Guarantees & Standby Letter of Credit in International Trade


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Outline

• Role of Guarantees and Standby LC in International Trade
• Distinction between Primary and Secondary Obligations
• Autonomy of the Guarantee Contract and Standby LC
• Bonding Structures in International Construction Contracts
• Problems of Demand Guarantees
• Court Intervention
• Applicable Law issues
• Uniform Rules for Demand Guarantees 2010
• UNCITRAL Convention 1995
Role of Guarantees and Standby LC

• The nature of risk in international trade
• Commercial, credit, political, litigation risks
• The role of guarantees in risk allocation
• Comparison of standby and non-standby letters of credit
• Standby letters of credit as payment mechanisms
Distinction between Primary and Secondary Obligations

- Primary – no proof of damages – guarantor’s obligation crystallizes upon demand
- Secondary – proof of damages – guarantor’s liability is co-extensive with the principal.
  * Question of Construction of wording!
  * Liability follows classification of obligation
- Case study: Apugo v ACB [1989] 1 CLRQ 87
Autonomy of Guarantee Contract and Standby LC

- The origin of autonomous undertakings
- The independence principle
- Payment obligation
- Indirect guarantees and counter-guarantees
- Compliance with the guarantee’s terms
Demand Guarantee Structure - CoS

1. Underlying contract (i.e. sales contract)

P (Principal (seller) in Japan)

(4) Counter-indemnity

IP Bank (Principal’s bank in Japan and also the instructing party of the demand guarantee.)

(3) Counter-guarantee

G Bank (Beneficiary’s bank in Nigeria and also the guarantor of the demand guarantee.)

B (Beneficiary (or buyer) in Nigeria)

(2) Demand guarantee

counter-guarantee.
Bonding Structures - Construction

- Bid and Tender Bonds
- Advance Payment Guarantees
- Retention Money Bonds
- Performance Bonds
- Maintenance and Warranty Bonds
Problems of Demand Guarantees

- Ambiguous drafting – *Trafalgar* case – keep it simple!
- Abusive calls – GOSS Arbitration – Juba II WB Contract
- Judicial misapprehension – *Equinox v. BG Exploration Production* [FHC/ABJ/CS/904/2011]
- Enforcement delays – *ADIC v. NLNG* [2000] 4 NWLR (Pt 653) 494.
Court Intervention

- Restrain abusive call
- Enforcement

* Success of judicial intervention depends on drafting!
* *Wuhan Guoyu* [2012] EWCA Civ. 1629:
  6/10 = Guarantee Contract!
Applicable Law issues

- Conflict of laws in international trade transactions
- Law Applicable to Contractual Obligations
- Issuer’s Law – an unsafe assumption

Uniform Rules for Demand Guarantees 2010

- Background and history of the URDG
- Non-documentary conditions
- Presentation of demand
- Time for examination of demand and for payment
- Extend or pay demands
- Governing law and jurisdiction
UNCITRAL Convention 1995

• The major purpose of the Convention is to ‘establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment under independent guarantees and stand-by letters of credit’.

• Article 19 provides an internationally agreed general definition of the types of situations in which an exception to the obligation to pay against a facially compliant demand would be justified.

• Article 20 deals with confers jurisdiction for the availability of provisional injunctive measures from the court in both preventing payment, as well as for the attachment of the proceeds of an alleged abusive call, where payment has already been effected.
Q & A

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