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الجمعية العامة



لجنة الأمم المتحدة للقانون التجاري الدولي
الدورة الثانية والثلاثون
فيينا ، ١٧ أيار/مايو-٤ حزيران/يونيه ١٩٩٩

القواعد الموحدة لسندات ضمان العقود

تقرير من الأمين العام

١ - طلبت الأمانة العامة للغرفة التجارية الدولية الى اللجنة ، في رسالة مؤرخة ٢٧ نيسان/أبريل ١٩٩٩ ، (استنسخت في المرفق الأول) أن تعترف بالقواعد الموحدة لسندات ضمان العقود وتصادق عليها بصورة رسمية . ويرد في المرفق الثالث استنساخ للقواعد الموحدة لسندات ضمان العقود باللغات الانكليزية أو الفرنسية أو الاسبانية .

٢ - ووفقا لما ذكر في التمهيد المتعلق بالقواعد الموحدة لسندات ضمان العقود ،

"بسبب حاجة صناعة التأمين الى مجموعة موحدة من القواعد التي تنطبق دوليا على سندات ضمان العقود وتنشئ التزامات ذات طبيعة تبعية ، أخذت لجنة التأمين التابعة للغرفة التجارية الدولية على عاتقها صوغ قواعد الغرفة التجارية الدولية الموحدة لسندات ضمان العقود ."

٣ - وللمزيد من المعلومات الخلفية عن القواعد الموحدة لسندات ضمان العقود ، ترد في المرفق الثاني المقدمة والملاحظات العامة المأخوذة من مطبوعة الغرفة التجارية الدولية .

المرفق الأول

(الأصل : بالانكليزية)

رسالة السيدة ماريا ليفانوس كتاوي ، الأمانة العامة
للغرفة التجارية الدولية

لعلكم تدركون أن الغرفة التجارية الدولية نشرت منذ عدة سنوات مجموعة قواعد موحدة لسندات ضمان العقود . وأكتب هذه الرسالة طالبة الى الأونسيترال أن تعترف بهذه القواعد وتصادق عليها بصورة رسمية . وتسعى الغرفة التجارية الدولية للحصول على مصادقة مماثلة من البنك الدولي والاتحاد الأوروبي ومصرف التنمية للبلدان الأمريكية .

وتتناول القواعد الموحدة لسندات ضمان العقود الكفالات المشروطة ، المعروفة باسم سندات الضمان التبعية ، التي تتصل مباشرة بالعقد الأصلي الذي تجري كفالاته لأغراض الأداء .

واليوم ، تتوفر القواعد الموحدة لسندات ضمان العقود بعدة لغات (بما فيها الانكليزية والاسبانية والفرنسية والايطالية والآيسلندية واليابانية والصينية والكورية) . وقد قامت حكومة اليابان والاتحاد الدولي للمهندسين الاستشاريين ومؤسسة المهندسين الكهربائيين والرابطة الدولية لتأمين القروض ورابطة المقاولين الفرنسيين الدوليين ورابطة الكفلاء في البلدان الأمريكية ، من بين هيئات أخرى ، باعتماد القواعد الموحدة لسندات ضمان العقود باعتبارها معيارا موصى به لسندات الضمان التي يصدرها أعضاؤها .

واستخدام القواعد الموحدة لسندات ضمان العقود كأطار عالمي لسندات الضمان سيوفر الاتساق المرجو في أشكال الضمان ، الأمر الذي يساعد على تعزيز التجارة الدولية . ونعتقد اعتقادا راسخا أن هذا الشكل النموذجي سيفيد أوساط الأعمال برمتها . وسيؤدي اعتراف المؤسسات العمومية بها الى مساعدة التعاقد من قبل القطاع الخاص وييسر تصدير وحرية التعاقد في جميع أنحاء العالم .

المرفق الثاني

(الأصل : بالانكليزية والفرنسية والاسبانية)

قواعد الغرفة التجارية الدولية الموحدة لسندات ضمان العقود

حقوق الطبع ١٩٩٣
الغرفة التجارية الدولية

جميع الحقوق محفوظة . ولا يجوز استنساخ أو نسخ أي جزء من هذا المؤلف بأي شكل أو بأية وسيلة - تصويرية أو الكترونية أو ميكانيكية ، بما في ذلك النسخ التصويري أو التسجيل أو نظم استرجاع المعلومات - بدون إذن خطي من دار النشر التابعة للغرفة التجارية الدولية .

مقدمة

صاغت هذه القواعد الموحدة فرقة عاملة تابعة للغرفة التجارية الدولية مؤلفة من أعضاء يمثلون لجنة التأمين وصناعتي البناء والهندسة بغية تطبيقها في جميع أنحاء العالم على سندات ضمان العقود ، بوصفها عقوداً تنشئ التزامات ذات طبيعة تبعية ، حيث تنشأ مسؤولية الضامن أو الكفيل وتكون مشروطة بوجود تقصير ثابت من جانب المقاول (المعرف في هذه القواعد باسم الأصيل) في العقد الذي يكون موضوع سند الضمان المعني . ولذلك فإن القواعد المبينة أدناه ستطبق حيث يكون في نية الأطراف أن تعتمد التزامات الضامن على واجبات أو مسؤوليات الأصيل بموجب العقد المعني .

والقصد من سندات الضمان التي تحكمها قواعد الغرفة التجارية الدولية الواردة أدناه هو أن تسري بحيث تمنح المستفيد ، في كل حالة ، ضماناً بأداء أو تنفيذ التزامات العقد أو بدفع أية مبالغ قد تستحق للمستفيد نتيجة لأي إخلال بالتزام أو تقصير من جانب الأصيل بموجب العقد . والقصد من سند الضمان هو أن يكفل ، رهناً بحدوده المالية ، إما تأدية أو تنفيذ الالتزامات المبينة في العقد أو ، عند التقصير ، استرداد المستفيد لأي مبلغ مستحق على النحو الصحيح بغض النظر عن إعسار الأصيل أو إخفاق الأصيل لأي سبب آخر في الوفاء بمسؤوليته أو الاضطلاع بها . وبناء عليه ، عندما يكون سند الضمان الذي تحكمه هذه القواعد ساري المفعول ، سيكون للمستفيد تأكيد إضافي إزاء التزامات الكفيل التبعية بكفالة تنفيذ الحكم أو القرار الصادر عن أية محكمة أو هيئة تحكيم مختصة .

والعلاقة بين الأطراف بموجب سند ضمان تحكمه هذه القواعد رقم ٥٢٤ تختلف عن العلاقة الناشئة بموجب القواعد الموحدة للكفالات المستحقة عند الطلب رقم ٤٥٨ (قواعد الطلب) . وينبغي اختيار

هذه القواعد حيث يكون القصد أن يحصل المستفيد على ضمان بشأن التزامات الأصيل الناشئة عن العقد وأن لا تنشأ مسؤولية الكفيل إلا في حالة وجود تقصير ثابت بموجب العقد .

أحكام عامة

القصد من هذه القواعد هو توفير مخطط واضح ومختصر لتنظيم طبيعة الالتزامات الناشئة بموجب اجراء سندات الضمان والمطالبات . وبما أن طبيعة سند الضمان الذي تحكمه هذه القواعد هو أن تكون التزامات الأطراف متصلة اتصالا مباشرا بالتزامات الأطراف الناشئة بموجب العقد ومعتمدة عليها ، فإن هذه القواعد لا تتضمن أحكاما مفصلة تتناول المتطلبات المستندية أو مشكلة المطالبة الجائرة . وفي حالة نشوء نزاع بشأن مسؤولية الكفيل ، تتوقع القواعد أن يحسم هذا النزاع بالرجوع الى العقد . والكفيل والأصيل محميان لأن المسؤولية لن تنشأ الا حيث يثبت التقصير . والمستفيد محمي عن طريق تأكده من أن الكفيل سينفذ أي حكم أو قرار اذا لم يفعل ذلك الأصيل .

والقواعد الموجودة لسندات ضمان العقود رقم ٥٢٤ الواردة أدناه تنطبق حيث تدرجها الأطراف صراحة وفقا لأحكامها المفصلة . ويعتمد نجاح هذه القواعد الجديدة على استخدام أوساط الأعمال الدولية لها . وتوصي الغرفة التجارية الدولية باستخدام هذه القواعد الجديدة التي ستساعد على كفاءة الاتساق في استخدام سندات الضمان وانفاذها .

المرفق الثالث

(Original: English, French, Spanish)

ICC UNIFORM RULES FOR CONTRACT BONDS

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Article 1

Scope and application

- (a) These Rules shall be known as the "Uniform Rules for Contract Bonds" and shall apply to any Bond which states that these Rules shall apply, or otherwise incorporates these Rules by reference and, for such purposes, it shall suffice that the Bond incorporates a reference to these Rules and the publication number.
- (b) If there shall be any conflict in the construction or operation of the obligations of any parties under a Bond between the provisions of these Rules and such Bond, or mandatory provisions of the Applicable Law regulating the same, the provisions of the Bond or, as the case may be, the mandatory provisions of the Applicable Law shall prevail.

Article 2

Definitions

In these Rules, words or expressions shall bear the meanings set out below and be construed accordingly

Advance Payment Bond

A Bond given by the Guarantor in favour of the Beneficiary to secure the repayment of any sum or sums advanced by the Beneficiary to the Principal under or for the purposes of the Contract, where such sum or sums is or are advanced before the carrying out of works, the performance of services or the supply or provision of any goods pursuant to such Contract.

Beneficiary

The party in whose favour a Bond is issued or provided.

Bond

Any bond, guarantee or other instrument in writing issued or executed by the Guarantor in favour of the Beneficiary pursuant to which the Guarantor undertakes on Default, either :

- (i) to pay or satisfy any claim or entitlement to payment of damages, compensation or other financial relief up to the Bond Amount; or
- (ii) to pay or satisfy such claim or entitlement up to the Bond Amount or at the Guarantor's option to perform or execute the Contract or any Contractual Obligation.

In either case where the liability of the Guarantor shall be accessory to the liability of the Principal under the Contract or such Contractual Obligation and such expression shall without limitation include Advance Payment Bonds, Maintenance Bonds, Performance Bonds, Retention Bonds and Tender Bonds.

Bond Amount

The sum inserted in the Bond as the maximum aggregate liability of the Guarantor as amended, varied or reduced from time to time or, following the payment of any amount in satisfaction or partial satisfaction of a claim under any Bond, such lesser sum as shall be calculated by deducting from the sum inserted in the Bond the amount of any such payment.

Contract

Any written agreement between the Principal and the Beneficiary for the carrying out of works, the performance of services or the supply or provision of any goods.

Contractual Obligation

Any duty, obligation or requirement imposed by a clause, paragraph, section, term, condition, provision or stipulation contained in or forming part of a Contract or tender.

Default

Any breach, default or failure to perform any Contractual Obligation which shall give rise to a claim for performance, damages, compensation or other financial remedy by the Beneficiary and which is established pursuant to paragraph j of Article 7.

Expiry Date

Either (a) the date fixed or the date of the event on which the obligations of the Guarantor under the Bond are expressed to expire or (b) if no such date is stipulated, the date determined in accordance with Article 4.

Guarantor

Any Person who shall issue or execute a Bond on behalf of a Principal.

Maintenance Bond

A Bond to secure Contractual Obligations relating to the maintenance of works or goods following the physical completion or the provision thereof, pursuant to a Contract.

Performance Bond

A Bond to secure the performance of any Contract or Contractual Obligation.

Person

Any company, corporation, firm, association, body, individual or any legal entity whatsoever.

Principal

Any Person who (i) either (a) submits a tender for the purpose of entering into a Contract with the Beneficiary or (b) enters into a Contract with the Beneficiary and (ii) assumes primary liability for all Contractual Obligations thereunder.

Retention Bond

A Bond to secure the payment of any sum or sums paid or released to the Principal by the Beneficiary before the date for payment or release thereof contained in the Contract.

Tender Bond

A Bond in respect of a tender to secure the payment of any loss or damage suffered or incurred by the Beneficiary arising out of the failure by the Principal to enter into a Contract or provide a Performance Bond or other Bond pursuant to such tender.

Writing and Written

Shall include any authenticated tele-transmissions or tested electronic data interchange ("EDI") message equivalent thereto.

Article 3

Form of bond and liability of the guarantor to the beneficiary

- (a) The Bond should stipulate :
- (i) The Principal.
 - (ii) The Beneficiary.
 - (iii) The Guarantor.
 - (iv) The Contract.
 - (v) Where the Bond does not extend to the whole of the Contract, the precise Contractual Obligation or Obligations to which the Bond relates.
 - (vi) The Bond Amount.
 - (vii) Any provisions for the reduction of the Bond Amount.
 - (viii) The date when the Bond becomes effective (defined in these rules as the "Effective Date").
 - (ix) Whether the Guarantor shall be entitled at its option to perform or execute the Contract or any Contractual Obligation.
 - (x) The Expiry Date.
 - (xi) The names, addresses, telex and/or telefax numbers and contact references of the Beneficiary, the Guarantor and the Principal.
 - (xii) Whether sub-paragraph i of Article 7j is to apply and the name of the third party to be nominated thereunder for the purpose of Article 7 below (claims procedure).
 - (xiii) How disputes or differences between the Beneficiary, the Principal and the Guarantor in relation to the Bond are to be settled.
- (b) The liability of the Guarantor to the Beneficiary under the Bond is accessory to the liability of the Principal to the Beneficiary under the Contract and shall arise upon Default. The Contract is deemed to be incorporated into and form part of the Bond. The liability of the Guarantor shall not exceed the Bond Amount.
- (c) Save for any reduction of the Bond Amount under the terms of the Bond or the Contract and subject to Article 4, the liability of the Guarantor shall not be reduced or discharged by reason of any partial performance of the Contract or any Contractual Obligation.
- (d) All defences, remedies, cross claims, counter-claims and other rights or entitlements to relief which the Principal may have against the Beneficiary under the Contract, or which may otherwise be available to the Principal in respect of the subject matter thereof, shall be available to the Guarantor in respect of any Default in addition to and without limiting any defence under or arising out of the Bond.

Article 4

Release and discharge of guarantor

- (a) Subject to any contrary provision in the Bond and the provisions of paragraph b of this Article 4, the Expiry Date shall be six months from the latest date for the performance of the Contract or the relevant Contractual Obligations thereunder, as the case may be.

- (b) Subject to any contrary provision of the Bond, the Expiry Date for the purposes of an Advance Payment Bond, a Maintenance Bond, a Retention Bond and a Tender Bond shall be as follows:
- (i) In the case of an Advance Payment Bond, the date on which the Principal shall have carried out works, supplied goods or services or otherwise performed Contractual Obligations having a value as certified or otherwise determined pursuant to the Contract equal to or exceeding the Bond Amount.
 - (ii) In the case of a Maintenance Bond, six months after either the date stipulated by the Contract or, if no date has been specified for the termination of the Principal's maintenance obligations, the last day of the applicable warranty period or defects liability period under the Contract.
 - (iii) In the case of a Retention Bond, six months after the date stipulated by the Contract for the payment, repayment or release of any retention monies.
 - (iv) In the case of a Tender Bond, six months after the latest date set out in the tender documents or conditions for the submission of tenders.
- (c) Where the Expiry Date falls on a day which is not a Business Day, the Expiry Date shall be the first following Business Day. For the purpose of these Rules "Business Day" shall mean any day on which the offices of the Guarantor shall ordinarily be open for business.
- (d) A Bond shall terminate and, without prejudice to any term, provision, agreement or stipulation of the Bond, any other agreement or the Applicable Law providing for earlier release or discharge, the liability of the Guarantor shall be discharged absolutely and the Guarantor shall be released upon the Expiry Date whether or not the Bond shall be returned to the Guarantor, save in respect of any claim served in accordance with Article 7.
- (e) Notwithstanding the provisions of paragraph d of this Article 4, the Bond may be cancelled at any time by the return of the Bond itself to the Guarantor or by the service upon and delivery or transmission to the Guarantor of a release in writing duly signed by an authorised representative of the Beneficiary, whether or not accompanied by the Bond and/or any amendment or amendments thereto.
- (f) The Guarantor shall promptly inform the Principal of any payment made under or pursuant to the Bond and of the cancellation, release or discharge thereof or any reduction in the Bond Amount where the same shall not already have been communicated.

Article 5

Return of the bond

The Bond shall immediately after release or discharge under these Rules be returned to the Guarantor, and the retention or possession of the Bond following such release or discharge shall not of itself operate to confer any right or entitlement thereunder upon the Beneficiary.

Article 6

Amendments and variations to and of the contract and the bond and extensions of time

- (a) The Bond shall, subject to the Bond Amount and the Expiry Date, apply to the Contract as amended or varied by the Principal and the Beneficiary from time to time.
- (b) A Tender Bond shall be valid only in respect of the works and contract particulars set out or described in the tender documents at the Effective Date, and shall not apply beyond the Expiry Date or in any case where there shall be any substantial or material variation of or amendment to the original tender after the Effective Date, unless the Guarantor shall confirm, in the same manner as set out in paragraph c of this Article 6, that the Tender Bond so applies or the Expiry Date has been extended.
- (c) Any amendment to a Bond, including without limitation the increase of the Bond Amount or the alteration of the Expiry Date, shall be in writing duly signed or executed by authorised representatives of each of the Beneficiary, the Principal and the Guarantor.

Article 7

Submission of claims and claims procedure

- (a) A claim under a Bond shall be in writing and shall be served upon the Guarantor on or before the Expiry Date and by no later than the close of the Business Day at the Guarantor's principal place of business set out in the Bond, on the Expiry Date.
- (b) A claim submitted by authenticated tele-transmission, EDI, telex or other means of telefax facsimile or electronic transmission shall be deemed to be received on the arrival of such transmission.
- (c) A claim delivered to the Guarantor's principal place of business set out in the Bond shall, subject to proof of delivery, be deemed to be served on the date of such delivery.
- (d) A claim served or transmitted by post shall, subject to satisfactory proof of delivery by the Beneficiary, be deemed to be served upon actual receipt thereof by the Guarantor.
- (e) The Beneficiary shall, when giving notice of any claim by telefax or other tele-transmission or EDI, also send a copy of such claim by post.
- (f) Any claim shall state brief details of the Contract to identify the same, state that there has been a breach or default and set out the circumstances of such breach or default and any request for payment, performance or execution.
- (g) Upon receipt of a claim from the Beneficiary, the Guarantor shall send notice in writing to the Principal of such claim as soon as reasonably practicable and before either (a) making any payment in satisfaction or partial satisfaction of the same or (b) performing the Contract or any part thereof pursuant to a Contractual Obligation.

- (h) The Beneficiary shall, upon written request by the Guarantor, supply to the Guarantor such further information as the Guarantor may reasonably request to enable it to consider the claim, and shall provide copies of any correspondence or other documents relating to the Contract or the performance of any Contractual Obligations and allow the Guarantor, its employees, agents or representatives to inspect any works, goods or services carried out or supplied by the Principal.
- (i) A claim shall not be honoured unless
 - (i) A Default has occurred ; and
 - (ii) The claim has been made and served in accordance with the provisions of paragraphs a-f of Article 7 on or before the Expiry Date.
- (j) Notwithstanding any dispute or difference between the Principal and the Beneficiary in relation to the performance of the Contract or any Contractual Obligation, a Default shall be deemed to be established for the purposes of these Rules :
 - (i) upon issue of a certificate of Default by a third party (who may without limitation be an independent architect or engineer or a Pre-Arbitral referee of the ICC) if the Bond so provides and the service of such certificate or a certified copy thereof upon the Guarantor, or
 - (ii) if the Bond does not provide for the issue of a certificate by a third party, upon the issue of a certificate of Default by the Guarantor, or
 - (iii) by the final judgment, order or award of a court or tribunal of competent jurisdiction, and the issue of a certificate of Default under paragraph (i) or (ii) shall not restrict the rights of the parties to seek or require the determination of any dispute or difference arising under the Contract or the Bond or the review of any certificate of Default or payment made pursuant thereto by a court or tribunal of competent jurisdiction.
- (k) A copy of any certificate of Default issued under j (i) or (ii) shall be given by the Guarantor to the Principal and the Beneficiary forthwith.
- (l) The Guarantor shall consider any claim expeditiously and, if such claim is rejected, shall immediately give notice thereof to the Beneficiary by authenticated tele-transmission or other telefax, facsimile transmission, telex, cable or EDI, confirming the same by letter, setting out the grounds for such refusal including any defences or other matters raised under paragraph d of Article 3.

Article 8

Jurisdiction and settlement of disputes

- (a) The Applicable Law shall be the law of the country selected by the parties to govern the operation of the Bond and, in the absence of any express choice of law, shall be the law governing the Contract and any dispute or difference arising under these Rules in relation to a Bond shall be determined in accordance with the Applicable Law.
- (b) All disputes arising between the Beneficiary, the Principal and the Guarantor or any of them in relation to a Bond governed by these Rules shall, unless otherwise agreed, be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or

more arbitrators appointed in accordance with the said Rules.

- (c) If the Bond shall exclude the operation of the arbitration provisions of this Article 8, any dispute between the parties to the Bond shall be determined by the courts of the country nominated in the Bond, or, if there is no such nomination, the competent court of the Guarantor's principal place of business or, at the option of the Beneficiary, the competent court of the country in which the branch of the Guarantor which issued the Bond is situated.
