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Analyzing Bank Drafted Letter of Credit Rules, The International Standby Practice (ISP98)

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ANALYZING BANK DRAFTED STANDBY LETTER
OF CREDIT RULES, THE INTERNATIONAL
STANDBY PRACTICE (ISP98)

JOHN F. DOLAN[†]

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I. INTRODUCTION

The evidence is strong that abstract payment undertakings¹ have finally arrived. Long confused with their dependent siblings, the suretyship undertaking and the secondary² guaranty,³ the independent nature of these primary undertakings is now largely recognized.⁴ More compelling evidence of the surge in independent undertaking recognition lies in the fact that merchants and banks have now differentiated three of them: the commercial letter of credit,⁵ the standby letter of credit,⁶ and the independent

1. The generic term, abstract payment undertaking, which applies to standby and commercial letters of credit and to independent or first demand bank guarantees, is Roy Goode's. See Roy Goode, *Abstract Payment Undertakings in International Transactions*, 22 BROOK. J. INT'L L. 1 (1996); Roy Goode, *Abstract Payment Undertakings and the Rules of the International Chamber of Commerce*, 39 ST. LOUIS U. L.J. 725 (1995).

2. This paper will not indulge in the debate, fostered by some, that there is no real difference between Goode's abstract payment undertakings and secondary obligations such as bonds, suretyship obligations, or guaranties. For some of the better arguments, see Peter A. Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle*, 1993 U. ILL. L. REV. 447; Amelia H. Boss, *Suretyship and Letters of Credit: Subrogation Revisited*, 34 WM & MARY L. REV. 1087 (1993); Neil Cohen, *Subrogation: A Further Probing*, LETTERS OF CREDIT REPORT, Sept.-Oct. 1995, at 5.

3. In this paper, as in most of the commercial literature, the term "guaranty" refers to the secondary obligation; the term "guarantee" refers to the independent abstract payment obligation issued by European banks as a product similar in function to but different in form from the standby letter of credit. See, e.g., Jean Stoufflet, *Recent Developments in the Law of International Bank Guarantees in France and Belgium*, 4 ARIZ. J. INT'L & COMP. L. 48 (1987); Egon Guttman, *Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOK. L. REV. 167 (1990).

4. See, e.g., 12 C.F.R. ¶ 7.1016 (1998); *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (1995), reprinted in JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* App. F (rev. ed. 1999).

5. The commercial letter of credit usually arises in connection with the international sale of goods. In this transaction, the buyer of the goods causes its bank to issue the credit in favor of the seller. The buyer thus "applies" for the credit and is the "applicant." The seller is the party to whom the credit runs, that is, the "beneficiary" of the credit. Often, the issuer causes a bank in the seller's

guarantee.⁷ But, the jewel in the independent undertaking's crown of recognition is the fact that commercial lawyers have now fashioned five legal regimes to govern these undertakings: (1) Article 5 of the Uniform Commercial Code,⁸ (2) the Uniform Customs and Practice for Documentary Credits (UCP500),⁹ (3) the United Nations Convention on Independent Guarantees and Standby Letters of Credit,¹⁰ (4) the Uniform Rules for Demand Guarantees (URDG),¹¹ and (5) the International Standby Practices 1998 (ISP98).¹²

This Article analyzes the latest of these regimes, ISP98, in light

market, the nominated bank, to advise the credit. Frequently, the adviser will also confirm the credit or at least pay it under the issuer's mandate. For an illustrative case, see *Ng Chee Chong v. Austin Taylor & Co.*, 1 Lloyd's Rep. 156 (Q.B. 1975).

6. There seems to be no limit to the number and variety of transactions out of which the standby can arise. Standby credits can secure any executory obligation. Illustrative transactions include the obligation of a promisor under a promissory note, see *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1978), the duty of a contractor to complete subdivision improvements, see *McGee Constr. Co. v. Neshobe Dev., Inc.*, 594 A.2d 415 (Vt. 1991), or the obligation of a parent to return children to a divorced spouse under a child custody agreement, see *In re Tischendorf*, 321 N.W.2d 405 (Minn. 1982). In the standby transaction, there is usually only one bank, the issuer of the standby. The person obligated on the underlying executory obligation is the applicant. The beneficiary is the party to whom the applicant owes the executory obligation. Compare this transaction with the commercial letter of credit transaction previously described. See *supra* note 5 and accompanying text.

7. For discussion of the independent guarantee, see ROELAND F. BERTRAMS, *BANK GUARANTEES IN INTERNATIONAL TRADE* (2d rev. ed. 1996).

8. U.C.C. §§ 5-101-117 (1999).

9. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 500, *UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS* (1993).

10. The UN Convention, *supra* note 4, was promulgated by UNCITRAL, the trade arm of the United Nations in 1995. It has been ratified by five countries, not including the United States, which is, nonetheless, a signatory without Senate ratification.

11. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 458, *UNIFORM RULES FOR DEMAND GUARANTEES* (1992).

12. INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 590, *INTERNATIONAL STANDBY PRACTICES ISP98* (1998).

of the notion that rules, especially when they compete with other regimes, should give considerable deference to efficiency notions. To an extent the Article also measures ISP98 comparatively to two of the other regimes¹³ with regard to the same efficiency interest. The Article reaches two conclusions: First, that ISP98 in many respects has struck a balance that renders it inefficient by imposing educational and other transaction costs on the commercial parties,¹⁴ who are less able to bear them, rather than on the banks that issue standby credits; second, that letter of credit users, that is, the commercial parties that purchase standby letters of credit from the banking industry, are well-advised to insist that the rules be incorporated selectively, an insistence that will increase those costs, or to eschew ISP98 entirely, the less transaction costly course.

II. THE RUBIN THESES

In two articles, Professor Edward Rubin has posited two theses in connection with the fashioning of payments law that have relevance to the evaluation of ISP98.¹⁵ First, Rubin argued that the

13. ISP98, UCP 500, and URDG do not compete with Articles of the Uniform Commercial Code or with the UN Convention. Rather, they supplement the statute and the convention, which relate primarily to the structure of letter of credit governance and are, therefore, amenable to industry fashioned rules. The drafters of Article 5 explicitly endorse that conclusion. See U.C.C. § 5-101 cmt., paras. 3-4 (1999). The UN Convention is less explicit, referring to such external rules obliquely only in the article dealing with documentary compliance. See *United Nations Convention*, *supra* note 4, at art. 16(1).

14. By "commercial parties" this Article means the beneficiary who receives the credit issuer's obligation, and the applicant, the party that causes the credit to issue. Often banks will apply for standby credits and just as or even more often credits will run to bank beneficiaries.

15. See Edward L. Rubin, *Thinking Like A Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising U.C.C. Article 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993) [hereinafter Rubin, *Thinking*]; Edward L. Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991) [hereinafter Rubin, *Efficiency*]; cf. Robert D. Cooter & Edward L. Rubin, *A Theory of Loss Allocation for Consumer Payments*, 66 TEX. L. REV. 63 (1987) (developing some

absence of consumer representatives at the drafting table¹⁶ skewed the statutory result away from consumer interests and in favor of the well-represented banking interests. He claimed that such a result was not the product of any conspiracy of bank lawyers against consumers, but was a consequence of conceptual frameworks peculiar to lawyers representing banking interests that the bank lawyers brought with them to the drafting process.¹⁷ Second, Rubin contended that allocation of costs in a statutory product will yield waste if that allocation puts costs on parties who, often by virtue of information asymmetry, are less well able to shoulder them than another party.¹⁸

This Article accepts these theses as valid instruments for analyzing the efficiency of public law such as Articles 3 and 4 of the Uniform Commercial Code (UCC). This Article takes the analysis one step further by advancing the theory that Rubin's theses apply equally well to rules such as ISP98 that effect the private ordering of commercial relationships.

III. ISP98 DRAFTING PROCESS

The International Standby Practices (ISP98) were issued in draft form in the fall of 1997. In April of 1998, after some revision, the ISP98 received a significant endorsement when the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC),¹⁹ with some dissent,²⁰ approved them and

of the efficiency arguments):

16. Articles 3 and 4 of the Uniform Commercial Code were drafted by a committee consisting largely of Commissioners from the National Conference of Commissioners on Uniform States Laws. See Rubin, *Thinking, supra* note 15, at 744-48.

17. See *id.* at 752-53.

18. See Rubin, *Efficiency, supra* note 15, at 561-70.

19. The Commission on Banking Technique and Practice of the International Chamber of Commerce (the Commission) is the group squarely responsible for drafting and revising the Uniform Customs and Practice for Documentary Credits, whose latest version is UCP 500. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9. The Commission is active in fielding

recommended their adoption by the ICC. The International Institute of Banking Law and Practice, Inc., the main sponsor of ISP98, and ICC Publishing ultimately agreed to the publication of the Rules, which are available for banks to incorporate into their standby credits as of January 1, 1999.²¹

The principal drafter of the Rules is Professor James Byrne, who has authored an extensive "official commentary" of the Rules.²² He was chair of the ISP Working Group that served as the drafting committee for the Rules.²³ James Barnes, a Chicago lawyer, was the vice chair.²⁴ Byrne and Barnes have collaborated often in American Bar Association reports concerning letters of credit.²⁵

inquiries from banks regarding UCP 500 and otherwise explaining the UCP. See GARY COLLYER, MORE QUERIES AND RESPONSES ON UCP 500 1997, OPINIONS OF ICC BANKING COMMISSION (ICC Pub. No. 596, 1998); GARY COLLYER, OPINIONS OF THE ICC BANKING COMMISSION 1995-1996 RESPONSES TO QUERIES ON UCP 400, UCP 500, AND URC 222, (ICC Pub. No. 565, 1997); CHARLES DEL BUSTO, CASE STUDIES ON DOCUMENTARY CREDITS UNDER UCP 500 (ICC Pub. No. 535, 1995); CHARLES DEL BUSTO, THE NEW STANDARD DOCUMENTARY CREDIT FORMS FOR THE UCP 500 (ICC Pub. No. 516, 1993); CHARLES DEL BUSTO, ICC GUIDE TO DOCUMENTARY CREDIT OPERATIONS FOR THE UCP 500 (ICC Pub. No. 515, 1994); ICC, UCP 500 & 400 COMPARED, AN ARTICLE BY ARTICLE DETAILED ANALYSIS OF THE NEW UCP 500 COMPARED WITH THE UCP 400 (ICC PUB. NO. 511, 1993). The Commission also sponsored the URDG. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 11; ICC; ROY GOODE, GUIDE TO THE ICC UNIFORM RULES FOR DEMAND GUARANTEES (ICC Pub. No. 510, 1992).

20. There is some flavor in the newsletters that the U.S. bankers "rammed" approval of ISP98 through the Commission. A report from an ICC affiliate announced that the vote of the Commission was 32 in favor and 9 opposed, with 46 Commission members abstaining or failing to participate. See, e.g., News Briefs, DOCUMENTARY CREDITS INSIGHT (ICC, Paris), Spring 1998 at, 24.

21. See ISP98 Title Page.

22. See JAMES E. BYRNE, THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICE (1998).

23. See *id.* at XVIII-XIX.

24. See *id.* at 18.

25. See, e.g., James G. Barnes & James E. Byrne, *Letters of Credit: 1996 Cases*, 52 BUS. LAW. 1547 (1997); James G. Barnes & James E. Byrne, *Revision of Article 5*, 50 BUS. LAW. 1449 (1995); James G. Barnes & James E. Byrne, *Letters of Credit: 1994 Cases*, 50 BUS. LAW. 1517 (1995).

The sponsors of the Rules are the Institute of International Banking Law & Practice, Inc., of which Professor Byrne is director;²⁶ the International Financial Services Association (IFSA), an international bank trade organization;²⁷ three money center banks;²⁸ the National Law Center for Inter-American Free Trade at the University of Arizona College of Law, of which Professor Boris Kozolchyk is president and director;²⁹ and Baker & McKenzie, the law firm with which Mr. Barnes practices. The identification of the sponsors is relevant to this inquiry because virtually all sponsors are connected to banking. Mr. Barnes represents the IFSA.³⁰ Professor Byrne is the editor in chief of *Documentary Credit World*, a letter of credit newsletter that is sponsored jointly by his Institute for International Banking Law & Practice, Inc. and the IFSA.³¹ Professor Byrne's Institute and an affiliate of the IFSA have also sponsored seminars in letters of credit.³² Barnes and Byrne have also worked together as expert witnesses or counsel in letter of credit cases.³³ Professor Kozolchyk

26. See THE 1998 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE Title Page (1998).

27. For a brief history of the IFSA, formerly the United States Council on International Banking (USCIB), see *Introducing the USCIB*, DOCUMENTARY CREDIT WORLD, Oct. 1997, at 16. The IFSA maintains a web site that describes its activities. See <<http://www.intlbanking.org>> (last visited Feb. 22, 1999).

28. Citibank, N.A., The Chase Manhattan Bank, and ABN-AMRO. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, at 9.

29. See ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1998-99 605 (1998).

30. See James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 N.W. J. INT'L L. & BUS. 189, 213-14 (1995); cf. United States Council on International Banking, *Newsletter* (last modified Jan. 1997) <<http://www.intlbanking.org/net0197.htm>> (referring to Mr. Barnes as acting as "counsel" for the USCIB, now the IFSA).

31. See *IFSA Web Site*, (visited Feb. 25, 1999) <<http://www.intlbanking.org/pub.htm>>.

32. See Article 5 Seminar (flyer on file with *The Wayne Law Review*) (describing seminars in New York, Seattle, Chicago, San Francisco, and Los Angeles in 1997).

33. See James G. Barnes & James E. Byrne, *Letters of Credit: 1996 Cases*, 52

was the IFSA's representative to the drafting of the Uniform Customs and Practice (UCP 500) and continued to represent the IFSA from 1989 through 1995.³⁴ The ISP Working Group that drafted the Rules, moreover, consisted largely of bankers.³⁵

That is not to say that the drafters of the Rules were unmindful of the need to consult with standby credit users. Professor Byrne has taken pains to explain the steps the Working Group took to consult the entire standby credit community when the Group fashioned the Rules.³⁶ One must acknowledge, furthermore, that the drafters of the Rules could not, with any common sense, neglect the views of the standby user. If the user sees the Rules as unfair, it will eschew them and the drafters' efforts to standardize and harmonize standby practices will suffer.

Yet, the drafters and the sponsors' intimacy with bankers and banking might have had the effect Professor Rubin identified in the UCC drafting process. As the following analysis of the Rules suggests, the effect that Professor Rubin observed may well have played a role in the drafting of the Rules.

There were non-bankers and non-bank lawyers involved in the fashioning of the ISP98.³⁷ The ICC's participation may have resulted in modification of the original drafts of the Rules. The published version of the Rules, however, remains significantly different in form and subtly different in substance from other ICC publications in the realm of abstract undertaking law.³⁸ The

BUS. LAW. 1547, 1547 n.*(1997).

34. See ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra* note 29, at 605.

35. See BYRNE, *supra* note 22, at xix.

36. See James E. Byrne, *Standby Rulemaking: A Glimpse at the Elements of Standardization and Harmonization of Banking Practice*, NEW DEV. IN INT'L COM. AND CONSUMER L. 135, 149 (1998) (hereafter James E. Byrne, "Standby Rulemaking").

37. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, at 10.

38. Compare INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, with INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 11, and INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 525, UNIFORM RULES FOR BANK-TO-BANK REIMBURSEMENTS UNDER DOCUMENTARY CREDITS (URR) (1995).

differences relate foremost to detail. ISP98 is filled with detail, and no issuer, beneficiary, or applicant should deal with a standby subject to these rules without studying them. It is not the case that ISP98 fills in the blanks of relationships with expected terms, at least not until ISP98 becomes well known. Many of the details of ISP98 are, in fact, unexpected or idiosyncratic. That is not to say they are unfair, though some courts might so decide. All of the rules, including those that are unexpected or idiosyncratic, have principled bases.

IV. EVALUATING THE RULES

It is worth initiating this evaluation by asking why the banking community that organized and sustained the ISP98 effort bothered. The Uniform Customs and Practice have, since 1983,³⁹ included standby letters of credit within their scope. Furthermore, the URDG, a product of the ICC Banking Commission, govern independent bank guarantees, which, while different in form, are functionally the equivalent of the standby. Courts, in fact, have applied standby credit law to the independent bank guarantee⁴⁰ and scholars are in general agreement that the same law should apply to them.⁴¹ Finally, the United Nations Convention on Independent

39. The first version of the UCP to include standby credits was UCP 400. See INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 400, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS art. 1 (1983).

40. See, e.g., *American Nat'l Bank & Trust Co. v. Hamilton Indus. Int'l, Inc.*, 583 F. Supp. 164 (N.D. Ill. 1984), *rev'd on other grounds sub nom. Banque Paribas v. Hamilton Indus. Int'l, Inc.*, 767 F.2d 380 (7th Cir. 1985); *United Trading Corp. v. Allied Arab Bank Ltd.*, 2 Lloyd's Rep. 554 (C.A. 1985); *RD Harbottle (Mercantile) Ltd. v. National Westminster Bank*, 2 All E.R. 862 (Q.B. 1977).

41. See ROY GOODE, *COMMERCIAL LAW* 1035-38 (2d ed. 1995); E. Peter Ellinger, *Performance Bonds, First-Demand Guarantees and Standby Letters of Credit—A Comparison*, LETTERS OF CREDIT REPORT, May-June 1987, at 1; Egon Guttman, *Bank Guarantees and Standby Letters of Credit: Moving Toward a Uniform Approach*, 56 BROOK. L. REV. 167 (1990).

Guarantees and Stand-by Letters of Credit,⁴² as its title suggests, governs standby credits. It is legitimate to ask, then, why the U.S. banking community found these regimes inadequate to deal with the standby and felt compelled to fashion a new one.

UCP 500 is essentially a set of rules for commercial letters of credit. It is not difficult to make the case that incorporating UCP 500 into standby credits is unwise. Professor Byrne has made that case in some detail.⁴³ Many provisions in UCP 500 are inapplicable to most standby credits,⁴⁴ and some provisions are harmful to the standby.⁴⁵ It is enough to say here that a separate regime for standby credits is a reasonable alternative to UCP 500, though many standby credits have incorporated the UCP.

The URDG, however, are free from the two inadequacies that plague UCP 500. The URDG do not contain a passel of unneeded provisions and, it is fair to say, contain none that are inimical to the standby. That conclusion is not surprising. The URDG were fashioned for a product that is largely a standby equivalent and it may be only an accident of banking politics that the URDG did not cover standby credits in the first place.

It appears that at the time the ICC Banking Commission

42. See *United Nations Convention*, *supra* note 4.

43. See generally Byrne, *supra* note 36, at 145-49. The problems arise by virtue of the differences between the standby and the commercial credit. Proper regard for the standby's common functions requires issuers to adopt UCP 500 selectively.

44. UCP 500 generally deals with questions of documentary compliance under commercial letters of credit. Thus, many articles in UCP 500 deal with transport documents, insurance documents, and invoices, all of which seldom arise in standby credits; and if they do, they play a much less significant role than in the commercial credit transaction. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, arts. 23-37.

45. The installment drawing rule of UCP 500 art. 41 is particularly unsuited for standby credits. That article causes a credit to expire if the beneficiary does not draw on an installment. In the standby credit, the failure to draw on an installment may simply mean that the applicant has paid the beneficiary directly. In the commercial credit, it means that the beneficiary has failed to make a required shipment. For further discussion of inhospitable provisions in UCP 500 for the standby, see Byrne, *supra* note 36.

decided to draft a regime for independent bank guarantees, U.S. bankers were largely left out of the process. Independent bank guarantees have traditionally been the product of European banks. The chair of the URDG Drafting Group was Professor Roy Goode from St. John's College Oxford, and the major participants, understandably, were not U.S. Bankers.⁴⁶ U.S. bankers were, however, very much involved in the drafting of UCP 500, promulgated in 1993.⁴⁷ It may be, then, that the U.S. bankers, who had achieved a measure of hegemony in the UCP drafting process, were unhappy at the prospect of having a European law professor and European bankers draft rules for the quintessential U.S. product, the standby credit. Whatever the reason, UCP 500, promulgated the year after the URDG, continued to cover the standby, even though the URDG regime is far more congenial to the standby than UCP 500.

Ultimately, U.S. bankers decided that UCP 500 was indeed sufficiently inhospitable to the standby such that there was a need for a separate regime. By the time they acknowledged that need, the URDG, with no mention of the standby and no incorporation of standby locution, was in place.

This vignette of drafting history takes on some significance by virtue of the fact that the provisions of ISP98 that may be inefficient and unfair are completely absent from the URDG. That absence may reflect the inadequacy of the URDG or it may reflect the reason that U.S. bankers have been dissatisfied with the URDG.

That is not to say, however, that ISP98 is solely an attempt to foist inefficient and unfair rules on standby users. It isn't. ISP98

46. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 11, at 2-3. The U.S. bankers were not involved partly because the independent bank guarantee has traditionally not been a product that U.S. banks market. The U.S. banks sell the standby.

47. The chair of the drafting group was Charles del Busto, a U.S. banker. See CHARLES DEL BUSTO, DOCUMENTARY CREDITS: UCP 500 & 400 COMPARED iii-v (International Chamber of Commerce Pub. No. 511, 1993). Professor Boris Kozolchyk, the IFSA's representative to the drafting sessions also played a major role. See *id.*; Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 BROOK. L. REV. 45 (1990).

contains much that clarifies standby practice.⁴⁸ The history of the drafting efforts may explain, nonetheless, the reasons that the drafting group for ISP98 may have gone overboard in a few respects.

V. EVALUATING THE FAIRNESS OF ISP98

The second question in evaluating ISP98 is to ask why letter of credit users need them. For some time, versions of the Uniform Customs have acknowledged their appropriate role in standby credit practice.⁴⁹ The URDG, moreover, governs an undertaking, the independent bank guarantee, different in form but identical in function to the standby.⁵⁰

At the time the ICC Banking Commission adopted the URDG, the Commission had concluded that the UCP could govern letters of credit adequately, be those credits commercials or standbys. In retrospect, it may have been more efficient to fashion the URDG for both independent bank guarantees and standby credits. Ultimately, the ICC lost the initiative to the Institute of International Banking Law and Practice, Inc., which turned out to be rather closely allied with U.S. banking interests, particularly the International Financial Services Association (IFSA).

The Institute's initiative has had two effects on the rules that now are supposed to govern standby credits.⁵¹ The style of ISP98 is more detailed than that of the ICC rules and mercifully clearer; however, the ISP are arguably less balanced than typical ICC products.

48. See generally Paul S. Turner, *New Rules for Standby Letters of Credit: The International Standby Practices*, 14 BANKING & FIN. L. REV. 457 (1999).

49. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 1; INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 39, art. 1.

50. See sources cited *supra* note 41.

51. The ISP98 rules say they are for international standby credits, but if UCP practice is any indication of what the practices will be, banks will fashion only one generic form for the standby credits and will incorporate ISP98 into it and will use it indiscriminately for standby transactions, be they international or domestic.

Deciding whether the inclusion of detail is excessive must abide experience. There is certainly a calculated risk in detailing rules as much as ISP98 details them.⁵² Details can put the parties in a straitjacket. The ISP98 sponsors, however, have announced that they intend to issue revisions to ISP98 periodically; it may be that they will use those revisions to deal with any problems that appear in the details. One must acknowledge, furthermore, that the ISP drafters' election to include the detail is a principled effort to provide direction to issuers, commercial parties, and courts. Unfortunately, the details exacerbate what the following discussion suggests is unevenness in the Rules. The ISP contain a number of unexpected provisions, all of them favoring issuers over commercial parties. All of these rules are defensible in principle. They inevitably, in a competitive market such as that for standby credits, reduce the nominal cost of standbys. Yet, by virtue of information asymmetry in the standby transaction, the ISP allocation of risk is often inefficient. By foisting the loss on an unsuspecting party who may be less able than an issuer to protect itself, the ISP may actually increase the cost of standbys, a consequence harmful to commercial parties. That consequence may also be harmful to the banking interests that fashioned ISP98. In a knowledgeable market, an increase in the standby's cost (whether in its price or in its allocation of risk) renders the product less attractive and less successful in competing with obligations such as bonds, secondary guarantees, and other suretyship undertakings.

52. The significant success of the original Article 5 of the UCC lay in its refusal to accommodate requests for detail. Rather, Article 5 in its original version posited a framework for letters of credit. See U.C.C. § 5-101 cmt. (1962). That framework proved remarkably sturdy. It served commerce well throughout the growth of commercial credits in international trade and provided structure for the standby when it began its signal role in domestic commerce. Wisely, the drafters of revised Article 5 have elected to follow a similar course of establishing a framework and leaving the details to commercial parties, bankers, and to other law. See *id.*

VI. INFORMATION ASYMMETRY

The first problem relates to information asymmetry. In any multi-party relationship, there is bound to be a measure of this asymmetry. Yet, the party with superior knowledge that fashions governing rules in a way that exploits that asymmetry may expect a measure of correction from the market or from the courts. If ISP98 favors banks over commercial parties in a setting where the banks are information rich and the commercial parties information poor, the commercial parties, once they learn about it, will be inclined to insist that their standby credits not incorporate ISP98. That is a rational market response, and it is one that will detract from the whole ISP effort. Similarly, courts that identify the situation as information asymmetrical and then see rules that are bound to catch commercial parties by surprise will be inclined to distort or reject the Rules.

Banks were more than well represented in the drafting of ISP98, just as they were well represented in the drafting of UCP 500 and the URDG. Yet, the significantly high measure of detail in the former and the absence of that detail in the two latter regimes matters. Banks will know the Rules well and will be able to price their products in a setting rich with information. But, commercial parties, applicants, and beneficiaries, do not enjoy the same level of information. If past experience is any indication, commercial parties will not have copies of the ISP in their libraries. Many of them do not have law libraries. When a bank issues a standby to them that is "subject to ISP 1998," they might reasonably assume that the ISP is a compilation of industry standards designed to fill in the blanks of the credit with terms that are generally familiar to everyone. That assumption would be wrong, for the ISP contain provisions that would surprise the commercial parties.

The purpose of this essay is not to criticize the drafters of ISP98, who charged themselves with the onerous responsibility of drafting rules that must satisfy hundreds of banks, rating agencies, central bankers, and international commercial organizations. No group of drafters ever fashions a perfect product. Yet, there are serious

problems with ISP98, and it is worth noting them. The fact that the drafters do not appear to see them as problems may well be a consequence of the factors that Professor Rubin has documented.⁵³

Banks that issue most standby credits could attach a copy of ISP98 to their credits or could in some attention-catching fashion bring to the attention of their customers that the standby credits are now subject to a new regime with rules that differ markedly from the rules that formerly applied. Such practices would blunt much of the criticism advanced in this paper. Until the banks do make serious efforts to educate commercial parties and until that education diminishes what is bound to be significant asymmetry in knowledge and understanding of ISP98, banks that incorporate ISP98 into their standby credits run the risk of being charged with unfairness.

VII. UNFAIRNESS IN THE COMMERCIAL SETTING

ISP98 provisions that catch commercial parties unaware are, by themselves, arguably insufficient to render the Rules unfair. Of course, one might take the position that in a freedom of contract regime, all provisions in a contract, even provisions of which one party is unlikely to be aware, govern the relationship. Another view might be that all terms that surprise one of the parties are unenforceable. Probably, no court would seriously entertain either of those positions today. Thus, we are forced to say that only some surprising provisions are unenforceable; and there must be a principled basis for determining which surprising terms are unfair and which are not. There are two views on unfairness in commercial relationships. The first view, enshrined in the Restatement of Contracts,⁵⁴ holds that it is insufficient that a term take a party unaware and that, in addition to the surprising nature

53. See Rubin, *supra* note 15 and accompanying text.

54. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981). "Standardized Agreements" provides "[w]here the other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." *Id.*

of a provision, there must be a finding that incorporation of the provision, as part of ISP98 as a whole, would prompt a reasonable person to elect not to incorporate the ISP. In other words, it is, under the Restatement of Contracts, a mistake to look to the provision alone in determining its fairness. Rather, proper analysis requires evaluation of the entire complex of rules that ISP98 fashions. If, then, there are significant benefits to the commercial parties in the Rules, a reasonable party might take the "bad" provisions in order to avail itself of the "good" ones.

A harsher view of unfairness is that proposed by the Unidroit Principles of International Commercial Contracts.⁵⁵ Under the Unidroit Principles, a provision should not be enforced if it is unfair and if the agreement does not call it to the attention of the party that suffers that unfairness.⁵⁶ Letters of credit are not "agreements," but they are obligations. Application of the Unidroit Principles to them when they arise in the international setting would not be out of the question. In fact, application of principles of international law may well be more appropriate than application

55. INTERNATIONAL INSTITUTE FOR UNIFICATION OF PRIVATE LAW (Unidroit), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994), reprinted in Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 318 (1994). Letters of credit are not contracts but unique commercial undertakings. See U.C.C. § 5-101 cmt. (1995). Courts should not apply contract principles to letters of credit without first determining that the principles are compatible with the unique nature of the credit. This paper assumes that there is nothing incompatible in article 2.20 of the Unidroit Principles and the international standby letter of credit or, for that matter, the domestic standby credit.

56. See Unidroit, *supra* note 55, at art. 2.20 (surprising terms).

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard is to be had to its content, language and presentation.

Id. For further discussion of the Unidroit Principles, see generally Klaus Peter Berger, *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts*, 46 AM. J. COMP. L. 129 (1998); Perillo, *supra* note 55, at 281.

of the American Law Institute's product.⁵⁷ This analysis will use, nonetheless, the Contract Restatement test. If ISP98 fails that test of fairness, it surely fails the test of the Unidroit Principles.

This paper applies a second measure for determining the success of the Rules, and that is an efficiency test. If ISP98 misallocates costs, the Rules encourage waste. While waste is not always a proper standard for measuring fairness, it is a proper standard for measuring the success of the Rules themselves. This part of the evaluation of the Rules assumes that the drafters of ISP98 intended to enhance the attractiveness of the standby as a commercial product that banks sell to commercial parties. If the Rules impose costs on the commercial parties that banks themselves could have shouldered more efficiently than the commercial parties, the Rules are less successful than they might have been. Such allocation is, in effect, misallocation. It is axiomatic that as a consequence of it, some educated commercial parties will, at the margin, elect not to use the product. That commercial party response is harmful to the interests of banks. Of course, there will be some commercial parties, oblivious to the misallocation, that will use the product, all to the banks' gain; however, that instance, a consequence of information asymmetry and a clear instance of inefficiency, counts not in the efficiency calculus applied here, but in the fairness calculus.

In sum, if ISP98 provisions would not only surprise a commercial party but would surprise that party to the point that, were the party aware of them, it would not, taking the benefits of the ISP with the surprise, agree to a standby incorporating the ISP,

57. The position advanced in the text is actually a compromise between those on the one hand that would enforce any provision in an undertaking, whether or not it is boilerplate that would surprise a reasonable person, and those on the other who would never enforce a surprising term that is part of boilerplate that has not been called to the attention of a party. The Restatement of Contracts takes the compromise position advanced in the text. See *RESTATEMENT (SECOND) OF CONTRACTS* § 211 (3) (1981). Unidroit has taken the more liberal view. See Unidroit, *supra* note 55, art. 2.20. See generally James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315, 320-24 (1997).

then the ISP is unfair. And, if the ISP's allocation of costs is such that commercial parties will spend more shouldering the loss than issuers would spend if the loss were allocated to issuers, then the ISP is inefficient and hurts both commercial users and banks competing for business.

Regrettably, some of the ISP98 provisions may offend one of these principles and some provisions may offend both. The conclusion that a provision is unfair or inefficient does not demand that the provision be ignored by courts or arbitrators; it does raise that possibility, however. It also supports the recommendation that commercial parties not rely on standbys incorporating ISP98 until they have studied the ISP with some diligence and supports the recommendation that commercial parties use ISP98 selectively, that is, that they demand of the bank issuers that some of the provisions of the Rules not operate.

The following discussion addresses those articles of ISP98 that may be unfair (to the beneficiary or the applicant) or that may allocate costs inefficiently.⁵⁸

VIII. PROBLEMATIC RULES

A. Scope

It would come as a surprise to most parties to learn that their obligations are subject to privately fashioned rules not incorporated into their obligations. Good and fair commercial practice demand that parties be put on notice that such rules will be governing their relationships.⁵⁹

58. ISP98 is not the first effort by the banks to fashion rules that protect themselves at the cost of their own product. For an argument that UCP 500 has similarly in some instances unwisely shifted costs to letter of credit users, see John F. Dolan, *Weakening the Letter of Credit Product: The New Uniform Customs and Practice for Documentary Credits*, INT'L BUS. L.J. 149 (1994).

59. There is some authority to the effect that the Uniform Customs apply by virtue of being evidence of trade usage, but generally courts have used the Uniform Customs only if they are incorporated in the credit itself. See generally

The scope provision of ISP98 may have the untoward effect of applying the Rules when a commercial party is unaware of them. Rule 1.04(vi) of ISP98 stipulates that when an individual "authorizes issuance of the standby or otherwise agrees to the application" of the Rules, the Rules apply to the "agreement" of that applicant.⁶⁰ The term "standby" is a defined term under the Rules and is limited to "an undertaking subject to these Rules."⁶¹ Thus, if the issuer of a standby credit incorporates ISP98, the credit is a "standby" credit for purposes of the Rules and the applicant's agreement that authorized the issuance of the credit is subject to the Rules.

This may strike some as tortured reading of the Rules and a devious way to render the applicant's "agreement" subject to them. In fact, of course, all applicants will have authorized the issuance of the credit because that is what the applicant does in the application agreement.⁶² Thus, all application agreements under this reading are subject to rules incorporated not into the application agreement but into the credit that the applicant authorizes the issuer to issue.

The chief drafter of the rules, Professor Byrne, agrees with this tortured reading: "This provision would encompass the situation where the application expressly provides that the standby will be issued subject to these Rules. It also conceivably would encompass the situation where the standby was issued subject to the Rules and the applicant, after having been given due notice, failed to object."⁶³

It is common practice for an issuer to send the applicant a copy of the credit when it issues. One would suppose that such action by the issuer would constitute notice to the applicant that in addition to the standby, his "agreement" is also subject to ISP98.

the discussion in JOHN F. DOLAN, *THE LAW OF LETTERS OF CREDIT* ¶ 4.06[1][c] (1999).

60. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.04 (vi).

61. *Id.* at Rule 1.01(d).

62. For an illustration of a typical application agreement, see DOLAN, *supra* note 59, at App. E-19.

63. BYRNE, *supra* note 22, at 17.

This reading is both unfair and inefficient. First, it is unfair to any applicant that is unaware at the time it applies for the credit that its credit will incorporate the Rules. The suggestion, moreover, that the applicant can object when he receives a copy of the credit, is unconvincing, unless it is a fact that the applicant is aware of this ISP98 rule. In fact, many, many applicants will not be aware of the rule. Standby credits arise in a host of situations. Many applicants, however,⁶⁴ are not frequent standby credit users. They use the standby when their counterparty, who might include a bank,⁶⁵ an insurance company construction lender,⁶⁶ the holder of securities,⁶⁷ a university marketing its sports program,⁶⁸ the holder of a promissory note,⁶⁹ an agency of the federal government,⁷⁰ a supplier selling on credit,⁷¹ or an equipment lessor,⁷² asks for one. These

64. In many cases, applicants are buyers seeking to obtain sales on open account. Their sellers are willing to ship on open account, but only if the buyer causes its bank to issue a standby letter of credit payable in the event the buyer does not pay the open account invoice. These buyers (of propane from refiners or automobile parts from manufacturers) are typically smaller enterprises. The transaction is the "invoice standby transaction;" and it arises in many industries. One can be relatively certain that small buyers such as these are not members of the IFSA. For a description of the invoice standby transaction, see DOLAN, *supra* note 59, at ¶ 1.06.

65. Banks are frequent beneficiaries of standby letters of credit. *See, e.g.,* Northern Trust Co. v. Peters, 69 F.3d 123 (7th Cir. 1995).

66. *See, e.g.,* Fidelity Bank v. Lutheran Mut. Life Ins. Co., 465 F.2d 211 (10th Cir. 1972).

67. *See, e.g.,* BMR Gold Corp. v. United States, 41 Fed. Cl. 277 (Fed. Cl. 1998).

68. *See, e.g., In re Metro Communications, Inc.*, 95 B.R. 921 (Bankr. W.D. Pa. 1989), *aff'd in part, rev'd in part*, 135 B.R. 15 (Bankr. W.D. Pa. 1991), *rev'd*, Mellon Bank, N.A. v. Metro Communication, Inc., 945 F.2d 635 (3rd Cir. 1991).

69. *See, e.g.,* Republic Nat'l Bank of Dallas v. Northwest Nat'l Bank of Fort Worth, 578 S.W.2d 109 (Tex. 1978).

70. *See, e.g.,* Austral Oil Co. v. National Park Serv., 982 F. Supp. 1238 (N.D. Tex. 1997) (discussing standby securing of an obligation to repair damage to federal lands).

71. *See, e.g.,* Tosco Corp. v. FDIC, 723 F.2d 1242 (6th Cir. 1983).

72. *See, e.g.,* LeaseAmerica Corp. v. Northwest Bank Duluth, N.A., 940 F.2d 345 (8th Cir. 1991).

applicants would be surprised to learn that their obligations under the application agreement are subject to rules they probably have never seen and that largely favor the bank that issued the credit. It is safe to say that not only would the incorporation of ISP98 into the application agreement surprise the applicant; but the applicant would find nothing in the application of the Rules to the agreement that would render them at all attractive to him.⁷³ Thus, this "conceivable" reading renders Rule 1.04(vi)⁷⁴ unfair.

The Rule is also inefficient. The only way applicants can avoid the untoward effects of the Rules is by educating themselves sufficiently so that they know about this little Rule in the middle of a regime that bankers and their lawyers have drafted. Educating oneself is difficult because the applicant may first learn about the Rule after the credit issues and because ISP98 is only available from ICC Publishing Corp. in New York for something less than \$15.00.⁷⁵

An applicant will not see mention of the Rules in the application agreement, however, unless the issuer uses a form that incorporates them. Sometimes an application agreement consists of the applicant's letter to the issuer asking the issuer to issue the credit. In that case, the applicant will have "authorized" issuance of the credit and will not know that the credit is going to be subject to the Rules. It is usually the issuer of the standby that will decide whether to make the credit subject to the Rules. Whether Rule 1.04(vi)⁷⁶ would apply if the applicant does not know that the credit is to incorporate the ISP is unclear, but such a rule may strike some courts as unfair, since it would bind a party to rules when he does

73. It is safe to say that, but for a measure of clarification, nothing in the Rules gives the applicant more than it would have under Article 5 of the UCC or under the common law of letters of credit.

74. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.04(vi).

75. The current cost of a copy of the Rules is \$14.95 plus shipping and handling charges. ICC Publishing Corp.'s address is 156 Fifth Ave., New York, NY 10010.

76. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.04(vi).

not know they bind him until after the credit issues. Customarily, issuers do not send drafts of the credit to the applicant in advance of issuance but send a copy to the applicant at the same time they send the original to the beneficiary. By sending the original to the beneficiary, the issuer becomes irrevocably bound.⁷⁷ The cost of requiring the bank to give advance notice to the applicant is far less. A clause in the application agreement reciting that it is subject to the Rules would cost banks little. Making that clause conspicuous would hardly cost them anything more.

Yet, the Rules put the far greater cost on the applicant.⁷⁸ It is worth noting, moreover, that it is more than a rare possibility that some parties might intentionally or inadvertently incorporate ISP98 into an obligation that it does not suit, such as a secondary obligation, *i.e.*, a bond or suretyship undertaking. The Rules do not indicate what course a court might want to follow in that event. The fact is, however, that ISP98 is a regime that does not suit dependent undertakings.

Yet, the drafters of ISP98 make it clear that ISP98 trump other

77. For discussion of the issuance or establishment of a credit, see DOLAN, *supra* note 59, at ¶ 5.01.

78. A similar argument of inefficiency, and perhaps unfairness, might be made with respect to the scope provision's extension of the Rules to "inter-related" obligations, such as advices, confirmations, and assignments of the standby, if the standby itself is subject to ISP98. How much more efficient it would be if the Rules required the advice, confirmation, or assignment to incorporate ISP98. True, a confirmer's liability under a standby credit is also subject to ISP98, but should ISP98 apply to the provisions of the advice, confirmation, or assignment that arise outside the original credit? An adviser has obligations *dehors* the credit. *See, e.g.*, U.C.C. § 5-107(c) (1999); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 7. The language of the scope rule and Professor Byrne's reading of it would apply to those extrinsic obligations. *See* BYRNE, *supra* note 22, at 16. A beneficiary who receives a confirmation will not see mention of the Rules in the confirmation, though the credit could be attached to the confirmation, and in that case, the credit itself will mention the Rules, but not all confirmations attach a copy of the original credit, which may have been issued by electronic data interchange, that is, with no hard copy to attach. For an illustration of a confirmation that did not attach a copy of the original credit, see DOLAN, *supra* note 59, at App. E, Doc. 2.

rules that might apply to an undertaking, be it primary or secondary.⁷⁹ This is the rule, it appears, even when the undertaking is a commercial letter of credit that incorporates the Uniform Customs. In that event, courts are advised by the Rules to resolve conflicts between the Uniform Customs and ISP98 in favor of ISP98.⁸⁰

B. Documentary Compliance

Documentary compliance is an area of letter of credit law that has proved troublesome.⁸¹ ISP98 addresses some of those problems with a minimum of imagination and maximum resort to answers that have proved inhospitable to the interests of commercial parties and more than generous to the interests of banks.

There are provisions in ISP98 on documentary compliance that place heavy burdens on beneficiaries, heavier burdens than beneficiaries might suspect and perhaps heavier than are necessary even to protect bank issuers.⁸²

C. Standard of Documentary Compliance

Issuers must be concerned about the standards document checkers use when they examine documents presented under the credit. Rule 4.01(b)⁸³ of ISP98 stipulates that examiners read ISP98

79. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.02(b); Rule 4.20(b) (indicating that commercial letter of credit type documents such as bills of lading or commercial invoices are subject to ISP98 rules not UCP 500 provisions).

80. See *id.* Rule 1.02(b).

81. For general discussion of those problems, the plethora of litigation they have generated, and the various solutions fashioned by courts and rules other than ISP98, see DOLAN, *supra* note 59, ¶¶ 6.02-.06.

82. In short, some of the rules discussed here will surprise the beneficiary that is unfamiliar with ISP98, for, in fact, the rules do not reflect current practice and are in some respects major departures from current practice, as the text explains.

83. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule

documentary compliance rules "in the context of standard standby practice."⁸⁴ One must question seriously the notion that there is any such standard standby practice. If there isn't, this rule is an invitation to ad hoc standards.⁸⁵ It is clear to anyone familiar with bank drafting efforts to deal with the documentary compliance issue that this rule stems from bankers' concerns that the documentary examination process not be evaluated without due regard for the banking exigencies of that process. Courts must take account of the fact that clerical staff conduct the documentary examination and that the cost of error can be significant.⁸⁶ Thus, failure to reckon the banking exigencies into the application of documentary compliance issues can lead to bizarre results.⁸⁷ No rules and no law in a principled regime should rest on adherence to mythical standards.

The notion that there are standards is actually easier to make than the opposite assertion. UCP 500 recognizes the notion,⁸⁸ as does Article 5 of the UCC.⁸⁹ Yet, such recognition should not absolve banks from proving these assertions. Under U.S. law, a party relying on trade usage must prove the existence and scope of that usage as fact.⁹⁰ ISP98 assert in Rule 1.03 that ISP98 should be

4.01(b).

84. *Id.* UCP 500 commands document examiners to determine that the beneficiary's documents comply with the terms of the credit and that in making that determination, the examiners follow "international standard banking practice as reflected in these Articles." INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 13(a).

85. Some authorities close to the UCP drafting process acknowledge that similar language in the UCP rests on mythical notions. See Bernard Wheble, *What's Behind the UCP Article 13 Phrase "International Standard Banking Practice?"*, DOCUMENTARY CREDITS INSIGHT (ICC, Paris), Autumn 1996, at 11.

86. See generally John F. Dolan, *Strict Compliance with Letters of Credit: Striking a Fair Balance*, 102 BANKING L.J. 18 (1985).

87. See, e.g., *Crocker Commercial Servs., Inc. v. Countryside Bank*, 538 F. Supp. 1360 (N.D. Ill. 1981).

88. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 13(a).

89. See U.C.C. § 5-108(e) (1999).

90. See *id.* § 1-205(2).

"interpreted as mercantile usage."⁹¹ Interpreting them as usage would normally require the courts to resolve questions of interpretation as matters of law.⁹² Interpreting them as usage, however, must abide proof that they are usage. In any number of respects it is demonstrable that ISP98 is legislative, that is, an instance of rule making, not codification of trade usage, which by definition consists of rules that are already observed.⁹³

It would be decidedly unfair, furthermore, to apply international banking usages to commercial parties who are not familiar with them. When two banks with international departments contest an issue governed by international standby letter of credit practices, it would make sense to apply those practices; but it does not make sense to apply them to parties unfamiliar with such usages. The Rules' assertion that they are to be construed "in the context of applicable practice"⁹⁴ may bind banks or others who are or should be aware of such practice, assuming they are proved, but might not bind those who are not aware of them, as many commercial parties would not be. If ISP98 incorporates into the Rules all standby usages that can be proved, the Rules may be harshly inefficient by forcing commercial parties to learn practices of another industry.

ISP98 makes it clear that banks are not subject to usages with which they may be unfamiliar.⁹⁵

91. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.03.

92. See U.C.C. § 1-205(a)(1999).

93. The demonstrably legislative nature of ISP98 is evident in rules relating to the definition of "confirmer," the requirement that drafts be negotiable, practices relating to presentation at the counters of an issuer when the credit is confirmed, and the rules on determining whether a document is an original. For discussion of these questions more fully, see DOLAN, *supra* note 59, at ¶ 4.09(3).

94. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.11; *cf. id.* Rule 2.01(a) (similar language describing issuer's undertaking) and Rule 4.01(b) (providing that document examination shall be determined in accordance with the terms of the standby and the rules of ISP98, "which are to be read in the context of standard standby practice").

95. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.08(d) (providing that issuers are not responsible for "law or practice other than

D. Official Documents

Under Rule 4.19(v), official documents presented by a beneficiary under a standby must be certified even if the credit does not speak to the certification requirement.⁹⁶ A call for certification is probably not unusual for such documents. Yet, under the strict compliance rule that normally applies to documents submitted under a letter of credit, an issuer cannot insist on a certified document unless the credit calls for one.⁹⁷ Incorporation of ISP98, banks will undoubtedly argue, renders certification a requirement even if the credit only calls for a copy of the document. The cost of including language in the credit requiring certification is slight, while the cost to beneficiaries to learn of Rule 4.19(v) is major.

E. Mirror Image Rule

Similarly, Rule 4.09(c) requires some certificates to contain the mirror image of language that appears in the credit. The Rule stipulates that the beneficiary submitting documents under a credit that calls for language that is "exact" or "identical" to quoted language in the credit must present a document with all words, numbers, and other symbols, including typographical errors, spelling, punctuation, spacing, blank lines, and the like exactly as they appear in the standby.⁹⁸ Byrne claims that this provision calls for "slavish" conformity between the wording, spacing, and punctuation of the credit and the document submitted by the beneficiary.⁹⁹ Paul Turner has criticized the provision, justly, by

that chosen in the standby or applicable at the place of issuance"). Cf. U.C.C. § 5-108(f)(3) & cmt. 10.

96. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.19(v).

97. Cf. *Bank of Canton, Ltd. v. Republic Nat'l Bank*, 509 F. Supp. 1310 (S.D.N.Y. 1980), *aff'd*, 636 F.2d 30 (2d Cir. 1980) (finding that issuer cannot add condition to certificate if condition is not stated in credit itself).

98. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.09(v).

99. See BYRNE, *supra* note 22, at 164.

virtue of its potential to trap even a careful lawyer or beneficiary.¹⁰⁰ Under the rule, a beneficiary that elects to choose an appropriate option will render the document non-complying. A credit might call for the beneficiary's certificate that the applicant has "missed (a) an interest payment or (b) a principle payment." If the applicant misses an interest payment, the beneficiary will be tempted to certify that the applicant missed an interest payment. Such certification would be non-conforming and would give the issuer grounds to dishonor the beneficiary's demand for payment. Under this mirror image rule, the beneficiary must recite that the applicant "missed (a) an interest payment or (b) a principle payment." And, he better not correct the spelling error. The rule would also trap the unwary beneficiary whose clerk assumes that "California" can be abbreviated to "CA" or that "U.S." and "United States" are exactly equivalent. Of course, beneficiaries apprised of the rule have no excuse for failing to comply with it. It is salutary law that requires a beneficiary to examine the credit before relying on it.¹⁰¹

One wonders what conceivable reason the drafters had for resorting to this procrustean rule. Sometimes, standby credits call for lengthy documentation, and an issuer might prefer a document from the beneficiary that its scanners can check to see that there are no alterations. Yet, issuers who need such documentation can easily provide the documents to the beneficiary as exhibits to the credit and require the beneficiary to execute the original copy of a document, with appropriate blanks filled in or boxes checked.

The mirror image requirement of Rule 4.09(c) is inefficient and may strike courts as unfair.

100. See Turner, *supra* note 48.

101. As a general rule, courts will not redraft a letter of credit in order to make it possible for the beneficiary to comply with its conditions. See, e.g., *Corporacion De Mercadeo Agricola v. Mellon Bank Int'l*, 608 F.2d 43, 47 (2d Cir. 1979). "No prudent lawyer would counsel his client to accept a letter of credit without knowing its specific terms." *In re Sunflower Racing, Inc.*, 219 B.R. 587, 601 (Bankr. D. Kan. 1998), *aff'd*, 226 B.R. 673 (D. Kan. 1998). There is contrary authority, however. See DOLAN, *supra* note 59, at ¶ 4.08[1].

F. Demands

It is efficient letter of credit practice for the beneficiary to include in its demand on the issuer certain data that will help the issuer locate the credit that governs the transaction, determine the documentary requirements of the credit, examine the documents promptly, and ensure that the credit has not expired. Such data might include the date when the demand is made, the amount demanded, and the beneficiary's signature. If an issuer seeks to have the beneficiary include such detail in its demand, the easiest way to ensure that the beneficiary complies with the requirement is to insert a clause in the credit requiring that information. ISP98 Rule 4.16 relieves banks, however, from that simple duty by requiring a beneficiary to include that data in its demand even though the credit does not require it. The rule goes further by commanding that the demand be "directed to the issuer or the nominated person."¹⁰²

Similarly, Rule 3.03 stipulates the eminently sensible requirement that the demand identify the standby.¹⁰³ Such a requirement is obviously important to a bank issuer that may have thousands of outstanding standby credits, hundreds of them, perhaps, in favor of the beneficiary that is making the demand. Bankers should not spend time hunting for the standby but will want to call it up on their word processors quickly by using the identification data included in the demand. Yet, it has long been the tradition that letters of credit specify these requirements in the text of the credit itself,¹⁰⁴ not in some set of rules incorporated by reference. The cost of putting that information in the standby software would be puny compared to the cost on the beneficiary that must learn this rule and that might easily fail to include this information if the credit does not call for it. The Rule renders any draft or demand that does not identify the credit noncompliant

102. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.16(b)(i).

103. *See id.* Rule 4.16.

104. For an early case, see *Coolidge v. Payson*, 15 U.S. 66 (1817).

even when the credit does not contain that requirement.¹⁰⁵

A similar provision in Rule 4.08 that a standby, even when it does not call for a demand explicitly, is not properly called on by the beneficiary unless it includes a demand in the package of documents it presents to the issuer, is subject to the same criticism and the same wonder that the drafters would include such a rule in ISP98 when the cost of putting the requirement in the credit is so small. Traditionally, issuers have included that requirement in their credits.¹⁰⁶ Even if the issuer forgets to include the requirement, the cost to the issuer is not great, though it will have to hunt for the standby and may have to call someone on the phone to find out what is going on. Yet, under this rule, if the issuer fails to observe what is now standard practice and leaves out the requirement for the demand, the beneficiary that does not present one will have made a non-complying presentation and may lose the entire benefit of the standby.

G. Certificates of Default

In a fashion similar to that associated with demands, ISP98 stipulates the content of a certificate of default. Most standby credits, except direct pay credits,¹⁰⁷ call for two documents: a demand or a draft and a certificate, usually a certificate of default. Thus, by legislating the data content of these two documents, ISP98

105. The fact that the issuer may, on its own motion, waive this requirement is insufficient protection for the beneficiary. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 3.11(a)(ii). The issuer will be inclined to invoke Rule 3.03 and decline a waiver at the precise time that it matters most to the beneficiary: when the applicant is insolvent.

106. For cases involving litigation of that requirement, see for example, *Tosco Corp. v. FDIC*, 723 F.2d 1242 (6th Cir. 1983); *Datapoint Corp. v. M & I Bank*, 665 F. Supp. 722 (W.D. Wis. 1987); *First Bank v. Paris Savs. & Loan Ass'n*, 756 S.W.2d 329 (Tex. App. 1988).

107. A direct pay standby credit is unusual in that it is a standby under which the parties expect to make payments. Most standby credits are drawn on only if there is a breach of some kind in the underlying transaction. For a definition, see BYRNE, *supra* note 22, at 3.

is essentially covering all of the bases.

Rule 4.17(a) stipulates that the certificate of default must include a "representation to the effect that payment is due because a drawing event described in the standby has occurred."¹⁰⁸ Once again, a beneficiary unlettered in ISP98 rules could reasonably assume that, absent specific reference in the credit to the data content of the certificate, any certificate of default is adequate if it recites that there has been a default. Note, once again, the simplicity and efficiency of a regimen without Rule 4.17(a). Issuers under that regimen would have to include in the standby the language that they deem important. Absent such language, any certificate would do.¹⁰⁹ Certainly the cost of including the language in the credit would be small. Most credit forms contain blanks in which the issuer describes the documents that must be presented in order to obtain payment under the credit. Thus, the issuer usually must attend to the blank and can insist on any necessary language or other data content at that point.

Significantly, Rule 4.17 contains other provisions for the data content of the certificate, namely, that it be signed and dated.¹¹⁰ Those provisions are helpful to issuers and yet they are probably innocuous. Most beneficiaries will know that they should sign their certificates and most will date their signatures. The offensive feature of the first provision, that the certificate use ISP98 language to describe the default, lies in the fact that it is unexpected.

108. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.17(a).

109. *See, e.g.*, *First Bank v. Paris Savs. & Loan Ass'n*, 756 S.W.2d 329 (Tex. Ct. App. 1988). *Cf.* *United States v. Sun Bank*, 609 F.2d 832 (5th Cir. 1980) (holding that issuer cannot insist on certificate if credit does not call for one).

110. *See* INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.17(b)-(c).

IX. OTHER UNFAIR PROVISIONS

A. *Waivers of Rights*1. *The Beneficiaries*

The problem of documentary discrepancies has plagued letter of credit practice and creates serious problems for the credit as a commercial product. If beneficiaries cannot be relatively certain that they can comply with the credit's documentary conditions, they will not want the credit. In commercial letters of credit, where the documentation is often more complicated and the documents more numerous than in the standby transaction,¹¹¹ documentary discrepancies are frequent.¹¹² In fact, the history of the UCP indicates that it was a desire to give beneficiaries notice of what issuers expected that prompted banks to undertake the UCP as a project.¹¹³

It is an efficient and judicially sanctioned response to the problem of frequent documentary discrepancies in the letter of credit industry for issuers that receive nonconforming documents to ask their applicants whether they will waive the discrepancies and permit the issuer to pay the beneficiary despite them.¹¹⁴ That practice of obtaining the applicant's waiver of discrepancies is much less likely to occur in the standby credit transaction than in the commercial letter of credit transaction. In the commercial letter of credit transaction, usually the applicant wants the beneficiary to be

111. A typical commercial letter of credit will call for a draft, commercial invoice, shipping document, packing list, insurance certificate, and, possibly, customs documents. For description of the commercial letter of credit transaction, see JOHN DOLAN, *COMMERCIAL LAW, TERMS AND TRANSACTION* 39-50 (2d ed. 1997); CLAYTON P. GILLETTE & STEVEN WALT, *SALES LAW, DOMESTIC AND INTERNATIONAL* 369-84 (1999).

112. See generally Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 *BROOK. L. REV.* 45, 47-49 (1990).

113. See generally DOLAN, *supra* note 59, ¶ 4.06[1] and authority cited therein.

114. See U.C.C. § 5-108 cmt. 2, para 4 (1999).

paid because the applicant wants the goods that the beneficiary is shipping in the underlying sales transaction. In the standby transaction, the applicant's financial demise or its breach of an executory obligation prompts the beneficiary's draw under the credit.

Sometimes, beneficiaries know that their documents are discrepant, but they present them to the issuer under the credit and ask the issuer to seek the applicant's waiver. Some cases hold that such a request by the beneficiary amounts to its own waiver of rights under the credit.¹¹⁵ That authority is questionable, since waiver is the intentional relinquishment of a known right. In fact, the beneficiary's belief to the contrary notwithstanding, the documents might conform. If they do, the beneficiary's request that the issuer seek a waiver from the applicant should not waive the beneficiary's claim against the issuer for improper dishonor. It may be that the rule of these cases is in the nature of an estoppel, rather than waiver. Under estoppel reasoning, the beneficiary's request that the issuer seek a waiver might lull the issuer into thinking that it need not examine the documents and need not give the notices required if the documents are defective.¹¹⁶ By not giving the notices, the issuer would itself be subject to a preclusion rule that operates as an estoppel without the need to show detriment and reliance.¹¹⁷

ISP98 carries the waiver rule against the beneficiary a step beyond the case law and a giant leap beyond its reason. Under Rule 5.06 if the issuer notifies the beneficiary that the documents are discrepant and if the beneficiary *at that time, i.e.*, after the issuer has given the notice, a time when it cannot be lulled into a trap that will cause it to be estopped, asks the issuer to request the applicant's

115. See, e.g., *Alaska Textile Co. v. Chase Manhattan Bank, N.A.*, 982 F.2d 813 (2d Cir. 1992); *Merchants Bank v. Credit Suisse Bank*, 585 F. Supp. 304 (S.D.N.Y. 1984).

116. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 5.01; cf. INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 14(d).

117. See U.C.C. § 5-108(c) (1999); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 14(e); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 5.03.

waiver, the rule makes the request a waiver of rights under the credit. Rule 5.06(c)(i) stipulates that the beneficiary that makes that request has waived its right to claim that the documents comply. This rule is doubly inefficient for putting on the beneficiary a burden it would not reasonably expect and for discouraging beneficiaries from asking the issuer to present the demand to the applicant in situations where the beneficiary might reasonably assume the applicant will honor the demand.

2. *The Applicants*

Applicants as well as beneficiaries may be surprised to learn that there lurks in ISP98 an applicant-preclusion provision. Rule 5.09(a) requires the applicant to examine the documents after the issuer pays and forwards them to the applicant. The applicant's failure to notify the issuer within a reasonable time of any discrepancies operates to preclude the applicant from raising the discrepancies in a claim against the issuer for improperly honoring the beneficiary's demand for payment.¹¹⁸

The preclusion rules of letter of credit law correctly operate without regard to reliance and detriment. Thus, under Rule 5.09(c) of ISP98 an issuer that pays over defective documents may claim reimbursement from the applicant unless the applicant gives the notice.

The serious objection to Rule 5.09(a) lies in the fact that it is hidden in ISP98 and that many applicants will be unaware of it. The rule adopts what is probably an obscure line of authority under current law precluding the applicant if it fails to notify the issuer of defects promptly;¹¹⁹ and it probably will surprise the applicant,

118. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 5.09(c).

119. See, e.g., *Petra Int'l Banking Corp. v. First Am. Bank*, 758 F. Supp. 1120 (E.D. Va. 1991), *aff'd*, 953 F.2d 1383 (4th Cir. 1992). *But cf.* *Oei v. Citibank, N.A.*, 957 F. Supp. 492 (S.D.N.Y. 1997) (holding that applicant's failure to object to documents did not constitute waiver if applicant was unaware of defects); *Overseas Trading Corp. v. Irving Trust Co.*, 82 N.Y.S.2d 72 (Sup. Ct. 1948)

even a seasoned letter of credit applicant. The nature of the document examination process and the customary rules that relate to it reenforce the surprise and evince the policy weakness of the rule. Under standard letter of credit law, the issuer must examine the documents to determine whether they comply with the terms of the credit.¹²⁰ There is convincing authority that *between the issuer and the beneficiary* an issuer may not, under UCP 500, abdicate that responsibility by submitting the documents to the applicant for examination.¹²¹ Article 5 permits an issuer to abdicate the responsibility *with respect to the applicant*, assuming that the issuer pays the beneficiary.¹²² The issuer's right to abdicate arises if the right is "established between the issuer and the applicant by agreement or by custom."¹²³ While ISP98 is probably not custom, unless a party marshals proof that they are custom,¹²⁴ incorporation of ISP98 into the standby probably renders the rule of 5.09(a) a matter of agreement.

Thus, any applicant that reasonably expects that, absent custom or agreement, the issuer will examine the documents and will relieve the applicant from the obligation of examining them is going to be surprised. The result of that surprise, moreover, is not a minor result. It is the whole ball game. Invocation of the preclusion in Rule 5.09(a) should not rest on a provision deep within ISP98. It should be a matter of concern, moreover, that there is no discernable benefit to the issuer in the applicant's post-payment notice of defects. By the time the issuer receives the

(same).

120. See U.C.C. § 5-108(b) (1999); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 13(b); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 5.01(a).

121. See *Bankers Trust Co. v. State Bank of India*, 1 Lloyd's Rep. 587 (Q.B. 1991), *appeal dismissed*, 2 Lloyd's Rep. 443 (C.A. 1991).

122. See U.C.C. § 5-108 cmt. 1, para. 6 (1999). The assertion that the abdication arises only if the issuer pays the beneficiary, rests on the fact that the comment refers to the right of reimbursement from the applicant, a right that arises only if the issuer has paid. See *id.* § 5-108(i)(1).

123. *Id.* § 5-108 cmt. 2, para 6.

124. See *supra* notes 88-93 and accompanying text.

notice, it will have paid the beneficiary.¹²⁵ In a rational, fair regime, an issuer that seeks to effect such a preclusion should give an inexpensive yet explicit notice in the letter that covers transmittal of the documents to the applicant, such as the following: "NOTICE: Under ISP98 Rule 5.09(a) you have only a reasonable time to examine these documents for defects and will be precluded from claiming that any of these documents are defective unless you examine them and notify us of any defect(s) promptly." Regrettably, ISP98 Rule 5.09(a) requires nothing from the issuer and, under the circumstances, will often result in a preclusion that would be patently unfair.

X. CONCLUSION

To date, there are no cases from courts or arbitrators construing ISP98, but there is a body of jurisprudence that grapples with the policy on the one hand of giving effect to incorporated rules and giving effect to notions of fairness on the other, namely, the Restatement of Contracts, and the Unidroit Principles. There is moreover, decisional law under UCP 500, which to a lesser extent has fashioned rules unfair to commercial parties similar to the rules discussed in this paper;¹²⁶ that may herald inhospitable treatment of ISP98.¹²⁷ This body of law testifies for the conclusion that one of

125. One might argue, under a line of authority this writer has criticized, that the issuer needs the notice in order to pursue a breach of warranty against the beneficiary that presents defective documents. For cases holding that the beneficiary makes such a warranty, see *Pro Fab, Inc. v. Vipa, Inc.*, 772 F.2d 847 (11th Cir. 1985); *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230 (5th Cir. 1983). *But cf.* *Paramount Export Co. v. Asia Trust Bank, Ltd.*, 238 Cal. Rptr. 920 (1987). For criticism of the *Philadelphia Gear* line of reasoning, see John F. Dolan, *Letters of Credit, Article 5 Warranties, and the Beneficiary's Certificate*, 41 BUS. LAW. 347 (1986).

126. For criticism of those similar provisions, see John F. Dolan, *Weakening the Letter of Credit Product: the New Uniform Customs and Practice for Documentary Credits*, 2 INT'L BUS. L.J. (1994).

127. See *Kumagai-Zenecon Constr. Pte. Ltd. v. Arab Bank plc*, 1997 SLR LEXIS 152 (C.A.). This case dealt with non-documentary conditions, which

the costs that ISP98 visits upon the standby transactions to which they apply is uncertainty—a cost that benefits neither the banks nor the commercial parties.

Another obvious cost is that knowledgeable commercial parties must engage in negotiations with the banks to delete from their standby credits those terms in ISP98 that are unfair. How much easier to fashion rules that are fair *ab initio* and demand no transaction costs in their implementation. Finally, the presence of unfair provisions in ISP98 will encourage some commercial parties to eschew them entirely,¹²⁸ which of course is easier than going through the Rules one by one to determine which are harmful, which benign. Other commercial parties will find it easier to eschew standby credits altogether rather than conduct stressful inquiry and deal with the distrust the presence of unfair provisions generates.

There is much in ISP98 to admire. The Rules are clear, their

UCP 500 and ISP98 tell issuers they can ignore. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 9, art. 13(c); INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 4.11(a). Mindful of the need to follow incorporated rules, the court held, nonetheless, that it could not ignore a condition that was crucial to the applicant's obligation in the underlying transaction. The case in question, so well reasoned and so convincingly delivered suggests that courts will not enforce rules that effect significant unfairness. Article 5 has avoided the unfairness in the non-documentary conditions rule by crafting the same rule but limiting its application to situation in which the condition is not "central and fundamental" to the issuer's undertaking. See U.C.C. § 5-108(g) cmt. 9, para 2 (1999). Thus U.C.C. Article 5 and the *Kumagai-Zenecon* case fashion the same rule. For further discussion of the *Kumagai-Zenecon* case, see Adam B. Strauss, *Disguised Guaranties: Liability of Issuers Ignoring Non-Documentary Conditions*, 115 BANKING L.J. 1039 (1998).

128. In 1978, the International Chamber of Commerce promulgated Uniform Rules for Contract Guarantees. See INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 325, UNIFORM RULES FOR CONTRACT GUARANTEES (1978). These rules were plagued by similar overreaching attempts to protect the issuers of the contract guarantee. Beneficiaries of such guarantees, usually state agencies, declined to take guarantees subject to the rules, which have fallen into disuse. The failure of those rules prompted the drafting of new rules that were fairer to all parties. See ROY GOODE, UNIFORM RULES FOR DEMAND GUARANTEES INTERNATIONAL CHAMBER OF COMMERCE (Pub. No. 458, 1992).

syntax helpful, a significant advance over UCP 500, which tends to be turgid and recondite.¹²⁹ The Rules are also fashioned in many instances with an eye to the peculiarities of the standby transaction and thus avoid harmful or irrelevant provision.

It is unfortunate, then, that the drafters did not take greater care, great care, in fact, to resist (a) what appears to be banker insistence on rules that are in the final analysis not helpful either to banks or to the standby as a commercial product or (b) their own inability, as Professor Rubin has described, to check their clients at the drafting room door.

129. The Rules wisely, for example, leave most questions regarding the troublesome subject of fraud in the transaction to local law. See INTERNATIONAL CHAMBER OF COMMERCE, *supra* note 12, Rule 1.05(c). A major failing of the UNCITRAL Convention lies in the Convention's attempt to codify rules dealing with that subject. For criticism of the UNCITRAL attempt to legislate the question, see John F. Dolan, *The UN Convention on International Independent Undertakings: Do States with Mature Letter of Credit Regimes Need It?*, 13 BANKING & FIN. L. REV. 1 (1998). Because fraud questions are inextricably entwined with matters of local procedural law and because the notion of fraud itself vary from jurisdiction to jurisdiction, fraud rules are best left to local law. It is the market that will sort out the problem. Jurisdictions that do not fashion efficient rules, procedurally and otherwise, for resolving fraud questions, will find credits issued by their banks unacceptable in world markets. UCP 500 and ISP98 correctly eschew the fraud question.

ISP98 fashions rules for electronic presentation of demands and documents under standby credits [Rule 1.09(c)]; recommends the deletion of specified vague terms that find their way into the letter of credit lexicon [Rule 1.10]; emphasizes the irrevocability [Rule 2.03]; and independence of credits [Rule 1.06]; fashions rules for lost, stolen or destroyed credits [Rule 3.12]; clarifies the rules on assignment of proceeds [Rules 6.06-.10] and transfers [Rule 6.01-.05], including adoption of the modern rule that a beneficiary's successors may draw on the credit [Rule 6.11.1]; and imposes reasonable time limits, with a serious minimum and a serious maximum, on issuers when they examine documents [Rule 5.01(a)]. In short, there is much to commend the Rules as a regime that clarifies and modernizes standby credit practices.