



WHAT'S WRONG WITH REQUIRING PRESENTATION OF THE ORIGINAL STANDBY?

When discussing the subject with peers, few bankers may admit that they issue standbys requiring presentation of the original standby. Banks try to avoid it, but it does happen.

As explained by one Hong Kong-based banker, some reasons for asking for presentation of the original instrument (standby, guarantee, or commercial LC) include:

- The issuer, confirmer, or nominated bank will endorse the drawing amount evidencing the payment (partial or full) under the instrument. If no endorsement is done, it appears on the face that there is no drawing under the instrument. The beneficiary may use the original instrument to obtain financing?
- When the beneficiary tenders the original instrument for drawing, it can ensure that it is fully entitled to be paid. In other words, the issuer or confirmer will avoid the situation whereby a third party (holder of the original instrument) makes a claim that it has interests in proceeds of the instrument under a separate agreement or contract with the beneficiary.

It has been the practice of banks (particularly in Hong Kong) to insert a special clause "The original instrument of this standby, guarantee or commercial L/C must be presented by the beneficiary for endorsement in each drawing" or similar wording in the instrument.

Do the anticipated benefits outweigh the potential dangers?

Says one expert: I don't think it gets you what you want. The first question to ask is whether any of these reasons would apply to a straight credit. Presumably, they would not since an issuer would consult its own records regarding a presentation and payments.

The second question is what is the original where the LC is sent via SWIFT and whether the LC itself indicates what constitutes the original when it is required to be presented.

The third question is how much comfort the requirement of an original provides where it is teletransmitted via SWIFT and the beneficiary receives a print out from an advising bank.

The discussion will continue at upcoming Guarantee & Standby Forums in Hong Kong and Singapore.

OUT WITH THE NEW (GUARANTEE) BEFORE RECEIVING THE OLD

Query:

Do you have any suggested wording a bank might consider adding to its guarantee when it issues a new original prior to receiving the old original?

DCW Responds:

Without seeing the actual text of your guarantee, it is difficult to match this suggested text to the text that you use, but here is a start:

This Guarantee No. [insert number of new guarantee] (hereinafter "Replacement Guarantee") is provided in substitution for Guarantee No. [insert] issued on [date] hereinafter "Prior Guarantee"). Despite being delivered to you [Beneficiary], it is neither issued nor enforceable unless and until the original Prior Guarantee is returned to us at the following address accompanied by the signed and dated statement addressed to us and reciting as follows: "I surrender this Guarantee [insert number of Prior Guarantee before you send it out] which accompanies this statement to you for cancellation and replacement by Guarantee No. [insert number of Replacement Guarantee before you send it]." On receipt of a duly signed and dated statement accompanied by the original Prior Guarantee, this Replacement Guarantee will become automatically issued and enforceable without any further action on our part.

One problem with this clause is that it is open-ended. You certainly would not want it to be available beyond the expiration of the Prior Guarantee if there is one. You may want to insert a shorter limit. One way to do that would be to insert a date, such as "on or before [calendar date]" after "is returned to us".

This clause is not very sophisticated but it should achieve the end that you seek, not expose you to liability on two guarantees, and provide a practical means of booking the liability. It should also work under ISP98, URDG 758, and UCP600. Of course without having reviewed the text of your undertaking nor considered the legal regime to which it is subject, this response is for educational and information purposes only. It is not intended to constitute legal or professional advice. To assure yourself of its enforceability, you should consult your own counsel and other advisers.

Comments to all queries posed are not necessarily those of DCW and are not provided as legal advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought.