



## INADEQUACIES OF ICC UNIFORM RULES FOR DEMAND GUARANTEES 758 2010

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### Abstract

*Guarantee is a common civil obligation security measure, but so far, no international law has been enacted to regulate this guarantee method, apart from international commercial practices issued by the International Chamber of Commerce (ICC). The ICC Uniform Rules for Demand Guarantees 758 2010 is the current revision – referred to as “URDG 758 2010 ICC”. URDG 758 2010 ICC is a clearer, more precise, and more comprehensive set of rules than previous rules of guarantees. However, following the actual application of URDG 758 2010 ICC to economic and social life, some inadequacies have been revealed. This article aims to analyze the inadequacies of URDG 758 2010 in the articles such as Article 1 (a): The principles of application of URDG 758 2010, Article 1(d): Which URDG version does the reference apply to?, Article 2: Definitions, Article 2 & 10: First advising Party and Second advising Party, Article 4: Concept of issuing a guarantee, Article 9: Liability for failure to inform or delay in informing, Article 10: What is the apparent authenticity?, Article 11: Accept or reject the revised notice, Article 19: What is inspection on the surface of documents?, Article 33(b): unclear... with the purpose of notifying the parties using the guarantee method and recommending necessary amendments to the URDG in the future.*

**Keywords:** Demand guarantees, Guarantee, Guarantor, Applicant, Beneficiary



## INTRODUCTION

Guarantee is a measure to secure civil obligations widely applied in international as well as national markets. There are many types of guarantees such as performance guarantees, payment guarantees, bid guarantees, credit guarantees, warranty guarantees, deposit return guarantees, tariff guarantees, etc. As of today, only national laws and international trade practices – namely “Uniform Rules for Demand Guarantees” of 1992 and amended in 2010, version 758 – referred to as URDG 758 2010 ICC – issued by the ICC have been enacted to govern the guarantees.

URDG 758 2010 ICC, which replaced URDG 458 1992 ICC, has proven to be both successful and reliable. URDG 758 2010 was unanimously adopted by the ICC Executive Board at its meeting in New Delhi on 3 December 2009, and entered into force on 1 July 2010. URDG 758 2010 ICC not only updated URDG 458 1992, but were also the result of an ambitious process that seeks to bring a new set of rules into the 21st century: one that is clearer, more precise, and more comprehensive. URDG 758 has received the support of international organizations, financial institutions, banking regulators, legislators and professional federations. They are used by banks and businesses across continents and across all sectors. However, through the actual application of URDG 758 2010 in economic and social life, some inadequacies have been identified. This article presents and analyzes these inadequacies in order to remind users about URDG758 and suggest necessary modifications for URDG in the future.

## LITERATURE REVIEW

If in national trade as well as in international trade, the Documentary Credits are commonly applied in financing for buyers/importers and ensuring payment for sellers/exporters, the Guarantees have a much broader scope of financing, not only in the commerce, finance, banking, and investment but also in the civil areas. There are commonly used types of guarantees as follows: Payment Guarantees, Performance Guarantees, Bidding Guarantees, Reinsurance Guarantees, Subcontract Guarantees, Court Guarantees, Parent Company Guarantees, Suretyship Guarantees, etc. To guide this guarantee financing method, The International Chamber of Commerce (ICC) has issued a number of uniform rules on guarantees including:

- Uniform Rules for Contract Guarantees – URCG 325 1978.
- Uniform Rules for Demand guarantees – URDG 458 1992.
- Uniform Rules for Contract Bonds – URCB 524 2000.
- Uniform Rules for Demand Guarantees – URDG 758 2010.
- International Standard Demand Guarantee Practice ISDGP 758 2021.

After 18 years of application in the international financial market (1992-2010), URDG 458 1992 has achieved certain successes, especially giving confidence to bankers, businesses, non-financial organizations and individuals in society. In order to adapt to the changes and developments of the world economy, URDG 458 1992 had to be revised accordingly. On 3 December 2010, URDG 758 2010 version was officially released by the ICC. 10 years later, the ICC continues to issue the International Standard Demand Guarantee Practice - ISDGP 758 2021.

Among the above rules, URDG 758 2010 is now mainly referenced in letters of guarantee issued around the world, especially in European banks and European customary banks, including commercial banks in Vietnam. Accordingly, "*Demand Guarantee or Guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand*" - article 2 URDG 758 2010.

URDG 758 2010 includes 35 articles, fully showing the contents related to a guarantee transaction such as: Application Of URDG, Definitions, Interpretation, Issue and effectiveness, independence of guarantee and counter-guarantee, Documents v. goods, services or performance, Non-documentary conditions, Content of instructions and guarantees, Advising of guarantee or amendment, Amendments, Presentation, Requirements for demand, Examination, Payment, Reduction and termination, Force majeure, Transfer of guarantee and assignment of proceeds, Governing law, Jurisdiction....

It can be affirmed that URDG758 has many advantages shown in the following aspects:

- URDG 758 2010 was revised to ensure *a balance of interests of the three parties* including the Guarantor, the Applicant and the Beneficiary. Adding counter-guarantees to URDG 758 2010 is to satisfy the interests between the Applicant) and the Beneficiary (Article 2). Articles 15 and 24 provide the legal basis for payment, if the complying documents are presented. These terms are intended to balance the interests of all three parties.
- Regulations *on transfer of guarantee* of URDG 758 2010 are also completely different from those in URCB 524 and URDG 458. Bonds issued in compliance with URCB 524 can only be transferred in accordance with the Commercial Bills Law of the issuing country, URCB does not regulate this type of bond. If URDG 458 only provides for the transfer of proceeds from the guarantee, then URDG 758 2010 more provides for the right to transfer the guarantee (Article 33).
- A prominent feature of URDG 758 2010 is *the documentation of the guarantee* shown in Article 6: "Guarantors deal with documents and not with goods, services or performance to which the documents may relate."
- A fundamental feature of the demand guarantee is *the independence of the guarantee*. Demand Guarantee under URDG 758 2010 is independent of (Article 5): (i) underlying

relationship, (ii) Application for issuance of guarantee, (iii) Other relationships related to the guarantee, (iv) The independence of the guarantee is also reflected in the article 18 on the separateness of each demand.

- The content structure is *easy to understand, recognizable and scientific*. Some examples can be illustrated such as: URDG 758 2010 in article 2 “Definitions”, which includes clear definitions such as “Expiry”, “Expiry Date” and “Expiry Event”...; URDG 758 states that the Guarantee Commitment is irrevocable in article 4.b: “a guarantee is irrevocable on issue event if it does not state this”; Simplifying the provisions of the law governing guarantees in article 34 URDG 758 2010: “Unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee”...

It can be said that URDG 758 2010 ICC is a clearer, more precise and comprehensive rule than the previous rules on guarantees. However, through the actual application of URDG 758 2010 ICC to economic and social life, there have also been some inadequacies that need to be improved.

## METHODOLOGY

For the article, the authors use qualitative research methods such as: analysis, synthesis, logic, comparative jurisprudence.

The secondary data source for the authors to synthesize, analyze and compare is the ICC rules on Guarantees such as: Uniform Rules for Contract Guarantees (URCG 325 1978), Uniform Rules for Demand Guarantee (URDG 458 1992), Uniform Rules for Contract Bonds (URCB 524 2000), Uniform Rules on demand guarantee (Uniform Rules for Demand guarantee – URDG 758 2010), International Standard Demand Guarantee Practice ISDGP 758 2021.

In order for the article to be objective, the authors also consulted the views, analysis and comments of a number of articles from official and professional websites (*in the reference list*). The experience of teaching, guiding practice and adjudicating international commercial disputes for many years in Vietnam is also applied by the authors for the analysis in the article.

## ANALYSIS AND FINDINGS

### Analysis of Some Inadequacies of ICC URDG758 2010

#### 1. Article 1(a): The principles of application of URDG 758 2010.

Article 1(a) states: “*The Uniform Rules for Demand Guarantees [“URDG”] apply to any Demand Guarantee or Counter-Guarantee that expressly indicates it is subject to them. They are binding on all parties to the Demand Guarantee or Counter-Guarantee except so far as the*

*Demand Guarantee or Counter-Guarantee modifies or excludes them*". These URDG 758 2010 stipulate principles as following:

- First, the parties applying URDG 758 2010 to the underlying contract must refer to URDG 758 2010 in the underlying contract. If not, the rules of URDG 758 2010 will not apply.

- Second, once the URDG 758 2010 is referred to in the contract, the rules of URDG 758 2010 shall bind the parties to the Guarantee, unless **so far as** the Guarantee excludes or modified those rules.

The second rule is not clear: "*Except "so far as" the Demand Guarantee or Counter-Guarantee modifies or excludes them*". So, what does "**so far as [...] modifies or excludes**" mean?

- Is it possible to exclude all the rules of URDG 758 2010, or just some rules? If so, what kind of rules?

- Does the modification of rules, which fundamentally changes the "independent" or "documentary" nature of the Guarantee, violate the provisions of clause 1(a) of URDG 758 2010?

## **2. Article 1(d): Which URDG version does the reference apply to?**

Article 1(d) stipulates: "*Where a Demand Guarantee or Counter-Guarantee issued on or after 1 July 2010 states that it is subject to the URDG without stating whether the 1992 version or the 2010 revision is to apply or indicating the publication number, the Demand Guarantee or Counter-Guarantee shall be subject to the URDG 2010 revision*". Such a provision is highly inflexible and is only true if there has been no revised version of the URDG by the date of reference of the URDG in the underlying contract. Otherwise, in cases where there is a new modified version bearing the symbol (xxxx), it is unreasonable to still refer to apply as prescribed in article 1(d), unless in the underlying contract, the two parties agree to apply the old version URDG 758 2010.

In the case of a Guarantee after July 1, 2010, i.e. the year the revised URDG 758 2010 took effect, but the version number and year of issuance of the URDG are not stated, how will it be resolved? There are options as follows:

- First, apply article 1(d) of URDG 758 2010, if the underlying contract and guarantee do not provide otherwise;
- Second, if the underlying contract stipulates the application of 2010 version of URDG 758, the reference to the Guarantee shall apply;
- Third, in the event that the underlying contract and the Guarantee do not have a reference to which version of the URDG, when the following cases arise, which version does the reference apply?

- (i) Apart from URDG version 758 2010, there is no new version of URDG.
- (ii) There are many versions of URDG coexisting and in effect in the market, eg:
- URDG 758 2010;
  - URDG 858 2020;
  - URDG 958 2030 and
  - An URDG is in the process of being revised?

Guarantee is the surest and most popular financing method in the national as well as international market, so according to the practice and market requirements, it often needs to be modified to suit economic and social development.

As everyone knows, the payment method "*documentary credits*" is an extremely popular method of financing import and export payments in the market. The Uniform Customs and Practices for Documentary Credits (UCP) were first implemented in 1933, and have since been revised six times with versions 151 in 1951, 222 in 1962, 290 in 1974, 400 in 1983, 500 in 1993 and the most recent version 600 in 2007. According to customary practice issued by the ICC, later versions do not declare annulling the old version, so all versions currently on the market will be of equal validity. Customers can choose according to their requirements to refer to L/C, but it is not necessary to refer to the most recently revised version.

Uniform Rules for Demand Guarantees (URDG) was published in 1992, version number 458. 18 years later, the URDG was first revised in 2010 with version 758. It is possible that version number 758 URDG 2010 will not be the final version, so a provision like article 1(d) would not be appropriate.

### 3. Article 2: Definitions.

Under article 2 URDG 758 2010: "Complying presentation under a guarantee means a presentation that is in accordance with, first, the terms and conditions of that guarantee, second, these rules so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice." Subsequently, people may ask themselves the question: what is the difference between "...Second, these rules **so far as consistent with those terms and conditions**" and "...Second, these rules **are consistent with those terms and conditions**"? It is necessary to give a definition of what the conjunction "**so far as**" is, because otherwise it would be difficult to determine the content of the conjunction "**so far as**."

The demand is a very important document. The beneficiary of the guarantee sets up a demand to the guarantor when the applicant breaches an obligation specified in the guarantee. Then the guarantor checks the demand document for compliance with the terms and conditions

of the guarantee and in accordance with the relevant rules of URDG 758 2010, where applicable, must pay. Otherwise, the guarantor has the right to refuse payment.

Plus, URDG 758 2010 gives a very general definition of a demand: “*Demand means a signed document by the beneficiary demanding payment under a guarantee*”. According to the provisions of the concept, can all signed documents become demand documents?

Also in article 2, a document can be a demand and a supporting statement of both of which have been signed by its originator, i.e. the beneficiary. Payment instruments may include Bill of exchange (Draft), Order for money (order), Request for payment (request to pay) etc. can become a document to demand payment as specified in this article 2 URDG 758 2010?

#### **4. Article 2 & 10: First advising Party and Second advising Party.**

According to the definition of article 2 of URDG 758 2010: “*Advising Party means the party that advises the guarantee at the request of the guarantor*” – the guarantor is the party requesting advice for the guarantee. In article 10 of URDG 758 2010, it is stated: “*A guarantee may be advised to the beneficiary through an Advising party. By Advising a guarantee, whether directly or by utilizing the services of another party (**second** advising party)*”. One question that arises is who is asking the second advising party to advise a guarantee: the Guarantor or the First advising Party?

- Article 10.f specifies: **Guarantor**;

- Also this article again specifies: “An **advising party** using the services of a second advising party to advise a guarantee.” Thus, is there a contradiction in the content of this article 10?

In our opinion, only one person has the right to require a party to advise a guarantee. In case the first party is unable to provide advising, it is only then that they should be allowed to use the service of another party, that is, the second advising party.

#### **5. Article 4: Concept of issuing a guarantee.**

Article 25(c) of URDG 758 2010 states: “*If the Guarantee does not specify an expiration date and does not provide for its expiration date, the guarantee will terminate after a period of three years from the date of issuing a guarantee*”. What is the guarantee issue date? There are several response scenarios as follows:

- In the case of a guarantee by ordinary mail, the date of issue of the guarantee is the date indicated on the letter of guarantee. However, in order to avoid penalties for issuing the guarantee later than specified in the underlying contract, the guarantor may indicate the issue date on the letter in accordance with the underlying contract. For example, the underlying contract stipulates that the applicant must instruct the bank to issue the guarantee no later than 30 days from the date of signing the underlying contract. If the

issuance is delayed, there will be a penalty of 0.1% of the total guarantee value per day of late issuance. Due to certain difficult circumstances, the issuance of the guarantee is delayed by 10 days, in order to avoid penalties, the applicant or instructing party asks the bank to still write the issuance date in accordance with the provisions of the underlying contract.

- In the case of a guarantee by email, the date of issue of the guarantee may be indicated in the body of the email or it may be the date on which the guarantee is released from the guarantor's control as specified in clause 4 URDG 758 2010: "*A guarantee is issued when it leaves the control of the guarantor*".

From the above concept of issuance, there may arise arguments such as:

- + What evidence verifies that a guarantee by email has been issued?
- + What evidence verifies that an electronic guarantee has left the guarantor's control?
- + Is the date of issuance of guarantee by SWIFT the date on which the guarantee is sent from the guarantor or the date on which the beneficiary receives the guarantee?

#### **6. Article 9: Liability for failure to inform or delay in informing.**

Article 9 states: "*Where, at the time of receipt of the application, the guarantor is not prepared or is unable to issue the guarantee, the guarantor should without delay inform the party that gave the guarantor its instructions*". This provision creates three legal loopholes: (1) the guarantor does not notify the inability to receive the petition for issuance of the guarantee, (2) in the case of notification, but the notification is delayed, and (3) how much time can be considered "late."

#### **7. Article 10: What is the apparent authenticity?**

Article 10 stipulates: "*By advising a guarantee, the second advising party signifies to the beneficiary that it has satisfied itself as to the apparent authenticity of the advice it has received and that the advice accurately reflects the terms and the conditions of the guarantee as received by the second advising party*". Provisions stipulate that if the advising party inspects the guarantee and is satisfied with the apparent authenticity of the guarantee, it will advise the beneficiary. Otherwise, it has the right to refuse to notify. Such stipulation is satisfactory and acceptable.

The reason the advising party must check the apparent authenticity of the guarantee is that it should be compatible with the principle of examining documents, claiming payment only on the surface of the documents. If it is not found to be in accordance with the terms and conditions of the guarantee, payment can be refused.

However, this principle should clearly stipulate the definition of "authenticity," compared with what provisions in the guarantee determine to be "*truthfulness*."



## 8. Article 11: Accept or reject the revised notice.

(i) Article 11(a) of URDG 758 2010 states that it is the responsibility of the guarantor to notify acceptance or rejection of the amendment: *“where, at the time of receipt of instructions for the issue of an amendment to the guarantee, the guarantor for whatever reason is not prepared or is unable to issue that amendment, the guarantor shall without delay so inform the party that gave the guarantor its instructions”*.

In the event that the guarantor, i.e. the person requested to amend the guarantee, is unable or not prepared to make the modification of the guarantee, the guarantor must give notice without delay of such information to the instructing party, which will notify the beneficiary. If the guarantor is not notified or notified late, what is the responsibility of the guarantor to the beneficiary? This provision is not covered by article 11 URDG 758 2010 yet.

(ii) Article 11(b) of URDG 758 2010 seems to state that it is the responsibility of the beneficiary to accept or reject the amendment: *“An amendment made without the beneficiary’s agreement is not binding on the beneficiary...”*. In principle, the beneficiary must notify the acceptance or rejection of the amendment. If not, what will be the liability of the beneficiary? Unfortunately, this provision has not been mentioned in the article 11(b).

## 9. Article 19: What is inspection on the surface of documents?

Article 19 states: *“The guarantor shall determine, on the basis of a presentation alone, whether it appears on its face to be a complying presentation.”* How to check the surface of presented documents is a problem that arises not only in practice but also in legal theory. The following questions have not been answered by Article 19:

- + Documents usually have two sides, so do we check the front or the back or both?
- + Documents usually consist of many pages, so which page do we check?
- + Is there any difference between the surface of paper vouchers and the surface of electronic documents?
- + How is the contextual checking of the data different from checking the data content directly?
- + The data in the document is not necessarily identical to the data in the document, which is an unclear provision.

## 10. Article 33(b): unclear.

Article 33(b) states: *“Even if a guarantee specifically states that it is transferable, the guarantor is not required to give effect to a request to transfer that guarantee after its issue except to the extent and in the manner expressly consented to by the guarantor.”* This statement seems superfluous because:

- + Only after the guarantee has been issued will the right to benefit from the amount of that guarantee form and exist during the validity period of the guarantee. Of course the beneficiary

specified in the guarantee shall be the lawful beneficiary of the guarantee amount. The beneficiary of the guarantee has the right to assign his/her benefit to another beneficiary, if the guarantee is a transferable type of guarantee.

+ In summary, the right to transfer the guarantee can only be realized and exercised after the guarantee has been issued, so the provisions of article 39(b) of URDG 758 2010 seem to be excess.

## CONCLUSION AND RECOMMENDATIONS

In fact, URDG 758 2010 ICC is a relatively complete set of rules, applied by lawyers, arbitrators, banks, businesses and individuals in many countries around the world, especially URDG758 is also adopted by the World Bank, the United Nations Commission on Commercial Law and the International Association of Construction Consultants. However, after 12 years of practical application, URDG758 also appeared some inadequacies that the article would like to point out above to note the parties using URDG in their guarantee transactions. We also would like to proposes some recommendations for the ICC to continue to revise some articles in URDG 758 in the future, summarized as follows: (i) Clarify what the phrase “So fas as modify or exclude” is in Article 1(a); (ii) Article 1(d) should be edited as follows: “Where a Demand or Counter-Guarantee issued on or after 01 June 2010 states that it revision is subject to the URDG without applicable 458-1992 version or whether the 758-2010 to apply the recent revised version of the URDG”; (iii) Clarify the definition of “a Demand” in Article 2 of URDG 758 2010; (iv) Specify who is asking the Second Advising party to advise a guarantee in Clause 10.f to avoid conflicts; (v) Clarification of clause 4 of URDG 758 2010: “A guarantee is issued when it leaves the control of the gurantor”; (vi) Make clear the concept of “without delay” in Article 9 and the concept of “What is the apparent authenticity” in Article 10; (vii) Clarify if the guarantor is not notified or notified late, what is the responsibility of the guarantor to the beneficiary in clause 11a URDG 758 2010. In our opinion, there are two possible ways provided for in clause 11(b) as follows: one is an incomplete modification; and another is the presentation of a claim document in accordance with the terms and conditions of the guarantee, and unaccepted amendments shall be deemed the beneficiary's notice of acceptance of the amendment; (viii) Clarify what is inspection on the surface of documents in Clause 19; and finally a proposal to remove Article 39(b) of URDG 758 2010.

This research can be developed in the future on two aspects: firstly, propose amendments and improvements of the legal system on guarantees of Vietnam closer to URDG758 ICC 2010 as well as overcome the inadequacies of this rule; secondly, study the

experience in applying National Laws and URGD 758 ICC 2010 to settle disputes on guarantees in some countries and Vietnam.

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