

# The URDG Newsletter

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Edited by Georges Affaki



Georges Affaki  
Chair of the URDG  
Drafting Group

## URDG 758 – Two years later

The world is celebrating today the second anniversary of URDG 758. The two years since URDG 758 succeeded URDG 458 on 1 July 2010 have been marked by success after success. Almost immediately – and in at least one case, even before 1 July 2010 – demand guarantees and counter-guarantees started being issued worldwide subject to the new URDG 758. The transition provision in article 1(d) greatly facilitated the move. The percentage of guarantees subject to URDG 758 compared WITH those subject to URDG 458, or to no rules at all, has never stopped increasing since.

At its General Assembly meeting on 5 July 2011, the United Nations Commission on International Trade Law endorsed URDG 758. On 14 March 2012, the International Federation of Consulting Engineers upgraded the model guarantee forms used in connection with its model construction contracts to include the new URDG 758. The World Bank likewise announced on 26 June 2012 that it has updated its Procurement Division's model guarantee forms so they are now subject to URDG 758 in place of URDG 458. Other multilateral development banks are expected to follow suit shortly. Bank regulators, including Bank Markazi of Iran, and lawmakers, including the Organisation for the Harmonisation of Business Law in Africa (OHADA), approved URDG 758 and used them as model for national statutes now in force in 16 countries. Hundreds of seminars and workshops on the new rules were reported in 45 countries. Having been published initially only in English, URDG 758 approved translations are now available in 21 other languages: Arabic, Bulgarian, traditional Chinese, Croatian, Czech, Finnish, French, German, Hungarian, Italian, Japanese Mandarin, Polish, Portuguese, Russian, Serbian, Slovenian, Spanish, Swedish, Turkish and Ukrainian.

The success of URDG 758 is a tribute to the men and women of the ICC Task Force on Guarantees, who had the vision and the determination to lead the revision of URDG towards successful adoption; the members of the two sponsoring commissions: the Banking Commission and the Commercial Law and Practice Commission; and the innumerable bankers, exporters, importers and lawyers who shared with us their feedback on guarantee practice and their aspiration for a standard set of sound internationally accepted demand guarantee practices. This is what URDG 758 aim to achieve.

URDG 758 do not merely update URDG 458; they are the result



URDG 758 Drafting Group (Dr Georges Affaki, Farideh Tazhibi, Roger Carouge, Dr Andrea Hauptmann, Pradeep Taneja, Sir Roy Goode and Glenn Ransier)

## Inside...

[URDG 758 – Two years later](#)

[From 458 to 758: URDG move from youth to adulthood](#)

[URDG 758 in the world](#)

[Queries on URDG 758](#)

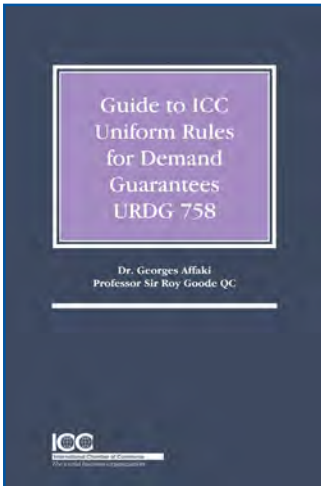
[URDG 758 – The future](#)



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“URDG 758 are a transformation from URDG 458, a set of useful but basic provisions, into rules that address all the key issues of modern demand guarantee practice”



Guide to ICC Uniform Rules for Demand Guarantees  
<http://www.iccbooks.com/Product/ProductInfo.aspx?id=659>

of an ambitious process that seeks to bring a new set of rules for demand guarantees that are clearer, more precise and more comprehensive. By offering a much needed clarification of the presentation and examination process and excluding imprecise standards, URDG 758 foster certainty and predictability. Examples are strict time durations for the examination of a demand, the extension of the validity period in the case of force majeure, and the suspension of the guarantee in the case of an extend or pay demand. URDG 758 are comprehensive and cover important practices that had been left out of URDG 458, including the advising of guarantees, amendments, standards for examination of presentations, partial, multiple and incomplete demands, linkage of documents and transfer of guarantees. They endorse and build on the balanced approach that characterised URDG 458, offering the most reasonable balance between the legitimate interests of the applicant, the beneficiary and the guarantor. URDG 758 also feature a number of innovations, such as the new rule that proposes a substitution of currencies when payment in the currency specified in the guarantee becomes impossible and the new termination mechanism for guarantees that state neither an expiry date nor an expiry event.

In June 2011, the rules and the accompanying model forms welcomed a companion that quickly became indispensable to all users: *Guide to ICC Uniform Rules for Demand Guarantees*, ICC pub 702, which is now in its second print run. With that, the world of demand guarantees has in its possession all the means necessary to have an optimised, pacified and standardised demand guarantee practice. The Task Force is proud of having contributed to this result. Happy birthday URDG 758!

Dr Georges Affaki  
[georges.affaki@bnpparibas.com](mailto:georges.affaki@bnpparibas.com)



ICC Uniform Rules for Demand Guarantees  
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## From 458 to 758: URDG move from youth to adulthood

The first edition of the Uniform Rules for Demand Guarantees, published in 1992, was driven by the need to replace the failed URC 325. The great bulk of the work was done by a Joint Working Party of the Commission on International Commercial Practice and the Commission on Banking Technique and Practice under the chairmanship of Dr Rudolf von Graffenried. But after years of hard work the Working Party reached an impasse. This was resolved by two meetings of a Drafting Group in Paris under my chairmanship, each lasting a mere three hours, when some key issues, and in particular the requirement of a statement of breach, were resolved. URDG 458 were a good piece of work for their time, but their inadequacies gradually became apparent. Hence a new drafting group and a steering committee, both under



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“URDG 758... address all the key issues of modern demand guarantee practice”

*Sir Roy Goode, Emeritus Professor of Law, Oxford*

the inspired chairmanship of my friend and colleague Dr Georges Affaki, consulted widely and went through every single submission from ICC National Committees and others, line by line. It is interesting to reflect that the requirement of a statement of breach, much debated when first introduced, is now almost universally accepted as sound and desirable practice. With many important new provisions, URDG 758 are a transformation from a set of useful but basic provisions into rules that address all the key issues of modern demand guarantee practice and in a mere two years have gained an astonishing degree of acceptance. *Floreat URDG 758!*

Sir Roy Goode QC, Emeritus Professor of Law, Oxford  
[roy.goode@sjc.ox.ac.uk](mailto:roy.goode@sjc.ox.ac.uk)



**Dr Andrea Hauptmann**  
Task Force Chair

## URDG 758 in the world

The Guarantees Department at Raiffeisen Bank International led by Dr Andrea Hauptmann has studiously compiled over the past year statistics on the use of URDG 758 in the world. The figures were reported by members of the Task Force, who are spread across 26 countries. Overall, the reports show a satisfactory uptake of URDG 758, which have replaced URDG 458 in commercial transactions and seem to be going further in conquering new parts of the guarantee market, including in public procurement.

In Europe, guarantees and counter-guarantees governed by URDG 758 account for 20% to 70% of the aggregate guarantee volume. The leading French, Italian and Spanish banks and savings and loan institutions are reported to offer URDG guarantees and counter-guarantees by default, i.e. subject to their customers requesting an opt-out where mandatory guarantee forms are imposed by public beneficiaries. In Germany, a considerable portion of beneficiaries are reported increasingly to require that their bank guarantees be governed by URDG 758. This evolution in the German guarantee market contrasts sharply with the timid debut of URDG 458 and should be credited to the leadership of ICC local members. When asked about URDG 758's reception in the UK, Geoffrey Wynne, a leading export finance lawyer at SNR Denton, commented "URDG 758 is slowly but surely gaining popularity here. A number of the UK banks have adopted URDG 758 as their default position. We are seeing URDG 758 guarantees in increasing numbers and have not encountered any bank unwilling to issue or accept a URDG 758 guarantee or counter-guarantee."



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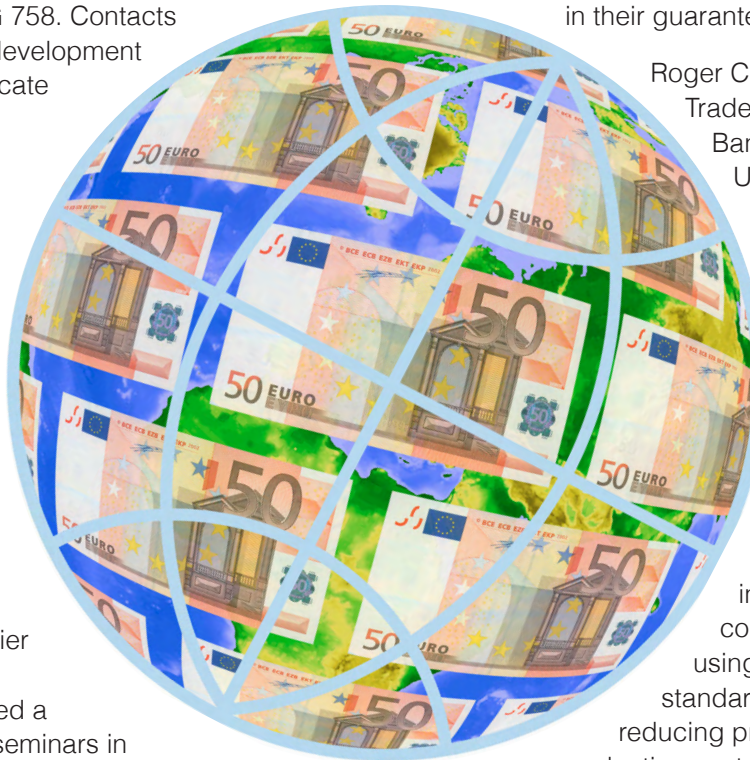
“We are seeing URDG 758 guarantees in increasing numbers and have not encountered any bank unwilling to issue or accept a URDG 758 guarantee or counter-guarantee.”

*Geoffrey Wynne, SNR Denton*

In the Middle-East, reports from Turkey, Egypt and Jordan show an increase of 35% to 50% in the use of URDG 758. In Iran, the Central Bank issued a circular letter to national banks commending URDG 758. Reports by regional members of the Task Force confirmed the *Shari'a*-compliant character of URDG 758 and the possibility for Islamic finance-related guarantees to be governed by URDG 758. Contacts were made with Islamic development banks in the Gulf to advocate the use of URDG 758 in development financing. Mohammad M. Burjaq, Chief Operations Officer for Bank al Etihad in Jordan and a member of the Task Force reported that a higher level of use of URDG 758 could easily be achieved if templates get updated. Out-of-date governmental regulations governing public procurement are often perceived as a barrier to a wider use of the new rules. Mr Burjaq conducted a considerable number of seminars in the Arab region and reported a particular interest in Arab banking and business circles in URDG 758 and the model forms offered in the rule brochure.

In India, the Foreign Exchange Dealers' Association (FEDA) likewise recommended to its member banks the use of URDG 758. In Russia and PRC no national statistics were available but members of the Task Force reported that leading banks have advised their branches and subsidiaries to use URDG 758. Bank of China reported that the Supreme People's Court of PRC is examining the possibility of updating its

interpretative rulings on independent guarantees and considering URDG as a restatement of customs and practice in international guarantees. As indicated in *Guide to ICC Uniform Rules for Demand Guarantees*, the PRC Supreme People's Court had previously rendered judgments applying URDG (458) even in cases where the parties had not explicitly incorporated the rules in their guarantees.



Roger Carouge, Head of Global Trade Services for Deutsche Bank and a member of the URDG 758 Drafting Group, has travelled extensively throughout Asia including in PRC, Singapore, UAE and Turkmenistan to promote URDG. His report from his extensive lecturing to banks, central banks and corporate customers in the region is that all sectors embraced URDG 758 after their entry into force. Mr Carouge commented that banks prefer using URDG 758 because their standard use is perceived as reducing processing risks and therefore production cost, which ultimately would

have been charged by the bank to its customer. Local bankers also reported that URDG 758 considerably lessen the length and antagonism of guarantee wording negotiation. The model forms appended to the URDG 758 booklet are reportedly often used for guidance.

No reliable statistics were available for Africa, Australasia or the Americas. However, members of the Task Force reported regularly about URDG 758 guarantees issued or accepted in those regions. In the United States, the combined efforts of Task Force regional members, USCIB and BAFT-IFSA, as well as the leadership of a



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“The Task Force acts as the standing ICC body that monitors international guarantee practice...”



Mohammed Burjaq  
Task Force Member

number of US national banks and US branches of European banks, resulted in URDG guarantees and counter-guarantees issued by or in favour of US parties. This growing success was reported by participants at numerous workshops on URDG 758 organised by banks, banking organisations and law firms in the United States. As confirmed by Michael Evan Avidon, a leading trade finance attorney in New York, a typical demand guarantee governed by URDG 758 is an “independent undertaking” to pay against documents within the meaning of Office of the Comptroller of the Currency Interpretative Ruling 12 C.F.R. § 7.1016 (revised) and, as such, is not a prohibited activity for US national banks.

Compiled from contributions made by:

Amr Kamal ([amr.kamal\\_63@yahoo.com](mailto:amr.kamal_63@yahoo.com)), Vasant Shanbhag ([vasants@ingvysyabank.com](mailto:vasants@ingvysyabank.com)), Mohammed Burjaq ([cdcsmbb@yahoo.com](mailto:cdcsmbb@yahoo.com)), Kate Richardson ([kate.richardson@snrdenton.com](mailto:kate.richardson@snrdenton.com)), Roger Carouge ([roger.carouge@db.com](mailto:roger.carouge@db.com)), Michael Evan Avidon ([mavidon@mosessinger.com](mailto:mavidon@mosessinger.com)), Zuo Yichen ([js\\_zuoych@bank-of-china.com](mailto:js_zuoych@bank-of-china.com)) and Andrea Hauptman ([andrea.hauptmann@rbinternational.com](mailto:andrea.hauptmann@rbinternational.com)).

## Queries on URDG 758

The Task Force acts as the standing ICC body that monitors international guarantee practice and offers technical support in the use of URDG worldwide. In the two years of use of URDG 758, the Task Force received numerous queries regarding the proper interpretation of certain URDG 758 provisions. The majority of those queries were submitted before the release of *Guide to ICC Uniform Rules for Demand Guarantees* and found an answer in the Guide. Other queries were considered by the Task Force as educational in nature or involving an ongoing dispute. Under the terms of reference of the ICC Banking Commission, no such queries can be processed as official opinions of the Commission. We release in this Newsletter excerpts of those queries, given their educational value.



URDG 758 Global launch conference,  
Paris, 18 March 2010



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## If a guarantee says it will expire “on Final Acceptance”, does the three-year termination date in article 25(c) apply?

**Q.** A guarantee stipulates that it expires on a specific calendar date but that notwithstanding the expiry date, the beneficiary may present documents to the guarantor up to 30 days after the expiry date. Is it complying with URDG 758?

**A.** Article 14 provides that a presentation shall be made to the guarantor on or before expiry. After expiry, the guarantor is automatically released from its obligations under the guarantee and no longer has authority to receive, examine or act upon a presentation made after expiry. The guarantee referred to in the query is in conflict with URDG 758 and should not be made subject to the rules.

**Q.** A beneficiary is insisting on introducing into the guarantee a political risk clause covering the risk of currency control. The guarantor asks if there is a need for such a clause where URDG 758 apply to the guarantee.

**A.** The independent nature of the guarantee, explicitly acknowledged in article 5, bars the guarantor from asserting a currency control regulation in the country of the applicant as a defence for not honouring its payment undertaking. A political risk clause adds little value in such a case. If the currency control is imposed in the country of the guarantor and results in the prohibition of payment in the currency of the guarantee being a foreign currency, article 21 requires the guarantor to pay in the currency of the place for payment. Admittedly, if the place of payment were in the country that has imposed the currency control, the beneficiary would have no choice but to accept payment in the local currency. The result is not any different if a political risk clause is added because it would be overridden by the mandatory character of the currency control of the place of payment. Article 21 is particularly helpful where the place of payment is outside the country that has imposed the currency control. It dispenses with the need for a separate political risk clause. More on that in the Guide, paragraphs 21.1 and following.

**Q.** A guarantee is issued without any indication of an expiry date but stipulates one of the following clauses: “This guarantee will expiry upon Final Acceptance”, “This guarantee is valid until completion of the contract” or “This guarantee is valid until released by the beneficiary”. Does the three-year termination date in article 25(c) apply?

**A.** All three clauses stated in the query are non-documentary conditions since they do not specify any

document to indicate compliance with these conditions. Accordingly, article 7 requires that they should be disregarded except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee does not conflict with data in the guarantee. More on that in the Guide, paragraph 25.6. This query was adopted as Official Opinion 470/TA.745.

**Q.** A counter-guarantee is issued through SWIFT MT760. Field 40C (applicable rules) indicates URDG but field 77C (details of the guarantee) indicates: “Our counter-guarantee and your guarantee will be governed by Turkish law and place of jurisdiction Istanbul”. Is there a conflict with URDG articles 34 and 35?

**A.** Where the counter-guarantor has chosen the applicable law to both the counter-guarantee and the guarantee and has explicitly so indicated in the relevant field in the SWIFT message, the counter-guarantor’s choice will prevail over the default rules in URDG 758, i.e. articles 34 and 35. More on that in the Guide, paragraphs 82 and following.

**Q.** A counter-guarantee is issued through SWIFT MT760. Field 40 C indicates NONE and field 77C indicates: “The guarantee is subject to URDG 758 except articles 16, 22 and 35. The counter-guarantee is subject to English law and the jurisdiction is English courts”. Is there a conflict with URDG article 1(b)?

**A.** The deliberate choice of NONE in field 40C excludes the application of URDG to the counter-guarantee and therefore overrides article 1(b). More on that in the Guide, paragraph 1.26.

**Q.** Is a guarantor entitled to recalculate the beneficiary’s calculation in a required document and, if it considers that calculation to be incorrect, to raise a discrepancy and is a counter-guarantor entitled to recalculate and reject the guarantor’s demand if the guarantor chose not to recalculate or didn’t find any mistake?

**A.** Article 19(e) provides the guarantor with the choice as to whether it recalculates a beneficiary’s calculations under a formula stated or referenced in the guarantee. In doing so, if the guarantor finds a mistake, it may reject the demand as discrepant. The counter-guarantor is obliged to pay the guarantor that has chosen not to recalculate the beneficiary’s calculation even if the counter-guarantor



## Can a beneficiary make a second claim during an extend or pay suspension period?

finds a mistake in the calculation made by the beneficiary. More on that in the Guide, paragraph 19.14.

**Q.** Is a guarantor entitled to pay an “extend or pay” demand directly, even without the consent of the instructing party?

**A.** Article 23(a) provides the guarantor with the choice to extend or to pay upon its receipt of a complying extend or pay demand. However, if it has decided to suspend payment, it has to wait for the end of the suspension period to extend or to pay. If the instructing party refuses the extension requested by the beneficiary, the guarantor remains free to extend the guarantee nonetheless but risks losing any right to be reimbursed by the instructing party for acting in breach of its mandate (unless it is authorised to do so in the application). More on that in the Guide, paragraphs 23.1 and following.

**Q.** Is it possible for a beneficiary that has already presented a complying extend or pay demand to make a new demand for payment during the suspension period? If not, is it possible for the beneficiary to withdraw the extend or pay demand and present a new demand assuming that the guarantee has not expired?

**A.** Unless the terms of the guarantee provide otherwise, article 17 permits the beneficiary to present multiple partial demands. Therefore, provided that the beneficiary has not presented a complying demand for the total guarantee amount, it is still possible to present another demand for the remaining amount during the suspension period on or before the expiry date of the guarantee. If the first extend or pay demand had been made for the total guarantee amount and the guarantor found it to be a complying demand and decided to suspend payment, the beneficiary has to wait for the expiry of the suspension period that it is deemed to have accepted when presenting an extend or pay demand. If the extension is granted, its demand for payment is withdrawn automatically and it may present a new demand. If not, the guarantor has to pay so it is unnecessary for the beneficiary to present a new demand. More on that in the Guide, paragraphs 23.1 and following.

**Q.** Is it possible for a beneficiary to make a demand under several separate guarantees issued in its favour by the same guarantor by presenting only one demand? Please assume that the beneficiary has indicated in its demand the guarantee number and the required article 15 statements referring to each underlying contract separately.

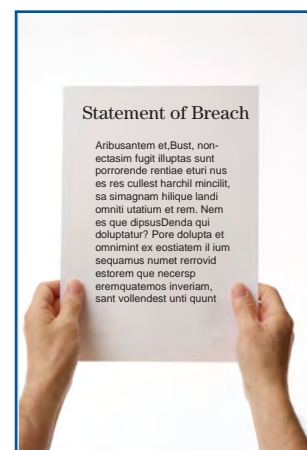
**A.** The demand is acceptable as long as it clearly states the amount claimed under each guarantee and otherwise complies with the terms of each guarantee.

**Q.** If a guarantee issued (before 1 July 2010) subject to URDG (458) is extended after URDG 758 came into force on 1 July 2010, does it become subject to URDG 758?

**A.** Extending the guarantee is an amendment of its expiry term; it is not an issue of a new guarantee. The guarantee remains subject to URDG 458.

**Q.** If a guarantee requires the presentation of a statement of breach the terms of which are explicitly stated in the guarantee, is the beneficiary also obliged to present the supporting statement required in article 15(a)?

**A.** If the statement the terms of which are explicitly stated in the guarantee requires the beneficiary to indicate in what respect the applicant is in breach, there is no need for the beneficiary also to provide a new statement to comply with article 15(a). In other terms, the statement requirement under article 15(a) is deemed to be satisfied by the presentation of the statement required in the guarantee because the terms are similar. Conversely, if the statement the terms of which are explicitly stated in the guarantee is restricted to indicate that the applicant is in breach without however requiring the beneficiary also to indicate the respect in which it may be in breach (in other words, a URDG 458 article 20(a)(i) type statement), the beneficiary is still required to state additionally in what respect the applicant is in breach in order to comply with article 15(a). Article 15(a) can only be excluded where expressly so provided in the guarantee as indicated in article 15(c).



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“Bankers and users can certainly afford to be more ambitious in their use of electronic guarantees.”

*Dr Georges Affaki, BNP Paribas*

## URDG 758 – The future



Task Force members are often asked whether the ICC Banking Commission will compile and release in the form of a booklet the “international standard demand guarantee practice” referred to in URDG 758 article 2. There is consensus that any such publication would be premature at this stage. It took ICC 10 years between the drafting of the then-novel concept of *international standard banking practice* in UCP 500 and releasing the first compilation of ISBP (ICC pub 645, now updated into ICC pub 681). The Task Force would better concentrate its efforts on promoting a wider use of URDG 758, especially in public procurement. That said, the Task Force is regularly

compiling practices fed back to its members through the numerous workshops on URDG 758 organised around the world, the queries submitted to the ICC Banking Commission and its own members’ experiences as demand guarantee experts. In due course, those practices would likely evolve into a compilation of ISDGP. In the meantime, readers should remember that international standard demand guarantee practice – like *international standard banking practice* for UCP – is a method to identify on a case-by-case basis the proper international practice to answer a question that is not covered in the terms of the guarantee or URDG. Even when codified and released, *international standard demand guarantee practice* will – and should – never be an exhaustive recital of all guarantee practice, for that would jeopardise the adaptability of URDG to the evolving operational context.

Two years in the use, URDG 758 have achieved the status of market standard. The numerous seminars that are still regularly organised on URDG 758 are expected to evolve into more technical workshops focusing on specific guarantee practices under URDG 758, although general presentations of URDG 758 and the difference from the former URDG 458 are still very appropriate to customers, lawyers and regulators.

ICC will continue campaigning for a universal use of URDG 758, especially in public procurement where the rigidity of governmental regulation makes the acceptability of the rules more limited. The joint work currently in progress with The World Bank and the Asian Development Bank aiming to achieve a wider use of URDG 758 is likely to enhance that prospect.

Finally, the many URDG provisions covering electronic guarantees (see, for instance, articles 2 and 16) would undoubtedly benefit from wider publicity. Flow banking is increasingly relying on electronic data interchange. URDG 758 were drafted to work equally well for guarantees and counter-guarantees in electronic form as for those in paper form. Bankers and users can certainly afford to be more ambitious in their use of electronic guarantees.

This is obviously not an epilogue but the first of a long series narrating the success of URDG 758 with the steadfast support of the Task Force.

**Dr Georges Affaki**



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