LITIGATION, ARBITRATION AND DISPUTE RESOLUTION

LEGAL ISSUES WITH GUARANTEES, SURETY, AND JOINT AND SEVERAL DEBTORS AND THEIR DISTINCTIONS

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Given the current economic scenario, the issue of contractual guarantees is increasingly in vogue in legal transactions conducted in recent years. To ensure faithful and full compliance with the signed contracts, parties have sought mechanisms to ensure the security of these instruments.

To enter into and perform a business deal, it is not enough just to believe that the debtor will honor its contractual obligations. It is necessary to guarantee that, in the event of breach of contract, the creditor will be able to enforce, quickly and efficiently, the guarantees that will be presented to it to compensate it for the losses that default will surely cause it. It can be said, therefore, that the existence of a guarantee is often what defines the completion (or not) of a deal. Hence its importance is obvious.

Sureties and guarantees are the most common contractual guarantees. Both are chosen in many situations in commercial practice, even though they do not tie the debt to a certain asset, precisely because they are personal guarantees, inasmuch as they originate from contractual relationships.

While surety is valid for contracts in general, a guarantee is a concept linked to the exchange law and can only be attached to negotiable instruments.

Although there is a difference between the concepts, contracting parties are rarely able to distinguish them easily. These types of guarantees are even confused with the situation in which, specifically, extension of joint and several liability is established (article 264, Civil Code). For this reason, it is common to find a mistake in the nomenclature of the type of guarantee indicated in the contract, a fact that may give rise to litigation regarding interpretation of the clause that stipulates it will be provided.

In other words, the intervening joint and several guarantor is not to be confused with the surety provider or guarantor. Nevertheless, the joint and several debtor and the guarantor are liable for the obligation under the same conditions, in the same way, and at the same time as the debtor who assumed the obligation (articles 275 and 899, Civil Code), not providing for, therefore, the benefit of discussion which the guarantor is given by operation of law.

Regarding the benefit of discussion, the creditor must first sue the principal debtor. Thus, the execution of the guarantor's assets (for the entire debt) starts only in the event that no assets of the original debtor have been found or due to insufficient funds. At any rate, if the contract indicates a waiver of the benefit of discussion, a possibility that is legally provided for and does not give rise to an abusive clause (Special Appeal No. 851.507), the guarantor, who previously was secondarily liable for the debt, now competes with the original debtor, as occurs in cases of joint and several liability and surety.

While surety is an ancillary and solemn contract (which must observe written form, article 819, Civil Code, and be executed by public or private instrument, or, further, in the body of the contract itself), the validity requirement of joint and several liability and sureties is unique: the signature of the joint debtor and the guarantor in the contractual instrument suffices.

On the other hand, although the joint and several liability and guarantees, unlike surety, have a substantially autonomous and independent nature (since they are not subordinated to the main obligation), they are not to be confused with each other either, since guarantees are a specific concept for negotiable instruments.

It is also important to pay attention to the legal formalism related to the spousal consent, which prevents one of the spouses from assuming specific obligations without the prior authorization of the other spouse in order to avoid deterioration of the couple's assets. If, on the one hand, there is no legal provision providing for the need for spousal consent for the validity of the joint and several liability, on the other hand, there is a settled understanding that the "surety provided without the authorization of one of the spouses entails total ineffectiveness of the guarantee" (Precedent 332 of the STJ).

Although there is a provision in the law requiring spousal consent in order for a guarantee to have full effectiveness (article 1,647, III, Civil Code), a provision that is confirmed by the majority of the judgments that have decided on the matter, recent case law has taken the position that the interpretation of this article must be suited to the characteristics of the guarantee.

Considering that a guarantee gives more efficiency and agility to banking transactions, reducing, moreover, the

costs of financial transactions, the law could not impose the need for a consent, at risk of condemning the very concept to failure.

And that is why recent judgments have taken the position that the need for spousal consent should be limited to cases in which the guarantee is provided on securities governed by the Civil Code (in consonance with article 1,647, III, Civil Code). It does not reach the nominated (typical) negotiable instruments, which are ruled by special laws, in which there would be no such requirement.

Having outlined the main differences between the concepts of joint and several liability, sureties, and guarantees, the importance of the distinction of nomenclatures and the correct use of such concepts by the contracting parties is noted. It is evident that, although there are similarities, the intervening joint and several guarantor, the surety provider, and the guarantor are distinct legal concepts and, therefore, they must be clearly defined in the contractual provisions in order to avoid application of a regime different from the will of the contracting parties.