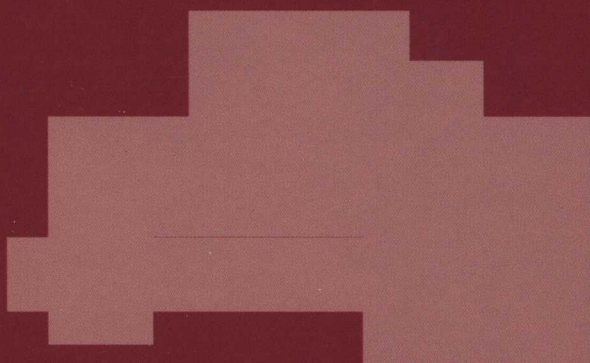


Roeland F. Bertrams

Bank Guarantees in International Trade

Fourth Edition



Wolters Kluwer
Law & Business



International Chamber of Commerce
The world business organization

Bank Guarantees in International Trade

The Law and Practice of Independent
(First Demand) Guarantees and
Standby Letters of Credit in Civil Law
and Common Law Jurisdictions

Fourth Revised Edition

Roeland H. Bertrams



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**Bank Guarantees in
International Trade**

PREFACE TO THE FOURTH EDITION

The third edition of this book on independent bank guarantees and standby letters of credit appeared in 2004. With an interval of nine years, a fourth edition was long overdue. Here it is. The entire text has been thoroughly revised, updated and amended in the light of new developments in the law and changing patterns in practice. This also resulted in the deletion of several (sub)paragraphs and the addition of a significant number of new (sub)paragraphs. All new case law as from 2003 until approximately 2012 in The Netherlands, Germany, England, France and Belgium as well as new case law from certain other European countries and the United States has been taken into account. Legal writing throughout the period from these jurisdictions has also been incorporated into this fourth edition. Much attention has been paid to the new Uniform Rules for Demand Guarantees, 2010 revision, ICC Publication No. 758, which was one of the major developments.

As I wrote in the preface of the previous editions, this book is not a one-man operation. Many persons and institutions have greatly contributed in different ways to this fourth edition. Again I have had the good fortune to maintain invaluable as well as congenial contacts with the banking community. I would especially like to mention Hans Hol, Gijs van der Leeuw and Tom Klijsen of ABN-AMRO, Flavio Gambrosier, Geertje Meijer and Robert van den Bosch of ING Bank, Rob Mulder, Michel Joskin, Hedy Blijboom-van der Kleijn and Louis van Hooft of RaboBank Netherlands. The library and information desks of several law firms have been most helpful in tracing case law, legal publications and other materials from their jurisdiction: Vola Walker and her staff, and Nigel Thomas of Watson, Farley & Williams, London; Barbara Vogler and her staff, and Heinrich Meyer of Beiten Burkhardt, Frankfurt am Main; Anne Stenfort, Eve van den Abbeele and Valery Denoix de Saint Marc of August & Debouzy, Paris; Ingrid Quinet, Nadine Willegems, Elide Sonck, Greet van Lierde and Werner van Lembergen of Laga, Brussels. I am particularly grateful to the Amsterdam office of AKD lawyers & notaries which gave me great support and allowed me (some) time to work on the project. Several of my colleagues at the Law Faculty of the VU University Amsterdam gave me much appreciated academic support. Many others gave technical assistance, especially the editorial staff of Kluwer Law International and ICC Publishing.

Roeland F. Bertrams

Amsterdam, December 2012

ABOUT THIS BOOK

At present, major, especially cross-border, transactions do not take off without some kind of guarantee support, while the frequency in smaller deals depends on a number of factors. Bank guarantees are increasingly used in domestic contracts too. In this book the term 'bank guarantee' means the independent (first demand) guarantee, including the American standby letter of credit, as opposed to the traditional accessory guarantee or suretyship. Several factors have contributed to their growth. One reason is that bank guarantees can be employed to back up all kinds of transactions, both non-financial, such as contracts of sale, leases and construction contracts, and financial transactions, such as loans and overdraft facilities, participation in joint ventures, bond issues and other financial commitments. Accordingly, a bank guarantee could serve as a security device for both non-financial and financial obligations. A predominant factor is that in international trade especially, risk is becoming an aspect of increasing significance and concern. Transactions tend to grow bigger and investments in projects are becoming larger. A particular feature of trade today is its global expansion. As a result of their size and complexity the execution of many transactions often takes a considerable period of time and a wide range of events could adversely impact on its completion. The element of risk is, however, no less important in smaller and short-term transactions, even in a domestic context. One particular type which has attracted the greatest attention and which is prevalent in many branches of trade and geographic regions is the bank guarantee 'payable on first demand'. These first demand guarantees represent a reallocation of risks, to the advantage of the creditor and to the detriment of the principal debtor, for whose account bank guarantees are issued and who bears the grave risks which attend their issuance. Bank guarantees have given rise to new and major difficulties, both legal and practical.

This book contains a comprehensive study of the legal and practical aspects of (first demand) bank guarantees and standby letters of credit. The table of contents provides an overview of the subjects which are examined. It is based on case law and legal writing from the Netherlands, Germany, France, Belgium and the United Kingdom. In order to ensure reliability, all case law in the area of independent (first demand) guarantees as from 1980 has been reviewed on the basis of the original reports as cited. As far as the United States is concerned a major part of the prolific legal writing and case law has been taken into account. In addition, some Swiss, Austrian and ICC arbitral decisions have been included. Throughout this book the effect and significance of the Uniform Rules for Demand Guarantees (URDG) of the

International Chamber of Commerce, 2010 revision (ICC Publication No.758), the 1998 International Standby Practices (ISP98) and the 1995 UNCITRAL Convention on Independent Guarantees and Stand-by letters of credit are examined too. Considerable attention is also paid to the way guarantees function in actual practice and to the numerous practical aspects and issues to which they give rise. Since guarantees are nothing but a creation of practice in international trade and business the law must start from the grass roots. To this end intensive contacts over a great number of years have been maintained with the banking community, construction firms and their organisations, and export credit insurance companies. Much energy has been spent on researching a huge number of files, which provided insight into 'the daily life' of the world of independent (first demand) guarantees and the practices, difficulties and peculiarities in a great number of countries and regions. Legal opinions from local lawyers and circular letters from foreign banks have especially been an invaluable source of information, which is particularly relevant in relation to countries in the Middle East and North Africa.

Since independent (first demand) guarantees and standby letters of credit are relatively recent phenomena and as they are born and bred in a cross-border setting, the law on this subject, as developed in and applied by national courts and as treated in legal writing in different jurisdictions, shows a remarkable degree of uniformity. This book has, therefore, been written on that basis and no particular system of national law has been taken as a point of reference. It can, therefore, and is used in both Civil Law and Common Law jurisdictions.

ABOUT THE AUTHOR

In 1972 Roeland Bertrams graduated from the Faculty of Law, State University of Utrecht. A Leverhulme fellowship enabled him to continue his studies at the University of London (London School of Economics), where he took an LL.M degree in 1973. In 1974 he obtained an LL.M degree from Harvard Law School, Cambridge Mass. In the period 1974-1978 Roeland Bertrams was an associate of the Amsterdam law firm Van Doorne and in 1978 he joined the Faculty of Law at the VU University, Amsterdam. In 1991 he also joined on a part time basis the Amsterdam office of Clifford Chance, solicitors, as senior associate. As from 2007 Roeland Bertrams is a senior associate on a part time basis of AKD, lawyers & notaries, Amsterdam office, practicing banking and financial law, security interests, international contracting, (international) insolvency and restructuring, and private international law. The author has published several books and many articles in these fields and he is a frequent speaker in seminars and conferences. He is a member (of the board) of several professional organizations, including the ICC Banking Commission and the ICC Task Force for Demand Guarantees (URDG).

LIST OF ABBREVIATIONS

AA	Ars Aequi
All ER	All England Law Reports
Banking L.J.	Banking Law Journal
BLI	Business Law International
Bb	Nieuwsbrief Bedrijfsjuridische Berichten
BFLR	Banking and Financial Law Review
BRH	Belgische Rechtspraak Handelszaken (=JCB)
Bus. Law.	Business Lawyer
CISG	UN Convention on Contracts for the International Sale of Goods (Vienna 1980)
D.	Recueil Dalloz Sirey
D.-CDA	Receuil Dalloz, Cahier Droit des Affaires
DB	Der Betrieb
DCI	Documentary Credits Insight
DPCI	Droit et Pratique du Commerce International
EWCA	England and Wales Court of Appeal Decisions
EWHC	England and Wales High Court Decisions
FIDIC	Federation Internationale des Ingenieurs-Conseils, Conditions of Contract for Works of Civil Engineering Construction, 1999
Harvard Int. L.R.	Harvard International Law Review
HLR	Harvard Law Review
IBL	International Banking Law
IBLJ	International Business Law Journal (= RDAI)
ICC	International Chamber of Commerce
ICLR	International Construction Law Review
IFLR	International Financial Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrecht
JBL	Journal of Business Law
JCB	Jurisprudence Commerciale Belge (=BRH)

JCP	Juris-classeur Périodique (La Semaine Juridique)
JDI	Journal du droit international (Clunet)
JIBFL	(Butterworth's) Journal of International Banking and Financial Law
JIBL	Journal of International Banking Law
JLMB	Jurisprudence de Liege, Mons et Bruxelles
JMLC	Journal of Maritime Law and Commerce
JOR	Jurisprudentie Onderneming & Recht
JT	Journal des Tribunaux
Jur. Liège	Jurisprudence Liège
KG	Kort Geding
KGK	Kort Geding Kort
LJN	Landelijk Jurisprudentie Nummer
Lloyd's Rep.	Lloyd's Law Reports
L.M.C.L.Q.	Lloyd's Maritime and Commercial Law Quarterly
Meed	Middle East Economic Digest
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW	Neue juristische Wochenschrift
NTBR	Nederlands Tijdschrift Burgerlijk recht
NJF	Nederlandse Jurisprudentie Feitenrechter
OHADA	Organisation pour l'Harmonisation de Droit des Affaires en Afrique
Q.B.	(Law reports) Queen's Bench Division
RABG	Rechtspraak Antwerpen, Brussel, Gent
R.N.B.	Revue du Notariat Belge
RDC	Revue Droit Commercial Belge (=TBH)
Rev. Banque	Revue de la Banque (Bank- en Financiewezen)
RPDB	Répertoire Pratique du Droit Belge
Rev. Reg. Dr.	Revue Régionale de Droit
RDAl	Revue de Droit des Affaires Internationales (= IBLJ)
RGDC	Revue Générale de Droit Civil Belge
RIW	Recht der internationalen Wirtschaft
RTDC	Revue trimestrielle droit commercial
RW	Rechtskundig Weekblad
S & S	Schip en Schade
SAMA	Saudi Arabian Monetary Agency
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht
TBH	Tijdschrift Belgisch Handelsrecht (=RDC)
TOP	Tijdschrift voor de Ondernemingsrechtpraktijk
T.P.D.C. 2007	Traité Pratique de Droit Commercial, 2007, Kluwer
TPR	Tijdschrift voor Privaatrecht

TVVS	Tijdschrift voor Verenigingen, Vennootschappen en Stichtingen
UCC	United States Uniform Commercial Code
UCC LJ	Uniform Commercial Code Law Journal
UCP	Uniform Customs and Practice for Documentary Credits (2007 edition), ICC Publication no. 600
Uncitral Convention	United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, 1995
URCG	Uniform Rules for Contract Guarantees, ICC Publication no. 325 (1978)
URCB	Uniform Rules for Contract Bonds, IIC Publication no. 524.
URDG	Uniform Rules for Demand Guarantees, 2010 edition, ICC Publication no. 758
WLR	Weekly Law Reports
WM	Wertpapier-Mitteilungen
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
ZGR	Zeitschrift für Unternehmungs und Gesellschaftsrecht
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis

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