Revised Rules of Turkish Code of Obligations on Formal Requirements of Contract of Surety

Kefalet Sözleşmesinin Şekline İlişkin Türk Borçlar Kanunu'ndaki Yeni Düzenlemeler

Dr. Cansu Kaya Kızılırmak*

Summary

Many substantial changes have been introduced with the new Code of Obligations, dated 2012. Contact of surety, is surely one of which that has been subject to notable revisions. The changes regarding the form present a revised form of contract of surety. The revised rule of formal requirements have been regulated under Art. 583 of the Code of Obligations. Art. 583 provides stricter rules to the formal requirements of validity of a contract of surety. Contract of surety is to be contracted in written form. However, three particular points that should be declared in handwriting have been introduced to the formal requirements. The total amount of liability of the surety, a declaration of the contract date and the existence of solidary intent, when there may be one, must be declared in handwriting of the surety on the form. Legislators, in order to protect the surety, have provided for these stricter requirements of form. The aim is to enable the surety to consider at length and to have a better understanding of the liability that he/she is going under.

Keywords: Turkish Law of Obligations, Turkish Code of Obligations, Law of Securities, Contract of Surety, Form of Contract.

* Dr., University of Istanbul Faculty of Law, Department of Civil Law, cansukaya@istanbul.edu.tr.

Özet

2012 tarihli Türk Borçlar Kanunu ile, borçlar hukukunda esaslı değişiklikler meydana gelmiştir. Kefalet sözleşmesine ilişkin gerçekleştirilen değişiklikler bunların arasında en kapsamlı değişikliklerden birini teşkil etmektedir. Sözleşmenin şekline ilişkin getirilen değişiklikler dikkate alındığında, kefalet sözleşmesinin tamamen yeni bir şekil şartına tabi tutulduğu söylenebilir. Kefalet sözleşmesinin şekline ilişkin kural, Türk Borçlar Kanunu'nun 583. maddesi ile öngörülmektedir. Türk Borçlar Kanunu madde 583 düzenlemesi ile, kefaletin geçerlilik şekli daha katı kurallara tabi tutulmuştur. Kefalet sözleşmesi yazılı şekilde kurulur. Bunun yanı sıra kefaletin şeklinin kapsamına, üç unsurun kefalet senedinde kefilin el yazısı ile beyan edilmesi gerektiği eklenmiştir. Kefilin sorumlu olduğu azami miktarın, kefalet tarihinin ve müteselsil kefalet olma iradesi bulunuyor ise bu iradenin kefalet sözleşmesinde kefilin el yazısı ile beyan edilmesi gerekir. Kanunkoyucu, kefilin korunması amacıyla kefaletin şekline ilişkin kuralları ağırlaştırmıştır. Sözleşmenin şekil şartlarının ağırlaştırılması ile amaçlanan, kefilin düşünmeye sevk edilmesi ve altına gireceği sorumluluğun kapsamını daha iyi algılayabilmesinin sağlanmasıdır.

Ahahtar Kelimeler: Türk Borçlar Hukuku, Türk Borçlar Kanunu, Teminat Hukuku, Kefalet Sözleşmesi, Sözleşmenin Şekli.

A. General Remarks on Amended Form of Contract of Surety

In Turkish law of contracts, the validity of a contract is not subject to compliance with any particular form, unless a particular form is prescribed by law (TBK m. 12/I). Contract of surety is one of the contract types that does not enjoy this freedom. Even before the revision of the Code of Obligations, surety contracts were required in a specified written form.

With the amended version, the New Turkish Code of Obligations brought forth substantial changes to the formal requirements of contracts of surety. The relevant rule is regulated under Art. 583 of the Turk-

ish Code of Obligations. This fairly new legislation from 2012 provides stricter rules to the form required to conclude a valid contract of surety. As was the rule of the former Turkish Code of Obligations, a contract of surety is to be contracted in written form. The written form, however, is not sufficient. In order to protect the surety, formal requirements have been increased. Three particular points that are to be declared in handwritten statement of the surety have also been included to the form of the contract. First, the total amount of liability of the surety must be declared in handwriting on the form (TBK 583/I/1). Additionally, the written form must also have a declaration of the date of the contract in handwriting. Also when contracting solidary suretyship, the surety must acknowledge the existence of such solidary intent, in handwriting. The sui generis characteristics of a contract of surety always leave legislators aiming to ensure the protection of the surety. With this consideration in mind, additional conditions to the form of the contract of surety have been regulated.

The requirements of the form aim to protect the surety and as a consequence, only apply for the surety's declaration of intent. The creditor, on the other hand, does not need to comply with these formalities[1], which is why Art. 583 is regarded to be regulating a single-sided validity form[2].

---

[1] **Emil Beck**, Das Neue Bürgschaftsrecht, Zürich, 1942, Art. 493, N. 13; **Silvio Giovanoli**, Das Obligationenrecht, Art. 492-515, 2. Auf., Bern, 1978, Art. 493, N. 9; **Gülçin Elçin Grassinger**, Borçlar Kanunu'na Göre Kefilin Alacaklıya Karşı Sahip Olduğu Savunma İmkanları, İstanbul, 1996, p. 98; **Hüseyin Murat Develioğlu**, Kefalet Sözleşmesini Düzenleyen Hükümler Işığında Bağımsız Garanti Sözleşmeleri, İstanbul, 2009, p. 144; **Nami Barlas**, Kefalet Sözleşmesinin Geçerlilik Şartları, Türk Borçlar Kanunu Sempozyumu Makaleler- Tebliğler, (Ed. Murat İnceoğlu), İstanbul, 2011, (p. 349-401), p. 354; **Burak Özen**, 6098 sayılı Türk Borçlar Kanunu Çerçevesinde Kefalet Sözleşmesi, 3. Edition, İstanbul, 2014, p. 213; **Mustafa Alper G**ümüş, Borçlar Hukuku, Özel Hükümler, C. II, İstanbul, 2012, p. 313; **Serkan Ayan**, Kefalet Sözleşmesinde Kefilin Sorumluluğu, Ankara, 2013, p. 150; Özlem Acar, Türk Borçlar Hukukunda Müteselsil Kefalet Sözleşmesi, İstanbul, 2015, p. 156; Şefika Deren Gündüz, 6098 Sayılı Türk Borçlar Kanunu'na Göre Kefalet Sözleşmesinin Şekli, İstanbul, 2015, p. 27.

[2] **Giovanoli**, Art. 493, N. 9; **Christoph M., Pestalozzi**, Basler Kommentar Obligationenrecht I, (Hrsg. Honsell/Vogt/Wiegand) Art. 1-529 OR, 6. Auf., Basel, 2015, Art. 493, N. 2; Özen, p. 213; **Ayan**, p. 150; **Acar**, p. 156, 157; **Gündüz**, p. 27.

The rules apply to both natural persons and legal entities. The formal requirements of Art. 583 also apply to any contract, which entail real persons giving personal security, regardless of what name they may be contracted under (TBK 603). As stated in the preamble, attempts to bypass legal formalities by such misuse are intended to be prevented to insure the protection of the surety. The use of e-signatures for standing surety is not allowed for contracts of surety (Code of Electronic Signature, Art. 5/II).

Naturally, the rules of the new form do not apply for existing contracts that have been concluded prior to the enforcement date of the Code of Obligations (01.07.2012)[3]. Accordingly, the new form requisites are for contracts of surety concluded after the enforcement date[4].

B. Elements to be Stated in Handwriting

1. Total Amount of Liability

One of the main problems of practice is determining the limit of liability of the surety. Certainly, limiting the liability of surety also serves the purpose to protect the surety. Unpredictability and indefiniteness of the liability limit is always an obstruction to the protection of the surety.

The surety's liability is, in any event, limited to the total amount indicated in the contract (TBK m. 589/I). Unless otherwise agreed, liability that is up to the total amount also includes, legal consequences of any fault or default on the part of the principal debtor, the costs of debt enforcement proceedings and legal action brought against the principal debtor, and interest at the contractually agreed rate up to a maximum of the interest payable for the current year and the previous year (TBK m. 589/II)[5]. Needless to say, determining the amount limit of a surety's

[3] As per Art. 1 of Law No. 6101 on enforcement of Code of Obligations, the rules of validity of the new Code do not apply to legal acts and transactions that have been concluded prior to the enforcement date of the Code.

[4] Yarg. 12. HD., 2014/19149 E., 2014/21744 K., 18.09.2014 T., (www. kazanci.com.tr)

[5] However, liability from costs of debt enforcement proceedings and legal actions brought

liability and having a determined limit in all cases is vital for preventing disputes.

The determination of a surety's total amount of liability and requiring it to be handwritten by the surety is to ensure protection of surety. The aim of this condition is to prevent the abusive practice of banks filling the liability column on the contract as per their wishes subsequent to contract formation[6]. It is also expected from this condition, that the surety may have an additional opportunity to gain a better understanding of the liability that is being undertaken[7]. It is these considerations that have led the legislators to amend the form with the condition of total amount of liability in handwritten statements.

Even in cases where the principal obligation is non-monetary, the surety's total amount of liability should be handwritten in a numeric value[8]. There is no specific rule stating that total amount of liability must be declared in Turkish Lira, therefore the statement can be in foreign currency as well[9].

Unlike its source law Art. 493 OR, which contains the word *"zahlenmaessig"*, Art. 583 does not specifically state that the total amount of liability is to be written in numeric form. There have been discussions derived from the lack of clarity in this wording. One view suggests that the handwritten statement should not have to be declared neither in numbers nor in letters. As long as the handwritten statement holds a

against the surety, also the contractual interest liability arising from the contract of surety, may be requested regardless of the limit, **Beck**, Art. 499, N. 7; **Safa Reisoğlu**, Türk Kefalet Hukuku, Ankara, 2013, p. 81; **Özen**, p. 145; **Ayan**, p. 432; **Gündüz**, p. 144.

6 **Atilla Altop**, Neuerungen und Änderungen bei den Bestimmungen zum Bürgschaftsvertrag in Entwurf des türkischen Obligationengesetzes, Reformen im österreichischen und im türkischen Recht, Vortäge der Österreichisch-Türkischen Juristenwoche 14. Bis 17. April 2010, (Hrsg. Rudolf Welser), Band IV, Wien, 2010, (p. 117-122), p. 119; **Barlas**, p. 355; **Gündüz**, p. 37, 38.

7 **Pestalozzi**, Art. 493, N. 11; **Reisoğlu**, p. 73; **Develioğlu**, p. 152; **Özen**, p. 227; **Ayan**, p.149, 161, 162; **Acar**, p. 155; **Gündüz**, p. 142.

8 **Beck**, Art. 493, N. 26; **Ayan**, p. 162.

9 **Reisoğlu**, p. 87; **Elçin Grassinger**, p. 109; **Barlas**, p. 359; **Gümüş**, C. II, p. 315, 319; **Ayan**, p. 162; **Acar**, p. 169; **Gündüz**, p. 139.

determinable value direction, the form requirement has been met[10]. Prevailing view interpreting the issue in unison with the OR rule accepts that a numeric value of the total amount should be declared in handwriting, and it should not matter whether it is stated in numbers or in letters[11]. Agreeing with the second view, I would also like to point out that debating whether the total amount should be handwritten in numbers or in letters[12] has no practical value since either can present the same outcome and the law is silent on the matter[13]. As for cases where the number and the handwritten words in the contract do not match, unless otherwise proven, precedence is given to the words, not the numbers[14].

It has been argued that in cases where the contact of surety is drafted by the notary public in official form, there would be no need to fulfill the form requirements of handwriting of Art. 583[15]. This view, however, leaves one aspect of the ratio legis of Art. 583 behind. Although official form in terms of general rules of contract law would be much reliable than written form, the requirement of a handwritten statement does not only aim to create a reliable form, but also has the purpose of making the surety think and grasp the amount of liability he/she is going under one more time[16]. Therefore, even in contracts drafted by the notary public, especially the total amount of liability should be stated by the surety in handwriting[17].

---

[10] **Ayan**, p. 165.

[11] **Reisoğlu**, p. 85; **Özen**, p. 222-227; **Barlas**, p. 359; **Burak Özen**, Kefalet Sözleşmesinde Şekle Aykırılık ve Şekle Aykırı Kefalet Sözleşmesinin Kefil Tarafından İfa Edilmesi, Prof. Dr. Belgin Erdoğmuş'a Armağan, İstanbul, 2011, (p. 747-768), p. 753; **Gümüş**, C. II, p. 317; **Gündüz**, p. 125-131.

[12] **Ece Baş**, 6098 sayılı Türk Borçlar Kanunu'nda Kefalet Sözleşmesinin Geçerlilik Şartlarına İlişkin Bazı Yenilikler, İÜHFM, C. 70, S. 2, (p. 115-144), p. 133.

[13] See also, **Acar**, p. 168.

[14] **Reisoğlu**, p. 85.

[15] **Barlas**, p. 356; **Baş**, p. 130; **Ayan**, p. 170, 171, 207; **Acar**, p. 160; **Gündüz**, p. 39, 40.

[16] **Reisoğlu**, p. 89; **Özen**, p. 218.

[17] Same can be expected, in conferral of special authority by notary public. See, **Reisoğlu**, p. 101; **Özen**, p. 265, 266; **Baş**, p. 138; Contra, **Barlas**, p. 356; **Ayan**, p. 207; **Acar**, p. 193.

2. Date of Contract

The liability of the surety and the extent of his/her liability is naturally determined by the date of the surety contract. Determining the date holds importance especially in framework loan agreements. If the date of contract is left unstated, the surety faces the risk of being a victim of a common unfavorable practice. The creditors tend to fill the date, naturally choosing a prior date to the actual contract date of surety. This illegal, albeit common practice of creditors, is regarded to be the main reason behind this new formal condition. The objective is to prevent this common practice and to protect the surety in this regard[18].

In order to determine surety's liability limit, the date of the contract of surety matters as such: The general rule is, unless otherwise agreed upon by the parties, a surety's liability limit does not extend to prior obligations of the principal debtor (TBK m. 589/III). So the surety is not liable for the debts of the principal debtor prior to the contract date of standing surety. In other words, the surety would be liable only for the principal debtor's obligations subsequent to the contract of surety. This aforementioned general rule regarding the scope of a surety's liability renders the determination of the date of the contract of surety essential. Particularly in framework loan contracts, the determination of the surety's liability limit is often a disputed issue in practice.

Without the date of the contract specifically stated, and especially with leaving the date column of the contract unfilled, the surety faces the risk of being liable for prior obligations of the principal debtor. In instances where the empty date columns are subsequently filled out by the creditors as per their wishes to a prior date (mostly a common practice of banks), the surety is almost always left liable for more than he/she bargained for with no means of proof. Thus, the date of contract condition has been supplemented to the new legal form of contract of surety and in accordance with its importance required to be stated in handwriting.

Aside from providing determinability of surety's extent of liability, the contract date is used to determine several issues. Naturally, various

[18] **Altop**, p. 119; **Barlas**, p. 355; **Baş**, p. 132; **Acar**, p. 163; **Gündüz**, p. 145.

examples may be given to the importance and convenience of a stated contract date. In determining the condition of spousal consent (TBK 584), a contract date is needed. Not to mention the great significance that the date of a contract has when determining time limits for the termination of surety's liability. Under Turkish law, when a contract of surety is concluded for a fixed term, the surety is released automatically at the end of the fixed term (TBK 600). Therefore, knowledge of the contract date has great importance to calculate the fixed time agreed by the parties. The same can be said for the determination of the ten year liability limit of natural persons. As per Art. 598/III, any surety given by a natural person, automatically ends with the lapse of ten years from the contracting date. So the statement of the contract date in the written legal form would be practical for calculating this time period. Also, the contract date's determinability is of consequence when determining the substantial deterioration of the principal debtor's financial situation since the contract was concluded in order to use the right to revoke the contract of surety as per Art. 599.

3. Solidary Surety

If a solidary surety is intended, it is required that this intention be declared in handwriting in the contract form. As is the case for all three particulars that are to be stated in handwriting, the ratio is to provide protection to the surety. Standing solidary surety entails more liability compared to simple surety, thus protection is intended by stricter conditions of legal form. This would actually be the case if solidary surety's legal position had not been altered by the new Code of Obligations to a point where it almost stands side by side with simple surety. So it may be argued, the solidary surety was already protected adequately with the new legislation and therefore, this addition to form of contract was not needed. Be that as it may, the rule is clear on this matter and when intending to contract solidary suretyship, this intention must be declared in the written form in handwritten statement by the surety.

The handwritten declaration does not need to strictly contain the wording of 'solidary surety'. Any other words or phrases that can be regarded equivalent to this intention are also satisfactory, so long as the solidary intention can be deduced. In this regard, if no exact statement of solidary surety exists but it is contracted that the creditor may pursue the surety prior the principal debtor, the intention of solidary suretyship can be accepted[19]. Either way, these intentions must be in handwriting.

Unlike other formal requirements of contract of surety, the lack of a handwritten statement of solidary surety does not affect the validity of the contract. The lack of stating solidary suretyship in handwriting can only mean one thing; existence of a simple surety[20].

Article 583 does not indicate a distinction of the nature of the principal obligation. Whether the principal obligation is of commercial nature or likewise, whether the surety is a merchant is of no concern of Art. 583. The rule does not indicate such particularities, in the sense that the form requirement applies regardless. However, Turkish Commercial Code Art. 7/II opposes this reasoning. According to this contradicting rule, when standing surety for obligations of commercial nature, the legal presumption of solidarity applies. There has been different views as to whether the handwritten statement requirement of Art. 583 is to be met when standing solidary surety for commercial obligations. One view suggests that since there is no exception to the rule in the wording of Art. 583, the intention to stand solidary surety must be stated in handwriting of the surety as Art. 583 stipulates. No exception is accepted for commercial dealings[21]. The contrary view gives TTK priority and assumes solidary suretyship irrespective of the handwriting condition[22]. Yargıtay practice seems to be in favor of the second view[23]. If TTK rule were to

[19] **Beck**, Art. 496, N. 11; **Pestalozzi**, Art. 493, N. 11; **Özen**, p. 315; **Efe Can Yıldırır**, Birlikte Kefalet, İstanbul, 2013, (Master's Thesis, Unpublished), p. 56; **Acar**, p. 170; **Gündüz**, p. 88.

[20] **Pestalozzi**, Art. 493, N. 12; **Reisoğlu**, p. 169, 170; **Develioğlu**, p. 153; **Özen**, p. 231; **Özen**, Şekil, p. 57; **Gümüş**, C. II, p. 315; **Baş**, p. 134; **Ayan**, p. 150, 169; **Acar**, p. 171.

[21] **Reisoğlu**, p. 35; **Yıldırır**, p. 52, 53; **Acar**, p. 172.

[22] **Özen**, p. 316; **Baş**, p. 134; **Ayan**, p. 52; **Gündüz**, p. 89.

[23] Yarg. 6. HD., 2015/8817 E., 2016/3432 K., 27.04.2016 T., (www.kazanci.com.tr). In

prevail, it would lead all surety contracts for bank credits to be solidary, regardless of the handwritten statement condition is met or not. This would render Art. 583's rule on solidary surety in most cases pointless, an outcome which legislators did not surely intend.

4. Several Sureties in Relation with the Handwriting Condition

It is common commercial practice to have more than one person to stand surety for one principal obligation. That may mean having several separate contracts of surety to the same principal obligation or standing co-surety as per Art. 587. Either way, there is no explanatory rule regarding the handwritten statement condition when several sureties exist.

The issue may seem irrelevant at first sight. One may suppose that if one of the sureties states the date, the amount, and the solidary suretyship intent then the others just signing the document should suffice. But since there is no specific legal declaration on the matter, validity issues in regards to nonobservance of formal requirements when there are more than one surety may always rise. Also, when worst comes to worst and there comes the time for payment, determining each surety's solidary suretyship intentions and dates of contract and total amounts of liability becomes a vital issue.

Furthermore, in existence of co-suretyship, one of the co-surety's invalidity caused by non-observance to formal requirements may eventually lead to loss of all other sureties if conditions of Art. 587/III are met[24].

the mentioned case, the surety contract has been concluded in 2011. And the solidarity of the surety has been stated in the lease contract, i.e. the principal obligation. Although form requirements of Art. 583 do not apply to contracts concluded before 01.07.2012, and before the 2012 amendment declaration of solidary surety in the lease contract would suffice, the court nevertheless cited TTK Art. 7 and mentioning the handwritten statement is not required thereof, held the surety liable as a solidary.

[24] Art. 587/III states: The surety may be released in cases where *"the creditor knew or ought to have known that the surety entered into the contract in the assumption of existing or prospective sureties standing alongside him for the same principal obligation and if such assumption does not actualize or if subsequently one of the co-sureties is released from his liability by*

Accordingly, the matter of handwritten statements in existence of several sureties must be dealt with caution[25]. Although it may seem impractical, in order to achieve the protective purpose of the legal form, every surety is expected to state all three elements in their own handwriting[26]. If any of these elements in handwriting is missing, that surety contract should be considered void due to non-observance of formal requirements.

B. Formal Requirements of Subsequent Amendments

The amendments that increase the liability of the surety after the conclusion of the contract have been subject to the same formal requirements of Art. 583 (TBK 583/III). This is a specific repetition of the general rule for the form of amendments to contracts, regulated under TBK 13/I. Therefore, in harmony with the general rule, TBK m. 583/III demands for parties to abide by the formation rules when making alterations to the contract that increase the liability of the surety, after the conclusion of the contract.

Formal requirements are commonly imposed to protect either one or both contracting parties. In contracts of surety, the surety is the main target of the protective measures. The parties may, after the conclusion of the contract, wish to alter the provisions of the contract. While this is common in contractual relationships, the alterations that increase the surety's liability should comply with the formal requirements of Article 583. Therefore, not only the alterations should be in writing but also when increasing surety's total amount of liability this must be stated in surety's handwriting.

Another issue is whether the date of alteration that increases surety's liability should be stated in handwriting. There seems to be a simple reason for the need to state the date of alteration in handwriting. The alteration needs to comply with the form that is regulated under Art. 583 which requires the date to be declared in handwriting. And needless to

the creditor or one of the co-sureties' undertaking is declared invalid".

[25] **Pestalozzi**, Art. 493, N. 12; **Ayan**, p. 175, fn. 636.

[26] **Pestalozzi**, Art. 493, N. 12; **Ayan**, p. 176; **Gündüz**, p. 43.

say for further purposes of determinability of liability, stating the date of the alteration is essential in cases where the total amount of liability of the surety is increased.

Only alterations or addendums that increase surety's liability is subject to this form. Therefore, any alterations that decrease liability may be contracted even verbally. Naturally, verbal alterations may enable deniability to the creditor and are not recommended. But in terms of validity, verbal alterations are sufficient when decreasing liability.

Whether an amendment constitutes increase of surety's liability should be decided in a wider sense than the sole action of increasing total amount of liability. The scope of amendments that increase the liability should be regarded in a broader sense. Any alteration that increases surety's liability is subject to the same legal form principle. This could be the case when the surety contracts fixed term is prolonged, or when simple surety is transformed into solidary surety. It is evident how in these cases, although the total amount of monetary liability is not altered, the liability is increased in different means.

Specifically a common practice of banks is to include clauses to the standardized form of contract of surety that contain the pre-approval of the surety for agreements that are made in the future between the creditor and principal debtor about the alteration of the principal obligations content and quantity. As per Art. 582/III, any such clause should be deemed invalid and may be agreed upon only after the conclusion of the contract and by compliance to the form requirements of Art. 583[27]. Similarly, after the conclusion of the contract of surety, agreements between creditor and the principal debtor on increasing the principal debts amount does not have any altering effect on the surety's liability. The surety remains liable for the amount of principal debt stated in the written form of the contract of surety. If the principal debt has not been stated in the contract, the surety's liability is still determined as per the debt of the principal, at the date of the contract of surety[28]. In cases where the principal obligation is

[27] **Ayan**, p. 444; **Gündüz**, p. 98, fn. 89; Contra, **Reisoğlu**, p. 210.

[28] **Reisoğlu**, p. 209; **Ayan**, p. 211; **Gündüz**, p. 97.

assumed by a third party and the principal debtor is released, the contract of surety is extinguished unless the surety consents to such assumption, also in writing (TBK m. 198/II).

C. Consequences of Nonobservance to Formal Requirements

If a contract of surety is contracted without observance to the legal requirements of Art. 583, the contract is deemed to be void[29]. Invalidity of the contract in cases of nonobservance to the legal form has various consequences. The invalidity should be taken into account by the judge ex officio. The invalidity is certain and final, therefore the contact may not be deemed valid via surety's consent, performance or legal acknowledgement. If parties wish to deem the contract void, they may achieve the same result only by contracting another contract of surety, but the recent invalid contract may not be deemed void by intent of the parties[30]. If the surety makes payment without the knowledge of nonobservance to the legal form and by extension the invalidity, the return of payment can be demanded via an unjust enrichment claim[31].

A contract of surety can only be valid in one particular instance. When intent of solidary suretyship is not declared in handwriting, the contract is still valid but is accepted as simple surety[32].

---

[29] **Beck**, Art. 493, N. 15; **Pestalozzi**, Art. 493, N. 3; **Haluk Tandoğan**, Borçlar Hukuku Özel Borç İlişkileri, C. II, 2. bası, İstanbul, 1982, p. 540; **Reisoğlu**, p. 93; **Elçin Grassinger**, p. 98; **Özen**, Şekil, p. 759; **Gümüş**, C. II, p. 315, 325; **Giovanoli**, Art. 493, N. 3, 10; **Markus Vischer**, Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2, 3. Auf., (Hrsg. Claire Huguenin, Markus Müller-Chen), Zürich, Basel, Genf, 2016, Art. 493, N. 3; **Gündüz**, p. 187.

[30] **Beck**, Art. 493, N. 19; **Tandoğan**, C. II, p. 540; **Reisoğlu**, p. 94; **Elçin Grassinger**, p. 99; **Gümüş**, C. II, p. 336, 328; **Özen**, Şekil, p. 759, 760; **Ayan**, p. 152; **Gündüz**, p. 188.

[31] **Beck**, Art. 493, N. 21; **Giovanoli**, Art. 493, N. 12; **Pestalozzi**, Art. 493, N. 4; **Tandoğan**, C. II, p. 540; **Reisoğlu**, p. 97, 98; **Elçin Grassinger**, p. 99; **Özen**, p. 246; **Özen**, Şekil, p. 762; **Gümüş**, C. II, p. 326; **Ayan**, p. 154; **Gündüz**, p. 194.

[32] **Pestalozzi**, Art. 493, N. 12; **Reisoğlu**, p. 169, 170; **Develioğlu**, p. 153; Özen, Şekil, p. 57; **Özen**, Şekil, p. 57; **Gümüş**, C. II, p. 315; **Baş**, p. 134; **Ayan**, p. 150, 169; **Acar**, p. 171.

In cases where the surety became party to the contact willingly in knowledge of the informality, the validity of the contract can still not be claimed. The invalidity of the contract is absolute and infinite.

In exceptional instances where the surety has personally caused the nonobservance of form, relying on its invalidity would be in breach of TMK Art. 2 which regulates that the abuse of a right is not protected by law. In these rare cases, venire contra factum proprium would not be tolerated and therefore, the contract of surety may be accepted as valid[33].

If the form of conferral of special authority does not meet the form requirements of Art. 583, the contract of surety that has been contracted upon the special authority would be invalid[34]. The form of conferral of special authority to enter into a contract of surety must be in the form regulated under Art. 583/I (Art. 583/II/1). Therefore, when conferring special authority to enter into a contract of surety, the surety must also declare the maximum amount of liability, the date of the contract and if existing the intent of solidary suretyship in a handwritten statement[35].

A debated issue is the handwritten statement of date of contract in conferral documents. The wording of the article 583/II/1 is silent on the matter of which date is to be handwritten. The rule only stipulates that the formal requirements of contract of surety also apply to the conferral of special authority. There seems to be a supporter for every possible solution in this matter. It has been argued that, the date of the conferral of special authority should be stated in handwriting[36]. Conversely, it is also claimed that the date of the contract of surety must be stated in the conferral[37]. Finally, a more flexible view of there being no need to state any

[33] **Beck**, Art. 493, N. 18; **Giovanoli**, Art. 493, N. 12; **Tandoğan**, C. II, p. 541; **Elçin Grassinger**, p. 121; **Özen**, p. 244; **Özen**, Şekil, p. 760; **Gümüş**, C. II, p. 326; **Gündüz**, p. 189, 190, 193.

[34] **Reisoğlu**, p. 101.

[35] **Özen**, p. 265; **Gülçin Elçin Grassinger**, Kefalet Sözleşmesinden Doğan Bazı Hukuki Sorunlar, Banka ve Tüketici Hukuku Sorunları Sempozyumu, Türk İsviçre Hukuk Günleri, İstanbul, 2010, (p. 293-308), p. 304; **Ayan**, p. 190, 207; **Gündüz**, p. 154.

[36] **Acar**, p. 193; **Gündüz**, p. 154.

[37] **Reisoğlu**, p. 101.

date at the conferral has been suggested[38]. The latter is, in my view, the most reasonable approach. The underlying objective of the handwritten date of contract condition is, as mentioned before, to enable the determination of the time scope of surety's liability. But such necessity does not exist when conferral is being contracted[39]. Nevertheless, considering the consequences when a stricter view is accepted, being thorough and stating both the conferral date and if possible the planned date of the contract of surety in handwriting is advised to avoid facing validity issues.

List of Abbreviations:

Art.	:	Article
Auf.	:	Auflage
C.	:	Cilt/Volume
E.	:	Esas
Ed.	:	Editor
fn.	:	Footnote
Hrsg.	:	Herausgegeben
K.	:	Karar
N.	:	Number
OR	:	Obligationenrecht (Swiss Code of Obligations)
p.	:	Page
T.	:	Tarih
TBK	:	Türk Borçlar Kanunu/Turkish Code of Obligations
TTK	:	Türk Ticaret Kanunu/Turkish Commercial Code
Yarg.	:	Yargıtay

[38] **Özen**, p. 265; **Ayan**, p. 207.

[39] **Gümüş**, C. II, p. 324, fn. 1815; **Ayan**, p. 207.

References

Özlem Acar, Türk Borçlar Hukukunda Müteselsil Kefalet Sözleşmesi, İstanbul, 2015.

Atilla Altop, Neuerungen und Änderungen bei den Bestimmungen zum Bürgschaftsvertrag in Entwurf des türkischen Obligationengesetzes, Reformen im österreichischen und im türkischen Recht, Vortäge der Österreichisch-Türkischen Juristenwoche 14. Bis 17. April 2010, (Hrsg. Rudolf Welser), Band IV, Wien, 2010, (p. 117-122).

Serkan Ayan, Kefalet Sözleşmesinde Kefilin Sorumluluğu, Ankara, 2013.

Nami Barlas, Kefalet Sözleşmesinin Geçerlilik Şartları, Türk Borçlar Kanunu Sempozyumu Makaleler- Tebliğler, (Ed. Murat İnceoğlu), İstanbul, 2011, (p. 349-401).

Ece Baş, 6098 sayılı Türk Borçlar Kanunu'nda Kefalet Sözleşmesinin Geçerlilik Şartlarına İlişkin Bazı Yenilikler, İÜHFM, 2012, C. 70, S. 2, (p. 115-144).

Emil Beck, Das Neue Bürgschaftsrecht, Zürich, 1942.

Hüseyin Murat Develioğlu, Kefalet Sözleşmesini Düzenleyen Hükümler Işığında Bağımsız Garanti Sözleşmeleri, İstanbul, 2009.

Gülçin Elçin Grassinger, Borçlar Kanunu'na Göre Kefilin Alacaklıya Karşı Sahip Olduğu Savunma İmkanları, İstanbul, 1996.

Gülçin Elçin Grassinger, Kefalet Sözleşmesinden Doğan Bazı Hukuki Sorunlar, Banka ve Tüketici Hukuku Sorunları Sempozyumu, Türk İsviçre Hukuk Günleri, İstanbul, 2010, (p. 293-308).

Silvio Giovanoli, Das Obligationenrecht, Art. 492-515, 2. Auf., Bern, 1978.

Mustafa Alper Gümüş, Borçlar Hukuku, Özel Hükümler, C. II, İstanbul, 2012.

Şefika Deren Gündüz, 6098 Sayılı Türk Borçlar Kanunu'na Göre Kefalet Sözleşmesinin Şekli, İstanbul, 2015.

Burak Özen, Kefalet Sözleşmesinde Şekle Aykırılık ve Şekle Aykırı Kefalet Sözleşmesinin Kefil Tarafından İfa Edilmesi, Prof. Dr. Belgin Erdoğmuş'a Armağan, İstanbul, 2011, (p. 747-768).

Burak Özen, 6098 sayılı Türk Borçlar Kanunu Çerçevesinde Kefalet Sözleşmesi, 3. Edition, İstanbul, 2014.

Christoph M., Pestalozzi, Basler Kommentar Obligationenrecht I, (Hrsg. Honsell/Vogt/Wiegand) Art. 1-529 OR, 6. Auflage, Basel, 2015.

Safa Reisoğlu, Türk Kefalet Hukuku, Ankara, 2013.

Haluk Tandoğan, Borçlar Hukuku Özel Borç İlişkileri, C. II, 2. Edition, İstanbul, 1982.

Markus Vischer, Handkommentar zum Schweizer Privatrecht, Vertragsverhältnisse Teil 2, 3. Auflage, (Hrsg. Claire Huguenin, Markus Müller-Chen), Zürich, Basel, Genf, 2016.

Efe Can Yıldırır, Birlikte Kefalet, İstanbul, 2013, (Master's Thesis, Unpublished).