UDK 347.7:336.7(497.6 RS)
DOI: 10.7251/FIN2004051B

PREGLEDNI RAD

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Analiza posebnosti instituta samostalne bankarske garancije kroz tumačenje relevantnih domaćih propisa

Particularity analysis of the institute of independent bank guarantee through the interpretation of relevant domestic regulations

Rezime

Samostalna bankarska garancija ili, kako je još poznata u našem Zakonu o obligacionim odnosima i poslovnoj praksi, garancija „bez prigovora" ili „na prvi poziv" predstavlja poseban oblik bankarske garancije koji se masovno koristi u međunarodnoj razmjeni dobara. Postoji više objašnjenja za ovako raširenu upotrebu u međunarodnopravnom prometu, ali među njima svakako je najvažnija činjenica da se putem samostalne bankarske garancije povjerilac (korisnik garancije) obezbjeđuje ne samo od rizika insolventnosti dužnika iz osnovnog ugovora, već i od nepunovažnosti odnosno nemogućnosti ispunjenja njegove obaveze. U domaćem pravu, izražena su vrlo oprečna mišljenja oko definisanja pravne prirode samostalne bankarske garancije, a prevashodno su zasnovana na tvrdnjama da se u postojećim izvorima obligacija, a prije svega u ugovoru i jednostranoj izjavi volje, ne mogu pronaći potrebna rješenja kojima se u potpunosti objašnjava nastanak, ali i apstraktni odnosno nezavisni karakter obaveze koju banka preuzima prema korisniku garancije. Kroz pojašnjenje postojećih nedoumica u vezi njenog pojma i pravne prirode, te utvrđivanja sličnosti i razlika sa drugim institutima obezbjeđenja povjeriočevog potraživanja, u ovom radu smo utvrdili da je, sa aspekta tumačenja domaćih propisa, samostalna bankarska garancija pouzdan, ali nedovoljno uređen instrument obezbjeđenja ispunjenja dužnikove obaveze iz osnovnog ugovora.

Ključne riječi: *samostalna bankarska garancija, pravna priroda, sličnosti sa drugim pravnim institutima, instrument obezbjeđenja.*

Abstract

An independent bank guarantee or, as it is known in our Law of Contracts and Torts, a guarantee "without objection" or "at the first call" is a special form of bank guarantee that is widely used in the international exchange of goods. There are several explanations for such widespread use in international transactions, but among them the most important is certainly the fact that through an independent bank guarantee the creditor (guarantee user) is insured not only from the risk of insolvency of the debtor from the basic contract, but also from the invalidity or impossibility of fulfilling his obligation. In domestic law, very conflicting opinions have been expressed regarding the definition of the legal nature of an independent bank guarantee, and they are primarily based on claims that in existing sources of obligations, and above all in the contract and unilateral declaration of will, the necessary solutions cannot be found that fully explain the origin, but also the abstract or independent character of the obligation that the bank assumes towards the beneficiary of the guarantee. By clarifying the existing doubts regarding its concept and legal nature, and determining similarities and differences with other institutions of securing the creditor's claim, in this paper we have established that, from the aspect of interpretation of domestic regulations, an independent bank guarantee is a reliable but insufficiently regulated instrument for securing the fulfillment of the debtor's obligation from the basic contract.

Keywords: *independent bank guarantee, legal nature, similarities with other legal institutes, security instrument.*

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UVOD

U međunarodnopravnom prometu bankarska garancija se snažno afirmisala kroz standardizovanje i usaglašavanje bankarske prakse (Bunčić, 2017). Nivo ujednačavanja je dostigao tako visok nivo da su već u drugoj polovini 20. vijeka stvoreni svi potrebni uslovi za donošenje pisanih pravila. U svemu tome najznačajniju ulogu je odigrala Međunarodna trgovinska komora u Parizu koja je ponajviše zaslužna za stvaranje dva pisana izvora prava u ovoj oblasti: Jednoobrazna pravila za ugovorne garancije iz 1978. godine i Jednoobrazna pravila za garancije na poziv iz 1992. godine. S druge strane, kada su u pitanju nacionalna prava, institut samostalne bankarske garancije često ostaje neregulisan. Međutim, naš Zakon o obligacionim odnosima iz 1978. godine u svom članu 1087. predviđa i uređuje ovaj institut, te spada u red rijetkih nacionalnih zakona kojima se reguliše samostalna bankarska garancija.

U poslovnoj praksi se najčešće dešava da ugovorne strane prilikom zaključenja ugovora objektivno sagledaju svoje ekonomske mogućnosti i ekonomske prilike na tržištu, pa i šire. Međutim, nakon zaključenja ugovora, a prije dospjelosti činidbi, može doći do velikih promjena u opšim ekonomskim prilikama, ili prilikama vezanim za ekonomski položaj samih ugovarača, i to u takvoj mjeri da ispunjenje obaveze postane pretjerano otežano ili neizvodljivo (Svorcan, 2007). U takvim situacijama samostalna bankarska garancija može poslužiti kao veoma korisno sredstvo obezbjeđenja povjerioočevog potraživanja. Ističemo da naziv „bankarska garancija" upućuje na to da poslove izdavanja garancije obavljaju isključivo banke. Iako to jeste slučaj u domaćem pravu, važno je za naglasiti da, prema Jednoobraznim pravilima za garancije na poziv, bankarske garancije mogu izdavati i druga lica. Tako, npr., prema američkim propisima, bankama je čak i zabranjeno da preuzimaju samostalne apstraktne obaveze, a davanje garancija je prebačeno u djelatnost osiguravajućih kompanija.

1. PREGLED LITERATURE

Bankarska garancija kao sredstvo za obezbjeđenje ispunjenja ugovora nastaje iz složenog sklopa poslovnih odnosa u kome se pojavljuju najmanje tri lica: povjerilac (korisnik garancije), dužnik (nalogodavac) i banka garant (davalac garancije). Između svih navedenih učesnika u garancijskom poslu uspostavljaju se posebni pravni odnosi. Preciznije, povjerilac (korisnik garancije) u neposrednom je pravnom odnosu sa svojim dužnikom iz osnovnog ugovora, dužnik (nalogodavac) je u neposrednom pravnom odnosu sa svojom bankom (davaocem garancije), a banka je u neposrednom pravnom odnosu sa korisnikom garancije, koji je ujedno i povjerilac iz osnovnog ugovora. Takve garancije, u kojima se uspostavljaju neposredni pravni odnosi između tri lica, označavaju se kao direktne garancije (Kelly-Louw, 2008).

Prilikom ispunjenja obaveze koju je preuzeo osnovnim ugovorom, nalogodavac zaključuje ugovor o izdavanju samostalne bankarske garancije sa bankom koja se istim ugovorom obavezuje da će u svoje ime, a za račun nalogodavca, dati garanciju trećem licu odnosno korisniku garancije, čime se obezbjeđuje njegovo potraživanje, dok se nalogodavac obavezuje da za tu činidbu banke plati određenu naknadu (proviziju), ali i da vrati novčanu sumu ukoliko banka isplati korisnika garancije i ispuni druge obaveze koje su predviđene zaključenim ugovorom.

U bankarskoj praksi iskristalisali su se bitni elementi samostalne bankarske garancije i to su: naziv (firma) i sjedište davaoca garancije, naziv (firma) i sjedište korisnika garancije, podaci o osnovnom poslu, novčani iznos na koji garancija glasi, rok važenja garancije, mjesto i datum izdavanja garancije te potpis ovlašćenog lica. Osim toga, bankarska garancija mora biti izdata u pisanom obliku (forma ad solemnitatem), a može se dati i za novčana i za nenovčana potraživanja, s tim da banka svoju obavezu prema korisniku uvijek izmiruje u novcu (tzv. garantovani iznos, garantovana suma).

Imajući sve navedeno u vidu, ističemo da samostalna bankarska garancija predstavlja posebnu vrstu bankarske garancije koju karakteriše pravna nezavisnost garancije od postojanja ili punovažnosti osnovnog ugovora. Banka koja je izdala samostalnu bankarsku garanciju ima pravo da prema korisniku ističe isključivo prigovore koji svoj osnov imaju u garanciji (načelo autonomije garancije). Zbog toga, samostalna bankarska garancija predstavlja apstraktan pravni posao, a njegova apstraktnost je posebno izražena u obavezi banke da ispuni svoju obavezu bez obzira na kauzalnost osnovnog ugovora. Zahvaljujući tome, banka ne može osujetiti, otežati ili usporiti isplatu bankarske garancije isticanjem peremptornih ili dilatornih prigovora koji svoje uporište imaju u osnovnom ugovoru, što ovaj oblik garancije čini vrlo sigurnim i efikasnim sredstvom obezbjeđenja povjerioočevog potraživanja.

Za isplatu novčanog iznosa koji je naveden u samostalnoj bankarskoj garanciji, dovoljno je da korisnik garancije u roku važenja garancije, u pisanoj formi, podnese zahtjev banci za isplatu garantnog iznosa, bez potrebe dokazivanja neispunjenja dužnikove obaveze iz osnovnog ugovora. Čvrsto pravilo u ovoj oblasti glasi: „prvo platite, a potom osporavajte", čime se korisniku garancije omogućava da, bez obraćanja sudu, naplati iznos iz samostalne bankarske garancije. Izuzetno, u nekim nacionalnim pravima za isplatu garantnog iznosa dovoljan je i usmeni zahtjev. Tako je prema pravu Saudijske Arabije banka garant obavezna da plati na usmeni zahtjev korisnika (Kozolchyk, 1989).

U cilju sopstvene zaštite od potencijalnog rizika, a prije izdavanja samostalne bankarske garancije, banke često zahtijevaju od svog klijenta (nalogodavca) popratnu izjavu iz koje se mogu uočiti razlozi zbog kojih bi njegov poslovni partner insistirao na garanciji (Vunjak, Kovačević, 2006). Naravno, banka ima pravo regresa prema nalogodavcu kada isplati korisniku određeni iznos po garanciji, dok nalogodavac, izuzetno, ima pravo na restituciju od korisnika garancije koji je primio novac od banke, u slučajevima kada bi nalogodavac mogao da zahtjev korisnika odbije odgovarajućim prigovorom. Dakle, u obligacionom odnosu između banke i korisnika garancije postoji puna apstraktnost posla, dok u obligacionom odnosu između korisnika garancije i nalogodavca postoji kauzalnost pravnog posla (Antić, 2014). Upravo je to i razlog što u konačnom obračunu nalogodavac ili korisnik garancije ne mogu biti neosnovano obogaćeni, jer će kauza osnovnog posla izvršiti svoju funkciju i time ponovo uspostaviti narušenu ravnotežu u angažovanim imovinama svih lica.

Međutim, kada je riječ o prevari (fraus omnia corumpit) ili zloupotrebi prava iz osnovnog ugovora, onda se u pravnoj teoriji sve više pojavljuju opravdana mišljenja o potrebi korekcije apstraktnosti samostalne bankarske garancije, te o ovlašćenju banke da odbije očigledno neosnovan zahtjev za isplatu (Vasiljević, 2008). Nažalost, naš Zakon o obligacionim odnosima čvrsto zastupa stanovište „pune apstraktnosti" samostalne bankarske garancije te predviđa da je nalogodavac dužan da plati banci svaki iznos koji je ona platila korisniku garancije, i to „bez prigovora", a zauzvrat može da se obrati korisniku za povraćaj nepravedno naplaćenog iznosa.

2. REZULTATI ISTRAŽIVANJA I DISKUSIJA

2.1. Problemi u određivanju pravne prirode samostalne bankarske garancije

Dok je sasvim jasno da između nalogodavca i banke garanta postoji ugovorni odnos, budući da oni zaključuju ugovor o izdavanju

INTRODUCTION

In international transactions, the bank guarantee has been strongly affirmed through standardization and harmonization of banking practices (Buncic, 2017). The level of harmonization reached such a high level that in the second half of the 20th century all the necessary conditions for the adoption of written rules were created. The most important role in all this was played by the International Chamber of Commerce in Paris, which is mostly responsible for creating two written sources of law in this area: the Uniform Rules for Contract Guarantees from 1978 and the Uniform Rules for Demand Guarantees from 1992. On the other hand, when it comes to national law, the institute of independent bank guarantee often remains unregulated. However, our Law of Contracts and Torts from 1978, in its article 1087, envisages and regulates this institute, and is one of the few national laws that regulates an independent bank guarantee.

In business practice, it usually happens that the contracting parties, when concluding the contract, objectively consider their economic possibilities and economic opportunities on the market and beyond. However, after the conclusion of the contract, and before the due date of the obligation, there may be major changes in the general economic situation, or opportunities related to the economic position of the contractors themselves, to such an extent that fulfillment of the obligation becomes excessively difficult or impossible (Svorcan, 2007). In such situations, an independent bank guarantee can serve as a very useful means of securing the creditor's claim. We emphasize that the name "bank guarantee" indicates that the issuance of the guarantee is performed exclusively by banks. Although this is the case in domestic law, it is important to emphasize that, according to the Uniform Rules for Demand Guarantees, bank guarantees can also be issued by other persons. Thus, for example, according to US regulations, banks are even prohibited from assuming independent abstract liabilities, and the provision of guarantees has been transferred to insurance companies.

1. SOURCES OVERVIEW

A bank guarantee as a means of securing the fulfillment of a contract arises from a complex set of business relations in which at least three persons appear: the creditor (guarantee beneficiary), the debtor (orderer) and the guarantor bank (guarantor). Special legal relations are established between all the listed participants when the guarantee is issued. More precisely, the creditor (guarantee beneficiary) is in a direct legal relationship with his debtor from the basic contract, the debtor (orderer) is in a direct legal relationship with his bank (guarantor), and the bank is in a direct legal relationship with the guarantee beneficiary, who is also the creditor from the basic contract. Such guarantees in which direct legal relations are established between three persons are referred to as direct guarantees (Kelly-Louw, 2008).

When fulfilling the obligation assumed by the basic contract, the orderer concludes a contract on issuing an independent bank guarantee with a bank which assumes to give a guarantee in its own name and on behalf of the orderer to a third party or guarantee beneficiary, which secures his claim, while the orderer obliges to the bank to pay a certain fee (commission) for that obligation, but also to return the amount of money if the bank pays the guarantee beneficiary and fulfills other obligations stipulated in the concluded contract.

In banking practice, the essential elements of an independent bank guarantee have been defined and they are: name (company) and address of the guarantor, name (company) and address of the guarantee beneficiary, data on the basic contract, monetary amount, guarantee period, place and the date of issuance of the guarantee and the signature of the authorized person. In addition, the bank guarantee must be issued in writing (form ad solemnitatem), and can be given for both monetary and non-monetary receivables, provided that the bank always settles its obligation to the user in cash (so-called guaranteed amount).

In accordance with the above, we emphasize that an independent bank guarantee is a special type of bank guarantee characterized by the legal independence of the guarantee from the existence or validity of the basic contract. A bank that has issued an independent bank guarantee has the right to point out to the user only objections that have their basis in the guarantee (principle of guarantee autonomy). Therefore, an independent bank guarantee is an abstract legal transaction, and its abstractness is particularly pronounced in the obligation of the bank to fulfill its obligation regardless of the causality of the basic contract. Thanks to that, the bank cannot thwart, hinder or slow down the payment of the bank guarantee by pointing out pre-emptive or dilatory objections that have their basis in the basic contract, which makes this form of guarantee a very safe and efficient means of securing the creditor's claim.

For the payment of the amount stated in the independent bank guarantee, it is sufficient for the guarantee beneficiary to submit a written request to the bank for payment of the guarantee amount, without the need to prove non-fulfillment of the debtor's obligation from the basic contract. A firm rule in this area is: "pay first, then dispute", which allows the guarantee beneficiary to collect the amount from the independent bank guarantee without going to court. Exceptionally, in some national laws, an oral request is sufficient for the payment of the guarantee amount. Thus, under Saudi Arabian law, the guarantor bank is obliged to pay at the oral request of the guarantee beneficiary (Kozolchyk, 1989).

In order to protect themselves from potential risk, and before issuing an independent bank guarantee, banks often require an accompanying statement from their client (orderer) from which one can see the reasons why his business partner would insist on a guarantee (Vunjak, Kovacevic, 2006). Of course, the bank has the right of recourse to the orderer when it pays the guarantee beneficiary a certain amount under the guarantee, while the orderer has the exclusive right of restitution from the guarantee beneficiary who received money from the bank, in cases where the orderer could reject the guarantee beneficiary's claim. Thus, in the obligatory relationship between the bank and the guarantee beneficiary, there is a complete abstractness of the transaction, while in the obligatory relationship between the guarantee beneficiary and the orderer, there is a causality of the legal transaction (Antić, 2014). This is precisely the reason why in the final calculation, the orderer or the guarantee beneficiary cannot be unjustifiably enriched, because the cause of the basic contract will perform its function and thus re-establish the disturbed balance in the engaged assets of all persons.

However, when it comes to fraud (fraus omnia corumpit) or abuse of rights under the basic contract, then in legal theory there are more and more justified opinions about the need to correct the abstractness of an independent bank guarantee, and the bank's authority to reject an obviously unfounded request for payment (Vasiljevic, 2008). Unfortunately, our Law of Contracts and Torts strongly advocates the stance of "full abstractness" of an independent bank guarantee and stipulates that the orderer is obliged to pay the bank any amount it paid to the guarantee beneficiary, "without objection", and in return may address the guarantee beneficiary for refund of an unfairly charged amount.

2. RESEARCH RESULTS AND DISCUSSION

2.1. Problems in determining the legal nature of an independent bank guarantee

While it is quite clear that there is a contractual relationship between the orderer and the guarantee beneficiary, since they conclude an agreement on issuing an independent bank guarantee, the effect

samostalne bankarske garancije, sporno je pitanje dejstva koje proizvodi tako nastala samostalna bankarska garancija na odnos između korisnika garancije i davaoca garancije (banke). S tim u vezi, u našoj pravnoj teoriji nailazimo na dva različita mišljenja.

Prema jednom gledištu, samostalna bankarska garancija je ugovor koji nastaje prećutnim prihvatanjem ponude davaoca garancije od strane budućeg korisnika garancije (Perović, 1995). Naime, u praksi, korisnik koji je zadovoljan sadržinom samostalne bankarske garancije najčešće ne odgovara na ponudu banke (ako se ponudom može smatrati obavještenje o izdatoj garanciji), posebno ne u kratkom roku nakon njenog dobijanja (Vukadinović, 2010). Njegovo izjašnjavanje se ispoljava u konkludentnim radnjama, odnosno u preduzimanju pravnih ili faktičkih radnji kojima de facto izražava svoju saglasnost sa dobijenom ponudom, a to najčešće čini podnošenjem banci zahtjeva za naplatu. Pristalice ugovornog shvatanja navode da je prihvatanje samostalne bankarske garancije na prećutan način toliko rasprostranjeno u poslovnoj praksi da se može smatrati međunarodnim običajem u bankarskom poslovanju (Šogorov, 1985).

Istina je da se ovakav način nastanka ugovora može prihvatiti u slučajevima kada su korisnici garancije zadovoljni sadržinom ponude. Međutim, problem nastaje kada treba dati odgovor na pitanje u kom stanju se nalazi saopštenje o garanciji (garantno pismo) kao ponuda u situaciji kada istekne razumni rok u okviru koga je trebalo da se korisnik izjasni o njoj. Razumni rokovi moraju biti kratki, tako da bi zadocnjelo prihvatanje ponude trebalo tretirati kao prihvat nove ponude, što ujedno znači da dolazi do prestanka starog i potrebe za zaključenjem novog ugovora o izdavanju samostalne bankarske garancije. Međutim, praksa zauzima drugačiji stav te smatra da, ako korisnik garancije nije izričito odbio ponudu banke garanta, i dalje postoji zaključen prvobitni ugovor o izdavanju samostalne bankarske garancije. Važno je za naglasiti da se našim Zakonom o obligacionim odnosima i Jednoobraznim pravilima za garancije na poziv predviđa da je za nastanak ugovora o izdavanju samostalne bankarske garancije neophodno da prihvat ponude od strane korisnika garancije bude učinjen u pisanoj formi.

Nadalje, ugovorno shvatanje podrazumijeva i određivanje kauze, odnosno pravnog osnova, ali i oko toga ne postoje jedinstvena shvatanja. Naime, kauza predstavlja bitan element svakog ugovora i može se odrediti kao ekonomski ili pravni razlog obavezivanja ili zaključivanja određenog posla. Kod samostalne bankarske garancije kauzom bi trebalo objasniti razloge zbog kojih se banka garant obavezuje korisniku garancije, a da za to od njega ne dobija nikakvu protivnaknadu. Pravo ne priznaje ugovore kod kojih se ne može utvrditi taj posebno kvalifikovani razlog, te im ne pruža pravnu zaštitu. S tim u vezi, pristalice ugovornog shvatanja kauzu garancije određuju kao cilj ugovora o izdavanju samostalne bankarske garancije i vide je u obezbjeđenju i zaštiti korisnika garancije od štetnih posljedica i nastupanja eventualnih rizika koji bi ugrozili ostvarivanje njegovog interesa (Šogorov, 1985). Međutim, mišljenja smo da razlog obavezivanja banke prema korisniku nije sadržan u prostoj želji da mu pomogne, već je u pitanju privredni interes banke, budući da izdavanje garancije, s jedne strane, spada u njenu redovnu djelatnost za koju ona dobija odgovarajuću naknadu, a sa druge strane to čini u cilju ispunjenja obaveze koju je preuzela prema nalogodavcu, sa kojim je zaključila ugovor o izdavanju samostalne bankarske garancije. Zauzimanje suprotnog stava bi značilo da se banka obavezuje u namjeri da korisniku garancije pribavi neku besplatnu imovinsku korist, što svakako nije tačno. Na osnovu toga dolazimo do zaključka da se u ugovornom odnosu između banke i korisnika garancije ne može pronaći zadovoljavajuća kauza.

Po drugom gledištu, samostalna bankarska garancija predstavlja jednostrani pravni posao kojim se banka, na osnovu ugovora o izdavanju samostalne bankarske garancije zaključenog sa nalogodavcem, obavezuje da će korisniku garancije isplatiti novčani iznos na koji garancija glasi ako nalogodavac djelimično ili u potpunosti ne ispuni svoju obavezu iz osnovnog ugovora. Dakle, prema ovom shvatanju, za nastanak i važnost obaveze banke nije potrebna saglasnost korisnika garancije, tako da se pitanje određivanja načina prihvatanja ponude i ne postavlja. Takođe, pristalice ovog stanovišta ističu da naš Zakon o obligacionim odnosima pominje termin „garancija 'bez prigovora'" (samostalna bankarska garancija), a ne „ugovor o samostalnoj bankarskoj garanciji" i na osnovu toga zaključuju da je riječ o jednostranom pravnom poslu.

Međutim, i shvatanju samostalne bankarske garancije kao jednostrane izjave volje mogu se uputiti određeni prigovori. Naime, naš Zakon o obligacionim odnosima dozvoljava da se jednostranim izjavama volje stvaraju obligacioni odnosi, ali samo u tačno navedenim slučajevima (javno obećanje nagrade, izdavanje hartija od vrijednosti i ponuda za zaključenje ugovora). Pošto samostalne bankarske garancije nisu izričito pomenute, njihovo kvalifikovanje kao jednostrane izjave volje pretpostavlja da ispunjavaju opšte uslove koji se tiču sadržine izjave, načina kako je izjava učinjena i kruga lica kojima je upućena (Vukadinović, 2010). Prema tome, da bi samostalnim bankarskim garancijama bila priznata moć stvaranja obligacionog odnosa, neophodno je da se ispune sljedeći uslovi: da je izjava volje učinjena javno, upućena neodređenom krugu lica i da sadrži potrebne uslove čijim ispunjavanjem svako lice stiče pravo na nagradu. Kvalifikaciji garancije kao jednostrane izjave volje naročito se prigovara iz razloga što banka svoju volju ne izjavljuje neodređenom broju lica, već tačno određenom licu, a to je korisnik garancije.

Za razliku od domaćeg prava, u međunarodnim izvorima se pronašao čvrst oslonac za određivanje samostalnih bankarskih garancija kao jednostranih pravnih poslova. Naime, članom 6. Jednoobraznih pravila za garancije na poziv iz 1992. godine predviđa se da samostalna bankarska garancija proizvodi pravno dejstvo od momenta izdavanja, osim ako na izričit način nije drugačije određeno. Tako je na nedvosmislen način potvrđeno da za nastanak pravnog dejstva samostalne bankarske garancije nije potrebna saglasnost druge strane, odnosno korisnika garancije, čime je ujedno i odbačeno ugovorno shvatanje ovog odnosa. Iz navedenog se vidi da se u međunarodnim izvorima, kroz određivanje samostalne bankarske garancije kao jednostranog pravnog posla, više vodilo računa o praktičnim potrebama savremenog prometa, budući da je na ovaj način njihovo izdavanje maksimalno uprošćeno.

Nažalost, revizijom Jednoobraznih pravila za garancije na poziv iz 2009. godine, odredbe ranijeg člana 6. su „precizirane" odredbom člana 4a, gdje je navedeno da se samostalna bankarska garancija smatra izdatom u trenutku „kad napusti kontrolu garanta". Ovakva formulacija dovodi do pojave pravnih nejasnoća. Naime, izraz „napustiti kontrolu garanta" ne predstavlja precizno određen pojam, što ostavlja mogućnost da se tumači na razne načine. Kao posljedica, stvara se dilema i nesigurnost u pogledu toga da li se ovdje misli na pravnu ili fizičku kontrolu. U oba slučaja se mora poći od toga da od trenutka kada banka izda tzv. garantno pismo, ono više nije u njenoj fizičkoj kontroli. Ta činjenica važi bez obzira na to da li je navedeni dokument korisnik garancije preuzeo. Prihvatanje takvog tumačenja za posljedicu bi imalo mogućnost da samostalna bankarska garancija postoji bez obzira na to što osim izdavaoca niko drugi za nju ne zna i bez obzira na to što možda i neće stići do

of the independent bank guarantee on the relationship between the guarantee user and the guarantor (bank) is disputable. In this regard, in our legal theory we come across two different opinions.

According to one point of view, an independent bank guarantee is a contract that arises from the tacit acceptance of the guarantor's offer by the future guarantee beneficiary (Perovic, 1995). Namely, in practice, the guarantee beneficiary who is satisfied with the content of the independent bank guarantee usually does not respond to the bank's offer (if the offer can be considered a notice of the issued guarantee), especially not shortly after obtaining it (Vukadinovic, 2010). His statement is manifested in conclusive actions, ie in taking legal or factual actions by which he de facto expresses his consent to the received offer, and he usually does that by submitting a request for payment to the bank. Proponents of the contractual understanding state that the acceptance of an independent bank guarantee in a tacit manner is so widespread in business practice that it can be considered an international custom in banking (Sogorov, 1985).

It is true that this way of creating a contract can be accepted in cases when the guarantee beneficiaries are satisfied with the content of the offer. However, the problem arises when it is necessary to answer the question of the condition of the guarantee statement (letter of guarantee) as an offer in a situation when a reasonable period of time has elapsed within which the guarantee beneficiary should have declared about it. Reasonable deadlines must be short, so late acceptance of the offer should be treated as acceptance of the new offer, which also means that the old one is terminated and there is a need to conclude a new contract for issuing an independent bank guarantee. However, the practice takes a different stance and considers that if the guarantee beneficiary has not explicitly rejected the offer of the guarantor bank there is still a concluded original contract on the issuance of an independent bank guarantee. It is important to emphasize that our Law of Contracts and Torts and Uniform Rules for Demand Guarantees stipulates that for an agreement on the issuance of an independent bank guarantee, it is necessary that the acceptance of the offer by the guarantee beneficiary be made in writing.

Furthermore, the contractual understanding implies the determination of the cause, ie the legal basis, but there are no unified understandings about that either. Namely, a cause is an essential element of any contract and can be determined as an economic or legal reason for committing or concluding a certain deal. In the case of an independent bank guarantee, the cause should explain the reasons why the guarantor bank is obliged to the guarantee beneficiary, without receiving any compensation from him. The law does not recognize contracts in which this specially qualified reason cannot be determined, and does not provide them with legal protection. In this regard, the supporters of the contractual understanding define the cause of the guarantee as the goal of the contract on issuing an independent bank guarantee and see it in securing and protecting the guarantee beneficiary from harmful consequences and possible risks that would jeopardize the realization of his interest (Sogorov, 1985). However, we believe that the reason for the bank's commitment to the guarantee beneficiary is not in the simple desire to help him, but in the economic interest of the bank, since the issuance of a guarantee, on the one hand belongs to its regular business for which it receives appropriate compensation, and on the other it does so in order to fulfill the obligation it has assumed towards the orderer, with whom it has concluded a contract on the issuance of an independent bank guarantee. Taking the opposite stance would mean that the bank assumes in order to obtain a free property benefit for the guarantee beneficiary, which is certainly not true. Based on that, we come to the conclusion that no satisfactory cause can be found in the contractual relationship between the bank and the guarantee beneficiary.

According to another view, an independent bank guarantee is a unilateral legal transaction by which the bank, based on the contract on the issuance of an independent bank guarantee concluded with the orderer, assumes to pay the guarantee beneficiary the guarantee amount, if the orderer does not partially or fully fulfill its obligation under the basic contract. Therefore, according to this understanding, the occurrence and validity of the bank's obligation does not require the consent of the guarantee beneficiary, so the question of determining the manner of accepting the offer does not arise. Also, the supporters of this stance point out that our Law of Obligations and Torts mentions the term "guarantee without objection" (independent bank guarantee), and not "agreement on independent bank guarantee" and on that basis they conclude that it is a unilateral legal transaction.

However, certain objections can also be raised to the understanding of an independent bank guarantee as a unilateral declaration of will. Namely, our Law of Contracts and Torts allows unilateral declarations of will to create obligatory relationships, but only in precisely stated cases (public promise of a reward, issuance of securities and offers for concluding a contract). Since independent bank guarantees are not explicitly mentioned, their qualification as unilateral declarations of will presupposes that they meet the general conditions regarding the content of the statement, the manner in which the statement was made and the circle of persons to whom it is addressed (Vukadinovic, 2010). Therefore, in order for independent bank guarantees to recognize the power to create an obligatory relationship, it is necessary to fulfill the following conditions: that the declaration of will is made publicly, addressed to an indefinite circle of persons and contains the necessary conditions by which each person acquires the right to a reward. The qualification of the guarantee as a unilateral declaration of will is especially objected to because the bank does not declare its will to an indefinite number of persons, but to a specific person, and that is the guarantee beneficiary.

Unlike domestic law, international sources have found a solid basis for determining independent bank guarantees as unilateral legal transactions. Namely, Article 6 of the Uniform Rules for Demand Guarantees from 1992 stipulates that an independent bank guarantee produces legal effect from the moment of issuance, unless explicitly stated otherwise. Thus, it was unequivocally confirmed that the legal effect of an independent bank guarantee does not require the consent of the other party, ie the guarantee beneficiary, which also rejected the contractual understanding of this relationship. It can be seen from the above that in international sources, through the determination of an independent bank guarantee as a unilateral legal transaction, more attention was paid to the practical needs of modern transactions, since in this way their issuance was maximally simplified.

Unfortunately, the revision of the Uniform Rules on Demand Guarantees from 2009, the provisions of the former Article 6 are "specified" by the provision of Article 4a, where it is stated that an independent bank guarantee is considered issued at the moment "when it leaves the control of the guarantor". This formulation leads to legal ambiguities. Namely, the term "leave the control of the guarantor" does not represent a precisely defined term, which leaves the possibility to be interpreted in various ways. As a result, a dilemma and uncertainty arises as to whether legal or physical control is meant here. In both cases, one must start from the moment when the bank issues the so-called a letter of guarantee, it is no longer in her physical control. This fact is valid regardless of whether the said document was taken by the the guarantee

korisnika garancije. U suprotnom, korisnik koji nije dobio samostalnu bankarsku garanciju, a koja je van kontrole banke, mogao bi tražiti od nalogodavca, a nalogodavac od banke, da izda novu garanciju, što dodatno potvrđuje besmislenost ovog tumačenja. Svakako da se ovakvo shvatanje direktno suprotstavlja zdravoj logici, koja mora važiti i kod apstraktnih pravnih poslova.

2.2. Sličnosti i razlike između samostalne bankarske garancije i drugih instituta obezbjeđenja povjerioočevog potraživanja

Razgraničenje samostalne bankarske garancije od srodnih poslova preko utvrđivanja sličnosti i razlika ima, pored opšteg teorijskog, i praktičan značaj. Teorijski gledano, pouzdano utvrđivanje njihovih podudarnih elemenata ima za cilj da u odsustvu sveobuhvatne pravne regulative omogući korišćenje samostalne bankarske garancije kroz primjenu pravila iz srodnih poslova u onim oblastima koje su utvrđene kao zajedničke. S druge strane, u praktičnom smislu, jasno razlikovanje samostalne bankarske garancije od drugih pravnih instituta, a naročito jemstva, od ogromnog je značaja sa sva fizička i pravna lica koja ih izdaju ili dobijaju kao sredstvo obezbjeđenja. Praksa pokazuje da se prilikom sastavljanja samostalne bankarske garancije često koriste i izrazi koji se međusobno isključuju ili, u najmanju ruku, stvaraju sumnju u pogledu njihovog pravog značenja, čime se usporava pravni promet, a sam posao garancije bespotrebno kompromituje (Rosenberg, 1975).

2.2.1. Sličnosti i razlike između samostalne bankarske garancije i jemstva

Razlog postojanja sličnosti između samostalnih bankarskih garancija i građanskopravnog, odnosno privrednopravnog jemstva treba tražiti u činjenici da je bankarska garancija kao pravni institut nastala iz jemstva. Ta sličnost je naročito primjetna u njihovoj privrednoj svrsi i karakteru činidbe. I samostalna bankarska garancija i jemstvo predstavljaju personalna sredstva obezbjeđenja povjerioočevog potraživanja od rizika i štetnih posljedica koje mogu nastati zbog neispunjenja obaveza iz osnovnog posla. Dakle, njihov cilj, odnosno svrha postojanja je u obezbjeđivanju ispunjenja obaveza dužnika iz osnovnog ugovora. Iz tog razloga, ako se posmatraju u ekonomskom smislu, i samostalna bankarska garancija i jemstvo čine ekonomsko jedinstvo sa osnovnim poslom.

Međutim, pored pomenutih sličnosti između ova dva instituta, ističemo i značajne razlike. Pravna zavisnost jemčeve obaveze u odnosu na obavezu glavnog dužnika iz osnovnog posla označava se kao akcesornost i, prema shvatanju pravne teorije i prakse, predstavlja glavni kriterijum razlikovanja jemstva od samostalnih bankarskih garancija (Antonijević, Petrović, Pavićević, 1982). Kao posljedica toga proizlazi da jemstvo pruža povjeriocu sigurnost samo od rizika insolventnosti dužnika iz glavnog ugovora, ali ne i od rizika pravnog postojanja obaveze tog dužnika. Međutim, u praksi se povjerioci ne zadovoljavaju samo obezbjeđenjem protiv rizika od neispunjenja pravno valjane i utužive obaveze iz osnovnog ugovora, već nastoje da se zaštite i obezbijede i od štetnih posljedica neizvršenja obaveze zbog toga što osnovni posao nije punovažno nastao, ili je kasnije prestao, ili je postao nepunovažan, kao i od rizika nemogućnosti ispunjenja usljed više sile, političkih događaja i pravnih akata upravnih vlasti, kao što su npr. devizna i druga javnopravna ograničenja (Jankovec, 1999). Za razliku od jemstva, kod samostalne bankarske garancije ne postoji pravna zavisnost garancije u odnosu na pravne poslove iz koje je nastala, a i obaveza banke je nezavisna u odnosu na obavezu dužnika iz osnovnog ugovora.

Druga razlika između samostalne bankarske garancije i jemstva proizlazi iz supsidijarnosti jemčeve obaveze. Supsidijarnost označava obavezu povjerioca da se prvo obrati dužniku iz glavnog ugovora sa zahtjevom za ispunjenje, pa tek u slučaju nemogućnosti naplate od njega stiče pravo da se obrati jemcu. Izuzetak predstavlja slučaj kada su dužnik i jemac solidarno odgovorni, jer se tada povjerilac može obratiti i jednom i drugom, ili obojici istovremeno, a sve u cilju naplate svoga potraživanja. Suprotno tome, kod samostalne bankarske garancije korisnik može zaobići dužnika i odmah se obratiti banci garantu radi dobijanja garantnog iznosa.

Iz akcesornosti jemstva vidljiva je i treća razlika, a ona se odnosi na prigovore kojima se jemac može služiti prema povjeriocu prilikom ispunjenja preuzetih obaveza. Naime, jemac ima pravo da protiv povjerioočevog zahtjeva ističe sve prigovore glavnog dužnika (uključujući i prigovor prebijanja), osim čisto ličnih prigovora. Kod samostalne bankarske garancije banka je ovlašćena da protiv korisnika garancije osim subjektivnih (ličnih) prigovora ističe i objektivne prigovore, ali samo one koji neposredno izviru iz same garancije (prigovor kompenzacije, prigovor u pogledu punovažnosti i sadržine garancije).

Nadalje, razlika postoji i u pogledu visine jemčeve obaveze i obaveze banke. Dok je obim obaveze jemca uvijek jednak obimu obaveze glavnog dužnika, kod samostalne bankarske garancije visina obaveze banke je unaprijed fiksirana na određeni ili odredivi iznos u samoj garanciji. Pored toga, obaveza banke se uvijek svodi na isplatu određenog novčanog iznosa korisniku u slučaju da dužnik nije ispunio obavezu iz glavnog ugovora. S druge strane, obaveza jemca se može sastojati i u nekoj drugoj činidbi.

Takođe, i u pogledu načina prestanka samostalne bankarske garancije i jemstva postoje određene razlike. Iz načela akcesornosti proizlazi da jemstvo traje onoliko dugo koliko traje i obaveza glavnog dužnika. Osim toga, i u ugovoru o jemstvu mogu biti navedeni razlozi koji dovode do prestanka jemstva, a to su raskid ugovora, njegovo poništenje i protek vremena. Za razliku od navedenog, kod bankarske garancije, trajanje obaveze banke je isključivo određeno prirodom, odnosno vrstom garancije (Vukadinović, 2010).

2.2.2. Sličnosti i razlike između samostalne bankarske garancije i dokumentarnog akreditiva

Sličnosti između samostalne bankarske garancije i dokumentarnog akreditiva postoje iz razloga što i jedan i drugi pravni institut imaju isti cilj, a to je da zadovolje praktične potrebe poslovnih fizičkih i pravnih lica u međunarodnopravnom prometu.

Naime, i samostalna bankarska garancija i dokumentarni akreditiv predstavljaju instrumente obezbjeđenja ispunjenja obaveze iz osnovnog posla. Takođe, u domaćem pravu, oba pravna instituta karakteriše učešće banke kao glavnog aktera u preuzimanju čvrste, neopozive i apstraktne obaveze prema korisniku.

Međutim, i pored navedenih sličnosti, između samostalne bankarske garancije i dokumentarnog akreditiva postoje poprilične razlike, među kojima je najupečatljivija ona vezana za prirodu i svrhu podnijetih dokumenata. Kad je riječ o dokumentarnom akreditivu, uredni akreditivni dokumenti služe kao dokaz da je korisnik uredno ispunio svoju obavezu iz osnovnog posla. S druge strane, kod samostalne bankarske garancije, podnošenje zahtjeva od strane korisnika garancije vodi pretpostavci da obaveza iz osnovnog posla nije valjano ispunjena. Preciznije rečeno, kod dokumentarnog akreditiva, kupčeva obaveza na isplatu cijene je suspendovana otvaranjem akreditiva banke, budući da banka stupa na mjesto kupca, sve vrijeme dok je akreditiv u važnosti, dok se kod samostalne bankarske garancije banka ne obavezuje na ono što duguje kupac, već na odštetnu

beneficiary. Accepting such an interpretation would result in the possibility that an independent bank guarantee exists regardless of the fact that no one other than the issuer knows about it and regardless of the fact that it may not reach the guarantee beneficiary. Otherwise, the guarantee beneficiary who did not receive an independent bank guarantee, which is out of the bank's control, could ask the orderer, and the orderer could ask the bank to issue a new guarantee, which further confirms the meaninglessness of this interpretation. Certainly, such an understanding directly opposes common sense, which must also apply to abstract legal affairs.

2.2. Similarities and differences between an independent bank guarantee and other institutes of securing the creditor's claim

The distinction between an independent bank guarantee and related transactions, through the determination of similarities and differences, in addition to general theoretical, has also practical significance. Theoretically, the reliable determination of their matching elements aims to enable the use of an independent bank guarantee in the absence of comprehensive legal regulation through the application of rules from related transactions in those areas that have been identified as common. On the other hand, in practical terms, a clear distinction between an independent bank guarantee and other legal institutes, and especially guarantees, is of great importance with all natural and legal persons who issue or receive them as collateral. Practice shows that when compiling an independent bank guarantee, terms that are mutually exclusive or, at the very least, cast doubt on their true meaning are often used, which slows down legal transactions and unnecessarily compromises the guarantee itself (Rosenberg, 1975).

2.2.1. Similarities and differences between an independent bank guarantee and a warranty

The reason for the existence of similarities between independent bank guarantees and civil legal, ie economic legal warranty should be sought in the fact that the bank guarantee as a legal institution arose from the warranty. This similarity is especially noticeable in their economic purpose and character of obligation. Both the independent bank guarantee and the warranty represent personal means of securing the creditor's claim against risks and harmful consequences that may arise due to non-fulfillment of obligations from the basic contract. Therefore, their goal or purpose of existence is to ensure the fulfillment of the debtor's obligations under the basic contract. For that reason, if viewed in economic terms, both an independent bank guarantee and a warranty form an economic unity with the core transaction.

However, in addition to the mentioned similarities between these two institutes, we also point out significant differences. The legal dependence of the warranter's obligation in relation to the obligation of the main debtor from the basic contract is marked as accessory and according to the understanding of legal theory and practice is the main criterion for distinguishing the warranty from independent bank guarantees (Antonijevic, Petrovic, Pavicevic, 1982). As a consequence, the warranty provides the creditor with security only from the risk of insolvency of the debtor from the main contract, but not from the risk of the legal existence of the obligation of that debtor. However, in practice, creditors are not only satisfied with securing against the risk of non-fulfillment of a legally valid and enforceable obligation from the basic contract, but also try to protect and insure themselves from the harmful consequences of non-fulfillment of obligations because the basic contract did not come into force, either it later ceased, or became invalid, as well as from the risk of impossibility of fulfillment due to force majeure, political events and legal acts of administrative authorities, such as e.g. foreign exchange and other public law restrictions (Jankovec, 1999). Unlike a warranty, for an independent bank guarantee, there is no legal dependence of the guarantee in relation to the legal transactions from which it arose, and the obligation of the bank is independent in relation to the obligation of the debtor from the basic contract.

Another difference between an independent bank guarantee and a warranty arises from the subsidiarity of the warranter's obligation. Subsidiarity means the obligation of the creditor to first address the debtor from the main contract with the request for fulfillment, and only in case of impossibility of collection from him, he acquires the right to address the warranter. The exception is the case when the debtor and the warranter are jointly and severally liable, because then the creditor can address both, or both at the same time, all in order to collect his claim. Conversely, in the case of an independent bank guarantee, the user can bypass the debtor and immediately contact the guarantor bank in order to obtain the guarantee amount.

The third difference is visible from the accessory nature of the warranty, and it refers to the objections that the warranter can use against the creditor when fulfilling the assumed obligations. Namely, the warranter has the right to point out all the objections of the main debtor (including the objection of set-off) against the creditor's request, except for purely personal objections. In the case of an independent bank guarantee, the bank is authorized to point out objective objections against the beneficiary of the guarantee in addition to subjective (personal) objections, but only those that directly arise from the guarantee itself (compensation objection, objection regarding validity and guarantee content).

Furthermore, there is a difference in terms of the amount of the warranter's and the bank's obligation. While the scope of the warranter's liability is always equal to the scope of the main debtor's liability, in the case of an independent bank guarantee, the amount of the bank's liability is fixed in advance to a certain or determinable amount in the guarantee itself. In addition, the obligation of the bank is always reduced to the payment of a certain amount of money to the guarantee beneficiary in case the debtor has not fulfilled the obligation from the main contract. On the other hand, the warranter's obligation may consist of another obligation.

Also, there are certain differences regarding the manner of termination of an independent bank guarantee and warranty. It follows from the principle of accessory that the warranty lasts as long as the obligation of the main debtor lasts. In addition, the warranty contract may state the reasons that lead to the termination of the warranty, namely the termination of the contract, its annulment and the lapse of time. In contrast to the above, in the case of a bank guarantee, the duration of the bank's obligation is determined exclusively by the nature, ie the type of guarantee (Vukadinović, 2010).

2.2.2. Similarities and differences between an independent bank guarantee and a documentary credit

The similarities between an independent bank guarantee and a documentary credit exist for the reason that both legal institutes have the same goal, which is to satisfy the practical needs of business individuals and legal entities in international transactions.

Namely, both the independent bank guarantee and the documentary credit are instruments for securing the fulfillment of the obligation from the basic contract. Also, in domestic law, both legal institutes are characterized by the bank's participation as the main actor in assuming a firm, irrevocable and abstract obligation to the beneficiary.

However, despite the above similarities, there are considerable differences between an independent bank guarantee and a documentary credit, among which the most striking is related to the nature and purpose of the submitted documents. In the case of a documentary credit, proper credit documents serve as proof that the user has duly fulfilled his obligation under the basic contract. On

činidbu prema korisniku garancije (Gutteridge, Megrah, 1979). Osim toga, dokumentarni akreditiv obezbjeđuje interese obje strane (i povjerioca i dužnika), dok samostalna bankarska garancija štiti interese isključivo jedne strane (korisnika garancije).

2.2.3. Odnos samostalne bankarske garancije prema standby akreditivu

Samostalna bankarska garancija i standby akreditiv pokazuju visok nivo sličnosti, kako u funkcionalnom smislu, tako i u pravnim karakteristikama. Ova vrsta akreditiva potiče iz prakse američkih banaka gdje se raširenо koristi, što je posljedica zabrane tim istim bankama da preuzimaju apstraktne ugovorne obaveze i izdaju samostalne bankarske garancije. Da se zapravo samo radi o različitim oblicima iste pojave svjedoči i činjenica da su i samostalna bankarska garancija i standby akreditiv predviđeni i regulisani istom konvencijom.

2.2.4. Sličnosti i razlike između samostalne bankarske garancije i osiguranja kredita

Na kraju, samostalna bankarska garancija ima izvjesnih sličnosti i sa poslovima osiguranja kredita, budući da se i osiguranjem kredita vrši obezbjeđenje povjerioočevog potraživanja na sličan način kao i garancijom. Naime, zaključivanjem ugovora o osiguranju kredita osiguranik se obezbjeđuje od rizika nastanka štete zbog nastupanja nekog budućeg neizvjesnog događaja. To znači da u slučaju da dužnik ne plati dug o dospjelosti, osiguranik ima pravo na dobijanje osigurane sume kao vid naknade štete, koja odgovara šteti koju je on zaista doživio. Međutim, kod samostalne bankarske garancije banka je dužna da korisniku garancije isplati iznos koji je fiksno određen u garanciji, a fiksnost obaveze isplate novčanog iznosa ujedno označava i nemogućnost mijenjanja visine tog iznosa, bez obzira na veličinu štete koju je korisnik stvarno pretrpio.

Razlika postoji i u karakteru premije osiguranja i bankarske provizije za izdatu garanciju, kao i visini i značaju koje ima njihovo neplaćanje za nastanak i ispunjenje obaveze iz ugovora o osiguranju i posla garancije (Vukadinović, 2010). Takođe, i u pogledu pravne prirode postoji razlika, jer posao osiguranja kredita nesporno predstavlja dvostrano obavezujući ugovor, dok su mišljenja o prirodi samostalne bankarske garancije podijeljena na ugovorna shvatanja i shvatanja o jednostranoj izjavi volje. Osim toga, u domaćem pravu, poslove osiguranja obavljaju osiguravajuća društva, a poslove izdavanja samostalnih bankarskih garancija vrše banke.

ZAKLJUČAK

Savremeni međunarodni promet odlikuje se time što privredni subjekti stupaju u poslovne odnose sa nepoznatim partnerima, pa se javlja izvjesna doza nepovjerenja u spremnost i sposobnost druge ugovorne strane da uredno i na vrijeme ispuni svoje obaveze koje je preuzela prilikom zaključenja ugovora. Upravo zbog toga, samostalna bankarska garancija (barem ona koja je predviđena Jednoobraznim pravilima za garancije na poziv), posjeduje enorman potencijal da se kroz obezbjeđenje povjerioočevog potraživanja afirmiše kao nezaobilazno sredstvo osiguranja ispunjenja ugovornih obaveza.

U međunarodnoj razmjeni dobara drugih zemalja već je ostavila dubok trag. Međutim, u našoj državi, rasprostranjenost samostalne bankarske garancije nije na visokom nivou, a uzrok njene skromne upotrebe možemo pronaći u našem Zakonu o obligacionim odnosima kojim je samostalna bankarska garancija (ne)uređena na takav način da se ostavljaju velike mogućnosti za pojavu novih problema i nejasnoća u poslovnoj praksi, što dovodi do stvaranja pravne nesigurnosti.

Kako bi se ta situacija izbjegla, ugovorne strane bi prilikom zaključenja ugovora trebale predvidjeti obavezu dužnika da pribavi samostalnu bankarsku garanciju koja će biti u skladu sa međunarodno prihvaćenim običajima, a naročito sa Jednoobraznim pravilima za garancije na poziv, a to posebno važi za privredne subjekte koji posluju sa inostranim licima, imajući u vidu pomenute nesigurnosti, ali i vrijednost njihovih poslovnih ugovora.

Sumirajući sve navedeno, možemo zaključiti da u našem pravu postoji potreba za podrobnijim, širim i preciznijim uređenjem ovog pravnog instituta. S tim u vezi, činjenica da je samostalna bankarska garancija uređena isključivo članom 1087. Zakona o obligacionim odnosima, a imajući u vidu vrijeme i okolnosti u kojima je pomenuti zakon donesen, postaje jasno da je neophodno izvršiti modernizaciju navedenog pravnog instituta kroz uvođenje novih zakonskih odredbi kojima bi se ona jasnije i detaljnije regulisala, a sve to u cilju zadovoljenja potreba savremenog društva.

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the other hand, in the case of an independent bank guarantee, the submission of a request by the guarantee beneficiary leads to the presumption that the obligation from the basic contract has not been properly fulfilled. More precisely, in the case of a documentary credit, the buyer's obligation to pay the price is suspended by the bank opening the documentary credit, since the bank takes the place of the buyer, as long as the documentary credit is valid, while in the case of an independent bank guarantee, the bank does not commit itself to what the buyer owes, but to a compensatory act towards the guarantee beneficiary (Gutteridge, Megrah, 1979). In addition, a documentary credit secures the interests of both parties (both the creditor and the debtor), while a independent bank guarantee protects the interests of only one party (the guarantee beneficiary).

2.2.3. Relationship between independent bank guarantee and standby letter of credit

An independent bank guarantee and a standby letter of credit show a high level of similarity, both in functional terms and in legal characteristics. This type of letter of credit originates from the practice of American banks where it is widely used, which is a consequence of the ban on these same banks to assume abstract contractual obligations and issue independent bank guarantees. That these are in fact only different forms of the same phenomenon is evidenced by the fact that both the independent bank guarantee and the standby letter of credit are provided for and regulated by the same Convention.

2.2.4. Similarities and differences between an independent bank guarantee and credit insurance

Finally, an independent bank guarantee has certain similarities with credit insurance, since credit insurance also secures the creditor's claim in a similar way as a guarantee. Namely, by concluding a loan insurance contract, the insured person is insured against the risk of damage due to the occurrence of a future uncertain event. This means that in the event that the debtor does not pay the debt on maturity, the insured is entitled to receive the insured amount as a form of compensation, which corresponds to the damage he actually suffered. However, with an independent bank guarantee, the bank is obliged to pay the beneficiary the amount specified in the guarantee, and the fixed obligation to pay the amount also means the impossibility of changing the amount, regardless of the amount of damage actually suffered by the user.

There is also a difference in the character of the insurance premium and bank commission for the issued guarantee, as well as the amount and significance of it's non-payment for the occurrence and fulfillment of the obligation from the insurance and guarantee contract (Vukadinović, 2010). Also, in terms of legal nature, there is a difference, because loan insurance is indisputably a bilaterally binding contract, while opinions on the nature of an independent bank guarantee are divided into contractual understandings and understandings of unilateral declaration of will. In addition, in domestic law, insurance is performed by insurance companies, and the issuance of independent bank guarantees is performed by banks.

CONCLUSION

Modern international trade is characterized by the fact that economic entities enter into business relations with unknown partners, so there is a certain amount of distrust in the readiness and ability of the other party to properly and on time fulfill its obligations under the contract. Precisely because of that, an independent bank guarantee (at least the one provided by the Uniform Rules for Demand Guarantees) has an enormous potential to affirm itself as an unavoidable means of securing the fulfillment of contractual obligations by securing the creditor's claim.

It has already left a deep mark in the international exchange of goods of other countries. However, in our country, the prevalence of an independent bank guarantee is not at a high level, and the cause of its modest use can be found in our Law of Contracts and Torts, which regulates the independent bank guarantee in such a way that there are opportunities for new problems and ambiguities in business practice, leading to the creation of legal uncertainty.

In order to avoid this situation, the contracting parties should, when concluding the contract, provide the obligation of the debtor to obtain an independent bank guarantee that will be in accordance with internationally accepted customs, and in particular with the Uniform Rules for Demand Guarantees, and this is especially true for economic entities that do business with foreign persons, having in mind the mentioned uncertainties, but also the value of their business contracts.

Summarizing all the above, we can conclude that in our law there is a need for a more detailed, broader and more precise regulation of this legal institute. In this regard, the fact that the independent bank guarantee is regulated exclusively by Article 1087 of the Law of Contracts and Torts, and given the time and circumstances in which the law was passed, it becomes clear that it is necessary to modernize the legal institute through the introduction of new legal provisions. which would regulate it more clearly and in more detail, all in order to meet the needs of modern society.

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