

## Discussion of the form of the warranty provisions of Vietnam's civil code 2015

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**ABSTRACT:** *In Vietnam, a guarantee is formed when the parties enter into a contract. As with all contracts, the guarantee is only valid once all the conditions under the common law have been met: consent, capacity to enter into, content and form of the contract. The issue of the form of the guarantee can be explored through the analysis of consent to a certain form and its effect on the value of the contract. The practice of resolving guarantee disputes shows that disputes over the form of guarantees also frequently occur. And the courts themselves also contradict each other when applying the provisions of the law on this issue. The article focuses on analyzing and clarifying the provisions of Vietnam's civil law on the form of guarantee from the actual implementation of the law.*

**Keywords:** *Guarantee, guarantee form, guarantee dispute*

### CONTENT

#### I. Make a problem

The issue of the form of the guarantee has been recognized in Vietnamese ancient law. According to article 590 of Quoc Trieu Penal Law, "If it is stated in the document that someone will pay for it, that person must pay it like a debtor"[1]. According to article 1311 of the Tonkin Civil Code, "the guarantee is either made by notarized visa documents" or "together with documents" [2]. According to Article 367 of the Civil Code 1995 "The guarantee must be made in writing certified by the State Notary Public or certified by the People's Committee of the competent level, if so agreed or prescribed by law"[3]. This provision leads to the understanding that, if there is no regulation or agreement that requires notarization or authentication, the guarantee contract is entered into orally. Then, in Article 362 of the Civil Code 2005 "The guarantee must be made in writing, which can be made in a separate document or stated in the main contract. In cases where it is prescribed by law, the guarantee document must be notarized or authenticated"[4]. Thus, the guarantee must be in writing. This is convenient for the agency to settle disputes arising on guarantees.

The 2015 Civil Code no longer retains the provisions on the form of guarantee of the Civil Code 2005. At this time, the form of the guarantee is subject to the provisions of the Civil Code in Clause 2, Article 117 of the Civil Code 2015 "the form of a civil transaction is conditions for the validity of the GDDS in cases where it is provided for by law"[5]. Thus, the guarantee can be in the form of oral, written or notarized or authenticated documents depending on the agreement of the parties, civil law is not required on the existence form of the guarantee. When the parties have agreed to make a written guarantee, the document is made out of necessity with the parties, which is proof of the existence of the contract. There is no requirement under Vietnamese law that a guarantee must be handwritten, and the principle that the guarantor's signature is proof of his/her acceptance of the guarantee commitment is recorded. The notary's certification of the guarantor's signature has the effect of increasing the legal validity of the guarantee. According to Clause 3, Article 43 of Decree 21/2021/ND-CP, "A guarantee agreement may be expressed in a separate guarantee contract, letter of guarantee or other form of guarantee commitment".

#### II. Contents

##### 2.1. Guarantee in the form of a separate contract

Private contracts can exist in the form of oral, derived from ancient Latin law and is still used in modern individual-to-personal business relations. This form is based on credit usually because the subjects in the guarantee relationship are often familiar and the value of the guarantee obligation is small. The time the

guarantee contract takes effect is when the parties have agreed on the terms of the guarantee. This form of guarantee often faces difficulties when settling disputes, the way of negotiation is chosen instead of taking to court.

Private contract in written form is common and often applied in the field of bank guarantees such as contracts or letters of guarantee [6]. Written guarantees are recognized in the guarantee laws of many countries around the world. Section 6(b) of the Singapore Civil Code provides that an oral guarantee is not enforceable, and to bring proceedings against the respondent for any undertaking to pay a debt owed by another must be in writing. Note or memorandum signed by the guarantor, an oral guarantee is unenforceable under Singapore Law [7]. According to British law, the document "is a proof, not a formal claim, that an oral guarantee is not void, but simply unenforceable. If the guarantor still performs the obligation then he cannot get back the money paid. The guarantee contract itself can exist in the form of a written note or memorandum, which can be made after the main contract has been signed is sufficient" [8]. This provision is intended to protect people of good faith from liability for guarantees they do not make.

According to author Nguyen Ngoc Dien, "The law does not require a guarantee to be entered into in writing, so when the parties have agreed to make a document, the time of entering into a guarantee contract is the time when the contract is established and that time. is still the time when the contract is agreed orally, not the time when the parties sign the document". However, based on Clause 4, Article 400 of the 2015 Civil Code, the time of entering into a guarantee contract established in writing must be "the time when the last party signs the document". If the parties agree on a specific time or event, the effective date of the guarantee is at that time or event. Where the law does not require a guarantee to be in writing, the document must be made solely because it is necessary for the parties to strengthen the evidence for the existence of the guarantee.

In some special cases, when specialized law stipulates that the guarantee must be entered into in writing to be legally valid, the making in writing is a condition for the contract to be valid. When either party refuses to sign the guarantee document, the contract does not form, if the contract is not made in writing, the guarantee contract may be invalidated. The effective time of the guarantee in this case is the time when the parties sign the guarantee contract.

## **2.2. Guarantee in the form of a letter of guarantee**

Guarantee letter is a written commitment between the two parties, the guarantor and the guarantor, made to ensure that the guarantor will have to perform the obligation to pay the debt on behalf of the guaranteed party in the event that the guaranteed party The surety fails to pay the debt on time or pays it in full or on time to the guarantee recipient as prescribed in the guarantee contract. According to Article 24 of Decree 34/2018/ND-CP on the establishment, organization and operation of the credit guarantee fund for small and medium-sized enterprises in Vietnam, there are regulations on the basic contents of the credit guarantee fund. Guarantee: Specific information of the guarantor, the guarantor and the guarantor such as name, address; Time of issuance of guarantee certificate together with provisions on obligation to repay principal and interest; Conditions for performance of guarantee obligations; The effective date of the guarantee certificate; Contents of rights, obligations and responsibilities of the three parties when performing the terms specified in the guarantee deed.

Thus, the content of the letter of guarantee is essentially the content of the guarantee contract. However, the letter of guarantee is issued by the Bank and sent to the guarantee recipient. Therefore, many scholars believe that the letter of guarantee is a unilateral commitment and not a contract because there is no agreement between the parties. But in fact, there was a "tacit agreement" between the parties, so the letter of guarantee cannot be considered as a unilateral commitment. Accordingly, the effective time of the letter of guarantee will be from the time of issuance of the letter to the time of the agreement, otherwise, it will be determined from the date of issuance of the letter of guarantee to the expiry of the term of the obligation specified in the letter of guarantee. Guarantee. In fact, there are disputes arising from the guarantor's refusal to perform the guarantee obligation because it believes that it has only issued a letter of guarantee but has not yet signed a guarantee contract. The dispute between Hoa Mai Brick Joint Stock Company and Saigon Bank, including the guarantee of Nguyen Van Thao, was heard by the People's Court of District X, Ho Chi Minh City in Judgment No. 13/KDTM-ST on the dispute requesting implementation. Guarantee obligations are similar. While the guarantor refused to perform the obligation, the Court forced this party to perform the obligation with the argument that "the letter of guarantee No. 138 has legal validity from the time of issuance of the guarantee on February 9/ 2012" [10]. However, the Courts still adjudged the value of the guarantee. In addition, the practice of law enforcement also recognizes that the guarantee agreement is only a provision in the contract that gives rise to the guarantee obligation. All trial courts recognize the value of bail in these cases. In these cases, the effective time of the guarantee is similarly determined according to the above analysis. The same is true of the Ho Chi Minh City Court at Judgment No. 13/KDTM-ST on the dispute asking for the performance of the guarantee obligation. While the guarantor refused to perform the obligation, the Court forced this party to perform the obligation with the argument that "the letter of guarantee No. 138 has legal validity from the time of issuance of the guarantee on February 9/ 2012" [10]. However, the Courts still adjudged the value of the

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### **2.3. Guarantee in another form**

A guarantee can be presented in a simpler form, not necessarily in a separate contract or letter of guarantee. Actual implementation of the law on guarantee recognizes that the parties agree on the guarantee right in the basic contract, even the guarantor only says "I commit to perform the obligation on behalf of the obligor". or "I am responsible" is also recognized as legally valid because the Courts all believe that the only substance of the agreement is a commitment to perform the obligation on behalf of the obligor when the obligor fails to perform or performs improperly. duty.

In addition, a guarantee can also be established by electronic transactions because the law has recognized that "Civil transactions through electronic means in the form of data messages are considered as written transactions. " and is applied in civil and commercial transactions [12]. Obviously Clearly, the legal basis of the data message form has been firmly established. Besides, according to Clause 5, Clause 6, Article 4 of the Law on Electronic Transactions of Vietnam, which took effect on March 1, 2006, then: "Data is information in the form of symbols, letters, numbers, images, sound or similar form" and "Electronic transaction means a transaction made by electronic means". An electronic data message about the guarantee is only valid as the original if it meets the conditions specified in Article 12 of the Law on Electronic Transactions: (i) The content of the data message is guaranteed to be complete. since first initialized as a complete data message; (ii) The content of a data message is considered to be complete when such content has not been changed, except for changes in appearance arising during the sending, storage or display of data messages;

According to the provisions of Articles 36 and 38 of the Law on Electronic Transactions 2005, "The offer to enter into a contract and accept the conclusion of a contract can be made through data messages" and "In concluding and performing In an electronic contract, a notification in the form of a data message has the same legal validity as a notice by traditional methods", so the time the electronic contract is signed is the time when the parties confirm the conclusion of the contract through communication. through data messages. The offeree gives a reply accepting the offer to enter into a contract or the offeror receives a reply accepting the offer to enter into a contract.

In fact, subjects often do not use this form because of security requirements and high risks when establishing and implementing guarantees. If a statement of the guarantor is not sent to the guarantor but is made public in the mass media. According to the German Civil Code, "Guarantee declaration cannot be presented in electronic form" [13]. There are cases where the guarantor makes a guarantee statement published on the Web site or the mass media stating that it will undertake the guarantee which does not qualify as an offer to enter into a guarantee contract. Because: (i) According to Article 12 of the Law on Electronic Transactions, "Where the law requires information to be presented in writing, a data message is considered to meet this requirement if the

information contained in the information is that data message is accessible and usable for reference when needed". Thus, notices on the Website or on the mass media can be accessed and collected at any time. the express expression of the offeror's intention to enter into a contract and to be bound by this offer to the identified party or to the public". Therefore, elements of an offer to enter into a contract include: (i) a clear expression of intent to enter into a contract; (ii) express the will of the offeror to be bound if the other party accepts it; (iii) the offer is addressed to a specified audience or to the public; (iii) The content of the guarantee commitment (guarantee agreement) must contain the basic contents of the guarantee contract. Notice on the Website or on the mass media can be accessed and collected at any time, however, according to the provisions of Clause 1, Article 386 of the Civil Code 2015, "An offer to enter into a contract is an expression of clearly indicate the offeror's intention to enter into a contract and to be bound by this offer to the identified party or to the public. Therefore, elements of an offer to enter into a contract include: (i) a clear expression of intent to enter into a contract; (ii) express the will of the offeror to be bound if the other party accepts it; (iii) the offer is addressed to a specified audience or to the public; (iii) The content of the guarantee commitment (guarantee agreement) must contain the basic contents of the guarantee contract. Notice on the Website or on the mass media can be accessed and collected at any time, however, according to the provisions of Clause 1, Article 386 of the Civil Code 2015, "An offer to enter into a contract is an expression of clearly indicate the offeror's intention to enter into a contract and to be bound by this offer to the identified party or to the public. Therefore, elements of an offer to enter into a contract include: (i) a clear expression of intent to enter into a contract; (ii) express the will of the offeror to be bound if the other party accepts it; (iii) the offer is addressed to a specified audience or to the public; (iii) The content of the guarantee commitment (guarantee agreement) must contain the basic contents of the guarantee contract.

Although the notice of guarantee on the official website or on the mass media has not met the necessary conditions to be valid as an offer to enter into a contract. As a general rule, an offer must be specific enough to permit the formation of a contract when it is accepted. National law often requires that an offer to enter into a contract must contain all the essential elements of the contract intended to be entered into. Moreover, for the guarantee relationship, it is a special relationship with the participation of 3 parties: the guarantor, the guarantor and the guarantor, so the establishment of the guarantee must be done strictly. , specifically, clearly, clearly identify the parties to the contract. Besides that,

Furthermore, regarding acceptance of an offer to enter into a contract under Article 393 of the Civil Code 2015, "Acceptance of an offer to enter into a contract is the offeree's reply to the offeree's acceptance of the entire content of the offer." In an electronic transaction, the acceptance of an offer to enter into a contract is an electronic data message, indicating acceptance of the entire content of the offer to enter into a contract. Therefore, when the offer to enter into a contract does not have sufficient, specific and clear content, there is no basis for the offeree to accept or not accept. Therefore, a notice of guarantee on the official website or in the mass media should only be considered an invitation to negotiate.

Thus, according to the provisions of Vietnamese law, the form of guarantee is very flexible. The use of standard documents such as contracts is common, but because of the flexibility of the guarantee, a single document can, in many cases, be used.

In Vietnam today, it is a fact that banks often sign contracts to secure the performance of obligations of a third party with the name "guarantee contract" or "mortgage and guarantee contract", " guarantee mortgage contract", "third party guarantee contract". The forms of the security contract above are incorrect, causing confusion between security measures. In many cases, the Court hears that when a third person uses the property to secure the obligation for the obligor, it is recorded as a mortgage contract, and considers this to be a case where the security contract violates the effective conditions. enforce the form of the contract and declare the contract null and void. However, the Court did not consider the mixing of the above names to be a serious violation of form, so it did not declare the contract invalid as the case "Mr. Chien, Ms. Hoa and Mr. Number, Ms. Muoi uses her property as a land use right as a guarantee to secure the loan of Dung Luoc Company at Foreign Trade Bank which has been made in writing and signed by the three parties in front of the State Notary and registered at the State Notary Public. Land use right registration office, contract of mortgage of land use right with the name of contract of mortgage and guarantee". The first-instance court determined that the security contract was invalid for the actual reason that the security in the form of a guarantee stated in the contract was a mortgage, while the appellate court did not consider that as a basis for determining the guarantee contract. void the contract because it considers that what is essential is the nature of the agreement between the parties. If it is an agreement to perform obligations on behalf of a third party, it should be determined that it is a guarantee.

### III. CONCLUSION

According to the 2015 Civil Code of Vietnam, the guarantee is free in form. The guarantee can be made in writing, notarized or authenticated, but can also be made orally if the parties agree. At this time, the form of the guarantee is governed by the regulations on the form of the transaction, including Clause 2, Article

117 of the Civil Code 2015. We can feel unsafe with the scenario outlined above. Where the law does not require the recording of the agreement between the parties in writing. Since the making of an agreed-upon guarantee is only one of the means of establishing evidence, once there is a dispute about consent in entering into a contract, the Court is forced to accept the request for appraisal of the documents. evidence is provided from any legitimate source and it is difficult to avoid mistakes in the trial process.

#### REFERENCES

- [1]. Institute of Vietnamese History, *National Court of Criminal Law (Hanoi, National Political Publishing House, 2010)*
- [2]. Ngo Tu Ha, *Tonkin Civil Code (Gouvernement Général de L'ind'ochine, Hanoi, 1931)*
- [3]. *Civil Code 1995 (Hanoi, Judicial Publishing House, 1995)*
- [4]. Dinh Trung Tung, *Commenting on new contents of the 2005 Civil Code (Hanoi, Judiciary Publishing House, 2005)*
- [5]. Nguyen Minh Tuan, *Scientific commentary on the Civil Code 2015, (Hanoi, Judicial Publishing House, 2016)*
- [6]. Circular No. 07/2015/TT-NHNN of the State Bank of Vietnam dated June 25, 2015 providing for bank guarantees.
- [7]. Low Kee Yang, *The Law of guarantee (Singapore Management University, 2015), Chapter 23, <https://www.singaporelawwatch.sg/About-Singapore-Law/Commercial-Law/ch-23-the-law-of-guarantees>, access September 4, 2021 at 9:29 a.m*
- [8]. Mr and Mrs. Grace Longwa Kayembe, *The fraud exception in bank guarantee (South Africa, Western Cape, University of Cape Town UCT, 2008), Page 35*
- [9]. Nguyen Ngoc Dien, *Scientific commentary on ensuring the performance of obligations in Vietnamese civil law (Ho Chi Minh City, Youth Publishing House, 2001), pp.56*
- [10]. <https://thegioiluat.vn/an-le/ban-an-so-13-kdtm-st-tranh-chap-yeu-cau-thuc-hien-nghia-vu-bao-tinh-229> accessed 24/7/2021 at 19:27
- [11]. Clause 1, Clause 2, Article 119 of the 2015 Civil Code stipulates “1. [...] Civil transactions through electronic means in the form of data messages in accordance with the law on electronic transactions are considered written transactions. 2. Where the law stipulates that civil transactions must be expressed in writing, notarized, authenticated or registered, such provisions must be complied with.” And Article 1 of the Law on Electronic Transactions 2005 on the scope of application of electronic contracts: This Law provides for electronic transactions in activities of state agencies; in civil, business, commercial and other fields prescribed by law.
- [12]. Hanoi Law University, *German Civil Code, Obligations (Hanoi, Labor Publishing House, 2014)*