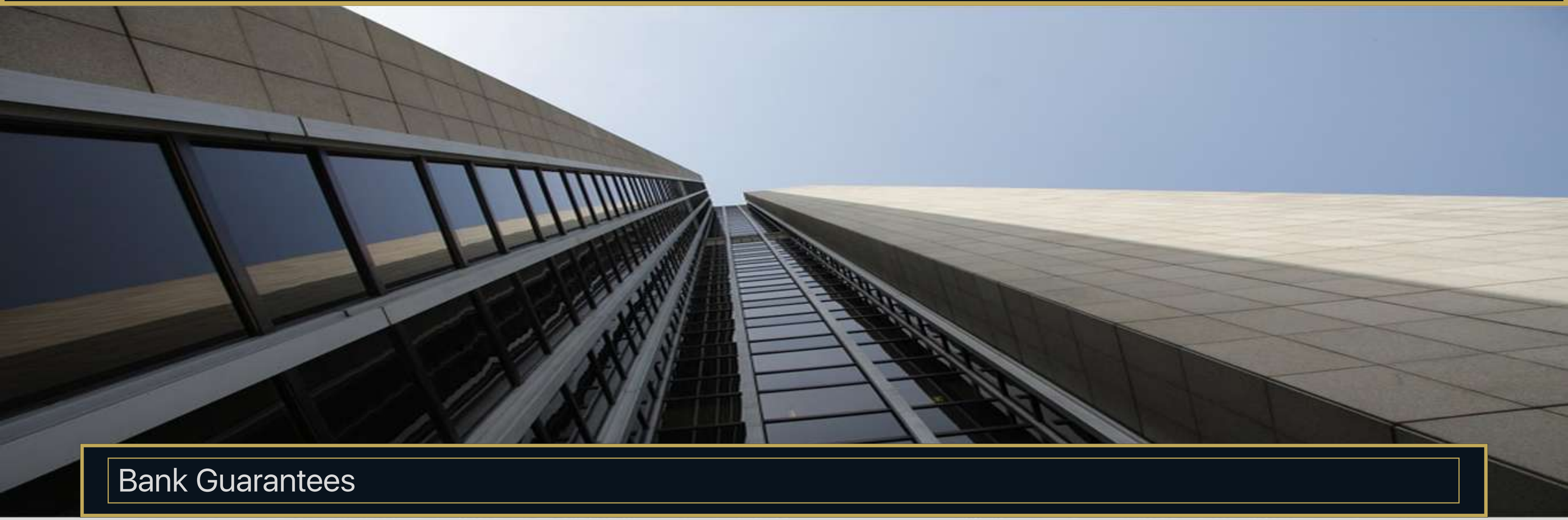
# Auricoin Bank Guarantees





## Bank Guarantees

Your peace of mind matters, especially when your money crosses global borders. Protect your business from unexpected disruptions in international trade through Auricoin's Bank guarantees. These can be your contingency measures in the event of sudden cash flow problems. It also ensures that your losses are minimised in the event that your suppliers are unable to meet the terms of your transactions.

# The Bank Guarantees

Demand guarantees are irrevocable undertakings, independent underlying contracts, issued by a bank guarantor on the instructions of the applicant to pay the beneficiary any sum that may be demanded stated in the text of the guarantee. The International Chamber of Commerce (ICC) has aimed to highlight the use of ther most important instruments of the international trade to achieve an important juridical security and help to avoid hesitation, misunderstating and confusion. In the field of the independent guarantees, the recent major development has been the adoption of the Uniform Rules for Demand Guarantees (URDG), Brochure 758. This publication replaces URDG 458 and contains new definitions and interpretation rules to provide greater clarity and precision.
Keywords: Bank Guarantees; Types of Guarantees; Independence Principle; International Chamber of Commerce; Uniform Rules.

# Introduction

Guarantees can be defined as those instruments that ensure the fulfilment of the obligations agreed by the parties in a contractual relationship. Consequently, guarantees serve as a means of preventing the risk of non-performance, as a means of dissuasion of the possible non-performing party and, in the last case, as a mechanism of compensation for the injured party for the damage caused in the event of non-performance of a contract.

In different legal systems, two types of security are usually distinguished: in rem and personal security:

1) the former are those that encumber specific assets and are subject to the performance of the obligation that is secured;

2) the latter are those over the assets of the guarantor, which are added to the debtor's assets in order to respond to the debt incurred.

Guarantees have acquired an enormous boom in international trade due to at least two circumstances that currently condition its development:

Firstly, the ever-increasing economic interdependence has led to a wide variety of international contracts in which the parties involved are companies from different countries. Economic exchanges tend to be initiated by instantaneous contractual transactions. Sometimes these transactions are ongoing and sometimes they are the seed for other, more complex and economically relevant transactions, which have the added advantage of generally taking place over an extended period of time. These types of commitments can be described as "long-term contracts": a category that encompasses operations such as the execution of an engineering project, the installation of industrial equipment or the manufacture of capital goods.

The growing economic importance of contractual commitments and the remoteness of the contracting parties directly justifies the existence of a mutual distrust between the parties. This fact is at the root of the need to influence the securing of contracts by means of a guarantee. Thus, the guarantee appears in international trade as a "daughter of mistrust". This distrust is justified by the normal and mutual ignorance that the parties have of each other in this type of operation, and which prevents them from fully gauging the seriousness and capacity to execute, in the future, the contractual obligations assumed by each of them.

Secondly, in recent years, a fact of enormous significance has become increasingly perceptible: the change in the economic positions of sellers and buyers in the market. From an international market dominated by the former, there is an increasing shift to a market controlled by the latter. As a result, the creditor of the services is making the provision of guarantees for the fulfilment of contractual obligations a regular requirement. In fact, importing countries today tend to impose their conditions on exporters and contractors from more developed countries on the basis of high liquidity, largely from raw materials, and extreme competition among suppliers and contractors. The creditor party does not want its interests to be harmed and therefore demands that, as a condition for the conclusion of a contract, the debtor of the obligations must provide sufficient security for the performance of its obligations.

As we have just seen, the multiplication of the risks inherent in international economic operations and the distrust and uncertainty that usually surrounds them, has made the granting of guarantees for the performance of contractual obligations an unavoidable requirement. These guarantees tend to be basically of a personal nature. Security interests are infrequent in the field of international trade due, to a large extent, to the limited international effectiveness of such figures. This is particularly evident in relation to the creation of security rights in movable property. Due to the traditional application of the lex rei sitae rule and the profound divergences in national laws, the existence of a security right, which has been validly created in one country, may become ineffective when the asset given as security is transferred to a second country.

In conclusion, economic operators have clearly opted for recourse to personal guarantees, using, at first, institutions already known in the various legal systems, such as the surety bond. However, nowadays, in the vast majority of cases, it is through the issuance of an independent bank guarantee that compliance with the contractual obligations corresponding to the originator of the guarantee is usually ensured.

# The origin and economic role of independent Guarantees

The international commercial reality is increasingly giving rise to standard scenarios such as the following: a Spanish construction company goes to a public tender for the construction of an industrial facility in Saudi Arabia. In the bidding conditions established by a Saudi Arabian public body, an unavoidable requirement is the presentation of a bank guarantee to ensure that, if the work is finally awarded to this company, it will carry out the construction in accordance with the terms of the tender. The Spanish company, therefore, turns to a Spanish bank to issue a guarantee in favour of the Saudi public body that can be executed if the Spanish company, being awarded the contract, does not finally carry out the construction in accordance with the terms set out in the tender documents.

This imaginary scenario reflects a reality that is commonplace today in international commercial practice. With the new economic circumstances and the incessant growth of international trade, in recent years there has been a spectacular boom in the issuance of independent bank guarantees. In fact, although the birth of this type of guarantee took place several years before, the interest of the doctrine on the figure really began after the Iranian revolution of 1979, when a large number of independent guarantees issued in favour of government agencies of the Iranian government were claimed and Western companies from several countries went to their courts with the aim of preventing the payment of these guarantees.

In the mid-sixties of the last century and in this context of redefinition of the correlation of forces existing between the participants in international trade that we have already mentioned, the interests of the parties involved -including those of the credit institutions- were not in line with the traditional types of existing personal guarantees -the so-called surety bonds-, which had been used in the past to guarantee the payment of the guarantees.

As a consequence, a profound change took place. Thus, banking practice is going to give rise to new forms of insurance with which it is intended to guarantee the correct fulfilment of the obligations assumed by the debtor in the main contract. The fundamental reasons for this change are:

1. The reality of international commercial transactions shows how the creditor of the performance in the main contract, due to his usual pre-eminent position, requires - given the solvency margin that accompanies such entities - the presence of a bank that becomes the guarantor of the debtor's performance.
2. Secondly, the debtor party in the main relationship takes a dim view of the traditional surety deposit, which was a heavy burden on the treasuries of the various exporting companies.
3. This is accompanied - thirdly - by the fact that the banking institutions seek to maintain an independent position with regard to the circumstances and possible litigation that may arise from the guaranteed relationship, seeking to maintain an autonomous position with regard to the main contract.

In response to these claims, and especially to the possibility of the bank assuming an independent position, American banks began to issue independent guarantees, using the formal forms of traditional letters of credit for this purpose. This practice was due to the fact that US law considered the issuance of guarantees to be outside the scope of the banks' activities and prevented them from deriving any effects from any such commitment made by them. Thus, the letter of credit scheme began to be used to achieve the practical result of issuing guarantees. These letters of credit, which formally constitute genuine documentary credits, are called standby letters of credit and their use has become increasingly generalised in a large part of international commercial relations, with the issuing of this new form of personal guarantee being assumed by the different entities in the world as a typically banking function.

The purpose of the guarantee, which is very different from the traditional documentary credits serving as a means of payment, will have a decisive influence on the change in the hitherto typical structure of the commercial L/C. The delivery of the documents representing the goods will be replaced by the notification of the beneficiary of the guarantee to the bank, stating that the debtor of the main contract has defaulted. The delivery of the documents representing the goods will be replaced by the notification of the beneficiary of the guarantee to the bank, stating that the debtor of the main contract has defaulted on his obligations. Subsequently, such a notification will not even be necessary, and only the simple claim of the beneficiary will be necessary for the guarantor bank to pay the guaranteed amount.

The new purpose of the L/C and its characterisation as an independent undertaking was widely accepted on the international markets, in particular by European banks, which gradually developed a new type of stand-alone contract with an insurance purpose, known as first demand guarantees. This new form of guarantee will eventually acquire a specific structure and contours compared to the US standby letter, although its purpose is the same.

## Advantages of its use

The success achieved by independent bank guarantees in international trade has been enormous. Their massive use is due to the multiple advantages that, given their particular structure, derive from them for all the participants in an international commercial transaction. This is logical if we consider the economic function that a bank guarantee plays for the three parties involved in such a transaction: a) the beneficiary of the guarantee -creditor in the main guaranteed relationship-, b) the bank, which acts as guarantor, and c) the originator of the guarantee -generally the debtor in the main relationship-.

Advantages for the beneficiary

Focusing on the figure of the beneficiary, the issuance of a guarantee of this type entails a first advantage for him: the guarantee fulfils an insurance function, since its mission is to cover the risks that may arise if his counterparty in the underlying relationship has not fulfilled its obligations, compensating him for the economic damages that such conduct has caused him.

In addition, secondly, the person who receives the guarantee tries to ensure that his claim can be met at any time, without having to prove either the damage suffered or the default of the debtor in the principal relationship. Consequently, it prevents the execution of the guarantee from being influenced by the vicissitudes that affect the normal development of the underlying contract, by imposing a total separation between the guaranteed obligation and the guarantee contract.

These advantages for the beneficiary have a direct correspondence in the wording of the guarantee contract itself through the introduction of the "on first demand" clause which, in addition to providing the aforementioned facilities, allows a change of roles in the procedural sphere through the reversal of the proof. In effect, according to this clause, the beneficiary is only obliged to comply with what is agreed in the letter of guarantee, and no proof of the debtor's non-compliance with the guaranteed obligation can be required. Consequently, if the debtor - usually the originator of the guarantee - were to disagree with the bank's payment, it would be the debtor who would have the burden of taking legal action. This special position of the beneficiary is reflected in the German doctrine of erst zahlen, dann prozessieren (first pay, then litigate).

Advantages for the issuing bank

Secondly, the issuer of the guarantee itself, the guarantor bank, is also greatly benefited by the issuance of the guarantee. Firstly, it receives a financial reward from the debtor-guarantor of the guarantee. However, although this financial benefit is important, the real interest of independent guarantees for banks is that their autonomous position means that they fulfil their mission if they issue the guarantee in favour of the beneficiary and pay the amount when it is properly claimed.

The bank's position makes it deal only with formal conditions incorporated in the letter of guarantee, but it does not have to ascertain whether or not the claim is materially valid. The bank does not want to be mixed up in the circumstances surrounding the main relationship, so if the claim is made in accordance with the agreement, it must make payment of the guaranteed amount. Once the guarantee has been honoured, the bank will exercise its right of recourse against the originator, who must compensate the originator for that fact. In this situation, the originator may not oppose the payment demanded by the bank, claiming that the claim for the guarantee was not legitimate, provided that the bank had acted in accordance with the terms of the guarantee contract.

Consequently, as J. Sánchez-Calero Guilarte points out, the bank is greatly favoured by this contractual figure, as it achieves the elimination of two types of risk:

1. On the one hand, it avoids the fulfilment of its obligations depending on circumstances or vicissitudes outside its conduct, or what amounts to the same thing: as long as its actions have been diligent, the ordering party will not be able to oppose it with any type of exceptions derived from the main contract;

2. On the other hand, it prevents fraudulent or irregular actions carried out by the beneficiary from having repercussions on him, since it will be the debtor-ordering party himself who will have to act against such conduct.

Advantages for the debtor-ordering parties

Finally, the issuance of an independent guarantee also brings advantages for the debtor-orderer of the guarantee. This person, although not a party to the guarantee contract, has a strong interest in the conclusion of an independent guarantee for two main reasons:

Firstly, the guarantee fulfils a credit function for him, as the bank assures the beneficiary that it will pay the guarantee if it is properly claimed from him. It accepts this obligation without the originator having to make a provision in the same amount as the amount stipulated in the letter of guarantee.

Secondly, in the main contract, the debtor has undertaken to obtain the intervention of a bank to guarantee the performance of his obligations in this relationship, the issuing of the guarantee being an indispensable condition for the final conclusion of such a contract. The guarantee therefore becomes a prerequisite for the realisation of the underlying contract, the bank's trust in doing so proving to be a factor of economic benefit for the debtor, to such an extent that, without it, he would certainly not have succeeded in the main relationship.

Consequently, the multiplication of the risks inherent in international economic transactions and the distrust and uncertainty that usually surrounds them, have made the granting of guarantees for the fulfilment of contractual obligations a common requirement. However, this need was not accompanied by contractual figures that were adapted to the interests of those involved in these operations. It has therefore been the participants in international trade themselves, and in particular the banking institutions, who have been developing a new type of personal guarantee: "independent or autonomous bank guarantees", which have become the means of insurance for international trade operations par excellence, due to the multiple advantages derived from their use. These guarantees, as we will see below, do not correspond to a single type, but, as they have been used more profusely in trade, they have adopted a varied typology. The following pages are devoted to their analysis.

# Types of independent guarantees

The enormous complexity of international economic operations and the wide diffusion that this type of guarantee has experienced in international trade introduce a factor of difficulty when it comes to systematising them.

As a result of practice, the circumstances of each case have conditioned the characteristics of each type of guarantee, which means that we are faced with a very wide range of guarantees, with great diversity among them. In any case, and in spite of this variety, we will use a series of criteria - by no means random - with the aim of clarifying the different types of independent bank guarantees.

Thus, 1) firstly, we will distinguish between bank guarantees according to the type of guaranteed contract; 2) secondly, we will take into account the criterion of the number of banks involved in the overall guarantee operation; 3) thirdly, we will differentiate according to the way in which the guarantee is claimed; 4) finally, we will analyse in a separate section the specific characteristics of the standby letter of credit, when it fulfils an insurance function.

According to the purpose of the guarantee

This classification, the most traditional, takes into account the nature of the guaranteed obligation, highlighting the different possibilities of using the independent guarantee contract to secure the different transactions that take place in international trade. Within this section, we can highlight the following:

Bid or tender guarantees. The requirement of this form of guarantee is common in the award of contracts for the execution of works, supplies or other types of contracts, particularly when the entity that calls for the execution of the contract is a public law entity. The purpose of such guarantees is to prevent the bidder from withdrawing its bid once the tender or competition in question has been awarded. Accordingly, the bank acquires the obligation to pay the amount set out in the letter of guarantee in the event that the debtor-orderer refuses to conclude the contract with the beneficiary according to the terms specified in the bid in advance.

This guarantee is the best illustration that companies that decide to bid for a contract do so with the intention of finally being awarded the contract offered, i.e. its purpose is to ensure the seriousness of the bid submitted. For the beneficiary, the guarantee covers the risk that the bidder to whom the contract has been awarded does not finally complete the contract and, as a result, a new invitation to tender has to be issued. A study of practice shows that this type of guarantee usually covers an amount estimated at one to five percent of the overall value of the transaction.

Performance bonds. This form of security usually takes various forms in international trade, depending on the content of the obligations secured. The most important of these are delivery guarantees, in which it is ensured that the principal debtor will deliver the specified goods and that such delivery will be made in accordance with the terms of the contract.

In this case, the debtor-orderer's breach of the duty of "good performance" of the obligations of the underlying contract is secured by the issuance of the guarantee, whereby, consequently, the bank would be obliged to make payment of the stipulated amount if the debtor-orderer fails to fulfil these obligations. In other words, its purpose is simply to guarantee the fulfilment of an obligation: the proper performance of the main contract. In this case, the beneficiary has a strong interest in the fulfilment of the obligations of the main contract and demands the issuance of such a guarantee in his favour. For its part, the bank promises to pay the sum of money agreed in the letter of guarantee if the debtor-orderer does not comply with the provisions of the main contract. Again, it can be seen from the usual practice that the amount of this type of guarantee usually ranges between 5 and 20% of the total value of the contractual transaction.

Refund guarantees. In this case, the obligation of the guarantor bank is to pay the amount of the guarantee to the beneficiary in the event that the originator-debtor fails to repay the amounts previously paid by the beneficiary in accordance with the stipulations agreed between the two parties in the main contract. With them, the beneficiary tries to protect himself from the serious economic damage that could result from the loss of the sums of money advanced to the debtor-ordering party. By issuing this type of guarantee, the beneficiary also seeks to ensure that the underlying contract will be performed correctly, since, if this is not the case, he can always recover the advances previously paid. As a general rule, it is logical that the value of the guarantee corresponds to the price paid in advance.

Maintenance bonds. This last type of guarantee is intended to guarantee the contractual obligations arising from the maintenance of a specific work or construction after its completion, in accordance with the terms of the main contract.

Depending on the intervention of one or more banking institutions

If up to now we have been talking about a "standard situation", in which a triangular relationship arises with the presence of a single bank in the guarantee operation, practice shows that such a scheme is not the closest to the one that exists in reality. On the contrary, the intervention of a second bank is common. This is due to the requirement of the beneficiaries that the guarantee must be issued by a bank established in their own country. We can therefore speak of two forms of guarantees in this classification: direct and indirect.

Direct guarantees

Firstly, there are direct guarantees. In this case there is a triangular scheme with a debtor-guarantor, a creditor-beneficiary and a bank-guarantor. In this form of guarantee, it is normal for the main contract to contain a clause whereby the debtor undertakes to provide a guarantee in favour of the creditor in this relationship, in order to ensure the proper performance of its obligations. This agreement usually contains the precise terms and conditions under which the security is to be issued.

Subsequent to the conclusion of the main contract, the debtor in this relationship orders his bank to issue a letter of guarantee, in accordance with the stipulations previously agreed with the beneficiary. This letter of guarantee must contain the conditions according to which a hypothetical future payment must be made, so that, if the bank pays according to the terms of the guarantee, the debtor-ordering party will be under the obligation to reimburse the bank for the amount delivered by the latter to the beneficiary.

Indirect guarantees

Secondly, it is necessary to refer to indirect guarantees. In this case, the intervention of two banks is required. In this second type, although sometimes the presence of a second bank in the operation is due to a legislative imposition in this sense, it is normally due mainly to the distrust felt by the beneficiary towards his counterparty in the main relationship. This distrust leads the beneficiary to force the originator to have the guarantee issued by a bank in his own country, where it will be much easier for him to submit the claim directly.

In such cases, the originator usually delegates the financial aspects of the guarantee contract to a bank he trusts, which is ultimately liable for the guarantee. This bank, in turn, will ask a bank based in the beneficiary's country to provide such a guarantee, undertaking to reimburse the beneficiary should the beneficiary claim payment.

Consequently, the guarantor bank is directly liable to the beneficiary and thus bears the risk of the claim and the payment of the guarantee. In order to insure itself against this risk, the guarantor bank requires the first bank to guarantee that it will not suffer any economic damage from a hypothetical payment of the guarantee. The first bank must therefore issue a "counter-guarantee" or "guarantee of a guarantee" in favour of the guarantor bank, the purpose of which is to indemnify the second bank - the guarantor bank - against all costs that it might incur as a result of the possible enforcement of the guarantee issued in favour of the beneficiary.

Although the intervention of a second bank is normally articulated in the manner described above, there are other modalities - basically two - in which, unlike the previous one, the second bank is not obliged to issue the guarantee directly in favour of the beneficiary. It is therefore necessary to differentiate between the two types, since it is strictly only in the case described above - indirect guarantee - that there is an independent and autonomous commitment on the part of the second bank.

The first possible scenario is one in which the second bank acts only as a notifying or advising bank, merely notifying the beneficiary of the issuance of a guarantee in his favour, but without assuming any payment obligation. Its role is thus limited to the notification of the guarantee and the transmission of the guarantee together with any communications that the collateral taker may make to the guarantor bank. The advising or notifying bank does not assume any obligation towards the collateral taker in relation to the collateral contract, although it does seem that it has to maintain a general duty of care, in particular in checking the authenticity of the collateral in the event of a claim.

The second case refers to the fact that the advising bank may also undertake to make the payment, but this does not result in an obligation towards the collateral taker as there is no relationship between the two. In this case, payment will be made if, when the guarantor bank is notified of the existence of the claim for payment, it authorises the delivery of the amount agreed in the letter of guarantee.

In short, the conclusion of a separate guarantee contract between a bank and the beneficiary does not imply the existence of a single relationship. On the contrary, in the simplest case of a direct guarantee, there is necessarily also a principal relationship between the debtor-guarantor and the creditor-beneficiary of the guarantee, as well as a relationship between the debtor-guarantor and the bank-guarantor. Therefore, rather than speaking of a security contract, one should speak of an "overall security transaction", which is composed of several relationships or segments. Moreover, if we are dealing with the issue of an indirect guarantee, a fourth segment must be added to the relationships that make up the global operation: the one that links the two banks to each other.

# According to your claim form

This classification takes into account the way in which the demand for payment of the guarantee by the beneficiary must be made in order to be considered adequate to the terms stipulated in the guarantee. Two main groups can be distinguished:

Guarantees on first demand or on first demand.

Firstly, one can speak of guarantees on first demand or on first demand. This type of guarantee is widely used in international trade, as it is the most favourable to the beneficiary's interest. This is because the guarantor bank must pay once it has knowledge of the claim on the guarantee. There are no other conditions, apart from those established in the letter of guarantee itself in relation to the claim period and the amount of the claim.

These guarantees are also called "automatic" or "unconditional" insofar as the bank has to pay out once the beneficiary has made a proper claim. The bank does not have to consider any evidence of the debtor's default, nor does it even need to ask for any documents that could justify it.

In this case, we must be aware that we are dealing with a type of guarantee that is being used on a massive scale, which is due - ultimately - to the redefinition of economic forces in international trade, to which we have alluded previously: the market is today - increasingly - dominated by the buyers, imposing this form of guarantee which, as we have just seen, is the one that most favours their interests. However, if the balance of power in the principal relationship were greater, then the exporter will try to negotiate a guarantee that is payable by the presentation of documents, which leads us to the second category.

Documentary or conditional guarantees

Secondly, it is worth mentioning documentary or conditional guarantees. This is a category that is increasingly used as a reaction to the numerous abuses that have been occurring in the claiming of guarantees on first demand. This type of guarantee incorporates a set of formal and documentary conditions, the purpose of which is to show objectively that the event giving rise to the guaranteed event has actually occurred.

In this type of guarantee, it is established that the beneficiary must provide, together with the claim, a series of documents. It should be noted that such documentation, the presentation of which is a prerequisite for the validity of the claim, is not always necessarily that which seeks to reflect specific aspects of the secured obligation, but may also consist of a declaration in which the payer accepts the claim for the guarantee, or a declaration by a third party stating that the debtor has defaulted on his obligations.

Finally, although not as frequently as in the previous cases, it is also possible that the claim is conditional upon the beneficiary's presentation to the guarantor of a court judgment or arbitration award condemning the obligor-ordering party for non-performance of its obligations under the main contract.

Although at first sight it may seem that the imposition of this type of claim introduces a certain type of dependence of the guarantee contract on the principal relationship, the independence of the guarantee is not altered since, on such occasions, the bank is only confronted with documents and never has to decide on the existence of facts. The guarantor bank has to assess whether or not the documentation submitted by the beneficiary corresponds to that stipulated in the letter of guarantee, but does not have to ascertain whether or not there has actually been a default of the debtor in the underlying relationship.

Ultimately, only those guarantees in which documentary conditions are stipulated can be considered as fully autonomous and independent. The success of international guarantees is due, among other reasons, to the fact that banks are exempted from any examination of factual issues. The banks only accept the possibility to assess whether the documentation submitted complies with the conditions proposed in the letter of guarantee. The payment of the guarantee is therefore not influenced in any way by the circumstances surrounding the main relationship. What is important - as we say - is the presentation of certain documents - those required in the letter of guarantee - which are a clear indication of the occurrence of the eventuality for the securing of which the guarantee was issued. Therefore, if the guarantor, after assessing the documents presented with the required diligence to decide their adequacy to the terms of the guarantee, makes the payment, it is the debtor-guarantor who will have the burden of going to court in the event that the latter considers that the guaranteed obligation has not arisen.

# Stand-by Letter of Credit

The external form of this type of L/C should not make us forget that we are dealing with an instrument that fulfils the same function as any other independent guarantee and that, therefore, it can be classified as such. Possibly, the use of the contractual mould of documentary credits has caused a great deal of confusion as to the nature of both instruments and their differences. However, if we go into the comparison between independent bank guarantees and stand-by letters, the idea that we are dealing with a similar instrument increases for several reasons:

Firstly, it is observed that both figures fulfil the same guarantee function: their purpose is to ensure the beneficiary the payment of a sum of money in the event of a default by the debtor of the principal relationship.

Along with the functional identity, there is nowadays - in the second place - a similarity with regard to the claim for payment of the guarantee, especially if we refer to a documentary guarantee. In the latter case, as in the case of the stand-by letter of credit, the beneficiary must accompany his claim with all the documentation stipulated in the letter of guarantee in order for the claim to be considered correct.

Last but not least, in both situations we find that the obligation assumed by the bank in relation to the guaranteed contract is an independent and autonomous commitment.

All these considerations cast serious doubts on the effective existence of two instruments of a different nature. In support of this position, the work of UNCITRAL in this field can be cited, where an international convention has been drawn up that has been able to accommodate both instruments by generating a series of common rules of application. However, the decisive influence exercised by US banks in international trade, in addition to their traditional position of regulating this operation by means of the Uniform Rules on Documentary Credits, has always been a serious obstacle to the definitive unification of the regulation of all the instruments that operate as independent bank guarantees in international trade. This regulatory separation was also definitively imposed at the ICC after the approval in 1998 by the Commission on Banking Techniques and Practices of specific rules for the issue of international stand-by letters: the Rules on International Stand-by Letter of Credit Practices - hereinafter ISP 98 -, seven years after the adoption of the Uniform Rules on First Demand Guarantees - hereinafter RUGD 458 -.

So far, the analysis of the different types of collateral. Even assuming their differences, they all seem to have some common elements, which -in short- are the ones we are going to deal with next.

# General characteristics of independent guarantees

Bank guarantees have a characteristic that clearly distinguishes them from other personal guarantees in commercial transactions: their lack of accessory nature (1). Together with this main feature that differentiates them, we must point out that the issuance of a guarantee is not an isolated activity, but that a series of relationships coexist with it, which lead us to speak of the guarantee operation as a complex operation (2). Let us focus on these two issues.

Lack of accessory nature as a defining feature

As we have already pointed out, the success of bank guarantees is mainly due to the guarantor bank's interest in being disassociated from any circumstance relating to the main contract. In order to respond to this interest, banking practice, through the autonomy of will of the parties, has escaped from the traditional personal guarantees, especially from the surety which, as a characteristic feature, maintains its accessory nature. In order to understand what has come to be called "the flight from accessoriness", in the words of G. Portale, it is necessary to clarify the two possible meanings of this term in relation to the bank guarantee contract, since, as opposed to a "functional" accessoriness, a "structural" accessoriness must be distinguished.

1. Firstly, it is possible to speak of a "functional" ancillary nature. In this case it seems absurd to ignore the fact that bank guarantees are ancillary contracts insofar as they are contractual commitments with an ancillary function in relation to another. In this case, the bank guarantee, like the surety, fulfils a related economic function such as securing the performance of a third party.

2. On the other hand, "structural" accessory nature consists of the close link existing between the obligation of the debtor and that of the guarantor, to the point of stating that the latter fulfils it for the former, in the event that the latter does not do so, as is the case of the surety in the Spanish Civil Code.

This second meaning of accessory nature, however, is not characteristic of the guarantee contract. In fact, the bank that issues the letter of guarantee does not perform "instead of" but assumes a different obligation, the purpose of which is the payment of a monetary sum, and for whose performance it is only necessary that the beneficiary's request takes place in the manner stipulated in the contract of guarantee. This lack of "structural accessory nature" of bank guarantees has two very important consequences: a) the independence of the guarantee contract from the other relationships that make up the overall guarantee transaction, in particular from the guaranteed contract, and b) the unenforceability of defences in the guarantee relationship deriving from the main relationship.

The principle of independence

The guarantee contract maintains a clear independence with respect to the other contracts with which it is functionally connected in the global guarantee transaction. Similarly, it should be noted that in the case of the intervention of a second bank established in the beneficiary's country, the counter-guarantee contract linking the two banks also has the same autonomous or independent character with respect to the other linked contracts.

The relationship of the bank - the issuer of the guarantee - with the beneficiary, from an obligatory point of view, maintains total independence with respect to the vicissitudes that may surround the relationship that links, firstly, the debtor-guarantor with the beneficiary - the main or underlying relationship - and, secondly, that which links the bank-guarantor with the debtor-guarantor. The issuer of the letter of guarantee makes a commitment of its own, the content of which is determined by the stipulations of the letter of guarantee, but which is independent of the commitment that the debtor may have made in the underlying relationship.

This principle is the fundamental principle on which the international texts on the subject are based. Thus, first of all, in the Uniform Rules for First Demand Guarantees, 2010 revision - hereinafter RUGD 758 -, Article 5, entitled "Independence of the guarantee and the counter-guarantee", includes this principle. Thus, in relation to guarantees, it states that "the guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is not affected or bound in any way by that relationship". The same applies to counter-guarantees, stating that "the counter-guarantee is by its nature independent of the guarantee, the underlying relationship, the application and any other counter-guarantee to which it is related, and the counter-guarantor is not affected or bound in any way by that relationship".

Accordingly, RUGD 758 applies exclusively to stand-alone or independent guarantees, i.e. guarantees where the bank's obligation is not influenced by evidence of the debtor's failure to perform its obligations under the principal relationship. In these guarantees, the bank does not want to be obliged to assess whether or not the debtor in the underlying relationship, who is also its customer and who has asked it to issue the comfort letter, has properly fulfilled the obligations assumed in the main contract. Banks do not want their position in the guarantee relationship to be akin to that of an arbitrator or a judge. On the other hand, the collateral taker is in a rather comfortable position, as he does not have to prove the debtor's default in the underlying relationship, but only has to correctly claim payment of the collateral in accordance with the stipulations of the collateral.

Secondly, the 1995 UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit also contains the principle of independence in Articles 2 and 3. Thus, Article 2.1 states that:

For the purposes of this Convention, an undertaking is an independent obligation, known in international practice as an independent guarantee or standby letter of credit, undertaken by a bank or some other institution or person ("guarantor/issuer"), to pay to the beneficiary a specific or determinable sum on its simple claim or on its claim accompanied by other documents, under the terms and any documentary conditions of the obligation, stating, or implying, that payment is due by reason of a failure to perform an obligation, or other contingency, or for money lent or advanced, or as a result of an overdue debt owed by the claimant or another person.

Article 3, entitled "Independence of the undertaking", provides that:

For the purposes of this Convention, an undertaking is independent when the obligation of the guarantor/issuer to the beneficiary (a) does not depend on the existence or validity of an underlying transaction, or any other undertaking (including a stand-by letter of credit or independent guarantee to which a confirmation or counter-guarantee relates), or (b) is not subject to any term that does not appear in the undertaking or to any future and uncertain act or event other than the production of documents or other similar act or event within the guarantor's/issuer's line of business.

From the reading of the foregoing provisions, we can conclude that the relationship between the bank and the beneficiary is considered in the contractual text as autonomous, since both its validity and its effectiveness and conditions are at no time subject to the possible non-performance of the obligations of the obligor-guarantor.

Closely linked to the principle of independence - a principle that characterises bank guarantees - is another typical feature that the doctrine usually refers to: their abstraction. In spite of the multiple interpretations that have been given in relation to it and, above all, in terms of its link with the cause of the contract, the abstraction of the bank guarantee contract actually occurs in relation to the main or underlying business.

This abstraction means that the guarantee and the main contract are completely independent of each other, from which it can be derived that the guarantee contract must be considered as an abstract contract, since its validity, effectiveness and operation do not depend in any way on the specific vicissitudes of the underlying relationship, and also on the particular circumstances of the contractual commitment that links the bank with the guarantor of the guarantee.

Consequently, when it is said that the guarantee is abstract or autonomous, we are affirming that it is a contractual commitment whose performance is not influenced in any way by the development of the bonded relationship. In terms of obligations, the guarantee contract is an independent contract with respect to any other contractual commitment that forms part of the overall guarantee operation, because its content and effects depend solely on what is stipulated between the beneficiary of the guarantee and the bank.

## Non-opposability of defences arising from the main contract

As noted above, the second consequence of the lack of "structural" accessoriness is that the bank cannot invoke any defences arising from the underlying contract when the collateral taker requests payment of the collateral. For the purposes of enforcing the guarantee, the guarantor is only interested in the correctness of the claim, and it is not his task to ascertain whether or not the claim is legitimate.

Consequently, the independence or autonomy from the main relationship entails the unenforceability of all defences other than those specific to the contract of guarantee. In other words, defences based both on the underlying contract that links the debtor-ordering party to the beneficiary and those derived from the contractual commitment that links the bank to the originator of the guarantee are unenforceable.

This is expressly stated in RUGD 758 itself, stating that "a guarantor's undertaking to pay under the guarantee is not subject to claims or defences arising from a relationship other than that between the guarantor and the collateral taker". An idea that is repeated in relation to a counter-guarantor's undertaking to pay under the counter-guarantee, since it "is not subject to claims or defences arising from a relationship other than that between the counter-guarantor and the guarantor or any other counter-guarantor to whom the counter-guarantee is issued".

However, we must point out that the general rule described above maintains an exception: the opposability of the exceptio doli. The fundamental reason for this exception is that the autonomy or independence of the guarantee cannot lead to the unfair result that the bank cannot oppose payment in cases of fraud or manifest abuse on the part of the beneficiary. The introduction of the fraud or fraud defence is not to be seen as an attack on the independent character of the guarantee, but rather as a necessary safeguard in those cases where it is necessary to hinder unfounded claims that may undermine the economic function of the guarantee, leading to manifestly unfair and immoral results.

## The guarantee transaction as a complex transaction

As J. Sánchez-Calero Guilarte points out, the exact determination of the nature of independent guarantees encounters a difficult obstacle in its configuration as a complex operation, which includes different relationships. The global guarantee operation will lead, at least, to the conclusion of three contractual commitments between the different parties involved.

a) Thus, in the first place, we can speak of the contractual relationship between the debtor of the main relationship and the bank. This relationship is characterised by the fact that it involves the assignment or order for the bank to issue a letter of guarantee in favour of the beneficiary - the creditor in the principal relationship. The content of this relationship makes it possible to include this type of contract in a fairly broad category of banking commitments in which a service is provided by the bank in the interest of its client. In fact, as R. F. Bertrams states, such a relationship between the ordering party and the guarantor bank must be regarded as a mandate contract. The term principal shows us clearly and concisely that, although the bank assumes an obligation of its own towards the beneficiary of the letter of guarantee, the bank is always acting on behalf of the debtor of the underlying relationship.

b) Secondly, it is necessary to refer to the actual contractual guarantee commitment, where the bank is directly obliged to the beneficiary to pay him the stipulated sum in the event that the debtor defaults on the guaranteed obligation. This relationship is the essential part of the whole guarantee transaction. Its main characteristic - as we have already repeated - is the independence of the guarantor's obligation with respect to the guaranteed obligation.

c) Finally, there is the main or underlying contract between the debtor -the guarantor- and the creditor -the beneficiary of the guarantee-. This contractual commitment, it can be said, is the presupposition of the other relationships encompassed by the overall security transaction.

d) However, these three relationships, although fundamental, are not the only ones. As we have already seen, in the vast majority of cases of guarantee operations in international trade, to these can be added the need for the intervention of a second bank established in the beneficiary's country and which issues the letter of guarantee. On these occasions, a fourth relationship is added to the three previous ones: the interbank relationship or segment.

As can be easily observed, the overall guarantee transaction is complex. It is made up of a set of legal relationships, and although such a transaction has an undeniable functional unity as a consequence of its ultimate purpose - to serve as a means of securing contractual obligations in international trade - it is no less true that the legal structure of the transaction does not correspond to this unity. Certainly, these relationships are functionally linked to each other, in such a way that if one of them did not exist, the others could not exist. To such an extent that, from a temporal perspective, they could be ordered by placing, in the first place, the conclusion of the underlying contract, in the content of which the obligation to issue the independent guarantee will be imposed. Secondly, there is the contractual relationship in which the debtor gives the order to his bank to issue the guarantee, with the aim of complying with what was previously stipulated in the main contract, and finally, as a consequence of this sequence of conduct, the bank commits itself to the beneficiary in the guarantee contract.

Despite this complex nature, from a legal point of view, the different relationships or segments that form part of the overall guarantee transaction are to be treated as independent contracts and, consequently, not legally linked to each other. This conclusion is based - as we have already stated - on the basic principle of bank guarantees: the principle of independence, which has been accepted both by RUGD 758 and by the UNCITRAL Convention. In the case of a bank guarantee, it is indisputable that the guarantee relationship linking the bank with the beneficiary of the guarantee must be considered independently of the underlying relationship and separately from the mandate relationship linking the debtor-ordering party with its bank, as well as, in the hypothetical case of the intervention of a second bank, from the interbank relationship.

# Regulation for independent guarantees

The massive use of bank guarantees clashes head-on with the problem that derives from their origin in international commercial practice: the lack of specific regulation in the vast majority of national legal systems. Since their emergence, the rules applicable to these guarantees were freely established by the contracting parties who, taking refuge in the principle of free will, adapted the text to their own interests. The problem of the lack of regulations was further aggravated by the different interpretations on similar points provided by the case law of the different countries which, at first, tried to integrate this new figure within the legal framework of the existing typical personal guarantees, especially in that of the surety.

Given this situation - lack of regulation and divergent jurisprudential interpretation - the insecurity of not having a uniform applicable regulation could put a stop to the widespread use of this type of guarantee by banking institutions in most of the world. These circumstances were aggravated by the aforementioned dominant position in the international relations of buyers, which was particularly reflected in the existence of an imbalance between the interests of the parties involved, giving rise to frequent abuses and unfounded claims by the beneficiaries of the guarantees.

With the objectives of, on the one hand, trying to achieve greater security in this field of international contracting and, at the same time, balancing the conflicting interests, the International Chamber of Commerce (ICC) of Paris has drawn up Rules that integrate a uniform set of rules applicable to these guarantees. Together with the former institution, and often in close collaboration with it, UNCITRAL worked on the elaboration of an International Convention on Collateral, which was finally adopted in 1995.

# The work of the ICC

The Uniform Rules for Contractual Guarantees (UGCG) (RUGC, 1978)

The ICC first became concerned about the issue of guarantees in international trade in 1964. In that year a Joint Working Group on Contractual Guarantees was set up, in which the Commission on Banking Techniques and Practices and the Commission on International Trade Practices were represented. The original idea was to try to achieve a uniform text reflecting existing usages and practices in this area, building on the experience of the ICC's earlier work on documentary credits, which had been very successful among international traders.

The work bore fruit in 1978 with the adoption by the ICC of the Uniform Rules for Contractual Guarantees (URCG). After tough negotiations and intense collaboration with UNCITRAL, a text was finally reached that sought to put an end to the abuses that had been occurring in relation to the use of contractual guarantees in international trade. However, so much work was not deservedly rewarded by a wide acceptance of the Rules in the commercial and banking sectors concerned. On the contrary, apart from a few exceptional applications, the 1978 Rules were a complete failure. The reasons for their lack of success are directly linked to certain features of the Rules which did not reflect what was actually happening in this particular sector. They have been criticised in this way:

1. Firstly, that there was a lack of clarity in the drafting of the Rules, a consequence of being the product of a compromise between "economic" forces with conflicting views.
2. Secondly, that such problematic issues as the non-inclusion of specific rules on guarantees on demand or on first demand, which, at that time, were already the most widely used in international commercial traffic, were omitted.
3. Thirdly, the correct claim by the beneficiary was subject to extremely demanding requirements. Thus, a court judgement or arbitration award or, failing that, written notification of the debtor-ordering party's approval of the claim had to be presented as justification for the claim.
4. Finally, the primary reason for their failure was that such Rules had not taken into consideration the main characteristic of bank guarantees: the independence or autonomy of the guarantor's obligation from the guaranteed obligation. On the contrary, they regulated contractual commitments provided with the note of accessoriness, where the bank was obliged to check whether there had been an actual breach of its obligations by the debtor in the principal relationship. Consequently, these rules did not serve the interests of the banks, let alone those of the beneficiaries.

The ICC Uniform Rules on First Demand Guarantees (RUGD 458)

The initial failure did not discourage the ICC Commission on Banking Techniques and Practices but, on the contrary, served as an incentive to work on a new text that would solve the errors and problems that had been noted in the previous one. However, the work encountered numerous obstacles, and two successive drafts - in 1983 and 1986 - were discarded, largely due to the lack of agreement between the sectors involved and, in particular, between those in favour of prioritising the contractual position of the banking institution and those who, on the contrary, defended a greater consideration of the interests of the other parties involved in the operation - beneficiaries and originators of the guarantee.

Finally, after the Joint Group resumed its work in 1988, the Uniform Rules for Demand Guarantees - RUGD 458 - were drawn up in 1991. In RUGD 458, the guarantee contract is considered as an independent, autonomous and irrevocable commitment. In this case, the payment of the guarantee by the guarantor is not conditional on proof of default of the underlying obligation by the debtor-guarantor, but rather the bank fulfils its obligations when it pays, once a claim is submitted by the beneficiary, in accordance with the conditions set out in the letter of guarantee. The guarantees covered by these Rules are of all types, ranging from the simple guarantee on first demand to the most complex documentary guarantees. Finally, it should be noted that they also apply to counter-guarantees, which are guarantees issued by a counter-guarantor bank for the payment of an amount of money to the guarantor bank, in the event that the latter has had to pay the guarantee.

## International Standby Practices for Contingent Liabilities (ISP98)

In this section we must mention, albeit briefly, the International Customs on Contingent Credit, drawn up by the ICC in 1998 -ISP 98-. Although, in theory, and taking into consideration its formal aspect as a documentary credit, nothing prevents the uniform regulation of this security instrument from being contemplated, if the parties so consider, by means of the ICC Uniform Customs and Practice for Documentary Credits -the latest version being the UCP 600 of 2007-, the functional differentiation of stand-by letters of credit - guarantee function versus payment function - together with the inadequacy of the UCPs for their regulation - since the latter rules are primarily designed to solve the problems in commercial traffic raised by commercial letters of credit -, make this choice unhelpful for the parties.

For this reason, and taking into consideration the specific characteristics of these letters of credit, the ICC has drawn up the PSI 98 as the most convenient option to have a detailed and complete regime of the obligations incumbent on each of the parties to a stand-by letter of credit. In these Rules, the stand-by letter of credit is configured as an autonomous commitment, with respect to the main contract, and of an irrevocable nature. Its claim by the beneficiary is essentially documentary in nature and, therefore, the issuer will have to check that the documents required in the letter of credit are presented and, once this has been checked, pay the agreed sum.

First Requirement (RUGD 758)

In the early years of RUGD 458, this regulation was not very well received worldwide. However, it should be pointed out that, on this point, the banking sector in Spain maintained a special position, since the Spanish Private Banking Association agreed at the General Council of 17 July 1995 that Spanish banks should collectively adhere to RUGD 458. Decisive for this was that in 1999 the International Federation of Consulting Engineers (FIDIC), an organisation that has a series of model contracts that are used worldwide, took the decision to incorporate RUGD 458 in all its independent guarantee models. This advance in practice was followed by a second step with the incorporation in 2002 by the World Bank of RUGD 458, also in the different model guarantee contracts proposed by this international organisation. These actions have had a decisive impact on the increased use of RUGD 458 in the issuance of guarantees and counter-guarantees worldwide, especially in relation to contracts concluded with emerging countries.

The ICC, which initially had not taken any measures to promote RUGD 458 in the various areas involved, nevertheless accompanied the above actions with a greater involvement in the task of training and technical support in relation to RUGD 458. In addition, this was accompanied by the creation by the Commission on Banking Techniques and Practices in October 2002 of a specific Task Force on collateral dedicated to both the promotion and the study of the practice of issuing international bank guarantees under RUGD 458. The task of this group was soon rewarded as a large number of major European banks adopted RUGD 458 as subsidiary rules in their collateral models, numerous consultations were held on their practical application, banks in many Middle Eastern countries began to issue collateral under the Rules and, overall, there was a fairly wide global acceptance that RUGD 458 met the needs of the various participants in international trade.

The growing success of RUGD 458, however, did not mean that the Collateral Task Force became complacent. On the contrary, at the April 2007 meeting of the ICC Commission on Banking Techniques and Practices, a paper entitled "The Business Case for the Revision of the URDG" was presented. This document was to be the starting signal for the revision of the RUGD 458, which has now finally resulted in the adoption of the new RUGD 758. The reasons given for adopting the new RUGD 758 are as follows:

RUGD 458 came into force in 1992. Since then, international banking practice in relation to independent guarantees has undergone some changes. The Rules had therefore become somewhat outdated. It was therefore necessary to accurately reflect at the regulatory level the reality that they were intended to address, and thus to reflect current market practice and the interests and aspirations of market users. While recognising that RUGD 458 remains a text that largely reflects existing practice, many of the Rules need to be redrafted to achieve greater precision and to remove the doubts raised in their practical application. These issues that are brought to the attention of the Commission on Banking Techniques and Practices are resolved by means of opinions which, in general, are not very far-reaching in terms of knowledge. The revision of the Rules is a good opportunity to incorporate the points made in these opinions and, in this way, to improve the rules applicable up to now.

A second and largely related reason is to provide much clearer answers, especially in cases where the practical application of RUGD 458 had given rise to ambiguities or misinterpretations. This need could not only be derived from the questions raised by users that gave rise to the Commission's opinions, but could also be drawn from the numerous observations and criticisms raised in the seminars and workshops in which the ICC had participated, as a consequence of its active attitude on the promotion of the Rules, which we have already pointed out.

Finally, and thirdly, the aim is to achieve greater coherence - both formal and substantial - in the codification carried out by the ICC in the field of international banking practice. Indeed, in the period since the adoption of RUGD 458, the ICC had developed PSI 98 on the issuance of stand-by letters of credit and, more recently, revised the Uniform Rules on Documentary Credits - UCP 600. These rules had improved their wording and filled certain gaps and problems that still existed in the wording of the UCP 458. In this respect, for example, ambiguous terms such as what should be considered as "reasonable time" had been eliminated or the standard of care required of the bank for the examination of the documents had been deepened. It is therefore a good opportunity to take into account the improvements made to the solutions provided in the aforementioned regulatory texts, through the same use of the concepts and terminology used.

Taking into account the above reasons, and after two and a half years of intense work, in which up to five draft texts have been produced in succession, the ICC finally approved these new rules on 3 December 2009, stating that RUGD 758 would enter into force on 1 July 2010. According to the introduction to the Rules, "RUGD 758 does not merely update RUGD 458, but is the result of an ambitious process to provide a new set of rules for first-demand collateral in the 21st century, rules that are clearer, more precise and more comprehensive".

a) In effect, in the first place, they attempt to provide greater clarity in the regulation of independent guarantees. This is because they have incorporated a treatment, concepts and terminology that have their origin in the current wording of the Rules and Practices for Documentary Credits -UCP 600-, a regulation that is now widely accepted by all users involved in international banking practice. Thus, following this model, Article 2 includes a set of definitions of certain terms that are used by these Rules both in relation to the subjective and objective elements of the guarantee obligation. In the same way, the search for greater clarity is reflected in the rules - especially Article 19 - which refer to the examination procedure by the guarantor to verify that the guarantee claim is in conformity with the stipulations.

b) Secondly, RUGD 758 is also intended to be more precise than its predecessors. The achievement of this objective has been behind many of the proposals of the drafters of this revision, as certain standards in the previous Rules had given rise to divergent interpretations on certain important issues. In particular, for example, this could be predicated in relation to the interpretation to be given to certain expressions contemplated both to the standard of care that is required of the guarantor in the examination of the guarantee -reasonable care- and to the time limit for carrying out such examination -reasonable time-. Consequently, the new RUGD 758 eliminates any standard that could give rise to an ambiguous interpretation, promoting greater certainty and predictability for the parties involved in a comprehensive collateral transaction. Examples of this greater precision can also be found in the provisions on time limits in the event of a review of a payment claim, in the case of a necessary extension due to force majeure, or in the case of suspension due to a request for a "extend or pay" claim.

c) Finally, the aim is to fill certain regulatory gaps in the previous Rules by means of more comprehensive RUGD that accurately reflect the current reality of independent guarantee practices in international trade. Certain important issues that had been left out of RUGD 458 now receive a regulatory response: the intervention of an advising bank, possible amendments to the letter of guarantee, standards for the examination of submissions, partial, multiple or incomplete claims, the question of possible "mismatches" between documents, or the transfer of collateral, are good examples of what has been expressed here. In addition, the revision of these Rules resolves one of the most controversial issues raised by RUGD 458, namely the fragmentary nature of the regulation on counter-guarantees. This problem is finally solved on the understanding that all the rules applicable to the guarantee relationship also refer to the interbank counter-guarantee relationship.

The idea that these new RUGD 758s accurately reflect international practice by operators in this field and provide a secure and predictable framework for all participants in international trade has already received a first endorsement by UNCITRAL at its 44th annual session held in Vienna from 27 June to 8 July 2011.

# The UNCITRAL Convention

In 1988, UNCITRAL began to study the possibility of drafting a uniform text containing a regulation applicable to all types of independent guarantees, both European bank guarantees and US stand-by letters. This interest was basically based on two reasons:

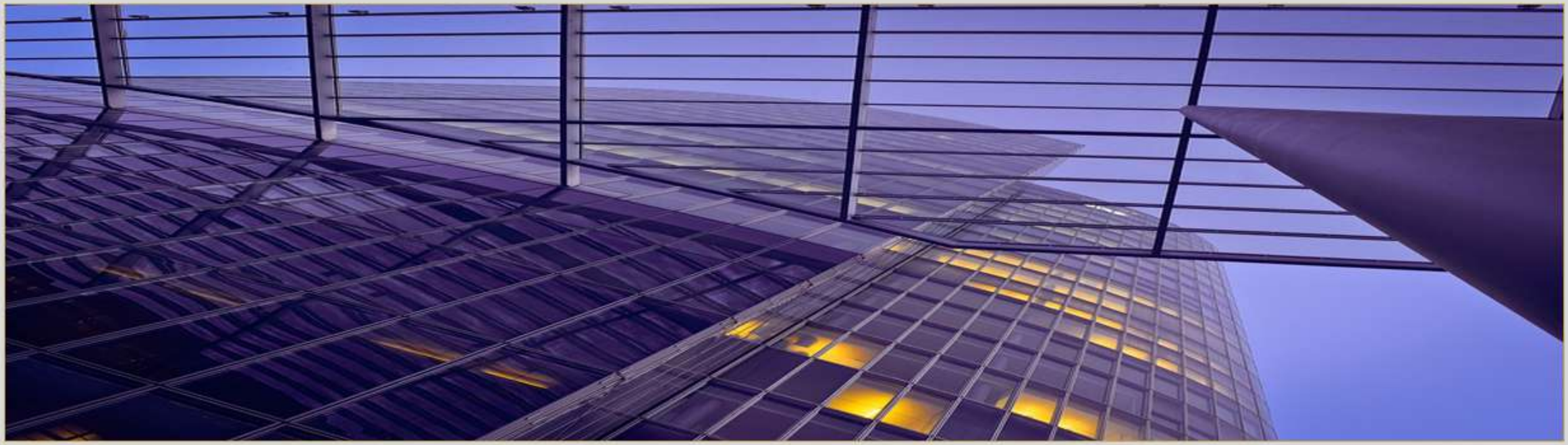
The aim was to establish a uniform and general legal regime for all independent guarantees in international trade, regardless of the formal form in which they may be issued. In the situation that existed at the beginning of UNCITRAL's work, there were already two ICC texts that could be applied to the different forms of independent guarantees, a situation that, moreover, is repeated today, as we have seen: PSI 98 for stand-by credits and RUGD 758 for independent bank guarantees.

This duplication of regulations clashes with the similar purpose of the different guarantee instruments in international contracting insofar as they serve as independent contractual guarantee commitments. For this reason, UNCITRAL has sought to develop a text that encompasses all types of guarantees within its scope of application. In fact, this is stated in Article 2 of this treaty text, defining the letter of guarantee as an independent obligation, known in international practice as an independent guarantee or standby letter of credit. Thus, both types of guarantee fall under the general category of "undertaking".

This is combined, however, with the traditional prejudices of developing countries in relation to the texts that are adopted within the ICC. In particular, given that no representatives of the potential beneficiaries took part in the drafting of the RUGD 458, this could lead one to believe that the text is merely a reflection of the interests of the most developed countries, in other words, the countries of origin of the guarantor banks and debtors.

As a final result of the work carried out by the Working Group on International Contract Practices, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit was adopted on 11 December 1995. Despite its objectives, the convention text has not been widely supported at the national level, with only eight accessions to date. And this may seem paradoxical at first sight, since this treaty text addresses, in addition to all the issues contemplated in the ICC Uniform Rules, some of the most problematic issues that had not achieved sufficient consensus within the ICC in order to incorporate a solution to them. Among these issues, it is necessary to highlight the regulation relating to cases of abusive or fraudulent claims by the beneficiary of the guarantee, contemplating the possibility of adopting precautionary measures, as well as the different means available to the ordering party to oppose payment of the guarantee -articles 19 and 20-.

# Final assessment



The issuance of an independent guarantee is nowadays a usual and typical operation by banks in international trade. The lack of national regulation of this contractual form has not prevented bank guarantees from becoming a highly successful and key instrument for the increased exchange of goods and services worldwide. In this context, the ICC's work in this area has, from the outset, sought to provide legal certainty, avoiding disputes and confusion as far as possible. It is in this direction that the new Uniform Rules on First Demand Guarantees - RUGD 758 - are situated, which seek to be clearer, more precise, understandable and balanced for all parties involved in an international guarantee transaction.

For these reasons, Auricoin Bank adheres to RUGD 758, to issue any type of Bank Guarantee.