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DEMAND GUARANTEE IS ACTUALLY A TYPE OF DOCUMENTARY GUARANTEE

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Abstract

In many countries, guarantee is a very popular method. Therefore, there are many varieties of guarantees, such as guarantee, civil guarantee, bank guarantee or documentary guarantee, ect. Article 2 of URDG 758 2010 defines demand guarantee as follows: "Demand guarantee or guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand". URDG 758 2010 provides a very concise definition of guarantee, it doesn't matter how you want to name or describe the guarantee, as long as the content of the guarantee meets the following core requirements: Guarantee is any signed undertaking; Guarantee is an irrevocable undertaking; Guarantee is an undertaking to pay; Payment condition is presentation of complying demand. This article focuses on analyzing to clarify that the Demand Guarantee is actually a type of documentary guarantee on such aspects as: (i) The object of the transaction is a document, (ii) Complying documents are the basis for payment decisions (iii) Presentation documents (iv) Non - documentary conditions.

Keywords: Demand Guarantees, Documentary Guarantee, Guarantor, Obligor, Obligee, Complying documents



INTRODUCTION

Globalization and multilateralization positively affect trade, service, financial and investment transactions in the domestic market as well as in the international market, but on the other hand, there are also conflicts of interest that have diluted trust between participants and caused them to find measures to prevent risks in the transaction.

There are many hedging measures in commercial, service, financial and investment transactions applied in the market such as:

- Measures to ensure the performance of obligations specified in the Civil Code of most countries such as pledge of property, mortgage of property, deposit, security collateral, escrow deposit and guarantee ...etc.
- Measures to prevent risks by using payment, credit and financing methods such as documentary credit, standby credit. In which documentary credit, bank guarantee is more commonly applied.

With a documentary credit, the obligor upon fulfilment of his contractual obligations, will present documents to the issuing bank, provided that the presented documents are in accordance with the terms and conditions specified in the letter of credit, however, the documentary credit has a huge disadvantage and potential risk that it does not bind the obligations of the obligor to perform the contract.

The disadvantage of a documentary credit will be overcome by a guarantee, which stipulates that the guarantor commits to the obligee to perform the obligation on behalf of the obligor, if, when the obligation is due, the obligor fails to perform the obligation or to perform improperly.

The research is aimed to clarify the nature of the guarantee or demand guarantee as a documentary guarantee. The guarantor only pays when the beneficiary presents complying documents.

LITERATURE REVIEW

From an overall perspective or from a civil legal profile, a general concept of guarantee can be given as follows: *A guarantee is a commitment by a third party (called a guarantor) to an obligee (referred to as the beneficiary) to perform on behalf of the obligor (referred to as the obligee or also known as the entrusting party or the applicant) if, upon the due date for performance of the obligation, the principal fails to perform or performs incorrectly the obligation.*

According to this definition, a third party, i.e., the guarantor, is responsible for issuing a demand guarantee at the request of the applicant or principal. In fact, when applying a guarantee, the third party usually includes two types, one is financial institutions, credit

institutions and commercial banks, the other is any organization or individual that can issue a guarantee in their own name.

The Guarantor is the party that issues the guarantee. If guarantees are issued by financial institutions or banks, they are called bank guarantees, by non-financial organizations, they are called civil guarantees or guarantees. Currently, the bank guarantee that is widely applied in countries as well as in the world is the demand guarantees, the essence of which is the payment based on the documents specified in the guarantee.

The Obligor is a party to whom the guarantor undertakes to perform an obligation on behalf of the obligor when it fails to perform the obligation specified in the underlying transaction or in the guarantee. This party is also known as the guaranteed party, for example:

- + In the contract of sales, the obligor is the seller, that is, the party must deliver the goods;
- + In a credit contract, the obligor being the borrower is obliged to pay the capital and interest to the lender;
- + In the construction contract, the obligor is the construction contractor, etc...

The Obligee is the beneficiary of which the guarantor issues the guarantee for him as the beneficiary of the guarantee, for example:

- + In the credit contract, the obligee is the lender;
- + In the contract of sales, the obligee is the purchaser;
- + In the warranty contract, the obligee is the buyer of the goods under warranty;
- + In the bidding contract, the obligee is the bid solicitor, etc...

In the world today, there are no international conventions issued and adjusted by the United Nations (UN) on guarantees, if any, there are only regional conventions such as:

- The Convention on Independent Guarantees and Stand-by Letter of Credit (CIG) was drafted and adopted by UNCITRAL on 11/12/1995 and 01/01/2000. The ratifying parties include Belarus, Ecuador, El Salvador, Gabon, Kuwait, Panama and Tunisia.
- The OHADA Uniform Act on Secured Transactions (OHADA) was signed by 16 countries including: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Senegal and Togo.

The International Chamber of Commerce (ICC) has issued three international rules governing guarantees:

- Uniform Rules for Contract Bonds (URCB) No. 524 1993.
- Uniform Rules for Contract Guarantees (URCG) No. 325 1978.
- Uniform Rules for Demand Guarantees (URDG) No. 458 of 1992, as amended in 2010 of No. 758. This version was declared by the member states of the ICC and the World Bank apply.

The most obvious difference of URDG compared to the above-mentioned international conventions governing guarantees and at the same time also shows the superiority of URDG is the provision of preconditions for the guarantor to perform the obligations of the obligor when he fails to fulfil his contractual obligations if the presented documents are suitable.

METHODOLOGY

For this article, the authors use qualitative research methods such as: analysis, synthesis, logic, and comparative jurisprudence.

The secondary data sources that were used for analysis and comparison include the ICC Uniform Customs and Practice for the Documentary Credits (UCP600 ICC 2007) and the ICC Rules on Guarantees such as: Uniform Rules for Contract Guarantees (URCG 325 1978), Uniform Rules for Demand Guarantee (URDG 458 1992), Uniform Rules on Demand Guarantee (Uniform Rules for Demand Guarantee – URDG 758 2010), International Standard Demand Guarantee Practice ISDGP 758 2021.

In order for the article to be objective, the authors also interviewed 5 experts at Vietnamese commercial banks (Vietcombank, Vietinbank, BIDV, VBA, MB), as well as consulting views, analysis and comments of some articles from orthodox and professional websites (listed in the References).

ANALYSIS AND FINDINGS

What is a demand guarantee?

After 18 years of practical application (1992-2010), Uniform Rules for Demand Guarantees, version 458 in 1992 has achieved certain successes. It especially has brought confidence to the bank owners, businesses and individuals as well as non-financial organizations in general society.

The strong development of globalization, along with the impact of the internet in socio-economic life has made the "stagnation" of international and national legal documents increase, thus leading to the need for it is necessary to amend and add "new" to the content of existing legal documents.

URDG 758 2010 is the first revision of URDG 458 1992, including many new amendments and supplements, easily seen in Article 2, which regulates the concept of guarantee under the revision of URDG 458 1992. The original revision, from a lengthy concept with over 200 words, has been distilled and simplified to only around 50 words of the guarantee concept of URDG 758 2010.

While the concept of guarantee specified in Article 2 of URDG 758 2010 is shorter and more concise, its content still contains the core tenets of a demand guarantee concept: "Demand guarantee or guarantee means any signed undertaking, however named or described, providing for payment on presentation of a complying demand".

The concept of demand guarantee mentioned above has a very wide connotation and openness which enables flexible and effective application given the nature of documents and the independence of this type of guarantee. The reason behind designing the structure of the concept according to the aforementioned connotations is because this concept of "demand guarantee" is located in the legal environment of commercial customs and practices, not the legal environment of law. It is a favourable environment for customers when choosing to apply.

Around the world, guarantee is a very popular method, so there are many ways to call it, such as guarantee, civil guarantee, bank guarantee or documentary guarantee, etc. It is difficult to uniformly agree on the name of the guarantee internationally as well as nationally. URDG 758 2010 provides a very concise guarantee concept that generally captures the nature of guarantee. According to this article, it does not matter how you want to name or describe the guarantee, as long as the content of the guarantee meets the following core requirements:

- Guarantee is any signed undertaking;
- Guarantee is an irrevocable undertaking;
- Guarantee is an undertaking to pay;
- Payment condition is presentation of complying demand.

Demand guarantee is actually a type of documentary guarantee.

a. The object of the transaction is the document

A contract means an agreement between parties on the establishment, change or termination of the rights and obligations of the parties in the purchase, sale, lease, loan or donation of property; do or not do a thing, service or other agreement to meet the needs of daily life or consumption...

To prevent risks of the contract performance, the parties choose preventive measures, of which guarantee is the most widely applied in the national and international environment. The guarantee is always formed after the contract. The contractual transactions between the parties are physical transactions such as goods, provision of services and performances such as inspection of goods. In contrast, in a guarantee transaction, the guarantor issues a guarantee only based on the application to design a guarantee. In addition, it does not know what the physical objects of the contract are, therefore article 6 URDG 758 2010 has stipulated that:

“Guarantors deal with documents and not with goods, services or performance to which the documents may relate”.

b. Complying documents are the basis for payment decisions

Just as Article 15 of the Uniform Customs and Practice for Documentary Credits, publication No 600, 2007 Revision - UCP 600 2007 provides for the presentation of complying documents, Article 2 of URDG 758 2010 explains the concept of complying presentation must satisfy the following conditions:

- Comply with the terms and conditions specified in the guarantee;
- Comply with the applicable terms and conditions set forth in URDG 758 2010;
- Comply with “International Standard Demand Guarantee Practice (ISDGP) for URDG758”;
- Data need not be identical to, but shall not conflict with data in that document and in any other required document.

Thus, the payment to the beneficiary of the guarantee is based on the presentation of demand and other accompanying documents in accordance with the terms and conditions specified in the guarantee and other applicable terms of URDG 758 2010, Other than that, payment is not based on anything else. From that point of view, it can be said that the demand guarantee is actually a documentary guarantee.

c. Presented documents

The issue of presentation of a demand is an important content specified in URDG 758 2010, so it is necessary to explain and analyse this content on the following aspects:

(i) What is a document?

Documents used in guarantee transactions are documents recording events arising, existing and ending guarantee transactions based on which, the parties involved will exercise their rights and obligations specified in the guarantee. Without it, the guarantee will not be able to operate.

According to Article 2 of URDG 758: “a document is a signed or unsigned record of information in paper or electronic form that is capable of being restored by a person in a tangible form, when it is presented.”

Because the guarantee is applied in an extensive environment from of commercial business, finance, credit to the field of design, construction, bidding, civil disputes in court, etc. so, in addition to the paper form, electronic and digital forms are also applicable and acceptable to the guarantor.

It is common sense that the issuer must sign documents. Nowadays, due to the development of information technology, documents may not need to be signed; such as, discs, photos can be used as evidence of the existence of things.

(ii) What is a presentation?

Suppose the obligor specified in the underlying contract fails to perform or improperly performs the obligation. In that case, i.e., a contract breach, the guarantee's beneficiary shall make a payment claim document and present it to the guarantor to request payment as specified in the guarantee commitment. So, what is the presentation of documents?

According to the provisions of article 2 of URDG 758 2010, there are two types of presentation: one is presented for the purpose of payment, while the other is to prove that a job or a stage of the guarantee business process has been performed. As the name implies, "demand guarantee", the beneficiary of the guarantee wishing to claim money from the guarantor must demonstrate the claim with a demand and deliver such demand to the guarantor. Thereby conforming to the terms of the guarantee, the guarantor must pay; if not, he or she has the right to refuse to pay.

During the operation of a guarantee, there may be things and stages of the guarantee operation process that arise the need to extend the time limit for presentation of documents or extend the expiry of the guarantee, or reduction or increase of the amount of guarantees, acceptance or refusal to amend the guarantee, etc. Those things need to be shown in documents and must be presented for proof at the time of payment. Such a presentation is called a presentation for non-payment as defined in article 2 URDG 758 2010.

(iii) Types of the presented documents

If the guaranteed is in breach of an obligation specified in the underlying contract and the guarantee, the beneficiary of the guarantee shall present a demand, a supporting statement verifying the breach and other required documents (If any), for example:

- A statement that the assignee has acquired the transferor's rights and obligations in the underlying relationships if the transferor assigns the guarantee;
- A separate notice of payment refusal, if it occurs;
- A notice of acceptance or refusal to amend the guarantee, if any;
- Documents notifying the extension of expiry of the guarantee;
- Statement indicating in what respect the applicant is in breach of its underlying contract obligations;
- An engineering's certificate;
- A surveyor's report;

- A court judgment whether final or subject to appeal,
- An arbitral award.

A demand means a signed document by the beneficiary demanding payment to satisfy the following requirements:

- *In terms of form*, it can be in paper or electronic form, not verbally or in body language;
- *What is the date of issuance of documents?* It is specified in the guarantee, and it depends on the type of presented documents specified in the guarantee:
 - + For a demand and a supporting statement, the date of issuance of the document cannot be before the date of issue of the guarantee, or it cannot be later than the date specified in the guarantee if any, but before the expiry date of the guarantee.
 - + For other documents, as mentioned in C (iii) above, the date of issuance of the document may be dated before the date on which the beneficiary is entitled to present a demand.
 - + If the guarantee does not specify an expiration date or does not specify the expiry event, when and how will the guarantee expire? There are two options: one is to comply with the provisions of URDG 758 2010, and the other is to request an amendment to the guarantee. Option one, i.e., in compliance with 25c URDG 758 2010, the guarantee will end 3 years from the date of issue, and the counter-guarantee will end 30 calendar days after demand guarantee terminates. If the first option is not appropriate, the second option may be to propose an amendment of the guarantee by specifying a specific expiration date, for example, X years or Y calendar days from the date of issue guarantee.

- *Number of times to present documents.*

Guaranteed contracts are usually large-scale contracts, with an extended contract term, sometimes up to several years, so the number of times of presentation of documents cannot be just once, but more than once.

For large contracts with identical goods such as rice, corn, etc., delivery time is monthly or quarterly or according to the specified quantity or average or partial payment. The time limit for presentation of a demand is also divided in the same way. For large-scale, long-term construction contracts, the time limit for presenting documents in the guarantee is usually divided by each stage of the project acceptance test, etc.

In the case of a guarantee that permits multiple presentations or partial payment, a presentation has to be complete or, in cases where it is not possible, presentation is to be completed later. However, it is necessary to specify clearly when "to be later" is. A demand presentation in an interrupted sequence of presentations e.g., not complying demand will void the next presentation? Of course, it's not possible.

d. non-documentary conditions

Documentary payment regulation covers many payment methods, such as collection, documentary credit, standby letter of credit and documentary guarantee. However, there should be a screening in which documents need to be relied on, otherwise not, so the issue of non-documentary needs to be raised.

Article 7 of URDG 758 2010 on non-documentary conditions itself asserts that the demand guarantee is a documentary guarantee, even though none of the 35 articles of this rulebook provides for such a provision.

The payment rule of a guarantee, as required under URDG 758 2010, is that if a document is presented in accordance with the conditions of the guarantee, the guarantor must pay the beneficiary. However, there are provisions in the guarantee does not require documents presented per that provision, such conditions are called non-documentary. So, what provisions in the guarantee will be considered non-documentary conditions, which may include, for example:

+ A specified guarantee will expire X years after its issuance, after which the presented documents are no longer enforceable for the guarantee. This provision cannot be considered as a condition for placing for presentation of a demand; the guarantor will not consider this condition and assume it does not exist. Therefore, the provision of time in a guarantee is considered a non-documentary condition, as provided for in article 7 of URDG 758 2010.

+ A customs guarantee on temporarily imported goods for re-export provides that this guarantee will be released if the importer presents a certificate of re-export of the imported consignment. The presentation of that certificate is considered a non-documentary condition, it is a proof for customs clearance of import duties, the documents then presented will no longer be valid for the said customs guarantee.

+ A guarantee should not have provisions that rely on those provisions to check the conformity of the presented documents. For example, it cannot rely on the guarantor's own records to know or rely on the instructions (index) stated in the guarantee to determine, for example:

* In operating a guarantee, it is common practice to increase or decrease the amount or the provision of instalment payments of guarantee, but relying on the guarantor's account statement to check compliance documentary is not feasible, URDG 758 2010 considers such a non-documentary condition.

* The amount of the guarantee is subject to change due to the price index referenced in the guarantee. URDG 758 2010 considers that provision to be a non-documentary condition, which is not feasible to check the complying presentation with the guarantee since the index is

not a fixed indicator. It is constantly changing, contrary to the nature of the demand guarantee, which is an irrevocable commitment to pay.

CONCLUSION AND RECOMMENDATIONS

Through the above analysis, it can be said that *a demand guarantee is an irrevocable undertaking issued by the guarantor on the instructions of the applicant to pay the beneficiary any amount due to the beneficiary up to the maximum amount specified in the guarantee if required payment documents are presented in accordance with the terms and conditions of the guarantee*

The article shares the view that the nature of the demand guarantee under URDG 758 2010 is a documentary guarantee. The article guides the different types of documents commonly used in the guarantees. We also note that, even if the guarantor does not consider non-documentary condition or even if such conditions are not met, the data of the documents specified in the guarantee upon presentation must not contradict the document itself and do not contradict each other, if it does, the presented documents would be considered unsuitable, and the guarantor has the right to refuse payment.

This research can be developed in the future on the risks and disputes that often arise in guarantee-related activities and lessons learned for the parties involved.

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