

Getting Ready for ISP98—The New International Standby Practices

by Michael E. Avidon

January 1, 1999, is the effective date for the new International Standby Practices (ISP98). The upcoming effectiveness of these new rules raises a host of issues for letter of credit users and their counsel. Businesses and their counsel should get ready for ISP98 if they haven't already done so.

ISP98 is a carefully crafted set of rules designed to facilitate the domestic and international use of standby letters of credit. ISP98 is the product of more than five years of drafting under the auspices of the Institute of International Banking Law & Practice, Inc. Both bankers and lawyers were involved in the drafting process, as were rating agencies, beneficiaries, and applicants.

ISP98 reflects generally accepted practice, custom, and usage of *standby* letters of credit. The rules which are currently most often used for letters of credit, the Uniform Customs and Practice for Documentary Credits (UCP), reflect letter of credit practice more generally, and are now used domestically and internationally for standby letters of credit *and* commercial letters of credit. The latest version of the UCP, the 1993 revision, International Chamber of Commerce Publication No. 500 (UCP 500), provides in Article 1 that UCP 500 "shall apply to all Documentary Credits (including Standby Letter(s) of Credit) where they are incorporated into the text of the Credit." Portions of UCP 500 emphasize commercial letters of credit and the documents typically presented under commercial letters of credit (such as transport documents, insurance documents, and commercial invoices), whereas ISP98 is devoted to standbys.

ISP98 should streamline the process of preparing and negotiating standby letters of credit. It should also result in changes in forms of standby letters of credit and reimbursement agreements and applications as well as changes in certain practices. ISP98's detailed rules may also lead some parties to focus on issues they had previously overlooked. In some cases the parties will opt for ISP98's default rules; in other cases they may want to limit or vary particular ISP98 rules, just as parties today often limit or vary particular UCP 500 rules in particular letters of credit.

The drafting style of ISP98 will be more familiar to most lawyers than that of UCP 500. ISP98 was drafted, in part, to withstand the legal scrutiny given to standby letters of credit in the event of applicant insolvency or dispute, often involving large sums of money. Many of ISP98's provisions specify detailed rules and the consequences of complying or failing to comply with the rules. In contrast, UCP 500's drafting style (with the exception of its rules on transport documents and other commercial documents) is somewhat more general and aspirational in nature.

Perhaps the most fundamental issue facing letter of credit users is whether to choose to be governed by ISP98 or by UCP 500, in whole or in part. In order to make an informed decision, it is necessary to compare the rules and applicable law (such as the Uniform Commercial Code or the United Nations Convention on Independent Guaranties and Stand-by Letters of Credit) and to consider their impact on proposed transactions. Although a full-scale comparison of the two sets of rules is beyond the scope of this short article, a brief look at some of their differences is in order. (The author has written a detailed analysis of ISP98 that will be published in an upcoming issue of *Documentary Credit World*).

ISP98 addresses several topics that are not addressed at all by UCP 500 or that are addressed only generally by UCP 500. In addition, ISP98 contains several rules crafted for standby letters of credit that differ from their UCP 500 counterparts.

For instance, ISP98 Rule 3.14 addresses, among other things, the risk of issuer closure for force majeure. It automatically extends the last day for presentation of documents for 30 days if the place specified for the presentation of documents is closed on what would otherwise be the last business day for presentation of documents. This is in contrast to UCP 500 Article 17, which is frequently expressly varied or limited in standby letters of credit because it imposes on the beneficiary the risk of issuer closure for force majeure. While many commercial letter of credit beneficiaries are willing to bear this risk, standby letter of credit beneficiaries are less willing to do so.

In a major departure from UCP 500 Articles 13(a) and 21 (which provide that drawing documents that appear on their face to be inconsistent with one another will be considered as not in compliance with the letter of credit),

documents presented for payment under an ISP98 standby letter of credit need not be examined for consistency except to the extent provided in the standby. (See ISP98 Rule 4.03). Thus, each presented document need only comply with the requirements provided in the letter of credit for such document. This is useful in the standby context, where the letter of credit applicant and beneficiary may be in a dispute and the beneficiary is supposed to be paid notwithstanding the dispute, e.g., the standby backs up a seller's warranty and the beneficiary is a buyer of goods that asserts in its drawing statement that the applicant shipped defective goods whereas the applicant's invoice that is required to accompany the drawing statement states that the applicant shipped complying goods. Of course, if the parties to a particular transaction desire that the drawing documents be examined for inconsistency, then they can still use ISP98 but must expressly vary this rule in the letter of credit reimbursement agreement.

ISP98 is coming soon, and there is not much more time to get ready. The first step is to obtain a copy. Copies are expected to be available through ICC Publishing (www.iccwbo.org) and through the Institute of International Banking Law and Practice (www.isp98.com or www.iiblp.org). The Institute can also be reached by telephone at 301-869-9840.

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