

antee texts from the various parts of the world. Such materials, to be forwarded to the Secretariat, would help to identify the essential formal requisites of guarantees and stand-by letters of credit on the basis of current international practices. In response, doubts were expressed as to the feasibility and actual benefit of such an extensive endeavour. While any information on current practices would be useful to the Secretariat, it was feared that the collection of information would be hampered by reasons of confidentiality. Above all, the information collected could be expected to reflect a large diversity of practices that were still in the process of development and that would change in the years to come. It was felt that any such compilation of current practices would thus not lead directly to solutions for the uniform law, especially when taking into account the possibility that some of the current practices might be regarded as unfair or unacceptable for other reasons.

105. As regards the required form of a guaranty letter, wide support was expressed for requiring some tangible or material form, to the exclusion of purely oral undertakings. In searching for an acceptable formula, regard should be had to the various means of communication that were currently used and to the rapid developments in the field.

106. As regards possible later amendments or modifications of the terms and conditions, it was suggested that the required form should be the same as that for the original establishment of the guaranty letter. It was stated in reply that there existed a practice under which an amendment of a written guaranty letter might be made orally and authenticated in that form. While the amendment would then be confirmed by a message in a form that provided a record of the amendment, the oral communication was in practice regarded as determining the point of time of effectiveness of the amendment.

107. As regards the question of the decisive point of time of the establishment of a guaranty letter, one view was that the guaranty letter should become binding and effective

when it was issued or released by the guarantor. Under another view, the guaranty letter should become effective when it was communicated to the beneficiary or accepted by it. It was stated that the decisive point of time depended on whether the undertaking was characterized as unilateral or contractual. While there was considerable support for the characterization as contractual, it was pointed out that some legal systems regarded the guaranty letter as a speciality of mercantile law, like the commercial letter of credit, where acceptance was usually implied from the silence of the beneficiary or effected by stipulations in advance.

III. FUTURE WORK

108. The Working Group took note of the decision of the Commission at its twenty-second session that the fourteenth session of the Working Group would be held from 3 to 14 September 1990 at Vienna.⁷

109. The Working Group requested the Secretariat to submit to its next session a first draft set of articles, with possible variants, on the issues considered during the current session.

110. The Working Group further requested the Secretariat to submit to its next session a note discussing other possible issues to be covered by the uniform law. It was agreed that, of a number of detailed issues mentioned at the previous session,⁸ the following issues should not be retained: 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; and measure of damages.

⁷Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), para. 297.

⁸A/CN.9/316, para. 173.

B. Independent guarantees and stand-by letters of credit: discussion of some issues of a uniform law: substantive scope of uniform law, party autonomy and its limits, and rules of interpretation: note by the Secretariat^a

(A/CN.9/WG.II/WP.65) [Original: English]

CONTENTS

	Paragraphs	Page
INTRODUCTION	1-7	239
I. SUBSTANTIVE SCOPE OF UNIFORM LAW	8-59	240
A. Types of instrument to be covered	9-47	240
1. Focus on independent guarantees and stand-by letters of credit ...	9-12	240
2. Sample of current definitions	13-20	241

^aWorking paper submitted to the Working Group on International Contract Practices at its thirteenth session.

	<i>Paragraphs</i>	<i>Page</i>
3. Possible elements of a definition of "guaranty letter"	21-47	242
(a) Independent undertaking to pay	21-29	242
(b) Compliance with terms and conditions	30-32	243
(c) Definite or determinable amount and currency of payment	33-35	243
(d) Claim within specified period of time	36-37	244
(e) Purpose for which guaranty letter is issued	38-39	244
(f) Undertaking in written form	40-42	244
(g) Issued by a bank or other guarantor, at the request of a customer (principal, instructing or account party)	43-45	244
(h) Payment to another party (beneficiary)	46-47	245
B. Relationships to be dealt with in uniform law	48-52	245
1. Relationship between guarantor and beneficiary	48	245
2. Relationship between guarantor and counter-guarantor	49-51	245
3. Relationship between guarantor and principal	52	245
C. Restriction to international guaranty letters	53-59	246
II. PARTY AUTONOMY AND ITS LIMITS	60-82	246
A. Express recognition of party autonomy	60-62	246
B. Possible reference to uniform rules and usages or customs	63-70	247
1. Reference to specific sets of rules or to uniform rules in general .	63-68	247
2. Reference to usages or customs	69-70	247
C. Possible limits to party autonomy	71-82	248
1. Limits set in mandatory provisions	71-74	248
2. Exclusion of non-documentary conditions of payment	75-82	248
(a) Scope of problem	75-79	248
(b) Possible solutions	80-82	249
III. POSSIBLE RULES OF INTERPRETATION	83-99	249

INTRODUCTION

1. The Commission, at its twenty-first session, in 1988, 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 at two levels, the first relating to contractual rules or model terms and the second pertaining to statutory law.¹

2. With respect to the first level, 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. 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. The Commission also asked the Working Group to examine the desirability and feasibility of any future work relating to the second level 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.

3. At its twenty-second session, in 1989, the Commission had before it the report of the Working Group on International Contract Practices on the work of its twelfth session (A/CN.9/316). The Commission noted that the Working Group had engaged in a review of the ICC draft Uniform Rules for Guarantees, as well as a discussion of the desirability and feasibility of achieving greater uniformity at the statutory level. The Commission also noted the recommendation of the Working Group that work should be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

4. After deliberation, the Commission decided that work on a uniform law should be undertaken. It entrusted this task to the Working Group on International Contract Practices and requested the Secretariat to prepare the necessary documentation.²

¹Official Records of the General Assembly, Forty-third Session, Supplement No. 17 (A/43/17), paras. 19-24.

²Official Records of the General Assembly, Forty-fourth Session, Supplement No. 17 (A/44/17), paras. 236-244.

5. The present note constitutes the first part of a detailed discussion of possible issues of a uniform law. It covers essentially those topics and issues that the Working Group, based on a note by the Secretariat (A/CN.9/WG.II/WP.63), tentatively considered at its twelfth session under the headings "Possible scope of uniform law" and "Recognition of party autonomy for independent undertaking"; it also covers some of the issues dealt with under the heading "Strict construction and compliance" and some other possible issues that were mentioned at the twelfth session.³ The Secretariat intends to cover the remaining issues, in particular those considered under the headings "Fraud and other objections to payment" and "Applicable law and related issues",⁴ in a second discussion paper to be submitted to the Working Group at its fourteenth session (Vienna, 3-14 September 1990). Those issues, while closely linked with topics discussed in the present note, require especially careful preparation and in depth study in view of both the particular difficulties of harmonization efforts and the crucial importance of finding acceptable solutions in those areas.

6. The present note is designed to stimulate and aid the extensive deliberations by the Working Group that appear to be necessary before any draft provisions of a uniform law can usefully be formulated. It is based on the tentative considerations of the Working Group at its twelfth session. Where appropriate, reference is made to a pertinent provision in one of the few statutes dealing with independent guarantees or stand-by letters of credit, in the latest version of the ICC Draft Uniform Rules for Guarantees (URG)⁵ or in the Uniform Customs and Practice for Documentary Credits (UCP; 1983 revision).⁶

7. The following discussion attempts to describe the selected issues and the relevant policy considerations in the light of current law and practice. It draws attention to those questions that need to be answered in order to provide the basis for the formulation of draft provisions. Even where not expressly noted, one basic question that needs to be kept in mind is whether or not a given issue or aspect thereof should be regulated in the uniform law. In a number of cases, this question will appropriately be answered only after extensive deliberation of the issue and of possible solutions.

I. SUBSTANTIVE SCOPE OF UNIFORM LAW

8. The Working Group, at its twelfth session, reached a number of conclusions relevant to the substantive scope of the uniform law. Those conclusions pertain to the types of instrument to be covered, to the kinds of relationship to be dealt with and to the question whether the uniform law should apply to international instruments only.⁷

A. Types of instrument to be covered

1. Focus on independent guarantees and stand-by letters of credit

9. The Working Group was agreed that the uniform law should focus on independent guarantees and, in view of their functional equivalence, on stand-by letters of credit. The Working Group was also agreed that the uniform law should be extended to traditional commercial letters of credit where that would be useful in view of their independent nature and the need for regulating equally relevant issues. Accessory guarantees are not to be covered, except perhaps in the context of a definition for the purpose of drawing a clear demarcation line between independent and accessory guarantees.

10. In conformity with that decision to focus on independent guarantees and stand-by letters of credit, it would be necessary to define those two types of instrument. Depending on the extent to which the uniform law would cover traditional commercial letters of credit, that type of instrument may later have to be defined. For the present purposes, and in view of the desirability of maintaining harmony with the UCP, it suffices here to reproduce the current version of the definition contained in article 2 as well as articles 3 and 4, which, while not forming part of the definition, express the independent and documentary nature of the undertaking:

"Article 2

"For the purposes of these articles, the expressions 'documentary credit(s)' and 'standby letter(s) of credit' used herein (hereinafter referred to as 'credit(s)'), mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant for the credit),

- i. is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary, or
- ii. authorizes another bank to effect such payment, or to pay, accept or negotiate such bills of exchange (drafts),

against stipulated documents, provided that the terms and conditions of the credit are complied with.

"Article 3

"Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credit.

"Article 4

"In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate."

³A/CN.9/316, paras. 124-139, 172-173.

⁴A/CN.9/316, paras. 147-171.

⁵ICC Document No. 460/364 and No. 470/584 of 18 October 1989.

⁶ICC Publication No. 400, reproduced in A/CN.9/251.

⁷A/CN.9/316, paras. 124-126, 134-136, 172.

11. While stand-by letters of credit are covered by the UCP (according to article 1, to the extent to which the articles may be applicable) and for that reason are said to be excluded from the URG,⁸ the uniform law would use a different categorization and would treat them jointly with independent guarantees, based on their functional equivalence. In this vein, an attempt should be made to formulate a single definition that would cover both types irrespective of how they may be labelled.

12. One may even go a step further and adopt a common name for both types, e.g. "guaranty letter". Such a name could be used in the text of the uniform law without, of course, requiring that the individual guarantees and stand-by letters of credit be so named. An alternative drafting approach could be to use throughout the text the term "guarantee" and to define that term as including the stand-by letter of credit. For the purposes of the following discussion, the suggested common name "guaranty letter" will be used to refer jointly to independent guarantees and stand-by letters of credit.

2. Sample of current definitions

13. In preparing a suitable definition of "guaranty letter" for the future uniform law regard may be had to definitions found in legislation or uniform rules. To start with statutory definitions, there is only a very limited number of provisions from which guidance or inspiration may be drawn. As indicated in the report of the Secretary-General (A/CN.9/301, para. 57), few States have special statutory provisions on bank guarantees, indemnities or stand-by letters of credit.

14. Some of these laws cover in their definition both independent and accessory guarantees. For example, the 1963 International Trade Code of Czechoslovakia provides in section 665(1):

"Under a banking guaranty a bank (banking institution) undertakes to give satisfaction to the receiver of the guaranty (the entitled person) in accordance with the provisions of the guaranty, if a third party fails to execute his obligation or if the conditions specified in the guaranty are fulfilled."

This provision is said to cover both the accessory guaranty and the banking guaranty itself while another provision contains a special rule for so-called independent guaranties,⁹ namely section 672, which reads:

"If the banking guaranty provides for the obligation of the bank to execute the secured obligation at the entitled person's first request and without objections, the bank may not raise objections against the entitled person, which would otherwise be available for the committer as debtor under the secured obligation against the entitled person."

⁸Statement of Observer of the ICC, A/CN.9/316, para. 19, and more recently expressed in the introduction to the latest draft of the URG: "Stand-by letters of credit cannot be governed by these rules since they are governed by UCP 400".

⁹Act No. 101 (of 4th December, 1963) on Legal Relations arising in International Business Transactions, Introduction and commentary by Kopač (Prague 1967), p. 200, 202.

15. Similarly, the 1978 Law of Obligations of Yugoslavia contains, in addition to a general definition (article 1084), a special rule for certain independent guarantees. Article 1087(1) reads:

"If the bank guarantee contains a clause 'no objection', 'first demand' or words of the same meaning, the bank may not raise against the beneficiary the objections which the principal could invoke as the beneficiary's debtor against the beneficiary on the basis of the guaranteed obligation."

16. The 1976 International Commercial Contracts Act of the German Democratic Republic contains the following definition in section 252:

"By a contract of indemnity one party (the party giving the indemnity) undertakes to the other party (the party to be indemnified) to effect payment up to the amount of the indemnity on the occurrence of the event contemplated by the contract."

The following two provisions, while not forming part of the definition, are also relevant for the characterization of the instruments covered:

"Sect. 253:

"Where the party to be indemnified claims the indemnity the party giving it is entitled to demand that he gives proof of the occurrence of the event contemplated by the contract.

Sect. 254:

Where the party giving the indemnity has done so on behalf of a third party, he may not assert any defences or claims available to such third party against the party to be indemnified."

While section 253 may appear to exclude independent guarantees that do not require proof, the commentary clarifies the non-mandatory character of the provision by stating that no proof would be required in the case of first-demand guarantees.¹⁰

17. Statutory definitions that focus on the independent guarantee are found in very similar form in the following States: Bahrain, Democratic Yemen, Iraq and Kuwait. For example, the 1980 Commercial Law of Kuwait provides in article 382:¹¹

"A letter of guarantee is an undertaking issued by a bank, at the request of one of its customers (the person giving the instruction), to pay unconditionally a certain specified or determinable sum to another person (the beneficiary), if payment is requested within the time-period set in the letter; the letter of guarantee shall state the purpose for which it has been issued."

18. The definitions in the laws of the other three States are in substance the same, with the following exceptions. The 1987 Commercial Code of Bahrain (article 331) omits the word "unconditionally",¹² while the 1984 Com-

¹⁰Fincke, in: Kommentar zum Gesetz über internationale Wirtschaftsverträge — GIW — vom 5. Februar 1976, 2nd ed. (Berlin 1983), p. 359.

¹¹Decree No. 68 of 1980 Enacting the Law of Commerce of Kuwait.

¹²Commercial Code of Bahrain, Law No. 7 of 1987.

mercial Code of Iraq (article 287) uses instead the expression "without any reservation" and adds to the above definition a separate rule (in article 293) that provides: "The beneficiary shall not claim the amount of the letter of guarantee for another purpose than that stated therein".¹³ The 1988 Civil Code of Democratic Yemen contains (in article 1497) the above definition without the word "unconditionally" and adds the following rules on the validity period: "A letter of guarantee may be issued for an indeterminate period" and (in article 1500(2)) "If the letter of guarantee is valid for an unspecified period, its validity expires three years after the date on which it has been issued".¹⁴ All four laws underline the independent character of the bank's undertaking by a provision along the following lines: The bank may not refuse payment to the beneficiary on grounds relating either to its relationship with the principal or to the relationship between the principal and the beneficiary.¹⁵ The only exception is that the latter relationship is not mentioned in the Bahraini provision.¹⁶

19. As regards relevant definitions contained in uniform rules, it may suffice here to reproduce the current version of article 2 of the URG:

"a) For the purposes of these Rules a Guarantee means an undertaking by a bank, insurance company or other body or person (hereinafter 'the Guarantor') given in writing for the payment of money, subject to compliance with the terms and conditions of the Guarantee

i) at the request, or on the instructions and under the liability of a Party (hereinafter called 'the Principal'); or

ii) at the request, or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter 'the Instructing Party') acting on the instruction of a Principal to another party (hereinafter the 'Beneficiary').

b) A Guarantee is independent of any underlying transaction and the terms of any such transaction shall not affect the Guarantor's rights and obligations under a Guarantee notwithstanding any reference thereto in the Guarantee. A Guarantor's obligation of performance under a Guarantee is to pay the sum or sums specified therein, subject to compliance with the terms and conditions of the Guarantee.

c) For the purpose of these Rules 'Counter-Guarantee' means the written undertaking of the Instructing Party to effect payment to the Guarantor in accordance with the terms of the Counter-Guarantee on receipt of the Guarantor's notification that it has been called upon to pay in accordance with the terms of the Guarantee.

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

d) The expression 'writing' shall include an authenticated teletransmission or tested electronic data interchange ('EDI') message equivalent thereto."

20. The above sample of definitions should prove useful in identifying and discussing the possible elements of a definition of "guaranty letter" for the future uniform law. The following discussion of such elements will often be relevant also for later considerations in the drafting of operative provisions. However, one must clearly distinguish between a definition that delimits the substantive scope of application and an operative rule that regulates an issue of any instrument falling within that scope. For example, non-compliance with a requirement of form included in the definition would result in the non-application of the law. In that case the instrument might be subject to another law with different requirements that might favour its validity. On the other hand non-compliance with a mandatory requirement of form found in the operative rules would entail the sanction prescribed therein, such as invalidity.

3. Possible elements of a definition of "guaranty letter"

(a) Independent undertaking to pay

21. To start with the less difficult part of this central element, the "undertaking to pay" is certainly to be contained in the definition. The term "undertaking", or possibly "promise", seems preferable to expressions like "contract", "agreement" or "arrangement" in that it leaves open the controversial question of the legal characterization of the guaranty letter. At least, it does not positively characterize the guaranty letter as contractual, which would trigger the application of ordinary contract rules, even though the obligation may have come about in a different manner. The terminology would later have to be adjusted if, during the preparation of the operative provisions, it would become necessary to decide whether the guaranty letter constitutes a contract or, for example, a special creation of commercial law.

22. Considerably more difficult to deal with is the "independent" character of the undertaking to pay. This character constitutes the most essential common feature of the guarantees to be covered and the stand-by letters of credit as well as the traditional letters of credit, and the principle of independence will be an important theme underlying the preparation of the uniform law. While its precise meaning and scope will have to be determined in the context of various operative provisions, it must be expressed in the definition with sufficient clarity to distinguish between the guaranty letters covered by the uniform law and the accessory or secondary guarantees, bonds or suretyships not covered by it.

23. It seems very doubtful whether, for that purpose, a single word would suffice; not even the term "independent" seems to be sufficiently certain in its meaning and widely established. In fact, it invites, more than the similar term "autonomous", the question as to what the guaranty obligation is independent from. The answer given in some of the above definitions or separate rules is primarily the so-called underlying transaction (or guaranteed obligation) and often also the relationship between the guarantor (issuer) and the principal (customer, applicant, account party, instructing party).

¹³Commercial Code of Iraq, Law No. 30 of 1984.

¹⁴Civil Code of Democratic Yemen, Law No. 8 of 1988.

¹⁵Democratic Yemen: Sect. 1499; Iraq: Sect. 290; Kuwait: Sect. 385.

¹⁶Sect. 334.

34. Another question that should be considered is whether the amount payable must be specified in the guaranty letter and whether it must be definite or, at least, determinable, as provided for in some of the above statutory definitions. From a practical point of view, it is a reasonable requirement that the amount payable be specified. In fact, it seems highly unlikely that a guaranty letter would be issued without such specification, and to exclude such rare instruments from the scope of the uniform law would not appear to serve a useful purpose. Instead, consideration may be given to merely assuming such specification in wording such as "payment of amount specified in the guaranty letter" or, as found in article 16 URG, "a guarantor is liable up to an amount not exceeding that stated in the guarantee . . .". One might even be content with the appeal expressed in article 3 URG that "all Guarantees should stipulate: . . . (e) the maximum amount payable and the currency in which it is payable; . . . (h) any provision for reduction of the guarantee amount".

35. Special considerations may apply in respect of the possible requirement that the amount be definite or, at least, determinable. The expression "determinable" raises the question on what basis that determination would be made. This, in turn, raises the above general question of whether non-documentary conditions should be excluded (e.g. reduction of performance guarantee amount according to progress of construction without providing for documentary proof such as certificates of completion of defined stages of construction).

(d) Claim within specified period of time

36. It is an essential and obvious requirement that the claim or request for payment must be made within a specified period of validity or effectiveness. While this requirement may be included as an element in the definition, as done in some of the above statutory definitions, it should certainly be included in the operative rules on the guarantor's duties or the beneficiary's right to payment, as, e.g., in article 19 URG: "a claim shall be made in accordance with the terms of the Guarantee on or before its expiry . . .".

37. As regards the question as to whether a period of time has to be specified in the guaranty letter, similar considerations apply as those relating to the specification of the amount payable (see above, paragraph 34). Here, too, it would not seem appropriate to exclude from the scope of the uniform law those instruments that do not specify such a time-limit. Instead, consideration might be given to providing a solution for those instruments in a rule of interpretation taking into account the purpose of the given guaranty letter or in a suppletive rule that would fix the time-limit failing specification, as done in the Commercial Code of Democratic Yemen (see above, paragraph 18). Finally, as regards the possibility that an expiry event rather than a date may be specified in the guaranty letter, the general question becomes relevant here as to whether non-documentary conditions should be excluded.

(e) Purpose for which guaranty letter is issued

38. Inspired by the statutory definitions cited in paragraphs 17 and 18, consideration might be given to includ-

ing the requirement that the guaranty letter would have to state the purpose for which it had been issued. It has been pointed out in support of such a requirement that an instrument without any information about its purpose and its qualifying event cannot be properly described, for example, as a first demand guarantee. "It may be an ordinary debenture bond or a promissory note, depending on its actual wording. The statement in the instrument that it has been issued in respect of a certain contract or legal relation prevents its call to satisfy claims under other contracts or legal relations."¹⁸

39. If one were to follow that reasoning, it would seem appropriate to include the requirement in the definition so that instruments without specified purpose could be valid under other laws. However, one may doubt whether the requirement needs to be retained and expressed at all. Apart from the practical assumption that guaranty letters without any indication of their purpose are highly unlikely, the very requirement of stating the purpose might lead to the inclusion of language that could give the guaranty letter a less independent flavour than was in fact intended.

(f) Undertaking in written form

40. "Writing" constitutes an element of the definition in the URG and is explained in a separate part of the definition as including an authenticated teletransmission or tested electronic data interchange ("EDI") message equivalent thereto. The above statutory provisions, which do not expressly require written form, appear to have been formulated on the assumption that guaranty letters would be in writing. Either of the two approaches may be considered as appropriate for the uniform law.

41. Yet another approach could be to require written form in an operative rule, with the result that non-complying guaranty letters would be included in the scope of the law and they would be subject to the sanctions provided therein. If that approach were to be adopted, the definition of "writing" should be even broader and future-oriented than under the first approach, where it would form a requirement delimiting the scope of application.

42. If "writing" were to be defined in the uniform law, no terms should be used that are linked to particular technologies. A wide wording, inspired by the UNCITRAL Model Law on International Commercial Arbitration, would be, for example, "any transmission that provides a record of the text of the guaranty letter", and one may add "provided that it is authenticated [in an authorized manner]". One might even go so far as not to define "writing" but merely require and define "signature or other authentication".

(g) Issued by a bank or other guarantor, at the request of a customer (principal, instructing or account party)

43. The Working Group may wish to decide whether the uniform law should cover only those guaranty letters issued by banks, in which case it would need to find a uniform definition of the term "bank". Such a restriction

¹⁸Khalek Omar, The regulation of international first demand bonds—a comparative approach, 4 Arab L.Q. (1989), p. 103.

may, however, be inappropriate in view of the fact that stand-by letters of credit and guarantees are currently issued also by other institutions and persons and that future developments in that respect should be taken into account. As regards the term to be used throughout the uniform law for the institution or person issuing the guaranty letter, one may choose, for example, "guarantor" or "issuer".

44. As regards the fact that the guaranty letter is issued at the request of another person, it would not seem appropriate to require an indication in the guaranty letter of that request or of the requesting person, whether as an element delimiting the scope of application or as a requirement in an operative provision. However, the requesting person needs to be given a name for the purposes of the uniform law. In choosing a suitable term, regard must be had to the possible fact situations and, in particular, different relationships in more complex cases involving, for example, counter-guarantees syndicated guarantees or confirmed guarantees (see below, paragraphs 50-51). In this light, terms like "customer", "applicant" or even "account party" might not prove to be appropriate. The term "principal" might prove to be inappropriate for another reason, namely that it would not fit guaranty letters with a purpose other than to cover the risk of default of the debtor of an underlying transaction. A more neutral and wider term could be "instructing party" which is used in the URG only for an intermediate party. It may be noted that the present note still uses the terms used in earlier documents, i.e. principal, guarantor, counter-guarantor and beneficiary.

45. It may be added that in choosing appropriate terms due account must be taken of the need for establishing correspondent terms in the six official languages of the United Nations. The same applies to all other questions of terminology. It is submitted that the establishment of uniform terminology in those six languages would be of considerable practical value even beyond the uniform law in that it would help to overcome the current disparity and confusion.

(h) Payment to another party (beneficiary)

46. The definition of "guaranty letter" should contain the element that the guarantor's undertaking is to pay to another party. Following common usage, that party would be called "beneficiary" throughout the uniform law.

47. The definition would, however, not be the appropriate place for dealing with related issues such as the exact determination or identification of the beneficiary, the possible plurality of beneficiaries or the possible transfer of the status and rights of a beneficiary. Such issues should be dealt with, if at all, in operative provisions of the uniform law.

B. Relationships to be dealt with in uniform law

1. Relationship between guarantor and beneficiary

48. The Working Group was agreed at its twelfth session that the uniform law could usefully describe the

essential rights and obligations of the parties to a guaranty letter; thus the relationship between the guarantor and the beneficiary would naturally be covered.¹⁹ This relationship will be dealt with, in addition to the above discussion of the definition of "guaranty letter", in the bulk of the operative provisions. There, a general question will be into what detail the regulation of the essential rights and obligations of these two central parties should go.

2. Relationship between guarantor and counter-guarantor

49. As regards the relationship between guarantor and counter-guarantor, the Working Group deemed its inclusion appropriate in view of the fact that it was in substance a guarantee relationship.²⁰ This very fact suggests that the operative provisions of the uniform law should be drafted so as to apply to that relationship as well, unless otherwise stated in the provisions.

50. The definition of "counter-guarantor" might expressly include a consortium of counter-guarantors giving a syndicated guaranty letter. In formulating the definition and any special operative provisions due regard must be had to the fact that the counter-guarantor is liable solely to the guarantor, who is his "beneficiary", while the guarantor's beneficiary (the ultimate beneficiary) has no right to payment from the counter-guarantor.

51. The position of the counter-guarantor is in clear contrast to that of a confirming guarantor who, like a confirming bank under a traditional letter of credit, adds its own undertaking to that of the issuer with the result that both are liable to the ultimate beneficiary. Confirmed guaranty letters are probably rare. If they were to be covered by the uniform law, as they are, for example, by the Czechoslovak International Trade Code,²¹ the definition of "confirming guarantor" or "confirmer" could be drafted parallel to that of "confirming bank" under a traditional letter of credit.

3. Relationship between guarantor and principal

52. While the prevailing view in the Working Group was that the guarantor's relationship with the principal should be kept clearly separate from that with the beneficiary and as such should fall outside the scope of the uniform law, it was agreed that reference to the principal would have to be made and that certain aspects of the guarantor-principal relationship might be covered.²² As a first consequence, the position of the principal needs to be defined and the word used to designate him reconsidered (as suggested above, paragraphs 44). The question as to which aspects of his relationship with the guarantor might be covered will have to be answered in the context of par-

¹⁹A/CN.9/316, para. 134.

²⁰A/CN.9/316, para. 135.

²¹Sect. 669(1) reads: "If, acting under the instructions of the bank, another bank confirms the guaranty of the former bank, the entitled person may assert his claims under the guaranty against any of these banks".

²²A/CN.9/316, para. 136.

ticular operative provisions, such as those on the guarantor's duties and on possible measures of enjoining payment as well as in defining the scope of possible choice-of-law provisions.

C. Restriction to international guaranty letters

53. When the Working Group considered whether the uniform law should cover only international guarantees and letters of credit or whether it should also include domestic instruments, 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.²³

54. The Working Group may wish to consider the following variants of a possible test of internationality: (a) guarantor and beneficiary have their places of business in different States; (b) place of issue and place of business of requesting or instructing party (principal or counter-guarantor) are situated in different States; (c) place of issue and place of payment are situated in different States; (d) guaranty letter stipulates its treatment as international.

55. It may be noted that the above variants are designed to determine the international character of one given guaranty letter, which may or may not be part of a more complex guarantee network (e.g. principal in State A, counter-guarantor in State B, issuing guarantor and beneficiary in State C, confirming guarantor in State D). This limited focus seems necessary to facilitate the determination by those handling the instrument who may not know of other parts of the network or who may wish to make that determination before other parts have been created. However, in formulating the test of internationality regard should be had to the possibility of a complex network and to the desirability of a consistent determination for all its parts. Similar considerations apply to the different issues of the territorial scope of the uniform law and possible conflict-of-laws provisions to be discussed in a separate note.

56. As regards the above mentioned variants, it is submitted that variant (a) would be too narrow in that it would exclude those many guaranty letters with international set-up or flavour that are given to beneficiaries by local banks. In this respect variant (b) seems more appropriate in view of the likelihood that instructions are given by a foreign party, if it is a counter-guarantor; even where a principal turns to his local bank, the guaranty letter for a foreign beneficiary may be issued by a foreign branch of that bank or by another bank in the foreign country. Yet, since his local bank may also issue itself the guaranty letter for the foreign beneficiary, consideration may be given to combining variants (a) and (b) as alternative criteria of internationality.

57. The scope of international coverage could somewhat be widened by adding variant (c) which, standing alone, would be too limited in view of the infrequency of instances where the place of issue and the place of payment are situated in different States, except perhaps in the case of a confirming guaranty letter.

58. Finally, one may consider adding variant (d), provided that this criterion would as such be acceptable. This criterion, which could be regarded as an opting-in clause, may raise the question of the legal qualification of the guaranty letter of which the clause would form part. It is submitted, however, that admission of such clause would not necessarily require the qualification as contractual; one might consider following the philosophy of the United Nations Convention on International Bills of Exchange and International Promissory Notes that the Convention would be applicable to a holder who merely takes an instrument bearing the appropriate words.

59. It may be added that the suggested combination of all variants, while desirable in view of the width of international coverage, may create certain difficulties for those who need to determine the international character of the guaranty letter. In order to reduce such difficulties, one may provide that the places serving as connecting factors are relevant only if they can be ascertained from the text of the guaranty letter. It is submitted that the interests of those handling guaranty letters should be generally borne in mind in formulating the test of internationality as well as other provisions of the uniform law. Another general suggestion in respect of the test of internationality would be to ascertain from those States that wish to retain their current laws for domestic stand-by letters and guarantees which borderline between international and domestic instruments would be acceptable as preserving their interests.

II. PARTY AUTONOMY AND ITS LIMITS

A. Express recognition of party autonomy

60. The Working Group, at its twelfth session, 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.²⁴

61. While an express provision may thus not be necessary, it might provide the following advantages. In particular for jurisdictions where the principle of independence is not yet firmly established or where the freedom of independent undertakings is surrounded by uncertainty,²⁵ an express provision may have a salutary effect in that it would put the matter beyond doubt. This effect would be reinforced by the nature of the uniform law as a *lex specialis*, i.e. a special law prevailing over other laws of the given State as regards the matters covered by it.

²⁴A/CN.9/316, para. 128.

²⁵On the evolution of law recognizing independent guarantees, see A/CN.9/301, paras. 57-61.

²³A/CN.9/316, para. 172.

62. An express provision recognizing party autonomy would also provide the more technical advantage of forming an appropriate base or context for dealing with the following two items tentatively considered at the twelfth session of the Working Group.²⁶ One item suggested for inclusion in the uniform law would be a reference to uniform rules and to usages or customs. Another item, on which the Working Group was agreed, is the need that the recognition of party autonomy be accompanied by a clear description of its limits. Both items deserve careful consideration, irrespective of whether the Working Group would favour an express provision recognizing party autonomy.

B. Possible reference to uniform rules and usages or customs

1. Reference to specific sets of rules or to uniform rules in general

63. In favour of including in the uniform law a reference to the URG and the UCP it was noted that these two texts reflected the ongoing dynamism of banking and commercial practice, and that a reference in the uniform law could foster their harmonizing effect.²⁷ It could be regarded as a recognition of the different but complementing functions of law and of rules, as described by the Task Force on the Study of UCC Article 5 concerning the relationship between US letter-of-credit law and the UCP: "There is much wisdom in the dual scheme which has emerged by which rules of practice are articulated by a non-legislative body in intimate contact with the letter of credit industry, on the one hand, and statutory rules are of a more skeletal character. The two approaches complement one another and permit maximum flexibility without compromising basic concerns regarding the character of legal obligations, rights, and duties which are necessary to provide certainty and predictability. As a result, any revisions should preserve this balance, strengthening the foundational character of the statute and welcoming clarification of trade practices where appropriate."²⁸

64. There are certain considerations that may militate against an express reference to the UCP and, it is submitted, even more so in respect of the URG. As pointed out by the above Task Force, future revisions of the UCP could possibly be unacceptable to the banking community of the country in question, and it is not beyond the realm of possibility that the UCP may expire or be replaced by another trade code or set of uniform rules; any reference must be so drafted as to permit this type of evolutionary growth.²⁹

65. The Working Group may wish to take these possibilities into account in its preparation of a uniform law that is expected to be in force for decades to come. While the above possibilities might be viewed as remote as regards the UCP as an internationally accepted articulation of custom or practice, the situation is considerably different as regards the URG, not only because they are still in the preparatory stage but also because it would be premature to dare predict the extent of their future acceptance and thus their potential for harmonization.

66. As regards the UCP, two additional considerations may be taken into account, one relating to the scope of the uniform law and the other one relating to the legal character of the UCP. It is submitted that, despite the fact that stand-by letters of credit are currently governed by the UCP and not by the URG, the appropriateness of a reference depends on the extent to which traditional commercial letters of credit will be covered by the uniform law.

67. If a reference were to be included, care should be taken so as not to take a stand, or appear to take a stand, on the controversial issue of whether the UCP may be regarded as commercial usages, constituting a source of law, or whether they become effective only by agreement of the parties.³⁰ One approach may be to provide, along the lines of article 2(e) of the UNCITRAL Model Law on International Commercial Arbitration, that party autonomy includes the freedom of referring to the UCP and to deal in a separate rule with the applicability of usages or customs (see below, paragraphs 69-70).

68. Another approach could be not to mention the UCP expressly but to refer in general terms to uniform rules. That approach would not constitute an express endorsement of the UCP and might not achieve in full the desired fostering of their harmonizing effect. However, it would have the considerable advantage of taking care of the above general concerns about specific references to the UCP and the URG.

2. Reference to usages or customs

69. The Working Group may wish to consider including a reference to usages or customs, whether or not it were to decide to include a specific or general reference to uniform rules. A special reason for doing so may be seen in the controversial issue of the legal nature of the UCP. A more general justification may be seen in the fact that the uniform law covers a central area of commercial law where usages and customs are of particular relevance.

70. If the Working Group were in favour of including a reference to usages or customs, it may wish to use as a model article 9(2) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980): "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to

²⁶A/CN.9/316, paras. 129-130.

²⁷A/CN.9/316, para. 130.

²⁸An Examination of U.C.C. Article 5 (Letters of Credit), A Report of the Task Force on the Study of U.C.C. Article 5, presented to the Letter of Credit Subcommittee of the Uniform Commercial Code Committee of the American Bar Association's Business Law Section and the U.S. Council on International Banking, Inc. (1989; Chairman: Prof. J. E. Byrne), p. 15.

²⁹*Idem*.

³⁰A/CN.9/316, para. 130.

contracts of the type involved in the particular trade concerned". However, apart from the necessary adjustment of the wording to the guarantee context, the reference to the agreement of the parties may have to be modified so as not to qualify the guaranty letter as contractual (see above, paragraphs 21 and 58).

C. Possible limits to party autonomy

1. Limits set in mandatory provisions

71. Party autonomy would be granted or recognized by the uniform law within certain limits that should be clearly described by the law. As a result, the rights and obligations of the parties would follow from the terms of the guaranty letter, subject to the uniform law.

72. In technical terms, the limits would be set in mandatory provisions of the uniform law. As suggested at the twelfth session of the Working Group, careful consideration should be given in respect of each future provision as to whether parties would or would not be permitted to derogate therefrom.³¹

73. In substantive terms, such mandatory provisions may relate, for example, to the establishment and effectiveness of the guaranty letter, to the beneficiary's right to payment and the guarantor's corresponding obligations, to the expiry or termination of the guaranty letter, and to possible court measures. In those individual contexts consideration may be given to the suggestion, made at the twelfth session, that the uniform law could, for example, establish certain standards of accountability and set forth the requirement of good faith. Such standards of accountability could be cast as limits to exemption clauses and, for example, impose liability on guarantors for failure to act in good faith or with reasonable care, as provided for in article 15 URG. As regards the requirement of good faith, its inclusion as a generally limiting rule might be objected to as undermining the independent nature of the guaranty letter and the doctrine of strict compliance.³² However, its inclusion in individual contexts would be less objectionable, and even less so would be its inclusion in a rule of interpretation (see below, paragraph 86).

74. Yet another suggestion as to general limits was to disallow those variations that would undermine the fundamental nature of the undertaking. One concrete proposal in this respect was to exclude non-documentary terms and conditions of payment. As noted in the discussion of the independent undertaking to pay (see above, paragraphs 28-29), the problem of non-documentary conditions of payment does not lend itself to an easy and satisfactory solution. The problem was discussed in depth by the US Task Force on the Study of UCC Article 5 and the following discussion relies in part on the report of that Task Force.³³

2. Exclusion of non-documentary conditions of payment

(a) Scope of problem

75. A non-documentary condition of payment makes the beneficiary's entitlement under an established guaranty letter dependent on the occurrence of an uncertain future event. As indicated earlier (see above, paragraph 28), the guarantor would thus have to undertake a factual determination that may be time-consuming, create difficulties and get him involved in a dispute between other parties. The burden placed on guarantors who might have to determine difficult factual issues in a variety of transactions would adversely affect the swiftness and certainty of payment.

76. An important distinction needs to be drawn in view of the fact that non-documentary conditions of payment often pertain to acts or omissions in the underlying transaction. Where the right to claim payment is conditioned, for example, upon the principal's non-performance and not on a statement by the beneficiary or a third person certifying such default, the guarantor's undertaking would not be independent and would therefore fall outside the scope of the uniform law. For the purposes of the uniform law, unlike the law in the United States where it tends to be outside the authority of a bank to issue an accessory guarantee, raising the spectre of unenforceability,³⁴ the problem of non-documentary conditions of payment is thus reduced to those instances where the guarantor's undertaking is to be judged as independent.

77. Whether a given undertaking is to be judged as independent or as accessory is a preliminary and separate question. As regards an undertaking accompanied by a non-documentary payment condition, the answer is particularly difficult since the underlying policy considerations are in essence very similar to those that underlie the distinction between the documentary or representational level, on which letter of credit law operates, and the level of factual determination with its burdens and difficulties.

78. However, the two demarcation lines are not identical and non-documentary conditions may be found in independent undertakings to pay, whether included by intent or by inadvertence. For example, the amount payable, including its possible reduction, may have to be determined on the basis of a particular act or event. The same may be true in respect of the expiry or termination of a guaranty letter, unless a time-limit is set exclusively by a fixed date or documented event. It might even be true in cases where the non-documentary condition relates to the commercial object of the guaranty letter, for example, where the funds to be drawn under a stand-by letter of credit are to be used and disbursed by the beneficiary as supplement funds to complete a specific construction project.³⁵

79. Before looking at possible solutions to the problem of non-documentary payment conditions, it may be added that certain acts or events do not create the burden of

³¹A/CN.9/316, para. 129.

³²E.g. Harfield, *Identity Crises in Letter of Credit Law*, 24 Arizona L.R. (1982), p. 239, 254.

³³*Supra*, note 28, p. 2-6.

³⁴*Supra*, note 28, p. 5.

³⁵*United States v. Sun Bank of Miami*, 609 F. 2d 832 (5th Cir. 1980).

difficult factual investigations. For example, where a guaranty letter stipulates, as a mode of performance, presentation at the counters of a given branch, the fact of compliance can be readily ascertained. Accordingly, the scope of the problem under discussion may be refined by excluding those acts or events that are readily ascertainable or easily verifiable as falling within the normal purview of the guarantor's clerks.

(b) Possible solutions

80. The Working Group may wish to consider the following three possibilities of dealing with non-documentary conditions in the uniform law, whether in a general provision or in individual contexts (e.g. amount payable and expiry). The first possibility would be to disallow such conditions and to ignore them if they nevertheless occur. That approach would deter their inclusion most effectively and satisfy the expectations of the parties regarding the independence and integrity of the guaranty letter. However, it may be regarded as too radical in that it may frustrate certain intentions of the parties by ignoring part of the text of the guaranty letter.

81. The second possibility would be to recognize and enforce the non-documentary condition, despite the above concern that it may adversely affect the swiftness and certainty of payment. That approach may be favoured on the ground that a guaranty letter should be enforced in accordance with its terms unless there is a compelling reason not to enforce a particular condition. It could also provide an incentive to guarantors not to use such conditions so as to avoid adverse consequences. Yet, it may be viewed as not solving the problem because it does not preclude the appearance of undesirable conditions that require a factual determination.

82. The third possibility would be to treat the non-documentary condition as a documentary condition. That approach may be viewed as a middle path that avoids to a large extent the disadvantages of the first two approaches. While such conversion into a documentary condition may be contrary to the expectation of one or more of the parties, the problem may be expected to disappear over time with the parties' increased familiarity with the relevant rule of conversion in the uniform law. As regards the possible details of such a rule, the uniform law could provide, for example, that a non-documentary payment condition be construed as being satisfied by a statement of the beneficiary certifying the occurrence of the event in question or, possibly at the option of the beneficiary, by a certificate of an appropriate third person.

III. POSSIBLE RULES OF INTERPRETATION

83. The Working Group may wish to consider ways in which the uniform law may provide guidance in the interpretation of the wording of guaranty letters, including any reference to uniform rules, and of certain terms used in the uniform law. As regards the possible definition of terms, e.g. "independent undertaking", "money", "document", "establishment" or "issue" of guaranty letter, "writing" or "signature" or "authentication", "expiry" and "termina-

tion", the need and possible content of such definitions may best be discussed in the context in which they first appear. At that stage, a common understanding should be established so as to ensure the consistent use of each term throughout the uniform law. It is submitted that generally agreed definitions may have a salutary effect beyond the application and interpretation of the uniform law in that they may help to reduce the terminological disparity and confusion currently encountered in law, rules and practice.

84. As regards possible rules of interpretation, a final stand may appropriately be taken only upon agreement on the content of the operative provisions of the uniform law. Nevertheless, a tentative discussion may already here be useful, in particular, as regards possible rules of interpretation that would apply to the whole uniform law and should thus be taken into account when preparing the operative provisions.

85. A first rule of such general nature could be modelled on article 3 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) and, for example, read: "In the interpretation and application of the provisions of this Law regard shall be had to its international [character] [origin] and to the need to promote uniformity". If the Working Group were in favour of such a rule designed to eliminate reliance on traditional national concepts, it may wish to consider the appropriateness of extending the rule to cover also the interpretation and application of uniform rules such as the UCP.

86. As mentioned earlier (see above, paragraph 73), the requirement of good faith might be adopted as another, probably additional, standard of interpretation. If acceptable, it could be combined with the first rule, as done in article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".

87. A somewhat more specific rule geared to the nature of guaranty letters would be to call for the strict construction of the terms and conditions of the guaranty letter. While such a rule might be regarded as an essential operative provision and not as a rule of interpretation in the strict sense, it invites consideration of possible rules of interpretation for those cases where terms and conditions are ambiguous or inconsistent and thus provide obstacles to strict construction.

88. An ambiguity or uncertainty may exist in respect of a given term (e.g. payment upon "showing" of default) or in respect of various terms and conditions that reflect different intentions or are in conflict with one another (e.g. first demand guarantee given as security for the due performance of specified contract). Such doubtful terms may relate to any issue covered in a guaranty letter, including the crucial question as to whether the undertaking is independent and thus covered by the uniform law. As to this latter question, consideration may be given to providing guidance in determining whether an undertaking that refers to an underlying contract or states its commer-

cial purpose would fall under the earlier discussed definition of "independent undertaking" (see above, paragraphs 22-26) or whether it would fall outside the scope of the uniform law as an accessory guarantee or suretyship.

89. As a first aid in interpreting the terms and conditions one might construe them according to the guarantor's intent where the beneficiary knew or could not have been unaware what that intent was, otherwise according to the understanding that a reasonable person of the same kind as the beneficiary would have had in the same circumstances. While the suggested wording is inspired by paragraphs (1) and (2) of article 8 of the United Nations Convention on Contracts for the International Sale of Goods, the following rule found in its paragraph (3) would not seem appropriate in the guaranty letter context, at least not in full: "In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties". The Working Group may wish to consider whether any described circumstances, e.g. established practices or subsequent conduct, or other transactional facts could be used as criteria of interpretation without undermining the principles of independence and of strict construction or literalism.

90. Where an ambiguity or inconsistency remains, a solution offered in the uniform law would be beneficial in view of the current disparity in statutory and case law. For example, where the legal nature of an undertaking is in doubt, it appears that French and Swiss courts would favour the obligor and regard the undertaking as accessory or secondary,³⁶ while courts in the United States tend to favour the beneficiary by construing the undertaking against the drafter (*contra proferentem*) as independent.³⁷

91. The latter rule of interpretation might be considered as a possible uniform solution in view of the fact that the principle is known also in other legal systems, even though it may be limited to general conditions and standard contracts (e.g. Art. 1370 Italian Civil Code). However, the rule poses a dilemma in view of the fact that the terms of the guaranty letter are often drafted not by the guarantor/issuer but by the applicant/principal or by the beneficiary or even by non-parties such as governmental bodies or trade associations. In those cases, it may be unfair or at least unrealistic to tar the guarantor with the label of having drafted the ambiguous terms. If one were therefore to take the rule literally and not equate the guarantor with the drafter, one would permit or even require guarantors as well as courts to delve into the underlying or other relationships and investigate who in fact drafted the ambiguous language at issue. Such investigation, which may itself involve obscure facts and disputed issues, detracts from the role of the guaranty letter

as a swift and certain payment undertaking independent of other transactions.³⁸

92. The latter difficulties may lead to a consideration of the appropriateness of a clear-cut rule that would have the advantage of easy application. If, for the sake of certainty, one were to adopt a rigid solution for all ambiguities, the choice would be to favour either the beneficiary or the guarantor. The choice is obviously a very difficult one in view of the different interests of those two parties and the need of taking into account also the principal's interests. To mention only one consideration in support of favouring the beneficiary, a rule of construing ambiguities against the guarantor may be justified on the ground that the terms of the guaranty letter are often drafted by the guarantor and, where that is not the case, the very rule would probably stimulate guarantors to pay attention and get involved in an effort to avoid ambiguous terms in the guaranty letters they issue.

93. If such a general rule of interpretation against the guarantor or against the beneficiary were to be adopted, the following two rules for special cases of inconsistencies should be given priority over the general rule. Even if no such general rule were to be adopted, they seem worthwhile considering as possible guides in interpretation on their own merits.

94. A first rule could help to overcome any inconsistency between the label or legal characterization of an undertaking and the terms or conditions by according priority to the terms and conditions. For example, where the expression "simple demand guarantee" is used in the heading or in the context of the undertaking ("to pay against beneficiary's simple demand"), it would be disregarded if one of the terms requires, for example, presentation of an engineer's statement certifying default. Another example could be to disregard the label "*cautionnement*" or "*cautionnement solidaire*" in a French guarantee text which otherwise leaves no doubt as to the independent nature of the undertaking.³⁹ The appropriateness of such a rule may be less clear where the terms or conditions that would prevail are found in printed standard clauses or in general conditions or rules referred to in the text.

95. Here, a second rule may be of assistance that would accord priority to special, individual clauses. For example, a clause contained in a rider would prevail over obviously pre-printed standard clauses to which it has been added. The same would apply to a clause in the text of the guaranty letter that is in conflict with a clause found in general conditions referred to in the guaranty letter. The Working Group may wish to consider whether the same should apply in cases where a clause is in conflict with an article of uniform rules referred to in the guaranty letter. Three examples may assist in the consideration of this complex matter.

96. Where a performance guarantee subject to the 1978 ICC Uniform Rules for Contract Guarantees (ICC Publication No. 325) stipulates payment against simple de-

³⁶E.g. *Cour de Cassation*, 2 February 1988, referring to Article 1162 French Civil Code; *Kronauer*, Guarantees and Guarantee-like Indemnities under Swiss Law, 3 Int. Bank. L. (1985), p. 124.

³⁷*Supra*, note 28, p. 16.

³⁸*Supra*, note 28, p. 17.

³⁹Cf. *Wollan/Pomerantz*, The Impact of Loss Commutations on Letters of Credit, 4 Letter of Credit Report (Sep/Oct 1989), p. 8.

mand, the above suggested rule would entitle the beneficiary to payment upon simple demand, despite the fact that article 9 of the Uniform Rules requires "either a court decision or an arbitral award justifying the claim, or the approval of the principal in writing to the claim and the amount to be paid".

97. Where a stand-by letter of credit, issued subject to the UCP, provides for payment within one business day upon presentation of the claim and specified documents, the above rule would give effect to that time-limit irrespective of whether one day were to be regarded as "reasonable time" in the terms of article 16(c) UCP.

98. Where a guaranty letter that incorporates the URG contains a cancellation clause or otherwise indicates that it is revocable, the above rule would uphold the revocable nature of the undertaking, despite the fact that, under article 5 URG, all guarantees and counter-guarantees are irrevocable. It may be added that the effect of article 5 is

not clear in that it may be interpreted either as excluding revocable guarantees from the scope of the URG or as disallowing them. In the first case, one may conclude in the above example that the whole URG would not be applicable; in the latter case, an additional uncertainty arises in that article 5 does not say whether the sanction is, for example, invalidity of the guaranty letter or conversion into an irrevocable undertaking.

99. In the light of these uncertainties, consideration may be given to providing in the uniform law that the undertakings covered by it are irrevocable unless otherwise stated in the guaranty letter. Such a rule would differ from that applicable to stand-by letters of credit governed by the UCP which treat letters of credit that are silent on that point as revocable (article 7(c)). If adopted in the uniform law, it would prevail over the UCP provision. It is submitted that such a rule favouring irrevocability is sound in view of the fact that, from a commercial point of view, a revocable guaranty letter remains a rare exception.