

Uniform Independent Guarantees and Letters of Credit

SHORT TITLE

Short title

1. *Uniform Independent Guarantees and Letters of Credit.*

HER MAJESTY

Binding on Her Majesty

2. This Act is binding on Her Majesty in right of Canada / (*name of province or territory*).

PART 1

INDEPENDENT GUARANTEES AND LETTERS OF CREDIT

DEFINITIONS AND INTERPRETATION

Definitions

3. (1) The following definitions apply in this Part.

“adviser”

« *informateur* »

“adviser” means a person who, upon request, notifies or requests another to notify the beneficiary that an undertaking has been issued, confirmed or amended.

“applicant”

« *donneur d'ordre* »

“applicant” means a person, including a customer of the issuer, at whose request an undertaking is issued.

“beneficiary”

« *bénéficiaire* »

“beneficiary” means a person in whose favour an undertaking is issued and includes a person to whom the right to make presentation of documents has been transferred in accordance with the terms of the undertaking.

“confirmation”

« *confirmation* »

“confirmation” means a commitment mentioned in section 12.

“confirmer”

« *confirmateur* »

“confirmer” means a nominated person who adds a confirmation to an undertaking.

“counter-guarantee”

« *contre-garantie* »

“counter-guarantee” means an undertaking mentioned in subsection 11.

“document”

« *document* »

“document” means a draft, demand, document of title, investment security, certificate, invoice, or other communication, statement, or representation that preserves a complete record thereof.

“draft”

« *traite* »

“draft” means a bill of exchange under section 16 of the *Bills of Exchange*.

“good faith”

« *bonne foi* »

“good faith” means honesty in fact in the conduct of the transaction concerned.

“honour”
« *paiement* »

“honour” means the performance of an issuer’s commitment provided for in an undertaking in accordance with subsections 22(2) and (3).

“issuer”
« *émetteur* »

“issuer” means a bank or another person who issues an undertaking that is not for personal, family or household purposes.

“nominated person”
« *personne désignée* »

“nominated person” means a person authorized by the issuer under section 14(1).

“presentation”
« *présentation* »

“presentation” with respect to one or more documents, means their delivery to an issuer or a nominated person in order to demand that the undertaking be honoured.

“presenter”
« *présentateur* »

“presenter” means a person who makes a presentation of documents as or on behalf of a beneficiary or a nominated person.

“proceeds” means the cash, cheque, accepted draft, or the specified item of value to be paid or delivered to honour the undertaking by the issuer or any nominated person under the undertaking, but does not include (a) the right of the beneficiary to make presentation and (b) documents presented by the beneficiary.

“undertaking”
« *engagement* »

“undertaking” means a commitment mentioned in subsection 6(1).

Interpretation of this Part

(2) In the interpretation of this Part, consideration will be given to the need to promote uniformity in the international practice of undertakings regardless of what they are called.

Deeming provision — issuer

(3) A reference in this Act to an issuer is deemed to include a reference to a confirmer except in paragraphs 5(1), 12, 13(1) and (2) and 17(2)(b).

Deeming provision — undertaking

(4) A reference in this Act to an undertaking is deemed to include a reference to a confirmation except in paragraphs 12, 13(1) and (2) and 17(2)(b).

APPLICATION

Application to domestic undertakings

4. (1) This Part applies to all undertakings.

Exception

(2) Despite subsection (1), with respect to any undertaking to which Part 2 applies, if there is any conflict between any provision of this Part and any provision of Part 2, the provision of Part 2 prevails.

Exception

5. (1) With the exception of this subsection and subsections 3(1) and (2), subsection 6(4), subsections 7(1) and (2), subsections 8(1) and (2), paragraph 10(1)(b)(ii), subsections 16(1) and (3) and subsection 29(4), and subject to subsection 5(2), the rights, obligations and rules set out in this Part may be varied by agreement or by a provision stated or incorporated by reference in an undertaking.

Exclusion of liability

(2) A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this Act.

UNDERTAKING

Undertaking

6. (1) An undertaking is an independent commitment — known in international practice as a stand-by letter of credit, an independent guarantee, or a letter of credit — that, in conformity with the terms and conditions of the undertaking, is given by an issuer to a beneficiary to honour a demand upon presentation of documents.

Issuer and beneficiary

(2) The rights and obligations of the issuer and the beneficiary are provided for in this Part and in the undertaking and include any rules, customs and practices referred to in the undertaking.

International rules and usages

(3) In interpreting the provisions of an undertaking or in settling any questions that are not dealt with in the undertaking or this Part, regard shall be had to generally accepted international practices relating to undertakings.

Independence of issuer's obligation

(4) The obligation of the issuer to honour the undertaking is independent of:

- (a) the existence, validity or performance of any underlying transaction between the applicant and the beneficiary whether or not it is referred to in the undertaking;
- (b) any defence or claim arising from the breach of any underlying transaction between the applicant and the beneficiary, whether or not the issuer has knowledge of the breach;
- (c) any term or condition that does not appear in the undertaking;
- (d) any future act or event except the presentation of documents or another such act or event within the sphere of the issuer's operations;
- (e) the issuer's right or ability to obtain reimbursement from the applicant, whether or not a reimbursement is referred to in the undertaking; and
- (f) the existence of any other undertaking.

Issuing of undertaking

7. (1) An issuer may issue an undertaking:

- (a) at the request of the applicant; or
- (b) on its own behalf in the ordinary course of business.

When issuer also beneficiary

(2) The undertaking may stipulate that the issuer is the beneficiary when the issuer acts on behalf of another person or in another capacity.

Time and place of issuance of undertaking

(3) An undertaking is issued when and where it is sent or otherwise transmitted to the person requested to advise it or to the beneficiary by the issuer.

Irrevocable

(4) Once it is issued, an undertaking is irrevocable unless it stipulates that it is revocable.

Form

8. (1) An undertaking, an amendment, an advice, a transfer of the beneficiary's right to make presentation of documents, a notice or a termination may be issued or given in any form that preserves a complete record of the text thereof and provides authentication of its source by generally accepted means or by a procedure agreed upon by the issuer and the beneficiary.

Consideration

(2) Consideration is not required in order to issue, amend, transfer or cancel an undertaking, advice or confirmation.

Amendment of undertaking

9. (1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing stipulation in the undertaking, in a form referred to in subsection 8(1).

Prior authorization

(2) The amendment of an undertaking that has been previously authorized by the beneficiary becomes effective upon its issuance.

Notice of acceptance

(3) If an amendment has not received prior authorization of the beneficiary, it only takes effect when the issuer receives notice of the acceptance of the amendment by the beneficiary in a form referred to in Subsection 8(1).

Applicant and confirmer

(4) An amendment of an undertaking has no effect on the rights and obligations of:

- (a) an applicant; or
- (b) a confirmer

unless the amendment has been consented to by such person.

Expiry of undertaking

10. (1) Subject to subsection (2), the validity period of the undertaking expires:

- (a) on the expiry date or the last day of the period stipulated in the undertaking;
- (b) if the undertaking does not indicate an expiry date or a stipulated period:
 - (i) if the expiry of the undertaking depends on the occurrence of an act or event that is not within the issuer's sphere of operations, then on the earliest of
 - (A) when the issuer is advised that the act or event has occurred by presentation of documents specified for that purpose or, if no document is specified, of a certification by the beneficiary of the occurrence of the act or event, or
 - (B) six years from the date on which the undertaking was issued;
 - (ii) in any other case, six years from the date on which the undertaking was made.

Deemed work day

(2) If, by the application of subsection (1), the undertaking expires on a day that is not a business day at the specified location where presentation of documents is to be made, the undertaking is deemed to expire on the next business day.

COUNTER-GUARANTEE

Counter-guarantee

11. A counter-guarantee is an undertaking:

Terms and conditions – Giving of an undertaking

(1) given to the issuer of another undertaking at the request of the applicant;

Terms and conditions – Honour of an undertaking

(2) providing for honour upon presentation of documents, in conformity with the terms and conditions of the undertaking; and

Terms and conditions – Honour of the other undertaking

- (3) indicating — or from which is to be inferred — that honour of that other undertaking has been demanded from, or made by, the issuer of that other undertaking.

CONFIRMATION

Confirmation

12. A confirmation is a commitment by a person authorized by the issuer that is added to an undertaking and that gives the beneficiary the right to demand that the undertaking be honoured by the confirmer instead of the issuer, upon presentation of documents, in conformity with the terms and conditions of the undertaking, without prejudice to the beneficiary's right to make presentation of documents to the issuer.

Confirmer bound by terms and conditions of confirmation

13. (1) A confirmer is directly obligated on the undertaking and has the rights and obligations of an issuer in conformity with the terms and conditions of the confirmation.

Rights and obligations of confirmer

(2) The confirmer also has rights against and obligations to the issuer as if the issuer were an applicant and the confirmer had issued the undertaking at the request and for the account of the issuer.

NOMINATED PERSON

Nominated person

14. (1) The issuer may authorize any person to accept or negotiate a draft, to pay or to otherwise give value under the terms of an undertaking. If the issuer is bound to reimburse that person, that person is a nominated person.

Not agent or mandatary

(2) A person is not an agent by reason only of being a nominated person.

Nominated person not confirmer

(3) A nominated person who is not a confirmer is not obligated to honour an undertaking upon presentation of documents.

ADVISER

Adviser

15. (1) An adviser is not obligated to honour a presentation of documents.

Obligation of adviser

(2) An adviser is bound to the issuer and the beneficiary to accurately advise the terms of an undertaking, confirmation, amendment or advice received by that adviser and is bound to the beneficiary to check the apparent authenticity of the request to advise.

Inaccurate advice

(3) Even if the advice is inaccurate, an undertaking, confirmation, or amendment is enforceable as issued.

Transferee

(4) A person who notifies a transferee beneficiary of the terms of an undertaking, confirmation, amendment or advice has the rights and obligations of an adviser under subsections (1) to (3).

STANDARD OF CONDUCT

Standard of conduct

16. (1) In discharging its obligations under the undertaking and this Part, the issuer, the nominated person or the adviser shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of undertakings.

Non-compliance of standard of care

(2) Even if the issuer or the nominated person does not comply with subsection (1) when honouring an undertaking, the rights of the applicant are not affected.

Negligence or fault

(3) The issuer, the nominated person or the adviser may not be exempted from liability as a result of any gross negligence or, in Quebec, gross fault.

PRESENTATION AND EXAMINATION

Form of presentation

17. (1) A presentation of documents shall be made in a form referred to in subsection 8(1) and in accordance with the terms and conditions of the undertaking.

Place of presentation

(2) Unless the undertaking stipulates otherwise, presentation of documents shall be made

- (a) to the issuer at the place where the undertaking was issued;
- (b) to the confirmer at the place where the confirmation was made; or
- (c) to any other nominated person at the place specified by that person.

Good faith presumed

18. In making a presentation of documents, the beneficiary is deemed to warrant to the issuer, any other person to whom presentation is made and the applicant that the presentation is made in good faith and that no exception to honour under subsection 24(1) is present.

Transfer of right to make a presentation

19. (1) The beneficiary's right to make a presentation of documents may be transferred only if, and to the extent and in the manner, authorized in the undertaking.

Consent not required

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the issuer or another authorized person is required, neither the issuer nor any other authorized person is obliged to effect the transfer of the beneficiary's right to make a presentation of documents except to the extent and in the manner expressly consented to by it.

Cessation of right to make presentation of documents

20. (1) The right of the beneficiary to make a presentation of documents ceases when:

- (a) the issuer has received a statement by the beneficiary of release from liability in a form referred to in subsection 8(1);
- (b) the beneficiary and the issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in subsection 8(1);
- (c) the amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking; or
- (d) the validity period of the undertaking expires in accordance with the provisions of section 10.

Condition for cessation of right to make presentation

(2) The undertaking may stipulate, or the issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to make presentation of documents, either alone or in conjunction with one of the events referred to in subsections (1)(a) or (b).

Exception

(3) Despite subsection (2), in no case shall retention of any such document by the beneficiary, after the right to make presentation of documents ceases in accordance with subsection (1)(c) or (d), preserve any rights of the beneficiary under the undertaking.

Examination of presented documents

21. (1) The issuer shall examine, in accordance with the standards of conduct referred to in section 16, the documents presented by the beneficiary in order to determine whether there is any discrepancy. A “discrepancy” exists unless (i) each of the documents is, on its face, in strict compliance with the terms and conditions of the undertaking, and (ii) the documents are consistent with one another.

Delay

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed to by the issuer and the beneficiary, within a reasonable time, but not more than seven business days, following the day of receipt of the documents presented to demand honour, the issuer shall:

- (a) examine the documents;
- (b) decide whether or not to honour the undertaking; and
- (c) if the decision is not to honour the undertaking, issue a notice to that effect to the beneficiary, which notice shall set out the discrepancies.

Sending of notice

(3) The notice referred to in subsection (2)(c) shall, unless otherwise stipulated in the undertaking or elsewhere agreed to by the issuer and the beneficiary, indicate the reason for the decision not to honour the undertaking and be made by any electronic means or, if that is not possible, by other expeditious means.

Failure to give notice

(4) The issuer is precluded from asserting, as a basis for not honouring the undertaking, any discrepancy with respect to which the issuer has not given timely notice under subsection (2)(c)

Exception

(5) Failure to give notice under subsection (2)(c) does not preclude the issuer from refusing to honour the undertaking on the basis of fraud, probability of incurring criminal liability or expiration of the undertaking before presentation.

Non-documentary conditions

(6) If an undertaking contains non-documentary conditions, an issuer shall disregard the non-documentary conditions and treat them as if they were not stated.

HONOUR

Honour upon presentation of documents

22. (1) The issuer shall honour the undertaking against a presentation of documents made in accordance with the provisions of section 17.

Delay in honouring

(2) Honour shall be effected promptly, unless the undertaking stipulates honour on a deferred basis, in which case honour shall be effected at the stipulated time.

Form of honour

(3) The issuer honours an undertaking by performing the issuer’s commitment as stipulated in the undertaking, which may include:

- (a) the payment of a sum of money;
- (b) the acceptance of a draft and its payment at maturity;
- (c) the incurrence of a deferred obligation of payment and its payment at maturity; or
- (d) the provision of a specified item of value.

Stipulation of payments

(4) The payments referred to in paragraphs (3)(a) to (c) must be stipulated in a certain or determinable amount in a specified currency or unit of account.

Consequences of honouring of undertaking

(5) Once the issuer has honoured the undertaking, the issuer:

(a) is entitled to be reimbursed by the applicant on demand;

(b) takes the documents free of claims by the beneficiary or presenter;

(c) is precluded from any recourse with respect to any draft that formed part of the presentation of documents; and

(d) is precluded from making any claim for restitution of money paid or other value given by mistake, to the extent the mistake concerns discrepancies as set out in subsection 21(1) which are apparent on the face of the presentation of documents.

Set-off

23. Unless otherwise stipulated in the undertaking or elsewhere agreed to by the issuer and the beneficiary, the issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with respect to any claim assigned to it by the applicant.

Exceptions to obligation to honour

24. (1) The issuer, acting in good faith, has a right, as against the beneficiary, to not honour the undertaking when

(a) it is manifest and clear that:

(i) any document included in the presentation is not genuine or has been falsified; or

(ii) honour of the presentation would facilitate the commission of a fraud by the beneficiary that would have a material effect on the issuer or applicant; or

(b) there is a high probability that honour will result in criminal liability by the issuer.

Presumption

(2) Without restricting the circumstances covered by subsection (1)(a)(ii), fraud that would have a material effect on the issuer or applicant is deemed to have occurred if it is manifest and clear that either honour is not due on the basis asserted in the presentation, or judging by the type and purpose of the undertaking, the presentation has no conceivable basis.

No conceivable basis

(3) For the purposes of subsection (2), the following are types of situations in which a presentation has no conceivable basis:

(a) the contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) the underlying obligation of the applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) for the purposes of paragraph 24(3)(b), “declared invalid” means:

(i) declared to be void,

- (ii) declared to be invalid by reason of fraud, or
- (iii) declared to be invalid by reason that payment will result in criminal liability by the issuer;

(d) the underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(e) fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;

(f) in the case of a presentation under a counter-guarantee, the beneficiary of the counter-guarantee has honoured in bad faith as an issuer of the undertaking to which the counter-guarantee relates.

Provisional court measures

(4) In the circumstances set out in paragraph (1)(a) or (b), the applicant is entitled to apply to a competent court for provisional measures in accordance with section 25.

PROVISIONAL COURT MEASURES

Provisional court measures

25. (1) When, on an application by the applicant, a court finds that there is a strong prima facie case that with regard to a presentation made, or expected to be made, one of the circumstances referred to in paragraph 24(1)(a) or (b) is present, the court may issue a provisional order:

(a) that the issuer not honour the undertaking, including an order that the issuer hold the amount of the undertaking, or

(b) when the issuer has honoured the undertaking, that the proceeds paid to the beneficiary be seized, frozen or sequestered if the absence of such an order would likely cause serious harm to the applicant.

Security may be required

(2) When the court issues the provisional order under subsection (1), it may require that the applicant provide security that the court deems appropriate.

Reasons

(3) The court may not issue a provisional order of the kind referred to in subsection (1) based on any objection to honour of the undertaking other than grounds specified in paragraphs 24(1)(a) and (b).

MISCELLANEOUS

Assignment of proceeds and discharge

Beneficiary — assignment of proceeds

26. (1) The beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

Discharge

(2) If the issuer or another person obliged under an undertaking has received a notice originating from the beneficiary, in a form referred to in subsection 8(1), of the beneficiary's irrevocable assignment of proceeds, the honour of the undertaking to the assignee discharges the obligor, to the extent of the honour from its liability under the undertaking.

Successor of beneficiary

Rights of successor

27. (1) The successor of a beneficiary has all of the rights of the beneficiary under the undertaking, whether or not it discloses its status as a successor, and may exercise all of those rights either in its own name or the name of the beneficiary.

Disclosed successor

(2) An issuer shall recognize a disclosed successor under subsection (1) of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of the beneficiary's right to make presentation of documents by operation of law under the standard practice of financial institutions that regularly issue undertakings.

No obligation to verify

(3) Subject to subsection (2), there is no obligation on the issuer to determine whether a purported successor of the beneficiary is the genuine successor of the beneficiary or whether the signature of the purported successor is genuine or authorized.

Beneficiary name change

Beneficiary's name change

28. A beneficiary whose name is changed after the issuance of an undertaking has the same rights and obligations as a successor of a beneficiary under section 27.

Subrogation

Subrogation of issuer

29. (1) An issuer that honours a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

Applicant

(2) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (1).

Nominated person

(3) A nominated person who honours a draft or demand presented under an undertaking is subrogated to the rights of:

- (a) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;
- (b) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and
- (c) the applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.

Implementation of subrogation rights

(4) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (1) and (2) do not arise until the issuer honours the undertaking and the rights in subsection (3) do not arise until the nominated person honours the undertaking.

Present or future rights

(5) Until the rights of subrogation stated in subsections (1), (2) and (3) arise, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defence, or excuse.

CHOICE OF APPLICABLE LAW

Laws governing undertaking chosen by issuer and the beneficiary

30. (1) The undertaking is governed by the laws of the jurisdiction specified in the undertaking or agreed to elsewhere by the issuer and the beneficiary.

Laws governing liability of nominated person or adviser

(2) The liability of a nominated person or an adviser is governed by the laws of the jurisdiction agreed to by the affected parties.

When applicable laws not specified

(3) When the laws that are to apply have not been specified or agreed to in accordance with subsection (1) or (2), the undertaking or the liability of a nominated person or an adviser, as the case may be, is governed:

- (a) other than as provided in paragraph (b), by the law of the jurisdiction where the undertaking is to be honoured; or
- (b) where the undertaking specifies that any bank or other person may act as a nominated person, by the law of the jurisdiction where the undertaking was issued.

Credit freely available

(4) For the purpose of paragraph (3)(b), an undertaking providing for credit freely available, unrestricted for negotiation, or freely available by negotiation, or using any other language to that or substantially similar effect, is deemed to specify that any bank or other person may act as a nominated person.

PART 2

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

Definitions

31. (1) The following definitions apply in this Part.

“Convention”
« *convention* »

“Convention” means the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* set out in the Schedule.

“declaration”
« *déclaration* »

“declaration” means a declaration made by Canada under Article 25 of the Convention.

Interpretation of the Convention

(2) In interpreting the Convention, recourse may be had to

- (a) the *Explanatory note by the UNCITRAL secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit*; and
- (b) the *Report of the United Nations Commission on International Trade Law on its twenty-eight session, 2–26 May, 1995, General Assembly Official Records, Fiftieth session, Supplement No. 17.*

Derogation

32. (1) With the exception of this section and Articles 2(2) and (4), 3, 5, 6, 7(2), 12(c) and 14(1) and (2) of the Convention, subject to subsection 32(2), the rights, obligations and rules set out in the Convention may be varied by agreement or by a provision stated or incorporated by reference in an undertaking.

Excusing liability

(2) A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by the Convention.

Force of law — Canada

33. (1) The Convention has the force of law during the period that it is, by its terms, in force in respect of Canada.

Force of law — provinces

34. (1) To the extent that it applies (to/in/in the) (*name of province or territory*) as described in a declaration, the Convention has the force of law in (*name of province or territory*) during the period that it is, by its terms, in force in respect of Canada

Exception

(2) Subsection (1) does not apply to Articles [x] to [z] of the Convention.

Publication

35. The (*name of Minister*) shall publish in (*name of the publication*) a notice of the following dates:

(a) the day on which the Convention comes into force; and

(b) the day on which a declaration or withdrawal of such a declaration takes effect (in/in the) (*name of province or territory*).

COMING INTO FORCE

Coming into force

36. This Act comes into force on (*date*).

Coming into force

[**36.** The provisions of this Act come into force on a day or days to be fixed by (*name of instrument*).]

SCHEDULE

(*Section 31*)

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

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

CHAPTER I. SCOPE OF APPLICATION

ARTICLE 1

SCOPE OF APPLICATION

1. This Convention applies to an international undertaking referred to in article 2:

(a) If the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) If the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

2. This Convention applies also to an international letter of credit not falling within article 2 if it expressly states that it is subject to this Convention.

3. The provisions of articles 21 and 22 apply to international undertakings referred to in article 2 independently of paragraph 1 of this article.

ARTICLE 2

UNDERTAKING

1. For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an Independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person (“guarantor/issuer”) to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, 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/applicant or another person.

2. The undertaking may be given:

- (a) At the request or on the instruction of the customer (“principal/applicant”) of the guarantor/issuer;
- (b) On the instruction of another bank, institution or person (“instructing party”) that acts at the request of the customer (“principal/applicant”) of that instructing party; or
- (c) On behalf of the guarantor/issuer itself.

3. Payment may be stipulated in the undertaking to be made in any form, including:

- (a) Payment in a specified currency or unit of account;
- (b) Acceptance of a bill of exchange (draft);
- (c) Payment on a deferred basis;
- (d) Supply of a specified item of value.

4. The undertaking may stipulate that the guarantor/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/issuer’s obligation to the beneficiary is not:

- (a) Dependent upon the existence or validity of any underlying transaction, or upon any other undertaking (including stand-by letters of credit or independent guarantees to which confirmations or counterguarantees relate); or
- (b) Subject to any term or condition not appearing in the undertaking, or to any future, uncertain or event except presentation of documents or another such or event within a guarantor/issuer’s sphere of operations.

ARTICLE 4

INTERNATIONALITY OF UNDERTAKING

1. An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

2. For the purposes of the preceding paragraph:

- (a) If the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;
- (b) If the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

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 the international practice of independent guarantees and stand-by letters of credit.

ARTICLE 6 DEFINITIONS

For the purposes of this Convention:

- (a) "Undertaking" includes "counter-guarantee" and "confirmation of an undertaking";
- (b) "Guarantor/issuer" includes "counter-guarantor" and "confirmer";
- (c) "Counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;
- (d) "Counter-guarantor" means the person issuing a counter-guarantee;
- (e) "Confirmation" of an undertaking means an undertaking added to that of the guarantor/ issuer, and authorized by the guarantor/Issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/ issuer, upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;
- (f) "Confirmer" means the person adding a confirmation to an undertaking;
- (g) "Document" means a communication made in a form that provides a complete record thereof.

CHAPTER III. FORM AND CONTENT OF UNDERTAKING

ARTICLE 7

ISSUANCE, FORM AND IRREVOCABILITY OF UNDERTAKING

1. Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.
2. An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.
3. From the time of issuance of an undertaking, a demand for payment may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.
4. An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

ARTICLE 8

AMENDMENT

1. An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of article 7.
2. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, an undertaking is amended upon issuance of the amendment if the amendment has previously been authorized by the beneficiary.
3. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the guarantor/issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in paragraph 2 of article 7.
4. An amendment of an undertaking has no effect on the rights and obligations of the principal/applicant (or an instructing party) or of a confirmer of the undertaking 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 may be transferred only if authorized in the undertaking, and only to the extent and in the manner authorized in the undertaking.

2. If an undertaking is designated as transferable without specifying whether or not the consent of the guarantor/issuer or another authorized person is required for the actual transfer, neither the guarantor/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 10

ASSIGNMENT OF RECORDS

1. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

2. If the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, in a form referred to in paragraph 2 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 undertaking.

ARTICLE 11

CESSATION OF RIGHT TO DEMAND PAYMENT

1. The right of the beneficiary to demand payment under the undertaking ceases when:

(a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph 2 of article 7;

(b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph 2 of article 7;

(c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;

(d) The validity period of the undertaking expires in accordance with the provisions of article 12.

2. The undertaking may stipulate, or the guarantor/issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the guarantor/issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subparagraphs (a) and (b) of paragraph 1 of this article. However, in no case shall retention of any such document by the beneficiary after the right to demand payment ceases in accordance with subparagraph (c) or (d) of paragraph 1 of this article preserve any rights of the beneficiary under the undertaking.

ARTICLE 12

EXPIRY

The validity period of the undertaking 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 undertaking, provided that, if the expiry date is not a business day at the place of business of the guarantor/issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation of the demand for payment, expiry occurs on the first business day which follows;

(b) If expiry depends according to the undertaking on the occurrence of an or event not within the guarantor/issuer's sphere of operations, when the guarantor/issuer is advised that the or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event;

(c) If the undertaking does not state an expiry date, or if the act or event on which expiry is stated to depend has not yet been established by presentation of the required document and an expiry date has not been stated in addition, when six years have elapsed from the date of issuance of the undertaking.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

ARTICLE 13

DETERMINATION OF RIGHTS AND OBLIGATIONS

1. The rights and obligations of the guarantor/issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Convention.

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

ARTICLE 14

STANDARD OF CONDUCT AND LIABILITY OF GUARANTOR/ISSUER

1. In discharging its obligations under the undertaking and this Convention, the guarantor/issuer shall in act good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees or stand-by letters of credit.

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

ARTICLE 15

DEMAND

1. Any demand for payment under the undertaking shall be made in a form referred to in paragraph 2 of article 7 and in conformity with the terms and conditions of the undertaking.

2. Unless otherwise stipulated in the undertaking, the demand and any certification or other document required by the undertaking shall be presented, within the time that a demand for payment may be made, to the guarantor/issuer at the place where the undertaking was issued.

3. The beneficiary, when demanding payment, is deemed to certify that the demand is not in bad faith and that none of the elements referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19 are present.

ARTICLE 16

EXAMINATION OF DEMAND AND ACCOMPANYING DOCUMENTS

1. The guarantor/issuer shall examine the demand and any accompanying documents in accordance with the standard of conduct referred to in paragraph 1 of article 14. In determining whether documents are in facial conformity with the terms and conditions of the undertaking, and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit.

2. Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer shall have reasonable time, but not more than seven business days following the day of receipt of the demand and any accompanying documents, in which to:

- (a) Examine the demand and any accompanying documents;
- (b) Decide whether or not to pay;
- (c) If the decision is not to pay, issue notice thereof to the beneficiary.

The notice referred to in subparagraph (c) above shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor / issuer and the beneficiary, be made by teletransmission or, if that is not possible, by other expeditious means and indicate the reason for the decision not to pay.

ARTICLE 17

PAYMENT

1. Subject to article 19, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 15. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

2. Any payment against a demand that is not in accordance with the provisions of article 15 does not prejudice the rights of the principal / applicant.

ARTICLE 18

SET-OFF

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with respect to any claim assigned to it by the principal/applicant or the instructing party.

ARTICLE 19

EXCEPTION TO PAYMENT OBLIGATION

1. If it is manifest and clear that:

- (a) Any document is not genuine or has been falsified;
- (b) No payment is due on the basis asserted in the demand and the supporting documents; or
- (c) Judging by the type and purpose of the undertaking, the demand has no conceivable basis,

the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.

2. For the purposes of subparagraph (c) of paragraph 1 of this article, the following are types of situations in which a demand has no conceivable basis:

- (a) The contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;
- (b) The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;
- (c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;
- (d) Fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;
- (e) In the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates.

3. In the circumstances set out in subparagraphs (a), (b) and (c) of paragraph 1 of this article, the principal /applicant is entitled to provisional court measures in accordance with article 20.

CHAPTER V. PROVISIONAL COURT MEASURES

ARTICLE 20

PROVISIONAL COURT MEASURES

1. Where, on an application by the principal/applicant or the Instructing party, it is shown that there is a high probability that, with regard to a demand made, or expected to be made, by the beneficiary, one of the circumstances referred in subparagraphs (a), (b) and (c) of paragraph 1 of article 19 is present, the court, on the basis of immediately available strong evidence, may:

- (a) Issue a provisional order to the effect that the beneficiary does not receive payment, including an order that the guarantor/issuer hold the amount of the undertaking, or
- (b) Issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether In the absence of such an order the principal/applicant would be likely to suffer serious harm.

2. The court, when issuing a provisional order referred to in paragraph 1 of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

3. The court may not issue a provisional order of the kind referred to in paragraph 1 of this article based on any objection to payment other than those referred to in subparagraphs (a), (b) and (c) of paragraph 1 of article 19, or use of the undertaking for a criminal purpose.

CHAPTER VI. CONFLICT OF LAWS

ARTICLE 21

CHOICE OF APPLICABLE LAW

The undertaking is governed by the law the choice of which is:

- (a) Stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or
- (b) Agreed elsewhere by the guarantor/issuer and the beneficiary.

ARTICLE 22

DETERMINATION OF APPLICABLE LAW

Failing a choice of law in accordance with article 21, the undertaking is governed by the law of the State where the guarantor / issuer has that place of business at which the undertaking was issued.

CHAPTER VII. FINAL CLAUSES

ARTICLE 23

DEPOSITARY

The Secretary-General of the United Nations is the depositary of this Convention.

ARTICLE 24

SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL, ACCESSION

1. This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until 11 December 1997.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

ARTICLE 25

APPLICATION TO TERRITORIAL UNITS

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may, at any time substitute another declaration for its earlier declaration.
2. These declarations are to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the place of business of the guarantor/issuer or of the beneficiary is located in a territorial unit to which the Convention does not extend, this place of business is considered not to be in a Contracting State.
4. If a State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

ARTICLE 26

EFFECT OF DECLARATION

1. Declarations made under article 25 at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
4. Any State which makes a declaration under article 25 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

ARTICLE 27

RESERVATIONS

No reservations may be made to this Convention.

ARTICLE 28

ENTRY INTO FORCE

1. This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.
2. For each State which becomes a Contracting State to this Convention, after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
3. This Convention applies only to undertakings issued on or after the date when the Convention enters into force in respect of the Contracting State referred to in subparagraph (a) or the Contracting State referred to in subparagraph (b) of paragraph 1 of article 1.

ARTICLE 29

DENUNCIATION

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at New York, this eleventh day of December one thousand nine hundred and ninety-five, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Convention.