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LEGAL REGULATION OF THE BANK GUARANTEE AS A MEAN OF SECURITY UNDER THE MACEDONIAN AND COMPARATIVE LAW

(Summary)

The dynamic development that modern corporate relations are facing with a constant trend of internationalization of the investment undertakings followed up by a time extension of completion of the obligations have led to the rapid growth of the popularity and the meaning of the bank guarantee as a mean of security. The mass usage of the bank guarantees in domestic and international legal transactions opens the question of whether the domestic laws can adequately answer the needs of the business sector or the development and usage of the bank guarantee will be determined by the autonomic business practice. The author of this paper through a normative analysis of the legal regulation of the bank guarantee in the domestic legal system will give adequate critics regarding the applicability of the domestic laws vis a vis the real needs of the business practice. The growing diversification of the types of the bank guarantee with the related institutes for providing a bank guarantee as well as the fact that this institute is a regular accessory to every serious financial undertaking demand the author to analyze the comparative and international sources of the law that are related to the bank guarantee as a method of securing the claims. Therefore, the author of this paper will make a short analysis of the comparative solutions in the legal systems close to the Macedonian legal system as well as on the Model Rules of the International Chamber of Commerce in Paris.

Keywords: Bank, Guarantee, securing claims, creditor, debtor, warrant.

I. INTRODUCTION

The dynamic trade relations that experience daily quantitative and qualitative expansion followed by a pronounced degree of risk of timely, quality and complete fulfilment of the debtor's obligations for the proper execution of the contracts raise the question of the means of securing the claims. Timely detection of risk as an economic and legal category and the increased awareness of its occurrence followed by the time extension of the contractual relations in modern business reality require the creditor to be constantly looking for an appropriate means of securing his claims. Large investments that often last several years require a serious mean of security for the creditor's claims where the mean of security provided by the debtor is not always sufficient in a quantitative and qualitative sense for a comprehensive settlement of the creditor. Creditors always prefer the debtor's obligation to be followed by a certain guarantee of a third party who has sufficient credibility primarily financially, which sufficiently guarantees the creditor that the debtor's obligation will be properly, timely and fully fulfilled, and if the debtor fails in its fulfilment, then

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a third party will pay the appropriate monetary equivalent to the creditor. This is how we come to the notion of a bank guarantee as a mean of security. Bank guarantee appeared in the commercial practice at the end of the XIX century and since then there has been a consistent trend of the rapid growth of its popularity. The reasons for the popularity of the bank guarantee as a mean of securing is conditioned by several factors. The development of international trade relations influenced their appearance of new and the evolution of existing instruments for ensuring the quality of fulfilment of obligations arising from trade agreements but today there is no instrument for securing the claims that are important in business relations as a bank guarantee. If we have to single out one reason for the popularity of the bank guarantee (*of course there are several reasons*) it is the fact that in business relations with a bank guarantee the bank appears as a guarantor or issuer of the guarantee which adds additional assurance to the creditor that the obligation owed to him will be properly and timely fulfilled.

Despite the existence of a plurality of means of security available to the contracting parties such as the collateral agreement, the contractual penalty, the insurance contract and others, however, the bank guarantee seems to sovereignly hold the primacy of the most effective means of security. of claims when it comes to modern trade relations. In theory, there are several definitions of bank guarantee but due to the economy of the paper the author decided on the following definition: *"The bank guarantee is a specific type of personal mean of security the claims which arose from the institute of guarantee whose specificity and practical advantage is the fact that the debtor's obligation is guaranteed by a bank - the issuer of the guarantee which as a rule is in a special regime of supervision and control by the central bank so it is a very trustworthy debtor"*[1]

In the further part of the paper, the author will deal with the legal regulation of the bank guarantee in the domestic and comparative law with special reference to the international sources of the law on bank guarantees.

II. LEGAL FRAMEWORK OF THE BANK GUARANTEE AS A MEANS OF SECURING CLAIMS UNDER THE LAW OF NORTH MACEDONIA

Agreements as a consent of the will of the parties related to a particular object represent the legal facts that are the basis for the occurrence of the obligation relationship. If the effect that contracts have is taken into consideration, they can be divided into 5 major groups of contracts.[2] The bank guarantee, given the legal effect it possesses, is systematized in the group of agreements which are the legal basis for strengthening the claims. In addition to the bank guarantee, this group of contracts also includes pledge agreement, guarantee, contractual penalty etc. Having in mind that the dominant field of interest of this paper is exactly the bank guarantee, the author will not dwell on the legal regulation of the other agreements in this group and they will be subject to sporadic processing. The bank guarantee in the Macedonian positive law, in addition to belonging to the group of agreements which are the legal basis for strengthening the claims, this agreement according to the degree of regulation in the positive legal regulations, in the systemic Law on Obligations from 2001 It also belongs to the family of named legal matters, i.e named contracts. The bank guarantee in the domestic legislation is scarcely regulated by Articles 1122 - 1126 of the Law on Obligations and it is a recurrence of the federal law of 1978 and is defined by the content of the liabilities of the bang guarantor *"With the bank guarantee, the bank undertakes towards the*

[1] Zivkovic M, Development of the legal system of Serbia and harmonization with EU law, Faculty of Law, University of Belgrade page 229

[2] See: Galev G, Dabovikj – Anastasovska J. Law on Obligations, Skopje 2012

recipient of the guarantee (the beneficiary) that in case a third party does not fulfil its obligation within the certain period, it will settle the obligation if the conditions stated in the guarantee are met. The guarantee must be in written form. "[3] From the very legal definition of this term, no conclusions can be drawn about the essential elements of the guarantee, for the legal relations on the occasion of which it occurs or which occur as a consequence of it, nor can its legal nature be determined. However, this legal definition of the term bank guarantee is a basic basis for its application and its understanding. However, to gain a broader context of the meaning of the term bank guarantee, the perceptions of this institute must be analyzed. It is necessary to analyze the views of legal jurisprudence, especially international.

It is worth noting that the regulated articles that refer to the bank guarantee in the Macedonian obligation law regulate only one segment of the legal relations that occur with the bank guarantee as well as the relations on the occasion of which the bank guarantee itself occurs. Macedonian positive law does not deal at all with the agreement for issuing the bank guarantee as an agreement that regulates the legal relations between the debtor from the basic legal work who is the ordering party and the bank issuer of the guarantee. As a rule, this issue is left to the autonomous trade practice as a matter that should be developed through the interaction of the entities in the trade relations.

i. The agreement for issuing a bank guarantee as an unnamed agreement

The agreement for issuing a bank guarantee is a special type of unnamed agreement by which the guarantor bank undertakes to issue a guarantee in its name but on behalf of the principal (the debtor from the basic legal work) in favour of a third party (the creditor from the basic legal work) which the third party after the issuance of the bank guarantee will acquire the status of a beneficiary of the guarantee.[4] By agreeing to issue a bank guarantee, the bank assumes the obligation to pay the guaranteed monetary amount of the guarantee if its client fails to perform its basic obligation, but unlike an ordinary guarantee here the bank does not undertake the execution of the obligation of its client, which obligation arises from the basic agreement between the creditor and the debtor, but only assumes the obligation to pay a certain amount of money which amount has a guaranteed character and is a replacement for the unfulfilled obligation under the basic contract.[5] From here it is clear that the agreement for issuing a bank guarantee creates a legal presumption and basis for issuing a bank guarantee as a realized order from the principal where the bank is the agent, based on which a new and independent legal relationship is established between the guarantor bank and beneficiary of the bank guarantee. The bank guarantee agreement itself is essentially a formal, adhesive and standard agreement. Even though the client of the bank, ie the ordering party in most cases is known to the bank from before as they have established proper business practice, it does not have such causal power in the negotiation process with the bank which undoubtedly represents the stronger side in this regard to "box" its own terms of the contract but most often it is directed to approach the already given contractual conditions. This agreement is usually concluded in written form, and it is a commutative, mutually binding agreement. The basic elements of this agreement are the bank commission which is obliged to pay the ordering party and the guaranteed

[3] Article 1122 of Law on Obligations (Official Gazette of the Republic of Macedonia 18/01, 78/01, 04/02, 59/02, 05/03, 84/08, 81/09, 161/09, 23/13 и 123/13).

[4]See: Minic Savo Legal Aspects of Bank Guarantee as a Mean of Securing Claims, DOCTORAL DISSERTATION, UNIVERSITY BUSINESS ACADEMY IN NOVI SAD FACULTY OF LAW AND COMMERCE AND JUDICIARY IN NOVI SAD 2018, page 97

[5] *Ibid. p.p 110*

amount. The bank fee in this case has the status of interest on reserved funds. It is worth mentioning that in most of the cases, the ordering party, although it enters the business venture on its own, does not have all the funds necessary for the realization of this venture but at the moment of entering into that venture, he hopes that he is capable of completing it. For that reason, it independently strives to fulfil its contractually undertaken obligations with its funds and capacities, while the bank that received the order to issue a bank guarantee only adds a qualitative reinforcement of the security to the creditor that the debtor will fulfil his obligation. If there is an evasion of fulfilment by the debtor and activation of the bank guarantee in favour of the creditor, in that case, the bank guarantee issuance agreement usually turns into a loan agreement where the principal has the role of a borrower who later has to return it to the bank in annuities. For these reasons, often in the agreement for issuing a bank guarantee, it is explicitly stated that if the bank guarantee is realized, it will be considered that the bank has given a loan to the ordering party. Thus, from the moment of concluding the contract for issuing a bank guarantee, the ordering party owes the bank a fee in the form of commission, but if the bank guarantee is activated, it will be converted into a loan. In that case, the principal as a debtor from the basic agreement will have to repay the bank loan in equal annuities. The difference between the loan agreement and the agreement for issuing a bank guarantee is reflected in the service provided by the bank itself. In theory, there is an opinion that the issuance of bank guarantees enters the sphere of activity of banks and has the status of neutral banking service. Starting from the division of banking services into active (where banks appear as creditors as in loans), passive (where banks appear as debtors as in deposits) and neutral where the bank has neither the status of a creditor nor the debtor but performs a service activity of a temporary nature.[6]

ii. Bank guarantee as a named contract

It has already been mentioned that the Bank guarantee in the Macedonian obligation law is a named legal work, ie a named contract. Although at first glance this institute is scantily regulated in the domestic law of obligations, what is extremely important for this paper is that with the very act of regulating this institute within the systemic law and its clear differentiation from his ancestor - the guarantee agreement with the addition of the term Bank in the whole name reaffirms the great importance that this means of securing for the Macedonian business relations on the one hand and the trust enjoyed by the banks as financial institutions on the other hand.

In the provisions of the law that regulate the bank guarantee, two important principles are highlighted, which are a kind of feature of the bank guarantee. First is the principle of formality provided in Article 1122 paragraph 2 which contains an imperative provision in terms of the form in which the bank guarantee should be concluded and states that *"The guarantee must be issued in written form."* This principle acquires serious significance only in countries where the bank guarantee is a named agreement regulated by the law of obligations, while in Western countries where the bank guarantee itself is a product of autonomous trade practice based on the principle consensus between merchants this principle is irrelevant.

The second principle provided in the Law on Obligations is the principle of Article 1123 which provides that *"The bank will pay in cash even when the obligation guaranteed by the bank is non-monetary"* A qualitative step forward from a standard point of view is the fact that this article stipulates that a bank guarantee can be provided for a non-monetary obligation, thus avoiding all doubts regarding the question of which obligations the bank guarantees.

[6] See Caric S. Banking services and securities. Scientific book Belgrade 1987

However, in theory, the question is open about the number of funds with which the bank guarantees, ie whether the amount with which the bank guarantees should be determined or determinable. In practice, the view is generally accepted that this issue is regulated in the previous agreement for issuing a bank guarantee where, as a rule, the maximum amount with which the bank guarantees are determined and the amount of the activated guarantee may be less than or equal to the maximum amount. Hence, the essence of this principle is that the bank always fulfils its obligation in money, regardless of the fact that it may have guaranteed a certain debt obligation that is non-monetary.

During the regulation of the institute of bank guarantee, in addition to the principles of monetary and formality, our legislator decided to emphasize two types of bank guarantee, which are essentially sub-institutes of the bank guarantee. These are subspecies of bank guarantee that are frequently used. These are super guarantee and guarantee on demand.

a. Super guarantee

The legislator in Article 1124 where the confirmation of the guarantee is regulated(super guarantee), in essence, does not give a classical legal definition of the term super guarantee but is determined for its description through the right of the guarantee beneficiary to submit a request for payment to any of the banks. So the law says "*If another bank confirms the obligation under the guarantee, the beneficiary may submit its claims under the guarantee either to the bank that issued the guarantee or to the one that confirmed the guarantee*." The need for participation of several banks in the guarantee relationship is only a consequence of the complexity of the obligations guaranteed by the bank and the degree of (dis) trust between the debtor and the creditor on the one hand as well as the plurality of banks that exist in the market at the moment that are essentially different from each other. Banks differ from each other in terms of adequacy and the amount of capital they have, the market share and the number of clients they hold, as well as the degree of liquidity and solvency in the turnover. Thus, the creditor can not always be satisfied with the choice of the bank for which the debtor has chosen to be the issuer of the bank guarantee, so it is common for him to ask for the guarantee issued by the issuing bank to be confirmed by another bank that enjoys a greater degree of solvency. Most often, the issuance of a super guarantee is done by an order issued by the super guarantee bank, which confirms the issued initial guarantee by the issuing bank.[7] Of course, the business logic is not missing in the case of super guarantee, so the super guarantee bank does not enter into this relationship without any interest, but it is about banks that usually have established long-term business relationships.

b. Guarantee on demand

Article 1126 of the Law on Obligations, which regulates the guarantee on-demand, is the most extensive article that regulates the bank guarantee. However, although the most extensive, this article regulates only the unconditional bank guarantee while the conditional bank guarantee is left to the autonomous will of the contracting parties. The division of bank guarantees into conditional and unconditional is based on the fact whether it is necessary to meet a certain condition beforehand, which would be a condition for the guarantee beneficiary to submit a request for collection to the bank issuing the guarantee.[8] An unconditional bank guarantee is a type of

[7] Jang, N. (2009): Bank guarntee in Germany. Berlin, Esp, pgn. 203.

[8] See: Minic Savo Legal Aspects of Bank Guarantee as a Mean of Securing Claims, DOCTORAL DISSERTATION, UNIVERSITY BUSINESS ACADEMY IN NOVI SAD FACULTY OF LAW AND COMMERCE AND JUDICIARY IN NOVI SAD 2018 page 160-168

guarantee in the content of which there is no condition or restriction stipulated as a preliminary obstacle for the guarantee beneficiary to activate the collection of the guaranteed monetary amount. Our law is on the same line "*If the bank guarantee contains a clause "without objection", on the "first call" or contains words that have the same meaning, the bank can not point out to the beneficiary the objections that the principal as a debtor can point out to the user after the secured obligation. The principal is obliged to pay to the bank any amount paid by the bank based on a guarantee issued by the clause without objection. The beneficiary of the guarantee owes to the principal the amount received based on the guarantee to which he would not otherwise be entitled due to the justified objections of the principal.*" If a sufficient analysis is made of this type of guarantee on demand, it can be noticed that this type of guarantee is the most desirable form of guarantee for the creditor because without any particular difficulties it can reach the stage of activation of the guarantee. On the other hand, the bank is relieved of the burden of proving the objections between the debtor and the creditor and proving them.

c. Transfer of the bank guarantee

The Law on Obligations in Article 1125 also regulates the transfer of the bank guarantee observed through the prism of its beneficiary. The transfer of the bank guarantee is referred to as "Deviation of the rights from the guarantee" which states that "*The beneficiary may assign his rights from the bank guarantee to a third party only with the assignment of the claim secured by the guarantee and the transfer of his obligations in connection with the secured claim.*" From this way of regulation of the transfer it can be noticed that it is a conditional transfer where for a valid transfer of the rights from the bank guarantee it is necessary to have a deviation from the claim secured by the bank guarantee. This means that to transfer the bank guarantee it is necessary for there to be a change on the part of the creditor from the basic legal work.

III. LEGAL FRAMEWORK OF THE BANK GUARANTEE IN COMPARATIVE LAW

While we are analyzing the legal regulation of the bank guarantee as a means of securing claims, we necessarily have to refer to the related legal systems with which the Macedonian legislation nurtures the same legal tradition. The analysis of the institute of bank guarantee in comparative law enables us to be updated in terms of the novelties that are needed in the future regulation and are a consequence of the increased needs of the real turnover between traders. Due to the economy of the paper, the author will deal with the regulation of the bank guarantee in the Republic of Serbia and the Republic of Croatia as two related legal systems which together with the Macedonian legal system are successors of the former federal system of law on bank guarantees.

i. Legal regulation of the bank guarantee in the Republic of Serbia

Regarding the institute of bank guarantee in the Republic of Serbia, it is regulated by the Serbian Law on Obligations[9] in Chapter XXXVIII Articles 1083-1087. In Serbia, the bank guarantee is also named agreement that is regulated in an almost identical way as in the Republic of Northern Macedonia as a consequence of the fact that both laws represent a recurrence of the Federal Law on Obligations from 1978. This law, in the same way as the Macedonian one, identically defines

[9]See: https://www.paragraf.rs/propisi/zakon_o_obligacionim_odnosima.html

the bank guarantee, the principles of formality and the principle of monetary are provided, the types of super guarantee and guarantee on-demand are provided and the transfer of the bank guarantee itself is regulated.

ii. Legal regulation of the bank guarantee in the Republic of Croatia

In the Republic of Croatia, the bank guarantee is regulated at a higher nomotechnical level in the Croatian Law on Obligations.[10] Croatian law speaks exclusively of the guarantee on-demand, which is the unconditional bank guarantee. Unlike the Macedonian and Serbian law, the Croatian law also contains provisions for another sub-institute of the bank guarantee, which is the counter-guarantee. Thus, according to Croatian law, *"a counter-guarantee is a written obligation to pay, whatever it is called, by which the bank (counter-guarantor) undertakes to the guarantor that it will pay him the amount of money upon presentation of a written request in accordance with the terms of the counter-guarantee the counter-guarantee is separate from the guarantee and from the basic business to which it refers, even when they are mentioned in the counter-guarantee"* The other provisions also state that there is no difference between the Macedonian and Croatian legislation.

IV. INTERNATIONAL SOURCES OF BANK GUARANTEE LAW

When we talk about international standardization and regulation of the law on guarantees we are essentially referring to the international sources of the law on guarantees. When it comes to international trade relations, it is extremely important to note that the degree of legal regulation of this institute is determined by the autonomous trade practice and business reality. In this segment of the autonomous sources of the law on bank guarantees, the Paris International Chamber of Commerce leads with its model rules.[11] The emergence and use of bank guarantees are essentially a consequence of the needs of international trade, which require an international approach to the creation of law and its unification to the extent and quality that would meet the needs of the trade entities themselves. The International Chamber of Commerce of Paris, although not a classic interstate or intergovernmental international organization, still with its model rules achieves a significant impact in the field of bank guarantees.

Until today the International Chamber of Commerce in Paris has published 3 publications related to bank guarantees:

- Uniform Rules for Contract Guarantee (Publication 325)
- Uniform Rules for Demand Guarantees (Publication 459)
- Uniform Rules for Demand Guarantees (Publication 758)[12]

The significance of these model rules extends to the extent that they apply to different types of guarantees. These rules have a strong trend of acceptance by the participants in international trade because they regulate all situations that are not foreseen in the text of the guarantee. URDG - Publication no. 758 are currently the only available contract rules dedicated exclusively to guarantees and counter-guarantees and which have been gaining importance since 2004. The application of these rules allows avoiding different interpretations of the clauses that are not sufficiently specified or are ambiguous and therefore it is recommended to apply these rules in the

[10] See: https://www.zakon.hr/z/75/Zakon-o-obveznim-odnosima

[11] See: https://iccwbo.org/

[12] See: http://www.cipcic-bragadin.com/wp-content/uploads/2015/09/ICC-URDG-758.pdf

warranties. The rules of Publication No. 758 are the most important rules regarding bank guarantees and they are an improved version of the rules of Publication No. 459. Publication 758 appears as a logical consequence of the dynamic development of trade relations determined primarily by the development of IT technology and globalization processes where there is a spontaneous deletion of geographical barriers to doing business that open the need to use international unified rules. for guarantees. The Uniform Rules for Demand Guarantees ("URDG") apply to any demand guarantee or counter-guarantee that expressly indicates it is subject to them. They are binding on all parties to the demand guarantee or counter-guarantee except so far as the demand guarantee or counter-guarantee modifies or excludes them. Among other things, this publication contains provisions on application, definitions, interpretation, advancement, issuance and entry into force, control of guarantees. Probably the biggest qualitative step forward in this publication is in the part of defining the basic terms that are used because by clearly and sufficiently defining the terms to understand them, it is easier to apply them. Additionally, the very fact that the publication number 758 appears as a kind of legal successor of the publication 459 speaks enough that there is room for analysis of the practical application and the degree of acceptance of the rules from the publication 459 in determining the text of the publication 758 and removing all anomalies. occurred during the application of the previous rules.

V. CONCLUSION

Analyzing the legal regulation in the Macedonian, comparative and international law is essential for the understanding of this institute which has the primacy among the other means for securing the claims, thanks to its efficiency. The description of the legal norms in the positive Macedonian legislation is an opportunity to see the essence of the meaning of the bank guarantee. The analysis of the legal regulation of this institute gives us a solid opportunity to give an appropriate assessment of the degree of regularity in the regulation and standardization of this institute vice versa the degree of development that has reached the autonomous trade practice. The comparison between the solutions provided in the legislation that is similar to ours opens new horizons that could be used as a guiding idea in the future regulation of this institute *de lege ferrenda*. The massive use of bank guarantees in domestic and international legal transactions raises the question of whether national legislative solutions can adequately meet the needs of real business practise or the development and use of bank guarantees will be determined by autonomous trade practice. For a more complete understanding and proper implementation in the commercial practice, domestic and international, it is necessary to properly differentiate this institute from the other institutes to secure the claims that were mentioned in this paper, as well as to give a more serious overview of the international autonomous sources of law, primarily the model rules of the International Chamber of Commerce from Paris, as well as to study to a degree of meticulousness all the important and irrelevant elements of the bank guarantee itself, something that due to the character and spatial economy, the author of this paper only sporadically started them as legal issues.

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