



Bank Letters of Guarantee's Impact on Domestic and International Banking Procedure

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ABSTRACT

Bank Letters of guarantee are one of important instruments in domestic and international business intercourses in order to guarantee commitments of contract parties or customers, whereby the bank guarantee to pay a certain amount of cash in case of reversal or not fulfilling the contract, on behalf of guarantee applicant, based on the request against beneficiary. Regarding to the volume and extensiveness of current business transactions and letters of guarantee's functions, commitments guarantees, which are subject to letters of guarantee can't be perfectly phrased as contract guarantees in civil law, and it seems they are private contracts that are examined in article 10 of civil law. Letters of guarantee's principle of independence is noticed as most important characteristic of this instrument and it pays the cash without considering the base contract between parties. Letters of guarantee's many primary traits, including the principle of independence, are accepted based on uniform regulations of warrant letters named as URDG 758. As the central bank of the Islamic republic of Iran accepted these regulations, there are no differences in general framework of issuing domestic and international letters of guarantee, among Iranian banks. Warranties in tender or auction, verity of fulfilling commitments, prepayment and etc. are among regular and common letters of guarantee's classifications.

Keyword:

Bank Letters of Guarantee (warrants), Beneficiary, Guarantee applicant, Independence principle

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INTRODUCTION

Nowadays, lifestyle and its significance have become one of Bank letter of guarantee is one of prevalent instruments for domestic and international contracts. Letter of guarantee is a kind of personal pledge that is issued to guaranty and secure contract commitments. These kinds of pledges are useful when the commitments are not fulfilled nor accomplished completely or perfectly. Among prevalent contracts, Bank letter of guarantee are most similar to contract of guarantee. However, it's important to know that the comparison between these two, is more based on extremity, rather than material and substantive structure, as we will see later. Bank letters of guarantee, are came from commercial and banking traditions, so juridical procedure has deduced and announced its regulations from these traditions and the law does not play an important role in this. Widespread usage of bank letters of guarantee, makes it necessary to gather and study its regulations. The writer's effort in this article is to provoke thought about the letters of guarantee's legal system, using other people's experiences. Increasing spread of domestic and foreign transactions' volume and urgent need for transactions' parties to know each other and a guarantee for parties' commitments, has resulted to use an instrument namely letter of guarantee. Letter of guarantee's parties are beneficiary, guarantee applicant and issuing bank. The person whom the letter of guarantee is for, called "beneficiary" and the person who orders the letter of guarantee to bank based on primary commitment, is called "directive" or "primary obligor", and the bank that issues the letter of guarantee, called "issuing bank" or "guarantor". The contract between the primary obligor and beneficiary which the letter of guarantee is issued to ensure it, is called "prime contract".

The difference between legal system of countries, involved to relations based on international bank letter of guarantee was so heavy that the need for a uniform regulation in this context, was required just as these instruments used for international transactions. At the beginning, international chamber of commerce tried to regulate URDG325 codes in order to establish uniform procedure in international transactions. These regulations includes original interests rather than balancing both letter of guarantee's benefits for parties. Hence it was not welcomed and this case brings the need to review these regulations and after that, URDG 458 codes was prepared and published by international chamber of commerce. Despite URDG35 codes, this regulation payed proper attention to commerce and banking tradition and procedure and so, is accepted and welcomed by many countries. The regulations went through many procedures based on requirements during the time, and now, there are uniform regulations called URDG758 codes, which are embraced as a common language to understand rules and regulations for international bank letters of guarantee in commerce relations between countries. At the moment, letters of guarantee are turned to a prevalent instrument in domestic and foreign contracts, and in fact they can be assumed as a kind of personal pledge that are issued to guaranty contract commitments.

Bank letters of guarantee are the most important instruments for risk hedging and they can be implemented in buy tender contracts, international commerce transactions, contracting

and etc., as a useful instrument, and this extensive usage, necessitate us to review and study current regulations, because a primary reason of parties' problems in many domestic and international commerce contracts, is the lack of expert attention to letter of guarantee subject. These problems are sometimes subject to lack of attention to letter of guarantee subject in contracts, and in some cases, they are related to some bugs in letter of guarantee's text.

Based on what mentioned above, it seems that it's important to develop the bank letters of guarantee's subject because of its special role in domestic and international commerce transactions, and in this paper, we are going to perform a careful examination of nature, types and frameworks of domestic and international bank letters of guarantee and compare it to traditional bank letters of guarantee.

2. Definitions and Concepts

2.1. Contract of Guarantee concept in civil law

Contract of guarantee is one of defined contracts in Islamic law which has a long history in our law. With the expansion of banking services that was born in European countries, one of duties that has devoted to banks, was to guaranty people's transactions and debts, which was different from traditional concept of guarantee based on debt guaranty, because it also guaranty transactions and job accomplish, beside debts. Article 684 of civil law define guarantee as follows: "contract of guarantee is that a person, takes over a property which is the obligation of another person", but the public perception does not match with above definition. Because public transaction and commerce traditions, has always identified an imitation and replacement nature for guarantee, meaning that, if primary debtor, does not pay his/her debt and does not fulfill commitments, the guarantor pays his debt.

2.2. Guarantee concept in Commercial Law

Chapter 10 of commercial law which was approved in 1932, includes 402-411 articles and states "Guaranty of Conscience" and defined two kinds of these guarantees. One is "Guaranty of Conscience" and another is "joint and several guarantee". Article 402 of commercial law states that: "the guarantor has the right to ask applicant to originally reference to primary debtor and refer to him/her in case the debt has not paid, if this arrangement has been set between parties (whether in a special contract or in the letter of guarantee itself). Another kind of Guaranty of Conscience, joint and several guarantee, is the subject of article 403 in commercial law: "in all cases which by the law or based on private contracts, the guarantee is joint and several, the creditor can refer to the guarantor or the primary debtor in the same time or refer to one of them, for whole or rest of the debt after the debt has not been paid by another one". The difference between this guarantee and the simple Guaranty of Conscience is in sequence of reference to guarantor.

2.3. Letter of Guarantee

Letter of guarantee or bankroll which it's word came from guaranty meaning security, pledge or assurance ,and also known as warranty, is that the seller of services or products usually guaranty to repair or change the product or refund the money, if his/her claim about it, had been failed. Failure of claim is the time when one commitment has not been fulfilled or a product has a problem or is not as the customer

wants or expects. Hence it can be said that: bank letter of guarantee, is an irreversible commitment of a bank to pay guaranteed payment in case the contract has not been fulfilled by a third party that is a seller or undertaker of a contract.

2.4. International Bank letters of guarantee

Bank letters of guarantee which are also known as independent, warrant or not non-conditional guarantees, are irreversible commitments whereby bank (or financial institution) guaranty based on applicant's request and his/her order, to pay certain money to beneficiary in the case he/she requests and based on written terms. Bank letters of guarantee, are one of independent warrants which may be issued by banks, financial institutions, insurance companies or any other corporation. Regarding more prevalence of bank letters of guarantee, are mentioned here, while what is stated here, are also true about other independent warrants and letters of guarantee.

3. Letter of Guarantee's components

Letter of guarantee's components are indeed inseparable parts of it which are present in every letter of guarantee and issuing a letter without them is not possible. Characteristics of a letter of guarantee are necessary and definite qualities which no condition contrary to them would be allowed in the letter. Letter of guarantee's nine essential components, are:

- Guarantor: is the party that issue the letter of guarantee and obligate to pay the letter of guarantee's payment if asked to do it by the beneficiary, based on letter's text. This role is usually played by banks, but insurance companies also can issue letters of guarantee.
- Beneficiary: is the person who the letter of guarantee has issued for, and can request letter of guarantee's payment from the guarantor, based on letter's text.
- Applicant: (orderer) is the person who requests from bank to issue letter of guarantee on behalf of beneficiary.
- Maturity: letter of guarantee's maturity can be a certain date or special event, but in this particular case, bank letter of guarantee has attributive nature like letter of credit and so, any event in it, can be in the letter's text, only if it was recognizable by attributive presentation for selected bank or by bank's documents. Anyway, the letter of guarantee is creditable until its maturity and after that, it's worthless, unless it extended by the request of beneficiary, before it's maturity and based on its text.
- Amount and Currency: one of main differences between bank letters of guarantee and commodity letters of guarantee, are in money commitment of it. Bank letter of guarantee is sort of money service and therefore, each letter guaranties certain amount of payment. The accepted currency should be specified in exchange letters of guarantee, which will be stated later. Amount of payment in bank letter of guarantee is a distinctive characteristics comparing to commodity letters of guarantee.
- Basic relation: it is the contract between beneficiary and applicant of guarantee whereby

issuing letter of guarantee is requested from guarantor.

- Payment claim condition: it should be always noted precisely in the letter of guarantee's text that what document or documents must be presented by beneficiary to guarantor in order to claim letter's payment. The condition of payment should always be with a statement from beneficiary to declare delinquency of applicant from his/her commitments based on basic relation, to the guarantor.
- Date of coming into effect: common assumption is that, letter of guarantee has been came into effect since its issuing date, but there are also exceptions. For example, in most of prepayment letters of guarantee, it will be came into effect from date of paying the advance payment. Thus, if there were no condition about date of coming into effect, in letter's text, date of issuing the letter is assumed as the it.
- Letter of guarantee's number: since the bank letter of guarantee is an official document, it should be segregated by a specific number from other letters of guarantee. This number usually is on top of the letter and should be dedicated to this letter of guarantee.

4. Bank letter of guarantee's juridical nature and types

Bank letters of guarantee include domestic and international types. We will review these letters of guarantee, below.

4.1. Domestic bank letters of guarantee

One of the issues which Iranian banks has been faced – after emersion of international commerce in Iran – is letters of guarantee, because the old method of buying or cash money was being forgotten, and businessmen began to use commercial documents to solve many cash money's problems such as high risk of moving and difficulty of carrying them in long distances. Besides playing the role of cash money, Commercial documents had many further benefits and this made them acceptable for businessmen in a short time after their emergence. There were variety of commercial documents that commercial law has announced their regulation by approving related articles, but payment methods of transactions doesn't end up here and continue its progress rapidly, meanwhile another judicial entity appeared called bank letters of guarantee. This document was a guaranty one which issued by the bank and guaranty obligor versus obligant to be a trump card for him/her to fulfill obligor's commitments; and because businessmen needed an inviolable letter of guarantee – especially when they face with foreign parties - they embraced it impressively. Banks which had great reputation in people's commercial relations, claimed issuing letters of guarantee and since there are high risk in important contracts, parties expressed tendency to these letters of guarantee. Iranian banks (in domestic and international fields) adopted issuing these letters based on their own regulations.

4.2. International bank letters of guarantee

Bank letter of guarantee, is a relatively new phenomenon in international commercial law. This

instrument was first used in 1960s and for commercial transactions. Drastic rise of international oil prices, increased oil producer countries at that time, especially in Middle East and North Africa. Mentioned countries, began to contract vast commercial and constructive agreements with western corporations, because of economic and infrastructure development, and oil sale's abundant revenue. Other undeveloped countries, also benefit economic developments due to rise of oil price. Beside the loans which was paid by oil exporter countries directly to other undeveloped ones, increased their deposit at international monetary funds and foreign banks, made it more possible to investigate in poor countries. On the other hand, because of increased volume of international contracts and their monies, the risk of incomplete fulfillment of contracts became more serious and practically, some importer countries experienced significant losses. This made mentioned countries try to access a proper guaranty for complete fulfillment of contract. Independent bank letters of guarantee, specially letters which were payable only by request, shows success of this efforts which is obtained based on great financial position of oil exporter countries and superior position of them in negotiation stage of international contracts. Bank letters of guarantee are one of commercial credentials. These letters include many different forms. If we assume commercial letter of credit as the origin of these letters, as it's like that in guaranty letter of credit, their history is back to one hundred and fifty years ago. But if we don't consider historical origin and background of documents credits, for bank letters of guarantee, these are among new events in international commerce, and their age is not more than 30 years, as they are back to 70s decade and increased oil prices.

4.3. Juridical nature of bank letters of guarantee

Some may believe that bank letters of guarantee are the same with common and prevalent contract of guaranty that has reshaped and got new regulations. Some others also believe that, bank letter of guarantee, is civil guaranty and the third group thinks it's a commercial guaranty. Although a letter of guarantee's object is to guaranty obligant or beneficiary against losses due to delinquency of obligor or applicant in prime contract, but beneficiary's right to request letter's payment, is only denoted and evaluated based on contents and conditions of letter's text, so the bank could not cite to defenses and objections from prime contract. Since bank letters of guarantee entered Iran's commercial field, many interesting and different juridical comments are presented about its juridical nature or other commercial contracts. Some analyzed it based on unilateral obligation framework and some other regarded it as a contract of guaranty or obligation on behalf of third party or a contract which came from article 10 of civil law, and etc. anyway, scientist and jurist's opinions about juridical nature of bank letters of guarantee as a new legal instrument, can be divided in four categories.

- Some believe that letter of guarantee, as it's clear from its name, is naturally a kind of guaranty, so

it's based on contract of guaranty in civil law and can act as different functions.

- Some other believe that issuing a letter of guarantee, is a one side unilateral obligation, and not a contract.
- Some other's belief is that, bank letter of guarantee is a new instrument with a special objective.
- Some people also consider it as a kind of commitment on behalf of third party.

5. Letter of guarantee's types

There are various types for letters of guarantee:

5.1. Based on juridical format

There are two kinds of letter of guarantee based on juridical format, or from philosophic point of view, material cause:

5.1.1. Bank Letter of Guarantee

Bank letter of guarantee defines as: independent letter of guarantee, is commitment of paying a certain cash, which is accepted about a prime contract and as a fulfillment guaranty for it. This letter of guarantee, is a commitment which is independent from guaranty subject and has a feature that objections related to prime contract are not attributable about it. Thus, bank letter of guarantee is a commitment from the bank about paying a certain cash to beneficiary whom is obligant of prime contract, in order to avoid the risk of not fulfilling prime contract which threatens him/her.

5.1.2. Guarantying letter of credit

This is one letters of credit's type which the issuing bank is obligated based on it and by request of its customer to pay some money to beneficiary, according to credit terms. These kind of credits, follow uniform regulations of credit letters (article 1 of uniform regulations of credit letters U.C.P), but they are different with other credits in usage and payment conditions. Other letters of credit, are an instrument to pay and fulfill commitments and the bank should pay the money after receiving and checking documents from beneficiary. But, guarantying letter of credit is useful when there is no commitment and its claim doesn't need presentation of documents. In fact, these kind of credits are replacement for bank letters of guarantee in international commercial relationships and also in countries which its banks are prohibited to issue letters of guarantee.

5.2. Based on payment purpose

There are three kinds of letters of guarantee, based on payment purpose or final cause:

5.2.1. Good performance guarantee

This is issued for security of correct and standard fulfillment of prime contract's contents and in fact, it's an instrument to compensate losses which are resulted from not perfectly fulfilling the commitment.

5.2.2. Prepayment refund letter of guarantee

This is a letter of guarantee to ensure refunding prepayment of prime contract, if it became canceled or revoked.

5.2.3. Letter of guarantee for tender or auction participant

This is a letter of guarantee for adherence of tender or auction participant on his/her offers.

5.3. Based on payment conditions

From this point of view, letters of guarantee can be divided in two types:

5.3.1. Unconditional or at-call letter of guarantee

Bank letters of guarantee's nature necessitate its payment to be unconditional and banks should pay it as the beneficiary wanted to. In this case, we call the letter of guarantee as unconditional or at-call, because just as the first claim, bank must pay the money.

5.3.2. Conditional letter of guarantee

Payment of money for these letters of guarantee is usually subject to presenting a document, like an ordinance or court order in beneficiary's favor, or a third party evidence based on the right of beneficiary, or even his own written testimony about original obligor or contractor's fault. Letters of credit are usually in this way. Of course there is a principle in such letters of guarantee, namely, letter of guarantee's perfect accurate fulfillment of terms, meaning that. Any terms or evidence which is expected to present in letter of guarantee, must be clearly detailed in letter's text and bank should also perform an accurate conformity in comparison of presented documents to letter's terms.

6. International letters of guarantee's impact, with emphasis on URDG 758

As international letter of guarantee, is an international instrument in commercial field, and the office who has role to code these regulations should be naturally international. For years, active international organizations and institutions of world commerce, are trying to create a uniform regulation about bank letters of guarantee. Two organizations' activities are significant in this context: The United Nations Commission on International Trade Law (UNCITRAL) and international chamber of commerce.

Unlike UNCITRAL that followed unifying regulation of bank letters of guarantee in a convention framework, international chamber of commerce devoted its complete effort to create a set of voluntary regulations. This organization, is a non-governmental institution which work for facilitating commerce between various countries, at international level. This organization is more known as its short term, ICC. International Chamber of Commerce, has a commission called as banking commission. URDG758 has considered almost every main and disputable aspects of letters and tried to code regulations which it would be possible to investigate every ambiguity about letters of guarantee or any probable quarrel between parties based on its contents. In addition to that, there are sample letter of guarantee and counter indemnity's texts in the mentioned regulation booklet. Since most of probable cases are seen in above regulation, letters of guarantee's texts and counter indemnity's, which are issued according to these regulations, are very short and mostly includes just necessary items for letter of guaranty, or special conditions that are involved in it, based on parties' agreement. It's obvious that all businessmen and banking experts which directly or indirectly, need information about letters of guarantee,

should possess these regulation set, and read its content carefully.

6.1. Juridical nature of URDG

In order to recognize juridical nature of mentioned regulation, first we have to notice that URDG is not a rule or an international pact. URDG is a private contract, like letter of guarantee. Therefore, a letter of guarantee or a counter indemnity is according to this regulation, only if it had been mentioned clearly in it. Based on article 10 of civil law, people are free in their private contracts, unless it was against the rules. An almost similar one to this regulation is anticipated in regulation of every countries in the world so URDG regulation has tried to create this regulation set to remove at-call letters of guarantee's ambiguities and problems using the principle of freedom. Besides indicating these regulations in letter's text, a letter of guarantee or counter indemnity needs to have necessary components and properties, in order to be according to URDG regulation. Especially if a letter of guarantee has been issued in a subordinative way, meaning it doesn't heed the independence of prime contract, even if regulation was mentioned, it won't be under this regulation. Nevertheless, in letters of guarantee, which has not been issued according to URDG regulation, in case of problems or ambiguities in them especially discord between parties, it's possible to refer this regulation to remove ambiguity.

The first reference about letters of guarantee, is its text. Each condition that has clearly been mentioned in letter of guarantee's text, is prior to any other reasoning and reference. The reason of this, is related to independent nature of this letter. Since letter of guarantee, is a private contract between guarantor and beneficiary, what has written in its text, has priority. Although it's necessary to note that, some articles of 758 URDG regulation, like article 5 which is about letter of guarantee and counter indemnity's independence from prime contract and from each other, and article 7 which stresses on letter of guarantee's attributive nature, are not removable or amendable, even if one or several conditions opposing to these two article, were stated in letter of guarantee's text. Despite other articles, conditions contrary to these two, will be ignored.

6.2. Properties of URDG758

To codify a comprehensive regulation about letters of guarantee, the first step is to understand requirement and request of each one of parties, which is different and sometimes contrary to other ones. Bank letter of guarantee has got three main parties at least. Each one of these three, has an expectation from bank letter of guarantee and the primary objective of URDG regulation is to balance demands of these three parties. Expectations of beneficiary, applicant and guarantor from a bank letter of guarantee are as follows:

Letter of guarantee's beneficiary expects to receive letter of guarantee's payment easily and quickly, in case applicant fails in commitments, based on prime contract between parties. In fact, he/she wants to own a liquidated instrument and doesn't be forced to perform executive or juridical actions in order to receive letter of guarantee's payment. Letter of guarantee's applicant expects to have immunity about claiming unfair

payment of letter of guarantee. In other word, applicant wants letter of guarantee's text to be adjusted in a way that beneficiary could not receive payment, in case that no violation was done by applicant. Actually, applicant wants letter of guarantee's payment be paid to beneficiary, only if his/her violation had been proved. Guarantor wants to hold its commitment independent from prime contract between applicant and beneficiary. In other word, guarantor expects letter of guarantee's text to clearly separate it from prime contract's parties. As a result, what guarantor would want more than anything else, is letter of guarantee's independence from prime contract.

Clearly it's a difficult task to maintain peace between letter of guarantee's parties, because on one hand, beneficiary and guarantor both want letter of guarantee's text to be independent from prime contract, but on the other hand, applicant wants guarantor, to pay letter of guarantee's payment only if his/her violence has been proved, and this case requires that the guarantor intervene to parties prime contract and so the letter of guarantee would be subordinative. To solve this problem, URDG758 has been adjusted in a way that, first every request in letter of guarantee, should be presented with one or several special documents to guarantor, so the presenter of document would be responsive. If one or several documents were incorrect, and second, guarantor's role would be limited to investigate document's semblance. For example, letter of guarantee's beneficiary, should state applicant's delinquency and its foul's type, in a written form, in order to request the payment. It's obvious that, if beneficiary signs payment demand letter, with respect to above constraints, first, in case its contents came to be incorrect, he/she should be responsive about mentioned documents, second, the guarantor is ordered to pay the money to beneficiary without the necessity to prove beneficiary's claim. ((pay first, dispute after)) idiom has come from this point, meaning that, on the one hand, beneficiary has no obligation to prove his/her claim but on the other hand, in case his/her claim was incorrect, he should be responsible against jurisdiction, after receiving letter of guarantee's money. Such attitude to at-call letters of guarantee, can establish balance in parties' benefits and expectations, and also can keep independent, at-call and attributive nature of letters of guarantee.

6.3. Comparing URDG458 to URDG758

Cases like non-attributive circumstances, corrections, demands, document's language, payment claim's way and date of expiry for those letters of guarantee that doesn't have it, are not mentioned in URDG458, but they has been payed attention in URDG758. Based on above cases, international regulation's development process for letters of guarantee, can be classified in four historical periods:

In the first stage, there were no acceptable international regulation for at-call letters of guarantee. In the next stage, URDG regulation set for contractual letters of guarantee, was codified by international chamber of commerce, but it has not been embraced and became

desolated because the lack of necessary performance. In the third stage, URDG458 regulation had been codified with respect to at-call letters of guarantee, in order to establish balance between parties and resolve concerns about these letters of guarantee. Finally, after 15 years from URDG458 and receiving many feedbacks, codifying new regulation was began in 2007. URDG758 regulation set, was issued in 2010 after serious, comprehensive and international efforts.

7. International bank letters of guarantee's impact in URDG758 regulation

Purpose and motivation of parties for dealing a contract, in any juridical act, is to gain its result. It's true for letter of guarantee too. Letter of guarantee's Beneficiary requests obligor to receive and present bank letter of guarantee that is suitable for the contract, because, in case the obligor doesn't fulfill his/her commitments, he can receive losses from guarantor (bank), which is an accepted fixed amount of payment (mentioned money in letter of guarantee). So if this happens, it can be said that bank letter of guarantee has functioned properly. It's noticeable that the relation between obligor and guarantor bank after the letter of guarantee's payment by the bank, and also the relation between obligor or guarantor bank with letter of guarantee's beneficiary based on proving the right to get letter of guarantee's money, can result to significant claims.

7.1. Payment claim of International bank letters of guarantee

Letter of guarantee, is basically issued to be a guaranty and security for beneficiary, so he/she can obligate applicant to fulfill contractual commitments, and also can receive losses due to letter of guarantee, thus claiming the letter of guarantee's payment is subject to failure of applicant to fulfill his/her guaranteed commitments, and based on existing regulation, if the beneficiary declares the delinquency, it means that it has happened and there is no need for the guarantor (bank) to ensure about it.

7.2. Payment claim procedure of International bank letters of guarantee

In the first step, it should be known that, what's claim and what descriptions, conditions and properties does it have. "Recording Letter of guarantee" idiom is also used for bank letter of guarantee's claim, in banking custom. Claim means demand and plea, and in letter of guarantee's subject, it means demanding letter of guarantee's payment by beneficiary. In other word, letter of guarantee's payment claim is an administrative action to receive its money.

7.3. Payment claim conditions of International bank letter of guarantee

Letter of guarantee's beneficiary should meet conditions that are written in letter of guarantee, to claim its payment, as well as preparing and presenting all necessary documents based on letter of guarantee's text and observing formalities which were denoted in letter of guarantee. Guarantor must check documents and demand for payment claim, when they were presented to it.

Uniform articles of 12, 15, 16, 17, 18, 19, 20, 22 and 24 about at-call letters of guarantee, (URDG758) mentions current cases and terms in letter of guarantee's payment claim subject. Based on what has been mentioned above, guarantor's commitment is based on letter of guarantee's terms and its regulations, and are utmost equal to the mentioned amount of money in letter of guarantee. Payment claim must also be with presenting documents which are mentioned in letter of guarantee, and banks make decision only by the apparent status of documents and doesn't pay attention to their essence. When the documents and payment claim request was presented to guarantor, it should check them and declare its opinion.

7.4. Undue claim

Easiness of getting letter of guarantee's payment may tempt beneficiary to claim it without any right about it, and unfair, undue and unexpected claim of payment is very risky for letter of guarantee's applicant. At-call letters of guarantee's undue payment risks are classified in four general titles which are: commercial, technical, financial and political risks.

8. Bank letters of guarantee's misuse in international commerce and its regulation

International commerce, faced a problem called bank letter of guarantee's misuse, in the last decade. Because this commercial letter of credit is used unlike its final objective. For example, it's possible that beneficiary try to get letter of guarantee's payment with cheating and by adjusted date, despite on-time performing the job by contractor. Prevalent procedure in these cases is that, original obligor get the order to prohibit letter of guarantee's payment from the court. However, banks assume these orders inconsistent with their credit in various countries. The German Federal Supreme Court admitted a special kind of misuse as cheating or subreption about independent and primary commitments that are written in letter of guarantee, for German law in 1984. The origin of this vote is many judgements of lower courts about various cases which in, original obligor successfully proved misuse of beneficiary from letter of guarantee. In United States, based on uniform commercial regulation of this country: if the required document was counterfeit or there were some cheating or subreption in dealing, issuing bank may be prohibited to pay the money, unless in cases that the claimer, bank, the owner of documents transfer it with official formalities or the buyer has good faith. There are disagreements in American courts about this legal rule and the matter of entering cheat and subreption in dealing. It has been discussed whether the rule's purpose is cheating or subreption in the main dealings, or there is a trick in issuing letter of credits or claiming it. Anyway, most of American courts, see this rule as an exception for letters of credit's independence principle which should not be extended.

Letter of guarantee's payment claim can be evaluated and described as clear cheating or misuse, in following cases:

- Letter of guarantee's payment claim by beneficiary only because of political reasons which resulted

conflicts between two countries, instead of not fulfilling prime contract.

- Letter of guarantee's payment claim is because of issuer's property Confiscation by foreign country's general officials.
- The beneficiary claims the payment, despite guaranteed commitments has been fulfilled completely and perfectly and it was accepted by him/her too, or good performance of commitments has been proved by an expert lawyer (agent) or even and there were no doubt about them.

8.1. Cheating effects on international bank letter of guarantee

Article 19 of United Nations' convention, include cases about independent letters of guarantee and guaranteed letters of credit, which are that, letter of guarantee's issuer (guarantor) or letter of credit's, can refuse to pay the money based on cheating objection. But not article 19 of United Nations' convention nor court's judgements doesn't see cheating objection as a punishment for bad intention, and doesn't interpret it with traditional and conventional meaning, as cheating objection is denoting an objective and generic fact, or the probability that money claim is not legitimate. This analysis has also been endorsed in cases which cheating objection is applied for transactions related to commercial letters of credits.

When banks knows about the cheating, it can refuse paying the money. This solution is perfectly practicable about commercial letters of credits, because in this case, if one or several documents were incorrect or not original, it's assumed that the cheating has taken place. If it was clear that presented documents are not correct and based on credit's terms, the payment is not claimable. According to article 19 of United Nation's convention, this rule is also applicable for guaranteed letters of credits and independent letters of guarantee, if it was clear and visible that: A) Each one of documents is not original or correct, or is fake or hypocrite. B) The money is not claimable based on what posited in claim note and its attached documents. The letter of guarantee or letter of credit's issuer has right to refuse to pay the money, based on good faith.

9. Governing law and Dispute resolution offices

In many cases, the problem of governing law and court's qualification in letters of guarantee, has become forgotten. Despite the contracts which usually include old ways of dispute resolution, many issuing letters of guarantee, does not mention such details, so in cases of dispute, the court must first determine governing and applicable law and investigate in quality of the case. In letters of guarantee, it's better to ensure that governing law and applicable qualification on letter of guarantee, are the same as about prime contract, because in this case, objections and quarrels of both, would be investigated by one rule and in one legal or judgment office. Of course these problems are less proposed in domestic law because in domestic law, there is one governing rule and plurality doesn't exist. About qualification, it's also possible to recognize qualified offices based on regulation of civil trial. Determination of governing law problem is only for international letters of guarantee. In these type of guarantee letters,

there are two kinds: primary letter of guarantee and indemnity counter. As it mentioned before, indemnity counter is different from primary letter of guarantee, but in most of legal systems, their regulations and commitments are based on what has been agreed between parties and this rule is called "parties' intention". This rule is came from "volition sovereignty" principle. So the governing rule in letters of guarantees, are the same that parties has agreed and announced. In case no such rule has been determined by parties, it seems that the rule of contract place (letter of guarantee's issuing) is closest rule to parties' will, and best rule to apply on their relation.

9.1. Dispute investigation and resolution office

International contract's parties usually wants their disagreements about the contract to be investigated by judge or jury which they already selected. Yet, about judgement in international contracts and bank letters of guarantee, following points are noticeable:

1. If conditions of possible disagreement's reference to judgement, was mentioned in prime contract, or contract's parties agreed to refer it to judgement, these terms does not include possible disagreements between letter of guarantee's guarantor bank and beneficiary, because of its independence from prime contract. Including judgement term into counter indemnity isn't related to primary letter of guarantee and its disagreements could not be referred to judgement based on judgement term in counter indemnity.

2. Principle 139 of Iran's constitution law states that: "comprise of claims, about public or state properties or its reference to judgement in any case, is conditional to approval of cabinet and has to inform the parliament. In cases that the quarrel's party is foreign, and in important domestic cases, it requires parliament's approval too, and important cases would be determined by law".

Based on legal components of civil law implement, it's necessary for execution of ordinance to present the written appeal to the losing party's living place court, and if his/her living place was not known, general court of Tehran would be qualified. After receiving the appeal, the court will check it and its attached documents in a special administrative session. In case of accepting the request, the ordinance is entered into force and rejecting the request should be with reasons. Request's rejection can be objected by applicant until 10 days after it's declare, in revision court of province. Revision court will investigate the case in a special administrative session. In case the objection was relevant, it orders to perform the ordinance by reversal of revision request, and if not, it confirms that. Revision court's verdict would not be appealable. In case the request was accepted, the ordinance would be implemented based on content and in a way that the law has adjusted and if there were problems in implement stages and in case of requesting holdup or cancel the executive order, the court which ordered it, will investigate and decide about it.

9.2. Temporary prohibition for letter of guarantee's payment in Iran law

Iranian courts of justice doesn't want to accept letter of guarantee's independence from prime contract, so it assume temporary order's request and letter of guarantee's payment temporary prohibition to be investigated like other claims, in the framework of governing legal system and civil trial regulations.

The Important point in here is that, there are two ways to request the temporary order: one way is to request prohibition of bank from payment, and second way is to request prohibition of beneficiary to capture the letter of guarantee and receive the money. The form difference between this two types of claim is that in the first claim it should be proposed on behalf of the bank but in the second one, the bank doesn't need to be invited and claimed, but in practice, there is no difference between these two temporary orders because the practical result of them is canceling the payment to beneficiary. The request of to prohibit the bank from letter of guarantee's payment, is more direct and better, and remove any mistake possibility.

10. Conclusion

Bank letter of guarantee is an irreversible commitment of a bank to pay guaranteed money, if a third party doesn't fulfill the contract, which this third party is seller or obligor of the contract. Based on most of jurist's opinion, bank letter of guarantee's nature is like private contracts of civil law's article 10. Despite the fact that bank letters of guarantee are same as contract commitment's guaranty of transaction parties and is also similar to other guaranty instruments in Iran's civil law, but it has distanced from its traditional structure, and it can't be assumed based on guaranty structure and regulations which is mentioned in civil or commercial law. Subjects of Commitment on behalf of third party or Unilateral obligation, are not related to bank letter of guarantee.

Beneficiary's rights are well supported in international bank letters of guarantee, with respect to principle of independence from prime contract, and receiving beneficiary's losses from applicant in case of his/her violence from prime contract's commitments, has increased using bank letters of guarantee in commercial intercourses. The necessity for steady rules about this, resulted to emersion of at-call letters of guarantee's uniform regulation and the last version of that, was called URDG758 which regulated by international chamber of commerce and became available for world community. the letter of guarantee's independence from prime relation between beneficiary and applicant, has been accepted in international banking procedures, and importance of this principle as the most important and fundamental principle in international bank letters of guarantee, doesn't allow any dependency for letter of guarantee on prime contract, and from this point of view, it has brought a very useful and fast instrument to guaranty commercial transactions. This principle is limited to cases which denotes to fraud or misuse and through this, it supports beneficiary and applicant's rights in the same time, but unfortunately in Iran's law, there is no certain place for bank letters of guarantee and this important principle has been ignored in many courts' verdicts and resulted to order different and sometimes contrary verdicts. Bank letters of guarantee, can be classified based on various aspects, such as number of guarantors or legal framework of

issuing or written guaranty in them including prepayment letter of guarantee, deduction of guaranteed money, participating in trend or auction and etc. which each one has its own practical usage based on circumstances and its properties in domestic and foreign businessmen and merchants. Domestic bank letters of guarantee, usually composed of three parties: letter of guarantee's applicant (main obligor), Bank (guarantor) and beneficiary (guaranteed); and in international bank letters of guarantee, it may include other parties like counter guarantor. When the letter of guarantee's payment is brought to subject, main letter of guarantee's parties are guarantor and beneficiary, so the bank has no obligation to get approval from applicant, to pay the money to beneficiary.

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