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Buyer Beware: Electronic Letters of Credit and the Need for Default Rules

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Buyer Beware: Electronic Letters of Credit and the Need for Default Rules

William Patrick Cronican*

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I. INTRODUCTION

The international sale of goods often entails high volume, high price transactions in which parties may be unfamiliar with one another and in which a premium is placed on expediency and lowered transaction costs.¹ Parties who seek to expand the international impact of their business without sacrificing the security of the transaction have used letters of credit (LOC) to accomplish these goals.² In a LOC transaction, the buyer presents an instrument drafted by a financial institution that evidences his ability and promise to pay.³ The seller, upon compliance with the terms of the LOC (i.e., proper and prompt shipment and presentment of complying documents), receives payment from the bank.⁴ However, the transaction is not foolproof, and when things go wrong, it is often at great expense to one or both of the parties. To set the stage, an example may be helpful.

A clothing retailer in the Netherlands sought to acquire Levi's® jeans to resell in its multiple retail stores.⁵ The retailer contracted with a wholesale distributor in the United States to deliver the jeans and procured a LOC in order to remit secure payment to the wholesaler.⁶ Wholesaler shipped the merchandise and provided the purported, required documents needed to receive payment.⁷ The issuing bank released payment to the wholesaler upon presentation of the documents and received reimbursement from the retailer.⁸ When the retailer subsequently discovered that the over 43,000 pairs of jeans were counterfeit, it sued the bank for wrongful honor of the LOC.⁹ At trial, the court determined that the documents that the wholesaler presented to the bank were reproductions, whereas the LOC required originals, these were discrepant from those required by the terms of the LOC.¹⁰ As such, the bank was liable for wrongful dishonor.¹¹ At the completion

1. See Richard G. Weissman, *Caution! International Suppliers Ahead!*, THE FED'N OF INT'L TRADE ASS'N, <http://www.fta.org/aotm/1101.html> (last visited Feb. 27, 2013) (on file with the *McGeorge Law Review*) (describing the complexities of using international suppliers).

2. See A.D. Saunders, *Letters of Credit in International Transactions*, 102 BANKING L. J. 361, 361 (1985) ("It is axiomatic that letters of credit are extremely valuable in international buy/sell transactions, particularly where partners are unknown to one another.").

3. See *id.* (discussing the role of the buyer).

4. See *id.* (discussing the role and responsibility of the seller).

5. *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 498 (S.D.N.Y. 1997).

6. *Id.*

7. *Id.* at 499.

8. *Id.* at 497–500.

9. See *id.* at 498, 501 (describing the procedural posture of the case); see generally Boris Kozolchyk, *Strict Compliance and the Reasonable Document Checker*, 56 BROOK. L. REV. 45, 70–71 (1991) (explaining an action for wrongful honor as the "customer's invocation of strict compliance [with the letter of credit's terms] against the issuing bank's claim of reimbursement").

10. *Oei*, 957 F. Supp. at 510.

11. *Id.* at 505.

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of the transaction and resulting litigation, the bank was out \$1,004,400 and the retailer was out 43,200 pairs of Levi's®.¹²

The previous case description illustrates what can be at stake when parties enter into international sale of goods transactions with unknown parties.¹³ The stringent requirements placed upon the parties to an LOC are a reflection of what the instrument seeks to accomplish: to provide a secure method of payment and assurances to all parties that a trusted, neutral third-party will supervise the payment and shipment portions of the contract.¹⁴ The intricacies of LOCs are a product of the high risk and high stakes world of the international sale of goods.¹⁵ The complexities associated with compliance with the LOC can be magnified when the parties elect to undertake this process in an electronic format.¹⁶ Because the security and comfort provided by utilizing a LOC lies in the strict requirements associated with providing and verifying documents, electronic mediums add new complications to the equation.¹⁷ Deciding how documents should be formatted, how and to whom they should be sent, and what to do when data is lost or corrupted can all increase the difficulty inherent in an already intricate transaction.¹⁸

The International Chamber of Commerce (ICC) promulgated the Electronic Uniform Customs and Practice for Documentary Credits (eUCP) to address the aforementioned concerns.¹⁹ However, LOC users are currently reluctant to adopt it.²⁰ Therefore, this Comment urges the ICC to adopt the following recommended revisions to the eUCP in order to realize uniform adoption of a regulatory scheme of default rules for electronic letters of credit that are fair and reflective of modern market practices among participants in international sale of goods transactions.

In Part II, this Comment introduces the letter of credit, the parties involved and their respective responsibilities, the components of the instrument and how it

12. *Id.* at 498, 523.

13. *See supra* notes 5–12 and accompanying text (illustrating the potential liability to the parties involved).

14. *See* George P. Graham, *International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV. 201, 204 (2001) (describing generally the purpose behind letters of credit).

15. *See* Richard G. Weissman, *Caution! International Suppliers Ahead!*, THE FED'N OF INT'L TRADE ASS'N, <http://www.fta.org/aotm/1101.html> (last visited Feb. 27, 2013) (on file with the *McGeorge Law Review*) (describing the complexities of using international suppliers).

16. *See* JAMES E. BYRNE & DAN TAYLOR, ICC GUIDE TO THE EUCP: UNDERSTANDING THE ELECTRONIC SUPPLEMENT TO THE UCP 500 16 (2002) (describing how electronic records may “impinge” on traditional letter of credit transaction principles).

17. *See id.* (stating that the transition to an electronic process “raises new considerations for the safety and soundness of letter of credit practice”).

18. *See id.* (describing examples of how electronic records may complicate letter of credit principles).

19. *See id.* at 11 (stating the purpose behind drafting the eUCP).

20. Roberto Bergami, *ISBP, Non-Bank Letters of Credit and eUCP: A Commentary*, 11 VINDOBONA J. OF INT'L COM. L. & ARB. 147, 156 (2007).

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functions ideally, as well as its purpose and benefits.²¹ In Part III, this Comment discusses the law that governs LOC formation, performance, and dispute resolution.²² In Part IV, this Comment focuses primarily the rules that govern electronic LOC transactions.²³ Finally, in Part V, this Comment identifies the current regulatory scheme for electronic letters of credit, illustrates its shortcomings, and proposes a series of amendments to that regulatory paradigm in the hopes of providing a set of default provisions that will adequately address the complexities of electronic transactions and represent the expectations and intentions of current market participants.²⁴

II. THE LETTER OF CREDIT AND ITS USES

The commercial LOC is an invaluable tool for merchants in commercial transactions who lack the requisite trust, assets, or general business relationship to warrant an extension of credit between the parties.²⁵ When circumstances arise whereby the seller has reason to be concerned with the buyer's ability to pay, or the buyer has reason to doubt the seller's ability to deliver the goods, a LOC provides both parties a secure, neutral device that ensures all parties appropriately perform the payment and shipment requirements.²⁶ In other words, the LOC "is a common payment mechanism in international trade that permits the buyer in a transaction to substitute the financial integrity of a stable credit source (usually a bank) for his own."²⁷

A LOC primarily involves three parties.²⁸ The applicant or account party (generally the buyer) is the party who requests the LOC be issued.²⁹ The issuing bank is the lending institution that agrees, for a fee, to provide the necessary credit line on behalf of the buyer.³⁰ The advising bank is the bank that, upon

21. See *infra* Part II (discussing LOCs and their intended uses).

22. See *infra* Part III (detailing the legal background associated with LOCs).

23. See *infra* Part IV (discussing the regulatory scheme associated with electronic letters of credit specifically).

24. See *infra* Part V (recommending changes to problem sections of the eUCP in its current form).

25. See *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l*, 435 F. Supp. 2d 285, 295 (S.D.N.Y. 2006) (describing the letter of credit as a "device [that] is typically used when a seller of goods has identified a potential buyer but has reservations about the buyer's ability to pay").

26. See George P. Graham, *International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV. 201, 204 (2001) (describing generally the purpose behind letters of credit). While the terminology describing the parties to an LOC may differ depending on the governing law or jurisdiction, this Comment will use the terminology of the UCP and eUCP.

27. *Bouzo v. Citibank, N.A.*, 96 F.3d 51, 56 (2d Cir.1996) (quoting *Alaska Textile Co. v. Chase Manhattan Bank*, 982 F.2d 813, 815 (2d Cir. 1992)).

28. See Timothy K. Jordan, *Commercial Law Survey*, 70 DENVER U. L. REV. 685, 693 (1993) (describing the parties involved in a typical letter of credit transaction).

29. INT'L CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 17 (2006).

30. *Id.* at 18.

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request of the issuing bank, or as required by the sales contract, interacts with the beneficiary (usually the seller) to receive the documents and provide payment to the beneficiary.³¹ The beneficiary is the party who receives payment upon production of the required documents.³²

The role and logistics behind a LOC are, on their face, quite simple. When two parties enter into a transaction where they are unfamiliar with each other, or for whatever reason have concerns regarding the payment system portion of the transaction, the buyer procures a LOC.³³ The account party goes to his bank and applies for a LOC, whereby, for a fee, the bank will inform the seller/beneficiary that if he provides the required documents laid out in the LOC, he will receive payment.³⁴ The seller feels comfortable completing the transaction with an unknown buyer because he knows that if he meets the LOC requirements he will receive payment from a reputable financial institution.³⁵ The buyer is reassured because he now knows that before payment is made, the bank will have received the documents generally indicating that his product has been satisfactorily shipped.³⁶

The process of applying for and satisfying a LOC is generally as follows. The applicant will go to his bank and apply for the LOC. The LOC will state to the seller that if the required documents are presented to the issuing bank during the portion of the process known as “presentation,”³⁷ the bank will provide payment unconditionally.³⁸ The terms of the LOC will specify exactly what documents the seller must provide before the bank remits payment³⁹ These documents generally include items such as bills of lading, documents indicating that the items have been shipped, or proof of insurance.⁴⁰ Upon presentation of the required documents, the bank will review the documents for any discrepancies during the portion of the process known as “examination.”⁴¹

31. *Id.* at 17.

32. *Id.*

33. See Jordan, *supra* note 28, at 693 (describing how letters of credit “alleviate the tension that exists between sellers . . . and buyers. . .”).

34. See generally *id.* (describing the process of honoring letters of credit).

35. See Bouzo, 96 F.3d at 56 (describing the substitution of the individual party’s financial reputation with that of the issuing bank).

36. See *MSF Holding Ltd.*, 435 F. Supp. 2d at 295–96 (describing the various benefits of letter of credit usage).

37. INT’L CHAMBER OF COMMERCE, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS 18 (2007).

38. See Jordan, *supra* note 28, at 693 (detailing instances where the bank is required to honor payment even in the event of a dispute between the parties).

39. See *MSF Holding Ltd.*, 435 F. Supp. 2d at 296 (describing the strict adherence requirements of a letter of credit).

40. See, e.g., *Oei v. Citibank, N.A.*, 957 F. Supp. 492, 499 (S.D.N.Y. 1997) (describing the requirements contained in the letter of credit at issue).

41. See INT’L CHAMBER OF COMMERCE, *supra* note 37, at 27 (describing the duty of the issuing bank during examination as “examin[ing] a presentation to determine, on the basis of the documents alone, whether

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Assuming that the documents are in exact compliance with the LOC's requirements, the issuing bank will "honor" the LOC, provide payment to the beneficiary, and subsequently require payment from the applicant.⁴² The requirement that documents strictly comply with the terms set forth in the LOC is essential for ensuring that the buyer is afforded the protection which he envisioned when selecting a LOC. Since the buyer is not present to supervise the transaction, he must rely on the accuracy of the documents. In transactions where the issuing bank is unable, unwilling, or uncomfortable interacting with the beneficiary directly, the issuing bank will request that a second bank, the advising or confirming bank, interact with the seller to ensure that all required documents are obtained.⁴³ While an advising bank is required to inform the beneficiary that a LOC has been procured naming him as the beneficiary, and to inform him of the terms of the LOC, it takes on no responsibility to honor the LOC itself.⁴⁴ A confirming bank however, assumes the same rights and obligations as the issuing bank, including the responsibility of honoring the LOC upon presentation.⁴⁵ The parties may use an advising or confirming bank in circumstances where the seller wishes to interact with a bank that it has a previous relationship with, or one within closer proximity.⁴⁶ In such cases, the sales contract will instruct the issuing bank to interact with the selected advising or confirming bank.⁴⁷

The responsibility of the issuing and advising banks extend only to the details contained in the LOC; it does not include the original sales contract.⁴⁸ Therefore, the responsibility of the issuing bank is only to ensure that the terms of the LOC are complied with, regardless of whether the original sales contract has been fulfilled. Additionally, the bank is required to provide payment to the beneficiary even in cases where the account party is insolvent and unable to reimburse the bank.⁴⁹

or not the documents appear on their face to constitute a complying presentation").

42. 50 AM. JUR. 2D LETTERS OF CREDIT § 2 (2012).

43. See George P. Graham, *International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV. 201, 207-08 (2001) (summarizing the motivations behind designating an advising or confirming bank).

44. See *id.* (explaining the responsibilities and obligations of the advising bank).

45. See *id.* (explaining the responsibilities and obligations of a confirming bank).

46. *Id.*

47. See *id.* (explaining the responsibilities and obligations of a confirming bank).

48. See *MSF Holding Ltd.*, 435 F.Supp.2d at 296 (describing the bank's obligation to pay as "separate and independent from any obligation of its customer to the beneficiary under the sale of goods contract and separate as well from any obligation of the issuer to its customer under their agreement").

49. See *Jordan*, *supra* note 28, at 693 ("[T]he bank must pay even if the account party is insolvent, cannot, or refuses to reimburse the bank for payment to the beneficiary.").

III. THE LAW APPLICABLE TO LETTERS OF CREDIT

The law chosen by agreement of the parties will govern the LOC.⁵⁰ If not specified, the default rules of the jurisdiction where the parties (generally the issuing bank or account party) are located will govern the LOC.⁵¹ In instances where the transaction will be governed by the Uniform Commercial Code (UCC), Article 5 provides the applicable default rules specific to letters of credit.⁵² While the UCC originally made no reference to the use of electronic mediums, the 1995 amendments to the code recognize the issuance of letters of credit by “electronic means.”⁵³ This explicit reference to an electronic medium coupled with the general flexibility inherent in the UCC allowed the UCC to govern electronic transactions. However, it was by no means a perfect fit, and interpretive problems still arose.⁵⁴

While the UCC is commonly the default, the parties will frequently adopt the Uniform Customs and Practice For Documentary Credits (UCP).⁵⁵ The UCP is not a statute, but is instead a collection and codification of current business practices promulgated by the International Chamber of Commerce.⁵⁶ The UCP takes the force of, and acts as, governing law when the parties expressly adopt it within their agreement.⁵⁷ The UCP became a popular regulatory scheme to adopt because of its reflection of market practices and its more modern and practical approach to the transaction in general.⁵⁸ The appeal of the UCP to market participants and their desire to use it as the default provisions governing their transactions are illustrated by amendments to the UCC that specifically allow incorporation of the UCP into the governing law of the transaction.⁵⁹ Additionally, a non-uniform amendment adopted by certain states allows the UCP to displace the UCC in circumstances where the UCP is expressly elected in the LOC.⁶⁰ Further, conflict of law problems can arise when applying the UCP

50. 50 AM. JUR. 2D LETTERS OF CREDIT § 7 (2012).

51. *Id.*

52. U.C.C. art. 5 (2011).

53. U.C.C. § 5-104, official comment 3 (2011).

54. See R. David Whitaker, *Letters of Credit and Electronic Commerce*, 31 IDAHO L. REV. 699, 706 (1995) (discussing examples of unsettled law such as perfecting interests in paperless credit instruments).

55. INT’L CHAMBER OF COMMERCE, *supra* note 37; see also U.C.C. § 5-103(c) cmt. 2 (2011) (describing the frequent adoption of the UCP).

56. See JAMES E. BYRNE & DAN TAYLOR, ICC GUIDE TO THE EUCP: UNDERSTANDING THE ELECTRONIC SUPPLEMENT TO THE UCP 17 (2002) (describing the role of the UCP).

57. 50 AM. JUR. 2D LETTERS OF CREDIT § 7 (2012).

58. See Katherine A. Barski, *Letters of Credit: A Comparison of Article 5 of the Uniform Commercial Code and the Uniform Customs and Practice for Documentary Credits*, 41 LOY. L. REV. 735, 737–38 (1996) (describing the benefits of the UCP for those who elect to use it).

59. U.C.C. § 5-103(c) cmt. 2 (2011).

60. See, e.g., ALA. CODE § 7-5-116 (2013); ARIZ. REV. STAT. ANN. § 47-5116 (2013); MO. ANN. STAT. § 400.5-116 (2013); N.Y. U.C.C. Law § 5-116 (McKinney 2013).

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and UCC, although they are outside of the scope of this Comment.⁶¹ In circumstances where the parties wish to use electronic formats to streamline presentation, an additional set of rules and practices may be incorporated as the governing law by the express consent of the parties: the eUCP.⁶²

IV. THE EUCP

The eUCP was drafted by the International Chamber of Commerce to function as a supplement to the UCP.⁶³ The following Part of this Comment discusses both the structure and purpose of the eUCP in its current form.

A. *The Purpose Behind the eUCP*

As technology advanced, parties to LOCs looked for ways to expedite the process and reduce transaction costs.⁶⁴ They began to use electronic formats to issue letters of credit and present the required documents.⁶⁵ The increase in these practices prompted the ICC to draft a supplement to the UCP in order to allow market participants to utilize electronic formats, secure in the knowledge that an applicable body of default rules existed that they could incorporate.⁶⁶ The eUCP does not supplant the UCP, but was instead drafted as an addendum to address specific issues related to the electronic presentation of documents.⁶⁷ For example, the eUCP contains articles specific to how electronic records are to be formatted,⁶⁸ how data is to be transmitted,⁶⁹ and how corrupted data is to be dealt with.⁷⁰ Just as the parties to the transaction must expressly adopt the UCP, the parties must further expressly adopt the eUCP.⁷¹ The drafters of the eUCP made specific efforts to ensure that the terms and articles of the eUCP were “technology neutral” in order to provide the flexibility envisioned in most default rules and to allow the market itself to dictate where and how the electronification

61. See generally Dale Joseph Gilsinger, Annotation, *Validity, Construction, and Application of the Uniform Customs and Practice for Documentary Credits (UCP)*, 56 A.L.R. 5th 565, 602–16 (1998) (describing specific conflict of law problems associated with the UCC and UCP).

62. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 57 (2006).

63. See BYRNE, *supra* note 56, at 11–12 (describing the creation of the UCP).

64. See *id.* at 11 (stating that users of letters of credit have “sought to increase the speed of their transactions over the years. . .”).

65. See *id.* at 11–12 (describing the implementation of telegrams and cables and the progression towards more modern technology such as computerized processing systems).

66. See *id.* at 11 (“[I]t is only a matter of time until the vast majority of presentations will be made electronically.”).

67. See *id.* at 13 (describing the relationship between the UCP and eUCP).

68. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 59.

69. *Id.* at 59–60.

70. *Id.* at 62.

71. *Id.* at 57.

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process would evolve.⁷² Additionally, the drafters realized that the transition to electronic presentation would occur in stages, and thus drafted the articles to allow for mixed formats where some documents would be presented electronically and others in hard copy.⁷³ The endgame envisioned by many who are urging the transition to a fully electronic system is to allow for fully automated presentation and evaluation.⁷⁴ The current system where a live employee checks documents against the credit requirements is time consuming, expensive, and prone to mistake.⁷⁵ A fully adopted set of default rules would help to facilitate the transition to a fully electronic and automated system, reducing transaction costs and increasing efficiency.⁷⁶

B. Organization of the eUCP

The eUCP is organized into twelve Articles.⁷⁷ Articles 1 and 2 lay out the scope of the eUCP and its relationship to the UCP.⁷⁸ Article 3 provides a set of definitions tailored to the realities of electronic transactions,⁷⁹ and the remaining Articles provide “substantive rules that change underlying concepts of” the UCP.⁸⁰

V. THE EUCP: PROBLEMS AND SOLUTIONS

At present, the eUCP flaunts an adoption rate of almost zero.⁸¹ This rate perhaps serves as a cautionary tale to policymakers who seek to write regulations in anticipation of technological and market changes.⁸² While the goal of the eUCP to provide a set of default rules that would allow the law to operate in the background of business negotiations similar to the UCC was admirable, the realities of the market have exposed significant flaws in the scheme as it is

72. See BYRNE, *supra* note 56, at 12–13 (detailing the decisions of the ICC regarding specific technologies).

73. See *id.* at 13 (describing the decision to include multiple presentation formats).

74. See Whitaker, *supra* note 54, at 703–04 (discussing the prospective benefits of a fully automated and electronic letter of credit system).

75. See Boris Kozolchik, *Strict Compliance and the Reasonable Document Checker*, 56 BROOK. L. REV. 45, 49 (1990) (“The highest operational cost of all, however, is the distrust fueled by the perception that the . . . letter of credit is no longer the reliable means of payment and finance that it [once] was.”).

76. See *id.* at 48–49 (describing the costs associated with refusal of presentation).

77. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 57–63.

78. *Id.* at 57.

79. *Id.* at 58–59.

80. See BYRNE, *supra* note 56, at 14.

81. Roberto Bergami, *ISBP, Non-Bank Letters of Credit and eUCP: A Commentary*, 11 VINDOBONA J. OF INT’L COM. L. & ARB. 147, 156 (2007).

82. See *id.* at 157 (commenting that changes to the eUCP will likely be “driven by e-business factors outside the banking community”).

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currently written.⁸³ A sampling of the problems that may be contributing to the low adoption rate are as follows.

A. *Presentation*

The following three Subsections will address the eUCP articles relating to presentation, identify the problems with the articles as currently enacted, and propose an amendment to the articles that will encourage adoption of the eUCP.

1. *Current eUCP Article e5 and e11*

Article e5 discusses the current model for presentation.⁸⁴ The Article discusses how LOCs governed by the eUCP “must state a place for presentation of electronic records” and paper documents should there be any.⁸⁵ The Article states that “electronic records may be presented separately and need not be presented at the same time.”⁸⁶ The Article also discusses the process to be followed in the event that a bank, due to a system error, is unable to retrieve submitted documents.⁸⁷

Article e11 discusses the steps the parties may take if they receive a corrupted document.⁸⁸ The Article details the process for re-presenting the corrupted document and addresses how the timeline for examination is affected.⁸⁹

2. *Problems with Current Articles e5 and e11*

In contrast to traditional delivery of hard copy documents to the bank (likely to its brick and mortar place of business), sending documents electronically to the bank or storing them remotely for the bank to access may raise problems associated with the “place for presentation.”⁹⁰ Virtual storage requires careful instructions to the bank for the retrieval of documents and any error in these instructions may lead to delivery being deemed defective or noncompliant⁹¹

83. See generally Roberto Bergami, *eUCP: A Revolution in International Trade?*, 8 VINDOBONA J. OF INT’L COM. L. & ARB. 23 (2004) (describing multiple flaws with the eUCP in its current state).

84. See *infra* App. A for the full text of all current eUCP articles discussed.

85. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 59.

86. *Id.*

87. *Id.* at 60.

88. See *infra* App. A for the full text of all current eUCP articles discussed.

89. See INT’L CHAMBER OF COMMERCE, *supra* note 37, at 62 (explaining how the time for examination is suspended).

90. See *id.* at 20–21 (describing that documents must be presented to the “place of the bank” that is providing the credit).

91. See BYRNE, *supra* note 56, at 104 (providing a warning to practitioners regarding the complications and implications of remote data storage).

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Alternatively, the possibility that the bank will be unable to retrieve the documents sent to them directly due to some system failure or file corruption creates problems as to ascertaining whether the bank timely received the documents.⁹² For example, if documents would have arrived at the bank's server, but the bank is unable to retrieve them for whatever reason, is delivery defective or must the bank honor the LOC and bare the risks associated with potential technological failures?⁹³ The possibility that data corruption will cause documents to be late or incomplete, which would usually lead to discrepancy and denial in a non-electronic version of the transaction, requires particular attention from parties considering the use of electronic documents.⁹⁴ The electronic conversion of this process will be accompanied by the problems associated with the transmission of all electronic documents.⁹⁵ Determining how such innocent, and potentially trivial problems will affect document verification and the timing of the transaction will likely prove to be an important clarification.⁹⁶ In a system where the timing and strict requirements associated with the delivery of documents are paramount, data retrieval issues further complicate the issue.⁹⁷

Article e11 suspends the time allotted for examination by the bank if there is some sort of data corruption that prevents the bank from viewing the document after it receives it.⁹⁸ The Article, however, explicitly states that no other deadlines related to the LOC are extended.⁹⁹ As such, while Article e11 affords the bank the protection of extending the time required to perform its obligation of examination, it does not offer similar protection to beneficiaries who transmitted their electronic records, but due to the extended time required for examination may now run the risk of violating other terms or timelines contained in the LOC.¹⁰⁰ Decisions on whether this scenario represents discrepant presentation, as it may now fall outside of designated timelines, or if the extension of time is similarly granted to the beneficiary would be left to the parties to negotiate prior to entering any agreement.¹⁰¹ Negotiating a multitude of nuanced and hypothetical

92. *See id.* at 139 (distinguishing between data corrupted prior to receipt not being in compliance, and data corrupted after receipt).

93. *See id.* at 139 (describing the potential effect of different types of data corruption).

94. *See Bergami, supra* note 83, at 33–34 (describing questions that parties should ask before electing to use the eUCP).

95. *See* BYRNE, *supra* note 56, at 12–13 (2002) (describing the difficulties associated with drafting the rules, particularly those difficulties associated with integrating an electronic system into a traditionally paper-based transaction).

96. *See Bergami, supra* note 83, at 33–34 (detailing clarifications that parties will need before they elect to use electronic letters of credits and the eUCP).

97. *See* BYRNE, *supra* note 56, at 87–96 (describing particularly how the electronic nature of presentation affects the transaction).

98. INT'L CHAMBER OF COMMERCE, *supra* note 37, at 62 (2007).

99. *Id.*; BYRNE, *supra* note 56, at 95 (stating that the article applies only to the expiry deadline).

100. *See, e.g., id.* at 144 (illustrating the possibility of one party having to pay interest or other damages associated with the delay).

101. *See id.* at 140 (stating that a bank may modify the article or exclude it in its entirety).

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scenarios prior to consummating a business relationship is undoubtedly contrary to the reality of the market, where business players would much rather get the deal done and worry about the “legal stuff” later.¹⁰² The elegance of default rules are that they allow business people to conduct negotiations within their comfort zones while being secure in the fact that any issues they have failed to contemplate can be addressed by the application of a default rule later on.¹⁰³ A default rule that protects both the bank and the beneficiary should these problems occur would likely be popular among participants who want to strike a deal, without having to foresee all possible problems.¹⁰⁴

3. Proposed Amendment to Article e11

This Comment’s proposed amendment to the eUCP inserts into Article e11(b) an additional subsection which reads as follows:

- b. If the bank requests that an electronic record be re-presented
 - i. the time for examination is suspended and resumes when the presenter re-presents the electronic record; and
 - ii. *the time for presentation is suspended and resumes when the presenter re-presents the electronic record.*¹⁰⁵

This amendment will allow the beneficiaries to feel secure in knowing that they can resubmit any corrupted documents they inadvertently send without violating the timeline for presentment.¹⁰⁶ As a compromise for allowing the beneficiary to suspend the time for presentation, the thirty (30) day timeline for re-presentation should be shortened to fifteen (15) days. This change to the Article will help to ensure that beneficiaries will not abuse their newfound latitude and be careless with their document presentation at the expense of the account party.¹⁰⁷

102. See Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 684 (2006) (describing default rules as those used to fill gaps in contracts).

103. See *id.* (describing the use of default rules).

104. See George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109, 1110 (2006) (describing benefits of default rules).

105. See *infra* App. B for the full text of all proposed article revisions.

106. See Leslie King O’Neal, *They’re Back: Letters of Credit Provided in Lieu of Surety Bonds*, CONSTRUCTION LAW., Jan. 2011, at 4 (discussing generally the repercussions of violating the timeline for presentment).

107. See BYRNE, *supra* note 56, at 81 (discussing the possibility that a party may utilize an “obscure format” to avoid strict compliance requirements in the event a format is not specified).

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The change related to the suspension of expiry time when banks are unable to view corrupted documents would advantage the beneficiary with little disruption to the transaction as a whole. Because allowing the bank to extend its own time for examination will delay the overall timeframe of the transaction, adding comparable protection for the beneficiary as a default rule will improve the adoption rate of the eUCP.¹⁰⁸ Beneficiaries will now be protected from breaching any contract with the account party based solely upon verification issues with the data housed at the issuing, advising, or confirming bank. Freezing one timeline and allowing another to run may result in a breach; while this possibility may be remote, the repercussions of just such an occurrence may be severe and warrant the protection of a default rule should the parties fail to foresee such an occasion.¹⁰⁹

A default rule that protects banks during their obligation for examination, beneficiaries during their obligations of presentment, and account parties by insuring that beneficiaries will continue to be attentive to their document production will likely be well-received and incorporated into commercial practice.

*B. Agreement on Formatting**1. Current eUCP Article e4*

An eUCP credit must specify the formats in which electronic records are to be presented. If the format of the electronic record is not so specified, the record may be presented in any format.¹¹⁰

2. Problems With Current Article e4

A problem of paramount importance is the agreement and implementation of a system for sending, receiving, and viewing the documents.¹¹¹ Because multiple parties (i.e., bank, beneficiary, third party carriers, and others) are all likely to be sending, editing, or receiving documents, the need for a user-friendly and widely accepted formatting system arises.¹¹² Additionally, Article e4 requires that the LOC specify in which format electronic records will be presented and states that

108. See Roberto Bergami, *eUCP: A Revolution in International Trade?*, 8 VJ 23, 33–34 (2004) (describing questions that parties should ask before electing to use the eUCP).

109. See *Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F. Supp. 386, 387–88, 402 (D. Md. 1982) (finding against the beneficiary in an action for wrongful dishonor when the beneficiary failed to meet deadlines for presentment imposed by the terms of the letter of credit).

110. INT'L CHAMBER OF COMMERCE, *supra* note 37, at 59 (2007).

111. See Bergami, *supra* note 83, at 33–34 (2004) (discussing questions that must be answered before electronic transactions become prevalent).

112. See BYRNE, *supra* note 56, at 86–87 (2002) (discussing the implications of electronic presentation).

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if the format is not specified that “it may be presented in any format.”¹¹³ The Article, as currently written, also allocates the risk of failure to specify the format to the banks.¹¹⁴ Failure to specify will result in the beneficiaries being allowed to transmit documents in any format they choose; the bank’s inability to view the documents will not stand as grounds for refusal.¹¹⁵

The current Article, which allocates the risk for the omission of a specified document format to the bank, has likely attributed to the low adoption rate of the eUCP.¹¹⁶ It is unlikely that the risk management model of a bank would allow the express incorporation of a regulatory scheme where the result of a somewhat trivial omission may lead to the bank’s exposure to substantial liability.¹¹⁷ The instrument and its implementation hinges on the participation of commercial banks or similar financial institutions,¹¹⁸ so a change to the default rule which garners the favor of the banks issuing the LOCs is essential to the adoption of any set of default rules.¹¹⁹

The following recommendation will continue to address the necessity for an agreed upon document format, but will remove the burden for ensuring its implementation on the bank and instead place it upon the parties to the sales contract. The portion of Article e4, which requires a document format to be specified, will remain unaltered. However, the burden of ensuring that the bank can view the documents will now fall to the beneficiary.

3. *Proposed Amendment to Article e4*

The second sentence of Article e4 should be amended so that Article e4 reads as follows:

An eUCP credit must specify the format in which electronic records are to be presented. If the format of the electronic record is not so specified, it shall be the duty of the beneficiary to ensure that the documents are viewable by the issuing, advising, or confirming bank. Any formatting issues encountered after issuance of the credit will not suspend or extend the time for presentation.

113. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 59 (2007).

114. See BYRNE, *supra* note 56, at 80–81 (2002) (discussing the implications of electronic formatting).

115. *Id.*

116. See Bergami, *supra* note 83, at 33–34 (2004) (detailing questions that must be asked by practitioners and market participants before electing to utilize the eUCP).

117. See Zachary J. Gubler, *The Financial Innovation Process: Theory and Application*, 36 DEL. J. CORP. L. 55, 62–67 (2011) (describing the different risk management models of financial institutions).

118. See *Bouzo*, 96 F.3d at 56 (quoting Ala. Textile Co., 982 F.2d 813, 815 (2d Cir. 1992)) (detailing the rationale behind involving commercial banks in the sale of goods transaction).

119. See *MSF Holding Ltd.*, 435 F.Supp.2d at 295 (describing the benefit of utilizing a financial institution for party confidence).

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The new language will require the beneficiary to ensure that the issuing bank can receive and view its documents for examination. By not extending the timeline for presentation, any possibility of using formatting conflicts to the advantage the beneficiary is likely eliminated.¹²⁰ Additionally, when beneficiaries are now faced with the risk allocation for any formatting problems, they will likely take care that formatting requirements are addressed during negotiations and are included in the text of the LOC.¹²¹ While potentially adding an element to negotiations may seem counter to the goals of default rules, the burden of Article e4 as it currently stands must be shifted to ensure that commercial banks are willing to adopt the other default rules contained in the eUCP.¹²² By shouldering the responsibility of negotiating a document format prior to drafting the LOC, the parties could then receive the benefit of the other default rules being adopted.¹²³

Amending Article e4 and shifting the burden of universally accepted formatting to the beneficiary better represents the realities of the transaction. The account party and the beneficiary are the parties who have the most at stake in the transaction, while the bank has come on board merely to facilitate the transaction and to collect its fee.¹²⁴ Asking the bank to shoulder the substantial risk that it will have to honor a LOC regardless of whether it can view documents is nonsensical and warrants redrafting. By requiring the beneficiary to ensure that data is viewable by all parties, a larger number of banks are likely to adopt the eUCP and the lower risk taken on by the bank may possibly lead to lower fees associated with the transaction.¹²⁵

4. *Documents Transmitted by a Third Party*

a. *Current eUCP Article e5*

Article e5 discusses the current model for presentation, which allows documents to be presented separately by multiple parties.¹²⁶

120. BYRNE, *supra* note 58, at 81 (discussing the possibility that a party may utilize an “obscure format” to avoid strict compliance requirements in the event a format is not specified).

121. *See* Bergami, *supra* note 83, at 33–34 (describing the thought process parties should undertake prior to entering into a transaction governed by the eUCP).

122. *See* George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109, 1110 (2006) (describing benefits of default rules).

123. *See generally* TED A. DONNER, ATTORNEY’S PRACTICE GUIDE TO NEGOTIATIONS § 11:9 (2012) (describing the benefit of making concessions during negotiations).

124. *See* Jordan, *supra* note 28, at 693 (describing generally the roles of the parties in the transaction).

125. *See* Waltraud S. Scott, *Deferred Cash Payments to Secured Creditors in Cram Down of Chapter 11 Plans: A Matter of Interest*, 63 WASH. L. REV. 1041, 1056, n.78 (1998) (describing the relationship of risk to interest rates).

126. *See infra* App, A for the full text of all current eUCP articles discussed; *see also supra* Part.IV.A.I.

*2013 / Electronic Letters of Credit and the Need for Default Rules**b. Problems With Current Article e5*

The model for presentation as it was traditionally envisioned and implemented consisted of the beneficiary collecting all necessary documents and delivering them in one lot for examination.¹²⁷ This provided the beneficiary with the opportunity to ensure that all documents were correct and delivered in a timely manner. The eUCP expressly permits documents to be presented separately and to come from multiple sources.¹²⁸ With documents being forwarded to the bank directly, either to expedite the process or lower transaction costs, the beneficiary potentially loses control over the verification of important documents.¹²⁹ While the eUCP allows the documents to be forwarded from whatever source and in any order, it does require that the beneficiary deliver a notice of completeness stating that the bank now has all of the necessary records in its possession.¹³⁰ The problem inherent in this structure is that the beneficiary retains the obligation of providing documents that must pass a strict review and a notice of completeness.¹³¹

However, the default position of the current scheme purports to give away important control over the presentation process by allowing others to deliver documents to the bank “piecemeal.”¹³² In order for beneficiaries to ensure that they have the opportunity to review all documents and provide the notice of completeness, they must specifically negotiate with the involved parties to circumvent the default position of the eUCP.¹³³ It seems more logical to have the default rule protect beneficiaries’ interests in insuring the adequacy of the documents and allow them to contract around the rule in the interest of expediency or lowered transaction costs.

c. Proposed Amendment to Article e5

The recommended revisions to Article e5 to accomplish this goal are as follows. Article e5(b) should be amended to read:

127. See BYRNE, *supra* note 56, at 86 (2002) (stating that banks typically expect presentation to be in one lot).

128. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 59.

129. See Bergami, *supra* note 83, at 30–31 discussing how transmission of documents by third parties “would potentially weaken the position of the beneficiary if the bank was to discover discrepancies after receipt of the record”).

130. INT’L CHAMBER OF COMMERCE, *supra* note 37, at 59.

131. *Id.* at 59–60.

132. See *id.*; BYRNE, *supra* note 56, at 89 (describing how documents are not required to be received in one lot).

133. See *id.* at 95 (detailing the process for modifying the article).

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*Unless expressly contracted otherwise, both electronic and paper documents must be received exclusively from the beneficiary and delivered in one installment.*¹³⁴

The requirement that the documents must all flow through the beneficiary will operate, in a sense, similarly to UCC implied warranties.¹³⁵ They exist as the default to benefit and protect the parties involved, but may be disclaimed or contracted around as the parties see fit.¹³⁶ A default position whereby the beneficiary is secure in knowing that it will have complete control over the required documents further decreases the uncertainties related to the transaction, which is a primary goal of LOCs.¹³⁷ Conversely, if the beneficiary feels comfortable with other parties transmitting documents on its behalf, it is free to change the default position.¹³⁸ The nature of the default rule should be to best protect the parties to the transaction in the event that they have elected or forgotten to negotiate specific aspects of the deal.¹³⁹ Here, the beneficiary retains the maximum amount of control over the presentation process under the default rule and is given the freedom to exchange some of that control for faster transactions or lower transactional costs at its own discretion.

Changing the default position associated with how documents may be sent to the bank would allow the beneficiary to retain essential control over the transaction while still preserving the flexibility that is inherent in default rules. Because the essence of the transaction necessarily relies on the accuracy of the documents presented and the potential liability of all parties radiates from this verification, the default position should award the greatest amount of control to the parties with the most at stake.¹⁴⁰ By allowing the beneficiary to retain control over the documents, the beneficiary protects himself throughout the transaction, potentially eliminates unnecessary errors that add to transaction costs, and may still contract around the default positions should he choose to do so.

134. See *infra* App. B for the full text of all suggested revisions.

135. See 68 AM. JUR. 2d SALES § 676 (2nd ed. 2003) (describing implied warranties generally).

136. See *id.* at § 768 (describing how warranties may be disclaimed).

137. See *MSF Holding Ltd.*, 435 F. Supp. 2d at 295 (describing the security of the transaction).

138. See BYRNE, *supra* note 56, at 95–96 (detailing the process for modifying the article).

139. See Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 684 (2006) (stating the purpose of default rules).

140. See Michael J. Funk, *Letters of Credit in Bankruptcy: The Rights and Duties of the Parties*, 2 J. BANKR. L. & PRAC. 683, 692 (1992) (describing the principle of strict compliance as “crucial to the credit’s function”).

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5. *Evidentiary Treatment of Electronic Records*

a. *The Problem with the Current eUCP*

One problem that may occur in the event that deals go bad and litigation becomes necessary is how the court will weigh the evidentiary value of the electronic record that the parties have created.¹⁴¹ Some jurisdictions have been hesitant to give electronic records the same evidentiary weight as hard copy documents, while other jurisdictions have incorporated them substantially into their litigation processes.¹⁴² As parties attempt to eliminate paper records from their business practices and move towards an automated system, the parties must feel comfortable with the way that the record will be treated in the event that they must litigate.¹⁴³ A system that potentially requires exclusively electronic documents, yet presents obstacles as to whether they will be admissible based upon their formatting, is surely fundamentally flawed.¹⁴⁴ While it is possible that this is not one of the primary reasons that parties have elected not to incorporate the eUCP into their business practices,¹⁴⁵ the function of default rules generally is to ensure that any omissions or oversights will be resolved.¹⁴⁶ Theoretically this resolution would be in the best interest of all parties. A default rule that takes special care to ensure that electronic records will be fully accessible in court will likely be beneficial to the parties.¹⁴⁷ Whether or not this amendment will be a primary reason for adoption is unknown, however, it may serve to “sweeten the pot” and lend further credibility to the argument that the eUCP drafters have thoroughly considered the best interests of the parties.

Parties to international letters of credit, as sophisticated business participants, will likely have the foresight to negotiate choice of law provisions within their contracts.¹⁴⁸ The goal of revising the eUCP is that it will be the primary governing scheme that parties elect; therefore, it is necessary to include provisions not only to help facilitate the transaction when it functions as expected, but to address

141. See Roberto Bergami, *Rotterdam Rules: Volume Contracts, Delivery Terms, Transport Documents and Letters of Credit*, 14 VJ 9, 30 (2010) (describing potential problems associated with the evidentiary value of electronic records).

142. See *id.* (detailing the disparate treatment of electronic records among different jurisdictions).

143. See BYRNE, *supra* note 56, at 18 (2002) (discussing how certain judicial decisions have “increase[d] significantly the risk of engaging in trade finance” electronically).

144. See generally Bergami, *supra* note 83, at 23 (describing generally the current problems with the eUCP).

145. See *id.* (detailing likely more pressing problems associated with electronic letters of credit).

146. See Curtis Bridgeman, *Default Rules, Penalty Default Rules, and New Formalism*, 33 FLA. ST. U. L. REV. 683, 684 (2006) (stating purpose of default rules).

147. See David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 960–61 (1990) (describing the policy in American courts favoring admissibility of evidence).

148. See George P. Graham, *International Commercial Letters of Credit and Choice of Law: So Whose Law Should Apply Anyway?*, 47 WAYNE L. REV. 201, 230 (2001) (describing the impact and importance of choice of law provisions).

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potential problems inherent when the deal turns sour.¹⁴⁹ Here, inserting a default rule that provides that courts will give electronic records the necessary evidentiary weight allows parties to select the eUCP knowing that if they do end up in court, at least one procedural rule will represent the parties' intent to use electronic data, regardless of what other law is imposed based upon the venue.¹⁵⁰

b. Proposed Amendment to the eUCP

In order to effectuate a change to the legal landscape and ensure that electronic documents and records will receive the evidentiary value they require, a separate article should be added to the current eUCP. The new article will be stated as follows:

Notwithstanding any other choice of law provisions contained in the letter of credit or otherwise, the parties expressly incorporate UNCITRAL Model Law on Electronic Commerce Articles 5 and 9.

Articles 5 and 9 state that a document shall not be “denied legal effect . . . solely on the grounds that it is in” electronic format.¹⁵¹ They further go on to supersede applicable rules of evidence to state that electronic messages will not be deemed inadmissible strictly because they are in an electronic form.¹⁵² The Articles do mention the fact that these rules do not automatically make the evidence admissible, and that their evidentiary weight must be evaluated based upon reliability of their source, condition, and other similar factors.¹⁵³

Implementation of these Articles would not necessarily mean that all electronic records are automatically admissible or that they create any sort of irrefutable presumption of validity.¹⁵⁴ They merely state that the court cannot exclude the electronic documents from the record based on their format alone. The addition of these Articles to the eUCP would further simplify negotiations and potential pretrial or trial conflicts associated with the evidentiary value of the record created.¹⁵⁵ Market participants, by incorporation of the eUCP, would also

149. *See id.* (advising U.S. lawyers to negotiate choice of law provisions that are “full of teeth”).

150. *See* John G. Powers, *Planning for Forum Selection in Commercial Transactions*, 78 FEB N.Y. ST. B.J. 22 (2006) (discussing the implications of failing to anticipate complications associated with litigating in an unfamiliar jurisdiction).

151. U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT 1996, at 5, U.N. Sales No. E.99.V.4 (1999).

152. *Id.* at 7.

153. *See id.* (describing how the “evidential weight” of electronic messages is to be evaluated).

154. *See Electronic Commerce Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce*, 7 TUL. J. INT'L & COMP. L. 251, 267 (1999) (“[A]rticle 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.”).

155. *See* Bergami, *supra* note 141, at 30 (detailing the disparate treatment of electronic records among different jurisdictions).

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by default be ensuring that should litigation become a necessity, the evidentiary record would mirror the realities of the transaction, despite any procedural hurdles they may encounter based upon the courtroom that they ultimately end up litigating in.

Negotiation battles over choice of law provisions are often hotly contested because of the potential implications to the parties involved.¹⁵⁶ As opposed to other negotiations that center around the transaction itself, choice of law provisions are often written in and discussed with an eye to what will happen if things go wrong and the parties are forced to litigate.¹⁵⁷ Implementing a choice of law provision that is mutually beneficial to all parties, within the structure of the rules that will govern the transaction, allows the parties to streamline negotiations.¹⁵⁸ By including an evidentiary rule within the transactional rules associated with letters of credit, the parties' true intent to have a fully electronic and potentially automated transaction is protected. International sale of goods transactions can present complicated choice of law questions for parties and courts alike.¹⁵⁹ The insertion of a guiding evidentiary principle into the default provisions that govern the transaction allows parties to focus their negotiation efforts elsewhere and know that if all else fails, and they find themselves in court, there will be one less issue to be resolved.

VI. CONCLUSION

A revision of the eUCP that incorporates the aforementioned changes would likely lead to a regulatory scheme that better addresses the concerns of the users.¹⁶⁰ It would also give the market participants a fair and feasible body of regulatory law to incorporate into their contracts. Adoption of these changes would likely lead to an increase in the adoption rate of the eUCP and allow for a body of interpretive case law to develop, which would guide future transactions and negotiations.¹⁶¹ Business participants seek favorable default rules so that they may continue to engage in their daily business without adding to the already labor intensive negotiation process.¹⁶² These recommended changes will provide protection to both the beneficiary and account party where needed and ensure

156. See Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245, 246–249 (1993) (detailing the benefits associated with choice of law provisions).

157. See *id.* at 254 (describing the impact of choice of law provisions).

158. See *id.* (stating multiple benefits to choice of law clauses).

159. See Graham, *supra* note 148, at 214–20 (providing a general overview of complicated decisions regarding choice of law problems in international sale of goods transactions).

160. See *infra* Part V (discussing the change of rules specific to electronic transactions).

161. See *infra* Part V (discussing the benefits of proposed solutions).

162. See George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109, 1110 (2006) (discussing default rules).

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that commercial banks will be willing to incorporate the eUCP into their letters of credit.

Overall, the restructuring of the eUCP rules would streamline the transaction and its application, but more importantly it would create a regulatory structure that better protects the parties involved. The new set of rules, if adopted, would ensure that those parties who seek to utilize letters of credit are governed by a set of default rules that are practical, protective of the parties' interests, and easily applicable.

VII. APPENDIX A: ORIGINAL EUCP ARTICLES

Article e4

Format

- a. An eUCP credit must specify the formats in which electronic records are to be presented. If the format of the electronic record is not so specified, it may be presented in any format.

Article e5

Presentation

- a. An eUCP credit allowing presentation of:
 - i. electronic records must state a place for presentation of the electronic records
 - ii. both electronic records and paper documents must also state a place for presentation of the paper documents.
- b. Electronic records may be presented separately and need not be presented at the same time.
- c. If an eUCP credit allows for presentation of one or more electronic records, the beneficiary is responsible for providing a notice to the bank to which presentation is made signifying when the presentation is complete. The notice of completeness may be given as an electronic record or paper document and must identify the eUCP credit to which it relates. Presentation is deemed not to have been made if the beneficiary's notice is not received.
- d.
 - i. Each presentation of an electronic record and the presentation of paper documents under an eUCP credit must identify the eUCP credit under which it is presented

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- ii. A presentation not so identified may be treated as not received.
- e. If the bank to which presentation is to be made is open but its system is unable to receive a transmitted electronic record on the stipulated expiry date and/or the last day of the period of time after the date of shipment for presentation, as the case may be, the bank will be deemed to be closed and the date for presentation and/or the expiry date shall be extended to the first following banking day on which such bank is able to receive an electronic record. If the only electronic record remaining to be presented is the notice of completeness, it may be given by telecommunications or by paper document and will be deemed timely, provided that it is sent before the bank is able to receive an electronic record.
- f. An electronic record that cannot be authenticated is deemed not to have been presented.

Article e11

Corruption of an Electronic Record After Presentation

- a. If an electronic record that has been received by the issuing bank, confirming bank, or another nominated bank appears to have been corrupted, the bank may inform the presenter and may request that the electronic record be re-presented.
- b. If the bank requests that an electronic record be re-presented:
 - i. the time for examination is suspended and resumes when the presenter re-presents the electronic record; and
 - ii. if the nominated bank is not the confirming bank, it must provide the issuing bank and any conforming bank with notice of the request for re-presentation and inform it of suspension; but
 - iii. if the same electronic record is not re-presented within thirty (30) calendar days, the bank may treat the electronic record as not presented, and
 - iv. any deadlines are not extended.

VIII. APPENDIX B: PROPOSED AMENDMENTS

An additional subsection shall be inserted into Article e11(b) so that Article e11(b) would read as:

- b. If the bank request that an electronic record be re-presented
 - i. the time for examination is suspended and resumes when the presenter re-presents the electronic record; and
 - ii. *the time for presentation is suspended and resumes when the presenter re-presents the electronic record.*

Article e4 shall be amended to read:

An eUCP credit must specify the format in which electronic records are to be presented. If the format of the electronic record is not so specified, it shall be the duty of the beneficiary to ensure that the documents are viewable by the issuing, advising, or confirming bank. Any compatibility issues encountered after issuance of the credit shall not suspend or extend the time for presentation.

Article e5(b) shall be amended to read:

Unless expressly contracted otherwise, both electronic and paper documents must be received exclusively from the beneficiary and delivered in one installment.

The new article to be inserted will state as follows:

Notwithstanding any other choice of law provisions contained in the letter of credit or otherwise, the parties expressly incorporate UNCITRAL Model Law on Electronic Commerce Articles 5 and 9.