RAIS Journal for Social Sciences | VOL. 5, No. 2, 2021
ISSN 2574-0245 (Print) | ISSN 2574-1179 (Online) | DOI: 10.5281/zenodo.5722248

Brief Considerations regarding the Enforceability of the Letter of Bank Guarantee

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ABSTRACT: The letter of guarantee is, as the name suggests, the instrument of a negotium usually offered by a banking institution for the benefit and at the request (order) of a client of his, engaged in production, trade or services in which he has the quality of debtor. Through the letter of guarantee, various types of guarantee can be constituted (including surety), being essential that the contents of the letter show the intention of the parties regarding the type of guarantee (negotium), which they intended to conclude.

KEYWORDS: the enforceability, letter of guarantee, negotium, enforceable titles, the executory law

Introduction

The letter of bank guarantee is regulated in art. 2321 of the Civil Code, together with the comfort letter regulated by art. 2322 in Chapter III with the name of autonomous guarantees, which is part of Title X of the Civil Code with the name of personal guarantees (Bemink, Jon, and Charles 2007, 109).

The enforceable title represents the document drawn up by the competent body under the conditions provided by law by virtue of which the creditor may request, by forced execution, the fulfillment by the debtor of the assumed obligation.

According to the provisions of art. 638 Code of Civil Procedure are also enforceable and may be enforced:

1. Conclusions and minutes drawn up by bailiffs which, according to the law, constitute enforceable titles;
2. Authentic documents, in the cases provided by law;
3. notarial enforceable titles issued under the conditions provided by law;
4. credit titles or other documents to which the law recognizes enforceability".

The existence of an enforceable title is a sine qua non condition for the commencement of enforcement (Bogliacino and Cardona 2010, 77).

Irrespective of the manner in which enforcement is to be effected, the obligation required to be enforced must be established by an enforceable title

The phrase "only on the basis of an enforceable title" used by the legislator is likely to emphasize and also limit the scope of acts under which enforcement can be performed, in the sense that only the enforceable title can lead to the initiation of enforcement proceedings, excluding any other titles that they do not have this character (Collett, Pandit and Saarikko 2014, 112).

At the same time, in the hypothesis in which the forced execution was started on the basis of a title that is not according to the executory law, it is possible to obtain the annulment of all the execution acts by way of the contestation to the execution.

It can be observed that the provisions of art. 632 C. proc. do not define the notion of enforceable title, the legislator limiting himself only to enumerating the documents that constitute enforceable titles. In the analysis of the category of enforceable titles, we will note that they constitute „acts drawn up according to law by the competent bodies and which may serve to initiate enforcement and to achieve, in this way, the rights recognized by those acts."

Article 638 para. (1) § 4 C. proc. civ. disposes on the character of executory title, on the one hand, of the credit titles, on the other hand, of other documents to which the law confers executory power (Colombo, Croce and Guerini 2013, 54).

The bill of exchange, the check, the promissory note and any other credit securities (bearer shares, bearer bonds, real and personal guarantees, etc.) constitute enforceable securities provided that they meet the requirements of the special law governing them.

Regarding the expression of the legislator "other documents to which the law recognizes executory power", we appreciate that this is vast, and not limiting, enforceable titles being found both in the general law (Civil Code) and in special laws. Thus, there are executory titles in various matters, respectively, according to art. 8 of O.G. no. 51/1997 on leasing operations and leasing companies, "leasing contracts, as well as real and personal guarantees, established in order to guarantee the obligations assumed by the leasing contract, constitute an enforceable title".

Or, corroborating all the legal provisions and principles of law established in the legal doctrine, the letter of bank guarantee is without a doubt a personal guarantee, being the result of an agreement of will between the credit institution and the beneficiary of the guarantee.

The personal nature of the letter of bank guarantee results from the way in which the legislator understood to place this new type of guarantee, namely in Title X of the new Civil Code entitled "Personal guarantees". At the same time, according to art. 2279 NCC, the personal guarantees are: "the surety, the autonomous guarantees, as well as other guarantees specifically provided by law."

The character of executory title of the letter of bank guarantee was conferred previously to the regulation intervened on the occasion of the entry into force of the new Civil Code, of pre-existing regulations, the new code only coming to strengthen what was adopted by Law no. 58/1998 regarding the banking activity, which in art. 79 para. 2 provided: "bank credit agreements as well as real and personal bank guarantees constitute enforceable titles." Paragraph 3 of the same art. 79 also provided for the need to invest with an enforceable formula (Cowling, Liu and Ledger 2012, 223). Currently the same provisions are provided in the O.U.G. no. 99/2006 on credit institutions and capital adequacy.

This is the reason the letter of bank guarantee undoubtedly falls within art. 120 of the O.U.G. no. 99/2006, which provides for "credit agreements, including collateral or personal guarantees, concluded by a credit institution, constitute enforceable titles", undoubtedly resulting in the fact that it constitutes an enforceable title. The letter of bank guarantee represents an enforceable title according to the provisions of the special laws regarding other titles referred to in art. 638 para. 1 pt. 4 C. pr. regarding the credit titles or other documents to which the law recognizes the executory power - being the category of "other executory titles", a wider one and includes on the one hand the credit titles, which are developed by art. 640, and on the other hand, other documents to which the law recognizes the executory power.

The ascertaining title of the guarantee has a constitutive character of rights, which attracts the qualification of the letter of bank guarantee as a true credit title. Or, according to art. 640 of the Code of Civil Procedure, are enforceable titles: bill of exchange, promissory note and check, as well as other credit titles, if they meet the conditions provided by the special law (Deventer, Imai and Mesler 2013, 169).

If the issuer is in bad faith and does not execute the letter of bank guarantee voluntarily, the creditor will be in the situation of being forced to start a lengthy process and, not infrequently, difficult, in order to be able to enforce it. Thus, on the one hand, according to art. 120 of the Government Emergency Ordinance no. 99/2006: "Credit agreements, including collateral or personal guarantees, concluded by a credit institution shall be enforceable." On the other hand, the Civil Code establishes that the letter of bank guarantee is a personal and autonomous guarantee contract, being regulated in Title X Personal guarantees, together with sureties and other specific guarantees provided by law.

Due to its appearance and development, its international use, as well as the differences in jurisdictions, autonomous guarantees have known extremely different names. The Romanian Civil Code uses the term autonomous guarantee and letter of guarantee as its species, considering that the idea of autonomy from the basic report is essential for this. In the same vein, in the UNCITRAL Convention on Independent Guarantees and Standing Letters, the term independent guarantee is used.

Publication no. 325, also called Uniform Rules on Contractual Guarantees, which sought to standardize the practice by resolving issues related to the abusive, fraudulent execution of guarantees (Cowling, Liu and Ledger 2012, 223).

Publication no. 458 or Uniform Rules on Guarantees on Demand, intended to supplement the shortcomings of the first publication, shortcomings highlighted by the evolution of international practice in this area. A new update from ICC takes place relatively recently, in 2010, through Publication No. 758, also entitled Uniform Rules on Guarantees on Demand.

The purpose of these new rules is to revise the previous ones; therefore, Publication no. 758 does not repeal them, but only updates them, adapting them to the current needs of international trade. As Romania has also acceded to these conventions, they apply mainly on the territory of the country, of course only when the parties decide that they should govern their legal relationship. This is because the regulation provided by the new Civil Code is a summary one, which is limited to defining and describing the main legal effects, without a detail of the mechanism of operation.

In parallel with this approach of the ICC, in 1995, the United Nations Commission on Trade Law (UNCITRAL) drafted a convention whose purpose was to bring together under the same regulation both continental self-guarantees and pending letters of credit (Dincă 2007, 155).

The fundamental difference between the UNCITRAL Convention on Independent Guarantees and the Stand-by Letter of Credit (in force since 1 January 2000) and ICC Publications is that while Publications are soft-law, the Convention becomes binding as part of the positive law for states ratifying it. However, Romania is not among the states parties to the convention.

The name on-demand guarantee or first-demand guarantee is one of the relevant international standards, as it is the terminology promoted by Publication 758 and because in the United Kingdom and France, it is preferred to use the equivalent names First Demand Guarantee. The terminology of other states also uses the names Guarantee zur Zahlung auf erstes Anfordern or Bankgarantie (German), first demand guarantee or contratto autonomo di garanzia (Italian), and in the United States the Stand-by Letter of

Credit is used, which is considered to be the equivalent mechanism due to the similarities between them (Deventer, Imai and Mesler 2013, 169).

The secondary legislation applicable in the case brought to trial, respectively the application norms in the matter of public procurement procedures establish at art. 41 of the Methodological Norms for the application of the provisions regarding the award of the public procurement contract / framework agreement from Law no. 98/2016 on public procurement of 02.06.2016, "the right of the contracting authority to issue claims on the performance guarantee, at any time during the performance of the public procurement contract / subsequent contract, within the limit of the damage created, if the contractor does not fulfill through his fault the obligations assumed by the contract.

Prior to issuing a claim on the performance guarantee, the contracting authority has the obligation to notify the claim to both the contractor and the issuer of the guarantee instrument, specifying the obligations that have not been complied with, as well as the method of calculating the damage. In the event of the performance of the performance guarantee, in whole or in part, the contractor shall be obliged to replenish the security in question in relation to the remainder to be performed."

Conclusions

Autonomous guarantees are guarantee instruments regulated for the first time in national law as a legal institution; the letter of bank guarantee is one of those institutions that appeared and developed in the absence of a legislative framework in domestic law.

International trade practices developed in the banking field to guarantee obligations were codified by the Paris International Chamber of Commerce, first in 1978 (Publication 325), then in 1995 (Publication 458); in 2009 the same body revised the Uniform Rules on On-Demand Guarantees through a new set of rules on bank guarantees which entered into force on 1 July 2010 (Publication 758). The rules contained in Publication 758 apply to any letters of guarantee or counter-guarantee in which it is expressly stated that they are subject to these rules.

The bank guarantee consists of the commitment assumed by a bank (guarantor), at the request of a supplier of goods or services (authorizing officer or applicant) or on the basis of the instructions of a bank authorized by the authorizing officer, to a buyer or beneficiary of works (beneficiary), whereby the guaranteeing bank undertakes to make a payment in favor of the beneficiary of the guarantee within certain value limits. In English it is called "tender bond" or "bid bond", and in French "guarantie de soumission" (Bemink, Jon and Charles 2007, 109).

The beneficiary of the guarantee seeks by requesting the guarantee the coverage of the risks arising from the non-execution or defective execution of the contract by the applicant (seller), both in terms of quantity and quality.

The guarantee covers both the risks prior to the execution of the contract (when the guarantee aims at fulfilling the seller's obligations under the terms and conditions of the contract) and those subsequent to the execution of the contract (when the guarantee covers the quality of products and services delivered and provided).

The letter of autonomous bank guarantee produces its effects directly, between the beneficiary of the guarantee and the bank, and indirectly, between the applicant of the guarantee and the bank.

The guarantee is independent of the fundamental legal relationship. The bank is an autonomous debtor of the beneficiary of the guarantee. The autonomous bank guarantee takes effect only if its beneficiary expressly requests the guaranteeing bank to fulfill its obligation to pay. Related to the type of guarantee (unconditional or

conditioned), the beneficiary's request can be: a) pure and simple and b) justified or documentary. The bank's obligation to pay persists regardless of the type of guarantee.

Article 2321 of the Civil Code regulates the letter of guarantee having as object the autonomous guarantee, the autonomous character of the guarantee having to result unequivocally from the content of the document.

Establishing the type of guarantee constituted by letter is essential for determining the conditions under which the main effect is achieved - execution of the guarantee: in case of autonomous guarantee, the issuer (bank) is obliged to execute the guarantee on the simple request of the beneficiary or upon presentation of documents in the letter, without making any checks on the legal relationship (primary) between the creditor (beneficiary of the guarantee) and the debtor (authorizing officer) (Collett, Pandit and Saarikko 2014, 141).

We emphasize that it is very important not to create confusion between Letters of Guarantee, which means any signed commitment, whatever it may be called or described, that ensures payment upon submission of a compliant payment request and Documentary Credentials. ("Letters of Credit"), the latter having a different regime, being used mainly in international trade in import-export activities and governed by rules promulgated by the International Chamber of Commerce, known as the Uniform Rules and Practices on Documentary Credentials (UCP 600 being the latest version).

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