

**Nothing Is Over Until We Decide It Is: Is Article 11(1) of the UN
Standby Convention a Complete List of Ways to End the Beneficiary's
Right to Demand Payment?**

Hilary Taylor*

Introduction

Article 11(1) of the United Nations Convention on Independent Guarantees and Standby Letters of Credit¹ (the Convention²) lists four instances where the beneficiary's right to demand payment on a letter of credit ceases: (1) when the guarantor/issuer receives a statement from the beneficiary releasing it from liability; (2) when the guarantor/issuer and beneficiary have agreed on the termination of the undertaking; (3) when the amount available under the undertaking has been paid; and (4) when the validity period of the undertaking expires.² The question arises: is this list intended to be exclusive? Since Article 11(1) fails to include provisions for cessation in certain cases (including transfer of drawing rights, force majeure clauses, and fraud); other articles in the Convention refer to instances leading to either a discharge of or an exception to payment obligations; and the United Nations Commission on International Trade Law (UNCITRAL)'s Working Group on International Contract Practices' (Working Group) drafting notes for the Convention all imply other possibilities for ending a beneficiary's right, this paper concludes that the list is not exclusive.

In explaining this conclusion, I will consider the text of Article 11(1), drawing on other prominent documents in the field of letters of credit (LCs), including the International Standby Practices (ISP98)³, the Uniform

* Associate Editor of the GEORGE MASON JOURNAL OF INTERNATIONAL COMMERCIAL LAW, 2009-2010; George Mason University, J.D., 2010; University of Miami, M.F.A., 2004; University of Maryland, B.A. 2000. A much-deserved thank you to all of the journal editors, Professor Byrne, and, of course, to Aaron and Betsy.

¹ United Nations Convention on Independent Guarantees and Standby Letters of Credit, U.N. Doc. A/RES/50/48 (Dec. 11, 1995), *available at* <http://www.uncitral.org/pdf/english/texts/payments/guarantees/guarantees.pdf> [hereinafter The Convention].

² *Id.* art 11(1).

³ *The International Standby Practices 1998 (ISP98)*, International Chamber of Commerce [ICC] Publ'n No. 590 (Jan. 1, 1999) [hereinafter ISP98].

Customs and Practice (UCP600)⁴ and Revised Article 5 of the Uniform Commercial Code (UCC)⁵ to clarify definitions of key terms, in addition to the Working Group's notes compiled while drafting the Convention. Finally, I will detail conduct and circumstances that are not addressed in Article 11(1).

I. Establishing the Parameters: The Purpose of the Convention and the First Sentence of Article 11(1)

Article 11(1) of the Convention states that:

“The right of the beneficiary to demand payment under the undertaking ceases when:

- (a) The guarantor/issuer has received a statement by the beneficiary of release from liability in a form referred to in paragraph (2) of article 7;
- (b) The beneficiary and the guarantor/issuer have agreed on the termination of the undertaking in the form stipulated in the undertaking or, failing such stipulation, in a form referred to in paragraph (2) of article 7;
- (c) The amount available under the undertaking has been paid, unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking;
- (d) The validity period of the undertaking expires in accordance with the provisions of article 12.”⁶

UNCITRAL drafted the Convention in order to “facilitate the use of independent guarantees and stand-by letters of credit”⁷ by stating commonly

⁴ The Uniform Customs and Practice for Documentary Credits (UCP600), ICC Publ'n No. 600 (July 1, 2007) [hereinafter UCP600].

⁵ U.C.C. art. 5 (1995), available at <http://www.law.cornell.edu/ucc/5/overview.html>.

⁶ The Convention, *supra* note 1, art. 11(1).

⁷ See United Nations Commission on International Trade Law [UNCITRAL], Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit cmt. 2, U.N. Doc. A/CN.9/431 (July 4, 1996), available at <http://daccess-ods.un.org/TMP/9645256.html> [hereinafter Explanatory Note].

recognized basic principles for these instruments to “provide greater legal certainty in their use.”⁸ As the Convention applies solely to international undertakings (more specifically, ones that do not specifically exclude its application)⁹ it has been drafted carefully to work in conjunction with different LC laws in a wide variety of countries. For our purposes, a few specific terms used in the Convention—as well as its silence on certain issues—are of paramount importance in understanding its application.

With this in mind, the introductory sentence of Article 11(1), “The right of the beneficiary to demand payment under the undertaking ceases when,”¹⁰ defines the scope of the four subsections that follow by its use of three key terms.

A. Beneficiary

While the Convention loosely defines the other parties involved in the letter of credit transaction, it never defines “beneficiary.”¹¹ Although the Convention’s drafters noted early on that this was a problem, stating that “[a]nother point in need of clarification is who exactly is covered by the term ‘beneficiary,’” the final document fails to address this concern.¹² While it can be argued that the term is left intentionally broad in order to encompass complex transactions and relationships between parties, the lack of a defined term is occasionally problematic. For example, given the singular use of “the beneficiary” in Article 11(1), it is unclear what occurs in situations that the Working Group discussed, where “the original guaranty letter [has] a number of beneficiaries,” or, if amendments to the LC are made subsequent to its issuance, where “other beneficiaries may have to be recognized, namely substitute beneficiaries and beneficiaries by

⁸ *Id.* at cmt. 4.

⁹ The Convention, *supra* note 1, art. 1(1).

¹⁰ *Id.* art. 11(1).

¹¹ *Id.* art 2(1) (defining “guarantor/issuer” as “a bank or other institution or person,” with Article 6(a) expanding that definition to include “counter-guarantor” and “confirmer.” Article 2(2)(a) and (b) define the “principal/applicant” as the “customer”; and 2(2)(b) defines the “instructing party” as “a bank, person, or institution.”).

¹² UNCITRAL, Working Group on Int'l Trade Practices, Discussion of Further Issues of a Uniform Law: Amendment, Transfer, Expiry, Obligations of a Guarantor, Liability and Exemption, ¶ 8, U.N. Doc. A/CN.9/WG.II/WP.68 (July 31, 1990), available at <http://www.uncitral.org/pdf/english/yearbooks/yb-1991-e/vol22-p330-339-e.pdf>.

operation of law.”¹³ Substitute beneficiaries and beneficiaries by operation of law will be covered *infra*, at section III (B)(1)(a).

In discussing the definition of “beneficiary,” the Working Group debated whether or not to expressly mention special categories of substitutes and transferees or “whether general rules of interpretation would lead to the conclusion that they were covered.”¹⁴ To help bridge this gap, the definitions of “beneficiary” in other LC documents will help determine these general rules of interpretation.

Revised UCC Article 5 defines “beneficiary” as “a person who under the terms of a letter of credit is entitled to have its complying presentation honored. The term includes a person to whom drawing rights have been transferred under a transferable letter of credit.”¹⁵ ISP98 provides a similar definition: “a named person who is entitled to draw under a standby,” adding that the term “includes a person to whom the named beneficiary has effectively transferred drawing rights.”¹⁶

Two things about these definitions are noteworthy. First, the term is not limited to a sole beneficiary, as any person who meets the requirements is eligible. Secondly, both definitions allow for drawing rights to be transferred.¹⁷ The ability to transfer these rights is granted in the Convention’s Article 9, which states that “[t]he beneficiary’s right to demand payment may be transferred.”¹⁸ While the Convention does not explicitly include multiple beneficiaries, its explicit approval of transfer strongly implies that it envisions multiple beneficiaries. After all, according to UCP600, the act of transferring credit (in whole or in part) creates two beneficiaries—the “first beneficiary,” who requests the transfer, and the “second beneficiary,” who receives the transfer.¹⁹ Thus, if the Convention

¹³ *Id.*

¹⁴ *Id.*

¹⁵ U.C.C. § 5-102(a)(3) (1995).

¹⁶ ISP98, *supra* note 2, R. 1.09(a), 1.11(c)(ii).

¹⁷ The subject of transfer is discussed in more detail, see *infra* Part III(B)(1)(a).

¹⁸ The Convention, *supra* note 1, art. 9.

¹⁹ UCP600, *supra* note 4, art. 38(b), (d) (“A credit may be transferred in part to more than one second beneficiary provided partial drawings or shipments are allowed.”).

allows for transfer of a beneficiary's drawing rights, it should also allow for the creation of the multiple beneficiaries that will result from that transfer.

B. Undertaking

As drafted, it is not obvious whether the Convention is intended to cover both commercial and stand-by letters of credit. Article 11(1) refers to “[t]he right of the beneficiary to demand payment under the undertaking.”²⁰ “Undertaking” is defined in Article 2 of the Convention as “an independent commitment, known in international practice as an independent guarantee or as a standby letter of credit.”²¹ The Official Comments on the Convention clarify this point, stating that the Convention only covers standby LCs, although parties to commercial LCs have the right to “opt into” it.²² Thus, while this discussion will focus on standby LCs, the Convention also provides a legal framework which may be applied to commercial LCs by agreement of the parties or as a model for local law.

C. Ceases

The most important word in the first sentence of the Convention's Article 11(1)—“the right of the beneficiary to demand payment under the undertaking ceases when”—is “ceases,” as the finality of the term draws a distinction between events or instances which *end* the beneficiary's right and events or instances which *negatively impact* the beneficiary's right to demand payment.²³ While Article 11(1) is the only article in the Convention dealing with the cessation of the beneficiary's right to demand payment, several other articles mention instances in which the beneficiary's ability to collect payment is negatively impacted, including transfer, assignment, set-off, and fraud.²⁴ At first glance, since none of these instances were included in Article 11(1), it appears that they cannot constitute a complete loss of the beneficiary's right to repayment. However, after analyzing the Working

²⁰ The Convention, *supra* note 1, art. 11(1).

²¹ *Id.* art. 2. The definition section of the Convention adds: “‘Undertaking’ includes ‘counter-guarantee’ and ‘confirmation of an undertaking.’” *Id.* art. 6(a).

²² Explanatory Note, *supra* note 7, cmt. 16.

²³ The Convention, *supra* note 1, art. 11(1).

²⁴ *Id.* arts. 9, 10, 18, and 19. While the word fraud is not specifically used, it is also referenced in Articles 15(3), 16(2)(b), and 20.

Group's notes regarding the drafting of both Article 11(1) and these other articles, it appears that certain types of transfers (including a transfer of an LC in its entirety) as well as some cases of fraud and set-off can also cease the beneficiary's right to payment.²⁵

II. Ending the Beneficiary's Right to Payment

A. What Article 11(1) Explicitly Covers

1. Paragraphs (a)-(c)

Paragraphs (a)-(c) of Article 11(1) are very straightforward, and require little explanation. Subsection (a) covers a statement by the beneficiary releasing the guarantor/issuer of liability in a form covered by Article 7(2) (which requires authentication by either generally accepted means or a procedure agreed to by the parties).²⁶ Paragraph (b) allows the beneficiary and the guarantor/issuer to agree on the termination of the undertaking, either as stipulated in that undertaking or subject to the same Article 7(2) form requirement.²⁷ Paragraph (c) ends the beneficiary's right because the guarantor/issuer has paid the amount available under the undertaking (unless the undertaking provides for automatic renewal or another form of continuation).²⁸

In each of these situations, cessation requires an active step taken by the beneficiary—writing a letter, reaching an agreement with the guarantor/issuer, or making a presentation—in order to be valid.²⁹ Correspondingly, the guarantor/issuer must receive and read that notice, reach an agreement with the beneficiary, or make the payment.³⁰ As both parties are required to take some sort of action, some level of cognizance on both sides is required of the transaction, minimizing the potential for confusion.

²⁵ See *infra* Part III.

²⁶ The Convention, *supra* note 1, arts. 7(2), 11(1)(a).

²⁷ *Id.* art.11(1)(b).

²⁸ *Id.* art. 11(1)(c).

²⁹ *Id.* art. 11.

³⁰ *Id.*

2. Paragraph (d)

Unlike the previous three paragraphs, under Article 11(1)(d), the beneficiary's right to demand payment under the undertaking ends based on the *inaction* of a party; specifically, when the validity period of the undertaking expires in accordance with Article 12.³¹ Expiry can occur on a specified calendar date, the occurrence of an act or event outside the guarantor/issuer's control (along with presentation of a document and certification of that event's occurrence), or if neither of these is provided, six years from the date of issuance of the undertaking.³² While the topic of customer renewal is not covered in 11(1)(d), 11(1)(c) notes that expiry may be avoided if the undertaking "provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking."³³

Having a time period instead of an explicit action that results in the cessation of a right creates several potential problems in the case of last-minute or late presentations by the beneficiary. For example, if the documents are lost in transmission prior to the first presentation, it is unclear which party bears the responsibility.³⁴ UCP600 states that banks assume no liability or responsibility for the loss in transit of any letters or documents if those letters or documents are sent according to the requirements established in the LC, but it is unclear whether this provision is echoed by the Convention.³⁵ The Working Group debated including very similar provisions in the Convention that would absolve guarantors of liability for the genuineness or sufficiency of documents; for any delay, difficulties caused by errors in translation, and/or loss in transit of documents; and for any of the events typically covered by a force majeure clause.³⁶ However, as no such provisions appear in the final version of the Convention, it is unclear whether the Working Group decided against

³¹ *Id.* art. 11(1)(d).

³² *Id.* art. 12.

³³ *Id.* art. 11(1)(c), (d).

³⁴ *See* UCP600, *supra* note 4, art. 35. After presentation, however, the responsibility would lie with the party sending the documents. *Id.*

³⁵ *Id.* art. 35.

³⁶ UNCITRAL, *supra* note 12, at ¶ 65.

providing such protections, or decided that other documents (like UCP600) already provided that protection.

B. What Is Not Included in Article 11(1)

As demonstrated by its constant cross-references (three of the four paragraphs in Article 11(1) reference other articles), the Convention is clearly designed to be read as a whole. As several other of the Convention articles reference instances in which the beneficiary's right to payment is affected, the question arises: can any of these instances not only impede but also end a beneficiary's right to payment?

1. Concepts Discussed Elsewhere in the Convention **a. Transfer and Assignment (Articles 9 and 10)**

Articles 9 and 10 of the Convention cover transfer and assignment of the proceeds, respectively. The Official Comments by the UNCITRAL Secretariat note that the Convention reflects the distinction drawn in practice between transfer and assignment.³⁷ In practice, a transfer leaves the original beneficiary with no rights, while in an assignment, "the right to demand payment remains with the original beneficiary, the assignee being given only the right to receive the proceeds of payment if such payment occurs."³⁸ With this distinction made clear, assignment is outside the scope of Article 11(1), as it does not end a beneficiary's right to demand payment, but instead funnels the funds (if paid) to another party (the assignee). Transfers, however, merit closer scrutiny. Under the Convention, the beneficiary's right to demand payment is transferable "only if authorized in the undertaking."³⁹ The Official Comment adds that the guarantor/issuer also must consent to any transfer.⁴⁰

Some transfers establish substitute beneficiaries and beneficiaries by operation of law.⁴¹ A substitute beneficiary typically appears in standby

³⁷ Explanatory Note, *supra* note 7, cmt. 30.

³⁸ *Id.*

³⁹ *Id.* art. 9(1); *see also* Explanatory Note, *supra* note 7, cmt. 31.

⁴⁰ Explanatory Note, *supra* note 7, cmt. 31.

⁴¹ *See supra* Part II(A); *see also* UNCITRAL, *supra* note 12, ¶ 8; ISP98, *supra* note 3, R. 6.11.

LCs “as a replacement of the original beneficiary when the latter resigns or is removed by the represented beneficiaries, usually the holders of debt or equity securities.”⁴² Whether or not such an instance is covered by Article 11(1) depends entirely on the interpretation of “beneficiary” used. If the term refers to each specific beneficiary, then clearly, the removal of one beneficiary by others would end the removed beneficiary’s right to demand payment—something not covered by the Convention’s Article 11(1). However, if a more general definition of “beneficiary” is used, only requiring that one beneficiary remains able to demand payment, this would fit within the scope of Article 11(1), since the remaining beneficiaries (and the substitute) would still remain able to demand payment in such a circumstance, thus not technically would not end the right of “the beneficiary” to demand payment.

A similar problem occurs with beneficiaries by operation of law, which are typically involved in transfers “decreed by statutory, administrative or decisional law in instances where the original beneficiary is insolvent or incapable of acting as a beneficiary.”⁴³ While statutory transfers are beyond the scope of this note, the concept of an insolvent or incapable beneficiary is one worth a brief investigation. The Convention does not outline the circumstances in which a beneficiary would be unable to act as a beneficiary, but ISP98 mentions several examples, including merger or consolidation, insolvency, death or incapacity, or “that the name of the beneficiary has been changed to that of the claimed successor.”⁴⁴

In such a case, it is possible that the original beneficiary could be unable to function as a beneficiary, and that its right would cease with a required transfer to a second beneficiary. However, this example has another potential problem: cessation of the beneficiary’s right could also occur if the LC is not designated as transferable, as ISP98 notes that “[a] standby is not transferable unless it so states.”⁴⁵ As previously mentioned, the Convention reflects a similar opinion: “The beneficiary’s right to demand payment may be transferred only if authorized in the undertaking,

⁴² UNCITRAL, *supra* note 12, ¶ 8.

⁴³ *Id.* Transferees by operation of law are also mentioned in ISP98 R. 6.11.

⁴⁴ ISP98, *supra* note 3, R. 6.12(a)-(d). *See also* U.C.C. §§ 5-102(a)(15), 5-102 cmt.10 (1995).

⁴⁵ ISP98, *supra* note 3, R. 6.02(a).

and only to the extent and in the manner authorized in the undertaking.”⁴⁶ Thus, if the LC is not specifically subject to transfer by operation of law, then death or dissolution of the beneficiary would end its right to demand payment, as there would be no one to make the required presentation. Thus, in the case of a non-transferable LC, if a beneficiary is unable to act as a beneficiary, there is a cessation to the right to demand payment—an instance that is outside the four provisions of Article 11(1).

b. Set-off (Article 18)

Article 18 of the Convention allows the guarantor/issuer to “discharge the payment obligation under the undertaking by availing itself of a set-off,” unless otherwise stipulated in the undertaking or elsewhere agreed by the parties.⁴⁷ The Working Group stated that despite concerns about the effects of allowing set-offs on the liquidity functions of guarantees, at least one English judge had reasoned that precluding such set-offs “would seem very unjust ... and it would seem to me anomalous that such a set-off should be unavailable in letters of credit cases, but available against bills of exchange which are closely analogous.”⁴⁸ While the Working Group suggested that set-off was an area of law where “[c]ertainty and uniformity seem to be particularly needed,” it did not provide that clarity.⁴⁹ However, for our purposes, the point is moot, as a set-off of the full amount owed would still fall under the scope of Article 11(1)(c), as the amount available under the undertaking would have been paid by the set-off.⁵⁰

c. Fraud (Article 19)

Fraud is a very complicated and involved topic, and, along with the appropriate court measures in response to it (covered in the Convention’s Article 20), was held to be “probably the most important topic for a uniform

⁴⁶ The Convention, *supra* note 1, art. 9(1).

⁴⁷ *Id.* art. 18.

⁴⁸ UNCITRAL, *supra* note 12, ¶ 84 (citing *The Hong Kong and Shanghai Banking Corp. v. Kloeckner & Co. A.G., Q.B.*, [1989] 2 *Lloyd’s Rep.* 323, 331 (per Hirst J.)).

⁴⁹ *Id.* ¶ 89.

⁵⁰ The Convention, *supra* note 1, art. 11(1)(c).

law” by the Working Group.⁵¹ In investigating the language used in Article 19, again, our core question will be: can fraud ever be so egregious that the beneficiary’s right to demand payment ceases?

Article 19(1) focuses on exceptions to the guarantor/issuer’s payment obligation, listing instances where “the guarantor/issuer, acting in good faith, has a right, as against the beneficiary, to withhold payment.”⁵² Such instances include: clear fraud, demands unsupported by the basis asserted in the demand and supporting documents, and demands with no conceivable basis.⁵³

Regarding fraud, one of the Working Group’s earliest concerns in the Convention’s drafting process was that, due to differing procedural law in varying jurisdictions, there existed (and still exists) considerable divergence in “the types and conditions of court measures that may be available in cases of alleged fraud or other objections.”⁵⁴ Thus, one of the main purposes of the Convention is “to establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands for payment.”⁵⁵ The Convention does not use the term “fraud,” but it does contain exceptions to payment obligations, including a case where it “is manifest and clear that ... [a]ny document is not genuine or has been falsified.”⁵⁶ However, the Convention only allows courts to issue provisional orders which temporarily block payments while claims (supported by “immediately available strong evidence”) are investigated, and does not provide courts with any permanent powers to terminate the beneficiary’s claim.⁵⁷

⁵¹ UNCITRAL, *supra* note 12, ¶ 2.

⁵² The Convention, *supra* note 1 art. 19(1)(a)-(c).

⁵³ Explanatory Note, *supra* note 7, cmt. 9 (stating that the review of the transaction is cursory and only needs to determine whether the documentary demand conforms on its face to the terms. “The guarantor/issuer is not called on to investigate the underlying transaction.”).

⁵⁴ The Secretary-General, Report of the Secretary-General on Standby Letters of Credit and Guarantees, ¶ 89, U.N. Doc. A/CN.9/301 (March 21, 1988).

⁵⁵ Explanatory Notes, *supra* note 7, cmt. 45.

⁵⁶ The Convention, *supra* note 1, art. 19(1)(a).

⁵⁷ *Id.* art. 20(1).

ISP98 explicitly avoids the topic of fraud as well as another defense that is theoretically available to the issuer—the lack of authority to issue a standby—stating that “[t]hese matters are left to applicable law.”⁵⁸ Section 5-109 of UCC Article 5 is more helpful, noting that if an applicant claims that honoring a presentation of documents would “facilitate a material fraud by the beneficiary,” a court may “temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons.”⁵⁹ However, this potential for permanent relief is undercut by the provision’s requirement that the court must first find that four conditions are satisfied, one of which is “that a beneficiary ... who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted.”⁶⁰ Obviously, terminating a beneficiary’s right to collect payment causes that beneficiary to suffer a loss. Thus, it seems highly unlikely that a court would ever find this condition to be satisfied, meaning that no matter how material the fraud, the court is unlikely to ever end a beneficiary’s right to draw under the undertaking.

The Official Commentary on UCC Article 5 indicates how difficult a proposition such fraud would be. First of all, the only exception to the general “no injunction rule” involves fraud “so serious as to make it obviously pointless and unjust to permit the beneficiary to obtain the money.”⁶¹ Secondly, the Official Commentary indicates that, as issuers “may be liable for wrongful dishonor if they are unable to prove forgery or material fraud, presumably most issuers will choose to honor despite applicant’s claims of fraud or forgery unless the applicant procures an injunction”—a difficult task, since “[t]he standard for injunctive relief is high.”⁶² While these Notes set a helpful, letter-of-credit-specific standard of material fraud, scholars Gao Xiang and Ross P. Buckley have noted that

⁵⁸ ISP98, *supra* note 3, R. 1.05.

⁵⁹ U.C.C. § 5-109(b) (1995).

⁶⁰ *Id.* § 5-109(b)(2).

⁶¹ *Id.* § 5-109 cmt. 1.

⁶² *Id.* § 5-109 cmts. 2, 4.

generally, U.S. courts have taken “an unduly narrow” approach to material fraud, rarely holding that conduct meets this standard.⁶³

However, there are exceptions to this general rule, currently in the form of UCC 5-109, but also in historical case law. For example, in the 1941 United States case *Szteijn v. Henry Schroder Banking Corp.*, the seller shipped worthless rubbish to the buyer, and then demanded payment.⁶⁴ The court held that, where the facts of the underlying transaction show that the seller went beyond a mere breach of the agreement to the level of a complete failure to perform, “the principle of the independence of the bank’s obligation under the letter of credit could not be extended to protect the unscrupulous seller.”⁶⁵ Thus, where the seller’s misconduct was both intentional and serious, it created an exception to the independence of the undertaking.

Even in England, which has a narrower constriction of fraud than most countries, since it considers LCs to be “the life-blood of international commerce,”⁶⁶ the Working Group suggested that there were cases upholding findings of fraud.⁶⁷ Thus, in varying jurisdictions, the Working Group found examples of fraud sufficient to justify court action against those beneficiaries.

As for Article 19(1)(c)’s “demands with no conceivable basis,” specific examples are given in Article 19(2), including the following:

- (b) ... The underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal ... ;
- (c) The underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary; ...

⁶³ Gao Xiang and Ross Buckley. A Comparative Analysis of the Standard of Fraud Required Under the Fraud Rule in Letter of Credit Law, 13 DUKE J. OF COMP. & INT’L. L. 293, 322 (2003).

⁶⁴ UNCITRAL, *supra* note 12, ¶ 11 (citing *Szteijn v. Henry Schroder Banking Corp.*, 31 N.Y.S. 2d 631, 634 (1941)).

⁶⁵ *Id.*

⁶⁶ *Id.* ¶ 21 (citing *Harbottle v. National Westminster Bank* (per Kerr J.), Q.B., [1977] 2 *All E.R.* 862, 870).

⁶⁷ *Id.* ¶¶ 23, 24.

- (e) ... Fulfillment of the underlying obligation has clearly been prevented by willful misconduct of the beneficiary.⁶⁸

In drafting Article 19(2)(b), the Working Group debated whether or not to grant the parties full autonomy to contract around 19(2), but expressed concern over doing so, as allowing such autonomy “would allow the parties to exclude even the most serious cases of improper demand, which could run counter to public order.”⁶⁹ The Commission also debated whether or not to draft an additional subsection of 19(2) covering situations where “the amount demanded is manifestly disproportionate to the damage suffered.”⁷⁰ This suggestion failed to attract the required support, however, “in particular since that situation was not one of complete lack of a basis for the demand and since it addressed a problem that could be dealt with by including in the guaranty letter a reduction mechanism.”⁷¹ This also explains why gross disparity was not included in Article 11(1).

Article 19(2)(c) essentially restates 11(1)(c)’s statement that “the amount available under the undertaking has been paid” (though from a different source—by the applicant and not the issuer), while 19(2)(d) raises the interesting point that even wilful misconduct on the beneficiary’s part does not end its right to demand payment, but only provides the guarantor/issuer the right to withhold payment in good faith.⁷² The right to *withhold* payment is not necessarily indefinite, however, and thus, is not technically a cessation of the beneficiary’s right to demand payment. This limitation is shown in Article 20 of the Convention, which allows a court to issue “a *provisional* order to the effect that the beneficiary does not receive payment” (emphasis added), but is silent on whether or not that court may subsequently issue a final order.⁷³ As the power to enter a final order is not expressly granted to courts in the Convention, it is unlikely that the

⁶⁸ The Convention, *supra* note 1, art. 19(2) (b)-(d).

⁶⁹ UNCITRAL, Working Group on Int’l Trade Practices, Report of the Working Group on International Contract Practices on the Work of Its Twentieth Session, ¶ 27, U.N. Doc. A/CN.9/388 (December 23, 1993).

⁷⁰ *Id.* at ¶ 28.

⁷¹ *Id.*

⁷² The Convention, *supra* note 1, art. 11(1)(c).

⁷³ *Id.* art. 20(1)(a).

Working Group intended the Convention to give the power to do so to courts.

2. Concepts Not Covered by the Convention

a. Force Majeure

The 1988 draft of the International Chamber of Commerce (ICC)'s Uniform Rules for Demand Guarantees' Article 14 states that guarantors and confirming guarantors assume no liability or responsibility for consequences arising out of force majeure events, including riots and acts of God.⁷⁴ The Convention makes no mention of force majeure clauses, though the Working Group did discuss potentially including a clause stating that guarantors were not liable for the consequences arising from the interruption of business due to "acts of God, riots, civil commotions, insurrections, wars, or any other causes beyond their control or by strikes, lock-outs or industrial action of whatever nature."⁷⁵ In its discussions on the topic, the Working Group noted that "guarantee texts often contained force majeure clauses and that even without any contractual exemption a similar result would obtain from the applicable national law,"⁷⁶ but that given the divergence in national laws in exempting impediments, it might be beneficial to establish a universal rule "to strive for a greater degree of harmony."⁷⁷ Ultimately, however, the Working Group decided not to adopt any of the proposed language on force majeure clauses, as "it was felt that it would not be appropriate to deal with exemption from liability at the statutory level; the issue should be left to the contractual level."⁷⁸ Thus, force majeure clauses are outside the scope of the Convention, and depending on the jurisdiction or specific clause contracted for, could possibly end the beneficiary's right to payment under the right circumstances.

⁷⁴ The Secretary-General, *Report of the Secretary-General on Standby Letters of Credit and Guarantees*, Annex, art. 14, U.N. Doc. A/CN.9/301 (Mar. 21, 1988).

⁷⁵ UNCITRAL, *supra* note 12, ¶ 65.

⁷⁶ *Id.* ¶ 70.

⁷⁷ *Id.*

⁷⁸ UNCITRAL, Working Group on Int'l Trade Practices, *Report of the Working Group on International Contract Practices on the Work of its Fifteenth Session*, ¶31, U.N. Doc. A/CN.9/345 (June 3, 1991). The specific clause considered by the Working Group is Article 13 of the ICC's Draft Uniform Rules for Demand Guarantees (URDG458), previously cited in UNCITRAL, *supra* note 12, ¶ 65.

b. Unconscionable Contracts

The Working Group discussed that there may be other objections to payment than fraud: “[a] basic ground for refusing payment would be that the guarantor’s undertaking is void or voidable under the law applicable to questions of material validity.”⁷⁹ Depending on the applicable law, examples would include circumstances where “the payment undertaking or its fulfillment would be contrary to public policy, in violation of a legal prohibition, immoral or for similar reasons illegal.”⁸⁰ However, despite this discussion, such a provision was explicitly excluded from the Convention: “the Working Group was agreed that the uniform law should not contain any special provisions dealing with instances of invalidity, voidability or unenforceability of payment obligations under guaranty letters.”⁸¹ While the Working Group offered no explicit reason for this decision, presumably, the difficulty of writing an article that would cover a multitude of very different jurisdictions and court systems far outweighed the necessity or utility of such an article. Thus, depending on the jurisdiction, an LC undertaken for illegal reasons, reasons contrary to public policy, or immoral reasons could conceivably end the beneficiary’s right to demand payment. Hence, a beneficiary’s right to demand payment may cease when a court rules or declares that the bank’s obligation has ceased – another instance outside the scope of Article 11(1) of the Convention.

Conclusion

As stated above, certain types of transfers, egregious cases of fraud, and immoral or illegal letters of credit could all potentially end the beneficiary’s right to demand payment under the undertaking, all of which are outside the scope of Article 11(1) of the Convention. As the Working Group which drafted the Convention discussed all of these matters and left them up to individual contracts and the diverse laws of different jurisdictions, Article 11(1) is not an exclusive list of ways in which the beneficiary’s right to demand payment ceases. However, while Article 11(1) is not an exclusive list, it covers the overwhelming majority of situations in which the beneficiary’s right would cease.

⁷⁹ UNCITRAL, *supra* note 12, ¶ 76.

⁸⁰ *Id.* ¶ 77.

⁸¹ UNCITRAL, *supra* note 78, ¶ 80.