BANK GUARANTEES

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Abstract

The present study propose the analyse of the irrevocable commitment of a bank entity towards a determined person, through which guarantees a certain legal conduct of its client, and, in case of breach, assumes the payment obligation of a determined amount of money. This kind of legal technique it is called bank guarantee and in the usual business language it is called "Letter of Bank Guarantee". The determined reason to choose this scientific initiative it is the frequency of this kind of financial - banking commitments with various practical issues which are occurred by the use of those.

From the legal point of view, the bank guarantees are not under an own legal regulation and are based on the common law, used in the guarantees domain. Through the new aspects of the actual Civil Code it are the legal regulation of the letter of bank guarantee and of the comfort letter, which shall constitute the main regulation in the negotiation and conclusion of a letter of bank guarantee or a bank comfort letter. For the legal reports with foreign elements, the parties can also use the Uniform Rules regarding the Guarantees at Request (URGR) Publish no.758/2010.

Keywords: *guarantee, letter of guarantee, comfort letter, obligation, issuant, beneficiary, debtor.*

1. Introductory notions

By adopting the new civil code, several institutions of private law have been redefined and others were first introduced in the Romanian legal regulation. They also include the institution of guarantees.

The participants in relationships involving obligations specific to guarantees may be the natural persons and legal entities and, according to this criterion, the guarantees may be real, when these relate to movable or immovable property and personal guarantees, when the guarantor is liable with all the present and future assets to guarantee his obligations.

2. The concept of bank guarantee

In the practice of commercial activities are more frequent the situations where the obligations undertaken by different subjects of legal relationships are guaranteed by the banking entities or by non-banking financial institutions[1].

The bank guarantees are preferred to other categories of guarantees due to the financial credibility enjoyed by the banking companies in the relevant market, as well as due to easiness to capitalize them.

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[1] The non-banking financial institutions are regulated by the Law no. 93/2009 regarding the non-banking financial institutions, published in the Official Gazette no. 259 of April 21, 2009.

It is necessary to note that not all the guarantees in which is involved a banking entity fall into the category of the bank guarantees.

In the carried on crediting activity, a banking company is required to comply with the financial prudence regulations which, among others, imply the procurement of some guarantees from the debtors credited by it. According to quality of the debtors and the purpose of the credit, the banking entities request the establishment of some real or personal guarantees. It is understood that, in case of failure to reimburse the granted credit, the lending bank will pursue either the assets assigned to guarantee, or the persons who have undertaken the obligation to make the payment instead of the debtor, if he fails to fulfill it. Not such relationships involving obligations form the content of the bank obligations. In order to be in the presence of a bank guarantee is required the bank to take the legal position of debtor of the payment obligation. It is noted that, in case of the lending operations for which the debtor brings real or personal guarantees, the bank has the status of creditor of the guarantees, meaning that it is the beneficiary of the guarantee, a quality that allows it to pursue them in order to satisfy its debts to the guaranteed debtor. Or, the bank guarantees are those where the bank has the capacity of debtor, meaning that it undertakes the obligation to pay a sum of money or to indemnify if the debtor guaranteed by it does not fulfil or fulfil improperly the guaranteed obligations.

Therefore, in the crediting relationships, the bank has the capacity of creditor of the real or personal guarantee set up in its favour and, as concerns the bank guarantees, the issuing bank has the capacity of debtor of the guarantee. It means that, if the customer guaranteed by it will not fulfil the obligation to reimburse the credit, the lending bank will satisfy its debt by pursuing the assets assigned to guarantee or the persons who have undertaken to make the payment instead of the debtor. The guarantees accompanying the credit have nothing particularly compared to the civil legal guarantees, meaning that they may be real or personal, that is the debtor may set up an immovable or movable property or he may guarantee with his entire patrimony. The only difference is that the beneficiary of the guarantees of the credit is the lending bank entity.

On the other hand, the bank guarantees are different from the ordinary guarantees in that they are intended only to pay a sum of money or to give some compensation. Unlike the guarantees of common law that may have as object both movable and immovable property, as well as the personal guarantees, the bank guarantees are set up exclusively on some amounts. In other words, the bank issuing the guarantee is committed to its beneficiary, not with an immovable property or determined movable property, but with its entire patrimony. This is because, according to the financial-bank prudence rules, the acquisition and the ownership of movable and immovable property, it has a legal system very different from the other legal entities and natural persons.

3. Concept and regulation

As shown above, the new Civil Code has defined the field of guarantees and, as a novelty, introduced the so-called category of *autonomous guarantees*. Under the heading *autonomous guarantees*, the Civil Code regulates the letter of guarantee in article 2321 and the letter of comfort within the content of article 2322.

We notice, therefore, that the legislator does not use the term of bank guarantee, but, in practice, both the letter of guarantee and the letter of comfort are issued by a banking entity. Hence the usual expression *letter of guarantee*. Certainly, as the two categories of guarantees are regulated, they may be used and issued by any participant in the legal relationships, but, as we mentioned, they are especially used by the issuers of the banking companies. Hence the consequence according to which, if they are issued by other entities, they shall have the character of ordinary guarantees and only if they are undertaken by a banking entity or non-banking financial institution, they will acquire the legal status of bank guarantees.

4. Letter of bank guarantee

According to the provisions of article 2321 of Civil Code, the letter of guarantee is the irrevocable and unconditional commitment by which a person, called issuer, undertakes, at the request of a person called authorizing officer, in consideration of a preexisting report involving obligations, but independently, to pay a sum of money to a third party called beneficiary, under the terms of the undertaken commitment.

The definition given by the legislator shows the main characters of the letter of bank guarantee.

Thus, although the legislator uses the notion of *guarantee*, actually, this is an authentic contract between the issuer and the beneficiary of the guarantee. It follows that this category of obligations has as source the parties' agreement and, at least in principle, it cannot be set up by a judicial process or by any legal norm.

Then, the letter of guarantee has an irrevocable character, resembling with the irrevocable documentary letter of credit[2]. The irrevocable character of the letter of bank guarantee consists in the fact that, once undertaken the payment committed, it cannot be unilaterally revoked, denounced or modified by the issuing bank.

The commitment made by the issuing bank is also unconditional, meaning that the bank will pay, without being able to invoke the exceptions resulting from the relationships involving obligations which are guaranteed by it. Hence the autonomous character of the letter of guarantee materialized by the payment of money, independently of the pre-existing legal relationships guaranteed by it.

The letter of bank guarantee has a trilateral character, expressed by the fact that in the conduct of the relationships of guarantee participate at least three entities: the issuing bank, the authorizing officer and the beneficiary.

This type of guarantee requires a relationship involving obligations, pre-existing and independently of it. In other words, as a technique of drawing up and issuing the guarantee, the bank will undertake the irrevocable payment commitment only after the obligations intended to be guaranteed have been executed.

The letter of guarantee aims to pay a sum of money, which means that will not be brought as a guarantee any movable or immovable property. Since is not specified a property or a category of assets as a guarantee, it means that the issuing bank exhibits its entire patrimony on the occasion of issuing the letter of guarantee, meaning that its status is very similar to the personal guarantor' status from the relationships involving obligations specific to the common law.

5. The participants in the legal relationships specific to the letter of guarantee

As shown in the definition given by article 1321 of Civil Code, in the conduct of the relationships of a letter of guarantee take part the issuer, the authorizing officer and the beneficiary.

Under the silence of law, in capacity of issuer may be any natural person or legal entity and the undertaken commitment will have the legal nature of the letter of bank guarantee only in case it was undertaken by a banking entity or non-banking financial institution.

[2] The main regulation of the documentary letter of credit is the Publication no. 600 regarding the uniform rules and the practice on the letters of credit of the Chamber of International Commerce - Paris (UCP - 600); for further details concerning the documentary letters of credits, see V. Nemes, Banking Law. Academic course, "Juridic Universul" Publishing, Bucharest 2011, page 184 et seq.

The issuing bank has the capacity of debtor of the guarantee, meaning that if its customer, that is the authorizing officer guaranteed by it does not fulfil his obligations or fulfill them improperly, the issuing bank will pay a sum of money to the third-party beneficiary.

The authorizing officer of the bank is a customer who, in the preexisting relationships involving obligations, acts as a debtor, meaning that he has to execute certain actions, to perform works, to provide services or to deliver certain goods to the beneficiary, pursuant to some arrangements made with him. Thus, the letter of guarantee requires the existence of at least two conventions. The first consists of the agreement between the authorizing officer and the beneficiary to deliver certain assets, to perform works or to provide services and the second is the convention that materializes the proper letter of guarantee by which the issuing bank undertakes to pay a sum of money to the beneficiary.

The position of the participants in the relationships specific to the letter of guarantee is different. In the convention generating the preexistent relationship involving obligations, the parties are the authorizing officer and the beneficiary and their capacity varies according to the nature of the convention. This may be a sale-purchase contract by which the authorizing officer, in capacity of seller, undertakes to deliver certain goods to the beneficiary, in capacity of buyer, or may be an agreement, an enterprise contract by which the authorizing officer, in capacity of entrepreneur, undertakes to perform a work for the beneficiary.

The mechanism of the bank guarantee arises from the protection ensured by the beneficiary. Keeping on the above examples, the beneficiary, in capacity of buyer or, where appropriate, consignee of the works, requires the authorizing officer, namely the seller, respectively the entrepreneur, to bring as a guarantee the obligation of a bank to compensate him by paying a sum of money, if the authorizing officer, in capacity of seller or, where appropriate, entrepreneur, will not fulfill his obligations or will fulfill them improperly. Definitely, he will not deliver the goods at the deadline agreed in the contract, he will not deliver the goods as determined by the parties, he will not complete the works within the agreed period etc.

From the technique of regulation and operation of the letter of guarantee is understood that the parties of a bank guarantee are the issuing bank and the beneficiary of the guarantee. This is because the issuing bank undertakes to make the payment to the beneficiary. We notice, therefore, that the authorizing officer is not a party of the letter of guarantee, as the issuing bank is not a party of the contract which generated the preexisting relationship involving obligations.

Definitely, under the principle of relativity of legal documents, the letter of guarantee will cause legal effects between the issuing bank and the beneficiary, the authorizing officer being a third party of it and the contract which generated the preexisting relationship involving obligations will cause legal effects exclusively between the authorizing officer and the beneficiary and the third party of the contract being, this time, the issuing bank.

6. The purpose of the bank guarantees

As we mentioned above, according to the provisions of article 2321 of Civil Code, the letter of guarantee is the commitment by which the issuer undertakes, at the request of the authorizing officer, to pay a sum of money to the beneficiary for the event that the authorizing officer will not fulfill his obligations arising from the preexisting legal relationships or will fulfill them improperly.

As we can see in the content of article 1321 of Civil Code, the obligation of the issuing bank consists of the payment of an amount. Therefore, the purpose of the letter of bank guarantee will consist of sums of money, excepting other movable or immovable property.

Definitely, the purpose of the letter of bank guarantee is the irrevocable and unconditional obligation of the issuing bank to pay a sum of money to the third party, called the beneficiary, in the event that the authorizing officer fails to perform his obligations or perform them improperly.

7. The effects of the letter of bank guarantee

As the relationships specific to the letter of bank guarantee have a trilateral character, meaning that in such relationships participate the issuer, the authorizing officer and the beneficiary, we will consider the effects generated by it, distinctly, between the issuer and the authorizing officer, the effects between the issuer and the beneficiary, as well as the legal effects between the authorizing officer and the beneficiary.

7.1. The effects of the bank guarantee between the issuer and the authorizing officer

As shown by the norm, the article 1321 of Civil Code, the letter of guarantee is issued upon the request of the authorizing officer. Usually, the authorizing officer is a customer of the issuing bank, who needs its commitment towards the beneficiary.

We mentioned that the authorizing officer is not a party in the letter of guarantee; under the principle of relativity of legal documents, the authorizing officer is a third party. This feature is materialized by the fact that is generated the relationship involving obligations of the bank guarantee and it will be carried out exclusively between the issuing bank and the beneficiary of the guarantee. The issuing bank undertakes the payment commitment, based on the legal relationships with the authorizing officer. Please note that the bank warrants the obligation of the authorizing officer towards the beneficiary of the preexisting relationships involving obligations and, in order to undertake the commitment, the authorizing officer, in his turn, must provide the guarantees required by the bank. Once the bank compensates the beneficiary, it will return against the authorizing officer in order to recover the amounts paid pursuant to the letter of bank guarantee.

According to the financial-bank prudence rules, the issuing bank may require guarantees to the authorizing officer, such as: mortgages on movable goods or mortgages on real estates, pledge on accounts or certain personal guarantees in order to protect its right to recover the amounts paid to the beneficiary. The right of the bank to recover the amounts paid as a guarantee is stipulated in the article 1321, paragraph 4, of Civil Code which states that: *"The issuer who made the payment has the right of recourse against the authorizing officer of the letter of guarantee"*.

Since the right of recourse is provided by law, the issuing bank will recover the amounts paid as a guarantee, even if this issue is not expressly stipulated in the contract.

7.2. The legal effects between the issuer and the beneficiary

Whereas the parties of the letter of bank guarantee are the issuing bank and the beneficiary, it causes legal effects between the two parties. Definitely, if the authorizing officer does not fulfill his obligations of the preexisting legal relationships (he does not deliver the goods, does not perform the works, does not provide services etc.) or fulfill them improperly, the beneficiary will activate the letter of guarantee and, pursuant to the undertaken obligation, the bank which makes the guarantee will pay the amount stipulated in the contract.

The letter of guarantee may be executed at the first and simple request of the beneficiary, meaning unconditionally, or it may be subject to the occurrence of certain circumstances that might cause the non-fulfillment or improper fulfillment of the guaranteed obligations.

Article 2321, paragraph 2, of Civil Code provides that the undertaken commitment is executed at the first and simple request of the beneficiary, if not otherwise provided in the letter of guarantee. It follows that the method to activate the letter of guarantee depends on the parties'

agreement and, definitely, it may be submitted in two forms: one form is that the amount will be paid at the first and simple request of the beneficiary and the second, where the letter of guarantee is conditional, the sums of money will be paid only after the beneficiary will demonstrate the conditions which generated the non-fulfilment of the obligations by the debtor.

For example, in the letter of guarantee may be stipulated that the payment of the amounts will be made only if the authorizing officer did not fulfil his obligation due to the fact that he became insolvent or he started the insolvency proceeding. The differences between the letter of guarantee at the first and simple request (unconditional) and the conditional letter of guarantee are substantial and consist in the manner and terms of payment of the amounts by the bank which makes the guarantee.

If the guarantee is at the first and simple request, is sufficient the beneficiary to prove that the authorizing officer did not fulfil his obligations of the pre-existing legal relationship or fulfilled them improperly and, therefore, the bank which makes the guarantee will be required to pay the amount indicated in the letter of guarantee. On the other hand, if the bank guarantee is conditional, for example by the debtor's insolvency or other circumstances, the beneficiary may not claim the payment from the issuing bank before proving the conditions for the non-fulfilment of the obligations by the authorizing officer. In this example, the beneficiary of the letter of guarantee must prove to the bank which makes the guarantee that the authorizing officer did not fulfil his obligations due to the insolvency proceeding. Therefore, in the relationships involving obligations, from the beneficiary's view, the greatest protection is offered by the letter of bank guarantee executed at the first and simple request.

We mentioned in the above lines that the relationships specific to the bank guarantees are independent of the pre-existing relationships involving obligations guaranteed by them. The autonomous character of the two categories of relationships involving obligations is expressly provided by the article 1321, paragraph 3, of Civil Code.

In this respect, the said legal text provides that the issuer cannot oppose to the beneficiary the exceptions based on the relationship involving obligations existing before the commitment undertaken by the letter of guarantee and he shall not be held to pay in case of abuse or obvious fraud.

The beneficiary of the bank guarantee may assign the right to request the payment within the letter of guarantee if its text expressly provided it; therefore, the letter of bank guarantee is transferable but only if the parties have conferred such character.

In terms of the period in which the letter of guarantee covers the payment of the amounts for the obligations undertaken in the preexisting legal relationships, the Civil Code allows the parties to agree in such matter. Specifically, we have in view the provisions of the article 2321, paragraph 7, of Civil Code, providing that, if not otherwise stipulated in the letter of guarantee, it shall take effect from the issuing date and the validity shall cease by law at the specified deadline, independently of the delivery of the original letter of guarantee. In practice, the validity period of the letter of guarantee exceeds the execution time of the obligations undertaken in the preexisting legal relationships. This is because, even if the letter of bank guarantee is autonomous, independent and unconditional, it cannot be activated before the expiration of the execution period of the obligations undertaken in the preexisting, main legal relationships guaranteed by it. In other words, the beneficiary cannot capitalize the bank guarantee before the maturity of the main obligations, meaning before the term for the delivery of the goods, providing services, execution of works etc. A contrary attitude of the beneficiary would lead to the refusal of the request regarding the payment as prematurely submitted.

It should be noted that is important the non-fulfillment of the obligations of the guaranteed preexisting legal relationships or improper performance by the authorizing officer to take place and to be observed within the validity period of the letter of bank guarantee because, by hypothesis, if the

guaranteed events occur after the expiry of the letter of guarantee, undoubtedly the bank which makes the guarantee is exempted from liability. In the practice of the guaranteed legal relationships often happens the parties extend the terms for the execution of the obligations by omitting, many times, to also extend the validity of the letter of bank guarantee. In such cases where the maturity of the obligations is extended and falls outside the validity period of the letter of guarantee, the bank which makes the guarantee cannot be required to pay pursuant to the letter of guarantee.

Therefore, in order the bank guarantee may be capitalized, it is important that the non-fulfillment of the guaranteed obligations or improper fulfillment take place during the validity of the letter of bank guarantee and the capitalization of rights will be done thereafter, amicably or by judicial process.

7.3. The legal effects between the authorizing officer and the beneficiary

The authorizing officer, not being a party in the letter of bank guarantee, causes legal effects between the issuing bank and the beneficiary of the guarantee. Do not forget that the letter of bank guarantee comes into being at the request of the beneficiary. The request is submitted to the authorizing officer and he, finally, requires the bank to issue a letter of guarantee. Therefore, although the letter of bank guarantee causes legal effects directly between the issuing bank and the beneficiary, the guarantee is not generated at the direct request submitted to the beneficiary by the bank, but upon the request submitted to the authorizing officer.

Due to the independent and autonomous character of the letter of guarantee, the authorizing officer will not be responsible for the non-fulfillment of the payment obligation undertaken by the bank which makes the guarantee. This is because, as we mentioned above, according to the applicable legal norms, the payment of the amount is the responsibility of the bank which makes the guarantee. For this reason, if the bank which makes the guarantee refuses to pay, the beneficiary cannot claim damages from the authorizing officer, but only for the capitalization of his rights pursuant to the letter of guarantee, by judicial process.

8. Letter of comfort

8.1. Concept and regulation

The regulation of the letter of comfort is foreseen in the provisions of the article 2322 of Civil Code. According to the said text, the letter of comfort is the irrevocable and autonomous commitment by which the issuer undertakes an obligation to do or not do, in order to support another person, called debtor, for the execution of its obligations towards a creditor.

Even here the law does not condition the capacity of the issuer, meaning that the letter of comfort may be undertaken by any natural person or legal entity. It will be deemed a bank letter of comfort if the payment commitment is undertaken by a banking entity or non-banking financial institution. In the regulation of Civil Code are also foreseen the main characters of the letter of comfort. Therefore, as the letter of guarantee, the letter of comfort generates an obligation to guarantee the execution of certain services by the debtor for his creditor.

The letter of comfort is also submitted as an authentic contract between the issuer and the creditor of the main obligations, who will receive the legal status of beneficiary of the letter. The commitment undertaken by the letter of comfort has an irrevocable character, expressed on the fact that, as in case of the letter of guarantee, the issuer cannot unilaterally cancel, withdraw or modify the payment obligation.

The purpose of the letter of comfort consists in the obligation of the issuer to do or not do, in order to support another person. Thus, unlike the letter of guarantee whose purpose consists in the payment of an amount, the letter of comfort has as subject the obligation to do or not do. This is

clearly shown in the definition of the letter of comfort contained in the article 2322, paragraph 1, of Civil Code, according to which the letter of comfort is an irrevocable and autonomous commitment where the issuer undertakes an obligation to do or not do, in order to support another person, called debtor.

The payment of an amount is the secondary purpose of the letter of comfort and an accessory, meaning that it is conditioned by the non-fulfillment of the obligation to do or not do, undertaken by the issuer of the letter of comfort. This feature arises from the content of the article 2322, paragraph 2, of Civil Code, according to which the issuer of the letter of comfort may be required only to pay damages to the creditor.

The letter of comfort has a trilateral character, the participants in the legal relationships specific thereof are: the issuer, the debtor and the creditor of the guarantee obligation.

The letter of guarantee is independent and autonomous of the main obligations guaranteed by it. This feature is foreseen in the content of the article 2322, paragraph 1, of Civil Code prohibiting the creditor to assert any defense or exception arising from the relationship involving obligations guaranteed by the letter of comfort.

8.2. The legal effects of the letter of comfort

As the letter of guarantee, the letter of comfort causes three categories of legal effects, namely: legal effects between the issuer and the debtor, legal effects between the issuer and the creditor or the beneficiary of the letter and legal effects between the debtor and the creditor.

As concerns the legal effects specific to the relationships between the debtor and the issuer of the letter, it should be noted that the letter of comfort is issued at the request of the debtor, submitted to the issuer. As in case of the letter of guarantee, the issuing of the letter of comfort is based on the creditor's initiative, but he does not apply for it directly to the issuing bank, but to his debtor and, finally, the debtor applies to the issuer in order to make a guarantee for him.

If the debtor fails to fulfill his guaranteed obligations or fulfill them improperly, the issuer is liable for damages to the creditor. After he compensates the creditor, the issuer of the letter of comfort shall recourse against the debtor in order to recover the paid amounts. The issuer's right of recourse is foreseen in the article 2322, paragraph 3, of Civil Code providing that the issuer of the letter of comfort, who is required to compensate the creditor, has the right of recourse against the debtor.

As the issuer of the letter of guarantee, the issuer of the letter of comfort may condition the issuing thereof by certain real or personal guarantees from the debtor who asked him to make a guarantee, on his behalf, towards the creditor. It is understood that, if the debtor does not make the payment, the issuer of the letter of comfort may capitalize his right of recourse by pursuing the movable or immovable assets or the persons who have guaranteed the debtor's obligation.

As concerns the legal relationships between the issuer of the letter and the creditor, they are governed by the principle of independence and autonomy of the undertaken guarantee obligation.

The article 2322, paragraph 2, of Civil Code provides that, if the debtor fails to fulfill his obligation, the issuer of the letter of comfort may be required only to pay damages to the creditor and only if the latter proves that the issuer of the letter of comfort did not fulfill his obligation undertaken by the letter of comfort. The payment of damages may be performed amicably and, in case of refusal from the issuer of the letter of comfort, by judicial process.

However, it should be noted that, according to the article 2322, paragraph 1, final thesis of Civil Code, the issuer may not oppose the creditor any defense or exception arising from the relationship involving obligations between the creditor and the debtor. This is the consequence of the independent and autonomous character of the guarantee obligation undertaken by the letter of comfort towards the obligations arising from the main legal relationships guaranteed by it.

Finally, the legal effects between the debtor and the creditor are those arising from the main relationship involving obligations, in relation to which the letter of comfort was issued. Indirectly, the letter of comfort takes effect also regarding the legal relationships between the creditor and the debtor by the fact that, as stated in the foregoing, according to the legal norms, the issuer of the letter may be required to pay damages only if the creditor proves that he did not properly fulfil his obligations.

Conclusions

As it relates from the present study, the New Civil Code has the merit of institutionalising the rules that are the embedment necessary for the making and use of the bank guaranties, which are so used in the commercial activity nowadays.

The Civil Code legislates only the general principals regarding bank guaranties wich means that the parties to the obligation must see to the details and must adapt these guaranties in accordance to their personal interests.

None the less, apart from the dispositions of the Civil Code regarding the guaranties, the rules regarding the financial prudence towards the credit institutions and nonbanking financial institutions exposure must be kept in sight.

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