Європейським Союзом Угоди про асоціацію, є певним орієнтиром як для законодавця, так і для осіб, які беруть участь в судочинстві. В свою чергу, застосування положень міжнародної судової практики, безумовно, буде сприяти реалізації принципу верховенства права. Певні недоліки регулювання правового статусу експерта з питань права, в тому числі і ті, про які йшлося вище, потребують виправлення на законодавчому рівні.

Список бібліографічних посилань:

1. Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів: Закон України від 3 жовтня 2017 року // Відомості Верховної Ради. – 2017. – № 48. – Ст. 436.

2. Цивільний процесуальний кодекс України від 18.03.2004 р. № 1618-IV: за станом на 13 лип. 2017 р. // Офіційний вісник України. – 2004. – № 16 (07.05.2004). – Ст. 1088 (із змінами).

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ENSURING MECHANISM OF GUARANTEE

With adoption of Civil Code of Ukraine, institute of guarantee has received fundamentally new content. The guarantor is not acting as a solidarity debtor or subsidiary which is a bondsman. In accordance with provisions of article 562 of Civil Code obligation of guarantor to creditor is independent of main obligation (its termination or invalidity), specifically in those cases when guarantee has reference to main obligation.

Problems of guarantee as new type of ensuring implementation of obligation are in such researches of such scientists as: T. Bondar, N. Kuznetsova, E. Pavlodsky, I. Puchkovska, A. Rubanov; M. Sibilov; V. Sloma and others. Thus, solving certain problems of this institute, scientists are doing rather contradictory conclusions which pointed out to ambiguous perception of a guarantee in scientific literature. The peculiarity of guarantee is connected with its independence from principal obligation which has been proclaimed by legislator in Article 562 of Civil Code of Ukraine. The latter gave rise to a dispute among scientists concerning real independence of guarantee and possibility of its existence as a type of ensuring implementation of obligations.

According to Article 560 of Civil Code under guarantee a bank, other financial institution and an insurance organization (guarantor) give guarantee to creditor (beneficiary) of performance of its obligation by debtor (principal). In accordance, in relations under guarantee take part three subjects – guarantor, beneficiary and principal. While guarantors can only be financial institutions. The beneficiaries and principals may be both individuals, including entrepreneurs and juridical entities. A guarantee issued by a non-financial institution cannot be considered valid.

In order to understand nature of independent guarantee as one of types of ensuring implementation of obligation it is necessary to consider entire ensuring mechanism of guarantee, that is, unlike other types of ensuring implementation of obligation, consisting of, unlike other types of ensuring implementation of obligation, instead of two (main and ensuring) transactions but of three ones. The guarantee cannot exist otherwise than as a unilateral transaction made by guarantor in favor of creditor (beneficiary), since latter cannot appear without a prior agreement of debtor (principal) with guarantor on its issuance in interests of creditor (beneficiary). A guarantee cannot exist otherwise than factor of ensuring construction, consisting of relations of debtor (principal) and creditor (beneficiary); debtor (principal) and guarantor, and this construction only in its integrity is one of types of ensuring implementation of obligations of. In the case of investigation of guarantee as legal institute, main figure will be guarantor than, from economic point of view, main acting person in system of guarantee relations as relations established with aim of protection in case of breach by debtor of contract is creditor. It is the creditor in process of conclusion of contract with debtor requires insurance of guarantees with aim of protection in case of a possible breach by debtor of his obligation under contract, that is, initiates emergence of guarantee. The creditor, with aim of guarantee reliability, selects guarantor, which in case of breach of obligation by debtor will lay claim, using as any authorized person right of choice as to exercise of his own right. On creditor place also consequences of laying of unfounded claim.

The creditor and debtor having taken decision on ensuring implementation of obligation by guarantee may conclude as a preliminary contract on future conclusion of main contract provided it will be given guarantee by debtor so main contract provided pointing out there that rights and obligations will arise at moment of issuance on behalf of creditor of guarantee or that moment of giving obligation by creditor under this contract will be moment of rights under this contract arising. In this case parties, as a rule, stipulate participation of certain guarantor and essential conditions of guarantee which will be giving by debtor to guarantor for inserting them in text of guarantee.

So, for obtaining of guarantee debtor, first of all, has to apply to guarantor and in case of consent of latter contract is concluded between them on issuance of guarantee, on base of which debtor will pay to guarantor a certain sum of money for provision of such a service as issuance of guarantee by guarantor in favor of creditor.

The legislator has not regulated in § 4 of Chapter 49 of Civil Code relations prior to issuing of guarantee as one-sided-binding of guarantor of transaction. Meanwhile, the existence of contract on issuance of guarantee has found its reflection in law of Ukraine «On Financial Services and State Regulation of Financial Markets». So according to Article 6 of this law provision of guarantee is made on basis of contract.

So, taking into account provisions of Civil Code of Ukraine, essential for arising of guarantee obligation are such terms as: on terms of guarantee; on maximum guarantee monetary amount; presentation of claim to beneficiary on payment of guarantee sum, including a list of documents attached to such a requirement or reference to fact that guarantee is a guarantee on first demand (i. e. unconditional guarantee); a reference to main obligation, which performance is provided by guarantee. Other terms for content of guarantee text are optional and not obligatory.

Despite fact that in Civil Code, as well as in Uniform Rules assumed regulation of guarantee on request based on principles of its independence from basic obligation, without right to recall, inability to transfer rights under guarantee; and procedure for granting claims by beneficiary under guarantee, as well as consideration of claims of beneficiary by guarantor coincide as to their content with terms specified in Unified Rules, domestic legislator, determining concept of guarantee in Article 560 of Civil Code, underlines that «under guarantee bank, other financial institution and insurance organization guarantee to creditor implementation by debtor of his obligation.

The guarantor is responsible to creditor for breach of obligation by debtor that does not make it possible to have doubt about emergence and existence of guarantee as a way of creditor protection in case of a possible breach of obligation by debtor.

Moreover, the legislator establishes that basis for implementation of his obligation by guarantor is laying claim to him in written by creditor on payment of cash amount according to guarantee issued by him, in which creditor should indicate what is debtor's breach of principal obligation insured by guarantee consisted of. Nonobservance of this claim entails consequences set forth by Chapter 1 of Article 565 of Civil Code, namely, grants right to guarantee to refuse to satisfy creditor's claims.

It should be emphasized that Civil Code provides provision on guarantee only as a unilateral transaction and, accordingly, regulates relationships between guarantor and creditor. This approach doesn't give a holistic view on establishment of given ensuring and its realization with aim of protection the creditor's infringed rights in contract obligation. It is necessary to take into account that ensuring guarantee construction covers three transactions among them creditor is a party only in one transaction – the main contract and right to claim has as under principal obligation so in case of its breach under «independent» of this obligation by guarantee. If creditor does not receive performance under main contract in connection with its breach by debtor then

laying this claim to guarantee he will receive performance in order of protection − under guarantee, by way, he will receive it urgently. If the creditor will use his rights under guarantee and it is not in connection with debtor's breach of basic obligation, for example, to lay claim to guarantee after proper execution of his obligation by debtor than latter after presentation him by guarantor of recourse, may apply to court and proving that creditor received double performance (from him and guarantor), requires from creditor return of moneys received groundlessly which is possible only in case of recognition of guarantee as some type of ensuring implementation of obligation and, that's why, established for protection of rights of creditor under main obligation. Protective purpose of guarantee is that beneficiary as creditor under main obligation could easily meet requirements at expense of guarantor if debtor fails to fulfill obligations. Accordingly, independence of guarantee from contractual relationship between debtor and creditor stipulated, exclusively, by effectiveness of protection granted by it.

In literature rightly notes that guarantee has arisen in connection with needs of participants of quick receiving by creditor of money from guarantor in case of debtor's breach of obligation.

It is settling of task of time minimization that begins from moment of participants occurrence of damage among participants of property relations to moment when it is actually compensated, promoted introducing in recent years of institute of independent guarantee in business practice of countries with advanced economy. Despite peculiarities of national legal systems in different countries in functioning of guarantee institute it is observed same approaches. Firstly, the problem of time minimization is solved at expense of third party practice that does not take part in relevant contract, namely, guarantor. Secondly, creditor for principal obligation − beneficiary – is empowered to decide on his own, in what moment to require payment from guarantor. Accordingly, it is placed a duty on last on first request of beneficiary to pay sum. Thirdly, for same purpose is sharply restricted rights of guarantor to refuse of payment or delay of it for reasons connected with main contract. The guarantor is not entitled to refuse to satisfy claim of beneficiary with reference to fact that in main contract some circumstances have arisen that allow it to refrain from payment.

Білик М., Василенко М. Гарантія як спосіб забезпечення зобов'язань.

У роботі досліджено питання правової природи, сутнісних ознак гарантії, визначення її місця у системі засобів забезпечення зобов'язань. Проаналізовано сучасну концепцію гарантії. Охарактеризовано підстави виникнення та припинення гарантійних правовідносин, специфіка юридичної сукупності, що тягне виникнення цих відносин.