



## **What are the ICC Uniform Rules for Demand Guarantees (URDG)- Tanzania**

They refer to a set of guidelines first adopted by the International Chamber of Commerce (ICC) in 1991 that sets forth generally agreed-upon rules governing securing payments and meeting performance guarantees in contracts among global trading partners.

These are used by banks and contractors as well as business entities in Tanzania when seeking bank guarantee either during tendering or importation of goods dealings.

### **What is a demand Guarantee?**

Also called an on-demand bond, a demand bond or a performance bond. A guarantee that imposes a primary obligation on the issuer to pay the beneficiary on its first demand (or on-demand) where the primary obligor fails to perform the contract. Example: *xx bank gives a guarantee to xxx construction company in Tanzania for a contract by the government agency on road construction...if the company fails the bank in Tanzania pays the agency on first demand.* The issuer's obligations are not affected by disputes over the underlying contract between the beneficiary and the primary obligor, and the beneficiary is usually entitled to payment simply on submitting a statement that the primary obligor has failed to perform the contract. The guarantee is independent from the underlying contract which guarantees and operates strictly in accordance with its terms. ABC Attorneys represent clients in demand guarantee negotiations.

### **Articles of the URDG**

The URDG consists of 35 Articles which in clear, simple and precise terms do the following:

1. Set a balance in the legitimate and competing interests of the applicant, the guarantor and the beneficiary.
2. Limit the risk of unfair calls and demands on guarantors and counter-guarantors; and
3. Explain the various important phases in the lifecycle of a demand guarantee, just like the ICC's Uniform Customs and Practice for Documentary Credits (UCP) 6004 which is used for Letters of Credit (LCs) and other documentary credits.

The terms are incorporated in the contract between parties. Being a standard form of contract, once incorporated, there is little need for parties to draft a long form contract. The 35 articles are taken to have been incorporated.

However, the provisions of the URDG are limited to the scope of the matters upon which the contracting parties are free to contract on, and is subject to mandatory national laws of the



governing jurisdiction, for example, Tanzania laws, which is the law and jurisdiction of the guarantor or counter guarantor, unless otherwise agreed by the parties.

It is safe to say that (URDG) are a set of voluntary contractual rules, published by the International Chamber of Commerce (ICC) with the aim of regularizing and creating a standard set of international banking practice on-demand guarantees and counter demand guarantees. They are standard terms of international banking practice in the operation of demand guarantees.

### **Its operation:**

It provides that where an applicant (that is the party say a Tanzania Contractor who applies for the issue of a demand guarantee, defaults, the beneficiary (that is, the party in whose favor the demand guarantee is issued, say the Road Construction Agency,) is entitled to make a demand, by presenting certain documents specified in the guarantee agreement to the guarantor (which in this instance would be the local Tanzanian bank), whose role essentially is to examine the documents on their facial appearance only, in order to verify whether they are complying and where they comply, make payment without arguments, except in the case of fraud, which entitles such guarantor bank to refuse payment.

Under the URDG, demand guarantees differ from true guarantees in that, a true guarantee is an undertaking or promise (of a secondary nature) made by a bank to pay a beneficiary in the event that an applicant fails to pay, upon proof of default. Whereas, a demand guarantee is an undertaking or promise (of a primary nature) made by a bank, to pay the beneficiary **on its first demand for payment**, in the event that an applicant fails to pay, without proof of default. The maxim “pay first and argue later” best describes one of the key principles underlying demand guarantees.

### **Enforcement of Law**

The URDG, being a voluntary instrument, lacks the force of law, and must thus be expressly incorporated by the parties in order for it to apply to a demand guarantee or counter-guarantee. Likewise, parties are free to exclude provisions they are not comfortable with.



This means guarantors and counter-guarantors are rest assured that demand guarantees issued by them which incorporate the URDG, are entirely subject to their own terms, while incorporating beneficial terms of the URDG.

It is important to note that the URDG may apply without the parties expressly including it in certain instances, including where it is in the general usage of a particular trade; where the applicable law provides for its application; or where it has been inconsistent use in the course of a transaction or dealings between the parties.

Being a standard form of contract, once incorporated, there is little need for parties to draft a long-form contract. The provisions of the URDG are limited to the scope of the matters upon which the contracting parties are free to contract on, and is subject to mandatory national laws of the governing jurisdiction, which is the law and jurisdiction of the guarantor or counter guarantor, unless otherwise agreed by the parties. The Articles incorporate all the matters pertaining to a contract the need to use local laws and the court as a way of dispute settlement. For Example:

#### Article 34 on Governing law

- 1. Unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee. b. Unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the counter-guarantee.*

#### Article 35 on Jurisdiction

- 1. Unless otherwise provided in the guarantee, any dispute between the guarantor and the beneficiary relating to the guarantee shall be settled exclusively by the competent court of the country of the location of the guarantor's branch or office that issued the guarantee. b. Unless otherwise provided in the counter-guarantee, any dispute between the counter guarantor and the guarantor relating to the counter-guarantee shall be settled exclusively by the competent court of the country of the location of the counter-guarantor's branch or office that issued the counter-guarantee.*

### **Why do Tanzanian Banks use the Rules:**

#### **1. Independence from underlying contracts**

1. Article 5 of the URDG expressly provides that the obligations of a guarantor and counter-guarantor is independent of any issues in the underlying contract. This provision is rather favorable to the banks because guarantor and counter-



guarantor banks are not usually parties to such underlying contracts, hence, it is unreasonable to have them entangled in issues emanating from such contracts.

## **2. Role of the guarantor**

1. The URDG limits the guarantor's responsibility and role in the agreement to dealing with, and examining presented documents on their facial appearance of conformity only, without any need to verify the authenticity. Furthermore, Article 7 of the URDG entitles a guarantor to disregard non-documentary evidence or requirements which cannot be verified from its records.
2. Although welcome by beneficiaries and guarantors, applicants on the other hand consider this rule as an exposure to the risk of fraud because in a situation where a beneficiary presents falsified documents or sends inferior goods, the guarantor bank is not required to verify the validity of the goods or services being rendered in the underlying contract, but merely to examine the presented documents on the facial appearance only.
3. The importance of this provision to the fluidity since banks remain unencumbered by the underlying contract, are entitled to rely on complying documents, and are protected from liability in instances where falsified documents are presented on a demand for payment, as it places the responsibility on the applicant to seek redress in the law courts.

## **3. Amendments**

1. Article 11 provides that where at the time of receiving instructions to amend a guarantee, a guarantor for whatever reason is not prepared or is unable to issue that amendment, the guarantor shall without delay inform the party that gave the instructions to amend of its refusal or inability to do so.
2. The guarantor thus has a discretion on whether or not to accept an instruction to amend a guarantee.

## **4. Entire Agreement**

1. Article 12 of the URDG limits the liability of the guarantor to only the terms contained in the agreement, hence further alienating and protecting the guarantor bank from liabilities emanating from other agreements entered into by the other parties to the contract of which it may or may not even be aware.



## 5. ***Demand***

1. Article 15 of the URDG provides that where a beneficiary makes a demand on a guarantor, the demand shall be accompanied by the documents specified in the guarantee and also by a supporting statement which indicates in what respect the applicant is in breach of its obligations under the underlying contractual relationship.
2. This rule undoubtedly stands in favour of the guarantor bank because it provides an opportunity or a basis upon which the guarantor may challenge a demand in court by claiming that an accompanying statement is false.

## 6. ***Currency Payment default***

1. Article 21 of the URDG ensures that a guarantor bank is not held in default in the event that it is unable to pay the beneficiary in the currency specified in the demand guarantee, due to an impediment beyond its control or because it is illegal under the law of the place for payment, by providing that the guarantor may make payment in the currency of the place for payment, which need not be the same as the place where the presentation was made.
2. This provision also works in favour of the beneficiary, as it can rest assured that irrespective of unforeseen disruptions, payment can be made in a different currency (that is, the currency of the place of payment) according to the applicable rate of exchange prevailing there when payment or reimbursement is due.
3. In a country beset by unpredictable currency fluctuations, the ability to pay in a currency other than the currency stipulated in the guarantee must have considerable advantages. Hopefully, the financier should have in place a Certificate of Capital Importation, which then entitles it to purchase foreign exchange in the official exchange market for remittance offshore.

## 7. ***Discretion***

1. Article 23 provides that where a guarantor receives an extend or pay request, which is a request made by a beneficiary for the extension of the validity of the guarantee, or alternatively for payment of the demand sum, a guarantor bank may suspend payment for a period not exceeding 30 calendar days; and where following the suspension, the guarantor makes an extend or pay request under the counter-guarantee, the counter guarantor may suspend payment for a period not exceeding 26 calendar days to enable the parties resolve any dispute



- between them and agree to extend the validity of the guarantee.
2. Where no extension is granted, the guarantor must pay after the 30 calendar days have elapsed without any further demand being required. But if the extension is granted during that time, the demand is deemed to be withdrawn, and the guarantee and counter-guarantee will need to be amended to effect this change. In practice, extend or pay requests which result in an extension happen far more frequently than actual payment of the guarantee.
  3. In favour of the guarantor bank, the URDG entitles a guarantor and counter-guarantor to a discretion on whether or not to accept an extend or pay request.

#### **8. Exemption from Liability**

1. Articles 27 to 30 of the URDG exempts the guarantor from liability on the quality of documents presented to it; on errors it may make in the transmission of documents; or the acts of its agents and subagents<sup>18</sup> and any act or omission carried out by it in the course of carrying out the applicant's directives where it acts in good faith.

#### **9. Indemnity**

1. Article 31 of the URDG provides for unlimited indemnity in favour of a guarantor and counter-guarantor with regard to all obligations and responsibilities imposed on them by foreign laws and usages. These obligations or responsibilities may include foreign regulations obligating guarantor to indemnify other third parties or pay fees or charges outside the scope of the transaction or impose a validity period on guarantees.
2. The URDG backed guarantee ensures that the guarantor and counter guarantor banks are indemnified for their loss in such instances.

#### **10. Transfer and Assignment**

1. Article 33 of the URDG provides that a guarantee is transferable only if it specifically states that it is "transferable", in which case it may be transferred more than once for the full amount available at the time of transfer. However, a counter-guarantee is not transferable.
2. It further provides that a guarantor may refuse a request by a beneficiary for the transfer of a guarantee and assignment of proceeds. Hence such transfers can



only be done to the extent that a guarantor has expressly consented to it, failing which the guarantor has a right to refuse to pay the proposed assignee.

3. This provision is highly beneficial to the guarantor, who can withhold its consent to a transfer or assignment of a guarantee, even if the guarantee provides that it is transferable. Thus the URDG provides an in-built protective mechanism for the guarantor.
4. This protection is important for various reasons amongst which are: the likelihood of termination of an existing insurance coverage by reason of such transfer; the need for banks to be able to assess the creditworthiness of the potential beneficiary;<sup>21</sup> and to help a guarantor bank determine the possibility of payment recovery in the event that the courts decide that the proposed beneficiary is not entitled to payment.

### **1. *Applicable law and Jurisdiction***

1. Articles 34 and 35 of the URDG provide that except the parties agree otherwise, the guarantor's law and jurisdiction applies to the demand guarantee and in the case of a counter-guarantee, the counter guarantor's law and jurisdiction applies to the counter guarantee.
2. Thus, where a Tanzanian bank gives a guarantee, Tanzanian law automatically governs the guarantee and the courts of Tanzania have jurisdiction over any dispute, without any need for the guarantee to provide to that effect.
3. Incorporating the URDG automatically swings the balance of negotiation in favour of the Tanzanian bank, who may rely on the default provisions.

### **Advantages to the beneficiary:**

#### **1. Irrevocability**

1. While the foregoing Articles seem to be mainly in favour of the guarantor, it is useful to mention that Article 4(b) of the URDG appears to swing in favour of the beneficiary to the disadvantage of the guarantor, by providing that a demand guarantee issued subject to the URDG is deemed irrevocable, even though the guarantee declares itself to be revocable. This obviously precludes guarantors from issuing revocable demand guarantees.
2. This rule is not as dis-advantageous as it appears. In reality, a bank is not likely to issue a revocable guarantee for example in import in international trade as the probability of beneficiaries accepting revocable guarantees is very low because of the little protection it affords them. Also, even where a guarantor bank is desirous of issuing a revocable guarantee, it can simply exclude the applicability of Article 4(b).



**General Advantages:**

1. reduces risk for all parties involved as they are contracting based on tried and tested legal terms and structure;
2. reduces negotiation and brings efficiency to the transaction documentation and timelines;
3. saves time and costs;
4. is internationally acceptable.
5. brings transparency to the guarantee, especially where the beneficiary has a limited understanding of Tanzanian law;

**Conclusion:**

Parties should remember that the terms and conditions of the URDG are not cast in stone, and they are free to exclude any terms they find not suitable or amenable to their appetite.

ICC's Uniform Rules for Demand Guarantee, apply to all independent guarantees, from those payable on simple written demand, to those requiring the presentation of a judgment or arbitral award.

The Rules have been endorsed by the United Nations Commission on International Trade Law (UNCITRAL), and were adopted by the World Bank and the International Federation of Consulting Engineers in their model guarantee forms. National lawmakers have used them as a model for independent guarantee statutes.

ABC Attorneys lawyers can assist banks ad companies seeking to enter into agreements under the above model.