

Chapter Three

Timely Presentation of Documents

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3.0 Introduction

Chapter Three discusses the timely presentation of documents, which is the condition on which the obligation of the Issuer/Guarantor and any Confirmer depends. It discusses presentation as such, while Chapter Four (Examination and Compliance of Documents Presented) addresses the process of examination to determine compliance of the documents presented.

The questions and issues related to presentation treated in this Chapter include: 1) what is a “Presentation” and a “Presenter”; 2) where is presentation made; 3) to whom is presentation made; 4) how is presentation made; 5) incomplete presentations; 6) partial and multiple drawings; 7) presentation after normal banking hours; 8) extend or pay demands; 9) the deadline when the bank to which presentation is made is ordinarily closed; and 10) closure on the business day of expiration.

3.1 What is a “Presentation” and a “Presenter”?

The term “Presentation” has more than one meaning in practice. It is used to signify the act of delivering documents under an independent undertaking and also to signify the documents that are delivered. Which meaning is intended must be determined by the context in which the term is used.

ISP98 Rule 3.02 (What Constitutes a Presentation) provides “[t]he receipt of a document required by and presented under a standby constitutes a presentation requiring examination for compliance with the terms and conditions of the standby even if not all of the required documents have been presented.” The Rule implies that presentation does not occur merely by forwarding data or documents to an Issuer/Guarantor or Nominated Bank but forwarding them for honour which, in turn, requires examination to determine compliance with the terms and conditions of the undertaking. While UCP600 does not contain this provision, UCP600 is consistent

with the practice that ISP98 articulates. This meaning is also implied under the URDG 758 Article 2 (Definitions) definition of “Presentation”.

The implication of these Rules is that a presentation places the Issuer/Guarantor or any Confirmer in the position of having to examine, either honour or dishonour and if the latter to provide timely and adequate notice of refusal. The sanction of preclusion is an ever-present consequence in the event of a failure to do so in a timely and adequate manner.

Two terms are important in understanding presentation, namely “Presentation” and “Presenter”.

The term “Presentation” is defined in ISP98 Rule 1.09(a) (Definitions) as “depending on the context, either the act of delivering documents for examination under a standby or the documents so delivered.” UCP600 Article 2 (Definitions) defines the term as “either the delivery of documents under a credit to the issuing bank or nominated bank or the documents so delivered.” These definitions note the ambiguity in the use of “Presentation” which can mean either the act by which documents are delivered or the documents that are so delivered. URDG 758 Article 2 (Definitions) copies this approach, but adds that “Presentation” also “includes a presentation other than for a demand, for example, a presentation for the purpose of triggering the expiry of the guarantee or a variation of its amount”. The implication of this broadening of the definition of presentation will be discussed subsequently.

“Presenter” is defined in ISP98 Rule 1.09(a) (Definitions) as “a person who makes a presentation as or on behalf of a beneficiary or nominated person.” UCP600 Article 2 (Definitions) defines it as a “beneficiary, bank or other party that makes a presentation.” URDG 758 Article 2 (Definitions) combines the two approaches, adding that presentation can be as or on behalf of the Applicant in parallel to the URDG 758 definition of “Presentation”. It states, “[p]resenter means a person who makes a presentation as or on behalf of the beneficiary or the applicant, as the case may be”.

3.2 Where is Presentation to be Made?

ISP98 Rule 3.01 (Complying Presentation under a Standby) states that a standby should identify the place, location within that place and the person to whom presentation should be made. ISP98 Rule 3.04(a) (Where and to Whom Complying Presentation Made) requires that “a presentation must be made at the place and any location at that place indicated in the standby or provided in these Rules.” Where the standby is silent, ISP98 Rule 3.04(b) (Where and to Whom Complying Presentation Made) provides that it must be made “at the place of business from which the standby was issued.” If confirmed, ISP98 Rule 3.04(c) (Where and to Whom Complying Presentation Made) provides that presentation must be made “at the place of business of the confirmer from which the confirmation was issued or to the issuer.” ISP98 Rule 3.04(d) (Where and to Whom Complying Presentation Made) contains default rules in the event that no location at the place of presentation is indicated. Nomination of a

bank to pay or negotiate also implies that presentation may be made to that bank unless expressly excluded.

URDG 758 Article 14(a)(i) (Presentation) provides that presentation must be made to such place as is indicated in the demand guarantee.

UCP600 Article 6(a) (Availability, Expiry Date and Place for Presentation) requires that a credit “state the bank with which it is available”. It also provides that a credit that is “available with a nominated bank is also available with the issuing bank.” Being “available with” a bank is the UCP600 phrase for a place where presentation can be made.

3.3 To Whom is Presentation to be Made?

There are several ways to indicate to whom presentation is to be made: 1) by indicating that the credit is available for presentation with a Nominated Bank (or by nominating a bank); 2) by indicating the name of the bank to which presentation must or can be made; 3) by indicating the location at which presentation must be made and naming the entity to whom it must be made in connection with stating its address; and 4) by issuing the independent undertaking in which case presentation can be made to the Issuer/Guarantor unless such a presentation is expressly excluded.

Unless a standby expressly states that presentation cannot be made to a Nominated Bank, nomination implies that presentation of documents may be made to the Nominated Bank whether or not the Nominated Person elects to act on the nomination.

Unless a standby expressly states that presentation cannot be made directly to an issuing bank, presentation can always be made directly to the Issuer/Guarantor, thus bypassing Nominated Banks (including the Confirmer). As indicated in Chapter Two (Obligations of Parties to an Independent Undertaking), bypassing the Confirmer may discharge the Confirmer’s obligation depending on the applicable practice rule and the terms of the standby.

Since there is no provision in URDG 758 for Confirmers or other Nominated Persons, presentation must be made to the Issuer/Guarantor unless the guarantee expressly provides otherwise.

3.3.1 Providing for Exclusive Presentation to an Entity Other Than the Issuer/Guarantor

Because practice rules can be varied, it is possible to provide either that presentation may not be made to an Issuer/Guarantor or not made to a Nominated Person, but such a provision should be express and leave no ambiguity. Consequently, a variation should expressly state that presentation must be made to the desired entity and negatively state that presentation may not be made to the entity to whom presentation otherwise could be made but is not to be made. An example: “Presentation must be made to [Nominated Bank] and may not be made directly to [Issuer/Guarantor]”.

As indicated previously, only the Issuer/Guarantor or a Nominated Bank is entitled to receive a presentation unless the standby/demand guarantee expressly designates another person. For purposes of receiving a presentation, an Advising Bank is not a “nominated” bank. However, the Advising Bank may also be nominated under ISP98 or UCP600 to confirm, pay, or negotiate, in which case it would be a Nominated Bank for presentation in addition to being an Advising Bank. Likewise, a bank that is not nominated (including the Advising Bank) can act as a presenting bank in that it receives documents from the Beneficiary and forwards them to the Issuer/Guarantor or a Nominated Bank. Delivery of documents to a bank that is not nominated does not constitute “presentation” even though that bank is a “presenting bank” to whom any notice of refusal must be sent and to whom the documents must be returned. Thus, if the undertaking expires before the presenting bank presents the documents to the Issuer/Guarantor or a Nominated Bank, the presentation comes too late in that the standby/demand guarantee has ceased to be available.

3.3.2 Timely Presentation

To satisfy the terms of the undertaking on which the Issuer/Guarantor or Confirmer’s obligations are conditioned, the Beneficiary must make presentation on or before the expiry date. Presentation marks the date and time for purposes of determining whether the Beneficiary has made timely presentation with respect to the expiry date. The same principle applies to any deadline in the standby/demand guarantee.

Under URDG 758 Article 14(b) (Presentation), as long as the presentation indicates that it is to be completed later, the Beneficiary has up to and including “expiry” to present the missing document or documents. ISP98 and UCP600 treat this issue differently. This topic is considered in more detail later in Chapter Three.

Although “expiry” marks the termination of the time when presentation may be made in all three practice rules, a series of court decisions and governmental regulations have from time to time sought to alter the meaning of the term. For example, they sometimes interpret “expiry” to signify the last day for the occurrence of the event entitling the Beneficiary to draw. Such interpretations are aberrations, distort standard international practice, and, as such, should be resisted strongly.

3.3.3 Problems with Specifics Regarding Presentation

A standby/demand guarantee should provide sufficient specifics to enable the Beneficiary to know where to make presentation. Standbys/demand guarantees often contain specific provisions about the place for presentation and even the person to whom presentation must be made. ISP98 Rule 3.04 (Where and to Whom Complying Presentation Made) not only encourages specific details regarding presentation, but also provides default rules in their absence. This approach is true particularly regarding the place for presentation, for which the default rule is that the place of presentation is the place of business from which the standby was issued or confirmed. ISP98 Rule 3.04(d) (Where and to Whom Complying Presentation Made) also

considers the location at that place, permitting presentation at the mail address, mail room, or to any person apparently authorized to receive the presentation.

However, there is a downside to detailed specificity. Unlike commercial LCs, standbys, or demand guarantees are often in place for long periods of time. As a result, various factors with regard to the degree of specificity regarding presentation have to be weighed in drafting a standby/demand guarantee. For example, should a particular person be identified? People leave or they are promoted. Should the title of the person be given? Sometimes the titles of positions change. Should a particular location for presentation be identified? If a bank has multiple offices in a particular location, a drafter would want to identify the place for presentation, although over time offices move or close. The risk underlying these matters is that a presentation in accordance with the terms of the standby/demand guarantee may be mislaid in the event of a change, resulting in preclusion or repudiation of the obligation.

One solution to too specific information regarding presentation is to amend the standby/demand guarantee. This method is less than satisfactory, however, because the Beneficiary's consent is required and most Beneficiaries ignore requests for amendment.

It is also possible to structure the standby/demand guarantee to allow the Issuer/Guarantor to provide the Beneficiary with a binding notice that presentation be made to a new location. Such a term adds another layer of complexity that many banks, Applicants, and Beneficiaries resist. Under UCP600 and URDG 758, these are the only available options.

ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) provides a workable solution to this commonplace problem. It provides, in effect, for "automatic amendment" on the Beneficiary's receipt of notice of another reasonable place of presentation. Under this provision, if at least 30 calendar days notice is given that presentation must be made at another place that is reasonable, the Beneficiary must make presentation to that place. What is a reasonable place, of course, is a factual question to be determined, but in most cases the answer will be obvious.

3.4 The Manner of Presentation: How

Since the commercial use of the telegraph in the 19th century, LC type undertakings and amendments have been issued and advised electronically. However, because of the common use of unique documents of title in commercial LCs, the normal mode of presentation is paper. Such unique documents are rarely required by standbys/demand guarantees. There are various means by which non-unique documents can be presented, including paper, data transmission, email, and telefax.

Ideally, a standby/demand guarantee should indicate the manner in which documents are to be presented. Where it does not, the question arises as to how presentation is to be made and where it does, the question arises as to whether that manner is exclusive or permissive.

Where the standby/demand guarantee is silent, the default means of presentation is paper. UCP600 does not address the means of presentation directly, but the eUCP—its supplement for electronic presentation under the UCP—states that paper is the norm under the UCP. URDG 758 Article 14(e) (Presentation) provides that documents presented must be in paper unless otherwise provided. ISP98 Rule 3.06(b) (Complying Medium of Presentation) also provides that paper is the default means with one notable exception. ISP98 Rule 3.06(b)(i) (Complying Medium of Presentation) provides that an electronic demand complies when it is presented by a Beneficiary that is a SWIFT participant, a bank, or by some other authenticated means. Moreover, under ISP98 Rule 3.06(b)(ii) (Complying Medium of Presentation), the Issuer/Guarantor is given absolute discretion to honour a simple demand presented electronically by a non-bank.

All three practice rules accommodate electronic presentation where the standby/demand guarantee so provides. ISP98 Rule 1.09(c) (Definitions) contains terms that could be used in drafting a provision in a standby permitting electronic presentation. The eUCP also contains definitions accompanied by substantive rules in the event that a UCP600 standby incorporates it. URDG 758 Article 14(c) (Presentation) provides that the guarantee has to indicate the format of the system for data delivery and the electronic address for that presentation and, by failing to do so, any electronic format is suitable.

Under the practice rules, it is not always clear whether presentation can be made by telefax. Where the transmission begins with a paper document that is scanned and transmitted, it is likely that such a presentation would not be regarded as an electronic presentation, but as an electronic copy of the paper original. On the other hand, a telefax can originate in a purely data mode without a paper original, in which case it would be an electronic presentation. If telefax is to be permitted, the standby/demand guarantee should expressly so state for the avoidance of doubt, giving the telefax number. If the standby/demand guarantee indicates a mode of presentation that does not include such a number, it may be inferred that presentation by telefax is not permitted.

3.4.1 Mode of Presentation

The “mode” of presentation is the medium by which it occurs. In a paper presentation, the mode could be by courier, surface mail, physical delivery, or similar method. Unless a standby/demand guarantee expressly mandates the exclusive manner in which a paper presentation must be presented, any mode of presentation is acceptable. In that case, the condition in the undertaking regarding presentation is that the documents be presented to an Issuer/Guarantor or a Nominated Bank on or before the expiration date or any other deadline. How it arrives would not matter unless the standby/demand guarantee expressly mandates an exclusive mode. For that reason a provision indicating the manner of presentation should not be construed to be mandatory unless the undertaking expressly provides that it is mandatory and exclusive. While this rule is stated in URDG 758 Article 14(d) (Presentation), the same principle would apply under ISP98 or UCP600. Even if the undertaking

indicates a mode of delivery, it should not be read as a condition to the Issuer/Guarantor's undertaking and should be overlooked where there is a commercial difficulty in making presentation via the indicated mode unless there is a compelling commercial reason for such a restriction.

3.4.2 Documents Lost in Transit

A problem arises when documents that have been presented are subsequently lost in the process of forwarding them from the Nominated Bank to the Issuer/Guarantor. In such a situation, the Beneficiary is entitled to have the presentation honoured if the documents complied with the terms and conditions of the undertaking. Whether the loss after presentation is to be borne by the Issuer/Guarantor, the Applicant, the Nominated Bank, or another person forwarding the documents is unsettled.

UCP600 Article 35 (Disclaimer on Transmission and Translation) imperfectly attempts to deal with the problem. It provides that the Issuer/Guarantor must reimburse the Nominated Bank, a result that would apply even if the Nominated Bank did not claim reimbursement, but merely acted on the Beneficiary's behalf. This rule would not apply, however, unless the documents had been timely presented (i.e., delivered to the Nominated Bank on or before the expiry date) and forwarded to the Issuer/Guarantor. UCP600 Article 35 (Disclaimer on Transmission and Translation), however, in its first paragraph seems to limit its application to a situation where the bank forwarding the documents sends them in accordance with the requirements of the credit. It remains to be seen how these provisions will be interpreted. The same result would obtain under ISP98 even though there is no express rule. URDG 758 Article 28 (Disclaimer on Transmission and Translation) contains a general disclaimer regarding transmission. It refers to the Issuer/Guarantor, and not any other bank, and applies to the actions of the Issuer/Guarantor, which is consistent with the fact that URDG 758 does not provide for Nominated Banks.

3.5 Incomplete Presentations

An incomplete presentation—as opposed to a partial drawing—is a delivery of less than all the required documents under a standby/demand guarantee. For example, if the undertaking requires presentation of a draft, a statement of default and a copy of an arbitral award, there would be an incomplete presentation if the Beneficiary presented the draft and statement of default, expecting the arbitral agency to present the award later. This would be the case even if the Beneficiary informed the Issuer/Guarantor or Confirmer that the award would be forthcoming shortly.

When there is an incomplete presentation, an Issuer/Guarantor or Confirmer must determine how it should be treated. If it is a “presentation”, the documents must be examined and honoured or refused within the timeframe permitted under the applicable rules and under the sanction of preclusion.

There is no doubt that delivering two-thirds of the required documents is a presentation. The documents were delivered to the Issuer/Guarantor or Confirmer with the intent of drawing on the undertaking. The real problem is the effect of the

Beneficiary's request to the Issuer/Guarantor or Confirmer to hold the documents until the presentation is complete.

ISP98 Rule 3.02 (What Constitutes a Presentation) requires that an incomplete presentation be treated as a presentation requiring examination unless the Issuer/Guarantor, in its sole discretion, elects at the request of the Beneficiary to treat the documents as having been presented at a later date. Such an election would take place under ISP98 Rule 3.11(a)(i) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules). URDG 758 Article 14(b) (Presentation) permits the Beneficiary to dictate to the Issuer/Guarantor whether it must hold documents presented under an incomplete presentation. UCP600 does not address this issue.

If the Issuer/Guarantor or Confirmer examines the documents under ISP98 or UCP600, the notice of refusal should not only note the missing document(s), but any discrepancy in those document(s) that were presented. This action prevents the Issuer/Guarantor or Confirmer from being precluded from asserting those discrepancies under the applicable preclusion rule.

There are significant differences with respect to an incomplete presentation between URDG 758 Article 14(b) (Presentation), ISP98 Rule 3.02 (What Constitutes a Presentation), ISP98 Rule 3.11(a)(i) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules), and UCP600.

Under the approach of URDG 758 Article 14(b) (Presentation), the Beneficiary dictates whether the Issuer/Guarantor must hold the incomplete presentation until such time as the balance of the documents are presented, presumably until the expiration of the demand guarantee. In such a situation, the Issuer/Guarantor of a URDG 758 undertaking would be required to store the documents presented at its own risk which would include their loss or destruction. Nor is there a limit to one document, so multiple documents could be presented in a piecemeal fashion, meaning that the demand could be presented on one date, the statement of default on another, and the arbitral award on a third date.

ISP98 confers discretion as to whether or not to hold the presented documents pending presentation of the balance. Moreover, ISP98 Rule 3.11(a)(i) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules) assures the Issuer/Guarantor or Confirmer of its right to reimbursement from the Applicant if the Issuer/Guarantor elects to hold the documents. The Rule also permits the Issuer/Guarantor or Confirmer to examine the documents and send a notice of refusal even if the Beneficiary requests that they be held.

Under all these rules, an Issuer/Guarantor or Confirmer should require that a request to hold documents be made in writing and not orally. The difficulties with oral requests are too obvious to require explanation.

3.6 Partial and Multiple Drawings

Can a Beneficiary make more than one complying presentation? Unless the undertaking provides otherwise, the answer is "yes" under UCP600 Article 31(a)

(Partial Drawings or Shipments), ISP98 Rule 3.08(b) (Partial Drawing and Multiple Presentations; Amount of Drawings), and URDG 758 Article 17(b) (Partial Demand and Multiple Demands; Amount of Demands).

Can a Beneficiary make a demand for less than the full amount or available balance of the undertaking? Unless the undertaking provides otherwise, the answer is “yes” under UCP600 Article 31(a) (Partial Drawings or Shipments), ISP98 Rule 3.08(a) (Partial Drawing and Multiple Presentations; Amount of Drawings), and URDG 758 Article 17(a) (Partial Demand and Multiple Demands; Amount of Demands).

Problems and questions arise when the undertaking limits this general rule. There are two different ways in which this general rule can be limited, namely stating that “no partial drawings” are permitted or that “no multiple drawings” are permitted. These two provisions have different consequences. For example, if a guarantee states that it is in the amount of USD 1 million, but it also states “no partial drawings”, then a drawing for USD 750,000 would not be permitted.

The statement that “no partial drawings” are permitted signifies that there may only be one drawing and that it must be in the full amount of the undertaking. This interpretation would apply under all three practice rules. ISP98 Rule 3.08(c) (Partial Drawing and Multiple Presentations; Amount of Drawings) expressly provides for this result. Under UCP600 Article 31 (Partial Drawings or Shipments) and URDG 758 Article 17 (Partial Demand and Multiple Demands; Amount of Demands) this result is implied from the meaning of the term “partial”. If the drawing may not be for less than the full amount of the undertaking, there cannot be a drawing for less than the full amount or more than one drawing.

The clause “no partial drawings” makes little sense for most standbys/demand guarantees. The Applicant and Issuer/Guarantor would typically prefer a drawing for less than the full amount over a drawing for the full amount, particularly where less than the full amount was due on the underlying transaction. The reference to “partial drawings” in the UCP Rule was mechanically inserted into the provisions regarding partial shipments without any appreciation of standby practice when the UCP was expanded to encompass standbys.

If instead of stating “no partial drawings”, the guarantee or standby stated “no multiple drawings”, a different result would follow under both URDG 758 and ISP98. For example if a guarantee states that it is in the amount of USD 1 million, and also states “no multiple drawings”, then a drawing for USD 750,000 would be permitted even though it is less than the full amount of the guarantee. ISP98 Rule 3.08(d) (Partial Drawing and Multiple Presentations; Amount of Drawings) provides that only one drawing would be permitted which could be less than the full amount available. URDG 758 Article 17 (Partial Demand and Multiple Demands; Amount of Demands) tracks the ISP98 Rule. UCP600 does not address the “no multiple drawings” provision.

3.6.1 Re-Presentation

Even if a standby/demand guarantee prohibits partial drawings or multiple drawings, the Beneficiary can always cure a non-complying presentation by making a re-presentation of the documents prior to the expiry of the undertaking. Such a re-presented document would not constitute a prohibited partial or multiple presentation.

Likewise, a Beneficiary can withdraw a presentation before refusal, cure it, and re-present without running afoul of the prohibitions.

The exceptions discussed here are inferred from practice rules rather than expressly stated.

3.6.2 Installments

Under commercial LC practice, it is expected that there will be a shipment of each installment of the goods ordered and a corresponding drawing on the related credit. Where an installment is missed, UCP600 Article 32 (Installment Drawings or Shipments) provides that the credit should cease to be available because there has been a failure to ship pursuant to the underlying transaction.

The UCP Installment Rule was expanded from its reference to shipments to include drawings when the UCP was revised to encompass standby LCs. The drafters probably did not appreciate that application of the installment rule to a standby made no sense under standby practice. A standby supporting an obligation to pay in installments would typically only be drawn when there was a failure to make a direct payment. Accordingly, it would be normal under a standby not to make a drawing on an installment. A rule that provided that the standby ceased to be available if there was no drawing on every installment that was due would defeat the role of the standby as a backup mechanism.

An example is an Applicant that agreed to pay USD 100,000 via a promissory note in ten installments due annually every 1st April backed by a standby/demand guarantee. The Applicant paid the Beneficiary directly on the 2012 installment, so that the Beneficiary did not draw on the standby for the 2012 installment. In April 2013, the Applicant defaulted on the April 2013 payment. If the standby/demand guarantee were subject to UCP600, a drawing on the 2013 installment would be discrepant because the standby would have ceased to be available when there was no drawing on the 2012 installment. This result contradicts the Beneficiary's expectation that the standby would be available as a backup for non-payment of any installment.

On the other hand, ISP98 Rule 3.07(a) (Separateness of Each Presentation) expressly disclaims applicability of the UCP Installment Rule to ISP98 standbys. URDG 758 does not address this issue.

3.6.3 Separateness of Each Presentation

There are situations where an Issuer/Guarantor honours a presentation that does not comply with the terms and conditions of the standby/demand guarantee under which it is presented. Such an honour can occur because the Issuer/Guarantor has decided that the discrepancy is minor, the Issuer/Guarantor has made a mistake, or the Issuer/Guarantor has obtained the Applicant's waiver. In these situations, it may appear to the Beneficiary that the documents comply because the Issuer/Guarantor behaves as if they do.

Where the Issuer/Guarantor has honoured a non-complying presentation, can it refuse to honour a subsequent, similar presentation under the same or a similar standby/demand guarantee? The answer under LC practice is that it can refuse. The undertaking of an Issuer/Guarantor is to honour complying documents. Past conduct regarding a prior presentation is not a course of dealing or course of performance for the current presentation because the express terms of the standby/demand guarantee control each presentation.

ISP98 Rule 3.07(c) (Separateness of Each Presentation) reflects this practice. It provides, “[h]onour of a non-complying presentation, with or without notice of its non-compliance, does not waive requirements of a standby for other presentations.”

URDG 758 Article 18(b) (Separateness of Each Demand) similarly provides “[p]ayment of a demand that is not a complying demand does not waive the requirement for other demands to be complying demands.”

UCP600 does not address this issue.

3.6.4 Cure

When a Beneficiary makes a non-complying presentation that is dishonoured or withdraws a presentation before dishonour the question arises whether the Beneficiary can cure the presentation. This question, in part, was addressed in connection with prohibitions of partial or multiple drawings earlier in Chapter Three, but is one that arises in connection with every non-complying presentation.

The first factor to consider is whether the expiration date of the undertaking has passed. If so, then it is too late to cure.

If the undertaking has not expired, then the Beneficiary can re-present whether or not the standby/demand guarantee prohibits partial or multiple drawings or presentations. This principle is embodied in ISP98 Rule 3.07(a) (Separateness of Each Presentation) which provides:

Making a non-complying presentation, withdrawing a presentation, or failing to make any one of a number of scheduled or permitted presentations does not waive or otherwise prejudice the right to make another timely

presentation or a timely re-presentation whether or not the standby prohibits partial or multiple drawings or presentations.

URDG 758 Article 18(a) (Separateness of Each Demand) follows the ISP98 Rule. UCP600 does not address this issue, but ICC Banking Commission opinions have articulated this principle.

3.6.5 Wrongful Dishonour

If the Issuer/Guarantor dishonours a presentation that complies on its face with the terms and conditions of the standby/demand guarantee, it is liable for wrongful dishonour of that presentation.

Wrongful dishonour of a presentation by itself, however, does not constitute repudiation of the entire obligation embodied in the standby/demand guarantee. This principle is stated in ISP98 Rule 3.07(b) (Separateness of Each Presentation). Neither URDG 758 nor UCP600 address this issue.

It should be noted, however, that other actions or statements of the Issuer/Guarantor besides refusal of a presentation can constitute repudiation or even anticipatory repudiation of the obligation. For example, if the Issuer/Guarantor states that its obligation has been terminated because the amount due has been fully paid and the undertaking is exhausted, there would be repudiation (or anticipatory repudiation) if it were determined that the amount due was not exhausted.

3.7 Presentation After Normal Banking Hours

UCP600 Article 33 (Hours of Presentation) states that a bank need not accept a presentation after banking hours, but ICC Banking Commission opinions have treated receipt in a bank's mailroom which was open after hours as acceptance of a presentation even when the bank is otherwise closed for business. There is no equivalent rule in URDG 758. ISP98 Rule 3.05(b) (When Timely Presentation Made) provides that a presentation made after hours is deemed to have been made on the next business day. However, the Issuer can waive this Rule in its sole discretion and without jeopardizing its right to reimbursement from the Applicant under ISP98 Rule 3.11(a)(iv) (Issuer Waiver and Applicant Consent to Waiver of Presentation Rules).

3.8 Extend or Pay Demands

An extend or pay demand arises in situations where the undertaking is about to expire and the Beneficiary demands that the Issuer/Guarantor extend the undertaking or pay. Often these demands are not accompanied by complying documents. The question for Issuers/Guarantors is what to do in such situations. In particular, they must decide whether to treat such a demand as a "presentation" that would require timely and adequate notice of refusal with the possibility of preclusion overshadowing the failure to give such notice. There are also a number of secondary issues such as the consequences of an extension, e.g., whether the extension is an amendment requiring Beneficiary consent, the implications of granting an extension on the demand, and

how to address an extend or pay demand in a situation involving a Local Undertaking and a counter undertaking or a confirmation.

A classic example of an extend or pay demand is a communication from the Beneficiary to the Issuer/Guarantor immediately prior to the pending expiration date. The communication effectively says “extend your undertaking or pay us the amount due under it”. The problem for the Issuer/Guarantor which arises on receipt of such a communication is how it should respond. Is this document a request for an amendment extending the undertaking and what happens if the Issuer/Guarantor proposes an amendment? Is it a demand? Is it merely something that can be ignored at the Issuer/Guarantor’s discretion?

While UCP600 provides no guidance in such a situation, ISP98 and URDG 758 do. URDG 758 Article 23 (Extend or Pay) is roughly modeled on ISP98 Rule 3.09 (Extend or Pay). The major difference is that ISP98 Rule 3.09 (Extend or Pay) applies to all extend or pay demands whether or not they comply. On the other hand, URDG 758 Article 23 (Extend or Pay) applies only to a “complying demand”, and provides no guidance for a non-complying presentation. A non-complying extend or pay demand would therefore come within the scope of URDG 758 Article 16 (Information About Demand), requiring the Issuer/Guarantor to, without delay, inform the Instructing Party of the extend or pay request while refusing the discrepant presentation. Therefore, URDG 758 Article 23 (Extend or Pay) places an unobservant Issuer/Guarantor at risk of preclusion if it assumes that the extension provision of URDG 758 Article 23 (Extend or Pay) is applicable or if it errs regarding the compliance of the demand.

3.8.1 Consequences of Extension

If an extend or pay demand is to be treated as a presentation, then a number of other questions follow whose answers depend on whether the standby/demand guarantee is subject to ISP98, UCP600, or URDG 758.

None of the practice rules require an Issuer/Guarantor to accede to a demand to extend or pay. Discretion to decide whether to extend or pay the complying demand is inherent in URDG 758 Article 23 (Extend or Pay) and to extend or dishonour/honour in ISP98 Rule 3.09(b)(ii) (Extend or Pay). UCP600 does not address this issue as such, but UCP600 Article 10(a) (Amendments) requires Issuer/Guarantor consent for an amendment to be effective.

How much time does an Issuer/Guarantor have to decide whether to accede to the Beneficiary’s demand? The Issuer/Guarantor has the amount of time available in which to give a notice of refusal before it is precluded, namely, five banking days from the day of presentation under UCP600 Article 16(d) (Discrepant Documents, Waiver and Notice) and seven banking days from the banking day of presentation under ISP98 Rule 3.09(b)(iv) (Extend or Pay), which allows the Issuer/Guarantor the maximum of seven banking days in an extend or pay situation.

Where a complying extend or pay demand is made on a guarantee, URDG 758 Article 23(a) (Extend or Pay) permits the Issuer/Guarantor to suspend payment for “a period not exceeding 30 calendar days following its receipt of the demand.” Following such suspension, where the Local Bank makes a complying extend or pay demand on the counter-guarantee running to it, URDG 758 Article 23(b) (Extend or Pay) allows the Counter-Guarantor to suspend payment on the counter-guarantee for “a period not exceeding four calendar days less than the period during which payment of the demand under the [local] guarantee was suspended.” The Issuer/Guarantor must “without delay” inform the Instructing Party or Counter-Guarantor, in the case of a counter-guarantee, of the suspension under URDG 758 Article 23(c) (Extend or Pay).

While these time frames may seem bewildering with the period for suspension of the counter-guarantee shorter than for the Local Guarantee, the context sheds some light. Because the demand under the counter undertaking must comply in order for URDG 758 Article 23(b) (Extend or Pay) to be applicable—as is the case regarding the Local Guarantee under URDG 758 Article 23(a)—the Counter-Guarantor must either pay or extend the obligation.

Even if the Issuer/Guarantor accedes to the request to extend the undertaking, what about the demand that has been made which is a presentation requiring honour? ISP98 Rule 3.09(b) (Extend or Pay) provides that an extend or pay demand implies that the Beneficiary retracts its demand if the request to extend is granted. URDG 758 Article 23(d) (Extend or Pay) has a similar rule. UCP600 does not address this issue.

What if the Issuer/Guarantor refuses to extend? If the Issuer/Guarantor refuses to extend the undertaking as requested, the Issuer/Guarantor must examine the documents presented and either honour or give a notice of refusal by the seventh banking day following the banking day of presentation under ISP98 Rule 3.09 (Extend or Pay). Under URDG 758 Article 23(d) (Extend or Pay), it must pay since the URDG 758 Rule only deals with complying presentations. The effect of the URDG 758 Rule would be to enable the Issuer/Guarantor to suspend payment for up to 30 calendar days although it has, in effect, admitted its obligation to pay. UCP600 does not address this issue.

Since any extension in response to a demand to extend or pay requires an amendment, must the Issuer/Guarantor obtain the Beneficiary’s consent? Under ISP98 Rule 3.09(b)(i) (Extend or Pay), Beneficiary consent to the date requested is treated as being implied. Neither URDG 758 nor UCP600 address this issue.

If the Issuer/Guarantor accedes to the request to extend or pay, none of the practice rules indicates what should be done with the documents that were presented together with the request to extend or pay. ISP98 Rule 5.07 (Disposition of Documents) provides that documents presented must be disposed of in any manner reasonably indicated by the presenter, but that the failure to do so does not give rise to preclusion. URDG 758 Article 24(g) (Non-Complying Demand, Waiver and Notice) permits return of paper documents to the presenter and disposal of electronic documents without responsibility. UCP600 Article 16 (Discrepant Documents, Waiver and Notice) requires a notice of discrepancy to state what is being done with the

documents, but the Article does not indicate what must actually be done with the documents or whether preclusion is applicable for the failure to act appropriately. This issue is discussed in greater detail in Chapter Five (Honour and Dishonour).

3.9 Deadline When Bank is Ordinarily Closed

A problem arises when a presentation is made on the pendency of a deadline and the place of presentation is closed because it falls on a non-business day.

All three practice rules provide for extension of the expiration of an undertaking when it falls on a day on which there is closure due to a holiday or non-business day. In such a situation, URDG 758 Article 25(d) (Reduction and Termination) provides that the expiry date is extended to “the first following business day” at the place where presentation would have been made. ISP98 Rule 3.13(a) (Expiration Date on a Non-Business Day) provides:

If the last day for presentation stated in a standby (whether stated to be the expiration date or the date by which documents must be received) is not a business day of the issuer or nominated person where presentation is to be made, then presentation made there on the first following business day shall be deemed timely.

UCP600 Article 29(a) (Extension of Expiry Date or Last Day for Presentation) provides “[i]f the expiry date of a credit or the last day for presentation falls on a day when the bank to which presentation is to be made is closed . . . the expiry date or the last day for presentation, as the case may be, will be extended to the first following banking day.”

The Rules use two different terms, “business day” and “banking day”. UCP600 Article 2 (Definitions) defines “Banking day” as “a day on which a bank is regularly open at the place at which an act subject to these rules is to be performed.” ISP98 and URDG 758 refer to “Business day”. The terms are defined in each Rule. URDG 758 Article 2 (Definitions) defines “Business day” as “a day on which the place of business where an act of a kind subject to these rules is to be performed is regularly open for the performance of such an act”. ISP98 Rule 1.09(a) (Defined Terms) defines “Business day” as “a day on which the place of business at which the relevant act is to be performed is regularly open”. Where an Issuer/Guarantor or Confirmer of a UCP600 standby/demand guarantee is not a bank, the rule would require interpretation to make it applicable.

While the three practice rules operate similarly when the expiry date falls on a non-business day, only ISP98 encompasses other deadline situations that fall on a day when the Issuer/Guarantor is not regularly open for business and that may arise under standbys/demand guarantees such as deadlines for presentation of demands in installments.

Assume that the standby/demand guarantee requires presentation of the first installment on Sunday 17 January (when the Issuer is closed). If the Beneficiary

attempts to present the first installment on the next business day, ISP98 Rule 3.13(a) (Expiration Date on a Non-Business Day) would extend the time for presentation to Monday 18 January. This provision would make the presentation timely since the extension rule applies to “the expiration date or the date by which documents must be received”. On the other hand, presentation on Monday 18 January would not be timely under URDG 758 or UCP600 because the scope of their extension rules applies only to expiry dates and not to other deadlines.

As noted earlier, there would be an additional problem for the Beneficiary of a UCP600 standby/demand guarantee. Under UCP600 Article 32 (Instalment Drawings or Shipments), the failure of the Beneficiary to make a demand under the first installment would result in the cessation of the availability of the standby for future drawings although this result is absurd for most standby situations.

3.10 Closure When the Expiration Date is on a Business Day

A different problem arises when the place to which the Beneficiary is entitled to present documents is closed on a business day on which it would be expected to be open. Such closure is typically because of a supervening event. For example, an electrical outage on Monday 18 March, 2013 would be a supervening event. The question is whether the Beneficiary or the Applicant bears the risk of the inability of the Beneficiary to make presentation on this day. Another question is whether the Beneficiary has forfeited its right to make a presentation when the Issuer/Guarantor re-opens on Tuesday 19 March, 2013 when the electrical power is restored.

The approach to this question under commercial LCs has been to place this risk on the Beneficiary. Because the Applicant typically wants the documents, is probably contractually bound to pay, and the Beneficiary typically retains control of the documents which in turn give control of the goods, this approach has not caused significant problems for Beneficiaries of commercial LCs. This approach has, however, been a matter of significant concern to sophisticated Beneficiaries of standbys who typically insist that a UCP standby vary the closure rule and provide for an extension of the expiration date in such situation. If there is no variation, a presentation where the Issuer/Guarantor re-opens after closure on the business day of expiration under a UCP600 standby would not be timely under UCP600 Articles 29(a) (Extension of Expiry Date or Last Day for Presentation) and 36 (Force Majeure).

Recognizing that the approach of the UCP to closure on a business day was inapt for standbys/demand guarantees, ISP98 Rule 3.14 (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) extends the expiration date. URDG 758 Article 26 (Force Majeure) follows the ISP98 approach generally but the manner in which they approach and solve this problem differs considerably.

3.10.1 Closure Due to Force Majeure

UCP600 and URDG 758 treat the problem of closure on a business day under the concept of “force majeure”, that is an outside factor intervening to cause closure. The

major problem with force majeure as a test for a practical problem is that it is an abstract concept whose presence in a specific situation cannot readily be determined.

There is no formal definition of “force majeure” in UCP600 or in URDG 758. UCP600 Article 36 (Force Majeure) is entitled “Force Majeure” and informally explains the significance of the term, namely “the consequences arising out of the interruption of its business by Acts of God, riots, civil commotions, insurrections, wars, acts of terrorism, or by any strikes or lockouts or any other causes beyond its control.” URDG 758 Article 26(a) explains it as “acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor”.

The notion of a cause “beyond the control” of the Issuer/Guarantor decreases the usefulness of the concept of force majeure. It is not always clear whether a closure is caused by a force majeure event. For example, a strike may be a cause beyond the control of the bank because it may not have control over those on strike (but again, it may arguably be within its control). However, a lock out certainly is not a force majeure because the bank itself is doing the locking out.

3.10.2 Inadequacy of Force Majeure as a Basis for LC Practice

An Issuer/Guarantor’s closure on a day it would otherwise be open for business due to an electrical outage provides one illustration of the inadequacy of force majeure as a basis for LC practice. Whether closure because of an electrical outage is caused by a force majeure event depends on its cause. What if a mistake by a maintenance employee of the bank caused the outage? If so, the closure is probably not a force majeure event.

If the bank closure was not because of a force majeure event, it is unclear what consequence would follow under UCP600. Under UCP600 Article 29(a) (Extension of Expiry Date or Last Day for Presentation), the expiry date would be extended, and the Beneficiary could either re-present on the next business/banking day when it reopened or sue the bank for repudiating its obligations by not being open when the documents were tendered on a business/banking day. The same result would follow if the bank refused due to expiry when it was later determined that the closure was not due to force majeure. Under URDG 758, there would be no extension if there was no force majeure event, but the Issuer/Guarantor would still be subject to the same quandaries as it would under UCP600.

The problem is that the bank is closed on a day when it ought to be open. The question that ought to be asked instead of whether closure was caused by a force majeure event, is whether an Issuer/Guarantor or Beneficiary of a standby/demand guarantee is prepared to take a chance on the interpretation of what is inherently an ambiguous and highly debatable term. Reasonable business people would not accept such a risk.

3.10.3 Solutions and Guidance to Closure from the Practice Rules: UCP600

The UCP600 solution to the closure of the bank to whom presentation is made on the expiry date is to shift the risk to the Beneficiary under the clumsy device of force majeure. Assuming that there is a force majeure event, an attempt to present is not timely and there is no extension of the time to present to a time when the bank is opened. This approach is reflected in UCP600 Article 29(a) (Extension of Expiry Date or Last Day for Presentation). While this notion may have made some sense with respect to commercial LCs (where the discrepancy is probably waived and presumably the Beneficiary controls the goods since it holds the documents), it makes no sense under UCP600 demand guarantees or standbys where the Issuer/Guarantor is unlikely to waive the discrepancy if the closure is not because of “force majeure” and the documents do not typically represent control of goods. Because rational Beneficiaries would not accept the UCP solution, it is regularly varied in standbys/demand guarantees subject to the UCP. There is, however, little uniformity in the format used for the variations as to the length of time, if any, or the consequences of re-opening.

3.10.4 Solutions and Guidance to Closure from the Practice Rules: ISP98

ISP98 recognized the need for an extension and sought to impose uniformity by adopting a default rule based on the format used by more powerful Beneficiaries. URDG 758 followed this general approach while differing in the particulars.

ISP98 takes a radically different approach than the UCP to treating closure due to extraordinary events. As indicated, under ISP98 Rule 3.14(a) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation), whether an event is force majeure or not is irrelevant. Rather, the dispositive factor is whether the deadline fell on a day on which the place for presentation is closed when it would normally be open and presentation was not made because of the closure. If these conditions are satisfied, the deadline is automatically extended until 30 calendar days after the Issuer/Guarantor re-opened.

The period of 30 calendar days was picked because most Beneficiaries that varied the UCP Rule for standbys chose a 30 calendar day extension. However, ISP98 Rule 3.14(a) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) is a default rule that can be varied by the terms of the standby that can provide for a longer or shorter period of time for presentation after re-opening of the place for presentation.

There are however, occasions when the Issuer/Guarantor is not content to wait until the place for presentation re-opens, such as when a considerable length of time will pass before the place for presentation re-opens. Indeed, the place for presentation may not re-open at all.

ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) allows the Issuer/Guarantor to designate a “reasonable” alternative place for presentation. The alternative designation under this Rule is not a proposal to amend and does not require the Beneficiary’s consent to be effective. The provision functions as an automatic amendment. However ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) also provides important protections for Beneficiaries. First, it requires that the Beneficiary must have received notice of this designation. Second, it requires that the place designated must be “reasonable” (i.e., commercially practicable for the Beneficiary to reach).

The ISP98 provision permitting the designation of an alternative place for presentation is attractive for both the Issuer/Guarantor and Beneficiary where there has been closure because of a supervening event. However, there does not need to be a closure caused by a supervening event. ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation) also permits the Issuer/Guarantor to designate an alternative place for presentation in advance of a closure, or relocation, without risking a repudiation of its obligations. As long as the notice of an alternate, reasonably located place for presentation is received more than 30 calendar days before the change, it would be automatically effective under ISP98 Rule 3.14(b) (Closure on a Business Day and Authorization of Another Reasonable Place for Presentation).

There is not a similar provision permitting designation of an alternative place for presentation under UCP600 or URDG 758. Under these practice rules, the best that the Issuer/Guarantor can do in a situation where it wishes to close or relocate a facility is to propose an amendment and hope that the Beneficiary will consent. However, most Beneficiaries simply ignore such requests and, in any event, need not consent to them.

3.10.5 Solutions and Guidance to Closure from the Practice Rules: URDG 758

While URDG 758 Article 26 (Force Majeure) uses the UCP600 concept of force majeure, it does not shift the risk of closure onto the Beneficiary as does UCP600. Although URDG 758 extends the time for re-presentation (as does ISP98 and unlike UCP600), it operates quite differently than ISP98. URDG 758 Article 26(b) (Force Majeure) is not restricted only to force majeure situations. The Rule expands its application to situations where “presentation or payment under . . . [a] guarantee is prevented by force majeure”, meaning where presentation is prevented, where examination is prevented, and where payment is prevented.

3.10.5.1 URDG 758 Article 26 (Force Majeure): Force Majeure Preventing Presentation

URDG 758 Article 26(b)(i) (Force Majeure) extends the date of expiration for a guarantee and counter-guarantee for 30 calendar days from the applicable expiration date.

What if the bank is not re-opened within 30 calendar days? In some force majeure situations, 30 calendar days is a reasonable time for the bank to re-open. However, in many recent natural and human disasters, affected banks have not re-opened within 30 days. In the World Trade Center collapse and recent severe hurricanes, closings have exceeded 30 calendar days.

Because URDG 758 Article 26 (Force Majeure) affords only partial protection to Beneficiaries, they must consider whether they are prepared to risk that a force majeure event will close the bank for more than 30 calendar days. This risk will be unacceptable to prudent risk managers and counsel in its current form. If protection is desired, there is little point in going halfway.

3.10.5.2 URDG 758 Article 26 (Force Majeure): Documents Presented, but Force Majeure Preventing Examination

URDG 758 Article 26(b)(ii) (Force Majeure) also applies to documents that have been timely presented, but not examined. Neither ISP98 nor UCP600 operates where documents have been presented prior to the occurrence of the force majeure event. Once presented under these rules, the risk shifts to the Issuer/Guarantor or Confirmer. The URDG 758 Rule, however, suspends the time for examination under URDG 758 Article 20 (Time for Examination of Demand; Payment) until resumption of the Issuer/Guarantor's business. What constitutes the "resumption of the guarantor's business" is not explained. Does it mean the business of the place for presentation that is affected? Moreover, what if the documents have been examined and no notice of refusal has been sent?

URDG 758 Article 26(b)(ii) gives no indication of the consequence of a failure of the location for presentation to re-open. It would appear that under this rule a Beneficiary that has made a timely presentation would have no action against an Issuer/Guarantor who had not honoured because it had not examined the presentation. It is unlikely that a prudent Beneficiary would agree to such a result.

URDG 758 Article 26(b)(ii) (Force Majeure) also contains a potential trap for Issuers/Guarantors because it refers to the time for examination under URDG 758 Article 20 (Time for Examination of Demand; Payment), but it fails to reference URDG 758 Article 24(e) and (f) (Non-Complying Demand, Waiver and Notice). URDG 758 Article 24(e) requires a refusal notice to be sent no later than the 5th business day following the day of presentation. URDG 758 Article 26(b)(ii) (Force Majeure) does not refer to this requirement, creating the possibility that the Issuer/Guarantor will be precluded from asserting a discrepancy if it does re-open within 30 calendar days and examines the documents.

3.10.5.3 URDG 758 Article 26 (Force Majeure): Force Majeure Preventing the Issuer/Guarantor from Paying

URDG 758 Article 26(b)(iii) (Force Majeure) also applies to a situation where the Beneficiary has made a timely presentation of complying documents, but where the

force majeure event has prevented the Issuer/Guarantor from effecting payment. Neither ISP98 nor UCP600 contain such a provision. Under these practice rules, where complying documents have been presented (or timely notice of refusal not given), the Issuer/Guarantor or Confirmer is obligated to honour or pay. However, the URDG 758 Rule provides that the balance due is only to be paid when the force majeure “ceases”. What the cessation of the force majeure means is not clear. Unlike URDG 758 Article 26(b)(i) (Force Majeure) which turns on a fixed number of calendar days, and URDG 758 Article 26(b)(ii) (Force Majeure) which turns on the resumption of business, URDG 758 Article 26(b)(iii) (Force Majeure) turns on the force majeure ceasing. It is unclear whether that signifies the resumption of business or the end of the force majeure event.

The end of the force majeure event, however, does not necessarily mean that the Issuer/Guarantor will have re-opened. Even though the event itself has ended (e.g. a massive storm), the Issuer/Guarantor may not be able to re-open immediately. Is it in breach of its obligation at the point the “event” ceases?

When cessation occurs, whether the Beneficiary would have an action for wrongful dishonour against the Issuer/Guarantor that failed to pay may depend on the interpretation of these provisions.

The Beneficiary must ask itself whether it is prepared to wait for payment and choose the interpretation of these provisions until the force majeure ceases. In some cases, cessation will be apparent. In others, it will not. Does that mean that the Beneficiary will not have a claim against the Issuer/Guarantor until cessation occurs? As indicated, some force majeure events can continue for long periods of time. In other situations, the event will have ceased, but the Issuer/Guarantor may not be able to re-open due to the consequences. And, will a prudent Beneficiary be prepared to assume the risk that it cannot bring an action against the Issuer/Guarantor until cessation occurs?

3.10.5.4 Closure and Extension in Counter Undertaking Situations & Confirmation

When a transaction involves two or more related undertakings, the consequences of a closure of one of the banks making the undertaking become very complex.

If the bank closed has issued the counter undertaking, then the problem is less difficult. The claim of the Local Bank would fall within the practice rules to which the counter undertaking was subject. The concern of the Local Bank, of course, should be to protect itself in such a situation.

Where there is closure by the Local Bank on an expiry date, the problem becomes more difficult. The undertaking to the Local Beneficiary will only be extended if the local undertaking is extended which will depend, in part, on the practice rules to which the local undertaking is subject. If the local undertaking is extended, the Local Bank may encounter difficulties in claiming under the counter undertaking which may have expired in the interim.

Similar issues can arise under a confirmation if the confirmer is closed. In that case, the Beneficiary would have an alternative place for presentation but is likely to face practical problems in making presentation to the issuer.

3.10.5.5 ISP98 Approach to Closure in Counter Undertaking Situations; UCP600

UCP600 does not anticipate a counter undertaking issued subject to it. Therefore, its closure rules would apply to such a counter undertaking as well as to any local undertaking subject to it. Nor does it address the application of its force majeure closure rule to presentations by the Beneficiary to any Confirmer. On the other hand, the Confirmer would be entitled to forward documents to the Issuer where it had honoured its confirmation because the expiry of the standby is tolled by presentation to the Confirmer.

ISP98 also eschews any attempt to regiment or anticipate the solutions to a counter undertaking situation or to a confirmation. Nor does it expect that the two undertakings are subject to the same rules. Because the interests of the bank issuing the counter undertaking, the Local Bank, and the Local Beneficiary are adverse to one another in such a situation, it was thought impossible to draft a rule that was neutral or satisfactory. It is left to the parties to work out an appropriate regime.

3.10.5.6 URDG 758 Article 26 (Force Majeure): Application to Counter-Guarantee Situations

URDG 758 Article 26 (Force Majeure), on the other hand, contains a parallel structure to its rules for demand guarantees addressing the impact of a force majeure closure on a counter-guarantee situation. Article 26(b) (Force Majeure) deals with the impact of a force majeure closure of the Local Bank (as well as a situation where there is no counter-guarantee) and Article 26(c) (Force Majeure) deals with the impact of a force majeure closure of the Counter-Guarantor. As indicated, these provisions apply to the inability of the Beneficiary under the Local Guarantee, or the Local Bank under the counter-guarantee, to make presentation because of the force majeure closure of the respective bank on the expiry date. The provisions also apply to documents that have been presented and not examined and documents that have been examined and deemed to comply, but not honoured.

The problems and questions discussed previously about URDG 758 are applicable to a force majeure closure in a counter-guarantee situation. Moreover, there are additional problems resulting from the complex nature of the arrangement which are compounded by the drafting of URDG 758, the solutions adopted, and the failure to develop adequate terminology that distinguishes the two situations.

URDG 758 Article 26(b)(i) (Force Majeure) addresses two different issues: notice of closure and extension if there has not been presentation because of a force majeure closure. These problems are distinct and can readily be confused. The requirement that the Local Bank give notice of the closure to the Counter-Guarantor applies not

only in the situation covered in Article 26(b)(i) (Force Majeure), but also to those situations covered by Article 26(b)(ii) and (b)(iii) (Force Majeure).

If the Local Bank is closed on the expiry date because of a force majeure event, preventing presentation, then URDG 758 Article 26(b)(i) (Force Majeure) extends the expiry date of both the Local Guarantee and the counter-guarantee for 30 calendar days from their respective expiry dates. The Local Bank is required to inform the Counter-Guarantor “as soon as practicable”. If the Local Bank receives the presentation, but examination has not been conducted, then URDG 758 Article 26(b)(ii) (Force Majeure) suspends the running of the time for examination until the Local Bank resumes its business. URDG 758 Article 26(b)(iii) (Force Majeure) addresses the situation where a “complying demand” has been presented before the expiration date, but not paid because of the force majeure. It is not clear how this provision is distinct from URDG 758 Article 26(b)(ii) (Force Majeure). Does URDG 758 Article 26(b)(ii) (Force Majeure) cover non-complying demands? Does it envision that the Beneficiary would be entitled to cure the presentation, or does it merely protect the Local Bank against operation of the preclusion rule? If so, then why is the reference to URDG 758 Article 20 (Time for Examination of Demand; Payment) and not to URDG 758 Article 24 (Non-Complying Demand, Waiver and Notice) which contains the preclusion rule? What if the notice of note refusal is not timely or adequate? Would that constitute a complying demand?

If the Counter-Guarantor is closed on the expiry date of the counter-guarantee due to a force majeure, then URDG 758 Article 26(c) (Force Majeure) operates in a manner roughly parallel to Article 26(b) (Force Majeure) with similar problems and ambiguities.

The URDG 758 provisions on force majeure present significant issues and problems, and given their untested character, parties should carefully review those provisions before use. Where the Local Bank has not made a presentation to the Counter-Guarantor because the Counter-Guarantor has been closed because of a force majeure event, the expiry date is extended for 30 days from the date the Counter-Guarantor informs the Local Bank that the force majeure has ceased. Notably, this provision, unlike that of URDG 758 Article 26(b)(i) (Force Majeure) protects the Local Bank where the Counter-Guarantor’s closure is lengthy since it only begins to run from the “cessation” of the force majeure (although, as observed, that may not mean re-opening).

Why give the Local Bank more protection than the Local Beneficiary or the Beneficiary of a regular guarantee where there is a counter-guarantee? URDG 758 Article 26(c)(i) (Force Majeure) reveals that the drafters deliberately preferred Local Banks over Beneficiaries, whether a Local Beneficiary of a counter-guarantee or a Beneficiary of a guarantee where there was no counter-guarantee. Similar to ISP98, the running of time for the Local Bank only begins when the force majeure has ceased. This result is in contrast to the Issuer/Guarantor (where there is no counter-guarantee) or Local Bank that has a flat 30 calendar period from the expiry date—whether or not the force majeure has ceased or the bank has re-opened.

URDG 758 Article 26(c)(ii) (Force Majeure) parallels Article 26(b)(ii) (Force Majeure) and contains the same difficulties, namely whether it also suspends the operation of the preclusion rule of URDG 758 Article 24 (Non-Complying Demand, Waiver and Notice).

URDG 758 Article 26(c)(iii) (Force Majeure) does not parallel Article 26(b)(iii) (Force Majeure) although both deal with a complying demand not paid before force majeure closure. Like Article 26(b)(iii) (Force Majeure), Article 26(c)(iii) (Force Majeure) does not address the effect of a notice of refusal that is not timely or adequate. However, Article 26(c)(iii) (Force Majeure) requires that the Local Bank be “paid when the force majeure ceases”, whereas Article 26(b)(iii) (Force Majeure) only allows the Local Bank 30 calendar days to make a demand on the Counter-Guarantor.

3.10.5.7 Does URDG Force Majeure Rule Affect Inability to Present?

The drafters of the URDG 758 departed from the approach of the UCP with respect to force majeure and did not follow the approach of the ISP98 which was based on long-standing standby practice, thereby forging new ground. Both UCP600 and ISP98 focus on the closure of the bank at which the presentation is to be made. The URDG takes a different and untried approach in its formula both in Article 26(b) (Force Majeure) and Article 26(c) (Force Majeure): regardless of whether the undertaking is a guarantee or counter-guarantee, the force majeure provisions are triggered if the guarantee expires at a time when force majeure event prevents presentation. “Presentation” is a defined term in the URDG, meaning either “delivery” or “the documents delivered”.

The opening clause to URDG 758 Article 26(b) (Force Majeure) provides “[s]hould the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure”. What is the result if a force majeure event prevents the Beneficiary’s presentation even though the Issuer/Guarantor is not closed? It is a reasonable interpretation of the preface of Article 26(b) (Force Majeure) and Article 26(c) (Force Majeure) to suggest that the Beneficiary’s failure to deliver the documents because of a force majeure event affecting only the Beneficiary, and not causing the Issuer/Guarantor to be closed, might well fall within the scope of URDG 758 Article 26(b) (Force Majeure) and (c) (Force Majeure).

However, it is unlikely that drafters of URDG 758 intended an outcome that would permit the Beneficiary to avail itself of the force majeure provisions where a force majeure event prevented it from making a presentation. A Beneficiary that was unable to get the documents to the Issuer/Guarantor because of a force majeure event might well urge the application of URDG 758 Article 26 (Force Majeure). A recent example would be the Icelandic volcano which did not close banks, but shut down air and air courier traffic throughout Europe. Because of the structure of ISP98 and UCP600, this argument would not prevail under those Rules. Issuers/Guarantors and Applicants should consider whether they are prepared to accept this risk of the interpretation of these provisions. Ultimately, it will be a matter for interpretation for the courts.

3.10.5.8 Closure Prior to Expiry

None of the practice rules address a situation where the bank obligated on the independent undertaking is closed for whatever reason in the days immediately prior to the expiry date. Even if the bank re-opens in time for the expiry date, there may be disruption and uncertainty on the part of the Beneficiary in organizing a presentation on or immediately before the reopening on or before the expiry date. In such a situation, a conservative Beneficiary may wish to insist that the undertaking to it provide for an extension and a right to present subsequent to the expiry date if there is a closure that precedes the expiry date.

3.11 Review Questions

3.1 What is a “Presentation” and a “Presenter”?

3.1.1.1 What is a “Presentation”?

3.1.1.2 What are an Issuer/Guarantor or Confirmer’s obligations on presentation?

3.1.1.3 Is a required advance payment undertaking “presented” when delivered to the Issuer/Guarantor as a pre condition of a drawing?

3.2 Where is Presentation to be Made?

3.2.1.1 Where must presentation be made?

3.3 To Whom is Presentation to be Made?

3.3.4.1 May presentation be made to the Issuer/Guarantor even if the standby/demand guarantee indicates another entity to whom presentation can be made?

3.3.4.2 Must presentation be made to the Issuer/Guarantor?

3.3.4.3 Can presentation be made to an Advising Bank?

3.3.4.4 Where should presentation be made if the standby/demand guarantee is silent in regard to the specific location within the place of presentation?

3.3.4.5 Where should a Beneficiary make presentation if the Issuer/Guarantor’s location has moved from the one specified under the standby/demand guarantee?

3.4 The Manner of Presentation: How

3.4.3.1 How must the Beneficiary make a presentation?

3.4.3.2 Which practice rules accommodate electronic presentation?

3.4.3.3 Who is liable if presented documents are lost in transit from Nominated Bank to an Issuer/Guarantor?

3.5 Incomplete Presentations

3.5.1.1 If the Beneficiary requests an Issuer/Guarantor to hold the documents in an incomplete presentation, can it do so?

3.6 Partial and Multiple Drawings

- 3.6.6.1** Can the Beneficiary of a standby/demand guarantee draw for less than the full amount?
- 3.6.6.2** Can the Beneficiary of a standby/demand guarantee make more than one drawing?
- 3.6.6.3** If a standby/demand guarantee provides that no partial drawings are allowed, can the Beneficiary draw less than 100% of the amount available?
- 3.6.6.4** Where a UCP600 demand guarantee indicates that it supports the payment of installments, what is the result if the first drawing made is on a default on the third installment because the Applicant paid the first two installments directly to the Beneficiary?

3.7 Presentation After Normal Banking Hours

- 3.7.1.1** What is the effect of a presentation made after business or banking hours?

3.8 Extend or Pay Demands

- 3.8.2.1** What should the Issuer/Guarantor of a UCP600 standby/demand guarantee do if it receives a demand which states “extend this undertaking one year or pay me the balance due”?
- 3.8.2.2** What should the Issuer/Guarantor of a URDG 758 demand guarantee do if it receives a demand which states “extend this undertaking one year or pay me the balance due”?
- 3.8.2.3** What should the Issuer/Guarantor of an ISP98 standby do if it receives a demand which states “extend this undertaking one year or pay me the balance due”?

3.9 Deadline When Bank is Ordinarily Closed

- 3.9.1.1** What is the deadline for presentation if the expiration date falls on a holiday or non-business day at the place for presentation?
- 3.9.1.2** If an installment demand deadline falls on a holiday or non-business day, when must presentation of that installment demand be made?

3.10 Closure When the Expiration Date is on a Business Day

- 3.10.6.1** If a UCP600 standby expires on a business day on which the place for presentation is closed because of an extraordinary event beyond the control of the bank, when it would otherwise be open, will the Beneficiary have the right to make a presentation on the day when the issuing bank re-opens?
- 3.10.6.2** If a URDG 758 demand guarantee expires on a business day on which the place for presentation is closed when it would otherwise be open, will the Beneficiary have the right to make a presentation on the day when the issuing bank re-opens?
- 3.10.6.3** What if a force majeure event occurs after a presentation is made under a URDG 758 demand guarantee, preventing the Issuer/Guarantor from examining the presentation?
- 3.10.6.4** What if a force majeure event occurs after a complying demand is made under a URDG 758 demand guarantee, but the Issuer/Guarantor has not honoured?
- 3.10.6.5** If an ISP98 standby expires on a business day on which the place for presentation is closed when it would be expected to be open, will the Beneficiary have the right to make a presentation when the issuing bank re-opens?
- 3.10.6.6** Can the Issuer/Guarantor designate an alternative place for presentation?
- 3.10.6.7** If a URDG 758 counter-guarantee expires at a time when presentation or payment under that counter-guarantee is prevented by force majeure, for how long is the counter-guarantee extended?
- 3.10.6.8** If a presentation is made under a URDG 758 counter-guarantee, but has not yet been examined because of force majeure, for how long is the running of the time for examination suspended?
- 3.10.6.9** If a complying demand is made under a URDG 758 counter-guarantee, but has not yet been paid due to force majeure, when shall payment occur?

Suggested Answers to these Questions Appear Starting at Page 232