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Analyzing various kinds of guarantees in international payments

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ABSTRACT

Guaranteeing the payments in the international arena is an instrument for acquiring double assurance that the transacting parties fulfill their mutual obligations that per se lead to the development of the international business. Banks' letters of guarantee are amongst the most effective methods of guaranteeing the obligations. The convention on the international sales of goods speaks of a traditional method that has also been common in the countries' domestic laws, as well, and that is lien. The contracting parties occasionally use such a contractual condition as keeping the ownership in their obligations. Generally, the insurance letters, the right to resale an already sold goods as well as the loss compensation mechanisms, collateral and revocation guarantee sum have so far preserved their roles and past stances in the contracts of the international sales of goods. The present study aims at analyzing various kinds of guarantees in international payment. The study takes advantage of a descriptive-analytical method and gathers library search-based materials to investigate the nature of the banks-issued international letters of guarantee. The results indicated that the banks' guarantee letters are different from the contractual warrants and that they should be considered as non-specific contracts the parties of which are banks and the interested parties. The guarantee demander is not a party of the guarantee certificate contract though the guarantee certificate is the product of his or her agreement with the interested party in the base contract. In Iran's laws, this contract can be considered amongst the private contract subjects of article 10 of the civil law.
Key Words: banks' letters of guarantee, contractual warrants, payments' guarantee

Introduction

Daily increasing growth and development of the international business and the need for the international transactions between the countries has been the undeniable truth of the recent decades and its importance should not be ignored. These evolutions actually stem from the human needs in the current era. The business transactions between the countries are becoming faster day in day out. Consequently, the countries need to establish novel methods for transactions in their regulations and these methods should be able to supply the rights of each of the importing and exporting individuals. Having perceived this necessity, the jurists have made efforts to codify certain criteria and regulations for maximally guaranteeing the transacting parties' rights in such a way that daily increasing progress can be made in the international transactions, on the one hand, and the transacting parties' rights can be favorably guaranteed, on the other hand, and the transactions can be resultantly performed with optimum speed and sufficient guarantee. The international businessmen and businesswomen arrange their activities based on

any methods that can supply their interests. In order to guarantee the payments in the international arena, there are various methods commonly applied and they differ based on the parties' trust in one another, their exchange history of their previous relationships, business credibility and the goods and commodities' types and amounts.

In legal terms, guaranteeing includes any sort of securing and safeguarding of the contractual obligations between the individuals. This guarantee can be actualized through various specific contracts, especially the guarantee and mortgage contracts in an independent manner or in the form of the in-contract conditions. The difference between the guarantee contract and the contract works' warrants can be sought in the type and nature of them because it has been stated in the guarantee contract stipulated in article 684 of the civil law that "guarantee contract includes a third person's guaranteeing of a financial property owed by a person to another.

Banks' international letters of guarantee should be considered as a novel phenomenon coined in the common laws and the banks' procedures for meeting the business and economic needs. As for the nature of this "novel phenomenon", there is still not reached much of a general agreement between the authors of the international business laws and the judicial procedure related thereto. The international doctrine is yet to reach a common point about the idea that whether the foresaid phenomenon is a contractual or a unilateral obligation in nature. However, the perspectives posited in this regard share one point and that is the idea that the regulations governing this novel phenomenon are substantially of a transnational aspect that should not be ignored in the investigation and analysis of the nature of the guarantee letters. Resultantly, the independent banks' guarantee letters should not be analyzed within the framework of the traditional provisions and rules of the national laws and classified accordingly.

The banks' guarantee letters are different from the contractual warrants and they should be considered as non-specific contracts with their parties being the banks and the interested parties. The guarantee demander is not the contracting party of the guarantee letters though the guarantee letters are the products of his or her agreement and the interested parties in the base contracts. In the laws of Iran, this contract can be considered of the same type as the private contracts as introduced in article 10 of the civil law. The goal of this study is analyzing the various kinds of the guarantees for international payments. The present study uses a descriptive-analytical method and gathers materials through library research to investigate the nature of the banks' international letters of guarantee.

Study's Theoretical Foundation

Banks' Letters of Guarantee

The banks' letters of contract and contractual warrants have similar properties in that both of them support the interested party against the non-enforcement of the base contract by the guarantee demander. The important difference between these two is that the payment commitment of the guaranteeing bank (in the banks' letters of guarantee) is independent from the commitment by the guarantee demander (or the primary guarantor) whereas the guarantor's commitment in the contractual warrants is a function of the commitment by the primary promisor (Erfanian, 2013).

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In a viewpoint, banks' commitment by the force of the banks' letters of guarantee should be realized in nature as a unilateral commitment based on a comparison between the unilateral commitment and unilateral action (Murray, 1990, p.30). It is believed that the indispensability of the aforesaid commitment stems merely from the unilateral declaration of the bank for making itself committed to the interested party. This unilateral declaration is done through announcing the contents and conditions of the guarantee letter to the interested party. Corresponding to this perspective, acceptance and satisfaction of the interested party is not a precondition in the issuance of the guarantee letters and the banks' unilateral commitment is indispensable and, considering that it is not required to append the interested party's acceptance to the bank's unilateral declaration, the time of rendering the commitment indispensable and

its method are the very ones specified in the letter of guarantee which is commenced from the date of the guarantee document's issuance. The theory of the unilaterality of the banks' commitment is dominant in the legal writings in Belgium and this country's judicial procedure, as well, has not confirmed it (Simont, 1983, Herbots, 1983 and Velu, 1990).

Another part of the international doctrine realizes the bank's commitment by the force of the letter of guarantee as the commitment stemming from the agreed contract which is actualized with requirement and acceptance. Corresponding to this perspective, the issuance of the guarantee letters is solely deemed as requirement made by a bank and it has to be appended with the interested party's acceptance to become indispensable. On the other hand, acceptance of the requirement can take place implicitly according to the general conditions of the contracts (Shahidi, 1998, p.215). In the letters of guarantee, the dominant procedure is that the interested party expects the issuance of a requirement by the guarantee-demanding party's corresponding bank according to the fact that the prediction of the letter of guarantee in the base contract between the interested party and the guarantee-demanding party and that his non-objection is equal to the implicit acceptance of the requirement.

The issue of the banks' guarantee letters being a contractual or a unilateral obligation has been proposed in the laws of Iran (Akhlaghi, 1989, p.164). The basis of the theory indicating that the guarantee letters are unilateral obligations is the perspectives of some jurisprudents who, against the well-known sayings, do not realize the interested party's satisfaction as being necessary when concluding a guarantee contract and consider guarantee as being anything similar to the "payment of another person's debt" which is needless of the creditor's satisfaction hence know guarantee as a sort of unilateral obligation. However, disregarding the idea that the aforesaid perspective is not also the well-known saying in the jurisprudence and considering the differences between the natures of the guarantee stipulated in the civil law and the jurisprudence from the banks' guarantee letters, generalization of the aforesaid discussions to the guarantee letters is not devoid of fault (Kashani, 1998, pp.38-40). In the meanwhile, the perspective holding the contractual nature of the guarantee has been selected in Iran's statutory provision following the lead of the aforesaid well-known saying (Katouziyan, 1997)[1].

Comparing the As-Demanded Guarantee Letters and Credit Letters in the International Business:

A) Common Points:

1. The banks' guarantee letters that are issued in favor of the buyer or employer ensure him or her in case of the seller or the contractor's non-fulfillment of the obligations in respect to the contract that s/he can demand and receive the guaranteed sum according to the guarantee letter's text from the guarantor.
2. Considering the diversity of the international business and financial contracts, flexibility is one of the accessories of the corresponding financial instruments. Letters of credits and as-demanded guarantees both feature flexibility.
3. Conditional obligations inserted in the letters of credit and as-demanded guarantee letters serve the paying of a given amount of money but these obligations are nevertheless free of certain constraints and conditions.
4. As-demanded letters of guarantee and letters of credit are both considered as independent obligations; therefore, the banks are solely faced in these two kinds of instruments with documents and not goods and services or actualization of the damage and non-fulfillment of the obligations.
5. Immediate paying is one of the other common attributes of the letters of credit and as-demanded guarantee letters and the banks are obliged to immediately make the required payment when being presented with the documents and the corresponding demand.

[1] For viewing the conditions of the contractual warrants' formation, please see Katouziyan, 1997, v.4, p.254 on

B) Divergence Points:

1. Various instruments were mentioned in the discussion on risk coverage and the letters of credit were mentioned amongst the payment instruments by which the sellers can offer the required documents in match with the credit conditions and receive the credit sum; however, guarantee letter is a tool of guarantee by which the buyer can offer a written request in match with the letter of guarantee and receive the sum mentioned therein following recognizing that the seller has violated the performance of his or her obligations as set under the base relationship.
2. If the guarantee letters committed to the paying of specified sums of money are excluded, the interested party and the applicant in the letters of credit are completely converse to the interested party and applicant in the letters of guarantee.
3. The letters of credit are means of payment and letters of guarantee are means of warranting.

The Effect of Sale Item's Submission on Ownership in the International Sales of Goods:

It can be stated in a general state that thing of a great importance in the discussions on goods' delivery includes commodities, submission time, submission place and documents' presentation.

1) Favorable Submission and its Principles:

Submission includes any sort of action allowing the buyer take the goods in his or her possession and domination (Audit, 1990, 80). Therefore, it has to be stated that the submission is actualized by the mere buyer's taking possession and domination of the goods. The same issue has been explicitly mentioned in our civil law. Article 367 of the civil law stipulates that "submission includes the customer's possession of the sale item in such a way that s/he affords occupying and taking advantage thereof and possession includes the customer's domination over the sale object". From the perspective of the convention, the submission is conceptualized not as the goods' match with what has been stated in the contract and the necessity of the match cannot be realized as ancillaries of the commitment to the submission whereas the match is enumerated amongst the ancillaries of the submission in the uniform laws of the convention on the international sales of goods approved in 1964 (article 19, paragraph 1). Based thereon, when the goods is practically delivered to the buyer or made available to him or her, submission has taken place as ruled in the 1980's convention though it is found not in match with what has been specified in the contract and/or flawed.

In the laws of Iran, the necessity of the goods' match with the contract is an independent commitment apart from the commitment to the submission. Thus, if a flawed goods is submitted, it can be stated that submission has taken place and it is followed by the effects thereof. For example, the vendor's lien right should be aborted but s/he is held responsible as an independent commitment when the sale item is flawed and the regulations of the contract revocation due to the goods' flaw or non-acceptance become worthy of exertion. However, if the sale item is a generally specified thing, the submission of the flawed property or not in match with the contract's content is in this case not envisioned as a credible submission and the customer can demand another example which is in match with the contract. Therefore, it can be stated that the necessity of the match is amongst the ancillaries of the commitment to the submission in the sale of generally specified items.

2) Submission and the Ownership and Guarantee Conveyance:

After submission and exchange of the related documents, the substantial issue put legally forth is that the goods are brought out of the seller's ownership in this case and the buyer's ownership is ensured. So, is the buyer responsible for all the contingent dangers and risks or not? In this case, there are generally two important theories investigable. According to the first theory, conclusion of the sale contract is viewed as the conveyer of the ownership (article 362 of the civil law) and, in order to more support the customer through enacting the axiom of the sale item's wastage before receiving (article 378 of the civil law), the legislator has actually placed the risks stemming from the sale item's wastage until before the submission of the exact property to the customer on the shoulder of the seller. Based on the second theory, the actualization of the sale contract is pendent over the submission of the sale item to the

customer in which case the enactment of a maxim like the sale item's wastage before being received by the customer does not seem to be necessary (Nasiriov, 2004, p.129).

In most of the legal systems, the ownership is transferred when the parties reach an agreement for its conveyance. If no agreement is reached in this regard between the parties, the ownership transferring regulations differ from a country to another. In common law system, ownership of an exactly specified item is transferred when a contract is signed and, as it was said before, the ownership is transferred in a contract of a generally promised item when the goods is specifically determined in the contract (Smitov, 1999) and it is specifically determined when it is given to a transporter for delivery to the buyer. The laws of Denmark, Italy and France and several other legal systems that stem from the France's system of law, as well, enforce such regulations in regard of the buyer's precedence in the goods to the seller's creditors. Based on article 62 of England's 1979 business law, delivery means volitional transferring of the occupation from a person to another. The goods are usually transferred to the buyers when s/he or his or her representative take possession of them or be able of supervising them (Smitov, 1999).

3) Submission and Transferring of the Guarantee:

Since a goods is sold till it is placed in the hands of the buyer, it might encounter dangers. The convention has accepted the goods' submission time as a primary maxim for the transferring of the guarantee (article 67 of the convention) and it is consistent with the laws of Iran. Exceptionally and as a secondary maxim, the first solution which is in accordance with the Switzerland's law has been accepted in some of the cases (article 68 of the convention). In justifying the solution accepted in the convention (submission time), it has been stated that, since goods' submission is a material incident, its determination in the contract is easy between the absentees. Furthermore, the individual who has the occupation and control of the goods is in a better situation for preventing the dangers and/or devising strategies for repelling the losses, including referring to the experts or insurers and it is fairer for the goods' guarantee to be placed on his or her shoulder (paragraph 1 in article 20 of SGA)[2].

4) Laws Governing the Submission and Various Kinds of Contracts:

The issue of the seller's responsibleness or non-responsibleness depends on the contents of the sale contract and, eventually, the regulations enforceable for the contract. The failure in enforcing the contract by the seller includes cases like delay in the delivery, non-delivery, goods delivery for a lower amount or a lower quality and delivery of goods not legally in match with what has been specified in the contract.

The seller's delay in submitting the sale item and the verification of the idea that s/he is not intending to fulfill his or her commitment to the submission of the sale item constitute an essential violation. Article 49 of the convention implies the same purport in section (B) of the first paragraph. Therefore, there is no need for the passage of time and considerable delay for submission and even if the seller announces before the submission time that s/he does not intend to fulfill the commitment, the buyer has the right to revoke the contract. In case that the submitted goods are found not in match with the contractual contents and this mismatch is enumerated amongst the essential violations, the customer has the revocation right. If the contract necessitates goods' transportation, the seller has fulfilled his or her commitment by submitting the goods to the transportation agent but the buyer receives the goods in the destination in naturally a later period of time. As for the time, it has to be noted that the buyer should be given a respite for setting the ground for the goods' reception and making the required interventions for fulfilling the reception[3].

The receiving of the sale item and paying the price are amongst the most primary duties of the buyer and this has been underlined in all of the legal systems. The time and place of the sale item's reception by the buyer is dependent in most of the cases on the goods delivery time and place (articles 53 and 60 of the convention).

[2] Benjamin´s sale of Goods , No. 200, p.284
[3] Ibid, p.254

5) Submission on a Given Date:

The goods' submission time and place are amongst the issues related to the method of fulfilling the commitment to the submission. In addition, article 31 which is about the determination of a goods' submission place and paragraph (A) of article 33 which is about the determination of a goods' submission time have stipulated the governance of will. The determination of the goods' submission place and time is either performed explicitly in the contract or it is inferred implicitly from the whereabouts and situations (corresponding to paragraph 3 of the article 8); in case of the contract's silence about the submission time, use is made of a commonly agreed way between similar parties.

6) Submission in an Estimated Date:

When a specific period of time is found having been specified, the buyer can demand delivery within that period. s/he has to specify a date in that period for the submission of the goods. If s/he does not succeed in doing so, s/he has perpetrated a violation. This issue can be inferred from the paragraph (B) of article 33. If the buyer is obliged to collect the goods as stated in articles (B) and (C) and there is specified a time period within which the seller is to provide the buyer with the goods but nothing is mentioned about the exact time of the goods' delivery, s/he can perform this after a common time following being notified about the seller's readiness for the submission as pointed out in article 31 in paragraph (C) to some extent.

7) Early Submission:

According to article 45 of the convention, early delivery allows the customer like delayed delivery to demand the loss compensation. Article 34 of the convention stipulates that "if the seller is obliged to submit the documents related to the goods, s/he has to deliver them at a given time and place as stipulated in the contract. In case that the seller delivers the documents before the specified date, s/he can correct and remove any flaw and mismatch of the documents till the arrival of the specified data provided that the exertion of this right does not cause problem and irrational discomfort to the buyer or the imposition of hefty costs onto him or her. However, the customer's right to demand any sort of loss compensation is reserved in a way stipulated in this convention" (Darabpour, 2016, p.90).

8) Formative Formalities of the Guarantee Letters' Contract Conclusion:

The international regulations related to the guarantee letters (article 2 of the uniform ICC regulations for the as-demanded guarantee letters and paragraph 2 of article 7 in UNCITRAL), as well, have realized being in written form as the only required formative condition and it includes the sending of a text through electronic means. In the mutual guarantee letters issued in the relations between the issuing and ordering banks, as well, the issuance of the mutual guarantee letters by the ordering bank forms the reason for the issuing bank's commitment before the interested party (corresponding to the main guarantee letter). Thus, an expression in the following form exists in the text of the main guarantee letter: in the laws of Iran, there are two different legal systems about guarantee one is the contractual guarantee as stipulated in the civil law and the other is the guarantee stipulated in the business law which is known as the obligation-annexation guarantee (Gorji, 1993, p.33 and Kashani, 1990-1991, p.203).

9) Comparing the Banks' Guarantee Letters with Similar Provisions in the Laws of Iran:

In our country, the analysis of the legal issues related to the banks' guarantee letters based on the traditional provisions' regulations and basics and ignorance of this business instrument's properties have led to the ambiguities about its credibility in the most supreme judicial authority of Iran in the past[4] and the doctrine as distanced away from the proper path of the banks' guarantee letters by continuing the same tradition. For instance, in a criticism, one of the law professors realizes letters of guarantee as being case-specifically requirement to the providing of a future debt and/or the so-called surety (Katouziyan,

[4] Verdict no.46/9/22-71 of the general assembly of Iran's supreme court and the opinion of the then attorney general, Kaihan's legal archive, p.215

1997, pp.307-310). In the laws of Iran, there are two different legal systems about guarantee one is the contractual guarantee as stipulated in the civil law and the other is the guarantee stipulated in the business law which is known as the obligation-annexation guarantee. It is worth mentioning that there are dualities in the jurisprudential schools, as well, regarding the nature of guarantee in such a way that Imamiyyeh jurisprudents believe in the obligation-transfer guarantee and the general jurisprudents mostly believe in the obligation-annexation guarantee (Gorji, 1993, p.33 and Kashani, 1990-1991, p.203).

Conclusion

The goal of the present study was analyzing various kinds of guarantees in the international payments. Despite being similar to the other means of guarantee in terms of goal, the banks' international guarantee letters have distanced away from the aforementioned provisions, especially the traditional guarantee, in other dimensions and aspects and they have been presented recently as new phenomena. This new guarantee should not be evaluated based on the national law's regulations and scales governing the traditional guarantee rather the international regulations and the attributes of such a document should be taken into account for analyzing and interpreting the issues resulting thereof. Considering the discussions presented about the nature of the banks' international guarantee letters in terms of their being of a contractual or unilateral obligation, the guarantee letters can be presently realized as a non-specific contract the parties of which are the banks and the interested parties based on the legal basics, judicial procedures and the international business norms. The guarantee-demander or the principal is not the party to the banks' international guarantee letters though his or her commitments in the base contract as well as his or her mutual commitment to the bank issuing the guarantee letter for repaying the sum mentioned in the guarantee letter in case of the interested party's demand can be the main reason for the banks' entry into mutual relations with the interested parties. Thus, if the guaranteeing bank pays the guarantee letter's sum with the observance of the guarantee letter's conditions and contents without the guarantee-demander's satisfaction to the interested party, it has the right to refer to the guarantee-demander and demand the paying of the sum. Considering the divergence of the banks' international letters of guarantee from the contractual guarantee and the guarantee stipulated in the business law in the laws of Iran, this new contract can be realized amongst the private contracts' type as inferred from the article 10 of the civil law.

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