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Understanding the URDG 758

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The Uniform Rules for Demand Guarantees, 2010 Revision, International Chamber of Commerce Publication No. 758 (the "URDG"), became effective on July 1, 2010. Designed to unify independent guarantee practice, this revised set of rules for demand guarantees and counter-guarantees replaces International Chamber of Commerce Publication No.458, which was issued in 1992 but not extensively used in the US.

The new Publication 758 is fashioned after the widely successful Uniform Customs and Practice for Documentary Credits (UCP) 600. Similar to UCP600 and International Standby Practices 98 (ISP98), URDG 758 is not "law." It merely sets out the roles and responsibilities of all parties at each key stage of the life cycle of a demand guarantee and reflects "best practice" in the guarantee business.

After three years of working on these new rules, the ICC has produced a publication that is comprehensive, innovative and concise. Banks in the US, if they choose to do so, now have another offering in their product set that their clients may opt to use when considering how to best support their cross-border business.

Reviewing Some Key Provisions

Article 7 of URDG 758 is similar to ISP98 Rule 4.11, UCP600 Article 14(h) and NYUCC § 5-108(g), in that non-documentary conditions are to be disregarded. However, URDG adds an exception that non-documentary conditions are *not* to be disregarded to the extent that information in any required documents conflicts with such conditions. This URDG rule can make it tricky to know when these conditions

are met and compliance is necessary. To minimize errors, banks may want to provide extra training to those examining these documents.

URDG **Article 14(b)** permits the presenter to provide the required information for a complying demand in a piecemeal fashion if it records this in its partial presentation and if the presentation is completed before the guarantee expires. This effectively shifts the burden of storing and caring for documentation until a demand is complete from the presenter to the guarantor. Under ISP98, UCP600 and the NYUCC, a bank is permitted to return incomplete, non-complying documents to the presenter.

The URDG **Article 15** requirement for presentation of a default statement, even if not mentioned in the guarantee, is a potential trap for both beneficiaries and guarantors. A beneficiary that is unaware of this requirement may fail to present this statement and be unable to correct this if the guarantee is to expire shortly. A guarantor that fails to request the statement may jeopardize its right to reimbursement. Beneficiaries and guarantors may protect themselves by using the Article 15(c) option to exclude any requirement for the presentation of a default statement under Article 15(a) or (b). Banks may also want to include protective provisions in their reimbursement agreements.

URDG **Article 24** provides that notice of dishonor must be sent "without delay" and not later than the close of the fifth business day. However, "without delay" is not explicitly defined, and it could be argued that this means just one or two days. Neither ISP98, UCP600 nor the NYUCC requires that notice be given "without delay" (as opposed to within a "reasonable time" or "within a specified period of time"). ISP98 Rule 5.01(a)(i) provides a "safe harbor" for issuers — notice within three business days after the day of presentation is deemed to be not unreasonable and therefore does not trigger the preclusion penalty. Banks may protect themselves from this URDG risk by including appropriate provisions in their guarantees or reimbursement agreements.

URDG **Article 35** has no counterpart in ISP98 or UCP600. It specifies an "exclusive place" for the resolution of disputes — something that may work well where there is a demand guarantee but no counter-guarantee. However, where there are both, the "exclusive place" can be different for the guarantor than for the counter-guarantor (likely, as they will often be located in different countries). This exposes them to the risk of inconsistent judgments (e.g., a court in Country A may hold that the guarantor is obligated to pay under the demand guarantee, but a court in Country B may hold that the guarantor is not entitled to be paid under the counter-guarantee). The parties may wish instead to agree on exclusive jurisdiction in a single jurisdiction for both guarantees. NYUCC § 5-116(e) permits great freedom in selecting the jurisdiction for disputes under documentary undertakings.

Guarantor's Independent Role

URDG 758 is being actively promoted and marketed by the ICC and has been officially translated into 16 languages. It clearly recognizes the guarantor's independent role, as detailed in URDG **Article 5**, which points out that a guarantee is independent of the underlying relationship and application, and in **Article 6**, which states that guarantors deal with documents and not with the goods, services or performance to which the documents may relate.

URDG 758 also recognizes the guarantor's potential role of being in the middle of a dispute between the beneficiary and the instructing party by requiring the guarantor to, without delay, notify the instructing party of any demand to extend the guarantee (**Articles 16 and 23**). URDG 758 also offers a model guarantee and counter-guarantee for use, which will further level the playing field and help avoid any misunderstandings.

URDG 758 has been endorsed by the World Bank, the International Federation of Consulting Engineers (FIDIC), the Organization for Harmonization of Business Law in Africa (OHADA), the UN Commission for International Trade Law and BAFT-IFSA.

Considering that URDG 458 reportedly governs over \$14 trillion in trade, there are many new opportunities that URDG 758 offers the trade finance community through more comprehensive, stronger and clearer rules for demand guarantees.