

ПРОЕКТ ЗА ЗАКОН-МОДЕЛ ЗА ГАРАНЦИИТЕ на УНСИТРАЛ

Chapter I

Sphere of Application

Article 1

Substantive scope of application

This law applies to international guaranty letters.

Article 2

Guaranty letter

A guaranty letter ['however named or described'] is an [express] undertaking of independent [and essentially documentary] character, given by a bank or other institution or person ([„guarantor“] [„issuer“]).

Var. A: at the request of its customer („principal“) or on the instruction of another bank, institution or person („instructing party“) acting at the request of that instructing party's customer („principal“),

Var. B: whether or not so requested or instructed by another bank, institution or person, to pay to another person („beneficiary“) a certain or determinable amount of a specified currency or union of account [or other item of value] [or to accept or to negotiate without recourse a bill of exchange for a specified amount] in conformity with the terms of the undertaking upon receipt of a demand

Var. X: made in the manner prescribed in the undertaking, provided that the undertaking [indicates that it] is given for the purpose of [indemnifying the beneficiary for the consequences of a specified contingency] [securing the beneficiary against the non-fulfilment of certain financial or other obligations by the principal or against another specified risk].

Var. Y: stating or, if so required in the undertaking, certifying or otherwise establishing that payment is due.

Article 3

Independence of undertaking

(1) An undertaking is independent if ['according to its terms'] the payment obligation [does not depend on] [is not subject to, or qualified by'] the existence or validity of an underlying transaction ['whether or not referred to in the undertaking'] [between the principal and the beneficiary or between an instructing party and the guarantor] or of any other relationship, and the guarantor may [therefore] not invoke any defence arising from a relationship other than its relationship with the beneficiary. [The independent character of an undertaking is not

affected by the fact that the guarantor, as provided in article 17 (1) (c), may raise certain objections to payment that might be based on facts relation to any such other relationship.]

(2) (a) An undertaking is [irrefutably] deemed to be independent when it contains the heading „[Independent guaranty letter] [Independent documentary promise] [First demand guaranty letter]“ and contains the same words also in its text. [Where an undertaking is deemed to be independent, any term or condition that would have the effect of rendering the undertaking to be accessory shall be treated as void.]

(b)[Otherwise] [Subject to the provisions of subparagraph (a) of this paragraph, any characterization or a single term found in the text of the undertaking shall not be deemed conclusive [of whether or not the undertaking is independent] if other terms clearly weigh in favour of the opposite result. In evaluating the terms in their totality, the following factors may be regarded as points weighing in favour of independence:

(i) The undertaking to pay is expressed to be „on simple demand“, „on first demand“, „on demand“, „upon receipt of a written request“, „unconditional“, „irrespective of the validity or existence of X—contract“, „waiving all rights of objection and defences arising from said contract“, „without proof of default“ or is qualified by any other words of similar import

(ii) Payment is due upon receipt of a statement by the beneficiary or any document by a third party, and the guarantor is not required to verify any fact outside its preview

(iii) Any underlying transaction is referred to in the undertaking only in a preamble or otherwise in a recital of what has gone before, and not in operative clauses [provided that the text of the undertaking is divided in that manner]

(iv) The undertaking is stated to be subject to the Uniform Customs and Practice for Documentary Credits or the Uniform Rules for Demand Guarantees of the International Chamber of Commerce.

Article 4

Internationality of guaranty letter

(1) A guaranty letter is international if:

Var. A: (a) the places of business specified in the guaranty letter of any two of the following are in different States: guarantor, beneficiary, principal [instructing party, confirming guarantor]

Var. B: (a) any two of the guarantor, beneficiary and principal have their place of business in different States, provided that this fact is apparent to the guarantor and the beneficiary either from the undertaking or from information disclosed not later than the time of receipt the guaranty letter by the beneficiary

[or

(b) if the guaranty letter expressly so states].

(2) For the purposes of the preceding paragraph:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the guaranty letter

(b) if a party does not have a place of business, reference is to be made to its habitual residence.

Chapter II

Interpretation

Article 5

Interpretation of this [Law] [Convention]

Version for Model Law: In the interpretation of this Law, regard is to be had to its international origin and to the need to promote the observance of good faith in international guaranty and credit practice.

Version for Convention: In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international guaranty and stand-by letter of credit practice.

[Article 6]

Definitions and rules of interpretation

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

(a) „guaranty letter“ includes „counter-guaranty letter“ and „confirming guaranty letter“ and „guarantor“ includes „counter-guarantor“ and „confirming guarantor“

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

(c) where a provision of this Law refers to a possible agreement of the parties, the parties meant are the guarantor and the beneficiary of the guaranty letter in question and the reference is to any term of the guaranty letter or its amendment or to any separate agreement between the guarantor and the beneficiary.]

Chapter III

Effectiveness of guaranty letter

Article 7

Establishment of guaranty letter

(1) Var. A: A guaranty letter may be established by any means of communication that [itself] provides a record of the text of the guaranty letter.

Var. B: A guaranty letter may be issued in any form which preserves a complete record of the information contained therein [and is authenticated as to its source by generally accepted means or by a procedure agreed upon by the parties].

Var. C: The guaranty letter shall be issued by a means of communication that provides a record thereof, including by an authenticated teletransmission or equivalent electronic data interchange message.

(2) Var. X: The guaranty letter becomes binding and, unless it expressly states that it is revocable, irrevocable, when it is issued by the guarantor [, provided that the beneficiary does not reject it promptly upon receipt]. The guaranty letter becomes effective at that time, unless it states a different time of effectiveness [, by a reference to a fixed date or to a determinable period of time,] or [it expressly provides that its effectiveness is subject to a specified condition that is determinable by the G on the basis of a document specified in the guaranty letter][it makes its effectiveness depend on the occurrence of a specified, uncertain future event, in which case the guarantor may require the beneficiary to certify that occurrence, unless the parties have agreed on another means of establishing that occurrence or its verification is within the preview of the guarantor.]

Var. Y: Unless otherwise stated therein, a guaranty letter becomes effective and irrevocable when it is issued by the guarantor [, provided that the beneficiary does not reject it promptly upon receipt].

Article 8

Amendment

(1) A guaranty letter may be amended in the form agreed upon by the parties or, failing such agreement, [in the form in which the guaranty letter was established] [in any form referred to paragraph (1) of article 7]. [A party may be precluded by its conduct from asserting non-compliance with such form requirement to the extent that the other party has relied on that conduct.]

(2) The amendment becomes effective, unless it states a different time of effectiveness,

Var. A: when it is issued by the guarantor [, provided that the beneficiary does not reject it promptly upon receipt].

Var. B: when it is issued by the guarantor, provided that the guarantor receives notice of the acceptance by the beneficiary within [ten] business days.

Var. C: when the guarantor receives notice of the acceptance by the beneficiary.

(3) Var. X: The provisions of paragraphs (1) and (2) of this article do not excuse the failure of the guarantor to obtain the consent of the principal as may be required by the instructions of the principal or an agreement with the principal.

Var. Y: The provisions of paragraphs (1) and (2) of this article do not entitle the guarantor to invoke the amendment in support of any claim for reimbursement against the principal if the guarantor failed to obtain the consent of the principal as required by instructions of the principal or an agreement between the principal and the guarantor.

Var. Z: When issuing an amendment, the guarantor shall promptly dispatch a copy thereof to the principal.

Article 9

Transfer of rights assignment of proceeds

(1) The beneficiary may not transfer its right to make a demand for payment under the guaranty letter,

Var. A: unless so authorized by the guarantor [either in the guaranty letter or by separate consent in any form referred to in paragraph (1) of article 7].

Var. B: except where the guaranty letter was given for the purpose of securing the beneficiary against the non-performance of certain obligations by the principal and the right to claim performance from the principal has passed from the beneficiary to the intended transferee.

(2) However, the beneficiary may assign to another person any proceeds to which it may be entitled under the guaranty letter. If the guarantor has notice of the assignment, only payment to the assignee discharges the guarantor from its liability towards the beneficiary.

Article 10

Cessation of effectiveness of guaranty letter

The guaranty letter ceases to be effective, irrespective of whether [the instrument] [any document embodying it] is returned to the guarantor, when:

(a) the guarantor receives from the beneficiary a statement of release from liability [in any form referred to in paragraph (1) of article 7].

(b) the beneficiary and the guarantor agree on the termination of the guaranty letter

(c) the guarantor pays the maximum amount stated in the guaranty letter or, if that amount has been reduced according to an express provision in the guaranty letter [for reduction by a specified or determinable amount or a specified date or upon presentation to the guarantor of a document specified for this purpose in the guaranty letter], the remaining balance

or

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

Article 11

Expiry

(1) The validity period of the guaranty letter expires:

(a) at the expiry date [which may be specified calendar date or the last day of a fixed period of time stipulated in the guaranty letter]

(b) if expiry depends according to the guaranty letter on the occurrence of an event, when the guarantor receives confirmation that the event has occurred by presentation of the document specified for that purpose in the guaranty letter [or, if no such document is specified, a statement of the beneficiary or other conclusive evidence of the occurrence of the event].

(2) If the guaranty letter states neither an expiry date nor an expiry event or if a stated expiry event has not yet been established, the validity period expires [five] years after the establishment of the guaranty letter, unless the parties agree on an extension of the validity period.

Chapter IV

Rights, obligations and defences

Article 12

Determination of rights and obligations

Subject to the provisions of this Law, the rights and obligations of the parties are determined by the terms [and conditions] set forth in the guaranty letter, including any rules, [general] conditions or usages referred to therein.

Article 13

Liability of guarantor

[The guarantor shall act in good faith and exercise reasonable care as required by good guaranty and credit practice.] Guarantors [and instructing parties] may not be exempted from liability for their failure to act in good faith or for any [grossly negligent conduct] [act or omission done either with the intent to cause damage or recklessly and with the knowledge that damage would probably result.]

Article 14

Demand for payment

Any demand for payment under the guaranty letter shall be made in the form referred to in paragraph (1) of article 7 and in conformity with the terms of the guaranty letter. In particular, the demand shall be made, and received by the guarantor, within the time of effectiveness of the guaranty letter and shall be accompanied by any statement or document required by the guaranty letter [or this Law]. [If no statement or document is required, the beneficiary, when demanding payment, is deemed to impliedly certify that payment is due.]

[Article 15]

Notice of demand

Without prejudice to the provisions of articles 16 and 17, the guarantor shall promptly upon receipt of the demand give notice thereof to the principal or, where applicable, its instructing party, unless otherwise agreed between the guarantor and the principal.]

Article 16

Examination of demand

(1) Var. A: In examining the demand and any required statement or document accompanying it, the guarantor shall comply with the standard of reasonable care prevailing in international guaranty and stand-by letter of credit practice to ascertain their facial conformity with the terms of the guaranty letter, which are to be construed strictly.

Var. B: The demand and any required statement or document accompanying it shall be examined by the guarantor with the professional diligence of a knowledgeable, prudent guarantor to ascertain whether they appear on their face to conform with the terms of the guaranty letter and to be consistent with one another.

(2) Unless otherwise agreed by the parties, the guarantor shall have

Var. X: reasonable time

Var. Y: [four] business days

Var. Z: reasonable time, but not more than [seven] business days

in which to examine the demand and to decide whether or not to pay.

Article 17

Payment or rejection of demand

(1) The guarantor shall make payment as demanded by the beneficiary, unless:

(a) the guaranty letter is non-existent, invalid or unenforceable or

(b) the demand does not mean the requirements referred to in article 14 [or

Var. A: (c) the demand is [manifestly] [clearly and obviously] improper according to article 19].

(2) Var. B: [The guarantor may make payment despite an assertion by the principal that the demand is improper according to article 19, provided that the guarantor acts in good faith. However, if]

[If] the principal asserts that the demand is improper according to article 19 and the guarantor decides not to reject the demand, the guarantor shall promptly inform the principal about its decision [and, if so requested by the principal, defer payment for [three] business days].

(3) If the guarantor decides to reject the demand on any ground referred to in paragraph (1) (a) and (b) of this article, it shall promptly give notice thereof, indicating, where appropriate, the reason for the decision, to the beneficiary by teletransmission or, if that is not possible, by other expeditious means.

[(4) If the guarantor fails to comply with the provisions of article 16 or paragraph (3) of this article, it shall be precluded from claiming that the demand is not in conformity with the terms of the guaranty letter.]

Article 18

Request for extension or payment

If the beneficiary [demands in the alternative payment or] [combines a demand for payment with a request for] an extension of the validity period of the guaranty letter, the guarantor shall comply with the following rules, unless otherwise agreed by the parties:

(a) The guarantor shall give prompt notice of the alternative demand for extension or payment to the principal [directly or through an instructing party]

(b) The guarantor may not extend the validity period without the consent of the principal however, even the principal consents to the extension, the guarantor is not obliged to extend the validity period, unless so required by an agreement with the principal

(c) The guarantor shall examine the demand for payment in accordance with article 16 and decide whether to pay or to reject the demand if the guarantor decides not to reject the demand, it [shall] [may] defer payment until [ten] business days have elapsed after [giving notice to the principal] [receiving the alternative demand from the beneficiary] and then make payment, unless the guarantor extends the validity period.

Article 19

Improper demand

Var. A: A demand for payment is improper if:

(a) any certification by the beneficiary or any required document accompanying the demand is [untrue] [essentially incorrect] or forged or

(b) the demand falls clearly outside the purpose for which the guaranty letter was given or otherwise lacks any plausible basis.

Var. B: (1) [Same as Var. A]

(2) A demand has no plausible basis, for example where:

(a) in the case of guaranty letter that [supports][backs up] the financial obligation of a third party, the principal amount is not due

(b) in the case of tender guaranty letter,

(i) the contract has not yet been awarded or

(ii) the contract has been awarded to a tender other than the principal or

(iii) the contract has been awarded to the principal and the principal has [accepted] [signed] the contract and secured any performance guaranty letter

(c) in the case of repayment guaranty letter, no advance payment has been made

(d) in the case of performance guaranty letter,

(i) a competent court or arbitral tribunal has determined [in a final decision] that the obligations of the principal towards the beneficiary, the performance of which the guaranty letter was intended to secure, do not exist or are unenforceable on the ground that the underlying transaction [between the principal and the beneficiary] is not existent, violates public policy or is otherwise invalid

(ii) the principal has completely [to the satisfaction of the beneficiary] fulfilled its obligations the performance of which the guaranty letter was intended to secure

(iii) the beneficiary has prevented the principal from fulfilling its obligations, the performance of which the guaranty letter was intended to secure, by a [wilful] [serious] breach of its own [fundamental] obligations of the underlying transaction

(iv) the amount demanded is [grossly disproportionate to] [at least five times higher than] the damage suffered due to the failure of the principal to fulfil its obligations]

(e) in the case of a counter-guaranty letter, the beneficiary of the counter-guaranty letter has paid [or intends to pay] to its beneficiary under its guaranty letter, the reimbursement for which constitutes the purpose of the counter-guaranty letter, upon a demand that is [evidently] affected by one of the infirmities referred to in paragraph (1) of article 17, provided that the beneficiary of the counter-guaranty letter

Var. X: acted in collusion with its beneficiary.

Var. Y: [acted in bad faith] [failed to exercise professional care].

Var. Z: is by virtue of the counter-guaranty letter or any reimbursement agreement with the counter-guarantor or by virtue of law [entitled] [under a duty] to reject the demand because of such infirmity].

Var. C: (1) A demand for payment is improper if making it constitutes fraud or an abuse of rights,

(2) The making of a demand constitutes fraud where:

(i) the beneficiary [has no belief that the amount demanded is due] [knows or cannot be unaware of the fact that the amount demanded is not due] on the basis asserted in the demand or any supporting statements or documents or

(ii) any supporting statement or document is [untrue] [essentially incorrect] or

(iii) any supporting document is forged.

(3) The making of a demand constitutes an abuse if:

Var. X: the beneficiary exercises its right for purpose other than that for which the guaranty letter was given.

Var. Y: the contingency against the consequences of which the guaranty letter was designed to indemnify the beneficiary has undoubtedly not materialised or has clearly been brought about by a fundamental breach of the underlying transaction wilfully committed by the beneficiary.

Var. D: The guarantor [may] [shall] reject a demand as improper if, having due regard to the independent [and essentially documentary] character of its undertaking, the guarantor concludes that the demand is made in bad faith or fraudulently, including fraud or forgery relating to the documents or fraud in the underlying transaction, or that the making of the demand constitutes an abuse of rights by the beneficiary, provided that the facts constituting the basis of the conclusion are clearly and convincingly established without investigation by the guarantor.

Article 20

Set-off

Var. A: Unless otherwise [expressly] agreed by the parties, the guarantor may not avail itself of a set-off with any claim against the demand for payment under the guaranty letter.

Var. B: Unless otherwise agreed by the parties and subject of the provisions of the law of insolvency, the guarantor may discharge its payment obligation under the guaranty letter by means of a set-off with any claim not assigned to it by the principal, provided that the claim of the guarantor is [liquidated and] certain or undisputed.

Var. C: Unless otherwise agreed by the parties, the guarantor is precluded from discharging its payment obligation under the guaranty letter by means of a set-off with any claim, except where:

(a) the beneficiary is insolvent or

(b) the guaranty letter is designed to secure the fulfilment of a financial or payment obligation of the principal or the guarantor and that obligation could have been discharged by means of a set-off with the claim of the guarantor.

Chapter V

Provisional court measures

Article 21

Preliminary injunction against guarantor

(1) Where, on an application by the principal,

Var. A: strong prima facie evidence is produced to the satisfaction of a competent court

Var. B: clear and liquid proof is presented to a court of competent jurisdiction

Var. C: it is manifestly shown by documentary means, including [sworn witness statements] [affidavits]

that a demand made for anticipated to be made] by the beneficiary constitutes an improper demand, the court may issue a preliminary order enjoining the guarantor from meeting the demand [or from debiting the account of the principal], provided that [the court is satisfied that] the refusal to issue such an order would cause the principal [serious harm] [irreparable loss] which would be [clearly] more substantial than the loss that might be suffered by the beneficiary as a result of the issuance of such an order.

(2) Before deciding on the application of the principal, the court [may hear the guarantor] [shall provide the guarantor with an opportunity to be heard]. It may also ['if so permitted by its procedural law'] consider the advisability of hearing the beneficiary or of allowing the principal to seek injunctive relief against the beneficiary as co-defendant.

(3) An order referred to in paragraph (1) of this article shall be issued for a specified period of effectiveness not exceeding [six] months. An extension of that period may be made dependent on the initiation by the principal of proceedings other than preliminary proceedings against the guarantor or the beneficiary.

(4) The court may make the effect of an order referred to in paragraph (1) of this article subject to the furnishing by the principal of such security as the court deems appropriate.

Article 22

Preliminary injunction against beneficiary

(1) Where, on an application by the principal, strong prima facie evidence is presented to a competent court that a demand made by the beneficiary constitutes an improper demand, the court may order the beneficiary not to accept payment or to withdraw its demand or, if such a demand is anticipated to be made, not to make the demand, provided that the refusal to issue such an order would cause the principal serious harm that would be more substantial than the loss that might be suffered by the beneficiary due to such an order.

(2) Before deciding on the application of the principal, the court [may hear the beneficiary] [shall provide the beneficiary with an opportunity to be heard].

(3) An order referred to in paragraph (1) of this article shall be issued for a specified period of effectiveness not exceeding [six] months. An extension of that period may be made dependent on the initiation by the principal of proceedings other than preliminary proceedings against the beneficiary. [If an order restraining the beneficiary from making a demand is repealed or becomes otherwise ineffective, the period of effectiveness of the guaranty letter shall be deemed to have been extended so as to allow the beneficiary [ten] days after the time of ineffectiveness of the order for making a demand.]

(4) The court may make the effect of an order referred to in paragraph (1) of this article subject to the furnishing by the principal of such security as the court deems appropriate.

[Article 23]

Principles of preliminary proceedings

(1) Injunctive relief may be sought from a competent court against the guarantor by the principal or by the beneficiary, and against the beneficiary by the principal or by the guarantor, even if the place of business of the applicant is not situated in this State.

(2) The court shall [endeavour to] deal expeditiously with an application for injunctive relief [and take into due account the special character of the guaranty letter.]

Chapter VI

Jurisdiction

Article 24

Choice of court or of arbitration

(1) The parties may, in the guaranty letter or by a separate agreement in a form referred to in paragraph (1) of article 7, designate a court or the courts of a specified State as competent to settle disputes that have arisen or may arise in relation to the guaranty letter, or stipulate that any such dispute shall be settled by arbitration.

(2) If the parties have designated a court or the courts of a specified State in accordance with paragraph (1) of this article, only the designated court or courts shall have jurisdiction.

(3) The provisions of the preceding paragraphs of this article do not constitute an obstacle to the jurisdiction of the courts of this State for provisional or protective measures.

Article 25

Determination of court jurisdiction

(1) Unless otherwise provided in accordance with paragraph (1) of article 24 [or if a designated court of another State declines to exercise jurisdiction], the courts of this State [may exercise] [have] jurisdiction over disputes between the guarantor and the beneficiary relating to the guaranty letter if [the guaranty letter was issued] [the guarantor has its place of business, where the guaranty letter was issued,] in the territory of this State.

(2) The courts of this State may also entertain an application by the principal for a preliminary order against the guarantor [or the beneficiary] if the guaranty letter was issued in this State.

Chapter VII

Law applicable to guaranty letter

Article 26

Choice of applicable law

[The rights and obligations arising out of] [The rights, obligations and defenses relating to] a guaranty letter are governed by the [rules of] law designated by the parties. Such designation shall be by an express clause in the guaranty letter or in a separate agreement, or

Var. A: result without doubt from the terms of the guaranty letter.

Var. B: be demonstrated by the terms of the guaranty letter [or the circumstances of the relationship between the guarantor and the beneficiary].

Var. C: result by implication from the terms of the guaranty letter.

Article 27

Determination of applicable law

Failing a choice of law in accordance with article 26, [the rights and obligations arising out of] [the rights, obligations and defenses relating to] a guaranty letter are governed by the law of the State where the guarantor has its place of business or, if the guarantor has more than one place of business, where the guarantor has that place of business at which the guarantor was issued. [However, if according to the guaranty letter the examination of the demand and any required documents takes place in another State, the law of that State applies to the standard of care and responsibility for such examination, failing a specific agreement to the contrary.]