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## The ICC Publication of International Standard Banking Practice (ISBP) And the Probable Effect on United States Letter of Credit Law

Tom Pifer

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# THE ICC PUBLICATION OF INTERNATIONAL STANDARD BANKING PRACTICE (ISBP) AND THE PROBABLE EFFECT ON UNITED STATES LETTER OF CREDIT LAW

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## I. INTRODUCTION

A letter of credit (LC) is an established method of securing payment for the supply of goods under international contracts. However, many international sellers would be surprised to learn that the standards for determining compliance with the terms of an LC have traditionally been applied with significant inconsistency among banks and courts in the United States. For example, in New York, a court found that the simple misspelling of the buyer’s name on a transport docu-

ment ("Soran" instead of "Sofan") was sufficient to justify the rejection of the seller's demand for payment under an LC.<sup>1</sup> In contrast, a court in Texas found that the apparent misspelling of the seller's name on *all* export documents ("Voest-Alpine Trading USA" instead of "Voest-Alpine USA Trading" as shown on the LC) was not sufficient to justify the rejection of the seller's demand for payment.<sup>2</sup> In another example of such inconsistency, a court in New York found that the failure of the beneficiary to include the LC number on his collection draft was sufficient to justify nonpayment under the LC,<sup>3</sup> while a Texas court found a seemingly comparable seller's error in providing an LC number on a draft (showing "86-122-5" instead of "86-122-S") was not justification for nonpayment.<sup>4</sup> While the details of these examples have some significant variation, the general results represent an unacceptable degree of inconsistency among United States courts in determining compliance under an LC. Fortunately for exporters and importers in the United States and around the world, there have been significant efforts to bring an end to such inconsistency.

The drive toward consistency in determining compliance has taken some dramatic steps forward in the past decade, first with the issuance by the International Chamber of Commerce (ICC) of the latest revision of the Uniform Customs and Practice for Documentary Credits (UCP 500) in 1993, and then with the revision of Article 5 of the Uniform Commercial Code (UCC) in 1995.<sup>5</sup> Both of these works supported the "flexible strict compliance standard" that allows for varying degrees of flexibility depending on whether the nature of the noncompliance was commercial (relating to the underlying sales transaction) or banking (related specifically to the LC transaction).<sup>6</sup> The UCC and UCP 500 are also in agreement that when determining what degree of noncompliance should be allowed, a bank or court should look to the standard practice of the banking industry.<sup>7</sup> While these publications did help standardize compliance determinations, they left open the possibility of significant variation in determining what standard banking practices were.<sup>8</sup> The recent issuance by the ICC of the International Standard Banking Practice for the Examination of Doc-

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1. See *Beyene v. Irving Trust Co.*, 596 F. Supp. 438, 439, 342 (S.D.N.Y. 1984).

2. See *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940, 948 (S.D. Tex. 2000).

3. *Wood v. State Bank of Long Island*, 609 N.Y.S.2d 665, 666-67 (N.Y. App. Div. 1994).

4. *New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313, 318 (Tex. App.—Austin 1989, writ denied).

5. ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, Pub. No. 500 (1993) [hereinafter UCP 500]; U.C.C. art. 5 (1995).

6. See UCP 500, *supra* note 5, art. 13; Joseph D. Gustavus, *Letter of Credit Compliance Under Revised UCC Article 5 and UCP 500*, 114 BANKING L.J. 55, 61 (1997).

7. UCP 500, *supra* note 5, art. 13(a); U.C.C. § 5-108(e) (1995).

8. See James J. White, *The Influence of International Practice on the Revision of Article 5 of the UCC*, 16 Nw. J. INT'L L. & Bus. 189, 213 (1995).

uments under Documentary Credits (ISBP) was meant to address this issue by providing a highly persuasive source for determining standard banking practices.<sup>9</sup> It is the thesis of this Comment that the effect of the ISBP will be to promote the flexible strict compliance standard in United States courts and to allow LC users greater predictability in their LC operations.

Section II of this Comment will provide a brief explanation of what an LC is and how it functions. Section III begins with a description of the development of conflicting standards among United States courts for determining compliance with LC terms. Section III further provides a summary of the current standards for compliance under the UCC and the UCP 500, with an emphasis on the effort to standardize the documentary compliance standards required by these publications on a flexible strict compliance standard. Section IV of this Comment provides an explanation of the ISBP and analyzes how it will function as the latest step toward securing greater consistency among courts and banks in determining documentary compliance. This Comment concludes that the ISBP will be highly persuasive on United States courts and will more firmly establish the flexible strict compliance standard in LC jurisprudence.

## II. WHAT IS A LETTER OF CREDIT AND HOW DOES IT FUNCTION?

An LC is an independent undertaking by the issuer, usually a bank or other financial institution, to honor a demand for payment so long as the demand complies with the conditions set forth in the LC.<sup>10</sup> There are basically two varieties of LC: standby and commercial.<sup>11</sup> While the rules governing issuance and collection under these two varieties are similar, they perform very different functions.<sup>12</sup> A standby LC serves as a background guarantee that can be called on should a specific triggering event occur.<sup>13</sup> Generally the intent of the parties to a standby LC is that if all goes according to plan the LC will never be drawn on. A commercial LC, by contrast, is issued with the expectation that it will be drawn on. The commercial LC typically serves as a secure method of payment for international transactions involving the provision of goods.<sup>14</sup> While the standards governing the determina-

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9. INTERNATIONAL STANDARD BANKING PRACTICE (ISBP) FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS, *Introduction*, (2003) [hereinafter ISBP].

10. Katherine A. Barski, *Letters of Credit: A Comparison of Article 5 of the Uniform Commercial Code and The Uniform Customs and Practice for Documentary Credits*, 41 LOY. L. REV. 735, 736 (1995).

11. UCP 500, *supra* note 5, art. 1.

12. See JAMES G. BARNES ET AL., *THE ABCS OF THE UCC, ARTICLE 5: LETTERS OF CREDIT*, 7 (1998).

13. See *id.*

14. See Dorothea W. Regal, *Basic Principles of Letters of Credit*, in *WHAT LAWYERS NEED TO KNOW ABOUT UCC ARTICLE 5 2003: LETTERS OF CREDIT*, 13, 26-27

tion of compliance for the two varieties have traditionally been very similar, there has recently been some divergence.<sup>15</sup> Since the standards governing compliance can no longer be considered common between the two types of LCs, this Comment will address the issue of compliance only from the perspective of commercial LCs.

Commercial LCs have played a significant role in facilitating international business transactions as far back as the year 1210, when King John used an LC to purchase Italian marble.<sup>16</sup> Today LCs continue to play an important role in international commerce. They are used as the payment mechanism for approximately 15% of world trade and have an annual aggregate value of over \$1 trillion.<sup>17</sup> While at times it may seem surprising that the traditional commercial LC still plays such a large role as a payment vehicle, one should keep in mind that it still performs as an extremely secure method, "with less than one-tenth of one percent of [LC negotiations] resulting in less than full payment."<sup>18</sup>

To understand the functioning of a commercial LC it is useful to illustrate a typical transaction. The first step is for a Seller and a Buyer to enter into a contract for the sale of goods. In our example, the Seller will be from China and the Buyer from France. As one can well imagine, the distance between the parties to this contract, in terms of geography, culture, and business practices, leads to some concern by each party over the performance of the other. The Chinese Seller would ideally prefer to receive payment in advance from the French Buyer, so as to eliminate the risk of nonpayment. Meanwhile, the French Buyer would ideally prefer to withhold payment until it has had the opportunity to receive and inspect the goods. A commercial LC can help bridge the gap between these positions. The French Buyer can approach a French Bank and request the issuance of a commercial LC for the benefit of the Chinese Seller. In typical LC terminology, the French Buyer would be termed the Applicant, the French Bank would be the Issuer, and the Chinese Seller would be the Beneficiary. The LC would set forth specific documentary requirements that the Chinese Seller would need to meet in order to secure payment. The LC serves as the French Bank's independent undertaking to make payment should the documentary requirements be complied with.

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(PLI Commercial Law Practice Course Handbook Series No. A0-00H8, 2003) available on Westlaw at 847 PLI/Comm 13.

15. See INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL STANDBY PRACTICES ISP98, *Preface* (1998).

16. Institute of Management & Administration, *The Best-Kept Secrets to Workable Letters of Credit*, MANAGING CREDIT RECEIVABLES & COLLECTIONS, June, 2003, at 5.

17. ICC Approves ISBP, TRADE FINANCE: THE GLOBAL MAGAZINE FOR EXPORT AND COMMODITY FINANCE, Nov. 2002, at 4.

18. ICC To Take Crucial Vote on LC Documents, TRADE FINANCE: THE GLOBAL MAGAZINE FOR EXPORT AND COMMODITY FINANCE, Oct. 2002, at 8.

This illustration provides two key principles of LC transactions: (1) the Principle of Independence and (2) the Principle of Strict Compliance.<sup>19</sup> The Principle of Independence provides that the Issuer's (Bank's) responsibility to make payment upon Beneficiary's (Seller's) submission of compliant documents is independent of the contract of sale between Applicant (Buyer) and Beneficiary (Seller).<sup>20</sup> Except for limited instances where the Applicant can show that the documentation submitted by the Beneficiary is fraudulent, the Issuer is obligated to make payment regardless of any disputes between Applicant and Beneficiary (Buyer and Seller) or any deterioration in the financial position of the Applicant.<sup>21</sup> The application of the Principle of Independence allows the Chinese Seller to supplant the transaction risk of the contract of sale with the French Buyer with the presumably lesser transaction risk of the LC with the French Bank.<sup>22</sup>

The Principle of Strict Compliance provides that the Issuer (Bank) will not make payment to the Beneficiary (Seller) unless the documentation submitted is in strict compliance with the requirements set forth in the LC.<sup>23</sup> Under this principle, the Issuer's determination of compliance is made solely on the face of the documents presented.<sup>24</sup> The Issuer has no obligation or authority to look beyond the documents presented to attempt to determine if the Beneficiary actually complied with the terms of the contract for the sale of goods.<sup>25</sup> Traditionally, this principle has been applied so absolutely that documents indicating that the Beneficiary actually provided more than was contractually required of him have been rejected for noncompliance with the terms of the LC.<sup>26</sup> Thus the application of the Principle of Strict Compliance assures the Applicant (Buyer) that payment will not be made unless and until the Beneficiary (Seller) has submitted documentary evidence, as specifically required by the terms of the LC, of its performance under the contract for the sale of goods. The Principles of Independence and Strict Compliance are indicative of the particular laws that have developed around the use of LCs.

The law surrounding LCs is *sui generis*, developing from the law merchant, separate from the law of contract or suretyship.<sup>27</sup> LC law

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19. Gao Xiang and Ross P. Buckley, *The Unique Jurisprudence of Letters of Credit: Its Origin and Sources*, 4 SAN DIEGO INT'L LAW J. 91, 119-24 (2003).

20. *See id.* at 119.

21. *Id.*

22. *See id.* at 122.

23. *See id.*

24. *Id.*

25. *See id.* at 123.

26. *Sunlight Distrib., Inc. v. Bank of Commc'ns*, No. 94 Civ. 1210, 1995 WL 46636, at \*3 (S.D.N.Y. Feb. 7, 1995).

27. BARNES, *supra* note 12, at 10. *Sui generis* can be translated as "[of] its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY 1475 (8th ed. 2004). In other words, generally the law applied to LCs was developed specifically for use with LCs.

was mainly established through the confirmation of the customary practices of bankers in dealing with applicants, beneficiaries and various other participants and intermediaries in international transactions.<sup>28</sup> Since LCs usually involved parties from at least two countries, most countries did not attempt to individually establish specific legislation to address their use.<sup>29</sup> This is generally still true today with some notable exceptions, such as the UCC Article 5 in the United States.<sup>30</sup> In 1933, the ICC issued the first Uniform Customs and Practice for Documentary Credits in an attempt to provide a sum of the standard practices related to LCs.<sup>31</sup> The UCP has been updated about every 10 years and, though it is not the law in any country, it has developed almost to a "supranational code" status, particularly in countries that have not legislated their own code regarding LCs.<sup>32</sup>

### III. STANDARD OF COMPLIANCE REQUIRED UNDER LETTERS OF CREDIT

This section will review the standards that have developed for determining whether documentation submitted for collection under an LC sufficiently complies with the terms set forth in the LC so as to require payment by the issuing bank. The traditional standard of Strict Compliance will be reviewed, as well as a number of variations on this standard that have developed through case law. The section proceeds with a review of both the standards set forth in the UCC Article 5 and the UCP 500 and ends with a comparison of these standards.

#### A. *The Development of Conflicting Standards of Compliance*

Prior to the issuance of the revised UCC Article 5 in 1995, the traditional view of absolute strict compliance had begun to be abandoned by a number of United States courts and was replaced with a variety of standards.<sup>33</sup> These varying standards developed as courts struggled to balance two opposing judicial objectives: (1) providing certainty in LC transactions by requiring exact adherence to the LC terms and (2) maintaining a reasonable flexibility in determining compliance so as to accurately reflect performance of the transactions underlying the

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28. See Xiang & Buckley, *supra* note 19, at 108-09.

29. *Id.* at 109.

30. *See id.*

31. See Dale J. Gilsinger, Annotation, *Validity, Construction, and Application of the Uniform Customs and Practice for Documentary Credits (UCP)*, 56 A.L.R.5th 565, § 2[a] (1998).

32. See Xiang & Buckley, *supra* note 19, at 112.

33. See Wayne R. Barr, *Cause of Action by Beneficiary Against Bank for Wrongful Dishonor of Draft or Demand for Payment under Letter of Credit*, in 6 CAUSES OF ACTION 337, §§ 11-12, at 372-74 (Wesley H. Winborne et al. eds., Shepard's McGraw-Hill 1st ed. 1983).

LCs.<sup>34</sup> While the strict compliance standard remained the majority view,<sup>35</sup> a minority of courts had developed the lesser standards of substantial compliance and reasonable compliance.<sup>36</sup> Even in United States states that retained the strict compliance standard, variations developed.<sup>37</sup> These flexible strict compliance variations allowed for the existence of minor discrepancies on non-critical items so long as the substantive requirements of the LC were complied with strictly.<sup>38</sup> Eventually, one could identify at least four standards of compliance that developed among the states: (1) strict compliance; (2) flexible strict compliance; (3) substantial compliance; and (4) reasonable compliance.<sup>39</sup> A brief review of these four standards, along with a few examples of the application of each, is to follow. This review is offered as a background for the later section regarding the current standards of compliance established in the UCC and the UCP 500.

### 1. Strict Compliance – The Historical Standard

Strict compliance has been the traditional standard and was summarized as follows by the Court of Appeals of New York in 1933:

We have heretofore held that these letters of credit are to be strictly complied with, which means that the papers, documents, and shipping descriptions must be followed as stated in the letter. There is no discretion in the bank or trust company to waive any of these requirements. The terms of the letter constitute an agreement between the purchaser and the bank.<sup>40</sup>

The primary benefits of the strict compliance standard are that it provides: (1) assurance to the Applicant (Buyer) that his desired performance, as expressed by the LC, will be met, and (2) an absolute standard of compliance for the reviewing bank.<sup>41</sup> The disadvantage is that even the slightest and least consequential error can result in non-payment.<sup>42</sup> An example of strict compliance in practice is *Wood v. State Bank of Long Island*.<sup>43</sup> In *Wood*, the court stated that the failure of Andrew Wood to include the LC number on his collection draft, as expressly required by the LC, was sufficient grounds for the bank's refusal to honor the draft.<sup>44</sup> The court maintained this holding even

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34. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230, 234 (1st Cir. 1967).

35. See Barr, *supra* note 33, § 11, at 373–74.

36. See *id.* §§ 11–12, at 374, 377–78.

37. See *id.* § 11, at 123 (Supp. 2005).

38. See *id.* § 11, at 124 (Supp. 2005).

39. See *id.* §§ 11–12, at 373–74, 377–78.

40. *Anglo-South Am. Trust Co. v. Uhe*, 184 N.E. 741, 743 (N.Y. 1933).

41. See *Gustavus*, *supra* note 6, at 58.

42. See Barr, *supra* note 33, § 11, at 374.

43. *Wood v. State Bank of Long Island*, 609 N.Y.S.2d 665, 667 (N.Y. App. Div. 1994).

44. *Id.*



though the bank clearly knew which LC Wood was drawing under, because a certificate submitted with the draft did show the LC number.<sup>45</sup> Such a result, where inconsequential discrepancies lead to non-payment, inspired some courts to develop more flexible standards of compliance.

## 2. Flexible Strict Compliance – Introduction of the Insignificant Discrepancy

In order to introduce some degree of equity while still maintaining the integrity of the LC transaction, courts have developed various flexible derivations of the strict compliance doctrine.<sup>46</sup> Under these more flexible standards, strict compliance can be shown even though the beneficiary's presentation is not absolute in its compliance.<sup>47</sup> The various derivations have attempted to describe the degree of noncompliance in differing ways. Some courts have allowed noncompliance as long as it could not mislead the issuing bank.<sup>48</sup> Other courts have attempted to describe the degree of acceptable noncompliance as "minor" discrepancies.<sup>49</sup> However, the flexible standard that has come to dominate<sup>50</sup> and, as we shall see shortly, has been incorporated into the most recent version of the UCC 5,<sup>51</sup> is the standard applied by a Texas court in *New Braunfels National Bank v. Odiorne*.<sup>52</sup>

In *New Braunfels*, a beneficiary's application for payment was rejected due to an incorrect LC number being shown on the draft.<sup>53</sup> The draft showed an LC number of 86-122-5, instead of the correct number of 86-122-S.<sup>54</sup> The standard applied in *New Braunfels* recognized a distinction between discrepancies related to the underlying business transaction (commercial discrepancies) and discrepancies related only to the LC transaction (banking discrepancies).<sup>55</sup> The *New Braunfels* standard allows an issuing bank to apply a higher standard of strict compliance to commercial discrepancies, because the reviewer is not expected to know the details of the underlying transaction and is therefore not equipped to determine the significance of the discrep-

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45. See *id.* at 666–67.

46. See Barr, *supra* note 33, § 11, at 374.

47. See *id.* at 374.

48. *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank of Boston*, 569 F.2d 699, 705 (1st Cir. 1978).

49. *Integrated Measurement Sys. v. Int'l Commercial Bank of China*, 757 F. Supp. 938, 944 (N.D. Ill. 1991).

50. See generally Gustavus, *supra* note 6, at 58–61 (discussing the adoption of standard practices by the U.C.C. Article 5 and jurisdictions throughout the United States).

51. U.C.C. § 5-108 cmt. 1 (1995).

52. *New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313 (Tex. App.—Austin 1989, writ denied).

53. *Id.* at 316.

54. *Id.*

55. See *id.* at 317.

ancy.<sup>56</sup> Alternatively, the issuing bank is expected to understand the significance of a banking discrepancy and is expected to exercise discretion in determining if it justifies nonpayment.<sup>57</sup> The *New Braunfels* court held that in reviewing compliance with the banking conditions of an LC banks must allow “something less than absolute, perfect compliance,” but was silent on the standard to be applied to commercial conditions.<sup>58</sup> Given that the facts established that the original LC was submitted with the beneficiary’s draft, the issuing bank could not have been confused as to which LC was being drawn upon, and therefore, the court held that the beneficiary’s presentation strictly complied with the terms of the LC as a matter of law.<sup>59</sup>

### 3. Substantial Compliance – Furthering the Insignificant Discrepancy

In an effort to make LCs function with greater flexibility, so as to better mirror the standards of their underlying transactions, some courts have chosen to forsake strict compliance for a substantial compliance standard.<sup>60</sup> Georgia courts chose to apply a substantial compliance standard as it was believed this standard more accurately reflected the state’s statutory guidelines.<sup>61</sup> In *First National Bank v. Wynne*, a Georgia court faced a fact scenario very similar to that faced by the New York court in *Wood*.<sup>62</sup> The beneficiary failed to include the LC number on his collection draft, contrary to the LC requirements, but did include other documentation that included the LC number.<sup>63</sup> The Georgia court concluded that ultimately an LC was a contract and should therefore be subject to the same statutory standard that was applied to contracts: “[S]ubstantial compliance with the spirit and not the letter only of the contract . . . .”<sup>64</sup> In addition, the court found that because the beneficiary’s draft was accompanied by other documents that did reflect the LC number, the failure to include the LC number was not material, and therefore, the beneficiary’s draft must be honored.<sup>65</sup> While the substantial compliance standard may more accurately reflect the standard applied in other commercial contracts, critics have commented that this standard reduces the Applicant’s assurance of having the LC terms met and leaves the bank with

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56. See *Gustavus*, *supra* note 6, at 58, 61.

57. See *New Braunfels Nat’l Bank*, 780 S.W.2d at 317.

58. *Id.* at 318.

59. *Id.* at 320.

60. See *Barr*, *supra* note 33, § 12, at 377.

61. *Strozzo v. Sea Island Bank*, 521 S.E.2d 392, 395 (Ga. Ct. App. 1999).

62. See *First Nat’l Bank of Atlanta v. Wynne*, 256 S.E.2d 383, 384 (Ga. App. 1979); *Wood v. State Bank of Long Island*, 609 N.Y.S.2d 665 (N.Y. App. Div. 1994).

63. *First Nat’l Bank of Atlanta*, 256 S.E.2d at 384.

64. *Id.* at 386.

65. *Id.* at 387.

too much authority to subjectively determine what constitutes compliance.<sup>66</sup>

#### 4. Reasonable Compliance – The Minor Discrepancy

Faced with some of the seemingly unjust results from application of the strict compliance standard, Illinois courts have applied a reasonable compliance standard instead.<sup>67</sup> The Illinois reasonable compliance standard has been described as the strict compliance standard applied with an eye toward recognizing the inequity that can result when minor and trivial discrepancies, which have no impact on performance of the underlying transaction, result in nonpayment to the beneficiary.<sup>68</sup> Similar to the substantial compliance standard, critics have pointed to the uncertainty created by allowing a bank or court to subjectively determine what is “minor and trivial.”<sup>69</sup> Such uncertainty creates risk, and risk is what LC users are trying to minimize.

#### B. *Current Standards of Compliance Under the UCC and the UCP 500*

In the United States, there are two dominant sources in the law of LCs: Article 5 of the UCC and the UCP 500.<sup>70</sup> This section will review respectively the standard of compliance endorsed by the UCC and UCP 500. A short explanation of the forces driving toward a harmonization of the UCC and UCP standards will also be provided. In this review, the importance of applying “standard banking practices” in determining strict compliance will be illustrated.

##### 1. The UCC

In LC law, the United States stands apart from the large majority of other countries by having established its own law governing LCs.<sup>71</sup> In almost all fifty states, some variation of the UCC 5 has been adopted to govern the law of LCs.<sup>72</sup> Of course the UCC 5 itself is not law, but is instead a model statute developed by the National Conference of Commissioners of Uniform State Laws and the American Law Institute for submittal to the states as recommended statutory language.<sup>73</sup> The latest version of the UCC 5 was completed in 1995 and was developed to replace a prior version put forth almost forty years earlier.<sup>74</sup>

66. See Barr, *supra* note 33, § 12, at 378–79.

67. First Arlington Nat'l Bank v. Stathis, 413 N.E.2d 1288, 1298 (Ill. App. Ct. 1980).

68. See Integrated Measurement Sys. v. Int'l Commercial Bank of China, 757 F. Supp. 938, 944 (N.D. Ill. 1991).

69. See Barr, *supra* note 33, § 12, 378–79.

70. Barski, *supra* note 10, at 736.

71. See Xiang & Buckley, *supra* note 19, at 109.

72. *Id.* at 118.

73. *Id.* at 117.

74. *Id.*

A major goal of the 1995 revision was to provide more guidance for the states in LC law, with the result of increased consistency among the states and within the international community.<sup>75</sup> In fact, the desire to ensure the alignment of US law regarding LCs with that of the international community was so great that in many ways the international UCP 500 standard published in 1993 had a greater influence on the 1995 revision of UCC 5 than did the prior version of UCC 5.<sup>76</sup>

While the prior version of the UCC 5 had remained silent on establishing a standard of compliance, the 1995 revision includes a strong adoption of the flexible strict compliance standard described in *New Braunfels*.<sup>77</sup> Article 5 goes on to establish the proper degree of flexibility to apply as equivalent to the "standard practice of financial institutions that regularly issue letters of credit."<sup>78</sup> Article 5 also provides that determining what constitutes "standard practice" is a question of law for the court to decide after allowing the parties reasonable opportunity to submit evidence.<sup>79</sup>

## 2. The UCP 500

The UCP 500 is a compilation of accepted LC customs and practices in the international banking industry published by the International Chamber of Commerce.<sup>80</sup> As the ICC is not a legislative body, the UCP 500 is not law in any jurisdiction and is applicable only when invoked by reference in the terms of the LC.<sup>81</sup> However, virtually every commercial LC incorporates the UCP 500 by reference.<sup>82</sup> Once incorporated, the UCP 500 governs the parties' obligations as fully as any legislation could.<sup>83</sup> The UCP 500 is so well respected that in many countries that have not adopted their own statutory law governing LCs, the UCP is treated as quasi-law even when not specifically incorporated by reference into the LC.<sup>84</sup> As for the United States, UCC 5 states that if any rules of custom or practice are incorporated by reference any UCC 5 provisions inconsistent with such incorporated terms will not apply to the LC transaction, with the exception of a few UCC 5 provisions that cannot be waived.<sup>85</sup> These unwaivable provisions are of limited scope and typically do not play a significant role in the usual commercial LC transaction.

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75. *See id.* at 117-18.

76. White, *supra* note 8, at 190.

77. U.C.C. § 5-108 cmt. 1 (1995).

78. *Id.* § 5-108(e).

79. *Id.*

80. *See Xiang & Buckley, supra* note 19, at 108.

81. UCP 500, *supra* note 5, art. 1.

82. Xiang & Buckley, *supra* note 19, at 112.

83. White, *supra* note 8, at 189-90.

84. James G. Barnes, *Internationalization of Revised UCC Article 5 (Letters of Credit)*, 16 Nw. J. INT'L L. & BUS. 215, 216 (1995).

85. *See* U.C.C. § 5-116(c) (1995).

The ICC lists the expansion of international commerce through the establishment of standards that facilitate transactions as one of its core tasks and cites the universal acceptance of the UCP 500 as the foremost example of their success.<sup>86</sup> The ICC began its efforts to compile the internationally recognized customs and practices of LCs with the publication of the initial UCP in 1933; subsequent revisions have followed about every ten years since 1951.<sup>87</sup>

The most recent revision, which was completed in 1993 and resulted in the publication of the UCP 500, was required due to: (1) new developments in international transport, (2) new technological applications, and (3) a marked increase in litigation surrounding LCs.<sup>88</sup> In preparing the revision to the UCP, the ICC Commission on Banking Technique and Practice authorized the assembly of a Working Group composed of international bankers; law professors; and banking lawyers and tasked them to determine established practices and to standardize developing practices for inclusion into the publication.<sup>89</sup> For assistance in determining what standard banking practices were, the Working Group relied in part on a survey of 450 member banks of the United States Council on International Banking.<sup>90</sup> While banking practices played the primary role in developing the revision, the Working Group also looked to a lesser degree at the decisional law regarding the UCP in influential jurisdictions.<sup>91</sup> This mixture of standard practice and judicial decisions led to a result that was readily acceptable in all the major trading nations.<sup>92</sup> In fact, the UCP 500 plays such a dominant role in international LC transactions, that it is considered the most authoritative statement of standard practice in existence.<sup>93</sup>

The UCP 500's standard of compliance is stated simply as a requirement that all documents appear on their face to be in compliance with the terms and conditions of the LC.<sup>94</sup> Later ICC publications have recognized that in practice most jurisdictions apply this reference as a requirement for strict compliance.<sup>95</sup> The determination as to what constitutes compliance is to be in accordance with international standard banking practice as reflected in the UCP 500 itself.<sup>96</sup> The UCP provides some specific examples of standard banking practice related to specific documentation. For example, the UCP includes the long

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86. See UCP 500, *supra* note 5, *Foreword*.

87. Gilsinger, *supra* note 31, § 2[a].

88. UCP 500, *supra* note 5, *Preface*.

89. *Id.*

90. See Gustavus, *supra* note 6, at 56.

91. *Id.* at 68-69.

92. See *id.* at 69.

93. See White, *supra* note 8, at 198.

94. UCP 500, *supra* note 5, art. 13(a).

95. See Gustavus, *supra* note 6, at 63.

96. UCP 500, *supra* note 5, art. 13(a).

accepted practice that while most documents can contain a description of goods in very general terms (so long as not inconsistent with the description contained in the LC), the commercial invoice must match the LC description to a strict degree.<sup>97</sup> Unfortunately, the UCP 500 includes only a limited number of such practices, so banks and courts are often forced to look elsewhere for guidance as to what is standard practice.<sup>98</sup> In subsequent explanatory publications, the ICC has provided greater guidance to the standard of compliance endorsed by the UCP 500 and has indicated that it recognizes that absolute strict compliance is not practical and that a distinction can be made between commercial matters related to the underlying transaction and banking matters falling within the reasonably competent banker's knowledge.<sup>99</sup>

This distinction can be viewed as being closely analogous to the flexible strict compliance standard espoused in *New Braunfels* and adopted by the UCC.<sup>100</sup> The ICC has gone on to indicate its disapproval of flexible strict compliance standards that have not made the distinction between commercial and banking matters and have instead attempted to make a determination from the bank's point of view as to whether a discrepancy in a commercial matter is significant enough to warrant nonpayment.<sup>101</sup> Such standards are said to: (1) be contrary to the independence principle fundamental to LC transactions and (2) fail to provide a functional standard for compliance as it does not readily allow for generalization to varying fact patterns.<sup>102</sup>

### 3. Comparing the UCC and UCP standards – Internationalization of the UCC

From the above analysis, it can be seen that the standards of compliance espoused by the UCC 5 and UCP 500 are in practice very comparable.<sup>103</sup> Both require strict compliance but not absolute strict compliance. In addition, both recognize that a reviewing bank should refrain from exercising discretion on commercial matters where it lacks sufficient knowledge of the underlying transaction, but may exercise some flexibility regarding banking matters within the bank's field of expertise.<sup>104</sup> Even in banking matters however, the bank should remain within the standard practices of the banking industry.<sup>105</sup> The fact that the UCC 5 and UCP 500 standards are so comparable at first seems quite remarkable when one considers the varying

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97. See *id.* art. 37(c).

98. See Barski, *supra* note 10, at 749–50.

99. See Gustavus, *supra* note 6, at 61–62.

100. See *id.* at 58.

101. See *id.* at 64.

102. See *id.*

103. See *supra* Part III.B.1–2.

104. See Gustavus, *supra* note 6, at 61.

105. *Id.*

standards applied in the United States prior to the 1995 revision of Article 5 of the UCC. However, this harmonization of standards is less surprising when one considers the powerful motivation to minimize deviations between compliance standards when dealing with such international instruments as LCs.

The UCP 500 replaced the UCP 400 in 1993. As discussed above, major international banks played a substantial role in developing the revised compilation of LC customs and practices of the international banking industry.<sup>106</sup> When it came to the 1995 revision of UCC 5, it was important to these banks that the UCC reflect positions similar to the UCP 500 so that international bankers would not be faced with inconsistencies between United States and international banking laws.<sup>107</sup> According to James White, the Reporter for the Revision of UCC 5, the idea was “[w]here the big boys play with a rigid and hard-edged set of rules, the law should follow those rules.”<sup>108</sup> With the substantial involvement of the banks’s trade association, the United States Council on International Banking, Inc., it was ensured that the UCP 500—and the international customs and practices it represents—would have a heavy influence in the revision of UCC 5.<sup>109</sup> In fact, Mr. White has stated that the UCP 500 had an “enormous influence,” greater than American common law or even the prior version of the UCC 5.<sup>110</sup> One area deemed critical to the international bank’s success in tailoring the UCC 5 to parallel the UCP 500 was the fixing of a standard of flexible strict compliance and the inclusion of the concept of “standard practice” as a limitation on the flexibility allowed.<sup>111</sup> The fixing of one standard was believed to be extremely important to put an end to the development of varying standards of compliance by courts attempting to develop doctrines for specific fact situations.<sup>112</sup>

#### IV. THE ICC’S INTERNATIONAL STANDARD BANKING PRACTICES

This section begins with a review of the current status of LC law and then introduces the ISBP. The section proceeds with an analysis of how persuasive the ISBP will be on United States courts. The section concludes with examples of how the ISBP will likely be applied to specific fact patterns exhibited in prior cases.

##### A. *Current Status of Letter of Credit Law*

To review the current status of LC law, the standard of compliance applied to the review of an LC presentation has historically been an

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106. UCP 500, *supra* note 5, *Preface*.

107. *See* White, *supra* note 8, at 211.

108. *Id.* at 199.

109. *See* Barnes, *supra* note 84, at 222.

110. White, *supra* note 8, at 190.

111. *See* Barnes, *supra* note 84, at 222.

112. *See id.*

issue of inconsistency among United States courts.<sup>113</sup> Fortunately, the 1993 publication of the UCP 500 and the 1995 publication of the revised UCC 5 have produced substantial advancement in fixing the standard at flexible strict compliance.<sup>114</sup> The stringency of application of this strict compliance standard should be greater when a discrepancy is related to a commercial issue for which the bank is ill equipped to determine the degree of significance.<sup>115</sup> On the other hand, a more flexible standard can be applied in waiving banking discrepancies which the bank can determine to be insubstantial.<sup>116</sup> Of course, to further the goal of consistency in application of LC law, some objective basis must apply to determine what degree of flexibility is appropriate. In both the UCC 5 and the UCP 500, this objective standard is "standard banking practice."<sup>117</sup> In the UCC 5, the exact standard practice referred to is the "standard practice of financial institutions that regularly issue LCs."<sup>118</sup> In the UCP 500, the standard of practice employed is to be determined by "international standard banking practice as reflected in these Articles."<sup>119</sup> Thus the determination of where to turn to determine standard practice is a critical first step when a reviewing bank or court is faced with documents that do not absolutely adhere to the terms of an LC.

The UCC 5 directs that sources of standard practice include: (1) the UCP 500; (2) other practice rules published by banking associations; and (3) local and regional practice—presumably to be established by expert testimony.<sup>120</sup> Because the UCP 500 is the most recognized source of standard practice,<sup>121</sup> it applies to the vast majority of LCs by incorporation; and its express terms state that standard practice is as "reflected in these articles,"<sup>122</sup> the UCP 500 itself is a logical first source to consult. Unfortunately, only some standard practices are specified in the UCP 500.<sup>123</sup> Given the nearly unlimited number of discrepancies that a bank may encounter, there results a large area of practice with no guidance; where such areas exist litigation will often result.<sup>124</sup> When situations are not specifically addressed in the documents, the UCP 500 directs practitioners to ICC publications; decisions; opinions; and publications of national banking associations; treatises; and expert opinions.<sup>125</sup> Again though, such sources are of

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113. See *supra* Part III.

114. See UCP 500, *supra* note 5, art. 13(a); U.C.C. § 5-108(e) (1995).

115. See *supra* Part III.B.2.

116. See *supra* Part III.B.2.

117. See UCP 500, *supra* note 5, art. 13(a); U.C.C. § 5-108(a) (1995).

118. U.C.C. § 5-108(e) (1995).

119. UCP 500, *supra* note 5, art. 13(a).

120. U.C.C. § 5-108 cmt. 8 (1995).

121. White, *supra* note 8, at 198.

122. UCP 500, *supra* note 5, art. 13(a).

123. See Barski, *supra* note 10, at 749-50.

124. See Gustavus, *supra* note 6, at 67.

125. *Id.* at 70.



limited applicability and are often conflicting, as expressed by James White while reflecting on the drafting of the revised UCC 5:

At every drafting meeting advisers made empirical assertions about American practice, practice in Oklahoma, practice in Europe or Asia; not one of those assertions was ever empirically verified.

The little empirical digging that I did suggested—contrary to assertions sometimes made at committee meetings—that the American practice, at least as to certain events, is quite varied. Chicago practice is different from that in New York City and, as with other things, the Californians live a life of their own. Having experts at the table both helps and hurts.<sup>126</sup>

Ultimately, such a varied understanding of what constitutes “standard practice” could undermine the advancement made toward the unification of LC law. What was needed was a more detailed statement of standard practice. The ICC responded with the publication of the International Standard Banking Practice for the Examination of Documents under Documentary Credits.<sup>127</sup>

### B. *What is the ISBP?*

The International Standard Banking Practice for the Examination of Documents under Documentary Credits was published by the ICC in 2003 to serve as a “practical complement” to the UCP 500.<sup>128</sup> The purpose of the ISBP is not to amend the UCP 500, but to serve as a readily available source of information on standard international banking practices for LCs.<sup>129</sup> The ISBP contains a listing of general principles regarding standard practice for determining documentary compliance, followed by specific practices regarding the documents typically required by LCs: drafts, invoices, transport documents (whether by ocean, air, road, rail, or a combination of modes), insurance certificates, and certificates of origin.<sup>130</sup> It is interesting to note that unlike the UCP 500, no specific incorporation is required for the ISBP to be applicable to an LC and in actuality the ICC advises against express incorporation—the idea being that the UCP 500’s existing reference to standard practice is sufficient to incorporate the ISBP.<sup>131</sup> Given that the current versions of the UCC 5 and UCP 500 both cite “standard banking practice” as the measure for determining strict compliance,<sup>132</sup> it is expected that having an accepted source for finding what standard practice actually is will improve consistency

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126. White, *supra* note 8, at 213.

127. See ISBP, *supra* note 9, *Foreword*.

128. *Id.*

129. See *id.*

130. *Id.* arts. 6–200.

131. See *id.* *Introduction*.

132. UCP 500, *supra* note 5, art. 13(a); U.C.C. § 5-108(a) (1995).

when determining compliance.<sup>133</sup> One can imagine the significant impact such a resource could have.

The manner of the creation of the ISBP reflects the truly international nature of LCs. In May of 2000, the Commission on Banking Technique and Practice of the International Chamber of Commerce (ICC Banking Commission) established a task force to first determine what international standard banking practices were and then to document these practices.<sup>134</sup> A primary goal was to create a very practical document that focused on issues commonly encountered in the daily functioning of an LC specialist.<sup>135</sup> To ensure a truly international perspective, the team consisted of a diverse group of 12 members; two from the United States, two from Denmark, two from the U.K., and one each from Austria, Turkey, Sweden, Germany, France, and Singapore.<sup>136</sup> The team solicited ICC national committees and major international banks for input on the standard practices in particular countries.<sup>137</sup> They reviewed the 39 national committee responses received as well as a substantial number of responses from individual international banks<sup>138</sup> and eventually were able to distill the results to a list of 200 standard practices that today make up the ISBP.<sup>139</sup> The completed document met with strong approval by the ICC Banking Commission and was approved in October of 2002 by a vote of 57 to 8.<sup>140</sup>

### C. *How Persuasive Will the ISBP Be on United States Courts?*

The progression of LC law through the publication of the UCP 500, UCC 5, and the ISBP has established the legal framework for consistent application of a flexible strict compliance standard based on a commercial/banking term distinction.<sup>141</sup> This principle is greatly clarified by the detailed standard practice explanation provided in the ISBP.<sup>142</sup> The question then arises of how influential this framework will be in the United States. Some variation of the UCC 5 is now enacted into law in all 50 states, so its influence is undoubted.<sup>143</sup> Unfortunately, the UCP 500 and the ISBP lack such clear legal support. Certainly the banking industry supports the use of these ICC publications, as the industry played a significant role in their issuance.<sup>144</sup>

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133. See *ICC Approves ISBP*, *supra* note 17, at 4.

134. *ISBP*, *supra* note 9, *Introduction*.

135. *See id.*

136. *See id.* *Foreword*.

137. *See id.*

138. *Id.*

139. *See generally id.*

140. *ICC Approves ISBP*, *supra* note 17, at 4.

141. *See supra* Part III.B.2.

142. *See infra* Part IV.D.

143. *See Xiang & Buckley*, *supra* note 19, at 118.

144. UCP 500, *supra* note 5, *Preface*; *see ISBP*, *supra* note 9, *Foreword*.

While the pace at which individual banks incorporate the ISBP provisions may vary, their ultimate acceptance in the industry is certain.<sup>145</sup> But what will form the basis of acceptance of the ICC standards by United States courts? This Comment suggests that ultimately United States courts will find the required basis in: (1) the specific support of the UCP 500 in UCC 5; (2) the preeminence of the ICC in the field of LC law; (3) the lack of viable alternative sources; and (4) the public good gained by the application of a consistent compliance standard and set of standard practices.

In looking for support for the acceptance of the UCP 500 and ISBP, a court can first turn to the UCC 5. In section 5-108(e), the UCC specifically incorporates the "standard practice of financial institutions that regularly issue letters of credit."<sup>146</sup> The most widely known and authoritative statement of such standard practice existing today is the UCP 500.<sup>147</sup>

The comments to the UCC 5 even indicate that the UCP 500 is a primary source of determining practice.<sup>148</sup> A court can also base acceptance of the ICC publications on the preeminence of the ICC in the field of LC law and the overwhelming support the organization has shown to the UCP 500 and ISBP. Since the publication of the UCP 500 in 1933, the ICC has taken the lead position in establishing international LC standards.<sup>149</sup> The ICC clearly shows support for the UCP 500 publication by declaring it to be the foremost example of success in its core task of facilitating international commerce.<sup>150</sup> The ICC's support of the use of the ISBP as a complement to the UCP 500 is shown by the strong majority of the ICC Banking Commission that approved its publication.<sup>151</sup>

Additionally, support for a United States court's acceptance of the standard practices evidenced by the UCP 500 and ISBP can be obtained by the shortcomings of alternative sources of standard practice. No other source of standard practice can claim to have the international acceptance that the ICC publications have.<sup>152</sup> No other source can claim the impressive support documentation of the ISBP, which includes 39 separate surveys of the banking practices in particular countries.<sup>153</sup> Any source based on expert opinion, but lacking such empirical backing will be subject to rebuttal by conflicting opinions of apparently equal expert status, as evidenced in the development of the

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145. John Walden, *Letters of Credit – International Standard Banking Practice (ISBP)*, CREDIT MANAGEMENT, Sep. 2003, at 23.

146. U.C.C. § 5-108(e) (1995).

147. White, *supra* note 8, at 198.

148. See U.C.C. § 5-108 cmt. 8 (1995).

149. See Gilsinger, *supra* note 31, § 2[a].

150. UCP 500, *supra* note 5, *Foreword*.

151. See *ICC Approves ISBP*, *supra* note 17, at 4.

152. See White, *supra* note 8, at 198.

153. ISBP, *supra* note 9, *Foreword*.

revised UCC 5.<sup>154</sup> The UCP 500 and the ISBP both benefit from the acceptance that is gained simply by their publication. The simple truth is that “[w]hen standard practice becomes published, then issuers tend strictly to observe the published rule as written.”<sup>155</sup> Finally, a United States court can point to the public good to be gained by the application of the predictable standard practices provided by the ISBP. Importers and exporters, as well as other parties involved in international transactions, have frequently expressed frustration with the delays and uncertainty caused by the unpredictable application of varying local practices.<sup>156</sup> The ISBP is intended to provide these parties with the long desired “reasonable expectation of a consistent global approach to document examination” that has been lacking.<sup>157</sup> In sum, when a United States court is faced with the task of determining standard practice, it should have no difficulty in finding support for turning to the UCP 500 and ISBP as highly persuasive sources on standard practice.

#### D. *What Will Be the Result of the ISBP's Influence?*

In short, the general influence of the ISBP will be to further the flexible strict compliance standard favored by the UCC 5 and UCP 500. This will be accomplished by providing banks and courts with a substantial listing of specific practices that reflect the flexible strict compliance standard. By providing this listing, the ISBP will help minimize the possibility of the misapplication of the current standard's distinction between commercial and banking nonconformities, as well as prevent disputes regarding the current standard practices in the banking industry. The ISBP will accomplish this primarily through the specific application of its listing of 200 standard banking practices. However, in instances where the ISBP does not contain a specific practice on point, banks and courts will likely find at least one of the listed practices to be sufficiently analogous to provide adequate guidance. The following section will include an application of the ISBP's principles to specific fact patterns that have existed in cases prior to the issuance of the ISBP. This application is designed to help highlight the distinction between what is a commercial noncompliance and what is a banking noncompliance. In addition, explanations of how this application furthers the UCP's flexible strict compliance standard will be provided where applicable.

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154. See White, *supra* note 8, at 213.

155. BARNES, *supra* note 12, at 34.

156. Press Release from Citigroup Inc., Citibank Lauds International Chamber of Commerce Banking Commission Vote to Adopt the International Standard Banking Practices for the Examination of Documents Under Documentary Credits (ISBP) (Nov. 14, 2002), available at <https://www.citigroupgcib.com/data/documents/press11-14-02.shtml> (last visited Feb. 9, 2006) (on file with the Texas Wesleyan Law Review).

157. *Id.*

## 1. Misspellings and Typing Errors

Under the traditional strict compliance standard, any misspelling or typing error was considered to be noncompliance with the terms of the credit sufficient to justify rejection of the beneficiary's demand for payment.<sup>158</sup> The ISBP reflects the more flexible approach that "[m]isspellings or typing errors that do not affect the meaning of a word or the sentence in which it occurs, do not make the document discrepant."<sup>159</sup> Thus the ISBP would support the Texas court's holding in *New Braunfels National Bank v. Ordiorne*, that a bank must honor the beneficiary's LC presentation even though the draft contained an error in the LC number (showing 86-122-5 instead of the correct 86-122-S).<sup>160</sup> The ISBP's support of this holding is consistent with the UCC's position that some flexibility is allowed in determining whether strict compliance is met.<sup>161</sup> The ISBP would also support the holding that the beneficiary's use of an incorrect LC number in a required fax (as occurred in *Voest-Alpine Trading Co. v. Bank of China*)<sup>162</sup> was not a discrepancy sufficient to justify nonpayment.<sup>163</sup>

Note that the ISBP's position on this issue is consistent with the distinction between commercial and banking discrepancies, for the inclusion of the LC number on certain documentation is a banking condition imposed by the LC issuer, not a commercial issue originating in the underlying commercial transaction.<sup>164</sup> Therefore, the standard practice is for a reviewing bank to show greater flexibility in accepting documents reflecting an error in the LC number.<sup>165</sup> When applying the ISBP to noncompliance with a commercial term of the LC, less flexibility would be the rule.<sup>166</sup> Therefore, the allowance for misspellings and typing errors included in Article 28 of the ISBP would likely not apply to an instance where, as in *Beyene v. Irving Trust Co.*,<sup>167</sup> the section of a transport document showing the party to be notified on arrival at destination showed "Soran" instead the LC specified "Sofan."<sup>168</sup> Given the commercial nature of this noncompliance, a reviewing bank would be unable to ascertain whether this error met the requirement that it "not affect the meaning of a word or sentence"<sup>169</sup> and therefore the bank should deny payment.

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158. See *Anglo-South Am. Trust Co. v. Uhe*, 184 N.E. 741, 744 (N.Y. 1933).

159. ISBP, *supra* note 9, art. 28.

160. *New Braunfels Nat'l Bank v. Odiorne*, 780 S.W.2d 313, 318 (Tex. App.—Austin 1989, writ denied).

161. See U.C.C. § 5-108 cmt. 1 (1995).

162. See *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940, 949 (S.D.Tex. 2000).

163. See ISBP, *supra* note 9, art. 28.

164. See *supra* Part III.B.2.

165. See *supra* Part III.B.2.

166. See *supra* Part III.B.2.

167. *Beyene v. Irving Trust Co.*, 596 F. Supp. 438 (S.D.N.Y. 1984).

168. See *id.* at 439; cf. ISBP, *supra* note 9, art. 28.

169. ISBP, *supra* note 9, art. 28.

Similarly, in a fact pattern like that presented in a 1985 case where a beneficiary showed an incorrect insurance cover note number in his cable to the applicant's insurer (showing "4291" instead of "429711"),<sup>170</sup> the standard practice per the ISBP would be to dishonor the beneficiary's demand for payment. Certainly the reviewing bank would not be in a position to make the determination required to allow payment — that the error did "not affect the meaning of a word or sentence."<sup>171</sup> Also note that in keeping with the Independence Principle, the reviewing bank is under no obligation to determine if the error actually did result in any loss of insurance.<sup>172</sup>

## 2. Insurance Document

While it is correct to say that reviewing banks can show greater flexibility regarding noncompliance on banking issues, it must be remembered that standard practice requires a certain degree of flexibility on commercial issues also.<sup>173</sup> This is generally applicable where there can be no doubt that the noncompliance does not illustrate a breach of the underlying transaction. Such a situation is illustrated in Article 191 of the ISBP which states that "[a] requirement for 'Insurance for 110%,' or the like is deemed to be the minimum amount of insurance coverage required."<sup>174</sup> Thus, when faced with facts similar to those presented by *Sunlight Distribution, Inc. v. Bank of Communications*, where the LC required insurance at 110% of value, the beneficiary's over-insurance of the first shipment at 119% would require payment, but the under-insurance of the second shipment at 67% value would justify nonpayment.<sup>175</sup>

## 3. Title of Document

Prior to the ISBP, there was disagreement as to whether the title of a document must match the description of the document in the LC. For example, when an LC calls for the beneficiary to submit his "written certification that you continue to be liable as Surety on one or more bonds," is there strict compliance when the beneficiary submits an untitled written document?<sup>176</sup> The ISBP confirms that the standard practice is to allow that "[d]ocuments may be titled as called for in the credit, bear a similar title, or be untitled."<sup>177</sup> The critical issue is

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170. *Bank of Cochin, Ltd. v. Mfrs. Hanover Trust Co.*, 612 F. Supp. 1533, 1536 (S.D.N.Y. 1985).

171. ISBP, *supra* note 9, art. 28.

172. UCP 500, *supra* note 5, art. 13(a).

173. *See supra* Part III.B.2.

174. ISBP, *supra* note 9, art. 191.

175. *See Sunlight Distrib., Inc. v. Bank of Commc'ns*, No. 94 Civ. 1210, 1995 WL 46636, at \*3 (S.D.N.Y. Feb. 7, 1995).

176. *Employers Mut. Cas. Co. v. Tascosa Nat'l Bank*, 767 S.W.2d 279, 281 (Tex. App.—Amarillo 1989, writ denied).

177. ISBP, *supra* note 9, art. 43.

that “[t]he content of a document must appear to fulfill the function of the required document.”<sup>178</sup>

The above examples show that the application of the standard practices listed in the ISBP will promote compliance with the flexible strict compliance standard promoted by the UCC 5 and UCP 500. By following the principles set forth, banks reviewing LC documentation and courts hearing disputes regarding LC transactions can promote a consistent standard in LC law both in the United States and abroad.

## V. CONCLUSION

For centuries, LCs have played a substantial role in facilitating international trade by reducing the risk involved in such transactions.<sup>179</sup> Modernly, significant effort has been directed at increasing the usefulness of LCs as risk mitigating devices by clarifying the legal framework surrounding their use.<sup>180</sup> A major advancement was made with the synchronization of the UCC 5 and UCP 500 in the critical area of the standard of documentary compliance required to justify payment.<sup>181</sup> The current standards of the UCC 5 and the UCP 500 can both be said to be flexible strict compliance.<sup>182</sup> The degree of flexibility allowed to a reviewing bank in accepting documents with less than absolute compliance is greater when the non-compliance is related to a banking issue rather than a commercial issue.<sup>183</sup> Ultimately though, the flexibility exercised by the reviewing bank must be in compliance with standard banking practices.<sup>184</sup> The establishment of compliance with standard practice as the defining limitation on a reviewing bank's actions has made the development of reliable documented banking industry standard practice critically important.<sup>185</sup> The publication of the ISBP by the ICC in 2003 was a major achievement in this area and is certain to be a highly persuasive source for United States courts in determining standard practice.<sup>186</sup> United States courts will find the standard practices contained in the ISBP to be in agreement with the flexible strict compliance standard of the UCC 5 and UCP 500.<sup>187</sup> As such, the 200 standard practices contained in the ISBP should find ready acceptance in United States courts, and should be extended by

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178. *Id.*

179. *See supra* Part II.

180. *See supra* Part III.B.3.

181. *See supra* Part III.B.3.

182. *See supra* Part III.B.3.

183. *See supra* Part III.B.2.

184. *See supra* Part III.B.2.

185. *See supra* Part IV.A.

186. *See supra* Part IV.C.

187. *See supra* Part IV.D.

analogy to fact patterns not specifically addressed in the ISBP whenever practical.<sup>188</sup>

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188. *See supra* Part IV.D.