Fixed-term guarantee

(Article 866 of Greek Civil Code).

Substantive and procedural law issues in Greek and Swiss legal order.

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Abstract

This dissertation was written as part of the L.L.M. in Transnational and European Commercial Law, Banking Law, Arbitration/Mediation at the International Hellenic University.

In the narrow framework afforded by this study, it is attempted to present in English a short but comprehensive review of the Greek Legal Order related to the guarantee issues in a general aspect and in particular the Fixed-term guarantee agreements as they are regulated by the articles 847-870 of the Greek Civil Code. In the light of the contemporary and earlier but consolidated views in the Greek theory and the everyday judicial practice there will be scrutinized subjects that stipulate the interest of legal professionals increasingly, such as the specific preconditions under which the fixed-term guarantee is terminated according to the article's 866 G.C.C. provisions or the legal context that governs the letters of credit issued usually by banks.

Concurrently, it is effected a brief overview of the provisions governing the relative surety issues in the Swiss Legal Order, which regulate a capital and credit market highly developed, with a simultaneous comparative assessment of the similarities and differences in relation to the Greek Legal Order.

At this point, I need to thank some people that inspired me and offered me their unconditional help and precious support throughout this difficult and highly demanding task that I decided to undertake under adverse circumstances (both in the personal and professional field). First of all, I would like to thank the supervisor Professor Athanassios Kaissis for his trust in me as a person and legal professional and confidence in my abilities. He used to be and he still is for me a professional and somehow paternal role model due to his eternal eager for study and evolution. I would like also to thank Mrs. Rafaela Tsertsidis, lawyer and member of the IHU staff for her positive attitude each time I felt completely lost and disappointed during the courses.

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Keywords: guarantee agreement, guarantor, principal debtor, liberation, letter of credit

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Preface

As the capital and credit markets gain more and more importance in financial practice every day, it is a matter of great interest to be clear about what the institution of guarantee function is, which are the prerequisites for the creditor to assert his claims as well as those for the principal debtor and the guarantor to "escape" from their contractual obligations. In particular, the practice of the fixed-term guarantees gradually gathers the attention of the market players, since it now represents the majority of the credit contracts which involve personal sureties. Additionally, due to the steady persistence of the jurisprudence to consider the letters of credit usually issued by banks as a form of fixed-term guarantee, also standardised according to the guarantee provisions of the Greek Civil Code and in particular the article 866 G.C.C., the preconditions set by the latter for the guarantor to be eventually liberated by his contractual obligations should definitely be scrutinised.

Therefore, a study in English over the general concept of the Greek law concerning the guarantee issues and in particular those referring to fixed term surety agreements would be surely helpful to all those scholars and businessmen who might seek for a short and comprehensive overview of legal facts, both in theory and in judicial practice.

Finally, it appears to be very interesting to place the Greek legal status concerning the guarantee issues to the wider context of the European legal orders in order to assess its weaknesses for them to be revised and its strong points to be highlighted.

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INTRODUCTORY REMARKS IN ARTICLES 847-870 OF GREEK CIVIL CODE

In general: The guarantee agreement in Greek Civil Code System

I. Collateral security agreements

According to the guarantee agreement, as it is regulated under the art. 847-870 G.C.C., the guarantor takes over the obligation to fulfil debtor's duties to the creditor in case the debtor fails to do so. The guarantee's principal objective, from a financial and contractual aspect, is to strengthen and assure another primary contractual obligation between the guarantor and the other (third) person, namely the principal debtor. The guarantee agreement is part of a wider range of contractual obligations, which form the surety relations or collaterals[1]. This broader category also includes the cumulative acceptance of a debt (art. 477 G.C.C.), the abstract promise or acceptance of a debt (art. 873-875 G.C.C) and some other contractual forms of contract law which remain out of law's regulation, such as the guarantee contracts, the letters of credit e.t.c.[2]

II. Personal and in rem collaterals

The guarantee agreement regulated in articles 847-870 G.C.C. falls within the subdivision of the personal collaterals of the whole sphere of collaterals. Personal collaterals refer to the situation where a new debtor contractually renders his entire property as a guarantee for another person's obligations i.e. the principle debtor to his (the initial debtor's) own creditor[3].

Personal collaterals, thus, should be distinguished from in rem collaterals (interests) which are in rem rights agreed among persons bound by an in rem law contract, even though this contract could be unilateral (art. 1266 G.C.C.).

Though, in rem collaterals tend to attract significant importance in everyday financial practice due to their greater security power which derives from their capacity to focus mainly on the certain thing, mobile or immobile, offered as collateral. This

[1] Zepos, ErmAK Intr. 847-870 No. 9; Georgiadis, Gen. Enohiko, par. 21 no. 1 et seq.; Georgiadis, The collateralisation of credits, par. 2 no. 1 et seq.
[2] *Karagounidis*, to Georgiadis SEAK, Intr. 847-870 no. 1.
[3] Georgiadis, The collateralisation of credits, par. 2 no. 7.

isolated asset often provides more specific and stable financial characteristics compared to the typically relative and uncertain credibility of the person offered the personal collateral.

III. Guarantee agreement as a three-party relation

Guarantor's obligation assumes that there always exists a primary obligation of a third party (the principle debtor)[4]. Therefore, guarantee constitutes a type of the wider notion of the undertaking alien obligation, known in Roman law as *intercessio*[5]*.* In any case the obligation of the guarantor stands alone as an independent relation and is clearly distinguished from the one of the principle debtor, feature that differentiates the guarantee instrument from the comparable one of the cumulative acceptance of a debt regulated in article 477 of G.C.C[6].

Due to this clear distinction between the principle debtor and the guarantor, guarantee forms a three-party relation among the creditor, the principle debtor and the guarantor, which leads to the generation of respective contractual relations (principle debtor-creditor, principle debtor-guarantor and guarantor-creditor). In this three-party relations scheme, the contract between the creditor and the guarantor stands as the prevailing guarantee connection dedicated to the favour of the bond between the principle debtor and the creditor (relation of value). This characteristic attaches to this connection the designation of an ancillary or supplementary relation.

IV. Guarantee as an ancillary and supplementary institution

As the tradition has shaped the respective institution of guarantee through years of legal practice the guarantor takes over the responsibility of assuring and empowering an alien obligation *pro bono.* His motivation must be sought in some short of social or moral demand, which attributes to it an altruistic character[7]. This unique feature necessitated the law providing for a greater safeguard for the guarantor offering to his obligation an ancillary and supplementary character against the principle debtor's

[4] Greek Supreme Court (in plenary session) 43/2005 EllDni 2005, 1649; Theodoropoulos, The guarantee, p. 77-78; Filios, Eid. Enohiko II, p. 134; Georgiadis, The collateralisation of credits, par. 28 no. 41; Christakou-Fotiadi, The creditor's collateralisation (2002, p.9).
[5] Zepos, ErmAK Intr. 847-870 no. 27; Elefteriadis, Arm 2003, 142.
[6] Georgiadis, The collateralisation of credits, par. 3 no. 20, par. 7 no. 56.
[7] Zepos, ErmAK Intr. 847-870 no. 10.

obligation[8]. As *Helidonis* additionally states[9], from art. 862-863 G.C.C. also derives *the principle of alienation* of guarantor's obligation against principle debtor's one, principle with mandatory character, which differentiates in substance and in function both from the principle of ancillary and the principle of subsidiary. Accordingly the guarantor's obligation is related to primary obligation's origination (art. 847 G.C.C.), validity (art. 850 G.C.C.), ambit (art. 851 G.C.C.), effectiveness (art. 853 G.C.C.) and redemption (art. 864 G.C.C.). In that sense, from the procedural point of view, the act related to the guarantee falls within the exclusive jurisdiction of the court ruling on the primary obligation (art. 31 par. 1 G.C.P.C.). In that regard, a favourable for the principle debtor or the guarantor judgment at the trial between them and their counterparty-creditor constitutes res judicata for the principle debtor or the guarantor, respectively, in case the initial obligation is considered non-existing (art. 328 par. 1 and 2 G.C.P.C.).

As far as the element of subsidiary is concerned, the law provides that the guarantor can only be taken to court when it is proved that initial debtor's property is not sufficient for the fulfilment of creditor's demands (art. 855 & 856 G.C.C.).

Moreover, the aforementioned element of ancillary constitutes a core and distinctive feature of the guarantee institution that is legally based on a complex of legal rules, mainly the articles 850, 851 & 864 G.C.C. Evidently it is closely connected to the very essence of the tie between the securing institution of guarantee and the guaranteed one between the principle debtor and the creditor (relation of value). Contractual departure or waiver from this element is relatively accepted in the context of soft law provisions of articles 853, 855, 858, 862, 863 G.C.C[10].

Though, should there is a total limitation of the element of ancillary this means that the respective contractual term would be considered null and void[11]. As a result the guarantor's liability would be reconsidered in the context of the initial one as it is regulated according to art. 847 et seq. G.C.C. Contractual divergence of the aforementioned *very core* of guarantee's regulation can be regarded as a total limitation of this core characteristic, which is considered as a mandatory provision contrary to jurisprudence that stands for a "soft" law approach of guarantee's

[8] Greek Supreme Court 1500/2008 NOMOS; Vrellis, art. 847 no. 5; Filios, Eid. Enohiko II, p. 136
[9] Helidonis, EpiskED 2000,372 and 2001, 351.
[10] Georgiadis, The collateralisation of credits, par. 4 no. 58; EfThess 449/1996 DEE 1996, 826.
[11] Georgiadis, The collateralisation of credits, par. 4 no. 65, par. 5 no. 41 and note 31.

provisions (art. 847 et seq. G.C.C.), even though the Greek jurisprudence deals with this particular issue differently[12].

Nevertheless, the ability of the counterparties to provide for a potentially stronger collateralisation of the creditor should not be restricted versus that of the original guarantee provisions offer. This initiative should be scrutinized under the interpretation of the counterparties' will as per the provisions of articles 173 & 200 G.C.C. Despite the use of the notion of "guarantee" on behalf of the respective counterparties in the contract, it should not, in any case, be regarded as a guarantee liability of the art. 847 et seq. G.C.C. but as another contractual relation -regulated or not by the law- in obvious favour of the creditor, regardless of the initial obligation's progress[13]. In any case, should there be any second thoughts about the true character of the contractual providence, the genuine guarantee provisions of art. 847 et seq. G.C.C. must prevail so long as they offer greater protection for the guarantor's position[14].

[12] Ef. of Thessaloniki 449/1996 DEE 1996, 826

[13] G.S.C. 1800/2008 NOMOS; Zepos, ErmAK Intr. 847-870 no. 14; Vrellis, art. 847 no. 10; Kallimopoulos, NoV 1985, 1525-1526, 1541.

[14] Georgiadis, The collateralisation of credits, par. 5 no. 41.

Article 866 G.C.C.: Fixed-term guarantee

I. In general. Nature of the provision

It is apparent that the respective provision originally covers *only the guarantee offered for a limited period of time*.

It is steadily acknowledged by the domestic jurisprudence that the article's 866 G.C.C. provision is also applied to the letters of credit issued by banks, which are considered as a fixed-term collateral by nature[15]. On the contrary, the guarantee in a bill of exchange is not regarded as falling within the scope of application of the relevant provision[16].

It functions in obvious favour of the creditor as it prolongs for one month the deadline he (the creditor) had contractually in order to act against the principal debtor before his rights related to the guarantee are revoked[17].

Though, this favourable in the first place treatment for the guarantor is not granted to him without preconditions, as the law provides for strict terms in order for him to be benefited from the additional collateralisation of the guarantor[18].

In detail, there should be a cease of guarantor's liability in case the creditor *deliberately delays* the relevant procedure against the principal debtor even though he had previously acted within the time limit. Thus, the law *balances* the one month period extension with the time limitation in creditor's willingness to act against the initial debtor. Therefore, the law seeks to protect the guarantor from a deliberate or negligent delay of the procedures on behalf of the creditor[19].

The affirmation of the decisive element of *deliberate delay* on behalf of the creditor is determined in each and every occasion[20] by applying the principles of good faith and fair trade practice, taking at the same time into consideration the general behaviour of the creditor as well as the whole circumstances, i.e. the credibility or not of the

[15] G.S.C. (in plenary session) 10/1992 EllDni 2002,757; 48/1996 EllDni 1996, 1332; 210/1993 NoV 1994,399; Ef. of Thessaloniki 1078/2007 Arm 2008, 570; Ef. of Larissa 671/2004 EpiskED 2004, 973; Ef. of Athens 6281/2002 EllDni 2004, 271; Ef. of Thessaloniki 1193/1992 Arm 1992, 712.
[16] Ef. of Athens 87/1979 EEmpD 31/260.
[17] Ef. Of Athens 637/2003 EllDni 2004, 527; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 516.
[18] Zepos, ErmAK 866 no. 1.
[19] Zepos, ErmAK 866 no. 8.
[20] Georgiadis, The collateralisation of credits, par. 3 no. 195.

principal debtor e.t.c.[21].Nevertheless, a show of cruelty against the principal debtor is not at all demanded by the Law[22]. The creditor's fault or neglect factor is considered so decisive that the guarantor's liability against the creditor rests viable otherwise, despite the delay or suspension of judicial proceedings[23].

In particular, the creditor's response to the need of due pursuance of his legitimate rights against the initial creditor stands as a very crucial point for his demand against the guarantor to be considered effective or annulled, as a result of the aforementioned law provision. Consequently, the cease or delay in judicial proceedings already initiated by the creditor, not attributed to his fault, should not bring the loss of his rights based on the article 866 G.C.C. (cease caused by a moratorium etc)[24].

However, the provision of articles 866 G.C.C. and 867 G.C.C., does not cover the guarantees agreed by the Greek State in favour of Banks, which are governed by ad-hoc provisions[25].

Moreover, the article 866 G.C.C. is totally open to contra-agreements of the relevant parties i.e. between the creditor and the guarantor or even modifications of its provisions due to its "soft law" feature[26], *however, before the expiry of the one-month-time period*. This alteration of the original concept of law can be beneficial either *for the creditor* in case the guarantor rests liable against the creditor even when he (the creditor) neglects to comply with the preconditions set by the respective provision[27] or *for the guarantor* in the sense that he has no obligations against the creditor *ipso facto* as soon as the creditor fails to initiate judicial proceeding against the guarantor in the time lapse agreed for guarantee's power[28].

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[21] Zepos, ErmAK 866 no. 8; Vrellis, art. 866 no. 11.

[22] Zepos, ErmAK 866 no. 8; Vrellis, art. 866 no. 10; Georgiadis, The collateralisation of credits, par. 3 no. 195.

[23] Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 518-519; Zepos, ErmAK 866 no. 8; Vrellis, art. 866 no. 10.

[24] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.4.

[25] G.S.C. 55/2002 NOMOS; 1435/1998 EllDni 1999, 604; 1434/1998 EEmpD 1999, 277; Ef. of Athens 300/2001 EpiskED 2001, 1066.

[26] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.2.

[27] G.S.C. 482/2006 CrID 2006, 597; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 518. According to these views, it should be applied the article 867 G.C.C..

[28] Georgiadis, The collateralisation of credits, par. 3 no. 197.

In fact, the waiver of article 866 G.C.C. rights of the guarantor in favour of creditor demands *a written form* of the respective agreement (art. 849 G.C.C.) since it renders the guarantor's position less favourable[29].

Nevertheless, parties are not allowed to extend or curtail by agreement the one-month time-limit of article 866 G.C.C. neither wholly waive from this right after time-limit completion due to its exclusive and mandatory character which the Court should consider on its own motion (articles 280, 279 & 275 G.C.C.). Moreover, it is easily understood that such an after time-limit completion waiver could not bring back in life the automatically by the law terminated obligation of the guarantor[30].
However, the grounds for suspension of the time limitation would be applied in this case, too[31].

II. Conditions of application

a) Fixed-term guarantee

According to article 866 G.C.C. provisions, there is "a fixed time guarantee obligation" when guarantor's liability ends after a certain point in time, which usually is related to creditor's action against the initial debtor[32] and is specified by the parties in calendar time or otherwise i.e till the olive harvest[33] or when the creditor declares that his obligations will last up to the point the main debt expires[34]. In other words, the guarantee agreement is receptive to time limitation so as the guarantor's liability to be constricted in a certain period of time and more specifically in relation to the pursuit of creditor's claims within this period. This time limitation might also indicate that the guarantor would be liable only for the creditor's claims against the debtor occurred during this period due to the latter's infringements of obligations. Further, it is evident

[29] Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 518; Vrellis, art. 866 no. 2.
[30] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.4; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 517-518; Zepos, ErmAK 866 no. 15.
[31] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.4; Kafkas, Enohiko Dikaio, Eidiko Meros, art. 866 no.2.
[32] Ef. of Athens 637/2003 EllDni 2004, 527; Ef. of Patras 586/2002 AhN 2003, 71; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 515.
[33] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.4; see also G.S.C. 689/1964 NoV 13/399, Ef. of Athens 901/1955 EEN 24/462.
[34] Georgiadis, The collateralisation of credits, par. 3 no. 194.

that in absence of time limitation the guarantor's liability should last indefinitely, so long as the creditor remains liable for his obligations[35].

Therefore, this time-element renders the certain type of guarantee a contractual obligation covered *by a termination time-limit*[36]. On the contrary, the guarantee under *a termination clause* should not be considered as a fixed-term guarantee[37].

Additionally, a guarantee should not be regarded as a fixed-term one by the only fact that the primary obligation of the principal debtor was agreed for a fixed time limit, since the claims of the creditor whose fulfilment the guarantee secures are still valid and due[38]. Exceptionally, this can happen when the guarantor initially agreed to be bound by this agreement till the time-limitation of the primary obligation[39].

Accordingly, a guarantee should not be considered as a fixed-term one as a result of an agreement that the guarantee secures the entire debt of the principal debtor occurred in a certain period of time, so long as the guarantor's obligation is not subject to any other time limitation[40]. In this particular case, it is upheld by theory that only a constraint on the secured claims related to their time of establishment might be admitted[41].

Should there is *a future or under suspensory condition* primary obligation the guarantee is considered as a fixed-term one if the creation of the primary obligation or the completion of the time limitation occur within the time limit laid down by the guarantor and the creditor, resulting in article's 866 G.C.C. provisions application. In other words, in case of a future or under suspensory condition primary obligation the guarantor's liability ends if the primary obligation had not emerged till the moment the guarantee's fixed period expired. Otherwise, guarantee cannot be assumed because of the inexistence of the primary obligation within the latter period[42].

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[35] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.2.
[36] Georgiadis, The collateralisation of credits, par. 3 no. 193.
[37] Ef. of Athens 637/2003 EllDni 2004, 527; Zepos, ErmAK 866 no. 5; Vrellis, art. 866 no. 6.
[38] G.S.C. 80/2004 HrID 2004, 429, 463/1994 NoV 1995, 540, Ef. of Thessaloniki 1078/2007 Arm 2008, 570, Ef. of Larissa 671/2004 EpiskED 2004, 973, Ef. of Athens 8180/2004 Arm 2006, 751, Ef. of Athens 6902/1995 EllDni 1996, 1399.
[39] G.S.C. 741/1998 NoV 1999, 1562, G.S.C. 463/1994 NoV 1995, 540, Ef. of Patras 586/2002 AhN 2003, 71; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 516-517; Vrellis, art. 866 no. 6.
[40] Georgiadis, The collateralisation of credits, par. 3 no. 193.
[41] Georgiadis, The collateralisation of credits, par. 3 no. 193.
[42] Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 519-520; Zepos, ErmAK 866 no. 5; Vrellis, art. 866 no. 7; Georgiadis, The collateralisation of credits, par. 3 no. 194.

On the contrary, in a situation where the primary obligation is covered *by a termination clause* an agreement that the guarantor would be liable should the termination does not occur within a certain time limit is valid and the creditor is obliged to comply with the article's 866 G.C.C. preconditions. Whereas, should the termination occurs within the certain time limit the guarantor's liability then expires[43].

b) Preconditions for the validity of the time-limitation clause

As it was mentioned before, an agreement that limits the time frame of guarantor's liability towards the creditor is admissible at first under the preconditions set by the law. This agreement should be explicit and clear. In any case the relevant volition of the parties would be subject to *an interpretation on the basis of the articles' 173 & 200 G.C.C. principles*[44]. This agreement can be also concluded between the creditor and the guarantor *after* their initial guarantee agreement. In this condition the agreement should not be in the written form, which the provision of article 849 mandates in general for the valid conclusion of the guarantee's contractual relation. This "loosening" of law's demands is the result of the fact that the subsequent agreement renders the guarantor's position more favourable than it was under the initial agreement[45].

c) The creditor's demand of his contractual rights

aa) Failure in initiating legal proceedings against the debtor within the one-month-time period

According to the article 866 G.C.C. provisions, the guarantor's obligations come to an end should the creditor fails to pursue his contractual rights within the one month period of time set by the law, which commences the next day of the expiry of the agreed time of the guarantee (article 241 par. 1 G.C.C.)[46].

[43] Kafkas K./Kafkas D., art. 866, par. 2, p. 517 note 1b; Vrellis, art. 866 no. 8.
[44] G.S.C. 80/2004 CrID 2004,429; G.S.C. 741/1998 NoV 1999, 1562; Ef. of Thessaloniki 1078/2007 Arm 2008, 570; Ef. of Lariss 671/2004 EpiskED 2004, 973; Ef. of Athens 8180/2004 Arm 2006, 751; Ef. of Athens 637/2003 EllDni 2004, 527; Ef. of Athens 6902/1995 EllDni 1996, 1399.
[45] Ef. of Thessaloniki 1903/2003 Arm 2005, 1056; Kafkas K./Kafkas D., art. 866, par. 2, p. 516; Vrellis, art. 866 no. 5; Georgiadis, The collateralisation of credits, par. 3 no. 194.
[46] Vrellis, art. 866 no. 12.

The pursuit of creditor's contractual rights should *follow the appropriate judicial proceedings* such as the bringing of an action, the raising of a plea against an action, the registering of his claim in the liquidation procedure or the auction of an asset belonging to the principal debtor and so forth. A simple extrajudicial letter or formal notice of the latter is not sufficient[47].

Though, the aforementioned reference of the law to the appropriate judicial proceedings does not necessitate the pursue of the creditor's claims through an enforcement procedure respectfully, within the relevant one-month-time period, using one of the instruments of enforcement laid down in article 904(2) (b-g) G.C.C.P.. It is pretty clear that the law provides only for an initiation of court proceedings aiming to the clearance of the creditor's claims against the principal debtor without demanding him entering in a procedure for the enforcement of the claim recovery, which presupposes the existence of a claim previously attested[48], so it is claimed that the article 862 G.C.C. should be applied[49].

Assumingly, no initiative is expected on behalf of the creditor within the relevant one-month-time period in case where the principle debtor has already, within the same period, acknowledged his obligations, so it is assumed that the article 862 G.C.C. could be applied[50].

bb) Deliberate delay in judicial proceedings

Additionally, as it was elaborated before (see **I.** In general. Nature of the provision), there should be a cease of guarantor's liability in case the creditor *deliberately delays* the relevant procedure against the principal debtor *even though he had previously acted within the time limit*.

[47] Kafkas K./Kafkas D., art. 866, par. 2, p. 518 and note 2; Zepos, ErmAK 866 no. 7; Vrellis, art. 866 no. 9; Georgiadis, The collateralisation of credits, par. 3 no. 195.
[48] *Karagounidis*, to Georgiadis SEAK, 866 no. 11; G.S.C. 210/1993 NoV 1994, 399; Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.4; Kafkas K./Kafkas D., Enohikon, art. 866, par. 2, p. 519; Vrellis, art. 867 no. 9, according to them art. 862 G.C.C. is applied in this case; Georgiadis, The collateralisation of credits, par. 3 no. 195).
[49] Georgiadis, The collateralisation of credits, par. 3 no. 195.
[50] Kafkas K./Kafkas D., art. 866, par. 2, p. 518-519; Vrellis, art. 866 no. 9.

d) Effects of non-compliance with the article's 866 G.C.C. provisions

Provided that the creditor does not fulfil the article's 866 G.C.C. prerequisites the guarantor would be liberated from the guarantee's obligations *automatically* without the need of notifying the creditor by any mean[51]. It is also considered as irrelevant whether the creditor's claims were fulfiled or not or the creditor's behaviour has provoked further damage to the guarantor[52].

Therefore, it is promoted a legitimate right of annulment of the contractual obligations of the guarantor, as a result of the creditor's behaviour, by the introduction of *"a specific ground for deliberation of the guarantor"*[53] in case the creditor remains inactive as to pursue his contractual rights within the one month period of time set by the law, which commences the next day of the expiry of the agreed time of the guarantee and he (the creditor) deliberately delays the relevant procedure against the principal debtor even though he had previously acted within the respective time limit.

On the contrary, *the guarantor's liability remains intact*, even *after* the completion of his time-limited guarantee, if the creditor acts according to his legitimate right *against either the principal debtor or the guarantor*, provided that the article's 866 G.C.C. prerequisites were fulfilled, and the guarantor has not retained in his favour the right to object as the article 857 G.C.C. provides (plea against the immediate-recourse guarantee)[54]. Yet, the guarantor's, reserved in his favor, capacity to plead against the immediate-recourse guarantee should force the creditor to pursue his claim against the principal debtor more vigorously so as to safeguard his legitimate interests[55]. Accordingly, should the creditor fail to bring proceedings against either the debtor or the guarantor within the respective one-month-time period this would result in the article's 866 G.C.C. sanctions[56].

In fact, the possible, on behalf of the guarantor, payment in full of the creditor's claims, despite the favourable provisions of the article 866 G.C.C., his (the guarantor's) right to ask the principal debtor for repayment or to exercise all the remaining rights

[51] Kafkas K./Kafkas D., art. 866, par. 2, p. 519; Zepos, ErmAK 866 no. 10; Vrellis, art. 866 no. 13.
[52] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.5.
[53] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.1.
[54] G.S.C. 210/1993 NoV 1994, 399; Kafkas K./Kafkas D., art. 866, par. 2, p. 519; Zepos, ErmAK 866 no. 12; Vrellis, art. 866 no. 15.
[55] Kafkas K./Kafkas D., art. 866, par. 2, p. 519; Vrellis, art. 866 no. 15.
[56] Vathrakokoilis ERNOMAK 2006 vol. C' art. 866 no.5.

attributed to him by the law (articles 858-861 G.C.C.) rests viable and fully operable due to the fact that the article's 866 G.C.C. provision only affects the relations *between the creditor and the guarantor*[57]. In accordance with the established case-law of the domestic Courts of Justice an additional criterion should be met in order for the guarantor to retain the above rights. There has to have been concluded a guarantee agreement within the frame of a contract between the creditor and the principal debtor ordering at the same time the guarantor, explicitly or implicitly, to pay the sum secured by the guarantee, upon a formal notice on behalf of the creditor, even though the prerequisites of the article 866 G.C.C. were met[58].

On the other hand, the guarantor is deprived of his above mentioned right for repayment by the principal debtor in case he pays the creditor after the expiry of the one-month-time period with action not having been taken by the creditor. The reason is that the respective payment would be made after the guarantee obligation had expired, since the waiver from the right to evoke the one-month-time period of the article 866 G.C.C., is not admissible, when this period has already passed[59].

[57] Zepos, ErmAK 866 no. 13; Filios, Eid. Enohiko II, p. 155.
[58] G.S.C. 10/1992 EllDni 1992, 757.
[59] Kafkas K./Kafkas D., art. 866, par. 2, p. 520; Vrellis, art. 866 no. 14.

III. The abusive nature of the article's 866 G.C.C. rights waiver general term

A natural or a legal person which guarantees in favour of an principal debtor which acts *as a consumer* (as this term is specified in the article 1(4) (a) (a) of the Law 2251/1994, as it was amended by the article 5 (1) of the Law 2587/2007), is deemed to be a consumer, too, provided that he does not act in the frame of his professional or business occupation (article 1 (4) (a) (bb) (bb) of the Law 2251/1994, as it was amended by the article 5 (1) of the Law 2587/2007). Consequently, the guarantor may evoke against the creditor the protective provisions of the article 2 (general terms-abusive ones) of the Law 2251/1994[60].

On the contrary, as long as the principle debtor does not fulfil the criteria set by the relevant Consumer Protection Law[61] it is claimed that neither the guarantor can be regarded as a consumer benefited from the consumer protective provisions of the Law 2251/1994. Nevertheless, this argument is critically viewed by a significant part of theory for the reason that in a particular case the guarantor might be presented as acting in a weaker negotiating position or being purely informed alike a typical consumer irrespective of initial debtor's experience or information[62].

In fact, it is widely accustomed the general terms to be pre-formulated for an indefinite number of future agreements [art. 2 (1) of Law 2251/1994]or be incorporated in the final agreement without being at all negotiated before by the relevant parties [art. 2 (10) of Law. 2251/1994]. This particularly occurs in the case of the terms of guarantee. This is the common practice as far as the bank credits are concerned where the crucial terms of the guarantee are included in a pre-written form issued by the bank. The lawfulness of the aforementioned inclusion of the respective general terms in the agreement, their interpretation and their judicial assessment are subject to the Consumer Protection Law (2251/1994) provisions of article 2.

In general, the decisive factor for a general term to be considered as an abusive one and therefore null and void is primarily the article 2 (7) of Law 2251/1994 which

[60] Perakis, ConsProtLaw (edit.: El. Alexandridou) (2008), art. 1 (84); Georgiadis, The collateralisation of the credits, par. 3 (84) et seq.).
[61] Perakis, ConsProtLaw (edit.: El. Alexandridou) (2008), art. 1 (60).
[62] Dellios, Individual and Collective consumer protection (2008), no. 89 et seq. and in particular no. 94; Georgiadis, The collateralisation of credits, par. 3 (88) no. 100).

provides for an indicative list of them[63]. In addition, the terms of a credit agreement should be considered as abusive when they turn out to have significantly detrimental effects on the status of the guarantor-consumer in relation to a favourable impact on the creditor or the principal debtor (article 2 (6) (a) of Law 2251/1994)[64].

Hence, the term is deemed among others to be distinctively abusive regarding the waiver of the guarantor of his right to plead on the grounds of articles 862-864 G.C.C[65] and particularly the term that precludes the application of article 866 G.C.C. in case of a fixed-term guarantee[66].

[63] Perakis, ConsProtLaw (edit.: El. Alexandridou) (2008), art. 2 (58 et seq.).
[64] G.S.C (in plenary session) 15/2007 C.L. review 2007, 1094).
[65] Ef. of Athens 6294/2007 C.L. review 2007, 1257, 5253/2003 D.E.E. 2004, 797; Prot. of Athens 1990/2004 N.V. 2004, 1592, 1119/2002 D.E.E. 2003,422; contra Prot. of Thessaloniki 2619/2007 Armenopoulos 2007, 1219).
[66] Ef. of Athens 5253/2003 D.E.E. 2004, 797; Georgiadis, The collateralisation of credits, par. 3 no. 95; Mentis, Cr.P.L 2004, 192).

Article 866 G.C.C. compared to articles 867-868 G.C.C. (Indefinite Duration Guarantee): Similarities and differences

Firstly, both articles 867 and 868 G.C.C. provide for the indefinite duration guarantee. They regulate, *alike the article 866 G.C.C.*, exclusively the relation between the creditor and the guarantor[67], who is deliberated from guarantee's obligations provided that the creditor does not adopt the specific measures against the initial debtor[68].

However, both the provisions of article 867 G.C.C. and of article 866 G.C.C., do not apply to the guarantees agreed by the Greek State in favour of Banks, which are governed by ad-hoc provisions[69].

It is evident that indefinite duration guarantees normally lack the ability to be declared as ordinarily terminated, by a unilateral initiative of the guarantor[70], unless the contract provides otherwise[71]. In fact, the guarantor's benefit stemming out of the article's 867 G.C.C. rule is deemed to somehow compensate for this deficiency[72].

Moreover, the articles' 867-868 G.C.C. provisions are considered as "soft law"[73]

In specific, a guarantee is regarded as indefinite duration one when the contract misses to include a certain term indicating expressly and clearly parties' will to limit the duration of guarantor's liability[74]. Indefinite duration guarantees indicatively refer to cases where the guarantor agrees to be bound till the total discharge of the debt or it is about an initial debt of limited duration and the guarantor misses to expressly declare that the relevant guarantee covers only this limited period of time[75]. Where

[67] Zepos, Int.G.C.C. 867 no. 11.
[68] Zepos, Int.G.C.C. 867 no. 1.
[69] G.S.C. 55/2002 NOMOS; G.S.C. 1435/1998 EllDni 1999, 604; G.S.C. 1434/1998 EEmpD 1999,277; Ef. of Athens 300/2001 EpiskED 2001, 1066.
[70] Ef. of Larissa 800/2003 NOMOS; Georgiadis, The collateralisation of credits, par. 4 no. 54.
[71] Zepos, Int.G.C.C. Intr. 847-870 no. 52, 862 no. 2; Vrellis, art. 862 no. 1.
[72] Georgiadis, The collateralisation of credits, par. 3 no. 198.
[73] Ef. of Thessaloniki 763/1992 Arm. 1993, 222; Zepos, Int.G.C.C. 867 no. 12; Vrellis, art. 867 no. 2; Georgiadis, The collateralisation of credits, par. 3 no. 198; See also G.S.C. 1306/1994 NOMOS.

[74] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 521; Zepos, Int.G.C.C. 867 no. 4; Vrellis, art. 867 no. 3; See also G.S.C. 741/1998 NoV 1999, 1562).
[75] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 521-522; Vrellis, art. 867 no. 3,5.

there is doubt about the true nature of the guarantee it would be assumed that the relevant guarantee was concluded for an indefinite period[76].

The application of article's 867 G.C.C. benefit presupposes that the initial debt has already fallen due and then the guarantor shall invite, by a statement of his intention, the creditor to act according to the respective provision's prerequisites. This statement is *in rem and informal.* The opportunity granted for the guarantor, in the context of the article's 867 G.C.C. provision, to be liberated from his obligations by inviting the creditor to bring proceedings against the principal debtor has a provisional character. This means that should the guarantor avoids notifying the creditor his obligations live on unless he is liberated due to another beneficial law provision i.e article 862 G.C.C.[77].

Regarding the notion, the nature and the function of the one-month period laid down in the respective article and the relative obligation of the creditor to keep on acting without undue delay all the elements that were analysed previously about the article's 866 G.C.C. preconditions shall apply similarly[78].

As far as the consequences of the non-action on behalf of the creditor, after he was invited so by the guarantor according to the article's 867 G.C.C. prerequisites, are concerned the guarantor would be liberated from guarantee's obligations *automatically* without the need of notifying the creditor by any mean, just as the article 866 G.C.C. provides.

Moreover, should the guarantor has not retained in his favour the right to object as the article 857 G.C.C. provides for (plea against the immediate-recourse guarantee), all those that were previously attested regarding the fixed-term guarantee of the article 866 G.C.C. shall apply accordingly to the indefinite duration guarantee of the articles 867-868 G.C.C.[79].

[76] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 521; Vrellis, art. 867 no. 3.
[77] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 523; Vrellis, art. 867 no. 7; Zepos, Int.G.C.C. 867 no. 8.
[78] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 522; Vrellis, art. 867 no. 9.
[79] Kafkas K./Kafkas D., Enohikon, art. 867-868, par. 2, p. 522; Vrellis, art. 867 no. 12; Zepos, Int.G.C.C. 867 no. 10.

Letters of Credit as a representative instrument of fixed-term guarantee

I. Time-limit link

As it was previously stated (see p. 4: "Nature of article's 866 G.C.C. provision"), it is now common ground in the domestic jurisprudence that the letters of credit usually issued by banks, are governed by the article's 866 G.C.C. provisions, as well, so as to be considered *as a fixed-term collateral by default*[80], since it constitutes a related institution operating on a similar concept (security of a third party obligations in a fixed-time period).

Following the Greek Courts' rationale the issuing bank's liability terminates the moment the recipient of the letter of credit fails to bring legal proceedings against it within the one-month-time period after the collateral's expiry provided that the recipient's claim was initiated *within the accorded period of the letter of credit validity*. Though, this acceptance is tempted by the consideration about the possibility or not that the recipients of the letter of credit claim to be pursued within the one-month-time limitation of article 866 G.C.C. in case the cause of the issuer's liability was triggered before the expiry of the collateral's time limit or after it, but within the above one month period[81].

In fact, the letters of credit usually comprise a specific term regulating their duration. The banks are actually very concerned about how to disconnect from their obligations the soonest possible, as issuers of the letters of credit, alike the principal debtors seek to avoid being charged for a long time with extra commissions by the banks.

On the contrary, in absence of a specific clause of time duration of the letter of credit the issue of an implicit time limitation could be raised. A critical hint could be the collateral purpose of the agreement i.e. when it is concluded a certain period within the guaranteed claim should be fulfilled. Should a potential inactive overlap of this deadline or an incident that would normally trigger the letter of credit liability are

[80] G.S.C. (in plenary session) 10/1992 EllDni 2002,757; G.S.C. 48/1996 EllDni 1996, 1332; 210/1993 NoV 42, 399; 593/1989 EEmpD 42, 416; 585/1989 NoV 38, 820; Ef. of Thessaloniki 1078/2007 Arm 2008, 570; Ef. of Larissa 671/2004 EpiskED 2004, 973; Ef. of Athens 6281/2002 EllDni 2004, 271; Ef. of Thessaloniki 1193/1992 Arm 1992, 712.

[81] Georgiadis, The collateralisation of credits, par. 6 no. 163.

somehow occurred, there might be implied by the agreement an obligation of the recipient to *at least inform* the issuing bank about his intentions[82]. Consequently, the recipient of the letter of credit would be forced to assert his rights provided the issuer has invited him to do so.

Nevertheless, the true meaning of the time-limit clause in a letter of credit could be identified dually: Either the recipient of the collateral should pursue his claims stemming out of the letter within the contractually fixed time-limit or it is just needed to act as the cause of triggering the issuer's liability (i.e. failure to fulfil the collateralised obligation) to occur within the same period while the legal pursuit of the claim could be postponed.

Furthermore, should there is a dispute about the identification of the time lapse clause in absence of a specific provision in the letter of credit agreement it is accepted that within this fixed time-limit both the triggering of the letter of credit's liability and the consequent legal pursuit of the relevant obligation against the issuer must occur. It is evidently expected on both of the issuer of the letter of credit and the debtor side to be cleared out, in a definite and certain way, whether the recipient of the letter acted accordingly in the fixed time in respect of its formal nature[83].

However, it is argued by a part of theory[84]that all the aforementioned elements of the letter of credit function should deprive the application by analogy of the article's 866 G.C.C. provisions as far as the letter of credits are concerned.

II. General features of letter of credit

Moreover, the guarantee agreement shaped by the articles 847-870 G.C.C. is part of the broader notion of personal collaterals which refer to the general institution of the collaterals. In this sense, personal collaterals regulate the situation where a new debtor contractually offers his entire property, as a guarantee for another person’s obligations (the principle debtor), in favour of the creditor.

In detail, the letter of credit issued by a bank constitutes a specific kind of guarantee regulated by the article's 847 et seq G.C.C. provisions, insofar as there are

[82] Georgiadis, The collateralisation of credits, par. 6 no. 164; Horn, no.207.
[83] Georgiadis, The collateralisation of credits, par. 6 no. 163; Gouskos, p.90; Psychomanis, p.357; Dimitriadis, p.51.
[84] Georgiadis, The collateralisation of credits, par. 6 no. 163.

not special provisions neither in the Trade Law nor in another field of Law regulating otherwise these topics.

The letter of credit constitutes a unilateral and, in its very essence, autonomous and independent agreement from the basic one between the principal debtor and the creditor, in contrast to the ancillary and supplementary character of the general guarantee agreement. It is concluded between the bank and the creditor so as the bank to promise the payment of a certain amount of money to the creditor (recipient of the letter), should he ask for it, irrespective of the validity of the primary obligation (relation of value) between the beneficiary of the guarantee (initial debtor) and the recipient of the letter[85].

Moreover, the letter of credit would be considered as acceptable, regardless of the fact that the principal debtor is not the same person as the subject of the obligation from recourse of the article 858 G.C.C., i.e. identification between the subject of the initial debt (relation of value) and the subject of relation covered by the guarantee. In fact, it is accustomed, in the everyday business routine, the person that orders the issuance of the letter of credit to be different than the principal debtor (a third person). The issuance of the letter of credit is carried out by the respective bank as a result of the received "order" (in a broad sense), no matter under which legal form this process is realised[86]. Thus, this leads to the establishment of an obligation of the person who ordered the issuance for paying back the amount consumed due to the accomplishment of the order, since the forfeiture of the letter of credit. Moreover, it is quite common the agreement between the bank and the third person ordered the issuance of the letter of credit, by which the latter guarantees towards the bank the fulfilment of the initial debtor's obligations, so as this relation (the counter-guarantee) to be covered by the guarantee's rules of art. 866 et seq. G.C.C., as well.

In contrast to the relation between the guarantor and the person benefited by the guarantee (namely the external relation) covered by the guarantee rules, the other

[85] Vathrakokoilis ERNOMAK 2006 vol. C' art. 847 no.35; EA 8188/2003 Dni 40/1721; EA 6281/2002 Dni 45/1080.

[86] Vathrakokoilis ERNOMAK 2006 vol. C' art. 847 no.35; Krimpas, The guarantee in banking services 57 et seq.; Syllas, NDTrEll 1 p.47; Triantafyllopoulos, EEN 20/1 et seq.; G.S.C. 990/73 NoV 22/513; Ef. of Athens 6442/76 Arm 31/358 (peculiar contract), EisPHr 1253/70 EEmpD 21/588; MPHer 1142/69 NoV 17/1227, PA 278/69 EEmpD 20/2013, PA 25239/68 EEmpD 20/214 (order), PSer 381/62 NoV 10/1126 (service contract).

relation governing the obligation of the bank to pay back the debt has the features of "*the order*" institution, which would be transformed in a service contract should there would be agreed a commission.

Furthermore, the letters of credit issued by Banks have as common feature that the involved person's intention is not to add extra collateral to its obligations and claims, as this is generously offered by the respective high liable and financially powerful parties but, as a matter of fact, to assure the immediate payment of the secured debt without the need of bringing legal proceedings.

In specific, the intervention of the bank renders the payment of the collateralised debt more *direct and prompt* in favour of the recipient of the letter. This would be triggered by the occurrence of an incident typically ascertained or *by the expiry of a prefixed deadline* or by an informal declaration of the recipient of the letter (the creditor) that the relevant reason of triggering is occurred, *without this being influenced at all by a possible objection of the principal debtor in favour of whom the letter of credit was issued*.

This feature, together with the "soft law" character of the provisions of the articles 851, 853 859 and 866 G.C.C., which also apply in the letter of credit agreements accordingly, requires the issuing bank, should it would be requested by the recipient of the letter of credit, to unreservedly declare that it would pay him on behalf of the initial debtor, in favour of whom the letter was issued, waiving at the same time of its right to plead according to the articles' 853 and 855 G.C.C. provisions (grounds for plea based on the relation of value or against the immediate-recourse guarantee).

In this way, the creditor has the legitimate right, provided that the guarantee obligation was triggered, to demand the payment of the secured amount by the guaranteed bank, without the latter being allowed to dispute about the legality of the claim or the cause of the triggering. Similarly, the principal debtor would be prevented from obstructing the process alleging the inexistence of the reason of triggering. This mechanism definitely assures the creditor's payment of the amount which the letter of credit promised to cover. Though, it would not be precluded that the principal debtor would not raise claims against the creditor, respectively. In other words, should the creditor is paid the amount of the letter of credit, although the legitimate and actual reason that triggered the payment did not really exist, the debtor, as the client of the

issuing bank, is capable of raising claims against his benefited creditor and ask back what the creditor had unlawfully received invoking the relative and suitable provisions of unjust enrichment[87]. In fact, it is mainly in the initial debtor's legitimate interest to ask for repayment, insofar he is the actual payer of the amount, since the bank can easily seek to compensate for what it has paid on behalf of him by charging the initial debtor's bank account. Moreover, banks are fully equipped with the adequate infrastructure to manifest each time their dominant position in financial disputes, forcing by different manners the fulfilment of their claims towards their "weaker" clients.

[87] Vathrakokoilis ERNOMAK 2006 vol. C' art. 847 no.35; Saratsoglou: The letter of credit Nov 2/1177; Triantafilloulos EEN 20/1 et seq.; EA 3425/86 Arm 41/578; PPTh 2756/91 Arm 1992/714.

Fixed-term surety institution as viewed under the article's 510 par. 3 of the Swiss Civil Code provisions

I. General features of surety regime

First of all, surety issues in Suisse legal order are governed by the Federal Act on the Amendment of the Swiss Civil Code 220 (Part Five: The Code of Obligations) of 30 March 1911 (Status as of 1 July 2014), (Title Twenty: The Contract of Surety), as Amended later by No 1 of the Federal Act of 10 December 1941, which is in force since the 1st of July 1942 (AS 58 279 290 646; BBl 1939 II 857).

The actual text of the Swiss Federal Code of Obligations (CO) relating to contracts and tort was presented as a supplementary part of the Civil Code (Zivilgesetzbuch, voted December 10, 1907), both entered in force as per January 1, 1912. Its text is to a large extent based on its predecessor, the ancient CO as adopted in 1881 and in force since January 1, 1883, whose creation preceded that of the German Civil Code (Bürgerliches Gesetzbuch, BGB) by almost two decades and necessarily-influenced the latter. The contract law of the CO and the Greek one are part of the continental Civil Law, based mainly on the tradition of Greek-Roman Law, relation which easily explains the high amount of similarities between them, as it will be anticipated below.

Generally speaking, almost similarly to the Greek law the Swiss civil law regulates surety issues in the light of the principle that the debt obligations are always accompanied by a legal action which assures the execution of a transaction between parties to a commercial relationship. However, the creditors sometimes are eager to strengthen their position with additional guarantees. Therefore, collateral securities exist in order to facilitate the trade relationship. These are most common in the banking sector.

There are two types of collateral securities under Swiss law: (i) security interests and (ii) personal securities.

In particular, personal securities concern a third party’s commitment to fulfil an obligation if the debtor does not perform on same. This commitment can be realized through two particular personal securities; the contract of surety (cautionnement) and the guarantee of performance by a third party (promesse de porte-fort).

The contract of surety (cautionnement), according to Section 492(1) of the Swiss Code of Obligations ("SCO"), is defined as "*[when] the surety undertakes as against the creditor of the principal debt to vouch for performance of the obligation*". In other words, the contract of surety is an agreement between the creditor of the principal obligation and a third party, the guarantor, to secure the principal debt existing between the principal creditor and the principal debtor.

Under the term "contract of surety" two principal modalities of guarantees exist: the simple contract of surety and the joint and several surety. The distinction between these modalities depends on the differing condition to fulfil in order to call on the guarantee. (a) The simple contract of surety. In the case of a simple contract of guarantee, when the debt is payable, the creditor must do everything possible to obtain the payment from the principal debtor before requiring the guarantor to perform on its obligations. Contrary to the simple contract of surety, a joint and several surety allows the principal creditor to get to the guarantor directly provided that some conditions are fulfilled.

Just alike the Greek law, Swiss law on guarantees is founded on the **"***Principe de l'accessoriété*". This means that as the contract of surety is based on and inherently linked to the principal debt, it can only exist if the principal debt exists and is valid. In other words the guarantor's obligation to pay the principal creditor is dependent upon the relationship with the principal debtor. This concept is the key feature of the contract of surety and is distinct from the contract of guarantee strict sensu, not explicitly governed by the Swiss Code of Obligations, but frequently linked to Article 111 of the SCO, which represents an independent, distinct from the underlying credit line, abstract undertaking to pay a specified amount to the secured party upon the latter's request. In particular, this situation allows both the debtor and the guarantor to invoke a set-off against any monies already paid to the creditor by the debtor.

II. The framework of article's 510 par. 3 of the Swiss Civil Code application. Comparative view in the context of similar Greek provision

In particular, the article 510 par. 3 SCC provides for the fixed-term contract of surety and its revocation. Thus, according to the wording of this article: "Where a contract of surety is concluded for *a fixed term*, the surety's liability is extinguished if

the creditor fails to assert his claim at law *within four weeks* of the expiry of such term and to pursue it *without significant interruption*.

To begin with, it should be pointed out that even from the first reading an evident similarity between the two provisions of Greek and Swiss law is witnessed. Hence, the wording is almost identical fact that reveals the close relation of the two legal orders, as they reflect the common and over time values and principles of the European Continental Law.

Consequently, a word by word analysis of the two respective provisions demonstrates the intention of both legislators to be in accordance with the fundamental guidelines which govern the actual commercial transactions in the field of guarantee agreements, as means for the improvement of professional and business credit.

Thus, it is observed a consistent reference of the Swiss legislator to the choice of the eventual deliberation of the guarantor initially bound by a fixed-term surety agreement in case the creditor fails to pursue its claims within a certain period of time after this fixed time passes. Though, this time limit is defined in the two legal orders in a slightly different manner as in the Greek provision is calculated by reference to a one-month-time period contrary to the Swiss provision of four weeks period, resulting to an expected alteration of the point of the expiry of the two deadlines, respectfully.

In addition, the time bonus of the four weeks period attributed to the creditor, according to the Swiss law as well is accompanied by a complex of duties that he should carry out in order to be allowed to pursue his claims even against the guarantor. So, the creditor should pursue his claims within the certain period of time and at the same time to carry on the proceedings without significant interruption.

However, this reference to the avoidance of significant interruption does not correspond to the Greek law which provides for a cease of guarantor's liability in case the creditor *deliberately delays* the relevant procedure against the principal debtor, even though he had previously acted within the time limit. Indeed, the creditor's fault or negligence element is so needed to support guarantor's liability elimination, according to the article's 866 G.C.C. provision, that in its absence the creditor is entitled to involve the guarantor into the debt's clearance process, despite the delay or suspension of judicial proceedings.

Therefore, the relevant Swiss law provision which relies on the "*without significant interruption*" element in order to assess the creditor's capability to still pursue his claims against the guarantor, without the additional reference to his fault or negligence, appears to be for his interests a much more aggravating condition as long as it actually facilitates the guarantor to declare his liberation from his obligations by pointing out only the delay factor irrespective of the creditor's any misconduct or not.

Case Law relating to Article 866 G.C.C. issues

Introductory remarks

There have been issued several judgments of Greek Courts of different levels specifying in detail firstly the general concept under which the guarantee institution functions in relation to the principle debtor's obligations which the guarantee secures and the creditor's claims against them. Secondly, Greek Court decisions illustrate the framework of the preconditions set by the article 866 G.C.C., under which the right of the guarantor to be liberated by his contractual obligations towards the creditor is activated. However, a crucial point that it has at first to be cleared out is that due to the provisional character of the relevant provisions the respective parties of the guarantee contract are allowed *to contractually modify or to eliminate the preconditions* set by the law in favour either of the creditor or the guarantor in any time just *only before* the one-month-time period is expired. In other words, parties are not allowed to extend or curtail by agreement the one month time-limit of article 866 G.C.C. neither wholly waive from this right *after the time-limit completion.*

a) *Judgment No 736/2018 of the Court of Appeal of Thessaloniki*

In this case, the Court, among other issues, stated the following:

"In addition, according to the articles 847, 848,851 G.C.C., 47, 64-67 of the Decree-Law of 17-07/13-08-1923 relating to particular terms governing public limited liability companies' issues and the article 112 of Introductory Law of G.C.C. the guarantor of a creditor's claim against a debtor to pay (the latter) him the final balance of a revolving credit agreement resulting from its final clearance is liable, *due to the ancillary nature of the guarantee*, up to the amount of the main debt (i.e. the credit) which it secured, and not for other claims generated from a subsequent agreement, not having been secured, *unless this subsequent agreement is not autonomous but a supplementing one*, only causing an increase of the amount of credit, and nothing else, so the guarantor's liability raises up to any other final-balance outcome of the credit, no matter if he has not participated in this agreement as guarantor, though limited to the amount of credit of the initial agreement or the following additional ones (all or part of them), since he secured them too, accepted, in other words, his liability for the

payment of each higher final balance attributable to the principal debtor of the respective credit agreement. Moreover, according to the article 864 G.C.C., in case the primary obligation is fulfilled, the guarantor is liberated, unless he acted unlawfully. This means, as a result of the ancillary nature of the guarantee that the guarantor's obligations end automatically provided that this was not caused by his unlawful action. A partial extinction of the primary obligation leads to a similar limitation of the guarantor's liability. The cause of the elimination of the primary obligation does not affect the guarantor's position (G.S.C. 1658/2006, 579/2001, C. of. Ap. of Patras 379/2008 NOMOS). Finally, the acceptance of the final balance on behalf of the debtor is binding for the guarantors as well (G.S.C. 1850/2011, 1790/2008, 1458/2006, C. of Ap. of Thessaloniki 117/2002 NOMOS). [...]

b) *Judgment No 47/2019 of the First-Instance Court of Korinthos (Single Judge)*

In this case, the Court, among other issues, ruled that:

"According to the article 866 G.C.C., the guarantor who has guaranteed for a fixed-time period should be liberated from his obligations provided that the creditor does not pursue his claims by judicial process within a month after this period of time ends and does not keep pursuing his claims without undue delay. The meaning of this provision is that guarantee for a fixed-time period exists when the creditor and the guarantor agree that the obligations of the latter expire at a certain point in time, defined in calendar time or otherwise. The guarantor's intention to be bound for a limited time period should be stated explicitly and clearly. In obvious favour of the creditor, according to the article 866 G.C.C., the time-restricted obligations from the guarantee, contractually concluded, are prolonged for an extra one month period. Therefore, the guarantor bound by a fixed-term guarantee agreement is benefited particularly by the right to plead for having been liberated from his obligations in case the creditor has delayed in bringing proceedings for the pursue of his guaranteed claims, under the preconditions set by the article 866 G.C.C.. Nevertheless, the provisions of the respective article are "soft law" ones. For this reason, the written waiver of the guarantor's benefit of the article 866 G.C.C. as the guarantee agreement is concluded is admissible, this waiver, thus, means that the guarantor remains under the guarantee's obligations according the respective article's provisions. Though, the

valid waiver of this benefit presupposes the existence of this benefit, which is particularly provided by the concept of the fixed-term guarantee (Greek Supreme Court 1093/2015, 482/2006, 80/2004, Court of Appeal of Piraeus 405/2015, Administrative Court of Appeal of Thessaloniki 804/2014, Court of Appeal of Athens 1415/2012 NOMOS).

Besides, the pursue according to the article 866 G.C.C. of creditors' claims should follow the judicial proceedings such as the bringing of an action, the raising of a plea against an action, the registering of his claim in the liquidation procedure or the auction of an asset belonging to the initial debtor, while a simple extrajudicial letter or formal notice of the latter or the guarantor is not sufficient (A. Georgiadis S.E.A.K., V. I, art. 866 no. 10)."

As far as the assessment of the validity of the expression of the relevant volition of the parties this would be subject to *an interpretation on the basis of the articles' 173 & 200 G.C.C. principles*. For this purpose the Court asserted that: "interpreting rules based on the articles 173 & 200 G.C.C. should apply when the Court judging the facts, without this judgment being subject to appeal before the Supreme Court, ascertains, even indirectly, that there is a gap or an uncertainty in the agreement relating to the expression of the volition of the parties. In this context, the Court has the ability to proceed with the searching of the true and wilful meaning of the crucial statement in correlation to the specific expressions of the parties or other, previous or subsequent, statements of them, using additional evidences or with indecisive expressions or arguments (Greek Supreme Court 71/2016, 134/2016 NOMOS).

Additionally, according to the reasons of the relevant decision related to the ability of the parties to deviate from law provisions and modify the preconditions for the effective and lawful release of the guarantor from his contractual obligations, it was stated that: "Subsequently, by the combination of the articles 281,288,386,672,766 and 767 G.C.C. it is concluded a general principle of law by which it is allowed to terminate an ongoing contractual relation, such as a credit contract, , i.e. irrespective if it is about a fixed or indefinite duration agreement (Greek Supreme Court 416/2013 NOMOS). After a month's period from the termination of the interest-bearing loan contract, this agreement ends and the relevant claim becomes due and payable (A. Georgiadis S.E.A.K., V. I, art. 807 no. 2, 3 & 4). However, the results of the

termination become effective if only, according to the provision of article 167 G.C.C., the expression of the relevant legal intention, i.e. the receipt of termination on behalf of the other contractual party-borrower in the sense of an actual entry in his sphere of influence (A. Georgiadis S.E.A.K., V. I, art. 167 no. 6). In the present case, with the second ground of appeal, the opponent claimed that according to with the number 13.2(b) term of the under dispute with the number /29.8.2016 credit contract, which was signed by him as a guarantor, it was agreed that he is liberated from his guarantee obligations should the creditor does not bring proceedings within the one-year-time period after the main debt becomes due. That, in fact, the guarantee obligation expired, since, from 4.9.2011, when the creditor's relevant claim became due, till the day the latter brought the present action (14.3.2017), had passed a longer than the one-year period of time. This ground of appeal…… embodies the plea of deliberation of the guarantor; it is considered lawful based on the provisions of the articles 361 and 866 G.C.C. and should thus be further examined on the merits.".

Besides, it has been mentioned previously that the article 866 G.C.C. is totally open to *pre-contractual* contra-agreement of the relevant parties i.e. between the creditor and the guarantor or modification of its provisions leading to an alteration of the original concept of the law in the sense that this agreement could be beneficial *for the creditor* in case the guarantor rests liable against the creditor although he (the creditor) neglects to comply with the preconditions set by the respective provision.

Despite this optional ability of the involved parties to significantly depart by agreement from the original form of the legal provision of the article 866 G.C.C., when it comes to cases covered by the Consumer Protection Law provisions, this kind of initiatives taken by the creditor, in favour of himself, and in obvious detriment of the debtor and the guarantor, who usually represent the "weaker" part of the agreement i.e. the consumers, are deemed as abusive general terms, thus invalid. It was argued above that among others the terms regarding the waiver of the guarantor of his right to plead on the grounds of articles 862-864 G.C.C *and particularly the term that precludes the application of article 866 G.C.C. in case of a fixed-term guarantee* are found to be distinctively abusive. Therefore, it is very crucial to assess whether a person participating in an agreement either as a debtor or as guarantor bears the

features of the "weak" consumer worthing the protection of the law. This kind of evaluation is effected by the competent Court in the following case where it was ruled that:

Judgment No 302/2018 of the Court of Appeal of Athens (Single Judge)

"According to the article 2 (6) of the Law 2251/1994 "for the protection of the consumers", as amended by the Law 3587/2007, the general terms, i.e. the pre-formulated terms for an indefinite number of future agreements, are prohibited as null and void, when they turn out to have significantly destabilising effects on the balance between the rights and obligations of the participants in the agreement to the detriment of the consumer [Greek Supreme Court (in plenary session) 15/2007 DEE 2007.975]. The abusive feature of this kind of general term incorporated in the agreement is assessed, after taking into consideration, the nature of the goods or the services relating to the agreement, the general context of the special conditions referring to its conclusion, and all other clauses in the particular agreement or another connected (Greek Supreme Court 1196/2010 DEE 2010.1310, 1987/2006 EEmpD 2008.105). These general terms that refer to the indicative cases of the paragraph 7 of the above article are considered by the Law, indisputably, as abusive, without any need to be regarded in the context of the prerequisites set by the general clause of the paragraph 6 of the article 2 of Law 2251/1994 (Greek Supreme Court 1996/2010 NOMOS). As the above articles dictate, which specify the general rule of the article 281 G.C.C. regarding the control of the general terms of business contracts using their criteria, the assessment of the validity or not of these terms depending on their abusive character is based mainly on the consumer's legitimate interest taking also into consideration the very nature of the goods or services relating to the specific agreement, as well as its target, but having always in mind the preservation of a relative balance among contractual parties' rights and obligations (Greek Supreme Court 904/2011 NOMOS). The "soft law" provisions that are implemented in every single contract are used as a point of reference during this process of balancing. The destabilisation of the legitimate interest of the parties in detriment of the consumer should only refer to crucial ones so as to lead to an annulment of a general term for abusiveness and this destabilisation should be particularly severe according to the

principle of good faith. For this reason, after taking into consideration the legitimate interest of the contractual parties (in the particular contract) there should be an assessment of the personal interest of the supplier which dictates the preservation of the specific term and that of the consumer which dictates its abolishment. The circumstances, which destabilise the balance between rights and obligations of the contractual parties and renders the relevant term invalid as abusive, should be presented in front of the Court of the merits in detail in order to have the ability to assess, in the context of the achievement of a relative balance between rights and obligations of the contractual parties, the invalidity or not due to abusiveness of the specific term (Greek Supreme Court 350/2016 NOMOS). Besides, the unfairness of a general term is considered according to the applicable law not at the time it was initially introduced or the agreement was concluded but at the time when, pending the agreement, the question occurs, as the supplier invokes this term (Greek Supreme Court 15/2007 NOMOS). As the common sense dictates and in need for a uniform treatment of similar cases, the feature of "consumer" should be awarded according the applicable law at the time the supplier invokes the abusive general term. Furthermore, in Greek legal order there has not been implemented a special framework governing directly the prerequisites and the context of control of the general terms of banking services. Given, though, the ongoing growth of massive transactions that leads to a usual adherence of the financially weaker party to unilaterally formed terms, it is necessary to accept the expansion of the consumer protection status even in the field of the banking services. This is because the broad wording of the article's 1 (4) (a) of Law 2251/1994 implies that the legislator's intention was not the exclusion of the banking services from the framework of the relevant law. Moreover, the usual banking services which include the credit agreements and loans always address to their final recipient, because they are consumed by their use, without leaving any possibility for further transfer. In this sense, the aforementioned banking services are characterised as provisions to their final recipients, even when they are merchants or professionals and they use them personally, as a banking product, in order to satisfy their business or professional needs, without them being the subject of further transfer. Thus, the protection of the law 2251/1994 covers not only the banking services which involve by nature private

clients to satisfy their personal needs but also professionals who receive loans and credits for their business or professional purposes. This should not precludes the implementation of the article's 281 G.C.C. provision following a relevant plea on behalf of the bank, each time the use of feature of consumer appears to be abusive, as it happens in cases when the debtor cannot be considered as mal protected as being accustomed to this kind of transactions or he possess such an economic status and organizational infrastructure that he can equally negotiate the terms of his credit contract. Additionally, till the amendment of the law 2251/1994 by the law 3587/2007 the Greek legal order did not included provisions relating to the protection of the guarantor as consumer and in particular the guarantor of a business or professional credit. Nevertheless, due to the ancillary character of the guarantee in relation to the primary obligation according to article 847 G.C.C. it should be accepted that if the initial debtor-creditor of a business or professional credit is considered as a consumer, in the sense of the final recipient, deemed with the protection of this law, the same protection should be attributed to the guarantor, provided that the guarantee is not part of his business or professional activity, for the reason that a discriminatory treatment of the guarantor relating to the debtor cannot be justifiable. This perception is further supported by the fact that, according to the article 1 (4) (bb) of the aforementioned law, as it was amended by the article 1 (5) of the law 3587/2007, every natural or legal person which guarantees in favour of a consumer is covered by this protection provided he does not operate in the context of his business or professional activities. In the light of the previous findings, a) the debtor of a business or professional credit is deemed to be the final recipient of the credit services of the bank and therefore a consumer in the sense of the article 1 (4) (a) of the law 2251/1994 and b) the guarantor of this kind of debtor and in particular the one that agreed for a joint-liability (waiving from the relevant pleas), provided he does not act as a professional, should be privileged by the relevant legal protection because of the ancillary character of the guarantee (Greek Supreme Court (in plenary session) 13/2015 NOMOS).".

Furthermore, the issue of whether or under which preconditions the letter of credit, as special form of personal collateral, could be embedded in the wider legal framework

of guarantees regulated by the articles' 847 et seq. G.C.C. provisions, has launched a serious debate among theory and Courts' judgments. As it was previously affirmed it has become common ground in the domestic jurisprudence that the letters of credit usually issued by banks, are treated as guarantee agreements governed by the articles' 847 et seq. G.C.C. provisions. In this context, the Greek Supreme Court has repeatedly stated the following:

Judgment No 48/1996 of the Greek Supreme Court

"…the triangular relation among the creditor-debtor and the Bank based on the letter of credit issued by the latter is governed, in absence of other provisions regulating more specifically these relations, by those referring to the guarantee agreement of articles' 847 et seq. G.C.C.. In particular, the letter of credit "redeemable on demand", which is characterised by a respective unreserved declaration of the issuing Bank, that it is charged with the payment of the amount indicated in the letter of credit, without being allowed to check the validity of the existent debt or the appearance of the cause of the call on of the guarantee, and to plead against the immediate-recourse guarantee, is deemed to be a particular form of guarantee and is regulated by the above articles as long as they are found to be compatible with its own context. Moreover, the guarantee contract, which is not regulated specifically in the Civil Code, since it offers the collateral in the form of a letter of credit bears the features of a guarantee which is covered by the aforementioned provisions. In this case, according to the findings of the Court of Appeal, as attested in its final judgment: "The opponent….., with the 470/1985 agreement, had granted an overdue credit account to the company with the name "……", based in Holargos, Attica. The defendant foreign bank based in the city of Dusseldorf of the ex-West Germany, issued the D 3178/11-02-1985 letter of credit addressed to the opponent bank, offering a guarantee, unreservedly and irrevocably, in favour of the above company, as the debtor, for the payment of the amount up to 10.000.000 drachmas, redeemable on demand and declaration of the opponent creditor bank that the debtor company would not fulfil its contractual obligations. It was also included in the letter of credit the time-limit clause that the guarantee would last till the 31th of December 1985 and that every claim of the opponent bank should be delivered to the guarantor in writing

till this day, and after that the letter of credit would be declared as null and void. It is so resumed that the respective letter of credit is clearly considered as a guarantee. The findings of the Court of Appeal are deemed to be precisely and fully justified, either as far as the nature of the letter of credit redeemable on demand is concerned or the evidences which led the Court to its assessment about the issuing of the letter of credit by the bank as the third party in relation to the creditor,…….".

The Supreme Court also stated that:

"……the guarantee and the declaration of extension of its power should be in writing, otherwise they would be found null and void……Moreover, the guarantee, as an expression of civil law by nature, constitutes an objectively commercial action with the by analogy application of the article 2 of the Royal Decree of 2/14.5.1835 which covers this transaction, according to the article 25 of G.C.C., since the defining factors of the genuine commercial action are met, such as the provision of risky credit services with profit 9…."

In this case, the Supreme Court also held that: "Because, according to the article 866 G.C.C., one that guaranteed only for a fixed period of time shall be free from the guarantee provided that the creditor does not pursue his claims by judicial process within a month after the end of this period of time and does not keep pursuing his claims without undue delay. In the particular case, since the Court of Appeal, as it is attested by the contested decision, accepted, out of the control of the superior Court, that *the aforementioned guarantee was concluded, in the form of a letter of credit, for a definite period of time*, i.e. till the 31st of December 1985, when it expired, without being lawfully prolonged. According to its correct interpretation and application of the relevant provision, it also held that the action of the opponent on the 30th of December 1987 *was out of time limit and the guarantor was liberated from its obligations*."

Finally, the Supreme Court fully supported the Court of Appeal Judgment and dismissed all the arguments laid down on behalf of the opponent by stating that: "This core reasoning adequately justifies the dismissal of the action…….on the ground that the Court of Appeal violated the substantive law provision of the article 866 G.C.C. when it had ruled that the opponent was deprived of its right to bring proceedings for

not compliance with the terms of the letter of credit, so the appeal brought before the Supreme Court should be dismissed as inoperative."

Case Law relating to Article's 510 S.C.C. provisions in comparison with the relevant issues raised by the Article's 866 G.C.C. application.

Relating to the genuine interpretation of the "*without significant interruption*" clause embedded in the article's 510 S.C.C. provision as a precondition for the preservation of creditor's claims against the guarantor, the Swiss Federal Court in his judgment no 108//199 held that:

"Abstract of the Court's reasoning:

According to article 510 par. 3 of the Swiss Code of Obligations, the fixed-term surety expires if the creditor fails to assert his claim at law within four weeks of the expiry of such term and to pursue it without significant interruption. For the reasons set out below, it is sufficient to estimate here whether the creditor persisted on pursuing his claims fallen due on the expiry of the guarantee without significant interruption according to the respective legal provision. As the Federal Court has held similarly in relation to the interpretation of the article 503 (a) of the Code of Obligations the Law does not provide for a schematic rule about the meaning of the "significant interruption", but since it defines the four weeks' time limit for raising claims an indicative hint is revealed on the period, after its ending, within which it can be expected that the creditor would pursue his claims. However, the specific circumstances would probably result in a prolongation of the inactivity. Moreover, the guarantor might consent to an extension of the proceedings. This judgment fully confirmed by the doctrine (GIOVANOLI, n. 12 et 13 ad art.510; BECK, n. 43 ss ad art. 510; GUHL/MERZ/KUMMER, p. 545/546; HEMMELER, Die Gründe für den Untergang der Bürgschaft, thèse Berne 1954, p. 52; SCYBOZ, Le contrat de garantie et le cautionnement dans Traité de droit privé suisse, VII 2, p. 115 n. 7; cf., avec certaines réserves, OSER/SCHÖNENBERGER, n. 21 ad art. 510), should be confirmed. Therefore, the creditor should exercise a particular diligence towards the guarantee issues and this diligence should not be measured in relation only to the criterion of the diligent creditor defending only his own interests. The overcharge of certain Courts as a ground invoked by the opponent at his appeal should not justify on its own a diversification of this judgment, but it can be taken under consideration during the assessment of the

particular circumstances of this case as it could ascertain that the prolonged inaction could not be avoided due to this overcharge."

Consequently, Swiss Courts in order to specify this abstract notion resort to the use of certain general principles, such as the specific circumstances or the diligence expected by the common-minded creditor, which assure the appropriate application of the law provisions in the specific and individualized each time real facts.

Conclusions

The contemporary financial practice in global but also in domestic context as well has intensively highlighted the importance of the personal guarantee scheme, as the creditors now seek more and more to assure their claims by involving in the credit issuing process more reliable parts who can underpin the primary obligation's performance by offering to the creditor a trustful recourse in case of principal debtor's failure to pay his debts.

Moreover, it is evident that the guarantor who got involved in a fixed-term surety in favor of the principal debtor is eager to put an end to his contractual obligations the soonest possible after the agreed expiry of his liability towards the creditor.

Consequently, the Greek legislator alike as it is observed in the Swiss legal order, which is under scrutiny in this particular study, has deliberately chosen to limit the guarantor's ability to be liberated in a contractually fixed point in time by attributing to the creditor the benefit of claiming the performance of the primary obligation within a pre-defined, short period of time (just one month). It was evidently evaluated as significantly crucial to impose an obligation for the creditor to react timely so as an unfair long-term involvement of the guarantor to be avoided. In addition to this, the Law also demands from the creditor to keep on pursuing his rights after the initiation of this process without causing unreasonable delays in his fault. So, the guarantor's ability to be liberated rests on the strict precondition of the creditor's non deliberate involvement in the delay of the ongoing judicial process.

In fact, it appears to be quite justifiable, by both legal and rational arguments, for the creditor to be excluded from the detrimental effects of these factors that he is unable to control, beyond his own intentions or faults. In the contrary, in Swiss legal order the creditor is treated differently, in a stricter and absolute manner, as he is actually subject to an unfair and unreasonable deprivation of his rights against the creditor, even when the delay in proceedings is caused by unintentional factors, unless he proves that his prolonged inaction could not be avoided anyway.

Furthermore, an issue that has raised a lot of controversy between the domestic theory and practice is the assessment of prerequisites under which a guarantor could be considered acting as a consumer in order to be granted with the relevant privileges

relating to the protection of the weaker party of a contract against the powerful creditor's -usually the bank that issued the credit- pre-written general terms. In case the guarantor is deemed to have the consumer's protection status is considered not allowed to opt out from the right to plead for his deliberation, according to the article's 866 G.C.C. provision in compliance with the general terms imposed by the creditor, as this behavior of the creditor should be regarded as manifestly abusive.

Finally, an issue that crucially affects the financial practice is the assessment of the legal character of the letter of credit, i.e. whether it can be regarded as a fixed-term agreement by nature falling within the scope of application of the general guarantee provisions of the Greek Civil Code or it should remain as an unregulated institution. Nevertheless, the exceptional significance of this form of guarantee renders its clear and defined regulation an indispensable priority for the smooth functioning of the credit market.

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