuer. Sometimes that person is identified as a "payor" or "paying bank," or as an "acceptor" or "accepting bank," in other cases as a "negotiating bank," and in other cases there will be no specific designation. The section does not impose any duties on a person other than the issuer or confirmor, however a nominated person or other person may have liability under this article or at common law if it fails to perform an express or implied agreement with the beneficiary.

7. The issuer's obligation to honor runs not only to the beneficiary but also to the applicant. It is possible that an applicant who has made a favorable contract with the beneficiary will be injured by the issuer's wrongful dishonor. Except to the extent that the contract between the issuer and the applicant limits that liability, the issuer will have liability to the applicant for wrongful dishonor under Section 5-111 as a matter of contract law. A good faith extension of the time in Section 5-108(b) by agreement between the issuer and beneficiary binds the applicant even if the applicant is not consulted or does not consent to the extension.

The issuer's obligation to dishonor when there is no apparent compliance

with the letter of credit runs only to the applicant. No other party to the transaction can complain if the applicant waives compliance with terms or conditions of the letter of credit or agrees to a less stringent standard for compliance than that supplied by this article. Except as otherwise agreed with the applicant, an issuer may dishonor a noncomplying presentation despite an applicant's waiver.

Waiver of discrepancies by an issuer or an applicant in one or more presentations does not waive similar discrepancies in a future presentation. Neither the issuer nor the beneficiary can reasonably rely upon honor over past waivers as a basis for concluding that a future defective presentation will justify honor. The reasoning of *Courtaulds of North America Inc. v. North Carolina Nat. Bank*, 528 F.2d 802 (4th Cir. 1975) is accepted and that expressed in *Schweibish v. Pontchartrain State Bank*, 389 So.2d 731 (La.App. 1980) and *Titanium Metals Corp. v. Space Metals, Inc.*, 529 P.2d 431 (Utah 1974) is rejected.

8. The standard practice referred to in subsection (e) includes (i) international practice set forth in or referenced by the Uniform Customs and Practice, (ii) other practice rules published by associations of financial institutions, and (iii) local and regional practice. It is possible that standard practice will vary from one place to another. Where there are conflicting practices, the parties should indicate which practice governs their rights. A practice may be overridden by agreement or course of dealing. See Section 1-205(4).

9. The responsibility of the issuer under a letter of credit is to examine documents and to make a prompt decision to honor or dishonor based upon that examination. Nondocumentary conditions have no place in this regime and are better accommodated under contract or suretyship law and practice. In requiring that nondocumentary conditions in letters of credit be ignored as surplusage, Article 5 remains aligned with the UCP (see UCP 500 Article 13c),

approves cases like *Pringle-Associated Mortgage Corp. v. Southern National Bank*, 571 F.2d 871, 874 (5th Cir. 1978), and rejects the reasoning in cases such as *Sherwood & Roberts, Inc. v. First Security Bank*, 682 P.2d 149 (Mont. 1984).

Subsection (g) recognizes that letters of credit sometimes contain nondocumentary terms or conditions. Conditions such as a term prohibiting "shipment on vessels more than 15 years old," are to be disregarded and treated as surplusage. Similarly, a requirement that there be an award by a "duly appointed arbitrator" would not require the issuer to determine whether the arbitrator had been "duly appointed." Likewise a term in a standby letter of credit that provided for differing forms of certification depending upon the particular type of default does not oblige the issuer independently to determine which kind of default has occurred. These conditions must be disregarded by the issuer. Where the nondocumentary conditions are central and fundamental to the issuer's obligation (as for example a condition that would require the issuer to determine in fact whether the beneficiary had performed the underlying contract or whether the applicant had defaulted) their inclusion may remove the undertaking from the scope of Article 5 entirely. See Section 5-102(a)(10) and Comment 6 to Section 5-102.

Subsection (g) would not permit the beneficiary or the issuer to disregard terms in the letter of credit such as place, time, and mode of presentation. The rule in subsection (g) is intended to prevent an issuer from deciding or even investigating extrinsic facts, but not from consulting the clock, the calendar, the relevant law and practice, or its own general knowledge of documentation or transactions of the type underlying a particular letter of credit.

Even though nondocumentary conditions must be disregarded in determining compliance of a presentation (and thus in determining the issuer's duty to the beneficiary), an issuer that has promised its applicant that it will honor only on

the occurrence of those nondocumentary conditions may have liability to its applicant for disregarding the conditions.

10. Subsection (f) condones an issuer's ignorance of "any usage of a particular trade"; that trade is the trade of the applicant, beneficiary, or others who may be involved in the underlying transaction. The issuer is expected to know usage that is commonly encountered in the course of document examination. For example, an issuer should know the common usage with respect to documents in the maritime shipping trade but would not be expected to understand synonyms used in a particular trade for product descriptions appearing in a letter of credit or an invoice.

11. Where the issuer's performance is the delivery of an item of value other

than money, the applicant's reimbursement obligation would be to make the "item of value" available to the issuer.

12. An issuer is entitled to reimbursement from the applicant after honor of a forged or fraudulent drawing if honor was permitted under Section 5-109(a).

13. The last clause of Section 5-108(i) (5) deals with a special case in which the fraud is not committed by the beneficiary, but is committed by a stranger to the transaction who forges the beneficiary's signature. If the issuer pays against documents on which a required signature of the beneficiary is forged, it remains liable to the true beneficiary. This principle is applicable to both electronic and tangible documents. As amended in 2003.

Actions in Adopting Jurisdictions

Alabama

In subsection (e), omits the last two sentences regarding the interpretation of the issuer's observance of standard practice.

Arizona

In subsection (g), does not include reference to 47-5102(a)(10) [UCC 5-102(a)(10)]

Delaware

In subsection (i)(5), omits "...unless the issuer honored a presentation in which a required signature of a beneficiary was forged."

Hawaii

In subsection (b), omits "...of the issuer...."

In subsection (g), omits "...under Section 5-102(a)(10)...."

Louisiana

In subsection (b), adds "...of at least three days..." following "...presentation....".

New Jersey

In subsection (e), omits "...of the issuer's observance..." preceding "...of the standard practice...".

New York

In subsection (e), deletes the last two sentence leaving only, "An issuer shall observe standard practice of financial institutions that regularly issue letters of credit."

Pennsylvania

Subsection (e) omits the second and third sentences. "Determination of an issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice."

Subsection (i)(5) omits "unless the issuer honored a presentation in which a required signature of a beneficiary was forged" from the end of the sentence.

Wisconsin

In subsection (e), omits "issuer's observance" from the second sentence.

In subsection (g), omits "Under Section 5-102(a)(10).

Wyoming

In subsection (e), omits the 2nd sentence: "Determination of the issuer's observance of the standard banking practice is a matter of interpretation for the court."

SECTION 5-109. FRAUD AND FORGERY.

- (a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:
 - (1) the issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmor who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and
 - (2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.
- (b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:
 - (1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
 - (2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
 - (3) all of the conditions to entitle a person to the relief under the law of this State have been met; and
 - (4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

Official Comment

1. This recodification makes clear that fraud must be found either in the documents or must have been committed by the beneficiary on the issuer or applicant. See *Cromwell v. Commerce & Energy Bank*, 464 So.2d 721 (La. 1985).

Secondly, it makes clear that fraud must be "material." Necessarily courts must decide the breadth and width of "materiality." The use of the word requires

that the fraudulent aspect of a document be material to a purchaser of that document or that the fraudulent act be significant to the participants in the underlying transaction. Assume, for example, that the beneficiary has a contract to deliver 1,000 barrels of salad oil. Knowing that it has delivered only 998, the beneficiary nevertheless submits an invoice showing 1,000 barrels. If two barrels in a 1,000 barrel shipment would be

an insubstantial and immaterial breach of the underlying contract, the beneficiary's act, though possibly fraudulent, is not materially so and would not justify an injunction. Conversely, the knowing submission of those invoices upon delivery of only five barrels would be materially fraudulent. The courts must examine the underlying transaction when there is an allegation of material fraud, for only by examining that transaction can one determine whether a document is fraudulent or the beneficiary has committed fraud and, if so, whether the fraud was material.

Material fraud by the beneficiary occurs only when the beneficiary has no colorable right to expect honor and where there is no basis in fact to support such a right to honor. The section endorses articulations such as those stated in *Intraworld Indus. v. Girard Trust Bank*, 336 A.2d 316 (Pa. 1975), *Roman Ceramics Corp. v. People's Nat. Bank*, 714 F.2d 1207 (3d Cir. 1983), and similar decisions and embraces certain decisions under Section 5-114 that relied upon the phrase "fraud in the transaction." Some of these decisions have been summarized as follows in *Ground Air Transfer v. Westate's Airlines*, 899 F.2d 1269, 1272-73 (1st Cir. 1990):

We have said throughout that courts may not "*normally*" issue an injunction because of an important exception to the general "*no injunction*" rule. The exception, as we also explained in *Itek*, 730 F.2d at 24-25, concerns "*fraud*" so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money. Where the circumstances "*plainly*" show that the underlying contract forbids the beneficiary to call a letter of credit, *Itek*, 730 F.2d at 24; where they show that the contract deprives the beneficiary of even a "*colorable*" right to do so, *id.*, at 25; where the contract and circumstances reveal that the beneficiary's demand for payment has "*absolutely no basis in fact*," *id.*; see *Dynamics Corp. of America*, 356 F. Supp. at 999; where the beneficiary's conduct has "*so vitiated*

the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served," *Itek*, 730 F.2d at 25 (quoting *Roman Ceramics Corp. v. Peoples National Bank*, 714 F.2d 1207, 1212 n.12, 1215 (3d Cir. 1983) (quoting *Intraworld Indus.*, 336 A.2d at 324-25)); then a court may enjoin payment.

2. Subsection (a)(2) makes clear that the issuer may honor in the face of the applicant's claim of fraud. The subsection also makes clear what was not stated in former Section 5-114, that the issuer may dishonor and defend that dishonor by showing fraud or forgery of the kind stated in subsection (a). Because issuers may be liable for wrongful dishonor if they are unable to prove forgery or material fraud, presumably most issuers will choose to honor despite applicant's claims of fraud or forgery unless the applicant procures an injunction. Merely because the issuer has a right to dishonor and to defend that dishonor by showing forgery or material fraud does not mean it has a duty to the applicant to dishonor. The applicant's normal recourse is to procure an injunction, if the applicant is unable to procure an injunction, it will have a claim against the issuer only in the rare case in which it can show that the issuer did not honor in good faith.

3. Whether a beneficiary can commit fraud by presenting a draft under a clean letter of credit (one calling only for a draft and no other documents) has been much debated. Under the current formulation it would be possible but difficult for there to be fraud in such a presentation. If the applicant were able to show that the beneficiary were committing material fraud on the applicant in the underlying transaction, then payment would facilitate a material fraud by the beneficiary on the applicant and honor could be enjoined. The courts should be skeptical of claims of fraud by one who has signed a "*suicide*" or clean credit and thus granted a beneficiary the right to draw by mere presentation of a draft.

4. The standard for injunctive relief

is high, and the burden remains on the applicant to show, by evidence and not by mere allegation, that such relief is warranted. Some courts have enjoined payments on letters of credit on insufficient showing by the applicant. For example, in *Griffin Cos. v. First Nat. Bank*, 374 N.W.2d 768 (Minn. App. 1985), the court enjoined payment under a standby letter of credit, basing its decision on plaintiff's allegation, rather than competent evidence, of fraud.

There are at least two ways to prohibit injunctions against honor under this section after acceptance of a draft by the issuer. First is to define honor (see Section 5-102(a)(8)) in the particular letter of credit to occur upon acceptance and without regard to later payment of the acceptance. Second is explicitly to agree that the applicant has no right to an injunction after acceptance — whether or not the acceptance constitutes honor.

5. Although the statute deals principally with injunctions against honor, it also cautions against granting "similar relief" and the same principles apply when the applicant or issuer attempts to achieve the same legal outcome by injunction against presentation (see *Ground Air Transfer Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269

(1st Cir. 1990)), interpleader, declaratory judgment, or attachment. These attempts should face the same obstacles that face efforts to enjoin the issuer from paying. Expanded use of any of these devices could threaten the independence principle just as much as injunctions against honor. For that reason courts should have the same hostility to them and place the same restrictions on their use as would be applied to injunctions against honor. Courts should not allow the "sacred cow of equity to trample the tender vines of letter of credit law."

6. Section 5-109(a)(1) also protects specified third parties against the risk of fraud. by issuing a letter of credit that nominates a person to negotiate or pay, the issuer (ultimately the applicant) induces that nominated person to give value and thereby assumes the risk that a draft drawn under the letter of credit will be transferred to one with a status like that of a holder in due course who deserves to be protected against a fraud defense.

7. The "loss" to be protected against — by bond or otherwise under subsection (b)(2) — includes incidental damages. Among those are legal fees that might be incurred by the beneficiary or issuer in defending against an injunction action.

Actions in Adopting Jurisdictions

South Dakota

The text of this section reads "[Reserved for future use]" despite South Dakota's retention in other sections of cross references to this section.

Wisconsin

Section 5-109(b) adds "all of the following conditions are met" after "only if the court finds that:"

SECTION 5-110. WARRANTIES.

(a) If its presentation is honored, the beneficiary warrants:

- (1) to the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in Section 5-109(a); and
 - (2) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.
- (b) The warranties in subsection (a) are in addition to warranties arising under Article 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those articles.

Official Comment

1. Since the warranties in subsection (a) are not given unless a letter of credit has been honored, no breach of warranty under this subsection can be a defense to dishonor by the issuer. Any defense must be based on Section 5-108 or 5-109 and not on this section. Also, breach of the warranties by the beneficiary in subsection (a) cannot excuse the applicant's duty to reimburse.

2. The warranty in Section 5-110(a)(2) assumes that payment under the letter of credit is final. It does not run to the issuer, only to the applicant. In most cases the applicant will have a direct cause of action for breach of the underlying contract. This warranty has primary application in standby letters of credit or other circumstances where the applicant is not a party to an underlying contract with the beneficiary. It is not a warranty that the statements made on the presentation of the documents presented are truthful nor is it a warranty that the documents strictly comply under Section 5-108(a). It is a warranty that the beneficiary has performed all the acts expressly and implicitly necessary under any underlying agreement to entitle the beneficiary to honor. If, for example, an underlying sales contract authorized the beneficiary to draw only upon "due performance" and the beneficiary drew even though it had breached the underlying contract by delivering defective goods, honor of its draw would break the warranty. by the same token, if the underlying contract authorized the beneficiary to draw only upon actual default or upon its or a third party's determination of default by the

applicant and if the beneficiary drew in violation of its authorization, then upon honor of its draw the warranty would be breached. In many cases, therefore, the documents presented to the issuer will contain inaccurate statements (concerning the goods delivered or concerning default or other matters), but the breach of warranty arises not because the statements are untrue but because the beneficiary's drawing violated its express or implied obligations in the underlying transaction.

3. The damages for breach of warranty are not specified in Section 5-111. Courts may find damage analogies in Section 2-714 in Article 2 and in warranty decisions under Articles 3 and 4.

Unlike wrongful dishonor cases — where the damages usually equal the amount of the draw — the damages for breach of warranty will often be much less than the amount of the draw, sometimes zero. Assume a seller entitled to draw only on proper performance of its sales contract. Assume it breaches the sales contract in a way that gives the buyer a right to damages but no right to reject. The applicant's damages for breach of the warranty in subsection (a)(2) are limited to the damages it could recover for breach of the contract of sale. Alternatively assume an underlying agreement that authorizes a beneficiary to draw only the "amount in default." Assume a default of \$200,000 and a draw of \$500,000. The damages for breach of warranty would be no more than \$300,000.

Actions in Adopting Jurisdictions

Texas

In subsection (c), added provision states, "Notwithstanding any agreement or term to the contrary, the warranties in Subsection (a) do not arise until the issuer honors the letter of credit."

Wisconsin

Subsection (s) adds "all of the following".

SECTION 5-111. REMEDIES.

- (a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.
- (b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.
- (c) If an adviser or nominated person other than a confirmor breaches an obligation under this article or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmor has the liability of an issuer specified in this subsection and subsections (a) and (b).
- (d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.
- (e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.
- (f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

Official Comment

1. The right to specific performance is new. The express limitation on the duty of the beneficiary to mitigate damages adopts the position of certain courts and commentators. Because the letter of credit depends upon speed and certainty of payment, it is important that the issuer not be given an incentive to dishonor. The issuer might have an incentive to dishonor if it could rely on the burden of mitigation falling on the beneficiary, (to sell goods and sue only for the difference between the price of the goods sold and the amount due under the letter of credit). Under the scheme contemplated by Section 5-111(a),

the beneficiary would present the documents to the issuer. If the issuer wrongfully dishonored, the beneficiary would have no further duty to the issuer with respect to the goods covered by documents that the issuer dishonored and returned. The issuer thus takes the risk that the beneficiary will let the goods rot or be destroyed. Of course the beneficiary may have a duty of mitigation to the applicant arising from the underlying agreement, but the issuer would not have the right to assert that duty by way of defense or setoff. See Section 5-117(d). If the beneficiary sells the goods covered by dishonored documents or if the

beneficiary sells a draft after acceptance but before dishonor by the issuer, the net amount so gained should be subtracted from the amount of the beneficiary's damages — at least where the damage claim against the issuer equals or exceeds the damage suffered by the beneficiary. If, on the other hand, the beneficiary suffers damages in an underlying transaction in an amount that exceeds the amount of the wrongfully dishonored demand (e.g., where the letter of credit does not cover 100 percent of the underlying obligation), the damages avoided should not necessarily be deducted from the beneficiary's claim against the issuer. In such a case, the damages would be the lesser of (i) the amount recoverable in the absence of mitigation (that is, the amount that is subject to the dishonor or repudiation plus any incidental damages) and (ii) the damages remaining after deduction for the amount of damages actually avoided.

A beneficiary need not present documents as a condition of suit for anticipatory repudiation, but if a beneficiary could never have obtained documents necessary for a presentation conforming to the letter of credit, the beneficiary cannot recover for anticipatory repudiation of the letter of credit. *Doelger v. Battery Park Bank*, 201 A.D. 515, 194 N.Y.S. 582 (1922) and *Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria*, 497 F.Supp. 893 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The last sentence of subsection (c) does not expand the liability of a confirmer to persons to whom the confirmer would not otherwise be liable under Section 5-107.

Almost all letters of credit, including those that call for an acceptance, are "obligations to pay money" as that term is used in Section 5-111(a).

2. What damages "result" from improper honor is for the courts to decide. Even though an issuer pays a beneficiary in violation of Section 5-108(a) or of its contract with the applicant, it may have no liability to an applicant. If the underlying

contract has been fully performed, the applicant may not have been damaged by the issuer's breach. Such a case would occur when *A* contracts for goods at \$100 per ton, but, upon delivery, the market value of conforming goods has decreased to \$25 per ton. If the issuer pays over discrepancies, there should be no recovery by *A* for the price differential if the issuer's breach did not alter the applicant's obligation under the underlying contract, i.e., to pay \$100 per ton for goods now worth \$25 per ton. On the other hand, if the applicant intends to resell the goods and must itself satisfy the strict compliance requirements under a second letter of credit in connection with its sale, the applicant may be damaged by the issuer's payment despite discrepancies because the applicant itself may then be unable to procure honor on the letter of credit where it is the beneficiary, and may be unable to mitigate its damages by enforcing its rights against others in the underlying transaction. Note that an issuer found liable to its applicant may have recourse under Section 5-117 by subrogation to the applicant's claim against the beneficiary or other persons.

One who inaccurately advises a letter of credit breaches its obligation to the beneficiary, but may cause no damage. If the beneficiary knows the terms of the letter of credit and understands the advice to be inaccurate, the beneficiary will have suffered no damage as a result of the adviser's breach.

3. Since the confirmer has the rights and duties of an issuer, in general it has an issuer's liability, see subsection (c). The confirmer is usually a confirming bank. A confirming bank often also plays the role of an adviser. If it breaks its obligation to the beneficiary, the confirming bank may have liability as an issuer or, depending upon the obligation that was broken, as an adviser. For example, a wrongful dishonor would give it liability as an issuer under Section 5-111(a). On the other hand a confirming bank that broke its obligation to advise the credit but did not commit wrongful dishonor would be treated under Section 5-111(c).

4. Consequential damages for breach of obligations under this article are excluded in the belief that these damages can best be avoided by the beneficiary or the applicant and out of the fear that imposing consequential damages on issuers would raise the cost of the letter of credit to a level that might render it uneconomic. *A fortiori* punitive and exemplary damages are excluded, however, this section does not bar recovery of consequential or even punitive damages for breach of statutory or common law duties arising outside of this article.

5. The section does not specify a rate of interest. It leaves the setting of the rate to the court. It would be appropriate for a court to use the rate that would normally apply in that court in other situations where interest is imposed by law.

6. The court must award attorney's fees to the prevailing party, whether that party is an applicant, a beneficiary, an issuer, a nominated person, or adviser. Since the issuer may be entitled to recover its legal fees and costs from the applicant under the reimbursement agreement, allowing the issuer to recover those fees from a losing beneficiary may also protect the applicant against undeserved losses. The party entitled to attorneys' fees has been described as

the "prevailing party." Sometimes it will be unclear which party "prevailed," for example, where there are multiple issues and one party wins on some and the other party wins on others. Determining which is the prevailing party is in the discretion of the court. Subsection (e) authorizes attorney's fees in all actions where a remedy is sought "under this article." It applies even when the remedy might be an injunction under Section 5-109 or when the claimed remedy is otherwise outside of Section 5-111. Neither an issuer nor a confirmor should be treated as a "losing" party when an injunction is granted to the applicant over the objection of the issuer or confirmor; accordingly neither should be liable for fees and expenses in that case.

"Expenses of litigation" is intended to be broader than "costs." For example, expense of litigation would include travel expenses of witnesses, fees for expert witnesses, and expenses associated with taking depositions.

7. For the purposes of Section 5-111(f) "harm anticipated" must be anticipated at the time when the agreement that includes the liquidated damage clause is executed or at the time when the undertaking that includes the clause is issued. See Section 2A-504.

Actions in Adopting Jurisdictions

Alabama

In subsection (e), states that reasonable attorney's fees "may" (not "must") be awarded.

Alaska

In subsection (e), substitutes "Attorney's fees and costs shall be awarded..." for "... reasonable attorney's fees and other expenses of litigation must be awarded."

Connecticut

In subsection (a), substitutes "...and, if appropriate under the circumstances, consequential damages." for "...but not consequential damages." in the third

sentence.

In subsection (b), substitutes "...and, if appropriate under the circumstances, consequential damages..." for "...but not consequential damages...".

In subsection (e), states that reasonable attorney's fees "may" (not "must") be awarded to the prevailing party.

Louisiana

Substitutes "...foreseeable damages for pecuniary loss but not unforeseeable damages, exemplary damages, or damages for nonpecuniary loss." for "...incidental but not consequential damages." in the third

sentence of subsection (a), in subsection (b), and the first sentence of subsection (c).

Subsection (f) substitutes "...stipulated by agreement or undertaking, unless the damages stipulated are so manifestly unreasonable as to be contrary to public policy." for "liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated."

New Jersey

In subsection (e), states that reasonable attorney's fees "may" (not "must") be awarded.

SECTION 5-112. TRANSFER OF LETTER OF CREDIT.

- (a) Except as otherwise provided in Section 5-113, unless a letter of credit provides that it is transferable, the right of a beneficiary to draw or otherwise demand performance under a letter of credit may not be transferred.
- (b) Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if:
 - (1) the transfer would violate applicable law; or
 - (2) the transferor or transferee has failed to comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard practice referred to in Section 5-108(e) or is otherwise reasonable under the circumstances.

Official Comment

1. In order to protect the applicant's reliance on the designated beneficiary, letter of credit law traditionally has forbidden the beneficiary to convey to third parties its right to draw or demand payment under the letter of credit. Subsection (a) codifies that rule. The term "transfer" refers to the beneficiary's conveyance of that right. Absent incorporation of the UCP (which make elaborate provision for partial transfer of a commercial letter of credit) or similar trade practice and absent other express indication in the letter of credit that the term is used to mean something else, a term in the letter of credit indicating that the beneficiary has the right to transfer should be taken to mean that the beneficiary may convey to a third party its right to draw or demand payment. Even in that case,

New York

In subsection (e), New York omits this subsection.

North Carolina

In subsection (e), adds "G.S. 6-21.2 shall not apply."

Texas

In subsection (e), states that reasonable attorney's fees "may" (not "must") be awarded.

Wyoming

In subsection (e), the word "must" replaced "shall" and "party" replaced with plaintiff.

the issuer or other person controlling the transfer may make the beneficiary's right to transfer subject to conditions, such as timely notification, payment of a fee, delivery of the letter of credit to the issuer or other person controlling the transfer, or execution of appropriate forms to document the transfer. A nominated person who is not a confirmer has no obligation to recognize a transfer.

The power to establish "requirements" does not include the right absolutely to refuse to recognize transfers under a transferable letter of credit. An issuer who wishes to retain the right to deny all transfers should not issue transferable letters of credit or should incorporate the UCP. by stating its requirements in the letter of credit an issuer may impose any requirement

without regard to its conformity to practice or reasonableness. Transfer requirements of issuers and nominated persons must be made known to potential transferors and transferees to enable those parties to comply with the requirements. A common method of making such requirements known is to use a form that indicates the information that must be provided and the instructions that must be given to enable the issuer or nominated person to comply with a request to transfer.

2. The issuance of a transferable letter of credit with the concurrence of the applicant is *ipso facto* an agreement by the issuer and applicant to permit a beneficiary to transfer its drawing right and permit a nominated person to recognize and carry out that transfer without further notice to them. In international commerce, transferable letters of credit are often issued under circumstances in which a nominated person or adviser is expected to facilitate the transfer from the original beneficiary to a transferee and to deal with that transferee. In those circumstances it is the responsibility of the nominated person or adviser to establish procedures satisfactory to protect itself against double presentation or dispute about the right to draw under the letter of credit. Commonly such a person will control the transfer by requiring that the original letter of credit be given to it or by causing a paper copy marked as an original to be issued where the original letter of credit was electronic.

By keeping possession of the original letter of credit the nominated person or adviser can minimize or entirely exclude the possibility that the original beneficiary could properly procure payment from another bank. If the letter of credit requires presentation of the original letter of credit itself, no other payment could be procured. In addition to imposing whatever requirements it considers appropriate to protect itself against double payment the person that is facilitating the transfer has a right to charge an appropriate fee for its activity.

“Transfer” of a letter of credit should be distinguished from “assignment of proceeds.” The former is analogous to a novation or a substitution of beneficiaries. It contemplates not merely payment to but also performance by the transferee. For example, under the typical terms of transfer for a commercial letter of credit, a transferee could comply with a letter of credit transferred to it by signing and presenting its own draft and invoice. An assignee of proceeds, on the other hand, is wholly dependent on the presentation of a draft and invoice signed by the beneficiary.

By agreeing to the issuance of a transferable letter of credit, which is not qualified or limited, the applicant may lose control over the identity of the person whose performance will earn payment under the letter of credit.

Actions in Adopting Jurisdictions

Kentucky

Subsection (a) was omitted from Kentucky Code

In subsection (a), subsection

SECTION 5-113. TRANSFER BY OPERATION OF LAW.

- (a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.
- (b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall

recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Section 5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

- (c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.
- (d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in Section 5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 5-109.
- (e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmor or nominated person may decline to recognize a presentation under subsection (b).
- (f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

Official Comment

This section affirms the result in *Pastor v. Nat. Republic Bank of Chicago*, 76 Ill.2d 139, 390 N.E.2d 894 (Ill. 1979) and *Federal Deposit Insurance Co. v. Bank of Boulder*, 911 F.2d 1466 (10th Cir. 1990). Both electronic and tangible documents may be signed.

An issuer's requirements for recognition of a successor's status might include presentation of a certificate of merger, a

court order appointing a bankruptcy trustee or receiver, a certificate of appointment as bankruptcy trustee, or the like. The issuer is entitled to rely upon such documents which on their face demonstrate that presentation is made by a successor of a beneficiary. It is not obliged to make an independent investigation to determine the fact of succession. As amended in 2003.

SECTION 5-114. ASSIGNMENT OF PROCEEDS.

- (a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the beneficiary.
- (b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.
- (c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.
- (d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.
- (e) Rights of a transferee beneficiary or nominated person are independent of the

beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

- (f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Article 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 or other law.

Official Comment

1. Subsection (b) expressly validates the beneficiary's present assignment of letter of credit proceeds if made after the credit is established but before the proceeds are realized. This section adopts the prevailing usage — "assignment of proceeds" — to an assignee. That terminology carries with it no implication, however, that an assignee acquires no interest until the proceeds are paid by the issuer. For example, an "assignment of the right to proceed" of a letter of credit for purposes of security that meets the requirements of Section 9-203(b) would constitute the present creation of a security interest in a letter of credit right. This security interest can be perfected by control (Section 9-107). Although subsection (a) explains the meaning of "proceeds" of a letter of credit, it should be emphasized that those proceeds also may be Article 9 proceeds of other collateral. For example, if a seller of inventory receives a letter of credit to support the account that arises upon the sale, payments made under the letter of credit are Article 9 proceeds of the inventory, account, and any document of title covering the inventory. Thus, the secured party who had a perfected security interest in that inventory, account, or document has a perfected security interest in the proceeds collected under the letter of credit, so long as they are identifiable cash proceeds (Section 9-315(a), (d)). This perfection is continuous, regardless of whether the secured party perfected a security interest in the right to letter of credit proceeds.

2. An assignee's rights to enforce an assignment of proceeds against an issuer and the priority of the assignee's rights against a nominated person or transferee beneficiary are governed by Article 5. Those rights and that priority are stated in subsections (c), (d), and (e). Note also that Section 4-210 gives first priority to a collecting bank that has given value for a documentary draft.

3. by requiring that an issuer or nominated person consent to the assignment of proceeds of a letter of credit, subsections (c) and (d) follow more closely recognized national and international letter of credit practices than did prior law. In most circumstances, it has always been advisable for the assignee to obtain the consent of the issuer in order better to safeguard its right to the proceeds. When notice of an assignment has been received, issuers normally have required signatures on a consent form. This practice is reflected in the revision. by unconditionally consenting to such an assignment, the issuer or nominated person becomes bound, subject to the rights of the superior parties specified in subsection (e), to pay to the assignee the assigned letter of credit proceeds that the issuer or nominated person would otherwise pay to the beneficiary or another assignee.

Where the letter of credit must be presented as a condition to honor and the assignee holds and exhibits the letter of credit to the issuer or nominated person, the risk to the issuer or nominated person of having to

pay twice is minimized. In such a situation, subsection (d) provides that the issuer or nominated person may not unreasonably withhold its consent to the assignment.

SECTION 5-115. STATUTE OF LIMITATIONS. An action to enforce a right or obligation arising under this article must be commenced within one year after the expiration date of the relevant letter of credit or one year after the [claim for relief] [cause of action] accrues, whichever occurs later. A [claim for relief] [cause of action] accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

Official Comment

1. This section is based upon Sections 4-111 and 2-725(2).

2. This section applies to all claims for which there are remedies under Section 5-111 and to other claims made under this article, such as claims for breach of warranty under Section 5-110. Because it covers all claims under Section 5-111, the statute of limitations applies not only to wrongful dishonor claims against the issuer but also to claims between the issuer and the applicant arising from the reimbursement agreement. These might be for reimbursement (issuer v. applicant) or for breach of the reimbursement contract by wrongful honor (applicant v.

issuer).

3. The statute of limitations, like the rest of the statute, applies only to a letter of credit issued on or after the effective date and only to transactions, events, obligations, or duties arising out of or associated with such a letter. If a letter of credit was issued before the effective date and an obligation on that letter of credit was breached after the effective date, the complaining party could bring its suit within the time that would have been permitted prior to the adoption of Section 5-115 and would not be limited by the terms of Section 5-115.

Actions in Adopting Jurisdictions

Alabama

Allows a cause of action to be commenced within two years of the expiration date of the letter of credit instead of only one year.

Louisiana

Adds that an action to enforce an issuer's right to reimbursement must be commenced within five years of the date of payment of funds.

Pennsylvania

Adds "..., except that, in the event of fraud or forgery adversely affecting the aggrieved party, a cause of action accrues on the earlier of the date on which the fraud or forgery was discovered by the aggrieved party or the date on which the fraud or forgery could have been discovered by the aggrieved party by the exercise of reasonable diligence."

SECTION 5-116. CHOICE OF LAW AND FORUM.

- (a) The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.
- (b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction in which the person

is located. The person is considered to be located at the address indicated in the person's undertaking. If more than one address is indicated, the person is considered to be located at the address from which the person's undertaking was issued. For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of credit, but not enforcement of a judgment, all branches of a bank are considered separate juridical entities and a bank is considered to be located at the place where its relevant branch is considered to be located under this subsection.

- (c) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).
- (d) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.
- (e) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

Official Comment

1. Although it would be possible for the parties to agree otherwise, the law normally chosen by agreement under subsection (a) and that provided in the absence of agreement under subsection (b) is the substantive law of a particular jurisdiction not including the choice of law principles of that jurisdiction. Thus, two parties, an issuer and an applicant, both located in Oklahoma might choose the law of New York. Unless they agree otherwise, the section anticipates that they wish the substantive law of New York to apply to their transaction and they do not intend that a New York choice of law principle might direct a court to Oklahoma law. By the same token, the liability of an issuer located in New York is governed by New York substantive law — in the absence of agreement — even in circumstances in which choice of law principles found in the common law of New York might direct one to the law of another State. Subsection (b) states the relevant choice of law principles and it should not be subordinated to some other choice of law rule. Within the States of the United States *renvoi* will not be a problem once every jurisdiction has enacted Section 5-116 because every jurisdiction will

then have the same choice of law rule and in a particular case all choice of law rules will point to the same substantive law.

Subsection (b) does not state a choice of law rule for the "liability of an applicant." However, subsection (b) does state a choice of law rule for the liability of an issuer, nominated person, or adviser, and since some of the issues in suits by applicants against those persons involve the "liability of an issuer, nominated person, or adviser," subsection (b) states the choice of law rule for those issues. Because an issuer may have liability to a confirmor both as an issuer (Section 5-108(a), Comment 5 to Section 5-108) and as an applicant (Section 5-107(a), Comment 1 to Section 5-107, Section 5-108(i)), subsection (b) may state the choice of law rule for some but not all of the issuer's liability in a suit by a confirmor.

2. Because the confirmor or other nominated person may choose different law from that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is possible that a confirmor or nominated person may be obligated to pay (under their law) but will not be entitled to

payment from the issuer (under its law). Similarly, the rights of an unreimbursed issuer, confirmer, or nominated person against a beneficiary under Section 5-109, 5-110, or 5-117, will not necessarily be governed by the same law that applies to the issuer's or confirmer's obligation upon presentation. Because the UCP and other practice are incorporated in most international letters of credit, disputes arising from different legal obligations to honor have not been frequent. Since Section 5-108 incorporates standard practice, these problems should be further minimized — at least to the extent that the same practice is and continues to be widely followed.

3. This section does not permit what is now authorized by the nonuniform Section 5-102(4) in New York. Under the current law in New York a letter of credit that incorporates the UCP is not governed in any respect by Article 5. Under revised Section 5-116 letters of credit that incorporate the UCP or similar practice will still be subject to Article 5 in certain respects. First, incorporation of the UCP or other practice does not override the nonvariable terms of Article 5. Second, where there is no conflict between Article 5 and the relevant provision of the UCP or other practice, both apply. Third, practice provisions incorporated in a letter of credit will not be effective if they fail to comply with Section 5-103(c). Assume, for example, that a practice provision purported to free a party from any liability unless it were "grossly negligent" or that the practice generally limited the remedies that one party might have against another. Depending upon the circumstances, that disclaimer or limitation of liability might be ineffective because of Section 5-103(c).

Even though Article 5 is generally consistent with UCP 500, it is not necessarily consistent with other rules or with versions of the UCP that may be adopted after Article

5's revision, or with other practices that may develop. Rules of practice incorporated in the letter of credit or other undertaking are those in effect when the letter of credit or other undertaking is issued. Except in the unusual cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will override the rules of Article 5 and the parties to letter of credit transactions must be familiar with practice (such as future versions of the UCP) that is explicitly adopted in letters of credit.

4. In several ways Article 5 conflicts with and overrides similar matters governed by Articles 3 and 4. For example, "draft" is more broadly defined in letter of credit practice than under Section 3-104. The time allowed for honor and the required notification of reasons for dishonor are different in letter of credit practice than in the handling of documentary and other drafts under Articles 3 and 4.

5. Subsection (e) must be read in conjunction with existing law governing subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction not including letter of credit disputes, subsection (e) does not authorize parties to choose that forum. For example, the parties' agreement under Section 5-116(e) would not confer jurisdiction on a probate court to decide a letter of credit case.

If the parties choose a forum under subsection (e) and if — because of other law — that forum will not take jurisdiction, the parties' agreement or undertaking should then be construed (for the purpose of forum selection) as though it did not contain a clause choosing a particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory where neither the chosen State nor the State which would have jurisdiction but for the clause will take jurisdiction — the former in disregard of the clause and the latter in honor of the clause.

Actions in Adopting Jurisdictions

Kentucky

Subsection (b) was omitted from Kentucky Code

Wisconsin

Subsection (d) lists sections 3, 4, 9, of 10 rather than sections 3, 4, 4a, or 9.

North Carolina

Subsection (e), adds “Notwithstanding G.S. 22-13-3,” prior to the sentence.

SECTION 5-117. SUBROGATION OF ISSUER, APPLICANT, AND NOMINATED PERSON.

- (a) An issuer that honors a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.
- (b) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (a).
- (c) A nominated person who pays or gives value against a draft or demand presented under a letter of credit is subrogated to the rights of:
 - (1) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;
 - (2) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and
 - (3) the applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.
- (d) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (a) and (b) do not arise until the issuer honors the letter of credit or otherwise pays and the rights in subsection (c) do not arise until the nominated person pays or otherwise gives value. Until then, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defense, or excuse.

Official Comment

1. by itself this section does not grant any right of subrogation. It grants only the right that would exist if the person seeking subrogation “were a secondary obligor.” (The term “secondary obligor” refers to a surety, guarantor, or other person against whom or whose property an obligee has recourse with respect to the obligation of a third party. See Restatement of the Law Third, Suretyship and Guarantee § 1 (1996).) If the secondary obligor would

not have a right to subrogation in the circumstances in which one is claimed under this section, none is granted by this section. In effect, the section does no more than to remove an impediment that some courts have found to subrogation because they conclude that the issuer's or other claimant's rights are “independent” of the underlying obligation. If, for example, a secondary obligor would not have a subrogation right because its payment did not fully satisfy

the underlying obligation, none would be available under this section. The section endorses the position of Judge Becker in *Tudor Development Group, Inc. v. United States Fidelity and Guaranty*, 968 F.2d 357 (3rd Cir. 1991).

2. To preserve the independence of the letter of credit obligation and to insure that subrogation not be used as an offensive weapon by an issuer or others, the admonition in subsection (d) must be carefully observed. Only one who has completed its performance in a letter of credit transaction can have a right to subrogation. For example, an issuer may not dishonor and then defend its dishonor or assert a setoff on

the ground that it is subrogated to another person's rights. Nor may the issuer complain after honor that its subrogation rights have been impaired by any good faith dealings between the beneficiary and the applicant or any other person. Assume, for example, that the beneficiary under a standby letter of credit is a mortgagee. If the mortgagee were obliged to issue a release of the mortgage upon payment of the underlying debt (by the issuer under the letter of credit), that release might impair the issuer's rights of subrogation, but the beneficiary would have no liability to the issuer for having granted that release.

Actions in Adopting Jurisdictions

Louisiana

In subsection (a), the second use of the phrase "obligor of the underlying" is omitted, presumably by mistake.

Ohio

In subsection (c)(2), substitutes "issuer" for "nominated person" and is probably a mistake.

SECTION 5-118. SECURITY INTEREST OF ISSUER OR NOMINATED PERSON.

- (a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.
- (b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9, but:
 - (1) a security agreement is not necessary to make the security interest enforceable under Section 9-203(b)(3);
 - (2) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and
 - (3) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

Official Comment

1. This section gives the issuer of a letter of credit or a nominated person thereunder an automatic perfected security interest in a "document" (as that term is defined in Section 5-102(a)(6)). The security

interest arises only if the document is presented to the issuer or nominated person under the letter of credit and only to the extent of the value that is given. This security interest is analogous to that awarded to a collecting bank under

Section 4-210. Subsection (b) contains special rules governing the security interest arising under this section. In all other respects, a security interest arising under this section is subject to Article 9. See Section 9-109. Thus, for example, a security interest arising under this section may give rise to a security interest in proceeds under Section 9-315.

2. Subsection (b)(1) makes a security agreement unnecessary to the creation of a security interest under this section. Under subsection (b)(2), a security interest arising under this section is perfected if the document is presented in a medium other than a written or tangible medium. Documents that are written and that are not an otherwise-defined type of collateral under Article 9 (e.g., an invoice or inspection certificate) may be goods, in which an issuer or nominated person could perfect its security interest by possession. Because the definition of document in Section 5-102(a)(6) includes records (e.g., electronic records) that may not be goods, subsection (b)(2) provides for automatic perfection (i.e., without filing or possession).

Under subsection (b)(3), if the document (i) is in a written or tangible medium, (ii) is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, and (iii) is not in the debtor's possession, the security interest is

perfected and has priority over a conflicting security interest. If the document is a type of tangible collateral that subsection (b)(3) excludes from its perfection and priority rules, the issuer or nominated person must comply with the normal method of perfection (e.g., possession of an instrument) and is subject to the applicable Article 9 priority rules. Documents to which subsection (b)(3) applies may be important to an issuer or nominated person. For example, a confirmor who pays the beneficiary must be assured that its rights to all documents are not impaired. It will find it necessary to present all of the required documents to the issuer in order to be reimbursed. Moreover, when a nominated person sends documents to an issuer in connection with the nominated person's reimbursement, that activity is not a collection, enforcement, or disposition of collateral under Article 9.

One purpose of this section is to protect an issuer or nominated person from claims of a beneficiary's creditors. It is a fallback provision inasmuch as issuers and nominated persons frequently may obtain and perfect security interests under the usual Article 9 rules, and, in many cases, the documents will be owned by the issuer, nominated person, or applicant.

Actions in Adopting Jurisdictions

Louisiana

In subsection (a) "...and any identifiable proceeds of the collateral..." is inserted preceding "...to the extent...".

In subsection (b) "Subject to subsection (c)..." is inserted at the beginning before "...as long as..." Subsection (b)(2) is changed to read "the security interest is perfected and has priority over conflicting security

interests in the collateral or its proceeds." Subsection (c) is added providing that: "A security interest that arises under this section is subject to the rights of a subsequent purchaser under R.S. 10:9-330 or 9-331 or a transferee under R.S. 10:9-332."

Montana

In subsection (a), "...and any identifiable proceeds of the collateral..." is inserted preceding "...to the extent...".

Nevada

In subsection (a), “...and any identifiable proceeds of the collateral...” is inserted preceding “...to the extent...”.

New York

In subsection (a), “...and any identifiable proceeds of the collateral...” is inserted preceding “...to the extent...”.

Oklahoma

In subsection (a), “...and any identifiable proceeds of the collateral...” is inserted preceding “...to the extent...”.

Rhode Island

In subsection (a) “...and any identifiable proceeds of the collateral...” is inserted preceding “...to the extent...”.

Rhode Island inserts “Subject to subsection (c)” in the beginning of subsection (b) but the statute does not contain a subsection (c) or otherwise indicate to what this reference relates.

S. Carolina

In subsection (a) “...and any identifiable proceeds of the collateral...” is inserted preceding “...to the extent...”.

Table of Adoption

Jurisdiction	Article 5 Effective Date	5-118 Effective Date	Statute
Alabama	1-Jan-98	1-Jan-02	Ala. Code § 7-5-101 ff
Alaska	1-Jan-00	1-Jul-02	Alaska Stat. (chapter) § 45-05-101 ff
Arizona	20-Jul-96	1-Jul-01	Ariz. Rev. Stat. (chapter) § 47-5101 ff
Arkansas	1-Aug-97	1-Jul-01	Ark. Code (chapter) § 4-5-101 ff
California	1-Jan-97	1-Jul-01	Cal. Com. Code (Division) §5-101 ff
Colorado	1-Jul-96	1-Jul-01	Col. Rev. Stat. §4-5-101 ff
Connecticut	1-Oct-96	1-Feb-02	Conn. Gen. Stat. § 42a-5-101 ff
Delaware	1-Oct-98	1-Jul-01	Del. Code. Tit. 6 § 5-108(i)(5)
D.C.	9-Apr-97	1-Jul-01	D.C. Code § 28:5-101 ff
Florida	1 July 1999	1-Jan-02	Fla. Stat. (chapter) 675.101 ff
Georgia	1-July 2002	1-Jul-02	O.C.G.A. § 11-5-101 ff
Hawaii	1-Jul-96	1-Jul-01	Haw. Rev. Stat. §490: 5-101 ff
Idaho	1-Jul-96	1-Jul-01	Idaho Code (chapter) § 28-5-101 ff
Illinois	1-Jan-97	1-Jul-01	810 ILCS 5/5-101 ff
Indiana	1-Jul-96	1-Jul-01	Ind. Code § 26-1-5.1-101 ff
Iowa	1-Apr-96	1-Jul-01	Iowa Code § 554.5101 ff
Kansas	1-Jul-96	Not Enact.	Not Enacted
Kentucky	1-Jul-01	1-Jul-01	Ky. Rev. Stat. § 355.5-101 ff
Louisiana	1-Jan-01	1-Jul-01	La. Rev. Stat. (chapter) § 10:5-101 ff

Jurisdiction	Article 5 Effective Date	5-118 Effective Date	Statute
Maine	10-Jun-97	1-Jul-01	11 Maine Rev. Stat. §5-1101 ff
Maryland	1-Oct-97	1-Jul-01	Md. Com. Law Code (Title) §5-101 ff
Mass.	19-Mar-98	1-Jul-01	Mass. Gen. Laws. ch. 106 §5-101 ff
Michigan	4-Jan-99	1-Jul-01	Mich. Comp. Laws §440.5-101 ff
Minnesota	1-Aug-97	1-Jul-01	Minn. Stat. §336.5-101 ff
Mississippi	1-Jul-96	1-Jul-02	Miss. Code. (chapter) §75-5-101 ff
Missouri	28-Aug-97	1-Jul-01	Mo. Rev. Stat. §400.5-101 ff
Montana	5-May-97	1-Jul-01	Mont. Code (chapter) § 30-5-101 ff
Nebraska	Jan-97	1-Jul-01	R.R.S. Neb. (U.C.C.) § 5-101 ff
Nevada	1-Oct-97	1-Jul-01	Nev. Rev. Stat. § 104.5101 ff
New Hampshire	1-Jan-99	1-Jul-01	N.H. Rev. Stat §382A: 5-101 ff
New Jersey	19-Jan-98	26-Jun-01	N.J. Stat (chapter) § 12A:5-101 ff
New Mexico	1-Jul-97	1-Jul-01	N.M. Stat. § 55-5-101 ff
New York	1-Nov-00	1-Jul-01	N.Y. CLS UCC Prec § 5-101 ff
North Carolina	1-Oct-99	1-Jul-01	N.C. Gen. Stat. § 25-5-101 ff
North Dakota	1-Aug-97	1-Jul-01	N.D. Cent. Code (chapter) § 41-05-01 ff

UCC ARTICLE 5 TABLE OF ADOPTIONS

Jurisdiction	Article 5 Effective Date	5-118 Effective Date	Statute
Ohio	1-Jul-98	1-Jul-01	Ohio Rev. Code (chapter) §1305.01 ff
Oklahoma	1-Jan-97	1-Jul-01	Okl. Stat. tit. 12A § 5-101 ff
Oregon	1-Jan-98	1-Jan-02	Or. Rev. Stat. (chapter) §75.101 ff
Pennsylvania	1-Jul-01	1-Jul-01	13 PA C.S. § 5101 ff
Puerto Rico	Not Enact.	Not Enact.	19 L.P.R.A. § 1221 - 1236
Rhode Island	1-Jul-01	1-Jul-01	R.I. Gen. Laws. (chapter) § 6A-5-101 ff
S. Carolina	1-Jul-01	1-Jul-01	S.C. Code Ann. § 36-5-101 ff
South Dakota	30-Jun-99	1-Jul-01	S.D. Codified Laws (chapter) § 57A-5-101 ff
Tennessee	1-Jul-98	1-Jul-01	Tenn. Code. § 47-5-101 ff
Texas	1-Sep-99	1-Jul-01	Tex. Bus. & Com. Code (chapter) § 5-101 ff
U.S. Virgin Isl.	1-Feb-01	1-Feb-01	VI ST T. 11A § 5-101 ff
Utah	1-Jul-97	1-Jul-01	Utah Code (chapter) § 70A-5-101 ff
Vermont	1-Jan-99	1-Jul-01	Vt. Stat. tit. 9A § 5-101 ff
Virginia	1-Jan-98	1-Jul-01	Va. Code (Title) § 8.5A-101 ff
Washington	27-Jul-97	1-Jul-01	Wash. Rev. Code. § 62A.5-101 ff
West Virginia	1-Jul-96	1-Jun-00	W. Va. Code § 46-5-101 ff
Wisconsin	1-Jul-06	1-Jul-06	W.S.A 405.101 ff
Wyoming	1-Jul-97	1-Jul-01	Wyo. Stat. Ann. § 34.1-5-101 ff

U.S. Uniform Commercial Code

Article 1: General Provisions

Editor's Overview

UCC Article 1 contains rules and definitions that are generally applicable to the other Articles of the UCC, including Revised UCC Article 5 (Letters of Credit). Revised UCC Section 5-102(c) (Definitions) notes that “Article 1 contains certain additional general definitions and principles of construction and interpretation applicable throughout this article.”

Model UCC Article 1 was revised effective 2001. Since the revision has been adopted by all 50 U.S. states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, the revision has been reprinted here. The Official Comments are omitted.

PART 1. GENERAL PROVISIONS

§ 1-103. Construction of [Uniform Commercial Code] to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law.

- (a) [The Uniform Commercial Code] must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.
- (b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

PART 2. GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION

§ 1-201. General Definitions.

- (a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof, have the meanings stated.
 - (b) Subject to definitions contained in other articles of [the Uniform Commercial Code] that apply to particular articles or parts thereof:
- ***
- (3) “Agreement”, as distinguished from “contract”, means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.
- ***
- (5) “Bearer” means a person in possession of a negotiable instrument, document of title, or certificated security that is payable to bearer or indorsed in blank.

(12) “Contract”, as distinguished from “agreement”, means the total legal obligation that results from the parties’ agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws.

(21) “Holder” means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or (B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

(24) “Money” means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(31) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(36) “Send” in connection with a writing, record, or notice means: (A) to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or (B) in any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) “Signed” includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(43) “Writing” includes printing, typewriting, or any other intentional reduction to tangible form. “Written” has a corresponding meaning.

§ 1-202. Notice; Knowledge.

- (a) Subject to subsection (f), a person has “notice” of a fact if the person: (1) has actual knowledge of it; (2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists.
- (b) “Knowledge” means actual knowledge. “Knows” has a corresponding meaning.
- (c) “Discover”, “learn”, or words of similar import refer to knowledge rather than to reason to know.
- (d) A person “notifies” or “gives” a notice or notification to another person by taking such steps as may be reasonably required to inform the other person in ordinary course, whether or not the other person actually comes to know of it.
- (e) Subject to subsection (f), a person “receives” a notice or notification when: (1) it comes to that person’s attention; or (2) it is duly delivered in a form reasonable under the circumstances at the place of business through which the contract was made or at another location held out by that person as the place for receipt of such communications.
- (f) Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time it is brought to the attention of

the individual conducting that transaction and, in any event, from the time it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

PART 3. TERRITORIAL APPLICABILITY AND GENERAL RULES

§ 1-302. Variation by Agreement.

- (a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.
- (b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.
- (c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

§ 1-303. Course of Performance, Course of Dealing, and Usage of Trade.

- (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
- (b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
- (c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.
- (d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.
- (e) Except as otherwise provided in subsection (f), the express terms of an agreement and

any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade; (2) course of performance prevails over course of dealing and usage of trade; and (3) course of dealing prevails over usage of trade.

- (f) Subject to Section 2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.
- (g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

[This text updates, combines, and replaces 1999 UCC § 1-205 (Course of Dealing and Usage of Trade) and 2-208 (Course of Performance or Practical Construction)]

§ 1-304. Obligation of Good Faith.

Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.

§ 1-306. Waiver or Renunciation of Claim or Right After Breach.

A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

U.S. Uniform Commercial Code

Section 2-325

§ 2-325. “Letter of Credit” Term; “Confirmed Credit”.

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term “letter of credit” or “banker's credit” in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term “confirmed credit” means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

Excerpts from the Official Comment to U.S. UCC § 2-325

The purpose of Section 2-325 was said to be to “express the established commercial and banking understanding as to the meaning and effects of terms” calling for requiring a LC or confirmation.

1. notes than a LC is analogous to payment by check, that is ordinarily conditional. “Thus the furnishing of a letter of credit does not substitute the financing agency's obligation for the buyer's but the seller must first give the buyer reasonable notice of his intention to demand direct payment from him.”

2. notes that § 2-325(3) “requires that the credit be irrevocable and be a prime credit as determined by the standing of the issuer” but it need not be a negotiation LC.

3. notes that the definition of the term “confirmed audit in § 2-325(3) assumes that the issuer is not located in the same place as the seller/beneficiary”.

U.S. Uniform Commercial Code Revised Article 9: Secured Transactions

Editor's Overview

Model Revised UCC Article 9 states the law applicable to security interests in personal property. These interests include security interests in letters of credit. See Table of Adoptions for effective dates of Amendment to Revised UCC Article 5, Section 5-118. Completed 1 July 2001 and revised somewhat subsequently, it has been adopted by all fifty U.S. states, the Commonwealth of Puerto Rico, the District of Columbia, and the U.S. territories.

Revised UCC Article 9 has been aligned with Revised UCC Article 5 as indicated by Revised UCC Section 5-118 (Security Interest of Issuer or Nominated Person). In the event of conflict, UCC Section 5-116(d) (Choice of Law and Forum) provides that UCC Article 5 governs. Revised UCC Article 9 contains various provisions that indicate its applicability to LC security interests and provide for exceptions for issuing banks, nominated banks, transferee beneficiaries, and LC assignees of proceeds. These provisions are reproduced here.

UNIFORM COMMERCIAL CODE

REVISED ARTICLE 9: SECURED TRANSACTIONS

By

THE AMERICAN LAW INSTITUTE

and

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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PART 1

GENERAL PROVISIONS

[SUBPART 1. SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS]

SECTION 9-101. SHORT TITLE. This article may be cited as Uniform Commercial Code—Secured Transactions.

Official Comment

4. **Summary of Revisions.** Following is a brief summary of some of the more significant revisions of Article 9 that are included in this Article.

- a. **Scope of Article 9.** This Article expands the scope of Article 9 in several respects.

* * *

Supporting obligations and property securing rights to payment. This Article also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) any property (including real property) that secures a right to payment or performance that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

* * *

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. This Article enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. This Article explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

* * *

- b. **Duties of Secured Party.** This Article provides for expanded duties of secured parties.

Release of control. Section 9-208 imposes upon a secured party having control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 expands a secured party's duties to provide the debtor with information concerning collateral and the obligations that it secures.

* * *

- c. **Choice of Law.** The choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found in Part 3, Subpart 1 (Sections 9-301 through 9-307). See also Section 9-316.

* * *

Goods covered by certificates of title, deposit accounts; letter-of-credit rights, investment property. This Article includes several refinements to the treatment of choice-of-law matters for goods covered by certificates of title. See Section 9-303. It also provides special choice-of-law rules, similar to those for investment property under current Articles 8 and 9, for deposit accounts (Section 9-304), investment property (Section 9-305), and

letter-of-credit rights (Section 9-306).

* * *

- d. **Perfection.** The rules governing perfection of security interests and agricultural liens are found in Part 3, Subpart 2 (Sections 9-308 through 9-316).

Deposit accounts; letter-of-credit rights. With certain exceptions, this Article provides that a security interest in a deposit account or a letter-of-credit right may be perfected *only* by the secured party's acquiring "control" of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has "control" of a deposit account when, with the consent of the debtor, the secured party obtains the depositary bank's agreement to act on the secured party's instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositary bank. The control requirements are patterned on Section 8-106, which specifies the requirements for control of investment property. Under Section 9-107, "control" of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

* * *

Automatic perfection. Section 9-309 lists various types of security interests as to which no public-notice step is required for perfection (e.g., purchase-money security interests in consumer goods other than automobiles). This automatic perfection also extends to a transfer of a health-care-insurance receivable to a health-care provider. Those transfers normally will be made by natural persons who receive health-care services; there is little value in requiring filing for perfection in that context. Automatic perfection also applies to security interests created by sales of payment intangibles and promissory notes. Section 9-308

provides that a perfected security interest in collateral supported by a "supporting obligation" (such as an account supported by a guaranty) also is a perfected security interest in the supporting obligation, and that a perfected security interest in an obligation secured by a security interest or lien on property (e.g., a real-property mortgage) also is a perfected security interest in the security interest or lien.

- e. **Priority; Special Rules for Banks and Deposit Accounts.** The rules governing priority of security interests and agricultural liens are found in Part 3, Subpart 3 (Sections 9-317 through 9-342). This Article includes several new priority rules and some special rules relating to banks and deposit accounts (Sections 9-340 through 9-342).

* * *

Letter-of-credit rights. The priority rules for security interests in letter-of-credit rights are found in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority over one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). [Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained.] However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114. See Section 9-109(c)(4).

* * *

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in Sections 9-324 (purchase-money security interest priority) and 9-330 (priority of certain purchasers

of chattel paper and instruments).

* * *

- f. **Proceeds.** Section 9-102 contains an expanded definition of “proceeds” of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes collections on account of “supporting obligations,” such as guarantees.

* * *

- m. **Conforming and Related Amendments to Other UCC Articles.** Appendix I contains several proposed revisions to the provisions and Comments of other UCC articles. For the most part the revisions are explained in the Comments to the proposed revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.

* * *

Article 5. New Section 5-118 is patterned on Section 4-210. It provides for a security interest in documents presented under a letter of credit in favor of the issuer and a nominated person on the letter of credit.

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

- (a) **[Article 9 definitions.]** In this article:

- (2) “Account”, except as used in “account for”, means a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to be incurred, [...]. The term does not include [...] (v) letter-of-credit rights or letters of credit, [...].
- (3) “Account debtor” means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper.
- (11) “Chattel paper” means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods,...or a lease of specific goods. [...]
- (12) “Collateral” means the property subject to a security interest or agricultural lien. The term includes:
- (A) proceeds to which a security interest attaches;
 - (B) accounts, chattel paper, payment intangibles, and promissory notes that have been sold; and
 - (C) goods that are the subject of a consignment.
- (28) “Debtor” means:
- (A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;
 - (B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or
 - (C) a consignee.

- (30) "Document" means a document of title or a receipt of the type described in Section 7-201(b).
- (42) "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.
- (43) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- (44) "Goods" means all things that are movable when a security interest attaches. [...]. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.
- (51) "Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance. The term does not include the right of a beneficiary to demand payment or performance under a letter of credit.
- (59) "Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral, (i) owes payment or other performance of the obligation, (ii) has provided property other than the collateral to secure payment or other performance of the obligation, or (iii) is otherwise accountable in whole or in part for payment or other performance of the obligation. The term does not include issuers or nominated persons under a letter of credit.
- (61) "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation.
- (64) "Proceeds" ... means the following property:
- (A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;
 - (B) whatever is collected on, or distributed on account of, collateral;
 - (C) rights arising out of collateral;
 - (D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or
 - (E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.
- (71) "Secondary obligor" means an obligor to the extent that:
- (A) the obligor's obligation is secondary; or
 - (B) the obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.
- (72) "Secured party" means:
- (A) a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is

- outstanding;
- (B) a person that holds an agricultural lien;
- (C) a consignor;
- (D) a person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold;
- (E) a trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for; or
- (F) a person that holds a security interest arising under Section 2-401, 2-505, 2-711(3), 2A-508(5), 4-210, or 5-118.
- (73) "Security agreement" means an agreement that creates or provides for a security interest.
- (76) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.
- (77) "Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.
- (b) [Definitions in other articles.] ... The following definitions in other articles apply to this article:
- "Applicant" Section 5-102.
"Beneficiary" Section 5-102.
"Issuer" (with respect to a letter of credit or letter-of-credit right) Section 5-102.
"Letter of credit" Section 5-102.
"Nominated person" Section 5-102.
"Proceeds of a letter of credit" Section 5-114.

* * *

Official Comment

2. Parties to Secured Transactions.

- a. **"Debtors"; "Obligors"; "Secondary Obligors."** Determining whether a person was a "debtor" under former Section 9-105(1)(d) required a close examination of the context in which the term was used. To reduce the need for this examination, this Article redefines "debtor" and adds new defined terms, "secondary obligor" and "obligor." In the context of Part 6 (default and enforcement), these definitions distinguish among three classes of persons: (i) those persons who may have a stake in the proper enforcement of a security interest by virtue of their non-lien property interest (typically, an ownership interest) in the collateral, (ii) those persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt, and (iii) those persons who have an obligation to pay the secured debt but have no stake in the proper enforcement of the security interest. Persons in the first class are debtors. Persons in the second class are secondary obligors if any portion of the obligation is secondary or if the obligor has a

right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. One must consult the law of suretyship to determine whether an obligation is secondary. The Restatement (3d), Suretyship and Guaranty § 1 (1996), contains a useful explanation of the concept. Obligors in the third class are neither debtors nor secondary obligors. With one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties provided by Part 6 affect ... only obligors who are "secondary obligors."

5. Receivables-related Definitions.

- d. **"General Intangible"; "Payment Intangible."** "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument.... The definition has been revised to exclude commercial tort claims, deposit accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated on letters of credit (letter-or-credit rights) are not "account debtors" having the rights and obligations set forth in Sections 9-404, 9-405, and 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not obligated to pay an assignee (secured party) upon receipt of the notification described in Section 9-404(a).

See Comment 5.h. Another important consequence relates to the adequacy of the description in the security agreement. See Section 9-108.

* * *

- e. **"Letter-of-Credit Right."** The term "letter-of-credit right" embraces the rights to payment and performance under a letter of credit (defined in Section 5-102). However, it does not include a beneficiary's right to demand payment or performance. Transfer of those rights to a transferee beneficiary is governed by Article 5. See Sections 9-107, Comment 4, and 9-329, Comments 3 and 4.
- f. **"Supporting Obligation."** This new term covers the most common types of credit enhancements—suretyship obligations (including guarantees) and letter-of-credit rights that support one of the types of collateral specified in the definition. As explained in Comment 2.a., suretyship law determines whether an obligation is "secondary" for purposes of this definition. Section 9-109 generally excludes from this Article transfers of interests in insurance policies. However, the regulation of a secondary obligation as an insurance product does not necessarily mean that it is a "policy of insurance" for purposes of the exclusion in Section 9-109. Thus, this Article may cover a secondary obligation (as a supporting obligation), even if the obligation is issued by a regulated insurance company and the obligation is subject to regulation as an "insurance" product.

This Article contains rules explicitly governing attachment, perfection, and

priority of security interests in supporting obligations. See Sections 9-203, 9-308, 9-310, and 9-322. These provisions reflect the principle that a supporting obligation is an incident of the collateral it supports. Collections of or other distributions under a supporting obligations are “proceeds” of the supported collateral as well as “proceeds” of the supporting obligation itself. See Section 9-102 (defining “proceeds”) and Comment 13.b. As such, the collections and distributions are subject to the priority rules applicable to proceeds generally. See Section 9-322. However, under the special rule governing security interests in a letter-of-credit right, a secured party’s failure to obtain control (Section 9-107) of a letter-of-credit right supporting collateral may leave its security interest exposed to a priming interest of a party who does take control. See Section 9-329 (security interest in a letter-of-credit right perfected by control has priority over a conflicting security interest).

* * *

13. **Proceeds-Related Definitions: “Cash Proceeds”; “Noncash Proceeds”; “Proceeds.”** The revised definition of “proceeds” expands the definition beyond that contained in former Section 9-306 and resolves ambiguities in the former section.

- a. **Distributions on Account of Collateral.** The phrase “whatever is collected on, or distributed on account of, collateral,” in subparagraph (B), is broad enough to cover cash or stock dividends distributed on account of securities or other investment property that is original collateral. Compare former Section 9-306 (“Any payments or distributions made with respect to investment property collateral are proceeds.”). This section rejects the holding of *FDIC v. Hastie*, 2 F.3d 1042 (10th Cir. 1993) (postpetition

cash dividends on stock subject to a prepetition pledge are not “proceeds” under Bankruptcy Code Section 552(b)), to the extent the holding relies on the Article 9 definition of “proceeds.”

- b. **Distributions on Account of Supporting Obligations.** Under subparagraph (B), collections on and distributions on account of collateral consisting of various credit-support arrangements (“supporting obligations,” as defined in Section 9-102) also are proceeds. Consequently, they are afforded treatment identical to proceeds collected from or distributed by the obligor on the underlying (supported) right to payment or other collateral. Proceeds of supporting obligations also are proceeds of the underlying rights to payment or other collateral.

* * *

26. **Terminology: Assignment and Transfer.** In numerous provisions, this Article refers to the “assignment” or the “transfer” of property interests. These terms and their derivatives are not defined. This Article generally follows common usage by using the terms “assignment” and “assign” to refer to transfers of rights to payment, claims, and liens and other security interests. It generally uses the term “transfer” to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction (see Section 9-107, Comment 4), no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or to the assignment or transfer of a limited interest, such as a security interest.

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SECTION 9-107. CONTROL OF LETTER-OF-CREDIT RIGHT. A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under Section 5-114(c) or otherwise applicable law or practice.

Official Comment

1. **Source.** New.
2. **“Control” of Letter-of-Credit Right.** Whether a secured party has control of a letter-of-credit right may determine the secured party’s priority as against competing secured parties. See Section 9-329. This section provides that a secured party acquires control of a letter-of-credit right by receiving an assignment if the secured party obtains the consent of the issuer or any nominated person, such as a confirmor or negotiating bank, under Section 5-114 or other applicable law or practice. Because both issuers and nominated persons may give or be obligated to give value under a letter of credit, this section contemplates that a secured party obtains control of a letter-of-credit right with respect to the issuer or a particular nominated person only to the extent that the issuer or that nominated person consents to the assignment. For example, if a secured party obtains control to the extent of an issuer’s obligation but fails to obtain the consent of a nominated person, the secured party does not have control to the extent that the nominated person gives value. In many cases the person or persons who will give value under a letter of credit will be clear from its terms. In other cases, prudence may suggest obtaining consent from more than one person. The details of the consenting issuer’s or nominated person’s duties to pay or otherwise render performance to the secured party are left to the agreement of the parties.
3. **“Proceeds of a Letter of Credit.”** Section 5-114 follows traditional banking terminology by referring to a letter of credit beneficiary’s assignment of its right to receive payment thereunder as an assignment of the “proceeds of a letter of credit.” However, as the seller of goods can assign its right to receive payment (an “account”) before it has been earned by delivering the goods to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. See Section 5-114(b). If the assignment creates a security interest, the security interest can be perfected at the time it is created. An assignment of, including the creation of a security interest in, a letter-of-credit right is an assignment of a present interest.
4. **“Transfer” vs. “Assignment.”** Letter-of-credit law and practice distinguish the “transfer” of a letter of credit from an “assignment.” Under a transfer, the transferee itself becomes the beneficiary and acquires the right to draw. Whether a new, substitute credit is issued or the issuer advises the transferee of its status as such, the transfer constitutes a novation under which the transferee is the new, substituted beneficiary (but only to the extent of the transfer, in the case of a partial transfer).

Section 5-114(e) provides that the rights of a transferee beneficiary or nominated person are independent of the beneficiary’s assignment of the proceeds of a letter of credit and are superior to the assignee’s right to the proceeds. For this reason, transfer does not appear in this Article as a means of control or perfection. Section 9-109(c)(4) recognizes the independent and superior rights of a transferee

beneficiary under Section 5-114(e); this Article does not apply to the rights of a transferee beneficiary or nominated person to the extent that those rights are independent and superior under Section 5-114.

5. **Supporting Obligation: Automatic Attachment and Perfection.** A letter-of-credit right is a type of “supporting obligation,” as defined in Section 9-102. Under Sections 9-203 and 9-308, a security interest in a letter-of-credit right automatically attaches and is automatically perfected if the security

interest in the supported obligation is a perfected security interest. However, unless the secured party has control of the letter-of-credit right or itself becomes a transferee beneficiary, it cannot obtain any rights against the issuer or a nominated person under Article 5. Consequently, as a practical matter, the secured party’s rights would be limited to its ability to locate and identify proceeds distributed by the issuer or nominated person under the letter of credit.

* * *

SECTION 9-109. SCOPE.

- (a) **[General scope of article.]** Except as otherwise provided in subsections (c) and (d), this article applies to:
 - (1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;
 - (6) a security interest arising under Section 4-210 or 5-118.
- (b) **[Security interest in secured obligation.]** The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.
- (c) **[Extent to which article does not apply.]** This article does not apply to the extent that:
 - (4) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 5-114.
- (d) **[Inapplicability of article.]** This article does not apply to:
 - (6) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

PART 2

EFFECTIVENESS OF SECURITY AGREEMENT; ATTACHMENT OF SECURITY INTEREST; RIGHTS OF PARTIES TO SECURITY AGREEMENT

SECTION 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.

- (a) **[Attachment.]** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.
- (b) **[Enforceability.]** Except as otherwise provided in subsections (c) through (i), a security

interest is enforceable against the debtor and third parties with respect to the collateral only if :

- (1) value has been given;
 - (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
 - (3) one of the following conditions is met:
 - (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
 - (D) the collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents and the secured party has control under Section 7-106, 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.
- (c) **[Other UCC provisions.]** Subsection (b) is subject to Section 4-210 on the security interest of a collecting bank, Section 5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 9-110 on a security interest arising under Article 2 or 2A, and Section 9-206 on security interests in investment property.
- (f) **[Proceeds and supporting obligations.]** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.
- (g) **[Lien securing right to payment.]** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

Official Comment

8. **Supporting Obligations.** Under subsection (f), a security interest in a "supporting obligation" (defined in Section 9-102) automatically follows from a security interest in the underlying, supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is the principle that the secured party's interest in a supporting obligation extends to the supporting obligation only to the extent that it supports the collateral in which the secured party has a security interest. Complex issues may arise, however, if a supporting

obligation supports many separate obligations of a particular account debtor and if the supported obligations are separately assigned as security to several secured parties. The problems may be exacerbated if a supporting obligation is limited to an aggregate amount that is less than the aggregate amount of the obligations it supports. This Article does not contain provisions dealing with competing claims to a limited supporting obligation. As under former Article 9, the law of suretyship and the agreements of the parties will control.

SECTION 9-207. RIGHTS AND DUTIES OF SECURED PARTY HAVING POSSESSION OR CONTROL OF COLLATERAL.

- (c) [Duties and rights when secured party in possession or control.] Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-106, or 9-107:
- (1) may hold as additional security any proceeds, except money or funds, received from the collateral;
 - (2) shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and
 - (3) may create a security interest in the collateral.

SECTION 9-208. ADDITIONAL DUTIES OF SECURED PARTY HAVING CONTROL OF COLLATERAL.

- (a) [Applicability of section.] This section applies to cases in which there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.
- (b) [Duties of secured party after receiving demand from debtor.] Within 10 days after receiving an authenticated demand by the debtor:
- (5) a secured party having control of a letter-of-credit right under Section 9-107 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party.

PART 3

PERFECTION AND PRIORITY

Official Comment

2. **Scope of This Subpart.** Part 3, Subpart 1 (Sections 9-301 through 9-307) contains choice-of-law rules similar to those of former Section 9-103. Former Section 9-103 generally addresses which State's law governs "perfection and the effect of perfection or non-perfection of" security interests. See, e.g., former Section 9-103(1)(b). This Article follows the broader and more precise formulation in former Section 9-103(6)(b), which was revised in connection with the promulgation of Revised Article 8 in 1994: "perfection, the effect of perfection or non-perfection, and the priority of" security interests. Priority, in this context, subsumes all of the rules in Part 3, including "cut off" or "take free" rules such as Sections 9-317(b), (c), and (d), 9-320(a), (b), and (d), and 9-332. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement is governed by the rules in Section 1-105, that governing law typically is specified in the same agreement that contains the security agreement. And, another jurisdiction's law may govern other third-party matters addressed in this Article. See Section 9-401, Comment 3.
3. **Scope of Referral.** In designating the jurisdiction whose law governs, this Article directs the court to apply only the substantive ("local") law of a particular jurisdiction and not its choice-of-law rules.

SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS. Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

- (1) Except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral.
- (2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral.

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SECTION 9-306. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN LETTER-OF-CREDIT RIGHTS.

- (a) [Governing law: issuers or nominated person's jurisdiction.] Subject to subsection (c), the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a State.
- (b) [Issuer's or nominated person's jurisdiction.] For purposes of this part, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in Section 5-116.
- (c) [When section not applicable.] This section does not apply to a security interest that is perfected only under Section 9-308(d).

Official Comment

1. **Source.** New; derived in part from Sections 8-110(e) and former Section 9-103(6).
2. **Sui Generis Treatment.** This section governs the applicable law for perfection and priority of security interests in letter-of-credit rights, other than a security interest perfected only under Section 9-308(d) (i.e., as a supporting obligation). The treatment differs substantially from that provided in Section 9-304 for deposit accounts. The basic rule is that the law of the issuer's or nominated person's (e.g., confirmor's) jurisdiction, derived from the terms of the letter of credit itself, controls perfection and priority, but only if the issuer's or nominated person's jurisdiction is a State, as defined in Section 9-102. If the issuer's or nominated person's jurisdiction is not a State, the baseline rule of Section 9-301 applies—perfection and priority are governed by the law of the debtor's location, determined under Section 9-307. Export transactions typically involve a foreign issuer and a domestic nominated person, such as a confirmor, located in a State. The principal goal of this section is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors, and a domestic nominated person.
3. **Issuer's or Nominated Person's Jurisdiction.** Subsection (b) defers to the rules established under Section 5-116 for determination of an issuer's or nominated person's jurisdiction.

Example: An Italian bank issues a letter of credit that is confirmed by a New York bank. The beneficiary is a Connecticut corporation. The letter of credit provides that the issuer's liability is governed by Italian law, and the confirmation provides that the confirmor's liability is governed by the law of New York. Under Sections 9-306(b) and 5-116(a), Italy is the issuer's jurisdiction and New York is the confirmor's (nominated person's) jurisdiction. Because the confirmor's jurisdiction is a State, the law of New York governs perfection and priority of a security interest in the beneficiary's letter-of-credit right against the confirmor. See Section 9-306(a). However, because the issuer's jurisdiction is not a State, the law of that jurisdiction does not govern. See Section 9-306(a). Rather, the choice-of-law rule in Section 9-301(1) applies to perfection and priority of a security interest in the beneficiary's letter-of-credit right against the issuer. Under that section, perfection and priority are

governed by the law of the jurisdiction in which the debtor is located. That jurisdiction is Connecticut (beneficiary). See Section 9-307.

4. **Scope of this Section.** This section specifies only the law governing perfection, the effect of perfection or nonperfection, and priority of security interests. Section 5-116 specifies the law governing the liability of, and Article 5 (or other applicable law) deals with the rights and duties of, an issuer or nominated person. Perfection, nonperfection, and priority have no effect on those rights and duties.
5. **Change in Law Governing Perfection.** When the issuer's jurisdiction, or nominated person's jurisdiction changes, the jurisdiction whose law governs perfection under subsection (a) changes, as well. Nevertheless, this change will not result in an immediate loss of perfection. See Section 9-316(f), (g).

SECTION 9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION.

- (a) **[Perfection of security interest.]** Except as otherwise provided in this section and Section 9-309, a security interest is perfected if it has attached and all of the applicable requirements for perfection in Sections 9-310 through 9-316 have been satisfied. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches.
- (d) **[Supporting obligation.]** Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral.

Official Comment

5. **Supporting Obligations.** Subsection (d) is new. It provides for automatic perfection of a security interest in a supporting obligation for collateral if the security interest in the collateral is perfected. This is unlikely to effect any change in the law prior to adoption of this Article.

Example 2: Buyer is obligated to pay Debtor for goods sold. Buyer's president

guarantees the obligation. Debtor creates a security interest in the right to payment (account) in favor of Lender. Under Section 9-203(f), the security interest attaches to Debtor's rights under the guarantee (supporting obligation). Under subsection (d), perfection of the security interest in the account constitutes perfection of the security interest in Debtor's rights under the guarantee.

SECTION 9-309. SECURITY INTEREST PERFECTED UPON ATTACHMENT.

The following security interests are perfected when they attach:

- (8) a security interest of an issuer or nominated person arising under Section 5-118;

SECTION 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY.

- (a) **[General rule: perfection by filing.]** Except as otherwise provided in subsection (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and agricultural liens.
- (b) **[Exceptions: filing not necessary.]** The filing of a financing statement is not necessary to perfect a security interest:
 - (1) that is perfected under Section 9-308(d), (e), (f), or (g);
 - (2) that is perfected under Section 9-309 when it attaches;
 - (8) in deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which is perfected by control under Section 9-314;
 - (9) in proceeds which is perfected under Section 9-315; or
 - (10) that is perfected under Section 9-316.

SECTION 9-312. PERFECTION OF SECURITY INTERESTS IN CHATTEL PAPER, DEPOSIT ACCOUNTS, DOCUMENTS, GOODS COVERED BY DOCUMENTS, INSTRUMENTS, INVESTMENT PROPERTY, LETTER-OF-CREDIT RIGHTS, AND MONEY; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION.

- (a) **[Perfection by filing permitted.]** A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing.
- (b) **[Control or possession of certain collateral.]** Except as otherwise provided in Section 9-315(c) and (d) for proceeds:
 - (1) a security interest in a deposit account may be perfected only by control under Section 9-314;
 - (2) and except as otherwise provided in Section 9-308(d), a security interest in a letter-of-credit right may be perfected only by control under Section 9-314; and
 - (3) a security interest in money may be perfected only by the secured party's taking possession under Section 9-313.

Official Comment

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- 6. **Letter-of-Credit Rights.** Letter-of-credit rights commonly are “supporting obligations,” as defined in Section 9-102. Perfection as to the related account, chattel paper, document, general intangible, instrument, or investment property will perfect as to

the letter-of-credit rights. See Section 9-308(d). Subsection (b)(2) provides that, in other cases, a security interest in a letter-of-credit right may be perfected only by control. “Control,” for these purposes, is explained in Section 9-107.

SECTION 9-314. PERFECTION BY CONTROL.

- (a) **[Perfection by control.]** A security interest in investment property, deposit accounts, letter-of-credit rights, or electronic chattel paper or electronic documents may be perfected by control of the collateral under Section 7-106, 9-104, 9-105, 9-106, or 9-107.
- (b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A security interest in deposit accounts, electronic chattel paper, letter-of-credit rights, or electronic documents is perfected by control under Section 7-106, 9-104, 9-105, or 9-107 when the secured party obtains control and remains perfected by control only while the secured party retains control.

SECTION 9-315. SECURED PARTY'S RIGHTS ON DISPOSITION OF COLLATERAL AND IN PROCEEDS.

- (a) **[Disposition of collateral: continuation of security interest or agricultural lien; proceeds.]** Except as otherwise provided in this article and in Section 2-403(2):
 - (1) a security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien; and
 - (2) a security interest attaches to any identifiable proceeds of collateral.
- (c) **[Perfection of security interest in proceeds.]** A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected.
- (d) **[Continuation of perfection.]** A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless:
 - (1) the following conditions are satisfied:
 - (A) a filed financing statement covers the original collateral;
 - (B) the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed; and
 - (C) the proceeds are not acquired with cash proceeds;
 - (2) the proceeds are identifiable cash proceeds; or
 - (3) the security interest in the proceeds is perfected other than under subsection (c) when the security interest attaches to the proceeds or within 20 days thereafter.
- (e) **[When perfected security interest in proceeds becomes unperfected.]** If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under subsection (d)(1) becomes unperfected at the later of:
 - (1) when the effectiveness of the filed financing statement lapses under Section 9-515 or is terminated under Section 9-513; or
 - (2) the 21st day after the security interest attaches to the proceeds.

Official Comment

2. **Continuation of Security Interest or Agricultural Lien Following Disposition of Collateral.** Subsection (a)(1), which derives from former

Section 9-306(2), contains the general rule that a security interest survives disposition of the collateral. In these cases, the secured party may repossess

the collateral from the transferee or, in an appropriate case, maintain an action for conversion. The secured party may claim both any proceeds and the original collateral but, of course, may have only one satisfaction.

In many cases, a purchaser or other transferee of collateral will take free of a security interest, and the secured party's only right will be to proceed. For example, the general rule does not apply, and a security interest does not continue in collateral, if the secured party authorized the disposition, in the agreement that contains the security agreement or otherwise. Subsection (a) (1) adopts the view of PEB Commentary

No. 3 and makes explicit that the authorized disposition to which it refers is an authorized disposition "free of" the security interest or agricultural lien. The secured party's right to proceeds under this section or under the express terms of an agreement does not in itself constitute an authorization of disposition. The change in language from former Section 9-306(2) is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned upon the secured party's receipt of the proceeds. In that situation, subsection (a) leaves the determination of authorization to the courts, as under former Article 9.

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SECTION 9-316. CONTINUED PERFECTION OF SECURITY INTEREST FOLLOWING CHANGE IN GOVERNING LAW.

- (f) [Change in jurisdiction of bank, issuer, nominated person, securities intermediary, or commodity intermediary.] A security interest in deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:
 - (1) the time the security interest would have become unperfected under the law of that jurisdiction; or
 - (2) the expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

Official Comment

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- 6. **Deposit Accounts, Letter-of-Credit Rights, and Investment Property.** Subsections (f) and (g) address changes in the jurisdiction of a bank, issuer of an uncertificated security, issuer of or nominated person under a letter

of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

* * *

SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

- (a) **[General priority rules.]** Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:
 - (1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.
- (b) **[Time of perfection: proceeds and supporting obligations.]** For the purposes subsection (a)(1):
 - (1) the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds; and
 - (2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.
- (c) **[Special priority rules: proceeds and supporting obligations.]** Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under Section 9-327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in:
 - (1) any supporting obligation for the collateral; and
 - (2) proceeds of the collateral if:
 - (A) the security interest in proceeds is perfected;
 - (B) the proceeds are cash proceeds or of the same type as the collateral; and
 - (C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.
- (d) **[First-to-file priority rule for certain collateral.]** Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.
- (e) **[Applicability of subsection (d).]** Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.
- (f) **[Limitations on subsections (a) through (e).]** Subsections (a) through (e) are subject to:
 - (3) Section 5-118 with respect to a security interest of an issuer or nominated person; and

Official Comment

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7. Priority in Proceeds: Special Rules.

Subsections (c), (d), and (e), which are new, provide additional priority rules for proceeds of collateral in situations where the temporal (first-in-time) rules of subsection (a)(1) are not appropriate. These new provisions distinguish what these Comments refer to as “non-filing collateral” from what they call “filing collateral.” As used in these Comments, non-filing collateral is collateral of a type for which perfection may be achieved by a method other than filing (possession or control, mainly) and for which secured parties who so perfect generally do not expect or need to conduct a filing search. More specifically, non-filing collateral is chattel paper, deposit accounts, negotiable documents, instruments, investment property, and letter-of-credit rights. Other collateral—accounts, commercial tort claims, general intangibles, goods, nonnegotiable documents, and payment intangibles—is filing collateral.

8. Proceeds of Non-Filing Collateral:

Non-Temporal Priority. Subsection (c)(2) provides a baseline priority rule for proceeds of non-filing collateral which applies if the secured party has taken the steps required for non-temporal priority over a conflicting security interest in non-filing collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property...). This rule determines priority in proceeds of non-

filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under subsection (c)(2), the priority in the original collateral continues in proceeds if the security interest in proceeds is perfected and the proceeds are cash proceeds or non-filing proceeds “of the same type” as the original collateral. As used in subsection (c)(2), “type” means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is “of the same type” as a security entitlement (i.e., investment property), and a promissory note is “of the same type” as a draft (i.e., an instrument).

* * *

10. Priority in Supporting Obligations.

Under subsections (b)(2) and (c)(1), a security interest having priority in collateral also has priority in a supporting obligation for that collateral. However, the rules in these subsections are subject to the special rule in Section 9-329 governing the priority of security interests in a letter-of-credit right. See subsection (f). Under Section 9-329, a secured party’s failure to obtain control (Section 9-107) of a letter-of-credit right that serves as supporting collateral leaves its security interest exposed to a priming interest of a party who does take control.

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SECTION 9-329. PRIORITY OF SECURITY INTERESTS IN LETTER-OF-CREDIT RIGHT. The following rules govern priority among conflicting security interests in the same letter-of-credit right:

- (1) A security interest held by a secured party having control of the letter-of-credit right under Section 9-107 has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control.
- (2) Security interests perfected by control under Section 9-314 rank according to priority in time of obtaining control.

Official Comment

1. **Source.** New; loosely modeled after former Section 9-115(5).
2. **General Rule.** Paragraph (1) awards priority to a secured party who perfects a security interest directly in letter-of-credit rights (i.e., one that takes an assignment of proceeds and obtains consent of the issuer or any nominated person under Section 5-114(c)) over another conflicting security interest (i.e., one that is perfected automatically in the letter-of-credit rights as supporting obligations under Section 9-308(d)). This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds. If an issuer or nominated person recognizes multiple security interests in a letter-of-credit right, resulting in multiple parties having control (Section 9-107), under paragraph (2) the security interests rank according to the time of obtaining control.
3. **Drawing Rights; Transferee Beneficiaries.** Drawing under a letter of credit is personal to the beneficiary and requires the beneficiary to perform the conditions for drawing under the letter of credit. Accordingly, a beneficiary's grant of a security interest in a letter of credit includes the beneficiary's "letter-of-credit right" as defined in Section 9-102 and the right to "proceeds of [the] letter of credit" as defined in Section 5-114(a), but does not include the right to demand payment under the letter of credit.

Section 5-114(e) provides that the "[r]ights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds." To the extent the rights of a transferee beneficiary or nominated person are independent and superior, this Article does not apply. See Section 9-109(c).

Under Article 5, there is in effect a novation upon the transfer with the issuer becoming bound on a new, independent obligation to the transferee. The rights of nominated persons and transferee beneficiaries under a letter of credit include the right to demand payment from the issuer. Under Section 5-114(e), their rights to payment are independent of their obligations to the beneficiary (or original beneficiary) and superior to the rights of assignees of letter of credit proceeds (Section 5-114(c)) and others claiming a security interest in the beneficiary's (or original beneficiary's) letter of credit rights.

A transfer of drawing rights under a transferable letter of credit establishes independent Article 5 rights in the transferee and does not create or perfect an Article 9 security interest in the transferred drawing rights. The definition of "letter-of-credit right" in Section 9-102 excludes a beneficiary's drawing rights. The exercise of drawing rights by a transferee beneficiary may breach a contractual obligation of the transferee to the original beneficiary concerning when and how much the transferee may draw or how it may use the funds received under the letter of credit. If, for example, drawing rights are transferred to support a sale or loan from the transferee to the original beneficiary, then the transferee would be obligated to the original beneficiary under the sale or loan agreement to account for any drawing and for the use of any funds received. The transferee's obligation would be governed by the applicable law of contracts or restitution.
4. **Secured Party-Transferee Beneficiaries.** As described in Comment 3, drawing rights under letters of credit are transferred in many commercial contexts in which the transferee is not a secured party

claiming a security interest in an underlying receivable supported by the letter of credit. Consequently, a transfer of a letter credit is not a method of “perfection” of a security interest. The transferee’s independent right to draw under the letter of credit and to receive and retain the value thereunder (in effect, priority) is not based on Article 9 but on letter-of-credit law and the terms of the letter of credit. Assume, however, that a secured party does hold a security interest in a receivable that is owned by a beneficiary-debtor and supported by a transferable letter of credit. Assume further that the beneficiary-debtor causes the letter of credit to be transferred to the secured party, the secured party draws under the letter of credit, and, upon the issuer’s payment to the secured party-transferee, the underlying account debtor’s obligation to the original beneficiary-debtor is satisfied. In this situation, the payment to the secured party-transferee is proceeds of the receivable collected by the secured party-transferee. Consequently, the secured party-transferee would have certain duties to the debtor and third parties under Article 9. For example, it would be obliged to collect under the letter of credit in a commercially reasonable manner and to remit any surplus pursuant to Sections 9-607 and 9-608.

This scenario is problematic under letter-

of-credit law and practice, inasmuch as a transferee beneficiary collects in its own right arising from its own performance. Accordingly, under Section 5-114, the independent and superior rights of a transferee control over any inconsistent duties under Article 9. A transferee beneficiary may take a transfer of drawing rights to avoid reliance on the original beneficiary’s credit and collateral, and it may consider any Article 9 rights superseded by its Article 5 rights. Moreover, it will not always be clear (i) whether a transferee beneficiary has a security interest in the underlying collateral, (ii) whether any security interest is senior to the rights of others, or (iii) whether the transferee beneficiary is aware that it holds a security interest. There will be clear cases in which the role of a transferee beneficiary as such is merely incidental to a conventional secured financing. There also will be cases in which the existence of a security interest may have little to do with the position of a transferee beneficiary as such. In dealing with these cases and less clear cases involving the possible application of Article 9 to a nominated person or a transferee beneficiary, the right to demand payment under a letter of credit should be distinguished from letter-of-credit rights. The courts also should give appropriate consideration to the policies and provisions of Article 5 and letter-of-credit practice as well as Article 9.

* * *

SECTION 9-332. TRANSFER OF MONEY; TRANSFER OF FUNDS FROM DEPOSIT ACCOUNT.

- (a) **[Transferee of money.]** A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.
- (b) **[Transferee of funds from deposit account.]** A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

Official Comment

1. **Source.** New.
2. **Scope of This Section.** This section affords broad protection to transferees who take funds from a deposit account and to those who take money. The term “transferee” is not defined; however, the debtor itself is not a transferee. Thus this section does not cover the case in which a debtor withdraws money (currency) from its deposit account or the case in which a bank debits an encumbered account and credits another account it maintains for the debtor.

A transfer of funds from a deposit account, to which subsection (b) applies, normally will be made by check, by funds transfer, or by debiting the debtor’s deposit account and crediting another depositor’s account.

Example 1: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. Debtor draws a check on the account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit account (it is an order to pay funds from the deposit account), Lender’s security interest in the deposit account does not give rise to a security interest in the check. Payee deposits the check into its own deposit account, and Bank A pays it. Unless Payee acted in collusion with Debtor in violating Lender’s rights, Payee takes the funds (the credits running in favor of Payee) free of Lender’s security interest. This is true regardless of whether Payee is a holder in due course of the check and even if Payee gave no value for the check.

Example 2: Debtor maintains a deposit account with Bank A. The deposit account is subject to a perfected security interest in favor of Lender. At Bank B’s suggestion, Debtor moves the funds from the account at Bank A to Debtor’s deposit account with Bank B. Unless Bank B acted in collusion with Debtor in violating

Lender’s rights, Bank B takes the funds (the credits running in favor of Bank B) free from Lender’s security interest. See subsection (b). However, inasmuch as the deposit account maintained with Bank B constitutes the proceeds of the deposit account at Bank A, Lender’s security interest would attach to that account as proceeds. See Section 9-315.

Subsection (b) also would apply if, in the example, Bank A debited Debtor’s deposit account in exchange for the issuance of Bank A’s cashier’s check. Lender’s security interest would attach to the cashier’s check as proceeds of the deposit account, and the rules applicable to instruments would govern any competing claims to the cashier’s check. See, e.g., Sections 3-306, 9-322, 9-330, 9-331.

If Debtor withdraws money (currency) from an encumbered deposit account and transfers the money to a third party, then subsection (a), to the extent not displaced by federal law relating to money, applies. It contains the same rule as subsection (b).

Subsection (b) applies to *transfers of funds from* a deposit account; it does not apply to *transfers of the deposit account* itself or of an interest therein. For example, this section does not apply to the creation of a security interest in a deposit account. Competing claims to the deposit account itself are dealt with by other Article 9 priority rules. See Sections 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit account itself. If so, the normal rules applicable to transferred collateral would apply; this section would not.

3. **Policy.** Broad protection for transferees helps to ensure that security interests in deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a secured party

will enjoy a claim to whatever the transferee purchases with the funds. Rules concerning recovery of payments traditionally have placed a high value on finality. The opportunity to upset a completed transaction, or even to place a completed transaction in jeopardy by bringing suit against the transferee of funds, should be severely limited. Although the giving of value usually is a prerequisite for receiving the ability to take free from third-party claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c) provides that, even where the law of restitution otherwise would permit recovery of funds paid by mistake, no recovery may be had from a person “who in good faith changed position in reliance on the payment.” Rather than adopt this standard, this section eliminates all reliance requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would object to these payments. In the vast proportion of cases, the transferee probably would be able to show a change of position in reliance on the payment. This section does not put the transferee to the burden of having to make this proof.

4. **“Bad Actors.”** To deal with the question of the “bad actor,” this section

borrows “collusion” language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g., Section 1-201(9)* (“without knowledge that the sale . . . is in violation of the . . . security interest”); Section 1-201(19) (“honesty in fact in the conduct or transaction concerned”); Section 3-302(a)(2)(v) (“without notice of any claim”).

5. **Transferee Who Does Not Take Free.** This section sets forth the circumstances under which certain transferees of money or funds take free of security interests. It does not determine the rights of a transferee who does not take free of a security interest.

Example 3: The facts are as in Example 2, but, in wrongfully moving the funds from the deposit account at Bank A to Debtor’s deposit account with Bank B, Debtor acts in collusion with Bank B. Bank B does not take the funds free of Lender’s security interest under this section. If Debtor grants a security interest to Bank B, Section 9-327 governs the relative priorities of Lender and Bank B. Under Section 9-327(3), Bank B’s security interest in the Bank B deposit account is senior to Lender’s security interest in the deposit account as proceeds. However, Bank B’s senior security interest does not protect Bank B against any liability to Lender that might arise from Bank B’s wrongful conduct.

* * *

SECTION 9-339. PRIORITY SUBJECT TO SUBORDINATION.

This article does not preclude subordination by agreement by a person entitled to priority.

Official Comment

2. **Subordination by Agreement.** The preceding sections deal elaborately with questions of priority. This section makes it entirely clear that a person entitled to priority may effectively agree to subordinate its claim. Only

the person entitled to priority may make such an agreement: a person’s rights cannot be adversely affected by an agreement to which the person is not a party.

* * *

PART 4

RIGHTS OF THIRD PARTIES

SECTION 9-401. ALIENABILITY OF DEBTOR'S RIGHTS.

- (a) **[Other law governs alienability; exceptions.]** Except as otherwise provided in subsection (b) and Sections 9-406, 9-407, 9-408, and 9-409, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this article.
- (b) **[Agreement does not prevent transfer.]** An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect.

Official Comment

- 2. **Scope of This Part.** This Part deals with several issues affecting third parties (i.e., parties other than the debtor and the secured party). These issues are not addressed in Part 3, Subpart 3, which deals with priorities. This Part primarily addresses the rights and duties of account debtors and other persons obligated on collateral who are not, themselves, parties to a secured transaction.
- 3. **Governing Law.** There was some uncertainty under former Article 9 as to which jurisdiction's law (usually, which jurisdiction's version of Article 9) applied to the matters that this Part addresses. Part 3, Subpart 1, does not determine the law governing these matters because they do not relate to perfection, the effect of perfection or nonperfection, or priority. However, it might be inappropriate for a designation of applicable law by a debtor and secured party under Section 1-105 to control the law applicable to an independent transaction or relationship between the debtor and an account debtor.
- 4. **Inalienability Under Other Law.** Subsection (a) addresses the question whether property necessarily is transferable by virtue of its inclusion (i.e., its eligibility as collateral) within the scope of Article 9. It gives a negative answer, subject to the identified exceptions. The substance of subsection (a) was implicit under former Article 9.

* * *

SECTION 9-404. RIGHTS ACQUIRED BY ASSIGNEE; CLAIMS AND DEFENSES AGAINST ASSIGNEE.

- (a) **[Assignee's rights subject to terms, claims, and defenses; exceptions.]** Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:
 - (1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and
 - (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

Official Comment

5. **Scope; Application to “Account Debtor.”** This section deals only with the rights and duties of “account debtors”—and for the most part only with account debtors on accounts, chattel paper, and payment intangibles. Subsection (e) provides that the obligation of an insurer with respect to a health-care-insurance receivable is governed by other law. References in this section to an “account debtor” include account debtors on collateral that is proceeds. Neither this section nor any other provision of this Article, including Sections 9-408 and 9-409, provides analogous regulation of the rights and duties of other obligors on collateral, such as the maker of a

negotiable instrument (governed by Article 3), the issuer of or nominated person under a letter of credit (governed by Article 5), or the issuer of a security (governed by Article 8). Article 9 leaves those rights and duties untouched; however, Section 9-409 deals with the special case of letters of credit. When chattel paper is composed in part of a negotiable instrument, the obligor on the instrument is not an “account debtor,” and Article 3 governs the rights of the assignee of the chattel paper with respect to the issues that this section addresses. See, e.g., Section 3-601 (dealing with discharge of an obligation to pay a negotiable instrument).

SECTION 9-409. RESTRICTIONS ON ASSIGNMENT OF LETTER-OF-CREDIT RIGHTS INEFFECTIVE.

- (a) **[Term or law restricting assignment generally ineffective.]** A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary’s assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice:
- (1) would impair the creation, attachment, or perfection of a security interest in the letter-of-credit right; or
 - (2) provides that the creation, attachment, or perfection of the security interest may give rise to a default, assignment or the breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right.
- (b) **[Limitation on ineffectiveness under subsection (a).]** To the extent that a term in a letter of credit is ineffective under subsection (a) but would be effective under law other than this article or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, the creation, attachment, or perfection of a security interest in the letter-of-credit right:
- (1) is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary;
 - (2) imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary; and
 - (3) does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

Official Comment

1. **Source.** New.
2. **Purpose and Relevance.** This section, patterned on Section 9-408, limits the effectiveness of attempts to restrict the creation, attachment, or perfection of a security interest in letter-of-credit rights, whether the restriction appears in the letter of credit or a rule of law, custom, or practice applicable to the letter of credit. It protects the creation, attachment, and perfection of a security interest while preventing these events from giving rise to a default or breach by the assignor or from triggering a remedy or defense of the issuer or other person obligated on a letter of credit. Letter-of-credit rights are a type of supporting obligation. See Section 9-102. Under Sections 9-203 and 9-308, a security interest in a supporting obligation attaches and is perfected automatically if the security interest in the supported obligation attaches and is perfected. See Section 9-107, Comment 5. The automatic attachment and perfection under Article 9 would be anomalous or misleading if, under other law (e.g., Article 5), a restriction on transfer or assignment were effective to block attachment and perfection.
3. **Relationship to Letter-of-Credit Law.** Although restrictions on an assignment of a letter of credit are ineffective to prevent creation, attachment, and perfection of a security interest, subsection (b) protects the issuer and other parties from any adverse effects of the security interest by preserving letter-of-credit law and practice that limits the right of a beneficiary to transfer its right to draw or otherwise demand performance (Section 5-112) and limits the obligation of an issuer or nominated person to recognize a beneficiary's assignment of letter-of-credit proceeds (Section 5-114). Thus, this section's treatment of letter-of-credit rights differs from this Article's treatment of instruments and investment property. Moreover, under Section 9-109(c)(4), this Article does not apply to the extent that the rights of a transferee beneficiary or nominated person are independent and superior under Section 5-114, thereby preserving the "independence principle" of letter-of-credit law.

PART 6

DEFAULT

SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED PARTY.

- (a) **[Collection and enforcement generally.]** If so agreed, and in any event after default, a secured party:
 - (1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;
 - (2) may take any proceeds to which the secured party is entitled under Section 9-315;
 - (3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;
- (c) **[Commercially reasonable collection and enforcement.]** A secured party shall proceed in a commercially reasonable manner if the secured party:

- (1) undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and
 - (2) is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.
- (e) **[Duties to secured party not affected.]** This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

Official Comment

3. **Scope.** The scope of this section is broader than that of former Section 9-502. It applies not only to collections from account debtors and obligors on instruments but also to enforcement more generally against all persons obligated on collateral. It explicitly provides for the secured party's enforcement of the debtor's rights in respect of the account debtor's (and other third parties') obligations and for the secured party's enforcement of supporting obligations with respect to those obligations. (Supporting obligations are components of the collateral under Section 9-203(f).) The rights of a secured party under subsection (a) include the right to enforce claims that the debtor may enjoy against others. For example, the claims might include a breach-of-warranty claim arising out of a defect in equipment that is collateral or a secured party's action for an injunction against infringement of a patent that is collateral. Those claims typically would be proceeds of original collateral under Section 9-315.

* * *

6. **Relationship to Rights and Duties of Persons Obligated on Collateral.**

This section permits a secured party to collect and enforce obligations included in collateral in its capacity as a secured party. It is not necessary for a secured party first to become the owner of the collateral pursuant to a disposition or acceptance. However, the secured party's rights, as between it and the

debtor, to collect from and enforce collateral against account debtors and others obligated on collateral under subsection (a) are subject to Section 9-341, Part 4, and other applicable law. *Neither this section nor former Section 9-502 should be understood to regulate the duties of an account debtor or other person obligated on collateral.* Subsection (e) makes this explicit. For example, the secured party may be unable to exercise the debtor's rights under an instrument if the debtor is in possession of the instrument, or under a non-transferable letter of credit if the debtor is the beneficiary. Unless a secured party has control over a letter-of-credit right and is entitled to receive payment or performance from the issuer or a nominated person under Article 5, its remedies with respect to the letter-of-credit right may be limited to the recovery of any identifiable proceeds from the debtor. This section establishes only the baseline rights of the secured party *vis-a-vis the debtor*—the secured party is entitled to enforce and collect after default or earlier if so agreed.

* * *

9. **Commercial Reasonableness.**

Subsection (c) provides that the secured party's collection and enforcement rights under subsection (a) must be exercised in a commercially reasonable manner. These rights include the right to settle and compromise claims against the account debtor. The secured party's failure to observe the standard

of commercial reasonableness could render it liable to an aggrieved person under Section 9-625, and the secured party's recovery of a deficiency would be subject to Section 9-626. Subsection (c) does not apply if, as is characteristic of most sales of accounts, chattel paper, payment intangibles, and promissory notes, the secured party (buyer) has no right of recourse against the debtor (seller) or a secondary obligor. However, if the secured party does have a right of recourse, the commercial-

reasonableness standard applies to collection and enforcement even though the assignment to the secured party was a "true" sale. The obligation to proceed in a commercially reasonable manner arises because the collection process affects the extent of the seller's recourse liability, not because the seller retains an interest in the sold collateral (the seller does not). Concerning classification of a transaction, see Section 9-109, Comment 4

The Supreme Court of the People's Republic of China Letter of Credit Rules

Editor's Overview

Over the past thirty years, China has experienced a remarkable revolution in its approach to letter of credit law and practice that in many ways parallels its economic emergence. From a situation in which China did not even participate in the work of the International Chamber of Commerce or issue its letters of credit subject to the UCP, it has evolved to a situation where now it provides officers to the ICC Banking Commission and represents one of the most vibrant LC economies in the world with the UCP as the norm of both law and practice.

A similar development has taken place in Chinese letter of credit law. Twenty years ago, Chinese commercial law was in a very basic formative stage with arbitration as the normal means of settling civil disputes, due in large part to concerns about the judicial system. There was no Chinese letter of credit law as such.

In the sphere of banking practice and law, there have been considerable advances. Chinese banks not only apply the UCP but are coming to recognize that an aggressive literalness can be counter-productive to their reputation and their own position as the beneficiaries or correspondent banks confirming or negotiating letters of credit.

Chinese courts, starting with the important work of the Supreme People's Court have rendered a series of decisions which reflect a maturing letter of credit jurisprudence and the Chinese government has shown a willingness to provide their judges with opportunities for education and interaction with legal colleagues in other legal systems.

It is in this context that the issuance on 24 October 2005 of the "Rules of the Supreme People's Court Concerning Several Issues in Hearing Letter of Credit Cases" must be seen. Taken together with the Provisions of the Supreme People's Court "Concerning Jurisdiction over Foreign-Related Civil and Commercial Cases" issued in 2002, they provide a useful skeletal framework for the evolution of Chinese letter of credit law that should be the envy of most other legal systems which must rely on erratic judicial decisions that are in reaction to specific issues often raised in a misleading context and that have produced confusion and chaos in the commercial world more than once in the past decade.

Although the Chinese Legal system is based on the civil law model in which judicial decisions even of the Supreme People's Court are not binding on other courts in different cases, the opinions of the Supreme People's Court in letter of credit matters have been widely distributed and are of considerable guidance to trial and appellate courts. Under Chinese Organic Law, the Supreme People's Court is able to issue by decree regulations or rules that are binding on all Chinese courts. The two Rules translated and published here regarding letters of credit are such rules and are, in effect, the letter of credit law of China since there is no statute or other legislative provision of the Chinese National People's Congress.

The great advantage of these rules is that they provide or are based on a systematic framework that is aligned with modern developments in letter of credit law and practice represented by the UN Convention on Independent Guarantees and Standby Letters of Credit, the conceptual work that lead to the revision of the U.S. statute on letters of credit (both in 1995), and the International Standby Practices (ISP98). While very much Chinese in terminology and approach, these rules provide non Chinese bankers and lawyers with a basis for a common understanding with their Chinese counterparts.

The rules address fundamental questions about Chinese letter of credit law and the legal system. The 2002 rules include provisions reserving letter of credit cases for special courts with the expertise to handle such sophisticated matters and protections in the event of the exercise of jurisdiction by other courts. The 2005 rules address the application of international rules, practices, and regulations, permitting their application where the undertaking is issued subject to them and providing for their application as appropriate even where they are not expressly made applicable. In addition, these rules address issues of the scope of their application, the duty of the issuer, the independence of the letter of credit undertaking, the standard of compliance, the discretion of the issuer to approach the applicant for waiver, the implications of a decision to waive discrepancies, letter of credit fraud, criteria for suspension or freezing payment and applicable procedural standards, situations where payment must be made even where there is letter of credit fraud. In effect as of 1 January 2006, these rules provide a fundamental framework for Chinese letter of credit law.

The Institute is proud to have been associated with the formulation of these rules through discussions and meetings with members of the Chinese judiciary since 2000 in private meetings and in connections with its Annual Surveys of Letter of Credit Law & Practice that have been held since 2001 in Beijing or Shanghai.

The Institute is especially proud to be associated with Dean GAO Xiang, now a joint member of the faculty of law at the University of Canberra and China University of Political Science and Law, a Fellow of the Institute, and a former judge of the Supreme People's Court who was a principal figure in drafting the November 2005 rules and his forthcoming Commentary on the Rules, to be published by the Institute will be the definitive study of these important provisions.

It is also proud to be associated with Mr. JIN Saibo, a partner of the Beijing Zhonglun law firm and an Associate of the Institute. Mr. Jin has been a leading figure in Chinese letter of credit law, providing training to judges and lawyers throughout China, translating Chinese cases into English, and providing non Chinese LC professionals with access to the Chinese letter of credit system. Mr. JIN is responsible for the translation of the 2002 rules.

The rules appear below, with the 2002 rules "Concerning Jurisdiction over Foreign-Related Civil and Commercial Cases" appearing after the 2005 "Rules of the Supreme People's Court Concerning Several Issues in Hearing Letter of Credit Cases".

***Rules of the Supreme Court of the People's Republic of China
Concerning Several Issues in Hearing Letter of Credit Cases
(2005)***

**ARTICLE 1
Scope of Rules**

Credit cases referred to herein include cases arising out of issuance, advising, amendment, revocation, confirmation, negotiation and reimbursement of Credits.

**ARTICLE 2
Application of International Rules or Practices**

When hearing a Credit case, a people's court shall apply the international customs and practices or other rules or regulations that the parties have agreed upon; in the absence of such an agreement, the UCP issued by the ICC or other relevant international customs and practices shall be applied.

**ARTICLE 3
Application to Reimbursement Disputes**

These Rules shall also apply to cases involving reimbursement disputes arising out of the application for the issuance of a Credit between the applicant and the issuing bank, disputes arising out of an agency agreement for the authorisation of the application for the issuance of a Credit between the principal and the agent, disputes arising out of a guarantee provided by a guarantor for the issuance of a Credit or the authorisation of the application for the issuance of a Credit, and disputes arising out of the financing under a Credit.

**ARTICLE 4
Choice of Law Rule Regarding LC Application**

Laws of the People's Republic of China shall be applied to cases involving reimbursement

disputes arising out of the application for the issuance of a Credit, disputes arising out of an agency agreement for the authorisation of the application for the issuance of a Credit, guarantee disputes arising out of the aforesaid application for the issuance of a Credit or the authorisation of the application for the issuance of a Credit, and disputes arising out of the financing under a Credit, unless otherwise agreed upon by the parties to a foreign-related contract.

**ARTICLE 5
Time for Honor of Letter of Credit Undertaking**

When the issuing bank has undertaken to pay, accept or perform other obligations under a Credit, it should honour its payment obligation within the time limit provided in the Credit if the documents appear on their face in compliance with the terms and conditions of the Credit and consistent with one another. A people's court shall not give effect to a defence based on the underlying transaction between the applicant and the beneficiary unless it is based on the circumstances provided in Article 8 hereinafter.

**ARTICLE 6
Honor**

When hearing a Credit case involving the examination of documents, a people's court shall apply the international customs and practices or other rules or regulations agreed upon by the parties; in the absence of such an agreement, it shall follow the standard set out in the UCP and other documents published by the ICC to determine whether or not the documents are on their face in compliance with the terms and conditions of the Credit and consistent with one another.

The documents shall not be held as discrepant where they appear on their face not totally in compliance with the terms and conditions of the Credit or consistent with one another but will not lead to any misunderstanding.

ARTICLE 7 **Independence in Examination and Waiver**

The issuing bank has rights and obligations to examine the documents independently, is entitled to determine by itself whether or not the documents appear on their face in compliance with the terms and conditions of the Credit or consistent with one another, and can decide by itself whether to accept or reject the documents if they are discrepant.

The issuing bank can decide by itself whether or not to approach the applicant to see if it is willing to accept the documents when discrepancies are found. Whether the applicant is to waive the discrepancies or not will have no impact on the ultimate power of the issuing bank to decide whether it is to take up the documents or not, unless otherwise agreed by the applicant and the issuing bank.

The issuing bank shall be obligated to honour its obligations under a Credit if it has expressly indicated to the beneficiary that it has accepted the documents although they are discrepant.

A people's court shall not support a payment claim by the beneficiary on the ground that the applicant has waived the discrepancy of the documents presented where the issuing bank has refused to do so.

ARTICLE 8 **What Constitutes Letter of Credit Fraud**

Any of the following shall be considered as Credit fraud:

- (i) The beneficiary has forged documents or presented documents containing fraudulent information;
- (ii) The beneficiary has intentionally failed to deliver goods or delivered goods with no value;
- (iii) The beneficiary has conspired with the applicant or a third party and presented fraudulent documents whereas there is no actual underlying transaction; or
- (iv) Other circumstances that constitute Credit fraud.

ARTICLE 9 **Right to Seek Suspension of Payment**

The applicant, the issuing bank or other interested parties may apply to a competent people's court for a ruling to suspend the payment under the Credit if they have found out that the circumstances set out in Article 8 hereinbefore have occurred and will cause them irreparable damage.

ARTICLE 10 **Persons Protected from Suspension of Payment Order**

A people's court shall make a ruling to suspend the payment or a judgement to permanently stop the payment under a Credit when fraud is established, unless one of the following has happened:

- (i) The nominated person or the person authorised by the issuing bank has paid in good faith in accordance with the instructions of the issuing bank;
- (ii) The issuing bank or its nominated or authorized person has accepted the bills of exchange under the Credit in good faith;
- (iii) The confirming bank has paid in good faith; or
- (iv) The negotiating bank has negotiated in good faith.

ARTICLE 11

Emergency Application for Suspension of Payment Prior to Filing Action on Letter of Credit or Contract

A people's court shall accept the application by a party for a ruling to suspend the payment of a Credit prior to the filing of the action when the following conditions are met:

- (i) The people's court receiving the application has competent jurisdiction over the case;
- (ii) The evidence rendered by the applicant has established the existence of the circumstances set out in Article 8 hereinbefore;
- (iii) The applicant will suffer irreparable damage if a ruling to suspend the payment is not issued;
- (iv) The applicant has provided reliable and adequate security; and
- (v) The circumstances set out in Article 10 hereinbefore do not exist.

Where a party applies for a ruling to suspend the payment of a Credit in the course of the proceedings, the conditions set out in (ii), (iii), (iv) and (v) of the preceding section shall be met.

ARTICLE 12

Rulings on Application for Suspension of Payment

A people's court must make a ruling within 48 hours after an application for the suspension of the payment under a Credit has been received. The ruling shall be effective the moment it is rendered if it is to suspend the payment.

The ruling to suspend the payment under the Credit shall clearly list the details of the applicant, the respondent and the third party.

ARTICLE 13

Appeal of Suspension Order

A party may apply to the people's court at the next higher level for a reconsideration of the ruling by a people's court for the suspension of the payment under a Credit within 10 days upon its delivery if it has an objection. The higher level people's court shall make a ruling within 10 days upon its receipt of the application for reconsideration.

The execution of the original ruling shall not be affected during the course of the reconsideration.

ARTICLE 14

Jurisdiction in Fraud Cases

When hearing a Credit fraud case, a people's court can hear the dispute arising out of the Credit transaction and that arising out of the underlying transaction together when it is necessary.

A party may list the issuing bank, the negotiating bank or any other interested party under the Credit as a third party when filing an action on the ground of fraud in the underlying transaction; a third party may apply for joining in the proceedings, and the people's court may notify the third party to join in the proceedings.

ARTICLE 15

Entry of Permanent Injunction

After hearing the case, the people's court shall render a judgement to permanently stop the payment under the Credit if fraud has been established and there are no circumstances as set out in Article 10 hereinbefore.

ARTICLE 16

Ability of Guarantor to Assert Defense of Waiver of Discrepancies

A people's court shall not give effect to a claim by a guarantor to discharge its guarantee obligation on the ground that the issuing bank or the applicant has waived

discrepancies of the documents without its consent, unless otherwise provided in the guarantee contract.

ARTICLE 17

Effect of Amendment of Credit on Obligation of Guarantor

Where a Credit has been amended through the applicant or the issuing bank without the consent of the guarantor, the guarantor shall

be merely liable for its guarantee obligations as agreed upon under the original guarantee contract or within the time and scope set out by law, unless otherwise provided in the guarantee contract.

ARTICLE 18

Effective Date of Rules

These Rules shall come into force as of 1 January 2006.

People's Republic of China Letter of Credit Rules: Concerning Jurisdiction over Foreign-Related Civil and Commercial Cases (2002)

ARTICLE 1

Limitation of Jurisdiction

The cases of the first instance are under the jurisdiction of the following people's courts:

- (i) the people's courts located in the Economic and Technological Development Zones approved by the State Council ("ETDZ");
- (ii) the intermediate people's courts located in the capitals of provinces, capitals of autonomous regions and municipalities directly under leadership of the state;
- (iii) the intermediate people's courts located in special economic zones and cities independently planned;
- (iv) other intermediate people's courts appointed by the Supreme People's Courts, and
- (v) the high people's courts.

The scope of jurisdiction of the intermediate people's courts shall be decided by the high people's courts at the location of the intermediate people's courts.

ARTICLE 2

Appeals from Decisions of Courts in Economic & Technological Development Zones

Any appeal of the rulings or orders issued by the courts located in the ETDZ during the first instance should be heard by the intermediate people's courts at the same location.

ARTICLE 3

Scope of Jurisdiction

These provisions shall apply to the following cases:

- (1) cases involving foreign-related contract and tort disputes;
- (2) cases involving L/C disputes;
- (3) cases involving claims for cancellation, recognition and enforcement of international arbitration awards;
- (4) cases involving review of effectiveness of arbitration clauses in foreign-related civil and commercial contracts; and

- (5) cases involving claims for recognition and enforcement of judgments and orders issued by foreign courts for civil and commercial cases.

ARTICLE 4 Limitation of Scope

These provisions shall not apply to cases involving border trade disputes occurring in the provinces bordering with foreign countries, foreign-related real estate cases and foreign-related intellectual property cases.

ARTICLE 5 Inclusion of Disputes Involving Hong Kong, Macao, and Taiwan

The jurisdiction over civil and commercial cases involving parties from Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan shall be handled with reference to these provisions.

ARTICLE 6 Supervision

The high people's courts shall supervise the jurisdiction over the cases. If it finds that a court accepts and/or hears a foreign-related civil or commercial case by exceeding its scope of jurisdiction, it shall notify such court or order the court to transfer the case to a people's court having jurisdiction over the case.

ARTICLE 7 Implementation of Rules

These provisions shall come into force as of March 1, 2002. The cases already accepted and/or heard by any courts before these provisions come into force shall continue to be heard by such courts.

In case that there is any discrepancies between these provisions and the relevant legal interpretations or provisions issued prior to promulgation of these provisions, these provisions shall prevail.

Provisions of the Supreme People's Court of the People's Republic of China on Several Issues Concerning the Trial of Disputes Over Independent Guarantees (2016)

Editor's Overview

The Independent Guarantee Provisions were released in an Announcement issued by the Supreme People's Court of the People's Republic of China which stated that "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Disputes over Independent Guarantees, adopted at the 1688th meeting of the Judicial Committee of the Supreme People's Court on July 7, 2016, are hereby published and shall come into effect as of December 1, 2016".

The Independent Guarantee Provisions do not mention the source of their legal force. The authority of the Supreme People's Court to issue such judicial interpretations is derived from Article 32 of the Organic Law of the People's Court (Order No. 59 of the President of the People's Republic of China, promulgated by Standing Committee of the People's Congress on October 31, 2006, and effective on 1 January 2007) and Article 2 of the Resolution of the Standing Committee of the National People's Congress Providing an Improved Interpretation of the Law (promulgated and effective on 10 June 1981) which authorises the Supreme People's Court to "make justice interpretations with respect to the application of the laws and decrees in adjudication".

Under these authorisations, the Supreme People's Court can make justice interpretations of a Chinese statute on interstitial issues not addressed by the statute in order to clarify its provisions, and even on matters of legal practice of which there is no governing statute in discrete areas where there have been numerous judicial decisions. The Rules of the Supreme Court of the People's Republic of China Concerning Several Issues in Hearing Letter of Credit Cases (2005) and the Independent Guarantee Provisions are examples of such areas. As a result of this delegation of power, the Independent Guarantee Provisions have the practical effect of law in a manner analogous to a judicial decision under the Common Law.

In this translation, the shorthand English name "Independent Guarantee Provisions" is used. "Provisions" is a translation of the Chinese word "规定" (Guiding), and is used in preference to "Interpretations", "Rules" or similar terms. The Supreme People's Court has issued several types of Judicial Interpretations "司法解释" (Sifa Jieshi), one category of which is Provisions. To signify their official, legal, and binding character, this translation also refers to them as "Judicial Provisions".

This English translation of the Independent Guarantee Provisions was prepared by a team headed by JIN Saibo (Beijing office) of Beijing Jincheng Tongda & Neal Law Firm. The translators were FENG Jing, HONG Qin (Beijing office), and ZHANG Zheng (Shanghai Office) of the Jincheng Tongda & Neal Law Firm (www.jtnfa.com/CN/index.aspx). Any suggestions or comments on the translation may be sent to Mr. JIN at jinsaibo@jtnfa.com.

The English translation has been reviewed and edited by Professor James BYRNE of the Institute of International Banking Law & Practice (www.iiblp.org), with the valuable assistance of the IIBLP team: Justin BERGER, Associate Counsel; Karl MARXEN, Director of Research; and Yangjun “Anora” WANG (汪洋俊), Intern and J.D. Can. 2019 GMU School of Law.

Provisions of the Supreme People’s Court of the People’s Republic of China on Several Issues Concerning the Trial of Disputes Over Independent Guarantees

Fa Shi [2016] No.24

For the purpose of proper adjudication of Independent Guarantee dispute cases, maintaining the legal rights and interests of the parties, servicing and safeguarding the “Belt and Road Initiatives”,¹ and promoting the Opening-up Policy,² these Judicial Provisions³ are formulated in accordance with General Principles of the Civil Law of the People’s Republic of China, Contract Law of the People’s Republic of China, Security Law of the People’s Republic of China, Law of the Application of Law for Foreign-related Civil Relations of the People’s Republic of China, Civil Procedure Law of the People’s Republic of China and other laws, and in light of the adjudication practices:

[Part A:⁴ Definitions & Scope]

Article 1 [Key Terms]⁵

For the purpose of these Provisions, “Independent Guarantee” refers to an undertaking given in writing by a bank or a non-bank financial institution as the Issuer to the Beneficiary, by which the Issuer undertakes to pay the Beneficiary an amount up to the maximum amount of the guarantee upon the Beneficiary’s demand for payment and presentation of documents complying with the terms and conditions of the Guarantee.

1. **“Belt and Road Initiatives”.** “Belt and Road Initiatives” is a translation of the Chinese “一带一路” (Yi Dai Yi Lu). It signifies a recently launched, government sponsored, nation-wide economic project aiming at the promotion of trades, investments and other economic activities of Chinese enterprises in the Middle East, Central Asia, South Asia, South East Asia, and Europe. Since these areas overlap geographically with the historically renowned “Silk Road Belt” extending from China through Central Asia and the Middle East to Western Europe, and with the “Silk Road on the Sea” starting from Chinese ports alongside the coast through South East Asia and India to the Arabic area, this project is named “Belt and Road Initiative”.
2. **“Opening-up Policy”.** “Opening-up Policy” is a translation of the Chinese “对外开放” (Duiwai Kaifang). It signifies a policy initiated by Deng Xiaoping soon after the end of the Great Cultural Revolution, in order to establish China’s economic, political and cultural connection and communication with the outside world, especially with the Western countries. The launch of this policy is widely regarded as having triggered the recent decades of fast development of the Chinese economy.
3. **“Provisions”.** The Chinese word “規定” (Guiping) is translated “Provisions” in preference to “Interpretations”, “Rules” or similar terms. The Supreme People’s Court has issued several types of Judicial Interpretations “司法解釋” (Sifa Jieshi), one category of which is Provisions. To signify their official, legal, and binding character, this translation refers to them also as “Judicial Provisions”.
4. **PARTS. The official Chinese text of the Independent Guarantee Provisions does not contain “Parts” consisting of related Articles.** In this translation, however, the Articles are grouped into “Parts” such as “[Part 4: Definitions & Scope]” to aid the reader in locating various related provisions. With the exception of Articles 23 [*Applicable to Domestic Undertakings*] and 24 [*Freeze of Cash Collateral*], the articles fall into fairly apparent groupings. Their informal character is highlighted by the use of brackets and of an italics script, distinguishing them from the translation of the text of the articles themselves.
5. **ARTICLE TITLES. The official Chinese text of the Independent Guarantee Provisions does not contain article titles.** Although many of the drafts of the PRC Judicial Independent Guarantee Provisions, including the penultimate draft, contained headings describing the content of the article, these headings were omitted in the final version of the official Chinese text. The explanation for this omission was that the use of such titles would be inconsistent with other Judicial Provisions of the Supreme People’s Court which do not follow this approach. For the convenience of the reader, however, informal descriptive titles are used in this translation. Their informal character is highlighted by the use of brackets and of an italics script, distinguishing them from the translation of the text of the articles themselves.

Documents referred to in the preceding paragraph are the written documents required by the Independent Guarantee to be presented by the Beneficiary, which indicate the triggering event of the obligation to pay. Documents include but are not limited to a payment demand, statement of default, document issued by a third party, court judgment, arbitral award, bill of exchange, and invoice.

Independent Guarantees may be issued upon an application made by a Guarantee Applicant or instructions given by another financial institution (“Instructing Parties”). Where an Issuer issues an Independent Guarantee upon instructions, the Issuer may require the instructing party to issue an Independent Guarantee in favor of the Issuer, so as to assure the Issuer’s reimbursement.

Article 2 [Scope]

For the purpose of these Provisions, “Independent Guarantee Disputes” refers to disputes arising out of the issuance, revocation, amendment, transfer, payment and reimbursement and so forth of Independent Guarantees.

Article 3 [Independence]

Except where a Guarantee does not specify any document against which the payment shall be made or the maximum amount payable, a party’s claim that the guarantee is an Independent Guarantee shall be supported by a People’s Court if:

- (1) the guarantee states that it is payable on demand;
- (2) the guarantee states that it is subject to the ICC *Uniform Rules for Demand Guarantees* or other model rules for independent guarantee transactions; or
- (3) based on the text of the Guarantee, the Issuer’s payment obligation is independent from the underlying transaction relationship or guarantee application relationship, and the Issuer is liable for payment only against a complying presentation.

A party’s claim that the nature of a guarantee is a general guarantee or a guarantee with joint and several liability, on the ground that such guarantee refers to the relevant underlying transaction, shall not be supported by a People’s Court.

A party’s claim that the rules applicable to general guarantees and guarantees with joint and several liability under the *Security Law* shall apply to an Independent Guarantee shall not be supported by a People’s Court.

Article 4 [Issuance and Irrevocability]

An Independent Guarantee is issued when the Issuer sends out the Independent Guarantee.

An Independent Guarantee becomes effective upon issuance, unless it otherwise provides for an effective date or event(s).

A party's claim that an Independent Guarantee is irrevocable after its issuance shall be supported by a People's Court where it does not provide that it is revocable.

Article 5 [Model Practice Rules]

Where an Independent Guarantee states that it is subject to the *Uniform Rules for Demand Guarantees* or other model rules for independent guarantee transactions, or where the aforementioned rules are cited without objection by both the Issuer and the Beneficiary prior to conclusion of arguments in the trial proceedings, a People's Court shall take such model rules as an integral part of the Independent Guarantee.

In the absence of the foregoing, a party's claim for the application of the transaction model rules to an Independent Guarantee shall not be supported by a People's Court.

[Part B: Compliance]

Article 6 [Honour or Payment]

Where the documents presented by the Beneficiary comply on their face with the terms and conditions of the Independent Guarantee and are consistent with one another, the Beneficiary's claim against the Issuer for payment under the Independent Guarantee shall be supported by a People's Court.

The Issuer may not seek to excuse its payment obligation based on defenses arising out of the underlying transaction relationship or the Independent Guarantee's relationship with the Applicant and such defenses shall not be supported by a People's Court, except under the circumstances provided in Article 12 [*Fraud*] of these Judicial Provisions.

Article 7 [Compliance]

A People's Court shall decide whether documents comply on their face in accordance with the terms and conditions of the Independent Guarantee. In determining compliance, a People's Court may refer to relevant examination standards formulated by the International Chamber of Commerce.

Documents which do not appear on their face to be completely consistent with the terms and conditions of the Independent Guarantee or with one another shall be found by a People's Court to be complying on their face if no different meaning is thereby caused.

Article 8 [Issuer's Obligation; Waiver of Discrepancies]

The Issuer has the right and obligation to examine documents on its own and may determine in its own discretion whether or not the documents appear, on their face, to be in compliance with the terms and conditions of the Independent Guarantee, and with one another, and may decide in its own discretion whether or not to accept a discrepancy.

The Beneficiary's claim against the Issuer for payment shall be supported by a People's Court if the Issuer has expressly informed the Beneficiary of its acceptance of the discrepancy.

The Beneficiary's claim against the Issuer for payment on the ground of the Guarantee Applicant's acceptance of the discrepancy shall not be supported by a People's Court if the Issuer refuses to accept the discrepancy.

[Part C: Reimbursement, Transfer, and Termination]

Article 9 [Reimbursement]

The Issuer's claim for reimbursement against the Guarantee Applicant after the Issuer has paid under the Independent Guarantee shall be supported by a People's Court, unless there is any discrepancy in the documents presented by the Beneficiary.

Article 10 [Transfer]

Unless an Independent Guarantee states it is transferable and specifies document(s) based on which a new Beneficiary can be determined, a People's Court shall support the Issuer's claim that it is not bound by the Beneficiary's transfer of its right to demand payment. Where there are special provisions in relation to the Beneficiary's transfer of its right to demand payment in the Independent Guarantee, such provisions shall prevail.

Article 11 [Termination]

A party's claim that the rights and obligations under an Independent Guarantee have terminated shall be supported by a People's Court:

- (1) Where the expiry date or expiry event specified in the Independent Guarantee has occurred, and the Beneficiary has failed to present documents compliant with the terms and conditions of the Independent Guarantee on or before its expiry;
- (2) Where the complete amount payable under the Independent Guarantee has been paid;
- (3) Where the amount available under the Independent Guarantee has been reduced to zero;
- (4) Where the Issuer receives any document issued by the Beneficiary to release the Issuer from its payment obligation under the Independent Guarantee; or
- (5) Where any other termination event by operation of law or as agreed by the parties occurs.

Where any of the preceding circumstances occurs, the Beneficiary's claim for payment on the ground of the fact that it holds the original of the Independent Guarantee shall not be supported by a People's Court.

[Part D: *Independent Guarantee Fraud*]

Article 12 [Fraud]

Independent Guarantee fraud shall be found by a People's Court under one of the following circumstances:

- (1) The Beneficiary, acting in collusion with the Guarantee Applicant or any other party, has fabricated the underlying transaction;
- (2) Any of the third-party documents presented by the Beneficiary is forged or contains false information;
- (3) Any court judgment or arbitral award finds that the party obligated on the underlying transaction shall not be liable for payment or damages;
- (4) The Beneficiary acknowledges that the obligations under the underlying transaction have been fully discharged or that the payment triggering event specified in the Independent Guarantee has not occurred; or
- (5) The Beneficiary otherwise knowingly abuses its right to demand payment when it has no such right.

Article 13 [Petition for Suspension of Payment]

The Applicant, the Issuer, or the Instructing Party of the Independent Guarantee may, prior to or during the court litigation or arbitral procedure, file a petition with a People's Court of the Issuer's domicile or any other People's Court with competent jurisdiction over the Independent Guarantee fraud dispute to suspend the payment under the Independent Guarantee in the event they find out that any of the circumstances provided in Article 12 [Fraud] has occurred.

Article 14 [Suspension of Payment]

A People's Court shall issue a ruling suspending payment under an Independent Guarantee, provided all the following conditions are met:

- (1) The evidence filed by the petitioner for payment suspension supports a high probability of existence of any of the circumstances provided in Article 12 [Fraud];
- (2) It is under such urgent circumstances that the petitioner's lawful rights and interests will suffer irreparable damage if payment is not suspended; and
- (3) The petitioner has provided security sufficient to cover the damage probably caused by the payment suspension to the party(ies) against whom the application is made.

A petitioner's application for payment suspension on the ground of the Beneficiary's breach of contract in the underlying transaction shall not be supported by a People's Court.

Where the Issuer has paid in good faith under the Independent Guarantee which has been issued upon instructions of the Instructing Party, a People's Court shall not suspend the payment under another Independent Guarantee whose purpose is to secure the Issuer's right to reimbursement.

Article 15 *[Compensation for Wrongful Petition]*

A party's claim for compensation for losses caused by the wrongful petition for suspension of payment against the petitioner shall be supported by a People's Court.

Article 16 *[Payment Suspension Order]*

A People's Court shall rule in writing within forty-eight hours upon its receipt of the petition for suspension of payment. The ruling shall state the petitioner, the party against whom the petition is made, and any third party affected, the facts a People's Court preliminarily found, and the ground(s) on which the petition for payment suspension is granted or rejected.

A ruling granting the payment suspension shall be enforced immediately.

In relation to an Independent Guarantee fraud dispute, if the petitioner fails to initiate court litigation or an arbitration proceeding in accordance with the law within thirty days after the ruling for the payment suspension, a People's Court shall revoke the ruling.

Article 17 *[Reconsideration of Suspension Order]*

Where any party objects to the ruling rendered by a People's Court regarding the petition to suspend the payment, that party may, within ten days after the ruling is served on it, apply to the same People's Court for reconsideration. During the reconsideration period, the enforcement of the ruling shall not be halted.

The People's Court concerned shall reconsider the case and query the parties within ten (10) days after receiving the review petition.

Article 18 *[Underlying Transaction in Suspension Cases]*

In the adjudication of cases involving an Independent Guarantee fraud dispute or a petition for payment suspension, a People's Court may hear and decide on the facts of the underlying transaction asserted by any party in relation to the particular circumstances provided in Article 12 [*Fraud*].

Article 19 *[Intervention]*

Where the Guarantee Applicant sues only the Beneficiary in an Independent Guarantee fraud dispute case, either the Issuer, the Instructing Party, or both may participate in the proceedings as third parties upon their own petition or upon notification by a People's Court.

Article 20 [Where Fraud Found]

After hearing a case on an Independent Guarantee fraud dispute, if a People's Court finds beyond reasonable doubt that there is Independent Guarantee fraud, and that the circumstances provided in the third paragraph of Article 14 [*Suspension of Payment*] have not occurred, it shall enter a judgment terminating the payment obligation of the Issuer under the Independent Guarantee.

[Part E: Jurisdiction & Law]

Article 21 [Jurisdiction]

A People's Court of the Issuer's domicile or of the defendant's domicile shall have jurisdiction over disputes between the Beneficiary and the Issuer in relation to an Independent Guarantee, unless the Independent Guarantee states that such dispute should be submitted to jurisdiction of any other court or for arbitration. Any party's claim for court jurisdiction or arbitration as a result of application of the dispute resolution clause stipulated in underlying transaction shall not be supported by a People's Court.

A People's Court of the domicile of the Issuer of the Independent Guarantee, under which the payment is requested to be suspended, or of the defendant's domicile, shall have jurisdiction over the Independent Guarantee fraud dispute, unless the parties agree in writing that such dispute should be submitted to jurisdiction of any other court or for arbitration. Any party's claim for court jurisdiction or arbitration as a result of application of the dispute resolution clause contained in the underlying transaction or the Independent Guarantee shall not be supported by a People's Court.

Article 22 [Choice of Law]

Where no governing law is specified in a foreign-related Independent Guarantee, and the Issuer and the Beneficiary fail to reach consensus on the governing law prior to conclusion of court arguments in the trial proceedings, the dispute between the Issuer and the Beneficiary shall be governed by the law of the Issuer's habitual residence; and where an Independent Guarantee is issued by a legally registered branch of a financial institution, the law of the branch's registration place shall govern.

In relation to disputes of foreign-related Independent Guarantee fraud, if the parties fail to reach consensus on the governing law, the law of the habitual residence of the Issuer of the Independent Guarantee, under which the payment is requested to be suspended, shall govern. Where an Independent Guarantee is issued by a legally registered branch of a financial institution, the law of the branch's registration place shall govern. Where the parties have the same habitual residence, the law of such habitual residence shall govern.

The preservation procedures of payment suspension of a foreign-related Independent Guarantee shall be governed by the law of a People's Republic of China.

[Part F: Scope: Domestic Undertakings]

Article 23 [Applicable to Domestic Undertakings]

Where the parties agree to use an Independent Guarantee in a domestic transaction, any party's claim that the agreement as to the independent nature of the guarantee is invalid on the ground that the Independent Guarantee has no foreign elements shall not be supported by a People's Court.

[Part G: Freeze Of Cash Collateral]

Article 24 [Freeze of Cash Collateral]

A People's Court may freeze but not reduce or transfer the cash collateral for the issuance of an Independent Guarantee which is to be administered in a special account and transferred to the Issuer's possession. Where the funds in the special account ceases to serve as the cash collateral for the issuance of the Independent Guarantee, a People's Court may reduce or transfer the deposit according to the law.

Where the Issuer has discharged its payment obligations, a People's Court shall release the freezing measures against the corresponding portion of the cash collateral upon application by the Issuer.

[Part H: Effectiveness & Applicability]

Article 25 [Applicability]

These Provisions shall apply to those cases in which the final judgment is pending on the effective date of these Provisions; but these Provisions shall not apply to the cases in the retrial proceedings launched upon any party's petition or in accordance with the judicial supervision procedure by a People's Court, for which final judgments have been rendered prior to the effective date of these Provisions.

Article 26 [Effective Date]

These Provisions come into effect on December 1, 2016.

Issued

By The First Secretariat of General Office of the
Supreme People's Court

On November 18, 2016

Sanctions and Letters of Credit

Editor's Overview

As a means of achieving national political objectives, governments have imposed economic sanctions against various other governments, organizations, and individuals deemed to be hostile. Targets of these sanctions include avowed enemies, terrorists, illegal drug traffickers, and other notorious criminal elements who threaten national security.

Pursuant to these regulations, the property including funds of certain nations, institutions owned by them, and specifically designated nationals and Blocked Persons under the effective control of a person subject to the jurisdiction is blocked or frozen and no payment, transfer, withdrawal, or other dealing may occur without a license. Failure to comply with these regulations can result in a civil fine or a criminal penalty. In recent years, fines have been quite large.

There is no global consensus on sanctions. It is, therefore, necessary to check the sanctions regimes of each country. There are some sanctions that are more widely followed, particularly those imposed by the UN. The United States government has played a leading role in imposing sanctions on payments but it is by no means alone.

Even within a country, there may be multiple sanctions regimes, relating for example to boycotts, money laundering, prohibited export of certain items or weapons, financial transactions, drugs, prohibited organizations and persons, etc. It is, therefore, necessary to understand the sanctions regimes of a given country.

Sanctions commonly but not necessarily affect transactions within a country. The US, however, imposes some of its sanctions (but not anti-money laundering rules) on any transaction by a bank with offices in the US if it is a US dollar transaction even if the transaction is outside the US. This extraterritorial application of US regulations is new but being aggressively applied.

Following the rapid changes in foreign relations and the rise and fall of governments, sanctions change too. It is, therefore, necessary to keep current on sanctions regulations.

What is required under the different regimes differs also. They can vary from a prohibition of action or payment to filing a report. Even where there are prohibitions, licenses can be obtained permitting discrete transactions.

It is incumbent on banks to have a sanctions programme in place that demonstrates due diligence in applying applicable sanctions regimes. The use of such software, the existence of a comprehensive compliance program, and regular internal audits are factors which may be taken into account in assessing the seriousness of any violation penalties for violations of the sanctions.

Due to the far reaching nature of sanctions, it has become common for banks to include disclaimers in their letters of credit exonerating banks from the effect of application of sanctions despite attempts by the ICC Banking Commission to discourage them. Some of these clauses undermine the letter of credit obligation and appear to be arbitrary.

In this volume, two guidance papers issued by the ICC regarding sanctions clauses have been included. The first, Guidance Paper on the Use of Sanctions Clauses in Trade-Finance Related Instruments Subject to ICC Rules, was published in 2014 and was intended to address the proliferation of such clauses in trade instruments and their impact on bank undertakings. The paper highlights concerns regarding these clauses, reviews troublesome examples found in trade transactions, and concludes by offering best practices. The second paper, an addendum to the 2014 guidance, was published in May 2020, and was intended to bring attention to the concerning “resurgence” of sanctions clauses in trade products. The paper discusses how such clauses are often problematic and create uncertainty of the effectiveness of a given undertaking. Nevertheless, despite discouraging use of sanctions clauses, the ICC included sample text, that, if desired, would serve as a workable clause in an LC type undertaking.

Sanctions, Money Laundering and Boycotts

Selected Websites for Information

Country	Link
Australia	http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html
Canada	http://www.international.gc.ca/sanctions/index.aspx?view=d http://laws-lois.justice.gc.ca/eng/acts/S-14.5/ http://laws-lois.justice.gc.ca/eng/acts/U-2/http://laws-lois.justice.gc.ca/eng/acts/F-29/index.html http://laws-lois.justice.gc.ca/eng/acts/E-19/ http://www.international.gc.ca/sanctions/index.aspx?view=d
European Union	http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm http://eeas.europa.eu/cfsp/index_en.htm http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#2
International	http://www.fatf-gafi.org/ http://www.un.org/sc/committees/index.shtml
New Zealand	http://www.mfat.govt.nz/Treaties-and-International-Law/09-United-Nations-Security-Council-Sanctions/index.php
Singapore	http://www.mas.gov.sg/Regulations-and-Financial-Stability.aspx
United Kingdom	http://www.hm-treasury.gov.uk/fin_sanctions_index.htm
USA	http://www.bankersonline.com/ofac/ofacchart.html http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx http://www.justice.gov/criminal/fraud/fcpa/ http://www.fincen.gov/statutes_regs/guidance/html/fin-2010-a001.html http://www.fincen.gov/statutes_regs/bsa/ http://www.bis.doc.gov/index.php/enforcement/oac http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx http://www.irs.gov/irm/part4/irm_04-061-006.html http://www.soxlaw.com/ http://www.pmddtc.state.gov/regulations_laws/itar.html http://www.ffiec.gov/bsa_aml_infobase/default.htm

For further reading, see:

James E. Byrne & Justin B. Berger, *Trade Based Financial Crime Compliance* (IIBLP 2017).

IIBLP Sanctions Clause

The Institute takes no position on whether or not an LC should contain a so-called “Sanctions” clause but, if one is to be included, suggests consideration of the following text:

We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by a judicial order or government regulation applicable to us [or our service providers].



ICC Guidance Paper on the Use of Sanction Clauses

Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules

The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules, Including Documentary And Standby Letters Of Credit, Documentary Collections And Demand Guarantees

The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules, Including Documentary And Standby Letters Of Credit, Documentary Collections And Demand Guarantees

1. Introduction
 - 1.1 The use of clauses in relation to trade, economic or financial sanctions or embargos (“sanctions”) in trade finance-related instruments that are subject to the rules drafted by the ICC Banking Commission (“ICC rules”), stating banks’ intention to comply with sanctions regulations, has become a problematic issue for banks involved in trade finance transactions, including, particularly, irrevocable, independent documentary and standby letters of credit, demand guarantees and counter-guarantees.
 - 1.2 Sanctions are imposed by the United Nations, the EU Council or individual countries to achieve political and economic ends. They may prohibit dealings with specific countries, persons or property. The need for sanctions is a political matter outside the realm of the ICC. The enforceability of sanctions is a question to be decided by courts, national regulators or administrative agencies; it is not an issue that can be addressed by rules of banking practice such as ICC rules. Accordingly, ICC rules do not address how sanctions should be interpreted or their impact on the trade finance-related instrument in which they are incorporated.
 - 1.3 Sanctions may restrict a bank’s ability to perform its role under ICC rules. International banks may be confronted with different sanctions regimes imposed in the multiple jurisdictions in which they operate. As a result, those banks may be subject to conflicting regulatory requirements, and consequently be amenable to formulating internal policies to mitigate the resulting legal risks. Some banks have chosen to control these legal risks by use of sanctions clauses.
 - 1.4 Sanctions laws and regulations to which a bank engaged in a trade finance-related instrument is subject may include those of its country of operation, its country of incorporation or registration, the country of the currency or the place of payment, and any other jurisdiction whose laws govern the transaction. Where they are determined to be applicable to the instrument, sanctions laws and regulations are generally considered as being mandatory and thus may override the ICC rules applicable to that instrument and, more generally, the contractual terms of the instrument. If these are the only

sanctions laws and regulations applicable to the parties, adding a clause in a trade finance-related instrument stating the bank's commitment to respect such sanctions law or regulation applicable to it by law may be unnecessary and lead to confusion. In some circumstances, banks may even face legal liability in some countries if mandatory laws prohibit the use of such clauses on grounds of discrimination (see paragraph 2.3 below).

- 1.5 The purpose of this Guidance Paper is to highlight certain issues arising from the use of such clauses and recommend best practices in that respect.

2. Sanctions clauses

- 2.1 Concerned about the implications of sanctions for their own obligations under trade-related transactions, and seeking to notify their counterparties, whether correspondent banks or beneficiaries, banks sometimes include so-called "sanctions clauses" in transaction documents.

- 2.2 There is no standard for these clauses and they vary considerably in their scope. Where they simply state: "[The bank] is under a statutory duty to comply with sanctions laws and regulation mandatorily applicable to [it]", they are merely informational and do not extend beyond applicable laws and regulation.

- 2.3 Some countries have legislation that prohibits, on grounds of discrimination, any reference to "exclusion" or "boycott" regulation or language in any transaction unless such exclusion or boycott is required under the laws of those countries. In those countries, the inclusion of sanctions clauses in a trade finance-related instrument, or in instructions to confirm, advise or offer other services in relation to such an instrument, may compel the addressee to reject and return the received instrument or instructions, failing which it may face legal liability.

- 2.4 If the sanctions clauses in trade finance-related instruments, including letters of credit or demand guarantees or counter-guarantees, allow the issuer a level of discretion as to whether or not to honour beyond the statutory or regulatory requirements applicable to that issuer, they bring into question the irrevocable and documentary nature of the letter of credit or guarantee. The implementation by a bank of an internal sanctions-related policy that goes beyond what is required under the laws and regulations applicable to that bank is an illustration of that discretion. It may cause a serious problem when considering the role of a confirming bank, a nominated transferring bank, a guarantor or a beneficiary. If the reference to an internal, sanctions-related policy were to allow the bank discretion to honour or refuse payment, one could even question if that bank has in fact assumed a legally binding obligation, a question that of course has to be determined under the applicable law. Of particular concern are clauses that purport to alter the reimbursement provisions of UCP 600 with respect to nominated banks that have acted pursuant to their nominations or clauses that seek to shift the risk of compliance with sanctions to those nominated banks. The same concern arises for guarantors that have acted pursuant both to the instructions and the counter-guarantees received from the counter-guarantors under URDG 758.

- 2.5 Where sanctions clauses that refer to banks' internal policy requirements appear in the letter of credit or counter-guarantee, the nominated bank is in a difficult position

as it is not aware of the internal sanctions policy that the issuing bank might elect to apply. If such a policy purports to have a broader scope than that of sanctions laws and regulations applicable as a matter of mandatory law to the issuing bank, the nominated bank would face uncertainty as to whether it will be reimbursed should it pay a complying presentation. As a result, a nominated bank's risk assessment is likely not only to include the issuing bank and the country risk, but also the assessment of the likelihood of a prohibited reimbursement due to sanctions regulations or an internal, sanctions-related policy. This may result in increased costs, delays and potential disputes.

3. Examples of sanctions clauses

3.1 Below are examples of sanctions clauses sometimes seen in trade transactions.

- a. The following is an example of an informative sanctions clause that does not extend beyond applicable laws and regulation:

“Presentation of document(s) that are not in compliance with the applicable anti-boycott, anti-money laundering, anti-terrorism, anti-drug trafficking and economic sanctions laws and regulations is not acceptable. Applicable laws vary depending on the transaction and may include United Nations, United States and/or local laws.”

- b. The following sanctions clause is more problematic in that it refers to internal policies that are unknown to the nominated bank. By doing so it brings into question whether the bank will comply with its irrevocable obligation:

“[Bank] complies with the international sanction laws and regulations issued by the United States of America, the European Union and the United Nations (as well as local laws and regulations applicable to the issuing branch) and in furtherance of those laws and regulations, [Bank] has adopted policies which in some cases go beyond the requirements of applicable laws and regulations. Therefore [Bank] undertakes no obligation to make any payment under, or otherwise to implement, this letter of credit (including but not limited to processing documents or advising the letter of credit), if there is involvement by any person (natural, corporate or governmental) listed in the USA, EU, UN or local sanctions lists, or any involvement by or nexus with Cuba, Sudan, Iran or Myanmar, or any of their governmental agencies.”

- c. Another problematic example that may permit exercise of discretion beyond the requirements of applicable law is the following:

“Trade and economic sanctions (“sanctions”) imposed by governments, government agencies or departments, regulators, central banks and/or transnational organizations (including the United Nations and European Union) impact upon transactions involving countries, or persons resident within countries currently including Balkans, Belarus, Cote d’Ivoire (Ivory Coast), Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Syria, the Democratic Republic of Congo, Uzbekistan, Afghanistan, Iran, Iraq, Myanmar (Burma), North Korea, Cuba, Zimbabwe and Sudan. Issuing bank and all of its related bodies corporate might be subject to and affected by, sanctions, with which it will comply. Please contact issuing bank for clarification before presenting documents to issuing bank for negotiation or undertaking any dealings regarding this credit involving

countries or persons affected by sanctions. Issuing bank is not and will not be liable for any loss or damage whatsoever associated directly or indirectly with the application of sanctions to a transaction or financial service involving issuing bank. Issuing bank is not required to perform any obligation under this credit which it determines in its discretion will, or would be likely to, contravene or breach any sanction. This clause applies notwithstanding any inconsistency with the current edition of the International Chamber of Commerce Uniform Customs and Practice for Documentary Credits.”

4. Recommendations

- 4.1 It is recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements. It is also advisable for practitioners to be aware of the risks posed by such clauses if included by other banks involved in their transactions.
- 4.2 In trade finance transactions involving letters of credit or demand guarantees subject to ICC rules, practitioners should refrain from bringing into question the irrevocable, independent nature of the credit, demand guarantee or counter-guarantee, the certainty

Addendum to the ICC Guidance Paper on the Use of Sanction Clauses (2014)

Addendum to The Use Of Sanctions Clauses In Trade Finance-Related Instruments Subject To ICC Rules, Including Documentary And Standby Letters Of Credit, Documentary Collections And Demand Guarantees

Key messages:

1. Addendum to the ICC Guidance Paper on the use of Sanctions Clauses (2014)
 2. Sanctions clauses should not be used routinely.
 3. Any clause should be drafted in clear terms according to the sample clause.
- Implementation: May 2020

Document review: May 2022



Introduction

The ICC Guidance Paper on the use of Sanctions Clauses (2014)¹ dealt with the use of sanctions clauses in relation to trade, economic or financial sanctions, restrictive measures or counter-measures (collectively “sanctions”) in trade finance instruments (documentary and standby letters of credit, demand guarantees and counter-guarantees) that are subject to the rules drafted by the ICC Banking Commission (“ICC rules”).

That paper stated that the use of sanctions clauses had become a problematic issue in that they lead to uncertainty as to their application and may put into question the very effectiveness of the instrument in which they are drafted. They are non-documentary conditions for the purpose of the UCP and the URDG. The Guidance Paper highlighted the problems associated with the use of sanctions clauses in trade finance and recommended that banks should refrain from issuing trade finance-related instruments that include sanctions clauses that purport to impose restrictions beyond, or conflict with, the applicable statutory or regulatory requirements.

The ICC has noted a resurgence in the use of sanctions clauses in documentary credits and in demand guarantees, particularly in the form of non-specific clauses that create uncertainty. In fact, many of the sanctions clauses witnessed in practice could lead to making trade finance instruments unworkable. Moreover, the use in bank undertakings of sanctions clauses not scheduled in public procurement documents may lead to the disqualification of the contractor as a result of the non-compliance with the tender regulations.

As a result, the ICC Banking Commission considers it necessary to emphasise its principled position towards sanctions clauses by way of an update of the Guidance Paper, with the addition of an addendum with a sample clause and guidance for use.

Operators must not consider that the sample clause drafted in this Paper is in any way recommended practice. The only purpose of proposing a sample clause in this Paper is to limit the legal uncertainty by linking the referenced sanctions regulations to those objectively applicable in the transaction.

Proposed Addendum

The ICC Banking Commission recommends that banks review this Guidance Paper and the principles thereunder when considering the drafting of sanctions clauses.

As generally stated in the original Guidance Paper issued in 2014, it is recommended that banks refrain from issuing or accepting trade finance instruments that include Sanctions clauses that purport to impose restrictions beyond those applicable to the performance of the obligation under the trade finance instruments as a matter of law. Broader sanctions clauses defeat the independence principle in letters of credit and demand guarantees, the exclusively documentary nature of the instrument, and create uncertainty.

That said, the paper recognises that there may be instances in which a bank determines it wants to include a sanctions clause.

1. <https://iccwbo.org/publication/guidance-paper-on-the-use-of-sanctions-clauses-2014/>

The ICC confirms its guidance that sanctions clauses should not be used generally. Nevertheless, if a bank, after consultation with its customer and counterparty in the trade finance transaction, considers that a sanctions clause is to be used, ICC recommends that the clause should be drafted in clear terms, restrictively, to limit the reference only to mandatory law applicable to the bank, as according to the following sample clause:

“[notwithstanding anything to the contrary in the applicable ICC Rules or in this undertaking,] We disclaim liability for delay, non-return of documents, non-payment, or other action or inaction compelled by restrictive measures, counter-measures or sanctions laws or regulations mandatorily applicable to us or to [our correspondent banks in] the relevant transaction.”

While the sample clause may not contemplate every conceivable instance of sanctions application or, indeed, exempt the bank abstaining from the performance of its obligation from liability, it does give notice that the bank will comply with the sanctions to which it is subject and that the bank disclaims liability for doing so.

ICC recommends that the following Guidance is noted when drafting a sanctions clause:

- Sanctions clauses should not be used routinely. They ought only to be considered in specific transactions, and only after consulting with the customer and counterparties in the relevant transaction.
- Specific sanctions regulations may be referred to in the clause (e.g. *sanctions administered and enforced by the Hong Kong Monetary Authority*) provided, however, that those references are limited to those regulations directly and mandatorily apply to the bank.
- Sanctions regulations may apply as mandatory rules in several situations, including, without limitation, the following situations:
- As the law applicable to the bank or, if relevant, the branch that issued the relevant undertaking in the trade finance instrument;
- As the law applicable to the currency of payment of relevant undertaking in the trade finance instrument;
- As the law governing the performance of the relevant undertaking in the trade finance instrument as a result of choice of law clause, or of the determination of the applicable law in accordance with the conflict of laws rules in the competent jurisdiction;

- As international public policy where the arbitral tribunal or the court with jurisdiction so characterise the particular multilateral sanctions regulations.
- Clauses should refrain from including unparticularised references to laws generally (e.g. “any applicable local and foreign laws”).
- Reference to “bank policy and procedure” should be avoided at all times.
- There are jurisdictions in which the local law prevents the inclusion of a sanctions clause that references the laws of a foreign jurisdiction on the grounds of illegal discrimination or otherwise. To the extent that the law of those jurisdictions applies to the bank or to the transaction, banks ought to consider not using sanctions clauses in the trade finance instrument and to seek legal advice as to their liability if they were to contravene such laws.
- The reference to correspondent banks should be added in a sanctions clause only if a correspondent bank is in a different location from that of the instructing bank and would be unable to complete the transaction due to sanctions directly applicable to the correspondent bank that are not applicable to the issuing bank. An example is a correspondent bank in the US, therefore subject to primary US sanctions, which is clearing USD payments on behalf of a non-US bank.

Important Notice: The referenced example clause is a sample only and not to be used without seeking advice from legal and compliance advisors.

OFAC Framework for Compliance Commitments (2019)

Editor's Overview

As a means of achieving national political objectives, the U.S. government has imposed economic sanctions against various governments, organizations, and individuals deemed to be hostile. Targets of these sanctions include avowed enemies of the U.S., terrorists, illegal drug traffickers, and other notorious criminal elements who threaten the security of the United States.

Contained in various statutes and regulations promulgated under them, the sanctions are administered by the Office of Foreign Assets Control (OFAC), a unit of the U.S. Department of the Treasury, in cooperation with bank regulatory agencies regarding compliance of financial institutions.

Pursuant to these regulations, the property of certain nations, institutions owned by them, and specifically designated nationals and Blocked Persons under the effective control of a person subject to the jurisdiction of the United States is blocked or frozen and no payment, transfer, withdrawal, or other dealing may occur without a license from OFAC. Failure to comply with these regulations can result in a civil fine or a criminal penalty.

The countries and government owned organizations that are the subject of economic sanctions are identified in the various regulations. Specifically, Specially Designated Nationals (SDN) and Blocked Persons are identified on a list maintained by the Treasury Department.

There are certain general licenses under the various regulations which permit action without application for a specific license.

Banks are required to report any freezes of funds within 10 days of their occurrence and the failure to do so could result in adverse publicity, fines, and criminal penalties. As a result, it is imperative that a bank establish and maintain an effective compliance program. Software exists which interdicts such transactions. The use of such software, the existence of a comprehensive compliance program, and regular internal audits are factors which may be taken into account in assessing the seriousness of any violation penalties for violations of the sanctions.

Assets fully within the jurisdiction of OFAC can include letters of credit, advice of letters of credit, nominations to act, and proceeds of letters of credit

As sanctions issues evolve on a nearly day-to-day basis, it is critical for financial institutions to maintain efficient and effective compliance programs. To aid practitioners, OFAC published A Framework for OFAC Compliance Commitments (May 2019), which is reprinted in this volume. While noting that risk based sanctions programs vary across different organisations and banks, the documents states that "each program should be predicated on and incorporate at least five essential components of

compliance: (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training.” The perspective of this OFAC guidance stems from the decision making processes that OFAC makes when assessing whether or not a civil monetary penalty is appropriate and the degree of the suspected sanctions violation(s) at issue. Often a bank’s compliance programme is either entirely missing or lacking in one or more of the above essential elements.

The paper reviews in detail each of these essential elements necessary for an effective sanctions program; however, perhaps the most helpful section of the framework is the second part of the document which addresses “root causes” of sanctions compliance violations as based on previous OFAC investigations and administrative actions. Perhaps unsurprisingly, OFAC often encounters organisations that have failed to formally adopt a sanctions compliance program, thereby rendering adequate compliance practically impossible. OFAC notes that this issue is “frequently” identified as an “aggravating factor” in accessing civil penalties. Another root cause of failures concerns the screening or filtering systems that banks employ to detect sanctions issues. OFAC often encounters organisations that have failed to (1) regularly update SDN or SSI lists; (2) incorporate important identifiers such as the “SWIFT Business Identifier Codes”; or (3) utilize systems or processes which can account for slight spelling variations among sanctioned individuals, countries or organisations. Another notable root cause of failure involves organisations where, if a sanctions program is adopted at all, the program is decentralised such that “personnel and decision-makers [are] scattered in various offices or business units.” Such decentralisation can lead to improper understanding and application of OFAC regulations, miscommunications, and, perhaps most critically, no formal “escalation process” for handling high risk transactions.

As a related matter, financial institutions are increasingly expected to be mindful of illicit shipping and sanctions evasion issues. Trade personnel, however, are understandably often unfamiliar with the many intricacies and practices involved in the shipping industry. To assist banks in managing their compliance program in the face of these issues, the US Department of Treasury, in cooperation with the UK Office of Financial Sanctions Implementation (OFSI), published the Guidance to Address Illicit Shipping and Sanctions Evasion Practices (14 May 2020), which is reprinted in this volume. The guidance identifies four steps that financial institutions should take with regard to the risk assessment related to maritime customers and sanctions evasions. These include: (a) identifying commodities and trade corridors susceptible to transhipment and ship-to-ship transfers and the extent of their use by an institution’s maritime industry customer; (b) Results from an assessment of the nature of each client’s business, including the type of service(s) offered and geographical presence; (c) Client activity for transactions inconsistent with the client’s typical business practices, to include when clients acquire new vessels; and (d) Client acquisition or sale of vessels to determine that the client’s assets do not include blocked property. Furthermore, specific illicit practices are explained and typologies are offered such as those regarding ship-to-ship transfers (not always necessarily illicit), disabling Automatic Identification Systems (AIS), complex ownership schemes and issues concerning vessels and their national flags, among others.

The OFAC website (<https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information>) contains a current lists of countries, organizations, and persons who are the subject of sanctions.



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

A Framework for OFAC Compliance Commitments

The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) administers and enforces U.S. economic and trade sanctions programs against targeted foreign governments, individuals, groups, and entities in accordance with national security and foreign policy goals and objectives.

OFAC strongly encourages organizations subject to U.S. jurisdiction, as well as foreign entities that conduct business in or with the United States, U.S. persons, or using U.S.-origin goods or services, to employ a risk-based approach to sanctions compliance by developing, implementing, and routinely updating a sanctions compliance program (SCP). While each risk-based SCP will vary depending on a variety of factors—including the company’s size and sophistication, products and services, customers and counterparties, and geographic locations—each program should be predicated on and incorporate at least five essential components of compliance:

- (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training.

If after conducting an investigation and determining that a civil monetary penalty (“CMP”) is the appropriate administrative action in response to an apparent violation, the Office of Compliance and Enforcement (OCE) will determine which of the following or other elements should be incorporated into the subject person’s SCP as part of any accompanying settlement agreement, as appropriate. As in all enforcement cases, OFAC will evaluate a subject person’s SCP in a manner consistent with the Economic Sanctions Enforcement Guidelines (the “Guidelines”).

When applying the Guidelines to a given factual situation, OFAC will consider favorably subject persons that had effective SCPs at the time of an apparent violation. For example, under General Factor E (compliance program), OFAC may consider the existence, nature, and adequacy of an SCP, and when appropriate, may mitigate a CMP on that basis. Subject persons that have implemented effective SCPs that are predicated on the five essential components of compliance may also benefit from further mitigation of a CMP pursuant to General Factor F (remedial response) when the SCP results in remedial steps being taken.

Finally, OFAC may, in appropriate cases, consider the existence of an effective SCP at the time of an apparent violation as a factor in its analysis as to whether a case is deemed “egregious.”

This document is intended to provide organizations with a framework for the five essential components of a risk-based SCP, and contains an appendix outlining several of the root causes that have led to apparent violations of the sanctions programs that OFAC administers. OFAC recommends all organizations subject to U.S. jurisdiction review the settlements

published by OFAC to reassess and enhance their respective SCPs, when and as appropriate.

MANAGEMENT COMMITMENT

Senior Management's commitment to, and support of, an organization's risk-based SCP is one of the most important factors in determining its success. This support is essential in ensuring the SCP receives adequate resources and is fully integrated into the organization's daily operations, and also helps legitimize the program, empower its personnel, and foster a culture of compliance throughout the organization.

General Aspects of an SCP: Senior Management Commitment

Senior management commitment to supporting an organization's SCP is a critical factor in determining the success of the SCP. Effective management support includes the provision of adequate resources to the compliance unit(s) and support for compliance personnel's authority within an organization. The term "senior management" may differ among various organizations, but typically the term should include senior leadership, executives, and/or the board of directors.

- I. Senior management has reviewed and approved the organization's SCP.**
- II. Senior management ensures that its compliance unit(s) is/are delegated sufficient authority and autonomy to deploy its policies and procedures in a manner that effectively controls the organization's OFAC risk. As part of this effort, senior management ensures the existence of direct reporting lines between the SCP function and senior management, including routine and periodic meetings between these two elements of the organization.**
- III. Senior management has taken, and will continue to take, steps to ensure that the organization's compliance unit(s) receive adequate resources—including in the form of human capital, expertise, information technology, and other resources, as appropriate—that are relative to the organization's breadth of operations, target and secondary markets, and other factors affecting its overall risk profile.**

These efforts could generally be measured by the following criteria:

- A. The organization has appointed a dedicated OFAC sanctions compliance officer¹;**
- B. The quality and experience of the personnel dedicated to the SCP, including: (i) the technical knowledge and expertise of these personnel with respect to OFAC's regulations, processes, and actions; (ii) the ability of these personnel to understand complex financial and commercial activities, apply their knowledge of OFAC to these items, and identify OFAC-related issues, risks, and prohibited activities; and (iii) the efforts to ensure that personnel dedicated to the SCP have sufficient experience and an appropriate position within the organization, and are an integral component to the organization's success; and**

1. This may be the same person serving in other senior compliance positions, e.g., the Bank Secrecy Act Officer or an Export Control Officer, as many institutions, depending on size and complexity, designate a single person to oversee all areas of financial crimes or export control compliance.

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- C. Sufficient control functions exist that support the organization’s SCP—including but not limited to information technology software and systems—that adequately address the organization’s OFAC-risk assessment and levels.

IV. Senior management promotes a “culture of compliance” throughout the organization.

These efforts could generally be measured by the following criteria:

- A. The ability of personnel to report sanctions related misconduct by the organization or its personnel to senior management without fear of reprisal.
 - B. Senior management messages and takes actions that discourage misconduct and prohibited activities, and highlight the potential repercussions of non-compliance with OFAC sanctions; and
 - C. The ability of the SCP to have oversight over the actions of the entire organization, including but not limited to senior management, for the purposes of compliance with OFAC sanctions.
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- V. **Senior management demonstrates recognition of the seriousness of apparent violations of the laws and regulations administered by OFAC, or malfunctions, deficiencies, or failures by the organization and its personnel to comply with the SCP’s policies and procedures, and implements necessary measures to reduce the occurrence of apparent violations in the future. Such measures should address the root causes of past apparent violations and represent systemic solutions whenever possible.**

RISK ASSESSMENT

Risks in sanctions compliance are potential threats or vulnerabilities that, if ignored or not properly handled, can lead to violations of OFAC’s regulations and negatively affect an organization’s reputation and business. OFAC recommends that organizations take a risk-based approach when designing or updating an SCP. One of the central tenets of this approach is for organizations to conduct a routine, and if appropriate, ongoing “risk assessment” for the purposes of identifying potential OFAC issues they are likely to encounter. As described in detail below, the results of a risk assessment are integral in informing the SCP’s policies, procedures, internal controls, and training in order to mitigate such risks.

While there is no “one-size-fits all” risk assessment, the exercise should generally consist of a holistic review of the organization from top-to-bottom and assess its touchpoints to the outside world. This process allows the organization to identify potential areas in which it may, directly or indirectly, engage with OFAC-prohibited persons, parties, countries, or regions. For example, an organization’s SCP may conduct an assessment of the following: (i) customers, supply chain, intermediaries, and counter-parties; (ii) the products and services it offers, including how and where such items fit into other financial or commercial products, services, networks, or systems; and (iii) the geographic locations of the organization, as well as its customers, supply chain, intermediaries, and counter-parties. Risk assessments and sanctions-related due diligence is also important during mergers and acquisitions, particularly in scenarios involving non-U.S. companies or corporations.

General Aspects of an SCP: Conducting a Sanctions Risk Assessment

A fundamental element of a sound SCP is the assessment of specific clients, products, services, and geographic locations in order to determine potential OFAC sanctions risk. The purpose of a risk assessment is to identify inherent risks in order to inform risk-based decisions and controls. The Annex to Appendix A to 31 C.F.R. Part 501, OFAC's Economic Sanctions Enforcement Guidelines, provides an OFAC Risk Matrix that may be used by financial institutions or other entities to evaluate their compliance programs:

- I. The organization conducts, or will conduct, an OFAC risk assessment in a manner, and with a frequency, that adequately accounts for the potential risks. Such risks could be posed by its clients and customers, products, services, supply chain, intermediaries, counter-parties, transactions, and geographic locations, depending on the nature of the organization. As appropriate, the risk assessment will be updated to account for the root causes of any apparent violations or systemic deficiencies identified by the organization during the routine course of business.**

A. In assessing its OFAC risk, organizations should leverage existing information to inform the process. In turn, the risk assessment will generally inform the extent of the due diligence efforts at various points in a relationship or in a transaction. This may include:

1. On-boarding: The organization develops a sanctions risk rating for customers, customer groups, or account relationships, as appropriate, by leveraging information provided by the customer (for example, through a Know Your Customer or Customer Due Diligence process) and independent research conducted by the organization at the initiation of the customer relationship. This information will guide the timing and scope of future due diligence efforts. Important elements to consider in determining the sanctions risk rating can be found in OFAC's risk matrices.
2. Mergers and Acquisitions (M&A): As noted above, proper risk assessments should include and encompass a variety of factors and data points for each organization. One of the multitude of areas organizations should include in their risk assessments—which, in recent years, appears to have presented numerous challenges with respect to OFAC sanctions—are mergers and acquisitions. Compliance functions should also be integrated into the merger, acquisition, and integration process. Whether in an advisory capacity or as a participant, the organization engages in appropriate due diligence to ensure that sanctions-related issues are identified, escalated to the relevant senior levels, addressed prior to the conclusion of any transaction, and incorporated into the organization's risk assessment process. After an M&A transaction is completed, the organization's Audit and Testing function will be critical to identifying any additional sanctions-related issues.

- II. The organization has developed a methodology to identify, analyze, and address the particular risks it identifies. As appropriate, the risk assessment will be updated to account for the conduct and root causes of any apparent violations or systemic deficiencies identified by the organization during the routine course of business, for example, through a testing or audit function.**

INTERNAL CONTROLS

An effective SCP should include internal controls, including policies and procedures, in order to identify, interdict, escalate, report (as appropriate), and keep records pertaining to activity that may be prohibited by the regulations and laws administered by OFAC. The purpose of internal controls is to outline clear expectations, define procedures and processes pertaining to OFAC compliance (including reporting and escalation chains), and minimize the risks identified by the organization's risk assessments. Policies and procedures should be enforced, weaknesses should be identified (including through root cause analysis of any compliance breaches) and remediated, and internal and/or external audits and assessments of the program should be conducted on a periodic basis.

Given the dynamic nature of U.S. economic and trade sanctions, a successful and effective SCP should be capable of adjusting rapidly to changes published by OFAC. These include the following: (i) updates to OFAC's List of Specially Designated Nationals and Blocked Persons (the "SDN List"), the Sectoral Sanctions Identification List ("SSI List"), and other sanctions- related lists; (ii) new, amended, or updated sanctions programs or prohibitions imposed on targeted foreign countries, governments, regions, or persons, through the enactment of new legislation, the issuance of new Executive orders, regulations, or published OFAC guidance or other OFAC actions; and (iii) the issuance of general licenses.

General Aspects of an SCP: Internal Controls

Effective OFAC compliance programs generally include internal controls, including policies and procedures, in order to identify, interdict, escalate, report (as appropriate), and keep records pertaining to activity that is prohibited by the sanctions programs administered by OFAC. The purpose of internal controls is to outline clear expectations, define procedures and processes pertaining to OFAC compliance, and minimize the risks identified by an entity's OFAC risk assessments. Policies and procedures should be enforced, and weaknesses should be identified (including through root cause analysis of any compliance breaches) and remediated in order to prevent activity that might violate the sanctions programs administered by OFAC.

- I. The organization has designed and implemented written policies and procedures outlining the SCP. These policies and procedures are relevant to the organization, capture the organization's day-to-day operations and procedures, are easy to follow, and designed to prevent employees from engaging in misconduct.**

- II. The organization has implemented internal controls that adequately address the results of its OFAC risk assessment and profile. These internal controls should enable the organization to clearly and effectively identify, interdict, escalate, and report to appropriate personnel within the organization transactions and activity that may be prohibited by OFAC. To the extent information technology solutions factor into the organization's internal controls, the organization has selected and calibrated the solutions in a manner that is appropriate to address the organization's risk profile and compliance needs, and the organization routinely tests the solutions to ensure effectiveness.**

- III. The organization enforces the policies and procedures it implements as part of its OFAC compliance internal controls through internal and/or external audits.**
- IV. The organization ensures that its OFAC-related recordkeeping policies and procedures adequately account for its requirements pursuant to the sanctions programs administered by OFAC.**
- V. The organization ensures that, upon learning of a weakness in its internal controls pertaining to OFAC compliance, it will take immediate and effective action, to the extent possible, to identify and implement compensating controls until the root cause of the weakness can be determined and remediated.**
- VI. The organization has clearly communicated the SCP's policies and procedures to all relevant staff, including personnel within the SCP program, as well as relevant gatekeepers and business units operating in high-risk areas (e.g., customer acquisition, payments, sales, etc.) and to external parties performing SCP responsibilities on behalf of the organization.**
- VII. The organization has appointed personnel for integrating the SCP's policies and procedures into the daily operations of the company or corporation. This process includes consultations with relevant business units, and confirms the organization's employees understand the policies and procedures.**

TESTING AND AUDITING

Audits assess the effectiveness of current processes and check for inconsistencies between these and day-to-day operations. A comprehensive and objective testing or audit function within an SCP ensures that an organization identifies program weaknesses and deficiencies, and it is the organization's responsibility to enhance its program, including all program-related software, systems, and other technology, to remediate any identified compliance gaps. Such enhancements might include updating, improving, or recalibrating SCP elements to account for a changing risk assessment or sanctions environment. Testing and auditing can be conducted on a specific element of an SCP or at the enterprise-wide level.

General Aspects of an SCP: Testing and Auditing

A comprehensive, independent, and objective testing or audit function within an SCP ensures that entities are aware of where and how their programs are performing and should be updated, enhanced, or recalibrated to account for a changing risk assessment or sanctions environment, as appropriate. Testing or audit, whether conducted on a specific element of a compliance program or at the enterprise-wide level, are important tools to ensure the program is working as designed and identify weaknesses and deficiencies within a compliance program.

- I. The organization commits to ensuring that the testing or audit function is accountable to senior management, is independent of the audited activities and functions, and has sufficient authority, skills, expertise, resources, and authority within the organization.**
- II. The organization commits to ensuring that it employs testing or audit procedures appropriate to the level and sophistication of its SCP and that this function,**

whether deployed internally or by an external party, reflects a comprehensive and objective assessment of the organization’s OFAC-related risk assessment and internal controls.

- III. The organization ensures that, upon learning of a confirmed negative testing result or audit finding pertaining to its SCP, it will take immediate and effective action, to the extent possible, to identify and implement compensating controls until the root cause of the weakness can be determined and remediated.**

TRAINING

An effective training program is an integral component of a successful SCP. The training program should be provided to all appropriate employees and personnel on a periodic basis (and at a minimum, annually) and generally should accomplish the following: (i) provide job-specific knowledge based on need; (ii) communicate the sanctions compliance responsibilities for each employee; and (iii) hold employees accountable for sanctions compliance training through assessments.

General Aspects of an SCP: Training

An adequate training program, tailored to an entity’s risk profile and all appropriate employees and stakeholders, is critical to the success of an SCP.

- I. The organization commits to ensuring that its OFAC-related training program provides adequate information and instruction to employees and, as appropriate, stakeholders (for example, clients, suppliers, business partners, and counterparties) in order to support the organization’s OFAC compliance efforts. Such training should be further tailored to high-risk employees within the organization.**
- II. The organization commits to provide OFAC-related training with a scope that is appropriate for the products and services it offers; the customers, clients, and partner relationships it maintains; and the geographic regions in which it operates.**
- III. The organization commits to providing OFAC-related training with a frequency that is appropriate based on its OFAC risk assessment and risk profile.**
- IV. The organization commits to ensuring that, upon learning of a confirmed negative testing result or audit finding, or other deficiency pertaining to its SCP, it will take immediate and effective action to provide training to or other corrective action with respect to relevant personnel.**
- V. The organization’s training program includes easily accessible resources and materials that are available to all applicable personnel.**

Root Causes of OFAC Sanctions Compliance Program Breakdowns or Deficiencies Based on Assessment of Prior OFAC Administrative Actions

Since its publication of the Economic Sanctions Enforcement Guidelines, 31 C.F.R. part 501, App. A (the “Guidelines”), OFAC has finalized numerous public enforcement actions in which it identified deficiencies or weaknesses within the subject person’s SCP. These items, which are provided in a non-exhaustive list below, are provided to alert persons subject to U.S. jurisdiction, including entities that conduct business in or with the United States, U.S. persons, or U.S.-origin goods or services, about several specific root causes associated with apparent violations of the regulations it administers in order to assist them in designing, updating, and amending their respective SCP.

I. Lack of a Formal OFAC SCP

OFAC regulations do not require a formal SCP; however, OFAC encourages organizations subject to U.S. jurisdiction (including but not limited to those entities that conduct business in, with, or through the United States or involving U.S.-origin goods, services, or technology), and particularly those that engage in international trade or transactions or possess any clients or counter-parties located outside of the United States, to adopt a formal SCP. OFAC has finalized numerous civil monetary penalties since publicizing the Guidelines in which the subject person’s lack of an SCP was one of the root causes of the sanctions violations identified during the course of the investigation. In addition, OFAC frequently identified this element as an aggravating factor in its analysis of the General Factors associated with such administrative actions.

II. Misinterpreting, or Failing to Understand the Applicability of, OFAC’s Regulations

Numerous organizations have committed sanctions violations by misinterpreting OFAC’s regulations, particularly in instances in which the subject person determined the transaction, dealing, or activity at issue was either not prohibited or did not apply to their organization or operations. For example, several organizations have failed to appreciate or consider (or, in some instances, actively disregarded) the fact that OFAC sanctions applied to their organization based on their status as a U.S. person, a U.S.-owned or controlled subsidiary (in the Cuba and Iran programs), or dealings in or with U.S. persons, the U.S. financial system, or U.S.-origin goods and technology.

With respect to this specific root cause, OFAC’s administrative actions have typically identified additional aggravating factors, such as reckless conduct, the presence of numerous warning signs that the activity at issue was likely prohibited, awareness by the organization’s management of the conduct at issue, and the size and sophistication of the subject person.

III. Facilitating Transactions by Non-U.S. Persons (Including Through or By Overseas Subsidiaries or Affiliates)

Multiple organizations subject to U.S. jurisdiction—specifically those with foreign-based operations and subsidiaries located outside of the United States—have engaged in transactions or activity that violated OFAC’s regulations by referring business opportunities to, approving

or signing off on transactions conducted by, or otherwise facilitating dealings between their organization's non-U.S. locations and OFAC-sanctioned countries, regions, or persons. In many instances, the root cause of these violations stems from a misinterpretation or misunderstanding of OFAC's regulations. Companies and corporations with integrated operations, particularly those involving or requiring participation by their U.S.-based headquarters, locations, or personnel, should ensure any activities they engage in (i.e., approvals, contracts, procurement, etc.) are compliant with OFAC's regulations.

IV. Exporting or Re-exporting U.S.-origin Goods, Technology, or Services to OFAC-Sanctioned Persons or Countries

Non-U.S. persons have repeatedly purchased U.S.-origin goods with the specific intent of re-exporting, transferring, or selling the items to a person, country, or region subject to OFAC sanctions. In several instances, this activity occurred despite warning signs that U.S. economic sanctions laws prohibited the activity, including contractual language expressly prohibiting any such dealings. OFAC's public enforcement actions in this area have generally been focused on companies or corporations that are large or sophisticated, engaged in a pattern or practice that lasted multiple years, ignored or failed to respond to numerous warning signs, utilized non-routine business practices, and—in several instances—concealed their activity in a willful or reckless manner.

V. Utilizing the U.S. Financial System, or Processing Payments to or through U.S. Financial Institutions, for Commercial Transactions Involving OFAC-Sanctioned Persons or Countries

Many non-U.S. persons have engaged in violations of OFAC's regulations by processing financial transactions (almost all of which have been denominated in U.S. Dollars) to or through U.S. financial institutions that pertain to commercial activity involving an OFAC-sanctioned country, region, or person. Although no organizations subject to U.S. jurisdiction may be involved in the underlying transaction—such as the shipment of goods from a third-country to an OFAC-sanctioned country—the inclusion of a U.S. financial institution in any payments associated with these transactions often results in a prohibited activity (e.g., the exportation or re-exportation of services from the United States to a comprehensively sanctioned country, or dealing in blocked property in the United States). OFAC has generally focused its enforcement investigations on persons who have engaged in willful or reckless conduct, attempted to conceal their activity (e.g., by stripping or manipulating payment messages, or making false representations to their non-U.S. or U.S. financial institution), engaged in a pattern or practice of conduct for several months or years, ignored or failed to consider numerous warning signs that the conduct was prohibited, involved actual knowledge or involvement by the organization's management, caused significant harm to U.S. sanctions program objectives, and were large or sophisticated organizations.

VI. Sanctions Screening Software or Filter Faults

Many organizations conduct screening of their customers, supply chain, intermediaries, counter-parties, commercial and financial documents, and transactions in order to identify OFAC-prohibited locations, parties, or dealings. At times, organizations have failed to update their sanctions screening software to incorporate updates to the SDN List or SSI List, failed to include pertinent identifiers such as SWIFT Business Identifier Codes for designated, blocked,

or sanctioned financial institutions, or did not account for alternative spellings of prohibited countries or parties—particularly in instances in which the organization is domiciled or conducts business in geographies that frequently utilize such alternative spellings (i.e., Havana instead of Havana, Kuba instead of Cuba, Soudan instead of Sudan, etc.).

VII. Improper Due Diligence on Customers/Clients (e.g., Ownership, Business Dealings, etc.)

One of the fundamental components of an effective OFAC risk assessment and SCP is conducting due diligence on an organization’s customers, supply chain, intermediaries, and counter-parties. Various administrative actions taken by OFAC involved improper or incomplete due diligence by a company or corporation on its customers, such as their ownership, geographic location(s), counter-parties, and transactions, as well as their knowledge and awareness of OFAC sanctions.

VIII. De-Centralized Compliance Functions and Inconsistent Application of an SCP

While each organization should design, develop, and implement its risk-based SCP based on its own characteristics, several organizations subject to U.S. jurisdiction have committed apparent violations due to a de-centralized SCP, often with personnel and decision-makers scattered in various offices or business units. In particular, violations have resulted from this arrangement due to an improper interpretation and application of OFAC’s regulations, the lack of a formal escalation process to review high-risk or potential OFAC customers or transactions, an inefficient or incapable oversight and audit function, or miscommunications regarding the organization’s sanctions-related policies and procedures.

IX. Utilizing Non-Standard Payment or Commercial Practices

Organizations subject to U.S. jurisdiction are in the best position to determine whether a particular dealing, transaction, or activity is proposed or processed in a manner that is consistent with industry norms and practices. In many instances, organizations attempting to evade or circumvent OFAC sanctions or conceal their activity will implement non-traditional business methods in order to complete their transactions.

X. Individual Liability

In several instances, individual employees—particularly in supervisory, managerial, or executive-level positions—have played integral roles in causing or facilitating violations of the regulations administered by OFAC. Specifically, OFAC has identified scenarios involving U.S.- owned or controlled entities operating outside of the United States, in which supervisory, managerial or executive employees of the entities conducted or facilitated dealings or transactions with OFAC-sanctioned persons, regions, or countries, notwithstanding the fact that the U.S. entity had a fulsome sanctions compliance program in place. In some of these cases, the employees of the foreign entities also made efforts to obfuscate and conceal their activities from others within the corporate organization, including compliance personnel, as well as from regulators or law enforcement. In such circumstances, OFAC will consider using its enforcement authorities not only against the violating entities, but against the individuals as well.

U.S. OFAC Vessel and Shipping Advisory

Department of the Treasury Department of State United States Coast Guard

Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities

Issued: May 14, 2020

Title: Guidance to Address Illicit Shipping and Sanctions Evasion Practices

The U.S. Department of State, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), and the U.S. Coast Guard are issuing this advisory to provide those engaged or involved in trade in the maritime industry and energy and metals sectors with further information and tools to counter current and emerging trends related to illicit shipping and sanctions evasion. This advisory reflects the U.S. government's commitment to work with the private sector to prevent sanctions evasion, smuggling, criminal activity, facilitation of terrorist activities, and proliferation of weapons of mass destruction (WMD), with a focus on Iran, North Korea, and Syria. Combined with Annexes A and B, this advisory updates and expands on the North Korea-related shipping advisories OFAC issued on February 23, 2018, and March 21, 2019; the Iran-related shipping advisory OFAC issued on September 4, 2019; and the Syria-related shipping advisories OFAC issued on November 20, 2018, and March 25, 2019. At a later date, OFAC may issue further updates to this advisory, including with respect to the vessel lists that have appeared in previous shipping advisories.

This advisory discusses sanctions risks and contains information on common deceptive shipping practices and general approaches to aid in further tailoring due diligence and sanctions compliance policies and procedures. It is intended primarily to provide guidance to the following: ship owners, managers, operators, brokers, ship chandlers, flag registries, port operators, shipping companies, freight forwarders, classification service providers, commodity traders, insurance companies, and financial institutions.^{1,2} This advisory includes both updated information on the deceptive practices used to evade sanctions and policies and procedures that entities operating in the specific maritime sectors enumerated above may wish to consider adopting as part of a risk-based sanctions compliance program.

It is critical that private sector entities appropriately assess their sanctions risk and, as necessary, implement compliance controls to address any identified gaps in their compliance programs. This is especially important when operating near or in areas they determine to be high-risk, which may include areas frequently used for potentially sanctionable

1. While this advisory primarily addresses sanctions risks, U.S. financial institutions should also be aware that, consistent with suspicious activity reporting requirements in 31 CFR Chapter X, if a financial institution knows, suspects, or has reason to suspect that a transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction, the financial institution should file a Suspicious Activity Report (SAR). See 31 CFR §§ 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, 1029.320, and 1030.320.

2. The guidance in this document is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable laws or regulations.

transportation-related activities. The United States also encourages entities and individuals involved in the supply chains of trade in the energy and metals sectors, including trade in crude oil, refined petroleum, petrochemicals, steel, iron, aluminum, copper, sand, and coal, to review this advisory and take appropriate action as deemed necessary or advisable.

Deceptive Shipping Practices

Approximately 90 percent of global trade involves maritime transportation. Malign actors constantly seek novel ways to exploit global supply chains for their benefit. The following list, while not exhaustive, summarizes several tactics utilized to facilitate sanctionable or illicit maritime trade linked to Iran, North Korea, and Syria. We recommend that persons conducting any transportation or trade involving the maritime sector continue to be vigilant against the following tactics in order to limit the risk of involvement with sanctionable or illicit activity, and that they exercise heightened due diligence with respect to shipments that transit areas they determine to present high risk.

1) Disabling or Manipulating the Automatic Identification System (AIS) on Vessels

AIS is an internationally mandated system that transmits a vessel's identification and navigational positional data via high frequency radio waves. The International Convention for the Safety of Life at Sea (SOLAS) *requires* that certain classes of vessels traveling on international voyages operate AIS at all times with few exceptions. Although safety issues may at times prompt legitimate disablement of AIS transmission, and poor transmission may otherwise occur, vessels engaged in illicit activities may also intentionally disable their AIS transponders or manipulate the data transmitted in order to mask their movement. The practice of manipulating AIS data, referred to as "spoofing," allows ships to broadcast a different name, International Maritime Organization (IMO) number (a unique, seven-digit vessel identification code), Maritime Mobile Service Identity (MMSI), or other identifying information. This tactic can also conceal a vessel's next port of call or other information regarding its voyage.

2) Physically Altering Vessel Identification

Passenger ships of 100 Gross Tonnage (GT) and upwards and cargo ships of 300 GT and upwards are required to display their name and IMO number in a visible location on the vessel's hull or superstructure. A vessel's IMO number is intended to be permanent regardless of a change in a vessel's ownership or name. Vessels involved in illicit activities have often painted over vessel names and IMO numbers to obscure their identities and pass themselves off as different vessels.

3) Falsifying Cargo and Vessel Documents

Complete and accurate shipping documentation is critical to ensure all parties to a transaction understand the entities, recipients, goods, and vessels involved in a given shipment. Bills of lading, certificates of origin, invoices, packing lists, proof of insurance, and lists of last ports of call are examples of documentation that typically accompanies a shipping transaction. Authorities have found that sanctions evaders have falsified shipping documentation pertaining to petrochemicals, petroleum, petroleum

products, or metals (steel, iron) or sand in order to disguise their origin.

Falsifying certain documents (including customs and export control documents) is illegal in most countries, and irregularities may provide a basis to hold a shipment until its contents are validated. In addition, persons conducting transportation or trade involving the maritime sector are encouraged to conduct due diligence, as necessary, on documents that indicate or suggest that cargo is from an area they determine to be high-risk for sanctions evasion, notwithstanding any purported low-risk place of origin.

4) **Ship-to-Ship (STS) Transfers**

While ship-to-ship transfers (the transfer of cargo between ships at sea) can be conducted for legitimate purposes, STS transfers—especially at night or in areas determined to be high-risk for sanctions evasion or other illicit activity—are frequently used to evade sanctions by concealing the origin or destination of surreptitiously transferred petroleum, coal, and other material.

5) **Voyage Irregularities**

Malign actors may attempt to disguise the ultimate destination or origin of cargo or recipients by using indirect routing, unscheduled detours, or transit or transshipment of cargo through third countries. Although transit and transshipment are common in the global movement of goods, private sector entities, including flag registry management companies, port operators, shipping industry associations, ship owners, operators, and charterers, ship captains, and crewing companies are encouraged to scrutinize routes and destinations that deviate from normal business practices, as appropriate.

6) **False Flags and Flag Hopping**

Bad actors may falsify the flag of their vessels to mask illicit trade. They may also repeatedly register with new flag states (“flag hopping”) to avoid detection. We recommend that the private sector be aware of and report to competent authorities any instances of a vessel owner or manager who continues to use a country’s flag after it has been removed from a registry (i.e., “deregistered”), occurrences of a ship claiming a country flag without proper authorization, or instances when a vessel has changed flags frequently in a short period of time in a suspicious manner consistent with flag hopping. Specific measures for different parts of the private sector are included in the industry guidance accompanying this report as Annex A.

7) **Complex Ownership or Management**

Global shipping is inherently complex and involves multiple interactions with both government and private sector entities. Bad actors attempt to take advantage of this complexity through the use of complex business structures, including those involving shell companies and/or multiple levels of ownership and management, to disguise the ultimate beneficial owner of cargo or commodities in order to avoid sanctions or other enforcement action, among other reasons. Bad actors also may engage in a pattern of changes in the ownership or management of companies or in the International Safety

Management Code (ISM) management companies used. If private sector entities are unable to reasonably identify the real parties in interest in a transaction, they may wish to consider performing additional due diligence to ensure it is not sanctionable or illicit.

General Practices for Effective Identification of Sanctions Evasion

As industry actors implement appropriate due diligence and compliance programs based on their risk assessments, we recommend that they continually adopt business practices to address red flags and other anomalies that may indicate illicit or sanctionable behavior. Detailed below are specific practices that may assist in more effectively identifying potential sanctions evasion. However, these are not intended to be, nor should they be interpreted as, comprehensive, as imposing any specific requirements under U.S. law, or as otherwise addressing any particular requirements under applicable laws or regulations.

1) Institutionalize Sanctions Compliance Programs

We recommend that, as appropriate, private sector entities assess their sanctions risk, implement sanctions compliance and due diligence programs, and provide training and resources to personnel in order to best execute those programs. Entities may wish to consider communicating with their counterparts, partners, subsidiaries, and affiliates to articulate their compliance expectations in a manner consistent with applicable local requirements.

As appropriate, private sector entities continue to be encouraged to develop, implement, and adhere to written standardized operational compliance policies, procedures, standards of conduct, and safeguards. These compliance programs may establish that engaging in sanctionable conduct is cause for immediate termination of business or employment, or could determine that appropriate controls have been adopted that adequately mitigate potential risks associated with the activity. Further, it is a compliance best practice that employees who disclose illicit behavior be protected from retaliation and that a confidential mechanism exist to report suspected or actual illicit or sanctionable activity.

To the extent appropriate, private sector entities may wish to have their sanctions compliance programs routinely audited by qualified third parties as a means of continuous improvement.

Additionally, sanctions compliance programs may include communicating to counterparts, including but not limited to ship owners, managers, charterers, and operators, an expectation that they have adequate and appropriate compliance policies that respond to their internal risk assessments. In addition to doing so themselves, and when appropriate, private sector entities are encouraged to communicate to their counterparts an expectation that they: 1) conduct their activities in a manner consistent with U.S. and United Nations (UN) sanctions, as applicable; 2) have sufficient resources in place to ensure execution of and compliance with their own sanctions policies by their personnel, e.g., direct hires, contractors, and staff; 3) ensure subsidiaries and affiliates comply with the relevant policies, as applicable; 4) have relevant controls in place to monitor AIS; 5) have controls in place to screen and assess onboarding or

offloading cargo in areas they determine to present a high risk; 6) have controls to assess authenticity of bills of lading, as necessary; and 7) have controls in place consistent with this advisory.

2) Establish AIS Best Practices and Contractual Requirements

AIS manipulation and disruption may indicate potential illicit or sanctionable activities. Entities in the maritime industry may wish to consider, based on their individual risk assessments, researching a ship's history to identify previous AIS manipulation and monitoring AIS manipulation and disablement when cargo is in transit. As appropriate, maritime industry participants, flag registries, and other private sector entities to include insurers and financial institutions that conduct business with ship owners, charterers, and managers are encouraged to promote continuous broadcasting of AIS throughout the life of the transaction, consistent with SOLAS, especially in those areas determined to pose a high risk for sanctions evasion.

Private industry, including those industries referenced in Annex A, are encouraged to investigate signs and reports of AIS transponder manipulation before entering into new contracts involving problematic vessels or when engaging in ongoing business. Financial institutions may continue to assess this activity pursuant to a risk-based approach and—as appropriate—implement relevant controls for their maritime industry clients, particularly those that own, operate, and/or provide services to ships operating in areas determined to pose a high risk for sanctions evasion. Service providers may wish to consider amending contracts to make disabling or manipulating AIS for illegitimate reasons, grounds for termination of contracts or investigation, which could lead to termination of services or contracts if illicit or sanctionable activity is identified. Additionally, parties could consider incorporating contractual language that prohibits transfers of cargo to client vessels that are not broadcasting AIS in accordance with SOLAS or have AIS history that indicates manipulation or termination for illegitimate reasons.

Additionally, port state control and vessel traffic services authorities are encouraged to reiterate the requirement to maintain AIS broadcasts to tankers and bulk containers arriving in and leaving their jurisdictions. If a vessel cannot account for its AIS history consistent with SOLAS, port authorities may wish to consider investigating the underlying activity to ensure that it is not sanctionable or otherwise illicit. If determined to be illicit, the port authorities may wish to consider prohibiting that vessel from entering their ports or taking other appropriate actions.

3) Monitor Ships Throughout the Entire Transaction Lifecycle

As appropriate, consistent with their risk assessments, ship owners, managers, and charter companies are encouraged to continuously monitor vessels, including those leased to third parties. This could include supplementing AIS with Long Range Identification and Tracking (LRIT) and receiving periodic LRIT signals on a frequency informed by the entity's risk assessment. Port authorities in areas that present a high risk related to sanctions evasion may wish to consider monitoring ships using LRIT

within their areas of operation as a risk mitigation strategy. Ship owners and managers may wish to consider raising awareness of common deceptive practices among vessel operators that conduct STS transfers in areas determined to be high-risk. Prior to any such transfers, vessel operators may wish to consider verifying the other vessel's name, IMO number, and flag, and checking that it is currently broadcasting AIS. As part of identifying red flags, industry actors may also consider looking for situations where ownership of a vessel is transferred between companies controlled by the same beneficial owner and where there is no discernable legitimate purpose for the transfer.

4) Know Your Customer and Counterparty

Flag registry administrations, insurers, financial institutions, managers, and charterers should continue to conduct risk-based due diligence as appropriate. This due diligence might include maintaining the names, passport ID numbers, address(es), phone number(s), email address(es), and copies of photo identification of each customer's beneficial owner(s). For example, if a legal entity is seeking to register a vessel with a flag or seeking insurance or financing for a vessel, each of these parties could request documentation regarding the ultimate beneficial owner(s) of the vessel, and seek to verify this with the documentation above, as appropriate and on a risk-basis.

5) Exercise Supply Chain Due Diligence

As appropriate, exporters and entities across the maritime supply chain are encouraged to conduct appropriate due diligence as relevant to ensure that recipients and counterparties to a transaction are not sending or receiving commodities that may trigger sanctions, such as Iranian petroleum or North Korea-origin coal. They may also consider implementing controls that allow for verification-of- origin and recipient checks for ships that conduct STS transfers, particularly in high-risk areas. As necessary, they should consider requesting copies of export licenses (where applicable) and complete, accurate shipping documentation, including bills of lading that identify the origin or destination of cargo.

As appropriate, private sector maritime entities are encouraged to review the details of the underlying voyage, including the vessel, cargo, origin, destination, and parties to the transaction. In particular, and in line with their internal risk assessment, parties are encouraged to review the relevant documents in order to demonstrate that the underlying goods were delivered to the port listed in the documentation and not diverted in an illicit or sanctions-evading scheme.

6) Contractual Language

Members of the industry are encouraged to incorporate these best practices in contracts related to their commercial trade, financial, and other business relationships in the maritime industry.

7) Industry Information Sharing

Successful sanctions compliance programs often rely on fostering industry-wide awareness of challenges, threats, and risk mitigation measures. The Department of State, OFAC, and the U.S. Coast Guard recommend that industry groups encourage members to provide relevant information and share it broadly with partners, other members, and colleagues consistent with applicable laws and regulations. For example, when a protection and indemnity (P&I) club insurance company becomes aware of illicit or sanctionable activity or new tactics in sanctions evasion, it may wish to consider notifying other P&I clubs, as appropriate, redacting personally identifiable information that cannot be shared with third parties where necessary. Similarly, vessel owners and clubs are encouraged to share information with the financial industry, potentially working through competent authorities where required, and flag administrations should routinely pass information to the IMO and parties to the Registry Information Sharing Compact.

Additional Resources

For additional resources, parties are encouraged to consult previous guidance from OFAC and the UN on these topics.³ The United States encourages all interested parties to register for OFAC sanctions updates at https://public.govdelivery.com/accounts/USTREAS/subscriber/new?topic_id=USTREAS_61. They may also register for routine updates from the Department of State's Counter Threat Finance and Sanctions Division at <https://www.state.gov/subscribe-to-sanctions-alerts/> or contact the office by email at sanctions@state.gov.⁴

For additional questions or concerns related to OFAC sanctions regulations and requirements, including to disclose a potential violation of U.S. sanctions, please contact OFAC's Compliance Hotline at 1-800- 540-6322 or via OFAC_Feedback@treasury.gov. Parties may also submit a request for a specific OFAC license on its website at <https://licensing.ofac.treas.gov/Apply/Introduction.aspx>.

In order to support international efforts to enforce UN Security Council sanctions on North Korea, the

U.S. Department of State's Rewards for Justice (RFJ) Program offers rewards of up to \$5 million for information that leads to the disruption of financial mechanisms of persons engaged in certain activities that support North Korea and its efforts to evade sanctions, including illicit shipping activities, money laundering, cyber-crime, and WMD proliferation. For more information, or to submit a tip, visit https://rewardsforjustice.net/english/about-rfj/north_korea.html.

The RFJ Program also offers rewards of up to \$15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps (IRGC) and its branches, including the IRGC-Qods Force (IRGC-QF). The IRGC, which is a Specially Designated Global Terrorist and was designated as a Foreign Terrorist Organization by the U.S. government in April 2019, has financed numerous terrorist attacks and activities globally. The IRGC-QF supports terrorist operations outside Iran via militant

3. UNSC Sanctions Compliance for the Maritime Sector, January 2015 <<https://undocs.org/S/2015/28>>.

4. The division's website is located here: <<https://www.state.gov/economic-sanctions-policy-and-implementation/>>.

groups, such as Hizballah and Hamas. For more information, or to submit a tip, visit <https://rewardsforjustice.net/english/irgc.html>.

For verification of IMO numbers, you can consult the IMO's database of IMO numbers at <https://gisis.imo.org/Public/SHIPS/Default.aspx>. To report vessel deregistrations or other actions, please directly contact the IMO (or private parties nominated by the IMO to update the IMO's database at the IMO's direction).



Department of the Treasury



Department of State



United States Coast Guard

ANNEX A: Additional Guidance and Information to Assist Sanctions Compliance Efforts in the Maritime Industry

The U.S. Department of State, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), and the United States Coast Guard strongly encourage persons subject to U.S. jurisdiction, as well as foreign persons that conduct transactions with or involving the United States or U.S. persons, to employ a risk-based approach to sanctions compliance. This approach may include the development, implementation, and routine updating of a sanctions compliance program for such persons' particular business models. While each risk-based sanctions compliance program will vary depending on a variety of factors—including the company's size and sophistication, products and services, customers and counterparties, and geographic locations—each program that is implemented should be predicated on and incorporate at least five essential components of compliance: (1) management commitment; (2) risk assessment; (3) internal controls; (4) testing and auditing; and (5) training. See [A Framework for OFAC Compliance Commitments](#) for more details.

Set forth below is additional guidance and information intended to assist organizations involved in the maritime industry in developing and implementing an effective sanctions compliance program, consistent with these five components. Specifically, this annex provides such guidance and information for:

- maritime insurance companies – page 9;
- flag registry managers – page 11;
- port state control authorities – page 13;
- shipping industry associations – page 14;
- regional and global commodity trading, supplier, and brokering companies – page 15;
- financial institutions – page 17;
- ship owners, operators, and charterers – page 18;
- classification societies – page 20;
- vessel captains – page 22; and
- crewing companies – page 23.

Each organization should assess its own risk and adopt the elements included in this guidance as it deems appropriate.⁵

⁵. This guidance is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable law. Its sole intent is to provide information to companies operating in the maritime industry that they may wish to consider in assessing their sanctions exposure as part of a risk-based compliance program.

Guidance for Maritime Insurance Companies

A maritime insurance company may wish to consider implementing the following diligence practices as appropriate in assessing and mitigating sanctions risks.

- Monitoring Automatic Identification System (AIS) transmissions and investigating the following occurrences when involving an insured vessel: any significant time period with non-transmission that is not consistent with the International Convention for the Safety of Life at Sea (SOLAS); navigation of suspicious deviations in routes (e.g., changes without what appears to be a legitimate reason to go off-route, such as unsafe ports, extreme weather, or emergencies); a pattern of turning off AIS in a manner inconsistent with SOLAS; and engaging in trade to or from vessels that are not transmitting AIS consistent with SOLAS.
- Including in pre-coverage and claims presentment, due diligence procedures that assess the AIS history of vessels that engage in potentially illegal activities and operate in areas determined to be high-risk areas for sanctions evasion, both of which may be indicators of possible involvement in illicit activity and may warrant further investigation of the ship's voyage, charter, ownership, and other factors.
- Ensuring that insurers that provide coverage for ship owners, suppliers, buyers, charterers, and ship managers could research the AIS history for all the vessels under the ownership or control of such parties. Insurers may wish to consider further communicating to clients that any signs of AIS transponder manipulation inconsistent with SOLAS could be considered a red flag and investigated prior to entering into contracts with, continuing to provide services to, or engaging in other activities with such vessels (including engaging in financial transactions in connection with the vessel's activities).
- Incorporating contractual language and explicitly notifying clients that AIS disablement or manipulation inconsistent with SOLAS is possible grounds for investigation by the insurer of the ship's activities and could result in cancellation of insurance.
- Incorporating a contractual provision that prohibits transfers of cargo to or from clients with other vessels that are not broadcasting AIS consistent with SOLAS or have a history of AIS transponder manipulation inconsistent with SOLAS.
- Informing legal regulators/competent authorities, other insurers, commercial databases, the International Maritime Organization (IMO), and when relevant, the United Nations (UN) Security Council 1718 Committee Panel of Experts (the UN DPRK Panel of Experts) in the event of insurance denial or cancellation of services of a vessel in relation to illicit activity.
- Informing registrants (including owners of vessels) that activity inconsistent with relevant U.S. or UN sanctions may be cause for immediate termination of business and that the underlying due diligence and registration documents revealing information on

ownership structure may be sent to the relevant U.S. government and/or UN body at the discretion of the insurer.

- Ensuring, as appropriate and allowed by applicable laws and regulations, due diligence documents (e.g., registration documents for flag registries) include a color photocopy of the passports, names, business and residential addresses, phone numbers, email of all *individual* owners of the vessel(s), and the names and IMO numbers of all the vessels in the fleet of the individual ship owner, for ships operating near areas determined to be high risk for sanctions evasion or violations. Where necessary, include in forms collecting personally identifiable information (PII) that the insurers and re-insurers may share the PII with competent authorities if the vessel conducts unlawful activities, as allowed by applicable laws and regulations.
- Ensuring clear communication with international partners, as shipping business arrangements may involve parties subject to the laws of different jurisdictions. Clearly explaining relevant restrictions under and the steps required to comply with U.S. and UN sanctions regimes and encouraging all parties involved in the shipping industry to share this advisory with others in their supply chain.
- Incorporating data such as historical ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard into due diligence practices.

Guidance for Flag Registry Managers⁶

A flag registry manager may wish to consider implementing the following diligence practices to the extent it deems such practices appropriate and helpful in assessing and mitigating sanctions risks.

- Verifying the IMO number of each vessel when receiving an application for registration through the IMO's Global Integrated Shipping Information System (GISIS) Ship and Company Particulars module. If the IMO and ship name do not clearly match, additional investigation could be conducted prior to the registration of the vessel, and the manager should contact the previous Flag State to confirm the application and its intended release from the previous registry.
- Transmitting to the receiving Flag State administration a copy of the Continuous Synopsis Record, consistent with SOLAS regulation X1-1/5, covering the period during which the ship was under their jurisdiction, together with any Continuous Synopsis Records previously issued to the ship by other states.
- Reviewing and confirming the Continuous Synopsis Record with the current Flag State before completing registration.

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- Conducting research on the AIS history of vessels that transport oil, refined petroleum, petrochemicals, steel, aluminum, copper, other metals, sand, and coal to determine if such vessels have a pattern of AIS disablement or manipulation inconsistent with SOLAS, which could indicate involvement in illicit activities. Any signs of AIS transponder disablement or manipulation inconsistent with SOLAS should be considered a red flag and investigated fully prior to engaging in other activities with such vessels.
- Sharing with other flag registries, commercial databases, and the IMO the names and IMO numbers of vessels that have been denied registration, or deregistered related to involvement in sanctionable or illicit shipping activities, so that other flag registries can be made aware and act in a manner consistent with relevant U.S. and UN sanctions. Inform the UN DPRK Panel of Experts in the event of registration denial or deregistration for North Korea-related reasons.
- Noting the reason for a vessel's deregistration on the certificate of deletion, particularly in cases of UN-prohibited activity.
- Acquiring, as appropriate, the capability to monitor AIS transmissions continuously for signs of AIS disablement or manipulation and supplement AIS tracking by using Long Range Identification and Tracking (LRIT).
- Communicating to all ships and related clients that suspicious AIS disablement and manipulation inconsistent with SOLAS may be investigated and qualify them for possible deregistration.
- Assessing AIS history of vessels on the registry in order to identify a pattern of AIS disablement or manipulation inconsistent with SOLAS and then cease or deny flag-registry services to those vessels.
- Requesting to join the Registry Information Sharing Compact (currently led by Liberia, Panama, and the Marshall Islands) via a memorandum of understanding.
- Organizing trainings and seminars on UN and U.S. sanctions implications for the owners and managers of vessels they have flagged that could potentially be facilitating sanctionable or illicit activities.
- Considering the adoption of a system of QR codes or barcoding of documents in order to easily check for authenticity, validity, or cancellation of registry documents using a mobile phone app or by accessing the website of the former Flag State.
- Conducting cyclical checks on vessel companies to determine if the companies are still registered.

This would ensure that the companies are not dissolved.

- Cooperating with classification societies to provide a soft lock on AIS equipment that does not interfere with SOLAS requirements' allowance for disablement in emergency situations, to ensure the integrity of vessel identification and positional data. A soft lock would not allow manual changes during voyages but would allow disablement when necessary for safety or in the event of emergency, while permitting classification societies to check the change log and report any manipulation of this data during the mandated annual equipment checks.
- Utilizing relevant bodies to report possible illicit activity to the Flag State to help mitigate risk.
- Suggesting owners train all vessel masters that may engage in ship-to-ship transfers on maritime implications of relevant sanctions programs prior to their first voyage.
- Requiring notification within 24 hours of the LRIT being switched off or otherwise disabled and require an investigation of such incidents.
- Informing registrants and owners of vessels that sanctionable or illicit conduct would be cause for immediate removal of flags and that the underlying due diligence and registration documents revealing ownership information may be sent to the United States and relevant UN body at the discretion of the registry and consistent with applicable laws and regulations.
- Ensuring employees who reveal illegal or sanctionable behavior are protected from retaliation, and ensuring there is a confidential mechanism to report suspected or actual violations of law or sanctionable conduct.
- Incorporating data such as historical ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard, into due diligence practices.
- Providing that AIS disablement and manipulation inconsistent with SOLAS and illegal conduct as of the registration date are grounds for deregistration and/or denial of services, including the ability to dock at ports of the flag state. Additionally, other grounds for deregistration could include transfers of cargo to clients that are not broadcasting AIS consistent with SOLAS or have an AIS history that indicates manipulation and disablement inconsistent with SOLAS.

Guidance for Port State Control Authorities⁷

Port state control authorities and relevant customs authorities may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks and consistent with local laws and regulations.

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- Requiring vessels arriving in port to maintain AIS broadcasts, as provided for in SOLAS.
- Notifying relevant parties, including ship captains, managers, and others, that disablement or manipulation of AIS inconsistent with SOLAS is an indicator of possible illicit activity and could be investigated by competent authorities.
- Denying port entry to ships with a history of AIS disablement or manipulation inconsistent with SOLAS.
- Reviewing bills of lading to confirm origin of the cargo. Bills alleging oil, petrochemicals, fuel, and metals from areas determined to be high-risk for sanctions evasion should be reviewed with particular due diligence.
- Requesting and reviewing complete and accurate shipping documentation, including bills of lading identifying the origin of cargo for individuals and entities processing transactions pertaining to shipments involving products going to or from Iran, North Korea, and Syria. As is generally the case, such shipping documentation should reflect the details of the underlying voyage, including the vessel(s), cargo, origin, destination, and parties to the transaction. Any indication of manipulated shipping documentation, whether in connection with these or other areas, may be a red flag for potential illicit activity and should be investigated fully prior to providing services.
- Ensuring employees of the port state authority who reveal illegal or sanctionable behavior are protected from retaliation, and ensuring there is a confidential mechanism to report suspected or actual violations of law or sanctionable conduct.
- Incorporating data such as historical ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard, into due diligence practices.
- Circulating information about an award offered through the Rewards for Justice (RFJ) program that offers rewards of up to \$5 million for information that leads to the disruption of financial mechanisms of persons engaged in certain activities that support North Korea, including illicit shipping activities, money laundering, sanctions evasion, cyber-crime, or weapons of mass destruction (WMD) proliferation. For more information, or to submit a tip, visit www.rewardsforjustice.net or e-mail northkorea@dosinfo.com.
- Circulating information about an award offered from the RFJ Program of up to \$15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps (IRGC) and its branches, including the IRGC-Qods Force (IRGC-QF). For more information, or to submit a tip, visit <https://rewardsforjustice.net/english/irgc.html>.

Guidance for Shipping Industry Associations⁸

Shipping industry associations may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks.

- € Disseminating this advisory, or creating their own advisory addressing these issues, and providing it to members in order to raise awareness of global deceptive shipping practices and identify the ways that members can mitigate the risks of involvement in illicit shipping activities.
- Providing regular case studies and updates regarding illicit activity in industry-wide circulars, particularly in relation to shipping oil and petroleum products.

Guidance for Regional and Global Commodity Trading, Supplier, and Brokering Companies⁹

Regional and global commodity trading, supplier, and brokering companies may wish to consider implementing the following due diligence practices as appropriate in assessing and mitigating sanctions risks.

- Monitoring AIS transmissions of chartered clients, especially in the case of vessels in areas determined to be at high-risk for sanctions evasion via ship-to-ship transfers.
- Identifying the vessels which, in the past two years, have a pattern of AIS disablement or manipulation inconsistent with SOLAS and potentially terminating business relationships with clients that continue to use those vessels.
- Adopting contractual language with chartered clients that incorporate an “AIS switch-off” clause, allowing for contract termination if the chartered clients demonstrates a pattern of multiple instances of AIS disablement or manipulation that is inconsistent with SOLAS.
- Incorporating contractual language that prohibits transfers of cargo to vessels that are not broadcasting AIS for reasons inconsistent with SOLAS.
- Adopting a contractual provision that incorporates a mechanism to monitor whether commodity transactions occur as outlined under the original contract and any addenda to the contract.

8. This guidance is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable law.

9. This guidance is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable law.

- Ensuring that, in transactions involving ship-to-ship transfers, transacting parties should endeavor to note all involved vessels' IMO numbers and conduct reviews of vessel logs and cargo certificate of origin to establish a relevant chain of custody for the commodity in question.
- Sensitizing clients to potential sanctions risk related to activities involving Iranian, North Korean, or Syrian ports.
- Providing regular case studies and updates regarding illicit activity in industry-wide circulars, particularly in relation to shipping oil and petroleum products. This should include the specific North Korea-related UN Security Council resolutions provisions regarding ship-to-ship transfers (UNSCR 2375, OP 11), as well as UNSCR 2397 (OP 13), which expresses concern that North Korea-associated vessels intentionally disregard requirements to operate AIS to evade UNSCR sanctions monitoring.
- Recognizing that purchases of crude and refined petroleum, petrochemicals, and metals at rates significantly below market prices may be red flags indicating illicit behavior.
- Requesting and reviewing complete and accurate shipping documentation, including bills of lading identifying the origin of cargo where individuals and entities are processing transactions pertaining to shipments potentially involving products to or from Iran, North Korea, or Syria. Such shipping documentation should reflect the details of the underlying voyage, including the vessel(s), cargo, origin, destination, and parties to the transaction. Any indication of manipulated shipping documentation is a red flag for potential illicit activity and should be investigated fully prior to continuing with the transaction.
- Ensuring employees who reveal illegal or sanctionable behavior are protected from retaliation, and ensuring there is a confidential mechanism to report suspected or actual violations of law or sanctionable conduct.
- Communicating with international partners, as shipping business arrangements may involve parties subject to the laws of different jurisdictions. Explaining relevant restrictions under U.S. and UN sanctions regimes to parties involved in a transaction can facilitate more effective compliance with them. The United States encourages all parties involved in the shipping industry to share this advisory with those in your supply chain.
- Incorporating data into due diligence practices from several organizations that provide commercial shipping data, such as ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard.
- Requiring contractual language that describes AIS disablement and manipulation inconsistent with SOLAS and sanctionable conduct as of the contract date as potential grounds for termination of the contract and removal and denial of services. Additionally, parties could incorporate contractual language that prohibits transfers of cargo to

clients that are not broadcasting AIS consistent with SOLAS or have an AIS history that indicates manipulation inconsistent with SOLAS.

Information Helpful to Financial Institutions to Assess the Risks of their Maritime Industry Customers¹⁰

Similar to the customer due diligence approach conducted for any customer, financial institutions should rely on their internal risk assessments for customers in the maritime industry, in order to employ appropriate risk mitigation measures consistent with applicable existing U.S. laws and regulations designed to combat money laundering and terrorist and proliferation financing.¹¹ This approach to compliance may include appropriate due diligence policies and procedures as required by law and regulation, such as, where applicable, FinCEN's customer due diligence and beneficial ownership requirements.¹²

Risk factors that financial institutions may wish to consider as a part of that assessment include, but are not limited to:

- Identifying commodities and trade corridors susceptible to transshipment and ship-to-ship transfers and the extent of their use by an institution's maritime industry customer.
- Results from an assessment of the nature of each client's business, including the type of service(s) offered and geographical presence.
- Client activity for transactions inconsistent with the client's typical business practices, to include when clients acquire new vessels.
- Client acquisition or sale of vessels to determine that the client's assets do not include blocked property.

Guidance for Ship Owners, Operators, and Charterers¹³

Ship owners, operators, and charterers may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks.

10. This information is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable law.

11. See anti-money laundering program requirements established in 31 CFR 1010.210 as applicable to specific types of financial institutions in 31 CFR 1020.210 (banks), 1021.210 (casinos), 1022.210 (money services businesses), 1023.210 (securities), 1024.210 (mutual funds), 1025.210 (insurance), 1026.210 (futures), 1027.210 (precious metals), 1028.210 (credit card systems), 1029.210 (loan or finance), and 1030.210 (housing government sponsored entities).

12. See customer identification program requirements established in 31 CFR 1010.220 as applicable to specific types of financial institutions in 31 CFR 1020.220 (banks), 1023.220 (securities), 1024.220 (mutual funds), and 1026.220 (futures). See also the beneficial ownership requirements for legal entity customers established in 31 CFR 1010.230.

13. This guidance is not intended to be, nor should it be interpreted as, comprehensive or as imposing requirements under U.S. law or otherwise addressing any particular requirements under applicable law.

- As appropriate, continuously monitoring ships, including ships leased to third parties, and ensuring that the AIS is continuously operated consistent with SOLAS and not manipulated. Parties could also consider using LRIT in addition to AIS and receiving LRIT signals every 3 hours.
- Monitoring AIS transmissions of vessels, especially in the case of vessels capable of transporting cargoes and that are susceptible to ship-to-ship transfers that are known to be used in the evasion of sanctions (e.g., coal, petroleum and petroleum products, and petrochemical products).
- Emphasizing to clients that all ships will be monitored for AIS manipulation, and instances of AIS disablement inconsistent with SOLAS will be investigated and reported.
- Identifying the vessels which, in the past two years, have a pattern of AIS manipulation not consistent with SOLAS and terminate business relationships with clients that continue to use those vessels.
- Assessing the AIS history of all new clients and refusing to conduct business with vessels that have a history of AIS manipulation not consistent with SOLAS.
- Adopting contractual language with clients, in the form of an “AIS switch-off” clause, allowing ship owners, charterers and operators to terminate work with any clients that demonstrate a pattern of multiple instances of AIS manipulation that is inconsistent with SOLAS.
- Keeping and analyzing records, including, where possible, photographs, of delivery and recipient vessels and/or recipients located at ports when possible, to enhance end-use verification.
- Providing regular case studies and updates regarding illicit activity in industry-wide circulars, particularly in relation to shipping and chartering oil and petroleum products. This should include the specific North Korea-related UN Security Council resolutions provisions regarding ship-to-ship transfers (UNSCR 2375, OP 11), as well as UNSCR 2397 (OP 13), which express concern that North Korea-associated vessels intentionally disregard requirements to operate AIS to evade UNSCR sanctions monitoring.
- Communicating to counterparts as necessary and appropriate (e.g., ship owners, managers, charterers, operators) an expectation that they have adequate and appropriate compliance policies, which could include: 1) conducting their activities in a manner consistent with U.S. and UN sanctions, as applicable; 2) having sufficient resources in place to ensure execution of and compliance with their own sanctions policies by their personnel, e.g., direct hires, contractors, and staff; 3) to the extent applicable, ensuring subsidiaries and affiliates comply with the relevant policies; 4) having relevant controls in place to monitor AIS; 5) having controls in place to screen and assess onboarding or offloading cargo in areas they determine to present a high risk; 6) having controls

to assess authenticity of bills of lading, as necessary; and 7) having controls in place consistent with this guidance.

- Ensuring employees who reveal illegal or sanctionable behavior are protected from retaliation, and ensure there is a confidential mechanism to report suspected or actual sanctionable conduct.
- As shipping business arrangements may involve parties subject to the laws of different jurisdictions, communicating relevant restrictions under U.S. and UN sanctions regimes to parties involved in a transaction can facilitate more effective compliance. The United States encourages all parties involved in the shipping industry to share this advisory with those in your supply chain.
- Incorporating data into due diligence practices from several organizations that provide commercial shipping data, such as ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard.
- Requiring explicit contractual language that describes AIS disablement and manipulation inconsistent with SOLAS and sanctionable activity as of the contract date as grounds for termination of the contract and removal and denial of services. Additionally, parties could incorporate contractual language that prohibits transfers of cargo to clients that are not broadcasting AIS or have an AIS history that indicates manipulation inconsistent with SOLAS.
- Circulating information about an award offered through the Rewards for Justice (RFJ) program that offers rewards of up to \$5 million for information that leads to the disruption of financial mechanisms of persons engaged in certain activities that support North Korea, including illicit shipping activities, money laundering, sanctions evasion, cyber-crime, or weapons of mass destruction (WMD) proliferation. For more information, or to submit a tip, visit www.rewardsforjustice.net or e-mail northkorea@dosinfo.com.
- Circulating information about an award offered from the RFJ Program of up to \$15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps (IRGC) and its branches, including the IRGC-Qods Force (IRGC-QF). For more information, or to submit a tip, visit <https://rewardsforjustice.net/english/irgc.html>.

Guidance for Classification Societies¹⁴

Classification societies may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks.

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- Keeping records, including photographs, of recipient vessels and/or recipients located at ports when possible, to enhance end use verification.
- Adopting Know Your Customer (KYC) due diligence measures to the extent appropriate.
- Sensitizing clients to potential sanctions risks related to activities involving Iranian, North Korean, or Syrian, ports.
- Providing regular case studies and updates regarding illicit activity in industry-wide circulars. This should include specific UN Security Council sanctions regarding ship-to-ship transfers with North Korean flagged vessels and AIS disablement or manipulation inconsistent with SOLAS under “Terms and Conditions” on the company’s website, particularly in relation to shipping and chartering oil and petroleum products.
- Informing registrants and owners of vessels that sanctionable conduct may be cause for immediate termination of business and that the underlying due diligence/registration documents revealing information of the owners may be sent to the U.S. and any relevant UN body at the discretion of the classification society and consistent with applicable laws and regulations.
- Communicating to counterparts as necessary and appropriate (e.g., ship owners, managers, charterers, operators) an expectation that they have adequate and appropriate compliance policies, which could include: 1) conducting their activities in a manner consistent with U.S. and UN sanctions, as applicable; 2) having sufficient resources in place to ensure execution of and compliance with their own sanctions policies by their personnel, e.g., direct hires, contractors, and staff; 3) to the extent applicable, ensuring subsidiaries and affiliates comply with the relevant policies; 4) having relevant controls in place to monitor AIS; 5) having controls in place to screen and assess onboarding or offloading cargo in areas they determine to present a high risk; 6) having controls to assess authenticity of bills of lading, as necessary; and 7) having controls in place consistent with this guidance.
- Ensuring due diligence documents (e.g., registration documents for flag registries) include a color photocopy of the passports, names, business and residential addresses, passport numbers and country of issuance, phone numbers, and email of all **individual** owners of the vessel(s) and the names and IMO of all the vessels in the fleet of such ship owner, when appropriate.
- Ensuring employees who reveal illegal or sanctionable behavior are protected from retaliation, and ensuring there is a confidential mechanism to report suspected or actual violations of law or sanctionable conduct.
- As shipping business arrangements may involve parties subject to the laws of different jurisdictions, communicating relevant restrictions under U.S. and UN sanctions regimes to parties involved in a transaction can facilitate more effective compliance. The United

States encourages all parties involved in the shipping industry to share this advisory with those in your supply chain.

- Incorporating data into due diligence practices from several organizations that provide commercial shipping data, such as ship location, ship registry information, and ship flagging information, along with available information from the U.S. Department of the Treasury, the UN, and the U.S. Coast Guard.
- Requiring contractual language that describes AIS disablement and manipulation inconsistent with SOLAS and activity prohibited by sanctions as of the contract date as grounds for termination of the contract and removal and denial of services. Additionally, parties could incorporate contractual language that prohibits transfers of cargo to clients that are not broadcasting AIS or have an AIS history that indicates manipulation inconsistent with SOLAS.

Guidance for Vessel Captains¹⁵

Seafarers may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks.

- Understanding, and ensuring your deck officers are aware of, the IMO required AIS regulations, which include consistently broadcasting AIS transmissions consistent with SOLAS.
- Practicing awareness of the IMO circulated guidance in relation to illicit shipping.
- Communicating to ship owners and charterers that the ship you are operating/crewing will be monitored for AIS disablement, and instances of AIS disablement will be investigated.
- Researching your vessel's AIS history to help determine whether the vessel may have been involved in illicit activities.
- Ensuring that vessel captains conducting ship-to-ship transfers in high risk areas for sanctions evasion are aware of the potential for blocked vessels or vessels carrying cargo the transport of which is prohibited by U.S. and UN sanctions to use deceptive practices to hide their identities, including by using false vessel names or IMO numbers. To the extent appropriate, vessel captains should ensure that they have verified the vessel name, IMO number, and flag prior to engaging in such a transfer and ensure there is a legitimate business purpose for the ship-to-ship transfer.
- Circulating information about an award offered through the Rewards for Justice (RFJ) program that offers rewards of up to \$5 million for information that leads to

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the disruption of financial mechanisms of persons engaged in certain activities that support North Korea, including illicit shipping activities, money laundering, sanctions evasion, cyber-crime, or weapons of mass destruction (WMD) proliferation. For more information, or to submit a tip, visit www.rewardsforjustice.net or e-mail northkorea@dosinfo.com.

- Circulating information about an award offered from the RFJ Program of up to \$15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps (IRGC) and its branches, including the IRGC-Qods Force (IRGC-QF). For more information, or to submit a tip, visit <https://rewardsforjustice.net/english/irgc.html>.

Guidance for Crewing Companies¹⁶

Crewing companies may wish to consider implementing the following due diligence practices to the extent they deem such practices appropriate and helpful in assessing and mitigating sanctions risks.

- Being aware of, and ensuring your crewmembers are aware of, the IMO circulated guidance in relation to illicit shipping and why these practices are unsafe.
- Communicating to clients that the ships your crews will be operating will be monitored for AIS disablement and manipulation, and that such instances will be investigated.
- Researching your prospective vessel's AIS history to help determine whether the vessel may be involved in illicit activities.
- Ensuring employees who reveal illegal or sanctionable behavior are protected from retaliation, and ensuring there is a confidential mechanism to report suspected or actual violations of law or sanctionable conduct.
- Circulating information about an award offered through the Rewards for Justice (RFJ) Program that offers rewards of up to \$5 million for information that leads to the disruption of financial mechanisms of persons engaged in certain activities that support North Korea, including illicit shipping activities, money laundering, sanctions evasion, cyber-crime, or weapons of mass destruction (WMD) proliferation. For more information, or to submit a tip, visit www.rewardsforjustice.net or e-mail northkorea@dosinfo.com.
- Circulating information about an award offered from the RFJ Program of up to \$15 million for information leading to the disruption of the financial mechanisms of Iran's Islamic Revolutionary Guard Corps (IRGC) and its branches, including the IRGC-Qods Force (IRGC-QF). For more information, or to submit a tip, visit <https://rewardsforjustice.net/english/irgc.html>.

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Department of the Treasury

Department of State

United States Coast Guard

ANNEX B: Information on North Korea-, Iran-, and Syria-related Sanctions Relevant to the Maritime Industry¹⁷

NORTH KOREA

This section provides information about North Korea-related U.S. and UN sanctions relevant to the maritime industry, including a non-exhaustive list of bases for which persons could be sanctioned by the U.S. government. It also provides supplemental information about North Korea's deceptive shipping practices. Combined with the other documents in this global maritime advisory, this annex updates and expands on the North Korea-related shipping advisories issued by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) on February 23, 2018, and March 21, 2019. This information is current as of the date of this advisory, but parties should regularly check OFAC's website for comprehensive information on North Korea-related sanctions programs.¹⁸ At a later date, OFAC may issue further updates to this advisory, including with respect to the vessel lists that have appeared in previous shipping advisories. OFAC maintains a comprehensive, consolidated, and searchable list of sanctioned persons, as well as vessels identified as blocked property, on the List of Specially Designated Nationals and Persons (SDN List).¹⁹

U.S. Government and UN Prohibitions on North Korea-related Conduct

The United States generally prohibits²⁰ any transactions or dealings involving the property or interests in property of the Government of North Korea or the Workers' Party of Korea and the direct or indirect export to and import from North Korea of nearly all goods, services, and technology. Vessels in which a foreign person has an interest that have called at a port in North Korea in the previous 180 days, and vessels in which a foreign person has an interest that have engaged in a ship-to-ship (STS) transfer with such a vessel in the previous 180 days, are prohibited from calling at a port in the United States. U.S. persons are also prohibited from registering a vessel in North Korea, obtaining authorization for a vessel to fly the North Korea flag, and owning, leasing, operating, and insuring any vessel flagged by North Korea.

Relevant UN Security Council resolutions (UNSCRs) require Member States to prohibit, among other things, owning, leasing, operating, or providing vessel classification, certification or associated service and insurance to any North Korean-flagged vessel; providing classification services to any vessel that Member States have reasonable grounds to believe were involved in activities prohibited by relevant UNSCRs; and providing insurance or re-insurance services to vessels owned, controlled, or operated by North Korea or vessels that Member States have reasonable grounds to believe were involved in activities or the

17. This document is explanatory only and does not have the force of law. This document does not supplement or modify statutory authorities, Executive orders, or regulations.

18. OFAC, "North Korea Sanctions," <https://www.treasury.gov/resource-center/sanctions/Programs/pages/nkorea.aspx>.

19. OFAC, "List of Specially Designated Nationals and Blocked Persons (SDN List)," <https://www.treasury.gov/resource-center/sanctions/sdn-list/pages/default.aspx>.

20. These prohibitions apply to transactions by a U.S. person or within the United States, including those that are processed through or involve the U.S. financial system. For additional details on OFAC prohibitions related to North Korea, see www.treasury.gov/ofac.

transport of items prohibited by the relevant UNSCRs.²¹ Additionally, Member States are required to prohibit the provision of bunkering or other services to North Korean vessels if they have information that provides reasonable grounds to believe that such vessels are carrying prohibited items. The UNSCRs also limit port entry of any vessel that is designated for a port entry ban by the UN Security Council (UNSC) or if a State has information that provides reasonable grounds to believe that a vessel is owned, controlled, or operated by persons or entities designated by the UNSC, subject to limited exceptions.

The U.S. government prohibits the importation of goods from North Korea to the United States absent exemption or authorization. Meanwhile, UNSCRs require Member States to prohibit the importation of a broad range of goods from North Korea, including the following:

<ul style="list-style-type: none"> • Coal • Textiles • Seafood, including fishing rights • Iron and iron ore • Lead and lead ore • Copper • Nickel 	<ul style="list-style-type: none"> • Silver • Titanium ore • Rare earth metals • Vanadium ore • Statues and monuments • Food and agricultural products • Zinc • Gold 	<ul style="list-style-type: none"> • Machinery • Electrical equipment • Earth and stone, including magnesia and magnesite • Wood • Conventional arms • Vessels
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Absent an applicable exemption or authorization, the U.S. government prohibits the exportation or reexportation of goods to North Korea from the United States or by U.S. persons, wherever located. The relevant UNSCRs require Member States to prohibit the exportation to North Korea of a range of goods, including the following:

<ul style="list-style-type: none"> • Refined petroleum* (beyond 500,000 barrels/year) • Crude oil* (beyond 4,000,000 barrels/year) 	<ul style="list-style-type: none"> • Rocket fuel • Condensates and natural gas liquids • Industrial machinery 	<ul style="list-style-type: none"> • Iron, steel, and other metals • Conventional arms • Ballistic missiles
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<ul style="list-style-type: none"> • Aviation fuel (except fuel required for civilian passenger aircraft to fly to and return from North Korea) 	<ul style="list-style-type: none"> • All transportation vehicles (including motor vehicles, trucks, trains, ships, aircraft, helicopters) • Vessels 	<ul style="list-style-type: none"> • Weapons of mass destruction and components • Luxury goods
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21. All UN Member States have an obligation to implement the binding sanctions measures contained in UNSCRs. North Korea-related UNSCRs can be found at the 1718 Sanctions Committee website at <https://www.un.org/securitycouncil/sanctions/1718>.

*Transfers below the annual cap established by the UNSC are permissible but must: (a) be reported to the Sanctions Committee established pursuant to UNSCR 1718 (1718 Committee) within 30 days; (b) not involve any individual or entity associated with North Korea's nuclear or ballistic missile programs or other UNSC-prohibited activities; and (c) be exclusively for livelihood purposes of North Korean nationals and unrelated to generating revenue for North Korea's nuclear or ballistic missile programs or other UNSC-prohibited activities. If any of these three conditions are not met, then transactions below the authorized annual cap are in violation of UNSCR 2397.

UNSC measures to be implemented by UN Member States:

Actions on the high seas:

- Member State to inspect vessels with consent of the Flag State if inspecting Member State has information that provides reasonable grounds to believe that the vessel carries certain prohibited cargo (**discretionary**).
- Flag State to cooperate with such inspections (**discretionary**).
- Flag State to direct suspected vessels to proceed to an appropriate and convenient port for the required inspection by local authorities if the Flag State refuses to permit inspection on the high seas (**mandatory**).

Actions in territorial seas or within ports:

- Member State to seize, inspect, and freeze (impound) any vessel in a Member State's ports when there are reasonable grounds to believe that a vessel is transporting prohibited items or was involved in prohibited activities involving North Korea (**mandatory**).
- Member State to seize, inspect, and freeze (impound) any vessel subject to a Member State's jurisdiction in its territorial waters if there are reasonable grounds to believe that the vessel transported prohibited items or was involved in prohibited activities involving North Korea (**discretionary**).
- Member State to inspect cargo that is going to or coming from North Korea that has been brokered or facilitated by North Korea or by designated individuals or entities, or that is being transported on North Korea-flagged vessels (**mandatory**).

Actions on high seas or in territorial waters/ports:

- Member State to seize and dispose of any items the supply, sale, transfer, or export of which is prohibited by relevant UNSCRs that are discovered in inspections (**mandatory**).

Registration and other Flag State responsibilities:

- Flag States to deregister and prohibit classification services for any vessel that the Flag State has reasonable grounds to believe was involved in activities or transported items prohibited by relevant UNSCRs, and to deregister any vessel that is owned, operated, or controlled by North Korea as well as deny registration of vessels deregistered by other Member States or flag registries pursuant to the UNSCRs relating to North Korea (**mandatory**).
- Flag States to immediately deregister any vessel designated for deregistration by the 1718 Committee (**mandatory**).

U.S. Government Sanctions Authorities

As relevant for purposes of this advisory, U.S. law requires the U.S. government to impose sanctions on any person that is determined to knowingly, directly or indirectly:

- Provide significant amounts of fuel or supplies, provide bunkering services, or facilitate a significant transaction or transactions to operate or maintain a vessel or aircraft that is designated under a North Korea-related Executive Order (E.O.)²² or UNSCR²³, or that is owned or controlled by a person designated under a North Korea-related E.O. or UNSCR.
- Insure, register, facilitate the registration of, or maintain insurance or a registration for, a vessel owned or controlled by the Government of North Korea.
- Sell or transfer a significant number of vessels to North Korea, except as specifically approved by the UNSC.
- Engage in a significant activity to charter, insure, register, facilitate the registration of, or maintain insurance or a registration for, a vessel owned, controlled, commanded, or crewed by a North Korean person.
- Engage in the importation from or exportation to North Korea of significant quantities of coal, textiles, seafood, iron, iron ore, or refined petroleum products or crude oil above limits set by the UNSC, and with which the United States concurs.
- Engage in importation from, or exportation or re-exportation to or into, North Korea of luxury goods.

U.S. law also requires the U.S. government to impose sanctions on any foreign financial institution that is determined by the Secretary of the Treasury, in consultation with the Secretary of State, to have knowingly, on or after April 18, 2020, provided significant financial services to any person designated for the imposition of sanctions with respect to North Korea under North Korea-related E.O.s, UNSCRs, or the North Korea Sanctions and Policy Enhancement Act, as amended. These sanctions may include asset blocking or restrictions on correspondent or payable-through accounts.

Among others, the U.S. government also aggressively targets for designation any person that has engaged in at least one significant exportation to or importation from North Korea of any goods, services or technology, as well as any person that operates in certain North Korean industries, including transportation, mining, energy, and financial services.

UN Sanctions Authorities

The UNSC or the 1718 Committee may designate for targeted sanctions (asset freeze and, for individuals, travel ban) any individual or entity engaged in or providing support for, including through other illicit means, North Korea's nuclear-related, other weapons of mass destruction-related, and ballistic missile-related programs, or engaged in certain other UNSCR-prohibited activity.

The 1718 Committee may also designate vessels for which it has information that indicates they are, or have been, engaged in activities prohibited by relevant UNSCRs. For example, the 1718 Committee, as authorized by paragraph 12 of UNSCR 2321 (2016), may designate

22. North Korea-related sanctions E.O.s include E.O.s 13382, 13466, 13551, 13570, 13687, 13722, and 13810.

23. Relevant UNSCRs include 1695 (2006), 1718 (2006), 1874 (2009), 2087 (2013), 2094 (2013), 2270 (2016), 2321 (2016), 2356 (2017), 2375 (2017), and 2397 (2017).

vessels that have engaged in certain prohibited activities, requiring Member States to take any or all of the following actions: (a) deflagging, (b) direction to a designated port for inspection and follow-on actions, (c) a global port entry ban, and/or (d) an asset freeze.

In addition, when Member States have information about vessels on the high seas that provides reasonable grounds to believe that the cargos of such vessels contain items the supply, sale, transfer, or export of which is prohibited by relevant UNSCRs, and the vessels or Flag States are uncooperative, the 1718 Committee may take a variety of actions. If the Flag State of the vessel neither consents to inspection on the high seas nor directs the vessel to proceed to an appropriate and convenient port for the required inspection, or if the vessel in question refuses to comply with Flag State direction to permit inspection on the high seas or to proceed to such a port, then the 1718 Committee may designate the vessel for an asset freeze and other measures authorized in paragraph 12 of UNSCR 2321. Further, when the 1718 Committee makes the designation, the relevant Flag State must immediately deregister that vessel. Any State that does not receive the cooperation of a Flag State of a vessel suspected of carrying illicit cargo on the high seas must promptly submit a report to the 1718 Committee containing relevant details regarding the incident, the vessel, and the Flag State, which the 1718 Committee will publish on its website on a regular basis.

Deceptive Practices

Exports of Coal and Sand:

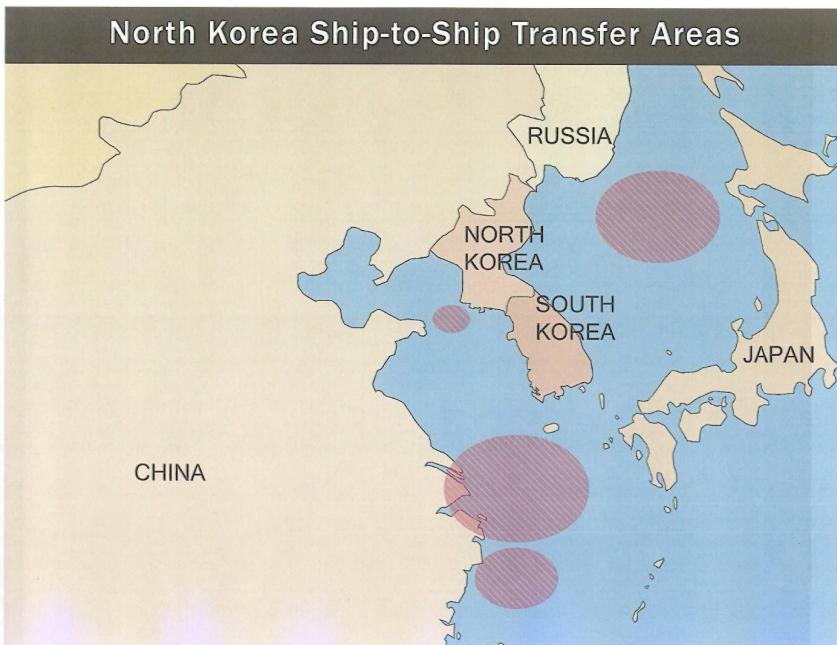
Coal: According to the 2020 UN DPRK Panel of Experts Final Report (PoE Report), North Korea exported 3.7 million metric tons of coal between January and August 2019, primarily in and around the Ningbo-Zhoushan Port area. The majority of these exports have occurred via STS transfers from North Korea-flagged vessels to local barges in Chinese territorial sea. Self-propelled barges, likely delivering to China, constitute the second-largest method of North Korean coal exports. This includes direct deliveries originating from North Korea to three ports in Hangzhou Bay, China.

Sand: Since at least April 2019, non-North Korean self-propelled barges and other non-North Korea-flagged cargo vessels have been loading sand in or near Haeju (Hwanghae Province), and Sinchang (South Hamgyong Province), to be exported to China.

Imports of Refined Petroleum:

UNSCR 2397 limits North Korea's refined petroleum imports to a maximum of 500,000 barrels per calendar year. From January 2019 through October 2019, North Korean ports received at least 221 tanker deliveries of refined petroleum, including at least 157 deliveries procured from illicit STS transfers involving North Korean vessels. If these tankers were fully laden when they made their deliveries, North Korea would have imported 3.89 million barrels from these transactions alone, or more than seven-and-a-half times the allowable amount of refined petroleum under UNSCR 2397.

North Korea Ship-to-Ship Transfer Areas:



Acquisition of Old Vessels:

According to the 2020 UN DPRK Panel of Experts Final Report, North Korea is acquiring old vessels destined for scrapping and incorporating them into its fleet of vessels transporting coal and other goods.

Use of Non-Ocean-Going Barges:

According to the 2020 UN DPRK Panel of Experts Final Report, North Korea sometimes utilizes non-ocean-going barges that do not transmit an AIS signal to illicitly transport North Korea- origin goods to China. These barges may not be safe to operate on the high seas.

For additional details and descriptions of known sanctions evasion techniques, please refer to the main text of the “Sanctions Advisory for Maritime Industry, Energy and Metals Sectors, and Related Communities,” to “Annex A: Additional Guidance and Information to Assist Sanctions Compliance Efforts in the Maritime Industry” for good due diligence practices to counter sanctions evasion in the maritime industry, and to [A Framework for OFAC Compliance Commitments](#), a document provided by OFAC that provides industry with good overall practices regarding sanctions compliance.

IRAN

This section provides information about Iran-related U.S. sanctions relevant to the maritime industry, including a non-exhaustive list of bases for which persons could be sanctioned by the U.S. government. Combined with the other documents in this global maritime advisory, this annex updates and expands on the Iran-related shipping advisory issued by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) on September 4, 2019. This information is current as of the date of this advisory, but parties should regularly check OFAC's website for comprehensive information on Iran-related sanctions programs.²⁴ At a later date, OFAC may issue further updates to this advisory, including with respect to the vessel lists that have appeared in previous shipping advisories. OFAC maintains a comprehensive, consolidated, and searchable list of sanctioned persons, as well as vessels identified as blocked property, on the List of Specially Designated Nationals and Blocked Persons (SDN List).²⁵

U.S. Prohibitions on Iran-related Activities

OFAC administers and enforces comprehensive sanctions and a government blocking program against Iran, as set forth in the Iranian Transactions and Sanctions Regulations, 31 C.F.R. part 560 (ITSR). The ITSR prohibits most direct and indirect transactions involving Iran or the Government of Iran by U.S. persons or U.S.-owned or -controlled foreign entities or within the United States, unless authorized by OFAC or exempted by statute. In addition, the ITSR blocks the property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, of the Government of Iran, as defined in section 560.304 of the ITSR, including any entities owned or controlled by the Government of Iran. Further, absent an applicable exemption or OFAC authorization, foreign persons, including foreign financial institutions, are prohibited from processing transactions to or through the United States in violation of these prohibitions, including transactions through U.S. correspondent accounts for or on behalf of Iranian financial institutions, other persons located in Iran, or where the benefit of those services is otherwise received in Iran.

U.S. Government Sanctions Authorities

In addition, non-U.S. persons — including foreign financial institutions — risk exposure to U.S. sanctions for knowingly facilitating significant transactions for or providing certain material support to Iranian persons on the SDN List, such as the National Iranian Oil Company (NIOC), the National Iranian Tanker Company (NITC), and the Islamic Republic of Iran Shipping Lines (IRISL), with the exception of non-designated Iranian depository institutions.²⁶ These authorities are generally subject to certain waivers and exceptions, including (i) an exception for the export to Iran of food, medicine, medical devices, and agricultural products, and (ii) an exception for reconstruction assistance and economic development for Afghanistan. Even if an exception or waiver applies, certain transactions involving Iran's Islamic Revolutionary Guard

24. OFAC, "Iran Sanctions," <https://www.treasury.gov/resource-center/sanctions/programs/pages/iran.aspx>.

25. OFAC, "List of Specially Designated Nationals and Blocked Persons (SDN List)," <https://www.treasury.gov/resource-center/sanctions/sdn-list/pages/default.aspx>.

26. See Iran Freedom and Counter-Proliferation Act (IFCA), §§ 1244(c) and 1247(a); Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), § 104; E.O. 13846, §§ 1 and 2.

Corps (IRGC) or any other person designated in connection with Iran's support for international terrorism or its proliferation of weapons of mass destruction or their means of delivery may be exposed to U.S. sanctions.

Petroleum, Petroleum Products, and Petrochemical Products:

On or after November 5, 2018, persons knowingly engaged in a significant transaction for the purchase, acquisition, sale, transport, or marketing of petroleum, petroleum products (e.g., aviation gasoline, motor gasoline, distillate fuel oil), or petrochemical products from Iran, and certain persons affiliated with vessels that transport Iranian crude oil, risk being sanctioned under

U.S. sanctions authorities relating to Iran, unless a waiver or an exception applies.²⁷ For more information on the definitions of petroleum, petroleum products, and petrochemical products, please see Section 16 of E.O. 13846.

Metals and Additional Identified Sectors of Iran's Economy:

Persons who operate in the iron, steel, aluminum, or copper sectors of Iran, or who knowingly engage in a significant transaction for the sale, supply, or transfer to Iran of significant goods or services used in connection with those sectors or for the purchase, acquisition, sale, or transport, or marketing of iron, steel, aluminum, or copper from Iran, risk being sanctioned pursuant to

E.O. 13871, unless a waiver or an exception applies. Similarly, persons who knowingly sell, supply, or transfer, directly or indirectly, to or from Iran, precious metals or certain materials, including coal, graphite, or certain raw or semi-finished metals such as aluminum and steel, risk being sanctioned if such metals or materials are provided for certain end-uses or end-users.²⁸ Additionally, persons who operate in the construction, mining, manufacturing, and textile sectors of the Iranian economy, or who knowingly engage in a significant transaction for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with those sectors, risk being sanctioned pursuant to E.O. 13902, unless a waiver or exception applies.

The maritime industry is advised to review the Iranian Sector and Human Rights Abuses Sanctions Regulations, 31 C.F.R. part 562, as well as guidance on OFAC's website pertaining to the iron, steel, aluminum, copper, construction, mining, manufacturing, and textile sectors of Iran for additional guidance on the scope of these new authorities. Of note, the wind-down period for activities described in E.O. 13871 expired on August 6, 2019; the wind-down period for activities described in E.O. 13902 expired on April 9, 2020. Failure to conclude, within the specific wind-down periods, any existing sanctionable transactions related to these sectors may result in sanctions exposure unless covered by an applicable waiver or exception.

Services to Vessels:

Persons risk exposure to sanctions if they knowingly provide certain bunkering services to Iranian vessels or to non-Iranian vessels transporting cargo, including petroleum or petroleum products from Iran, for Iranian persons on the SDN List, unless an applicable waiver or exception applies. In addition, persons risk exposure to sanctions if they knowingly provide underwriting services or insurance or reinsurance to or for Iranian persons on the SDN List,

27. See E.O. 13846, §§ 2 and 3; Iran Sanctions Act (ISA), § 5(a)(7) and (7).

28. See, e.g., IFCA § 1245.

including IRISL, NIOC, NITC, or to or for any person with respect to or for the benefit of any activity in the energy, shipping, or shipbuilding sectors of Iran, for which certain U.S. sanctions against Iran have been imposed, unless a waiver or exception applies.²⁹ For additional guidance, please review OFAC’s Frequently Asked Questions on the OFAC website.

Deceptive Shipping Practices

As the global community increases its pressure on the Iranian regime, some persons associated with the petroleum shipping industry continue to deploy deceptive practices to facilitate Iranian transactions. As evidenced by Treasury designations and actions taken by partners around the world, actors, such as Iran’s IRGC-QF, attempt to evade U.S. sanctions by obfuscating the origin, destination, and recipient of oil shipments. Note that the use of such deceptive tactics is unique neither to Iran nor to Iran’s petroleum industry.

Please refer to the main text of the “Sanctions Advisory for Maritime Industry, Energy and Metals Sectors, and Related Communities” for descriptions of known sanctions evasion techniques, to “Annex A: Additional Guidance and Information to Assist Sanctions Compliance Efforts in the Maritime Industry” for potential due diligence practices to counter sanctions evasion in the shipping industry, and to “[A Framework for OFAC Compliance Commitments](#),” a document provided by OFAC that provides industry with good overall practices regarding sanctions compliance.

29. See, e.g., IFCA § 1246.

SYRIA

This section provides information about Syria-related U.S. sanctions relevant to the maritime industry, including a non-exhaustive list of bases for which persons could be sanctioned by the U.S. government. Combined with the other documents in this global maritime advisory, this annex updates and expands on the Syria-related shipping advisories issued by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) on November 20, 2018 and March 25, 2019. This information is current as of the date of this advisory, but parties should regularly check OFAC's website for comprehensive information on Syria-related sanctions programs. At a later date, OFAC may issue further updates to this advisory, including with respect to the vessel lists that have appeared in previous shipping advisories. OFAC maintains a comprehensive, consolidated, and searchable list of sanctioned persons, as well as vessels identified as blocked property, on the List of Specially Designated Nationals and Blocked Persons (*SDN List*).

U.S. Government Syria-related Prohibited Conduct

The United States generally prohibits transactions by U.S. persons or within the United States that, directly or indirectly, involve the Government of Syria, or other entities sanctioned under the Syrian Sanctions Regulations, 31 C.F.R. Part 542. The term Government of Syria includes:

(a) the state and the Government of the Syrian Arab Republic, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Syria; (b) any entity owned or controlled, directly or indirectly, by the foregoing, including any corporation, partnership, association, or other entity in which the Government of Syria owns a 50 percent or greater interest or a controlling interest, and any entity which is otherwise controlled by that government; (c) any person that is, or has been, acting or purporting to act, directly or indirectly, for or on behalf of any of the foregoing; and (d) any other person determined by OFAC to be included within (a) through (c).

The United States also prohibits the importation of petroleum or petroleum products of Syrian origin into the United States and any transaction dealing in, or related to, petroleum or a petroleum product of Syrian origin by a United States person or any facilitation thereof, pursuant to E.O. 13582.

Additionally, the United States understands that due to the complex and fluid environment in Syria, other illicit actors operate in the maritime sector, to include persons related to terrorism and illicit Iranian- or Russian-related activity.³⁰

Sanctions Risks and U.S. Government Syria-related Sanctions Authorities

U.S. law provides for mandatory sanctions on foreign persons that are determined to have knowingly provided significant financial, material, or technological support to, or knowingly engaged in a significant transaction with, the Government of Syria; or who have knowingly sold or provided significant goods, services, technology, information, or other support that significantly facilitates the maintenance or expansion of the Government of Syria's domestic production of natural gas, petroleum, or petroleum products. This could include entities

^{30.} For additional details on OFAC prohibitions related to counter-terrorism, Iran, or Russia, see <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>

or individuals who deliver or finance petroleum shipments to the Government of Syria or government-owned entities, such as the U.S.-designated Syrian Company for Oil Transport or Banias Refinery Company.

Deceptive Shipping Practices

The United States is committed to holding the Government of Syria, the Bashar al-Assad regime, and those who continue to support them accountable for their brutality and killing of Syrian civilians. To this end, the supply chain and petroleum-related shipments create significant sanctions risk for those in the maritime industry. Countries such as Iran and Russia have been involved in providing the Government of Syria with petroleum and other goods. In connection with this activity, in September 2019, OFAC sanctioned Maritime Assistance LLC and three individuals for facilitating the sale and delivery of jet fuel to Russian military forces operating in Banias, Syria. Separately, in November 2018, OFAC sanctioned Iranian and Russian private and public sector entities involved in a scheme to procure Iranian oil for Syria. This scheme used a payment offsetting arrangement in which the sale and shipment of Iranian oil to Syria provided hundreds of millions of dollars to Iran’s terror proxy groups, including Hizballah, HAMAS, and the IRGC-QF.

For additional details and descriptions of known sanctions evasion techniques, please refer to the main text of the “Sanctions Advisory for Maritime Industry, Energy and Metals Sectors, and Related Communities,” to “Annex A: Additional Guidance and Information to Assist Sanctions Compliance Efforts in the Maritime Industry” for good due diligence practices to counter sanctions evasion in the shipping industry, and to “[A Framework for OFAC Compliance Commitments](#),” a document provided by OFAC that provides industry with good overall practices regarding sanctions compliance.



Edwin Schooling Latter and David Geale

Financial Conduct Authority

Rebecca Jackson and Melanie Beaman

Prudential Regulation Authority

9 September 2021

Dear CEO,

Trade Finance Activity

Background

We are writing to you as we are aware that your firm carries out trade finance business.

The purpose of this letter is to reiterate our expectations of firms when undertaking trade finance activity. Both the FCA and PRA have expectations for trade finance activity, reflecting their respective remits. The expectations set out in this letter are not exhaustive and should be considered alongside relevant rules and guidance such as Joint Money Laundering Steering Group guidance, the PRA Rulebook and the FCA's Financial Crime Guide.

There is also an action for your firm, detailed below, to carry out a financial crime risk assessment.

During the past 18 months there have been several high-profile failures of commodity and trade finance firms with significant financial loss. There are inherent risks within trade finance activity, given that it can be complex, global in nature and the large volumes of trade flows utilising multiple currencies. Firms need to demonstrate that they have taken a risk sensitive approach to their control environment that ensures the relevant risks are effectively mitigated. Our recent assessments of individual firms have highlighted several significant issues relating to both credit risk analysis and financial crime controls. These issues have exposed firms to unnecessary risks that are material in both a conduct and prudential context.

Risk Assessment

In our reviews to date we have found that there is often insufficient focus on the identification and assessment of financial crime risk factors, such as the risk of dual-use goods or the potential for fraud. In other instances, firms have not adequately evidenced their assessment of mitigating controls or recorded the rationale to support conclusions drawn on the level of residual risk to which the firm is exposed. At the client risk level, assessments have been too generic to cover the different types of risk exposures that may exist in trade finance client relationships, such as the industry or jurisdictions in which the client operates.

The client risk rating will impact the level of due diligence required for individual trade

finance transactions, and firms should also consider the risks presented by the specifics of the transaction itself including any apparent transaction specific “red flags”. We have found that firms have either failed fully to assess these risks, are unable to evidence the checks they have undertaken, or in some cases discounted them inappropriately. Failure to assess or understand these risks can lead to insufficient due diligence being undertaken such as additional pricing checks or using tools such as vessel tracking and independent document verification. We have seen examples of how failing to conduct these checks can lead to exposure to suspicious activity.

As a firm that undertakes trade finance activity, you should, if you have not already, undertake a holistic assessment of the associated financial crime risks. These risks include money laundering, sanctions evasion, terrorist financing and fraud. The Money Laundering Reporting Officer (SMF17) should be responsible for ensuring that the assessment is subject to appropriate governance, oversight and challenge. In carrying out this assessment we expect your firm to also consider the issues raised in this letter. The assessment should be clearly documented within the business-wide financial crime risk assessment and should identify the types of customers or transactions where enhanced due diligence is needed. In future engagement with your firm, we may ask to see the risk assessment you have carried out and any follow-up action undertaken as a result.

Counterparty Analysis

In line with the PRA’s regulatory expectations, we expect firms to undertake appropriate credit analysis of all trade finance counterparts prior to formal credit limits being put in place. This analysis should include all parties with an interest in the transaction and not be limited to the borrower i.e. the end-buyer, credit insurer and other parties, where relevant, should form part of the analysis.

A firm’s policies and procedures should set out clearly when it may be appropriate to conduct due diligence on other parties. For example, counterparty checks can help in identifying related parties or adverse media, and verify the rationale for the transaction. We identified examples where firms had facilitated transactions with no sensible business rationale given the jurisdictions, or industry of other parties involved in the transaction. This could be an indicator of fraudulent activity, collusion or money laundering. Firms should also consider whether the activity is in line with the expected activity of their client and previous interactions with the parties to the transaction.

Transaction Approval

Prior to individual transactions being approved, we expect firms to determine if further specific analysis is required. This should include, but not be limited to, consideration of the financial and non-financial risk on the end-buyers and the rationale for the transaction. Firms should identify instances of higher risk which require enhanced due diligence. Conducting a more structured assessment of risks and red flags, as well as clearly defined policies and procedures, helps trade finance specialists in the business to identify transactions that require additional due diligence or escalation to the second line. Firms should ensure there is adequate oversight of the work being undertaken, to ensure that the firm’s policies and controls are operating effectively. This could include monitoring the discounting of red flags, transaction approval rationales, and the quality of escalations from first line business functions or trade finance operations teams.

Transaction Payments

Where the end-buyers represent the primary source of repayment under the transaction, prudent risk management is likely to include obtaining formal written acknowledgement from the end-buyer that the amount due and payable under the trade finance transaction is payable to the financing firm, and not to the borrower.

For transactions involving credit insurance arrangements, best practice would be for a firm to seek formal confirmation that they are explicitly identified as a loss payee for risk insurance cover on non-payment of debts by the end-buyers and that the firm is in compliance with any requirements set out in the insurance agreement.

Robust risk management would ensure that the security is appropriately valued, perfection of security is correctly applied, appropriately maintained, including in respect of segregation as well as consideration of how to realise the underlying security in the event of non-payment.

This letter has reiterated our expectations of firms when undertaking trade finance activity. We expect firms to consider the issues raised carefully.

Yours sincerely

Edwin Schooling Latter
Director, FCA
Investment, Wholesale & Specialist Supervision

David Geale
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U.S. Office of Anti-Boycott Compliance - Provisions & Examples

Editor's Summary

To combat the influence of boycotts that are opposed by the government of the United States, the Office of Anti-Boycott Compliance was created by statutes under the Department of Commerce. This Office has promulgated regulations contained at 15 Code of Federal Regulations Section 760. Among other things, these regulations prohibit implementation of a letter of credit containing prohibited conditions or requirements that have been determined to further the boycott. The principal scope of this regulation is provisions relating to the boycott of Israel.

The regulations cover issuance, confirmation, honor, payment, negotiation, or taking any action to implement a letter of credit by a person in the United States or by a US person outside the US where the beneficiary has a US address, requires documents indicating shipment from the US, or requires documents indicating US origin of the goods. A US person “is not prohibited from advising a beneficiary of the existence of a letter of credit in his favor, or from taking ministerial actions to dispose of a letter of credit which it is prohibited from implementing” under 15 CFR § 760.2 (f)(4). Failure to comply with the regulations may result in fine or other penalties.

To view examples of reported clauses and conditions representing restrictive trade practices or boycotts, visit the U.S. Department of Commerce’s Bureau of Industry and Security, Office of Antiboycott Compliance: <https://www.bis.doc.gov/index.php/all-articles/7-enforcement/1755-examples-of-recent-boycott-related-requests>.

Trade finance and compliance professionals should direct questions regarding requests to potentially engage in prohibited foreign boycotts to the Office of Antiboycott Compliance (OAC) Anti Boycott Advice Phone Line at 1 (202) 482 2381.

The prohibitions are complex and detailed. The scope of the regulations are detailed at The Office of Anti-Boycott Compliance website at www.bis.doc.gov/AntiboycottCompliance/Default.htm.

Dual Use Goods (from Trade Based Financial Crime Compliance Book, 2nd ed)

Defined. Dual use goods are goods with both a civil and military purpose, suggesting the possibility that goods may be utilised for illegitimate ends.

Explained. Dual use goods can range from computer software, technology, or other goods that have both a civil and military purpose. In addition to the trade based financial crime compliance concerns, many jurisdictions also impose import and export controls on dual use goods.

There are extensive lists of dual use goods and banks should look to its governing authority for guidance on what constitutes dual use goods. For example, in Hong Kong, they are listed under the Import and Export (Strategic Commodities) Regulations under the Import and Export Ordinance (Cap. 60).

The Wolfsberg Group, *Trade Finance Principles* (2019) section 1.5.5 (Challenges) states that “[d]ual use items are goods, software, technology, documents and diagrams, which may have both civil and military applications. Identification of dual use goods in a trade transaction is challenging given their possible complex and technical nature. While [Financial Institution] s may be in a position to identify obvious dual use goods; corporates, customers, Customs and export licensing agencies are better able to make this determination.

A [Financial Institution]’s [Risk Based Approach] should give guidance and provide regular training to staff involved in relationship management, transaction processing and any others who are involved in transactions on a regular basis (this should include Front Office and Middle Office staff involved in the transactions). Guidance and regular training may include how to perform an analysis of pricing for those goods where reliable and up-to-date pricing information can be obtained, how to identify where a unit price would be seen as obviously unusual and the escalation process that should be followed. The same applies to dual use goods. Staff should be aware of dual use goods issues, as well as the common types of goods which have a dual use and should attempt to identify dual use goods in transactions wherever possible.” [<https://www.wolfsberg-principles.com/sites/default/files/wb/Trade%20Finance%20Principles%202019.pdf>]

The Wolfsberg Group, *Trade Finance Principles* (2019) section 1.6.1(b) (Recommendations) adds that governments are needed to assist banks in dealing with dual use goods. It states that governments should provide “details... in a manner that can be understood by non-experts, in respect of products and materials that relate to ‘Dual Use’ goods. These details should ideally be capable of being integrated into electronic processing systems.”

Intended to supplement the Wolfsberg Group, *Trade Finance Principles* (2019), the International Chamber of Commerce (ICC) issued a June 2019 guidance paper, *How Does Global Trade and Receivables Finance Mitigate against Proliferation Financing?* [<https://iccwbo.org/publication/global-trade-receivables-finance-mitigate-proliferation-financing/>] The paper explores the challenges financial institutions face in detecting risks of proliferation finance (i.e. funding or servicing the manufacture, movement or development of WMDs; or,

relatedly, financing technology or dual use goods transactions that are used for illegitimate purposes). While the documentation supporting traditional trade products offers some insight on the relevant goods, open account terms rarely provide any detailed information about the underlying goods. Moreover, banks are often unaware of the end user of the goods or even their ultimate destination. Specifically, the paper notes the difficulty in identifying proliferation dual use goods “even when detailed information on a particular good is available, due to specialist knowledge required for the assessment.”

Trade finance professionals often lack the requisite knowledge of high risk proliferation goods and technology, and the guidance even mentions the confusion of the role of regulators in this aspect of trade based financial crime compliance as customs organisations and officials are much better equipped and positioned to detect and track the movement of proliferation goods in and out of their respective jurisdictions. Currently, there is no standard list against which banks may screen for high risk proliferation goods, and prior attempts at such screening have resulted in unwieldy numbers of false positive hits. The guidance concludes that the most effective option for managing proliferation financing rests on information sharing arrangements and cooperation between law enforcement / intelligence and the finance sector.

FACTFIND

In the European Union dual use goods are listed under Council Regulation (EC) No 428/2009 at: http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154129_2015-2420.pdf

In the United States, the Bureau of Industry and Security, an agency of the Department of Commerce, lists dual use goods under the Commerce Control List at: <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>

Formally established in 1996, the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (the Wassenaar Arrangement), is a multilateral, voluntary export control regime that strives to promote international security through transparency in transfers of conventional arms and dual use goods. The Wassenaar Arrangement has 42 member states and is the successor to the Cold War era Coordinating Committee for Multilateral Export Controls (COCOM). Generally, member countries report on their transfers of relevant conventional arms to non Wassenaar members every six months. The Wassenaar Arrangement is not a legally binding treaty and members do not have veto powers over proposed exports of other members. The Secretariat for the Arrangement is located in Vienna, Austria. To learn more visit: <https://www.wassenaar.org/>.

When a transaction involves dual use goods, the financial institution should make sure it knows who the other party to the transaction is. It should engage in enhanced due diligence and conduct further reviews if the other party is a PEP, from a high risk jurisdiction, or another Indicator is identified. Financial institutions should develop a system of controls to help its staff identify dual use goods.

Where a dual use good is involved, many governments require exporters to obtain a license to export such goods. The financial institution may wish to ask for a copy of, or information regarding, the export license.

Example. Bank’s customer produces and sells fertiliser. Fertiliser can be used for agriculture and for weapons. Its customers are agricultural enterprises in Southern Europe. Customer

receives a large order for fertiliser from a new buyer in Algeria. Bank is asked to confirm a commercial LC in Customer's favour. Diligent examination of the customer, the buyers, its location, and the route and mode of shipment are warranted.

What it could signify. Dual use goods are typically candidates for support of terrorism and could involve violations of sanctions. The degree of scrutiny should be magnified where there are other Indicators present.

Reaction. The bank should document the incident, noting that it has spotted the problem; determine whether investigation is warranted and, if not, why; the results of any further action; and what, if anything was done and why.

If the concern was elevated to a serious suspicion that there was the possibility of a financial crime, the financial institution should report it unless it indicated terrorism financing or violation of a sanction, which might well be the case with a weapon or military product, in which case the financial institution should act as required by the applicable regulation. If commercial fraud was indicated, the financial institution should consider whether payment should be delayed or frozen in order to avoid disbursement of the funds in a manner that was irretrievable. If the suspicious activity was spotted before the transaction was undertaken, the financial institution might decline to facilitate it or even close the account for reputational or similar reasons.

ACTIVITY: Identify an example of dual use goods encountered by your financial institution.

Mexico's Law of Credit Institutions:

Article 71: Letters of Credit

Credit institutions, to issue letters of credit referred in parts VIII and XIV of article 46 of this Law shall be subject to what is stated in this article and, in default, the customs and practices explicitly indicated by the parties in each one of them. The provisions of the General Law on Securities and Credit Operations in the field of letters of credit do not apply to this operation.

For purposes of this Law, a letter of credit means the instrument under which a credit institution is obligated to pay, at sight or after a certain term, on its own behalf or on behalf of its client, directly or through a correspondent bank, a certain or ascertainable sum of money in favor of the beneficiary, upon presentation of required documents, provided they comply with the terms and conditions contained in the letter of credit.

Letters of credit may be issued by credit institutions as a loan or as a service, upon receipt of the letter of credit amount. In both cases, letters of credits are issued based on documents containing at least the terms and conditions for the exercise of the credit or the performance of services, payment of principal, accessories, expenses and commissions, as well as the return of the unused amounts.

Once the letters of credit are issued, the payment obligation of the institution issuing the credit will be independent of the rights and obligations that it against its client. Letters of credit must establish a certain or ascertainable term.

Irrevocable letters of credit may only be amended or cancelled with the express acceptance of the issuer and the beneficiary and, when applicable, the confirming institution.

For purposes of this article, confirmation means by a credit institution's express commitment to pay a letter of credit issued by another institution, at the request of the latter. The confirmation creates a direct obligation to pay the beneficiary, subject to the beneficiary's compliance with the terms and conditions stated in the letter of credit. This payment obligation is independent of the rights and obligations between the confirming institution and the issuing institution.

Credit institutions will not be responsible for:

- I. Compliance or noncompliance with the act that motivated the issuance of the letter of credit;
- II. The accuracy, authenticity or legal validity of any document presented under the letter of credit;
- III. The acts or omissions of third parties, even if those third parties are appointed by the issuing institution, including banks that act as correspondents;
- IV. The quality, quantity, weight, value or any other characteristic of the merchandise or services described in documents;

V. The delay or loss in the means of transmission or communication, and

VI. Noncompliance by fortuitous event or force majeure.

Letters of credit referred to in this article may be commercial, as well as guarantees or contingents. Commercial letters of credit allow the beneficiary to make due payment of an obligation arising from an commercial operation, upon presentation of the document stated in the letter of credit and in accordance with the letter of credit's terms and conditions. The terms "documentary credit", "documentary commercial credit" and "commercial credit" refer to the commercial letters of credit provided in this paragraph.

As an exception to part XV of Article 106 of this Law, the issuing or confirming institutions may pay letters of credit before the term and, when applicable, make anticipated acceptances in relation with such letters of credit when the documents submitted by the beneficiary comply with the terms and conditions contained in these letters of credit. This does not alter the obligations of the client with the issuing institution.

Guarantee or contingent letters of credit guarantee payment of a certain or ascertainable sum of money upon presentation of the payment order and other documents referred to therein, provided that they meet the stated requirements.

Unless otherwise agreed, resolution of disputes relating to letters of credit will be subject to the jurisdiction of the courts where such letters of credit are issued. Notwithstanding the foregoing, liability arising from the confirmation of letters of credit, unless otherwise agreed, will be callable before the competent courts of the place where confirmation is made.

Bangladesh Open Account Rules

Foreign Exchange Policy Department Bangladesh Bank
Head Office Dhaka
www.bb.org.bd

FE Circular No. 25 Date: June 30, 2020

All Authorized Dealers in Foreign Exchange in Bangladesh

Dear Sirs,

Export under open account credit terms against payment undertaking/payment risk coverage with option of early payment arrangement on non-recourse basis

Please refer to paragraph 25, chapter 8 of the Guidelines for Foreign Exchange Transactions-2018 (GFET), Vol-1 and its subsequent circulars regarding the stipulations for discounting usance export bills in foreign exchange.

02. To bring easy access to finance by exporters, it has been decided that Authorized Dealers (ADs) may allow exporters to ship goods on sales contracts under open account credit terms within the statutory period, if otherwise not extended, from the date of shipment, subject to compliance with following instructions:

(a) Exports shall be executed against payment undertaking/payment risk coverage for settlement of export bills/receivables within the permissible statutory period by international factoring companies/ foreign banks/foreign financial institutions/trade financiers/insurance entities (hereinafter referred to as designated institutions) arranged in association with importers and/or exporters.

(b) Payment undertaking/payment risk coverage by designated institutions abroad shall be, in case of default by importers, received in such a way so as to be ensured of payment on priority basis in accordance with appropriate underlying arrangements for settlement on the basis of physical/electronic presentation of export invoices/bills/documents.

(c) Payment undertaking/payment risk coverage from designated institutions abroad may contain option for early payment arrangement before maturity against the relative export bills/receivables. Early payment shall be arranged on non-recourse basis from designated institutions or designated financiers based on the payment undertaking/payment risk coverage.

03. ADs shall satisfy themselves that exporters are appropriately financed. Expenses to exporters for guarantee commission against payment undertaking/payment risk coverage, and interest with relevant charges for early payment against export bills/receivables shall not exceed 6-month USD LIBOR plus

3.50 percent annually. These will, however, not include normal bank charges required for transactions. For calculation of FOB export value, such charges need to be adjusted.

04. Export price declared in EXP Form shall be competitive in consideration of necessary costs for underlying periods of export under open account credit terms.

05. ADs should have counterparty arrangements/relations for such transactions with designated institutions of repute with acceptable credit ratings operating under the licenses of central banks/competent authorities, for which they may join globally recognized professional bodies having representation for the services. Payments on account of membership/affiliation/subscription required for joining in such bodies are remittable abroad subject to deduction of applicable taxes.

06. ADs may allow transport documents to be issued in accordance with underlying arrangements among the parties. In case of issuance of transport documents in the name of importers or other nominated parties as per arrangements, ADs may give instruction (as per enclosed format) to carrier companies. Export invoices/bills/documents can be sent abroad through banking channel/electronic platform/suitable arrangements directly to designated institutions/importers/other relevant parties as per requirement of the underlying arrangements.

07. The process to send the export invoices/bills/documents abroad as noted at 6 above needs to be completed within 14 days from the date of shipment. Within this period, exporters shall submit a full set of export documents including signed EXP Form to ADs for regulatory compliance as referred to paragraph 10(iii), chapter 8 of GFET.

08. Subject to observance of relevant instructions noted herein, ADs may extend early payment facilities to exporters on non-recourse basis out of their own funds against payment undertaking/payment risk coverage from designated institutions abroad. ADs shall ensure that the fund used for early payment is not committed for otherwise use. Payment guarantee commission payable abroad shall be within the all-in-cost limit to be charged to exporters as per 3 above.

09. In case of exercise of early payment option, relevant portion of export proceeds may be assigned to designated institutions or designated financiers abroad as per arrangements in terms of FE Circular No. 43 of November 17, 2019.

10. ADs shall be satisfied with the bona fide of underlying exports shipped from Bangladesh for which export invoices to be financed and shall comply with KYC and AML/CFT standards, including applicable taxes regulations on relevant expenses payable abroad.

ADs may, for technical support, consult with the Guidelines on International Factoring prepared by the technical committee on factoring. Other relevant instructions pertaining to export transactions shall remain unchanged. Please bring the contents of this circular to the notice of your concerned constituents.

Encl. As stated.

Yours faithfully,



(Mohammad Khurshid Wahab)
General Manager
Phone: 9530123

Format

Ref: FE Circular No. 25/2020

(To be issued on the letter head of Authorized Dealer)

**CERTIFICATE OF AUTHORIZED DEALER TO BE PRODUCED BY THE
EXPORTER TO CARRIER COMPANY**

CERTIFIED THAT shipment against EXP Form No.....
dated.....by M/s.....
(Name and address of the exporter)
to M/s.....
(Name and address of the importer or their instructions)

is being made against financing through payment undertaking/payment risk coverage under factoring arrangement and there is no objection to Railway Receipt, Bill of Lading, Airway Bill and other documents of title to cargo being drawn to the order of

Signature of the Authorized Official :

Name:
Designation:
PA No.:
Phone No.:

Seal:

Date:



Persian Gulf State Regulations

Editor's Overview

The following regulations and statutes from Bahrain, Kuwait, Oman, Qatar and Saudi Arabia, are offered as an indication of regulations imposed on standby or independent guarantee practice in the Persian Gulf states. No assurance is offered as to the accuracy of the translation or the currency of these texts which were made available to the Institute.

Bahrain

Letter of Guarantee

Article 331

A letter of guarantee is an undertaking issued by a bank at the request of one of its customers (the person making the order) to pay a certain specified sum or a sum that can be determined in favour of the beneficiary when payment is requested within the fixed period of the letter. The letter of guarantee shall state the purpose for which it has been issued.

Article 332

The bank may require the production of a security against the issue of a letter of guarantee. The security may be in cash or in the form of financial instruments or commercial papers, goods or an assignment by the applicant for the letter of guarantee of his right visa-B-vis the beneficiary in favour of the bank.

Article 333

Save with the approval of the bank, a beneficiary may not assign his right which arose from the letter of guarantee to a third party.

Article 334

The bank may not refuse payment to the beneficiary on grounds relating to the bank's relationship with the applicant for the letter of guarantee or to the relationship between the applicant for the letter of guarantee with the beneficiary.

Article 335

(1) The bank shall be discharged of liability towards the beneficiary if within the validity period of the letter of guarantee no request for payment is received from the beneficiary, unless it had been expressly agreed to renew the term thereof.

Kuwait

Letter of Guarantee

Article 382

A letter of guarantee is an obligation issued by a bank pursuant to the request of the customer (the person who makes the order) for payment of a specified amount or amount subject to determination to another person (the beneficiary) without any restriction or condition if the bank is requested to do so within the period specified in the letter. The purpose for which the letter of guarantee is issued shall be stated.

Article 383

1. The bank may ask for a security against the issue of the letter of guarantee.
2. The security may be an assignment made by the person who makes the order, from his right towards the beneficiary.

Article 384

The beneficiary may not assign his right resulting from the letter of guarantee to a third person, without obtaining the relevant bank approval.

Article 385

The bank may not refuse to make the relevant payment to the beneficiary due to reason of the relationship of the bank with the person who makes the order or due to his relation with the beneficiary.

Article 386

In case the bank does not receive within the validity of the period of the letter of guarantee a

Oman

Letter of Guarantee

Article 392

A letter of guarantee shall be an undertaking issued by a bank upon the application of a customer thereof (the person giving the order) to pay a specific or a quantifiable amount to another person (the beneficiary) without restriction or condition, if the same is demanded of it within the period stated in the letter. The purpose for which the letter of guarantee has been issued shall be stated therein.

Article 393

A bank may require the provision of security in consideration of the issue of a letter of guarantee.

The security may be an assignment by the person giving the order of his entitlement in relation to the beneficiary.

Article 394

A beneficiary may not assign to a third party his entitlement arising under a letter of guarantee save with the agreement of the bank.

Article 395

A bank may not refuse payment to the beneficiary for a reason attributable to the relationship of the bank with the person giving the order or the relationship of the person giving the order with the beneficiary.

Article 396

A bank shall be released in relation to the beneficiary, if a demand from the beneficiary for

Qatari Law No. 27 of 2006

Promulgating the Trading Regulation Law

(THE COMMERCIAL CODE)*

Subchapter VIII: Letter of Guarantee

Article 406

A letter of guarantee is an irrevocable written pledge issued by the bank at the request of its client, known as the applicant, to pay a certain amount or amount to be specified to another person, known as the beneficiary if the beneficiary so requests within the period specified in the letter and without regard to any rejection. The purpose for which the letter of guarantee is issued shall be explained therein.

Article 407

The bank may ask for insurance to be provided against issue of the letter of guarantee. The insurance may be a waiver from the applicant of his rights regarding beneficiary.

Article 408

The beneficiary may not cede his right arising from the letter of guarantee to others, except with the consent of the bank, provided that the bank is authorized by the applicant to give such approval.

Article 409

The bank may not refuse to pay the beneficiary by reason of its relationship with the applicant or the applicant's relationship with the beneficiary.

Article 410

The guardianship or seizure in the bank may not be imposed on the value of the letter of guarantee for any reason.

Article 411

The bank shall be absolved of responsibility to the beneficiary if during the period of validity of the letter of guarantee no application from the beneficiary for payment is received, unless renewal before expiry is otherwise agreed between the bank and the applicant.

Article 412

Where the bank repays the beneficiary the amount agreed in the letter of guarantee, it shall replace the beneficiary to recourse to the applicant by amount that the bank pays.

* NOTE: Unofficial translation. All Qatari laws, decisions, and decrees are published in Arabic. As there is no official translation into any other language, all references to the Commercial Code (and other Qatari laws) are based on unofficial English language translations.

SAMA Rules

Deputy Governor

No. 28283/BC/310

Date: 7-11-1414H

Circular to All Banks Operating in the Kingdom

Greetings,

Re SAMA circular No. BC/144 dated 4-6-1414H in connection with the amendment of the appended declaration to bills of lading,

SAMA has received the letter of HE the Minister of Finance & National Economy No. 27/7331 dated 2-11 1414H, noting that the United Arab Shipping Co. (in Kuwait) is a stock company owned partly by the Kingdom of Saudi Arabia. HE requested that Saudi banks be instructed not to ask said company to submit the declaration referred-to in paragraph (b) of article I of the letters of credit conditions.

Please be informed and comply.

Regards,

Deputy Governor

J.A. Al-Suhaimi



Deputy Governor

No. 14310/BC/144

Date: 4-6-1414 H

Attachment: 2

Urgent & Confidential

Circular to All Banks Operating in the Kingdom

Greetings,

Re SAMA circular No. 3299/BC/31 dated 6-2-1414 regarding the form of the appended declaration to the bills of ladings, which states the name of the vessel or plane, its nationality, the name of its owner and the name of sea ports or airports called en route to the Kingdom of Saudi Arabia.

SAMA has received the letter of HE the Minister of Finance & National Economy No. 27/4027 dated 2-6-1414, noting that HE has approved the amendment to said form to be in the version attached herewith in Arabic and English.

Please advise your people in charge to accept the declaration in its new form.

Regards,

Deputy Governor

J.A. Al-Suhaimi

1. Appended Declaration to Bills of Lading.
2. Airway Bill.
3. Truck Way Bills.

A Certificate Issued and Signed by The Owner, Agent, Captain or Company of The Vessel/Plane/Truck Appended to The Bill of Lading/Airway/Plane/Truck Appended to the Bill of Lading/Airway Bill/Truck Waybill and Notarized or Legalized by Saudi Arabian Embassy or Consulate Stating:

- (1) Name of Vessel.....Previous Name.....(In Case of Sea).
Name of Plane/Flight no.....(In Case of Air).
Name of the Truck Company/Trucks no.....(In Case of Land).
- (2) Nationality of Vessel/Plane/Truck.....
- (3) Owner of Vessel.....(In Case of Sea)
- (4) Vessel/Plane/Truck Will Call or Pass through the Following Ports/Airports/Border En Route to Saudi Arabia:
1., 2.
3., 4.
(Please List Ports/Airports/Borders).

The Undersigned (The Owner, Agent, Captain or Company of The Vessel/Plane/Truck) Accordingly Declares that the Information Provided (In Response to 1 to 4) above is Correct and Complete and that the Vessel/Plane/Truck Shall not Call at or Anchor on Any Other Ports/Airports/Borders other than that Mentioned above En Route to Saudi Arabia.

Written on The.....Day of.....199.....
Sworn to Before Me, on The.....
Day of.....199.....
At.....

Notary or Saudi
Consulate Seal & Signature

Signature of Vessel's/
Plane's/ Truck's Owner,
Captain or Company

This Certificate is Not Required if
Shipment is Effected
through National Shipping Company
of Saudi Arabia
or Saudi Arabian Airlines.

Deputy Governor
No. 427/BC/256
Date: 11-11-1413 H
(2-5-1993A.D)

**Circular to All Banks
Operating in the Kingdom**

Greetings,

Subject: Certificate of Origin

SAMA has received the latter of HE the Minister of Finance & National Economy No. 27/7327 dating 6-11-1413H, regarding the acceptance of certificates of origin issued by the exporter of goods, provided that the certificate carries the name of each product and the country of production and that the goods themselves carry a regular evidence of origin in accordance with what was stated in the certificate of origin, and the application of same to letters of credit (the positive version). HE requested the notification of banks.

Please be informed and notify your people in charge to act accordingly.

Regards,

Deputy Governor

J.A. Al-Suhaimi

No. BC/196
Date: 28-3-1398 H
(7-3-1978A.D)

**Circular to All Banks
Operating in the Kingdom**

HE the Manager

Greetings,

Reference our circular No. 5708/BC/72 dated 18-10-1986 regarding the decision of the Ministry of Commerce No. 1584 dated 23-8-1386H, which regulates imports from abroad, SAMA has received a copy of the letter of HE the Minister of Commerce No. 920 dated 12-3-1398H, addressed to HE the Minister of Finance & National Economy, and containing the new provisions regulating import operations, including the terms and conditions for opening letters of credit as follows:

I. Saudi importer must ask the foreign exporter to deliver the following certificates:

- a) A certificate of origin issued by manufacturer or exporting company, approved by the exporting country, testifying that the exported goods to the Kingdom are of a pure national origin, and mentioning the name of manufacturer or producer in the certificate.

In the event the exported goods are not of a pure national origin, manufacturer or foreign exporter must identify the non-national components and their source (attached herewith is a sample of the required certificate in Arabic and English (attachment No. one)).

- b) A certificate issued by the vessel owner, agent or captain testifying that the vessel carrying the shipment is not registered in Israel or owned by Israeli nationals or residents and that the vessel will not stop at any Israeli port en route to the Kingdom of Saudi Arabia. The signatory of this certificate must also confirm that the vessel is permitted to enter Saudi ports in accordance with Saudi laws and regulations (attached is a sample of the required certificate in Arabic & English (attachment No. 2)).
- c) A certificate issued by an insurance company confirming that the goods described in the insurance policy have been insured with an insurance company that has an agent or representative residing in the Kingdom.

(attached herewith is a sample of the certificate in Arabic and English (attachment No. 3)).

II. Certificates mentioned above certified by Saudi diplomatic mission in the city in which the certificate was issued or where the exporter resides in the first place. In the event such mission are not available in the exporting country, the signature of the chamber of commerce or industrial union in the city where the certificate was issued or where the exporter resides shall be sufficient.

- III. In the event of COD imports through banks or direct COD imports, where the whole value of the goods, or any part thereof, is paid, Saudi banks must take a statement from the collector of all the documents mentioned in I & II above. When the importer receives these documents as delivered, he, not the banks, shall become responsible for any shortage.
- IV. In the event of import from Arabic or foreign free zones, the certificates mentioned in I item (a) above, or a photocopy thereof, must be presented certified by a Saudi diplomatic mission, in the country of export, if any, or, otherwise, the certification of the chamber of commerce or industrial union shall be sufficient.
- V. The provisions of (I) above is not applicable to goods and products manufactured in the Arab League Country Members and exported therefrom because these countries apply the provisions of Israel Boycott.
- VI. These procedures and instructions supersede all the provisions of the Ministry of Commerce decision No. 1584 dated 23-8-1386 with no prejudice to the provisions of VII below.
- VII. For those importers who may have been committed to letters of credits under prior procedures and instructions, they are allowed to act accordingly for six months from the date of this letters.

We hope you comply with the above provisions and provide your correspondents abroad with the English samples of the certificates so that the procedures will be standardized with all the correspondents of Saudi banks. Please instruct your branches to act accordingly.

Regards,

Governor
Abdul Aziz Al-Quaraishi

CC: The Office of HE the Governing with attachments
The Office of HE the Vice Governor with attachments
All SAMA Branches with attachments
Foreign Departments/Credits with attachments
Banking Control 20 copies with attachments.

Tunisian Commercial Code
Promulgated by the law no 129 on 05 October 1959
Articles Related to “Documentary Credit” (“Commercial Letter of Credit”) (from 720 to 727)

ARTICLE 720

The documentary credit is a credit opened by a bank at the request of an applicant in favour of a correspondent and guaranteed by the possession of the documents representative of goods in the course of transport or intended to be transported.

The documentary credit is independent of the sale contract which can form its base and from which the banks remain separate.

ARTICLE 721

The bank opening the credit is held to carry out the clauses of payment, acceptance, discount or negotiation, envisaged in the opening of credit, provided that the documents are in compliance with the data and conditions of the open credit.

ARTICLE 722

The documentary credit can be revocable or irrevocable.

Except where there is contrary express stipulation, any credit is considered as irrevocable.

ARTICLE 723

The revocable credit does not bind the bank to the beneficiary. It can be modified or revoked at any moment by the bank, either on its own initiative, or at the request of its customer, without warning the beneficiary, on the condition that the modification or revocation is not executed not in bad faith, nor with qualification.

ARTICLE 724

The irrevocable credit comprises a firm and direct engagement of the bank to the beneficiary or to holders in good faith of negotiated documents.

This engagement cannot be cancelled or modified without the agreement of all the interested parties.

The irrevocable credit can be confirmed by another bank which then takes firm and direct engagement to the beneficiary.

The notification of the credit to the beneficiary by the intermediary of another bank is not by itself confirmation of this credit.

ARTICLE 725

The bank is held to ensure the strict compliance of the documents to the instructions of the applicant.

When it refuses the documents, the bank must, as soon as possible, warn the applicant and announce to him the noted irregularities.

ARTICLE 726

The bank does not incur any responsibility if the documents are apparently in compliance with the received instructions.

It does not assume any obligation relating to the goods which are the subject of the open credit.

ARTICLE 727

The documentary credit is transferable or divisible only if the bank issuing the credit for the benefit of the beneficiary designated by the applicant, is authorized to pay in all or partly to one or more other person on the instructions of the first beneficiary.

The credit is transferable only on express instructions given by the bank which opens the credit; it does only once, except if there is a contrary stipulation.

Source:

Translation from French Version published in the “*Official Journal Of the Tunisian Republic*”, by M. Jamel BACCAR, Doctor in Law, Lawyer in Tunisia, Senior Lecturer in The Superior School of Commerce of Sfax.

OCC Interpretive Rulings

Editor's Overview

One of the essential components of the letter of credit system is the safety and soundness of the banks that issue them. In this regard, the US Office of the Comptroller of the Currency has played a leading role in issuing its regulations. They assure that banks could prudently consider the importance of limits to the time frame of their exposure and not be exposed to the vagaries of non-documentary conditions. In their current form, the rulings are the most current approach to LC regulation now in place and serve well as a model for enlightened regulation of this field.

U.S. Office of the Comptroller of the Currency: Regulations

12 C.F.R. § 7.1016 and § 7.1017

SUBPART A-BANK POWERS

§ 7.1016 -- Independent undertakings issued by a national bank to pay against documents.

(a) *General authority.* A national bank may issue and commit to issue letters of credit and other independent undertakings within the scope of the applicable laws or rules of practice recognized by law.¹ Under such letters of credit and other independent undertakings, the bank's obligation to honor depends upon the presentation of specified documents and not upon nondocumentary conditions or resolution of questions of fact or law at issue between the account party and the beneficiary. A national bank may also confirm or otherwise undertake to honor or purchase specified documents upon their presentation under another person's independent undertaking within the scope of such laws or rules.

(b) *Safety and soundness considerations.*

(1) Terms. As a matter of safe and sound banking practice, banks that issue independent undertakings should not be exposed to undue risk. At a minimum, banks should consider the following:

(i) The independent character of the undertaking should be apparent from its terms (such as terms that subject it to laws or rules providing for its independent character);

(ii) The undertaking should be limited in amount;

(iii) The undertaking should:

1. Examples of such laws or rules of practice include: The applicable version of Article 5 of the Uniform Commercial Code (UCC) (1962, as amended 1990) or revised Article 5 of the UCC (as amended 1995) (available from West Publishing Co., 1/800/328-4880); the Uniform Customs and Practice for Documentary Credits (International Chamber of Commerce (ICC) Publication No. 600 (available from ICC Publishing, Inc., 212/206-1150; <http://www.iccwbo.org>); Supplements to UCP 500 & 600 for Electronic Presentation (eUCP v. 1.0 & 1.1) (Supplements to the Uniform Customs and Practices for Documentary Credits for Electronic Presentation) (available from ICC Publishing, Inc., 212/206-1150; <http://www.iccwbo.org>); the International Standby Practices (ISP98) (ICC Publication No. 590) (available from the Institute of International Banking Law & Practice, 301/869-9840; <http://www.iiblp.org>) the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (adopted by the U.N. General Assembly in 1995 and signed by the U.S. in 1997) (available from the U.N. Commission on International Trade Law, 212/963-5353); and the Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (ICC Publication No. 525) (available from ICC Publishing, Inc., 212/206-1150; <http://www.iccwbo.org>); as any of the foregoing may be amended from time to time.

- (A) Be limited in duration; or
- (B) Permit the bank to terminate the undertaking either on a periodic basis (consistent with the bank's ability to make any necessary credit assessments) or at will upon either notice or payment to the beneficiary; or
- (C) Entitle the bank to cash collateral from the applicant on demand (with a right to accelerate the applicant's obligations, as appropriate); and

(iv) The bank either should be fully collateralized or have a post-honor right of reimbursement from the applicant or from another issuer of an independent undertaking. Alternatively, if the bank's undertaking is to purchase documents of title, securities, or other valuable documents, the bank should obtain a first priority right to realize on the documents if the bank is not otherwise to be reimbursed.

(2) *Additional considerations in special circumstances.* Certain undertakings require particular protections against credit, operational, and market risk:

(i) In the event that the undertaking is to honor by delivery of an item of value other than money, the bank should ensure that market fluctuations that affect the value of the item will not cause the bank to assume undue market risk;

(ii) In the event that the undertaking provides for automatic renewal, the terms for renewal should be consistent with the bank's ability to make any necessary credit assessments prior to renewal;

(iii) In the event that a bank issues an undertaking for its own account, the underlying transaction for which it is issued must be within the bank's authority and comply with any safety and soundness requirements applicable to that transaction.

(3) *Operational expertise.* The bank should possess operational expertise that is commensurate with the sophistication of its independent undertaking activities.

(4) *Documentation.* The bank must accurately reflect the bank's undertakings in its records, including any acceptance or deferred payment or other absolute obligation arising out of its contingent undertaking.

(c) *Coverage.* An independent undertaking within the meaning of this section is not subject to the provisions of § 7.1017.

§ 7.1017 -- National bank as guarantor or surety on indemnity bond.

(a) A national bank may lend its credit, bind itself as a surety to indemnify another, or otherwise become a guarantor, if:

(1) The bank has a substantial interest in the performance of the transaction involved (for example, a bank, as fiduciary, has a sufficient interest in the faithful performance by a cofiduciary of its duties to act as surety on the bond of such cofiduciary); or

(2) The transaction is for the benefit of a customer and the bank obtains from the customer a segregated deposit that is sufficient in amount to cover the bank's total potential liability. A segregated deposit under this section includes collateral:

(i) In which the bank has perfected its security interest (for example, if the collateral is a printed security, the bank must have obtained physical control of the security, and, if the collateral is a book entry security, the bank must have properly recorded its security interest); and

(ii) That has a market value, at the close of each business day, equal to the bank's total potential liability and is composed of:

- (A) Cash;
- (B) Obligations of the United States or its agencies;
- (C) Obligations fully guaranteed by the United States or its agencies as to principal and interest; or
- (D) Notes, drafts, or bills of exchange or bankers' acceptances that are eligible for rediscount or purchase by a Federal Reserve Bank; or

(iii) That has a market value, at the close of each business day, equal to 110 percent of the bank's total potential liability and is composed of obligations of a State or political subdivision of a State.

(b) In addition to paragraph (a) of this section, a national bank may guarantee obligations of a customer, subsidiary or affiliate that are financial in character, provided the amount of the bank's financial obligation is reasonably ascertainable and otherwise consistent with applicable law.

For further reading, see:

Byrne, James E. UNDERSTANDING THE NEW OCC REGULATIONS 12 C.F.R. § 7.1016 AND § 7.1017 (Institute of International Banking Law & Practice, Inc. 1996).

Lending Limits: U.S. Comptroller of the Currency Regulations

Editor's Summary

Letters of credit are off balance sheet transactions reflected as footnotes to bank liabilities. After the collapse of the Bank of the United States in the 1970s, due in part to the extension of credit in the form of standbys, however it was recognized that standby letters of credit increase the exposure of a bank in a manner greater than do commercial letters of credit which were typically linked to a discrete transaction in goods that served as collateral for an advance of funds.

Accordingly, a number of regulators have promulgated regulations linking limitations of extension of credit under standbys with other loan limitations. The best known of these regulations is that of the U.S. Comptroller of the Currency which requires that standby letters of credit be treated as loans for purposes of determining the safety and soundness of extensions of credit and be subject to rules regarding the extent to which credit may be extended to any one person.

These regulations appear in the Code of Federal Regulations (12 CFR § 32). They provide that an extension of credit including a contractual commitment to advance funds in the form of a standby letter of credit (but not a commercial letter of credit) or similar instrument to any person may not exceed 15 percent of the bank's capital and surplus.

A standby letter of credit is defined in 12 CFR § 32.2(t) as "any letter of credit or similar arrangement, that represents an obligation to the beneficiary on the part of the issuer: (1) To repay money borrowed by or advanced for the account of the account party; (2) To make payment on account of any indebtedness undertaken by the account party; or (3) To make payment on account of any default by the account party in the performance of an obligation." The commercial letters of credit or similar obligations to which the regulations do not apply are described in 12 CFR § 32.2(f)(2) as undertakings "where the issuing bank expects the beneficiary to draw on the issuer, that do not guarantee payment, and that do not provide for payment in the event of default by a third party."

A person to whom credit is extended, entitled a "borrower" in the regulations, includes an individual, sole proprietorship, partnership, joint venture, association, trust, estate, business trust, corporation, limited liability company, not-for-profit corporation, sovereign government or agency, instrumentality, or political subdivision thereof, or any similar organization or entity under 12 CFR § 32.2(l). For purposes of calculating the amount of credit extended includes situations where the person where the funds are used for the direct benefit of that person even though borrowed by another person or where a common enterprise is deemed to exist between persons in which case each person is deemed to be a borrower under 12 CFR § 32.5.

The portion of an extension of credit sold as a participation on a non-recourse basis does not constitute an extension of credit for purposes of calculating lending limits “provided that the participation results in a pro rata sharing of credit risk proportionate to the respective interests of the originating and participating lenders” under 12 CFR §§ 32.2(k)(2)(vi)(A).

Any extension of credit that exceeds 15 percent of the bank’s capital and surplus must be fully secured by readily marketable collateral in which the bank holds a security interest perfected under applicable law and that has a current market value of at least 100 percent of the extension of credit that exceeds the 15 percent figure pursuant to 12 CFR § 32.3(a).

A bankers’ acceptance or purchase of drafts eligible for discount under 12 USC Section 372 and 373 but not a bank’s purchase of its own acceptances are not subject to the lending limits under 12 CFR § 32.3(c)(2) nor are loans to industrial development authorities under 12 CFR § 32.3(c)(9).

Federal Reserve Definitions

Editor's Overview

The U.S. Federal Reserve Board is charged with oversight of the Federal Reserve System and regulation of banks that are members of the system. These definitions are widely used.

CHAPTER II - FEDERAL RESERVE SYSTEM

REGULATION H

SUBPART B - INVESTMENTS AND LOANS

12 CFR 208.24

§ 208.24 Letters of Credit and acceptances.

- (a) Standby letters of credit. For the purpose of this section, standby letters of credit include every letter of credit (or similar arrangement however named or designated) that represents an obligation to the beneficiary on the part of the issuer:
 - (1) To repay money borrowed by or advanced to or for the account of the account party; or
 - (2) To make payment on account of any evidence of indebtedness undertaken by the account party; or
 - (3) To make payment on account of any default by the party procuring the issuance of the letter of credit in the performance of an obligation.¹
- (b) Ineligible acceptance. An ineligible acceptance is a time draft accepted by a bank, which does not meet the requirements for discount with a Federal Reserve Bank.
- (c) Bank's lending limits. Standby letters of credit and ineligible acceptances count toward member banks' lending limits imposed by state law.
- (d) Exceptions. A standby letter of credit or ineligible acceptance is not subject to the restrictions set forth in paragraph (c) of this section if prior to or at the time of issuance of the credit:
 - (1) The issuing bank is paid an amount equal to the bank's maximum liability under the standby letter of credit; or
 - (2) The party procuring the issuance of a letter of credit or ineligible acceptance has set aside sufficient funds in a segregated, clearly earmarked deposit account to cover the bank's maximum liability under the standby letter of credit or ineligible acceptance.

1. A standby letter of credit does not include: (1) Commercial letters of credit and similar instruments, where the issuing bank expects the beneficiary to draw upon the issuer, and which do not guaranty payment of a money obligation; or (2) a guaranty or similar obligation issued by a foreign branch in accordance with and subject to the limitations of 12 CFR part 211 (Regulation K).

**CHAPTER III - FDIC
SUBPART B - REGULATIONS AND
STATEMENTS OF GENERAL POLICY
12 CFR 337.2**

§ 337.2 Standby Letters of Credit.

- (a) Definition. As used in this section, the term standby letter of credit means any letter of credit, or similar arrangement however named or described, which represents an obligation to the beneficiary on the part of the issuer: (1) To repay money borrowed by or advanced to or for the account of the account party, or (2) to make payment on account of any indebtedness undertaken by the account party, or (3) to make payment on account of any default (including any statement of default) by the account party in the performance of an obligation.¹ The term similar arrangement includes the creation of an acceptance or similar undertaking.
- (b) Restriction. A standby letter of credit issued by an insured State nonmember bank shall be combined with all other standby letters of credit and all loans for purposes of applying any legal limitation on loans of the bank (including limitations on loans to any one borrower, on loans to affiliates of the bank, or on aggregate loans); *Provided, however,* That if such standby letter of credit is subject to separate limitation under applicable State or federal law, then the separate limitation shall apply in lieu of the loan limitation.²
- (c) Exceptions. All standby letters of credit shall be subject to the provisions of paragraph (b) of this section except where:
 - (1) Prior to or at the time of issuance, the issuing bank is paid an amount equal to the bank's maximum liability under the standby letter of credit; or,
 - (2) Prior to or at the time of issuance, the issuing bank has set aside sufficient funds in a segregated deposit account, clearly earmarked for that purpose, to cover the bank's maximum liability under the standby letter of credit.
- (d) Disclosure. Each insured State nonmember bank must maintain adequate control and subsidiary records of its standby letters of credit comparable to the records maintained in connection with the bank's direct loans so that at all times the bank's potential liability thereunder and the bank's compliance with this section may be readily determined. In addition, all such standby letters of credit must be adequately reflected on the bank's published financial statements.

1. As defined in this paragraph (a), the term standby letter of credit would not include commercial letters of credit and similar instruments where the issuing bank expects the beneficiary to draw upon the issuer, which do not "guaranty" payment of a money obligation of the account party and which do not provide that payment is occasioned by default on the part of the account party.

2. Where the standby letter of credit is subject to a non-recourse participation agreement with another bank or other banks, this section shall apply to the issuer and each participant in the same manner as in the case of a participated loan.

U.S. FFIEC Instructions for Preparation of Call Reports by U.S. Banks and U.S. Branches & Agencies of Foreign Banks

Editor's Overview

The United States' Federal Financial Institutions Examination Council (FFIEC) is a formal interagency body empowered to prescribe uniform principles, standards, and report forms for the federal examination of financial institutions by the Board of Governors of the Federal Reserve System (FRB), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of the Comptroller of the Currency (OCC), and the Consumer Financial Protection Bureau (CFPB) and to make recommendations to promote uniformity in the supervision of financial institutions.

The Council is responsible for developing uniform reporting systems for federally supervised financial institutions, including the reporting of financial institutions' assets and liabilities. Among this reporting is data for letters of credit. The excerpts of the FDIC and FFIEC's regulations below show what these agencies define a letter of credit to be and give examples of how these regulators require certain information to be reported.

Quarterly data of LC statistics from U.S.-based financial institutions based on the regulations is reported by Documentary Credit World (www.doccreditworld.com).

U.S. Federal Financial Institutions Examination Council (FFIEC) Schedule RC-L – Derivatives and Off-Balance Sheet Items

GENERAL INSTRUCTIONS

Schedule RC-L should be completed on a fully consolidated basis. In addition to information about derivatives, Schedule RC-L includes the following selected commitments, contingencies, and other off-balance sheet items that are not reportable as part of the balance sheet of the Report of Condition (Schedule RC). Among the items not to be reported in Schedule RC-L are contingencies arising in connection with litigation. For those asset-backed commercial paper program conduits that the reporting bank consolidates onto its balance sheet (Schedule RC) in accordance with ASC Subtopic 810-10, Consolidation – Overall (formerly FASB Interpretation No. 46 (Revised), “Consolidation of Variable Interest Entities,” as amended by FASB Statement No. 167, “Amendments to FASB Interpretation No. 46(R)”), any credit enhancements and liquidity facilities the bank provides to the programs should not be reported in Schedule RC-L. In contrast, for conduits that the reporting bank does not consolidate, the bank should report the credit enhancements and liquidity facilities it provides to the programs in the appropriate items of Schedule RC-L.

ITEM INSTRUCTIONS

2 and 3 General Instructions for Standby Letters of Credit – Originating banks must report in items 2 and 3 the full amount outstanding and unused of financial and performance standby letters of credit, respectively. Include those standby letters of credit that are collateralized by cash on deposit, that have been acquired from others, and in which participations have

been conveyed to others where (a) the originating and issuing bank is obligated to pay the full amount of any draft drawn under the terms of the standby letter of credit and (b) the participating banks have an obligation to partially or wholly reimburse the originating bank, either directly in cash or through a participation in a loan to the account party.

For syndicated standby letters of credit where each bank has a direct obligation to the beneficiary, each bank must report only its share in the syndication. Similarly, if several banks participate in the issuance of a standby letter of credit under a bona fide binding agreement which provides that (a) regardless of any event, each participant shall be liable only up to a certain percentage or to a certain amount and (b) the beneficiary is advised and has agreed that each participating bank is only liable for a certain portion of the entire amount, each bank shall report only its proportional share of the total standby letter of credit.

For a financial or performance standby letter of credit that is in turn backed by a financial standby letter of credit issued by another bank, each bank must report the entire amount of the standby letter of credit it has issued in either item 2 or item 3 below, as appropriate. The amount of the reporting bank's financial or performance standby letter of credit that is backed by the other bank's financial standby letter of credit must also be reported in either item 2.a or 3.a, as appropriate, since the backing of standby letters of credit has substantially the same effect as the conveying of participations in standby letters of credit. On the FFIEC 031, also include all financial and performance guarantees issued by foreign offices of the reporting bank pursuant to Federal Reserve Regulation K or Section 347.103(a)(1) of the FDIC Rules and Regulations.

2 Financial standby letters of credit (and foreign office guarantees – for the FFIEC 031).

Report the amount outstanding and unused as of the report date of all financial standby letters of credit (and all legally binding commitments to issue financial standby letters of credit) issued by any office of the bank. A financial standby letter of credit irrevocably obligates the bank to pay a third-party beneficiary when a customer (account party) fails to repay an outstanding loan or debt instrument. (See the Glossary entry for "letter of credit" for further information.)

Exclude from financial standby letters of credit:

- (1) Financial standby letters of credit where the beneficiary is a consolidated subsidiary of the reporting bank.
- (2) Performance standby letters of credit.
- (3) Signature or endorsement guarantees of the type associated with the clearing of negotiable instruments or securities in the normal course of business.

2.a Amount of financial standby letters of credit conveyed to others. Item 2.a is to be completed by banks with \$1 billion or more in total assets.

Report that portion of the bank's total contingent liability for financial standby letters of credit reported in Schedule RC-L, item 2, above, that the bank has conveyed to others. Also include that portion of the reporting bank's financial standby letters of credit that are backed by other banks' financial standby letters of credit, as well as the portion that participating banks have reparticipated to others. Participations and backings may be for any part or all of a given obligation.

3 Performance standby letters of credit (and foreign office guarantees – for the FFIEC 031). Report the amount outstanding and unused as of the report date of all performance standby letters of credit (and all legally binding commitments to issue performance standby letters of credit) issued by any office of the bank. A performance standby letter of credit irrevocably obligates the bank to pay a third-party beneficiary when a customer (account party) fails to perform some contractual non-financial obligation. (See the Glossary entry for “letter of credit” for further information.)

Exclude from performance standby letters of credit:

- (1) Performance standby letters of credit where the beneficiary is a consolidated subsidiary of the reporting bank.
- (2) Financial standby letters of credit.
- (3) Signature or endorsement guarantees of the type associated with the clearing of negotiable instruments or securities in the normal course of business.

3.a Amount of performance standby letters of credit conveyed to others. Item 3.a is to be completed by banks with \$1 billion or more in total assets. Report that portion of the bank’s total contingent liability for performance standby letters of credit reported in Schedule RC-L, item 3, above, that the bank has conveyed to others. Also include that portion of the reporting bank’s performance standby letters of credit that are backed by other banks’ financial standby letters of credit, as well as the portion that participating banks have reparticipated to others. Participations and backings may be for any part or all of a given obligation.

4 Commercial and similar letters of credit. Report the amount outstanding and unused as of the report date of issued or confirmed commercial letters of credit, travelers’ letters of credit not issued for money or its equivalent, and all similar letters of credit, but excluding standby letters of credit (which are to be reported in Schedule RC-L, items 2 and 3, above). (See the Glossary entry for “letter of credit.”) Legally binding commitments to issue commercial letters of credit are to be reported in this item.

Travelers’ letters of credit and other letters of credit issued for money or its equivalent by the reporting bank or its agents should be reported as demand deposit liabilities in Schedule RC-E.

5 Not applicable.

6 Securities lent. Report the appropriate amount of all securities lent against collateral or on an uncollateralized basis. Report the book value of bank-owned securities that have been lent. In addition, for customers who have been indemnified against any losses by the reporting bank, report the market value as of the report date of such customers’ securities, including customers’ securities held in the reporting bank’s trust department, that have been lent. If the reporting bank has indemnified its customers against any losses on their securities that have been lent by the bank, the commitment to indemnify — either through a standby letter of credit or other means — should not be reported in any other item on Schedule RC-L.

9 All other off-balance sheet liabilities. Report all significant types of off-balance sheet liabilities not covered in other items of this schedule. Exclude all items which are required to be reported as liabilities on the balance sheet of the Report of Condition (Schedule RC), contingent liabilities arising in connection with litigation in which the reporting bank is involved, commitments to purchase property being acquired for lease to others (report in Schedule RC-L, item 1.e, above), and signature and endorsement guarantees of the type associated with the regular clearing of negotiable instruments or securities in the normal course of business.

Report only the aggregate amount of those types of “other off-balance sheet liabilities” that individually exceed 10 percent of the bank’s total equity capital reported in Schedule RC, item 27.a. If the bank has no types of “other off-balance sheet liabilities” that individually exceed 10 percent of total equity capital, report a zero.

Disclose in items 9.a through 9.f each type of “other off-balance sheet liabilities” reportable in this item, and the dollar amount of the off-balance sheet liability, that individually exceeds 25 percent of the bank’s total equity capital reported in Schedule RC, item 27.a. For each type of off-balance sheet liability that exceeds this disclosure threshold for which a preprinted caption has not been provided, describe the liability with a clear but concise caption in items 9.d through 9.f. These descriptions should not exceed 50 characters in length (including spacing between words).

Include as other off-balance sheet liabilities:

(1) Securities borrowed against collateral (other than cash), or on an uncollateralized basis, for such purposes as a pledge against deposit liabilities or delivery against short sales. Report borrowed securities that are fully collateralized by similar securities of equivalent value at market value at the time they are borrowed. Report other borrowed securities at market value as of the report date. (Report the amount of securities borrowed in Schedule RC-L, item 9.a, if this amount exceeds 25 percent of the bank’s total equity capital reported in Schedule RC, item 27.a.)

(2) Contracts for the purchase of when-issued securities that are excluded from the requirements of ASC Topic 815, Derivatives and Hedging (formerly FASB Statement No. 133, “Accounting for Derivative Instruments and Hedging Activities,” as amended) (and therefore not reported as forward contracts in Schedule RC-L, item 12.b, below), and accounted for on a settlement-date basis. (Report the amount of these commitments in Schedule RC-L, item 9.b, if this amount exceeds 25 percent of the bank’s total equity capital reported in Schedule RC, item 27.a.)

(3) Standby letters of credit issued by a Federal Home Loan Bank on behalf of the reporting bank, which is the account party on the letters of credit and therefore is obligated to reimburse the issuing Federal Home Loan Bank for all payments made under the standby letters of credit. (Report the amount of these standby letters of credit in Schedule RC-L, item 9.c, if this amount exceeds 25 percent of the bank’s total equity capital reported in Schedule RC, item 27.a.)

(4) Financial guarantee insurance which insures the timely payment of principal and interest on bond issues.

(5) Letters of indemnity other than those issued in connection with the replacement of lost or stolen or official checks.

(6) Shipside or dockside guarantees or similar guarantees relating to missing bills of lading or title documents and other document guarantees that facilitate the replacement of lost or stolen official checks.

(Note: The Full Text of the Schedule is available online at http://www.fdic.gov/regulations/resources/call/crinst/2012-06/612RC-L_062912.pdf)

**U.S. Federal Financial Institutions Examination Council
Instructions for the Preparation of Report of Assets and Liabilities
of U.S. Branches and Agencies of Foreign Banks Reporting Form
FFIEC 002
Reissued September 2008**

**Instructions for the Preparation of Derivatives and
Off-Balance Sheet Items
Schedule L**

GENERAL INSTRUCTIONS

The amounts reported in this schedule are for the reporting branch or agency *including* its IBF, if any. Exclude from this schedule: commitments not yet drawn down under retail credit cards, check credit, and related plans; and contingencies arising in connection with litigation.

Exclude all transactions with related depository institutions. Report derivatives and off-balance sheet items with related depository institutions in Schedule M, Part V.

ITEM 3 STANDBY LETTERS OF CREDIT.

Report in item 3(a) the total amount outstanding *and* unused as of the report date of all standby letters of credit (and all legally binding commitments to issue standby letters of credit) issued by the reporting branch or agency, including its IBF, or acquired from others. Include those standby letters of credit that are collateralized by cash on deposit and those in which participations have been conveyed to others where (a) the originating branch or agency, including its IBF, is to pay the full amount of any draft drawn under the terms of the standby letter of credit and (b) the participating institutions have an obligation to partially or wholly reimburse the originating branch or agency, including its IBF, either directly in cash or through a participation in a loan to the account party. (See the Glossary entry for “letter of credit” for the definition of standby letter of credit.)

Originating branches or agencies, including their IBFs, also must report the amount of standby letters of credit conveyed to others through participations in item 3(b). Branches or agencies, including their IBFs, participating in such arrangements must report in item 3(a)

the full amount of their contingent liabilities to participate in such standby letters of credit without deducting any amounts that they may have reparticipated to others. Participating branches or agencies, including their IBFs, also must report the amount of participation interests in such transactions they have reparticipated to others, if any, in item 3(b).

For syndicated standby letters of credit where each institution or branch or agency has a direct obligation to the beneficiary, each financial institution must report only its share in the syndication. Similarly, if several financial institutions participate in the issuance of a standby letter of credit under a *bona fide* binding agreement which provides that (a) regardless of any event, each participant shall be liable only up to a certain percentage or to a certain amount and (b) the beneficiary is advised and has agreed that each participant is only liable for a certain portion of the entire amount, each bank or branch or agency shall report only its proportional share of the total standby letter of credit.

For a standby letter of credit that is in turn backed by a standby letter of credit issued by another financial institution, each branch or agency, including its IBF, must report the entire amount of the standby letter of credit it has issued in item 3(a). The amount of the branch or agency's standby letter of credit must be included in item 3(b) since the backing of a standby letter of credit has substantially the same effect as the conveying of participations in standby letters of credit.

Exclude from standby letters of credit signature or endorsement guarantees of the type associated with the clearing of negotiable instruments or securities in the normal course of business.

Item 3(a) Total.

Report the total amount of all standby letters of credit issued by the reporting branch or agency, including its IBF, or acquired from others.

Item 3(a)(1) To U.S. addressees (domicile).

Report the amount of standby letters of credit (as defined in item 3) to U.S. addressees. The distinction between U.S. addressees and non-U.S. addressees is determined by the domicile of the account party, *not* the domicile of the beneficiary. See the Glossary entry for "domicile."

Item 3(a)(2) To non-U.S. addressees (domicile).

Report the amount of standby letters of credit (as defined in item 3) to foreign (non-U.S.) addressees. The distinction between U.S. addressees and non-U.S. addressees is determined by the domicile of the account party, *not* the domicile of the beneficiary. See the Glossary entry for "domicile."

Item 3(b) Amount of total standby letters of credit in item 3(a) conveyed to others through participations.

Report that portion of the branch or agency's (including its IBF's) total contingent liability for standby letters of credit reported in items 3(a)(1) and 3(a)(2) that the branch or agency has conveyed to others. Participations and backings may be for any part or all of a given obligation. Also, include that portion of the branch or agency's standby letters of credit reported in items 3(a)(1) and 3(a)(2) that are backed by other banks' standby letters of credit.

Item 4 Commercial and similar letters of credit.

Report the amount outstanding *and* unused as of the report date of issued or confirmed commercial letters of credit, travelers' letters of credit *not issued* for money or its equivalent, and all similar letters of credit, *but excluding standby letters of credit* (which are to be reported in item 3 above). Legally binding commitments to issue commercial letters of credit are also to be reported in this item. (See the Glossary entry for "letter of credit.")

Travelers' letters of credit or other letters of credit *issued* for money or its equivalent by the reporting branch or agency or its agents should be reported as demand deposit liabilities in Schedule E.

Excerpt from the Glossary

Letter of Credit: A letter of credit is a document issued by a bank, including a branch or agency, on behalf of its customer (the account party) authorizing a third party (the beneficiary), or in special cases the account party, to draw drafts on the bank or branch or agency up to a stipulated amount and with specified terms and conditions. The letter of credit is a conditional commitment (except when prepaid by the account party) on the part of the bank or branch or agency to provide payment on drafts drawn in accordance with the terms of the document.

As a matter of sound practice, letters of credit should:

- (1) be conspicuously labeled as a letter of credit;
- (2) contain a specified expiration date or be for a definite term;
- (3) be limited in amount;
- (4) call upon the issuing branch or agency to pay only upon the presentation of a draft or other documents as specified in the letter of credit and not require the issuing branch or agency to make determinations of fact or law at issue between the account party and the beneficiary; and
- (5) be issued only subject to an agreement between the account party and the issuing branch or agency which establishes the unqualified obligation of the account party to reimburse the issuing branch or agency for all payments made under the letter of credit.

There are four basic types of letters of credit:

- (1) commercial letters of credit,
- (2) letters of credit sold for cash,
- (3) travelers' letters of credit, and
- (4) standby letters of credit,

each of which is discussed separately below.

A ***commercial letter of credit*** is issued specifically to facilitate trade or commerce. Under the terms of a commercial letter of credit, as a general rule, drafts will be drawn when the underlying transaction is consummated as intended.

A ***letter of credit sold for cash*** is a letter of credit for which the branch or agency has received funds from the account party at the time of issuance. This type of letter of credit is not to be reported as an outstanding letter of credit but as a demand deposit. These letters are considered to have been sold for cash even though the branch or agency may have advanced funds to the account party for the purchase of such letters of credit on a secured or unsecured basis.

A ***travelers' letter of credit*** is issued to facilitate travel. This letter of credit is addressed by the branch or agency to its correspondents authorizing the correspondents to honor drafts drawn by the person named in the letter of credit in accordance with specified terms. These letters are generally sold for cash.

A ***standby letter of credit*** is a letter of credit or similar arrangement that:

(1) represents an obligation on the part of the issuing branch or agency to a designated third party (the beneficiary) contingent upon the failure of the issuing branch or agency's customer (the account party) to perform under the terms of the underlying contract with the beneficiary, or

(2) obligates the branch or agency to guarantee or stand as surety for the benefit of a third party to the extent permitted by law or regulation.

The underlying contract may entail either financial or nonfinancial undertakings of the account party with the beneficiary. The underlying contract may involve such things as the customer's payment of commercial paper, delivery of merchandise, completion of a construction contract, release of maritime liens, or repayment of the account party's obligations to the beneficiary. Under the terms of a standby letter, as a general rule, drafts will be drawn only when the underlying event fails to occur as intended.

(Note: The text of the full report can be viewed online at http://www.ffiec.gov/PDF/FFIEC_forms/FFIEC002_201206_i.pdf)

Vietnam Rules

THE STATE BANK

SOCIALIST REPUBLIC OF
VIETNAM

Independence - Freedom - Happiness

No: 711/2001/QD-NHNN

Hanoi, May 25, 2001

DECISION

PROMULGATING THE REGULATION ON THE OPENING OF LETTER OF CREDIT FOR IMPORTING GOODS WITH DEFERRED PAYMENT

THE STATE BANK GOVERNOR

Pursuant to Law No.01/1997/QH10 on the State Bank and Law No.02/1997/QH10 on Credit Institutions;

Pursuant to the Government's Decree No.15/CP of March 2, 1993 stipulating the tasks, powers and management responsibilities of the ministries and ministerial-level agencies;

Pursuant to the Government's Decree No.90/1998/NĐ-CP of November 7, 1998 promulgating the Regulation on management of foreign loan borrowing and debt repayment;

At the proposal of the director of the Foreign Exchange Management Department of the State Bank of Vietnam.

DECIDES:

Article 1. - To promulgate together with this Decision the "Regulation on the opening of letter of credit for importing goods with deferred payment".

Article 2. - This Decision takes effect 15 days after its signing and replaces Decision No.207/QD-NH7 of July 1, 1997 promulgating the Regulation on opening of letter of credit for importing goods with deferred payment.

Article 3. - The director of the Office, the heads of the units of the State Bank, the managing board chairmen and the general directors (directors) of banks shall, within the ambit of their functions, tasks and powers, have to implement this Decision.

STATE BANK GOVERNOR

Le Duc Thuy

REGULATION

ON OPENING OF LETTER OF CREDIT FOR IMPORTING GOODS WITH DEFERRED PAYMENT

(Promulgated together with Decision No. 711/2001/QD-NHNN of May 25, 2001)

Chapter I GENERAL PROVISIONS

Article 1.- Settlement by means of deferred payment letter of credit (hereinafter referred to as “deferred payment L/C operation”) is a mode of term documentary credit settlement performed by banks in service of goods import by enterprises.

Article 2.- Banks that perform deferred payment L/C operation include the State commercial banks, investment banks, development banks, joint stock commercial banks, policy banks, joint-venture banks, branches of foreign banks in Vietnam and banks of other types (hereinafter called “banks”), which are established and operate under the Law on Credit Institutions and meet all the conditions prescribed in Article 6 of this Regulation.

Article 3.- Subjects for which banks open deferred payment L/C are enterprises established and operating in Vietnam under the provisions of the Vietnamese law and meeting all the conditions prescribed in Articles 8 and 9 of this Regulation. Enterprises include: State enterprises, private enterprises, joint-ventures enterprises with foreign parties, enterprises with 100% foreign capital, limited liability companies, joint stock companies, partnerships, branches of foreign companies, enterprises of socio-political organizations, cooperatives and other enterprises of all economic sectors, as prescribed by law (hereinafter called “enterprises”).

Article 4.- The opening of deferred payment L/C for importing goods must be compliant with:

1. The State’s import policy;
2. The State’s current regulations related to the foreign loan borrowing and debt repayment, loan security and the provisions of this Regulation.
3. The Uniform Practice Rules on Documentary Credit of the International Chamber of Commerce (upon the version chosen by banks for implementation).

Article 5.- The opening of deferred payment L/C for importing goods items designated by the Prime Minister shall be effected under his/her directions.

Chapter II CONDITIONS FOR AND SCOPE OF DEFERRED PAYMENT L/C OPERATION

Article 6.- To be allowed to undertake deferred payment L/C operation, banks must fully meet the following conditions:

1. Being licensed to provide international settlement services;
2. Having specific written regulations on the order, procedures and dossiers necessary for undertaking deferred payment L/C operation under the Uniform Practice Rules on Documentary Credit of the International Chamber of Commerce (upon the version chosen by banks for implementation) and consistent with this Regulation.
3. Having specific written regulations on criteria for determining enterprises’ financial capabilities to ensure the L/C settlement within the committed time limit.

Article 7.- Upon opening deferred payment L/Cs for enterprises, banks must ensure that:

1. The balance of deferred payment L/C opened by a bank for one client (including money amount of deferred payment L/C already opened by the bank but not yet paid to the beneficiary) must lie within the limits of the total guarantee balance of

the credit institution for one client according to the provisions of the Regulation on bank guarantee.

2. The balance of deferred payment L/C opened by banks for their clients must lie within the limits of the total guarantee level set by the State Bank in the Regulation on bank guarantee.

Article 8.- Banks shall consider the opening of short-term deferred payment L/C (with a term of up to one year) for enterprises when the latter fully meet the following conditions:

1. Having financial capabilities to ensure the L/C settlement within the committed time limit according to the banks' regulations.
2. Making written commitments with banks on the schedule for transfer of money to banks, so that the latter make payments to foreign countries. Such a money transfer schedule must conform with the banks' obligation to make payments to foreign countries with regard to the to-be-opened L/C.
3. At the time of applying for L/C opening: Making no breach of the commitment on transfer of settlement money to banks, so that the latter make payments to foreign countries with regard to previously opened deferred payment L/Cs; owing no debt to banks in cases specified in Clauses 1 and 2, Article 13 of this Regulation.
4. Having lawful security (in one or several forms such as: deposit, pledge or property mortgage, or guarantee by a third party) for the opening of deferred payment L/C at banks' requests.
5. Being able to satisfy the conditions prescribed by the State Bank Governor for short-term foreign loans.

Article 9.- Banks shall consider the opening of medium- and long-term deferred payment L/Cs (with a term of over one year) for enterprises when the latter fully meet the following conditions:

1. Those prescribed in Clauses 1, 2, 3 and 4, Article 8 of this Regulation.
2. Obtaining the State Bank's written certification that they have registered for foreign loan borrowing and debt repayment.

Chapter III

DEPOSIT, PLEDGE, MORTGAGE, GUARANTEE AND SETTLEMENT

Article 10.- Before opening deferred payment L/Cs for enterprises, the general directors (directors) of banks or competent persons defined by the banks shall, depending on the actual production and/or business situation, financial capabilities and prestige of each enterprise and characteristics of import goods, reach agreements with enterprises on the application of one or several security measures (deposit, pledge, property mortgage, guarantee) and decide on the secured value which enterprises must provide. The application of the security measure being deposit for opening of deferred payment L/C shall be effected in compliance with the provisions of Article 11 of this Regulation.

Article 11.- Regarding the security measure being deposit for opening of deferred payment L/C:

1. Basing himself/herself on the actual situation and the State's goods import policy, when necessary, the State Bank Governor shall decide the minimum deposit level for goods items on the list of goods restricted from import promulgated by the Government for each period.
2. Enterprises are not allowed to make deposits with bank loans or capital amounts currently guaranteed by banks.

Article 12.- The pledge, property mortgage and guarantee for the opening of deferred payment L/C shall be made according to the agreements between banks and enterprises and

in compliance with the current law provisions on loan security and other relevant regulations.

Article 13.- Enterprises shall be responsible for transferring money to banks strictly according to the commitments between enterprises and banks for making payments to foreign countries on time. Banks shall be responsible for making payments to foreign countries according to their own commitments.

If enterprises fail to transfer money (the whole or part) to banks according to commitments, the banks shall still have to perform their obligation to make payments to foreign countries and be entitled to make client debit entries as from the date of payment, and in the following cases, the banks may make their decisions:

1. In cases where enterprises fail to transfer money (the whole or part) to banks strictly according to the commitments due to objective reasons, the banks shall, on their own conditions, make debit entries against enterprises with a credit interest rate applicable to undue debts and decide the debt repayment time limits as follows:
 - a For short-term deferred payment L/C, the maximum debt repayment time limit shall be equal to one production or business cycle but must not exceed 12 months after the banks make payments to foreign countries, except for special cases where the State Bank Governor permits or authorizes the banks to consider and decide it;
 - b For medium-and long-term deferred payment L/C, the maximum debt repayment time limit shall be equal to half of the term of deferred payment L/C after the banks make payments to foreign countries, except for special cases where the State Bank Governor permits or authorizes the banks to consider and decide it.
2. Banks shall debit or transfer over-due debts, and at the same time apply the over-due debt interest rate as prescribed by the State Bank Governor at the time of debiting or transferring over-due debts and take necessary measures to recover debts according to the provisions of law in the following cases:
 - a Enterprises fail to transfer money (the whole or part) to banks according to the commitments due to subjective reasons of enterprises.
 - b Enterprises fail to fulfill the debt repayment obligation within the time limit decided by banks according to the provisions in Clause 1 of this Article.
3. Right after debiting debts, over-due debts or transferring over-due debts for enterprises under the conditions prescribed in Clause 1 or Clause 2 of this Article, banks shall have to promptly notify such in writing to enterprises.

Chapter IV

COMPETENCE TO SIGN DEFERRED PAYMENT L/C AND CHARGE LEVELS FOR DEFERRED PAYMENT L/C OPERATION

Article 14.- Banks shall prescribe competence to decide the opening of deferred payment L/C in their own systems in compliance with the current law provisions.

Article 15.- Charge levels for deferred payment L/C operation (value added tax not yet included):

1. The total charge for L/C opening and charge for document examination shall be at most equal to 2%/year calculated on the value and within the term of the opened L/C.
2. Charge for payment acceptance shall be at most equal to 2%/year calculated on the money amount accepted for payment but not yet paid to the beneficiaries, and within the period from payment acceptance to the payment deadlines.

- 3. Charge for transfer of money abroad when settling L/C prescribed by banks in compliance with Vietnam State Bank's regulations on collection of charges for via-bank payment services.
- 4. Charge for L/C modification, electricity and telex and other reasonable charges (if any) prescribed by banks.

Chapter V

INSPECTION, EXAMINATION AND HANDLING

Article 16.- Periodically or when necessary, the inspection or examination of deferred payment L/C operation shall be conducted as follows:

- 1. Banks shall submit to the inspection and/or examination by the State Bank;
- 2. Enterprises shall submit to the inspection and/or examination by banks;
- 3. Enterprises shall submit to the inspection by the State Bank of the situation of foreign loan borrowing and debt repayment in form of opening letters of credit for importing goods with deferred payment according to the current regulations on foreign loan borrowing and debt repayment by enterprises.

The inspected or examined banks and enterprises shall have to supply all data and vouchers related to the performance of deferred payment L/C operation in service of the above-said inspection or examination. The inspection and examination must be conducted in strict compliance with law provisions.

Article 17.- Organizations and individuals that violate the provisions of this Regulation shall, depending on the nature and seriousness of their violations, be disciplined, administratively handled or examined for penal liability. If damage is caused, compensation therefor must be made according to the law provisions.

Chapter VI

REPORTING REGIME

Article 18.- Periodically, banks shall have to send to the State Bank (the Foreign Exchange Management Department) and the State Bank's branches in provinces and centrally-run cities where they are located reports made according to the current regulations on reports on foreign loan borrowing and debt repayment (including deferred payment L/C operation).

Article 19.- The State Bank's provincial/municipal branches shall report to the State Bank (the Foreign Exchange Management Department) according to the following regulations:

- 1. To promptly report upon detecting violations of the Regulation on opening of letter of credit for importing goods with deferred payment and propose handling measures.
- 2. To comply with the current regulations on reports on foreign loan borrowing and debt repayment (including deferred payment L/C operation).

Chapter VII

CLAUSE ON SUPPLEMENT AND AMENDMENT

Article 20.- The supplement and/or amendment to this Regulation shall be decided by the State Bank Governor.

DOCDEX

Editor's Summary

To accommodate the desire for informal resolution of LC disputes, the ICC has created a non-binding system by which appointed experts issue an opinion. Known as DOCDEX, the system is administered by the ICC Banking Commission and its rules can be found at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/docdex/docdex-rules/>

ICLOCA

Editor's Summary

Since letters of credit are counter-intuitive to most commercial lawyers, judicial decisions are not regarded as an optimal means to resolve letter of credit disputes. For the same reasons, general commercial arbitration does not yield optimal results and is rarely utilized for LC disputes.

In order to reduce the delay and confusion resulting from the current system, two related forms of alternative dispute resolution have evolved.

The International Center for Letter of Credit Arbitration (ICLOCA) Rules are formal rules of arbitration based on the internationally acclaimed UNCITRAL Rules for Arbitration. The rules provide for summary resolution of most disputes by expert arbitrators. They can be found at <http://www.iiblp.org>. As a system of arbitration, an ICLOCA-based award would be enforceable throughout the world under the universally adopted 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).

To render a credit or a reimbursement agreement subject to the ICLOCA rules, the following clause is suggested:

Any dispute, controversy or claim arising out of or relating to this undertaking or the dishonor, termination or invalidity thereof shall be finally settled by arbitration administered by the International Center for Letter of Credit Arbitration, Inc., under its Rules of Arbitration (1996).

For further reading, see:

Newman, Lawrence W. and Michael Burrows. *Alternatives for Resolving Letter of Credit Disputes* 1997 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 162.

