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INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Revised articles of draft Convention on international guaranty letters

Addendum

Note by the Secretariat

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CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 12. Determination of rights and obligations

(1) Subject to the provisions of this Convention, [1] the rights and obligations of the parties are determined by the terms and conditions set forth in the guaranty letter, including any rules, general conditions or usages [specifically] referred to therein.

(2) Variant A — The parties are considered, unless otherwise agreed, to have impliedly made applicable to [their relationship] [the guaranty letter] a usage of which the parties knew or ought to have known and which in international [trade and finance] [guarantee or stand-by letter of credit practice] is widely known to, and regularly observed by, parties to guaranty letters.

Variant B — [In interpreting terms and conditions of the guaranty letter and] [2] in settling questions that are not addressed by the terms and conditions of the guaranty letter or by the provisions of this Convention, regard [may] [shall] be had to generally accepted international rules and usages of guarantee or stand-by letter of credit practice.

Remarks

1. As stated during the sixteenth session of the Working Group (A/CN.9/358, para. 155), the proviso has been used in previous international instruments and is commonly interpreted as meaning that only the mandatory provisions of the Convention prevail over stipulations by the parties; suppletive provisions, i.e. provisions from which the parties may derogate, apply only in the absence of an agreement by the parties on the matters addressed by those provisions. If the Working Group were to regard the proviso as not being sufficiently clear, consideration might be given to limiting the proviso to mandatory provisions of the Convention and to adding to paragraph (1) or (2) a separate reference to suppletive provisions, taking into account the decision on whether such provisions should prevail over usages not referred to in the guaranty letter, as suggested in Variant B, or whether the opposite result is desirable, as suggested in Variant A.

2. The wording between square brackets is based on an intermediate view expressed at the sixteenth session concerning the relevance of usages not referred to in the guaranty letter (A/CN.9/358, para. 161). However, that view is presented here as an additional field of application of such usages, in addition to the questions that cannot be answered by the sources of determination mentioned in paragraph (1).

Article 13. Liability of issuer

(1) The issuer shall act in good faith and exercise reasonable care [as required by good guarantee or stand-by letter of credit practice].

(2) Variant A — Issuers [and instructing parties] may not be exempted from liability for their failure to act in good faith or for any grossly negligent conduct.

Variant B — The issuer may not be exempted from liability [towards the beneficiary] [1] for failing to discharge its obligations under the guaranty letter in good faith and [, subject to the provisions of paragraph (1) of article 16,] [2] with reasonable care. However, the extent of liability may be limited to [the amount of the guaranty letter] [foreseeable damages].

Remarks

1. The wording between square brackets has been added to Variant B with a view to soliciting consideration of whether the strict standard of mandatory liability suggested in that Variant should benefit only the beneficiary. While such a restriction might be viewed as balancing the strictness of the standard and could meet the possible desire of the principal and the issuer to agree on a lower standard, it would considerably reduce the practical relevance of the suggested standard.

2. The proviso referring to article 16 has been added with a view to accommodating a possible consent by the principal to requiring less than reasonable care in the examination of documents, as suggested for consideration by the Working Group in article 16 and as envisaged in article 13(1) of the United States proposal. Since such lower standard of care is likely to affect adversely the principal rather than the beneficiary, the proviso would seem appropriate only if the restriction to the beneficiary discussed in remark 1 were not to be adopted. The proviso, if accepted, would constitute one of the elements built into Variant B with a view to softening the strictness of the liability standard, together with the reference to the discharge of the obligations under the guaranty letter and with the limits of the recoverable amount suggested in the alternative at the end of Variant B.

Article 14. Demand

Any demand [for payment] [1] under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter [or this Convention] shall be presented, within the time of effectiveness of the guaranty letter, to the issuer at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter [2]. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that payment is due.

Remarks

1. Deletion of the words "for payment" which seem unnecessary here might meet the concern, raised at the seventeenth session (A/CN.9/361, para. 15) and in the United States proposal (note to article 14), relating to the presentation of a bill of exchange under a stand-by letter of credit. However, the reference to payment which is found in various other articles and appears to be necessary there could be retained in view of the fact that article 2 embraces the acceptance of a bill of exchange and other types of obligations of the issuer in terms of payment modalities. If all such modalities suggested in article 2 were to be adopted, consideration might be given to embodying them in a definition of payment in article 6.

2. The proviso has been added with a view to accommodating, as suggested at the seventeenth session (A/CN.9/361, para. 17), situations where payment is claimed not directly from the issuer or a confirming bank but from another bank. It would also accommodate the situation, apparently not envisaged by article 14 URDG which requires presentation at the place of issue, where payment by the issuer has to be demanded by presentation of documents at a place other than that where the guaranty letter was issued.

[Article 15. Notice of demand [1]

Without delaying the fulfilment of its duties under articles 16 and 17, [2] the issuer shall promptly upon receipt of the demand give notice thereof to the principal or, where applicable, its instructing party, unless otherwise agreed between the issuer and the principal. Failure to give notice does not deprive the issuer from its right to reimbursement but entitles the principal to recover from the issuer damages for any loss suffered as a consequence of that failure.]

Remarks

1. If the article were to be retained, consideration might be given to exempting stand-by letters of credit from the notice requirement, as suggested at the seventeenth session, although it was also then suggested that the notice procedure might usefully be applied to them (A/CN.9/361, paras. 26-27). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not require such notice, and demand guarantees are likely to incorporate the URDG which, in article 17, require notice of demand, without, however, addressing the consequences of failure to give the notice.

2. Consideration might be given to placing article 15, if retained, after articles 16 and 17 with a view to adding emphasis to the rule expressed in the opening words of article 15, namely that the required giving of notice shall not adversely affect the process leading to payment.

Article 16. Examination of demand and accompanying documents

(1) Variant A The issuer shall examine documents in accordance with the standard of conduct referred to in paragraph (1) of article 13 [, unless the principal has agreed to a lower standard] [1]. In determining whether the documents are in facial conformity with the terms and conditions of the guaranty letter, the issuer shall observe the [pertinent] [applicable] standard of international guarantee or stand-by letter of credit practice. [2]

Variant B The issuer shall examine the demand and accompanying documents with the professional diligence required by international guarantee or stand-by letter of credit practice [, unless the principal has consented to a lesser duty of care,] to ascertain whether they appear on their face to conform with the terms and conditions of the guaranty letter and to be consistent with one another. [3]

(2) Unless otherwise stipulated in the guaranty letter, the issuer shall have reasonable time, but not more than seven days [4], in which to examine the demand and accompanying documents and to decide whether or not to pay.

Remarks

1. The wording between square brackets has been added with a view to accommodating the possible need, referred to at the sixteenth session (A/CN.9/358, para. 171), for guaranty letters at lower costs, in particular, with reduced examination fees.

2. Variant A embodies the division proposed at the seventeenth session (A/CN.9/361, paras. 37 to 39) between the examination of documents and the determination of their facial compliance with the terms of the guaranty letter.

3. Based on the view that such a division may be artificial and lead to complications, Variant B embodies another approach suggested at the seventeenth session (A/CN.9/361, para. 36) and combines the standard of diligence with international practice requirements. As regards the examination of documents, the difference between Variant A and B seems to be minimal if the Working Group were to retain in article 13 the suggested reference to practice requirements.

4. The reference to "days", rather than "business days" as used in the previous draft, accords with the terminology used in other legal texts elaborated by the Commission. If, however, the term "business days" were to be preferred, consideration should be given to including in the draft Convention, probably in article 6 and together with the rule currently embodied in the proviso in article 11(a), a provision on the calculation of a period of business days, particularly on the effect of non-business days falling within that period.

Article 17. Payment or rejection of demand

(1) The issuer shall pay against a demand

Variant A in conformity with the terms and conditions of the guaranty letter. [1]

Variant B made by the beneficiary in accordance with the provisions of article 14. [2]

(2) The issuer shall not make payment if

Variant X it knows or ought to know [3] that the demand is improper according to article 19.

Variant Y the demand is manifestly and clearly improper according to the provisions of article 19.

(3) If the issuer decides to reject the demand [on any ground referred to in paragraphs (1) and (2) of this article], it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the guaranty letter, [4] the notice shall

Variant A indicate the reason for the rejection.

Variant B , if non-conformity of documents with the terms and conditions of the guaranty letter constitutes the reason for the rejection, specify each discrepancy and, if the rejection is based on another ground, indicate that ground.

[(4) If the issuer fails to comply with the provisions of article 16 or of paragraph (3) of this article, it is precluded

Variant X from claiming that the demand was not in conformity with the terms and conditions of the guaranty letter.

Variant Y from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.]

Remarks

1. Variant A closely follows a suggestion made at the seventeenth session (A/CN.9/361, para. 49). Since Variant A does not clearly embrace the requirements set forth in article 14 relating to the form of the demand and the place of presentation, Variant B which refers to article 14 has been added for consideration by the Working Group. It should be recalled that it was stated in support of the above suggestion, and apparently accepted by the Working Group, that the reference to conformity with the terms and conditions of the guaranty letter would encompass the issues of existence, validity and enforceability of the undertaking that had been specifically addressed in previous subparagraph (a) of paragraph (1). The Working Group may wish to consider whether that interpretation is sufficiently clear or whether it would not be appropriate, for example, to add to paragraph (2) as further ground of rejection the invalidity of the guaranty letter.

2. Paragraph (1), in whichever Variant, leaves open the question whether the issuer, in the exceptional case where it would not be obliged to pay, would have an obligation or a mere authorization to refuse payment. The Working Group may wish to decide that question; if the decision were in favour of an obligation not to pay, that solution might be included in paragraph (2).

3. Variant A contains, as agreed at the seventeenth session, a rule to the effect that an issuer who knows or ought to know that the demand is improper shall reject the demand (A/CN.9/361, para. 55). However, it is submitted that the concept of knowledge of a person or institution creates difficulties of proof because of its subjective character. Moreover, knowledge of the issuer might not be an appropriate criterion if one wants to achieve strict parallelism between article 17 and article 21 as regards the required standard of proof. It is for those reasons that Variant Y has been added for consideration by the Working Group.

4. The proviso would help to accommodate different practices as reflected, for example, by the fact that article 10(b) URDG does not require the statement of reasons, while the UCP (in article 16(d)) contains a rule requiring reasons that differs in scope and content from those suggested in Variants A and B.

[Article 18. Request for extension or payment in the alternative [1]

If the beneficiary combines a demand for payment with a request for an extension of the validity period of the guaranty letter, the issuer shall comply with the following rules, unless otherwise agreed by the parties:

Variant A

(a) The issuer shall give to the principal prompt notice of the alternative demand for extension or payment;

(b) The issuer may not extend the validity period without the consent of the principal; however, even if the principal consents to the extension, the issuer is not obliged to extend the validity period, unless so required by an agreement with the principal;

(c) The issuer shall examine the demand for payment in accordance with article 16 and decide whether to pay or to reject that demand; if the issuer decides not to reject the demand, it may defer payment until ten days have elapsed after receiving the alternative demand from the beneficiary and then make payment, unless the issuer extends the validity period.

Variant B

(a) The issuer shall reject the demand for payment because of its [conditional] [equivocal] character [and promptly notify the beneficiary thereof];

(b) The issuer shall treat the request for extension as a request for amending the guaranty letter in accordance with the provisions of article 8.] [2]

Remarks

1. If the article were to be retained, consideration might be given to excluding from its scope stand-by letters of credit, as suggested at the seventeenth session, although it was also then suggested that no such limitation would be warranted (A/CN.9/361, para. 67). It is submitted that deletion of the article would in practice lead to a similar result since, as expected by the International Chamber of Commerce, stand-by letters of credit are likely to be subject to the UCP which do not address the extend-or-pay situation, and demand guarantees are likely to incorporate the URDG which, in article 26, contain rules that are roughly comparable with those suggested in Variant A.

2. If the article were to be retained with Variant B, consideration might be given to adding here or to article 8 some rules on communications and other procedures to be followed in the case of an amendment request made by the beneficiary. Consideration might also be given to placing the article before article 16 so as to emphasize the lack of any need for examining the demand.

Article 19. Improper demand

(1) Variant A — The issuer shall reject a demand as improper if, having due regard to the independent and documentary character of the undertaking, it is clear and beyond doubt to the issuer that: [1]

Variant B — A demand for payment is improper if:

(a) [the beneficiary knows that] any document is forged;

(b) the beneficiary knows or cannot be unaware that no payment is due [on the basis asserted in the demand and the supporting documents]; or

(c) judging by the type and purpose of the guaranty letter, the demand has no conceivable basis.

(2) Variant X — The following are types of situations in which a demand has no conceivable basis:

(a) The contingency or risk against which the guaranty letter was designed to secure the beneficiary has undoubtedly not materialized;

(b) The underlying obligation of the principal has been declared invalid by a court or arbitral tribunal;

(c) The secured obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) Fulfilment of the underlying obligation has clearly been prevented solely by wilful misconduct of the beneficiary. [2]

Variant Y — Instances of a demand that has no conceivable basis include [, but are not limited to,] [3] the following, unless otherwise indicated in the guaranty letter [4]:

(a) In the case of a guaranty letter that supports the financial obligation of a third party [5], neither the principal amount nor any interest is due [and the third party has not become insolvent];

(b) In the case of a tender guaranty letter, the contract has not been awarded to the principal or, if so awarded, the principal has signed the contract and procured any required performance guaranty letter;

(c) In the case of a repayment guaranty letter, no advance payment has been made or it has been repaid in full;

(d) In the case of a performance guaranty letter, the underlying obligation of the principal has been declared invalid in a final decision of a competent court or arbitral tribunal, or it has been completely fulfilled [to the satisfaction of the beneficiary], or its fulfilment has been prevented exclusively by wilful misconduct of the beneficiary;

(e) In the case of a counter-guaranty letter, the beneficiary has not received a demand for payment under the guaranty letter issued by it, or the beneficiary has paid upon such a demand although it was obliged [under the law applicable to its guaranty letter] [6] to reject the demand [as lacking conformity or as being improper].

Remarks

1. Variant A follows the approach previously embodied in Variant D and preferred by the Working Group. However, it duplicates some elements already contained in article 17 (2), namely the duty to reject and the requirement that the improper nature of the demand be known or manifest and clear. If Variant A were to be retained, it would have to be aligned with article 17 (2), and consideration might be given to incorporating article 19, depending on its final length, into article 17.

2. Variant X attempts to provide some guidance to the application of the general formula of lack of conceivable basis, without providing examples for the various types of guaranty letters. While the basic situations described in Variant X probably embrace all particular situations arising under the various types of guaranty letters, it is submitted that Variant X would not provide sufficient guidance to ensure certainty and uniformity. For that reason, and based on the request of the Working Group to focus on a description of the improper demand and to take into account various types of instruments and their different purposes (A/CN.9/361, para. 91), the list of particular situations arising under different types of instruments is presented in Variant Y for consideration by the Working Group.

3. The words between square brackets are designed to emphasize the non-exhaustive character of the situations listed thereafter. It is submitted that, despite their illustrative character, the listed situations of clear impropriety are not only useful in cases where such situations occur but may also prove useful in setting guide-posts for other, comparable cases.

4. The proviso is designed to address situations where the terms of the guaranty letter indicate a restriction or an expansion of the risk usually covered by the particular type of guaranty letter.

5. If Variant Y were to be adopted, consideration might be given to giving a name to that type of guaranty letter (e.g., "financial guaranty letter") and to providing definitions of that and other types referred to in Variant Y, as already done in article 6 (d) for "counter-guaranty letter" and for all types of stand-by letters of credit in the United States proposal, article 6(2).

6. The wording between square brackets, while not absolutely necessary, might serve as a useful reminder that the obligations of the beneficiary in its capacity as issuer of a separate guaranty letter may be governed by a law other than the Convention.

Article 20. Set-off

Variant A — Unless otherwise agreed by the parties and subject to the provisions of the law of insolvency, the issuer may discharge its payment obligation under the guaranty letter by availing itself of a right of set-off with a claim against the person demanding payment [1], excepting any claim assigned to the issuer by the principal.

Variant B — Unless otherwise stipulated in the guaranty letter, the issuer may not discharge its payment obligation by means of a set-off with any claim assigned to it by the principal.

Remarks

1. The wording "by availing itself of a right of set-off" has been chosen, instead of the previous wording "by means of a set-off", in view of the understanding of the Working Group that the general law of set-off might impose further restrictions (A/CN.9/361, paras. 97-98). Taking this understanding one step further, Variant B merely presents the restriction and prohibits for claims assigned by the principal the exercise of any right of set-off available under the general law of set-off.

CHAPTER V. PROVISIONAL COURT MEASURES [1]

Article 21. Preliminary injunction [against issuer or beneficiary] [2]

(1) Where [,on an application by the principal,] it is manifestly and clearly shown [by documentary and other readily presentable means of evidence] that a demand made [or expected to be made] [3] by the beneficiary is improper according to article 19, [the] [a competent] [4] court may issue a preliminary order:

a) enjoining the issuer from meeting the demand [or from debiting the account of the principal], or

b) enjoining the beneficiary from accepting payment or ordering the beneficiary to withdraw the demand [or, if such a demand is expected to be made, not to make the demand],

provided that the refusal to issue such an order would cause the principal [serious harm] [irreparable loss].

[(2) Before deciding whether or not to issue a preliminary order, the court may provide the respondent with an opportunity to be heard.]

[(3) The court may make the effect of an order referred to in paragraph (1) of this article subject to the furnishing by the principal of such security as the court deems appropriate.]

(4) Variant A Paragraph (1) of this article does not preclude a court from issuing a preliminary order based on a ground other than improper demand if its procedural law so permits [; however, it may not issue a preliminary order based on non-conformity of documents with the terms and conditions of the guaranty letter] [5].

Variant B The provisions of paragraph (1) [and paragraphs (2) and (3)] of this article apply equally to an application by the principal for a preliminary order based on the ground of invalidity [, non-existence, ineffectiveness or unenforceability] of the guaranty letter.

Variant C The court may not issue a preliminary order [of the kind referred to in paragraph (1) of this article] [6] based on any ground other than improper demand.

[(5) The court may not order an attachment or seizure of assets of the beneficiary or of the issuer based on improper demand unless, in addition to the requirements of its procedural law, the conditions referred to in paragraph (1) of this article are met.] [7].

Remarks

1. This chapter might later be combined with chapter VI, depending on the final content and length of the provisions covered therein. Both chapters as well as chapter VII are addressed, as noted in a previous working paper (A/CN.9/WG.II/WP.73/Add.1, remark 1 to article 26), to the courts of the States where those chapters would be in force. If, following what is currently a working assumption, the final text were to be in the form of a Convention, questions relating to the territorial scope of application would need to be considered. For example, if the connecting factor suggested in article 1 were to be adopted, its effect on the applicability of chapters V to VII needs to be discussed. The Working Group may also wish to consider, probably at a later stage, whether the concerns expressed in respect of chapters V to VII might be met by making the provisions of those chapters subject to other treaties, or by including a reservation allowing Contracting States not to apply those provisions.

2. As agreed at the seventeenth session (A/CN.9/361, para. 116), an attempt has been made to merge the provisions of articles 21 and 22 and to reduce the procedural details regulated in paragraphs (2) to (4) of those articles.

3. As was stated at the seventeenth session (A/CN.9/361, para. 106), the need for allowing anticipatory injunctive relief would be greater if the Working Group were to decide against the notice requirement currently envisaged under article 15.

4. The reference to the competent court would not be needed if the provisions of article 21 were later to be combined with the provisions on court jurisdiction for provisional measures (article 25 (2)).

5. The wording between square brackets has been included in response to a concern expressed at the seventeenth session (A/CN.9/361, para. 109) that it would be especially disruptive if an injunction were allowed on the ground of non-conformity of documents. Although the concern was expressed in support of the view reflected now in Variant C, it might be appropriately addressed also in Variant A.

6. The wording between square brackets attempts to limit the prohibition embodied in Variant C to applications based on objections to the payment demanded by the beneficiary.

7. New paragraph (5) is based on a proposal to expand article 21 to deal also with other provisional measures such as prejudgment seizure or attachment of assets. While leaving the requirements and procedures of such measures to the general procedural law, the provision attempts to add the conditions for preliminary injunctions set forth in paragraph (1) as minimum conditions for such other measures, as an underpinning of the practical effect of the provisions on preliminary injunctions.

(Article 22 has been incorporated into article 21)

(Article 23 has been deleted)

CHAPTER VI. JURISDICTION [1]

Article 24. Choice of court or of arbitration

(1) The parties may, in the guaranty letter or by a separate agreement in a form referred to in paragraph (1) of article 7, designate a court or the courts of a specified State to settle disputes that have arisen or may arise in relation to the guaranty letter, or stipulate that any such dispute shall be settled by arbitration.

(2) The provisions of the preceding paragraph do not affect the jurisdiction of the courts [of Contracting States] [2] for provisional or protective measures.

Remarks

1. As regards the scope of application of this chapter and other questions relating to the entire chapter, see remark 1 to article 21.

2. The wording between square brackets is intended to solicit consideration of whether the rule of paragraph (2), according to which a choice-of-forum clause or an arbitration agreement does not affect any existing court competence for provisional or protective measures, should be limited to the courts of Contracting States or whether the rule, which does not itself confer jurisdiction on any court, should be as universal in scope as is paragraph (1).

Article 25. Determination of court jurisdiction

(1) Unless otherwise provided in accordance with paragraph (1) of article 24 [or if a designated court of another State declines to exercise jurisdiction] [1], the courts of the [Contracting] State where the guaranty letter was issued [may exercise] [have] jurisdiction over disputes between the issuer and the beneficiary relating to the guaranty letter.

(2) The courts of the [Contracting] State where the guaranty letter was issued may also entertain an application by the principal [in accordance with the provisions of article 21] for a preliminary order against the issuer

Variant A — or against the beneficiary. [2]

Variant B — , and the courts of a [Contracting] State in which the beneficiary has a place of business may entertain an application by the principal for a preliminary order against the beneficiary. [3]

Remarks

1. It is submitted that the wording between square brackets has not been rendered obsolete by the decision of the Working Group to delete paragraph (2) of article 24 which attempted to confer exclusive jurisdiction on the court chosen by the parties; even in the case of a non-exclusive jurisdiction clause the designated court might decline to exercise jurisdiction. In view of that decision, however, no provisions have been added for consideration by the Working Group on such issues as lis pendens, res iudicata or stay of proceedings.

2. Consideration might be given to limiting the jurisdictional rule presented in Variant A by adding such requirements as probable enforceability in the beneficiary's country or non-availability of preliminary orders in that country.

3. Consideration might be given to expanding the scope of paragraph (2) by including preliminary orders sought by the issuer against the beneficiary. It is submitted that such preliminary orders, like those sought by the beneficiary against the issuer, would otherwise be covered by paragraph (1), although that interpretation might not be immediately clear, especially in view of the distinction drawn in article 24 between applications for provisional measures and other court actions. If Variant A were to be adopted, such an expansion would clarify that interpretation by specifying for preliminary orders against the beneficiary the same rule as paragraph (1), and the same clarification should be made for preliminary orders sought by the beneficiary against the issuer. However, if Variant B were to be adopted, an expansion of paragraph (2) to include preliminary orders against the beneficiary would lead to a different result from that obtaining under paragraph (1).

CHAPTER VII. CONFLICT OF LAWS [1]

Article 26. Choice of applicable law

The rights, obligations and defences relating to [a] [an international] [2] guaranty letter are governed by the law designated by the parties. Such designation shall be by an express clause in the guaranty letter or in a separate agreement, or be demonstrated by the terms and conditions of the guaranty letter.

Remarks

1. As to the scope of application of chapter VII and other general questions relating to articles 21 to 27, see remark 1 to article 21. As regards the scope of application of chapter VII, there appears to be no theoretical reason not to limit the application of the conflict-of-laws rules to the field of application suggested in article 1. However, such limitation appears to be undesirable in practical terms. It is therefore suggested that the conflict-of-laws rules should be applied in a Contracting State irrespective of whether the guaranty letter was issued in any of the Contracting States.

2. The reference to the international character of the guaranty letter has been added to solicit consideration of whether such express limitation would be appropriate. One the one hand, one might object to that reference as being redundant since a conflict-of-laws context necessarily includes international elements. On the other hand, one might favour the reference on the ground that it might be surprising to find conflict-of-laws rules not expressly limited to international instruments in a draft Convention on international guaranty letters, assuming that that limitation will be retained in the final text. Moreover, some States might be unwilling to accept a provision that may be interpreted as allowing two parties of that State to choose the law of another State.

Article 27. Determination of applicable law [1]

Failing a choice of law in accordance with article 26, the rights, obligations and defences relating to a guaranty letter are governed by the law of the State where [the guaranty letter was issued] [the issuer has its place of business or, if the issuer has more than one place of business, where the issuer has that place of business at which the guaranty letter was issued] [2].

Remarks

1. In view of the brevity of the provisions of articles 26 and 27, consideration might be given to combining those provisions into a single article.

2. If the latter, more elaborate wording between square brackets were to be preferred by the Working Group, it should also be included in other articles containing that connecting factor (i.e., articles 1 and 25).