

**ABA UCC/COMFIN NEWSLETTER**  
**LETTERS OF CREDIT SUBCOMMITTEE**

**January 2009**

This quarter's report focuses on three recent letter of credit cases.

1. Letter of credit in lieu of surety bond. In *Jaimie Shipping, Inc. v. Oman Insurance Company*, 2008 U.S. Dist. Lexis 67765 (September 8, 2008), plaintiffs were various companies who were suing the defendant insurance company for the defendant's failure to pay on an insurance policy. The primary proceedings were in London. However, plaintiffs obtained a writ of attachment against accounts of the defendant in New York. The defendant requested that the New York court issue an order compelling the plaintiffs to release the funds that they had attached and to accept as substitute security an irrevocable letter of credit from Mashreq Bank, a bank of the United Arab Emirates, which had offices in London and New York. Plaintiffs refused to accept the Mashreq Bank letter of credit as substitute security.

The court held that under the local rules of the U.S. District Courts for the Southern and Eastern Districts of New York, absent the plaintiffs' consent the proposed letter of credit was not acceptable, notwithstanding the reliability of letters of credit in general and the credit standing of Mashreq Bank. The local rules required an undertaking of "a corporate surety holding a certificate of authority from the Secretary of the Treasury." Because Mashreq Bank was not an approved surety within the meaning of the local rule, the proposed letter of credit failed to comply with the requirements for substitute security absent the plaintiffs' consent. The court emphasized that, notwithstanding the acceptability of Mashreq Bank's letter of credit generally in other contexts, the court's hands are bound by the requirements of the local rule.

The case emphasizes that the Letters of Credit Subcommittee's supersedeas bond project has a number of technical hurdles to overcome. No matter how well drafted the letter of credit is and no matter how creditworthy the issuing bank is, the letter of credit and the issuing bank must nevertheless comply with whatever the local rules are in the particular court. Many of those rules were drafted without letters of credit in mind and therefore would not permit the use of a letter of credit in lieu of a surety bond.

2. Inability to issue letter of credit because of failure to have appropriate credit rating. In *Associated Warehousing, Inc. v. Banterra Corp.*, 2008 U.S. Dist. Lexis 68586 (September 8, 2008), Associated Warehousing, Inc. ("AWI") negotiated with Banterra Corp. ("Banterra") for financing for a construction project. Banterra delivered a Term Letter covering three components, a non-revolving construction loan, a real estate term loan and a letter of credit to support an eventual bond issue for the permanent financing of the first two components. The Term Letter was not signed by either party. However, the non-revolving construction loan and the real estate term loan were made by Banterra. At some point in the discussions about the letter of credit, it was discovered that, in order to issue the letter of credit to support the bond offering, Banterra must be a rated bank, which it was not.

Banterra attempted to solve the problem by seeking a wrap-around letter of credit by a rated bank. However, those attempts ultimately failed. Banterra then informed AWI that it would issue the letter of credit without the assistance of a rated bank. AWI declined to accept the unrated letter of credit, claiming that to do so would be outside the Term Letter. AWI then sued Banterra for breach of the Term Letter.

Banterra should have known whether or not it was a rated bank and if it could issue the letter of credit for a bond offering. Banterra also failed to make a full disclosure of its status as a non-rated bank, a status that was material to the use of the letter of credit. Banterra's failure to disclose allegedly injured AWI. The court also found that Banterra was subject to promissory estoppel. Accordingly, the court held that AWI had pled facts sufficient to overcome Banterra's motion to dismiss various counts of the Complaint.

3. Description and quantity of goods. In a four paragraph opinion in *Imptex International Corp. v. HSBC Bank USA, N.A.*, 52 A.D.3d 215, 859 N.Y.S.2d 147 (June 3, 2008), the New York appellate division addressed an appeal in a suit by the applicant for wrongful honor of a letter of credit on three different drawings. The court held that the first two presentations on the letter of credit strictly complied with the terms of the letter of credit although, in addition to stating that the merchandise was "on rolls," as required by the letter of credit, the presented documents described merchandise as packaged in "bales," a term not specified in the letter of credit. However, the court found that the additional reference did not under the circumstances create a discrepancy or inconsistency. Accordingly, the court upheld the motion for summary judgment granted by the trial court to the defendant issuer as to those two presentations. However, with regard to the third presentation, the court found that there was a discrepancy because the quantity of goods listed in the presentment documents exceeded the quantities listed in the letter of credit by more than 5%, in violation of Article 39(b) of UCP 500.