



A.S. Pratt

RE: 2011 Supplement No. 2

Dear Valued Customer,

Enclosed you will find your 2011 Cumulative Supplement No. 2 to *The Law of Letters of Credit, Fourth Edition*. This supplement, which updates the permanent main volume, brings the Fourth Edition up to date by incorporating significant recent developments. In this heavily litigated industry, *The Law of Letters of Credit* provides you with up-to-date analysis of court decisions and laws that affect letter of credit transactions. This leading treatise measures the cases in light of policies that strengthen, rather than weaken, the letter of credit as a commercial product. The enclosed supplement includes discussion of cases, articles, and commentary dealing with the following:

- As a general rule, amendments to a credit must be in writing. The official comments to UCC 5-106 suggest, however, that a beneficiary may consent to an amendment of a credit by implication, say, by presenting documents consistent with the amendment, but for an amendment reducing the amount of the credit by more than \$1.2 million courts might look for something more than implicit consent. See ¶ S5.02[2].
- An issuer that dishonors wrongfully not only sullies its image as a credit issuer, but, when it relies on underlying contract terms to justify its dishonor, it also destroys the independence of the credit, permits litigation of what should be styled a breach of the letter of credit warranty before payment in direct conflict with the warranty section, and shifts litigation burdens from those to which credit law allocates them. See ¶ S11.07.
- While assignment and transfer of a beneficiary's rights under a credit are matters of letter of credit law, assignment of an issuer's or an applicant's rights under the application agreement are governed by assignment and secured transactions law. See ¶¶ S10.03[1][b] and S10.03[1][c].

- The Uniform Law Commissioners propose federal enactment of the Official Text of Article 5 as a scheme to render the UNCITRAL Convention U.S. law with modest negative impact, if any, on U.S. letter of credit law. See ¶ S4.01[4][b] and Appendix M.
- Beneficiaries of credits with evergreen clauses must take precautions against the effect of the issuer's announcement that it will not renew the credit. See ¶ S5.03[3][b].
- Most courts refuse, on due process grounds, to entertain wrongful dishonor claims against out-of-state issuers, but it remains puzzling that awards of attorney fees to the prevailing issuer in such litigation remain scarce, as such awards to prevailing parties in other letter of credit litigation remain scarce. See ¶¶ S9.09, S11.02[1][a].
- The independence principle prevents parties from altering the issuer's obligations under the credit by reference to terms or conditions in other agreements, but it does not prevent parties from using terms in the credit to supplement the reimbursement agreement or some other agreement. That is definitely not to say, however, that a merger clause in the credit operates as a merger clause in the reimbursement agreement; yet, that is what one court inexplicably holds. See ¶ S2.09[7].
- A letter of credit issuer that insisted on additional collateral from its applicant engaged in traditional banking activity, which cannot support the applicant's claim under the Bank Holding Company Act's antitying provisions. See ¶ S12.05[3].
- It may come as a surprise to many in the banking and transport industry that one federal court has ruled that a bill of lading without any recital that it is clean and without any clause indicating damage to goods or their packaging is nonetheless noncomplying when the credit calls for a clean bill. See ¶ S6.04[4] and SAPP. C: art 20.
- Summary judgment is often available to dispose of letter of credit litigation, but not, one court holds, when the question is one of the issuer's good faith in cancelling a credit. See ¶ S11.06[4][a].
- The economic loss doctrine notwithstanding, trial attorneys seeking a remedy under Article 5 frequently seek recovery under common law theories. When their client prevails under both Article 5 and the common law, what attorney fees may the party recover? One court appears to rule that the party recovers all of its attorney fees. See ¶ S9.09.

- One state's command that banks issue what the state's legislation calls a "letter of credit" imposes a duty on farm lenders that conflicts with the Comptroller of the Currency's Interpretive Ruling and may create a letter of credit that would not be subject to UCC Article 5. See ¶¶ S2.03[1] and S12.05[1].
- Statutes of limitations arguably only bar a remedy, and a contract statute bars suits for breach of contract but does not bar draws on a letter of credit securing the underlying contract obligation, all according to one court but not according to another. See ¶ S9.06[8].
- UCC 5-116(b) stipulates the governing law for the various banks in a letter of credit transaction, but that provision plays no role in determining the banks' citizenship for purposes of federal diversity of citizenship. See ¶ S11.02[3][a].
- Aligning interests in multiparty letter of credit litigation is not an easy task, especially when reimbursement agreements and credits are independent of each other prepayment. Intervention can obviate inconsistent rulings in different actions, but some courts are reluctant to allow what appears to be an interested party to intervene. See ¶ S11.03[1][b].
- Attorney fees are mandated by virtually all states except New York, the most important letter of credit jurisdiction. Litigators seem unaware of this feature of Article 5 and may miss an opportunity for their clients. See ¶ S9.09.
- Courts should not abide applicant use of breach of underlying contract claims to stop or otherwise limit a beneficiary's draws on a credit prepayment. The warranty section provides the applicant relief postpayment in a fashion that protects the credit from the corrosion that such prepayment efforts effect. See ¶ S11.07.
- Prefunded standby credits are useful in large dollar revolving loan facilities. See ¶¶ S1.04, S12.04[4], and the Glossary.
- Cases and authority applying UCP 600. See SAPP. C: bibliography, definitions, arts. 10(a), 14, 16, 20. For authority applying UCP 500, see SAPP. D: art. 48.