

UNIFORM LAW CONFERENCE OF CANADA

CIVIL SECTION

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

INTERIM REPORT OF THE WORKING GROUP

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have not been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

Ottawa, ON

August 9-13, 2009

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Interim Report of the Working Group

August 2009

Background

[1] At its Annual Meeting in 2005, the ULCC decided to review the advisability of preparing a uniform implementing act for the 1995 *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (hereinafter referred to as the “Convention”).

[2] In March 2006, the Conference considered a report by Steven Jeffery, Partner, Blaney McMurtry LLP and Marc Lacoursière, Professor, Université Laval, which examined the Canadian framework for the law of independent guarantees and stand-by letters of credit, both from a common law and civil law perspective. The report recommended that the Convention be adopted in Canada.

[3] There is no existing legislation in Canada that specifically deals with letters of credit or bank guarantees. The law applicable to letters of credit in the common law provinces and federally has been developed by the courts. On the civil law side, there have been some attempt to associate independent bank guarantees with certain nominate contracts. Others have done so with innominate contractual instruments. However, the nature of the bank guarantee is still not determined in Quebec civil law.

ULCC Working Group on Independent Guarantees and Stand-by Letters of Credit

[4] A Working Group was established following the 2006 Annual Meeting. Its mandate is to prepare, in accordance with the directions of the Conference, a uniform act and commentaries to implement the Convention, to report on the desirability of any other legislative recommendations and to work in co-operation with the Uniform Law Commission in the United States (ULC) and the Mexican Uniform Law Centre, should those organizations be agreeable.

[5] The Working Group is composed of the following members: Mireille LeBlanc (International Private Law Section, Justice Canada), Professor Marc Lacoursière (Université Laval), Steven Jeffery (Blaney McMurtry LLP), Michel Deschamps (McCarthy, Tétrault LLP), Professor Benjamin Geva (Osgoode Hall Law School) and Clark Dalton (Projects Coordinator for the ULCC).

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Activities

Draft Uniform Act

[6] At its Annual Meeting in 2007 and again in 2008, the Conference was updated on the Working Group's progress. It considered a draft uniform act and encouraged the Working Group to continue its work in developing both a draft uniform act implementing the Convention and specific rules to address domestic transactions and all aspects of international ones.

[7] Over the last year, the Working Group continued to meet regularly by conference call. It continued to develop a draft uniform act in two parts. Part 1 establishes domestic rules, basically codifying existing common law and civil law rules that are consistent with the Convention. It addresses domestic transactions in the area of independent guarantees and letters of credit as well as aspects of international transactions not covered by the Convention. It will eventually include commentaries.

[8] Part 2 implements the Convention in Canada and includes commentaries. Although commentaries have yet to be developed for Part 1, the Working Group has now finalized its text of the draft uniform act (attached).

Work with the US Uniform Law Commission (ULC)

[9] Members of the Working Group participated, with colleagues from the ULC, in a series of conference calls organized by the Committee for Implementation of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. Discussions focused on implementation issues in the United States and Canada.

[10] On December 5-6, 2008, members of the Working Group attended the ULC Joint Drafting Committee for Implementation of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit in Chicago. The Working Group presented Part 1 of its draft uniform act and obtained valuable comments regarding various policy issues, in an attempt to bring about a harmonized approach to implementing the Convention across the Americas.

[11] There were also discussions surrounding implementation methods of the Convention in the United States. The Uniform Law Commission continues to work to develop an implementation strategy based on implementation through State law, adoption of federal implementing legislation and using the text of Article 5 of the Uniform Commercial Code as a basis, rather than the text of the Convention.

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Consultations

[12] The Working Group continues to maintain ongoing discussions with key stakeholders. In May 2009, the Working Group consulted beneficiaries of letters of credit through Canada's largest trade and industry association: Canadian Manufacturers and Exporters. The association has yet to provide the Working Group with its official position.

[13] The Canadian Bar Association has expressed its support for the project. Major Canadian banks and the Canadian Bankers Association have yet to provide the Working Group with their official positions.

Legislative Drafting

[14] Although the legislative drafting process officially began in the spring of 2008, little formal progress has been made since then since the legislative drafters responsible have had to deal with Parliamentary matters. However, in March 2009, members of the Working Group attended a first formal drafting session with the legislative drafters. At that session, the drafters were provided with important background information on letters of credit law, necessary to advance their work. No new dates have been set for future drafting sessions at this time but drafting will resume as soon as possible, subject to the drafters' availability. A final draft uniform act is expected by spring 2010.

Next Steps

[15] The Working Group intends to maintain ongoing discussions with stakeholders, including following up on previous consultations.

[16] The Working Group expects that a final draft uniform act and commentaries will be presented at the 2010 ULCC Annual Meeting. The Working Group would prepare a final report on the project for consideration at the meeting.

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Draft Uniform Independent Guarantees and Letters of Credit Act

Part 1

(Draft 30 includes changes to May 4, 2009)

Scope of Application

1 (1) Part 1 applies to all undertakings as defined in subsection 1.1(r), except that for undertakings governed by Part 2, Part 1 applies only insofar as it is not inconsistent with the specific provisions of Part 2.

(2) With the exception of this subsection, **sections 1.1, 2, 3, 4, 5, 6(2), 12(c), 14, and 22(4)**, and subject to subsection (3), the effect of this Act may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this Act.

Comment

On modification of the definitions: see Comment 3 to UCC Section 5-103: “parties should generally avoid modifying the definitions...”

(3) The obligations of good faith, diligence, reasonableness and care may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever this Act requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(4) An issuer, nominated person or adviser may not be exempted from liability for any grossly negligent conduct.

(4.1) All provisions that apply to an issuer apply equally to a confirmer other than subsections 7(2), 1.1(c) and 7(3)

(4.2) All provisions that apply to an undertaking apply equally to a confirmation other than subsections 7(2), 7(3) and 7(4)(c).

(5) The statement of a rule in this Act does not by itself require, imply, or negate application of the same or a different rule to a situation not provided for, or to a person not specified, in this Act.

(6) The fact that the language of any provision in Part 1 is different from the language used in the related provision of the Convention and of Part 2 does

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not, in and of itself, mean that the provision in Part 1 is to be interpreted differently than the related provision of the Convention and of Part 2. Parts 1 and 2 shall be interpreted in a consistent manner.

Definitions

1.1 In this Part:

- (a) "adviser" means a person who, at the request of the issuer, or another adviser, notifies or requests another adviser to notify the beneficiary that an undertaking has been issued, confirmed, or amended;
- (a.1) "applicant" means a customer of the issuer or other person at whose request or for whose account an undertaking is issued. Where a person requests an issuer to issue an undertaking on behalf of another, if the person making the request undertakes an obligation to reimburse the issuer, each person is an applicant;
- (b) "beneficiary" means a person who under the terms of an undertaking is entitled to have its complying presentation honoured and includes a person to whom drawing rights have been transferred under a transferable undertaking;
- (c) "confirmation" of an undertaking means a commitment added to that of the issuer, and authorized by the issuer, providing the beneficiary with the option of demanding that the confirmer honour the undertaking instead of the issuer, upon presentation, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to make presentation to the issuer;
- (d) "confirmer" means a nominated person adding a confirmation to an undertaking;
- (e) "counter-guarantee" means an undertaking given to the issuer of another undertaking by its applicant and providing for honour upon presentation, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that honour of that other undertaking has been demanded from, or made by, the person issuing that other undertaking;
- (f) "counter-guarantor" means the person issuing a counter-guarantee;
- (g) "dishonour" of an undertaking means failure timely to honour or to take an interim action, such as acceptance of a draft, that may be required by the undertaking;
- (h) "document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record,

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communication, statement, or representation of fact, law, right, or opinion that provides a complete record thereof;

(h.1) "draft" means a bill of exchange under the *Bills of Exchange Act (Canada)*;

(i) "electronic" includes created, recorded, transmitted or stored in digital form or in other intangible form by electronic, magnetic or optical means or by any other means that has capabilities for creation, recording, transmission or storage similar to those means;

(j) "good faith" means honesty in fact in the conduct or transaction concerned;

(k) "honour" of an undertaking means performance of the issuer's commitment in the undertaking which may be stipulated in the undertaking to be made in any form, including:

(a) payment;

(b) acceptance of a draft and at maturity, its payment;

(c) incurrence of a deferred payment obligation and at maturity, its payment; or

(d) supply of a specified item of value.

Payment under sub-paragraph (a), (b), and (c) must be stipulated to be made in a certain or determinable amount in a specified currency or unit of account.

(l) "issuer" means a bank or other person that issues an undertaking, and includes a counter-guarantor, but does not include an individual who makes an engagement for personal, family, or household purposes;

(m) "nominated person" means a person whom the issuer

(i) designates or authorizes to pay, accept, negotiate, or otherwise give value under an undertaking; and

(ii) undertakes by agreement or custom and practice to reimburse;

(n) "presentation" means delivery of a document or documents to an issuer or nominated person for demanding the honour of an undertaking;

(o) "presenter" means a person making a presentation as or on behalf of a beneficiary or nominated person;

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(p) "record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in intelligible form;

(q) "successor of a beneficiary" means a person who succeeds to substantially all of the rights of a beneficiary by operation of law; and

(r) "undertaking" means an independent commitment, known in international practice as a letter of credit, given by an issuer to the beneficiary, to honour a presentation, in conformity with the terms and any documentary conditions of the undertaking, and includes a standby letter of credit, an independent guarantee or a counter-guarantee.

(Definitions Source: 5-102 – UCC)

Giving an undertaking

2(1) The undertaking may be given:

(a) at the request or on the instruction of the applicant; or

(b) on behalf of the issuer itself, but only where it issues in the ordinary course of its business undertakings under section 2(1)(a).

(2) The undertaking may stipulate that the issuer itself is the beneficiary when acting on behalf of another person or in another capacity.

(3) Consideration is not required to issue, amend, transfer, or cancel an undertaking, advice, or confirmation.

(Comment: To be added to the Commentary to this section: Subsection (3) is not required under the Quebec Civil Code}

Independence of undertaking

3. The issuer's obligation to honour under Section 17 is independent of:

(a) the existence, validity or performance of any underlying transaction between the applicant and the beneficiary, whether or not referred to in the undertaking, and not subject to any defence or claim arising from its breach, whether or not the issuer has knowledge of such breach;

(b) any other undertaking (including letters of credit or independent guarantees to which confirmations or counter-guarantees relate), any term or condition not appearing in the undertaking and any future, uncertain act or event except presentation of documents or another such act or event within an issuer's sphere of operations; and

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(c) the issuer's right or ability to obtain reimbursement from the applicant, whether or not any reimbursement agreement is referred to in the undertaking.

(Source: Article 3 – Convention and ISP98 1.06 (c))

Principles of interpretation

4. In the interpretation of this Part, regard is to be had to the need to promote uniformity in the international practice of independent guarantees and letters of credit.

(Source: Article 5 - Convention)

Binding on Crown

5. This Act is binding on the Crown in right of (*name of the enacting jurisdiction*).

Comment: The Convention is drafted on the assumption that it applies to all independent guarantees and stand-by letters of credit otherwise within its scope whether or not they involve governmental entities. Section 5 merely confirms this. Of course, if a jurisdiction's interpretation legislation already provides that the Crown is bound unless otherwise stated in the particular act, there is no need to include it Issuance, form and irrevocability of undertaking

Issuance, form and irrevocability of undertaking

6. (1) Issuance of an undertaking occurs when and where the undertaking leaves the control of the issuer concerned.

(1.1) An undertaking is deemed to have left the control of the issuer when it has been sent or otherwise transmitted to the person requested to advise it, or to the beneficiary.

(2) An undertaking, advice, transfer or amendment may be issued or cancellation provided in any form which preserves a complete record of its text and provides authentication of its source by generally accepted means or by a procedure agreed upon by the parties.

Note: if 6(2) is renumbered, this change needs to be reflected throughout the Act

(3) From the time of issuance of an undertaking, a presentation may be made in accordance with the terms and conditions of the undertaking, unless the undertaking stipulates a different time.

(4) An undertaking is irrevocable upon issuance, unless it stipulates that it is revocable.

(Source: Article 7 - Convention)

Amendment

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7. (1) An undertaking may not be amended except in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in section 6(2).

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, an amendment that has previously been authorized by the beneficiary becomes effective upon its issuance.

(3) Unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, where any amendment has not previously been authorized by the beneficiary, the undertaking is amended only when the issuer receives a notice of acceptance of the amendment by the beneficiary in a form referred to in section 6(2).

(4) An amendment of an undertaking has no effect on the rights and obligations of:

(a) the applicant; or

(b) a confirmer of the undertaking

unless such person consents to the amendment.

(Source: Article 8 – Convention)

Confirmer, Nominated Person, and Adviser

8. (1) A confirmer is directly obligated on an undertaking and has the rights and obligations of an issuer to the extent of its confirmation. The confirmer also has rights against and obligations to the issuer as if the issuer was an applicant and the confirmer had issued the undertaking at the request and for the account of the issuer.

(2) A nominated person who is not a confirmer is not obligated to honour a presentation.

(2.1) A nominated person, acting in such capacity, is not an agent for the issuer, the beneficiary or any other participant in the undertaking transaction.

(3) A person requested to advise may decline to act as an adviser.

(4) An adviser is not obligated to honour a presentation.

(5) An adviser undertakes to the issuer and to the beneficiary accurately to advise the terms of an undertaking, confirmation, amendment, or advice received by that person and undertakes to the beneficiary to check the apparent authenticity of the request to advise.

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(6) Even if the advice is inaccurate, an undertaking, confirmation, or amendment is enforceable as issued.

(7) A person who notifies a transferee beneficiary of the terms of an undertaking, confirmation, amendment, or advice has the rights and obligations of an adviser under subsections (3) to (6).

(8) The terms in the notice to the transferee beneficiary may differ from the terms in any notice to the transferor beneficiary to the extent permitted by an undertaking, confirmation, amendment, or advice received by the person who so notifies.

(Source: 5-107 – UCC)

Transfer of Beneficiary's right to make presentation

9. (1) The beneficiary's right to make presentation may be transferred only if authorized in an undertaking, and only to the extent and in the manner authorized in the undertaking.

(2) If an undertaking is designated as transferable without specifying whether or not the consent of the issuer or another authorized person is required for the actual transfer, neither the issuer nor any other authorized person is obliged to effect the transfer except to the extent and in the manner expressly consented to by it.

(Comment: In the commentary draw attention to paragraph 31 of the Commentaries to the Convention)

Transfer by operation of law

9.1(1) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(2) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary,

(3) An issuer shall recognize a disclosed successor under subsection (2) of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice of financial institutions that regularly issue undertakings.

(4) Subject to 9.1(3), an issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

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(5) Subject to 9.1(3), an issuer who honours a purported successor's apparently complying presentation has the rights specified in section 17(4), even if the purported successor is not the successor of a beneficiary.

(6) A beneficiary whose name is changed after the issuance of an undertaking has the same rights and obligations as a successor of a beneficiary under this section.

(Source: 5-113 UCC)

Assignment of proceeds

10. (1) Unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, the beneficiary may assign to another person any proceeds to which it may be, or may become, entitled under the undertaking.

(2) If the issuer or another person obliged to honour an undertaking has received a notice originating from the beneficiary, in a form referred to in section 6(2), of the beneficiary's irrevocable assignment, honour of the undertaking to the assignee discharges the obligor, to the extent of the honour, from its liability under the undertaking.

(3) In this section, "proceeds" means the cash, cheque, accepted draft, or other item of value to be paid or delivered upon honour or giving of value by the issuer or any nominated person under the undertaking, but does not include a beneficiary's drawing rights or documents presented by the beneficiary.

(Source: Article 10 – Convention and UCC 5-113 (a))

Cessation of right to make presentation

11. (1) Subject to subsection (3), the right of the beneficiary to make presentation ceases when:

(a) the issuer has received a statement by the beneficiary of release from liability in a form referred to in section 6(2);

(b) the beneficiary and the issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in section 6(2);

(c) the amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking; or

(d) the validity period of the undertaking expires in accordance with the provisions of section 12.

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(2) The undertaking may stipulate, or the issuer and the beneficiary may agree elsewhere, that return of the document embodying the undertaking to the issuer, or a procedure functionally equivalent to the return of the document in the case of the issuance of the undertaking in non-paper form, is required for the cessation of the right to demand payment, either alone or in conjunction with one of the events referred to in subsections (1)(a) and (b).

(3) In no case shall retention of any document by the beneficiary after the right to demand honour of an undertaking ceases in accordance with subsection 1(c) or (d) preserve any rights of the beneficiary under the undertaking.

(Source: Article 11 – Convention; Article 11(2) is split into subsections (2) and (3))

Expiry

12. The validity period of the undertaking expires:

(a) at the expiry date, which may be a specified calendar date or the last day of a fixed period of time stipulated in the undertaking, provided that, if the expiry date is not a business day at the place of business of the issuer at which the undertaking is issued, or of another person or at another place stipulated in the undertaking for presentation, expiry occurs on the first business day which follows;

(b) if expiry depends according to the undertaking on the occurrence of an act or event not within the issuer's sphere of operations, when the issuer is advised that the act or event has occurred by presentation of the document specified for that purpose in the undertaking or, if no such document is specified, of a certification by the beneficiary of the occurrence of the act or event; or

(c) if the undertaking does not state an expiry date, or if expiry is stated in the undertaking to depend on the occurrence of any act or event not within the issuer's sphere of operations, which act or event has not occurred in six years from the date of issuance of the undertaking, when six years have elapsed from the date of issuance of the undertaking.

(Source: Article 12 – Convention)

Determination of rights and obligations

13. (1) The rights and obligations of the issuer and the beneficiary arising from the undertaking are determined by the terms and conditions set forth in the undertaking, including any rules, general conditions or usages specifically referred to therein, and by the provisions of this Act.

(2) In interpreting terms and conditions of the undertaking and in settling questions that are not addressed by the terms and conditions of the undertaking

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or by the provisions of this Act, regard shall be had to generally accepted international rules and usages of independent guarantee or letter of credit practice.

(Source: Article 13 – Convention)

Standard of conduct and liability of issuer

14. In discharging its obligations under the undertaking and this Act, the issuer, nominated person or adviser shall act in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of independent guarantees and letters of credit.

(Source: Article 14 – Convention)

Presentation

15. (1) Any presentation shall be made in a form referred to in section 6(2) and in conformity with the terms and conditions of the undertaking.

(2) Unless otherwise stipulated in the undertaking, presentation shall be made, within the time that presentation may be made, to the issuer at the place where the undertaking was issued or if applicable the confirmer at the place the confirmation was made or if applicable to any other nominated person at the place specified by such person.

(3) The beneficiary, when making a presentation, is deemed to warrant to the issuer, any other person to whom presentation is made, and the applicant, that the presentation is not in bad faith and that no exception to honour under section 19 is present.

Examination of presented documents

16. (1) The issuer shall examine the documents delivered in the presentation in accordance with the standard of conduct referred to in section 14 in order to determine whether such documents are, on their face, in strict compliance with the terms and conditions of the undertaking and consistent with one another.

(2) Unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, the issuer shall have reasonable time, but not more than seven business days following the day of receipt of the documents delivered in the presentation in which to:

- (a) examine such documents;
- (b) decide whether or not to honour;
- (c) if the decision is not to honour, issue notice thereof to the beneficiary.

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(3) The notice referred to in subsection (2)(c) shall, unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, be made by teletransmission or other electronic means or, if that is not possible, by other expeditious means and indicate the reason for the decision not to honour the undertaking.

(4) The issuer is precluded from asserting as a basis for dishonour any discrepancy in breach of subsection (1) with respect to which it has not given timely notice under subsection (2)(c).

(5) Notwithstanding subsection (4), the failure to give the notice specified under subsection (2)(c) does not preclude the issuer from asserting as a basis for dishonour fraud, probability of incurring criminal liability or expiration of the undertaking before presentation.

(6) If an undertaking contains non-documentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(Source: Article 16 – Convention – Jeffery Draft redrafted to 4 subsections)

Honour

17. (1) Subject to section 19, when a presentation is made in accordance with the provisions of section 15, the issuer shall honour in the manner stipulated in the undertaking.

(Source: Article 17(1) split)

(Source: new in accordance with the instructions)

(2) Following a determination that a presentation is made in accordance with the provisions of section 15, honour shall be effected promptly, unless the undertaking stipulates honour on a deferred basis, in which case honour shall be effected at the stipulated time.

(Source: Article 17(1) split)

(3) Any honour against a presentation that is not in accordance with the provisions of section 14 does not prejudice the rights of the applicant.

(Source: Article 17(2))

(4) An issuer who honours a presentation:

(a) is entitled to be reimbursed by the applicant on demand;

(b) takes the documents free of claims of the beneficiary or presenter;

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(c) is precluded from asserting a right of recourse on any draft that formed part of the presentation; and

(d) except as otherwise provided in section 8.1, is precluded from restitution of money paid or other value given by mistake, to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation.

(Source: UCC Article 5-108(i))

Set-off

18. Unless otherwise stipulated in the undertaking or elsewhere agreed by the issuer and the beneficiary, the issuer may discharge its obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the applicant.

(Source: Article 18 Convention)

Exception to payment obligation

19. (1) Notwithstanding any other provision of this Part, when:

(a) it is manifest and clear that:

(i) any document included in the presentation is not genuine or has been falsified; or

(ii) honour of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant; or

(b) there is a high probability that honour will result in criminal liability by the issuer

the issuer, acting in good faith, has a right, as against the beneficiary, transferee or assignee of proceeds, to withhold honour of the undertaking.

(2) Without restricting the circumstances covered by subsection (1)(a)(ii), material fraud is deemed to have occurred if it is manifest and clear that either honour is not due on the basis asserted in the presentation, or judging by the type and purpose of the undertaking, the presentation has no conceivable basis.

(3) For the purposes of subsection (2), the following are types of situations in which a presentation has no conceivable basis:

(a) the contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

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- (b) the underlying obligation of the applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;
 - (b.1) for the purposes of subsection 19(3)(b), “declared invalid” means:
 - (i) declared to be void,
 - (ii) declared to be invalid by reason of fraud, or
 - (iii) declared to be invalid by reason that payment will result in criminal liability by the issuer;
 - (c) the underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;
 - (d) fulfilment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary;
 - (e) in the case of a presentation under a counter-guarantee, the beneficiary of the counter-guarantee has honoured in bad faith as an issuer of the undertaking to which the counter-guarantee relates.
- (4) In the circumstances set out in subsection (1)(a) and (b), the applicant is entitled to provisional court measures in accordance with section 20.

(Source: Article 19 Convention - Jeffrey Draft)

Provisional court measures

- 20.** (1) Where, on an application by the applicant, it is shown that there is a strong prima facie case that with regard to a presentation made, or expected to be made, one of the circumstances referred to in subsection 19(1) is present the court, may:
- (a) issue a provisional order to the effect that the issuer not honour the undertaking, including an order that the issuer hold the amount of the undertaking; or
 - (b) issue a provisional order to the effect that the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the applicant would be likely to suffer serious harm.
- (2) The court, when issuing a provisional order referred to in subsection (1), may require the person applying to furnish such form of security as the court deems appropriate.
- (3) The court may not issue a provisional order of the kind referred to in subsection (1) based on any objection to honour of the undertaking other than grounds specified in subsection 19(1).

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(Source: Article 20 Convention Jeffery Draft)

Choice of applicable law

21. (1) The undertaking is governed by the law the choice of which is:

(a) stipulated in the undertaking or demonstrated by the terms and conditions of the undertaking; or

(b) agreed elsewhere by the issuer and the beneficiary.

(2) The liability of a nominated person or adviser is governed by the law of the jurisdiction chosen by an agreement by the affected parties.

(3) Failing a choice of law in accordance with subsections (1) or (2), the undertaking or liability is governed by the law of the jurisdiction where the issuer or the party liable has that place of business at which the undertaking was issued or the liability is incurred.

(Source: Article 21 Convention - 5-116 – UCC)

Subrogation of issuer, Applicant, and Nominated Person

22. (1) An issuer that honours a beneficiary's presentation is subrogated to the rights of the beneficiary to the same extent as if the issuer were a secondary obligor of the underlying obligation owed to the beneficiary and of the applicant to the same extent as if the issuer were the secondary obligor of the underlying obligation owed to the applicant.

(2) An applicant that reimburses an issuer is subrogated to the rights of the issuer against any beneficiary, presenter, or nominated person to the same extent as if the applicant were the secondary obligor of the obligations owed to the issuer and has the rights of subrogation of the issuer to the rights of the beneficiary stated in subsection (1).

(3) A nominated person who honours a draft or demand presented under an undertaking is subrogated to the rights of:

(a) the issuer against the applicant to the same extent as if the nominated person were a secondary obligor of the obligation owed to the issuer by the applicant;

(b) the beneficiary to the same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the beneficiary; and

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- (c) the applicant to same extent as if the nominated person were a secondary obligor of the underlying obligation owed to the applicant.
- (4) Notwithstanding any agreement or term to the contrary, the rights of subrogation stated in subsections (1) and (2) do not arise until the issuer honours the undertaking and the rights in subsection (3) do not arise until the nominated person honours the undertaking.
- (5) Until the rights of subrogation stated in subsections (1), (2) and (3) arise, the issuer, nominated person, and the applicant do not derive under this section present or prospective rights forming the basis of a claim, defence, or excuse.

(Source: 5-117 – UCC)

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

Part 2

Interpretation

1. (1) The following definitions apply in this Act.

“Convention” means the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* set out in the schedule. (Convention)

Comment: *This is a standard provision in uniform acts implementing international conventions. For previous examples, reference may be made to subsection 1(2) of the Uniform International Commercial Arbitration Act and subsection 1(2) of the Settlement of International Investments Disputes Act.*

“declaration” means a declaration made by Canada under the Convention with respect to (*name of province or territory*). (*déclaration*)

Comment: *Article 25 of the Convention provides for the deposit of declarations by contracting States:*

Article 25 is a standard provision in private law conventions. It allows federal States to identify by declaration the territorial units to which the convention is to extend. Canada will make declarations pursuant to Article 25 upon the request of provinces and territories that adopt implementing legislation.

(2) Unless a contrary intention appears, words and expressions used in this Part have the same meaning as in the Convention.

(3) In interpreting this Part and the Convention, recourse may be had to

(a) the commentary prepared by the United Nations Commission on International Trade Law with respect to the Convention; and

(b) the Report of the United Nations Commission on International Trade Law on its twenty-eighth session, 2-26 May, 1995, General Assembly Official Records, Fiftieth session, Supplement No. 17 (A/50/17).

Comment: *The supplementary interpretive sources listed in paragraph (3) conform to the interpretive sources sanctioned by Article 32 of the Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37. The object of permitting judicial recourse to these sources is reflected in the observation of Justice La Forest in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at pp. 577-578, that “It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to this supplementary means of interpreting the Convention, and I shall also do so. I note that this Court has recently taken this approach to the interpretation of an international treaty in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689.”*

For an example of a similar provision, reference may be made to subsections 14(1) and (2) of the Uniform International Commercial Arbitration Act.

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To facilitate ease of access to the sources referred to in paragraph (3), enacting jurisdictions may wish to include reference to the UNCITRAL web address (<http://www.un.org/>) from which they may be downloaded in their Gazettes or other appropriate governmental organ.

The list in paragraph (3) is not intended to be exhaustive. It merely indicates the principal sources to be used in interpreting the Convention. It is expected that over time other helpful resources will emerge. In particular, over time UNCITRAL's Case Law on UNCITRAL Texts (CLOUT) will provide a useful source of the evolving jurisprudence on the Convention from the courts in all Contracting States.

Purpose

2. The purpose of this Part is to implement the Convention.

Publication

3. A notice shall be published in *(name of publication)* of the day on which the Convention comes into force, or a declaration or withdrawal of a declaration takes effect, in *(name of province or territory)*.

Force of law

4. Subject to any declaration that is in force, the Convention has the force of law during the period that it is, by its terms, in force in *(name of province or territory)*.

Comment: *Under this Part, the Convention is given the force of law domestically only from the date the Convention comes into force at the international level for Canada in the jurisdictions declared pursuant to Article 25. That date is (i) the first day of the month following the expiration of one year after the date of deposit of Canada's instrument of accession, pursuant to Article 28(2); or (ii) in the case of a jurisdiction adopting implementing legislation after accession by Canada, the first day of the month following the expiration of six months after the date the declaration extending the application of the Convention to that jurisdiction is received by the depositary, in accordance with Article 25(3).*

The ULCC Uniform International Interests in Mobile Equipment Act (Aircraft Equipment) excluded specific (final) provisions from having the force of law. However, the preferred approach has been to give the force of law to all the provisions of a Convention. This approach eliminates the risk of inadvertently overlooking provisions or omitting substantive provisions. To the extent that the final provisions of the Convention are not substantive but are binding as to States on an international level, they would produce no legal effect in provinces or territories in any event.

Inconsistent laws

5. If a provision of this Part, or a provision of the Convention that is given the force of law by section 6, is inconsistent with any other Act, the provision prevails over the other Act to the extent of the inconsistency.

Comment: *This Part and Convention need to prevail over inconsistent provisions in other Acts to ensure that Canada is in conformity with its international obligations. To avoid internal conflict, enacting jurisdictions should ensure that if an equivalent provision appears in other Acts with*

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

which this Part or the Convention might potentially be inconsistent, those other Acts should be amended to give precedence to this Part and the Convention.

Coming into force

6. This Act comes into force on (_____).

OR

6. The provisions of this Act come into force on a day or days to be fixed by (_____).

Comment: *There is a need to co-ordinate the entry into force of the Convention at the international level, the coming into force of domestic implementing legislation, and giving the Convention force of law. A provision in the implementing legislation stating that the Act comes into force when the Convention enters into force for enacting jurisdictions is not recommended since the actual date is not transparent on the face of the legislation. Accordingly, it is recommended that the legislation implementing the Convention state that it comes into force on Royal Assent or similar means. Enacting jurisdictions will need to communicate with Justice Canada officials to coordinate dates.*