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San José, Barrio Tournón, 175
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Costa Rica

2 December 2020

Subject: Document 470/TA.907rev

Dear Ms. María Claudia Jiménez Pájaro,

Thank you for your query regarding URDG 758. Please find below the opinion of the ICC Banking Commission.

QUOTE

On behalf of one of our distinguished Banking members, (the 'Guarantor'), we kindly request your opinion, related to the fact that the Guarantor in country "A", issued four demand guarantees subject to URDG 758 (these four are very similar under the terms, conditions, facts and events). The purpose of said instruments was to provide a written bank undertaking in favour of a Public State Entity in country "A" (the 'Beneficiary'), accordingly to support the underlying contract between this entity and a construction corporation in country "B" (the 'Applicant'). This Applicant requested its bank (the 'Counter-Guarantor') located in the same country "B" to issue a counter-guarantee in favour of the Guarantor. The underlying contract refers to the construction and further maintenance of several roads and streets in country "A". The four guarantees were issued for an aggregated value of USD11,113,194.82.

The facts.

Due to the fact that the counter-guarantor issued the afore-mentioned four guarantees, which were (also) subject to the URDG 758, and taking into consideration the Counter-Guarantor´s reputation, high rating and credit worthiness, the Guarantor issued and delivered to the Beneficiary the mentioned guarantees and further amendments under normal conditions, according to the international demand guarantee practice.

On Friday, 6 September 2019, and within the validity, the Beneficiary presented to the Guarantor complying presentations, demanding full payment of the four local guarantees.

After confirming that the presentations were complying, the Guarantor did the following, strictly in accordance with all terms and conditions of the counter-guarantees: a) on Monday, 9 September 2019 sent SWIFT authenticated messages to the Counter-Guarantor informing about the complying demands and claiming immediate reimbursement; b) effected payment of the full amount to the Beneficiary, due to the natural condition of this type of instrument, which requires honouring at first demand.

On Thursday, 12 September 2019, at 08:37, a message from the Counter-Guarantor to the Guarantor stated: "*our commercial staff in charge of the Applicant´s account reports that they have already requested the funds from our client, who, notwithstanding has not paid yet.*" (our translation).

Same day, at 09:07hrs, the Counter-Guarantor replied via email to this claim from the Guarantor, stating that: *"…My operating area indicates that the requirement meets the Standby conditions, so they have an estimated date to make the payment for this Friday"* (our translation).

On Thursday, 12 September 2019 at 13:35, the Counter-Guarantor sent a message to the Guarantor stating: *"Regards. We´ll let you know as soon as the payment is settled* ***on next Tuesday****, which is already confirmed by our International Operations Area."* (our translation and bold text).

However, given the representative amounts of the debt, the Guarantor made in previous days subsequent follow-up calls, SWIFT messages, and requests on the claims for reimbursement. But, inexplicably, the Counter-Guarantor was silent. Then, surprisingly, by SWIFT message received on Friday 13 September 2019, at 17:35 p.m., after having previously declared that it was a complying demand, the Counter-Guarantor states that it will not pay because of the following argument: *"…Pls be informed that we have received a payment restriction from* [*Country B*] *authorities and we do not honor this payment negotiation on maturity date September 13, 2019".*

On its part, the Guarantor paid the full amount to the Beneficiary. Notwithstanding, it has not been possible for the Guarantor to collect the sums corresponding to USD11,113.194.82. It represents a serious and unprecedented risky, financial and credibility injury for the Guarantor.

The Claim.

Our associate, the Guarantor, hosted a business of a common nature, providing international banking services. With the intention of participating in an apparently well-structured international operation, by issuing the respective guarantees required by the Counter-Guarantor in favour of the Beneficiary, the Guarantor applied the proper internal and external standard practices in this type of transaction. Based on the well-known name and credibility of a prestigious bank in country “B”, that was supposed to be performing all necessary credit checking, risk-taking parameters, and security from its Applicant when issuing its Guarantee, the facts demonstrate that the Counter-Guarantor did not honour its liability. In conclusion, the Guarantor refuses the actions taken by the Counter-Guarantor, based on the following:

- Technically and rigorously, all the procedures related to the issuance and handling of the guarantees were complied with.
- The evaluation and qualification of a world-class bank, as a Counter-Guarantor, for its reputation, strength and prestige was carefully considered before committing to the issuance of the guarantees by the Guarantor.
- The facts and documentary evidence on file demonstrate that the Counter-Guarantor: i) acknowledged receipt of the complying demand; ii) recognized that the requirement met the Counter-Guarantees conditions; iii) informed that it was going to pay (on Friday); iv) inexplicably changed the internally confirmed payment day (to next Tuesday); v) refused to pay because of a local payment restriction.
- In fact, the Counter-Guarantor received the payment restriction after having received the complying demand, after having declared to the Guarantor that all terms were complied, and after asserting that payment was going to be consummated.
- The Counter-Guarantor acted against the URDG 758 towards its own advantage and for its client´s benefit; for example, against: sub-articles 1 (a), 1 (c), 4 (b), 5 (a), 5 (b), article 7, and sub-articles 20 (b), 24 (c), 24 (d) and article 31.
- It´s unacceptable for the Counter-Guarantor to act **extemporaneous and beyond the URDG 758 argument**, denying the corresponding reimbursement, based on a judicial action of its country “B”, no matter its nature, and refusing its responsibility to honour a commitment, which has been acquired, according to international banking practice.

Based on the stated arguments, we ask for your expert opinion, if the Guarantor acted according to the scope of the URDG 758 and if there is enough technical support to recover from the Counter-Guarantor the amounts disbursed, plus all applicable indemnities, according to URDG 758 article 31.

UNQUOTE

ANALYSIS

The guarantor received complying presentations under its guarantees, and consequently it provided its own demands for payment under the respective counter-guarantees. The counter-guarantor confirmed that the guarantor's demands were in compliance with the counter-guarantees, as noted in several messages relayed by the counter-guarantor to the guarantor on 12 September 2019. The earlier messages from the counter-guarantor on that date indicated that the payment under its counter-guarantees would occur on 13 September 2019; but then, later that same day, indicated that payment would occur "next Tuesday" (presumably 17 September 2019).

However, on 13 September 2019, the counter-guarantor then advised: "*we have received a payment restriction from* [*Country B*] *authorities and we do not honor this payment negotiation on maturity date September 13, 2019".*

URDG 758 sub-article 20 (b) states that: "When the guarantor determines that a demand is complying, it shall pay". Given that the counter-guarantor had initially indicated that it would pay on 13 September 2019, it would be obligated to do so under the counter-guarantee.

Without further information on the nature of the "payment restriction from Country B authorities", it is not known what this document is or how it impacts the counter-guarantor. As such, for the purpose of this query, it is presumed that the document is similar to a court injunction or the like. In respect of the counter-guarantor advising~~on 12 September 2019,~~ that it had received a "payment restriction from [Country B] authorities", ~~(which is presumed to be similar to a court injunction or the like),~~ the ICC Banking Commission has, over the years, responded in a consistent manner. The most recent example is Opinion R902 (TA880rev) which states "an issuing bank cannot ignore a court injunction", and banks "should seek to resist the imposition of such an injunction or, if an injunction has already been obtained, seek to have it lifted". Although the stated Opinion refers to the obligations of the issuer of a documentary credit, the same would apply to the issuer of a guarantee or a counter-guarantee.

In line with best practice, the counter-guarantor appears to have advised the guarantor promptly upon its receipt of the payment restriction. The quoted facts do not indicate anything to the contrary.

However, there is no information provided on the content of the "payment restriction from [Country B] authorities". Therefore, it is not clear whether the payment restriction is specifically preventing the counter-guarantor from effecting payment under each counter-guarantee or simply preventing the counter-guarantor from debiting the account of the applicant, in reimbursement for its payments. In the latter case, the counter-guarantor would still be held by its undertaking and consequently it would have to pay to the guarantor, even if it is not allowed to debit the applicant.

In any event, the guarantor should be provided with a copy of the ‘payment restriction’ without delay.

CONCLUSION

If the “payment restriction from Country B authorities” does not specifically prohibit the counter-guarantor from paying a complying demand submitted under each counter-guarantee, then it remains obligated to pay each of the complying demands.

If the “payment restriction from Country B authorities” does prohibit the counter-guarantor from paying a complying demand submitted under each counter-guarantee, it should seek the lifting of the restriction so that it may pay each of the complying demands.

The reference to URDG 758 article 31 in the final sentence of the query has no relevance to the response.

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission based on the facts under “QUOTE” above.

The reply given is not to be construed as being other than solely for the benefit of guidance and there should be no legal imputation associated with the reply offered.

If this query relates to a matter currently under consideration by the courts, the ICC Banking Commission will refrain from considering it for adoption as an opinion.

Neither the ICC nor any of its employees, nor any member of the Banking Commission, including the Chairman, Vice-Chairmen or Technical Advisers shall be liable to any person for any loss or damage arising out of any act or omission in connection with the rendered opinion(s).

Yours Sincerely,

David Bischof
Deputy Director, Finance for Development