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Bank guarantees

The ICC publishes a guide to the application of URDG 758

Par Marie de Gottrau le 5 October 2021

Ten years after the entry into force of the Uniform Rules for Demand Guarantees (URDG, ICC publication no. 758), the International Chamber of Commerce published in 2021 the *International Standard Demand Guarantee Practice for URDG 758* (ISDGP, ICC publication no. 814), adopted by the ICC Banking Commission in March 2021. The collection consists of a set of practices ('*best practices*'), inspired by international customs and intended to complement URDG 758. The text is published exclusively in English.

Like the URDG, the ISDGP does not have the force of law. Rather, it is a guide for the application of the URDG, to be read in conjunction with the latter.

Below, we discuss some of the most significant provisions of the ISDGP for the interpretation of the RUGD.

The ISDGP first provides some clarification of the key concepts of the guarantee operation in § 9 to 48 ISDGP, as practice has revealed that some definitions contained in the RUGD (cf. art. 2 RUGD) needed clarification. The RUGD thus make a distinction between the notion of 'principal' and 'instructing party' : the principal is the party mentioned in the guarantee as being liable by virtue of the relationship underlying the guarantee, while the instructing party is the party that gives the instructions for the issuance of the guarantee and is liable to indemnify the guarantor. For this purpose, the GPIS specify that if the principal is not the party giving the instructions, the latter may be a parent company or a subsidiary of the principal or any other person with an interest in the issuance of the guarantee (GPIS §9).

Regarding the issuance of the guarantee, which according to the RUGD is determined according to the criterion of effective control implying that the guarantee is issued as soon as it leaves the control of the guarantor (cf. art. 4 let. a RUGD), the ISDGP provides a useful clarification : according to § 68 ISDGP, a guarantee that is no longer under the control of the guarantor is considered to be validly issued, even if the internal approval procedure in the guarantor's establishment is not complete.

Another welcome clarification is that, when the parties have agreed to an electronic presentation (cf. art. 14 let. c RUGD), it is recommended that this method of presentation also includes SWIFT messages, unless the guarantee instrument has expressly excluded them (art. 84 ISDGP).

The ISDGP devote several paragraphs to the question of '*extend or pay*' requests (cf. Art. 23 RUGD), which are quite frequent in practice. In particular, an *extend or pay* request must precisely designate the desired extension period (§ 123 ISDGP) and include a request for payment in accordance with the agreement, so that the guarantor is obliged to make the payment if the extension requested by the beneficiary is not granted (§ 122 ISDGP).

In a section dedicated to the payment of the guarantee amount to the beneficiary, § 160 ISDGP offers a supplement to art. 20(b) GURD, which states that 'where the guarantor determines that a demand for payment is compliant, it shall pay', by recommending that, to comply with standard practice regarding guarantees on demand, payment to the beneficiary should be made within three working days of the demand being determined to be compliant. The ISDGP go further here than the RUGD, which do not state any time limit within which payment must be made, by indicating the standard time limit for making payment in order to avoid unjustified delays.

The DPSIR conclude with a chapter entitled 'miscellaneous'. This deals with the concept of abusive appeal, recalling that this is a subject that is not regulated by the RUGD, and which falls under the law applicable to the latter (§ 209 DPSIR). It is also recommended that, in the event of provisional measures directed against the guarantor, the latter should promptly notify the beneficiary of the impossibility of making the guarantee payment by providing him with a copy of the court decision (section 211 ISDGP).

In conclusion, and in our opinion, the ISDGP constitute an excellent complement to the RUGD. While it is regrettable that the ISDGP are not drafted as an article-by-article commentary, which would have enabled practitioners to find explanations relating to a particular article of the RUGD more directly, we must nevertheless commend the efforts of the ICC Banking Commission to codify a large part of the international standardised practices in the field of independent guarantees in a compendium.

It should also be emphasised that in the practice of Swiss bank guarantees, the URDG are still little used, except by certain banks active in *trade finance*. Therefore, in the absence of a commercial custom or usage, a Swiss judge cannot directly refer to the URDG and the ISDGP to resolve a dispute relating to a bank guarantee transaction if it is not subject to the URDG. However, the Federal Court has held, in two decisions relating to guarantees not subject to the RUGD, that the RUGD made it possible to clarify the qualifications and the relationships between the parties to the guarantee transaction, and recognised that certain provisions of the RUGD were consistent with certain Swiss doctrinal positions (SJ 1997 p. 245, 251 ; ATF 122 III 273, 276). In our view, the Swiss judge should then be able to *draw inspiration* from the solutions contained in the RUGD and the ISDGP, given that these texts generally reflect international practice in the area of guarantees on first demand.

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