

Newsletter No. 8 (EN)

**Various Ways of Securing Performances and
Obligations in Legal Relationships**

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I. Introduction

In an ordinary course of business, a contracting party takes the risk of non-performance of the obligations under contracts by the other party. Therefore, there have been certain legal tools created in order to secure and guaranty such performances and obligations.

II. Letter of Credit (L/C)

A L/C is normally used to secure payments owed by buyers in trades of goods. In such a transaction, the supplier will ask the buyer to provide a L/C. In the following the buyer will request its bank to issue such L/C in favour of the supplier.

1. Players Concerned

The parties to an L/C transaction will be recognized as 1) the Issuer, which is the bank issuing the L/C, 2) the Applicant, which is the buyer, and 3) the Beneficiary, which is the supplier.

2. The Laws, Rules, and Regulations

L/Cs are usually governed by the Uniform Customs and Practice for Documentary Credit (UCP 500), International Stand By Practice 1998 (ISP 1998), or other internationally accepted rules endorsed by the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), or any other internationally accepted private organizations.

3. Factors that must be taken into Account

Drafting an L/C must be done very carefully since banks have a tendency not to honour L/Cs, particularly when the buyer is deemed likely to become insolvent, or a bankruptcy proceeding has been filed against the buyer.

III. Guaranties Governed by Thai Suretyship Doctrine

Governed by Sections 680-701 of Thai Civil and Commercial Code (CCC), a suretyship is a contract by which one person called a guarantor becomes liable to pay upon a certain non-performance of another.

1. Players Concerned

The parties concerned in this transaction are 1) the creditor, 2) the debtor, and 3) the guarantor, which is the person guaranteeing the obligations of the debtor

2. The Laws

Generally, creditors are not required to exhaust remedies against debtors or to look for any other party before collecting the debts from guarantors. Several Thai Supreme Court Decisions such as Decisions Nos. 804/2500, 3944/2525, and 2093/2526 support this point of view.

In addition, all claims arising out of or incurring in connection with the obligations under the contract secured by such guaranty are subject to a 10-year prescription period under Thai law.

IV. Independent Bank Guaranties

An independent guarantee is a separate contract between a bank and a third party and not directly related to the underlying contract. It is of the so-called “abstract nature.” Such an instrument is widely used in construction agreements, for example.

1. The Laws, Rules, and Regulations

An independent bank guaranty should be drafted by following internationally accepted rules. This enables the construction in accordance with the latter while still maintaining its independent characteristic. Otherwise, the guaranty might be misinterpreted as suretyship.

2. Non-Return of the Guaranty Document; Legal Significance

The independent guaranty document is neither a commercial paper nor a negotiable instrument. The retention of the document itself is, therefore, of no legal significance.

V. International Bills of Exchange and Promissory Notes

Bills of exchange play an important role in commercial and financial segments not only as a method of payments or a means of providing credit, but also as security for credits.

1. The Convention on International Bills of Exchange and International Promissory Notes

In 1988, an attempt to harmonize the system of using and implementing bills of exchange initiated by UNCITRAL was concluded. The United Nations General Assembly unanimously approved the text of the Convention on International Bills of Exchange and International Promissory Notes in its 43rd Plenary Session. However,

due to the lack of ratifications the bill is not yet into force.

2. Specific Characteristics of the Convention

Bills and Notes which are governed by the Convention have certain specific and interesting characteristics, which may vary considerably from those governed by local laws. However, it is necessary to keep in mind that the governing law provision of such bills or notes must be read in a way that it is in accordance by the Convention.

3. Permitted Delay in Making Payments

Delay in making payments may be permitted according to Article 56(1) of the Convention. In addition, Article 56 of the Convention also provides certain excuses for the issuer not to pay upon the presentment if the bill has been protested for dishonour by non-acceptance or if the drawer, an endorser, or a guarantor has expressly waived presentment.

4. Additional Liability under the Bills

Article 28(3) of the United Nations Convention on International Bills of Exchange and International Promissory Notes mandates that a holder who takes an instrument after the expiration of the time-limit for presentment for payment is subject to any claim to, or defense against liability on, the instrument to which his transferor is subject. Therefore, if you decide to purchase this instrument at discount, or being a transferee to the instrument, we insist that you investigate the terms and conditions and conduct such undertaking carefully.

VI. Bills under Thai Law

In general, according to Section 898, bills under Thai Civil and Commercial Code consist of 1) bills of exchange, 2) promissory notes, and 3) cheques.

1. Bills of Exchange

In a bill of exchange transaction, a person called “drawer” orders another person called “drawee” to pay to, or pay to the order of, another person called “payee”. Any person drawing or indorsing a bill of exchange represents and warrants that, upon due presentment, the bill shall be accepted and paid in accordance with its terms (Section 914). For Payments, it is necessary that

the holder of a bill of exchange presents the bill upon its maturity (Sec. 941).

2. Promissory Notes

A promissory note is a written instrument by which a person called “maker” promises to pay a certain sum of money to, or to the order of, another person called “payee”.

According to Sec. 982, such promissory note must contain certain provisions such as an unconditional promise to pay a certain sum of money and a maturity date. Most aspects of a promissory note are -to the extent that it is not inconsistent with the nature of the instrument- governed by the law concerning bills of exchange.

*We hope that the information provided in this newsletter was helpful for you.
If you have any further questions please do not hesitate to contact us.*

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**Annex:
Brief Table of Differences among L/Cs, Guaranties, Independent Bank Guaranties, and Bills of Exchange/International Promissory Notes**

Instruments	Independent/ Abstract Characteristics	Expiration of instruments	Prescription period un- der applica- ble laws
1) Bills of Exchange			
1a) Under Thai Law	Depending on the terms and conditions of the instruments	Can be set by the parties to the transaction or 6 months after its issuance if considered “at sight”	3 years (holders against acceptors) or 1 year (holders against endorsers or drawers)
1b) Under German Law	Yes	1 year by law or can be set by the parties to the transaction	3 Years
1c) International	Yes	Can be set by the parties to the transaction subject to the laws of applicable jurisdiction	Depending upon the laws of applicable jurisdiction
2) L/Cs			
2a) Local	Yes	Can be set by the parties to the transaction subject to common banking practice	N/A
2b) International	Yes	Can be set by the parties to the transaction subject to common banking practice	N/A
Instruments	Independent/ Abstract Characteristics	Expiration of instruments	Prescription period un- der applica- ble laws
3a) Under Thai Law	No	Can be set by the	10 years

		parties to the transaction	
3b) Under German Law	No	Can be set by the parties to the transaction	30 Years
4) Promissory Notes			
4a) Under Thai Law	Depending on the terms and conditions of the instruments	Can be set by the parties to the transaction	3 years
4b) Under German Law	Yes	Can be set by the parties to the transaction	30 years subject to the terms of underlying contracts
4c) International	Yes	Can be set by the parties to the transaction subject to the laws of applicable jurisdiction	Depending upon the laws of applicable jurisdiction
5) Independent Bank Guaranties			
	Yes	Can be set by the parties to the transaction subject to common banking practice	N/A
6) Cheques			
6a) Local cheques under Thai Law	Yes	1 month after its issuance	1 year (holders against endorser) or 6 months (endorser against endorser)
	Independent/ Abstract Characteristics	Expiration of instruments	Prescription period under applicable laws
6b) International cheques under Thai Law	Yes	3 months after its issuance	1 year (holders against endorser) or 6 months (endorser against endorser)
6c) Local cheques under German Law	Yes	8 days	6 months (holders against

			endorsers)
6d) Continental cheques under German Law	Yes	20 days	Depending on the law of the jurisdiction of issuance
6e) International cheques under German Law	Yes	70 days	Depending on the law of the jurisdiction of issuance

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