

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

Deputy Project Manager: Tudor Taslaoanu, Director, Alphabank Romania

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.

Law on Bank Guarantees

<http://www.spi-romania.eu/program-2007/law-on-bank-guarantees/>

SPI Committee Meeting November 13, 2007

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Project Working Group Activities

PWG Members: 8

Public stakeholders

- National Bank of Romania;
- Ministry of Public Finance.

PWG Meetings: 1 (strategy meeting)

Private stakeholders

- Banking sector (4 banks)

Project Main Steps

Jan. 07: PWG Strategy Meeting

March 07: Approval of the definitions to be provided by the law in the RBA Legal Commission

March 07: SPI Secretariat proposes to PMG further measures and actions, including the invitation of a local independent expert to draft the law

April 07: PO's discussion with BCR representatives on the opportunity of the law and on other regulatory changes

May 07: RBA approved the proposal of contracting a legal consulting company as a local independent expert for preparing the draft law

June 07: RBA identified and agreed with the legal consulting company the preparation of the law

Oct. 1: The legal consulting company sent to RBA a memorandum on Bank LGs

Oct. 11: RBA sent to banks the proposal for amending the Civil Code prepared by the Legal Commission

Summary of Impact Assessment

X: First full year, (mln Eur)

1. Government: tax revenues* (0.14);
2. Banks: net benefits (0.9)
3. Consumers: more efficient and cheaper LG issued.

*=Levied on Banks higher profits and costs reduction

For more information, please contact:

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2. Project Management Group: Mr. Constantin Barbu (Project Owner), Director, RBA, tel: +40 21321 20 78; e-mail: constantin.barbu@arb.ro

Project Team

Project Management Group

Project Owner (PO): Constantin Barbu, Director, RBA

Project Manager (PM): Ianfred Silberstein, Director, Legal Department, NBR

Deputy Project Manager (DPM): Tudor Taslaoanu, Director, Alphabank Romania

Project Working Group:

Margareta Puschiaza, Director, Raiffeisen Bank Romania

Madalina Cristea, Unicredit Tiriac

Simona Butoi, Advisor, MEF

A. Zaharescu, Director, BCR

Raluca Cristofor, Legal Advisor, NBR

Summary of the SPI Secretariat Contribution

Expansion of the original RBA working group to include NBR and MEF senior experts;
Proposal to outsource the preparation of the draft law to a local independent expert;
Request for NBR and MEF review of the draft law.



Document prepared by SPI Secretariat
Ramona Bratu, Director of Bank Products and Services
ramona.bratu@convergence-see.eu

SPI Project on Law on Bank Guarantees

Project Status Report

I. Summary of actions undertaken so far

Legal opinion of an independent expert

Nestor Nestor Diculescu Kingston Petersen sent on October 1st a memorandum on "independent guarantees". The memorandum addresses the following issues:

- The conclusion is that Romanian legislation doesn't recognize expressly the concept of independent guarantees;
- Romanian jurisprudence treats independent guarantees as fidejussion;
- However, Romanian doctrine makes reference to the independent guarantees as different from fidejussion;
- International experience – France introduced in 2006, in their Civil Code, an express chapter on independent guarantees. German legislation has some references on the independent guarantees and their doctrine and jurisprudence recognize them. Although Spanish and Italian law have no provisions on independent guarantees, their doctrines and jurisprudences also recognize them.

The law firm provided also pros and cons regarding the issuance of special regulations on independent guarantees, concluding with their opinion on the necessity of having special legal provision on the matter.

Banking community proposal

The independent expert sustained its opinion in a meeting with the banking community. As a result of the discussions held on that occasion, a working group of the RBA Legal Commission prepared a proposal for amending the Civil Code in order to introduce special references for the bank letters of guarantee and for bank letters of comfort. RBA is collecting now banks' opinions on the law amendment proposals. The proposals were forwarded to the Project Manager – the Director of NBR Legal Department – and to MEF representative in the PWG for opinion.

II. Proposed next steps

Based on NBR Legal Department confirmation and on MEF representative opinion, RBA will send to MoJ and to Parliament the amendment proposals. SPI Committee will have the option to second this recommendation (see attached letter).

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For more information, please contact:

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2. Project Management Group: Mr. Constantin Barbu (ProjectOwner), Director, RBA, tel: +40 21321 20 78; e-mail: constantin.barbu@arb.ro

A. Project objective and deadline

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.

Initial deadline: end of March, 2007

B. Actions taken so far

B1. Project Strategy Meeting

In the strategy meeting held on January 16th, 2007, the Project Management Group (PMG) decided to entrust the law drafting activity to a working group gathering members of the RBA Legal Commission and the NBR Legal Department, under the leadership of the President of the RBA Legal Commission.

PMG agreed that the working group drafting the law uses as starting point the terms, principles and conditions prepared by the RBA Settlement Commission so that the Romanian law be aligned with the provisions of the ICC Publication no. 458. The law drafting working group had to agree on the outline of the law and each member to contribute and propose the provisions for some chapters.

The estimated delivery term of the law draft to the SPI PWG was established at the end of February.

B2. Law drafting working group activity

The working group succeeded until now to finish the first chapter of the law regarding the definitions to be used within the law. These were approved by the RBA Legal Commission in its meeting on March 27. The members of the RBA Legal Commission were asked to provide opinions on the law outline.

B3. SPI Secretariat actions

Based on an assessment done with the Convergence Program, the SPI Secretariat prepared and sent on March 30 a memo for PMG's attention where the following main measures were suggested:

- a) to hire *a local independent* expert (LIE), funded by the Convergence budget (as an exception to the RBA-Convergence June 2006 MoU) and reporting to the PM, to draft the law;
- b) to hire *a foreign peer reviewer (PR)* whose role would be not only to revise the draft law to ensure its alignment with international experience and practice, but also the methodology used to generate the legal draft.

SPI Secretariat proposed also an action plan that would have enabled the presentation of the law proposal in the April SPI Committee meeting.

C. Assessment of the project status

In the March meeting of the RBA Legal Commission when the definitions for the law were approved, questions were asked about the opportunity of such a special law on bank guarantees. One of the most powerful voices against the law was the BCR representative's, although one of the background documents justifying the need for a special law for bank LGs was signed by other BCR representatives..

Consequently, the PO had a meeting in April with the Director of BCR Legal Department and there were debates on the treatment of this issue under the current legal framework. The RBA Legal Commission will meet on April 25, having the PM from NBR as guest, to reach to a final conclusion on the opportunity of and on the necessary regulatory amendments (a special law for bank guarantees and an amendment to the Civil/Commercial Code).

Until the needed regulatory changes will be clarified, the law drafting activity of the working group gathering members of the RBA Legal Commission and the NBR Legal Department has been interrupted and the PMG postponed a decision on the proposed action plan.

D. Proposed project rescue strategy

Once the regulatory change need is confirmed and in order to have the project objective achieved by the following SPI Committee meeting, the PMG should adopt *a more structured approach* and to take *supportive measures*.

In order to have a more structured approach, the SPI Secretariat has developed in Appendix 1 an *action plan* with clear terms and responsibilities for the drafting activity, in which the SPI PWG should be involved on different stages of the law drafting.

The supportive measures to be considered refer to the appointment of the local independent expert and of the peer reviewer.

E. Next Steps

- E1.** PMG will discuss and approve the proposed new action plan;
- E2.** PMG will discuss and establish the professional profile for the LIE;
- E3.** PMG will identify a short list of eligible person(s) to act as LIE;
- E4.** PMG will agree on the next steps for the SPI Secretariat.

By the end of May, PO with SPI Secretariat support will send a progress report to the SPI Committee members.

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Appendix 1

Proposed action plan

No.	Action	Responsible	Deadline	Comments
1.	Prepare the invitation letter and the LIE's ToRs	SPI Secretariat /Convergence / PMG	May 2	According to the usual procedure
2.	Select/identify of the local independent expert (LIL)	PMG and President of the RBA Legal Commission	May 4	SPI Secretariat will facilitate the process
3.	Prepare and sign the STC contract	Convergence/WB Bucharest Office	May 11	
4.	Prepare a first issues paper with the main business and jurisprudence goals of the proposed law - and an appropriate background section on the Romanian and international experience.	LIE	May 15	SPI Secretariat and RBA will offer LIE the entire available documentation and support
5.	Prepare a methodology for drafting the law	LIE	May 15	If considered necessary by the PMG
6.	Get PR's opinion on the methodology	LIE/SPI Secretariat/ Convergence	May 18	
7.	Get NBR and MoPF representatives' opinion on the methodology	LIE	May 18	
8.	Prepare the law outline	LIE	May 18	
9.	Get PWG agreement on the law outline	LIE/SPI Secretariat	May 22	PMG will have to ensure that the PWG gives the necessary feedback in due time
10.	Prepare the draft law	LIE	June 20	

11.	Submit the draft law for PWG consultations	SPI Secretariat	June 22	
12.	Get the NBR approval on the draft law	PM	July 2	
13.	Get the RBA approval on the draft law	PO/DPM	July 2	
14.	Get the MoPF legal drafting unit approval	PWG members	July 2	
15.	Ask for PR's opinion on the draft law	LIE/SPI Secretariat/ Convergence	July 2	
16.	Discuss and include the suggestions and comments made in the draft law	PWG/LIE/SPI Secretariat	July 6	
17.	Submit the draft law for SPI Committee endorsement	PWG/SPI Secretariat	July 13	