

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

INTERIM REPORT OF THE WORKING GROUP

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Halifax, NS

August 22-26, 2010

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Interim Report of the Working Group

August 2010

Background

[1] At its Annual Meeting in 2005, the ULCC decided to review the advisability of preparing a uniform implementing act for the 1995 *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (hereinafter referred to as the “Convention”).

[2] In March 2006, the Conference considered a report by Steven Jeffery, Partner, Blaney McMurtry LLP and Marc Lacoursière, Professor, Université Laval, which examined the Canadian framework for the law of independent guarantees and stand-by letters of credit, both from a common law and civil law perspective. The report recommended that the Convention be adopted in Canada.

[3] There is no existing legislation in Canada that specifically deals with letters of credit or bank guarantees. The law applicable to letters of credit in the common law provinces and federally has been developed by the courts. On the civil law side, there have been some attempt to associate independent bank guarantees with certain nominate contracts. Others have done so with innominate contractual instruments. However, the nature of the bank guarantee is still not determined in Quebec civil law.

ULCC Working Group on Independent Guarantees and Stand-by Letters of Credit

[4] A Working Group was established following the 2006 Annual Meeting. Its mandate is to prepare, in accordance with the directions of the Conference, a uniform act and commentaries to implement the Convention, to report on the desirability of any other legislative recommendations and to work in co-operation with the Uniform Law Commission in the United States (ULC) and the Mexican Uniform Law Centre, should those organizations be agreeable.

[5] The Working Group is composed of the following members: Mireille LeBlanc (International Private Law Section, Justice Canada), Professor Marc Lacoursière (Université Laval), Steven Jeffery (Blaney McMurtry LLP), Michel Deschamps (McCarthy, Tétrault LLP), Professor Benjamin Geva (Osgoode Hall Law School) and Clark Dalton (Projects Coordinator for the ULCC).

UNIFORM LAW CONFERENCE OF CANADA

Activities

Draft Uniform Act

[6] At its Annual Meeting in 2007, 2008 and 2009, the Conference was updated on the Working Group's progress. It considered a draft uniform act and encouraged the Working Group to continue its work in developing both a draft uniform act implementing the Convention and specific rules to address domestic transactions and all aspects of international ones.

[7] The Working Group finalized its text of the draft uniform act in May 2009. Part 1 establishes domestic rules, basically codifying existing common law and civil law rules that are consistent with the Convention. It addresses domestic transactions in the area of independent guarantees and letters of credit as well as aspects of international transactions not covered by the Convention. It will eventually include commentaries. Part 2 implements the Convention in Canada and includes commentaries.

Work with the US Uniform Law Commission (ULC)

[8] Members of the Working Group participated, with colleagues from the ULC, in conference calls organized by the Committee for Implementation of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. Discussions focused on implementation issues in the United States and Canada.

[9] Over the last year, the ULC completed its work to develop an implementation strategy based on implementation through State law, adoption of federal implementing legislation and using the text of Article 5 of the Uniform Commercial Code as a basis, rather than the text of the Convention. The US is now proceeding with implementing federal legislation. The draft is being reviewed by various federal agencies with a view to enactment.

Consultations

[10] Various stakeholders were consulted between February 2008 and May 2009 (in-person consultation sessions and/or consultations through letters and teleconferences). The Canadian Bar Association has expressed its support for the project. Other key stakeholders (major Canadian banks, the Canadian Bankers Association, beneficiaries of letters of credit through Canada's largest trade and industry association: Canadian Manufacturers and Exporters) haven't provided any comments to the Working Group regarding the project.

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Legislative Drafting

[11] Although the legislative drafting process officially began in the spring of 2008, progress has been slow because the legislative drafters responsible have had to deal with Parliamentary matters. The drafting will continue, subject to the drafters' availability. A final draft uniform act is expected by spring 2011.

Next Steps

[12] The Working Group expects that a final draft uniform act and commentaries will be presented at the 2011 ULCC Annual Meeting. The Working Group would prepare a final report on the project for consideration at the meeting.