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Research Paper

Analysis of legal nature of bank guarantees in Iranian Law

Law

KEYWORDS : bank (independent) guarantee, (civil and commercial) suretyship conclusion, unilateral obligation, commitment in favor of the third party

Dr. Homayoun Mafi | Associate Professor of Private Law department of University of Mazandaran

Mahdi Rahmani | PhD student of Private Law, University of Mazandaran

ABSTRACT

Bank guarantee or Independent guarantee is a contract or a document whereby the issuer (guarantor), upon the request of the applicant (principal), is committed against the beneficiary (guaranteed side) that on demand or at a certain maturity, without any stipulation to pay a certain amount of cash for a specific issue which is related to the beneficiary or to the order of him/her. According to this definition about the legal nature of bank guarantees, one can consider four perspectives: Some have considered this banking document as a justification for civil liability conclusion stipulated in Article 684 of the Civil Code. However, some other group believe that the nature of banking guarantees can be justified in accordance with articles 402-411 of Commerce Act. Another group consider bank guarantees as bank's unilateral commitment against the beneficiary and another group believe that guarantee issuance is dependent on a contract between guarantee applicant and guarantor bank according to which a provision shall be specified in favor of the third party namely the beneficiary. Nevertheless, after criticism and analysis of reasons of supporters for any of the opinions, we conclude that bank guarantees are private contracts set forth in Article 10 of Civil Code. But in recent trade bill, the legislator had a tendency towards a condition to consider and interpret bank guarantees as subsets of certain contracts stipulated in Commercial Code.

Introduction

Bank guarantees have emerged according to the requirements arising from commercial transactions and interactions and by accepting this commercial pattern, many countries are moving at a rapid pace for their own growth and commercial development in the field of the globalization of trade and economics. Iran is also seeking to overcome the disadvantages of this pattern and enact regulations in this regard, so with its presence in the global trade arena, prepare the atmosphere for improving its economic conditions, and approval and communication of 1404 vision document can be considered in this respect in which Iran will be a developed nation with the first position of economy, science and technology in the region.

This must be accompanied by understanding the prevailing atmosphere of the multipolar society of global trade and analysis of implications and business relationships in order to join WTO.

On the other hand in the field of international trade, the most common collateral for guaranteeing and ensuring contractual liabilities which comprises the foundation and base of modern commerce, is bank guarantee the nature of which still has no uniform procedure in international trade law and judicial procedure and there is no consensus among the legal scholars about it.

In Iranian law, different interpretations and analyses have been expressed about the nature of bank guarantees and there is not a common point among the jurists. In other words, since the arrival of bank guarantees into the commercial sectors of Iran, different interpretations are presented for the nature of this commercial document or contract. Some have considered the legal nature of bank guarantees as unilateral obligation, some have regarded it as conclusion suretyship or commitment in favor of third party or as contract in terms of instances of Article 10 of Civil Code. However, all of these analyses are used in order to make new laws of international trade comply with and aligned with the principles of Imamiye jurisprudence which is the main source of laws in Iran.

In this paper, it has been tried to represent the concept, objective and legal relationship of bank guarantees as well as the relationship between the bank and principal and the relationship between guarantor and guaranteed side and the relationship between guaranteed side and principal in part one. In the second part, the legal nature of bank guarantees are discussed along with different opinions and we will consider whether a bank guarantee is a conclusion or a unilateral obligation, or a commitment in favor of a third party or it may be discussed in the form of will-power principle which is one of the instances of Article 10 of Civil Code. And at the end, a conclusion is made on the basis that according to provided statements and evidences, the legal nature of the bank guarantees will be in accordance with will-power principle which is one of the instances of Article 10 of Civil Code.

Part I: concept, purpose and legal relations of bank guarantee

In this section we will examine the concept, the purpose of issuance and the two sides of a bank guarantee in three topics:

1 - The concept of bank guarantee

At the time of bank guarantee introduction to Iranian banking system, the jurists and legal thinkers offered various definitions for this legal nascent document. Various definitions are mentioned below:

" Guarantee is an ordinary or official writting containing conclusion suretyship or any type of commitment such as where in a guarantee, one is paroled to be freed. If guarantor is a person, it is called personal guarantee . If a bank guarantees then it is a bank guarantee."

In this definition the concept of bank guarantee has been used alongside other types of guarantees, and in definition of a guarantee has gone far beyond the financial commitment, and has become closer to characters such as the guardianship and mortgage. With careful examination of bank guarantee elements and relations between the two sides of this commercial document, it can be said the current definition is quite general and has little to do with this document.

In Dictionary of Banking, William Thomson has defined bank guarantee as: "Guarantee is the personal commitment (of guarantor) against the bank, in order to meet the liabilities of another person (the debtor) to the bank in case of his/her failure."

This definition of guarantee seems to be more about cases where someone provides a collateral and introduces a guarantor to the bank. Another definition is "Guarantee is a secondary and incidental commitment by which the the obligor is obliged to be responsive against warrantee's liabilities in case another person who had primary responsibility against warrantee, fails or violates his/her commitments."

Provided Definitions are far away from the structure of bank guarantees which are currently in use, therefore in order to achieve an inclusive and exclusive definition, it is necessary to have a look at the manner of this commercial document issuance:

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Depending on bank guarantee being a simple or a mutual one, the main parties of the relationship are two or three people. Thus, in simple guarantee, first we have guarantee applicant (guarantee applicant or principal), then the document issuing bank (guarantor) and finally beneficiary of guarantee (guaranteed side). At first, its issuance applicatnt refers to the bank and provides the necessary collateral to request for issuing the guarantee, then according to this request and by determining the validity duration of the guarantee and its terms, the bank issues a guarantee for the beneficiary and in case the guarantee is international, basically the bank does not issue the guarantee directly, but issues the guarantee for the benefit of a bank in the beneficiary's country (reciprocal guarantee), and with the credibility of this guarantee, the second bank will also issue a guarantee (original guarantee) for the beneficiary in which case the guarantee will be a reciprocal one.

Bearing this in mind, one of the jurists has defined the bank guarantee as follows:

"Bank guarantee is a contract or a document whereby the issuer (guarantor), upon the request of the applicant (principal), is committed against the beneficiary (guaranteed side) that on demand or at a certain maturity, without any stipulation to pay a certain amount of cash for a specific issue which is related to the beneficiary or to the order of him/her".

Trading bill provided a definition of guarantee in 2012 which has been stated in Article 836 as follows: "Independent guarantee is a document whereby the issuer (guarantor) according to the request of applicant (principal) assumes the responsibility of certain payment to the beneficiary (guaranteed side) in accordance with the conditions stipulated in the guarantee contract". In the next Article, the legislator states that: "Obligations caused by independent guarantee is a part of reciprocal obligations of the beneficiary and applicant due to the main contract and independent of applicant's commitment to the issuer is also valid and failing, termination or invalidity of the main obligation does not cause the issuer's acquittance."

Description of the trade bill which is on the verge of final approval, is a complete description of the bank guarantees and at the same time it has not undermine the description of guarantee independence from the main contract.

Considering that currently bank guarantees or independent guarantees are only issued by banks and financial institutions, bank guarantee can be defined as follows:

"Bank guarantee is a document issued by banks whereby the Bank is committed so in case the guarantee applicant (principal) fails in his contractual obligations against beneficiary (guaranteed side) resulting from the main contract, according to declaration by beneficiary and demanding the guaranteed money, to pay the amount stated in the guarantee to him/her".

2 - The purpose of bank guarantees

Guarantee is a crucial tool in commercial contracts, particularly in international contracts, because it minimizes the contract economic risk and is a powerful sanction. No contract has functionality without having a bank guarantee or insurance. In the absence of a valid international guarantee for any contract, in case of any discrepancy during the procedure of the work or violation of one side about his/her commitment to the contract provisions, the other side should provide a litigation or some discussions and conflicts should be accomplished so the problem can be resolved. In these conditions, a guarantee is an innovative financial instrument, so that if any of the parties of a contract could not fulfill their obligations, the other party can receive the amount of the guarantee and its dividend in cash and thus any litigation, discussion and controversy can be avoided.

The aim of bank guarantee is providing some part of the damages due to violations from obligations that the guarantee applicant has undertaken in the contract against the beneficiary of the guarantee as obligee. Dependent on the type of basic contract, the purpose of issuing a guarantee varies. Bank guarantee is one of the common tools in contractual and legal relations of civil and International commercial laws. The purpose of guarantee issuance may be one of the followings:

- **Good performance guarantee:** The purpose of the issuance of some guarantees is to provide a document by which the issuer according to the request of the party which provides the goods or services (principal) commits to pay a certain sum of money to the beneficiary under the terms of the agreement between the principal and the guaranteed side (buyer and seller or contractor and employer) if the principal fails to succeed in these commitments or fails in good performance of the job.
- **Advance payment guarantee:** The issuance purpose of some other forms of bank guarranties is to have advance payment paid back. These guarantees are commitments by the bank to pay a certain sum of cash to beneficiary or employer in case of obligor or contractor's failure for repayment of any amounts paid to him/her by employer in advance.
- Tender guarantee: Sometimes the purpose of issuing bank guarantees is to establish a guarantee for a tender. This guarantee is a document whereby the issuer at the request of the applicant (principal), vendor or contractor, undertakes as the guarantor to pay a certain amount of cash in exchange for principal's obligations arising from tender to the beneficiary (customer or employee) who has invited the principal for a bid.
- **Retention money guarantee:** Usually in constructional or project contracts, some amounts are paid as intermediate payments. Such payments are carried out when engineering office confirms that some part of the project has been completed or when installation test of related phase has been verified. This intermediate payments enable the contractor to have the required cash during project operations. On the other hand, the employer reserves a percentage of payments with himself that depending on the size of project, is between 5 to 10 percent so that at the end of the project and ensuring good performance and related operations, releases these deductions for the benefit of the contractor. Employers and contractors often agree that these deductions called bail bond deductions, be released for the benefit of the contractor, provided that a guarantee called deduction retention money guarantee is issued in return. Deduction retention money guarantee can be claimed if the contractor fails in his obligation to complete the project.

Another classification is based on the purpose of guarantee. In addition to above mentioned guarantees, many other types of guarantees are issued by banks and financial and insurance companies. Two types of them which are the most common, are: Counter guarantee and Super guarantee.

- **Counter guarantee**: This type of guarantee is issued in case of an international contract when the seller requests the buyer to provide a good performance guarantee. Purchaser or contractor acquires such a guarantee from a bank in his own country, but the bank issues the guarantee in favor of a local bank in the seller or employer's country and not directly in favor of the seller or employer. The local banks will then proceed to issue a counter guarantee and will submit it to the seller. This guarantee is mostly applicable in international trade. Indeed, the major difference between counter guarantee and regular guarantee is that for issuing regular guarantees, the bank demands some collaterals from the principal and it is upon those collaterals that the bank accepts to issue the guarantee, but in counter guarantee another bank whose beneficiary is the issuing bank of the original guarantee, replaces that collateral.
- **Super guarantee**: Super guarantee is a special kind of indirect guarantee and actually is guaranteeing a guarantee. This guarantee is demanded by a beneficiary who wants to have the guarantee of a more reputable bank in addition to the guarantee of the debtor bank (which itself may not be well-known). The request for super guarantee is provided

by a guarantor bank which is obliged to repay the amounts which the superior guarantor will have to pay due to the obligations of super guarantee.

3 – The sides of bank guarantees
A bank guarantee has three sides:
- Principal or the guarantee applicant;
- Guarantor or the guarantor bank;
- Guaranteed side or beneficiary of the guarantee .

In this section, through three paragraphs, we will investigate the legal relationships (rights and obligations) of a bank guarantee parties:

1-3 - legal relationship between the bank and the principal
The principal or the guarantee applicant by going to the bank, requests for issuing the guarantee for the benefit of beneficiary. According to its previous relations with the guarantee applicant and based on its terms and regulations after demanding valid and acceptable collaterals, the bank gets engaged to issue the guarantee. So guarantee is issued based on guarantee applicant request and in case of payment conditions availability and bank's refuse, the main obligor due to his/her interest in its implementation (eg, to prevent the seizure of his/her other properties) can also urge the bank to pay the sum of guarantee. After repaying the sum of the guarantee, in accordance with its contract with the major obligor, the bank can also refer to the principal for collecting the sum it has paid for, and if he fails to repay this amount, the bank can collect it from the collaterals it had taken over from the main obligor at the time of guarantee issuance.

In the international trade customary law, legal relations of the guarantor bank and guarantee applicant are defined based on the laws governing the mandate conclusion, for example in Netherlands, Germany, England and France, this relationship is a mandate.

2.3 - Legal relationship between the guarantor and garanteed side
In bank guarantees, no contract shall be signed between the guarantor bank and guaranteed side. In compliance with the terms of the guarantee, the guaranteed side can claim its sum from the bank and urge it to act as its commitments. However, his rights are limited to urge the bank to do its commitments and he/she can not terminate the contract between the bank and the main obligor. Independency principle of bank guarantees is established in the relationship between guarantor and the guaranteed side in the basic contract, so for reasons that stem from the basic contract, the bank is unable to refuse the payment of the sum of the contract guarantee. Upon the receipt of the conditions prescribed in guarantee and according to provisions contained therein, the sum should be repayed to him/her on demand.

3-3 - Legal relationship between guaranteed side and principal
The principal shall not be obliged to further commitments because of the guarantee, so in case of bank refusing for repayment, the beneficiary can not claim the sum of guarantee by relying on that guarantee. Though he may have the right to litigate against the main obligor on the basis of the initial contract and by virtue of its infringement. After issuing the guarantee, the main obligor also can not change its beneficiary or its terms and conditions or urges the bank to stop payment. However, if the beneficiary does not get the sum of guarantee in the right way or commits great and staple frauds in receiving the sum of guarantee, he/she can refund it.

In Iranian law under Article 301 of the Civil Code, this refund can be justified because of the principle of unjust enrichment prohibition. According to this Article: 'If one receives something intentionally or by mistake that he/she is not entitled to it, he/she is required to submit it to the owner.'

Part II: the legal nature of bank guarantee
After explaining the meaning and purpose of bank guarantees issuance and also defining the legal relations of bank guarantee parties, in this section we will analyze the existing theories about the nature of bank guarantee. In explaining the nature of such an emerging and recently founded legal entity like bank guarantee, different views have been expressed by the jurists and in this section we will review and evaluate each of these viewpoints and finally, we will justify our chosen perspective:

1. Suretyship
Some believe that bank guarantee is the same as regular and common suretyship conclusion which has taken a new shape and new provisions have been enacted for it. Another group believe that bank guarantees is a civil liability and the others believe that it is a commercial liability. Hence, we will review their opinions in the following:

1-1-Civil liability (transfer of obligation)
The similarity between bank guarantee and civil liability stipulated in Civil Code has led some courts to consider it as a subject of civil liability rules. For example, in a contract in which the required number of sacs is delivered to a contractor to carry the cereals from Gorgan cereals office and he is committed to give back the sacs after delivery of wheat and barley and in case of missing the sacs, he should repay their prices and for this matter someone should guarantee the contractor, the second branch of Mazandaran Province Court has regarded the third party's obligation as a suretyship and has declared the contract null and void because at the time of suretyship realization, he was not beholden with liability. But one should know this viewpoint is not true. Under Article 684 of the Civil Code suretyship conclusion is defined as: "Suretyship conclusion is defined as a person undertakes financial liability obligation of another person." The obligor is called guarantor, the other party is called the guaranteed party and the third party is called principal or the original debtor." With this definition in mind, according to the following reasons bank guarantee is not the suretyship stipulated by Civil Code:

a) The result of civil suretyship conclusion is transfering the liability. According to Article 698 of Civil Code: "After the suretyship was properly defined, the principal becomes exempted from his/her obligations and obligor's obligations are against the guaranteed side." The authors of Civil Code following Imamye scholars works, have accepted some concept of liability in which the obligation of debtor is transfered to the guarantor. But the bank guarantee is a major commitment and an independent one by nature which initially engages the bank, itself rather than transfering from the main obligor to the bank.
b) Civil suretyship conclusion is an incidental conclusion. The commitment which the guarantor will guarantee, is the reason of his/her commitment and the fate of guarantor's commitment is completely dependent on the commitment of main debtor.

Article 2012 of the French Civil Code states that: "Suretyship shall not be concluded except for a correct liability". So the durability and influence of garrantor's commitment is dependent on the debt of principal toward creditor. But according to the bank guarantee independence principle, guarantor bank's commitment is an essential and independent commitment and is not dependent on the initial contract between principal and the guaranteed side. This is the main difference between civil liability and the bank guarantee. Guarantee independency means is its abstraction of initial contract which have resulted in guarantee issuance. In other words, although the purpose of a guarantee is guaranteeing obligee or beneficiariy against losses caused by the violations committed by obligor or guarantee applicant of the initial contract, beneficiariy's right to claim the sum of guarantee is merely specified and evaluated with reference to the terms and conditions stipulated in the contents of guarantee and the bank can not invoke defenses and objections arising from the initial contract.

c) Guarantor's obligation in contract liability is dependent on principal's commitment in initial contract, so the guar-

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antor can invoke all the objections which the main debtor enjoys against the guaranteed side. But, in bank guarantee, according to independency from initial contract principle, the unpredictablity principle of objections arising from mentioned contract is effective. In case of a claim for the sum of guarantee by beneficiary which has apparent compliance with the provisions of the guarantee, bank can not invoke to obligations and defences including completing the guarantee applicant's commitments or beneficiary's non-deservingness to claim compensation.

2.1 - Commercial Guarantee

Others tend to consider bank guarantee as a kind of liability set forth in the Commercial Code, Articles 402 to 411.

According to Article 402 of Commercial Code "The guarantor can only have the right to demand from the guaranteed side to firstly refer to the main debtor and in case of non-repayment of debt refer to it, if this procedure is stipulated (whether in the contents of special contract or in the guarantee itself) between the sides". Also, according to Article 403 of Commercial Code "In all cases that according to laws and based on private contracts the guarantee is a mutual guarantee, the creditor can collectively refer to both the guarantor and the main debtor or if he/she refers to one of them and fails to collect his demand, he/she can refer to the other one to collect all or the remaining part of his/her claim." According to the above-mentioned Articles, commercial guarantee conclusion leads to inclusion of guarantor's obligation in the obligations of the principal. Liability set forth in these Articles is a subordinated committment. So as civil liability, commercial guarantor can invoke to objections which exist in the initial contract between the principal and the guaranteed side. Nevertheless, bank guarantee can not be regarded as commercial liability because:

a) As previously mentioned, a bank guarantee is an independent commitment for the initial contract. While commercial liability is an incidental obligation.
b) In bank guarantees, in accordance with the principle of independence, the objections of initial contract can not be heard. While in commercial liability, like civil liability, the basis is on relying on objections of initial contract.

So far the word, the bank guarantee can not be the same as commercial or civil liability.

2 – Unilateral obligation

The result of theory of regarding bank guarantees as unilateral obligations is that in issuing a bank guarantee, the guarantor unilaterally undertakes payment of a certain amount of cash for a special issue against guaranteed side. In issuing a guarantee, acceptance and consent of guaranteed side is not required and guarantor's commitment alone makes him committed.

Proponents of liability as unilateral obligation theory, apart from the reports and comparison of suretyship with paying the debts, argue that no new property shall be created for the guaranteed side because of suretyship, so there is no need to his/her consent, but suretyship is like giving a collateral which is provided in favor of the creditor. Seyed Mohammad Kazem Yazdi regards suretyship as a unilateral obligation. He regards suretyship as a form of loyality toward liability even if the creditor's consent is needed, as in loyality toward something other than liability, the creditor's consent is needed and no one regards it as a conclusion. Some jurists also regard the commitment unilaterality as a substantial characteristic of a bank guarantee. In fact, proponents of guarantee as unilateral obligation theory, insist on the irreversible nature of the guarantee and its terms, the reason of which is the bank's unilateral commitment against the beneficiary that will be binding by a unilateral declaration.

This theory is also not immune from criticism:

The main objection of the above argument is that it is based on an uncertain and non-deterministic premise. This premise is the very irreversiblility (or declination) of the Bank's affirmation. Irrationality of the mentioned premise is because of the fact that it can not be said every affirmation is reversible and recapturable. Affirmation irreversiblity may be derived from international custom. Above topics are also true in case of international bank guarantees, firstly because through the context of guarantee which the issuing bank usually communicates to the beneficiary, makes clear that it is irreversible. Secondly, the international practice regards guarantee affirmation irreversible and by considering the customary viewpoint about the irreversiblility of the bank's affirmation, the beneficiary will rely and act based on it. Moreover, the international provisions relating to guarantees (Article 5 of ICC Uniform Rules for on demand guarantees and Article 7 of UN Convention for independent guarantees and expectative credentials) have also insisted on its being irreversible. Another argument in favor of a unilateral commitment by the bank is that since the time of guarantee communication, the banks feel that they are committed to its provisions, but if guarantee communication shall merely be an affirmation, there should be no such a feeling before obtaining the beneficiary's consent. It seems as though feeling a committment shall really exist once the guarantee is issued, but this feeling can be caused by irreversible affirmation due to agreement or custom. Therefore because on the one hand, the bank can not retake its approval or modify it after issuing the guarantee, and on the other hand guarantee can not virtually ensure the beneficiary's interests but he/she often accepts it, thus after issuing the guarantee, the bank feels committed to it. According to aforementioned topics, it appears that the alleged flaws in applying the rules of affirmation and acceptance are not applicable for an independent bank guarantee. In contrast, the theory of unilateral commitment may itself cause problems in the interpretation of the guarantee. For example, within the context of unilateral commitment theory, it can not be accepted that the precise content of the rights and obligations of the guarantee should be defined by referring to the interaction of the bank and beneficiary or refering to initial contract for interpretion of vague contents of the guarantee can not be justified.

In addition, if the beneficiary proposes some amendments or changes to the contents of the guarantee after its issuance and the bank agrees with this proposal, in this case it is obvious that according to the approval, the commitment of the bank will lose its effect and the modified content shall prevail. If guarantees is a unilateral commitment, how can above actions be justified? Above all if guarantee can be considered a unilateral obligation, in the above case before accepting to apply the amendment, the bank must also be committed to the terms of guarantee, however it is not this way, but in this premise if beneficiary's mutual suggestions includes essential amendments, it means bank's affirmation unacceptance which is provided in the contents of guarantee and after the bank accepts to apply the amendment, the guarantee shall be obligatory. It is worth mentioning that after the approval rejection by the beneficiary, the bank has no duty to provide a new approval or carry out the desired reforms, although the lack of a new approval or not applaying the desired modifications may result in guarantee applicant's violation of initial contract.

Perhaps the term "bank guarantee issuance" which has become common in banking custom, reinforces the illusion that guarantee issuance is a unilateral practice that is done by the bank without requiring another practice on behalf of other parties (the principal and the guaranteed one). But it should be noted that guarantee issuance only provids the liability papers and certificate and contractual relations of parties will manifest and appear in another contract which is the basis of guarantee issuance. The rights and obligations of the parties are explicitly specified and defined in the mentioned contract. In addition, the confirmation in laws and other legal sources indicate that there is no freedom principle in unilateral obligations in law and only in cases stipulated by the legislator, we can talk about about the credibility and influence of unilateral obligation.

As a result, the theory of unilateral commitment can not be a good justification for a bank guarantee.

3 - obligation in favor of third party

Some believe that the bank guarantee is in favor of commitment

to the third party. A contract that has no direct relationship with the initial and main contract, that is an independent contract itself the realization of which is not dependent on any prior process.According to this view, the primary obligor and the bank agree that in exchane of a certain payment or a creditable collateral by the primary obligor, the bank undertakes the responsibility of paying a certain sum to the third party and on the same basis, a guarantees in his favor and with terms and commitment of the bank to pay, is a genuine commitment itself and is not dependent on any other legal action. Theoretically, proponents of this view resort to Articles 196, 231 and 241 of Civil Code:

Article 196 states: "When someone trades, that trade is considered for that person himself/herself unless otherwise is specified at the contract conclusion or after that something contrary to it, is approved. However, while someone carries out a transaction for himself, he may undertake a commitment for a third party."

Article 231 also stipulates: "Transactions and contracts are only effective for the transactor parties and their legal deputies, except for Article 196."

And Article 241 adds: "It may be stipulated in the transaction that one of the transactor parties should provide a mortgage or a guarantor for something that due to the transaction, will result in a liability."

The above theory, brings the analysis of guarantee from a contract between the bank and the beneficiary back to a contract between guarantee applicant and bank, and regards it as the provision of an action which is included in another conclusion. This view has not too many supporters among the authors of international trade law.

This opinion is not a sacred cow. The main criticisms of this opinion are:

a) Practice provision in favor of third party is an incidental and subordinate provision for the main contract which brings about some rights and obligations for the parties. Article 196 also states that a person can undertake a committment in favor of a third party while making a transaction for himself/herself. Thus, in the original contract, there are rights and obligations for each party which provide the main elements of the contract, its purpose and the implicit stipulation of the conclusion is subordinate for them. But even if we admit that bank guarantee is merely the result of a contract between the guarantee applicant and bank, guarantee issuance will be the main and essential result of it and the guarantee applicant will earn no direct right from the mentioned contract. So it will not be consistent with the content stipulation of the conclusion in Article 196 of the Civil Code.
b) Theory of commitment in favor of a third party ignores the beneficiary' role in the initial contract which has led to issuing the guarantee.
c) Theory of commitment in favor of a third party contradicts to the possibility of reforming the guarantee based on the beneficiary's offer. Because if the beneficiary is merely deemed as a third-party beneficiary, refering to him/her for interpretation of the guarantee provisions will be unjustifiable and also his/her offers to remedy the guarantee will not be justified.

We conclude that bank guarantee can not be justified under the theory of commitment in favor of third party.

4 - Private Contract stipulated in Article 10 of Civil Code (selected viewpoint)

Most jurists believe that according to the will-power principle the bank guarantees shall be included in Article 10 of Civil Code. Article 10 of Civil Code Stipulates: "Private contracts are effective for those who have signed them, if they are not explicitly opposed to legislation."

So, except in cases where the law stands in the way of contracts, the will of parties is governing the fate of their contracts and will freedom should be accepted as a principle.

Uncertainty that may be raised against this view, is the issue of a possible conflict with the rules of civil and commercial liability. We believe that there is no possibility of such a conflict, because as we have seen, an independent bank guaranty is entirely a different entity from liability stipulated in civil law and commercial law and hence this different entity should not be evaluated based on the rules of traditional civil law about the guaranty. Accordingly, the possibility of any inconsistency would also be ruled out. In addition, the Iranian law doctrine and precedent have accepted the possibility of arrangements contrary to the rules of liability and making different procedures. Among others, vote No. 1444 dated Dec 4th 1948 the fourth branch of National Supreme Court declares: "In accordance with Article 684 of the Civil Code, guarantees means that someone undertakes the financial obligation of someone else, so if someone makes a commitment (in case, due to non-delivery of the sold items some losses are incurred to the buyer, to compensate losses), his action has merely been a contract arrangement between the referred one and the buyers according to Article 10 of the Civil Code and will not have conformity with Article 684 of the mentioned law.

Conclusions

The main results of this study are as follows :

- Bank guarantee independence principle as the most important and the most fundamental principle governing on bank guarantees, has some effects which will help us in our analysis of the legal nature of this nascent entity of international trade. According to this principle, bank guarantee is independent from the initial commitment is a main commitment itself. So the objections that may exist in the initial agreement, shall have no place in a bank guarantee. Apart from its insuring and guaranteeing nature, bank guarantee is an independent and elementary commitment and has the least similarities with civil and commercial liability.
- Therefore, with analysis and critiques that we carried out on the evidence adduced by any of theories, we are led to this conclusion that civil liability, commercial liability, unilateral obligation and commitment to the third-party favors, are not the elegant media for bank guarantees. So we must resort to Article 10 of Civil Code and consider the bank guarantee as a form of private contract which will be respected and enforced in accordance with the will-power rule. But recently in commercial bill, the legislative has mentioned bank guarantees as especial commercial contracts and has stated its provisions in that bill. We have to wait for the final approval of this bill and see the legislative's approach towards bank guarantees.
- At the end, it is suggested that in all disputes arising from of bank guarantees, the courts not only rely on traditional rules of liability for their judgments, but also by following the opinions of jurists and also according to legal precedent and international experiences in this context, issue their judgements according to the legal nature of bank guaranty.

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But in case of negligence or misconduct of the principal, merely the payment of damages caused by violation of its commitments equal to the value of guarantee would be on the obligation of the bank. Secondly, by the guarantee issuance, the principal is not exempted from his/her contractual commitments about compensation of losses (Mohebbi, Ibid, p 242). | Akhlaghi, Ibid, p. 157, Also see Safai, Hossein, , Good performance commitment of contract, Journal of the Law and Political Sciences Faculty, No. 2, Summer 1962, pp. 51-61 | Kashani, Mahmoud, Bank guarantees, Journal of Legal Studies, No. 16-17, Fall 1995 to Spring 1996, p. 148 | Akhlaghi, Ibid, p. 157; Kashani, Ibid, p. 148; also read more Smitove, Clive M., International Trade Law Volume II, translated by Behrooz Akhlaghi et al, Samt publishing, First edition, Tehran, 1999, p. 1128 . | http://www.ariatender.com/beta/tarife-zemanatebanki.php | Smithove, Ibid, p 687 | Cf. Masoudi, Ibid, p. 155 | Quoted from: Smithove, Ibid, pp. 687-688, the definition is from professor Hanzhkovich | Masoudi, ibid, pp. 101-102 | Ghomami, Majid, A discussion in governing rules of bank guarantees, Journal of Law and Political Sciences Faculty, No. 44, 1999, p. 130 | Roeland, Bertrams, Bank guarantees In International Trade, Kluwer Law Internatioanl, 2004, p. 115. Quoted from: Masoudi, ibid, p. 102 | Ghomami, Ibid, p 129. | The scope of this paper is limited to deal with all the dimensions and angles of the principle of independence for guarantees. To read more about the principle of the independence of bank guarantees: Cf. Isaei Tafreshi, Mohammad, Shahbazi Nia, Morteza, Bank guarantees independence and its impact on International trade law, Nameye Mofid, Issue 37, August-September 2003, pp. 5-24; Masoudi, ibid, pp. 71-84; Ghomami, ibid, pp. 131-135. | Ghmoami, ibid, p. 129, for more information on the effect of fraud in claiming the sum of guarantee Cf Masoudi, Ibid, pp. 180-193; Gao Xiang & Ross P. 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Legal archives of Keyhan institute, precedents collection from 1949 to 1963, Volume II, Number 184, page 432 onwards, Verdict No. 1341//12/22-3891 of General Board of the National Supreme Court. Quote from: Ghomami, Ibid, p. 145; also Cf, Katoozian, Naser, Definite conclusions, Volume IV, Tehran, Limited Publishing Company, Sixth Edition, 2010, p. 307 | See Katoozian, previous, page 228, Kashani, Mahmoud, Civil Rights: Special Treaties,Mizan Publications, Tehran, first edition, 2009, p. 278 . | Kashani, Ibid, p. 327 | Katoozian, Ibid, p 244 | Shahbazinia, Morteza, The legal nature of International bank guarantee and its comparison with traditional institutions, Name-ye-Mofid, Issue 43, August-September 2004, p. 125 | Pierce, Anthony, Demand Guarantee in International Trade, London, Sweet and Maxwell, 1th Ed, 1993, pp. 18-19. Quoted from: Isaei Tafreshi and Shahbazinia, Ibid, p 8. | Mohebbi, Mohsen, Bank guarantees in the procedure of Iran - United States Arbitration Court, Legal journal of Services Office, Issue 20, 1996, p. 98 | Akhlaghi, Ibid, p. 162 | Cf. Katoozian, Ibid, pp. 265-266, Akhlaghi, Ibid, p. 163. | Shiravi, Abdul Hossein, International Trade Law, Tehran, Samt publication, First Edition, 2010, pp. 287 and 280 | Cf. Shahbazinia, Ibid, p. 115. | Shahbazinia, Ibid, pp. 115-117. | Shahbazinia, ibid, pp. 117-119. | Cf. Katoozian, Naser, Civil Rights: Unilateral Obligation, Mizan publications, Tehran, fourth edition, 2008, p. 142 | Masoudi, Ali Reza, The legal nature of bank guarantees in Iran, Journal of Legal Studies, Issue 4, Fall & Winter 2003, pp. 182-183 | Ghomami, Ibid, p. 129. | Akhlaghi, Ibid, p. 177, Ghomami, ibid, pp. 131-132. | Shahbazinia, Ibid, p. 115. | Shahbazinia, previous, p. 119. | Shahbazinia, previous, pp. 119-120. | Katoozian, Naser, Civil Rights: Public Contracts Rules, Volume I, published by limited Co. in cooperation with Bahman Borna, Tehran, Sixth Edition, 2004, p. 144, Issue 85 | Quote from: Shahbazinia, ibid, pp. 134-135.