

**Guide to ICC
Uniform Rules
for Demand
Guarantees
URDG 758**

**Dr. Georges Affaki
Professor Sir Roy Goode QC**

Guide to ICC Uniform Rules for Demand Guarantees

Users and issuers choosing the URDG for their guarantees and counter-guarantees will find this Guide an indispensable companion. With its clear and comprehensive commentary on the rules and the accompanying model forms, this Guide provides the key to a successful guarantee practice in all sectors and jurisdictions. In the Guide, the authors have put the essence of their experience in researching, practising and teaching the law and practice of demand guarantees over a period of twenty years.

They also share their experiences of the revision process leading to URDG 758, revealing the background of each policy choice and drafting decision they took while drafting the rules. Case studies throughout the Guide support and enliven the comprehensive analytical commentary on the rules.

The authors, respectively chairmen of the URDG 758 and the URDG 458 drafting groups, debunk the many myths about international guarantee practice and identify pitfalls to avoid. They track in detail the seven key stages of a URDG guarantee's lifecycle: Drafting, Issuance, Changing of terms, Making a presentation, Examining the presentation, Making payment and Termination of the guarantee and counter-guarantee. Combining a practical approach and substantial research, the Guide meets the expectation of bankers, traders, lawyers and academics.

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by Dr Georges Affaki and Sir Roy Goode



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Preface

About URDG 758. The new URDG 758 succeeded URDG 458. Over 18 years of practice (1992-2010), URDG 458 proved to be both successful and reliable. They were used by banks and businesses across continents and industry sectors. URDG 458 were endorsed by international organisations, multilateral financial institutions, bank regulators, lawmakers and professional federations. Their conciseness and clarity were unanimously appreciated. In contrast to the failed Uniform Rules for Contract Guarantees (URCG 325), URDG 458 reflected the reality of the international demand guarantee market and struck the most reasonable balance between the interests of all of the parties involved. By choosing to instruct a guarantor to issue a URDG guarantee (as opposed to an accessory suretyship), applicants renounced their ability to obstruct payment for reasons derived from their relationship with the beneficiary. In turn, beneficiaries were expected to state in general terms – but not to justify, establish or prove – the nature of the applicant’s breach in the performance of the underlying relationship. Finally, because a demand guarantee is an independent undertaking, guarantors were assured that their commitment was subject to its own terms. They were insulated from the performance contingencies of the underlying relationship and were confined to document checking only. Their incremental use, backed by the support of ICC, enabled URDG 458 to make a critical contribution towards levelling the playing field among demand guarantee issuers and users regardless of the legal, economic or social system in which they operate. For that, the ICC members who foresaw the need for a separate set of rules for independent guarantees in the early 1980s and had the leadership and the vision to steer URDG 458 towards successful finalisation and implementation deserve credit.

The need for a change. Yet URDG 458 were the first attempt by ICC to codify independent guarantee practice. Over the years, the application of their provisions shed light on the need for various drafting adjustments, clarifications, expansion of scope or corrections of the adopted standard. Views reported to the ICC Task Force on Guarantees¹ from URDG users worldwide provided the necessary material to launch a revision of URDG 458 necessitated by the lapse of time and the evolution of practice. The revision was launched in 2007 and was conducted under the aegis of both the ICC Banking Commission and the ICC Commission on Commercial Law and Practice (CLP).

The ICC Task Force on Guarantees, the standing expert body created by ICC in 2003 to monitor international guarantee practice, acted as a consultative body to the Drafting Group that produced five comprehensive drafts during the two-and-a-half-year revision process. Each draft was submitted for review and comments to ICC national committees. Over 600 sets of comments were received from a total of 52 different countries and were thoroughly examined. These comments were instrumental in shaping the new rules. Regular progress reports were presented to meetings of each of the ICC commissions considering the rules and were comprehensively debated. This method ensured that views would be received from a broad cross-sector of concerned parties.

1. On the Terms of Reference of the ICC Task Force on Guarantees, see ICC Pub. No. 758 (English version), p. 41.

The resulting URDG 758 were adopted unanimously by the ICC Executive Board at its meeting in New Delhi on 3 December 2009, following their endorsement by the members of the two sponsoring ICC Commissions. They came into force on 1 July 2010, whereupon a considerable number of demand guarantees and counter-guarantees started being issued all over the world subject to the new URDG 758. The percentage of guarantees subject to URDG 758 compared to those subject to URDG 458, or to no rules at all, is increasing by the day and at a very satisfactory rate.

The new URDG 758 do not merely update URDG 458; they are the result of an ambitious process that seeks to bring a new set of rules for demand guarantees into the 21st century: rules that are clearer, more precise and more comprehensive.

This Guide. Users and issuers of demand guarantees and counter-guarantees, as well as their advisers, will find in this Guide an indispensable companion to URDG 758. With the rules and the model forms, this Guide forms the triptych on which a successful guarantee practice can be built. In its pages, we have put the essence of our experience in researching, practising and teaching the law and practice of demand guarantees over a period of twenty years. We also share our experiences of the two-and-a-half-year revision process leading to the new URDG 758, revealing the background of each policy choice and drafting decision that we took while drafting the new rules. Practical examples throughout the Guide support and enliven our analytical commentary on the rules. The Guide is divided into five chapters:

- Chapter 1 presents an overview of the world of demand guarantees and counter-guarantees. It explains the fundamental principles of demand guarantees and the differences from documentary credits, indemnities or accessory suretyships.
- Following a prologue tracing the road to URDG 758 and presenting a table comparing the key aspects of URDG 758 and URDG 458, Chapter 2 provides an overview of URDG 758. It presents, in a nutshell, the main features of the rules, their scope and the advantages they offer to each party involved in the guarantee structure. It also answers frequently asked questions about the nature of the URDG and their relationship with the applicable law.
- Divided into eight parts, Chapter 3 tracks the seven key stages of the lifecycle of a typical URDG guarantee and counter-guarantee: drafting, issue, changing of terms, making a presentation, examining the presentation, making payment and termination of the guarantee and counter-guarantee. The eighth part deals with the relationship between the instructing party and the guarantor. Each part details the particular rules of URDG 758 that apply to the selected situation and offers practical advice on how to make the most of the rules.
- Chapter 4 offers an article-by-article commentary on URDG 758. The commentary under each article is supported by illustrative case studies. We also present in this chapter insights from the revision process and the preparatory works that led to the final draft. Experience shows that those insights are particularly helpful, for example in litigation and academic research, to understand the drafting choices that underlie each rule as ultimately adopted.

- Chapter 5 provides an overview of the URDG in the world, including a presentation of the use of the URDG by international organisations, a comparison between URDG 758 and UCP 600, ISP98 and the UN Convention on Independent Guarantees and Stand-by Letters of Credit, all of which are also capable of applying to demand guarantees. It also features a selection of international case law from courts in six jurisdictions that have applied the URDG.

Each chapter is designed to stand on its own, thus offering a comprehensive overview of the topic without obliging users to consult other chapters in order to understand its substance. This is particularly the case with regard to Chapters 3 and 4. Chapter 3 presents a comprehensive overview of the URDG from an operational standpoint, while Chapter 4 allows readers to explore the interpretation of a particular article of the rules. This necessarily involves some repetition, but on balance we believe that offering readers two parallel ways to make the most of this Guide is the better choice. This also reflects the preference expressed by prospective users of URDG 758 during the numerous seminars that the authors conducted on the new rules.

Finally, we have furnished a detailed index which will enable the reader to pinpoint the places where a particular issue is discussed.

Acknowledgements. We would like to express our deep appreciation to the members of the ICC Task Force on Guarantees, the ICC national committees and members of both the Banking Commission and the Commission on Commercial Law and Practice for their guidance and support in the revision of the URDG. Our colleagues in the Drafting Group and partners in the drafting of URDG 758 – Roger Carouge, Andrea Hauptmann, Glenn Ransier, Pradeep Taneja and Farideh Tazhibi – have enriched this work with their substantial experience and helpful reflections. We are particularly indebted to Andrea, who meticulously read the entire typescript and made a substantial number of helpful comments. Stéphanie Lévi of BNP Paribas has thoroughly edited this Guide and offered invaluable comments, as well as preparing a preliminary draft of the index.

Our warm thanks are also due to those involved in the production of this book: Ian Lansley of Dickidot Limited for the artwork and typesetting; Elina Helenius of Bluenna Editorial for editorial management, Nicola Garwood for the proofreading; James Taylor of G&PP for the printing; and Laura Knox for the index.

We take great pleasure in presenting to the world this Guide as the successor to our previously separately published Guide and Handbook². We hope our readers find in this Guide the support they seek for their URDG guarantee practice and enjoy reading it as much as we have enjoyed drafting it together.

Georges Affaki and Roy Goode

Paris and Oxford
Trinity 2011

2. Roy Goode, *Guide to the ICC Uniform Rules for Demand Guarantees*, ICC Pub. No. 510 (1992); Georges Affaki, *A User's Handbook to the URDG*, ICC Pub. No. 631 (2001).

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