

III. FUTURE WORK

113. The Working Group noted that its twenty-first session would take place in New York, from 14 to 25 February 1994, at which time the Working Group would

consider the remainder of the revised articles in A/CN.9/WG.II/WP.80. It was also noted that, subject to the agreement of the Commission, the twenty-second session would take place from 19 to 30 September 1994 at Vienna.

B. Working paper submitted to the Working Group on International Contract Practices at the twentieth session: further revision of draft Convention: articles 1 to 17: note by the Secretariat (A/CN.9/WG.II/WP.80) [Original: English]

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INTRODUCTION

1. The Working Group on International Contract Practices examined at its sixteenth session draft articles 1-13 and at its seventeenth session draft articles 14-27 of a uniform law on international guaranty letters prepared by the Secretariat (A/CN.9/WG.II/WP.73 and Add. 1). The deliberations and conclusions of the Working Group at those sessions are set forth in the reports of the Working Group on those two

sessions (A/CN.9/358 and 361). On the basis of those conclusions, a revised draft of articles 1-27 was presented to the Working Group at its eighteenth session (A/CN.9/WG.II/WP.76 and Add.1). At that session, the Working Group examined articles 1-8 (A/CN.9/372) and at the nineteenth session articles 9-17 (A/CN.9/374) and requested the Secretariat to prepare a further revised version of articles 1-17 taking into account the deliberations and decisions at the eighteenth and nineteenth sessions.

2. The present note contains that further revision of articles 1-17. Additions and modifications to the text are indicated by italics. It may be noted that, in line with the recent instructions relating to the stricter control and limitation of United Nations documentation, no explanatory remarks have been added to the draft provisions. General reference is therefore made to the relevant portions of the Working Group reports (A/CN.9/372 and 374); additional explanations will be provided orally during the session of the Working Group.

DRAFT CONVENTION
ON INDEPENDENT GUARANTEES
AND STAND-BY LETTERS OF CREDIT

Chapter I. Scope of application

Article 1. Scope of application

This Convention applies to international guaranty letters [issued in a Contracting State], [unless otherwise stipulated therein], and to any other guaranty letter that provides that it is subject to this Convention.

Article 2. Guaranty letter

(1) A guaranty letter is an independent undertaking given by a bank or other institution or person ("guarantor" or "issuer")

Variant A: , as a demand guarantee or as a stand-by letter of credit,

Variant B: , whether designated as demand guarantee or stand-by letter of credit or an equivalent undertaking [typically given to secure the beneficiary against the non-fulfilment of certain obligations by the principal or applicant or against another contingency] [that provides for payment upon simple demand or upon presentation of documents stating that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal or applicant or another person],

Variant C: , excluding commercial letters of credit, insurance contracts and negotiable instruments,

to pay to the beneficiary a certain or determinable amount in conformity with the terms and any documentary conditions of the undertaking [when so demanded in the manner prescribed in the undertaking].

(2) The undertaking may be given

(a) at the request or on the instruction of the customer ("principal" or "applicant") of the guarantor or issuer ("direct guaranty letter");

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal" or "applicant") of that instructing party ("indirect guaranty letter"); or

(c) on behalf of the guarantor or issuer itself ("guaranty letter on guarantor's or issuer's own behalf").

(3) Payment may be stipulated in the guaranty letter to be made in any form, including payment:

(a) in a specified currency or unit of account;

(b) by acceptance of a bill of exchange for a specified amount;

(c) on a deferred basis; or

(d) by supply of a specified item of value.

(4) The guaranty letter may stipulate that the guarantor or issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor's or issuer's [performance] [obligation] to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any term or condition not appearing in the undertaking, or [even if stipulated as a condition of payment in the guaranty letter,] to any future, uncertain act or event other than presentation of stipulated documents.

Article 4. Internationality of guaranty letter

A guaranty letter is international if the places, as specified in the guaranty letter, of any two of the following [persons] are in different States: guarantor or issuer, beneficiary, principal or applicant, instructing party, adviser, confirmer. If the guaranty letter lists more than one place of a given person, the relevant place is that which has the closest relationship to the guaranty letter.

Chapter II. Interpretation

Article 5. Principles of interpretation

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 guarantee and stand-by letter of credit practice.

Article 6. Rules of interpretation and definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "guaranty letter" includes "counter-guaranty letter" and "confirmation of guaranty letter", and "guarantor or issuer" includes "counter-guarantor" and "confirmer";

[(b) any reference to the guaranty letter or the undertaking of the guarantor or issuer, or to its terms and conditions, is to the text as originally established in accordance with article 7 or, if later amended in accordance with article 8, to the text in its last amended version;]

(c) [deleted]

(d) "counter-guaranty letter" means a guaranty letter given to the *guarantor* or issuer of another guaranty letter by its instructing party or to the *guarantor* of another guarantee or the issuer of another letter of credit and providing for payment upon demand and presentation of any specified document stating that payment under that other guaranty letter or undertaking has been demanded from, or made by, the beneficiary of the "counter-guaranty letter";

(e) "counter-guarantor" means the *guarantor* or issuer of a counter-guaranty letter;

(f) "confirmation" of a guaranty letter means an independent undertaking added to that of the *guarantor* or issuer, and authorized by the *guarantor* or issuer, providing the beneficiary with the option of demanding payment and, unless expressly stipulated otherwise, presenting any required documents to the confirmer instead of to the *guarantor* or issuer;

(g) "confirmer" means the person confirming a guaranty letter;

(h) "document" means a communication made in a form that provides a complete record thereof, and authenticated if so, and in the form, required by the applicable law or by the terms and conditions of the guaranty letter [; where a requirement of authentication does not specify the form, any method of authentication may be used that is commercially reasonable in the circumstances];

(i) "issuance" of a guaranty letter means that the guaranty letter leaves the sphere of control of the *guarantor* or issuer;

(j) ["effectiveness"] ["validity"] of a guaranty letter means that it [entitles] [is open for] the beneficiary to make a conforming demand for payment.

Chapter III. Effectiveness of guaranty letter

Article 7. Establishment of guaranty letter

(1) A guaranty letter may be established in any form which preserves a complete record of the text of the guaranty letter and provides authentication of its source by generally accepted means or by a procedure agreed upon by the *guarantor* or issuer and the beneficiary.

(2) A guaranty letter becomes effective and, unless it expressly states that it is revocable, irrevocable when it is issued, provided that it does not state a different time of effectiveness.

Article 8. Amendment

(1) A guaranty letter may be amended in the form agreed upon by the *guarantor* or issuer and the beneficiary or, failing such agreement, in any form referred to in paragraph (1) of article 7.

(2) Unless otherwise agreed by the *guarantor* or issuer and the beneficiary, an amendment.

Variant A: consented to by the beneficiary [or consisting solely of an extension of the validity period of the guaranty letter] becomes effective when it is issued by the *guarantor* or issuer.

Variant B: becomes effective when it is issued by the *guarantor* or issuer, if previously authorized by the beneficiary [or consisting solely of an extension of the validity period of the guaranty letter]; any other amendment becomes effective when the *guarantor* or issuer receives a notice of acceptance by the beneficiary.

(3) An amendment of a guaranty letter has no effect on the rights and obligations of the principal or applicant (or an instructing party) or of a confirmer of the guaranty letter unless such person consents to the amendment.

Article 9. Transfer of beneficiary's right to demand payment

(1) The beneficiary's right to demand payment under the guaranty letter may be transferred only if so, and to the extent and in the manner, authorized in the guaranty letter.

(2) If a guaranty letter is designated as "transferable" [; or contains words of similar import,] without specifying whether or not the consent of the *guarantor* or issuer [or another authorized person] is required for the actual transfer, neither the *guarantor* or issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

Article 9 bis. Assignment of proceeds

(1) Unless otherwise agreed by the *guarantor* or issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the guaranty letter.

(2) If the *guarantor* or issuer, or another person obliged to effect payment, has received a notice of the beneficiary in a form referred to in paragraph (1) of article 7 of the beneficiary's irrevocable assignment, payment to the assignee discharges the obligor, to the extent of its payment, from its liability under the guaranty letter.

(3) The issuer or other person effecting payment may

Variant X: exercise any right of set-off with a claim against the beneficiary within the limits of article 20.

Variant Y: invoke towards the assignee any right of set-off referred to in article 20.

Article 10. Cessation of effectiveness of guaranty letter

(1) The guaranty letter ceases to be effective when:

(a) the *guarantor* or issuer receives from the beneficiary a statement of release from liability in a form referred to in paragraph (1) of article 7;

(b) the beneficiary and the *guarantor* or issuer agree on the termination of the guaranty letter [in a form referred to in paragraph (1) of article 7];

(c) *the amount available under the guaranty letter is paid, unless the guaranty letter provides for its automatic renewal or for an automatic increase of the amount available or otherwise provides for continuing effectiveness; or*

(d) *the validity period of the guaranty letter expires in accordance with the provisions of article 11.*

[(1 bis) Cessation of the effectiveness of the guaranty letter terminates the right of the beneficiary to demand payment under the guaranty letter, but does not affect other rights or obligations of the beneficiary or other parties created prior to the cessation of effectiveness of the guaranty letter.]

(2) *Variant A:* The provisions of paragraph (1) of this article apply irrespective of whether any document embodying the guaranty letter is returned to the *guarantor or issuer, [or irrespective of whether any procedure functionally equivalent to the return of the document is followed in the case of the issuance of the guaranty letter in non-paper form,]* and the retention of any such document by the beneficiary does not preserve any rights of the beneficiary under the guaranty letter, unless the guaranty letter stipulates, *or the guarantor or issuer and the beneficiary agree elsewhere, that the guaranty letter does not cease to be effective without the return of the document embodying it.*

Variant B: *Notwithstanding paragraph (1), the guaranty letter may stipulate, or the guarantor or issuer and the beneficiary may agree elsewhere, that the return of the document embodying the guaranty letter to the guarantor or issuer, [or a procedure functionally equivalent to the return of the document in the case of the issuance of the guaranty letter in non-paper form,] either alone or in conjunction with one of the events referred to in [subparagraphs (a) and (b) of] paragraph (1), is required for the cessation of the effectiveness of the guaranty letter; any such stipulation or agreement has no effect beyond the validity period of the guaranty letter according to article 11.*

Article 11. Expiry

The validity period of the guaranty letter expires:

(a) *at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter, provided that, if the expiry date is not a business day at the place of the guarantor or issuer, or of another person or at another place stipulated in the guaranty letter for presentation of the demand for payment, expiry occurs on the first business day which follows;*

(b) *if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor or issuer receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter or, if no such document is specified, of a certification by the beneficiary of the occurrence of the event;*

(c) *Variant A:* *if the guaranty letter does not contain a provision on the time of expiry, or if a stated expiry event has not yet been established by presentation of the required document, when five years have elapsed from the date at which the guaranty letter had become effective.*

Variant B: *if the guaranty letter states neither an expiry date nor an expiry event, or if a stated expiry event has not yet been established by presentation of the required document, five years after the establishment of the guaranty letter, unless the guaranty letter is issued in the form of a demand guarantee and contains an express stipulation of indefinite validity.*

Chapter IV. Rights, obligations and defences

Article 12. Determination of rights and obligations

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

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

Article 13. Liability of guarantor or issuer

(1) In discharging its obligations [under the guaranty letter and this Convention], the *guarantor or issuer* shall act in good faith and exercise reasonable care *as determined with due regard to* good guarantee or stand-by letter of credit practice.

(2) A *guarantor or issuer* may not be exempted from liability for its failure to act in good faith or for any grossly negligent conduct.

Article 14. Demand

Any demand for payment under the guaranty letter shall be made in a form referred to in paragraph (1) of article 7 and in conformity with the terms and conditions of the guaranty letter. In particular, any certification or other document required by the guaranty letter shall be presented, within the time of effectiveness of the guaranty letter, to the *guarantor or issuer* at the place where the guaranty letter was issued, unless another person or another place has been stipulated in the guaranty letter. If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that *the demand is not in bad faith or otherwise improper.*

[Article 15. Notice of demand

Without delaying the fulfilment of its duties under articles 16 and 17, the *guarantor or issuer* shall promptly upon receipt of the demand give notice thereof to the principal *or applicant* or, where applicable, its instructing party, unless otherwise agreed between the *guarantor or issuer* and the principal *or applicant*. Failure to give notice does not deprive the *guarantor or issuer* from its right to reimburse-

ment but entitles the principal or applicant to recover from the guarantor or issuer damages for any loss suffered as a consequence of that failure.]

*Article 16. Examination of demand
and accompanying documents*

(1) The guarantor or issuer shall examine [the demand and accompanying] documents in accordance with the standard of conduct referred to in paragraph (1) of article 13. In determining whether documents are in facial conformity with the terms and conditions of the guaranty letter, and are consistent with one another, the guarantor or issuer shall have due regard to the applicable standard of international guarantee or stand-by letter of credit practice.

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

Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the guarantor or issuer shall pay against a demand made in accordance with the provisions of article 14. Any payment against a demand that is not in accordance with the provisions of article 14 does not affect the rights and obligations of the principal or applicant.

[(1 bis) Payment shall be made promptly, unless the guaranty letter stipulates payment on a deferred basis, in which case the beneficiary shall promptly acknowledge the conformity of the demand and then make payment at the stipulated time.]

[(1 ter) The guarantor or issuer may not avail itself of the insolvency of the principal or applicant, or of any other circumstance that might affect the ability or obligation of the principal or applicant to reimburse or to otherwise compensate the guarantor or issuer, as a ground for not complying with paragraph (1).]

(2) The guarantor or issuer shall not make payment if it is shown facts that make the demand manifestly and clearly improper according to article 19.

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

[(4) Variant A: If the guarantor or issuer fails to comply with the provisions of article 16(2) or of paragraph (3) of this article, it is precluded from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions.

Variant B: The guarantor or issuer may not invoke any discrepancy in the documents not discovered within the time referred to in article 16(2) or not notified to the beneficiary as required by paragraph (3) of this article; if the guarantor or issuer in any other respect fails to comply with those provisions, the beneficiary may recover from the guarantor or issuer damages for loss suffered as a consequence of that failure.

Variant C: Where the guarantor or issuer has failed to discover or notify a certain discrepancy in the documents as required by article 16(2) and paragraph (3) of this article and if compliance with those provisions would have enabled the beneficiary to make a conforming demand before the expiry of the guaranty letter, the guarantor or issuer shall pay the amount of the guaranty letter, plus interest for delay, upon a conforming demand made at the latest [five days] [promptly] after having been notified of that discrepancy.

Variant D: If the guarantor or issuer fails to comply with paragraphs (1) and (1 bis) of this article or to discover or to notify any discrepancy in the documents as required by article 16(2) and paragraph (3) of this article, it is liable to the beneficiary for loss suffered as a direct result of such failure.]

**C. Report of the Working Group on International Contract Practices on the work
of its twenty-first session**

(New York, 14-25 February 1994) (A/CN.9/391) [Original: English]

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