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RE: 2009 Supplement No. 2

Dear Valued Customer,

Enclosed you will find your 2009 Cumulative Supplement No. 2 to *The Law of Letters of Credit, Fourth Edition*. This supplement brings the Fourth Edition up to date by incorporating significant recent developments. It includes discussion of cases, articles, and commentary dealing with:

- **Enjoining payment under letters of credit.** Injunctions can destroy the letter of credit, a fact too many lower court judges don't know, though the Sixth Circuit in two opinions in the same case makes the point with gusto. See ¶¶ S7.04[1]; S7.04[4][c][i]; S7.04[4][c][ii]; S11.05[2][c].
- **More on injunctions.** As a matter of equity, an injunction is improper if the petitioner fails to show a likelihood of success on the merits, but, sadly, that rule of equity does not prevent applicants from delaying for months or years payment under a credit that should have occurred within days. See ¶ S11.05[4].
- **And more on injunctions.** It is frustrating to read a U.S. District Court's list of rules for entering injunctions to stop payment on a letter of credit without mention of the tough anti-injunction rules of UCC Article 5 and without uttering the word "fraud." See ¶ S11.05[3][a].
- **Unconscionability and the fraud exception.** The fraud exception to the principle that letters of credit are independent of related contracts is problematic enough. Now we find courts in Australia and perhaps in Singapore adding the concept of "unconscionability." Not surprisingly, some LC commentators find the addition unwelcome. See ¶ S11.05[3][b].
- **UCP 600 interpretations.** With almost two years having passed since UCP 600 became operative, commentary, the ICC Banking

Commission rulings, and a DOCDEX decision are putting flesh on the barebones of the UCP. *See* ¶ S6.06[1][b][iv] and the annotation following Appendix C in this supplement to arts. 2, 7, 12, 14, 16, 17, 18, 20, 28, 31, 38.

- **Attorney fees.** They are akin to punitive damages, but the courts award them and litigants ask for them it appears, infrequently, even when claims are less than colorable and even though the legislatures do not give the courts discretion. They “must” award fees. *See* ¶¶ S6.07[1]; S9.09.
- **Warranties.** It is not unusual for a third party to apply for a letter of credit; and the beneficiary’s letter of credit warranty runs to the third-party applicant; but the applicant must show a breach of *its* underlying contract. Third-party beneficiary law does not always obviate the need for an assignment of underlying contract rights. *See* ¶¶ S1.03[2]; S6.07[5]; S9.04[3].
- **Negotiating banks.** Their duties in the document examination process are different from those of issuers and confirmers. *See* ¶¶ S5.03[2][b]; S6.06[1][b][iii]; S8.02[6]; App. C: arts 14, 16.
- **Value and negotiation.** There is no negotiation under UCP 600 *unless* the bank gives value, and the UCC may determine *if* the bank gives value. *See* ¶¶ S6.06[1][b][iii]; S8.02[6].
- **Leasecap.** A Wisconsin court applying unique Wisconsin receivership law applies the statute’s leasecap in a fashion consistent with the majority of courts applying federal bankruptcy law. *See* ¶ S7.03[3][j].
- **Letters of credit in lieu of supersedeas bonds and the like.** Watch out for letter of credit issuer financial strength and draw those credit conditions with an eye to their use in litigation. *See* ¶ S1.06.
- **Using standby credits.** Commercial parties continue to fashion standby credits for a host of unique transactions, and courts continue to approve *most* of them. *See* ¶ S1.06.