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ENSURING MECHANISM OF GUARANTEE

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Summary

In the article ensuring mechanism of a guarantee has been considered. The author believes that it is wrong to consider guarantee only as a unilateral transaction made by guarantor in favor of creditor (beneficiary) as latter cannot occur without prior agreement of debtor (principal) with guarantor on its issuance in interests of creditor (beneficiary). The guarantee cannot exist otherwise than as factor of ensuring construction which is relation of debtor (principal) with creditor (beneficiary), debtor (principal) with guarantor, creditor (beneficiary) with guarantor and only in its integrity that construction represents by itself one of types of ensuring implementation of obligation.

Key words: guarantee, indemnity contract, guarantee's responsibility, types of ensuring implementation of obligations.

Аннотация

В статье рассматривается обеспечительный механизм гарантии. Автор считает, что неверно рассматривать гарантию, лишь как одностороннюю сделку, совершенную гарантом в пользу кредитора (бенефициара), поскольку последняя не может появиться без предварительной договоренности должника (принципала) с гарантом о ее выдаче в интересах кредитора (бенефициара). Гарантия не может существовать иначе, как фактор обеспечительной конструкции, которую составляют отношения должника (принципала) с кредитором (бенефициаром), должника (принципала) с гарантом, кредитора (бенефициара) с гарантом, и только в целостности данная конструкция представляет собой один из видов обеспечения исполнения обязательства.

Ключевые слова: гарантия, договор о выдаче гарантии, ответственность гаранта, виды обеспечения исполнения обязательств.

The legislator having introduced in § 4 of Chapter 49 of Civil Code of Ukraine, 2004 a guarantee of financial institution as secured a separate, independent of principal obligation, type of ensuring implementation of obligation, a fundamentally new institute in comparison with that existed before adoption of new Civil Code of Ukraine.

A guarantee, in times of planned economy with its strict subordination of economic subjects to superior organizations, had quite narrow sphere of using as it was practically used almost exclusively to ensure repayment of loans issued by banks to socialist enterprises under responsibility of superior organization. In case of debtor has no cash and repayment of his debt by guarantor, latter has no right of recourse as to debtor-subordinated economic organization. On relations connected with use of a guarantee, Civil Code of Ukrainian SSR applied rules regulating bail permitting to consider guarantee as some type of bail. As it is rightly noted in literature under Civil Code of Ukrainian SSR, 1963 a guarantee really had no its own «face» and served only as specific so-called a «surrogate» of bail, as adapted to conditions of a planned centralized economy. A guarantee was distinguished by special subject composition of participants, that is, could be established only in relations between socialist organizations and subsidiary nature of liability of guarantor [11, p. 668] being used by creditor in simplified procedure (bank wrote off funds from account of debtor, and in that part that remained unpaid from account of guarantor).

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

Problems of guarantee as new type of ensuring implementation of obligation are in such researches of such scientists as: T. Bodnar [1], N. Kuznetsova [2], E. Pavlodsky [3], I. Puchkovska [5; 6], A. Rubanov [7]; M. Sibilov [8]; V. Sloma [9]

and others. Thus, solving certain problems of this institute, scientists are doing rather contradictory conclusions which pointed out to ambiguous perception of a guarantee in scientific literature. The peculiarity of guarantee is connected with its independence from principal obligation which has been proclaimed by legislator in Article 562 of Civil Code of Ukraine. The latter gave rise to a dispute among scientists concerning real independence of guarantee and possibility of its existence as a type of ensuring implementation of obligations.

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

A guarantee – unilateral transaction, content of which is obligation of guarantor to pay creditor-beneficiary a sum of money under terms of guarantee in case of a breach by debtor of obligation ensuring by guarantee. Performing this action, guarantor, in essence, performs a monetary obligation of principal before beneficiary in full or in certain part (but not more than sum by which guarantee was issued) in accordance with terms of guarantee. According to Part 1 of Article 566 of Civil Code scope of liability of guarantor to beneficiary for breach by debtor – principal of his obligation ensued by guarantee is limited to payment of sum for which it was issued.

A guarantee as a unilateral transaction does not require approval, adoption or its acceptance by beneficiary.

According to content of Articles 560−569 of Civil Code and taking into account provisions of Articles 206−208 of Civil Code, issuance of guarantee is carried out by way of written obligation drafting. Compliance with written form of guarantee as a unilateral transaction means issuance by guarantor of document entitled «Letter of Guarantee» or «Guarantee», in which he pledges to pay a determined sum of money on demand of certain creditor in accordance with terms specified in guarantee.

In order to understand nature of independent guarantee as one of types of ensuring implementation of obligation it is necessary to consider entire ensuring mechanism of guarantee, that is, unlike other types of ensuring implementation of obligation, consisting of, unlike other types of ensuring implementation of obligation, instead of two (main and ensuring) transactions but of three ones. The guarantee cannot exist otherwise than as a unilateral transaction made by guarantor in favor of creditor (beneficiary), since latter cannot appear without a prior agreement of debtor (principal) with guarantor on its issuance in interests of creditor (beneficiary). A guarantee cannot exist otherwise than factor of ensuring construction, consisting of relations of debtor (principal) and creditor (beneficiary); debtor (principal) and guarantor, and this construction only in its integrity is one of types of ensuring implementation of obligations of [5, p. 75].

In the case of investigation of guarantee as legal institute, main figure will be guarantor than, from economic point of view, main acting person in system of guarantee relations as relations established with aim of protection in case of breach by debtor of contract is creditor (beneficiary). It is the creditor (beneficiary) in process of conclusion of contract with debtor (principal) requires insurance of guarantees with aim of protection in case of a possible breach by debtor of his obligation under contract, that is, initiates emergence of guarantee. The creditor, with aim of guarantee reliability, selects guarantor, which in case of breach of obligation by debtor will lay claim, using as any authorized person right of choice as to exercise of his own right. On creditor (beneficiary) place also consequences of laying of unfounded claim (Article 1212 of Civil Code).

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

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

It is this contract that acts as a link between main contract of debtor and creditor as in contract on issuance of guarantee it is pointed out that guarantee is issued at request of debtor in connection with his liability to creditor under main contract and guarantee as a unilateral transaction that will be made by guarantor. So, contract is issued by guarantor for performance of his obligation under contract on issuance of guarantee, provision that has not been fixed by law n Civil Code. The legislator has not regulated in § 4 of Chapter 49 of Civil Code relations prior to issuing of guarantee as one-sided-binding of guarantor of transaction. Meanwhile, the existence of contract on issuance of guarantee has found its reflection in law of Ukraine «On Financial Services and State Regulation of Financial Markets» [4]. So according to Article 6 of this law provision of guarantee is made on basis of contract.

The contract on provision of guarantee as a financial service, unless otherwise provided by law, has to contain: 1) the title of document; 2) the name, address and details of business entity; 3) surname, name and patronymic of individual getting financial services and its legal address; 4) name, location of legal entity; 5) name of financial operation; 6) the amount of financial asset specified in monetary terms, terms of its payment and terms of its mutual settlement; 7) the term of contract; 8) the procedure for amendment and termination of contract; 9)rights and obligations of the parties, the parties ' liability for non-performance or improper performance of the contract; 10) confirmation that the information pointed out in the Part 2 of Article 12 of this Law, provided to the client; 11) other conditions by the contract of the parties; 12) signatures of parties.

Therefore, taking into account that issuance of guarantee is subject of contract, there should be clearly determined terms of guarantee, time of its action, as a rule, a way of ensuring implementation by debtor of recourse obligation as to return to guarantor of his expenses (Article 569 of Civil Code).

Sample list of obligatory conditions of guarantee itself is given in Article 3 of Uniform International Chamber of Commerce for guarantees on first request in 1992 [10], according to which all instructions on issuance of guarantee and amendments thereto should be clear, precise and exclude controversial moment. All guarantees should have following terms: 1) the name of principle; 2) the name of beneficiary; 3) the name of guarantor; 4) references to main contract, in which need for guarantee issuing has been foreseen; 5) the maximum monetary amount payable and currency of payment; 6) the period for which issued a guarantee or event on onset of which guarantee is terminated; 7) the terms under which payment is implemented; 8) provisions aimed at reducing amount of guarantee payments.

So, taking into account provisions of Civil Code of Ukraine, essential for arising of guarantee obligation are such terms as: on terms of guarantee action (Part 1 of Article 561 of Civil Code); on maximum guarantee monetary amount (Part 1 of Article 566 of Civil Code); presentation of claim to beneficiary on payment of guarantee sum, including a list of documents attached to such a requirement or reference to fact that guarantee is a guarantee on first demand (i. e. unconditional guarantee) (Part 2 of Article 563 of Civil Code); a reference to main obligation, which performance is provided by guarantee (Section 2 of Article 560, Part 3 of Article 563 of Civil Code).

Other terms for content of guarantee text are optional and not obligatory. In particular, rules on establishment of possibility to withdraw guarantee, transfer it to another person and so on are dispositive, and therefore can be set in text of guarantee itself, otherwise, if parties do not exercise their right differently their regulation then controversial legal relations are subjected to relevant provisions of Civil Code.

Despite fact that in Civil Code, as well as in Uniform Rules assumed regulation of guarantee on request based on principles of its independence from basic obligation, without right to recall (Article 561 of Civil Code), inability to transfer rights under guarantee (Part 5 of Article 536 of Civil Code); and procedure for granting claims by beneficiary under guarantee (Part 3 of Article 563 of Civil Code), as well as consideration of claims of beneficiary by guarantor (Article 564 of Civil Code) coincide as to their content with terms specified in Unified Rules, domestic legislator, determining concept of guarantee in Article 560 of Civil Code, underlines that «under guarantee bank, other financial institution and insurance organization (guarantor) guarantee to creditor (beneficiary) implementation by debtor (principal) of his obligation.

The guarantor is responsible to creditor for breach of obligation by debtor that does not make it possible to have doubt about emergence and existence of guarantee as a way of creditor protection in case of a possible breach of obligation by debtor [5, p. 79].

Moreover, the legislator establishes that basis for implementation of his obligation by guarantor is laying claim to him in written by creditor (beneficiary) on payment of cash amount according to guarantee issued by him, in which creditor should indicate what is debtor's breach of principal obligation insured by guarantee (Part 3 of Article 563 of Civil Code) consisted of. Nonobservance of this claim entails consequences set forth by Chapter 1 of Article 565 of Civil Code, namely, grants right to guarantee to refuse to satisfy creditor's claims.

It should be emphasized that Civil Code provides provision on guarantee only as a unilateral transaction and, accordingly, regulates relationships between guarantor and creditor (beneficiary).This approach doesn't give a holistic view on establishment of given ensuring and its realization with aim of protection the creditor's infringed rights in contract obligation. It is necessary to take into account that ensuring guarantee construction covers three transactions among them creditor (beneficiary) is a party only in one transaction – the main contract and right to claim has as under principal obligation so in case of its breach under «independent» of this obligation by guarantee. If creditor does not receive performance under main contract in connection with its breach by debtor then laying this claim to guarantee he will receive performance in order of protection − under guarantee, by way, he will receive it urgently. If the creditor will use his rights under guarantee and it is not in connection with debtor's breach of basic obligation, for example, to lay claim to guarantee after proper execution of his obligation by debtor than latter after presentation him by guarantor of recourse, may apply to court and proving that creditor (beneficiary) received double performance (from him and guarantor), requires from creditor return of moneys received groundlessly (Article 1212 of Civil Code) which is possible only in case of recognition of guarantee as some type of ensuring implementation of obligation and, that's why, established for protection of rights of creditor under main obligation.

Protective purpose of guarantee is that beneficiary as creditor under main obligation could easily meet requirements at expense of guarantor if debtor (principal) fails to fulfill obligations. Accordingly, independence of guarantee from contractual relationship between debtor (principal) and creditor (beneficiary) (Article 562 of Civil Code) stipulated, exclusively, by effectiveness of protection granted by it.

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

It is settling of task of time minimization that begins from moment of participants occurrence of damage among participants of property relations to moment when it is actually compensated, promoted introducing in recent years of institute of independent guarantee in business practice of countries with advanced economy [7, p. 56]. Despite peculiarities of national legal systems in different countries in functioning of guarantee institute it is observed same approaches. Firstly, the problem of time minimization is solved at expense of third party practice that does not take part in relevant contract, namely, guarantor. Secondly, creditor for principal obligation − beneficiary – is empowered to decide on his own, in what moment to require payment from guarantor. Accordingly, it is placed a duty on last on first request of beneficiary to pay sum. Thirdly, for same purpose is sharply restricted rights of guarantor to refuse of payment or delay of it for reasons connected with main contract. The guarantor is not entitled to refuse to satisfy claim of

beneficiary with reference to fact that in main contract some circumstances have arisen that allow it to refrain from payment.

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СУИЦИД И ПРЕСТУПЛЕНИЕ: ХАРАКТЕРИСТИКА КРИМИНОЛОГИЧЕСКИ ЗНАЧИМЫХ СВЯЗЕЙ

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Summary

This article analyzes criminological significant relations of criminal and suicidal behavior. Based on scientific provisions about mechanism of a single crime and suicide author distinguishes two typical situations of their criminogenic combination. The first involves coincidence of an offender and suitsidentor, the second – a mismatch. Within each of typical of situations author has conducted analysis of impact of suicidal behavior and personal qualities of suitsidentor on genesis of his criminal activity, and in relation to it. It is concluded that there is a presence of a wide network of multidirectional relations between a suicide and a single crime.

Key words: suicide, crime, relation, mechanism, motivation, victimization.

Аннотация

Статья посвящена анализу криминологически значимых связей преступного и суицидального поведения. На основании научных положений о механизме единичного преступления и самоубийства выделяются две типовые ситуации их криминогенного сочетания. Первая предусматривает совпадение личности преступника и суицидента, вторая – несовпадение. В пределах каждой из типовых ситуаций проведен анализ влияния суицидального поведения и личностных качеств суицидента на генезис как его криминальной активности, так и по отношению к нему. Сделан вывод о наличии широкой сети разнонаправленных связей между суицидом и единичным преступлением.

Ключевые слова: суицид, преступление, связь, механизм, мотивация, виктимность.

Постановка проблемы. Фоновые для преступности явления традиционно признаются в научной литературе неотъемлемым элементом предмета криминологии. Вместе с тем природа этих явления, их конкретный видовой состав, обоснование характера связей с преступностью и ряд других вопросов остаются не до конца разработанными. Это, в частности, касается и исследования суицидальности, как фонового явления. В современной криминологии до сих пор не выработано четких критериев идентификации криминологически значимых связей суицидальности. Прежде всего, речь идет о визуализации связей между механизмами суицидального и преступного поведения. Пересекаются ли они в отдельных составляющих? И если да, то в каких именно? От ответа на эти вопросы зависит формирование исходного гносеологического основания для дальнейшего научного поиска на уровне массовых асоциальных практик – преступности и суицидальности.

Актуальность исследования. Криминологические проблемы суицидальности поднимались в работах Ю.М. Антоняна, Я.И. Гилинского, В.В. Голины, А.Н. Джужи, В.Н. Дремина, А.П. Закалюка, И.И. Карпеца, В.Н. Кудрявцева, Д.А. Назаренко и других исследователей. Признавая существенный вклад этих ученых в решение заявленной проблематики, следует все же указать на недостаточность отдельного внимания к проблеме суицидальности, как фонового для преступности явления, чем и обусловлена актуальность темы этой статьи.

Цель статьи заключается в выявлении, описании, анализе криминологически значимых связей между суицидом и индивидуальным преступным поведением.

Изложение основного материала. Моделирование проекции составляющих механизма суицидального поведения на элементы механизма отдельного преступления позволяет выделить две ситуации их криминологически значимого сочетания:

1) личность преступника и суицидента совпадают; суицидальные наклонности или непосредственно акт