

# 神戸市外国語大学 学術情報リポジトリ

## Problems on Bank Guarantees

メタデータ	言語: eng 出版者: 公開日: 1979-11-30 キーワード (Ja): キーワード (En): 作成者: 小原, 三佑嘉, Ohara, Miyuka メールアドレス: 所属:
URL	<a href="https://kobe-cufs.repo.nii.ac.jp/records/2195">https://kobe-cufs.repo.nii.ac.jp/records/2195</a>

This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 International License.



# Problems on Bank Guarantees

Miyuka Ohara

Viewed from experiences in Japan, the forms and scopes of Bank Guarantees are not internationally standardized. Furthermore, there are differences in laws and regulations of various nations. For example, the following types of bank guarantees could be considered:

1. Tender bonds (bid bonds)
2. Performance bonds
3. Bonds for repayment of advances (Refundment bonds)
4. Guarantee for payment in relation to trade finance (short term)
5. Guarantee for deferred payment in relation to foreign trade finance (long term)

However, it should be said that there is no definite distinction between these various bank guarantees; furthermore, no legal concept has been established concerning these types. This is one of the reasons for major difficulties and disputes in international trade and finance.

It is indeed timely and fitting the ICC should have conducted studies concerning various problems in connection with bank guarantees referring to this note and relevant documents.

In order to avoid difficult problems concerning bank guarantees, it is most essential to clarify the purpose and significance of bank guarantees, and also the scope of obligations to be guaranteed. I think that one effective measure that could be taken by the ICC is to limit the types of bank guarantees (such as to tender bonds and performance bonds) so that the forms and interpretation could be standardized.

I would point out the following as particular difficulties involving bank guarantees and would like to have clarification on certain points.

## I. Particular difficulties involving bank guarantees<sup>(1)</sup>

### 1) *Expiry Date, Duration of Guarantee and Claim Validity Period.*

Does the expiry date as stated in the bank guarantee mean the last date of the duration of guarantee? Or, does it mean the latest date of the claim validity period? In most cases no clearcut instruction is given. Also, the relations between the duration of guarantee and time period of performance contained in the underlying contract between the beneficiary and the bank's principal are vague.

Therefore, it is essential to clearly state both the duration of guarantee and the claim validity period in the bank guarantee. In the case of bank guarantee without the claim validity period expressly stated, clearcut explanation is not given concerning its relation with the extinctive prescription or limitation of actions as prescribed by various national laws and legislations. For example, what laws and legislations are applicable in this case? Are they those of the country of the guaranteeing bank, or of the beneficiary, or of the bank instructed to give guarantee? Incidentally, it would be very helpful to us if a hand-book on the bank guarantee laws and legislations of various countries could be prepared.

### 2) *Amendment or Rescission of the Contents or Terms and Conditions of Obligations under Bank Guarantee.*

Concerning the bank guarantee submitted at the time of bid, when the terms and conditions of public announcement are unilaterally changed after the tender has been made, or when the details of the underlying contract between seller and buyer have been changed without the knowledge of the guaranteeing bank, or when the contract has been changed or rescinded for some other reason, it is desirable to protect the guaranteeing bank so that the original obligations under bank guarantee shall not be affected unless the said bank agrees to such amendments or rescission.

In the case of the seller failing to submit the performance bonds after succeeding in the tender and concluding the underlying contract, nothing seems to be definite concerning the tender bond as to whether it should be released or not. Also, the relations between the principal obligations covered by these two bonds have not been adequately defined.

Concerning inability to perform the underlying agreement, delays in performance or incomplete performance due to force majeure, it should be regarded that the obligations under bank guarantee naturally become extinct when the principal obligations are rescinded because of the provisions of force majeure and other exemption clauses. Yet, there are instances in which the beneficiaries will fail to follow this interpretation and will force the guaranteeing bank to fulfil their obligations under bank guarantee.

In other cases, there are disputes concerning the presentation of evidences of force majeure. This brings up the problem of what methods to take in deciding the evidence.

### 3) *Types and Scopes of Obligations under Bank Guarantees and Capacity of the Bank.*

As explained in the foregoing, there appear a variety of types, the scope of which is extensive. Banks naturally are asked to give guarantee to various obligations that are beyond the scope of the capacity of the bank, and are sometimes asked to give unlimited guarantee over an indefinite period. From the point of the capacity of the bank, both the bank's principal and beneficiary should strictly refrain from requesting such extended and unlimited guarantee.

The main problem lies in the fact that there is no explicit legal measure pertaining to the method and scope of bank guarantee.

In some countries, the laws and legislations prohibit banks from issuing their own guarantees. Even if banks may issue their own guarantees, various restrictions are usually placed on their issuing them. The result is that the beneficiary receiving such a bank guarantee is never certain of whether the bank guarantee he has received is legally effective or not.

## **II. Simple Demand Guarantees and Stand-by Letters of Credit**

It will be recalled that the ICC recently introduced Uniform Rules for Contract Guarantees (Publication N° 325),<sup>(2)</sup> aimed at standardizing international guarantee practice on an equitable basis with regard to all parties involved.

Guarantees payable on first demand (simple demand guarantees), and

stand-by letters of credit, which may in certain circumstances perform the same economic function as simple demand guarantees, may appear not to be expressly catered for by the above-mentioned Uniform Rules. Further, the special purpose of stand-by credits, which are increasingly used in certain areas for assuring performance of a wide range of obligations, and the type of documentation called for, raise doubts as to whether stand-by credits fall within the scope of uniform customs and practice for documentary credits.

Following discussion within the ICC, and with representatives of the United Nations Commission on International Trade Law (UNCITRAL) it was decided to establish a joint working party – comprising representatives of the Commissions of Banking Technique and Practice, and on International Commercial Practice of the ICC –, charged with the task of studying this specialised sector of guarantee practice, and recommending what action, if any, should be taken by the ICC. (The formulation of rules on simple demand guarantees and stand-by credits has been put on the programme of work of UNICITRAL but the UNICITRAL Study Group on International Payments has suggested at its recent meeting in Florence that the work should be entrusted to the ICC).

The working party held its first meeting at ICC International Headquarters on March 1979. The group decided that as a first step, the factual situation in each country should be established, so that the basis on which any recommendations might be formulated could be clarified.

### III. Questionnaire and its replies<sup>(3)</sup>

A. The following replies<sup>(4)</sup> to the questionnaire were received from 21 banks which are members of the Federation of Bankers Associations of Japan. The replies are varied for the reason that each bank operates according to its own policy.

In your country:–

(1) Are simple demand guarantees issued:–

- often
- occasionally
- never ?

Yes, there are issued occasionally by Japanese banks.

- (2) In respect of what sorts of operations are simple demand guarantees issued?

Simple demand guarantees are issued in order to guarantee:

- 1) that applicant for the guarantee (principal) will sign the contract if his tender is accepted. (Tender guarantee)
- 2) that principal will meet his obligations under the contract awarded. (Performance guarantee).
- 3) that principal will repay payments or advances made by the beneficiary in the event the principal fails to meet the terms of the contract. (Repayment guarantee)
- 4) that principal will pay for the contract fulfilled by the beneficiary.
- 5) that principal will repay the borrowed money to the beneficiary (lending bank).
- 6) that an undertaking will be given by a bank (the guarantor) in the importing country on the instruction of another bank so requested by the principal to the customs authorities whereby the guarantor undertakes to pay the custom duty regarding temporary import which shall be paid by the principal in case said imports are left in the importing country. (Duty payment guarantee)

- (3) Are stand-by letters of credit issued:—

- often
- occasionally
- never ?

Yes, they are issued often by Japanese banks.

- (4) In respect of what sorts of operations are stand-by letters of credit issued?

Stand-by letters of credit are issued in most cases to guarantee that third party named by the applicant for the credit (principal) will meet their obligations such as refundments of borrowed money to the beneficiary (lending bank) or settlement of drawings under the documentary credits issued by the beneficiary (banks issuing documentary credits). Occasionally they are issued for the same operations as stated in <sup>2)</sup> above.

- (5) Are simple demand guarantees and stand-by letters of credit issued for the same purposes? If not, specify the differences.

The usual purpose of simple demand guarantees is to guarantee the obligations which the principal (applicant for the guarantee) owes to beneficiary, whereas the usual purpose of stand-by letter of credit is to undertake to pay unpaid balance in the event that obligations of the party named by the principal (applicant for the credit) to the beneficiary falls due.

- (6) Are there any legal restrictions as to the giving of:

- (a) simple demand guarantees
- (b) stand-by credits

Under the current foreign exchange regulations, a certain degree of restrictions exist. However, these are being gradually lifted.

- (7) Do simple demand guarantees give rise to problems in practice for:—

- (a) principals
- (b) beneficiaries

guarantors ?

Simple demand guarantees give rise to problems in practice for principals and guarantors. This is because the simple demand guarantee makes it impossible for principals and guarantors to resist unfair calling by beneficiaries.

If so, please specify separately with regard to each of categories (a) (b) and (c) the problems involved.

- (8) Do stand-by letters of credit give rise to problems in practice for:—

- (a) applicants (principals)
- (b) beneficiaries
- (c) issuing banks (guarantors) ?

Problems may not arise in case that beneficiary is a bank; however, in the case beneficiary is a non-bank, a stand-by credit not requiring evidence of non-performance gives rise to problems similar to that of (7).

If so, please specify separately with regard to each of categories (a) (b) and (c) the problems involved.

- (9) To what extent, if any, is it felt that

- (a) the demand for and/or the wording of simple demand guarantees and stand-by credits is influenced by advice given to beneficiaries by consultants ?
  - a) Consultants such as lawyers may influence the demand for and/or the wording of simple demand guarantee and stand-by credits to a fairly large extent.
  - b) the bigger contractors are successfully resisting the giving of first demand guarantees or stand-by credits?
  - b) The larger contractors such as governmental bodies are successfully resisting the issuance of first demand guarantees but not the giving of stand-by credits.
- (10) Is it considered that the ICC should draw up rules relating to simple demand guarantees? If so, what should be the purpose of these Rules? If it is considered that Rules should not be established, is it thought desirable that the ICC take other action, and if so, what? Please give separately the observations of:
  - (a) principals
  - (b) beneficiaries
  - (c) guarantors

The ICC should draw up rules relating to simple demand guarantees. The main purpose should be to prevent unfair calling by beneficiaries. A provision of arbitration for this purpose should be included in the rules.

- (11) Is it considered that the ICC should draw up rules relating to stand-by letters of credit? If so, what should be the purpose of these rules? If it is considered that Rules should not be established, is it thought desirable that the ICC take other action, and if so, what? Please give separately the observations of: –
  - (a) applicants (principals)
  - (b) beneficiaries
  - (c) issuing banks (guarantors)

The ICC should draw up rules relating to stand-by credit. The main purpose should be to prevent unfair calling by beneficiaries. In case evidence that the claim has been satisfied is not required,



an arbitration clause should be included in the rules.

- (12) Are there any other observations that you wish to make? If so, please specify.

The ICC should draw up a rule aimed at discouraging the practice of simple demand guarantees.

- B. The reply to the questionnaire was received by a leading insurance company of Japan.

In your country:—

- (1) Are simple demand guarantees issued?

Yes, simple demand guarantees are issued occasionally by insurance companies.

- (2) In respect of what sort of operations are simple demand guarantees issued?

Simple demand guarantees are issued if the following conditions are fully satisfied;—

- 1) Beneficiaries (owners of construction contracts or of purchase contracts) have never accepted guarantees other than simple demand guarantees.
  - 2) Beneficiaries have never made any unreasonable demand under simple demand guarantees and have no bad reputations.
  - 3) Principals (contractors or suppliers) are well classified as first class in Japan and their financial standings are recognized to be excellent by guarantors.
  - 4) We can assume that principals can easily absorb any loss sustained by them due to any unreasonable demand under simple demand guarantees.
- (3) Are stand-by letters of credit issued:—

No, insurance companies do not issue any stand-by letter of credit.

- (4) In respect of what sorts of operations are stand-by letters of credit issued?

Not applicable.

- (5) Are simple demand guarantees and stand-by letters of credit issued for the same purposes? If not, specify the differences.

They are issued for the same purposes. But simple demand guaran-

tees are considered to be special types of surety bonds issued by insurance companies, whereas stand-by letters of credit are issued by banks.

- (6) Are there any legal restrictions as to the giving of:-
- (a) simple demand guarantees
- Insurance companies must obtain a licence from the Ministry of Finance under the Insurance Business Law to issue surety bonds including simple demand guarantees.
- (7) Do simple demand guarantees give rise to problems in practice for:
- (a) Simple demand guarantees give rise to problems to principals because such guarantees induce beneficiaries to make an unreasonable demand thereunder.
- (b) Simple demand guarantees give rise to problems to guarantors because they must pay the amount demanded by beneficiaries even if principals deny their defaults under main contracts.
- (8) Do stand-by letters of credit give rise to problems in practice for:-
- Not applicable.
- (9) To what extent, if any, is it felt that
- (a) the demand for and/or the wording of simple demand guarantees and stand-by credits is influenced by advice given to beneficiaries by consultants,
- Although we assume most of the demand for and/or the working of simple demand guarantees are influenced by consultants, we cannot confirm it.
- (b) the bigger contractos are successful resisting the giving of first demand guarantees or stand-by credits?
- In some cases where principals (contractos or suppliers) can offer competitives contract prices, they have been successful in resisting first demand guarantees. The numbers of such successes are, however, very limited in Middle East or in Southeast Asia.
- (10) Is it considered that the ICC should draw up rules relating to simple demand guarantees? If so, what should be the purpose of these Rules? If it is considered that Rules should not be established, is it thought desirable that the ICC take other action, and if so, what? Please give

separately the observations of:

- (a) principals
- (b) beneficiaries
- (c) guarantors

The ICC should take actions to the Government or the International Financial Institutions to amend their procurement codes or rules not to request *simple demand* guarantees or stand-by letters of credit.

- (11) Is it considered that the ICC should draw up rules relating to stand-by letter of credit? If so, what should be the purpose of these rules? If it is considered that Rules should not be established, is it thought desirable that the ICC take other action, and if so, what? Please give separately the observations of:-

- (a) applicants (principals)
- (b) beneficiaries
- (c) issuing banks (guarantors)

Same as our reply to Question (10) above.

- (12) Are there any other observations that you wish to make? If so, please specify.

The ICC has introduced Uniform Rules for Contract Guarantees (Publication No. 325), which we think are quite equitable.

We wish, therefore, that the ICC should concentrate its effort on canvassing the Uniform Rules among the Governmental bodies, the International Financial Institutions, the Associations of Engineers, the Associations of Contractors, the Associations of Sureties (Banks, Insurance Companies) etc. so that the Uniform Rules become popular among the International Contracts.

#### IV. Forms of Bank guarantee

The following are English translation of German Texts of Forms of Bank guarantee prepared by the Verein Deutscher Maschinenbau – Anstalten e.v. (German Association of machine Industries) which devised to ensure a greater degree of equilibrium among the parties concerned.

## FORM OF TENDER GUARANTEE

### Unconditional Tender Guarantee

Tender Guarantee given by ..... Bank (Guarantor) to ..... (Beneficiary) in the event of default by ..... (Principal) in the obligations resulting from the Tender, dated ..... for ..... (exact description of the object of the Tender).

The Guarantor hereby undertakes irrevocably to pay to the Beneficiary, within a period of 14 working days from the date receipt by him of the Beneficiary's first request in writing any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a certified copy of the document concerning the award of the Contract to the Principal, (or by a relevant statement in writing of the Beneficiary), as well as by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the above-mentioned Tender.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee document to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

### Conditional Tender Guarantee

Tender Guarantee given by ..... Bank (Guarantor) to ..... (Beneficiary) in the event of default by ..... (Principal) in the obligations resulting from the Tender, dated ..... for ..... (exact description of the object of the Tender).

The Guarantor hereby undertakes irrevocably to pay to the Beneficiary, within a period of 30 working days from the date of receipt by him of the Beneficiary's first request in writing, any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a certified copy of the document concerning the award of the Contract to the Principal, (or by a relevant statement in writing of the Beneficiary), as well as by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the above-mentioned Tender.

The Guarantor's liability to pay does not arise where the Principal, before the expiration of the time fixed for payment, refers the case to the arbitral tribunal agreed upon between him and the Beneficiary. However, upon presentation of an arbitral award confirming that the prerequisites are being met for paying out the sum claimed, the Guarantor shall pay out this sum without delay.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee document to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

## FORM OF PERFORMANCE GUARANTEE

### Unconditional Performance Guarantee

Performance Guarantee given by.....Bank (Guarantor) to .....(Beneficiary) in the event of default by ..... (Principal) in the obligations resulting from the Contract, dated ..... for ..... (exact description of the subject matter of the Contract).

The Guarantor hereby undertakes irrevocably to pay to the Beneficiary, within a period of 14 working days from the date of receipt by him of the Beneficiary's first request in writing any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee documents to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

### Conditional Performance Guarantee

Performance Guarantee given by.....Bank (Guarantor) to .....(Beneficiary) in the event of default by .....(Principal) in the obligations resulting from the Contract, dated ..... for ..... (exact description of the subject matter of the Contract).

The Guarantor here by undertakes irrevocably to pay to the Beneficiary, within a period of 30 working days from the date of receipt by him of the Beneficiary's first request in writing any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.

The Guarantor's liability to pay does not arise where the Principal, before the expiration of the time fixed for payment, refers the case to the arbitral tribunal provided for in the above-mentioned Contract. However, upon presentation of an arbitral award confirming that the prerequisites are being met for paying out the sum claimed, the Guarantor shall pay out this sum without delay.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee document to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

## FORM OF REPAYMENT GUARANTEE

**Unconditional Repayment Guarantee**  
Repayment Guarantee given by ..... Bank (Guarantor) to ..... (Beneficiary) in the event of default by ..... (Principal) in the obligations resulting from the Contract, dated ..... for ..... (exact description of the subject matter of the Contract).

The Guarantor hereby undertakes irrevocably to pay to the Beneficiary, within a period of 14 working days from the date of receipt by him of the Beneficiary's first request in writing any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee document to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

**Conditional Repayment Guarantee**  
Repayment Guarantee given by ..... Bank (Guarantor) to ..... (Beneficiary) in the event of default by ..... (Principal) in the obligations resulting from the Contract, dated ..... for ..... (exact description of the subject matter of the Contract).

The Guarantor hereby undertakes irrevocably to pay to the Beneficiary, within a period of 30 working days from the date of receipt by him of the Beneficiary's first request in writing any sum claimed, up to the amount of ..... DM, provided this request is received not later than ..... (expiry date).

The request must be accompanied by a written statement of the Beneficiary indicating the default of the Principal in the obligations resulting from the Contract.

The Guarantor's liability to pay does not arise where the Principal, before the expiration of the time fixed for payment, refers the case to the arbitral tribunal provided for in the above-mentioned Contract. However, upon presentation of an arbitral award confirming that the prerequisites are being met for paying out the sum claimed, the Guarantor shall pay out this sum without delay.

After the lapse of this Guarantee, the Beneficiary shall, without delay, return the guarantee document to the Principal. Where the Guarantee has been paid out to the Beneficiary it shall be the Guarantor's duty to return the guarantee document to the Principal.

German law shall apply to all disputes arising out of or in connection with this Guarantee.

- (1) Translated from “problems to be solved in Bank guarantee” of “KINYU HOMU JIJO” No. 506.
- (2) ① The International Chamber of Commerce, in close co-operation with interested inter-governmental and international commercial organisations – particularly the United Nations Commission on International Trade Law (UNCITRAL) – has therefore drawn up a set of “Uniform Rules for Contract Guarantees”, with a view to securing a uniformity of practice based upon an equitable balance between the interests of the parties concerned while observing the commercial purpose of the guarantee, i.e. to ensure the availability of funds with an independent third party in the event of the beneficiary having a justified claim against the principal.  
In drafting these Rules care has been taken to maintain the maximum possible flexibility consistent with observing the concepts referred to above, and also, by establishing the principle of the need to justify a claim under a guarantee, to invest guarantee practice with a moral content. Thereby it is hoped, international trade conducted on the basis of contract guarantees may develop in an atmosphere of confidence.  
For the said reasons it has not been found advisable to make provision for so-called simple or first demand guarantees, under which claims are payable without independent evidence of their validity. Although the Rules do not encourage the use of such guarantees and are not drafted to apply thereto (and there is evidence of a decline in their use in certain areas as their economic disadvantages are more fully understood), parties who so wish may agree to apply certain of the Rules to such guarantees.  
It has also not been found practicable to deal with the complex subject of the nature of the guarantee, i.e. whether it is a primary and independent obligation or whether it is a secondary and accessory one, because of the differing approaches to the matter under various national legislations. Instead, attention has been directed in a more concrete manner to the prerequisites for payment under the guarantee and the objections and defences available to the guarantor. (ICC Publication 325.)
- ② Each of the three parties involved has a different interest:  
The beneficiary wants to receive a compensatory sum of money if the tenderer fails to meet his obligations after submitting the tender or, if he is awarded the contract, fails to perform according to its terms.  
The principal (the party tendering or the party receiving the contract) does not want to pay if he has met his obligations.  
The guarantor wants to meet his commitment without becoming involved in possible disputes between beneficiary and principal concerning correct performance.  
The Uniform Rules aim to achieve a fair balance between the legitimate interests of all three parties. They invest guarantee practice with a moral content by establishing the principle that a claim under a guarantee must be justified.
- ③ Guarantees given by banks, insurance companies and other guarantors in the form of tender bonds, performance guarantees and repayment

guarantees in relation to projects in another country involving the supply of goods or services or the performance of work, are currently an important tool of international trade.

Broadly speaking, the purpose of the *tender bond* (bid bond) is to provide an assurance of the intention of the party submitting the tender (principal) to sign the contract if his tender is accepted.

Similarly, the *performance guarantee* is intended as a safeguard against the party to whom the contract is awarded (principal) failing to meet his obligations under such a contract, which, by its nature, normally requires a period of time for completion.

Finally, the *repayment guarantee* protects the interest of the party awarding the contract (beneficiary) in respect of the repayment of payments or advances made by him, in the event of the principal not fulfilling the contract terms.

- ④ Thus, in each type of guarantee three parties are involved – and their interests differ.

The *beneficiary*, i.e. the party inviting the tender, or awarding the contract, wants either to receive a compensatory sum of money if the tenderer fails to meet his obligations arising from submission of the tender, or if the tenderer, having been awarded the contract, fails to perform the contract in accordance with its terms, or to secure repayment of any payments or advances made by him if the principal fails to perform the contract. He wants to be sure that he will receive such amounts as may be due to him, even if the principal fails to pay such amounts, Whether by reason of unwillingness or inability to pay.

The *principal*, i.e. the party tendering, or the party to whom the contract has been awarded, does not want to be compelled to pay by reason of the guarantee if he *has* met his obligations arising from submission of the tender, or if, having been awarded the contract, he *has* performed it in accordance with its terms.

The *guarantor*, whether bank, insurance company or other party, wants to meet its commitment in the terms of the guarantee, without becoming involved in possible disputes between beneficiary and principal regarding correct performance by the principal of his obligations arising from submission of the tender, or of the contract in accordance with its terms.

- ⑤ The “Contract Guarantee” has therefore the difficult tasks of creating a fair equilibrium among the legitimate interests of the three parties, and of defining the rights and obligations of the three parties with sufficient precision to avoid disputes.

- ⑥ Unfortunately, these concepts have not always been appreciated, or applied, in practice. Lack of experience in certain cases, or abuse by a party of its dominant position in other cases, have tended to create *inequitable situations, leading to dispute and distrust.*

This state of affairs is a hindrance to the development of international commerce.



- (3) Brief mention of “Latest development of Uniform Rules on Contract guarantee ” of “KINYU HOMU JIJYO” No. 909.
- (4) The auther is solely responsible for collecting and summerizing the replies of banks and a leading insurance company in Japan.