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ARTICLE FIVE: LETTERS OF CREDIT

WILLIAM C. EDWARDS, JR.*

A discussion of Article 5 of the Uniform Commercial Code is a unique challenge for two reasons. First, it is concerned with letters of credit for which there is no prior North Carolina law.¹ Second, the absence of statutory law as well as court decisions implies there has been little need beyond the academic to study the legal aspects of letters of credit in North Carolina. The likely result of this is that most readers will be relatively unfamiliar with these financial instruments.

The conclusion may be drawn from these observations either that letters of credit are seldom used in this state or that there are some underlying rules that have served to prevent the occurrence of litigation. Actually, letters of credit are involved in commercial transactions somewhere in North Carolina every day, although the number of firms frequently doing business with them probably does not exceed 150. The rules followed have been developed over the years by the international banking institutions and are embodied in "Uniform Customs and Practice For Documentary Credit."² This document is really a tabulation of what bankers in the major trading countries of the free world have agreed are the universal customs for letter-of-credit operations and the ones to which they have agreed to subscribe.

The Uniform Customs and Practice has no force of law, but it has been very successful in eliminating most of the areas of uncertainty that would exist if banks had to comply with the differing laws or customs of individual nations. That is not to say it has eliminated litigation. It is not a perfect set of rules at all, but it is so well understood and widely used by the parties to letters of credit that the instances of litigation have been relatively few. This

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¹ LEGISLATIVE COUNCIL, NORTH CAROLINA ANNOTATIONS: THE UNIFORM COMMERCIAL CODE 217 (1965).

² THE INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDIT, BROCHURE No. 222 (1962 rev.) [hereinafter cited as UNIFORM CUSTOMS AND PRACTICE].

is true even in New York, which has been the center of letter-of-credit transactions for many years.³

It is particularly interesting to note the recognition New York gives to the effectiveness of the Uniform Customs and Practice by the so-called New York Amendment. This is a subsection added to the Uniform Commercial Code which removes the application of Article 5 to a letter of credit made subject in whole or in part to the Uniform Customs and Practice unless otherwise agreed.⁴

The opinion of this writer is that New York has acted correctly, and furthermore that Article 5 should be eliminated entirely. It adds little of significance which cannot be incorporated in the Uniform Customs and Practice. More importantly, it is concerned with an instrument used primarily in international transactions where uniformity among the nations is much more desirable than uniformity among the states.

The fact remains, however, that North Carolina has adopted Article 5 without the subordinating amendment applicable in New York, and the article's provisions should be understood in this state. To reach a better understanding, it is well to be familiar with the definition of a letter of credit, the purposes it serves, and the procedures followed from the inception of a transaction to its completion.

A letter of credit may be said to be the written undertaking of its issuer to pay a named beneficiary a specified sum of money upon his performance of certain conditions stated in the credit. Its acceptance by the beneficiary rests upon his estimation of the ability of the issuer to honor the undertaking. For this reason, large banks whose names are well known internationally issue the great majority of letters of credit. Only two banks in North Carolina issue credits on a direct worldwide basis. The others serve their customers by arranging with one of these two banks or a New York bank to issue credits in their behalf.

In essence, then, a letter of credit substitutes the credit standing of a well-known bank for that of its customers who may be individuals, commercial firms, or other banks. It is used primarily to facilitate the shipment of goods, although it has other uses. It

³ Harfield, *Code Treatment of Letters of Credit*, 48 CORNELL L.Q. 92, 94 (1962).

⁴ See NEW YORK COMMISSION ON UNIFORM STATE LAWS, SUPPLEMENTARY REPORT TO THE LEGISLATURE OF THE STATE OF NEW YORK 10 (1962).

appears in both international and domestic transactions, but because it is more difficult for buyers and sellers in different countries to be well acquainted with each other, it is found much more frequently in the international ones.

A description of an import transaction financed with a letter of credit should contribute to an understanding of the procedures followed by the buyer, seller and bank. Let us say that a North Carolina firm is negotiating a purchase of steel pipe from a German supplier and that they have agreed upon such details as price, quantity, specifications of manufacture, etc. Further, let us say the pipe to be purchased is to be sold for 50,000 dollars and will take three months to manufacture. With these circumstances at hand, which are fairly typical in an international transaction, the next matter to be considered is the terms of payment.

The seller, although in another country, may be able to acquire general information about the buyer by requesting his bank to make inquiries with banks in the buyer's city. He has other sources of information, also, but it is unlikely he will be successful in learning enough about the actual financial condition of the buyer to permit an evaluation of the buyer's ability to pay. Accounting practices vary so widely among countries that it is often difficult to make this evaluation, even with a financial statement.

Another risk the seller must consider is that the buyer may decide to cancel the order before delivery of the pipe. The probability of loss to the seller in that event is even greater if the pipe is to be made according to specifications for which there is little demand elsewhere. The risk of cancellation can be minimized by an appropriate provision in a sales contract, but an irrevocable credit will serve the purpose better. With these things in mind, the seller now decides he can safely agree to the sale only against cash in advance or under an irrevocable commercial letter of credit and informs the buyer accordingly.

The buyer is probably unwilling to trust the seller to perform as agreed after the seller receives the cash, and besides, the funds can be profitably employed at home during the time required for the manufacture of the pipe. He considers his financial standing to be favorably regarded at his bank and, as a result, may arrange for a letter of credit without tying up cash. Comparing the two alternatives the buyer chooses the letter of credit. He then notifies the

seller of his agreement with the requirement for a letter of credit and requests his bank to issue it.

The bank must review the request as an extension of credit to the buyer because it will have to honor the proper demands of the seller for payment under the letter of credit it issues, regardless of the ability of the buyer to provide reimbursement. We will assume, for the sake of simplicity, that the bank is satisfied with the buyer's financial condition and agrees to issue the credit. The bank will then ask the buyer to complete the bank's form of application and agreement for commercial letter of credit. This is always necessary because the application portion is a record of such essential data as the beneficiary's name and address, the amount of the credit, and the various conditions the buyer wants included in the letter of credit. The agreement portion of the form bears the buyer's signature, and it serves as the contract between the buyer and his bank.

Using the application as a guide, the bank proceeds to prepare the letter of credit.⁵ All banks follow much the same form of importation credit with only minor variations. A credit number is always assigned for reference purposes, and the beneficiary is required to include the reference number on his drafts as a condition of payment.

The original and one copy of the letter of credit are ordinarily forwarded by the issuing bank to a correspondent bank located near the beneficiary. A covering form letter is also sent requesting the correspondent to retain the copy of the credit and to forward the original to the beneficiary. The correspondent bank is termed the notifying bank, and it is in a position to authenticate the signature placed on the credit by the issuing bank. It can also inform the beneficiary about the size and reputation of the issuing bank, if necessary.

The beneficiary should examine the conditions of the letter of credit as soon as he receives it to determine whether he will be able to satisfy all of them within the prescribed time limit. If difficulty is anticipated, he may request the buyer to authorize the issuing bank to forward appropriate amendments modifying the original conditions. Amendments may be made at any time during the life of an irrevocable credit but only with the consent of all the parties.⁶ If the beneficiary has requested an amendment, the buyer may show

⁵ See Appendix for an example of a letter of credit as it would be issued in this hypothetical transaction.

⁶ UNIFORM CUSTOMS AND PRACTICE, art. 3.

consent by instructing the issuing bank to issue it. The issuing bank, in doing so, signifies its consent.

With the acceptance by the beneficiary of the original credit or the amended one, three independent contracts are in existence. The sales contract is a contract between the buyer and seller. The application and agreement for the letter of credit is a contract between the buyer and the issuing bank, and the letter of credit is a contract between the issuing bank and the beneficiary.

The beneficiary is now ready to proceed with the manufacture of the pipe and, subsequently, to have it loaded aboard the carrying vessel. When this is accomplished, he assembles all of the documents required by the credit. He may either present them to a local bank for negotiation or present them directly to the issuing bank for payment.

This transaction involves a credit expressed in dollars and, in accordance with general practice, the issuing bank has included a clause in the credit extending its privileges of payment to endorsers and holders in due course in addition to the drawer. The reason for this is that dollars are a foreign currency to this beneficiary. He needs the equivalent of his dollar draft in his own currency, and with this clause in the credit he has the option of using anyone willing to negotiate his draft at the most favorable rate of exchange. The currency to be used for settlement of an international transaction is decided between the buyer and seller. Had the credit been expressed in the beneficiary's own currency, the issuing bank would have specified in the credit the name and address of a bank in the beneficiary's country to serve as the paying bank.

The rule followed relative to the liability of the drawer on his draft is that he remains liable to a negotiating bank if the documents are not honored by the paying bank unless the negotiating bank is willing to purchase the draft without recourse. On the other hand, when the paying or drawee bank named in the credit pays the draft, recourse is terminated because by virtue of payment it has acknowledged compliance with the conditions of the credit.

In our example we will assume the beneficiary negotiates his draft at the bank which notified him of the credit. This bank will pay the beneficiary an equivalent amount of German marks at the rate of exchange prevailing at that time and forward the draft and shipping documents by airmail to the issuing bank.

Upon receiving the documents, the issuing bank must examine them carefully to assure itself they are in exact compliance with the conditions of the credit. We have already seen that payment of the draft will acknowledge compliance on the part of the beneficiary and that there will be no recourse to him under the letter-of-credit contract. However, if error exists in the decision to pay, the bank must still reckon with the contract it has with the buyer. This situation obviously calls for great care on the part of the issuing bank, and it is here that the many provisions of the Uniform Customs and Practice relative to the contents of the documents have served so well to prevent misunderstanding and possible litigation. They are too numerous to mention in our example, but a review of them is recommended for the student of letter-of-credit law.

Again, for simplicity, we will assume the documents are in order. The negotiating bank is thereupon paid in accordance with the settlement instructions it sent with the documents. This is usually by a credit to its account on the books of the issuing bank, or if no account exists there, the issuing bank is instructed to remit its payment to another bank where the negotiating bank has an account. This payment is offset by a debit to the buyer's account or by delivery of his check to the bank. The documents are then forwarded to him since he will need some of them to claim the pipe upon arrival of the carrying vessel and effect its entry through customs, while the others will be used within his business.

This transaction relative to the letter of credit has at this point been completed. Instances of nonconformance by the parties have not been brought into the example in order to present a clearer picture of events as they occur routinely in proper sequence. Now let us see how the provisions of Article 5 are applied to it.

Sections 5-101 and 5-102 are introductory and need no comment here.

We have, within the context of their appearance in the example, explained the terms appearing in subsection 5-103(1), with the exception of "confirming bank."⁷ If the German beneficiary had not been satisfied with the standing of the issuing bank, he may have requested that the notifying bank confirm the credit. The request would pass from the beneficiary to the buyer who would instruct the opening bank to arrange for the German bank's confirmation.

⁷ G.S. § 25-5-103(f).

The act of confirming the credit would add to it the undertaking of the German bank to honor the beneficiary's drafts, thereby giving him the assurance of both banks. The confirming bank views its confirmation as an extension of credit to the issuing bank, and arrangements for such credit must be negotiated between them. Foreign bank confirmations of American bank credits are seldom seen but the reverse situation is quite common. The provisions of section 5-103 are also covered in the Uniform Customs and Practice.⁸ The latter defines "irrevocable credit" and "revocable credit" so as to specify exactly how it may be determined whether a credit is irrevocable or not. Subsection 5-103(1)(a) fails to do this.

Section 5-104 regarding signing requirements for letters of credit states practices that have always been followed and signatures usually appear as indicated in the illustration.⁹ Our example concerns a credit forwarded by airmail but, if requested by the buyer, it could have been opened by cable. The message would include most of the details of the airmail version with the exception of some of the standard printed clauses in the airmail form which are omitted in the cable but understood by the notifying bank to be applicable. These would be included, however, in the advice form prepared by the notifying bank for the beneficiary. The authentication of the cable referred to in subsection (2) of section 5-104 is performed by means of private arrangements between the banks.

Section 5-105 on consideration again states the accepted practice. There is no case in which a letter of credit has been held invalid for want of consideration.¹⁰

Section 5-106 dealing with the time and effect of establishment of credit has no counterpart in the Uniform Customs and Practice except in subsection (4) regarding modification or revocation of a revocable credit, and there the two are inconsistent. In our example, the credit is irrevocable and the subsection does not apply. Had it been revocable, the issuing bank would have had to inform the notifying bank of a modification or revocation prior to a negotiation, payment or acceptance abroad of the beneficiary's draft in order to relieve itself of obligation under the unmodified or unrevoked terms of the credit. In this respect, there is compliance with subsection (4). However, under the international rule, if the credit

⁸ UNIFORM CUSTOMS AND PRACTICE, arts. 1-3.

⁹ See Appendix.

¹⁰ Harfield, *supra* note 3, at 99.

had not been forwarded to the beneficiary through a notifying bank, it could have been modified or revoked at any time without prior notice to any person authorized to honor or negotiate under the terms of the original credit.¹¹ Such notice would be required in subsection (4). This presents no real problem to the banks because it merely makes it advisable for credits always to be sent through a notifying bank. This is usually done anyway.

Section 5-107 referring to advice of credit, confirmation and error in statement of terms has already been partially dealt with. It is consistent with the Uniform Customs and Practice and needs no additional comment.

Section 5-108 contains provisions for "notation credits." The illustrated credit falls within the definition of this term, but the term itself has been unknown or certainly uncommon among banks. The clause appearing in the illustration bringing it within the scope of this term provides that a negotiating bank must endorse the amount of its payment to the beneficiary on the reverse of the credit. It further provides that the credit itself must accompany the draft if it is presented directly to the issuing bank by the beneficiary.

The international practice is not to require evidence of compliance with this clause from negotiating banks, although its intent is to prevent double negotiations by a beneficiary. Subsection (2)(a) of section 5-108 provides that the negotiating bank, in the instance of our example, acquires a right to honor only if it makes the appropriate notation or endorsement and warrants this fact to the issuer. Subsection (2)(b) provides that the issuing bank may delay honor of the draft for a reasonable time up to thirty days unless it receives the negotiating bank's signed statement that it has made the appropriate notation or unless it receives the credit itself. The force of this subsection and, consequently, the force of the section appears to be weakened by stating "the issuer may delay honor" instead of saying "the issuer must delay honor."

Banks have always considered that the burden of loss resulting from a double negotiation should fall on the bank negotiating the fraudulent draft. This, in their opinion, is simply following the old adage "know your endorser." Should subsection (2) prove burdensome, banks will probably drop the requirement of notation from their letters of credit in order to bring them in line with sub-

¹¹ UNIFORM CUSTOMS AND PRACTICE, art. 2.

section (3), which is more consistent with the practice being followed. In any event, the occurrence of double negotiation has been almost nonexistent over the years.

Section 5-109 concerns itself with the issuing bank's obligation to its customer. This should be the heart of Article 5 because it refers to the issuer's responsibility to examine documents presented for payment. However, it fails to provide the essential guidelines for the examination as does the Uniform Customs and Practice.¹² It implies, but does not state, that the issuer deals in documents and not in goods.¹³ This point is often, and perhaps conveniently, overlooked by buyers who discover upon the arrival of the goods that they are not as represented in the documents. Since documents arrive by airmail, they are paid well in advance of the arrival of the goods. Payment cannot be deferred until goods arrive unless the credit so states, and this is seldom permitted. The buyer in the event of a fraudulent or otherwise unsatisfactory shipment must seek recovery under the sales contract. He must not rely on the letter of credit for this purpose because even though it grows out of the sales contract, it is independent of that contract.

Subsections (1) and (2) of section 5-109 relieve the issuer from certain acts or omissions and from responsibility for such things as forged or falsified documents, but do not go so far as the Uniform Customs and Practice in respect to the issuer's responsibilities.¹⁴

Subsection (3), surprisingly, gives a nonbank issuer the privileges of the section without the responsibilities of conformance to any banking usage of which it has no knowledge. Banks must accept these responsibilities because they are the developers of banking usage.

Section 5-110 expresses in subsection (1) the availability of credit in portions and in subsection (2) the presenter's reservation of lien or claim. Partial shipments are permissible under the Uniform Customs and Practice unless the credit states to the contrary¹⁵ and is consistent with subsection (1). The provisions of subsection (2) have no written counterparts but state what has been the understanding of bankers.

¹² *Id.*, arts. 13-31.

¹³ See *Maurice O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925).

¹⁴ UNIFORM CUSTOMS AND PRACTICE, arts. 4-12.

¹⁵ *Id.*, arts. 33-34.

Section 5-111 deals with warranties by beneficiaries, negotiating, advising, confirming, collecting or issuing banks presenting or transferring a draft under a credit. It is consistent with the practices being followed. We have discussed the right of recourse held by a negotiating bank against the beneficiary and the acknowledgment the issuing bank gives as to conformance by the beneficiary to the conditions of the credit when the bank makes payment. These comments do not cover all the aspects of this section but should be sufficient to illustrate its consistency with the practices followed.

Section 5-112(1) specifies the time the issuing bank has to honor a draft before dishonor is presumed to occur from its failure to honor. The subsection defines the point at which the time begins and at which it ends. The Uniform Customs and Practice is silent on this subject, and some confusion exists among bankers and the other parties to a credit as to the time that should be allowed for honor. In this respect, article 5 contributes a rule that is needed.

Subsection (2) provides for the disposition of documents after dishonor and is consistent with international practice.¹⁶

Subsection (3) defines "presenter," but the definition neither adds nor subtracts from the general understanding of the term.

Section 5-113 confers on banks the right to give indemnities to others in behalf of themselves or other parties in order to induce honor, negotiation or reimbursement when there are defects in documents which would otherwise prevent these acts from occurring. Subsection (2)(b) sets forth the time an indemnity remains effective unless notice of objection by the ultimate customer is given and further sets forth the manner in which notice of objection must be given. This section appears to enable banks to act as surety to this limited extent. Heretofore, this was considered *ultra vires*. Since it provides banks in states where the Uniform Commercial Code has been adopted with a useful device serving to speed completion of some transactions, it is commendable. Further, it brings the use of this form of indemnity into the general custom followed in other countries where banks are allowed much more latitude in respect to indemnities.

Section 5-114 states the issuer's duty and privilege to honor a draft drawn under its credit and its right to reimbursement. Subsections (1), (2), and (3) put into law the practice followed, but

¹⁶ *Id.*, art. 8.

one not stated in the Uniform Customs and Practice. Subsections (4) and (5) have been omitted by North Carolina as they should be.

Section 5-115 provides the remedy for improper dishonor or anticipatory repudiation by an issuer in respect to the person entitled to honor. We have already mentioned that an irrevocable letter of credit, to which this section is applicable, may not be revoked or modified without prior consent of all the parties. Further, we have said it is a contract between the issuing bank and the beneficiary. Obviously, the person entitled to honor under the contract should also be entitled to remedy in the event of repudiation or wrongful dishonor. This section serves that purpose and fills a vacuum existing in the Uniform Customs and Practice and generally in the statutory laws and judicial decisions in other states.

Section 5-116 deals with the transfer and assignment of letters of credit. It can readily be seen that a letter of credit is not a negotiable instrument. International practice does, however, provide for the transfer of its responsibilities and privileges, and this is set forth in the Uniform Customs and Practice.¹⁷

Subsection (1) is entirely consistent with the Uniform Customs and Practice. Subsection (2) discusses only the transfer of proceeds, *i.e.*, privileges without the corresponding transfer of responsibilities. It permits a transfer of a contract right without contemplating the transfer of the contract in its entirety. Subsection (1) states the right to draw under a credit can be transferred only if expressly designated in the credit itself and, therefore, implies the responsibilities of the transferee must be identical to those of the original beneficiary. By contrast, subsection (2) gives the right to transfer the proceeds even though the credit does not state it is transferable or even if it specifically prohibits transfer. This gives recognition without adequate regulation to a troublesome and potentially hazardous practice. The Uniform Customs and Practice, in effect, is silent regarding the subject covered by subsection (2) and, consequently, has offered no assistance either.

As a practical matter, it would be more expedient to limit section 5-116 to subsections (1) and (3). Even though they contribute nothing new, they are at least harmless.

Section 5-117 gives the persons entitled to payment under a letter of credit preference over depositors and other general creditors

¹⁷ *Id.*, art. 46.

of an insolvent bank as to funds or collateral it is holding for the purpose of such payment. Further, it gives the owner of the funds or collateral the same preference as to their refund if the credit or the beneficiary's unused rights under it are surrendered. The owner is also entitled to receive all documents in payment of which such funds or collateral are utilized.

This section enters an area of law relative to insolvency of banks, but no attempt will be made here to judge its consistency with prior North Carolina law or other law. It is considered consistent with New York law and the law of the Second Federal Circuit.¹⁸

This discussion has not attempted to cite case laws in other states dealing with letters of credit. There are two publications containing numerous references to decisions in England and New York which together represent the most comprehensive body of letter of credit law. The reader interested in a study of the common law is referred to them.¹⁹

Article 5 brings to North Carolina a law that has heretofore been nonexistent. As we have seen on the other hand, the international rules developed from many years of experience with letters of credit have fostered a common understanding among the various parties of their rights and responsibilities. Article 5 is probably not necessary for North Carolina or any other state because of these rules, but because it as yet does not contradict materially the provisions of the Uniform Customs and Practice, its adoption creates no real problem.

¹⁸ Harfield, *supra* note 3, at 105.

¹⁹ GUTTERIDGE & MEGRAH, *THE LAW OF BANKERS' COMMERCIAL CREDITS* (2d ed. 1955); WARD & HARFIELD, *BANK CREDITS AND ACCEPTANCES* (4th ed. 1958).

APPENDIX

International Letter of Credit
 BANK AND TRUST COMPANY
 WINSTON-SALEM 1, NORTH CAROLINA
 U.S.A.

CABLE ADDRESS

INTERNATIONAL
DEPARTMENT

January 24, 19--

Irrevocable Commercial Letter of Credit No. 00000
--

ADVISED THROUGH

German Steel Products GmbH
 Lindenstrasse 26
 Hamburg, Germany

Deutsche Bank A.G. Postfach 778 2000 Hamburg 1, GERMANY

Gentlemen:

We hereby establish our irrevocable credit in your favor by order of Tarheel Importers, Inc., Winston-Salem, North Carolina and for account of same

for a sum or sums not exceeding a total of

*Fifty Thousand and 00/100 U.S.Dollars** (US\$50,000.00)***

available by your drafts on us

at Sight to be accompanied by

- 1) Signed commercial invoice in quadruplicate stating that it covers Steel Pipe per Sales Contract No. E-1201 dated January 15, 19--, CIF Wilmington, North Carolina.
- 2) Complete set clean onboard ocean bills of lading to order of Wachovia Bank and Trust Company marked notify Eastern Freight Forwarders, Inc., North Carolina State Docks, Wilmington, North Carolina.
- 3) Special Customs Invoice in duplicate.
- 4) Marine and War Risk Insurance Policy or Certificate in duplicate. Shipment to be made from Hamburg, Germany to Wilmington, North Carolina.

Partial shipments are not permitted.

Transshipment is not permitted.

Bills of lading to be dated not later than April 30, —.

All negotiation charges are for your account.

All drafts drawn under this credit must be marked: "DRAWN

UNDER BANK AND TRUST COMPANY CREDIT NO. 00000."

The amount and date of negotiation of each draft must be endorsed on the reverse hereof by the negotiating bank or banker. If any draft is not negotiated, this credit and all documents as specified must accompany the draft.

Except as otherwise expressly stated herein, this credit is subject to the Uniform Customs and Practice for Commercial Documentary Credits (1962 revision) International Chamber of Commerce Brochure No. 222.

We hereby agree with the drawers, endorsers, and bona fide holders that all drafts drawn under and in compliance with the terms of the credit will be duly honored on due presentation and delivery of the documents as specified to the drawee if negotiated or presented on or before May 10, —.

Yours very truly,

(S P E C I M E N)