

INDEPENDENT GUARANTEE CLAUSES IN CISG CONTRACTS

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“Kill him provisionally, we’ll investigate later.”

-A quote attributed to Pancho Villa

I. INTRODUCTION

The independent guarantee has become a standard arrangement in international trade. The use of independent guarantees has increased significantly since the 1960s³ and their frequency has grown exponentially ever since.⁴ Such development can be attributed to various factors. First of all, independent guarantees have proven useful in connection with any kind of underlying transaction, for example, in financial dealings, sales agreements and industrial projects.⁵ Second, the amounts at stake in modern transactions have increased, making the risk factor for the parties concerned significantly greater.⁶ The parties’ determination to cover the risk of a breach of contract has provided the impetus for the extraordinary development of independent guarantees.⁷ In international industrial projects, for example, long-term contracts involving significant amounts are very common and the question of whether the exporter (contractor) has performed its contractual obligations often requires the determination of complex issues.⁸ Importers (owners) have resorted to independent guarantees in order to ensure that performance claims can be compensated immediately and effectively by a third party guarantor.⁹

From the outset, independent guarantees have been a creation of the practice of international trade.¹⁰ Most national systems have not enacted provisions of law dealing expressly with independent guarantees.¹¹ The validity and binding effect of an independent guarantee therefore directly rests on the general principle of freedom of contract and sanctity of contracts.¹² The terms are negotiated between the guarantor – usually a bank – and its customer (the principal) pursuant to what was agreed in the underlying contract. The contracts are then interpreted and construed by courts and arbitrators in

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3. Filip De Ly, *The UN Convention on Independent Guarantees and Stand-by Letters of Credit*, 33 FOREIGN L. YEAR REV. 831, 833 (1998).

4. Mirjana Knezević & Aleksandar Lukić, *Bank Guarantees and Their Representation in Bank Business Activities*, 64 ECON. INSIGHTS - TRENDS & CHALLENGES 42 (2012) (“Due to its non-accessoriness, abstractness and the fact that a fast and simple act of realization provides coverage for a great amount of risk, the bank guarantee is one of the most important instruments of security payments in the trading operation.”).

5. R.I.V.F. BERTRAMS, *BANK GUARANTEES IN INTERNATIONAL TRADE 1* (ICC Publishing S.A. ed., Kluwer Law International, 1996) (“The increasing wealth in the oil producing countries of the Middle East in this period enable these countries to conclude major contracts with Western firms on large scale projects, such as infrastructure improvements (roads, airports, harbors facilities), public works [...]. It is to these developments that the origins and early demand for independent bank guarantees and specially those payable on first demand can probably be traced.”).

6. Enrique Fernández-Masiá, *Las Garantías Bancarias en el Comercio Internacional*, 1 BOLETÍN MEXICANO DE DERECHO COMPARADO 101, 103 (2014).

7. Knezević et al., *supra* note 4, at 43.

8. Fernández-Masiá, *supra* note 6, at 103.

9. BERTRAMS, *supra* note 5, at 2.

10. *Id.* at 7.

11. De Ly, *supra* note 3. With two notable exceptions: French Law Article 2321 of the Civil Code (2006) and US Law Article 5 U.C.C. with provisions on Stand-By Letters of Credit.

12. *Id.* at 389; *see also* Fernández-Masiá, *supra* note 6.

accordance with the provisions of the applicable rules,¹³ if any, or of the proper law of the guarantee,¹⁴ usually domestic laws on agency (*mandat* in French or *mandato* in Spanish and Portuguese).¹⁵

In light of the absence of specific regulation at a national level, some international treaties seek to harmonize international practice,¹⁶ for instance, the UNCITRAL Convention on Independent Guarantees and Stand-By Letters of Credit (1995) (the “UNCITRAL Convention on Independent Guarantees”).¹⁷ In addition, uniform contract terms to which the parties may agree¹⁸ have flourished and enhanced the use and utility of independent guarantees. The International Chamber of Commerce (“ICC”) has undertaken major private unification efforts in this area in the form of soft law or *lex mercatoria* instruments. The ICC has issued four major texts on independent guarantees: the ICC Uniform Rules for Contract Guarantees (“URCG”) (1978),¹⁹ the ICC Uniform Rules for Demand Guarantees (“URDG 458”) (1992),²⁰ the ICC Uniform Rules for Contract Bonds (“URCB”) (1994)²¹ and the ICC Uniform Rules for Demand Guarantees (“URDG 758”) (2010).²² Finally, the American Institute of International Banking Law & Practice has issued the International Standby Practices (“ISP98”).²³

The beneficiary of an independent guarantee may be the buyer (the owner or importer) so that the buyer’s right to claim performance of a contractual or legal duty can be guaranteed, as well as the seller (or the contractor or exporter) so that the seller’s claim for payment of the purchase price can be guaranteed.²⁴ Once established, an independent guarantee creates rights and obligations between the beneficiary and the guarantor.²⁵ These rights and obligations are formally independent from the underlying contract between the seller and the buyer of which performance of certain obligations has been guaranteed.²⁶

However, a clause in the underlying contract requiring the issuance of an independent guarantee creates an obligation for the applicant to have the guarantor issue²⁷ that guarantee for the beneficiary.

13. See ICC UNIFORM RULES FOR DEMAND GUARANTEES 758, art. 3, containing their own rules of interpretation [hereinafter U.R.D.G. 758].

14. See De Ly, *supra* note 3, at 838; BERTRAMS, *supra* note 5, at 7-8. (Pursuant to Article 21 of the UNCITRAL Convention on Independent Guarantees a guarantee is governed by the national law chosen in the guarantee or between the guarantor and the beneficiary. In the absence of such a choice, the guarantee is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued pursuant to article 22 of the UNCITRAL Convention on Independent Guarantees.).

15. In spite of the fact that practice is not entirely uniform considering the multiple fora which are available and the various systems of law which may apply in each forum, this state of affairs does not appear to have given rise to major difficulties.

16. De Ly, *supra* note 3, at 834-35; Fernández-Masiá, *supra* note 6, at 134-44.

17. United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (New York, 1995) has been ratified by eight States to date (Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama and Tunisia) and signed, but not ratified, by the U.S.A. See U.N. Convention on Independent Guarantees and Standby Letters of Credit, *last ratified* Sept. 16, 2005, http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1995Convention_guarantees_status.html. The UNCITRAL Convention contains interesting and useful provisions in spite of the fact that it has not gained widespread acceptance yet.

18. See U.R.D.G. 758 *supra* note 13, art. 1(a) (stating that the rules “apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them.” Where a guarantee issued on or after 1 July 2010 states that it is subject to the U.R.D.G. without stating whether 458 (1992) or 758 (2010) is to apply, the guarantee will be subject to 758).

19. UNIFORM RULES FOR CONTRACT GUARANTEES, ICC PUBLICATION NO. 325 (1978).

20. UNIFORM RULES FOR DEMAND GUARANTEES, ICC PUBLICATION NO. 458 (1992) [hereinafter U.R.D.G. 458].

21. UNIFORM RULES FOR CONTRACT BONDS, ICC PUBLICATION NO. 524 (1994).

22. U.R.D.G. 758 *supra* note 13, (2010).

23. Also published as INTERNATIONAL STANDBY PRACTICES, ICC PUBLICATION NO. 590.

24. Peter S. O’Driscoll, *Performance Bonds, Bankers’ Guarantees, and the Mareva Injunction*, 7 NW. J. INT’L L. & BUS. 380, 385 (1985).

25. BERTRAMS, *supra* note 5, at 9.

26. *Id.*

27. See U.R.D.G. 758 *supra* note 13, art. 4 (stating that a guarantee is issued when it leaves the control of the guarantor).

This obligation to apply for the guarantee to the guarantor is enforceable under the law governing the underlying contract.²⁸ Questions then arise as to the enforcement and effects of the applicant's obligation under the applicable law. In particular, failure to apply for an independent guarantee or a defective provision of an independent guarantee may entitle the other party to claim certain remedies but exclude others.

In this article, the authors address these questions in the light of the provisions of the 1980 United Nations Convention on Contracts for the International Sale of Goods (the "CISG").²⁹ Section II introduces the notion and features of independent guarantees. Section III addresses a party's obligation to provide an independent guarantee in accordance with the CISG. Section IV analyzes the remedies that may follow from a party's breach of a contractual obligation to provide an independent guarantee pursuant to the CISG. Section V discusses a party's right to suspend performance of a contractual obligation to provide an independent guarantee and other interdependent obligations as well as a party's right to stop payment after provision of an independent guarantee. Section VI reminds us of the legal effect of avoiding the underlying contract over an independent guarantee.

II. NOTION AND FEATURES OF INDEPENDENT GUARANTEES

An independent guarantee³⁰ may be defined as a contract between the guarantor and the beneficiary³¹ whereby the guarantor³² undertakes to pay the beneficiary the specified amount of money upon the beneficiary's demand in writing, provided that such demand is made within the period of validity of the guarantee and complies with the terms of the guarantee.³³

The party upon whose request the guarantee has been issued, known as the principal, the applicant³⁴ or the account party, is not a party to the guarantee.³⁵ The guarantor is usually a bank,³⁶ but may be an insurance company or any other entity or person such as the parent company of the main debtor in the case of a parent company guarantee.³⁷

28. See *infra* Section III.

29. The CISG is the law for contracts on the international sale of goods in force in more than 80 countries, including the US and its main trading partners. See text and status at www.uncitral.org.

30. In the law and practice of international trade "bank guarantee" and "guarantee" are the terms which have come to be generally accepted in spite of the fact that they are not free from ambiguity in many languages. They may therefore be regarded as a term of art in their own right.

31. BERTRAMS, *supra* note 5, at 12. ("A guarantee is a contract between two parties, namely the guarantor/bank and the beneficiary."). See also Rolf Meyer-Reumann, *Rights and Obligations in the Event of Bank Guarantees Being Called in Governmental Projects*, 17 ARAB L. Q., 34 (2002).

32. U.R.D.G. 758 *supra* note 13, art. 2.

33. ROY GOODE, GUIDE TO THE ICC UNIFORM RULES FOR DEMAND GUARANTEES 8 (International Chamber of Commerce. 1992). The UNCITRAL Convention defines a guarantee in article 2(1) as follows: "For the purposes of this Convention, an undertaking is an independent commitment, known in international practice as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person." United Nations Convention on Independent Guarantees and Stand-By Letters of Credit art. 2(1), Dec. 11, 1995, U.N. Doc. A/RES/50/48 [hereinafter Convention]; Meyer-Reumann, *supra* note 31, at 34 ("According to Article 411 and Article 414 [United Arab Emirates- Commercial Transactions Law] a bank guarantee is an undertaking according to which a bank undertakes to pay a customer's debt to a third party in accordance with the conditions, upon which the agreement is concluded and which are included in the guarantee").

34. See U.R.D.G. 758 *supra* note 13, art. 2.

35. See BERTRAMS, *supra* note 5, at 12.

36. See generally Peter O'Driscoll, *Performance Bonds, Bankers' Guarantees and the Mareva Injunction*, 7 NW. J. OF INT'L L. & BUS., 380 (1985).

37. See U.R.D.G. 758, art. 2.

An independent guarantee is different from a secondary (also called accessory) guarantee. Independent guarantees give rise to a primary contract duty on the guarantor which is independent from the underlying contract between the beneficiary of the guarantee and the latter's contracting party.³⁸ The guarantor's obligation to pay the agreed amount to the beneficiary is independent from the beneficiary's right to invoke a breach of the underlying contract by its contracting party.³⁹ In other words, the guarantor's obligation is "documentary"⁴⁰ in character as it arises upon the presentation by the beneficiary of the documents or statements mentioned in the guarantee itself.⁴¹

On the contrary, a secondary or accessory guarantee⁴² makes the guarantor liable to the beneficiary of the guarantee only if, when and to the extent that, the beneficiary's contracting party in the underlying contract has been found in breach of the underlying contract.⁴³ In this sense, an accessory guarantee is similar to contracts existing in civil law and common law jurisdictions in which the guarantor assumes a liability only in cases where the principal debtor has defaulted or breached the underlying transaction.⁴⁴ In Spanish these accessory guarantees are known as "*fianzas*",⁴⁵ in French law as "*cautionnement*" and in Anglo-American law as "suretyship." Secondary guarantees are therefore twofold. Firstly, the guarantor's duty to pay arises only if, when and to the extent that, the principal debtor has defaulted. Secondly, the guarantor duty to pay is limited to the liability of the principal debtor. Accordingly, the guarantor may rely on all the defenses and objections that the debtor has under the terms of the underlying contract with the creditor-beneficiary, including the right to challenge the very existence and validity of the underlying contract.⁴⁶

Because banks are generally reluctant to act as guarantors under terms that require the determination of fault or breach by a judge or arbitrator pursuant to a contract to which they are not a party (nor have they real incentive or interest to be),⁴⁷ international commercial practice produced "independent guarantees" where the guarantor's duty to pay the beneficiary would be independent of the underlying contract's proper performance.⁴⁸ In resemblance to the barbarian saying attributed to Mexican revolutionary leader Pancho Villa "Kill him provisionally, we'll investigate later,"⁴⁹ the fundamental bargain to which the parties under the underlying contract agreed to may be expressed by the maxim "pay first, litigate later."⁵⁰

For the purposes of this article, "guarantee" will indicate an independent guarantee provided by a bank or other guarantor, which is paid pursuant to its own terms upon demand by the beneficiary, independent

38. U.R.D.G. 758 *supra* note 13, art. 5(a); BERTRAMS, *supra* note 5, at 56; O'Driscoll *supra* note 36, at 385 (making reference to English case law on the legal nature of independent guarantees); De Ly, *supra* note 3, at 831-32 (1999).

39. See Convention, *supra* note 33, art. 3.

40. See U.R.D.G. *supra* note 13, art. 6, 7, 19.

41. See U.R.D.G. *supra* note 13, art. 15(a); BERTRAMS *supra* note 5, at 9.

42. Also known as dependent guarantees in international trade.

43. See BERTRAMS, *supra* note 5, at 3.

44. Fernández-Masiá, *supra* note 6, at 126.

45. *Id.* at 125.

46. *Id.* at 130.

47. U.R.D.G. 758 *supra* note 13, art. 5(a); BERTRAMS, *supra* note 5, at 2.

48. See Fernández-Masiá *supra* note 6, at 111; See also U.R.D.G. 758 *supra* note 13, art. 5.

49. This is what people tell Pacho Villa told to a shooting squad about to kill a suspected cow rustler.

50. Werner Blau & Joachim Jedzig, *Bank Guarantees to Pay upon First Written Demand in German Courts*, 23 INT'L L. 725, 725 (1989).

from any fault or breach by the principal.⁵¹ Nonetheless, in international trade practice other terms are often used to refer to independent guarantees as well. For example, “first demand guarantee”⁵² or “on demand guarantee,” “demand guarantee,”⁵³ “performance bonds”⁵⁴ and “Stand-By Letters of Credit”⁵⁵ are all terms used to describe independent guarantees.

III. A PARTY’S OBLIGATION TO PROVIDE AN INDEPENDENT GUARANTEE

The CISG does not require the parties to have a guarantor establishing an independent guarantee in order to cover the risk of a party’s breach of contract.⁵⁶ However, this state of affairs does not preclude the parties from agreeing to do so. Article 6 CISG expresses the principle of party autonomy to tailor their contract.⁵⁷ The provisions of the CISG governing the seller’s obligations and the buyer’s obligations apply only insofar as the contract does not contain other specific provisions.⁵⁸ As a result, the parties may agree upon the additional obligation to have a guarantor issuing an independent guarantee.⁵⁹ Where the contract as a whole falls within the scope of application of the CISG,⁶⁰ such additional obligations will also be subject to the CISG’s rules since they are obligations arising from that CISG contract.⁶¹

Despite the fact the CISG allows verbal agreements⁶² or the incorporation of obligations arising out of the parties’ prior practices,⁶³ it is advisable for independent guarantee clauses of the underlying contract to be an express term.⁶⁴ These clauses will in principle be regarded as giving rise to a main contract duty (see Section IV below). In some instances, the conclusion of the underlying contract is made conditional *inter alia* on all agreed guarantees having been duly provided.⁶⁵ The wording of the guarantee required by the underlying contract is often set out in an appendix to that contract.

51. See *United Nations Convention supra* note 39; Fernández-Masiá, *supra* note 6, at 127.

52. This is a type of guarantee, see *infra* Part III.

53. The term “Demand Guarantees” was coined by the ICC as it issued its second and third sets of uniform rules in 1992 and 2010 under the title “Uniform Rules for Demand Guarantees” (“U.R.D.G.”). U.R.D.G. 458 *supra* note 20; U.R.D.G. 758 *supra* note 13.

54. “Performance bond” is another expression used to refer to a bank guarantee.

55. The expression “stand-by letter of credit” adds further diversity to the terminology, and essentially refers to an independent bank guarantee used to guarantee payment obligations in the US. See De Ly, *supra* note 3, at 836.

56. Pursuant to articles 30 to 44 of the CISG, the seller’s obligations include the timely delivery of conforming goods, among other duties. United Nations Convention on Contracts for the International Sale of Goods art. 30-44, March 2, 1987, 52 Fed. Reg. 6262-02. In accordance with articles 53 to 60 of the CISG, the buyer’s obligations include the timely payment of the price and taking delivery of the goods. *Id.*, art. 53-60.

57. INGEBORG SCHWENZER ET AL., *GLOBAL SALES AND CONTRACT LAW* 65 (Oxford University Press 1st ed. 2011); SCHLECHTRIEM & SCHWENZER: *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS* 106 (Ingeborg Schwenzer ed., Oxford University Press 3d ed. 2010).

58. See Corinne Widmer, *Article 30 in SCHLECHTRIEM & SCHWENZER supra* note 57, at 490; see also ALEJANDRO M. GARRO & ALBERTO L. ZUPPI, *COMPRAVENTA INTERNACIONAL DE MERCADERÍAS* 170 (Abeledo Perrot 2012).

59. JAN RAMBERG, *INTERNATIONAL COMMERCIAL TRANSACTIONS* 47 (ICC Norstedts Juridik AB 4th ed. 2011).

60. The United Nations Convention on Contracts for the International Sale of Goods (CISG) applies to contracts for the international sale of goods when the parties to the contract have their places of businesses in different Contracting States or when the rules of private international law lead to the application of the law of a contracting state. United Nations Convention on Contracts for the International Sale of Goods, art. 1(1)(a), (b), Mar. 2, 1987, 52 U.S.T. 6264-6280, 1489 U.N.T.S. 3, <http://www.cisg.law.pace.edu/cisg/text/treaty.html> [hereinafter CISG].

61. Widmer, *supra* note 58, at 493.

62. CISG, *supra* note 60, art. 8, 11.

63. *Id.*, art. 9.

64. Bertrams, *supra* note 5, at 66.

65. *Id.* (“When the parties to the underlying relationship have agreed that the principal debtor is to furnish an guarantee payable on certain terms and conditions, that agreement constitutes a condition precedent in the sense that the obligations of the other party are suspended until the issuance of the guarantee”).

When the underlying sales contract is null and void or voidable for duress, undue influence, mistake, or any other legal grounds admissible under its applicable law,⁶⁶ that contract's independent guarantee clause will most likely follow the same fate. As such, the party who had provided the guarantee may claim that the guarantee should be handed back (see Section VI below). However, because the guarantee issued by the guarantor is independent from the underlying contract, the fact that the latter is null and void does not necessarily void the guarantee itself. The guaranty will remain valid until its own expiration event⁶⁷ or date.⁶⁸

As mentioned above, the main purpose of independent guarantees is to enable the beneficiary to obtain immediate payment without proving default or breach of the underlying contract.⁶⁹ In practice, the parties go further as to specify the type of breach or default that the independent guarantee intends to cover. In the context of international sales of goods, these typically include the following situations. First, parties can contract for a tender or bid guarantee, sometimes also called "initial guarantee," which is required for bidders taking part in a tender, especially a public tender.⁷⁰ This type of guarantee is intended to protect the beneficiary against the risk that the bidder, in spite of having tendered successfully, will fail to sign the contract or to sign it in a timely manner or fail to procure an additional performance guarantee.⁷¹ Second, the delivery guarantee (or bond), may be intended to protect the beneficiary against the risk that the seller/exporter fails to deliver the goods.⁷² This type of guarantee does not cover the whole risk relating to performance but only delivery,⁷³ and this has given rise to further types of guarantees which specifically cover the risk of defects in the goods or further risks. Alternatively, parties may contract for a performance guarantee (or bond) that is intended to protect the beneficiary against the risk that the seller/exporter fails to perform its contract duties,⁷⁴ like the delivery of conforming goods under the contract or the applicable law.⁷⁵ Such a guarantee may or may not, according to its terms, cover breaches of warranty; where it does not, a warranty guarantee may be issued as well.⁷⁶ Fourth, maintenance (or warranty) guarantee is intended to protect the beneficiary against the risk that the seller/exporter fails to perform its contract duties with respect to warranty,⁷⁷ maintenance or other activities to be performed after completion of the works or delivery of conforming goods, such as training or further activities relating to the commercial operation of a plant or machinery.⁷⁸ Fifth, the parties may contract for an advance payment (or repayment) guarantee (or bond) that purports to protect the beneficiary against the risk that the seller/exporter fails to perform its contract duties so that the advance payment made by the

66. The CISG will not apply to these issues as they fall outside its scope of application in accordance with article 4(a) of the CISG. CISG, *supra* note 60, art. 4.

67. U.R.D.G. 758 *supra* note 13, art. 2.

68. Bertrams, *supra* note 31, at 236-7; Dr. Filip De Ly, *Independent Guarantees and Stand-By Letters of Credit*, 33 *Int'l Lawyer* 831, 841 (1999); Meyer-Reumann, *supra* note 31, at 28, 29.

69. Fernández-Masiá, *supra* note 6, at 110.

70. *Id.* at, 115.

71. INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 59; Werner Blau and Joachim Jedzig, *Bank Guarantees to Pay upon First Written Demand in German Courts*, 23 *Int'l Lawyer* 725, 725 (1989); see UBS, *Bank Guarantees*, UBS (Nov. 20, 2015, 7:47PM), https://www.ubs.com/ch/en/swissbank/corporates/finance/trade_exportfinance/bankgarantie/mustertexte.html.

72. UBS, *supra* note 71.

73. Fernández-Masiá, *supra* note 6, at 115, 116.

74. INTERNATIONAL COMMERCIAL TRANSACTIONS, *supra* note 59.

75. Meyer-Reumann, *supra* note 31, at 28.

76. UBS, *supra* note 71.

77. Blau and Jedzig, *supra* note 71.

78. Fernández-Masiá, *supra* note 6, at 116; UBS, *supra* note 71.

beneficiary is to be reimbursed by the seller/exporter.⁷⁹ Sixth, a retention guarantee aims to protect the beneficiary against the risk that the seller/exporter fails to effect full performance of its contract duties in case the beneficiary has released full payment for the works or part of the works without withholding retention monies.⁸⁰ Finally, a payment guarantee or stand-by letter of credit intends to protect the seller against the risk that the buyer will fail to pay the contract price.⁸¹

Since the principle of freedom of contract operates also at the level of the independent guarantee (and not only at the level of the underlying contract), the parties are able to freely structure the payment mode of the guarantee's monies.⁸² Depending on the circumstances, the parties may choose a direct guarantee or an indirect guarantee. A direct guarantee involves three parties: the principal, the guarantor and the beneficiary.⁸³ The principal is the seller that instructs the guarantor to issue the guarantee.⁸⁴ The guarantor is the bank or other entity or person issuing the guarantee.⁸⁵ The beneficiary is the buyer for whose benefit the guarantee is issued.⁸⁶ In a CISG contract, the seller and the buyer have places of businesses in different countries. The guarantor (a bank) will usually be located in the seller's country. In such case, a second bank called the "advising bank" will usually be involved in the guarantee in the buyer's country, as the guarantor's agent.⁸⁷ The advising bank does not have a contractual relationship with the beneficiary and does not assume any contractual obligations.⁸⁸ Its task is limited to transmitting documents from and to the beneficiary, verifying that the terms of the guarantee⁸⁹ are met before any amount is made available to the beneficiary on behalf of the guarantor. In such a case, the beneficiary has a contractual relationship only with the issuing bank and can claim payment of the guarantee only from the issuing bank.⁹⁰

79. *Id.*

80. UBS, *supra* note 71.

81. DeLy, *supra* note 3, at 833; UBS, *supra* note 71.

82. Bertrams, *supra* note 5, at 64.

83. Fernández-Masiá, *supra* note 6, at 117, 118; Bertrams, *supra* note 5, at 13.

84. Bertrams, *supra* note 5, at 13.

85. *Id.*

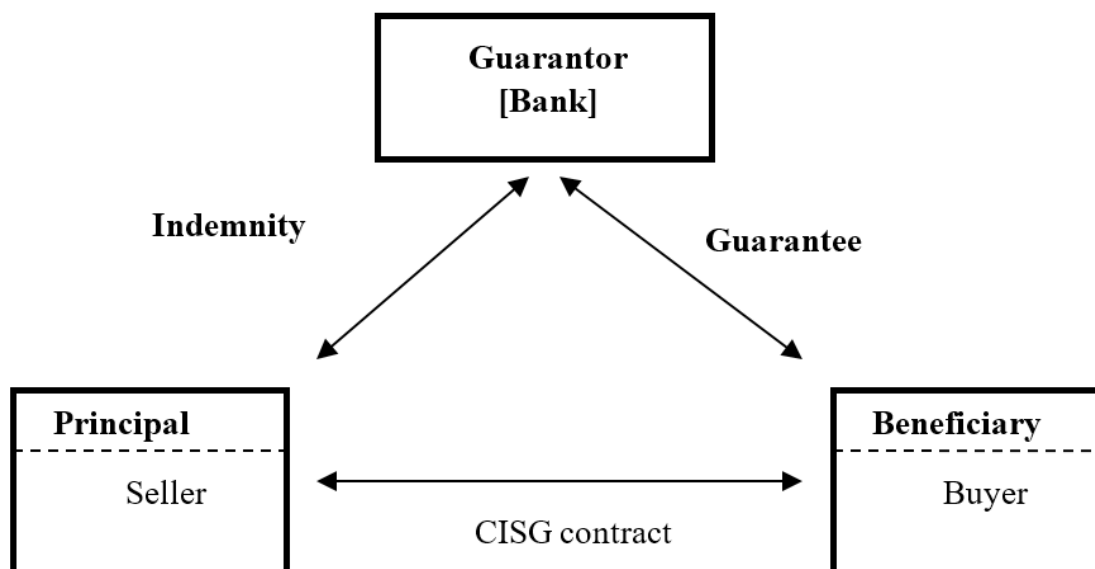
86. *Id.*

87. See U.R.D.G. 758 *supra* note 13, art. 10 § b (Int'l Chamber of Commerce 2010); *Id.* at 14.

88. See U.R.D.G. 758 *supra* note 13, art. 10 § c; BERTRAMS, *supra* note 5, at 14.

89. For example, verifying the authenticity of the beneficiary's signature on a demand. See U.R.D.G. 758 *supra* note 13, art. 10 § b.

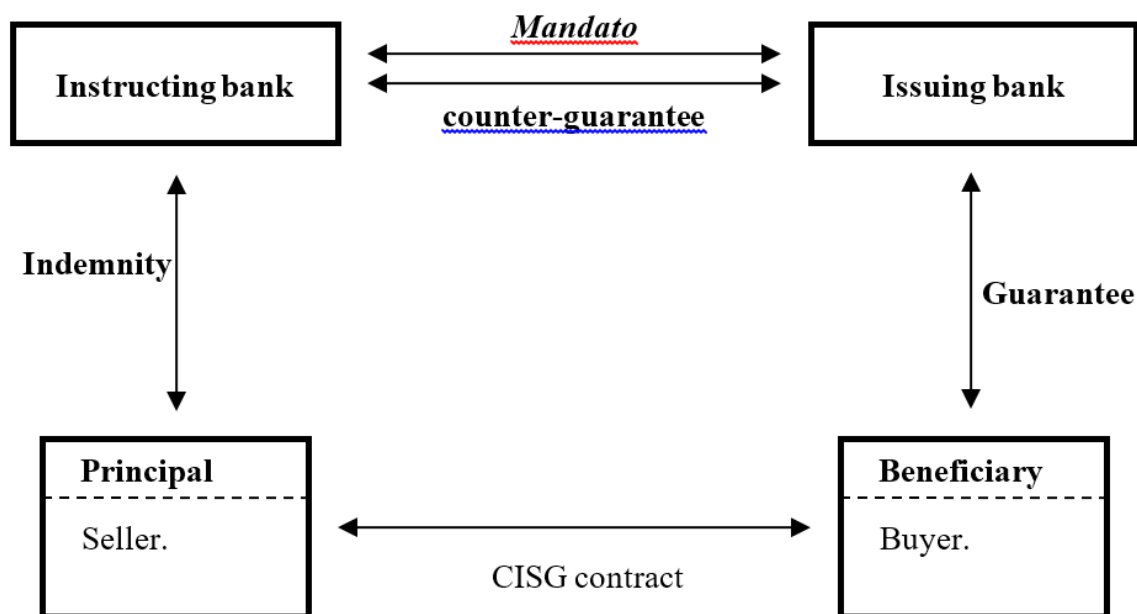
90. BERTRAMS, *supra* note 5, at 14.

DIRECT

In the case of indirect guarantees, the bank in the seller's country may also instruct a bank in the buyer's country to issue the guarantee; the former bank is then said to be the "first" or "instructing bank" and the latter the "second" or "issuing bank".⁹¹ The issuing bank usually requests an undertaking by the instructing bank to be reimbursed of all costs. Such undertaking has the nature of a guarantee and is known as a counter-guarantee.⁹²

91. *Id.* at 15; Fernández-Masiá, *supra* note 8, at 118.

92. See U.R.D.G. 758 *supra* note 13, art. 5 § b; BERTRAMS, *supra* note 5, at 15, 16; Fernández-Masiá, *supra* note 8, at 119. See also *Direct and indirect guarantee*, UBS, https://www.ubs.com/ch/en/swissbank/corporates/finance/trade_exportfinance/bankgarantie/garantie/direkte_indirektegarantien.html (last visited Jan. 19, 2016).

INDIRECT

In addition, the terms of the guarantee will then determine the formal and substantive requirements to be met by the beneficiary (for payment) under the guarantee.⁹³ For instance, the so called “(on) first demand guarantees” are payable simply against presentation of a demand for payment by the beneficiary.⁹⁴ On the other hand, where the beneficiary is required under the terms of the guarantee to state that the applicant [usually the seller] is in breach under the underlying relationship (the CISG contract),⁹⁵ the guarantee in essence remains a first demand guarantee. The beneficiary is not in principle bound, absent any language to that effect, to prove that its statement is accurate, and the bank is not entitled to request such proof.⁹⁶ However, the requirement to state that the applicant (usually the seller) breached the underlying contract is believed to be adequate to inhibiting unjustified demands and to strike a fair balance between a pure on-demand guarantee and a guarantee requiring evidence of breach in the form *e.g.* of a judgment or an arbitral award.⁹⁷ Moreover, an inaccurate statement on the part of the beneficiary may be relied upon by the applicant in later judicial or arbitral proceedings against the beneficiary.

IV. REMEDIES FOR BREACH OF A PARTY’S DUTY TO PROVIDE AN INDEPENDENT GUARANTEE

A party’s failure to perform any of its obligations will entitle the other party to claim the legal remedies available pursuant to articles 45 and 61 CISG.⁹⁸ A breach will ensue regardless of whether the obligation

93. Fernández-Masiá, *supra* note 8, at 121; See United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, *Independent Guarantees and Stand-by Letter of Credit*, art. 15(1), U.N. Doc. A/RES/50/48 (Dec. 11, 1995); see also DeLy, *supra* note 3, at 842.

94. RAMBERG, *supra* note 59; Fernández-Masiá, *supra* note 8, at 121.

95. This is the rule, absent any different express agreement of the parties, under the U.R.D.G. Sections 458 and 758. See GOODE, *supra* note 33, at 3233.

96. Fernández-Masiá, *supra* note 8, at 121.

97. *Id.* at 122.

98. GARRO & ZUPPI, *supra* note 58, at 285.

at stake is a main obligation or an ancillary one, whether it arises under the CISG provisions or the sales contract. A seller's failure to have the agreed independent guarantee issued by the guarantor and delivered to the beneficiary [the buyer] constitutes a breach of contract.⁹⁹ Accordingly, the injured party will be entitled to the remedies afforded by the CISG. These remedies include a request for (a) specific performance; (b) the avoidance of the sales contract; and (c) damages.

A. Specific Performance of an obligation to provide an independent guarantee

The CISG gives a party the remedy to require performance by the other party of its obligations, unless the former had opted for a different remedy that is inconsistent with specific performance, such as the avoidance of the sales contract.¹⁰⁰ Possible breaches giving rise to the remedy of specific performance include the failure to deliver the goods, related documents or their defective delivery, and also other contractually accepted obligations,¹⁰¹ like the provision of an independent guarantee by the seller or the buyer.¹⁰² When the buyer has received non-conforming goods, Article 46(2) CISG grants the buyer a right to request the delivery of substitute goods only if the lack of conformity constitutes a fundamental breach. In other words, a fundamental breach arises only if keeping the non-conforming goods substantially deprives the buyer of what it was entitled to expect under the contract and this deprivation was foreseen by the seller at the conclusion of the contract.¹⁰³ The rationale for requiring the high standard for a breach of substantial deprivation for the delivery of substitute goods assumes that the non-conforming goods have already been shipped and transported to the buyer's place of business or to the place where the goods are intended to be resold or used. In that case, the delivery of substitute goods is considered a *ultima ratio* remedy, which is made available only to the extent that other remedies that do not require a fundamental breach such as repair of the goods (Article 46 (3) CISG), the reduction of the price (Article 50 CISG) or/and damages (Article 74), would not fully remedy or compensate the seller's breach.¹⁰⁴

In the case of the establishment of an independent guarantee with terms that depart from the underlying sales contract's specifications, the beneficiary (the buyer for example) may require the applicant (the seller for instance) to have the guarantor issuing a substitute conforming guarantee or to amend its nonconforming terms, with the beneficiary's consent.¹⁰⁵ Since the issuance of a new bank guarantee does not implicate the hazards or expenses generally involved in the shipment and transportation of substitute goods, no reason exists to subject the buyer's claim to provide a new conforming independent guarantee to the requirements of Article 46(2) CISG, *i.e.* the existence of a fundamental breach. In this context, the basis for the beneficiary's claim is Article 46(1) CISG.¹⁰⁶

99. Markus Müller-Chen, *Article 45, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 519, 519, 520 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 1998).

100. CISG, *supra* note 60, at arts. 46, 61, 62; GARRO & ZUPPI, *supra* note 58, at 287.

101. Markus Müller-Chen, *Article 46, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 535, 537 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 1998).

102. Cf. Shael Herman, *Specific Performance: A Comparative Analysis* (2), 7 EDINBURGH L. REV. 194, 204 (2003).

103. CISG, *supra* note 60, art. 25.

104. Müller-Chen, *supra* note 101.

105. See U.R.D.G. 758 *supra* note 13, art. 11, § b.

106. Article 46, section 1 of CISG establishes the general right of the buyer to require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement. CISG, *supra* note 60, art. 46, § 1.

A party may nevertheless be exempted from performing its obligation to provide a bank guarantee due to an impediment beyond its own or the guarantor's control that was unforeseeable and unavoidable either by the applicant or the guarantor pursuant to article 79(1)(2)(a)(b) CISG.¹⁰⁷

1. Fixing an additional period of time to provide an independent guarantee

For the sake of goodwill among the parties or for its own benefit, a buyer may fix an additional period of time for performance by the seller of any contractual or statutory obligations pursuant to article 47(1) CISG.¹⁰⁸ The setting of an additional period of time also works for a contractual obligation to provide a conforming independent guarantee. In the case of a seller's breach of the obligation to deliver the goods, article 47(1) CISG is of paramount importance because a repeated failure to deliver the goods within the additional period of time fixed by the buyer will automatically entitle the buyer to declare the avoidance of the contract pursuant to article 49(1)(b) CISG.¹⁰⁹ However, those legal consequences do not follow from the breach of other types of obligations by the seller. In particular, if the seller breached its obligation to have a guarantor issue an independent guarantee, the buyer's right to avoid the contract depends only on whether or not the breach of contract is 'fundamental' within the meaning of Article 25 (see Section B below). The fixing of an additional period of time and the repeated failure is of no consequence in that regard. However, fixing an additional period of time may become important in cases where the breach of an obligation to provide an independent guarantee represents a fundamental breach pursuant to the terms of the sales contract.¹¹⁰ For instance, when the sales contract provides that failure to provide the independent guarantee to the buyer would lead to the termination of the contract,¹¹¹ but the buyer initially chooses, after the first failure, not to request the strict performance of that obligation. The buyer's conduct would lead to a failure to declare avoidance of the contract within the time-limit required by article 49(2)(b)(i) CISG.¹¹² If the buyer then wishes to pursue the termination of the contract, he may regain the initially lost right to avoid the contract by fixing an additional period of time for the seller to provide the guarantee.¹¹³ Other remedies available to the buyer (besides avoidance of the contract) never depend upon the formal step of an additional period of time, like the right to require performance (Article 46 CISG) and generally the right to claim damages (Article 45(1)(b) CISG).

In all cases, the additional period of time fixed by the buyer must be for a reasonable length of time as determined by the circumstances (Article 47(1) CISG).¹¹⁴ In the context of an obligation to have a

107. CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 187 § 18 (2008): "the obligor has basically no control over these third parties. Paragraph 2 thus only applies if the third party independently discharges a performance obligation of the obligor. Firstly, this is the case for transport companies or banks, inasmuch as they independently perform certain obligations of the seller or the buyer (e.g., to transport the goods, to transfer the money to the seller's bank, to open a letter of credit or to establish a bank guarantee)".

108. GARRO & ZUPPI, *supra* note 58, at 286.

109. CISG, *supra* note 60, art. 49, § 1, cl. b.

110. Markus Müller-Chen, *Article 47*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 553, 554 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 1998).

111. BERTRAMS, *supra* note 5, at 66: "When the parties to the underlying relationship have agreed that the principal debtor is to furnish and guarantee payable on certain terms and conditions, that agreement constitutes a condition precedent in the sense that the obligations of the other party are suspended until the issuance of the guarantee."

112. *Id.*

113. *Id.*

114. CISG, *supra* note 60, art. 47, § 1.

guarantor issue an independent guarantee, the banking practices at the seller's place of business, bank holidays, the type of guarantee agreed upon and its payment structure, *i.e.* whether the guarantee is a direct or indirect guarantee must be given due regard. In this line of thought, the issuance of an indirect guarantee may need a longer additional period of time because of the involvement of the issuing bank at the buyer's place of business and the counter-guarantee in place for the instructing bank. The buyer will be bound to hold any other remedy during the additional period of time unless the seller informs the buyer that it does not intend to perform during such period (Article 47(2) CISG).¹¹⁵

2. Possibility to request an opportunity to remedy an independent guarantee

Pursuant to article 48 CISG, the seller may request of the buyer the opportunity to remedy a defective performance of its obligations if the seller can do so without unreasonable delay or without causing an unreasonable inconvenience or uncertainty to the buyer.¹¹⁶ There is no express corresponding buyer's right to remedy a defective performance of its obligation after the due date. However, the seller's right to remedy a defective performance constitutes a foundational principle upon which the CISG is based¹¹⁷ (Article 7(2) CISG) and thus should be extended to the buyer. The right to remedy at one's own expenses exists for every type of breach of contract.¹¹⁸ It includes a violation of any agreed obligation like the provision of an independent guarantee.¹¹⁹

Article 48(1) CISG provides that the seller's opportunity to remedy does not exist until after the due date of the delivery of the goods. Prior to this time, the curing of defects is regulated by articles 34 and 37 CISG regarding early performance of a party's obligations. However, if a seller is required to provide an independent guarantee by a particular date in order to secure punctual and proper delivery of the goods and he fails to do so by that date, or if the terms of the guarantee do not correspond to the specification in the underlying sales contract, the date for exercise of the right to remedy by subsequent performance is moved from the delivery date to the date on which the duty in question was to be performed.¹²⁰

The way a seller is to remedy his failure comes from the nature of the obligation breached. Accordingly, a defective bank guarantee can be replaced by a new guarantee.¹²¹ In so far the failure is of a nature that allows itself to be remedied.¹²² Whether the seller is able to remedy its breach without 'unreasonable delay,' 'unreasonable inconvenience,' or 'unreasonable uncertainty of reimbursement of expenses' for the buyer cannot be decided as a general principle, but shall be answered only on the basis of the circumstances of each individual case.¹²³ In the case of an obligation to provide an independent guarantee, the seller's steps to remedy its failure to comply on time will always suit the buyer. Unless the buyer has already acquired the right to avoid the contract with regard to a different obligation, it is unlikely that the buyer may argue that the provision of a new independent guarantee, after its due date, causes him any

115. *Id.*, art. 47, § 2.

116. CISG, *supra* note 60, art. 48, § 1; *see Id.*, art. 48.

117. CISG, *supra* note 60, art. 72.

118. Markus Müller-Chen, *Article 48*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 562, 563 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 1998).

119. *Id.*

120. *Id.* at 564.

121. *Id.*

122. *Id.*

123. *Id.* at 565.

inconvenience or uncertainty. As one would say, better late than never. Consequently, a seller will usually be entitled to remedy its failure to provide a proper independent guarantee under article 48(1)(2) CISG.

B. Avoidance of the underlying contract caused by failure to provide an independent guarantee

In accordance with article 49 CISG, a party may declare the sales contract avoided if the other party's failure to perform any of its obligation amounts to a fundamental breach. A breach is fundamental if it results in such a detriment to the suffering party as to substantially deprive that party of what it was entitled to expect under the contract, and such result was, or ought to be, foreseeable for the breaching party.¹²⁴ In principle, whether a CISG contract may be avoided because of a seller's failure to hand over proper documents related to the goods is to be decided according to principles similar to those applicable to delivery of non-conforming goods.¹²⁵ For instance, if the seller fails to deliver documents that entitle the buyer to dispose of the goods or documents of title such as bills of lading, load notes, warehouse warrants, etc., or if there are defects in their content, then an objectively serious defect may exist.¹²⁶ In that case, a fundamental breach may have occurred. However, in the case of a seller's failure to perform a contractual obligation to provide an independent guarantee, the question of whether there has been a fundamental breach of contract depends on the objective importance of that breach in the context of the particular contract pursuant to article 25 CISG, and on whether the defect can be remedied within a reasonable period in accordance with article 48(1)(2) CISG (see section A, 2 above).¹²⁷

The rule of fixing an additional period of time under Article 49(1)(b) applies only to the failure to deliver the goods. In all other cases, when the breach is interpreted as being of a fundamental nature, Article 49(1)(a) leads to diverse solutions that are appropriate to individual cases (see section A, 1 above).¹²⁸

In our view, a failure to provide an independent guarantee is unlikely to constitute a fundamental breach. As stated above, independent guarantees are intended to cover the risk of different types of breach of contract or default. Coverage against that risk cannot, by default, constitute a party's main expectation under a sales contract. A seller's main expectation under a sales contract is to be paid for the value of the goods it sells. A buyer's main expectation under a sales contract is to obtain and be able to dispose of or use the goods in conformity with the contract and the CISG. Parties do not enter into a sales contract to be covered against the possibility of seeing their main expectations under the sales contract unfulfilled.

124. CISG, *supra* note 60, art. 8.

125. MARTIN DAVIES, CONTRACTS FOR THE INT'L SALE OF GOODS ADVISORY COUNCIL, CISG-AC OPINION NO. 11: ISSUES RAISED BY DOCUMENTS UNDER THE CISG FOCUSING ON THE BUYER'S PAYMENT DUTY, ¶ 3.5 (CISG Advisory Council ed., 2012), <http://www.cisgac.com/UserFiles/File/CISG%20Advisory%20Council%20Opinion%20No%2011.pdf>;

Cf. COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), art. 49, 751 [hereinafter COMMENTARY] (Peter Schlechtriem & Ingeborg Schwenzer eds., 3d. ed. 2005).

126. *See* INGBORG SCHWENZER, CONTRACTS FOR THE INT'L SALE OF GOODS ADVISORY COUNCIL, CISG-AC OPINION 5: THE BUYER'S RIGHT TO AVOID THE CONTRACT IN CASE OF NON-CONFORMING GOODS OR DOCUMENTS, ¶¶ 4.7- 4.10, (CISG Advisory Council ed., 2005), <http://www.cisgac.com/UserFiles/File/CISG%20Advisory%20Council%20Opinion%20No%205%20PDFA.pdf>

127. COMMENTARY, *supra* at note 125, at 752; *see also* SCHWENZER, *supra* note 126, at ¶ 4.9, Section IV (A)(1) (discussing the buyer's right to avoid the contract in case of non-conform).

128. COMMENTARY, *supra* note 125, at 752.

Of course, the parties may stipulate that, for example, the seller has an immediate right to contract avoidance should the buyer fail to provide an independent guarantee (Article 6 CISG). Indeed, there may be cases where a party would not have entered into a sales contract but for the other party's agreement to provide an independent guarantee. But that would need to be an express term or need to stem from the parties' implied intent (Article 8(2)(3) CISG), *i.e.* their prior practices or a trade practice in the industry (Article 9(1)(2) CISG). It is not a coincidence that parties who place great importance on being covered against the risk of breach or default (for instance, governments acting as private parties) will expressly subject the contract's existence to a condition precedent or subsequent, consisting of the proper issuance of an independent guarantee by a guarantor bank and its acceptance by the beneficiary.¹²⁹

When the parties agree that an independent guarantee is to be provided punctually before the performance of the obligation relevant to the guarantee, the question arises as to whether it may be concluded from the failure to provide the guarantee that the applicant will not perform the obligation guaranteed. For example, if the parties agree that the seller is to provide a "delivery guarantee" on September 4 prior to the delivery of the goods on September 28, some may argue that a fundamental breach exists if the seller fails to provide the guarantee in time and it follows that he will not deliver the goods either. In this case, however, the breach in question regards the failure to deliver the goods or its likelihood (and not the failure to provide the guarantee). The hypothetical falls into the realm of article 72 CISG, which entitles a party to declare the contract avoided if, prior to the date of performance, it is clear that one of the parties will commit a fundamental breach.

Another example is the case where the buyer is contractually obliged to provide the seller with a payment guarantee or stand-by letter of credit securing the seller for the buyer's failure to pay the price. If the buyer fails to provide the seller with such a guarantee, the seller is entitled to suspend the performance of his obligations until the buyer gives assurances (see V below). Some authors argue that if time is of the essence under the contract, the seller may be entitled to avoid the contract for fundamental breach of contract by the buyer.¹³⁰ Again, in this case, the breach that eventually reaches a "fundamental" level is not the failure to provide the stand-by letter of credit or payment guarantee, but the failure to pay the price as such, or its certainty pursuant to article 72(1) CISG.

In addition, a scholar submits that "where the failure to open a letter of credit or provide a bank guarantee cannot in itself be regarded as a fundamental [breach] of contract, the seller may set an additional period of time for the buyer to open the letter of credit or provide the guarantee, failing which the seller will then be entitled to avoid the contract under Article 64(1)(b) without needing to show a fundamental breach of contract."¹³¹ We respectfully disagree. The scholar refers to two instruments that deserve different treatment. A bank guarantee applied by the buyer, also known as "payment guarantee" or "stand-by letters of credit",¹³² intends to cover the seller against the risk that the buyer fails to pay. The amount of the payment guarantee or stand-by letter of credit does not necessary match the purchase

129. See BERTRAMS, *supra* note 5, at 79 (stating that "when the parties to the underlying relationship have agreed that the principal debtor is to furnish a guarantee payable on certain terms and conditions, that agreement constitutes a condition precedent in the sense that the obligations of the other party are suspended until the issuance of the guarantee").

130. COMMENTARY, *supra* at note 125, at 898.

131. *Id.* at 898.

132. See generally *Id.*

price.¹³³ Contrary to a commercial “letter of credit,” a “payment guarantee” may be considered neither part of the buyer’s obligations to pay the price under Article 53 CISG, which is the treatment given to a “letter of credit” when time is of the essence in documentary sales of commodities,¹³⁴ nor an act to enable payment under Article 54 CISG. Although some disagree with us,¹³⁵ the provision of an independent guarantee results from a different contractual obligation (see section III above). As put by Bertrams:

A documentary credit is a means of payment of the purchase price and its utilisation occurs in the ordinary course of events, in contemplation of performance as envisaged by the parties, whereas a guarantee provides security and contemplates payment of compensation in the unexpected event of non-performance of the principal contract. From the account party’s viewpoint this difference is crucial. In the case of a documentary credit, utilisation serves his interest, since he will thereby obtain the goods that he intended to obtain. In contrast, payment of the bank guarantee pursuant to a valid call under the guarantee merely results in the account party’s duty to reimburse the bank without any corresponding advantage....¹³⁶

Accordingly, a failure to provide an independent guarantee will not fall into the scope of Article 64(1) (b) CISG since such failure does not amount to failing to pay the price.

C. Damages

Liability for damages arises when a seller or a buyer breaches any of his obligations under the sales contract or the CISG.¹³⁷ The breach does not have to be a “fundamental” one under article 25 CISG. The breach of any obligation by one of the parties, including the obligation to provide an independent guarantee,¹³⁸ triggers the right to damages that, under the principle of full compensation, must be equal to the financial loss suffered by the other party because of the breach.¹³⁹ Therefore, damages recoverable

133. See INTERNATIONAL CHAMBER OF COMMERCE, UNIFORM RULES FOR DEMAND GUARANTEES (U.R.D.G.), art. 13 (2010) (noting “that a guarantee may provide for the reduction or increase of its amount on specified dates or on the occurrence of a specified event which under the terms of the guarantee results in the variation of the amount”).

134. See COMMENTARY, *supra* at note 125, at 431-32 (noting that a commercial “letter of credit” in a documentary sale of commodity may be “governed by the CISG”).

135. See Secretariat of the United Nations Convention on Contracts for the International Sale of Goods, *Secretariat Commentary on Article 50 of the 1978 Draft* art. 69 ¶ 3, (1978); UNCITRAL, DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, 264, (2012); Alejandro Osuna-González, *Buyer’s Enabling Steps to Pay the Price: Article 54 of the United Nations Convention on Contracts for the International Sale of Goods* 25 J. L. AND COM. 299, 303 (2006); Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary November 17, 1995, VB/94124, (Hung.),

<http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract>

(“Since, in accordance with Article 54 CISG, the buyer’s obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract to enable payment - such as the issuance of a bank guarantee - the buyer’s failure to secure payment constituted a breach of its obligation to pay the price), <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g1.html><http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g1.html>

See Oberlandesgericht München [OLG][Provincial Court of Appeal] Feb. 8, 1995, 7 U 1720/94, [cisgw3.law.pace.edu/cases/950208g1.html](http://www.cisg.law.pace.edu/cases/950208g1.html) (holding that the parties agreed to have a bank guarantee fulfill payment requirements, which also was a penalty for not taking the contracted items).

136. BERTRAMS, *supra* note 5, at 69.

137. See CISG, *supra* note 60, art. 73-74.

138. BERTRAMS, *supra*, note 5, at 66 (if the correct guarantee has not been issued in time, the other party is ordinarily [...] entitled to damages); HOSSAM A. EL-SAGHIR, THE INTERPRETATION OF THE CISG IN THE ARAB WORLD, (André Janssen & Olaf Meyer eds., 2008) (referring to an arbitral tribunal which awarded damages to one party in light of the other party’s breach of contractual obligations by not extending a bank guarantee), *reprinted in* Hossam A. El-Saghir, *The Interpretation of the CISG in the Arab World*, <http://www.cisg.law.pace.edu/cisg/biblio/el-saghir.html>

139. See Ingeborg Schwenzer & Pascal Hachem, *The Scope of the CISG Provisions on Damages*, in CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 92-93 (Djakhongir Saidov & Ralph Cunnington eds., 2008).

are not in such cases related or limited to the amount of the guarantee. The type of financial losses recoverable under the CISG includes non-performance loss, incidental loss, and consequential loss resulting from the breach¹⁴⁰ of the obligation to provide the guarantee,¹⁴¹ which is independent from the breach of the obligation that was intended to be guaranteed. For instance, where the delivery of the goods is subject to the issuance of a payment guarantee by the buyer's bank, any extra storage cost resulting from a deferred delivery of the goods because the buyer failed to provide the payment guarantee on time shall be recoverable by the seller as damages.¹⁴²

On the other hand, damages arising out of the guarantor's temporal or definite refusal to pay the guarantee's amounts to the beneficiary are not recoverable under the sales contract against the applicant party. This case cannot be considered as a breach of the sales contract if, for example, the seller has provided the agreed guarantee and the guarantor has refused or delayed payment to the buyer for reasons that could only be described as frivolous, untenable or spurious.¹⁴³ Any damage arising in such a case is recoverable under the guarantor and beneficiary's legal relationship only.

V. RIGHT TO WITHHOLD PERFORMANCE

Article 71(1) CISG entitles a party to suspend the performance of its obligations, when it becomes apparent that the other party will not perform a substantial part of its obligations.¹⁴⁴ A party's right to suspend performance applies to concurrent performance by both parties, to agreed performance by the debtor first, and to performance by the creditor first.¹⁴⁵

It has been generally held that the right of suspension applies only to reciprocal obligations.¹⁴⁶ In other words, a creditor may only be entitled to withhold an obligation that constitutes the counterpart of the debtor's obligation that is unlikely to be fulfilled. However, the right to suspension may also be extended to interdependent obligations, for instance, obligations that a party would not have agreed up on if the performance of a specific (probably nonreciprocal) obligation had not been promised in return.¹⁴⁷

In the context of independent guarantees, the following questions arise. A seller may be required to provide a delivery guarantee or performance guarantee prior to or concurrently to the buyer's payment of the price. The question thus arises as to whether failing to provide the independent guarantee entitles the buyer to suspend a related counter-obligation or even the interdependent payment obligation. In such a hypothetical, a seller, who must provide the independent guarantee prior or simultaneously to the payment of the goods, may learn that the buyer will not have the financial capacity to meet its payment obligation under the contract. The question then arises as to whether the seller may suspend its independent guarantee obligation or its (reciprocal) delivery of goods obligation or both. The same

140. COMMENTARY *supra* note 125, at 1006.

141. BRUNO ZELLER, DAMAGES UNDER THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 70 (2d ed. 2009) ("a breach can occur even if it is not laid down explicitly in this Convention").

142. COMMENTARY, *supra* note 131, at 1009.

143. BERTRAMS, *supra* note 5, at 244.

144. See CISG, *supra* note 60, art. 71, § 1.

145. COMMENTARY, *supra* note 131, at 951.

146. *Id.* at 950.

147. *Id.* at 951.

applies to a buyer's contractual obligation to furnish a payment guarantee or stand-by letter of credit prior to or simultaneously to the delivery of the goods or the documents representing them. May the buyer withhold its obligation to provide such guarantee or even its interdependent payment obligation if the buyer learns that the delivery of goods will be delayed? These questions will be addressed below after a brief review of the requirements for suspension under the CISG.

Article 71 CISG requires the existence of threat of future failure to perform. This provision specifies the situations giving rise to an imminent breach of contract. A party's inability to perform must be due to "a serious deficiency in his ability to perform" or "its creditworthiness" or to its "own conduct in preparing performance".¹⁴⁸ A "serious deficiency in the ability to perform" relates to factual elements such as strikes or impossibilities due to natural events as well as to legal impediments like failures due to government laws or action.¹⁴⁹ Generally, available information about basic market conditions or market developments that could possibly endanger performance is no impediment within the meaning of Article 71(1)(a) CISG.¹⁵⁰ Serious deficiency in "creditworthiness" relates to insolvency and similar events or by cessation of payment.¹⁵¹ Whether a failure to furnish a payment guarantee by the buyer may qualify as grounds for suspension of the seller's obligation to deliver the goods will depend on the circumstances, as further explained. Finally, doubts about the debtor's ability to perform its obligations due to its "own conduct in preparing performance" such as the seller's failure to source the raw or auxiliary materials, licenses, export permits, proper package, components or the like that are needed to accomplish its obligation to deliver the goods, in conformity with the contract or the CISG.¹⁵² As further discussed in this section, the seller's failure to furnish a delivery guarantee or performance bond may allow the buyer to withhold performance of a correlated contractual obligation like furnishing a payment guarantee. However, such failure may be insufficient to indicate that the seller will be unable to deliver conforming goods under the contract or the CISG.

A party's failure must relate to a "substantial" part of that party's obligations. The standard of failure is, nevertheless, lower than the "fundamental" breach standard in article 25 CISG.¹⁵³ This is due to the fact that the remedy granted by article 71 CISG is preventive. The contract's main obligations may have not been performed yet and the suspension of a party's obligation, *per se*, does not lead to the avoidance of the contract. What may be considered a substantial part of a party's obligation has to be determined in light of the sales contract's provisions as a whole and the creditor's reasonable expectations under the contract, which were known or should have been known by the other party.¹⁵⁴

Against this background, the buyer will be entitled to suspend an agreed obligation to provide a stand-by letter of credit if the seller has already failed to perform a related counter-obligation to provide a delivery guarantee or performance guarantee. On the other hand, a buyer may be entitled to suspend its obligation to pay the price in light of a seller's failure to perform an interdependent obligation to

148. Damien Nyer, *Withholding Performance for Breach in International Transactions: An Exercise in Equations, Proportions or Coercion?*, 18 PACE INT'L L. REV. 29, 72 (2006).

149. COMMENTARY, *supra* note 131, at 955.

150. *Id.* at 955.

151. *Id.* at 955.

152. *Id.* at 956.

153. *Id.* at 954.

154. *Id.*

provide a delivery guarantee if such failure indicates a threat that the seller will not perform its main obligation to deliver conforming goods. This could be the case where the seller has failed to comply with the obligation to deliver conforming goods (which will be considered a ‘substantial’ part) in the past and the guarantee requested is precisely intended to cover the risk that such failure repeats. The buyer could also withhold its interdependent obligation to pay the price if the contract expressly provides for payment against a delivery guarantee or performance guarantee and the seller is late in performing such an obligation.

A seller’s provision of a performance guarantee or delivery guarantee against a stand-by letter of credit by the buyer can be withheld until the buyer’s provision of the stand-by letter of credit. If the seller is required to provide the performance guarantee or delivery guarantee first, it may only suspend performance when, for instance, it obtains reliable information that the buyer’s usual guarantor is in bankruptcy or has refused to issue the independent guarantee for the buyer.

Where the buyer has already provided a stand-by letter of credit correlated to the seller’s performance guarantee, the seller is unlikely to have grounds to suspend its obligation to provide the performance guarantee based on a threat that the buyer will not pay the purchase price. In that scenario, the seller could eventually demand the payment guarantee in case the buyer also calls the performance guarantee. Depending on the value of the respective guarantees, both parties could be said to be temporarily set off. In case no stand-by letter of credit is required from the buyer, the seller will not be entitled to withhold the provision of a contractual independent guarantee if the payment of the purchase price is conditioned to the provision of the seller’s independent guarantee. The seller may only withhold the provision of an independent guarantee based on the future threat of never receiving the interdependent obligation of payment, if the buyer has become insolvent or bankrupt or if the transaction required the buyer’s bank or parent or government approval to finance the transaction and the seller learns from reliable sources that the buyer has not obtained such approval. The seller could also suspend its interdependent obligation to deliver the goods if the buyer fails to provide a valid payment guarantee prior to delivery of the goods as agreed by the parties.¹⁵⁵

Similarly, the buyer may withhold its contractual obligation to provide a stand-by letter of credit if the seller breaches its obligation to furnish a delivery or performance guarantee first. Where the buyer is contractually bound to provide a stand-by letter of credit first, only a real threat that the seller will not furnish a correlated delivery guarantee or performance guarantee may entitle the buyer to withhold the provision of a stand-by letter of credit. A real threat may emerge when the financing bank has cut the seller’s credit line or when the parent company that usually acts as the guarantor has announced its liquidation or insolvency.

155. See UNCITRAL, *supra* note 135, at 333; Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, *supra* note 135, available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract> <http://www.unilex.info/case.cfm?pid=1&do=case&id=217&step=Abstract> (“A Hungarian seller and an Austrian buyer that had a longstanding business relationship concluded a contract according to which the seller had to make several deliveries of mushrooms to the buyer. The buyer would secure payment for deliveries by a bank guarantee in favor of the seller which should be valid until a certain date. The said guarantee, however, was neither given by the buyer nor requested by the seller before that date. The seller started to deliver the goods, but as the buyer failed to make payment, stopped further deliveries and declared the contract avoided. On a later date, the parties agreed that the seller would resume delivery on condition that the buyer provide the required guarantee. The buyer finally sent a guarantee which however bore the expiry date originally agreed upon and therefore was no longer valid. The Court held that the seller was entitled to suspend performance of its obligation as the buyer had not given adequate assurance of payment of the price through a valid bank guarantee (Article 71(1)(b) CISG)”).

The buyer could also suspend a contractual obligation to furnish a stand-by letter of credit, as well as its main obligation to pay the price if it learns from reliable sources that the seller will not perform its obligation to deliver the goods. This may be the case when the goods in question have been destroyed before delivery and the seller is definitely prevented from performing its obligation to deliver the goods.

A party's imminent failure to perform a substantial part of its obligation due to *force majeure* or impossibility under article 79 CISG, does not preclude the other party's right to suspend performance if the requirements of article 71 CISG are met.¹⁵⁶ A question of major practical relevance is whether a party who has already performed its contractual obligation to provide an independent guarantee may order the guarantor to stop payment when it learns that the other party will not perform a correlated or an interdependent obligation. In other words, whether a party is entitled to stop performance after performance under article 71(2) CISG in the context of independent guarantees.

Some scholars submit that the right to stop performance after performance operates only on the seller's benefit and in relation to the delivery of goods since during the Vienna Conference the buyer's right to stop payment after being ordered was discussed but not included.¹⁵⁷ We submit, on the contrary, that the right of a party to stop the guarantor from paying the guarantee may be possible under the contract between the principal and the guarantor and that such possibility cannot have any negative effects under the CISG. If the terms of the guarantee allow the principal to withdraw the guarantee or at least to stop payment of its monies in light of the beneficiary's imminent threat of failure to perform the underlying contract, the principal may rely on the exoneration afforded by article 71(2) CISG. In that case the principal will not breach any obligation under the underlying sales contract. In principle, the guarantor undertakes a duty to deliver a guarantee to the beneficiary in accordance with the instructions received from the principal. The guarantor has a duty to follow the instructions received from the principal and to advise him on limited and special aspects. The guarantor is bound to inform the principal immediately when it becomes aware that the beneficiary intends to make a demand,¹⁵⁸ and always has a duty to do so before making payment. But a guarantor is not required to hold payment until the principal has been made aware of the demand or its reasons.¹⁵⁹ Under the terms of the contract with the principal, the guarantor is bound to pay the guarantee only where the demand is in accordance with the terms of the guarantee, or is complying in URDG 758 parlance.¹⁶⁰

But that hypothetical guarantee, whose terms could allow the principal to withdraw the guarantee or at least to stop payment of its monies in light of the beneficiary's imminent threat of failure to perform the underlying contract, may not be called an independent guarantee. Those terms would work against the very nature of an independent guarantee. Under most independent guarantees the guarantor has a duty to pay the guarantee upon the beneficiary's demand from the time the guarantee has entered into force until the expiry date or event.¹⁶¹ The express terms of the guarantee generally describe the case(s)

156. BRUNNER, *supra* note 107, at 376; Fountoulakis *supra* note 137, at 955.

157. Fountoulakis, *supra* note 137, at 961.

158. U.R.D.G. 758 *supra* note 13, art. 16; U.R.D.G. 458 *supra* note 20, art. 17; *see also* DeLy, *supra* note 11, at 835.

159. *Id.* at 836.

160. U.R.D.G. 758 *supra* note 13, art. 2 ("Complying presentation under a guarantee means a presentation that is in accordance with, first, the terms and conditions of the 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 practice.")

161. Blau & Jedzig, *supra* note 50, at 726; O'Driscoll, *supra* note 24, at 382.

in which the beneficiary is entitled to payment and any documents that may have to be provided.¹⁶² Not infrequently the guarantee contains ambiguous terms, especially terms which appear to refer to the main commercial contract, by conditions such as “if the seller has failed to perform his delivery obligation”; in such case, the guarantor may request the beneficiary to sign a statement declaring that the condition or requirement expressed by such clause is met.¹⁶³

Where the demand is noncompliant, the guarantor has a duty to the principal to refuse to pay.¹⁶⁴ But where the demand is compliant and there are no circumstances from which an inference of irregularity¹⁶⁵ or fraud may be drawn, the guarantor has a duty to pay in accordance with the terms of the guarantee.¹⁶⁶ In the case of demand guarantees, the beneficiary’s demand will be sufficient to trigger the guarantor’s obligation to pay the guarantee and at that point, it is impossible for the principal to stop the guarantor from paying.¹⁶⁷ The guarantor has a duty to pay even if the beneficiary is in breach under the terms of its contract with the principal.

In most scenarios, a principal will only be able to request a state court or arbitral tribunal to make an injunction ordering the guarantor to stop payment of the guarantee if the beneficiary’s demand is fraudulent.¹⁶⁸ The guarantor is entitled, indeed bound under its relationship with the principal, to refuse payment when a demand is fraudulent. National courts and tribunals interpret the notion of fraudulent demand in accordance with the law applicable to the guarantee¹⁶⁹ and thus the concepts are not uniform.¹⁷⁰ Generally, there is a fraudulent demand when such is manifestly contrary to the prohibition against abuse of legal and contractual rights and thus represents a gross and qualified breach of the rules of good faith.¹⁷¹ But a demand that is in contradiction with the parties’ respective rights

162. See U.R.D.G. 758 *supra* note 13, art. 19.

163. See U.R.D.G. 758 *supra* note 13, art. 15 § b; Ramberg, *supra* note 59, at 47, 48.

164. Blau & Jedzig, *supra* note 50 (“[u]nder German law, the contract between the contractor and the bank by which the bank was instructed to give the Guarantee is deemed to impose an obligation on the bank to protect the contractor against damage. Certainly, in case of an abuse, the contractor is damaged when the bank pays to the beneficiary and the contractor has to reimburse the bank promptly thereafter. Therefore, it is argued that the bank not only has a right to refuse payment in cases of abuse but, in regard to the contractor, has the obligation to do so.”).

165. U.R.D.G. 758 *supra* note 13, art. 25 §§ a, b.

166. U.R.D.G. 758 *supra* note 13, art. 20 § b; O’Driscoll, *supra* note 24, at 387, 388 (“Commenting the leading English case in the field of performance bonds *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] 1 Q.B. 159, where Lord Denning from the Court of Appeals held that “[a] bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.”).

167. U.R.D.G. 758 *supra* note 13, art. 20 § b; Blau & Jedzig, *supra* note 50, at 726; Meyer-Reumann, *supra* note 31 at 32, 33.

168. GOODE, *supra* note 33, at 23; O’Driscoll, *supra* note 24, at 384.

169. Austria Supreme Court Decision of July 28, 1999 [7 Ob 204/99x] [hereinafter *Pipe case*], translation available at <http://cisgw3.law.pace.edu/cases/990728a3.html><http://cisgw3.law.pace.edu/cases/990728a3.html>

(“[T]he Court of First Instance and the Court of Appeal only ignored that the guarantee document itself recites a choice-of-law. It is stated in this document that “Austrian law is applicable to this bank guarantee” [...] on which the Court of Appeal based its decision, it is argued, in accord with the preceding considerations, that the right to withdraw a bank guarantee has to conform with the law which is decisive for the contractual relationship.”).

170. For jurisprudential overview of what constitutes a fraudulent demand in various jurisdictions, see BERTRAMS, *supra* note 5, at 260; GOODE, *supra* note 33, at 23. For jurisprudential overview of what constitutes a fraudulent demand in the United States, United Kingdom, Canada and Australia, and under the United Nations Convention on Independent Guarantees and Standby Letters of Credit, see Goa Xiang & Ross P. Buckley, *A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law*, 13 DUKE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 293(2003). For jurisprudential overview of what constitutes a fraudulent demand in Germany, see Blau & Jedzig, *supra* note 50, at 727 (“German courts refuse to issue preliminary injunctions in cases where the call of the Guarantee is only “unjustified.” Apart from these cases, they are prepared to grant injunctive relief only in the rare cases of a “manifest abuse,” which in practice seems to be very similar to the concept of “fraud.” Such a manifest abuse is established only if the absence of any entitlement on the basis of the underlying contract is irrefutably prove.”).

171. BERTRAMS, *supra* note 5, at 273-74; GOODE, *supra* note 33, at 23.

and duties under the sales contract is not *per se* fraudulent.¹⁷² Accordingly, the right to stop payment of the guarantee in light of article 71(2) CISG could not be automatic even if the other party has failed to perform a correlated or interdependent obligation. Remember that the fundamental bargain to which the parties under that sales contract have agreed is expressed by the maxim “pay first, litigate later”,¹⁷³ and such term is also part of the contract between the principal and the bank.

Pursuant to Article 19 (1)(c) UNCITRAL Convention on Independent Guarantees a demand is fraudulent when, for example, it is made to cover one risk whereas the guarantee covers another.¹⁷⁴ Accordingly, situations that may entitle the principal to request stoppage of payment by the guarantor could include the buyer’s demand to pay a delivery guarantee where the buyer actually intends immediate compensation for some defects discovered in the goods at the time of taking delivery. It is similarly fraudulent when a *force majeure* event exempts the principal from liability or the beneficiary’s conduct is the cause of the damage complained of.¹⁷⁵ A seller could request its guarantor to stop payment of a delivery guarantee to the buyer if an impediment under article 79 CISG prevents the seller from performing its obligation to deliver. In a tender bond, the demand is fraudulent when the beneficiary has awarded the tender to a bidder other than the principal on whose instructions the guarantee was issued. Fraud does not require intention to cause harm or malice, because that is not a requirement of unconscionable conduct under most laws.¹⁷⁶

Under Article 71(3) CISG, the right of suspension or stoppage ceases to apply as soon as the debtor provides adequate assurances that it will perform. For example, if the buyer fails to provide the seller with a payment guarantee, the seller is entitled to suspend the performance of his obligations until the buyer gives assurances.¹⁷⁷ Assurances may consist of other types of means to secure the underlying transaction such as mortgages, liens, chattel mortgage, assignments, etc.¹⁷⁸

172. O’Driscoll, *supra* note 24, at 389, 390. Commenting on the English case of *Bolivinter Oil S.A. v. Chase Manhattan Bank* [1984] 1 Lloyd’s L.R. 251 (1983), where the English Court of Appeals held that it was “clearly debatable whether Horns [...] acted fraudulently in making their claim on the CBS guarantee or whether they[...] merely acted in breach of their release agreement with Bolivinter. Such knowledge is quite insufficient to justify a Court in preventing Chase and CBS complying with their contractual obligations”; *Pipe case*, *supra* note 161, translation available at <http://cisgw3.law.pace.edu/cases/990728a3.html><http://cisgw3.law.pace.edu/cases/990728a3.html>

(“The recipient could not be accused of acting fraudulently or in abuse of law as long as it was not definitely proven that it was not entitled to claim the purchase price. The affirmation or the negation of the clearness of the evidence to be brought by [Buyer] to prove an abuse of law was in any case an act of consideration of evidence carried out by a judge although the clearness of the guarantee’s abuse could not be assessed entirely without legal considerations”); Blau & Jedzig, *supra* note 50, at 727.

173. Blau & Jedzig, *supra* note 50, at 727.

174. DeLy, *supra* note 3, at 842; see also Meyer-Reumann, *supra* note 31, at 33.

175. UNCITRAL Convention on Independent Guarantees art. 19 § 2d.

176. BERTRAMS, *supra* note 5, at 273.

177. Mohs, *supra* note 130, at 898.

178. Fountoulakis, *supra* note 145, at 964.

VI. RESTITUTION

In case of avoidance of the underlying contract, article 81(2) entitles a party who has performed its obligation to provide an independent bank guarantee to claim its return from the other party. If the guarantee's monies have already been paid without legal grounds at the time of avoidance, the reimbursement of such monies may be claimed in accordance with the rules of unjust enrichment of the proper law.¹⁷⁹

VII. CONCLUSION

A party's obligation to have a guarantor issue an independent guarantee will be subject to the CISG's rules where the underlying contract as whole falls within the CISG's scope of application. Accordingly, a party's failure to provide the agreed independent guarantee to the beneficiary will constitute a breach of contract. The injured party will be entitled to the remedies afforded by the CISG.

As demonstrated above, the CISG offers an effective legal framework for the enforcement of a party's obligation to provide an independent guarantee under an international sale of goods contract. The CISG's system of remedies strikes a balance between a party's right to obtain coverage against the risk that the other party fails to perform its contractual obligations and the economic benefit of keeping the international sales contract alive in spite of the occurrence of a breach. In this line of thought, the beneficiary will always be entitled to request the applicant to have the guarantor issuing a substitute conforming guarantee or to amend its nonconforming terms. On the other hand, the fixing of an additional period of time to provide an independent guarantee and the repeated failure will not lead to the automatic avoidance of the sales contract: A party's right to avoid the contract will depend only on whether or not the breach of contract is 'fundamental' within the meaning of article 25 or pursuant to the contract terms. In addition, a seller will be generally entitled to remedy its failure to provide a proper independent guarantee under article 48(1)(2) CISG since it is unlikely that a late provision can cause the buyer any inconvenience or uncertainty.

Similarly, it is unlikely that a failure to provide an independent guarantee may constitute a fundamental breach because parties do not enter into a sales contract with the aim to be covered against the possibility of seeing their main expectations under the sales contract unfulfilled. The latter is part of the normal business' risk taken by traders. That being said, the parties may stipulate that, for example, a party has an immediate right to contract avoidance should the other party fail to provide the independent guarantee agreed.

The failure to comply with a contractual obligation to provide a guarantee may anticipate that the applicant will not perform the obligation guaranteed. This may entitle the beneficiary of the guarantee

179. Appellate Court München Germany, Decision of Feb. 8, 1995 [7 U 1720/94] *supra* note 127, *abstract available at* <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g1.html><http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950208g1.html>

("It was held that, although the CISG will normally apply to German-Italian sales, it does not regulate the seller's rights concerning bank guaranties. The court, applying its rules of private international law, determined that German law was applicable. The court found the [seller] to have been unjustifiedly enriched according to 812(1) 1 German Civil Code since the [seller] obtained the payment of the bank guarantee without legal grounds.")

to declare the contract avoided if it becomes clear that the applicant will commit a fundamental breach with respect to the obligation guaranteed pursuant to article 72 CISG. In those instances, however, the breach whose fundamentality is analysed regards the failure to comply with the obligation that was intended to be guaranteed or its likelihood (and not the failure to provide the guarantee).

The breach of an obligation to provide an independent guarantee triggers the right to damages that shall be equal to the financial loss suffered by the other party because of the breach. The amount of damages recoverable is not limited to the amount of the guarantee and is independent from the damages resulting from the breach of the obligation that was intended to be guaranteed.

Depending on whether the threat of a future breach meets the requirements of article 71 CISG, a party's failure to provide the independent guarantee will entitle the other party to suspend a related counter-obligation or even an interdependent obligation. Similarly, a party required to provide an independent guarantee prior or simultaneously to the obligation guaranteed may suspend performance if there is a clear threat that the other party will not perform a correlated obligation.

The very nature of independent guarantees makes it almost impossible for a party to stop performance after performance under article 71(2) CISG. The principal will only be able to request a State Court or Arbitral Tribunal to make an injunction ordering the guarantor to stop payment of the guarantee if the beneficiary's demand is fraudulent. But a demand that is in contradiction with the parties' respective rights and duties under the sales contract is not *per se* fraudulent. Accordingly, the right to stop payment of the guarantee in light of article 71(2) CISG cannot be automatic even if the other party has failed to perform a correlated or interdependent obligation.

In summary, the CISG's provisions contribute to the effective enforcement of the fundamental bargain to which the parties under an international sales contract agreed to with the incorporation of an independent guarantee clause: "pay first, litigate later."