

# Navigating the URDG 758

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## Uniform Rules for Demand Guarantees

July 2010

Strictly Private and Confidential



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## 1. Introduction of the URDG 758

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**Effective as of  
July 1, 2010**

# URDG 458—Background

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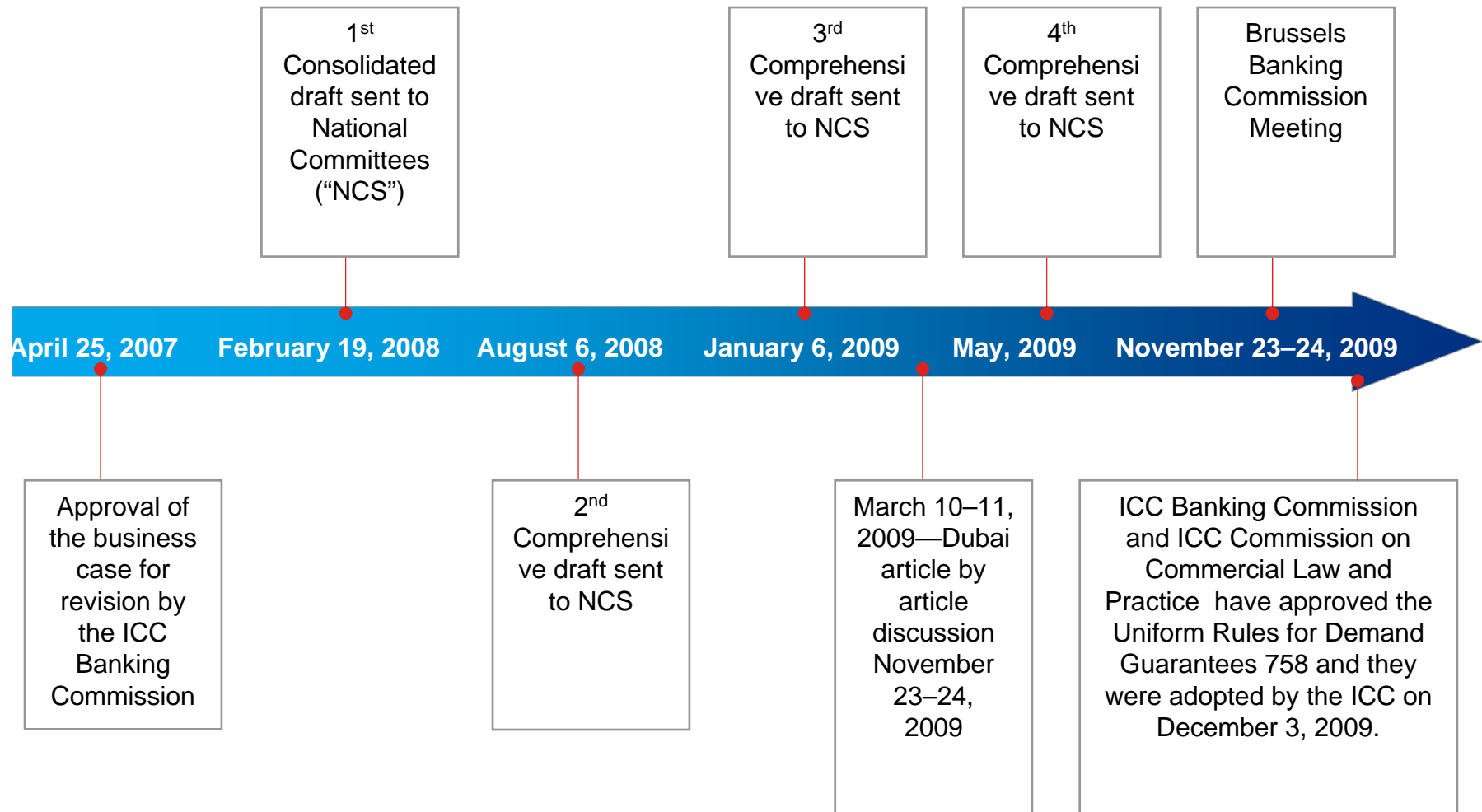
- First adopted by the International Chamber of Commerce (“ICC”) in 1991, URDG 458 reflects international practice in the use of demand guarantees
- URDG 458 is endorsed by
  - World Bank
  - International Federation of Consulting Engineers
  - Organization for Harmonization of Business Law in Africa
  - UN Commission for International Trade Law
  - URDG 458 is compliant with Shari’a law
  - Courts in certain countries used URDG as model of trade usage even though disputed guarantees were not subject to URDG

# URDG 458 – Some Reservations

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- Irrespective of the international usage of URDG 458, some segments of the banking community have expressed reservations about these rules
  - Article 17 – Requirement for the Guarantor to inform the Principal or, where applicable, its Instructing Party about receipt of a demand under the guarantee
  - Article 20 – Any demand under the Counter-guarantee shall be supported by a written statement that the Guarantor has received a demand for payment under the guarantee in accordance with its terms and with this Article
  - Lack of definition of the advising bank and absence of concept of the confirming bank
  - Lack of preclusion rule and treatment of non-documentary conditions

# Milestones of Drafting and Approval of URDG 758



# URDG 758

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- ICC Banking Commission and ICC Commission on Commercial Law and Practice have approved the Uniform Rules for Demand Guarantees 758 and they were adopted by the ICC on December 3, 2009
- Banking Commission votes tallied as of November 24, 2009 were:
  - 49 countries voted to approve the revision
  - 1 country voted to abstain
  - No country voted against the revision

# URDG 458 vs. URG 758

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## More Precise

- URG 458 has some imprecise articles which could be subject to different interpretation
  - Concept of “reasonable time” – Article 10 and 26
- URG 758 applies more precise standards
  - Article 20 – Drawing document(s) must be examined within 5 business days
  - Article 26 – “Force Majeure” extension of period for 30 days
  - Article 23 – Extend-or-pay scenario suspends payment for a period not exceeding 30 calendar days

## More Comprehensive

- URG 458 does not address important aspects and features of demand guarantees
  - Advice of a guarantee
  - Amendments
  - Standards for examination of presentations
  - Partial and multiple demands
  - Linkage of documents
  - Incomplete demands
  - Transfer of guarantees

# URDG 458 vs. URGD 758 (Cont'd)

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## More Balanced

- URGD 758 reflects a more balanced approach to certain issues than URGD 458
- For example
  - Independent nature
  - Force majeure scenario, correcting prior perceived unfairness to the beneficiary
  - Non-documentary conditions
  - Indemnity for foreign laws and usage
  - Preclusion rule

## Innovative

- URGD 758 introduce issues which are not covered by URGD 458
- Resolve the following situations
  - When payment in the currency specified in the guarantee becomes impossible
  - When the Demand Guarantee does not state an expiry date or expiry event

# Alignment of URDG 758 with UCP 600

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- UCP 600 and URDG 758 share common principles: Independence and documentary nature
  - However, in certain instances they use different terminology to express the same concepts
    - Definitions
    - Preclusion rule
    - Standards for examination of documents
    - Treatment of non-documentary conditions
    - International standard demand guarantee practices

## 2. URDG 758 Key Changes

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## Article 2 – Definitions

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- **Instructing party** means the party, other than the counter-guarantor, who gives instructions to issue a guarantee or counter-guarantee and is responsible for indemnifying the guarantor or, in the case of a counter-guarantee, the counter-guarantor
  - The instructing party may or may not be the applicant
- **Expiry event** means an event which under the terms of the guarantee results in its expiry, whether immediately or within a specified time after the event occurs, for which purpose the event is deemed to occur only
  - When a document specified in the guarantee as indicating the occurrence of the event is presented to the guarantor, or
  - If no such document is specified in the guarantee, when the occurrence of the event becomes determinable from the **guarantor's own records**
- **Complying presentation** under a guarantee means a presentation that is in accordance with, first, the terms and conditions of that guarantee; second, these rules so far as consistent with those terms and conditions; and third, in the absence of a relevant provision in the guarantee or these rules, international standard demand guarantee practice

## Article 2 – Definitions (Cont'd)

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- Other sources
  - UCP 600 Article 2 and ISP 98 Rule 1.09
- Comments
  - The word “principal” used in URDG 458 is replaced by “applicant” so as to be aligned with the terminology of UCP 600. The term “instructing party”, in URDG 458 referring to a counter-guarantor, now has a different meaning. The instructing party denotes the party, other than a counter-guarantor, that instructs issuer to issue guarantee or counter-guarantee and typically is obligor under the reimbursement agreement supporting the issuance of the guarantee or counter-guarantee. In most cases the instructing party and the applicant are the same parties, or the instructing party might be a parent company providing the guarantee and the applicant (sister company) being a party under underlying contract
  - Other significant new definitions include “guarantor’s own records” (relevant to article 7 and sub article 13 (b)); and “complying presentation”, which requires reference, first, to the terms of the guarantee, second, to the rules, and third, in the absence of a relevant provision in the guarantee or the rules, to international standard demand guarantee practice
  - Similarly in UCP 600 and ISP 98, reference to international standard demand guarantee practice is a gap-filler

# Article 7 – Non-documentary Conditions

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- A guarantee should not contain a condition other than a date or the lapse of a period without specifying a document to indicate compliance with that condition. If the guarantee does not specify any such document and the fulfillment of the condition cannot be determined from the guarantor's own records or from an index specified in the guarantee, then the guarantor will deem such condition as not stated and will disregard it except for the purpose of determining whether data that may appear in a document specified in and presented under the guarantee does not conflict with data in the guarantee
- **Other Sources**
  - URDG 458: No Rule
  - ISP 98 Rule 4.11 (b) states “Terms or conditions are non-documentary if the Standby does not require presentation of a document in which they are to be evidenced and if their fulfillment cannot be determined by the issuer from the issuer's own records or within the issuer's normal operations”
- **Comments**
  - Both URDG 758 and ISP 98 attempt to clarify what constitutes a non-documentary condition by providing a general test by which non-documentary conditions are to be identified. Conditions are non-documentary if no document is evidenced and if their fulfillment cannot be determined within the operational purview of the issuer

## Article 20 – Time for Examination of Demand; Payment

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- a. If a presentation of a demand does not indicate that it is to be completed later, the guarantor shall, within five business days following the day of presentation, examine that demand and determine if it is a complying demand. This period is not shortened or otherwise affected by the expiry of the guarantee on or after the date of presentation. However, if the presentation indicates that it is to be completed later, it need not be examined until it is completed
- b. When the guarantor determines that a demand is complying, it shall pay
- c. Payment is to be made at the branch or office of the guarantor or counter-guarantor that issued the guarantee or counter-guarantee, or such other place as may be indicated in that guarantee or counter-guarantee (“place for payment”)
- **Other Sources**
  - URDG 458 Article 10 (a) states “A Guarantor shall have a reasonable time within which to examine a demand under a Guarantee and to decide whether to pay or to refuse the demand”
  - ISP 98 Rule 5.01 (i) states “Notice given within three business days is deemed to be not unreasonable and beyond seven business days is deemed to be unreasonable”
- **Comments**
  - URDG 758 and ISP 98 provide a period of 5 days and 3 to 7 days, respectively, whether to refuse the demand or to pay. URDG 458 provides a Guarantor a reasonable time to examine the demand and to refuse or pay without specifying how many days is deemed reasonable

## Article 23 – Extend or Pay

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- a. Where a complying demand includes, as an alternative, a request to extend the expiry, the guarantor may suspend payment for a period not exceeding 30 calendar days following its receipt of the demand
- b. Where, following such suspension, the guarantor makes a complying demand under the counter-guarantee that includes, as an alternative, a request to extend the expiry, the counter-guarantor may suspend payment for a period not exceeding four calendar days less than the period during which payment of the demand under the guarantee was suspended
- c. The guarantor shall without delay inform the instructing party or, in the case of a counter-guarantee, the counter-guarantor, of the period of suspension of payment under the guarantee. The counter-guarantor shall then inform the instructing party of such suspension and of any suspension of payment under the counter-guarantee. Complying with this article satisfies the information duty under article 16
- d. The demand for payment is deemed to be withdrawn if the period of extension requested in that demand or otherwise agreed by the party making that demand is granted within the time provided under paragraph (a) or (b) of this article. If no such period of extension is granted, the complying demand shall be paid without the need to present any further demand

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## Article 23 – Extend or Pay (Cont'd)

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- e. The guarantor or counter-guarantor may refuse to grant any extension even if instructed to do so and shall then pay
- f. The guarantor or counter-guarantor shall without delay inform the party from whom it has received its instructions of its decision to extend under paragraph (d) or to pay
- g. The guarantor and the counter-guarantor assume no liability for any payment suspended in accordance with this article

## Article 23 – Extend or Pay (Cont'd)

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- Other Sources

- URDG 458 Article 26 states “If the Beneficiary requests an extension of the validity of the Guarantee as an alternative to a demand for payment submitted in accordance with the terms and conditions of the Guarantee and these Rules, the Guarantor shall without delay so inform the party who gave the Guarantor his instructions. **The Guarantor shall then suspend payment of the demand for such time as is reasonable to permit the Principal and the Beneficiary to reach agreement on the granting of such extension and for the Principal to arrange for such extension to be issued**”
- ISP 98 Rule 3.09 (a) states “A beneficiary’s request to extend the expiration date of the standby or, alternatively, to pay the amount available under it
  - a. Is a presentation demanding payment under the standby, to be examined as such in accordance with these rules; and”

- Comments

- Both URDG 758 Article 23 and URDG 458 Article 26 suspend payment of the demand to permit the Principal and Beneficiary to reach an agreement on the extension. URDG 758 Article 23 specifies the period not exceeding 30 calendar days following its receipt of the demand. While URDG 458 Article 26 suspends payment of the demand for such time as is reasonable
- ISP 98 Rule 3.09 differs from the approach of URDG. Rule 3.09 does not suspend the expiration date. Therefore, if the standby expires during the seven days following the business day of receipt and the extension is not granted, the issuer obligation to pay turns upon whether the presentation complies with the standby. Under ISP 98 suspension for payment is extended for maximum number of seven business days

## Article 26 – Force Majeure

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- a. In this article, “force majeure” means acts of God, riots, civil commotions, insurrections, wars, acts of terrorism or any causes beyond the control of the guarantor or counter-guarantor that interrupt its business as it relates to acts of a kind subject to these rules
- b. Should the guarantee expire at a time when presentation or payment under that guarantee is prevented by force majeure
  - i. Each of the guarantee and any counter-guarantee shall be extended for a period of 30 calendar days from the date on which it would otherwise have expired, and the guarantor shall as soon as practicable inform the instructing party or, in the case of a counter-guarantee, the counter-guarantor, of the force majeure and the extension, and the counter-guarantor shall so inform the instructing party
  - ii. The running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the guarantor’s business; and
  - iii. A complying demand under the guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that guarantee has expired, and in this situation the guarantor shall be entitled to present a demand under the counter-guarantee within 30 calendar days after cessation of the force majeure even if the counter-guarantee has expired

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## Article 26 – Force Majeure (Cont'd)

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- c. Should the counter-guarantee expire at a time when presentation or payment under that counter-guarantee is prevented by force majeure
  - i. The counter-guarantee shall be extended for a period of 30 calendar days from the date on which the counter-guarantor informs the guarantor of the cessation of the force majeure. The counter-guarantor shall then inform the instructing party of the force majeure and the extension
  - ii. The running of the time for examination under article 20 of a presentation made but not yet examined before the force majeure shall be suspended until the resumption of the counter-guarantor's business; and
  - iii. A complying demand under the counter-guarantee presented before the force majeure but not paid because of the force majeure shall be paid when the force majeure ceases even if that counter-guarantee has expired
- d. The instructing party shall be bound by any extension, suspension or payment under this article
- e. The guarantor and the counter-guarantor assume no further liability for the consequences of the force majeure

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## Article 26 – Force Majeure (Cont'd)

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- Other Sources

- URDG 458 Article 13 states “Guarantors and Instructing Parties assume no liability or responsibility for consequences arising out of the interruption of their business by acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control or by strikes, lock-outs or industrial actions of whatever nature”
- ISP 98 Rule 3.14 states “Closure on a Business Day and Authorization of Another Reasonable Place of Presentation
  - a. If on the last business day for presentation the place for presentation stated in a standby is for any reason closed and presentation is not timely made because of the closure, then the last day for presentation is automatically extended to the day occurring thirty calendar days after the place for presentation re-opens for business, unless the standby otherwise provides”

- Comments

- URDG 458 Article 13 excuses guarantees for consequences beyond their control. URDG 758 Article 26 extends the guarantee and any counter-guarantee for a period of 30 calendar days from the date on which it would otherwise have expired. ISP 98 also extends the standby thirty days after the place of presentation re-opens for business. Furthermore, ISP 98 Rule 3.14 does not make a distinction if the closure was planned or unplanned

## Article 33 – Transfer of Guarantee and Assignment of Proceeds

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- a. A guarantee is transferable only if it specifically states that it is “transferable”, in which case it may be transferred more than once for the full amount available at the time of transfer. A counter-guarantee is not transferable
- b. Even if a guarantee specifically states that it is transferable, the guarantor is not obliged to give effect to a request to transfer that guarantee after its issue except to the extent and in the manner expressly consented to by the guarantor
- c. A transferable guarantee means a guarantee that may be made available by the guarantor to a new beneficiary (“transferee”) at the request of the existing beneficiary (“transferor”)
- d. The following provisions apply to the transfer of a guarantee
  - i. A transferred guarantee shall include all amendments to which the transferor and guarantor have agreed as of the date of transfer; and
  - ii. A guarantee can only be transferred where, in addition to the conditions stated in paragraphs (a), (b), and (d)(i) of this article, the transferor has provided a signed statement to the guarantor that the transferee has acquired the transferor’s rights and obligations in the underlying relationship

## Article 33 – Transfer of Guarantee and Assignment of Proceeds (cont'd)

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- e. Unless otherwise agreed at the time of transfer, the transferor shall pay all charges incurred for the transfer
- f. Under a transferred guarantee, a demand and any supporting statement shall be signed by the transferee. Unless the guarantee provides otherwise, the name and the signature of the transferee may be used in place of the name and signature of the transferor in any other document
- Other sources
  - URDG 458 Article 4; ISP 98 Rule 6.01 through 6.05; UCP 600 Article 38
- Comments
  - Similar to ISP 98 and based on international banking practice, URDG 758 applies a much more comprehensive approach to the transfer of drawing rights than URDG 458. URDG 458 Article 4 used the word “assignable” which is more related to the concept of assignment of proceeds rather than transfer of drawing rights. Unlike UCP 600 or ISP 98, the transferor must provide a signed statement that the transferee has acquired the transferor’s rights and obligations in the underlying relationship. URDG 758 does not address issues related to transfer of drawing rights by operation of law

# Article 34 – Governing Law

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- a. Unless otherwise provided in the guarantee, its governing law shall be that of the location of the guarantor's branch or office that issued the guarantee
- b. Unless otherwise provided in the counter-guarantee, its governing law shall be that of the location of the counter-guarantor's branch or office that issued the counter-guarantee
- **Other Sources**
  - URDG 458 Article 27 states “Unless otherwise provided in the Guarantee or Counter-guarantee, its governing law shall be that of the place of business of the Guarantor or Instructing Party (as the case may be), or, if the Guarantor or Instructing Party has more than one place of business, that of the branch that issued the Guarantee or Counter-guarantee”
  - UCP 600: No article
  - ISP 98: No. rule
- **Comments**
  - One of the most important articles. Under the scenario of counter-guarantee and guarantee, two different laws will be applicable in most cases with eventually different consequences (e.g., countries which have different treatment of enforceability of expiry date). However, this solution is in the interest of the guarantor as well as the counter-guarantor

### 3. Summary

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# URDG 758 Summary

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## URDG 758:

- is aligned with UCP 600
- is more comprehensive than URDG 458
- reflects international practice in the use of demand guarantees and
- successfully balanced legitimate interest of the applicant, the guarantor and the beneficiary

# URDG Reference Materials

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- ICC Main Website: <http://www.iccwbo.org>
- ICC publications can be ordered through <http://store.iccbooksusa.net/iccuniformrulesfordemandguaranteesurdg785.aspx>
- A Drafter's Notes to URDG 758 (Glenn Reniser Book) - [www.loc.cc](http://www.loc.cc)
- URDG 758 compared with ISP98/UCP 600 by the Institute of International Banking Law & Practice Website: [www.iiblp.org](http://www.iiblp.org)
- DC-PRO Website: <http://focus.dcpprofessional.com>
  - URDG 758 has benefits for all parties DCInsight Vol. 16 No.2 April - June 2010 by Glenn R
  - ICC approves revised rules on demand guarantees DCInsight Vol. 16 No.1 January - March 2010 by Professor Sir Roy Goode

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# Q & A

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