RECENT DEVELOPMENTS

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Bank Guarantees to Pay upon First Written Demand in German Courts

In international business transactions bank guarantees to pay upon first written demand (Guarantees) are of great importance. They constitute a transnational legal instrument, and therefore, the legal problems connected with such Guarantees are similar in the various countries in which they are used. The general principle of such Guarantees may be summarized by the words "pay first, litigate later."[1] Their primary types of application are:

(1) *Bid bonds* cover the obligation of a bidder for a contract in case the contract is awarded to him, for execution of the contract and to supply the guarantees necessary upon signing.

(2) *Prepayment bonds* cover the obligation of a contractor to pay back the prepayment he has received in case the contract is not fulfilled in total.

(3) *Performance bonds* cover the obligation of the contractor to carry out his work and to do so within the agreed time; in addition, they cover liabilities for damages in case he discontinues his work or there is a delay.

(4) *Warranty bonds* cover obligations of a contractor under his warranty.

By their legal nature, Guarantees to pay upon first written demand are abstract promissory notes of a bank to pay within a very short period of time, say

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1. *See* H. Schneider & G. Maier-Reimer, *Banking*, in BUSINESS TRANSACTIONS IN GERMANY § 39.14(2) (B. Rüster ed. 1988 Supp.); F. VON WESTPHALEN, DIE BANKGARANTIE IM INTERNATIONALEN HANDELSVERKEHR 32–34 (1982).

forty-eight hours, if certain formalized conditions are fulfilled. Typically, such conditions are the first written demand of the beneficiary of a Guarantee. Sometimes an additional written statement by the beneficiary has to be attached if so stipulated. In this respect, a Guarantee is similar to a documentary letter of credit, except that, in the case of a documentary letter of credit, the bank has the duty to examine documents relating to the basic transaction, whereas in the case of a Guarantee the documents are replaced by a unilateral statement of the beneficiary.[2]

The purpose of such unilateral statement may be explained by the following example: A quite common type of Guarantee is a Guarantee under which a bank obligates itself to pay in the event a beneficiary requests payment, stating that the work performed by the contractor was delayed. In the case of such a unilateral allegation of delay, the bank will pay and will not examine the truth of this unilateral contention. It is to no avail that the contractor informs the bank that in his opinion the statement made by the beneficiary is incorrect. The bank will pay all the same, because otherwise the bank's international standing would be jeopardized. The contractor will be forced to hold the bank harmless. He has to reimburse the amount paid by the bank even if the statement made by the beneficiary to the bank concerning a delay was incorrect, and the payment to the beneficiary was not justified because there was no valid claim against the contractor. If the beneficiary's call of the Guarantee was not justified according to the purpose of the Guarantee, the contractor's only choice is to try to be reimbursed by the beneficiary. Since the beneficiary's place of business is usually in a foreign country, it may be rather difficult to sue him for reimbursement and to execute a judgment. In some cases, the amount of the Guarantee may be lost forever.

I. Provisional Legal Remedies Principally Available Under German Law

Since in most cases of a Guarantee considerable amounts—very often millions of U.S. dollars—are at stake, contractors sometimes try to block by immediate court proceedings the bank's payment under the Guarantee if they are of the opinion that the beneficiary's call of the Guarantee is not justified. Familiarity with these legal remedies is very important for both contractors and beneficiaries. Contractors should know to what extent they are able to block payment in the case of an unjustified call of the Guarantee. Beneficiaries should be informed of the risks of a blocking by the contractor that could make their Guarantee useless.

Due to the time pressure involved in cases in which the banks are prepared to honor Guarantees, in principle only attachments and preliminary injunctions as the two possible preventive court orders under German law are adequate legal

2. *See* H. Schneider & G. Maier-Reimer, *supra* note 1.

remedies. In the following we will examine whether or not such legal remedies are available under German law.

II. Preliminary Injunctions

Needless to say, it would be in conflict with the Guarantee's purpose if the contractor could easily obtain a preliminary injunction and thereby stop the beneficiary from calling the Guarantee. Where the existence of the claim of the beneficiary secured by the Guarantee is only questionable, as opposed to certain, there is no basis for intervention by a contractor. Otherwise, the purpose of the Guarantee would be frustrated. If, for instance, there is disagreement between beneficiary and contractor as to whether there has been a delay of the contractor's work, the beneficiary's statement prevails and a preliminary injunction is excluded. Especially in such doubtful cases it is the intention of the Guarantee—"pay first, litigate later"—to secure the payment "on demand." The question of whether or not the claim exists will be addressed in subsequent litigation.[3]

A. An Evident Abuse as Prerequisite of an Injunction

Legal remedies are acceptable only if it is quite certain that the claims made by the beneficiary and secured by the Guarantee do not exist. Preliminary injunctions might be acceptable, for instance, in cases where it is obvious that the work was performed within the time limit of the contract, so that the call of the Guarantee on the basis of a delay is clearly abusive.

For these reasons, German courts refuse to issue preliminary injunctions in cases where the call of the Guarantee is only "unjustified." Apart from these cases, they are prepared to grant injunctive relief only in the rare cases of a "manifest abuse," which in practice seems to be very similar to the concept of "fraud." Such a manifest abuse is established only if the absence of any entitlement on the basis of the underlying contract is irrefutably proven.[4] There is never a manifest abuse if such proof could be made only on the basis of an interpretation of the contract.

In this connection the following problem arises: In view of the short deadlines for payment under the Guarantee, a contractor most often has only one or two days left for blocking the payment by means of a court order. Thus, as a practical matter, the court is required to make its decision within hours. Therefore, it is impossible to obtain any comments from the beneficiary, let alone to schedule an oral hearing prior to the decision. The proceedings thus are necessarily ex parte as defined in article 936/921 of the German Civil Procedure Code (ZPO). In this

3. Judgment of March 12, 1984, Bundesgerichtshof (Federal Supreme Court in Civil Matters), BGH. W. Ger., 90 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 287–94 (1984).

4. For details, see Jedzig, *Aktuelle Rechtsfragen der Bankgarantie auf erstes Anfordern*, 42 Wertpapiermitteilungen [WM] 1469–74 (1988).

case the nonparticipation of the other party is for the benefit of the contractor. A contractor who alleges a manifest abuse of the Guarantee, however, cannot file affidavits to make a prima facie showing of such abuse even though affidavits usually would be sufficient under the German rules of civil procedure in cases of provisional remedies (cf. ZPO article 920). In the case of a Guarantee, German courts do not accept this procedure, since they are afraid that it could easily lead to an abuse of the injunctive relief. Therefore, German courts demand that the contractor make a clear showing of a manifest abuse and it is not accepted in such cases to submit less evidence than in proceedings on the merits. Contrary to the procedural requirements for cases on the merits, proof has to be furnished by documentary evidence, rather than by affidavits[5] or the testimony of witnesses who are deemed to be unreliable. As a result, injunctive relief is limited to the rare cases of clear showing by documents that the call of the Guarantee is evidently abusive.[6] For instance, if the beneficiary calls the Guarantee, stating that the contractor's work was delayed, an abuse might be proven by filing a certificate of completion signed by the beneficiary that confirms that the contract was performed in time.

There is disagreement as to whether or not, as a second prerequisite, a preliminary injunction should be issued only if for legal or factual reasons ultimate reimbursement by the beneficiary to the contractor is in jeopardy.[7] Those arguing in favor of this approach say that without such prerequisite the principle "pay first, litigate later" would be violated. It can be argued, however, that, in cases of a manifest abuse, this principle should no longer be applicable and therefore, the contractor should be entitled to block the payment caused by such abuse, irrespective of his chances to be reimbursed at a later point of time.

B. Practical Problems of Injunctions Against the Beneficiary

In connection with any injunctive relief against an abusive call of a Guarantee, it is crucial to determine whether the beneficiary or the bank is the appropriate defendant in such an action. As it is the beneficiary who is responsible for the abuse, it seems that a preliminary injunction, if any, should be directed against him. The German courts would have jurisdiction to render a decision in such cases as, under German rules of civil procedure (ZPO article 23), a German court has personal jurisdiction over a party if the party has any assets within the court's district.[8] In general, the beneficiary will have some assets in Germany. In

5. Judgment of March 3, 1983, Oberlandesgericht (Appellate Court) Frankfurt, OLG, W. Ger., 36 Neue Juristische Wochenschrift [NJW] 576 (1983).

6. *See* Heinsius, *Zur Frage des Nachweises der rechtsmissbräuchlichen Inanspruchnahme einer Bankgarantie auf erstes Anfordern mit liquiden Beweismitteln*, in Festschrift für Winfried Werner 229–50 (W. Hadding, U. Immenga, H.-J. Mertens, K. Pleyer, U. Schneider eds. 1984).

7. Judgment of February 11, 1981, Oberlandesgericht Stuttgart, OLG, W. Ger., 34 NJW 1913–14 (1981).

8. Jedzig, *supra* note 4, at 1471.

most cases, he has at least counterclaims against the (German) contractor arising from the contract, for example warranty claims.[9] Additionally, he has the claim under the Guarantee against the German bank involved. Such claims might be regarded as sufficient assets and could therefore serve as a basis for jurisdiction in Germany. Even if there is an arbitration clause in the main contract between beneficiary and contractor, courts would have jurisdiction to issue provisional remedies. In practice, however, the implementation of such court order is difficult.

The first problem is that service of the court order on the beneficiary is essential (cf. ZPO articles 936/928 *et seq.*); yet, service in foreign countries is in almost all cases too time-consuming. The second problem is that a court does not have the legal power to revoke the beneficiary's call of the Guarantee by means of a preliminary injunction. The court can order only that the beneficiary may refuse acceptance of the money if the bank pays. In case of a violation of this order, the court could impose a sanction. Under German law, preliminary injunctions are usually issued under penalty of a fine, with a ceiling of half a million German marks (approximately U.S. $ 270,000) in case of a violation of an injunction (ZPO article 890). While half a million German marks is the maximum amount of a fine under German law, a sum of half a million is only a small percentage and will be an insufficient deterrent to prevent a beneficiary from accepting the money if the Guarantee is for a much greater amount of money. And even such a penalty, if ordered, may very well be an obstacle for the service of the injunction in a foreign country since it is deemed to interfere with foreign rights of sovereignty.[10] Therefore, only an injunction without any sanction is permissible.

C. Refusal of an Injunction Against the Bank by the Frankfurt Court

In view of the foregoing discussion, it is very important to inquire into the question of whether it is possible to apply for a preliminary injunction against the *bank*, rather than the beneficiary under German law. In this context, two judgments of the *Bundesgerichtshof*, the highest German court in civil matters, have to be taken into consideration. In a judgment of 1984, the Court held that a bank itself *can* refuse payment on the Guarantee, if there is documentary evidence of a manifest abuse of the call of the Guarantee. In a most recent case the Court held that the bank has to examine whether there is such a manifest abuse.[11] The question arises whether the bank can be forced to refuse payment in these admittedly extreme cases.

9. Schütze, *Einstweilige Verfügungen und Arreste im internationalen Rechtsverkehr, insbesondere im Zusammenhang mit der Inanspruchnahme von Bankgarantien*, 34 WM 1438, 1439 (1980).

10. *Id.* at 1440–41.

11. Judgment of March 12, 1984, 90 BGHZ 287, 292; Judgment of January 17, 1989, 43 WM 433–35.

Under German law, the contract between the contractor and the bank by which the bank was instructed to give the Guarantee is deemed to impose an obligation on the bank to protect the contractor against damage. Certainly, in case of an abuse, the contractor is damaged when the bank pays to the beneficiary and the contractor has to reimburse the bank promptly thereafter. Therefore, it is argued that the bank not only has a right to refuse payment in cases of abuse but, in regard to the contractor, *has the obligation* to do so. The flipside of this obligation is a right of the contractor to demand, from the bank, such a refusal of payment.[12] If such a right is recognized, it would seem to be logical to enforce it by way of a preliminary injunction.[13]

It should be noted, however, that in its decision of April 22, 1987, the Appellate Court of Frankfurt held that a preliminary injunction cannot be granted on the grounds of the contractor's right to demand refusal of payment.[14] The court emphasized that the payment by the bank per se does not amount to damages on the part of the contractor. According to the court, only the actual repayment by the contractor to the bank may be considered as a damage. Therefore, the preliminary injunction can only aim at preventing the bank from debiting an existing account of the contractor with the bank in order to recover the money. An injunction order of such kind is, however, available in exceptional cases only. As a general rule, the contractor is forced to accept the debiting of his account by the bank. He could only sue the bank afterwards in order to recover the bank's reimbursement.

Only if such a recovery by the contractor from the bank is jeopardized because of the bank's shaky financial situation might an injunction against the bank be available. The second exception to the above mentioned general rule might be the case that in consequence of the bank debiting the contractor's account, the financial situation of the contractor becomes critical. Under these circumstances it would not help the contractor to get the money back later, after obtaining a final judgment against the bank, which may take a number of years.

As a practical matter, therefore, it seems that there are only very few cases in which a preliminary injunction against a bank in Frankfurt is available. Such an injunction would be legally unavailable even in cases in which there is clear documentary evidence of a manifest abuse of the Guarantee. Moreover, given the fact that Frankfurt is *the* German banking center, it would not change much if other district courts should decide not to follow the Frankfurt court's line of approach. A decision by the Bundesgerichtshof, which would be binding for the local appellate courts, is unlikely because, under German procedural rules, questions regarding preliminary injunctions cannot be appealed to the Bundesgerichtshof. In this respect, the various German appellate courts' judgments are final.

12. Horn, *Bürgschaften und Garantien zur Zahlung auf erstes Anfordern*, 33 NJW 2153, 2157 (1980).

13. *See* J. NIELSEN, BANKGARANTIEN BEI AUSSENHANDELSGESCHAFTEN 122–28 (1986).

14. Judgment of April 22, 1987, Oberlandesgericht Frankfurt, OLG, W. Ger., 42 WM 1480–83 (1988).

D. What Is Left: Impressing the Bank by an Injunction Against the Beneficiary

In view of the decision of the Frankfurt court, contractors, in the future, may proceed as follows: They may apply for a preliminary injunction against the beneficiary. The competent court would be the court in whose district the beneficiary's German assets are located. If the contractor is able to file documentary evidence that shows an obvious manifest abuse of the Guarantee by the beneficiary, the contractor is likely to obtain a preliminary injunction against the beneficiary. By such an injunction, the beneficiary could be prevented from accepting the money under the Guarantee. Once the injunction has been issued (and certainly before it has been served on the beneficiary), a copy thereof could be submitted to the bank. The contractor could inform the bank that he will refuse to reimburse the bank for the amount of the Guarantee if the bank decides to pay in spite of the injunction. Of course, a bank is not technically bound by such an injunction as it is addressed to the beneficiary. However, if the bank decides to pay to the beneficiary, and the preliminary injunction becomes final and binding, it seems doubtful whether a German court, in subsequent court proceedings between the bank and the contractor, would acknowledge the bank's right to be reimbursed by the contractor. Therefore, the bank has to evaluate the impact of its decision on its international standing on the one hand and the financial risk of not getting reimbursed on the other hand.[15]

E. Consequences of an Involvement of Two Banks

The legal situation concerning the abusive calling of a Guarantee becomes more complicated in cases where two banks are involved. Here a bank in the contractor's home country (the home bank) is instructed to make arrangements for a Guarantee by a second bank that has its place of business in the beneficiary's country (the fronting bank). The beneficiary thus gets a Guarantee of a bank in a legal and commercial environment with which he is familiar. In the event that the fronting bank's Guarantee is called by the beneficiary, the fronting bank will seek indemnity from the home bank under a counter-indemnity. This counter-indemnity obligates the home bank to pay to the fronting bank in the event the fronting bank has paid to the beneficiary under its Guarantee.

In this case, it is even more doubtful whether a preliminary injunction can be issued.[16] Since, according to the Frankfurt Appellate Court, a preliminary injunction usually cannot be issued against a bank, the same is true if two banks are involved. Consequently, there remains the problem of a preliminary

15. Jedzig, *supra* note 4, at 1471.

16. *See* Judgment of November 24, 1983, Bundesgerichtshof, BGH, W. Ger., 38 WM 44–45 (1984); Judgment of December 11, 1979, Landgericht (District Court) Frankfurt, LG, W. Ger., 35 WM 284–88 (1981); Judgment of January 23, 1981, Oberlandesgericht Saarbrücken, OLG, W. Ger., 35 WM 275–78 (1981); Judgment of October 31, 1984, Oberlandesgericht München, OLG, W. Ger., 39 WM 189–92 (1985).

injunction against the beneficiary. Usually, the beneficiary will have assets in Germany, at least in the nature of warranty claims against the (German) contractor. As outlined above, in such a case there is a place of jurisdiction at the contractor's place of business. In principle, in the event of a manifest abuse, an injunction from a German court could thus be obtained against the foreign beneficiary, which would order the beneficiary to refuse acceptance of the funds from the fronting bank. If the contractor obtains the injunction, he could hand copies of it to both banks. Thereafter, the legal situation becomes complicated.

It has to be examined under the law of the country that is the home country of the beneficiary and of the fronting bank whether or not the fronting bank is still obligated to pay under the Guarantee in this situation. It is quite possible that under the applicable foreign law the fronting bank is required to pay, irrespective of an abuse of the Guarantee and irrespective of the German preliminary injunction against the beneficiary. In this case, there is no reason why after payment to the beneficiary the fronting bank should not demand reimbursement from the German home bank under the counter-indemnity. Such a request under the counter-indemnity would not be an abuse of the counter-indemnity by the fronting bank. Therefore, the home bank is obligated to pay to the fronting bank, and after such payment under the counter-indemnity the home bank would be entitled to request reimbursement from the contractor. The German preliminary injunction would not help the contractor.

If under the applicable foreign law, however, the fronting bank has no obligation to pay to the beneficiary in case of a manifest abuse as confirmed in the German preliminary injunction, the situation becomes much more doubtful. If the fronting bank nevertheless decides to pay, and if the counter-indemnity and the contract between both banks are subject to German law, a request by the fronting bank for reimbursement from the German home bank under the counter-indemnity could be deemed an abuse of the fronting bank's rights under the counter-indemnity. If, nevertheless, such request *is* made, and the German home bank still decides to pay under its counter-indemnity, the home bank runs the risk of not being able to recover this sum from the contractor.

III. Attachment Orders

In German legal literature there are only a few references to cases in which a contractor made the attempt to block payment under a Guarantee by an attachment order.[17] Therefore, a recently published case is very instructive.[18]

17. However, this topic is discussed extensively in the German legal literature. *See, e.g.*, F. VON WESTPHALEN, *supra* note 1, at 303–12; Schütze, *Die Sicherung von Ansprüchen aus missbräuchlicher Inanspruchnahme von Bankgarantien auf erstes Anfordern durch Arrest*, 34 DER BETRIEB 779–81 (1981); Aden, *Der Arrest in den Auszahlungsanspruch des Garantiebegünstigten durch den Garantie-Auftraggeber*, 27 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 439–42 (1981); P. MULBERT, MISSBRAUCH VON BANKGARANTIEN UND EINSTWEILIGER RECHTSSCHUTZ 178–99 (1985);

The procedure in this case was as follows: A German contractor was convinced that the beneficiary's call of the Guarantee that had been issued by a bank in Frankfurt was abusive. In addition to an application for a preliminary injunction, he asked for attachment of the beneficiary's assets in Germany. The contractor asserted counterclaims arising from the main contract against the beneficiary that covered necessary additional work and damages caused by insufficient cooperation of the beneficiary. The amount of these alleged counterclaims exceeded the amount of the Guarantee. A prima facie showing of these counterclaims was made in several affidavits of employees of the contractor. It was argued that the enforcement of these counterclaims was jeopardized since the beneficiary had his place of business in a South East Asian country that was said to be politically and economically unstable. Furthermore, the beneficiary's "abusive" calling of the Guarantee allegedly showed that he had no intention of fulfilling his contractual obligations (cf. ZPO article 917).

The attachment order was issued by the Superior Court of Duisburg without a prior oral hearing. At the same time the beneficiary's claim under the Guarantee against the Frankfurt bank was garnished to implement the attachment order (ZPO article 928). The bank was notified of the garnishment immediately and instructed by the court not to pay under the Guarantee (ZPO article 829). Therefore, the bank was blocked from any payment under the Guarantee.

After the bank informed the beneficiary of this legal situation, he filed an objection against the attachment and garnishment order (ZPO article 924). Afterwards, the contractor made use of a provision in article 1281 of the German Civil Code, which states that a party that has garnished a claim can demand that the debtor deliver the amount of money owed by him into escrow to the competent local court. Consequently, the contractor asked the bank to deliver the amount of the Guarantee into escrow to the local court of Frankfurt and the bank acted accordingly, since in view of the garnishment, it had the obligation to do so.

Some days later the Duisburg court rescinded the attachment and, as a legal consequence thereof, the garnishment. The reason was that in the court's opinion the beneficiary had no chance of getting the amount in escrow within the next few years. Therefore, according to the court there was no longer any reason to secure the contractor's claims with an attachment order.[19]

Thereafter the beneficiary applied to the local court in Frankfurt for payment of the amount in escrow to him (*Hinterlegungsordnung*, German Decree on

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VERBAND DEUTSCHER MASCHINEN -UND ANLAGENBAU [VDMA], BANKGARANTIEN 10 (4th ed. 1985); C.-W. CANARIS, HANDELSGESETZBUCH GROSSKOMMENTAR [HGB], BANKVERTRAGSRECHT nn.1152, 1065–70 (1988).

18. Blau, *Blockierung der Auszahlung einer Bankgarantie auf erstes Anfordern durch Arrest und Hinterlegung*, 42 WM 1474–77 (1988).

19. Judgment of November 27, 1987, Landgericht (District Court) Duisburg, LG, W. Ger., 42 WM 1483–85 (1988). Because of a settlement, there was no final decision by an appellate court in this case.

Depositing, articles 12 and 13), and after some time, he succeeded. In the escrow proceedings pending at the Frankfurt court the following issues were held to be irrelevant: (a) the reason why the Duisburg court revoked the attachment order; (b) the fact that the contractor had appealed the decision of the Duisburg court; (c) the question whether or not there was an abuse of the Guarantee; and (d) the question whether the contractor had any counterclaims. Only the fact that the garnishment order had been revoked by the Duisburg court was of importance, and that for this reason the contractor had lost his rights arising from the garnishment. As a result, he lost his right to block the payment of the money in escrow to the beneficiary.[20]

This case illustrates that, under German law, the contractor cannot rely on an attachment, a garnishment, and a deposit as a successful legal remedy. In general, it seems that it is contrary to the Guarantee's purpose if the contractor is permitted to garnish the beneficiary's guarantee-claim against the bank, in order to secure the contractor's alleged counterclaims against the beneficiary under the main contract.[21] Therefore, a garnishment for the benefit of the contractor in order to secure his counterclaims arising from the same contract should be strictly excluded. Otherwise there is a potential risk that the money is put into escrow, at least for some time.[22] Needless to say that to *deposit* the money is just the opposite of the purpose of a Guarantee to pay upon first written demand.[23] In the light of the decisions in this case it is questionable whether attachment orders in connection with Guarantees will be of much help in the future.

IV. Conclusion

Provisional remedies blocking the payment under Guarantees in principle run contrary to the purpose of Guarantees, and are contrary to the agreements made by the parties in connection with Guarantees. Therefore, German courts, aware of the purpose of Guarantees, are very reluctant to grant injunctive relief for the

20. Judgment of February 26, 1988, Amtsgericht (Local Court) Frankfurt, AG, W. Ger., 42 WM 1485–87 (1988). Because of a settlement there was no final decision by an appellate court in this case.

21. Pleyer, *Die Bankgarantie im zwischenstaatlichen Handel*, 27 WM 25 (supplement No. 2/1973); J. ZAHN, E. EBERDING & D. EHRLICH, ZAHLUNG UND ZAHLUNGSSICHERUNG IM AUSSENHANDEL 2/355 (6th ed. 1986); J. NEILSEN, *supra* note 13, at 119–21. *Contra* P. MULBERT, *supra* note 17, at 181–85. For a discussion of the similar issue with respect to letters of credit, see Judgment of November 10, 1977, Oberlandesgericht Hamburg, OLG, W. Ger., 32 WM 388-39 (1978); Pilger, *Einstweiliger Rechtsschutz des Käufers und Akkreditivstellers wegen Gewährleistung durch Arrest in den Auszahlungsanspruch des Akkreditivbegünstigten?*, 25 RIW 588–90 (1979); W. Erman, *Einwirkungen des Kaufvertragsverhältnisses auf die Akkreditivverpflichtung der Bank*, in FESTSCHRIFT FÜR RITTERSHAUSEN 261, 268–70 (H. Büschgen ed. 1968).

22. Blau, *supra* note 18, at 1475–77.

23. F. VON WESTPHALEN, *supra* note 1, at 108–09. On the similar issue in the case of letters of credit, see Judgment of October 6, 1987, Oberlandesgericht Frankfurt, OLG, W. Ger., 42 WM 214–16 (1988).

benefit of the contractor in such cases. As a general rule they are only prepared to grant injunctive relief if they are convinced by documentary evidence that, as alleged by the contractor, the call of the Guarantee constitutes a manifest abuse. Even in these cases, a preliminary injunction against the beneficiary creates difficult practical problems. An injunction against a bank in Frankfurt is unlikely in nearly all cases in the light of a recent decision of the Frankfurt Appellate Court. It is uncertain whether an injunction against banks at other places will be permitted in the future. Whether in case of counterclaims attachment orders are possible is very uncertain as well. It seems that, under German law, at least a beneficiary who does not abuse the Guarantee in an evident way does not run a significant risk of being deprived of the benefits of the Guarantee by provisional remedies initiated by the contractor.