

The Identity of the Beneficiary or Presenter Calling for Payment under Demand Guarantees: A Purposive Approach

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Abstract

In practice issues may arise when a party other than the designated beneficiary makes a call for payment, leading to a non-conforming demand. This has threatened the commercial use of demand guarantees due to demands for payment being rejected for non-conformity. Notably, the party calling for payment may or may not be the designated beneficiary stated in the demand guarantee. It could be a third party or an authorised agent acting on behalf of the beneficiary or a party entitled to receive payment under the guarantee. Also, when the demand guarantee is transferred it is the transferee (the new beneficiary) who may sign and issue a demand for payment. This article undertakes a comparative analysis of the approach in South African and Australian case law and international instruments applicable to demand guarantees to address problems associated with the identity of the beneficiary. The approach followed in resolving such issues emphasises a purposive approach to compliance with the demand. A party other than the beneficiary can demand payment on behalf of the beneficiary if it has been authorised to do so. Imposing strict compliance would contradict well-established contract law and sound business practices. For this reason, if the parties do not wish it to be possible for an agent or a party other than the beneficiary to demand payment on behalf of the beneficiary, this should be stated in the guarantee itself. However, if the presenter of a demand is not the beneficiary but demands payment in its own right, it is suggested that a strict approach is entirely proper.

Keywords

Approach; beneficiary; conformity demand; identity; conformity.

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1 Introductory remarks

The term "guarantee" in law may refer to one of two significantly different instruments, namely an independent guarantee (commonly referred to as a demand guarantee) or an accessory (or suretyship) guarantee.¹ Under a demand guarantee the liability to pay is independent of the underlying obligation it secures and is determined with reference only to the terms of the guarantee.² In the case of an accessory guarantee, the liability for payment depends on the actual default of the principal in the underlying contract and is subject to any defences available to the principal. Demand guarantees are instruments of security³ used to secure any obligation, whether to pay or to render some other performance.⁴

In the context of a construction contract, a demand guarantee is often employed to safeguard the performance of contractual obligations by parties to the construction project. The employer runs the risk of losing significant amounts of money due to subpar performance or non-performance by the contractor or due to its bankruptcy. To safeguard the performance of contractual obligations by the contractor, the employer will require the contractor to provide a demand guarantee.⁵ In this instance the demand guarantee constitutes an undertaking to make payment to the beneficiary on demand (accompanied by any documents specified in the demand guarantee) in the event of the contractor's defaulting in its performance of the underlying construction contract.⁶ A demand guarantee may be governed by international rules applicable to demand guarantees. These include: (i) the *Uniform Rules on Demand Guarantees 758* (URDG758);⁷ (ii) *International Standard Demand Guarantees Practice for URDG758*

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¹ Hugo 2017 *TSAR* 14.

² Haggood *Paget's Law of Banking* 702.

³ For discussion on the law of guarantees see Bertrams *Bank Guarantees in International Trade* 4; and Marxen *Demand Guarantees in the Construction Industry* 49.

⁴ Kelly-Louw 2013 *SA Merc LJ* 410. For a more comprehensive background on demand guarantees see Kelly-Louw *Selective Legal Aspects of Bank Demand Guarantees* 110-114; Marxen *Demand Guarantees in the Construction Industry* 56-59.

⁵ Bridge *Benjamin's Sale of Goods* 2192.

⁶ Hugo "Bank Guarantees" 438.

⁷ Drafted by the Banking Commission of the International Chamber of Commerce (ICC), *Uniform Rules for Demand Guarantees, ICC Publication No 758* (2010) (URDG758). For an excellent brief background see Byrne *Letter of Credit Rules and Laws* 81. For a more comprehensive background see Hugo 2017 *TSAR* 6-14.

(ISDGP);⁸ (iii) *International Standby Practices 1998* (ISP98);⁹ (iv) the *Provisions of the Supreme People's Court of the People's Republic of China on Several Issues Concerning the Trial of Disputes over Independent Guarantees* (Chinese IGP);¹⁰ and (v) the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (henceforth the UN Convention).¹¹ However, in South Africa most guarantees are governed by standard-form guarantees such as those published by the Joint Building Contracts Commission (JBCC).¹²

1.1 The demand guarantee transaction

A demand guarantee arises from an underlying contract such as a construction contract in terms of which the contractor (the applicant) may be obliged to procure a performance guarantee issued by a bank or other financial institution (the guarantor), in favour of the employer (the beneficiary). The demand guarantee covers the beneficiary (the employer) for any increased costs of completing the construction project due to non-performance or default on the contractor's part. The demand guarantee would ordinarily be for an amount equal to a percentage of the contract price to secure the proper performance of the contractual obligations.¹³ The construction context used here is a common one, but any obligation can so be secured. The construction guarantee is used here simply as a typical example. The guarantor issues the guarantee as mandatary of the applicant for the beneficiary's benefit following the terms stipulated in the underlying

⁸ The International Standard Demand Guarantee Practice for URDG758 was drafted by the Banking Commission of the International Chamber of Commerce (*International Standard Demand Guarantee Practice for URDG758, ICC Publication No 814E* (2021) (ISDGP)). The ISDGP is destined to provide best practice and "unparalleled insight into the correct application of the URDG in a practical context." See Introduction to the ISDGP.

⁹ Drafted by the Institute of International Banking Law and Practice and endorsed by the ICC (*International Standby Practices, ICC Publication No 590* (1998) (ISP98)). For an authoritative brief background see "Editor's overview" in Byrne *Letter of Credit Rules and Laws* 29. For a more comprehensive background see Kelly-Louw *Selective Legal Aspects of Bank Demand Guarantees* 114-119; Marxen *Demand Guarantees in the Construction Industry* 59-61. See also Hugo 2017 *TSAR* 16.

¹⁰ These rules were adopted by the Judicial Committee of the Supreme People's Court in July 2016 and were translated by the Institute of International Banking Law and Practice and published in Byrne *Letter of Credit Rules and Laws* 317 and IIBLP *Annotated English Translation of the IGP* (the Chinese IGP). On these rules see further Hugo "Demand Guarantees" 129-132; Hugo 2019 *BRICS Law Journal* 22-23.

¹¹ This *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* (1996) (hereafter the UN Convention) drafted by the United Nations Commission on International Trade Law was adopted by the General Assembly in 1995 and became effective on 1 January 2000.

¹² See JBCC 2022 <https://jbcc.co.za/free-forms/>.

¹³ Marxen *Demand Guarantees in the Construction Industry* 49.

contract.¹⁴ The obligation of the guarantor arises when the applicant fails to discharge its obligations in the underlying agreement.¹⁵ When the guarantor makes a payment, it will have recourse against the applicant. The arrangement between the guarantor and the beneficiary is the contract of guarantee. It is independent and separate from the underlying agreement between the applicant and the beneficiary and the contract of mandate between the applicant and the guarantor.¹⁶

1.2 Parties to a demand guarantee transaction

The demand guarantee transaction usually involves three parties: the applicant, the guarantor (usually a bank or other financial institution) and the beneficiary.¹⁷ It may also involve four parties when a counter-guarantee is issued.¹⁸ The applicant is the party indicated in the demand guarantee as having its obligation in the underlying relationship supported by the guarantee.¹⁹ This could, for example, be a building contractor, a seller, an exporter or a supplier whose performance is covered under the demand guarantee.²⁰ This is the party that gives instructions for the issuance of the guarantee.²¹ The guarantor (or issuer) is the party issuing the guarantee and is usually a bank or other financial institution (for example, an insurance company).²² It undertakes liability for the payment of the claim by the beneficiary based on default of performance by the applicant. Lastly, the beneficiary is the party in whose favour the guarantee is issued.²³ The party is entitled to call for payment under the guarantee in the event of a default of performance on the applicant's part.

1.3 Conclusion in summary

The party calling for payment or presenting the demand may or may not be the stated beneficiary under the demand guarantee. The demand for payment may be presented by a third party or an agent on behalf of the beneficiary or a party entitled to receive payment under the guarantee. Also, when the demand guarantee is transferred it is the transferee (the new beneficiary) who may sign and issue a demand for payment.²⁴ A problem may arise when the party calling up the demand guarantee is not the stated

¹⁴ Marxen *Demand Guarantees in the Construction Industry* 49.

¹⁵ Murray, Holloway and Hunt *Schmitthoff's Export Trade* 245.

¹⁶ Murray, Holloway and Hunt *Schmitthoff's Export Trade* 245.

¹⁷ Eitelberg 2002 *SALJ* 120.

¹⁸ For detailed discussion of the four-party guarantee see Kelly-Louw *Selective Legal Aspects of Bank Demand Guarantees* 24.

¹⁹ Article 2 of URDG758; Art 2(1) of the UN Convention; and Rule 1.09(a) of ISP98.

²⁰ See Kelly-Louw *Selective Legal Aspects of Bank Demand Guarantees* 21.

²¹ Bertrams *Bank Guarantees in International Trade* 19.

²² Article 2 of URDG758.

²³ Article 2(a)(ii) of URDG758; Rule 1.09(a) of ISP98.

²⁴ See Art 33(a) of URDG758; Rules 6.02(a) and 6.02(b)iii of ISP98; Art 9(1)(2) of the UN Convention; and Art 10 of the Chinese IGP.

beneficiary in the guarantee, resulting in the demand's being non-conforming. The approach to solving problems relating to the conformity of a demand presented by a party other than the stated beneficiary in the guarantee is explored below. This contribution will review the approach in instances where the international rules relating to a demand guarantee are applicable and case law where the rule sets have not been incorporated by the parties.

2 General approaches to the conformity of a demand

A conforming demand is complete and contains all the stipulated documents required by the demand guarantee.²⁵ This implies that the guarantor must pay upon the presentation of a demand and other specified documents in line with the terms of the demand guarantee.²⁶ However, the extent to which a demand should adhere to the terms of the guarantee is not clear.²⁷ The general approaches to the conformity of a demand for payment under the rule sets governing guarantees and case law where the rules are not applicable are discussed below.

2.1 Conformity of a demand under rule sets

The approach to determining whether a demand is compliant under the URDG758 requires that the presentation comply "on its face" with the terms of the demand guarantee, the URDG758 and international standard demand guarantees.²⁸ In addition a complying presentation is:

a presentation that is in accordance with, first, the terms and conditions of that guarantee, second, these rules [ie, the URDG758] so far as consistent with those terms and conditions and, third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice.²⁹

It follows that a demand for payment under the URDG758 must adhere to (i) the terms of the demand guarantee, (ii) with applicable rules and (iii) international standard practice.³⁰ In addition the ISDGP³¹ defines a complying presentation as one that does not denote strict compliance with the terms of the demand guarantee or the rigid fulfilment of the precise wording in all cases.

The ISP98 stipulates that a demand "must comply with the terms and conditions of the standby."³² It requires examining a presentation "on its face

²⁵ Bridge *Benjamin's Sale of Goods* 2221.

²⁶ Enonchong *Independence Principle of Letters of Credit* 113.

²⁷ Hugo "Bank Guarantees" 455.

²⁸ Article 19(a) of URDG758.

²⁹ Article 2 of URDG758.

³⁰ Byrne *Standby and Demand Guarantee Practice* 122.

³¹ Paragraph J138 and J141 of ISDGP.

³² Rule 4.01(a) of ISP98.

against the terms and conditions stated in the standby as interpreted and supplemented by these Rules which are to be read in the context of standard standby practice."³³ The conformity of a demand under the ISP98 considers the terms and conditions listed in the standby, the documents presented, standard standby practice, and the ISP98 rules. This rule entails that the call for payment and documents must be examined in the light of the terms and conditions of the standby.³⁴ Furthermore, the determination of compliance considers the documents "on their face", implying that the issuer should not go beyond the presented documents to ascertain their compliance. In addition the examination of documents should be done in the context of the ISP98 rules.

As regards the conformity of a demand, the UN Convention provides:

In determining whether documents are in facial conformity with the terms and conditions of the undertaking and are consistent with one another, the guarantor/issuer shall have due regard to the applicable international standard of independent guarantee or stand-by letter of credit practice.³⁵

In addition the interpretation of the terms and conditions of the undertaking should take into account "generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice."³⁶ Furthermore, the guarantor/issuer is required to act "in good faith and exercise reasonable care having due regard to generally accepted standards of international practice of demand guarantees or standby letters of credit."³⁷ It follows that determining the conformity of a demand governed by the UN Convention requires the documents to be examined on their face to ascertain whether they adhere to the terms of the undertaking and international standard practice relating to independent guarantees and standby letters of credit.

The relevant provision of the Chinese IGP reads:

A people's Court shall decide whether documents comply on their face in accordance with the terms and conditions of the Independent Guarantee. In determining compliance, a People's Court may refer to relevant examination standards³⁸ formulated by the International Chamber of Commerce.³⁹

The Chinese IGP also require documents to be examined on their face (without reference to the underlying transaction) and in line with the terms

³³ Rule 4.01(a) of ISP98.

³⁴ Byrne *ISP98: The Official Commentary* 140.

³⁵ Article 16(1) of the UN Convention.

³⁶ Article 13(2) of the UN Convention.

³⁷ Article 14(1) of the UN Convention.

³⁸ According to IIBLP *Annotated English Translation of the IGP* 5 fn. 12, the relevant examination standards required are a matter of interpretation for the People's Court.

³⁹ Article 7 of the Chinese IGP.

and conditions of the demand guarantee and examination standards formulated by the International Chamber of Commerce.

The URDG758,⁴⁰ ISP98,⁴¹ UN Convention⁴² and Chinese IGP⁴³ therefore provide guidelines for determining compliance which differ in wording but refer to the same general concepts that documents should be examined on their face and adhere to the terms and conditions of the demand guarantee, taking into account international guarantee practice.⁴⁴ The UN Convention further requires the guarantor or issuer to act in good faith and exercise reasonable care.

It is of interest to note that the applicable rules avoid the term "strict compliance" in this respect.⁴⁵ In essence, in determining whether a demand is in conformity with the guarantee it is necessary to interpret the specific wording of whatever rule is applicable (the URDG758, ISP98, UN Convention or the Chinese IGP).⁴⁶ In that these rules all require that the demand must adhere to the terms of the guarantee, it is suggested that this indicates a strict approach, but it is softened by the reference to standard practice. One could therefore argue that when the guarantee is governed by any of these sets of rules, the approach to the conformity of a demand is strict but does not require the rigid fulfilment of precise wording in all cases.

2.2 Conformity of a demand where the guarantee is not subject to any rule sets

The approach to the conformity of a demand is uncertain when the guarantee is not subject to any international rules.⁴⁷ Whether the doctrine of strict compliance should apply to demand guarantees has not been clearly established in South Africa.⁴⁸ The doctrine of strict compliance has been held by some decisions to apply to demand guarantees.⁴⁹ Also, in

⁴⁰ Article 2 as read with Art 19(a) of URDG758.

⁴¹ Rule 4.01 of ISP98.

⁴² Article 16(1) of the UN Convention.

⁴³ Article 7 of the Chinese IGP.

⁴⁴ Guest *Benjamin's Sale of Goods* 2220.

⁴⁵ See Rule 2.01 of ISP98; Art 15 of the UN Convention; Art 16 of the UN Convention; and Art 7 of the Chinese IGP. See a similar guideline for letters of credits in Arts 2 and 14(a) of *International Standard Banking Practice for the Examination of Documents under Documentary Credits Revision for UCP 600*, ICC Publication No 681 (E) (2007) (UCP600).

⁴⁶ Kelly-Louw 2016 *CILSA* 96.

⁴⁷ For a discussion on the general approaches to conformity of demand not subject to any rules under English and South African law see Chivizhe *Law and Practice Relating to Compliance of Documents* 190-200.

⁴⁸ Kelly-Louw 2017 *THRHR* 152; see further *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 2 SA 537 (SCA) 540A-541F.

⁴⁹ Fisher AJ favoured the doctrine in *Grinaker LTA Rail Link Joint Venture v Absa Insurance Company Limited* (24110/2014) [2015] ZAGPJHC 302 (10 November 2015). See, also, in general, on complying demands in South African case law

*Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd*⁵⁰ the Court held that the principle of strict compliance applies to commercial letters of credit and therefore also to demand guarantees. However, more recent decisions have cast some doubt on this view, stressing that the question must be determined by the proper construction and interpretation of the terms of the guarantee.⁵¹ In *Denel Soc Ltd v Absa Bank Ltd*⁵² the Court emphasised that the strictness of a conforming demand was a matter of interpretation.

In the *Denel* case Malindi AJ remarked as follows:

Similarly, in my view, in the case of demand guarantees, the beneficiary must meet the conditions specified in the guarantee. Whether the condition or term of the guarantee 'conform strictly to the requirements of the credit' or to the principle of 'strict compliance', is a matter of a proper interpretation of the guarantee itself.⁵³

Although the courts have not pronounced on the application of the doctrine of strict compliance, the standard applied seems close to strict compliance. According to the Supreme Court of Appeal (SCA) in the *Compass* case,⁵⁴ the requirements of a complying demand depend on the interpretation of the terms of the demand guarantee. Still, a clear and precise term must be complied with meticulously – which, it is suggested, implies a high level of conformity.⁵⁵

In Australia a complying demand must adhere strictly to a proper interpretation of the terms of the guarantee.⁵⁶ In the case of *Simic v New South Wales Land and Housing Corporation*⁵⁷ the Court of first instance found that the demand for payment should strictly conform to the terms of the guarantee but not in a rigid manner.⁵⁸ The Court of Appeal remarked as follows:

The principle of strict compliance applies after the instrument has been construed and is not a rigid rule. It must be applied 'intelligently, not

Guardrisk Insurance Company Limited v Kentz (Proprietary) Limited 2014 1 All SA 307 (SCA); *Lombard Insurance Co Limited vs Landmark Holdings (Proprietary) Limited* 2010 2 SA 86 (SCA).

⁵⁰ *Stefanutti & Bressan (Pty) Ltd v Nedbank Ltd* 2008 JDR 0914 (D).

⁵¹ Hugo "Bank Guarantees" 458.

⁵² *Denel Soc Ltd v Absa Bank Ltd* 2013 3 All SA 81 (GSJ) 90 paras 35-44.

⁵³ *Denel Soc Ltd v Absa Bank Ltd* 2013 3 All SA 81 (GSJ) 90 para 51.

⁵⁴ *Compass Insurance Company Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 2 SA 537 (SCA) para 14.

⁵⁵ Kelly-Louw "General Update on the Law of Demand Guarantees" 56.

⁵⁶ *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 para 84, *Simic v New South Wales Land and Housing Corporation* [2016] 260 CLR 85 99; 339 ALR 200 216; 91 ALJR 108; 2016 HCA 47; and *Santos Limited v BNP Paribas* 2018 (QSC); [2019] QCA 11; [2019] 3 Qd R 286.

⁵⁷ *Simic v New South Wales Land and Housing Corporation* 2016 HCA 47.

⁵⁸ *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 para 84.

mechanically'; the issuer must exercise its judgment about whether the requirements stipulated in the instrument have been satisfied.⁵⁹

The above dictum implies that the standard of compliance required under a guarantee is strict but should not be applied in all circumstances.

The above analysis does not lead to a clear standard of conformity. Similarly some academic commentators have questioned the requirement that a demand for payment should strictly comply with the terms of the demand guarantee.⁶⁰ There is much semantic argument involved in this question since, even if it is accepted that the doctrine of strict compliance does apply, the degree of strictness must still be determined. Chuah⁶¹ argues that "there is no convincing rationale" for the doctrine of strict compliance to apply to demand guarantees, despite its being applied in international banking. On the other hand Hugo⁶² states that the required level of compliance is probably strict, following the doctrine applicable to letters of credit. Kelly-Louw⁶³ also notes that by implication the principle of strict compliance should also apply to demand guarantees because the instruments are similar. Byrne⁶⁴ argues that the proposition that a less strict standard of compliance is required under demand guarantees and a strict standard for letters of credit "does not reflect standard practice and leads to serious distortions." In his view the standard of compliance depends on the stated terms of the guarantee and the documents presented and their data taken individually and as a whole.⁶⁵

Another view is that a substantial compliance standard should be accepted in very special or exceptional circumstances.⁶⁶ Bertrams⁶⁷ explains that there are certain instances where it would be unjust to require a rigid adherence to the terms of the guarantee and where a substantial compliance would be more appropriate.⁶⁸ In his view substantial compliance would be appropriate where the "justified interests of the guarantor are not detrimentally affected."⁶⁹ He further submits that the doctrine of strict compliance should not be applied in a manner that produces "manifestly unreasonable or absurd results".⁷⁰ The substantial compliance standard is tenable to advance the commercial purpose of a guarantee but should not

⁵⁹ *Simic v New South Wales Land and Housing Corporation* [2016] 260 CLR 85 100.

⁶⁰ Kelly-Louw "General Update on the Law of Demand Guarantees" 56.

⁶¹ Chuah *Law of International Trade* 565.

⁶² Hugo 2014 *TSAR* 661.

⁶³ Kelly-Louw "General Update on the Law of Demand Guarantees" 56.

⁶⁴ Byrne *Standby and Demand Guarantee Practice* 124.

⁶⁵ Byrne *Standby and Demand Guarantee Practice* 124.

⁶⁶ Bertrams *Bank Guarantees in International Trade* 145.

⁶⁷ Bertrams *Bank Guarantees in International Trade* 140.

⁶⁸ Bertrams *Bank Guarantees in International Trade* 140.

⁶⁹ Bertrams *Bank Guarantees in International Trade* 146.

⁷⁰ Bertrams *Bank Guarantees in International Trade* 145.

result in the guarantor going beyond the demand to ascertain its compliance. Byrne⁷¹ notes that compliance consists of the "timely presentation of documents that on their face appear to satisfy the terms and conditions" of the demand guarantee.⁷²

2.3 Conclusion in summary

In summary, therefore, there is much support in the rules and judgements favouring a strict approach, but at the same time many indications favouring a less rigid approach in specific instances. In instances where the guarantee is subject to any of the rules⁷³ the standard of conformity is certain as it is determined with reference to the terms and conditions of the guarantee, the relevant rules and the standard practice of the instruments. This reflects a strict approach, but this is softened by the rules also requiring that international practice be considered. However, the standard of compliance required is uncertain where the guarantee is not subject to any rules, with a strict approach being favoured on the one hand⁷⁴ and a less-strict approach on the other.⁷⁵ The following conclusions are put forward: (i) if the terms of the guarantee are clear, these should be strictly complied with;⁷⁶ (ii) the extent to which the demand should conform with the terms of the guarantee depends on the construction of the guarantee;⁷⁷ (iii) there is room for a less strict approach to compliance with a demand to avoid an absurd result and to advance the commercial purpose of the guarantee;⁷⁸ (iv) a demand for payment should strictly comply with the terms of the demand guarantee to the extent that the wording of the guarantee renders it appropriate.⁷⁹ This involves a proper interpretation of the terms of the guarantee and, secondly, a comparison of these terms with the actual demand and documents presented.⁸⁰

⁷¹ Byrne *Standby and Demand Guarantee Practice* 122.

⁷² Byrne *Standby and Demand Guarantee Practice* 122.

⁷³ See Rule 2.01 of ISP98; Arts 15 and 16 of the UN Convention; and Art 7 of the Chinese IGP.

⁷⁴ *MUR Joint Ventures BV v Compagnie Monegasque De Banque* 2016 (EWHC) 3107 (Comm).

⁷⁵ See *GKN Contractors v Lloyd's Bank* 1985 30 BLR 48; and *Siporex Trade SA v Banque Indosuez* 1986 2 Lloyd's Rep 146 QB (Com Ct).

⁷⁶ Enonchong *Independence Principle of Letters of Credit* 86-87.

⁷⁷ *Rainy Sky SA v Kokmin Bank* 2011 UKSC 50; 2012 Lloyd's Rep 34 (SC).

⁷⁸ Bertrams *Bank Guarantees in International Trade* 146.

⁷⁹ Enonchong *Independence Principle of Letters of Credit* 86-87; Chuah *Law of International Trade* 565.

⁸⁰ Kelly-Louw "General Update on the Law of Demand Guarantees" 56.

3 The identity of the beneficiary or presenter of a demand under rule sets

3.1 The URDG758

The URDG758 provides that a beneficiary is a party in whose favour a demand guarantee is issued⁸¹ and a presenter is defined as a person who makes a presentation as or on behalf of the beneficiary.⁸² It follows that the presenter of the demand could be the beneficiary himself or an agent who makes a presentation on behalf of the beneficiary. A presenter could be "the applicant or subsidiary or an agent, the beneficiary or subsidiary or an agent, a bank, an insurance company or any other nominated person" that presents any document under a guarantee.⁸³ The presenter is not necessarily the beneficiary, and the beneficiary is not necessarily the presenter.

3.2 Other rule sets

The ISP98 defines a beneficiary as "a named person who is entitled to draw under a standby" and a presenter as "a person who makes a presentation on behalf of a beneficiary or nominated person."⁸⁴ Additionally it indicates that a beneficiary could also be the person to whom the right to call for payment has been transferred under a transferrable standby.⁸⁵ A beneficiary is a party named in the guarantee that is entitled to call for payment under the guarantee. However, the call for payment may be made on behalf of the beneficiary by a presenter.

The UN Convention does not distinguish between a presenter and beneficiary of a guarantee. It stipulates that the beneficiary is the party that demands payment, and any other party may demand payment if the guarantee has been transferred.⁸⁶ It does not therefore deal with the situation where an agent acts in this regard on behalf of the beneficiary. Therefore the question whether an agent can demand payment on behalf of the beneficiary is to be answered with reference to the domestic law of agency. It is suggested that there is no good reason in principle why this should not be possible. The Chinese IGP does not define the beneficiary or a presenter but stipulates that when the beneficiary presents complying documents the beneficiary's claim shall be supported by the court.⁸⁷

⁸¹ Article 2 of URDG758.

⁸² Article 2 of URDG758.

⁸³ Paragraph B41 of ISDGP.

⁸⁴ Rule 1.09(a) of ISP98.

⁸⁵ Rule 1.11(c)(ii) of ISP98.

⁸⁶ Article 9 of the UN Convention.

⁸⁷ Article 6 of the Chinese IGP.

3.3 Conclusion in summary

In summary therefore the rule sets applicable to demand guarantees provide certainty in solving the problem relating to the identity of the party calling for payment. In essence, the URDG758⁸⁸ and ISP98⁸⁹ define a beneficiary as a party in whose favour a guarantee is issued and has the right to demand payment. Thus, a distinction is made between the beneficiary of the guarantee and the presenter of the demand for payment. It follows that a demand for payment may be presented on behalf of the beneficiary by an agent, but that does not imply that the agent has a right to demand payment in its own right. The UN Convention⁹⁰ and Chinese IGP⁹¹ do not define a beneficiary, but it may be implied that the demand for payment may be made by the beneficiary (who has a right to demand payment) or by an agent on its behalf.

4 The identity of the presenter where the guarantee is not subject to any rule sets

The conformity of a demand for payment where a party other than the named beneficiary makes a call for payment may pose challenges in practice if the parties have not incorporated any applicable rules to the demand guarantee. In such an instance the courts have resorted to the principles of contractual interpretation and contract law to resolve the issue.

4.1 University of the Western Cape v Absa Insurance Company⁹²

The issue of the identity of the party demanding payment arose in this case, which involved a construction guarantee issued in favour of the University of Western Cape to secure the performance of a contract by Absa Insurance.⁹³ The guarantee required that the call for payment be issued by the beneficiary (the employer) to the guarantor at its physical address.⁹⁴ When the applicant failed to perform in terms of the construction contract, the beneficiary cancelled the contract. The principal agent then called for payment on behalf of the employer on the principal agent's letterhead.⁹⁵ The guarantor resisted payment, arguing that the demand was not in strict

⁸⁸ Article 2 of URDG758.

⁸⁹ Rule 1.09(a) of ISP98.

⁹⁰ Article 9 of the UN Convention.

⁹¹ Article 6 of the Chinese IGP.

⁹² *University of the Western Cape v Absa Insurance Company Ltd* (100/2015) [2015] ZAGPJHC 303 (28 October 2015) (*University of the Western Cape case*). For a discussion of the case see Kelly-Louw "General Update on the Law of Demand Guarantees" 64-68; Chivizhe *Law and Practice Relating to Compliance of Documents* 234-236.

⁹³ *University of the Western Cape case* para 3.

⁹⁴ *University of the Western Cape case* para 4.

⁹⁵ *University of the Western Cape case* para 5.

compliance with the guarantee, as its agent had made it and not the beneficiary.⁹⁶ The court had to decide whether a call for payment by a representative could be regarded as in strict compliance with the terms of the guarantee when it was clear from the demand that the principal-agent was acting on behalf of the beneficiary.⁹⁷ The Court further noted that in this instance there was no requirement that the employer act personally in calling up the guarantee.⁹⁸ The Court reasoned as follows:

[T]here is no term or condition in the guarantee which explicitly excludes performance by a representative or an agent on behalf of the employer. I am also unable to find that such a term or condition should be inferred by necessary implication. The note at the end of the guarantee referring to the 'Employer's duly authorised agent' relates to the return of the original guarantee before payment will be made. The intention was, so it appears to me, to ensure the return of the original guarantee before any payment will be made and not to authorised representation only in this instance.⁹⁹

Relying on principles of the law of agency the Court acknowledged that representation or agency could be applied concerning any lawful act which the principal himself can perform.¹⁰⁰ As a result, the act of the agent was to be regarded as the act of the beneficiary, and the guarantor's defence had no merit.¹⁰¹ Fourie AJ further noted that an agent could not act on behalf of a principal where the performance was of such a personal nature that the other party would be entitled to personal performance or where performance by an agent was expressly excluded by agreement or by necessary implication.¹⁰² The court found that the performance by the employer in this case did not need to be personal¹⁰³ and that the guarantee did not expressly exclude performance by a representative or agent of the employer. The court concluded that the act of the representative should be regarded as the act of the principal.¹⁰⁴

The judgement illustrates that, if the parties to a demand guarantee transaction do not intend a party other than the stated beneficiary to call for payment, this will have to be stated expressly in the guarantee. Kelly-Louw¹⁰⁵ submits that on a proper interpretation of the terms of the guarantee and giving it its ordinary and grammatical meaning, the court may have concluded that the demand was non-complying. However, this approach is

⁹⁶ *University of the Western Cape* case para 8.

⁹⁷ *University of the Western Cape* case para 10.

⁹⁸ *University of the Western Cape* case para 12.

⁹⁹ *University of the Western Cape* case para 12.

¹⁰⁰ See *Blower v Van Noorden* 1909 TS 890 899; *Du Bois Wille's Principles of South African Law* 984.

¹⁰¹ *University of the Western Cape* case para 11.

¹⁰² See *Christie and Bradfield Christie's Law of Contract* 422.

¹⁰³ *University of the Western Cape* case para 12.

¹⁰⁴ *University of the Western Cape* case para 12.

¹⁰⁵ Kelly-Louw "General Update on the Law of Demand Guarantees" 67.

untenable and would imply a rigid application of strict compliance, which would lead to absurdity and unbusiness-like results as it would defeat the purpose of the guarantee. It is suggested that in construing the requirements of a demand guarantee, the court should consider not only the ordinary meaning of the terms of the guarantee but also consider international standard guarantee practices as evidence of trade usage. In this case,¹⁰⁶ although the guarantee was not subject to any international rules, the judgement is in line with standard practice in that a demand for payment may be presented on behalf of the beneficiary by an agent.¹⁰⁷

The presenter of a demand could be the named beneficiary in the guarantee or its agent. Furthermore, the agent does not assume any rights or obligations under the demand guarantee. As a result this does not preclude a named agent from demanding payment on behalf of the beneficiary. The court, it is suggested, properly deviated from an overly strict approach in interpreting the terms of the demand guarantee, to a purposive approach which is in line with standard demand guarantee practice. Furthermore, in relation to the identity of a party, the legal meaning as opposed to the grammatical meaning of the beneficiary should be followed. For example, in the law of contract the term “creditor” may refer not only to the creditor himself but also to any person who has been authorised to act on behalf of the creditor.¹⁰⁸

4.2 *Millenium Aluminium and Glass Services CC v Group Five Construction (Pty) Ltd*¹⁰⁹

The issue relating to the identity of the beneficiary calling for payment arose in *Millenium Aluminium and Glass Services CC v Group Five Construction (Pty) Ltd*.¹¹⁰ The issue for determination was whether Group Five Construction complied with its requirements when calling for payment under a construction guarantee.¹¹¹ Group Five Construction had been appointed as a building contractor to carry out a project in Durban known as Pearls of Umhlanga – Pearl Sky. Group Five Coastal (Pty) Ltd (Group Five Coastal), acting as an agent of Group Five Construction, appointed Millenium as a subcontractor to carry out construction works.¹¹² The sub-contract agreement required Millenium to provide a performance guarantee in favour

¹⁰⁶ *University of the Western Cape* case.

¹⁰⁷ See Art 2 of URDG758 and Rule 1.09(a) of ISP98 that indicates that an agent can present a demand on behalf of the beneficiary.

¹⁰⁸ Bradfield *Christie's Law of Contract* 471.

¹⁰⁹ *Millenium Aluminium and Glass Services CC v Group Five Construction (Pty) Ltd* (693/2021) [2022] ZASCA 180 (14 December 2022) (*Millenium* case).

¹¹⁰ For a discussion of the case see Mchunu 2023 *De Rebus*; Magumise 2023 <https://wmnattorneys.com/ewExternalFiles/Legal%20Position%20Article.pdf>.

¹¹¹ *Millenium* case para 6.

¹¹² *Millenium* case para 6.

of Group Five Construction.¹¹³ That being so, Millenium obtained and provided a guarantee from Constantia. In the guarantee Constantia was the guarantor, Group Five Coastal acted as agents for Group Five Construction, which was the beneficiary, and Millenium was the applicant.¹¹⁴ The guarantee required the beneficiary to issue a written demand to the guarantor at its *domicilium*, with the payment advice which entitled the contractor to receive the payment under the agreement.¹¹⁵ The principal agent, Group Five Coastal, issued a written demand on Constantia accompanied by a payment certificate and reconciliation statement it had issued under its previous trading name, Group Five KZN (Pty) Ltd (Group Five KZN).¹¹⁶

However, the guarantor resisted payment, arguing that the demand was not in conformity with the guarantee, as the entity which called for payment (Group Five Coastal) was not the same entity that issued the payment certificate and reconciliation statement that accompanied the demand.¹¹⁷ Millenium approached the High Court and argued that the call for payment by Group Five Construction on Constantia had not been properly made as the payment certificate had been issued by Group Five KZN, which was a party to neither the construction contract nor the guarantee.¹¹⁸ Furthermore, it argued that since the payment advice had been made by Group Five KZN and not by Group Five Construction, Constantia was not obliged to pay.¹¹⁹ The Court rejected Millenium's argument and found that Group Five KZN and Group Five Coastal were the same entity with the same registration number, as Group Five Coastal had changed its name to Group Five KZN.¹²⁰ The Court further noted that in terms of the guarantee Group Five Coastal acted as agents for Group Five Construction, and therefore any document issued by Group Five Coastal was effected as the agent for Group Five Construction.¹²¹ As a consequence the guarantor was obliged to pay the amount claimed in the call for payment. Millenium subsequently appealed the decision to the SCA.¹²²

The SCA pointed out that the issue for determination was whether a compliant demand had been made. Furthermore, it pointed out that it was a matter of interpretation of the guarantee in circumstances where the party calling for payment was not the same as the party that had issued a payment

¹¹³ *Millenium* case para 7.

¹¹⁴ *Millenium* case para 7.

¹¹⁵ *Millenium* case para 8.

¹¹⁶ *Millenium* case para 9.

¹¹⁷ *Millenium* case para 10.

¹¹⁸ *Millenium* case para 11.

¹¹⁹ *Millenium* case para 11.

¹²⁰ *Millenium* case para 12.

¹²¹ *Millenium* case para 12.

¹²² *Millenium* case para 12.

certificate and the reconciliation statement which accompanied the demand.¹²³ Millenium argued that under guarantees the call for payment should strictly comply with the terms of the guarantee.¹²⁴ It further argued that the High Court had erred in finding that the call on the guarantee was lawful and valid since the payment certificate and reconciliation statement were not in the name of the contractor as defined in the guarantee.¹²⁵

The SCA reiterated the independent nature of a guarantee and pointed out that: "a guarantee of this nature must be paid according to its terms and is not affected by the relationship between other parties to the transactions that gave rise to its issue."¹²⁶ Accordingly the SCA stated that the payment advice had been issued by Group Five KZN (Group Five Coastal), which was in terms of the guarantee an agent of the beneficiary Group Five Construction.¹²⁷ As such, the call for payment was compliant as it was made on Constantia by Group Five Coastal in its capacity as agent of the beneficiary. The Court reasoned as follows:

Constantia was in no doubt about the identity of the Contractor because that was easily ascertainable from the guarantee itself which it had issued. The demands for payment were made to Millenium and to Constantia on the basis of the payment advice which identified the contract in respect of which it related, namely Pearls of Umhlanga – Pearls Sky. Millenium is identified as a subcontractor in the payment advice. The purpose of the guarantee was to enable Group Five Construction to obtain payment from Constantia in the event of default by Millenium.¹²⁸

The SCA accordingly dismissed Millenium's appeal, holding that Group Five Construction had met the requirements in order to rely on the guarantee and as a result was entitled to payment under the construction guarantee.¹²⁹ Furthermore, that the demand triggered Millenium obligations to Constantia to indemnify it against Group Five Construction's demand and to pay to Constantia an amount equal to Group Five Construction's demand.¹³⁰

The above judgement avoided a strict approach by considering the purpose of the guarantee in ascertaining whether the call for payment conformed to the requirements of the guarantee.¹³¹ While accepting that the beneficiary should adhere to the terms of the guarantee, the Court found that the determination of the conformity of a demand is a matter of the interpretation of the wording of the guarantee. The principles of contractual interpretation

¹²³ *Millenium* case para 6.

¹²⁴ *Millenium* case para 13.

¹²⁵ *Millenium* case para 13.

¹²⁶ *Millenium* case para 14.

¹²⁷ *Millenium* case para 16.

¹²⁸ *Millenium* case para 17.

¹²⁹ *Millenium* case para 21.

¹³⁰ *Millenium* case para 21.

¹³¹ *Millenium* case para 17.

determined the outcome of this case. This is commendable. The terms of the guarantee were interpreted with reference to the purpose of the guarantee (the purposive approach) to avoid inappropriate or unbusinesslike results.

The SCA followed the principle set out in *Lombard Insurance Company v Schoeman*,¹³² which established that in interpreting the wording of the guarantee the interpretation should be practical and business-like.¹³³ Accordingly the SCA found that it would be impractical and not business-like to argue that the demand had been incorrectly made by Group Five KZN instead of Group Five Construction, as they had the same company registration number and were part of the same group.¹³⁴ The court adopted a practical approach in finding that technical discrepancies in relation to the entity (within a group of companies) calling up the guarantee was not sufficient to render the call for payment non-compliant.

4.3 *Simic v New South Wales Land and Housing Corporation*¹³⁵

The issue relating to the identity of the beneficiary demanding payment also arose in the Australian case of *Simic v New South Wales Land and Housing Corporation*.¹³⁶ In this case the question for determination was whether the bank was justified to refuse payment under a performance bond where there was a misdescription of the beneficiary's name. The text of the guarantee indicated the beneficiary as "New South Wales Land and Housing Department Trading" whereas the underlying contract named the beneficiary as "New South Wales Land and Housing Corporation".¹³⁷ When the beneficiary made a call for payment the bank refused to pay because the employer was not the beneficiary identified in the bonds. The court of first instance found that the bank was justified to refuse payment and that the doctrine of strict compliance applied.¹³⁸ The Court of Appeal accepted the finding of the court of first instance, holding that a demand for payment should strictly adhere to the terms of the guarantee. French CJ remarked as follows:

¹³² *Lombard Insurance Co Limited v Schoeman* 2018 1 All SA 554 (GJ). For an insightful discussion of the case see Hugo 2018 *TSAR* 680-688 and Chivizhe *Law and Practice Relating to Compliance of Documents* 239-242.

¹³³ *Millenium* case para 15.

¹³⁴ Magumise 2023 <https://wmnattorneys.com/ewExternalFiles/Legal%20Position%20Article.pdf>.

¹³⁵ *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47.

¹³⁶ *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47.

¹³⁷ *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176.

¹³⁸ *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* 2015 (NSWSC) 176 para 84.

Where a performance bond is expressed, as in the present case, to be unconditional, strict compliance at least requires that the beneficiary making a demand for payment be the party named as beneficiary in the bond.¹³⁹

The court further noted that the terms of the guarantee did not oblige the guarantor to pay any entity other than the named beneficiary or make an enquiry into the background of the underlying contract.¹⁴⁰ The Court concluded that the doctrine of strict compliance rather than being a rigid rule was to be applied "intelligently and not mechanically".¹⁴¹ The case provides authority for the proposition that a demand for payment should adhere to the guarantee requirements. However, the extent to which the demand must strictly comply should not be determined rigidly but should consist of an exercise of judgement about whether the requirements stipulated in the instrument had been satisfied.

5 Conclusion

The issue relating to the identity of the beneficiary or presenter calling for payment is expressly acknowledged in some of the rule sets¹⁴² analysed in this article. The URDG758 and ISP98 require that for the demand to be compliant it must be presented by the beneficiary as stated in the guarantee or by a person other than the beneficiary who has been authorised to do so. The UN Convention allows a person other than the stated beneficiary to demand payment only if the guarantee has been transferred. It follows that a party other than the beneficiary can demand payment on behalf of the beneficiary if it has been authorised to do so. Regarding guarantees not subject to any of these rules, there is South African case law in support of the view that someone authorised to do so can demand payment on behalf of the beneficiary named in the guarantee, as seen in the *University of Western Cape* case.¹⁴³ This case provides a good example of a judgement that serves commercial or business sense instead of insisting on strict compliance. If a person having a different name to that of the beneficiary of the guarantee demands payment in its own right (albeit due to a misdescription of the beneficiary) the demand will be non-conforming, as seen in the Australian *Simic* case.¹⁴⁴ Furthermore, where there are technical discrepancies in relation to the identity of the presenter (within a group of companies) calling up the guarantee, such a demand will be conforming provided the purpose of the guarantee has been met (as seen in the

¹³⁹ *Simic v New South Wales Land and Housing Corporation* [2016] 260 CLR 85 97; 339 ALR 200 216; 91 ALJR 108; 2016 HCA 47 7.

¹⁴⁰ *Simic v New South Wales Land and Housing Corporation* [2016] 260 CLR 85 para 99; 339 ALR 200 216; 91 ALJR 108; 2016 HCA 47.

¹⁴¹ *Simic v New South Wales Land and Housing Corporation* [2016] 260 CLR 85 para 99; 339 ALR 200 216; 91 ALJR 108; 2016 HCA 47.

¹⁴² Article 2 of URDG758; Rule 1.09(a) of ISP98.

¹⁴³ See para 4.1 above.

¹⁴⁴ See para 4.3 above.

Millenium case).¹⁴⁵ It is suggested that in ascertaining whether a call for payment conforms to the requirements of the guarantee, a reliance on strict compliance would run counter to well-established contract law and sound business practices.

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List of Abbreviations

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| CILSA | Comparative and International Law Journal of Southern Africa |
| ICC | International Chamber of Commerce |
| IGP | Independent Guarantee Provisions |
| IIBLP | Institute of International Banking Law and Practice |
| ISDGP | International Standard Demand Guarantee Practice for URDG758 |
| ISP98 | International Standby Practices (1998) |
| JBCC | Joint Building Contracts Committee |
| SALJ | South African Law Journal |
| SA Merc LJ | South African Mercantile Law Journal |
| SCA | Supreme Court of Appeal |
| THRHR | Tydskrif vir Hedendaagse Romeins-Hollandse Reg |
| TSAR | Tydskrif vir die Suid-Afrikaanse Reg |
| UCP600 | International Standard Banking Practice for the Examination of Documents under Documentary Credits Revision for UCP 600 (2007) |
| UN | United Nations |
| URDG758 | Uniform Rules for Demand Guarantees, ICC Publication No 758 |