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A Comparative Examination of Transferable Trust Contracts in General and Imamieh Jurisprudence and Current Laws

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Abstract

Transferable trust contracts, entered into to secure financial claims and obligations, fall under the category of secondary contracts. During the creation of a trust contract, the debt must be in the possession of the debtor. However, there is a divergence of opinions regarding whether the debt must be fixed in the possession of the debtor or if its creation is sufficient. Some Islamic jurists consider contracts where the debt is not the result of a specific transaction as void, arguing that the substance of the debt has not been established in the possession of the debtor. Others, however, citing the Quranic verse "And for one who comes with a burdened camel and We were, over him, observers," do not find sufficient evidence for the nullity of such contracts. Therefore, the presence of the primary cause of the debt during the formation of trust contracts (guarantee and transfer) is that the primary cause of the debt exists but has not yet materialized. If no obstacle arises, the primary debt is realized. This article examines the views of general and Imamieh jurisprudence, as well as current laws, on the validity of transferable trust contracts. By analyzing the opinions of various scholars and jurists in this field, we contribute to the legal literature on the subject of transferable trust contracts.

Keywords: *Debt, Fixed Debt, Cause of Debt, Trust Contract - Substance of the Debt, Place of Creation, Impossible, and Fraudulent.*

Introduction

So far, a lot of research has been done about social sciences (Asaseh, M et al. 2023), (Shishebor, A., et al. 2020). The essential element of social life is the establishment of legal relationships between legal and natural persons. The outcome of such legal relationships may lead to the creation of contracts, where one of the parties may become a debtor to the other. In such cases, the creditor may seek to enter into trust contracts to secure and facilitate the collection of their claims. Given that trust contracts arise from an existing debt, the question arises as to whether this debt must be established and unshakeable before entering into a transferable trust contract, such as a guarantee or assignment. Is it sufficient for the primary cause of the debt to have occurred or not?

Civil law, in Article 691, states, "A guarantee for a debt that has not yet been caused is void." The opposite concept of this article is that a guarantee for a debt created due to legal or contractual reasons but is not yet claimable due to the unavailability of proving conditions is valid, such as the guarantee for the performance of a contractor in compensating the damages to the employer, which is valid (General Assembly of the Supreme Court, 71-22/6/49). The term "cause" in the recent mentioned article is interpreted to mean relevant.

Some general jurists believe that the debt must be established in the possession of the debtor at the time of entering into the guarantee contract; therefore, an unestablished guarantee contract is not valid, even

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if the cause for its obligation exists. Consequently, some jurists consider the existence of the primary debt as a condition in transferable trust contracts (guarantee and assignment), while others believe that only the presence of the cause of the primary debt is sufficient for the validity of such contracts. There is also a difference of opinion among legal scholars.

In the case of an assignment contract, the Civil Code does not explicitly mention the existence and cause of the debt, but according to Article 726, which considers the elements of the assignment contract, the existence of the debt is considered a condition for the assignment. Therefore, the effect of the assignment is the transfer of the debt from the assignor to the assignee. From this perspective, it bears resemblance to the guarantee contract. Hence, a debt created due to a cause is also valid for the assignment contract.

In general jurisprudence, the debt in the assignment contract must be necessary, and a non-essential debt (such as an optional sale) is not valid unless the option period has expired or the debt is on the verge of becoming necessary.

Therefore, the effect of the trust contract in guarantee, according to Imamieh jurisprudence, is the useful transfer of liability to the guarantor. The liability of the debtor, with all its characteristics and branches, is transferred to the guarantor. However, general jurists believe that the transfer of liability occurs to liability, not the debtor.

The Civil Code, in Article 698, states, "After the guarantee is properly established, the liability of the debtor is transferred to the guarantor, and the guarantor becomes engaged with the content of the liability." This has led some civil law scholars to consider the guarantee as based on the transfer of debt from the debtor to the guarantor. On the other hand, some legal scholars consider the guarantee contract as a form of commitment transformation that is executed by the credibility of transforming the debtor.

Similarly, the trust contract (assignment), in one aspect, is based on the transfer of debt, and in another aspect, it is based on the transfer of the claim. Both of these aspects can be seen as a form of commitment transformation (Article 730 of the Civil Code).

However, according to general jurists, they consider the debt as remaining with the assignor, and they only perceive the right to claim from him as transferred to the assignee or that the right to refer to the assignor and the right to claim are found in the assignee, which is not accepted in the Civil Code.

This article explores whether in transferable trust contracts (guarantee and assignment), from the perspective of general and Imamieh jurisprudence and current laws, there is a transfer of the claim, debt, or the transfer of the right to claim. It also examines the conditions of debt in trust contracts among legal scholars and general and Imamieh jurists.

Transferable Guarantee Contract

The guarantee contract is a subsidiary contract, meaning that during the conclusion of a guarantee or assignment contract, a debt or commitment that is a legal act is involved. There are differing opinions among Imamieh and general jurists and legal scholars about what the debt should entail. However, the term "transferable guarantee contract" refers to a contract in which, at the time of conclusion, the liability of the original debtor is transferred to the guarantor. It is encompassed by the guarantee and assignment contracts.

Guarantee Contract

In the terminology of jurists, the meanings of the guarantee contract include taking on a "commitment," and in legal contexts, it is used to refer to responsibility. The guarantee contract leads to the transfer of the debt from the debtor to the guarantor. However, general scholars consider the term "guarantee" as

superfluous, and they believe that the term "guarantee" is derived from "zam," and in reality, the debtor's liability is annexed and attached to the guarantor's liability, thus making the guarantee a contract that implies joint liability for one debt from two debtors. As a result, the guarantor and the original debtor become debtors against the creditor (the claimant). Imam Malik believes that the original debtor cannot demand his claim from the guarantor unless the claim from the original debtor becomes difficult due to absence, insolvency, or denial. Imam Shafi'i and Hanafi believe that the claimant can demand his claim from either the guarantor or the original debtor.

Legal Term of Guarantee: In legal terminology, the term "guarantee" has two meanings. In a general sense, it refers to the commitment to one's wealth and life. In this sense, guarantee includes the assignment and suretyship contracts. In a specific sense, guarantee refers exclusively to a commitment to wealth for which someone else is responsible. Civil law in Article 684 states, "The guarantee contract is an agreement for a person to assume the financial responsibility that is on someone else." In essence, a guarantee is based on the transfer of debt from the debtor to the guarantor. However, it should not be forgotten that, in the case of the debtor, a guarantee is also established. This results in both the guarantor and the debtor becoming indebted to the creditor (the claimant). This happens when it is explicitly mentioned in the contract; otherwise, if not specified, one guarantor may become the guarantor for another, leading to the transfer of liability.

Meanings of Guarantee in Shafi'i Jurisprudence

In the legal context, "zaman" means commitment, binding, and sticking. In the Quran, Allah says, "And Zakariya took charge of her" (Quran, 3:37).

"Zaman" in the Lexicon

In the lexicon, "zaman" means commitment, taking charge, and adhering. In the legal sense, it is related to financial commitments or life commitments. It includes the assignment and suretyship contracts.

"Zaman" in Sharia Terminology

In Sharia terminology, "Zaman" is committing to pay a fixed right on behalf of someone else. In other words, a guarantee is a contract through which the guarantor is committed to paying a fixed right that someone else owes. If that person, on whose behalf the right is fixed, fails to pay, the guarantor must pay the debt. The guarantee contract has three forms.

The first form is guaranteeing a debt, meaning that the guarantor is obliged to pay a right fixed on behalf of someone else, becoming involved in the debt.

The second form is guaranteeing the return of a specific thing, like a thing that has been lost or taken as a guarantee.
The third form is obliging someone to present the person who has become the subject of the guarantee (this form is considered general).

Types of Guarantee

In Shafi'i jurisprudence, guarantees are generally categorized into two types:

Personal Guarantee (Zaman al-Dain):

In this type, an individual takes the responsibility to pay a fixed debt on behalf of someone else. The guarantor commits to paying the debt if the debtor fails to do so within the specified period. This type is referred to as "Zaman al-Dain" or the guarantee of a debt.

Kafalah (Kafalat) Guarantee:

In this type, a person solely becomes responsible for the presence and delivery of someone who has rights, such as a debt, but is not committed to paying the debt. This form of guarantee is called "Kafalah" and is considered a general guarantee in the Civil Code of Iran.

Types of Guarantee in Hanafi Jurisprudence:

In Hanafi jurisprudence, guarantees are categorized into three types:

Guarantees Secured by the Guarantor Himself

In this type, the guarantor is obligated to return the exact thing that was guaranteed if it exists. If it is lost, it should be replaced with a similar item, and if a similar item is not available, the guarantor must pay its value. This type includes items obtained by usurpation or defective sales.

Guarantees Secured by Others (non-guaranteed)

Another person acts as the guarantor for the guaranteed item. If the item exists, it should be returned, and if it is lost, there is no obligation to return a similar item. Instead, the value of the item should be paid. This form is known as non-guaranteed (ghayr-mazmum) guarantees.

Non-Guaranteed Items

These are items that do not have a guarantor. The guarantor is not responsible for these items. If a person takes something from another person without a guarantor, they are obliged to return it if it is still present. If it is lost and there is no similar item, there is no obligation to return it. Examples include items obtained through usurpation or a defective sale.

This classification in Hanafi jurisprudence distinguishes between guarantees secured by the guarantor himself, guarantees secured by others, and non-guaranteed items.

Definition of Guarantee in Maliki Jurisprudence

According to Maliki scholars, guarantee (Zaman), bail (Kafalah), and transfer (Hawalah) share the same meaning, which is the commitment of the guarantor and the debtor to the owner of the right (the person entitled to the guarantee). The commitment of the guarantor and the debtor is interrelated, regardless of whether it is conditional on something or not. In Maliki jurisprudence, guarantees are divided into three categories:

Guarantee of Wealth (Zaman al-Mal):

In this type, when an individual provides a guarantee for wealth, that person becomes responsible for that wealth, similar to a debtor, without being conditional on the command of another. For example, a person in debt, without being subject to the command of someone else.

Guarantee of Face (Zaman al-Wajh):

This refers to the commitment to pay the debt of a person who is indebted to someone else. Guaranteeing the debt without involving actual wealth is not valid, and the guarantor does not become responsible for the wealth unless they cannot summon the debtor to pay the debt. In this type, the guarantor becomes responsible for the debt only when they cannot summon the debtor.

Guarantee of Demand (Zaman al-Talab):

In this type, the guarantor commits to paying a specific demand to the creditor. This type of guarantee is not valid if it does not involve actual wealth. The guarantor does not become responsible for the wealth unless the debtor defaults in payment and it is established that the debtor is unable to fulfill the obligation.

In summary, Maliki jurisprudence classifies guarantees into three categories: Guarantee of Wealth, Guarantee of Face, and Guarantee of Demand, each having its own conditions and implications in terms of the responsibility of the guarantor and the debtor.

Characteristics of the Guarantee Contract in the Civil Code

From Article 684 of the Civil Code, the characteristics of the contract of guarantee are as follows.

The Guarantee Contract is a Contract

The guarantee contract is fundamentally a contractual agreement. Its primary element is the commitment of the guarantor to pay the debt of the person entitled to the guarantee. Therefore, in the classification of contracts into proprietary and contractual, without a doubt, the guarantee should be categorized as a contractual agreement. However, the question arises as to whether this commitment is only from the side of the guarantor, or does the creditor also assume some responsibility? The answer lies in the legal nature of the guarantee contract, which is different. Since the guarantee is based on the agreement of the parties and the transfer of debt, it should be considered a unilateral contract. The guarantor commits solely to ensure that the debt owed will be paid within the specified period or, in case of refusal, the guarantor will fulfill the obligation. The creditor's role in this legal act is merely accepting the guarantee, and they do not assume any responsibility beyond that. However, in the case of an absolute guarantee, where the guarantee contract involves the transfer of debt to the guarantor, the claim of the person entitled to the guarantee against the person entitled to the debt is dropped. The guarantee contract is a mutual agreement between the guarantor and the person entitled to the guarantee, and the actions taken are the result of the mutual intention of these two parties. The transfer of debt can be analyzed as two legal actions:

The guarantor's commitment to accepting the debt owed.

The drop of the claim of the person entitled to the guarantee from the person entitled to the debt. The first action is the share of the guarantor, and the latter is the share of the person entitled to the guarantee in this agreement, resulting in the "transfer of debt." Therefore, it cannot be claimed that the guarantee contract, being unilateral, imposes no obligation on the creditor. While it is true that after the realization of the guarantee contract, only the guarantor becomes indebted, the occurrence of this debt coincides with the drop of the claim of the person entitled to the guarantee. On the other hand, the drop of the claim is the result of the negative commitment of the creditor, who does not receive anything from the debtor, and the immediate execution of this commitment implies that the creditor has not assumed any obligation as a result of the contract. Therefore, the guarantee contract is considered a contract with the effects of both parties involved: on the side of the guarantor, it leads to the creation of debt, and on the side of the creditor, it results in the drop of the claim and the discharge of the debtor.

"Guarantee is a Consensual Contract Resulting in the Transfer of Debt"

Guarantee is a consensual contract, and the agreement between the guarantor and the person entitled to the guarantee directly leads to the transfer of debt to the guarantor.

"Guarantee is a Compensatory Contract"

Due to the fact that the person entitled to the guarantee does not commit to any action against the guarantor, it should not be concluded that the guarantee contract is gratuitous. The guarantor commits to paying the debt to the person entitled to the guarantee without receiving anything in return. It should not be assumed that the guarantee is a gratuitous contract; the guarantor commits to paying the debt without receiving anything in return from the person entitled to the guarantee. What is stipulated in this

contract against the commitment of the guarantor is for the benefit of the person entitled to the guarantee (debtor) who is discharged. In a compensatory contract, there is no necessity for anything to be given to the person who provides the compensation. For example, in life insurance, the result of the commitment of the insurer reaches another person, and no one considers it a gratuitous contract. Therefore, it should not be assumed that in guarantee, the commitment to the benefit of the person entitled to the guarantee creates an obligation.

"Guarantee is Subsidiary"

The guarantee being subsidiary means that its effects and provisions are subject to another contract. However, the significance of subsidiary nature of the guarantee lies in the fact that the commitment of the guarantor, in terms of influence and continuity, is subsidiary to the debt that the person entitled to the guarantee has towards the debtor. Noteworthy outcomes arise from the subsidiary nature of the guarantee.

a. **The Guarantee is Valid when the Debt is Existing and Legitimate:** - The guarantee is valid when the underlying debt is present and legitimate. A debt is considered present when it is assigned to the debtor, even if there is a possibility of its dissolution. For instance, after the conclusion of a sales contract, the price is assigned to the buyer, and the right to rescind the transaction, which would undermine the existence of the debt, does not hinder proving the debt and achieving the guarantee. Similarly, if a husband divorces his wife before consummation, resulting in the husband being committed to paying half of the dowry. - However, the civil law does not have strict criteria regarding the condition "existence of debt." Instead, it considers the effect of the actual debt if realized, even if the conditions for proving it have not been met.

b. **Guarantor's Debt is the Same as the Debt of the Person Entitled to the Guarantee:** - The debt of the guarantor, in terms of amount, nature, and conditions of payment, is the same as the debt of the person entitled to the guarantee. If the guarantee is concluded without any conditions, the guarantor assumes the debt of the person entitled to the guarantee in its entirety, along with all its specifications and conditions, even though the guarantee contract may have its specific effects. The guarantee contract can stipulate a special term for the payment of the current debt, or the guarantor may undertake to pay a specified amount of the debt immediately, or the guarantee may be entrusted to the person entitled to the guarantee. - However, some jurists do not consider the guarantee of the present debt as valid. They argue that the subsidiary cannot be superior to the principal, and the principal should take precedence over it.

"Guarantee Contract Terms and Conditions"

The author outlines four scenarios that may arise in the context of a guarantee contract:
Present Debt with Specified Guarantee Period:
The debt is currently due, but the guarantor provides a guarantee with a specified time frame.
Present Debt with Immediate Guarantee:
The debt is currently due, and the guarantor guarantees it immediately.
Future Debt Accepting Guarantee with Condition:
The debt is payable in the future, but the guarantor agrees to guarantee it with a condition related to the maturity date.
Future Debt with Immediate Guarantee:

The debt is payable in the future, and the guarantor agrees to guarantee it immediately without waiting for the maturity date.

In a situation where both the debt and the guarantee are concurrent, the validity of the guarantee is not affected by whether the maturity and terms are the same or different. This is because, after payment, the guarantor can demand the amount paid from the debtor, regardless of whether the guarantee is immediate or with a specified period.

Regarding the duration of the debt, if the debt has a specified period, and the guarantee is concluded accordingly, the guarantor cannot claim the money from the debtor unless the time for payment has arrived. This applies whether the guarantee is immediate or for the maturity date.

If, due to any reason, the principal debt becomes void, the guarantee is also void. However, if the principal debt is rescinded, the guarantee remains valid since the guarantee is based on the existing debt at the time of concluding the guarantee contract.

Furthermore, the guarantor stands in the position of the person entitled to the guarantee. If the principal debt is proven to both parties involved in the original transaction, and this proof occurred before the guarantee, it is sufficient for the validity of the guarantee contract. The guarantor cannot object to a judgment issued in this regard, considering it as a third-party interference.

"Guarantee Arising from a Reconciliation Contract"

The author emphasizes that a guarantee contract is not for profit or transactional purposes but serves the purpose of resolving disputes and fostering reconciliation between the guarantor and the debtor. This description of a guarantee not only holds ethical implications but also has legal aspects (Articles 694 and 695 of the Civil Code).

"Necessity of Guarantee Contract"

In Article 701 of the Civil Code, it is stated, "A necessary guarantee contract, and the guarantor and the person guaranteed cannot rescind it." In necessary contracts, various options, including conditional options, exist. However, Article 701 specifies three exceptions, allowing termination only if certain conditions are met:

Guarantor's incapacity (as per Article 690).
Right to rescind concerning the guaranteed debt (Article 701).
Violation of contract regulations (including deception and transactional disparity).

Some types of options in a guarantee contract, such as conditional options, are considered negative and incompatible with the nature of the contract in the Imamiyah jurisprudence. Despite differences in opinion, the possibility of conditional options in guarantees is stronger from a rational and historical perspective, and legal codifiers in civil law consider them valid within the realm of guarantees.

While the wording of Article 701 makes it challenging to accept the termination of a guarantee contract based on a conditional option, it appears that invoking a conditional option may not invalidate the guarantee contract because declaring the nullity of such a contract requires explicit legal provisions.

"Elements of a Guarantee Contract in Shafi'i Jurisprudence"

In Shafi'i jurisprudence, a guarantee contract consists of five essential elements:
Guarantor (Zamin): The person providing the guarantee.
Person Guaranteed (Mazmun Lahu): The individual for whom the guarantee is made.
Guaranteed Debt (Mazmun Anhu): The debt for which the guarantee is provided.
Guaranteed Thing (Mazmun Ilayh): The thing or right that serves as collateral.
Form of the Guarantee Contract (Sighat Al-Aqd): The specific wording and form of the contract.
Each of these elements has its own set of conditions and requirements within Shafi'i jurisprudence.

"Conditions of the Guarantor"

The guarantor committing to pay the guaranteed rights must have the legal capacity to make donations. Therefore, it is incorrect for someone who is insane or a child to become a guarantor since they lack the capacity to make donations and have no control over themselves or their property. Similarly,

guaranteeing the property for someone who is restrained due to profligacy or legal restrictions on financial transactions is not valid. This is because guaranteeing involves a financial commitment, and the individual is prohibited from engaging in financial transactions. If the guarantor is sick to the extent that there is a fear of their death, they can only guarantee one-third of their property for others since they are restricted from making financial donations beyond one-third of their wealth.

"Conditions of the Person Guaranteed (Mazmun Lahu)"

The person guaranteed (Mazmun Lahu) refers to the rightful owner for whom the guarantee is undertaken. It has specific conditions:

Recognition of the Person Guaranteed

The person guaranteed must be explicitly identified, and the guarantor must recognize the individual. Recognizing the lineage alone does not suffice, as the person guaranteed is the rightful owner who will claim their right from the guarantor in the future.

People differ in how strictly or leniently they pursue their rights. Therefore, it is necessary for the obligated person to identify the one from whom they will claim their right.

If the person guaranteed is unknown, the philosophy of creating a guarantee for the rightful owner is not realized. Recognizing the person guaranteed is sufficient because people's appearances often reflect their true nature.

Presence of the Person Guaranteed at the Contract Formation Session: It is not necessary for the person guaranteed to be present at the session where the guarantee contract is concluded.

Acceptance of the guarantee by the person guaranteed is required since the guarantee is a commitment made for their benefit. It does not create any obligation against them. If the person guaranteed had an attorney, recognizing the attorney is necessary since people usually consider those attorneys who are stricter in demanding from them. If someone recognizes the attorney, there is no need to recognize the principal (person guaranteed).

The consent of the person guaranteed is necessary, but verbal acceptance is not required.

"Conditions of the Person Guaranteed (Mazmun Aneh)"

The person guaranteed (Mazmun Aneh) is someone from whom the right, guaranteed by the guarantor on behalf of the person guaranteed or their attorney, is demanded. Sometimes, the term "Asil" (original) is used to interpret the person guaranteed, opposite to the guarantor. It is essential that the right, such as a debt, for which the guarantee is provided, is valid and proven to be on the person guaranteed.

According to one viewpoint, in financial matters, the consent of the person guaranteed is not necessary. This is because paying someone else's debt without obtaining their permission is permissible. Therefore, the first interpretation is that commitment and obligation to pay the debt, even without the consent of the person guaranteed, are valid. For this reason, guaranteeing the debt of a deceased person is valid, even if they did not commit to paying it during their lifetime and the deadline for payment has not yet arrived.

"Conditions of the Right Guaranteed (Mazmun Be)"

The right guaranteed (Mazmun Be) refers to a right or debt, and it must meet the following conditions:

A. Existence of the Right: The right guaranteed must be established at the time of the guarantee contract on the person guaranteed. Therefore, a guarantee on non-established rights is not valid, whether the obligation for that right has arisen, like spousal alimony, or not arisen, like guaranteeing a future debt that a person may borrow from someone else. Guarantee, like a testimonial or a right, cannot be established retroactively.

If a right on the person guaranteed is not established, but the guarantor admits its existence, this admission is sufficient to prove the right. For example, if the guarantor states, "Zaid owes a hundred dinars to Umar, and I am the guarantor," and Umar denies having any debt, Zaid can claim a hundred dinars from the guarantor.

In one viewpoint, it is stated that guaranteeing a right that becomes obligatory later is valid. For instance, if the guarantor says, "Guarantee a loan of a hundred to him," and the person guaranteed later borrows that amount, their arrangement is valid due to the necessity and need for that right.

B. Donatable Right: The right guaranteed must be donatable to someone else without compensation. This means it can be transferred to someone other than its owner without receiving anything in return, such as rights mentioned before. If the right is not donatable, the guarantee is not valid, like the right of pre-emption because it belongs to the preemptor.

C. Clear Identification: The nature and characteristics of the right guaranteed must be known to the guarantor. The "nature" refers to what the right is, like being in gold or dinars, the "amount" could be a specific number, more, or less, and the "characteristics" refer to the quality, whether it's excellent or undesirable.

"Conditions of the Guarantee Contract (Sayghat-e Zamane)"

The guarantee contract involves an offer from the guarantor and acceptance from the person guaranteed. The acceptance and consent of the guaranteed person are not necessary; the offer from the guarantor is sufficient.

A. Explicit or Implicit Language: The offer by the guarantor must be made with explicit or implicit language indicating an obligation. An explicit statement can be something like, "I guarantee the debt you have with so-and-so" or "I undertake it" or "I become the guarantor." An "implicit language" could be something like, "I haven't done any work with so-and-so, and any debt you have with him is my responsibility."

B. Executed Guarantee Contract without Suspended Conditions: The guarantee contract must be executed and not subject to a suspended condition. According to the majority opinion, if the guarantor says, "If Zaid returns from his journey, I guarantee your debt to him," this guarantee is not valid.

C. Not Specific to Money and Not Time-bound: According to one viewpoint, the guarantee should not be related to money and should not be tied to a specific time. This is because the purpose of the guarantee is the payment of a debt, so tying it to a specific time is not valid. If the due date for the payment of a current debt is in the future, guaranteeing its payment at a specific time in the future is valid. This is because the guarantor may not be able to make an immediate payment from the time of the guarantee, and having a guarantor is necessary, so the guarantee will be based on the commitment and obligation of the guarantor.

D. Immediate or Future Payment: The guarantor can provide a guarantee for a debt while the payment is in the future. Although this is considered a voluntary commitment to immediate payment, it is still valid. However, according to the majority opinion, immediate payment is not obligatory for the guarantor.

Definition of Assignment (Hawalah) and Its Characteristics in Civil Law

According to Article 724 of the Civil Code, "Hawalah" is a contractual agreement through which a personal claim of a creditor is transferred from the debtor to a third party. In this arrangement, the debtor is referred to as the "Muhil," the creditor as the "Mahall," and the third party as the "Mahul Aleihi."

Characteristics of Hawalah Based on the Above Definition

a) Specific Contract: Hawalah is a defined contract and does not involve ambiguity. The fulfillment of the agreement lies in the hands of the Muhil, and the claim to be transferred must be established against

the debtor and requires mutual consent. For this reason, legislators have classified it as a distinct contract.

b) Effects of Hawalah: The primary effect of Hawalah is the transfer of a debt from the debtor (Muhil) to a third party. The result is the discharge of the Muhil, who is relieved of the debt, and the obligation to repay is transferred to the Mahul Aleihi. This legal transfer is substantiated by the issuance of Hawalah (Article 730 of the Civil Code).

However, general jurisprudential views differ, with some maintaining that the debt of the Muhil persists, and only the right to claim is transferred to the Mahul Aleihi. Others grant the Mahul Aleihi the option to refer to both the Muhil and Mahall, a position not explicitly acknowledged in the Iranian Civil Code.

General Jurisprudential Observations on the Distinction Between Transferring the Actual Debt and the Right to Claim in Hawalah

If the Muhil settles the debt after the Hawalah, the Mahul Aleihi is compelled to accept the payment. However, if the actual debt is transferred, the Muhil is a third party, and the Mahul Aleihi is not obligated to accept repayment from them.

The Mahul Aleihi cannot appoint an agent (wakil) to collect the claim from the Muhil. Still, if the actual debt is transferred, delegation becomes feasible.

The release (abra') of the Muhil after Hawalah is valid, whereas accepting the transfer of the debt does not release the person who has been discharged through Hawalah.

c) Hawalah as a Subsidiary Contract: Hawalah is a subsidiary contract and only materializes when the debtor (Mujil) owes the debt to the creditor (Muhall). This principle is derived from the provisions of Articles 724 and 725 of the Civil Code. If someone issues a document to another person who is not their creditor, even if it appears to instruct the payment of money to another individual, this action should not be considered as Hawalah. Despite the apparent directive for financial payment, the legal intention in this context is not the transfer and settlement of debt. The issuer of the document aims to provide funds to another person, be it a loan, a gift, or an agency. Therefore, the legal relationship between them corresponds to the nature of a loan, gift, or agency contract.

Definition of Hawalah and Its Implications in Hanafi Jurisprudence

In its literal sense, Hawalah denotes the transfer from one place to another, derived from the verbal noun 'ihtilah.' In Islamic jurisprudence, Hawalah refers to the transfer of a debt from the liability of one person to another, and through this transfer, the original debtor's liability is annulled.

Hanafi Perspectives on the Definition of Hawalah

According to Hanafi scholars, two viewpoints exist regarding the definition of Hawalah:

a) Transfer of Claim and Debt: The first perspective suggests that Hawalah transfers the right to claim from the original debtor to the new obligor. If someone owes a debt to another and assigns that debt to a third party through Hawalah, and the new obligor accepts liability for that debt, the original debtor is obligated to pay it. In this scenario, if the assignee (creditor) demands the payment of the debt, it is transferred from the original debtor to the new obligor. However, the debt itself remains intact.

b) Simultaneous Transfer of Debt and Claim: The second viewpoint posits that the transfer of debt and the transfer of the right to claim occur simultaneously. The liability of the original debtor is transferred to the new obligor, along with the transfer of the creditor's right to claim. Those who assert that Hawalah merely involves the transfer of the right to claim argue that when the assignee (creditor) decides to settle the debt themselves, the original debtor is obliged to accept. However, if the debt is transferred to the new obligor,

the original debtor is not compelled to accept it since, in this case, the original debtor has already fulfilled their Sharia obligation, and the individual is not obliged to accept a gratuitous payment.

Among these scenarios, if the creditor (mohal - mohtal) absolves the new obligor (mohal aleihi) from the obligation of paying the debt, the commitment and liability of the original debtor are annulled. The new obligor does not have the right to claim the debt for the second time. If the new obligor has gifted the debt to the original debtor (mohal), in this case, the new obligor has the right to demand it from the original debtor. If the original debtor has no debt, they will be subject to retaliation.

Moreover, if the new obligor passes away due to bankruptcy or denies the debt without any justification, and the debt remains unpaid by them, the creditor (mohtal) refers back to the original debtor, who is also the new obligor. However, if the new obligor dies in a state of bankruptcy or denies the debt without justification, and the creditor refers to the original debtor, this reference is not valid unless the debt is still outstanding. If the new obligor dies in a state of bankruptcy or denies the debt without justification, the creditor refers to the original debtor, and the debt is transferred back to them. The origin of this complexity lies in linguistic expressions, and Abu Hanifa attributed the waste of wealth to this concept. Two of his companions added that the judge issues a bankruptcy ruling while the new obligor is still alive. In this situation, the right of recourse is given to the original debtor (mohtal) against the new obligor (original debtor).

Lastly, it is emphasized that the annulment of Hawalah is valid even if the debt has been transferred from one liability to another. Hawalah requires a specific contract, and neither party has the right to annul it unilaterally.

Conditions of Hawalah in Hanafi Jurisprudence

In the "Conditions of Hawalah," four main conditions are outlined in the Hanafi school:

First: The mohal (new obligor) must be sane. Therefore, the transfer is not valid from a lunatic or a minor. For the transfer to be valid, the mohal must be an adult, and the transfer to a non-adult is not enforceable unless approved by their guardian, as adulthood is a necessary condition for the validity of the transfer. It is not necessary for the mohal to be in good health for the validity of Hawalah. Thus, the transfer of a debt to a sick person is valid.

Fourth: The mohal must have a liability to the debt. In other words, the transfer of Hawalah is not valid if the mohal is not liable for the debt. The Hawalah involves the transfer of a legal and non-material obligation from one debtor to another, and it is not a direct transfer of a material existence. If someone issues a Hawalah for the purpose of transferring an existing item to someone else, this cannot be termed as Hawalah because the essence of Hawalah is not the payment of material items but the transfer of a debt.

Conditions of Mohal Be (Cessionary)

a) The mohal must be liable for the debt. Therefore, Hawalah is not valid for a non-existing entity since it involves the transfer of a legal and non-material obligation from one debtor to another. The transfer of an existing entity would fall under the domain of representation (Wakalah) rather than Hawalah.

b) The debt must be necessary, such as a purchase price that becomes due after the delivery of the sold item or is payable at the end of the term, as in the case of Khiyar (right of option). This issue has differing opinions, and the mentioned viewpoint is considered more correct. If someone issues a Hawalah to receive a price after the end of the term, it is not valid because the price becomes necessary after the end of the term, and Hawalah for a non-necessary debt is not valid. However, if a seller issues a Hawalah to the buyer to receive the price after the term, the Hawalah is valid, as the price becomes necessary after the end of the term.

The Option Clause in Conditions of Hawalah

Hawalah must be executed and definite; therefore, the option clause, whether conditional or at the discretion of a third party, is not applicable in it. The option clause is fundamentally established to protect the parties from harm in transactions, whereas Hawalah is based on mutual agreement and cooperation, not deception and harm. The option clause in the sale of goods is established, and according to the more correct opinion, Hawalah is the transfer of a debt for a debt.

Conditions for the Validity of Hawalah

The mohal (new debtor) must have a debt with the original debtor; therefore, Hawalah is valid for someone who is a debtor to the original debtor. According to the more accurate opinion, Hawalah involves the transfer of a debt for a debt and has been permitted due to the needs of the people. Thus, it is necessary for the mohal to be a debtor to the original debtor so that the debt is paid to him in exchange for the right of the mohal.

Conditions of the Debt of Mohal Be (Cessionary)

a) The debt of the mohal be must be similar to the debt of the mohal.

b) In terms of substance, amount, description, being a loan or a cash debt, the debt of the mohal be must be equivalent to the debt of the mohal. If there is a discrepancy, the Hawalah is not valid. Hawalah is a fair transaction for cooperation among people, and its criterion is the equivalence of the two rights.

These conditions aim to ensure fairness and equity in the transfer of debts through Hawalah, emphasizing mutual agreement and the absence of harm in the process.

Consent of the Mohil (Original Debtor) and Mohal (Cessionary)

The mohil must be willing to carry out the Hawalah because they have the right to settle their debt in any way they choose. Therefore, they can personally pay the debt or have it paid through the debtor (mohal). The mohil cannot be compelled to pay the debt through a specific channel, whether personally or through the mohal, and if the creditor wishes to receive the debt through a channel other than the mohal, the consent of the mohil is necessary.

The consent of the mohal is also necessary for the validity of Hawalah. The mohal is the rightful owner of the debt transferred from the mohil to the mohal through the Hawalah agreement. The right of the mohal is established over the mohil, not another person. Therefore, the transfer without their permission is not valid, as debtors may differ in terms of the quality of debt payment or delays in payment.

Knowledge of the Mohil and Mohal Regarding the Debt

The mohil and mohal must be aware of the amount, nature, and characteristics of the debt being transferred. Since Hawalah is a type of sale, being unaware of the price or the sale makes the sale invalid.

Difference Between Mohil and Mohal in Hawalah

The distinction between the mohil and mohal is crucial in the context of Hawalah. The mohil is the original debtor, and the mohal is the new debtor or cessionary. Their roles, responsibilities, and rights are distinct in the Hawalah process. Understanding these differences is essential for the proper execution of Hawalah transactions.

Acquittal of the Original Debtor with Hawalah

Hanbalis' View: According to the Hanbali school, when the conditions of Hawalah are met, the original debtor (mohil) is acquitted of the debt merely by the act of Hawalah, regardless of whether the cessionary

(mohal) becomes insolvent, goes bankrupt, dies, or denies the debt afterward. However, if the conditions of Hawalah are not met, the Hawalah is not valid, and the rules of agency (wakalah) apply.

Malikis' View: The Malikis argue that the right of the cessionary is transferred to the mohal through Hawalah, and the mohal becomes responsible for the debt even if the cessionary becomes insolvent, goes bankrupt, dies, or denies the debt after Hawalah. In such cases, the cessionary has no right to revert to the mohil (original debtor). However, if the cessionary denies the debt that was already in the possession of the mohil before Hawalah, and there is no existing debt, the Hawalah is not valid because one of the conditions for its validity is the existence of a confirmed debt.

These divergent views highlight the importance of understanding the different perspectives within Islamic jurisprudence on the consequences of Hawalah and the acquittal of the original debtor.

Hanafi View (Continued): Hanafis believe that the debtor (mohil) is acquitted by ceding the debt through Hawalah to the cessionary (mohal), but this acquittal is temporary. It means that after Hawalah, the cessionary has no right to revert to the debtor (mohil), except in cases of distortion, as mentioned above. If the cessionary becomes insolvent or passes away, in such cases, they can revert to the debtor (mohil).

Shafi'i View (Continued): Shafi'is argue that through Hawalah, the responsibility of the debtor (mohil) is transferred to the cessionary (mohal), and vice versa. However, the equivalent of the debt becomes independent through Hawalah. After Hawalah, the cessionary has no right to revert to the debtor, regardless of whether the cessionary becomes bankrupt, dies, or denies the debt. This is similar to the scenario where if the debtor denies the debt before Hawalah, it doesn't matter if the cessionary is aware of it or not, as accepting the Hawalah implies implicit acceptance of the debt. Thus, the denial does not harm the cessionary, and even if the cessionary becomes insolvent before Hawalah, they have no right to revert.

Consent of the Cessionary (Continued): The requirement of the consent of the cessionary is a well-established opinion among jurists. Additionally, the consent of the cessionary is one of the essential elements of Hawalah. Furthermore, people differ in their ease or difficulty in demanding their rights. Therefore, when Hawalah occurs correctly, it is necessary for the debt to be transferred from the debtor to the cessionary, similar to the perspective of the Imamiyyah in the contract of guarantee, where the debt is transferred from the debtor to the guarantor.

Conclusion: The diverse views on Hawalah across different Islamic schools of thought illustrate the richness and complexity of Islamic jurisprudence, with each school providing unique perspectives on the legal consequences of debt cession through Hawalah.

Case 1: If, after the Hawala transaction, it becomes evident that the debtor (Mahal Ali) was insolvent at the time of the Hawala contract, in this case, the presenter (Mohattal) has the right to annul the Hawala, irrespective of whether the presenter had made the solvency of the debtor a condition (stipulated during the contract) or not. Whether the presenter gains financial capability against the debtor before the annulment of the Hawala or not, even if there is no harm to the presenter in the event of the debtor becoming solvent. The rationale for this ruling is grounded in the continuation of the right to annulment for the presenter.

Case 2: If the situation is reversed, meaning that the debtor (Mahal Ali) was affluent at the time of the Hawala contract but later becomes insolvent, in this case, the presenter (Mohattal) will not have the right to annul the Hawala. This is because the necessary condition for the Hawala (at the time of the contract) was present, namely the solvency of the debtor. Even if the debtor becomes financially constrained later, the presenter cannot annul the Hawala.

Definition of Hawala and its conditions according to Shahid Sani: "(It is an undertaking regarding money from the one engaged in a transaction similar to it) committing to pay money by the one who is a debtor

to the presenter (Hawala giver), and according to Shahid Sani, the more robust expression is that Hawala on someone who is not a debtor (to the presenter) is valid because the principle is based on validity. However, such a Hawala is more akin to a guarantee contract as it entails transferring the debt from the debtor (Mahal) who owes to someone who is not a debtor (Mahall Ali).

In a Hawala transaction, the consent of three parties is a prerequisite.

Consent of the Presenter: Firstly, there is a consensus among jurists on this matter. Secondly, the one who has the right upon him (is a debtor) has the option to settle his debt from any of his assets, and the claim given to him through the Hawala (by the presenter) is considered part of his property.

Consent of the Recipient: Firstly, there is a consensus among jurists on this matter. Secondly, the claim of the recipient is established against the presenter's liability (not against the liability of another person). Therefore, it is not necessary for the recipient to have the claim transferred to the liability of another person without his consent.

Definition of Hawala and its Legitimacy in Shafi'i Jurisprudence: Hawala, in its literal sense, means transfer and relocation, as stated in the book "Misbah al-Muneer," "It has moved from its place," meaning it has been transferred from its original place. However, in the legal terminology, it refers to a transaction that involves the transfer of debt from one liability to another. It is also referred to as the transfer of debt from one liability to another in the book "Mughni al-Muhtaj." The legitimate evidence for its validity comes from the narrations of the Imams al-Bukhari (2166), Muslim (1564), and Imam Ahmad in his Musnad (2/263) from Abu Huraira (may Allah be pleased with him), where the Prophet Muhammad (peace be upon him) said: "The wealthy debtor has been wronged; so if one of you is owed money and the debtor does Hawala to a wealthy person, he should accept it." Another narration in Imam Ahmad's collection states: "If someone has been referred to you for a debt, accept the Hawala."

The consensus of scholars is that the wording used in the hadith, namely the two phrases "FALAYATBAE" and "FALAYAHTAL," indicates the recommendation of Hawala, not its obligation. Therefore, if someone is a creditor to another person, and the latter transfers the debt to a third party through Hawala, accepting this Hawala is recommended for the creditor.

However, this recommendation is contingent upon the ability of the recipient (MAHALON ALAYH) to settle the debt and the absence of suspicion regarding their wealth. If the recipient does not have the capability to settle the debt or if there is suspicion about their wealth, accepting the Hawala is not recommended for the creditor.

Regarding the conditions of Hawala in Shafi'i jurisprudence, Shafi'is believe that the foundations and essentials of Hawala are six: the presenter (MOHIL), the recipient (MOHTAL), the debt (MAHALON ALAYH), the wording of the Hawala, and the acts of ordering and accepting.

Firstly, the consent of the presenter who is the debtor is essential.

Secondly, the consent of the recipient, who is the creditor, is crucial; without their consent, the Hawala is not valid.

Thirdly, the debt should be known in terms of value or nature. If the debt is unknown to one or both parties, the transfer is invalid.

Fourthly, it is necessary that the debt (MOHAL) be specified because an unspecified debt never becomes exempt from the responsibility of the debtor. For example, like the dowry of a woman that, after the marriage contract, consummation, and the specified amount, becomes due after the expiration of the stipulated period.

Fifthly, the debt of the presenter and the debt against him, in terms of nature, amount, current status, maturity, soundness, and being intact, should be equal.

Sixthly, the debts of the presenter and the recipient (MAHALON ALAYH) should be among those debts that can be sold and transferred to others, and the sale and transfer of them should be valid.

Regarding the legal aspects of Hawala in civil law, Article 725 stipulates, "Hawala does not take effect unless with the consent of the recipient and 'acceptance of the debt.'" Therefore, civil law explicitly states the necessity of the acceptance of the debt by the creditor, leaving no room for doubt. However, what is unconventional and contentious is how, contrary to other contracts, the acceptance of two parties is required for the realization of Hawala. Is there any obligation for the two parties? Therefore, two theories exist:

A) Most sources that consider the acceptance of the debt as effective in the formation of Hawala believe that the contract is concluded between the presenter and the recipient. The entire contract is completed with the acceptance of the debt, but the transfer of the debt to the creditor is conditional on their consent.

B) Hawala is composed of one offer and two acceptances. The debt against him is also like the presenter, a party to the contract, and must accept it to effect the transfer of the debt.

The second opinion is more compatible with the legal structure of debt transfer, as it is more plausible to think that a debt is placed on someone without seeking their consent.

In fact, the contract of Hawala is an institution consisting of two contracts, each of which is conditional on the occurrence of the other. Not only should the presence of two acceptances for the conclusion of Hawala not be surprising, but it should be acknowledged that the offer of the presenter is also a combination of two different offers.

One offer is addressed to the creditor (MOHTAL), and their claim is placed against the debtor (MAHALON ALAYH). The other offer is addressed to the debtor (MAHALON ALAYH) to undertake the subject of Hawala. If both of these offers are accepted, the effect of the contract is realized. Civil law also includes this perspective in Article 725, making the consent of the creditor and the acceptance of the debtor (

MAHALON ALAYH) conditions for the realization of the Hawala contract. In Article 732, the term " MAHALON ALAYH " is used to refer to the parties involved in the Hawala contract, and MAHALON ALAYH can be considered as the "third party" (SALES). The drafters of the civil law have referred to MAHALON ALAYH as the "third party" in relation to the two parties of the contract (presenter and recipient).

Civil law defines Hawala based on the claim of the recipient (MOHTAL) from the presenter (MOHIL). It is evident that MAHALON ALAYH, in relation to the two parties of the contract (MOHIL and MOHTAL), acts as a third party. Therefore, the term "SALES" (third party) is significant for the contractual relationship between MOHIL and MOHTAL, rather than determining the parties involved in the Hawala contract.

Existence of Debt from the Presenter to the Recipient: One of the essential components of the Hawala contract is the presence of a debt from the presenter to the recipient (Article 726 of the Civil Law). This signifies that Hawala is employed for the fulfillment of a debt, even if indirectly accompanied by an exchange. It is crucial to note that, following the unified criteria of guarantee contracts, the existence of the cause of the debt from the presenter to the recipient is a condition for the realization of the Hawala contract.

Legal Capacity of the Parties Involved in the Hawala Contract: Considering that the presenter, recipient, and debtor each exercise control over their properties, they possess the legal capacity for transactions (Section 2 of Article 210 onward).

Clarity and Specificity of the Subject Matter in the Hawala Contract: To establish the clarity of the subject matter in the Hawala contract, two theories exist:

Sufficiency of Capability for Determination: According to this view, the Hawala contract is

considered valid if the subject matter is capable of determination, and there is no necessity for it to be explicitly identified during the negotiation between the parties, similar to the provisions for guarantees in Article 694 of the Civil Law.

Requirement for Clarity in Quantity, Quality, and Nature: This perspective argues that the subject matter of the Hawala contract, concerning quantity, quality, and nature, must be explicitly known to the parties; otherwise, it could lead to ambiguity ('gharar'). While Article 694 of the Civil Law specifically addresses guarantees, no such specific law exists for Hawala, and it is governed by general principles.

Hawala Involving Non-Uniform Debt: The essence of Hawala necessitates unity in the debt transferred from the presenter to the recipient and what the recipient assumes responsibility for. This unity involves consistency in terms of nature, characteristics, and quantity. The debt that is transferred from the presenter to the recipient should not undergo alterations in its features, quantity, nature, or guarantees during the process.

Thesis Conclusion on Hawala: The legal effect of Hawala is the transfer of rights from the debtor (presenter) to the third party (recipient), leading to the discharge of the debtor's obligation. With this transfer and discharge, the Hawala arrangement concludes, and the legal relationship between the debtor (presenter) and the third party (recipient) ceases to exist. Instead, a creditor-debtor relationship is established between the third party (recipient) and the person to whom the debt has been transferred. If, for any reason, the third party (recipient) fails to collect the debt from the person to whom the debt was transferred, they no longer have the right to recourse to the original debtor (presenter).

Conclusion

Contracts of guarantee and assignment are prominent examples of transferable security contracts, both based on a fundamental debt. In fact, they are considered subsidiary contracts. However, there is a difference of opinion regarding whether this subsidiary contract must necessarily be a fixed contract leading to a fundamental contract or whether being a cause for the fundamental contract is sufficient for transferable security contracts. This disagreement exists among both jurists and legal scholars. The legislator, in Article 691 of the Civil Code, deems the existence of a debt as sufficient for the validity of a guarantee contract. However, in the case of the assignment contract, the legislator does not make such a explicit statement, leading to differences among legal scholars, especially among jurists. Nevertheless, considering the similarities between guarantee and assignment contracts, we can utilize the provisions of Article 691 of the Civil Code for assignment contracts, taking into account the liberated provisions in the assignment contract.

In general, some scholars argue that in the case of a guarantee contract, the existence of a debt must be established at the time of the contract, and therefore, if the guarantee contract is not established, it is not valid, even if it results in the creation of a debt. The guarantee contract is realized between the guarantor and the debtor, and it has significant consequences, with the most important being the transfer or assumption of the debt. Other consequences are dependent on these primary effects.

In Imami jurisprudence, opinions are divided into three categories:

The majority view among Imami jurists holds that the moment the guarantee contract is concluded, the debt is transferred from the debtor to the guarantor. This effect is considered an inherent part of the nature of the guarantee contract, and any assignment contrary to it is not permissible.

A minority of Imami jurists believes that upon the conclusion of the guarantee contract, the debt is transferred from the debtor to the guarantor, but it is not an inherent part of the nature of the guarantee contract. The parties can, through mutual agreement, assign the guarantee as an assumption of debt.

Some contemporary Imami jurists argue that neither the transfer nor the assumption of the debt is an

inherent part of the nature of the guarantee contract. The parties can make it a valid assignment or assumption, and silence implies an assumption of the debt. In other words, the essential requirement for the guarantee contract is the assumption of the debt.

In general jurisprudence, similar to Imami jurisprudence, there are different opinions. The majority of general jurists consider the transfer of the debt as inherent in the nature of the guarantee contract, and any assignment contrary to it is not permissible. A minority of general jurists does not consider the guarantee valid under certain conditions unless the original debtor is completely released. Some general jurists, like the majority of Imami jurists, view the inherent nature of the guarantee contract as the transfer of the debt from the debtor to the guarantor.

In the Iranian Civil Code, Article 698 considers the primary effect of the guarantee contract as the transfer of the debt from the debtor to the guarantor, while Articles 699 and 723 implicitly allow for assignment in certain situations. In the Iranian Commercial Code, Article 402 accepts the principle of joint guarantee.

Regarding the guarantee contract (Daman) in general jurisprudence, particularly in the Shafi'i school, it is believed that the debt must be necessary (Wajib) for the contract to be valid. Non-necessary debts, like optional sales (Bai' Khiyari), are not considered valid unless the optional period has expired or the debt is on the verge of becoming necessary.

The effects of the guarantee contract in Imami jurisprudence involve the useful guarantee of the transfer of the debt. The debtor, along with all its attributes and branches, is transferred to the guarantor. However, general jurists argue that the guarantee contract results in the "joining of debts," and the Civil Code accepts the transfer of debt unless joint guaranteeing is explicitly stated. In that case, the creditor can claim all or part of their demand from either or both parties.

The guarantee contract involving the transfer of a hawala (transfer of a debt) can be considered as both based on the transfer of a debt and causing the transfer of a claim.

Article 730 of the Civil Code stipulates the transfer of a hawala as a means of transferring a debt. However, according to general jurists, the hawala contract does not result in the transfer of the debt; instead, the debt remains valid under the responsibility of the debtor. Only the right to claim from the debtor is transferred to the person against whom the hawala is made. Alternatively, the person to whom the hawala is made gains the right to approach the debtor and the person against whom the hawala is made, a concept not accepted in the Civil Code.

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