

# Documentary Credit

# WORLD

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**JAMES EDWARD BYRNE**

**1945-2018**

On 1 July 2018, DCW Founder and Publisher Professor James ("Jim") Edward Byrne died after a valiant battle against cancer. The letter of credit community and all who knew and loved him mourn the loss of a great man who left an indelible mark on the industry and the lives of many. We honor and remember Jim by reprinting a small selection of his outstanding written works.

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# BYRNE TRIBUTES

## 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). 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. INTL. 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

# BYRNE TRIBUTES



Department of Policy and Business Practices

## Note to

- **Banking Commission members**
- **Advisory Board**
- **Executive Committee**

Dear all,

It is with sadness that we inform you that one of the great industry supporters, Professor James E. Byrne, passed away on Sunday, July 1 after a long battle with cancer. Jim, as he was known to most, was until recently a professor at George Mason University Law School, the publisher of Documentary Credit World and sponsor of a number of educational programs across the world. He was a strong advocate for the letter of credit and bank guarantee communities and principal drafter of ISP98. He was also involved with numerous other ICC rules, was involved in the UCC revision of Article 5 in the US as well as a chair of the American Bar Association Letter of Credit Subcommittee for many years. Jim will be missed by the international banking community worldwide.

Kind regards,  
ICC Banking Commission

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## MY FAREWELL LETTER TO JAMES BYRNE

by Dennis Noah

My Dear Friend Jim:

I knew you for well over three decades. I remember you as a man of many professional accomplishments, all of them outstanding. You were a teacher to countless students, bankers and lawyers in more countries than I can count. You were gifted with an incredible legal mind that you employed to the benefit of the world's legal and business communities. You spent countless hours sharing your experiences and talents. You did so without a thought or expectation of personal benefits. I especially respected this about you. You cared about people, particularly those you taught and employed. You never lost sight of this human aspect of your professional world. You were always mindful of people's feelings. You were kind to me when I was wrong and never made me feel badly. You did not admonish but provided kind firm guidance. I learned a great deal from you about banking law, and personal conduct. In addition, I so much enjoyed your spirited personality.

You were a giant of the international banking and legal communities. Your legacy will last for generations. A life well lived and a career that gave so much to thousands. Most of all, you were my friend. This is how I prefer to remember you. Someone once said that if at the end of a man's life he can count his true friends on one hand, he is truly blessed. I consider you one of the five in my life and honored that you accepted me as your friend. When you called me about a year ago to inform me of your diagnosis, I was very upset. You remained positive and ready to move forward into whatever the future held with minimal alterations to your life. I very much admired your courage and positive attitude during this extremely difficult time.

I first met you in the early 1980s, when you attended a Mid America Council on International Banking (MACIB) event. You interviewed me in my hotel room about the increasing numbers of court cases on letters of credit. I was never introduced to you but you appeared at my room one evening asking many questions. You said that you wanted to interview me as a future MACIB chairman for my thoughts. It was my first introduction to your quick mind. In all the years that I knew you, I never kept pace with your rapid-fire thinking. I improved over the years but I was always a step or two behind you. This became a strong learning experience for me. This was the beginning of our friendship that I will always cherish. I know heaven is a better place with you in residence. I am sure it's a lot more fascinating and animated since you moved into the celestial neighborhood.

Around a year or so after we first met, we were both attending a long-forgotten event and location. I was loudly complaining about lawyers of beneficiaries. I recall saying that these lawyers just did not understand bankers. This was especially true of terms like reasonable, assignments, transfers, choice of law, etc. Shortly thereafter you called me and asked me to go to dinner. It was just the two of us. You taught me that lawyers and bankers use the same words with very different meanings. I found your wisdom that you shared with me most enlightening. You gave me an insight early in my career that was, and I cannot stress this enough, valuable throughout my professional life.



# BYRNE TRIBUTES

Hotels! What great and fun memories! Let's talk about your hotel choices in the early days of the Institute. Jim, you were famous or better stated infamous in your selection of hotels. There is one particular hotel in New York City that was memorable. After dinner and making the rounds (on foot) of the Irish pubs with you, I retired exhausted to my room. It was about the size of two walk-in closets with a strong odor of natural gas coming from two cast iron burners. I called the front desk and they said to be sure the burner handles were completely closed. I endeavored to do so. It did not work and the smell was still strong. In a panic, I called you and said that we must evacuate as we will explode during the night. You calmly asked me: "Remind me, you do not smoke, right?" I replied that I did not. You then said: "Good, then open the windows and go to sleep. You will be fine." I did and I was. I often fondly recall and laugh about this incident. For a couple of years, I asked who picked the hotel. When told it was you, I prepared for another adventurous stay. It was always fun regardless of the hotels, especially with your calming sense of humor.

I also recall with fondness my trip to China about 15 years ago when I became your "courier". You called me and asked two questions. As a note, I observed over the years that you were prone to ask two questions, an introductory one and a second to your point. I found this an interesting technique and tried it myself from time to time with limited results. Frequently I attempted, usually without success, to determine upon hearing your initial question where you were heading. On this call your first inquiry was did I have favorable experiences with traditional Chinese herbal teas. I said that I had on occasion while traveling in China drank for various ailments. They usually tasted awful but worked for me. You then asked if I would bring home herbal tea for you that Jin Saibo would give to me during my next trip to China. Of course, I said yes envisioning a small container. On the appointed day in China, I met Jin for dinner. He arrived carrying his usual briefcase that I incorrectly assumed contained only legal documents and books. We had a nice dinner at a fine restaurant. After we finished, he opened his briefcase and piled a number of plastic wrapped bricks of smelly herbal tea on the table. I dutifully packed them in my suitcase with little remaining room for my clothes. I purchased a small bag as a carry on for my clothes that would no longer fit into my checked bag. I did not think advisable to carry the "bricks" into the plane's cabin. I was afraid everyone would pass out from the smell requiring an emergency landing. They did not and U.S. Customs were more casual that I thought they would be. I stored my open suitcase in the garage for about a month, hoping the smell would dissipate. It did not. I threw it into the trash. What a wonderful memory!

I have so many other marvelous and fun recollections about your energetic personality. I will briefly summarize a few. You were known to suddenly rise from the table in long arduous meetings. You ceremoniously sat on the floor, place your shoes neatly next to you, lay on your back on the floor and cross your hands on your chest, then close your eyes. The looks on the meeting participants who did not know you were priceless. They were not certain if to be worried or simply ignore your nap. When everyone thought you were sound asleep, you suddenly would jump up and make a salient, closing point. You certainly knew how to work a room with flair and finish a meeting with a favorable consensus. Or how you found Irish pubs no matter what country we traveled. I still have a fondness for Guinness. As we were departing from your wake, one of your parishioners suddenly materialized and unexpectedly handed me two cans of Guinness. I do not know his name nor did I discuss Guinness with him. I felt that you had directed him to hand me the cans. I felt you somehow were telling me to have a last couple on you. I can never forget your boundless energy, in particular about your favorite subject, L/Cs. You discussed them into the wee hours of many

# BYRNE TRIBUTES

mornings. You never seemed to tire. One late night or more likely early morning, we remarked how Jim Barnes could artfully rewrite a long paragraph into one meaningful sentence. We compared him to a skilled surgeon but with words. We decided to call him Doctor Barnes and this nickname carries to this day. I enjoyed every minute of the all too quick 30 plus years of our friendship. I always had marvelous and valuable times with you that I will surely miss.

In the beginning I said that a man is blessed if he can count his friends on one hand. Therefore, I decided to count you on my thumb. I believe you would enjoy this decision. However, and more to my point, the thumb is completely unique to humans. You were a scholar, teacher, legal expert, and possessed many other remarkable professional abilities. However, and most of all, you were human, completely unique, and my friend. This is how I will always remember you.

## *REQUIESCAT IN PACE*

Jim, Fr. Joe, and Notre Dame

The Funeral Mass at St. John Neumann Catholic Church in Maryland on 5 July 2018 was a beautiful and loving celebration of the life of James E. Byrne. The Mass was presided over by Fr. Joseph E. Rogers who Jim had gotten to know over the last several months of his life. At one point during his homily, Fr. Rogers reflected on a unique bond that he shared with Jim. Both men were “Domers”. That is, both are graduates of the University of Notre Dame. On one occasion when Fr. Rogers ministered to Jim in his final weeks and they prayed together, Jim sang the words of “Notre Dame, Our Mother”, the school’s Alma Mater that is dear to graduates and others with a fondness for the university. Before concluding his homily, Fr. Rogers sang the words.

### **Notre Dame, Our Mother**

*Notre Dame, our Mother  
Tender, strong and true  
Proudly in the heavens,  
Gleams thy gold and blue.  
Glory’s mantle cloaks thee  
Golden is thy fame,  
And our hearts forever,  
Praise thee, Notre Dame.  
And our hearts forever,  
Love thee, Notre Dame.*



UNIVERSITY OF  
NOTRE DAME

Written by Joseph Casasanta and Rev. Charles O'Donnell, C.S.C.

In 1930, the Alma Mater, “Notre Dame, Our Mother” debuted at halftime of the Notre Dame Stadium dedication game. The song was composed by band director Joseph Casasanta ('23) and the lyrics were written by University President Rev. Charles O'Donnell, C.S.C. ('06). Today, the song is played at the conclusion of many campus events, including commencement, Mass at the Basilica, and of course, football games.

(Source: <https://gameday.nd.edu/traditions/spirit/notre-dame-music/alma-mater/>)

## JIM BYRNE: A MAN OF EXCELLENCE

Jim wore many hats during his 72 years on earth.

**Family hat:** Jim was a passionate family man and to this day we are a very close-knit group. He was my husband of 45 years. We shared a deep bond of mutual love, respect, encouragement, affection, and friendship. He was always thankful for the smallest things. He was extremely generous and caring. I was reading the Psalms to him when he passed away very peacefully to go home to His Lord. I miss him deeply.

He was a wonderful father to our four children – John, Katie, Michael, and Jimmy – as well as a grandfather to Wilson, James, Johnny, and Caleb. He loved each one richly and uniquely. For our four adult children, Jim was the coach, confidant, and mentor. He conveyed his love of history, reading, and education to them. He modeled integrity, hard work and most of all his unique wit. (If you know Jim you know that his humor was priceless. One day you might find a six-foot giraffe with a cheery “Good morning” note in your closet!). Life with him was never dull! I am so delighted that each one of the children were able to spend private time with him at the end, holding his hand and speaking of their love and gratitude to him.

**Professional icon:** Jim graduated from Notre Dame and Stetson Law School, both at the top of his class and then studied for a further degree to be equipped to teach Law. He is a teacher and scholar at heart. As a Law Professor for 35 years, he taught thousands of students. He believed they deserved a rigorous education in the Law. He prepared for each class as if it was the first time. He deeply cared for his students, advising them both professionally and personally. Some shared that he was the reason they continued their law journey. Many students interned for us over the years in our non-profit institute. Jim was a demanding but compassionate mentor. Some became friends and some became sons to Jim even to this day.

Jim was well respected at the top of his field as an international leader. Jim being Jim, his wit was never far away. Once in a prestigious conference, he brought in a six-foot stuffed moose – “Mr. Moose” – dressed in a suit and tie, introducing him as the Director of the Institute. Another time Mr. Moose was dressed for vacation in Hawaiian clothes. Who else but Jim would risk such a thing?

We have received many emails and calls literally from around the world from friends and colleagues of 15, 20, 30 years. Many wrote “The International banking community has lost a giant, who will be greatly missed”; “Jim was a star in our field”; “a coach”; “he was no ivory tower scholar who had a gift for conveying his insights to us”. What touched me the most was that many shared that above all, “Jim was my friend” and “he deeply cared about me”.

Jim lived out his quiet faith in the Marketplace. During his last year fighting cancer, he grew very close to God. I had permission to bring him Holy Communion most days and we prayed together often. He never complained or pitied himself. Often he encouraged me to have hope.

Jim was an excellent man. We miss him greatly but know that he is happy, pain-free, and enjoying his reward in heaven.

For all those who have reached out to us, thank you for your many notes of condolence.

Sincerely,

Maria



# BYRNE TRIBUTES



**December 2016 Byrne Family Photo:** Laura Byrne (with James R. Byrne); Michael P. Byrne; Dawn Byrne; James E. Byrne; Wilson J. Cissel; Maria T. Byrne; James E. Byrne Jr.; Katie Cissel; John M. Byrne Sr. (with John M. Byrne Jr.)



**December 2017 Byrne Family Photo (Back Row):** James Byrne; Maria Byrne; Katie Cissel; Dawn Byrne; John Byrne.  
**Front Row:** James Byrne Jr.; Wilson Cissel; Michael Byrne

## JIM BYRNE: A MAN OF MANY GIFTS

by Christopher Byrnes

*Documentary Credit World*, Institute of International Banking Law & Practice

I am blessed to have known and worked with Jim Byrne for over 20 years. Shortly after the launch of *Documentary Credit World* in October 1997, the Institute of International Banking Law & Practice was seeking someone to take over *DCW* managing editor duties and coordinate programs and publications at the Institute. Imagine my surprise early in the interview process with Jim's second in command that the Institute Director's last name was nearly identical to mine. Growing up, I had known of others with the English/Scottish spelling (Burns) but had never met a non-relative with the Irish variation of the surname. Through the years, plenty of LC professionals have thought that I am one of Jim's sons. I am proud and privileged to be thought of in that way.

From the outset, it quickly became clear to me that Jim was a special person and supremely talented man. At the time I came on board, the Institute staff was scrambling to keep up with Jim's work pace during production of that year's 500-page Annual Review book. I joined the mix and was overwhelmed. At some point late in the process, a ZipDisk in my possession containing the bulk of material we were relying on for this volume was suddenly blank. Had I ruined the project and put us hopelessly behind schedule? I despaired. Jim calmly assured me things would be ok. He was right.

A month later, a few of us from the Institute accompanied Jim to New York where he had a weeklong series of pivotal meetings with prominent LC specialists from the US and Europe to complete the final phases of drafting the International Standby Practices (ISP98). Intense discussions for five straight workdays in meeting rooms gave way to equally significant conversations for several hours each evening at the local Irish pub. Whether over a projector or a pint, Jim's mind was laser-focused on the task at hand and advancing understanding of LCs. ISP98 would become his crowning achievement.

While dedicating countless hours to the Institute since its formation in 1987, Jim was a full time faculty member at the George Mason University School of Law up to his retirement in 2016. Professor Byrne prepared for each class as if he was the diligent student. He took his teaching responsibilities seriously and challenged his students in a way that would properly prepare them for their future in the legal profession. Each winter and summer, several law students would be offered internships at the Institute. I always marveled at Jim's patience and unselfishness to train and work with each group of interns. He took great pride and satisfaction in learning of the professional successes achieved by former interns of the Institute.

After six years conducting the Annual Survey of LC Law & Practice event in the US, Jim expanded the Institute's conferences to Europe in 1999. Annual programs then followed in Hong Kong and Singapore (2000), China (2002), the Middle East (2004), and other regions. Fitting of his classroom teaching style, these programs were carefully designed to maximize interactive discussion. Jim was not interested in any one individual dominating the room. While Jim graciously shared his

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knowledge and insights, he mastered the skill of listening intently to others. He had immense respect for bankers and the difficult decisions they face on a regular basis. Wherever he went, Jim sought to elevate the level of proficiency among all LC practitioners. His commitment to the LC industry was legendary and infectious. Following one Institute event in Seoul, I recall the entire room of bankers lining up for Jim to autograph their personal copies of that year's Annual Survey book.

As committed as he was to his life's work, Jim was devoted to his family. No matter the myriad of outstanding projects and pressing obligations he would be facing, Jim found a way to set work aside and find time for his family. Jim's wife, Maria, who has worked for the Institute for many years, lovingly understood and accepted the zeal he had for his LC work. Their four children literally grew up with the Institute and at one point or another as young professionals, John, Katie, Michael, and Jimmy all worked for the Institute in a full time capacity for some years.

Even as his health worsened this year, Jim continued to give everything he had to the letter of credit community. He persevered in writing. In March, Jim traveled to Charlotte where he led the 2018 Americas Annual Survey conference and personally recognized as "LC Lawyer of the Year" Carter Klein of Jenner & Block LLP, who continues his recovery from a serious accident. In April, Jim attended the ICC Banking Commission Annual Meeting in Miami and contributed comments during discussion of ICC Opinions. At the end of May, Jim flew to London to participate in panel discussions during a trade finance compliance conference co-sponsored by the Institute.

On 28 June, Institute colleague Justin Berger and I visited Jim in the hospital. Although I did not realize it that day, it would be my last time with Jim. I take great solace knowing that Jim had drawn closer to his Catholic faith. During my visit, I prayed with Jim. Among the prayers, I recited a special one titled "What Should I Fear?" that I had memorized in 2001 after losing a family friend. For his many gifts and for helping others cultivate their gifts, Jim will be remembered.

What Should I Fear?

No matter what losses or broken dreams may lie in my destiny, whatever burdens shall be my fate, I will meet each challenge with dignity and resolve. For God has given me many gifts and talents, and for each one that I may lose, I will find ten more that I never would have cultivated were the course of my life to always run smoothly.

And so, when I can no longer dance, I will sing joyfully; when I haven't the strength to sing, I will whistle with contentment; when my breath is shallow and weak, I will listen intently and shout love with my heart; and when the bright light approaches, I will pray silently until I cannot pray; alas, it will then be time for me to go to the Lord.

And what then should I fear?

Author: David L. Weatherford  
(Source: [www.davidlweatherford.com](http://www.davidlweatherford.com))

# BYRNE TRIBUTES

Professor James E. Byrne: His Spirit Transcended Us and Lives On!

As we go through this life we have countless personal interactions but at the end of the day there is only a handful of people who truly inspire us – Jim was one of these specially gifted people.

My first encounter with Jim goes back to 18 September 1992 which happened to be my birthday. We met in an Irish Bar in New York where I had a copy of UCP 400 in my pocket - I wanted to get some answers from the person known as the world's leading legal expert in letter of credit law. Jim was ready and willing to spend some hours engaging with an unknown but eager entity, sharing his talent of challenging conversation, always delivered with humor and warmth which was the hallmark of Jim's special way with people.

This encounter was the source of Jim on many occasions at conferences all over the world delivering the satirical line that he first met Mr. O'Brien when he was studying at the Bar in New York.

Since that first meeting, I have learnt so much from Jim: legal; practical; and most of all how to communicate with people. Jim has been the true source of my passion for my work in international trade & finance. His immense knowledge, his energy, and especially his kind-hearted wit was infectious in the most positive way imaginable. His spirit transcended all cultures, races, and backgrounds and has had an uplifting effect on everyone he met.

Jim brought us together.

Jim's writing is a true gift and an invaluable legacy to the international trade finance community. Since Jim passed I am again reading his many articles and books. As I now read ISP98 from cover to cover, I hear his voice and I am once more learning with new insights from the true master of letter of credit law and practice.

Jim's spirit lives on.

While Jim is sadly missed, we must continue our journey together and push forward the important work pioneered by Professor James E. Byrne.

A handwritten signature in blue ink, appearing to read 'Jim', on a light yellow background.

Vincent O'Brien  
Associate Director  
Institute of International Banking Law and Practice (IIBLP)

# BYRNE TRIBUTES

Jim Byrne: Like a Brother to Me

In mid-1990s, when I was working with United Overseas Bank Singapore, I received a phone call from someone identified himself from George Mason University, USA. It was Professor James Byrne. He went to Singapore with James Barnes, a lawyer from Chicago. He called to meet me and Lim Lay Hock from OCBC Bank.

In our meeting, he told us his plan to have letters of credit, standbys and independent guarantees events in Asia and invited us to join him. I saw his wisdom and passion in this field and accepted his invitation. Since then, we started the Annual LC Surveys and Guarantee & Standby Forums in Asia.

He is my family's friend and my mentor. Maria, his wife, told me that he treated me like his younger brother. Without him, I may not be who I am today. We may not be able to find someone like him, passion and in-depth knowledge of LC law and practice.

I last met him in Washington DC and Miami last April. We travelled together from Washington DC to Miami for ICC Banking Commission. We had very good fellowship all these days.

Two weeks before the Annual LC Surveys in Asia, Chris informed me that Jim would not be able to join us in the Asia events. I sensed he was seriously ill when my e-mails to him were not answered. In the past, he answered my e-mails without delay. I could not believe when I heard that he passed away on July 1, 2018.

Jim, our friends, my family and I really miss you.

– SOH Chee Seng  
Singapore

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Jim Byrne: The One Who Understood the Standby LC and Guarantee Mystery

The first time I met Jim was in the Spring of 1999 in London. I remember like it was yesterday. I was utterly impressed with his work and knowledge and I constantly tried to think of topics to discuss with him, nervous of saying the wrong thing. As it would turn out, there was nothing to be nervous about or afraid of. Within 15 seconds, it was like Jim and I had known each other our entire lives and this is what it was like until the end. I'll never forget all his amazing stories or what he taught me; in work and in life.

Jim, you always spoke about the mystery of Standby Letters of Credit and Guarantees. We all knew it before you left, but I want to say this to you now: That you were and always will be the one who was able to understand its mysticism. Your knowledge and your sense of spirit makes me overwhelmingly grateful to have known you.

You will be deeply missed.

Yours truly,

Lena Andersson  
Stockholm, Sweden



# BYRNE TRIBUTES

## JAMES E. BYRNE: I NEVER STOPPED LEARNING FROM HIM

I met Jim Byrne 30 years ago this year when he was involved with bringing the three “CIB’s” together under their merger to create the US Council on International Banking. Shortly after I became the President and CEO of the USCIB and then, after a name change, the IFSA. Fortunately for me, this was the beginning of a long friendship and working partnership. Jim was a trusted advisor to the IFSA and the ICC and was instrumental in much of the work of both organizations. It is impossible to list here all of Jim’s accomplishments such as the creation of ISP98, his work on ICC rules creation and revisions, the revision of UCC Article 5, UN Convention on Independent Guarantees and Standby Letters of Credit and his education programs held throughout the world, are only a few.

Perhaps his most important accomplishments, which had the most impact on the legal and banking industries, were the creation of *Letter of Credit Update* and *Documentary Credit World* and the Institute of International Banking Law and Practice. Both gave him a platform for continuing education and influence over the banking industry. The IFSA was pleased to be his partner in *Documentary Credit World* (still published in partnership with BAFT). What led to all of this was his desire and lifelong work to bring together the legal community with practicing bankers around the world. He inspired many lawyers and practitioners to learn from and appreciate each other’s work understanding of the product of independent undertakings and other international banking products. Personally, we worked together on many projects and I never stopped learning from him. His work has impacted the international banking business in many ways and has, I believe, been a driving force behind the harmonization of the legal and practical areas. For that, the industries, both legal and banking, owe Jim our gratitude. I now and forever will miss his trusted counsel, friendship and ever welcoming smile.

– Dan Taylor  
July 2018

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### Additional Tributes

Written tributes continue in this issue at page 62. Many other public condolences have been expressed at [james-edward-byrne.forevermissed.com](http://james-edward-byrne.forevermissed.com). The Byrne family is grateful and appreciative of the outpouring of emails, calls, and messages offering condolences for Jim’s passing.



### Additional Writing and Work

Several important articles of Jim Byrne follow in this issue at page 15. Readers interested in further information about the [writing and work of Professor James E. Byrne](#) may visit the IIBLP website.

### DCW’s 1997 Debut

After creating *Letter of Credit Update* in 1985 and serving as its Editor-in-Chief for 12 years, Professor James E. Byrne left the publication and embarked on launch of an innovative new monthly journal. *Documentary Credit World* debuted in October 1997. Reprinted on the following page appears the “Lowdown from the Editor” from that inaugural issue in which Professor Byrne outlined his vision for *DCW*.

*Documentary Credit*  
**WORLD**

# LOWDOWN FROM THE EDITOR

Professor James E. Byrne, Editor in Chief

## OLD WINE IN NEW BOTTLES

*New Beginnings:  
Continuing the Vision*

**T**welve years ago, in August 1985, I assembled the inaugural issue of *Letter of Credit Update*. At that time, I envisioned a publication which bridged banking practice and law, which contained the in-depth analysis which should characterize serious academic work without the pseudo-intellectual apparatus which usually attends such endeavors, and which, above all, served as a forum for the critical issues in the letter of credit community.

To accomplish that end, I associated myself with the leading figures in law and practice, and made the publication a vehicle for their views. Together, we supported reform as well as better codification of letter of credit law and practice, sometimes in error about specific provisions but always questioning, analyzing, and revising until we achieved approaches that commanded consensus and were effective.

Through this collaboration, we have had a significant impact and influence upon every major effort over the past decade, and have moved into the public forum many of the deliberations which otherwise would have been lost. The litany is long and noteworthy, starting with calls for revision of UCC Article 5, reformulation of the standard of examination, an international Convention which accommodated both independent guarantees and standbys, regulatory interpretations which reflected current practice, law which deferred to and encouraged sound practice, arbitration, standby rules, and the first warnings of the "prime bank" scams. In every major reform over the past decade (and the list is long) our journalistic collabo-

ration has played a not insignificant part. Indeed, if imitation is the sincerest form of flattery, the emergence of two other publications in the same mold suggests that we had achieved a certain measure of success.

This collective endeavor starts afresh in *Documentary Credit World*. I have reassembled the leading figures as the new editorial advisory board, and obtained access to every development in the field. *DC World* thus carries on the collaboration in a new format and in circumstances in which our entire publishing resources can be used to improve the effort.

As with all such beginnings, there are some new features to this endeavor. In the first place, the partnership which we have maintained and fostered with the U.S. Council on International Banking has now been formalized. No organization in this field has ever commanded such resources and placed them at the service of the international banking operations community for the good of the letter of credit community. Truly international in outlook and fact (more than half of its members are not US banks), the USCIB has tirelessly devoted itself to the encouragement of sound rulemaking. The features on the USCIB in this issue highlight this role. We are pleased to announce that future issues will contain a mini-USCIB newsletter highlighting its current projects.

In the same vein, this new publication will endeavor to present fully developments in the US, obviously of importance throughout the world, while cultivating a truly international outlook. To that end, efforts are now underway to strengthen links with

the Asian letter of credit community, truly the most dynamic in the world, and to deepen those with Europe, the Middle East, the Americas, and Africa. In addition to regular features, each month *DC World* will focus in-depth on one issue or topic through articles, interviews, and reports. To inform you about us and your fellow readers, we will regularly profile both. In addition, we will take advantage of the wonders of electronic communication to make available exclusively to our readers through our website ([www.letterofcredit.com](http://www.letterofcredit.com)) the full texts of the materials about which we report and which we will summarize in our pages.

Thus, the vision which guided us over the past decade is realized and fulfilled in *Documentary Credit World*. We pledge to inform, to prophesy, to alert, and to caution. We will not fear to challenge any group or organization, whosoever they may be, should their conduct undermine the integrity of the letter of credit but we will seek to promote harmonization and cooperation among all elements. In espousing the positions we support, we pledge to provide a forum for all viewpoints and welcome adverse comments and criticisms. The exercise is neither doctrinal nor personal but an effort to grow and improve the product in a professional manner. In this spirit, we welcome all readers not as passive objects but as joint collaborators in this ongoing endeavor. It is our sincere hope that the relationships which have been formed in the past and are being formed now through this publication will foster renewed understanding, cooperation, and mutual growth. ■

*Thus, the vision which guided us over the past decade is realized and fulfilled in Documentary Credit World.*

## E-COMMERCE AND LETTER OF CREDIT LAW AND PRACTICE

by James G. BARNES & James E. BYRNE\*

### I. Introduction

Much in the current movement to realign commercial law in light of the e-commerce revolution can be traced to the processes of simplification and harmonization of the procedures surrounding international trade. They involved decade-long efforts to identify and articulate practices, and to develop formulae and forms that reflected these practices.<sup>1</sup> This convergence of rulemaking and trade simplification occurred at an early stage in the field of letters of credit (LC) because of its central role in international trade and commerce.

Indeed, in many respects the LC lends itself to a paperless transaction. The undertaking that it embodies is dematerialized. Unlike negotiable instruments in which the obligation is merged with the paper, the obligation of an issuer of a LC is not reified and honor is not necessarily, or even typically, conditioned on presentation of the original LC. Nonetheless, the LC is an undertaking conditioned on the presentation of documents. As a result, it has one foot in the world of electronic commerce and one foot in the world of paper documentation. The question for today is what efforts are being made to put both feet squarely in the world of e-commerce. The question for tomorrow is whether this product of nineteenth-century mercantilism has any long-term future in the twenty-first century.

### II. The Current LC Regime

In terms of issuance and payments, electronic letters of credit (eLC) were in place decades ago. The presentation of paperless documents under LCs is still developing.

#### A. Issuance

By the end of the nineteenth century, LCs were regularly issued by telegraph, and major issuers developed code books containing shorthand expressions in order to reduce the cost of telegrams. In

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\* James G. Barnes is a partner of Baker & McKenzie in Chicago, Illinois. James E. Byrne is Director of the Institute of International Banking Law & Practice, Inc., Editor-in-Chief of *Documentary Credit World*, and teaches law at George Mason University. Both are former chairs of the Subcommittee on Letters of Credit of the Uniform Commercial Code Committee of the ABA's Section of Business Law. Professor Byrne assumed primary responsibility for this Article. He also serves as the Reporter of the eUCP Project. Both authors have played important roles in connection with the reform of letter of credit law and practice on the national and international levels, including U.C.C. Article 5, the International Standby Practices, and the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The support of George Mason University School of Law in the research necessary to prepare this Article is gratefully acknowledged.

1. The extraordinary impact of international LC practice on domestic LC law is set forth in James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 Nw. J. Int'l L. & Bus. 189 (1995) and James G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 Nw. J. Int'l L. & Bus. 215 (1995).



# FEATURE: BYRNE WRITINGS

the early 1950s, the prior version of U.C.C. Article 5 provided for telegraphic issuance and signature of LCs.<sup>2</sup> After World War II, telegraph came to be displaced by telex and, with the development of SWIFT,<sup>3</sup> the inter-bank communication network, by a secure, closed system. In addition, in the past fifteen years, many major banks began developing computerized links to their major customers enabling them to initiate issuance of LCs on their own terminals and processing them through the issuing bank with interface to the bank's SWIFT terminal. Originally, these links were based on special proprietary systems with attendant start-up costs. Recently, banks have been using the Internet for bank-customer links. As a result, virtually all LCs have an electronic component in their issuance, and the vast majority are entirely electronic up to the point of transmission to the beneficiary.

The remaining barrier to electronic issuance is the linkage with the beneficiary. Historically, a local advising bank has fulfilled the role of communicating the LC to the beneficiary. The adviser provides practical assurance that the LC is authentic. While similar assurance is theoretically possible in a direct issuer-beneficiary communication, there is currently no practical or cost-effective means in place to deliver it. Until such time, or until the risks inherent in direct communication are known and acceptable, the last step in electronic issuance is unlikely to be taken. When it is taken, the role of advising banks as advisers is likely to disappear, although there may well continue to be a place for a local bank to receive presentation or make payment.<sup>4</sup> Questions of choice of law are thought to be settled with respect to disputes between either the issuer or confirmer on the one hand and the beneficiary on the other hand on the basis of the place of issuance or confirmation.<sup>5</sup> The global network of banking, however, may raise questions about where is the place of issuance of an e-credit, at least where the credit does not recite the place of issuance or confirmation, or that recital is not given effect on its face.<sup>6</sup>

## B. Payments

As with electronic issuance, electronic payment is not new to the LC field. Fund transfers have been possible and conducted since the early twentieth century. Transfers are facilitated by the global payments system linking all the major banks in the world through New York and other international money centers, and have become the norm by which LC payments are made.

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2. Prior U.C.C. § 5-104(2) (1992) provides that “[a] telegram may be a sufficient signed writing if it identifies its sender by an authorized authentication. The authentication may be in code and the authorized naming of the issuer in an advice of credit is a sufficient signing.” Arguably, this provision is one of the first express statutory recognitions of electronic writings and signatures.

3. The Society for World-Wide Inter-bank Financial Telecommunications (SWIFT) is a private international cooperative society of over 2,500 banks and is headquartered in Belgium. It transmits financial messages. See Swift, <http://www.swift.com> (last visited Feb. 3, 2001).

4. The relevance of such banks is also impacted by the global consolidation of international banks through mergers and acquisitions. It is increasingly unlikely that an issuer will not have a presence in a local market.

5. Prior U.C.C. §§ 5-116(a)-(b); U.N. Convention on Independent Guarantees and Stand-by Letters of Credit, G.A. Res. 50/48, U.N. GAOR, 50th Sess., arts. 21-22, U.N. Doc. A/RES/50/48 (1995).

6. To date, however, there has been little concern or will to address this issue through rulemaking, a situation that will probably continue until the LC community is faced with a particularly unfortunate and expensive judicial decision that runs contrary to its expectations.

# FEATURE: BYRNE WRITINGS

## C. Examination of Documents

The modern business environment of 24/7/365 is a real possibility in the examination of documents presented under a LC. Driven by market leaders such as Citibank, documents are examined on a continuous basis throughout the world. This step is made possible by establishing processing centers in different time zones and scanning documents that are then forwarded as one center closes and another opens. What is then examined is an image. While only a few banks are in a position to create similar systems, it is likely that, except for certain regional markets, the processing of LC documents will gravitate to the banks able to forge strategic alliances or to build and maintain such facilities. The operational risk for such a system is the need to “eyeball” the originals for information that would not be apparent on the scanned version such as superimposition of data.

## D. Presentation of Documents

What is missing in current eLC practice is a provision for the electronic presentation of documents. On the whole, it is paper documents that are presented under LCs. There are important reasons and plausible explanations for the failure to electrify LC presentations. Many of them can be attributed to the transactions that give rise to LCs. For commercial LCs that support international trade, many of the documents to be presented must be in paper or original form to enable the applicant to obtain possession of the goods from carriers or warehousemen or to pass governmental tests necessary to import them. The absence of secure links between the issuer and the beneficiary or issuer of the documents also poses obstacles. Some issuers of commercial documents have not developed formats that are designed to be issued in an electronic format. Inertia is also a factor.

That is not to say that there are no current electronic presentations; merely that they are the exception. There is no inherent reason in the nature of a LC why a presentation cannot be electronic. But LC practice is grounded in a paper mentality. UCP500,<sup>7</sup> the international set of rules for commercial LCs, does not even expressly refer to paper, since it takes a paper presentation for granted. It is implied, but not stated, that presentation by an electronic medium would not comply unless expressly permitted by the terms and conditions of the credit.

There are two common situations where non-paper presentation is contemplated under current LC practice. Some LCs permit presentation by telefax, especially where only a demand is required or where time is a critical factor, such as for LCs backing payment of margin calls for commodity exchanges. In addition, where the beneficiary is another bank and the only required document is a demand, LCs routinely permit drawings by electronic means, such as a SWIFT message.

Notably, the LCs involved in these situations are standby LCs. Unlike commercial LCs, standbys rarely require presentation of documents that have inherent value. As a result, they are particularly well suited for electronic presentations. The rules of practice created for standby LCs, the International Standby Practices (ISP98),<sup>8</sup> provide that the normative medium for presentation under

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7. See ICC Uniform Customs and Practice for Documentary Credits, ICC Publication No. 500 (rev. 1993) [hereinafter UCP500].

8. See International Standby Practices, ISP98, ICC Publication No. 590 (1998) [hereinafter ISP98]; see also Institute of International Banking Law and Practice, 2001 Annual Survey of Letter of Credit Law and Practice, at <http://www.iiblp.org> (last visited Feb. 3, 2001). ISP98 is available for purchase through the Institute of International Banking Law and Practice.



# FEATURE: BYRNE WRITINGS

ISP standbys will be paper with the exception of a situation where only a demand is required and it 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 ... .”<sup>9</sup> As explained in The Official Commentary, this rule “reflects the common practice of permitting beneficiaries linked to the issuer by methods or systems which permit authentication to make drawings by such means ... . In such situations, the rule reverses the general norm, permitting electronic presentation unless the standby prohibits it.”<sup>10</sup> In addition, the ISP accords the issuer discretion to accept an electronic presentation from a beneficiary who is not linked to it by authenticated means although the issuer bears the risk that the presenter is the true beneficiary.<sup>11</sup>

The ISP also encourages electronic presentation by providing an optional glossary of terms that can be incorporated into standby LCs intended to permit electronic presentations. In ISP98 Rule 1.09(c), definitions are given for “electronic record,” “authenticate,” “electronic signature,” and “receipt.”

While these provisions represent an important step forward, they do not provide a clear distinction between telefaxes and the electronic transmission of data, and they leave many other important issues to the actual drafting of the text of the standby itself.

### III. Developments: eUCP

The recent e-commerce revolution will likely accelerate electronic presentations under letters of credit and the dematerialization of the documents used in trade. The principal challenges for electronic documents are government-generated documents, documents mandated by governments for export, import, or approval, and documents that embody rights with respect to property. Recent years have witnessed an acceleration of efforts on behalf of many governments to remove paper obstacles to trade and commerce in their regulations, and this process is accelerating. On the document-of-title front, SWIFT has joined with transport groups in the Bolero project to create a system by which title can be transferred by non-paper means pursuant to private rulemaking.<sup>12</sup>

In light of these developments, the LC community through the Commission on Banking Technique and Commerce of the International Chamber of Commerce has begun to develop rules for the electronic presentation of documents. To be known as the eUCP, these rules are intended to supplement UCP500 where a credit is issued subject to them. While the project is still underway at the time that this article is being written, it has yielded important insights into the electrification of

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9. Id. R. 3.06(b).

10. James E. Byrne, *The Official Commentary on the International Standby Practices 110* (James Barnes ed., 1998).

11. ISP98, *supra* note 8, R. 3.06(b)(ii), 3.11(c).

12. See Bolero: The Bolero Project, in *1998 Annual Survey of Letter of Credit Law & Practice* 389 (James E. Byrne ed., 1998); *The Bolero System: Paving the Way for a Paperless Future*, *Documentary Credit World*, Apr. 1997, at 16-22; see also Bolero.net, <http://www.bolero.net> (last visited Jan. 15, 2001).

# FEATURE: BYRNE WRITINGS

presentation of documents that have overarching significance for rulemaking in the brave new world of e-commerce.<sup>13</sup>

The eUCP project emphasizes the considerable significance of rules of practice for commerce. While legislation and regulation have their place, it is the formalized practices of the commercial community that will have the most significance for day-to-day commerce and will provide the needed flexibility to cope with the rapid pace of technological change. Contrary to the musings of certain doctrinaire theorists what is needed is not less lawmaking, but wise lawmaking with a realistic allocation of roles, with law deferring to the practical management of business affairs with sound rulemaking efforts and encouraging such efforts.

In any such effort, it is usually necessary to consider whether to develop rules exclusively for electronic activity or to address situations where both paper and electronic activity will occur. Wisely, the eUCP project has recognized that the current state of technology renders a dual approach essential if the project is to have any practical value, since there are irreducible paper documents in some situations. The rules address situations where both electronic and paper presentations are permitted under the same credit. Of course, such an approach adds considerable complexity to the exercise.

In considering the scope of the rules, it also becomes necessary to consider whether they should encompass only the electronic transmission of electronic data or also other technological approaches such as imaging or telefaxing. In the opinion of the Working Group, the latter technology presumed the existence of a document that was being scanned and transmitted, whereas the former involved situations where the document existed only in an electronic modality. Because of concerns in an LC context with the originality of documents, it was thought preferable to confine the eUCP to circumstances where there was only an e-document and no paper precursor.

A considerable portion of any effort at rulemaking for e-commerce must necessarily be devoted to linguistic concerns. One of the issues that must be addressed is whether to harmonize the definitions of inevitable terms such as “writing,” “signed,” and “document” with other international efforts at law or rulemaking. Wisely, the Drafting Group decided wherever possible to align its usage with important international efforts, particularly those of UNCITRAL. Other terms that have peculiar meaning or significance for letter of credit practice, such as “original,” “on its face,” “apparent,” or “superimposed,” also have required consideration. Several of these terms relate to fundamental principles of letter of credit law and practice, and in particular the independence of the credit transaction from the transaction that gave rise to it. In this respect, the increased possibility of authentication of sender, transmission, and of the contents of the data transmitted pose important questions and challenges to the role and obligations of banks in the LC transaction. While they offer important tools to combat commercial fraud (for example, the ability to check Lloyd’s Directory automatically with respect to the registry of a named vessel and its location on a certain date), they also call into question the meaning of the independent nature of the LC transaction in the eLC.

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13. The project is under the co-chairmanship of Dan Taylor, President of the International Financial Services Association and René Müller, Vice President, Credit Suisse First Boston. The members of the Drafting Group are: James E. Byrne, Bill Cameron, Neil Chantry, Carlo Di Ninni, Winfreid Holzwarth, Ron Katz, Laurence Kooy, Liu Yun Fei, Fredrik Lundberg, Salvatore Maccarone, Vincent Maulella, Paul Miserez, Vincent O’Brien, and Art Thomas. Although drafts have not yet been made public, information will be available through the International Chamber of Commerce at <http://www.iccwbo.org> (last visited Feb. 3, 2001). Completion of the eUCP is expected during the year 2001.

# FEATURE: BYRNE WRITINGS

The eUCP rules must address certain aspects of normative conduct of the parties affected by e-presentation. In a paper regime, all documents are expected to be presented at the same time unless the credit permits otherwise. In an e-presentation, it is not possible to present all documents at the same time because the senders may be different entities and they may be sent by the same sender in different files. Where the presentation combines paper and electronic documents, these problems are compounded. As a result, it will be necessary for banks permitting e-presentations to archive presentations. It is also necessary to determine when a presentation occurs in the sense that the bank is required to examine it and the time to do so begins to run. This point in time has enormous significance for LC practice because, under mercantile practice, a bank is precluded from raising objections based on discrepancies that it has not timely raised. Under paper practice, that time starts when the documents are received. The burden is on the bank to inform the beneficiary that the presentation is incomplete. In an e-presentation, it will be necessary that the beneficiary or its document-traffic manager inform the bank when the presentation is complete.

It is also necessary to consider whether the electronic presentation of documents mandates shortening of the time in which documents may be examined by banks, with the draconian consequences of preclusion attendant on a failure to act in a timely manner made even more pressing.

Since LCs have been important components in trade finance, historically through the negotiation of time drafts and through the creation of bankers' acceptances, it remains to be seen whether LC practice can accommodate a draft-free world of trade. The concerns, of course, are the protection of nominated banks that act pursuant to their nomination in financing an apparently complying presentation under another bank's LC. In the deferred payment undertaking, the LC community has an ideal vehicle to offer the commercial world. These undertakings are the functional equivalent of bankers' acceptances without the paper component. Although this reality is embraced in rules such as the ISP,<sup>14</sup> it may take time (and perhaps legislation) before paper-minded courts can adapt themselves to the new world of e-trade.<sup>15</sup>

## IV. Parallel Developments

In addition to such supplements to classical LC practice,<sup>16</sup> the e-revolution has spawned a wide variety of new products currently in various stages of roll-out. Some of these products, such as LCconnect, seek to provide a market in which applicants, beneficiaries, and banks can bid for LC issuances and confirmations, while others, such as QualityLC, attempt to improve the process of document issuance and presentation.<sup>17</sup> Other initiatives such as bolero.net, originalsonline, and

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14. ISP98, *supra* note 8, R. 5.03. Rule 5.03 recognizes that the obligation of the issuer or confirmer arises on the failure to give timely notice of dishonor or acknowledgment of a presentation under a deferred-payment undertaking.

15. See Revised U.C.C. § 5-109(a)(1), which protects assignees of deferred payment obligations like holders of accepted drafts. Lacking statutory guidance, the English courts do not protect assignees of deferred obligations incurred under LCs. *Banco Santander SA v. Banque Paribas*, [1999] 2 All E.R. 18 (Comm) (aff'd *Banco Santander SA v. Bayfern Ltd*, C.A. Feb. 25, 2000).

16. ICC Publishing has joined in a venture to make its rules and products more readily available to the international community in DC-PRO at <http://www.dcpprofessional.com> (last visited Jan. 15, 2001).

17. See LCconnect, <http://www.lconnect.com> (last visited Jan. 15, 2001); Quality Letters of Credit, Inc., <http://www.qualitylc.com> (last visited Jan. 15, 2001).

# FEATURE: BYRNE WRITINGS

SWIFT,<sup>18</sup> to name a few, seek to replace the mails and courier services with secure and reliable Internet transmission of electronic records. Taking the eUCP's coverage of electronic presentation of documents under LCs one step further, @globaltrade offers other payment obligors in addition to banks. Other products would compete with the LC or attempt to reach markets not currently serviced by LCs, typically for reasons of price. Some of these cater to business-to-business (B2B) exchanges, while others are directed to the marketplace at large, and include Ariba,<sup>19</sup> Commerce One,<sup>20</sup> escrow.com,<sup>21</sup> Tradenable.com,<sup>22</sup> and TradeCard.<sup>23</sup> It remains to be seen whether those products that would compete can offer the assurance that has been provided by LCs and whether they will attract similar regulatory attention.

## V. Reflections

The LC and the system of correspondent banking on which it is founded face critical challenges in the age of e-commerce. Increased mechanical creation of documents will inevitably reduce (but probably not eliminate) discrepancies in documents. The consolidation of banks will reduce the need for confirming and negotiating banks. The inability of courts to align the rule of strict compliance with typographical, irrelevant, and extraneous errors, and differences between documents themselves and the terms of the LC, calls into question the very efficacy of the commercial LC practice and has driven many users to commercial standbys instead because of their relative simplicity.

All of these considerations and many more suggest that the LC of the twenty-first century will differ in important ways from its predecessor, the classical commercial LC. Nonetheless, basic fundamentals in trade suggest that LCs will be around in some form for the foreseeable future. As long as parties are not prepared to exchange goods for payment without the use of a third-party carrier and a trusted intermediary, either to effect payment or to back up the promise to pay based on something less or other than inspection and acceptance of the goods by the buyer, there is a need for an LC-like device. As long as parties need trade finance, there is a possibility for financing intermediaries to assess one party's creditworthiness, provide funds, and examine various indicators of apparent performance by the other party. LCs can admirably and efficiently serve these functions. If, through the inflexibility or inattention of the LC community, the LC in its present form should fall into disuse or disrepute, it will remain for a future generation to reinvent it. ■

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18. Bolero.net, supra note 12; Originals Online, <http://www.originalsonline.com> (last visited Jan. 15, 2001); SWIFT, supra note 3.

19. See Ariba, <http://www.ariba.com> (last visited Jan. 15, 2001).

20. See Commerce One, <http://www.commerceone.com> (last visited Jan. 15, 2001).

21. See escrow.com, <http://www.escrow.com> (last visited Jan. 15, 2001).

22. See Tradenable, <http://www.Tradenable.com> (last visited Jan. 15, 2001).

23. See TradeCard, <http://www.tradecard.com> (last visited Jan. 15, 2001).

## TEN MAJOR STAGES IN THE EVOLUTION OF LETTER OF CREDIT PRACTICE

by Professor James E. BYRNE

The UCP is a formulation of standard international letter of credit practices. Its principal characteristics are that it is:

- Private rulemaking as opposed to legislative or regulatory;
- Evolving with standard practice;
- Flexible in that it can be varied by the terms of the undertaking;
- Universally recognized as the source of rules for commercial letters of credit.

Where there are positive laws (such as the UN Convention on Independent Guarantees and Standby Letters of Credit or U.S. UCC Article 5) or court decisions, they tend to defer to the UCP.

What is of most interest in understanding the UCP system are the principal stages of its evolution. “Stages” is used to describe important points in the evolution of the UCP system of rules and not in the Hegelian sense of an inevitable progression. Indeed, as will be seen, the evolution of the UCP was not inevitable nor was or is its continued acceptance. While the stages identified here are necessarily arbitrary in choice, they provide important insights into the nature of standard practice and the process by which it is formulated and, more importantly, to be interpreted.

Interpretation of the UCP is of considerable importance because it is not formulated in a systematic manner and requires considerable interpretation because it assumes many basic aspects of practice without expressing them.

Understanding the antecedents of the UCP is also important in grasping what constitutes sound practice as opposed to unsound practice. Not all practices are sound and not all practices should be embraced and encouraged. The UCP has achieved universal acceptance because it is generally perceived as neutral in most respects. For that reason, buyers and sellers as well as correspondent banks are prepared to accept its provisions with relatively few modifications. The process by which the UCP has arrived at neutrality in most respects is instructive. Such acceptance is not inevitable. The fact that rules are issued by the International Chamber of Commerce (ICC) does not inevitably assure their success as is apparent from the relative lack of use of the rules for demand guarantees issued by the ICC.

Several of these stages involve the intersection of the UCP with law. As the UCP has become more universally accepted, such intersections are inevitable. The UCP itself is not law and requires the blessing of law if it is to be enforced beyond voluntary compliance and if it is to be interpreted in a binding fashion.

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The origins of the UCP lie in the displacement of the London clearing banks as the world's financial arbiters during World War I. Until that time, London practice predominated and that practice was set by each of the clearing banks with its correspondents. It was widely understood to rest on fundamental principles and not specific rules. Indeed, it was a reluctance to adhere to a set of written rules that caused the British banks to decline to adhere to the UCP until the 1963 revision.

For that part of the world outside of the British imperial system, rules sprang up in the aftermath of World War I throughout Europe and in the U.S. The best known of these rules were those adopted by the predecessor of the International Financial Services Association in 1919 and revised several times. It was these rules that were the basis of the first UCP promulgated in 1933 by the ICC at the request and insistence of the American banks. The UCP was revised again in 1951 with minor changes. In order to accommodate the British banks, the 1962 revision was more extensive. The British representative to the ICC Banking Commission, Mr. Bernard Wheble, took the lead in bridging British practice and that of the balance of the western world. In the process, he came to chair the Banking Commission and to exert considerable influence over the 1974 and 1983 revisions. In order to reach out to the socialist world, the endorsement of the United Nations Commission on International Trade Law (UNCITRAL) was sought for the 1974 revision and all subsequent ones. The most recent and most extensive revision took place in 1993 which inaugurated the post-Wheble system.

These revisions marked accommodation to developments in communication and transport and delineation of the rights and obligations of the various parties to the letter of credit undertaking.

As long as letters of credit continue to be used in commerce, the pressure for change will not cease as is evidenced by the revision of UCP500 now underway.

## Ten Significant Stages

### **1. State Precisely the Documents Against Which Payment is to be Made**

One of the most significant features of the UCP as a system is contained in UCP500 Article 5(b) which provides that the credit and any amendments "must state precisely the document(s) against which payments, acceptance or negotiation is to be made." This provision is so taken for granted today that it is frequently overlooked.

The first two revisions of the UCP, however, differed considerably. They provided for maximum discretion on the part of banks. In effect, the issuing bank could determine which documents were necessary to evidence the transaction, whether or not stated in the credit. Such an approach certainly gave the bank considerable flexibility in determining whether or not the documents truly reflected the expectations of the parties and protected the bank's interests. They failed, however, to provide assurance and certainty to the beneficiary and in the hands of a bank seeking to protect itself from an insolvent applicant, they could be arbitrary.

Starting with the 1962 revision, the approach changed radically. If the bank was to refuse a presentation, its refusal must be based on a required document. As the UCP has evolved, this principal has matured and developed. At the present, beneficiaries may expect to find in the terms

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and conditions of the credit supplemented by the UCP and the ISBP all of the requirements which must be met.

The 1993 revision enhanced this approach by formulating in UCP500 Article 13(c) the rule that non documentary conditions must be disregarded. This rule highlighted the documentary character of the letter of credit undertaking, making it clear that any condition contained in the credit that was non documentary could not affect the right of the beneficiary to payment.

The net effect of these developments is to enhance the reputation of UCP letters of credit as dependable payment devices, a critical aspect of such a tool of international finance.

## 2. On Board Bills of Lading

Perhaps the most significant early rule in the first UCP was the norm adopted with respect to what was acceptable when the credit required presentation of an ocean bill of lading. While such a provision could be expressly stated in the credit itself, it was common for banks to use shorthand expressions in issuing credits, in part to save on telegraphic costs which were assessed for each letter or character.

Prior to World War I, it was assumed that a requirement for a bill of lading meant that the goods were laden on board the vessel. As a result of the intense pressures for shipping in the North Atlantic during World War I, received for shipment bills of lading became the norm. Because applicants were desperate for war material, no objections were raised to the presentation of received bills. At the end of the war, however, there was no need for certain goods that had been ordered and buyers and their agents were seeking ways to escape their obligations.

At this point, objections were raised to the presentation of received bills and applicants refused to reimburse banks that had honored presentations containing such bills.

Banks did not particularly care which type of bill was expected. They did not, however, want to be in the middle of a dispute between buyers and sellers. Since the trading community seemed unable or unwilling to establish a norm, the banks did, reverting to the prior norm that unless otherwise indicated, a requirement of a bill of lading meant that an on board bill of lading was expected.

In many other ways, the UCP became the repository for other norms, as well both with respect to the meaning of certain terms (i.e. “approximately”) or documentary requirements (i.e. invoice). This normative function of the UCP remains to this day one of its most important characteristics.

## 3. Revocable Credits

Not all credits are irrevocable. While rarely used, there is a species of LCs that is revocable. Such a credit can be revoked as to the beneficiary even after documents have been presented. Such a credit has no value as an assurance of payment against the insolvency of the applicant. It is used chiefly in situations where LCs are necessary for other reasons such as currency controls but where applicant payment or insolvency is not an issue such as between parent and subsidiary. Obviously, revocable credits are much less expensive than irrevocable ones.

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Until the 1993 revision, the UCP did contain a normative rule regarding whether or not a credit that was silent as to its revocability was revocable or irrevocable. The normative rule was that a silent credit was revocable.

This rule was not neutral nor sound. It placed on the party least likely to understand the significance of the issue the burden of policing it. While banks were acutely aware of the difference, many beneficiaries assumed that all LCs were equally safe and dependable and had no notion that the term “Irrevocable” must appear in the text of the LC. As a result, the rule was a trap for the unwary.

Such a rule is not wise, and, unlike most features of the UCP, its application was resisted by the courts who sensed that it was unfair. While courts would apply it to UCP credits where they had no other alternative, they began to seek exceptions in the interpretation of the text of the rule itself and in the surrounding practices. One such approach was to look for any corollary indications in the credit that it was intended to be irrevocable. Fortunately, the problem rarely arose.

The basis for resistance to the opposite rule was that the revocable default preserved the flexibility of the bank who could change the credit to be an irrevocable one if it made a mistake but could not reverse the process if it mistakenly issued an irrevocable credit. Such an explanation is not persuasive. It is the bank that has the expertise and who should bear the risk of this type of error and not the beneficiary who cannot be expected to possess this type of specialized expertise.

In the 1993 revision, the banking community came to its senses and reversed the rule to the one that now appears in UCP500 Article 6(c), removing one of the few provisions of the UCP that could be pointed to as non-neutral and pro-bank.

## 4. Transport Documents

Transport documents have been at the heart of UCP credits. Banks and applicants look to them not only for assurance that the ordered goods are en route, but as a source of security in the goods. Therefore, they are of considerable importance and most of the revisions of the UCP have focused considerably on them.

The current provisions of UCP500 that address transport documents encompass Articles 23 to 33.

What is notable about them is their evolution from a situation in which the primary document was the on board ocean bill of lading to one in which provisions exist for other types of transport such as air and courier that were not generally contemplated when the first UCP was formulated. They also have embraced developments in transport such as LASH carriage and containerization.

Not all of the developments have been successful. For example, the inclusion of Article 24 on the Non-Negotiable Sea Waybill reflected a theoretical solution to the electrification of paper bills of lading which has generally failed to gain acceptance.

In addition to coverage, the provisions on transport documents have become more precise and specific with respect to the features of such documents, detailing the nature of the signatures that are

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acceptable, the information that must be disclosed, and the acceptability of provisions on transshipment.

This development further illustrates the trend toward precision and specificity.

## 5. Preclusion

UCP500 Article 14(e) contains the preclusion rule which provides that a bank that fails to state discrepancies on which it relies or to give an effective and timely notice of refusal is precluded from claiming that the documents presented are not in compliance with the terms and conditions of the credit. This rule was not present expressly in the 1933, 1951, or 1962 revisions and was not expressed until the 1974 revision which closely resembles the current text.

The evolution of this rule represents a significant development for letter of credit practice in general and the UCP in particular. In the first place, it is an example of a procedural and remedial provision which takes the rules beyond definitions of terms and constitutes them as a system that regulates behavior in a manner similar to laws. In the second place, the rule places the burden of information on the very banks who controlled the drafting process. As such, it embodies rulemaking at its finest, providing a neutral rule that protects the integrity of the system for which it is designed. In the third place, it assures LC beneficiaries that they will be given timely notice of any claimed discrepancies and that they can rely on this notice in future dealings with the bank regarding that presentation.

It is also interesting to note that this provision evolved from one that indicated what banks “should” do and with the implication that the documents are being held at the disposition of the presenter to the current rule which spells out in detail what the notice of refusal is to say and the time frame within which the notice must be given.

## 6. Time for Examination of Documents

With respect to the time frame within which examination must take place and notice be given, the rules evolved from no time, to a reasonable time, to a specific limit of seven banking days in UCP500 Articles 13 and 14. This evolution marked the growth in maturity of the international banking community in its willingness to make a commitment to a time period.

As it now stands, however, the provisions are not perfect. They do not indicate a minimum time that the bank has within which to examine documents, exposing banks in every situation to the question of whether they have acted within a reasonable time. They also leave open the subsidiary question in every instance of whether, having examined the documents within a reasonable time, notice of refusal was given expeditiously. Moreover, as the rule is written, it would appear improper for a notice of refusal to be given face to face. Such a result, of course, makes no sense, and indicates that the rules must be interpreted in light of the practices and traditions which they seek to articulate.

## 7. Waiver of Discrepancies

A related area where the evolution of the UCP is at a more unfinished state is with respect to waiver of discrepancies. There are actually two circumstances in which waiver is relevant. The first

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is the situation in which the issuer determines that the documents are discrepant but inquires as to whether the applicant will waive the discrepancies. The second is the situation in which the issuer gives a notice of refusal and the beneficiary asks that the applicant be requested to waive the discrepancies.

UCP500 Article 14 addresses the former situation in Article 14(c) but does not address the latter situation. Moreover, even with respect to requests initiated by the issuer as opposed to the beneficiary, the current rule does not address several current scenarios in a manner that is satisfactory. As a result, there are variant practices that are fairly widespread.

Concerned about the possibility of missing the deadline for giving notice of refusal and also concerned about whether a bank has the full seven days if it seeks applicant waiver on its own initiative, many banks give what may be regarded as a qualified refusal in which they seek to refuse the documents but also hold out the possibility that the applicant will be approached and may waive the discrepancies.

The difficulty with this approach is that it departs from the UCP system and that it runs the risk of either not constituting a proper notice of refusal or of constituting a conversion or wrongful exercise of dominion over the documents in the event that the beneficiary demands that the documents be returned after they have been surrendered to the applicant on its waiver. Where the price of the goods has increased and where the applicant is in breach of the underlying contract, turning the goods over to the applicant can expose the bank to liability.

A number of suggestions have been made as to how to resolve these problems short of a revision of the UCP. None of them is entirely satisfactory. Moreover, it is not clear that all of the problems can be resolved by a revision of the UCP.

As to requests to seek waiver initiated by the beneficiary, the question is whether or not the resulting process is a collection or remains under letter of credit practice. The answer of the international banking operations community is that this process remains a letter of credit exercise and that the beneficiary is still entitled to the protections of the UCP. Sometimes this issue is confused by the use of the phrase “for collection”.

These circumstances reveal the unfinished state of the current UCP and the difficulties of addressing some problems by rulemaking.

## 8. Pre-Advices

UCP500 Article 11(c) contains what may appear as an obscure reference to pre-advices. It provides that a bank that gives a pre-advice is irrevocably committed to issue a credit in terms not inconsistent with the pre-advice. Pre-advices serve a genuine commercial need, namely assurance that a credit will be forthcoming in situations where the details are not yet firm and will soon be finalized but where the beneficiary needs evidence of the willingness of the bank to issue a credit.

This provision resulted from a concern that was current at the time of the revision related to a sharp practice by which some banks would issue a pre-advice to a beneficiary based on instructions



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from the applicant related to contract negotiations. If the price of the goods moved favorably, instructions would be forthcoming to issue a credit. If it moved unfavorably, the bank would send a communication instructing the beneficiary to disregard the prior communication.

Not only is such a practice potentially fraudulent as between buyer and seller, it undermines the credibility of the letter of credit system. As a result, the 1993 revision reinforced a more vague provision in the 1983 revision and created a new type of independent undertaking, the pre-advice.

This provision has largely ended this type of abuse. Unfortunately, it does not distinguish between situations where there is no intent on the part of the bank to issue an irrevocable undertaking absent detailed conditions. Such a situation is more likely to arise with respect to a standby. Unless banks are careful, their letters indicating that they are prepared to issue a standby subject to UCP500 run the risk of being mistaken for an advice.

This provision indicates how the UCP can be used to address and stem abuses of practice. It also illustrates how such efforts can cause unintended discomfort unless they are carefully crafted.

## 9. Originals

The relationship of UCP500 to originals is a complex tale that illustrates several aspects of the UCP. UCP500 contains three basic provisions relating to originals. The transport document articles require the presentation of an original transport document, Article 34(b) requires presentation of an original insurance document, and Article 20(b) indicates documents that will be accepted as originals.

UCP500 nowhere indicates that documents other than transport and insurance documents must be originals although no bank would accept a copy of other documents in lieu of an original. The UCP simply assumes this point which is fundamental to letter of credit practice.

The provisions in UCP500 Article 20(b) are an attempt to accommodate technological developments, allowing for the use of computers and other electronic means of reproduction of documents. The problem with this provision is that it is awkwardly drafted and does not state the assumptions on which it is based.

It can be read to require that any document created by reprographic means, which would include a computer, must bear a stamp as an original. This reading is not sensible and is inconsistent with practice, but it is technically possible. At least one English appellate court gave the provision this reading, starting with the assumption that it was apparent to the bank how the document was produced. In attempting to avoid the silliness of this result, other courts tortured the meaning of the text in other ways.

The plain truth is that Article 20(b) is not well drafted. Moreover, the ICC Banking Commission itself has issued some opinions that have added to the confusion.

Nonetheless, this decision caused considerable consternation throughout the world, leading banks to require that all documents contain an original stamp.

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After several years of increasing chaos, the ICC Banking Commission issued a “decision” in which it provided a detailed statement of practice regarding originality. That statement made it clear that banks are unaware of the means by which documents are produced and only make a determination based on how documents appear on their face. A document that is not apparently a copy and that bears a wet ink signature would be regarded as an original. Article 20(b) was taken as indication an additional means by which originality could be established.

As a result of this decision, several courts have rejected the approach of the first English court and practice has settled down, awaiting, no doubt, clarification in the revision of UCP500.

This episode illustrates the close link between court decisions and practice, the importance of court decisions, and the need for a practice approach on the part of the letter of credit community. It also illustrates the importance of clear drafting practices.

## 10. Standbys

Standby letters of credit began to emerge in the United States after World War II. They resulted from a desire on the part of New York banks to utilize the clean credit in situations where the shipment of goods was not involved. This development was simultaneous with the emergence of the independent bank guarantee in Europe. For several complex reasons, the realignment of a dependent guarantee to make it independent was not available to US banks which, on the whole, could not issue guarantees.

As a result, the instrument that evolved was clearly a species of letter of credit. This classification enabled standbys to avoid the difficulties that have emerged elsewhere in distinguishing the independent from the dependent guarantee.

Another important distinction was the emerging independent guarantee practice functioned largely without rules and, despite the existence of specialized ICC rules, continues to do so today. Standbys, on the other hand, were regarded as letters of credit and were, on the whole, issued subject to the UCP.

This development struck European bankers as odd because of the distinction that they tended to make between independent guarantees and commercial letters of credit. Indeed, some asserted that standbys could not be issued subject to the UCP because it did not recognize them. While this argument is silly since the UCP is not a law that can dictate what undertakings may incorporate it, it did concern U.S. bankers. As a result, they insisted that the 1983 revision contain express references to standbys. These references were inserted in two ways. In the first two articles that deal with scope, there was an express reference to standbys, providing that documentary credits include standbys. The second was to add specific references to documents that were intended to accommodate standby practices.

Both of these attempts were problematic but in different ways. The scope provisions were acceptable but reinforced the ambiguity in the term used by most Europeans to describe LCs that relate to the sale of goods, “documentary”. Under the UCP, the term “documentary” encompasses

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both standbys and commercial credits, although it is widely used in a narrow sense to signify only commercial credits, an older term.

The other approach was more serious. The term “drawings” was added at several points in the UCP to encompass standbys. Thus, UCP500 Article 41 relating to installments, refers to both drawings and shipments. While the rule that makes a commercial credit to cease to be available makes sense where there are a series of shipments, it makes no sense where there are to be a series of drawings under a standby. Indeed, it probably undermines the purpose for which the standby was issued.

As a result of these provisions and others which are not aligned with standby practices, the use of the UCP for standbys became a trap for the unwary and resulted in confusing clauses being required to adjust the rules. Despite familiarity with these difficulties, the 1993 revision of the UCP did not address them.

This state of affairs finally led to the creation of a set of rules that were specifically designed for standby letters of credit, the International Standby Practices or ISP98. These rules are widely used for standbys.

There remain, however, many standbys that are subject to UCP500, and, more importantly, the question remains of what references, if any, will remain in a revised UCP.

There are many lessons to be learned from this episode, namely the need to be flexible, to meet needs, and the ability of the letter of credit community to take matters in its own hands.

## Conclusion

These examples were chosen to provide insights into the 75-year process of evolution which has brought the UCP and the practices that it reflects to the present day. They reveal that the UCP is not unalterable nor necessarily the optimal solution to a problem nor the best way to formulate that solution. It is, however, an eminently workable product, in large part because of its central concern for the integrity of the letter of credit and its reputation as a device for payment. Where that concern has been foremost, courts and others have deferred to it and supported it. To the extent, however, that it becomes irrelevant or a device for excusing non payment or entrapping beneficiaries in technicalities, its support will rapidly diminish.

In light of this history, any revision of the UCP faces a serious challenge. Do too much, and the product will not command support. Do too little and events will overtake the rules. The real challenge facing commercial letter of credit practice is the increasing abandonment of LCs by commercial entities for other systems of payment and credit. If the revision of UCP500 makes this problem worse, the decline of the instrument will only increase. If it reduces it, there is a possibility of reversing the decline. ■

## INTERNATIONAL STANDBY PRACTICES (ISP98) (ICC PUBLICATION NO. 590): VERSATILE RULES FOR MODERN PRACTICE

by Professor James E. BYRNE\*

**Introduction.** On the occasion of the publication of the Japanese translation of the International Standby Practices, the Institute of International Banking Law & Practice extends congratulations to ICC Japan which has facilitated this project.<sup>1</sup> It is a pleasure to review ISP98 and the sources of its success.

ISP98 was drafted by the Institute and has been indorsed by the United Nations Commission on International Trade Law and the International Chamber of Commerce, bearing ICC Publication No. 590. The Japanese translation is the most recent translation of these rules from the English original.<sup>2</sup>

While there is no hard statistical evidence, ISP98 is widely used. Based on informal surveys of US and non US banks in the United States, ISP98 has come to account for a large percentage of the US standby market in the short time it has been in effect.<sup>3</sup> Indeed, because of its precision, ISP98 has become the norm for bank enhancement of municipal bonds and other sophisticated financial obligations. While such use might be expected in the US where standbys originated, the rules are

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1. The ICC Japan Translation Committee was chaired by Mr. Kunihiko Minakuchi, The Bank of Tokyo-Mitsubishi, UFJ, Ltd. Its members are Mr. Yoshiharu Takahashi of Sumitomo-Mitsui Banking Corporation and Mr. Tatsuro Kamikawa of Mizuho Corporate Bank, Ltd.

2. In addition to Japanese, ISP98 has been translated into the following languages: Bulgarian, Simplified Chinese, Traditional Chinese (Taiwan), French, Greek, Hebrew, Italian, Korean, Portuguese, Russian, Spanish, and Turkish. As indicated in the Preface to ISP98, the English version is the official text of ISP98.

3. A February 2007 poll of 12 US LC bankers representing major segments of the US market including non US banks in the US revealed that ISP98 accounted for 47% of dollar value of standbys. The poll also revealed that 70% of large dollars standbys were subject to ISP98. With the 2011 decision of the insurance regulators to permit ISP98 to be used in insurance and reinsurance standbys, these figures will increase considerably. See *Poll Shows Two Ways of Measuring Standby Trends*, July/August 2007 *Documentary Credit World* 5-6. It took the UCP more than 30 years to gain this level of acceptance.

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also widely used in the United Kingdom and increasingly throughout the world including the Middle East and Asia.

**Transactions for Which the Rules were Written.** Unlike the UCP which was drafted for commercial letters of credit to provide payment for the sale of goods or services and unlike the URDG which was drafted to provide funds after a default in performance or for refusal to account for advances received or other failure under a contract, ISP98 was designed for any transaction that required an independent assurance of payment. ISP98 standbys are thus regularly used to pay rated debt obligations as they become due and to pay and to pay for the sale of goods from which payment by the buyer is overdue.<sup>4</sup> In ISP98, unlike URDG 758, there is no necessary link to a default and no focus on a demand as the only or principal document.

ISP98 uses the term “standby” in the rules to refer to any independent undertaking that is subject to it.<sup>5</sup> ISP98 is fully usable by independent undertakings, whether called “letters of credit”, “demand guarantee”, “bond”, or any other name provided that the undertaking qualifies under applicable law as “independent” from the underlying transaction. At the fundamental level of law, there is no difference between a standby letter of credit and a demand guarantee.

**Judicial Decisions.** ISP98 was also written for judges and lawyers. Unlike commercial letters of credit, standbys and demand guarantees are heavily lawyered. Rules of practice, however, are not typically written with the precision needed for legal decisions. A long line of judicial decisions that have struggled with the interpretation of the various versions of the UCP and often misinterpreted it testifies to the difficulties that courts have had with banker-drafted rules of practice.<sup>6</sup> ISP98 was drafted by lawyers who listened to bankers and attempted to express standard international standby practice in a manner that could be used on a daily basis by bankers and business people but with which lawyers could work and that courts could apply in the manner intended. The relatively low level of litigation involving ISP98 standbys is itself evidence of the success of this drafting.

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4. Examples of the wide scope of the transactions supported by standbys include staying an execution of judgment pending appeal, assuring rent payments on realty, assuring payment of sports figures, assuring payment by moving picture investors, assuring payment under reinsurance contracts, assuring payments on excess insurance claims and deduction payments, assuring the repayment of loans, assuring payment of water and sewer impact fees, use as an earnest money deposit for the purchase of a condominium, satisfying a requirement to participate in an auction, assuring the payment of their contributions by Names who are members of Lloyd's insurance syndicates, and supporting the obligation of investors to make up losses in ticket sales for prize boxing fights and in connection with other sporting events and concerts. Some examples are colorful such as such as assuring payment of charter fees for a cruise ship to house Royal Canadian Mounted Police during the Vancouver Olympics, assuring the payment of traffic fines and parking tickets by diplomats with sovereign immunity in Washington DC, and assuring the payment of ransom for the Bay of Pigs prisoners from Cuba. These examples illustrate the flexibility of standby letters of credit.

5. ISP98 Rule 1.01(d) (Scope and Application) provides that “[a]n undertaking subject to these Rules is hereafter referred to as a ‘standby’.”

6. See, e.g., *China New Era International Ltd. v. Bank of China (H.K.) Ltd.*, [2010] 5 HKC 82 (2010), *rev'd* [2009] HKCU 2012 (2009) [Hong Kong] (UCP600 definition of negotiation), abstracted in 2011 *Annual Review of International Banking Law & Practice* 411; *Coöperatieve Centrale Raiffeisen-Boerenleenba.NK B.A. (Rabobank) v. Bank of China*, 8448 HKCU 1 (High Ct. 2004) [Hong Kong] (UCP500 definition of negotiation), abstracted in 2005 *Annual Survey of Letter of Credit Law & Practice* 269; *Banco Santander SA v. Bayfern Ltd.*, [1999] All ER (D) 586 (Queen's Bench Division, Commercial Court) [England] (UCP500: protected person under deferred payment undertaking), abstracted in 2000 *Annual Survey of Letter of Credit Law & Practice* 290; *Seconsar Far East Ltd. v. Bank Markazi Jamhuri Islami Iran*, Ct. Appl. (Civ. Div. 1998) [United Kingdom] (“reasonable time” under UCP400), abstracted in 1999 *Annual Survey of Letter of Credit Law & Practice* 381; *Banca Del Sempione v. Provident Bank*, 160 F.3d 992 (4th Cir.1998), *aff'g* 75 F.3d 951 (4th Cir.1996), *rev'd* 852 F.Supp. 417 (D.Md. 1994) [USA] (UCP 400 need for confirmer consent to amendment by issuer), abstracted in 1999 *Annual Survey of Letter of Credit Law & Practice* 324; and *Glencore International Ag v. Bank of China*, [1996] 1 Lloyd's Rep. 135 (C.A. 1995) [England] (originality under UCP500) abstracted in 1996 *Annual Survey of Letter of Credit Law & Practice* 561.



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Those few reported cases in which the interpretation of ISP rules has been at issue were decided in a manner consistent with the drafters' intent.<sup>7</sup>

**Bias in the Rules.** To the extent that there is a bias in the drafting of ISP98, it is in favor of the rules operating to facilitate prompt payment to a beneficiary under an ISP98 undertaking and reimbursement to banks acting under it. It avoids traps, attempts to provide clarity, and discourages ambiguity. UCP600 is much less precise<sup>8</sup> and, because it was not drafted for them, contains traps for users of standbys and demand guarantees. URDG 758, on the other hand, favors the instructing party of a performance guarantee or counter guarantees. Its substantive and notice rules operate to make it easier for the instructing party, in response to an unwanted drawing, to obtain a court freeze order or credibly threaten to withhold reimbursement.

**Tools for Using ISP98.** In addition to the rules themselves, the Institute has developed a series of tools for teaching and interpreting ISP98. Perhaps the most important is *The Official Commentary on the International Standby Practices*<sup>9</sup> supplemented by the Official Interpretations of ISP98 by the Council on International Standby Practices.<sup>10</sup> In addition, several online learning programs are available<sup>11</sup> as is the Certified Standby and Guarantee Professional Certification programme which will provide standardized tests.<sup>12</sup> In addition, the Institute is completing the ISP98 Model Forms.<sup>13</sup>

**Fifteen Major Features of ISP98.** This tour of ISP98 highlights 15 topics that illustrate its use and function.

**1. Independence.** One of the primary purposes of ISP98 was to establish definitively that the undertakings to which it applies were intended to be independent (or abstracted) from the underlying transactions which gave rise to them. In many countries, there are statutes covering

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7. See, e.g., *Middlesex Bank & Trust Co. v. Mark Equipment Corp.*, No. 01-4491, 2005 446035 (Mass. Super. 2005) [USA], abstracted in the 2006 *Annual Survey of Letter of Credit Law & Practice* 397.

8. See e.g., *China New Era International Ltd. v. Bank of China (Hong Kong) Ltd.*, [2010] 5 HKC 82 (2010) [H.K.], abstracted in 2011 *Annual Review of International Banking Law and Practice*, 411, in which the court struggled with the phrase "complying presentation" in the UCP600 definition of "negotiation".

9. James E. Byrne, *The Official Commentary on the International Standby Practices* (Institute of International Banking Law & Practice 1999).

10. The Council on International Standby Practices is comprised of 27 members. It is charged with overseeing and interpreting ISP98, assuring that ISP98 remains aligned with international standby practice and law, recommending when and whether revision is appropriate, advising regarding the revision of *The Official Commentary on the ISP*, and advising regarding intervention in litigation as an *Amicus Curiae* (Friend of Court). It also oversees the Standby & Guarantee Certification Program.

11. In cooperation with Coastline Solutions, the Institute of International Banking Law & Practice (IIBLP), has developed a 12-hour online training course on the ISP98 entitled *ISP Master*. For more information on *ISP Master* and other related products please visit: <http://www.iiblp.org/>

12. Established in 2010, the Certified Standby & Guarantee Professional (CSGP) Certification Programme is a professional certificate programme issued jointly by the Council on International Standby Practices (CISP) and the Institute of International Banking Law & Practice (IIBLP). For more information please visit: <http://www.csgponline.org/>

13. The Institute of International Banking Law & Practice is currently editing mature drafts of Model ISP98 Forms, and anticipates that they will be available by the end of the 2011 calendar year. The ISP98 Model Forms provide a model standby with and without attached demand and, based on this model, model forms for automatic extension, automatic reduction, demand for automatic transfer, counter standby, and confirmation. Drafts of the forms have been published in *Documentary Credit World* as will the final versions. They will also be available at the Institute's website, [www.iiblp.org](http://www.iiblp.org).

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dependent guarantees or other accessory or suretyship undertakings but not independent undertakings. Moreover many of the forms used, particularly for bank guarantees, are ambivalent and contain terms that could be considered to make them dependent. ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of Issuer-Beneficiary Relationship) were drafted to resolve any doubts about an undertaking subject to ISP98. In a notable English case, *Team Telecom*, the court concluded that an undertaking entitled a “Bond” was independent because it stated that it was subject to ISP98.<sup>14</sup>

In addition, ISP98 Rule 1.10 (Redundant or Otherwise Undesirable Terms) takes terms that commonly cause confusion in standbys and demand guarantees, discourages their use, but provides a definition that captures what is intended by the terms. One such term is “unconditional”. A standby is by its nature a conditional promise that is conditioned on the presentation of required documents. A statement in a standby that it is “unconditional” is not only wrong but may suggest that the undertaking is a different type of undertaking such as a promissory note or contract. ISP98 Rule 1.10(a)(i) provides that the use of “unconditional” “signifies merely that payment under it is conditioned solely on presentation of specified documents.” This approach provides clarity when the text of an undertaking is unclear.

**2. Conditions to Issuance or to Availability.** ISP98 Rule 2.03 (Conditions to Issuance) clarifies how to prepare the text of a standby and provide it to the beneficiary while preserving the defense that it is not yet issued to the beneficiary (and not yet booked or attracting fees from the applicant). The clarity comes from insisting that any such unissued but delivered text say “not enforceable” or “not issued” and that it not use ambiguous terms such as “not available” or “not effective”. Second, it clarifies that other words that arguably preserve the “not issued” defense do not; rather, they merely condition availability for drawing. For example, a standby that stated that it was “not available” until the beneficiary tendered its own performance standby in favor of the applicant/counterparty would be interpreted as having been issued and irrevocable but subject to the documentary condition that the performance standby be presented. Whether a standby says that it is not issued or merely that it is not available until a condition is met, the stated condition must be disregarded if it is non documentary. The rule on non documentary conditions, ISP98 Rule 4.11, provides another level of protection for beneficiaries (and thus for the reputation of ISP98 undertakings).<sup>15</sup>

**3. Presentation of Documents.** Many of the transactions for which standbys are issued require documents other than a simple demand. ISP98 contemplates requiring multiple documents including a demand,<sup>16</sup> various statements, negotiable documents,<sup>17</sup> legal or judicial documents,<sup>18</sup> and various

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14. *Team Telecom International v. Hutchison 3G UK Ltd.*, 2001 EWHC 762 (Q.B. Div'l Ct.) [England], abstracted in 2004 Annual Survey of Letter of Credit Law & Practice 335.

15. The rule incidentally reorganizes and supersedes whatever practice there is for “pre-advice”, a UCP600 Article 11 (Teletransmitted and Pre-Advised Credits) twilight zone that is unwanted for the harder edged ISP undertakings.

16. ISP98 Rule 4.16 (Demand for Payment).

17. ISP98 Rule 4.18 (Negotiable Documents).

18. ISP98 Rule 4.19 (Legal or Judicial Documents).

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commercial documents,<sup>19</sup> and provides minimal terms for each document in the event that the standby does not do so. Most importantly, ISP98 does not assume that a drawing will result from a default.<sup>20</sup> It is the standby itself and not ISP98 that dictates what documents the beneficiary must present and what they must say.<sup>21</sup>

**4. Incomplete Presentations.** Unlike UCP600, ISP98 Rule 3.02 (What Constitutes Presentation) contains a default rule for situations where the beneficiary presents less than all the required documents and asks the issuer to wait for the balance. Such a situation may occur, for example, where the standby requires a demand accompanied by an arbitral award. The beneficiary may present only the demand and ask the issuer to hold it, expecting that the award will come directly from the arbitrator. In such a situation, the issuer has the option of acceding to the beneficiary's request to hold the documents pending completion of the presentation or of treating it as a presentation, examining it, and presumably refusing it because a required document is missing.<sup>22</sup> Such a rule enables the issuer to avoid preclusion for failure to give timely notice of refusal and, unlike URDG 758 Article 14(b) (Presentation), does not force an unwilling issuer to retain custody of documents at the election of the beneficiary.

**5. Closure on a Business Day.** UCP600 assumes that valuable commercial documents are to be timely received by the issuing bank and then the applicant, and on this basis shifts the risk of force majeure closure to the beneficiary.<sup>23</sup> Most standby beneficiaries are not delivering inherently valuable documents and are therefore not willing to accept such a risk. The UCP force majeure forfeiture rule is excluded and replaced in the text of standbys issued subject to UCP and multiple clauses have emerged attempting to address the problem. Some of these clauses are as problematic as the UCP600 rule itself. ISP98 Rule 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) abandons the obscure notion of "force majeure" in favor of the simple question of whether or not the place for presentation is closed on a business day when it should be open. If so, the rule extends expiry to thirty calendar days after the day that the place of business reopens.<sup>24</sup> It should be noted that the thirty day period was chosen because it is the period usually used on standbys in favor of governmental entities or insurers. It can, of course, be varied in the standby. ISP98 Rule 3.14(b) also provides the issuer with the ability to designate another place for presentation, a rule that operates not only when there is closure due to unforeseen circumstances but also when the place for presentation is to be permanently closed due to a planned move or

19. ISP98 Rule 4.20 (Other Documents).

20. ISP98 Rule 4.17 (Statement of Default or Other Drawing Event) does not require a statement of default but merely that "payment is due because a drawing event described in the standby has occurred."

21. This approach contrasts with URDG 758 Article 15 (Requirements for Demand) under which presentation of a "supporting statement" detailing the applicant's "breach" of the underlying relationship.

22. The option appears in ISP98 Rule 3.11(a)(i) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules).

23. UCP600 Articles 29 (Extension of Expiry Date or Last Day for Presentation) and 36 (Force Majeure).

24. URDG 758 Article 26 (Force Majeure) retains the notion of force majeure and also limits the extension of time to a period 30 calendar days after the day when the undertaking would have expired. This rule would only assist the beneficiary where the reopening of the place for presentation occurred during that period. For many disasters such as hurricanes, earthquakes, and even 9/11, such a timetable is not realistic particularly without a rule such as the ISP98 provision for naming an alternative place for presentation. The URDG 758 rule also reaches documents presented and not examined and those for which payment has not been made, leaving the beneficiary with the risk of delay.

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consolidation.<sup>25</sup> Thus when the issuer plans to relocate, it can change the place for presentation by notifying beneficiaries of the new place for presentation more than thirty calendar days before the relocation. Provided that the new location is at a reasonable place and that the notice is received by the beneficiary, such a notice will be effective automatically without the need for beneficiary consent.

**6. Examination: Inconsistency & Conflict; Degree of Replication.** ISP98 Rule 4.03 (Examination for Inconsistency) permits refusal for inconsistency only where the standby specifies the extent to which documents must be consistent. UCP600 assumes that the documents must all show that goods are being delivered for payment of the purchase price under the issuing bank's undertaking. ISP98 does not assume anything about the relationship of the documents to the underlying obligation. Documents required under a standby could contain data that differs considerably from data in other required documents. Issuing banks have an insufficient basis to determine whether or how documents that otherwise comply might nonetheless be inconsistent. Issuers are justifiably fearful of second guessing by applicants and are therefore inclined to raise inconsistency as a discrepancy in case of any doubt.<sup>26</sup> ISP98 eliminates the uncertainty for all by eliminating examination for unspecified types of inconsistency.

Commercial letters of credit require commercial documents that fall into certain patterns addressed in UCP rules regarding transport documents, insurance documents, and commercial invoices. For commercial standbys or demand guarantees that assure payment when the buyer fails to pay the seller directly within a certain time period, UCP600's rules for commercial documents may result in refusal. Under UCP600, there is confusion about whether and to what extent copies of unpaid commercial documents should be examined as if they were originals. Where the documents required are originals, the rules apply. However, such documents typically are not prepared for presentation under a letter of credit where payment is expected directly from the buyer. ISP98 Rule 4.20(b) (Other Documents) makes it clear that in an ISP98 standby commercial documents should not be examined under commercial letter of credit rules. URDG 758 does not address this issue.

Standbys and demand guarantees frequently require presentation of carefully worded documents and regularly attach an exhibit or use quotation marks to indicate the wording of the document. The standard of examination in UCP600 and URDG 758 (compliance on its face with the terms and conditions of the credit) is not sufficiently nuanced to provide a bank with guidance in such a situation.<sup>27</sup> For example, does the use of quotation marks signify that every word including apparent errors be replicated? ISP98 Rule 4.09 (Identical Wording and Quotation Marks) distinguishes between a required statement without specified wording in which case the statement in the document must convey the same meaning, and specified wording through an exhibit, blocked text, or quotation marks. The rule also provides that, unless the standby requires that the document must be "exact" or "identical" to be quoted or blocked text, the document must contain the specified wording but need not replicate punctuation or errors that are apparent when read in context.

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25. ISP98 rule 3.14(b).

26. Polls consistently showed inconsistency as the most commonly notified reason for refusal. UCP600 substitutes "conflict" for "inconsistency", with little if any reduction in the use of this category of UCP discrepancy and complaints that it is overused. URDG 758 adopted the UCP600 "no conflict" approach. UCP600 Article 14(d) (Standard of Examination) and URDG 758 Article 19(b) (Examination).

27. See UCP600 Article 14(a) (Standard for Examination of Documents). URDG 758 Article 14(a) (Examination) contains the same unnuanced standard.

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7. **Counter Standbys and Confirmation.** While both UCP600 and ISP98 provide rules for confirmation, URDG 758 does not, depriving users of this valuable tool. While both ISP98 and URDG 758 facilitate counter guarantee/standby practice, UCP600 does not. Only ISP98 facilitates both.

Counter guarantees/standbys present unique problems in situations where there is misalignment between the counter guarantee/standby and the local undertaking. While URDG 758 contains many references to counter guarantees, it fails to provide workable rules for two serious problems that regularly arise. One involves the presentation of documents to the counter guarantor that were presented under the local undertaking. Is the counter guarantor supposed to examine these documents if the counter guarantee does not so provide? Can the counter guarantor refuse to honor a complying presentation by the local bank which is the issuer of the local undertaking and beneficiary of the counter guarantee because the documents presented by the local beneficiary against which it paid under the local undertaking do not comply in the opinion of the counter guarantor?<sup>28</sup>

While it may be thought that the local undertaking is independent from the counter guarantee, URDG 758 Article 5(b) (Independence of Guarantee and Counter Guarantee) (which so provides) contains a significant qualification. It states that the counter guarantee's independence exempts it from defenses or claims that result from "any relationship *other than a relationship*" between the counter guarantor and the local bank. [*Emphasis added.*] Since the counter guarantor has requested the local bank to incur a debt obligation for the benefit of the counter guarantor and its applicant, a legal relationship arises under which the counter guarantor is obligated to reimburse the local bank if it pays under its obligation. This obligation is not necessarily limited to the terms of the counter guarantee but may arise from general principles of the law of obligations and suretyship or accessory undertakings.<sup>29</sup>

ISP98 Rule 4.21 (Request to Issue Separate Undertaking) anticipated and addressed both of these problems. Rule 4.21(b) and (c) provide that the issuer of a counter standby may disregard any documents presented under the local undertaking and forwarded to it by the local bank that were not required by the counter standby. The issuer of the counter standby cannot refuse an otherwise complying presentation on its counter standby because of a claimed discrepancy in presentation on the local bank undertaking.

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28. URDG 758 Article 22 (Transmission of Copies of Complying Demand) incidentally requires that the documents presented under the local undertaking be transmitted to the counter guarantor and forwarded in turn to the instructing party but it does not give guidance about this situation.

29. This point is illustrated by the obligation that all counter guarantors believe that they have to pay the fees of the local bank when there is no drawing under the local undertaking. Since there is no drawing on the counter undertaking, one must ask from whence this obligation arises since it does not arise from the terms of the counter undertaking. Rather than limiting the reimbursement obligation to the terms of the counter guarantee, URDG 758 Article 5(b) expressly includes the relationship between the two banks within the scope of the reimbursement obligation. As a result, the expiration of the counter guarantee would not be a defense to the counter guarantor against a local bank that honored a complying demand on its local undertaking. For an example of a case in which such a problem arose, see *American Express Bank Ltd. v. Banco Español de Crédito, S.A.*, 597 F. Supp. 2d 394 (S.D.N.Y. 2009) [USA], abstracted in the 2010 *Annual Review of International Banking Law & Practice* 428. In that case, the New York Court of Appeals noted that the pending expiration of a counter standby issued by a Spanish bank in favor of the Pakistani branch of the US bank which was asked to issue its local undertaking in favor of a Pakistani governmental agency, did not justify a drawing on the counter guarantee although the local bank was embroiled in litigation in Pakistan. The US court opined that the US local bank should win in the Pakistani litigation but noted that "if [Local Bank paid Local Beneficiary] because it [had] been ordered to do so by a Pakistani court, Counter Guarantor [would] be under an obligation to reimburse it. In such circumstances, [Local Bank] could make a good faith demand for honor of the counter guaranties...."



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Rule 4.21(a) expressly deals with the extent of the reimbursement obligation of the issuer of the counter standby. It provides that the local bank “receives no rights other than its rights to draw under the standby even if the issuer pays a fee to the beneficiary [local bank] for issuing the separate undertaking.”

**8. Extend or Pay.** Sometimes the expiry date on a standby is shorter than the performance of the underlying transaction. When a beneficiary is concerned about a pending expiration, it will often indicate to the issuer that it is demanding payment unless the undertaking is extended. This “extend or pay” demand is not limited to counter undertakings but is common under them. In such a situation, the local beneficiary will make an extend or pay demand on the local bank which will in turn make a similar demand on the counter guarantor/issuer. It does not necessarily follow that the beneficiary has or is able to make a complying demand in an extend or pay situation.<sup>30</sup>

ISP98 Rule 3.09 (Extend or Pay) addresses this situation. It does not assume that the beneficiary has made a complying presentation.<sup>31</sup> Rule 3.09 treats the extend or pay demand as a presentation requiring examination, gives the issuer discretion to consult the applicant and extend, and the maximum time in which to do so before it is required to give notice of refusal. In the event that the undertaking is extended, the beneficiary is deemed to have consented to the amendment and withdrawn its demand.

Although URDG 758 Article 23 (Extend or Pay) follows part of the ISP98 rule, there is one notable difference. Article 23 only applies to a “complying demand”. Where the demand does not comply, which is a common situation, the URDG extend or pay rule provides no guidance.<sup>32</sup>

**9. Disposition of Documents and Preclusion.** Because the UCP was not drafted for standby practice, UCP600 Article 16(c) & (f) (Discrepant Documents, Waiver and Notice) is predicated on the notion that the documents are valuable, their return to the beneficiary is essential, and failure to include a recital regarding disposition in the notice of refusal will result in preclusion. Because documents presented under a standby rarely have value, this rule exposes issuers, guarantors, and confirmers to highly technical application of the preclusion rule. Under ISP98 Rule 5.07 (Disposition of Documents), the issuer has no obligation to give notice regarding the disposition of the documents presented and would not incur preclusion for failure to do so. URDG 758 Article 24 (Non-Complying Demand, Waiver and Notice) has copied the ISP98 approach.

**10. Cancellation.** Cancellation of a standby or demand guarantee is not uncommon. Requests for cancellation present unique issues for an issuer or guarantor which are different than those connected with the presentation of documents. The identity and authority of the beneficiary are but two of them. Unlike a demand in the name of the beneficiary even if made by a stranger or person

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30. UCP600, which does not address this phenomenon, is unclear whether there is a presentation requiring examination for compliance. The risk that the issuer bears in such a situation is being precluded from claiming that the demand did not comply.

31. If there is a complying presentation, the issuer can honor or extend. The problems arise where the demand does not comply.

32. Moreover, there is a risk that an unwary banker may overlook the technical phrase that limits the scope of the rule, apply it when the demand does not comply, suspend payment for up to 30 days as permitted, and then be precluded because it has not given timely notice of refusal.

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without authority,<sup>33</sup> the issuer is exposed if it cancels and releases collateral at the request of a stranger or a person without authority. UCP600 contains no rules regarding cancellation.<sup>34</sup> ISP98 Rules 7.01 (When an Irrevocable Standby is Cancelled or Terminated) and 7.02 (Issuer's Discretion Regarding a Decision to Cancel) contain detailed guidance for the issuer's consideration.<sup>35</sup> URDG 758 Article 25 (Reduction and Termination) contains far less detailed provisions on cancellation (or "termination" in its terminology). However, Article 25(b)(iii) requires a signed "release from liability" by the beneficiary.<sup>36</sup>

**11. Transfer and Assignment.** Transfer under a standby or demand guarantee is very different than transfer under a commercial letter of credit because the transactions giving rise to the need for transfer differ. Under a transferable commercial letter of credit, the first beneficiary is expected to use a transferred credit to pay one or more suppliers. Under a transferable standby, the transferor beneficiary is expected to transfer the entire right to be paid.<sup>37</sup> Commercial letter of credit transfers focus on partial transfer of drawing rights, the transfer only occurring once (with possible multiple partial transfers), and substitution of documents. In a standby or demand guarantee, it is expected that the transfer is entire (with no partial transfers) and that there may be multiple entire transfers. There are also concerns about the authority of the person requesting transfer. Therefore, UCP600 Article 38 (Transferable Credits) is not appropriate for transferable standbys or demand guarantees. ISP98 Rule 6.02 (When Drawing Rights are Transferable) restricts transfers of transferable standbys to entire transfers but permits more than one. It requires that the demand be signed by the transferee beneficiary. It also protects the rights of an issuer or nominated person to reimbursement as if it had made payment to the beneficiary where it takes steps to satisfy itself as to the existence and authenticity of the original standby, receives a request for transfer in an acceptable form, and the original standby is tendered.

URDG Article 33(a)-(f) (Transfer of Guarantee and Assignment of Proceeds) is similar although it contains an unusual provision. Article 33(d)(ii) requires that the transferor submit a signed statement of the acquisition by the transferee of the transferor's "rights and obligations in the underlying relationship."<sup>38</sup>

UCP600 Article 39 (Assignment of Proceeds) renders an assignment of proceeds subject to local law. In most countries, courts would turn to the general law of obligations and not letter of credit

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33. See ISP98 Rule 4.13 (No Responsibility to Identify Beneficiary).

34. While UCP600 Article 10(a) (Amendments) has a reference to cancellation, it contains no specific provisions.

35. One of its important rules is the provision that the beneficiary's request for cancellation is irrevocable, thus preventing it from invoking the doctrine of mistake where the issuer has arguably not relied on the request to cancel.

36. Such a requirement does not reflect practice and, while it may be prudent, it is too formal and should not prevent termination of the obligation where there is other probative evidence that the beneficiary has consented to cancellation.

37. This transfer of the entire right to draw (sometimes referred to as a "whole" transfer) to the transferee beneficiary divests the transferor beneficiary of any right in the standby or demand guarantee.

38. This requirement would prevent transfer of drawing rights to a bank providing financing to the transferor beneficiary. Article 33(d)(i) also suggests by omission that pending amendments are not transferred. One would expect that proposed amendments would also have been transferred since they are irrevocable by the guarantor.

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law for questions regarding assignments. As a result, the issuer may be obligated to recognize an assignment based on a notice from a stranger who claims to be the assignee. The assignment, however, is the wrong place to start for independent undertakings. What is of value to potential assignees is not a promise from the assignor but an acknowledgement of the assignment by the issuer or guarantor and its irrevocable promise to pay any proceeds to the assignee. ISP98 Rules 6.06 – 6.10 (Acknowledgment of Assignment of Proceeds) explain letter of credit practice regarding assignments in sufficient detail to enable a court to distinguish independent undertakings from general contractual obligations. Among other things, Rule 6.07(a) (Request for Acknowledgment) does not require the bank to give effect to an assignment or to acknowledge it. While omitting details regarding practice, URDG 758 Article 33(g) provides that a guarantor is not obligated to pay an assignee unless it agrees.

**12. Transfer by Operation of Law.** Situations arise where a stranger (i.e. not the named beneficiary) draws in its own name on a standby or demand guarantee that is not transferable or, if transferable, has not been transferred, and claims to be the legal successor of the named beneficiary. Such situations arise where the beneficiary has been acquired, has legally changed its name, is represented by an appointed successor due to insolvency, or has died. Under UCP600 and URDG 758, a demand by such a person in its own name would be non-complying and payment to such a person would jeopardize the right of the bank to reimbursement. ISP98 Rules 6.11-6.14 (Transfer by Operation of Law) provide a means by which a complying presentation can be made without amendment or jeopardizing the right to reimbursement. Under these rules a successor beneficiary can present an additional document (not required by the standby) that is issued by a public official and that establishes the succession. The rule allows the bank to suspend the time for examination of documents until it is satisfied about the succession, during which time it may request additional documentation. Where it receives the additional document establishing the authority of the successor to act in the name of the beneficiary, the issuer or nominated person is entitled to reimbursement as if it had paid the named beneficiary.

**13. Variations: Time to Pay or Give Notice.** ISP98 Rule 1.01(c) (Scope and Application) notes that ISP98 can be varied by the terms of the undertaking. In situations where there were not uniform practices, the ISP98 Rule reflected either the most common or best practice.<sup>39</sup> As a result, some provisions of ISP98 are regularly varied in standbys. Two commonly varied provisions are the time within which payment must be made and the time within which to give notice of refusal.

Under ISP98, payment must be made within the time available for the examination of documents, namely a time that is not unreasonable not to exceed seven banking days.<sup>40</sup> In order to provide certainty regarding payment, it is common for ISP98 standbys to indicate the timing and method of payment. For example, “*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 [with an advice of payment sent to Beneficiary at the above address].*”

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39. One such provision already mentioned is the 30 day period after reopening of the place of presentation in ISP98 Rule 3.14 (Closure of a Business Day and Authorization of Another Reasonable Place for Presentation).

40. ISP98 Rule 2.01(c) (Undertaking to Honour by Issuer and Any Confirmer to Beneficiary) indicates that an issuer acts in a timely manner if it honors within the time permitted for examining the presentation and giving notice of dishonor.

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The time for giving notice of dishonor under an ISP98 standby is also a time that is not unreasonable.<sup>41</sup> Given that UCP600 Article 16 (Discrepant Documents, Waiver and Notice) and URDG 758 Article 24 (Non-complying Demand, Waiver and Notice) now have a fixed five day rule, banks using ISP98 may wish to vary the ISP98 rule by inserting a provision in the ISP98 standby. For example, “*Any notice of refusal must be sent by prompt means before the close of the fifth banking day following the banking day of presentation.*”

**14. Standby Texts: Automatic Amendments Regarding Duration or Amount.** Beneficiaries expect a standby or demand guarantee to be in effect for the duration of the underlying transaction. On the other hand, issuers or guarantors are reluctant to make credit decisions for periods longer than one year. One common solution is to provide for automatic extension of the duration of the undertaking. While no practice rules contain detailed provisions on automatic extension, ISP98 Rule 2.06 (When an Amendment is Authorized and Binding) does recognize this practice and distinguishes it from a traditional amendment which requires consent of the beneficiary. It is the text of the standby itself, however, that must contain the detailed provisions for an automatic extension. Neither UCP600 nor URDG 758 provide for automatic extension.

Among the elements to be considered in drafting an automatic extension clause or a demand to be made in light of it are the cycle of the extensions, the amount of time before the pending expiration that notice of non extension must be given, whether the notice must be sent or received by this time, whether the sending of the notice of non-extension and the failure of the applicant to replace the standby constitutes a separate basis for drawing, what recitals the beneficiary must make with respect to the proceeds when it draws before the underlying obligations becomes absolute and matured, and whether or not there is to be a final expiration date that is not subject to automatic extension.<sup>42</sup>

Another matter commonly treated in the standby text is the automatic reduction of the amount available under the standby or demand guarantee as the transaction is completed where the amount required for assurance commonly decreases. Reduction of the amount outstanding reduces costs, benefitting both applicant and beneficiary. Reduction may be accomplished by amendment requiring beneficiary and issuer to consent. Reduction may also be made automatic in the text of the undertaking. If it is possible to determine the time when the reduction should occur, then the undertaking can so provide. If not, then the undertaking may provide for a document to be presented that will automatically trigger the reduction.<sup>43</sup> URDG 758 Article 13 (Variation of Amount

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41. A period in excess of seven banking days after the banking day following the banking day of presentation is deemed to be unreasonable. ISP98 was drafted so as not to depart significantly from the time period for giving notice of refusal under the current UCP rule, UCP500 Article 14 (1993 revision) (Discrepant Documents and Notice).

42. These matters are addressed in webinars “Drafting ‘Evergreen’ Clauses” and “Drafting Revolving Credits” (each hour long webinar is available from IIBLP at <http://www.iiblp.org/>), ISP98 Model Form 3 (Model Standby Providing for Extension, Reduction, and Transfer) and Attachment 3A (Model Attached Payment Demand with Alternative Non-Extension Statement) contain model text. This device also requires careful consideration of internal operations by the issuer and its credit department as well as awareness of its significance by the beneficiary.

43. This process is “automatic” in that presentation of the document results in the reduction without the necessity of consent.

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of Guarantee) contemplates such a documentary reduction which would constitute an “automatic amendment” under ISP98.<sup>44</sup> UCP600 does not address either situation.

**15. Variations: Transfer on Demand.** Another variation appropriate for sophisticated financial standbys would be a provision in the ISP98 standby varying the rules requiring issuer consent for a transfer of a transferable standby. Standbys backing municipal bonds, for example, are issued in favor of a trustee who represents all of the bond holders. The trustee is required by the terms of the trust to make regular drawings of principal and interest. The trustee is also required to draw in the event of a default by the issuer of the bonds. As a result, it is essential that there always be a trustee who is able to act. Accordingly, the standby in favor of the original trustee must provide for transfer of all rights in the event that the current trustee resigns or is disqualified to act for whatever reason, so as to allow the current trustee or the successor trustee to present a demand that drawing rights automatically and immediately be transferred. Because a right to demand transfer does not exist under ISP98 or any practice rule, it would need to be in the terms of a standby. ISP98 Model Form 3 (Model Form Providing for Extension, Reduction, and Transfer) and Attachment 3C (Model Attached Demand for Transfer) provide for transfer on presentation of the beneficiary’s demand for transfer.

**Conclusion.** This brief comparative tour of ISP98 should give some insight into the nature of the rules and their interpretation. Hopefully, it has also provided an appreciation of their transactional context and application. It is conservatively estimated that there is more than US\$ 1.5 trillion outstanding in standby letters of credit and demand guarantees.<sup>45</sup> With less need for processing than commercial letters of credit, increasing market acceptance, and the constant need in commerce for a dependable and certain independent assurance mechanism, standbys and demand guarantees represent the future of the field of letters of credit. In terms of outstanding amounts, they already dwarf commercial letters of credit by a ratio of approximately 17:1 in amount outstanding. However, to be effective, they require effective rules. A credible case has been made that practice rules are stifling the commercial letter of credit. ISP98 was drafted to prevent that from happening to standbys and those demand guarantees that are issued subject to it. Not every transaction requires an independent undertaking, but where one is issued, it is in the interest of the banking financial, and commercial community to be sure that it works in a certain and efficient manner. ISP98 is a tool designed to assure that result. ■

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44. Model Form 3 (Model Standby Providing for Extension, Reduction, and Transfer) and Attachment 3B (Model Attached Demand for Reduction) also provides model terms.

45. The top 300 US banks reported outstanding standby obligations of US\$427.3 billion and US\$25.4 billion in commercial LCs in the second quarter of 2010. Nov./Dec. 2009 *Documentary Credit World* 40. Totals for the same quarter of 2009 for the top 300 US Banks were US\$465.4 billion in standbys and US\$22.4 billion in commercial LCs. Nov./Dec. 2009 DCW 39. Quarterly figures for outstanding LCs are reported regularly in *Documentary Credit World*.

The top 187 non-US banks with offices in the US reported outstanding standby obligations at the end of the second quarter 2010 at US\$201.5 billion and commercial LC obligations at US\$7.3 billion. Oct. 2010 *Documentary Credit World* 36. Totals for the same quarter of 2009 for the top 186 non-US banks were US\$232.4 billion in standbys and US\$7.9 billion in commercial LCs. Nov./Dec. 2009 *Documentary Credit World* 45.



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## ISP98 MODEL FORMS: A PRESENTATION TO THE ICC BANKING COMMISSION

by Professor James E. BYRNE\*

14 November 2012, Mexico City

The Institute of International Banking Law & Practice (IIBLP) is pleased to report to the ICC Banking Commission the release of ISP98 Model Forms 1 – 8 as of 27 June 2012. These forms were drafted to complement the International Standby Practices (ISP98) which the ICC has endorsed and published as ICC Publication No. 590. IIBLP also wanted to inform the banks that are members of the various national committees of this release so that they can take advantage of the forms or at least avoid surprise when their customers approach them with requests for standbys or demand guarantees based on these forms.

ISP98 is the preferred set of practice rules for US banks (including non US banks in the US), for a significant number of banks outside the US, and for so-called power beneficiaries to be used in independent undertakings, especially undertakings in the USD 500 billion market that supports debt that will be priced and sold on the basis of the bank's credit rating as determined by rating agencies and other participants in the debt market that already prefer undertakings issued subject to ISP98. It has been translated into 13 languages, the latest of which are Japanese and Russian. We are informed that a Swedish translation is now underway. We expect that the ISP98 Forms will attract a following similar to ISP98 and, indeed, there are significant indications that they already have.

As of now, eight forms have been released. They are:

Form 1: Model Standby Incorporating Annexed Form of Payment Demand with Statement

Form 2: Model Standby Providing for Extension and Incorporating Annexed Form of Payment Demand with Alternative Non-Extension Statement

Form 3: Model Standby Providing for Reduction and Incorporating Annexed Form of Reduction Demand

Form 4: Model Standby Providing for Transfer and Incorporating Annexed Form of Transfer Demand

Form 5: Simplified Demand Only Standby

Form 6: Model Counter Standby with Annexed Form of Local Bank Undertaking

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Reprinted from *Documentary Credit World*, November/December 2012, p. 31.

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Form 7: Model Standby Requiring Confirmation

Form 8: Model Confirmation of Standby

The forms will be adopted and used because they are freely available on the internet, well drafted as a result of thousands of hours of work by the top bankers and attorneys in the field, contain annexed demand forms that (consistent with best practice) specify precisely what must be presented in order to obtain honour, include detailed endnotes that explain the text of the forms and provide workable alternatives, and come with the same drafting integrity as the ISP itself. And like ISP98, which was drafted under the auspices of IIBLP, the forms were drafted to work under pressure over the long term.

IIBLP's goal in making the forms free and widely available is to reduce at the source the many problems with commonly used forms of standbys and demand guarantees which have resulted in unnecessary delay and litigation. Only by going to the source of the problem, namely the corporations and government agencies and their attorneys, and the texts of the bank undertakings that they frequently provide to bank issuers can many of these problems be efficiently be addressed. Incorporated practice rules cannot and do not moot many of the problems. Moreover, some problems, such as automatic extension or reduction, cannot be adequately addressed by practice rules because what is wanted is too individualized. These matters are only able to be addressed by better drafting of undertakings that are drafted by applicants and beneficiaries before bank issuers are approached.

The ISP98 Forms are thus primarily intended for bank customers, the applicants, and for their customers, the beneficiaries. Banks are expected to refer customers to these forms as a neutral source of sound and balanced forms. Banks are also welcome to adopt them, adapt them, and promote them as some banks in Europe and the US have already done.

The ISP98 Forms are intended as a starting point for major corporate applicants (especially Treasury departments) and for beneficiaries (especially their credit departments) and their attorneys who draft their undertakings. While the operations' staff and counsel of issuing banks might not prefer every provision in the forms, IIBLP is confident that bankers can live with all of them. Indeed, the forms and the various suggested alternatives in the endnotes are far more preferable than the bad forms that customers frequently hand to banks and that banks must either fix, reject, or issue in the hope that ambiguities and non-documentary conditions in the text will be resolved if and when they later arise and are tested.

IIBLP is confident about the reception of the ISP98 Forms by bankers and lawyers because the forms were drafted with the advice of dozens of bankers and bank counsel from around the world. Indeed, the forms have already been used as the basis for complex undertakings worth USD hundreds of millions and will come into use increasingly. One major European bank has used the forms for at least 3 years based on their drafts. Recently, I personally used them as a basis for drafting a USD 300 million standby and confirmation for a middle eastern bank and its branch in favor of a major government and was pleasantly surprised to find that the result was acceptable to the applicant, beneficiary, and banks without any change whatsoever.

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The principal drafter is James G. Barnes of Baker & McKenzie. I edited them. The Institute's regional advisory councils and hundreds of bankers and lawyers from around the world have commented on them extensively during the five years over which they were drafted.

Given the limited time available, it is not possible to explain the forms themselves. To begin to approach the forms, I suggest that you and your staff start with a form that will be familiar and of interest, namely ISP98 Form 6 (Model Counter Standby with Annexed Form of Local Bank Undertaking). From there, you should turn to ISP98 Form 1 (Model Standby Incorporating Annexed Form of Payment Demand with Statement) which provides the basic template for the other forms and, accordingly, explains the basic terms in greater detail in the endnotes. You will naturally progress to the other forms according to your interest. I point out, however, that in order to understand and appreciate them, the forms must be read in their entirety and with care, including the endnotes.

The ISP98 Model Forms are available without charge on [www.iiblp.org](http://www.iiblp.org), have been commented on in a series of articles in *Documentary Credit World*, the IIBLP's monthly journal of letter of credit law and practice, and have been rolled out to banks, users, and attorneys at the IIBLP's 2012 Annual Surveys and Forums in Moscow, Beijing, Hong Kong, Singapore, London, Dubai, Istanbul, and New York in addition to events by banks and lawyers around the world. Over time, it is expected that more will come. They will be referenced extensively in the 2nd Edition of THE OFFICIAL COMMENTARY ON ISP98. Further educational products are also being prepared.

In addition, the IIBLP has participated in the SWIFT ISO 20022 Demand Guarantee and Standby Letter of Credit XML Messaging Project, drawing on many of the principles and insights that are embedded in the ISP98 Forms. These twenty-two messages are in the final stages of approval by the International Standards Organization Trade Standards Evaluation Group and, on approval, will be published with the expectancy that they will be fully operational by 2015. We fully expect this format to set the industry standard in the future for this approximately USD 3 trillion global market, based on figures available to *Documentary Credit World*. The messages are fully compatible with the ISP98 Forms which can be incorporated as an attachment to the XML messages.

We suggest that you bring the ISP98 Forms to the attention of your operations' personnel and legal department in the event that they are not aware of them. You are welcome to use them in any manner that you wish including, as some banks and law firms have done, distributing them to your customer base with your logo and conducting customer education as a product opportunity. These forms are intended as a gift by the IIBLP to the letter of credit community and constitute an important part of its legacy. [Forms available at: [www.iiblp.org/ISP98Forms](http://www.iiblp.org/ISP98Forms)] ■

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

by Professor James E. BYRNE\*

*The subject of letters of credit affords an ideal introduction to advanced commercial law studies. Rather than being taught as a traditional case-oriented course, it is best taught by conducting students through discrete problem-oriented experiences that focus on transaction and litigation skills rather than theory. Otherwise, the basic principles underlying letter of credit law and practice are only superficially grasped. A practice-oriented approach will enable students to discover, interiorize, and apply letter of credit principles in a manner that leads to an appreciation of sound letter of credit law and practice. Such a setting readily reveals the degree to which vocabulary, legal obligations, relevant practice rules, laws, and related issues have been acquired and mastered.<sup>1</sup>*

### Introduction

This Article addresses teaching letters of credit (“LC”) in the context of teaching international commercial law as a two credit hour semester course in light of 30 years of experience teaching commercial law classes of various sizes and experience ranging from undergraduate to skilled bank professionals and attorneys in multiple countries (with and without translation). Part I is a survey of the inadequacies of the conceptual framework for teaching commercial law subjects and of current instruction methods. Part II presents proposals for an alternative method of teaching commercial law and specifically letters of credit through a transactional approach. Finally, Part III discusses several lessons used to teach all grade levels are included to make concrete the abstract points made here.

The goal of the courses envisioned here is to enable the student to appreciate and begin to formulate sound letter of credit law and practice with respect to discrete international issues and indirectly to build a transactional basis towards approaching commercial law.<sup>2</sup>

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AMERICAN UNIVERSITY BUSINESS LAW REVIEW, Vol. 3:1, 2014. Reprinted from 2015 ANNUAL REVIEW OF INTERNATIONAL BANKING LAW & PRACTICE 33. For purposes of this reprint in DCW, footnotes 3-45 have been omitted, however they are available in the 2015 ANNUAL REVIEW referenced above or by following the underlined hyperlink below.

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

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

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Because this Article discusses the effective teaching of commercial law from the perspective of teaching a course on LC law and practice, it is helpful to begin with an introduction to LCs.<sup>3</sup>

The term “letter of credit”<sup>4</sup> and its variations such as “LC” in the context of this paper signifies the family of independent undertakings, (so-called “documentary”<sup>5</sup> letters of credit) including commercial letters of credit,<sup>6</sup> standby letters of credit,<sup>7</sup> independent (bank, first demand) demand guarantees,<sup>8</sup> confirmations,<sup>9</sup> reimbursement undertakings,<sup>10</sup> and pre-advices.<sup>11</sup> The term excludes other undertakings with similar functions such as accessory or suretyship undertakings (dependent undertakings), indemnities, insurance, or bilateral contracts.<sup>12</sup>

## I. The Inadequacies of the Current Conceptual Framework and Methodologies for Teaching Commercial Law

To begin this discussion of effective teaching of commercial law on a transactional basis, it is important to discuss current teaching practices and approaches to material and why they are not effective. Several points need to be made.

### A. It is Not Contract Law

In my experience, contract law is inapt for the effective study of LC law.<sup>13</sup> An LC is only a contract in the sense that it does not fall within the other branch of the law of obligations, namely tort.<sup>14</sup> There is no bilateral promise, the beneficiary has no obligation to the issuer/guarantor and perhaps to the applicant (who is, in any event, not a party to the LC undertaking) to perform (draw on the LC), and there is no bargained for agreement between the issuer/guarantor and the beneficiary.

An example is transfer. In contract law, “transfer is used in parallel with ‘assignment’”<sup>15</sup> whereas in LC law and practice, they are very different phenomena. An LC transfer is of the right to draw, namely, the transferee is a new beneficiary. LCs are not transferable undertakings unless they expressly so provide.<sup>16</sup> An “assignment” in LC law and practice is of any proceeds that may result from a drawing on a LC. If an assignment of proceeds by the beneficiary is not acknowledged by the issuer, then the issuer has no obligation to pay proceeds to the assignee.<sup>17</sup>

### B. Letters of Credit Are Neither Commercial Law Nor Sales Law

While LCs are a part of commercial law in a broad sense, they are more like pre-modern law in that they are a promise that runs to a unique person that is not freely transferable and calls for a performance that is more precise than substantial.<sup>18</sup> Many, if not most, of the instincts of a modern commercial lawyer or jurist are inapt in the application of LC law.

One telling example is the LC preclusion rule, a doctrine that operates quite differently than estoppel, to which it is sometimes incorrectly equated.<sup>19</sup> An issuer/guarantor that fails to give adequate and timely notice of refusal is precluded from asserting that the documents presented are not in compliance with the terms and conditions of the undertaking regardless of whether the discrepancy was curable or there was reliance. The point of this rule is not to give the beneficiary a “free ride”, but to assure the integrity of the LC institution and to require issuers/guarantors to



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make a timely and complete examination and to give timely notice of the results. While curability is a factor, it is a secondary one.<sup>20</sup>

In a Sales course, there are other differences with respect to payment terms. The focus in a letter of credit course regarding payment terms should be on the LC terms to be inserted into a contract for payment against the recent shipment of goods or extrapolated from it and inserted into a LC and their interpretation and application. In a Sales-oriented course, the focus would be on the provisions for payment by LC in the sales contract. Most of the materials on Sales that deal with LCs overlook this point and attempt to provide a mini-treatise on letters of credit. Such an approach is inadequate to teach LCs and does not attempt to focus students' attention on drafting an adequate payments clause or interpreting the inadequate ones that are often drafted. This failure may offer one explanation for the relative lack of sophistication in contract clauses related to payment or assurance of payment by LCs. An example would be whether a standby LC providing for payment 60 days after the date of delivery on a required copy of a transport document meets a sales contract required of "payment by LC issued by an acceptable bank[;]" i.e., is a "standby" a "letter of credit" in the sense intended?<sup>21</sup> This question is one for Sales law and not LC law.

## **C. The Study of Letters of Credit Is a Useful Basis for Understanding Commercial Transactions**

The study of LCs is an ideal platform from which to describe and discuss commercial transactions because it is highly challenging for even the brightest student at the highest level, but also understandable in a basic, but meaningful way even for students at the beginning of higher education. The study of LCs also brings together all of the aspects of a commercial transaction including sales or service contracts, payment, delivery, terms, obligations of third party intermediaries regarding delivery and inspection, the correspondent banking system, the differences between dependent and independent undertakings, the use of commercial documents in a representational capacity, mechanisms for third party assurance of performance, and mechanisms for assurances of repayment. These observations would also apply to differences with other forms of financial assurance ranging from the performance of obligations to the repayment of funds, whether from simple loans or supporting the bond market

Furthermore, the study of LCs is a significant instance of workable self-regulation in commercial law. Why it works is another, and charged, question. In my opinion it is because the LC banking community, which has evolved the rule making apparatus, has grasped the essential need for neutral rules as a basis for the credibility of the product and of specific banks. It helps that the banks themselves are often the beneficiary or nominated banks as well as issuers and confirmers and that the applicants are often good customers, thus feeding the desire for neutral rules.

## **D. Methodologies for Teaching Letters of Credit: The Problem of Using Reported Judicial Decisions**

In my opinion, an approach that emphasizes retention and reporting of facts, rules, and data embedded in judicial decisions should be avoided. The result of such an approach is a superficial understanding of LC law and often a misunderstanding of LC practice. To a considerable extent, this approach explains why lawyers and judicial decisions have tended to fail to grasp and apply the principles behind LC law. It is also why, in the opinion of experts, more than half of reported

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decisions are wrong; and, of those that are correct, more than half are correct for the wrong reason.<sup>22</sup>

U.S. law schools can place too much emphasis in their teaching methodology in advanced courses on the use of reported cases as a mechanism for teaching students the “black letter law”. This approach is not optimal if the goal of the course is to elicit critical faculties regarding the subject matter. The tendency of casebook editors is to fill their books with the leading decisions coupled with detailed notes and explanations of the principles contained in the cases.

Instead, casebooks should simply be “bare”, that is, platforms for the classroom experience, and should not be treatises of the subject involved. That function should be left to treatises themselves and students should be left to their own devices in learning how to master and utilize them in understanding the field as they will in practice. Thus, the texts should be excerpts from reported cases or the text of various undertakings that are appropriate platforms for discussion.<sup>23</sup> In my opinion, at least one-third of the cases in the materials should be wrong, misguided, or problematic. Otherwise, students are reinforced in the notion that they should take the printed word too seriously, a serious mistake for a lawyer. The notes should pose dilemmas that are not solved in the text, forcing students to grapple with the problem.

Needless to say, students hate this approach. They simply want to write down the answer and move along to “learning” more “things” with as little intellectual strain or work as possible. This negative student reaction is a positive indication of the merits of the method, based on the reasons behind it. Another positive indicator is that more mature students tend not to react in this manner.

The problem remains as to where students can look for the resolution of the problems and issues. Subtle hints should be given. In addition, the ready availability of the texts of practice rules, statutory provisions, and model forms helps considerably. The library should also have ample resources. Above all, however, students must learn to find sources themselves, a skill that they will need to do in the real world so it is essential not to spoon-feed them.

## E. What Are Letter of Credit Law and Letter of Credit Practice?

Since it has been asserted that LCs are not to be understood from the perspective of contracts or sales, it is necessary to consider what constitutes LC law and practice.

### 1. A Starting Place Is Classification

There has been considerable debate about how to classify LCs. This debate was undertaken at the beginning of the 20th Century and the best resolution was that it should be understood as *sui generis*, a manifestation of the *lex mercatoria*.<sup>24</sup> That conclusion, in any event, coincides with my opinion.

Excluded from an LC course in most instances are the following related LC subjects: bank-to-bank reimbursements,<sup>25</sup> collections,<sup>26</sup> SWIFT,<sup>27</sup> and authentication.<sup>28</sup> These topics are usually not addressed except in training professionals because they clutter discussions without adding light to basic issues. Also excluded are negotiation,<sup>29</sup> transfer, assignment, and pre-advice.<sup>30</sup> These topics are too difficult for students to readily grasp and, in my opinion, the time is better spent on more basic topics.<sup>31</sup>

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## 2. Deference of LC Law to LC Practice

The fundamental principle in the field of LC law is the deference of law to sound rules of practice. The corollary of this principle is that in order to understand LC law, it is necessary to understand LC practice. There are, of course, exceptions to this principle, but they are rather limited.<sup>32</sup> There are also important policy questions in addition to the matters indicated above, namely the importance of insisting on the soundness and neutrality of the practices to which deference is given.

## 3. Encouraging Sound LC Practice

The primary mission of LC law is to encourage sound LC practice. On the whole, soundness is manifested in the neutrality of a given rule which does not favor any particular party and which is manifested in making the LC workable and not in multiplying excuses to payment. This rule often equates to *contra proferentium*, that is, construing ambiguity against the issuer/guarantor but which can also involve public policy issues where LC fraud, protected persons, perpetual undertakings, or similar issues are involved.

## 4. Letter of Credit Law

To the extent that there is a letter of credit law, it is either statutory or case-inspired law. There are chiefly three statutory schemes available, the United Nations Convention on Independent Guarantees and Standby Letters of Credit,<sup>33</sup> Revised U.S. U.C.C. Article 5 (Letters of Credit),<sup>34</sup> and the Chinese Supreme Court rules regarding letters of credit.<sup>35</sup> These statutes or rules were formulated in light of letter of credit practice and compliment it.

Apart from these rules, however, LC law consists of judge-made pronouncements, which are non-systematic at best. Although the common law recognized at an early point in time the importance of a statutory formulation for a subject as complex as commercial paper in the UK Bills of Exchange Act in 1882, many common law jurisdictions (including England) have failed to do so for a subject far more complex—namely, LCs. Even less understandably, the civil law jurisdictions have no statutes for LCs. The result is a series of decisions both in common and civil law jurisdictions, which are of mixed value at best. As indicated, even where the result is proper, the rationale explaining it may not be.

## 5. Letter of Credit Practice

What constitutes sound LC practice is a fairly complex question. There are, of course, articulated rules of practice; namely, the Uniform Customs and Practice for Documentary Credits (UCP600),<sup>36</sup> the International Standby Practices (ISP98),<sup>37</sup> and the Uniform Rules for Demand Guarantees (URDG 758).<sup>38</sup> In addition, there are a host of subsidiary articulations of practice including most notably the International Standard Banking Practices (ISBP 2013).<sup>39</sup> These attempts to articulate standard international LC practice largely emanate from the Commission on Banking Technique and Practice of the International Chamber of Commerce. They are not written by lawyers or for lawyers and have occasioned considerable difficulty when courts have attempted to interpret them as statutes.<sup>40</sup>

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## F. Approach to Teaching

In the absence of a sophisticated conceptual model of teaching methodology for law schools, this paper distinguishes (i) a lecture-based approach, with or without tutorial session; (ii) a casebook approach; (iii) a litigation problem-oriented approach; and (iv) a transactional approach. For clarification purposes and understanding these following teaching approaches are understood and classified as:

*Lecture-Based Approach.* Lecture is understood to consist of a monoline presentation by the instructor with or without the possibility of questions that attempts to set forth a systematic exposition of the subject matter. It is my experience that pure lecture has very limited effect because it is difficult to determine the level of comprehension and is only effective as a means of summarizing material once it is apparent that the students have mastered it.

*Casebook Approach.* A casebook approach is understood to consist of using reported legal decisions as a platform on which to teach involving a series of oral questions designed to elicit an understanding of the decision and its theoretical underpinnings. It is my experience that this method is of limited value with non common law jurisdictions and that its focus for common law students is too narrow, in part because of the lack of a transactional appreciation of the underlying transactions.

*Litigation Problem-Oriented Approach.* A litigation problem-oriented approach is understood to consist of designed problems intended to systematically lead the students to resolve legal issues related to litigation through a series of situations that will require them to master the terminology and legal obligations involved and to apply them in a practical setting to resolve problems in a principled manner.

*Transactional Approach.* A transaction-oriented approach is understood to consist of problems related to resolving client needs by suggesting various solutions and drafting to implement them.

Both the litigation and transactional approaches require considerable instructional engineering and flexibility in execution depending on the circumstances in the classroom. Typically, both approaches involve having students attempt to resolve the various problems, often in a context in which they must justify their position against those held by parties reflecting divergent interests.

## II. Methodology for Teaching Letters of Credit: A Transactional Approach

Given that other more traditional studies of transactional law are inappropriate for the teaching of transactional law for the reasons discussed above, a better alternative is possible.

### A. Preferred Approach

The preferred approach for teaching this material is a combination of the three forms identified here with primary emphasis on the problem-oriented approach. A modified version of what is described here as the casebook approach (based on thorough questioning) is used to assure student familiarity with essential definitions and terms of art (but, generally, not using assigned case reports). The problem-oriented approach is used for the bulk of the class sessions, ideally in settings

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in which students explain their positions, interact with opposing positions in a litigation setting or seek accommodation in a transactional setting with other parties. Lecture is used to summarize material at the conclusion of a session where it is apparent that the students have grasped the principles intended to be identified in order to reinforce the lesson. A modified version is interspersed throughout the class session where it is essential to redirect fruitless discussions or misdirection.

## **B. Discussions**

Permitting students to discuss the issues among themselves during the class has proven helpful. Taking a break during a difficult point for the students to engage in side conversations can be useful for them to regroup and then raise more focused questions. This method is especially helpful where the students' first language is not English. In this case, it can be helpful for the students to engage in discussions among themselves in their own language. The discussions can either clarify points that are not fully grasped or to enable one of the students whose English is better to formulate questions in English for those not able to do so. These comments would not exclude online discussions using vehicles such as TWEN but live interaction in a monitored setting has considerable advantages.

## **C. Two Cautionary Observations for Instructors**

It is a challenge for instructors to refrain from intervening in problem solving exercises. However, if the students are to learn to apply their understanding to the resolution of problems, they must be allowed room to make mistakes and the freedom to conclude that they have made a mistake either by following their mistake to its ultimate consequence or with the assistance of classmates. Therefore, the instructor's best contribution to these exercises is not to speak or merely to ensure that the discussion flows evenly with all students involved.

There are times when silence can be golden. There is nothing wrong with silence in response to a question. Let the students work through the question. Many instructors fear silence and believe that they must fill any such void. Doing so, however, will teach the students that they need not think since the answer will be forthcoming if they only remain silent.

## **D. Assessment**

The focus of the assessment of students used in these courses is not to determine whether basic terminology has been mastered or whether basic principles can be repeated. Mastery of these basics is assumed. What is intended to be tested is the understanding of these principles at a deeper level. This understanding is measured by testing the ability of the student to take basic principles and apply them to situations not discussed in class or the readings. All questions are in the context of a factual problem.

An example of such a question would be a factual setting in which the beneficiary has committed letter of credit fraud, but the transferable credit has been duly transferred to a transferee beneficiary who has drawn on the LC. The issue is whether the doctrine of independence applies to the due transfer of a transferable credit and whether the transferee is a protected person, thus



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constituting an exception to the LC fraud and abuse exception to the independence principle. Of course, the problem set forth in the examination would not be described in a conclusory manner as it was here but the various facts would have been explained, leaving the student to determine the issues, identify and express them, and to resolve them.

## E. Forum and Governing Law

Careful thought must be given to the applicable law and forum for any problem. This decision will affect the significance of judge-made law in resolving the problem. Of course, a decision about judge-made law will be affected by the location where the course is being taught. However, students should be given the opportunity to explore at least one of the statutory schemes even where there is no applicable statutory scheme. The UN LC Convention provides a useful platform for such an exercise.

## III. Suggested Course Outlines, Methodology, Structure, and Examples<sup>41</sup>

The principles discussed here would also apply to treatment of LCs in the context of other traditional commercial law courses such as sales or commercial paper/negotiable instruments, in one or two classes. In such a setting, the temptation is to focus on transmitting information to be recalled rather than on interiorization of principles necessary for problem solving due in large part to time limitations. This condensing manifests itself on two levels: by cramming facts and data in a written discourse in the text and by pure lecture in the classroom.

### A. Prerequisites and Limited Coverage

The essential starting point for substantive areas of LC law is student understanding of the terms being used and an appreciation of the transactional or litigation context in which they unfold. Considerable work must be done to develop the contexts for these problems. Sample problems are explored further in following text.

While it is valuable for students to have some real world background in business, there are no essential prerequisite courses for this course, except that it is assumed that the course would not be offered to students in their initial year of legal or business studies. Contracts, or the law of volitional obligations, would be useful if the students understood third party debt obligations (suretyship or accessory undertakings), but this topic is rarely covered adequately in such courses. A course in the sale of goods may provide insights into the legal background for sales transactions, but it is my experience that any treatment of the payment obligation by means of letters of credit often causes more difficulties than benefits.

It also is assumed that no law school course will enable the student to obtain mastery of the entire field. The choice is between seeking a superficial mastery of large quantities of information and focusing on selected areas of concentration in which the student can be expected to gain some insight and understanding. The approach taken in this paper and the courses that it reflects is the latter choice. Therefore, it is necessary to identify discrete areas that can be grasped in the time available and that will yield significant insights into the subject. Even for these areas, however, it is necessary to select discrete problems that are typical and afford a useful insight.

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## B. Factors in Selecting the Areas Around Which the Problems Are Focused

The selected areas should be: (i) transaction—matters which involve the type of work that is done on a regular basis for clients with respect to drafting contracts, forms and other matters; (ii) litigation—issues that arise regularly and offer arguments from various perspectives; (iii) drafting of practice rules and related policy issues—issues that require in-depth appreciation of the various perspectives involved; and (iv) regulatory issues—questions of safety and soundness.

## C. Materials

The most significant problem in creating a course is providing materials for the students. The problems include obtaining access to practice rules, statutes and similar materials, reported cases, and practical problems. I have developed materials for these courses.<sup>42</sup> My students are required to have: (i) the texts of the practice rules and laws; (ii) a textbook containing problems, excerpts of texts of selected cases, and an outline of the course; and (iii) the ISP98 Model Forms. As indicated, it is not possible to understand LC law without thorough familiarity with the practice rules, meaning that the students must have their text. Because of the predatory copyright and pricing practices of the ICC, the Institute of International Banking Law & Practice (IIBLP) has collected the important texts into *LC Rules & Laws: Critical Texts* and made them currently available at USD 59.00, a price which is one quarter of what it would cost to purchase them individually, and more than half of the price of this book consists of royalties.<sup>43</sup> The textbooks differ in that one is focused on LCs generally while the other focuses on standbys and demand guarantees. In addition, the students should have resources available to them in the school library.<sup>44</sup>

## D. Examples of Practice Problems

The following areas have been selected for development of practice problems: (1) independence principle versus dependent undertakings; (2) rules and laws; (3) obligations; (4) compliance with the terms and conditions of the undertaking; (5) drafting a clause in an independent undertaking; (6) counter-standby or counter-guarantee practice and issues which arise with respect to it; (7) LC fraud or abuse; and (8) an example of an assessment (test) based on the application of the material to public policy. The rationale behind the choice of each area is explained with respect to each area below.

The selected areas represent examples that have been used previously. They are changed in the courses from time to time, based on developments in the field. Whenever possible, I try to draw on current issues being debated in the evolution of doctrine in LC law and practice. For example, currently there is considerable interest in automatic extension of the expiry date of a LC-type undertaking and the automatic reduction of the amount available, which is reflected in two of the exercises below. Fifteen years ago, the issue would have been originality of documents and applicable rules and case law.<sup>45</sup> That problem is now basically resolved and the issue is only of historical interest. An issue attracting attention and that is likely to be reflected in the next iteration of the course is how to handle the reinstatement of a LC that has expired, an issue on which there is no consensus.

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Example 1: Independent Undertakings. Analysis of LC Practice: The Independence of an Undertaking.

**The Assignment.** Classifying the text of an undertaking drawn from a reported case and redrafting it to ensure that it will be classified as an independent undertaking.

**Significance of the Topic.** Apart from the general importance of independence, a not insignificant number of cases are reported annually involving sophisticated parties and large sums in which it is not clear whether the undertaking is dependent or independent. Most of these cases relate to demand guarantees whose distinction from dependent (true) guarantees is often blurred. Considering these cases forces the student to decide what independence signifies, when it is present, and why.

**The Platform.** The materials contain the text of several undertakings from notable cases. The decisions are not linked to the texts and some of the decisions appear later in the materials. Valid arguments can be made for concluding that the texts are either dependent or independent. There is no obviously correct answer based on the texts.

**Classroom Approach.** Students are asked to determine whether or not a particular text is dependent or independent and justify their choice. They are then asked to compare their evaluation with that of the courts. They are then asked to revise the undertaking to make it unambiguously independent (or dependent) and, only after doing so, to compare the text with ISP98 Model Form 1 (Model Standby Incorporating Annexed Form of Payment Demand with Standby). The attempt to fix the text can alternatively be assigned before class.

**Instructional Goals.** It is hoped that the students will come to appreciate the importance of independence, the difference between it and suretyship, of drafting (good and bad and comparing the two), of classification, of using and relying on practice rules for independent undertakings, of presumptions in ambiguous situations, the problem of non documentary conditions, of clarity regarding the intention of a client, and of the elements of independence. They are also invited to consider whether independence is a question of drafting or status.

**Appendices.** Appendix B [omitted] contains an undertaking from an English case, *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2005] EWCA (Civ) 395, 2005 All E.R. 117, and Appendix C [omitted] contains ISP98 Model Form 1.

Example 2: Law & Practice. Drafting a Practice Rule.

**The Assignment.** Formulating a practice rule for automatic extension clauses.

**Significance of the Topic.** Practice rules are critical to the understanding of letter of credit practice and letter of credit law. However, their quality is uneven. ISP98 represents the most tightly drafted set of practice rules and UCP600 the most porous. It is essential that students appreciate the difficulty of interpreting and applying practice rules.

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**The Platform.** One of the areas not codified in detail in current practice rules is the automatic extension clause. Such clauses have considerable advantages in that they permit regular reevaluation of the credit decision for long-term undertakings, usually on an annual basis. There are, however, considerable challenges coupled with such clauses. Forcing students to attempt to draft a rule forces them to confront their own inadequacies as drafters. For convenience, I ask students to draft a new rule for ISP98 because it already deals with one preliminary issue—namely, that such a provision is not an “amendment” requiring the consent of the beneficiary—and so that they can concentrate on other more important doctrinal and technical issues.

A variation on this approach would be to start by asking the students to draft a revision of *The Official Commentary on the International Standby Practices* on ISP98 Rule 2.06 (When an Amendment is Authorised and Binding), which contains the provisions explaining the effect of an automatic amendment, and to require them to draft a new rule in a second class.

An alternative approach would be to take a specific rule and require students to critique it. One obvious example is the inadequate definition of “Negotiation” in UCP600 Article 2 (Definitions), which incorrectly links the definition to the presentation being complying. This problem surfaced in a recent Hong Kong decision, *China New Era Int’l Ltd. v. Bank of China (Hong Kong) Ltd.*, [2009] HKCU 2012 (C.F.I.). My approach has been to provide the facts of the case but not the decision and require the students to analyze the problem.

**Classroom Approach.** It is expected that students will circulate their clauses prior to class, and specific students are assigned to critique specific clauses.

**Instructional Goals.** The goal is to introduce an element of humility before the reality of LC practice and business needs. The students have no basis for drafting a practice rule without understanding the practice and the problems it entails. In my experience, they do not understand that practice rules must proceed from the comprehension of the practices being ordered. Only by taking what is typically a technically sound draft rule can this point be brought home to them forcefully.

**Appendices.** Appendix D [omitted] contains a recent assignment reflecting a two part exercise that involves revising *The Official Commentary on the International Standby Practices* and then revising ISP98 itself.

Example 3: Obligations.

**The Assignment.** Students are given a problem drawn from LC practice with ramifications for the obligation of various players and asked to sort it out with a view to pending litigation.

**Significance of the Topic.** A necessary prerequisite to understanding LCs is understanding the undertakings made by various entities.

**The Platform.** Here, the platform is a problem based on practice. Depending on the focus of the course, the problem could be drawn from so-called silent confirmations, the obligation of

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negotiating banks that negotiate but seek to recover the proceeds from the beneficiary when the issuer refuses on the basis of alleged discrepancies, or the obligation of a confirming bank when the beneficiary bypasses the confirmer and presents documents directly to the issuer.

An alternative exercise could be based on the role of an advising bank to which documents are presented on the expiration date and forwarded to the issuer or confirmer on that date but received after the expiration date.

**Classroom Approach.** Students are given the problem in advance and required to prepare and circulate brief memos to a senior partner assessing the problem and courses of action. They are given different clients, typically an applicant, issuer, nominated bank, and beneficiary. In class, they are required to discuss their positions.

**Instructional Goals.** The goal is to provide students with an appreciation of the obligations of the various players and their role in practice, the relative practice rules and their differences, and statutory provisions that might affect these obligations.

Example 4: Compliance.

**The Assignment.** Students are provided with the text of a letter of credit-type undertaking, documents presented under it, and a notice of refusal. They are given various persons as clients, namely an issuer, applicant, beneficiary, and possibly a nominated bank. The discrepancy is technical, that is: (i) omitting the number of the letter of credit or missing a number or letter in it; (ii) omitting or misstating some detail from the description of the goods that is not germane to the description of the goods and extraneous to the particular document (such as shipping information or addresses) and its role in the LC transaction; or (iii) omitting required information such as the LC number or inserting incorrect extraneous information on a document that has no bearing on its role in the LC. Applicable rules may have bearing on this problem and they will be indicated in the undertaking.

**Significance of the Topic.** A significant number of reported decisions deal with problems regarding the compliance of presented documents with the terms and conditions of the undertaking. Misunderstanding the notion of “strict compliance” (which is a legal term and not one contained in any of the practice rules), courts and attorneys often resort to the mindless notion of literal replication which neither reflects actual LC practice, the practice rules, or common sense.

**The Platform.** The problem and legal memos addressing it can proceed from the different perspectives of various clients. The problem could involve stages, starting with the course of action of the confirmer or negotiating bank (if there is one) and addressing the problems that arise when a notion of refusal is given for the issuer, the beneficiary, and the applicant. The notice of refusal is deliberately drafted inadequately but students’ attention is not drawn to this point until the classroom exercise is well underway.

**Classroom Approach.** Start with a discussion of the merits of the presentation, namely does it comply and why, and then to move on to the question of whether the notice of refusal is adequate and, if not, the consequences of its inadequacy.



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**Instructional Goals.** One goal is to help students deal with problems caused by pending litigation or that arise transactionally. Also, the problem forces students to see a problem from the perspective of various parties. It forces the students to face the inadequacy of the so-called “strict compliance” approach and to take a more nuanced approach to the problems caused by minor typographical errors that are extraneous to the role of an otherwise complying document in a letter of credit transaction. The problem also forces students to appreciate the importance of provisions in an agreement between the issuer/guarantor and the applicant dealing with such issues.

Example 5: Drafting an Automatic Extension Clause.

**The Assignment.** Students are given a factual problem and asked to draft an automatic extension clause for a letter of credit which is to be circulated before class.

**Significance of the Topic.** The topic focuses on the significance of the processes involved in drafting and the need for interaction between the parties to reach a consensus. Automatic extension clauses are essential to modern letter of credit practice since it is neither safe nor sound for banks to make long term commitments without regular reassessment of the credit standing of the applicant. Such clauses are also highly problematic, however. To name only one issue, should a notice of non-extension be effective when sent to the beneficiary or received?

**The Platform.** Here, the platform is a factual problem in which a construction company requires a performance standby or demand guarantee for 10 years related to a USD 50 million hydroelectric project in another country for a government-controlled entity. The focus on the issue is whether the bank will or can issue such an undertaking for that length of time and the alternatives.

**Classroom Approach.** First, the students are invited to comment on the various draft clauses which are projected on a screen.

Second, students are required to take the role of the applicant, the beneficiary, and the applicant’s bank with respect to a transaction for a period of ten years. They are required to consider the various issues involved in such an undertaking and how it is that the relative risks can be mitigated. The optimal solution in such a context apparently is a limited duration of an expiration date with an automatic extension clause coupled with notice of non extension and the ability to draw in the event that notice is given. The students are forced to discuss, negotiate and consider the various alternatives as well as the issues involved in the formulation of such a clause such as to whom notice is given, addresses, whether it is to be sent or received, and similar issues.

**Instructional Goals.** This exercise should be linked with the exercises on drafting rule for automatic extension clauses but need not immediately follow it. The exercise should demonstrate the inadequacy of practice rules to solve certain problems. At some point, the students’ attention should be directed to ISP98 Model Form 2 (Model Standby Providing for Extension and Incorporating Annexed Form of Payment Demand with Alternative Non-Extension Statement) whose provisions and endnotes detail many of these issues. The dramatization forces students to identify with the various perspectives of their clients and to come to a resolution with which the various parties can live or to face the consequences of failure to do so. Any solution must provide adequate protection to the issuer/guarantor and to the beneficiary.

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**Note:** Three of these exercises involve automatic extension clauses, namely (and in this order) drafting a comment in the official commentary on a practice rule, drafting a proposed revision of the rule, drafting a clause for a standby letter of credit, and negotiating the terms of the clause. These exercises are deliberately structured to be backwards. It is absurd to attempt to draft rules without understanding the issues that arise in practice and difficult to draft a clause for a standby without having a sense of what is possible. In addition, the exercises are designed to illustrate the limitations of rulemaking. Some things are better handled by drafting or model clauses than rules.

Example 6: Counter Undertakings and related issues and problems.

**The Assignment.** Students utilize the exercise involving drafting an automatic extension clause (Example 5), requiring issuance of a counter undertaking requesting issuance of a local bank undertaking in favor of the government agency ordering construction of the hydro-electric plant. The facts will be drawn from the problem in Exercise 5.

**Significance of the Topic.** Counter undertakings have assumed considerable importance in letter of credit practice.

**The Platform.** Students are requested to deal with the consequences of closure of the local bank on a business day which is also the expiration day of the local bank undertaking on the counter undertaking.

Alternatively, or in conjunction with this exercise, they can be asked to deal with forwarding documents presented under the local undertaking in the context of an otherwise complying presentation under the counter undertaking.

**Classroom Approach.** Students are assigned roles in advance and asked (separately or together as a group) to draft a counter undertaking containing the text of the requested local undertaking or to draft a reply to the request on the part of the local bank. The class is used to discuss the issues.

**Instructional Goals.** To acquaint students with counter undertakings and the different problems and issues that arise under them.

**Appendices.** Appendix E [omitted] contains a recent example of an assignment.

Example 7: Letter of Credit Fraud or Abuse.

**The Assignment.** Students are given a factual problem involving delivery of goods that had little or no economic value. The students are given various scenarios involving the beneficiary and involving nominated banks and a counter undertaking.

**Significance of the Topic.** An example is used in the context of counter-standbys or counter-guarantees coupled with several cases which speak to these issues. The focus of the exercise is the litigation postures of the various parties. Students are assigned to represent the local beneficiary, the local bank, the issuer of the counter-standby or counter-guarantee, and the applicant. They are

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required to indicate in a memo their approach to various issues including jurisdiction, law, and the substantive issues involved with respect to fraud and the role of protected persons. In the hypothetical that is set for them, it is likely that the local beneficiary has committed fraud and the question is whether or not a demand by the local bank which is the beneficiary of the counter-undertaking is to be honored where the local bank has honored its local obligation.

**The Platform.** The factual problem with various scenarios calling for memos on behalf of various clients.

**Alternative:** Use the problem from Example 6 and indicate a drawing without basis by the local beneficiary coupled with a complying drawing by the local bank on the counter standby. This problem would force the students to address whether the local undertaking was separately independent from the counter undertaking.

**Classroom Approach.** Require the students to submit to mediation on behalf of their clients and permit them to interact with each other's arguments.

**Instructional Goals.** Understanding the various degrees of conduct that constitute Letter of Credit Fraud or Abuse and exceptions in favor of protected persons.

**Appendices.** Appendix F [omitted] contains a recent assignment.

Example 8: Assessment based on application of principles to a public policy question.

**The Assignment.** Students are given a take-home examination limited by a time deadline and the number of words permitted. The examination asks students to address the following question: "The Peoples' Supreme Court is drafting rules [under Chinese organic law, legally binding on all Chinese courts] for standby letters of credit. Assume that you are asked for advice. What suggestions do you have?"

**Significance of the Topic.** Questions of public policy and statutory drafting. In a course to Chinese graduate students, they were required for the final examination to draft a memo directed to the People's Supreme Court indicating issues to be considered in drafting rules for standby letters of credit. It should be noted that the People's Supreme Court has drafted rules applicable to commercial letters of credit and is bogged down in theoretical and substantive questions with respect to demand guarantees which are confused with dependent guarantees for which there is legislation in China (as in many countries). The question is in the minds of the drafters whether standbys should be linked with commercial letters of credit or with demand guarantees which are (mistakenly) classified with dependent guarantees. The exercise tests the ability of the student to grasp substantive issues as well as to provide a sound resolution of the problem.

**Basis for the Assessment.** Whether the students able to provide a coherent and principled resolution to the various issues including classification. ■

## THE PASSING OF A FRIEND AND GIANT – JIM BYRNE

by Michael Evan Avidon

Partner, Moses & Singer LLP, New York, New York, USA  
Chair, Letter of Credit Subcommittee of the American Bar Association

I first met Jim more than 30 years ago. It was at an American Bar Association (ABA) meeting. He had red hair back then and I had not started balding. I offered to help with letter of credit-related projects. Little did I know then how important that meeting would be to my life and career.

Jim was welcoming and enthusiastic. He made it clear that he was “Jim” and not “Professor Byrne”. He welcomed me to the joint Task Force that had been formed by the ABA and the United States Council on International Banking (predecessor to IFSA and, later, BAFT) to study and report whether Uniform Commercial Code (UCC) Article 5 on Letters of Credit should be revised.

And so began a journey that went from the Task Force during the 80s, to the revision of UCC Article 5 during the 90s, the founding of the Institute of International Banking Law & Practice, Inc. (the Institute), the drafting of the International Standby Practices 1998 (now known as “ISP98” and the rules of choice for standby letters of credit), the revision of the Office of the Comptroller of the Currency’s (OCC’s) interpretative rulings on letters of credit and other independent undertakings, the drafting of the United Nations Convention on Independent Guarantees and Standby Letters of Credit, the founding of various publications, including *Documentary Credit World*, the periodic revision of the Uniform Customs and Practice for Documentary Credits (UCP), the founding of the Annual Survey of LC Law & Practice (which grew from humble New York beginnings into acclaimed programs held around the world), the founding of the annual LC Law Summit and the Standby and Guarantee Forum, and the drafting of Model Forms for ISP98.

But this just scratches the surface. Jim lent his time, his intellect, and his energy to so many other worthwhile efforts, including serving as a Chair of the ABA Letter of Credit Subcommittee, authoring or co-authoring numerous important articles, including the LC section of the annual UCC Survey published in *The Business Lawyer*, and acting as an expert witness, counsel or advisor on countless letter of credit disputes. Recently, his many accomplishments in the field of commercial law led to his election as a fellow of the American College of Commercial Financial Lawyers.

I never understood how he found the time to teach but he did. Sometimes he brought his students to my office to hear from me what it was like to be a practicing lawyer in a law firm. Jim was quite the mentor, not just to his students but to bankers and lawyers around the world.

Although Jim was an academic, one of his unusual gifts was his ability to connect with bankers, business people and their advisors and keep things real and down to earth. He was always looking to “standard practice” – what people do and why – and less to abstract legal principles although he was quite capable of dealing with legal principles. His extraordinary ability to network and integrate people was a large part of his success and the success of the Institute.

Jim will be missed by so many but he will also be remembered for his friendship, his drive, his inspiration, his sense of humor, and his guidance and help. My heartfelt condolences go out to Jim’s family (so many of whom have graced or facilitated our letter of credit conferences over the years) and his many friends. Rest in peace Jim, I am so glad that we met.

Mike

# BYRNE TRIBUTES

## Jim Byrne: A Warrior for Fair Play and Proper Application of the Rules

The financial, teaching and legal communities have lost a giant. Professor Byrne was a warrior for fair play on a level playing field and contributed significantly to the financial services world of both commercial and standby letters of credit, the revisions of the ICC's *Uniform Customs and Practices for Documentary Credits* and the creation of the ground-breaking *International Standard Banking Practices* and the *International Standby Practices*. His work on the revision of Article 5 of the Uniform Commercial Code in the United States, as well as the *United Nations Convention on Independent Guarantees and Standby Letters of Credit* is also well-known internationally. His leadership of the Institute for International Banking Law and Practice (IIBLP) and the impact of his books is legendary. Professor Byrne also served as an expert witness, fighting for clarity and application of the rules in a consistent manner.

I had the pleasure of meeting Jim in 1994 during the creation of the *International Standby Practices* and participating regularly in the IIBLP's seminars both in the United States and abroad. Following a seminar in New York, we occasionally walked the streets for hours discussing technical points and application of the letter of credit rules. Following Jim's comment on the interpretation of a UCP article in a standby credit I gazed him in wonder. Jim, who had never issued a letter of credit, noticed the look on my face and inquired "What? Was I wrong?" I will always remember him from the grin on his face when I explained he had made a leap of logic that I would not have expected of a senior letter of credit banker with 15 or more years of experience. We have lost a kind, considerate, deep well of knowledge and a friend I will never forget.

– Donald Smith  
United States



**Meeting of the Joint IIBLP/ICC ISP98 Drafting Group at Citi Headquarters, New York City, January 1998**

Back row: Donald Smith (Citibank); Dustin (NLCAIFT Intern); Brian J. Downey (IIBLP Associate Counsel); Guillermo Jimenez (ICC Secretariat); James G. Barnes (Baker & McKenzie LLP); Paul Miserez (SWIFT); Gary Collyer (Citibank, Drafting Group Co-Chair); Hansjörg Schlegel (Dresdner Bank); Reinhard Längerich (Unibank); Alan Bloodgood (Morgan Guarantee Trust, ret.) Dr. Gerold Herrmann (UNCITRAL Secretary); David R. Stewart (IIBLP Intern)

Front row: Lawrence O'Hare (National Westminster Bank); Dan Taylor (IFSA); David Meynell (Deutsche Bank); Professor James E. Byrne (IIBLP Director, Drafting Group Co-Chair); Boris Kozolchik (NLCAIFT); Salvatore Maccarone (Maccarone & Associatti); Anthony Capasso, (Chase Manhattan Bank); Vincent Maulella (Chase Manhattan Bank); Jean-Pierre Mattout (Banque Paribas); Chris Byrnes (IIBLP); Eric Dickman (IIBLP Intern)



# BYRNE TRIBUTES

## Jim Byrne: A Valuable Contributor to Drafting Processes

I am sure that I am not alone when I say that hearing of Jim's passing came as a profound shock. I had been aware for some time that he had been experiencing some health problems, but even then, to suddenly realise that we will no longer be able to benefit from or experience the wisdom, wealth of knowledge and wit that Jim possessed, will take some time to come to terms with.

My friendship with Jim began over 20 years ago and spanned a number of revisions of trade finance rules, plus the drafting of ISP98 and other ICC publications. During these drafting sessions, I recall Jim having this uncanny way of sitting around a table or on a chair at the back of the room and appearing to all around him to be sound asleep! However, when something was not to his liking or, shall we say, slightly controversial, he would suddenly sit forward and open his eyes, recapping points that had been made earlier, and why they were or were not appropriate, and ending by offering his own version of a proposed text. As someone that has been involved in numerous drafting groups for the development or revision of rules for international trade finance I can vouch that they are never easy processes, but having Jim in the room was certainly never dull and his contribution hardly questioned. This is one area where Jim's passing is a sad and serious loss for the trade finance community.

On a brighter note, these drafting sessions were often of one week duration so there was plenty of "after drafting" social events and Jim was usually the centre of attention, often relaying certain stories or anecdotes. Late nights were often the norm but we were always back around the table for a 9:00am start the next day.

Through the evolution and further development of the IIBLP Annual Letter of Credit Surveys, Jim established a hard core following outside of the US, across Europe, and in Singapore, Hong Kong and China. As a panellist at many of these events in the late 90s and early 2000s, I know how valuable these events were for the audiences at the time and I am sure that that continued to the present day. Unlike conventional seminars or workshops held globally, the IIBLP events were more of a discussion forum and allowed people to vent their frustrations and concerns, as well as hear from local and international experts. I am sure that Jim would have welcomed the fact that the 2018 Asia events continued in July.

Over the years, the trade finance community has lost many high profile figures and their loss can never adequately be put into words and never replaced; Jim was one of these figures.

– Gary Collyer

# BYRNE TRIBUTES

James E. Byrne: Friend, Teacher, and Colleague

Jim's passing was a sad day for his family, his friends and colleagues, and for the letter of credit community to which he was so devoted for so many years. I first met Jim in the early 80s, under UCP290. I considered Jim an older brother, even though I was a few years older; I started LC under UCP 222.

Jim had a unique way with words whether written or spoken. He had an equally unique way with people whether academic, lawyer, banker, or corporate. He respected the law, the rules, and practice and he graciously shared his knowledge and insights with all. Jim invited his students to visit bank operations and he invited bankers to speak to his law classes. He took great pride in mentoring students as well as some bankers, including myself.

Jim's contributions to International and domestic conventions, laws, rules and practice will be remembered for decades to make the world a better place for letters of credit. Having travelled the world with Jim for the better part of our 35 year relationship, I can confirm that Jim was a workaholic to the mission of making International Banking Law and Practice not just an expression or name of an Institute but a reality.

I am proud to have worked with Jim and hopefully to have helped him achieve his goal. He left me with many happy memories. I will remember his smile, his sense of humor and his uncanny ability to find a pub serving Guinness anywhere in the world. He is missed.

– Vin Maulella  
The Villages, Florida

# BYRNE TRIBUTES

## Jim Byrne: A Valued Friend and Professional Colleague

I first met Jim Byrne in the early 1980s when he came to New York on a moment's notice in response to my urgent request for his guidance. A valued client had been targeted in a suit to enjoin payment under what is sometimes referred to as first demand guarantee. The guarantee was issued in support of a large infrastructure project being undertaken by the Government of a middle-eastern country and the beneficiary of the guarantee was an agency of the Government. Because this particular form of guarantee had never before been the subject of litigation, there was no case law defining the rights and obligations of the parties to such an instrument. Nor was there any legislative or regulatory guidance, or any kind of industry compilation of customs and practices similar to that provided by the UCP. While I was trying to fill in the blanks on this very blank slate, I was told that if anyone could provide the assistance I needed, it would be Professor Jim Byrne. I called Jim, and we met the next morning—a Saturday morning—in an effort to run my problem to ground. Jim confirmed that I had not missed anything and we spent the day developing what turned out to be a successful approach and defense to the litigation. From that day forward, whenever I had a particularly intractable problem involving letters of credit, guarantees, or other trade instruments, I was quick to turn to Jim Byrne. His expert testimony was particularly crucial in an important and heavily litigated case involving a revolving standby letter of credit. His advice was always invaluable and over the years he became a valued friend as well as a professional colleague.

Jim was ubiquitous in the world of letters of credit. I encountered him in a number of contexts in which he was often the most prominent and cogent voice and a driving force, including among others the effort to revise Article 5 of the UCC, various efforts to revise successive iterations of the UCP, the UNCITRAL effort to codify independent guarantee and standby letter of credit practice, and in connection with various activities of the ABA Business Law Subcommittee on Letters of Credit. Among the most rewarding activities from a personal perspective was my participation in the Standby & Guarantee Forums, Letter of Credit Law Summits, and Annual Surveys that Jim conducted in venues around the world, from New York to London and Brussels and from Moscow to Istanbul and Dubai. The particular insight that Jim brought to these sessions was, in my view, that letter of credit law was a living manifestation of the law merchant and that lawyers had much to learn from letter of credit bankers, in part because such bankers, as the custodians of letter of credit practice, could be viewed as both legislators and jurists in this legal universe. His approach to the Forums, Summits, and Surveys resulted in a sophisticated and stimulating dialog between bankers and lawyers that was unique in my experience. Jim led and moderated the sessions with great good humor and penetrating insight, and the discussion of the issues at hand typically extended over dinner and late into the evening. Jim had much respect and affection for letter of credit bankers and those sentiments were very much reciprocated.

Jim was a giant in the world of letters of credit and has left a large body of work that will continue to guide practitioners and letter of credit bankers long into the future. His analytical commentaries on ISP98 and UCP600, and his analytical comparisons of ISP98 with UCP500 and UCP600 with UCP500, are always a sound starting point in the analysis of any letter of credit issue and quite often the search needs to go no further. Most significantly, Jim perceived the need for ISP98 and his development of its rules was a signal achievement.

I sometimes teased Jim with the inverted statement to the effect that Henry Harfield (a respected practitioner from a now-distant generation) was the Jim Byrne of his generation. In fact of course there is no one that could fairly be compared with Jim Byrne. He will be very much missed.

– James L. Kerr

# BYRNE TRIBUTES

Thanks to Jim Byrne

As we all know, Jim was a giant in the field of letter of credit law and practice. I had the privilege of recommending him for induction into the American College of Commercial Finance Lawyers, composed of lawyers held in the highest regard by their peers in various areas of commercial law. I am happy to report that Jim was inducted into the ACCFL. I reviewed Jim's bio for that purpose, and at several other times when he was an expert in letter of credit cases – both as our expert and as an expert for the other side. His resume or CV was one of the longest and most impressive I've seen of any legal expert. It chronicles his many accomplishments, seminars, surveys, publications, and case and legislative testimonies and reports.

He took his leadership role on letter of credit matters seriously and was tireless in that role. He wanted understanding and agreement on the rules and practice governing letters of credit so that their use and expectations and the duties of those who administer them would be clear and certain. He wanted letter of credit laws, rules and practice to be interpreted and applied in ways he thought best for issuers, nominated banks, and beneficiaries. His writings, meetings and surveys contributed mightily to understanding and sustaining the letter of credit as a viable payment assurance and payment instrument. He understood that to keep the letter of credit viable, reasonably priced and readily available, banks that issue, advise, confirm and pay letters of credit have to be protected from undue risk and uncertainty.

More than a letter of credit expert and prolific author, there are many stories that could be told about Jim as a person. He was a real human being, cared about people and his students, had a great smile, a good sense of humor (whenever I hear the phrase “dancing bears” I think of Jim), sponsored dinners and Irish bar tours, and gladly spoke to anyone interested in talking to him. I think more than anything, Jim brought those of us interested in his field together – for learning, hearing the latest practices of each other, and exchanging ideas and comments about letter of credit rules, developments and precautions. We who participate in the letter of credit field have seen each other so many times at Jim's surveys that I feel we are like a special family.

I am sure others miss Jim as much as I do or more. I am a strong believer in life after death, and I am positive Jim wants us to carry on the Letter of Credit Survey, the Letter of Credit Law Summit, and his other works in this field. If we mess up, he will let us know in his way. And I am thankful to his family and the staff of the Institute for carrying on.

– Carter Klein

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Jim: The Consummate Organizer

I will let others speak about Jim's numerous accomplishments. My comments are aimed at the overarching qualities with which he achieved such accomplishments. Jim was the consummate organizer. He could bring together numerous lawyers and bankers with divergent interests and get them to work together to produce a world class product. He is the one person I know that could “herd cats.”

Jim was particularly effective in encouraging others to “join the discussion.” I and many others were the beneficiaries of Jim's mentoring. Most importantly he did everything with patience and good spirit.

– George Hisert  
Retired partner of Bingham McCutchen

## JAMES E. BYRNE: VITAL IN THE BATTLE TO MODERNIZE LC LAW

by Boris Kozolchyk

Founder and Honorary Director of the Kozolchyk National Center  
Evo de Concini Professor Emeritus, James E. Rogers, College of Law  
Tucson, Arizona

Jim has been an integral part of my “letter of credit (LC) life” and a spiritual member of my family for the last three decades and will remain as such during the remainder of my life. Sometime in the fall of 1985, he introduced himself as a former graduate student of Professor John Honnold at the Penn Law School. In preparation of his thesis, he had read my 1966 treatise *Commercial Letters of Credit in the Americas* and my 1979 monograph on LC’s for the *International Encyclopedia of Comparative Law* and in his words “helped him understand the principles and practices behind the living law of LCs.” Anyone familiar with my writings will understand why these last words strongly resonated with me. He then told me of his new monthly journal “*Letter of Credit Update*” (LCU) and asked me if I would be willing to be a member of its editorial board. I told him I doubted there would be enough material for a monthly publication on LCs, but was willing to accept his offer. It was not that LCs were not important; they still were the premier instrument for the payment of commercial obligations worldwide. However, there was very little evaluation or reconsideration of doctrines such as that of “strict compliance” followed worldwide, despite its abuses and distortions of a good faith examination of LC documents.

Jim asked me about the mission of LC law that I thought remained unfulfilled. I told him that one mission was to overcome the sterility of the judicial doctrine of “strict compliance” of the 1920s whose rigidity crippled the growth of sound LC banking practices. He asked me if bankers agreed with me and I told him about Citibank’s Frank Sauter, a highly respected LC practitioner who also believed that the law should not prevent bankers from paying on documents that they knew were those requested by their applicants, but contained *de minimus* or meaningless discrepancies. I also told him that the rigidities of strict compliance also hindered what looked like an increasing use of LC’s acting as “bank guarantees” or as “standby” promises of irrevocable payment because many of these LC’s did not require the presentation of commercial documents but any kind of document that attested to the performance or non-performance of an open ended number of obligations.

He assured me that he was aware of these “obstacles” but precisely because of his awareness and “sameness of mind and spirit” he wanted me to join the board and also to help him in the battle to modernize the law of letters of credit by bringing it closer to sound normative principles and banking practices. I accepted his invitation and thanks to Jim, the non-existent dialogue began. Years later he introduced me to Dan Taylor, then President of the USCIB, and told Dan that I, not he, should be the US member of the drafting commission of UCP500, despite that he would have been a fine drafter himself. During that process, we remained in close touch, and at the end of many drafting days, I would telex Jim and ask for his opinion. I believe we succeeded in replacing the rigidities of strict compliance with new principles and practices that invigorated the use of commercial LCs and made life easier for standby LCs. I owe Jim my participation in the American Bar Association Task Force for the revision of Article 5 of the UCC, a task to which our common friend, James Barnes, was the principal contributor. Similarly, I owe to Jim and to our common



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friend Harold Burman my being a member of the United States Delegation to the United Nations Commission on International Trade Law (UNCITRAL) responsible for drafting the United Nations Convention on Independent Bank Guarantees and Stand-by Letters of Credit. Finally, Jim Byrne and James Barnes were responsible for the bank-inspired International Standby Practices (ISP98), a set of customary rules observed worldwide and largely responsible for the minimal litigation associated with the use of standby letters of credit.

It is worth repeating that none of these highly significant legislative accomplishments would have been possible without Jim's official or unofficial leadership. His knowledge of both the official law of letters of credit, i.e., statutes, court and administrative decisions, as well as its living law, i.e., banking practices, standard as well as fiduciary, allowed him to set the right normative course firmly, always willing to listen to contrary views. In the final analysis, his battle was never that of amassing material richness or academic or professional recognition but of contributing to the betterment of the human condition, a task in which he fully succeeded and in which Barnes, I, and so many others were deeply honored and privileged to participate.

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## Jim Byrne: Caring Professor to His Students

I met Jim Byrne in the fall of 2001, during my first year of law school. Jim was my contracts professor, and to get to know his students, he held a series of happy hours, during which he would meet with small groups of students. It was, as I came to learn, characteristic of Jim – he was interested in truly meeting his students, not just in seeing their faces in a lecture hall.

Jim and I shared at least one thing in common that drew us together during that happy hour: we both graduated from Notre Dame. It gave us a conversation starter, but thereafter, he talked to me about my background, my goals in my legal career, and soon enough, my working for him.

I have that discussion and Jim to thank for all of the good experiences I have had in my career since then. He mentored me, he gave me professional experiences I could not have otherwise had, and most importantly, he remained a friend. Seventeen years later, on the last time we talked, he was still providing advice about my career and still interested in my life, and of course, talking to me about family – mine and his.

Over seventeen years of knowing Jim, I learned that our relationship was not unique – that Jim truly cared about each of his students, and that he wanted each to succeed. He cared the same for every student every year for all of the years that he taught. He was brilliant and truly a great teacher; he was caring and humble. He saw every moment as a teaching opportunity – even if it was teaching where to find the best Irish pub in Vienna, Austria (Bockshorn Irish Pub). And I appreciated every moment of it. I will miss him greatly, and am extremely grateful that I had that conversation starter.

– Jacob Manning  
George Mason University School of Law (2004)  
Dinsmore & Shohl LLP

# BYRNE TRIBUTES

## Fond Memories of a Legal Giant and Friend

Jim's passing prompted fond memories which I wish to share with his colleagues, friends, and family. I had the pleasure of meeting Jim more than 25 years ago when he was drafting the International Standby Practices. Dan Taylor at USCIB/ IFSA was collaborating and introduced me to Jim. Citibank was a big supporter of the effort and we sponsored various drafting sessions at our facilities. In that experience I was overwhelmed with Jim's breadth of knowledge of international law, commercial law and ICC banking practices. More importantly, his ability to translate those complexities to a layman such as myself. He was always very "commercial" looking at transactions from the point of view of the participants rather than as a lawyer or a scholar. He was always intensely committed to fairness and consistency in law and practice. No matter what the situation or intensity of the debate, Jim never took himself too seriously nor lost his sense of humor.

After ISP was published, I had the pleasure to accompany Jim on a tour across Asia where we were promoting the use of ISP by Financial Institutions and their customers. We were accompanied by Dan Taylor, Gerold Herrmann from UNCITRAL and Leslie Corrigan, Citi's Trade general counsel. I was blown away by the respect and reverence seniors bankers in every country had for Jim. He was truly a global superstar. It was a great time as I began to know Jim as a person rather than as a fellow professional. He shared with us stories of his personal life, his love of and fun with his family, his professional development, and his memories of the professionals who shaped him along the way. His sense of humor and wit was at its sharpest in the casual times between meetings, on airplane rides, and over nightcaps after a long day. We had a 24-hour gap between meetings in Beijing and Hong Kong so we took a trip to the Great Wall of China. Having traveled in Asia for over ten years, I had a secret "bucket list" to see the Great Wall. It was to my surprise, frigidly cold at the wall and as most of our travels were to temperate climates we were ill prepared for an afternoon in the cold. My colleague, Leslie Corrigan, had but a thin sweater. Ever gallant and generous Jim gave Leslie his coat for the rest of the day.

I experienced Jim's generosity throughout our relationship. Any time I called for advice he was prompt and ever willing to share his insights and provide support. At times he would call for advice and I would respond in kind. We always shared a laugh regardless of the topic. When I moved to J P Morgan, Jim ran extensive programs for our customers and staff around the world. I and JPM could count on him for his advice and assistance in litigation both formally and informally. Throughout the years we had a special bond. I looked forward to the end of the year when Jim would send me a book. Knowing my love of history, it was always something historical. If you ever get a chance, read "The History of Salt". We were professional colleagues but more importantly friends. Jim, I miss you.

- Mike Quinn  
Citibank & J P Morgan

# BYRNE TRIBUTES

## Remembering the Incomparable Jim Byrne

Back in early 1999, shortly after the ISP98 rules were published, the bank I worked for had arranged for Professor James E. Byrne to give an “ISP98 Workshop” to the Standby LC team. I didn’t work much with Standbys and so I was hesitant to attend. I was so glad that I did, not only because the workshop was excellent, but especially because I got to meet Jim (as he became known to us) for the first time.

It would not be until four years later that I would see Jim again. By then I was working for my current bank. I attended an IIBLP event in Miami for the first time. How thrilled I was to see that it was the very same Jim Byrne that I met four years ago who was leading the IIBLP event! Little did I know back then what an enormous impact this truly remarkable individual would have on my life, professionally and as a friend.

Like many others who knew and looked up to Jim, we developed a special bond. Jim became like a mentor to me in my trade experience and I was also honoured to have his kind friendship. Words cannot express the depth of my sorrow when I learned that Jim had passed away.

Jim’s precious advice and insights were invaluable in the development of my trade knowledge, technical expertise, and confidence to state opinions. He was always available if I needed answers or explanations. There were no bounds to his generosity. Whether he was in Asia, Dubai, or other parts, he would always write back to me without delay, no matter the time of day. He was so helpful.

Anyone who attended the IIBLP events would know that Jim had a superb ability to engage people and generate thought provoking discussions about Standbys LCs and other trade topics from a practical and legal perspective. But even in the middle of intense debates, Jim always kept the interaction upbeat and never failed to throw in a clever funny remark that would make us burst out in laughter.

Jim’s perseverance in his mission to develop trade practitioners’ and legal professionals’ knowledge and the standardization of trade practices, particularly in the world of Standby LCs, was incomparable. He was brilliant and selflessly devoted his time and energy to the Trade Banking Industry and the Legal Community. His contributions are immeasurable as evidenced by the goldmines found in his books, courses, the ISP98 Rules, the ISP98 Model Forms, and the outstanding UCP600: AN ANALYTICAL COMMENTARY.

I would always ask him where he found all the time and energy to travel the world to hold IIBLP events, write all these books, teach at the University, and accomplish all he does. He was incredible.

There is so much more to share in heart-felt remembrance of Jim, having had the honour of knowing him for almost two decades, for the legend he truly was in Trade & Banking Law, and such a kind person. There will never be another like Jim. My thoughts and prayers are for Jim to rest in peace, as well as for his wife Maria and his children to have strength and courage.

Thank you Jim, for all your invaluable teachings, your tremendous support, and special guidance in helping me grow in my trade expertise. Most of all, thank you for giving me the great privilege of having your caring friendship. You’re truly one of a kind and I will never forget you.

Your friend,

Rita Ricci  
Montreal, Canada

## JAMES E. BYRNE: SHARING HIS TALENTS, HE BROUGHT THE TRADE FINANCE WORLD TOGETHER

by Lorna K. Strong, J.D.  
Deputy General Counsel  
HSBC Global Trade & Receivables Finance

Professor James E. Byrne left us on 1 July 2018, after a year of ill health, but a lifetime of success and friendship. As soon as the news broke of his passing, tributes flooded in. Trade finance professionals, legal professionals, friends, colleagues, professors wrote from all corners of the world. People expressed their sadness, their sense of loss, but most of all their love for this great man.

For Jim was a great man. And as great men and women do, he gave himself to the world, to all of us, as he lived everyday: with passion, intention, integrity, vision, intellectual rigour, humour, compassion, and love. Jim's vision created and supported the international community of trade finance professionals that exist today.

“His knowledge was immense, his friendliness, warmth and kindness even greater.”

“I'll never forget the first IIBLP conference I attended and how Jim called on me during the first session. I was terrified, but afterwards, I was glad that he recognized me and brought me into the IIBLP group with open arms.”

“He was such a giant in the field of law of trade finance, who worked tirelessly for decades and achieved so much in the field!”

“It was the fall of a great star.”

I was fortunate to have met Jim in 2010 at the IIBLP Annual Survey in Tampa, Florida. Having advised trade finance businesses without any formal training for a number of years, I was thrilled to find a conference filled with panellists of specialists with knowledge far beyond my then understanding. But what struck me even more was the respect which Jim gave to me, to the panellists, and to all attendees. He listened and learned and pontificated, and sometimes even had a nap on the dais (yes, Jim was a character). But what was clear was his wit and his intellect, and his passion for trade and the community that supported it.

Jim's professional designations and achievements are too endless to enumerate. But his most enduring were his 35 years teaching at George Mason University School of Law, his drafting and promotion of ISP98, and his creation, leadership, and legacy of the IIBLP. In 1990, he founded and for 28 years directed the Institute of International Banking Law & Practice (IIBLP), creating the Annual Survey of Letter of Credit Law & Practice, the Letter of Credit Law Summit, and the Standby and Guarantee Forum which from humble beginnings on the east coast of the US, became globally offered and acclaimed events.

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He drafted the International Standby Practices 1998 (ISP98) that have become the rules of choice for standby letters of credit globally and contributed to revisions of the Uniform Customs and Practice for Documentary Credits (UCP). Additionally, he drafted the revision of the Office of the Comptroller of the Currency's (OCC's) interpretative rulings on independent undertakings and the United Nations Convention on Independent Guarantees and Standby Letters of Credit. He wrote numerous articles and treaties, and founded various publications, including *Documentary Credit World* (DCW). He acted as expert counsel witness in a number of key trade finance cases. Recently, his many accomplishments led to his election as a fellow of the American College of Commercial Financial Lawyers (ACCFL).

According to Malcolm Gladwell in the *Tipping Point*, the success of any sort of social epidemic, initiative, or trend is heavily dependent on the involvement of people with a particular and rare set of social gifts: connectors, mavens, and salesmen. We were lucky that Jim had all three! There is no doubt that Jim was a connector. He knew so many people and took great joy in connecting us to each other, creating a social, professional and intellectual web like no other. Yet he was a "maven" too, an information specialist who we relied upon to connect us with new information. And don't forget his salesman side! He had the skills of persuasion and the charismatic presence or "gravitas" that almost always made us see his point of view. Not everyone agreed with Jim, but his views were respected and taken into account. What an amazing man, and what a community he created.

But the success of Jim went far beyond the community he created or his achievements. Jim's success was in who he was; his nature, his ethics, his intellect, and most importantly his inclusiveness. He gave newcomers a voice and welcomed differing perspectives. He embraced anyone who wanted to understand a complex area of law or practice, and he never wanted anyone's view to be unheard. Jim treated everyone he met with the same graciousness, understanding, and humour.

What must be remembered is that no great man or woman acts alone. Jim would be the first to acknowledge his family, colleagues, and friends that were there for him along the journey. He was blessed with a long marriage and wonderful children. The support of his wife, Maria, and his children no doubt allowed him to be there for the world, and he always relied upon them, through life and to the end.

In closing, the world will not always remember what we say here, nor the words posted in tribute to Jim, but the world will never be the same because Jim lived and because of the impact he had upon it. For us that remain, therefore, we will honour Jim by continuing in his path. Not necessarily by advancing the study or the community of trade finance, and not necessarily by becoming professors or connector or humourists; but by treating all those in our lives (both strangers and friends) with the compassion, inclusivity, humour, and understanding that was Jim. By offering a hand to pull up our fellow man, to share in the light of our day. And for some time, I expect, we will all feel a certain sadness each time we reference ISP98.



# BYRNE TRIBUTES

## Jim Byrne: A Reliable Friend

I have been acquainted with Jim for more than twenty years. Back in 1996 our department engaged in LCs needed to upgrade the professional skills of a group of managerial staff. We were looking for a top tutor and somebody at UNCITRAL recommended Jim as one of the best. A week's training in New York proved to be very successful. Jim had an outstanding capability to teach other people. He did so in a very simple manner that was easy to understand.

Provoking a discussion among trainees, Jim achieved better results in assimilation of material by the audience. Generously sharing his enormous knowledge, Jim helped to develop thousands of trade finance specialists around the world. And practitioners of versatile specializations, although standbys were his beloved favorites.

Bearing in mind success of that seminar we invited Jim and he kindly accepted the invitation to take part in a seminar for Russian and Indian bankers in Goa, India. At that time the volume of Russian-Indian LC business dealings was great and we needed a better understanding of basic LC principles among bankers on both sides. The seminar was very successful too. And we had a lot of fun there. Jim liked to remember that time whenever we met.

Jim was a reliable friend. Honest and selfless, he always cared and was ready to help. Himself, Jim was undemanding. On rare occasions when he asked for assistance it was for his professional interests like *Documentary Credit World*, other IIBLP publications, or the Annual LC Surveys.

Those who knew Jim well enough would agree that his remarkable ability was love and care for his children and wife. Whenever and wherever we met, he liked to proudly describe the successes in their professional and private lives. Jim had a generous and loving heart.

We all shall miss Jim for a long time.

– Alexander Zelenov  
Vnesheconombank  
Moscow, Russia

## PROFESSOR JAMES BYRNE: A GOOD TUTOR, A GOOD FRIEND

by Saibo Jin

**1. Annual Survey of LC Law & Practice and Guarantee Forum.** Professor James Byrne (Jim) was the professor of George Mason University Law School who taught LCs, Independent Guarantees, Commercial & Financial Fraud Prevention, and other law courses. He was also the founder and director of the Institute of International Banking Law & Practice (IIBLP). Introduced in 2000 by Mr. Jianbao Shan, then-vice president of ICC Banking Commission, I met Professor Byrne in New York for first time and attended the New York Guarantee Forum and Law Summit. Since then, I have participated in conferences almost every year.



**2. Seminars around the World.** In Stockholm, I met Jim once when it happened to be his birthday. With accompanying friend and long-time banker, Mr. Karl Mayrl of Austria, we celebrated Jim's birthday together. This photograph above was taken by Karl. Wherever we are, we always had a drink after conferences.

**3. The Lecture at Chinese Law School.** We Chinese have a saying: "courtesy demands reciprocity". Through my introduction, Jim visited the University of International Business and Economics School of Law in Beijing and gave a Standby LC Law lecture. My doctoral tutor and dean of the University at that time, Mr. Jun Wang also attended this lecture.



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**4. Attended Annual Surveys around the World as an Invited Expert.** I attended a conference of LC Law & Practice in Dubai as an invited expert. Although Jim was acquainted with me for many years, in accordance with IIBLP practice, Jim formally issued a study certificate of this conference to me. Since 2000, I followed Jim and visited many places around the world as a panel of experts member. We discussed LC Law & Practice with bankers, lawyers, and scholars from different countries and regions, benefitting and gaining a lot.



**5. Chinese Kung Fu vs. European & American Kung Fu.** I have said many times at conferences that the Standby Letter of Credit is American Kung Fu and the Independent Guarantee is European Kung Fu. For these two types of Kung Fu, Chinese people should learn how to use them. I believe that Chinese people could use standbys and independent guarantees professionally in practice. In one meeting with Jim, we demonstrated Kung Fu. Jim once told me: “In view of the LC & Guarantee decisions made by courts around the world, roughly one half of the decisions are correct while the other half are wrong. For the correct half, they often give the wrong explanation.”



**6. Irish and Beer.** I met Jim once again in London at a conference and we went to a frequented bar, enjoying beer and food there. Jim could always find an Irish bar anywhere around the world. He told me: “Without beer, Irish will rule the world.”

*(For Part 2 of Saibo JIN's pictorial tribute to Jim Byrne, visit the IIBLP website.)*







# Standby & Guarantee Forum

## LC Law Summit

New York | 25-26 October

### IIBLP Events Return to NYC

The Institute of International Banking Law & Practice (IIBLP) is pleased to confirm that we will be in New York City this October for our annual Standby Forum and LC Law Summit events.

We look forward to carrying on Jim Byrne's legacy by holding these two dynamic conferences with our panel of industry experts to spur top-notch discussions and debate among the bankers, lawyers, and other LC specialists who attend every year.

In the coming weeks, look for a detailed program with topics and panelists.

Register Today at [iiblp.org](https://iiblp.org)

**UCP600: AN ANALYTICAL COMMENTARY**, written by Professor James E. Byrne with Vincent M. Maulella, Soh Chee Seng, and Alexander Zelenov, was published by IIBLP in 2010. Relied on by countless specialists and referred to by courts, this volume which took seven years to produce is the world's most complete statement of commercial LC practice assembled. A book of nearly 1,500 pages, one particular page stands out. The poetic exercise contained within and reprinted below represents the creative and artistic side of James E. Byrne.

"And what is the use of a book,"  
thought Alice, "without pictures or conversations?"

*Alice's Adventures in Wonderland*  
Lewis Carroll

## An Ode to the UCP

Said Mr. U to Mrs. P,  
I certainly would like explained to me  
What is the pointe of an LC.

Said Mrs. P to Mr. U,  
If you move, I'll show you True  
And you shall have the answer due.

To Mrs. P said Mr. U,  
When I asked, I had no clue  
But the answer lies between us two.

And thus we have  
The  
UCP.

