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*The world has come to reject surety bonds and to embrace IFAs, and American businesses ignore these instruments at their peril.*

# Security for Contract Performance

KEVIN J. CONNOLLY

A time-honored method of providing security for the performance of a contract is the surety bond. Two parties enter into a contract, and a third party, the surety, promises to perform the obligation if its principal fails to do so.<sup>1</sup>

Despite its distinguished history, the surety bond has come to be derided by many parties. “A surety bond is just a license to sue,” is one of the pithier denunciations often heard.<sup>2</sup> Yet for all the denunciations (and undeniable shortcomings), surety bonds continue to be employed extensively in the common law world.

A surety bond claim is not, in the first instance, about the bond; it is about the “other” contract in

the transaction.<sup>3</sup> Thus, a claim under a surety bond depends upon a default under the primary obligation, and entails a “mini-trial” of that issue.

## Typology of Failure

The process of determining that collateral security for a contract is appropriate and selecting a suitable form of security can be viewed as an exercise in risk management. Proper risk management begins by recognizing the risks that are presented.

Contract failures can be classified depending on when the failure emerges.

### Tender Risk

This category addresses the failure of the counterparty, after being awarded the contract, to deliver the executed contract (and other required documents, such as insurance certificates or performance bonds). In United States public contracting practice, the tender risk is addressed by requiring bidders to deliver a “bid bond” or equivalent security.

### Performance Risk

This second category subsumes the risk that a contractor will not deliver the bargained-for performance. It includes untimely delivery, delivery of defective work, short delivery, and faults in the manner of delivery.

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### Litigation Risk

This family of loss exposures refers to the process of converting a claim into cash in hand in an amount sufficient to make the aggrieved party whole. It can be parsed into two further categories: the judgment risk, i.e., the risk of securing a legally enforceable decree that one party make payment to the other; and the execution risk, the risk that the contractor is insolvent.

Surety bonds excel at addressing the execution risk because they assure the obligee that, upon reducing a claim to judgment, there is a solvent party — the surety — that will take on the burden of payment. However, a performance bond does not remove the judgment risk. The surety does not owe the obligee an immediately performable duty to pay until and unless the claim of breach has been reduced to judgment. In short, a surety bond is not a “pay now — fight later” instrument, which dilutes its value.

### Securing the Transaction

Secured transactions are made up of two parts. The primary transaction, sometimes called the “value” transaction, is the commercial deal that drives the entire exercise, such as a construction contract. The secondary, or “collateral,” transaction serves to provide assurances to one of the parties in the primary transaction that the other will provide the agreed-upon return. When the discussion is focused on the collateral security, the primary transaction is sometimes referred to as the “underlying” transaction.

One approach to secured transactions is to hold an interest in collateral security that can be used as a fund to cover the expenses caused by a default. That collateral fund can be created through an outright grant, or it can be created by withholding a portion of the payments that are otherwise due to the counterparty. The latter method is commonly employed for construction projects and in that context is called “retainage.”

### Possessory Security Interest

There are many kinds of collateral security. Perhaps the simplest of them is the pledge, which is the delivery of property to the creditor, who may make itself whole in the event of default by taking the collateral (if it is cash or near-cash) or selling the collateral and applying the proceeds to the debt. Pledges have the virtue of simplicity and directness. Disadvantages include the custodial and administrative burden of holding and preserving the collateral property and the fact that the collateral remains the property of the counterparty, at least until there has been a default and a formal resort is had to the collateral.

### Suretyship

As an alternative, some parties use surety bonds to supply additional assurances of performance. A surety bond is a contract, separate from the underlying agreement, under which a third party, the surety, guarantees the performance of the underlying agreement. The tenor of these bonds generally is that the surety agrees to be liable for a stated sum of money (the “penal sum”) related to the underlying contract, but if the principal (i.e., contractor) performs the contract, then the surety is exonerated from all liability on the bond.

The surety’s liability is thus dependent on the prin-

principal's default. Note that the term "surety" consistently signifies only dependent, accessory, or "co-extensive" liability. While claims are often asserted that an instrument creates only accessory liability (because the issuer of the instrument wishes to resist payment and wishes to set up the value transaction as a defense to payment under the security instrument), the *intended* use of accessory instruments appears principally in the construction industries of the United States, Canada, and the United Kingdom.<sup>4</sup> If the instrument contains terms viewed by the courts as importing accessory liability, the issuer will generally decline to pay until a lawsuit has been commenced and prosecuted, regardless of the other terms of the instrument.<sup>5</sup>

Moreover, the liability of a surety is fragile, and said to be *strictissimi juris*.<sup>6</sup> Any modification of the underlying contract made without the assent of the surety will exonerate the surety, as will any act that diminishes the surety's recourse against the principal.

Surety bonds, when enforced through court proceedings, generally entail activity that prolongs rather than expedites the resolution of any real disputes over the performance of the work and the payments for it.<sup>7</sup>

### Independent Financial Assurances

In contrast to the foregoing, much of the world outside of the United States has come to rely on instruments that mandate payment of the sum of the instrument "on first written demand." These instruments are issued by banks and function as independent obligations of the issuer, irrespective of the actual right of the beneficiary to declare a breach of contract, the willingness of the principal that the payment be made, or any other matter or thing. In Europe and throughout Africa, Asia, and the Middle East, these instruments are known as "independent bank guarantees," and they have become critically important in a wide variety of commercial transactions.

Banks in the United States do not issue instruments of this kind. Until 1999, commercial banks in the United States were prohibited from guaranteeing the obligations of their customers. However, United States banks were not precluded from establishing letters of credit, which were not seen as guarantees but as payment facilities. Over time, other payment mechanisms evolved under which the letter of credit, now called a "standby" letter of credit, came to be a backstop

mechanism, used only when the ordinary, expected remittance failed to materialize.<sup>8</sup> Commercial credits continue to have a role in international trade as credit enhancers, but in today's market, the standby letter of credit represents a far greater volume of economic undertaking than the commercial credit.<sup>9</sup>

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Under a letter of credit, the issuing bank promises to honor a demand for payment that satisfies the conditions stated in the letter of credit. In the typical international trade case, the letter of credit stipulates that the beneficiary must present a draft or bill of exchange together with a commercial invoice for the goods being sold and a bill of lading demonstrating that the goods have been received by a common carrier and consigned for delivery to the purchaser. The standby letter of credit typically requires instead a declaration of default under the primary obligation.

### Characteristics of the Independent Financial Assurance (IFA)

Whether it takes the form of a bank guarantee or standby letter of credit, the salient characteristic of an IFA is its *independence*.

#### *Independence*

An IFA is independent of the underlying value transaction. This means that even if the demand for payment under the IFA is wrongful, the issuer is obligated to make payment upon demand and without further inquiry into the existence of proper grounds for demanding payment.<sup>10</sup> The obligation to make payment persists even if the issuer knows that the demand is wrongful.<sup>11</sup>

An IFA is independent of the agreement or obliga-

tion of the applicant to reimburse the issuer.<sup>12</sup> The fact that the applicant may be unable to reimburse the issuer does not diminish the issuer's obligation to make payment. Just as important, if the applicant is not legally obligated to reimburse the issuer, the issuer's obligation to pay remains unimpaired.

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#### *Documentary*

An IFA is a documentary instrument, which means, first, that it is embodied in a written instrument;<sup>13</sup> second, that the conditions of the instrument—both those that trigger the obligation to pay and those that excuse payment—are to be found from the instrument; and third, that the examination process that the issuer engages in does not include examination of anything other than the documents that are presented to the issuer.<sup>14</sup>

It should be noted that when the IFA is silent on the question of whether the documents presented must include a statement of default, the Uniform Rules for Demand Guarantees (URDG)<sup>15</sup> imposes such an obligation, including a statement of the particulars in which the principal is in default. A declaration of default is also imported into all IFAs governed by the laws of Germany.<sup>16</sup>

#### *Irrevocable*

An IFA is irrevocable, whether so stated in the instrument or not.<sup>17</sup>

#### *Conventional*

An IFA is a matter of agreement. One of the most remarkable features of the IFA is the lack of legal restraints on the form and substance of the documents. This makes it possible to tailor the IFA with as much detail as the transaction demands.

American lawyers are often put off by the simplicity of IFAs. Bank guarantees in particular are thought

to be too brief. From the beneficiary's perspective, however, these features are good, as they reduce the amount of obfuscation that a lawyer can successfully inject into the process.

#### **The Fraud Exception**

IFAs are remarkable for the smoothness and simplicity with which they operate, but there are cases in which the payment system breaks down. Since fraud is the only recognized exception to the obligation of the issuer to honor a demand under an IFA, it is not surprising that a large number of applicants raise fraud as a defense. Fraud is the only defense that has even a chance at success.<sup>18</sup>

It should be noted that the law of Germany represents an exception to the general rules concerning independence and fraud. Under German law, fraud is viewed as relevant not only to the beneficiary-applicant relationship, but also to the beneficiary-issuer relationship.<sup>19</sup> Other jurisdictions are uniform in requiring the applicant to demonstrate the utter and complete absence of any right on the part of the beneficiary. The burden of proof is an enhanced one, varying from proof "beyond a reasonable doubt" in the case of the Netherlands,<sup>20</sup> to unambiguous and promptly produced proofs of fraud in the case of France.<sup>21</sup> Belgium, too, requires immediate production of clear evidence of "manifest fraud."<sup>22</sup>

Under the laws of England and Wales, proof of fraud removes an IFA from the principle of independence, but English courts seek to avoid interfering in the "absolute and unconditional undertaking" embodied in an IFA. As a result, while English courts speak of fraud as an exception to the principle of independence, in practice the English courts do not grant applicants' petitions to forbid an issuer from honoring the IFA.<sup>23</sup>

#### *Asserting Fraud*

In all these cases, since the fraud is that of the beneficiary, normal principles require that the beneficiary be brought before the court as a defendant. As an alternative, applicants sometimes bring suit against the issuer. Such a suit turns on the obligation of the issuer to desist from payment if the beneficiary's fraud is evident to the issuer. The cases are uniform that such a duty exists and that its violation by the issuer will preclude the issuer from obtaining reimbursement from the applicant.<sup>24</sup>

The same standard is generally applied to a lawsuit by the applicant to prevent the issuer from making payment under an IFA. Not only must the applicant prove the underlying fraud; it must show that the fraud is or should be evident to the issuer.<sup>25</sup>

A further hurdle that must be overcome by an applicant bringing such a case is the inadequacy of damages. Common law courts do not grant injunctions unless the plaintiff can show that it has no adequate remedy at law.<sup>26</sup> However, since the injury that the applicant will sustain is the unjustifiable payment of money, it follows that a money payment will normally be quite adequate to redress the harm.<sup>27</sup>

German law appears to be in accord with this principle.<sup>28</sup> Other European jurisdictions, including the Netherlands, France, and Belgium, will entertain an action to enjoin payment when the proof of fraud is “evident,” “clear,” or “unmistakable.”<sup>29</sup>

The United States, too, recognizes fraud as an exception to the principle of independence.<sup>30</sup>

### Varying Legal Regimes

As noted above, IFAs are for the most part governed by the agreement between the parties. These instruments have evolved largely free from restraint by legal requirements. Nonetheless, the law has evolved to recognize a number of financial instruments that resemble each other and, in some cases, are functionally indistinguishable.

#### *Letters of Credit*

Letters of credit in the United States are governed by the Uniform Commercial Code unless the letter of credit provides otherwise. Letters of credit almost always provide otherwise. Prior to 1998, most letters of credit provided that they were governed by the Uniform Customs and Practices (UCP) for letters of credit, published by the International Chamber of Commerce. The UCP was developed for use with commercial credits — instruments that are expected by the parties to be used to effect payment for documentary sales transactions. The UCP provides that it applies to standby letters of credit “to the extent applicable,” but the use of the UCP with standby letters of credit introduces a certain disharmony in the legal background.

Much preferable as a governing body of rules is the International Standby Practices 1998 (ISP98). ISP98 came into being in response to the lackluster

reaction of the international banking community to the United Nations Commission on International Trade Law convention. ISP98 has been criticized as being overly detailed, but the deep level of detail is actually a source of some comfort. For example, neither the UCP nor the URDG address the rights of the parties if the IFA expires but presentment cannot be made because of civil unrest in the city where presentation is to be made. The ISP98 does supply an answer to that question as well as many others that have bedeviled bank counsel for decades.

If a standby letter of credit is accepted as an independent assurance of performance, then ISP98 should be selected as the governing rule. It is complete, unambiguous, and in general alignment with the practices of the world banking community.

#### *Bank Guarantees*

Bank guarantees can and should declare that they are governed by the URDG. The substantive effect of the URDG is to make the bank guarantee operate, functionally and practically, as the equivalent of a standby letter of credit governed by ISP98. Most European courts view the URDG as a statement of customary practice, even when the guarantee does not mention the URDG.

The United Nations Convention on Independent Guarantees and Stand-By Letters of Credit has not attracted significant support, and some international commentators have suggested that it is not needed except where the national legal system has not developed a “mature regime.”<sup>31</sup>

Technically, ISP98 can be used to govern a bank guarantee, but using ISP98 to govern a bank guarantee presents many of the same problems when using the UCP to govern a standby: ISP98 is designed to address letters of credit, and while ISP98 and URDG are very similar substantively, there are many procedural differences between the two. ISP98 should be used for standby letters of credit; URDG should be used for bank guarantees.

#### *National Regimes*

Whenever an IFA is tendered as security for a contract, the beneficiary must be aware of the *national* rules that govern or regulate the use of IFAs. A complete survey of the national differences is beyond the scope of this article, and the advice of expert counsel should be sought.

### Drafting an IFA

As discussed above, the law takes an essentially “hands off” approach to letters of credit and bank guarantees. While there are a few exceptions,<sup>32</sup> letters of credit and bank guarantees may be freely negotiated and agreed upon between the parties. As a result, close attention must be paid to the drafting of the language that makes up the IFA.

One salutary feature of the ISP98 and URDG regimes is their emphasis on sense and common practice, and this represents a welcome departure from the mindless formality that so often preoccupies practitioners under the UCP. Under the UCP, if the credit contains a typographical error in the specification of documents that must be tendered, then the tender must recapitulate the typographic error. The ISP98 is express in requiring only that the sense of the presentation must conform to the sense of the credit.<sup>33</sup>

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#### *Avoid the use of unnecessary provisions*

A recent case addressed a bank guarantee that undertook to make payment “against your simple demand, being the damages sustained by you in consequence of the Applicant’s failure to tender the required documents.” The reference to the beneficiary’s damages was enough to raise a question as to the accessory or independent nature of the guarantee, and that issue was grounds enough for the issuer to decline payment pending a court ruling. The outcome might have been different if the guarantee had contained a “Conclusive Evidence” clause of the sort favored by the courts of England and Wales, providing that the beneficiary’s certification of default is deemed to be conclusive evidence of the right to draw.

Further, an independent financial assurance should never contain even a connotation of accessory liability. Words such as “surety,” “*cautionnement*,” “*borgschaft*,” and the like must be avoided.

### Time

All IFAs provide for an expiration date. For some transactions, the expiration of the assurance is not a serious concern because the transaction is expected to be completed (or to fail altogether) within a reasonably short period of time. When a transaction is expected to be fulfilled over a longer period of time, such as is the case with construction works or requirements contracts that extend over an extended period, the expiration of an IFA becomes a serious concern.

One approach to this problem is to include an “evergreen” clause in the IFA. Such a clause provides that the IFA is automatically renewed upon expiration *unless* the issuer notifies the beneficiary that the IFA will not be renewed. When an evergreen clause is included in the IFA, the value transaction should provide a notice by the issuer that the IFA will not be renewed in the event of default, entitling the beneficiary to demand payment. As an alternative to evergreen clauses, the value transaction might provide that it is a default under the contract if the beneficiary’s counterparty does not furnish a renewal IFA at least 30 days prior to expiration. In any case, expiration of the IFA is an event that should be carefully controlled. Calendar and diary functions should be carefully established and tested to ensure that the beneficiaries are not prejudiced due to a failure to enforce the right to renewal of the IFA.

### The Payment Mechanism:

#### How to obtain payment under the IFA

Payment under an IFA depends on the terms of the IFA and not on the terms of the underlying agreement. When the liability of the issuer of a financial assurance depends on the liability of the applicant, the instrument is said to be an accessory one, and accessory instruments are worthless to any other party that is unwilling to submit to litigation.

If the IFA is in the form of a letter of credit, the demand for payment takes the form of a negotiable instrument, known as a “draft” or “bill of exchange” that is “drawn on,” or payable by, the issuer of the letter of credit. The demand must be accompanied by a certificate attesting to the beneficiary’s right to receive payment, and the form of the certificate should be specified in the body of the letter of credit. These documents are then delivered to the beneficiary’s bank for collection. The bank then uses the commercial paper clearing system to “present” the draft and certificate to the issuer.

Upon receipt, the issuer engages in the process of examination pursuant to Rule 4 of ISP98. The examination process judges the compliance of the presentation with the letter of credit by reference only to the documents that are presented. The required documents are issued solely by the beneficiary unless the credit specifies otherwise. If the letter of credit requires the issuer to ascertain anything that goes beyond the documents presented,<sup>34</sup> those requirements are to be ignored unless the issuer can determine them from its own records or normal operations.<sup>35</sup>

Payment under a bank guarantee is even simpler, since no draft need be presented. Instead, the beneficiary simply communicates a demand for payment to the issuer. First demand guarantees are known to exist in two forms. The first requires nothing more than the beneficiary's written demand for payment. Such forms are not in keeping with current practice. Instead, current practice, as reflected in the URDG, requires a declaration of the default, including the particulars in which the applicant is in default, that entitles the beneficiary to draw under the guarantee. This still does not require or permit the issuer to take into account anything beyond the four corners of the presented documents and to reinforce this outcome. Many courts take comfort when the IFA provides explicitly that the declaration shall be taken as conclusive evidence that the beneficiary is entitled to make the demand.

A variant sometimes encountered in connection with bank guarantees is one payable on first *justified* demand. These documents are not IFAs, but import only an accessory liability.

### Management under an IFA

One important difference between bonds and IFAs is the amount for which they are issued. Bonds typically cover 100 percent of the amount of the contract, while IFAs are issued for a smaller amount, commonly one million dollars. This means that the beneficiary cannot sit back and wait for trouble. It requires that the beneficiary be diligent and recognize when a default has grown to a size that calls for terminating the contract and drawing under the IFA. IFAs are reliable, but they do not enable the beneficiary to ignore problems, secure in the knowledge that eventually it will be paid by the bond. The world has come to reject surety bonds and to embrace IFAs,

and American business people and their legal counsel ignore these instruments at their peril.

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### Endnotes

1. Suretyship can be found in Chaps. 42-44 of Genesis, and many cuneiform tablets recovered from Babylon have been interpreted as surety contracts.
2. I acknowledge the contribution of Eugene R. Anderson, Esq., to the quoted expression and much, much more.
3. Sometimes that "other" contract is called the "underlying" contract, but that terminology turns the deal upside down. A better term for the "other" contract is "primary obligation." This emphasizes the fact that the bond is collateral, "alongside of" the primary obligation. A third term for the "other" transaction is "value transaction." This term was adopted by European legal scholars to avoid the connotation of interdependency that terms such as "underlying" or "primary" convey.
4. Bertrams, R.F., *Bank Guarantees in International Trade*,<sup>3rd</sup> rev. ed. (Hague: Kluwer Law International, 2004): §1-2. Surety bonds are still found as guarantees for the fidelity of fiduciaries when they are entrusted with funds, but the use of surety bonds in commerce appears generally to be uncommon.
5. A party that is intent on securing recourse without having to proceed in court should simply reject any instrument that uses terms such as *borgtocht*, *Bürgschaft*, *cautionnement*, surety, or bond. *Id.* at §§4-16 – 4-20 points out that such terms are regarded in Germany as making the document accessory rather than independent, and even outside of Germany there are cases that indicate that the inclusion of such terms is perilous if the beneficiary wishes to be paid promptly and without need of filing a lawsuit.
6. Or "strictest right." The use of obscure phrases and antiquated expressions is characteristic of suretyship law and causes great confusion even among practitioners who deal with these concepts regularly. For example, a bond that protects against a failure to complete a project and against the claims of laborers, subcontractors, and material suppliers is said to be "conditioned for the lien-free completion of the Works." When more commonplace language is employed in

- the bond, confusion sometimes results as the advocates and court go through fairly elaborate gyrations trying to establish whether a “condition” is one that triggers the liability of the surety, excuses the surety’s performance, or is a formal step that must be taken in order to enforce the liability of the surety.
- 7 Surety bonds do, however, introduce a measure of personal accountability because the individual owners of the contractor will almost certainly have personal liability to reimburse the surety for all expenses incurred by the surety in connection with the bond. Corporate sureties in the United States generally will not issue a bond unless the owners of the applicant business have executed an “Agreement of General Indemnity” that exposes their personal assets to loss.
- 8 Bertrams, *supra* note 4, at §3-7.
- 9 Byrne, J.E., “New rules for standby letters of credit: the International Standby Practices/ISP98,” *Business Credit*, June 1998, (available at [http://findarticles.com/p/articles/mi\\_hb4355/is\\_199805/ai\\_n15203504](http://findarticles.com/p/articles/mi_hb4355/is_199805/ai_n15203504)) (visited February 25, 2008). There are reports that the total volume of standbys outstanding in mid-2007 was at least US \$950 billion. Sifri, J., “The Banking System in Jordan,” <http://graincon.com/blog/2007/07/> (visited February 25, 2008). However, the volume of commercial credits is said by many commentators to be far smaller. Measuring the difference is complicated by the discontinuance, as of January 2007, of reports from the United States Federal Reserve System of the amount of commercial credits outstanding, apparently because this measure was thought no longer to be economically significant. United States Federal Reserve Board, “Commercial Paper Notes and Updates,” December 10, 2007 (available at <http://www.federalreserve.gov/feeds/cp.html>) (visited February 25, 2008). Studies released in 1995 indicated that the volume of standby letters of credit was approximately five times greater than the volume of commercial credits. Bertrams, *supra* note 4, at §1-1, n.2.
- 10 Uniform Customs and Practices (for Commercial Credits, hereinafter UCP) Article 3(a); Uniform Rules for Demand Guarantees (URDG) Rule Article 2(b); International Standby Practice 1998 (ISP98) Rules 1.06 and 2.01.
- 11 ISP98, §1.06(c)(iv).
- 12 Bertrams, *supra* note 4, at §9-5.
- 13 Both URDG and ISP98 contemplate that the “written instrument” may be an electronic document and express certain indefinite considerations with respect to the authentication process for electronic presentations. The details of such a system, including the facilities that need to be maintained by the beneficiary of such an IFA, are beyond the scope of this study, but should be vetted when and if the beneficiary is offered an IFA that contains provisions for electronic presentation. While electronic presentation can offer a streamlined and facile mechanism for handling the documents and the details of obtaining payment, it also presents vulnerabilities that are worth addressing in their own right.
- 14 ISP98, Rules 1.06(a/d) and 4.02. *Accord*, URDG Arts. 2(b) and 9.
- 15 URDG Article 20(a).
- 16 Bertrams, *supra* note 4, at §13-12ff.
- 17 URDG Article 5; ISP98 Rule 1.06(a).
- 18 Bertrams, *supra* note 4, at §14.1
- 19 This issue is discussed at length in Bertrams, *supra* note 4, at §§14-7ff. Highly informative is a widely-cited article by Dr. Jens Nielsen and Nicolai Nielsen, “Standby Letters of Credit and the ISP98: A European Perspective,” 16 *Banking & Finance Law Review* 163 (1999), which concluded that standby letters of credit should be denied effect as autonomous, independent undertakings. No other nation has supported such a radical interpretation of the law, but this uncertainty under German law indicates that the acceptability of IFAs issued by German banks or that are governed by German law is highly questionable.
- 20 CA Amsterdam, 5 February 1987, NJ 1988, 591.
- 21 Bertrams, *supra* note 4, at §14-9 n. 27.
- 22 *Trib. com. Brussels*, 26 May 1988, JT 1988, p. 460.
- 23 King, R., *Gutteridge and Megrah’s Law of Bankers’ Commercial Credits*, 8<sup>th</sup> Ed. (2001): §§4-21 *et seq.*
- 24 Bertrams, *supra* note 4, at §15.1.
- 25 *Edward Owen v. Barclays Bank Int.*, All ER 976 (1978); *Boliventer Oil v. Chase Manh. Bank*, 1 WLR 392 (1984); *Csarnikow-Rionda v. Standard Bank*, 2 Lloyd’s Rep. 187 (1999).
- 26 This saying is based on the common law distinction between remedies that are *legal* in nature (such as damages or other remedies that are satisfied by paying money) and those that are *equitable* (such as injunction), which require performing or desisting from a specific act.
- 27 *Harbottle Ltd. v. National Westminster Bank*, 2 All ER 862 (1977). *See also* Owen, *supra* note 25, *Boliventer*, *supra* note 25, and *Csarnikow-Rionda*, *supra* note 25.
- 28 Bertrams, *supra* note 4, at §16-5. It has been noted, however, that German law is unsettled on this point, *Id.* at §16-5, n. 35. Part of the problem, as noted in the cited authority, is the reluctance of German jurists to abandon the principles of co-extensiveness and accessory liability, which generally casts doubt on the utility of IFAs generally under German law.
- 29 *Id.* at §§16-6f.
- 30 *Sztein v. J. Henry Schroeder Banking Corp.*, 177 Misc. 719

- (N.Y. Sup. Ct. 1941).
- 31 Dolan, J.F., "The UN Convention on International Independent Undertakings: DO States with Mature Letter-of-Credit Law Regimes Need It?" 13 *BANKING & FIN. L. REV.* 1 (1997) (Osgoode Hall Law School).
- 32 Many of the regulatory regimes do not affect the internal workings of the IFA. For example, the Syrian regulation requires that letters of credit be "fronted" through the Syrian state bank. See Infoprod Research Report on commercial transactions in Syria, available at <http://www.infoprod.co.il/country/syria2f.htm> (visited April 11, 2008).
- 33 ISP98 Rule 4.09. This rule applies even if the letter of credit purports to specify the exact words to be employed in a demand for payment, unless the letter of credit stipulates that the demand must be "exact" or "identical." The URDG is not so explicit as the ISP98 (it rarely is) but the provision in Article 2(b) requires payment against demand documents that "appear on their face to be in accordance with the terms of the Guarantee."
- 34 These are sometimes known as "non-documentary conditions."
- 35 ISP98, Rule 4.11.

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Kevin J. Connolly is a member of Anderson Kill & Olick's Real Estate and Construction practice group, concentrating on providing legal services to clients involved in construction projects. His practice centers on representing owners and developers of significant commercial, industrial, and educational projects. Mr. Connolly also represents contractors, construction managers, and design professionals. Recognizing that insurance is critical to the survival of any organization involved in construction, Mr. Connolly adds value and legal acumen to his clients through his understanding of and experience with insurance services.

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