Finance for Development

Banking Commission

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Dear Prof. Deli,

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

QUOTE

A counter-guarantee was issued by a bank in Country K (the Counter-guarantor), for the amount of Euro155,000.00 in favour of Bank B in Country I (the Guarantor) requesting same to issue a Warranty Guarantee in favour of a Country I beneficiary.

Facts summary:

1) On 21.09.2017 the Counter-guarantor, acting in its first step as guarantor bank, issued a direct Warranty Guarantee in favour of the Country I beneficiary via MT760 SWIFT message sent to Bank B in Country I for the advising to the beneficiary.
2) On 26.01.2018, the guarantor bank issued amendment no. 1 to its guarantee to change its structure, from a “direct” guarantee (“issue” type) into a “request” type guarantee, thus asking Bank B to issue its own Warranty Guarantee in favour of the Country I beneficiary. Consequently, the wording of amendment no. 1 included the text of a counter-guarantee in favour of Bank B requesting it to act as Guarantor.
3) On 05.02.2018, the Guarantor (Bank B) issued a Warranty Guarantee (the Guarantee) based on the counter-guarantee. Before doing so, the Guarantor requested and received some minor amendments to the wording. According to the instructions in the counter-guarantee, the Warranty Guarantee was issued subject to URDG 758, whilst the counter-guarantee did not mention the URDG 758 as the applicable rule to the counter- guarantee, but stated that it was subject to Country I law, with place of jurisdiction the Court of City M, Country I. Nevertheless, according to URDG 758 sub-article 1 (b), the request of the Counter-guarantor to issue a guarantee subject to URDG 758 made the counter-guarantee subject to URDG 758 as well, while the applicable law to the counter-guarantee remained the Country I law and the place of jurisdiction the Court of City M, as a condition expressly required by the counter-guarantee text (see URDG 758 sub-article 34 (b)).
4) On 17.07.2020, the Guarantor received a claim from the beneficiary complying with the Guarantee terms (as per Form A of the Guarantee), requesting payment of the full amount of the Guarantee.

5) On the same day, the Guarantor advised the Counter-guarantor of receipt of a complying demand and claimed payment under the counter-guarantee for the full amount.

6) On 27 and 29 July, two tracers were sent by the Guarantor to the Counter-guarantor, since the original claim remained with no reply and no payment was received.

7) Only on 04.08.2020, the Counter-guarantor advised the Guarantor that the applicant had presented a request to the local Court of City U in Country K, for a precautionary order to suspend the payment of the amount claimed under the counter-guarantee, pending a judgment from the same Court. This message was not a refusal of the demand made by the Guarantor under URDG 758 sub-article 24 (d), but an advice that the applicant "*had initiated an injunction proceeding regarding the payment on the above counter-guarantee in the City U District Court. Accordingly we are obliged to await the decision of the Court on the said proceedings".* It is clear that the Counter-guarantor had not received an injunction not to make payment under its counter-guarantee which was not possible to ignore. The Counter-guarantor never notified the Guarantor the injunction precaution prohibiting a payment due under the irrevocable obligation of its counter-guarantee, as is best practice in such cases.

8) According to URDG 758 article 20, the Counter-guarantor had five business days following the day of presentation to decline payment based on a non-complying presentation. However, compliance of the claim presented on 17.07.2020 by the Guarantor was never challenged and the advice of refusal of payment to be made under URDG 758 sub-article 24 (d) was never sent, as noted above. The Counter-guarantor sent its first reaction to the demand only on 04.08.2020, well beyond the five business day time-limit provided for in URDG 758 article 20. The consequence in this case is that URDG 758 sub-article 24 (f) applies and the Counter-guarantor must pay.

9) The following message from the Guarantor to the Counter-guarantor urged them to abide by their own commitment which was due at first demand "*notwithstanding pending litigations and/or disputes between the applicant and the beneficiary*" (quote from the counter-guarantee text) and pointing out that the Court of City U had no jurisdiction on the matter, was of no use.

10) The Counter-guarantor replied to all tracers sent by the Guarantor referring to their need to await for the judgment of the City U Court (a number of similar messages were repeated in reply to the Guarantor's queries).

We would like to seek an official Opinion of the ICC Banking Commission concerning the following:

A) Was URDG 758 applicable to the Counter-guarantee (see item 3)?

B) The refusal of payment by the Counter-guarantor was unfounded because the bank had not received an injunction of stop payment by a public authority but an advice that the applicant "*had initiated an injunction proceeding regarding the payment on the above counter-guarantee".* (see item 7).

C) The Counter-guarantor did not respect the URDG 758 provisions, namely article 20 and sub-articles 24 (d) and (e) with the consequence of nullifying any objection against payment. (see item 8)

D) According to URDG 758 sub-article 20 (b), the Counter-guarantor had an obligation to pay <u>without delay</u> having received a compliant demand and unlawfully has been waiting for the Court decision.

UNQUOTE

ANALYSIS

A direct guarantee was issued which was not subject to ICC rules. At a later date, this was converted into a counter-guarantee, which was silent with regards to a governing ICC rule set, with resultant issuance of a guarantee subject to URDG 758. It is assumed that the beneficiary accepted the amendment in accordance with URDG 758 sub-article 3 (b), by virtue of the fact that a demand guarantee was issued.

As stated in URDG 758 sub-article 1 (b), where a demand guarantee is issued subject to the URDG, the counter-guarantee shall also be subject to the URDG, unless the counter-guarantee excludes the URDG. Based on the facts presented, no such exclusion was added, hence the counter-guarantee is deemed subject to URDG 758.

A demand was made under the guarantee for the full amount and, on the same date, the guarantor made a claim under the counter-guarantee. As a general note, and in accordance with URDG 758 sub-article 3 (b), the URDG 758 apply to both guarantees and counter-guarantees and treat them alike unless otherwise indicated in the guarantee or counter-guarantee. As such, it is considered that articles of the URDG 758 only referring to guarantees and guarantors, but not to counter-guarantees and instructing parties, equally apply to counter-guarantees and instructing parties.

Under URDG 758 sub-article 20 (a), the counter-guarantor must, within five business days following the day of presentation, examine the demand and determine if it is a complying demand.

If the demand is determined to be non-compliant then, under URDG 758 sub-article 24 (d), the counter-guarantor must send a single notice to that effect to the presenter of the demand. As stated in URDG 758 sub-article 24 (e), any notice of refusal must be sent without delay but not later than the close of the fifth business day following the day of presentation. Neither payment nor a notice of refusal was received by the guarantor within the required timeframe. As such, and in accordance with URDG 758 sub-article 24 (f), the counter-guarantor was precluded from claiming that the demand was not compliant and must pay.

It was only after 18 calendar days that the counter-guarantor responded to the guarantor by stating that its customer had initiated an injunction proceeding in a local court regarding payment, and that they were obliged to wait the decision of the court. However, it is not entirely clear whether an actual injunction reached the guarantor and if it was provided, did it actually prevent the guarantor from effecting payment. In any event, international standard demand guarantee practice requires a guarantor, while complying with an injunction issued by a court with jurisdiction, to resist the imposition of such an injunction absent manifest fraud or, if an injunction has already been obtained, seek to have it lifted. Additionally, a copy of the injunction should have been provided to the guarantor by the counter-guarantor.

CONCLUSION

A) URDG 758 was applicable to the counter-guarantee.

B) It is unclear whether an injunction was issued. In this case, the counter-guarantor appears to be following the directions of their court. Nevertheless, the counter-guarantor should simultaneously be seeking to have an injunction removed/lifted.
C) The counter-guarantor did not comply with URDG 758 articles 20 and 24 and, according to URDG 758 sub-article 24 (f), it is obligated to pay.
D) The counter-guarantor should have issued a notice of rejection for any discrepancies in the demand no later than the close of the fifth business day following the day of presentation, as outlined in URDG 758 sub-article 24 (e).

The opinion(s) rendered on this query reflect the opinion of the ICC Banking Commission's Technical Advisers based on the facts under "QUOTE" above. They do not necessarily reflect the opinion of the ICC Banking Commission until the Banking Commission renders its approval or disapproval of these opinion(s) at the next scheduled meeting.

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,

Andrew Wilson
Permanent Observer to the United Nations
Interim Director, Financefor Development
International Chamber of Commerce