

## The Comparative Study of Liability in the proved law 1311 With the reformed Bill 1390

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**Abstract:** Curiosity for achieving to the new legal issues that need of them is felt further is a reason for the lawyers made them think to new laws. In today's society, Due to the complexity of trade relations Especially at the international level, Creditors for maintaining their own request against bad risks don't hesitate of obtaining any warranty (whether personal or objective such as mortgage guaranty contract) a point that should be noticed is often the guarantees cause that the parties venture to participate into the big deals, And develop the prosperity and business. One thing that has always been disputed by jurists and lawyers, It is the nature of the contract of guarantee. Determining liability for quoting the obligation to obligation or obligation attached to the obligation, relations between them will be different.

[Hassan hiydari, Mozafar Mombeni. **The Comparative Study of Liability in the proved law 1311 With the reformed Bill 1390.** *Nat Sci* 2015;13(3):43-48]. (ISSN: 1545-0740). <http://www.sciencepub.net/nature>. 7

**Keywords:** liability, warranty, guarantee, new legislation, independent warranty

### The meaning and concept of liability

#### The first word: The meaning of Responsibility

Responsibility is a source and People of the word, The term liability (zeman) derived from zemn and according to the areas of application and its application in Arabic, it means commitment, Obligation to Compensating, or commitment to turning back. Also in the Arabic language, it means encompassing and accommodating in something, getting a sponsor, undertaking compensation or reparation. In Persian culture means accepting liability, accepting and taking another loan: Whenever someone hasn't fulfilled his obligation, he undertakes its damage. Jurists called it "commitment" and "undertake", In the common law, it applies to establish and to prove something in the world of credit, guarantee and liability. In terms of legal liability and responsibility, it means committing of the object Upon another and under taking the object, Responsibility (zeman) with special meaning is the contract of guarantee and a general sense that includes both the draft and Kfat.

#### Speech II: Definition of liability in law

1. Civil Rights: Article 684 of the Civil Code states: "Contract of guarantee is that someone under takes someone else's property obligation to take, commitment is called responsibility, Other side is called lah guarantor and someone who Bonded is called Anah guarantor. "In the Article 307 of the Civil Code, Legislator to following of the Islamic Jurisprudence recounts these cases as an enforcement liability.

2. In the business Law: Guarantee is the obligation of a third party to one or more of authorities

of general draft of a draft giver or endorser at the maturity that will pay the payment of draft. The person who makes such a commitment the sponsor and the other side is called lah guarantor and someone who Bonded is called Anah guarantor.

In a reform bill of 139, thenew reform bill in its own fourth part paid to articles 122 to 171 of the topic of liability, in this bill the contract of guarantee is not defined generally. The establishment of liability had a customary and institutional establishment in human is required. And so In terms of religion and law schools, despite differences in the causes and circumstances, the general principle of liability is formally recognized.

#### Juridical-legal nature of liability

The first speech - the nature of the liability at law  
Imami jurists' famous speech is based on contract of liability, and they have been frankly referred to the contract in defining of general liability in their own works. But in among Jurists contrary to popular opinion they assumed responsibility to unilateral obligations. In this way for the legal action, acceptance with satisfaction of lah guarantor has not been provided.

#### The second speech - the nature of liability in law

In business law, although the legislator hasn't defined the liability but noticing to the special rules and provisions of this contract in tenth part of the law clearly indicates the nature of the contract, because around the contract was the same guarantor, lah guarantor and Ana guarantor, which in this case is no different from civil law. General rules and provisions of this contract are common in both laws, the nature of

liability in civil law and unit business bases on the contract.

### **Characteristics, conditions of contract liability**

#### **First topic – features of guaranty contract**

Guarantee contract is a contract whereby the person against the creditor and with his consent, under takes other person duty and accepts transfer of it over his own obligation. "

#### **The second issue - the circumstances around the liability**

The first: sponsor

1, the guarantor who commits to addressing duty in obligation is the original owe, On the one hand, alah guarantor declared their consent to the fall of the duty in the obligation of the debtor. As a result of this demand and accepted that the duty extracted of obligation of alah guarantor and to the guarantee obligation is transferred.

2. solvency of guarantee is not the conditions of guarantee, As prescribed in Article 690, The guarantee is not a condition that guarantee to be rich, But if alah guarantor at the time of liability was unwise to debility of guarantee, he may terminate the contract of guarantee, But if the guarantor after the contract wasn't national lah guarantor won't be optional.

3. In the third chapter, it is reviewed that the contract of guarantee is based on carelessness and leniency, and science overview will suffice the guarantor to primary parties. in this chapter Section 695 prescribed that, "descriptive knowledge of guarantor isn't essential to lah guarantor or anah guarantor.

4. In Imami jurisprudence, The sponsor's bankruptcy prevents not the proper contract, but lah guarantor wasn't within the Ghrma Board and its explanation is that tflis causes incapable of debtor in seizing his property and no his own obligation, and each right that is effective in Confirmation of his due entitled to the board of creditors.

5.

#### **The second: lah guarantor**

We know that lah guarantor with accepting guarantee causes that his demand falls down from eneh guarantor and transfers to guarantee obligation. And this is the kind of disposition of property and assets and It needs to legal capacity. one of conditions of lah guarantor is no his bankruptcy. although because of the contract of guarantee against the guarantor is no commitment for the owed obligation but the contract causes relocation of the debtor and transfer of duty from obligation oftener guarantor to guarantor that it is seizure in the own property. In particular, the assets of guarantee of principal debator has less value it will cause losses to creditors.

#### **The third: eneh guarantor**

With regard to this that the eneh guarantor isn't The contract of guarantee, his satisfaction in guarantee of contract is not effective. It is stated in Article 685:in the guarantee satisfaction of the debtor isn't necessary, the owner of duty can make any occupation in it although the debtor does not agree with it.

2. the satisfaction of eneh guarantor isn't condition of realization, It is thus stated in Article 685: in guarantee, satisfaction of the main debtor isn't condition. So it is possible that someone who hasn't the capacity for a deal or has on seizure of his own property has also guaranteed that Even with the opposition and his exclusion makes the liability, As far as it is possible that the eneh guarantor to be Someone who is not alive. As prescribed in Article 987: "Guarantor of the insolvent and dead is correct."

#### **The third topic: works of liability contract**

The first speech - the effect of the law of liability and rights

First Paragraph: in the Jurisprudence

A) I Imami Jurisprudence: Imami jurists' s famous comment is about the effects of liability on the obligation quote, it cause that an Indebted obligation transfers to a deputing obligation.

B) Sunni jurisprudence: Unlike the majority of Sunni jurists Imami jurists believed that the contract of liability causes to be obligation to obligation, and evidence of its own documents is as verbal, intellectual and rational knowledge.

#### **Section II: in Rights**

A - Civil Rights: quoting obligation shouldn't be the nature of the contract of liability that is related to public order, The opposite condition is null and void, this order is follower of rules and parties will. And it is possible that The parties base on Article 10 of the Civil Code agree that guarantee obligation is pledge request of creditor, and even the main debtor or guarantor has the responsibility of a transverse solidarity that these cases are in line with accepted norms, According to Article (225) is penetrative and valid.

C) in Business Law: lawyers about the effect of liability in commercial law didn't comply of a single approach, In this section, a review of these ideas will be discussed, Some scholars believed in the effect of liability in the obligation of commercial liability, then the absolute liability that in business laws is like the civil laws causes obligation innocence and requirement of guarantee in paying the duty, But this effect is with inserting the opposite condition or with improving changeable laws and getting liability partnerships either longitudinal or transverse.

**Speech II - Effects of liability between the parties**

Section I - Effect of guarantee between the sponsor and lah guarantor

A) quote of obligation to obligation: Legislators have prescribed in Article 698 after the guarantee was correctly, obligation of eneh guarantor and guarantee obligation of lah guarantor was busy it means that in our laws, the absolute liability is an expression of obligation, and it has direct effect on obligation innocence of eneh guarantor and transfer of duty to guarantee obligation.

B) Appendix of obligation to obligation: in jurisprudence instead of solidarity appendix of obligation to obligation is applied, concepts of appendix of obligation and quote of obligation previously mentioned and briefly explained that if the main duty lies in guarantee obligation and eneh guarantor, guarantee obligation and eneh guarantor attached to paying the duty and appendix of the obligation is said two forms.

C) Sacked liability of partnerships: unlike the liability based on the obligation quote that Aqalh causes to harm to the main debtor for the restoration of the original duty. in this kind of the liability, Agalh of liability doesn't affect on the duty of eneh guarantor .because the liability is pledges of creditors that itself can neglect it with agreement of the sponsor. And it reduce its debt guarantees. Regardless of ability of Aqalh, it can be based on the terms of the contract, and is allowed to terminate the established parties.

**Second paragraph, the impact of liability between the guarantors**

Different guarantors may assume in both cases, In the case of several people from one person and for another debt are guaranteed, in the case that a person guarantees another person and second person guarantees the first, Likewise, other persons guarantee their previous guarantors. and called continuum, while eneh guarantor guarantees the sponsor.

Guarantee in the Business Law and its implementation with Reform Bill 1390

First topic - Generalities about liability in commercial law and reform bill in 1390 Article 122 of the draft for a new business pays attention to this topic and commercial sponsorship is divided into two independent and normal warranty, With this description the normal guarantees maintain the connection and its own association with debt and the main commitment. Article 139 also the commitment made by independent guarantee against the beneficiary's obligations is under the guarantee of the applicant's commitment to the issuer (guarantor). in Article 140 of the original contract, the legitimacy of the issue or the deal and like these in the validity of the warranty in the business is ineffective.

**Section II – the review of the liability in the trade law materials and reform bill in 1390****1) The definition of the liability**

Article 124 of the bill states that "ordinary commercial guarantee is a contract that by it someone against another under takes commitment for the second person then so commitment called a sponsor and the other called lah guarantor and the third called eneh guarantor or the main commitment. Article 136 of the Act in definition of an independent guarantee states: 'independent warranty is commitment that monetary, authority, irreversible and independent, Whereby the issuer's warranty (guarantee) by the applicant (Nh guarantor) against the beneficiary (lah guarantor) and with his agreement under takes it. "

Partnership or no partnership of commercial Warranty

Article 402 of business law states that: when sponsor can demand of lah guarantor that he refer to the main debtor and if he has received no demand, he refer to him that between the parties such as the order(whether the contract either in their own warranty) is thus required. " Article 402also states that: in all cases that made by laws or the agreement of private contracts of sponsoring Partnerships, creditor can refer to guarantee or the main debtor or after referring to one of them and non-receipt of all his request or the rest of it can refer to the other.

The principle of partnership s responsibility that adhered in draft, check, companies of partnerships, in Article 403, is reformed: in all cases that made by laws or the agreement of private contracts of sponsoring Partnerships, creditor can refer to guarantee or the main debtor or after referring to one of them and non-receipt of all his request or the rest of it can refer to the other.

**Multiple guarantors in contract guarantees**

In this case, Article143 of reformed bill states that: guarantee of a part of commitment is legal so if several people are sharing a commitment of a person to be guaranteed, lah guarantor can refer to only somewhat the share of each one of them, whenever the share of each of the several guarantor is not specified, apparently they have equal share. Otherwise in here is something different.

Commitment or lack of commitment of guarantee to the payment of bankrupt businessman

In this regard, both business law and reformed bill have stated cases that are verifiable .Article 405 stats that buffering death the main debt of guarantee isn't vital to payment. even though because of death and bankrupt, the main debtor is included .

### **Consequential of condition and prior notification to the guarantee**

Article 407 states that if taking the claim of the main debt is subject to prior notification. This notification should be done attribute to guarantees. also Article 129 of the new reformed bill states that if doing the main commitment is subject to condition, this condition is valid to guarantee

### **Clearance guarantee with Antegha of the main debt**

In the current business and as well as in ordinary commercial sponsorship in the reform bill, the important works of consequential of obligation of contract attribute to the main commitment, and to get guarantor because of falling debt

Requirement of Lah guarantee to receipt of the demand or waiver of liability

One of the options that in trade law for guarantee anticipated but is not in civil law, This is that guarantee is free when the main debt was, Lah guarantee requires that receives or seeks his own demand or deters from liability. doing debt means that it is time to pay it Or the equivalent of 421 the sentence of bankrupting businessman issued and his debts with regard to discounts rather to time change into the present time. In this regard, Article 409 provides that: when debt is paid, guarantee can force La h guarantee to receive his demand or to cancel it. Even if liability is moral. Also Article 130 of bill states that with paying commitment and guarantee s function for doing it, Lah guarantee is forced to accept to accept it, otherwise guarantee will be canceled. Although guarantee is moral, in this case, pledge of debt will be refunded.

The effect of the refusing Lal guarantee of receiving the demand

In Article 410 provides that refuel of Lah guarantee of receiving the demand or refusing of surrendering to pledge. If debt was with pledge it will instantly absolve guarantee by himself. In this Article achievement of one of the following case causes innocence of guarantee.1. the refusing Lal guarantee of receiving the demand2. refusing of surrendering pledge to the guarantee.

Submit of documents to the principal debtor

Prescribed in Article 411:after guarantee paid his debt . Lah guarantor should give documents that are necessary for referring guarantee to eneh guarantor. and if the main debt has pledge, it should be delivered to guarantee and if the main debt isn't rational, eneh guarantor has to transfer pledge to guarantee.

The third topic - new materials of the reformed bill to complete the trade laws

Article 126 of the reformed bill is cases that is recently stated about liability. And the reformed bill

could help to lawyers and legal community with the expression of the matter . Article 126 of the reformed bill provides that: in the case that commitment is upright to a person and its guarantee has no effect unless with satisfaction of Lu guarantor . in the case that guarantee cannot refer to eneh guarantor, In this case, Article of 132 and 133 expresses the bill of materials that guarantee cannot refer to eneh guarantor.

Section IV: independent commercial warranty on new reform bill

The first speech - definition of independent commercial warranty

Article 136 of the new reformed bill provides the definition of independent commercial warranty.1. warranty is an Independent, necessary, non-transcending, monetary and authority commitment whereby the issuer warranty (guarantee) to the request of the applicant (eneh guarantor) against the beneficiary ( lah guarantor) and with his agreement under takes them.2. Mutual guarantee is guarantee that with regard to the requests of the guarantee for guarantying of repayment that should be paid according to the warranty pays to lah guarantor and it is issued in favor of the guarantee.3.guarantee includes mutual guarantee and someone who verify the warranty.

The second statement - Terms of independent commercial warranty

Third speech – provisions of the independent warranty in the new reformed bill

Article of 139 of the bill, the independent warranty as it is clear with its name suggests guarantee that apart from the original contract. and the commitment that is the independent guarantee in the beneficiary. It is independent in the applicant's commitment against exporter.

Section Five - guarantee of leniency contract

Prescribed in Article 495: If one or more persons guaranteed all or part of the contract, Creditors can implement all or part of a contract that has a guarantees. And that part that hasn't guarantee can be canceled, and if the number of guarantees is a lot, their responsibility is partnership.

### **Section VI - guarantees on commercial papers**

We accept that the guarantee in the business of commercial papers has taken a big step in the ease of business activities. The new reform bill has paid more detailed to the discussion of guarantee in the commercial papers, and it has brought more or less useful bills of materials both the check and promissory notes .and it is somewhat able to overcome the shortcomings of the Commercial Code.

## Conclusion

Crystallization, objectivity up of legal, legal issues and the curiosity of the community so lawyers for reaching to the unknown legal issues have to create the up today business issues. When judicial security establishes more and more, and justice will be conducted more accurately, the legal texts of some of the ambiguities and contradictions are less, one of these legal texts which seem not to be unambiguous, and in commercial laws has been paid them generally, Liability and warranties in the business law is discussed. . Although our law has taken from the French Commercial Code and the opinions of jurists, but it seems that trade law, consequently the legal community and the judicial system of the country suffers from defects. Our business law with regard to 402 and 411 of the warranty issue, left many ambiguities and shortcomings in relation to lawyers, The doctrine and legislators decided to put the new laws such as the reformed bill in 1390 and tried to resolve such problems. The reformed Bill 1390 in its fourth chapter deals with the issue of guarantees and Article 122 to 171 are devoted to this topic, In Article 122 of the bill, Legislator divided guarantees into normal and independent guarantee, and then each material is discussed.

Briefly, it should be said that the liability as one of the personal guarantees (the mortgage as a guarantee of objectivity) of ancient days had a significant role in the process of trading and social relations. Today, due to the expansion of domestic and international transactions it has more importance, Because of the complexity of trade relationships, especially at the international level, Creditors will have to seek to protect their demand against bad risks of getting non receipt, they don't neglect both personal and objective documents. in fact such as guarantees cause to develop transactions and business activities . But what kind of liability would be better to achieve these goals is important. Because it is based on the obligation quote or the obligation attached to the obligation and it affect on Relations between the parties of the contract. On the other hand, The purpose of the guarantee of accepting the guarantor is not to be directly attributable to the debtor and the principal debtor obligation is freed against Mosharo aleh. It was his intention and purpose that for the debtor creates credit and makes guarantying and puts it besides eneh guarantor. in case of non-payment of the by eneh guarantor it acts as a payment of debt. if it isn't to the case how many people will be willing to guarantee. And the criticism that lawmakers plan to adopt such an approach leads to strand the part of the Act. And with knowledge that this context is the absolute opposite conventions and is inconsistent with the purposes and intentions parties. With the status of materials such as

402 and 403 Consequently trade law incorporates the obligation attached to the obligation. in fact Mitigation measures and keeps the promise of Imami jurists that People can with adherence to the regulations reach to the results of the obligation to obligation Although this isn't a real alternative social and legal solution arising from such a unusual procedure. It should be noted that the legislation in business law Although he stepped over general belief of the effects of this contract, And the consent parties expressly in the kind of effect are valid Although this position is the effective in transparency of effect of guarantee .but with regard to the lack of mentions in the effect of liability and the silence of legal rules and provisions related to trade in the most desirable effect are not guaranteed. In addition to these, In each of the civil and commercial law, Requirement of absolute liability that is the obligation to obligation quote has become necessary as a result of signing the partnership, and legal information, and Annex is necessary to this condition, however, the majority of the parties to the contract have been deprived of legal information, and based on the assumptions of the discussed customary transaction, After noticing to a legal point of view, the high commitment under takes transfer of the obligation to the obligation to guarantee. It causes astonishment and surprise and the unexpected and unreasonable assignment.

Fortunately, new legislation has been able to overcome such problems. And with stipulation in Article 123 it ended to all the problems and theories of commercial warranty of obligation attached to the obligation and the obligation laid obligation quote. with the mention of Partnership of commercial warranty, a big Step in the integration of the objectives of parties and business rules of the guarantee has been done, in this article stipulated that a commercial guarantee is a guarantee of partnership. And stated that warranty guarantee can be pledge of eneh guarantor no as a replacement for his debt. Then we see in the new bill that the legislator with seeing the realities of the enclosed contract of obligation accepts the liability theory. As it should be in its principle.

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2/21/2015