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Revisions to the Commercial Code may enhance the reliability of and reduce litigation over letters of credit

Earlier this year the National Conference of Commissioners on Uniform State Laws[1] presented California with sweeping new proposed changes to Article 5 of the Commercial Code—the governing state statute for letters of credit. These changes, now before the California Senate as SB 1599, represent the first revision of Article 5 in more than 30 years. The bill, sponsored by state Senator Robert Beverly (Republican-Long Beach), is due for a vote before summer.[2] If adopted, the Article 5 revisions will have a significant affect on how letters of credit are negotiated, drafted, issued, and enforced. For the first time in the history of the Commercial Code, the commissioners have eliminated statutory bank liability for consequential and punitive damages. Also for the first time, revised Article 5 offers the exporter/beneficiary a noncontractual provision for attorneys' fees in the event a suit is necessary to enforce a letter of credit.

Courts and the legal community continually search for clarity on issues surrounding letters of credit. Generally speaking, a letter of credit is a promise by a bank to honor drafts or other demands for payment submitted by a beneficiary.[3] Its primary function is the financing of international and domestic trade.[4] Typically, a foreign seller wants to sell goods to a domestic buyer and does not seek to place the goods in the stream of commerce without some assurances that the seller's invoice will be paid. The buyer approaches its bank and obtains a letter of credit, usually secured by the buyer's collateral.

This letter of credit is an independent promise on the part of the bank on behalf of the buyer (the "account party") to pay the seller (the "beneficiary") for the goods purchased by the buyer/account party. It is subject to only one condition: the seller/beneficiary must submit a demand for payment (a

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"draft") that is sometimes accompanied by invoices, bills of lading, and inspection certificates, among various documents.

Much of the confusion about letters of credit stems from the fact that they bear a similar appearance to three other legal instruments, but the comparisons are ultimately misleading. Letters of credit may look like contracts, but they are not. A letter of credit does not require consideration,[5] requires strict compliance with the terms instead of the contract rule of substantial compliance,[6] and damages upon breach generally are equivalent to the face amount of the letter of credit,[7] unlike contract damages, which require proof and mitigation.[8]

The letter of credit also seems to operate like a guaranty but looks are deceiving here as well.[9] Under a letter of credit, the issuer is primarily liable,[10] while under a guaranty, the guarantor is only secondarily liable.[11] In a guaranty, the guarantor will have the benefit of suretyship defenses such as the right to resort to security,[12] release,[13] the right to compel the creditor to pursue the principal,[14] and the right of subrogation.[15] In a letter of credit, there are only two defenses to the failure to pay: the beneficiary's failure to comply strictly with the terms of the letter of credit,[16] or fraud.[17]

Finally, a letter of credit is often confused with a negotiable instrument but, again, the two are not the same. A negotiable instrument is made payable to a bearer or to the order of someone,[18] while a letter of credit is not payable to a specific person, although the letter of credit usually limits the persons who are able to draw against it.[19] A negotiable instrument typically is an unconditional promise to pay,[20] but a letter of credit is always conditioned upon submission of drafts or documents of title.[21]

The letter of credit is enforced by the beneficiary submitting a draft.[22] Essentially the draft is a document that looks similar to a check but is signed by the beneficiary, made payable to the beneficiary, and addressed to the issuer. Upon submission of the draft, and any other documents required by the letter of credit,[23] the issuer will pay the beneficiary the face amount of the letter of credit.

The two general types of letters of credit are standby letters of credit and commercial letters of credit.[24] Most letters of credit fall under the commercial category. In a transaction secured by a commercial letter of credit, the beneficiary and account party expect the issuer to honor the letter of credit upon submission of the draft and the documents of title covering the shipped merchandise. Upon payment, the issuer charges the account of the buyer/account party, or resorts to security held by the issuer.[25] With a standby letter of credit, the beneficiary and account party expect that the account party will honor the invoice of the beneficiary, and only when the buyer/account party refuses to pay the invoice is a demand made upon the issuer.[26]

Letters of credit are essential to domestic and international trade. They assure prompt payment, provide goods to those who might otherwise not qualify for credit, shift litigation risks to the buyer instead of the seller, protect against currency fluctuations, and insulate the seller from many bankruptcy issues.[27]

Letter-of-credit law comprises five basic principles and is found in three specific sources.

- The independence principle holds that a letter of credit is an independent engagement on the part of the bank/issuer to honor its promise to pay. The letter of credit is independent because it is to be construed only by its own terms, without reference to any other agreement or transaction.[28] Most jurisdictions hold that the bank/issuer is not required (or allowed) to withhold payment on extrinsic evidence other than the terms contained in the four corners of the letter of credit.[29] California has departed from the independence principle by allowing a reviewing court to consider not only the letter of credit but the underlying transaction documents as well.[30] The majority of jurisdictions throughout the country, however, have upheld the independence principle and have refused to consider other documents outside the letter of credit no matter how tempting they may be.[31]
- Letters of credit always are conditioned upon the submission of documents, not extrinsic facts. The leading case in this area, and probably the single most important case in letter-of-credit law, is the Ninth Circuit's *Witchita Eagle & Beacon Publishing Co.* v. *Pacific National Bank.*[32] Here the court held that a document styled as a letter of credit was in fact a guaranty, because the document required the bank/issuer to determine extrinsic facts, such as whether a tenant failed to obtain a building permit or failed to build a garage. Since the determination of these facts required an analysis outside the parameters of the letter of credit, the document was held to be a guaranty.

If a document is construed as a guaranty, the result may be unpredictable. While the bank/issuer may have the benefit of suretyship defenses,[33] the amount of damages the bank/issuer may be forced to pay could actually be increased.[34] The bank/issuer also risks exposure to a lawsuit from its customer/account party if the terms of the document were honored by the bank.[35] While most letters of credit are conditioned upon the submission of documents, *Witchita* does not forbid all nondocumentary conditions. Indeed, the International Uniform Customs & Practices for Documentary Credits (UCP)[36] allows nondocumentary letters of credit but construes them so that the bank/issuer may disregard any nondocumentary condition and pay the beneficiary without regard to documentary conditions.[37]

- The strict compliance doctrine requires the seller/beneficiary to present documents that conform to a strict reading of the letter of credit. If the beneficiary submits the precise documents required by the letter of credit, the issuer must honor the letter of credit.[38] The majority of cases enforce strict compliance on the part of both the beneficiary and the bank/issuer.[39] Problems in this area develop chiefly when the seller/beneficiary fails to describe the goods exactly as indicated in the letter of credit,[40] places an improper amount on an invoice that does not match the letter of credit,[41] places the wrong name on an invoice,[42] or submits an improper draft.[43]

Problems frequently arise when beneficiaries make errors of omission, such as failing to submit the exact bill of lading[44] and/or the accompanying certificate[45]—both required by the letter of credit—or misstating the proper quantity of merchandise.[46] While the strict compliance rule may seem harsh to beneficiaries, its enforcement fosters predictability and certainty in letter-of-credit transactions.[47]

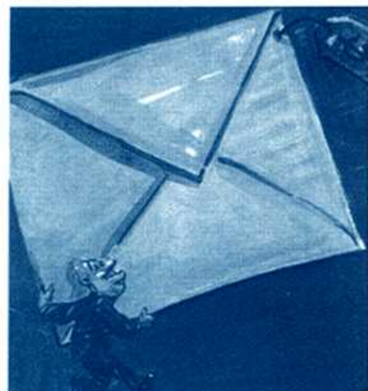
- The fraud/injunction doctrine is an exception to the strict compliance doctrine. An issuer may dishonor a letter of credit if the documents are fraudulent or if there is fraud in the transaction.[48] Typically, buyer/account parties attempt to obtain injunctions against the bank/issuer from honoring the letter of credit on the grounds that the seller/beneficiary has committed fraud.[49] The fraud must be connected with the documents used to draw on the letter of credit, such as an invoice,[50] misdated bill of lading,[51] or false certificates[52]—and it must be material.[53] Courts are reluctant to delve into the underlying agreement to find fraud to support an injunction.[54]
- There are several principles of letter-of-credit law applicable to bankruptcy proceedings. First, it appears to be well settled that a beneficiary may draw on a letter of credit without violating the automatic stay. The rationale is that it is the bank's funds, not the debtor's, that are being disbursed.[55] It is also well settled that the payment on a letter of credit is not a preferential transfer to the seller/beneficiary[56] nor to the bank.[57] It remains unclear whether a trustee may acquire a previously agreed-to letter of credit or draw against one as a successor to either the account party or the beneficiary.[58]

The three sources of letter-of-credit law are: Article 5 of the Commercial Code, common law, and the UCP. Article 5 of the Commercial Code was enacted in 1963 and has not been revised since. Article 5 comprises only 17 sections and does not attempt to address every issue in letter-of-credit law.[59] Common law interpretation of letters of credit began as early as 1765,[60] with the first reported American decision occurring in 1806.[61] The UCP, a publication of the International Chamber of Commerce, is merely an advisory statement of how letters of credit should operate. However, since its first publication in 1933,[62] the UCP has been embraced for international letters of credit. Although the UCP does not have the force of law, it has been considered a trade usage[63] and is routinely incorporated in letters of credit as a controlling contract term.[64] Unfortunately, Article 5 and the UCP contain numerous conflicting terms, and when the UCP is incorporated into a letter of credit, litigation often ensues over whether the UCP may trump provisions of the Commercial Code.[65]

The revision of Article 5 began in 1990 as part of the process to rewrite completely that portion of the Uniform Commercial Code.[66] The revision was necessitated by a huge increase not only in the numbers of letters of credit[67] but the amount of related litigation,[68] as well as the use of electronic wire transfers, and numerous conflicts among reported decisions.[69] The goal was to maintain letters of credit as an inexpensive and efficient instrument that facilitates trade.[70]

The proposed revisions generally reaffirm and expand the independence principle, the right of subrogation by an issuer who is called upon to honor a letter of credit, and the strict compliance doctrine. Additionally, the proposed revisions—for the first time in any UCC article—allow for noncontractual attor-

neys' fees, limit the statute of limitations, and codify damages as the face amount of a letter of credit. The proposed revisions further clarify the warranties given by beneficiaries who make demands to a bank/issuer, allow



smoother transfers of letters of credit, and provide for a more orderly method of assigning proceeds to a letter of credit. The most notable changes will have an immediate impact on all parties to a letter of credit.

Statute of limitations. Under former case law, many courts applied a contract statute of limitations,[71] which could easily prejudice banks. For example, a bank could refuse to honor a letter of credit, receive no objection, and release the customer/account party's collateral from a security interest. If sued for wrongful dishonor, the bank would not be able to resort against its collateral. The commissioners have added Section 5-115 (all section references are to the revised Article 5), which sets forth a one-year statute of limitation that runs from the expiration of the letter of credit. If no expiration date is stated, a one-year expiration from issuance is inferred.

Strict compliance. Revised Article 5 reinforces the strict compliance doctrine by adding Section 5-108, which for the first time incorporates this doctrine in the statute. Because of the strengthening of the strict compliance doctrine, the seller/beneficiary should assure itself ahead of time that it can comply with the exact documentary conditions specified in the letter of credit.

Expanded examination period. The UCP and the Commercial Code were in conflict over the allowable period of time for the examination of documents and the determination to honor or dishonor a draft. The UCP approved a reasonable time frame for these activities, while the Commercial Code allowed only three banking days.[72] The revised code has eliminated that conflict by adding Section 5-108(b), which allows banks a reasonable period of time not to exceed seven business days.

Limitation of damages. Previous statutory and case law allowed a beneficiary to sue a bank that dishonored a draft and recover consequential damages.[73] The commissioners have now reduced a bank's exposure by making it clear that the face amount of the letter of credit will generally be the amount of damages plus any incidental—but not consequential—damages. Also, there is no requirement to mitigate.[74]

Attorneys' fees as a measure of recovery. Attorneys' fees have never been a measure of damages under any of the articles of the Commercial Code. For the first time,[75] the commissioners have provided in Section 5-111(e) that reasonable attorneys' fees and expenses of litigation shall be awarded to a prevailing party.[76] Litigation expenses, which are different from costs, will now include many additional items such as expert witness fees, which are not recoverable as costs.[77] This change should have the effect of reducing dishonors and fostering settlements in smaller letter-of-credit disputes.

Transfers by operation of law. Under the guise of the strict compliance doctrine, many courts have refused to honor a letter of credit when the seller/beneficiary has lost its identity through merger or acquisition.[78] The commissioners have responded with Section 5-113, which provides that any transfer by operation of the law is valid, and an issuer is obligated to treat the successor as the original beneficiary.

Assignment of proceeds. The Commercial Code and the UCP reflected contrasting attitudes toward the assignment of letter-of-credit proceeds, with the code a bit more generous than the UCP.[79] The proposed revisions allow assignment of the proceeds without limitation or the consent of the issuer.[80] The right to transfer or draw upon the letter of credit remains subject to a specific provision in the letter of credit and, in certain circumstances, issuer consent.[81]

Explicit rules on fraud and injunctions. The Commercial Code is vague on the subject of fraud and injunctions, resulting in a number of conflicting decisions.[82] Section 5-109 requires that the fraud be material and perpetrated by the beneficiary. The fraud must either revolve around a forged document or somehow be of a type that would facilitate a fraud on the issuer or account party. This revision clarifies that the bank may nevertheless honor the letter of credit and has no duty to the account party. The account party may obtain an injunction only if certain specific criteria are met. The comments underscore that the account party will have a significant burden with a high standard of proof to obtain an injunction.[83]

Because the buyer/account party will have an even more difficult time obtaining injunctions against the draw on the basis of fraud, the account party should insure that the goods are exactly as described in the invoice, and should arrange for a third-party inspection and the issuance of an inspection certificate as a documentary condition.

Choice of law and forum. Choice of law was completely omitted from the 1963 version of Article 5. Unfortunately, cases in this area are conflicting and typically apply the law of the forum state.[84] Section 5-116 provides that the substantive law applied by the court will not automatically be governed by the forum state. Instead, the parties may contract for the applicable substantive law. In the absence of a contractual provision, the substantive law will generally be the law of the jurisdiction of the issuer.

Reaffirming right of reimbursement. Article 5 contained no right of subrogation on the part of the bank/issuer as against the beneficiary or account party.[85] A significant volume of case law has developed from common law to allow issuers to recover letter-of-credit funds from their customer/account party.[86] The result is a haphazard approach applying the common law right of subrogation to letters of credit.[87] The commissioners' attempt at resolution appears in Section 5-117, which removes an impediment in some of the cases preventing subrogation while not specifically granting a subrogation right.[88]

While most banks prefer to take cash, many commercial letters of credit are collateralized by negotiable documents of title, which allow the bank to take actual ownership of the goods. The bank should perfect its security interest by having the bills of lading issued in the bank's name, notifying the shipper/warehouse of the bank's security interest, or by filing a UCC-1 form.[89]

Recognition of uniform customs. The UCP is specifically mentioned, for the first time, in Section 5-116(c), which provides that a letter of credit can incorporate any rules of custom or practice, such as the UCP, to govern the liability of the issuer. If incorporated into the letter of credit, the UCP will control and will vary the terms of Article 5, subject to only a few narrow exceptions.[90]

Dishonor grounds preclusion. The 1963 version of Article 5 is silent on the issue of whether an issuer may dishonor a letter of credit for one reason and assert other defenses at a later time. Thus case law on this issue has been contradictory, with the majority rule requiring a common law estoppel analysis including reliance and detriment on the part of the beneficiary.[91] The commissioners, in Section 5-108(i), have removed the common law doctrine of estoppel and precluded any statutory assertion of a defect not asserted in the original dishonor. Of course, if the proceeds were obtained by fraud or forgery, that defense may be asserted later,[92] in line with other portions of the Uniform Commercial Code that allow fraud to be asserted at a later time.[93]

Electronic transmissions. Section 5-104 permits a letter of credit to be issued as long as it constitutes a "record" and can be authenticated. This permits electronic storage and transmission, and the use of such copies as originals.

Effective date of issuance and revocation. Current law provides that the letter of credit is effective upon receipt—that is, when it is "established."[94] The proposed revisions make the letter of credit effective upon sending.[95] Letters of credit will be deemed irrevocable unless they provide for revocability. This incorporates the most current rule of the UCP.[96]

Clearly the commissioners have produced a thorough overhaul of Article 5. The proposed amendments have positive attributes for every party engaged in the issuance and acceptance of letters of credit. For financial institutions and other issuers, consequential and punitive damages have been eliminated. Also, the applicable statute of limitations has been reduced to only one year. Issuers can be confident that their home state will determine the choice of law in whatever jurisdiction the matter is litigated.

The proposed amendments also strengthen the buyer/account party's position by reaffirming the strict compliance rule. No longer will beneficiaries be allowed to claim that defective documents substantially complied with the terms of the letter of credit.

Sellers and beneficiaries will benefit greatly from the proposed amendments as well. Dishonor preclusion will prevent banks from dishonoring on one ground and later having banking lawyers dream up new grounds to bootstrap the dishonor. While punitive and consequential damages have been eliminated, attorneys' fees have been added, which should significantly reduce litigation in smaller letters of credit. Beneficiaries can change their character through corporate reorganizations without affecting their rights to draw under a letter of credit.

The proposed amendments surely will make the operation of letters of credit more predictable and certain. The commissioners have brought harmony to the conflicting post-1963 rulings on consequential damages, statutes of limitation, choice of law, strict compliance, and dishonor preclusion. No doubt the desired goal is in sight—the reduction of litigation over letters of credit, and the maintenance of letters of credit as an inexpensive and efficient instrument to facilitate trade and economic growth. ■

[1] The National Conference of Commissioners on Uniform State Law is a nonprofit corporation funded by the states, with 350 members appointed by the various state governors. The conference, which meets annually, originated in 1892 as part of the American Bar Association. The proposed amendments to art. 5, released in Dec. 1995, have not been adopted yet by any state. The amendments can be found in B. McCullough, Letters of Credit (Matthew Bender, 1996) [hereinafter McCullough].

[2] At press time, SB 1599, comprising the art. 5 amendments, was scheduled to go before the state senate banking committee for a vote on Apr. 9, 1996. It is expected to go before the full senate this summer and to the assembly by fall.

[3] Com. Code §5103(1)(a).

[4] While facilitating trade may be the primary function of letters of credit, they have been used in real estate transactions, personal property leases, and as a substitute for a bond. *See generally* J. Dolan, The Law of Letters of Credit ¶1.06, at 1-22 to 1-33 (2d ed. 1991) [hereinafter Dolan].

[5] Com. Code §5105, revised art. 5 §5-105. Eastland Bank v. Massbank for Sav., 767 F. Supp. 29 (D.R.I.), *aff'd*, 953 F. 2d 633 (1st Cir. 1991); San Diego Gas & Elec. Co. v. Bank Leumi, 42 Cal. App. 4th 928, 50 Cal. Rptr. 2d 20, 23 (1996).

[6] Fidelity Nat'l Bank v. Dade County, 371 So. 2d 544, 546 (Fla. Ct. App. 1979) ("[C]ompliance with the terms of a letter of credit is not like pitching horseshoes. No points are awarded for being close."). The strict compliance doctrine continues in revised art. 5 §108(a).

[7] Com. Code §5.115(1). Airline Reporting Corp. v. The First Nat'l Bank, 832 F. 2d 823 (4th Cir. 1987). Damages continue to be the face amount of the letter of credit under revised art. 5 §5-111(a), plus attorneys' fees and litigation expenses.

[8] Com. Code §2706. Spurgeon v. Drumheller, 174 Cal. App. 3d 659, 665 (1985). There is no requirement for beneficiaries to mitigate damages. Com. Code §5115; San Diego Gas & Elec. Co., 50 Cal. Rptr. 2d at 24.

[9] A national bank may not issue a guaranty. 12 U.S.C. §24; 12 C.F.R. §332.1 (1990).

[10] Witchita Eagle & Beacon Publishing Co. v. Pacific Nat'l Bank, 493 F. 2d 1285 (9th Cir. 1974). The concept of the issuer being primarily liable continues in revised art. 5 §5-108(a).

[11] Civ. Code §2787.

[12] Royal Bank of Canada v. Trone, 634 F. 2d 459 (9th Cir. 1980).

[13] If a creditor releases the principal, the guarantor's obligation is extinguished. Civ. Code §2845. Asociacion De Azucareros De Guat. v. United States Nat'l Bank, 423 F. 2d 638, 641 (9th Cir. 1970).

[14] Civ. Code §2801. Nimmo v. Fitzgerald, 202 Cal. 565 (1927).

[15] Civ. Code §2848. Merchants Bank & Trust Co. v. Economic Enters. Inc., 44 B.R. 230 (Bankr. D. Conn. 1984).

[16] Com. Code §5114. Strict compliance continues in revised art. 5 §5-108(a).

[17] Com. Code §5114(2). Fraud was only briefly mentioned in the 1963 version; revised art. 5 §5-109 devotes an entire new section to the issue.

[18] Com. Code §3104(a)(1).

[19] Com. Code §5103(1)(a), (b); revised art. 5 §5-102(10). The right to transfer (draw on) a letter of credit is expanded by revised art. 5 §5-112 but may still be subject to issuer consent in certain circumstances.

[20] Com. Code §3106(a).

[21] Com. Code §5102(1)(a), revised art. 5 §5-102(a)(10).

[22] Com. Code §5103(b); revised art. 5 §5-102(a)(6).

[23] These documents may include a bill of lading, invoice, or inspection certificate. Com. Code §5103(b).

[24] Com. Code art. 5, Introductory Comment to California Edition.

[25] Dolan, *supra* note 4, ¶1.04, at 1-16; McCullough, *supra* note 1, at §3.02[2][a].

[26] Dolan, *supra* note 4, ¶1.04, at 1-15.

[27] McCullough, *supra* note 1, at §1.02[2]. There is no preference when a creditor supplies goods in the ordinary course of business or for new value. *See* Matter of Compton, 831 F. 2d 586 (5th Cir. 1987), *in re'hrg*, 835 F. 2d 584 (5th Cir. 1987) (an antecedent debt that would have been ordinarily preferential cannot change character by virtue of a letter-of-credit transaction).

[28] Com. Code §5109. Uniform Customs & Practices for Documentary Credits (UCP) art. 3, 4, 16, and 17.

[29] Com. Code §5114(1). Asociacion De Azucareros De Guat., 423 F. 2d 638.

[30] Steinmeyer v. Warner Consolidated Corp., 42 Cal. App. 3d 515 (1974). Some commentators and courts have rationalized these decisions because California is the odd state out with a nonuniform version of the law. *See* Com. Code §5114. It is hoped that the legislature will adopt revised art. 5 §5-108(f), without revision, to end this departure from mainstream letter of credit law. *See also* San Diego Gas & Elec. Co., 50 Cal. Rptr. 2d at 24.

[31] Ground Air Transfer Inc. v. Westates Airlines, Inc., 899 F. 2d 1269 (1st Cir. 1990).

[32] Wichita Eagle & Beacon Publishing Co., 493 F. 2d at 1286.

[33] *See* notes 12-15, *supra*.

[34] Witchita Eagle & Beacon Publishing Co., 493 F. 2d at 1286 (court increased damages by almost $100,000 using a liquidated-damages theory).

[35] Dolan, *supra* note 4, at 1995 Supp. ¶4.06[2][I], at S4-16. If the document is construed as a letter of credit, the issuer can honor the demand of the beneficiary. As long as the issuer acted in good faith and observed its own standards, it has no liability to its account party. Com. Code §5109; *see* revised art. 5 §5-108(f).

[36] *See* text, *infra*.

[37] UCP art. 13(c); *see* revised art. 5 §5-108(g) (now follows the UCP; allows issuer to disregard nondocumentary conditions).

[38] Com. Code §5114; *see* revised art. 5 §5-108(a) (strict compliance doctrine reinforced).

[39] Corporacion De Mercadeo Agricola v. Mellon Bank Int'l, 608 F. 2d 43 (2d Cir. 1979) (upheld strict compliance rule; letter of credit required beneficiary to obtain buyer's signed statement).

[40] Portuguese-Am. Bank v. Atlantic Nat'l Bank, 200 A.D. 575, 193 N.Y.S. 423 (1922) (letter of credit required "California Light Petaluma Extras" and invoice stated "Petaluma Ranch Extras"; court upheld dishonor).

[41] Oriental Pac. Inc. v. Toronto Dominion Bank, 78 Misc. 2d 819, 357 N.Y.S. 2d 957 (Sup. Ct. 1974) (improper amount on invoice).

[42] Kelly-Springfield Tire Co. v. Dakota Northwestern Bank, 321 N.W. 2d 516 (N.D. 1982) (name on invoice did not match letter of credit).

[43] Farmer v. Crocker Nat'l Bank, 21 B.R. 12 (Bankr. 9th Cir. 1982) (letter of credit called for sight draft; beneficiary submitted wrong type).

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