KOLCUOĞLU DEMİRKAN KOÇAKLI
HUKUK BÜROSU • ATTORNEYS AT LAW

TURKISH LAW BULLETIN March 2017

Issues To Consider When Drafting Guarantee Agreements

Our recent experience in disputes governed by Turkish law shows that parties should be very diligent while drafting guarantee agreements. Omissions that seem very simple may lead to significant problems in later stages, particularly in determining the legal nature of these agreements, whereby confusions arise about whether the agreement is a guarantee or a surety.

A guarantee agreement is an agreement where the guarantor guarantees the performance of any type of agreement. If the beneficiary of the guarantee faces problems such as lack of payment or non-delivery of a product, service or construction, the guarantor assumes the risk of the debtor's failure to fulfill his obligation. The debtor's obligation is separate from that of the guarantor's.

The guarantor's commitment has the character of "guarantee of performance by third party" under Article 128 of the Turkish Code of Obligations. This article of the Code of Obligations is considered in Turkish doctrine as the only basis of a guarantee agreement. For this reason, rules applied to guarantee agreements are mainly determined by doctrine and court precedent. On the other hand, despite the fact that there is no detailed provision in the Code of Obligations stipulating guarantee agreements, "surety agreement" is stipulated under several clauses.

Guarantee and surety are two different types of agreements, but they can be and often are confused for one another. Even if it is explicitly written in the agreement that it is a guarantee agreement, if the parties' real intention is not clear from the wording of a guarantee agreement, courts tend to interpret the relevant agreement as a surety agreement, which provides more favorable provisions than a guarantee agreement for the guarantor. Accordingly, the surety becomes an accessory to the obligations arising from the principal agreement and imposes an ancillary and (depending on the type) secondary obligation for performance. Therefore, the party who expects to be compensated by the guarantor in case of any breach of the principal agreement may face with similar non-performance claims by the guarantor, as if it is a surety agreement. On the other hand, a guarantee agreement imposes a primary and independent obligation, whereby the receivables arising from the guarantee agreement, similar to the bank letter of guarantee, must be paid upon the creditor's request without necessitating any other review.

In light of the above, a guarantee agreement's wording should be drafted with utmost attention, in order to reflect the real intention of the parties. Our general advice, based on the jurisprudence of the Court of Appeals as well as Turkish doctrine, is that the following points should be considered while drafting a guarantee agreement:

- The wording used by the parties should explicitly, without any doubt, reflect that it is a guarantee agreement which has the character of "*guarantee of performance by third party*" under Article 128 of the Code of Obligations; not "surety", which is a different concept.

- This guarantee commitment should be entirely independent from validity and enforceability of the principal agreement.
- The guarantor's obligations should be drafted in a manner requiring payment upon first request, being bound by an unconditional and non-recourse obligation.
- The guarantor should have a benefit in the performance of the underlying contractual relationship between the parties (this condition is generally not expected when the guarantor is a merchant or a company).

Finally, it is worth emphasizing that Turkish Law provisions applicable to guarantee agreements do not provide any special form requirement for guarantee agreements, but surety agreements may be concluded only by complying with important form requirements. Therefore, a legal instrument titled "guarantee agreement" may not be a binding agreement even as a surety agreement if formal requirements are not met.

Begüm Biçer İlikay (bbicer@kolcuoglu.av.tr)

© Kolcuoğlu Demirkan Koçaklı Attorneys at Law 2017