

**What Constitutes an *Original* Letter of Credit in the Fifth Circuit?  
*LaBarge: America's Glencore***

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**Introduction**

The International Chamber of Commerce's (ICC) Uniform Customs and Practices for Documentary Credits (UCP) is one of the primary sets of rules relied upon for governance of letter of credit transactions.<sup>1</sup> Not only has the ICC produced several revisions of the UCP since its inception, but experts, legal scholars, and bankers have written countless books, brochures, manuals, treatises, academic papers, and court decisions on the topic. Even the ICC itself has issued opinions to clarify and expound the meaning of the UCP's text. In sum, a plethora of material is available to help an interested party understand these rules. So, if a question arose as to what the UCP drafters meant by the use of a technical term, naturally, one would turn to . . . a dictionary? The court in *LaBarge Pipe & Steel Co. v. First Bank*,<sup>2</sup> did so, defining and interpreting the UCP terms "original" and "operative instrument" in ways that seriously distorted the meanings of the terms and misinterpreted provisions of the UCP.

In *LaBarge*,<sup>3</sup> PVF USA, LLC requested that First Bank issue a letter of credit for US\$144,000,000 in favor of LaBarge Pipe & Steel Co. as payment for the sale of steel pipe.<sup>4</sup> Accordingly, First Bank sent its letter of credit via telefax with a cover sheet stating, "Here is the letter of credit you requested. Please let me know if you need any additional information."<sup>5</sup> LaBarge's employee requested a change in the terms stipulated in the telefaxed letter of credit, First Bank sent an amended letter of credit via telefax along with a cover sheet stating, "Here is the revision to the letter of credit you requested. Please let me know if you need any additional

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<sup>1</sup> James E. Byrne, *Editor's Overview* to International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP600)*, ICC Publication No. 600 (July 1, 2007), in *LC RULES & LAWS CRITICAL TEXTS 1* (James E. Byrne ed., 4th ed. 2007).

<sup>2</sup> *LaBarge Pipe & Steel Co. v. First Bank*, 550 F.3d 442 (5th Cir. 2008).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 446.

<sup>5</sup> *Id.*

information.”<sup>6</sup> Nowhere did the telefaxed cover sheet or the text of the undertaking state that “full details [were] to follow” or a similar statement.<sup>7</sup>

The terms of the letter of credit, among other things, required that the *original* letter of credit be presented to its issuer.<sup>8</sup> The Fifth Circuit, relying on *Black’s Law Dictionary*<sup>9</sup> rather than practice, defined “original” as the “first copy of the document.”<sup>10</sup> Therefore, the court ruled that when LaBarge Pipe & Steel Co. submitted the telefaxed, amended letter of credit in its presentation to First Bank, the presentation did not comply with the terms required in the letter of credit.<sup>11</sup>

This article will analyze the decision in *LaBarge*. To do so, it will revisit the drafting history of relevant provisions of the UCP, consider the meaning and role of originality in letter of credit law as well as practice, and review relevant case law. In light of this background, this article will then analyze the decision in *LaBarge* and show it to be inconsistent with the intent of the general banking community.

## I. Background

Essential to understanding the outcome in *LaBarge* is a brief background of the relevant points of letter of credit law and banking practice. These include the following, which are indispensable for proceeding: the scope and purpose of letters of credit, what is meant by the terms “documentary credit” and “original documents,” an understanding of the level of scrutiny applied by banks to documents presented, the application of the concept of ambiguity, and the time when a letter of credit becomes available.

### A. Brief Explanation of the Field

The primary role of a letter of credit is to serve as a method of payment or source of potential payment in relation to an underlying transaction.<sup>12</sup> The basic letter of credit transaction involves three undertakings: an application (between the applicant and issuer), a letter of

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 451.

<sup>9</sup> BLACK’S LAW DICTIONARY 1099 (6th ed. 1990).

<sup>10</sup> *LaBarge*, 550 F.3d at 452-53.

<sup>11</sup> *Id.* at 453.

<sup>12</sup> BORIS KOZOLCHYK, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS 7-10 (1966).

credit (between the issuer and beneficiary), and an underlying contract (between the beneficiary and applicant).<sup>13</sup> The Louisiana Revised Statutes attempt to explain the relationship in §10:5-102(a)(10), defining a letter of credit as “a definite undertaking that satisfies the [formal requirements] by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.”<sup>14</sup>

The purpose of a letter of credit is to “relieve the tension between merchants and buyers when the merchant is hesitant to lose possession of its goods before being paid, but the buyer would like to have the goods before parting with its money.”<sup>15</sup> Through the use of a letter of credit, the overall amount of risk is reduced, eliminating some of the transaction costs that would otherwise be incurred by all parties to satisfy a beneficiary’s risk-averse nature.<sup>16</sup> Parties use letters of credit rather than other payment means for many reasons, but generally they use commercial letters of credit primarily to reduce the risk associated with both international and domestic sales of goods,<sup>17</sup> while they use standby letters of credit to assure a party’s payment or performance through a third party promise to pay.<sup>18</sup>

The nature of a letter of credit obligation is documentary in character.<sup>19</sup> In order to receive payment, beneficiaries must first present documents specified in the letter of credit to the issuing bank.<sup>20</sup> When presentation of documents is made under a letter of credit, the default “rule is and always has been that original documents are required.”<sup>21</sup> The purpose behind such a requirement is that the original may have a “particular commercial, legal or evidential value” for the parties involved.<sup>22</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> LA. REV. STAT. ANN. §10:5-110(a)(10) (2003).

<sup>15</sup> *LaBarge*, 550 F.3d at 449 (citing JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §26-1 (5th ed. 2008)).

<sup>16</sup> KOZOLCHYK, *supra* note 12, at 9.

<sup>17</sup> *Id.* at 9-12.

<sup>18</sup> *LaBarge*, 550 F.3d at 450 (citing JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §26-1(b) (5th ed. 2008)).

<sup>19</sup> KOZOLCHYK, *supra* note 12, at 8-9.

<sup>20</sup> *Id.*

<sup>21</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999) (citing RAYMOND JACK, DOCUMENTARY CREDITS 161 (1993) (1991)).

<sup>22</sup> RAYMOND JACK, DOCUMENTARY CREDITS 153 (Ali Malek QC & David Quest eds., 2009) (1991).

Under standard international practice, and as provided in the Uniform Customs and Practice 400 (UCP400), banks will accept documents “as presented, provided that they appear on their face to be in accordance with the other terms and conditions of the credit.”<sup>23</sup> Embedded within this standard is the doctrine of strict compliance, which stipulates that the documentation presented by a beneficiary of a letter of credit must “comply exactly with the requirements of the credit;” otherwise, the issuer may dishonor.<sup>24</sup> In the field of letter of credit practice, because of the reliance on documentary terms and conditions, certain words and phrases take on special meanings as terms of art. Generally, the default rule in letter of credit law is that ambiguity is held against the drafter of the document.<sup>25</sup> Therefore, in order to strictly comply with the terms of the standby, a beneficiary would need to present “the original Irrevocable Letter of Credit,” as stipulated in the standby.<sup>26</sup>

Once a letter of credit is sent or otherwise transmitted to the beneficiary or advising party, it is deemed to be “issued and becomes enforceable according to its terms against the issuer.”<sup>27</sup> Credits can be issued in several formats, one of which is the *teletransmission* credit. A teletransmission credit is a credit that is transmitted electronically, typically by cable, telegram, telex, or facsimile, and can later be evidenced in paper form.<sup>28</sup>

### B. Evolution of Concept of Original

After World War I, the international banking community found itself in need of an “authoritative and consistent formulation” to promote uniformity in letter of credit practice.<sup>29</sup> In 1929, the International Chamber of Commerce published a set of rules, which by 1933 had evolved into the first UCP.<sup>30</sup> An early description of the UCP was a “semi-official international codifications of customs.”<sup>31</sup> In *LaBarge*, the letter of credit at

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<sup>23</sup> International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP400)*, art. 22, ICC Publication No. 400 (Oct. 1, 1984) [hereinafter UCP400].

<sup>24</sup> *LaBarge*, 550 F.3d at 454-55.

<sup>25</sup> *United States v. Sun Bank of Miami*, 609 F.2d 832, 833 (5th Cir. 1980).

<sup>26</sup> *LaBarge*, 550 F.3d at 455.

<sup>27</sup> LA. REV. STAT. ANN. §10:5-106 (2003).

<sup>28</sup> BROOKE WUNNICKE & DIANE WUNNICKE, *STANDBY LETTERS OF CREDIT* 100 (1989).

<sup>29</sup> KOZOLCHYK, *supra* note 12, at 83.

<sup>30</sup> *Id.* at 84.

<sup>31</sup> *Id.*

issue was subject to UCP400.<sup>32</sup> However, in order to properly understand the intent of the drafters of the UCP400 with regard to originality, one should consider prior and subsequent versions of the rules.

Prior to effectuation of the UCP400 in 1984, the UCP290<sup>33</sup> was the most current revision of the UCP having gone into effect in 1975. It addressed the issue of electronic transfer of a letter of credit in Article 4,<sup>34</sup> which stated that when an issuer uses cable, telegram, or telex to advise a letter of credit “and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt” of the mail confirmation.<sup>35</sup> Article 4 further states that if the procedures of Article 4(a) are not followed, the issuer will be held responsible.<sup>36</sup> Section (c) of Article 4 elaborates further on the procedure to be followed when utilizing a cable, telegram, or telex, by stating that if the phrase “details to follow” (or similar wording) is not in the transmission, the issuer need not send a mail confirmation.<sup>37</sup> The general purpose of Article 4 was to take advantage of technological advances in communications between banks.<sup>38</sup> A shift had occurred in the banking community, and mailed instruments had been replaced by telecommunications for reasons of both timeliness and cost.

Finding the need to revise the rules in the banking community, the ICC Banking Commission, in 1983, laid out the UCP400<sup>39</sup>. The previous

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<sup>32</sup> *LaBarge*, 550 F.3d at 447.

<sup>33</sup> International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP290)*, ICC Publication No. 290 (1974).

<sup>34</sup> UCP290, *supra* note 33, art. 4. In full, it states “(a) When an issuing bank instructs a bank by cable, telegram or telex to advise a credit, and intends the mail confirmation to be the operative credit instrument, the cable, telegram or telex must state that the credit will only be effective on receipt of such mail confirmation. In this event, the issuing bank must send the operative credit instrument (mail confirmation) and any subsequent amendments to the credit to the beneficiary through the advising bank. (b) The issuing bank will be responsible for any consequences arising from its failure to follow the procedure set out in the preceding paragraph. (c) Unless a cable, telegram or telex states “details to follow” (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument, the cable, telegram or telex will be deemed to be the operative credit instrument and the issuing bank need not send the mail confirmation to the advising bank.”

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> H.C. GUTTERIDGE & MAURICE MEGRAH, *THE LAW OF BANKERS’ COMMERCIAL CREDITS* 14-15 (1984).

<sup>39</sup> UCP400, *supra* note 23.

Article 4 of UCP290 became Article 12<sup>40</sup> but with some alteration. Some changes were of little significance, such as the changing of “cable, telegram or telex” in UCP290 to the term “teletransmission” in UCP400 – the drafters merely intended to capture the rapid development of technology and communications devices.<sup>41</sup> However, of notable significance is the changing of wording from UCP290 Article 4(c) to UCP400 Article 12(b) regarding the sending of mail confirmation of a letter of credit.<sup>42</sup> The drafters of UCP290 utilized the phrase “need not,” leaving the provision open to broader interpretations.<sup>43</sup> When drafting UCP400, however, the language was strengthened to state, “no mail confirmation should be sent” unless the transmission contains some language to the effect that a mail confirmation would be sent.<sup>44</sup> UCP400 Article 12 creates a default rule that issuers must make it clear whether a teletransmission itself or a follow-up letter is the “operative credit instrument.”<sup>45</sup> Unless the teletransmission recites “full details to follow” (or something similar), the teletransmission is the credit instrument, and any attempt to add or subtract terms in a follow-up letter would be an ineffective attempt to amend the credit unilaterally.<sup>46</sup> The UCP400 continued to place the burden of responsibility on the issuer if these procedures were not followed.<sup>47</sup>

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<sup>40</sup> UCP400, *supra* note 23, art. 12. In full, UCP400 Article 12 states “(a) When an issuing bank instructs a bank (advising bank) by any teletransmission to advise a creditor an amendment to a credit, and intends the mail confirmation to be the operative credit instrument, or the operative amendment, the teletransmission must state “full details to follow” (or words of similar effect), or that the mail confirmation will be the operative credit instrument or the operative amendment. The issuing bank must forward the operative credit instrument or the operative amendment to such advising bank without delay. (b) The teletransmission will be deemed to be the operative credit instrument or the operative amendment, and no mail confirmation should be sent, unless the teletransmission states “full details to follow” (or words of similar effect), or states that the mail confirmation is to be the operative credit instrument or the operative amendment. (c) A teletransmission intended by the issuing bank to be the operative credit instrument should clearly indicate that the credit is issued subject to Uniform Customs and Practice for Documentary Credits, 1983 revision, ICC Publication 400. (d) If a bank uses the services of another bank or banks (the advising bank) to have the credit advised to the beneficiary, it must also use the services of the same bank(s) for advising any amendments. (e) Banks shall be responsible for any consequences arising from their failure to follow the procedures set out in the preceding paragraphs.”

<sup>41</sup> WUNNICKE & WUNNICKE, *supra* note 28; BERNARD WHEBLE, DOCUMENTARY CREDITS: UCP 1974/1983 REVISIONS, COMPARED AND EXPLAINED 26 (1984).

<sup>42</sup> UCP400 Article 12 (1983).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> CHARLES MOONEY, JR., LETTERS OF CREDIT AND BANKERS’ ACCEPTANCES 69 (1985).

<sup>47</sup> UCP400, *supra* note 23, art. 12.

One element lacking in UCP290, however, was a better explanation of the term *original*, and the Banking Commission sought to rectify this with Article 22 of UCP400.<sup>48</sup> Article 22(c) states, “Unless otherwise stipulated in the credit, banks will accept as originals documents produced or appearing to have been produced: by reprographic systems; by, or as the result of, automated or computerized systems; as carbon copies, if marked as originals, always provided that, where necessary, such documents appear to have been authenticated.”<sup>49</sup> The article seems to stipulate that when documents are photocopied, the documents must be marked as an original, *on* the original writing itself, and not merely the word “original” photocopied onto it.<sup>50</sup>

Due to misinterpretations by the English courts in both *Glencore International AG v. Bank of China*<sup>51</sup> and *Kredietbank v. Midland Bank PLC*,<sup>52</sup> the ICC adopted UCP500<sup>53</sup> in 1994, in which changes were made to both prior Article 12 and 22 of UCP400. The drafters took their intentions from UCP400 Article 12, and made them even clearer with the language of UCP500 Article 11(a).<sup>54</sup> Going beyond merely telling issuing banks that they should not send mail confirmations when a teletransmission is the operative instrument, the drafters reiterate that the mail confirmation would have “no effect” and that the advising bank need not compare the mailed credit with the teletransmitted credit.<sup>55</sup> Furthermore, the text creates the

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<sup>48</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 116 (2000).

<sup>49</sup> UCP400, *supra* note 23, art. 22.

<sup>50</sup> RAYMOND JACK, DOCUMENTARY CREDITS 153 (1991) (stating that it would be “pointless if it were sufficient that a document which was a photocopy included the word ‘original’ photocopied onto it”). Although one wonders how an issuer would necessarily see this upon merely a facial examination of the documents.

<sup>51</sup> *Glencore Int'l AG v. Bank of China*, [1996] 5 Bank L.R. 1, 1 Lloyd's Rep. 135 (CA).

<sup>52</sup> *Kredietbank v. Midland Bank PLC*, [1999] 1 All E.R. (Comm.) 801 (A.C.).

<sup>53</sup> International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP500)*, ICC Publication No. 500 (Jan. 1, 1994) [hereinafter UCP500].

<sup>54</sup> UCP500, *supra* note 53, art. 11. In full Article 11 states: “When an Issuing Bank instructs an Advising Bank by an authenticated teletransmission to advise a Credit or an amendment to a Credit, the teletransmission will be deemed to be the operative Credit instrument or the operative amendment, and no mail confirmation should be sent. Should a mail confirmation nevertheless be sent, it will have no effect and the Advising Bank will have no obligation to check such mail confirmation against the operative Credit instrument or the operative amendment received by teletransmission.”

<sup>55</sup> UCP500, *supra* note 53, art. 11.

presumption that the telecommunication is the only communication necessary when the teletransmission is authenticated.<sup>56</sup>

Concern in the banking community over the limited scope of UCP400 Article 22(c) caused the ICC to amend the language in UCP500 Article 20(b) to include more than just “reprographic, automated, or computerized systems.”<sup>57</sup> The provision can be read to require that “any documentation created by reprographic means, which would include a computer, must bear a stamp as an original.”<sup>58</sup> Although possible in theory, this result is neither reasonable nor consistent with practice.<sup>59</sup> Unfortunately, the imprecise draftsmanship led to misinterpretation in the courts.<sup>60</sup>

The final transformation of the electronic communication rule came in 2006 with the creation of the UCP600<sup>61</sup>. Article 11(a) states:

An authenticated teletransmission of a credit or amendment will be deemed to be the operative credit or amendment, and any subsequent mail confirmation shall be disregarded. If a teletransmission states “full details to follow” (or words of similar effect), or states that the mail confirmation is to be the operative credit or amendment, then the teletransmission will not be deemed to be the operative credit or amendment. The issuing bank must then issue the operative credit or amendment without delay in terms not inconsistent with the teletransmission.<sup>62</sup>

The Official Commentary of the ICC reinforces that 11(a) states a “more definitive rule that an authenticated teletransmission will be deemed to be

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<sup>56</sup> Based on a plain reading of UCP500, *supra* note 53, art. 11.

<sup>57</sup> International Chamber of Commerce, *UCP 500 & 400 Compared*, at 59, ICC Publication No. 511 (1993).

<sup>58</sup> James Byrne, *Ten Major Stages in the Evolution of LC Practice*, in 2004 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 24 (2004).

<sup>59</sup> *Id.*

<sup>60</sup> See *Glencore Int'l AG v. Bank of China*, [1996] 5 Bank L.R. 1, 1 Lloyd's Rep. 135 (CA); *Kredietbank v. Midland Bank PLC*, [1999] 1 All E.R. (Comm.) 801 (A.C.).

<sup>61</sup> International Chamber of Commerce, *The Uniform Customs and Practice for Documentary Credits (UCP600)*, ICC Publication No. 600 (July 1, 2007) [hereinafter UCP600].

<sup>62</sup> UCP600, *supra* note 61, art. 11.



the operative documentary credit or amendment, and should mail confirmation be sent, it will be disregarded.”<sup>63</sup> Furthermore, the Commentary states that if an issuing bank were to intend the transmitted document not to be the operative instrument, then wording such as “full details to follow” or something similar must be used.<sup>64</sup>

The 2006 revision of the UCP also saw an entire article devoted to *originals*. The creation of the originals article was due to two factors. The first was the ever increasingly advancement of electronic transmission of documents.<sup>65</sup> The second was the court decisions in *Glencore* and subsequent cases that were based upon an interpretation of UCP500 Article 20(b) that was not in accordance with standard banking practice. Sub-Article 17(a) sets forth that “At least one original of each document stipulated in the credit must be presented.”<sup>66</sup> Sub-Articles 17(b) and (c) share some overlap in dealing with what will be accepted as an original. Sub-Article 17(b) states that an issuer shall treat any document bearing an apparently original signature, mark, stamp, or label of the issuer of the document, unless the document itself states otherwise.<sup>67</sup> Sub-Article 17(c) states that “unless a document indicates otherwise, a bank will also accept a document as original if it: appears to be written, typed, perforated or stamped by the document issuer’s hand; or appears to be on the document issuer’s original stationery; or states that it is original, unless the statement appears not to apply to the document presented.”<sup>68</sup>

### C. Statement of the Case

In order to pay for the purchase of 3,800 feet of thirty-inch steel pipe from LaBarge Pipe & Steel, Co. (“LaBarge”), PVF USA, LLC (“PVF”), had First Bank issue a standby letter of credit for US\$144,000 to secure payment to LaBarge in case of default.<sup>69</sup> After employees of LaBarge and First Bank met and finalized the letter of credit (the standby), a First Bank employee sent a facsimile message to LaBarge.<sup>70</sup> The cover sheet in the facsimile “stated: ‘Here is the letter of credit you requested. Please let me

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<sup>63</sup> International Chamber of Commerce, *Commentary on UCP 600*, at 51, ICC Publication No. 680 (Nov. 15, 2007).

<sup>64</sup> *Id.*

<sup>65</sup> JAMES E. BYRNE, THE COMPARISON OF UCP600 & UCP500 154-155 (2007).

<sup>66</sup> UCP600, *supra* note 61, art. 17.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *LaBarge*, 550 F.3d at 446.

<sup>70</sup> *Id.*

know if you need any additional information.”<sup>71</sup> Upon receipt of the facsimile message, the LaBarge employee requested that First Bank amend the language of the standby.<sup>72</sup> After making the change, the First Bank employee sent a facsimile of the standby with the requested changes, this time with a cover sheet stating, “Here is the revision to the letter of credit you requested. Please let me know if you need any additional information.”<sup>73</sup>

The versions of the standby that the First Bank employee had originally transmitted to LaBarge via facsimile were claimed to have been kept by the employee.<sup>74</sup> The First Bank employee testified that a representative of PVC took the standby in early December.<sup>75</sup> However, the employee of PVC denied ever having received the letter of credit.<sup>76</sup> First Bank then informed LaBarge that the standby had been given to PVC.<sup>77</sup>

In January and February, LaBarge representatives talked on two occasions with First Bank employees about the documents necessary to present to First Bank in order to draw on the standby.<sup>78</sup> The LaBarge representatives informed First Bank that they were having trouble locating the original standby, to which First Bank responded that they would not honor a presentation which did not include the original standby.<sup>79</sup>

When LaBarge presented documents in February, in addition to the other required documents, it included both the facsimile-transferred versions of the standby that it had received and an “Affidavit of Beneficiary of Irrevocable Letter of Credit and Indemnification of Issuer signed by Michael Brand, CFO, Secretary, and Treasurer of LaBarge,” stating that, “the ‘original letter of credit’ could not be produced because it was not delivered to LaBarge and was lost or destroyed.”<sup>80</sup> The affidavit also stated that LaBarge would reimburse First Bank if another party were to present the original standby and successfully draw on the standby.<sup>81</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 447.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 448.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

First Bank dishonored this presentation, and LaBarge sued First Bank in the United States District Court for the Middle District of Louisiana, asserting claims of wrongful dishonor, breach of the standby, detrimental reliance, and breach of a good faith obligation.<sup>82</sup> The district court entered summary judgment for First Bank, and LaBarge appealed.<sup>83</sup>

The Fifth Circuit Court of Appeals ruled that the documents presented did not meet the requirements of strict compliance, because LaBarge presented the facsimile copy of the standby, while the standby required that “the original Irrevocable Letter of Credit must be presented with any drawing so that drawings can be endorsed on the reverse thereof.”<sup>84</sup> Determining that UCP400 Article 22 was not indicative of the meaning of an “original” document, the Fifth Circuit decided that the “plain meaning” of the term would govern.<sup>85</sup> Using *Black’s Law Dictionary*, the court determined that the term “original” meant “first copy or archetype; that from which another instrument is transcribed, copied, or imitated.”<sup>86</sup> Since the document presented was not the “original,” the presentation did not strictly comply.<sup>87</sup>

#### D. Important Cases

##### 1. *Glencore International AG v. Bank of China*<sup>88</sup> and *Kredietbank v. Midland Bank PLC*<sup>89</sup>

In *Glencore*,<sup>90</sup> the Bank of China refused to honor a presentation on a letter of credit in part because the beneficiary’s certificates lacked markings that indicated that they were “original.”<sup>91</sup> Among the documents to be presented to the issuer was a beneficiary’s certificate, which when created was photocopied onto identical paper for record keeping purposes.<sup>92</sup> When presentation occurred, beneficiary presented one of the photocopies

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<sup>82</sup> *Id.* at 448.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 455.

<sup>85</sup> *Id.* at 452.

<sup>86</sup> *Id.* at 452 (citing BLACK’S LAW DICTIONARY, 1099 (6th ed. 1990)).

<sup>87</sup> *Id.* at 455.

<sup>88</sup> *Glencore Int’l AG v. Bank of China*, [1996] 1 Lloyd’s Rep. 135 (CA).

<sup>89</sup> *Kredietbank v. Midland Bank PLC*, [1999] 1 All E.R. (Comm.) 801 (A.C.).

<sup>90</sup> *Glencore*, [1996] 1 Lloyd’s Rep. at 135.

<sup>91</sup> *Id.*

<sup>92</sup> *Glencore*, [1996] 1 Lloyd’s Rep. at 147.

bearing a blue ink signature, while none of the other documents (including the original print) were signed.<sup>93</sup> The Court of Appeal, Civil Division, stated that in the absence of stipulations in the credit to the contrary, the basic rule was that originals of all the documents are required.<sup>94</sup> The court then ruled that the documents were discrepant because they were not “marked as original.”<sup>95</sup>

Prior to the decision in *Glencore*, it was “understood that a document that appeared on its face to be an original did not have to be otherwise marked in order to indicate its originality.”<sup>96</sup> After the *Glencore* case, while some hoped for reform of the UCP’s provisions on originals, others suggested that until something was done that beneficiaries should “wield their rubber stamps and mark all documents ‘original’, except those which by the terms of the credit, are permitted to be copies.”<sup>97</sup> Despite the decision in *Glencore*, some experts believed that most courts would attempt to interpret UCP500 Article 20 in light of the international banking practices rather than the “plain language” approach of *Glencore*.<sup>98</sup>

In *Kredietbank*,<sup>99</sup> the letter of credit required the presentation of an original insurance policy, which was initially produced by printing a copy onto the insurance issuer’s watermarked, high-quality headed paper bearing the company’s blue logo and name. This printed document was then photocopied with the marking of “duplicate.” Both documents were signed by the insurance issuer and presented to the Issuer.<sup>100</sup>

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<sup>93</sup> *Id.*

<sup>94</sup> *Glencore*, [1996] 1 Lloyd’s Rep. at 147; Howard N. Bennett, *Strict Compliance Under U.C.P. 500*, [1997] 1 L.M.C.L.Q. 7.

<sup>95</sup> *Glencore*, [1996] 1 Lloyd’s Rep. at 147.

<sup>96</sup> James E. Byrne, *Editor’s Overview* to International Chamber of Commerce, *The Determination of an “Original” Document in the Context of UCP 500 Sub-Article 20(b)*, ICC Doc. No. 470/871 Rev. (July 12, 1999), in *LC RULES & LAWS CRITICAL TEXTS* 129 (James E. Byrne ed., 4th ed. 2007).

<sup>97</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 123 (2000) (citing Diana Wright, 10 J.I.B.L. Supplement (1995)).

<sup>98</sup> James Barnes, Opinion Letter by James G. Barnes on the Obligations of Issuing and Confirming Banks to Accept Documents as Originals (1999), reprinted in 1999 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 306 (1999).

<sup>99</sup> *Kredietbank v. Midland Bank PLC*, [1999] 1 All E.R. (Comm.) 801 (A.C.).

<sup>100</sup> *Id.*

The Court of Appeal, Civil Division, stated that it was bound by the decision in *Glencore*<sup>101</sup>, to hold that Article 20(b) required an original to be “marked as original.”<sup>102</sup> However, the judge concluded that the document need not have the word “original” placed on it, but that the requirement was satisfied if the terms or markings on the document would leave “no doubt about it being the original.”<sup>103</sup> Finding that the printed insurance policy met this test because of the colored logo, the signatures, the terms of the document, and the existence of a document labeled as “duplicate,” the judge ruled that the document need not be marked as original.<sup>104</sup> Attempting to isolate the effect of *Glencore*, the judge stated that its holding “was not concerned with an original document which contained a relevant contract and which was not itself a copy of some other document and the judgment did not qualify the bank’s duty to accept a document of that kind as valid tender under a credit.”<sup>105</sup>

The decision in *Kredietbank* was a clear balk by the court to the holding in *Glencore*.<sup>106</sup> While hesitant to contradict the precedent set in *Glencore*, the judge nonetheless carved out a separate groove for the specific facts in *Kredietbank*.<sup>107</sup> This, however, failed to rectify the problem created by *Glencore*.<sup>108</sup> Fear still existed that the *Glencore* decision would continue to haunt the banking community, requiring formerly unnecessary (and in their mind still unnecessary) markings on originals to avoid dishonor.

## 2. ICC Determination of an Original

The holding in *Glencore* (and the less-than-total solution issued by *Kredietbank*) was met with significant confusion within the banking

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<sup>101</sup> *Glencore Int'l AG v. Bank of China*, [1996] 1 Lloyd's Rep. 135 (CA).

<sup>102</sup> *Kredietbank*, [1999] 1 All E.R. (Comm.) 809-12 (A.C.).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> H.C. GUTTERIDGE & MAURICE MEGRAH, *THE LAW OF BANKERS' COMMERCIAL CREDITS* 195 (Richard King ed., 8th ed. 2001) (1984).

<sup>106</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 119-120 (2000).

<sup>107</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 120 (2000).

<sup>108</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 119 (2000) (suggesting that the decision was neither sound in terms of legal theory or banking practice).

community.<sup>109</sup> Recognizing the need to clarify UCP500 Article 20(b), the ICC Commission on Banking Technique and Practice issued a decision stating the intended meaning of the sub-article (the Determination of an Original).<sup>110</sup> Supporting the approach taken in *Kredietbank*<sup>111</sup>, the Commission's decision simply restated the standard banking practices, including a direct contradiction of the *Glencore* holding.<sup>112</sup> The Commission's decision states that if a photocopied document is either "completed by the document issuer's hand marking" or if it is photocopied "onto original stationery," then the document constitutes an original.<sup>113</sup>

### 3. Subsequent Cases

The Commission's Determination was quickly applied in the American courts.<sup>114</sup> In *Voest-Alpine Trading USA Corp. v. Bank of China*, when the Bank of China declared that packing lists were discrepant when not stamped as original, Voest-Alpine Trading USA Corp., the beneficiary, brought a suit for wrongful dishonor.<sup>115</sup> The United States District Court for the Southern District of Texas,<sup>116</sup> referring to the ICC policy statement, ruled that these documents were considered original under UCP500 Article 20, because all of the documents had blue-ink signatures, and there was no requirement under UCP500 that the documents be marked as "original."<sup>117</sup>

In England, the courts still felt obligated to pay homage to *Glencore*, while doing everything in their power to evade its vortex. In *Credit Industrial et Commercial v. China Merchants Bank*<sup>118</sup>, the Queen's Bench Division, Commercial Court, differentiated the case from *Glencore*, because the documents were not known to be copies.<sup>119</sup> However, the court, in undertaking an analysis of the International Chamber of Commerce's policy

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<sup>109</sup> Byrne, *supra* note 96.

<sup>110</sup> International Chamber of Commerce, *The Determination of an "Original" Document in the Context of UCP 500 Sub-Article 20(b)*, ICC Doc. No. 470/871 Rev. (July 12, 1999) [hereinafter *The Determination of an Original*].

<sup>111</sup> GUTTERIDGE & MEGRAH, *supra* note 105, at 196.

<sup>112</sup> Byrne, *supra* note 96.

<sup>113</sup> *The Determination of an Original*, *supra* note 110.

<sup>114</sup> Byrne, *supra* note 96.

<sup>115</sup> *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940, 948, *aff'd*, 288 F.3d 262 (5th Cir. 2002) (S.D. Tex. 2000).

<sup>116</sup> Worth note, is that this is the same circuit that decided *LaBarge*.

<sup>117</sup> *Voest-Alpine*, 167 F. Supp. 2d at 948.

<sup>118</sup> *Credit Indus. et Commercial v. China Merchs. Bank*, [2002] EWHC (Comm) 973, [2002] 2 All E.R. 427 (Comm).

<sup>119</sup> *Id.*

statement, determined that if the statement applied to the facts of the case, then the documents complied as “original.”<sup>120</sup> Despite the issuers’ protests to the contrary, the court ruled that since the “UCP is a code produced and published by the ICC . . . [i]t [was] entirely legitimate for the ICC to seek to resolve any ambiguities in, or difficulties of interpretation of, the code.”<sup>121</sup> The court’s parting from *Glencore* was not lost on the banking community, which saw through the “polite forms of English judicial decisions” to see the hidden rebuke of the *Glencore* decision.<sup>122</sup>

Nearly 9,000 kilometers away in the Republic of Korea, the courts reached similar outcomes to those in *Credit Industrial* and *Voest-Alpine*. In *Sungsan Yanghaeng v. Bank of China*<sup>123</sup>, the Bank of China challenged documents that were produced by “reprographic or computerized systems” that did not bear an “original mark.”<sup>124</sup> The Seoul Court of Appeal of the Republic of Korea ruled that under the UCP500 (which the letter of credit was subject to), when “the documents bear the signature by the stamps or of the one’s own handwriting, it would be just to treat them as original not as copies produced by reprographic system etc.,” and, as such, the documents need not bear a marking of “original.”<sup>125</sup> Again in *Korea First Bank v. Korean Export Insurance Corp.*,<sup>126</sup> the court held that the mark of “original” need not be present when a signature of the beneficiary was present.<sup>127</sup>

## II. Analysis of *LaBarge* Decision

The Fifth Circuit’s decision in *LaBarge* on the originality issue that confronted it was inconsistent with the intent of the UCP, failed to consider the ambiguity inherent in the transmittal of the letter of credit, and did not properly consider case law regarding a facsimile as an original. To avoid confusion on the issue of what does constitute an original letter of credit, there are additional steps that could be taken, such as revising the UCP

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> James E. Byrne, *Commentary on Credit Industriel et Commercial v. China Merchants Bank*, [2002] EWHC (Comm) 973, [2002] 2 All E.R. 427 (Comm), in 2003 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE 180 (2003).

<sup>123</sup> Seoul Court of Appeal 12th Div., August 14, 1999, *Sungsan Yanghaeng v. Bank of China*, Case No. 98 na 18072 (R.O. Korea).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Supreme Court 3rd Div., 2002, *Korea First Bank v. Korean Exp. Ins. Corp.*, Case No. 2000 da 63691 (R.O. Korea).

<sup>127</sup> *Id.*

provisions to more closely mirror those ISP Rule 4.15<sup>128</sup>, differentiating between *original* and *operative* in the text of the UCP, and broadening the language of the UCP to include letters of credit in its article dedicated to originals.

#### A. Inconsistent with Intention of ICC/ Text of UCP 400

The decisions by both the trial court and appellate court in *LaBarge* were inconsistent with the International Chamber of Commerce's intention in drafting the Uniform Customs and Practice for Documentary Credits. The Fifth Circuit acknowledged that the letter of credit presented was subject to UCP400 Article 12, but dismissed it as being contradictory to Article 22, which the Fifth Circuit deemed to apply only to "supporting documents."<sup>129</sup> The court reasoned that although Article 12 stated that a facsimile transmission of a letter of credit could act as the "operative" document, the terms "operative" and "original" might not be synonymous.<sup>130</sup> The court, looking to *Black's Law Dictionary* rather than banking practice, determined that "original" meant "the first copy or archetype; that from which another instrument is transcribed, copied or imitated."<sup>131</sup> Based on this definition of "original" the court concluded that the facsimile-transmitted letter of credit was not an original document.<sup>132</sup> Incredibly, the Fifth Circuit, referring to Louisiana statutory provisions,<sup>133</sup> determined that letters of credit could indeed be issued by facsimile, but only if they were "marked by the relevant bank as 'original'."<sup>134</sup> This limiting statement flew in the face of the ICC's Determination of Original Documents, which states several ways documents can be original without expressly marking documents as "original."<sup>135</sup>

Starting first with the expansion to include all teletransmissions in UCP400, Article 12 clearly indicates the status of the letter of credit. First Bank failed to state anything similar to "full details to follow," as required by UCP400 Article 12(a) to make a mail confirmation the operative instrument.<sup>136</sup> First Bank in fact took positive steps to state that the

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<sup>128</sup> International Chamber of Commerce, *The International Standby Practices (ISP98)*, rule 4.15, ICC Publication No. 590 (Jan. 1, 1999) [hereinafter ISP98].

<sup>129</sup> *LaBarge*, 550 F.3d at 542 n.8.

<sup>130</sup> *Id.* at 452-53.

<sup>131</sup> *Id.* at 452 (quoting BLACK'S LAW DICTIONARY 1099 (6th ed. 1990)).

<sup>132</sup> *Id.* at 453.

<sup>133</sup> LA. REV. STAT. ANN. §10:5-104 (2003).

<sup>134</sup> *LaBarge*, 550 F.3d at 451.

<sup>135</sup> The Determination of an Original, *supra* note 109.

<sup>136</sup> UCP400, *supra* note 23, art. 12.



facsimile was “the” letter of credit (although the ambiguity of this statement is addressed below).<sup>137</sup> Furthermore, under 12(b), since there was an absence of the phrase “full details to follow,” the UCP decreed that “no mail confirmation should be sent.”<sup>138</sup>

Although unnecessary, it would have been more prudent for the Fifth Circuit to have looked to subsequent publications of the UCP for the intent of the drafters or customs of banking practice, rather than rely on a dictionary. The same analysis would apply under UCP500 Article 11 (Teletransmitted and Pre-Advised Credits)<sup>139</sup> as it did under UCP400 Article 12, but with the added caveat that if First Bank had sent a mail confirmation, LaBarge would have been inclined to disregard the mailed letter of credit altogether.

Subsequent to the publication of the ICC’s Determination of an Original, courts should be inclined to look at the transmission at face value and determine if the document would be considered to be an original, rather than narrowly looking for the document to be “marked original.”<sup>140</sup> In contrast to the intent manifested in the ICC’s publications, the Fifth Circuit undertook no such analysis.

### **B. Inconsistent with the Use of Ambiguity in Banking Practice**

Under standard banking practice, when ambiguity exists in a letter of credit, it is to be construed against the drafter<sup>141</sup> or, more generally, the issuer.<sup>142</sup> The Fifth Circuit adopted this position in *United States v. Sun Bank of Miami*.<sup>143</sup> In *LaBarge*, the letter of credit was transmitted with a cover letter stating, “Here is the letter of credit you requested,” and a subsequent revision of the letter of credit with a cover sheet stating, “Here

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<sup>137</sup> *LaBarge*, 550 F.3d at 451.

<sup>138</sup> UCP400, *supra* note 23, art. 12.

<sup>139</sup> UCP500, *supra* note 53, art. 11.

<sup>140</sup> The Determination of an Original, *supra* note 110.

<sup>141</sup> *Bath Iron Works Corp. v. WestLB*, 2004 U.S. Dist. LEXIS 6212, at \*9 (S.D.N.Y., Sept. 8, 2004) (citing *Barclay Knitwear Co., Inc. v. King’swear Enter. Ltd.*, 533 N.Y.S.2d 724 (1st Dep’t 1988)).

<sup>142</sup> *3Com Corp. v. Banco Do Brasil, S.A.*, 2 F. Supp. 2d 452 (S.D.N.Y. 1998), *aff’d*, 171 F.3d 739 (2d Cir. 1999) (granting the beneficiary’s motion for summary judgment when issuer failed to provide the “clear and unequivocal” notice required to terminate the LC by the UCP and New York law, holding that ambiguities in the LC should be construed against the drafter, in this case the issuer).

<sup>143</sup> *United States v. Sun Bank of Miami*, 609 F.2d 832, 833 (5th Cir. 1980). (holding that the though the issuer might have intended to limit use of funds for specified purposes, it failed to require such in documentation).

is the revision to the letter of credit you requested.”<sup>144</sup> A plain reading of these terms would suggest that the accompanying letter of credit was *the* letter of credit. However, since the same phrases could be read (as the court did) to mean that the facsimile is a copy of the original credit, there are at least two interpretations associated with the transmission. Under standard banking practice, because ambiguities associated with the letter of credit are to be held against the drafter, the facsimile-sent letters of credit were the originals. The court, in failing to recognize valid ambiguities, was precluded from this outcome.

### C. Inconsistent with prior decisions in the US and Internationally

In light of the British courts’ reluctance<sup>145</sup> to overturn *Glencore*, it would be possible to decide that since the facsimile-transmitted credits from First Bank were not marked as an original (i.e. had the word *original* or something similar emblazoned upon the letter of credits themselves), they were not originals under the meaning of UCP400 Article 22(b)<sup>146</sup> (the predecessor of UCP500 Article 20(b)<sup>147</sup>). On its face it would appear that the exception carved out by the Court of Appeal in *Kredietbank* would not necessarily apply to the facts presented to the Fifth Circuit either. Unlike the facsimile-transmitted documents sent to LaBarge, the documents in *Kredietbank* left no doubt in the court’s mind that they were original because of the colored logo, signatures, terms of the document, and the existence of a document marked “duplicate.”<sup>148</sup> However, despite the dissimilarity of the precise facts, the Fifth Circuit could have reached a

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<sup>144</sup> *LaBarge*, 550 F.3d at 453.

<sup>145</sup> It is worth noting, that generally, English courts have a different, more strict, notion of precedence than their U.S. counterparts. Even dicta can be binding. *See* Raj Bhala, *Symposium: Global Trade Issues in the New Millennium: The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication*, 33 *Geo. Wash. Int'l L. Rev.* 873, 888 (2001) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 267-68 (J.P. Mayer ed., George Lawrence trans., Yale Univ. Press 1969) (1850)) (“The English lawyer values laws not because they are good but because they are old; and if he is reduced to modifying them in some respect, to adapt them to the changes which time brings to any society, he has recourse to the most incredible subtleties in order to persuade himself that in adding something to the work of his fathers he has only developed their thought and completed their work. Do not hope to make him recognize that he is an innovator; he will be prepared to go to absurd lengths rather than to admit himself guilty of so great a crime. It is in England that this legal spirit was born, which seems indifferent to the substance of things, paying attention only to the letter, and which would rather part company with reason and humanity than with the law.”).

<sup>146</sup> UCP400, *supra* note 23, art. 22.

<sup>147</sup> UCP500, *supra* note 53, art. 20.

<sup>148</sup> *Kredietbank v. Midland Bank PLC*, [1999] 1 All E.R. (Comm.) 807-12 (A.C.).

similar result as *Kredietbank*'s, if it had found the language of the cover sheets to be indicative that the transmitted documents were the original letters of credit.<sup>149</sup>

Although the Fifth Circuit's analysis of the originality of the documents appears to be in line with the *Glencore* and *Kredietbank* decisions, the cases after the ICC Determination of an Original presented an opportunity for the court to analyze the documents for originality despite the lack of an express marking of the word *original*. The decision in *Voest-Alpine* stood for greater acceptability under the interpretation of the UCP under the ICC Determination of an Original under Article 20 of UCP500.<sup>150</sup> The decisions of international courts are consistent with the opinions of *Voest-Alpine* in that they accept as "original" reproduced or computerized versions of documents at presentation.<sup>151</sup> The Fifth Circuit failed to acknowledge these cases, which had shown precedent and practice to favor allowance of facsimile-reproduced materials as original documents, when they merely appeared on their face to be the original. The court failed to look at the presented documents as a bank unaware of the letters of credit's statuses would – which would be without presumption of the knowledge of the documents' facsimile origins. However, under the facts given to the Fifth Circuit, First Bank was not unaware of the origin of the documents presented to it.<sup>152</sup> First Bank was probably faced with an obvious ground for dishonor when the beneficiary indicated in the documents presented that the LC was not the original because the "original letter of credit" could not be produced because it was not delivered to LaBarge and was lost or destroyed."<sup>153</sup>

Despite having this isolated ground as a reason to find valid grounds for dishonor<sup>154</sup>, the Fifth Circuit based its holding on the "plain meaning" of the term "original," precluding nearly all facsimile-transmitted letters of credit unless marked "original."<sup>155</sup> This holding presents bankers with a

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<sup>149</sup> *LaBarge*, 550 F.3d at 446-47.

<sup>150</sup> *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002).

<sup>151</sup> *Credit Indus. et Commercial v. China Merchs. Bank*, [2002] EWHC (Comm) 973, [2002] 2 All E.R. 427 (Comm); Seoul Court of Appeal 12th Div., August 14, 1999, *Sungsan Yanghaeng v. Bank of China*, Case No. 98 na 18072 (R.O. Korea); Supreme Court 3rd Div., 2002, *Korea First Bank v. Korean Exp. Ins. Corp.*, Case No. 2000 da 63691 (R.O. Korea).

<sup>152</sup> *LaBarge*, 550 F.3d at 448.

<sup>153</sup> *Id.*

<sup>154</sup> The issuer was aware that the standby present was not the original.

<sup>155</sup> *LaBarge*, 550 F.3d at 451-52 (5th Cir. 2008).

similar problem to the one created by *Glencore*. The Fifth Circuit in *LaBarge* essentially incorporated the *Glencore* holding to American jurisprudence because now, when transmitting letters of credit via facsimile, the letters must be marked as “original.”<sup>156</sup>

#### D. Possible Solutions

Although not a new idea<sup>157</sup>, one wonders if the International Banking Commission’s intention would not be better served if a clearer rule on originals was incorporated into the UCP. Rule 4.15 of the International (ISP98)<sup>158</sup> was intended to restate and clarify UCP500 Article 20 to better conform to standard banking practice.<sup>159</sup> Rule 4.15 provides:

- a. A presented document must be an original.
- b. Presentation of an electronic document record, where an electronic presentation is permitted or required, is deemed to be an “original”.
- c.
  - i. A presented document is deemed to be an original unless it appears on its face to have been reproduced from an original.
  - ii. A document which appears to have been reproduced from an original is deemed to be an original if the signature or authentication appears to be original.
  - ....
- d. If multiples of the same document are requested, only one must be an original<sup>160</sup>

The ISP98’s solution is attractive because it creates “a presumption that *all* documents presented are originals, unless they appear on their face to have been produced from some other document or documents.”<sup>161</sup> Furthermore, under sub-rule (c)(i), even if the letter of credit is reproduced from an

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<sup>156</sup> *LaBarge*, 550 F.3d at 451. The court failed to state any other situations when the facsimile copy would be accepted as the original, creating uncertainty in situations other than involve an express marking as an original.

<sup>157</sup> See Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 122-123 (2000).

<sup>158</sup> ISP98, *supra* note 128.

<sup>159</sup> JAMES E. BYRNE, THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES 179 (James G. Barnes ed., 1999).

<sup>160</sup> ISP98, *supra* note 128.

<sup>161</sup> Adam Johnson, *Letters of Credit and Original Documents-Again*, 14 J.I.B.L. 287 (1999), reprinted in 2000 Annual Survey of Letter of Credit Law & Practice 118 (2000).

original, it would constitute an original if it bears an original signature.<sup>162</sup> Therefore, even if such wording (as is found in the ISP98) were incorporated into a UCP revision, the outcome of this case would have been the same; although, all that would have been necessary for LaBarge to do was to have signed the document (or mark it in some way).<sup>163</sup> This solution would certainly be an improvement over the outcome in *LaBarge*, in which the Fifth Circuit determined that facsimiles, unless marked as “original,” were not in compliance with the originality requirement.<sup>164</sup>

A second more tailored solution that could be undertaken by the ICC would be to include the word “original” in addition to “operative” in future adaptations of UCP600 Article 11. This would relieve possible confusion stemming from an increased reliance on electronic means of communication. Or, similarly, simply defining “operative” would help to alleviate confusion over the use of two separate terms in UCP400 Article 12 and 22.<sup>165</sup>

A third possible solution would be to broaden the scope of the text (if maybe not the intended scope) of future versions of UCP600 Article 17 (“Original Documents”). The Fifth Circuit in *LaBarge* determined that UCP400 Article 22 was not intended to apply to letters of credit, but only to their “supporting documents.”<sup>166</sup> With this precedent set, it would not be impossible to foresee a future decision limiting the scope of UCP600 Article 17 to “supporting documents.”<sup>167</sup> Therefore explicit language in future revisions of UCP600 Article 17 detailing its application to letters of credits as well as other supporting documents could alleviate the discrepancy between practice and court decisions such as *Glencore*.

However, the problem with the latter two solutions is that they would not affect letters of credit already in existence under UCP600 or earlier. This was the case when the ICC issued its Determination of an Original because it applied to UCP500, but not UCP400, and therefore, letters of credit issued under UCP400 almost seem immune to the attempted clarification of banking practice in court. However, if courts were forward-looking enough to recognize the intent of the ICC and read the prior version

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<sup>162</sup> JAMES E. BYRNE, THE OFFICIAL COMMENTARY ON THE INTERNATIONAL STANDBY PRACTICES 180 (James G. Barnes ed., 1999).

<sup>163</sup> *Id.*

<sup>164</sup> *LaBarge*, 550 F.3d at 451.

<sup>165</sup> *LaBarge*, 550 F.3d at 452-53.

<sup>166</sup> *LaBarge*, 550 F.3d at 452 n.8.

<sup>167</sup> *Id.*

of the UCP with an eye toward that intent, the solution could be partially viable.

### Conclusion

The United States Court of Appeals, Fifth Circuit, in deciding *LaBarge Pipe & Steel Co. v. First Bank*, erred in determining that the presentation was non-complying. Both the prior and subsequent versions of the Uniform Customs and Practice for Documentary Credits produced by the International Chamber of Commerce, which had been published by the time of the trial, indicated through their respective articles governing teletransmissions and originals, that the letter of credit issued via telefax by First Bank was, indeed, original.<sup>168</sup> In cohesion with the text of the UCP, the telefaxed letter of credit would not have been sufficient as the original if the cover page had indicated that “full details [were] to follow,” but this was not the case.<sup>169</sup> The holdings of both American and foreign courts support the sufficiency of electronically transmitted documents under the circumstances in *LaBarge*.<sup>170</sup> The court here disregarded such notions and, instead, held that the beneficiary, LaBarge, would have been required to submit a document that was neither sent to it, nor should have been expected to have been sent to it. Furthermore, the Fifth Circuit ignored the ambiguity present in the facsimile from First Bank.<sup>171</sup> If the court had acknowledged that the language used in the issuer’s cover sheet could have been interpreted to create an original document, such ambiguity would have to be read in favor of the beneficiary, LaBarge, under standard banking practices.<sup>172</sup>

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<sup>168</sup> UCP600, *supra* note 61, art. 11; UCP500, *supra* note 53, art. 12.

<sup>169</sup> UCP600, *supra* note 61, art. 11.

<sup>170</sup> See *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002); *Sungsan Yanghaeng v. Bank of China*, 1998 NA 18072.; *Korea First Bank v. Korean Exp. Ins. Corp.*, 2000 DA 63691.

<sup>171</sup> *LaBarge*, 550 F.3d at 453.

<sup>172</sup> *United States v. Sun Bank of Miami*, 609 F.2d 832, 833 (5th Cir. 1980) (holding that though the issuer might have intended to limit use of funds for specified purposes, it failed to require such in documentation); see also *Bath Iron Works Corp. v. WestLB*, 2004 U.S. Dist. LEXIS 19206, at \*9 (S.D.N.Y., Sept. 8, 2004) (citing *Barclay Knitwear Co., Inc. v. King'swear Enter. Ltd.*, 533 N.Y.S.2d 724 (1st Dep't 1988)); *3Com Corp. v. Banco Do Brasil, S.A.*, 2 F. Supp. 2d 452 (S.D.N.Y. 1998), *aff'd*, 171 F.3d 739 (2nd Cir. 1999) (granting the beneficiary’s motion for summary judgment when issuer failed to provide the “clear and unequivocal” notice required to terminate the LC by the UCP and New York law, holding that ambiguities in the LC should be construed against the drafter, in this case the issuer).

The holding in *LaBarge* imposed a standard of analysis upon letter of credit issuance that was not only unintended by the ICC, but specifically guarded against with the UCP400 drafters' modification of Article 12. The most viable options appear to be either a court reversing or rebutting the *LaBarge* decision or a new ICC revision. The latter option, while leaving future parties using letters of credit subject to the UCP in a better position of knowing what the original document is, offers little consolation to LaBarge Pipe & Steel Co. for its US\$144,000 loss.