

The Return of the Ordinary Suretyship Contract

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I- Introduction

The Turkish Code of Obligations essentially provides for two different types of suretyships. One of them is *ordinary suretyship* and the other one is *joint and several suretyship*.

Joint and several suretyship is commonly preferred in practice since this type of suretyship, as analyzed below, provides creditors with more security. For example, banks typically impose joint and several suretyship on their customers

Legislation, however, prohibits joint and several suretyship contract by Articles 10 and 10/B of the *Law on the Protection of Consumers* and by Article 24 of the *Law on Bank Cards and Credit Cards*. Consequently, due to this prohibition, it can be concluded that ordinary suretyship has been reinstated.

This article first analyzes the essential features of the two types of suretyship contracts, and then, it discusses amendments that are legally related to the two types of suretyships.

II- Two Types of Suretyship Contracts

1- Ordinary Suretyship

The ordinary suretyship is regulated by Article 486 of the Turkish Code of Obligations. According to this article:

“A creditor can only demand payment from an ordinary surety if the principal debtor after the date of the suretyship

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has become bankrupt, or if an execution against him has proved barren without default on the part of the creditor, or if the principal debtor ceases to be within Turkish jurisdiction.

Where, before or at the time of the suretyship, the claim so guaranteed has been secured by pledge, the ordinary surety may call on the creditor to have primary recourse to the pledge. However, if the debtor has become bankrupt or if the pledge can not be sold unless the bankruptcy of the debtor is declared, this disposition is not applicable¹."

In light of these requirements, an ordinary surety is entitled to plead a defense against a creditor under the following circumstances:

- a. If a creditor sues the ordinary surety without first proceeding against the principal debtor, the ordinary surety can claim that the creditor first has to bring an action or proceed against the principal debtor.
- b. If a pledge, provided by a third party exists, besides the ordinary suretyship, before or at the time of suretyship, the ordinary surety may call upon the creditor to have a first right of recourse to the pledge.

2- Joint and Several Suretyship

Joint and several suretyship is regulated by Article 487 of the Turkish Code of Obligations. The first paragraph of this Article provides:

¹ In many texts, the term "guarantee" is used as the translation of the terms "la caution = das Bürgschaft = kefalet" (Georg Wettstein; The Swiss Federal Code Of Obligations, Código Federal Suizo de las Obligaciones, Le code fédéral suisse des obligations, 1939, Zurich, p: 351; Swiss-American Chamber of Commerce; Swiss Code of Obligations, English Translation of the Official Text, Volume I, Contract Law, Articles 1-551, 4. revised edition, Zurich, 2002, p: 207 ff or art. 492-512. However, this preference is not correct, at least when applied in the Turkish legal system, since these two types of contracts have essentially different features. In fact, the suretyship contract presupposes the existence of a valid principal debt to which the suretyship is bound. Accordingly, it is an accessory transaction; however, the guarantee contract does not require the existence of a valid principal obligation. Thus it is an independent security. Furthermore contract of suretyship must be made in writing, whereas there is not any obligatory form for the validity of a guarantee contract (See Lale Sirmen; Secured Transactions (Securities), in Introduction to Turkish Business Law, Edited by Tuğrul Ansay and Eric C. Schneider, The Hague-London-Boston, 2001, p: 56; Kemal Oğuzman; Turkey, The Hague-London-Boston, 1996, p: 172, n: 544).

*“If the surety obligates himself with principal debtor, by adding the qualification joint and several surety ...” ...²
 “ ... or any other equivalent expression, the creditor may sue him before proceeding against the principal debtor or realising the pledge.”*

According to this Article, a joint and several surety is deprived of using the two defenses available to an ordinary surety. For this reason, it can be concluded that the ordinary suretyship is weaker than joint and several suretyship. In fact, in practice, the parties prefer the latter type.

This fact was strengthened by the enactment of Article 7 of the Turkish Code of Commerce, related to the presumption of joint and several liability. According to this Article, suretyship that guarantees a commercial debt is joint and several suretyship unless the parties agree otherwise.

III- Dispositions of Special Laws on Ordinary Suretyship

1- Law on the Protection of Consumers

The legislature amended the third paragraph of Article 10 on the Law on the Protection of Consumers as stated below:

“In the cases of providing personal security as a guarantee for a consumer loan, the creditor may not sue the surety before proceeding against the principal debtor.”

² In the first paragraph of Article 487 the Turkish legislature employs the terms “joint debtor and joint and several debtor”. However, these terms are not correct since “joint debtor” and “joint and several debtor” are actually different legal terms; moreover, the terms “joint and several debtor” and “joint and several surety” are really different from each other, as well (See Kemal Oğuzman / Turgut Öz; Borçlar Hukuku, Genel Hükümler, Gözden Geçirilmiş ve Genişletilmiş 4. Bası, İstanbul, 2006, p: 838). The reason the Turkish legislature employs the term is that there was a mistake in the French text of the Swiss Civil Code dated 1911. In 1926, the Turkish legislature preferred the French text of Swiss Federal Code of Obligations for the translation. In the French text, the Swiss legislature used the term “codébiteur” (= joint debtor = co-debtor). Thus, this mistake was carried into the Turkish Code of Obligations. The German text of Swiss Code of Obligations did not contain a term like “Mitschuldner” (=joint debtor=co-debtor). As a matter of fact, in 1941 the Swiss legislature comprehensively amended the dispositions related to suretyship. Consequently, “caution solidaire” is used in the French text and “Wer sich als Bürge unter Beifügung des Wortes «solidarisch oder mit andern gleichbedeutenden Ausdrücken verpflichtet” (Der Solidarbürge) is maintained in the German text. These terms are equivalent to “joint and several surety”. In the Turkish Code of Obligations project this mistake was corrected; the term used in Article 591 of this project is “joint and several surety”. (See Türk Borçlar Kanunu Tasarısı, Ankara, 2005, p: 516).

The legislature added a new article for the housing finance contracts. According to the paragraph 8 of Article 10/B:

“If the housing finance is backed by a personal security, then the housing finance institution can not demand payment from the surety before proceeding against the principal debtor and other securities.”

These dispositions are required, as they preclude parties from agreeing to the contrary, and if they do so, their contracts will be null and void³.

With this amendment related to Article 10, the legislature demonstrated that it preferred ordinary suretyship for consumer loans. However, this Article is silent as to the circumstances when a pledge exists besides the ordinary suretyship.

I maintain that this omission was not consciously made. In the preamble to this amendment, there are not any explanations about this problem, and this omission creates a legal gap which must be addressed by the legislature⁴. Nevertheless, until this amendment is enacted, the courts can amend this legal gap according to Article 1 of the Turkish Civil Code:

“The law must be applied in all cases which come within the letter or the spirit of any of its provisions.”

3 Nevertheless, where the parties' joint and several suretyship fulfils the conditions of an ordinary suretyship and had the parties known that their joint and several suretyship would be null and void they would have preferred the ordinary suretyship, their contract can be converted to an ordinary suretyship (See Oğuzman / Öz, p: 138; Luc Thévenoz / Franz Werro / Benedict Winiger; Commentaire Romand, Code des obligations I, 2003, Genève, Bâle, Munich, Article: 18, no: 187.

4 According to paragraph 1 of Article 45 of the Turkish Execution and Bankruptcy Code a creditor can not proceed against the debtor without realizing the pledge. Nevertheless, I maintain that this Article does not preclude my interpretation as Article 45 of this code is related to the execution law.

Additionally, this regulation was controversial: some writers claimed that this article was mandatory and the parties could not agree on the contrary; while other writers claimed that this article was not mandatory. The legislature, in view to solve this discussion added a new paragraph as paragraph two just after paragraph one to the article 45. According to this paragraph, for the receivables of Housing Development Administration that are secured by pledge and for the receivables arising from housing finance defined in paragraph 1 of Article 38/A of Capital Markets Law No. 2499 distraint can be claimed and other properties of the borrower can be sold or liquidation of the mortgage can be claimed. Therefore, for the housing finance receivables, creditors do not have to claim the liquidation of the mortgage; they can claim distraint of the other properties of the borrower or they can claim the liquidation of the mortgage.

Where no provision is applicable, the judge shall decide according to the existing customary law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator.

Herein he must be guided by approved legal doctrine and case-law⁵.

The courts can utilise Article 486 of the Turkish Code of Obligations.

Thus, in a consumer loan, if a pledge exists besides the ordinary suretyship before or at the time of suretyship, the ordinary surety may call upon the creditor to have primary recourse to the pledge.

If my proposition to this problem is not accepted, there will be an incomprehensible difference between the ordinary surety for consumer loans and simple loans.

As a matter of fact, the legislature creating Article 10/B of the Law on the protection of consumers preferred this sentence: "the housing finance institution can not demand payment from the surety before proceeding against the principal debtor *and other securities*". This preference confirms our opinion.

2- Law on Bank Cards and Credit Cards

Article 24, paragraph 5, of this law states:

"The suretyship in the usage of credit cards is subject to the dispositions of ordinary suretyship in Code of obligations. Payment can not be demanded from surety without proceeding against the principal debtor by exploiting all possible actions for the payment."

It can be agreed that this disposition is required as well and hence, the parties can not agree to the contrary. If they do so, their accord will be null and void⁶. Nevertheless the legislature enacted an exception under Article 43:

"The dispositions of the article ... 24 ... of this law are not applicable to the corporate credit cards given to merchants."

Accordingly, the parties can prefer joint and several suretyship for these kinds of credit cards.

5 For the translation see Ivy Williams / Siegfried Wyler / Barbara Wyler; The Swiss Civil Code, English Version, Volume I, Zürich, 1976,

6 See footnote 3.

IV- Conclusion

Since 1926, legal practice has preferred joint and several suretyship due to its efficiency. The legislature has also supported this preference. Thus, the ordinary suretyship has almost never been used.

Nevertheless, by adopting new articles in the Law on the Protection of Consumers (Articles 10 and 10/B), the legislature changed its position by ordering that the ordinary suretyship be mandatory for consumer loans and housing finance contracts.

Moreover, the legislature created a special situation in the Law on Bank Cards and Credit Cards that brings about ordinary suretyship (Article 24, paragraph 5). It is accepted that this disposition is mandatory with the exception of suretyship for the corporate credit cards given to merchants (Article 43).

To summarize, ordinary suretyship has indeed returned to the practice.