

need for dealing with attachments. A first reason may be seen in the fact that, as noted above (paragraph 90), the issue of fraud or abuse is of primary practical relevance in the context of preliminary proceedings. Yet, a second reason, of equal importance, may be seen in the need to address the intricate relationship between elective dishonour by the guarantor and the involvement of courts in ordering injunctions, as alluded to earlier (e.g. paragraph 28) and addressed by Section 5-114 UCC, paragraph 12.

114. In devising appropriate provisions for the uniform law, the Working Group might wish to take into account the following considerations. While one may hesitate to attempt a unification effort in the field of procedural law,

it is submitted that these hesitations should be overcome with a view towards ensuring certainty and uniformity in the use of guaranty letters as truly international instruments. In order to achieve that goal, provisions are required on such issues as the standard of proof and the admissible means of evidence, the cause of action as a basis for injunctions, the considerations determining the danger of serious harm and the balance of convenience or similar factors, the appropriateness of requiring a security from the principal and of envisaging payment into court of the disputed amount. Moreover, issues of court competence and recognition of injunctions need to be addressed, as may be done in connection with the discussion on conflict of laws and jurisdiction (A/CN.9/WG.II/WP.71).

**2. Independent guarantees and stand-by letters of credit:  
discussion of further issues of a uniform law:  
conflict of laws and jurisdiction: note by the Secretariat  
(A/CN.9/WG.II/WP.71) [Original: English]**

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## INTRODUCTION

1. The present note on conflict of laws and jurisdiction is the fourth in a series of notes discussing possible issues of a uniform law on independent guarantees and stand-by letters of credit. The third note, also before the Working Group at its fifteenth session, discusses fraud and other objections to payment, injunctions and other court measures (A/CN.9/WG.II/WP.70). The issues discussed in the first note, i.e. substantive scope of uniform law, party autonomy and its limits, and rules of interpretation (A/CN.9/WG.II/WP.65), were considered by the Working Group at its thirteenth session (A/CN.9/330). The issues discussed in the second note, i.e. amendment, transfer,

expiry, and obligations of guarantor (A/CN.9/WG.II/WP.68), were considered by the Working Group at its fourteenth session (A/CN.9/342).

2. The Working Group, at its twelfth session (A/CN.9/316, paras. 163-171), noted that questions of applicable law and jurisdiction were likely to arise in the context of international guarantees and commercial letters of credit. While some doubts were expressed, the Working Group was agreed that the uniform law should address the question of the applicable law, in addition to the determination of its own territorial scope of application. The Working Group also considered the basis and scope of dispute settlement clauses. The Working Group was

divided on whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause.

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

4. Pursuant to that suggestion, the present note has been prepared in consultation with the Deputy Secretary-General of the Hague Conference.<sup>1</sup> It is based on the considerations and tentative conclusions of the Working Group at its twelfth session and takes into account the discussions of the Working Group earlier at that session (A/CN.9/316, paras. 111-120) on the relevant Articles of the ICC draft Uniform Rules for Guarantees (URG).

## I. POSSIBLE RULES ON CONFLICT OF LAWS

### A. Distinguished from rule on territorial scope of application

5. At the fourteenth session of the Working Group, it was pointed out during the discussion on draft article 1 of the uniform law that the decision on the territorial scope of application of the uniform law would in some respects depend on whether the uniform law would eventually be adopted in the form of a convention or in the form of a model law. In the latter case the question could be settled by rules on conflict of laws that would probably be included in the model law (A/CN.9/342, para. 16). It may be added that rules on conflict of laws could be included in the uniform law even if it were to be adopted in the form of a convention.

6. Since it is not yet decided whether the uniform law will eventually be adopted in the form of a convention or in the form of a model law, both options need to be kept in mind when considering the appropriateness of including in the uniform law provisions on conflict of laws and, possibly in addition, a rule on the territorial scope of application. In those considerations account should be taken of the difference in purpose and effect between

provisions on conflict of laws and a rule on the territorial scope of application.

7. The effect of a rule on the territorial scope of application, in contrast to provisions on conflict of laws, is limited in two respects. Firstly, the rule covers only those international fact situations that are territorially linked with the respective State, namely the contracting State or States in the case of a convention or the State enacting legislation based on the model law. It is in view of this effect that a rule on the territorial scope of application is less common and appropriate in a model law than in a convention. Secondly, a rule on the territorial scope of application concerns exclusively the provisions of the legal text of which it forms a part.

8. In contrast, a rule on conflict of laws is, firstly, designed for all international fact situations of the relevant subject-matter whether or not they are territorially linked to the State that has adopted that rule. Since those fact situations that are territorially linked to that State are thus included, it would be inappropriate for a model law to contain, in addition to the all-embracing conflict-of-laws rule, a rule on its territorial scope of application. Secondly, a conflict-of-laws rule incorporated in the uniform law would not necessarily be limited to the issues addressed in the uniform law, but would cover all the issues determined by the conflict-of-laws rule itself as the so-called domain or scope of the applicable law.

9. In this connection, it may be recalled that during the review of the then current draft Article 27 of the URG ("Unless otherwise provided in the Guarantee, the applicable law shall be that of the Guarantor's place of business . . .") the treatment of the issue of the applicable law was viewed as incomplete and imprecise, and questions were raised as to which of the relationships involved in a guarantee situation were covered by the Article (A/CN.9/316, paras. 112-113).

### B. Relationships to be covered by conflict-of-laws rules

10. As regards the relationships for which conflict-of-laws rules might be included in the uniform law, it seems clear that the focus should be on the relationship between guarantor and beneficiary. That relationship may exist under a direct guaranty letter (issued at the request of a principal) or under an indirect one (issued upon the instructions of an instructing party acting at the request of a principal). Another guarantor-beneficiary relationship to be covered exists between a counter-guarantor and its beneficiary that itself issues a guaranty letter to the ultimate beneficiary. Conflict-of-laws rules for the guarantor-beneficiary relationship would also apply to a confirming guarantor and to guarantors under multiple or syndicated guaranty letters, whereby consideration should be given to whether an express statement to that effect in the uniform law seems necessary. Whether the conflict-of-laws rules for all those types of guarantors can be incorporated in a single provision depends in large measure on whether, failing a choice of law by the parties, the same connecting factor (e.g. guarantor's place of business) would be appropriate for all those types (see paragraphs 22-35 below).

<sup>1</sup>The Secretariat wishes to express its gratitude to the Deputy Secretary-General who kindly gave his comments and advice despite his reservations about the inclusion of conflict-of-laws rules in the uniform law, at least if it were to be adopted in the form of a model law. In his view, only a separate convention on the law applicable to bank guarantees and stand-by letters of credit could regulate in sufficient detail the many questions concerning, in particular, the modalities and limits of choice-of-law clauses and the clear delimitation of the scope of the applicable law. In view of the almost uniformly accepted connecting factor (i.e. guarantor's place of business), he regards a regulation of the applicable law as needed and appropriate only if one were to aim, as he proposes, at a different connecting factor which would take into account the overall socio-economic situation of the contractual relationship for which the guarantee was given (see para. 35).

11. The Working Group may wish to consider whether the uniform law should include a conflict-of-laws rule for any other relationship such as that between principal and guarantor, principal and instructing party, instructing party and guarantor (apart from their relationship under a counter-guaranty letter), or issuing guarantor and confirming guarantor, or even the underlying relationship between principal and ultimate beneficiary. If any of those relationships (e.g., that between principal and guarantor) were to be dealt with in the substantive provisions of the uniform law, it would seem appropriate to include a conflict-of-laws rule for that relationship as well. As mentioned earlier (paragraph 8 above), the relationships and issues covered by the conflict-of-laws rule need not coincide with those dealt with in the substantive provisions of the uniform law. However, it might be surprising to see in the uniform law a conflict-of-laws rule for a relationship not dealt with in substantive terms, unless there are special reasons for its inclusion. Such reasons might include the experience of serious conflict-of-laws problems in a given relationship, or the idea of harmonizing the conflict-of-laws rule either for two relationships between the same parties (e.g., counter-guaranty letter and indemnity agreement between instructing party and guarantor; see paragraphs 28-29 below) or even for all above-mentioned relationships so as to embrace the overall socio-economic situation of which the guaranty letter forms a part (see paragraph 35 below).

12. After the Working Group has agreed on the relationships to be covered by conflict-of-laws rules in the uniform law, it may wish to discuss and decide on which law should be applicable and then determine the scope of that law (as discussed in paragraphs 36-43 below).

### C. Designation of applicable law

13. As regards the designation of the applicable law, the Working Group was agreed at its twelfth session that the future provisions of the uniform law should be composed of two elements: recognition of party autonomy to choose the applicable law, and determination of the applicable law failing agreement by the parties (A/CN.9/316, para. 164).

14. Those two elements are seemingly contained in the current conflict-of-laws rule of the URDG. Draft Article 27 reads:

"Unless otherwise provided in the Guarantee or Counter-Guarantee, its governing law shall be that of the place of business of the Guarantor or Instructing Party (as the case may be), or if the Guarantor or Instructing Party has more than one place of business, that of the branch which issued the Guarantee or Counter-Guarantee."<sup>2</sup>

<sup>2</sup>Revised text of the Uniform Rules for Demand Guarantees, ICC Document No. 460/470-1/19 BIS and 460/470-10/1 BIS of 8 February 1991; this draft text constitutes the most recent version of the earlier ICC draft Uniform Rules for Guarantees that had been reviewed by the Working Group at its twelfth session (A/CN.9/316).

15. However, due to the contractual character of the URDG, the effect of the rule differs considerably from the effect of a provision in the uniform law, even if the two were formulated in identical terms. Since the URDG are contractual rules, the second element does not provide the final determination of the applicable law but merely a supplementary choice (like one in general conditions or standard forms) failing a specific choice by the individual parties. Another difference is that, again due to the contractual character of the URDG, either choice would be subject to a law that provided limits to party autonomy or contained requirements as to the form or modalities of the parties' agreement. In contrast, the uniform law, due to its statutory character, would provide the final determination and could impose any such limits or requirements.

#### 1. Freedom of parties to choose applicable law

16. The Working Group was agreed at its twelfth session that any future rule on party autonomy should take a stand on whether the law chosen by the parties had to have a connection with the guarantee or letter of credit transaction or whether the freedom of choice was unlimited (A/CN.9/316, para. 166). In favour of requiring such a connection, one might refer to certain national laws of common law or civil law tradition that tend to limit party autonomy by requiring a certain connection (e.g., reasonable relation) to the given contractual relationship.<sup>3</sup>

17. However, the more common and modern attitude is to favour unlimited party autonomy, as evidenced, for example, by the Convention on the Law Applicable to Contractual Obligations (Rome 1980). The first sentence of its Article 3(1) reads: "A contract shall be governed by the law chosen by the parties." This liberal attitude seems particularly convincing in respect of the guaranty letter as an international commercial or financial instrument, irrespective of whether it would be classified as a mutual or unilateral contract or as a specialty of the law merchant. Moreover, as a practical matter, there would seem to be little need for limiting party autonomy since it is highly unlikely that a guarantor would include in the guaranty letter the choice of a law that bore no connection whatsoever to the case.

18. Other points to be considered in preparing an appropriate rule on party autonomy relate to the form and modalities of the choice by the parties. At the twelfth session, attention was drawn to the impact of the concept or nature of the guarantee in that it was difficult to conceive of an agreed choice if the guarantee constituted a unilateral undertaking, even if the guarantor had included the choice-of-law clause as a result of a request or assent by the beneficiary or the principal. It was stated in response that, at least from a practical point of view, the

<sup>3</sup>Pelichet, *Garanties bancaires et conflits de lois*, *Revue de droit des affaires internationales* 1990, 338 (citing the laws of Portugal, Poland and Spain and referring to case law in the United States and other common law countries).

choice-of-law clause in a guarantee should be given effect without the need for investigating the nature and genesis of the guarantee in question (A/CN.9/316, para. 166). It is submitted that, even from a legal point of view, there is no serious obstacle to giving effect to a choice-of-law clause in a guaranty letter even if the guarantor's undertaking is characterized as unilateral. The choice-of-law clause is, after all, but one of the terms of the guaranty letter and usually not the most important one. It should thus be treated in the same way as the entire guaranty letter the establishment of which has been discussed by the Working Group in the context of draft article 7 (A/CN.9/342, paras. 62-67).

19. Another point to be considered is whether only an express choice should be recognized or whether the choice may be implied or deduced from the terms of the guaranty letter or from surrounding circumstances. The 1980 Rome Convention provides in this regard that "the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case" (Article 3(1)). In a similar vein, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods provides in Article 7(1) that "the parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety". Its predecessor of 1955 followed a more limited approach by requiring in Article 2 that the choice must be by "an express clause or result without doubt from the terms of the contract".

20. Yet another approach might be that followed, in the somewhat different context of excluding the application of the Convention, by article 6 of the United Nations Convention on Contracts for the International Sale of Goods ("The parties may exclude the application of this Convention . . ."). While not requiring an express clause, such wording could, however, entail uncertainty in two respects. Unlike the sample provisions cited in paragraph 19, it provides no guidance as to which kinds of implied or otherwise non-express choice would be recognized, and it might even be misinterpreted as requiring an express clause. Particularly the latter difficulty might ensue if one were to follow the approach of draft Article 27 URDG ("Unless otherwise provided in the Guarantee . . .").

21. Whichever approach the Working Group may agree on, consideration might be given to including in the uniform law a statement to the effect that any choice-of-law clause found in another relationship (e.g., between principal and guarantor, principal and beneficiary, principal and instructing party or instructing party and guarantor) has no bearing on the issue of the law applicable to the guarantor-beneficiary relationship. Such a statement, while technically unnecessary, might help to underline the independence of the guaranty letter in the context of the conflict of laws. If such a clarifying statement would be deemed useful, it should not be limited to the choice-of-law by the parties but should embrace the determination of the applicable law according to an objective criterion or connecting factor.

## 2. *Determination of applicable law failing choice by the parties*

22. As regards the possible content of a rule determining the applicable law in the absence of agreement by the parties, it was noted at the twelfth session that the most common solution appeared to be the law of the guarantor's country. It was suggested that the uniform law might follow this approach; however, consideration should be given to whether that solution met the interest of the parties in all circumstances (A/CN.9/316, para. 167).

### (a) *Basic criterion: guarantor's place of business*

23. There are hardly any statutes on conflict of laws that deal specifically with bank guarantees or stand-by letters of credit. The 1982 Yugoslav Statute on Conflict of Laws is one such rare case. Its Article 20(17) reads:

"Failing a choice of the applicable law by the parties and unless the circumstances of the case indicate another law, the independent bank guarantee contract is governed by the law of the country where, at the time when the contract is concluded, the guarantor has its place of business."

24. Another example is Article 117 of Switzerland's 1987 Federal Statute on Private International Law which reads:

"1. If no law has been chosen, the contract is governed by the law of the country which it is most closely connected with.

2. The closest connection is presumed to exist with the country where the party that is to effect the characteristic performance has its habitual residence or, if the contract is entered into in the course of a professional or commercial activity, its place of business.

3. The characteristic performance is, in particular:

...

(e) in guarantee or surety contracts, the performance of the guarantor or surety."

25. In most jurisdictions, the same result obtains from conflict-of-laws rules that apply generally to contracts or obligations. While the criteria or concepts differ (e.g., closest connection, characteristic obligation or performance, professional activity, performance or execution of the contract (*lex solutionis*)), the solution in respect of the guarantor-beneficiary relationship is almost uniformly the same: the law of the guarantor's place of business.<sup>4</sup>

26. However, there appears to be less uniformity in respect of the relationship between counter-guarantor and guarantor and in those cases where a correspondent bank is involved as advising bank or paying agent. Those situations, which might call for exceptions or refinements, will be discussed later (paragraphs 28-35 below).

<sup>4</sup>For more details see Pelichet, *ibid.*, pp. 338-345.

27. Wherever the basic connecting factor is appropriate, it needs to be qualified for those cases where the guarantor has more than one place of business. Article 27 URDG provides in that case that the governing law shall be "that of the branch which issued the Guarantee . . ." (see paragraph 14 above). If that solution would be adopted for the uniform law, the term "branch" should probably not be used since it might be misunderstood, at least in the English language, as excluding the guarantor's headquarters or principal place of business. Instead, reference could be made to "that place of business where the guaranty letter was issued".

(b) *Possible refinement for cases involving more than one bank*

28. The Working Group may wish to consider whether the above basic rule needs to be refined for those cases where, in addition to one guarantor, a second bank is involved either as another guarantor or as an advising bank or as a paying agent. The most common case is an indirect guaranty letter that is counter-guaranteed by the instructing party. Since the guarantor and the counter-guarantor/instructing party usually have their place of business in different States, the two guaranty letters would be governed by different laws that might take a different stand, for example, on the effect of expiry dates or other terms determining the conformity of a call by the ultimate beneficiary. Another source of complications might be seen in the fact that a separate indemnity or reimbursement agreement, while serving essentially the same purpose as the counter-guaranty letter, tends to be governed by the law of the issuer of the indirect guaranty letter as the recipient of the instructions, by virtue of conflict-of-laws rules for contracts or for agency.

29. Suggestions for avoiding such complications by applying a single law, such as that of the issuer of the indirect guaranty letter,<sup>5</sup> have not found wide support, mainly because the application of different laws is viewed as a necessary consequence of the independent nature of the counter-guarantor's undertaking.<sup>6</sup> While the purpose of that undertaking is to indemnify the issuer of the indirect guaranty letter for its payment upon a conforming demand by the ultimate beneficiary, the law determining the conformity of the demand is only of indirect relevance (as a fact) to the decision about the counter-guarantor's payment obligation under the law applicable to the counter-guaranty letter. Where a separate indemnity or reimbursement agreement exists, the issuer of the indirect guaranty letter would anyway have two causes of action against the counter-guarantor/instructing party with often different content such as the amount of reimbursement. It may be added that any banks desirous of applying a single law may achieve that result by appropriate choice-of-law clauses. Finally, the promulgation of the uniform law and its adoption by many States would go a long way towards reducing any remaining concerns.

<sup>5</sup>E.g. Bertrams, *Bank Guarantees in International Trade* (Amsterdam 1990) p. 380; Richter, *Standby Letter of Credit* (Zürich 1990) p. 98.

<sup>6</sup>E.g. Dohm, *Bankgarantien im internationalen Handel* (Bern 1985) p. 145; Kleiner, *Bankgarantie* (4th ed., Zürich 1990) p. 252.

30. Turning now to the less frequent situations where an advising bank in a different State is involved as a confirming guarantor, as an advising or notifying bank or as a paying agent, reference may be made to a recent survey of English cases dealing with conflict-of-laws issues relating to commercial letters of credit, stand-by letters of credit and bank guarantees.<sup>7</sup> The author concluded that there existed a very strong presumption that, except for the relationship between the applicant for the credit and the issuing bank, all aspects of the letter of credit are governed by the law of the place at which the advising bank carries on business; the presumption would not apply if the law of the advising bank was excluded by a choice-of-law clause or by surrounding circumstances.

31. To start with the case where the advising bank confirms the undertaking of the issuing guarantor, the application of different laws might lead to the result that the payment obligation of the issuing guarantor is judged differently from that of the confirming guarantor even if cast in identical terms. Any such difference might be viewed as undesirable in view of the fact that, unlike the case of a counter-guaranty letter, both payment obligations are owed to the same beneficiary. If one were thus to aim at a single law, the above presumption in favour of the law of the advising/confirming guarantor would have the advantage of pointing to the country where payment is most likely to be demanded and of aligning the law of both payment obligations to that most likely governing the inter-bank relationship. However, it may again be pointed out that the application of different laws is a consequence of the independent nature of the undertakings, that banks may avoid that result by appropriate choice-of-law clauses and that the uniform law promises to alleviate remaining concerns.

32. It is submitted that it would be even less appropriate to apply to the undertaking of the issuing guarantor the law of an advising bank that merely advises or notifies the guaranty letter. What might be considered, however, is whether the uniform law should include a separate rule on the law applicable to questions relating to the obligations of an advising bank or at least determine whether those questions fall within the scope of the law applicable to the guaranty letter (see paragraph 38 below).

33. Different considerations may apply in those cases where a second bank is entrusted with receiving and examining a payment demand and paying on behalf of the issuing guarantor. It appears that this situation constituted the essence of those English cases of non-confirming advising banks on which the above presumption in favour of the law of the advising bank was based (in fact, in one of the main cases relied upon in the survey the bank where payment was to be made was not the advising bank<sup>8</sup>). The

<sup>7</sup>Schmitthoff, Conflict of laws issues relating to letters of credit: an English perspective, in: *Current Problems of International Trade Financing* (2nd ed. by Ho/Chan, Singapore 1990) pp. 103-114. In the same publication, a critical appraisal of English court decisions, noting their consistent application of the *lex fori*, is presented by Gopal, English courts and choice of law in irrevocable documentary letters of credit (pp. 115-136).

<sup>8</sup>*Power Curber International Ltd. v. National Bank of Kuwait S.A.K.*, C.A. [1981] 2 Lloyd's Rep. 394.

recurrent reasoning was that the place where the bank must perform its obligation under a letter of credit determines the proper law to be applied to the letter of credit.<sup>9</sup> As was stated in a bank guarantee case concerning an injunction, both from the point of view of the payer and from that of the payee, payment in one country can be a very different matter from payment in another.<sup>10</sup>

34. The Working Group may wish to consider whether any conflict-of-laws consequences should be drawn from the apparent importance of the place of payment which, after all, is the place of performance of the main obligation under the guaranty letter. If so, one possibility would be, in line with the above presumption, to declare the law of the place of payment to be the law applicable to the guaranty letter; this could be done either by providing an exception to the basic rule for those rare cases where payment is to be made in a State other than that of the guarantor's place of business or by adopting, in lieu of the above basic rule, a general rule referring to the place of payment since it coincides with that of the guarantor's place of business (and the issuance of the guaranty letter) in all but the most exceptional cases. Another possibility might be to take the issues relating to payment, including receipt and examination of the demand, out of the scope of the law applicable to the guaranty letter and to subject them to another law, namely that of the State where payment is to be made. However, this possibility may be viewed as undesirable in that it would split the rights and obligations under a guaranty letter into two parts governed by different laws.

35. Finally, it may be noted that the thrust of the above presumption was to have a single law govern all relationships in a letter of credit transaction, except for the relationship between the applicant and the issuing bank. In this connection, mention may be made of an even more embracing suggestion. Based on the view that the application of different laws to a socio-economic situation that undeniably forms a whole is regrettable and a possible source of problems, it has been suggested that the underlying transaction and the various bank guarantees should be governed by one and the same law.<sup>11</sup> A possible basis for determining that law was seen in Article 4(5) of the 1980 Rome Convention according to which the presumption in favour of the place of business of the party who is to effect the characteristic performance shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. It was thus said to be possible to identify a centre of gravity, a socio-economic function of all the contractual relationships which would be the basis for attaching these to a single law.<sup>12</sup> However, even leaving

aside the considerable uncertainty of application of this integral approach, one may here again (see paragraph 29 above) point out that the independent nature of each guarantor's undertaking might be called into question, that parties desirous of applying a single law to the entire transaction network may achieve that result by appropriate choice-of-law clauses, and that the uniform law promises betterment by reducing differences between national laws.

#### D. Scope of applicable law

36. On the assumption that the Working Group will favour a conflict-of-laws rule that is limited to the relationship between guarantor and beneficiary (including relationships between counter-guarantors, confirming guarantors or syndicated guarantors and their respective beneficiaries; see paragraph 10 above), the following discussion may assist the Working Group in determining the scope or domain of the applicable law. While the issues falling within the scope of the applicable law need not coincide with those issues dealt with in the substantive provisions of the uniform law (see paragraph 8 above), one may use the substantive provisions as a basis for considering the kind of issues that are expected to be dealt with and governed by the applicable law as determined by the conflict-of-laws rule.

37. The applicable law should thus cover the establishment and amendment of the guaranty letter, including the questions of form and of time of effectiveness; however, it would not cover questions relating to the capacity of parties or to the authority of individuals to bind or act on behalf of others. The applicable law would determine the meaning and effect of an expiry clause as well as any other term contained in the guaranty letter. It would also decide on the transferability of the beneficiary's rights, including the discharging effect of the guarantor's payment to a transferee.

38. The applicable law should, in particular, answer the questions arising in the most crucial situation in the life of a guaranty letter, that is, when the beneficiary demands payment. It would govern the assessment of the conformity of the demand with the terms and conditions of the guaranty letter and set the standard of the guarantor's duty to examine the demand, including the regularity of any required documents. As regards the standard of examination, consideration might, however, be given to excluding that issue from the scope of the applicable law for those cases where the examination is to take place in a different State, since document checkers may not be prepared to handle documents under laws other than their own (see paragraph 32 above). The idea of excluding standards of examination from the scope of the applicable law and localizing them has inspired, for example, Article 13 of the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods ("In the absence of an express clause to the contrary, the law of the State where inspection of the goods takes place applies to the modalities and procedural requirements for such inspection").

<sup>9</sup>E.g. *Offshore International S.A. v. Banco Central S.A.*, C.A. [1976] 2 Lloyd's Rep. 402.

<sup>10</sup>The "Bhoja Trader", C.A. [1981] 2 Lloyd's Rep. 258 (per L. J. Donaldson).

<sup>11</sup>Pelichet, *ibid.* (note 3) pp. 345-348, referring to an earlier proposal by Stoufflet, *L'ouverture de crédit bancaire en droit international privé*, *Clunet* 1966, 582, and Bonelli, *La Convention de Rome du 19 juin 1980 et la loi applicables aux opérations bancaires*, *Revue de droit des affaires internationales* 1985, p. 389.

<sup>12</sup>Pelichet, *ibid.*, p. 347.

39. It is submitted that the applicable law should also govern the question of whether the guarantor's obligations include the duty to notify the principal of a payment demand, in the absence of a clause to that effect in its contract with the principal.<sup>13</sup> The fact that this question affects the interests of the principal should not be viewed as necessitating its exclusion from the scope of application; after all, the same is true in respect of many other questions relating to the guarantor's obligations, such as examining the conformity of the demand with the terms of the guaranty letter or invoking valid objections to payment.

40. As regards objections to payment, the applicable law would determine the kinds of admissible objections and any limits or requirements for invoking them, although a different law might indirectly become relevant as, for example, in certain cases of manifest abuse or fraud (as discussed in A/CN.9/WG.II/WP.70). It is submitted that the same considerations should apply to the admissibility of a set-off, which is technically not an objection to payment but a modality of paying a recognized claim (as discussed in A/CN.9/WG.II/WP.70). However, certain objections to payment or other requirements affecting payment (e.g., restrictions on currency or foreign exchange or other matters of public policy) might be derived from laws other than the law applicable to the guaranty letter.<sup>14</sup>

41. Finally, the applicable law would govern such questions as whether the beneficiary may claim interest in case of late honour or damages in case of wrongful dishonour of its demand. Conversely, it would govern such questions as whether the guarantor has a right to reclaim from the beneficiary its payment in a case of wrongful honour or an amount erroneously paid in excess of the sum owed. Both sets of questions should, irrespective of whether they will be dealt with in the substantive provisions of the uniform law, fall within the scope of the applicable law as determined by the conflict-of-laws provisions of the uniform law.

42. In the light of the above presentation of issues, the Working Group may wish to consider how the scope of the applicable law should be formulated in the future conflict-of-laws rule of the uniform law. One approach, as used in the Yugoslav Statute and the URDG (see paragraphs 14 and 23 above), would be to speak simply of "the law governing the guaranty letter". However, one might doubt whether such a formula would do justice to the complexity of the matter and provide sufficient guidance to those applying the conflict-of-laws rule of the uniform law.

43. Another approach could be inspired by the conflict-of-laws rule in draft article 18 of the Model Law on International Credit Transfers, which describes its scope with the words "the rights and obligations arising out of

a payment order", with an exception for the question whether the actual sender of the payment order had the authority to bind the purported sender.<sup>15</sup> If one were to follow that approach in the uniform law, one could refer to "the rights and obligations arising out of a guaranty letter", with possible exceptions for issues falling outside the scope of the applicable law (e.g., capacity of parties, authority of agents, or, possibly, examination of documents abroad) and with possible clarifications concerning the inclusion of issues that not everyone might expect to fall within the scope of the applicable law (e.g., establishment and amendment, duty to notify principal, set-off against payment demand).

## II. JURISDICTION

44. The Working Group may wish to take current draft Article 28 of the URDG as a basis for its consideration of issues relating to the settlement of disputes and, in particular, of jurisdiction. Draft Article 28 on jurisdiction reads:

"Unless otherwise provided in the Guarantee or Counter-Guarantee, any dispute between the Guarantor and the Beneficiary relating to the Guarantee or between the Counter-Guarantor and the Guarantor and relating to the Counter-Guarantee shall be settled exclusively by the competent court of the country of the place of business of the Guarantor or Counter-Guarantor (as the case may be) or, if the Guarantor or Counter-Guarantor has more than one place of business, by the competent court of the country of the branch which issued the Guarantee or Counter-Guarantee."<sup>16</sup>

45. As was noted in respect of draft Article 27 URDG (paragraphs 14-15 above), the effect of such a rule differs considerably from the effect of a provision in the uniform law, even if the two were formulated in identical terms. Since the URDG are contractual rules, the reference to the exclusive jurisdiction of the competent court of the guarantor's country constitutes merely a supplementary choice of forum, failing a specific choice by the parties, and either choice would be subject to a procedural law that might establish certain limits or requirements. In

<sup>13</sup>Draft article 18 (A/CN.9/344, annex) reads as follows:

"(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks."

<sup>14</sup>E.g. von Westphalen, *Die Bankgarantie im internationalen Handelsverkehr* (2nd ed., Heidelberg 1990) p. 330.

<sup>15</sup>Von Westphalen, *ibid.* pp. 330-334.

<sup>16</sup>Revised text of the Uniform Rules for Demand Guarantees (note 2).



contrast, any provision on jurisdiction in the uniform law would constitute a legislative determination of jurisdiction or lack of jurisdiction of the courts in the State adopting the uniform law. It may be added that, in this respect, a provision as part of the *lex fori* is more limited in scope than a conflict-of-laws rule with its universal scope (see paragraph 8 above).

#### A. Arbitration or forum clause

46. The proviso in draft Article 28 URDG ("Unless otherwise provided in the Guarantee . . .") does not expressly state whether it embraces only the choice of a court or jurisdiction or, as one may assume, also an arbitration clause. When the Working Group reviewed that proviso in the context of a previous version of the draft Article, a view was expressed that it should be redrafted along the following lines: "Unless arbitration or the competent court is provided for in the Guarantee . . ." (A/CN.9/316, para. 119).

47. It is submitted that the proviso in a rule on jurisdiction should, for the sake of certainty, be formulated along the lines suggested in the Working Group, although arbitration clauses in bank guarantees and stand-by letters of credit appear to be rare, except for syndicated guarantees.<sup>17</sup> While arbitration may not always be appropriate for settling disputes arising under a guaranty letter, in particular as regards urgent decisions and provisional measures of protection, it is up to the parties to make that assessment.

48. As regards the choice of either arbitration or court jurisdiction, the same observations were made, during the twelfth session of the Working Group, as in the context of choice-of-law clauses concerning the uncertain basis of the parties' agreement if the guarantee constituted a unilateral undertaking (A/CN.9/316, para. 169). The response submitted in respect of choice-of-law clauses (paragraph 18 above) should apply here with equal force.

49. What remains to be considered is whether the uniform law, in view of its statutory character, should deal with questions concerning the validity and effect of a choice-of-forum clause, in particular, one that simply refers to the courts of State X or to a specific court located in State X. One may ask, for example, whether such a clause confers exclusive jurisdiction upon the chosen court, irrespective of whether that court would otherwise be competent, or whether it merely confers upon an otherwise not competent court jurisdiction that would concur with that of another court. Another question would be whether the choice-of-forum clause might apply to interim or provisional measures, which may be of special relevance in the context of guaranty letters. It may be noted, in this context, that the 1965 Hague Convention on the Choice of Court provides in Article 6(4) that "every court other than the chosen court or courts shall decline

jurisdiction except . . . for the purpose of provisional or protective measures". Special treatment is accorded to provisional and protective measures also by Article 24 of the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (Brussels 1968), which recognizes for such measures the jurisdiction of the courts of a State under its domestic law even if under the Convention the courts of another State would be competent to decide on the substance of the case in the main proceedings. Yet another question may be whether a court chosen for settling disputes within a given relationship might be competent for proceedings involving a third party as co-defendant or addressee of a provisional measure.

50. One may come to the conclusion that these and similar questions relating to choice-of-forum clauses need not be dealt with in the uniform law, taking into account the basic purpose of the uniform law as well as the fact that it would, where adopted, become part of a legal system expected to provide answers to these questions. In respect of some such questions, the situation may, however, be different when it comes to the statutory determination of court jurisdiction failing a choice by the parties.

#### B. Determination of jurisdiction failing choice by parties

51. At its twelfth session, the Working Group considered whether the uniform law should address the question of court jurisdiction for those cases where the guarantee contained neither an arbitration clause nor a choice-of-forum clause. Under one view, an attempt should be made to agree on an acceptable provision on court jurisdiction. Under another view, the uniform law should not deal with this issue (A/CN.9/316, para. 170). It appears that the divergent views within the Working Group relate to the need or appropriateness of including in the uniform law a rule on jurisdiction at all and not to the particular court jurisdiction, such as the one specified in draft Article 28 URDG.

52. It seems indeed appropriate to confer jurisdiction on the courts of the State where the guarantor has its relevant place of business (in line with the basic connecting factor for the conflict-of-laws rule; see paragraphs 23-27 above). As reported in an extensive survey of case law in many countries, "beneficiaries and second issuing banks have invariably brought proceedings for payment in the (first) bank's domicile, which is universally recognized as a proper forum".<sup>18</sup> Jurisdiction of the courts in the State where the guarantor has its place of business is in line with the fundamental principle expressed, for example, in Article 2 of the 1968 Brussels Convention (" . . . persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State"). It would often be justified on the additional basis of the place of performance of the obligation in question (recognized, for

<sup>17</sup>E.g., Dohm, *ibid.* (note 6) pp. 143, 146.

<sup>18</sup>Bertrams, *ibid.* (note 5) p. 373.



example, as special jurisdiction in Article 5(1) of the 1968 Brussels Convention).

53. However, national rules of jurisdiction based on the same principles may in less frequent cases point to the courts of the beneficiary's country, for example, for proceedings brought by the guarantor against the beneficiary or when the place of payment is in the beneficiary's country. Consideration may thus be given to aiming in the uniform law at exclusive jurisdiction in the guarantor's country, since otherwise the courts in the beneficiary's country would in such cases retain jurisdiction. That aim could be furthered by a rule according to which the courts of any State other than that of the guarantor shall decline jurisdiction unless the parties have chosen its courts. If one were to combine that rule with the positive rule designed for the guarantor's country, a provision in the uniform law to become part of the *lex fori* of the adopting State might be formulated as follows:

"(1) The courts of [this] [a Contracting] State shall exercise jurisdiction only if:

(a) the guarantor has its place of business in the territory of that State, unless the guaranty letter provides for arbitration or for the exclusive jurisdiction of the courts of another State;

or

(b) the guaranty letter confers jurisdiction upon the courts of that State.

(2) The jurisdiction conferred upon the courts of [this] [a Contracting] State by the provisions of paragraph (1) of this article shall be exclusive, unless the guaranty letter contains a non-exclusive choice-of-forum clause."

54. The Working Group may wish to consider refining this provision with a view to clarifying the scope of the court jurisdiction. The provision might, for example, determine whether the jurisdiction conferred by it covers all disputes between the guarantor and the beneficiary (as, e.g., provided for in draft Article 28 URDG) or whether certain types of disputes (e.g. tort claims) would be excluded. As mentioned in the context of choice-of-forum clauses (paragraph 49 above), it might address the question whether the jurisdiction conferred by it extends to provisional measures, and whether jurisdiction would be exercised over a third party, for example, a counter-guarantor or confirming guarantor as co-defendant or as addressee of an injunction.

55. Even if the uniform law would answer all these questions in favour of a wide scope of jurisdiction, the resulting scope of jurisdiction would still be limited and constitute but a segment of the realm of possible court involvement in guaranty letter transactions. The main limiting factor is that the rule on jurisdiction covers only the relationship between guarantor and beneficiary (including that between counter-guarantor and guarantor) and thus leaves out the person most likely to initiate

proceedings, namely the principal (or possibly the instructing party).

### C. Possible expansion of rule on jurisdiction to cover principal

56. The Working Group may thus wish to consider broadening the rule on jurisdiction so as to cover at least certain proceedings involving the principal (e.g., injunction enjoining payment by the guarantor or counter-guarantor, restraining orders against the beneficiary or the guarantor under an indirect guaranty letter). Such broadening would increase the usefulness of the rule. However, it would be a complex and difficult task in view of the variety of possible fact situations and the various relationships involved. To mention only a few questions that might have to be addressed, one may ask, for example, whether the courts of the State where an indirect guaranty letter is issued should accept jurisdiction for an application by a foreign principal to enjoin payment; whether the courts of the State of the counter-guarantor may grant such an injunction against the foreign guarantor (second issuing bank); or whether any courts outside the beneficiary's country would be competent to issue restraining orders against the beneficiary and, in particular, whether the courts of the State of the issuer of a direct guaranty letter have jurisdiction over the foreign beneficiary as a co-defendant in proceedings brought by the principal.

57. On such questions of considerable practical importance, national laws and court decisions do not always provide certain, let alone uniform, answers. While that may create difficulties in finding acceptable solutions for the uniform law, it may be taken as supporting the desirability and usefulness of expanding the rule on jurisdiction to proceedings involving the principal. One may point to the fact that, within that expanded scope, the issue of jurisdiction over foreigners is certain to arise since the issuer of an international guaranty letter tends to have its place of business in a State other than that of the principal (in the case of an indirect guaranty letter) or of the beneficiary (in the case of a direct guaranty letter); if the rule on jurisdiction would be limited to the relationship between guarantor and beneficiary, it would be less needed in view of the fact that both parties are often in the same country.

58. Finally, it is submitted that the decision should to a considerable extent depend on whether the uniform law would include provisions on the procedural requirements of injunctions or other court measures (as discussed in A/CN.9/WG.II/WP.70). If such provisions were to be included, an expanded rule on jurisdiction covering the most likely applicant for court measures would complement these provisions and further the same goal, namely to provide a certain and uniform procedural framework. This, in turn, would complement, from the procedural angle, the substantive provisions of the uniform law in their aim of ensuring a level playing field for all parties involved in guaranty letter transactions.