ARTICLES

BANK GUARANTEES AND LETTERS OF CREDIT: TIME FOR A RETURN TO THE FOLD

BORIS KOZOLCHYK*

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* © 1989, Boris Kozolchyk. Professor of Law, University of Arizona College of Law. This article is dedicated to Henry Harfield, Esq., whose teachings, friendship and wit this author has enjoyed for many years, on the occasion of his retirement from the hyperactive practice of law. (Henry will never retire from active practice.) This article contains segments of two chapters of B. Kozolchyk, COMMERCIAL LETTERS OF CREDIT IN THE AMERICAS (2d ed.), to be published by Little, Brown and Co. The author wishes to thank Professor James E. Byrne of the George Mason University School of Law for his thoughtful comments and suggestions, and acknowledges the helpful assistance of Harold S. Burman, Esq. of the Office of the Legal Advisor, United States Department of State, for facilitating access to helpful documentation; Mark Wayne for the preparation of Appendices A-C and the litigation chart (in conjunction with Anne Hunnycut); Mark Richter, a Harvard-Zurich doctoral candidate for supplying some of the European bank guarantee forms; and Angela P. Aczoza for help with the German materials. Although the author was a member of the United States Study Team that evaluated a draft of a proposed UNCITRAL Convention on the law of Bank Guarantees in preparation for the November 1988 Vienna UNCITRAL meeting, and is a member of the Secretary of State Advisory Board on International Trade Law, the views expressed in this article are solely the author’s and do not represent the official position of the United States State Department or of any other agency or instrumentality of the United States.

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FOREWORD

JAMES E. BYRNE**

At a time when the trade in goods and services has become increasingly sophisticated and has come to command enormous resources, the need for a reliable paymaster has not slackened. If anything, the need has increased. The tremendous breakthroughs in technology and telecommunications which have permitted virtually simultaneous transmission and receipt of data have not served to lessen the critical role of independent third party payment mechanisms either. Although these developments radically alter the circumstances under which payment occurs, there remains a need for an independent and trustworthy financial intermediary. Exactly how much these advances will impact third party financial instruments is not altogether clear but its effect is multi-faceted as recent work in the law and practice related to the trillions of dollars transferred by the wire transfer systems indicates. The issues are as fundamental as the character of the undertakings: Are the undertakings consensual in the sense that there is or needs be a mutuality of obligation? What is formality? What is a writing or signature? In addition, questions remain concerning matters of liability, risk, fraud, and damages.

In this extremely dynamic environment, however, one dimension of the brave new world we face is becoming increasingly clear: it is global. The computer, satellites, and telecommunications technology have in one fell swoop, as it were, mandated the unification of the infrastructures, legal and operational, which underlie third party payment devices. Where an undertaking made in Japan can impact within minutes on the technical and practical level undertakings in London, New York, and Cairo, there can be little tolerance for laws and rules which are fundamentally incompatible or uncertain as to scope, character, or interrelationship.

In the field of letters of credit, much of the ground breaking work in creating this new international order has been done by the Commission on Banking Technique and Practice of the International Chamber of Commerce inspired by the far-seeing leadership of Bernard Wheble, its Chairman. The Uniform Customs and Practice for Documentary

** Associate Professor of Law, George Mason University School of Law; Chairman of the American Bar Association's Task Force on the Study of U.C.C. Article 5; U.S. Delegate to the Session of the United Nations Commission on International Trade Law Working Group on Contract Practices which addressed letters of credit and bank

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Credits has in its successive revisions created an atmosphere of cooperation and trust among those engaged in letter of credit practice which has permitted identification of areas of agreement and resolution of problems as they have arisen. As a result, the letter of credit has functioned reasonably well for almost a century of intense use with hardly any positive law and with relatively little decisional law.

Ironically, the unparalleled success of the UCP in ordering letter of credit practice has, in a sense, set in train events which have thrown into jeopardy its stability. The trust accorded letters of credit by the market as to their original use in trade in goods has led to their expansion in assuring performance of undertakings or payment of obligations. So prevalent has been the need for a reliable mechanism by which payment or performance could be assured that these so-called standby letters of credit in the United States alone have grown to approximately $175 billion, dwarfing the approximately $30 billion outstanding in commercial credits. Standbys are not, however, by any means a U.S. device since they are used extensively in more than 30 countries in North America, South America, Australia and Asia. Nor is their use, as is sometimes suggested, a result of peculiarities in the U.S. regulatory scheme under which U.S. banks are generally restricted from issuance of guarantees. The standby represents a deliberate attempt engineered in the early 1950’s in large part under the auspices of Leonard A. Back of Citibank and Henry Harfield of Shearman & Sterling who almost singlehandedly led and shaped U.S. letter of credit law during the vital decades that standbys were coming to the fore. Their remarkable success was to create a genre of independent or abstracted assurances not by the fashioning of a new instrument but through the extension of the tried and true letter of credit.

The use of credits in circumstances in which payment is the exception and where charged situations are more likely to arise has, however, created strains which, in turn, require adjustment and revision of rules and law. A parallel development has occurred in Europe under which an independent or banker’s guarantee practice has arisen. As documented in this article, it has faced similar and perhaps even more difficult problems.

Because of the tremendous potential for this type of independent assurance of performance or payment and the obvious commercial need which it fulfills, it has become imperative to seek international harmonization of law and practice. Several important steps have already taken place. In the United States where U.C.C. Article 5, a skeletal codification of U.S. letter of credit law is the only substantial positive law in this field, the Uniform Commercial Code Committee of the
American Bar Association's Business Law Section appointed a Task Force to study problems related to U.C.C. Article 5. Its Report which has been described as a monumental effort recommends the reconsideration and revision of Article 5 along lines oriented to developments in practice and compatible with the international character of the device.

At the same time, the International Chamber of Commerce has undertaken to normalize practice in this area by formulating the Uniform Rules for Guarantees. Responding to the perceived need for a legal infrastructure in this area, the United Nations Commission on International Trade Law has also commenced a project directed to the formulation of a model or uniform law for letters of credit and bank guarantees.

Consequently, there exists at the present time an extraordinary opportunity for harmonization with the world's only serious municipal codification of letter of credit law in the early stages of revision and with two leading international organizations' attention focused on parallel projects directed to harmonization of law and practice.

The existence of such an opportunity, however, does not necessarily mean that anything useful will result. There remain serious obstacles to the successful unification of law and the formulation of rules of practice related to letters of credit and bank guarantees. On the fundamental level of definitions and terminology, it is not altogether clear whether there is agreement regarding the character of the undertakings made, the nature of the obligations of the various parties, their relationship to the underlying transaction and representational character and even their scope and expiry. Without mutual understanding here, any attempts to address other knotty problems such as exceptions to the requirement to honor are bound to be futile.

These difficulties are aggravated with respect to the independent guarantee because, unlike the standby, it is not immediately identified with a recognized and accepted legal categorization and is subject to treatment in a bewildering array of systems. Consequently, it is not easy to even determine what are the characteristics of this device and in what sense it can be likened to the standby credit and in what sense it differs.

In the face of these uncertainties, this seminal study by Professor Boris Kozolchyk serves to provide an invaluable and scholarly foundation for any future work toward harmonization. Drawing upon the richness of his own experience and his incomparable scholarship, he explores the true character of the independent guarantee and its essential relationship to the letter of credit, explaining many of the difficulties which it has encountered by virtue of the failure to recognize this
In its drafts, this study has already exercised extensive influence in the various developments which are underway. During the Vienna 1988 session of UNCITRAL Working Group, an early draft of this article helped shape the U.S. position and also helped persuade a majority of the countries present of the need for a uniform law governing both letters of credit and bank guarantees. More recently, a U.S. State Department Study Team agreed with Professor Kozolchyk’s suggestion that a useful first step would be a joint effort by lawyers and bankers to formulate the definitions of the most commonly used terms in bank guarantee law and practice. Inspired by this demonstration of the need for clarity on the level of basic definitions and concepts, the U.C.C. Article 5 Task Force, of which he is a leading member, has reconstituted itself both to aid the U.S. State Department in preparation for the UNCITRAL project and to continue its work on issues relating to these payment mechanisms.

Therefore, the hope expressed in this article that standbys and bank guarantees will return to the letter of credit fold is not only not utopian but is actually being realized. As this article receives the worldwide attention it deserves, I have no doubt that it will continue to exercise a positive influence on developments and bring to them the lucidity and practical wisdom which have become the hallmark of Professor Kozolchyk’s invaluable contribution to letter of credit law and practice and will again demonstrate why his name must be linked with those of Wheble, Harfield and Back as one of its preeminent figures.
BANK GUARANTEES AND LETTERS OF CREDIT: TIME FOR A RETURN TO THE FOLD

BORIS KOZOLCHYK

1. INTRODUCTION: BANK GUARANTEES, STANDBY AND COMMERCIAL LETTERS OF CREDIT

In the spring of 1990, the United Nations Commission on International Trade Law (UNCITRAL), in conjunction with the International Chamber of Commerce (ICC), will launch an effort to draft a uniform international law of bank guarantees. This article intends to contribute to such an effort by comparing key aspects of the law and practice of European bank guarantees with standby and commercial letters of credit. This comparison should foster acquaintance in the United States with European bank guarantees, one of the most important legal institutions in contemporary international trade. It should also help identify features of bank guarantee and letter of credit law and practice central to the success of the legislative task at hand.

The boundaries separating bank guarantees, standbys and commercial letters of credit remain unsettled. As aptly stated in a recent UNCITRAL study: "[W]hen entering the area of guarantees, bonds and similar securities issued by banks or other institutions, one is faced with confusing terminology, conceptual uncertainty and a bewildering array of classifications."1 Not all is confusion, however. The bank guarantee and the standby letter of credit share an essential feature. They are designed to indemnify their respective beneficiaries (parties entitled to payment in accordance with their terms and conditions), against default by the issuing bank’s customer (also known as “account party” or “applicant” for the credit or for the bank guarantee). This presupposition of default in the standby letter of credit and bank guarantee contrasts with that of performance in the commercial letter of credit. The documentary requirements of a commercial letter of credit are intended to evidence, on their face, the beneficiary’s performance in accordance with what was required of him in the underlying transaction. Conversely, the statements required for payment of the bank guarantee or standby letter of credit usually contain, or imply, the benefi-

1 Stand-By Letters of Credit and Guarantees: Report to the Secretary-General, 21 UNCITRAL at 9, U.N. Doc. A/CN.9/301 (1988) [hereinafter UNCITRAL Study]. By inserting the descriptive words “similar securities,” UNCITRAL itself may have contributed to the conceptual confusion and to the rise in blood pressure of United States banking and securities lawyers who had gotten used to the notion that standbys and bank guarantees were not “securities” for regulatory purposes.
ciary's or third party's affirmation that the issuing bank's customer has defaulted on his obligations to the beneficiary.²

In preponderant measure, bank guarantees were the European banking industry's response to importing countries' official or quasi-official demands for assurances of indemnification in the event of default by European suppliers. For at least fifteen of the last twenty years, these official or quasi-official buyers enjoyed a bargaining power superior to that of their foreign suppliers of heavy machinery, high priced technology, general contracting and banking services. The so called "simple" demand standby letter of credit is also a typical product of such a superior bargaining power. It allows one of the parties to the contractual relationship, usually the buyer of goods or services, to determine when the party will receive indemnification from its supplier's bank. The best explanation of why suppliers of goods and services and their banks agree to confer such a power upon their buyers is Walter Wriston's³ version of the "golden" rule: "[H]e who has the gold, rules." For a number of years, the gold that ruled the issuance of simple demand standbys and guarantees was the oil revenue of Persian Gulf countries.⁴ Construction companies from places as far away as Tucson, Arizona, rushed to tender their bid, performance and repayment guarantees or standby letters of credit at the drop of a mere hint of Persian Gulf business. Yet, as late as 1985, as asserted in an affidavit submitted to the United States Court of Appeals for the 7th Circuit, Saudi Arabian law required that a guarantor bank pay on its simple demand guarantee or letter of credit against a simple oral statement by the beneficiary that it was owed the amount claimed.⁵ In the same vein, Lib-

² For a comparison of these three institutions, see generally Kozolchyk, The Emerging Law of Standby Letters of Credit and Bank Guarantees, 24 ARIZ. L. REV. 319 (1982) [hereinafter Kozolchyk, Standbys].

³ Walter Wriston, formerly President of First National City Bank of New York, has been one of the world's most influential bankers of the last three decades. Martin Mayer attributes to Wriston the introduction of the negotiable certificate of deposit. See M. MAYER, THE BANKERS 200-01 (1976). In the present writer's opinion, the ability to place corporate cash for a short term at the highest possible rate made possible by the negotiable certificates of deposit was the essential antecedent to the development of the present day's "global financial marketplace." Less admiringly, many United States bankers also ascribe to Mr. Wriston the aphorism "sovereigns do not default in their debt." The attitude reflected in this aphorism encouraged enormous loans of Petrodollars to foreign sovereigns, especially developing nations. The lending banks' inability to collect on these loans was responsible for a sarcastic epilogue to Wriston's aphorism: "sovereigns may well not default in their debts; only their lenders do."

⁴ Kozolchyk, Standbys, supra note 2, at 330.

⁵ See Banque Paribas v. Hamilton Indus. Int'l, 767 F.2d. 380, 384 (7th Cir. 1985) ("And according to the Affidavit by Paribas' deputy manager in Bahrain, under Saudi law the guarantee, despite its apparently clear wording, would have required Paribas to pay SMG in response to an oral demand (provided that the documents speci-

https://scholarship.law.upenn.edu/jil/vol11/iss1/1
yan contract stipulations, examined by this writer, required wording in guarantees and letters of credit promising payment, despite injunctions or attachments or other legal proceedings to the contrary. Even as oil revenues declined, guarantees continued to be used in connection with the bidding for developing nations’ contracts of public works including the delivery, installation, maintenance and servicing of heavy machinery.6

Despite its common origin and function, the standby letter of credit has a much wider spectrum of usage than the bank guarantee. In addition to the sales and construction business reassurances, which it

\( fied in the letter were furnished later, as they were), because mails were uncertain in Saudi Arabia.”

shares with bank guarantees, the standby letter of credit is used to reassure the account party’s performance of purely financial obligations. Thus, one variety of standby issued by bank A, reassures thousands of purchasers of municipal bonds of the repayment of principal and interest owed in these bonds. Another standby, issued by bank B, reassures bank A that it will be reimbursed by B if the proceeds of the transaction financed by A’s standby are insufficient to effect A’s reimbursement. A third type of financial standby assures a long-term mortgagee that the construction phase of a project will be financed by a short term mortgage. A fourth type assures the short term mortgagee that it will be paid once construction is finished, regardless of whether the proceeds of a long-term mortgage are sufficient. Other standbys are used to reassure the holders of commercial paper, to secure the bank’s customer’s borrowing in the open market, or the payment of insurance or reinsurance obligations.7

Given the large variety and economic significance of these reassurances, the banks’ assumption of financial standby liability has reached an extremely high volume, especially when compared with the volume of issuance of commercial letters of credit. For example, for the years 1985 and 1986, the aggregate volume of outstanding obligations on standby letters of credit by American banks was approximately $175 and $170 billion respectively.8 Yet, as of March 31, 1987, the ratio of standby to commercial letter of credit liability for the larger banks was as high as six to one. Banks with assets over $10 billion reported a total of $124 billion of standbys outstanding as compared with approximately $20 billion in commercial letters of credit.9

Aside from its greater variety and larger volume of outstanding liability, the standby letter of credit has remained more faithful to the guiding principles of its progenitor, the commercial letter of credit, than has the bank guarantee. Well-drawn standbys reflect the influence of the principle of abstraction as expressed in Article 4 of the Uniform Customs and Practices for Documentary Credits (hereinafter referred to as the UCP): “In credit operations all parties concerned deal in documents, and not in goods, services and/or other performances to which the documents may relate.”10 Accordingly, compliance with such

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7 For a detailed description of the various types of financial standbys alluded to in the principal text, see Kozolchyk, Standbys, supra note 2, at 295.
9 See Chessen, supra note 8, at 22.
standbys is verifiable solely by the examination of the documents against the text of the credit. Faithful to the proverbial language in Articles 3 and 4 of the UCP, the issuers of these standbys discard wording that may require their ascertaining the occurrence of "causal" or underlying transaction facts or events. This principle, often referred to as "abstraction" or independence of the letter of credit, is now imbedded in the criteria for safety and soundness of banking practice adopted by United States banking regulatory agencies. Similarly, the drafters of the 1983 Revision of the UCP included standbys within the fold of commercial letters of credit.

2. The 1978 ICC Uniform Rules for Contract Guarantees (URCG)

In sharp contrast to United States regulatory policy on standbys

[hereinafter UCP].

11 Article 3 of the UCP states: "Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the credit." UCP, supra note 10, art. 3.

12 See, e.g., Comptroller of the Currency Interpretive Ruling 7.7016(d) of May 1977 ("[t]he bank's obligation to pay should arise only upon presentation of a draft or other documents as specified in the letter of credit, and the bank must not be called upon to determine questions of fact or law . . . "). For decisions that have influenced regulatory criteria, see, e.g., Wichita Eagle & Beacon Pub. Co. v. Pacific Nat'l Bank, 493 F.2d 1285 (9th Cir. 1974); Republic Nat'l Bank v. Northwest Nat'l Bank, 578 S.W.2d 109 (Tex. 1978) and comment thereto in Kozolchyk, Standbys, supra note 2, at 334-42.

13 Article 1 of the UCP states, in relevant part: "These articles apply to all documentary credits, including, to the extent to which they may be applicable, standby letters of credit . . . ." UCP, supra note 10, art. 1.

Article 2 states:

For the purpose of these articles, the expressions "documentary credit(s)" and "standby letter(s) of credit" used herein (hereinafter referred to as "credit(s)"), mean any arrangement, however named or described, whereby a bank (the issuing bank), acting at the request and on the instructions of a customer, (the applicant for the credit),

I is to make a payment to or to the order of a third party (the beneficiary), or is to pay or accept bills of exchange (drafts) drawn by the beneficiary, or

II authorizes another bank to effect such payment, or to pay, accept or negotiate such bills of exchange (drafts), against stipulated documents, provided that the terms and conditions of the credit are complied with.

and to the UCP principle of abstraction (as applicable to standbys since the 1983 UCP Revision), the policy of the 1978 ICC Uniform Rules for Contract Guarantees (URCG)\(^\text{14}\) was of "causality," i.e., the guarantor's involvement in ascertaining or completing the performance of obligations assumed by the contracting parties in the underlying transaction. The term contract guarantee included what the URCG described as "tender bonds," "performance guarantees" and "repayment guarantees."\(^\text{15}\) Contrary to the UCP principle of abstraction,\(^\text{16}\) the URCG sanctioned undertakings that required the issuing banks' determination of actual (as contrasted with purely documentary) underlying transaction performance or default. For example, Article 2(b) of the URCG described a performance guarantee as:

[a]n undertaking given by a bank, insurance company or other party ("the guarantor") at the request of a supplier of goods or services or other contractor ("the principal") . . . whereby the guarantor undertakes—\textit{in the event of default by the principal} . . . —to make payment . . . or . . . to arrange for performance of the contract . . . .\(^\text{17}\)

Unlike the issuer of a UCP commercial letter of credit, therefore, the issuer of a URCG contractual guarantee was required to ascertain whether the event of default had taken place, as a condition for payment of the guarantee. Predictably, prudent bankers stayed away from such undertakings. In addition, many of the intended beneficiaries of the URCG guarantee proved as reluctant as bankers. These beneficiaries were unhappy with the URCG's unwillingness to "make provision for the so-called simple or first demand guarantees, under which


\(^{15}\) \textit{In the Introduction to the URCG, the drafters describe each one of the transactions involved as follows:}

Broadly speaking, the purpose of a \textit{tender bond} (bid bond) is to provide an assurance of the intention of the party submitting the tender (principal) to sign the contract if his tender is accepted. Similarly, the \textit{performance guarantee} is intended as a safeguard against the party to whom the contract is awarded (principal) failing to meet his obligations under such a contract, which, by its nature, normally requires a period of time for completion. Finally, the \textit{repayment guarantee} protects the interest of the party awarding the contract (beneficiary) in respect of the repayment of payments or advances made by him, in the event of the principal not fulfilling the contract terms.

\(^{16}\) \textit{See UCP, supra note 10, arts. 3 and 4.}

\(^{17}\) \textit{See URCG, supra note 14, at 19-20.}

https://scholarship.law.upenn.edu/jil/vol11/iss1/1
claims are payable without independent evidence of their validity."18 The intended beneficiaries were also unhappy with the absence of rules that would allow them to extend the duration of the guarantees for the same period of time as their municipal statutes of limitations on guarantees, or for periods far in excess of the expiry period stipulated in the guarantees. Such demands, needless to say, were regarded by many issuing bankers and their account parties as highly unreasonable.

The determination of what is a reasonable duration of a UR CG type of guarantee is neither arbitrary nor subjective; it is or should be objectively ascertainable by the parties to the transaction. For example, assume that a bidder is awarded the construction contract on which he is bidding and, for which he is now required to tender a performance guarantee. The moment he replaces his tender bid or tender guarantee19 with a performance guarantee20 there is no reason to extend the life of the tender guarantee. There is, to be sure, good reason to allow a performance guarantee to continue to be enforceable for some time after the completion of the work: the additional period would cover the remaining time of the construction warranty. By the same token, however, it is manifestly unreasonable to demand a guarantee for an unspecified period of time or for a time beyond that of the expiration of the contract warranty. One need not be a banker to appreciate that an indeterminate or long term assumption of liability implies higher risks and higher costs in terms of commission and interest than in short term and determinable length assumptions. Furthermore, since sound management of credit resources requires that commitments be accounted for and evaluated from time to time, indeterminate or long-term bank guarantee liability reduces the issuers' ability to lend soundly.

While the UR CG were rarely used or incorporated into the text of standby credits or bank guarantees, European banks, approximately twenty years ago,21 commenced issuing irrevocable binding promises of indemnification of default to mostly official beneficiaries in the Persian Gulf and other developing nations. These promises were labeled letters of credit, letters of guarantee, bank guarantees, international bank guarantees, first guarantees, first demand guarantees, independent guarantees, and, in Great Britain, conditional, unconditional and per-

18 See id. at 9.
19 For a description of a tender bid in the UR CG, see UR CG supra note 14, at n.15.
21 See the author's interviews with European bankers in connection with the writing of the Chapter 5, "Letters of Credit," for IX INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, (Commercial Transactions and Institutions 1978) [hereinafter Kozolchyk, ENCYCLOPEDIA].
formance bonds. Eventually, the term bank guarantee became the most widely used.

The widespread use of the term bank guarantee did not assure uniformity of legal treatment. To begin with, serious differences in substantive law on whether guarantees were abstract or causal obligations existed among jurisdictions involved. These differences were known to the draftsmen of the UR CG who preferred to leave the determination of abstraction to courts or arbitral tribunals. In addition, some bank

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22 In Great Britain a distinction continues to be drawn between the traditional performance bond and the contemporary on demand performance bond. See Williams, On Demand and Conditional Performance Bonds, 1981 J. of Bus. L. 8. Williams describes these two bonds as follows:

Bonds and guarantees have been in common use in construction contracts over a number of years as a means of ensuring the financial standing of a contractor and his ability to fulfill a contract. They have been incorporated into both domestic contracts, i.e., confined within the United Kingdom, and international contracts. A bond may be defined for these purposes as: "[A]n instrument under seal, usually by deed poll, whereby one person binds himself to another for the payment of a specified sum either immediately or at a fixed future date." (citation omitted). . . Consequently, the practice has grown for many customers, particularly public authorities, to safeguard themselves by insisting on a performance bond clause within the contract (citation omitted). However, payment under the bond will be conditional upon the customer proving:

i) an unremedied breach of contract by the contractor;

and

ii) loss caused by such breach.

Such proof is normally secured by an arbitration award in favour of the customer or by agreement reached between the customer and contractor as to loss. This type of bond is termed a conditional performance bond, i.e. payment conditional upon non-performance, and until recent years was the only form of performance bond requested. However, within the last few years customers in certain countries, particularly in the Middle East, have required an alternative form of performance bond from contractors, which can be called in without proof of loss caused by breach of contract, or even breach at all. In short, such a bond can be demanded at will, i.e. an unconditional or on-demand performance bond.

Id. at 8-9. The influence of the British conditional performance bond is apparent in the wording of Article 9 of the UR CG that sets forth the documentation necessary to support a claim for payment:

A. [I]n the case of a tender guarantee, his declaration that the principal's tender has been accepted and that the principal has then either failed to sign the contract or has failed to submit a performance guarantee as provided for in the tender, and his declaration of agreement, addressed to the principal, to have any dispute on any claim by the principal for payment to him by the beneficiary of all or part of the amount paid under the guarantee settled by a judicial or arbitral tribunal as specified in the tender documents. . . .

UR CG, supra note 14, at 24.

23 See UR CG, supra note 14, at 9. The ICC drafters acknowledged that:

"It has also not been found practicable to deal with the complex subject of the nature of the guarantee, i.e. whether it is a primary and independent
guarantee forms linked the issuance of the guarantee to the existence of underlying transactions, thereby rendering these guarantees presumptively causal undertakings, whereas others excluded such linkage.

3. The Contemporary European Bank Guarantee: The Practice

3.1 Types of Issuers

Inspired by the commercial letter of credit practice of issuance and confirmation of the same credit by two different banks (the “issuing” and the “confirming” bank), the bank guarantee is also frequently issued by two banks. The first, bank A, issues its “direct” or “primary” guarantee to the beneficiary in his place of business. The second, bank B, assures A of reimbursement upon the latter’s payment of its guarantee. B’s guarantee, also known as a “counter-guarantee,” or “indirect” guarantee, is usually issued in the customer’s or account party’s place of business.

While the inspiration for the guarantee/counter-guarantee practice came from the irrevocable/confirmed letter of credit practice, the differences between the two practices are significant. In the irrevocable and confirmed letter of credit practice, the beneficiary is one and the same, i.e., the supplier of goods or services to the issuing bank’s customer or account party. In the guarantee/counter-guarantee practice, the beneficiary of the direct guarantee is usually the buyer of goods, services, or both, and the beneficiary of the counter-guarantee is the bank that issued the direct guarantee.

The legal implications of this distinction are reflected in the terms and conditions for the payment of the two guarantees. The direct guarantee is paid against the beneficiary’s statement, accompanied or not by supporting documents. Expressly or implicitly, the beneficiary warrants to the issuer of the direct guarantee the beneficiary’s compliance with the terms of the guarantee. By contrast, most of the counter-guarantees examined by this writer make it clear that the counter-guarantor will pay against a demand of reimbursement by the direct guarantor, accompanied or not as the case may be, by a certification or representation that the beneficiary of the direct guarantee complied with its terms. Only occasionally does the counter-guarantor specify payment against an examination of the documents tendered by the beneficiary.24 In

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24 See infra Appendices A-C (text of composite forms). See also Banque Paribas v. Hamilton Indus., Inc., 767 F.2d 380, 382 (6th Cir. 1985) (supplying a typical stipu-
other words, in most of the forms examined, the counter-guarantor acts as a reimbursing bank with no power to examine documents on its own, with the exception of the direct guarantor’s draft or demand for reimbursement.

Thus, the guarantee/counter-guarantee practice embodies two different promises. In the direct guarantee, the promise is to pay against the beneficiary’s draft or demand for payment accompanied or not by supporting documents. In the counter-guarantee, the bank promises to pay the direct guarantor upon the latter’s representation or certification of payment to the beneficiary in compliance with the terms of the direct guarantee. The difference between these promises explains why a guarantee may be issued subject to certain terms and conditions as a “bank guarantee,” and the counter-guarantee may be issued subject to related but not necessarily the same terms and conditions. It also explains why hybrids abound in the bank guarantee practice, i.e. direct guarantees issued as bank guarantees backed by standby letters of credit issued as counter-guarantees and vice versa.25

3.2 The Context of Issuance

Counter-guarantees which do not require the counter-guarantor’s verification of beneficiary’s compliance with the terms of the direct guarantee are usually the result of a pressured context. Many, if not most, of the guarantees so issued, are dictated by a governmental


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buyer's pre-conditions for the account party's doing business in his country. As a rule, the dictate also includes the designation of an issuing bank (often an official or quasi-official bank) in the buyer's place of business.\textsuperscript{26}

A less pressured version of the guarantee practice consists in the issuance of a direct guarantee by the principal's bank, followed by this bank's request for a confirmation of its guarantee by a bank in the beneficiary's place of business. This version allows for an examination of the beneficiary's tender of documents by both banks and thus is closer to the irrevocable/confirmed commercial letter of credit practice.\textsuperscript{27}

The direct guarantee/counter-guarantee practice has also been equated to the back-to-back letter of credit.\textsuperscript{28} This equation is inaccu-

\textsuperscript{26} The fate of "on demand" performance bonds seems inextricably tied with the law of "public works" in large importing nations such as Saudi Arabia. See Johnson, A Comparison: The New Saudi Standard Public Works Contract and the FIDIC Conditions, MIDDLE EAST EXECUTIVE REPORTS, Sept. 1988, at 11. Johnson reports the following development:

Saudi Arabia's recently adopted standard form contract for public works, while closely tracking the various clauses of the widely accepted 1977 third edition of the FIDIC Conditions, (Conditions of Contract (International) for Works of Civil Engineering Construction with Forms of Tender and Agreement, (3rd Edition, March 1977)) departs significantly from the Conditions in areas concerning the allocation of contractual burdens, opportunities for breach, and dispute settlement. Not surprisingly, these departures are all in favor of the employer . . . . The Saudi contract in certain areas puts all of the weight on one side, raising questions of fundamental fairness and reasonableness. For example, both contracts permit the employer to suspend work without penalty in certain circumstances. Article 40(2) of the FIDIC Conditions, however, permits the contractor in certain circumstances to treat a suspension lasting more than 90 days as an abandonment of the contract by the employer. The Saudi Contract grants no such contractor right of declaring an abandonment, thus giving the employer right of virtually indefinite or infinite suspension.

\textit{Id.} at 21 (citation omitted). From a guarantor or counter-guarantor's standpoint, this is a very important legal datum. As long as the contract underlying the guarantee is technically alive, albeit suspended, as opposed to abandoned and terminated, the Saudi Arabian beneficiary of the guarantee will contend that despite the term of expiration of the guarantee, the guarantee continues to be enforceable. Cf. Foxboro Co. v. Arabian Am. Oil Co., 805 F.2d 34 (1st Cir. 1986) (discussion of the expiration of the bank guarantee). Underlying the letter of credit and bank guarantee involved in \textit{Foxboro} was the following stipulation: "BUYER may, at any time and at its sole convenience, terminate this procurement contract of any part of the WORK by giving notice to SELLER". \textit{Id.} at 36 n.2. See generally Gnichtel, The Intricacies of Performance Guarantees in Saudi Arabia, 100 BANKING L.J. 354 (1983) (role of performance guarantees in the trade with Saudi Arabia).

\textsuperscript{27} For an example of a standby letter of credit payable upon presentation of a draft and certification as specified and attached to the standby letter of credit itself, see M. Rowe, GUARANTEES: STANDBY LETTERS OF CREDIT AND OTHER SECURITIES 121, 122 (1987) [hereinafter Rowe].

\textsuperscript{28} See Stand-By Letters of Credit and Guarantees: Report to the Secretary-G
rate. The back-to-back letter of credit practice is, at root, a secured transaction. In a back-to-back transaction, bank X is contacted by Z, an intermediary-seller who has in his possession an irrevocable letter of credit issued to him as beneficiary by bank Y. On the strength of Y’s letter of credit, X decides to issue its own letter of credit to W who is Z’s supplier. For security purposes, X acquires possession of Y’s letter of credit and will pay its own letter of credit upon presentation of documents compatible with the requirements in Y’s letter of credit. Accordingly, W becomes the beneficiary of X’s letter of credit and Z surrenders Y’s letter of credit to X until the latter can reimburse itself from its proceeds. In contrast, in the most common type of guarantee/counter-guarantee transaction the beneficiary of the counter-guarantee issued by bank X is not W, a third party, but the issuer of the direct guarantee, bank Y, and bank Y will not demand possession of X’s letter of credit as a precondition for issuing its own.

3.3 The Bank Guarantee Profile

The proliferation of banking guarantees throughout Europe and the mushrooming legal literature on European bank guarantees has made it possible to draw, if not a detailed picture, at least a transactional profile of a typical European bank guarantee transaction. Widely issued since the late sixties by banks in Austria, Belgium, France, West Germany, Great Britain, Greece, Italy, the Netherlands, Spain, Sweden and Switzerland, the bank guarantee covers many of the transactions associated with the standby letter of credit. These transactions range from the supply of machinery and equipment to local contractors, to the building of major public and private works by contractors, to the rendering of consulting services or franchising agreements to public or private entities in the direct guarantor’s country or place of business. Occasionally, these guarantees are issued to cover the payment of a lease or mortgage. On the whole, however, they are not used in con-

eral, supra note 1, para. 87 at 19. See also Judge Posner’s statement that “[i]t thus would make no difference whether Paribas was the confirming bank, as we have suggested was probably the case, or the issuer of a second letter of credit (the guarantee) of which American National Bank was the beneficiary, which would make this a case of “back to back” letters of credit.” Banque Paribas v. Hamilton Indus. Int’l, 767 F.2d 380, 384 (7th Cir. 1985) (emphasis added).

See supra note 6. See also appendices A-C (references to sources in the composite bank guarantee forms).

See, e.g., Kronauer, supra note 6, at 126 (discussing an unpublished decision of the District Court of Zurich of Feb. 17, 1981). In the booming “gold coast” of Spain, it has become customary to sell unbuilt condominiums with a bank guarantee that assures the purchaser of repayment of his purchase price in the event of the developer’s failure to complete the project or to deliver the finished condominium at the agreed upon time.
nection with an assurance of repayment of principal and interest, such as in a municipal bond or commercial paper issuance, or to pay proceeds of uncollectible insurance or reinsurance obligations, as is done routinely by United States financial standbys. Therefore, European bank guarantees continue to be issued generally to a single, and exclusive beneficiary, rather than to multiple beneficiaries or to fiduciary representatives of multiple beneficiaries or of sub-beneficiaries, as is customarily done with financial standbys.

While statistics on aggregate volume of issuance are generally unavailable, some researchers have been able to obtain figures that indicate the large volume of bank guarantee issuances in Europe. Professor von Marschall reports that one major German bank estimated its 1979-80 volume of issuances as approximately 10,000 guarantees.\(^\text{31}\) The amount per issuance is also considerable.\(^\text{32}\) In informal conversations with this author, European bankers estimated such an amount to be $250,000 on the average. Stumpf and Ullrich estimate that the amount commonly involved in German tender guarantees for the supply of plant and machinery is 2% of the tender sum, while Gavalda and Stoufflet estimate the amount of French performance guarantee ranges between 5 and 10% of the total amount of the contract.\(^\text{33}\)

The duration of the typical European bank guarantee also exceeds the average duration of a commercial letter of credit. While the expiry of commercial letters of credit is counted in terms of days and months, the expiry of bank guarantees, as that of many United States standbys, is usually in terms of years.

Collateralization practices differ with each issuance. On the whole, however, European banks do not rely on documents of title to the goods involved as collateral, as is the case with many commercial letters of credit. As often as not, the collateral involved in the issuance of a European bank guarantee or counter-guarantee is the account party's compensating balance or deposit of moneys or of liquid securities with the issuing bank or, occasionally, a real estate mortgage.

Through the 1970s and early 1980s the bargaining power of the beneficiaries and the "principals" (account parties) of European bank guarantees was markedly different. G. Sion, a keen observer of Belgian and French bank guarantee practices, points out that the bank guarantees issued or guaranteed by French and Belgian bankers reflected "monopsonic" market conditions, i.e., where contractors of public

\(^\text{31}\) von Marschall, Recent Developments, supra note 6, at 280 n.83.
\(^\text{32}\) See Sion, supra note 6, at 6.
\(^\text{33}\) STUMPF AND ULLRICH, supra note 6, at 6; Gavalda and Stoufflet, supra note 6, at 5.
works and suppliers of high technology were pitted against each other by a sole buyer with the legal wherewithal to determine the conditions of the sale or performance of services. And, unlike the picture of account party sophistication assumed by such landmark United States decisions as American Bell International v. Islamic Republic of Iran, Sion’s profile of the French typical account party is quite different since “a country like France, which exports almost 20% of its national product, [must] count among its exporters small and medium enterprises who are not familiar with the mechanism of the international banking guarantee.”

It is true that the bargaining power of the typical European bank guarantee beneficiary of the 1970s has, in tune with OPEC’s decline, also declined markedly since 1984 (the date of Sion’s study). Yet, monopsonic or “buyer’s market” conditions continue to prevail in many of the locations served by continental European bank guarantees, English performance bonds and United States standbys.

3.4 Customary Bank Guarantee Forms

While the wording of contemporary European bank guarantees varies significantly by country, commercial center, and bank or banking association involved, common elements are apparent. Representative language used in tender, advance payment and performance guarantees has been selected from eight different sets of banking forms and transcribed in composite fashion in appendices A (for tender guarantees), B (for advance payment guarantees) and C (for performance guarantees). Each of the selected composite texts contains references to the

34 Sion supra note 6, at 17. See also Gavalda and Stoufflet, supra note 6, at 1-2.
36 Sion refers to “de pays comme la France, qui exporte près de 20% de son produit national, et qui doit donc compter parmi ses exportateurs de petites et moyennes entreprises qui ne connaissant pas forcément le mécanisme de la garantie bancaire internationale . . . .” Sion, supra note 6, at 17.
37 See generally White, Bankers Guarantees and the Problem of Unfair Calling, 1979 J. MARSH. L. COM. 121.
38 For Austrian sources and sets of forms, see CREDITANSTALT-BANKVEREIN, AUSLANDSGARANTIEN: AUSFÜHRLICHE DARSTELLUNG DER AUSLANDSGARANTIEN MIT BEISPIELEN AUS DER BANKPRAXIS (Creditanstalt-Bankverein, Wien, 1987) 19-21 (advance payment guarantee), 23 (performance guarantee), 31 (counter-guarantee), 40 (extend or pay practice).
For Belgian and French sources and sets of forms, see Poullet, supra note 6, at 395-98, 412-18.
For Swiss sources and sets of forms, see ACKERMANN et al., supra note 6, at 41 (Stand-by-Akkreditiv), 141 (Bid Guarantee), 147-48 (Anzahlungsgarantie-Advance Payment Guarantee); DOHM, supra note 6, at 183 (Bietungsgarantie), 184 (Bid Bond), 185 (Garantie de soumission), 186 (Erfüllungsgarantie), 187 (Performance Guarantee), 188 (Garantie de bonne execution), 189-90 (Anzahlungsgarantie), 191-92 (Repayment Guaranties), 199-200 (Other Guarantee).

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legal cause of issuance, language on the cause of issuance, certainty of enforcement and expiration of the respective type of guarantee.

3.4.1 The Causal Section

The first or causal section contains a reference, in varying degree of detail, to the legal "cause" or transaction that prompts the issuance. The causal text of the three types of guarantees examined is fairly uniform and resembles the text of English "conditional" bonds, issued in response to requirements set forth in FIDIC, a compilation of rules and forms for civil engineering construction contracts influential throughout Europe. It should be noted that the transactions involved in the selected forms, i.e., tender of bids, repayment of buyer or importer advances and performance of sale or services are the same transactions the URCG unsuccessfully attempted to regulate.

An English conditional bond is a formal contract in which one party, the promisor, obligates himself to pay the promisee a sum of money on the happening of a particular event. Such a bond consists, inter alia, of the following:

1. The obligation by which the promisor binds himself to pay a sum of money;
2. The recitals which explain the relationship of the above promise to the main contract;
3. The condition which describes the events on the occurrence of

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Guarantee), 193-94 (Garantie de remboursement d'acomptes), 195-96 (Ausfall-Zahlungsgarantie), 197-98 (Payment Guarantee), 199-200 (Garantie de paiement), 205 (Gegengarantie), 206 (Counter-Guarantee), 207 (Contre-garantie); KLEINER, supra note 6, at 170 (Anzahlungsgarantie), 171 (Garantie de restitution d'acomptes), 172 (Letter of Indemnity), 173 (Erfüllungsgarantie), 174 (Garantie de bonne execution), 175 (Performance Bond); UNION BANK OF SWITZ., GUIDE TO DOCUMENTARY TRANSACTIONS IN FOREIGN TRADE: DOCUMENTARY CREDITS, DOCUMENTARY COLLECTIONS, BANK GUARANTEES 87 (Bid Bond), 88 (Performance Bond), 89 (Letter of Indemnity-Advance Payment Guarantee), 91 (Counter-Guarantee for Bid Bond), 92 (Letter of Indemnity) (1985).

For West German sources and sets of forms, see STUMPF & ULLRICH, supra note 6, at Annex I (Tender Guarantee-Bietungsgarantie, Repayment Guarantee-Anzahlungsgarantie, Performance Guarantee-Erfüllungsgarantie), Annex II (Unconditional Tender Guarantee-Bedigungsgarantie Bietungsgarantie, Unconditional Repayment Guarantee-Bedigungsgarantie Anzahlungsgarantie, Unconditional Performance Guarantee-Bedigungsgarantie Erfüllungsgarantie); VON WESTPHALEN, supra note 6, at 342-43 (Anzahlungsgarantie), 355-56 (Bietungsgarantie), 357-58 (Anzahlungsgarantie), 359-60 (Erfüllungsgarantie).

59 For a short description of a conditional bond, see supra note 22. For its relationship to FIDIC and, more recently, to the public law of contracts of large importers in the Persian Gulf, see supra note 26.

40 See supra text accompanying notes 14-23 for a description of the URCG transactions.

41 White, supra note 37, at 123.
which the obligation is to cease or expire.

Similarly, the tender guarantee of Appendix A uses “recital” language such as “tender given by . . . ,” or “we refer to the tender submitted to you by [guarantor customer’s name].”\textsuperscript{42} Accordingly, the guarantor assumes that his customer (also referred to as “principal” in bank guarantee parlance) has submitted his bid prior to the issuance of the bank guarantee. The guarantor’s promise of payment is thus predicated upon a pre-existing submission of the tender or bid. The guarantor also predicates his duty to pay on the bidder’s (the guarantor’s customer’s) failure to enter into the principal contract once the bid is awarded to him by the beneficiary of the guarantee. As stated in the Swiss bid guarantee forms drawn by Kleiner: “[W]hich (guarantee) shall be payable by us to you on receipt of your first written demand which shall incorporate your certificate that after acceptance of said bid, Messrs failed to enter into the respective contract.”\textsuperscript{43}

The conclusion is inescapable that if $X$, the guarantor’s customer, did not tender its bid or that if $Y$, another bidder, was successful in being awarded the contract in question, either $X$ or its guarantor should be able to claim the invalidity or unenforceability of the guarantee.

Similar language conditioning the issuance of the guarantee to an underlying transaction is found in advance payment and performance guarantees. Appendix B contains recitals by the guarantor such as:

[W]e understand from our clients Messrs . . . that they as sellers have signed with you as buyers on . . . a contract regarding the delivery of . . . with an invoice value of . . . . The payment conditions provide that you have to transfer to our above clients a $ . . . advance payment . . . amount to . . . against a covering bank guarantee.\textsuperscript{44}

And Appendix C contains the following stipulations:

We have been informed that you have concluded on . . . a contract no . . . hereafter the contract . . . with Messrs. hereafter the seller, for the supply of . . . at a total price of . . . . Pursuant to the contract the seller is required to provide you with a performance guarantee in the amount of . . . % of the total price . . . . \textsuperscript{45}

\textsuperscript{42} See infra app. A (language from STUMPF & ULLRICH, supra note 6, at 42 and ROWE, supra note 27, at 94).

\textsuperscript{43} See infra app. A (language from KLEINER, supra note 6, at 182).

\textsuperscript{44} See infra app. B (language from Austria’s Creditanstalt-Bankverein, supra note 38).

\textsuperscript{45} See infra app. C (language from DOHM, supra note 6, at 187).
The preceding advance payment and performance guarantees presuppose and are conditioned upon the buyer having made an advance payment, or the seller having been awarded a contract whose obligations the seller undertook to perform. If the buyer did not make such an advance payment, or if the customer was not the seller of the goods or supplier of the services involved in the contract in question, as with the non-bidder or the unsuccessful bidder of the tender guarantee, the advance payment and performance guarantees have nothing to reassure and thus lack their legal cause.\(^\text{46}\)

English bankers accustomed to issuing conditional bonds may object to the importance attached by continental civil-law lawyers to the clauses discussed above. These bankers may argue that the language in question does not amount to a condition in the technical legal sense but is a mere ritualistic and anecdotal “recital” lacking in legal significance. Yet the same bankers would have to admit that none of their profit-seeking customers would procure the issuance of a tender guarantee for a tender that the customer did not make and does not intend to make, or of a repayment guarantee for an advance payment the customer never received, or of a performance guarantee for a contract that does not exist and to which the customer does not intend to agree. Since these events are essential presuppositions for issuance, they must also affect the enforceability of the bonds or guarantees.

It should be noted that the legal cause that supports the issuance of a given type of guarantee is not necessarily the same that supports the whole underlying transaction between the customer and the beneficiary or that supports another phase of this transaction. Each of the three guarantees has its own legal cause or “base” transaction and is enforceable according to its terms even if another guarantee lacks its base and legal cause. Thus, a beneficiary of a tender guarantee can enforce it against a customer bidder who failed to enter into the final contract although the same beneficiary could not enforce a repayment guarantee that lacked the presupposed advance payment. Moreover, the legal cause of the performance guarantee could be one of many, depending upon what was meant by the base transaction. As stated by Professors Stoufflet and Gavalda:

> Cause, is above all a concept imbued with suppleness. The cause of the performance guarantee offers the most serious

difficulty: it could be the existence of a contract, or the completion of a contract between the customer and the beneficiary. The proven absence of any contract between the parties, or its annulment or rescission will liberate the guarantor, because of the absence or disappearance of the cause. . . . 47

Finally, they conclude that:

Another benefit of the preceding analysis is that it assures the guarantor, and indirectly its principal, a minimum of protection by leaving the door open to the limited but real possibility of annulling the guarantee when it violates the rules on cause. Mistake in the guarantee’s cause is not inconceivable. . . . One can visualize, also, the illegality of the cause, such as in a guarantee issued to enable the carrying out of an unlawful transaction. . . . 48

Therefore, the presence of causal language in the Appendix forms and the absence of such language in contemporary letters of credit is highly significant. The absence of a causal linkage between letters of credit and their underlying transactions was the result of the business decision to create a new variety of banking promise akin to an acceptance in advance of the presentation of the draft or demand of payment. In exchange for such a promise, the beneficiary had to present documents whose facial compliance with the terms of the credit alone would prompt payment. These documents, however, were deemed inherently valuable in the sense of being susceptible to convey commercial value, whether in the forms of title to goods, facilitation of customs entry or insurance proceeds.

Such a decision has not yet been made by the banking and legal communities involved in the issuance of bank guarantees. Interviews conducted by this writer approximately ten years ago revealed considerable distrust of the powers granted to beneficiaries, especially by the “first” or “simple” demand guarantees. Distrust in beneficiary inspired certification or documentation is as high as ever. 49 This distrust has led

47 Gavalda & Stoufflet, supra note 6, at 10-11.
48 Id. at 11.
49 The distrust and reluctance apparent in the 1970’s is still apparent in the reaction of some European bankers or banker associations to attempts to sanction the use of first or simple demand guarantees. See, e.g., ICC Docs 470/Int.263, 460/Int.218 and 460/Int-1Int.38, of 1989.IV.03 (containing a letter by Asea Brown Bovery AB to the Swedish National Committee of the ICC in which the banker signatory states, “My main concern is that this new version makes it possible for the beneficiaries to avoid the requirement of making a bona fide statement by merely using the words “simple de-
many bankers and banking lawyers to insert "causal" language to facilitate the invalidation of the guarantor's obligation if the need appears.

It should also be remembered that the causality described above is highly consistent not only with English conditional bonds but also with continental European suretyship. For example, Article 2012 of the French Civil Code, in its inimitable proverbial fashion, refers to suretyship as the type of obligation (cautionnement) which "could only exist for a valid obligation" (le cautionnement ne peut exister que sur une obligation valable). The same principle is found in other European codes. Because this view of suretyship was so widespread, once the URCG resorted to suretyship language it could not avoid enforcement as an accessory and causal promise.

3.4.2 The Abstract Section: Sources of Abstraction

The beneficiaries of the URCG guarantees made their displeasure with the URCG known to the International Chamber of Commerce: unless these guarantees could be enforced strictly on the basis of their textual requirements and unless these requirements could be verified by determining whether specified statements or representations had been made, the beneficiaries of the URCG guarantees would reject them as categorically as they rejected the URCG. This meant that the issuers of the European bank guarantees wishing to satisfy these beneficiaries had to engage in a most difficult balancing act. On the one hand, they could only protect themselves against unwarranted claims by preserving a modicum of causality. On the other hand, they could only induce beneficiaries' reliance by issuing abstract promises DI FR /DI FRof payment. Most jurisdictions, however, lacked statutory rules on abstract guarantees. Instead, code and statutory rules on guarantees were essentially causal. In addition, courts in some of the most influential jurisdictions did not sanction abstract bank guarantees for internal trade

mand" in the text of the guarantee.

[50] CODE CIVIL [C. Civ.] art. 2012 (Fr.).
[51] For an example in the Napoleonic family of codes, see CODIGO CIVIL art. 1824 (Spain). For a provision in a code of a different legislative tradition, see SCHWEIZERISCHES OBLIGATIONENRECHT, CODE DES OBLIGATIONS, CODICE DELLE OBLIGAZIONI [OR, Co, Co] art. 492(2) and comment thereto in Kronauer, supra note 6, at 122.
[52] See generally Kozolchyk, Standbys, supra note 2, at 323-24 (discussing that upon proof of non-performance, the bank must pay the beneficiary a stipulated amount of money or must complete performance of the contract despite further exposure to additional liability).
[53] See supra text accompanying notes 39-52 (discussing the causal section of customary bank guarantee forms).
until the mid-1970s or early 1980s. European banks, therefore, had to rely on contractual and customary law as the basis for enforcing bank guarantees, and hope that courts would remain sensitive to the need to enforce such a guarantee. By and large, courts have been supportive. In France, for example, enforcement of abstract bank guarantees was based not only upon the freedom of contract principle of Article 1134 of the French Civil Code, but also on the power of the commercial profession to create its own law through custom and usage of trade. This power has remained, on the whole, undisputed in the area of international trade.

Based on the Article 1134 freedom, French bank guarantees declared themselves to be abstract promises, not subject to various listed and unlisted defenses or equities. While occasionally criticized, this approach has succeeded, albeit only in principle. Generally, European courts are willing to enforce bank guarantees as abstract obligation promises. Yet, causality is still alive, especially as an exception to the general principle of abstraction. Beneficiary’s fraud, abuse of rights, illegality, and unjust enrichment are among the most prominent exceptions. These exceptions can be used by the counter-guarantor or customer as defenses or shields in actions for payment or reimbursement. They can also be turned into swords by customers or counter-guarantors petitioning for injunctions against drawing on or payment of the guarantees, or for attachment of guarantee or counter-guarantee proceeds.

In the opinions of Professors Stoufflet and Gavalda (and of this writer), the abstract or independent language in a bank guarantee

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54 See infra note 56 (alluding to bank guarantees as universally accepted international instruments, but questioning their validity in internal French law).
55 C. Crv. art. 1134 (Fr.) (stating in relevant part: “[c]ontracts lawfully entered into have the force of law between the contracting parties . . . .”). For the significance of this provision in terms of standards of adjudication, see Kozolchyk, Commercialization, supra note 46, at 13-14.
56 It is interesting that, to this day, some French “civilists” (experts in civil code institutions, as opposed to commercialists or publicists) are willing to accept the bank guarantee as a strictly international instrument but reject its validity in internal French law. See, e.g., J. Terray, Le cautionnement: une institution en danger, J.C.P. I No. 34/37, 3295 (1987) [hereinafter Terray]. Terray admits that the decision of December 13, 1983, by the Cour de cassation sanctioned the validity of the first demand guarantee in French law (dans l’ordre francaise interne). The author is also aware of Gavalda and Stoufflet’s advocacy of the “importation” of this institution. Yet he decries such an importation as destructive of the balance of equities in the suretyship relationship.
57 See, e.g., Gavalda and Stoufflet, supra note 6, at 2-3 and Gavalda and Stoufflet, J.C.P. No. 117, 14778 (1986).
58 See Terray, supra note 56.
59 See infra text accompanying notes 96-138.
60 See infra note 47 for the opinions of Professors Stoufflet and Gavalda. Stumpf
does not prevent a bank guarantee from being annulled because of the failure of its "base" transaction or legal cause. For example, even though a tender guarantee referred to itself as abstract or independent, the complying draft and certification of a beneficiary, although in compliance on its face, would not prevent the invalidation of the guarantee if the customer had failed to bid on the contract. In effect, then, the nonexistence of a legal cause gives the guarantor bank and its principal the power to annul or revoke what is represented as an irrevocable and abstract or independent promise.

3.4.3 Abstract Language

The abstract section expresses the guarantor’s irrevocable and certain promise to pay a sum of money upon compliance with stipulated conditions and within a certain term. Thus, the German banking forms of tender guarantees compiled by Stumpf and Ullrich state:

the guarantor hereby undertakes irrevocably to pay the beneficiary, within a period of 14 working days from the date of receipt by him of the beneficiary’s first request in writing any sum claimed up to the amount of . . . DM, provided this request is received no later than (expiry date).

The expression “first request” or “first demand” is significant enough to be included in every form examined by this writer. Yet, its meaning is not explained in the various ICC Draft proposals of Uniform Rules for Guarantees. The URCG’s unpopularity and the continuing popularity of Walter Wriston’s “golden” rule would indicate that “first demand” implies that once the beneficiary makes its demand for the first time it will not have to demand it again.

Other abstract stipulations reveal an ambiguity similar to that of “first demand.” For example, the Union Bank of Switzerland’s tender guarantee promises: “[T]o pay you on first demand irrespective of the validity and the effects of the above mentioned Bid and waiving all rights of objection and defense arising from said bid, any amount up

and Ullrich cite Schröder, Ruckzahlungsgarantien oder -bürgschaften ohne Anzahlungseingang beim Avalkreditgeber, DER BETrieb 2537 (1975) for the admissibility in German law of the defense where a down payment had not been made with respect to the enforcement of a repayment guarantee. STUMPF AND ULLRICH, supra note 6, at 6 n.9. For a German court decision that adopted the view that failure to pay the advance payment renders the guarantee absolutely null and void, see infra notes 136-138 and accompanying text (the 1985 Regional Court of Detmold decision).

See infra app. A.
See URCG, supra note 14 and listing of drafts infra note 176.
See supra note 3 and accompanying text.
to . . . ." The same bank’s advance payment guarantee undertakes: [T]o refund to you, on your first demand, irrespective of the validity and effects of the above mentioned contract, the advance payment in the amount of . . . ."

Its performance guarantee promises: "[T]o pay you on first demand, irrespective of the validity and the effects of the above mentioned contract and waiving all rights of objection and defense arising from said contract, any amount up to . . . upon receipt of your written confirmation that Messrs . . . have failed to . . . ."

Contrary to the effect of the causal language, these stipulations appear to assert that the Union Bank of Switzerland as guarantor cannot raise any causal defenses. A closer reading, though, reveals that the guarantor’s waiver of defenses in the above guarantees refers to the "validity and effects" of the base transaction and does not waive its nonexistence. In fact, the waiver language presumes the existence of a bid, of an advance payment, and of a performance contract. The guarantor’s waiver of “validity” defenses cannot be read to prevent a Swiss administrative or judicial authority from nullifying an illegal guarantee. The grant of such a power to a private party violates imperative code law.

3.5 The Expiry Section

Expiration looms larger for the issuers of bank guarantees than for the issuers of letters of credit. In the typical letter of credit form, expiration does not deserve a special clause, and it is often confined to a blank space to be filled in during each credit issuance. By contrast, bank guarantees devote special clauses to the expiration of the guarantee. For example, Ackermann’s bid guarantee form stipulates:

Any claim in respect thereof should be made to us by the twentieth of November . . . at the latest. Should we receive no claim from you by that date, our liability will cease 'ipso facto' and the present letter of guarantee will become null and void. Please return to us this letter of guarantee, on expiry date for cancellation.

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64 See infra app. A (emphasis added).
65 See infra app. B (emphasis added).
66 See infra app. C (emphasis added).
67 European civil codes invariably contain the principle that unlawful obligations are deemed either absolutely void or non-existent. See, e.g., OR, Co, Co § 20 (Switz) (stating that “[c]ontracts containing provisions which are impossible, illegal or contra bonos mores are invalid”).
68 See infra app. A.

https://scholarship.law.upenn.edu/jil/vol11/iss1/1
Other forms, such as Dohm's, insist that the "original of this instrument must be returned to us after the expiry date or after all your claims hereunder have been satisfied by us."\(^{68}\) Stumpf and Ullrich's form admonishes the beneficiary that "after the lapse of this guarantee, the beneficiary shall, without delay, return the guarantee document to the principal, (and, where the guarantee has been paid to the beneficiary) . . . it shall be the Guarantor's duty to return the guarantee document to the principal."\(^{70}\)

Much depends upon the beneficiary's awareness of when the guarantee expires, and who possesses the document that contains the "original" version of the guarantee.

### 3.5.1 The Beneficiary Statute of Limitations Problem

Why should the guarantor's repossession of the bank guarantee be so organically linked to the expiration of the guarantee if such a linkage has proven unnecessary for other "mercantile specialties," such as bills of exchange or letters of credit? The implication of the requirement to surrender an expired or unenforceable guarantee is that surrender will reassure the guarantor that no demand for payment can be made by the beneficiary in the future. Aside from the practical difficulties of enforcing such a stipulation (especially when the beneficiary of an expired guarantee has no incentive to surrender it if he thinks he can still enforce it), it attributes an almost magical consequence to the possession of a guarantee. Much like Aladdin's lamp, mere possession of a bank guarantee seems to carry with it everlasting effectiveness.

There is a more rational, although not fully convincing explanation. Dr. Herbert Stumpf, a member of the Executive Committee of the Federation of German Engineering Industries and former Chairman of the ICC Joint Working Party on Contract Guarantees, explains the URCG return of the guarantee provisions as follows:

1. The return of a guarantee that is no longer valid is considered a commercial necessity for balance sheet reasons;
2. The guarantors (banks) charge guarantee fees until the guarantee is returned to them. This means that very often the principal has to pay such fees although the validity period has expired and the guarantor is thus discharged from his undertaking under the guarantee.\(^{71}\)

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\(^{68}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) Stumpf, supra note 6, at 145-46.
This explanation of why the guarantee should be returned merely begs the question. If by “balance sheet reasons,” Dr. Stumpf meant that neither the bank nor its principal wanted to have their books burdened with an everlasting liability (a legitimate concern of bankers and bank customers alike), one wonders why the liability would continue after the guarantee’s expiration date. Similarly, Stumpf’s second reason assumes an answer which he had not provided; namely, that a bank should charge interest on an expired, nonexisting liability.

Another possible answer was provided by what Dr. Stumpf referred to as “an important legal reason”.

The laws in some countries like India, Afghanistan and Sudan do not allow any time limitation on the validity — i.e. no validity period can therefore effectively be provided for in this guarantee document — and this amounts to an indefinite validity. Now, if validity is indefinite, what else can put an end to it if not the return of the guarantee document! In fact, where no limitation in time is possible, the only assurance, both for principal and guarantor, of not being faced with wrongful claims in future [sic] is to have the guarantee returned and throw it in the paper basket. Adrian M. Birgi affirms that in Turkey a performance guarantee continues to be valid as long as it is retained by the client. It goes without saying that this practice involves enormous risks for the supplier or contractor.

Let us assume, that Stumpf’s “legal reason” was thoroughly researched and that expert legal opinions on the laws of India, Afghanistan, Sudan, and Turkey concluded that expired bank guarantees remained alive as long as the underlying obligor could be liable to the beneficiary of the guarantee or the beneficiary retained possession of the guarantee. This conclusion still does not constitute an “important” enough legal reason to shape commercial and banking rules and practices in jurisdictions other than those where it is in effect.

72 Id.

73 Id. See also Gavalda and Stoufflet, supra note 6, at 18 (referring to the prohibition in Algeria of a definite date of expiry, and to the German banking practice of Garantieerkunde, or return of the guarantee). Stumpf and Ullrich refer to a Resolution No. 4407 of May, 1973 of the Commercial Bank of Syria which “avails itself of the right to honour [sic] claims for payment under a guarantee regardless of whether such claims are made within the validity period or after the expiration of the latter.” STUMPF & ULLRICH, supra note 6, at 5 n.3. The same authors cite Williams, On Demand and Conditional Performance Bonds, 1981 J. Bus. L. 8, 13, for the proposition that in India, guarantees may be called even after 60 years unless they are returned. STUMPF & ULLRICH, supra note 6, at 9 n.14.
Deference to what was asserted as the law of Afghanistan, India, Pakistan, Sudan, and Turkey is inconsistent with key principles of modern commercial law. In fact, modern commercial law could not have come about unless it discarded the following two guiding principles of the law of ancient agricultural survival societies: 1) valuable property was not to be sold or marketed because it made possible the family’s survival; and 2) debts contracted by individual family members were owed by all family members until paid or forgiven.\(^74\)

Only when property became synonymous with marketability and the duration of liability became ascertainable by rules of finality, was commercial law enabled to provide equal treatment to merchants regardless of their family membership or citizenship. Equality of treatment and ascertainable finality brought predictability and agility to marketplace transactions. Any rule or practice which presently provides for an undetermined expiration of liability is not only anachronistic but is unlikely to survive any attempt to export it beyond its geographic confines. Moreover, a rule that attributes everlasting power to create obligations to the possession of an expired promise is as fetishistic as the proposed antidote of “throwing it into the wastepaper basket.” Surely any ruler who thought it within his power to enact everlasting existence for bank guarantees would not hesitate to rescue them from wastepaper basket oblivion.

### 3.5.2 The Extend or Pay Practice

Beneficiaries’ attempts to impose local rules that favor long, if not everlasting, guarantees are closely connected to another collection practice known as “extend or pay.” Frequently, demands for payment are presented or threatened to be presented by beneficiaries merely to obtain an extension of the guarantee’s expiry period. When the request for an extension is made in good faith it reflects the beneficiary’s desire to continue to hold the supplier’s guarantor liable for an additional and determinable period of time during which the supplier is supposed to complete performance. In this context, the extend or pay practice is nothing more than a \textit{sui generis} amendment of the duration of the guarantee.

A 1987 Austrian Supreme Court decision\(^75\) transcribes one such


\(^75\) See Austrian Supreme Court decision of December 18, 1987 in 7 Int'l Bank-

ing L. 92, 93 (Nov. 1988).
request by a beneficiary:

We hereby claim on the above-named guarantee in order to protect our interest. However, we request you not to make payment at present. Should we not be granted an extension by 4 January 1985 we request that you transfer the sum of 900,000 to our account.\(^76\)

Quite often, however, the extend or pay practice involves a bad faith demand for payment by a beneficiary who either does not expect an additional performance by the guarantor’s customer or who has himself made such an additional performance impossible. In such cases, the beneficiary’s demand for payment is inherently fraudulent or abusive. Since there is no counterpart to UCC Section 5-114(2)(b) in European law, few European guarantors enjoy the protection of a statutory discretion to dishonor the draft.\(^77\) Only a judicially-sanctioned fiduciary duty, as with the German law’s Geschäftsbegungsvertrag,\(^78\) could warrant the bank’s dishonor or refusal to pay.\(^79\) This explains why extend or pay demands to European banks often result in automatic extensions.

4. The Law

4.1 Statutory Law

A review of contemporary sources reveals very few statutory rules

\(^76\) Id.

\(^77\) U.C.C. § 5-114(2)(b) states:

[In all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor. U.C.C. § 5-114(2)(b) (emphasis added). Professor Freiherr von Marschall, a leading German commercial law authority, holds the view, however, that German and Austrian bankers are justified in not paying abusive or fraudulent drawings when they are aware of such abuse of rights or fraudulent misrepresentation. See infra notes 113-14 and accompanying text.

\(^78\) This relationship is predicated upon an express or implied agreement in which the promisor undertakes for value received, to carry out legal or commercial activities for its customer in an independent or discretionary capacity. On this relationship, see Stumpf & Ullrich, supra note 6, at 7, 12.

\(^79\) Based on the fiduciary nature of the Geschäftsbegungsvertrag relationship in which the bank acts as an agent for the carrying out of a given business transaction of its principal, Stumpf and Ullrich, as well as other German authorities, conclude that the guarantor is duty bound to raise, on its own, the defense of abuse of rights or else risk liability for damages to its principal. See Stumpf & Ullrich, supra note 6, at 12 n.19, with supporting citations in Pleyer, supra note 6, at 18, 19 and Finger, supra note 6, at 206, 208. See also infra notes 136-138 and accompanying text (referring to the 1985 Detmold court decision).
on bank guarantees. Some provisions originally designed for special types of indemnities have been suggested as applicable to bank guarantees. For example, Article 111 of the Swiss Civil Code of Obligations (SCO) provides for an indemnity type of guarantee. This guarantee is an undertaking wherein payment of damages is promised in the case of non-performance by a third party irrespective of whether such third party is obliged to render such performance. Contrary to the principles of causal guarantees, an indemnity is legally independent from the existence of an obligation to perform. Dr. Kronauer contrasted this "abstract" indemnity with the SCO's Article 492 causal guarantee, whose existence, like that of the French cautionnement, is dependent upon the validity of the underlying transaction. Professor Giger points out, however, that Article 111 is designed for promises made on behalf of a third party, not for a direct and primary undertaking, such as by the guarantor or counter-guarantor bank.

Dr. Kronauer finds SCO Article 111 so protective of the abstraction of the guarantor's promise that he suggests it be incorporated directly or by a clear reference into the most widely used forms of Swiss bank guarantees. This suggestion is supported by the Swiss court's holding that where bank guarantees are silent or ambiguous as to their abstraction, the presumption is in favor of SCO Article 492 causality and against SCO Article 111 abstraction.

Even if one agrees with Dr. Kronauer concerning the applicability of SCO Article 111, this provision still fails to indicate at what moment the guarantee is irrevocably established. Dr. Kronauer asserts that Articles 492 and 111 embody contracts known as mandates, whose clos-

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See UNICTRAL Study, supra note 1, at 13 (listing the regulations available in Eastern European countries); von Marschall, Recent Developments, supra note 6, at 266 n.29 (giving additional socialist country sources); STUMPF & ULLRICH, supra note 6, at 5 n.2 (stating that "[s]pecial rules exist only in a few countries, e.g., Turkey, Egypt, Libanon [sic], Burma, Czechoslovakia and Yugoslavia." No primary sources are provided by the authors).

1 Kronauer, supra note 6, at 123.
2 Id.
3 Giger, supra note 6, at 44.
4 See Kronauer, supra note 6, at 124. The forms referred to by Dr. Kronauer were drafted by Dr. B. Kleiner. KLEINER, supra note 6.
5 See Judgment of September 17, 1975, Bundesgericht, Switz., 101 BGE II 323. Kronauer summarizes this case in part as follows: "If neither the text of the undertaking nor its purpose (intention of the parties) nor the circumstances allow one to decide whether the undertaking is a guarantee or an indemnity, there is a presumption in favor of a guarantee." Kronauer, supra note 6, at 124. But cf. Judge Giovanoli's opinion in his Commentary on Articles 492-515 of the SCO, cited by Kronauer, supra note 6, at 124.
6 For a statutory rule on establishment of commercial letters of credit, see U.C.C. § 5-106.
est common law analogue is the contractual and quasi-contractual relationship between principal and agent.

Under Swiss law, the principal, or mandans, can revoke the mandate at any time, and his right to revoke cannot be waived. Nevertheless, "if the agent has engaged himself towards third persons in accordance with prior instructions of the principal, the latter can no longer revoke the mandate." The question then becomes what constitutes an engagement sufficient to satisfy the requirements of the SCO. Is mere issuance of the guarantee, regardless of mailing or reception, enough? Is knowledge of the issuance by the principal or by the beneficiary enough to establish the irrevocability or is receipt by both required? Is proven reliance by the beneficiary on the terms of the guarantee a requirement for the enforceability of the guarantee? Can a beneficiary revoke a guarantee whose terms deviate from the principal's mandate and if so, until when? These questions are not answered by SCO Article 111 or any other statutory provision in Swiss law.

Additional problems connected with the legal nature of the bank guarantee similarly lack a legislative solution. For example, at times, Swiss banks require the customer to waive the right to request the issuing bank's examination of the documents submitted with the guarantee. This waiver is usually given in connection with the counter-guarantee practice, where the Swiss counter-guarantor assures the foreign bank, a beneficiary of the Swiss counter guarantee that it will be reimbursed upon certification of compliance by the beneficiary of the direct guarantee. According to Dr. Kronauer, the Swiss customer, as principal of the mandate, has "the right which cannot be waived to revoke such authorization as long as the bank has not yet paid." The question arises, then, whether the Swiss bank's representation to the foreign guarantor or counter-guarantor that it would not examine the documents and simply reimburse upon certification of compliance by the foreign correspondent continues to bind it even after the customer's retraction of his waiver. These uncertainties illustrate the difficulties in attempting to apply late nineteenth-century statutory institutions to late twentieth-century commercial practices.

87 Kronauer, supra note 6, at 125 (referring to SCO art. 470).
88 Id.
89 Id. at 125.
4.2 Decisional Law

4.2.1 A Profile of Bank Guarantee Litigation

In contrast to the scarcity of statutory rules, European decisional law has been plentiful. A Lexis search of 1984-1989 decisions by the French Cour de Cassation (France's highest appellate court for, among others, private law matters) reveals twice as many decisions (eighteen) under the heading of "first demand guarantees" than in the preceding decade of commercial letter of credit litigation.\(^9\) While this study cannot evaluate the overall effect of court decisions on European bank guarantee law, it will focus mostly on the grounds for enjoining the guarantor's payment. The tenor and scope of these rules is of special significance to the task of harmonizing or unifying bank guarantee law.

Court decisions dealing with contemporary European bank guarantees reveal serious obstacles to uniformity and harmonization. These obstacles are creating an "unlevel playing field" for banks in different countries within the same European community. Austrian and French banking lawyers have expressed concern with the flight of the guarantor business to jurisdictions where the guarantor's obligation would be regarded as "hard as granite."\(^91\)

The majority of court decisions deal with allegations of abusive, fraudulent, and unlawful first demand drawings by the beneficiaries. The procedural context usually is that of petitions for extraordinary


remedies (the civil law equivalents of the common law restraining orders or injunctions) directed against the beneficiary's drawing or presentation of his first demand, or against the direct guarantor's or counter-guarantor's payment of the guarantee. At times, the remedy sought is the attachment or sequestration of funds, either in the hands of the first or direct guarantor or of the counter-guarantor, or of beneficiary's assets, including his bank guarantee claim. Some of these petitions were alleged to be prompted by "politically motivated" drawings by official governmental agencies. Others involved allegedly unlawful drawings by beneficiaries domiciled in the European Economic Community who engaged in transactions which were lawful in beneficiary's place of business but unlawful in the principal's place of business.

The most litigated bank guarantee is, by far, the first, or simple demand type, and the region whose beneficiaries are most prominently involved in this litigation is also, by far, the Middle East. The following chart of French and German bank guarantee litigation dramatically illustrates this point. Virtually 90% of the Stumpf and Ullrich citations of German first demand guarantee decisions involved disputes with beneficiaries or account parties in Middle Eastern countries.\(^2\) The remainder involved the Soviet Union.\(^3\) In France, almost 80% of the reported decisions involved Middle Eastern beneficiaries or account parties.\(^4\)

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It should be noted that Stumpf and Ullrich did not claim exhaustiveness and that some of the cases in which the authors failed to identify the country of import may have involved Middle Eastern jurisdictions.

\(^3\) See Stumpf & Ullrich, *supra* note 6, at 21 (citing Order of July 10, 1980, 2 0 1139/80 (AZ)).

\(^4\) See *supra* note 90.
Much of this voluminous litigation has resulted in an increasing number of continental European grounds with which to enjoin payment, attach funds, and otherwise annul guarantees. By contrast, English courts have been more reticent than their European counterparts. This reticence has placed English banks in a distinctly advantageous position when competing with continental European banks. It is also apparent that when courts in Germany, for instance, are willing to grant remedies against beneficiaries who are citizens or residents of Great Britain, courts in Great Britain are correspondingly less willing to give full faith and credit to Germany's court decisions. Hereafter, a summary description will be provided of the main doctrines used by European courts to support these exceptional remedies.

4.2.2 Abuse of Rights and Fraud

At the present time, Austrian, Belgian, French, German, and Dutch courts, among others, rely on the doctrines of abuse of rights and fraud to enjoin either the beneficiary's drawing or the bank's payment, or to attach or sequester the payment funds. Abuse of rights is not an equivalent of fraud, whether of the common or civil law variety.

4.2.3 French and Belgian Decisions

Professors Gavalda and Stoufflet describe fraud in French law as encompassing documentary and non-documentary elements. Fraud may be documentary in the sense that the document tendered is forged and therefore lacks authenticity. There is fraud where (a) the beneficiary affirms or represents the fact of non-performance in a manner contrary to the truth, (b) such an affirmation is a condition for the payment of the guarantee, and (c) the bank has evidence of the misrepresentation at hand.

While a misrepresentation of an operative fact is an essential element of Gavalda and Stoufflet's fraud, it is not a requirement of the doctrine of abuse of rights. Starting out with the Clément-Bayard affair, (the landmark case in which a landowner invoked his right of ownership to erect spires on his land thereby preventing the landing of his neighbor's dirigible in the adjoining parcel) many abuses of rights,

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96 See infra text accompanying notes 142-52.
97 Gavalda & Stoufflet, supra note 6, at 15.
98 Id.
99 On the famous affair Clément-Bayard, see Cueto-Rua, Abuse of Rights, 35 LA. L. REV. 965, 981 (1975) (summarizing Demoiselle de Bouteville v. Asou, 1913 D.P. II 177 (Amiens)).
while involving unabashedly selfish and unconscionable conduct, do not involve the abuser's misrepresentation of facts.

The doctrine of abuse of rights is well-suited for unwarranted drawings under first demand guarantees, especially where the beneficiary is required to state no more than "pay me" or, "pay me because your principal has breached its obligation." Where a beneficiary says very little, the beneficiary is not likely to make the overt or express misrepresentation required in Gavalda and Stoufflet's (as well as many European courts') definition of fraud. What the beneficiary misrepresents in the terse statements of simple or first demand guarantees is not what he states but what remains unstated, although assumed: that the beneficiary is entitled to draw upon his agreement with the principal concerning the issuance of the guarantee. The beneficiary abuses its right by drawing for invalid or nonexistent reasons or for reasons other than those agreed upon with the principal. However, abuse of rights is of no help to the counter-guarantor where the parties agreed to a totally unconditional reimbursement, i.e., regardless of compliance with payment conditions, as is the case with many counter-guarantees.

Despite their continuous reference to manifestly abusive drawings (appel manifestement abusif) and to fraud (appel fraudulent), the French Cour de Cassation has not been helpful in establishing their differences. Nevertheless, a laconic 1987 decision allowed Professor Jean Stoufflet, one of France's and Europe's most respected commentators, to draw sharper boundaries. In Société-Technique Electrique de l'Oise Télécoise v. Union Méditerranéenne de Banque, appellant and plaintiff below, a French exporter, procured the defendant (French) bank's counter-guarantee of reimbursement to a Libyan bank (Wahda Bank) that had issued a repayment and a performance guarantee to a Libyan official contractor. These were the only facts provided by the Cour de Cassation. The remainder of the decision merely stated why the intermediate appellate court, in this case the Cour d'appel de Paris, erred in its rejection of the doctrine of abuse of rights invoked by the principal.

The procedural steps involved in this case are typical of what happens with disputed first demand guarantees in French courts. The writ seeking the injunction was heard by a juge des référés (a special judge or magistrate who hears ex parte and disputed injunctions) in an ex parte procedure where the principal provided prima facie evidence of fraud, abuse of rights, and irreparability of the injury to the petitioner.

99 For a survey of these decisions, see Gavalda & Stoufflet, supra note 6.
This procedure, has in large measure replaced the saisie arrêt (sequestration of beneficiary’s claim or of funds set aside for payment to the beneficiary) as the device with which French principals, or account parties, stop, suspend, or block payment of the bank’s guarantee and irrevocable letters of credit. If the petitioner is successful before the juge des référés, the defendant usually appeals to a court such as the Cour d’appel de Paris. In this case, the Cour d’appel reversed the order of the juge des référés asserting that:

[T]he manifestly abusive nature of the drawing, as in the instant case, cannot be equated to a fraud, so as to prevent payment of the guarantee; . . . in effect, fraud presupposes maneuvers designed to deceive the other party to the contract, whereas, the drawing by the beneficiary in this guarantee is nothing more than his enforcement of a binding stipulation . . . 102

The principal appealed to the Cour de Cassation. It should be noted that since this court is France’s highest court of “law” it accepts the facts in dispute as established below and focuses only on the legal logic of the lower courts’ analysis. The Cour de Cassation invoked a favorite formula to highlight the lower court’s asymmetrical thinking: “[T]he Cour d’appel did not draw the legal consequences it should have from its own findings” (L’ja Cour d’appel n’a pas tiré les conséquences légales qui résultaient de ses propres constatations).

Professor Stoufflet noted that in a 1986 decision the same Cour de Cassation had approved a refusal to pay a guarantee of performance where the beneficiary’s demand for payment, which assumed nonperformance by the principal, collided with beneficiary’s, or beneficiary’s agent’s certification of the principal’s full performance. The doctrine used by the Cour de Cassation in that case, however, was not abuse of rights but fraud. The instant decision went considerably further by allowing abuse of rights to stand with fraud as one of the doctrines for blocking the payment of the guarantee. According to Stoufflet, both

101 On the saisie arrêt in French letter of credit law, see B. KOZOLCHYK, ENCYCLOPEDIA supra note 21, at 130-33. On the diminished role of the saisie arrêt in comparison with the present day injunction, see Mouly, Letters of Credit and Bank Guarantees in France and Belgium in the Last Two Years, 5 (1987) (draft of an article available in the Documentation Center of the University of Arizona College of Law, Foreign Law Collection) (“Besides attachment, escrow is often requested, but now more rarely admitted. However U.S. Courts sometimes give a mere stop payment order.”) (citing Vasseur, Summary of Paris, Dec. 3, 1984 decision, 1985 D.S. Jur. 240-41 and Summary of Paris, June 20, 1984 decision, 1985 D.S. Jur. 241).

102 Stoufflet, supra note 100.

103 Id.
doctrines presuppose the beneficiary’s intention to profit unlawfully at the expense of the principal. Abuse of rights, however, "is a much broader notion because it is available whenever the lack of entitlement to draw, as determined by the ‘base’ contract, is irrefutably established, whereas fraud requires demonstration of beneficiary’s harmful intention."104

Stoufflet praised this decision for having brought some coherence to the law of first demand guarantees, especially if the law continued to operate on the assumption that only proof of fraudulent maneuvers could block payment. Exclusive reliance on fraud would require giving it both excessive and insufficient powers. The power of fraud would be excessive where the bank guarantee was characterized as a totally abstract undertaking, unconcerned with the underlying transactions. The invalidating power of fraud would be insufficient where the guarantor’s promise was clearly predicated upon a causal transaction.

The present decision, according to Stoufflet, took into account causality and abstraction by permitting the conclusion that the guarantor is not to stop payment where nullity or rescission of the underlying contract, or full performance by the principal is not fully proven or definitively established. As Stoufflet states:

If the nullity, rescission, or full performance, is beyond dispute, the drawing on the guarantee is abusive . . . and the guarantor may refuse to pay on its own if he is aware of the operative facts, or the juge des référés, may, upon petition by the principal, order such a blockage . . . ."106

For Stoufflet, then, the weight of the evidence before the guarantor or the juge des référés is crucial. In principle, all the evidence that could establish the nullity, rescission, or full performance of the underlying contract is admissible.108

104 Id.
105 Id.
106 While this writer agrees with Prof. Stoufflet’s view on causa in bank guarantees, and on its relation to abuse of rights, the Cour de Cassation seems to have had serious reservations about this relationship, and about the relevance of causal evidence. For example, in a decision by the Commercial Chamber, a first demand performance guarantee was said to be wrongly enjoined despite proof of full performance by the principal. Moreover, it appeared that the dispute between principal and beneficiary was not really over the former’s performance but was based upon its refusal to extend the duration of the guarantee. The ordonnance en référé by the Paris Commercial Court, prohibiting payment by the French counter-guarantor bank to the Saudi Arabian direct guarantor, characterized the drawing as manifestly abusive. The Court of Appeal overturned the ordonnance, stating that no defense based on the performance of the underlying transaction could prevent the drawing on a first demand guarantee. The Cour de Cassation agreed and stated that “the fact, even if apparently established, that
A 1982 decision by the Commercial Court of Brussels illustrates the type of evidence deemed decisive in Professor Stoufflet's approach to abuse of rights. A Swedish company agreed to install and deliver equipment to Iranian milk factories and to provide advance payment guarantees and performance bonds to an Iranian buyer (IMPDC). Bank Melli, Iran, provided the advance payment guarantee. The counter-guarantees were provided by a Swedish bank and by Bank of America, Brussels. The Swedish principal introduced into evidence certificates of performance signed by IMPDC's own engineering consultants indicating that the principal had delivered the equipment as they had agreed. Documentary evidence also showed that in 1979, as a result of the Khomeini revolution, the principal was unable to continue work in Iran. The Iranian beneficiary, now nationalized, did not contest proof of this force majeur. In December 1981, the Iranian Central Bank (Bank Markazi) sent a circular letter to all the beneficiaries of United States standby letters of credit or first demand bank guarantees instructing them to draw on them. Accordingly, Bank Melli, a beneficiary of Bank of America's counter-guarantee drew on it.

Judge Duplat's exceptions to the principle of abstraction were, first, a "prima facie abusive call," and second, the illegality of the contract subject matter of the guarantee. The facts at hand, as evidenced by the certificate of performance issued by the beneficiary's own consultants, and the official letter directing Bank Melli to draw, pointed to a prima facie abusive call, connected with Iran's inflation of its monetary claim against the United States in connection with the hostage release negotiations. Such "purely political" motives for the draw required that it be enjoined.

A quick comparison with United States U.C.C. Article 5 injunctive relief illustrates the broader scope of the abuse of rights doctrine advocated by Professor Stoufflet. Section 5-114's injunctive relief is only granted to someone who is not:

[A] negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and

Fechoz [the principal] had fulfilled its obligations with respect to SAEMCO [the beneficiary of the direct guarantee] could not excuse BFCE [the counter-guarantor] from performance of an agreement, the terms of which obligated it to pay the guaranteed sums to Al Saoudi Al Frasi Bank on first demand. See 1983 INT'L BANKING L., at 22 (transcribing in part Swedish Ltd. Co. Alfa-Laval AB v. Bank of America (Commercial Ct. of Brussels, Apr. 6, 1982)).


109 Id.
under circumstances which would make it a holder in due course, and in an appropriate case would make it a person to whom a document of title has been duly negotiated or a bona fide purchaser of a certificated security . . . .

While in the preceding Belgian case Bank Melli-Iran would in all likelihood not have qualified as a holder in due course of the Iranian beneficiary's draft, a Belgian correspondent bank which had paid or given value in good faith to Bank Melli for the Iranian beneficiary's draft could qualify as a Section 5-114 holder in due course and, thus, be immune to that Section's injunction. Although such a rule would be supported by European negotiable instruments law,¹¹⁰ abuse of rights decisions so far have made no such exceptions for holders, or holders in due course, of beneficiary's draft. In fact, direct guarantors holding beneficiaries' drafts or demands for payment for which they purportedly gave value have been enjoined from collecting on their counter-guarantees.¹¹¹

In addition to the holder in due course restriction, Section 5-114 limits its application to the following circumstances: a) where a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title or of a certified security; b) where the tendered document is forged or fraudulent; and c) where there is fraud in the transaction.¹¹² The instances identified as a) and b), above, belong to what Gavalda and Stoufflet describe as documentary fraud.

Section 5-114 "fraud in the transaction," however, does not warrant the introduction of evidence on why the customer had a right to rescind the underlying "base" contract or to repudiate it in anticipation of the beneficiary's breach. If an Article 5, or for that matter a UCP, letter of credit is issued payable upon presentation of a certificate by the beneficiary stating that the principal failed to enter into the construction contract, the issuing bank will have to pay against presentation of such a certificate. Only if the principal can prove either that the certificate is forged or that it contains a fraudulent misrepresentation on the principal's failure to enter into the contract can payment be enjoined. Thus, the U.C.C. customer could introduce evidence showing

¹¹⁰ See, e.g., 8 Code de Commerce [C. Com.] art. 121 (Fr.) (which incorporates the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, June 7, 1930, 143 L.N.T.S. 257).


that, contrary to what is stated in the certification, he did enter into the
construction contract. However, the customer cannot involve the issuing
bank, or the court deciding his injunction petition, in the determination
whether he was right in not entering into the contract, or in rescinding
the construction contract.

The reason Section 5-114 is unconcerned with the customer’s right
or duty to enter into the contract or to continue to perform the underly-
ing contract is because the instrument to which it applies, the letter of
credit, unlike the guarantees in appendices A-C, does not have a causal
connection with its “base” contract or transaction. Unburdened with
the rights and duties connected with the legal cause or base transaction,
Section 5-114 fraud does not focus on what the customer or the cus-
tomer and beneficiary did or were supposed to do in connection with
the issuance of the guarantee, but on the beneficiary’s representations
in purported compliance with the terms of an established and, there-
fore, valid letter of credit.

4.2.4 German and Austrian Decisions

Professor von Marschall summarizes German decisional law on
fraudulent tenders as follows:

The bank is entitled to refuse payment whenever it has
knowledge that a demand is fraudulent. The source of such
knowledge is irrelevant, it may come from the principal or
from elsewhere. It can be expected, however, that a well ad-
vised bank will exercise its right to payment only when it is
in possession of sufficient evidence to establish that a demand
for payment is in fact fraudulent.113

For the guarantor bank to be under a duty not to pay, the fraud
must meet what von Marschall refers to as an “eye grabbing” standard
of obviousness.114 One such eye grabbing fraud is drawing on an ex-
porter’s performance or delivery of goods guarantee, where the bank is
in possession of an import-custom’s clearance document that attests to
the importation of the goods. Such a customs document clearly renders
the beneficiary’s assertion of non-delivery highly questionable.115

As in French and Belgian law, German and Austrian law recog-

113 von Marschall, Recent Developments, supra note 6, at 275. See also id. at 274
n.56 (referring to Schueiz, Zum Bürgschaftsrecht, one of the early and by now not very
popular analogues of the bank guarantee).
114 See id. at 275 (relying on the French expression “créer les yeux” to describe
the standard).
115 Id.
nize the separate status of abuse of rights (Unzulässige Rechtsabüßerung, or Rechtsmissbrauch) as grounds to enjoin the guarantor’s payment.\textsuperscript{116} Moreover, since Germanic codification is characterized by the presence of “supereminent” principles such as good faith and good customs in the discharge of obligations and in the exercise of rights,\textsuperscript{117} the injunction against an abusive drawing is conceptually compatible with code principles.\textsuperscript{118}

Stumpf and Ullrich, as well as other German authorities, conclude that in the event of a clear and manifest\textsuperscript{119} abuse of drawing rights, the guarantor, subject of a Geschäftsbegungsgungsvertrag, also had to refrain from paying the guarantee, or face an action for damages.\textsuperscript{120} Accordingly, the German Federal Court, in its decision of March 12, 1984, held that the customer-principal could use the defense of abuse of rights against the bank’s claim for payment if “the event giving rise to the obligation to pay had not happened.”\textsuperscript{121}

4.2.4.1 Summary Procedures: Injunctions and Attachments

Contrary to the uniformity of summary procedures apparent in French case law since the conferral of injunction jurisdiction to the juge des référents, the German and Austrian remedial picture is far from uniform. According to Stumpf and Ullrich, German law provides two types of summary procedures for bank guarantee litigation. The first is, in some respects, similar to the Anglo-American injunction because it intends to preserve rights likely to be irreparably harmed by means of temporary or interlocutory court orders. It is referred to as an einstweilige Verfügung and comprises two species of interlocutory orders: the Sicherungsverfügung (security or securing type with a freezing effect with respect to the disposition of the claim or collateral) and the Regelungsverfügung (regulatory type where the court supervises

\textsuperscript{116} See generally Stumpf & Ullrich, supra note 6 (explaining German law). See also the review of Nielsen, “Rechtsmissbrauch bei der Inanspruchnahme von Bankgarantien als typisches Problem der Liquiditätsfunktion abstrakter Zahlungsvorschriften, ZIP, March 20, 1982, in 1983 Int’l Banking L., at 93. See also Zahn, supra note 6, at 424-26 (on German law and practice); Schinnerer & Avancini, supra note 6, at 324, and Schwank, supra note 6, at 7 (both explaining Austrian law).

\textsuperscript{117} See generally Bolgar, Abuse of Rights in France, Germany, and Switzerland: A Survey of A Recent Chapter in Legal Doctrine, 35 LA. L. REV. 1015, 1016 n.5, 1023-30 (1975).

\textsuperscript{118} Accord Nielsen, supra note 116, at 92.

\textsuperscript{119} Presumably, this clear and manifest standard for abuse of rights is the counterpart to the “eye popping” standard for fraudulent tenders. See supra note 114 and accompanying text.

\textsuperscript{120} See supra notes 79-80.

\textsuperscript{121} See Stumpf & Ullrich supra note 6, at 12 (citing the German Federal Court Judgment of Mar. 12, 1984, 1984 Der. Betrieb 1389).
the handling of the claim or collateral until trial time).\textsuperscript{122}

The second summary procedure available in German and Austrian
law is the \textit{arrest}. It is the German and Austrian counterpart of the
French \textit{saisie arrêt} and of the Anglo American attachment or garnish-
ment procedure because the court takes possession, physically or sym-
bolically, of an asset. In the bank guarantee's case, the asset is the ben-
eficiary's claim of payment against the direct guarantor, or the direct
guarantor's claim against the counter-guarantor.

German judges do not agree on whether the \textit{einstweilige Verfugung} or the \textit{arrest} is the appropriate provisional remedy for alle-
gations of fraud and abuse of rights. While the majority prefer the
\textit{einstweilige Verfugung}, at least two regional courts opt for the \textit{ar-
rest}.\textsuperscript{123} In addition, they disagree occasionally on who is the proper
party defendant, the paying guarantor who would be ordered not to
accept or pay, or the drawing or demanding beneficiary, who would be
ordered not to draw or to demand payment.\textsuperscript{124} Similarly, some courts
hold the view that while the guarantor cannot be enjoined from paying
the beneficiary, the guarantor can be refrained from debiting the prin-
cipal's bank account.\textsuperscript{125}

Generally speaking, a German injunction petition requires the al-
legation of a suitable cause of action or claim (\textit{Verfgungsanspruch}),
such as for fraud or abuse of rights, and grounds therefor (\textit{Verfugungs-
grund}). By proper grounds is meant, among others, the seriousness or
irreparability of the harm about to be perpetrated.\textsuperscript{126} The evidentiary
standard is preponderance of the evidence.\textsuperscript{127} However, the petitioner
must allege at the time of filing all the facts that relate to the claim and
grounds therefor, preferably in the form of reliable documentary evi-
dence. A petitioner's sworn statement, by itself, will not persuade the
court to enjoin the bank or beneficiary. For example, a Frankfurt deci-
sion rejected a submission of petitioner's affidavits accompanied by re-

\begin{itemize}
\item\textsuperscript{122} See \textit{id.} at 12-13. See also H. \textsc{Thomas} and H. \textsc{Putzo}, \textsc{Zivilprozes-
sordnung} 1506-7 (12th ed. 1982).
\item\textsuperscript{123} See \textsc{Stumpf} \& \textsc{Ullrich} \textit{supra} note 6, at 13 (asserting that "German judges
are often of different opinion (sic) as to whether the injunction (\textit{Verfügung}) or the
attachment (\textit{Arrest}) is the right procedure to prevent abusive calls."). The same authors
note that the majority of German courts favor the injunctive remedy. While, the re-
\textit{gional courts of Frankfurt, Stuttgart, Saarbrücken, Munich, Dortmund, Düsseldorf,
Düsseldorf, Mannheim, Hanover, and Braunschweig opt for the injunction, those of
Nürnberg-Furth and Kempten prefer the attachment. \textit{Id.} at 13 nn.23-35.
\item\textsuperscript{124} See \textsc{Zahn} \textit{supra} note 6, at 424.
\item\textsuperscript{125} See \textsc{Stumpf} \& \textsc{Ullrich}, \textit{supra} note 6 at 14, nn. 36-37 (citing Judgment of
Feb. 11, 1981, Regional Court of Stuttgart ZIP 1981, 497 (W. Ger.) and Judgment of
June 6, 1981, Regional Court of Frankfurt, NJW 1981, 56 (W. Ger.).)
\item\textsuperscript{126} See \textit{id.} at 19.
\item\textsuperscript{127} \textit{Id.}
\end{itemize}
citals of statutory law as insufficient. The court indicated that if the petitioner-seller had submitted both a list of all the items to be supplied under the supply contract and the relevant shipping documents, then the petitioner-seller would have shown to the satisfaction of the court that the beneficiary had manifestly made an unlawful exercise of the beneficiary’s right to claim the amount of the guarantee.

By contrast, the Austrian Supreme Court has been less willing to specify what constitutes adequate documentary evidence. Instead, it formulated a vague principle inconsistent with its own espousal of abstraction. In a 1981 decision involving a petition to enjoin a local bank from paying its first demand bank guarantees, the Supreme Court accepted abuse of rights and fraud as grounds for enjoining payment. The injunction could not be decreed, except “where sufficiently strong evidence is readily available that the event for which (sic) commercial purpose the guarantee has been opened has in fact not occurred.”

The “event for whose purpose the guarantee has been opened” could be the performance of the underlying transaction as a whole. It could also be the factual precondition of issuance or “base” transaction, such as the bidding by the principal of the bid guarantee; the advance payment by the buyer of goods; the entering into a contract for the performance of services; or sale of goods by the principal of the performance guarantee. In addition, this event could be the Austrian law equivalent of the French final cause, i.e., the actual performance by the supplier of goods and services in exchange for payment of an agreed upon price. Unless the Austrian Supreme Court specified which purpose of which transaction or relationship had to be documented, the guarantor would have to accept as relevant any document related to any of the above enumerated transactions or relationships.

4.2.4.2 Illustrative Fraud and Abuse of Rights Decisions

As with French and Belgian decisions, it is important to determine what German and Austrian courts typically consider instances of fraud, abuse of rights, or both.

A 1979 Frankfurt am Main decision concerned a first demand
performance guarantee covering the shipment and delivery of machinery to an Iranian import company. The German principal introduced evidence that the Iranian importer had taken delivery of nearly all the machines; only a small number among the last to be delivered were rejected. In determining what constituted a manifestly unlawful or abusive draw, the court stated that it was a determination related not to the principal’s performance, but to the beneficiary’s own conduct. The exact meaning of this reference was not made clear by Stumpf and Ullrich. Their reference to the beneficiary taking delivery of nearly the whole shipment, and to the principal’s and German Embassy’s attempts to cure whatever problem existed, suggest that the beneficiary’s rejection of the offered cure was what was deemed abusive.

The court’s distinction between concern for the customer’s performance, which presumably was improper because of abstraction, and concern for beneficiary’s conduct, which presumably was proper if it was found to be abusive is unpersuasive. In the bilateral, for-profit transactions involved in bank guarantees, one party’s abuse cannot be determined without considering the other party’s performance, and vice versa. Carried to its logical conclusion, this decision requires that bankers become involved in determining not only whether the contract existed, but also how substantial was each party’s performance, a determination which bankers are neither prepared nor desirous to undertake.

A 1985 decision by the Regional Court of Detmold involved an attempt by an Egyptian beneficiary to collect on a repayment guarantee covering his down payment on a supply contract. The customer-petitioner proved by telexes, invoices, and certified translations of beneficiary’s communications that the beneficiary failed to make the down payment for which the guarantee was issued. The Court held that the Geschäftsbesorgungsvertrag between the German guarantor bank and its customer placed the bank under a duty not to pay once it became

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133 Id.
134 See id.
135 See id. at 16 (citing Judgment of July 9, 1980, Regional Court of Dortmund, WM 1981, 280 (W. Ger.), involving a similar claim of an Iranian beneficiary based on an insubstantial breach. The only ostensible reasons for drawing on the performance guarantee were minor damage suffered by some machines during transit and the theft of some small parts. These damages were covered by insurance policies and were in fact paid by the insurer. Alleging “non-performance of the agreed obligations,” the Iranian direct guarantor demanded payment from its German correspondent bank. Payment by the German bank was enjoined both by interlocutory decree and final judgment).
136 See id. at 17 (summarizing Order of Jan. 18, 1986, AZ 8.08.85 (unpublished)).

https://scholarship.law.upenn.edu/jil/vol11/iss1/1
aware of the absence of a transactional basis for the issuance of the guarantee.\textsuperscript{137} Hence, despite the absence of \textit{causa} as the justification for the enforcement of German contractual promises, the Detmold court reached the same result Gavalda and Stoufflet advocated.\textsuperscript{138}

\textbf{4.2.4.3 Conclusions}

German and Austrian court decisions evidence a willingness to question the fraud and abusiveness of a beneficiary’s drawing in terms that a French-trained lawyer would unhesitatingly describe as “causal.” Authoritative commentators, such as Zahn, and von Marschall,\textsuperscript{139} warn against interpreting these decisions as indicative of a trend. Dr. F. Schwank, though an Austrian banking lawyer equally familiar with European practice and decisional law, is convinced of the “causal” nature of the European bank guarantee and of the foreign beneficiaries’ awareness of such a nature:

[T]he guarantee cannot exist without the main contract. The default of the account party in fulfilling the main contract gives the beneficiary the right to make a demand under the guarantee. The beneficiary who frustrates the main contract invalidates thereby the guarantee and is no longer entitled to make a demand under the guarantee. Overseas buyers and beneficiaries have of course become aware of the readiness of the German and Austrian courts to interfere with payment of simple demand guarantees despite their unconditional format. Increasingly, beneficiaries now insist that guarantees are confirmed by local banks in the countries of their residence. Under these circumstances, German and Austrian banks usually request from their customers widely worded counter-guarantees, in order to avoid the embarrassment of being ordered by a Court not to honor the guarantee which has already been paid by the corresponding confirming bank abroad. Other beneficiaries prefer guarantees to be issued by English banks and the guarantees to be governed by English law, and subject to the jurisdiction of English courts . . . .\textsuperscript{140}

\textsuperscript{137} Id.
\textsuperscript{138} See supra notes 105-06.
\textsuperscript{139} See Zahn supra note 6, at 424 and von Marschall, Recent Developments, supra note 6, at 279.
\textsuperscript{140} Schwank, supra note 6, at 7.
4.2.5 English Decisions

The continental European perception that English courts are as “hard as granite” in their support of the abstraction of bank guarantees is, in large measure, attributable to three court decisions handed down in the late 1970s. In RD Harbottle (Mercantile) Ltd. v. National Westminster Bank Ltd., plaintiff was required to provide a simple or “on demand” guarantee by an Egyptian bank of 5% of the amount involved in contractual obligations. This direct guarantee was to be counter-guaranteed by defendant, an English bank. Plaintiff and its Egyptian buyers had agreed that the latter would procure the issuance of confirmed letters of credit as payment to plaintiff. Plaintiff contended that since these letters of credit were not issued, it was entitled to stop shipments and sought to enjoin defendant bank and its Egyptian correspondent from paying the guarantee. It should be noted, parenthetically, that this contention is not too different from the one likely to be made by a French, Belgian or Spanish principal of a tender, repayment or performance guarantee: the absence of a legal cause for issuance makes the payment or reimbursement obligation invalid.

Judge Kerr dismissed the petition for an injunction and stated that courts will rarely interfere with banks’ irrevocable obligations because these obligations “are the lifeblood of international commerce.” He found support for this assertion not in guarantee law, but in letter of credit law, thereby suggesting that bank guarantees and confirmed letters of credit were governed by the same body of law, or at least by the same general principles.

A perceptive commentator has noted that while Judge Kerr found the unqualified terms of payment of the simple demand guarantees before him “astonishing,” he did not find it necessary to explore the nature of these guarantees. Despite this serious analytical gap, the Kerr equation between confirmed irrevocable letters of credit and simple demand guarantees remains influential and unchallenged in English decisional law.

Howe Richardson Scale Ltd. v. Polimex-Cekop and National Westminster Bank Ltd. involved an attempt to restrain the beneficiaries of a 5% advance payment guarantee from obtaining payment. As

141 See supra note 91.
143 Id. at 870.
144 Id.
145 Id. at 865 (cited by Williams, supra note 22, at 11).
with the *Harbottle* case, the injunction was based on a fundamental breach of underlying contract obligations: untimely delivery of valuable equipment. Judge Roskill of the Court of Appeal agreed with most of Judge Kerr’s equation. He stated that the bank issuing guarantees “is in a position not identical but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit . . . the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen.”

Clearly, the Court of Appeal not only had agreed with most of Judge Kerr’s equation, but also had added its own, highly discordant, note. Contrary to the principle of abstraction of letters of credit law, a principle that requires that the parties abstain from involvement in the underlying performance, the Court of Appeal accepted the guarantor’s “concern” with the underlying performance, or triggering event. As will be recalled, the same determination that the Court of Appeal regarded above, a routine banking matter is regarded by United States regulatory authorities as neither a safe nor sound banking practice.

The third and most famous decision in the “hard as granite” trio, *Edward Owen Engineering Ltd. v. Barclays Bank International*, concerned a contract to supply and install glass houses for a Libyan state enterprise in Libya. The English contractors were obligated to supply an English performance bond in the amount of 10% of the contract price, confirmed by a Libyan branch of Barclays Bank International. As was the case in the *Harbottle* decision with the Egyptian buyer, here the Libyan buyer was to procure the issuance of a confirmed letter of credit for payment to the English contractor. Since Libyan buyers failed to procure the issuance of the confirmed letter of credit, the English contractors assumed that the Libyan state agency had rescinded the agreement. This, however, was not the case. As if to underscore the danger of building glass houses in Libya, the Libyan state agency drew on Barclay’s performance guarantee. After Judge Kerr (of *Harbottle* fame) discharged the English contractor’s interim injunction, the decision was appealed to the Court of Appeal. Lord Denning held that bank guarantees were a “new creature” but deserved to be on the same footing as letters of credit. This meant that the banks could not become involved in contractual disputes between the

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147 Id. at 165 (emphasis added).
148 See UCP, supra note 10 (“[i]n credit operations all parties concerned deal in documents, and not in . . . other performances to which the documents may relate.”).
149 See supra note 12 (independence of letter of credit from occurrence of underlying transaction events considered essential in United States).
151 Id. at 981.
contractor and customer. The bank in this case was bound to pay, "on demand without proof or conditions." The only possible exception to such payment was the customer's clear fraud. Judge Lane, Master of the Rolls, agreed with this characterization of simple demand bank guarantees, and equated them to promissory notes payable on demand. The Court of Appeal's decision was unanimous.

An English commentator noted that the concern created by this decision among contractors was such that the International Federation of European Contractors and the Confederation of British Industry warned their members against use of these simple demand or unconditional guarantees or bonds. 4.2.6.1 Illegality

4.2.6 Conflicts

The significant role of causality in European bank guarantee law is apparent not only in the broad admissibility of defenses such as fraud and abuse of rights, but also in the liberal treatment of other causal defenses such as illegality of the underlying transaction. Causal illegality has long been recognized as a defense against payment of letters of credit. Yet, while the cause may be illegal in the customer's place of business, a tender of documents by a foreign beneficiary that complies with the law of the place of tender may have to be honored by the issuing bank. In the final analysis, it all depends upon the seriousness of the illegality in the place of issuance. If the illegality involved in the place of issuance is serious enough to warrant comity in the beneficiary's jurisdiction, the tender may have to be rejected in both the beneficiary's and the customer's places of business. Illegalities that result

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152 Id. at 986.
153 Williams, supra note 22, at 13.
154 For a general discussion of illegality as a defense, see B. Kozolchyk, Commercial Letters of Credit in the Americas 471-76 (1966). For more recent illustrations of illegality in letter of credit law, and the anti-Israeli boycott provisions and decisions, see Kozolchyk, Encyclopedia, supra note 21, at 122-23.
155 At least since 1951, the UCP defers to the law and customs of the place of payment of the letter of credit. Thus, Article 14 of the 1951 UCP, Brochure 151 of the International Chamber of Commerce, stated in relevant part: "The applicants for the credit are responsible to the Banks for all obligations imposed upon the latter by foreign laws and customs." Thus, if bank A in country X requested bank B in country Y to confirm its irrevocable credit, and bank B paid in accordance with its own laws and customs (and presumably not in violation of any UCP rule), bank A was obligated to reimburse B, despite the unenforceability of the credit in X. Article 14 also placed the burden of reimbursement on the applicants. With minor variations, this rule has been preserved and appears as Article 20(c) of Publication 400.
156 See authorities, supra note 154.
from imperative rules, such as on forbidden or restricted imports, exports, or payments of foreign exchange, are more likely to prevent payment than those that result from a misdemeanor or from a “technical” violation of an obscure or rarely enforced rule.

Once the enforceability of underlying transactions becomes a primary concern for the adjudicator, as it does with bank guarantees, the scope of illegality is inevitably broadened. This broadened scope encourages conflicts among the laws of the place of issuance of the guarantee or of the counter-guarantee, and the laws of the principal’s and beneficiary’s places of business. A 1982 case that wound its way concurrently through German and English courts illustrates the likelihood and unsettling consequences of such a conflict.

In *J.H. Rayners (Mincing Lane Ltd.) v. Bank für Gemeinwirtschaft A.G.*\(^{187}\) one *B*, acting in behalf of *BEG* (a company in which *B* had a substantial interest), procured the issuance of two bank guarantees from the defendant bank (*BFG*) to plaintiffs in England (*Rayners*). The purpose of this guarantee was to assure the English beneficiary of the payment of *BEG*’s indebtedness on monetary transactions in the London foreign exchange market.

In relevant part the guarantee read as follows:

You are entering into regular business dealings with *BEG* . . . As a result of these dealings *BEG* from time to time incur obligations to make payments to you. In consideration of the promises, we, *BFG*, hereby irrevocably undertake on your first written request to forthwith pay amounts which *BEG* owe you up to a total of . . . upon your written declaration that *BEG* failed to pay the requested amount when it fell due. This guarantee expires no later than . . . . The issuance of this guarantee is allowed by the statutory law of the German Federal Republic. In the case of a claim being made under this guarantee we will make payment in accordance with the regulations in force governing payment between the German Federal Republic and your country. It is agreed that you will return us this guarantee upon expiry or upon a claim being made . . . .”\(^{188}\)

Shortly before Rayners made its claim on the guarantee, *B* procured an injunction in the Bonn District Court against Rayners’ drawing under the two guarantees in force. This injunction was based, *inter

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188 *Id.* at 464.
alia, upon the contention that despite the recital in the guarantee, West German law considered commodity futures transactions (including foreign exchange) to be an illegal form of gambling unenforceable against anyone other than substantial merchants registered in the commercial register.169 While BEG was registered, B was not. B was found by the Bonn District Court to be the real party in interest. Rayners, meanwhile, claiming damages for BFG's failure to honor the guarantee, brought an action against BFG in London, where the future transactions took place. In a subsequent action before the Bonn District Court, BEG requested that Rayners be ordered to discontinue the action against BFG in Great Britain. The Bonn District Court agreed and found that it had jurisdiction over the drawing of BFG's guarantee. Further, it found that this drawing was illegal and unenforceable in Germany because of B's status as a non-registered merchant. Meanwhile, BFG contended in the London proceedings that Rayners' action be stricken because Rayners' pursuit of the damages action in London, given what had been decided in Germany, was an abuse of judicial process. Judge Staughton of the Commercial Court disagreed, because he could not say that Rayners' action in London was bound to fail, a finding that was required on a motion to strike the pleadings in a case of abuse of process.

Following Staughton's judgment, Rayners appealed the Bonn District Court judgment to the Cologne Regional Court of Appeal in Germany. This court confirmed the lower court's decision that no contractual relation existed between Rayner and BEG, but that one did exist between Rayner and B. It held that even if its findings on the contractual relationship were incorrect, the transaction covered by the guarantee was illegal and unenforceable.160

Armed with this decision, BFG appealed Staughton's decision in London to the Court of Appeal. The Court of Appeal found, inter alia, that the West German courts did not consider what was the proper law applicable to the underlying contract. Since Rayners had not raised this issue in Germany and was ready to raise it during a trial on the merits in London, the London proceedings could not be regarded as an abuse of process. After all, the dealings in commodity futures took place in England and English law did not consider them illegal or unenforceable.161

169 Id. at 465. According to L.J. Slade of the Court of Appeal, an additional exception that would have made these transactions enforceable was their connection with a bona fide trading transaction.
160 Id. at 462.
161 Id. at 470.
Rayners was a disaster waiting to happen. What is worse, conflicts such as those in the Rayners case will continue to occur, even in the trade between cooperative trading partners or between nations which are members of the same common market. As long as bank guarantees are causal promises, the legality and morality of causal promises (among the most distinct and litigated areas of each jurisdiction's law), will continue to breed litigation.

4.2.6.2 Other Sources of Conflict

In addition to illegality, several other substantive and procedural law norms seem poised for conflict. Consider, for example, the Saudi Arabian rule on oral demands for payment. The uncontradicted allegation was made in the Paribas decision, that Saudi Arabian law entitled the beneficiary to payment upon his mere oral request, even if the guarantee clearly required a writing. Similarly, in the absence of contradictory evidence, the court had to accept that Saudi Arabian law does "not insist on strict compliance even with guarantees incorporated in letters of credit; substantial compliance, generously construed, is quite enough." As pointed out by Judge Posner, if this were the law, Paribas could not be refused reimbursement by American National Bank (its United States counter-guarantor, or issuer of the standby letter of credit). For American National Bank to refuse reimbursement: "would put Paribas in an intolerable position for the courts to say, your obligations to SMC are governed by the guarantee as interpreted under Saudi law but your rights against American National Bank are governed by the guarantee as inconsistently interpreted under American law."

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162 For example, see the discussion on the morality of cause in Kozolchyk, Commercialization, supra note 46, at 7-20.
163 See supra note 5 (uncertainty of mails necessitated honoring of oral demand).
164 Id. at 384.
165 Id. at 384-85.
166 Id. at 385. Earlier, Judge Posner had dismissed the need to characterize properly the role played by the various banks, stating that:

[i]t thus would make no difference whether Paribas was a confirming bank, as we have suggested was probably the case, or the issuer of a second letter of credit (the guarantee) of which American National Bank was the beneficiary, which would make this a case of 'back to back' letters of credit. Paribas' obligations, and the argument for insisting on strict compliance, would be the same.

Id. at 384 (citations omitted). Leaving aside the inaccurate reference to the back to back letters of credit, see supra note 28 (direct guarantee/counter-guarantee practice different from back to back letters of credit), it would make a difference if Paribas were a confirming bank, as opposed to the direct guarantor of American National's counter-guarantee. As discussed in the principal text, see supra note 24 (counter-guarantor may
Rules that make the guarantee perpetually enforceable or enforceable beyond the term stipulated in the guarantee are also prime candidates for conflict. Consider the predicament of a counter-guarantor whose counter-guarantee expires where issued on its specified date of expiry, but who, according to the place of issuance of the direct guarantee is obligated to reimburse the direct guarantor for a payment made after the expiration of the counter-guarantee. Such a counter-guarantor would be faced with having to reimburse the direct guarantor in accordance with the laws of the direct guarantor’s place of business and being unable to seek its own reimbursement by the laws of its place of business. Similarly, rules or practices that approve or condone a bad faith “extend or pay practice” face rejection in jurisdictions where rights or obligations are supposed to be claimed and discharged in good faith. One can visualize a judge in any such jurisdiction asking: “how could a beneficiary, willing to withdraw his demand of payment at the moment the guarantor extends the life of the guarantee, claim that his retracted demand had been truthful?” After all, if the act or event that supported the demand had taken place at the time the demand was made, why seek an extension, why not collect, then and there?

At times, the conflict arises not between substantive law rules but between principles of interpretation of obligational language. A February 2, 1988 decision by the French Cour de Cassation referred to Article 1162 of the French Civil Code as containing the principle that resolves obligational ambiguities in bank guarantee language. The issue was whether the guarantee involved was a causal Civil Code guarantee or an abstract or autonomous first demand bank guarantee. According to Article 1162 of the French Civil Code, “when doubt exists, an agreement is interpreted against the obligee and in favor of the obligor.” Swiss courts, apparently acting on a similar presumption, arrive at similar results. Yet, if the guarantee in question were examined by an Anglo-American judge, the principle and presumption he would apply

specify payment against examination of documents tendered by beneficiary), American National Bank as an issuing bank, would have the right to verify on its own that the documents tendered to Paribas were in compliance with its irrevocable credit. Its verification would be governed by the terms of its own irrevocable letter of credit, as construed by United States law. As a counter-guarantor, however, it is most often severely limited in its verification. It may have to pay strictly on the basis of Paribas’ statement that the Saudi beneficiary did comply with the terms of the credit.

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167 See, e.g., art. 242 of the German BGB of 1900 (Sebald, Nurnberg, 1910), and U.C.C. § 1-203 (imposing “obligation of good faith” upon all parties to contract).
169 See C. Civ. § 1162 (Dalloz 1980).
170 Kronauer, supra note 6 at 124.
would be "contra proferentum": the meaning of an ambiguous promise or statement of liability is to be interpreted not in favor, but against the party who proffered it.

Finally, conflict inevitably arises from choice of forum and choice of law clauses found in direct guarantees and in the URCG. Some direct guarantees require that the parties to the guarantee and counter-guarantee subject themselves to the law and jurisdiction of the courts of the place of issuance of the direct guarantee. Accordingly, a Belgian court would have had to order a bank in Belgium to pay its guarantee in accordance with Bank Markazi’s directive that all Iranian beneficiaries draw on bank guarantees, regardless of justification.171

Article 10 of the URCG, in turn, states that if the guarantee does not specify a governing law, "the applicable law is that of the guarantor’s place of business."172 This rule’s application by a Mexican federal court and its disregard by a California trial and appellate court, led both sets of courts to a paradigmatic renvoi standoff and to a denial of justice. In Movawad Curi v. Acciones Bursatiles Somex S.A., a recent unpublished decision, the Court of Appeals of California173 affirmed the Superior Court’s rejection of jurisdiction, inter alia, because of the inconvenience of the forum. The Court of Appeals held that jurisdiction was more properly found in Mexico. This decision, however, came on the heels of a Mexican federal court decision which similarly declined jurisdiction because the operative instrument was a bank guarantee issued in the state of California. Since this bank guarantee was silent on applicable law, it was subject to URCG Article 10 which applied the law of the place of issuance.174

The differences, incompatibilities, and standoffs described above are part of a calculus that has lead beneficiaries to select the laws and courts most favorable to their warranted or unwarranted claims. As of 1982, it was clear to Dr. Schwank that English law and courts were the favorites among beneficiaries.175

171 See supra notes 107-09 (principal unable to continue work because of Khomeini’s revolution).

172 URCG, supra note 14.


174 See Auto de 27 de noviembre de 1987, Juez Quinto de Distrito en Materia Civil en el Distrito Federal (on file with Documentation Center of the International Academy of Commercial and Consumer Law, University of Arizona, Foreign Law Collection, Tucson, Arizona). The California Court of Appeal disregarded this decision, arguing that as a federal court, the Mexican court could not exercise jurisdiction. It did not state that other Mexican courts could not exercise jurisdiction or that the plaintiff had failed to demonstrate that Mexican state courts could not exercise jurisdiction.

175 Schwank, supra note 6, at 7-8.
Given the well known integrity of English bankers and courts, the rules and practices that Middle East beneficiaries find so attractive are certainly not the product of an English conspiracy to corner the guarantee market. Yet, an unlevel playing field, however reached, does not bid well for the bank guarantee market. Markets in general, and financial markets in particular, thrive only when the participants cooperate and trust each other. Thus, if the bank guarantee market is to thrive, dependent as it is upon correspondent banking relations, its rules must be, to the extent that they embody safe, sound, and cost effective banking practices, fair to all participants. One-sidedness, whether at the transactional or at the adjudicative level, is certain to be countered with other one-sidedness. In the end, one-sidedness is the surest prescription for desuetude.

5. The Draft ICC Rules (URG) and Lege Ferenda

With the failure of the URCG to gain favor among beneficiaries, the International Chamber of Commerce has attempted to draw up a new set of acceptable bank guarantee rules. The effort has gained in intensity since 1985 and is presently in its Sixth [and final] Draft.176

176 The following is a chronological listing of ICC documents relating to the effort to draft a new set of bank guarantee rules, together with a brief summary of content relevant to the present writing. It is based upon the writer's own collection and thus is not exhaustive. The reader should be warned that the numbering of ICC documents is not uniform, especially with regard to Roman and Arabic numerals for months and days. Each document will be listed hereafter by number and date as it appears in the ICC's own version. ICC Doc. 470/468, 1985.01.30 reports on the meeting of the "relevant Working Party chaired by John Matthews (United Kingdom)" held on December 3, 1985. ICC Doc. 555-21/57, 1986.01.30, reports on the establishment of a special Working Party on a Code of Practice for Demand Guarantees. Mr. Fisek of Czechoslovakia stressed that demand guarantees were particularly a problem in developing countries including the Middle East and recommended the use of statements of default in demand guarantees, which would also be helpful with respect to the "extend or pay practice." Mr. Paashauf of the Federal Republic of Germany agreed. Mr. Bontoux of France stated that the standby-letter of credit provided a very useful instrument for the bank guarantee type of operation. The Chairman of the Working Party stressed that if the market insisted on bank guarantees, people could not be forced to use letters of credit instead. ICC Doc. 470/Int.215, 460/Int.184, 1986.05.23 contains the First Draft (May, 1986) version of a "Code of Practice for Demand Guarantees and Bonds" (Alternative Title-Uniform Rules for Demand Guarantees and Bonds) [hereinafter URG 1]. ICC Doc. 470/481, 1986.06.17, contains Mr. Matthews' progress report on ICC Doc. 470/Int.215; 555-21/61, 1987.06.02, and Mr. Matthews' progress report on the updating of rules used as a model by the British Bankers Association. ICC Doc. 555-21/59, 1986.11.07, contains references to problems with the extend or pay practice and the advisability of an Article 33 (draft) suspension of the payment procedure until instructions are received from principals involved. ICC Doc. 460/470-1, 1987.08.03 announces the composition of a Joint Working Party on Contractual Guarantees, presided over by Dr. Rudolf Von Graffenried of Switzerland, and having as Rapporteur, Ferdinand L. de May from the United Kingdom, and consisting of five delegates from.
Since many changes have been introduced in each draft, and since the revision process is ongoing, not much would be gained by a detailed analysis of each provision. Attention will be focused, instead, on the main normative principles and policies.

5.1 Scope

Article 1 is the URG's scope provision. An examination of the six drafts reveals that the URG is less ambitious in scope now than when first drawn.

Article 1 of URG 1 states that the URG applies to "all Demand Guarantees, Demand Bonds and, where they are employed in guarantee operations as substitutes for Demand Guarantees and Demand Bonds, Standby Letters of Credit, (all of which are hereinafter referred to as 'Guarantee(s)' . . . )."177

Article 1 of URG 5 now circumscribes application to "any guar-
argument, however named or described . . . and [any] amendment thereto which a U.C. guarantor . . . has been instructed to issue and which states that it is subject to the Uniform Rules for Guarantees of the International Chamber of Commerce . . . .”

The ambitious coverage of URG 1, 2, and 3 placed all these drafts on a collision course with the 1983 UCP, because the latter also applied to standby letters of credit, and contained inconsistent rules on revocability, assignment, transfer, suspension, expiration, and required wording. This problem was discussed during a September, 1988 meeting of the United States State Department Study Team with representatives of UNCTITRAL and the ICC. Subsequently, during the November 1988 UNCTITRAL Vienna meeting, Ms. Carol Xueref, the ICC’s legal attaché, clarified that the URG’s Joint Working Party did not intend to apply the URG to standby letters of credit.

Despite this clarification and the narrower scope of URG 6, Article 1, a conflict with the UCP is still a distinct possibility, particularly because “hybrid” issuances such as standby letters of credit as counter-guarantees for direct guarantees, or vice versa, are common in the North-Atlantic and Trans-Pacific trade. One part of the transaction would be subject to the UCP and the other to the URG. Thus, bankers, lawyers, and adjudicators will be attempting in vain to reconcile irreconcilable differences.

176 URG 6, art. 1, supra note 176.
179 See UCP, art. 1, supra notes 10, 13.
180 Compare Article 5 of URG 2, 3 and 4, requiring that all guarantees be irrevocable, with UCP, Articles 7 and 9, allowing revocable credits and setting forth a presumption in favor of revocability. Compare Article 4 of URG 2, 3, 4 and 5 prohibiting “assignment” with UCP, Articles 54 and 55 on the permissible category of transferable credits. Compare UCP, Article 46(b) on the mandatory presentation of documents prior to the expiration of a credit, with the URG 6, Article 26 version of the “extend or pay” practice, setting forth a suspension of payment of the credit. On necessary wording, compare UCP, Articles 3 and 4, discouraging, although not prohibiting, references to the underlying contract, with URG 3, Article 3(c), requiring a reference to “the underlying transaction requiring the issue of the Guarantee.”
181 The meeting of the United States Study Team on Standby Letters of Credit and Bank Guarantees took place on September 30, 1988 at the Fordham University School of Law in New York. During this meeting, Charles del Busto, former President of the United States Council for International Trade and this writer pointed out the potential for serious conflicts between the URG 3 and the UCP. A similar point of view was expressed subsequently by Bradley K. Sable, Esq., Counsel for the Federal Reserve of New York, in an October 26, 1988 facsimile communication to Professor Gerald McLaughlin, another member of the United States Study Team and delegate to the November 21-30, 1988 UNCTITRAL meeting.
183 See supra note 25 (sources describing various hybrid issuances).

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5.2 Certainty

Three consecutive URG drafts categorically espoused the irrevocability of bank guarantees. But by subjecting the effectiveness of the guarantor's promise to pre-establishment, non-documentary conditions the same drafts compromised irrevocability. As is stated in Article 6 of URG 2: "A guarantee enters into effect as from the date of its issue to the Beneficiary, unless its terms expressly provide that its effectiveness is subject to conditions (e.g. written notification of an award of contract, the receipt of specified advance payment monies or any other event)."

Clearly, what was labeled an irrevocable promise at the date of issuance became revocable if the guarantor verified that "events" such as the receipt by the principal or the guarantor of beneficiary's advance payment monies had not taken place. Another common pre-establishment condition (especially with French bank guarantees) was the receipt of funding or of "cover" for the issuance of the guarantee. Under these circumstances, to label the guarantee as irrevocable is, as stated by this writer during the September, 1988 New York meeting, to disguise its revocability.

URG 6, Article 6 refers to the effectiveness of the guarantee only "as from the date of its issue." It adds, however, that establishment is subject to terms that expressly provide "conditions specified in the Guarantee and determinable by the Guarantor." As the URG does not differentiate between documentary and non-documentary conditions, it continues to compromise the certainty of the guarantee.

5.3 Abstraction

Assertions of independence or abstraction of the guarantee promise abound in all the URG drafts. A guarantee is repeatedly described as "independent of any underlying transaction," and the terms of any such transaction "shall in no way affect the Guarantor's rights and obligations under a Guarantee notwithstanding any reference thereto in the Guarantee."

Abstraction, like certainty, is inconsistent with pre-establishment, non-documentary conditions, such as the making of an advance payment, the submission of a bid, or the award of a contract. Further-

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184 See URG 2, 3, 4, art. 5, supra note 176. The text of Article 5 was quite terse: "All Guarantees are irrevocable."
185 URG 6, art. 5, supra note 176.
186 Id.
187 URG 6, art. 2(b) supra note 176. See also URG 3, 4, 5, art. 2(b), supra note 176; URG 2, art. 7, supra note 176; URG 1, arts. 4, 5, supra note 176.
188 See generally URG 2, art. 6, supra note 176; URG 5, art. 5, supra note 176;
more, the espousal of abstraction cannot be reconciled with the widespread use of causal terms or stipulations as antidotes against abusive or fraudulent calls of the guarantee.

It is regrettable that the drafters of URG 6 did not see fit to rely on purely documentary conditions. Instead, the URG drafters focused on the language of simple demands. One of the most hotly debated issues was, "how simple can a simple demand be?" Should a simple demand guarantee contain, at a minimum, the beneficiary's representation that because of the principal's breach he is entitled to payment? Should such a representation be written, and should it be accompanied by other documents, including third party certificates or other written representations of entitlement to payment?

Until URG 2, the view in favor of a documentary type of simple demand seemed as though it would prevail. URG 2, Article 22, required that any claim be in any one of the following agreed forms of written demand:

a) the Beneficiary's written demand incorporating his statement that the Principal is in breach of his obligation(s) and indicating the nature of such breach; or
b) the Beneficiary's written demand incorporating his statement that the Principal is in breach of his obligation(s) and indicating the nature of such breach and supported by the documents to be specified in the Guarantee; or

Article 22 opted for a minimum documentary requirement in the case of silent simple demand guarantees. A guarantee subject to the URG that contained a simple demand clause and no documentary re-

URG 6, art. 6, supra note 176 (explaining that a Guarantee becomes effective from the date of its issue, unless subject to conditions). The objections raised in the principal text have not only been raised by this writer but also by representatives of banks and bankers' associations. See, e.g., URG 2, art. 2, comments in letter by Dr. B. Eckardt, February 25, 1988 (representing Hamburg bankers, to the ICC). See also the comments by the French Banking Association in ICC Doc. 470/560 and 460/348, 1988.X.27.

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qurement had to comply with paragraph (a) above.\textsuperscript{189}

Even this minimalist approach, which required nothing more than
the beneficiary's own statement of breach, proved unacceptable. While
each successive URG draft condemned the simple demand practice,\textsuperscript{190} it
also seemed more inclined to accept it. Complete acceptability came
with Article 19 of URG 5 and Article 20 of URG 6:

Any claim for payment under a Guarantee issued according
to these Rules shall be made by the Beneficiary in writing
and except where the Guarantee provides for payment on
simple demand or otherwise on conditions other than those
set out in paragraphs a) and b) below, shall be supported by
either:

a) the Beneficiary's statement that and in what respect the
Principal is in breach of his specified obligation(s); or
b) the Beneficiary's statement that and in what respect the
Principal is in breach of his specified obligation(s) together
with any other document(s) specified in the Guarantee.\textsuperscript{191}

The battle on the documentary contents of the simple demand led
to an interesting but misleading paradox. Those who argued in favor of
a non-documentary simple demand appeared to be the defenders of ab-
straction, and those who argued in favor of documentary conditions ap-
peared to be the supporters of causality. Facts are at odds with this
alignment. As the experience with European decisional law has shown,
the two most important factors in bank guarantee litigation are: 1) the
nature of the guarantee, i.e., a simple demand wording which lends
itself to abuse, illegality and fraud, and 2) the beneficiary's "monop-
sonic" or dominant party status and unfair method of doing business.
More than any other factors, these two have contributed to a decisional
law that is increasingly causal. Hence, to prevent causality from de-

\textsuperscript{189} URG 2, art. 22, supra note 176.

\textsuperscript{190} See URG 3, Introduction, supra note 176, at 1 (reference to a "good guarantee
practice" and to a "fairer balance"); URG 4, Introduction, supra note 176, at 3 (quot-
ing the ICC as voicing "its strong opposition to simple on-demand guarantees" and its
intention to discourage their use); URG 5, Introduction, supra note 176, at 3 (similarly
expressing strong opposition to simple demand guarantees and discourages such a prac-
tice, but nevertheless stating that the practice is permitted under the Rules and conced-
ing that the Rules incorporate a "major change favorable to beneficiaries in that they
no longer have necessarily to present an arbitration award or other independent docu-
mentary evidence in support of any claim"); URG 6, supra note 176, at 4.

\textsuperscript{191} URG 5, art. 19, supra note 176. To this text, URG 6, Article 20 adds: "Sub-
sections a) and b) shall not apply when the payment of the Guarantee is to be made on
(first) demand without supporting written statement(s) or document(s) (i.e. simple de-
mand)"
stroying the certainty of guarantees, the URG has to restore what the draftsmen themselves referred to as a "fairer balance" between the parties. The components of this balance, however, must result from an accurate assessment of both prototypical transactions and archetypal or desirable behavior by the guarantor as the trustworthy and pivotal party.

A review of contemporary simple demand practice reveals three types of transactions. In type one, the simple demand guarantee is nothing more than a transfer of funds by the principal supplier of goods or services, to its buyer or importer, who may then use these funds at its discretion. This type can be validly equated to a banker's acceptance, in that no true condition is imposed by the issuer of the promise upon the beneficiary's right to be paid. The beneficiary's presentation of the guarantee or his demand for payment, being completely within the beneficiary's control, are simple modalities of the collection process. The term "guarantee" is used in this transaction only because the beneficiary wishes that someone trustworthy (the guarantor) assure it of the availability of the funds upon his demand. The transfer of funds is either payment for doing business in beneficiary's jurisdiction or an entrustment for unspecified purposes. In type one, then, the parties' intent is that the beneficiary be paid solely upon its word and without the guarantor's exercise of discretion.

In type two, the simple demand guarantee is a promise of payment by a trusted and discretionary paymaster (the direct guarantor or the counter-guarantor), which uses its discretion to determine whether the beneficiary's tender of simple or easily verifiable statements or certifications meets the terms and conditions of the guarantee. These statements or certifications may be the beneficiary's or a third party's. As with commercial letters of credit, widespread reliance on type two depends upon the mutuality of value conferred: if the documents are inherently valuable, i.e., relied upon in the marketplace for the type of assurance sought by the principal and the guarantor, payment will be made willingly and quickly in the vast majority of issuances. Also, as with commercial letter of credit documents, the verification of the type two guarantee documents is "facial" and documentary; it is unconcerned with underlying transaction defenses or equities.

Type three is a combination of the preceding two types and is characterized by non-documentary requirements accompanied by "pure" simple demand language. Typically this guarantee leads to contradictory perceptions. The beneficiary regards type three as if it were a type one, whereas the principal regards it as if it were a type two. Clearly, type three gives rise to most of the litigation.
The URG could contribute to the reduction of litigation by correcting the parties' misperception and by spelling out the legal consequences attached to each type of simple demand. Type one should be treated either as the issuer's acceptance or as a transfer of funds to the direct guarantor, depending upon whether actual funds were transferred at the moment of issuance. It should not be treated as a guarantee, or as a transaction where the guarantor or counter-guarantor retains the discretion to pay. Type two should be treated as a documentary promise of the same species as the commercial letter of credit, where, by examining the required documents or statements, the promisor retains discretion to determine compliance and payment. The principal and the beneficiary should be encouraged to rely on creditworthy documents. These documents ought to be "merchantable" or valuable in the marketplace of the respective types of goods or services. Here, the experience with commercial letters of credit with inspection certificates on the quality or health standards of grains or vegetables should be helpful. A listing of acceptable inspectors or inspection agencies for each type of contract, together with standard language of evaluation of performance would also facilitate the verification of guarantee compliance. Finally, type three should be discouraged. It should be treated, in order to encourage trustworthy promises, as a type one issuance. Guarantors unhappy with the loss of payment discretion will hopefully elect not to issue such guarantees, or issue them as full-fledged documentary promises.

5.4 Expiry Rules and the Extend or Pay Practice

Article 23 of URG 5 seemingly put to rest what was described earlier as the fetishistic notion that possession of the guarantee conferred everlasting rights on the beneficiary. It asserts that the beneficiary's retention of the guarantee document past the date of expiry, payment, cancellation or other type of termination has no legal consequences. Unfortunately, however, the presentation of the guarantee document (and, implicitly, the beneficiary's possession) continues to play a role in preventing the expiration of the guarantee. On the one hand, the

192 See supra note 74 and accompanying text.
193 URG 5, art. 23, supra note 176, states, "Where a Guarantee has terminated by payment, expiry, cancellation or otherwise, retention of the Guarantee or of any amendments thereto shall not preserve any rights the Beneficiary may claim under the Guarantee." Cf. URCG, art. 6, supra note 14 (in which the same rule is stated, but modified by the insistence that the document "should be returned to the Guarantor without delay").
194 See URG 5, art. 23, supra note 176 (which states that retention "shall not preserve any rights the Beneficiary may claim under the Guarantee").
hand, the presentation of the guarantee document to the guarantor can qualify as an “expiry event.”

On the other hand, presentation, accompanied by a demand to extend or pay the guarantee, can lead to an extension beyond the original expiration date. Furthermore, since Article 3 of URG 5 and URG 6 allow guarantees to set forth either a date or an event of expiration, a guarantee without a stated date of expiration seems likely to be enforced indefinitely. All the beneficiary of an expiry date-lacking guarantee would have to do to assure indefinite duration is not to “propitiate” the “expiry event” by retaining possession of the relevant documents.

5.5 Choice of Law

Article 26 of URG 5 and Article 27 of URG 6 retain the same choice of law rule of Article 10 of the URCG: unless otherwise stipulated, the governing law is that of the Guarantor’s place of business. It will be remembered that Article 10 of the URCG was at the center of the renvoi by a California state court to a Mexican federal court in the Movawad Curi case. The choice of the law of the guarantor’s place of business is not only conducive to renvoi difficulties but also to the jurisdictional tug-of-war apparent in the Rayners case. In addition, the URG’s preference for the guarantor’s place of business over the counter-guarantor’s (even when the question is compliance with the terms of the counter-guarantee) encourages one-sidedness and unneces-

195 URG 5, art. 21 and URG 6, art. 22, supra note 176, state:

expiry of a Guarantee for the presentation of claims shall be upon a specified final date (“Expiry Date”) or upon presentation to the Guarantor of the document(s) specified for the purpose of expiry (“Expiry Event”). If both an Expiry Date and an Expiry Event are specified in a Guarantee, the Guarantee shall expire on whichever of the Expiry Date or Expiry Event occurs first. Claims received after the Expiry Date or Expiry Event shall be rejected by the Guarantor. It should be noted that the term “expiry event” is not used in a technical-legal sense. It presupposes not an occurrence beyond the beneficiary’s control, but the beneficiary’s voluntary act, such as his tender of the required documents or statements.

196 See URG 5, art. 25, supra note 176, which in relevant part states: “If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a conforming demand for payment . . .” (emphasis added). URG 6, Article 26 replaces the italicized words by “a claim for payment submitted in accordance with the terms and conditions of the Guarantee . . . .”

197 URG 5, art. 3, supra note 176, in relevant part reads as follows: “Accordingly, all Guarantees should stipulate: [f] the date and/or event of expiry of the Guarantee . . . .”

198 URG 5, art. 26 and URG 6, art. 27, supra note 176; URCG, art. 10, supra note 14.

199 See supra note 172 and accompanying text.

200 See supra notes 157-62 and accompanying text.
sary litigation. If the prototypical beneficiary is a governmental agency empowered to write its own law of compliance, surely it will not hesitate to invoke Article 27 against the counter-guarantor's law of abuse of rights, fraud and illegality. This situation will not be remedied by choosing the law of the place of the counter-guarantee on questions concerning the validity of and compliance with the counter-guarantee. Such a choice would only encourage contradictory decisions in the guarantor's and counter-guarantor's jurisdictions, thereby adding to the distrust that now plagues correspondent banking relationships throughout the trading world.

6. CONCLUSIONS

Trust lies at the root of viable correspondent banking relations. To succeed, the law of bank guarantees must instill trust in the legal institutions chosen to carry out the parties' intent. It must also protect the legitimate interests of the other participants in the financial marketplace, including the public at large, as represented by central banking authorities. The absence of "rules of traffic" in the URG to regulate the various guarantors and counter-guarantors, including paying banks and issuers or confirmers of standby letters of credit, truly constitutes a significant gap. However, before such rules of traffic can be written, a consensus must be reached on what are the acceptable prototypical transactions and the desirable behavior of archetypal guarantors, acting as trusted intermediaries, checkers of documents and paymasters. In this sense, the URG discussions on the documentary contents of simple demand guarantees have performed a very valuable lege ferenda task.

In focusing on what should be the minimum acceptable documentation, the fundamental issue of fairness has come to the fore. Other fundamental issues, such as the significance of possession with regard to expiry, the validity of extend or pay demands, and choice of law rules, may be seen as consequences of the balance of fairness between principal and beneficiary. If this balance is tipped on the side of the beneficiary, the norm will be non-documentation, accompanied by valid extend or pay demands, possession as an event of expiry, and choice of beneficiary's place of issuance of the direct guarantee as the governing law.

To restore the balance of fairness, the bank guarantee must return to its documentary origins and rely on the guarantor's verification of documentary compliance as a prerequisite of payment to the beneficiary. The issuing bank's customer, as well as the issuing bank, were willing to part with value (represented by payment of a specified sum) once the beneficiary was willing to give up the value inherent in the
tendered documents, especially the document of title. Surely deviant or exceptional transactions took place, such as the so-called "clean" credits. But letter of credit law was not built on exceptional practices. It was built on prototypical mutuality of value.

Mutatis mutandis, bank guarantee law must be built upon what was described earlier as merchantable documents, or documents regarded by the contractual marketplace as valuable indicators of breach or performance of the "base" transactions. Bank guarantors cannot be expected to ascertain either breach or performance, but they should be expected to assess the import and compliance of statements or certifications. These documents can be issued by the beneficiary himself and will have the value of facilitating actions for breach of warranty or fraudulent misrepresentation against the beneficiary. Reliable third party statements or certifications, however, are obviously preferable. The certification, by a bank of known solvency, that the beneficiary did transfer the funds or deposit a given sum in an account designated for advance payments to the principal, is more creditworthy than the beneficiary's own certification of such transfer or deposit. Similarly, a certificate of completion of a given construction project by an independent and respected engineering or architectural inspector is worth more in the marketplace and in an arbitral or judicial proceeding than that of a contractor or sub-contractor.

As indicated, the growth of the bank guarantee practice will thus depend to a large extent on the elaboration of acceptable prototype statements and certifications for the defaults envisaged by each type of guarantee. Banks and the ICC Commission on Banking Technique and Practice, as the most respected and influential recipients of these views, ought to remain at the center of this documentation effort (an effort, incidentally, which is not unlike that ably conducted for commercial letters of credit by the ICG for almost five decades). Indeed, the UCP at first only reflected the practices of various influential groups of bankers with respect to key documents. Subsequently, the UCP harmonized these practices with those of their correspondents, and thereby provided fair and efficient rules of traffic and principles of interpretation.

Hence, the ICC will need to re-examine the banking forms transcribed in the Appendix and suggest ways to eliminate their causal sections. One way is to replace causal language in the operative document with documentary requirements. For example, the causal reference to the underlying bid or to the advance payment may well be replaced by a condition requiring the presentation of documentary evidence of deposit of the advance payment at an agreed-upon bank, or the certifica-
tion by an agreed upon lawyer or notary public that a specified bid has been awarded to the principal. Parties would still be free to use their preferred banking forms, but the choice of a given abstract, documentary format will carry with it significant protection against causal defenses and equities. By the same token, the choice of a "pure" simple demand type of guarantee (type one in the earlier categorization) should, barring central banking or other public policy prohibitions, be available to willing parties but in a banker's acceptance or transfer of funds context, not in a guarantee format. Finally, ambiguities and non-documentary language should be interpreted *contra proferentum*, i.e., against the guarantor or counter-guarantor.

Once the ICC is able to build consensus among correspondent bankers on the use of guarantee and documentary language, the task of setting forth acceptable standards of verification and diligence in the handling of documents, payment, and reimbursement obligations can be accomplished easily. The ICC should continue to rely on the accumulated experience of almost a century of documentary letter of credit practice. At this point UNCITRAL should become the forum for the elimination of substantive and procedural law conflicts. In this respect, a recent report by the American Bar Association Task Force for the Revision of Article 5 of the Uniform Commercial Code201 has taken the first significant step by embracing, whenever possible, those rules or principles of interpretation most conducive to the international harmonization of letter of credit law.

Contrary to what is believed by some European bankers and banking lawyers, United States law is not hostile to either the form or the substance of abstract European bank guarantees. Even the term "guarantee" when used as part of or in connection with a letter of credit transaction should not give rise to regulatory problems. Thus, a term such as "guarantee letter of credit" may well resolve the nomenclature dispute between European and American bankers and banking lawyers. Essentially, what is unacceptable to United States commercial law is also unacceptable to the European jurisdictions discussed in this writing. Both find unacceptable a transaction, rule or principle of interpretation that requires that one or more parties assume a fully enforce-

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201 Toward the Revision of U.C.C. Article 5 (Letters of Credit), A Report of the American Bar Association Task Force on the Study of U.C.C. Article 5, J.E. Byrne, Chairman, Draft 4-1 (March 4, 1988).
able and costly obligation in exchange for the other party’s non-obligation or “pseudo-obligation.”

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202 The expression “pseudo-obligation” was taken from U.C.C. 2-313, Official Comment 4: “But in determining what they [the parties] have agreed upon good faith is a factor and consideration should be given to the fact that the probability is small that a real price is intended to be exchanged for a pseudo-obligation.” For a discussion on the meaning of fairness of commercial legal institutions, see Kozolchyk, Commercialization, supra note 46, at 20-47. See also Kozolchyk, Fairness in Anglo and Latin American Commercial Adjudication, 2 B.C. Int’l & Comp. L. Rev. 219 (1979).
Appendix A

Composite Text: Tender Guarantee

I. Causal Section (References to Base Contract)

A. “Tender Guarantee given by . . . Bank (Guarantor) to . . . Beneficiary in the event of default by . . . (Principal) in the obligations resulting from the Tender, dated . . . for . . . (exact description of the object of Tender).” [Stumpf & Ullrich at 42] "We refer to the tender submitted to you by (customer’s name) (the “Tenderer”) under reference no. . . . in respect of (description of works/project) (“the Tenderer”).” [Rowe at 94] “Bid Bond No. . . . Project . . . We have been informed that Messrs. . . . have submitted to you on . . . under your tender No. . . of . . . 19 . . . their bid for the supply of . . . at a total price of . . . Pursuant to your tender conditions, Messrs. . . . are required to provide you with a bid bond in the amount of . . . .” [Dohm at 184] “With reference to the tender of . . . in connection with the adjudication for the construction of the Cairo North Highway Bridge.” [Ackermann at 144] “Messrs. . . . submitted on . . . their bid for the supply of . . . under your bid invitation dated . . . .” [Kleiner at 182] “Messrs. . . . submitted on . . . their Bid No. . . . for the supply of . . . under your bid invitation No. . . . dated . . . .” [Union Bank of Switzerland at 87] “We have been informed that Messrs. . . . (supplier) have submitted to you on . . . under your tender No. . . . of . . . their bid for the supply of . . . at a total price of . . . According to your tender conditions, Messrs. . . . (supplier) are required to provide you with a bid bond in the amount of . . . .” [Swiss Bank Corporation at 23]

B. Counterguarantee

“In consideration of your issuing at our request a guarantee in favor of . . . hereinafter called the “beneficiaries” for the amount of . . . (in words) as requested, we, CREDITANSTALTBANKVEREIN, Vienna, Austria, hereinafter called “the bank,” . . . .” [Creditanstalt at 31.]

II. Abstract Section

A. “The Guarantor hereby undertakes irrevocably to pay the Beneficiary, within a period of 14 working days from the date of receipt by him of the beneficiary’s first request in writing, any
sum claimed, up to the amount of . . . DM, provided this request is received no later than . . . (expiry date). The request must be accompanied by a certified copy of the document concerning the award of the Contract to the Principal, (or by a relevant statement in writing of the Beneficiary), as well as by written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the above-mentioned Tender.” [Stumpf & Ullrich at 42]. ([B]ank) acting through our branch at (branch) hereby issue in your favor our irrevocable guarantee for an amount up to but not exceeding (figures) (say(words)) which shall be payable by us to you on receipt of your first written demand which shall incorporate your certificate that the Tenderer has been awarded a contract to which the Tender relates but has failed to perform its obligations under the terms and conditions on which the Tender was invited.” [Rowe at 94] This being stated, we, X-Bank A.G., at the request of Messrs. . . ., herewith irrevocably undertake to pay immediately to you, upon your first written demand, any amount up to . . . upon receipt of your written confirmation that you have accepted, in whole or in part, the aforementioned bid and that Messrs. . . . have failed to sign the contract in due time and/or that they have failed to furnish in due time the agreed delivery/performance guarantee.” [Dohm at 184] “We hereby undertake to hold at your disposal as Provisional Deposit, free of interest and payable in cash on your first demand, and notwithstanding any contestation by the tenderers, the sum of US 100,000.” [Ackermann at 144] “At the request of Messrs. . . ., we hereby irrevocably undertake to pay you on first demand, regardless whether such bid is in anyway binding upon Messrs. . . . and therefore irrespective of any legal effects of such bid and waiving all rights of objection and defense arising from such legal effects, any amount up to SFr . . . upon receipt of your written request for payment and your written confirmation that after acceptance of said bid Messrs. . . . failed to enter into the respective contract.” [Kleiner at 182] “At the request of Messrs. . . ., we, the UNION BANK OF SWITZERLAND, herewith irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above mentioned Bid and waiving all rights of objection and defense arising from said bid, any amount up to . . . upon receipt of your written and duly signed request for payment and your written confirmation that Messrs. . . . have not complied with
the conditions of their offer No. . . . dated . . .” [Union Bank of Switzerland at 87] “This being stated, we, Swiss Bank Corporation, (address), waiving all rights of objection and defense arising from the principal debt, hereby irrevocably undertake to pay immediately to you, upon your first demand, any amount up to . . . upon receipt of your written request for payment and your written confirmation stating that you have accepted, in whole or in part, the above mentioned bid and that Messrs. . . . (supplier) have failed to sign the contract in due time or in accordance to the tender conditions. [Swiss Bank Corporation, Documentary Operations at 23]

B. Expiration Clause

“Our obligation under this indemnity will expire on . . . at the latest, irrespective of whether the present instrument is returned to us or not. Your written claim must have reached us in . . . by that date, otherwise any and all claims against our bank will automatically expire. The original of this instrument must be returned to us after the expiry date or after all your claims hereunder have been satisfied by us.” [Dohm at 184] “Any claim in respect thereof should be made to us by the twentieth of November, nineteen eighty-one, at the latest. Should we receive no claim from you by that date, our liability will cease ‘ipso facto’ and the present Letter of Guarantee will definitely become null and void. Please return to us this Letter of Guarantee, on expiry date, for cancellation.” [Ackermann at 144] “After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary, it shall be the Guarantor’s duty to return the guarantee document to the Principal.” [Stumpf & Ullrich at 42]
Appendix B

Composite Text: Advance Payment Guarantee

1. Causal Section

"We refer to the contract entered into by you with (customer's name) "the Contractor") under reference no. . . . in respect of (description of works/project) ("the Contract"). [Rowe at 96] "We understand from our clients Messrs. . . . that they as Sellers have signed with you as Buyers on . . . A Contract . . . regarding the delivery of . . . with an invoice value of . . . . The above goods have to be delivered to you according to this Contract by . . . at the latest. The payment conditions provide that you have to transfer to our above clients a . . . % Advance Payment amounting to . . . against a covering Bank guarantee." [Creditanstalt at 21] "We have been informed that you have concluded on . . . a contract No. . . . (hereinafter the "Contract") with Messrs. . . . (hereinafter: the "Seller") for the supply of . . . at the total price of . . . . Pursuant to the Contract you are required to make an advance payment to the Seller of . . . % of the total price (i.e. . . . . Your claim as to reimbursement of this amount, should the Seller fail to perform its obligations in conformity with the terms of the Contract, is to be secured by a bank guarantee." [Dohm at 191] "You concluded a contract No. . . . with Messrs. . . . on . . . for the supply of . . . at a price of . . . . According to the terms of the contract you will make an advance payment of . . . to Messrs. . . . As Security for the possible claim for the refund of the advance payment, in the event that the merchandise is not delivered in conformity with the terms of the contract, an indemnity by a bank shall be furnished." [Union Bank of Switzerland at 89] "Repayment Guarantee given by . . . Bank (Guarantor) to . . . (Beneficiary) in the event of default by . . . (Principal) in the obligations resulting from the Contract, dated . . . for . . . (exact description of the subject matter of the Contract). [Stumpf & Ulrich at 44]

2. Abstract

"Now we, (bank) acting through our branch at (branch) hereby issue in your favor our irrevocable guarantee for an amount up to but not exceeding (figures) (say. (words)) which shall be payable by us to you on receipt of your first written demand which shall incorporate your certificate that the Contractor has failed to per-
form its obligations under the Contract. No drawing may be made by you under this guarantee unless we have previously received notice in writing from (you/the Contractor) stating that an advance payment of (figures) (say (words)) has been paid to the Contractor by you pursuant to the Contract. Our outstanding liability under this guarantee will reduce by such amounts (expressed in (currency)) as may be notified by (you/the Contractor) to us in writing and stated to be the reduction of this guarantee required to be made in accordance with the Contract by virtue of works completed thereunder by the Contractor.” [Rowe at 96] “On condition that you will transfer to us in favour and at the free disposal of our clients immediately after receipt of our present guarantee the abovementioned Advance Payment, we herewith undertake irrevocably on the strength of the general license of the Austrian National Bank, Vienna, to transfer to you upon your first written demand without any examination of the legal relationship between you and . . . any amount up to . . . should our clients fail to prove to us that they have delivered to you the above goods at the latest by . . . The surrendering to us by our clients of copies of the respective invoice and shipping document will be regarded as evidence for their having fulfilled their delivery obligations in time. In case of partial deliveries our obligation will be automatically reduced by . . . % of the value of each partial delivery, as soon as our clients will present to us copies of the respective invoice and shipping documents.” [Creditanstalt at 21] “At the request of Messrs . . . we, the UNION BANK OF SWITZERLAND, hereby irrevocably undertake to refund to you on your first demand, irrespective of the validity and the effects of the above mentioned contract and waiving all rights of objection and defense arising from said contract, the advance payment in the amount of . . . upon receipt of your written and duly signed request for payment and your written confirmation that Messrs . . . , have failed to deliver the ordered merchandise or not delivered such merchandise as specified in the above mentioned contract. The amount of this indemnity will automatically be reduced proportionally to the value of each part shipment upon receipt by us of an invoice-copy, issued by Messrs . . . . This letter of indemnity enters into force only after receipt by us of the advance payment in favor of Messrs . . .” [Union Bank of Switzerland at 89] “We, X-Bank A.G., at the request of the Seller herewith irrevocably undertake to pay immediately to you, upon your first written demand, any amount up to . . . upon receipt of your written confirmation that the Seller has
not performed its obligation in conformity with the terms of the Contract and that, as a result thereof, you are entitled to claim reimbursement of your advance payment. The present indemnity will enter into force only (condition precedent) after receipt by us of the aforementioned advance payment in favour our account No. . . . of the Seller held with us. The amount of our indemnity will automatically be reduced by . . . % of the invoice value for any delivery made by the Seller. A delivery will be considered to have taken place if the Seller has remitted to us documents which conform to the terms of the documentary letter of credit No. . . . issued by . . . Bank.” [Dohm at 191] “The Guarantor hereby undertakes irrevocably to pay the Beneficiary, within a period of 14 working days from the date of receipt by him of the Beneficiary’s first request in writing, any sum claimed, up to the amount of . . . DM, provided this request is received not later than . . . (expiry date). The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.” [Stumpf & Ullrich at 44]

3. Expiration Clause

“Our obligation under this indemnity will expire on . . . at the latest, irrespective of whether the present instrument is returned to us or not. Your written claim must have reached us in . . . by that date, otherwise any and all claims against our Bank under this indemnity will automatically expire. The original of this instrument must be returned to us after the expiry date or after all your claims hereunder have been satisfied.” [Dohm at 192] “After lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary, it shall be the Guarantor’s duty to return the guarantee document to the Principal.” [Stumpf & Ullrich at 44]
Appendix C

Composite Text: Performance Guarantee

1. Causal Section

"We refer to the contract entered into by you with (customer”的 name) (“the Contractor”) under reference no. . . . in respect of (description of works/project) (“the Contract”) [Rowe at 98] “Messrs. . . . We understand from our clients, Messrs. . . . that they as Sellers have signed with you as Buyers the contract no. . . . regarding the delivery of . . . with an invoice-value of . . . The respective contract provides that our clients have to furnish a performance bond in your favor for . . . % of the contract value.” [Creditanstalt at 23] “To . . . (beneficiary), Performance Guarantee No. . . ., We have been informed that you have concluded on . . . a contract No. . . . (hereinafter the “Contract”) with Messrs . . . (hereinafter the “Seller”) for the supply of . . . at a total price of . . . Pursuant to the Contract, the Seller is required to provide you with a performance guarantee in the amount of . . . % of the total price.” [Dohm at 187] “En date du . . . , vous avez conclu avec la Maison . . . un contrat No. . . . portant sur la livraison de . . . pour un prix total de . . . Conformément aux dispositions de ce contrat, vous êtes engagés à payer à la Maison . . . un acompte de Fr . . . Pour le cas de non-livraison de la marchandise ou de livraison non conforme au contrat, il a été prévu que la restitution de cet acompte serait assuré par une garantie bancaire remise en votre faveur.” [Kliener at 171] “You have concluded on . . . with Messrs. . . ., a contract No. . . . for the delivery of . . ., at a price of . . . As security for the due performance of the delivery, an indemnity by a bank shall be furnished.” [Union Bank of Switzerland at 88] “We have been informed that you have concluded on . . . a contract No. . . . with Messrs. . . . (supplier) for the supply of . . . at a total price of . . . According to this contract, Messrs. . . . (supplier) are required to provide you with a performance bond in the amount of . . . ( . . . % of the total price).” [Swiss Bank Corporation at 31] “Performance Guarantee given by . . . Bank (Guarantor) to . . . (Beneficiary) in the event of default by . . . (Principal) in the obligations resulting from the Contract, dated . . . for . . . (exact description of the subject matter of the Contract).” [Stumpf & Ull-
rich at 46]

2. Abstract

 "Now we, (bank) acting through our branch at (branch) hereby issue in your favour our irrevocable guarantee for an amount up to but not exceeding (figures) (say(words)) which shall be payable by us to you on receipt of your first written demand which shall incorporate your certificate that the Contractor has failed to perform its obligations under the Contract." [Rowe at 98] "Acting upon instructions received from our said clients we herewith issue this performance bond and undertake irrevocably on the strength of a general license of the Austrian National Bank, Vienna to transfer to you upon your first written demand without examination of the legal relationship between you and . . . any amount up to . . . should you advise us with reference to our guarantee no . . . that our clients have failed to fulfill their obligations under the above mentioned contract." [Creditanstalt at 23] "We, X-Bank A.G., at the request of the Seller, herewith irrevocably undertake to pay immediately to you, upon your first written demand, any amount up to . . . upon receipt of your first written confirmation that the Seller has not performed its obligations in conformity with the terms of the Contract." [Dohm at 186] Cela étant, d'ordre de la Maison . . ., nous engageons par la présent, d'une manière irrevocable, à vous rembourser, indépendamment de la validité et des effets juridiques du contrat en question, à première requisition de votre part et sans faire valoir d'exception, ni d'objection résultant du dit contrat, le montant de l'acompte, soit Fr. . . . contre remise d'une demande de paiement écrite de votre part attestant en particulier que la maison . . . n'a pas livré la marchandise commandée ou ne l'a pas livrée selon les modalités fixées dans le contrat ci-dessus mentionné." [Kliener at 171] "At the request of Messrs . . ., we, the UNION BANK OF SWITZERLAND, herewith irrevocably undertake to pay you on first demand, irrespective of the validity and the effects of the above mentioned contract and waiving all rights of objection and defense arising from said contract, any amount up to . . . upon receipt of your written confirmation that Messrs . . ., have failed to deliver the ordered merchandise as specified in the above mentioned contract." [Union Bank of Switzerland at 88] "We Swiss Bank Corporation, (address), waiving all rights of objection and defense arising from the principal debt, hereby irrevocably undertake to pay immediately to you, upon your first demand, any amount up to . . . upon receipt
of your written request for payment and your written confirmation stating Messrs . . . (supplier) have not fulfilled their obligations in conformity with the terms of the above mentioned contract.” [Swiss Bank Corporation at 31] “The Guarantor hereby undertakes irrevocably to pay the Beneficiary, within a period of 14 working days from the date of receipt by him of the Beneficiary’s first request in writing, any sum claimed, up to the amount of . . . DM, provided this request is received no later than . . . (expiry date). The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.” [Stumpf & Ullrich at 46]

3. Expiration Clause

“Our obligation under this indemnity will expire on . . . at the latest, irrespective of whether the present instrument is returned to us or not. Your written claim must have reached us in . . . by that date, otherwise any claims against our Bank under this indemnity will automatically expire. The original of this instrument must be returned to us after the expiry date or after all your claims hereunder have been satisfied.” [Dohm at 187] “Notre garantie est valable jusqu’au . . . et s’èteint automatiquement et entièrement si votre demande de paiement écrite et votre attestation écrite ne sont pas en notre possession d’ici cette date.” [Kliener at 171] “After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary, it shall be the Guarantor’s duty to return the guarantee document to the Principal.” [Stumpf & Ullrich at 46]