



**Official ISP98 Interpretation:  
Rule 1.01 (Scope and Application)**

**ISP98 Interpretation No. 1.01:01 (10 July 2017)\***

(ISP98 serves as a model rule for independent guarantees)

**Question:** Whether the ISP98 rules are model rules that can be used for independent guarantee transactions?

**Example:** Independent guarantee that is issued subject to ISP98 and would be governed by the law of the People's Republic of China by its express terms, choice of law rules, or the terms of the PRC Independent Guarantee Provisions Article 22.<sup>1</sup>

**Response:** Yes. ISP98 provides for issuance of independent guarantees that state that they are made subject to ISP98, and, like URDG 758,<sup>2</sup> are model rules for independent guarantee transactions.

**Explanation:**

1. The ICC International Standby Practices (ISP98) (ICC Publication No. 590) expressly provides for issuance of independent undertakings that are subject to it, including independent guarantees. ISP98 Rule 1.01(b) (Scope and Application) states its applicability in the following terms: "A standby letter of credit or other similar undertaking, however named or described, whether for domestic or international use, may be made subject to these Rules." An independent guarantee subject to ISP98 would be independent under ISP98 Rules 1.06 (a) and (c) (Nature of Standbys)<sup>3</sup> and 1.07 (Independence of the Issuer-Beneficiary Relationship).<sup>4</sup>
2. The use of ISP98 for independent guarantees was recognized by its drafters from the outset. The Preface to ISP98 states "Like the UCP and the URDG, the ISP will apply to any independent undertaking issued subject to it. This approach avoids the impractical and often impossible task of identifying and distinguishing standbys from independent guarantees..."<sup>5</sup> Moreover, *The Official Commentary on the International Standby Practices* (IIBLP 1998), Official Comment 2 (Intended Use) to ISP98 Rule 1.01 (Scope and Application), states that ISP98 "may be used, as well, for independent (first demand) (bank) guarantees..."<sup>6</sup> This point is reiterated in the ISP98 Model Forms.<sup>7</sup>
3. ISP98 was intended to be used to assure payment of underlying obligations, originating as performance obligations of the type for which independent guarantees are typically used, as well as financial obligations, as noted in the Preface to ISP98.<sup>8</sup>
4. In practice, a number of undertakings titled independent guarantees, performance bonds, and the like have been issued subject to ISP98 and treated by courts as independent.<sup>9</sup>

5. ISP98 qualifies as a model rule for independent guarantee undertakings, because independent guarantees may be issued, and have been issued, subject to ISP98 and its rules made applicable to them.

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\* Official Interpretations of ISP98. Under the protocols by which the International Standby Practices (ISP98) was issued by the Institute of International Banking Law & Practice (IIBLP) and endorsed by the International Chamber of Commerce and the United Nations Commission on International Trade Law, the Council on International Standby Practices was established to “provide for official interpretation of the rules, and to assure their proper evolution.” (Preface to ISP98). This Interpretation was issued by the Council on International Standby Practices and is an Official Interpretation of ISP98, and should be given deference in interpreting its provisions.

The citation to this interpretation is “ISP98 Interpretation No. 1.01:01 (10 July 2017) (ISP98 serves as a model rule for independent guarantees)”.

ISP98 and educational and training materials and programmes on standby letters of credit and independent guarantees, including *The Official Commentary on the International Standby Practices*, are available from IIBLP at [www.iiblp.org](http://www.iiblp.org).

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<sup>1</sup> PRC Independent Guarantee Provisions Article 22 (1) and (2) (Choice of Law).

<sup>2</sup> The Uniform Rules for Demand Guarantees (URDG), ICC Publication No. 758 (2009).

<sup>3</sup> ISP98 Rule 1.06 (a) and (c) (Nature of Standbys) provide: “a. A standby is an irrevocable, independent, documentary, and binding undertaking when issued and need not so state.

...  
c. Because a standby is independent, the enforceability of an issuer’s obligations under a standby does not depend on:  
i. the issuer’s right or ability to obtain reimbursement from the applicant;  
ii. the beneficiary’s right to obtain payment from the applicant;  
iii. a reference in the standby to any reimbursement agreement or underlying transaction; or  
iv. the issuer’s knowledge of performance or breach of any reimbursement agreement or underlying transaction....”

<sup>4</sup> ISP98 Rule 1.07 (Independence of the Issuer-Beneficiary Relationship) provides: “An issuer’s obligations toward the beneficiary are not affected by the issuer’s rights and obligations toward the applicant under any applicable agreement, practice, or law.”

<sup>5</sup> The Preface to ISP98 is by Professor James E. Byrne (IIBLP), Chair & Reporter of the ISP Drafting Group, James G. Barnes (Baker & McKenzie), Vice Chair, and Gary Collyer, Chair of ICC Ad Hoc Working Group and Technical Advisor to the ICC Banking Commission. The full paragraph that is quoted in the text states: “Like the UCP and the URDG, the ISP will apply to any independent undertaking issued subject to it. This approach avoids the impractical and often impossible task of identifying and distinguishing standbys from independent guarantees and, in many cases, commercial letters of credit. The choice of which set of rules to select is, therefore, left to the parties—as it should be. One may well choose to use the ISP for

certain types of standbys, the UCP for others, and the URDG for still others. While the ISP is not intended to be used for dependent undertakings such as accessory guarantees and insurance contracts, it may be useful in some situations in indicating that a particular undertaking which might otherwise be treated as dependent under local law is intended to be independent.”

<sup>6</sup> The relevant part of Official Comment 2 (Intended Use) to ISP98 Rule 1.01 in *The Official Commentary on the International Standby Practices* (1998) at page 1 – 2 states: “[ISP98] may be used, as well, for independent (first demand) (bank) guarantees although another set of ICC Rules, the Uniform Rules for Demand Guarantees (URDG), has been drafted for this type of undertaking.”

<sup>7</sup> The ISP98 Model Forms were drafted as a model to be used for independent undertakings to be issued subject to ISP98. ISP98 Model Form 1 (Model Standby Incorporating Annexed Form of Payment Demand with Statement) is a template for the other Model Forms which contain various provisions such as an automatic extension clause (Model Form 2) or a Counter Standby and Local Undertaking (Model Form 6). Endnote 3 (Name of Undertaking) of Model Form 1 states: “While this form of undertaking is named a “standby letter of credit”, the name is not determinative of its character as an undertaking within the scope of ISP98 or as an independent undertaking under applicable law. As provided in ISP98 Rule 1.01(b) (Scope and Application), it could be called an independent guarantee, bank guarantee, bond, or any other name.” For the Model Forms, see [www.iiblp.org/resources/isp-forms](http://www.iiblp.org/resources/isp-forms).

<sup>8</sup> The Preface to ISP98 indicates the various types of undertakings for which it was intended, including support for an obligation to perform (performance standby), to account for an advance payment (advance payment standby), to execute a contract where a bid is awarded (bid bond standby), to reimburse a bank that issues a Local Undertaking (counter standby), to support an obligation to pay money (financial standby), to pay interest and principal when it comes due without respect to a default (direct pay standby), to assure payment of reinsurance obligations (insurance or reinsurance standby), and to support obligations to pay for goods or services in the event of nonpayment by other methods (commercial standby).

<sup>9</sup> See *TTI Team Telecom International Ltd. v Hutchison 3G UK Ltd.* [2003] EWHC 762 (TCC) [England], abstracted in 2004 Annual Survey of Letter of Credit Law & Practice 335 (concluding that an undertaking that referred to itself at the outset as “Our Guarantee [Number]” and internally as a “Performance Bond” that was issued subject to ISP98 was independent on the basis of various provisions of ISP98 regarding the independent character of an ISP98 undertaking). See also *National Infrastructure Co. v. Banco Santander S.A.*, [2016] EWHC 2990 (Comm) [England], appeal dismissed, [2017] EWCA Civ 27 [England], (enforcing as independent various bank undertakings identified as standby letters of credit for security – e.g., a retention security and performance security – under a construction contract on the basis that they were issued subject to ISP98 and thereby incorporated ISP98 Rules 1.06, 1.07, and 2.01, which are quoted in the opinion).