FEATURE

LETTERS OF CREDIT*

by James G. BARNES and James E. BYRNE**

This survey concentrates on the most significant letter of credit ("LC")[1] issues addressed in cases decided in the United States in the year 2017.[2]

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PRE-HONOR CASES

Pre-honor cases are those in which a dispute arises before a demand for payment under an LC has been honored. These actions typically involve a beneficiary or other presenter claiming wrongful dishonor by the issuer, and they focus on:

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1. Unless otherwise indicated, "LC" or "credit" means "letter of credit," "U.C.C." refers to Revised U.C.C. Article 5 (2011), "ICC" refers to the International Chamber of Commerce, "UCP600" refers to the Uniform Customs and Practice for Documentary Credits, 2007 revision (ICC Pub. No. 600), and "ISP98" refers to the International Standby Practices (ICC Pub. No. 590). "ISP98 Forms" refers to the annotated standby forms (numbered 1 through 8 and 11.1), freely available at www.iiblp.org/ resources/isp-forms/. The texts of these laws, rules, and ISP98 Forms 1 and 2 are reprinted in LC RULES & LAWS: CRITICAL TEXTS FOR INDEPENDENT UNDERTAKINGS (James E. Byrne ed., 7th ed. 2018).

2. This survey also includes a few non-case developments and a few non-U.S. cases of interest in the LC field. For articles of interest and for abstracts of all available LC cases, see 2018 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE (James E. Byrne et al. eds., 2018). LC cases decided shortly before or after 2017 may be covered in a prior or subsequent year's *The Business Lawyer* survey.

(i) whether the issuer gave timely and sufficient notice of dishonor,[3] (ii) whether the discrepancies stated in that notice justify dishonor,[4] or (iii) whether there are extraordinary reasons requiring or permitting dishonor, such as forgery or material fraud,[5] injunction, governmental order, or insolvency.

DISCREPANCY DEFENSES AND PRECLUSION

Wrongful dishonor disputes based on facial compliance or preclusion issues continue to be resolved mostly outside the courts. This is attributable to the clarity with which U.C.C. Article 5 recognizes standard LC practice, including the role of incorporated international LC rules, and also to the continuing elaboration of standard LC practice in published materials applying the concepts of preclusion and strict compliance to independent undertakings issued subject to UCP, ISP, and other ICC rules.

In *ACR Systems, Inc. v. Woori Bank*,[6] the beneficiary adequately pled a wrongful (partial) dishonor action under a UCP600 LC. The court applied the conflict of laws rules stated in U.C.C. section 5-116. Under sections 5-116(b) and (c), and the terms of the LC, the court determined that the issuer's obligations to the beneficiary were governed by UCP600 and the ICC's Uniform Rules for Bank-to-Bank Reimbursements Under Documentary Credits (URR725), and supplemented as necessary by the law of the place of issuance, South Korea.[7] (The issuing bank's New York branch apparently acted as an advising bank but not as a confirming bank.) The court held that the one-year statute of limitations in U.C.C. section 5-115 did not apply because by its terms it applies only to rights and obligations arising under U.C.C. Article 5, citing the recently affirmed 2016 lower court decision in the *Indoafric* case discussed below.[8] Rather, the court applied the applicable contract statute of limitations under New York and Texas law.[9]

The U.S. Court of Appeals for the Second Circuit in *Indoafric Exports Private Ltd. v. Citibank, N.A.*[10] affirmed dismissal of the beneficiary's claims of wrongful dishonor by a New York bank that had confirmed a UCP500 LC. The confirmation was issued before U.C.C. section 5-115 became effective, and dishonor occurred nearly ten years before the complaint was filed. The claims were barred by a

3. *See* U.C.C. § 5-108(b)–(d) (2011).

4. *See id.* § 5-108(a).

5. *See id.* § 5-109(a).

6. 232 F. Supp. 3d 471 (S.D.N.Y. 2017).

7. *Id.* at 476–77.

8. *Id.* at 477 (citing Indoafric Exps. Private Ltd. v. Citibank, N.A., No. 15-CV-9386 (VM), 2016 WL 6820726, at *3 (S.D.N.Y. Nov. 7, 2016), *aff'd*, 696 F. App'x 551 (2d Cir. 2017)).

9. *Id.* at 477–78.

10. 696 F. App'x 551 (2d Cir. 2017), *aff'g* No. 15-CV-9386 (VM), 2016 WL 6820726 (S.D.N.Y. Nov. 7, 2016).

six-year statute of limitations, and equitable tolling was not available despite the beneficiary's claims that the confirming bank concealed from the beneficiary that it had dishonored the long since expired LCs.[11] (The beneficiary apparently pursued the issuing bank and the local advising and presenting bank in the interim.) The court refused to apply tolling based on the beneficiary's delay and lack of diligence in asserting its claims against the bank.[12]

The *ACR* and *Indoafric* cases escaped application of the one-year statute of limitations provided in U.C.C. section 5-115 because the beneficiary's dispute with the issuer did not and could not have arisen under U.C.C. Article 5. Section 5-115, as revised in 1995, has been effective in accordance with its terms to bar actions against issuers (or confirmers) of an LC (or confirmation) issued from the United States commenced by the beneficiary more than one year after expiry (or after later dishonor, e.g., of a deferred payment undertaking).

A successful wrongful dishonor action requires valid LC issuance and jurisdiction over the dishonoring LC issuer.

In *Compass Bank v. Morris Cerullo World Evangelism*,[13] the U.S. Court of Appeals for the Ninth Circuit affirmed the trial court's declaratory judgment based on its finding that "there is no actual letter of credit in this case."[14] The purportedly issued LC had not been signed or sent from the bank's Texas headquarters, and the California branch manager on whom the plaintiff purportedly relied had no actual or ostensible authority to issue any LC. While beneficiary reliance is not a requirement for beneficiary enforcement of an issued LC, it may be a factor in determining whether ostensible authority to issue an LC exists. Based on the court's conclusion that any such reliance was unreasonable, the court declined to find any ostensible authority.

In *Galesburg 67, LLC v. Northwest Television, Inc.*,[15] the beneficiary of expired LCs argued in an action for breach of an underlying contract that the LCs were not "irrevocable" because they contained a stated expiration date (January 22, 2001). This argument was rightly rejected as contrary to U.C.C. section 5-106, which provides that an LC "is revocable only if it so provides."[16]

Deutsche Bank AG v. CIMB Bank Berhad[17] involves a nominated bank's claim for payment from an issuing bank. The London Commercial Court held that an issuing bank's obligation to reimburse a

11. *Id*. at 552–53.

12. *Id.* (citing Abbas v. Dixon, 480 F.3d 636, 642 (2d Cir. 2007)).

13. 696 F. App'x 184 (9th Cir. 2017), *aff'g* No. 13-CV-654 BAS (WVG), 2015 WL 5039991 (S.D.Cal. Aug. 26, 2015) (discussed in James G. Barnes & James E. Byrne, *Letters of Credit*, 71 BUS. LAW. 1299, 1301 (2016)).

14. *Id*. at 185 (quoting *Compass Bank*, 2015 WL 5039991, at *11).

15. No. 15 C 5650, 2017 WL 3608204 (N.D. Ill. Aug. 22, 2017).

16. *Id*. at *3 (quoting U.C.C. § 5-106 (2011)).

17. [2017] EWHC (Comm) 1264 (Eng.), http://www.bailii.org/ew/cases/EWHC/Comm/2017/ 1264.html.

nominated bank is, as stated in UCP600 Article 7(c), conditioned on the nominated bank's honor or negotiation in fact,[18] and allowed the issuing bank limited discovery on whether the nominated bank claiming reimbursement had in fact paid the beneficiary.[19] This interpretation of UCP600 Article 7(c) is correct, and it is critical in a significant number of inter-bank LC disputes.[20]

The troublesome part of the opinion lies in the fact that the LC included a so- called "TT reimbursement" clause in which the issuer undertook to reimburse against the nominated bank's certification that it honored and forwarded complying documents. An appropriately drafted TT reimbursement clause is an independent undertaking (a mini-standby LC) in favor of the nominated bank, entitling the nominated bank to be paid sooner than under UCP600 Article 7(c) and to hold rather than chase funds if the issuer later challenges the certification and seeks a refund under UCP600 Article 16(g).[21]

FRAUD DEFENSES AND INJUNCTIONS

U.C.C. section 5-109 applies to an apparently complying presentation that is subjected to a defense or claim that a required document is forged or materially fraudulent or that honor would facilitate a material fraud by the beneficiary.[22] Issuers are not legally obligated to raise a fraud defense and are reluctant, if not unable, to do so. Accordingly, most LC fraud claims decided by courts are raised in emergency actions brought by applicants to obtain pre-honor injunctive relief, and section 5-109 dictates how U.S. courts should balance LC independence with fraud deterrence.

There continue to be very few U.S. cases involving applicant injunction actions or issuer defenses based on claims of forged or materially fraudulent presentation, a tribute to the specificity with which the LC fraud exception is addressed in section 5-109 and to the imposition of fees and costs on an applicant or issuer that unsuccessfully invokes the LC fraud exception.[23]

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18. *Id*. at [38]–[39] (citing UCP600 art. 7(c)).

19. *Id*. at [40]–[41].

20. An issuer receiving a complying presentation will normally pay the presenter, whether the presenter is the beneficiary or a nominated bank. The status of the presenter becomes important only if there is fraud or other extraordinary reason to dishonor the beneficiary's facially complying documents. *See* UCP600 art. 7(c) ("An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary.").

21. *Compare* Deutsche Bank AG, [2017] EWHC (Comm) 1264 [11] (Eng.) (setting forth the TT (tested telex) reimbursement clause), *with* James G. Barnes, *TT Reimbursement Misunderstood*, DOCUMENTARY CREDIT WORLD, July/Aug. 2017, at 42 (discussing the *Deutsche Bank* case), *and* James. G. Barnes, *TT Reimbursement Clauses—Better Drafting Options*, DOCUMENTARY CREDIT WORLD, Nov./Dec. 2017, at 34 (discussing alternative drafts of TT reimbursement clauses). *See generally* ISP98 Form 7 nn.8–9, www.iiblp. org/resources/isp-forms/ (advising on drafting reimbursement rights under an ISP98 standby LC— Model Standby Requiring Confirmation).

22. U.C.C. § 5-109 (2011).

23. *Id*. § 5-111(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.").

A preliminary injunction against honor of a pending drawing under a standby LC was granted in *In re Factory Sales & Engineering, Inc.*[24] after interlocutory findings and conclusions that the beneficiary's statement that the underlying contract was terminated by timely notice of termination was so clearly false as to make the drawing materially fraudulent. That conclusion is supportable under U.C.C. section 5-109. The court's additional conclusion that the attempted termination of the underlying contract violated the automatic stay in bankruptcy (and therefore made the beneficiary's statement that the contract was terminated materially fraudulent) unnecessarily allows applicant bankruptcy to interfere with drawing and honor of an LC.

In *Power Rental Asset Co. Two, LLC v. Forge Group Power Pty. Ltd.*,[25] the court denied interlocutory injunctive relief against a threatened drawing. The LC required presentation of a beneficiary certification of entitlement to payment as provided in the underlying contract. The underlying contract included additional conditions of drawing that were differently interpreted by the parties. The court applied U.C.C. section 5-109[26] and concluded that the beneficiary could non-fraudulently present the required certificate even if the applicant's interpretation of the underlying contract ultimately prevailed.[27]

In *Empire Room, LLC v. Empire State Building Co.*,[28] the plaintiff-tenant-applicant, while in pending litigation with the defendant-landlord-beneficiary, sought immediate return of the LC issued in lieu of a security deposit. The court correctly held that return or cancellation of the LC was premature while questions of breach of the underlying lease agreement remained to be determined.[29] In general, parties should try to keep standby LCs outstanding while the amount of underlying obligations that they support remains in doubt.

Taurus Petroleum Ltd. v. State Oil Marketing Co.[30] started with an English High Court order directing the London issuing bank of a UCP600 deferred payment LC to pay into court, rather than to the account with the New York Federal Reserve Bank that was specified in the LC. The plaintiff had no role in the LC or underlying transaction and was simply trying to collect on an unrelated arbitration award and English judgment against the defendant LC beneficiary. The lower court's various orders interfering with LC performance were later set aside, and that result was upheld in the Court of

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24. Factory Sales & Eng'g, Inc. v. Electrica Nueva Energia S.A. (*In re* Factory Sales & Eng'g, Inc.), No. 17-11446, 2017 WL 4570813 (Bankr. E.D. La. Oct. 12, 2017).

25. No. 17-cv-03621-RS, 2017 WL 2806715 (N.D. Cal. June 29, 2017).

26. *Id.* at *4. The issuer (Bank of America) represented that the LC was issued from Pennsylvania, but no party argued that Pennsylvania and California law under U.C.C. § 5-109 were materially different. *See id.* at *4 n.4.

27. *Id.* at *5.

28. No. 652017/2013, 2017 WL 2181088 (N.Y. Sup. Ct. May 18, 2017), *aff'd as modified*, No. 6138, 2018 WL 1526122 (N.Y. App. Div. Mar. 29, 2018).

29. *Id.* at *3, *6.

30. [2017] UKSC 64 (Eng.), http://www.bailii.org/uk/cases/UKSC/2017/64.html.

Appeal on other grounds, essentially because New York, rather than London, was treated as the place of the "debts" sought to be attached.[31] The 2017 U.K. Supreme Court opinion relocates the "debts" to the place of LC issuance (England), allowing the LC beneficiary's rights under an English bank LC to be attached and discharged by payment into court.[32]

U.C.C. section 5-116 would also locate issuer obligations at the place of issuance, absent express agreement to a different location. However, U.C.C. section 5-109 would allow judicial interference with honoring (or drawing under) an LC only after a showing of forgery or material fraud, and sections 5-102(a)(8) and 5-114(a) would not likely treat an issuer's payment into court as "honor" or the resulting payment as "proceeds of a letter of credit."[33]

A 2017 case from Quebec highlights the difficulties of applying the LC fraud exception to counter undertakings, i.e., independent bank undertakings issued in favor of other banks that issue their own undertakings to a local beneficiary (frequently a local government purchaser that has contracted with the applicant for a local bank undertaking). In *SNC-Lavalin Group Inc. v. BNP Paris Canada*,[34] the Quebec court held that it had jurisdiction over the Canadian applicant's request to enjoin a Canadian counter guarantor, BNP Paribas Canada, from paying its beneficiary, BNP Paribas SA in Poland, that had issued a separate guarantee supporting the applicant's performance of a construction contract in Poland.[35] The court then considered the underlying contract interpretive issues affecting the rightfulness of the demands and held that there was insufficient evidence to satisfy the test provided in Canada's leading precedent on the fraud exception.[36] The court did not address the significance of the fact that the alleged fraud concerned the drawing in Poland under the Polish bank guarantee, rather than the Polish bank's separate drawing under the Canadian bank counter guarantee. The Quebec court did note that there would be Polish law issues to be considered before any findings of fraud, abuse, dishonesty, or the like could be made.[37]

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31. *See* [2015] EWCA (Civ) 835 [3], [14]–[24] (Eng.), http://www.bailii.org/ew/cases/EWCA/Civ/ 2015/835.html (discussed in Barnes & Byrne, *supra* note 13, at 1303–04), *dismissing appeal from* [2013] EWHC (Comm) 3494 (Eng.), http://www.bailii.org/ew/cases/EWHC/Comm/2013/3494.html.

32. *Taurus Petroleum*, [2017] UKSC 64 [41]. The case, with its multiple dissents and confusing treatment of the nominated bank, is clear only in its unanimous overruling of existing precedent on the location of LC "debts" and in allowing restoration of the initial attachment orders. *See id.* at [59]–[60], [72]. (It appears that the payment into court has remained there some five years.)

33. *Taurus Petroleum* may invite more attachment actions against English issuing and confirming banks and lead to cases testing whether the attached banks may be sued elsewhere by the beneficiary or a nominated bank, and whether their applicants may face litigation or arbitration testing whether the underlying obligations were effectively discharged. (Standard LC reimbursement and indemnity agreements would likely protect issuers as against their applicants.)

34. 2017 QCCS 3694 (Can. Super. Ct.), http://canlii.ca/t/h5c3m.

35. *Id.* at paras. 8–16.

36. *Id.* at paras. 17–39, 45 (citing Bank of Nova Scotia v. Angelica-Whitewear Ltd., [1987] 1 S.C.R. 59 (Can.)).

37. *Id.* at paras. 28, 45.

Douglas County v. Hamilton State Bank[38] affirmed dismissal of a beneficiary's wrongful dishonor claim against a bank that had assumed the standby undertakings of a failed bank. The beneficiary had made an "extend or pay" demand on the issuing bank, for which it received no response, and then made a post-expiry payment demand on the successor bank. Dismissal was based on the beneficiary's failure to exhaust its administrative remedies against the FDIC. The court treated the undertakings, which were identified as performance and maintenance bonds, as "standby letters of credit" as defined in the assumption agreement and applicable regulations.[39] Lack of clarity about whether a bank undertaking is a letter of credit or a surety undertaking may explain the court's not deciding whether the "extend or pay" demand was wrongfully dishonored under U.C.C. section 5-108(c) on preclusion and whether the later payment demand was rightfully dishonored under U.C.C. section 5-108(d) on post-expiry presentations.

POST-HONOR CASES

Disputes that arise after the issuer honors an LC typically focus on: (i) whether the issuer is entitled to reimbursement, indemnification, subrogation, or other recovery from the applicant or, in some cases, from the beneficiary or other presenter, or (ii) whether the applicant or beneficiary may have impaired or enhanced rights against each other based on honor of the LC.

ISSUER RECOVERIES

In *Bank of India v. Essar Steel Holdings Ltd.*,[40] the issuer sued in New York (the issuer's location under U.C.C. section 5-116) to enforce its reimbursement rights against the applicant following LC honor. The applicant moved to dismiss for lack of personal jurisdiction on the basis that it was a non-U.S. corporation without any presence in New York and did not transact any purposeful business in New York related to the LC. The court denied the motion after referencing the defendant-applicant's execution of agreements with the plaintiff-issuer covering the transaction and LC-related contacts in New York.[41] Absent agreement on a different forum, anyone requesting a bank to issue an LC from the United States should expect to be sued in the courts located where the issuer is located to enforce the issuer's post-honor reimbursement rights. This result is dictated by U.C.C. sections 5-116 (applicable law and forum) and 5-108(i)(1) (reimbursement), as well as the typical bank LC application forms that supplement U.C.C. Article 5 rights and remedies.[42] In this regard, a claim of reimbursement from an issuer made by a confirmer that has honored its confirmation similarly arises

38. 798 S.E.2d 509 (Ga. Ct. App. 2017).

39. *Id.* at 510–11 (quoting the Purchase and Assumption Agreement and citing 12 C.F.R. § 337.2(a) to define "standby letter of credit").

40. No. 655315/2016, 2017 WL 4284557 (N.Y. Sup. Ct. Sept. 27, 2017).

41. *Id.* at *3–5.

42. U.S. LC issuance should not be a factor in determining U.S. court jurisdiction over an applicant in a suit against the applicant filed by the beneficiary to enforce the underlying agreement. *See* Viewpoint Prof'ls LLC v. Nat'l Inv. Co., No. 16 CV 1468-LTS, 2017 WL 4122620, at *3 (S.D.N.Y. Sept. 14, 2017).

from a targeted request to issue a specified LC undertaking subject to the reimbursement obligations provided in UCP600, ISP98, and U.C.C. Article 5.

CapitalPlus Equity, LLC v. Tutor Perini Building Corp.[43] is an unusual case in which it appears that the issuer sued the beneficiary to recover LC proceeds in escrow, alleging that the issuer negotiated for and relied on pre-issuance "no default" representations from the beneficiary that were contradicted post- issuance by the beneficiary's certifying default and demanding full payment. The court held that the allegations were sufficient to establish personal jurisdiction over the beneficiary and a cause of action for fraudulent inducement to issue the LC.[44] This case should go nowhere unless the claimed fraudulent inducement to issue the LC was followed by a materially fraudulent drawing under U.C.C. sections 5-109 and 5-110.

Many LCs are issued under multi-bank credit agreements that include an LC subfacility with segregated cash collateral securing LC issuers. *In re Energy Future Holdings Corp.*[45] quotes extensively from and analyzes the priority provisions in such agreements.

APPLICANT/BENEFICIARY RECOVERIES

Post-honor disputes between applicants and beneficiaries are typically based on the underlying agreements between them but are sometimes importantly supplemented by U.C.C. Article 5.[46]

In *Kirchhoff-Consigli Construction Management, LLC v. Deluxe Building Systems, Inc.*,[47] the defendant-subcontractor-applicant moved to amend its counterclaims to address a post-complaint drawing and honor of a standby LC in favor of the plaintiff-contractor-beneficiary. The court permitted adding to the existing counts allegations that the honored drawing breached the LC as well as the underlying subcontract.[48] The court did not permit the addition of a new count for breach of the U.C.C. section 5-110(a)(2) post-honor warranty 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."[49]

The opinion focuses on the failure to allege that the beneficiary's drawing violated the underlying subcontract (as distinguished from alleging violation of the LC itself) and on the failure to identify

43. No. 3:17-cv-00051 REEVES/GUYTON, 2017 WL 5586663 (E.D. Tenn. Nov. 20, 2017).

44. *Id.* at *5.

45. Marathon Asset Mgmt., LP v. Angelo Gordon & Co. (*In re* Energy Future Holdings Corp.), No. 14-10979-CSS, 2017 WL 1170830 (D. Del. Mar. 28, 2017), *aff'g* 548 B.R. 79 (Bankr. D. Del. 2016), *appeal filed*, No. 17-1958 (3d Cir. May 2, 2017).

46. *See* U.C.C. §§ 5-110, 5-117 (2011) (providing applicants with post-honor warranty and subrogation rights). Insolvency laws also may affect the application of LC proceeds.

47. No. 4:15-CV-01462, 2017 WL 3601981 (M.D. Pa. Aug. 22, 2017).

48. *Id.* at *6–7.

49. *Id.* at *6, *8–11.

the violated terms of the underlying obligations.[50] The Official Comment to section 5-110 explains that this warranty applies where "the beneficiary's drawing violated its express or implied obligations in the underlying transaction."[51] This allows for consideration of more than the express terms of the subcontract and should cover an honored drawing under any LC intended to support the subcontractor's obligations. The honored standby LC is quoted in the opinion. It required the beneficiary to present statements concerning performance under the subcontract with a draft that "does not exceed the amount due and owing" under the subcontract.[52] The weakness in the amended allegations lies, not in failing to identify any subcontract provision that prohibited the drawing, but in failing to identify the obligations intended by the parties to be enhanced[53] by the LC.

The opinion in *Kirchhoff-Consigli* helpfully focuses on the U.C.C. text and Official Comments[54] which make clear that the section 5-110(a)(2) warranty supplements the rights and remedies of the applicant against the beneficiary that are available under contract and unjust enrichment law applicable to the LC- supported obligations.[55] To the extent that the text of the statutory warranty and this opinion indicate that "violate" means more than "breach," it should be noted that the remedies for this statutory warranty are linked to the damage remedies for breach of the underlying obligation[56] and that the statutory warranty requires that the violation/breach occur when the drawing is made and not, for example, when the proceeds of a drawing are later misapplied to discharge obligations other than those intended by the applicant and beneficiary to be supported by the LC.

In *International Cards Co. v. MasterCard International Inc.*,[57] the defendant-beneficiary obtained honor of an LC by presenting a statement demanding payment of the full amount of the LC "representing funds . . . due and payable."[58] A jury found for the applicant on its conversion claim, essentially

50. *Id.* at *10.

51. *Id.* at *8 (quoting U.C.C. § 5-110 cmt. 2 (2011)).

52. *Id.* at *4 (quoting revised irrevocable standby LC).

53. The U.C.C. style committee substituted "augmented" for "enhanced." *See* U.C.C. § 5-110(a)(2) (2011) ("If its presentation is honored, the beneficiary warrants ... 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."). The marketplace has come to prefer "supported."

54. *Kirchhoff-Consigli*, 2017 WL 3601981, at *8 (quoting from U.C.C. § 5-110 cmt. 2 (2011)).

55. The opinion unhelpfully cites cases decided under pre-revised U.C.C. Article 5, which included a totally different statutory warranty.

56. *See* U.C.C. § 5-110 cmt. 3 (2011).

57. No. 13 Civ. 2576 (LGS), 2017 WL 3623684 (S.D.N.Y. Aug. 21, 2017), *appeal filed*, No. 17-3099 (2d Cir. Sept. 29, 2017); *see also* Int'l Cards Co. v. MasterCard Int'l Inc., No. 13 Civ. 2576 (LGS), 2016 WL 3039891 (S.D.N.Y. May 26, 2016); James G. Barnes & James E. Byrne, *Letters of Credit*, 72 BUS. LAW. 1119, 1127 (2017) (discussing the 2016 *Int'l Cards* decision).

58. *Int'l Cards*, 2017 WL 3623684, at *1 (quoting standby LC). *See generally* ISP98 Form 1 nn.25– 29, www.iiblp.org/resources/isp-forms/ (providing alternative forms of beneficiary statements with payment demands—Model Standby Incorporating Annexed Form of Payment Demand with Statement).

reversing the effect of the beneficiary's drawing. The court rejected the beneficiary's post-trial motions, holding that reasonable jurors could conclude that the beneficiary converted the entire amount drawn when it drew under the LC.[59] The opinion summarizes the evidence that the drawing was fraudulent and not permitted by the parties' underlying obligations to each other, i.e., that the beneficiary breached its warranties in U.C.C. sections 5-110(a)(1) ("no fraud") and (2) ("no violation").[60] Unfortunately, the opinion does not mention U.C.C. Article 5 or its effect on treating a drawing as fraudulent or as a taking of applicant property.

As discussed in prior surveys,[61] a drawing under an LC effects a transfer of funds of the issuer, not the applicant. There are contract, restitution, and fraud laws, supplemented by U.C.C. Article 5, that provide post-honor rights and remedies to aggrieved applicants who, after reimbursing their LC banks, deserve an accounting from a beneficiary who drew too much or too soon.

Accounting for LC proceeds can be difficult, particularly if the underlying contract providing for LC support is unclear about the conditions under which they may or may not be held interest-free to secure disputed underlying obligations. The U.S. Court of Appeals for the Eleventh Circuit in *Veolia Water North America Operating Services, LLC v. City of Atlanta*[62] for the second time remanded an amended judgment on contractual claims and counterclaims for recalculation of prejudgment interest attributable to an LC drawing.[63] The underlying applicant-beneficiary contract provided for interest on all underlying obligations, but did not provide clearly enough for the treatment of LC proceeds, e.g., as interest bearing cash collateral or as a non-interest bearing advance available for application by setoff in the discretion of the beneficiary. In *Veolia*, the drawing was not challenged as wrongful under U.C.C. Article 5 or under the underlying contract.

540 North LaSalle, LLC v. Inter-Track Partners, LLC[64] is another case involving the treatment of LC proceeds held by a landlord in a case in which the landlord and the tenant pursued valid claims and counterclaims. The lease agreement provided a favorable interest rate for the landlord's unpaid rent claims, whereas the tenant's counterclaims for breach of the lease agreement based on the landlord's

59. *Int'l Cards*, 2017 WL 3623684, at *3–5.

60. It appears that the parties, from the outset, treated applicant's breach of contract claim as focused on recovering consequential damages for wrongful termination of the underlying contract and its conversion claim as one focused on wrongful drawing.

61. *See, e.g.*, James G. Barnes & James E. Byrne, *Letters of Credit*, 65 BUS. LAW. 1267, 1276 n.69, 1277–78 (2010) (discussing multiple applicant post-honor claims, explaining the role of U.C.C. Article 5 in supporting post-honor accounting under the law applicable to the underlying obligations, and noting the awkwardness of relying on conversion theories "because LC proceeds may not qualify as applicant property subject to conversion").

62. No. 16-15049, 2018 WL 507170 (11th Cir. Jan. 23, 2018); *see also* Veolia Water N. Am. Operating Servs., LLC v. City of Atlanta, 546 F. App'x 820 (11th Cir. 2013) (remanding for recalculation of damage avoidance costs and prejudgment interest attributable to letter of credit drawing in 2006); James G. Barnes & James E. Byrne, *Letters of Credit*, 69 BUS. LAW. 1201, 1209 n.61 (2014) (discussing the 2013 *Veolia* decision).

63. *Veolia*, 2018 WL 507170, at *6–7.

64. No. 1-16-0481, 2017 WL 2829705 (Ill. App. Ct. June 29, 2017).

drawing and retaining LC proceeds were entitled to interest at a much lower statutory rate. The court rejected the tenant's argument that the claim and counterclaim amounts should have been offset before determining the net amount of the judgment in favor of the landlord.[65] The court accepted the interpretation of the lease agreement that permitted the landlord to be treated as *the* prevailing party entitled to its attorney's fees, notwithstanding the considerable extent to which the tenant prevailed on its counterclaims.[66] These results might have been different if the tenant had earlier demanded that LC proceeds be applied to its rent obligations as they came due or if the tenant had counterclaimed under U.C.C. section 5-110(a)(2) and sought attorney's fees as the prevailing party under U.C.C. section 5-111(e).

Whether LC rights might limit remedies for breach of the underlying obligation(s) was considered in a pre-honor case decided by the Appellate Division in New York. In *BP 399 Park Avenue LLC v. Pret 399 Park, Inc.*,[67] the court affirmed dismissal of an affirmative defense that the landlord's claims were barred because the landlord had been compensated by an LC provided under its lease agreement. The LC in favor of the landlord, which was insufficient to cover all remaining rent, did not operate under the lease as the landlord's exclusive remedy. (It is not clear whether the defendant was responsible for reimbursing any draw under the LC.)

OTHER DEVELOPMENTS

In December 2017, the EPA announced its decision, to become effective in 2018, not to issue final regulations under CERCLA section 108(b) for the hard-rock mining industry that would have included specified standby LC wording for financial assurance.[68] In May 2017, the IIBLP submitted a comment addressing the EPA's proposed wording and recommending alternative wording for standby LCs to be issued in favor of the EPA (or a trustee) based on ISP98 Model Form 11.1 (Model Government Standby Form).[69]

IN MEMORIAM PROFESSOR JAMES E. BYRNE

Jim Byrne died at home with family on July 1, 2018. His passing brought forth tributes from letter of credit bankers and lawyers worldwide, including Fred Miller (chair of the Business Law Section's UCC Committee and Executive Director of the Uniform Law Commission during the 1990's revision of UCC Article 5) and Mike Avidon (current Chair of the UCC Committee's Letter of Credit Subcommittee).

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65. *Id.* at *7–8.

66. *Id.* at *10.

67. 55 N.Y.S.3d 168 (App. Div. 2017).

68. *See* Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry, 83 Fed. Reg. 7556 (Feb. 21, 2018).

69. *See IIBLP Comment on EPA Proposed Regulation Under CERCLA Section 108(b)*, DOCUMENTARY CREDIT WORLD, June 2017, at 34.

Fred Miller's tribute aptly emphasized the real world orientation of Jim Byrne's career:

> Jim was in every sense an extraordinary individual. While he chose to pursue an academic career and his teaching and academic writing soon brought him recognition as one of the foremost attorneys in his chosen legal field of letter of credit law, Jim was not a so-called "ivory tower" academic. For example, Jim was a major force in the Institute of International Banking Law and Practice which annually conducted continuing legal education courses on letter of credit cases and developments including book materials the equal of treatises which led him to be the author of the Hawkland UCC series on letter of credit law and practice, one of the leading commercial law works, as well as the annual surveys on letter of credit law in the American Bar Association annual surveys in the Business Lawyer on the UCC and letters of credit. But Jim was not satisfied with merely discussing the law. His work, which emphasized his view that not only the law but also the practice mattered, encompassed work on the International Standby Practices (ISP98) rules and those of the Uniform Customs and Practices for Documentary Credits (UCP) and the revision of the basic letter of credit law in the United States, UCC Article 5, where he brought to the work top experts on letter of credit law and practice to advise the drafting committee of the National Conference of Commissioners on Uniform State Laws as to not only the appropriate statutory rules but also how they should interrelate to letter of credit practice. Nor were his efforts in this regard limited to the U.S. as he had an international view and worked on the United Nations Convention on Independent Guarantees and Standby Letters of Credit.

Jim Byrne could explain more about how LC bankers actually operate than any lawyer I ever met. He took his law students to New York to study bank LC operations. When he chaired the task force that launched the revision of UCC Article 5 in the 1990s, he made sure that it included non-lawyer LC bankers (who proved their worth to me and to others on the task force and again during the drafting of revised UCC Article 5).

Blessed with great energy, Jim Byrne was central to the many accomplishments in the LC field, particularly during the 1990s. (I chronicled the harmonization then of domestic and international letter of credit law and practice in *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 NW. J. INT'L. L. & BUS. 215 (1995).) Jim's crowning achievement was the International Standby Practices, which was drafted over several years with help from bankers, lawyers, and others pulled together by Jim and which he later supported with educational programs, official commentary, and ISP98 forms to assure its widespread use. He organized yearly programs in Asia, as well as Europe and the Middle East. He contributed significantly to the Supreme People's Court of China rules and provisions on independent undertakings in 2005 and 2016 and worked tirelessly to publish an annotated English translation.

The tribute to Jim Byrne from the ICC Banking Commission closed with "Jim will be missed by the international banking community worldwide." As co- author with Jim of the Business Lawyer LC survey since 1992, and collaborator or editor on most of his projects and publications since 1984, I will greatly miss him.

Jim Barnes, July 2018