



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

ISP98 Interpretation No. 1.01:02 (July 2017)*

(Chinese independent guarantees subject to ISP98 should fall under PRC Independent Guarantee Provisions)

Question: Whether an independent guarantee issued under the law of China that states that it is subject to the ISP98 rules should be governed by the PRC Independent Guarantee Provisions of the People's Republic of China?

Example: Document entitled "Independent Guarantee" which is subject to the laws of the People's Republic of China contains the following clause: "subject to ISP98".

Response: Yes. An independent guarantee issued under the law of China that states that it is subject to ISP98 should be governed by the PRC Independent Guarantee Provisions unless the Independent Guarantee Provisions allow it to be made subject to another country's law.

Explanation:

1. The Supreme People's Court of the People's Republic of China issued its Judicial Interpretations on Independent Guarantees,¹ effective 01 December 2016.²
2. These Judicial Interpretations provide that a written guarantee by a bank or non-bank financial institution to pay up to a maximum amount against the presentation of documents is to be treated as independent when it "states that it is subject to the ICC *Uniform Rules for Demand Guarantees* or other model rules for independent guarantee transactions".
3. ISP98 Interpretation No. 1.01:01 (10 July 2017) (ISP98 serves as a model rule for independent guarantees) concluded that ISP98 was a model rule for independent guarantee transactions. Therefore, the question arises whether an independent guarantee under Chinese law that is issued subject to ISP98 should be governed by these Judicial Interpretations for Independent Guarantees.
4. While this question is one that is to be decided by the Chinese courts, an advisory opinion by the Institute of International Banking Law & Practice may be of value to them.
5. The approach of the Supreme People's Court towards forming rules for independent undertakings is based on classification by the type of undertaking (i.e. commercial letter of credit: PRC LC Rules;³ independent guarantee: PRC Independent Guarantee Provisions). Under this approach, it would follow that undertakings titled "independent guarantee", "(demand or first demand) (bank) guarantee", or some similar term such as "(performance) bond", or the like that are expressly made subject to ISP98, should fall within the scope of the PRC Independent Guarantee Provisions.⁴

* 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. 1.01:02 (July 2017) (Chinese independent guarantees subject to ISP98 should fall under PRC Independent Guarantee Provisions)”.

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.

Copyright © 2017 by the Institute of International Banking Law & Practice, Inc. Permission is hereby granted to copy and use this Interpretation except for inclusion in a publication or database for which there is a charge to a purchaser or subscriber. These Interpretations are published for educational purposes and not as legal or professional advice. Potential users should consult with their own advisers in the drafting or interpretation of an independent undertaking.

¹ “*Provisions of the Supreme People’s Court on Several Issues Concerning the Trial of Disputes Over Independent Guarantees*”, Fa Shi [2016] No. 24.

² An *Annotated English Translation* is available from the *Institute of International Banking Law & Practice* under “Products” at www.iiblp.org.

³ It should be noted that the Supreme People’s Court has also issued a Judicial Interpretation directed to commercial documentary letters of credit, the Rules of the Supreme Court of the People’s Republic of China Concerning Several Issues in Hearing Letter of Credit Cases (2005). An English translation of these rules can be found in BYRNE, *LC Rules & Laws: Critical Texts for Independent Undertakings* (2016).

⁴ It should be noted that this Official Interpretation assumes that the independent undertaking does not provide for the application of another law in accordance with Article 22 (*Choice of Law*) of the PRC Independent Guarantee Provisions.

This ISP98 Interpretation does not consider how an undertaking titled “standby” or “standby letter of credit” should be classified by the Chinese courts since this question is a matter of Chinese law. Since this question touches on standard international letter of credit practice, however, the Institute of International Banking Law & Practice has been asked to express an advisory opinion on the question, but has declined to do so. From the perspective of the Institute, it is less important whether a standby letter of credit should be classified with commercial letters of credit or independent guarantees, or made subject to a separate set of judicial interpretations, than that its independent character be recognized. Having made this paramount point, however, it seems that the choice of the parties should be given effect if they expressly subject the standby to one set of Judicial Interpretations. If no choice is indicated, it seems more natural that standbys should be classified as letters of credits if a separate judicial interpretation for standbys is not issued.