

# General Conditions for Export Credit Guarantees

in respect of  
Loss on Production and Loss on Claim  
October 1996

**ekn**

EXPORTKREDITNÄMNDEN

THE SWEDISH EXPORT CREDITS GUARANTEE BOARD

# Preface

The general conditions for guarantees in respect of loss on production and loss on claim, established in March 1982, have been subject to a revision. Primarily, the object has been to clarify the formulations. Certain factual changes have also been made. In other respects the new conditions are based to a considerable extent on the conditions of 1982.

One experience which has been made in connection with the revision is that new, sometimes complex, financial solutions for export transactions in certain cases require specific guarantee conditions. EKN has in such cases declared itself prepared to consider separate solutions when so motivated. Such specific conditions will then be evident in the guarantee instrument.

The majority of the general conditions are accompanied by commentaries, which are intended to facilitate the comprehension of the conditions and which in more detail regulate certain issues. The commentaries are binding on EKN and the guarantee-holder to the same extent as the conditions.

The new general conditions will be applied to guarantees granted on the basis of applications received by EKN after September 30, 1996.

**This English translation of the authentic Swedish text serves merely information purposes and in case of dispute the Swedish text shall prevail.**

# General Conditions for Export Credit Guarantees

together with commentaries

in respect of

Loss on Production

and

Loss on Claim

# Content

|   |           |
|---|-----------|
| <b>1. Definitions of certain expressions</b>  | <b>6</b>  |
| <b>2. The extent of the guarantee etc</b>   | <b>8</b>  |
| 2.1 Basic provisions  | 8         |
| 2.2 Types of loss   | 9         |
| 2.2.1 Loss on production  | 9         |
| 2.2.2 Loss on claim   | 10        |
| 2.3 Commercial and political events   | 11        |
| 2.3.1 Commercial events   | 11        |
| 2.3.2 Political events  | 12        |
| 2.4 Loss caused by the guarantee-holder's fault or negligence etc   | 16        |
| 2.5 Waiting periods for loss on claim   | 18        |
| 2.5.1 Commercial events   | 18        |
| 2.5.2 Political events  | 18        |
| 2.6 Assertion of surety and other security  | 19        |
| 2.7 Demand for payment and protest of bills of exchange   | 20        |
| 2.8 The guarantee coming into force   | 20        |
| <b>3. Circumstances that may render the guarantee invalid, etc</b>  | <b>21</b> |
| 3.1 Lack of permits etc   | 21        |
| 3.1.1 Guarantee covering loss on production only and guarantee covering loss on production as well as loss on claim | 21        |
| 3.1.2 Guarantees covering loss on claim only  | 21        |
| 3.2 The wording of the contract, etc  | 22        |
| 3.3 Changes in the contract   | 23        |
| 3.4 Waiver of claim and security etc  | 24        |
| 3.5 Effect of failure to observe the provisions in 3.1 – 3.4 and of erroneous statements etc                        | 24        |
| 3.6 Transfer of excess risk   | 26        |
| 3.7 Assignment of the rights under the contract and the guarantee etc   | 26        |
| 3.8 Omission to pay the premium   | 28        |
| 3.9 Repayment of premium paid   | 28        |
| <b>4. The guarantee-holder's obligations in case of increased risk of loss, etc</b>                                 | <b>30</b> |
| 4.1 Obligation to notify EKN  | 30        |
| 4.2 Measures at increased risk  | 32        |
| 4.2.1 Certain general obligations for the guarantee-holder  | 32        |
| 4.2.2 Obligations for the guarantee-holder in connection with considerable increase of risk                         | 33        |

|   |           |
|---|-----------|
| <b>5. Indemnifications etc</b>  | <b>36</b> |
| 5.1 Basic provisions  | 36        |
| 5.1.1 Objections of the debtor etc  | 36        |
| 5.1.2 Assignment to EKN of the rights under the contract etc                        | 37        |
| 5.1.3 Latest day for request for indemnification                                    | 37        |
| 5.1.4 Payment of indemnification  | 38        |
| 5.1.5 Application of amounts received   | 39        |
| 5.1.5.1 Basic provisions  | 39        |
| 5.1.5.2 Loss on production  | 39        |
| 5.1.5.3 Loss on claim   | 40        |
| 5.2 Calculation of loss   | 41        |
| 5.2.1 Loss on production  | 41        |
| 5.2.2 Loss on claim   | 45        |
| 5.2.3 Specific provisions for loss on claim regarding<br>waiting period interest    | 47        |
| 5.2.4 Realization value etc   | 49        |
| 5.2.5 Costs not eligible for indemnification  | 49        |
| 5.2.6 Conversion of foreign currency  | 50        |
| 5.3 Specific provisions for combined guarantees                                     | 51        |
| 5.4 Maximum amount payable under the guarantee and<br>highest amount of loss        | 53        |
| 5.5 Measures to be taken after indemnification                                      | 53        |
| 5.5.1 Basic provisions  | 53        |
| 5.5.2 Recovery of loss on production etc  | 54        |
| 5.5.2.1 In the situation where EKN and the guarantee-holder<br>are in agreement     | 54        |
| 5.5.2.2 In the situation where EKN and the guarantee-holder<br>are not in agreement | 55        |
| 5.5.2.3 Recommencement  | 56        |
| 5.5.3 Recovery of loss on claim etc   | 57        |
| 5.5.3.1 In the situation where EKN and the guarantee-holder<br>are in agreement     | 57        |
| 5.5.3.2 In the situation where EKN and the guarantee-holder<br>are not in agreement | 58        |
| <b>6. Certain general obligations for the<br/>guarantee-holder etc</b>              | <b>59</b> |
| 6.1 Measures for limiting loss  | 59        |
| 6.2 Accounting and disclosure requirement   | 59        |
| 6.3 Inspection  | 60        |
| 6.4 Authority for EKN to conclude debt rescheduling<br>agreements, etc              | 60        |
| 6.5 The guarantee-holder's liability for certain damages                            | 61        |
| <b>7. Dispute regarding the guarantee</b>   | <b>63</b> |
| 7.1 Applicable law  | 63        |
| 7.2 Arbitration   | 63        |

# 1 Definitions of certain expressions

The following definitions are used in these general conditions:

***the contract:*** the contract (whenever applicable, for sale, civil engineering works, consultancy, loan, lease or similar contracts) to which the guarantee relates; a contract is deemed to be unconditional immediately upon fulfilment of such conditions as may have been made for its coming into force, apart from the condition that an EKN-guarantee shall have been granted,

***customary insurance:*** such transport insurances and other property insurances offered by established insurance companies and which in accordance with international business practice – considering the political and other conditions at the time – are normally contracted for exports to countries of the category concerned,

***the debtor:*** the buyer of the goods and/or services covered by the contract and, in case of a loan contract, the borrower. A buyer is equivalent to a lessee,

***default interest:*** interest accrued after the due date for payment,

***excess risk:*** the percentage of loss which is not eligible for indemnification under the guarantee. See also guarantee percentage,

***the exporter:*** the seller of goods and/or services under the contract. A seller is equivalent to a lessor,

***guarantee instrument:*** the document whereby a guarantee is issued,

***guarantee percentage:*** the percentage of a loss incurred which is eligible for indemnification in accordance with the terms of the guarantee instrument. See also excess risk,

**guarantee to lender:** a guarantee issued in favour of a lender in respect of loss on claim,

**indemnification:** payment of compensation under the guarantee,

**loss:** loss on production and/or loss on claim,

**market interest rate:** as regards a guarantee in SEK, the interest rate published by the Reuters information system on the "SIOR" display, or by such other system or on such other display that replaces said system or display, and which is based on the average of the interest rates quoted in the interbank market in Stockholm by banks in Sweden (=Stockholm Interbank Offered Rate, STIBOR) for loans in SEK for a period of three months at 11.00 a.m. two banking days in Stockholm prior to the due date, or, in cases mentioned in 2.5.2, first paragraph a) first sentence, two banking days in Stockholm prior to the date of deposit, and thereafter two banking days in Stockholm prior to the first day of every three months period, in each case with the addition of a margin of 0,25 percentage points and

as regards a guarantee in USD and DEM, the interest rate published by the Reuters information system on page "FRBD", and in CHF, JPY and ECU respectively, Reuters page "FRBE" or such other system or on such other page that replaces said system or page and which is based on the average of the interest rates quoted by banks in the interbank market in London (= London Interbank Offered Rate, LIBOR) for loans in the currency in question for a period of three months at 11.00 a.m. two banking days in London prior to the due date, or, in cases mentioned in 2.5.2, first paragraph a) first sentence, two banking days in London prior to the date of deposit, and thereafter two banking days in London prior to the first day of every three months period, in each case with the addition of a margin of 0,25 percentage points.

# 2 The extent of the guarantee etc

## 2.1 Basic provisions

A guarantee entitles the guarantee-holder to indemnification for a certain percentage of a loss incurred by the guarantee-holder due to the fact that the transaction relating to the guarantee has not been carried through in accordance with the contract entered into. The loss shall be of the type described in 2.2 and have been caused by such event as described in 2.3. The loss will be calculated as described in 5.2.

A guarantee can cover loss on production and/or loss on claim (types of loss) and commercial and/or political events. A guarantee for loss on claim can also cover waiting period interest.

The guarantee instrument will set forth the type(s) of loss and the events covered by the guarantee, the guarantee percentage of a loss incurred eligible for indemnification as well as the highest amount of loss covered by the guarantee.

The guarantee can include special conditions which complement or deviate from these general conditions. In such case this is stated in the guarantee instrument.

### *Commentary*

*To be entitled to indemnification under a guarantee the guarantee-holder shall have suffered a loss and such loss shall be the result of the transaction relating to the guarantee not having been carried through in accordance with the contract entered into, as that contract has been described in the application for guarantee.*

*Should the guarantee-holder be committed to pay a subcontractor employed by him only if and to the extent that he receives payment from the debtor (a so-called if-and-when-contract), omission by the debtor to pay amounts correspond-*



*ing to such sub-contract does not give rise to a loss for the guarantee-holder and is thus not covered by the guarantee.*

## 2.2 Types of loss

### 2.2.1 Loss on production

Loss on production is a loss incurred by the guarantee-holder due to the fact that the contract has been wholly or partially cancelled before the guarantee-holder has fulfilled all his contractual obligations, or due to the fact that the execution of the contract has been interrupted for a continuous period of not less than six months and which is not to be classified as a loss on claim.

#### **Commentary**

*Loss on production also comprises loss in connection with pure service performances.*

*Loss on production may occur regardless of whether it is the debtor or the guarantee-holder who has cancelled the contract. Especially as regards cancellation by the debtor, however, the provision in 2.4 should be observed, meaning that the guarantee does not entitle the guarantee-holder to indemnification for losses caused by fault or negligence on the part of the guarantee-holder, a consortium partner of his, or somebody acting upon his instructions.*

*The guarantee-holder may not cancel or discontinue the execution of the contract without EKN's consent except for as stipulated in 3.3.*

*Should six months have elapsed after the debtor should have fulfilled a specific contractual performance – such as a part payment or the supply of means of transport – and such performance, in spite of a reminder, has not been effected, the guarantee-holder can require indemnification, claiming that the execution of the contract has been interrupted for that period. Should the guarantee-holder have continued to make performances under the contract, although the debtor's performances have been interrupted, it is required that six*

*months shall have elapsed after the guarantee-holder's latest performance under the contract and that the debtor in the meantime has not reverted to perform his part of the contract. Manufacturing of goods and the like by the guarantee-holder without effecting shipment or delivery is not regarded as performance in this context.*

### **2.2.2 Loss on claim**

Loss on claim is a loss incurred by the guarantee-holder due to the fact that a justified and due payment under the contract amount due and payable by the debtor under the contract for a performance made by the guarantee-holder thereunder has not been put at the disposal of the guarantee-holder at the place agreed upon within the period of time set out in 2.5 and 2.6.

#### ***Commentary***

*Performance in the form of delivery of goods shall be deemed to have been made at the time when the goods were delivered according to the contractual delivery terms in such manner that the risk for the goods has passed from the guarantee-holder to the debtor. Should the contract stipulate that the goods are to be handed over to a warehousing agent in the country where from the export shall take place at the debtor's risk, the goods thus do not need to have left that country in order for the performance to be deemed effected and the guarantee for loss on claim to have entered into force.*

*Performance of services shall be deemed to have been effected by the services having been rendered according to the provisions of the contract.*

*Performance in the form of fulfilment of specific production and/or service elements, which the guarantee-holder is entitled to invoice according to the contract, shall be deemed to have been effected when the production and/or service elements have been fulfilled according to the terms of the contract, even if the goods has not yet been delivered to the debtor or if the service has not yet been rendered to him. The expression production and/or service elements may also*

*comprise the placing of an order with a subcontractor. Should the contract entitle the guarantee-holder to invoice amounts on specific dates, for example (mobilization) advance payment, without a direct relation to a performance made or to the fulfilment of specific production or service elements, failure by the debtor to pay such amounts is not deemed to constitute a loss on claim.*

*In the case of a loan contract, the disbursement of loan proceeds corresponding to a performance which has been effected in the manner stipulated above by the exporter according to his contract with the buyer, is deemed a performance made.*

*Loss on claim comprises only the debtor's regular payment commitments. Penalties, damages or the like that the debtor may be obliged to pay to the guarantee-holder due to breach of contract or the like thus fall outside the scope of the guarantee. A claim which has arisen only as a result of a discontinuation or cancellation of the contract is considered a claim for damages.*

*For a loss on claim to be considered it is not required that all the guarantee-holder's obligations under the contract should have been performed. Claims often arise in succession by the invoicing of partial deliveries or for the fulfilment of specific production and/or service elements.*

*Regarding place of payment, see 2.3.2, paragraph ten of the commentary.*

*Regarding a justified and due claim, see 5.1.1.*

## **2.3 Commercial and political events**

### **2.3.1 Commercial events**

By commercial events are meant

- a) the debtor's insolvency,
- b) although insolvency has not been proved, the fact that the debtor has failed to fulfil a contractual payment obligation in

spite of demand for payment having been made against him according to 2.7 or has failed to meet another contractual obligation and has not made rectification in spite of a reminder.

The debtor will be considered insolvent if

- he has suspended his payments generally or has been declared bankrupt,
- execution or similar procedure has not resulted in the fulfilment of the obligation in question,
- he has moved to an unknown address or has taken similar steps, or
- other circumstances have been shown which constitute sufficient evidence of insolvency.

### **2.3.2 Political events**

By political events are meant

- a) a foreign authority having unexpectedly taken measures preventing or delaying transfer of payment,
- b) a foreign authority having declared a general moratorium or otherwise exempted the debtor from his obligation to effect payment,
- c) a foreign authority having unexpectedly taken other measures preventing or delaying the anticipated fulfilment of the contract,
- d) war, civil commotion, natural catastrophe or other extraordinary event abroad having prevented or delayed payment or the fulfilment of the contract in any other respect; by other extraordinary event is understood an event of unusual nature and of vital importance being outside the guarantee-holder's and the debtor's scope of influence.

A loss caused by an event as aforesaid is not eligible for indemnification if and to the extent that the guarantee-holder has been able to protect himself against such loss by contracting customary insurances or by similar means.

## **Commentary**

- (1) For editorial reasons the expression political events covers a number of various events all of which need not, however, have a political background.*
- (2) In certain cases failure by an authority to take measures may result in consequences indicated in 2.3.2. The stipulations in 2.3.2 are also applicable concerning such failure.*
- (3) Events related to the guarantee-holder's country of domicile are not considered political events. Thus a guarantee does not entitle to indemnification for loss caused by a measure taken by an authority in the guarantee-holder's country of domicile, for example, introduction of export prohibition. However, what is stipulated in this paragraph does not apply if the measure is a result of a, for the country or authority, binding international decision. The aforementioned exception, however, is not applicable should the export concern goods or services which need special licence for exportation from an authority in the guarantee-holder's country of domicile.*
- (4) In the case non-payment or otherwise insufficient fulfilment of the contract has its origin in a commercial or a political event alternatively, a subsequent event does not bring about that the event causing loss changes character. The aforementioned is not applicable if the event causing loss has expired before the time of indemnification.*
- (5) Should a political and a commercial event occur simultaneously or in close connection with each other the loss shall be considered to have been caused by the political event. As an example of this can be mentioned a transaction with a private buyer and a state or central bank guarantee where neither the buyer nor the guarantor have fulfilled their commitments.*
- (6) Should there be uncertainty as to whether the loss has been caused by a political or commercial event and if the cause of loss can not be satisfactorily investigated, the reason for the insufficient possibility to investigate will determine whether the cause is political or commercial.*

*(7) Should there also be uncertainty as to the reason for the insufficient possibility to investigate, the loss will be indemnified as having been caused by a commercial event.*

*(8) It is incumbent on EKN and the guarantee-holder to do what can reasonably be expected of them to investigate the cause of loss.*

*(9) For a guarantee to cover transfer risk it is required, that it is incumbent on the debtor to effect payment outside the country of import. Should the contract expressly stipulate that payment shall be made in the debtor's country of domicile, or if such stipulation is missing, this shall apply according to prevailing commercial practice at the time of the entering of the contract or other prevailing legal rules, the debtor shall be deemed to have fulfilled his payment obligation by payment in that country. The fact that there may be any hindrance for transfer of thus paid amounts out of that country will not, in this case, be covered by the guarantee.*

*(10) In the event of inconsistency between the place of payment that has been stipulated in the contract and that on bills of exchange issued under the contract, the debtor shall be deemed to have fulfilled his payment obligation by payment at the place set out in the bills. Should the contract expressly state that bills of exchange shall be issued and that the place of payment according to the bills shall differ from the place of payment according to the contract and that this fact does not release the debtor from his obligation to effect payment at the place stated in the contract, the debtor shall not be deemed to have fulfilled his payment obligation until he has effected payment at the last-mentioned place. The above provisions in respect of bills of exchange shall also apply to promissory notes and documentary credits.*

*(11) It is a condition for a transfer hindrance to be considered that the currency agreed is accepted by EKN for such purpose. Should EKN not have accepted the currency in question, this will be shown by an express exception in the guarantee instrument for losses caused by an event as described in 2.3.2, first paragraph a). It is moreover required that the debtor has in vain used all legal means available to*

*obtain the currency agreed and to transfer the amount in question; should the debtor be legally allowed to purchase the currency at a higher rate than the rate officially quoted, it is incumbent upon him to do so.*

*(12) The debtor must within six months from the due date of the claim properly deposit the amount with such bank or other institution as is entitled to effect transfer. It is thus not enough that the debtor has sufficient means in an account with the institution. The amount must have been credited to a special account for transfer and thereby be due for the guarantee-holder's account – separated from the debtor's assets – awaiting the expiry of the transfer hindrance. Should the debtor have failed to deposit the amount within the six months period, the loss shall not be considered to have been caused by a transfer hindrance. What is stipulated in this paragraph regarding deposit does not apply if the debtor is a bank. This exception from the requirement for deposition can in certain cases result in uncertainty as to whether a transfer hindrance exists or not and shall then be treated in accordance with 2.3.2, sixth and seventh paragraphs of the commentary.*

*(13) A guarantee for transfer risk covers also the situation where – when a temporary transfer hindrance has expired – transfer has been effected but resulted in a lower amount than has been agreed because of a change in the exchange rate. The debtor may thus have paid an amount in local currency corresponding, at the time of payment, to the amount to be transferred to the guarantee-holder in the currency agreed. Due to the transfer hindrance the amount will be transferred only after a certain delay. In the meantime the exchange rate for the local currency as compared with the currency agreed may have decreased, thus causing the amount transferred to be less than the full amount of the debt.*

*(14) An authority unexpectedly having prevented or delayed payment in the currency agreed is equal to an authority in other ways having taken a measure which has prevented or delayed the transfer of payment.*

*(15) The measures mentioned in 2.3.2, first paragraph a) and*

*c), shall be deemed to have been made "unexpectedly" if they have been taken although the guarantee-holder has received confirmation according to 3.1 that the permits required have been obtained and the guarantee-holder has not otherwise had reason to expect such measure to be taken.*

*(16) Import prohibition is an example of a measure that may prevent the fulfilment of a contract. Hindrance to contracted export can, however, also be caused by the introduction of for example a prohibitive customs duty or deposit.*

*(17) An authority unexpectedly having "taken measures" according to 2.3.2, first paragraph a) and c), is equal to instability or deficiencies in the workings of society and of public authorities in connection with political and/or economic upheavals in the buyer country, which have prevented or delayed the anticipated fulfilment of the contract.*

*(18) A labour dispute may in certain cases be deemed an "other extraordinary event" according to 2.3.2, first paragraph d). It is, however, required either that the dispute has a clearly political purpose or is of a fairly general scope; for example a general strike. A strike confined to an individual company or group and whose only or primary aim is to influence the conditions within the company or group does not fall under the expression political event; the dispute does not in this case arise from political conflicts outside the company or the group.*

## **2.4 Loss caused by the guarantee-holder's fault or negligence etc**

Loss caused by fault or negligence on the part of the guarantee-holder, a consortium partner of his, or somebody acting on his instructions, is not eligible for indemnification.

### ***Commentary***

*By fault or negligence is meant not only faults and deficiencies in the guarantee-holder's execution of the contract*



*which can form the basis for an allegation by the debtor for breach of contract or otherwise be grounds for objections from the debtor. It can also be a fault or negligence of another kind, which can affect the debtor's obligation to pay, for example that the guarantee-holder has failed to observe current legal regulations or the like.*

*Fault or negligence committed by a consortium partner of the guarantee-holder or by somebody acting upon the guarantee-holder's instructions, will be judged as if the fault or negligence was committed by the guarantee-holder. As an example of fault or negligence committed by somebody acting upon the guarantee-holder's instructions may be mentioned the case where a bank or forwarding agent has released documents of title without collecting payment in the manner prescribed. Should the guarantee-holder, based on his own experience or that of others, have stated in his application for guarantee that he has reason to assume that the foreign bank to be engaged will not follow the instructions given regarding the release of documents of title, EKN can consent that loss caused by the bank acting against given instructions is eligible for indemnification. Such consent shall be stated in the guarantee instrument.*

*Should the guarantee-holder as a result of regulations or conditions in the debtor country be compelled to choose or engage a consortium partner or another person acting on his instructions whom he does not consider that he can supervise or control to the required degree, this shall be stated in the application for a guarantee. If thereby a loss arises as a result of the fault or negligence of such consortium partner or person acting on his instructions and if there is no prospect of the guarantee-holder to demand compensation for the loss from the consortium partner or the person acting on his instructions, EKN may grant that the loss is eligible for indemnification. Such consent shall be stated in the guarantee instrument.*

*Compare also 5.1.1.*

## 2.5 Waiting periods for loss on claim

Loss on claim will be considered to have occurred only after the lapse of time as stated below. Should surety or other security for the debtor's commitments have been provided, the provisions in 2.6 will also apply.

### 2.5.1 Commercial events

- a) In cases under 2.3.1, first paragraph a) (insolvency), no waiting period shall apply.
- b) In cases under 2.3.1, first paragraph b), the following shall apply:
  - Should the debtor or a person providing surety be a public entity, the waiting period will be four months from the due date for payment; if demand for payment according to 2.7, first paragraph, has been made later than two months from the due date, the waiting period will instead be two months from the date of the demand for payment.
  - If neither the debtor nor the person providing surety is a public entity, the waiting period will be six months from the due date for payment; if demand for payment according to 2.7, first paragraph, has been made later than two months from the due date, the waiting period will instead be four months from the date of the demand for payment.

#### *Commentary*

*The decision as to whether a debtor or a person providing surety is to be classified as a public entity or not will be made by EKN before the guarantee instrument is issued. Should the debtor or the person providing surety have been classified a public entity, this will be shown in the guarantee instrument.*

### 2.5.2 Political events

- a) In cases under 2.3.2, first paragraph a) the waiting period will be four months from the date on which the debtor has depos-

ited the amount in question with a bank or other institution entitled to effect the transfer and has taken all other measures required for such transfer. Should the debtor be a bank the waiting period will be calculated from the due date for payment.

- b) In cases under 2.3.2, first paragraph b)-d), the waiting period will be four months from the due date.

Should a debt rescheduling agreement have been concluded regarding the claim in question, no waiting period should apply thereafter irrespective of the provisions of 2.5.2, first paragraph a) and b).

Should a debt remain unpaid for six months after the due date without it being possible to refer the delay to a political event, the loss shall be deemed to have been caused by a commercial event.

## 2.6 Assertion of surety and other security

Should it have been stated in connection with application for guarantee or should the guarantee have been issued on condition that a third party shall have provided surety or the like for the debtor's obligations, a loss occurred will be eligible for indemnification only if the third party has not fulfilled his obligations within two months after the date when demand for payment has been made against him according to 2.7, first paragraph.

Should it have been stated in connection with application for guarantee or should the guarantee have been issued on condition that collateral, mortgage, or similar security shall have been provided for the debtor's obligations, a loss will not be deemed to have occurred until such security has been utilized and proved insufficient, or until it has been shown that through no fault of the debtor's, the security can not be utilized. Before measures are taken for the realization of security, the guarantee-holder shall consult with EKN.

### *Commentary*

*Should it have been stated in connection with application for*

*guarantee or should the guarantee have been issued on condition that bills of exchange which are to be issued will be avalized, it is assumed that the aval will be made for the debtor's/acceptor's obligations. If a third party shall provide surety or a payment guarantee for the debtor's obligations, EKN is entitled to assume that such surety or guarantee will be made as for the third party's own debt (personal surety) unless otherwise stated by the guarantee-holder.*

*The expression "security" in 2.6, second paragraph shall be deemed to include retention of title.*

## **2.7 Demand for payment and protest of bills of exchange**

Demand for payment referred to in 2.3.1, first paragraph b), and 2.6, first paragraph, shall have been made after the due date and shall contain a request to the recipient to state the reason for non-payment. If it cannot be shown that the addressee has received such demand, the demand will be considered to have reached him ten days after dispatch by registered mail to his latest known address.

Should bills of exchange have been issued, protest shall be drawn up, unless otherwise approved by EKN.

Should the guarantee-holder without EKN's permission have failed to have protest drawn up and should thereby the risk of loss for EKN have increased, the amount of indemnification which EKN would otherwise have been liable to pay under the guarantee shall be equitably adjusted.

## **2.8 The guarantee coming into force**

A guarantee only covers losses occurring after the guarantee coming into force. The point of time for the guarantee coming into force is stated in the guarantee instrument.

# 3

## Circumstances that may render the guarantee invalid, etc

### 3.1 Lack of permits etc

#### 3.1.1 Guarantee covering loss on production only and guarantee covering loss on production as well as loss on claim

At the time when the contract has become unconditional such permits for import, currency transfer, construction etc shall – according to information obtained by the guarantee-holder – be at hand as are required for the fulfilment of the contract. Should the guarantee come into force at a later time, it is further required that the guarantee-holder has not before the guarantee coming into force had reason to suspect that such permits are no longer valid or are insufficient.

#### *Commentary*

*It is incumbent upon the guarantee-holder to ascertain that the necessary permits are at hand. As to permits in the importing country it is usually sufficient that the debtor has asserted that the permits have been granted, provided that no particular circumstances indicate to the contrary.*

#### 3.1.2 Guarantees covering loss on claim only

At the time of the guarantee coming into force shall – according to information obtained by the guarantee-holder – such permits for import, currency transfer, construction etc be at hand as are required for the fulfilment of the contract. Furthermore, it is required that the guarantee-holder, no later than at the time of the guarantee coming into force, has made sure that the debtor has fulfilled such contractual obligations as are incumbent upon the debtor, such as effecting an advance payment, causing a documentary credit to be issued, or providing security.

### **Commentary**

*Compare commentary to 3.1.1.*

## **3.2 The wording of the contract, etc**

The contract shall be in writing and legally binding.

The contract may not contain provisions or otherwise be so drafted as to restrict the guarantee-holder's possibilities to observe his obligations according to the guarantee instrument and these general conditions. This applies also to sureties, mortgage deeds, and similar documents. The fact that EKN may have taken part of the contract and such documents can not be invoked against EKN, unless EKN shall have declared in writing that it does not object to the wording of the contract or such documents.

In a loan contract it must be expressly stated that the borrower's contractual obligations under the loan contract shall be met regardless of whether the exporter in the deal, to which the loan contract refers, or a party collaborating with him fulfils his obligations or not. Unless EKN admits otherwise, the loan contract shall prescribe that disbursement of the loan proceeds shall always be made directly to the exporter.

Should the guarantee cover waiting period interest it must be expressly stated in the contract that the debtor is obliged to pay default interest.

### **Commentary**

*The necessity for the contract to be in writing is connected with the guarantee-holder being able to transfer, upon indemnification, a legally binding claim against the debtor to EKN. Furthermore, a written contract facilitates for the guarantee-holder to show that he has fulfilled all his obligations under these general conditions.*

*In connection with 3.2, second paragraph, the following should, among other things, be observed. 2.7, second paragraph, prescribes that bills of exchange, if any, shall be protested, unless otherwise agreed to by EKN. The guarantee-*

*holder may therefore not commit himself not to draw up protest. According to 4.2.2 EKN is entitled in certain cases to require the guarantee-holder to cancel the contract. The contract may therefore not contain provisions limiting the guarantee-holder's possibilities for cancellation. 5.1.1 prescribes that EKN can in certain cases require that the guarantee-holder shall present a final court judgement or arbitral award showing that his claim is justified. The guarantee-holder must therefore see to it that he will be able to obtain such judgement or award. This should be particularly observed in the event that the debtor is a public entity which, unless the question is specifically provided for, might invoke immunity. Considering the provisions in 5.1.2 that the guarantee-holder is obliged to assign his contractual rights etc to EKN upon indemnification, the contract or other documents mentioned in 3.2 may not contain provisions preventing such assignment.*

### **3.3 Changes in the contract**

The contents of the contract shall be in accordance with what has been stated in connection with application for guarantee. The contract may thereafter not be changed in this respect without EKN's written consent. Neither may the guarantee-holder cancel the contract, interrupt its completion or transfer his contractual obligations to another party without EKN's written consent; credit institutions may, however, suspend disbursement under a loan contract without EKN's consent, if it is required by legal obligations for a prudent business applicable to the institution.

#### ***Commentary***

*EKN's consent is required not only in the event of a long term interruption in the completion of the contract. Even a temporary interruption requires such consent, unless the interruption – due to its short duration or for other specific reasons – cannot reasonably be invoked by the debtor as breach of contract on the part of the guarantee-holder.*

## **3.4 Waiver of claim and security etc**

Without EKN's written consent the guarantee-holder may not wholly or partially waive any claim of his or right to compensation for damages against the debtor, neither may he renounce from any such collateral, surety or other security as the guarantee-holder has stated in connection with application for guarantee or which is a condition for the guarantee.

The guarantee-holder may likewise not grant an extension of the payment period, without EKN's written consent.

## **3.5 Effect of failure to observe the provisions in 3.1 – 3.4 and of erroneous statements etc**

In the event that the guarantee-holder fails to observe the provisions in 3.1 – 3.4, and such failure has increased the risk of loss for EKN, indemnification under the guarantee shall be equitably adjusted.

If the guarantee-holder has given EKN an erroneous or misleading statement about the export or loan transaction or other matter of importance as regards the granting of the guarantee, and should this have increased the risk of loss for EKN, indemnification under the guarantee shall be equitably adjusted provided that the guarantee-holder has realized or ought to have realized that the statement was erroneous or misleading. Should a statement as to the correct circumstances – regardless of whether what has occurred has increased the risk of loss for EKN or not – have resulted in EKN not granting the guarantee as issued, EKN shall be entitled to declare the guarantee wholly or partially void.

What is stipulated in 3.5, second paragraph, shall also apply if the guaranteed transaction, due to a change in the provisions of the contract or due to other measures taken by the guarantee-holder, has been altered from what was originally stated by the guarantee-holder.



In case of a combined guarantee the following also applies. Should EKN – with reference to the provisions contained in 3.5, second or third paragraph – have declared the guarantee void as against one of the guarantee-holders, such guarantee-holder shall furthermore be obliged to reimburse EKN on demand for such amounts, as well as interest thereon, as EKN may have paid or may be obliged to pay to the other guarantee-holder. A corresponding liability to reimburse EKN applies if EKN with reference to the provisions in 3.5, first or second paragraph, has decided on adjustment of the indemnity and where it can be considered that the guarantee-holder, whose indemnification has been adjusted as a result of his actions or failure, also has caused an increased risk of loss under the guarantee to the other guarantee-holder. Compare 5.3.

### **Commentary**

*In some of the cases referred to in 3.5, second and third paragraph, EKN may declare the guarantee void, even if what has occurred has not increased the risk of loss for EKN. The reason for this is that when EKN examines an application for guarantee, EKN also considers aspects other than the risk. The examination takes place within a framework of rules based on the statutes governing EKN's guarantee operations, international agreements and the practice established within EKN in various respects. Among those factors which, apart from the risk aspect, are decisive, mention may be made of the nature and origin of the goods, the question whether the goods are new or used, the portion of so-called local and third country costs, the length of credit period, the size of the advance payment and other payment conditions.*

*It is in the nature of things also that an incomplete statement may be misleading, if it concerns a matter that the guarantee-holder has to report according to the form for application.*

*Interest according to 3.5, last paragraph, shall be the market interest rate prevailing at any one time.*

*Note that adjustment of indemnification in some cases may be made to nil.*

## 3.6 Transfer of excess risk

Without EKN's written consent the excess risk may not be insured or otherwise transferred to a third party except for as stipulated below. Should the guarantee-holder act contrary to this stipulation, the guarantee is void.

In case of a guarantee to an exporter the guarantee-holder may transfer the excess risk to the parent company within the group to which the guarantee-holder belongs and, in the case of lease, to the manufacturer. The excess risk may also be transferred to a sub- or main contractor in proportion to their share of the guaranteed transaction.

In case of a loan contract the guarantee-holder may transfer the excess risk to the exporter in the transaction to which the loan contract is connected.

Should several banks be guarantee-holders under the same guarantee the excess risk may be transferred wholly or partially to one of these banks, provided that such bank's share amounts to at least half of the maximum amount payable under the guarantee.

### *Commentary*

*Transfer of excess risk is equal to the guarantee-holder having required mortgage, surety or other security for the excess risk.*

## 3.7 Assignment of the rights under the contract and the guarantee etc

The guarantee-holder may assign his rights under the contract and the guarantee to AB Svensk Exportkredit, Nordiska Investeringsbanken, a Swedish joint-stock banking company, a Swedish savings bank, a member bank, or such bank-owned credit market company as referred to in the law on credit market companies. Such assignment shall be notified in writing to EKN without delay.

Assignment to any other party than mentioned above requires EKN's written consent. If such consent is not obtained, EKN is entitled to declare the guarantee void.

The assignee shall not hold better rights against EKN than the guarantee-holder's rights. Although the rights have been assigned, the guarantee-holder's obligations towards EKN remain unchanged. Regarding assignment of bills of exchange, see in particular 5.1.1, fifth paragraph of the commentary.

EKN is entitled to make agreements with the assignee in questions regarding the rights assigned with binding effect also for the guarantee-holder. EKN shall, however, notify the guarantee-holder before entering into such agreements.

The above shall be equally applicable to the pledging of the guarantee or the surrender of any particular right under the guarantee.

### **Commentary**

*Unless EKN has otherwise agreed, the guarantee-holder will carry the excess risk even after assignment of the rights under the contract and the guarantee and will thus have to stand losses occurring up to the excess amount; see further 3.6.*

*Since the guarantee-holder's obligations towards EKN remain unchanged even after an assignment of the rights under the contract and the guarantee, the guarantee-holder and the assignee are advised to agree on some practical arrangement with a view to ensuring that such obligations are not neglected; if the parties for example do not keep each other informed of such circumstances as mentioned in 4.1, first paragraph a)-d), there is a risk that the notification obligation prescribed therein will not be observed.*

*According to 5.1.2 one of the guarantee-holder's obligations is to assign his contractual rights etc to EKN upon indemnification. This must also be taken into consideration when assigning the rights under the contract and the guarantee.*

*In specific cases EKN may agree to exchange guarantee-*

*holder upon application from the original guarantee-holder. Normally a new guarantee instrument will be issued in such cases. Note that assignment of part of a loan to another lender in this context is equal to the exchange of the guarantee-holder.*

### **3.8 Omission to pay the premium**

The guarantee is void as against EKN if the prescribed premium is not paid within the stipulated time. Should the premium be paid in partial payments EKN shall be entitled, if there is a delay regarding other partial payments than the first, to declare the guarantee void as against EKN only after a certain time has elapsed after reminder of payment of premium.

### **3.9 Repayment of premium paid**

Should EKN, based upon the provisions in 3.6 or 4.2.2 inform the guarantee-holder that the guarantee is void or should EKN, with reference to the provisions in 3.5 or 3.7, declare that the guarantee is void, EKN shall repay part of the premium paid.

Should, as a result of measure as referred to in 4.2.1 or 4.2.2, the guaranteed transaction not have been completed, the guarantee-holder is entitled to recover part of the premium paid, reduced by any amount which EKN has already indemnified or may be obliged to indemnify under the guarantee. The corresponding shall apply should the guarantee-holder and the debtor agree that the transaction shall be only partly completed.

Should credit guaranteed by EKN have been repaid in advance, the guarantee-holder is entitled to recover part of the premium paid should EKN estimate the risk of loss to be equal to or greater than the risk which was estimated when the guarantee was issued.

Provided it has not been otherwise decided when the guarantee was issued, or at a later date after special consent by EKN, the guarantee-holder is entitled to recover the premium paid or part thereof only in such cases as stipulated in 3.9.

## **Commentary**

*Repayment shall be made in the following manner:*

*For repayments relating to 3.9, first paragraph, 3.9, second paragraph first sentence and 3.9, third paragraph, an amount shall be calculated which corresponds to the difference between the premium paid and the premium that should have been charged for the guarantee, if the guarantee had covered only the following period:*

- regarding what is stipulated in 3.9, first paragraph, until the date on which EKN gave such information or made such declaration as stipulated therein,*
- regarding what is stipulated in 3.9, second paragraph first sentence, until the date on which such measure as stipulated therein was taken,*
- regarding what is stipulated in 3.9, third paragraph, until the date on which the guaranteed credit was repaid.*

*Repayment according to 3.9, second paragraph second sentence, shall be made with an amount corresponding to the difference between the premium paid and the premium that should have been charged for the guarantee, if the guarantee had covered only the guaranteed transaction as the transaction was later agreed between the guarantee-holder and the debtor.*

*Ten percent of the amount calculated according to 3.9, commentary, shall be deducted constituting EKN's administration costs in the matter.*

*A decision by EKN to adjust indemnification does not constitute grounds for repayment of the premium paid.*

# 4 The guarantee-holder's obligations in case of increased risk of loss, etc

## 4.1 Obligation to notify EKN

The guarantee-holder is obliged to notify EKN in writing if

- a) the debtor has failed to effect payment for a debt covered by the guarantee within one month from the due date; the notification shall contain a statement regarding the assumed reason for non-payment,
- b) the debtor has failed to effect payment for another debt owed by the debtor to the guarantee-holder within two months from the due date, and circumstances indicate that the debtor is experiencing payment difficulties,
- c) the guarantee-holder has after the issuance of the guarantee become aware of such changes in the debtor's or the surety's financial situation or in the value of collateral or other security furnished which – according to what the guarantee-holder could reasonably have understood – have increased the risk of loss under the contract,
- d) the guarantee-holder's own situation has changed so that difficulties may arise for him to fulfil his part of the contract.

Should the guarantee-holder be a bank there is no obligation to notify such circumstances as are stipulated in 4.1, first paragraph b) and c).

Should the guarantee-holder fail to notify without delay such circumstances as are stated in 4.1, first paragraph, and if the failure increased the risk of loss for EKN, the indemnification under the guarantee shall be equitably adjusted. Corresponding provisions are applicable if the failure has increased the risk of loss for EKN for other guarantees issued upon application from the same guarantee-holder or from any other party for contract with the same

debtor. Should several banks be guarantee-holders under one and the same guarantee, adjustment will be made with an amount no higher than one which corresponds to the negligent guarantee-holder's share of the maximum amount payable under the guarantee. Should there be uncertainty regarding who has failed to notify, the now stated restriction shall not apply.

Should notification of non-payment of claim according to 4.1, first paragraph a), not have been received by EKN within three months from the due date, the applicable waiting period will be extended by two months. Should notification of non-payment be further delayed, each additional month of delay will lead to the waiting period being extended by two months. What has now been said is not applicable should the indemnity under the guarantee be adjusted according to 4.1, third paragraph.

Should notification of non-payment not have been received within twelve months from the due date, the guarantee is void as against EKN in respect of such claim, irrespective of whether or not the failure to notify has increased the risk of loss for EKN.

### **Commentary**

*Should the guarantee cover waiting period interest, a claim regarding default interest shall, on application of 4.1, first paragraph a), be deemed to have fallen due for payment simultaneously with the main claim.*

*The obligation to notify according to 4.1, first paragraph a) and b), may apply even if the guarantee-holder has received payment within the time prescribed therein, viz, in the event the payment has been effected – not by the debtor – but a surety or other third party. The guarantee-holder is not obliged, however, to ascertain who has in fact made the payment. Only if it is evident that the payment has been made by a party other than the debtor is there an obligation to notify in this case.*

*It should be particularly observed that failure by the guarantee-holder to fulfil the notification duty prescribed in 4.1, first paragraph, serves as cause for adjustment not only in case the failure has increased the risk of loss for EKN under the*

*contract covered by the guarantee, but also if the failure has increased the risk of loss for EKN in other guarantees concerning the same debtor. One example of increased risk of loss for EKN is where EKN issues new guarantees – applied for by the guarantee-holder or any other party – and is thereby exposed to risks that could have been avoided if notification had been made in due time. Failure to submit notification or delay in notification can further cause EKN to fail to take such measures as mentioned in 4.2.2 to avoid or limit loss under the guarantee in question or other guarantees concerning the same debtor.*

*Note that adjustment of indemnification in some cases may be made to nil.*

## **4.2 Measures at increased risk**

### **4.2.1 Certain general obligations for the guarantee-holder**

Should event mentioned in 4.1, first paragraph a)-d), occur or be expected to be immediately imminent, it is incumbent on the guarantee-holder to, to the best of his ability, try to avoid or limit loss. In case of doubt as to the appropriateness of a certain measure, the guarantee-holder shall find out with EKN before taking the measure.

Should the guarantee-holder fail to fulfil the obligations stated in 4.2.1, first paragraph, or act contrary to EKN's instructions and should this have increased the risk of loss for EKN, the amount of indemnification which EKN would otherwise have been liable to pay under the guarantee shall be equitably adjusted.

EKN defrays – with the limitations which follow from 5.4, first paragraph – specific costs which the guarantee-holder may have incurred as a result of measures as referred to in 4.2.1, first paragraph, to the extent these measures have manifestly decreased the risk of loss and also in other respects can be deemed reasonable. To the extent the measure has been taken as a result of EKN's instruction the stipulations in 4.2.2, last paragraph, regarding indemnity for particular costs, shall apply.



## **Commentary**

*A case where it may be doubtful as to the appropriateness of whether a certain measure should be taken or not – and where consultation with EKN shall consequently take place – can be exemplified by the taking of legal action and claim for payment in advance of amounts not yet due.*

*Regarding stipulations on particular costs in 4.2.1, last paragraph, see 4.2.2, third paragraph of the commentary.*

*Note that adjustment of indemnification in some cases may be made to nil.*

### **4.2.2 Obligations for the guarantee-holder in connection with considerable increase of risk**

The following applies if circumstances arise that according to EKN's appraisal have substantially increased the risk of loss as compared with the circumstances at the issuance of the guarantee.

EKN and the guarantee-holder shall consult regarding the measures which can be considered necessary to avoid or limit loss, such as revoking the contract, cessation of delivery, manufacture, or work in progress or disbursement under loan contracts or preventing goods shipped but still under the guarantee-holder's control to be put at the debtor's disposal.

Should EKN and the guarantee-holder not be able to come to an agreement regarding which measures should be taken or should the guarantee-holder refrain from consultation, the decision will be made by EKN.

Upon EKN's request the guarantee-holder is obliged to authorize EKN to take such measures as have been decided. EKN is also entitled to instruct the guarantee-holder to take such measures. Should the guarantee-holder not comply with what is stipulated in this paragraph, the guarantee is void as against EKN.

Should the guarantee-holder have incurred particular costs resulting from measures taken by or requested by EKN according to 4.2.2, fourth paragraph, such costs will be indemnified by EKN, applying 5.4, second paragraph.

## **Commentary**

*Regarding measures according to 4.2.2, second paragraph, it should be noted that credit institutions in certain cases may suspend disbursement under loan contracts without EKN's consent, see further 3.3.*

*A request according to 4.2.2, fourth paragraph, need not be limited to the guarantee-holder's own production. EKN can require that the guarantee-holder sees to it that a sub-contractor of his ceases the manufacturing of goods that shall be delivered under the contract.*

*By particular cost is meant an additional external cost which has incurred solely a result of a measure taken under 4.2.1 or 4.2.2. The cost should have a normal connection to the situation which has arisen and should be limited as much as possible by the guarantee-holder. As an example of such cost can be mentioned damages and storage charges. Regarding damages, EKN may require that they be established by definite decision of a court or by arbitration. In certain cases the measures taken may also give rise to specific interest costs which would otherwise not have arisen. Such costs will also be defrayed by EKN to the extent stated in 4.2.2, last paragraph, regardless of the guarantee-holder's choice of financing method.*

*Should the guarantee-holder have provided security in favour of the debtor – for example a bank guarantee or otherwise – for the repayment of an advance payment made under the contract or for the fulfilment of the contract etc, a measure taken according to 4.2.2 may cause the debtor to make use of the security. To the extent that such use is legally valid the guarantee-holder is entitled to indemnification for a loss so incurred within the limitations stated in 4.2.2, last paragraph.*

*It may also be the case, however, that measures taken according to the provisions in 4.2.2 cause security provided by the guarantee-holder for the fulfilment of his obligations under the contract guaranteed – or other contract entered into by him – to be called upon without legal grounds. Costs or loss*

*incurred by the guarantee-holder because of such misuse are not indemnified by EKN. In certain cases EKN may issue specific guarantees covering such risks.*

*Should a measure considered by EKN in a specific case be likely to lead to obviously unfavourable consequences for the guarantee-holder, then EKN is prepared to take this matter into consideration within reasonable limits before its final decision.*

*EKN's liability for costs does of course lapse – and the guarantee-holder is obliged to repay what he may have received – if it appears that the loss that the measure was intended to avoid or limit was not eligible for indemnification according to the guarantee or that the guarantee-holder has failed in his obligations according to the conditions for the guarantee or for some other reason.*

*Compare 5.2.1, fourth paragraph of the commentary.*

# 5

## Indemnifications etc

### 5.1 Basic provisions

#### 5.1.1 Objections of the debtor etc

Upon request for indemnification for a claim the guarantee-holder is obliged to inform EKN whether the debtor has objected that the guarantee-holder or a consortium partner of his has failed in his contractual undertakings, made a counter-claim or challenged the claim for some other reason.

Should the debtor have made objections according to what is stipulated in 5.1.1, first paragraph, the guarantee-holder shall – unless the debtor's objections are manifestly baseless – prove that the claim is justified and due or that the claim otherwise made by the guarantee-holder is justified. The same applies if some other circumstances exists which give rise to doubt whether the claim is justified and due or the claim is undeniable. The proof shall normally consist of a final judgement in court or an arbitration award.

#### *Commentary*

*Compare 2.4 and 2.7.*

*It should be observed that the guarantee-holder's obligations under 5.1.1, first paragraph, are in force until the indemnification.*

*Should the contract have been concluded by a consortium, of which the guarantee-holder is a member, and an objection that is not manifestly baseless has been made against the consortium's performance, the claim is not considered justified although the guarantee-holder may have performed what is incumbent on him according to the consortium agreement.*

*Should there be doubt as to whether a judgement or arbitration award can be presumed to be the result of an impartial procedure, the guarantee-holder should consult with EKN about other satisfactory proof.*

*It can occasionally be the case in a guarantee matter that the debtor accepts one or several bills of exchange. After a transfer of the guarantee and such a bill of exchange the new holder may in certain cases assert a justified claim against the acceptor based on a law of bills of exchange regardless of the acceptor's objections under the contract. Such a demand is not regarded by EKN as a justified claim when applying 5.1.1. Compare 3.7, third paragraph.*

### **5.1.2 Assignment to EKN of the rights under the contract etc**

Upon indemnification regarding loss on production the guarantee-holder is obliged to assign to EKN his rights under the contract, as well as the security relating thereto, and the claim for damages to which he may be entitled by the loss, unless EKN consents otherwise.

Upon indemnification for loss on claim, the guarantee-holder is obliged to assign to EKN the claim outstanding as well as the security relating thereto and possible claim for damages.

### **5.1.3 Latest day for request for indemnification**

Request for indemnification shall be made in writing, with the reasons for the request stated in detail. Such request for loss on claim shall have been received by EKN within two years from the due date of the claim. For loss on production the request shall have been received by EKN within two years from the revocation of the contract or if revocation has not taken place, within two years and six months from the interruption of the performance under the contract. Request for such particular cost as mentioned in 4.2.1, last paragraph, and 4.2.2, last paragraph, or such particular interest cost as stipulated in 4.2.2, third paragraph of the commentary, shall have been received by EKN within one year from the time

the cost was incurred. The guarantee-holder will lose his right to indemnification if such requests are not received within the time limits stated above.

### ***Commentary***

*It should be observed that a notification of payment delay or the like pursuant to 4.1, first paragraph a), is not deemed to include a request for indemnification under the guarantee.*

## **5.1.4 Payment of indemnification**

When EKN has reached a decision on indemnification under the guarantee, such indemnification shall be paid without delay. Interest on the indemnification amount shall be due from the date which falls thirty days after the guarantee-holder has made a request for indemnification and proved his right to indemnification under the guarantee, but not earlier, however, than thirty days after the period which, according to 2.5, 2.6 or 4.1, last paragraph, shall apply in the case in question. The proof shall also show the extent of the loss and such particular cost as mentioned in 4.2.1, last paragraph and 4.2.2 last paragraph, and such particular interest cost as mentioned in 4.2.2, third paragraph of the commentary. EKN, however, is not obliged to pay indemnification at a faster rate than follows from the regular contractual maturity dates, adding the applicable waiting periods in accordance with 2.5, 2.6 or 4.1, fourth paragraph.

Once EKN's obligation to indemnify has been established, EKN may upon the guarantee-holder's request agree to effect indemnification with an amount to be determined although the exact amount of the indemnification has not been finally established. Should such indemnification have been made in an amount exceeding that which EKN finds itself obliged to pay according to the final calculation, the guarantee-holder shall immediately repay the difference as well as interest thereon.

### ***Commentary***

*It follows from 5.1.4, first paragraph, among other things, that should the guarantee-holder for example by utilizing a so-called default or acceleration clause in the contract have*

*claimed payment by the debtor in advance, this gives no right for him to be indemnified earlier than otherwise would have been the case. EKN will pay indemnification only after lapse of the time given in 2.5 – and 2.6 if applicable – from the original maturity date of each amount.*

*Should EKN agree to indemnification although the amount has not yet been finally established, EKN may require that the guarantee-holder provide security for the repayment commitment that may be incumbent upon him.*

*Interest referred to in 5.1.4 shall be the market interest rate prevailing at any one time.*

## **5.1.5 Application of amounts received**

### **5.1.5.1 Basic provisions**

All amounts received from the debtor – regarding loss on claim whether they refer to contracts covered by an EKN-guarantee or not – shall be considered in the relation between EKN and the guarantee-holder in accordance with the following.

5.1.5.2 and 5.1.5.3 regulate the application of amounts received to amounts that are covered by the guarantee and amounts not covered by the guarantee respectively.

A received amount which thus has been found to be covered by the guarantee shall

- in case the amount is received prior to indemnification be considered when applying 5.2.1 and 5.2.2 respectively

**and**

- in case the amount is received after indemnification, be shared between EKN and the guarantee-holder pursuant to what is stipulated in 5.5.2 and 5.5.3 respectively.

### **5.1.5.2 Loss on production**

Should received amounts refer to compensation from the debtor to the guarantee-holder under a contract guaranteed by EKN and

should it be evident by the circumstances that the amount wholly or partially refers to compensation for loss not covered by the guarantee, the amount shall be applied in accordance with the relation between the loss which is covered by the guarantee and the loss which is not covered by the guarantee.

### ***Commentary***

*Loss not covered by the guarantee consists of, among other things, loss which exceeds the highest amount of loss given in the guarantee instrument and such loss which is not covered by the expression loss on production.*

#### **5.1.5.3 Loss on claim**

All amounts received from the debtor by the guarantee-holder – whether they refer to contracts covered by an EKN-guarantee or not – shall be applied in the order that justified claims are due. Should the guarantee-holder be a bank or should the rights under the contract and the guarantee have been assigned to a bank in accordance with 3.7, application shall be made in accordance with prudent banking practice.

Amounts received which, independent of what the debtor or the guarantee-holder may state, on objective grounds can be deemed to refer to a particular claim, such as

- amounts paid by surety or other third person liable for payment,
- amounts emanating from sale of collateral or similar security,
- amounts distributed in bankruptcy that relate to a certain stated claim,
- amounts which is payment for a claim based on final judgement in court or arbitration award which has come about as a result of an impartial procedure,
- amounts which is payment for a claim included in a debt rescheduling agreement,

shall, however, be applied against the claim to which the amount can be referred.



Save as stipulated in 5.1.5.3, second paragraph, amounts received shall be applied in the first instance against default interest, thereafter against other interest and finally against principal.

### **Commentary**

*Application shall first be made pursuant to 5.1.5.3, first and second paragraphs, then according to the stipulation in 5.1.5.3, third paragraph.*

## **5.2 Calculation of loss**

### **5.2.1 Loss on production**

Loss on production is the difference between

#### **on the one hand**

- costs incurred by the guarantee-holder for the performance of the contract,

#### **on the other hand**

- costs related to an already effected performance for which a claim has been established,
- costs related to an already fulfilled production and/or service element for which a claim has been established,
- amounts already received under the contract to the extent that such amounts do not relate to claims established by performances effected or fulfilment of specific production and/or service elements,
- amounts received by the utilizing of security provided,
- damages or other compensation received which have reduced the guarantee-holder's loss,
- counter-claims that the debtor or a person providing surety can make against the guarantee-holder to the extent that the counter-claim corresponds to a claim which the guarantee-holder has against the debtor or the person providing surety and which relates to the contract,

- realization value of such goods which the guarantee-holder has procured in order to fulfil his contractual undertakings as well as such goods which have not yet been delivered but which have been wholly or partially finished, though not to the extent of the fulfilment of specific production elements resulting in the establishment of a claim according to the contract; what has been stipulated here is valid also in applicable parts as regards service elements,
- the value of such goods as referred to in the preceding item – with the limitation given therein – in the situation where the goods have been lost, damaged, or embargoed while the guarantee-holder carried the risk for damages, such value being the value immediately before the event in question; if the event has occurred abroad and in turn has been a consequence of an event referred to in 2.3.2, first paragraph, though only if and to the extent that the guarantee-holder would have been able to protect himself against loss caused by such event by contracting customary insurances or by similar means.

### **Commentary**

*(1) EKN may have made exceptions in the guarantee instrument for certain costs for the fulfilment of the contract, such as local costs, costs referring to a third country, or costs incurred before an unconditional contract has been established.*

*(2) Costs incurred by the guarantee-holder for the fulfilment of the contract shall be calculated according to the methods normally employed by him when calculating the costs for production of goods or services of the kind in question. Should the guarantee-holder have employed specific calculation methods for the contract in question, such methods shall be applied. This is valid on the assumption that the methods employed by the guarantee-holder are essentially consistent with the calculation methods normally employed within the industry in question. Should this not be the case the costs shall be calculated on the basis of standard methods employed within the industry in question, to the extent that it is possible to establish such standard methods.*

*(3) Also indirect costs such as for administration etc and costs for stock-keeping will be considered. For initial costs such as costs for construction, drawings, or planning, the question arises whether such costs should be included totally or only to the extent corresponding to the actual progress of production. In case of a "tailormade" product such costs will be considered in their entirety. Regarding standard goods the initial costs will be considered only to the extent corresponding to the degree of completion.*

*(4) Should a cost have been indemnified by EKN according to 4.2.2 it shall not be included in the costs which the guarantee-holder has had for the fulfilment of the contract according to 5.2.1, first item.*

*(5) EKN may require the guarantee-holder's auditors to render their opinion regarding the calculation of costs.*

*(6) Costs for goods manufactured by a sub-contractor will normally be considered to correspond to what the guarantee-holder contractually has to pay to the sub-contractor for the goods in question; compare however, the remarks in 2.1, paragraph two of the commentary, regarding so-called if-and-when-contract.*

*(7) The costs will be calculated as per the day when the loss on production occurred, i.e. in case of cancellation of the contract the day when the cancellation took place and in case of interruption, at the end of the six months period prescribed in 2.2.1. However, reasonable costs for the winding up during the period thereafter, such as for relocation of personnel and machinery, will also be indemnified. The same applies to damages which the guarantee-holder may be obliged to pay a sub-contractor due to the non-fulfilment of the contract with him. Damages to the debtor can only be relevant applying 4.2.*

*(8) Costs for recommencing the project are not covered by loss on production but can in some cases be considered in connection with a possible recovery. Compare 5.5.2.3.*

*(9) Regarding claims for performance effected and claims arising because specific production and/or service elements*

*have been effected, see 2.2.2.*

*(10) It should be observed that in case the claim is based upon performances made or production and/or service elements effected, the amount of the claim as such will not be deducted, but only such costs which the guarantee-holder has incurred in order to establish the claim in question. This applies regardless of whether the costs are higher or lower than the amount of the claim.*

*(11) Advance payments which have been made under the contract will be deducted only to the extent the payment is not related to a claim already arisen.*

*(12) Amounts already received will be deducted also in case they have been returned to the debtor because he has made an unfair call under a bond or in respect of other security provided by the guarantee-holder; as mentioned in 4.2.2, paragraph five of the commentary, EKN may in certain cases issue specific guarantees covering such risks. Other amounts received by the guarantee-holder and which he has repaid according to the contract will be deducted only in the case where the repayment obligation is based upon circumstances referred to in 2.4.*

*(13) Deduction will be made not only for amounts resulting from the use of security presupposed at the issuance of the guarantee, but also from other security, if any, held by the guarantee-holder.*

*(14) Indemnification from EKN under a separate guarantee for physical loss is an example of other indemnification that may have reduced the guarantee-holder's loss.*

*(15) When establishing the amount of loss, consideration will be taken not only of those counter-claims relating to the contract for which the guarantee has been issued, but also of other counter-claims that the debtor or person providing surety can make against the guarantee-holder. Should the guarantee-holder dispute such counter-claim, EKN may require that the guarantee-holder proves that the counter-claim is unfounded, unless this is manifestly clear from the circumstances. The proof shall normally consist of final*

*judgement in court or arbitration award. Should there be doubt as to whether a judgement or arbitration award can be presumed to be the result of an impartial procedure, the guarantee-holder should consult with EKN regarding other satisfactory proof.*

*(16) Deduction shall be made for the realization value of such goods as have been procured or processed, although this has not yet resulted in establishment of a contractual claim. The value of goods, for which such claim has been established, shall also be deducted to the extent that the goods have been processed in excess of the requirements for establishment of the claim. Compare 5.2.2, paragraph five of the commentary.*

*(17) Regarding realization value, see further under 5.2.4. In case of a combined guarantee, see also 5.3.*

*(18) When calculating loss on production particular regard shall be taken to the case where the guarantee-holder's total costs of production exceed the highest amount of loss. Amounts, which according to 5.2.1, items four through nine, shall be deducted from costs which the guarantee-holder has had for the fulfilment of the contract, shall in the relation between EKN and the guarantee-holder be calculated as stipulated in 5.1.5.2.*

## **5.2.2 Loss on claim**

Loss on claim is the difference between

### **on the one hand**

- the principal amount of the claim plus accrued interest, excluding default interest,

### **on the other hand**

- amounts received in respect of the claim,
- amounts received by the utilizing of security provided,
- damages or other compensation received which has reduced the guarantee-holder's loss,

- counter-claims that the debtor or a person providing surety can make against the guarantee-holder, though not by calculation of loss caused by an event as described in 2.3.2, first paragraph a),
- realization value of goods to which the claim refers but which have not yet been delivered or which the guarantee-holder has recovered after delivery, though not in the case of a guarantee to lender,
- the value of such goods as referred to in the preceding item – though not in the case of a guarantee to lender – in the situation where the goods have been lost, damaged, or embargoed while the guarantee-holder carried the risk for damages, such value being the value immediately before the event in question; if the event has occurred abroad and in turn has been a consequence of an event referred to in 2.3.2, first paragraph, though only if and to the extent that the guarantee-holder would have been able to protect himself against loss caused by such event by contracting customary insurances or by similar means,
- cost that the guarantee-holder has avoided due to the loss event.

### **Commentary**

*Deduction will be made not only for amounts resulting from the use of security presupposed at the issuance of the guarantee, but also from other security, if any, held by the guarantee-holder.*

*Indemnification under a so-called export interest insurance is an example of compensation that may have reduced the guarantee-holder's loss.*

*When establishing the amount of loss consideration will be taken not only of those counter-claims relating to the contract for which the guarantee has been issued, but also of other counter-claims that the debtor or person providing surety can make against the guarantee-holder. Should the guarantee-holder dispute such counter-claim, EKN may require that the guarantee-holder proves that the counter-claim is unfounded, unless this is manifestly clear from the*

*circumstances. The proof shall normally consist of a final judgement in court or arbitration award. Should there be any doubt as to whether a judgement or arbitration award can be presumed to be the result of an impartial procedure, the guarantee-holder should consult with EKN regarding other satisfactory proof.*

*In one case a counter-claim need not be deducted, viz, when calculating a loss caused by transfer hindrances and where the debtor has deposited an amount corresponding to the guarantee-holder's claim.*

*Should the goods to which the claim refers have not yet been delivered, but have been processed in excess of the requirement for establishment of the claim when the claim is indemnified, the full realization value shall not be deducted. In this case the deduction shall comprise only such part of the realization value as corresponds to the degree of completion when the claim was established in relation to the degree of completion when the claim is indemnified.*

*Regarding realization value, see further under 5.2.4.*

*The provision that the value of such goods to which the claim refers but which have not yet been delivered or which have been recovered shall not be deducted is not applicable in respect of a guarantee to lender. In order to prevent the exporter – who has already received payment for such goods by disbursement of the loan to which the guarantee to lender refers – from appropriating the value of the goods, the exporter in certain cases will have to sign a specific commitment before the guarantee to lender is issued. According to such commitment it shall be incumbent upon the exporter to compensate EKN for the value of the goods.*

*In the case of a combined guarantee, see also 5.3.*

### **5.2.3 Specific provisions for loss on claim regarding waiting period interest**

If the main claim is paid – wholly or partially – before the expiry of the waiting period, no compensation will be payable for waiting

period interest in respect of the thus paid amount.

The compensation for loss is calculated on the basis of the refinancing interest during the period of time as set out in 5.2.3, third paragraph. When calculating the compensation the refinancing interest may not exceed the contractual default interest.

The period of time which shall apply in the calculation according to 5.2.3, second paragraph, is to be established as follows. The starting point is the due date of the main claim, or, in cases mentioned in 2.5.2, first paragraph first sentence, that date on which a deposition was made. The period of time ends on the date prior to when EKN pays compensation under the guarantee – but no longer than until thirty days after the expiry of the waiting period applicable for the guarantee, however, events mentioned in 2.5.1, first paragraph a), or 2.5.2, second paragraph, do not shorten the indicated maximum period of time.

In the event the waiting period has been extended on account of demand for payment, set out in 2.5.1, first paragraph b), having been raised later than two months from the due date, or if applying 4.1, fourth paragraph, no compensation for waiting period interest will be payable during the thus extended waiting period.

Otherwise what is stipulated in 5.2.2 is valid to the extent applicable.

### **Commentary**

#### *Pertinent definitions in 5.2.3*

**main claim:** *the guarantee-holder's claim outstanding on the debtor in respect of principal debt as well as accrued contractual credit interest, but not default interest,*

**waiting period:** *such term as set out in 2.5 or other term as set out in the guarantee instrument,*

**waiting period interest:** *interest which the guarantee-holder insures with EKN according to 5.2.3. Compare 3.2, last paragraph,*

**refinancing interest:** *interest which corresponds to the market interest prevailing at any one time.*



## 5.2.4 Realization value etc

If goods mentioned in 5.2.1 and 5.2.2, with the consent of EKN, have been sold to a third party, the agreed purchase price after deduction of the cost of sale shall be considered the realization value.

In other cases the guarantee-holder shall state his estimate of the value of the goods. Should EKN accept such estimate, it will be considered the realization value. This not being the case such value shall be determined by arbitrators according to 7.2. Within thirty days from the determination of the realization value EKN shall be entitled to acquire the goods against payment of the corresponding amount.

If so requested by EKN, the guarantee-holder shall be obliged to complete, in accordance with the contract, without delay the manufacturing of such goods which EKN has acquired according to the preceding paragraph. The cost thereof shall be paid by EKN on the dates stipulated in the contract.

### *Commentary*

*Specific rules may apply regarding distribution of amounts received for the sale of goods, see 5.5.2.1, third and last paragraphs, 5.5.2.2, last paragraph, 5.5.3.1, third and last paragraphs and 5.5.3.2, last paragraph.*

*The cost for completion of goods acquired by EKN shall be calculated in the manner described in the commentary to 5.2.1.*

## 5.2.5 Costs not eligible for indemnification

The following costs are not eligible for indemnification

- costs that the guarantee-holder has incurred in order to prove that EKN is obliged to indemnify or his costs for demanding payment,
- the guarantee-holder's costs for the utilization of security,
- specific interest costs that the guarantee-holder has incurred because the contract has not been fulfilled as agreed and which would otherwise not have arisen.

## **Commentary**

*What is mentioned in 5.2.5, first item, does not restrict EKN's obligation to indemnify such costs as EKN may be obliged to indemnify by arbitration according to 7.2; that EKN in certain other cases is prepared to compensate the guarantee-holder in part for costs in connection with initiating legal proceedings against the debtor is set out in 5.5.*

*From 4.2.2, third paragraph of the commentary, it follows that specific interest cost in certain cases may be compensated by EKN should it have incurred due to a measure taken according to 4.2.1 and 4.2.2.*

## **5.2.6 Conversion of foreign currency**

To the extent that the debtor's obligations in accordance with the contract should be fulfilled in Swedish Kronor, compensation will also be paid in Swedish Kronor. If the debtor is committed to carry out his obligations under the contract completely or partly in foreign currency, it will be obvious from the guarantee instrument if the compensation is to be paid in the foreign currency, and in that case the highest amount of loss in that currency will be given. In other cases the compensation will be determined by conversion of the currency in question to Swedish Kronor based on the average of the buying rates quoted for the foreign currency by two of the largest Swedish foreign exchange banks at or about 11.00 a.m. Stockholm time on the due date for the claim. The conversion will, however, never take place at a rate above that given in the guarantee instrument.

If a counter-claim, as referred to in 5.2.1 and 5.2.2, is brought forward in the same currency as compensation for the guaranteed claim is to be paid, settlement between the claims will take place before settlement of the guaranteed claim. In other cases the amount of the counter-claim will be converted to the currency in which compensation is to be paid, based on the average of the selling rates quoted for that currency by two of the largest Swedish foreign exchange banks at or about 11.00 a.m. Stockholm time on the due date for the claim, against the currency in which the guarantee-holder's claim is expressed.

## **Commentary**

*Should the guarantee cover waiting period interest, a claim regarding default interest shall, on application of 5.2.6, be deemed to have fallen due for payment simultaneously with the main claim.*

*If no buying or selling rate was fixed on the due date of the claim, the calculation will instead be carried out using the buying or selling rate which, in the opinion of the Swedish Bankers Association, best reflects the value of the currency in question.*

## **5.3 Specific provisions for combined guarantees**

Should a loss on claim occur in connection with a transaction for which a combined guarantee has been issued, and should the claim refer to goods which have not yet been delivered or which the exporter has recovered after delivery, the following shall apply.

The exporter is obliged to indemnify EKN for the realization value of the goods up to an amount corresponding to what EKN has paid under the guarantee to the lender for the claim in question as well as interest thereon. The realization value shall be determined according to 5.2.4.

Should the goods referred to in the first paragraph have been lost, damaged, or embargoed while the exporter carried the risk for damages, the exporter shall indemnify EKN for the value of the goods immediately before the event in question up to an amount corresponding to EKN's liability for indemnification under the guarantee to the lender in respect of the claim in question; if the event has occurred abroad and in turn has been a consequence of an event referred to in 2.3.2, first paragraph, though only if and to the extent that the exporter would have been able to protect himself against loss caused by such event by contracting customary insurances or by similar means.

Should the exporter – due to circumstances for which he can not be blamed – not receive payment to an anticipated extent under the

loan which is intended to be given by the lender the following applies. To the extent the exporter does not receive payment directly from the buyer or the equivalent of an amount, which should have been paid under the loan, the exporter – provided the claim is justified – has the right to indemnification as for loss on claim to the same extent and at the same dates as the lender would have been entitled to should he have disbursed equivalent payments under the loan.

### **Commentary**

*The expression combined guarantee constitutes a collective concept of guarantee issued in favour of exporter concerning loss on production and guarantee issued in favour of lender concerning loss on claim regarding one and the same transaction. Furthermore, a combined guarantee can cover loss on claim in favour of an exporter concerning a claim which is not covered by the loan contract. It will be shown in the guarantee instrument if the guarantee in question is a combined guarantee.*

*By disbursement of the loan, to which the guarantee to the lender refers, the exporter has already received payment for the goods in question. The provisions in 5.3 are intended to prevent the exporter from also obtaining benefit of the realization value of the goods. Should the exporter, however, have paid an amount to cover the excess risk or part thereof to the lender, as agreed between them in connection with the conclusion of the loan agreement, a corresponding amount shall be credited to the exporter. Should the realization value in a specific case exceed the sum of what EKN has paid to the lender for the claim in question under the guarantee to the lender as well as interest thereon and what the exporter has paid to the lender as just mentioned, the exporter may keep the excess value.*

*Settlement shall be made either by direct payment of the amount in question from the exporter to EKN or, if so requested by EKN, by EKN taking over the goods against payment of an amount corresponding to what is due to the exporter according to the preceding paragraph. In the latter*

*case the provisions in 5.2.4, paragraph three, shall apply.*

*Should the goods have been processed in excess of what is required for the establishment of the claim, the provisions in 5.2.2, paragraph five of the commentary shall apply.*

*Interest according to 5.3 shall be the market interest rate prevailing at any one time.*

## **5.4 Maximum amount payable under the guarantee and highest amount of loss**

The maximum amount payable under the guarantee corresponds to the percentage of the highest amount of loss given in the guarantee instrument.

Irrespective of the provisions in the preceding paragraph, EKN will indemnify the guarantee-holder – to the extent corresponding to the guarantee percentage applicable – for particular cost according to 4.2.2, last paragraph, up to an amount which, together with other combined indemnified amounts, exceeds the highest amount of loss by ten percent. Should particular cost refer to damages EKN will compensate this cost – to the extent corresponding to the guarantee percentage applicable – without limitation.

### ***Commentary***

*In cases where the guarantee has been issued for both loss on production as well as loss on claim respectively then separate highest amounts of loss are applicable for each respective type of loss.*

## **5.5 Measures to be taken after indemnification**

### **5.5.1 Basic provisions**

After payment of indemnification EKN and the guarantee-holder

shall consult with each other regarding the exercising of rights under the contract, collection of the claim or other measures for recovery as well as exercising of other rights relating to the contract.

Should the measures refer to recovery of loss on production, 5.5.2 applies.

In case of recovery of loss on claim, 5.5.3 applies.

### ***Commentary***

*Other rights relating to the contract are for example securities provided and claims for damages.*

*The expression recovery of loss on production is used as a collective concept for all the amounts which may be received after indemnification and which, according to 5.2.1, may reduce the final loss in the matter. Furthermore, the expression also covers amounts received after recommencement, see further 5.5.2.3.*

## **5.5.2 Recovery of loss on production etc**

### **5.5.2.1 In the situation where EKN and the guarantee-holder are in agreement**

Should EKN and the guarantee-holder be in agreement as to the measures to be taken then costs in connection with the measures shall – unless otherwise stipulated below – be shared between the guarantee-holder and EKN so that EKN shall be responsible for an amount corresponding to the applicable guarantee percentage while the guarantee-holder shall be responsible for the excess risk share. Should the measures to be taken by the guarantee-holder entail costs which are not insignificant to him, EKN will, upon the guarantee-holder's request, advance an amount corresponding to EKN's share of the estimated costs.

Should amounts be received after indemnification, which according to 5.2.1 shall be deducted from cost the guarantee-holder may have had for the completion of the contract, EKN's and the guarantee-holder's costs for the measure, as well as interest thereon, shall first be met. The remainder of the received amount shall then

be shared in accordance with the following; EKN shall receive an amount corresponding to the applicable guarantee percentage, but no higher than full payment for indemnification given, as well as interest thereon, while the guarantee-holder shall receive the rest, unless otherwise stipulated hereinafter.

Should the guarantee-holder sell goods mentioned in 5.2.1, eighth item, for an amount which exceeds the realization value of the goods established at the time of calculation of loss, the difference as well as interest thereon from the day of the sale – after costs for the sale have been deducted – shall be shared between EKN and the guarantee-holder so that EKN shall receive an amount corresponding to the applicable guaranteed percentage while the guarantee-holder receives an amount corresponding to the excess risk share.

Amounts originating from the sale of such goods, which according to stipulations in 5.2.4 and 5.3 has been acquired by EKN, shall accrue entirely to EKN.

### ***Commentary***

*Regarding application of amounts received, see 5.1.5.1 and 5.1.5.2.*

*Administration costs and other internal additional costs are not included in the expression costs as used in 5.5.2.1.*

*Should the guarantee-holder's production costs exceed the amount which has been the basis of EKN's indemnification, the surplus amount will be included in the excess risk share when allocating costs according to 5.5.2.1, first paragraph.*

*Interest according to 5.5.2.1, second and third paragraphs, shall be the market interest rate prevailing at any one time.*

### **5.5.2.2 In the situation where EKN and the guarantee-holder are not in agreement**

Should EKN and the guarantee-holder not be in agreement as to the measures to be taken or should the guarantee-holder refrain from consultation, the decision will be made solely by EKN – with reasonable consideration to the guarantee-holder's interests – and

EKN will defray all costs resulting from such decision.

Should amounts be received after indemnification, which according to 5.2.1 shall be deducted from cost the guarantee-holder may have had for the completion of the contract, the following shall apply. Firstly, EKN's costs as well as interest thereon shall be covered. After this EKN shall receive full payment for indemnification given as well as interest thereon. Lastly the guarantee-holder shall receive the remaining amount.

5.5.2.1, third and last paragraphs, shall be applied correspondingly where EKN and the guarantee-holder are not in agreement.

### **Commentary**

*Regarding application of amounts received, see 5.1.5.1 and 5.1.5.2.*

*Administration costs and other internal additional costs are not included in the expression costs as used in 5.5.2.2.*

*Interest according to 5.5.2.2, second and third paragraphs, shall be the market interest rate prevailing at any one time.*

### **5.5.2.3 Recommencement**

Should the measures refer to an interrupted project being recommenced, the decision will be made by the guarantee-holder who will normally defray all costs resulting from his decision. EKN can, however, upon the guarantee-holder's application, undertake to defray part of the costs.

Amounts received as a result of a recommencement shall – after the guarantee-holder's and EKN's costs (if any) for the recommencement have been met – be shared between EKN and the guarantee-holder so that EKN shall – up to receiving full payment for indemnification made as well as interest thereon – receive an amount corresponding to the applicable guarantee percentage while the guarantee-holder shall receive the remainder.

### **Commentary**

*Recommencement means the resumption of the guaranteed*



*transaction with the original or a new debtor.*

*When there is a recommencement the expression cost as used in 5.5.2.3, last paragraph, refers to manifest costs the guarantee-holder has had for the completion of the contract as well as mobilization cost and cost increases due to inflation.*

*Interest according to 5.5.2.3, last paragraph, shall be the market interest rate prevailing at any one time.*

### **5.5.3 Recovery of loss on claim etc**

#### **5.5.3.1 In the situation where EKN and the guarantee-holder are in agreement**

Should the measures involve costs these shall be shared between the guarantee-holder and EKN so that EKN shall be responsible for an amount corresponding to the applicable guarantee percentage while the guarantee-holder shall be responsible for the excess risk share. Should the measures to be taken by the guarantee-holder entail costs which are not insignificant to him, EKN will, upon the guarantee-holder's request, advance an amount corresponding to EKN's share of the estimated costs.

Amounts received after indemnification shall, unless otherwise stipulated in 5.5.3.1, last paragraph – EKN's and the guarantee-holder's costs for the measures first having been met – be shared between EKN and the guarantee-holder so that EKN shall receive an amount corresponding to the applicable guarantee percentage while the guarantee-holder receives an amount corresponding to the excess risk share. Amounts received shall totally be divided as just mentioned without consideration to factors which may have effected the size of the amounts, such as changes in foreign exchange rates. In cases where the guarantee does not cover waiting period interest EKN is, however, as regards default interest, entitled only to such portion as refers to the period after indemnification.

Should the guarantee-holder sell goods as mentioned in 5.2.2, sixth item, after indemnification, then 5.5.2.1, third and last paragraphs, shall be applied correspondingly.

### ***Commentary***

*Regarding application of amounts received, see 5.1.5.1 and 5.1.5.3.*

*Administration costs and other internal additional costs are not included in the expression costs as used in 5.5.3.1.*

### **5.5.3.2 In the situation where EKN and the guarantee-holder are not in agreement**

Should EKN and the guarantee-holder not be in agreement as to the measures to be taken or should the guarantee-holder refrain from consultation, the decision will be made solely by EKN with reasonable consideration to the guarantee-holder's interests. The guarantee-holder is, however, always obliged to participate in the exercising of rights according to the contract, collection of the claim or other measures for recovery as well as exercising of other rights relating to the contract.

EKN will defray the costs resulting from its decision. The guarantee-holder has no right to amounts received until these costs have been covered and EKN has received full payment for indemnification given as well as interest thereon. This applies unless EKN and the guarantee-holder have agreed otherwise.

5.5.3.1, last paragraph, shall be applied correspondingly in the situation where EKN and the guarantee-holder are not in agreement.

### ***Commentary***

*Regarding application of amounts received, see 5.1.5.1 and 5.1.5.3.*

*Administration costs and other internal additional costs are not included in the expression costs as used in 5.5.3.2.*

*Interest according to 5.5.3.2, second paragraph, shall be the market interest rate prevailing at any one time.*

# 6

## Certain general obligations for the guarantee-holder etc

### 6.1 Measures for limiting loss

In order to avoid or limit loss the guarantee-holder is obliged to take all such measures and also in other respects to act in such a manner as may reasonably be deemed incumbent upon him.

Should the matter become subject to indemnification and should the guarantee-holder have failed to fulfil the obligations stipulated in 6.1, first paragraph, and should this failure have increased the risk of loss for EKN, the amount of indemnification which EKN would otherwise have been liable to pay under the guarantee shall be equitably adjusted.

#### *Commentary*

*In 6.1 are stipulated general rules of conduct for the guarantee-holder. It is expected that the guarantee-holder will take equal care and act with equal prudence as he would have done should he not be holding a guarantee.*

*Regarding the guarantee-holder's obligations when there is risk of loss, see 4.1 and 4.2.*

*Note that adjustment of indemnification in some cases may be made to nil.*

### 6.2 Accounting and disclosure requirement

It is incumbent upon the guarantee-holder to keep such accounting records as clearly present the information required for determining the size of a loss incurred. It is further incumbent upon him, upon request, to make available his records and other documents relating to the guaranteed transaction to EKN or an external advisor of

EKN's, and to disclose all such information as is available to him which he may be able to obtain and which can be of importance to EKN.

## 6.3 Inspection

Where the guarantee-holder is a manufacturer or a contractor EKN and an external advisor of EKN's are entitled to inspect completed goods and work in progress on the guarantee-holder's premises or on the works site.

## 6.4 Authority for EKN to conclude debt rescheduling agreements, etc

As regards a guaranteed claim, the guarantee-holder is obliged to cooperate in measures required to carry out a debt rescheduling agreement. The guarantee-holder hereby authorizes the Swedish government and/or EKN to conclude such agreement. The conclusion of such agreement does not diminish EKN's liability to make indemnification under the guarantee.

### *Commentary*

*A debt rescheduling agreement according to 6.4 is concluded with the government or a government institution of the debtor's country of domicile and generally involves an extension of the amortization period but also sometimes remission of part of the guaranteed claim and other so-called concessional conditions.*

*A debt rescheduling agreement is of a general nature and thus covers, in principle, all of EKN's guaranteed claims on the country in question, which fall due during a certain period. Exception can however, have been made for certain types of claims, for example short-term claims or claims below a certain limit of amount.*

*The authorization to conclude such an agreement comprises*

*the total guaranteed claim; consequently the guarantee-holder's excess risk as well.*

*As regards remission of claim EKN is prepared to, conditioned on all guarantee-holders with claims covered by the debt rescheduling agreement so desire, take over each guarantee-holder's excess risk. The price will be decided by EKN in accordance with the method EKN usually applies when assessing claims. Should the remission be unilaterally decided by the Swedish government and/or EKN at a bilateral negotiation on debt rescheduling and not be included in a multilateral agreement, EKN shall, however, at the request of the guarantee-holder, take over his excess risk in accordance with the above.*

*Before multi- and/or bilateral rescheduling negotiations are entered into, the guarantee-holder will be informed that such negotiations will take place.*

## **6.5 The guarantee-holder's liability for certain damages**

The guarantee-holder shall indemnify EKN for costs and damages which may have been caused by fraudulent or negligent behaviour on his part or by his failure to observe his obligations under the guarantee conditions.

Liability to pay compensation is, however, limited to – except for when the guarantee-holder has acted in a fraudulent or grossly negligent manner – the amount the guarantee-holder has received in indemnification as well as interest thereon.

Should several banks be guarantee-holders under the same guarantee the following applies. Only the erring guarantee-holder is liable to indemnify EKN for costs and damages. The liability of the guarantee-holder is restricted to – except when the guarantee-holder has acted in a fraudulent or grossly negligent manner or has failed to observe the conditions in 5.1.1 – to an amount not exceeding an amount corresponding to his share of the maximum amount payable under the guarantee as well as interest thereon.

In case of omission as stipulated in 5.1.1 the liability is limited to the maximum amount payable under the guarantee as well as interest thereon. Should there be any uncertainty as to which party has caused the costs and damages the guarantee-holders are jointly responsible.

Should the rights according to the contract and the guarantee have been transferred to a third party in accordance with stipulations in 3.7, the liability to pay compensation as stipulated in 6.5 shall firstly pass to such third party up to an amount which corresponds to what he has received under the guarantee as well as interest thereon.

***Commentary***

*Interest according to 6.5, second, third and last paragraphs, shall be the market interest rate prevailing at any one time.*

# 7

## Dispute regarding the guarantee

### 7.1 Applicable law

Swedish law is applicable for the guarantee.

### 7.2 Arbitration

Any dispute in connection with the guarantee shall be settled by arbitrators in accordance with the Swedish law on arbitrators in force at the time when the dispute arises.

The arbitration proceedings shall take place in Stockholm.

Should the guarantee-holder wish to refer a decision taken by EKN to arbitration, he shall file such demand within twelve months after having been served with the decision in question. If he fails to do so he shall forfeit his right of action.

Should the arbitrators arrive at different decisions concerning a valuation matter, the average value shall apply as the decision of the arbitrators.

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