

THE LEGAL PERSPECTIVE ON STRENGTHENING THE PRACTICE OF BANK GUARANTEES IN INDONESIA: REVISITING PROVISIONS RELATED TO PAYMENT

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Abstract

This article provides a legal perspective on bank guarantees in Indonesia. It examines statutory and regulatory provisions related to payment for bank guarantees by comparing the provisions related to payment for a *bank garansi* and that of a standby letter of credit or demand guarantee. The work shows that a *bank garansi* is a dependent guarantee, whereas a standby letter of credit or demand guarantee is independent guarantee. The payment for *bank garansi* is based on the actual default, whereas the payment for a standby letter of credit or demand guarantees is based on the statement of default. The primary obligation to pay on a *bank garansi* is that of the issuing bank or guarantor, while the primary obligation to pay on a standby letter of credit or demand guarantee is that of the issuing bank. And, as to the international counter guarantee, conflicting provisions arise when a bank guarantee is from a domestic institution. The banks, companies and government agencies involved in such a *bank garansi* transaction are compelled to understand the implications of these findings and further prepare the appropriate solution.

Keywords: *bank garansi, standby letter of credit, demand guarantee, counter guarantee, international rules*

I. INTRODUCTION

Bank guarantees in practice in Indonesia consist of *bank garansi*, standby letters of credit, and demand guarantees. A company often needs some needs bank guarantee in domestic or international business transactions to secure contractual obligations under the underlying contract. A bank guarantee is issued for the economic purpose of securing payment of the underlying contract. However, the legal provisions related to payment for bank guarantees sometimes become an issue in practice.

Therefore, the laws and regulations of Indonesia regarding *bank garansi* will be examined extensively herein. At the center of this discussion, are the legal provisions related to payment on bank guarantees. This examination attempts

to answer the research question whether the legal provisions related to payment for bank guarantees in Indonesia stimulate the execution of payment on that bank guarantees. This examination is basically an innovative one. The writer wrote a book on bank guarantees with title of the book *Jaminan Perbankan Internasional: sesuai UCP 600, ISP98 & URDG 758*, published in Jakarta of the year 2011, and 2015 as a second edition.

Here is the theory upon which to address the research question. The ease of complying with these provisions related to payment on bank guarantees are the key to success in bank guarantee transactions and in achieving the economic purpose of the underlying contracts. Economically, a bank guarantee is not separate from the underlying contract. A bank guarantee is issued specifically for the underlying contract. There would be no bank guarantee without the underlying contract to guarantee.

The laws of Indonesia covering *bank garansi* and the international rules on standby letters of credit or demand guarantees apply concurrently in this country. An analysis of the interplay among the various legal provisions can be performed through a comparative analysis of the provisions related to payment for bank guarantees under the laws on *bank garansi* and the international rules.¹ The judicial decisions are used to see the application of the laws on *bank garansi* by courts.

This examination has revealed some confusion and conflict in the existing legal framework. A *bank garansi* is a dependent guaranty, whereas a standby letter of credit or demand guarantee are independent. The payment on a *bank garansi* is due based on an actual default, whereas the payment for a standby letter of credit or demand guarantee is due based on the statement of default. The primary obligation to pay on a *bank garansi* is that of the guarantor or the guaranteed party, while the primary obligation to pay on a standby letter of credit or demand guarantee is that of the issuing bank. Additionally, as to an international counter guarantee, its provisions related to payment are basically the same with that of a demand guarantee or a standby letter of credit. Conflicting provisions arise when asking a *bank garansi* as the domestic bank guarantee. However, the conflicting provisions do not arise when it demands payment a demand guarantee or standby letter of credit as a domestic bank guarantee.

This article provides the potential legal issues in a bank guarantee transaction. These legal issues concern the implementation of the provisions related to payment on bank guarantees found in Indonesian banking practice.

¹ The laws of Indonesia with regard to bank guarantees consist of the Private Law Statute, articles 1820 up to 1850 and the regulations of Bank Indonesia including the international rules acknowledged by Bank Indonesia in its regulations. The laws are divided into the laws on *bank guarantee* and the international rules on standby letter of credit or demand guarantee. See notes 5 - 7 below.

It needs to be recognised and further anticipated accordingly by the banks, companies, and government agencies before doing business.

Further, this article provides the same potential legal issues in the transaction of international counter guarantees involving a domestic bank guarantee. That legal matter must be understood and further anticipated by the overseas banks and companies, and government agencies.

II. RECOGNISING BANK GUARANTEES IN INDONESIA

II.A. What is a Bank Guarantee?

A bank guarantee is a guarantee issued by a bank. It is issued by issuing bank, the guarantor, to secure the contractual obligation of the applicant² for the benefit of the third-party beneficiary.³ The guarantor bank issues a bank guarantee to assume the contractual obligations of the applicant in case of default in performing its obligation.

A bank guarantee is an instrument of guarantee, not an instrument of payment which would be a documentary credit.⁴ Legally, a bank guarantee is a contract of guarantee between the issuing bank and beneficiary. The issuing bank agrees to pay a certain sum of money as claimed by the beneficiary based on the default of applicant, the guaranteed party. The value of payment for bank guarantee does not exceed the nominal value of bank guarantee.

II.B. Domestic Bank Guarantees

Domestic bank guarantees are issued by banks in Indonesia. In banking practice in Indonesia, bank guarantees consist of a *bank garansi* regulated under the laws on *bank garansi*,⁵ standby letters of credit regulated under international

² Applicant is the one that applies for the issuance of a bank guarantee.

³ Beneficiary is the one that receives a bank guarantee.

⁴ The documentary credit is also called commercial letter of credit or letter of credit.

⁵ The laws on *bank garansi* are the Private Law Statute, the Bank Indonesia Board of Directors' Decision No. 23/88/KEP/DIR 18 Maret 1991 on Providing Guarantee by Bank (Bank Indonesia Board of Directors' Decision 23/1991), and the Bank Indonesia Circular Letter No. 23/7/UKU 18 March 1991 on providing Bank Guarantees (Bank Indonesia Circular Letter 23/1991). Private Law Statute is equal to the Act, Statute. Then, the Bank Indonesia Board of Directors' Decision and Bank Indonesia Circular Letter are the regulations issued by Bank Indonesia as the implementing laws to the Private Law Statute. According to these implementing laws, *bank garansi* is bank guarantee which is a guarantee issued by a bank in Indonesia.

law,⁶ and demand guarantees are likewise regulated under international law.⁷ Standby letters of credit and demand guarantees have been used in this country in accordance with the implementing laws and regulations promulgated by the relevant banking authority.⁸ Legally, a standby letter of credit is the same with a demand guarantee. The difference between them is merely a procedural matter as regulated under the international rules. The three types of bank guarantees can be used domestically⁹ to protect the business transactions.

A *bank garansi* is issued according to the laws on *bank garansi*.¹⁰ Any issuing bank to issue a *bank garansi* is required to comply to the laws. Under the laws, an issuing bank has no right to modify or exclude the laws in the issuance of a *bank garansi*. The laws on *bank garansi* are mandatory.

However, this is not the case when an issuing bank issues a standby letter of credit or demand guarantee subject to international law.¹¹ Under this framework, an issuing bank is free to choose the relevant international law

⁶ The international rules applied in this country as the rules of standby letter of credit are the Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 (UCP 600) or the International Standby Practices 1998, ICC Publication No. 590 (ISP98).

⁷ The international rules applied in this country as the rules of demand guarantee are the Uniform Rules for Demand Guarantees, 2010 Revision, ICC Publication No. 758 (URDG 758).

⁸ The banking authority in Indonesia formerly was Bank Indonesia, the central bank of Indonesia. Then, as per 1 January 2014, under Law No. 21 of 2011 on Financial Services Authority, article 55 para 2, the said authority was transferred by Bank Indonesia to Minister of Finance Regulation, the successor.

⁹ Bank Indonesia Board of Directors' Decision 23/1991, Article 2 and Bank Indonesia Circular Letter 23/1991, article 4. Both of these implementing laws permitting the use of *bank garansi* and standby letter of credit to secure the domestic business in Indonesia. Then, Bank Indonesia Regulation No. 7/3/PBI/2005, 20 January 2005, on Maximum Limit of Credit for General Bank (Bank Indonesia Regulation 7/2005), article 1 point 17 acknowledging the use of *bank garansi*, standby letter of credit and demand guarantee in the banking practice in Indonesia. Then, article 1 point 18d and article 20 of the Bank Indonesia Regulation 7/2005 stated the existence of the guarantee, standby letter of credit or the other similar instruments. According to URDG 758, article 2 guarantee is demand guarantee. The same is true according to the article 2 of the URDG 458 stated that the demand guarantee is referred to as guarantee in the URDG 458. Further, Financial Services Authority Regulation No. 32/POJK.03/2018 on the Maximum Limit for Lending and Provision of Large Funds for Commercial Banks (Financial Services Authority Regulation 32/2018), article 1 point 21 also acknowledging the use of bank guarantee, standby letter of credit and demand guarantee in the business transaction in Indonesia. The Regulation of Bank Indonesia is also the regulation issued by Bank Indonesia. The Regulation of the Financial Services Authority is the regulation issued by the Financial Services Authority. Based on Indonesia Banking Statistics Volume 20 No. 03 February 2022, Table 1.11, p. 23 issued by the Financial Services Authority, as per December 2021 the received guarantees by commercial banks in Indonesia amounted to 204.276 billion rupiah, and the issued guarantees amounted 345.453 billion rupiah. A bank guarantees are issued under SWIFT-based or paper-based.

¹⁰ See note 5 above.

¹¹ The international rules are the UCP 600 and the ISP98 for a standby letter of credit, and the URDG 758 for the demand guarantee.

as the governing rules for a standby letter of credit or demand guarantee.¹² These international laws are not compulsory because they are not binding law. As rules they can be modified or excluded by agreement of the applicant and issuing bank, and said agreement is stated in the text of a standby letter of credit or demand guarantee. It is the international framework itself that permit that modification or exclusion.¹³ The rules provide the flexibility for the businesses in applying them. Under this framework, standby letters of credit and demand guarantees can be issued transactionally as required. The rules follow the business. In this regard, however, it is the intention of the International Chamber of Commerce, the issuer of the rules that apply to them as formulated to create the uniformity¹⁴ in the practice for standby letters of credit or demand guarantees worldwide, including Indonesia. Creating this uniformity is key for companies, especially banks worldwide. The modification or exclusion of the rules is the exception.

From an economic perspective, bank guarantees are issued for the economic purpose of increasing the value of the underlying contract. The smooth transaction of bank guarantees provides the advantages to the business of parties to underlying contract. A bank guarantee transaction is performed under the laws of Indonesia, and therefore, it is important to understand the laws and accompanying regulations before transacting business. The provisions of the laws related to payment for a bank guarantee are discussed in section III.4 and III.5 below.

III. INTERNATIONAL COUNTER GUARANTEES ISSUED IN INDONESIA

III.A. What is a Counter Guarantee?

A counter guarantee is a guarantee issued by a bank, the counter guarantor to another bank, the guarantor. The counter guarantor issues a counter guarantee¹⁵

¹² UCP 600, article 1 and ISP98, rule 1, 101 for a standby letter of credit. And, URDG 758, article 1a for the demand guarantee.

¹³ UCP 600, ISP98, and URDG 758.

¹⁴ See, para 2 of the Foreword to UCP 600 by Guy Sebban, Secretary General International Chamber of Commerce, 2006, para 2 of the Foreword to ISP98 by Maria Livanos Cattai, Secretary General of ICC, 1998, and para 4 of the Foreword to URDG 758 by Jean Rozwadowski, Secretary General International Chamber of Commerce, January 2010. See further, UCP 600, article 1, ISP98, rule 1, 1.01 and URDG 758, article 1a.

¹⁵ URDG 758, article 2 states: “counter-guarantee means any signed undertaking, however named or described, that is given by the counter-guarantor to another party to procure the issue by that other party of a guarantee or another counter-guarantee, and that provides for payment upon the presentation of a complying demand under the counter-guarantee issued in favor of that party”.

to the guarantor in order to issue its bank guarantee to secure the contractual obligation of a third party as set forth in the counter guarantee. Under the law, a counter guarantee is a contract of guarantee between the counter guarantor and the guarantor.

In this counter guarantee transaction, the counter guarantor is responsible for paying for the counter guarantee. The counter guarantor provides the payment of the counter guarantee to the guarantor when the guaranteed party stated in a bank guarantee is in default or breach of performing its contractual obligations under the underlying contract, and the guarantor has paid on a bank guarantee to the beneficiary. Other than providing payment, the counter guarantor in the counter guarantee mentioned the requirements to be disclosed as the substance of a bank guarantee to be issued by the guarantor. The guarantor is required to fulfill the requirements accordingly, and the fulfillment is the condition to get paid from the counter guarantor in case the guarantor has paid its bank guarantee to the beneficiary where the guaranteed party is in default or has otherwise breached its contractual obligations. That is to say, the payment from the counter guarantee is subject to the fulfillment of the requirements for a bank guarantee followed by the payment for that bank guarantee to the beneficiary. Essentially, this is an indemnification agreement. In this regard, the guarantor performs the transactions for the counter guarantor that received the instruction from the instructing party to issue the counter guarantee.¹⁶ The guarantor assumes no risks in issuing a bank guarantee as long as it complies with the requirements for bank guarantees as stated in the counter guarantee.

III.B. What is an International Counter Guarantee?

An international counter guarantee is a counter guarantee issued by an overseas bank, the counter guarantor to a domestic bank guarantor. The international counter guarantee is a contract of guarantee between the overseas bank and the domestic bank asking the latter bank to issue a domestic bank guarantee to secure the contractual obligation of a third party as stated in the counter guarantee.¹⁷

The international counter guarantee is issued under an agreement among the parties to underlying contract. As agreed, one party, the instructing party instructs an overseas bank to issue a counter guarantee to a domestic bank

¹⁶ URDG 758, article 2 defines the instructing party as follows: “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”.

¹⁷ International Counter Guarantee means a counter guarantee issued by an overseas bank to a domestic bank in another country. In other words, international counter guarantee is a counter guarantee involving two banks in two different countries. It is a cross border transaction.

in another country asking it to issue a domestic bank guarantee to secure the contractual obligation of a third party in its country.

III.C. The Rules of International Counter Guarantee

International law and specific rules govern international counter guarantees, specifically the international counter guarantee is subject to the Uniform Rules for Demand Guarantees, 2010 Revision, ICC Publication No. 758 (URDG 758). URDG 758 is the international legal framework¹⁸ of counter guarantees.

URDG 758 is the only international provisions on counter guarantees. The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 (UCP 600) as the international rules¹⁹ for a standby letter of credit has no specific provisions regarding counter guarantees. Also, the International Standby Practices 1998 (ISP98) which is also a set of uniform international rules²⁰ for standby letters of credit also have no provisions regarding counter guarantees. The URDG 758 is the only set of international rules that contains provisions concerning counter guarantees. All of these rules have been promulgated by the International Chamber of Commerce, a world business organization.

The URDG 758 is not, however, binding law. The use of the URDG 758, therefore, is not compulsory but based on the principles of freedom of contract and party autonomy.²¹ It is the sole decision of the parties to be governed by the URDG 758 for the benefit of its business. The banking

¹⁸ URDG 758, article 1a says: “The Uniform Rules for Demand Guarantees (“URDG”) apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them”. Then, para 4 of the Forward to URDG 758 by Jean Rozwadowski, Secretary General International Chamber of Commerce, January 2010 stating “...As such, URDG 758 is destined to become the standard text for demand guarantees worldwide”. Further, para 1 of the Introduction to URDG 758 by Georges Affaki Vice-Chair, ICC Banking Commission, January 2010 stating “The new URDG 758 succeed URDG 458. Over 17 years of practice (1992-2009), URDG 458 proved to be both successful and reliable. They were used by banks and businesses across continents and industry sectors. URDG 458 were endorsed by international organizations, multilateral financial institutions, bank regulators, lawmakers and professional federations...”. And, for the purpose of clarification, the URDG 758 does not mention the term of international counter guarantee, but mentioning the term of counter guarantee instead. Therefore, the word ‘international’ in the term of international counter guarantee just refers to any cross-border transaction.

¹⁹ See, para 2 of the Foreword to UCP 600 by Guy Sebban, Secretary General International Chamber of Commerce, 2006.

²⁰ See, para 2 of the Forward to ISP98 by Maria Livanos Cattai, Secretary General of ICC, 1998.

²¹ URDG 758, article 1a says: “The Uniform Rules for Demand Guarantees (“URDG”) apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or exclude them”. The use of the URDG 758 is not compulsory, but optional. That is to say, the use of the URDG 758 is based on the principle of freedom of contract.

authority of Indonesia, basically, has acknowledged the use of the URDG 758 in banking practice.²²

Internationally, a counter guarantee is subject to the URDG 758. Counter guarantees are contracts of guarantee between an overseas bank as the counter guarantor and a domestic bank as the guarantor. Under the URDG 758, the counter guarantor in its counter guarantee conditions the agreement on the domestic bank to issuing a demand guarantee as the domestic bank guarantee to secure the contractual obligation of a third party in the country of the domestic bank. Under the URDG 758, a counter guarantee and demand guarantee are performed following the uniform rules.²³ The URDG 758 is a set of rules governing both the counter guarantee and demand guarantee.

The question remains whether it is possible to instead use a standby letter of credit as the domestic bank guarantee. A counter guarantee could also ask the domestic bank to issue a standby letter of credit as the domestic bank guarantee. In this regard, a standby letter of credit is also subject to the URDG 758.²⁴ Thus, both the counter guarantee and a standby letter of credit is subject

²² See, Minister of Finance Regulation No. 32/POJK.03/2018, article 1 point 21 and article 38. Under this article, a standby letter of credit and demand guarantee are defined as the transaction of off-balance sheet items (*transaksi rekening administratif*). A standby letter of credit is subject to the UCP 600 or ISP98, and the demand guarantee is subject to the URDG 758. Indonesia does not have the laws on standby letter of credit or demand guarantee. Thus, the banks in Indonesia apply the UCP 600 and ISP98 as the rules of a standby letter of credit, and the URDG 758 as the rules of the demand guarantee, be it in the domestic or international transactions. The Bank Indonesia Regulation 7/2005, article 33 para 1 states that the issuance of a standby letter of credit is subject to the prevailing UCP and ISP. Further, the Financial Services Authority Regulation No. 32/POJK.03/2018, article 46 also states that the issuance of a standby letter of credit is subject to the UCP and ISP. As to the demand guarantee, Jean Rozwadowski, Secretary General International Chamber of Commerce in January 2010 stated in the para 1 of the Foreword to URDG 758 “This revision of ICC’s Uniform Rules for Demand Guarantees (URDG) is the first since the rules were developed by ICC in 1991. The original rules, URDG 458, gained broad international acceptance in recent years following their incorporation by the World Bank in its guarantee forms and their endorsement by UNCITRAL and leading industry associations, such as FIDIC”, then para 4 stated further, “...As such, URDG 758 is destined to become the standard text for demand guarantee worldwide”. As to the ICC Global Survey on the use of URDG 758 as the international rules, see ICC Banking Commission Miami 2018, First Findings-ICC Global Survey on URDG 758, provided by Andrea Hauptmann, Executive Director, Senior Consultant on Trade Finance, Raiffeisen Bank International AG, Vienna/Austria in <http://www.icc-cr.cz> cited on November 3, 2021 at 13.07 Jakarta time.

²³ See, paras 1,4,5,8 of the Introduction to URDG 758 by Georges Affaki, Vice-Chair, ICC Banking Commission, January 2010. And further, URDG 758, article 1b says: “Where, at the request of a counter-guarantor, a demand guarantee is issued subject to the URDG, the counter-guarantee shall also be subject to the URDG, unless the counter-guarantee excludes the URDG. However, a demand guarantee does not become subject to the URDG merely because the counter-guarantee is subject to the URDG”.

²⁴ According to the Preface to ISP98, p. 7, certain types of standby letter of credit may subject to the URDG 758.

to the URDG 758. Despite this, it is more common to issue a standby letter of credit, which is subject to the UCP 600 or ISP98. If this is the case, the counter guarantee remains subject to the URDG 758. There is no legal significance to following the URDG 758 guidelines as the international rules for the counter guarantee and the UCP 600 or ISP98 as the domestic set of rules for a standby letter of credit. The rules under the URDG 758 are consistent with the rules under the UCP 600 or ISP98. Again, all of these international rules are issued by the same institution, the International Chamber of Commerce.

Using a *bank garansi* as the domestic bank guarantee is somewhat more problematic. Here, a legal matter may arise since the counter guarantee is subject to the URDG 758 and a *bank garansi* is regulated by the domestic laws and regulations on *bank garansi*. The rules under the URDG 758 and the provisions under the laws on *bank garansi* are not necessarily consistent. The relationship between a counter guarantee and the domestic bank guarantees is discussed further in sub-section III.E. below.

III.D. The Laws of Domestic Bank Guarantees

Bank guarantees in Indonesia, the domestic bank guarantees, are regulated by the laws of Indonesia. The laws covering the international rules are also accepted and applied domestically. Also, bank guarantees themselves consist of a *bank garansi*, standby letters of credit and demand guarantees.

The statute on private law regulates *bank garansi* under Articles 1820 through 1850. These articles are further implemented by Bank Indonesia Board of Director's Decision No. 23/88/KEP/DIR²⁵ Bank Indonesia Board of Director's Decision and Bank Indonesia Circular Letter No. 23/7/UKU (hereinafter, BI Circular Letter 23/1991).²⁶ Both of these regulations implementing the statutes promulgated by the legislature.²⁷ *Bank Garansi* are regulated by these laws. This statutory provisions related to payment for a

²⁵ Indonesia, Bank Indonesia Board of Directors' Decision No. 23/88/KEP/DIR (18 March 1991) on Bank Guarantee Issuance.

²⁶ Indonesia, Bank Indonesia Circular Letter No. 23/7/UKU, 18 March 1991 on Bank Guarantee Issuance.

²⁷ Indonesia, Law No. 23 of 1999 on Bank Indonesia (hereinafter, Law 23/1999), article 1 point 8 stated that the Bank Indonesia Regulation is the legal provisions, which are legally binding, issued by Bank Indonesia. The Board of Directors' Decision of Bank Indonesia which is further implemented by the Bank Indonesia Circular Letter, both of which under the regime of the Law No. 13 of 1968 on Central Bank are equal to the Bank Indonesia Regulation under the regime of the Undang-undang No. 23 Tahun 1999. Therefore, the Surat Keputusan Bank Indonesia including the Surat Edaran Bank Indonesia is the same with the Peraturan Bank Indonesia which are the implementing laws issued by Bank Indonesia. And, Undang-undang No. 12 Tahun 2011 Tentang Pembentukan Peraturan Perundang-undangan, article 8 stated that regulation issued by Bank Indonesia is part of the Laws of Indonesia.

bank guarantee are as follows. Firstly, a *bank garansi* is a dependent guaranty. This means that the existence of a *bank garansi* depends on the underlying contract²⁸ that a *bank garansi* is securing performance of.²⁹ Secondly, payment in *bank garansi* is based on the actual default of the guaranteed party,³⁰ meaning that the default of the guaranteed party must be actual. The nature of the default must be agreed upon by the guaranteed party and the beneficiary. Thirdly, the primary obligation as to who should pay on a *bank garansi*, the issuing bank or the guaranteed party, needs to be indicated clearly in the text of a *bank garansi*.³¹ Legally, in the text of a *bank garansi* the issuing bank is required to state whether a *bank garansi* is subject to Article 1831 Paragraph 2 or Article 1832 Point 1 of the private law statute.³² Article 1831 Paragraph 2 basically states that when there is a claim on payment for a *bank garansi* then the guaranteed party assumes the primary obligation to pay the claim to the beneficiary. However, Article 1832 Point 1 basically says that when there is a claim on payment for a *bank garansi* by the beneficiary, the issuing bank assumes the primary obligation to pay.

On the other hand, international rules regulate standby letters of credit and demand guarantees. The UCP 600 and ISP98 are the international rules for standby letters of credit, and the URDG 758 is the set of the international rules for demand guarantees. These international rules are used across banking in Indonesia. Standby letters of credit are subject to either the UCP 600 or the ISP98. Demand guarantees however, are subject exclusively to the URDG 758. Regarding the provisions related to payment for standby letters of credit or demand guarantees under these international rules, it can be stated as follows. Firstly, standby letters of credit or demand guarantees are independent.³³ The existence of a standby letter of credit or demand guarantee is independent from the underlying contract. Secondly, payment on a standby letter of credit or demand guarantee is based on the statement of default presented in a document by the beneficiary.³⁴ Therefore, approval of the guaranteed party as to the default is not a condition precedent to payment. Thirdly, the primary

²⁸ Private Law Statute, article 1821 para 1 stated there is no (bank) guarantee without a valid underlying contract.

²⁹ *Ibid.*

³⁰ *Ibid.*, articles 1820, 1831 para 1 connected to article 1238 para 1. Articles 1820 and 1831 para 1 stated that a default is the base to claim on payment for the *bank garansi*. Then, article 1238 para 1 elaborated that the default must be proved by the letter of order (*surat perintah*) or similar deed.

³¹ BI Regulation 23/1991, article 2 h, and BI Circular Letter 23/1991, article 4, 4.1.h.

³² *Ibid.* Under these implementing laws, every issuing bank is required to state in the text of its *bank garansi* either the article 1831 or article 1832 of the Private Law Statute.

³³ UCP 600, article 4 and ISP98, rule 1, 1.06a for a standby letter of credit. And, URDG 758, article 5a for the demand guarantee.

³⁴ ISP98, rule 4, 4.17 for a standby letter of credit. And, URDG 758, article 15a for the demand guarantee.

obligation to pay on a standby letter of credit or demand guarantee is that of the issuing bank.³⁵ If there is a claim on payment for a standby letter of credit or demand guarantee, the issuing bank is the one that assumes the primary obligation to pay to the beneficiary.³⁶

By comparison, the provisions related to payment on *bank garansi* are significantly different. First, a *bank garansi* is dependent guaranty,³⁷ meaning that the existence of a *bank garansi* depends on the underlying contract.³⁸ If the validity of an underlying contract is in question, then it may affect the existence of a dependent *bank garansi*. However, this is not the case for standby letters of credit or demand guarantees. The payment for each of a bank guarantee is based on the fulfillment of the payment requirements stated in its text.³⁹

Further, payment on a *bank garansi* is based on an actual default. The default of the guaranteed party needs to be in-fact.⁴⁰ The legal document to prove the existence of an actual default according to the Private Law Statute, Article 1238, Paragraph 1, is a letter of order (*surat perintah*)⁴¹ or similar deed issued by a competent court. However, under judicial decisions interpreting this statute in Indonesia, the actuality of a default can be proven by an agreement between the guaranteed party and beneficiary. The form of the agreement could be stated in a document of work inspection or found in the written communications held between them.⁴² Under the statute, is not authorised for beneficiary of a *bank garansi* to decide the actual. Rather, the beneficiary still needs the approval from the guaranteed party as to the actuality of its default. Based on observations of normal⁴³ banking practice, the actuality of a default is not always easy to agree on. Agreement between the guaranteed party and beneficiary regarding the existence of the actual default is not always easy to

³⁵ UCP 600, articles 14,15 and ISP98, rules 2, 2.01, 3 for a standby letter of credit. And URDG 758, articles 15,19 for the demand guarantee.

³⁶ *Ibid.*

³⁷ Private Law Statute, article 1821 para 1 stated that there is no (bank) guarantee without a valid underlying contract.

³⁸ *Ibid.*

³⁹ The payment requirements consist of the default document and the supporting documents, if requested in a standby letter of credit or demand guarantee. The default document is a must, but the supporting documents are optional.

⁴⁰ See note 30 above.

⁴¹ Letter of order (*surat perintah*) means an official letter from the court informing that the guaranteed party is in default and instructing it to settle its contractual obligation as stated in the letter.

⁴² See the judicial decisions, for example the supreme court's decisions: *Supreme Court Decision RI No. 921 K/PDT/1995*, 12, *Supreme Court Decision RI No. 29 K/Pdt/2009*, 11, *Supreme Court Decision RI No. 2280 K/PDT/2010*, 3,4, *Supreme Court Decision RI No. 314 K/Pdt/2012*, 2,7, and the high court's decision: *Medan Court of Appeals Decision No. 98/PDT/2014/PT-MDN*, 3,4.

⁴³ The writer is a consultant and instructor for the trade finance laws including the laws on *bank garansi*. See further note 68 below to support the observation.

reach. Misunderstandings or disagreements between them as to what constitutes an actual default are found repeatedly in practice. To be understood, legally, an issuing bank is only allowed to pay on a *bank garansi* based on the existence of the actual default. However, payments on standby letters of credit or demand guarantees under the international rules is based merely on a statement of default,⁴⁴ not necessarily an actual default. The default of the guaranteed party is stated in a document by the beneficiary. The approval from the guaranteed party concerning its default is not required. Accordingly, disputes about the existence of default are not an issue.

Furthermore, the primary obligation to pay on a *bank garansi* is always an issue. The party to assume the primary obligation to pay needs to be stated clearly in the text of a *bank garansi*, whether it's the obligation of the issuing bank or that of the guaranteed party, meaning that the issuing bank has to choose either the Article 1831 or Article 1832 of the Private Law Statute to be stated in the text of a *bank garansi*. If an issuing bank chooses Article 1832 it means the primary obligation to pay on a *bank garansi* is that of the issuing bank. However, if an issuing bank chooses Article 1831 it means the primary obligation to pay on a *bank garansi* is that of the guaranteed party. Here, the payment for a *bank garansi* depends on the outcome of the asset sale owned by the guaranteed party. As to whether an issuing bank chooses Article 1831 or 1832 it was determined by a prior negotiation between the issuing bank and the applicant.⁴⁵ However, for a standby letter of credit or demand guarantee under international rules, the primary obligation to pay on each of these bank guarantees is not an issue. It is always the primary obligation of the issuing bank⁴⁶ to pay on each of them.

Based on the comparison, the provisions related to payment show that legally to execute the payment for a bank guarantee is not that easy than that of a standby letter of credit or demand guarantee. However, that provisions prevent the possibility of the unfair calling⁴⁷ by the beneficiary in the transaction of a bank guarantee, but not in the transaction of a standby letter of credit or demand guarantee.

Regarding the guaranteed party, a *bank garansi* gives protection more than a standby letter of credit or demand guarantee could give. The legal requirement of the actual default to pay on a *bank garansi* protects the guaranteed party from the possibility of the unfair calling by the beneficiary. But, as to the

⁴⁴ ISP98, rule 4, 4.17 for a standby letter of credit. And URDG 758, article 15a for the demand guarantee.

⁴⁵ See note 32 above.

⁴⁶ UCP 600, articles 14,15 and ISP98, rules 2, 2.01, 3 for a standby letter of credit. And URDG 758, articles 15,19,20 for the demand guarantee.

⁴⁷ Unfair calling is the claim on payment for a standby letter of credit or demand guarantee based on the unjustified or fraudulent written statement by the beneficiary.

beneficiary, a *bank garansi* could make difficulty in getting the payment. The legal requirement of actual default as the basis to pay on a *bank garansi* requires the beneficiary to present the actual default to the issuing bank to get payment. For the beneficiary, this is not always easy to do. On the other hand, a standby letter of credit or demand guarantee provides the guaranteed party less protection. The statement of default as the basis to claim on payment for a standby letter of credit or demand guarantee is the issue. The statement of default presented by the beneficiary does not require the approval from the guaranteed party. The guaranteed party has no supervision concerning that statement of default. But, as to the beneficiary, however, a standby letter of credit or demand guarantee provides the easiness to get payment from the issuing bank. The issuing bank pays a standby letter of credit or demand guarantee based on the statement of default by the beneficiary. In this case, internationally, the international rules on a standby letter of credit or demand guarantee are in favor of the beneficiary. The rules say that a statement of default⁴⁸ is the basis to pay on each of these bank guarantees. The easiness to get payment from the issuing bank is the focus of the international rules. In this regard, to be noted, the implementing laws issued by Bank Indonesia and further by Indonesia Financial Service Authority, the banking authority, permit the banks to issue a standby letter of credit or demand guarantee⁴⁹. A standby letter of credit and demand guarantee are the alternative to a *bank garansi*.

Meanwhile, the Minister of Finance Regulation RI No. 145/PMK.05/2017⁵⁰ (hereinafter, Minister of Finance Regulation 145/2017) regulates a *bank garansi* needed in the government procurement. According to the Minister of Finance Regulation in the government procurement, when needed, the payment in advance to the provider of goods or services can only be done after the provider gives a *bank garansi* to secure that payment. Under this Minister of Finance Regulation, the domestic bank guarantee is called the *surat jaminan*.⁵¹ *Surat jaminan* means a letter of guarantee. The letter of guarantee issued by a bank according to the implementing laws on *bank garansi*⁵² is *bank garansi*. Here,

⁴⁸ ISP98, rule 4, 4.17 for a standby letter of credit, and URDG 758, article 15a for the demand guarantee.

⁴⁹ See note 9 above.

⁵⁰ Minister of Finance Regulation Minister of Finance Regulation RI No. 145/PMK.05/2017 23 October 2017 on Payment Procedures at the expense of the State Revenue and Expenditure Budget before Goods/Services are Received. This Regulation is issued as the implementing law to the Kitab Undang-undang Huku Perdata with regard to guarantees, not limited to *bank garansi*. To be noted, the *bank garansi* for the customs under the Minister of Finance Regulation RI No. 259/PMK.04/2010 on Customs Guarantee is not discussed.

⁵¹ Minister of Finance Regulation 145/2017, articles 5,6,8,21,22,23,24. The terminology used for the *bank garansi* in this Minister of Finance Regulation is the *surat jaminan* issued by a bank. *Surat jaminan* means the letter of guarantee. The letter of guarantee, which is issued by a bank, is the *bank garansi*.

⁵² The implementing laws are BI Board of Directors' Decision 23/1991 and BI Circular Letter 23/1991.

a standby letter of credit or demand guarantee is not an option to be applied as a domestic bank guarantee. Under this Minister of Finance Regulation, a *bank garansi* is used as the advance payment guarantee and maintenance guarantee.⁵³

As to the default, legally, the default must be actual. Minister of Finance Regulation 145/2017 states that the default will be stated in a letter of statement of default issued by the authorised officer⁵⁴. Substantially, the letter of statement of default reflects the actual default as required by the Private Law Statute. The reason is Minister of Finance Regulation cannot supersede Private Law Statute which is equal to a statutory law. This Minister of Finance Regulation is the implementing law to the Private Law Statute with regard to *bank garansi*.

As to the choice of article, the article 1832 of the Private Law Statute must be chosen. The Minister of Finance Regulation mentions that the article 1832 of the Private Law Statute must be chosen and stated by the issuing bank in its *bank garansi*⁵⁵. It means that the primary obligation to pay the claim on payment for a *bank garansi* presented by the beneficiary, the authorised officer, is that of the issuing bank. Here, the article 1831 of Private Law Statute is not an option.

III.E. The Issue of Conflicting Provisions

In the payment transaction for the international counter guarantee and the domestic bank guarantee the conflicting provisions related to payment could arise. The conflicting provisions arise when the provisions related to payment for the counter guarantee are not in line with that of the domestic bank guarantees. The domestic bank guarantees consist of a *bank garansi*, standby letter of credit, and demand guarantee. A *bank garansi* is regulated by the laws on *bank garansi*, while a standby letter of credit or demand guarantee is subject to the international rules. On the other hand, the counter guarantee is subject to the international rules.

⁵³ Minister of Finance Regulation 145/2017, article 8 para 1 in relation to articles 6 para 1a, 5a and 3 para 3.

⁵⁴ *Ibid.*, article 21 para 1 stated that the letter of statement of default (*surat pernyataan wanprestasi*) is issued by the authorised officer.

⁵⁵ *Ibid.*, article 6 para 2.

Internationally, the counter guarantee is subject to the URDG 758. The URDG 758 is the international rules⁵⁶ for the counter guarantee, and the demand guarantee as well⁵⁷. The URDG 758 has become the international rules following the URDG 458 which was over 17 years of practice, 1992-2009⁵⁸. The URDG 458 proved to be successful and reliable⁵⁹ as the international rules for the demand guarantee, and the counter guarantee. The URDG 458 were used by banks and companies across continents⁶⁰. And the URDG 758 is the revision of the URDG 458.

In this regard, the international counter guarantee needs to mention clearly the domestic bank guarantee needed. If an overseas bank issues counter guarantee to Indonesia asking a domestic bank to issue domestic bank guarantee, then the counter guarantee should state clearly as to which domestic bank guarantee to issue. The laws of Indonesia with regard to bank guarantees could lead the overseas bank to choose the appropriate domestic bank guarantee. Whether the conflicting provisions are found or not in the relation between the international counter guarantee and the domestic bank guarantee is discussed below.

⁵⁶ Para 4 of the Foreword to URDG 758 by Jean Rozwadowski, Secretary General, International Chamber of Commerce, January 2010 stating "... As such, URDG 758 is destined to become the standard text for demand guarantees worldwide". And, the URDG 758, article 1a says: "The Uniform Rules for Demand Guarantees ("URDG") apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them". Then, para 1 of the Introduction to URDG 758 by Georges Affaki, Vice Chair, ICC Banking Commission, January 2010 stating "The new URDG 758 succeed URDG 458. Over 17 years of practice (1992-2009), URDG 458 proved to be both successful and reliable. They were used by banks and businesses across continents and industry sectors. URDG 458 were endorsed by international organizations, multilateral financial institutions, bank regulators, lawmakers and professional federations...". The Introduction, para 5 further saying "The new URDG 758 do not merely update URDG 458; they are the result of an ambitious process that seeks to bring a new set of rules for demand guarantees into the 21st century, rules that are clearer, more precise and more comprehensive".

⁵⁷ URDG 758, article 1a says: "The Uniform Rules for Demand Guarantees ("URDG") apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them".

⁵⁸ Para 1 of the Introduction to URDG 758 by Georges Affaki, Vice Chair, ICC Banking Commission, January 2010 stating "The new URDG 758 succeed URDG 458. Over 17 years of practice (1992-2009), URDG 458 proved to be both successful and reliable...". As to the ICC Global Survey on the use of URDG 758 as the international rules, see ICC Banking Commission Miami 2018, First Findings-ICC Global Survey on URDG 758, provided by Andrea Hauptmann, Executive Director, Senior Consultant on Trade Finance, Raiffeisen Bank International AG, Vienna/Austria in <http://www.icc-cr.cz> cited on November 3, 2021.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

III.E.1. Counter Guarantee vis-a-vis *Bank Garansi*

The conflicting provisions related to payment arise when the international counter guarantee asking a *bank garansi* as the domestic bank guarantee. Here, the counter guarantor and the guarantor other than knowing the provisions related to payment for the counter guarantee under the URDG 758, they also need to understand the legal provisions related to payment for a *bank garansi*⁶¹ under the laws on *bank garansi*. In line with these international rules and laws, as to the underlying contract, the counter guarantee is independent guaranty⁶², whereas a *bank garansi* is dependent guaranty⁶³. Then, as to the payment, the payment for the counter guarantee is done based on the statement of default⁶⁴, whereas the payment for a *bank garansi* is done based on the actual default⁶⁵. Further, as to the obligation to pay, in the counter guarantee, the primary obligation to pay is that of the counter guarantor⁶⁶, while in a *bank garansi*, the primary obligation to pay is that of the guarantor or the guaranteed party.⁶⁷ There are conflicting provisions related to payment between the counter guarantee and a *bank garansi*.

The payment for the counter guarantee depends on the payment for a *bank garansi*. When the domestic bank guarantee is a *bank garansi* then the payment for the counter guarantee is to be done after the payment for a *bank garansi* has been done. Under the URDG 758 the payment for the counter guarantee is relatively easy to perform, whereas under the laws on *bank garansi* the payment for a *bank garansi* is relatively not easy to do. As to a *bank garansi*, the requirement of actual default is the main issue in payment transaction. The existence of actual default cannot be decided by the beneficiary alone. The default of the guaranteed party stated in a document by the beneficiary needs to be approved by the guaranteed party. If there is no approval, then they fail to reach an agreement as to the actual default. In this regard, the court⁶⁸ is the solution; the existence of the actual default is to be decided by the court. That is to say, the execution of payment for a *bank garansi* affects the payment for the counter guarantee.

⁶¹ See notes 28, 30, 32 above.

⁶² URDG 758, article 5b.

⁶³ See note 38 above.

⁶⁴ URDG 758, article 15b.

⁶⁵ See note 40 above.

⁶⁶ URDG 758, articles 15b,19,20.

⁶⁷ See note 45 above.

⁶⁸ Here are some of the supreme court's decisions as to the actual default. Under Supreme Court Decision No. 29 K/Pdt/2009, 14, 20, *Putusan Mahkamah Agung RI No. 462 K/Pdt/2010*, 33,34,42,43 and Supreme Court Decision No. 372 PK/Pdt/2011, 6, the supreme court stated the existence of the actual default. And, under Supreme Court Decision No. 12 PK/PDT/2009, 3, the supreme court stated there is no actual default. Further, under Supreme Court Decision No. 1787 K/PDT/2005, 15, the supreme court stated that the existence of the actual default has to be proved by a court decision.

However, the payment for a *bank garansi* could be done smoothly. When the parties to the underlying contract can reach an agreement as to the actual default, the validity of the underlying contract is not in question, and a *bank garansi* states the choice of the article 1832 of the Private Law Statute, then the payment for a bank guarantee could run smoothly. As a result, the payment for the counter guarantee could also work well. Therefore, if a *bank garansi* is the choice in the counter guarantee, then it is good for the parties to the underlying contract to do as follows. Firstly, to agree in the underlying contract as to the form of the actual default. Secondly, to make sure the underlying contract is a valid contract⁶⁹. Thirdly, to convince the issuing bank to state the article 1832 of the Private Law Statute in a *bank garansi*.

In addition, a *bank garansi* under the Minister of Finance Regulation RI No. 145/PMK.05/2017 is in line with a *bank garansi* under the laws on *bank garansi*. Therefore, the counter guarantee under the URDG 758 and a *bank garansi* under the Minister of Finance Regulation is also in conflict as to the provisions related to payment. Under the Minister of Finance Regulation, the actual default is also the basis to pay on the surat jaminan, a *bank garansi*. Here, the letter of statement of default issued by the authorised officer as the document to claim on payment for a *bank garansi* must reflect the requirement of actual default by the Private Law Statute. Also, a *bank garansi* is still dependent guaranty as regulated in the Private Law Statute. Further, according to the Minister of Finance Regulation, the issuing bank assumes the primary obligation to pay on a *bank garansi*. On the contrary, under the URDG 758 the statement of default is the basis to pay on the counter guarantee. Then, the nature of the counter guarantee is independent guaranty. Further, the primary obligation to pay on the counter guarantee is that of the counter guarantor. Again, the payment for the counter guarantee depends on the payment for a *bank garansi*.

III.E.2. Counter Guarantee vis-a-vis Demand Guarantee or Standby Letter of Credit

There are no conflicting provisions related to payment when the international counter guarantee asking the demand guarantee or standby letter of credit as the domestic bank guarantee. If the counter guarantor issues the counter guarantee asking the guarantor to issue a demand guarantee, then the same international rules apply to both the counter guarantee and the demand guarantee, which

⁶⁹ Private Law Statute, article 1320 states that the legal requirements for the validity of a contract are the existence of the agreement of the parties, capabilities of the parties, object of the contract, and good cause.

is the URDG 758⁷⁰. Under the URDG 758, the counter guarantee, and the demand guarantee are independent guaranty⁷¹. Then, the statement of default by the beneficiary is the basis to pay on the counter guarantee, and the demand guarantee as well⁷². Further, the primary obligation to pay on the counter guarantee is that of the counter guarantor, and the primary obligation to pay on the demand guarantee is that of issuing bank, the guarantor⁷³.

As to a standby letter of credit as the domestic bank guarantee, the URDG 758 could also be its rules.⁷⁴ Normally, however, a standby letter of credit is subject to the ISP98 or UCP 600. But, for certain types of standby letter of credit they can be subject to the URDG 758⁷⁵. Thus, in the transaction of international counter guarantee, a standby letter of credit can also be asked as the domestic bank guarantee which is subject to the URDG 758. Under the UCP 600, ISP98 and URDG 758 a standby letter of credit is independent guaranty⁷⁶. And, according to the URDG 758 the counter guarantee is independent guaranty⁷⁷. Then, under the ISP98 or URDG 758 a standby letter of credit is paid based on the statement of default by the beneficiary⁷⁸. And, according to the URDG 758 the counter guarantee is paid based on the statement of default followed by the payment for a standby letter of credit to the beneficiary⁷⁹. Further, under the UCP 600, ISP98 and URDG 758 the primary obligation to pay on a standby letter of credit is that of the issuing bank, the guarantor.⁸⁰ And, according to the URDG 758 the primary obligation to pay on the counter guarantee is that of the counter guarantor.⁸¹

In this case, as to the provisions related to payment, the nature of a standby letter of credit is the same as the demand guarantee. It means that when the international counter guarantee asking the demand guarantee or standby letter of credit as the domestic bank guarantee then there are no conflict provisions.

⁷⁰ URDG 758 is the international rules for the counter guarantee and the demand guarantee as well. URDG 758, article 1a says: "The Uniform Rules for Demand Guarantees ("URDG") apply to a demand guarantee or counter guarantee that expressly indicates it subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them". But the URDG 758 could also be the international rules for a standby letter of credit according to the ISP98, Preface, p. 7 para 4.

⁷¹ URDG 758, article 5a, b.

⁷² URDG, article 15a, b.

⁷³ URDG 758, articles 15,19,20.

⁷⁴ ISP98, Preface, p. 7, para 4. It says: "...One may well choose to use the ISP for certain types of standbys, the UCP for others, and the URDG for still others..."

⁷⁵ ISP98, Preface, *Ibid*.

⁷⁶ UCP 600, article 4, ISP98, rule 1,1.06, URDG 758, article 5a.

⁷⁷ URDG 758, article 5b.

⁷⁸ ISP98, rule 4, 4.17 and URDG 758, article 15a.

⁷⁹ URDG 758, article 15b.

⁸⁰ UCP 600, articles 7,14,15, ISP98, rules 2,2.01, 3,3.01,3.02, 4,4.01,4.03, URDG 758, articles 15a, 19, 20.

⁸¹ URDG 758, articles 15b,19,20.

In the transaction of international counter guarantee, the counter guarantee is to be paid after a standby letter of credit or demand guarantee has been paid for. The counter guarantor pays the counter guarantee to the guarantor on the basis of a statement of default by the beneficiary followed by the payment for a standby letter of credit or demand guarantee by the guarantor to that beneficiary. Here, the actual default is not an issue. The validity of the underlying contract is also not an issue. The primary obligation to pay is not an issue as well. As a result, the payment for a standby letter of credit or demand guarantee can be done smoothly, and consequently the same condition is true as to the payment for the counter guarantee. Again, the payment for the counter guarantee is to be performed after the payment for a standby letter of credit or demand guarantee has been done. The smooth payment for a standby letter of credit or demand guarantee affects the payment for the counter guarantee.

In the payment transaction, however, there is possibility of the unfair calling⁸² done by the beneficiary. In the implementation of the statement of default as the basis to pay on a standby letter of credit or demand guarantee there is possibility the beneficiary performs the unfair calling. Internationally, the unfair calling is against the law, and it is to be settled case by case. The UCP 600, ISP98 and URDG 758 each of them does not address the issue of the unfair calling. The issue of the unfair calling is left to the applicable law. However, to mitigate the risk of unfair calling, it is good to agree in the underlying contract and a standby letter of credit or demand guarantee that the required statement of default by the beneficiary has to be specific⁸³. And, according to the URDG 758, the payment for any counter guarantee, and demand guarantee (or standby letter of credit) is done only under the complying demand.⁸⁴ Consequently, the beneficiary has to fulfill the said requirement in order to get payment.

In addition, the idea in the transaction of international counter guarantee can also be applied to the domestic counter guarantee. Here, the domestic counter guarantee and a standby letter of credit or demand guarantee as the requested guarantee are also subject to the URDG 758. It is to be done with the care for the possibility of unfair calling by the beneficiary. And, in this

⁸² See note 47 above.

⁸³ Compare to the URDG 758, article 15a says: "..., indicating in what respect the applicant is in breach of its obligations under the underlying relationship...".

⁸⁴ URDG 758, articles 15a, b, 19, 20. And, article 2 says: "complying demand means a demand that meets the requirements of a complying presentation". Then, article 2 also says: "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".

domestic counter guarantee, a *bank garansi* can also be used as the requested guarantee with the care of the smoothness for its payment. To be noted, the laws on *bank garansi* do not have provisions regarding the counter guarantee.

Finally, the banks in handling the transaction of domestic bank guarantees, international counter guarantee, and domestic counter guarantee are also required to comply with the prudential provisions under the Indonesian banking laws, and the implementing laws issued by the banking authority. The compliance requirements are compulsory to protect the interest of the banks, companies or government agencies using a bank guarantee.

IV. CONCLUDING REMARKS

To conclude, by doing anticipation or arrangement, the provisions related to payment for bank guarantees under the laws of Indonesia could stimulate the execution of payment for that bank guarantees. As to these provisions, the laws on *bank garansi* are not in line with the international rules on standby letter of credit or demand guarantee. The laws and the international rules show that a *bank garansi* is dependent guaranty, whereas a standby letter of credit or demand guarantee is independent guaranty. The payment for a *bank garansi* is based on the actual default, whereas the payment for a standby letter of credit or demand guarantee is based on the statement of default. The primary obligation to pay on a *bank garansi* is that of the issuing bank or the guaranteed party, while the primary obligation to pay on a standby letter of credit or demand guarantee is that of the issuing bank. For that reason, in the transaction of *bank garansi*, the potential legal matter with regard to the payment transaction is to be prevented by agreement of the parties to underlying contract and in the transaction of standby letter of credit or demand guarantee, the possibility of unfair calling by the beneficiary is to be anticipated by the issuing bank and the guaranteed party.

As to the international counter guarantee, its provisions related to payment are basically the same with that of the demand guarantee or standby letter of credit. The conflicting provisions do not arise when it asks the demand guarantee or standby letter of credit as the domestic *bank garansi*. However, the conflicting provisions arise when it asks a bank guarantee as the domestic bank guarantee. To avoid the conflicting provisions, the provisions related to payment for *bank garansi* are to be arranged by agreement of the parties to underlying contract accordingly.

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