

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

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

REPORT OF THE WORKING GROUP

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Victoria, British Columbia

August 11-15, 2013

Report of the Working Group

August 2013

I. 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 legal framework on independent guarantees and stand-by letters of credit, both from a common law and civil law perspectives. 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 and bank guarantees. The law applicable to letters of credit in the common law provinces and in Québec has been developed by the courts and doctrinal comments. Given the Supreme Court decision in *Bank of Nova Scotia v. Angelica Whitewear Ltd*¹, letters of credit in Québec law are subject to interpretation principles consistent with international standards and with those of the common law provinces.

II. Mandate

[4] The mandate of the Working Group is to prepare a uniform act to implement the Convention and to provide uniform legislation on independent guarantees and letters of credit more generally (i.e., covering legal relationships not falling under the scope of the Convention) as well as Commentaries.

[5] The Working Group is composed of the following members: Professor Marc Lacoursière (Université Laval), Steven Jeffery (Blaney McMurtry LLP), Michel Deschamps (McCarthy, Tétrault LLP) and Professor Benjamin Geva (Osgoode Hall Law School).

¹ [1987] 1 S.C.R. 59

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III. International developments and need for domestic reform

[6] The United States signed the Convention in 1997 and is currently working towards ratification. The rules of the Convention are generally consistent with those found in Article 5 of the Uniform Commercial Code of the United States. Because of this congruence, the adoption of the Convention by the United States will cause little change in U.S. law. Otherwise, only eight states are party to the Convention. The Convention entered into force on January 1, 2000 after the fifth instrument of ratification was deposited.

[7] Letters of credit, independent guarantees and stand-by letters of credit are commonly used in domestic and international transactions although in most countries, including Canada, they do not benefit from specific legislative support. They are treated as contracts and rules of construction of contracts apply to them. Parties often incorporate by reference specific terms and conditions such as the Uniform Customs and Practice on Documentary Credits of the International Chamber of Commerce, thereby greatly facilitating their interpretation and application. The introduction of a specific legal regime for international independent guarantees and stand-by letters of credit through the Convention begged for the adoption of similar rules domestically. The Working Group felt that doing otherwise would potentially raise questions and lead to uncertainty when the instrument falls outside the scope of the Convention. In addition, proposing domestic rules harmonised to international legal standards can only reflect positively on Canada.

IV. Uniform Letters of Credit and Independent Guarantees Act

[8] The Working Group is currently working on the Uniform Letters of Credit and Independent Guarantees Act (hereinafter referred to as “Uniform Act”), which incorporates comments received during the annual meetings of the Conference in the period from 2007 to 2011 and through consultations with stakeholders and U.S. experts. In line with its mandate, the Uniform Act implements the Convention and provides rules applicable to domestic transactions and international letters of credit not covered by the Convention.

[9] More specifically, the Uniform Act introduces domestic rules on letters of credit and independent guarantees codifying existing common law and civil law rules. These rules are also applicable to situations covered by the Convention, unless inconsistent with

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the provisions of the Convention.² The Uniform Act covers “commercial” letters of credit (i.e., letters of credit other than stand-by letters of credit).³ The adoption of domestic rules consistent with the Convention and Canadian common law and civil law principles will provide legislative support for commercial letters of credit governed by Canadian law.

[10] Part II of the Act brings into force the Convention. While Part I applies to all independent guarantees and letters of credit, Part II ensures that in case of conflict between the substantive provisions of the Uniform Act and those of the Convention, the provisions of the Convention prevail. This “prevailing clause” ensures Canada’s implementation of the Convention is fully consistent with the requirements of the Convention.

V. Next steps: Consultation and Preparation of Commentaries

[11] The Working Group submits the attached draft Uniform Act for consideration by the Conference. The Working Group is currently considering outstanding issues prior to finalising the Uniform Act and preparing the Commentaries. Legislative drafters and editors have already identified a large number of drafting concerns which need to be addressed prior to presenting a final version to the Conference. The attached text is therefore presented by the Working Group on the understanding that it needs to be revised in order to meet legislative standards.

² Section 5(1)

³ Section 6(1)