



The Nuts and Bolts of Guaranties

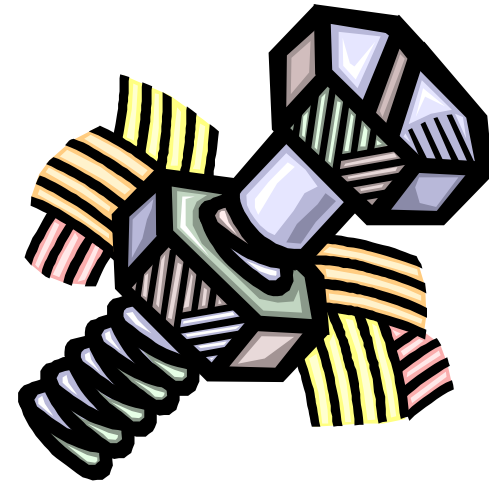
NAPCO Credit Conference
January 23, 2015

Kevin M. Page
Associate General Counsel
Tenaska, Inc.

Topics for Discussion

- **Back to the Basics:**

- First things first...
- When are guaranties issued?
- Who provides guaranties?
- Pros and cons of guaranties

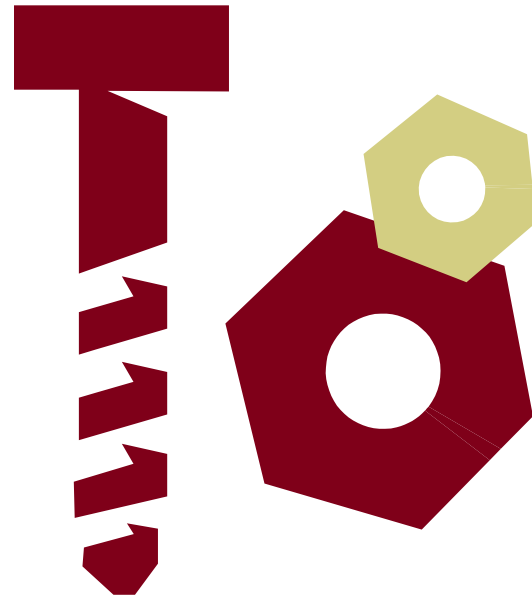


- **Integration Into Energy Trading Contracts:**

- Events of default
- Credit terms

Topics for Discussion

- **From Basics...to Practice:**
 - Boilerplate provisions
 - Commonly-negotiated terms
 - Enforceability with Foreign Guarantors

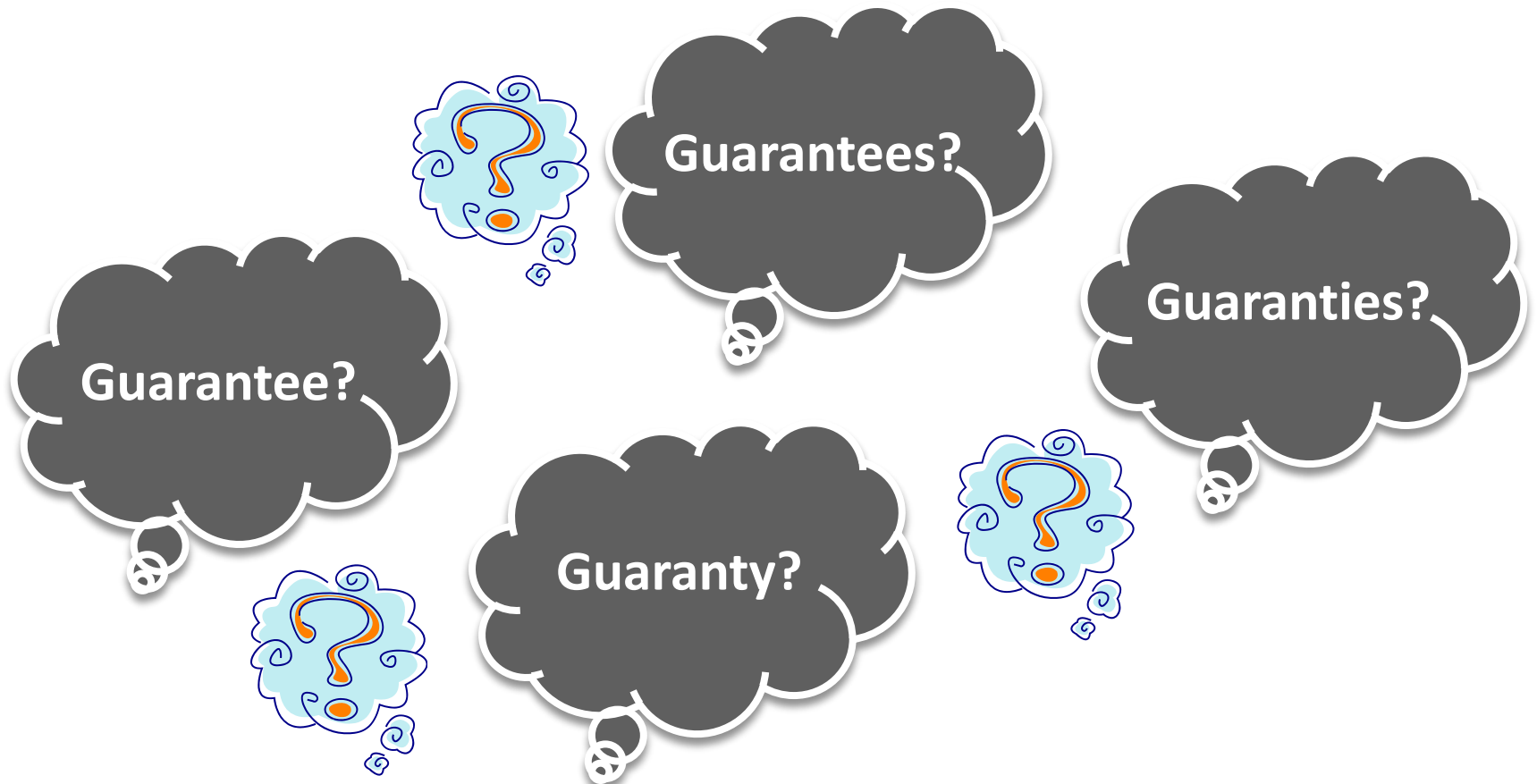


Back to the Basics



Back to the Basics

- First things first...**how do you spell it anyway?**



Back to the Basics

- **Distinction originally derived from British English:**
 - Guaranty (noun) v. Guarantee (verb)
 - In the legal, finance and banking contexts, this distinction is sometimes still made (though less common than it used to be)
- **Use of “guarantee” in American English:**
 - Commonly used as either a verb or a noun
 - “Guarantee” often used in context of consumer product warranties

Back to the Basics

- **Bryan Garner, “*Dictionary of Modern Legal Usage*”:**

Today “[the noun] guarantee is the usual term, seen often, for example, in the context of consumer warranties or other assurances of quality or performance. Guaranty, in contrast, is now used primarily in financial and banking contexts in the sense of “a promise to answer for the debt of another.”

Guaranty is now rarely seen in non-legal writing, whether in Great Britain or in the United States.” (emphasis added)

Back to the Basics

So in the context of the legal & credit world:

- If you're talking about the contract itself...

- **Guaranty** (noun)
- Guaranties (plural)



- If you're talking about the guarantor's promise to pay as security for debts...

- **Guarantee** (verb)
- Guarantees (third person singular)



Back to the Basics

- **When are guaranties issued?** If a trading entity has:
 - Limited creditworthiness;
 - Limited liquid collateral to provide as other form of security; and
 - A creditworthy affiliate

Back to the Basics

- **Who provides a guaranty?**
 - Usually a parent company or other affiliate benefitting from the subsidiary's trading activities
 - Basis for consideration under the contract
- **Key Analysis for Beneficiaries:** *How creditworthy is the guarantor issuing the guaranty?*

Back to the Basics

■ **Advantages:**

- Can yield a highly liquid form of collateral—cash
- Simple:
 - Usually no longer than 5 – 7 pages
 - Terms are fairly straightforward
- Common:
 - Particularly in the commodity trading context, one of the most commonly utilized credit tools

Back to the Basics

- **Advantages (cont.):**
 - Relatively quick to negotiate and implement
 - Low barriers to utilization
 - No detailed credit facilities involved, unlike may be involved with cash or letters of credit
 - For beneficiaries, adds value if guarantor and trading subsidiary go bankrupt
 - *Ex:* Enron corporate guaranty roughly doubled unsecured creditors' recovery

Back to the Basics

■ Disadvantages:

- Contract obligation, not cash or property
- Before exercised, it is illiquid—a contractual promise to pay
- Collateral is only realized if guarantor actually pays and does not breach its contractual obligation

Back to the Basics

- **Disadvantages (cont.):**
 - Guarantor's creditworthiness may subsequently deteriorate
 - Guarantor is required to report guaranteed obligations on its financial statements
 - May deter some guarantors or lead to caps on guaranteed amounts

Integration into Energy Trading Contracts



Integration into Energy Trading Contracts

Guaranties

ISDA

NAESB

EEI

Integration into Energy Trading Contracts

ISDA Schedule Part 4
(if specified)

NAESB
(2006 Cover Sheet)

EEI § 8.1(e)/8.2(e)
(if specified)

- Guaranties and guarantors are built into the framework of most energy trading agreements
 - **ISDA**: “Credit Support Provider” issues a “Credit Support Document”
 - **NAESB**: “Guarantor” issues a “guaranty”
 - 2006: “Guarantor” expressly stated in the Cover Sheet
 - **EEI**: “Guarantor” issues a “guaranty”

Integration into Energy Trading Contracts

ISDA § 5(a)(iii)

NAESB §10.2(vi), (viii)

EEI § 5.1(h)(ii), (iv)-(v)

■ Defaults Tied to the Guaranty:

- Failure to comply with or perform under the guaranty (ISDA, NAESB, EEI)
- Failure to pay under the guaranty when due (NAESB, EEI)
- Expiration of termination of the guaranty before all guaranteed obligations are satisfied (ISDA, EEI)
- Guarantor disaffirms, disclaims, repudiates, rejects or challenges the validity of a guaranty (ISDA, EEI)

Integration into Energy Trading Contracts

ISDA § 5(a)(vii)

NAESB § 10.2(i)-(v)

EEI § 5.1(d)

■ Bankruptcy:

- One of the most common Events of Default applicable to guarantors
- By pulling guarantors into this Event of Default, parties can exit the contract without having to wait on the impending bankruptcy of the guarantor's trading subsidiaries



Integration into Energy Trading Contracts

ISDA § 5(a)(v)

2006 NAESB
(if elected/specified)

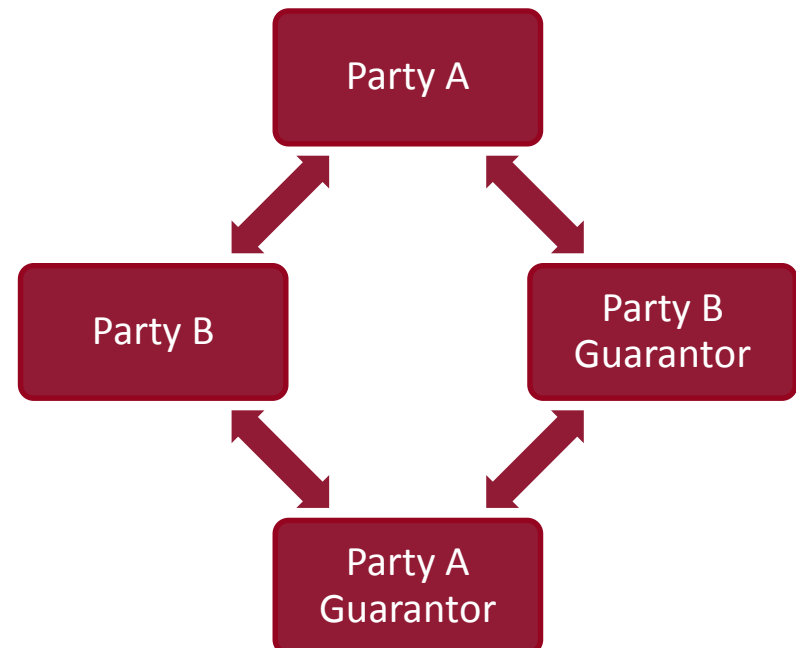
EEI
(if added)

▪ Default Under Specified Transaction:

“Specified Transactions”

May include transactions not only between the parties, but also the parties’ guarantors

- Built into ISDA framework
- 2006 NAESB: Elect “Transactional Cross Default” and specify guarantor transactions in Cover Sheet
- EEI: Must be added as an additional Event of Default in “Other Changes”



Integration into Energy Trading Contracts

ISDA § 5(a)(vi)
(if elected)

2006 NAESB
(if elected)

EEI § 5.1(g)
(if elected/specified)

■ Cross Default:

■ *ISDA*

- Must be elected as applicable in the Schedule
- Applies to ISDA parties and their CSPs
- Cross default is standard (v. cross acceleration)

■ *2006 NAESB*

- If “Indebtedness Cross Default” elected in Cover Sheet, then Additional Event of Default under Section 10.2(ix)
- Applies to parties and their guarantors
- Cross acceleration is standard

■ *EEI*

- Must be elected as to each Party and any “Other Entity” of such Party (e.g., the Party’s guarantor) specified in the Cover Sheet
- Cross default is standard (v. cross acceleration)

Integration into Energy Trading Contracts

ISDA § 5(a)(vii)

NAESB
(if added in SPs)

EEI § 5.1(h)(i)

■ Misrepresentation:

■ *EEI*

- Representation or warranty made by guarantor in connection with the Agreement is false or misleading in any material respect when made

■ *ISDA*

- Guarantor breaches a representation made in its guaranty:
 - Duly organized/good standing
 - Power and authority to execute and perform
 - Legal/binding obligation of guarantor
- Guaranty proves to have been “incorrect or misleading in any material respect”

Integration into Energy Trading Contracts

ISDA § 5(a)(viii)

NAESB
(if added)

EEI § 5.1(g)
(if specified)

- **Merger Without Assumption:**
 - Merger, transfer of assets or reorganization by a party's guarantor
 - Resulting entity fails to assume all obligations under the guaranty
- **ISDA:** Built into Agreement's framework
- **NAESB:** Can be added in Special Provisions
- **EEI:** Applies to parties (§ 5.1(f)); in the Cover Sheet's "Other Changes," can amend to include guarantors

Integration into Energy Trading Contracts

Other ISDA Termination Events Impacting Guarantors:

Illegality – 5(b)(i)

**Force Majeure Event – 5(b)(ii)
(2002 ISDA)**

Credit Event Upon Merger – 5(b)(v)

Integration into Energy Trading Contracts

ISDA Schedule
(if added)

NAESB § 10.1

EEI § 8.1/8.2(b)
(if elected)

- **Adequate Assurance of Performance:**
 - Required upon demand by a party that has “reasonable grounds for insecurity” regarding performance
 - Accepted form of assurance may include a guaranty
 - Caps on the Performance Assurance amount may directly impact the amount of the guaranty:
 - Amount “reasonably acceptable” to the Secured Party?
 - Limited to then-current exposure of the Secured Party?
 - Confirm any limitations on the guarantor
 - Acceptable to the Secured Party in its sole discretion?
 - Creditworthiness standard (i.e., ratings requirement)?

Integration into Energy Trading Contracts

ISDA Schedule
(if added)

NAESB
(if added)

EEI § 8.1(d)/8.2(d)
(if elected)

- **Material Adverse Change / Downgrade Event:**
 - If a party or its guarantor experiences a “material adverse change” or a “downgrade event”, often based on a credit ratings trigger, then Performance Assurance required
 - Performance Assurance may include a guaranty
 - Confirm whether there are any specified limitations on the guaranty amount and guarantor

Integration into Energy Trading Contracts

ISDA CSA

NAESB CSA

EEI CA or
§ 8.1(c)/8.2(c)

■ Margining Arrangements:

- A guaranty is often taken into account in determining a party's margining threshold
- Example - Threshold defined as the lower of:
 - Any cap placed on the guaranty amount; or
 - Amount tied to a credit ratings matrix (or other metric used to evaluate a party's creditworthiness)
- If Event of Default (including by guarantor), threshold drops to zero (0)

Integration into Energy Trading Contracts

■ Points to Take Away:

- The framework of master trading agreements takes guaranties into account
- A guarantor's financial situation, corporate structure and creditworthiness may directly impact a party's right to terminate/liquidate or receive credit support
- The performance (or lack thereof) of a guarantor may be just as significant as the performance of a party

From Basics... To Practice



From Basics...To Practice

Boilerplate Provisions

- General concepts that every guaranty should address

Commonly Negotiated Provisions

- Flags to raise internally
- Common sticking points in negotiations
- Language to propose to counterparties

From Basics...To Practice

Enforceability with Foreign Guarantors

- Service of process



Boilerplate Provisions

- *Obligations Clause: General Characteristics*
 - Guaranty is made “unconditionally and absolutely”
 - Takes into account amendments to the underlying contract
 - Guaranty of payment v. performance
 - Usually, guaranty is limited to payment only

Boilerplate Provisions

- *Obligations Clause*: “Unconditionally and absolutely”
 - Phrase holds legal significance
 - “Absolute” Guaranty: effective without beneficiary having to notify the guarantor of its acceptance of the guaranty
 - *Restatement (Third) of Suretyship and Guaranty § 8, comment a*

Boilerplate Provisions

- *Obligations Clause*: “Unconditionally and absolutely”
 - In many jurisdictions, means the guaranty can be enforced immediately upon trading company’s default
 - Beneficiary can look directly to guarantor for payment without having to first sue trading company
 - Usually covered by separate language that no exhaustion of remedies is required

Boilerplate Provisions

- *Obligations Clause*: What about a guaranty being “irrevocable”?
 - Most guaranties are “continuing” guaranties:
 - Series of obligations/payments under Agreement
 - Guarantor is “on the hook” for all guaranteed obligations incurred prior to termination of the guaranty
 - Many guaranties expressly state that it is a “continuing guaranty”

Boilerplate Provisions

- *Obligations Clause*: What about a guaranty being “irrevocable”?
 - Under a “continuing” guaranty, guarantor not liable for trading company’s future obligations incurred after the guaranty has been properly terminated
 - Stating that a guaranty is “irrevocable” is at odds with this concept:
 - May prevent guarantor from terminating its obligations as to trading company’s future payment obligations

Boilerplate Provisions

- *Obligations Clause*: When could a guaranty be “irrevocable”?
 - Usually structured, one-off transactions
 - Guaranty term is expressly tied to the deal term, so as long as deal is in place the guaranty obligations cannot be terminated unilaterally
 - Examples: Tolling agreement, Power Purchase Agreement, Output Contract

Boilerplate Provisions

- *Obligations Clause: **Guaranty of Payment***
 - If conditions in guaranty are met (i.e., non-payment by trading company, demand by beneficiary), guarantor's obligations are limited to payment only
 - Guarantor does not have to affirmatively perform any delivery obligations or perform any other actions in lieu of trading company

Boilerplate Provisions

- *Obligations Clause: **Guaranty of Performance***
 - If trading company fails to perform, guarantor must perform obligations in underlying Agreement
 - Sometimes utilized when a physical delivery obligation is involved (e.g., delivery or purchase of a commodity)
 - If obligations in underlying Agreement are just financial settlement—*i.e.*, derivative transactions—guaranty of payment should suffice

Boilerplate Provisions

- *Obligations Clause: **Guaranty of Performance - Issues***
 - Does guarantor have the ability to perform?
 - Licensing and authorization issues (gas, power, etc.)
 - Documentation issues—does guarantor know what obligations it must perform?
 - Copy of Confirmation? Timing/notice requirements?
 - Logistics – gas transportation rights, barges/ships for crude, etc.
 - Liability caps—not applicable to performance?
 - Presumably only applies to payment obligations

Boilerplate Provisions

■ Obligations Clause: Example

“Guarantor hereby unconditionally and absolutely guarantees the punctual payment when due of Trading Company’s payment obligations arising under the Agreement, as such Agreement may be amended or modified by agreement between Trading Company and Beneficiary from time to time. Guarantor’s obligations and liability will be limited to payment obligations only and Guarantor will have no obligation to perform under the Agreement, including, without limitation, to sell, deliver, supply or transport [gas, electricity, coal, crude, etc.] or any other commodity.”

Boilerplate Provisions

- *Guarantor's Reservation of Certain Rights*
 - As a general rule—
 - The guarantor should be placed “in the shoes” of the underlying trading company
 - It should not be entitled to greater rights or defenses than those afforded the trading company

Boilerplate Provisions

- *Guarantor's Reservation of Certain Rights*
 - Guarantor commonly reserves to itself “all rights, setoffs, counterclaims and other defenses” of the trading counterparty under the trading agreement
 - Exception: Guarantor should not reserve any defenses to payment based on bankruptcy or lack of capacity of the trading company
 - Statutes of limitation are also commonly waived
 - *Restatement (Third) of Suretyship and Guaranty § 34*

Boilerplate Provisions

■ Reservation Clause: Example

“Notwithstanding anything herein to the contrary, Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses to which Trading Company is or may be entitled arising from or out of the Agreement, except for defenses arising out of bankruptcy, insolvency, dissolution, liquidation or any lack of capacity of Trading Company.”

Boilerplate Provisions

- *Guaranty Absolute*
 - Laundry list of circumstances where guarantor remains obligated to pay when due, despite the occurrence of certain events or conditions
 - No conditions precedent to payment (other than notice, usually) or exhaustion of remedies required by beneficiary against trading company

Boilerplate Provisions

Liability of Guarantor is absolute and unconditional irrespective of...

- **Lack of validity or enforceability of the trading agreement**
- **Modifications, extensions or waivers under the Agreement**
- **Changes in payment terms**
- **Sale, exchange, release or non-perfection of property securing trading company's payment obligations**
- **Failure, omission, delay, waiver or refusal of beneficiary to exercise any rights under the Agreement**
- **Changes in the structure or ownership or guarantor or trading company**

Boilerplate Provisions

■ No Conditions Precedent/Exhaustion of Remedies: Example

“There are no conditions precedent to the enforcement of the Guaranty, except as expressly contained herein. It shall not be necessary for Beneficiary, in order to enforce payment by Guarantor under this Guaranty, to exhaust its remedies against Trading Company, any other guarantor, or any other person liable for payment or performance of guaranteed obligations.”

Boilerplate Provisions

- *Guaranty of Payment and Not of Collection*
 - Both terms have specific legal meanings
 - Practically, this distinction impacts how and when the beneficiary can pursue remedies for non-payment of the underlying Agreement:
 - Exhaust remedies against trading company?
 - Look directly to guarantor for payment?

Boilerplate Provisions

Guaranty of Payment

Affirmative obligation to pay if conditions of the guaranty are met.

Beneficiary looks to guarantor without first taking action against the trading company.

Guaranty of Collection

Beneficiary can only enforce if execution of a judgment against trading company is unsatisfied.

If judgment is satisfied, guarantor's obligations do not arise.

Boilerplate Provisions

■ Payment and Not Collection: Example

“This Guaranty is one of payment and not of collection and shall apply regardless of whether recovery of all guaranteed obligations may be discharged, or uncollectible, in any bankruptcy, insolvency or similar proceeding, or otherwise unenforceable.”

Boilerplate Provisions

- *Waiver*

- Guarantor waives a laundry list of notices and other conditions

- *Avoids*—

- Barriers to enforcing payment
- Guarantor's reliance on defenses that beneficiary did not intend for guarantor to retain

Boilerplate Provisions

Guarantor waives...

- Notice of acceptance of guaranty, and notice of creation or existence of guaranteed obligations
- Notice of entry into the underlying Agreement or any amendments, supplements or modifications thereto
- Notice of any waivers or consents under the Agreement
- Notice of increase or reduction of any guaranteed obligations
- Presentment, demand for payment (except as set forth in the guaranty), notice of dishonor, protest
- Requirement that beneficiary exhaust its remedies or first take action against trading company before seeking payment.

Boilerplate Provisions

- *Subrogation*

- Benefit to the guarantor
- Guarantor is “subrogated” (*i.e.*, steps into the shoes of beneficiary) as to all rights beneficiary has against trading company
- Timing: Beneficiary usually ensures that all guaranteed obligations have first been irrevocably paid in full

Boilerplate Provisions

■ Subrogation: Example

“Guarantor is subrogated to all rights of the Beneficiary against Trading Company in respect of any amounts paid by Guarantor pursuant to this Guaranty; provided, Guarantor waives any rights it may acquire by way of subrogation under this Guaranty, by any payment made hereunder or otherwise, until all of the guaranteed obligations shall have been irrevocably paid to Beneficiary in full. If Guarantor so performs and all guaranteed obligations are paid in full, Beneficiary will, at Guarantor’s request, execute and deliver to Guarantor appropriate documents to evidence the transfer by subrogation to Guarantor of any interest in the guaranteed obligations resulting from such payment by Guarantor.”

Boilerplate Provisions

- *Demand and Payment*
 - Establishes formalities for enforcement
 - What procedures are required by beneficiary?
 - Written notice? Method of delivery?
 - What other formalities, such as duly authorized signatures, must be followed?
 - When must guarantor make payment?
 - *cf.* Letters of Credit conditions to payment

Boilerplate Provisions

- *Demand and Payment*
 - Usually demands must be in writing and signed by duly authorized officer
 - Some Guaranties attach a form of demand
 - Timing of guarantor's payment
 - Internal decision that is commonly negotiated
 - Guarantors usually prefer a longer lead time for payment

Boilerplate Provisions

■ Demand and Payment: Example

“Any demand by Beneficiary for payment shall be in writing [in the form set forth in Exhibit A] and signed by a duly authorized officer of Beneficiary and delivered to Guarantor pursuant to the notices section herein. There are no other requirements of notice, presentment or demand. The Guarantor shall pay, or cause to be paid, the guaranteed obligations within [five (5)] business days of receipt of such demand.”

Boilerplate Provisions

- *Term and Termination*
 - When does the guaranty take effect?
 - How can the guaranty be terminated?
 - Unilaterally by guarantor?
 - By agreement of both beneficiary and guarantor?
 - What are guarantor's payment obligations after termination of the guaranty (if any)?

Boilerplate Provisions

■ Term and Termination: Example

“This Guaranty shall continue in full force and effect from the Effective Date until terminated by Guarantor within [five (5)] days prior written notice to the Beneficiary; provided, however, upon termination hereof, Guarantor agrees that the obligations and liabilities hereunder will remain in full force and effect with respect to any guaranteed obligations incurred prior to such termination date.”

Other Boilerplate Provisions

Standard Representations and Warranties

- Organization, authorization, valid, legal and binding obligation

Notices

- Directly impacts termination notice and payment demands

Assignment and Amendment

- Can guarantor unilaterally assign its obligations?
- How can the guaranty be amended?

Commonly Negotiated Terms

- *Expenses of Guaranty Enforcement*
 - Beneficiary may require that expenses and costs incurred in enforcing the guaranty be payable by guarantor
 - If included, usually in the Obligations Clause as part of the definition of “guaranteed obligations”

Commonly Negotiated Terms

- *Expenses of Guaranty Enforcement*
 - Generally Proposed: “Legal fees, costs and expenses” incurred by beneficiary in:
 - Collecting any debts under the guaranty
 - Otherwise enforcing the guaranty against guarantor
 - Some guarantors may refuse altogether or otherwise include in the max amount payable

Commonly Negotiated Terms

■ Expenses and Costs: Example

“Guarantor hereby unconditionally and absolutely guarantees the punctual payment when due of Trading Company’s payment obligations arising under the Agreement, as such Agreement may be amended or modified by agreement between Trading Company and Beneficiary from time to time, including all reasonable legal fees, costs and expenses incurred by Beneficiary in connection with collection of any debts hereunder or enforcement hereof (collectively, the “Guaranteed Obligations”).”

Commonly Negotiated Terms

- *Liability Caps*
 - Guarantor expressly limits the amount of guaranteed obligations it potentially owes to beneficiary under the guaranty
 - Often driven by negotiations among the credit departments of both sides
 - One of the most commonly-negotiated points in guaranties

Commonly Negotiated Terms

- *Liability Caps – Issues to Consider*
 - Dollar value of the cap:
 - What is the projected exposure of anticipated transactions under the Agreement?
 - Is your credit department comfortable with the cap based on the guarantor's creditworthiness?

Commonly Negotiated Terms

- *Liability Caps – Issues to Consider*
 - Treatment of Expenses: Does the cap include or exclude beneficiary's costs and expenses of enforcement?
 - Guarantors often push for the cap to include any additional expenses, such that guarantor's maximum payment liability is fixed
 - Beneficiaries often push for the cap to exclude expenses

Commonly Negotiated Terms

■ Liability Cap: Including Expenses

“Guarantor hereby unconditionally and absolutely guarantees the punctual payment when due of Trading Company’s payment obligations arising under the Agreement, as such Agreement may be amended or modified by agreement between Trading Company and Beneficiary from time to time, *including all reasonable legal fees, costs and expenses incurred by Beneficiary in connection with collection of any debts hereunder or enforcement hereof (collectively, the “Guaranteed Obligations”);* provided, however, that the total liability of Guarantor hereunder, regardless of any amendment or modification to the Agreement, is limited to the lesser of (i) all amounts owed by Trading Company to Beneficiary under the Agreement, or (ii) USD [\$10,000,000].”

Commonly Negotiated Terms

■ Liability Cap: Excluding Expenses

“Guarantor hereby unconditionally and absolutely guarantees the punctual payment when due of Trading Company’s payment obligations arising under the Agreement...including all reasonable legal fees, costs and expenses incurred by Beneficiary in connection with collection of any debts hereunder or enforcement hereof (collectively, the “Guaranteed Obligations”); provided, however, that the total liability of Guarantor hereunder, regardless of any amendment or modification to the Agreement, is limited to the lesser of (i) all amounts owed by Trading Company to Beneficiary under the Agreement, or (ii) USD [\$10,000,000], and further provided that such liability limitation shall be exclusive of any legal fees, costs and/or other expenses incurred by Beneficiary which are otherwise Guaranteed Obligations payable by Guarantor hereunder.

Commonly Negotiated Terms

- *Liability Caps – Beneficiary Considerations*
 - Is the proposed cap reasonable based on the anticipated transactions?
 - With a cap, beneficiary has additional monitoring:
 - Value of capped guaranty v. then-current transaction exposure
 - Are enforcement expenses a significant concern?
 - Likelihood that guaranty will need to be enforced if guarantor fails to pay when due?
 - Creditworthiness of trading company and guarantor?
 - What backup collateral exists for tail exposure if cap exceeded?
 - Do you haircut guaranty value when looking to backup collateral for tail exposure?

Commonly Negotiated Terms

- *Liability Caps – Guarantor Considerations*
 - How is the proposed cap determined:
 - Transaction exposure
 - Considerations about financial statement reporting
 - Importance of fixing potential payment liability:
 - Based on anticipated transactions, is a cap necessary?
 - If beneficiary wants to exclude expenses from the cap, can guarantor include expenses but agree to slightly increase the cap?

Commonly Negotiated Terms

- *Defenses to Payment and Waiver*
 - Generally, guarantor should have the same defenses as trading company under the Agreement
 - Exceptions:
 - Non-payment because of discharge of trading company's obligations in bankruptcy
 - Non-payment because trading company lacked capacity under the Agreement
 - Any defenses expressly waived in guaranty

Commonly Negotiated Terms

■ *Defenses to Payment & Waiver*

Suretyship Defenses

Defenses arise under law simply because of guarantor's role in guaranteeing obligations of another

Dates back hundreds of years ago to personal guaranties (usually by relatives)

Protects guarantor if payment risk is deliberately or inadvertently increased without guarantor's consent.

Commonly Negotiated Terms

■ *Defenses to Payment & Waiver*

- Premise was the guarantor was guarantying a specific obligation. If that obligation changed, then the obligation being guaranteed no longer existed. It was a way of ensuring guarantors always knew and could control the scope of their obligation
- In the context of parent guaranties, suretyship defenses do not make sense:
 - Guarantor likely has control over its subsidiaries' activities
 - Any benefit realized by subsidiary trading company is likely a benefit to parent guarantor as well
- In the modern guaranty context, the protections that suretyship defenses originally afforded to guarantors under common law are not necessary

Commonly Negotiated Terms

■ How to Waive Suretyship Defenses:

Waive laundry list of suretyship defenses?

- May be effective but not practical.
- Suretyship defenses are largely judicially created, so would be difficult to list each one in a waiver provision.

Waiver of “all defenses”?

- Guarantor likely would reject.
- May prevent guarantor from exercising any defenses held by trading company under the Agreement

Waiver of “all suretyship defenses”?

- Generally effective and supported by the Restatement (§ 48(1)).
- Restatement is not law --only a restatement of laws across jurisdictions.
- May want to include statement of the parties’ intent, referencing Section 48 of the Restatement.

Commonly Negotiated Terms

“Guarantor’s obligations are primary obligations and not secondary obligations”

Technically not correct—if it’s a primary obligation, then by definition it can’t be a guaranty

Restatement indicates that this phrase may effectively waive suretyship defenses

A primary obligor would only have defenses available under the Agreement—not suretyship defenses

Bottom Line: This language is not accurate, but may effectively waive suretyship defenses

Commonly Negotiated Terms

- *Governing Law and Jurisdiction*

- Choice of Law:

- Same choice of law applicable to the underlying trading Agreement?

- May make sense if guaranty only relates to a single Agreement

- Example: For ISDAs—generally New York law applies

- Choice of law based on guarantor's state of organization?

- May make sense if guaranty covers multiple agreements with varying choice of law provisions

- NY is the common default

Commonly Negotiated Terms

- *Governing Law and Jurisdiction*

- Jurisdiction:

- Exclusive or Non-Exclusive?
 - Waiver of Jury Trial?
 - Arbitration provisions?

- Key Analysis: How do governing law and jurisdiction provision sync with underlying trading Agreement?

- Guaranty is tied to trading Agreement, so disputes involving the guaranty necessarily involve Agreement interpretation

Foreign Guarantors

- Service of Process:

- **U.S.-Based Guarantors:** Service of process generally effected by delivery to guarantor's address for notices
- **Foreign Guarantors:** International service of process is more complex (Hague Service Convention), expensive and inconvenient for beneficiary
- **Possible Solution?** Foreign guarantor appoints U.S. process agent and consents to such process

Foreign Guarantors

■ Process Agent for Foreign Guarantors:

“Guarantor (i) agrees to designate and maintain an agent for service of process in the City of New York, New York in connection with any suit, action or proceeding and to deliver to Beneficiary evidence thereof, and (ii) irrevocably consents to service of process with respect to any such suit, action or proceeding by the mailing of copies thereof by certified mail, return receipt requested, postage prepaid, to Guarantor at its respective address as provided in this Guaranty.”



Questions?

Kevin M. Page

kpage@tenaska.com

(817) 462-8053 (office)

