# Instruments and Methodologies in Trade Finance and Project Finance Transactions

ICC Commission on Banking Technique and Practice

Bangkok, Thailand, October 30, 2019


# About Us

The Mahanakorn Partners Group (MPG) is a leading professional services firm, whose mission is to be a One-Stop Platform to assist any company or individual with a wide-range of Legal, Accounting, Auditing, Tax Advisory, and Management Consulting service offerings.

MPG is headquartered in Thailand, with an ASEAN presence and a global footprint. Our lawyers, accountants, auditors, business consultants and administrative staff are committed to supporting our clients in seamlessly navigating through the complexities of business, regulatory and legal matters, domestically and internationally.

# Our Leadership

## Luca Bernardinetti

Luca Bernardinetti is Chairman and Managing Partner of the Mahanakorn Partners Group. He leads the Banking & Finance division at MPG, which provides trade finance, corporate finance and project finance advice, as well as legal advice for cross-border financing. Over the past two decades, Mr. Bernardinetti has led his team in structuring equity and debt financing for infrastructure and Public-Private Partnership projects, working alongside highly rated banks and insurance providers. Under Mr. Bernardinetti's expertise and leadership, MPG has successfully undertaken several complex financing transactions, assisting private multinationals, state-owned enterprises and government agencies to secure multi-billion dollar lines of credit for infrastructure development projects.

Mr. Bernardinetti is also a member of the Board of Directors of the Thai-Italian Chamber of Commerce and serves as Chairman of the Business Economics Committee of the American Chamber of Commerce in Thailand (AmCham). He is a prolific contributor to a number of Advocacy Committees at the European Association for Business and Commerce (EABC) and Joint Foreign Chambers of Commerce in Thailand (JFCCT). He is in high demand as a guest lecturer and speaker at top ASEAN universities, such as Chulalongkorn University and National University of Singapore. He has enjoyed speaking at many international forums and events, including those organized by the United Nations Economic and Social Commission for Asia and the Pacific (UN ESCAP). Mr. Bernardinetti is a consummate media commentator, having given interviews to prominent global news outlets, such as BBC World Business Report, CNN and The New York Times, on matters of business, economics and finance, on numerous occasions.

## Vilasinee Thephasadin Na Ayuthaya

Vilasinee Thephasadin Na Ayuthaya is Managing Partner at the Mahanakorn Partners Group, and is one of the original founders of Vimami Consulting, the business consulting firm that laid the foundations for, and is now a member company of, MPG. Ms. Thephasadin Na Ayuthaya has led Vimami Co. since 1999, and the business consulting firm has subsequently grown to offering professional services in financial and tax planning, investments, accounting and legal services. She oversaw the company's expansion in its first two decades, which led to the opening of new strategic business units and branches, and finally, a major reorganization in 2016, when Vimami Co. reformed as MPG, now a leading international professional services firm boasting five business divisions.

Ms. Thephasadin Na Ayuthaya is well-respected for her competence and expertise, but she is also known for her warm and engaging personality. This formidable combination has earned the loyalty of her staff and clients, many of whom have been with her since the business' inception. Throughout her career, she has been commended by numerous Embassies in Thailand for her ability to deliver outstanding results. Ms. Thephasadin Na Ayuthaya enjoys a working command of four languages, which enables her to put clients at ease and assist them efficiently with their needs.

# What Others Say About Us

"I highly recommend Mr Luca Bernardinetti and Mahanakorn Partners Group for their qualified activity in the field of legal advice, and business and finance. MPG has a longstanding collaboration with the Embassy of Italy in Bangkok and has been instrumental in the solution of several complex judicial cases. They are renowned in the Thai business community and play an active role also as a member of the Thai-Italian Chamber of Commerce."

H. E. Lorenzo Galanti
Ambassador of Italy to Thailand

"It is my pleasure to endorse and recommend Mr. Luca Bemardinetti for his expertise in the area of project finance advisory, legal, and procurement services. In his capacity as Managing Partner of Mahanakom Partners Group, Ltd., based in Bangkok, he has accumulated significant related experience over many years."

Ulrich Zachau
World Bank Country Director, Colombia and Venezuela, Latin America and the Caribbean

"I have had the distinct pleasure and privilege of working with Luca Bernardinetti and his firm, Mahanakorn Partners Group ("MPG"), on a number of different project finance opportunities. A hugely successful entrepreneur, investor, business owner, financial advisor and mentor, Luca is a tour-de-force in the Thai business community. He and his firm are renowned throughout Southeast Asia for adhering to the highest ethical standards."

Marc D. Wagman
Arthur J. Gallagher Managing Director,
U.S. Practice Leader for Trade Credit and Political Risk Team

# Areas of Practice

## Corporate Services
Company Registration, Corporate Secretarial, BOI, FBL, Business Licenses, Trademarks

## Accounting & Audit
Accounting Packages, Bookkeeping, Payroll, Half Year Report, Personal Income Tax, Annual Audit

## Legal Services
Civil & Commercial Law, Criminal Defense, Property Law, IP, Notary Services, etc.


## Tax Advisory
Tax Structuring, Transfer Pricing, Tax Planning, Cross-Border Tax Compliance

## Global Mobility
Visas & Work Permits, Permanent Residency, Cross-Cultural Training

## Banking & Finance
Advisory and Structuring of Debt/Equity Model, TAS, Trade Finance & Project Finance Advisory

## Management Consulting
Business Process Optimization, IT Administration, Market Entry Strategies, Project Management

# Capital Projects Management

| Sector | Services |
| --- | --- |
| **Government Sectors and PPPs** | ✓ MPG provides comprehensive and proficient assistance to governmental agencies from the outset and throughout the implementation of PPP projects. MPG can conduct or assess feasibility studies and assist in framework and policy development as well as the tendering and procurement stages.<br>✓ MPG arranges PPP project financing and provides transaction advisory by liaising with the Mandated Lead Arranger (MLA), lenders and underwriters. |
| **Capital Project Management (CPM) Services** | ✓ MPG offers government agencies as well as private businesses its proprietary Capital Project Management, which is used to plan, structure, deliver and manage capital projects cost-efficiently and seamlessly.<br>✓ MPG structures risk mitigation mechanisms throughout the project, from the initial stages of contractual arrangements, framework and offtake agreements through the implementation phases of engineering, procurement and construction until the facility is transferred to the contracting authority. |
| **Market Entry Strategies** | ✓ MPG supports project stakeholders by assessing and laying out strategic plans for a successful market entry, to tackle existing opportunities and establishing a foothold in the new market.<br>✓ MPG provides multinational enterprises with a comprehensive overview on the size of the market, key factors driving its growth potential, competitive landscape, entry barriers and the associated risks, as well as legislative framework and government FDI policies. |
| **Bid Management** | ✓ MPG assists private sector infrastructure companies in assessing business opportunities and preparing bids for construction projects.<br>✓ MPG provides project management for the entire bid submission process, evaluating financial models to estimate the project's IRR, crafting the bid documents and providing commercial support. |

MPG

# Our Worldwide Presence

## Asia Pacific
Bangkok
Singapore
Hong Kong
Beijing
Shanghai

## Europe
London
Milan
Madrid

## North America
New York

# The International Chamber of Commerce



**Foundation**

In **1919** a few business leaders founded the ICC. The ICC is an international non-governmental organization consisting of thousands of member companies and associations from **over 130 countries**. It operates through its numerous **specialist commissions** based in Paris and through its **national committees** in all major capitals and collaborates with their membership to address the concerns of the business community and to put across to their government the business views formulated by the ICC.

**Purpose**

The ICC's aim is to promote an **open international trade and investment system** and the **market economy** worldwide. one of its most vital functions is to harmonize international trade practices through **uniform rules and trade terms** incorporated into contracts and through the publication of guides devoted to specific fields of activity or specific problem areas. In other words, it represents the diverse interests of the world business community and makes rules that govern the conduct of business globally.

**Services**

The ICC is the international business organization and the only representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world. It also provides essential services, the most important among them being the **International Court of Arbitration**. Within a year of the creation of the United Nations, the ICC was granted **consultative status** at the highest level with the United Nations and its specialized agencies. A few of the universal rules (standard guidelines) promulgated by the ICC have become cornerstones of international commercial law and, as such, even indispensable.

20 YEAR ANNIVERSARY ICC THAILAND INTERNATIONAL CHAMBER OF COMMERCE

The world business organization

Source: Mahanakorn Partners Group Research, 2019

# Documentary Credits (UCP600)

# UCP 600 – Brief History & Revisions



**1929**

For more than 70 years, the International Chamber of Commerce has formulated the so-called UCP – Uniform Customs and Practice for Documentary Credits. The first attempt to codify letters of credit practice started in 1929 when ICC introduced its "**Uniform Regulations and Commercial Documentary Credits**". Although they failed to gain wide acceptance, these rules provided a foundation for further developments.

**1933**

In 1933, the ICC issued the "**Uniform Customs and Practice for Commercial Documentary Credits**" and this set of rules received formal acceptance in **more than 40 countries** globally.

**1951-1993**

Revised versions were issued by the ICC in 1951, 1962, 1974, 1983 and 1993.

**2007**

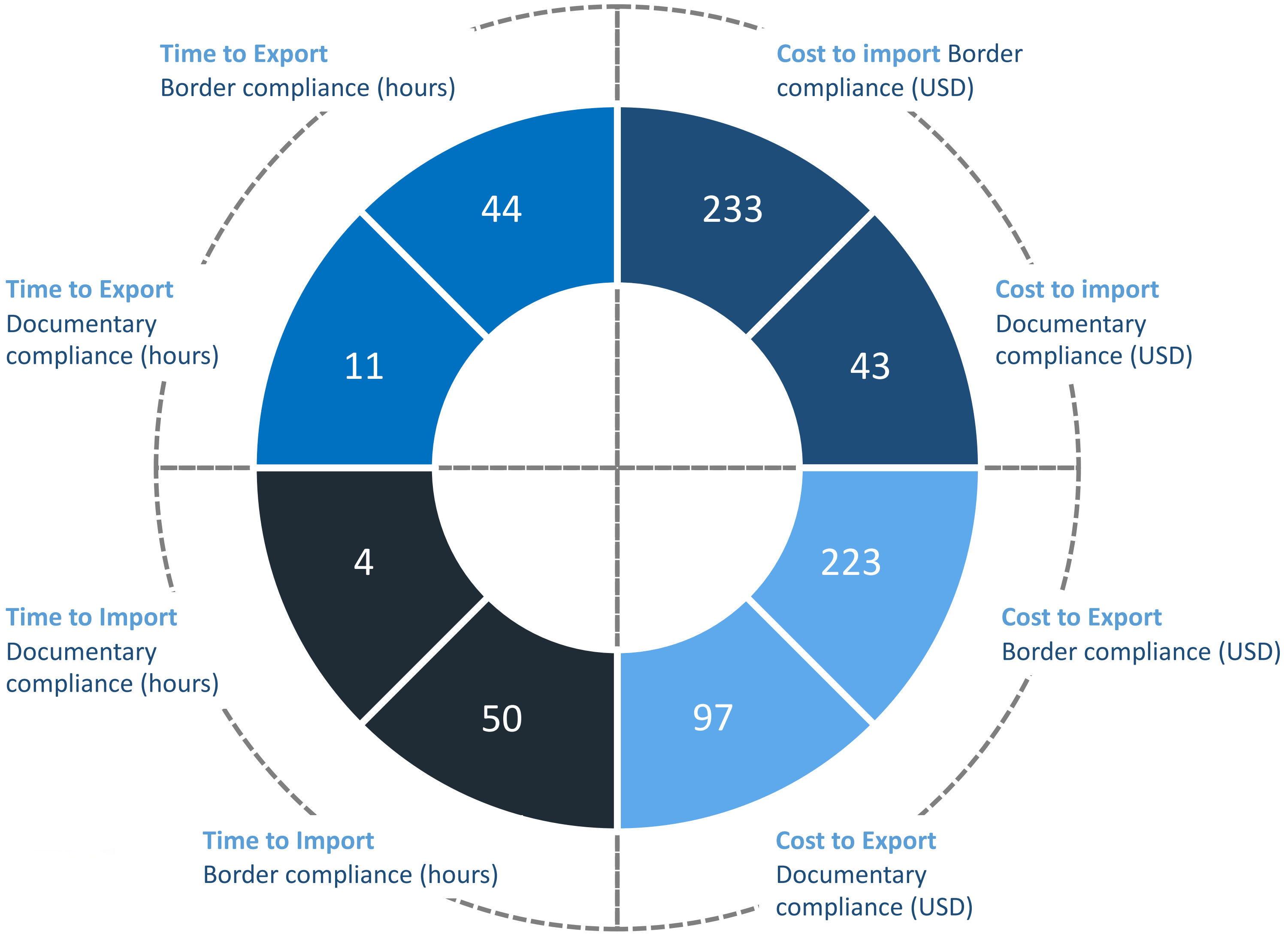
The **UCP 600** were published to amend rules that had proved to be outdated and ambiguous, which led to a series of commercial disputes, unjustified discrepancies and documentary rejections.
UCP 600 contains significant changes to the existing rules, including:

- ✓ A reduction in the number of **articles from 49 to 39**;
- ✓ New articles on "Definitions" and "Interpretations" providing **more clarity and precision** in the rules;
- ✓ A definitive description of **negotiation** as "purchase" of drafts of documents;
- ✓ The replacement of the phrase "reasonable time" for acceptance or refusal of documents by a maximum period of **five banking days**.

UCP 600 also includes the 12 Articles of the eUCP, ICC's supplement to the UCP governing presentation of documents in electronic or part-electronic form.

Source: International Chamber of Commerce, World Business Organization, 2019

# Thailand – Cross-Border Trade




Source: Mahanakorn Partners Group comparative study on Regional Comprehensive Economic Partnership (RCEP) Trade, 2019

MPG

# Definitions of “Document” & Letters of Credit



### New York Uniform Commercial Code

The **New York Uniform Commercial Code** defines Letters of Credit as an “**independent**” obligation of the issuer, which is “**documentary** in nature”.

NY UCC, Section 5-102 (10): “[the term] ‘*Letter of Credit*’ means a definite undertaking that satisfies the requirements of Section 5-104 [Formal Requirements], by an issuer to a beneficiary, at the request or for the account of an applicant or, in the case of a financial institution, to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value”.

NY UCC, Section 5-103 (d): “Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are **independent of the existence, performance, or nonperformance of a contract or arrangement** out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary”.

### Uniform Customs & Practice for DCs

**UCP 600** does not provide a definition. **Article 3** provides some interpretations for documents and **Article 14** provides standards for the examination of documents while **Article 17** lists some of the requirements for considering a document an original or a copy.

### International Standby Practices

**ISP 98 – Rule 1-09** “[the term] ‘Document’ means a draft, demand, document of title, investment security, invoice, certificate of default, or any other representation of fact, law, right, or opinion, that, upon presentation (whether in a paper or electronic medium), is capable of being examined for compliance with the terms and conditions of a standby”.

### Uniform Rules for Demand Guarantees

**URDG 758 – Article 2**: “document means a signed or unsigned record of information, in paper or in electronic form, which is capable of being reproduced in tangible form by the person to whom it is presented. Under these rules, a document includes a demand and a supporting statement”.

Source: Mahanakorn Partners Group Research, 2019

# Documentary Nature of Letters of Credit

### Uniform Customs & Practice for DCs

**UCP 600 – Article 2**: “Complying presentation means a presentation [of documents under a credit to the issuing bank or nominated bank] that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.” **Article 5**: “**Banks deal with documents** and not with goods, services or performance to which the documents may relate”.

### International Standby Practices

**ISP98 – Rule 1.06 (d)**: “Because a standby is documentary, an issuer's **obligations depend on the presentation of documents** and an examination of required documents on their face.”

### Uniform Rules for Demand Guarantees

**URDG 758 – Article 6**: “**Guarantors deal with documents** and not with goods, services or performance to which the documents may relate.”

Source: Mahanakorn Partners Group Research, 2019

# Documentary Credits vs Negotiable Instruments

## Negotiable Instruments

**Unconditional Promises** for payment – instrument-holder does not need to meet any particular condition to receive payment.

Need to have **Consideration**[1] based on their contractual nature.

## Documentary Credits

**Conditional** to presentation of complying documents by beneficiary – payment to beneficiary under documentary Letters of Credit is conditional to his/her/their presentation of complying documents to terms and conditions of credit to the bank.

Do not need to have **Consideration** for – In fact, under English Law, documentary credits are considered as an exception to general principle consideration in contract law, inasmuch as the relationship between bank and beneficiary is governed by mercantile usage.

1. In Contract Law, a contract needs six elements to be considered enforceable. It must contain:

1. An offer made by the promisor
2. An acceptance of the offer by the promisee
3. **Consideration** in the form of money or a promise to do or not do something
4. Mutuality between parties to carry out the promises of the contract
5. Capacity of both parties in mind and age
6. Legality of terms and conditions

For this purpose, we will focus on **consideration** or *an exchange of bargained-for promises* between two or more parties.

Source: Rules of Consideration in Contract Law: Elements & Case Examples, 2019

# Irrevocable & Independent Obligation

## Irrevocability

**UCP Article 2** “Credit means any arrangement, however named or described, that is **irrevocable**”; and

**UCP Article 3** “A **credit is irrevocable** even if there is no indication to that effect”.

**ISP98 Rule 1.06—a.** “A **standby is an irrevocable**, independent, documentary, and binding undertaking when issued and need not so state”.

**URDG Article 4 b.** “A **guarantee is irrevocable** on issue even if it does not state this”.

## Independence

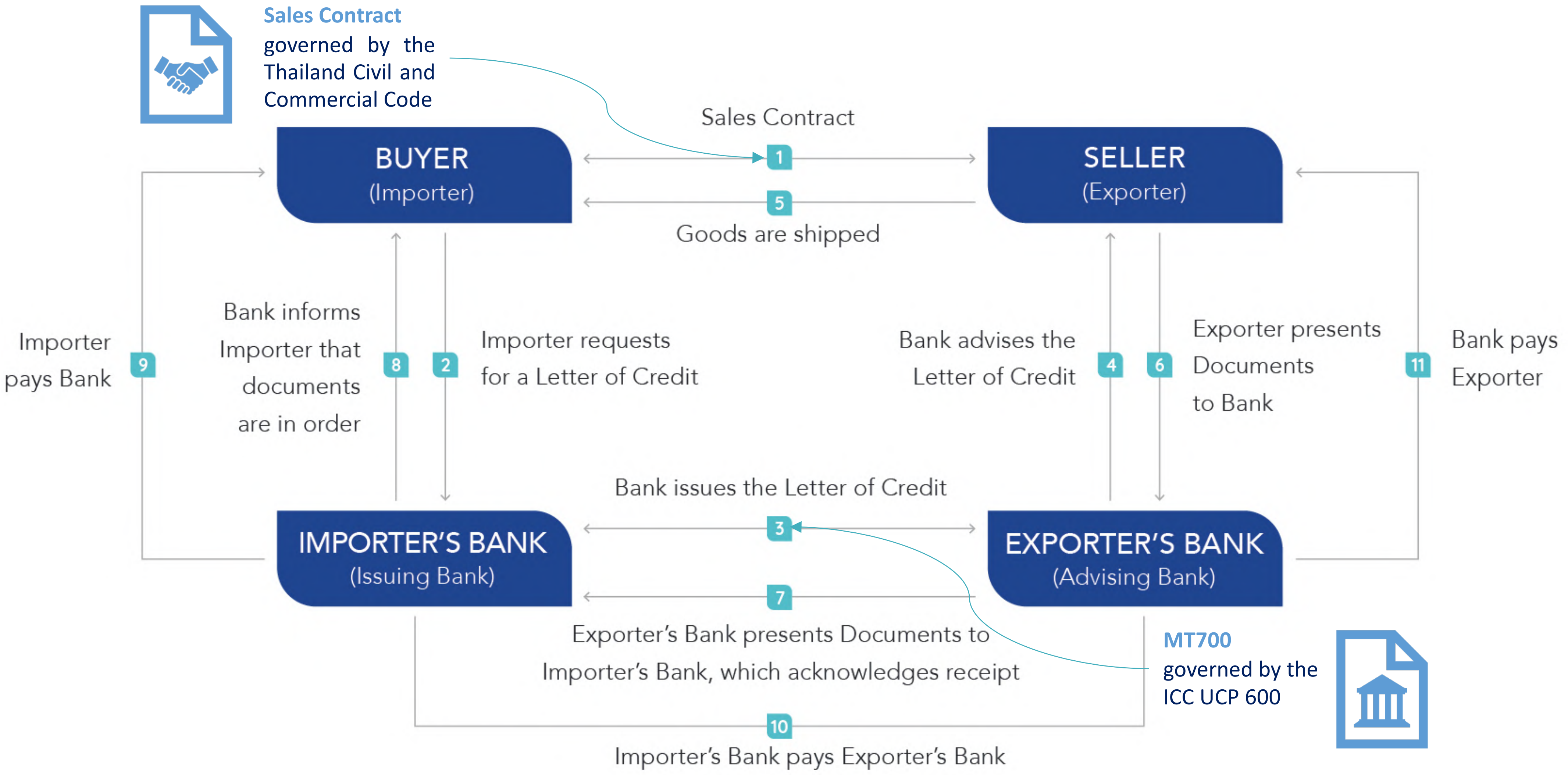
A Guarantee is an **independent** contract, separate from its underlying contract and independent of the underlying transaction.

**Incorporation of ISP98; law, court, arbitration, and sanctions**. Incorporation of ISP98 into an undertaking that is payable against the presentation of documents should qualify the undertaking as **independent** under applicable law. ISP98 invokes letter of credit law by emphasizing the letter of credit aspects of a standby and its independence in ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of the Issuer-Beneficiary Relationship).

**UCC Section 5-103** provides an overview of an issuer’s commitment as – “(d) Rights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are **independent of the existence, performance, or non-performance of a contract or arrangement** out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary”

Source: UCP 600, ISP 98, URDG 758, NY UCC

# LC-Backed Transaction




Source: Mahanakorn Partners Group Research, 2019

# Arbitration Clauses in Trade Finance

### Sales Agreement, Governing Law

**Governing Law and Arbitration.** This Agreement is made pursuant to, and all of the rights and obligations of the Parties hereto and all of the terms and conditions herein shall be construed in accordance with and governed by the laws of [**Country**]. All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the [**Arbitral Tribunal**] by one [three] arbitrator[s], appointed in accordance with said Rules. The law governing the contract shall be [**Law**]. The seat[1] of arbitration shall be [**Seat**]. The language of the arbitration shall be [**Language**]. The decision of the arbitrator[s] shall be final and binding on both Parties, who hereby agree to comply therewith. In every case where the arbitrator decides that this Agreement has been properly fulfilled by a Party, all costs and fees, including reasonable attorneys' fees, incurred during or necessitated by the arbitration proceedings shall be paid by the other Party.

[1] The *Seat* of Arbitration (as opposed to the location where hearings are to take place, which is often referred to as the *Venue* of arbitration) is indicated. It is important to note that, regardless of the Seat of Arbitration that is chosen, the Venue of the arbitration may be any Arbitral Tribunal in the world.

### MT700, Field 40E:

**40E (30x [35x]).** One of the following codes must be used in Applicable Rules (Error code(s): T59)

**EUCP LATEST VERSION** The credit is subject to the version of the Supplement of the **ICC Uniform Customs and Practice** for Documentary Credits for Electronic Presentations, International Chamber of Commerce, Paris, France, which is in effect on the date of issue.

**ISP LATEST VERSION** The standby letter of credit is subject to the version of the **ICC International Standby Practices**, International Chamber of Commerce, Paris, France, which is in effect on the date of issue.

**OTHR** The credit is subject to another set of rules, or the credit is not subject to the version of the rules that is in effect on the date of issue, these must be specified in Narrative (2nd subfield).

Source: Mahanakorn Partners Group Research, 2019

# Expiration Date

## Uniform Customs & Practice for DCs

**UCP 600 Article 6.d.i.** "A credit must state an expiry date for presentation" and "An expiry date stated for honor or negotiation will be deemed to be an expiry date for presentation".

## International Standby Practices

**ISP98 9.01** "A standby must:

a. Contain an expiry date; or
b. Permit the issuer to terminate the standby upon reasonable prior notice or payment".

## Uniform Rules for Demand Guarantees

**URDG 758 Article 2** "Expiry means the expiry date or the expiry event or, if both are specified, the earlier of the two:

- ✓ Expiry date means the date specified in the guarantee on or before which a presentation may be made.
- ✓ Expiry event means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only:
  a. when a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or
  b. if no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the guarantor's own records".

Source: UCP 600, ISP 98, URDG 758

MPG

# Issue, Amendment, Advice and Transfer of L/C



| Message | MT Name | Purpose |
|---|---|---|
| MT 700 (+MT 701) | Issue of a Documentary Credit | This message is sent by the issuing bank to the advising bank. It is used to indicate the terms and conditions of a documentary credit that has been originated by the Sender (issuing bank). |
| MT 707 (+MT 708) | Amendment to a Documentary Credit | This message is sent by the issuing bank to the advising bank. It may also be sent by an advising bank to another advising bank or by a transferring bank to an advising bank. It is used to inform the Receiver about amendments to the terms and conditions of a documentary credit issued by the Sender or by a third bank. The amendment is to be considered as part of the documentary credit, unless the MT 707 is used to convey only brief details of the amendment, details of which are to follow. |
| MT 710 (+MT 711) | Advice of a Third Bank's Documentary Credit | This message is sent by an advising bank, which has received a documentary credit from the issuing bank or the non-bank issuer, to the bank advising the beneficiary or another advising bank. |
| MT 720 (+MT 721) | Transfer of a Documentary Credit | MT 720 Transfer of a Documentary Credit When a beneficiary has requested the transfer of a documentary credit – originally issued by a bank or a nonbank – to a second beneficiary, this message is sent by the bank authorized to advise the transfer of the documentary credit to the bank advising the second beneficiary. It is used to advise the Receiver about the terms and conditions of the transferred documentary credit, or part thereof. |

Source: Mahanakorn Partners Group Research, 2019

# Advising & Confirming the Credit

## Uniform Customs & Practice for DCs

**UCP 600 Article 9**

a. A credit and any amendment may be advised to a beneficiary through an advising bank. An advising bank that is not a confirming bank advises the credit and any amendment **without any undertaking to honor** or negotiate; and
b. By advising the credit or amendment, the advising bank signifies that it has satisfied itself as to the **apparent authenticity** of the credit or amendment and that the **advice accurately reflects the terms and conditions** of the credit or amendment received.

## International Standby Practices

**ISP98 Rule 2.05**

Unless an advice states otherwise, it signifies that:

i. The **advisor has checked the apparent authenticity** of the advised message in accordance with standard letter of credit practice; and
ii. The **advice accurately reflects what has been received**.

## Uniform Rules for Demand Guarantees

**URDG 758 Article 10**

a. A guarantee may be advised to a beneficiary through an advising party. By advising a guarantee, whether directly or by utilizing the services of another party (“second advising party”), the advising party signifies to the beneficiary and, if applicable, to the second advising party, that it has satisfied itself as to the **apparent authenticity** of the guarantee and that the **advice accurately reflects the terms and conditions** of the guarantee as received by the advising party; and
b. An advising party or a second advising party advises a guarantee without any additional representation or any undertaking whatsoever to the beneficiary

Field 22A: **Purpose of Message** must contain one of the following codes: **ACNF** Advice and confirmation of the credit amendment. **ADVI** Advice of the credit amendment. **ISSU** Issuance of the credit amendment.

Source: UCP 600, ISP 98, URDG 758

# Confirmer's Undertaking – FAQs

***With the MT 707, which amount does the add confirmation (CONFIRM in Field 49 - Confirmation Instructions) refer to if an increase is made to an amount which hasn't been confirmed yet?***

The confirmation is expected on the amended amount as indicated by the code ACNF (Advice and confirmation of the credit amendment) in Field 22A (Purpose of Message) and use of code CONFIRM (The requested confirmation party is requested to confirm the credit) in Field 49.

***If a confirming bank has been required to confirm a letter of credit, and the confirming bank refuses to add its confirmation should it keep using a MT 799?***

Use the MT 759 (Ancillary Trade Structured Message) with code OTHERFNC (Other request) in Field 23H (Function).

***Clarify usage of code ADVI (Advice of issued undertaking) in MT 760?***

Distinct from the codes ISSU (Issuance of undertaking), ISCO (Issuance of counter-undertaking) and ICCO (Issuance of counter-counter-undertaking), the codes ADVI (Advice of issued undertaking) and ACNF (Advice and confirmation of issued undertaking) are used by the 1st advising bank to advise the 2nd advising bank the details of the issued MT 760 or the amended MT 767 guarantee / standby L/C. Codes ISSU, ISCO and ICCO are used by the issuing bank to designate that the MT 760 is being advised by the issuing bank itself.
There may be multiple advising banks in the chain and all advising banks would use code ADVI or ACNF, the latter only when the advising bank is adding its confirmation.

***Why was the field ISSUE/REQUEST removed from MT 760?***

ISSUE/REQUEST code list was removed because the codes in field 22A "Purpose of message" cover the different functions in the new MT 760.
The codes in 22A are:
**ACNF** Advice and confirmation of issued undertaking
**ADVI** Advice of issued undertaking
**ICCO** Issuance of counter counter-undertaking and request to issue counter-undertaking
**ISCO** Issuance of counter-undertaking and request to issue local undertaking
**ISSU** Issuance of undertaking

Source: UCP 600, ISP 98, URDG 758

# Demand Guarantees (URDG758)

MPG

MPG

# URDG Revision Roadmap

The new, **2010 URDG 758** rules, developed by the International Chamber of Commerce (ICC), replace the old, **1992 URDG 458** rules. Similarly to the URDG 458, the URDG 758 maintains the notion of the guarantee or counter-guarantee as **independent** of the underlying relationship and of the application, as well as its **irrevocability** upon issuance even where this is not expressly stated therein. The rules apply where they have been **expressly incorporated** by reference in a guarantee or counter-guarantee and even if they are **not expressly incorporated** by reference to the text of a guarantee or counter-guarantee: (i) in the event of indirect, asymmetrical guarantees and (ii) as a result of trade usage or a consistent course of dealing.

**25 April 2007**
- ✓ Approval of the business case for revision by the Banking Commission (Singapore)

**23-24 November 2009**
- ✓ Brussels Banking Commission Meeting

**3 December 2009**
- ✓ Approved by the ICC Executive Board

**1 July 2010**
URDG 758 entered into force

# Demand Guarantees

A guarantee is a legally enforceable promise whereby the guarantor agrees to fulfill the principal obligor's obligations, should the principal obligor fail to pay or perform. In project finance transactions, lines of credit are structured so as to be underpinned by several credit enhancement mechanisms. These are contingent liabilities for the issuer, which cover the insured in the event of principal obligor's failure to perform under any circumstances.

## Bid Bond

An assurance issued by a guarantor (a bank) to warrant that the importer (tenderee or project owner) receives an agreed compensation if the exporter (tenderer or contractor) defaults on its obligations under an international tender. The presentation of a bid bond is virtually always an indispensable condition for a tender to even be considered.

## Performance

A guarantee that indemnifies the importer, should the exporter fail to meet its contractual obligations (failure of performance) and complete a project in a timely and satisfactory manner. The guarantee can offer coverage against a number of issues, such as quality, function or delivery. A performance bond usually covers 10-20% of the contract value.

## Advance Pmt

A type of guarantee that is commonly linked to a supply agreement for capital goods, wherein the importer has agreed to make a down payment, or in a service agreement, wherein a Contractor requires an advance payment to fund the preliminary costs and mobilization works of the contract. The advance payment is commonly between 10-30% of the contract value.

## Retention

A Retention is a fraction of the amount due to a contractor on an interim certificate that is retained by the principal. The purpose of the retention is to ensure that the contractor honor their contractual obligations. A percentage of the amount retained is released upon completion of the contract and the remaining amount is paid upon issuance of a certificate of making good defects.

## Payment

This surety is issued by a guarantor (commonly a bank or other financial institution) to underpin the performance of a construction contract. A payment guarantee can be issued as an endorsement on a bill of exchange, also known as a Per Aval (third party) endorsement. By means of a Per Aval endorsement, the exporter benefits from the credit substitution of the guarantor for the importer.

# URDG 758 – Definitions



Article 2 of the URDG 758 provides various definitions, amongst which:

- ✓ **Applicant**: party indicated in the guarantee whose obligations under the underlying relationship are secured; may, but does not have to be identical with **instructing party** .
- ✓ **Demand**: (mere) signed demand for payment (a claim must additionally incorporate a **supporting statement**).
- ✓ **Expiry event**: event resulting in expiry of the guarantee and which may be determined due to a specific document or movements on an account with the guarantor (guarantor‘s **own records**).
- ✓ **Guarantor‘s own records**: guarantor‘s records showing movements on an account with him, if guarantee may be identified.
- ✓ **Instructing party**: party ordering to issue a guarantee/counter-guarantee; may, but does not have to be identical with the **applicant**.
- ✓ **Presentation**: presentation of a document or the document itself (not only a **demand**).
- ✓ **Supporting statement**: beneficiary‘s declaration, complying with requirements of Art. 15 a., in what respect the applicant is in breach of its obligations under the underlying relationship, respectively guarantor‘s declaration, required as per Art. 15 b., having received a complying **demand** under the guarantee.

Source: Uniform Rules for Demand Guarantees (URDG 758)

# Guarantees & Counter-Guarantees

Unlike for Letters of Credit, banks cannot confirm **demand** guarantees that have been issued by other banks, because the ICC **Uniform Rules for Demand Guarantees** 2010 Revision does not define confirmation. Instead of confirmation, the **URDG 758** define **counter guarantees**:

**Counter-Guarantee means any signed undertaking, however named or described, that is given by the counter-guarantor to another party to procure the issue by that other party of a guarantee or another counter-guarantee, and that provides for payment upon the presentation of a complying demand under the counter-guarantee issued in favor of that party.**


Source: Mahanakorn Partners Group Research, 2019

MPG

# Abstract of the Most Important Points



**Art. 7:**
**Non-documentary conditions**
Conditions without documentary evidence or the fulfilment of which cannot be determined from the **guarantor's own records** (Art. 2) are disregarded (except to determine whether data in a document required and presented conflict with the guarantee).

**Art. 11:**
**Amendments**
- ✓ Can only be accepted in whole; partial acceptance only is considered as refusal
- ✓ Beneficiary may refuse until he expressly agrees or until he makes a presentation in conformity with the amended guarantee

**Art. 14:**
**Presentation**
- ✓ Various rules regarding place, time and form of a **presentation** (Art. 2) (not restricted to a **demand** (Art. 2))
- ✓ Electronic presentation (if expressly allowed)
- ✓ If presentation is required through a particular mode of delivery (e.g. courier), without excluding another one, such other mode is also acceptable
- ✓ Language of documents:
  - if issued by **applicant** (Art. 2) or beneficiary: in the guarantee's language
  - if issued by any other party: in any language

(ICC 458 – art. 9, 17–21: various rules, but exclusively regarding a demand)

Source: Uniform Rules for Demand Guarantees (URDG 758)

# Abstract of the Most Important Points (cont'd)



**Art. 15:**
**Requirements for a demand**

a. A **demand** (Art. 2) under a guarantee must be accompanied by the documents specified in the guarantee and a **supporting statement** (Art. 2) in what respect the **applicant** (Art. 2) is in breach of its obligations.
b. A **demand** (Art. 2) under a counter-guarantee must be supported by a **supporting statement** (Art. 2) having received a complying **demand** (Art. 2) under the guarantee.

The **supporting statement** (Art. 2) as per a. and b. above may be given in the **demand** (Art. 2) itself or in a separate document.

c. The requirement for a **supporting statement** (Art. 2) can be waived by express notion only.
d.: A **demand** (Art. 2) and **supporting statement** (Art. 2) must not be dated prior to a possible earliest drawing date stated in the guarantee; any other document may be dated earlier.
(ICC 458 – Art. 17–21; Art. 20 a): a demand must indicate **that and in which** respect the principal is in breach.)

**Art. 19:**
**Examination of a presentation**

- ✓ Data in a document
  - are examined in context with that document, the guarantee and the URDG
  - must not conflict with data in that document or in another required document or in the guarantee
- ✓ If a document is required without stipulating whether it must be signed and by whom to be issued or signed or its data content, it is accepted as presented if its content appears to fulfil the function of the document required
- ✓ Documents not required, but presented, will be disregarded

Source: Uniform Rules for Demand Guarantees (URDG 758)

# Abstract of the Most Important Points (cont'd)

**Art. 20a.:**
**Time for examination of a demand**
A demand (Art. 2) must be examined **within** 5 business days after presentation (Art. 2).

(ICC 458 – Art. 10 a): the guarantor has a reasonable time to examine a demand.)

**Art. 25:**
**Reduction and termination**
c.: A guarantee/counter-guarantee without expiry date and expiry event (Art. 2) terminates 3 years after issuance/30 calendar days after termination of the guarantee.
d.: If the expiry date falls on a non-business day, it is automatically extended to the next business day.

**Art. 23:**
**Extend or pay**
a.: The guarantor **may** (note: but is not obliged to) suspend payment for maximum of 30 calendar days after receipt of the demand (Art. 2).
b.: In case of suspension under the guarantee, payment under the counter-guarantee **may be** (note: but does not have to be) suspended, too (4 days less than under the guarantee).

**Art 31:**
**Indemnity for foreign laws and usages**
The instructing party (Art. 2) respectively the counter-guarantor has to indemnify the guarantor for all obligations and responsibilities arising from foreign laws and usages.

Source: Uniform Rules for Demand Guarantees (URDG 758)

# Abstract of the Most Important Points (cont'd)

**Art. 26:**
**Force Majeure**

a.: Definition of "force majeure" (acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor/counter-guarantor)

b.i.: If a guarantee expires at a time when presentation (Art. 2) is not possible due to "force majeure", the guarantee (and counter-guarantee, if any) is extended once by 30 calendar days.

b.iii.: A **demand** (Art. 2) under a guarantee that cannot be paid due to "force majeure" will be paid after termination of "force majeure", even if the guarantee has expired in the meantime. A respective counter-guarantee may be claimed within 30 calendar days after termination of (local) "force majeure", even if it has expired.

c.i.: If a counter-guarantee expires at a time when **presentation** (Art. 2) is not possible due to "force majeure", it is extended by 30 calendar days from the date on which counter-guarantor informs guarantor about the termination of "force majeure".

c.iii.: A **demand** (Art. 2) under a counter-guarantee that cannot be paid due to "force majeure" will be paid after termination of "force majeure", even if it has expired.

(ICC 458: no rules)

**Art. 32:**
**Liability for charges**

A party instructing another party to perform services under the URDG is liable, amongst other, to pay the latter's charges, even if they should be borne by, but cannot be collected from, the beneficiary.

**Art. 34:**
**Governing law**

Law at the place of guarantor (guarantee) resp. counter- guarantor (counter-guarantee), unless otherwise provided.

Source: Uniform Rules for Demand Guarantees (URDG 758)

# Abstract of the Most Important Points (cont'd)

**Art. 33:**
**Transfer of a guarantee and assignment of proceeds**

a.: A guarantee is only transferable if it expressly states so.

b.: If transferable, the guarantor must comply with a transfer request only to the extent he expressly agreed to.

d.ii.: Condition for a transfer is a statement from the 1st beneficiary that the 2nd beneficiary has acquired the 1st beneficiary's rights and obligations in the underlying relationship.

g.i.: The right to the proceeds of a guarantee can always be assigned.

g.ii.: Subject to provisions of the applicable law, the guarantor is not obliged to pay to the assignee.

**Art. 35:**
**Jurisdiction**
Courts at the place of guarantor (guarantee) resp. counter-guarantor (counter-guarantee), unless otherwise provided

**Summary of Differences (URGD 458)**

**Presentation**: various rules, but exclusively regarding a demand.
**Requirements for a Demand**: a demand must indicate **that and in which** respect the principal is in breach.
**Time for Examination of a Demand**: the guarantor has a reasonable time to examine a demand.
**Extend or Pay**: payment to be suspended for reasonable time allowing the parties to reach a consent.
**Force Majeure**: no rules.

Source: Uniform Rules for Demand Guarantees (URDG 758)

# MT760: Applicable Rules



Any applicable rules must be indicated in field 40C. If no rules are applicable, this must also be indicated (code "NONE"). If the guarantee is subject to rules other than URDG (Uniform Rules for Demand Guarantees) or ISP (International Standby Practices) it must be indicated in field 40C using the code OTHR. (e.g. TAI rules).

## Field 40C: Applicable Rules

e.g. 1 THIS GUARANTEE IS SUBJECT TO THE UNIFORM RULES FOR DEMAND GUARANTEES (URDG) 2010 REVISION, ICC PUBLICATION NO.758.

e.g. 2 THIS GUARANTEE IS SUBJECT TO THE RULES OF THE THAI ARBITRATION INSTITUTE

Source: Mahanakorn Partners Group Research, 2019

# Form of Demand Guarantee under URDG 758





## APPENDICES

### Form of Demand Guarantee under URDG 758*

[*Guarantor Letterhead or SWIFT identifier Code*]

To: [*Insert name and contact information of the Beneficiary*]

Date: [*Insert date of issue*]

- **TYPE OF GUARANTEE:** [*Specify tender guarantee, advance payment guarantee, performance guarantee, payment guarantee, retention money guarantee, warranty guarantee etc.*]
- **GUARANTEE NO.** [*Insert guarantee reference number*]
- **THE GUARANTOR:** [*Insert name and address of place of issue, unless indicated in the letterhead*]
- **THE APPLICANT:** [*Insert name and address*]
- **THE BENEFICIARY:** [*Insert name and address*]
- **THE UNDERLYING RELATIONSHIP:** The Applicant's obligation in respect of [*Insert reference number or other information identifying the contract, tender conditions or other relationship between the applicant and the beneficiary on which the guarantee is based*]
- **GUARANTEE AMOUNT AND CURRENCY:** [*Insert in figures and words the maximum amount payable and the currency in which it is payable*]
- **ANY DOCUMENT REQUIRED IN SUPPORT OF THE DEMAND FOR PAYMENT, APART FROM THE SUPPORTING STATEMENT THAT IS EXPLICITLY REQUIRED IN THE TEXT BELOW:** [*Insert any additional document required in support of the demand for payment. If the guarantee requires no documents other than the demand and the supporting statement, keep this space empty or indicate "none"*]

* The Form of Demand Guarantee and Counter-Guarantee under URDG 758 as well as the Optional Clauses proposed in the following pages are provided for guidance. They are not part of the rules.





- **LANGUAGE OF ANY REQUIRED DOCUMENTS:** [*Insert the language of any required document. Documents to be issued by the applicant or the beneficiary shall be in the language of the guarantee unless otherwise indicated herein*]
- **FORM OF PRESENTATION:** [*Insert paper or electronic form. If paper, indicate mode of delivery. If electronic, indicate the format, the system for data delivery and the electronic address for presentation*]
- **PLACE FOR PRESENTATION:** [*Guarantor to insert address of branch where a paper presentation is to be made or, in the case of an electronic presentation, an electronic address such as the Guarantor's SWIFT address. If no Place for presentation is indicated in this field, the Guarantor's place of issue indicated above shall be the Place for presentation*]
- **EXPIRY:** [*Insert expiry date or describe expiry event*]
- **THE PARTY LIABLE FOR THE PAYMENT OF ANY CHARGES:** [*Insert the name of the party*]

As Guarantor, we hereby irrevocably undertake to pay the Beneficiary any amount up to the Guarantee Amount upon presentation of the Beneficiary's complying demand, in the form of presentation indicated above, supported by such other documents as may be listed above and in any event by the Beneficiary's statement, whether in the demand itself or in a separate signed document accompanying or identifying the demand, indicating in what respect the Applicant is in breach of its obligations under the Underlying Relationship.

Any demand under this Guarantee must be received by us on or before Expiry at the Place for presentation indicated above.

**THIS GUARANTEE IS SUBJECT TO THE UNIFORM RULES FOR DEMAND GUARANTEES (URDG) 2010 REVISION, ICC PUBLICATION NO. 758.**

**SIGNATURE(S)**

MPG

# Independent Obligations



### Uniform Rules for Demand Guarantees

a) A **guarantee** is by its nature **independent** of the underlying relationship and the application, and the **guarantor is in no way concerned with or bound by such relationship**. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defenses arising from any relationship other than a relationship between the guarantor and the beneficiary.

b) A **counter-guarantee** is by its nature **independent** of the guarantee, the underlying relationship, the application and any other counter-guarantee to which it relates, and the counter-guarantor is in no way concerned with or bound by such relationship. A reference in the counter-guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the counter-guarantee. The undertaking of a counter-guarantor to pay under the counter-guarantee is not subject to claims or defenses arising from any relationship other than a relationship between the counter-guarantor and the guarantor or other counter- guarantor to whom the counter-guarantee is issued.

### International Standby Practices

**Incorporation of ISP98; law, court, arbitration, and sanctions.** Incorporation of ISP98 into an undertaking that is payable against the presentation of documents should qualify the undertaking as **independent** under applicable law. ISP98 invokes letter of credit law by emphasizing the letter of credit aspects of a standby and its independence in ISP98 Rules 1.06(c) (Nature of Standbys) and 1.07 (Independence of the Issuer-Beneficiary Relationship).

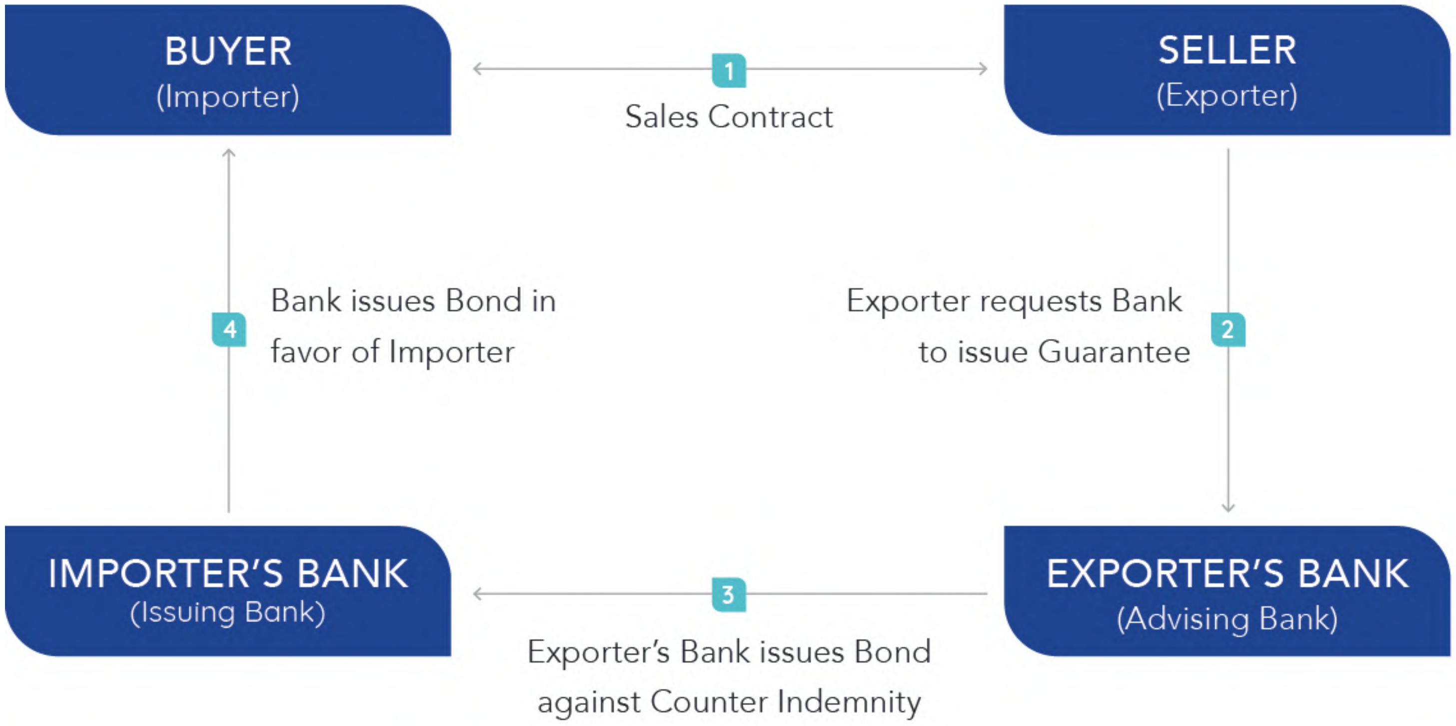
### Corollary

the legal implications of the independent nature of a Bank Guarantee is that all disputes arising out of or in connection with the Guarantee are to be finally settled under the **Rules of the Guarantee**, independently of the law governing the underlying contract.

Source: Mahanakorn Partners Group Research, 2019

# Credit Substitution

The success of project finance transactions may be undermined by a number of factors and unforeseen circumstances. In order to secure their investment, the parties to an equity financing or debt financing contract often seek guarantees that serve as a contingency mechanism to sidestep unpleasant surprises.




Source: Mahanakorn Partners Group Research, 2019

# Credit Substitution Principles

**Irrevocable and unconditional.** A guarantee that is offered as a substitute of the guarantor's credit rating for that of the project owner would create an unconditional payment obligation on the part of the guarantor. The guarantee, such as a letter of credit or bond insurance policy, is called a first demand instrument where the credit enhancer must simply pay without recourse to any defenses.

**Full and timely payment.** The timing of payment specified by the terms of both the underlying obligation and the guarantee must assure that the guarantor must pay no later than when the guaranteed obligation is contractually due. A guarantee that achieves credit substitution also covers the full amount of the principal and interest due on the debt obligation as well as any other amounts that are contractually owed to the MLA, such as a redemption premium or penalty interest.

**Covers payment, not just collection.** Guarantees of collection require that the creditor first exhaust all judicial remedies against the principal obligor before demanding payment from the guarantor. Such guarantees do not provide credit substitution; they merely provide a possible recovery at the end of two litigations (first against the principal obligor, then against the guarantor). Guarantees of payment, in contrast, require the guarantor to pay upon demand from a beneficiary or automatically pay when payment becomes contractually due according to the terms of the underlying obligation.

**Exemption.** The guarantee covers preference payments, fraudulent conveyance charges, or other payments that have been rescinded, repudiated, or "clawed back.". A guarantee that achieves credit substitution covers any payment from the principal obligor that a court rescinded, or required noteholders to give back (i.e., "disgorge") either as a result of the principal obligor's bankruptcy or otherwise. While claw-back or disgorgement most typically occurs as the result of a judicial order from a bankruptcy court, a regulatory agency will sometimes have similar statutory powers.

**Waiver of defenses.** A guarantor can invoke various defenses to payment (so-called suretyship defenses). In addition, the guarantor may have the benefit of virtually all the principal obligor's defenses under the guarantee-backed loan agreement. In order to avoid complex fact-based litigation, thus increasing the risk that debt service payments may not be made on a timely basis, all suretyship defenses must be expressly waived.

Source: Moody's Investors Service

# Credit Substitution Principles

**Term as per underlying obligation.** The term of the guarantee extends as long as the term of the underlying obligation, as the guarantee must remain in force for the entire life of the guaranteed obligation, including any bankruptcy or other regulatory preference periods. The guarantee cannot be terminated prematurely at the guarantor's sole option. The guarantee also remains in force if there is a partial settlement or intermediate payment, and terminates only after the final payment due under the guaranteed obligation has been received.

**Enforceable.** The guarantee is enforceable against the guarantor. Many transaction structures, including those for which the rights under the guarantee are to serve as collateral for the noteholders, may not achieve credit substitution without the acknowledgment and agreement of the guarantor that the benefit of the guarantee may be assigned or transferred and may be granted as security.

**Unimpaired credit.** The transfer, assignment or amendment of the guarantee by the guarantor does not release the guarantor from the obligation, thus does not result in a deterioration of the credit support provided by the guarantee. However, it is not uncommon for the guaranteeing assignor to also provide written confirmation of retaining its liability, notwithstanding the guarantee assignment, so as to preserve credit substitution. Likewise, it is common for SBLCs to be expressly issued as irrevocable, non-transferable.

**Governing law.** The guarantee is governed by the law of a jurisdiction that is hospitable to the enforcement of guarantees. Some jurisdictions give guarantors a wide range of rights and defenses, which may result in a deterioration of the credit of the guarantee and negatively affect credit substitution. It is common, to avoid unnecessary risk, that international guarantees be governed by ICC Uniform Rules for Demand Guarantees (URDG )758

Source: Moody's Investors Service

# Preventing Unfair & Fraudulent Calls

The URCG (ICC Publication No. 325E) are aimed at encouraging more equitable practices in the area of contract guarantees (i.e., tender, performance, or repayment guarantees (demand guarantees)), particularly by limiting the problem of **unfair calling** of these guarantees. The ICC considered desirable that the URCG should not provide for first demand guarantees payable without any **evidence of default**. To prevent abuse by unscrupulous beneficiaries, the URCG therefore provide that ‘evidence’ of default by the principal is required to justify the honoring of a claim under a contract guarantee.

It can be expected that in most cases the parties to such a guarantee will specify in it what form of evidence is required. Guarantors have been advised to require documentation prepared independently of the beneficiary and in a form capable of verification by the guarantor.

## Demand

Claim under a performance guarantee.

## Evidence

supporting certificate presented by experts / engineers indicating the defect in the construction or performance of a particular structure.

## Honoring

Payment is made immediately, upon verification

Source: Mahanakorn Partners Group Research, 2019

# Unfair Calling Risk for the Parties

### Beneficiaries

Need a device that would enable them to get paid against a simple demand or document without risking obscure objections.

### Principals

Need to have some kind of safety mechanism in the system so as to prevent unfair callings.


### Banks

Require a simple instrument whereby the issuer (guarantor) would have to pay without having to make difficult investigations or take complicated decisions based on doubtful evidence.

Source: Mahanakorn Partners Group Research, 2019

# URDG Preventing Unfair Calls of Guarantees

## URDG 458

### Art. 9

All documents specified and presented under a Guarantee, including the demand, shall be examined by the Guarantor with reasonable care to ascertain whether or not they **appear on their face to conform** with the terms of the Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused.

### Art. 20

Demand supported by **written statement**:

(i) the Principal is in breach of his obligation(s) under the underlying contract(s) or, in the case of a tender guarantee, the tender conditions; and

(ii) the respect in which the Principal is in breach

### Art. 21

The Guarantor shall without delay transmit the Beneficiary's demand and any related documents to the **Principal** or, where applicable, to the Instructing Party for transmission to the Principal.

## URDG 758

### Art. 10

A guarantee may be advised to a beneficiary through an advising party. By advising a guarantee, [...], the advising party signifies to the beneficiary and, if applicable, to the second advising party, that it has satisfied itself as to the **apparent authenticity** of the guarantee and that the advice accurately reflects the terms and conditions of the guarantee as received by the advising party.

### Art. 15

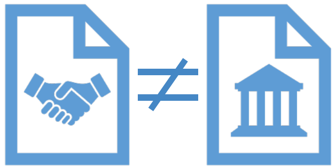
A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a **statement**, by the beneficiary, indicating **in what respect the applicant is in breach** of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand.

### Art. 19

The guarantor shall determine, on the basis of a presentation alone, whether it **appears on its face** to be a complying presentation.

Source: Mahanakorn Partners Group Research, 2019

# The Fraud Exception to the Autonomy Principle



## Independent Obligations

It is often said that letters of credit and demand guarantees are 'as good as cash' because the bank's obligation under them is independent of its customer's (applicant's/principal's) obligation to its trading partner (beneficiary) under the underlying contract. Therefore, **even if the beneficiary is in breach of the underlying contract** or that contract has been terminated for repudiatory breach, the bank must, in principle, still pay if the demand complies with the instrument's requirements

## Exceptions

To solve the unsatisfactory situation that the beneficiary may benefit from its own fraudulent conduct in letter of credit and demand guarantee transactions, a limited number of exceptions to the autonomy principle have come to be acknowledged and accepted in practice. Therefore, in certain circumstances, the autonomy of demand guarantees and letters of credit may be ignored by the bank and regard may be had to the terms and conditions of the underlying contract. The main exceptions concern **fraud** and **illegality**.

Therefore, in principle, a breach of contact of the underlying contract will not affect the bank's obligation to pay, but if there is clear fraud the situation is quite different.

the defense of fraud has been pleaded successfully in England in only a very small minority of cases (see sources). English courts have traditionally adopted a non-interventionist approach that seeks to uphold the sanctity of the principle of autonomy of demand guarantees and to maintain commercial certainty

Sources: H N Bennett 'Performance bonds and the principle of autonomy' (1994) *Journal of Business Law* 574 at 581–582; and I Ndekugri 'Performance Bonds and Guarantees: Construction Owners and Professionals Beware' (November/December 1999) 125 *Journal of Construction Engineering and Management* 428 at 433. See also *Themehelp Ltd v West and Others* [1996] QB 84 (CA) ([1995] All ER 215 (CA) and [1995] 3 WLR 751 (CA)); and *Kvaerner John Brown v Midlands Bank Plc* [1998] CLC 446.

# Bankers Professional Liability

## Documentary Nature of Demand Guarantees

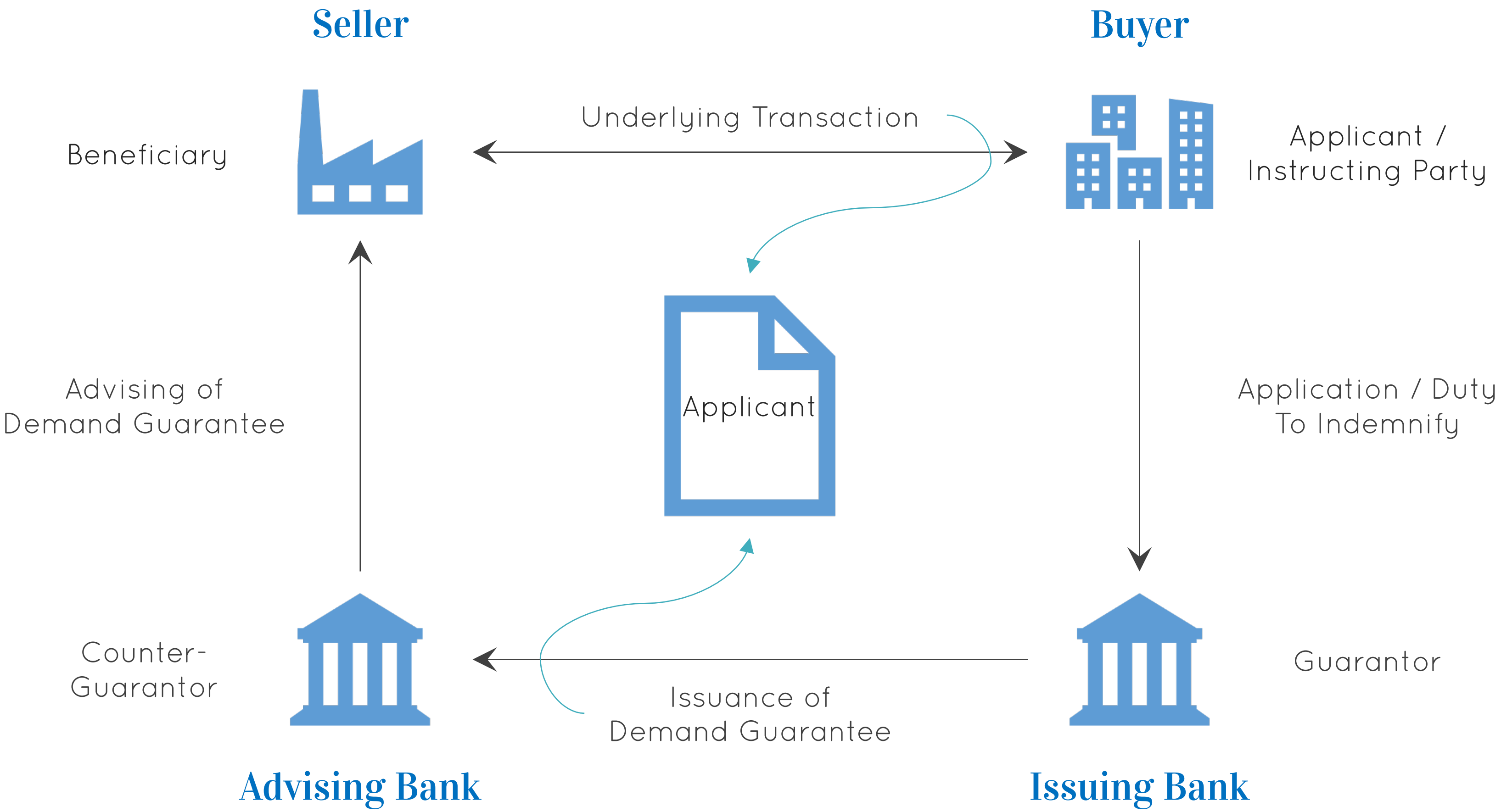
In terms of the principle of autonomy in relation to letters of credit/demand guarantees, all parties under a credit/guarantee transaction are **dealing in documents**, not goods or services to which the documents relate. If documents/demands tendered/presented appear on their face to be in strict compliance with the terms and conditions stipulated in the credit/guarantee, the issuer/guarantor will **make the payment, irrespective of any disputes or claims** regarding other related transactions. The issuer/guarantor is entitled to make payment with full recourse against the applicant/principal, even if the document received turns out to be a forgery or includes fraudulent statements. The issuer's/guarantor's only **duty is to exercise reasonable care to ensure that the documents tendered on their face comply with the terms and conditions of the credit/guarantee**. This doctrine generally serves commerce well, and facilitates the commercial utility of letters of credit and demand guarantees.

## Closing a Loophole in the Law

Owing to the documentary nature of letters of credit and demand guarantees, beneficiaries demanding payment under these instruments do not have to show that they have properly performed their duties in the underlying contracts; all they have to do is to produce documents that conform on their face. The separation of the documents from the actual performance of the underlying contract creates a loophole in law for those unscrupulous beneficiaries to abuse the system.
This allows beneficiaries to run away with others' money by presenting forged or fraudulent documents or making fraudulent demands. If the **fraud rule** is applied, the loophole in the letter of credit and demand guarantee system is shrunk. The fraud rule will not prevent every injustice that fraud can cause, but its effects are at least minimized.

Source: Mahanakorn Partners Group Research, 2019

# Duties & Liabilities in Demand Guarantees




Applicant is the party indicated in the guarantee as having its obligation under the underlying relationship supported by the guarantee.

Instructing party is the party, other than the counter-guarantor, who gives instructions to issue a guarantee or counter-guarantee and is responsible for indemnifying guarantor or counter-guarantor.

Source: Mahanakorn Partners Group Research, 2019

MPG

# Securing Performance & Payment



| Problem | What type of bank instrument is possible? |
|---|---|
| The machinery manufacturer, Generator Co. Ltd., Bangkok, bids for an order from Electricity Supply Ltd., Osaka, in response to a call for tenders by the latter.<br>As the buying firm does not want to deal with unreliable and unqualified companies, only guaranteed bids will be accepted. | To guarantee the bid, as required by Electricity Supply Ltd., the bank provides a **bid bond** at the request of Generator Co. Ltd. |
| Electricity Supply Ltd. awards Generator Co. Ltd. the contract, and the particulars of manufacture and delivery are agreed. | To guarantee the delivery and performance of Generator Co. Ltd., the bank issues a **performance bond** at the request of Generator Co. Ltd. |
| Generator Co. Ltd. requests an advance payment from Electricity Supply Ltd. for the manufacture and the preparations for delivery of the ordered machinery. | To secure the advance payment, the bank provides an **advance payment guarantee** at the request of Generator Co. Ltd. for the event that the payment must be refunded due to non-delivery. |
| Generator Co. Ltd. performs its contract in collaboration with a consortium or with subcontractors, but as general contractor assumes sole liability towards Electricity Supply Ltd. | At the request of Generator Co. Ltd., the bank issues the guarantees for the total amount (**consortium guarantees**), including the shares of the consortium members or the subcontractors. To limit its liability to its own share of the contract, Generator Co. Ltd. requires of the consortium members or subcontractors a **counter-guarantee** covering their obligations under the contract. To ensure that the members of the consortium or the subcontractors share in the security provided by the documentary credit issued by the buyer's bank, Generator Co. Ltd.'s bank transfers the documentary credit or issues a **back-to-back documentary credit** in their favor. Another alternative: the members of the consortium or the subcontractors agree with Generator Co. Ltd. on a percentage **assignment** of the documentary credit proceeds. |

Source: Mahanakorn Partners Group Research, 2019

MPG

# Securing Performance & Payment (cont'd)

| Problem | What type of bank instrument is possible? |
|---|---|
| Generator Co. Ltd. finances its delivery by means of an export credit secured under the Export-Import Bank of Thailand (EXIM Bank) scheme. | The bank grants an export credit after having obtained approval for a Short-Term Export Credit Insurance (STECI) on the basis of the prevailing terms and the actual need. |
| Generator Co. Ltd. agrees with Electricity Supply Ltd. that payment for a particular delivery will take the form of a documentary collection. | Generator Co. Ltd. instructs its bank to handle the **documentary collection**. The bank forwards the documents to the buyer's bank, which then releases them to Electricity Supply Ltd. against payment or acceptance of a draft, depending on the agreement. |
| Generator Co. Ltd. agrees with Electricity Supply Ltd. that payment for the main delivery will be in the form of a documentary credit. | The documentary credit applicant – in this case, Electricity Supply Ltd. – asks its bank (issuing bank) to issue a **documentary credit (DC)**. Depending on the requirements of the seller and the buyer, either an **unconfirmed DC** or a **confirmed DC** will be issued via a correspondent bank in the country of the seller. The documents stipulated in the DC are submitted by the beneficiary (Generator Co. Ltd.) to its bank, forwarded to the issuing bank and, finally, handed over to the DC applicant (Electricity Supply Ltd.). Depending on the terms of the DC, payment is made either on a sight or deferred basis. |
| Generator Co. Ltd. can only obtain the export contract if they or a third party likewise agree to purchase merchandise of an equivalent value from the importing country. | To secure the mutual payments in such **barter deals, compensation or switch transactions**, DCs may be issued by both parties and the incoming and outgoing payments processed via an offset account. |

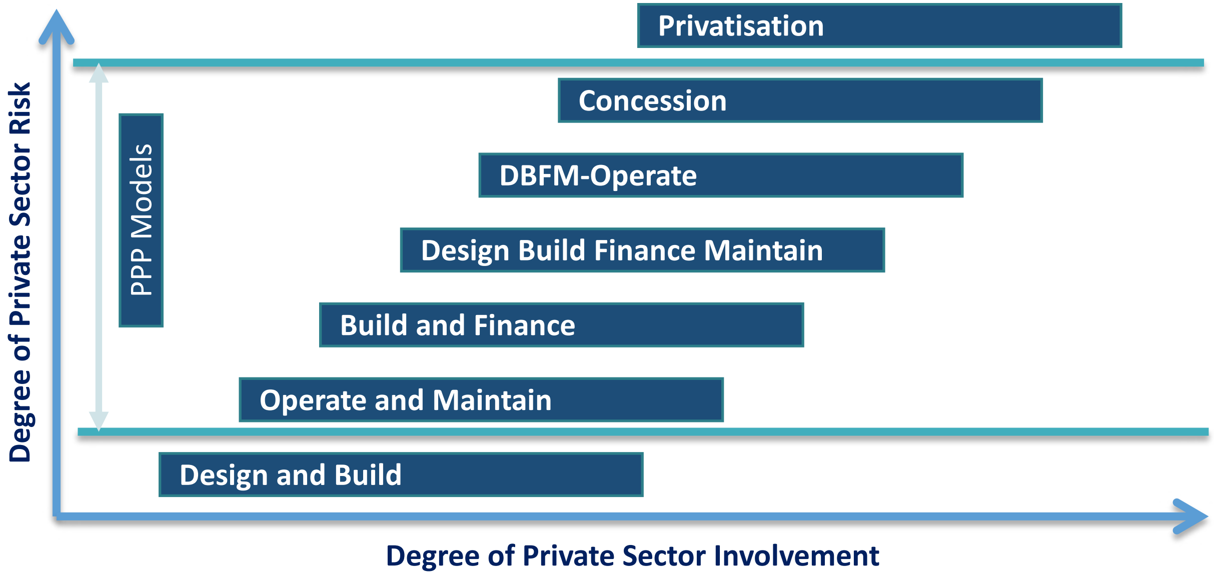
Source: Mahanakorn Partners Group Research, 2019

# Project Finance

MPG

# Public-Private Partnerships (PPP)

| Economic Infrastructure Projects | Social Infrastructure Projects |
|---|---|
| Ports and airports | Education (i.e., schools, universities) |
| Toll roads, inter-city and urban rail transport | Public housing |
| Water resources and sewage facilities | Justice (i.e., courts and correctional facilities) |
| Telecommunications and communications | Public buildings |
| Energy generation, transmission and distribution | Emergency services |
| Conference and car-parking facilities | Health services (i.e., hospitals, outpatient services) |



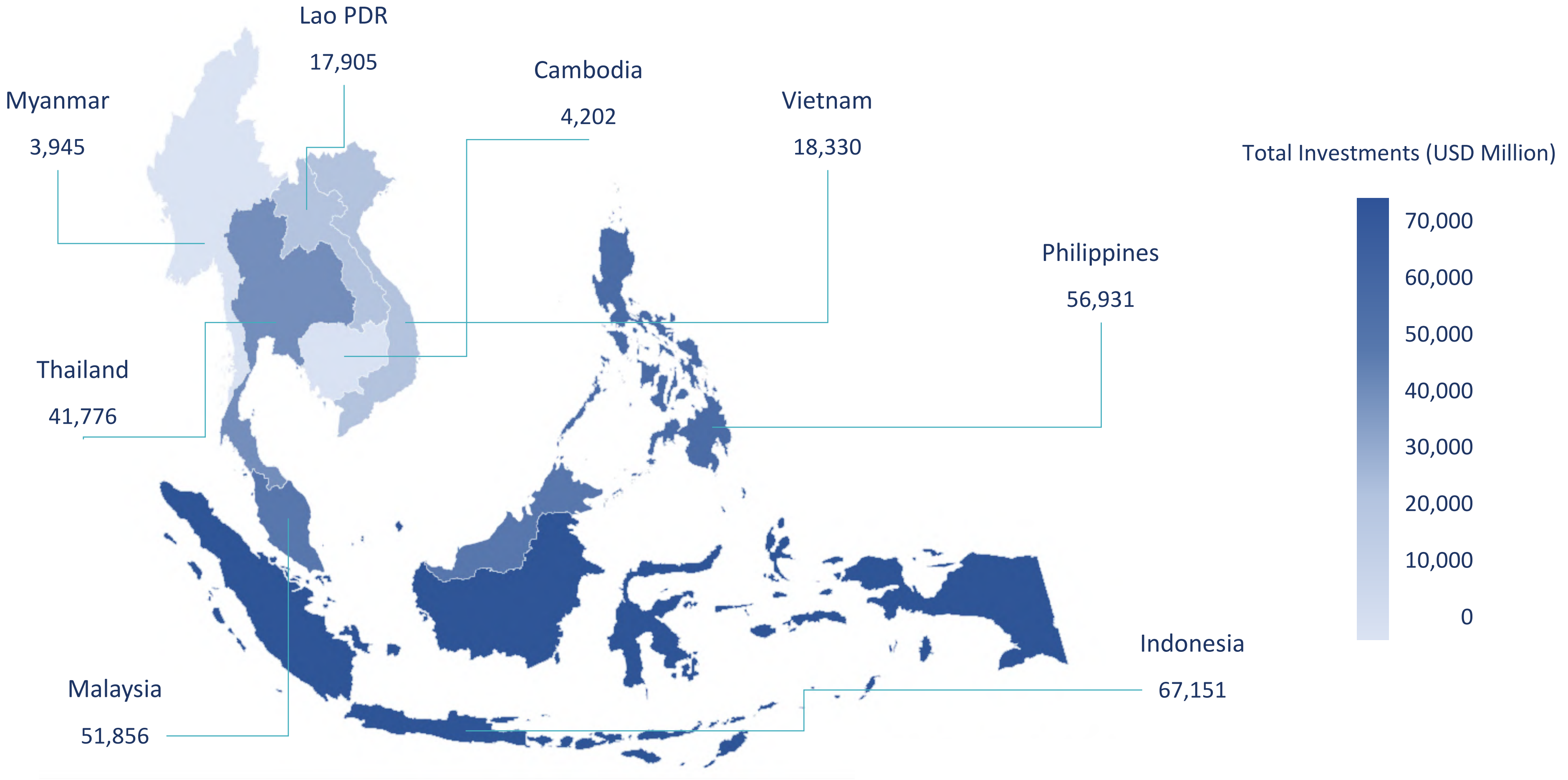

**Characteristics of projects to be delivered as PPPs:**

a. May be delivered under an output specification
b. Possess economies of scale (minimum size of USD50 million)
c. Involve a level of technical and/or operational complexity
d. Offer scope for design and construction innovation and operational technologies
e. May be privately financed
f. Would benefit from incentivized private expertise and management
g. Provide opportunity for significant transfer of risk.

Source: OECD, The ASEAN Principles for Public-Private Partnership Frameworks, 2014

# ASEAN PPP Investments 1990-2018





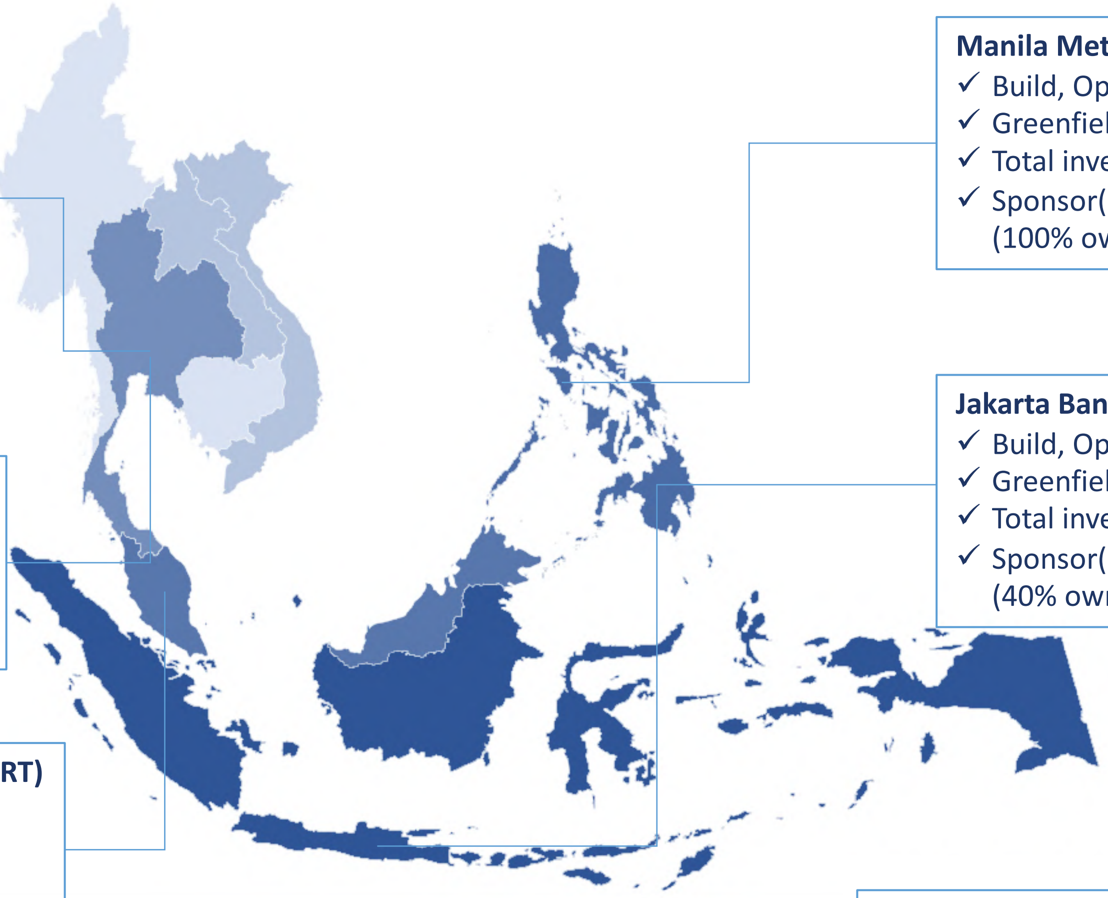

Source: Mahanakorn Partners Group elaboration on World Bank data, 2019

# Build, Operate, and Transfer (BOT) Model

**Bangkok Pink and Yellow Monorail Lines**
- ✓ Build, Operate, and Transfer
- ✓ Greenfield
- ✓ Total investment: $3,129*
- ✓ Sponsor(s):
  - o Tanayong Group (75% ownership)
  - o Sino-Thai Engineering & Construction (15% ownership)

**Bangkok Transit System Corporation (BTSC)**
- ✓ Build, Operate, and Transfer
- ✓ Greenfield
- ✓ Total investment: $1,700*
- ✓ Sponsor(s): Tanayong Group

**System Transit Aliran Ringan Sdn Bhd (STAR-LRT)**
- ✓ Build, Operate, and Transfer
- ✓ Greenfield
- ✓ Total investment: $1,365*
- ✓ Sponsor(s): Renong Berhad (100% ownership)



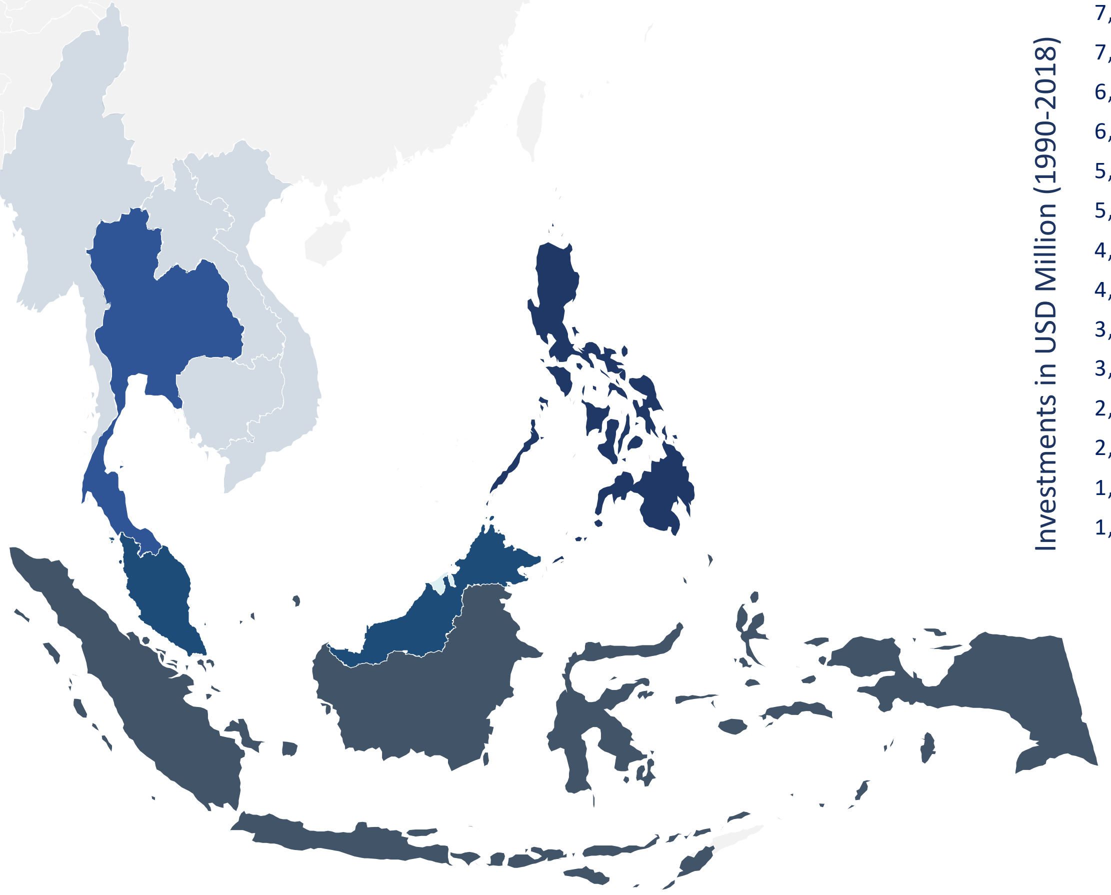
**Manila Metro Rail Transit Line 7 (MRT-7)**
- ✓ Build, Operate, and Transfer
- ✓ Greenfield
- ✓ Total investment: $1,287*
- ✓ Sponsor(s): San Miguel Corporation (100% ownership)

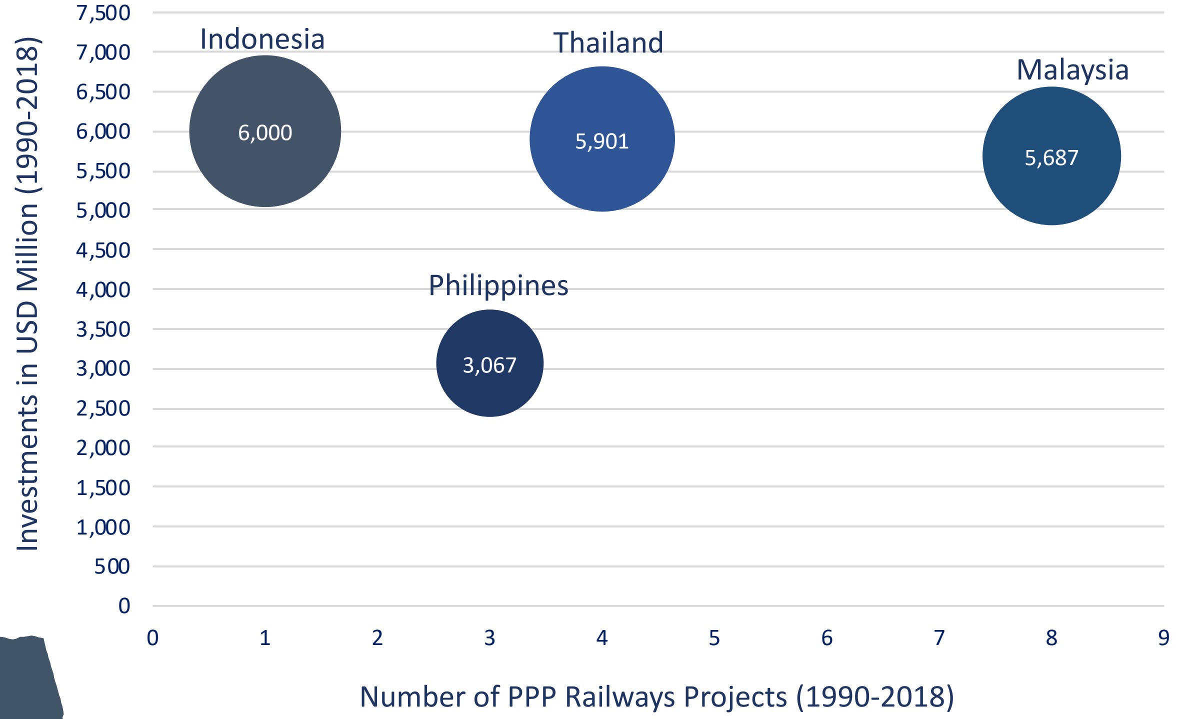
**Jakarta Bandung High-Speed Railway**
- ✓ Build, Operate, and Transfer
- ✓ Greenfield
- ✓ Total investment: $6,000*
- ✓ Sponsor(s): China Railway Construction Group (40% ownership)

* All figures are expressed in millions of U.S. dollars

Source: Mahanakorn Partners Group elaboration on World Bank data, 2019

# Railways PPP Investments by Country






Source: Mahanakorn Partners Group elaboration on World Bank data, 2019

# Thailand PPP Law



### Value for Money
Introduction of a Value for Money (VfM) principle

### Prerequisites
Clear prerequisites for different types of PPP arrangements

### PPP Unit
The establishment of a central PPP unit

### Strategic projects
The creation of a master plan of "Strategic Projects"

### Evaluation
Evaluation of unsolicited proposals for "Strategic Projects"

### Project Development Fund
The creation of a Project Development Fund (PDF)

### Transparency
Transparent procedures to streamline the PPP bidding process

### PPP Fast Track
The implementation of the PPP Fast Track

Source: Mahanakorn Partners Group Research, 2019

# Thailand PPP Act B.E. 2562

## Chapter 1 – General Terms

The Public-Private Partnership Act (PPP Act) came into force on March 11, 2019, governing PPP projects **exceeding a value of THB 5 billion**, as outlined in Section 8 of the Act, and certain projects that meet prescribed criteria that are valued at less than THB 5 billion.

## 12 Categories of PPP Projects

- ✓ Roads, highways, special ways and land-transportation;
- ✓ Trains, electric trains and other rail-transportation;
- ✓ Airports and air-transportation;
- ✓ Ports and water-transportation;
- ✓ Water management, irrigation, waterworks and wastewater treatment;
- ✓ Energy works;
- ✓ Telecommunications and general communications;
- ✓ Hospitals and public health;
- ✓ Schools and education;
- ✓ Housing and facilities for low or medium wage earners, the elderly, underprivileged or disabled;
- ✓ Exhibition centers and conference centers; and
- ✓ Other projects as to be announced by Royal Decree.

## Project Value > THB 5 million

Joint investment projects whose value exceeds THB 5 billion are regulated by the rules, procedures and conditions specified in the PPP Act.

## Project Value ≤ THB 5 million

Joint Investment Projects valued at not more than THB 5 billion are regulated by the rules and procedures specified by the Committee.

Source: Mahanakorn Partners Group, Overview of the Thailand Public-Private Partnership Act B.E. 2562 (2019) (PPP Act)

# Thailand – 2018 Credit Commentary



| | Moody's | S&P | Fitch | Classification |
|---|---|---|---|---|
| Singapore | Aaa | AAA | AAA | Stable Investment Grade |
| Hong Kong | Aa2 | AA+ | AA+ | Stable Investment Grade |
| South Korea | Aa2 | AA | AA- | Stable Investment Grade |
| Taiwan | Aa3 | AA- | A+ | Stable Investment Grade |
| Japan | A1 | A+ | A | Stable Investment Grade |
| China | A1 | A+ | A+ | Stable Investment Grade |
| Malaysia | A3 | A- | A- | Stable Investment Grade |
| Thailand | Baa1 | BBB+ | BBB+ | Stable Investment Grade |
| Philippines | Baa2 | BBB+ | BBB | Stable Investment Grade |
| Indonesia | Baa2 | BBB | BBB | Stable Investment Grade |
| Vietnam | Ba3 | BB | BB | Non-Inv. Grade Speculative |
| Cambodia | B2 | n/a | n/a | Highly Speculative |
| Laos | n/a | n/a | n/a | Not Rated |
| Myanmar | n/a | n/a | n/a | Not Rated |
| Brunei | n/a | n/a | n/a | Not Rated |

## Key Takeaways

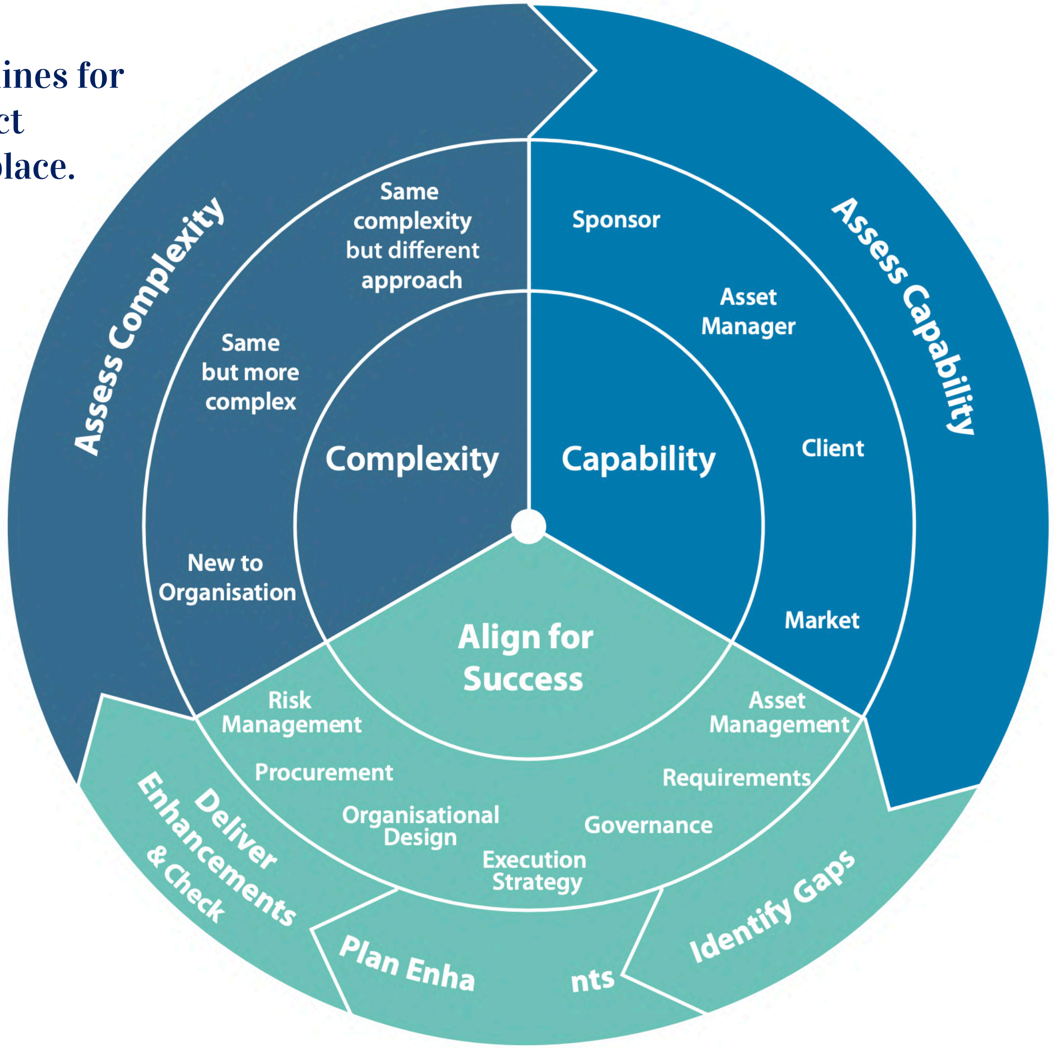
- ✓ Nonperforming loan ratios have stabilized in Thailand, an encouraging sign.
- ✓ Large companies are benefitting the most from the export-led economic recovery.
- ✓ Asset quality problems persist at small and midsized companies.
- ✓ We expect loan dissemination to rise, but high credit costs will curb profit growth.

Sources: S&P Global Ratings – ASEAN Credit Spotlight 2018

# PPP Project Initiation Routemap

**A structured process and guidelines for early stage screening and project identification should be put in place.**

The Routemap is an aid to strategic decision making. It supports the alignment of the sponsor and client organization's capability to meet the challenges during initiation and delivery of a project. It provides an objective and systemic approach to project initiation founded on a set of assessment tools that help determine the complexity and context of the delivery environment, and the capability of current and potential sponsors, clients, asset managers and the infrastructure market.




The Routemap contains detailed checklists to use during the initial assessment steps, advice on how to perform the gap analysis, and advice about what to include in the plans for an enhanced project environment.
The components of the Routemap are:

- ✓ **Complexity Assessment**: through the Delivery Environment Complexity Analytic, a set of 12 factors that determine complexity.
- ✓ **Capability Assessment**: of the sponsor, asset manager, client, and market.
- ✓ **Align for Success**: covering governance; execution, organization design, and procurement; risk management; and asset management.

Source: Global Infrastructure Hub, 2019

# Project Preparation Phase

## Options Appraisal

Carried out to establish that all pertinent options have been considered involving the all the project's stakeholders: equity investors, sponsors, lenders and public sector at the national, regional and local level

## Commercial Viability

Project feasibility and deliverability for investors, contractors, the government and citizens/end-users. Testing the supplier market and developing the procurement strategy and contractual structure of the project, with a correct risk allocation

## Long-Term Affordability

Ascertaining the expected life-cycle costs, adequate and affordable maintenance funding and financing of the project. Accordingly, the analysis should:

I. demonstrate that the project is affordable and cost-effective

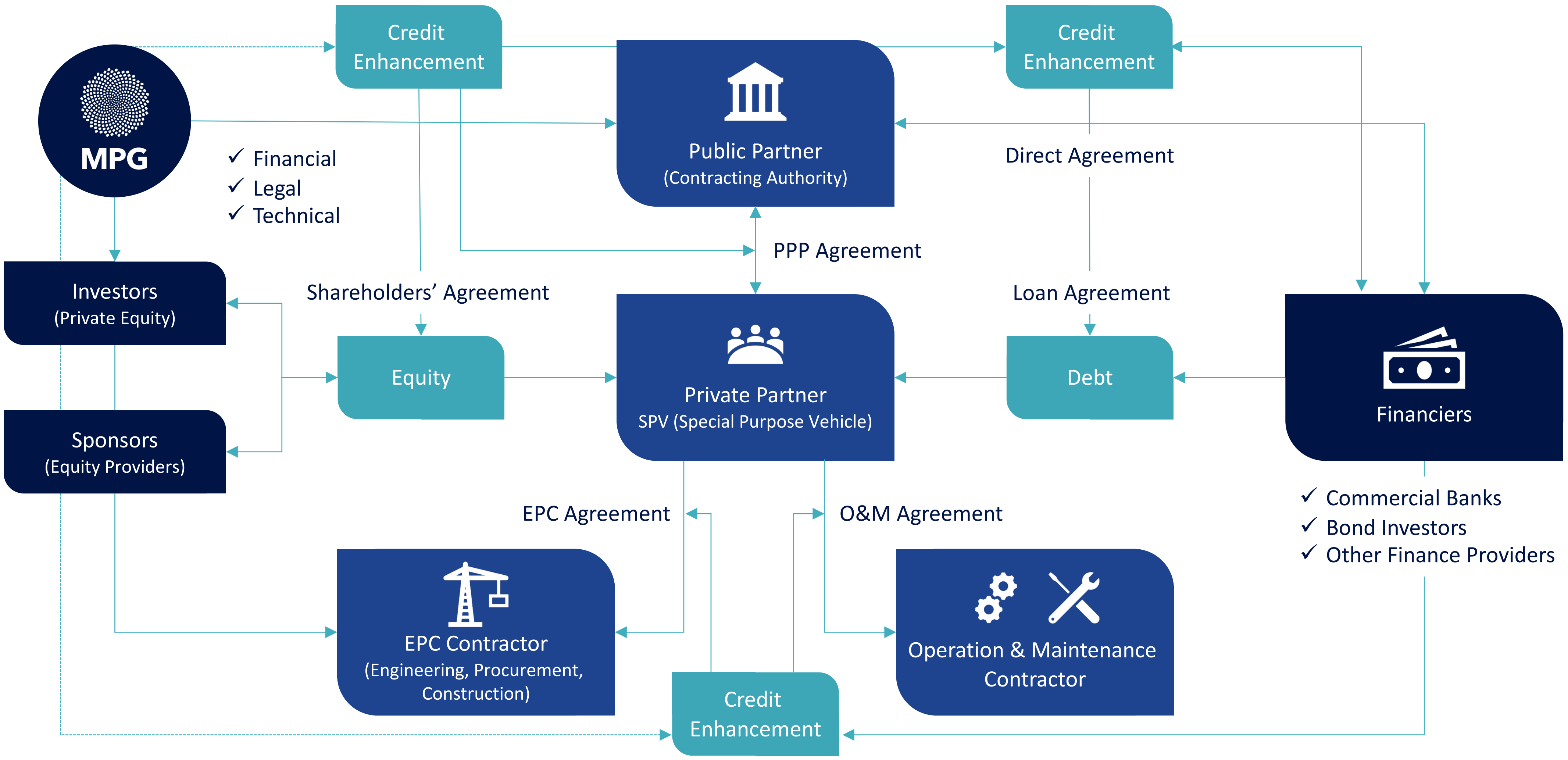
II. distinguish between public sector funding and private-sector funding

## Deliverability

Demonstrating whether there are arrangements in place to ensure the successful delivery, operation and maintenance of the project, in compliance with current environmental and social safety measures

Source: Mahanakorn Partners Group Research, 2019

# Legal & Financial Structures




Source: Mahanakorn Partners Group research

# Sources of Financing for PPP Projects

| Models | | Infrastructure Finance Instruments | | Market Vehicles |
|---|---|---|---|---|
| **Asset Category** | **Instrument** | **Infrastructure Project** | **Corporate Balance Sheet / Other Entities** | **Capital Pool** |
| Fixed Income | **Bonds** | Project Bonds | Corporate Bonds, Green Bonds | Bond Indices, Bond Funds, ETFs |
| | | Municipal, Sub-sovereign bonds | | |
| | | Green Bonds, Sukuk | Subordinated Bonds | |
| | **Loans** | Direct/Co-Investment lending to Infrastructure project, Syndicated Project Loans | Direct/Co-investment lending to infrastructure corporate | Debt Funds (GPs) |
| | | | Syndicated Loans, Securitized Loans (ABS), CLOs | Loan Indices, Loan Funds |
| Mixed | **Hybrid** | Subordinated Loans/Bonds, Mezzanine Finance | Subordinated Bonds, Convertible Bonds, Preferred Stock | Mezzanine Debt Funds (GPs), Hybrid Debt Funds |
| Equity | **Listed** | YieldCos | Listed infrastructure & utilities stocks, Closed-end Funds, REITs, IITs, MLPs | Listed Infrastructure Equity Funds, Indices, trusts, ETFs |
| | **Unlisted** | Direct/Co-Investment in infrastructure project equity, PPP | Direct/Co-Investment in infrastructure corporate equity | Unlisted Infrastructure Funds |

Increasing Risk

Decreasing Cost

60%-90% of Capitalization

0%-20% of Capitalization

10%-30% of Capitalization

Source: OECD, Infrastructure Financing Instruments and Incentives, 2015

# Risk Identification & Management


Source: Mahanakorn Partners Group Research, 2019

# Risk Management

## Political

- ✓ Political violence;
- ✓ Expropriation or confiscation of assets;
- ✓ Contract Frustration;
- ✓ Wrongful calling of demand guarantees;
- ✓ Business Interruption;
- ✓ Inconvertibility of FX;
- ✓ Governmental assurances;
- ✓ Stabilization clauses;
- ✓ Bilateral investment treaties (BIT);
- ✓ PRI (MIGA; OPIC; ECA; Lloyd's of London);
- ✓ Lender Support

## Construction

- ✓ Can the project be completed and operated according to the agreed standards and specifications?
- ✓ Can the project be completed on budget?
- ✓ Can the project be completed on schedule?
- ✓ Which party should assume the risk for construction delays, costs overruns and performance shortfalls?

## Operational

- ✓ Engage a competent project operator;
- ✓ Obtain insurance (property damage, third party liability and business interruption insurance);
- ✓ Extensive reporting and inspection;
- ✓ Meeting manufacturers' maintenance specs;
- ✓ Controlling maintenance costs;
- ✓ Reducing down time and associated costs

## Currency

If the PPP agreement and the loan agreement are denominated in two different currencies, currency volatility must be factored in and hedging mechanisms should be considered to mitigate such risk:

- ✓ Inconvertibility;
- ✓ Transferability.

Risk mitigation via:

- ✓ PRI;
- ✓ Currency swaps;
- ✓ Offshore reserve account

## Authorizations

- ✓ Environmental permits
- ✓ Drilling permits
- ✓ Permit to own property employ expatriate labor or operate the project (FDI)
- ✓ Approvals to import goods or for outbound fund transfers

Mitigants:

- ✓ Stabilization clauses (HGA)
- ✓ Legal opinions
- ✓ Representations and warranties
- ✓ Enforceable approvals

# Credit Enhancement

Credit Enhancement mitigates political, technological or development risks and it can be pivotal in obtaining the Credit Rating sought by Investors. It aims to achieve the two-fold goal: (1) viability of the project and (2) lowering the cost of financing and resulting in a more competitive price and better value for money.


Source: Mahanakorn Partners Group Research, 2019

MPG

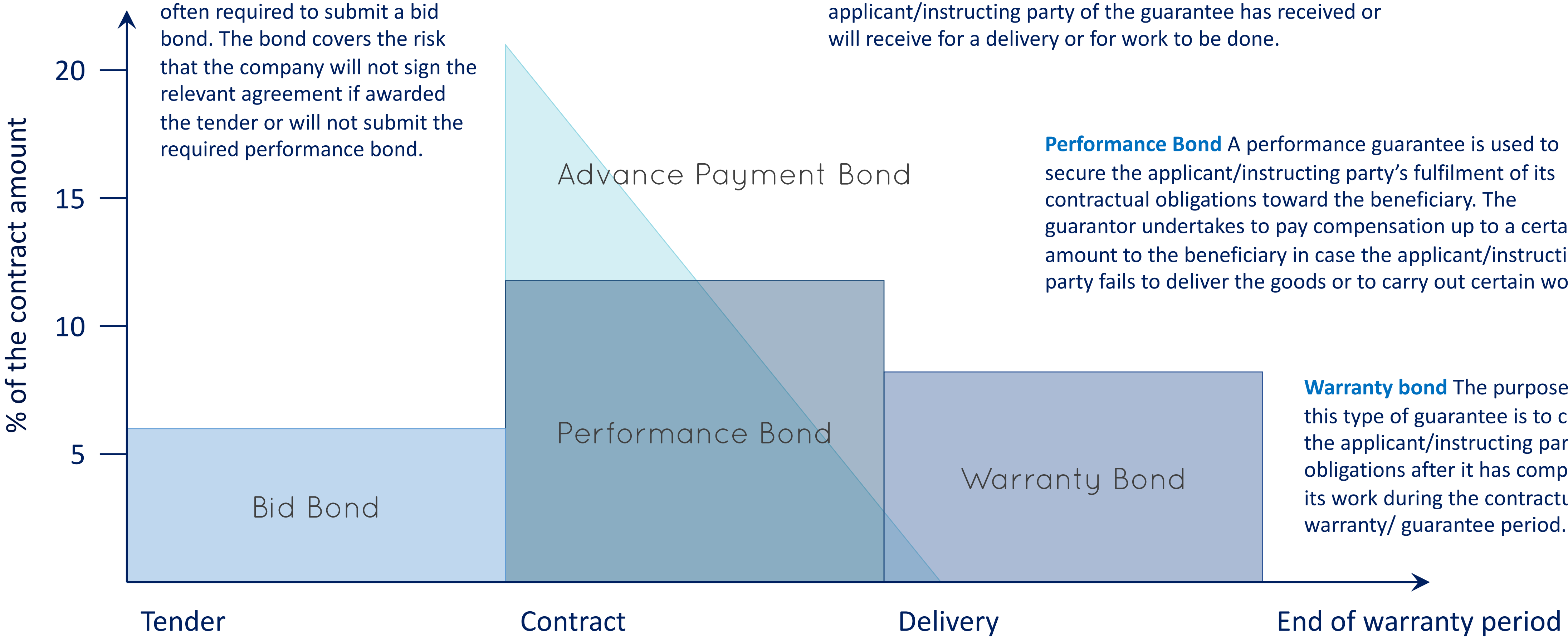
# Guarantees in Construction Contracts

**Bid/tender bond** When a company invites tenders, it is often required to submit a bid bond. The bond covers the risk that the company will not sign the relevant agreement if awarded the tender or will not submit the required performance bond.

**Advance payment, down payment or repayment bond** Their purpose is to ensure the repayment of an advance which the applicant/instructing party of the guarantee has received or will receive for a delivery or for work to be done.

**Performance Bond** A performance guarantee is used to secure the applicant/instructing party's fulfilment of its contractual obligations toward the beneficiary. The guarantor undertakes to pay compensation up to a certain amount to the beneficiary in case the applicant/instructing party fails to deliver the goods or to carry out certain work.

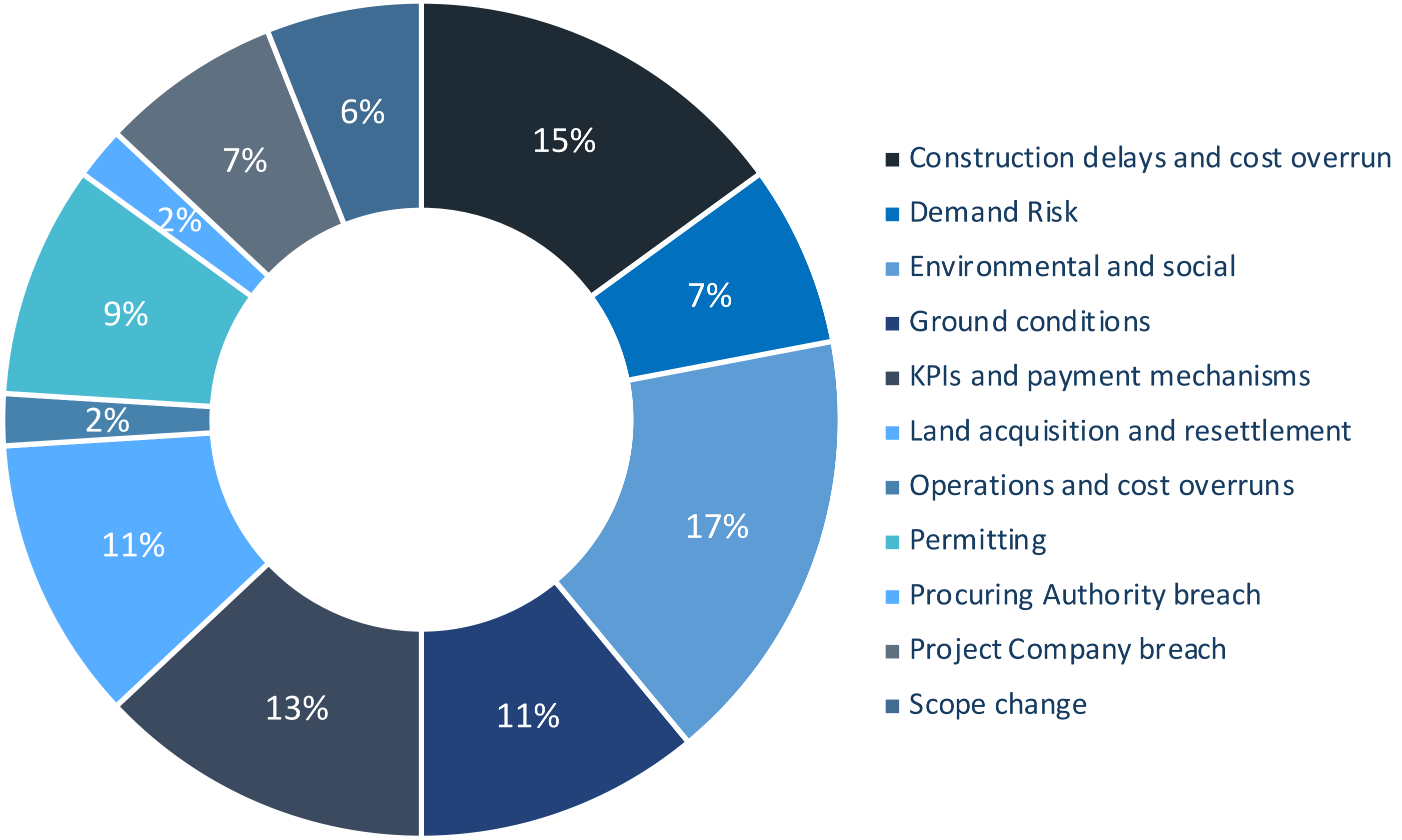
**Warranty bond** The purpose of this type of guarantee is to cover the applicant/instructing party's obligations after it has completed its work during the contractual warranty/ guarantee period.




Source: Mahanakorn Partners Group Research, 2019

# Dispute Resolution in PPP Contracts

## Dispute Subject Matters




## Dispute Resolution Mechanisms

| Mechanism | Examples found* | Percentage* |
|---|---|---|
| Escalation to senior management | 31 | 27% |
| Expert determination | 29 | 25% |
| Dispute Resolution Board | 25 | 22% |
| Mediation | 37 | 32% |
| Domestic arbitration | 62 | 54% |
| International arbitration | 19 | 17% |

Prevalence of dispute resolution mechanisms explicitly defined in PPP contracts, based on 115 projects *As there may be more than one mechanism used per PPP contract the total examples/percentage is greater than the number of projects with data available.

Source: Mahanakorn Partners Group Research, 2019

# Advantages & Disadvantages

Selecting an appropriate contractual arrangement is essential for a PPP project's feasibility and long-term sustainability. As the conditions of different projects can vary widely, a thorough evaluation of a project's requirements and a in-depth risk-benefit analysis dictate the structure to be adopted.

## Advantages

- ✓ Tailored project risk allocation ensures cost-efficient credit enhancement structures
- ✓ Long-term income streams for private sector stakeholders
- ✓ Projects benefit from private sector proficiency and experience
- ✓ Improved quality and shorter timelines to deliver public services
- ✓ Projects tend to be on schedule and within budget, relieving the public of potential, extra expenditures
- ✓ Private funding reduces the public burden, allowing for government spending in other areas
- ✓ Off-balance sheet financing mitigates the public sector's risk, while generating additional revenue streams

## Disadvantages

- ✓ The delivered facility may be more costly than a public concession one
- ✓ Off-balance sheet financing entails deferred fiscal liabilities for the public sector, which may adversely affect future fiscal indicators
- ✓ PPP contractual arrangements may require lengthy negotiations and greater funding than traditional public procurement
- ✓ PPP contracts are long-term, complex and precarious due to unforeseeable, adverse circumstances

Source: Mahanakorn Partners Group Research, 2019

# Project Terms of Reference

| | |
|---|---|
| **Background** | ✓ Provide an overview of the history behind the proposed project<br>✓ Clearly state why perform the project, and also refer to a programming context<br>✓ State the general role of stakeholders in doing project activities<br>✓ Write a brief explanation of the need behind the project |
| **Objectives** | ✓ State the major objectives of the proposed project<br>✓ Describe the intended achievements to be gained at different stages of the project lifecycle<br>✓ Provide an overview of the resources required<br>✓ Clearly identify and define what is expected from the project and who the target audience is |
| **Issues** | ✓ Highlight the key issues to be studied and disputed at every stage of the project lifecycle<br>✓ List the criteria (including Efficiency, Relevance, Effectiveness, Impact, Sustainability) against which the issues will be analyzed and evaluated |
| **Methodology** | ✓ Define the key phases of the project implementation process<br>✓ Specify the required level of stakeholder involvement<br>✓ Describe the content and duration of project activities<br>✓ List the information collection tools necessary for monitoring purposes<br>✓ Provide data analysis rules |

| | |
|---|---|
| **Expertise** | ✓ Specify the type of work involved in the proposed project<br>✓ Describe the type of skills and abilities required<br>✓ Define the exact number of individuals involved<br>✓ Point at the period of engagement of each team member<br>✓ Describe the duties and responsibility per teammate<br>✓ Identify the relationships between the team members |
| **Reporting** | ✓ Provide the Table of Contents for project reports<br>✓ Define rules for composing annexes<br>✓ Add report templates<br>✓ Set submission dates<br>✓ List the computer software programs to be used for report writing<br>✓ Refer to people responsible for reporting and approving<br>✓ Provide other sufficient information such as number of copies to be created, responsibilities for report production and presentation, etc. |
| **Work plan** | ✓ Provide a summary of the anticipated work<br>✓ Describe the activities and necessary resources required for achieving the project's results and purpose<br>✓ Provide the activity schedule template<br>✓ Describe The finance resources allocated to the project |

Source: Mahanakorn Partners Group Research, 2019

# Case Study – ToR for Social Infrastructure

## Terms of Reference for The Construction of 16 Schools and one Warehouse in Rakhine State, Myanmar

| | |
|---|---|
| **Background** | Quality Basic Education Project (QBEP) was initiated in 2012 with support from Governments of UK, Denmark, Australia, the European Union (EU) and Norway. |
| **Objectives** | This activity consists of the construction of 16 new school buildings and one warehouse covering 7 Townships in Rakhine. |
| **Description of the assignment** | UNICEF Myanmar is seeking to procure the services of technically and financially sound construction companies (contractors) for the construction of schools in Rakhine State. The tender document for these schools will be carried out a through Request for Proposal (RFP). |
| **Duration of the Contract** | For warehouse and school - 6 months construction period plus 9 months for Defects Liability Period (DLP). |
| **Timeline** | It is expected that the school and warehouse construction will take 6 months to be substantially completed. An additional 9 months for the Defects Liability Period (DLP) will be needed to fully complete this project phase. |

| | |
|---|---|
| **Services Description and Minimum Requirements** | The work contracts will be awarded through a competitive selection process where the bidders must clearly demonstrate through a written proposal (technical and financial), extensive contextual experience in construction work, sustainable capabilities, technical proficiency and competency, in addition to the adherence to required local and international building codes, good practices in the provision of construction services. |
| **Contractor's scope of Services and Expected Deliverables** | a. Resource management<br>b. Mobilization of resources (man-power, materials, machines) to the construction sites<br>c. Site clearance, dismantling existing structures and disposal of debris out of the school compound<br>d. Management of construction activities for maintaining quality standards and timelines |
| **Request for Proposal** | a. Technical Proposal (50 Points)<br>b. Financial Proposal (50 Points) |
| **Selection process** | The 50/50 evaluation criteria will be applied to evaluate the submitted proposals. |

**Documents to be provided in the Technical proposal envelope, Documents to be provided in the Financial proposal envelope, team members for technical evaluation, payment schedule & fee**

Source: Mahanakorn Partners Group Research, 2019

# Case Study – ToR for Social Infrastructure cont'd



## Terms of Reference for The Construction of 16 Schools and one Warehouse in Rakhine State, Myanmar

| | |
|---|---|
| **Bid Security** | ✓ Every bidder shall furnish a Bid Security a lump-sum amount of USD One Thousand (USD 1,000) for each Lot of bid.<br>✓ The Bid Security shall be a Bank Guarantee in favor of UNICEF from a well-established Bank, legally operating in the Republic of the Union of Myanmar and acceptable to UNICEF<br>✓ **The Bid Security shall be included in the technical proposal and should not be part of the financial proposal**<br>✓ Any technical proposal not accompanied by Bid Security will be rejected by UNICEF and will not be evaluated |
| **Performance Security** | ✓ Along with the signature of the contract, the selected construction company shall submit a performance security to UNICEF<br>✓ The performance security is set for 10% of the total contract value and must be presented in the form of bank guarantee. The performance security will be released by UNICEF upon substantial completion of work by the contractor and approval by the consulting firm<br>✓ The performance security shall be a Bank Guarantee in favor of UNICEF from a well-established Bank, legally operating in the Union Republic of Myanmar and acceptable by UNICEF<br>✓ If the consulting firm fails to submit the required performance security, UNICEF may cancel the contract and the consulting firm will have no claim whatsoever on UNICEF |
| **Retention Money** | In order to effectively monitor the contractor's performance, UNICEF will keep an amount equivalent to 10% of total contract value. This amount (called Retention Money) will be retained by UNICEF and will be only released upon successful completion of 9-month Defects Liability Period (DLP) and following the issuance of the "Final Completion Certificate" by the consulting firm. |

Source: Mahanakorn Partners Group Research, 2019

## SCHEDULE 7 MODELS

### PART 1

### PERFORMANCE BOND

[Name and other details of the bank or financial institution]

Guarantee number ([__])

**THE UNDERSIGNED**,

[Name of bank or financial institution], with its registered office at [place], hereinafter referred to as the "**Bank**".

**WHEREAS:**

[Contractor], with its registered office and principal place of business at [address] [postal code] [place], hereinafter to be referred to as the "**Contractor**"

and

The Government of the Philippines, with its seat in Manila, Department of Health, represented herein by the government-owned and controlled corporation Philippine Health Insurance Corporation, also known as PhilHealth, hereinafter referred to as the "**Contracting Authority**",

entered into a "DBFM Agreement" number [__], on [contract date] hereinafter to be referred to as the "Agreement";

the Contractor is obliged pursuant to Article 3.3 (Performance Bond) of the Agreement to provide a bank guarantee in favor of the Contracting Authority as security for the fulfilment of its obligations towards the Contracting Authority arising from the Agreement;

The Bank is prepared to issue such a guarantee in favor of the Contracting Authority on the conditions as stated below;

**DECLARES AS FOLLOWS:**

1. By way of an independent obligation towards the Contracting Authority, the Bank hereby irrevocably and unconditionally stands guarantor for all that the Contracting Authority may claim from the Contractor under the Agreement, subject to a cumulative maximum amount of U.S. Dollars [__].





2. This bank guarantee is an abstract first demand guarantee. The Bank may not under any circumstances rely on the underlying legal relationship between the Contracting Authority and the Contractor as set out in the Agreement.
3. The Bank must, on the Contracting Authority's first written demand, without requiring a statement of the reasons or requesting further proof, proceed to pay all that the Contracting Authority declares that the Contractor owes the Contracting Authority pursuant to the Agreement, unless and to the extent that the amount of the payment increased by any other payments by the Bank on the grounds of this Article would exceed the maximum amount as referred to in Article 1.
4. This bank guarantee shall lapse on the first of the following dates:

   (a) one months after [fill in: scheduled availability date]; or

   (b) upon receipt by the Bank of a declaration from the Contracting Authority that this bank guarantee may expire.

5. This bank guarantee is governed by the ICC Uniform Rules for Demand Guarantees (URDG) 758. The Court of the International Chamber of Commerce (ICC) in Singapore shall hold jurisdiction to settle any disputes that may arise in relation to this bank guarantee.
6. This bank guarantee must be returned no later than the date referred to in Article 5 to the signatory at the following address: [address].

[place], [date]

[name of bank]

# Arbitration Award Default Insurance



Despite the protection provided by international investment treaties, holders of international arbitral awards remain exposed to the **risk of non-compliance** by the respondent. Whether due to illiquidity or unwillingness, respondents to arbitrations can flout rulings, forcing claimants into the difficult and costly process of **award enforcement**.

Arbitration Award Default Insurance (AADI) **guarantees payment** of a legally enforceable arbitral award against a sovereign entity 60 days after its failure or refusal to honor it. By matching the insurance market's appetite for sovereign risk and debt enforcement with investors' desire for certainty and returns, AADI provides protection against complex political and economic risks which can change drastically over the course of an arbitration.

## AADIs at a glance

- ✓ Cover available at any time prior to rendering of award
- ✓ Limit of liability equal to estimate of reasonable settlement
- ✓ Limited exclusions and conditions
- ✓ Instalments outside of policy period covered provided first payment falls within
- ✓ Policy periods of up to 7 years
- ✓ Claims paid 60 days after award
- ✓ After a claim, enforcement costs met initially by insurers
- ✓ Policies underwritten by Lloyd's syndicates benefitting from its A+ S&P rating.
- ✓ Eligible respondent states must be New York Convention signatories

Source: Mahanakorn Partners Group Research, 2019

# Required Underwriting Information



1. Case overview including:
    - Background to underlying investment
    - Basis of dispute
    - Quantum sought with rationale
    - Assessment of implications of default
2. Q&A document (following insurers initial feedback);
3. Copies of legal advice on key aspects of the arbitration identified by insurers
4. Decision tree of potential outcomes

Source: Mahanakorn Partners Group Research, 2019

# Provisional Payment under AAD



In general, underwriters have very little appetite for covering PPAs without the benefit of **arbitration**, and despite the positives and merits of the proposed project, they won't be able to provide coverage on a straight non-payment / non-honoring basis under the PPA. One of the issues for them under these PPAs is that they would only be able to pay a claim against a **valid and enforceable arbitral award**, whereas a non-honoring event could potentially lead to an unsuccessful arbitral award ruling for the client and therefore an unrecoverable loss. That said, the MLA/lenders may only be interested in comprehensive non-honoring versus AAD following Breach of Contract, due to the so-called **timing issue** as it pertains to paying a claim, rather than waiting during a protracted legal battle and arbitration proceedings for the appropriate ruling. Therefore, what can be considered (on a case-by-case basis) is a so-called "provisional payment" under AAD coverage.

So that under AAD coverage following a non-honoring event and subsequent disputes resolution process, the Insured may file a claim for up to **50%** of the lesser of the **Limit of Liability** or the **remaining obligations due**, on a provisional basis. Once arbitration is commenced, the Insured may claim for up to the provisional payment amount, however must furnish an appropriate bond or other security to Insurers prior to receiving the claim payment. The bond can be called upon by Insurers in the event the Insured unsuccessfully adjudicates its claim via arbitration.

If the Host Gov't fails to honor the Final Arbitral Award in the Insured's favor, Insurers will pay the remaining amount due. Otherwise there will be a reimbursement to Insurers should the Insured not win a favorable award.

Source: Mahanakorn Partners Group Research, 2019

# Learning Objectives Quizlet

MPG

# Question 1

An underlying transaction is supported by a First Demand Guarantee for USD 1 million. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

The Applicant requests the two following amendments:

1. Increase the Guarantee Amount to USD 1.2 million;
2. Request additional documents in support of the demand for payment.

Consider the following scenarios and answer the corresponding questions:

A. The Beneficiary receives the amendment by the Guarantor but does not respond. Is the amendment binding on the Beneficiary? Is it binding on the Guarantor?

B. The Beneficiary receives the amendment but does not explicitly accept nor reject them. However, the Beneficiary makes a presentation that complies only with the guarantee as amended. What should the Guarantor do?

C. The Beneficiary receives the amendment and accepts the variation in the Guarantee Amount but rejects the request for additional documents in support of the demand for payment. Should the Guarantor comply with the Beneficiary's notification of partial acceptance?

# Article 11 – Amendments

## Answers:

A. No, the amendment isn't binding on the Beneficiary. It is however binding on the Guarantor. [**Art. 11 b.** *An amendment made without the beneficiary's agreement is not binding on the beneficiary. Nevertheless the guarantor is irrevocably bound by an amendment from the time it issues the amendment, unless and until the beneficiary rejects that amendment*.]

B. The Guarantor must honor the Guarantee as amended. [**Art. 11 c.** *Except where made in accordance with the terms of the guarantee, the beneficiary may reject an amendment of the guarantee at any time until it notifies its acceptance of the amendment or makes a presentation that complies only with the guarantee as amended*.]

C. The Guarantor must disregard the amendment. [**Art. 11 e.** *Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment*]

# Question 2

A. A Beneficiary of a Demand Guarantee subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758 makes a presentation in electronic form. The guarantee does not specify the format nor system for data delivery. The presentation cannot be authenticated by the Guarantor, therefore the presentation is deemed to be:

   1. Complete; the Guarantor is expected to accept the presentation;
   2. Incomplete; the presentation can be completed on or before expiry of the guarantee;
   3. Non-complying; the Guarantor is expected to reject it within five business days by sending a rejection notice that lists all of the discrepancies;
   4. Not presented.

B. Article 20 of the URDG 758 states that the guarantor shall, within five business days following the day of presentation, examine that demand and determine if it is a complying demand. However, a presentation, although authenticated, does not indicate the Guarantor's Transaction Reference Number (TRN) for a guarantee. When does the time for examination start?

# Article 14 – Presentation

## Answers:

A. (4) Not presented. [**Art. 14 c.** *Where the guarantee indicates that a presentation is to be made in electronic form, the guarantee should specify the format, the system for data delivery and the electronic address for that presentation. If the guarantee does not so specify, a document may be presented in any electronic format that allows it to be authenticated or in paper form. An electronic document that cannot be authenticated is deemed not to have been presented*.]

B. The time for examination will start from the date of identification. [**Art. 14 f.** *Each presentation shall identify the guarantee under which it is made, such as by stating the guarantor's reference number for the guarantee. If it does not, the time for examination indicated in article 20 shall start on the date of identification. Nothing in this paragraph shall result in an extension of the guarantee or limit the requirement in article 15 (a) or (b) for any separately presented documents also to identify the demand to which they relate*.]

# Question 3

A. A Beneficiary of a Demand Guarantee subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758 presents a demand. The undertaking requires:

1. Demand – a signed document by the Beneficiary demanding payment under the guarantee;
2. Supporting statement that indicates that the applicant is in breach of its obligations;
3. Copy of invoice.

The Beneficiary presents the demand and supporting statement but not the invoice; instead it presents a cover letter with payment instructions and contact information. Can the demand be accepted?

B. Under the URDG 758, is the supporting statement always necessary?

C. Can the demand or the supporting statement be dated before the date when the Beneficiary is entitled to present the demand? Can the demand or the supporting statement be dated later than the date of its presentation?

# Article 15 – Requirements for Demand

## Answers:

A. The document specified in the guarantee (invoice) is required. [**Art. 15 a.** *A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand*.] However, the presentation can be completed any time before expiry [**Art. 14 b.** *A presentation has to be complete unless it indicates that it is to be completed later. In that case, it shall be completed on or before expiry.*]

B. Not always. [**Art. 15 c.** *The requirement for a supporting statement in paragraph (a) or (b) of this article applies except to the extent that the guarantee or counter-guarantee expressly excludes this requirement. Exclusion terms such as* "The supporting statement under article 15[(a)] [(b)] is excluded" *satisfy the requirement of this paragraph*.]

C. No. [**Art. 15 d.** *Neither the demand nor the supporting statement may be dated before the date when the beneficiary is entitled to present a demand. Any other document may be dated before that date. Neither the demand, nor the supporting statement, nor any other document may be dated later than the date of its presentation*.]

# Question 4

An underlying transaction is supported by a First Demand Guarantee for USD 200,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758. Consider the following scenarios and answer the corresponding questions:

A. The Beneficiary makes a demand for USD 50,000 within the expiry date. Should the Guarantor honor the demand? Should it reject it as non-complying?
B. After having made its first demand for USD 50,000, the Beneficiary makes a second demand for USD 100,000 within the expiry date. Should the Guarantor honor this second demand?
C. A guarantee expressly states: “multiple demands prohibited”. The Beneficiary makes a demand for the total amount of USD 200,000 within the expiry date but presents documents, required by the guarantee, indicating a total amount of USD 150,000. The Guarantor rejects the demand as non-complying; can the Beneficiary present another demand?
D. The Beneficiary makes a demand for USD 200,000 within the expiry date. However, it presents documents indicating an amount of USD 215,000. Should the Guarantor reject the demand?

# Article 17 – Partial & Multiple Demands; Amounts



## Answers:

A. Yes, partial demands are permitted. [**Art. 17 a.** *A demand may be made for less than the full amount available ("partial demand").*]

B. Yes. [**Art. 17 b.** *More than one demand ("multiple demands") may be made.*]

C. Yes, provided the demand is presented within the guarantee's expiry date. [**Art. 17 d.** *Where the guarantee provides that only one demand may be made, and that demand is rejected, another demand can be made on or before expiry of the guarantee.*]

D. No, the Guarantor must honor the guarantee. [**Art. 17 e.** *A demand is a non-complying demand if:*

   *i. it is for more than the amount available under the guarantee, or*

   *ii. any supporting statement or other documents required by the guarantee indicate amounts that in total are less than the amount demanded.*

   *Conversely, any supporting statement or other document indicating an amount that is more than the amount demanded does not make the demand a non-complying demand.*]

# Question 5

An underlying transaction is supported by a First Demand Guarantee for EUR 340,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

Consider the following scenarios and answer the corresponding questions:

A. The guarantee requires presentation of the demand, a supporting statement, the contract of the underlying transaction and relevant invoices. When the documents are presented, the Guarantor notices that:

   I. the contract is not printed on the contractor letterhead;

   II. A corporate affidavit with specimen of authorized signatories is missing;

   III. The invoices are duly stamped but not signed.

   Should the Guarantor reject the demand as non-complying?

B. Together with the listed documents, the Beneficiary presents an ancillary contract and bill of quantities, which are not required by the guarantee. Should the Guarantor honor or reject the demand?

# Article 19 – Examination

## Answers:

A. No. The guarantee did not provide details and must be honored provided the presentation appears to be complying. [**Art. 19 c.** *If the guarantee requires presentation of a document without stipulating whether it needs to be signed, by whom it is to be issued or signed, or its data content, then:*

   *i. the guarantor will accept the document as presented if its content appears to fulfill the function of the document required by the guarantee and otherwise complies with article 19 (b), and;*

   *ii. if the document is signed, any signature will be accepted and no indication of name or position of the signatory is necessary.*]

B. The Guarantor must honor the guarantee provided the presentation appears to be complying. The non-required document is irrelevant. [**Art. 19 d.** *If a document that is not required by the guarantee or referred to in these rules is presented, it will be disregarded and may be returned to the presenter.*]

MPG

# Question 6

An underlying transaction is supported by a First Demand Guarantee for BRL 500,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

The Beneficiary, a corporate entity in the United States of America, presents a complying demand to the Guarantor; however, the Brazilian real (BRL) is a non-convertible currency (Brazilian real cannot be transferred out of Brazil). **Art. 21 a.** of the URDG 758 stipulates that "the Guarantor shall pay a complying demand in the currency specified in the guarantee". Under these circumstances, the Guarantor shall:

A. Not honor the demand, inasmuch as payment in BRL is impossible out of Brazil;
B. Honor the demand and arrange for a payment in BRL, regardless of the currency inconvertibility;
C. Honor the demand and arrange for a payment in USD, regardless of the currency specified in the guarantee.
D. Suspend payment unless and until the BRL becomes convertible.

# Article 21 – Currency of Payment

## Answers:

C. Honor the demand and arrange for a payment in USD. [**Art. 21 b.** *If, on any date on which a payment is to be made under the guarantee:*

*i. the guarantor is unable to make payment in the currency specified in the guarantee due to an impediment beyond its control; or*

*ii. it is illegal under the law of the place for payment to make payment in the specified currency.*

*The guarantor shall make payment in the currency of the place for payment even if the guarantee indicates that payment can only be made in the currency specified in the guarantee. The instructing party or, in the case of a counter-guarantee, the counter-guarantor, shall be bound by a payment made in such currency. The guarantor or counter-guarantor may elect to be reimbursed either in the currency in which payment was made or in the currency specified in the guarantee or, as the case may be, the counter-guarantee.*]

# Question 7

An underlying transaction is supported by a First Demand Guarantee for GBP 170,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

Consider the following scenarios and answer the corresponding questions:

A. The Guarantor or Counter-Guarantor receives a non-complying presentation. Must the Guarantor or Counter-Guarantor necessarily reject the demand or is there any other course of action?

B. The Guarantor receives a waiver from the Counter-Guarantor. Must the Guarantor waive any discrepancy?

C. The Guarantor receives a non-complying presentation. What notice must the Guarantor give to the presenter?

D. The Guarantor receives a non-complying presentation. After a thorough examination, seven business days after the day of presentation, the Guarantor gives the presenter notice of rejection and a list of discrepancies. What are the options for the presenter?

# Article 24 – Non-Complying Demand & Waiver



## Answers:

A. The Guarantor may reject the demand; however, it may also seek waiver of the discrepancies from applicant/presenter. [**Art. 24 a.** *When the guarantor determines that a demand under the guarantee is not a complying demand, it may reject that demand or, in its sole judgment, approach the instructing party, or in the case of a counter-guarantee, the counter-guarantor, for a waiver of the discrepancies.*]

B. Not necessarily. [**Art. 24 c.** *Nothing in paragraphs (a) or (b) of this article shall extend the period mentioned in article 20 or dispense with the requirements of article 16. Obtaining the waiver of the counter-guarantor or of the instructing party does not oblige the guarantor or the counter-guarantor to waive any discrepancy.*]

C. A single notice stating (i) that the guarantor is rejecting the demand, and (ii) each discrepancy for which the guarantor rejects the demand. [As indicated in **Art. 24 d.**]

D. The URDG 758 are in favor of the Beneficiary. [**Art. 24 e.** *The notice required by paragraph (d) of this article shall be sent without delay but not later than the close of the fifth business day following the day of presentation.* **Art. 24 f.** *A guarantor failing to act in accordance with paragraphs (d) or (e) of this article shall be precluded from claiming that the demand and any related documents do not constitute a complying demand.*]

# Question 8

An underlying transaction is supported by a First Demand Guarantee for THB 5,000,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

Consider the following scenarios and answer the corresponding questions:

A. The guarantee has expired. Under what circumstances, if any, can a Beneficiary demand payment?

B. In the event of Force Majeure, can the instructing party accept or reject an extension or suspension of payment?

C. In the event of Force Majeure, are the Guarantor and Counter-Guarantor liable to pay interest for the suspension of payment?

# Article 26 – Force Majeure

## Answers:

A. Force Majeure. [**Art. 24 b.** *Should the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure:*

   *iii. a complying demand under the guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that guarantee has expired, and in this situation the guarantor shall be entitled to present a demand under the counter-guarantee within 30 calendar days after cessation of the force majeure even if the counter-guarantee has expired.*]

B. No. [**Art. 24 d.** *The instructing party shall be bound by any extension, suspension or payment under this article.*]

C. No. [**Art. 24 e.** *The guarantor and the counter-guarantor assume no further liability for the consequences of the force majeure.*]

# Question 9

An underlying transaction is supported by a First Demand Guarantee for EUR 360,000. The guarantee is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 Revision, ICC Publication No.758.

The parties to the underlying transaction are a German exporter and a Hong Kong importer. The importer makes an order for refrigerators and freezers, to be delivered CIF to Hong Kong. An annex to the sales agreement contains a list with the quantities, technical specifications and price per unit.

Consider the following scenarios and answer the corresponding questions:

A. What efforts must the Guarantor make in order to ensure that the documents are genuine? What is the banker’s liability in the event of falsification of the documents?

B. What is the Guarantor’s liability in the event that:

   i. The containers only contain refrigerators but not freezers;

   ii. The containers contain refrigerators and freezers in the quantity specified in the documents; however, the total weight of the shipped goods only is 86% of the declared total weight;

   iii. The shipped goods are of poorer quality than those specified in the documents;

   iv. The containers are empty.

# Article 27 – Effectiveness of Documents

## Answer:

Article 27 of the URDG 758, *disclaimer on effectiveness of documents*, limits the responsibility of the Guarantor to a diligent examination of the documents.

[**Art. 27** *The guarantor assumes no liability or responsibility for:*

a. *The form, sufficiency, accuracy, genuineness, falsification, or legal effect of any signature or document presented to it;*
b. *The general or particular statements made in, or superimposed on, document presented to it;*
c. *The description, quantity, weight, quality, condition, packing, delivery, value or existence of the goods, services or other performance or data represented by or referred to in any document presented to it; or*
d. *The good faith, acts, omissions, solvency, performance or standing of any person issuing or referred to in any other capacity in any document presented to it.*]

# Sample Guarantees

MPG

# Tender Bank Guarantee Sample

***Issued By: First National Commercial Bank***
***1000 John Rogers Drive 35210 Birmingham United Kingdom***

*Beneficiary : Aqaba Development Corporation (ADC).* *Date : 30.August.2014*
*Al-Hussein Ben Ali street*
*P.O. Box 2680,*
*Aqaba 77110,*
*The Hashemite Kingdom of Jordan*

***Tender Bank Guarantee No. : 2014/003-Adc***

*We have been informed that Reliance Industries Limited, Mumbai. India. , (hereinafter called "the principal"), responding to your invitation to tender No. 2014/tndr/002 for the supply of 200 Metric Ton/Metric Tons of Cleaning Chemicals, has submitted to you his offer No:15082014 dated 15.August.2014.*

*Furthermore we understand that, according to your conditions, offers must be supported by a tender guarantee.*

*At the request of the principal, we ICIDI Bank. hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of 200.000,00 USD (say two Hundred Thousand USD) upon receipt by us of your first demand in writing and your written statement stating:*

> *that the principal is in breach of his obligations under the tender conditions, and*
> *the respect in which the principal is in breach.*

*Your demand for payment must also be accompanies by the following documents:*

> *Proof of identity certificate issued and signed by our branch in beneficiary's country or else one of our corresponding bank's located in beneficiary's country stating that the bank has verified beneficiary's signature(s) appearing on the first demand of payment.*

*This guarantee shall expire on 15.October.2014 at the latest.*

*Consequently any demand for payment under it must be received by us at this office on or before that date.*

*This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC publication No. 758.*

# Advance Payment Bank Guarantee Sample

***Issued By: First National Commercial Bank***
***1000 John Rogers Drive 35210 Birmingham United Kingdom***

*Beneficiary : Trusted Importhause of Heidelberg*
*Kurfuersten-Anlage 50-60*
*69000 Heidelberg*
*Germany*

*Date : 30.August.2014*

***Advance Payment Bank Guarantee No. : 2014/001***

*We have been informed that Al-Aman Soap Factory Co. P.O.Box 2022 Jeddah 24500 K.S.A, (hereinafter called "the principal"), has entered into contract No. 1910201107 dated 19.August.2014 with you, for the supply of 230 Metric Ton/Metric Tons Laundry Soap.*

*Furthermore we understand that, according to the conditions of the contract, an advance payment in the sum of is to be made against an advance payment guarantee.*

*At the request of the principal, we First National Commercial Bank K.S.A. hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of 100.000,00USD (say One Hundred Thousand USD) upon receipt by us of your first demand in writing and your written statement stating:*

*that the principal is in breach of his obligations under the underlying contract, and the respect in which the principal is in breach.*

*Your demand for payment must also be accompanies by the following documents:*

*Copy of commercial invoice*

*It is a condition for any claim and payment under this guarantee to be made that the advance payment referred to above must have been received the principal on his account number 111222333 at The National Commercial Bank (Head Office) Jeddah KSA.*

*This guarantee shall expire on 30.September.2014 at the latest.*

*Consequently any demand for payment under it must be received by us at this office on or before that date.*

*This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC publication No. 758.*

# Performance Guarantee Sample

***Issued By: First National Commercial Bank***
***1000 John Rogers Drive 35210 Birmingham United Kingdom***

*Beneficiary: Bihar Urban Infrastructure Development Corporation Ltd.* *Date:30.August.2014*
*#303, 3rd Floor, Maurya Tower,*
*Maurya Lok Complex,*
*Budh Marg, Patna -800 001, Bihar*
*India*

***Performance Guarantee No. : 2014/002-PFRM***

*We have been informed that Daihon-dai Corporation. Tokyo, Japan, (hereinafter called "the principal"), has entered into contract No. 2014/0001/Cnt dated 15.July.2014 with you, for the supply of 1000 Metric Ton/Metric Tons of Stainless Steel.*

*Furthermore we understand that, according to the conditions of contract, a performance guarantee is required.*

*At the request of the principal, we The International Commerce Bank of Tokyo. hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of 300.000,00 USD (say Three Hundred Thousand USD) upon receipt by us of your first demand in writing and your written statement stating:*

> *that the principal is in breach of his obligations under the tender conditions, and the respect in which the principal is in breach.*

*Your demand for payment must also be accompanies by the following documents:*

> *Proof of identity certificate issued and signed by our branch in beneficiary's country or else one of our corresponding bank's located in beneficiary's country stating that the bank has verified beneficiary's signature(s) appearing on the first demand of payment.*

*This guarantee shall expire on 15.December.2014 at the latest.*

*Consequently any demand for payment under it must be received by us at this office on or before that date.*

*This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC publication No. 758.*

# Retention Money Guarantee Sample

*Beneficiary : State Property Committee*
*55, Uzbekistanskaya str.,*
*700003 Tashkent,*
*Uzbekistan*

*Date : 31.August.2014*

***Retention Money Guarantee No. : 2014/0015***

*We have been informed that Advanced Manufacturing Systems Corporation, Hwaseong, South Korea (hereinafter called "the principal"), has entered into contract No. 20140831 dated 08.August.2014 with you, for the supply of Semiconductor Machinery Manufacturing.*

*Furthermore we understand that, according to the conditions of the contract, retention money in the sum of 50.000,00 covering the Principal's warranty obligations will be released against a retention money guarantee.*

*At the request of the principal, we KLB Bank hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of 50.000,00 USD (say Fifty Thousand USD) upon receipt by us of your first demand in writing and your written statement stating:*

> *that the principal is in breach of his obligations under the underlying contract, and the respect in which the principal is in breach.*

*Your demand for payment must also be accompanies by the following documents:*

> *Copy of commercial invoice*
> *Proof of identity certificate issued and signed by our branch in beneficiary's country or else one of our corresponding bank's located in beneficiary's country stating that the bank has verified beneficiary's signature(s) appearing on the first demand of payment.*

*It is a condition for any claim and payment under this guarantee to be made that the advance payment referred to above must have been received the principal on his account number 444333222 at KLB Bank (Head Office) South Korea.*

*This guarantee shall expire on 30.December.2014 at the latest.*

*Consequently any demand for payment under it must be received by us at this office on or before that date.*

*This guarantee is subject to the Uniform Rules for Demand Guarantees, ICC publication No. 758.*

# We are passionate about exceeding your expectations.

Kian Gwan House III, 152 Wireless Road

+66 (0) 2651 5107 – 5108

mahanakornpartners.com

info@mahanakornpartners.com

MPG

Legal Services | Accounting & Tax Advisory | Corporate Services | Banking & Finance