



## CHAPTER 8

### GUARANTEES OR BONDS

#### ✿ *Objectives*

**After studying this chapter you should be able to understand:**

**8.1 The role of guarantees and bonds in international trade**

**8.2 Bonds: definition, parties involved, elements, and types**

**8.3 On demand bonds**

***8.3.1 An overview of the Uniform Rules for Demand Guarantees***

## **8.1 The role of guarantees and bonds in international trade**

A guarantor issues a guarantee or bond, usually a bank or an insurance company, on behalf of an *exporter*. It is a guarantee to the buyer that the exporter will fulfil his contractual obligations. If these obligations are not fulfilled, the guarantor undertakes to pay a sum of money to the buyer in compensation. This sum of money can be anything from 1% to 100% of the contract value.

If a bank issues the bond, then the exporter is asked to sign a counter indemnity, which authorises the bank to debit his account with any money, paid out under the bond.

Bonds are usually required in connection with overseas contracts, or with the supply of capital goods and services.

Middle Eastern countries commonly require bonds, but nowadays, many other countries also require them. Most international aid agencies, such as the World Bank or the European Development Fund, and most government purchasing organisations in the developing world, plus major purchasers of goods and services in the North Sea Oil sector now require bonds from sellers.

In the international trade, it is usually difficult for the buyer of goods and services to estimate the professional and financial abilities of the supplier. So, the buyer is interested to request a guarantee, which proves that the seller is able to follow his commitments.

On the other hand, the bank guarantee is mainly limited to covering the right of non-payment, provided that the payment system based on invoices is used.

## **8.2 Bonds: definition, parties involved, elements, and types**

**The bank guarantee** represents an irrevocable engagement assumed by a bank to pay a cash amount in the case that a third party does not respect his duties to deliver certain goods, perform certain services or follow payment. The guarantee represents itself an engagement, independent of the contract signed between the creditor and the debtor.

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From the moment when the bank guarantee is issued, the bank is responsible to pay at first request to the beneficiary of the bank guarantee, if the conditions stipulated if the guarantee is correct.

Usually, the guarantees are subject to the national law of the issuing bank.

There are two methods to issue a bank guarantee, as follows:

- *direct*, by using the bank from the seller's country to issue the guarantee in favour of the foreign buyer;
- *indirect*, the bank from the seller's country empowers a foreign bank to issue a guarantee in favour of the buyer.

The wording of a guarantee is very important. It needs to be *clear, precise, and simple*. Accordingly, all guarantees should include the following parties involved:

- a) the Principal who is requiring the issue of the guarantee, bond.
- b) the Beneficiary is the person in the favour of whom the payment shall be made.
- c) the Guarantor is a bank. It issues the guarantee, bond.

Important inclusions as far as the UK bank is concerned are:

- a) name and address of beneficiary;
- b) clear and unambiguous wording;
- c) definite expiry date;
- d) maximum bank liability stated;
- e) guarantee for monetary payment only, i.e. no goods involved;
- f) time period for submission of claims under guarantee;
- g) procedure for claims;
- h) drawn subject to English law, where possible.

In Romania the guarantee or bond is called a letter of guarantee. Taking into consideration the important role of the bonds in the international trade, the International Chamber of Commerce from Paris and other international bodies wanted to standardise the practices in the bond field.

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Thus, in 1978, the International Chamber of Commerce from Paris elaborated “the Uniform Rules for Contract Guarantees”, called “the Publication No. 325” (see Annex No. 1), with the view to securing a uniformity of practice based upon an equitable balance between the parties concerned.

In 1992, the International Chamber of Commerce from Paris issued a new set of rules called “the Uniform Rules for Demand Guarantee” or “the Publication No. 458” (see Annex No. 2).

It should be mentioned that nowadays both the Publication No. 325, and the Publication No. 458 is into force.

In Romania, banks apply these two sets of rules in the guarantee field.

The main elements of a guarantee are (see Annex No. 3):

- a) the *parties involved* (the beneficiary, the principal);
- b) the *guarantee purpose/object* (e.g. Under this contract the buyer is to pay them sum of...as *an advance payment being ...%* of the contract value in favour of the seller);
- c) the *guarantee value* (e.g. In consideration of the above conditions, we Bank ...hereby give you our guarantee and undertake *to pay irrevocably the amount of....* );
- d) the *assignment formulation of the bank* (e.g. The Bank.....undertake to pay the amount....*on receipt of your first demand in writing*);
- e) the *terms of payment*;
- f) the *guarantee validity* (e.g. This guarantee is valid for written.....*on or before ...after which date our liability.....will cease*);
- g) the *legislation clause* (e.g. This guarantee *shall be governed by English law*).

There are several types of guarantees, which the seller may be called upon to provide in favour of the buyer. The most common types of guarantee are:

- a) Tender or bid bonds

This type of guarantee is necessary in the case of public offer requests. The purpose of a tender bond is to indicate to the buyer that the tender is a serious offer and the party submitting it will sign the contract if the tender is accepted. The buyer will be confident in the knowledge that the seller is

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financially able to enter into such an undertaking. The validity term is until the signing of the contract or the delivery of a performance bond (usually from three to six months). Finally, it is an assurance to the buyer that on award of the contract subsequent guarantee requirements to secure performance and/or advance payments will be forthcoming.

A tender or bid bond is usually for between 2% and 5% of the contract value, and will guarantee that the exporter will take up the contract if it is awarded. Failure to take up the contract results in a penalty for the amount of the bond. In addition, the tender bond usually commits the exporter and his bank to joining in a performance bond if the contract is awarded. Tender bonds serve to prevent the submission of frivolous tenders.

### b) Performance bonds

These are the most commonly used types of guarantee. The purpose of a performance guarantee is exactly what it states – to ensure performance by the seller in accordance with their contractual obligations. Thus, the performance bond is given at the seller's request by the bank, which commits itself to pay to the beneficiary the guaranteed sum, in the case that the supplier does not fulfil his contractual obligations.

Performance bonds guarantee that the goods or services will be of the required standard and a stated penalty is payable if they are not. The amount payable will be a stated percentage of the contract price: often 10% but sometimes more.

The validity term is for the entire amount until the complete execution of the contract.

### c) Advance payment bonds

Advance payment bonds undertake to refund any advance payments if the goods or services are unsatisfactory. The validity term is until the end of the complete delivery of the object of the contract.

### d) Warranty or maintenance bonds

Warranty or maintenance bonds undertake that the exporter will maintain the equipment for a period of time. Maintenance guarantees are normally requested in connection with construction contracts. The purpose is to ensure that once construction has been completed the obligation of the contractor will be fulfilled during the maintenance period.

e) Retention bonds

Retention bonds enable retention money, which would otherwise be held by the buyer beyond the completion of the contract, to be released early. These bonds guarantee the returns to the buyer of the retention money in the event of non-performance of post-completion obligations by the exporter. A retention money guarantee enables the seller to receive the total amount of each payment while assuring the buyer that these funds will be payable in the event of a failure of performance.

f) Recourse bonds

Recourse bonds are sometimes demanded by the ECGD to cover the potential recourse by the ECGD under buyer credit.

g) Stand-by letter of credit

This type of credit, which has the characteristics of a guarantee, is especially used in the United States of America, where the law does not entitle the banks to issue guarantee, in the European meaning of the word.

An alternative to the bond is a stand-by letter of credit issued by the UK bank in favour of the importer, promising to pay a given amount against specified documents, usually a formal default claim. From the UK bank's point of view, a stand-by letter of credit is better than a bond because it will be subject to UCP for documentary credits instead of being subject to complex legalities. In addition, a stand-by letter of credit will always have a definite expiry date.

All these types of guarantees may take the form either of *bank demand guarantee* or of *surety default bonds*.

- a) *Demand guarantee/bond* or *Bank first demand guarantee* – where the bank undertakes to pay away funds on claim.
- b) *Surety bonds* – where the surety is bound to make good any defaults of the constructor, e.g. remedial work. Insurance companies, not banks, normally issue these bonds.

Since a bank will not wish to have primary responsibility for the fulfilment of a customer's contractual obligations, the bank will issue only demand guarantees.

Demand guarantee can be:

- *Simple* – when the beneficiary claims, bank pays, i.e. no conditions, or
- *Conditional* – where the beneficiary must support the claim with specific documentation. Conditional bonds can be divided into two types:
  - ❑ *Conditional bonds* requiring documentary evidence; they give maximum protection to the exporter, and
  - ❑ Conditional bonds which do not require documentary evidence.

Any claim received where the guarantee is payable on *simple demand* must be honoured, whether or not the seller claims that they are not in default.

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These bonds, sometimes known as *unconditional bonds*, can be called at the sole discretion of the buyer. The bank must pay if called upon to do so, even in circumstances where it may be clear to the exporter that the claim is wholly unjustified. UK courts have often ruled that the bank must honour claims under demand bonds.

If the bank has to pay under the bond, it will debit the customer's account under the authority of the counter indemnity. The exporter will then be left with the unenviable task of claiming reimbursement in the courts of the buyer's country.

It should be mentioned that banks never become involved in contractual disputes. If payment is called for which conforms to the terms of the bond, the bank must pay.

Under the provisions of the Uniform Rules concerning the bank demand guarantee, any *demand bond, guarantee* or *other instrument* in writing issued or executed by the *Guarantor* in favour of the *Beneficiary* pursuant to which the Guarantor undertakes on Default<sup>1</sup>, either:

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<sup>1</sup> Articles 2 from ICC Uniform Rules for Contract Bonds – “Any breach, default or failure to perform any contractual obligation which shall give rise to a claim for performance, damages, by the Beneficiary.”

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- i. to pay or satisfy any claim or entitlement to payment of damages, compensation or other financial relief up to the *Bond Amount*<sup>2</sup>; or
- ii. to pay or satisfy such claim or entitlement up to the Bond Amount or at the *Guarantor*<sup>3</sup>'s option to perform or execute the *Contract*<sup>4</sup> or any *Contractual Obligation*<sup>5</sup>.

Bank demand guarantee imposes legally binding obligations on a bank. It may provide for payment to the buyer either on first or simple demand, or on first or simple demand supported by a document or documents referred to in the guarantee. That means that if a Bank receives a demand, which on its face complies with the terms of the guarantee, the Bank is obliged to pay without any reference to the seller.

Accordingly the Uniforms Rules on demand bonds, all guarantees should stipulate:

- a) the Principal;
- b) the Beneficiary;
- c) the Guarantor;
- d) the underlying transaction requiring the issue of the guarantee;
- e) the maximum amount payable and the currency in which it is payable;
- f) the Expiry Date and/or Expiry Event of the guarantee;
- g) the terms for demanding payment;
- h) any provision for reduction of the guarantee amount.

A guarantee enters into effect as from the date of its issue unless its terms expressly provide that such entry into effect is to be at a later date or is to be subject to conditions specified in the guarantee and determinable by the guarantor on the basis of any documents.

The UK banks basic requirements are that any guarantee, which it is asked; to issue should comply with the following criteria:

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<sup>2</sup> Idem - "The sum inserted in the bond as the maximum aggregate liability of the Guarantor..."

<sup>3</sup> Idem - "Any Person who shall issue or execute a Bond on behalf of a Principal."

<sup>4</sup> Idem - "Any written agreement between the Principal and the Beneficiary for the carrying out of works, the performance of services..."

<sup>5</sup> Idem - "Any duty, obligation or requirement imposed by a clause, paragraph, term, condition...of the Contract."

1. The guarantee must be for a defined sum of money either in sterling/Euro or in a specified foreign currency. The guarantee must not place upon the UK bank any obligation other than payment of a defined sum of money.
2. The wording of the guarantee must be clear and unambiguous. In particular, the circumstances in which the UK bank is to pay a claim must be clear, e.g. simple demand or a demand supported by signed statements and/or specified documents. The UK bank will not enter into a commitment, which involves acting as an arbitrator between its customer and the buyer.
3. The guarantee must provide for termination on a specified date or on an indisputable event, e.g. the issue and production to the UK bank of a specified architect or engineer's certificate.
4. The guarantee must be non-assignable by the beneficiary.

### ***8.3.1 An overview of the Uniform Rules for Demand Guarantees***

The first function of the Uniform Rules for Demand Guarantees (see Annex No.2) is to codify rules of good practice to which parties subscribe by incorporating the rules in their contracts. Thus, the Rules provide a contractual framework for the relationships between the guarantor and the beneficiary, between the Instructing party and the guarantor, and between the principal and the guarantor or the instructing parties.

The text of the Rules is prefaced by an Introduction, which describes the purpose and scope of them, the legitimate expectations of the various parties and the concern of the International Chamber of Commerce to encourage good demand guarantee practice. The text itself consists of 28 articles divided into six sections, as follows:

- A. Scope and Application of the Rules
- B. Definitions and General Provisions
- C. Liabilities and Responsibilities
- D. Demands
- E. Expiry Provisions
- F. Governing Law and Jurisdiction

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It should be mentioned the three fundamental principles of demand guarantee law, as follows:

- the independence of the guarantee from the underlying transaction;
- the documentary character of the guarantee;
- the guarantor is concerned only with whether demands and other documents appear on their face to conform to the guarantee.

One of the main important parts of the Rules is the Section C that is devoted to the liabilities and responsibilities of the parties. These are broadly of three kinds: to examine, to inform and to transmit.

Section D of the Rules is devoted to the important subject of demand and contains a rule designed to provide some safeguard against unfair calling whilst preserving the documentary character and speed of implementation of demand guarantees.

A demand guarantee must be made on or before the expiry date of the guarantee and before any expiry event. It must comply with the express terms of the guarantee and to independent documentary requirements.

The main problems which bonds cause for exporters are:

- a) The effect of bonds on the credit rating of the exporter.

Banks treat the issue of bonds in exactly the same way as they would treat any lending facility. If payment is called for within the terms of the bond, the bank must pay, irrespective of whether its customer has funds to honour the counter indemnity. Hence banks would normally wish to reduce a customer's maximum borrowing facilities pound for pound by the same amount as the bond.

Tender bonds involve the worst problems. The average success rate is often said to be one in eight for tenders, so the average contractor may at any one time have eight tenders outstanding. If each of these tenders involves a tender bond, say 2%, and then the exporters total potential borrowing facilities are reduced by 16% of his overall tender volume.

b) Unauthorised extension of bonds.

Some countries, such as Syria, have laws, which prevent the local bank from cancelling the bond without the importer's specific authority. This prohibition applies even if the bond contains an expiry date.

Sometimes the local bank will threaten to call for payment unless the bond is formally extended. The usual result is that the local bank is able to persuade the UK bank to extend the bond, and that the annual bank charges continue to be levied by both banks.

Sometimes tender bonds are not cancelled, even when the contract has been awarded and a performance bond has been issued.

c) Unfair calling of bonds.

The buyer may call for payment, even when such a call is unjustified. If the call conforms to the terms of the bond, the bank must pay and will debit the exporter's account under the terms of its counter indemnity. The exporter can be left with the task of claiming reimbursement from the buyer via the overseas courts.



**Progress test**

1. What is a bank guarantee?
2. List the parties involved in a guarantee.
3. Enumerate the main elements of a guarantee.
4. Define the tender or bid bond.
5. Define the performance bond.
6. What is a demand guarantee?

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7. What are the main provisions stipulated in the Uniform Rules on contract bonds?
8. What are the main provisions stipulated in the Uniform Rules on demand bonds?
9. What are the main problems that bonds cause for exporters?

***UNIFORM RULES FOR CONTRACT GUARANTEES<sup>6</sup>***

**Article 1. Scope**

1. These Rules apply to any guarantee, bond, indemnity, surety or similar undertaking, however named or described (“guarantee”), which states that it is subject to the Uniform Rules for Tender, Performance and Repayment, Guarantees (“Contract Guarantees”) of the International Chamber of Commerce (Publication No. 325) and are binding upon all parties thereto unless otherwise expressly stated in the guarantee or any amendment thereto.
2. Where any of these Rules is contrary to a provision of the law applicable to the guarantee from which the parties cannot derogate, that provision prevails.

**Article 2. Definition**

For the purposes of these Rules:

- a. “tender guarantee” means an undertaking given by a bank, insurance company or other party (“the guarantor”) at the request of a tendered (“the principle”) or given on the instructions of a bank, insurance company, or other party so requested by the principle (“the instructing party”) to a party inviting tenders (“the beneficiary”) whereby the guarantor undertakes - in the event of default by the principle in the obligations resulting from the submission of the tender – to make payment to the beneficiary within the limits of a stated sum of money;
- b. “performance guarantee” means an undertaking given by a bank, insurance company or other party (“the guarantor”) at the request of a supplier of goods or services or other contractor (“the principal”) or given on the instructions of a bank, insurance company, or other party so requested by the principle (“the instructing party”) to a buyer or to an employer (“the beneficiary”) whereby the guarantor undertakes – in the event of default by the principal in due performance of the terms of

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<sup>6</sup> Publication No 325 issued by the International Chamber of Commerce from Paris

a contract between the principal and the beneficiary (“ the contract”) – to make payment to the beneficiary within the limits of a stated sum of money or, if the guarantee so provides, at the guarantor’s option, to arrange for performance of the contract;

- c. “repayment guarantee” means an undertaking given by a bank, insurance company or other party (“the guarantor”) at the request of a supplier of goods or services or other contractor (“ the principal”) or given on the instructions of a bank, insurance company, or other party so requested by the principle (“ the instructing party”) to a buyer or to an employer (“ the beneficiary”) whereby the guarantor undertakes – in the event of default by the principal to repay in accordance with the terms and conditions of a contract between the principal and the beneficiary (“ the contract”) any sum or sums advanced or paid by the beneficiary to the principal and not otherwise repaid – to make payment to the beneficiary within the limits of a stated sum of money.

### **Article 3 Liability of the guarantor to the beneficiary**

1. The guarantor is liable to the beneficiary only in accordance with the terms and conditions specified in the guarantee and these Rules and up to an amount not exceeding that stated in the guarantee.
2. The amount of liability stated in the guaranty shall not be reduced by reason of any partial performance of the contract, unless so specified in the guarantee.
3. The guarantor may rely only on those defenses, which are based on the terms, and conditions specified in the guarantee or are allowed under these Rules.

### **Article 4 Last date for claim**

If a guarantee does not specify a last date by which a claim must have been received by the guarantor, such last date (“expiry date”) is deemed to be:

- a. In the case of a tender guarantee, six months from the date of the guarantee;
- b. In the case of a performance guarantee, six months from the date specified in the contract for delivery or completion or any extension thereof, or one month after the expiry of any maintenance period (guarantee period) provided for in the contract if such maintenance period is expressly covered by the performance guarantee;

- c. In the case of a repayment guarantee, six months from the date specified in the contract for delivery or completion or any extension thereof.

If the expiry date falls on a non-business day, the expiry date is extended until the first following business day.

### **Article 5 Expiry of guarantee**

1. If the guarantor on or before the expiry date has received no claim or if any claim arising under the guarantee has been settled in full satisfaction of all the rights of the beneficiary thereunder, the guarantee ceases to be valid.
2. notwithstanding the provisions of Article 4, in the case of tender guarantees: a) upon acceptance by the beneficiary of the tender by the award of the contract to the principal and, if so provided for in the written contract, or, if no contract has been signed and it is so provided for in the tender, the production by the principal of a performance guarantee or, if no such guarantee is required, the signature by the principal of the contract, the tender guarantee issued on his behalf ceases to be valid;
  - a) a tender guarantee also ceases to be valid if and when the contract to which it relates is awarded to another tenderer, whether or not that tenderer meets the requirements referred to in para.2a of this Article;
  - b) a tender guarantee also ceases to be valid in the event of the beneficiary expressly declaring that he does not intend to place a contract.

### **Article 6 Return of guarantee**

When a guarantee has ceased to be valid in accordance with its own terms and conditions of these Rules, retention of the document embodying the guarantee does not in itself confer any rights upon the beneficiary, and the document should be returned to the guarantor without delay.

### **Article 7 Amendments to contracts and guarantees**

1. A tender guarantee is valid only in respect of the original tender submitted by the principal and does not apply in the case of any amendment thereto, nor is valid beyond the expiry date specified in the guarantee or provided for by these Rules, unless the guarantor has given

notice in writing or by cable or telegram or telex to the beneficiary that the guarantee so applies or that the expiry date has been extended.

2. A performance guarantee or a repayment guarantee may stipulate that it shall not be valid in respect of any amendment to the contract or that the guarantor be notified of any such amendment for his approval. Failing such a stipulation, the guarantee is valid in respect of the obligations of the principal as expressed in the contract and any amendment thereto. However, the guarantee shall not be valid in excess of the amount or beyond the expiry date specified in the guarantee or provided for by these Rules, unless the guarantor has given notice in writing or by cable or telegram or telex to the beneficiary that the amount has been increased to a stated figure or that the expiry date has been extended.
3. Any amendment made by the guarantor in the terms and conditions of the guarantee shall be effective in respect of the beneficiary only if agreed to by the beneficiary and in respect of the principal or the instructing party, as the case may be, only if agreed to by the principal or the instructing party, as the case may be.

#### **Article 8 Submission of claim**

1. A claim under a guarantee shall be made in writing or by cable or telegram or telex to be received by the guarantor not later than the expiry date specified in the guarantee or provided for by these Rules.
2. On receipt of a claim the guarantor shall notify the principal or the instructing party, as the case may be, without delay, of such claim and of any documentation received.
3. A claim shall not be honored unless:
  - a. It has been made and received as required by para.1 of this Article; and
  - b. It is supported by such documentation as is specified in the guarantee or in these Rules; and
  - c. Such documentation is presented within the period of time after the receipt of a claim specified in the guarantee, or, failing such specification, as soon as practicable, or, in the case of documentation of the beneficiary himself, at the latest within six months from the receipt of a claim. In any event a claim shall not be honoured if the guarantee has ceased to be valid in accordance with its own terms or with these Rules.

## **Article 9 Documentation to support claim**

If a guarantee does not specified the documentation to be produced in support of a claim or merely specifies only a statement of claim by the beneficiary, the beneficiary submit:

- a. In the case of a tender guarantee, his declaration that the principal's tender has been accepted and that the principal has then either failed to sign the contract or has failed to submit a performance guarantee as provided for in the tender, and his declaration for agreement, addressed to the principal, to have any dispute on any claim by the principal for payment to him by the beneficiary of all or part of the amount paid under the guarantee settled by judicial or arbitrate tribunal as specified in the tender documents or, if not so specified or otherwise agreed upon, by arbitration in accordance with the Rules of the ICC Court of Arbitration or with the UNCITRAL Arbitration Rules, at the option of the principal;
- b. In the case of a performance guarantee or of repayment guarantee, either a court decision or an arbitrage award justifying the claim, or the approval of the principal in writing to the claim and the amounts to be paid.

## **Article 10 Applicable law**

If a guarantee does not indicate the law by which it is to be governed the applicable law is that of the guarantor place of business. If the guarantor has more than one place of business, the applicable law is that of the branch which issued the guarantee.

## **Article 11 Settlements of disputes**

1. Any disputes arising in connection with the guarantee may be referred to arbitration by agreement between the guarantor and the beneficiary, either in accordance with the Rules of ICC Court of Arbitration, the UNCITRAL Arbitration Rules or such other rules of arbitration as may be agreed between the guarantor and the beneficiary.

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2. If a dispute between the guarantor and the beneficiary which touches upon the rights and obligations of the principal or the instructing party is referred to arbitration, the principal of the instructing party shall have the right to intervene in such arbitrage proceedings.
3. If the guarantor and the beneficiary have not agreed to arbitration or to the jurisdiction of any specific court, any dispute between them relating to the guarantee shall be settled exclusively by the competent court of the country of the guarantor's place of business or, if the guarantor has more than one place of business, by the competent court of the country of his main place of business or, at the option of the beneficiary by the competent court of the country of the branch which issued the guarantee.

## ICC UNIFORM RULES FOR DEMAND GUARANTEES<sup>7</sup>

### A. Scope and Application of the Rules.

#### Article 1

These Rules apply to any demand guarantee and amendment thereto which a Guarantor (as hereinafter described) has been instructed to issue which states that it is subject to the Uniform Rules for Demand Guarantees of the International Chamber of Commerce (Publication No.458) and are binding on all parties thereto except as otherwise expressly stated in the Guarantee or any amendment thereto.

### B. Definitions and General Provisions

#### Article 2

- a. For the purpose of these Rules, a demand guarantee (hereinafter referred to as “Guarantee” ) means any guarantee, bond or other payment undertaking, however named or described, by a bank, insurance company or other body or person ( hereinafter called “ the Guarantor” ) given in writing for the payment of money on presentation in conformity with the terms of the undertaking of a written demand for payment and such other document(s) ( for example a certificate by an architect or engineer, a judgment or an arbitrage award ) as may be specified in the Guarantee, such undertaking being given:
  - at the request or on the instructions and under the liability of a party (hereinafter called “the Principal” ); or
  - at the request or on the instructions and under the liability of a bank, insurance company or any other body or person (hereinafter “the Instructing Party”) and acting on the instructions of a Principal to another party (hereinafter “the Beneficiary”).
- b. Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they be based, and Guarantors are in no way concerned with or bound by such contract(s), or tender conditions

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<sup>7</sup> Publication No. 458 issued by The International Chamber of Commerce from Paris

despite the inclusion of a reference to them in the Guarantee. The duty of a Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee.

- c. For the purpose of these Rules “Counter-Guarantee” means any guarantee, bond or other payment undertaking of the Instructing Party, however named or described, given in writing for the payment of money to the Guarantor on presentation in conformity with the terms of the undertaking of a written demand for payment and other documents specified in the Counter-Guarantee which appear on their face to be in accordance with the terms of the counter-guarantee. Counter – Guarantees are by their nature separate transactions from the Guarantees to which they relate and from any other underlying contract(s) or tender conditions, and Instructing Parties are in no way concerned with or bound by such Guarantees, contract(s) or tender conditions despite the inclusion of a reference to them in the Counter-Guarantee.
- d. The expressions “writing” and “written” shall include an authenticated tele-transmission or tested electronic data interchanged (“EDI”) message equivalent thereto.

### **Article 3**

All instructions for the issues of Guarantees and amendments thereto and Guarantees and amendments themselves should be clear and precise and should avoid excessive detail. Accordingly, all Guarantees should stipulate:

- a. The Principal;
- b. The Beneficiary;
- c. The Guarantor;
- d. The underlying transaction requiring the issue of the Guarantee;
- e. The maximum amount payable and the currency in which it is payable;
- f. The Expiry Date and /or Expiry Event of the Guarantee;
- g. The terms for demanding payment;
- h. Any provision for reduction of the Guarantee amount.

#### **Article 4**

The Beneficiary's right to make a demand under a Guarantee is not assignable unless expressly stated in the Guarantee or in an amendment thereto.

This article shall not, however, affect the Beneficiary's right to assign any proceeds to which he may be, or may become, entitled under the Guarantee.

#### **Article 5**

All Guarantees and Counter-Guarantees are irrevocable unless otherwise indicated.

#### **Article 6**

A Guarantee enters into effect as from the date of its issue unless its terms expressly provide that such entry into effect is to be at a later date or is to be subject to conditions specified in the Guarantee and determinable by the Guarantor on the bases of any documents therein specified.

#### **Article 7**

- a. where a Guarantor has been given instructions for the issue of a Guarantee but the instructions are such that, if they were to be carried out, the Guarantor would by reason of law or regulation in the country of issue be unable to fulfill the terms of the Guarantee, the instructions shall not be executed and a Guarantor shall immediately inform the party who gave the Guarantor his instructions by telecommunication, or, if that is not possible, by other expeditious means, of the reasons for such inability and request appropriate instructions from that party.
- b. Nothing in this Article shall oblige the Guarantor to issue a Guarantee where the Guarantor has not agreed to do so.

#### **Article 8**

A Guarantee may contain express provision for reduction by a specified or determinable amount or amounts on a specified date or dates or upon presentation of the Guarantor of the document(s) specified for this purpose in the Guarantee.

## **C. LIABILITIES AND RESPONSABILITIES**

### **Article 9**

All documents specified and presented under a Guarantee, including the demand shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform to the terms of the Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another they shall be refused.

### **Article 10**

- a. A Guarantor shall have a reasonable time within which to examine a demand under a Guarantee and to decide whether to pay or to refuse the demand.
- b. If the Guarantor decides to refuse a demand, he shall immediately give notice thereof to the Beneficiary by tele-transmission, or, if that is not possible, by other expeditious means. Any documents presented under the Guarantee shall be held at the disposal of the Beneficiary.

### **Article 11**

Guarantors and Instructing Parties assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification, or legal effect of any document presented to them or for the general and/or particular statements made therein, nor for the good faith or acts or omissions of any person whomsoever.

### **Article 12**

Guarantors and Instructing Parties assume no liability or responsibility for the consequences arising out of delay and/or loss in transit of any messages, letters, demands or documents, or for delay, or other errors arising in the transmission of any telecommunication. Guarantors and Instructing Parties assume no liability for errors in translation or interpretation of technical terms and reserve the right to transmit Guarantee texts or any parts thereof without translating them.

### **Article 13**

Guarantors and Instructing Parties assume no liability or responsibility for the consequences arising out of the interruption of their business by acts of God, riots, civil commotion, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial actions of whatever nature.

### **Article 14**

- a. Guarantors and Instructing Parties utilising the services of another party for the purpose of giving effect to the instructions of a Principal do so for the account and at the risk of that Principal.
- b. Guarantors and Instructing Parties assume no liability or responsibility should the instructions they transmit not be carried out even if they have themselves taken the initiative in the choice of such other party.
- c. The Principal shall be liable to indemnify the Guarantor and the Instructing Party, as the case may be, against all obligations and responsibilities imposed by foreign loss and usage.

### **Article 15**

Guarantors and Instructing Parties shall not be excluded from liability or responsibility under the terms of Articles 11, 12 and 14 above for their failure to act in good faith and with reasonable care.

### **Article 16**

A Guarantor is liable to the Beneficiary only in accordance with the terms specified in the Guarantee and any amendment(s) thereto and in these Rules, and up to an amount not exceeding that stated in the Guarantee and any amendment(s) thereto.

## **D. DEMANDS**

### **Article 17**

Without prejudice to the terms of Article 10. in the event of a demand the Guarantor shall without delay so inform the Principal or, where applicable, his Instructing Party, and in that case the Instructing Party shall so inform.

## **Article 18**

The amount payable under a Guarantee shall be reduced by the amount of any payment made by the Guarantor in satisfaction of a demand in respect thereof and, where the maximum amount payable under a Guarantee has been satisfied by payment and/or reduction, the Guarantee shall thereupon terminate whether or not the Guarantee and any amendment(s) thereto are returned.

## **Article 19**

A demand shall be made in accordance with the terms of a Guarantee before its expiry, that is, on or before its Expiry Date and before any Expiry Event as defined in Article 22. In particular, all documents specified in the Guarantee for the purpose of demand, and any statement required by Article 20, shall be presented to the Guarantor before its expiry at its place of issue; otherwise the Guarantor shall refuse the demand.

## **Article 20**

- a. Any demand for payment under the Guarantee shall be in writing and shall (in addition to such other documents as may be specified in the Guarantee) be supported by a written statement (whether in the demand itself or in a separate document or documents accompanying the demand and referred to in it) stating:
  - that the principal is in breach of his obligation(s) under the underlying contract(s) or, in the case of a tender guarantee, the tender conditions; and
  - the respect in which the Principal is in breach;
- b. Any demand under the Counter-Guarantee shall be supported by a written statement that the Guarantor has received a demand for payment under the Guarantee in accordance with its terms and with this Article.
- c. Paragraph a of this Article applies except to the extent that it is expressly excluded by the terms of the Guarantee. Paragraph b of this Article applies except to the extent that it is expressly excluded by the terms of the Counter-Guarantee.

- d. Nothing in this Article affects the application of Articles 2 (b) and 2 (c), 9 and 11.

## **E. EXPIRY PROVISIONS**

### **Article 22**

Expiry of the time specified in a Guarantee for the presentation of demands shall be upon a specified calendar date (“ Expiry Date”) or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry (“ Expiry Event”). If both an Expiry Date and an Expiry Event are specified in Guarantee, the Guarantee shall expire on whichever of the Expiry Date or Expiry Event occurs first, whether or not the Guarantee and any amendment(s) thereto are returned.

### **Article 23**

Irrespective of any expiry provision contain therein a Guarantee shall be cancelled on presentation to the Guarantor of the Guarantee itself or the Beneficiary’s written statement of release from liability under the Guarantee, whether or not, in the latter case, the Guarantee or any amendment(s) thereto are returned.

### **Article 24**

Where a Guarantee has terminated by payment, expiry, and cancellation or otherwise, retention of the Guarantee or of any amendment(s) thereto shall not preserve any rights of the Beneficiary under the Guarantee.

### **Article 25**

Where to the knowledge of the Guarantor the Guarantee has terminated by payment, expiry, cancellation or otherwise, or there has been a reduction of the total amount payable there under, the Guarantor shall without delay so notify the Principal or where applicable, the Instructing Party shall so notify the Principal.

## **Article 26**

If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a demand for payment submitted in accordance with the terms and conditions of the Guarantee and these Rules, the Guarantor shall without delay so inform the party who gave the Guarantor his instructions.

The Guarantor shall then suspend payment of the demand for such time as is reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such extension to be issued.

Unless an extension is granted within the time provided by the preceding paragraph, the Guarantor is obliged to pay the Beneficiary's conforming demand without requiring any further action on the Beneficiary's part. The Guarantor shall incur no liability (for interest or otherwise) should any payment to the beneficiary be delayed as a result of the above-mentioned procedure.

Even if the Principal agrees to or requests such extension, it shall not be granted unless the Guarantor and the Instructing Party or Parties also agree thereto.

## **F. GOVERNING LAW AND JURISDICTION**

### **Article 27**

Unless otherwise provided in the Guarantee or Counter-Guarantee, its governing law shall be that of the place of business of the Governor 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 that issued the Guarantee or Counter-Guarantee.

### **Article 28**

Unless otherwise provided in the Guarantee or Counter-Guarantee, any dispute between the Guarantor and the Beneficiary relating to the Guarantee or between the Instructing Party and the Guarantor 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 Instructing Party (as the case may be), or, if the Guarantor or Instructing Party has more than one place of business, by the competent court of the country of the branch which issued the Guarantee or the Counter-Guarantee.

**Simple Demand Tender Guarantee**

*Our* \_\_\_\_\_ *guarantee*  
*number* \_\_\_\_\_

\_\_\_\_\_  
*We are informed that*

\_\_\_\_\_  
*(hereinafter called the Seller) are tendering for a contract with you for the supply of* \_\_\_\_\_

\_\_\_\_\_  
*and that a tender guarantee is required in the sum of* \_\_\_\_\_

\_\_\_\_\_  
*On behalf of the Seller we Barclays Bank PLC [branch] hereby give you our guarantee and undertake to pay you any amount or amounts not exceeding in total a maximum of [amount] on receipt of your first demand in writing. Any claims must bear the confirmation of your bankers that the signatures thereon are authentic.*

*This guarantee is valid for written demands received by us on or before [date] after which date our liability to you under this guarantee will cease and this guarantee will be of no further effect.*

*This guarantee is personal to you and is not assignable.*

*This guarantee shall be governed by English law.*