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THE IMPACTS OF THE CONTRACT OF GUARANTEE

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Abstract- Guarantee is one of the specific contracts. In order to give advantage to the debtor and reduce the pressure of the creditors, the guarantor undertakes to pay in place of the debtor. Whenever the guarantee takes place without any clause, it will lead to the acquittal of the main debtor and transfers the debt to the obligation of the guarantor. What we investigate in the present research is the effect of guarantee among its two parties. Although the contract of guarantee is concluded between the guarantor and the creditor and the debtor plays no role in the realization of guarantee, for the sake of the richness of discussion and having in mind that the legal relationship between guarantor and debtor cannot be considered as something outside the effects of the contract, and given that the consent of the debtor is liable to legal effect, the relationship between the guarantor and debtor has been studied and thereby the findings of the research are innovative, considerable and substantial.

Keywords- transfer of obligation, guarantees, consent of debtor, discharge.

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Introduction

Lexically, guarantee denotes different meanings such as obligation, civil responsibility, obligation, liability and bailment. In the Islamic jurisprudence and law, the term guarantee is used to denote two concepts. In one concept, guarantee is used as a general meaning which encompasses every kind of commitment. The obligation of the guarantor in paying to the creditor, the obligation of assignee in paying to the creditor and the obligation of the surety in summoning the principal in a contract of bailment are all the applications of the term guarantee in a general context.

However, if guarantee is referred to the obligation of the guarantor for undertaking the debt of the debtor and paying to the creditor, then it will be called guarantee in a specific context. What has been studied in the present research is guarantee in the second meaning.

Guarantee is a consensual contract and as soon as a compromise is reached between the guarantor and the creditor, the debt will be transferred from the debtor to the obligation of the guarantor. The commitment and obligation of the guarantor for paying the debt of the creditor is subject to a debt which the debtor should pay to the creditor and this is famously called the subordination of the guarantee. The contracts of assignment and bailment are of this type, as well. Guarantee, assignment and bailment which are closely similar to each other, because in all of these contracts, a third party undertakes an obligation with regards to the creditor. However, there are also differences which make them distinct from each other. The nature of guarantee demands the transfer of debt while assignment may sometimes include the transfer of debt and sometimes a mixture of the transfer of debt and active debt. Bailment is commitment to person and the summoning of the debtor while guarantee is commitment to property. Moreover, bailment is actually a security which has been arisen for the claim of the assignee while guarantee does not have a security-oriented nature based on the theory of transfer.

The first impact of guarantee is the transferring of debt from the obligation of debtor to that of the guarantor. Much discussion has been made in domestic and foreign papers and studies about the effects of guarantee; however, there are still ambiguities with regards to the impacts of guarantee. As a result, the issue has been investigated in an in-depth manner in the present research with an emphasis on law and jurisprudence with regards to a number of cases about which the Civil Law of Iran has been silent and the lawyers have contested less. In the present research, questions such as whether the agreement of guarantor and creditor will influence the object of guarantee, or whether a guarantee to a value more than the amount of debt can have an effect in the relationships between the guarantor and debtor, or that if the creditor receives a mortgage from the debtor in place of a commitment for which he is committed to the creditor if a third party undertakes the payment of the debtor and the fate of the security bond have been investigated and explored.

The Effect of Guarantee between Guarantor and Creditor

The Transferring of Obligation and Exoneration of Debtor

In contrast to what some Immamiyah jurists say [1], and as Malik, Ahmad Hanbal and Shafe'ei have defended the invalidity of the consent of creditor in realizing the guarantee and have considered it as unilateral legal act [2], the Civil Law has considered it as a contract following the viewpoints of the majority of Immamiyah jurists.

In Civil Law, guarantee is beneficial to the transfer of the obligation. Immamiyah jurists believe that the effect of guarantee is tantamount to the transferring of the obligation of debtor to that of the guarantor [1]. Therefore, with the conclusion of the contract of guarantee between the guarantor and the creditor, the debtor will be acquitted of obligation and the guarantor will be indebted. The point that the authors of civil law have paid an attention to and followed is contrary to the viewpoint of the Sunnis who believe that the result of the guarantee is the annexation of obligation to the obligation of the debtor [3]. The Civil Law confirms this and stresses in the Article 698 that "once the guarantee is carried out accurately, the obligation of the debtor will be acquitted and the guarantor will be indebted to the creditor."

Therefore, after the realization of the guarantee, the debtor will not have any commitment to the creditor anymore. As a result, his acquittal will be meaningless and insignificant and will not have any legal effect and will be tantamount to the fact that a person acquits somebody who is not indebted to him at all. The Article 707 also emphasizes on this rule and stipulates that: "if the creditor acquits the obligation of the debtor, the guarantor will not be acquitted unless the purpose is acquittal from the principle of debt."

The doubtfulness of some lawyers regarding the second part of the aforementioned article is pointless. They ask that "don't the contents of the article indicate that the lawmaker hasn't considered the debtor as a third party even after the conclusion of the contract and doesn't accept the transferring of the obligation?" [4]. It should be said in response that if the Civil Law hadn't accepted the theory of transferring and believed in the annexation of obligation to obligation, the acquittal of debtor should have resulted in the clearance of the obligation of the guarantor because guarantee is subject to the existing debt to the obligation of the main debtor and with the clearance of his obligation, the contract of guarantee will expire as well. However, as it's clear, the aforementioned article does not stipulate such an effect but refutes the theory of annexation. As a result, the second part of the article does not mean that for the main debtor, the indebtedness of obligation has been presumed; rather, it indicates that whenever the creditor discards his claim, the guarantor will certainly be acquitted. Since the commitment of the guarantor is secondary to the debt of the main debtor and this is called the subordination of the guarantee. Therefore, if the purpose is acquittal from the main debt, the obligation of the guarantor will be acquitted; however, it's evident that this purpose should be ascertained because the main supposition is the non-acquittal of the obligation of the guarantor and it's up to him to demonstrate the opposite.

The Continuance of Guarantees

The main question is that will the securities and bonds be released as a result of the transferring of the debt if a guarantor undertakes the payment of the debt or will it remain in place and be transferred along with the debt? The answer to this question is clear according to those who believe that the effect of guarantee is equivalent to the annexation of obligation to obligation and there should be no doubt about the continuance of the guarantees. Because when according to the aforementioned theory the debt is upon the obligation of the main debtor, the guarantees and securities will also remain intact and will not be dissolved.

However, based on the theory of transferring, the Immamiyah jurists have given different answers to this question. The majority of the jurists believe that the guarantees of the debt don't remain in place after the transferring [5-8]. Some others, however, have considered accepting this theory difficult and believe that dissolving the guarantees after the debt is transferred would be problematic. The Civil Law has presented forward an explicit verdict in this regard. Some scholars believe that the guarantees will remain in place [9-11] and some others have confirmed the viewpoint of the majority of the jurists [12,13].

It seems that we should confirm the idea of those who have ruled that the guarantees may remain in place, because the nature of the guarantee is the "transferring of the debt", not the transformation thereof. In the transformation of the obligation, the main obligation will be dissolved and another obligation will take its place while in the transferring of the debt, the main obligation will not break up and only the object of debt, that is the debt, will be transferred from the obligation of the main debtor to the obligation of the new debtor. As a result, in the transformation of the commitment, the guarantees will be disbanded with the downfall of the first commitment, because the guarantees do not have independent legal entities and their existence depends on the presence of the obligation itself; however, in guarantee which is the transferring of the debt, the debt will not disappear and only its place will change and the debt will be transferred to the obligation of the guarantor with all of its consequences and impacts.

Guaranteeing Something other than the Object of Debt

This discussion deals with the assumption that the guarantor and the creditor change the object of debt as a result of a mutual consent and the guarantor promises to give the creditor another material instead of the object of the debt. For example, someone owes 1 tone of rice to another person and a guarantor guarantees him for million 20 Rials which is contrary to payment to a material other than the object of debt, because in payment to a material other than the object of debt, the object of guarantee does not change and the guarantee takes place with the same object of debt and in time of the fulfillment of the promise, the obligation changes and the transformation of commitment happens.

Some jurists don't consider as permissible guaranteeing something other than the object of debt and say that guarantee is the transferring of obligation and it's not possible to transfer to the obligation of the guarantor something which has been demonstrated to the obligation of the debtor [14]. Conversely, a group of scholars have ruled that such a guarantee is effective [1]. The Civil Law is silent in this regard. The majority of the compilers of Civil Law have also considered such a guarantee as effective and said that this guarantee would not be confined to the transferring of debt and contains a "transformation of commitment" as well [9]. However, they have refused to elaborate on this issue and have not contested the aforementioned action which is made of two actions.

The first question which comes to mind in this regard and may be challenged or questioned is that the transformation of commitment by changing the object of debt takes place with the agreement of creditor and debtor such that the parties agree to bring into exist-

ence a new commitment with a new subject while in our supposition, no agreement or mutual consent has taken place between the creditor and the debtor, but the agreement has been made between creditor and the third party (guarantor), so legal effect should not be applicable to such an agreement. So, how should we consider guarantee to something other than the object of debt a combination of transferring the debt and transforming the obligation and rule that it would be effective?

In response, it should be said that guarantee to something other than the object of debt is not a mere commitment, but the transferring of the debt is based on the contract of guarantee which is accompanied by the transferring of commitment.

Secondly, although the transformation of the debt takes place with the agreement of creditor and debtor, as a result of guarantee, the parties of the contract are creditor and the third party and the third party will have legal influence as long as its effect is applied to the parties of the mutual consent. We accept that wherever the consequences and impacts of this mutual consent affect the third parties and debtor, it will be ineffective. Having in mind this issue and based on the nature of the transformation of commitment and the impact of the will of debtor, this important issue will be discussed in the section of the return of guarantor to debtor. Therefore, it should be said that such a guarantee is valid but the mutual consent and agreement of the creditor and guarantor in changing the material of the debt cannot affect the debtor and it's not plausible to oblige him to pay the guarantor what he has paid the creditor unless he gives consent himself. So, it should be added and stressed at the end that if the permission of the debtor affects both the contract of guarantee and transformation of the commitment, then the guarantor can return to the debtor for what he has paid to the creditor, but if the permission of the debtor is only limited to the contract of guarantee, the returning of the guarantor to the debtor will be only permissible for claiming the object of the debt.

Guaranteeing Something Less or More than the Debt

When we have accepted a guarantee to something other than the object of debt, we should not be doubtful about the validity of guarantee to a portion of debt or something less or more than the debt. We first discuss about the guarantee for something less than the debt. For example, if someone has a claim of million 50 Tomans and a third party guarantees million 20 Tomans of it, unquestionably such a guarantee will be valid and effective.

What is liable to discussion and exploration in this supposition and the Civil Law compilers have contested less about is that now that we have accepted the accuracy of guarantee to something less than the debt, will guarantee to something less than the debt indicate the commitment of guarantor to a portion of debt or is an evidence and incidium that the creditor has absolved his right vis-à-vis the remaining part which the guarantor has not guaranteed? In other words, does guarantee to something less than the debt indicate the acquittal of the obligation of debtor from the whole debt or has his obligation been acquitted to the same extent that the guarantee has taken place about it? The Civil Law of Iran has been silent in this regard. However, it should be said that if the contract of guarantee has been concluded in an absolute form and there's no evidence, what will prevail is the non-clearance of the obligation of the main debtor regarding the remaining part which has not been guaranteed, because the indebtedness of the debtor is assured and in case of uncertainty, the survival of the debt and indebtedness of the debtor will be authorized unless there's a reason for his acquittal. Moreover, the surface of the contract of guarantee in which the guarantor will guarantee only a portion of the debt can be a reason for the validity of this claim. As a result, the creditor can return to that very portion, but with regards to the remaining part which has not been guaranteed, the right of recourse of the creditor to the debtor will remain in place unless the creditor accepts the realization of guarantee provided that the whole debt would be guaranteed for a lower value and in this case, the return or recourse of the creditor to debtor will be discarded. However, with regards to guarantee to something with a higher value than the debt, it might be contested that this contract is contrary to the objective of guarantee. How is it possible that the same debt or more than it be transferred to the obligation of the guarantor?

In this regard, it should be noted that the debtor will not ever be held responsible to pay an amount additional to the main debt and the contract between the guarantor and the creditor is effective and influential among them. Among the jurists, the author of Oravth-ul-Vosqa has proposed such a guarantee and considered it effective. He states that the return of guarantor to debtor is only permissible when he wants to claim the debt, unless the debtor has allowed the guarantor to add to the value of debt [1]. In the Article 714, the Civil Law has also taken the same measures and stipulated that "if the guarantor pays to debtor more than the value of debt, he is not allowed to return to claim the additional value, unless he is permitted by the debtor to do so."

Sight Guarantee and Liability due at a Future Time

If the guarantor undertakes the sight debt as a liability due at a future time by saying that, for example, "I guarantee the debt of that person and will pay it in one year from now," there's no doubt and uncertainty about it among the jurists [15-17]. The Civil Law has also emphasized on this point in the Article 692: "in the sight debt, it's possible that the guarantor specifies a fixed period for it. Applying the issue of suspension in guarantee to the aforementioned discussion is out of question, because guarantee causes the suspension of debt, not the suspension of guarantee. Accordingly, such a guarantee is in favor of the guarantor and the debtor, since it has given more time for the payment of the debt to the debtor, because even if the guarantor pays the debt to the creditor sooner than the deadline, he will not be entitled to return to debtor who has permitted the liability due at a future time before the arrival of the deadline.

In this regard, the Article 716 of the Civil Law stipulates that "if the debt is a sight guarantee, the guarantor can return to the debtor whenever he pays the debt even if there's time for the payment of the debt and the deadline has not arrived unless the debtor has permitted the liability due at a future time. Moreover, from the other hand, the creditor cannot return to the guarantor sooner than the deadline by referring to the fact that the debt is a sight guarantee. That's why the Article 702 of the Civil Law has stipulated that "whenever the guarantee has duration, the creditor cannot claim his active debt from the guarantor before the expiration of the time even if the debt is a sight guarantee."

However, if the guarantor guarantees a liability due at a future time in the form of a sight guarantee, like when a third party tells the creditor that "I guarantee to pay to you today the amount of money which somebody owes to you and must pay to you six months later," then such a guarantee will not be valid, because the obligation of the guarantor is auxiliary to the obligation of the debtor and cannot be additional to it [18]. Furthermore, if a guarantee becomes a

sight guarantee, the right of the creditor will increase and this will not be an addition to the obligation of the static debtor and such a guarantee will be a representation of a guarantee for non-existence liability and is doomed to invalidity [19,20].

The Civil Law in Iran has considered such a guarantee as valid in the Articles 692 and 703 following the tradition of renowned jurists [6]. However, in the discussion related to the return of guarantor to the debtor, we can raise this question: in the sight guarantee, can the guarantor return to the debtor right after paying the debt or should he wait until the deadline of the debt has arrived?

In response, it should be said that if the permission of the debtor simply deals with guarantee in an absolute form, then the guarantor can return to the debtor only if he has fulfilled his obligation and the deadline of the debt has arrived; however, if it's demonstrable by evidence and indicium that the permission of the debtor to the guarantor has not only been a permission to guarantee in an absolute form but a permission in the sight guarantee form, then the guarantor can immediately return to the debtor after paying the debt and claim from him what he has paid. Therefore, what prevails is non-permission to sight guarantee unless the opposite is proved, because immediately upon the conclusion of the guarantee contract, the obligation of the debtor will be cleared and his permission is equivalent to the return of the guarantor to him without any implication that the main debt has turned into a sight guarantee. The Civil Law has also chosen the same mechanism in the Article 715 and stipulated that "whenever the debt has an expiration date and the guarantor pays it before the deadline, he cannot claim the debt as long as the debt has not turned into a sight guarantee."

The Impossibility of Bilateral Discharge

Guarantee is a consensual contract and is realized as soon as the will of guarantor and the debtor is initiated and the impact of contract which is the transferring of the obligation of debtor to that of the guarantor will be applied to it. Some jurists permit the bilateral discharge of the guarantee [14]. However, in criticizing this viewpoint, it should be said that after the contract of guarantee, the obligation of the debtor will be cleared and the bilateral discharge of the guarantee will indebt him once again. The indebtedness needs cause and it's evident that the bilateral discharge of the guarantee cannot hold accountable the non-parties of it. In other words, the contract of guarantee leads to the commitment of the guarantor and if the absolved debt is about to return to the previous debtor, a cause should be created so that he might be indebted, for example the bilateral discharge should be done with the consent of the debtor. The majority of the compilers of Civil Law are in agreement and accordance with this conviction [9]. With this reasoning, the inaccuracy of the conviction of those who believe that bilateral discharge is possible in guarantee and said that the obligation of the debtor has not been cleared from all aspects and the contract of guarantee had not dropped the right of bilateral discharge for the contractors will become evident [13].

The Impact of Guarantee between Guarantor and Debtor

The Necessity of the Permission of Debtor in Guarantee

We have already said that the debtor does not play a role in the realization of guarantee and the contract of guarantee will be concluded upon the consent of the guarantor and the creditor. However, the consent of debtor has a legal effect from the viewpoint of the eligibility of the return of the guarantor to him. The Article 720 of the Civil Law stipulates that "the guarantor, who has made a guarantee with the purpose of a pious act, is not entitled to return to the debtor." The logic of this article is certainly true; however, if we accept the opposing concept of the aforementioned article, we have considered the criterion of the validity of lawmaker in the return of the guarantor to the debtor as the purpose of the guarantor and such a result is absolutely incompatible with legal principles and it cannot be perceived that the purpose of someone will entitle him to return to somebody else.

In our law, the principle is that everybody can pay the debt of another person, but "someone who pays the debt of another person can return to him if he is permitted; otherwise, he cannot return without permission." (Article 267 of Civil Law). So the purpose of pious act deprives the payer of the right of return but the purpose of return does not endow him any right. The renowned Immamiyah jurists have discussed the necessity of the permission of the debtor for the possibility of the return of the guarantor to him [1,7,8,19]. The jurists of the two religious branches of Shafi'i and Hanafiyyah also hold the same viewpoint [21,22]. The interpreters of Civil Law also believe that the guarantor cannot return to the debtor without permission even if they don't guarantee with the purpose of pious act. In other words, they don't consider the purpose of the guarantor a criterion and index for returning to the debtor [4,9,13].

Now in the modality of the right of return of the guarantor to the debtor, one can raise the question that to what issue should the debtor give permission so that it may lead to the eligibility of the return of guarantor to him? Is it when the debtor has given permission in guarantee, payment or both?

Unquestionably, when both the guarantee and the payment are done with the permission of the debtor, one should not be doubtful about the return of guarantor to the debtor. However, if the permission does not include both, it should be said that the guarantor can return to the debtor when his permission is applied to the contract of guarantee and not permission for payment, because with the realization of the guarantee, the debt will be transferred from the obligation of the debtor to that of the guarantor and guarantee is tantamount to the fulfillment of the debt and the permission in guarantee contains permission to payment as well. Therefore, if the debtor gives permission to guarantor in guarantee even if he does not give permission in payment and even prevent him from payment, the right of return for the guarantor will remain in place. In other words, after the realization of guarantee, the obligation of the debtor will be cleared. The prevention of debtor from payment is like a third party prevents the debtor from paying his debt to the creditor and unquestionably it will not have any effect.

From the other hand, when the guarantee takes place without permission but the payment is carried out with the permission of the debtor, the guarantor will not be entitled to return. But some people have mistakenly concluded from the Article 267 of the Civil Law that if the guarantor gets permission from the debtor for payment without getting permission for guarantee, he will have the right of return. This article stipulates that "… but someone who pays the debt of another person can return to him if he is given permission; otherwise, he will not have the right." However, it should be certainly said that the relationship between the Article 267 of the Civil Law and the eligibility of the return of the guarantor to the debtor is absolutely pointless because according to the aforementioned article, when a third party pays the debt of the debtor, the only thing which should be taken into consideration is "permission and payment" and no contract will be signed between non-debtor (third party) and credi-

tor; however, in this supposition, we have one contract and one fulfillment of the commitment and these are two issues: permission in guarantee and permission in payment. According to the Article 267 of the Civil Law, if the debtor has given permission, then certainly his permission will be applied to payment because there's no other issue to be dealt with. In this case, the eligibility of the return of the third party will be definite. However, we have two issues in the contract of guarantee and if in the contract of guarantee, the debtor has only permitted the payment, then having in mind that because of the guarantee the obligation has been transferred from debtor to the guarantor, this permission will be identical to a third party's permission that obliges the debtor to pay his debt to the creditor. So it's evident that no legal impact will affect this issue. In other words, the debtor will be cleared as a result of the transferring of the obligation to obligation and undertakes the position of a third party and since he has not given permission in guarantee and the guarantee has taken place with the purpose of a pious act, even if he asks the guarantor to take action in paying the debt of the contract of guarantee, this request will not be effective and the gratuitous guarantee will preserve its effects.

The Necessity of Payment by the Guarantor

The return of guarantor to the debtor takes place after the debt has been paid to the creditor. In other words, fulfilling the obligation by the debtor depends on the fulfillment of the obligation by the guarantor. That's why the Article 709 considers this as a principle: "the guarantor is not entitled to return to the debtor unless after paying the debt…" The conviction which the Civil Law has accepted is the famous viewpoint of the Immamiyah jurists [1]. Four branches of the Sunnis believe that when the creditor claims his active debt from the guarantor, this will give the guarantor the right to return to the debtor. Accordingly, if the creditor files a lawsuit against the guarantor, the guarantor can call the debtor to trial and ask him to pay his debt to the creditor directly [21,22]. But in the Immamiyah jurisprudence, before the realization, the convicted guarantor will not have the right to return to the debtor. In the British law, the guarantor has been given the right to ask the main debtor to pay the active debt [23]. From the other hand, even though the lawmaker has made the return of guarantor to the debtor dependent on the payment, the exceptional return has been stipulated provided that an agreement has been made between the guarantor and the debtor in the last part of the article. The last part of the article says that "… but he can return if the debtor has been obliged to attain his acquittal and the aforementioned date has expired." Correspondingly, whenever the debtor has been obliged to attain the acquittal, which is to pay his active debt to the guarantor while the date has expired, then the guarantor can return to the debtor according to the contract, even if he has not paid the debt.

The Repetition of Payment by the Debtor

Whenever after the conclusion of the contract of guarantee, the debtor pays the debt to the creditor the obligation of the guarantor will be cleared, whether the contract of guarantee has been made with his permission or without it. In this case, he will be considered a third party who has paid the debt of the debtor by the virtue of the rule of bona fide and with the purpose of a pious act. The Article 717 of the Civil Law states in this regard that "whenever the debtor pays the debt, the guarantor will be acquitted, even though the guarantor has not given permission to the debtor for the fulfillment of the obligation."

So, if the guarantor pays the debt to the creditor another time after the debtor has paid the debt, he will not be entitled to return to the debtor even if he is not aware of the first payment of the debtor to the creditor, because what he has paid to the creditor was not the debt of the debtor. As a result, the guarantor should return to the creditor and what he has paid to the creditor will be considered unwarranted fulfillment. Therefore, the guarantor will be entitled to return to the creditor having in mind the principle of non-pious act and the creditor will be entitled to receive the debt in two parts and by the virtue of the Article 301 of the Civil Law, and because of causeless possession, he will be obliged to return.

Re-payment by the Debtor

Contrary to the previous example, the arrangement of payments has been reversed in this supposition. It means that firstly the guarantor has paid the debt and the debtor will pay the debt to the creditor once again, thinking that the debt has not been paid yet. In this case, what the guarantor has paid is valid because he has been indebted for the obligations resulting from the contract of guarantee and has paid the debt to the creditor through the easiest and most prevalent means of realizing the commitment that is the fulfillment of the obligation. Therefore, he will not have the right to return to the creditor. The guarantor will be entitled to return to the debtor and get back from him what he has paid to him previously whether the debtor has exercised his right of return to the creditor or abandon it or whether he returns him what he has received unwarrantedly or not, because the repetition of payment by the debtor is unwarranted fulfillment and the creditor should return it. However, this will not disrupt the guarantor's right of returning to the debtor and this right will not be impeded in any way after the payment is made. In this regard, the Article 711 of the Civil Law has stipulated that "if the guarantor pays the debt and the debtor pays it for another time, the guarantor will not have the right to return to the creditor and should return to the debtor and the debtor can get back from the creditor what he has paid to him."

The Acquittal of Guarantor by the Creditor

If the creditor acquits the obligation of the guarantor, his obligation will certainly be acquitted and the creditor will not be entitled to claim his debt of him. Therefore, the debtor will be acquitted as a result of the contract of guarantee and the guarantor will be acquitted as a result of the acquittal of the creditor. The Article 718 of the Civil Law stipulates that "whenever the creditor acquits the guarantor from the debt, both the guarantor and the debtor will be acquitted." The result of the aforementioned article is the famous conviction of the jurists of Immamiyah school. The Sunni jurists also hold the same opinion and believe that with the acquittal of guarantor by the creditor, the obligation of guarantor vis-à-vis creditor and the obligation of debtor vis-à-vis the guarantor will be dissolved [2].

The aforementioned article has been compiled in an inaccurate way and its surface denotes that the acquittal of the guarantor by the creditor leads to the acquittal of the obligation of debtor and guarantor. However, it should be strongly emphasized that the acquittal of the guarantor will only cause the acquittal of the same guarantor and the obligation of the debtor was already acquitted upon the realization of the contract of guarantee. That's why the Article 707 of the Civil Law stipulates that if the creditor acquits the debtor, the guarantor will not be acquitted. Consequently, the debtor will not be indebted to the creditor after the realization of guarantee so that acquittal may be of any significance to him, unless we hold the view

that the acquittal of the debtor is equivalent to the fact that the guarantor will not be entitled to return to the debtor anymore. From the other hand, the guarantor cannot return to the debtor and claim the debt of him, because even if the guarantee has been realized with his permission, since the return of the guarantor to the debtor happens for making up for the damage that he has suffered for paying the debt and given the non-profit nature of guarantee and that the guarantor has not paid anything to the creditor and possessed nothing of his property, he will not have the right to return to the main debtor.

Conclusion

Guarantee is one of the specific contracts. They are the guarantor and the creditor who carry out this legal act and the debtor does not play a role in the realization of contact. As soon as the guarantee and its effect that is the transferring of obligation to obligation are carried out, the debt will be transferred from the obligation of the debtor to the obligation of the guarantor. As a result, the obligation of the debtor will follow the presumption of innocence and the obligation of the guarantor will be indebted. Correspondingly, since the nature of guarantee is the transferring of debt and not the transformation of commitment, the guarantees and securities will remain in place after the transferring. The agreement and compromise of the guarantor and the creditor on whether to change the object of guarantee to something more or less than the debt is influential and effective and does not require the consent of the debtor. However, with regards to the return of the guarantor to the debtor, if the debtor has not given consent to a guarantee other than the object of debt or guarantee or guarantee to something with a higher value than the debt, his obligation regarding the guarantor for paying what the guarantor has paid the creditor will not have any significance. In liability due at a future time, when the debt belongs to present time, the guarantor can return to the debtor only when he has paid the debt entirely and the deadline of the debt has arrived unless it could be inferred from the situation that the permission of the debtor is in the form of the present time. In such a case, the guarantor can return to the debtor after paying the debt. Although the debtor is not considered an essential element in the contract of guarantee, his consent carries legal effect and leads to the entitlement of the return of the debtor to him. If the guarantor guarantees upon the request and permission of the debtor, he can return to the main debtor after paying the debt for claiming what he has paid to the creditor. Whenever either of the guarantor or the debtor pays the debt to the creditor after the contract of guarantee is held, the fulfillment of the promise is carried out after the first payment and the obligation will be dissolved and each of the payments which is temporally more recent will be ineffective, so the creditor will be obliged to return it to the guarantor and the debtor as a result of possessing it without any reason. The acquittal of the guarantor by the creditor will acquit the guarantor. The debtor will be also acquitted by the virtue of the contract of guarantee; therefore, the guarantee will expire and the debt relationship of its parties will end.

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