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DEVELOPMENT OF BANK GUARANTEE INSTITUTION IN GLOBALIZATION ERA: A COMPARATIVE LEGAL STUDY

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Abstract

The scientific literature indicates the 60s of the XX century as the time of formation of the modern understanding of "bank guarantee". The importance of this institution increased in the next decade of the XX century due to the implementation of numerous investment projects in the Middle East. There is no doubt that the implementation of any project is associated with certain risks, that is why it became necessary to design a legal institution which would enable to realize various types of business projects. These risks occur both at the international level and at the national level. In all countries, a bank guarantee is used as appropriate protection to protect against financial losses. Such a guarantee means for companies a way to prove their creditworthiness, helping to build confidence in the transaction, thereby stimulating to a large extent this process and trade on a mass scale, and as a result, the development of business activities on the national and international markets. This institution has found its consolidation in Russian law, but relatively recently, after the transition of the Soviet-type economy to a new track. All the reforms carried out with this institution show that changes in the Russian legal bank guarantee institution are aimed at its unification with international legislation. That contributes to the entry of our entrepreneurs to the international level, their rightful place in the international economic arena, developing the domestic market and economy, as well as overcoming the negative consequences of the sanctions policy against our country.

Keywords: Globalization, bank guarantee institution, legal institution.

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1. Introduction

Globalization as a special phase of international relations was born in the 90-ies of the last century. Today, it is recognized as one of the main characteristics of the world economy, which is an interweaving of relations not only between countries, but also between economic entities belonging to different states and regions. Here, a bank guarantee institution (independent guarantee) is an important tool for leveling risks of the international business activity.

2. Problem Statement

For research purposes, the authors formulated a number of tasks: to investigate a set of legal acts of Russia regulating the bank guarantee institution. The next task was to analyze legal rules governing a similar institution in the former Soviet republics. The generalizing task of the study was a comparative legal analysis of the legal bank guarantee institute in Russian law, the law of former Soviet republics and international law.

3. Research Questions

What are specific features of the legal bank guarantee institution in the international law? What are specific features of the legal bank guarantee institution in the Russian law? What are features of regulating the bank guarantee institution in the CIS countries?

4. Purpose of the Study

The purpose of this study is a comparative legal analysis of public relations that arise, change and stop in the field of a bank guarantee registration as a way to ensure the fulfillment of obligations, the specifics of national legal acts regulating the legal institution "bank guarantee", as well as similar legal acts of the international level and legislation of foreign countries.

5. Research Methods

In a study of a bank guarantee as a legal institution of the international law and law of some foreign countries, following methods were used: the main scientific dialectical method of cognition and private-scientific methods, including formal-logical, comparative-legal analysis and synthesis, etc. These methods were used together, which allowed the authors to conduct a comprehensive analysis of the bank guarantee institution, as it is fixed in the Russian legislation.

6. Findings

The Bank guarantee institution is not something completely new, unknown until now. International practice has long established provisions regulating guarantees, including bank guarantees. Bank guarantee research is conducted by foreign scientists (Knezevic & Lukic, 2016; Lukic, 2014) and Russian scientists (Nikolova, 2018). English scientists consider it as a unilateral contract concluded by the guarantor and the

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beneficiary, since the obligation arises only for the guarantor – to pay the guarantee amount (Holden, 1998). German civilists define a bank guarantee as a guarantee contract other than a warranty – a unilaterally binding contract (Kobler, 2007).

First, it is necessary to point to the UN Convention on independent guarantees and standby letters of credit, adopted on 11.12.1995. Its adoption was preceded by the creation of a number of documents in this area. The following main features are distinguished: it contains provisions on a bank guarantee of a type "a reserve letter of credit"; defines it as an obligation issued in favor of the beneficiary; regulates the legal relationship between the guarantor (issuer) and the beneficiary. In 1978, uniform rules for contract guarantees (International Chamber of Commerce (ICC), 1978) were adopted, which are a codification of the world experience in using the bank guarantee institute. These rules were a systematization of legal customs in the international law in the field of bank guarantees, without giving a concept of this phenomenon or disclosing its legal nature, but it only specified and described the various types of guarantees. International Chamber of Commerce in 1992 publishes (ICC publication No. 458) Uniform Rules for Demand Guarantees (International Chamber of Commerce (ICC), 1992). These rules established a number of principles of a bank guarantee: independence from the main obligation; irrevocability. In addition, the procedure has come into effect according to which the guarantor does not have the right to analyze documents that the beneficiary attached to the payment request and which must be drawn up according to the form and external features of documents listed in the text of the bank guarantee. A new version of the above rules was adopted in 2009. The editorial version contained many innovations: instead of the term "principal", the term "applicant" is used»; the representative, the advising party and the instructing party have become subjects of legal relations of the bank guarantee; a new procedure for payment of the guarantee amount, which is a subject to immediate payment by the guarantor after receiving the corresponding payment request, and others. In accordance with these rules, an independent guarantee is any guarantee or payment obligation of a bank, insurance company or any other legal or natural person (guarantor) issued in writing and containing an obligation to pay a monetary amount in case of a written payment request made in accordance with its terms, as well as other documents (for example, a certificate issued by an architect or engineer, a court or arbitration decision). The guarantee is recognized here as a transaction that is in no way dependent on the contract – the basis of its registration. The year 1998 was marked by the publication of ICC No. 590 of the above-mentioned uniform rules (International Standby Practices hereinafter referred to ISP 98), dedicated to standby letters of credit. They were applied in practice only if they didn't contradict the norms of national legislations and if the text of the obligation contained references to them. Therefore, they can be considered as a custom of international trade. This was their disadvantage (International Chamber of Commerce (ICC), 1998). The United Nations Commission on International Trade Law (UNCITRAL) has been working on a draft of International Convention that would become a law for states that accept it. However, the first version, which appeared in 1970, was unsuccessful. Then it was planned to develop a model law on the basis of which the national laws of the acceding states were to be reformed (UNCITRAL uniform law on international guarantee letters). In 1988, it was decided to give to this document a status of an International Convention of direct effect. In the Convention of 11.12.1995, the provision on the independence of the guarantee from various conditions was fixed, that is, it is abstracted from the obligation of which it is the guarantor (article 3). The concept of obligation is used

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both for a bank guarantee and for a letter of credit. Personal objections raised by the guarantor against the beneficiary are covered by article 18 of this document in accordance with which the guarantor is entitled to make a set-off on its counterclaim to the beneficiary. Here is also an exception to this right – the impossibility of such a set-off of claims that passed to the guarantor from the principal. Article 9 establishes a sign of non-transferability of the guarantee, that is, it is not possible to transfer rights under it to another person. It should be noted that not all countries that joined the Convention agreed with this provision, and there is no such provision in the Principles, Definitions and Model Rules of European Private Law (Study Group on a European Civil Code, & Research Group on EC Private Law (Acquis Group), 2008). In accordance with the rules, such an assignment is possible, but simultaneously with the assignment of the right to the claim provided by it.

These rules do not apply only to the first-demand guarantee (IV.G.-3:108). The right to personal objections of the guarantor in relation to the principal was also enshrined in article IV, paragraph 2.G.-3:103 in the Principles, Definitions and Model Rules of European Private Law (Study Group on a European Civil Code, & Research Group on EC Private Law (Acquis Group), 2008). The same rules describe this type of independent guarantee as a first-demand guarantee (article IV.G.-3:104). The guarantor cannot raise personal objections to it in contrast to the beneficiary's claims. Provisions of the above mentioned rules (art. IV.G.-3:106) establish the right of the guarantor and the principal to require from the beneficiary to pay damages and the amount of unjust enrichment: (c) the principal may claim the return of the beneficiary's received funds and compensation for damages in connection with the statement of an unreasonable claim for payment under the guarantee if the beneficiary demanded and received the performance from the guarantor in the absence of a secured debt; (d) the beneficiary's liability to the guarantor is also based on the beneficiary's receipt of an improper performance (including double performance from both the guarantor and the principal). A claim by the guarantor against the beneficiary for the return of unjust enrichment and compensation for losses caused by an unreasonable demand for payment is possible, in particular, when the guarantor failed to satisfy a recourse claim against the principal (for example, because of the bankruptcy of the latter). In the Principles, Definitions and Model Rules of European Private Law, there is no clear delineation of claims on the compensation by the debtor for the paid collateral by guarantees and claims on the compensation by the debtor for the paid collateral by warranties (Study Group on a European Civil Code, & Research Group on EC Private Law (Acquis Group), 2008). That is one of the hallmarks of the national regulation of these provisions. The rules mean the application of a single legal regime that includes a subrogation (article IV.G.-2:113, article IV.G.-3:109). Based on these rules, the guarantor who made the payment under the independent guarantee is also responsible for securing the principal's debt to the beneficiary. The document ICC Uniform Rules for Demand Guarantees (International Chamber of Commerce (ICC), 2010), regulates on-demand guarantees, requirements for which must be applied to all types of guarantees.

The document specifies such types of guarantees as: on-demand guarantees or counter-guarantees. The rules contain the following concepts: the applicant, the beneficiary, and the advising party. It is stated in this document that guarantee on demand or guarantee means any signed obligation, regardless of its name or description, providing for payment upon presentation of an appropriate claim. Here, the signs of a guarantee are also fixed: irrevocability, independence. Article 8 regulates data that the guarantee must

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contain, but these are only recommendations. In our opinion, an interesting provision is that all instructions for issuing guarantees and the guarantees themselves should be clear and precise and should not contain unnecessary details. The limits of the guarantor's liability apply to the amount of a guarantee in accordance with its terms, conditions and the above rules, but those that do not conflict with its terms.

Noteworthy are also provisions on the performance of the guarantee in the presence of force majeure, which means: natural disasters, riots, civil unrest, insurrections, wars, terrorist acts or any other circumstances beyond the control of the guarantor or counter-guarantor that prevent them from performing actions. For example, if a guarantee is presented before such conditions occur, its execution is delayed until they are completed. It should be noted that similar norms have not been fixed at the national Russian level. The civil legislation of the USSR contained rules on guarantees as one of the types of security for the performance of obligations-sureties and documentary letters of credit. In the new economic conditions, the Russian legislation has the institution of a bank guarantee as a way to ensure the fulfillment of obligations. This Institute combined the global trends of its development and was adapted to the Russian legal and economic reality. The transformation of the institute occurred in connection with the transition of the socialist economy to the "new rails" – denationalization. In the new Civil Code of the Russian Federation (part one) from 30.11.1994 № 51-FZ (1994), a bank guarantee is enshrined as an independent method of ensuring performance of obligations, the identification of it with the guarantee was excluded: by virtue of a Bank guarantee, a bank or another credit institution or insurance organization (guarantor) gives at the request of another person (the principal) a written obligation to pay to the creditor of the principal (beneficiary) in accordance with the terms given by the obligations guarantor a monetary amount upon the presentation by the beneficiary of the written requirement about this payment.

The range of guarantors was limited to a bank, another credit institution, or an insurance company. The introduction of such rules was based on the above-mentioned international acts. In 2015, this institution was subjected to a new transformation, which resulted in the formation of the "independent guarantee" institute in the Russian civil legislation; one of its types is a bank guarantee. Today, in the Russian legislation, a bank guarantee is one of the ways to ensure the fulfillment of an obligation, both personal and unilateral one. A bank guarantee can be considered as a contract or a transaction, and this depends on whether or not the legal value of the beneficiary's will be recognized. Such recognition can be fixed both in the contract and at the legislative level. If the will is given legal significance, then the bank guarantee should be considered as a contract, if not – as a transaction. A bank guarantee has specific features that allow it to be distinguished from other providing ways: one-sidedness, independence, causality, gratuitousness. The subject of the obligation can be both monetary and non-monetary, which is fixed at the legislative level.

Requirements for the presence of a bank guarantee are established by the provisions of the Civil Code of the Russian Federation (1994) and other legal acts. There is a certain set of requirements to organizations that can issue a bank guarantee. A list of such organizations is prepared by the Ministry of Finance of the Russian Federation according to information received from the Russian Central Bank. Considering a bank guarantee as a financial institution and as a transaction, it should be noted that it should be made in writing, and sent by any type of communication, including in the form of an electronic message using the SWIFT system. The legislator and the court practice confirm the provision that non-compliance

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with the requirements to the form does not entail the recognition of such a transaction as invalid. The absence of a signature of the chief accountant on the bank guarantee is not such a basis too. The signature of the head of the organization or a person entrusted to them is sufficient to confirm the will of the legal entity to conclude this transaction.

In the Republic of Kazakhstan, the rules regulating the guarantee are located in paragraph 6 of the Civil Code of this country (Civil Code of the Republic of Kazakhstan, 2015) together with the rules about the warranty. A guarantee is defined so: the guarantor undertakes before the creditor of another person (debtor) to be responsible for the performance of an obligation of that person wholly or partly in solidarity with the debtor, except for cases stipulated by legislative acts. It is also possible to issue a guarantee for obligations that will arise in the future; several persons may act on the side of the guarantor, in this case their liability will be joint (in contrast to the guarantee, where only a single person can be the guarantor and the liability is therefore subsidiary); legal relations in the field of guarantees arise from a written contract – guarantee; failure to comply with the requirements to the form entails the invalidity of the guarantee; the guarantee is only a provision of a valid claim; the guarantor is liable if he was notified of the debtor's incapacity, and the creditor did not have such information; as a general rule, the guarantor and the debtor are liable to the creditor in the same amount (all types of losses of the creditor arising from the failure or improper performance of obligations by the debtor), etc. The bank guarantee in the Republic of Kazakhstan can be issued by a bank of the 2nd level of the banking system, which received a license from the competent authority (article 331 of the Civil Code of the Republic of Kazakhstan, 2015).

In Moldova, the legislation enshrined only a bank guarantee (article 1774 of the Civil Code of the Republic of Moldova): "the written commitment made by a bank or another financial institution (guarantor) at the request of another person (the manager), to pay the administrator's creditor (beneficiary) a certain amount of money on the basis of a written application of the beneficiary" (Civil Code of the Republic of Moldova (Book three. Obligations), 2002). Under the civil law of the Republic of Moldova, a bank guarantee is an independent personal security on demand, in the form of a unilateral transaction. The contract is concluded in writing, is paid, and the terms are agreed between the parties. Both personal and proprietary collateral can be accepted as security for the guarantor's claim. The bank guarantee may be subject to the regulation of unified rules and customs, and the rules of the Civil Code are applicable to the extent that it does not contradict such rules and customs.

The Ukrainian legislator attributed the guarantee to one of the types ensuring the fulfillment of the obligation (article 546 of the Civil Code of Ukraine, 2003). According to the general rule that applies to all security types – the form is written, its non-compliance leads to the recognition of a transaction as null and void. Guarantors in Ukraine can be banks, other financial institutions, insurance organizations (the rules are similar to those which were previously in force in the Civil Code of the Russian Federation), which act as such for the beneficiary, guaranteeing that the principal fulfills his duty (Civil Code of Ukraine, 2003). The guarantor is responsible for non-performance of the obligation to the creditor. The guarantee is irrevocable, independent, non-transferable, and non-refundable. Article 569 establishes the right of the guarantor to a recourse claim against the debtor within the amount paid by him under the guarantee to the creditor. There are no provisions on liability for bank guarantees in the legislation. As we can see, these norms are almost identical to the norms of the Russian Civil Code that were in force before 2015.

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A similar regulation of the guarantee (without specifying its types) is provided by the civil legislation of Armenia. So, according to article 383 of the Civil Code of Armenia, the guarantor (bank, another credit institution or insurance company) at the request of another person (the principal) accepts a written undertaking related to the creditor of the principal (the beneficiary) to pay the beneficiary an monetary amount in accordance with the terms of the warranty upon submission of a written requirement by the beneficiary (Civil Code of the Republic of Armenia, 1998). As in the Ukrainian legislation, the guarantee is independent, irrevocable and non-transferable. As for recourse, the possibility of such a claim should be established by an agreement between the guarantor and the principal.

In accordance with article 478 of the Civil Code of the Republic of Azerbaijan (1999) by virtue of the guarantee, the guarantor (a bank, another credit institution or insurance organization) shall, at the request of another person (principal), give a written obligation to pay the principal's creditor (beneficiary) in accordance with the terms of the obligation given by the guarantor, a monetary amount upon submission by the beneficiary of a written request for its payment." The nature of the guarantee is legally fixed – ensuring the principal's obligation. The guarantee is paid, independent, irrevocable, and non-transferable (unless otherwise specified by the parties in its terms). The requirement: its form, terms of consideration and grounds for refusal are similar to the Russian law. As for recourse, the conditions for its application should be specified in the guarantee.

7. Conclusion

Allocation of a legal institution of bank guarantee is typical for the legislation of our country and the CIS countries. In the legislation of other countries, this institution is not a subject to the separate regulation. It should also be noted that the terminology is identical in the rules regulating bank guarantees in the Russian legislation and the legislation of the CIS countries. However, the latest reformation of this institute has shown the focus of our legislation on the unification of national and international law. The history of the development of the bank guarantee institution at the international level began in the 60s of the twentieth century, and in the 70s, its modern appearance was already formed. The development of the international bank guarantee institution was triggered initially by the development of the US domestic market, and later by a large number of investment projects being implemented in the Middle East. And since the implementation of any project is associated with certain risks, this is what has created the need for a legal institution with the help of which it would be possible to provide various types of projects in business as reliably and liquid as possible. The bank guarantee institute can rightly be considered as such an institution.

References

Civil Code of the Republic of Armenia (1998). no. ZR-239 from July 28, 1998. Retrieved from http://www.parliament.am/law_docs/050598HO239rus.html Accessed: 07.12.2019. [in Rus.].

Civil Code of the Republic of Azerbaijan (1999). Retrieved from https://online.zakon.kz/Document/?doc_id=30420111 Accessed: 07.12.2019. [in Rus.].

Civil Code of the Republic of Kazakhstan (2015). Retrieved from https://online.zakon.kz/document/?doc_id=1006061 Accessed: 07.12.2019. [in Rus.].

Civil Code of the Republic of Moldova (Book three. Obligations) (2002). Retrieved from https://online.zakon.kz/document/?doc_id=30397914 Accessed: 07.12.2019. [in Rus.].

Civil Code of the Russian Federation (1994). Part 1. Retrieved from http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=340325&fld=134&dst=100008,0&rnd=0.09688529702033488#08699275486476137 Accessed: 07.12.2019. [in Rus.].

Civil Code of Ukraine (2003). no. 435-IV, 435-IV of 16.01.2003. Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/T030435.html Accessed: 07.12.2019. [in Rus.].

Holden, M. J. (1998). *The law and practice of banking*. New Delhi: Universal Law Publishing Co Ltd.

International Chamber of Commerce (ICC) (1978). *Uniform rules for contract guarantees. ICC publication No. 325*. Retrieved from http://www.conventions.ru/view_base.php?id=19907 Accessed 07.12.2019. [in Rus.].

International Chamber of Commerce (ICC) (1992). *ICC uniform rules for demand guarantees*. *ICC publication No. 458*. Retrieved from https://base.garant.ru/517245/. Accessed: 07.12.2019. [in Rus.].

International Chamber of Commerce (ICC) (1998). *ISP 98 international standby practices – Bilingual English-Russian edition*. Retrieved from http://store.iccwbo.org/isp-98-international-standby-practices-bilingual-english-russian-edition Accessed: Accessed: 07.12.2019.

International Chamber of Commerce (ICC) (2010). ICC Uniform Rules for Demand Guarantees. ICC Publication N 758. Retrieved from https://ru.scribd.com/doc/63397237/International-Rules-for-Demand-Guarantees-URDG-758 Accessed: 07.12.2019.

Knezevic, M., & Lukic, A. (2016). The importance of bank guarantees in modern business (business environment in Serbia). *Investment Management and Financial Innovations, 13*(3-1), 215-221. DOI: 10.21511/imfi.13(3-1).2016.07

Kobler, G. (2007). *Juristisches Wörterbuch: Für Studium und Ausbildung*. Munchen: Verlag Franz Vahlen GmbH.

Lukic, A. (2014). The role and importance of bank demand guarantees in international trade. *International Journal of Economic Research, v5i3*, 06-09.

Nikolova, L. (2018). Problems of trade financing development in the Russian Federation. *The EUrASEANs: Journal on Global Socio-Economic Dynamics, 6*(13), 34-44.

Study Group on a European Civil Code, & Research Group on EC Private Law (Acquis Group) (2008). *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)*. Retrieved from https://www.law.kuleuven.be/personal/mstorme/european-private-law_en.pdf Accessed: 07.12.2019.

UN Convention on independent guarantees and standby letters of credit, adopted on 11.12.1995. Retrieved from https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees Accessed: 07.12.2019.

UNCITRAL uniform law on international guarantee letters. Retrieved from https://iccwbo.org/publication/icc-endorsement-of-the-uncitral-convention-on-independent-guarantees-and-stand-by-letters-of-credit/ Accessed: 07.12.2019.