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Choice of Law Under Revised Article 5 of the Uniform Commercial Code--§ 5-116

Franck Chantayan

CHOICE OF LAW UNDER REVISED ARTICLE 5 OF THE UNIFORM COMMERCIAL CODE - § 5-116

INTRODUCTION

The New York legislature is considering adopting Revised Article 5 of the Uniform Commercial Code (U.C.C.), which governs letter of credit transactions.[1] The newly Revised U.C.C. Article 5 offers several amendments from New York's current version of Article 5. This Note will examine the proposed change to section 5-116 of the U.C.C. under Revised Article 5 pertaining to choice of law in letter of credit transactions. The choice of law provision of section 5-116 is an important issue to scrutinize since the majority of international letters of credit are handled through New York banks.[2] Therefore, any proposed changes must be thoroughly analyzed before being implemented since many transactions will be affected by the implementation of the new Article 5.

Part I will examine the mechanics of a letter of credit transaction. Part II will examine the status of the choice-of-law provisions in letters of credit under New York's current version of the Uniform Commercial Code Article 5, Letters of Credit. Part

[1] *See* Ass.11025, 221st Leg. (NY 1997) (amended June 2, 1998) (stating that on May 27, 1998 bill was introduced in New York Legislature to adopt Revised Article 5 of Uniform Commercial Code); *see also* Edwin E. Smith, *Letter of Credit*, 769 PLI/COMM 469, 473 (1998) (updated) (stating that New York has not adopted Revised Article 5 of Uniform Commercial Code); Peter H. Weil, *Letters of Credit*, 754 PLI/COMM 511, 516 (1997) (indicating that some states have adopted Revised Article 5, but New York is not one of them).

[2] *See* N.Y. U.C.C. § 5-102 (McKinney 1991) (stating that most international letter of credit business is handled by New York banks); 29 N.Y. JUR. CRED. CARDS § 43 (1997) (stating that bulk of international letters of credit in United States are handled by New York banks); Joseph H. Sommer, *A Law of Financial Accounts: Modern Payment and Securities Transfer Law*, 53 BUS. LAW. 1181, 1189 (1998) (recognizing that "[a] vast amount of international letter of credit business is customarily handled by certain New York banks); *see also* Peter Linzer, *Non-["Un-"?] American Law and the Core Curriculum*, 72 TUL. L. REV. 2031, 2040 (1998) (stating that New York is "the most significant jurisdiction for letter of credit").

III will explore the choice-of-law provision under New York's proposed Revised Article 5, including what may occur in the absence of an agreement regarding the choice-of-law clause under the Revised Article 5. The conclusion will suggest that the New York legislature should refrain from adopting Revised Article 5 of the Uniform Commercial Code.

I. NATURE OF LETTER OF CREDIT TRANSACTION

Letters of credit are commonly used in business practice to assure payment in a variety of commercial transactions.[3] The most common use for letters of credit is as a method of payment for goods in a commercial sales transaction.[4] Letters of credit can also be used as security in certain transactions, such as real estate.[5]

Generally, there are at least three parties in a letter of credit transaction.[6] The first person is the party who opens the letter of

[3] *See* Peter H. Weil, *Asset Based Financing 1998*, 769 PLI/COMM 469, 471 (1998) (stating that letter of credit is "commitment to make a payment"); Reade H. Ryan, Jr., *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 587-89 (1997) (indicating that primary purpose of letter of credit is for applicant to pay money to beneficiary); *see also* J. Zeevi & Sons v. Grindlays Bank (Uganda), 371 N.Y.S.2d 892, 897 (1975) (citing Kingdom of Sweden v. N.Y. Trust Co., 96 N.Y.S.2d 779, 787 (1949)) (indicating that letters of credit are "well-known instrumentalit[ies] of commerce"). *See generally* Burton W. Kanter and Sheldon I. Banoff, *Tax-Exempt Bond Status Threatened by New Development*, 63 J. TAX'N 359, 359 (1985) (stating that it is common practice that bonds are backed by letters of credit).

[4] *See* Leslie King O'Neil, *They're Back: Letters of Credit Provided in Lieu of Surety*, 13 J. CONSTRUCTION L. 3, 3 (1993) (stating that letters of credit in sales transactions are called commercial letters of credit); Michael Stern, Comment, *The Independent Rule in Standby Letters of Credit*, 52 U. CHI. L. REV. 218, 219 (1985) (stating that businesses choose standby letters of credit over traditional ones in commercial transactions); *see also* Beat U. Steiner, *A Letter of Credit Primer for Real Estate Lawyers*, 28 REAL PROP. PROB. & TR. J. 125, 126 (1993) (stating that letters of credit traditionally were used in "the international sale of goods transaction[s]"); Linzer, *supra* note 2, at 2040 (stating that most common use of letters of credit is in international sales transactions).

[5] *See* Monte M. Brem, Note, *Western Security Bank v. Beverly Hills Business Bank: The Vanishing Utility of Letters of Credit in Real Estate Transactions*, 31 SAN DIEGO L. REV. 775, 775 (1994) (indicating that letters of credit are used in real estate transactions); *see also* Patricia J. Frobes and Joseph G. McHugh, *Effect of California Anti Deficiency Laws on Transactions Secured by Real Property and Letters of Credit*, 389 PLI/REAL 553, 555 (1993) (indicating that in 1980s letters of credit were used to "shore up values in real estate"); Steiner, *supra* note 4, at 126 (stating that "[l]etters of credit are being used for a variety of purposes in real estate transactions").

[6] *See* Weil, *supra* note 3, at 471 (stating that "there are normally three parties involved in a letter of credit transaction"); *see also* Howard N. Gorney, *Enjoining Payment of Letters of Credit Under the Bankruptcy Code: New Concerns for Issuers and Beneficiaries*, 66 AM. BANKR. L.J. 333, 334 (1992) (noting that letters of credit involve issuer, customer, and beneficiary); Daniel J. Isenberg, *Tangible Property (Owner Financing)*, 339 PLI/COMM 81, 91 (1984) (stating that at least three parties are involved

credit, known as either the account party or the applicant.[7] In a sales transaction, this party would be a buyer who is required to pay for the goods.[8] The second party in a letter of credit transaction is the beneficiary of the letter of credit,[9] the manufacturer, or the seller in a sales transaction. The third party in a transaction is the bank that issues the letter of credit, known as the issuing bank or the issuer.[10] At times there may be a fourth party involved in a letter of credit transaction, called the advising or confirming bank.[11] The difference between an

in letter of credit transaction); Weil, *supra* note 1, at 513 (stating that there are normally three parties in letter of credit transaction).

7 *See* § 5-102(2), Ass.11025, 221st Leg. (NY 1997) (amended June 2, 1998). This bill states that an "applicant means a person at whose request or for whose account a letter of credit is issued." *Id.* An applicant is a person who causes a letter of credit to be issued. *See* Weil, *supra* note 3, at 471. In a letter of credit transaction the person who asks a bank or other institution to open a letter of credit for the benefit of another party is know as the account party. *See Id.* The account party is sometimes called the applicant because he or she files a letter of credit application with his or her bank in order to open a letter of credit for the benefit of the party who is to receive the proceeds under the letter of credit. *See Id.* The account party, or applicant, is the party "which causes the issuer to issue the letter of credit." Smith, *supra* note 1, at 471; *see also* Lawrence W. Newman and Michael Burrows, *Letters of Credit Disputes*, N.Y.L.J., March 29, 1996, at 3.

8 *See* L. FARGO WELLS AND KARIN B. DULAT, EXPORTING FROM START TO FINANCE 160 (Tab Books 1st ed. 1989) (mentioning that applicant is buyer who opens letter of credit); *see also* BLACK'S LAW DICTIONARY 98 (6th ed. 1990) (indicating that applicant is customer in letter of credit transaction); *see also* John M. Czarnetzky, *Modernizing Commercial Financing Practices: The Revisions to Article 5 of the Mississippi Uniform Commercial Code*, 66 MISS. L.J. 331, 333 (1996) (stating that usually buyer of goods or services is termed applicant); Kris S. Dighe, Note, *Standby Letters of Credit: Are They Insured Deposits?*, 32 WAYNE L.REV.1165, 1167 (1986) (stating that account party owes money to beneficiary).

9 *See* § 5-102(3), Ass.11025, 221st Leg. (NY 1997) (amended June 2, 1998) (indicating beneficiary is person who is to be paid when complying documents are presented to bank); William C. Hillman, *Letters of Credit: Basics*, 544 PLI/COMM. 7, 18 (1990) (stating that beneficiary is party that receives payment under letter of credit); Amy D. Ronner, *Destructive Rules of Certainty and Efficiency: A Study in the Context of Summary Judgment Procedure and the Uniform Customs and Practice for Documentary Credits*, 28 LOY. L.A. L. REV. 619, 623 (1995) (stating that beneficiary is party that receives payment under letter of credit); Weil, *supra* note 3, at (stating that beneficiary may be seller in sales transaction, financial institution, or real estate developer).

10 *See* § 5-102(9), Ass.11025, 221st Leg. (NY 1997) (amended June 2, 1998); *see also* Amelia H. Boss, *Suretyship and Letters of Credit: Subrogation Revisited*, 34 WM. & MARY L. REV. 1087, 1092 (1993). The issuer, typically a bank, Ronner, *supra* note 9, at 623, is the party that is committing their financial responsibility to pay the letters of credit. Weil, *supra* note 3, at 471. The issuing bank will, generally, be the account party's bank. The account party will make out a letter of credit application indicating the amount to be drawn by the beneficiary and what documentation will need to accompany the draft. The issuing bank may place its own conditions or may be obligated by local laws to require certain documents in order to make payment.

11 The adviser communicates to the beneficiary that letter of credit has been open at request of issuer. *See* § 5-102(4) & (1), Ass.11025, 221st Leg. (NY 1997) (amended June 2, 1998); *see also* John B. Hendricks, *Financing the Export Transaction*, 458 PLI/COMM 55, 67 (1988). Many times the confirming or advising bank will be a corresponding bank to the bank that issues the letter of credit. *See* Calgarth Investments, Ltd. v. Bank Saderat

advising and confirming bank is the level of responsibility the bank undertakes in guaranteeing payment to the beneficiary.[12]

A letter of credit is, essentially, a contract to make payment when the requisite conditions outlined in the letter of credit have been satisfied.[13] Usually in a letter of credit transaction the applicant and the beneficiary will agree in advance which requirements must be met for the beneficiary to be able to draw on a letter of credit, that is, obtain payment.[14] However, many times the issuing bank may include its own requirements, or those of the issuing bank's government.[15] For example, while the

Iran, 1996 WL 204470, *2 (S.D.N.Y. 1996). A corresponding bank is a bank in the beneficiary's country with which the issuing bank has a relationship. This could simply mean that the issuing bank has an account with the corresponding bank from which funds can be drawn. Beneficiaries generally prefer to deal with banks in their own jurisdiction to avoid having to present a draft for payment to an oversees institution. By contrast a confirming bank confirms that they will make payment upon presentation of a draft along with conforming documentation. Once the confirming bank has made payment to the beneficiary it sends the documents to the issuing bank in order to be reimbursed. Without this confirmation to make payment the bank is an advising bank. That is, they are only advising the beneficiary that a letter of credit has been open in his favor. When a draft is presented to an advising bank the bank does not make payment, but instead forwards the draft and documents to the issuing bank for payment. defines the role of advising bank in letter of credit transaction. In 29 N.Y. JUR. CRED. CARDS § 47 the duties of the advising bank are explained.

12 *See* Marian Nash (Leich), *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 312, 320 (1994) (stating that confirming bank has legal obligation to pay beneficiary who has fulfilled terms of letter of credit, but advising banks do not have this obligation); Julia Anderson Reinhart, Note, *Reallocating Letter of Credit Risks: Chuidian v. Philippine National Bank*, 18 N.C. J. INT'L L. & COM. REG. 725, 730 (1993) (stating that confirming bank is liable, while advising bank is not); *see also* Arthur Fama, Jr., Note, *Letters of Credit: The Role of Issuer Discretion in Determining Documentary Compliance*, 53 FORDHAM L. REV. 1519, 1521 (1985) (stating that role of advising bank is limited).

13 *See* JAMES J. WHITE AND ROBERT S. SUMMERS, UNIF. COMMERCIAL CODE PRACTITIONER TREATISE SERIES 120 (4th ed. 1995). A letter of credit is "a well-know instrumentality of commerce" which is governed under the same principles as contract law. *See* J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), 371 N.Y.S.2d 892, 897 (1975). In almost all letter of credit transactions there will be at least two contracts, the sales contract and the letter of credit. Many times there will be an additional contract between the issuing bank and the applicant assuring reimbursement, as sort of promissory note if you will. Therefore, most letter of credit transactions will have three contracts. *See* B. Lynn Kremers, Note, *Letters of Credit: Should Revised Article 5 of the Uniform Commercial Code be Adopted in Missouri*, 65 UMKC L. REV. 567, 570 (1997). A letter of credit is similar to the customer-beneficiary contract. *See* Jonathan D. Thier, Note, *Letters of Credit: A Solution to the Problem of Documentary Compliance*, 50 FORDHAM L. REV. 848, 851 (1982).

14 *See* J. Zeevi & Sons, Ltd. 371 N.Y.S.2d at 897 (indicating that letter of credit is governed by same principles as contract law); Kremers, *supra* note 13, at 570 (citing to White and Summer) (indicating that letter of credit transactions are governed by contracts); Jonathan D. Thier, Note, *Letters of Credit: A Solution to the Problem of Documentary Compliance*, 50 FORDHAM L. REV. 848, 851 (1982) (indicating that letter of credit is form of customer-beneficiary contract).

15 *See* Gerald T. McLaughlin, *Should Deferred Payment Letters of Credit be*

applicant may require a single original commercial invoice, the issuing bank may require that the beneficiary to supply three sets of original commercial invoices. Furthermore, the issuing bank's country may require the beneficiary to obtain an import license from the country's consulate to permit the merchandise to clear customs. Payment is made upon presentation of a draft, along with certain other documents such as a commercial invoice, a bill of lading, and any additional documents that may be required under the terms of the letter of credit.[16] A bank is obligated to pay on a letter of credit when presented with a draft and conforming documents.[17]

Specifically Treated in a Revision of Article 5, 56 BROOK. L. REV. 149, 150 (1990) (stating that issuing bank will pay letter of credit drafts provided required documents are presented); RALPH FOLSOM, MICHAEL WALLACE GORDON, AND JOHN A. SPANGOLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS 913-14 (West 3d ed. 1995) (indicating that some governments prevent removal of hard currency from the country as payment); James G. Barnes and James E. Byrne, *Survey Uniform Commercial Code: Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449, 1454 (1995) (indicating that issuer has control over the transaction); Weil, *supra* note 1, at 530 (stating issuer has great control over letter of credit transaction).

[16] Letters of credit are paid when a draft and "certain documents specified in the letter of credit" are presented to the issuing, or confirming bank. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letter of Credit - of the Uniform Commercial Code*, at 9-10 (1997). Another kind of letter of credit is known as a stand by letter of credit:

> Corporations issue or case shell subsidiaries to issue commercial paper backed by letters of credit that can be drawn on if the corporation or subsidiary does not pay off the commercial paper when due. This allows commercial paper to be sold in situations in which it could not otherwise be. A slightly more complex example of this is in real estate financing, where commercial paper is supported by the letter of credit and the letter of credit is supported, in turn, by a non-recourse mortgage on real estate. Commercial paper is also used to fund securitization transactions and is frequently supported in whole or in part, directly or indirectly, by letters of credit.

See Weil, *supra* note 3, at 472. Some of the documentation necessary to obtain a credit includes a description of goods, a bill of lading, an invoice, proof of insurance, and inspection certificate. *See* Robert W. Williams, *Assessing the Treatment of Letters of Credit Under the Risk Based Capital Guidelines*, 10 ANN. REV. BANKING L. 271, 284 (1990).

[17] *See* Ryan, *supra* note 3, at 599. Under the current version of New York's U.C.C. §5-109(2) the issuer's obligation is to ascertain that the documents comply with requirements on their face. If the documents comply then the draft is to be honored. A bank is not obligated to look beyond the documents that are presented with the draft to determine whether to pay or not. In other words, the bank will only look at the documents presented according to the terms of the letter of credit and not the underlying transaction. Therefore, if the document comply on their face to the terms of the letter of credit the bank will pay on the draft even if the beneficiary has breached the terms of the underlying sales contract. The applicant, as the buyer, would have to either obtain compliance with the sales contract terms from the seller or sue the seller for performance. *Id.* A bank will pay "the amount specified on the buyer's draft to the seller upon presentation of certain shipping and sales documents by the seller." *See* Stephen J. Leacock, *Fraud in the International Transaction: Enjoining Payment of Letters of Credit in International Transactions*, 17 VAND. J. TRANSNAT'L L. 885, 887 (1984). Therefore, it is clear that "the issuing bank undertakes an obligation to accept drafts drawn on itself provided that stipulated documents are presented." *See* Gerald T. McLaughlin, *Should*

One of the most difficult aspects relating to letters of credit is determining which law governs the transaction.[18] There can potentially be as many laws governing the transaction as there are parties to the transaction.[19] Difficulties arise when the various laws are not uniform in their approach or their remedies to problems.

II. CHOICE OF LAW UNDER NEW YORK'S CURRENT ARTICLE 5

In 1962, New York adopted Article 5 of the Uniform Commercial Code as a governing framework for letters of credit.[20] Under New York's version of Article 5, the choice of law is governed under section 1-105(1) of the U.C.C.[21] According to

Deferred Payment Letters of Credit be Specifically Treated in a Revision of Article 5, 56 BROOK. L. REV. 149, 150 (1990).

[18] *See* Raymond T. Nimmer, *Selling Product Online: Issues in Electronic Contracting*, 467 PLI/PAT 823, 831 (1997) (indicating that choice-of-law issues are always problematic); Patrick Del Duca, *The Evolving Antarctic Legal Regime*, 83 AM. J. INT'L L. 694, 694 (1989) (book review) (stating that choice of law can be problematic with letters of credit); *see also* Mark S. Blodgett and Donald O. Mayer, *International Letters of Credit: Arbitral Alternatives to Litigating Fraud*, 35 AM. BUS. L. J. 443, 454 (1998) (stating that Article 5 was designed to "alleviate state jurisdictional differences").

[19] *See* Anderson 3d § 5-116(b), at 163 (West 1998). Unless the parties agree otherwise, the applicable law will be that of the jurisdiction in which the party is located. *Id.* A letter of credit may be governed by the Uniform Commercial Code, Uniform Customs and Practices for Documentary Credits, or some other local law. *Id.* § 5-116(a) states the parties may agree on applicable law. Problems occur when the different parties to the letter of credit transaction disagree on which law should apply to the transaction. "Unless the parties specify the law to govern each contract, the choice of law rules of different jurisdictions may readily lead to different contracts in the same credit being governed by different bodies of law." *See* Ross P. Buckley, *The 1993 Revision to the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT'L L. & ECON. 265, 300 (1993). Although some state that where the relevant parties are in different jurisdictions the "meshing" of the choice of law in the letters of credit will not occur until enactment of revised Articles 5 and 9. *See* George A. Hisert, *Letters of Credit and Article 9: Mixing Oil and Water*, 73 AM. BANKR. L. J. 183, 208 (1999).

[20] *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letter of Credit - of the Uniform Commercial Code*, at 1 (stating that "Article 5 of the Uniform Commercial Code, governing letters of credit, was adopted by New York in 1962); *see also* James E. Byrne, *The Revision of UCC Article 5 A Strategy for Success*, 56 BROOK. L. REV. 13, 16 (1990) (discussing approach N.Y. legislature took regarding letters of credit); Gerald T. McLaughlin and Neil B. Cohen, *Simple Questions, Complex Answers*, N.Y.L.J., July 14, 1993, at 3 (stating that U.C.C. text was stabilized in 1962); James J. White, *The Influence of International Practice on the Revision of Article 5 of the U.C.C.*, 16 NW. J. INT'L L. & BUS. 189, 190 (1995) (stating that when New York adopted Article 5, there was great debate).

[21] *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letter of Credit - of the Uniform Commercial Code*, at 41 (indicating that under New York's current version of Article 5 of Uniform Commercial Code choice of law is governed pursuant to § 1-105(1)); *see also* Donna J. Zenor, *Perfecting Security Interests: Determining Applicable Law*, 544 PLI/COMM 491, 493 (1990) (indicating § 1-105 allows choice of law); David Brown and Theodore Killiam, *Multistate Transactions*, 463

the statute, the law selected must bear a "reasonable relation" to the transaction.[22] The term "reasonable relation" is broadly interpreted. According to contract law, under U.C.C. § 1-105, almost anything may be considered a reasonable basis for the choice of law.[23] For example, the law of either the seller's or the buyer's forum are obvious choices for a "reasonable relation."

Over the years, the international banking community has developed a set of customs and practices, which were compiled and published by the International Chamber of Commerce. This compilation is known as the Uniform Customs and Practice for Documentary Credits (UCP).[24] The UCP has been selected by many institutions as the governing framework for letter of credit

PLI/COMM 319, 321 (1988) (stating that § 1-105(1) of U.C.C. allows parties to agree upon what law will govern).

22 *See* U.C.C. § 1-105(1) (McKinney 1998):

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Id. The U.C.C. uses reasonable a relation test to resolve choice of law issues. *See* Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Parties Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 231-32 (1994). This means that U.C.C. permits parties to a transactions to select the law that will govern as long as "the 'transaction bears a reasonable relation to the law chosen.' " *See* Donna J. Zenor, *Perfecting Security Interests: Determining Applicable Law*, 544 PLI/COMM 491, 493 (1990).

23 Under contract law reasonable basis for choice of law selected can simply be the drawing attorney's familiarity with that law. *See* St. John's University School of Law, International Business Transaction Class Notes, Professor Charles Biblowit, September 3, 1998. Under this concept the drawing attorney's familiarity with the choice of law would be considered reasonably related to the transaction because he or she would be able to readily respond to any problems or questions that may arise. *Id.* Similarly, a reasonable basis could be the parties selection of the law of a third, neutral forum because they cannot agree on the law of which of their two countries should govern. All that § 1-105 of the U.C.C. requires is "some relationship between the law that the parties choose and their transaction." *See* William J. Woodward, Jr., *"Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC*, 75 WASH. U. L.Q. 243, 248-49 (1997). Although there are some authorities which state that the official comment gives no precise definition of reasonable relation. *See* 15A AM. JUR. 2d *Commercial Code* § 12 (1976).

24 *See* Canadian Imperial Bank of Commerce v. Pamukbank Tas, 632 N.Y.S.2d 918, 922 (Sup. Ct. 1994) (citing Ross Bicycles, Inc. v. Citibank, N.A., 613 N.Y.S.2d 538 (Sup. Ct. 1994)) (stating that UCP is "'an internationally accepted codification of banking practice and custom regarding letters of credit'"); *see also* S. Isabella Chung, *Developing a Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 FORDHAM INT'L L.J. 1349, 1355 (1996) (stating that UCP evolved from world banking community's desire to have uniform procedures); Dale Joseph Gilsinger, *Validity, Construction, and Application of the Uniform Customs and Practice for Documentary Credits (UCP)*, 56 A.L.R. 5th 565 (1999) (stating that UCP "is a compilation of internationally accepted commercial practices").

transactions.[25] While the UCP is not the law, it has come to have the same binding effect as the law.[26] The UCP has become widely accepted as the law chosen to govern letter of credit transactions.[27] For example, New York's current version of U.C.C. Article 5 states that the U.C.C. is not applicable to transactions in which the UCP has been selected "in whole or in part."[28] Under this provision parties to a letter of credit transaction can, in effect, opt out of a binding statute.[29]

III. CHOICE OF LAW UNDER REVISED UNIFORM COMMERCIAL

[25] *See* Eva Maija Marceau, Case Comment, *Alaska Textile Co., Inc. v. Chase Manhattan Bank, N.A.: The Second Circuit Raises Unanticipated Risks for Letters of Credit*, 25 U. MIAMI INTER-AM. L. REV. 319, 325 (1993/94) (stating that UCP is applied by 160 countries); Ronner, *supra* note 9, at 626 (stating that UCP is one of "two main sources of law governing letters of credit"); *see also* Kremers, *supra* note 13, at 572 (mentioning that UCP is "used in most international letters of credit as well as many domestic ones").

[26] *See* E & H Partners v. Broadway National Bank, 39 F. Supp. 2d 275, 281 (S.D.N.Y. 1998) (stating that "under New York law, where a letter of credit is made expressly subject to the UCP, the UCP governs rather than Article 5 of New York's Uniform Commercial Code"); Calgarth Investments, Ltd. v. Bank Saderat Iran, 1996 WL 204470, at *7 (S.D.N.Y. 1996) (indicating UCP is substantive law); Mennen v. J.P. Morgan & Co., Inc., 653 N.Y.S.2d 1010, 1013 (A.D. 4th Dept. 1997) (denoting that U.C.C. Article 5 does not apply to letter of credit transaction when UCP is incorporated into contract).

[27] *See E & H Partners*, 39 F. Supp. 2d at 281 (indicating that under New York law UCP governs letters of credit transactions instead of Article 5 when UCP is incorporated as choice of law); *Calgarth Investments*, 1996 WL 204470, at *7 (denoting that UCP is substantive law governing letters of credit); *see also* Ronner, *supra* note 9, at 626 (indicating that UCP is source of law governing letters of credit); Kremers, *supra* note 13, at 572 (mentioning that UCP is incorporated as choice of law in most international letters of credit and many domestic ones).

[28] *See* U.C.C. § 5-102(4):

> Unless otherwise agreed, this Article 5 does not apply to a letter of credit or a credit if by its terms or by agreement, course of dealing or usage of trade such letter of credit or credit is subject in whole or in part to the Uniform Customs and Practice for Commercial Documentary Credits fixed by the Thirteenth or by any subsequent Congress of the International Chamber of Commerce.

Id. Under New York Law, when the UCP is used Article 5 does not come into play. *See E & H Partners*, 39 F. Supp. 2d at 281. This means that New York's current version of Article 5 of the Uniform Commercial Code does not apply to letter of credit transactions when the UCP is incorporated into the contract. *See Mennen*, 653 N.Y.S.2d at 1013.

[29] "[I]f revised Article 5 is adopted by the states, a state statute will incorporate rules made by a private international body [International Chamber of Commerce] . . . so that the rules of that private body will preempt many of the rules in the state statute." *See* Donald J. Rapson, *New Developments in the Law of Credit Enhancement: Domestic and International*, 22 BROOK. J. INT'L L. 55, 55 (1996). Rapson's comment indicates that revised Article 5's "incorporation [of the UCP] is so open-end that it incorporates not only the UCP as presently written but also the UCP as it may be amended or revised in the future." *Id.* Before Missouri adopted Revised Article 5, its version of the U.C.C. also had a non-conforming amendment, similar to New York's, that stated when the UCP was incorporated the U.C.C. would not apply. *See* Kremers, *supra* note 13, at 571. The UCP is not legislation but given force of law in many jurisdictions. *See* Chung, *supra* note 24, at 1356.

CODE ARTICLE 5

During the 1990's, the National Conference of Commissioners on Uniform State Law (NCCUSL) rewrote Article 5 of the U.C.C. because it believed that Article 5 did not adequately reflect international letter of credit practices.[30] The revisions to Article 5 of the U.C.C. were an attempt to conform the U.C.C. to the practice of international letter of credit transactions. The result was a completely redrafted Article 5.[31]

Under section 5-116 of the revised draft of Article 5 parties are able to choose the law to govern the letter of credit transaction.[32] If the issuer indicates that the letter of credit is to be governed under the UCP, the transaction will still be subject to the "nonvariable" aspects of Article 5.[33] The nonvariable aspects of

[30] *See* Barnes and Byrne, *supra* note 15, at 1451 (purporting that revised Article 5 of Uniform Commercial Code "reconnects law and practice"); *see also* Robert J. Graves and John T. Perugini, *Maintaining the Commercial Vitality of Letters of Credit: Revised Illinois UCC Article 5*, 85 ILL. B.J. 220, 220 (1997) (listing weakness in original Article 5); Kerry Lynn Macintosh, *Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules be Based on Business Practices?*, 38 WM. & MARY L. REV. 1465, 1506-07 (1997) (noting that ABA Task Force desired limiting conflict with international rules and practices and detailing how essential it is for United States to conform to international rules and practices; that goal of redrafting Article 5 was to accommodate evolving technologies and practices).

[31] "[N]early all of original Article 5" was rewritten and as such there are three major differences between the two versions of Article 5. *See* Barnes and Byrne, *supra* note 15, at 1451. In their article, Gene N. Lebrun and Fred H. Miller, offer examples of how Revised Article 5 incorporates international practices into the U.C.C.. *See* Gene N. Lebrun and Fred H. Miller, *The Law of Letters of Credit & Investment Securities Under the UCC – Modernization and Process*, 43 S.D. L. REV. 14, 22-24 (1998). Article 5 was revised so it would finally correspond to and fill gaps left by the International Chamber of Commerce's UCP. *See* Dellas W. Lee, *Letters of Credit: What Does Revised Article 5 Have to Offer to Issuers, Applicants and Beneficiaries?*, 101 COM. L.J. 234, 240 (1996). Revised Article 5 tries to address some of the interest of applicants and beneficiaries that are not addressed in the UCP. Most issuers rely on the UCP, which focuses on banker's interests. *Id. Compare* NY U.C.C. Article 5 (McKinney 1998); *with* Revised U.C.C. Article 5.

[32] *See* Anderson U.C.C.3d § 5-116(a), at 163 (West 1998):

> The liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or otherwise authenticated by the affected parties in the manner provided in Section 5-104 or by a provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction whose law is chosen need not bear any relation to the transaction.

Id. According to Revised Article 5 of the U.C.C. the parties can select any law they wish to govern the letter of credit transaction, not necessarily one that has a "reasonable relation" to the transaction. "Revised section 5-116(e) provides that the forum for settling disputes may be chosen in the same manner as governing law may be chosen under revised section 5-116(a)." *See* Graves and Perugini, *supra* note 30, at 227 n. 91. The original Article 5 did not have forum selection provision, therefore, the chosen forum must have subject matter jurisdiction or an agreement term is inoperative. *See* Lee, *supra* note 31, at 241.

[33] *See*, Anderson U.C.C.3d § 5-116:3, Official Code Comment, at 165 (West 1998)

revised Article 5 are provisions that the drafters did not want parties to circumvent by selecting the choice of law of another jurisdiction.[34] Therefore, where New York's current version of Article 5 has a non-conforming amendment that states that Article 5 shall not apply when the UCP is incorporated, under the revised Article 5 select provisions would still apply even if the choice of law conflicted with those provisions. Additionally, whenever the terms of the UCP and Revised Article 5 could be read together, both provisions would govern the transaction.[35] The NCCUSL's motivation in revising Article 5 was to try to harmonize Article 5 of the U.C.C. with international letter of credit practice, "clarify ambiguities," and to respond to omissions in the current version of Article 5.[36] To date 35 jurisdictions have

(stating that under Revised Article 5 incorporation of UCP or other similar practice will not waive certain aspects of Article 5 as New York's current version of Article 5 permits with its non-conforming amendment, § 5-102(4)); *see also* Katherine A. Barski, *An Analysis of the Recent Revision to Article Five of the Uniform Commercial Code: Letters of Credit*, 101 COM. L.J. 177, 179 (1996) (noting that where there is no such agreement between parties, choice of law is decided by § 5-116); John M. Czarnetzky, *Modernizing Commercial Financing Practices: The Revisions to Article 5 of the Mississippi U.C.C.* 66 MISS. L.J. 325, 345 (1996) (stating revised Article 5 provides that when UCP is incorporated into letter of credit transaction "the agreement varies the provisions of Article 5 with which the UCP conflicts."); Sandra Stern, *Varying Article 5 of the UCC by Agreement*, 114 BANKING L. J. 516, 517 (1997) (stating § 5-103(c) offers general rule that Article 5 is variable with exception of § 5-103(a) and (d), § 5-102(a)(9) and (10), § 5-106(d) and § 5-114(d) except to extent prohibited in §§ 1-102(3) and 5-117(d)).

[34] *See* Anderson U.C.C.3d § 5-116:3, Official Code Comment, at 165 (West 1998) (indicating that under Revised Article 5 incorporation of another choice of law will not waive certain aspects of Article 5 as New York's current version of Article 5 permits with non-conforming amendment, § 5-102(4)); *see also* Stern, *supra* note 33, at 517 (indicating certain provisions of revised Article 5 that cannot be varied by adopting another choice of law).

[35] "[W]here there is no conflict between Article 5 and the relevant provision of the UCP or other practice, both apply." *See* Anderson U.C.C.3d § 5-116:1, Official Code Comment, at 165 (West 1998). Revised Article 5 may be altered by a jurisdiction's adoption of the UCP 500, Uniform Customs and Practices for Documentary Credits, by excluding "rules in Revised Article 5 that have no parallel in UCP 500." *See* Stern, *supra* note 33, at 522-23. The manner in which the UCP may apply to letter of credit transaction, if not by reference then by documenting the specific custom. *See* Ryan, *supra* note 3, at 591-94 (1997). Ryan suggests a clause may be incorporated into a letter of credit to protect parties from waiving Article 5 of the U.C.C. in situations where it is expressly overridden due to a conflict with the UCP; he also compares which topics are covered by the UCP and by Article 5. *Id.*

[36] In its report the New York State Law Revision Commission states what were "the prime objectives" for revising Uniform Commercial Code. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letter of Credit - of the Uniform Commercial Code*, at 1. In his article James J. White examined the effects of the UCP on the revision of Article 5, considered the regional diversity of American business transactions and highlighted the impetus for and organization of change. *See* White, *supra* note 20, at 192-213. It is important to note that New York's current version of the Uniform Commercial Code has changes that do not conform to other states' versions of the U.C.C.. Donald J. Rapson analyzed the NCCUSL's perspective of the revision process. *See*

adopted Revised U.C.C. Article 5.[37]

A. Proposed Change to New York's Uniform Commercial Code Article 5

The New York State Law Revision Commission ("Commission") recommended adopting Revised Article 5 - Letters of Credit - of the Uniform Commercial Code.[38] The Commission suggested adopting section 5-116 even though it "would [significantly] alter [the] statutory and common law of New York."[39] The Commission

Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 259-61, 267 (1994). Rapson examined the role of public interest groups, the U.C.C. drafting committees and the USCIB. The USCIB was concerned that legally isolated U.S. banks would be operating at a disadvantage to foreign banks. *Id.* at 267-68.

[37] *See*, Anderson U.C.C.3d § 5-116(1) (West 1998). Alabama: ALA. CODE § 7-5-116 (1998); Arizona: ARIZ. REV. STAT. ANN. § 47-5116 (West 1998); Arkansas: ARK. CODE ANN. § 4-5-116 (Michie 1997); Connecticut: CONN. GEN. STAT. § 42a-5-116 (1997); District of Columbia: D.C. CODE ANN. § 28:5-116 (1998); Hawaii: HAW. REV. STAT. § 490:5-116 (1998); Idaho: IDAHO CODE: § 28-5-116 (1998); Illinois: 810 ILL. COMP. STAT. 5/5-116 (West 1998); Indiana: IND. CODE § 26-1-5.1-116 (1998); Iowa: IOWA CODE § 554.5116 (1997) (Variation); Kansas: KAN. STAT. ANN. § 84-5-116 (1997); Maine: ME. REV. STAT. ANN. tit. 11, § 5-1116 (West 1997); Maryland: MD. CODE ANN., COM. LAW § 5-116 (1998); Massachusetts: MASS. GEN. LAWS ANN. ch. 106, § 5-116 (West 1999); Minnesota: MINN. STAT. § 336.5-116 (1998); Mississippi: MISS. CODE ANN. § 75-5-116 (1998); Missouri: MO. REV. STAT. § 400.5-116 (1997); Montana: MONT. CODE ANN. § 30-5-116 (variation); Nebraska: NEB. REV. STAT. § 5-116 (1998); Nevada: NEV. REV. STAT. § 104.5116 (1999) (variation); New Jersey: N.J. REV. STAT. § 12A:5-116 (1999); New Mexico: N.M. STAT. ANN. § 55-5-116 (Michie 1998); North Dakota: N.D. CENT. CODE § 41-05-16 (1999); Ohio: OHIO REV. CODE ANN. § 1305.15 (Anderson 1996); Oklahoma: OKLA. STAT. tit. 12A, § 5-116 (1998); Oregon: OR. REV. STAT. § 75.1160 (1997) (variation); South Dakota: S.D. CODIFIED LAWS § 57A-5-116 (Michie 1999); Tennessee: TENN. CODE ANN. § 47-5-116 (1999); Utah: UTAH CODE ANN. § 70A-5-116 (1998); Vermont: VT. STAT. ANN. tit. 9A, § 5-116 (1998); Virginia: VA. CODE ANN. § 8.5A-116 (Michie 1998); Washington: WASH. REV. CODE § 62A.5-116 (1999); West Virginia: W. VA. CODE § 46-5-116 (1999) (variation); Wyoming: WYO. STAT. ANN. § 34.1-5-116 (Michie 1999); Puerto Rico: P.R. LAWS ANN. CTA § 5-116.

[38] The New York State Law Revision Commission recommended adoption of Revised Article 5. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 6. The Commission stated that they believed that a disparity between New York's Uniform Commercial Code and those jurisdictions that adopted Revised Article 5 could have a negative effect on persons and business that "conducted their business in New York." *Id.* The Commission did acknowledge though that there was no real way to measure if there would in effect be any negative impact. It seems unreasonable to change a well-established body of law in order to conform to other jurisdictions, especially because of an imagined apprehension.

[39] Revised Article 5, § 5-116 would allow New York's statutory and common law to be altered without analysis or justification. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 8. New York law would be altered based on the selection of another forum's laws. Some have found fault with proponents' belief that adopting §5-116 would present no conflict between Article 5 and the UCP. *See* Rapson, *supra* note 29, at 56-57. Rapson argues that this approval neglects the possibility of future changes in the UCP affecting issuer liability concerns, due to the "open ended" nature of Article 5. *Id.*

gave several reasons for adopting Revised Article 5, including to retain uniformity with the other states that have already adopted Revised Article 5 and to maintain uniformity with the international community's letter of credit practice.[40] The NCCUSL expressed their view in the official comment to Revised Article 5, section 5-116.[41]

New York banks handle the majority of letter of credit transactions; consequently, any changes to New York's statute regarding letter of credit transactions must be scrutinized.[42]

[40] It is important to note that New York's version of Article 5 has already allowed itself to be superseded by UCP. *See* Semetex Corporation v. UBAF Arab American Bank, 853 F. Supp. 759, 769 (S.D.N.Y. 1994). This suggests a similarity of ideals and willingness by New York to conform with international letter of credit practices. Although there is some that indicate it is desirable to maintain uniformity among statutes which govern commercial practice. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 6. The New York State Law Revision Commission gave three additional reasons for recommending adoption of Revised Article 5: 1) a common international practice of allowing choice of law selection; 2) New York's public policy exception which would grant protection; and 3) that "reasonable relation" to transaction could cause uncertainty, even in domestic letters of credit. *Id.* at 46. There is a distinction in the perspectives of the state groups that are considering the U.C.C. revision which is that often it is not whether New York should have to make a case to change it law to a uniform law proposed, but rather the uniform proposal needs to establish why New York law should be changed. *See* Fred H. Miller, *Realism Not Idealism in Uniform Laws - Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 734 n. 7 (1998).

[41] *See* Anderson U.C.C.3d § 5-116:1, Official Code Comment (West 1998). "Within the States of the United States renvoi will not be a problem once every jurisdiction has enacted Section 5-116 because every jurisdiction will then have the same choice of law rule and in a particular case all choice of law rules will point to the same substantive law." *Id.* "[C]ommercially important California, Illinois, and Massachusetts are among the 34 states and Washington D.C. to adopt Revised Article 5 by mid 1998. . . ." *See* Richard F. Dole, Jr., *The Essence of a Letter of Credit Under Revised UCC Article 5: Permissible and Impermissible Nondocumentary Conditions*, 35 HOUS. L. REV. 1079, 1086 (1998). While California, Illinois, and Massachusetts may be commercially important, New York is the jurisdiction in which the majority of the letter of credit transactions occur. *See* N.Y. U.C.C. LAW § 5-102, Comment (McKinney 1991). Therefore, some consideration should be given to the way letter of credit statutory and case law has developed in New York. After all, New York was reluctant to adopt Article 5 in the first place in 1962, and did so on the condition of a "non-uniform amendment to section 5-102, the provision governing the scope of Article 5" be adopted. *See* Macintosh, *supra* note 30, at 1501-02. The purpose in drafting the U.C.C. as whole was to reduce state jurisdictional differences. *See* Mark S. Blodgett and Donald O. Mayer, *International Letters of Credit: Arbitral Alternatives to Litigating Fraud*, 35 AM. BUS. L. J. 443, 454-55, 458 (1998). Blodgett and Mayer indicate that it was impossible to realize this goal as evidenced by the case law, and the differing focus of bankers and lawyers. *Id.*

[42] *See* N.Y. U.C.C. Law § 5-102 (McKinney 1991). New York would be forgoing well established statutory and common law rules in order to maintain uniformity with the statutory rules of states that handle a relatively small percentage of the international letter of credit business. It would seem more reasonable that the other jurisdiction should emulate New York's rules in regards to international letter of credit transactions. Letters of credit are very useful in international transactions due to the increased costs of "cross-border enforcement of contract rights" and its near impossibility. *See* David E. Van Zandt, *The Market as a Property Institution: Rules for the Trading of Financial Assets*, 32 B.C. L.

Additionally, the commission claimed that "explicit mention of a reasonable relationship in the statute, even one limited to domestic letters of credit, arguably could lead to uncertainty concerning what law would govern the letter of credit."[43] There has been a considerable amount of case law developed under New York's current version of U.C.C. Article 5 with respect to letter of credit transactions. The courts have developed a solid foundation from which to eliminate uncertainty regarding a choice of law in a letter of credit transaction.

Under the Revised Article 5, section 5-116, parties are free to select the law to govern their transaction,[44] regardless of whether the choice of law bears any relation to the transaction, as is required by New York's current versions of Article 5.[45] Under New York's current version of Article 5, the law selected has to be reasonably related to the transaction. This could mean the law selected is the law of the applicant's jurisdiction, the beneficiary's jurisdiction, or some other rational basis. The choice of law is generally made by either the issuing bank or the other party issuing the letter of credit.[46]

REV. 967, 983 (1991). Some suggest that uniformity can be achieved through flexibility of laws, such as revised § 5-116(e) which allows parties to use a forum which is unrelated to the transaction, in order to do away with the need to prove a foreign law in litigation. *See* Stern, *supra* note 33, at 522 n.5.

43 The New York State Law Revision Commission, Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code, at 46.

44 *See* Anderson U.C.C.3d § 5-116(a) (West 1998) (stating that "[t]he liability of an issuer, nominated person, or adviser for action or omission is governed by the law of the jurisdiction chosen by an agreement."); *see also* Rapson, *supra* note 36, at 269 (noting by seventh draft, U.C.C. Article 5 revision had not reached goals of setting up framework and maintaining procedural flexibility, which tends to foster choice among parties); White, *supra* note 20, at 198 (noting this often resulted in reference to UCP as law, despite static nature of substantive law under Article 5).

45 *See* Anderson U.C.C.3d § 5-116(a) (West 1998). "The jurisdiction whose law is chosen need not bear any relation to the transaction." *Id.* at 138. "[P]arties [are] free to choose the law of a jurisdiction without regard to the chosen jurisdiction's relationship to the transaction or whether the law chosen conflicts with the fundamental public policy of New York". *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, at 8 which states. Courts generally don't allow the fact that the choice of law is unrelated to transaction to control their decisions. *See* Michael A. Rosenhouse, Annotation, *Validity and Effect of Stipulation in Contract to the Effect that it Shall Be Governed by Law of Particular State Which is Neither Place Where Contract is made nor Place Where it is to be Performed*, 16 ALR 4TH 967, 975 (1981). Rosenhouse also indicates that courts first question is usually whether the result of such choice contradicts public policy of the forum whose law governed the deal, by default. *Id.*

46 *See* Anderson U.C.C.3d § 5-116(a) (West 1998); *see also* Anderson U.C.C.3d § 5-116:7, Official Code Comment, at 167 (West 1998) (stating issuer, nominated person, or adviser selects choice of law); §5-116:8, Official Code Comment, at 167 (indicating when

Although the issuer generally makes the choice of law, under the existing law, section 5-116(a) of Revised Article 5 requires that both parties agree to the governing law.[47] Problems however, may arise when the parties fail to agree on which law will govern the letter of credit transaction. Additionally, if no agreement is made, section 5-116(b) of Revised Article 5 states that the governing law will be the law in which the parties are located—*lex loci*.[48] In the event the issuing, advising or confirming bank has more then one branch, the governing law will be that of the jurisdiction of the branch that deals with the letter of credit transaction.[49]

no choice of law is selected law of issuer's jurisdiction will govern). *See generally* Reade H. Ryan, Jr., *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 593 (1997) (stating issuer may choose law of any jurisdiction, absent a selection law of issuers jurisdiction applies); Robert A. Weber, Jr., *Commercial and Banking Law*, 49 MERCER L. REV. 95, 113 (1997) (citing to *Vass v. Gainsville Bank & Trust* where a Georgia court held that bank that issue letters of credit have ability to examine all supporting documents) (indicating any ambiguity in letters of credit are resolved according to regular contract law).

47 *See* Anderson U.C.C.3d § 5-116(a) (West 1998). The law chosen is "by an agreement in the form of a record signed or otherwise authenticated by the affected parties . . ." *Id.* This type of agreement particularly benefits banks by permitting them to standardize their letter of credit documentation by electing the law and the forum of perhaps the main branch's jurisdiction, despite having branches in other states, though those states will likely have adopted Revised Article 5 as well. *See* Stern, *supra* note 33, at 522. Most states had the same version of Article 5 before it was revised. Currently, there are two versions of Article 5 with the majority of jurisdiction having adopted Revised Article 5, but where the majority of letter of credit transactions occur in New York which is still uses the old version of Article 5. Additionally, the old version of Article 5 provided that the choice of law need to be reasonably related to the transaction, arguably selecting the law of the main branch's jurisdiction would be reasonably related. In the event the forum agreed to by the parties does not accept jurisdiction, the choice of law clause continues to be enforced, requiring a court in the issuer's jurisdiction to determine the law applied to the letter of credit transaction. *See* Stern, *supra* note 33, at 522 n. 5.

48 *See* Ryan, *supra* note 46, at 593. "For purpose of choice of law, all branches of a bank are considered "separate judicial entities" and a bank is considered to be located where its relevant branch is considered to be "located". *Id.* (quoting Anderson U.C.C.3d § 5-116(b) (West 1998)). Therefore, a branch bank of Citibank, with branches throughout the United States, will be considered to have chosen the law of the state in which the branch is located if no other choice of law is selected. *See* Anderson U.C.C.3d § 5-116(b) (West 1998). Some sources indicate that a court in issuer's jurisdiction will determine the applicable letter of credit law. *See* Stern, *supra* note 33, at 522 n. 5. The address indicated in the letter of credit is deemed to be the issuer's address for purpose of determining the jurisdiction of the issuer. *See* Graves and Perugini, *supra* note 30, at 227 n. 92. If multiple addresses are indicated, the address from which the letter of credit was issued determines the issuer's jurisdiction. *Id.* In his article Joseph H. Sommer discusses the genealogy of the branch location requirement under § 5-116(b). *See* Joseph H. Sommer, *Where is a Bank Account?*, 57 MD. L. REV. 1, 5 (1998).

49 *See* Anderson U.C.C.3d § 5-116(b) (West 1998) (stating that "all branches of a bank are considered separate judicial entities and a bank is considered to be located at the place where its relevant branch is considered to be located"); *see also* Stern, *supra* note 33, at 522 n. 5 (stating that issuer's jurisdiction will determine law applicable to letter of credit transaction); Graves and Perugini, *supra* note 30, at 227 n. 92 (indicating

The application of various laws in the absence of a choice of law selection can pose a conflict of law problem. When such problems arise, the court will determine which law to apply.[50] In most cases, the freedom to select the applicable law will not create a problem since most financial institutions select the UCP to govern their transactions.[51] The official comment to Revised U.C.C. Article 5, section 5-116 acknowledges that a disparity may occur among the parties in such a transaction:

jurisdiction of issuer in letter of credit transaction is deemed to be issuer's address); Ryan, *supra* note 46, at 593 (stating that liability of issuer is governed by law of jurisdiction of issuer's location).

50 Some courts have held that in determining which state's law to apply, the court is restricted to the choice-of-law rules of the forum state. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). Others have concluded that a court is governed by the choice of law rules of the forum state. *See* Brennan v. Carvel Corp., 929 F.2d 801, 806 (1st Cir. 1991). In making a choice of law determination regarding the substantive law to apply in a diversity case, a federal district court is to apply the choice of law rules of its forum state. *See* Bank of Joliet v. Firstar Bank of Milwaukee, N.A., 1997 WL 619875, *5 (N.D. Ill. 1997). A federal court in Massachusetts applied Massachusetts' "most significant relationship test". *See* Crabowski v. Bank of Boston, 997 F. Supp. 111, 118-19 (Mass. 1997). "In determining the choice of law, New York follows the approach of 'giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.'" *See* Loebig v. Larucci, 572 F.2d 81,84 (2d Cir. 1978) (quoting Babcock v. Jackson, 12 N.Y.2d 473, 481). Having the courts make a conflicts of law analysis to determine which law to apply to a letter of credit transaction would leave the parties with the same sort of uncertainty the New York State Law Revision Commission indicated it wanted to avoid with the "reasonable relation" provision of U.C.C. § 1-105(1). The Commission indicated the uncertainty regarding the applicable law in the letter of credit transaction would not be limited to international letters of credit but would also occur in domestic letters of credit. *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, at 46. In their article Oberhard H. Rohm and Robert Koch assert that while the U.C.C. "does not explicitly state a public policy limitation on the choice of law provisions, it is a fair assumption that the courts would not enforce a provision that violates a fundamental public policy of the forum." *See* Oberhard H. Rohm and Robert Koch, *Choice of Law in International Distribution Contracts: Obstacle or Opportunity*, 11 N.Y. INT'L L. REV. 1, 7 (1998). Bernardo M. Cremades notes that in *Bank of Credit and Commerce Hong Kong, Ltd. v. Sonali Bank*, an English court stated that when a contract lacks a choice of law clause, the governing laws should also govern the reimbursement obligation. *See* Bernardo M. Cremades, *International Financial and Secured Transactions*, 31 INT'L LAW 301, 304 (1997).

51 *See* Reade H. Ryan, Jr., *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 590 (1997) (stating issuers generally indicate in letter of credit that it is "subject to" UCP); *see also* James G. Barnes, Symposium, *The Impact of Internationalization of Transactional Commercial Law*, 16 NW. J. INT'L L. & BUS. 215, 222 (1995) (indicating how widespread use of UCP has resulted in explicit recognition in Revised Article 5 of U.C.C.); Ross P. Buckley, *The 1993 Revision of the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT'L L. & ECON. 265, 266 (1995) (estimating that UCP governs ninety-five percent of all international letters of credit); William V. Roth, Jr. & William V. Roth III, *INCOTERM: Facilitating Trade in the Asian Pacific*, 18 U. PA. J. INT'L ECON. L. 731, 732 n. 2 (1997) (noting that banks may choose to have UCP govern issuance of letter of credit).

> Because the confirmer or other nominated person may choose different law from that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is possible that a confirmer or nominated person may be obligated to pay (under their law) but will not be entitled to payment from the Issuer (under its law).[52]

Under the revised section 5-116, parties may unwittingly choice a law that will eliminate a right they expect to be available.[53] Therefore, a problem may occur when the choice of law selected violates New York's public policy,[54] or when the selected law conflicts directly with New York or federal law.[55] In its suggestion to adopt Revised Article 5, the Commission reasoned that the courts would not enforce a choice-of-law clause in a letter of credit that violates public policy.[56]

[52] Anderson U.C.C.3d § 5-116:1, Official Code Comment (West 1998). The official comment concluded that since most international letters of credit incorporate the UCP it would be unlikely that a dispute would arise regarding a duty to honor payment. *Id.*

[53] *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, at 43. The Commission stated that certain choice of law selections can "destroy[] rights [a] . . . party might normally expect to have." *Id.* For example, a party to a transaction may be at a disadvantage because of his or her status in the transaction. As a result, that party will be obliged to accept a choice of law selection that is detrimental to his or her interest.

[54] *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, at 43. The New York State Law Revision Commission acknowledged that a choice of law selection could destroy certain rights that a party may have expected to be available to him or her. *Id.* Additionally, the Commission indicated that it could be possible for a person to select the law of a jurisdiction that would permit him or her to "disclaim the obligation of good faith" which would not be possible under the Uniform Commercial Code. *Id.*

[55] *See* Richard v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998) (following six other circuits by allowing a waiver of Securities Act of 1933 and the Securities Exchange Act of 1934); Bonny v. Society of Lloyd's, 3 F.3d 156, 162 (7th Cir. 1993) (upholding English forum and choice of law selection counter to anti-waiver clause in U.S. securities law); *see also* Haynsworth v. The Corporation, 121 F.3d 956, 966 (5th Cir. 1997) (permitting waiver of Securities Act of 1933 and Securities Exchange Act of 1934); Allen v. Lloyd's of London, 94 F.3d 923, 931 (4th Cir. 1996) (same); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227, 1230 (6th Cir. 1995) (same); Roby v. Corporation of Lloyd's. 996 F.2d 1353, 1356 (2d Cir. 1993) (same); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992) (same).

[56] *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 46-47 (stating "New York judicial decisions will not enforce a contract that violates fundamental New York policy."); *see also* Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154 (1995) (stating that "clear and unambiguous" choice-of-law provision in arbitration agreement must be upheld); Marine Midland Bank v. United Missouri Bank, 223 A.D.2d 119, 123-24 (1st Dep't 1996) (citing Restatement [Second] of Conflicts of Law § 187 and 19 N.Y. Jur.2d, Conflicts of Laws, § 33, at 611) (stating that choice of law provisions may be held invalid if public policy overrides intent of parties) Eastern Artificial Insemination Cooperative, Inc. v. La Bare, 210 A.D.2d 609, 610 (3rd Dep't 1994) (stating that choice of law selection is generally given effect if enforcement of law selected would not violate New

Unfortunately, there have been times when public policy has been violated. For example, the Court of Appeals in *Bonny v. Society of Lloyd's*[57] allowed the parties to escape unwaivable rights under United States securities laws. In that case, the plaintiff's invested in the English insurance underwriting market and secured their obligations with a letter of credit.[58] The contract contained a forum selection clause and a choice-of-law clause stating that disputes were to be resolved by arbitration under English law.[59] Lloyd's drew on the letters of credit after the investment sustained losses. The plaintiffs brought suit under United States securities laws claiming the defendants had "failed to disclose material facts and risk factors concerning investments in Lloyd's."[60] The Court of Appeals allowed both the forum selection clause and the choice-of-law clause to stand when doing so would deprive the plaintiff's of "specific rights" available to them under the securities laws.[61] The court permitted the waiver of United States securities laws even though Congress

York public policy).

[57] 3 F.3d 156 (7th Cir. 1993). *Accord* Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996); Shell v. R.W. Storage, Ltd., 55 F.3d 1227 (6th Cir. 1995); Roby v. Corporation of Lloyd's. 996 F.2d 1353 (2d Cir. 1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir. 1992). These cases involved substantially the same facts as *Bonny* and reached identical conclusions. Roberta S. Karmel discussed the Lloyd's securities litigation cases. *See* Roberta S. Karmel, *Sex, Lloyd's and Pre-Dispute Waivers*, N.Y.L.J., June 18, 1998, at 3. also Symeon C. Symeonides also discusses the Lloyd's cases. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 273-74 (1998).

[58] *See* Bonny v. Society of Lloyd's, 3 F.3d 156, 158 (7th Cir. 1993). "The Society of Lloyd's operates one of the largest insurance markets in the world. Individuals invest in Lloyd's and thereby obtain the right to participate in Lloyd's insurance underwriting syndicates . . . " *Id.* "To secure their obligations to Lloyd's, each of the plaintiffs issued an irrevocable letter of credit in favor of the Society and Council of Lloyd's." *Id.*

[59] *See Bonny*, 3 F.3d at 159.

[60] *Bonny*, 3 F.3d at 159. The plaintiffs claimed that the defendants violated the following anti-waiver provisions: "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void." *See* 15 U.S.C.S. § 77n (1998). "Any condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rules or regulations thereunder, or of any rule of an exchange required thereby shall be void." *See* 15 U.S.C.S. §78cc(a) (1998).

[61] *See Bonny*, 3 F.3d at 162 (indicating that "[g]iven the international nature of the transaction involved here, and the availability of remedies under British law that do not offend the policies behind the securities laws, the parties' forum selection and choice of law provisions contained in the agreements should be given effect"). *See generally* Lipcon v. Underwritters of Lloyd's, 148 F.3d 1285, 1292-93 (11th Cir. 1998) (analyzing courts treatment of choice of law clauses and securities law); Jon A. Jacobson, *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law / Forum Clause in International Securities Contracts*, 8 DUKE J. COMP. & INT'L L. 469, 479-80 (1998) (describing reasons to enforce forum selection clauses).

had specifically inserted anti-waiver provisions in the statutes.[62] The court reasoned that the plaintiffs were afforded "similar" remedies under English law as those that would be available to them under the United States securities laws.[63] It is clear that Congress intended that a waiver of United States securities laws would violate public policy because they specifically addressed the matter in the securities law. Nonetheless, the Court of Appeals allowed these securities law provisions to be waived in direct contravention of congressional intent.

Often United States law is applied in a variety of ways in an international context. For example, Congress has enacted anti-boycott laws which prohibit "United States person[s]" from engaging in any transaction which has the effect of discriminating against parties whom the United States considers friendly.[64] The United States government has also enacted laws boycotting nations it deems unfriendly.[65] In response, certain

[62] *See* 15 U.S.C.S. §§ 77n, 78cc(a) (1998); *Bonny*, 3 F.3d at 160-61 (holding that forum selection clause and choice of law clause are valid and enforceable); *see also* Allen v. Lloyd's of London, 94 F.3d 923, 928 (4th Cir. 1996) (stating that choice of law and forum selection clauses are enforceable); Shell v. R.W. Storage, Ltd., 55 F.3d 1227, 1232 (6th Cir. 1995) (agreeing forum selection clause should be given effect); Roby v. Corporation of Lloyd's. 996 F.2d 1353, 1360-61 (2d Cir. 1993) (holding forum selection clause must be enforced absent other considerations); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 956-57 (10th Cir. 1992) (reasoning parties should abide by forum selection clauses in agreements).

[63] *See Bonny*, 3 F.3d at 161. "The record makes clear that English law affords plaintiffs a cause of action for fraud *similar* to that available for the claims they have brought under Rule 10b-5." *Id.* (emphasis added). Other courts have allowed claims under U.S. securities law to be tried in England under English law. *See* Richard v. Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998). The court indicated that the plaintiffs would be provided "with sufficient protection" under the English law. *Id.* Arguably, sufficient protection is not only inadequate but also counter to the will of Congress. When Congress enacted the Securities Act of 1933 and the Securities and Exchange Act of 1934 it specifically provided that the provision of the Act may not be waived by "*any condition, stipulation, or provision*". *See* 15 U.S.C.S. §§ 77n, 78cc(a) (1998) (emphasis added).

[64] *See* 50. U.S.C.A. app § 2407 (1998).

> The President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation.

Id. The constitutionality of anti-boycott provisions have been upheld. *See* Briggs & Stratton Corp. v. Baldridge, 728 F.2d 915, 916 (7th Cir. 1984) *cert. Denied* 469 U.S. 826. Although there may be some confusion as to what constitutes a boycott as one court dismissed a claim against a defendant stating the defendants refusal to deliver oil to Israel was not boycott and did not violate anti-boycott laws).*See* Bulk Oil (Zug) A.G. v. Sun Co., 583 F. Supp. 1134, 1136 (S.D.N.Y. 1983).

[65] *See* Cuban Asset Control Regulations, 31 C.F.R. pt. 515 (prohibiting U.S. owned and controlled foreign firms in third countries from transacting with Cuba); Cuban

foreign countries have enacted their own legislation specifically tailored to counteract U.S. boycott laws.[66] In reality, a party to a letter of credit transaction could be placed in a situation in which the party is violating some law, whether it be the law of the United States, the party's local jurisdiction, or that of a selected third party jurisdiction. Therefore, it is possible for the issuer to select the laws of a jurisdiction with which the other party to the transaction will find it impossible to comply.

For example, Article VIII, 2(b) of the International Monetary Fund (IMF) Agreement states that any exchange contract that violates the exchange control regulations of an IMF member nation is unenforceable in any member jurisdiction.[67] The courts in the United States and the United Kingdom have given a narrow interpretation to what constitutes an exchange contract.[68] Under this narrow interpretation only contracts

Liberty and Democratic Solidarity Act (LIBERTAD), 22 U.S.C.S. § 6021-91 (1998) (strengthening boycott against Cube and providing for sanctions against foreign companies which traffic in confiscated property); *see also* S. Kern Alexander, *Trafficking in Confiscated Cuban Property: Lender Liability Under the Helms-Burton Act and Customary International Law*, 16 DICK. J. INT'L L. 523, 524-31 (1998) (providing background on Helms-Burton Act, also known as LIBERTAD); Andreas F. Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90 A.J.I.L. 419, 420-33 (1996) (providing thorough critique and analysis of Cuban Asset Control Regulations and Helms-Burton Act).

66 *See* United Kingdom Protection of Trading Interests (U.S. Cuban Assets Control Regulations) Order 1992 (indicating that no person shall comply with 31 C.F.R. pt. 515 to the detriment of trade between the United Kingdom and Cuba); Foreign Extraterritorial Measures (United States) Order, 1992, JUS-92-777-01 (SOR/DORS) (prohibiting Canadian firms from complying with 31 C.F.R. pt. 515); Foreign Extraterritorial Measures Act, R.S.C. ch. F-29, 1-6 (1992) (Can.), amended by 130 C. Gaz. No. 2, 610, 611-15 (1996) (prohibiting Canadian businesses from complying with extraterritorial measures of Helms-Burton Act, affecting trade between Canada and Cuba); *see also* Douglas H. Forsythe, *Canada: Foreign Extraterritorial Measures Act Incorporating the Amendments Countering the U.S. Helms-Burton Act*, 36 I.L.M. 111, 112-14 (1997) (explaining Canadian block legislation aimed at countering Helms-Burton and summarizing its provisions).

67 *See* International Monetary Fund Agreement, Article VIII, 2(b), T.I.A.S. Nos. 1501-50 ("[E]xchange contracts which involve the currency of any member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."). *See generally* Theodore Allegaert, *Recalcitrant Creditors Against Debtor Nations, or How to Play Darts*, 6 MINN. J. GLOBAL TRADE 429, 455-71 (1997) (providing comprehensive analysis of Art. VIII, § 2(b) and arguing that it should be construed liberally); Richard Herring & Friedrich Kubler, *The Allocation of Risk in Cross-Border Deposit Transactions*, 89 NW. U.L. REV. 942, 1027 (1995) (arguing that Art. VIII, § 2(b) exclusively applies to "exchange contracts" and not deposit transactions); Note, *The International Monetary Fund Agreement and Letters of Credit: A Balancing of Purposes*, 44 U. PITT. L. REV. 1061, 1076 (1983) (indicating that American courts have been slow to incorporate Art. VIII, § 2(b)).

68 *See* J. Zeevi & Sons v. Grindlays Bank (Uganda), 371 N.Y.S.2d 892, 897, *cert. denied*, 423 U.S. 866 (1975) (indicating that letter of credit is not considered exchange contract); Libra Bank, Ltd. v. Banco National de Costa Rica, 570 F. Supp. 870, 902

dealing specifically with the exchange of currency are considered exchange contracts.[69] Meanwhile, other nations, such as Germany, have adopted a broader interpretation of what constitutes an exchange contract.[70] Under this broader interpretation, almost any contract can be considered an exchange contract. Therefore, a party in a country that has stringent exchange control regulations can select German law to govern the transaction, thereby making it difficult for the beneficiary to obtain payment in hard currency.[71] For example,

(S.D.N.Y. 1983) (holding that loan agreement is not exchange contract); RALPH FOLSOM, MICHAEL WALLACE GORDON, AND JOHN A. SPANGOLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS 917 (West 3d ed. 1995) (stating that American and British courts narrowly interpret "exchange contracts"). *But see* Western Banking Corp. v. Turkiye Garanti Bankasi, 57 N.Y.2d 315, 334 (1982) (Meyer, J., dissenting) (stating that "exchange contract" is broad enough to encompass, "in light of legislative history", transactions involving "balance of payments or exchange resources of member state"). *See generally* Barcley Knitwear Co., Inc. v. Kingswear Enterprise Ltd., 533 N.Y.S.2d 724, 727 (1st Div. 1988) (stating that letters of credit are governed by general contract principles); Weber, *supra* note 46, at 113 (indicating that any ambiguity in letter of credit are resolved under regular contract law).

69 *See* RALPH FOLSOM, MICHAEL WALLACE GORDON, AND JOHN A. SPANGOLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS 917 (West 3d ed. 1995); *see also* Paul B. Stephan, *Interdisciplinary Approaches to International Economic Law: Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745, 761 (1995) (explaining the difficulty in determining what constitutes an exchange contract); Brian K. Kurzman, *International Trade Selection: Challenges to Monetary Unification in the European Union: Sovereignty Reigning Supreme*, 23 DENV. J. INT'L L. & POL'Y 135, 136 (1994) (stating importance of reevaluating exchange currencies).

70 *See* RALPH FOLSOM, MICHAEL WALLACE GORDON, AND JOHN A. SPANGOLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS 917 (West 3d ed. 1995) (citing German case law) (indicating under German courts' interpretation of exchange contract all contracts for "sale of goods or services, licensing agreements, and sureties or guarantees" can be considered exchange contract); William Park, *When the Borrower and the Banker are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323, 1351-52 (1991) (stating that German and French courts interpret "exchange contract" more broadly than American and English courts). *But cf.* Western Banking Corp. v. Turkiye Garanti Bankasi, 57 N.Y.2d 315, 334 (1982) (Meyer, J., dissenting) (stating that "exchange contract" is broad enough to encompass transactions involving "balance of payments or exchange resources of a member state"); Monroe Leian, *Decision: Decisions of Foreign Courts: United Kingdom: Letters of Credit – Documentary Misstatements Not Material to Enforcement – Illegal Collateral Agreement Renders Credit Unenforceable Under IMF Agreement*, 77 A.J.I.L. 155, 157 (1983) (stating House of Lords held a collateral agreement was an exchange contract in disguise).

71 Export control regulations are a method for a country to regulate the exchange of currency in its country. Some nations regulate the use of hard currency, not allowing it to be removed from the country in order to stabilize its local currency. *See* RALPH FOLSOM, MICHAEL WALLACE GORDON, AND JOHN A. SPANGOLA, JR., INTERNATIONAL BUSINESS TRANSACTIONS 913-14 (West 3d ed. 1995). Exchange regulations are often used by countries that do not have large amounts of hard currency, in order to maintain enough hard currency reserves to pay their international obligations. Other times exchange controls are used by a country in order to stabilize and regulate the value of its currency. This poses a problem for a seller of goods that is expecting to be repaid by a letter of credit issued by a bank in a country that regulates hard currency. He may be forced to accept payment in a currency that he cannot use outside the issuing country. *Id. See also*, R.

export control regulations under German law would place a confirming bank in the difficult position of being obligated to pay the beneficiary upon presentation of a draft and conforming documents, while at the same time being unable to collect reimbursement from the issuing bank.[72] This would place a confirming bank in the frustrating position of being able to do little to alleviate its dilemma, particularly if it has unwittingly agreed to the choice-of-law clause. While it would seem to be in violation of public policy to obligate a third party bank to pay the beneficiary while the bank is unable to get reimbursed, courts have allowed choice-of-law clauses limiting a party's remedies to stand. Not only have courts enforced choice-of-law clauses when the parties agreed to the selection during arms length negotiations, but they have even allowed them at times when the parties had not bargained for the selection.

The Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*,[73] upheld an English forum selection and choice-of-law clause between an American and German company stating that through arm's length negotiations the parties had agreed to the clause.[74]

FOLSOM & M. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS—WHY A CURRENCY IS CONTROLLED, (West Hornbook Series 1995). Brian K. Kurzman analyzed the conflicts between national monetary interests and the interest of the international community. *See* Brian K. Kurzman, *International Trade Selection: Challenges to Monetary Unification in the European Union: Sovereignty Reigning Supreme*, 23 DENV. J. INT'L L. & POL'Y 135, 138 (1994). Many times difficulties may arise in currency valuation legislation. *See* Monroe Leian, *Decision: Decisions of the Iran – United States Claims Tribunal: Exchange Controls – International Monetary Fund Agreement – Choice of Law – Burden of Proof*, 78 A.J.I.L. 235, 467-68 (1984).

[72] *See* Bergerco Canada v. Iraqi State Company for Food Stuff Trading, 924 F. Supp. 252, 258-59 (U.S.D.C. 1996) (indicating confirming bank has obligation to pay beneficiary upon receipt of complying documents and can then seek reimbursement from issuing bank) (reversed on other grounds); Canadian Imperial Bank of Commerce v. Pamukbank Tas, 632 N.Y.S.2d 918, 920 (Sup. Ct. N.Y. Cnty 1994) (stating after confirming bank made payment to beneficiary it sought reimbursement from issuing bank); *see also*, John M. Czarnetzky, *Modernizing Commercial Financial Practices: The Revisions to Article 5 of the Mississippi UCC*, 66 MISS. L.J. 325, 341 (1996) (stating requirements of bank to pay under letter of credit); Milton R. Schroeder, *The 1995 Revision to UCC Article 5, Letters of Credit*, 29 U.C.C. L. J. 331, 352 (1997) (mentioning confirming bank has same obligation under letter of credit as issuer).

[73] 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

[74] *See Zapata*, 407 U.S. at 12-13 (stating that businessmen negotiate to select neutral forum with expertise in subject matter); *see also* Haynsworth v. The Corporation, 121 F.3d 956, 970 (5th Cir. 1997) (holding plaintiffs must honor bargains and enforce forum selection clauses); Cal-State Bus. Prods. & Serv., Inc. v. Ricoh, 16 Cal. Rptr. 2d 417, 423 (Cal. Ct. App. 1993) (describing forum selection clauses are valid and enforceable absent showing that they were result of unequal bargaining power); Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 667-68 (1997) (stating agreements arrived at as result of arm's length negotiation should be enforced).

The cause of action arose when a storm damaged an oilrig, which the M/S Bremen was towing from Louisiana to Italy. After the rig was damaged it was towed to Tampa, and Zapata filed suit in Florida District Court. Both the District Court and the Court of Appeals for the Fifth Circuit denied defendant's motion to dismiss on the grounds of *forum non conveniens*. In vacating and remanding the case the Supreme Court stated that a "freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power, such as that involved here, should be given full affect."[75]

B. Choice of Law by the Parties

Unfortunately, the reality of letter of credit transactions is that the parties do not always have equal bargaining power. The practice involves an applicant submitting an application to his or her bank to have a letter of credit issued for the benefit of some distant beneficiary.[76] The amount of influence the applicant will have in determining which law is selected may be limited by the amount of influence he or she has over the bank.[77] The applicant

[75] *Zapata*, 407 U.S. at 12-13; *see also* Jon A. Jacobson, *Other International Issues: Your Place or Mine: The Enforceability of Choice-of-Law / Forum Clause in International Securities Contracts*, 8 DUKE J. COMP. & INT'L L. 469, 479 (1998) (stating that negotiated contracts cannot be inconvenient); Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 668 (1997) (discussing Bremen opinion); Brian Mattis, *Forum Selection Clause in Florida*, 6 ST. THOMAS L. REV. 247, 256-57 (1994) (stating importance of enforcing freely negotiated private international agreements).

[76] *See* Bergerco Canada v. Iraqi State Company for Food Stuff Trading, 924 F. Supp. 252, 258 (U.S.D.C. 1996) (stating issuing bank has bank in beneficiary's country transmit information) (reversed on other grounds); *see also* S. Isabella Chung, *Developing A Documentary Credit Dispute Resolution System: An ICC Perspective*, 19 FORDHAM INT'L L. J. 1356, 1378 n.29 (1996) (outlining typical letter of credit transaction); Beat U. Steiner, *An Updated Primer on Letters of Credit*, 28 APR COLO. LAW. 5, 5 (1999) (stating that essence of letter of credit is obligation of issuer to pay beneficiary); Roland P. Wiederaenders, III, *Export Financing Options for NAFTA Country Business*, 4 NAFTA: L. & BUS. REV. AM. 51, 58 (1998) (describing process of American commercial banks in issuing letters of credit for foreign beneficiaries).

[77] *See* Peter H. Weil, *Letters of Credit*, 754 PLI/COMM 511, 530 (1997). In his article Weil discusses the issuer's enhanced control over the letter of credit transactions. *Id.* There are many that agree that the issuer has great control over the transaction. *See* James G. Barnes and James E. Byrne, *Survey Uniform Commercial Code: - Revision of U.C.C. Article 5*, 50 BUS. LAW. 1449, 1454 (1995). "Issuers typically require an LC applicant to sign a reimbursement agreement limiting the applicant's rights and remedies against the issuer for honor of a noncomplying presentation, and obligating the applicant to indemnify the issuer against substantially all risks, such as the risk of beneficiary fraud." *Id.* It is difficult to reconcile that the issuer can obligate the applicant to effectively waive his right to seek a remedy from the issuer when the parties are of equal bargaining power. It is clear these parties are not dealing at arms length. *Id.* The nature

may have a great deal of influence with his bank and may use that influence to select a law most favorable to him. While it is certainly true that the beneficiary, for whose benefit the letter of credit is open and who must collect under the credit, will have very little input regarding the law selected.[78] By the time the beneficiary receives notification of the terms, including the choice-of-law clause, the letter of credit will already have been issued.[79]

A letter of credit will need to be amended to make any subsequent changes. Amending a letter of credit can cause unwanted delays and added expenses. Additionally, the choice-of-law clause will probably not be a term which either the applicant or the beneficiary can easily amend. Assuming that either party is able to negotiate for a different choice-of-law clause, it is very possible that the beneficiary will have to relinquish something in the compromise. For example, the beneficiary may have to accept payment 45 to 90 days after presentation of documents, or even possibly discount the letter of credit.[80] Therefore, it would be difficult to consider these parties

of a relationship between the applicant and the issuer bears upon the ease with which the parties may obtain letters of credit. *See* Steiner, *supra* note 74, at 10.

78 *See* Anderson U.C.C.3d § 5-116(a) (West 1998); *see also*, Anderson U.C.C.3d § 5-116:7, Official Code Comment, at 167 (West 1998) (stating issuer, nominated person, or adviser selects choice of law). *Compare Bergerco Canada*, 924 F. Supp. at 258 (indicating the beneficiary will be *advised* of the letter of credit terms) (emphasis added); *with* Calgrath Investments, Ltd. v. Bank Saderat Iran, 1996 WL 204470, *1 (S.D.N.Y. 1996) (stating parties agreed to forum selection and choice of law clause when letter of credit was *assigned*) (emphasis added).

79 *See* Schroeder, *supra* note 70, at 353. "An adviser of a letter of credit does not have any obligation to honor or give value for a presentation under a letter of credit. An Adviser is someone who *notifies* the beneficiary that a letter of credit has been issued, confirmed or amended." *Id.* (emphasis added). Donald J. Rapson states that according to his experience the beneficiary receives the letter of credit towards the end of the funding transaction. *See* Rapson, *supra* note 29, at 55. It is true that in most letter of credit transactions the letter of credit, along with the applicable terms are not delivered to the beneficiary until the merchandise is ready to be shipped. The reason for this is a pragmatic business necessity, since the applicant must "pay" for the letter of credit by either depositing funds with the issuing bank, or tying up his line of credit. There are several steps regarding payment of letters of credit. *See* BROOKE WUNNICKE, DIANE B. WUNNICKE, AND PAUL S. TURNER, STANDBY AND COMMERCIAL LETTERS OF CREDIT, § 17.1 at 481-82 (2d ed. 1996). Since the applicant is reducing his financial liquidity he or she will want to have the letter of credit issued to the beneficiary as close to the merchandise's ship date as possible, and also have as brief an expiration date for the letter of credit as possible. This short time frame in which to work does not give the beneficiary, or the advising or issuing bank, much time in which to change terms, including a choice of law selection. *Id.*

80 *See* BROOKE WUNNICKE, DIANE B. WUNNICKE, AND PAUL S. TURNER, STANDBY AND COMMERCIAL LETTERS OF CREDIT, § 3.10 at 49 (2d ed. 1996). A deferment payment credit is a letter of credit whereby the issuer agrees to pay the beneficiary a specified time

to be dealing at arm's length. On the other hand, the confirming bank may be in the best position to challenge the choice of law by refusing to confirm a letter of credit with the law selected. In this event the beneficiary's bank can decide to act as an advising bank.[81] Thereby, the bank will limit its responsibilities and obligations under the letter of credit to little less then that of a courier of information between the issuing bank and the beneficiary.

A more likely scenario is that the beneficiary will make its own choice of law selection, possibly resulting in a conflict of law situation.[82] Allowing each party to select the law they wish to govern the transaction would create an uncertainty regarding the applicable law and lead to unnecessary litigation. It may even be possible for the parties to completely escape Article 5 by choosing the law of a non-U.C.C. jurisdiction.[83] In effect, the plain

period after presentation of the documents. *Id.* This type of letter of credit is sometimes called a Letter of Credit for Days. A deferred payment letter of credit has the net effect of the beneficiary extending credit terms to the applicant as the applicant receives the merchandise and the beneficiary will not be paid until a specified time in the future. *Id.* As these types of letter of credit transactions are common there are many authors who discuss deferred payment credits. *See* Denis Petkovic, *UCP 500: Relevance for Trade in the Americas*, 1 NAFTA: L. & BUS. REV. AM. 108, 110 (1995).

[81] *See* Bergerco Canada v. Iraqi State Company for Food Stuff Trading, 924 F. Supp. 252, 258 (U.S.D.C. 1996). An advising bank will advise the beneficiary that a letter of credit has been issued in his or her favor but will not undertake to make payment upon presentation of drafts against the letter of credit. *Id.* An advising bank has no obligation to pay on letter of credit. *See* John M. Czarnetzky, *Modernizing Commercial Financial Practices: the Revisions to Article 5 of the Mississippi UCC*, 66 MISS. L. J. 325, 332 (1996). Conversely, a corresponding bank or confirming bank is authorized to pay upon presentation of a draft with conforming documentation. *See* Bergerco, 924 F. Supp. at 258. Confirming banks have subrogation rights when they pay on a draft. *See* Reade H. Ryan, Jr., *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 616 (1997). The court in Merchants Bank of New York v. Credit Suisse Bank defined an advising banks role:

> An advising bank . . . assumes no . . . responsibility under the letter of credit arrangement. It is considered a neutral party, important in forging some connection between the issuing bank and the beneficiary, parties which generally have no prior link. The advising bank is confined to transmitting information and authenticating the information transmitted, and therefore assumes no liability to the party addressed, except liability for accurate transmission.

See Merchants Bank of New York v. Credit Suisse Bank, 585 F. Supp. 304, 308 (S.D.N.Y. 1984).

[82] *See* Anderson U.C.C.3d § 5-116:1, Official Code Comment, at 164 (West 1998) (indicating it is possible for confirmer or other nominated person to choose different law from that chosen by issuer); *see also* Schroeder, *supra* note 70, at 346 (stating each party may select choice of law). *See generally* Amelia Boss, *The Jurisdiction of Commercial Law: Party Anonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code*, 32 INT'L L. 1067, 1080-81 (1998) (stating parties have complete autonomy to select law governing letter of credit transaction).

[83] *See* Schroeder, *supra* note 70, at 346 (stating "[t]hrough exercise of the right to

language of section 5-116 of Revised U.C.C. Article 5 permits the parties to bypass the U.C.C. as the governing law since the selection "need not bear any relation to the transaction."[84]

The New York State Law Revision Commission, in its report proposing to adopt Revised Article 5 of the U.C.C., acknowledged that the ability of parties to select the applicable choice of law "will enable some stronger parties to obtain unfair and unexpected advantages."[85] The requirement that the parties agree on the choice of law selection should alleviate some of the conflict, but it cannot completely eliminate it.[86] Notably, the requirement that parties agree on the choice of law is not determinate, as the issuer can unilaterally declare the choice of law in the letter of credit when it is issued.[87]

C. Choice-of-Law Clause Upheld When Parties did not Agree

Courts have been willing to enforce choice-of-law clauses even in situations where a party lacked bargaining power. In

choose a jurisdiction whose law will govern liability, the parties may escape the application of Article 5 entirely by choosing a jurisdiction that has not adopted the UCC."); *see also* Anderson U.C.C.3d § 5-103:2, Official Code Comment, at (West 1998); Richard F. Dole, *The Essence of a Letter of Credit Under Revised U.C.C. Article 5: Permissible and Impermissible Nondocumentary Conditions Affecting Honor*, 35 HOUS. L. REV. 1079, 1117 n.60 (1998) (designating law of jurisdiction that has not enacted Revised Article 5 can effectively avoid enforcement).

84 *See* Anderson U.C.C.3d § 5-116(a), at 166 (West 1998); *see also* Dole, *supra* note 81, at 117 n.60 (stating Revised Article 5 permits choice of law designation of two jurisdictions unrelated to letter of credit transactions); Reade H. Ryan, *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 593 (1997) (issuing bank may choose law of any jurisdiction); Schroeder, *supra* note 70, at 346; The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 42.

85 The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 43 (indicating freedom of choice of law will allow stronger parties unfair advantage); *see also* Katherine A. Barski, *An Analysis of the Recent Revision to Article Five of the Uniform Commercial Code: Letters of Credit*, 101 COM. L.J. 177, 179 (1996) (stating that revision grants *issuer* choice of law selection) (emphasis added).

86 *See* The New York State Law Revision Commission, *Report on the Proposed Revised Article 5 - Letters of Credit - of the Uniform Commercial Code*, 43 (noting stronger parties will have unfair advantage with freedom of choice of law selection).

87 *See* Anderson U.C.C.3d § 5-116:6, Official Code Comment, at 167 (West 1998) (stating "[Rev] UCC § 5-116 permits the making of choice of applicable law by agreement and by *unilateral* declaration.") (emphasis added); *see also* Anderson U.C.C.3d § 5-116(a) (West 1998); Anderson U.C.C.3d § 5-116:7, Official Code Comment, at 167 (West 1998) (stating issuer, nominated person, or adviser selects choice of law); §5-116:8, Official Code Comment, at 167 (indicating when no choice of law is selected law of issuer's jurisdiction will govern). *See generally* Reade H. Ryan, Jr., *General Principles and Classifications of Letters of Credit*, SB74 ALI-ABA 583, 593 (1997) (stating issuer may choose law of any jurisdiction, however, absent a selection, law of issuer's jurisdiction applies).

Carnival Cruise Lines, Inc. v. Shute,[88] the Supreme Court upheld forum selection and choice-of-law clauses printed on a cruise line ticket.[89] The Court determined that the ticket was considered an adhesion contract because the parties were not advised of these clauses before they purchased the non-refundable tickets.[90] Even if the plaintiffs had been made aware of the choice-of-law and forum selection clauses prior to purchasing the ticket, it is unlikely they would have been able to negotiate for a different clause. The court acknowledged it would be "unreasonable" to conclude the petitioners would "have bargaining parity with the cruise line."[91] Yet, the Court allowed the forum selection and choice-of-law clauses to stand. This is clearly disadvantageous to parties that are unable to negotiate the terms of their transaction.

While a letter of credit transaction differs from a contract for voyage, it is not difficult to draw a parallel between *Carnival Cruise Line* and what a court might do in a letter of credit transaction. It is entirely possible for the courts to reach a conclusion similar to *Carnival Cruise Line* when the choice of law

[88] 499 U.S. 585, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991).

[89] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991) (stating forum selection clause did not deprive party of "a trial by [a] court of competent jurisdiction"). *See generally* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (stating forum selection clause are "prima facie valid"); Doctor's Associates, Inc. v. Neal, 1998 Bus. Franchise Guide (CCH) ¶ 11,330 (2d Cir. Feb. 5, 1998) (finding forum selection clause valid); Pascalides v. Irwin Yacht Sales North, Inc. 118 F.R.D. 298, 302 (D.R.I. 1988) (holding forum selection clause valid).

[90] *See Carnival Cruise Lines*, 499 U.S. at 596-97. The Court held that a forum selection clause was valid because it allowed judicial review and did "not purport to limit petitioner's liability for negligence." *Id.* The Court allowed the choice of law and forum selection clause to stand between a cruise ship line issuing the ticket of voyage and the individual parties purchasing the ticket. *Id.* It is not difficult to conclude there was a disparity between the bargaining power of these two parties. Arguably, the court's decision was counter to what would be considered public policy. Not surprisingly, after the Courts decision in Carnival Cruise Line, Congress enacted legislation that considered cruise ship tickets contract of adhesion. *See* 46 U.S.C.A. app. § 183. *In O'Brien v. Okemo Mankin, Inc.*, the court declared that the validity of a forum selection clause is dependent on whether it was communicated to the other party. *See* O'Brien v. Okemo Mankin, Inc., 17 F. Supp. 2d 98, 103 (D. Conn. 1998).

[91] *Carnival Cruise Lines*, 499 U.S. at 593 (stating that Court would not conclude that "a nonnegotiated [choice of law] clause in a form ticket contract is never enforceable simply because it is not the subject of a bargaining"); *see also* Union Steel American Co. v. M/V Sanko Spruce, 14 F. Supp. 2d 682, 686 (D.N.J. 1998) (stating and arm's length agreement between knowledgeable commercial entities is valid despite lack of negotiation over forum selection clause). *But cf.* Foster v. Chesapeake Insurance Co., 933 F.2d 1207, 1219 (3d Cir. 1991) (holding forum selection clause in contract between insurance companies where one ceded portion of risk to other party was enforceable).

in a letter of credit transaction is pre-selected by the issuer.[92] In *Carnival Cruise Line*, the Court acknowledged that certain contract terms in form contracts are not subject to negotiation.[93] Therefore, if contract terms are not open to the negotiating process the parties are not truly dealing at "arm's length." It becomes apparent that the issuer would have an advantage in selecting the law since it is his forms that are being used to issue the letter of credit. Therefore, it is not unreasonable to conclude that the terms an issuer includes in a letter of credit are standardized in all of that particular issuer's letters of credit and would not be subject to negotiation.

CONCLUSION

New York is a major commercial center. As a result, the majority of international letter of credit transactions are processed through New York banks. The high volume of letter of credit transactions, coupled with the fact that New York's current version of the Uniform Commercial Code Article 5 has been intact since 1962, and has contributed to a well defined common law is ample reason for New York to refrain from adopting Revised Article 5. By allowing parties the freedom to choose the law of any jurisdiction, whether or not the law is related to the transaction, a New York court will be faced with the challenge of applying substantive law with which it may not be familiar. There would be a greater possibility for confusion

92 *See* Bonny v. Society of Lloyd's, 3 F.3d 156, 159 (7th Cir. 1993) (indicating plaintiffs executed a form contract which included a forum selection and choice of law clause). *See generally* Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 629 (1985) (stating international comity, respect for international tribunals, and international commercial system necessitate enforcement of private international agreements).

93 *See Carnival Cruise Lines*, 499 U.S. at 593 (1991):

> [I]t would be entirely unreasonable for us to assume that respondents—or any other cruise passenger—would negotiate with petitioner the terms of a forum-selection clause in an ordinary commercial cruise ticket. Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have the bargaining parity with the cruise line.

Id. From this view of the Court one may infer that the terms in a standard letter of credit issued by a bank will also not be subject to negotiation. Some courts have applied the holding in *Carnival* to validate a forum selection clause. *See* Generale Bank New York Branch v. Choudhuny, 779 F. Supp. 303, 304-05 (S.D.N.Y. 1991). The court in *Richardson Greenshields Secs. v. Metz* held that a failure to negotiate does not constitute showing of fraud or overreaching necessary to invalidate a forum selection clause. *See* Richardson Greenshields Secs. v. Metz, 566 F. Supp. 131, 133 (S.D.N.Y. 1983).

regarding the applicable law in letter of credit transactions. Therefore, in the interest of commerce and judicial efficiency it would be wise to carefully contemplate any changes to New York's Uniform Commercial Code Article 5.

Since most letter of credit transactions are handled through New York banks, and many of these transactions incorporate the UCP as the choice of law, perhaps other jurisdictions should adopt a section 5-102 similar to New York's current version of Article 5. This is particularly true given the stated purpose for changing the statutory law pertaining to letters of credit was to conform to international letter of credit practice and to avoid uncertainty in the applicable law.

Franck Chantayan