Ms. Caroline Rantzau
ICC Denmark
Boersen
1217 Copenhagen K
Denmark

28 June 2011

Subject: Document 470/TA.745

Dear Ms. Rantzau,

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

QUOTE
We kindly ask your opinion to the following query related to demand guarantees issued subject to URDG 758.

We have seen demand guarantees subject to URDG 758 that include clauses such as:

1. This guarantee will expire upon Final Acceptance.
2. This guarantee is valid until completion of the contract.
3. This guarantee is valid until released by the beneficiary.

The demand guarantees in question do not include an expiry date nor is there any required document to specify the "expiry condition".

We ask you kindly to advise if the "3 year rule", as described in URDG 758 sub-article 25 (c), applies to guarantees such as those mentioned above.

ANALYSIS

URDG 758 article 2 includes the following definitions:
"**expiry** means the expiry date or the expiry event or, if both are specified, the earlier of the two;

expiry date means the date specified in the guarantee on or before which a presentation may be made;

expiry event means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:

a.   when a document specified in the guarantee as indicating the occurrence of the   event is presented to the guarantor,

or

b.   if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records.

guarantor's own records means records of the guarantor showing amounts credited to or debited from accounts held with the guarantor, provided the record of those credits or debits enables the guarantor to identify the guarantee to which they relate;"

URDG 758 article 7 Non-documentary conditions states:
"A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfilment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee do not conflict with data in the guarantee."

URDG 758 sub-article 25 (b) states:
"Whether or not the guarantee document is returned to the guarantor, the guarantee shall terminate:
    i.   **on expiry,**
    ii.   when no amount remains payable under it, or
    iii.   **on presentation to the guarantor of the beneficiary's signed**
release   **from liability under the guarantee."** [emphasis added]

URDG 758 sub-article 25 (c) states:
"If the guarantee or the counter-guarantee states neither an expiry date nor an expiry event, the guarantee **shall terminate after the lapse of three years** from the date of issue and the counter-guarantee shall terminate 30 calendar days   after   the guarantee
terminates." [emphasis added]

If any of the respective clauses is deemed to constitute an expiry event (as defined in article 2), then the "three year rule" stated in sub-article 25 (c) will not apply.

For an expiry event to be effective under URDG 758 it must be either documentary in nature (the guarantee must specify a document to be presented to the guarantor indicating the occurrence of the event) or determinable from the guarantor's own records (records of the guarantor showing amounts credited to or debited from accounts held with the guarantor).

If not, a guarantee containing one of the three clauses listed in the query will, by virtue of sub-article 25 (c), expire after the lapse of three years from the date of issue, provided that the guarantee does not terminate earlier by virtue of URDG 758 sub-articles 25 (b) (ii) or (iii).

Clause 1: "This guarantee will expire upon Final Acceptance"

The guarantee did not specify any document to be presented indicating the occurrence of the event (final acceptance). Its occurrence cannot be determined from the guarantor´s own records (as defined in article 2).

If the parties intended the guarantee to expire on the presentation of a document, i.e., a document certifying "Final Acceptance", the guarantee should have clearly specified this requirement. A reference to "Final Acceptance" cannot be understood to represent a request for a document showing final acceptance.

The clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Clause 2: "This guarantee is valid until completion of the contract"

The guarantee did not specify any document to be presented indicating the occurrence of the event (i.e., completion of the contract). Its occurrence cannot be determined from the guarantor´s own records (as defined in article 2).

The clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Clause 3: "This guarantee is valid until released by the beneficiary"

The guarantee did not specify any document to be presented indicating the occurrence of the event (the release by the beneficiary). It also did not indicate how the release by the beneficiary is to be accomplished. Its occurrence cannot be determined from the guarantor´s own records (as defined in article 2).

Absent a documentary requirement to act as evidence of release by the beneficiary, the clause is a non-documentary condition and according to URDG 758 article 7 is deemed as not stated and will be disregarded. Sub-article 25 (c) therefore applies.

Application of URDG 758 sub-article 25 (b) (iii):

Even though Clause 3, as written, is deemed to be a non-documentary condition,
URDG 758 sub-article 25 (b) (iii) permits the presentation to the guarantor of the beneficiary´s signed release from liability under the guarantee as one of the circumstances when a URDG 758 guarantee may terminate. This signed release may be given whether or not the guarantee has an expiry date or event. In respect of Clause 3 (and also Clauses 1 and 2), if a beneficiary's signed release is presented to the guarantor prior to the lapse of three years from the date of issue the guarantee will expire as of the date of its presentation.

It should be noted that the referenced clauses are examples of poor drafting and may lead to significant problems and misunderstanding. Guarantors should take care to avoid the drafting of clauses that are of a non-documentary nature.

CONCLUSION

Under URDG 758, all three clauses listed in the query are to be disregarded and the guarantees in which they are stated will terminate after the lapse of three years from the date of issuance pursuant to sub-article 25 (c).

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

The reply given is not to be construed as being other than solely for the benefit of guidance and there should be no legal imputation associated with the reply offered. If this query relates to a matter currently under

consideration by the courts, the ICC Banking Commission will refrain from considering it for adoption as an opinion.

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

Yours sincerely,

Thierry Senechal
Senior Policy Manager
Banking Commission