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CHALLENGES RELATING TO BANK GUARANTEES AND APPROACHES TO THEIR RESOLUTION
(A Comparative Analysis of Georgian Legal Practice and Foreign Experience)

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Abstract

The present paper addresses the legal challenges associated with bank guarantees, the practical aspects of their use, and possible means of resolving the relevant issues, based on a comparative analysis of Georgian legal practice and foreign experience. In modern commercial relations, a bank guarantee constitutes an important instrument for securing claims, protecting the beneficiary's interests in the event of the principal's failure to perform, or improper performance of, the underlying obligation.

The paper examines the legal nature of a bank guarantee, the principle of its independence, and the specific characteristics of conditional and unconditional guarantees. Particular attention is devoted to the principle of "strict compliance," which, in the context of the autonomy of a bank guarantee, serves as the principal control mechanism applicable to unconditional and irrevocable guarantees.

The study also analyses the risks arising from bad-faith conduct by the beneficiary, instances involving the submission of wrongful demands. Particular importance is attached to the possibility of applying interim measures, which, in exceptional circumstances, may ensure the suspension of payment of the guaranteed amount and the preservation of the existing state of affairs, „the status quo", pending the final resolution of the dispute.

The purpose of the paper is to identify the normative and practical ambiguities relating to bank guarantees within the Georgian legal system, assess their compatibility with international standards, including the approaches embodied in URDG 758.

The study analyses the case law of the Supreme Court of Georgia, as well as the judicial practice of the United States, England, Australia, and European countries.

The article considers and analyses the approaches adopted in both European jurisdictions and common-law countries for the purpose of interpreting the existing legal provisions.

Several research methods were used, including the methods of analysis and synthesis, logical analysis, and comparative legal analysis.

Keywords: Bank guarantee; Unconditional guarantee; Principle of independence; Principle of strict compliance; Wrongful demand.

1. **Introduction**

In the modern economic system, bank guarantees constitute one of the most important financial instruments, serving to strengthen trust between the parties, secure the performance of contractual obligations, and promote a stable environment for entrepreneurial activity. The role of bank guarantees is particularly significant n areas such as infrastructure projects, public procurement, international trade, and investment relations, where financial risks and information asymmetry between the parties are considerable.

Bank guarantees represent a flexible mechanism within economic relations which, in addition to protecting the interests of the creditor, facilitates business activity and promotes financial discipline. Notwithstanding their widespread use, the practice relating to bank guarantees is not free from challenges. Such challenges may arise from legal regulation and the institutional environment, as well as from the operational policies of the banking sector, applicable financial standards, and the level of awareness among businesses.

Both financial and legal practice have demonstrated that traditional means of securing claims, such as a mortgage, are not capable of reducing the risk of a breach of contractual relations.[1]

Georgia's transition to a market economy laid the foundation for the expansion of business activity and the viability of small and medium-sized enterprises. Economic development is impossible without a solid legal framework, since the conduct of business is associated with numerous risks.

1 Kemale Aslanova, "The Impact of Globalization on Bank Guarantees: Changing Role of Letter of Guarantee in Banking", Globalization of Financial Institutions, (2013), 201.

Private-law entities, as well as public authorities, seek to enter into legal relations with business entities that are associated with a lower risk of loss and a high standard of good faith. Although the legislation of every country, including that of Georgia, enshrines the principle of good faith in its Civil Code, in practice, trust without guarantees is inconceivable. It therefore became necessary to develop a legal institution capable of facilitating the implementation of various types of business projects.

"The role and significance of bank guarantees in business transactions is confirmed by the fact that this security instrument is equally beneficial both in relations involving a foreign element and within the domestic commercial sphere."2 A bank guarantee is a complex security instrument involving at least three distinct legal persons.3 The broad diversity of legal systems, the increasing tendency towards their harmonisation, and the need to ensure a high level of protection for beneficiaries make the bank guarantee an indispensable instrument of commercial transactions.4

In comparison with other forms of security, a bank guarantee offers significant advantages. It does not require the use or encumbrance of tangible assets and does not restrict their circulation, which makes it a particularly flexible security instrument. Furthermore, from both a legal and an economic perspective, a bank guarantee affords a higher degree of security than other forms of personal security.5 A bank guarantee is a formal legal act, that is, a legal act that can only be transmitted in writing. Without a written form, it is impossible to establish the obligation of the guarantee. Since a bank guarantee adheres to the principle of formality, the guarantee must contain all the important elements that the parties agree on when concluding the contract. The purpose of requiring the written form of a bank guarantee is clear - the obligations of the bank as a guarantor must be precise and foreseeable in order to eliminate any doubts regarding the guarantee to be issued.6

Banks play a very important and strategic role in economic growth, as one of the benchmarks of a country's progress is its economic development, and the backbone of economic progress is the business world.7 It can be safely said that all major international economic transactions are carried out with a bank guarantee.8 This rapid growth is associated with the possibility of using bank guarantees as a support for all types of transactions, purely financial obligations. 9

The institution of bank guarantee was created in the 60s of the 20th century and its scope was limited to construction and similar investments. Initially, cash deposits were used. However, such a form posed a serious difficulty for the depositor, as it significantly limited his liquidity. This problem was solved by turning to financial institutions.10

In Georgian law, a guarantee is traditionally considered one of the forms of securing the fulfillment of an obligation. We could also find the beginnings of a bank guarantee with a similar content in the Georgian legislation of the Soviet period. According to Article 205 of the Civil Code of 1964, a guarantee was essentially considered a kind of suretyship (Article 197). The main difference between them was that the role of a guarantor in property relations could only be performed by the superior body of the relevant organization, while any person could act as a surety.11

The institution of bank guarantee was established in independent Georgia on June 26, 1997. The term was first used in the Civil Code of Georgia, and its basic definitions have remained almost unchanged to this day.12 Georgia, as a country with a growing economy, needs both solid financial institutions and a uniform definition of the normative foundations that ensure the independence of the private sector and the competitiveness of entrepreneurial entities.

The functioning of bank guarantees in the Georgian reality is characterized by a number of specific problems. Among them are: the heterogeneity of the interpretation of legal norms, high bank commission rates, complex and lengthy procedures for issuing guarantees, low level of accessibility for small and medium-sized businesses, as well as additional pressure on working capital. These factors often reduce the effectiveness of the use of bank guarantees and hinder the dynamic development of economic relations.

The aim of the paper is to identify and analyze the main challenges facing bank guarantees in the context of Georgian reality, as well as to assess possible ways to eliminate these problems taking into account foreign experience. The study focuses on both legal, economic and institutional aspects, which allows for the formulation of practical recommendations for improving the bank guarantee system and increasing its effectiveness.

2. **Legal and documentary uncertainty concerning bank guarantees**

The institution of a bank guarantee is widely used in the economic and legal relations of countries around the world. Its original source is the United States of America, although today it is actively used throughout the world.

2 Predrag Mirković, Pravni Odnosi U Bankarskoj Garanciji, The Legal Framework And The Economic Development Of The Southeast European Countries, (2019), 104.
3 Stefan Eberhard, Die Bankgarantie und ihre Bedeutung im Baugewerbe, (Karl-Franzens-Universität Graz, 2016), 10.
4 Friedrich Graf Von Westphalen, Die Bankgarantie im internationalen Handelsverkehr, 5 berarbeitete Auflage, Frankfurt am Main,(2023), 3.
5 Mirjana Knezevic, "Banking operations and securities", Kragujevac, (2009), 43.
6 Mirjana Knezević and Aleksander Lukić, Bank Guarantees and their Representation in Bank Business Activities (Parallel Legal Presentation), Economic Insights – Trends and Challenges Vol. LXIV No. (1/2012), 43.
7 International Finance Corporation, Multilateral Investment Guarantee Agency, The World Bank Global Financial Development Report 2014 Financial Inclusion, (2014), 15.
8 Vasile Nemes, Bank guarantees, LESIJ NO. XIX, VOL. 2/2012, (Bucharest, 2012), 128.
9 Roeland Ivo Victor Frans Bertrams, op.cit., 2.
10 Natasa Babić, Filip Novaković and Aleksej Indžić, Legal nature of documentary letter of credit and bank guarantee in international business law., (2022), 181.
11Paata Khotenashvili, "Legal Aspects of Bank Guarantees", (2015), 8.
12 Nino Chipashvili, Georgian legal science about bank guarantee, European Scientific Journal (November 2014) /Special/ edition vol.1 ISSN: 1857 – 7881, 185.

Since a bank guarantee is a product of international commerce, in addition to national legal norms, it is regulated on the basis of the Unified Rules adopted by the International Chamber of Commerce and the Convention on Independent Guarantees and Standby Letters of Credit of the United Nations Trade Commission, which clearly indicates the importance and need for this institution.13 The above-mentioned international acts recognize several fundamental principles applicable to bank guarantees: 1) good faith, 2) independence, 3) non-accessory, 4) legitimacy of the claim, 5) exact compliance with the terms of the guarantee.14

Article 879 of the Civil Code of Georgia establishes a general definition of a bank guarantee, according to which "by virtue of a bank guarantee, a bank, other credit institution or insurance organization (guarantor) undertakes, at the request of another person (principal), a written obligation to pay the principal's creditor (beneficiary) a sum of money in accordance with the assumed obligation, based on the beneficiary's written request for payment."15 The issuance of a bank guarantee by the guarantor in favor of the beneficiary constitutes the fulfillment of the obligation that is incumbent upon him and which arises from the previously concluded agreement between him and the principal on the issuance of the bank guarantee.

In order for a legal institution to exist in civil law, it is first necessary to determine its legal nature. The legal nature of a bank guarantee is determined by its economic “purpose”.16 A bank guarantee is a means of securing a claim. It is mainly used in cases where the creditor has a special interest in the fulfillment of the obligation.17

A bank guarantee is often referred to as an abstract promise by virtue of which the guarantor, or financial institution, undertakes to pay a specific amount to the beneficiary upon the occurrence of a guaranteed event.18 At the same time, the agreement on issuing a bank guarantee is bilateral and pecuniary, as indicated by the entry in Part 2 of Article 880 of the Civil Code of Georgia - "For issuing a bank guarantee, the principal pays the guarantor the agreed remuneration."19

It is clear that issuing a bank guarantee involves complex procedures. First of all, there must be a basic obligation, a bilateral agreement between the creditor - beneficiary and the debtor - principal, the risk of which is insured by a bank guarantee. The next stage is the conclusion of a synlogmatic agreement on the issuance of a guarantee between the guarantor and the principal, by which the principal acquires the right to require the guarantor to issue a letter of guarantee in favor of the beneficiary, and the guarantor assumes the obligation to establish the principal as a guarantor.20

It must be noted that a bank guarantee is not a tripartite agreement. "For the institution of a bank guarantee to be effective, it is necessary to carry out two main actions in sequence: 1. Conclusion of a contract for payment between the principal and the guarantor and 2. Issuance of a guarantee by the guarantor upon the request of the beneficiary."21

A bank guarantee is a non-accessory means of securing a claim; the existence of this agreement, unlike a surety, does not depend on the main obligation. The autonomy of a bank guarantee is its main distinguishing feature from other means of securing a claim. According to Article 881 of the Civil Code, it is independent of the main agreement between the debtor and the beneficiary.22 This means that the beneficiary can request the issuance of the guarantee regardless of any disputes over the main contract.23 The beneficiary's right to demand payment under the guarantee is determined only by the terms specified in the guarantee. The bank cannot rely on the provisions of the main contract. "This provision ensures the reliability of the bank guarantee and, at the same time, the creditor's expectations regarding the performance of the obligation, but only within the limits of the obligations assumed by the guarantor under the bank guarantee."24 Article 5 of URDG 758 recognizes the independence of the guarantee and indicates that the guarantee is independent of the underlying relationship, while Article 6 clarifies that guarantees relate to documents and not to the goods, services or performance covered by the contract itself.25 Accordingly, the question of whether the debtor has fulfilled its obligations and whether the creditor/beneficiary is entitled to compensation for damages within the framework of the underlying relationship is not a matter for determining relevance between the bank and the beneficiary.

As for the guarantor, the principle of independence in relation to this entity shows a significant advantage. When the guarantee is activated at the request of the beneficiary, the role of the bank is mainly limited to checking whether the terms of the guarantee have been fulfilled. This task is simplified by the fact that the payment terms are usually summarized

13 Nino Lipartia, Analysis of Legal Nature of Bank Guarantees in the Light of the Principles of Autonomy and Strict Compliance. (Jlaw, 2017), 36.

14 Supreme Court of Georgia Case No. ას-1789-2018, August 3, 2021, Tbilisi.

15 Civil Code of Georgia, Consolidated Version: 01/04/2026, Article 879.

16 Hans Giger, Problems of Bank Guarantee Abuse in Swiss Law, The University of Arizona James E. Rogers College of Law, (1987), 43.

17 Ibid. 39

18 Lado Chanturia, Credit Collateral Law, ("Samaratali" Publishing House, 2012), 204-207.

19 Civil Code of Georgia, Consolidated Version: 01/04/2026, Article 880.

20 Paata Khotenashvili, "Legal Aspects of Bank Guarantees", (dissertation, 2015), 18.

21Paata Khotenashvili, Some Issues of Bank (Independent) Guarantees According to National Legislation and Private International Law, (Georgian Law Review, 6/2003-2/3), 330.

22 Tamar Zambakhidze, Commentary on the Civil Code, Article 881, 1-3.

23 Ljupka Petrevska, Ivana Petrevska and Miroslava Petrevska, Legal aspects of a bank guarantee as a financial security instrument, (2024), 340.

24 Supreme Court of Georgia ruling, case ას-562-871-09, October 20, 2009. Tbilisi

25 John Baranello, Understanding the URDG 758, Deutche bank, Global Transaction banking, 3.

in a documentary format.26 The Supreme Court of Georgia explains in one of its cases that "the cancellation, termination or other change in the legal situation of the principal's main obligation will not in itself lead to the termination of the validity of the bank guarantee. Therefore, the bank guarantee must clearly reflect the prerequisites for its fulfillment."27 In other words, the obligation to issue a guarantee is of a "documentary" nature, as it arises upon the submission by the beneficiary of the documents or statements specified in the guarantee itself.28

The main purpose of an independent bank guarantee is to allow the beneficiary to receive immediate payment without having to prove a default or breach of the main contract. In practice, the parties go further and specify the type of default or breach,29 Which the independent guarantee aims to cover.30 The Court of Appeal of South Wales explained in one of the cases that the beneficiary seeks to achieve two main objectives when requesting a bank guarantee: first, to secure the principal's claim in the event of the principal's solvency, and second, to immediately reimburse the beneficiary for the amounts claimed by the creditor.31

In many cases, the incorrect use of bank guarantees at the national level is related to confusion in classifications.32

Article 882 of the Civil Code of Georgia prohibits the withdrawal of a bank guarantee if the guarantee does not provide for this. "A bank guarantee is an irrevocable obligation of the bank to pay the guarantee amount in the event of the principal's failure to fulfill its obligations to the beneficiary."33 In practice, we also encounter irrevocable guarantees. Unlike Georgia, URDG 758 Article 4(B) does not recognize revocable guarantees34 And it clearly states that "the guarantee is irrevocable from the moment of issuance, even when it does not state so."35 In addition, Article 5 of the "Uniform Rules for Undemand Guarantees" of the SSP Publication No. 458 also confirms that "all guarantees and counter-guarantees are irrevocable, unless otherwise specified in them."36

In Georgian commercial practice, in any category of bank guarantees used in both the public and private sectors, we often encounter unconditional guarantees, although the Civil Code does not recognize the concept of the so-called unconditional/first-demand guarantee. The Unified Rules 758, in paragraphs A, B and C of Article 15, define both conditional and unconditional guarantees.37

Article 885 of the Civil Code of Georgia does not provide for the concept of an unconditional guarantee, but does not prohibit its use. Accordingly, if the parties agree on an unconditional guarantee, the legislative provision cannot impede their contractual freedom.38 Initially, the first sentence of the first part of this norm establishes that "the beneficiary's request for payment of a sum of money under a bank guarantee must be submitted to the guarantor in writing, attaching the documents specified in the guarantee." What documents the parties indicate in the guarantee agreement is already within the competence of the parties. The second part of the same norm indicates that "in the request or in its appendix, the beneficiary must indicate what constitutes the principal's breach of the main obligation, for the security of which the guarantee was issued." However, it is debatable what evidence the beneficiary should present if the parties did not determine in the guarantee agreement how the beneficiary should prove the occurrence of the guarantee event. There are three opinions in German doctrine on this issue:39 According to one opinion, the beneficiary must prove that the conditions stipulated are met.40 According to another opinion, the beneficiary is not required to prove the existence of the conditions, but must present them convincingly.41 According to the third opinion, a statement by the beneficiary regarding the satisfaction of the conditions of the guarantee event is sufficient.42

If we look at other normative acts, we will notice that in the main case, an unconditional and irrevocable bank guarantee is required by the state.43 There is an opinion in foreign literature that an unconditional guarantee further increases the degree of autonomy and independence of the guarantee, although at the same time it is indicated that it is necessary to have specific legal levers that would limit the arbitrariness of the beneficiary and prevent the unconditional guarantee from becoming a powerful weapon for violating the rights of the principal.44

26 Roeland Ivo Victor Frans Bertrams, Bank guarantees in international trade, Nibe ; (Kluwer Law and Taxation Publishers, 1990), 18-20.
27 Supreme Court of Georgia Ruling Case No. ას-749-709-2015 September 25, 2015, Tbilisi.
28 URDG. supra note 13, art. 15(a); Bertrams supra note 5, at 9
29 Fernández-Masiá, supra note 6, at 110
30 Edgardo Munozi and David Obey Ament-Guemez, Independent Guarantee Clauses in CISG Contracts, (George Mason Journal of International Commercial Law. 7. 2, 2016), 174.
31 " Lucas Stuart Pty Ltd v Hemmes Hermitage Pty Ltd [2010] NSWCA 283", Dixon, B, Bank Guarantees and the Reasonable Expectations of Beneficiaries, 4.
32 A bank guarantee can be revocable and irrevocable, conditional and unconditional, direct and counter-guaranteed, covered and uncovered.
33 Supreme Court of Georgia Ruling Case No. ას-161-151-2015 May 4, 2015, Tbilisi
34 ICC Uniform Rules for Demand Guarantees (URDG 758), Article 4.
35 Tamar Zambakhidze, Commentary on the Civil Code, Article 881, 1-3.
36 Paata Khotenashvili, "Legal aspects of bank guarantees", (dissertation, 2015), 94.
37 ICC Uniform Rules for Demand Guarantees (URDG 758), Article 15.
38 Robyn Carrol, Agreements to Specifically Perform Contractual Obligations, (Journal of Contract Law, 2012), 155.
39 Zum Streitstand in Deutschland: SCHMIDT, WM (1999), 312.
40 KLEINER, Bankgarantie,192 f.; ZOBL, Bankgarantie, 37.
41 Diese Auffassung wird – soweit ersichtlich – nur von deutschen Autoren vertreten, immerhin aber an schweizerischen Fachtagungen. Vgl. etwa HORN, Bankgarantie, 90.
42 DOHM, Bankgarantien, Rn. 200.
43 Paragraph 3 of Article 6 of the Law of Georgia "On State Property": In order to participate in the auction, an interested party is obliged to submit an unconditional and irrevocable bank guarantee/guarantee;
Local Self-Government Code - Article 1182 Special conditions for the privatization of real estate owned by a municipality - obligation to provide an unconditional and irrevocable guarantee.
44 Cameron Mckenna, Unconditional bank guarantees, 16.

Based on the above, at the stage of concluding the contract, the parties should have a high standard of self-determination. It is better to consider the specific scope of non-fulfillment of the obligation in the contract in order to avoid the unlawful issuance of a guarantee. If the guarantee is conditional, the contract should contain minimum requisites, if presented, the guarantee can be issued. In the case of an unconditional guarantee, the good faith of the parties is of decisive importance, which is the cornerstone of civil law.

3. **Bad-faith conduct by the beneficiary and the risks associated with the unlawful issuance of a bank guarantee**

A bank guarantee is not merely a means of securing a claim, but also a mechanism for the allocation of risk.45 A civil right must be used in good faith,46 In order not to violate the balance of rights between the parties. Although any legal relationship assumes the good faith of the parties, this is more clearly manifested in such relationships when the parties have a special interest in the insured risk. In the presence of a bank guarantee, the beneficiary's interest is to properly fulfill the obligation, and the principal's goal is to receive a specific benefit for fulfilling the obligation. In the case of an objective observation of the essence of a bank guarantee, we will notice that if the parties maintain good faith within the framework of the main contract and the contractual terms are fulfilled as agreed, the bank guarantee will truly fulfill the purpose of risk insurance and will not be transformed into a means of satisfying the creditor. The criterion of good faith applies to both the creditor - the beneficiary, and the debtor - the principal. In relation to the principal, the matter is relatively simple: if the debtor violates the condition and does not fulfill the obligation at the agreed time and place, the beneficiary will be satisfied with the bank guarantee. In international practice, the beneficiary's actions are perceived as so-called "Fraud" when the beneficiary has information that the factual grounds for the claim for compensation have not arisen, or have arisen but are insignificant, or the principal has not contributed to the guarantee case. At the same time, the issuance of a bank guarantee is unlawful when the beneficiary knows that the factual grounds do not exist or the document is inauthentic.47 In such a case, both the financial and legal status of the principal are harmed, and the beneficiary's actions are perceived as an abuse of civil rights.

In one case, the German Federal Court considered a guarantee issued on the basis of inauthentic, forged documents to be unlawful, and explained that "the authenticity of the documents submitted is one of the regular prerequisites for the use of the guarantee. The guarantor must examine these prerequisites with particular diligence. In particular, he may not appeal to the fact that the forgery was not obvious and, therefore, the issuance of the guarantee was justified."48

URDG №758 does not directly regulate the case when the beneficiary submits a request unlawfully. According to the current version of these rules, the burden of proof for the beneficiary at the stage of submitting a request is somewhat reduced compared to the previous version. However, this does not mean that the submission of a guarantee request can be carried out without control. In order to prevent unlawful requests, the rules still maintain the bank's obligation to promptly notify the principal of the received request and to check the request itself with due diligence.49

A bank guarantee is a beneficiary's assurance of the principal's solvency. However, the degree of beneficiary assurance in the presence of unconditional guarantees increases the risk of harm to the principal.50 It is necessary to categorically distinguish and strike a fair balance between the need to issue a bank guarantee and the wishes of the beneficiary, so that the bank guarantee does not become a weapon against the principal.51

Most jurisdictions agree that there should be a specific lever that would limit the potential arbitrariness of the beneficiary and give the principal the opportunity to protect itself from an unlawful demand. English law and case law require a high standard of proof to prove the illegality of issuing a bank guarantee. "The principal must present irrefutable evidence that the guarantee event has not arisen and the beneficiary's claim regarding the issuance of the guarantee has no legal basis."52 At the same time, the principal is obliged to ensure that the guarantor is informed in a timely manner about the illegality of the request and to submit the available evidence.53 The practice of the United States is quite diverse and includes different standards of unfairness. The Court of Appeals for the Northern District of Georgia explained in one case that "unfairness in fact, from the point of view of justice, includes all acts, omissions and concealments of fact, which involve a breach of a legal duty, trust or confidentiality and cause harm to another person, or which give another person an unfair and unfair advantage."54 Such a standard is quite low and contradicts the principle of autonomy of the guarantee. The spread of this fact will give the principal the opportunity to interpret any action of the beneficiary as

45 Bill Dixon, Bank Guarantees and the Reasonable Expectations of Beneficiaries, 6.

46 Civil Code of Georgia, Consolidated Version: 01/04/2026, Article 8, Section 3.

47 Gvanca Popkhadze, Legal Nature of Bank Guarantee, (2016), 42. Cited: Lipartia, N, Management of Beneficiary's Claims Under a Bank Guarantee and Its Legal Consequences, Dissertation, 2018, 148.

48 BGE 131 III 222 E. 4.2. S. 225.

49 Supreme Court of Georgia Case No. ას-245-2019 June 5, 2019 Tbilisi.

50 Jeffrey J. Browne, "The fraud exception to standby letters of credit in Australia: Does it embrace statutory unconscinability?", (Bond Law Review vol.11, 1996), 101.

51 Xiang Gao, Ross P Buckley, "A comparative analysis of the standard of fraud required under the fraud rule in letter of credit law", (2003), vol. 13: 293.

52 United Trading Corp. v. Allied Arab Bank, [1985] 2 Lloyd's Rep.554, Cited: Kayembe G.L, The Fraud Exception in Bank Guarantee, (2008), 32.

53 Anthony Connerty, Fraud and Dpcumantary Credits: The approach of the English Courts, Cited: Lipartia, N., Management of the Beneficiary's Claim Under a Bank Guarantee and Its Legal Consequences, (Dissertation, 2018), 158.

54 Dynamics Corp. of America v. Citizens & Southern Nat'l Bank, 356 F. supp.991 (N.D. Ga.1973), Kayembe G.L, The Fraud Exception in Bank Guarantee, (2008), 33.

unlawful, which undermines the credibility and commercial usefulness of guarantees. However, a similar approach existed in the initial phase of the formulation of the issue, and currently a higher standard has been established in the US case law and legislation, which protects the legitimate interests of both the principal and the beneficiary. The Uncitral Convention contains the circumstances in which payment may be suspended and thus establishes a high degree of certainty regarding the exception of unlawfulness. According to Article 19 of the Convention, there are three essential grounds for an unfair claim, when: 1. any document is not authentic or is falsified; 2. the need for payment is not due to the grounds specified in the claim and supporting documents; 3. Given the type and purpose of the obligation, the claim has no conceivable basis. The existence of each of them alternatively and the approval of the principal is sufficient to recognize the claim as unlawful.55

Although the legislation contains legal grounds for protection against unlawful claims, it is the principal who must exercise this right. The principal must prove the facts he has presented and show the “legal consequences” arising from these facts. For example, in the case of full performance of the contract, the principal must prove that he has fulfilled his contractual obligation and that the beneficiary has no right to claim damages, or, if the contract was suspended due to force majeure, the principal must prove the occurrence of force majeure. In the case of forgery of documents, he must provide evidence that the documents are not “authentic.”56

Article 887 of the Civil Code of Georgia grants the guarantor the authority to refuse to satisfy the beneficiary's claim. According to the aforementioned norm, "The guarantor must refuse to satisfy the beneficiary's claim if this claim or the attached documents do not comply with the terms of the guarantee, or if they were submitted to the guarantor after the expiration of the period specified in the guarantee. The guarantor must immediately notify the beneficiary of the refusal to satisfy his claim. If, before satisfying the beneficiary's claim, the guarantor becomes aware that the main obligation secured by the bank guarantee has already been fully performed in the relevant part, has been terminated on other grounds or is invalid, he must immediately notify the beneficiary and the principal about this." "The legislator, precisely to secure the claim, allowed the possibility of a third party issuing a guarantee in favor of the creditor and did not make the beneficiary's right dependent on the relationship between the creditor and the debtor (beneficiary and principal)."57 Although the guarantor, the bank, is a systematically and legally organized financial institution, in practice it chooses a rather simple path.58 In German doctrine, it is widely believed that the bank must independently examine whether there is an abuse of rights. First, it maintains independence between the principal and the beneficiary. Secondly, it should be noted that the payment period for bank guarantees is usually 1-3 days, depending on the complexity of the transaction and the documents it has to examine. Within this period, the guarantor is obliged to consider the issue of issuing the guarantee.59

The guarantor is obliged to take "precautionary measures to mitigate potential risks." 60 In one of the famous cases, Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 QB 159, it was emphasized that the bank is not interested in the relationship between the parties to the main contract, nor in whether the debtor has fulfilled his contractual obligation, the exception being made only if there is clear evidence of both the illegality and the bank's knowledge of this fact.61 The nature of an unconditional guarantee allows the guarantor to release the guarantee amount upon notification of a breach by the beneficiary, thereby placing the principal in an extremely difficult financial situation.62 In most cases, the nature of the guarantor's obligation to pay or not to pay usually depends on whether the claim submitted by the beneficiary complies with the relevant provisions of the unconditional bank guarantee. "The peculiarity of an unconditional and first-demand guarantee is that the beneficiary's claim gives rise to the guarantor's obligation to pay the amount without the beneficiary having to prove the basis for the claim."63 Usually, the bank has the right to take into account only the correctness of the payment request when making a payment decision.64 The autonomy of an unconditional guarantee should not be used as a universal basis for issuing an unlawful claim. The bank is obliged to assess the need to issue a guarantee and not ignore the circumstances of which it is aware and which affect the legality of the beneficiary's claim.65 According to the firmly established practice of the Supreme Court of Georgia, "According to Article 887

55 Ibid. 40.
56 Roeland Ivo Victor Frans Bertrams, Bank guarantees in international trade, Nibe ; (Kluwer Law and Taxation Publishers, 1990), 278.
57 Supreme Court of Georgia Ruling No. ას-161-151-2015, May 4, 2015.
58 Tenore Pty Ltd v Roleystone Pty Ltd ; Coleman, "Performance Guarantees", 1990, Lloyd's Maritime and Commercial Law Quarterly 223 at 230.
59 DOHM, Bankgarantien, Rn. 210; DE GOTTRAU, Bankgarantie, 464 f. Für Deutschland vgl. etwa BERGER, DZWir 1993, 10, Cited: Emmeneger, S, Zbinden, A, Die Inanspruchnahme der Bankgarantie, SCHWEIZERISCHE BANKRECHTSTAGUNG 2008, Kreditsicherheiten, Institut für Bankrecht, Universität Bern (2008), 167.
60 Tanja Varađanin, Marko Stanković, Nenad Stefanović, Bank Guarantee as a Means of Securing Contract Performance under the Law of the Republic of Serbia, (Naše gospodarstvo/Our Economy, 71(3), 2025), 68.
61 Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 QB 159, Supardi, A, PERFORMANCE BOND: CONDITIONAL OR UNCONDITIONAL, (2007), 59.
62 Boris Kozolchyk, "The Emerging Law of Standby Letters of Credit and Bank Guarantees", (Arizona Law Review,1982), 319-329.
63 Supreme Court of Georgia Case No. AS-960-925-2016, September 27, 2017
64 Carl A Mead, "Documentary Letter of Credit" , (Columbia Law Review, 1922), 297-309.
65 Inflatable Toy Co Pty Ltd v State Bank of New South Wales (1994) 34 NSWLR 243 at 252, per Young J. HW Bevan & Co Pty Ltd v National & Commercial Banking Australia (unreported, Sup Ct NSW, Hodgson J, 26 April 1985) 2-4.

of the Civil Code of Georgia, the guarantor may refuse to reimburse the amount only if the beneficiary's claim does not comply with the terms of the guarantee and is submitted after the expiration of the guarantee period."66 "Particular attention is paid to compliance with the formal prerequisites for submitting a request in the case of a "guarantee of payment upon first demand", since in this case, the beneficiary has virtually unlimited authority, which is compensated for by shifting the emphasis precisely to this formal procedure."67 According to the Supreme Court of Georgia, "The most important role in balancing the interests of the parties to the main contract is assigned to the proper implementation of the principles of autonomy of the bank guarantee and "exact compliance". The only mechanism for protecting the principal from the risk of abuse of rights by the beneficiary, it can be said, lies precisely in determining the exact compliance of the beneficiary's claim with the terms of the bank guarantee."68 In another case, the Court of Cassation explains that "due to the fact that the beneficiary's claim is subject to verification only on a formal basis and the annulment, termination or other change of the legal situation of the principal does not in itself lead to the termination of the validity of the bank guarantee, the prerequisites for its satisfaction must be clearly reflected in the bank guarantee."69 That is why, when satisfying a claim secured by a bank guarantee, it is crucial to check the external compliance of the submitted documents. This approach is known in legal doctrine as the Principle of Strict Compliance. The "Principle of Strict Compliance" is also reflected in Article 9 of the International Chamber of Commerce Uniform Rules No. 458 on Independent Guarantees. According to this norm, the guarantor must check with reasonable care all documents requested by or submitted on the basis of a bank guarantee, including the claim itself. The purpose of the check is to determine whether these documents comply with the terms of the guarantee. If such compliance is not evident in the documents, the guarantor has the right to refuse to satisfy the claim.70 A similar approach is developed by the Grand Chamber of the Supreme Court of Ukraine in one of its cases, in which it explains that "when resolving a dispute related to the existence of a payment obligation under a guarantee, the subject of proof is not the examination of the existence or absence of a breach of the obligation secured by the guarantee by the debtor."71

There are cases when the parties assess the quality of the performance of the main obligation differently, the principal believes that the obligation was performed properly and in good faith, while the beneficiary believes that there is a warranty case. In one of the cases, the Supreme Court of Georgia explained that "when assessing inadequate performance, the volume of the contract, the complexity of the work to be performed, the performance of the obligation by the performer within the time specified in the contract and, of course, the severity of the performance defect are taken into account."72 According to the above definition, we may have a minimal breach of contract that does not provide us with a factual and legal basis for demanding the guarantee amount. Despite the autonomous nature of the bank guarantee, the principal still has a legal lever to protect his own interests, which is expressed in the possibility of requesting an interim measure. In exceptional cases, when the beneficiary's claim against the guarantor is clearly unlawful or constitutes an abuse of rights, the basic principle characteristic of the bank guarantee "pay first, dispute later" should no longer be applied. In such a situation, the principal may request the use of an interim measure, on the basis of which the guarantor is prohibited from satisfying the disputed claim. This measure suspends actions related to the guarantee case until the final resolution of the dispute. Its main purpose is to maintain the existing situation - the status quo. 73

Securing a claim is a guarantee of the enforcement of a decision. It is permissible when the failure to use a measure to secure a claim would make it difficult or impossible to enforce the decision, exercise a violated or disputed right, cause irreparable and direct damage or damage that cannot be compensated for by imposing damages on the defendant.74 "The security of a claim is a temporary and effective means of achieving a goal that serves to facilitate the enforcement of a realized right and must exist as long as there is a critical need to protect the interests of justice."75 The use of security for a claim makes it possible to avoid lengthy court proceedings. When using security for a claim, the court takes into account the legitimate interests of both parties. In relation to bank guarantees, the financial interest of the beneficiary and the principal is more important. Accordingly, a high standard of proving the illegality of the claim has been established. "The Court of Cassation explains that when requesting the use of a security measure to prohibit the demand for a bank guarantee, the applicant must unequivocally, with relevant evidence, confirm the illegality of the claim or the abuse of the right to demand by the beneficiary."76

66 Supreme Court of Georgia Case No. ას-786-1073-09, September 27, 2010

67 Supreme Court of Georgia Case No. ას-1038-999-2016, February 1, 2017

68 Supreme Court of Georgia Case No. ას-960-925-2016, September 27, 2017

69 Supreme Court of Georgia case No. ას-749-709-2015, September 25, 2015

70 Supreme Court of Georgia Case No. ას-1633-2019; Ruling of March 9, 2020; Supreme Court of Georgia Case No. ას-950-886-2017; Ruling of November 3, 2017

71 Resolution of the Joint Chamber of the Commercial Court of Cassation, Case No. 910/17772/20 17 May 2024.

72 Supreme Court of Georgia Case No. ას-1900-2018, March 12, 2019

73 Nino Lipartia, Management of the Beneficiary's Claim Based on a Bank Guarantee and Its Legal Consequences, (Tbilisi: Dissertation Submitted for the Degree of Doctor of Law, 2018), 203, 204

74 Civil Procedure Code of Georgia, Consolidated Version: 09/12/2025, Article 191, Part 1.

75 Supreme Court of Georgia Case No. ას-1215-2019, January 31, 2020

76 Supreme Court of Georgia Ruling, Case No. ას-245-2019 June 5, 2019 Tbilisi.

In judicial practice, there are many cases when the beneficiary's unlawful claim was satisfied and the guarantor regressively imposed the guarantee amount on the principal. In one case, the Supreme Court did not even recognize the cassation as admissible, shared the approach of the lower instances and left in force the decision by which the beneficiary was imposed with the amount of the guarantee illegally received against the principal. The Court of Cassation noted that "the payment of the guarantee amount by the guarantor in compliance with the guarantee conditions (term, form of presentation, impossibility of using the collateral) and the regressive claim of the said amount (Article 890 of the Civil Code) create a suitable legal basis for the beneficiary to return what was received without grounds (Articles 385, 976.1. "a", 991)."77

Such cases demonstrate that the suspension of the withdrawal of a bank guarantee by using the security of the claim does not contradict the principle of autonomy, but rather serves to protect oneself from an unlawful demand.

In one of the cases, the Kutaisi City Court satisfied the plaintiff's motion regarding the use of the security of the claim. The defendant was prohibited from withdrawing the funds provided for by the bank guarantee and at the same time was prohibited from applying to the State Procurement Agency regarding the registration of the principal in the black list. In this case, the court fully shared the plaintiff's legal reasoning and considered that if the claim is satisfied and the unlawfulness of the claim is confirmed, the failure to use the security of the claim will impede the enforcement of the decision that has entered into legal force and the plaintiff will suffer irreparable economic damage.78 The Kutaisi Court of Appeal fully shared the legal reasoning of the Kutaisi City Court and did not satisfy the appeal regarding the annulment of the above-mentioned ruling.79 Such precedents further increase the credibility of the institution of bank guarantees, and even in the case of unconditional, irrevocable guarantees, the principal still has a legal remedy to protect himself from an unlawful demand.

4. **Conclusion**

A bank guarantee is one of the most important and practical means of security in modern commercial relations. Its main function is to protect the beneficiary from the risk that may arise in the event of non-fulfillment or improper fulfillment of the main obligation by the principal. A bank guarantee helps to demonstrate the creditworthiness of a business entity and strengthen trust in commercial relations.

The study revealed that the effectiveness of a bank guarantee largely depends on the correct understanding of its legal nature. A bank guarantee is not a tripartite agreement nor an additional security for the main obligation. It is an independent, non-accessory means of securing a claim, within the framework of which the guarantor's obligation is usually determined not by the actual fulfillment of the main agreement, but by the compliance of the conditions specified in the guarantee and the submitted documents.

The principle of "exact compliance" is of particular importance. This principle is one of the main levers for protecting the principal from the possible arbitrariness of the beneficiary. Since unconditional and demand guarantees give the beneficiary a wide opportunity to quickly receive money from the guarantor, it is necessary that the guarantor carefully check the compliance of the demand and attached documents with the terms of the guarantee. Otherwise, the bank guarantee may turn from an instrument of fair risk allocation into a weapon to be used against the principal.

One of the main problems in the Georgian legal space remains the ambiguity of the legislative regulation of conditional and unconditional guarantees. Despite the fact that unconditional and irrevocable guarantees are often used in practice, the Civil Code of Georgia does not fully and clearly define their content, scope of application and the standard for verifying the beneficiary's demand. This creates legal ambiguity and increases the risk of fraudulent claims.

A comparative analysis shows that international practice, including the approaches of URDG 758 and UNCITRAL, seeks to protect the principle of autonomy of a bank guarantee and a fair balance of the interests of the parties. On the one hand, the guarantee should remain a fast and effective financial instrument, and on the other hand, it should not allow abuse of rights by the beneficiary. That is why, in the event of an unlawful claim, forged documents or manifest unfoundedness, the principal should have a real legal remedy to protect his interests.

In this regard, the use of interim measures is of particular importance. Despite the independence of a bank guarantee, in exceptional cases, when the beneficiary's claim is manifestly unlawful or constitutes an abuse of rights, the principal should be able to apply to the court and temporarily suspend payment of the amount under the guarantee. Such a measure does not violate the autonomy of the bank guarantee, but rather serves to maintain the status quo and protect the principal from irreparable financial damage.

Based on all of the above, it can be said that Georgian legislation on bank guarantees is approaching international standards, although it still requires predictability and systematic development. It is advisable to more clearly define in the legislation the scope of verification of the beneficiary's claim, the guarantor's obligation and the legal mechanisms for protecting the principal. Such an approach will contribute to both strengthening the credibility of the bank guarantee institution and establishing a fair balance between the interests of the beneficiary and the principal.

77 Supreme Court of Georgia Ruling, Case No. ას-1217-1176-2016, February 10, 2017

78 Ruling of Kutaisi City Court of January 15, 2026 on securing the claim, case N2/84-26

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