

GEORGIAN LEGAL SCIENCE ABOUT BANK GUARANTEE

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Abstract

Representation of European Union in Georgia says that, “Since 2004 trade between Georgia and European Union has been developing fast, European Union has become the main trade partner of Georgia and the share of trade with it became equal to one third of the annual trade balance [4]. Georgia was actively involved in the international commerce and bank relations. The geographic location of the country contributed to it as the short way from Asia to Europe passes through “Georgia South corridor”, as specified in the agreement of association of Georgia with European Union (AA) signed on June 27, 2014. According to the Appendix XV-A of the mentioned agreement, Georgia undertook the obligation to gradually draw its legislation nearer to the legislation of European Union and international legal instruments in the banking sphere. One of the objectives of the association agreement is integration of Georgian economy to European Union through “deep and comprehensive free trade area” (DCFTA). In this new reality bank guarantee acquires great significance, as quickly executable and strong security of performance of monetary obligations at the international market. It will perfectly facilitate this integration. This article is dedicated to the views and scientific opinions of Georgian well-known doctors and professors of law, related to the legal side of the bank guarantee that is reflected in their monographs. This article shows, according to the opinions of Georgian scientists, how ready Georgian law is for new challenges.

Keywords: Uniform Rules for Demand Guarantees (URDG), Bank guarantee, Beneficiary, DCFTA

Introduction

On June 27, 2014, the agreement of association of Georgia with European Union was signed. The issue of trade acquired even more importance in the context of “deep and comprehensive free trade area” (DCFTA) between Georgia and European Union. At present, all states of European Union should ratify the agreement concluded with Georgia which will turn customs, bank and trade relations into new mode.

In order to make the stages of development of Georgian legal science in the scientific study of legal status of bank guarantee clearer, let us follow chronology from the time when this term was used for the first time in the legislation of independent Georgia.

Bank guarantee has established in free and independent Georgia since June 26, 1997. For the first time this term was used in Georgian civil code and its main definitions remained almost unchanged until today. Legal regulations of the bank guarantee in the private part of Georgian civil code are given in chapter 21 of contractual law, which is called “bank service”, and twelve articles are dedicated to it - from 879 to 890 inclusive [7].

By the time, when the legislator has adopted a new civil code, Georgian independent bank system was very young. Some legal relations, which were offered to the country and monetary-credit system by the new civil code, were unexpected by their innovations and at the same time offered freedom of transactions and comprised many types of agreements.

The banking sector to work without hindrances, according to the Article 1517 of transitional provisions of Georgian civil code, the National Bank of Georgia was assigned to ensure cancellation of restrictions related to opening of bank accounts for physical persons. This happened in order all physical and legal persons to be able to open accounts and enter into bank service agreements stipulated by Georgian civil code. Obviously, it concerned bank guarantees as well [7]. Prior to entering of the new code into force, physical persons had the right to conclude only deposit agreements.

Obviously, the legal regulation, defined by twelve articles of new civil code was not enough for detalization that required the banking sector. By this time, ICC publication No 458 for demand guarantees has been in force for only three years. However, it was an international unified rule and the banks were careful about transfer of its norms by direct analogue into the internal regulations of the country. Now it is clear that ICC publication No 458 comprised many vague norms and could not ensure deepening of confidence towards bank guarantee, although in comparison with its forerunner - ICC publication No 325, it was undoubtedly high quality act.

In order the legal nature of bank guarantee, as securing of performance the monetary obligation, was clear for business, scientific explanations, study of foreign experience and court practice were required. But at the time when Georgian civil code came into force, court reform was just starting in the country; its objective was selection of candidates for the positions of qualified judges, further training and creation of fair court.

A large group of Georgian lawyer-scientists started to work at creation of comments of civil code of independent Georgia and conducted high-volume work. Civil code comments were issued in five volumes and acquired high popularity. The editorial board, under the guidance of Professor Lado Chanturia, composed of Besarion Zoidze, Tedo Ninidze, Roman Shengelia and Jonny Khetsuriani, created comments on Georgian civil code for the private part of obligatory law, including the relevant articles of the bank guarantee. Along with the professors, comprising the editorial board, famous Georgian lawyer-scientists - M. Kakhadze, T. Chitoshvili, Z. Dzlierishvili, T. Zambakhidze, D. Sukhitashvili and Sh. Chikvashvili - worked on this issue. The comments on twelve articles, related to the bank guarantee, belong to the Professor of the Faculty of Law of Tbilisi State University, Roman Shengelia, a prominent scientist in Financial Law [3]. These comments were the first scientific explanation that were dedicated to the bank guarantee and were issued in 2001[5].

The content of the articles, related to the bank guarantee is explained in the comments. He made clear rights and obligations of the parties of the transaction and indicated the legal status which characterizes the bank guarantee as a unilateral and non-accessory transaction, which means that it does not depend on the main obligations, nor the order, that the principal gave to the guarantor for certain payment. The irrevocability of the bank guarantee, entering of the guarantee into force, the form of submission of demand for payment to the guarantor, the obligations and rights, performed by the guarantor, which were explained in comments, served to clear expression of legal essence and objective of this financial instrument. Georgian civil code and its comments deal only with local bank guarantees that are issued within Georgian territorial framework.

These comments are scientific explanation of Georgian civil code. They do not have the obligatory of the law, as, for example, comments on Russian civil code, which were approved by Russian “Duma” and assigned obligatory force along with Russian civil code.

The next work, which was dedicated to the bank guarantee, already considered it as not only intrastate, but as an international financial instrument. It was published in 2003 with the title “some issues of bank (independent) guarantees according to the national legislation and international private law” in the book review of Georgian law of 2003 [8]. The article

belongs to Paata Khotenashvili who was the head of legal department of the National Bank of Georgia at that time and is now engaged into practice of law.

It was the first scientific article, which along with the origin and development of independent bank guarantee, reflected its significant legal characteristics already towards the sources of international law sources. It competently discussed the legal nature of bank (independent) guarantees, on the terms and their meanings, which are reflected in the UN conventions, international unified rules about guarantees, national legislation of European countries and international private law.

The work indicates that the concept of guarantee was understood naturally and incoherently according to the national legislation of various countries, and in Georgian law it had correctly defined definition. It is necessary to eradicate this vagueness. The work deals with the limits of application of the bank (independent) guarantee according to Georgian legislation, as well as according the international acts. It was the first comparative scientific legal research during the study of legal status of the bank guarantee. The work is based on monographs issued by European scientists in the period from 1996 until 2003. It was a step forward for the presentation of law of the new independent country - Georgia at the international level and reviewed readiness of Georgian law for the international market with proper legal status of such strong financial instrument as the bank guarantee.

The third work, which in Georgian jurisprudence was dedicated to the bank guarantee, belongs to one of the famous young Georgian scientists, Doctor of Law, Professor Zurab Chechelashvili. He translated German civil code into Georgian. His work in this direction is interesting in the aspect that he simultaneously has great practical experience of work in one of the leading banks of Georgia TBC bank as a lawyer, which was positively reflected in the theoretical-legal research of the bank guarantee. In his work, the legal nature of the bank guarantee was analyzed in details and its theoretical, as well as practical aspects were formed, which was reflected in the book “Georgian business law” published in 2011 and soon became popular [3].

After that a scientific work was published which belongs to the Georgian scientist, civilist, famous in Europe, author of over 120 scientific works, Professor Lado Chanturia who contributed much to creation of Georgian civil code and development of civil thinking. His new work is “Law of securing credit” published as a book in 2012 [1]. Lado Chanturia is a guest Professor at Keele University (Law Institute of Eastern Europe) in Germany. His works are published in German, English and Russian languages. In the work “Law of Securing Credit”, he discusses the bank guarantee as quick and safe means of ensuring performance of monetary obligations, arising out of credit relations.

Professor Chanturia states: “The peculiarity of guarantee is that in case of non-performance of the undertaken obligations by the principal, the guarantor is not assigned to perform the obligations of the principal before the beneficiary; he is assigned only to pay an amount”. It underlines the fact, that though the issuer of the guarantee secures the main agreement concluded between the principal and the beneficiary, it guarantees only the performance of monetary obligations and does not ensure performance of any other obligations. He also notes that “the bank guarantee ensures satisfaction of the beneficiary even when the main obligation under the agreement concluded with the principal did not arise, was performed completely, terminated, or is invalid” [1]. This legal nature grants the bank guarantee the characteristics of quickly executable security instrument and makes the bank guarantees issued by Georgian banks reliable inside the country, as well as at the international financial market.

After that, the scientific work titled “Bank Law” was published which was published as a book in 2012 [6]. It belongs to a young Georgian scientist, author of 25 scientific works, Professor of Georgian-American University, Zviad Gabisonia who has been on scientific

internship at the legal faculties in Bonn, Hamburg and Munich Ludwig-Maximilian Universities. He is the Professor of Caucasus University. His work “Bank Law” is by today the only work dedicated to legal basis of bank activities and studies the legal aspect of all directions of these activities. By using the comparative-legal method, the institutes of bank law are analyzed and compared to Georgian banking legislation. This work is drawn according to the syllabus of European University and the textbooks intended for students. It is an auxiliary textbook for study of the bank law for students of the law faculty, as well as for scientist-lecturers, judges, lawyers and practitioners of law. The bank systematically explains the concept of law, system and resources, mandatory norms of intrastate, as well as of international agreements and conventions. Bank rules and traditions, court and arbitrary practice are discussed. The fifth chapter of the book is completely dedicated to the bank guarantee and is performed with high legal and scientific degree, the same, as the whole monograph. It contains non-accessory nature of the bank guarantee and legal status of the bank guarantee.

The next scientific work, titled “Bank Guarantee” belongs to Irakli Robakidze, candidate of Doctor’s Degree of Jena Friedrich Shiller University, which is included in the Georgian textbook “Contractual Law” published in 2014 and is intended for law schools. A group of authors - Professors Zurab Dzlierishvili, George Tsertsvadze, George Svanidze, Levan Janashia and Irakli Robakidze worked on the book [5].

Irakli Robakidze’s work is comprehensive and thorough in relation to the bank guarantee. It gives a full idea and scientific explanation for terminological and theoretical definition of this financial instrument. All articles dedicated to the bank guarantee in Georgian civil code are commented scientifically. The work is based on the research of German scientists; it provides cases and reviews the newest court practice. The work is rather significant because it is the first one which gives the text of the bank guarantee, whose sample is taken on the basis of ICC publication URDG 758 and which is used by the banks for issuance of intrastate, or local guarantees.

After studying the above-mentioned works, it should be mentioned that Georgian scientists have agreed on the following legal nature and the following main principles of the bank guarantee:

The bank guarantee is an independent and non-accessory unilateral transaction. It does not depend on the veracity of the agreement for whose security it was issued. If the guarantor issues the bank guarantee in favor of the beneficiary, he is obliged to pay the amount indicated in the guarantee even when the main obligation under the agreement concluded by the beneficiary with the principal did not arise, was completely performed, terminated, or is invalid. The bank guarantee is the most attractive security for the beneficiary, because only two things are required from him. These are: 1) to send to the guarantor a written request, where the obligation, violated by the contractor should be indicated, demand payment of the guarantee amount within the term of validity of the guarantee and 2) to attach to the demand those documents, in such format, which is indicated in the letter of guarantee. Thus, Georgian law shares the principle “first pay, and then argue” [5]. Beneficiary has no other load of proving. The circumstance that authorizes the guarantor not to pay the agreed amount is only violation of the above-mentioned terms by the beneficiary. The legislation states and Georgian scientific society agrees with the regression right of the guarantor towards the principal in case of payment of the guarantee amount and does not make this issue disputable. Georgian scientists are unanimous in the issue that the framework of the obligations of the guarantor is only payment to the beneficiary of the amount on which the guarantee was issued. Scientists are also unanimous on the issue that the guarantor cannot revoke already issued guarantee, unless there is any special provision in the text of the guarantee. It is interesting that Georgian law provides for revocation of the guarantee if it is stipulated in the

text of the guarantee, but scientists consider this circumstance to be an exception, though in the banking practice there has been no case of revoking of the issued bank guarantee.

As it is made clear from the chronology, from 2003 to 2011 there were no scientific works related to the bank guarantee. From time to time, the opinions and publicist letters of lawyers appeared in Georgian internet space, regarding this issue that expressed an interest of more knowledge. During this time, Georgian banks and businessmen gained enough experience in using the bank guarantee and court practice has also been established gradually. Meanwhile, since 2010 ICC Publication URDG 758 entered into force that cleared the vague norms in force in previous years, made them more exact and introduced many new concepts. This news has increased confidence towards the bank guarantee and enabled business to get involved in the international trading, as the risk of losing money in the international trade was reduced to minimum.

Today, in Georgia in case of state procurement and announcement of tender and contest by the state, the first and main condition is submission of the bank guarantee by the bidder, starting from the tender offer; at all stages it is required until final performance of the contractual obligations.

URDG 758 new unified rules are very detailed and include definition of new and various circumstances in many directions. Scientifically it is still to be studied by the comparative legal research method towards the Georgian legislation. Despite this fact, Georgian banking and civil law completely respond to this new challenge as well. Georgian banks issue international bank guarantees with the indication to URDG 758 and foreign beneficiaries have not had any public claims yet.

Conclusion

As we see from the above-mentioned, Georgian lawyers and famous civilist-scientists are very competent and have scientific interest towards innovations, which are offered to Georgia by international challenges. Georgian scientists know well, thoroughly study and analyze European experience related to the bank guarantee and works of European scientists. Their works are based on the scientific experience of European Universities in relation to bank guarantees.

The above-given works and comparative legal researches contribute to integration of Georgia into the international processes and approaching the legislations of the countries of European Union by Georgian legislation. It also popularizes Georgian banking law in European countries, as Georgia is ready to undertake equal partnership and perform obligations, undertaken by the association agreement in the direction of banking activities.

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