WORDING OF GUARANTEE

- Is it truly a demand (abstract, independent guarantee) and not an accessory guarantee (suretyship)?
- Who is the issuer?
  - (a) Bank;
  - (b) Insurance company;
  - (c) Surety or fidelity company;
  - (d) Corporation?
- Is the guarantee effective/operative?
We have been informed that the Beneficiary, as Orderer: . . . .
. . . . . . . . . . . . . . . . . . . . had reached with the Principal, as Supplier: . . . . . . an agreement as per above for a total amount of . . . . . .

At the request of the Supplier, we, the undersigned bank, hereby guarantee towards the Orderer, as for our own debt, the due fulfilment of the obligations assumed by the Supplier in accordance with the above-mentioned agreement.

However, we shall not by reason of this undertaking be liable to disburse more than up to an aggregate maximum amount as stated above.

Our guarantee is valid until . . . . and claims, if any, are to reach us on or before that date. Please return the original guarantee to us upon expiry. However, after the expiry date this guarantee will become null and void whether returned to is nor not.

We have been informed that (company B) has entered into contract no . . . . . . . . . . . . . . . . . . of . . . . . . . . . . . . . . . . . . . (date) with you for the supply of . . . . . . . (goods). Furthermore, we understand that a warranty guarantee is required.

At the request of (company B) we, the bank, hereby irrevocably undertake to pay you, waiving all rights of objection and defense arising from the debt of the company B, any sum or sums not exceeding a total amount of . . . . . . . . . . . . . . . . . . . . (say: . . . . . . . . . . . . . . . . . . . .) upon the receipt of your first demand in writing supported by your written statement stating that and in which respect company B is in breach of its obligation(s) under the underlying contract.

Your demand for payment must also be accompanied by a survey report issued by SGS.

This guarantee shall expire on . . . . (date) at latest.
In consideration of ........(hereafter called the „Supplier‟) having according to contract no......dated.......(hereafter called the „Contract‟) sold to you ............. (the goods) for the total price of ............. and the Supplier being entitled according to the payment conditions to receive an advance payment of .............. (say: .................................)

We, the undersigned bank, hereby guarantee as for our own debt, the repayment of the said advance payment in case the Supplier is obliged to repay the said advance payment in accordance with the Contract.

It is a condition for claims and payments to be made that the advance payment of ............. has been received on account no............... with us in favour of the Supplier.

This guarantee remains in force until ..... by which date at the latest all claims under it shall have reached us in writing in order to be taken into consideration. Otherwise this guarantee will become null and void.

Between the Beneficiary, as Orderer, and the principal, as Supplier, an agreement has been reached as per above for a total amount of ............

At the request of the Supplier, we, the undersigned bank, hereby undertake to pay to the Beneficiary, upon his first request in writing any sum or sums up to an aggregate maximum amount as stated above, provided that any claim for payment is supported by a declaration that the Supplier has failed to fulfil the terms and conditions of the said agreement.

However, we shall not by reason of this undertaking be liable to disburse more than up to an aggregate maximum guarantee amount as stated above.
WORDING OF GUARANTEE

- Is the reduction, termination clause well drafted and workable?
- *Are conditions for demand only documentary and under control of the Beneficiary?*
- Is the expiry workable? What is it?
- Is Expiry date enforceable under the governing law?

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WORDING OF GUARANTEE

- Is Expiry date enforceable under the governing law?
- R.F.Bertrams, *Bank Guarantees in International Trade*, 2nd edition, 1996 – listed 4 countries in which expiry date were deemed not to be enforceable (Jordan, Lebanon, Syria, Thailand)
- 3rd edition, 2004 – only Syria
- Bangladesh, Greece, India, Malaysia, Indonesia: the expiry date and the last day for demand
GUARANTEE PRACTICE - ISSUES

• No expiry date (an event)!
• Evergreen clause(s)
• Operative clause – advance/retention payment
• Reduction clause – payment, document
• Examination of demand – what to examine, standard of compliance?

Evergreen clause

The Evergreen or automatic extension clause allows the Standby LC to be issued for a specified initial period (usually one year) with an “automatic” expiry extension.

"It is a condition of this Letter of Credit that it shall be deemed automatically extended for an additional period of one year from the present or any future date hereof unless at least 30 (60/90) days prior to any such expiration date we notify you by courier or registered mail that we elect not to extend this Letter of Credit for any such additional period."
**Evergreen clauses**

- 1) Extension if requested by BNF before the expiry date of the guarantee
- 2) Automatic extension („upon your request“ omitted)

**Common clause:**

- Clause automatically renews the credit unless the Issuer notifies the Beneficiary of its election not to renew prior to expiration
- with or **without** automatic payment
- A need for demand: BNF document reciting the Applicant´s failure to provide a replacement (extension) of the credit
Guarantee – wording

Things to avoid when drafting the text of the guarantee

➢ Ambiguous wording
➢ Inconsistency (suretyship)
➢ Excessive detail (art.8)
➢ Reference to conditions of the contract
➢ Non-documentary conditions except those determinable from the guarantor´s own records or index referenced in the guarantee
Instructions and Guarantees – Art.8.

😊 Should be clear and precise and should avoid excessive detail.

➢ the Applicant; the Beneficiary; the Guarantor;
➢ reference number, information identifying the Underlying relationship;
➢ Reference number identifying the issued guarantee or counter-guarantee;
➢ the Amount, Currency; the Expiry;
➢ any Terms for demanding payment;
➢ whether a demand or other document shall be presented in paper and/or electronic Form;
➢ the Language of any document specified in the guarantee; and
➢ the Party liable for the payment of any charges.

Guarantee – wording

URDG 758 – other important rules:

Demand: presentation of demand
➢ Place for presentation (art.14 a)
➢ Time for presentation (art.14 a)
➢ How? In paper – mode of delivery (art.14 d)
➢ Form? Electronic/paper (art.14 c,e)
➢ Identification of the guarantee
Guarantee – wording

URDG 758 – other important rules:

Demand:
- Demand – see art. 2
- Other required documents, if any
- In any case a statement in what respect the Applicant is in breach of its obligations under the underlying relationship.

Guarantee – wording

URDG 758 – other important rules:

Demand:
- Demand:
  - Partial demand allowed
  - Multiple demands allowed
- Amount of demands – see art. 17e!
Guarantee – wording

URDG 758 – other important rules:

➢ Reduction of amount available (25a)
➢ Termination of the guarantee (25b)
➢ Return of the original?
➢ No expiry (expiry date or expiry event) – see (25c)!
➢ Applicable law and jurisdiction

Optional clauses to be inserted in the Form of Demand Guarantee

➢ Effectiveness clause:
  ■ Date (different from the date of issue)
  ■ Event:
    ◦ The crediting of to the Applicant’s account maintained with the Guarantor
    ◦ The receipt by the Guarantor of proceeds for further credit to the Applicant’s account maintained with the Guarantor,
    ◦ …provided such remittance identifies the guarantee to which it relates
    ◦ The presentation to the Guarantor of a statement stating ……
Reduction

➢ a. The amount payable under the guarantee shall be reduced by any amount:
   ➢ i. paid under the guarantee,
   ➢ ii. resulting from the application of article 13, or
   ➢ iii. indicated in the Beneficiary’s signed partial release from liability under the guarantee.

Optional clauses to be inserted

➢ The Guarantee Amount will be **reduced** by [...% of Guarantee Amount or exact amount] upon:
   ➢ Presentation to the Guarantor of the following document(s):...;
   ➢ In the case of an index specified in the guarantee as triggering reduction [insert index figure triggering the reduction...]; or
   ➢ (In the case of a payment guarantee): the remittance of ......to the Beneficiary’s account ...., provided the record of such remittance enables the Guarantor to identify the guarantee to which it relates.....
Termination

➢ b. Whether or not the guarantee document is returned to the Guarantor, the guarantee shall terminate:
  ➢ i. on expiry,
  ➢ ii. when no amount remains payable under it, or
  ➢ iii. on presentation to the Guarantor of the Beneficiary’s signed release from liability under the guarantee.

Expiry

➢ Expiry means the expiry date or the expiry event or, if both are specified, the earlier of the two;
➢ expiry date means the date specified in the guarantee on or before which a presentation may be made;
➢ expiry event means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:
  ➢ a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or
  ➢ b. if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records.
Guarantor’s own records (art.2)

guarantor’s own records means records of the guarantor showing amounts credited to or debited from accounts held with the guarantor, provided the record of those credits or debits enables the guarantor to identify the guarantee to which they relate;

Non - documentary conditions as per URDG 758

➢ A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition.
➢ If the guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor’s own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except …..
Non-documentary conditions (art.7)

➢......then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee.

URDG 758 ICC Opinions - 470/TA.745

We have seen demand guarantees subject to URDG 758 that include clauses such as:

• 1. This guarantee will expire upon Final Acceptance.
• 2. This guarantee is valid until completion of the contract.
• 3. This guarantee is valid until released by the beneficiary.
ICC Opinion - URDG 758
470/TA.745

• The demand guarantees in question do not include an expiry date nor is there any required document to specify the “expiry condition”.

• We ask you kindly to advise if the “3 year rule”, as described in URDG 758 subarticle 25 (c), applies to guarantees such as those mentioned above.

URDG 758 sub-article 25 (b) states:
“Whether or not the guarantee document is returned to the guarantor, the guarantee shall terminate:

i. on expiry,

ii. when no amount remains payable under it, or

iii. on presentation to the guarantor of the beneficiary’s signed release from liability under the guarantee.”
URDG 758 sub-article 25 (c) states:
“If the guarantee or the counter-guarantee states neither an expiry date nor an expiry event, the guarantee shall terminate after the lapse of three years from the date of issue and the counter-guarantee shall terminate 30 calendar days after the guarantee terminates.”
If any of the respective clauses is deemed to constitute an expiry event (as defined in article 2), then the “three year rule” stated in sub-article 25 (c) will not apply.

Requirements for Demand under GUA

- **Demand**
- Plus **Documents** required by the GUA
- and **ALWAYS** a **Statement**, by the Beneficiary, indicating in what respect the Applicant is in breach of its obligations under the underlying relationship.
- This statement may be in the demand or in a separate signed document accompanying or identifying the demand.
Demand under Counter-Guarantee

Demand

ALWAYS a Statement, by the party to whom the Counter-guarantee was issued, indicating that such party has received a complying demand under the Guarantee or Counter-guarantee issued by that party.

This statement may be in the demand or in a separate signed document accompanying or identifying the demand.

Demand Statement

The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent the Guarantee or Counter-guarantee expressly excludes this requirement.

Exclusion terms such as “The supporting statement under article 15[(a)] [(b)] is excluded” satisfy the requirement of this paragraph.