

Bank Guarantees and their Representation in Bank Business Activities (Parallel Legal Presentation)

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Abstract

The financial instability of business entities and the growing uncertainty of collection of receivables increasingly impose the need for utilization of instruments for security payments which provide safety to business partners to the fullest extent and minimize the effect of risk factors. From the vast number of these instruments authors sort out bank guarantees as the important security instrument for contemporary circulation. This work attempts to introduce the basic characteristics of bank guarantees, their elements, the advantages for users and principals and to analyze the representation of bank guarantees in the banks of Serbia and the countries around. The objective of the research is to point out the importance of the bank guarantees and the necessity of their representation in bank business activities. The authors suggest, as a means for overcoming that state, changes in a banking business system, an active approach to clients and their constant education, which will provide them with insight into the advantages of using bank guarantees as a means of security in contemporary circulation. In this work, with the object and the goal of exploration being set, qualitative and quantitative methodology of exploration based on usage of descriptive and statistical analysis will be applied.

Key words: bank guarantees, risk control, protection of importers, contract

JEL Classification: G21

Introduction

In contemporary business conditions, which are characterized by spatial distance of clients and impossibility of real assessment of credit standing of the business partner, it is often necessary in business transactions to use bank guarantees as instruments of security payments. Bank guarantees are usually required when it comes to specific businesses which employ stronger obligation and security that obligations transferred with contract will be fulfilled in the manner that was noted. Understanding the utilization of bank guarantees provides better negotiating positions in business conclusions, faster reactions to demands of public calls for collecting proposals and securing own claims. Due to its non-accessoriness, abstractness and the fact that a fast and simple act of realization provides coverage for a great amount of risk, the bank guarantee is one of the most important instruments of security payments in the trading operation.

The Legal Term of Bank Guarantee

In freight traffic and money turnover, bank guarantees are being increasingly used to secure the realization of contractual liability, as a very efficient means of security. The essence of this institute is that with the bank guarantee, the bank requires that the user of the guarantee, being creditor from basic contractual relationship, pays off a certain amount of money if the bank's client, being debtor from basic work, does not settle his contractual obligations. The primary obligation of the guarantor's bank is to issue the guarantee to the user according to the conditions set up by the order and instructions received from the principal. If the bank guarantor does not fulfill this obligation and does not issue the guarantee, it will no longer be in any kind of commitment to the third party which should be the user of the guarantee, but to the principal alone.¹

The function of the bank guarantee is not fulfilling the debtor's obligation from the bank's side, but covering different kinds of risks, when certain work does not develop normally. Compared to other security instruments, the bank guarantee demonstrates significant advantages. It is the most convenient means from the real securities, for it does not employ certain material resources, nor does it limit their turnover. It is legally and economically more secure than other personal means of securing. To provide receivables with the bank guarantee means to protect to the fullest possible extent the creditor's economic interests from the risk of failure to perform the contract. Regulation for bank guarantee are being equalized by common terms of bank business activities, form bank guarantees, standardization of content and equalized interpretation of guarantee clauses, which gradually developed and constructed the autonomous Commercial Law for bank guarantees.²

Bank guarantee is a typical Commercial Law activity for it is being mass used in the business of international trade and due to the issuing of the guarantee it lies under the regular commercial activity of banks. Hence derive certain principles which specifically define the bank guarantee: the principle of independence, the principle of formality, the principle of immediacy and the principle by which the bank guarantee is issued concerning personal properties of guarantor's bank.

The principle of independence of the bank guarantee claims that the bank guarantee is separated from primary business on which the economic-financial activity is based, but to which bank guarantor does not have any legal connections, or any obliging relationship. Likewise, bank guarantee is legally separated from legal relationship between bank guarantor and principal, as well as the legal relationship between banks concerning guarantee issue. Bank guarantee can only in this way successfully demonstrate its function in legal turnover as a means for securing the fulfillment of the contract.

The bank guarantee is a formal legal activity, i.e. such legal activity that its form is manifested in written format. Without the written form, the guarantee liability cannot be established. Since the bank guarantee abides to the principle of formality, the guarantee must have all important elements agreed upon when concluding the primary contract. The written form of the bank guarantee provides that the obligations of the bank guarantor are clearer and more precisely formulated to eliminate any suspicion concerning the transferred guarantee liability.

The principle of immediacy comes to expression when the user of the guarantee has the right to claim payment to any bank that issued super-guarantee. With super-guarantee, the bank who issued the super-guarantee commits itself to paying off the user if the bank which issued the guarantee does not do so. Likewise, the principle of immediacy comes to full expression in the case when multiple banks jointly commit themselves to paying off the bank guarantee to the

¹ Jankovec, I., "Commercial Law", Belgrade, 1996, p. 556.

² Knezevic, M., "Banking operations and securities", Kragujevac, 2009, p. 43.

user if all the conditions provided in the guarantee are being fulfilled. Here, the user of the guarantee can come forward with a demand for payment from one bank, from several banks or from all banks that took the guarantee obligation.

The bank guarantee is such a legal activity which emerges considering the business reputation and the financial status of the bank that takes up the guarantee obligation. Financial circumstances of the guarantor's bank, liquidity and business reputation it maintains in the business world, demonstrate the primary reason why the creditor from the primary contract demands for the guarantee to be obtained from the bank that possesses such means. This is understandable because only such a bank gives security to the debtor that it will indemnify if the debtor from the primary contract does not fulfill his contractual obligations. How much significance does the bank have is best shown by the fact that the debtor from the primary contract is authorized to unilaterally withdraw it, should he not receive the guarantee from the bank that was determined in the contract. Besides, for the guarantees of the most prominent and first class banks, higher commission is being paid from the banks that do not possess such preferences or that do not have them in sufficient amount. Therefore, when establishing a guarantee relationship, the trust is engaged to the great extent, the one that debtor has in guarantor's bank and its aptitude to fulfill its obligations according to the guarantee in all aspects because, otherwise, the bank guarantee would lose any significance in legal turnover. As with all the other Commercial Law activities, the bank guarantee has its important elements that are usually contained in the financial or guaranty clause of the primary contract. The most important elements of every bank guarantee are: 1) the name of the bank and its address, 2) the name of the user of bank guarantee, 3) indication of the activity for whose fulfillment provides bank guarantee, 4) amount of money for guarantee, 5) expiry date of the bank guarantee, 6) place of issue of bank guarantee, 7) date of issue of bank guarantee and 8) signature of bank guarantor.

To create enforceable guarantee obligation, it is necessary to fill in the exact name of the bank and its address in the guarantee. Should the guarantee lack this element, it would be impossible to establish which bank issued the guarantee and therefore take over guarantee obligation toward the user of the guarantee.

Entering the data for the user of the bank guarantee is an important personal element, because the bank guarantee is not security addressed to the carrier. Any natural or legal person can be the user of the bank guarantee, except for the bank that issued the guarantee. The name of the user of the guarantee is entered the moment the guarantee is issued and cannot be changed later without the consent of all the participants in the guarantee activity.

The following data is entered most of the times: contracting parties, subject of the contract, deadline for fulfillment, price or fee for delivered merchandise or performed services, as well as all data which should be entered, estimated by participants in the guarantee activity.

In the bank guarantee, the amount of money which the bank guarantor is obliged to pay off to the user of the guarantee must be determined. The subject and extension of bank's obligation from the guarantee is expressed in the money, the amount which is established in advance as a fixed amount, or the specified percentage from the value of the business whose fulfillment is being secured through the bank guarantee.

The expiry date of the bank guarantee specifies the time period in which the user of the guarantee has the right to demand the collection of the amount of money entered in the guarantee, and the guarantor bank has the obligation to execute that payment. It is customary that the expiry date should be fixed to a certain date, for out coming event or for the certain flow of time calculated from the maturation date for completing the obligation from the primary contract. In order for the user to realize his right from the guarantee, the maturation date for completing the primary contract must be in the time frame of validity of the bank guarantee and the user must place demand for payment no later than the last expiration day. The place of the

issue of the bank guarantee is the place in which resides the head office of the bank. It is important for the determination of the national Law which would be applied to guarantee, its legal forms, contracting of protecting clauses and determination of jurisdiction of the court or arbitration. Place of issue of guarantee is identical to the place of payment, on the condition that it wasn't specified otherwise. Unless the place of issue of the guarantee has been stated in the guarantee itself, the place of issue is considered to be the one specified as the place of head office of the bank guarantor.

Date of issue of guarantee has manifold importance. From this date starts the deadline in which the user of the guarantee has the right to demand payoff of the guarantee, if all the conditions provided are fulfilled. The principle of the monetary nominalism for the monetary obligation contained in the guarantee, according to which the bank guarantor is obliged to pay off the specified number of monetary units of the currency named in the guarantee, no matter whether the purchasing power of these monetary units increased or decreased in the meantime. This means that the risk of increasing the purchasing power of the currency in which the obligation is expressed is borne by the bank guarantor, and the risk decreases for the user of the guarantee. To neutralize this principle, protective clauses are used which are expressed in form of currency clauses by which modification of monetary nominalism is performed so the protection of the bank guarantor and the user of guarantee from the changes of the money values is achieved in the time frame from the creation of the guarantee obligation to the moment of the bank guarantee maturation. For the bank guarantee to be enforceable, it is necessary to be signed by authorized persons from the bank guarantor. When signing the guarantee, the authorized person is bound to enter his/her name, surname and the bank seal from the bank which issued the guarantee.³

Together with important elements which derive from the nature of the business, participants in the guarantee business can provide other elements such as: clause of withdrawal of bank guarantee, clause of interest rate or clause of implementation of authoritative Law in dispute settlement. Due to its fast and efficient realization, bank guarantees are one of the most frequently used security instruments in international circulation. Through bank guarantee, the creditor can charge his/her claims without any difficulty, if the debtor from the primary contract defaults from the contractual obligation. In the legal system of Serbia, the bank guarantee is usually regulated by the Law on obligation relations, while certain questions concerning bank guarantee are regulated by specific regulations and rules of autonomous Law.

Parallel Overview of Representation of Bank Guarantees in Bank Business Activities in Serbia and Neighboring Countries

Bank guarantees can be sorted according to the method of passing and domain of rule application which regulate guarantees in international turnover which is regulated by rules of international sources and guarantees in internal turnover which is regulated by internal or national sources. In international turnover, the bank guarantee is regulated by Uniform Rules for Demand Guarantees, passed in 2010 by the International Chamber of Commerce from Paris.

The current economic situation in Serbia and in the neighboring countries is characterized by significant insolvency of business entities and unsatisfactory percentage of collection of receivables which indicates the need for greater usage of bank guarantees as a means for securing payments. The guarantees approved by the bank can be completely or partially covered or financed by bank credits and the most common terms which the client of the bank must fulfill during the approval of the guarantee is that he is bank depositor, that he performs his business

³ Pavicevic, B., "Bank guarantee", Belgrade, 1999, str. 121.

activity through the bank, that he has credit standing and has the required level of turnover which provides orderly debt pay off.

Table 1. Overview of bank guarantees in the banks of Bosnia and Herzegovina, Montenegro and Croatia⁴

	2008. year		2009. year		2010. year	
	payment	performance	payment	performance	payment	performance
Bosnia and Herzegovina in thousands KM						
Unicredit Bank Mostar	152,686	111,650	152,356	87,856	137,258	110,661
Privredna banka Sarajevo	485	6,140	2,610	10,447	6,362	11,151
MF bank Banja Luka	260	14	507	30	439	60
Komercijalna banka Banja Luka	7,611	1,997	3,678	2,233	4,178	583
Montenegro in thousands EUR						
Hipotekarna banka	4,411	170	6,654	356	16,212	1,047
Crnogorska komercijalna banka	39,256	37,255	36,820	31,232	19,237	15,369
Podgoricka banka	8,099	5,512	6,547	6,452	13,070	5,120
Croatia in thousands HRK						
Nova banka Zagreb	29,583	28,439	15,199	13,715	14,140	17,862
Slatinska banka	3,569	4,726	3,808	2,691	2,871	1,804
OTP bank Zadar	116,136	120,205	88,263	82,190	514,141	59,090

In the Serbian legal system, bank guarantees are regulated in a common way by the Law on obligation relations, Law on banks and Law on foreign exchange operations. Certain questions concerning the bank guarantee are regulated by specific rules, as well as the rules of autonomous Law. Note that with the Law on obligatory relations, only some of the questions are regulated and that regulations of the Uniform Rules can be applied in internal circulation, too, like the contracted rules for those questions which are not regulated by Law, the same goes when both parties had a strict contract on them. According to the Article 25 of the Law on Foreign Currencies, the banks can issue guarantees, avals and other forms of affidavit on current and capital business between resident and non-residents according to the regulations on banks and to this Law and they can obtain guarantees from the foreign banks and the guarantees and affidavits of non-residents for those businesses. The bank can, according to the regulations on banks, obtain guarantees from foreign banks, as well as the guarantees and other instruments of security of non-residents on the receivables from the residents.⁵ The banks in Serbia approve payment and performance guarantees in dinars and in the foreign currency to their clients.

⁴ bank Internet portals

⁵ Law on Foreign Exchange Affairs, Official Bulletin RS, No. 31/2011

Table 2. Overview of bank guarantees in the banks of Serbia⁶

- in thousands RSD -

		2008. year		2009. year		2010. year	
		payment	performance	payment	performance	payment	performance
Erste bank	in RSD	4,717,360	517,229	1,272,266	953,104	1,237,932	2,234,832
	In fgn.curr.	393,955	157,729	176,681	232,534	163,015	506,267
Credy bank	in RSD	663,298	134,208	831,841	195,625	668,703	177,801
	In fgn.curr.	22,323	16,369	31,789	8,054	66,007	9,491
Findomestic bank	in RSD	800,697	279,638	1,019,789	287,548	1,059,985	391,920
	In fgn.curr.	260,677	20,357	274,897	6,975	352,481	25,561
Razvojna banka Vojvodine	in RSD	5,221,309	2,080,068	6,404,421	2,862,169	8,010,792	4,676,759
	In fgn.curr.	1,373,904	25,548	1,467,249	13,734	1,342,949	83,148
Banca Intesa a.d.	in RSD	12,839,629	8,799,136	13,838,404	9,613,954	17,912,073	12,444,212
	In fgn.curr.	20,105,430	1,343,365	15,514,681	1,677,615	10,679,338	2,518,971
Privredna banka Belograd	in RSD	881,940	352,802	910,784	511,503	895,675	651,834
	In fgn.curr.	95,034	162,005	187,607	99,663	187,312	90,841
JUBMES bank	in RSD	307,663	1,032,716	385,359	436,869	497,343	789,031
	In fgn.curr.	40,826	790,207	57,831	732,388	57,151	583,439

With payment guarantees, the obligations of orderly payment according to the contract on the primary business, for payment of the obligations on the received credits or for the securing payment of certain kinds of goods are accepted. Along with them, guarantees for securing the deposit on participation in the privatization of the company and guarantees issued to the favor of Fond for the Development of Republic of Serbia for the payoff of the credit are often used.

Performance guarantees are issued in cases when the obligation from the primary contract is some non-monetary compensation. The most important performance guarantees that are being issued in Serbia are: bank guarantee for the return of the advance payment, tender bank guarantees and bank guarantees for the good performance of the work.

The bank guarantee for the return of the advance payment can be given with all contracts for which it is usual to give advance payment, but it is more often with the contract on the delivery of the equipment on credit. With this guarantee, the bank of the debtor obliges to pay off the complete amount of the given advance payment to the user of the guarantee, if the seller does not fulfill his/her obligations concerning the delivery of goods and does not return the advance payment he/she took. For the bank guarantee to serve its purpose, it is necessary that the deadline for the submission of the request for the payment should be greater than the deadline set up in the contract for the delivery of merchandise, as well as from the deadline in which the delivery can be subsequently executed.

According to the Article 16 of the Regulations on obligatory elements of the bidding documentation in the procedure of the public acquisition in Serbia, bank guarantee for the return of the advance payment, which the purchaser can demand in cases when it predicts advance payment, is issued in the amount of the paid advance payment and must have duration until the final delivery or the completion of the work. The amount of bank guarantee can be reduced if that guarantee covers partial or successive deliveries or situational execution of works, when it is allowed, where the method of decreasing of the value of guaranteed amount must be stated.⁷

⁶ bank Internet portals

⁷ Regulations on obligatory elements of bidding documents the procedure of the public acquisition, Official Bulletin RS, No. 50/2009

The tender guarantee is a kind of guarantee with which the bank guarantor commits to payoff to the user of the guaranteed amount in case the participant of the bidding whose bid was accepted does not fulfill his obligations. With this guarantee the user is secured from the risk if the bidder whose offer was accepted does not fulfill obligations provided in the bidding terms, and those are the obligation to conclude primary contract or to obtain bank guarantee for the good performance of the work. In the case of default from these obligations, the bidder can inflict great damage to the purchaser, because the scheduling of the bidding is connected to the expenses and costs calculated in the overall price of the object that is under construction or the equipment being delivered. The deadline for the bidder to submit tender bank guarantee and its contents is determined by the bidding terms. Due to the importance and size of the risk covered with this guarantee, the purchaser frequently demands to be given the guarantee from the top class bank, because only such kind of bank and the guarantee it provides can offer complete safety that the amount guaranteed will be paid off as compensation for the losses caused by the breach of the bidding terms by the participant to whom the business was assigned to. The amount of the tender guarantee is mostly determined by fixed or determined percent from the overall estimated values of the investment object. It should be determined in a way that can cover costs, expenses and damages that occur in case the participant in the bidding declines to conclude the building contract for the investment building or to deliver investment equipment or if he does not fulfill his obligations at all. Tender guarantee should be issued in the currency and amount stated in the call for the participation in the bidding, and it should show maximal amount to which the guarantor takes the obligation based on the issued guarantee. Expiry date of the tender guarantee must be long enough to cover the time of the duration of the bidding, and beside that, it must cover one shorter period of time in which the purchaser can require the payment of the guaranteed amount. In this case, the bank guarantor is obliged to pay off the amount guaranteed, on condition that the demand for the payment is submitted not later than the last day of the expiration date of the tender guarantee.⁸

Unlike other forms of bank guarantees, the condition for the collection of the tender guarantee is not associated with the breach of the contract from the principal, but with the breach of the bidding terms which the participant in the bidding had accepted the moment he submitted the proposal with appropriate documentation.

The guarantee for the good performance of the work is a guarantee with which the bank guarantor is obliged to pay off the certain amount of money to the purchaser (investor), respectively the user of the guarantee in case the debtor (seller, provider of services) does not fulfill or disorderly fulfill his/her contractual obligations. It is mostly used as a means of securing in business of building investment, which has greater risks from the default of the contract and is by its character different from the risk that is emerging with other obligation contracts, and especially from the risks that appear with the contract for the selling or purchase of the merchandise. In the bank guarantee for the good performance of the work it is necessary to state the amount of the guarantee, and the international business currency in which the guarantee amount is denoted at, as well. The amount of guarantee should cover the amount of supposed damage that could be inflicted to the user of the guarantee in case the debtor from the primary contract does not fulfill his/her contractual obligations.

According to the Article 17 of the Regulation on the obligatory elements of the bidding documentation in the procedure of the public acquisition in Serbia, the bank guarantee for the good performance of the work is issued for the amount of no more than 10% from the value of the contract, considering the deadline for the job execution. The bidder has to submit the bank guarantee for the good performance of the work to the purchaser in the moment of the conclusion of the contract or within the deadline set by the purchaser, not later than the first delivery. If he fails to do so, the contract concludes with a delayed condition and starts to be

⁸ Pavicevic, B., *op. cit.*, p. 159.

valid from the moment of submission of the bank guarantee. The bank guarantee for the good performance of the work lasts for at least three days longer than the expiration date for the final job completion. If in the meantime the contract terms for the execution of the contracted obligations are changed, the bank guarantee must be extended.⁹

Unlike the tender guarantee, the guarantee for the good performance of the work determines the bank guarantor in agreement with the principal, so that the influence of the user of the guarantee to the content of the obligation from the guarantee drains on the plan of the acceptance of the guarantee or its denial.

Conclusion

Constant growth of business activities and complexity of business connections between economic subjects results in a growing issue of securing receivables and unstable business. On condition that the subjects who are participating in the realization of commercial and non-commercial turnover encounter elements of uncertainties and suspensions that are coming not only from their material state but usually from the effect of various institutional factors, the authors recommend greater usage of bank guarantee as security instruments in contemporary circulation. The conditions for that are the changes in the organization of bank business and the introduction of clients with advantages of using bank guarantee. The improvement of the relations and communication with the bank clients may be realized through the organization of professional seminars, announcing publications, Internet presentations and other forms of education in the field of banking. A high level of transparency in the bank business, informing clients and their constant education should induce more usage of bank guarantees as a significant means of security in contemporary circulation.

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Garanțiile bancare și reprezentarea lor în activitățile de afaceri bancare (în paralel cu perspectiva legislativă)

Rezumat

Instabilitatea financiară a întreprinzătorilor și nesiguranța crescândă a colecției de sume încasate impun utilizarea instrumentelor de asigurare a plăților, ceea ce oferă siguranță partenerilor de afaceri în cea mai mare măsură și diminuează efectul factorilor de risc. Din numărul mare de instrumente autorii au selectat garanțiile bancare ca instrument important de securitate a fluxului contemporan. Articolul de

⁹ Law on Obligatory Relations, Official Journal SRJ, No. 31/93

față încearcă să prezinte caracteristicile de bază ale garanțiilor bancare, elementele lor, avantajele utilizatorilor și ale debitorilor și să analizeze reprezentarea garanțiilor bancare în băncile din Serbia și din țările vecine. Obiectivul cercetării este de a indica importanța garanțiilor bancare și necesitatea reprezentării lor în activitățile bancare de afaceri. Ca mijloc de preîntâmpinare a acelei stări, autorii sugerează schimbări în sistemul bancar de afaceri, o abordare activă a clienților și educarea lor constantă, ceea ce le va aduce la cunoștință avantajele utilizării garanțiilor bancare ca mijloc de securitate în fluxul monetar contemporan. În această lucrare, având deja stabilite obiectul și scopul explorării, se va folosi metoda explorării calitative și cantitative, axată pe utilizarea analizei descriptive și statistice.