

SLOPING IN THE RIGHT DIRECTION: A FIRST LOOK AT THE UCP 600 AND THE NEW STANDARDS AS APPLIED TO VOEST- ALPINE

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INTRODUCTION

INTERNATIONAL BUSINESS HAS GROWN SUBSTANTIALLY in the past decade and continues to grow in importance globally.¹ As a business engaged in an international transaction must consider translation risks, political turmoil, exchange rate fluctuations, and buyer or seller insolvency,² the financial strength of a company affects its ability to buy and sell products in the global marketplace. The capacity of businesses to engage in such transactions is of great importance, as the majority of global business transactions involve the export and import of goods. In these transactions, it is usually the case that the buyer locates a product that it wishes to purchase from a foreign country and the seller arranges to ship the goods requested.³ Although the transaction itself may seem simplistic, different mercantile laws, payment structures, and changes in currency evaluation play a major role in the execution of the sale.⁴

For example, a seller in Germany may want to sell automobile parts to a buyer in the U.S. The parties have never transacted before and both have concerns regarding the sale. The buyer is concerned with the quality of the parts, whether they conform to contract specifications, and, if advance payment is required, that the seller will even ship the goods.⁵ If the German seller pays for the packaging and shipment of the

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¹ See generally Ewell E. Murphy, Jr., "Coming to Grips with Globalization" (Winter, 2002) 11 *Currents: Int'l Trade L.J.* 3.

² See generally Charles E. Meacham, "Foreign Law in Transactions Between the United States and Latin America" (2001) 36 *Tex. Int'l L.J.* 507 at 509-512.

³ See generally Murphy, Jr., *supra* note 1 at 3.

⁴ See generally Marcia A. Wiss & Robert H. Lantz, "Issues in Negotiating and Structuring International Project Finance Transactions," reprinted in (2006) 2 *Int'l Bus. Trans. Latin Amer.* 234 at 319 (on file with author).

⁵ See generally Gao Xiang & Ross P. Buckley, "The Unique Jurisprudence of Letters of Credit: Its Origin and Sources" (2003) 4 *San Diego Int'l L.J.* 91 at 96.

goods and the buyer becomes insolvent, or refuses to pay for the goods, he risks the further expense of litigation in an unfamiliar jurisdiction or the expense of finding another American buyer.⁶ Therefore, the seller wants assurances that the buyer is financially secure and is able to make payment once the parts ship.⁷ To minimize the concerns of both parties, they may agree to use a financial instrument known as a letter of credit,⁸ a common and accepted method of guaranteeing and obtaining payment in international sales contracts.⁹

This Comment focuses on the new changes to the compliance principal presented within the *Uniform Customs and Practice for Documentary Credits* (“UCP”) 600 that take effect in July 2007.¹⁰ Part I of this comment introduces the letter of credit, and provides background on the types of letters of credit available, the parties and transactions involved, and the key principles of the letter of credit. Part I also concentrates on the domestic and international laws that govern a letter of credit and considers two letter of credit cases decided in the U.S. Part II analyzes these cases in the context of the *UCP 600* and illustrates how the *UCP 600* will affect the case law. Part III provides recommendations for the judicial standard of review in light of the *UCP 600* and banks’ overarching fears.

⁶ See generally *ibid.*

⁷ See Kyle Roane, “Note: Hanil Bank v. PT. Bank Negara Indonesia (persero): Continuing The Quandary Of Documentary Compliance Under International Letters Of Credit” (2004) 41 Hous. L. Rev. 1053 at 1056.

⁸ See generally Gao Xiang & Buckley, *supra* note 5 at 96. See generally *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff’d*, 288 F.3d 262 (5th Cir. 2002) [*Voest-Alpine I*]. The letter ensures the seller payment upon presentation of stipulated documents showing compliant delivery, and provides assurances to the buyer that the bank will not pay the seller until the goods are delivered and comply with the letter of credit. See Roane, *supra* note 7 at 1056-1057. Letters of credit are defined by the *Uniform Commercial Code* (“UCC”) and the *Uniform Customs and Practice for Commercial Documentary Credits* (“UCP”). See *Uniform Commercial Code*, § 5-102 at § 5 (2002) [U.C.C.]; International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits*, § 2 (1993) [UCP 500].

⁹ See Peter Linzer, “Non-['Un-?'] American Law and the Core Curriculum” (1998) 72 Tul. L. Rev. 2031 at 2040; 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” (1996) 41 Loy. L. Rev. 735.

¹⁰ International Chamber of Commerce, *Uniform Customs and Practice for Documentary Credits*, Pub. No. 600 (rev. 2006) [UCP 600].

I. BACKGROUND

THE LETTER OF CREDIT IS A CREATION of the business and finance industries whereby a neutral party, such as a bank, substitutes its creditworthiness for that of the buyer and simultaneously assures timely payment of any amount owed under the contract for the seller.¹¹

The standard letter of credit contains the party names, payment amount, expiration date, and description of the merchandise, and specifies the documents, special conditions, and instructions that it requires for payment.¹² A letter of credit is either a commercial letter of credit or standby letter of credit,¹³ and typically involves at least three parties and three independent contracts.¹⁴ This comment focuses on the commercial letter of credit, which is a payment mechanism, rather than the standby letter of credit, which serves as a guarantee.¹⁵ Presently, the two major sources of law governing commercial letters of credit are Article 5 of the *Uniform Commercial Code* (“UCC”) and the *Uniform Customs and Practice for Documentary Credits* (“UCP”).¹⁶

A. The Basics of the Commercial Letter of Credit

Today, commercial letters of credit play an important role in international commerce.¹⁷ The commercial letter of credit is a payment instrument used for international sales of goods, and has a high degree

¹¹ See *Voest-Alpine Int'l Corp. v. Chase Manhattan Bank*, N.A., 707 F.2d 680 at 682 (2d Cir. 1983); see also *Voest-Alpine I*, 167 F. Supp. 2d 940 at 943 (citing *Alaska Textile Co., Inc. v. Chase Manhattan Bank*, N.A., 892 F.2d 813 at 815 (2d Cir. 1992)). See generally Dorothea W. Regal, “What Lawyers Need to Know About U.C.C. Article 5 2003: Letters of Credit” (2003) 847 Prac. L. Inst. 13 at 19.

¹² See Beat U. Steiner, “An Updated Primer on Letters of Credit” (April, 1999) 28 Colo. Law. 5 at 8.

¹³ See Gao Xiang & Buckley, *supra* note 5 at 100, for a discussion of how standby letters of credit operate differently than commercial letters of credit. See also Leslie King O’Neal, “They’re Back: Letters of Credit Provided in Lieu of Surety Bonds” (1993) 13 Construction Law. 3.

¹⁴ See Part I.A, below.

¹⁵ Compare Part I.A-B discussion, below, and David J. Barru, “How to Guarantee Contractor Performance on International Construction Projects: Comparing Surety Bonds and Standby Letters of Credit” (2005) 37 Geo. Wash. Int'l L. Rev. 51 at 67 with Joshua E. Luber, “Letters of Credit and 11 U.S.C. § 502(B)(6): The Full Analysis—Why the Fifth Circuit’s Decision in *Re Stonebridge* is Only Part of the Answer” (2006) 22 Emory Bankr. Dev. J. 679 at 680.

¹⁶ See Part I.C, below.

¹⁷ See Tom Pifer, “The ICC Publication of the International Standard Banking Practice (ISBP) and the Probable Effect on United States Letter of Credit Law” (2006) 12 Tex. Wesleyan L. Rev. 631 at 634 (citing “ICC Approves ISBP” *Trade Finance: The Global Magazine for Export and Commodity Finance* (Nov. 2002) at 4.

of commercial utility because it benefits all parties concerned.¹⁸ There are typically three parties involved in the formation of a letter of credit.¹⁹ Using the example above, the German seller is the “beneficiary,”²⁰ the American buyer is the “applicant” or the “customer,”²¹ and the bank issuing the letter of credit on behalf of the buyer is the “issuer” or “issuing bank.”²²

There are also three separate transactions that create a letter of credit: (1) the underlying contract between the buyer and seller for the purchase and sale of goods; (2) the agreement between the issuer and its customer; and (3) the bank’s obligation to pay the seller under the letter of credit itself.²³ These transactions are independent of each other and do not occur simultaneously.²⁴

1. The First Transaction: The Buyer and the Seller

The underlying transaction is the contract between the buyer and the seller.²⁵ Traditional contract law governs this transaction.²⁶ The contract must stipulate that the buyer will make payment using a letter of credit²⁷ and must indicate the law to govern the letter of credit transactions, which in most instances is the *UCP*.²⁸

2. The Second Transaction: The Buyer and the Bank

The buyer and the bank form the second transaction, whereby the bank issues the letter of credit in favor of the seller, and the buyer

¹⁸ See Gao Xiang & Buckley, *supra* note 5 at 97.

¹⁹ See generally *ibid.*; Peter H. Weil, “Asset Based Financing 2006 Letters of Credit” (2006) 886 Pract. L. Inst. 407 at 409.

²⁰ See *U.C.C.*, *supra* note 8, § 5-102; *UCP 500*, *supra* note 8, § 2.

²¹ See *U.C.C.*, *ibid.*; *UCP 600*, *supra* note 10, § 2 (using the term “applicant” rather than customer and defining applicant as “the party on whose request the credit is issued”).

²² See *U.C.C.*, *ibid.*; Compare with *UCP 600*, *supra* note 10, § 2 (making no mention of the “other person” described in the *UCC* and defining an issuing bank as “the bank that issues a credit at the request of an applicant or on its own behalf”).

²³ See George P. Graham, “Note: International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?” (2001) 47 Wayne L. Rev. 201 at 210; see generally Gao Xiang & Buckley, *supra* note 5 at 96-97; *Blonder & Co. Inc., v. Citibank, N.A.*, 28 A.D.3d 180; 808 N.Y.S.2d 214 (2006).

²⁴ See Part I.B, below.

²⁵ See Gao Xiang & Buckley, *supra* note 5 at 97.

²⁶ See Regal, *supra* note 11.

²⁷ See *UCP 600*, *supra* note 10, art. 1.

²⁸ See Part I.C.2, below; Peter Mendell, “Managing International Transactions”, online: Mondaq <<http://www.mondaq.com/article.asp?articleid=32143>>.

reimburses the bank when payment is made.²⁹ Typically, the bank has a relationship with the buyer and secures a partial payment and a commission before drafting the letter of credit.³⁰ A copy of the letter of credit document is sent to the beneficiary directly or to the beneficiary's bank—the “intermediary bank”³¹ or the “advising bank.”³²

3. The Third Transaction: The Bank and the Seller

The third transaction occurs between the bank and the seller, and involves the letter of credit itself.³³ Commentators believe that document presentation is the most important stage of the letter of credit transaction because current jurisprudence requires banks to adhere to a strict compliance standard when checking documents.³⁴ Additionally, if a bank determines that documentary discrepancies exist, the bank may elect to dishonour the letter of credit or ask the applicant for a waiver of the documentary requirements.³⁵

B. The Fundamental Principles of Letters of Credit

At the core of the letter of credit are the principles of independence and strict compliance.³⁶ First, the principle of independence establishes that each contract is completely independent of the next.³⁷ Therefore, a letter of credit is independent of the underlying sales contract, and both the banks and the parties must construe and perform the letter of credit in accordance with their own terms, without

²⁹ See Gao Xiang & Buckley, *supra* note 5 at 97. See generally *Voest-Alpine I*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002).

³⁰ See Gao Xiang & Buckley, *ibid.* at 98; see generally Boris Kozolchyk, *Commercial Letters of Credit In The Americas* (Matthew Bender & Company Inc. ed., 1966) at 141.

³¹ See *U.C.C.*, *supra* note 8, § 5-102.

³² See *ibid.*; see also *UCP 600*, *supra* note 10, art. 2. See generally Kozolchyk, *supra* note 30 at 143.

³³ See Gao Xiang & Buckley, *supra* note 5 at 97.

³⁴ See *infra* notes 81-105 and accompanying text (analyzing the compliance principle in further depth); see also Roberto Bergami, “Discrepant Documents and Letters of Credit -- The Banks’ Obligations Under UCP 500” (2003) 7 *Vindobona J. Int’l Com. L. & Arb.* 105 at 118; see also Boris Kozolchyk, “Strict Compliance and the Reasonable Document Checker” (1990) 56 *Brook. L. Rev.* 45 at 47.

³⁵ See *infra* note 111 and accompanying text.

³⁶ See Gao Xiang & Buckley, *supra* note 5 at 119-124.

³⁷ See *ibid.* at 120; Joseph J. Ortego & Evan H. Krinick, “Letters of Credit, Benefits and Drawbacks of the Independence Principle” (1998) 115 *Banking L.J.* 487 at 488.

reference to any other agreement or transaction.³⁸ The independence principle is codified in Article 5 of the *UCC*³⁹ and has been acknowledged in American courts.⁴⁰

Second, the principal of compliance dictates that documents presented to the bank must comply with the letter of credit requirements.⁴¹ Document examination and rejection is therefore one of the most important topics concerning letters of credit, especially as empirical studies have shown that document discrepancies are the rule and perfect tenders are the exception.⁴²

C. The Laws Governing the Commercial Letter of Credit

By codifying the commercial letter of credit, businessmen and counsel can ensure that parties to transactions are operating under the same assumptions.⁴³ This increases the likelihood of delivery and payment in a sales transaction.⁴⁴ As mentioned, the two major sources of law presently governing commercial letters of credit are Article 5 of the *UCC* and the *UCP 500* generally.⁴⁵

1. Domestic Law: UCC Article 5

The U.S. is the only country with an extensive specific regulation for letters of credit.⁴⁶ Article 5 of the *UCC* is a uniform statutory scheme governing letters of credit.⁴⁷ International practice, as reflected in the *UCP*, heavily influenced the 1995 revision of *UCC* Article 5.⁴⁸

³⁸ See *UCP 600*, *supra* note 10, art. 4. (directing that an issuing bank should discourage any attempt by the applicant to include, as an integral part of the credit, copies of the underlying contract, performance invoice and the like); see also Ortego & Krinick, *ibid.*

³⁹ See *U.C.C.*, *supra* note 8, § 5-103(d).

⁴⁰ For an example, see *Banco Nacional De Mexico S.A. v. Societe Generale*, 820 N.Y.S.2d 588 (2006).

⁴¹ See Gao Xiang & Buckley, *supra* note 5 at 122; see also Elizabeth O. I. Adodo, "Conformity of Presentation Documents and a Rejection Notice in Letters of Credit Litigation: A Tale of Two Doctrines" (2006) 36 H.K.L.J. 309.

⁴² See Kozolchyk, *supra* note 34 at 47.

⁴³ See Pifer, *supra* note 17 at 642.

⁴⁴ See *ibid.* at 634 (citing ICC, "To Take Crucial Vote on LC Documents" *Trade Finance: The Global Magazine for Export and Commodity Finance* (Oct. 2002) at 8).

⁴⁵ See Part I.C.1-2, below.

⁴⁶ See Paolo S. Grassi, "Letter of Credit Transactions: The Banks' Position in Determining Documentary Compliance: A Comparative Evaluation Under U.S., Swiss, and German Law" (1995) 7 *Pace Int'l L. Rev.* 81 at 103.

⁴⁷ See *U.C.C.*, *supra* note 8, § 5.

⁴⁸ See James C. Barnes, "Internationalization of Revised *UCC* Article 5 (Letters of Credit)" (1995) 16 *NW. J. Int'l L. & Bus.* 215.

2. International Law: UCP

The *UCP*, created by the International Chamber of Commerce (“ICC”), is a set of rules based on internationally accepted banking practices regulating the issuance and use of letters of credit.⁴⁹ The ICC published the current set of rules in January 1994. However, the ICC approved a new, sixth version of the rules, known as the *UCP 600*, in October 2006. These rules are to take effect in July 2007.⁵⁰ Although the *UCP* is neither an international convention nor the law of any one country, U.S. courts and arbitration tribunals recognize and enforce the *UCP* where it is specifically incorporated into the letter of credit.⁵¹ When incorporated, the *UCP* is binding on all parties unless expressly modified or excluded by the credit.⁵² Despite the existence of Article 5 of the *UCC*, the *UCP* has great authority in the U.S., especially because Article 5 of the *UCC* governs only a limited part of the letter of credit transaction.⁵³

D. Commercial Letter of Credit Jurisprudence

Most letter of credit transactions are international transactions governed by the *UCP*.⁵⁴ When documents contain discrepancies, disputing parties have called upon U.S. courts to interpret the *UCP* and provide relief.⁵⁵ Consequently, courts have struggled to evaluate a bank’s refusal to honour documents under a letter of credit incorporating the *UCP* against the principle of compliance.⁵⁶

⁴⁹ See Gao Xiang & Buckley, *supra* note 5 at 112; International Chamber of Commerce, online: ICC <<http://www.iccwbo.org/id93/index.html>>.

⁵⁰ See *UCP 600*, *supra* note 10. See generally Donald R. Smith, “The Rules for Letters of Credit are Changing!” *Cash-to-Credit Advisor* (25 August 2006), online: Cash-to-Credit Advisor <http://www.credit-to-cash-advisor.com/news_325.html>.

⁵¹ See *Alaska Textile Co. Inc., v. Chase Manhattan Bank*, N.A., 982 F.2d 813 at 816 (2d Cir.1992) (citing Lazar Sarna, *Letters of Credit*, 2d ed. (Canada: Thomson Professional Publishers, 1986) at 54-55); *MSF Holding Ltd. v. Fiduciary Trust Co. Intern*, 435 F.Supp.2d 285 (S.D.N.Y. 2006). See generally Henry Harfield, “Code Treatment of Letters of Credit” (1962) 48 Cornell L.Q. 92 at 96; Regal, *supra* note 11 at 24.

⁵² See *UCP 500*, *supra* note 8, art. 1.

⁵³ Gao Xiang & Buckley, *supra* note 5 at 118; see also Roane, *supra* note 7 at 1058-59.

⁵⁴ See Gao Xiang & Buckley, *ibid.* (citing James J. White & Robert S. Summers, *Uniform Commercial Code*, 4th ed. (West Publishing Co., 1995)).

⁵⁵ See Part I.D.1-2, II, below.

⁵⁶ See *infra* notes 97-108 and accompanying text (describing the various judicial interpretations of the correct compliance standard).

1. *Voest-Alpine Trading USA Corp. v. Bank of China*

Voest-Alpine Trading USA Corp. v. Bank of China was first heard by the District Court for the Southern District of Texas and later appealed to the U.S. Court of Appeals for the Fifth Circuit. Since each court dealt with different issues, this Comment refers to the District Court case as *Voest-Alpine I* and the appeals case as *Voest-Alpine II* for ease of distinction between the courts and the issues decided.

In the *Voest-Alpine* dispute, Jianyin Foreign Trade Corporation (“JFTC”) requested that the Bank of China (“BOC”) issue a letter of credit for \$1.2 million in favour of Voest-Alpine Trading USA Corp. (“Voest-Alpine”).⁵⁷ After shipment, Voest-Alpine presented the documents required by the letter of credit to BOC.⁵⁸ Although the intermediary bank noted several discrepancies in the documents, Voest-Alpine instructed it to present the documents to BOC, expecting a waiver from the applicant.⁵⁹ BOC telexed seven discrepancies and the following statement: “We are contacting that applicant for acceptance of the relative discrepancy. Holding documents at your risk and disposal.”⁶⁰ Four days later, Voest-Alpine demanded payment from BOC, arguing that the discrepancies did not amount to adequate grounds for rejection.⁶¹ BOC replied, “Now the discrepant documents may have us refuse to take up the documents according to Article 14(B) of UCP 500.”⁶² Alleging that the discrepancies were not an adequate basis for refusal, Voest-Alpine sued BOC for payment.⁶³ The question before the District Court for the Southern District of Texas was whether the typographical errors warranted rejection.⁶⁴

The District Court for the Southern District of Texas analyzed three interpretations of the compliance standard as applied to document examination.⁶⁵ The court rejected the first standard, known as the mirror image rule, as “problematic” because banks can reject documents that common sense would otherwise find compliant.⁶⁶ The court also

⁵⁷ See *Voest-Alpine Trading USA Corp. v. Bank of China*, 288 F.3d 262 at 264 (5th Cir. 2002) [*Voest-Alpine II*].

⁵⁸ See *ibid.*; *infra* notes 63-68 and accompanying text (detailing the facts of the case).

⁵⁹ See *Voest-Alpine I*, 167 F. Supp. 2d 940 at 942 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002) [*Voest-Alpine I*].

⁶⁰ See *ibid.* at 943.

⁶¹ See *Voest-Alpine II*, *supra* note 57.

⁶² *Ibid.*

⁶³ See *ibid.*

⁶⁴ See *Voest-Alpine I*, *supra* note 59 at 945-46.

⁶⁵ See *ibid.* at 946.

⁶⁶ See *ibid.* at 947; see also Kozolchyk, *supra* note 34 at 50.

dismissed the second standard known as flexible strict compliance.⁶⁷ Finding that the third standard requiring banks to analyze documents for risk to the applicant had little case law support and would undermine the independence rule, the District Court also rejected it.⁶⁸ The District Court announced that it would apply a common sense, case-by-case approach, where the actual calculus used by the issuing bank is whether the documents bear a rational link to one another.⁶⁹ Using this standard, the District Court held that the discrepancies in the documents were insufficient to warrant the dishonour of the credit.⁷⁰

On appeal, the U.S. Court of Appeals for the Fifth Circuit held that BOC's refusal notice was insufficient where it merely stated that BOC would contact JFTC for a waiver, and thereby held open the possibility of acceptance upon waiver.⁷¹ The Court based this decision on expert testimony given at the district court level indicating that BOC's actions were ambiguous and inadequate.⁷² The expert noted that the Bank's telex would have given adequate notice had it not contained the waiver clause.⁷³ Furthermore, the expert testified that the *UCP 500* contemplates a three-step procedure for dishonouring letters of credit where the bank first examines the documents presented for discrepancies, then if it finds discrepancies, it contacts the applicant for waiver, and finally, after conferring with the applicant, the bank issues its notice of refusal.⁷⁴ In this case, because the notice of refusal came after the refusal deadline, the Court held that BOC had forfeited its right to refuse the documents and was obligated to pay Voest-Alpine.⁷⁵

2. *DBJJJ, Inc. v. Nat'l City Bank*

The *DBJJJ* case presents a small but important issue in letter of credit law, and its analysis compliments an understanding of a bank's obligation to pay or reject a letter of credit when read in connection with *Voest-Alpine*. Once a bank determines that discrepancies exist in presentation documents, the bank may elect to reject the documents and refuse to pay the letter of credit, or the bank may elect to ask the applicant for a waiver of the discrepancies. *UCP 500* expressly grants a bank a maximum of seven banking days to make the decision to accept

⁶⁷ See *Voest-Alpine I*, *supra* note 59 at 946-947.

⁶⁸ See *ibid.* at 942.

⁶⁹ See *ibid.* at 947.

⁷⁰ See *ibid.* at 942.

⁷¹ See *Voest-Alpine II*, *supra* note 57.

⁷² See *ibid.* at 266.

⁷³ See *ibid.*

⁷⁴ See *ibid.*

⁷⁵ See *ibid.*

or reject.⁷⁶ Therefore, like *Voest-Alpine, DBJJJ, Inc.* is another recent example of how the *UCP 600* clarifies ambiguities raised by *UCP 500* and will restore confidence in letters of credit transactions. In this case, *DBJJJ, Inc.* contracted with *Pennsylvania Fashions Inc.* for the sale of clothing to be paid by a letter of credit governed by the *UCP 500*.⁷⁷ The issue facing the Court of Appeals for the Second District of California was whether the phrase “reasonable time not to exceed seven banking days” in the UCP allows banks to use all seven days when seeking a waiver from the applicant before issuing a decision to the beneficiary.⁷⁸ The facts of the case indicated that the bank sent a letter to the buyer identifying the discrepancies in the documents presented and sought waiver before 11 December 2001, the seventh, and last, day that the bank needed to respond to the beneficiary regarding approval or rejection. The Court of Appeals held that where the bank, in seeking a waiver, permitted the applicant to accept or decline on or before the last day of the full seven days, it failed to give timely and reasonable notice of refusal to the beneficiary.⁷⁹ The Court reasoned that although the seven banking days is the maximum time permitted, it is not automatically reasonable to use the full seven days where the bank seeks waiver from an applicant that it could have otherwise been granted in less time. The Court of Appeals further concluded that the bank did not provide “timely notice” of its refusal and was thereby precluded from refusing to honour the credit.⁸⁰

II. ANALYSIS

ALTHOUGH LETTERS OF CREDIT FUEL INTERNATIONAL SALES by reducing the risks of unknown creditworthiness and offering secure payment for buyers and sellers, standards for determining compliance remain inconsistent among courts and this can eliminate many benefits that letters of credit can provide.⁸¹ The second principal of letter of credit law is compliance, where the documents presented to the bank by the beneficiary must comply with the documents required in the

⁷⁶ See *UCP 600*, *supra* note 10, art. 13(b)

⁷⁷ See *DBJJJ, Inc. v. Nat'l City Bank*, 123 Cal. App. 4th 530 at 534 (2004).

⁷⁸ See *ibid.* at 535-36.

⁷⁹ See *ibid.* at 535.

⁸⁰ See *ibid.*; see also *UCP 500*, *supra* note 8, art. 14(e).

⁸¹ See *supra* text accompanying notes 1-9; *infra* text accompanying notes 89-93; Pifer, *supra* note 17 at 631; Roane, *supra* note 7 at 1083-84; Michael Imeson, “Getting Ready For The UCP 600 Roll-out—A New Set Of Rules For Documentary Credits Is Expected To Restore The Reputation Of This Much-maligned Method Of Trade Finance. But Will Bankers Be Able To Meet The July Deadline?” *The Banker* (5 February 2007) at 88.

letter of credit.⁸² Therefore, document examination and rejection is one of the most important topics concerning letters of credit.⁸³ In the absence of a clear standard by which to accept or reject documents, banks have not only failed to honour letters of credit for the wrong reasons, but have also been unclear about how to effectively notify the seller of the decision to reject payment.⁸⁴

Fortunately for buyers, sellers, and banks, the *UCP 600* coupled with the recent U.S. court decision in *Voest-Alpine*, has made significant strides to end the uncertainty and has clarified many unresolved issues stemming from the *UCP 500*.⁸⁵ Under the *UCP 600*, the standard of compliance is not “strict” compliance.⁸⁶ This approach is consistent with recent court decisions such as *Voest-Alpine*, which reject the strict compliance standard.⁸⁷ Finally, the *UCP 600* also clarifies effective refusal both in terms of waiver and notice.⁸⁸

The UCP 600 Rejects the Strict Compliance Test and Supports Compliance under a Rational Link Test as Applied in *Voest-Alpine I*

Because the *UCP 500* does not provide guidance on what the standard of compliance should be, courts in the U.S. and courts abroad began to create new standards of compliance that varied across districts.⁸⁹ At least four standards of compliance have developed among courts: (1) strict compliance; (2) flexible strict compliance; (3) substantial compliance; and (4) reasonable compliance.⁹⁰ Recognizing that courts have failed to agree on a uniform approach to compliance, the writers of

⁸² See *supra* text accompanying notes 41-46.

⁸³ See *supra* text accompanying note 42.

⁸⁴ See Part II.B1-2, below.

⁸⁵ See Imeson, *supra* note 81 at 88.

⁸⁶ See Part II.A, below.

⁸⁷ *Ibid.*

⁸⁸ See Part II.B, below.

⁸⁹ Compare *Voest-Alpine I*, 167 F. Supp. 2d 940 at 946 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002), with *Tosco Corp. v. Federal Deposit Ins. Corp.*, 723 F.2d 1242 (6th Cir. 1983). But see *Equitable Trust Co. v. Dawson Partners*, [1927] Ll. L. Rep. 49 at 52 (H.L.) (“There is no room for documents which are almost the same, or which will do just as well.”); *Banco General Runinahui, S.A. v. Citibank Int'l*, 97 F.3d 480 at 483 (11th Cir. 1996) (“This Court has recognized and applied the strict compliance standard to requests for payment under commercial letters of credit [...] [t]he fact that a defect is a mere technicality does not matter.” (quoting *Kerr-McGee Chem. Corp. v. FDIC*, 872 F.2d 971 (11th Cir. 1989)).

⁹⁰ See Pifer, *supra* note 17 at 636-37, for a historical overview of the development of the conflicting standards of compliance. Also see Roane, *supra* note 7 at 1064-1068 for a history of strict compliance cases.

the *UCP 600* sought to relieve uncertainty by revamping the law.⁹¹ Consequently, the *UCP 600* provides the much needed guidance to find the optimum standard.⁹² The *UCP 600* rejects the strict compliance test and supports compliance under a rational link test as applied by the District Court for the Southern District of Texas in *Voest-Alpine I*.⁹³

The *UCP 600* embraces the case-by-case approach, permitting minor deviations and adopting the position taken by the court in *Voest-Alpine I*, as the *UCP 600* states that banks can read data in a document in context with the letter of credit.⁹⁴ Furthermore, the *UCP 600* expressly refutes any claim that a document needs to be identical to all other information in that document, any other stipulated document, or the credit.⁹⁵ Therefore, the District Court in *Voest-Alpine I* was correct to examine “whether the whole of the documents obviously relate to the transaction on their face” and whether the documents “bore obvious links,” and their decision would be upheld under the *UCP 600*.⁹⁶

The holding of *Voest-Alpine I* and the *UCP 600* effectively prohibit the courts from utilizing the standard of strict compliance in future letter of credit cases.⁹⁷ Letter of credit industry experts have gone as far as to define the practice-oriented approach taken in *Voest-Alpine I* as “refreshing.”⁹⁸ Arguably, however, the adoption of the common-sense

⁹¹ See Pradeep Taneja, “UCP 600: ‘A document restoring the credibility of L/Cs’”, online: ICC Books <<http://www.iccbooks.com/Home/CredibilityofLCs.aspx>>.

⁹² See *ibid.*

⁹³ In addition to *Voest-Alpine*, courts in other districts have moved away from strict compliance. See e.g. *Cont'l Cas. Co. v. Southtrust Bank, N.A.*, 933 So. 2d 337 at 342 (2006), where the Supreme Court of Alabama held that the letter of credit did not, as a matter of law and as governed by *UCP 500*, art. 14(e), require the inclusion of an address for the beneficiary on the draft presented. Another recent example where courts granted deference to financial institutions that regularly issue letters of credit is in *Blonder & Co. Inc. v. Citibank N.A.*, 28 A.D.3d 180 at 181, 808 N.Y.S.2d 214 at 216 (2006), where the New York Supreme Court, Appellate Division, held that (1) the *UCP* specifically governed the transaction, (2) the plaintiff’s expert’s opinion about what standard international banking practice does or does not require was irrelevant, and (3) Citibank was justified to honor a demand for payment relying on the submitted documents even where documents contained numerous deficiencies such as (a) the bill of lading did not designate a consignee, (b) conflicting dates, and (c) conflicting ports of loading because such documents appeared on their face to substantially comply with the terms set forth in the letter.

⁹⁴ See *UCP 600*, *supra* note 10, art. 14(d).

⁹⁵ See *ibid.*

⁹⁶ *Voest-Alpine I*, *supra* note 59 at 946 (S.D. Tex. 2000), *aff’d*, 288 F.3d 262 (5th Cir. 2002).

⁹⁷ See *supra* notes 65-70, 94-95 and accompanying text (rejecting the strict compliance test).

⁹⁸ See James G. Barnes & James E. Byrne, “Letters of Credit: 2000 Cases” (2001) 56 Bus. Law. 1805 at 1807.

approach taken in *Voest-Alpine I* will require courts to distinguish between obvious typographical errors and documents that are distinctly different from those required by the letter of credit.⁹⁹ Some commentators suggest that this judicial scrutiny does not satisfy the needs of bankers.¹⁰⁰

The view that judicial scrutiny is contrary to the needs of the letter of credit community is valid and does not contradict the holding of *Voest-Alpine I*.¹⁰¹ Prior courts interpreted strict compliance to mean unwavering adherence and thereby failed to consider parties' motives, expectations, and reasoning for accepting or rejecting a document that merely had a typographical error.¹⁰² It is true that courts applying strict compliance did not judicially interpret the actions of the banks. However, they also did not give deference to reasonable banking practices.¹⁰³ By nullifying the strict compliance standard, the *UCP 600* and *Voest-Alpine I* are not asking courts to impose their own judicial interpretations of what constitutes a material discrepancy; rather courts are to apply a reasonable document checker standard.¹⁰⁴ Under this standard, if a bank determines that a discrepancy is material, a court will uphold that decision if international banking standards imply that the same is true. Likewise, a court will reject that decision if it is not supported by international banking standards.¹⁰⁵ Commentators have made various recommendations on how to establish such a standard, and this comment advances a banking judgment standard.¹⁰⁶

The UCP 600 Clarifies the Rules Governing Dishonour and Thereby Rejects *DBJJJ vs. National City Bank* but Supports *Voest-Alpine II*

In addition to their concerns regarding the proper standard of compliance, bankers are also unsure as to how much time they have to notify a beneficiary of a decision to dishonour a letter of credit, whether they must always seek an applicant waiver when faced with document discrepancies, and how to effectuate proper notice of rejection. The holding in *DBJJJ* was erroneous and accordingly, presents an example of why *UCP* writers needed to make the law more clear. The *DBJJJ* case presents a small but important issue in letter of credit law, and its

⁹⁹ See *Voest-Alpine I*, *supra* note 59 at 947 (holding that minor typographical deviations are permissible under the case-by-case approach).

¹⁰⁰ See generally Kozolchuk, *supra* note 30 at 46-47.

¹⁰¹ See *infra* notes 105-108 and accompanying text.

¹⁰² See *supra* notes 81-83, 89-91 and accompanying text.

¹⁰³ See *supra* notes 89-90 and accompanying text.

¹⁰⁴ See *infra* notes 133-134 and accompanying text.

¹⁰⁵ See *ibid.*

¹⁰⁶ See Part III.A, below.

analysis complements an understanding of a bank's obligation to pay or reject a letter of credit when read in connection with *Voest-Alpine*.¹⁰⁷

1. The UCP 600 Rejects *DBJJJ*'s Reasonable Time Argument

Once a bank determines that discrepancies exist in presentation documents, the bank may elect to reject the documents and refuse to pay the letter of credit, or the bank may elect to ask the applicant for a waiver of the discrepancies.¹⁰⁸ The *UCP 500* expressly grants a bank a maximum of seven banking days to make the decision to accept or reject.¹⁰⁹ The Court of Appeals in *DBJJJ* incorrectly held that where a bank seeks waiver from an applicant, using the maximum time permitted is unreasonable where the bank could have granted or rejected the credit in less time.¹¹⁰ Holding that the time was unreasonable, the Court further concluded that the bank did not provide "timely notice" of its refusal and was thereby precluded from refusing to honour the credit.¹¹¹ This conclusion would have been correct if notice was not ultimately timely. However, since this was not the case, future courts should reject this holding in full.¹¹²

The Court of Appeals reasoned that the bank did not use the full seven banking days allowed "reasonably" because none of the factors generally relevant in assessing reasonableness of the time period were present.¹¹³ However, the Court of Appeals confused these factors, which relate only to the reasonableness of the time taken to examine documents, and misapplied them for use in situations where the bank reviewed the documents, concluded that they contain discrepancies, and sought waiver from the applicant.¹¹⁴ The new provisions in the *UCP 600* clearly reject the Court's holding in the case and will cure any confusion arising out of this decision.

The *UCP 600* provides clarity in a number of ways. Firstly, *UCP 600* Article 14(b) will permit a bank a maximum of five, rather than seven, banking days following the day of presentation to determine if a presentation is complying.¹¹⁵ Secondly, and very important in the context

¹⁰⁷ See Part II.B.1-2, below.

¹⁰⁸ See Part I.A.3, above.

¹⁰⁹ See *UCP 500*, *supra* note 8, art. 13(b).

¹¹⁰ See *infra* notes 116-122 and accompanying text.

¹¹¹ See *supra* notes 77-80 and accompanying text.

¹¹² See *DBJJJ, Inc.*, *supra* note 77 and Barnes & Byrne, *infra* note 114.

¹¹³ See *DBJJJ, Inc.*, *ibid.* at 542.

¹¹⁴ See James G. Barnes & James E. Byrne, "Letters of Credit: 2004 Cases" (2005) 60 Bus. Law. 1699 at 1700.

¹¹⁵ See *UCP 600*, *supra* note 10, art. 14(b); see also Email from Pradeep Taneja, Member, ICC Banking Commission and the UCP 600 Consulting Group, to Lisa Pietrzak, Law Student, Washington College of Law, American University (21

of the *DBJJJ* case, the words “reasonable time” and “not to exceed” have been entirely eliminated from the *UCP 600* article.¹¹⁶ Finally, *UCP 600* Article 16(b) makes it clear that when a bank determines that a presentation does not comply and requests a waiver from the applicant, this does not extend the period mentioned in Article 14(b).¹¹⁷ Therefore, *UCP 600* put an end to courts determining what qualifies as “reasonable time” and will succeed in providing a bright line rule to banks and businessmen where the *UCP 500* failed.¹¹⁸

2. Waiver and Notice of Dishonour Rules are Clear and Unambiguous under *UCP 600*

Understanding that banks have a full five days to review documents, seek waiver, and inform the beneficiary of acceptance or rejection is just the beginning. They must also understand how and when to seek waiver and how to properly dishonour the credit in order to avoid future liabilities.¹¹⁹ The Court of Appeals decision in *Voest-Alpine II* is helpful in providing those answers and is aligned with the law as set forth in *UCP 600*.¹²⁰

Although the *UCP 500* supports the Court of Appeals decision, and even where the outcome would not change if analyzed under the *UCP 600*, the Court’s reasoning is flawed because a bank may reject documents where it finds discrepancies without contacting the applicant for a waiver.¹²¹ Additionally, the *Voest-Alpine II* case sheds light on the fact that the *UCP 500* provides inadequate instruction to banks and courts regarding the actual language necessary to reject documents.¹²²

January 2007, 05:37:55 AM) [Taneja Email] (providing, for example, that under *UCP 600*, art. 14(b), once documents are presented on the day of expiry to a Nominated Bank, that bank could take five banking days “following” the date of expiry to examine and forward to the Confirming Bank). The writer further provides that the bank could take four days before giving the documents to the Confirming Bank (courier period plus Saturday and Sunday off), then the Confirming Bank can take another five days before forwarding to the Issuing Bank who in turn could take another five days. *Ibid.* (concluding that the whole process could take more than twenty days before the Issuing Bank eventually honours the documents, but that it is acceptable in the given context).

¹¹⁶ Compare *UCP 500*, *supra* note 8, art. 13(B) with *UCP 600*, *supra* note 10, art. 14(b). See also Taneja, *supra* note 91. See also Taneja Email, *ibid.*

¹¹⁷ See *UCP 600*, *supra* note 10, art. 16(b).

¹¹⁸ *Supra* note 116.

¹¹⁹ See *DBJJJ, Inc. v. Nat’l City Bank*, *supra* note 77.

¹²⁰ See *infra* notes 121-128 and accompanying text.

¹²¹ See *UCP 500*, *supra* note 8, art. 14(C); see also *UCP 600*, *supra* note 10, art. 16(b).

¹²² Compare *UCP 500*, *supra* note 8, art. 14(B) with *UCP 600*, *supra* note 10, art. 16(c) (contradicting the rationale of the expert testimony in *Voest-Alpine II*, that

Acknowledging that the *UCP 500* lacked clarity with regard to the rejection of documents, the writers of the *UCP 600* rewrote *UCP 500* Article 14(B) in *UCP 600* Article 16(c) and provided the much needed instruction.¹²³

The new article states that when a bank decides to refuse to honour or negotiate, it must give a single notice to the presenter.¹²⁴ The *UCP 600* is clearer than the *UCP 500* because it provides that the notice must expressly state that the bank is refusing to honour or negotiate and must include each discrepancy upon which the bank made its decision to refuse payment.¹²⁵ The *UCP 600* goes even further and directs that the notice must also state either: (a) that the bank is holding the documents pending instructions from the applicant, (b) that the bank is holding the documents until it receives a waiver from the applicant and agrees to accept it, (c) that the bank is returning the documents, or (d) that the bank is acting in accordance with instructions previously received from the applicant.¹²⁶

Regardless of which option the bank chooses, it is clear that banks are required to expressly state their rejection of the documents.¹²⁷ Accordingly, whether or not the beneficiary fully understands the refusal notice becomes a non-issue, as the *UCP 600* clearly mandates a requirement of an express rejection of documents.¹²⁸ This is just one example of how the *UCP 600* will alleviate potential litigation on the issue of refusal language in the aftermath of *Voest-Alpine II*.

III. RECOMMENDATIONS

BASED ON THE HOLDING IN *VOEST-ALPINE* and the language in the *UCP 600*, the standard of compliance is shifting from one of strict compliance to semi-flexible compliance, based on banking standards.¹²⁹ Thus, the degree of flexibility allowed to a reviewing bank in accepting documents is less than absolute compliance, but much

the bank had otherwise given valid notice where there was no express statement of refusal to honour the credit).

¹²³ Compare *UCP 500*, *supra* note 8, art. 14(d)(i)-(ii) with *UCP 600*, *supra* note 10, art. 16(c).

¹²⁴ See *UCP 600*, *supra* note 10, art. 16(c).

¹²⁵ See *ibid.*, art. 16(c)(i) and 16(c)(ii).

¹²⁶ See *ibid.*, art. 16(c)(iii).

¹²⁷ See *ibid.*, art. 16(c)(i).

¹²⁸ See generally James G. Barnes & James E. Byrne, "Letters of Credit: 2002 Cases" (2003) 58 Bus. Law. 1605 at 1606. But see *UCP 600*, *supra* note 10, art. 16(c).

¹²⁹ See cases cited at *supra* note 93.

greater than non-compliance.¹³⁰ The publication of the *UCP 600* is a major achievement in this area and is certain to be a highly persuasive source for U.S. courts in determining standard practice.¹³¹

A. The Reasonable Document Checker and Banking Judgment: A New Standard for Future Courts

Judges are not bankers or document checkers and are thus ill-qualified to make banking decisions regarding the standard practice for which a document checker will accept or reject the documents presented against a letter of credit.¹³² Therefore, courts should establish a banking judgment rule, applicable to letter of credit transactions, where the court presumes that in making a decision to honour or reject documents, the document checker has acted on an informed basis, in good faith, and under the belief that the documents were in compliance with the letter of credit.¹³³ Absent an abuse of discretion, the courts should respect the judgment used by the bank in its decision to honour or dishonour payment under the letter of credit.¹³⁴

To decide whether or not an abuse of discretion has occurred, banks should be required to satisfy a negligence standard predicated on standard banking practice.¹³⁵ That is, where a judge is considering the matter after the fact, and believes that the bank made the wrong decision, so long as the court determines that the process employed was rational and completed with care and good faith, banks should be free of liability.¹³⁶ The burden should be on the party challenging the decision to establish facts that rebut the presumption that the document checker acted under such a banking judgment rule.¹³⁷ Shifting the burden from the bank to the challenging party will resolve banks' fear of litigation and curtail the high rate of initial rejection amongst banks today.¹³⁸

¹³⁰ See Part II.A, above and *ibid.*

¹³¹ See Imeson, *supra* note 81.

¹³² See Kozolchik, *supra* note 34 at 46.

¹³³ See *ibid.* See also Cf. *Aronson v. Lewis*, 473 A.2d 805 at 812 (Del. 1984).

¹³⁴ See Kozolchik, *supra* note 34 at 46-7.

¹³⁵ For an example of how comparable types of standards are used in judicial practice, see *Aronson v. Lewis*, *supra* note 133 at 812. The author of this comment has posited a stricter standard for the banking judgment rule than the gross negligence standard advanced by the business judgment rule because banks do not need the same flexibility given to directors who take risks to earn capital. See also Kozolchik, *supra* note 34 at 75.

¹³⁶ Cf. *In re Caremark Int'l Inc.*, 698 A.2d 959 at 967 (Del. Ch. 1996).

¹³⁷ See Kozolchik, *supra* note 34 at 47.

¹³⁸ See *ibid.* at 49.

Employing a judicial standard, such as the one advanced, will provide the much needed uniformity to letter of credit laws and transactions.¹³⁹

B. Considerations for Counsel Assisting in Letter of Credit Transactions

Based on the advantages of using a commercial letter of credit as discussed above, it appears that the use of the commercial letter of credit in international business transactions presents a viable option for payment.¹⁴⁰ Although the following considerations are not conclusive, they provide counsel with guidance to ensure that basic requirements are met in the transaction. Moreover, counsel assisting a client in a letter of credit transaction should advise their clients to make an effective underlying contract in order to avoid unwanted litigation in a foreign jurisdiction.¹⁴¹

First, counsel must determine what type of letter of credit the client needs and must decide if the letter of credit should be revocable or irrevocable.¹⁴² Before drafting or accepting a letter of credit, counsel must choose the law to govern the letter of credit.¹⁴³ Counsel should give special attention to whether the letter of credit is governed by the *UCP* or by an alternative law chosen by the parties.¹⁴⁴ Counsel must then determine if the importing country has a consulate in the exporting country in the event that legalization of documents is required. Another determination that counsel must make is what conflict of law rules govern in the jurisdiction chosen.¹⁴⁵ Finally, counsel should include an arbitration clause if it is beneficial to the client.¹⁴⁶

Once counsel has evaluated the above described factors and chooses to use a letter of credit, counsel must ensure that the letter of credit conforms to the underlying contract.¹⁴⁷ At this stage, counsel

¹³⁹ See *supra* notes 89-90 and accompanying text (discussing the various standard of compliance used by courts today); see also Roane, *supra* note 7 at 1085.

¹⁴⁰ See Graham, *supra* note 23 at 204.

¹⁴¹ See Part I.B, above and *supra* notes 23 & 25-28.

¹⁴² See *supra* note 15. Also see Keith A. Rowley, "Anticipatory Repudiation of Letters of Credit" (2003) 56 SMU L. Rev. 2235 at 2246-47 for a discussion of the key differences and legal treatment of revocable and irrevocable letters of credit.

¹⁴³ See Mendell, *supra* note 28.

¹⁴⁴ See *ibid.*; see also Part I.B, above and *supra* notes 23 & 25-28.

¹⁴⁵ See Ayelet Ben-Ezer & Ariel Bendor, "The Constitution and Conflict of Law Treaties: Upgrading the International Comity" (2003) 29 N.C.J. Int'l L. & Com. Reg. 1 at 3.

¹⁴⁶ See Stefano E. Cirielli, "Arbitration, Financial Markets and Banking Disputes" (2003) 14 Am. Rev. Int'l Arb. 243 at 265.

¹⁴⁷ See *supra* notes 33-35.

should verify that the letter of credit provides the correct (a) beneficiary, (b) amount of payment, (c) payment due date, (d) place where payment will be made, (e) description and unit price of the goods, (f) names and addresses of the applicant, beneficiary, and bank, (g) shipping date, (h) point of arrival and point of departure, and (i) due date of document presentation.¹⁴⁸ Finally, counsel must establish that the beneficiary has enough time to prepare for and comply with the terms and conditions of the letter of credit before its expiration date.¹⁴⁹ Keep in mind that the beneficiary must produce specific documents to receive payment.¹⁵⁰

IV. CONCLUSION

COURTS MISAPPLYING THE *UCP* erode the letter of credit marketplace where non-material discrepancies permit banks to evade payment and thereby negate the benefits to the seller derived from the substitution of the bank's creditworthiness for that of the buyer's.¹⁵¹ The *UCP 600* and the holding of *Voest-Alpine* reduce the confusion regarding the proper standard of compliance.¹⁵² They also eradicate and replace the standard of strict compliance with a practical approach to letter of credit compliance.¹⁵³ Therefore, the *UCP 600* and *Voest-Alpine* are huge steps towards uniformity and harmonization that will rebuild confidence in the letter of credit marketplace.¹⁵⁴ However, the judiciary should go one step further and create a bright line standard of review, such as a banking judgment rule, in order to effectively apply the new practice oriented compliance test set forth in *Voest-Alpine*.¹⁵⁵ By doing so, the new guidelines will be best able to fulfill their purpose and make the commercial letter of credit an especially attractive method for conducting international business transactions.

¹⁴⁸ See Steiner, *supra* note 12 at 8-14.

¹⁴⁹ See Regal, *supra* note 11 at 36.

¹⁵⁰ See *ibid.*

¹⁵¹ See *supra* notes 137-138 and accompanying text.

¹⁵² See Part II.A, above.

¹⁵³ See *supra* notes 97-100.

¹⁵⁴ See Gao Xiang & Buckley, *supra* note 5 at 112; see also Roane, *supra* note 7 at 1085.

¹⁵⁵ See Part III.A, above.