

**ISP98 Rule 3.12(a):
Is It A Trap, Or A Warning to An Unwary Beneficiary
of a Letter of Credit?**

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Rule 3.12(a) of the International Standby Practices (“ISP98”)² provides:

If an original standby³ [letter of credit] is lost, stolen, mutilated, or destroyed, the issuer need not replace it or waive any requirement that the original be presented under the standby [letter of credit].⁴

Is this rule a trap for an unwary letter of credit beneficiary that accepts a letter of credit that requires presentation of the original letter of credit as a condition to obtaining payment, transferring drawing rights or assigning proceeds of the letter of credit? Or is it a warning to the beneficiary (and its counsel) not to accept such requirement or to vary such rule? At first blush, the rule appears to be a trap, but further analysis shows that it is more of a warning: *Do not condition your rights to obtain payment, transfer drawing rights or assign letter of credit proceeds upon presentation of the original letter of credit because, if the original letter of credit is ever lost, stolen, mutilated, or destroyed, you may be unable to obtain payment, transfer drawing rights or assign letter of credit proceeds.*⁵

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² *International Standby Practices 1998 (ISP98)*, Rule 3.12(a), International Chamber of Commerce Publication No. 590 (Jan. 1, 1999) [hereinafter ISP98].

³ ISP98 defines a “standby” as “[a]n undertaking subject to these Rules” ISP98, *supra* note 2, Rule 1.01(d) (Scope and Application).

⁴ Other ISP98 Rules expressly recognize that the issuer may refuse to effect a transfer of drawing rights or an assignment of letter of credit proceeds if the beneficiary fails to present the original letter of credit. *See id.* Rule 6.03(b)(ii) (Conditions to Transfer), 6.08(a) (Conditions to Acknowledgment of Assignment of Proceeds).

⁵ *See id.* Rule 4.15(a) (Original, Copy, and Multiple Documents) (providing that a “presented document must be an original.”). Under ISP98, then, the default rule is that an

What is a Beneficiary to Do?

Having been warned of the danger by ISP98 Rule 3.12(a), what can a beneficiary and its counsel do to protect the beneficiary? This article analyzes the following four options:

1. Choose different letter of credit rules, practices, or law to govern the letter of credit.
2. Refuse to accept a letter of credit that requires presentation of the original letter of credit.
3. Accept the requirement that the original letter of credit be presented but build in a mechanism for replacement of the original or waiver of the requirement where appropriate.
4. Accept the requirement that the original letter of credit be presented and take steps to safeguard the original letter of credit.

1. Do Other Letter of Credit Rules Afford More Protection to Beneficiaries?

The first option beneficiaries may consider is whether other rules could be chosen to better protect a beneficiary whose original letter of credit is lost, stolen, mutilated, or destroyed. This part examines whether beneficiaries can find better protection under the 2007 revision of the Uniform Customs and Practice for Documentary Credits (UCP600),⁶ or the Uniform Commercial Code Revised Article 5 (UCC Rev. Article 5).⁷

original is required unless the letter of credit states otherwise. *Id.* This understanding is implicit in standard letter of credit practice. See JAMES E. BYRNE, ISP98, THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES 179–80 (James G. Barnes ed., 1998).

⁶ *Uniform Customs and Practice for Documentary Credits (UCP600)*, International Chamber of Commerce Publication No. 600 (July 1, 2007) [hereinafter UCP600].

⁷ Rev. U.C.C. Article 5 (1995).

A. UCP600

UCP600 does not contain a specific provision dealing with lost, stolen, mutilated, or destroyed letters of credit but its general provisions appear to reach the same result as ISP98 Rule 3.12(a), with one limited exception. UCP600 Articles 7(a) (Issuing Bank Undertaking) and 8(a) (Confirming Bank Undertaking) both provide that an issuing bank or a confirming bank, respectively, is obligated to honor a letter of credit only if “the stipulated documents are presented to the . . . bank and . . . they constitute a complying presentation” UCP600 Article 2 (Definitions) defines a “[c]omplying presentation” as a “presentation that is in accordance with the terms and conditions of the [letter of] credit, the applicable provisions of these [UCP 600] rules and international standard banking practice.” UCP600 Article 38(a) (Transferable Credits) provides that “[a] bank is under no obligation to transfer a [letter of] credit except to the extent and in the manner expressly consented to by that bank.” Thus, if the letter of credit requires the presentation of the “original” letter of credit, the beneficiary’s failure to provide the “original” letter of credit would generally constitute a non-complying presentation, warranting dishonor by the issuer.

The limited exception in UCP600 to these general provisions relates to documents lost in transit from a nominated bank, but it does not extend to a beneficiary that is unable to present documents to the issuing bank or a nominated bank because they have been lost, stolen, mutilated, or destroyed:

If a nominated bank determines that a presentation is complying and forwards the documents to the issuing bank or confirming bank, . . . an issuing bank or confirming bank must honour or negotiate, or reimburse that nominated bank, even when the documents have been lost in transit between the nominated bank and the issuing bank or confirming bank, or between the confirming bank and the issuing bank.⁸

This exception applies only to documents lost in transit between certain banks *after* the beneficiary has made a complying presentation and, in effect, makes the banks responsible for that loss. With this limited exception, UCP600 affords no more protection than ISP98 to a beneficiary

⁸ UCP600, *supra* note 6, Art. 35 (Disclaimer on Transmission and Translation).

that is unable to comply with a requirement for presentation of the original letter of credit.

B. UCC Revised Article 5

UCC Rev. Article 5 also does not contain a specific provision dealing with lost, stolen, mutilated, or destroyed letters of credit but, again, its general rules appear to reach the same result as ISP98 Rule 3.12(a) (Original Standby Lost, Stolen, Mutilated, or Destroyed). UCC Rev. § 5-108(a) (Issuer's Rights and Obligations) provides that "an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection [5-108](e), appears on its face strictly to comply with the terms and conditions of the letter of credit." UCC Rev. § 5-112(b) (Transfer of Letter of Credit) provides that "[e]ven if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if: . . . (2) the transferor or transferee has failed to comply with any requirement stated in the letter of credit" Thus, UCC Rev. Article 5 affords no more protection than ISP98 or UCP600 to a beneficiary that is unable to comply with a requirement to present the original letter of credit because it has been lost, stolen, mutilated, or destroyed.

Prior versions of the Uniform Customs and Practice and of Uniform Commercial Code Article 5 were also no more protective of beneficiaries. They too did not contain any specific provision dealing with lost, stolen, mutilated, or destroyed letters of credit, but their general rules required compliance with the terms and conditions of the letter of credit and so posed a danger to a beneficiary whose original letter of credit was required to be presented but was lost, stolen, mutilated, or destroyed.⁹

United States courts have applied these general rules in cases where the beneficiary failed to present the original letter of credit as required by the terms of the letter of credit.¹⁰

⁹ See, e.g., *Uniform Customs and Practice for Documentary Credits (UCP500)*, Art. 9(a), International Chamber of Commerce Publication No. 500 (Jan. 1, 1994) (providing that the issuing bank undertakes to honor "provided that the stipulated documents are presented to the Nominated Bank or to the Issuing Bank and that the terms and conditions of the Credit are complied with"); U.C.C. § 5-114(1) (1994). The previous version of U.C.C. Article 5, the original Article 5, provided that "[a]n issuer must honor a draft or demand for payment which complies with the terms of the relevant credit" *Id.*

¹⁰ See *Brul v. MidAmerican Bank & Trust Co.*, 820 F. Supp. 1311 (D. Kan. 1993) (holding that where the letter of credit called for presentation of the original letter of credit and an original promissory note to draw, and where instead photocopies were presented and an

The bottom line is that other letter of credit rules do not appear to be more protective of letter of credit beneficiaries than ISP98 Rule 3.12(a) (Original Standby Lost, Stolen, Mutilated, or Destroyed). Therefore, beneficiaries should not seek refuge under UCP600 or UCC Rev. Article 5 to protect themselves from the risk of having their original letter of credit lost, stolen, mutilated, or destroyed.

2. Refuse to Accept a Letter of Credit That Requires Presentation of the Original Letter of Credit

Another option available to a beneficiary is to simply refuse to accept a letter of credit that requires presentation of the original letter of credit as a condition to obtaining payment, transferring drawing rights or assigning letter of credit proceeds. Will a savvy issuing bank, confirming bank, or their applicant agree to issue the letter of credit without that requirement? To put it another way, why is the requirement there in the first place? Does it serve a legitimate purpose of the issuing bank or confirming bank or their applicant, or is it simply a trap for an unwary beneficiary?

Some reasons that have been asserted for requiring presentation of the original letter of credit are:

1. It reduces the risk of letter of credit fraud.¹¹

accompanying affidavit stated that the originals were lost or destroyed, the copies failed to meet the requirements for strict or even substantial compliance with the terms of the letter of credit, so the issuing bank was not obligated to pay the drawing); *Airlines Reporting Corp. v. Norwest Bank, N.A.*, 529 N.W.2d 449 (Minn. Ct. App. 1995) (holding that where the letter of credit required presentation of the original letter of credit, failure to do so justified dishonor). *Cf. LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442 (5th Cir. 2008) (where letter of credit required that the “original Irrevocable Letter of Credit” be presented for drawing and the beneficiary presented a facsimile of the letter of credit, the presentation was non-complying but the issuing bank was precluded from asserting the discrepancy under UCP400 Article 16(e), which required the bank to give notice of dishonor “without delay by telecommunications or, if that is not possible, by other expeditious means,” because the issuing bank’s mailed notice of dishonor could have been given “virtually immediately, or at least in fewer than three days”). Note that in *LaBarge* the issuing bank apparently never provided the signed original letter of credit to the beneficiary but provided only a facsimile copy of the signed original with a fax cover sheet that stated, “Here is the letter of credit you requested.” *Id.* at 446, 453. Perhaps in those circumstances the court should have held that the facsimile copy provided by the issuing bank to the beneficiary was the “original” that was required to be presented.

¹¹ See James G. Barnes & James E. Byrne, *Letters of Credit*, 64 BUS. LAW 1219, 1220 (2009) (“Conditioning honor on presentation of the letter of credit is atypical but not an unusual or bad practice. When imposed, such conditions are strictly enforced, which may

2. It makes it easier to track payments, transfers and assignments.¹²
3. It is no great burden on a beneficiary to take good care of the original letter of credit.¹³
4. It is not an uncommon letter of credit provision.¹⁴

While some merit exists for each of these reasons, the benefits of requiring presentation of an original letter of credit are not likely in most cases to outweigh the risk to the beneficiary that an original letter of credit may be lost, stolen, mutilated, or destroyed. As to the first reason, the risk of dealing with an imposter-beneficiary may be reduced somewhat by requiring the beneficiary to produce the original letter of credit, which, in effect, vouches for the beneficiary's identity like an ID card. However, that risk obviously cannot be eliminated as an imposter might present a stolen original letter of credit or a forged letter of credit.¹⁵

deter presentation of forged draws, but also frustrate any presentation under [a letter of credit] that is not in the beneficiary's possession.”).

¹² The letter of credit in *LaBarge* stated that “the original Irrevocable Letter of Credit must be presented with any drawing so that drawings can be endorsed on the reverse thereof.” 550 F.3d at 451.

¹³ *Cf.* Reply of Longview Power, LLC to Staff's Response to Petition of Longview Power, LLC to Post Letter of Credit in Lieu of Funding an Escrow Account, Cases No. 03-1860-E-C-S, 05-1467-E-CN, Longview Power LLC, Pub. Serv. Comm. of W. Va. 2 (Nov. 5, 2007) (arguing that it would “appear to be an inconsequential burden” for the Public Service Commission of West Virginia to have to safeguard the original letter of credit where the petitioner seeks permission to post a letter of credit).

¹⁴ *See* BARNES & BYRNE, *supra* note 11, at 1220 (“Conditioning honor on presentation of the letter of credit is atypical but not an unusual or bad practice.”).

¹⁵ *See* U.C.C. § 5-108(i)(5) (1995); U.C.C. § 5-108 cmt. 13 (1995). An issuer is not discharged from its obligations to the true beneficiary under a letter of credit by honoring a presentation containing a forged signature of the beneficiary, so the issuer may have to pay again if the true beneficiary later makes a complying presentation. *See id.* Likewise, the applicant is not discharged from its obligation to reimburse the issuer for a complying presentation by the true beneficiary if it previously reimbursed a drawing by a forger. *See id.* § 5-108(i)(1); § 5-108 cmt. 12; § 5-109(a)(2); § 5-109 cmt. 2. Official Commentary to U.C.C. § 5-114 recognizes that “[w]here the letter of credit must be presented as a condition to honor . . . the risk to the issuer or nominated person of having to pay twice is minimized.” § 5-114 cmt. 3. An exception to the rule that an issuer is not discharged by honoring a presentation containing a forged beneficiary signature is where a letter of credit

As to the second reason, although drawings, transfers and assignments can be noted on an original letter of credit and the original can be treated much like an old-fashioned bank passbook noting each deposit and withdrawal into a bank account, there are obviously other ways to track drawings, transfers and assignments as many letters of credit do not require presentation of the original (and even where there is such a requirement, banks sometimes agree to waive such requirement or replace an original that has been lost, stolen, mutilated, or destroyed). The case for requiring presentation of the original may be strongest where the letter of credit is available by negotiation at multiple banks. An example of such an arrangement is a “freely negotiable” letter of credit, where each bank that is requested to negotiate drafts drawn under the letter of credit wants to know the current terms and conditions of the letter of credit, including its undrawn amount, as opposed to where the letter of credit is available at only one bank that will always know the undrawn amount of the letter of credit.¹⁶

As to the third reason, although prudent beneficiaries can take steps to safeguard original letters of credit, such as by storing them in safe deposit boxes and presenting them by relatively secure means, the costs of protective measures can be substantial and no protective measure is

is governed by Pennsylvania law because Pennsylvania enacted a non-uniform version of U.C.C. § 5-108 that shifts to the beneficiary the risk of the issuer paying based on a forged beneficiary signature. *See* 13 PA. CONS. STAT. ANN. § 5108 cmt. 2 (West 2009). Pennsylvania law discharges the issuer from further liability to the extent that the issuer paid a facially complying presentation over a forged beneficiary signature. *See id.* § 5108(i)(5) (providing that an “issuer that has honored a presentation as permitted or required . . . is discharged to the extent of its performance under the letter of credit”).

¹⁶ The drafters of U.C.C. Rev. Article 5 recognized that requiring presentation of the original letter of credit could facilitate tracking transfers and reducing the risk of fraud. *See* U.C.C. § 5-112 cmt. 2 (1995):

[T]ransferable letters of credit are often issued under circumstances in which a nominated person or adviser is expected to facilitate the transfer from the original beneficiary to a transferee and to deal with that transferee. In those circumstances it is the responsibility of the nominated person or adviser to establish procedures satisfactory to protect itself against double presentation or dispute about the right to draw under the letter of credit. Commonly such a person will control the transfer by requiring that the original letter of credit be given to it or by causing a paper copy marked as an original to be issued where the original letter of credit was electronic. By keeping possession of the original letter of credit the nominated person or adviser can minimize or entirely exclude the possibility that the original beneficiary could properly procure payment from another bank. If the letter of credit requires presentation of the original letter of credit itself, no other payment could be procured.

foolproof. For example, consider the many documents that were destroyed in the September 11, 2001 World Trade Center attacks (including documents contained in safe deposit boxes on premises) and in other disasters such as hurricanes and fires.

As to the fourth reason, although it is true that many letters of credit require presentation of the original letter of credit, that fact alone does not make the practice fair or sensible; it suggests, however, that there may be a legitimate basis for the practice, at least in some contexts.¹⁷

Although none of the four aforementioned reasons by itself provides a strong basis for fairly requiring the beneficiary to present the original letter of credit or risk forfeiting its rights, there is enough justification and enough precedent that, in the author's experience, banks have refused to dispense with the requirement.

One instance where applicants and beneficiaries have leverage to persuade banks to dispense with the requirement to present the original letter of credit is where regulatory authorities weigh-in against requiring presentation of the original. For example, the Insurance Department of the State of New York issued an opinion on May 27, 2003, that a letter of credit used to comply with certain insurance requirements under 11 N.Y.C.R.R. Part 79, Reg. 133, must not be subject to ISP98 but may be subject to the UCP (then I.C.C. Publication No. 500) and is not permitted to require presentation of the original letter of credit as a condition to drawing. The letter of credit is permitted only to require the presentation of a draft.¹⁸

There is at least one reason why a prudent beneficiary might want the letter of credit to require presentation of the original as a condition to drawing. Under UCC Rev. § 5-114(d) (Assignment of Proceeds), the issuer is not permitted to unreasonably withhold its consent to an assignment of letter of credit proceeds "if the assignee possesses and exhibits the letter of

¹⁷ Another possible reason for the presentation requirement is the hope on the part of some issuing banks and applicants that the original will be lost, stolen, mutilated, or destroyed, so the beneficiary will be unable to draw, transfer its drawing rights or assign letter of credit proceeds. This reason, even if real, seems so blatantly unfair that it merits no further discussion.

¹⁸ See Re: Letters of Credit & Regulation 133, State of N.Y. Ins. Dep't, The Office of Gen. Counsel (May 27, 2003), *available at* <http://www.ins.state.ny.us/ogco2003/rg030523.htm> (concluding that all letters of credit issued under Reg. 133 must be "clean and unconditional," which means that the beneficiaries need only present a sight draft and that no other document need be presented).

credit and presentation of the letter of credit is a condition to honor.” So if the beneficiary fears the issuer may unreasonably withhold its consent to an assignment of letter of credit proceeds, the beneficiary can insist that the letter of credit require presentation of the original; then the issuer can withhold its consent only on reasonable grounds. Of course, the beneficiary could also try to achieve this result by insisting on an explicit provision in the letter of credit that the issuer may not unreasonably withhold its consent to an assignment of proceeds.

3. Accept the Requirement but Build-In Protections for the Beneficiary

In the author’s experience, where an issuing bank or a confirming bank or their applicant insists that the letter of credit contain a provision requiring presentation of the original, there are protections for the beneficiary that can be built into the letter of credit that most banks and their applicants have been willing to accept. A typical protective provision would state:

At the Beneficiary’s request prior to the then current stated expiration date of this Letter of Credit, the Issuer will issue a replacement letter of credit (having the same terms and conditions as this Letter of Credit and any accepted amendments thereto) to the Beneficiary if the Beneficiary returns the mutilated original Letter of Credit to the Issuer or if the Beneficiary certifies to the Issuer that the original Letter of Credit has been lost, stolen or destroyed and provides the Issuer with a reasonably acceptable indemnity from a reasonably acceptable indemnitor.

This protective provision is not foolproof, but it appears to strike a fair balance. For instance, the beneficiary and the issuer could obviously disagree whether the proposed indemnity or a proposed indemnitor is reasonable and might have to resolve their dispute in court or by some other means. This is not ideal, but it is better for the beneficiary to be able to argue that its proposed indemnity and indemnitor are reasonable than to be left without payment if the original letter of credit is lost, stolen, mutilated, or destroyed. Where the beneficiary is financially strong, it may itself be a reasonable indemnitor or may have little trouble procuring a third party to act as a reasonable indemnitor. On the other hand, if the beneficiary is financially weak it may not qualify as a reasonable indemnitor and may be unable to procure a stronger indemnitor.

Provision of an indemnity is consistent with ISP98 Rule 3.12(b), which gives the issuer the option to aid a beneficiary who claims that its letter of credit has been lost, stolen, mutilated, or destroyed:

If the issuer agrees to replace an original standby or to waive a requirement for its presentation, it may provide a replacement or copy to the beneficiary without affecting the applicant's obligations to the issuer to reimburse, but, if it does so, the issuer must mark the replacement or copy as such. The issuer may, in its sole discretion, require indemnities satisfactory to it from the beneficiary and assurances from nominated persons that no payment has been made.¹⁹

A corollary issue that the beneficiary and the issuer should address is what, exactly, the beneficiary is required to present when presentation of the "original" letter of credit is one of the terms of the letter of credit.²⁰ In the case of a letter of credit issued directly by an issuer to the beneficiary in the form of a manually-signed paper document, there may be little doubt that the "original" is that manually-signed piece of paper. However, which document constitutes the "original" becomes less clear if the letter of credit is transmitted electronically by SWIFT²¹ directly to the beneficiary. Indeed, it is difficult to see in what sense there is any original if the recipient can print out as many "originals" or "copies" as it wishes from its SWIFT terminal and the printouts are indistinguishable from one another. Or, suppose the issuer transmits the letter of credit by SWIFT to an advising bank that prints out the letter of credit and then sends it to the beneficiary accompanied by a letter of advice manually-signed by the advising bank. It

¹⁹ ISP98, *supra* note 2, Rule 3.12(b) (Original Standby Lost, Stolen, Mutilated, or Destroyed); *See also* BYRNE, *supra* note 5, at 130 (concluding that ISP98 Rule 3.12(b) permits the issuer to require satisfactory indemnities from the beneficiary and assurances from any nominated person due to the concern that the beneficiary or a third person might use the original letter of credit in a fraudulent manner).

²⁰ *See International Standard Banking Practice for the examination of documents under documentary credits (ISBP)*, Preliminary Considerations ¶ 1, International Chamber of Commerce Publication No. 681 (2007) ("To avoid unnecessary costs, delays and disputes in the examination of documents . . . the applicant and beneficiary should carefully consider which documents should be required . . .").

²¹ SWIFT, Company Information, http://www.swift.com/about_swift/company_information/index.page?lang=en ("SWIFT is the Society for Worldwide Interbank Financial Telecommunication, a member-owned cooperative through which the financial world conducts its business operations with speed, certainty and confidence.").

is unclear whether the “original” letter of credit is the SWIFT printout (of which there may be many) or the manually signed letter from the advising bank or that letter together with the SWIFT printout.²²

Although ISP98 does not define the term “original,” ISP98 Rule 4.15 (Original, Copy, and Multiple Documents) provides some parameters as to which documents should be treated as originals and which documents should be treated as copies, in addition to the general rule that a presented document must be an original under ISP98. For example, Rule 4.15(c) provides that a “presented document is deemed to be an original unless it appears on its face to have been reproduced from an original.”²³ This suggests that whatever one might otherwise consider as an “original,” if the document being presented appears on its face to be a reproduction of such an original, then it should not be deemed to be an original but a copy. However, a “copy” or a document that appears to have been reproduced from an original is deemed to be an “original” if the signature or authentication on that “copy” or other document appears to be an original.²⁴ The terms “signature” and “authenticate” are both defined in ISP98 Rule 1.09 (Defined Terms). A “signature” includes any symbol executed or adopted by a person with a present intent to authenticate a document.²⁵ However, the definition of “authenticate” appears to focus on verification of “electronic records.”²⁶ The bottom line is that sometimes it may not be obvious what the “original” letter of credit is.

Even if it is clear what the initial “original” letter of credit is, the beneficiary is still faced with the dilemma of whether it should also present any letter of credit amendments, and whether it matters if the beneficiary has accepted or rejected the amendment(s) or has not yet communicated its response to the amendment.²⁷ The answer to these issues may depend upon

²² Cf. U.C.C. § 5-104 cmt. 3 (1995) (noting that the letter of credit transmitted by SWIFT may be printed at the advising bank, stamped “original” and provided to the beneficiary in that form).

²³ ISP98, *supra* note 2, Rule 4.15(c)(i).

²⁴ *Id.* Rule 4.15(c)(ii).

²⁵ *Id.* Rule 1.09(a) ¶ 12.

²⁶ *Id.* Rule 1.09(c) ¶ 2.

²⁷ The issuer faces the same dilemma in deciding whether the terms of its letter of credit require presentation of any or all amendments as well.

how the presentation requirement in the letter of credit is drafted. For instance, does it require presentation of:

- a. “the original letter of credit”;
- b. “the original letter of credit and any amendments thereto”;
- c. “the original letter of credit and any accepted amendments thereto”;
- d. “the original letter of credit and any amendments thereto, whether or not accepted or rejected”; or
- e. “the original letter of credit but not any amendments thereto”?

Variations (a) and (b) are not as precise as variations (c), (d) and (e), and there is obviously the potential for dispute. Which of variations (c), (d) and (e) makes the most sense depends upon the reason for having the presentation requirement in the first place. If the reason for the requirement is fraud prevention, variation (d) is supported, as each additional scrap of required paper adds some marginal fraud protection. If the reason for the requirement is something else, variations (c) or (e) may be supported.

Another situation for a beneficiary to watch for is when the original letter of credit is never delivered to it. Suppose that the issuer prints out a paper letter of credit, manually signs it, and gives it to the applicant, who gives the beneficiary a photocopy of the signed letter of credit, not the signed original – must the beneficiary present the signed original that it never received or may it present the photocopy or be excused from complying with the requirement? Or suppose the issuer prints out a paper letter of credit and signs it but sends the beneficiary a fax of the signed letter of credit – must the beneficiary present the signed original that it never received or may it present the fax or be excused from complying with the requirement?²⁸ Or suppose the issuer prints out a paper copy of the letter

²⁸ This was the situation in *LaBarge*. See 550 F.3d at 446–48. Barnes and Byrne commented that if the signed original, as opposed to the faxed copy, “is significant, it should be treated as belonging to the beneficiary and held by the issuer subject to the beneficiary’s instructions, a topic not discussed in *LaBarge*.” BARNES & BYRNE, *supra* note 11, at 1221.

of credit, signs it, and sends it to the beneficiary but it is lost in transit -- what then? A careful beneficiary should make sure that it is able to satisfy all the requirements of the letter of credit.

Still another scenario is where the beneficiary presents the original letter of credit for a partial drawing but the issuer fails to return the original letter of credit, perhaps because it was lost, stolen, mutilated, or destroyed while in the issuer's possession or while in transit back to the beneficiary or perhaps because the issuer is trying to prevent the beneficiary from drawing again. Presumably the issuer should not be allowed to enforce the requirement to present an original letter of credit where the issuer's actions have prevented the beneficiary from complying with the requirement.²⁹

4. Accept the Requirement and Safeguard the Letter of Credit

Although it is not recommended, one option for the beneficiary is obviously to accept the requirement that it must present the original letter of credit, and then try its hardest to safeguard the original letter of credit. Fortunately for most beneficiaries, mishaps are relatively rare, and even where they occur the applicant may be obligated to cooperate with the beneficiary to enable it to obtain the payment supported by the letter of credit; of course, if the applicant is then insolvent or not on good terms with the issuing bank, the applicant may be unable to cause the issuing bank to pay the letter of credit and may be unable to pay the beneficiary itself or procure a replacement letter of credit.

Conclusion

ISP98 Rule 3.12(a) (Original Standby Lost, Stolen, Mutilated, or Destroyed) provides a valuable warning to beneficiaries and their counsel about the risks of conditioning the beneficiary's right to obtain payment, transfer drawing rights or assign letter of credit proceeds upon the presentation of the original letter of credit. Acquiescence to that condition may be tantamount to treating the original letter of credit like a magic talisman that must be safeguarded at all costs lest the beneficiary effectively lose its rights to obtain payment, transfer drawing rights, or assign letter of credit proceeds. That is a risk many beneficiaries should refuse to bear.

²⁹ Cf. U.C.C. § 3-504(a)(i) (2006) (presentment for payment of a negotiable instrument is excused if "the person entitled to present the instrument cannot with reasonable diligence make presentment.").