

IV. STAND-BY LETTERS OF CREDIT AND GUARANTEES

A. Report of the Working Group on International Contract Practices on the work of its twelfth session (Vienna, 21-30 November 1988) (A/CN.9/316) [Original: English]

INTRODUCTION

1. At its twenty-first session, the Commission considered the report of the Secretary-General on stand-by letters of credit and guarantees (A/CN.9/301). Agreeing with the conclusion of the report that a greater degree of certainty and uniformity was desirable, the Commission noted with approval the suggestion in the report that future work could be carried out in two stages, the first relating to contractual rules or model terms and the second pertaining to statutory law.¹

2. Concerning the first stage, the Commission welcomed the work undertaken by the International Chamber of Commerce (ICC) in preparing draft Uniform Rules for Guarantees and agreed that comments and possible recommendations by the States Members of the Commission, with its balanced representation of all regions and the various legal and economic systems, could help to enhance the world-wide acceptability of such rules.² Accordingly, the Commission decided to devote one session of the Working Group on International Contract Practices to a review of the ICC draft Uniform Rules for Guarantees in order to assess the world-wide acceptability of the draft Rules and to formulate comments and possible suggestions that ICC could take into account before finalizing the draft Rules.³

3. The Commission also asked the Working Group to examine the desirability and feasibility of any future work relating to the second stage as envisaged in the conclusions of the report, namely the idea of striving for greater uniformity at the statutory level, through work towards a uniform law.⁴

4. The Working Group, which was composed of all States Members of the Commission, held its twelfth session at Vienna from 21 to 30 November 1988. The session was attended by representatives of the following States Members of the Working Group: Argentina, Austria, China, Czechoslovakia, France, German Democratic Republic, Iran (Islamic Republic of), Italy, Japan, Mexico, Netherlands, Nigeria, Spain, Sweden, Union of

Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

5. The session was attended by observers from the following States: Afghanistan, Bulgaria, Canada, Colombia, Germany, Federal Republic of, Indonesia, Poland, Sudan and Thailand.

6. The session was attended by observers from the following international organizations: Commission of the European Communities, Hague Conference on Private International Law and International Chamber of Commerce.

7. The Working Group elected the following officers:
Chairman: Mr. A. S. HARTKAMP (Netherlands)
Rapporteur: Mr. LIU Daguo (China).

8. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.61); a note by the Secretariat containing the most recent version of the ICC draft Uniform Rules for Guarantees (A/CN.9/WG.II/WP.62); and a note by the Secretariat containing tentative considerations on the preparation of a uniform law (A/CN.9/WG.II/WP.63).

9. The Working Group adopted the following agenda:
(a) Election of officers
(b) Adoption of the agenda
(c) Review of the ICC draft Uniform Rules for Guarantees
(d) Possible features and issues that might appropriately be covered in a uniform law
(e) Adoption of the report.

DELIBERATIONS AND DECISIONS

10. The Working Group engaged in a review of the ICC draft Uniform Rules for Guarantees as contained in the note by the Secretariat (A/CN.9/WG.II/WP.62), with the understanding that the preparation of the Rules was the responsibility of ICC. The discussion of the Working Group and the suggestions on individual draft articles are set forth below in chapter I.

11. Following that discussion the Working Group proceeded to an examination of the desirability and feasibility

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17* (A/43/17), para. 19.

²*Ibid.*, para. 20.

³*Ibid.*, paras 21-22.

⁴*Ibid.*, paras. 22-24.

of the preparation of a uniform law. The tentative considerations of the Working Group, including its discussion on the possible scope and on the issues that might be dealt with in a uniform law, are set forth below in chapter II.

I. REVIEW OF ICC DRAFT UNIFORM RULES FOR GUARANTEES

General considerations

12. The Observer of the International Chamber of Commerce (ICC) explained to the Working Group the background, purpose and status of the ICC draft Uniform Rules for Guarantees (hereinafter referred to as "the Rules"). She noted, for example, that ICC's current work towards a new set of rules had been prompted by the limited success of the 1978 ICC Uniform Rules on Contract Guarantees (ICC Publication No. 325). The new draft Rules were the result of a serious and ongoing effort of reconciling the different interests of the parties to a guarantee operation.

13. The new draft Rules were in part modelled on other ICC texts, especially the Uniform Customs and Practice for Documentary Credits (UCP) and the 1978 ICC Uniform Rules on Contract Guarantees. The draft Rules before the Working Group, and in particular the introduction, were of a tentative nature in that they were still subject to revision by the ICC Joint Working Party and later review by its two parent bodies, namely the ICC Commission on Banking Technique and Practice and the ICC Commission on International Commercial Practices. Once the Rules were finalized, it was envisaged that model forms for the more common types of guarantees would be prepared.

14. After expressing its appreciation to the Observer of the ICC, the Working Group considered some general points before embarking on an article-by-article review of the Rules. As regards the task of the Working Group to review a text prepared by another organization, the view was expressed that this should not constitute a precedent for the future, in particular since the organization in question was non-governmental and since the text had not yet been finalized by that organization itself.

15. As regards the formulation of the topic used in the documents of the Commission and the Secretariat, a view was expressed that the wording "Stand-by letters of credit and guarantees" appeared to place emphasis on stand-by letters of credit. One should speak only of guarantees (or bank guarantees) or at least reverse the order of the two types in line with their frequency of use. It was noted in response that the above wording was not intended to convey any order of frequency or importance but had been chosen by the Secretariat in view of the fact that the original request by the Commission referred only to the use of letters of credit in non-sale transactions and that the topic had been widened to include the functional equivalents, i.e. independent guarantees (as explained in document A/CN.9/301, paras. 1-6). The Working Group agreed to consider at a later stage a different wording for any future activity of the Commission or its Working Group in this field.

16. As regards the Rules in general, appreciation was expressed for the efforts of ICC in preparing a new set of rules to be applied when so agreed by parties. The Working Group welcomed the opportunity to review the Rules and make recommendations in the spirit of co-operation. A greater degree of uniformity was desirable for international guarantee practice. Although uniform rules could not effectively deal with all current problems, of which those arising from unfair callings were mentioned by way of example, they could help to provide certainty on many substantive points as illustrated by the text under review. It was suggested that the independent nature of the guarantee and the autonomy of the parties should be the guiding principles for such uniform rules. A suggestion was made that the situations in which the Rules were intended to be used should be explained either in the introduction or in any comment accompanying the Rules.

Article-by-article review

17. The text of the draft articles reviewed by the Working Group was the one presented in document A/CN.9/WG.II/WP.62. However, as regards articles 1 to 8, and 20, the Observer of the ICC informed the Working Group about some modifications that had been made by the ICC Joint Working Party only a few days before the session of the Working Group. Those modifications are noted below, to the extent they were relevant to the discussion.

Article 1

18. The text of the draft article as considered by the Working Group was as follows:

"These Rules apply to any guarantee, however named or described (hereinafter 'Guarantee') which a guarantor (as hereinafter described) is instructed to issue and which states that it is subject to the Uniform Rules for Guarantees of the International Chamber of Commerce (Publication No. XXX) and are binding on all parties unless otherwise expressly provided in the Guarantee or any amendment thereto. Instructions for the issue of a Guarantee can also be subject to the Rules."

19. Concerns were expressed that the article did not clearly state which kinds of guarantees were covered by the Rules, in particular, whether accessory guarantees were included. The Observer of the ICC explained that the article had to be read in conjunction with other provisions, in particular articles 2 and 20. It would, thus, be seen that the Rules would not cover accessory guarantees, i.e. guarantees that were not independent from the underlying transaction. The Rules would, for example, not cover suretyships or insurance policies. They were also not intended to cover stand-by letters of credit. This latter exclusion was for a purely procedural reason since those instruments were currently covered by UCP. Otherwise all independent (or autonomous) kinds of guarantees were covered. Even though pure simple demand guarantees were not envisaged in article 20, they could also be covered by the Rules, since article 1 allowed parties to subject their guarantee to some or all of the Rules. The parties could, thus, exclude article 20. As regards the

relevant portion of article 1 ("unless otherwise expressly provided"), the Working Group suggested that the wording should be improved so as to convey more clearly the idea that partial derogation from the Rules was permitted.

20. Another concern was that article 1 did not clearly distinguish between the principal-guarantor relationship and the guarantor-beneficiary relationship and did not address the problem of any discrepancy between the instructions and the text of the guarantee. While it was stated in reply that the approach of the article was pragmatic rather than legally perfect, the Working Group felt that a clear distinction was desirable. Suggestions in this respect included the following: deletion of the second sentence; deletion of the reference to instructions in the first sentence; inclusion of a provision along the lines of article 6 UCP.

21. Yet another concern was that the Rules, in article 1 and other articles, referred to an amendment to the guarantee without regulating the amendment procedure (unlike UCP). The Working Group suggested that such a regulation should be included in the Rules, to the effect that an amendment required the consent of all parties concerned.

Article 2

22. The text of the draft article as considered by the Working Group was as follows:

"(a) (i) For the purposes of these Rules a Guarantee means a written undertaking for the payment of money given by a bank, insurance company or other body or person (hereinafter 'the Guarantor') at the request and on the instructions of a party (hereinafter called 'the Principal') to another party (hereinafter the 'Beneficiary') if the terms and conditions of the Guarantee are complied with. Such Guarantees are sometimes described as 'Direct Guarantees'.

(ii) Guarantees may also be given on the instructions of a bank, insurance company or any other body or person (hereinafter the 'Instructing Party') to a Beneficiary. Such Guarantees are sometimes described as 'Indirect Guarantees'.

"(b) Each Guarantee is independent of any underlying transaction and the terms of any such transaction shall in no way affect the Guarantor's rights and obligations under a Guarantee even if any reference whatsoever thereto is included in the Guarantee. A Guarantor's obligation of performance under any Guarantee is to pay the sum or sums specified therein if the terms and conditions of the Guarantee are complied with.

"(c) In the case of an Indirect Guarantee, the Instructing Party's request and instruction to the Guarantor for the establishment of the Guarantee will be supported by the Instructing Party's 'Counter-Guarantee' by which reimbursement is promised to the Guarantor on receipt of his notification that he has been called upon to effect payment under his Guarantee.

The Counter-Guarantee is independent of the Guarantee itself and of any underlying transaction."

23. The Working Group suggested that the requirement, in paragraph (a) (i), that the undertaking be "written" should be widened so as to include electronic and other modern means of teletransmission including computer messaging.

24. Different views were expressed as to the special mention of indirect guarantees. Under one view, there was no need since indirect guarantees were of the same nature as other guarantees, although the designation of the respective parties may have to be different. Under another view, the contexts were different in that normal guarantees tended to be accompanied by collateral or other security while indirect guarantees were given on the basis of creditworthiness alone. Under yet another view, special mention of indirect guarantees was desirable for clarity's sake. The Working Group concluded that, while indirect guarantees might be mentioned, it was inappropriate for it to be cast in terms of a definition and that, thus, the last sentence of paragraph (a) (ii), and accordingly the last sentence of paragraph (a) (i), might be deleted.

25. A number of questions were raised as to certain terms used in the article. For example, a view was expressed that the expressions "bank" and "party" were not sufficiently clear. A lack of consistency was seen in the interchangeable use of expressions like "establishment", "issue" or "giving" of a guarantee. Another drafting suggestion was to include the declaration of independence, contained in paragraph (b), into the definition of the guarantee under paragraph (a). Yet another proposal was to express more clearly that the guarantees covered were only those promising exclusively payment of money and not those promising the alternative of, for example, completing the works in the principal's stead. A concern was expressed that the reference to instructions of the principal to the guarantor seemed to exclude those cases, which were admittedly rare, where the guarantor issued the guarantee either on its own behalf or, as was possible under the vague term "bank", for its own benefit.

26. Considering, in particular, paragraph (b), the Working Group discussed the relationship between the principle of independence and the reference to "terms and conditions" of the guarantee. The Working Group suggested that those two elements should be clearly distinguished and that the "terms and conditions" should not be of a kind that would undermine the independent character of the guarantee. In this context, it was proposed that, throughout these Rules, it should be made clear that the "terms and conditions" of the guarantee had to be of a documentary character, setting out that the facts triggering the guarantee had occurred. With a view to strengthening the viability of the guarantee, the Working Group expressed preference for such documentary terms and conditions.

27. As regards the obligation of a counter-guarantor to reimburse the guarantor, objections were raised to the rule in paragraph (c), according to which the obligation crystallized upon notification by the guarantor that he had been called upon to pay the guarantee. It was stated in reply that in practice the guarantor often requested cover from the counter-guarantor before effecting payment. After deliberation, the Working Group suggested that the

³Last part of sentence as modified by ICC Joint Working Party on 18 November.

counter-guarantor should be obligated to reimburse the guarantor only when the guarantor had effected payment. With regard to receipt of instructions from the counter-guarantor, the view was expressed that provision should be made for an acknowledgement as to whether inter-bank instructions had or had not been accepted.

Article 3

28. The text of the draft article as considered by the Working Group was as follows:

"All instructions for the issue of Guarantees and amendments thereto and Guarantees and amendments themselves should be clear, precise and avoid excessive detail. Accordingly, all guarantees should stipulate:

- (a) the name of the Principal if applicable;
- (b) the name of the Beneficiary;
- (c) the underlying transaction requiring the issue of the Guarantee if applicable;
- (d) a maximum amount payable and the currency in which it is payable;
- (e) the date and/or event of expiry of the Guarantee;
- (f) the terms and conditions for claiming payment."

29. The Working Group discussed the nature of the list of items contained in subparagraphs (a) to (f), in particular, whether the list of items was intended to be exhaustive, whether the list was mandatory and what the consequences of non-adherence would be. It was suggested that a list of items to be stipulated in a guarantee should not be included in the Rules. It was stated that such a list would conflict with the autonomy of the parties to draw up guarantee terms and that the multiplicity of possible circumstances found in individual cases made any such list of dubious value. Comments were also made concerning difficulties in identifying those items in an enumeration that appeared to be mandatory and those that were suggestive or situational. Reference was also made to article 5 UCP, which did not include any such enumeration.

30. The Observer of the ICC stated that it had been decided to include an enumeration of items to be stipulated in a guarantee in response to comments from bankers and others involved in guarantee practice that such a list would be helpful. Accordingly, the article 3 enumeration had been included for educational and informational purposes. A guarantee would not necessarily be invalid merely because it did not contain all the elements listed in article 3.

31. It was suggested that there may be additional elements which might be included in the article 3 enumeration, for example, reduction of the guarantee amount and place of availability. As in the discussion of article 2, concern was expressed about the meaning of the subparagraph (f) reference to "the terms and conditions for claiming payment".

32. The Working Group concluded its discussion of article 3 by suggesting the retention of the enumeration of items to be stipulated in a guarantee. It suggested, however, that, for the purposes of additional clarity, the words "if applicable", presently found only in subparagraphs (a) and (c), should be made to apply to all the listed items by being moved to the beginning of the second sentence of article 3.

Article 4

33. The text of the draft article as considered by the Working Group was as follows:

"The right to claim under a Guarantee is not assignable. Should an assignment take place, the Guarantor shall not be bound by such an assignment unless he and the Principal expressly agree thereto in the guarantee wording itself or in an amendment thereto. This shall, however, not affect the beneficiary's right to assign any proceeds to which he may be or may become entitled under the Guarantee."⁶

34. In the discussion, questions were raised concerning the completeness and clarity of the present draft. It was suggested that some aspects of transfer that were dealt with in the UCP provisions on transferable credits, such as the number of permitted transfers and fractional transfers, might also be addressed in the Rules for Guarantees. The Working Group suggested that the relevant provisions of the Rules for Guarantees be aligned with articles 54 and 55 UCP, which concern the transferable letter of credit and assignment of the proceeds of letters of credit.

Article 5

35. The text of the draft article as considered by the Working Group was as follows:

"All Guarantees are irrevocable."

36. The Working Group agreed with the principle laid down in this article that guarantees were irrevocable. The view was expressed that the article might be redundant. However, the prevailing view was in favour of retaining the present text since a provision to this effect would be useful.

37. The question was raised whether under the present formulation it would be possible to issue a revocable guarantee under the Rules. The answer was that, in accordance with the freedom of derogation recognized in article 1, parties to the guarantee operation would be free to exclude article 5 for the purposes of issuing a revocable guarantee. It was suggested that such a variation from the Rules would, however, have to be expressed.

Article 6

38. The text of the draft article as considered by the Working Group was as follows:

⁶Text as modified by ICC Joint Working Party on 18 November.

"A Guarantee enters into effect as from the date of its issue unless its terms expressly provide that its effectiveness is subject to conditions verifiable by the Guarantor."⁷

39. As regards the entry into effect of a guarantee, the question was raised as to whether entry into effect should take place on the date of issuance or upon receipt. Concerns were expressed that the article did not clearly indicate the circumstances intended to be covered and that the mechanism of issuance indicated was not clear. In particular, questions were raised as to the meaning of "effectiveness". Uncertainty was expressed as to whether this term referred to the commencement of the guarantor's legal obligation under the guarantee or to the availability of payment at some subsequent date. It was proposed that "effectiveness" be replaced by "availability for drawdown". Another view was that "effectiveness" was preferable because it was shorter and meant the same thing as "availability for drawdown".

40. Various questions were raised as to the nature of the conditions referred to in the article to which the effectiveness of a guarantee might be made subject. As in the earlier discussion of other articles, one concern was that the article did not clearly exclude the possibility of non-documentary conditions. Moreover, the article did not make clear whether the conditions mentioned therein were different from the conditions to be met in order to obtain payment. A further concern was that the article might inadvertently encourage the issuance of guarantees subject to conditions under the control of the principal and that such instruments might be of little value to the beneficiary. The beneficiary would have an interest in knowing when the guarantee entered into effect. It would be more complicated to do so if the validity of the guarantee was subject to conditions to be verified by the principal. In response, it was pointed out that it was for the parties to agree on the type of the guarantee to be issued.

41. A suggestion was made that the article should focus on dates rather than on conditions precedent. It was observed that, while in most cases a date would be involved, instances of non-date conditions could easily be given, e.g., receipt of advance payment monies or notification of the award of a contract. Another proposal was that, while the first part of the article (concerning entry into effect upon issuance) might be retained, the second part could be deleted. Yet another proposal was to delete the entire article, in view of the confusion as to its meaning and since it might be self-evident that conditions may be included in a guarantee.

42. After deliberation, the Working Group suggested that, due to uncertainty as to its terms, the article might be deleted.

Article 7

43. The text of the draft article as considered by the Working Group was as follows:

⁷Last portion of provision as modified by ICC Joint Working Party on 18 November.

"Where a Guarantor has been given instructions for the issue of a Guarantee but the instructions are such that, if they were to be carried out, the Guarantor would by reason of law be unable to fulfil the terms and conditions of the relevant Guarantee, the instructions shall not be executed and the Guarantor shall immediately inform the party which gave that Guarantor its instructions by the most expeditious means of the reasons for such inability and request appropriate instructions from that party."⁸

44. Support was expressed for the purpose underlying this article, but it was doubted whether that purpose could be achieved by a legal provision in the Rules. Concerns were expressed in respect of a number of terms used in the draft article.

45. For example, in the expression "by reason of law" it was not clear to which law the article made reference. If the reference was intended to be to the law in the guarantor's country or to specific conditions in the beneficiary's country, this should be clarified. A lack of clarity was also seen in the notion of "being unable to fulfil the terms and conditions". Yet another matter that, it was suggested, might be clarified concerned the relationship between this article and article 13, as well as article 27. One could indicate more clearly that article 7 related to the preparatory phase of the issuance of a guarantee and that article 13 concerned liabilities and responsibilities once a guarantee had been issued. In this regard, a question was raised as to the appropriateness of presuming at this early stage an obligation of the guarantor to issue a guarantee. With respect to the words "by reason of law", it was asked whether there were not other, business, reasons that could result in a non-acceptance of the guarantor's obligations. Concerns about "pre-contractual" applications were raised with reference to the contractual manner in which the Rules were to be incorporated. It was observed, however, that article 1 provided for application of the Rules to instructions as well as to guarantees themselves.

46. As regards a possible suggestion of the Working Group, there was support for the retention of the article, with the above clarifications, on the ground that it concerned important issues requiring uniform regulation; there was considerable support for the deletion of the article, leaving the issues dealt with therein to solution by municipal law.

Article 8

47. The text of the draft article as considered by the Working Group was as follows:

"All documents presented under a Guarantee must be examined by the Guarantor or Instructing Party as appropriate with reasonable care to ascertain whether or not they appear on their face to conform with the terms and conditions of the Guarantee. Where such documents do not appear so to conform or appear on their

⁸Last portion of provision as modified by ICC Joint Working Party on 18 November.

face to be inconsistent with one another, they shall be rejected.”⁹

48. In the deliberations of this article a number of concerns were expressed. For example, while documents may be presented to the guarantor or the instructing party, it was felt that it should only be the guarantor who determined the conformity of the documents with the terms of the guarantee. The Working Group also felt that the article should apply only to documents that were called for under the guarantee.

49. Questions were also raised concerning the standard to be applied to documentary examination. A related question was whether the article addressed cases where the guarantor was aware that documents were tainted by fraud or that there was fraud in the underlying transaction. It was stated in reply that the matter of fraud was not dealt with in the article but was governed by national law.

Article 9

50. The text of the draft article as considered by the Working Group was as follows:

“(a) A Guarantor shall have reasonable time in which to examine a claim in respect of the Guarantee and to determine whether to pay or to reject the claim.

“(b) If the Guarantor determines to reject a claim, it will give notice without delay by teletransmission or, if that is not possible, by other expeditious means to that effect to the Beneficiary.”

51. The Working Group discussed the question whether it would be desirable to replace, in paragraph (a), the notion of “reasonable time” by a definite period of time within which a guarantor would be obligated to complete examination of the claim. In favour of retaining the notion of “reasonable time” it was noted that that notion was well known and took into account differences in circumstances found in individual cases as well as regional and national variations in practice. With a view to achieving certainty, various proposals were made concerning inclusion of a definite period. One compromise suggestion was to use a rebuttable presumption of a certain fixed length of time as appropriate, unless agreed or proven otherwise, with the burden being on the party alleging its reasonableness. As regards the expression “to examine a claim”, a proposal was made to replace it by the expression “to examine the documents”.

52. With respect to paragraph (b), it was noted that there was no provision concerning the contents of the notice of rejection. Since a beneficiary, if informed of the nature of a documentary discrepancy, might be in a position to cure and re-submit, the Working Group suggested that the notice should include a statement of the reasons for the rejection. A consequential proposal was that the article might include a “preclusion” rule, perhaps similar to the one contained in article 16 UCP, thereby limiting the right

of a guarantor to reject a submission of documents on the basis of discrepancies that could or should have been notified to a beneficiary during an earlier submission.

Article 10

53. The text of the draft article as considered by the Working Group was as follows:

“Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them under the Guarantee or for the general and/or particular statements made therein, or for the good faith or acts and/or omissions of any person whomsoever.”

54. The view was expressed that the article was the first in a series of provisions that, while presented under the heading “Liabilities and responsibilities of guarantors”, contained in substance exemption clauses and thus raised problems of validity and construction. The article was regarded as acceptable only if the balancing provision of article 14 was maintained.

55. The Observer of the ICC stated that it was the intention of the ICC Joint Working Party to maintain that balance. She added that article 10 was inspired by article 17 UCP but that there was no provision in the UCP equivalent to article 14 of the draft Rules. This difference might be explained by the different orientation of the two sets of rules. Even though the restriction for grossly negligent or wilful acts of banks would normally follow from the applicable national law, it was felt desirable to include a restriction in the Rules for Guarantees. The Working Group commenced a discussion on whether the standard of liability should be negligence or gross negligence.¹⁰

Article 11

56. The text of the draft article as considered by the Working Group was as follows:

“Guarantors and Instructing Parties assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters, claims or documents, or for delay, mutilation or other errors arising in the transmission of any telecommunication. Guarantors assume no liability for errors in translation or interpretation of technical terms and reserve the right to transmit Guarantee texts or any parts thereof without translating them.”

57. The view was expressed that the article unduly favoured guarantors and instructing parties, thus essentially banks. A suggestion was therefore made that this exempting provision should be deleted or drafted in a more balanced manner.

58. As regards details of the provision, various questions were raised and suggestions made for clarification. For

⁹First sentence as modified by ICC Joint Working Party on 18 November.

¹⁰As to the suggested content of article 14, see further discussion below, para. 69.

example, computer messages should be clearly included. Certainty was desirable as to the consequences of the use of leased lines or the guarantor's own equipment and of possible differences concerning the use of public lines. A more general suggestion was to take into account the results of UNCITRAL's work on electronic funds transfers.

59. The Working Group suggested to the ICC Joint Working Party to review the article in the light of the relevant conclusions set forth in the UNCITRAL Legal Guide on Electronic Funds Transfers and to have particular regard to the findings of the UNCITRAL Working Group on International Payments in its current work towards a model law on funds transfers.

Article 12

60. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature."

61. It was noted that this article was inspired by article 19 UCP. Serious objections were raised against such an exemption provision in the context of international guarantee operations. The article was viewed as unduly favouring banks to the detriment of beneficiaries. It was noted in this connection that article 14 did not include a reference to article 12 even though the restriction in article 14 could in practical terms be relevant to some of the instances listed in article 12. Moreover, the detailed list of exempting instances was difficult to apply and, at least in respect of some of the instances, gave rise to misgivings.

62. In response to the objections, it was stated that guarantee texts often contained *force majeure* clauses and that the equivalent provision in the UCP had not given rise to considerable problems. It was noted that even without any contractual exemption for *force majeure* a similar result would obtain from the applicable national law. However, since national laws differed as to the scope of exempting impediments, it might be desirable to strive for a greater degree of harmony.

63. In the light of the above, two alternative proposals were made and each was supported by some representatives. One proposal was to recommend deletion of the article, with the result that the matter would be left to national law and contract practice within the limits of that law. The other proposal was to recommend a revision of the article along the lines of article 79 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), covering not only guarantors and instructing parties but all parties concerned (in which case the heading of the section would have to be widened by deleting the words "of guarantors").

Article 13

64. The text of the draft article as considered by the Working Group was as follows:

"(a) Instructing Parties utilising the services of another party as Guarantor for the purpose of giving effect to the instructions of the Principal do so for the account and at the risk of the Principal.

"(b) Instructing Parties assume no liability or responsibility should the instructions they transmit not be carried out even if they have themselves taken the initiative in the choice of such other party as Guarantor.

"(c) The Principal shall be liable to indemnify the Guarantor in the case of a Direct Guarantee or Instructing Party in the case of an Indirect Guarantee against all obligations and responsibilities imposed by foreign laws and usages."

65. The Observer of the ICC stated that article 13 was inspired by article 20 UCP and that banks, when utilising the services of another party, tended to rely on their own network of correspondents.

66. Serious objections were raised against article 13 of the Rules. One objection was that the situation envisaged here was extremely remote, unlike in the documentary credit context governed by the UCP, where banks often used the services of others for examining documents. Another objection was that the exemption rule was one-sided in that it essentially limited the liability to instances of fault relating to the selection of the other party. Some representatives therefore recommended deletion of the article.

Article 14

67. The text of the draft article as considered by the Working Group was as follows:

"Guarantors and Instructing Parties shall not be excluded from liability or responsibility under the terms of Articles 10, 11 and 13 above for their grossly negligent or wilful acts."

68. In the discussion of this article, objections were raised at two levels. As regards the drafting of the provision, it was stated that the words "for their grossly negligent and wilful acts" were ambiguous and difficult to apply. For example, the concept of gross negligence was not familiar to all legal systems and the expression "wilful acts" might include deliberate acts of a positive nature. It was stated in reply that this was a familiar problem of finding a uniform terminology for conduct for which national laws, while using different concepts, tended to restrict the freedom of stipulating exemptions from liability. Reference was made to formulations used in modern transport conventions such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) which, in its article 8, denied the benefit of the limitation of liability for loss, damage or delay that resulted from an act or omission "done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result". It was

noted that this formula did not cover instances of incompetence of the person in question.

69. As regards the substantive question of the appropriate standard of care that should be used in article 14 of the Rules, wide support was expressed for the view that guarantors and instructing parties should exercise reasonable care in performing their obligations. While anticipating opposition from interested circles, it was strongly felt that this would accord with a truly professional sense of responsibility of banks and similar bodies acting as guarantors or instructing parties under the Rules. It was noted with approval that the recently adopted United Nations Convention on International Bills of Exchange and International Promissory Notes, in its articles 25 and 26, had incorporated the same standard of care required by article 1 of the ICC Uniform Rules for Collections, namely that "banks must act in good faith and exercise reasonable care".

Article 15

70. The text of the draft article as considered by the Working Group was as follows:

"A Guarantor is liable to the Beneficiary only in accordance with the terms and conditions specified in the Guarantee and any amendment thereof, and in these Rules and up to an amount not exceeding that stated in the Guarantee and any amendment thereof."

71. As in the consideration of other articles, a question was raised as to the meaning of "terms and conditions." The Observer of the ICC explained that the terms and conditions referred to were of a documentary nature.

Article 16

72. The text of the draft article as considered by the Working Group was as follows:

"In the event of a claim, the Guarantor shall, without delay, inform the Principal or its Instructing Party and where applicable the Instructing Party shall inform the Principal."

73. A suggestion was made that for the purpose of clarity the term "claim" could be defined. Concerning the mechanics of the procedure instituted by the article, a question was raised as to whether the article intended that notice be given prior to payment, or whether payment could validly be made without notice and whether the notification, if made prior to payment, should contain information concerning the guarantor's intention to honour or dishonour the claim.

74. A concern was expressed that lack of clarity in this article might invite delays in payment. Moreover, the article needed to express more clearly the distinction between the duty of information and the obligation to pay. As in the discussion of other articles, the suggestion was made that the provision concerning rapidity of communication (in this instance, "without delay") either be clarified or aligned with other similar expressions in the Rules.

75. A suggestion was made that the article institute an obligation on the part of the guarantor to submit, along with the notification of a claim under the guarantee, copies of any documents presented with the demand for payment.

Article 17

76. The text of the draft article as considered by the Working Group was as follows:

"A Guarantee may contain express provision for reduction by a specified or determinable amount or amounts on a specified date or dates or upon presentation to the Guarantor of the document(s) specified for this purpose in the Guarantee."

77. The view was expressed that a provision of this type was necessary, particularly in the context of advance payment guarantees.

Article 18

78. The text of the draft article as considered by the Working Group was as follows:

"The amount payable under a Guarantee shall be reduced by the amount of any payment made by the Guarantor in satisfaction of a claim in respect thereof and, where the maximum amount payable under a Guarantee has been satisfied by payment and/or reduction, the Guarantee shall thereupon terminate."

79. A question was raised whether the article indicated that partial drawings under a guarantee were permitted. The Observer of the ICC answered in the affirmative.

Article 19

80. The text of the draft article as considered by the Working Group was as follows:

"A claim must be made in accordance with the terms and conditions of the Guarantee on or before the expiry and, in particular, all documents specified in the Guarantee must be presented to the Guarantor on or before the expiry of the Guarantee at its place of issue, otherwise the claim will be rejected."

81. The question was raised whether in the case of a claim made after the expiry of the guarantee it was necessary to reject that claim. The Observer of the ICC stated that in strict legal terms there was no need for a formal rejection; however, in practical terms it was desirable to envisage a rejection since cases of that nature often involved claims in unfair procedures.

82. Concerns were expressed that the requirement that the claim and documents be presented to the guarantor was not easily reconciled with the practice in some countries where the guarantor would name a paying agent at a place other than the place of issue to whom the claim and documents must be presented. It was stated in reply that

any such stipulation of a different place of payment or presentment would probably constitute a derogation from article 19 as permitted by article 1. The Working Group suggested that the matter be clarified so as to accommodate the described practice.

Article 20

83. The text of the draft article as considered by the Working Group was as follows:

"In the absence of any other specific provision governing the form and content of a claim for payment, any claim presented to the Guarantor shall be made in either one of the following forms of written demand:

(a) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s); or

(b) the Beneficiary's written demand supported by his statement that and in what respect the Principal is in breach of his specified obligation(s) and supported by the documents which are specified in the Guarantee."

84. The Observer of the ICC stated that the draft article constituted a compromise solution between different interests concerning the crucial question of the conditions for calling a guarantee. The draft article specified two types of calling requirements. Subparagraph (a) required the beneficiary's statement about the principal's breach of his obligations and served the purpose of identification. Subparagraph (b) contained the additional condition of specified documents and served the purpose of justification. Other possible types of calling requirements could be determined by the parties under the proviso presented in the opening words of the article. The simple demand guarantee was not mentioned in the article, with a view to discouraging the use of this kind of guarantee; however, it was also not expressly excluded.

85. The Working Group considered the individual requirements as well as the structure and concept of the draft article, including its treatment of the simple demand guarantee.

86. As regards the beneficiary's statement about the principal's breach of his obligations as required under subparagraphs (a) and (b), various concerns were expressed. One concern was that the legal nature and effect of the statement was uncertain, for example, as regards any later dispute or proceedings with the principal. Clarification in this respect would be desirable. Another concern was that the breach of the principal's obligations appeared to be an essential notion. This would leave out guarantees covering risks other than the principal's default, e.g. guarantees given in case of lost bills of lading or other instruments. It was suggested that the matter should be clarified and possibly a wider notion should be adopted. In connection with the reference to the principal's default, a more general concern was expressed that it was not easily seen precisely which types of guarantees were covered, since the definition had to be gathered from various elements spread over a number of provisions.

87. The presentation of the two types of calling requirements and the relationship between subparagraphs (a) and (b) gave rise to the following questions and suggestions. It was questioned whether subparagraphs (a) and (b) truly presented two different types. The only difference lay in the requirement of supporting documents; however, this requirement had to be specified in the guarantee and would thus fall under the proviso presented in the opening words of the article. Pursuant to that analysis, there was considerable support for consolidating the two subparagraphs in either of two ways. One suggestion was to recommend deletion of subparagraph (a) since it was already contained in subparagraph (b). Another suggestion was to recommend deletion of subparagraph (b) since, if the requirement was not specified in the guarantee, the calling condition of the guarantee was the one set forth in subparagraph (a). In fact, the regulatory scope of article 20 was limited to the case where no calling conditions had been specified in the guarantee and thus the opening proviso was inapplicable. The question whether this result was also true in the case of a simple demand guarantee opened a detailed discussion of the treatment of this type of guarantee under the Rules.

88. The specific question was what the answer of article 20, in terms of calling requirements, would be in the case of a guarantee that stated that it was payable against simple demand. Under one view, subparagraph (a) would apply and the beneficiary would have to support his demand by his statement about the principal's default, unless this requirement had been expressly excluded in the guarantee text. Proponents of this view stated that it was a desirable result to require a *bona fide* statement in such circumstances. Under another view, subparagraph (a) would not apply, and reasonably so, since the type of guarantee, as known to the parties, was one that clearly provided for payment against simple demand without conditions.

89. In the light of this divergency, it was felt that article 20 was ambiguous and uncertain in its treatment of simple demand guarantees. It was recognized that the issue of how to deal in the article with this kind of guarantee touched upon delicate policy considerations. However, doubts were expressed as to whether a legal provision of the nature of article 20 could in fact discourage or encourage the use of a certain type of guarantee. Even if it had such potential, it was doubted whether a provision of contractual rules should be used for that purpose. Irrespective of the frequency with which this type of guarantee was used, it was submitted that a legal rule should take into account, and provide certainty for, all types of guarantees in use and leave the choice of the type of guarantee to be used to the credit decisions of the parties involved.

90. While there was considerable support for recommending a clearer treatment of simple demand guarantees in article 20, there was no prevailing view as to how this could best be achieved. Suggestions made in this regard were, for example, to mention simple demand as an example of "any other specific provision" referred to in the proviso or to present the simple demand guarantee as a specific type in a subparagraph of the article.

Article 21

91. The text of the draft article as considered by the Working Group was as follows:

"After paying a claim the Guarantor shall submit without delay the Beneficiary's claim documents to the Principal or to the Instructing Party for transmittal to the Principal."

92. A suggestion was made that, perhaps in this article or in the section on liabilities and responsibilities of guarantors, the Rules institute an obligation on the part of the guarantor to return rejected documents to the remitting party.

Article 22

93. The text of the draft article as considered by the Working Group was as follows:

"Expiry of a Guarantee for the presentation of claims must be upon a specified final date ('Expiry Date') or upon presentation to the Guarantor of the document(s) specified for the purpose of Expiry ('Expiry Event'). If both an Expiry Date and an Expiry Event are specified in a Guarantee, the Guarantee will expire on whichever of the Expiry Date or Expiry Event occurs first. A Guarantor shall have no obligation in respect of claims received after the Expiry Date or the Expiry Event specified in the Guarantee."

94. A general drafting suggestion was made with respect to the title of Section H, "Guarantee Expiry Provisions". It was observed that the articles in the Section contained provisions on a broader range of situations than mere expiry and that more appropriate terminology might be found. For example, articles 22 through 25 could be, according to this suggestion, viewed as treating termination. As regards the words "for the presentation of claims", one view was that these words were redundant, while under another view they were unduly restrictive.

95. A number of questions were raised with respect to the terminology utilized in the article. For example, it was suggested that the use of the term "expiry event" might be clarified and aligned with the same expression found in articles 23 to 25. In this connection, it was observed that, as used in article 22, an "expiry event" may be a payment, whereas in articles 24 and 25 the term was mentioned as an alternative to payment as a means of causing a guarantee to terminate. A similar question was whether the reduction referred to in article 18 constituted an expiry event.

96. With regard to termination of a guarantee upon the occurrence of an "expiry event", the question was raised whether the article might not lead to the undesirable establishment of a guarantee that might never expire. It was pointed out that typically a guarantee would stipulate an expiry date, before which an "expiry event" might be expected to occur. However, the concern was that, in view of the "date and/or event of expiry" language in article 3(e), a guarantee could be issued stipulating only

an "expiry event", to be triggered, for example, by the presentation of a document by a beneficiary. It was suggested that, in such a situation, were the beneficiary to fail or refuse to submit the document, the guarantee could remain valid for an unforeseeably long period of time.

97. The Working Group suggested that the terminology used in this article should be clarified and harmonized with that used in other articles.

Article 23

98. The text of the draft article as considered by the Working Group was as follows:

"Irrespective of any expiry provision contained therein, a Guarantee shall be cancelled prior to the Expiry Date or Expiry Event on presentation to the Guarantor of the Beneficiary's written statement of release from liability under the Guarantee, whether or not the Guarantee or any amendments thereto are returned with such statement."

99. The question was raised as to the desirability of including a requirement that the guarantee instrument be returned upon expiry, as provided for in article 6 of the 1978 ICC Uniform Rules on Contract Guarantees. The Observer of the ICC stated that such a requirement was not retained in the draft Rules because it had proven ineffective in practice and that it had therefore been decided to substitute a written statement of release for the obligation to return the guarantee instrument.

100. There was support for the suggestion that the article address the situation in which a guarantee was transferred. In particular, it was felt that the article might indicate whether a transferee of a guarantee, unlike an assignee of the proceeds, would be the appropriate party to issue the written statement of release.

Article 24

101. The text of the draft article as considered by the Working Group was as follows:

"Where a Guarantee has terminated (by payment, expiry, cancellation or otherwise) retention of the Guarantee or of any amendments thereto does not preserve any rights under the Guarantee."

102. A question was raised as to whether it might not be possible to clarify the types of circumstances of termination referred to by the term "otherwise" or to delete the words between brackets.

Article 25

103. The text of the draft article as considered by the Working Group was as follows:

"Where a Guarantee has terminated (by payment, expiry, cancellation or otherwise) or there has been a reduction of the total amount payable thereunder a Guarantor shall so notify the Instructing Party or Principal as appropriate."

104. A suggestion was made that the article provide a specific description of how notification would be given, in particular, with respect to time requirements. It was also suggested that, if the intention was to follow the formula established in article 21 concerning transmittal by the instructing party to the principal, the drafting of the two articles should be harmonized.

Article 26

105. The text of the draft article as considered by the Working Group was as follows:

"If the beneficiary requests an extension of the Guarantee as an alternative to his demand for payment, in accordance with the terms and conditions of the Guarantee, the Guarantor shall so inform the party which gave that Guarantor its instructions in relation to the Guarantee and shall suspend payment of the claim for such time as the Guarantor shall consider reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such an extension to be issued. The Guarantor shall incur no liability (for interest or otherwise) should any payment to the Beneficiary be delayed as a result of the above-mentioned procedure.

"Even if the Principal were to agree to or request such an extension, it shall not be granted unless the Guarantor also consents thereto."

106. With respect to the precise scope of application, it was stated that the article did not specify whether it applied only to guarantees permitting a request for extension or to all guarantees to which an extension had been requested and that this might be a subject for clarification. Questions were also raised as to whether the article should be understood as applying only to simple demand guarantees.

107. It was noted that the article covered two extensions, the first being an automatic one, for a period of time considered "reasonable" by the guarantor, during which the principal and the beneficiary would have the opportunity to agree on what would be a second extension. In relation to the first, "automatic" extension, a concern was expressed as to the uncertainty of its duration and the adequacy of the "for such time as the Guarantor shall consider reasonable" formula. Another concern was that the article was too strict in forcing the guarantor in all circumstances not to honour its undertaking of prompt payment. A related concern was that the delay provided by the article could cause difficulty for the guarantor with respect to collateral securing the principal's reimbursement obligation.

108. A suggestion was made that the article be deleted because the procedure it established could provide a principal with a non-judicial remedy to prevent payment in a timely fashion. Another suggestion was that the potential for abuse of the procedure and insecurity of the guarantor as to its collateral could be mitigated by modifying the article to give the guarantor discretion as to whether or not to suspend payment upon receipt of an "extend or pay"

request, e.g. by replacing the words "shall suspend payment" by the words "may suspend payment". Yet another view was that the "automatic" extension envisaged in the article should be retained.

109. Concerning the mechanics of the procedure envisaged in the article, the question was raised whether, if an extension was refused in response to an "extend or pay" demand, a subsequent formal payment demand would still be required. It was pointed out that, if the inference of a requirement of a payment demand subsequent to a refusal to extend was correct, it would cast doubt on the meaning of "suspend payment". The need for a separate demand for payment subsequent to a refusal to extend under the article could raise the problem of expiry of the guarantee. It was suggested that the article should be clear as to whether it suspended only payment or also in some way postponed the expiry date of the guarantee extending the period of effectiveness of the payment obligation if, for example, expiry were to occur during the suspension period.

110. It was pointed out that the above-mentioned questions concerning the need for a formal payment demand subsequent to refusal of extension and the problem of expiry could be heightened where the demand for payment involved the production of supporting documents. There was some discussion in the Working Group of a proposal that the article be expressly limited to simple demand guarantees, though there was also support for leaving open the possibility of application to guarantees requiring documented claims. A view was expressed that, if the article was intended to be applicable to demands for payment involving supporting documents, it was left unclear in the article whether the "extend or pay" request should be accompanied by the documents required to obtain payment.

Article 27

111. The text of the draft article as considered by the Working Group was as follows:

"Unless otherwise provided in the Guarantee, the applicable law shall be that of the Guarantor's place of business. If the Guarantor has more than one place of business, the applicable law shall be that applying to the branch which issued the Guarantee."

112. The view was expressed that the Rules were contract rules whose choice-of-law clauses would not necessarily be binding on a court and that the treatment of the issue of the applicable law in the current draft article was incomplete and imprecise. Following the example of the UCP, the article should be deleted. However, the prevailing view in the Working Group was to recommend inclusion of an article of this nature, although a number of questions and suggestions were discussed concerning the existing formulation.

113. For example, a concern was expressed that the terminology used in the article ("branch") concerning filial relationships may not be adequate and that the article may not adequately cover the situation in which the guarantor

had more than one place of business. Questions were raised as to which of the relationships involved in a guarantee situation were covered by the article. For example, it was pointed out that the article did not expressly cover the relationship between guarantor and counter-guarantor. In the interest of certainty, the article should also specify the law applicable to that relationship.

114. As to which other relationships might be covered by the article, there was a suggestion that a formulation might be found that would identify appropriate relationships involved in the guarantee. For example, the article might be formulated so as to apply the law of the guarantor only to those guarantee relationships in which the guarantor was involved. A question was also raised whether there may be instances in which the principal-beneficiary relationship may be seen as involving the guarantor such that the law of the guarantor would be applicable. A possible example cited in the discussion was a principal-beneficiary agreement pursuant to article 26 on the extension of a guarantee.

Article 28

115. The text of the draft article as considered by the Working Group was as follows:

"Unless otherwise provided in the Guarantee, any dispute between the parties relating to the Guarantee shall be settled exclusively by the competent court of the country of the Guarantor's place of business or, if the Guarantor has more than one place of business, by the competent court of the country of the branch which issued the Guarantee."

116. The Working Group suggested that an article of this nature should be included in the Rules. However, various questions were raised and suggestions made with respect to the existing text.

117. The question was raised whether "parties" meant only the guarantor and the beneficiary or also the principal. The Working Group suggested that this matter should be made clear. It also suggested that the term "exclusively" should be deleted since it was inappropriate. Also the expression "relating to the Guarantee", used in the article to describe the types of disputes to be covered by the jurisdiction clause, needed clarification. For example, it was not clear whether the article applied solely to disputes involving the obligations of the guarantor, the conditions for payment and the like or also to other, more remote, disputes, e.g. concerning the principal's instructions and other elements of its relationship with the guarantor.

118. As in the discussion of article 27, a question was raised as to the use of the term "branch" and a suggestion was made that the selection of language for describing filial relationships should be carefully considered. Also on the subject of filial relationships on the part of guarantors, an alternative formulation presented in the Working Group's discussion was that whenever a guarantor had more than one place of business, litigation could be

permitted either in the jurisdiction of the guarantor's main place of business or in the jurisdiction of the place of issue.

119. A view was expressed that the initial part of article 28 should be redrafted along the following lines: "Unless arbitration or the competent court is provided for in the Guarantee, . . .".

120. A general observation was made that the discussion of articles 27 and 28 as well as some previous articles had shown the impact of the character of the guarantee on the solutions to be embodied in the Rules. The answers depended, in particular, on whether there was in fact a bilateral agreement between the parties or whether the guarantee in question constituted essentially a unilaterally established undertaking. It was suggested that this difference in the legal nature, which in turn depended in large part on which of the various possible types of guarantees was being used, should be taken into account by the drafters of the Rules and perhaps be explained in the introduction to the Rules.

Suggestions for additional articles

121. Following the conclusion of the consideration by the Working Group of the draft articles, a number of further issues were mentioned which might usefully be treated in additional articles: a definition of the concept of issue of the guarantee; a description of the essential ingredients of documents commonly encountered in guarantee practice, e.g., certificates of default; operational norms for periodic renewals, revolving guarantees and guarantees with drawings by instalments; a rule on whether partial drawings were permitted; provisions similar to those contained in UCP articles 4, 6, and 51; revocable guarantees, including a definition of the character of the undertaking; the nature and consequences of a negotiation under a guarantee were that to be envisaged; and a rule on whether the guarantor was entitled to defer payment until receipt of current money from the principal.

II. DESIRABILITY AND FEASIBILITY OF PREPARATION OF UNIFORM LAW

122. Upon completion of its review of the ICC draft Uniform Rules for Guarantees, the Working Group proceeded to the second task entrusted to it by the Commission: consideration of the desirability and feasibility of any future work at the level of statutory law. It was noted that the findings and recommendations of the Working Group were intended to assist the Commission at its twenty-second session when taking a final decision on whether a uniform law should be prepared and, if so, what its scope and contents should be.¹¹ The Working Group recalled the preliminary deliberations by the Commission as reflected in the report on the twenty-first session:

"While some doubts were expressed as to the practical need and usefulness of such a uniform law, there was

¹¹A/43/17, para. 26.

wide support for the view that successful work in this direction was desirable in view of the practical problems that could only be dealt with at the statutory level. The Commission was aware of the difficulties inherent in such an effort relating to fundamental concepts of law, such as fraud or similar grounds for objections, and touching upon procedural matters. Nevertheless, it was felt that, in view of the desirability of legal uniformity and certainty, a serious effort should be made."¹²

123. The Working Group took as a basis for its deliberations the note by the Secretariat entitled "Tentative considerations on the preparation of a uniform law" (A/CN.9/WG.II/WP.63). Following the approach suggested in the note, the Working Group decided to consider first the possible scope of any future uniform law, followed by the topics and issues that might be dealt with in such law, and, thereafter, the basic question of whether a uniform law should be prepared.

A. Possible scope of uniform law

124. The Working Group was agreed that the uniform law should cover independent guarantees and, in view of their functional equivalence, stand-by letters of credit. Divergent views were expressed as to whether other instruments, in particular traditional letters of credit and accessory guarantees, should also be covered.

125. As regards traditional (or commercial) letters of credit, one view was that, in view of their different function and purpose, they should not be included, at least not for the time being. Under another view, traditional letters of credit should be included, since the guiding standard for the scope of the law should be the independence of the undertaking from the underlying transaction. Some proponents of that view stated that it would suffice to cover traditional letters of credit only in respect of certain issues and rules. After deliberation, the Working Group was agreed that the uniform law should focus on independent guarantees, including stand-by letters of credit, and that it should be extended to traditional letters of credit where that was useful in view of their independent nature and the need for regulating equally relevant issues.

126. As regards accessory guarantees (or suretyships), one view was that they should be included in the uniform law. It was stated in support that the difference between independent and accessory guarantees was, in substance, the degree of permissible objections to the payment obligation. It was also pointed out that the difference in character was less easily clarified by mere definitions than by complete regulation of the two types of guarantees. However, the prevailing view was that accessory guarantees should not be included in the uniform law, in view of their different nature and function. It was further pointed out that accessory guarantees were adequately regulated by national statutes and case law, and that national laws appeared to be too different to provide a basis for a promising unification effort. After deliberation, the Working

Group was agreed that the uniform law should not cover accessory guarantees, except perhaps in the context of a definition for the purpose of drawing a clear demarcation line between independent and accessory guarantees.

B. Possible topics and issues to be dealt with in uniform law

127. The Working Group discussed what topics and issues might be dealt with in the uniform law, following the order of the presentation in the note by the Secretariat (A/CN.9/WG.II/WP.63, paras. 9-21). The discussion was in the form of an exploratory exchange of views and ideas, with the understanding that any findings and conclusions were of a tentative nature. On many issues, the discussion went into considerable detail, often including accounts of their treatment in certain jurisdictions and even references to individual court cases. It was noted that this detailed discussion, which the report could not reflect in full, would be taken into due account and would be of great assistance to the Secretariat in the preparatory work.

(1) Recognition of party autonomy for independent undertaking

128. The Working Group was agreed that the recognition of party autonomy constituted an important principle for a future uniform law. Even without an express provision to that effect, the uniform law would by its very existence and regulation of independent undertakings recognize the freedom of the parties to establish, for example, an independent guarantee.

129. It was also agreed that the recognition of party autonomy had to be accompanied by a clear description of its limits. The uniform law could, for example, establish certain standards of accountability and set forth the requirement of good faith. Another suggestion was to disallow those variations that would undermine the fundamental nature of the undertaking. As regards restrictions to party autonomy by way of mandatory provisions, it was suggested that careful consideration should be given in respect of each future provision as to whether parties would or would not be permitted to derogate therefrom.

130. It was suggested that the uniform law in recognizing party autonomy might include a reference to the future ICC Uniform Rules for Guarantees and to the UCP. These two texts reflected the ongoing dynamism of banking and commercial practice, and a reference in the uniform law could foster their harmonizing effect. In particular as regards the UCP, care should be taken when drafting any reference so as not to take a stand, or appear to take a stand, on the controversial issue of the legal nature of such rules. It was also stated that any reference in the uniform law to usages or customs would require special consideration.

131. The Working Group was agreed that there should be no formal requirements for the independent undertakings covered by the uniform law. In line with current practice, parties should certainly not be required to use

¹²A/43/17, para. 24.

specific wording or sacrosanct language. A possible cure for the often encountered uncertainty in determining the precise nature of the undertaking could be a process of standardization by means of model forms, for example, as envisaged by ICC for independent guarantees upon its completion of the Uniform Rules. It was also felt that written form, while advisable in practical terms, should not be imposed by the uniform law. It was noted in this connection, as in respect of any signature requirement, that future consideration on what precisely that encompassed should take into account modern developments in electronic processing and the increasing use of computer links.

132. The same observation was made in respect of the establishment of a guarantee or credit and its notification to the interested party. Modern technical developments tended to blur legal concepts and distinctions based on traditional modes of communication. The Working Group discussed the question at what point of time a guarantee or credit undertaking became effective or operative. It concluded that the uniform law should provide clarity in this respect by way of a definition of "establishment" or "issue". Contrary to some existing laws, it should not depend upon the receipt of the instrument but should refer to the sending out of the signed or authenticated promise to pay.

133. The Working Group was agreed that the uniform law should not require "consideration" or "value". However, it considered whether a uniform law that did not expressly state that consideration or value was not required might create difficulties in those countries that applied the doctrine of consideration and, since exceptions were noted in this respect, applied it to letters of credit and guarantees. It was agreed that in the drafting of the uniform law account should be taken of the possibility of such difficulties.

134. The Working Group was agreed that the uniform law could usefully describe the essential rights and obligations of the parties to a guarantee. While this would naturally cover the guarantor and the beneficiary, it was less clear whether other relationships should be included, such as those between guarantor and counter-guarantor and between guarantor and principal (or account party).

135. As regards the relationship between guarantor and counter-guarantor, which was often an inter-bank relationship, it seemed appropriate to include it in view of the fact that it was in substance a guarantee relationship. It was suggested that, to the extent traditional letters of credit were to be covered, provisions on the relationship between the issuing bank and confirming bank might be useful in order to clarify the differences between their rights and obligations and those of a counter-guaranteeing and a confirming bank towards a beneficiary.

136. As regards the relationship between guarantor and principal, one view was that it should be included as one of the elements of the triangular guarantee operation. It was pointed out that, for example, the rights and obligations of the guarantor could not be determined in full

without taking into account the instructions and interests of the principal. The prevailing view was that the guarantor-principal relationship should be kept clearly separate and as such fell outside the scope of the uniform law. It was agreed, however, that the uniform law would have to make reference to the principal and might cover certain aspects of the guarantor-principal relationship.

(2) *Strict construction and compliance*

137. The Working Group agreed on the importance of the principle of strict construction of the terms and conditions of the guarantee or the credit. Divergent views were expressed on the question whether the uniform law should contain rules of interpretation for language used by the parties and, possibly, for uniform rules.

138. One view was that the uniform law could not appropriately tackle this matter of interpretation, which was a general problem to be settled in accordance with general principles of contract law. In view of the great variety of relevant circumstances, it would be extremely difficult to find an appropriate formula, and any necessarily general formula would provide little guidance for the individual case.

139. The prevailing view, however, was that the uniform law should contain some rules of interpretation, which could help to enhance certainty and uniformity. It was realized that the formulation of workable and useful rules was not an easy task. For example, a rule to construe ambiguous clauses against the drafting party had to take into account such situation as where the text had been formulated upon the insistence of another party, e.g. the beneficiary.

140. The Working Group agreed on the importance of the principle of strict compliance. However, divergent views were expressed as to whether the principle should be expressed in the uniform law and, if so, whether a workable definition could be found.

141. One view was that there was no need to state the principle of strict compliance in the uniform law. The principle as such was commonly adhered to. Its real problems lay in the area of practical application to individual cases, and here the uniform law could provide no assistance. If a standard were to be expressed in the uniform law, it should be one of truly strict or formal compliance, since banks did not want to play the role of arbitrator. Courts would be able, as they had been in the past, to determine the rare exceptions in case of absolutely immaterial deviations.

142. The prevailing view, however, was that the uniform law should embody the principle of strict compliance and provide a definition adopting, for example, the concept of professional diligence of a reasonable banker and his ability to distinguish between essential and non-essential deviations. It was felt that such a definition would be useful and sufficiently flexible to accommodate the great variety of fact situations.

143. During the discussion on a workable standard, a suggestion was made that consideration should be given to differentiate between traditional letters of credit and independent guarantees and to envisage a more flexible standard for independent guarantees, including stand-by letters of credit. One might further distinguish between those guarantees requiring presentation of documents other than the beneficiary's statement of the principal's default and those guarantees payable on simple demand or against the beneficiary's statement of breach. It was stated in reply that there appeared to be no convincing reason for such distinctions for the purposes of strict compliance.

144. Another distinction, suggested in this context, was to consider applying one standard for the payment obligation of the guarantor and another, more lenient one for his right to recovery or reimbursement from the principal. Such a dual standard was opposed on the grounds that it appeared to confound the two separate relationships to which the guarantor was a party and that the crucial element determining the guarantor's right of reimbursement was not a standard of compliance as such but was the reimbursement provisions in the contractual agreement. In this connection, the Working Group reiterated its conclusion that the uniform law should deal with the guarantor-principal relationship only to the extent that it was necessary to do so in order to clarify the different relationships and to determine the rights and obligations under the guarantee itself.

145. The Working Group considered whether the uniform law should deal with the issue of payment under reserve. It was noted that that practice had been developed in commercial letter of credit cases where the principal could not be reached in time to give his consent to payment despite deviations in the documents presented by the beneficiary. It was pointed out that any agreement between the bank and the beneficiary to payment under reserve created difficulties for the bank with respect to the principal and his instructions. Another area of possible difficulties was the relationship between an issuing bank and a confirming bank. It was noted that the practice of payment under reserve appeared to be rather uncommon in the field of independent guarantees and stand-by letters of credit, probably due to the limited use of documents. A view was expressed that the uniform law should not encourage the practice of payment under reserve in this field.

146. A suggestion was made that consideration should be given to dealing in the uniform law with the following issues mentioned in the note by the Secretariat (A/CN.9/WG.II/WP.63, paras. 12, 15): definition of "deferred payment credit" and a rule as to whether a bank is entitled to pay before the deferred payment date; appropriateness of contacts between guarantor and principal; precise scope and effect of any rule of preclusion, such as the one in article 16(e) UCP; and the allocation of the risk of any loss of documents. In relation to the last issue, it was suggested that account should be taken of modern technical developments, e.g. electronic registry of formerly paper-based documents.

(3) *Fraud and other objections to payment*

147. Turning its attention first to the area of fraud, the Working Group considered whether the uniform law should contain provisions concerning the effect of fraud on the payment obligation of a guarantor or an issuer of a letter of credit. It was pointed out that the effect of fraud on guarantees and letters of credit, both of which were based on an obligation to pay independent of what transpired in the underlying transaction, was a complex question and that there was disparity in the concepts and rules applied at the national level.

148. It was observed that an effort to harmonize the divergent approaches to the problem of fraud would be difficult, particularly in view of the existing substantive and procedural provisions of national law. Nevertheless, there was general agreement that there should be greater uniformity in the treatment of the problem of fraud and that the formulation of provisions in the uniform law would be a particularly useful contribution. With regard to the scope and effect of any fraud provision in the uniform law, it would be necessary to determine to what extent general principles of law normally applicable to fraud would remain applicable.

149. The Working Group agreed that a determination of the content of provisions in the uniform law dealing with fraud would have to be based on additional study. In its preliminary discussion, the Working Group recognized that establishing a definition would be difficult, particularly in view of the wide range of circumstances found in individual cases, variations in national law and ongoing developments in practice. There was support for the view that, on a practical basis, if the uniform law were to address fraud, it would be necessary to provide at least some minimal definition.

150. It was pointed out that there may be, on the one hand, fraud in the inducement to obtain a guarantee and, on the other hand, fraud to obtain payment. From an analytical and legal point of view, the question was raised as to what the "fraud exception" was an exception to: whether it was to the principle of the autonomy of the guarantee (or letter of credit) from the underlying transaction or whether it was to the principle of payment against a presentation of compliant documents. The question was also raised whether the uniform law would cover fraud in the documents only or also fraud in the underlying transaction. Furthermore, it was suggested that it would be necessary to develop a standard to distinguish clearly between fraud and improper execution of the underlying transaction.

151. Related to the definition of fraud, as well as to the scope of a provision in the uniform law dealing with fraud, was the discussion by the Working Group of the parties whose misconduct would be covered. The Working Group discussed variations in legal systems based on who must be the parties to a fraud in order for the obligation to pay to be avoided. It was observed that in some countries it may be necessary for the beneficiary to be directly involved, while in other countries such participation by the

beneficiary would not be deemed necessary. It was agreed that careful consideration would have to be given to the question of parties to the fraud and that it would not necessarily be advisable to limit application of the fraud provisions to misconduct by the beneficiary, particularly in view of the possibility of misconduct by principals as well as guarantors or issuers of letters of credit.

152. Following a suggestion that the uniform law should have provisions on manifestly abusive calls, the Working Group agreed that extensive study was required of the relationship between the concept of fraud and the concept of *abus de droit*, a concept which existed in certain legal systems. Questions were raised as to how the uniform law could accommodate that concept, particularly in view of the autonomy of the guarantee from the underlying transaction and the apparent agreement of the parties under a guarantee or letter of credit that the beneficiary should hold the funds while settlement of a dispute was pending. It was suggested that the Secretariat should gather information on the concept of *abus de droit* and its application in various legal systems.

153. Another question of importance to the preparatory work concerned the manner in which an interruption of the guarantor's or issuer's obligation to pay could be initiated. With respect to which party may take the initiative to block payment, the Working Group noted that there were differences among legal systems. It was pointed out that in some countries it was common for the guarantor or issuing bank with actual knowledge of fraud to refuse payment on its own initiative. In other countries it would often be the principal who attempted to secure a court order preventing payment. In instances of particular urgency, temporary *ex parte* orders might be obtainable; national laws differed on the relevant procedures and requirements, including the need to furnish a bond or other security. It was further pointed out that securing a court order against a beneficiary in order to prevent presentation of a claim for payment was more difficult since the beneficiary was often outside of the jurisdiction. The level of evidence required to obtain a court measure blocking payment was noted as an important issue to be considered in the preparation of procedural rules for the uniform law.

154. The discussion of the identity of the party on whose initiative payment could be blocked raised the question of the nature and extent of the responsibility of the guarantor or issuing bank, not only to effect payment to the beneficiary, but also to protect the interests of the principal by refusing payment when it had actual knowledge of fraud. The related issue of sanctions for failure by the guarantor or issuer to abide by such a duty was also raised.

155. In discussing the availability of judicial measures to block payment, the Working Group noted a number of other issues that would have to be taken into consideration in preparing provisions on fraud for the uniform law. Attention was drawn to the importance of protecting the interest of banks in maintaining their reputation as reliable paymasters. In this connection, it was suggested that court orders blocking payment should not come to be regarded as something that could be obtained as a matter of course.

Reference was also made to the difficult position that banks may find themselves in when a court order blocked their payment, particularly when they had assets or branches in the beneficiary's country.

156. It was suggested that the question of extraterritorial effects of court-ordered measures warranted special consideration and that a greater degree of international comity was desirable. In preparing pertinent provisions of the uniform law, account should be taken of existing international agreements and practice.

157. The Working Group next turned its attention to grounds other than fraud for avoidance of the obligation to pay under a guarantee or letter of credit. As in the consideration of fraud, there was discussion as to whether the uniform law should address this category of objections to payment. The suggestion was made that it was a complicated area better left to the existing precepts of general contract law. From the discussion which ensued, it appeared that some aspects of the problem might be more appropriate for treatment in the uniform law than others and that additional study was needed before definite decisions could be taken.

158. In the discussion, it was pointed out that "impossibility" as a ground for avoiding the obligation to pay may be recognized in national law in various instances of the guarantor's or issuer's inability to perform. For example, the obligation to pay may be avoided due to insolvency or some other form of incapacity. Foreign exchange control regulations were cited as an example of supervening local law which may prevent fulfilment of an obligation to pay under a guarantee or letter of credit.

159. With a view to the independence of the payment obligation, the question was raised whether the illegality of the underlying transaction could itself constitute a valid ground for non-payment. It was pointed out that the question of illegality highlighted the question of the extent to which the autonomy of the obligation could be considered absolute. It was observed that the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) left the question of the validity of the contract to the applicable national law and that this might be an appropriate precedent for the uniform law.

160. The Working Group also considered the related question of the impact of objections to payment based on "public policy". It was suggested that "public policy" should be viewed as an impediment to the enforceability of the payment obligation rather than a mechanism unilaterally available to a guarantor or issuer to avoid payment. A question was raised whether payment in the face of obvious illegality in the underlying transaction could be considered a violation of public policy. Doubts were expressed as to whether the uniform law could deal adequately with problems raised by the presence in national legal systems of "super-mandatory" principles of law and it was suggested that, at least in this respect, the uniform law should confine itself to the execution of the guarantee. A further suggestion was that the uniform law should indicate certain cases in which national law would remain applicable.

161. The Working Group considered the question whether the admissibility of a set-off should be dealt with in the uniform law. Allusions were made to variations in the law and practice of different countries. For example, in some countries set-off was permitted, while in others its availability may be restricted to bankruptcy situations, where it may be mandatory or at the option of the liquidator. The availability of set-off also varied according to whether the claim arose out of the principal-beneficiary relationship or out of the guarantor (issuer)-beneficiary relationship. In some countries, set-off of claims of the guarantor against the beneficiary was excluded, based on the autonomy of the payment obligation, so as not to defeat the purpose of the guarantee or letter of credit. In a number of other countries, set-off of claims of the guarantor against the beneficiary was permitted, unless expressly excluded in the terms of the instrument.

162. A view was expressed that any permitted set-off should be related to the payment transaction itself, for example to take into account an advance payment. Another view was that the discussion indicated a wide disparity of approaches to set-off and that it would therefore be difficult to establish uniformity.

(4) *Applicable law and related issues*

163. The Working Group noted that questions of applicable law and jurisdiction were likely to arise in the context of international guarantees and commercial letters of credit. While some doubts were expressed, the Working Group was agreed that the uniform law should address the question of the applicable law, in addition to the determination of its own territorial scope of application.

164. It was agreed that the future provisions on the applicable law should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties. The Working Group discussed the current law and practice in respect of these two elements and any special considerations to be taken into account in the formulation of future provisions.

165. As regards stipulations by the parties on the applicable law, it was noted that current practice was varied. In some countries, choice-of-law-clauses were reportedly found only in special cases, while in other countries they were used frequently. Overall they appeared to be less often found in traditional letters of credit than in guarantees and stand-by letters of credit, in particular financial stand-bys.

166. It was agreed that any future rule on party autonomy should take a stand on whether the law chosen by the parties had to have a connection with the guarantee or letter of credit transaction or whether the freedom of choice was unlimited. Other important points to be considered in preparing appropriate provisions were the basis and scope of a choice-of-law clause. Attention was drawn to the impact of the concept or nature of the guarantee in that it was difficult to conceive of an agreed choice if the

guarantee constituted a unilateral undertaking, even if the guarantor had included the choice-of-law clause as a result of a request or assent by the beneficiary or the principal. It was stated in response that, at least from a practical point of view, the choice-of-law clause in a guarantee should be given effect without the need for investigating the nature and genesis of the guarantee in question. As regards the scope of a choice-of-law clause, questions were raised as to whether it would cover not only the rights and obligations of the guarantor but also those of the beneficiary and, possibly, certain aspects of the guarantor-principal relationship.

167. As regards the possible content of a rule determining the applicable law failing agreement by the parties, it was noted that the most common solution appeared to be the law of the guarantor's country. It was suggested that the uniform law might follow this approach. However, consideration should be given to whether this solution met the interest of the parties in all circumstances.

168. Further consideration was also needed as regards the scope of the rule, in particular whether it covered all aspects of the guarantor-beneficiary relationship and, possibly, any aspects of the guarantor-principal relationship. While realizing the legal separation and independence of these two relationships, a suggestion was made that the uniform law might provide a unitary rule that would make the same law applicable to both relationships. The prevailing view, however, was that each relationship should be looked at separately in determining the most appropriate rule on the applicable law. It was further suggested that consideration be given to dealing with applicable law questions also in respect of other relationships (e.g. between guarantor and counter-guarantor or issuing bank and confirming bank) and certain special situations (e.g. syndicated or multiple guarantees).

169. Turning to the issue of settlement of disputes, the Working Group considered first the basis and scope of dispute settlement clauses. As regards the choice of either arbitration or court jurisdiction, the same observations were made as in the context of choice-of-law clauses concerning the uncertain basis and scope of the clauses in a guarantee (see above, para. 166).

170. The Working Group considered whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause. Under one view, an attempt should be made to agree on an acceptable provision on court jurisdiction. Under another view, the uniform law should not deal with this issue.

171. The Working Group was agreed that the above questions relating to applicable law, arbitration and court jurisdiction required further consideration and study. Since difficult issues of conflict of laws were involved, it was suggested that the Secretariat, in its preparatory work, may have co-operative consultations with the Hague Conference on Private International Law.

(5) *Other possible issues*

172. The Working Group considered whether the uniform law should cover only international guarantees (and letters of credit) or whether it should include also instruments of a domestic character. A view was expressed that both types should be included since a distinction was neither easily drawn nor justified and since there was a need for improving the often unsettled laws in respect of domestic guarantees. The prevailing view, however, was that, in line with UNCITRAL's functions, the uniform law should be limited to international instruments, in particular, since inclusion of domestic instruments would adversely affect the world-wide acceptability of the uniform law. As regards the possible definition of internationality, various tentative suggestions were made referring, in particular, to the different places of business of the parties and the places of issue and payment.

173. A number of other issues were mentioned which, on the basis of further study, might be covered in the uniform law: fostering the independent nature of the guarantee by excluding non-documentary terms and conditions of payment; providing for irrevocability, unless expressly stipulated to the contrary; preventing adverse

effects of the submission of documents not called for under the terms of the guarantee; the risk of payment to an imposter, as regards both the right of reimbursement from the principal and any future claim by the true beneficiary; the beneficiary's warranty as to genuineness of documents; measure of damages; transferability of guarantee and assignment of proceeds; and impact of bankruptcy or insolvency on rights and obligations of parties.

C. *Recommendation on future work*

174. The Working Group was agreed that it was desirable and feasible to undertake work towards greater uniformity at the statutory level. While realizing that the task would be difficult and required extensive consideration and research, it was agreed that the Commission, with its expertise and balanced representation, could make an important contribution in this field.

175. The Working Group, therefore, agreed to recommend to the Commission to initiate the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

B. Working papers submitted to the Working Group on International Contract Practices at its twelfth session

1. *Stand-by letters of credit and guarantees: review of ICC draft Uniform Rules for Guarantees: note by the Secretariat (A/CN.9/WG.II/WP.62)* [Original: English]

1. The Commission, at its twenty-first session, decided to devote one session of the Working Group on International Contract Practices to a review of the International Chamber of Commerce (ICC) draft Uniform Rules on Guarantees.¹ The purpose of that review during the twelfth session of the Working Group would be to assess the world-wide acceptability of the draft Rules and to formulate comments and possible suggestions that ICC could take into account before finalizing the Rules.

2. The present note sets forth, in the annex, the most recent version of the draft Rules received from ICC in English (with a French translation by ICC).² In the unlikely event that any further modifications would be made by ICC before the session of the Working Group, the observer of ICC attending the session would inform the Working Group about any such modifications.

Annex

ICC draft Uniform Rules for Guarantees

Introduction

These Uniform Rules have been drawn up by an ICC Joint Working Party of members representing the Commission on International Commercial Practices and the Commission on Banking Technique and Practice to apply to the use of guarantees worldwide. Their purpose is to provide a basis for consistency of treatment by the parties to these engagements and the resolution of problems notably in relation to claims and expiry.

The Rules have been drafted to take account of and to encourage the issue of guarantees which provide for the documentary support of claims and for reduction of the guarantee amount against delivery documents or against dates. They aim also at reducing the common expiry problems encountered with guarantees. One purpose, therefore, is to provide a framework within which equitable guarantee arrangements between principals and beneficiaries can continue to develop. The Rules intend to encourage a better understanding and standard practice in the use of guarantees.

The ICC hopes these Rules will make a major contribution to regulating guarantees by providing the basis on which parties can operate consistently. The Rules aim, by encouraging good guarantee practice, to achieve a fairer balance between the interests of the parties concerned and to deal with problems that arise.

As with the Uniform Customs and Practice for Documentary Credits (ICC Publication No. 400), this is a voluntary set of

¹Report of the United Nations Commission on International Trade Law on the work of its twenty-first session, *Official Records of the General Assembly, Supplement No. 17* (A/43/17), para. 22.

²An earlier version was reproduced in the annex to A/CN.9/301.