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OBLIGATION FULFILLMENT GUARANTEE IN THE LAWS OF IRAN AND ENGLAND

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ABSTRACT

Good contract enforcement guarantee is a bond received in order to prevent any breach of the contract and ensure the fulfillment of the obligations in a favorable manner consistent with the contractual conditions and employer's loss compensation. Good contract enforcement guarantee has become prevailing as performance guarantee and surety bond in England's laws and it is completely well-known in the laws of the foresaid country and it features its own specific verdicts. As for the nature of the Good contract enforcement guarantee, there are various notions offered, including the following: "corresponding to the principle of contract freedom and article 10 of the civil law and mortgaging a debt through setting a condition for the suspension of the result". But, the idea that can better justify the nature of this type of guarantee is the principle of contract freedom stipulated in article 10 of the civil law. Nowadays, the variegated examples of Good contract enforcement guarantee, like "guarantee for taking part in bids and tenders" and "good performance guarantee" have been transformed into common practices in substantial commercial contracts. So, they are required to be studied.

Keywords: *Good Performance, Guarantor, Principal Debtor, Oblige.*

INTRODUCTION

Third party guarantee has been proposed in civil law as the property (including debts and objective properties) suretyship within the format of contractual warrant which is one form of the specific contracts intended by the Iranian legislator. The contractual guarantee of interest to Iran considers exchange of obligation following the lead of the majority of Imamiyyeh Jurisprudents (Ja'afary Langrudi, 2003).

When a contract is signed, one party demands in certain cases a performance guarantee in order to ensure the attainment of the most favorable and most perfect intended outcomes.

Therefore, good contract enforcement guarantee speaks of the idea that a party might be asked to guarantee his good performance and fulfillment of the contractual obligations as well as the compensation of the contingent losses. It is also sometimes the case in some contracts that the obligee tends to have the debtor guaranteed by a third party from the very beginning of the contract enforcement for the probable violations and losses.

Nowadays, such a suspension is common in international contracts and the 1980's international sale of goods convention has accepted such a nature in its article 71. Based on the aforesaid article, if it is proved after the contract was endorsed that a party has left a substantial part of his or her obligations unfulfilled then the other party can suspend his or her own obligation fulfillment (Farbang, 1989).

The guarantee may be actualized in various stages of the principal contract. It is also possible for a guarantee to be demanded when the principal contract is on the verge of endorsement and, in other words, the actualization of the guarantee could be serving the elevation of motivation for the endorsement of the principal contract or it even can happen at the same time with the principal contract endorsement during a general contract. The guarantee might be asked for the entire obligational articles of a principal contract or it can be rendered specific to the principal contracts warranting sum. The guarantee might also be actualized after the imposition of losses resulting from the breach of the principal contract's contents. The guarantee for the good enforcement of the contractual obligations in commercial contracts is usually actualized by means of banks or credible individuals. The questions that are asked in regard of the dissertation topic are as listed below:

- 1) What is the nature of the good contract enforcement guarantee?
- 2) Are such contracts authentic or invalid?
- 3) What are the conditions for the good contract enforcement guarantee?

STUDY LITERATURE

1. *The Nature of the Good Contract Enforcement Guarantee in the Laws of Iran and England:*

Chapter One: the Nature of the Good Contract Enforcement Guarantee in Iran's Laws:

The good contract enforcement guarantee mostly supported by banks as well as by credible real or legal persons in contract works bears the idea that the fulfilment of the obligation subjects of the contract is warranted by a guarantor in respect to an obligee and payment of cash sums, conveyance of a generally specific property or the accomplishment of a certain action might be specified as the guarantee in doing so.

Paragraph One: Good Contract Enforcement Guarantee- A Manifestation of Contract Freedom

The principle of contract freedom has been accepted as a concrete axiom. The principle that is per se resulting from the more general principle of "governance of volition" conveys the idea that it is authentic and influential in a contract between two or several parties in their interrelationships unless the contract articles are found set against public order and good virtues. Article 10 of Iran's civil law, as well, authenticates these contracts unless they are envisioned opposite to the explicit text of the law. Such an explicit disapproval of the law is in fact holding in regard of the contracts established in conflict with public order and/or good virtues. That is because, as author sees it, opposition to the law means opposition to the imperative regulations and the violation of the imperative rules is equal to the breach of the public order.

On the other hand, the other aspect of the idea that the majority of the present good performance guarantees are not included in the semantic domain of guarantee as commonly considered nowadays is that these guarantees are indeed appending of obligation to obligation and not exchanging of obligation for obligation and, as it is practiced in Imamiyyeh Jurisprudence, the will for annexing obligation to obligation within the guarantee contract format causes it to be rendered invalid. But, even in this respect, as well, the guarantee contracts the way they are being currently practiced nationwide are authentic and correct and are qualified for the most of the proofs put forth for the contract authenticity and the contract freedom principle, as well, (considering the article 10 of civil law) confirms it. On the other hand, Iran's business law has



accepted the joint guarantee in its various parts, including in the discussions on the business entities in which case the stakeholders, even the non-partnership companies are realized liable to its creditors in certain cases. The guarantee commitment between the debtors has also been accepted in Iran's business law (Gildashti, 1966).

According to the introductions posited regarding the nature of good performance guarantee from the perspective of the jurists, now before anything, the topic "commitment of a party (obliged person) to a main contract whose accomplishment of obligations has been supported by a guarantor will be elucidated legally; then the nature of the actions taken in this respect will be elaborated case-specifically.

- A) If the commitment subject of the principal debtor (obliged person) is the payment of cash sums such as rent installments or payment of a price in an installment sale contract or a generally specific property, the legal action should be taken as it is commonly intended because, in fact, the guarantor warrants the fulfilment of obligation by the obliged person and the exchange of the obligation has also been actualized in practice. Evidently, in case that the guarantee contract is signed after the endorsement of the primary contract (rent and sale in installment), the guarantee constitutes part of the debt being created even if it is not yet demandable and this is correct and faultless based on the concept opposite to the article 691 of the civil law.
- B) If the subject of the principal debtor's obligation (obliged person) is the actualization of a work and the foremanship of the debtor is not intended by the creditor such as when an individual becomes obliged to build another a house or dig a well or transport a certain goods from a place to another and it is guaranteed by a third party. This is also included by guarantee conceptualization as commonly agreed, to wit exchange of obligation (Safa'ei, 1996).
- C) Some jurists have opined it incorrect if the subject of the primary commitment is the accomplishment of a job wherein the debtor's foremanship is intended by the creditor and s/he is guaranteed by another person (Najafi, 2005).

Chapter Two: the Nature of Good Performance Guarantee in England's Laws

In England's legal system, the good contract enforcement guarantee is a widely exercised practice featuring certain characteristics and it is usually termed performance guarantee and surety bond.

Several points have to be mentioned regarding the nature of the good contract enforcement guarantee:

- A) The good contract enforcement guarantee is a commitment and requirement and it is comprised of three parts: contractor and guarantor (the warranting company, a percentage of the contract sum, real person) and employer (Schubert Lynn, 2003).
- B) Good contract enforcement guarantee is a special type of contract so it has to be like a contract (written) (Wiezoiek Sonja, 2005).
- C) The contract incorporates the guarantor's commitment to an employer in case of default in the primary contract obligations' articles and conditions (Schubert Lynn, 2003).
- D) The guarantee is created within the format of a secondary or ancillary contract to support the obligation fulfillment of a party.



- E) In case that the contractor is found unable to fulfill his or her duties specified in a primary contract, both the contractor and the guarantor will be held liable in a continuous and attached manner.

In England's legal system, the performance guarantee is recognized as a type of styled contract and there is no doubt about its contractual nature.

The Conditions of Performance Guarantee in Iran's laws:

The conditions of such a type of guarantee encompass the conditions of contract, guarantor, obliged person and obligee which will be discussed below.

Chapter One: Contractual Conditions:

As it is stated in the definition of contract in article 183 of the civil law, "contract is the agreement reached by one or several person regarding the fulfillment of certain obligations".

With such a description, contract possesses two essential conditions:

- 1) It is created as a subsequence to the agreement by two or several wills.
- 2) The result and outcome of the agreement is creation of obligation.

Article 190 of the civil law specifies the fundamental conditions of transaction authentication as below:

- 1) Parties' intentions and agreement
- 2) Parties' legal capacity
- 3) A definite subject of the transaction
- 4) Legitimacy of the contract direction

Therefore, each contract is said to be of legal effect when it possesses the essential conditions for the transaction to be authentic (Emami, 1994).

So, when the above four conditions are all found existent in a contract, it will be authentic and of valid effects as determined by law.

"Sharayet" (Persian equivalent for conditions) is the broken plural form of "Shart" (Persian equivalent for condition) which is differently defined by literary men, jurisprudents and syntacticians and scholars of fundamentalism. Literally, "condition" means "contract, treaty, requirement, attaching something to something else" (Beheshti, 1991).

Commonly, "condition" means "commitment and requirement". Such a commitment and requirement might be occasionally independently set and sometimes within the format of a contract or another independent commitment following which it is given a secondary aspect and it will be called "provisio" (Harisi, 2012).

Chapter Three: Qualifications of the Guarantor, Obligated and Obligee

The guarantor, principal debtor and obligee have to be qualified for certain characteristics in order for the performance guarantee to be formed and these qualifications will be surveyed herein.

Paragraph One: Qualifications of Guarantor

The guarantor can be a credible real person and/or a credit firm (legal person). The guarantor has to have the following qualifications if s/he is a real person:

- A) S/he has to be determined in his decision and independent: guarantying abominable actions is invalid (Ja'afary langrudi, 1989).
- B) The guarantor has to have legal capacity for entering the suretyship contract (Emami, 1994). In suretyship contracts, the guarantor becomes committed to the fulfillment of certain obligations and the legal capacity is amongst the essential conditions of the



authenticity of all transactions as stipulated in article 190 of the civil law. So, guarantying the minors and the insane individuals is invalid because they do not have the legal capacity for entering a contract.

If the guarantor is a credit and finance institution in which the individual has an account, the guarantor has to be especially qualified for the transaction corresponding to the article 210 of the civil law. As for the bank surety bonds issued by the banks, they naturally feature legal capacity because they play the role of the guarantor and possess a legal personality (Eivazlou, 2001).

The bank receives part of the amount of money specified in the performance bond from the obliged person (Principal Debtor).

Paragraph Two: Qualifications of Obligated Person (Principal Debtor)

- A) Principal debtor of a performance guarantee contract can be a real or a legal person. Article 7 of the general conditions of contract has also introduced contractors as legal or real persons.
- B) As it was mentioned before, the fulfillment of the subject obligations of a contract is the duty of the contractor. So, the contractor has to have the required ability to optimally and appropriately accomplish the contract goals.
- C) The contractor has to have legal capacity for signing a contract.

Paragraph Three: Qualifications of Obligee

- A) The obligee has to have the legal capacity for entering a contract (articles 210 and 212 of civil law) (Ja'afary Langrudi, 2003)
- B) S/he does not have to be bankrupt or insolvent (Ja'afary Langrudi, 2003).
- C) According to article 6 of the general conditions of the contracts, "employer is a legal person forming a party of a contract ..." Therefore, the employer (Obligee) is a legal person because one of the parties in contract working agreements is an executive organ that assigns on behalf of the government a person, contractor, to the contract subject (Harisi, 2012).

Conditions of Good Performance in England's Laws:

- 1) In England's laws, the guarantee makes the guarantor committed when it is composed in written form in which case it will not run the risk of being envisaged as evidence of baseless promise hence invalidated. Of course, oral guarantee is not always baseless but it lacks the executory sanction (Wiezorek Sonja, 2000).
- 2) The guarantee contract has to be signed by the guarantor.
- 3) Something has to be specified as exchange for the commitment shouldered by the third party in performance guarantee contract (Mofazi, 1977).
- 4) Performance guarantee should embrace definitions, conditions, parties, specified sum of money and an expiration date.
- 5) The guarantor cannot be held committed over the contract term.
- 6) Guarantors' responsibilities are initiated where the principal debtors fail fulfilling their obligations because their commitments are formed for the principal debtor's default in contract enforcement.
- 7) The guarantor's temporal length of responsibility depends on the guarantee conditions. In continuous contracts, the guarantor's responsibilities should be kept credible until the contract is revoked (Wiezorek Sonja, 2000).



- 8) It is set as a condition in the performance guarantee contract that the obligations of all parties should be mentioned.
- 9) It is also set as a condition that if the beneficiary of a contract brings about an amendment in the preliminary obligations, the guarantor has to declare his or her agreement thereto otherwise s/he can refrain from guarantying the performance.
- 10) The obliged person has to have the financial capacity and expertise in implementing the contract so as to prevent losses from coming about.
- 11) The guarantor is responsible for determining the principal debtor's lack of payment and also responsible for preparing and providing all the financial and/or technical aids to the contractor, making arrangements for the surrogate persons to enter a bid or tender for the resuming of the project and/or paying the commitment fines (Schubert Iynn, 2001).

Performance Guarantee in the Laws of Iran and England:

There are three solutions in Iran's laws for the compensation of the losses:

- 1) Determination of compensation rates in the contract before losses are incurred
- 2) Determination of the method of loss evaluation after the losses were incurred and this method is considered as the most evident status in Iran's legal system. Based on this method, any agreement for the compensation of losses after their being incurred is valid unless it is found in conflict to the laws or common practices and the adjudication of the case can be a solution in case of dispute. This is a common method in contracting job agreements and it is applied in the contracting type and counseling agreements authenticated by the management and planning organization.
- 3) The determination of the amount and the quality of compensation by law (such as a court's sentence) and/or mores (implicit determination by the parties)

First of all, it does not matter whether an obligation bond or a definite compensation rate is included as a condition in the guarantee contract with the difference being in that the England laws accept a pre-specified compensation for the contingent violation of contractual obligations provided that it is not exaggerative and punitive; in other words, as it was mentioned above, the pre-specified compensation rate is either termed liquidated damages or agreed damages and the predetermined compensation rate is not enforceable if it is not found as a beforehand and honest estimation of the losses rather a sort of threat and penalty and the plaintiff demanding the enforcement of such compensation rates might find themselves only receiving the compensation for the losses they have been actually incurred. But, as it was mentioned in relation to Iran's legal system, there is no such a constraint and the principle of the parties' contractual freedom necessitates the unconstrained submission of the compensation specified before as the surety bond or as the definite compensation rate for any violation of the contractual obligation even if such a compensation is found a lot more than the losses actually incurred.

Secondly, in cases of obligation unfulfillment, the claim for the compensation in Iran's laws is parallel to the "demand for the exact actualization of the obligation" while this does not hold in England's laws.

Thirdly, England's laws accept compensation for lack of being benefited from the enforcement of the contract while the note 2 to article 515 of the civil procedure of Iran's legal system implies that compensation for the lack of being benefited from contract enforcement is not demandable. This is while it can be perceived based on the interpretation of note 2 to the article 515 of civil



procedure, passed in 2000, that the compensation can also be demanded for cases of lack of being benefited from the contract enforcement in Iran's laws but no compensation for compensation losses or compensation for the losses incurred by not being benefited from the contract enforcement can be demanded. However, it is better for the Iranian legislator to enact explicit regulations pertaining to the claims on compensation of losses resulting from not being benefited from contract enforcement for such reasons as obligation unfulfillment or delay in contractual obligations' fulfillment so that the ambiguities could be removed and the issuance of different verdicts could be prevented.

Fourthly, the difference between the "surety bond", as a sanction for the enforcement of the contractual obligations through setting a condition for the determination of contractual compensation, can be stated as follows: claiming for the surety bond in case it is set as a guarantee for the obligation unfulfillment and or delay in obligation fulfillment is needless of justifying loss incurrance and the claim for the loss compensation can be adjudicated even if there is not specified any definite compensation rate for the losses incurred (including material or lack of being benefited from the contract enforcement) provided that the obligee proves the incurrance of losses; in other words, the conditions and specifications of demandable compensation are to be taken into account beforehand. Although the predetermined sum of money cannot be increased or decreased to extents below or above the actual losses in which case it is similar to the surety bond, both the surety bond and the predetermined definite compensation rates are included by article 10 of the civil law and the parties are obliged to adhere to the stipulations therein.



CONCLUSION

The following results are obtained from the two consecutive chapters presented in this dissertation:

- 1) Guarantee in its specific sense is the very topic introduced in article 684 of the civil law which defines it as follows: "guarantee contract includes the commitment of a person to an obligation that has to be fulfilled by another". Corresponding to article 698 of the civil law, the debtor will be exempted after the debt was guaranteed by a person, guarantor, who becomes committed to repay the debt before a creditor (obligation exchange); but, in England, the guarantee is given an aspect named "obligation annexation" and both the principal debtor and the guarantor remain liable.
- 2) Performance guarantee ensures the obligee of the correct and on-time fulfillment of the contract articles. The losses and contractual violations will not be left uncompensated.
- 3) In order for the performance guarantee to be considered within the format of surety bond, the way it is commonly viewed, the expansion of cause concept from philosophical to legal meaning becomes compulsory.
- 4) Although it is appropriate to analyze the performance guarantee within the format of civil law's surety bond that frees the parties from a lot of difficulties and spending of so much time and high costs in predicting and codifying the characteristics and effects and outcomes of the new contracts and assists the judges in their investigation of the legal relations and issuance of suitable sentences in case lawsuits are filed, on the other hand, the unjustifiable insistence and eagerness in line with this causes the wastage of the individuals' rights from various aspects. That is because the analysis of some examples

within the commonly-accepted surety bond will lead to the invalidation of the guarantee contract while the jurists have to generally accept these contracts as authentic.

- 5) Performance guarantee is not enumerated amongst the styled contracts and it is verified of its nature based on article 10 of civil law and contract freedom principle and volitional governance principle.
- 6) The legal concept “good contract enforcement guarantee”, though not being stated in jurists’ works under such a title, it is well attended to. Such an institution as “obligation guarantee” is the distinct instance of obligation fulfillment guarantee and “tangible properties suretyship” is a jurisprudential example of performance guarantee.
- 7) The principle of contract freedom embodied by article 10 of Iran’s civil law is confirmed by the jurists and they have authorized it in examples like “obligation guarantee” and “tangible properties suretyship”. Since inclusion of these guarantees by the commonly-accepted suretyship format is faced with faults from various aspects, the general proofs presented in this regard have been wholly considered in separation of these guarantees from commonly-accepted suretyships and these examples’ foundations of authenticity have been laid on such general Quranic statements as “Keep Your Promises” and “the Believers are Realized by their Fulfillment of their Vows” based on the idea that accepts the preliminary conditions.

Therefore, considering these foundations and the examples of the good contract enforcement guarantee that cannot be incorporated by the suretyship bond format and feature such expedencies as the guarantee of future debt and/or guarantee suspension and/or obligation exchange, the general format of the private obligations’ necessity (article 10 of the civil law) can be used as a basis authenticating such a type of guarantees.

- 8) Bank surety is one of the most substantial instruments of security creation in various commercial grounds. Nowadays, very few sizeable contracts can be found wherein the bank surety is not used as a guarantee for the contract enforcement. But, the legal status of this surety instrument and the rights and obligations of the parties thereto have not been yet codified within the format of a comprehensive law in our country.
- 9) Good contract enforcement guarantee is completely well-known and customary in England’s laws and it features specific conditions and characteristics and it is envisaged as a sort of contract. But, the good contract enforcement guarantee is not seen in Iran’s legal system as an overtly expressed specific and styled type of contract in civil law and it is only justifiable based on article 10 of the same law. In England’s legal system, the guarantor is a specific company assigned to doing so but the guarantor in Iran’s laws is a credible bank and/or a credit company and or a wealthy and credible person.

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