

Guaranty in International Contracts

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Abstract: Considering complexity of trade relations especially in international level, traders are facing a huge amount of risks hampering good performance of trade relations and in some cases making them impossible. Therefore to make sure of performance and diminish the effect of such risks both sides and compensate probable damages resulting from breach of undertakings, parties to contracts implement letters of guaranty. Letters of guaranty are issued by banks, financial institutes and insurance companies. In lexical and idiomatic terms letter of guaranty is undertaking loan of someone else or in other words undertaking to bear compensation in case the undertaken is violated. Parties to a letter of guaranty are: 1) debtor 2) guarantee (beneficiary) 3) guarantor. Letters of guaranty are the best tool to secure international contracts. In international trade, letters of guaranty are used for good performance or payment and since traders are not able to freely exercise their contractual rights and compensate damages resulting from any breach, letters of guaranty become an integral part of trade and international relations. In international trades, parties to the contracts are in a strong need to banks and financial institutes to protect them against risks threatening their contracts. Therefore, banks and financial institutes issue bank letters of guaranty to guaranty performance of parties to contracts. Letters of guaranty come out in different types: 1) Ordinary letters of guaranty 2) Bank letters of guaranty 3) Guaranty L/Cs 4) insurance premiums. Each of them is applicable under the relevant terms and conditions and governing law. Governing law is one of the main issues regarding letters of guaranty. It is widely accepted that the best type of law is the one that parties to a contract may agree on and finally this fact should be taken into consideration that such letters of guaranty encourage parties to go on trading and it flourishes economy and develops trade affairs.

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Introduction

Assurance about adherence of guarantor to carry out the undertakings is one of the most effective factors persuading the other party to enter into a contract. Because it is quite rational that the one who cannot see any adherence in the other party would not enter any contract with it. In case of doubt it is wise to demand for a guaranty from the other party to adhere to its undertakings under the contract. Therefore, due to complexities of contractual relationships especially in international levels, to collect their credits, creditors do their best to obtain any kind of guaranty against risks of credits inaccessibility.

The point that demands attentions is that such guaranties encourage the parties to the contract to enter into contract in convenience and it flourishes economy and commercial development. However in current business world, there are many risks such as political and financial ones threatening both importers and exporters.

For the above mentioned reasons, nowadays international commercial contracts may come to practice by a network of guaranties. In international environment in which traders cannot easily practice their contractual rights and receive compensation for

breach of contracts, guaranties become an integral part of international commercial relationships.

Concept of guaranty

To draw a better image of guaranty concept, it is essential to discuss lexical, idiomatic meaning and comparative concept of it beforehand.

1) Lexical meaning

In Persian culture guaranty or surety means accepting and undertaking loan of somebody else or in other words undertaking to compensate in case someone does not discharge his obligation.

2) Idiomatic meaning

Article 684 of Iranian Civil Law stipulates that contract of guaranty means that someone undertakes the property that someone else is liable for.

3) Meaning of guaranty in comparative law

a) United States of America

In American law guaranty is defined as a contractual relationship and a result of an agreement by which the one who is referred to as guarantor shall undertake debt, fault, failure or loss other party who is referred to as guaranteed or debtor and when one of them discharges the undertaking the other party shall be relieved of his obligation.

b) The UK

In Britain guaranty is deemed a kind of consequential undertaking and it is stipulated so: "Guaranty is referred to an undertaking that is deemed a consequential or security undertaking for such defaults or failures of the other party."

c) France

By referring to French law and other European laws it is inferred that guaranty is merely a security for debt of debtor and it is the main purpose of creditor to be safe in case the debtor goes bankrupted.

Guaranty in view point o International Chamber of Commerce

In that view point guaranty means: any subscribed undertaking referred to under any name or title by which guarantor shall undertake to pay against submission of documents under provisions of letter of guaranty and document shall mean any data record whether subscribed or not, on paper or electronically in a way that the receiver may be able to reproduce it. Under such regulations document shall include claiming for deposit or collateral and notice of breach as well.

As it was mentioned in introduction, nowadays due to complexities in relations among traders in international level, there are many risks threatening parties to contracts and hampering proper execution of contracts. Some of the risks can be named as follows:

a) Political risk resulted from political crisis in the country of importing party or legislating some restricting regulations by government of importing party,

b) Price fluctuations in in international markets in a way that it makes the purchaser unable to make payment,

c) Financial risk including non-payment or delay in payment by importing party that could be resulted from inability or reluctant to make payment,

d) Default of exporting party in providing contract proper documents upon which customs authorities do not permit the products to be exported.

By considering the above facts, the only effective way to significantly decrease those risks and transfer them from traders to banks is implementing international letter of guaranties (ordinary, bank, insurance guaranties and letter of credits). For this reason, commercial contracts are backed up by a set of guaranties nowadays and guaranties are an integral part of international commercial relations.

Suppose that as per a contract, the seller is undertaken to remedy any defect in equipment subject of contract for a year as of installation time on its own account but it rejects to discharge its undertaking once a defect is seen after six months. In that case the purchaser should bring an action in a court arbitration board to administrate justice. Bringing an international action (in a court or arbitration board is

so costly and time consuming and it might be uneconomical but taking a good performance guaranty from the seller or contractor by the purchaser could be a good resolution to remedy the probable damages made to the purchaser. Therefore, in case the seller's default in discharging its undertakings the purchaser may remedy probable damages without any need to bring an action or confiscate the guaranty.

International guaranties in international commercial contracts

International contracts are generally divided to several groups. The first group is ordinary guaranties that are usually issued by companies assuring discharge of undertakings of affiliated companies or other companies. The second group is bank guaranties to be issued by international financial banks. The third group is letter of credits to be issued by operating banks. The last one is premiums to be issued by some companies that are applied like ordinary guaranties.

Ordinary guaranties

In international trade it is possible that someone takes the responsibility for act of someone else in a way that he may discharge the undertaking of the main undertaking party in case he defaults in discharging his undertaking and he may compensate any damages. Therefore, by virtue of ordinary guaranty or surety contract, the guarantor shall undertake to bear any undertaking not discharged by the main party or any damage made to the other party and both the guarantor and undertaking party shall be responsible for subject of guaranty and any damage to the debtor.

Since undertaking in ordinary contracts is subject to breach of contract while it unconditional in bank guaranties, ordinary guaranties are referred to as conditional letter of guaranties and bank guaranties as unconditional letter of guaranties.

Ordinary letter of guaranties basically have three features as follows:

a) Undertaking and responsibility resulting from letter of guaranty to the main debtor is consequential, therefore there should be a debt or undertaking or at least a cause for that in first place to guaranty that. It is fully in line with article 691 of Iranian Civil Law where it states that "Guaranty for the debt that cause of it has not been established yet is cancelled". Consequentiality of guarantor's undertakings has significant results that are dealt with here as follows:

(i) Degree of guarantor's liability is in a level that it is stipulated in main contract and its liability cannot exceed the liability of main debtor. Therefore if some liabilities are excluded in main contract or the degree of them is limited, degree of guarantor's liability should be excluded or limited to the same level.

(ii) In case main debtor is cancelled or terminated over any reason, guarantor's liability shall be cancelled accordingly. Article 708 of Iranian Civil Law stipulates in this regard so: "The one who is a guarantor for the execution of a contract or transaction shall be discharged of the guaranty if the contract is cancelled for cancellation or option".

(iii) Guarantor may rely on all claims, defenses and drawbacks in main undertaking. Suppose that the main debtor has rejected to discharge his undertakings for the subject of guaranty by referring to right of lien or has terminated contract due to breach of his undertakings, in that case the guarantor may reject to carry out his undertakings by relying on such facts.

b) Undertaking resulting from letter of guaranty is complementary to the main undertaking. Therefore, by materializing guaranty, the undertaking of main debtor shall remain and guarantor's undertaking shall be added to main undertaking as a complementary and secondary undertaking. Contrary to Iranian Civil Law that deems guaranty transfer of liability to liability and deems guaranty materialization a way for discharge of guaranty, in international trade, presence of guarantor by no means shall release the main debtor from his undertaking. Therefore, carrying out the undertaking or paying fund out of guaranty can be claimed when main guarantor is in breach of his undertaking or rejects from making payment in due time. There is no dispute in this matter that warrantee should provide documents proving the failure of main guarantor in carrying out his undertakings or breaching his undertakings. The dispute is over this fact if warrantee should refer to debtor to prove the breach and in case of non-payment refer to guarantor or he may refer to guarantor from the very beginning. According to Iranian Trade Law, warrantee should refer to debtor at first and in case undertaking is not discharged by debtor, warrantee may refer to guarantor. In British law, it is not essential to refer to debtor and in case of non-payment refer to guarantor.

c) Warrantee (guarantee) shall be a party to guaranty contract and this contract shall not be administrated without his consent. This fact is inferred from article 689 of Iranian Civil Law: "Where several persons are guarantors for the same person guaranty of the one who is correct that guarantee accepts". It should be noted that in international trade, companies basically do not act on guaranties without request of debtor but it shall not mean that debtor interferes in guaranty as a party to contract. Therefore, in guaranty contract presence of at least two parties that are guarantor and guarantee is essential but there is no problem if contract is entered into by presence of debtor and in triple way.

Kinds of ordinary letters of guaranty

- There are a variety of ordinary letters of guaranty. Some of them have a given time and when the time is over they become expired while some other guaranties are with no time limitation and valid term of guaranty is subject to main undertaking and it is completed once main undertaking is discharged.

- Ordinary letters of guaranty may be entered into by two or three parties. In mutual guaranty contracts guarantor and guarantee are the two parties while in triple contracts guarantor, guarantee and debtor are the parties to contract. In many cases contract is entered into in mutual way under the above mentioned condition and there is no need to presence of debtor.

- Letter of guaranty may be demand. In that case guarantor shall be bound to make payment if guarantee requests guarantor to do so. Under conditions of letter of guaranty, demanding from guarantor shall be subject to request of guarantee from debtor to discharge the undertaking or pay compensation and if debtor rejects to do so, the request shall be made to guarantor.

Ordinary letters of guaranty usually contain some provisions on demanding for debt or undertaking. For instance, when guaranty is limited to time, guarantee may demand for payment within the valid term. In addition, letter of guaranty may have some more conditions such as a decision of court or arbitration board on condemnation of guarantor or non-payment certificate from the relevant bank and in such cases; guarantor shall be bound to pay when all the above mentioned conditions are met.

- A ceiling for undertakings in ordinary letters of guaranty may be set up like maximum payment of USD 20 million or letter of guaranty may be in general form and without any special limitation. For example a company may guaranty undertaking discharge of another company without any ceiling or limitation and in that case, responsibility degree of guarantor company shall depend to main contract.

- Accepted undertakings in an ordinary letter of guaranty may be different as the case may be that are mentioned here:

a) Guarantor undertakes to pay a certain amount of money to guarantee in case of breaching undertakings or causing any damage and it shall be regardless to this fact if the money is sufficient for carrying out contract or making compensation or not.

b) Guarantor undertakes to make payment to guarantee to carry out contract in case debtor or principal does not discharge his undertaking. In that case principal shall have another contractor execute project and then demand for expenses from guarantor.

c) Guarantor may accept undertakings of main obligor in general without setting up the manner of its execution. In that case, if main obligor defaults in

discharging the undertakings under contract, warrantor may refer to guarantor to demand for discharging contractual undertakings and guarantor shall be responsible.

Rules and regulations supervising ordinary letters of guaranty

Due to lack of widely accepted and uniform conventions or regulations in international level on ordinary letters of guaranty, such letters of guaranty are not governed by the same regulations and they are subject to national law of countries as the case may be and such regulations are in accordance with rules of conflict settlement governing letter of guaranty. Due to contradictions among national law of countries there is a risk that such letters of guaranty may be led to different endings in various countries. To tackle such risk, details, terms of claim for guaranty fund should be clearly set up. As it is indicated most countries respect mutual agreements and deem them applicable. Therefore, parties to international letters of guaranty may utilize such favor and by setting up clear terms and conditions for letters of guaranty diminish the possibility of various interpretations in national systems.

In 1978, in its first attempt to standardize regulations supervising ordinary letters of guaranty, International Chamber of Commerce (ICC) ratified "Uniform Regulations on Contractual letters of guaranty". Due to lack of ambiguity and unfamiliarity to bank letters of guaranty these regulations were not widely welcomed so that ICC decided to separate ordinary letters of guaranty from bank letters of guaranty and eventually two sets of regulations were enacted "Regulations demand Letters of Guaranty" which were accepted on 3 Apr. 1991 by ICC as regulations supervising contractual letters of guaranty.

Here some articles of such regulations are briefly introduced:

- According to article 1 of Regulations on Contractual Letters of Guaranty, such regulations shall govern letters of guaranty when they are referred to in letters of guaranty. Parties to contracts shall be free to delete or amend any part of regulations that find inappropriate.

- According to article 3 of Regulations on Ordinary Letters of Guaranty are complementary and secondary contracts and they are fully dependent to main contracts and degree of liabilities inserted in them. Articles 3 & 7 of Regulations on Ordinary Letters of Guaranty stipulate that guarantor shall be liable when main obligor has breached its undertaking under contract.

- Article 4 that supervises the cases in which guarantor shall be discharged of performing its undertakings is of a great importance. Expiration of

letter of guaranty term is one of the cases that discharges guarantor of its undertakings.

- Article 7 deals with manner of demanding for guaranty from guarantor. In this article manner of forwarding a request for payment to guarantor, content of request as well as other requirements are stipulated.

It should be noted that in case in letters of guaranty the above mentioned uniform regulations are referred to, they should be carefully read to find out about any part that might be inappropriate and needs amendment. In case they are not referred to, it is appropriate to arrange provisions of letter of guaranty to cover all fundamental issues. For this purpose uniform regulations can be used as a good guidance.

Insurance premium

Although there are some similarities in guaranty contracts and insurance contracts and in the latter ones insurers undertake to compensate warrantee in case of damage, there are also some differences. In first place, guaranty contracts are consequential and secondary contracts while insurance contracts are independent. Likewise, in guaranty contracts guarantors are somehow controlling debtor and they undertake to be responsible in case debtor defaults in discharging its undertaking or causes any damage. Therefore, the cases in which guarantors are discharged of their undertakings shall not apply to insurers.

The other difference is that guaranty contracts are correct when there is main debt and undertaking or at least cause of it is established while there is no such a limitation in insurance contracts. In current international trade, there are some institutes and companies that guaranty discharge of others' undertakings by receiving some amount of money. In this way they undertake to discharge the undertakings in case main debtors default in carrying out their contractual undertakings. Function of such companies is so similar to what insurance companies do. Nevertheless, the differences like consequentiality, secondary or supplementary are different from with the nature of a prevalent insurance contract. However, there are so many insurance companies issuing ordinary letters of guaranty.

Bank guaranties

Bank letters of guaranty should be considered as a new phenomenon originated from the west and bank procedures as well as trade and economic requirements. Bank letters of guaranty enjoy a high status in international trade. Being far away from each other and tough and costly procedures of carrying out contractual undertakings have made parties to contracts to obtain bank letters of guaranty to diminish probable risks. As a result, in addition to cover above mentioned risks, bank letters of guaranty could be a good way to prevent occurrence of other risks

threatening international trades. While receiving charges, banks can facilitate trade procedure in international level and diminish its risks.

Here we give some explanations on meaning of bank letters of guaranty and then various kinds of bank letters of guaranty are discussed over and then the relevant regulations governing such letters of guaranty are taken into consideration.

Concept of bank letters of guaranty

Bank letters of guaranty that are also known as demand independent or unconditional letters of guaranty are an undertaking re-exchange by which banks or financial institutes undertake by virtue of request of an applicant to pay a certain amount of money upon request of a beneficiary and under provisions stipulated in it.

Bank letters of guaranty are a kind of demand independent letters of guaranty to be issued only by banks, financial institutes and insurance companies. They are similar to promissory notes by which a bank undertakes to pay a certain amount of money demand to the favor of a certain person or a carrier. The difference between these two instruments is that a promissory note is an unconditional undertaking and the one issuing that undertakes to pay the amount on due date to the carrier of the instrument. While for a letter of guaranty payment shall be made to beneficiary if the conditions set out in letter of guaranty are met. The other difference is that promissory notes are basically endorsable or transferrable while letters of guaranty are not endorsable and they can be transferred only when the relevant bank permits. The other difference is that in promissory notes it is not clear that payment shall be made upon what basis while in letters of guaranty banks guaranty another undertaking.

Specifications of bank letters of guaranty

Being independent to the main contract, unilaterally, unconditionally and irrevocability are the main specifications of such guaranties that we take them into consideration in brief:

Bank has an independent undertaking regarding main contract and undertakings. It is too difficult and risky for banks to be engaged in contractual matters and disputes of debtor who is applying for issuance of a letter of guaranty and main warrantee who is the beneficiary to the letter of guaranty despite this fact that there is a basic contract between parties and a letter of guaranty is issued to guaranty that undertaking. Bank letters of guaranty are unilateral and although banks issue them upon request of applicants, letters of guaranty are unilateral undertakings that banks bear against third beneficiaries and consent of beneficiaries has nothing to do with them.

The next specification is that the undertaking set out there is not subject to breach of main debtor and even if there is no breach by main debtor, bank is obliged to make payment to the beneficiary under terms and conditions of letter of guaranty. It should be noted that there are some terms and conditions for claiming for the money and banks are bound to act in accordance with them.

The other specification is that letters of guaranty are irrevocable and banks are bound to make the payment within letter of guaranty term to the beneficiaries and they cannot reject their undertaking under any circumstances. For this reason banks proceed with issuing letters of guaranty when they make sure that in case of confiscating letter of guaranty, the client (applicant for issuance) shall have financial capability to pay the money to the bank.

On the other hand bank letters of guaranty are divided to four groups in terms of provisions set there:

- First group: The letters of guaranty that can be paid upon the request of beneficiary when they are valid and there is no other need to meet other conditions.

- Second group: The letters of guaranty that can be paid upon the request of beneficiary and his written notice on default of main debtor in discharging his undertakings and there is no need to other reasons.

- Third group: The letters of guaranty that can be paid when they are valid upon the request of beneficiary and approval of third party on entitlement of beneficiary or default of main debtor in discharging his undertakings under main contract.

- Forth group: The letters of guaranty that can be paid when they are valid upon the request of beneficiary along with a court or arbitration board decision indicating default of main debtor in discharging his undertakings or entitlement of beneficiary.

- It should be noted that most bank letters of guaranty fall in the first group that are payable to beneficiary merely upon a claim and that is why they are known as demand letters of guaranty.

Kinds of bank letters of guaranty

They are in different types and the most important and prevalent ones are letters of guaranty for tenders, repayment, discharging undertakings and good performance that we explain them in brief.

1) Bank letters of guaranty for tenders

In tenders, tenderers should be confident that those attending the tenders are determined and adhere to the undertakings if they win. To make sure of it, those attending tenders are required to provide a bank letter of guaranty to 5% of basic value or offering price along with their offers. The validity term for such bank letters of guaranty shall be to the extent which is stipulated in tender documents.

2) Payment guaranty (repayment of advance money)

When someone lends money to another person, the lending person sets a condition that the receiver should provide a bank letters of guaranty in an amount equal to principal and accrued interest and the lending party shall confiscate that in case the loan or accrued interest is not repaid. Or in cases where the seller accepts to receive contract price later, the seller may require the purchaser to provide a bank letter of guaranty in an amount equal to contract price to be able to confiscate that if the contract price is not paid in due time. And likewise, when the purchaser pays a part of contract price before job completion or receiving products the purchaser may make his pre-payment subject to a bank letter of guaranty in an amount equal to his payment.

Usually bank letters of guaranty are arranged in a way that by repayment of installments or partial discharge of undertakings, price of letter of guaranty diminishes accordingly or in advance payment guaranty case, by partial shipment of products or rendering services, price of good performance bond shall diminish in proportion of value of rendered services.

Letters of guaranty for discharging undertakings

In most state contracts, sellers of products and providers of services are required to provide a letter of guaranty for discharging their undertakings. Primary term of such letters of guaranty is usually some months later than contracts execution time. More than half of letters of guaranty issued in America have been for construction contracts and contracting.

It should be noted that in these kinds of contracts, in addition to provide a letter of guaranty, client shall retain 10% as good performance from any payment to contractor and such amounts shall be released to contractor after permanent delivery and completion of guaranty period.

4) Good performance bond

Good performance bond is similar to performance guaranty. In contracts for purchasing products or providing consultation where client is a state entity, sellers and consultants are bound to provide a letter of guaranty in amount equal to 10% of contract price at the time of contract conclusion to guaranty good performance. Primary term of that kind of letter of guaranty is usually a few months higher than contract term and completion of product guaranty and repairs subject of contract.

Law governing bank letters of guaranty

Lack of uniform rules and regulations in international level is one of the main problems of bank letters of guaranty. There are various and sometimes contradictory rules and regulations on bank letters of guaranty in national law systems that turn

law governing such letters of guaranty into a main concern. Where various law systems are applicable on legal relations among guarantee and debtor and bank the question that is brought up is that what law may govern making letter of guaranty or resulting undertakings, law of conclusion place or law of where letter of guaranty is issued and relevant undertakings are resulted. The issue that is put forward due to conflict of laws is that the law governing letters of guaranty issued itself is subject to law of what country and if parties to the contract may agree on legal rules and applicable law or not, if they may agree, then what law may govern and finally regarding the meaning of guaranty independency toward basic contract, if law governing guaranty is other than law governing basic and main contract or not.

By studying various national and international laws it can be concluded that generally the law governing letters of guaranty shall be the law of country issuing letters of guaranty but in case parties to the contract agree, they may choose law of a third country upon approval of the relevant banks.

Due to significance of letters of guaranty in international trade and attempt to solve the problems on such issue, it is for years that international organizations are endeavoring to make uniform regulations on bank letters of guaranty aiming to coordinate various countries with different legal and cultural backgrounds and speed up international trade.

The intentions of two organizations are remarkable in this regard: UNCITRAL (The United Nations Commission on International Trade Law) and ICC.

UNCITRAL began its endeavors since 1948 and it was from 1990 to 1995 that by conducting 11 gatherings attended by organizational and international representatives of interested countries that it could prepare draft for The UN Convention for Independent Letters of Guaranty and Sight Letters of Credits which was enacted in 1995 by The UN General Assembly and then approved by ICC in 1999.

The endeavors of ICC in that regard are as follows:

- a) Uniform regulations for contractual letters of guaranty (publication No. 35)
- b) International regulations on letters of guaranty
- c) Uniform regulations for demand letters of guaranty (publication No. 1458)

Guaranty letters of credits

L/Cs can act as a guaranty for a transaction. Letter of credit refers to a conditional undertaking upon which a bank (opening credit) shall be undertaken upon order of a customer (applicant for credit) or on its own way against receiving due instruments in due time subject to the case where

conditions of letter of credit are met. In this way, exporter shall receive the money from bank only upon submitting freight documents as per conditions of L/C and there shall be no concern for non-payment by purchaser because seller is dealing with a bank not the purchaser in this regard and on the other hand purchaser shall have no concern about non-shipment of products or discrepancy to contract because as long as bank has not received sufficient documents indicating discharge of seller's undertakings no money shall be paid to seller.

Since in some European countries, Far East countries and mostly some US states banks are forbidden to issue letters of guaranty, L/Cs come as a great help. As it was already mentioned, in this system, seller supplies products forwards them to purchaser along with the documents enabling him to proceed with clearing them and purchaser remit the money to account of seller upon receiving documents. In case on non-payment seller may refer to the bank with the true copies of documents to the bank to receive the money. In that case bank is responsible to follow up the matter and pay the guaranteed money on behalf of both parties. Such credits are to guaranty payment of bills for guarantying repayment or prepayment of shipments and sometimes for good performance.

Guaranty L/C is mostly used for carrying oil where no B/L is issued.

Conclusion

In this paper the importance of letters of guaranty in international contracts was examined and it was found out that nowadays due to complexities of trade relations especially in international there are many risks threatening proper discharge of contractual undertakings. Therefore, under such risky circumstances that traders are not able to exercise their contractual rights and compensate damages resulting from breach of undertakings, letters of guaranty play a great helpful role and become an integral part of international trade relations. Furthermore, since bringing an international action (in a court or arbitration board) is so costly and time consuming and probably uneconomical, taking a letter of guaranty could be good solution to be able to compensate any probable damage without any need to bring an action and only by confiscating letter of guaranty.

International letters of guaranty are issued by banks, financial institutes and insurance companies

and by using letters of guaranty; traders diminish risk of not discharging contractual undertakings and on the other hand guaranty discharge of undertakings. By implementing letters of guaranty, parties to a contract transfer the responsibility of contract execution to institutes issuing letters of guaranty and it promotes the number of international trade contracts and eventually develops economy and trade affairs.

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