**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 470.1, 470.2 and 471 of the Civil Code of the Republic of Azerbaijan*

**September 4, 2012 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan consisting of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Jeyhun Garajayev(Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Rovshan Suleymanov, senior adviser of Department of the Administrative Legislation of the Staff of Milli Mejlis of the Republic of Azerbaijan, Jeyhun Gadimov, Judge of the Hazar District Court;

experts: Sarvar Suleymanli, senior teacher of Civil Law Board of Baku State University and Dr. Azad Talibov, Civil Law Board of Baku State University;

specialists: Natiq Mammadov, lawyer of law firm “Baker and Mckenzie”, Shirin Aliyeva, head of legal department of Open Joint-Stock Company “Pasha Bank”,

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Hazar District Court of Baku city on interpretation of Articles 470.1, 470.2 и 471 of the Civil Code of the Republic of Azerbaijan.

having heard the report of Judge Jeyhun Garajayev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Hazar District Court of Baku city in its inquiry to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) indicated that in the case being on its consideration, T. Hajiyev, having made the claim against V. Shukyurov, asked to adopt the decision on deduction from the respondent of 1618 AZN which had been charged off of his account according to the contract “On Business Cooperation in the framework of Crediting”, concluded on April 4, 2011 between the Open Joint Stock Company “Unibank” Commercial Bank (hereinafter referred to as the JSC Unibank) and DNS Computers Limited Liability Company (hereinafter referred to as the JSC DNS Computers).

As it appears from the circumstances of the case revealed by court, the above-mentioned contract was signed by authorized representatives of JSC Unibank, JSC DNS Computers and T. Hajiyev. According to the contract, JSC Unibank assigned to itself the obligation to credit sale of goods by JSC DNS Computers, and T. Hajiyev had to pay in full the debts of buyers of JSC Unibank, guaranteeing return of credits issued by the bank to the latter (together with interest).

On April 26, 2011 between JSC Unibank and V. Shukurov the credit agreement for the sum of 1498 AZN was signed with an annual interest rate of 26 percent with a return condition within 12 months for acquisition of the computer of the “Dell” brand. According to Article 1.2 of the contract, the credit was issued to “client” under this contract on the basis of the contract as of April 4, 2011 “On Business Cooperation in the framework of Crediting”, concluded between JSC Unibank, JSC DNS Computers and T. Hajiyev.

Taking into consideration the fact that V. Shukurov did not fulfill his credit obligation before the creditor, the bank - having charged off 1618 AZN of account of T. Hajiyev (owed by V. Shukurov) – transferred the legal claim right against V. Shukurov to T. Hajiyev.

Hazar District Court having considered the issue of existence for T. Hajiyev of subjective right following from guarantee relations - including the one following from the Article 475 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code) regulating the rights of the guarantor who fulfilled obligation – had come to a conclusion on necessity to clear up the provisions of the Articles 470.1, 470.2 and 471 of this Code establishing legal grounds of the indemnity contract, and appealed to the Constitutional Court with inquiry to interpret these provisions from the point of view of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In connection with the inquiry, the Plenum of the Constitutional Court considers it necessary to pay attention to a number of provisions of the Civil Code establishing types of civil contracts, and opening the legal nature of the indemnity contract.

The fulfillment of obligations following from property and connected with property of non-property relations has big social - economic value in the conditions of free enterprise and market economy. The conscientious fulfillment of obligations, following from contracts, first of all, serves to legitimate interests of parties and stability of a civil circulation. In this sense, at implementation of the rights and fulfillment of duties by the parties it is required to work as that is demanded by conscientiousness. At fulfillment of obligations the party for creation of a basis for implementation of the contract have to work in common and evade from any actions which can prevent achievement of the purpose of the contract or put at risk the fulfillment of obligations (Articles 425.1 and 425.2 of Civil Code).

In Article 460.1 of the Civil Code (having dispositive character) the legislator for protection of a civil circulation, defines the special ways aimed at providing of fulfillment of obligations. According to this article, the fulfillment of obligations can be assured by a pledge, forfeit, debtor’s property withholding, guarantee, deposit and other means envisaged by this Code or a contract. The listed ways of identical legal purpose follow from the main contracts, but differ on essence and order of application.

The warranting, which is one of ways of ensuring fulfillment of the main obligation, is regulated by Articles 470-477 of the Civil Code. According to the Article 470.1 of the Civil Code, the guarantor, under a guarantee agreement, takes an obligation before the other person’s creditor, to answer for his fulfillment of the obligation in full or in parts.

The warranting can provide not only the obligation for payment of a sum of money, but also the obligation for transfer of goods, execution of work, rendering service, non-fulfillment by the debtor of certain actions.

The guarantee agreement providing implementation of the obligations following from the contract signed between the creditor and the debtor has accessory character. Accessory character of the warranting consists that the guarantee agreement acts as addition to the obligation of the debtor for ensuring fulfillment of the main obligation that is not fulfilled or fulfilled improperly.

The warranting is the unilateral, consensual contract. The unilaterality of the contract is reflected in the requirement of the creditor to the guarantor to take the responsibility of the debtor, and providing this obligation by the guarantor in case of non-fulfillment or inadequate fulfillment by the debtor of the main obligation. The warranting is a gratuitous contract and in exchange for a capture the guarantor on itself responsibility in connection with the obligation of the main debtor, the creditor does not incur any obligations to the guarantor.

The guarantee agreement must be made in writing. The nonobservance of the written form result in the invalidity of the guarantee agreement (Article 471 of the Civil Code).

By means of the requirement concerning the conclusion of the guarantee agreement provided in the legislation the unconscious conclusion by the guarantor of the contract of guarantee forming the obligation unilaterally and by that, first of all, the rights of guarantor are protected in writing is prevented.

Plenum of the Constitutional Court notes that as the contract of guarantee is one of the ways providing fulfillment of the main obligation in such contract has to be fixed the establishment or the possibility of establishment of the main obligation that provided with the guarantee. According to it, in the contract of guarantee has to be specified the following:

- under what main contract the guarantee is formed (with the indication of the parties, dates and number of the contract);

- indication on limits of the main obligation (obligation of the debtor to the creditor).

The indication in the contract of the concrete sum of the obligation provided with the guarantee is one of important conditions and pursues the aim to protect legitimate interests of the guarantor.

Forming of guarantee obligation to the creditor has the peculiar base. Thus, the conclusion of the contract of guarantee doesnot lead to creation of the rights and obligations not for guarantor nor for creditor. The obligation of the guarantor to the creditor on payment of a debt, and the requirement of the creditor to the guarantor are formed only after non-fulfillment or inadequate fulfillment by the debtor of the main obligation as it is specified in Article 472.1 of the Civil Code.

Thus, as with the conclusion of the contract of guarantee this obligation does not arise, this legal fact (that is, non-fulfillment or inadequate fulfillment by the debtor of the obligation provided with the guarantee) the guarantor cannot take any action directed on fulfillment of the obligation.

Three parties participate in the relations of the guarantee: the debtor according to the main obligation, his creditor and the guarantor who is the third party. Coherence is based by their uniform legal relations on the reason of emergence of the contract of guarantee, and the function that is carried out by them. For this reason in spite of the fact that in a standard order it is also not required the debtor's consent, the contract of guarantee has to be signed with the notification of the debtor, or the debtor has to be informed on already existing contract of guarantee. Along with it, the actions directed on the conclusion of the contract of guarantee between the creditor and the guarantor for transferring in the future to the guarantor of the right for making demands to the debtor and by that considerably complicate the legal status of the debtor, can lead to invalidity of such contract.

The civil legislation provide the mutual notice of the guarantor and debtor at fulfillment of the requirement of the creditor. Thus, according to Article 476 of the Civil Code, the debtor who fulfilled the obligation provided with the guarantee is obliged to inform the guarantor hereof immediately. Otherwise that is, if the main debtor, having fulfilled the demand made to it by the creditor won't inform hereof the person bearing subsidiary responsibility, and the guarantor will fulfill the obligation, responsibility falls on the main debtor. In turn, according to Article 474.2 of this Code, prior to the satisfaction of creditor’s demand the guarantor is obliged to inform the debtor hereof, and in the event of an action against the guarantor, the latter is obliged to attract the debtor to the case.

Article 470.2 of the Civil Code provide the possibility of the conclusion of the contract of guarantee also for providing the obligation that will arise in the future. Thus, it is necessary to consider that the contract of guarantee according to the obligation which will arise in the future, can be concluded at achievement of a consent by the parties in the demanded form of all important terms of the contract.

Concerning providing the obligation which exists or will arise in the future, according to the contract of guarantee, it is also necessary to note that according to Article 385.1 of the Civil Code, due to an obligation, one person (debtor) is obliged to fulfill certain actions to the benefit of the other person (creditor), namely: payment of funds, fulfillment of works, transfer of property, delivery of services, etc., or refrain from certain actions, and the creditor is entitled to demand from the debtor the fulfillment of his obligations. According to Article 386.1 of the Civil Code, except for the cases when an obligation results from a damage, unsubstantiated enrichment or is based on other grounds, envisaged in this Code, a contract between the parties required for the appearance of obligations.

Thus, the legislator, regulating circumstance of providing the debtor with the guarantee of the obligation to the creditor, provides concrete obligation established by the contract.

At the same time, considering that the contract of guarantee has accessory character and fulfillment of the nonexistent obligation it is impossible, the mutual rights and obligations of the parties of the contract of guarantee ensuring the obligation which will arise in the future are formed not from the moment of the conclusion of such contract but from the moment of emergence of the main obligation which is the subject to providing by the guarantee. The requirement of the creditor to the guarantor concerning violation by the debtor of the obligation provided with the guarantee can be shown only in the cases specified in Article 472.1 of the Civil Code.

Along with it, the contract of guarantee can be also provided by the obligations following from the contracts signed under the suspensive or canceling condition, and the contract of guarantee can be signed with a certain condition. According to Article 328.1 of Civil Code, a contract considered concluded with condition in the event parties have made emergence of rights and obligations conditional on occurrence or non-occurrence of unknown events.

The conclusion by the creditor of the guaranteeing contracts (for example, the mortgage contract) with the debtor or the third parties, etc. can be referred to the suspensive conditions causing the entering of the contract of guarantee in force (Article 328.6 of the Civil Code). As the canceling condition (Article 328.7 of the Civil Code) in the contract of guarantee the termination or recognition as invalid or unconcluded of other security contracts signed between the creditor and the debtor can be provided.

Plenum of the Constitutional Court considers that the contract of guarantee signed on fulfillment of the obligation that will arise in the future needs to be distinguished from the preliminary contract on the following features:

- in the preliminary contract the conditions allowing to establish a subject and other important conditions of the main contract have to be specified. Date of the conclusion of the main contract to be determined by the preliminary contract. In case of not indication in the preliminary contract of such date, the contract has to be signed within one year from the date of the conclusion of the preliminary contract;

- the contract of guarantee enter into force from the moment of achievement of a consent according to the main obligation in the form established by the corresponding conditions. If the date of fulfillment of the main obligation is not specified and cannot be defined or it is defined by the claiming moment, the guarantee stops if within two years from the date of the conclusion of the contract the creditor does not make the claim to the guarantor;

- any of the parties of the preliminary contract can refuse signing of the main contract on condition of compensation of the damage which resulted from non-fulfillment of obligations. The parties of the contract of guarantee can evade from commission of the actions provided by the main contract, and in that case, they satisfy not negative, but positive interests, bear responsibility for non-fulfillment or inadequate fulfillment of the obligations.

As the debtor of the obligation notes it, in cases of non-fulfillment or inadequate fulfillment, the debtor and the guarantor bear joint responsibility before the creditor.

Thus, according to Article 472 of the Civil Code, In the event of non-fulfillment or improper fulfillment by the debtor of the obligation assured by the guaranty, the guarantor and the debtor are jointly liable before the creditor, provided a subsidiary liability of the guarantor envisaged by this Code or the guaranty agreement. The guarantor is liable before the creditor to the same extent as the debtor, including payment of interest, compensation of judicial costs for the recovery of the debt and other damages of the creditor, resulting from the non- fulfillment or improper fulfillment of the obligation by the debtor, provided nothing otherwise is envisaged by the guaranty agreement.

In case of subsidiary responsibility, the creditor at first has to impose demand to the main debtor. In the event the main debtor refused to satisfy creditor’s demands, or the credit or did not receive the debtor’s reply to the demand within a reasonable time, then such demand may be brought against a person under subsidiary liability (Article 453 of the Civil Code).

The obligation of the debtor can be also provided with several guarantors:

- the guarantee by several persons on the basis of different contracts of guarantee;

- the guarantee by several persons as the guarantor on the basis of one contract (the guarantee is provided by several persons in common).

In the first case, the creditor can impose the relevant demand to any guarantor. In that case, between guarantors there are no legal relations. In the second case as it is noted above if the subsidiary liability is not provided in the contract of guarantee, the guarantors bear joint responsibility before the creditor. Thus, within one contract of guarantee, providing with the guarantor or joint guarantors only of the existing concrete obligation or the concrete obligation that can arise in the future is possible.

Considering the above, Plenum of the Constitutional Court comes to conclusion that:

- according to Articles 470 and 471 of the Civil Code, the conclusion of the contract of guarantee does not require the debtor's consent. Nevertheless, the debtor has to be informed on existence of the contract of guarantee.

- according to Article 470.2 of the Civil Code, the contract of guarantee according to the obligation which will arise in the future, can be concluded at achievement in the demanded form of a consent of the parties of all important terms of the contract.

According to sense of this article, the situation “ensuring of the obligation which will arise in the future”, has to be understood as the guarantee of the guarantor for the obligation that will arise in the future on in advance approved main debt.

- the obligation under the contract of guarantee ensuring the main obligation that will arise in the future is formed not from the moment of the conclusion of this contract, but from the moment of emergence of the main obligation that has to be provided with the guarantee.

In this case, according to Article 472.1 of the Civil Code the creditor can impose the demands to the guarantor only at non-fulfillment or inadequate fulfillment by the debtor of the obligation provided by the guarantee.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to the Articles 470 and 471 of the Civil Code, the conclusion of the contract of guarantee does not require the debtor's consent. Nevertheless, the debtor has to be informed on existence of the contract of guarantee.

2. According to the Article 470.2 of the Civil Code, the contract of guarantee with respect to obligation which will arise in the future, can be concluded at achievement in demanded form of a consent of the parties on all important terms of the contract.

According to essence of this article the provision “ensuring the obligation which will arise in the future” has to be understood as the guarantee of the guarantor for the obligation that will arise in the future on main debt which was approved in advance.

3. The obligation under the contract of guarantee ensuring the main obligation that will arise in the future is formed not since the moment of the conclusion of this contract, but since the moment of emergence of the main obligation that has to be provided with the guarantee. In this case, according to the Article 472.1 of the Civil Code the creditor can impose the demands to the guarantor only at non-fulfillment or inadequate fulfillment by the debtor of the obligation provided by the guarantee.

4. The decision shall come into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.