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STAND-BY LETTERS OF CREDIT AND GUARANTEES

Review of ICC draft Uniform Rules for Guarantees

Note by the Secretariat

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.

1/ Report 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.

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

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 rules which does not confront the difficulties and conflicts arising from different national systems of law, and it recognises for example that specific requirements in some countries will have to be met. As a general guide, therefore, principals will be required to indemnify Guarantors against the consequences of foreign laws and usages. These Rules will largely depend for their eventual success, as did the Uniform Customs and Practice, upon their adoption and employment by the international business community. It is acknowledged that there may remain situations for a period of time in which some guarantees will not by their terms or because of the specific requirements of certain countries fall within all the articles hereafter, but the frequency of such cases would be expected to diminish.

A. SCOPE AND APPLICATION OF THE RULES

Article 1

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.

B. DEFINITIONS

Article 2

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 is also subject to the Rules.

C. GENERAL PROVISIONS

Article 3

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.

Article 4

The benefit of a Guarantee is not assignable. Should an assignment take place, the Guarantor cannot be bound by such an assignment unless he and the Principal expressly agree thereto.

Article 5

All Guarantees are irrevocable.

Article 6

A Guarantee enters into effect as from the date of its issue unless its terms expressly provide that its effectiveness is subject to conditions (e.g., the receipt of specified advance payment monies).

Article 7

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 Principal or Instructing Party as appropriate of the reasons for such inability and request appropriate instructions from that Principal or Instructing Party.

D. LIABILITIES AND RESPONSIBILITIES OF GUARANTORS

Article 8

All documents presented under a Guarantee to a Guarantor must be examined with reasonable care to ascertain whether or not they appear on their face to be in accordance and conformity with the terms and conditions of the relevant Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another, they shall be rejected.

Article 9

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.

Article 10

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.

Article 11

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.

Article 12

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.

Article 13

- 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.

Article 14

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 willful acts.

E. CLAIMS

Article 15

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.

Article 16

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.

Article 17

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.

Article 18

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.

F. SUBMISSION OF CLAIMS

Article 19

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.

Article 20

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.

G. PAYMENT OF THE CLAIM

Article 21

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.

H. GUARANTEE EXPIRY PROVISIONS

Article 22

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.

Article 23

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.

Article 24

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.

Article 25

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.

Article 26

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.

I. APPLICABLE LAW AND JURISDICTION

Article 27

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.

Article 28

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.