

Convergence Romania Financial Sector Modernization

Special Projects Initiative Public-Private Steering Committee



TERMS OF REFERENCE

Project: Law on Bank Guarantees

Project Owner: Constantin Barbu RBA Director (on behalf of RBA)

Project Manager: Janfred Silberstein, Director, NBR

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I- Background

Bank guarantees play an important role in commercial contracts due to their capacity to secure performance in an environment where partners with different backgrounds are called upon to do business together. In general, countries have specific bank guarantees laws or ratify relevant international conventions (see below) that clearly define the rights and obligations of the parties involved and balance the interests of the beneficiary against the need to protect the principal against unfair claims.

In Romania, there is no specific law on bank guarantees. The disparate and incomplete legal provisions (from the Civil and Commercial Code, Law no. 99/1999) that have some relevance in addressing the issues pertaining to bank guarantees leave unclear numerous aspects, among which the most important are:

- the delimitation between the principal obligation resulting from the commercial contract and the obligation resulting from the bank guarantee;
- the extent to which the bank issuing the guarantee is bounded to pay the beneficiary based on his simple written request;
- the extent to which the issuing bank can invoke the exceptions stipulated in the principal contract;
- the extent to which the bank issuing the guarantee has the right to revert against the principal for recovering the guarantee amount and any other costs paid and not honored by the principal.

In international trade, bank guarantees are governed almost exclusively by the law of the country of the bank which issues the guarantee to the beneficiary. Likewise, the International Chamber of Commerce (ICC) issued in 1992 a set of “Uniform Rules for Demand Guarantees” (ICC Publication no. 458) that have achieved a broad international recognition.

In issuing domestic letters of guarantee, Romanian banks make reference either to the Romanian law or to the regulations from the parent entity’s country. This practice may result in unfavourable decisions to Romanian banks due to the incompleteness of the

Romanian legislation on the matter and to the limited knowledge of Romanian courts of international rules.

In order to help overcome the drawbacks in enforcing bank guarantee contracts, an RBA group has put together the principal terms of a proposed guarantees law.

II - Project Objective

To prepare a bank guarantee law proposal that would meet the interest of the banking industry to improve the enforceability of banking contracts, supported by a legal comparison of similar laws in other EU countries and a RIA on the costs met by banks under the current practice and the possible benefits if a law is enacted.

III – Intended Strategy

The project management group (Project Owner, Project Manager, Deputy Project Manager, supported by the SPI Secretariat) acts based on the mandate received from the SPI Committee to reach the project objective.

To build on the existing RBA work on the matter and to make it adequate to initiate the formal legislative amendment process after SPI Committee endorsement, the PMG should form a project working group (PWG) with meaningful representation by authorities (Ministry of Justice, Ministry of Public Finance, and National Bank of Romania).

The project management group (PMG) should start building on the existing understanding of the problems raised by the current practice of issuing and enforcing bank letters of guarantee (LGs). In order to get acquainted with the RBA analyses and recommendations on the issue, the SPI Secretariat, on behalf of the PMG, will ask the RBA to provide the draft bank guarantee law proposal and any other relevant materials regarding the RBA work on the matter.

To help document the PWG work with the costs and risks incurred by banks in applying the current legislation, the SPI Secretariat will support the PM to:

- a. perform a survey on the practices used by banks in drafting the LGs and the problems encountered in enforcing the LGs, outlining the costs and risks generated and necessary improvements with their implied effects in terms of costs and risks for banks;
- b. prepare a RIA outlining the cost incurred by banks under the current legislative framework and the possible benefits if a law is enacted.

Also, in order to broaden the understanding of the drawbacks perceived in applying the current legislation, the PM/DPM/SPI Secretariat will ask the Romanian Chamber of Commerce to outline its experience in dealing with LGs related disputes.

The SPI Secretariat will help the PWG assess whether the RBA draft law proposal adequately addresses the concerns of the stakeholders, based on these documents and an analysis on the costs and risks raised by the current practice of issuing and enforcing LGs. The PWG members will incorporate any adjustments necessary and will prepare a

document with proposals for a bank guarantee law. If necessary, the SPI Secretariat will use its best efforts to secure an independent international legal opinion on the proposed draft law.

IV- Methodology: from kick off to the accomplishment of the project

Preparation of PWG 1st meeting (PM/DPM and SPI Secretariat) - January 17 – February 2

PM/DPM/SPI Secretariat will gather existing documentation on the matter from the RBA Legal Committee.

SPI Secretariat will conduct a survey on the practices used by banks in drafting the LGs and the problems encountered in enforcing the LGs on a representative sample of banks. Based on the costs and risks as outlined by the survey, the SPI Secretariat will perform a RIA.

PM/DPM/SPI Secretariat will conduct preliminary interviews with the Romanian Chamber of Commerce and the Ministry of Justice in order to acquire an understanding of the drawbacks perceived in applying the current legislation.

PO/PM selects and appoints PWG members.

PO/PM will send to the PWG members the SPI Committee Mandate Letter together with the following documents before the PWG 1st meeting:

1. A paper prepared by the SPI Secretariat on the costs and risks raised by the current practice of issuing LGs, enforcing LGs, and solving LG-related legal disputes, outlining proposed improvements in line with international practices, based on the following contributions:
 - a. RBA: a package of documents gathering RBA bank guarantee law proposals and any other supporting documentation;
 - b. Romanian Chamber of Commerce: a presentation of its experience in dealing with LGs disputes;
 - c. PM/DPM/SPI Secretariat: the results of the survey, the findings of the interviews, a RIA outlining the cost incurred by banks under the current legislative framework and the possible benefits if a law is enacted, and a compilation of relevant EU laws;
2. Draft TORs prepared by SPI Secretariat and endorsed by PO and PM/DPM.

PWG 1st meeting - February 26 – March 2

1. PWG members discuss the paper prepared by the SPI Secretariat, outlining:
 - a. the costs and risks incurred by banks and non-bank parties in applying the current legislation pertaining to LGs and their quantitative assessment as resulted from the RIA;
 - b. the present practices in solving litigations regarding LGs as described in the presentations prepared by the Romanian Chamber of Commerce and, if possible,

- by the Ministry of Justice
2. PWG members discuss the RBA bank guarantee law proposal and outline any other additional issues to be included in the draft regulation as resulted from the PWG discussions;
 3. PWG members agree on TORs prepared by SPI Secretariat and endorsed by PO and PM/DPM;
 4. PM/DPM establish **homework** for PWG members:
 - PWG Ministry of Justice member: review the RBA law proposal and integrate any additional necessary aspects as resulted from the PWG discussions;
 - PWG Ministry of Public Finance member: provide an opinion on the proposed legislative improvements.

The individual contributions will be sent to the PM/DPM and SPI Secretariat. SPI Secretariat will centralize the contributions and circulate them to PWG members before the PWG 2nd meeting.

PWG 2nd meeting - March 12 - 16

1. PWG members discuss and agree on the revised bank guarantee law proposal;
2. PWG members decide on the need for an independent international legal opinion;
3. PWG members agree on an outline of a paper supporting the legislative proposals to be prepared by PM/DPM/SPI Secretariat.

Homework:

- SPI Secretariat: if necessary, provide an independent international legal opinion on the draft law approved by PWG members.
- PM/DPM/SPI Secretariat: write the paper supporting legislative proposals.

PWG 3rd meeting - March (26 - 30)

1. PWG members take note of the independent international legal opinion on the proposed draft law (if requested);
2. PWG members agree on any adjustments necessary based on the independent legal opinion and modify the draft law accordingly;
2. PWG members discuss and approve the paper supporting the legislative proposals.

Homework: PM/DPM/SPI Secretariat: finalize actionable SPI Committee proposal.

V- Output

PWG 1st meeting

- PWG members send individual contributions;
- PWG take note of the costs and risks incurred by banks and third parties in applying the current legislation;
- PWG members agree on possible legislative improvements starting from the RBA law proposal.

PWG 2nd meeting

- PWG members agree on the bank guarantee law proposal;

- PWG decide on the need for an independent international legal opinion;
- PWG member prepare paper supporting legislative proposals.

PWG 3rd meeting

- PWG members incorporate any adjustments resulted from international legal opinion;
- PWG members approve supporting position paper;
- SPI Secretariat sends SPI Committee Actionable Paper to Convergence.

VI - Project Team

The team is composed of:

- Ministry of Justice
 - 1 expert with commercial law background;
- Banks
 - M. Socol, Banca Carpatica;
 - A. Zaharescu, BCR;
 - Mihaela Roman, HVB Ţiriac;
 - Margareta Puşchiază, RZB;
 - Madalina Cristea, Unicredit.
- National Bank of Romania
 - Raluca Cristofor.
- Ministry of Public Finance
 - Dan Butoi. M.F.P..

The team will be chaired by the Project Manager and co-chaired by the Deputy Project Manager .

PM/DPM have to report to PO at least after each meeting of the PWG.