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GUARANTEE AGREEMENTS UNDER TURKISH OBLIGATIONS ACT NO. 6098

Turkish Obligations Act No. 6098 (TOA) reforms the topic of guarantees, there is especially much new legislation in favor of the guarantor. At first sight, the terms of guarantee agreements carrying a relatively mandatory power is one of the innovations. Guarantor cannot waive these rights before entering into the guarantee agreement, unless specified so in the agreement. The inverse interpretation of this statement brings us to the conclusion that the guarantor can waive his rights after entering into the guarantee agreement.

Guarantee agreement is an agreement where the guarantor assumes the responsibility of assuring payment or fulfillment of debtor's debts or obligations to the creditor. Accordingly a guarantee agreement is a collateral agreement between the guarantor and the creditor, which provides a personal assurance to the creditor. Thus the debtor's obligation is separate from the guarantor's and therefore their cause of action is also separate. Guarantor assumes the outcome of the debtor failing to perform his obligation, however does not assume all of the debtor's liabilities. For example, debtor may have undertaken to perform an act to the creditor, the guarantor cannot assume liability and do the act if the debtor does not perform his obligation. Guarantor can only be liable for the damages that were caused by the debtor not performing his obligation, i.e. payment of money.

The new act also contains important changes in terms of the character of the guarantee agreement. The most significant of these is the condition of the agreement being in written form. There was not such a requirement before and the agreement was valid as long as liability limit was determined and it was signed. According to Section 585 of the Act No. 6098, the agreement must contain a liability limit, date of guarantee and where there is a joint guarantor, the liability of this person must also be written by the guarantor's own handwriting. Also the top limit of liability must be stated in figures. Not complying with this form renders the agreement null and void. Legal entities could also be guarantors just as real persons. In these circumstances the authorized person must comply with the formal requirements by writing with his/her own handwriting. Where there is joint authority in the legal entity, the views are not clear as to how to approach the situation and at present two solutions have emerged. First view states that one authorized person writes in the agreement while the other signs. According to the second view, all the authorized persons write and sign separately.

Apart from all with Section 584 a condition to receive the spouse's consent has been introduced. According to this, the spouse must give consent until the moment of enter-

ing into a guarantee agreement. Consent could be conditional, for example where there is more than one guarantor they could agree that the consent will be valid as long as the condition is satisfied. The provisions on the consent of the spouse apply to all kinds of guarantee agreements made by real persons. Consequently, the consent of spouse will be sought in all guarantee agreements made by real persons. This point extends the scope of application of the section.

Where the spouse has no legal capacity, consent will be given by the legal representative. According to Turkish Civil Act a legal representative is prohibited to act as a guarantor on behalf of the represented. Therefore one cannot be a guarantor on behalf of a person with no legal capacity but can give consent for a guarantee agreement on behalf of the same.

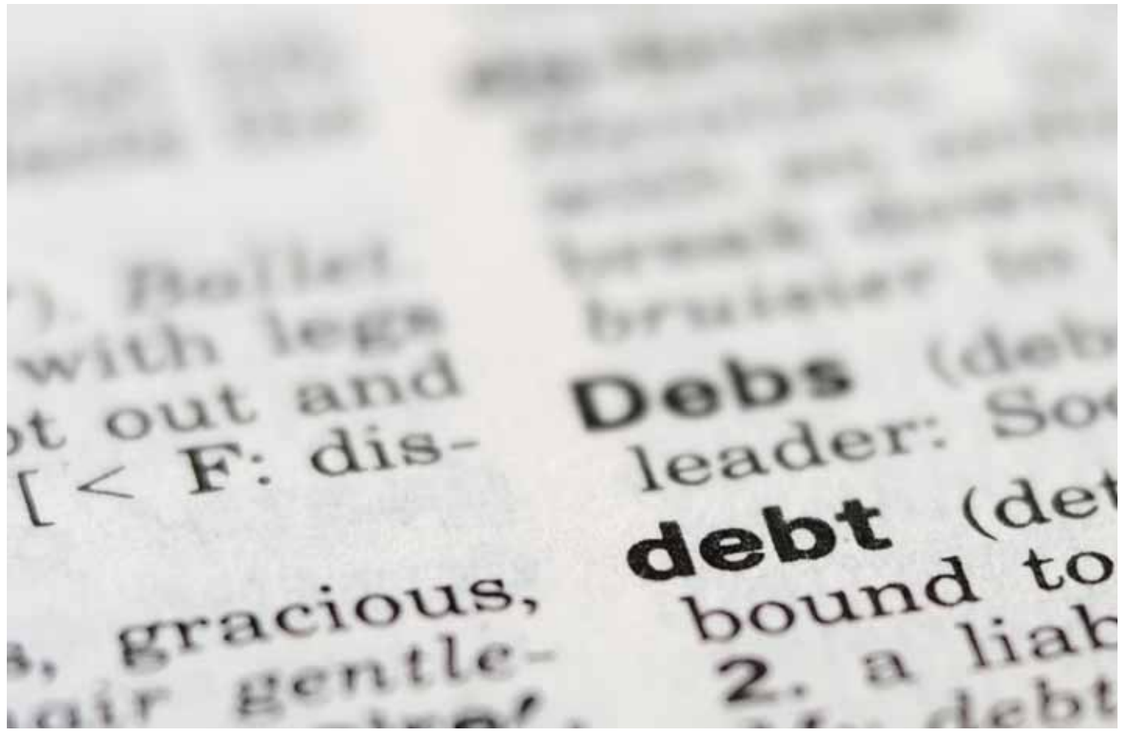
According to the doctrine general task consent is not possible; obtaining prior consent will not be valid, under the circumstances. Spouse must consent immediately before the agreement or latest during the agreement.

Consent of the spouse is not required in the circumstances where the later changes to the guarantee agreement did not result in the increase of the amount that the guarantor is liable for or simple guarantee to change to joint guarantee or the assurances in favor of the guarantor to be significantly reduced.

On the subject of representation, one person could give power to the other to enter into a guarantee agreement on behalf of him. This special power of attorney must be given as per TOA583/3, i.e. the top limit of the guarantee must be stated, also must state as far as possible for which agreement it is, where there is joint guarantee this must also be stated.

Another significant point is that the amendments made to the guarantee agreement and changes increasing the liability of the guarantor are not valid if they do not comply with the formal conditions.

The law maker has altered the guarantor's liability issue with the new act and significantly reduced the scope of responsibility. Guarantor's liability is limited in every instance to the amount stated in the agreement. The guarantor is also liable for the legal consequences (such as damages, interest) of the debtor's failure to comply with the contract up to the maximum amount, unless specified otherwise in the agreement. Where the debtor's liability is strict, the guarantor may also be liable for seizure or defects. Any agreements as to hold the guarantor liable in the circumstances where the debtor's agreement



becomes void or for criminal accountability are null and void. Therefore when the main agreement creating the debtor's liability becomes dissolved or cancelled, the guarantor will not be liable for resulting damages. According to section 589 TOA the guarantor is also liable for: cost of litigation and accumulated interest of the last year and accruing contractual interest and interest of the debt. The significant point here is that the guarantor is liable for default interest and there is no time limit to claim although there is time limit to claim the actual debt.

Guarantor's obligation is subordinate, therefore is will be invalid where the principal contract is invalid. The principal debt could be invalid due to various reasons, such as lack of authority, contrary to public decency, false pretense or impossibility. Although this is the main rule there is an exception in TOA 582: Guarantee agreements can be created for an existing and a valid debt as well as for a future or conditional debt to come in force at a future date or when the condition is satisfied. Where the guarantor has agreed to act as a guarantor despite invalidity or an existence of an invalidating condition, the rules on guarantee agreements will apply. The same goes for a guarantor who knowingly guarantees the debtor's obligation which is barred by time. If the guarantor knows that the debt is time barred and has agreed to guarantee the debt despite this, then there is no doubt the terms of the guarantee agreement will be valid. Guarantor cannot agree to be liable in these circumstances beforehand. That would destroy the subordinate character of the guarantee agreement. Liability of this kind cannot be assumed prior to it happening, i.e. guarantor cannot claim that he agrees to be liable even if the principal obligation becomes invalid. However as seen above, there are situations where liability may still remain despite the invalidity of the principal debt.

Looking at the scope of application of the legislation, it contains special rules for personal guarantee agreements that come under TOA603. Accordingly, same formal requirements (hand written form), capacity to act as guarantor (full capacity) and approval of spouse must be satisfied for indemnity agreements that are not guarantee agreements and for agreements that are not classified as guarantee agreements where a real person gives assurances. These agreements are: guarantee, joining an existing debt, undertaking the obligation of a 3rd party, bill of exchange and etc. Consequently banks could request guarantee from legal entities and will opt for pledge agreements to escape the rigid conditions.

There are no changes in the procedure of pursuing the guarantor; the point that even if the principal debt becomes due before, the guarantor cannot be pursued before the agreed due date, remains unchanged. The Act 6098 has brought an alteration that a guarantor can make a request to stop the pursuance against him, by providing financial security, until the existing assurances are liquidated by court order and upon pursuance against the debtor document of total financial incapacity is obtained or until a decision of concordat is reached. This point is most beneficial to the joint guarantor.

In addition to all this not only the guarantor has the right to raise defenses that the debtor or his descendants have, which do not occur from payment difficulties, but the guarantor must raise these defenses to set off the claim. This is a burden in the technical sense. The guarantor cannot set off the fact of acting as a guarantor by mistake or guaranteeing a debt that is barred by time, against claim and must bear the consequences. Guarantor can benefit from the defenses available to the main debtor. For example, if the debtor has the defense of non-payment against the creditor, the guarantor could also benefit from this defense. According to the Act, the guarantor could benefit from a defense against the creditor, even if the main debtor has waived his right to that defense. In other words, if the main debtor has knowingly or unknowingly for whatever reason did not raise a valid defense against a claim or has even waived his right to the defense, the guarantor's right to raise the defense will not be effected. Even if the guarantor does not know the existence of a defense available to the debtor, he must know all the defenses available to himself. For example, if the guarantor has paid the outstanding debt when the creditor claimed it from him, because he was not aware of any defenses available to the debtor, this is a valid payment and will satisfy the claim as much as the amount that has been paid. The guarantor can have recourse against the debtor when he satisfies the claim, even if this has been done despite the availability of some defense which the guarantor was not aware of. However, if the debtor proves that the guarantor was aware of or must have been aware of the defenses available to the debtor, then he will be relieved from recourse as much as the amount of the defense.

One other point where notification is important is where the guarantor must notify the debtor if he has fully or partially performed debtor's obligation upon being called by the creditor. Where the guarantor does not notify the debtor and the debtor who is not aware of or who cannot be expected to be aware of the guarantor's performance submits his performance to the creditor, the guarantor will lose his right to recourse for the amount in question.

In some circumstances, the guarantor has a right to request assurance or to be released from obligation. There are three situations where this could occur: First is; where the guarantor can request the debtor to give assurance and to release him from obligation where the debt is due, if the debtor breached his promises to the guarantor, especially the promise to release the guarantor from obligation within a specified period. Where the debt is not due, the guarantor can only request assurances to be given. Second is where the debtor is in default or proceedings against him have become difficult because he moved his residence abroad. Third situation where the guarantor can use these rights is where the guarantor's risk has increased significantly from the time when the guarantee agreement was made, due to decline in the debtor's economic situation, loss of value of the assurances or debtor's fault.

Moving on to the termination of guarantee agreements, we come across four circumstances: By law; expiry of time where there is a time limit; expiry of unlimited guarantees and disclaimer. Right to disclaim a guarantee is introduced with the new Obligations Act. According to Section 599 TOA "In a guarantee for a future obligation, where the debtor's economic situation before the creation of the debt is significantly worsened after the guarantee agreement or it was revealed that the debtor's economic situation is significantly worse than what the guarantor had assumed with good faith, then the guarantor can send a written notification to the debtor disclaiming the debt as long as a it has not been created. The guarantor is liable for the damages emerging from the debtor relying on the guarantee agreement." Even though the guarantee agreement is made between the creditor and the guarantor, contrary to the balance of interest, when the guarantor instigates the right of disclaimer it will be the creditor who suffers. The legislator clearly intends to protect the guarantor. However special provision in connection with this provision imposes upon the guarantor the obligation to remedy the damages creditor suffers due to relying on the guarantee. The implied damages are of course the compensation of negative loss suffered due to false reliance of the creditor.

The typical legal termination of the guarantee agreements occurs with the termination of the main debt. When the main debt comes to an end the guarantee also comes to an end, it does not matter how the main debt was terminated. Another significant point is the expiry of a period of 10 years. It has been accepted with the TOA that guarantee agreements must be limited to a time period. Accordingly, all kinds of guarantee agreements entered into by real persons terminate automatically at the expiry of 10 years from the date of the agreement. The provision depends on the following conditions: the guarantee must the given by a real person and 10 years must pass from the date of the relevant agreement i.e. guarantee agreement. After the period the guarantee agreement and the guarantee comes to an end.

Termination of non-periodic guarantee agreements is more complicated. The guarantor can, any time after the debt is due in simple guarantee agreements and as specified in the act in joint guarantee agreements, request the creditor to use his right to legal action and proceedings within one month and to liquidate the pledge if available and to continue with the proceedings without stopping. Where the debt will be due upon a notice given by the creditor, the guarantor can request the creditor to notify the debtor and upon the debt becoming due by this method, to activate his right to legal action and proceedings as stated in the above section. If the creditor does not carry on with the above proceedings the guarantor will be released from his obligation.

There has been some confusion during the enforcement of the Act as it has come into force recently. The Application Act has resolved those problems. Accordingly if a legal transaction has been made, completed and terminated before 1 July 2012 OA applies. If a legal transaction has been made, completed and terminated after 1 July 2012 TOA applies. If a legal transaction is made before 1 July 2012 and is still valid, a problem occurs. The legislators' solution is: "The acts and transactions that occurred before Turkish Obligations Act came in force are subject to, in terms of validity and the implications of those acts and transactions, the acts that were in force at the time. However if such events of default, termination and liquidation occurs after Turkish Obligations Act came in force they are subject to the Turkish Obligations Act." The exception to the rule is: "The rules of Turkish Obligations Act on public order and public morality apply to all acts and transactions regardless of their date." The most significant aspect of this provision is the fact that it covers procedural rules, as they are related to public order.

Final point is the effect of the death of the guarantor on the guarantee agreements. The guarantor's liability under the guarantee agreement is personal liability, i.e. liable with his assets. Therefore if a guarantor who is a real person dies within the 10 years of the guarantee agreement, his estate will continue to be liable. The guarantee agreement does not come to an end with the death of the guarantor.

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The Provisions on Guarantee that have Changed with TAO

A. Time Limit • There is not a time limit in the old act.	• Guarantee agreement has been limited to 10 years. > Guarantee that is given by real persons comes to an end automatically at the expiry of 10 years, even if it was given for a period longer. > Guarantee period could be extended for a maximum of 10 years as long as the extension is made not sooner than one year before the guarantee agreement comes to an end. Guarantor will only be pursued for a period of 10 years even if the guarantee was given for a longer period unless it was extended or renewed.
B. Guarantors Legal Obligation **1.** Liability for the main debt **2.** Liability for the outcome of the fault and default of the debtor **3.** Liability for the legal expenses and proceedings **4.** Liability for the agreement interest	**1.** Liability for the main debt **2.** Liability for the outcome of the debtor's fault and default **3.** Liability for the litigation and legal expenses > This is not a mandatory provision. **4.** Liability for the cost of transferring the pledges to guarantor and for the expenses arising from transferring pledges > This is not a mandatory provision. **5.** Liability for the principal debt against interest and bond > Liability is limited to accrued one year and accruing interest in both circumstances. > This section stating guarantor's liability for principal debt interest is not mandatory.
C. Liability for the Main Debt • There was no provision in the old act in this subject > In practice there was a presumption that the guarantor was liable for all the debts rising after the guarantee agreement was made	• Unless specified in the agreement the guarantor is only liable for the debts rising after the guarantee agreement. > This is not a mandatory provision.
Liability for the Main Debt • There were no provisions on this subject.	• Agreements stating the guarantor's liability for the loss and criminal consequences caused by the principal debt being void are definitely invalid.
Consent of the Spouse • There were no provisions on this subject.	• The real person guarantor must give written consent to the guarantee agreement before or at least during the agreement for the agreement to be valid.