

**"Personal guarantees between commercial law and consumer protection"**

**French Report**

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**1. Economic aspects**

**1.1 Are figures available in your country concerning the number of personal guarantees issued within a certain period of time? How are these figures determined ?**

In France, personal guarantees are not officially and systematically recorded. Indeed, no file concerning them specifically exists nor will they be recorded in the new positive indebtedness file, the National Registry of loans to private individuals, that will be dedicated to consumer credit<sup>1</sup>.

However statistics are drawn up by organisations that represent or supervise French banks such as the Autorité de Contrôle Prudentiel et de Résolution, according to which, for example, 60% of property loans are secured by suretyships issued by specialised financial establishments.

The lack of a general and official recording of personal guarantees is regrettable for several reasons. Firstly, for the main types of loans, this prevents us from knowing the nature of the guarantees put together<sup>2</sup>, as well as the quality of guarantors<sup>3</sup>. Then, to assess loan applicant solvency, a personal guarantee file would be very useful since these guarantees constitute latent indebtedness and they often lead to overindebtedness. Finally, in case of the decease of the guarantor, a central personal guarantees file would enable heirs to exercise their inheritance options in better conditions<sup>4</sup>.

**2. Legislation**

**2.3 How has the law on personal guarantees developed in your country?**

The French Civil Code of 1804 only regulated one personal security : the suretyship. Its provisions on the nature, scope, effects and extinguishment of suretyships make no distinction as to the capacity of the surety, creditor or principal debtor, nor as to the characteristics of the debts secured.

From the 1980s, to protect sureties deemed to be weakest and/or the most exposed to the dangers of suretyships, the legislation became more specialised. Alongside the common law set down in the Civil Code, rules were added to other codes or uncoded laws were passed specific to suretyships that secure corporate debt ; suretyships for debts resulting from a home rental lease ; suretyships taken out by a natural person to secure a consumer or property loan granted to a consumer ; suretyships signed between a "*natural person surety*" and a "*professional creditor*", regardless of the purpose of the secured debt. Furthermore special rules specifying the fate of sureties in insolvency proceedings have been added to the Commercial Code (professional insolvency proceedings) and to the Consumer Code (procedures to treat the problem of overindebtedness among private individuals). The interaction between on the one hand, common law and specific suretyship legislation, and on the other, the numerous special rules, has not been sufficiently taken into account in the successive sector-based reforms.

Therefore litigation concerning suretyships has increased greatly. The Cour de Cassation has not always managed to put things in order. On the contrary, some of its jurisprudences, more dictated by

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<sup>1</sup> Consumer bill passed by the National Assembly on 3 July 2013 and the Senate on 13 September 2013. see <http://www.economie.gouv.fr/loi-consommation>

<sup>2</sup> **1.2** : the global importance of personal guarantees compared to real securities cannot therefore be determined. It is not possible either to estimate, within personal guarantees, the respective weight of personal securities recognised by the Civil Code (suretyships, independent guarantees and letters of intent) and innominate guarantees based on the common law on obligations (such as plurality of debtors, partial assignment of debt, undertakings to vouch for a third party) or insurance law (insurance-loans).

<sup>3</sup> **1.2** and **1.3** : it is therefore impossible to quantify the personal guarantees granted, either by private individuals not carrying out any commercial or professional activity in relation to the loan granted, or by natural or juridical persons related to the secured enterprise, or by institutional guarantors.

<sup>4</sup> See *infra* **3.2.7**.

the willingness to protect sureties deemed to be weak than by the imperative of legal security and the guarantee function of the suretyship, have further compromised the efficiency of this security.

Over the last thirty years, French law on suretyships has become complex, inaccessible, incomprehensible, incoherent and unpredictable. It is increasingly turned towards the protection of sureties either to avoid having them take out or make reckless and ruinous undertakings, or to encourage the creation and durability of companies whose debts are secured by these sureties<sup>5</sup>.

This suretyship crisis<sup>6</sup> has led creditors to have recourse to new personal guarantees, in particular the independent guarantee, letter of intent or mechanisms in the law on obligations enabling an additional debtor to be obtained (in particular, plurality of debtors with or without a stake in the debt, partial assignment of debt, undertaking to vouch for a third party). But the efficiency sought was not always achieved because the lack of regulation for these replacement guarantees made qualifying them and determining their regime an uncertain task. Numerous innominate guarantees were thus requalified as suretyships ; others had the mandatory rules of this catch-all security applied to them.

Hence it became clear at the start of the 21st century that all personal guarantees and not just suretyships needed to be reformed in depth. Whereas detailed proposals along these lines were put forward by the doctrine<sup>7</sup>, the order n° 2006-346 dated 23 March 2006 that reformed securities mainly focused on real securities<sup>8</sup>. The suretyship was not modified in any significant way ; only the numbering of the articles in the Civil Code concerning it was changed<sup>9</sup>. Yes independent guarantees and letters of intent were recognised but only in two articles of the Civil Code that define them but do not detail their regime<sup>10</sup>.

In France therefore, the reform of personal guarantee law has yet to be performed. When it finally takes place, it would be desirable on the one hand that rules be set down in the Civil Code common to all personal guarantees<sup>11</sup> and on the other hand that groups of special rules, some based on their accessoriness, reinforced, independent or indemnity-based, others based on the capacity of the guarantor (consumer-guarantor or acting for professional purposes)<sup>12</sup>.

**2.1 Are there different statutory provisions governing personal guarantees given by private parties, given by commercial actors / professionals or given by consumers in your country? Are small and medium enterprises treated separately ?**

**2.2 Concerning codification of the statutory provisions: Are commercial and consumer guarantees covered by one act or are they dealt with in separate acts ?**

A consumer is "*any natural person who is acting for purposes which are outside his or her trade, business, craft or profession*"<sup>13</sup>.

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<sup>5</sup> This reminds us of the two logics that govern consumer law today: firstly protect the weak from the strong and secondly, regulate the market.

<sup>6</sup> See *infra* 3.2.6.

<sup>7</sup> A complete reform of personal securities was proposed by a committee chaired by Professor Michel Grimaldi, in a report submitted to the Justice Ministry on 31 March 2005 (see [www.ladocumentationfrancaise.fr](http://www.ladocumentationfrancaise.fr)).

<sup>8</sup> In the enabling statute n° 2005-842 dated 26 July 2005, the Government was not authorised by Parliament to carry out a global reform of personal securities, above all since it appeared inappropriate, from a democratic point of view, to have recourse to an order to deal with contracts that play such an important role in the daily lives of private individuals and that is likely to lead them into overindebtedness.

<sup>9</sup> Civil Code, articles 2288 to 2320.

<sup>10</sup> Civil Code, articles 2321 and 2322.

<sup>11</sup> In particular, rules on the general accessoriness, common to all guarantees, rules on the subsidiary nature of personal guarantees or rules based on the contractual ethical imperative, such as the requirement for proportionality between the guarantee and the financial faculties of the guarantor or the need for the guarantor to be informed of the first delinquency by the debtor.

<sup>12</sup> For detailed reform proposals along these lines, consult our thesis : M. Bourassin, *L'efficacité des garanties personnelles (The efficiency of personal guarantees)*, LGDJ, 2006, n° 709 à 996.

<sup>13</sup> This definition, included in the consumer bill (passed by the National Assembly on 3 July 2013 and the Senate on 13 September 2013), should shortly appear in the Consumer Code. It complies with the definition given in European directive 2011/83 of 25 October 2011 on consumer rights.

Suretyships granted by consumers are not specially governed by French law, but they are subject to not only all rules concerning sureties in general<sup>14</sup>, but also those concerning more particularly "*natural person sureties*".

Indeed, in the Consumer Code, there are provisions protecting both natural person sureties who guarantee consumer or property loans taken out by a consumer-borrower<sup>15</sup> and natural person sureties contracting with a "*professional creditor*", regardless in this case of the nature of the debt secured and the capacity of the principal debtor<sup>16</sup>. The field of application of this second body of rules, that overlaps the first<sup>17</sup>, has given rise to serious difficulties of interpretation.

Firstly, are "*professional creditors*" solely those whose profession is to provide credit ? The Cour de Cassation has ruled out this restrictive conception since 2009. It considers that "*in the meaning given to articles L. 341-2 and L. 341-3 of the Consumer Code the professional creditor is he whose debt comes about in the course of his profession or is directly related to one of his professional activities*"<sup>18</sup>. This broad interpretation is favourable to sureties, since they must benefit from the rules in the Consumer Code, even if their co-contractor is not an institutional creditor (e.g. a car salesman or seller of building materials who grants payment facilities to customers and receives suretyships in exchange).

Then, what is meant by "*natural person surety*"?

To limit application of the texts based on this qualification to consumer-sureties only, i.e. to sureties not acting in the course of their profession, a formal argument has been put forward : since these texts are set down in the Consumer Code and not the Civil Code, they should not benefit sureties acting in the course of their profession, in particular managers or members securing the debts of their business. To exclude sureties who are part of the indebted business, it was also advanced that these sureties do not need to be protected by rules of form aimed at making the consent more thorough (articles L. 341-2 and L. 341-3 of the Consumer Code), nor by information that the creditor must provide on the principal debtor during the lifetime of the suretyship (articles L. 341-1 and L. 341-6 of the Consumer Code), since these sureties are by their very capacity already informed.

However, other arguments have been put forward to support undifferentiated application to all natural person sureties. In particular, the interpretation maxim "*Ubi lex non distinguit nec non distinguere debemus*", since the Consumer Code concerns all natural person sureties. But also the spirit of the Act of 1st August 2003, from which the litigious provisions of the Consumer Code come : this law "*of economic initiative*" having sought to improve the protection for entrepreneurs<sup>19</sup>, it seemed logical to apply it to sureties involved in the life of their business.

The Cour de Cassation ruled on this delicate question of interpretation<sup>20</sup> by leaning in the direction most favourable to sureties. Since 2012 it has ruled that the provisions of the Consumer Code on

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<sup>14</sup> All common law in the Civil Code as well as the rules applicable to all sureties guaranteeing given debts, such as debts arising from a home rental lease or those of a business.

<sup>15</sup> Articles L. 311-11, L. 312-7, L. 312-10 of the Consumer Code, based on the Act n° 78-22 dated 10 January 1978. See *infra* **3.2.2**.

Articles L. 313-7, L. 313-8, L. 313-9 and L. 313-10 of the Consumer Code, based on the Act n° 89-1010 dated 31 December 1989. See *infra* **3.1.6, 3.1.7, 3.2.3** and **3.2.4**.

<sup>16</sup> Article L. 341-1 of the Consumer Code, based on the Act n° 98-657 dated 29 July 1998. See *infra* **3.2.3**.

Articles L. 341-2 to L. 341-6 of the Consumer Code, based on the Act n° 2003-721 dated 1er August 2003. See *infra* **3.1.6, 3.1.7, 3.2.3** and **3.2.4**.

<sup>17</sup> The imperative of legal security should have led to the repeal of articles L. 313-7 to L. 313-10 of the Consumer Code when articles L. 341-1 and following were adopted.

<sup>18</sup> Civ. 1<sup>re</sup>, 25 June 2009, *Bull. civ. I*, n° 138 ; Civ. 1<sup>re</sup>, 9 July 2009, *Bull. civ. I*, n° 173 ; Com. 10 January 2012, *Bull. civ. IV*, n° 2.

<sup>19</sup> In particular it enabled a limited liability company to be incorporated without registered capital, as well as providing protection for individual entrepreneurs main homes through a declaration of immunity from distraint.

<sup>20</sup> Therefore the practical implications are essential, since the rules of the Consumer Code concerned condition either the very existence of the suretyship (articles L. 341-2, L. 341-3 and L. 341-4 of the Consumer Code), or its joint and several nature (article L. 341-5 of the Consumer Code), or coverage of the accessories to the principal debt (articles L. 341-1 and L. 341-6 of the Consumer Code).

natural person sureties are applicable "*whether they are informed or not*"<sup>21</sup>. Therefore they also benefit managers and members of secured companies.

Other rules protect only natural person sureties when the principal debtor is the subject of professional insolvency proceedings<sup>22</sup>, or an overindebtedness procedure<sup>23</sup>. But here again it is certain that they benefit all sureties and not just consumers. Furthermore, the Commercial Code provisions that are favourable to natural person sureties of a business in difficulty were mainly inspired by the will to protect surety-managers to encourage them to initiate the procedure as early as possible and thereby increase the chance of saving the business.

Since the suretyships granted by persons carrying out a professional or commercial activity are not subject to any specific regulations in France<sup>24</sup>, all the rules of the Consumer Code or the Commercial Code concerning natural person sureties specifically are therefore applicable to them.

Outside these special texts, the personal or professional links maintained by the surety and debtor do however have an effect.

Firstly, in legislation, a text in the Civil Code concerns the cause (professional or not) of the surety's undertaking. This is article 1108-2, from the Act n° 2004-575 of 21 June 2004, which authorises hand written indications, required under pain of being declared void, to be replaced by electronic ones only if the security is taken out "*by a person for the needs of their profession*".

Furthermore, in jurisprudence, it has been accepted since 1969<sup>25</sup> that the suretyship is a commercial one if the surety gains "*a personal and patrimonial advantage*" from it, which is the case for the managers of a debtor company, even if they do not have the capacity of trader (like managers of sociétés anonymes or limited liability companies). But it must be acknowledged that this qualification<sup>26</sup> has little impact, since there are no provisions specific to commercial suretyships and few rules in common law on commercial deeds concerning suretyships<sup>27</sup>.

The Cour de Cassation however takes into consideration the quality of the surety, layman or "*informed*"<sup>28</sup>, when deciding to apply, or not to apply, the protections set down in contract common law. Several means of defence are thus refused to surety-managers : non-compliance with the requirement of proof of the suretyship<sup>29</sup> ; the deceit committed by the creditor concerning the financial

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<sup>21</sup> Com. 10 January 2012, *Bull. civ. IV*, n° 2 ; Civ. 1<sup>re</sup>, 8 March 2012, *Bull. civ. I*, n° 53.

<sup>22</sup> Commercial Code, article L. 622-26, paragraph 2 (opposability of failure to declare debts), L. 626-11 (opposability of the provisions of the rescue plan), L. 622-28, paragraph 1 (opposability of the interest ceasing to be incurred in the rescue procedure), L. 622-28, paragraph 2 and L. 631-14 (suspension of proceedings during the observation period of the rescue or reorganization procedure). Moreover, these texts do not only benefit sureties, but all "*natural persons who have consented a personal security or having assigned or given property in guarantee*".

<sup>23</sup> Consumer Code, articles L. 331-7-1, 2°, L. 332-5, L. 332-9 (debts which have been settled on the debtor's behalf by a surety or co-obligor shall not be eligible for writing off, in whole or in part).

<sup>24</sup> Subject to the special texts concerning institutional guarantors (credit establishments, mutual guarantee companies, insurance companies).

<sup>25</sup> Com. 7 July 1969, *Bull. n° 269*.

<sup>26</sup> The suretyship can also be commercial, either by its form (this is the endorsement of trade bills), or its nature when it is taken out by a professional surety (bank, mutual guarantee company).

<sup>27</sup> Nonetheless we should note the competence of trade courts ; the presumption of the joint and several nature ; the liberty of proof, but only when the suretyship is commercial and the surety is a trader (Commercial Code, article L. 110-3). Traditionally, the main difference between civil and commercial suretyships was related to their limitations period (30 years for the former, 10 years for the latter). The Act n° 2008-561 of 17 June 2008 that reformed the limitation abolished these specific limitations. The common law limitation is now 5 years, both for civil and commercial cases.

<sup>28</sup> See *infra* 3.2.1.

<sup>29</sup> In pursuance of article 1326 of the Civil Code (see *infra* 3.1.3), the Commercial Chamber of the Cour de Cassation considers, since the start of the 1990s, that in the presence of an equivocal or incomplete wording or in the absence of any wording, the sole capacity of manager constitutes sufficient proof (e.g. Com. 19 June 1990, *Bull. civ. IV*, n° 180).

circumstances of the debtor company<sup>30</sup> ; the responsibility of the creditor for wrongful granting of credit to the debtor<sup>31</sup> or for failure to warn the surety<sup>32</sup>.

If suretyship law is therefore particularly complex and not very coherent at present as regards the capacity of the surety, the law applicable to the other personal securities is incomplete. The new articles 2321 and 2322 of the Civil Code in no way deal with the capacity of the independent guarantor or the issuer of a letter of intent. We could be led to believe therefore that the regime of these securities does not vary depending on whether the guarantor is acting for professional purposes or not. In reality such is not the case.

The order of 23 March 2006 introduces a ban in article L. 313-10-1 of the Consumer Code on taking out an independent guarantee for a consumer or property loan granted to a consumer-borrower. Furthermore, for home rental leases it provides that the independent guarantee can only be signed to replace the security deposit having to be paid by the tenant<sup>33</sup>. Debts which, in practice, are most often secured by natural persons not acting for professional purposes, but for affective reasons, may not therefore be secured by an independent guarantee.

As regards the letter of intent, no special text limits the capacity of the subscriber, but this capacity may have an impact if contractual responsibility is claimed. Indeed, if the issuer has taken out obligations to make his best efforts to do or not to do, the creditor will have to show proof that the issuer did not make his best efforts to avoid the default of the secured debtor. It is likely that this proof will be all the easier to provide the closer the professional links are between the secured enterprise and the issuer. The liability of a parent company could thus be easier to establish than that of the manager of the secured company or of a sister company<sup>34</sup>.

It would be appropriate to conclude this presentation of French law by looking at the capacity of the guarantor and specifying that company law (common law and rules specific to certain types of companies<sup>35</sup>) has provisions on personal guarantees. It sets down the powers company representatives must have to obligate a company as guarantor<sup>36</sup>. In addition, in joint stock companies and limited liability companies, managers<sup>37</sup> are banned from having these companies secure or endorse their own undertakings to third parties<sup>38</sup>.

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<sup>30</sup> E. g. Com. 17 December 1996, n° 94-20808 ; Com. 19 April 2005, n° 03-12879.

<sup>31</sup> Since 1994, the Cour de Cassation rejects the responsibility of banks for wrongful granting of credit given the perfect knowledge of the circumstances of the debtor company by the surety-manager (e. g. Com. 15 February 1994, *Bull. civ. IV*, n° 60 ; Civ. 3<sup>e</sup>, 22 June 2005, n° 03-19694).

<sup>32</sup> Failure to have been warned, when signing the contract, on the risks of the planned operation and/or on the disproportion of the undertaking to be made, can only be claimed by "*uninformed*" debtors and sureties (Cass., ch. mixte, 29 June 2007, *Bull. ch. mixte*, n° 7). Thus, company managers or members, to the extent that they are involved in managing the guaranteed company and that they are aware of the financial situation of this company, cannot avail of such provisions (e. g. Com. 27 March 2012, *Bull. civ. IV*, n° 68). However inexperienced and/or fictitious managers can be indemnified on these grounds (e. g. Com. 11 April 2012, *Bull. civ. IV*, n° 76 ; Com. 5 February 2013, n° 11-26262).

<sup>33</sup> Article 22-1-1 of the Act n° 89-462 of 6 July 1989, based on order of 23 March 2006.

<sup>34</sup> In practice, credit establishments only make guarantors acting for professional purposes take out letters of intent, and not natural laypersons who are not involved in the debtor company's activities.

<sup>35</sup> It is the nature of the company (civil company, partnerships, limited liability company, joint stock company) that matters and not the size. Thus, small and medium sized businesses who stand guarantor are not subject to any specific rule.

<sup>36</sup> Requirement that the undertaking be compliant with the company's object (principle of speciality) and be in the company's interest.

In sociétés anonymes, requirement to obtain authorisation for "*suretyships, endorsements and guarantees*" from the board of directors or the supervisory board (Commercial Code, articles L. 225-35 and L. 225-68), under pain, depending on the jurisprudence, of the guarantee being inopposable to the company (since Com. 29 January 1980, *Bull. civ. IV*, n° 47).

<sup>37</sup> As well as their family (spouses, ancestors or descendants) and more generally, "*any interposed person*". In joint stock companies (and not the SARL), the ban also concerns company members.

<sup>38</sup> Commercial Code, articles L. 225-43, L. 225-91, L. 227-12, L. 226-10 and L. 223-21.

### **3. Aspects of substantive law**

#### **3.1 General**

**3.1.1 Describe the distinction between dependent guarantees, e.g. a suretyship with a strong accessory relation to the secured debt, and independent guarantees, e.g. an indemnity or unconditional guarantee without such a relationship, in your country.**

**3.1.2 With regard to the accessoriness of guarantees: Are guarantees, or certain types of guarantees, only valid if they cover valid obligations? Are they valid only to the extent of the secured obligation?**

Since the order of 23 March 2006, the French Civil Code has recognised three personal securities : the suretyship, the independent guarantee and the letter of intent (article 2287-1).

In each, the obligation to secure taken out by the surety, the independent guarantor or the letter issuer does not have an independent existence ; it must be attached to a principal obligation. In addition, the obligation to secure is at the service of this principal obligation, since performance thereof has the function of extinguishing it. For these two reasons, we can consider that all personal securities are accessories of the principal obligation. In other words, they all have a general accessory character.

In one, the suretyship, this accessoriness is even more present since it is in play throughout the entire life of the security by having its regime (its existence, validity, scope, effects) depend on that of the secured debt. Three rules of the Civil Code dating from 1804 express the reinforced accessoriness of the suretyship.

Firstly, "*a suretyship may exist only on a valid obligation*" (article 2289). Consequently, the nullity or inexistence of the principal obligation normally results in the disappearance of the suretyship<sup>39</sup>.

Then, "*the suretyship may not exceed what is owed by the debtor, nor be contracted under more onerous conditions*" (article 2290, paragraph 1)<sup>40</sup>. Otherwise, it "*is not void: it is only reducible to the extent of the principal obligation*" (article 2290, paragraph 3).

Finally, the surety may set up against the creditor all the defences, i.e. all means of defence, "*which belong to the principal debtor, and which are inherent to the debt. But he may not set up the defences which are purely personal to the debtor*" (article 2313). The following are defences "*inherent to the debt*"<sup>41</sup> payment by the debtor<sup>42</sup>, offsetting between reciprocal debts between the creditor and the debtor (article 1294, paragraph 1), the nullity or resolution of the principal contract, conventional debt remissions (article 1287, paragraph 1), novation of the secured obligation (article 1281, paragraph 2) or the confusion between the persons of the creditor and the debtor (article 1301, paragraph 1). As for defences "*purely personal to the debtor*"<sup>43</sup>, article 2289, paragraph 2, gives us an example: when the debtor is a minor. The jurisprudence adds the other causes of incapacity, but also, for example, the waiving by the creditor to sue the debtor<sup>44</sup> or the defects affecting the consent of the debtor if the debtor did not himself request the cancellation of the principal contract in court<sup>45</sup>.

It is mainly to avoid these three expressions of the reinforced accessoriness of the suretyship, greatly protective of sureties, that creditors had recourse from the 1970s, to other personal guarantees.

The independent guarantee is distinguished from the suretyship by its independence. Before being introduced into the Civil Code by the order of 23 March 2006, the Cour de Cassation had specified this distinction by taking as criterion the object of the obligation to guarantee: "*the undertaking that has as its object the principal debtor's own debt is not independent*"<sup>46</sup>. To not be requalified as a suretyship, the independent guarantee had to therefore have precisely set amounts and durations,

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<sup>39</sup> In the silence of the texts on the nature of this disappearance, the doctrine evokes either the invalidity or the null and void status of the suretyship.

<sup>40</sup> See *infra* 3.1.7.

<sup>41</sup> See *infra* 3.1.9.

<sup>42</sup> See *infra* 3.1.7.

<sup>43</sup> See *infra* 3.1.9.

<sup>44</sup> Com. 22 May 2007, *Bull. civ. IV*, n° 136.

<sup>45</sup> Cass., ch. mixte, 8 June 2007, *Bull. ch. mixte*, n° 5 ; Com. 22 May 2013, n° 11-20398.

<sup>46</sup> Since Com. 13 December 1994, *Bull. civ. IV*, n° 375.

without it being necessary to consult the principal contract, and its performance should not be subordinate to the default of the principal debtor.

This independence is now set down in article 2321 of the Civil Code: "*an independent guarantee is an undertaking by which the guarantor binds himself, in consideration of a debt subscribed by a third party, to pay a sum either on first demand or subject to terms agreed upon. A guarantor may set up no defence depending on the guaranteed obligation*<sup>47</sup>. Unless otherwise agreed, that security does not follow the guaranteed obligation".

Since the order of 23 March 2006, the letter of intention is defined by article 2322 of the Civil Code as "*an undertaking to do or not to do whose purpose is the support provided to a debtor in the performance of his obligation in respect of his creditor*". The obligation of the issuer of the letter has therefore a purpose totally different from that of the principal obligation. If the agreed obligation to do or not to do is not satisfied, the issuer must repair the prejudice suffered by the creditor, in the conditions of common law contractual responsibility. For this reason, the letter of intent is frequently described as an indemnity based guarantee.

Its accessoriness or independent nature is however discussed in the doctrine. Determining defences that can be opposed by the issuer is delicate, since it depends on the dual nature of the letter : as a security presenting a general accessory character it enables the issuer to oppose some defences arising out of the guaranteed contract<sup>48</sup> ; as an indemnity mechanism, it offers the issuer means of defence based on contractual responsibility law which may be related to defences inherent to the principal debt<sup>49</sup>.

### **3.1.3 As there is generally no direct monetary consideration for the guarantor, are personal guarantees seen as binding unilateral legal acts in your country? What are the consequences for interpretation in contrast to a contract imposing mutual obligations?**

Personal securities are, by nature, unilateral contracts<sup>50</sup>, since the guarantor subscribes to a undertaking<sup>51</sup> with respect to the creditor, whereas the latter does not generally contract any obligation. Even when the parties agree on obligations at the charge of the creditor<sup>52</sup> or that are imposed on him by the law or the courts, the unilateral character remains, for these obligations do not constitute the cause (in the sense of counterparty) of that to guarantee<sup>53</sup>.

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<sup>47</sup> By virtue of the principle of independence, the jurisprudence refuses that the guarantor oppose to the beneficiary the invalidity of the principal contract, its resolution, non-performance by the beneficiary, its performance by the debtor, its modification, its extinguishment in particular by offsetting or by transaction.

The principle of independence does however have some exceptions : the illicit or immoral nature of the basic contract ; the patently abusive or fraudulent calling in of the guarantee by the beneficiary (article 2321, paragraph 2) ; the means of defence that law on companies in difficulty confers to all guarantors or, where necessary, to natural person guarantors (see *supra* 2.1 and 2.2).

<sup>48</sup> The non-existence, invalidity or resolution of the principal contract, pronounced at the request of the debtor, or else full payment made by the latter.

<sup>49</sup> If the secured debt is extinguished by payment, offsetting, remission of debt, confusion, novation, limitation, etc., the issuer should benefit from this extinguishment by the effect of the conditions of civil liability. Indeed, this extinguishment may either make the creditor's prejudice disappear (if the extinguishment results from a payment), or may prevent this prejudice from being attributed to non-performance of the obligations of the issuer of the letter (absence of a causal link between the responsibility generating event and the prejudice). See *infra* 3.1.9.

<sup>50</sup> According to article 1103 of the Civil Code, the contract "*is unilateral where one or more persons are bound towards one or several others, without there being any obligation on the part of the latter*".

<sup>51</sup> Undertaking to pay in the suretyship and independent guarantee, to do or not to do in the letter of intent.

<sup>52</sup> For example, information obligations or the obligation to obtain the agreement of the guarantor to grant the debtor a term extension.

When the guarantor is a credit establishment, a mutual guarantee company or an insurance company, the guarantee is consented in exchange for payment. This payment is usually borne by the principal debtor. In the exceptional cases in which it is placed at the expense of the creditor, the guarantee contract certainly becomes synallagmatic, since the cause of the obligation of the professional guarantor then lies in the obligation of the co-contractor, the creditor, to make this payment.

The main consequence of the unilateral character is of a probative nature.

The perfect proof of synallagmatic contracts is subordinate to their being drawn up in as many original copies as there are parties (article 1325). Since personal securities are not subject to this so-called "double original" formality, they are most often drawn up in one original copy that is retained by the creditor.

The perfect proof of contracts in which "*one party alone undertakes towards another to pay him a sum of money*" depends on compliance with article 1326 of the Civil Code : the title must feature "*the signature of the person who subscribes that undertaking as well as the mention, written by himself, of the sum or of the quantity in full and in figures*". This probative formality, that only concerns civil contracts<sup>54</sup> drawn up under a private arrangement<sup>55</sup>, is applicable to the suretyship<sup>56</sup> and the independent guarantee<sup>57</sup>. However it does not come into play with respect to the letter of intent, since this letter never gives rise to a unilateral undertaking to pay a sum of money to the creditor<sup>58</sup>.

### **3.1.6 Do form requirements (writing, notarial deed) apply for the issuing of a personal guarantee in your country?**

Personal securities are in principle consensual contracts, i.e. they are validly formed by the sole exchange of consent between the guarantor and the creditor.

While they may be signed before a notary<sup>59</sup> or countersigned by a lawyer<sup>60</sup>, there is no legal requirement to do so<sup>61</sup>.

Given that this is in writing, it was traditionally only required as proof (Civil Code, article 1326<sup>62</sup> and article 1341<sup>63</sup>) and, with respect to suretyships, to easily satisfy the requirement of the surety's specific consent (Civil Code, article 2292<sup>64</sup>).

But since the end of the 1980s, to ensure the surety binds themselves in perfect awareness of the nature, breadth and scope of their undertaking, several laws have imposed handwritten indications mainly concerning the amount, duration, even the joint and several nature of the surety's obligation and this, under pain of the security as a whole being declared void. Three types of suretyships have thus ceased to be consensual contracts to become solemn ones : the suretyship granted under private contract by a natural person to secure a consumer or property loan subscribed by a consumer-

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<sup>53</sup> For over forty years now, the Cour de Cassation has ruled that "*the cause of the surety's obligation is the consideration for the credit granted by the creditor to the principal debtor*" (Com. 8 November 1972, *Bull. civ. IV*, n° 278).

<sup>54</sup> The proof of commercial deeds subscribed by traders is free (Commercial Code, article L. 110-3).

<sup>55</sup> Since the Act n° 2011-331 of 28 March 2011, notarial deeds and private contracts countersigned by a lawyer are dispensed of the need to include the indications set down by law, both for reasons of proof and for the validity of legal deeds.

<sup>56</sup> Its field of application is however greatly restricted since the Act of 1<sup>st</sup> August 2003 imposed hand written indications under pain of being declared void in private suretyship contracts between a natural person surety and a professional creditor (Consumer Code, articles L. 341-2 and L. 341-3). See *infra* 3.1.6 and 3.1.7.

<sup>57</sup> Com. 10 January 1995, *Bull. civ. IV*, n° 13 ; Com. 13 March 2001, n° 98-17133.

<sup>58</sup> Com. 25 October 2011, n° 10-25607.

<sup>59</sup> The creditor gains numerous advantages from this : since the indications imposed by law in private contracts do not have to be provided in deeds signed before a notary (nor in deeds countersigned by a lawyer), the risks of inefficiency of the security for want of proof or validity are considerably reduced ; the amount and duration of the suretyship do not have to be restricted ; the notarial deed constitutes a very efficient writ of execution if the guarantor does not honour his undertaking.

For the guarantor, recourse to a notary (or lawyer) has the essential advantage of receiving customised information and advice on the characteristics of the security.

<sup>60</sup> Deed countersigned by a lawyer was created by the Act n° 2011-331 of 28 March 2011.

<sup>61</sup> The sole conventional securities drawn up by a notary, under pain of being declared void, are the mortgage (Civil Code, article 2416) and the antichresis (Civil Code, article 2388).

<sup>62</sup> Cf. *supra* 3.1.3.

<sup>63</sup> Civil contracts for sums in excess of 1,500 euros must in principle be proven in writing.

<sup>64</sup> This provision means the willingness of the surety to commit themselves must not be presumed and implies strictly interpreting this will. However it does not impose any particular form or the use of specific terms to express the surety's consent.



borrower<sup>65</sup> ; the suretyship securing the obligations arising out of a home rental lease<sup>66</sup> ; the suretyship by private contract between a natural person surety and a professional creditor<sup>67</sup>.  
With respect to independent guarantees and letters of intent, consensualism does not know such exceptions.

**3.1.4 Are personal guarantees seen as contracts for the performance of a continuing obligation? What are the necessary conditions for the guarantee to be terminated?**

**3.1.7 Describe the possible extent of the guarantee obligation:**

**Could it be unlimited, even as a universal guarantee, or does it have to be limited to a maximum amount?**

**Is it possible to limit the guarantee obligation to a part of the secured debt or to certain included assets, and how is the partial guarantee affected by partial payment of the debt?**

**Is it possible to limit the guarantee period?**

**Does the guarantee cover accessories and/or costs of legal remedies? Are guarantees valid for future debts and/or conditional obligations?**

As for their scope, the three personal securities recognised by French law must be envisaged separately, for their distinctive characters - reinforced accessoriness, independent, indemnity-based - and the imperative rules specific to the suretyship are decisive here.

Concerning in the first place the suretyship, a limit has featured in the Civil Code since 1804 : due to its reinforced accessoriness, the amount, duration and terms of the suretyship may not exceed the amount, duration and terms of the principal obligation, under pain of being reduced to the measure of this obligation (article 2290). For example, if the surety secures a conditional obligation, his/her

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<sup>65</sup> Consumer Code, article L. 313-7 : *"The natural person who undertakes by virtue of a private contract to stand surety for one of the transactions coming under chapters I or II of this part of the code must, under penalty of its undertaking being rendered invalid, precede its signature with the following handwritten statement, and only this statement :*

*"in standing surety for X....., up to the sum of ..... covering payment of the principal, interest and, where appropriate, penalties or interest on arrears and for the duration of ..... I undertake to repay the lender the sums owing on my income and property if X..... fails to satisfy the obligation himself".*

Consumer Code, article L. 313-8 : *"Where the creditor asks for a joint and several guarantee for one of the transactions to which chapters I or II of this part of the code relate, the natural person who is standing surety must, under penalty of its undertaking being rendered invalid, precede its signature with the following handwritten statement :*

*"In renouncing the benefit of execution defined in article 2021 of the French civil code and obliging me, jointly and severally, with X....., I undertake to repay the creditor without being able to ask that the latter first institute proceedings against X...".*

<sup>66</sup> Act of 6 July 1989, article 22-1, from the Act of 21 July 1994: *"The person who is to stand surety precedes his/her signature by reproducing in hand writing the amount of the rent and the rent revision conditions such as they appear in the rental contract, by the hand written indication explicitly and unequivocally expressing their awareness of the nature and scope of the obligation they are contracting and the hand written reproduction of the previous paragraph. The lessor provides the surety with a copy of the rental contract. These formalities are required under pain of the suretyship being declared void".*

<sup>67</sup> Consumer Code, article L. 341-2 : *"Any natural person who undertakes to act as surety for a professional creditor through a private agreement shall, if his undertaking is not to be declared null and void, affix the following words above his signature in his own handwriting, and these words only :*

*"By standing surety for X ..., for a maximum sum of ... in respect of payment of the principal, interest and, should this prove necessary, any arrears interest or penalties, for a term of..., I hereby undertake to pay the sum due to the lender from my own income and property should X... fail to pay it himself".*

Consumer Code, article L. 341-3 : *"When the professional creditor requests a joint and several guarantee, the natural person standing surety shall, if his undertaking is not to be declared null and void, affix the following words above his signature in his own handwriting :*

*"By waiving the benefit of discussion defined in Article 2021 of the Civil Code and committing myself jointly and severally with X..., I hereby undertake to pay the creditor without any right to demand that he prosecute X... beforehand".*

Cf. *supra* 2.1 and 2.2 ; cf. *infra* 3.2.2.

obligation must be subject to the same condition and not be pure and simple<sup>68</sup>. The parties may not therefore contractually modify the reinforced accessoriness of the suretyship to make the surety more severely obligated than the principal debtor.

However it is important to stress that the legislator and the courts, on the contrary, set aside this character from time to time, to serve interests deemed to be superior to those of the sureties. Thus, when the debtor is subject to insolvency proceedings, the surety may be bound to pay more and earlier than the debtor<sup>69</sup>, for this type of procedure is a manifestation of the risk the security is designed to provide protection against and makes protection of the creditor even more imperious.

On condition the reinforced accessoriness of the suretyship is respected, the parties were traditionally free to sign either an indefinite suretyship, i.e. not having any limits other than those of the principal debt, or a defined suretyship, i.e. having specific limits both in terms of the amount and the duration of the surety's undertaking.

The suretyship that is indefinite with respect to the amount may take two forms depending on whether secured debts are already present at the time of signing or are future debts. If the suretyship covers one or more debts already existing and determined, such as one or more loans of a certain amount, it is limited to this amount. If it covers one or more future undetermined debts that will arise between the debtor and the creditor after being signed, its amount is unknown *ab initio*; this so-called "*omnibus*" suretyship automatically adapts to the changing indebtedness circumstances of the principal debtor without it being necessary to complete or reiterate the suretyship.

Regardless of whether it takes one or the other of these two forms, the indefinite suretyship "*extends to the accessories of the debt*"<sup>70</sup> (Civil Code, article 2293), without this needing to be specified<sup>71</sup>. However the parties may stipulate a clause to the contrary.

The indefinite suretyship in terms of duration does not have a specified expiry term ; it takes on the duration of the principal debt. If the secured obligation has a set duration (e.g. a lease or a three year loan), when the term is up this puts an end to the surety's obligation to cover it<sup>72</sup>. If the principal obligation has an undetermined duration, the suretyship is also deprived of an expiry term. By virtue

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<sup>68</sup> The jurisprudence ensures that the terms of the principal obligation cannot be brought into question, to the detriment of the surety, by the will of the parties to the principal contract (see *infra* 3.1.9). So neither the creditor waiving the condition affecting the principal debt (Civ. 1<sup>re</sup>, 12 June 1990, *Bull. civ.* I, n° 158), nor the agreement between the creditor and the principal debtor by which they waive performance of a condition, may be opposed to the surety (Civ. 1<sup>re</sup>, 29 April 1997, *Bull. civ.* I, n° 133).

<sup>69</sup> For example, no guarantor can avail of the provisions of a recovery plan (Commercial Code, article L. 631-20), whether this be debt remission or payment deadline extensions. Similarly, in case of overindebtedness, the measures consented by the creditors in the conventional settlement plan cannot benefit sureties (Civ. 1<sup>re</sup>, 13 November 1996, *Bull. civ.* I, n° 401) and they do not benefit either from the recovery measures decided by the overindebtedness commission or by the courts (Civ. 1<sup>re</sup>, 3 March 1998, *Bull. civ.* I, n° 82 ; Civ. 1<sup>re</sup>, 26 April 2000, *Bull. civ.* I, n° 122).

<sup>70</sup> The accessories covered by the surety are : contractual or legal interest on the secured debt ; the indemnities set down in the principal contract, such as premature termination expenses, the penalty clause or contractual damages due by the debtor for failure to perform the contract.

<sup>71</sup> The Cour de Cassation has ruled that the handwritten indication imposed by article 1326 of the Civil Code does not need to mention the accessories to have them covered by an indefinite suretyship (Com. 16 March 1999, *Bull. civ.* IV, n° 59 ; Civ. 1<sup>re</sup>, 29 October 2002, *Bull. civ.* I, n° 247 et 248).

<sup>72</sup> If the surety secures an existing debt, arising entirely *ab initio* and of which only the payability is delayed, the extinguishment of the cover obligation has no impact on the obligation to pay the totality of this debt.

However, if the surety secures a future debt, the extinguishment of the cover obligation (which is a successive performance obligation) puts an end to the obligation to pay the debts subsequently arising between the debtor and the creditor ; only the obligation to settle existing debts remains.

This distinction between the cover obligation and the settlement obligation within future debt suretyships was highlighted by Professor Christian Mouly (*Les causes d'extinction du cautionnement*, Litec, 1979) and approved by the Cour de Cassation in 1982 (see *infra* 3.2.7).

of the principle of prohibiting perpetual undertakings, it may then be unilaterally terminated at any time by the surety<sup>73</sup>.

The accessory rule in no way requires that the surety's undertaking strictly covers the scope of the principal debt. This is stated by article 2290, paragraph 2, of the Civil Code : "*it may be contracted for a part of the debt only, and under less onerous conditions*".

Given this, the suretyship can be defined, in terms of its amount, for example by just a fraction of the principal debt or just the capital or by the setting of a ceiling. When the amount of the suretyship is thus limited, the accessories of the principal debt are only covered if the surety specifically undertakes to cover them. According to the Cour de Cassation, "*when the suretyship only secures a part of the debt, it only expires when this debt is fully paid, with partial payments made by the principal debtor being firstly deducted from the unsecured part of the debt, failing agreement to the contrary*"<sup>74</sup>.

The suretyship can also be limited in terms of duration. Regardless of the duration of the principal obligation, the suretyship may be given a separate expiry term, which may be explicit<sup>75</sup>, or just implicit<sup>76</sup>. In suretyships for existing debts, the stipulation or subsequent discovery of an expiry term is without effect, since the debts existing when the suretyship is signed must be covered by the surety, regardless of the duration of his undertaking. On the contrary, in suretyships for future debts, the term specific to the surety's obligation plays a decisive role : when this term is up it puts an end to the cover period, in such a way that the surety only guarantees the debts that arose prior to the term.

While forming a defined rather than indefinite suretyship was traditionally determined by the exclusive will of the parties, the scope of this freedom has been considerably reduced over the last twenty five years by several special texts.

In certain cases, suretyships restricted in terms of the amount are encouraged. Indeed, the suretyship consented, either by a natural person to secure an individual entrepreneur's debts (Act n° 94-126 of 11 February 1994, article 47-II, paragraph 1), or by a natural person for the benefit of a professional creditor, regardless of the nature of the principal debt, but by notarial deed<sup>77</sup> (Consumer Code, article L. 341-5 based on the Act n° 2003-721 of 1st August 2003), cannot be at once unlimited in terms of its amount and joint and several<sup>78</sup>. Since the joint and several suretyship is very protective of the creditors' interests<sup>79</sup>, these creditors are therefore incited to limit the suretyship to "*an expressly and contractually determined global amount*".

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<sup>73</sup> This termination produces the same effects on the cover obligation and the settlement obligation as when the term expires.

<sup>74</sup> Com. 28 January 1997, *Bull. civ.* IV, n° 28 ; Com. 12 January 2010, n° 09-11710 ; Com. 27 March 2012, n° 11-13960.

<sup>75</sup> The term stipulated in the suretyship contract can be certain (a precise duration or date) or uncertain (e.g. for the duration of the surety's functions within the debtor company).

<sup>76</sup> Failing a term specifically stipulated in the suretyship contract, the question arises as to whether changes in the legal circumstances of the protagonists in the suretyship operation (creditor, debtor, surety) can constitute implicit expiry terms. The Cour de Cassation refuses this qualification and thereby the extinguishment of the surety's cover obligation in case of a change concerning the debtor company or the creditor company, but not jeopardizing their very existence, and when relations between the debtor and the surety change, particularly in case of a surety-manager ceasing to exercise his functions or in case of a divorce between the secured spouse and the surety-spouse. On the contrary, implicit expiry terms are constituted by the decease of the surety (Com. 29 June 1982, *Bull. civ.* IV, n° 258) and the disappearance without liquidation (in particular by merger or breakup) of the surety, debtor or creditor company.

<sup>77</sup> Article L. 341-5 of the Consumer Code does not mention notarial suretyships specifically, but it is solely by restricting in this way the scope of application of this provision that it is possible to avoid contradiction with article L. 341-2 of the same code, that prohibits indefinite private contract suretyships. The Cour de Cassation confirmed this interpretation (Com. 6 July 2010, *Bull. civ.* IV, n° 118).

<sup>78</sup> In the contrary situation, the stipulation of the joint and several nature of the suretyship or waiving the benefit of seizure and sale must be deemed to have not been written.

<sup>79</sup> It deprives the surety of the benefit of seizure and sale and the benefit of division (Civil Code, articles 2298 to 2304). See *infra* 3.1.10.

In other hypotheses, much more detrimental to contractual freedom, the suretyship defined in terms of amount and duration is imposed for validity purposes. This is the case each time the suretyship must feature, under pain of being declared void, the following hand written indication: "*By standing surety for X ..., for a maximum sum of ... in respect of payment of the principal, interest and, should this prove necessary, any arrears interest or penalties, for a term of..., I hereby undertake to pay the sum due to the lender from my own income and property should X... fail to pay it himself*". Since the Act of 1st August 2003<sup>80</sup>, it is all private contract suretyships signed by a natural person surety in favour of a professional creditor that must comply with this indication (Consumer Code, article L. 341-2<sup>81</sup>).

This means, on the contrary, that the choice between defined suretyship and indefinite suretyship now only exists in three hypotheses: if the suretyship is signed by means of a notarial deed or private contract countersigned by a lawyer<sup>82</sup> ; or if the suretyship is signed by private contract by a juridical person ; or else if the suretyship is signed by private contract between a natural person surety and a non-professional creditor.

As regards independent guarantees, the freedom of the parties as to the scope of the guarantor's undertaking is much greater since it is restricted neither by the reinforced accessoriness specific to the suretyship nor by the mandatory provisions set out above that only concern suretyships. However this contractual liberty has a limit : so as to not be requalified as a suretyship, the independent guarantee must have a different object from that of the principal debt<sup>83</sup>. So it must not be necessary to refer to the basic contract to determine its scope<sup>84</sup>.

The amount is thus set on signing the guarantee and is not limited by that of the principal debt. However, the accessories of this debt are not covered due to the independence of the guarantee, unless they are included in the global amount stipulated.

The independent guarantor's obligation is usually accompanied by an expiry term<sup>85</sup>, certain or uncertain, close to that of the principal obligation, so the guarantee is efficient for the entire performance of the basic contract. The expiry of this term is particularly serious for the creditor, since it totally extinguishes the guarantor's undertaking, even if the principal contract is still being performed and new debts can arise<sup>86</sup>. To avoid this extinguishment, the creditor can request an extension. If the guarantor refuses, he risks having the creditor demand immediate payment of the guarantee.

Finally, as regards the scope of the letter of intent, there can be no question of its amount since the issuer does not commit himself to pay a sum of money<sup>87</sup>, but to provide one or more services so the debtor may be in a position to honour their undertakings to the creditor. The parties must therefore determine what are the obligations to do or not to do subscribed by the issuer, their intensity (best efforts or result obligations) and their duration. If the issuer does not comply with his obligations and there results a prejudice for the beneficiary, the latter can call in the contractual responsibility. The

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<sup>80</sup> Prior to this, this indication was reserved for private contract suretyships signed by a natural person surety to secure a consumer or property loan taken out by a consumer-borrower (Consumer Code, article L. 313-7, based on the Act of 31 December 1989).

<sup>81</sup> This text is applicable to suretyships signed since 1st February 2004.

<sup>82</sup> These two types of instruments are dispensed of any handwritten indications required by law (Civil Code, article 1317-1 and the Act of 31 December 1971, article 66-3-3, based on the Act n° 2011-331 of 28 March 2011).

<sup>83</sup> See *supra* 3.1.1.

<sup>84</sup> Com. 18 May 1999, *Bull. civ.* IV, n° 102.

The Cour de Cassation however recognises the efficiency of so-called "sliding" or "reducible" guarantees, whose amounts vary over time as the principal debt is executed like work progress whose price is guaranteed (Com. 2 October 2012, n° 11-23401).

<sup>85</sup> Nothing prevents the independent guarantee from having an undetermined duration, but this is rare since it runs the risk for the creditor of losing the totality of the guarantee at any time by the guarantor's unilateral termination. This risk however can be mitigated by stipulating a notice clause.

<sup>86</sup> Com. 26 January 1993, *Bull. civ.* IV, n° 28 ; Com. 12 July 2005, *Bull. civ.* IV, n° 161 ; Com. 5 June 2012, n° 10-24875.

<sup>87</sup> If the letter contains the signatory's undertaking to take the place of the debtor, there is a strong risk of the letter being requalified as a suretyship (Com. 21 December 1987, *Bull. civ.* IV, n° 281).

amount of the repairable prejudice does not necessarily coincide with the amount of the secured debt<sup>88</sup>. It may be less, in particular if the letter features a clause limiting the amount of the repairable prejudice<sup>89</sup>; it may also be greater<sup>90</sup>, since article 2290 of the Civil Code, that prevents the surety from being bound more severely than the principal debtor, does not apply to the letter of intent<sup>91</sup>.

### **3.1.8 Which recourse can the guarantor take against the debtor after the guarantor has fulfilled his obligation and paid the creditor?**

Regardless of the advantage the surety may obtain from the guarantee operation<sup>92</sup>, the surety remains bound for the principal debtor. Because the surety is only a subsidiary debtor, the Civil Code acknowledges that the surety can take recourse against the principal debtor: an exceptional recourse before payment, aimed at protecting the surety against the risk of non-reimbursement, in the hypotheses restrictively envisaged by articles 2309 and 2316 of the Civil Code<sup>93</sup>; two types of recourse after payment, that the surety has every interest in invoking cumulatively, since each has specific advantages.

The surety has, on the one hand, a personal recourse because he/she is acting on behalf of and in the interest of the debtor by virtue either of a specific mandate or the business management quasi-contract. This recourse, governed by article 2305 of the Civil Code, has two advantages. The first concerns its assessment basis: it enables the surety to claim from the debtor full payment of all expenses incurred directly or indirectly by performance of the suretyship. The surety may thus demand repayment of expenses separate from the payment made to the creditor. For example, interest on arrears on the overall sum paid to the creditor<sup>94</sup>, expenses incurred in recovering his/her debt or compensatory damages if his/her payment causes a particular prejudice. The second advantage of the personal recourse lies in the independence of its regime compared to that of the creditor's action, in particular with respect to extinctive prescription.

On the other hand, the surety has a right of subrogation, triggered by the payment it makes for the principal debtor (Civil Code, articles 1251, 3° and 2306<sup>95</sup>). It is not as broad as the personal recourse, since it only authorises repayment of those sums paid to the creditor and interest on these sums at the legal rate<sup>96</sup>. However it is safer, since the debt of the creditor with all its accessories, in particular the various suits against the debtor or third parties and the other guarantees covering the same debt are forwarded to the surety.

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<sup>88</sup> It is however frequent, when the issuer has subscribed to a result obligation, that the jurisprudence aligns the amount of the repairable prejudice on that of the unpaid debt.

<sup>89</sup> Com. 17 May 2011, *Bull. civ. IV*, n° 78.

<sup>90</sup> For example, if non-performance of the issuer's obligations and consecutive default of the principal debtor compromise the creditor's financial situation.

<sup>91</sup> Com. 6 May 2003, n° 00-22045.

<sup>92</sup> A payment for professional sureties; for sureties involved in the affairs of the debtor company, a financial advantage resulting from the benefits the latter is likely to obtain through the granting or maintaining of the secured loan; a patrimonial and/or moral interest for sureties affectively close to the debtor.

<sup>93</sup> These are hypotheses in which the risk of non-repayment is aggravated: either the debtor is insolvent and proceedings are taken against the surety or the debtor is about to go insolvent, so it is urgent to bring the debtor into question; or the surety sees their obligation extended beyond what was initially provided for in the contract or beyond what is a reasonable deadline.

Then, the anticipated recourse by the surety can take three forms: either an introduction of the debtor; or, when the debtor is already in insolvency proceedings, the declaration of the debt the surety has against him (since this debt "*comes about on the date of the surety's undertaking*" and not on that of the payment: Com. 3 February 2009, *Bull. civ. IV*, n° 11); or a request to be indemnified for the risk of having to pay (Com. 29 October 1991, *Bull. civ. IV*, n° 316; Civ. 1<sup>re</sup>, 25 May 2005, *Bull. civ. I*, n° 225).

<sup>94</sup> Civ. 1<sup>re</sup>, 22 May 2002, *Bull. civ. I*, n° 138.

<sup>95</sup> Personal subrogation in favour of he who pays "*for others*" is provided for by article 1251, 3° of the Civil Code. In suretyship law, this general rule is restated in article 2306 of the Civil Code: "*a surety who has paid the debt is subrogated to all the rights which the creditor had against the debtor*".

<sup>96</sup> For example, Civ. 1<sup>re</sup>, 29 October 2002, *Bull. civ. I*, n° 257.

If the creditor loses, through his own fault, these actions or guarantees, the surety can use the means of defence provided for by article 2314 of the Civil Code<sup>97</sup> (often called "benefit of subrogation"), which is one of the most efficient in suretyship common law.

Can independent guarantors and subscribers of letters of intent also seek relief at law after payment<sup>98</sup> against the secured debtor?

Even though the link between their undertaking and the debt concerned by this undertaking is much weaker than in the presence of a suretyship, the performance of their undertaking extinguishes this debtor's debt in proportion<sup>99</sup>. It is logical therefore that they should be able to take action against him. Their recourse may be based on three different elements. Firstly, the contract frequently binding them to the debtor. Then, business management, if the guarantor bound himself unbeknownst to or without having received instructions from the debtor. Finally, personal legal subrogation, even if independent guarantors and subscribers of letters of intent are not bound for the debtor to the very debt of the debtor, since jurisprudence accepts that article 1251, 3° of the Civil Code can benefit "*he who pays a debt that is personal to him if, by this payment, he discharges with respect to their common creditor he who must bear the definitive charge of the debt*"<sup>100</sup>.

If we accept recourse through subrogation, it appears coherent to acknowledge that independent guarantors and subscribers of letters of intent have the right to invoke article 2314 of the Civil Code, which sanctions the loss through the fault of the creditor of the rights that should have been transferred by subrogation. Several appeal courts have ruled to the contrary on the grounds that this text only envisages the discharge of sureties<sup>101</sup>. We see here how regrettable it is that the regime of the independent guarantee and letter of intent has not been further developed.

### **3.1.9 What is the effect if the debtor deals or colludes with the creditor to the detriment of the guarantor?**

If the creditor and/or the principal debtor act fraudulently against the rights of the guarantor, the guarantor can invoke the special texts that punish fraud or, failing this, the general principle "*fraus omnia corrumpit*" to be partially or even totally released. Here are three examples. Firstly, jurisprudence accords the joint and several surety, who has not taken part in the proceedings between the creditor and the debtor, the right to file a third opposition, by claiming their fraud<sup>102</sup>. Then, with regard to the independent guarantee, article 2321, paragraph 2 of the Civil Code states that "*a guarantor is not bound in case of patent abuse or fraud of the beneficiary or of collusion of the latter with the principal*". Finally, when the principal debtor is subject to professional insolvency proceedings, article L. 650-1 of the Commercial Code<sup>103</sup> provides that "*creditors may not be held liable for harm in relation to credits granted*", except in three cases, including fraud. Any guarantor can avail of this possibility to claim not only damages but also the invalidity or reduction of his undertaking<sup>104</sup>.

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<sup>97</sup> "A surety is discharged where the subrogation to the rights, mortgages and prior charges of the creditor, may no longer take place in favour of the surety, by the act of that creditor. Any clause to the contrary is deemed not written".

<sup>98</sup> Before paying or indemnifying the creditor, independent guarantors and subscribers of letters of intent can doubtless not seek relief at law against the secured debtor, for anticipated recourse is a legal favour only granted to sureties.

<sup>99</sup> This extinguishment results from their general accessory nature (see *supra* 3.1.1).

<sup>100</sup> Civ. 1<sup>re</sup>, 23 February 1988, *Bull. civ. I*, n° 50 ; Com. 9 May 1990, *Bull. civ. IV*, n° 146.

<sup>101</sup> Rennes, 6 November 1991, *JurisData* n° 048834 ; Paris, 28 April 1994, *JurisData* n° 021848.

<sup>102</sup> Civ. 1<sup>re</sup>, 10 December 1991, *Bull. civ. I*, n° 348.

<sup>103</sup> Inserted by the Act n° 2005-845 of 26 July 2005.

<sup>104</sup> However such an application has little chance of success, since the Cour de Cassation, since 2012, has defined fraud in a very strict manner, by assimilation to penal fraud, by demanding the creditor be aware he is causing harm (Com. 2 October 2012, n° 11-23213 ; Com. 16 October 2012, *Bull. civ. IV*, n° 186). For example, granting a loan to a company in an irremediably difficult situation, even if this is to obtain a personal security, is not sufficient to characterise a fraud (Com. 27 March 2012, n° 11-13536).

If the creditor and principal debtor come to an agreement causing prejudice to the guarantor, without however this being fraudulent, the question arises as to whether this agreement can be opposed to the guarantor or opposed by the guarantor. The solution usually depends on the accessory, independent or indemnity-based character of the guarantee and the meaning given to the reinforced accessory character of the suretyship. But some legal provisions and jurisprudence rulings take liberties with these solutions of principle.

If the guarantee is independent of the principal obligation, non-fraudulent agreements between the creditor and the debtor cannot be opposed to the guarantor<sup>105</sup> or by the guarantor<sup>106</sup>.

If the guarantee is of an indemnity nature, the solution is less evident, for it is necessary to combine the independence of the object of the guarantor's obligation and the rules of contractual responsibility. Thus, the issuer of a letter of intent can certainly not refuse to perform his obligations to do or to not do on the grounds that the creditor has granted the secured debtor a debt remission or remission of proceedings against him. But the creditor's application for indemnification could be rejected in the presence of such remissions because they could remove the causal link between the prejudice claimed by the creditor and the failings by the issuer to meet his obligations.

In terms of suretyship, the scope of some agreements between the creditor and debtor is set down by law. Article 1287, paragraph 1, of the Civil Code thus accepts that "*a remission or agreed discharge granted to a principal debtor releases the sureties*". On the other hand, according to article 2316 of the Civil Code, "*a mere extension granted by the creditor to the principal debtor does not discharge the surety, who may in that case sue the debtor to compel him to pay*".

In the absence of a legal provision, the opposability of agreements between the creditor and the debtor depends on their qualification as defences "*inherent to the debt*" or defences "*which belong to the principal debtor*". Indeed article 2313 of the Civil Code states that the former are opposable, unlike the latter, but without defining them. The dualist analysis of the obligation, inspired by work on the German doctrine, could enable this distinction to be clarified : the defences inherent to the debt are apparently those that affect the obligation itself, whereas defences purely personal to the debtor apparently refer to the sole right of the creditor to proceed. Some decrees would seem to confirm this analysis. The Cour de Cassation for example ruled on 22 May 2007 that "*the waiving by the creditor of the right to proceed for payment against the principal debtor does not signify extinguishment of the principal obligation nor the recourse by the surety against this debtor, in such a way that the clause (to waive any legal proceedings whatsoever) is not an obstacle to the creditor proceeding against the joint and several surety*"<sup>107</sup>.

But in many other rulings, the solution seems to be less based on the reinforced accessory character thus interpreted than on a teleological reasoning, based on the interests the judges wish to favour (those of the surety over those of the creditor or *vice versa*). The jurisprudence concerning conventional changes to the term of the principal obligation reveals such opportunistic and incoherent solutions. Indeed, the principle of the accessory is set aside in an event of default<sup>108</sup>, whereas it comes into play if the term is extended<sup>109</sup>, in both cases failing the surety's will to the contrary. It is consequently very difficult to summarise the position of French law with regard to agreements between creditors and debtors to the detriment of sureties.

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<sup>105</sup> For example, extending the term of the basic contract cannot be opposed to an independent guarantor to have his undertaking maintained beyond its own term. This result can only be achieved if the guarantor consents to having his own obligations extended (see *supra* 3.1.7).

<sup>106</sup> For example, a debt remission or remission of proceedings against the debtor have no impact on an independent guarantor.

<sup>107</sup> Com. 22 May 2007, *Bull. civ.* IV, n° 136.

<sup>108</sup> The jurisprudence gives priority to the requirement of the express nature of the suretyship (Civil Code, article 2292) and the principle of the relative effect of agreements (Civil Code, article 1165), in ruling that the event of default on this guarantee, based on a clause of automatic forfeiture for failure to perform, is inopposable to the surety (e. g. Civ. 1<sup>re</sup>, 20 December 1976, *Bull. civ.* I, n° 415 ; Civ. 1<sup>re</sup>, 18 February 2003, n° 00-12771).

<sup>109</sup> Old jurisprudence from a court of appeal gives the surety an option : the surety may request to benefit from the extension or to discharge at the term initially agreed (Lyon, 6 January 1903, *DP* 1910. Somm. 1).

This difficulty is all the more important given that all the solutions set out up to here, based on the accessory or independent nature of the guarantee, can be ruled out by the legislator or the courts to give priority to interests other than those of the guarantor or the creditor<sup>110</sup>. This is especially true when the principal debtor is the subject of insolvency proceedings. The agreements signed between the debtor and his creditors are treated differently in amicable proceedings taken on behalf of a company in difficulty and in proceedings concerning an overindebted private individual.

In the composition procedure, all guarantors<sup>111</sup> can avail of the provisions of the agreement observed or certified (Commercial Code, article L. 611-10-2, paragraph 1<sup>112</sup>), in order to favour the rescue of the debtor company<sup>113</sup>.

In the conventional procedure to deal with overindebtedness, creditors benefiting from a suretyship have a greater chance of being paid fully and regularly, since the remissions and deadlines they grant to the debtor are inopposable by the sureties<sup>114</sup>. The guarantee function of the suretyship then takes priority over its reinforced accessory nature, at the risk moreover of compromising the recovery in the overindebted party's situation<sup>115</sup>.

### **3.1.10 Describe the relationship between the different parties in the case of a plurality of, even personal and real, security rights.**

Creditors are free to cumulate several personal and/or real securities to secure the same debt and to choose among them the means to obtain payment<sup>116</sup>, within the limits however of fraud or abuse<sup>117</sup> and at the risk, furthermore, that the loss of one of them by the creditor's fault be invoked by a surety as grounds for it being discharged on the basis of article 2314 of the Civil Code<sup>118</sup>.

When a creditor is secured by several sureties and one of them is released without having paid him, the question arises as to the impact of this release on the obligation of the co-fidejussors to settle. The parties can subordinate the very existence of this obligation to the maintaining of the other suretyships. In that case, the release of one of the sureties means the others are also released<sup>119</sup>. In the absence of such a condition, the solution depends on the type of release in question.

If the extinguishment of one of the surety's obligation to settle does not result from a payment by the surety in question, but is nonetheless accompanied by the creditor being paid, in principle the creditor

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<sup>110</sup> See *supra* 3.1.7.

<sup>111</sup> Both those who consented a personal security and those having assigned or given property in guarantee (real security for others) ; both natural person guarantors and juridical person guarantors.

<sup>112</sup> Inserted by the Act n° 2005-845 of 26 July 2005. The same solution was chosen beforehand by the Cour de Cassation in the framework of the former amicable settlement procedure (Com. 5 May 2004, *Bull. civ.* IV, n° 84).

<sup>113</sup> The opposability of the measures in the composition plan by all guarantors does in no way arise from the reinforced accessory nature of the suretyship, since it also benefits independent guarantors. It was inspired by the desire to encourage company managers, who are very often guarantors for their company's debts, to take early action in treating the difficulties of their companies by initiating proceedings even before payments are suspended.

<sup>114</sup> The solution does not feature in the Consumer Code, which unfortunately does not specify the impact on guarantors of the various steps taken to deal with overindebtedness. It is of jurisprudence origin (Civ. 1<sup>re</sup>, 13 November 1996, *Bull. civ.* I, n° 401).

<sup>115</sup> The Cour de Cassation has indeed ruled that the debtor cannot oppose the remissions and deadlines previously granted to the debtor to the *solvens* surety taking recourse for reimbursement (Civ. 1<sup>re</sup>, 15 July 1999, *Bull. civ.* I, n° 248 ; Civ. 1<sup>re</sup>, 28 March 2000, *Bull. civ.* I, n° 107).

<sup>116</sup> Com. 2 June 2004, *Bull. civ.* IV, n° 106 (freedom to call a surety for payment rather than an independent guarantor).

<sup>117</sup> Execution Procedure Code, articles L. 111-7 and L. 121-2, on useless or abusive execution measures.

Commercial Code, article L. 650-1, which in the framework of professional insolvency proceedings, rules out the non-liability in principle of the creditors for the loans granted when "*the guarantees obtained for the loans or credits are disproportionate*". This disproportion can be revealed by an excessive accumulation of guarantees (Com. 27 March 2012, *Bull. civ.* IV, n° 68).

<sup>118</sup> See *supra* 3.1.8.

<sup>119</sup> Civ. 1<sup>re</sup>, 18 May 1978, *Bull. civ.* I, n° 195.



loses his right to payment against the co-fidejussors. Such is the solution that the Cour de Cassation adopted in 2010 in the hypothesis of an offsetting of the reciprocal debts of the creditor and one of his sureties<sup>120</sup>.

If, on the contrary, one of the surety's obligations to settle is extinguished without any payment to the creditor, the co-fidejussors are not released<sup>121</sup>, but the amount of their contribution is reduced accordingly. Thus, a debt remission granted to one of the sureties releases the others for the personal share of the beneficiary surety<sup>122</sup>. The same should be true in case of merger or novation.

When a creditor is secured by several sureties and none can avail of the above-mentioned causes of release, another question arises, that of the amount that can be claimed from each. Article 2302 of the Civil Code provides that, "*where several persons have become surety of the same debtor for a same debt, each one is liable for the whole debt*".

But this obligation for the whole debt is set aside if the surety can avail of the benefit of division, i.e. the right to ask the creditor to divide his action and reduce it to the share of each of the co-fidejussors (Civil Code, article 2303). This benefit is only available to non joint and several sureties called "single" sureties<sup>123</sup>. Since joint and several co-fidejussors are much more numerous in practice<sup>124</sup>, they can therefore be called to pay the totality of the debt.

Recourse for reimbursement<sup>125</sup> may be taken by the *solvens* surety against joint and several sureties for the same debt, which is very useful in case of insolvency of the principal debtor. Whether the recourse be personal (based on article 2310 of the Civil Code<sup>126</sup>) or by subrogation (based on article 1251, 3° of the Civil Code<sup>127</sup>), it enables the *solvens* joint and several surety to ask co-fidejussors only for what he has paid over and above his share and this by dividing his recourse to only request from each surety their share in the debt. The calculation of this contribution share may turn out to be complex, for all suretyships do not necessarily have the same scope<sup>128</sup>. To avoid these difficulties, sureties can organise their recourse in advance in a special agreement.

In the presence of a principal debt secured at once by a surety and by a real security consented by a third party, for a long time the Cour de Cassation assimilated this security to a personal suretyship to enable the *solvens* surety to take recourse against the third party who constituted this real security<sup>129</sup>. Since the High jurisdiction has ruled that the real security constituted by a third party does not imply any

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<sup>120</sup> Com. 3 November 2010, n° 09-16173. The solution of this decision, based on the extinguishment of the principal debt consecutive to the offsetting between the debt of one of the sureties and that of the creditor, could however be abandoned, for the Cour de Cassation ruled in 2012 that this offsetting did not extinguish the secured debt (Com. 13 March 2012, *Bull. civ.* IV, n° 51).

<sup>121</sup> In case of debt remission granted to one of the sureties, this absence of release of co-fidejussors is specifically provided for in article 1287, paragraph 3, of the Civil Code. In case of novation with respect to one of the sureties, it is retained by the Cour de Cassation (Com. 7 December 1999, *Bull. civ.* IV, n° 219).

<sup>122</sup> Civ. 1<sup>re</sup>, 18 May 1978, *Bull. civ.* I, n° 195 ; Civ. 1<sup>re</sup>, 4 January 2005, n° 02-11307.

<sup>123</sup> If a single surety pays the creditor after opposing to him the benefit of division, the surety has no recourse against the other sureties since this means of defence enables him to only have to pay his share in the debt.

<sup>124</sup> The clause of joint and several liability between sureties is a formal clause in civil suretyships. If the suretyships are of a commercial nature, joint and several liability is presumed.

<sup>125</sup> Jurisprudence rules out the anticipated recourse in articles 2309 and 2316 of the Civil Code, which can only be taken against the principal debtor (e. g. Com. 11 December 2001, *Bull. civ.* IV, n° 196). This does not prevent the *solvens* caution from having the co-fidejussors made party to the proceedings, each for their share and portion (Civ. 1<sup>re</sup>, 15 June 2004, *Bull. civ.* I, n° 169).

<sup>126</sup> "*Where several persons have been sureties for the same debtor in regard to the same debt, a surety who has satisfied the debt has a remedy against the other sureties, for the share and portion of each of them*".

<sup>127</sup> "*Subrogation takes place by operation of law : 3° For the benefit of the person who, being bound with others or for others to the payment of a debt, was interested in discharging it*".

<sup>128</sup> When the sureties have taken out unequal undertakings, "*the fraction of the debt having to be borne by each of the sureties must be determined in proportion to their initial undertaking*" (Civ. 1<sup>re</sup>, 2 February 1982, *Bull. civ.* I, n° 55).

<sup>129</sup> To calculate this recourse, the jurisprudence accepted that the undertaking of the "real surety" was equal to the value of the goods allocated to the guarantee (Civ. 1<sup>re</sup>, 25 October 1977, *Bull. civ.* I, n° 388).

personal undertaking and that this is solely a real security<sup>130</sup>, it is not certain that this recourse can still be taken. The *solvens* surety can still however be subrogated in the real accessory rights of the creditor concerning the goods of the third party who constituted the real security.

In terms of suretyships, a last recourse hypothesis deserves to be presented. When recourse for reimbursement by the surety is covered by a sub-surety<sup>131</sup>, the surety can take recourse against this sub-surety after paying the creditor<sup>132</sup>. This is a personal recourse<sup>133</sup> subject to the regime of that of the surety against the principal debtor. The sub-surety, who secures the surety's debt against the principal debtor, and not that of the initial creditor, cannot avail themselves of the defences inherent to the debt of the principal debtor with regard to this creditor to combat the recourse of the surety. However, it can claim the liability of the surety for having wrongly omitted to invoke these defences<sup>134</sup>, subject however to a clause that limits or waives liability and that first rank professional sureties do not fail to stipulate.

As regards independent guarantees, it is even more frequent that the guarantor be counter-guaranteed<sup>135</sup>. So there is a dual independence of the counter-guarantee - on the one hand vis-à-vis the basic contract, and on the other vis-à-vis the initial guarantee<sup>136</sup> - which prevents the counter-guarantor from using the defences arising out of these two contracts<sup>137</sup>. However, in 2010, the Cour de Cassation tempered this principle of independence by ruling that "*the independence of the counter-guarantee with respect to the first rank guarantee does not prevent the principal debtor, bound by the first demand independent guarantee, from taking liability proceedings against any one of the guarantors who, through their fault, forced him to pay*"<sup>138</sup>.

### **3.2 Consumer protection**

#### **3.2.1 Describe the concept and provide the definition of a consumer as related to personal guarantees in your country. Does it include directors or members of companies ?**

As things stand, French law on personal guarantees does not feature any rule specific to consumer-guarantors, i.e. natural persons acting for purposes which are outside their trade, business, craft or profession<sup>139</sup>.

Remember that only the suretyship is in reality concerned, since the order of 23 March 2006 banned independent guarantee coverage of debts most often secured by consumers (consumer or property loans : Consumer Code, article L. 313-10-1 ; the debts arising out of a home rental lease : Act 6 July 1989, article 22-1) and because the creditors themselves do not take the risk of having natural persons sign letters of intent when these persons have no control or management powers over the debtor company.

The latest laws that partially reformed the suretyship focused on "*natural person sureties*", especially when they contract with a "*professional creditor*". The Cour de Cassation refuses to limit the

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<sup>130</sup> Cass., ch. mixte, 2 December 2005, *Bull. civ.*, n° 7.

<sup>131</sup> Also called the "counter-guarantor".

<sup>132</sup> The pre-payment recourse in articles 2309 and 2316 of the Civil Code is however excluded (Com. 24 March 1980, *Bull. civ. IV*, n° 141), since this is a favour only granted to sureties and that, in the relationship between a surety and a sub-surety, the former does not act in the capacity of a surety but rather in the capacity of a secured creditor.

<sup>133</sup> Since there is no relationship between the creditor and the sub-surety, the *solvens* surety cannot avail of a subrogation in the rights of the creditor to take his recourse against the sub-surety (Com. 30 March 2005, *Bull. civ. IV*, n° 71).

<sup>134</sup> Com. 27 May 2008, *Bull. civ. IV*, n° 106.

<sup>135</sup> Thus, when drawing up an international business contract, the bank of the client benefitting from the guarantee often stands as independent guarantor and is itself counter-guaranteed by the entrepreneur's bank.

<sup>136</sup> Com. 13 September 2011, *Bull. civ. IV*, n° 128.

<sup>137</sup> E. g. Com. 19 February 1991, *Bull. civ. IV*, n° 76 ; Com. 12 March 2013, n° 11-22048.

<sup>138</sup> Com. 30 March 2010, *Bull. civ. IV*, n° 65.

<sup>139</sup> See *supra* 2.1 and 2.2.

application of these special texts to just sureties not acting for professional purposes. Sureties involved in the secured company, in particular its managers or members, benefit from the protective provisions set down in the Consumer Code and in the Commercial Code<sup>140</sup>.

When ruling on the common law grounds of contracts, in particular in the light of the contractual good faith requirement, the Cour de Cassation does however make a distinction between "*informed sureties*" and "*uninformed sureties*"<sup>141</sup>. This jurisprudence is hardly satisfactory. Indeed, the High jurisdiction has never defined these two categories of sureties, nor even accepted presumptions with respect to them. It is content to control the criteria adopted by the courts of first instance and courts of appeal and lets them independently assess these criteria (principally, the skills of the surety, their professional experience, their relations with the secured debtor) in each individual case. This assessment *in concreto* leads to unpredictable qualifications.

Thus, the managers or members of the debtor company are not necessarily considered as "*informed sureties*". They are only so considered if the creditor proves their effective involvement in managing the secured company and their knowledge of the financial situation of this company<sup>142</sup> or at least their knowledge of its field of activity resulting from former or concomitant professional experience<sup>143</sup>. The qualification of "*informed surety*" can on the contrary be rejected if the manager was, when signing the suretyship, a novice, inexperienced and/or fictitious<sup>144</sup>. He may then benefit from the protections reserved for "*uninformed sureties*", in particular the cancellation of the suretyship on the grounds of fraudulent non-disclosure by the creditor as to the financial situation of the secured company or on the grounds that the creditor was contractually liable for failing to warn about the dangers of the undertaking.

As for the spouses and other persons close to the principal debtor, they only benefit from these means of defence if their capacity of "*uninformed sureties*" is established. No presumptions are made with respect to this. It therefore may happen that a spouse, relation or friend of the principal debtor be qualified as an "*informed surety*", if for example their profession enabled them to understand the scope of the undertakings taken<sup>145</sup> or, as regards the spouse of the manager of the debtor company, due to the sole community regime enabling the spouse to benefit from "*financial interests in the company*"<sup>146</sup>. The capacity of guarantor is therefore currently taken into account in French personal security law in a very imperfect manner.

Since the capacity of "consumer" is not defined by positive law, the following questions on consumer-guarantors will be answered using concepts that come closest to this concept, in other words, in legislation, that of "*natural person surety*" and, in jurisprudence, that of "*uninformed surety*".

### **3.2.2 Is there any pre-contractual duty to inform a consumer-guarantor in your country? What are the legal consequences in case of violation ?**

Pre-contractual information for sureties on the characteristics and dangers of their undertaking takes several different forms and is sanctioned differently depending on whether it is imposed *a priori* by special texts or discovered *a posteriori* by the courts on the grounds of contract common law.

Under the influence of consumer law, several preventive measures aimed at informing the consent of what are deemed to be the weakest sureties, have been imposed since the 1980s.

In some hypotheses, the formal information precedes the surety's undertaking to ensure his decision is as informed as possible. This takes two forms.

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<sup>140</sup> See *supra* 2.1, 2.2 and 2.3.

<sup>141</sup> See *supra* 2.1 and 2.2.

<sup>142</sup> E. g. Com. 27 March 2012, *Bull. civ.* IV, n° 68.

<sup>143</sup> Com. 12 March 2013, n° 12-12372.

<sup>144</sup> Com. 11 April 2012, *Bull. civ.* IV, n° 76 ; Com. 13 November 2012, n° 11-24178 ; Com. 27 November 2012, n° 11-25967 ; Com. 5 February 2013, n° 11-26262.

<sup>145</sup> Com. 22 November 2011, n° 10-25920. The solution provided in this decision, that seems logical in principle, is nonetheless surprising given the facts of this particular case since the surety exercised the profession of nurse.

<sup>146</sup> Com. 31 January 2012, n° 10-27651.

On the one hand, the provision of documents to the suretyship candidate. He who is planning to secure a consumer loan or a property loan must be given a copy of the prior offer given to the consumer-borrower by the financial establishment<sup>147</sup>.

On the other hand, the granting of a cooling off period to the suretyship candidate. This preventive measure is provided solely for a property loan suretyship<sup>148</sup>. If the natural person surety commits himself before the end of a period of ten days following reception of the loan offer, the Cour de Cassation considers that the surety is void<sup>149</sup>. This solution can be criticised, for, given the silence from the law as regards the sanction for non-compliance with this period, forfeiture of the right to interest, the usual sanction in rules on loan offers, could be preferable.

The formal information requirement takes other forms and has a very wide scope at the time when the surety commits himself.

When a surety is signed to secure the debts arising out of a home rental lease, the lessor must provide the surety with a copy of the rental contract and this under pain of the suretyship being declared void<sup>150</sup>, "*without it being necessary to establish the existence of a grievance*"<sup>151</sup>.

In this rental debt suretyship, but also in private contract suretyships granted by a natural person to secure a consumer or property loan taken out by a consumer-borrower<sup>152</sup> and, more broadly, in the private contract suretyship between a "*natural person surety*" and a "*professional creditor*"<sup>153</sup>, the pre-contractual information provided to sureties takes the form of a handwritten indication *ad validitatem* on the principal characteristics of the undertaking<sup>154</sup>. While the actual wording of the indication is not imposed by the act of 6 July 1989, it is however by the Consumer Code, which "*only*" accepts the wording it stipulates. Such a requirement can only encourage a spirit of bickering. Fortunately however, most of the small differences between the letter of the law and the content of the indications, invoked in bad faith by sureties, were not upheld when put to the Cour de Cassation<sup>155</sup>.

The High jurisdiction was also measured with respect to the sanction for non-compliance with the formal requirement. Indeed, while the nullity of the suretyship is not subordinate to proof of prejudice suffered by the surety<sup>156</sup>, this is only a relative nullity, which the surety may, after the fact, abandon, for the formalism has as its goal "*to protect the interests of the surety*"<sup>157</sup>. Furthermore, when the irregularity only concerns the indication of the joint and several nature of the surety<sup>158</sup>, nullity is ruled out due to the impossibility for the creditor of availing of this joint and several liability<sup>159</sup>.

The role of jurisprudence in pre-contractual information for sureties is not limited to the interpretation of special texts introducing preventive measures. It arises also every time when the courts, on the grounds of contract common law, discover, after the fact, an obligation to inform or warn.

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<sup>147</sup> With regard to consumer credit, see Consumer Code, article L. 311-11, paragraph 1. With regard to property loans, see Consumer Code, article L. 312-7, that specifically concerns only natural person sureties.

<sup>148</sup> Consumer Code, article L. 312-10. See *infra* 3.2.5.

<sup>149</sup> Civ. 1<sup>re</sup>, 25 November 2010, n° 09-14336 et 09-68321.

<sup>150</sup> Act n° 89-462 of 6 July 1989, article 22-1 *in fine*.

<sup>151</sup> Civ. 3<sup>e</sup>, 8 March 2006, *Bull. civ.* III, n° 59.

<sup>152</sup> Consumer Code, articles L. 313-7 and L. 313-8.

<sup>153</sup> Consumer Code, articles L. 341-2 and L. 341-3.

<sup>154</sup> On the scope and content of these indications, see *supra* 2.1, 2.2, 3.1.6 and 3.1.7.

<sup>155</sup> In 2004, the High jurisdiction accepted for the first time that the handwritten indication had differences that "*effect neither the meaning nor the scope of the handwritten indication*" (Civ. 1<sup>re</sup>, 9 November 2004, *Bull. civ.* I, n° 254). Declaring the suretyship void is thus ruled out in case of purely material errors (Com. 5 April 2011, *Bull. civ.* IV, n° 54), differences in punctuation (Com. 5 April 2011, *Bull. civ.* IV, n° 55), additions or omission of terms not having any impact on the surety's understanding (Civ. 1<sup>re</sup>, 5 April 2012, *Bull. civ.* I, n° 84 ; Civ. 1<sup>re</sup>, 10 April 2013, n° 12-18544 ; Com. 1st October 2013, n° 12-20278).

<sup>156</sup> Civ. 3<sup>e</sup>, 14 September 2010, n° 09-14001 ; Civ. 1<sup>re</sup>, 16 May 2012, n° 11-17411.

<sup>157</sup> Com. 5 February 2013, n° 12-11720.

<sup>158</sup> Consumer Code, articles L. 313-8 and L. 341-3.

<sup>159</sup> Com. 8 March 2011, *Bull. civ.* IV, n° 31 ; Civ. 1<sup>re</sup>, 5 April 2012, *Bull. civ.* I, n° 84 ; Com. 10 May 2012, *Bull. civ.* IV, n° 92 ; Com. 16 October 2012, *Bull. civ.* IV, n° 184.

The sanction for the silence of the creditor as to the financial difficulties of the principal debtor when signing the suretyship, based on the deception<sup>160</sup>, is also classically justified by the existence of a pre-contractual obligation to inform, itself based on the requirement of good faith<sup>161</sup>.

It is also the requirement of contractual loyalty that the Cour de Cassation has been imposing on credit establishments since 2007 that underlies the duty to warn "*uninformed sureties*" as to the risks of the planned operation and/or the disproportionate nature of the undertaking to be taken out<sup>162</sup>. This duty is, with the previously discussed handwritten indications, one of the most frequently used means of defence by sureties to escape their undertaking<sup>163</sup>. This shows the extent to which pre-contractual information for sureties as to the nature and scope of their undertaking has become essential.

### **3.2.3 Does your legal system impose continuous duties to inform the consumer-guarantor during the guarantee period? What are the legal consequences in case of violation of such a duty?**

Over the last thirty years, the legislator has intervened on several occasions to impose on creditors two types of information during the guarantee period : firstly, annual information ; secondly, information when the debtor defaults.

The annual information prescribed, in an imperative manner<sup>164</sup>, by four texts each having a specific field of application : article L. 313-22 of the Monetary and financial Code<sup>165</sup> concerns the suretyship by a natural or juridical person, in favour of a credit establishment, of financial facilities granted to a company ; article 47-II, paragraph 2, of the Act n° 94-126 of 11 February 1994 concerns the undetermined duration suretyship granted by a natural person to secure the professional debts of an individual entrepreneur ; article 2293, paragraph 2, of the Civil Code<sup>166</sup> concerns the indefinite suretyship<sup>167</sup> given by a natural person, regardless of the legal status of the principal debtor ; finally, article L. 341-6 of the Consumer Code, resulting from the Act n° 2003-721 of 1<sup>st</sup> August 2003, focuses on the suretyship signed between a "*natural person*" and a "*professional creditor*", regardless of the nature and amount of the principal debt<sup>168</sup>. This multitude of texts and application criteria is hardly compatible with the demands of legal security and the search for efficiency in suretyships. These reproaches are all the more justified since the annual information obligation regime varies from one text to another and has serious shortcomings which are sources of disputes.

Firstly, the object of the information is not exactly the same in all four texts. Three of them<sup>169</sup> order creditors to inform their sureties, between 1<sup>st</sup> January and 31 March of each year, not only as to the amount of the principal debt<sup>170</sup> on 31 December of the previous year, but also as to the term of the suretyship if it has a set duration or as to the faculty of unilateral termination if it is of an undetermined duration. Article 2293, paragraph 2, of the Civil Code does not impose this information as regards the

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<sup>160</sup> Civil Code, article 1116.

<sup>161</sup> For example, Civ. 1<sup>re</sup>, 10 May 1989, *Bull. civ.* I, n° 187.

On the jurisprudence that rejects nullity of the suretyship for deception and/or refuses claims of damages made by the surety, when the surety works within the debtor company, see *supra* 2.1 and 2.2.

<sup>162</sup> Com. 13 February 2007, *Bull. civ.* IV, n° 31.

<sup>163</sup> In principle, failure to comply with the warning duty should not lead to total extinguishment of the surety by offsetting between the surety's debt and the payment of damages incumbent on the creditor. Indeed, the Cour de Cassation rules that the prejudice for which the "*uninformed surety*" can claim repair consists in the "*loss of a chance to not contract*" (Com. 20 October 2009, *Bull. civ.* IV, n° 127 ; Com. 26 January 2010, *Bull. civ.* IV, n° 21), which is not a prejudice that is fully repairable. This principle is not however fully respected, since the High Jurisdiction admits that there only remains one symbolic euro for the surety to pay (Com. 8 November 2011, n° 10-23662).

<sup>164</sup> The parties cannot dispense the creditor of all information obligations vis-à-vis the surety for the provisions on annual information to sureties are provisions of public policy (Com. 14 December 1993, *Bull. civ.* IV, n° 467).

<sup>165</sup> Based on the Act n° 84-148 of 1<sup>st</sup> March 1984.

<sup>166</sup> Based on the Act n° 98-657 of 29 July 1998.

<sup>167</sup> See *supra* 3.1.7.

<sup>168</sup> This latter detail was provided by Civ. 1<sup>re</sup>, 28 November 2012, *Bull. civ.* I, n° 251.

<sup>169</sup> Monetary and financial Code, article L. 313-22 ; Act of 11 February 1994, article 47, II, paragraph 2 ; Consumer Code, article L. 341-6.

<sup>170</sup> "*The amount of principal, interest, commissions, expenses and ancillary costs*".

duration of the suretyship and, as regards the principal debt, it is at once more flexible and more blurred when it provides that the surety "*shall be informed by the creditor of the evolution of the amount of the debt secured and of those accessories at least once a year at the date agreed between the parties or, failing which, at the anniversary date of the contract*".

Then, the differences are even more marked as regards the scope of the partial forfeiture sanctioning the lack of information : article L. 313-22 of the Monetary and financial Code and article 47-II, paragraph 2, of the Act of 11 February 1994, concern the "*interest due since the previous information up to the date of communication of the new information*" ; article L. 341-6 of the Consumer Code provides for forfeiture, for the same period of "*penalties or interest on arrears*" ; article 2293, paragraph 2, of the Civil Code is more rigorous, by providing for the loss of "*all accessories of the debts, costs and penalties*", without limiting the forfeiture in time.

Finally, since important conditions for application of the information duty are not specified anywhere in the texts, there are numerous disputes about beneficiary sureties<sup>171</sup>, the way the information is provided<sup>172</sup>, the performance duration of the information duty<sup>173</sup> or the sanction for breach thereof<sup>174</sup>.

The other information imposed during the lifetime of the suretyship, i.e. when the principal debtor defaults, is not regulated in a satisfactory manner either. The information on "*the first payment difficulty*" by the debtor is dealt with by three provisions : article L. 313-9 of the Consumer Code<sup>175</sup> on the suretyship consented by a natural person to secure a consumer or property loan subscribed by a consumer-borrower ; article 47-II, paragraph 3, of the Act n° 94-126 of 11 February 1994 concerning the natural person surety guaranteeing the professional debt of an individual entrepreneur or a company ; article L. 341-1 of the Consumer Code<sup>176</sup> taking in more generally all suretyships subscribed by a "*natural person*" in favour of a "*professional creditor*".

In these texts, the "*first payment difficulty*" is defined in two different ways. The articles 47-II, paragraph 3, of the Act of 1994 and L. 341-1 of the Consumer Code qualify it as a payment difficulty that is "*not settled by the end of the month in which said payment is due*", whereas, according to article L. 313-9 of the same code, this is the incident "*characterised as being liable for registration in the file*<sup>177</sup>".

However the three texts edict an identical sanction : partial forfeiture of "*penalties or interest on arrears payable between the date of this first incident and that on which notification was given*". The Cour de Cassation has recently specified that the forfeiture can also concern sums due by virtue of a penalty clause<sup>178</sup>.

Given the numerous imperfections in French law on information due to sureties during the lifetime of the contract, it is desirable that the reform of personal securities, whenever it takes place, simplifies,

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<sup>171</sup> The courts are constant in ruling, under cover of the "*ubi lex...*" rule, and probably also to avoid a dispute about the real knowledge of sureties integrated into the secured company, that annual information obligations also benefit surety-managers (e. g. Com. 25 May 1993, *Bull. civ. IV*, n° 203).

<sup>172</sup> No text specifies how creditors should inform sureties. The jurisprudence accepts that the information be given by simple letter, but on condition the creditor can prove, not only that it was sent, but also the content thereof (Civ. 1<sup>re</sup>, 17 November 1998, *Bull. civ. I*, n° 321). However the creditor does not have to establish that the information was received (Com. 2 July 2013, n° 12-18413).

<sup>173</sup> According to the Cour de Cassation, the information obligation must be complied with until extinguishment of the principal debt, which authorises the surety to avail of it even after the judgement condemning the surety has become an enforceable judgement (Cass., ch. mixte 17 November 2006, *Bull. ch. mixte*, n° 9). This solution can be criticised, since the information remains due at a time when the surety must be aware of the outstanding amount of the principal debt.

<sup>174</sup> Can the contractual responsibility of the creditor be claimed while the four texts studied provide for a special sanction ? Since the start of the 2000s, the Cour de Cassation has ruled that, failing deceit or gross negligence by the creditor, the lack of annual information is sanctioned only by the forfeiture of accessories of the principal debt (Com. 25 April 2001, *Bull. civ. IV*, n° 75 ; Civ. 1<sup>re</sup>, 4 February 2003, *Bull. civ. I*, n° 35).

<sup>175</sup> Based on the Act n° 89-1010 of 31 December 1989.

<sup>176</sup> Based on the Act n° 98-657 of 29 July 1998.

<sup>177</sup> This is the national file containing information relating to instances of deliberate non-payment of loans granted to natural persons for non-professional purposes (Consumer Code, article L. 333-4).

<sup>178</sup> Civ. 1<sup>re</sup>, 19 June 2013, n° 12-18478.

and clarifies positive law and that it reserves this information to those guarantors who do not already have it, i.e. mainly consumer-guarantors.

### 3.2.4 Do any limitations in terms of amount or duration apply to guarantees provided by consumers?

All private contract suretyships signed since 1 February 2004 by a "*natural person surety*" in favour of a "*professional creditor*" must contain, under pain of being declared void, a handwritten indication setting out the exact amount and duration of the surety's undertaking (Consumer Code, article L. 341-2, based on the Act n° 2003-721 of 1st August 2003)<sup>179</sup>. The aim of this mandatory indication of the scope of the suretyship is to prevent excessive undertakings.

Moreover French law punishes, on different grounds, suretyships that are patently disproportionate *ab initio* to the surety's assets.

Article L. 341-4 of the Consumer Code<sup>180</sup>, applicable to all suretyships subscribed since 5 August 2003<sup>181</sup> by a "*natural person*"<sup>182</sup> in favour of a "*professional creditor*"<sup>183</sup>, enables the surety to be entirely discharged<sup>184</sup> if he/she can prove that his/her "*undertaking was, at the time of signing, manifestly disproportionate to his/her property and income*"<sup>185</sup>.

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<sup>179</sup> See *supra* 3.1.7.

<sup>180</sup> Based on the Act n° 2003-721 of 1st August 2003.

<sup>181</sup> The Cour de Cassation refuses to apply this text retrospectively (Cass., ch. mixte, 22 September 2006, *Bull. ch. mixte*, n° 7).

With respect to suretyships signed before 5 August 2003, the disproportion can be punished on other grounds.

Suretyships consented by a natural person surety to secure a consumer or property loan assigned to a consumer-borrower come under article L. 313-10 of the Consumer Code (based on the Act n° 89-1010 of 31 December 1989), the wording of which is identical to that of article L. 341-4.

The praetorian requirement of proportionality governs the others. Indeed in 1997 the Cour de Cassation accepted the liability of a credit establishment that had a surety-manager subscribe to a patently disproportionate undertaking and this on the grounds of contractual good faith (Com. 17 June 1997, *Macron*, *Bull. civ. IV*, n° 188). In 2002, the High Jurisdiction toughened its jurisprudence with respect to sureties integrated in the debtor company by subordinating their indemnification to proof, not only of a mathematic disproportion between their undertaking and their property, but also to proof of deceit committed by the creditor as to the financial situation of the surety (Com. 8 October 2002, *Nahoum*, *Bull. civ. IV*, n° 136).

<sup>182</sup> Since 2010, the Cour de Cassation grants the benefit of article L. 341-4 of the Consumer Code to surety-managers in ruling that "*the informed nature of the surety is indifferent for the application of this text*" (for example, Com. 19 October 2010, n° 09-69203 ; Civ. 1<sup>re</sup>, 12 July 2012, n° 11-20192). This solution can only be approved, since the discharge of sureties who subscribed to a patently disproportionate undertaking is part of the fight against overindebtedness of private individuals ; in the name of social justice and human dignity, it is legitimate to preserve all natural persons from this risk regardless of their functions or skills. It is furthermore coherent to have surety-managers benefit from overindebtedness prevention measures to the extent that, since the Act n° 2008-776 of 4 August 2008, they are eligible for overindebtedness treatment procedures (Consumer Code, article L. 330-1).

<sup>183</sup> When article L. 341-4 of the Consumer Code is not applicable (i.e. for a suretyship signed before 5 August 2003 and/or by a juridical person surety), the Cour de Cassation also rules that non-professional creditors do not commit a fault by having an excessive suretyship signed (Com. 13 November 2007, *Bull. civ. IV*, n° 236).

<sup>184</sup> The surety's excessive undertaking is not only reducible, for the Cour de Cassation considers that the sanction set down by article L. 341-4 of the Consumer Code ("*a professional creditor cannot avail of...*") "*is not assessed by the measure of the disproportion*" (Com. 22 June 2010, *Bull. civ. IV*, n° 112).

<sup>185</sup> The disproportion must be proven by the surety who claims it (Com. 22 January 2013, n° 11-25377). It is independently assessed by the courts of first instance and appeal (Civ. 1<sup>re</sup>, 4 May 2012, *Bull. civ. I*, n° 97), based however on criteria controlled by the Cour de Cassation. For example it imposes on these courts to assess the "*property and income declared by the surety*", and not the surety's effective assets (Com. 14 December 2010, *Bull. civ. IV*, n° 198). It checks that the disproportion has indeed been assessed on the basis of all the elements of the surety's situation, both assets (property and income) and liabilities (in particular, other surety undertakings : Com. 22 May 2013, n° 11-24812). In the event of a plurality of joint and several sureties, it also checks that the proportionality has indeed been assessed individually, for each of them (Com. 22 May 2013, n° 11-24812).

In the presence of a suretyship claimed to be excessive, it is very frequent that the surety invokes, not just this special text, but also a failing by the creditor to perform his general warning duty<sup>186</sup>. Indeed this warning must be personalised in relation to the "*financial capacities and risks of indebtedness*" of the "*uninformed surety*"<sup>187</sup> and, in its absence, the contractual responsibility of the credit establishment can only be invoked if a disproportion is proven<sup>188</sup>.

If, despite all these preventive or corrective rules, the natural person surety ends up in an inextricable financial situation because of his obligation to secure, he can ask to benefit from an overindebtedness treatment procedure<sup>189</sup>, even if his undertaking was excessive at the time of signing<sup>190</sup>. If recovery is not possible, the personal restoration procedure enables the totality of the suretyship debt to be written off<sup>191</sup>.

### **3.2.5 Under what conditions is the consumer-guarantor entitled to withdraw or to revoke the contract ("cooling off period") ?**

A cooling off period of ten days is only granted to natural person sureties planning to secure a property loan granted to a consumer (Consumer Code, article L. 312-10)<sup>192</sup>.

However no period is provided for after the signing of the suretyship during which the surety may change his mind and retract.

To the extent that the private contract suretyships signed by a "*natural person surety*" in favour of a "*professional creditor*" are, under pain of being declared void, of a fixed duration<sup>193</sup>, the unilateral termination by the surety has a very limited field of application. It can only concern two types of suretyships whose duration may still be undetermined, i.e. those signed by notarial deed or by private contract countersigned by a lawyer, or those signed by private contract between a natural person surety and a non-professional creditor.

Most texts on the annual information for sureties impose on creditors the obligation to remind them of either the term of the suretyship if it has a fixed duration, or their faculty to unilaterally terminate if it does not have a fixed duration, under pain of forfeiture of interest (or penalties) due from the previous provision of information until the date on which the new information is communicated<sup>194</sup>.

### **3.2.6 Describe the restrictions placed on standard contract terms concerning guarantees by consumers.**

The efficiency of a guarantee depends to a great extent on the freedom given to creditors to organise the protection of their interests<sup>195</sup>.

Thus, the suretyship has for a long time been considered as an efficient security for contractual freedom had pride of place in it. Traditionally, in the Civil Code, the freedom of the parties was only restricted by the reinforced accessory nature of the suretyship<sup>196</sup>. So creditors could freely choose their sureties, the form of the contract, the scope and terms of the guarantee<sup>197</sup> and deprive sureties of means of defence, in particular through clauses that waived their entitlement to the benefits of seizure and sale, of division, of subrogation or to information on the financial situation of the principal debtor. A

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<sup>186</sup> See *supra* 3.2.2.

<sup>187</sup> E. g. Com. 5 October 2010, n° 09-69660.

<sup>188</sup> For example, Civ. 1<sup>re</sup>, 18 February 2009, *Bull. civ.* I, n° 36.

<sup>189</sup> Consumer Code, article L. 330-1 and following.

<sup>190</sup> Civ. 2e, 31 March 2011, n° 09-72819.

<sup>191</sup> Consumer Code, articles L. 332-5 and L. 332-9.

<sup>192</sup> See *supra* 3.2.2.

<sup>193</sup> See *supra* 3.1.7.

<sup>194</sup> See *supra* 3.2.3.

<sup>195</sup> On the various factors favouring the "*objective efficiency*", i.e. the realization of the expectation common to all creditors (payment through realization, or even the very constitution, of the guarantee), as well as the "*subjective efficiency*", i.e. the realization of the expectations each party has depending on the specific features of the principal contract and the guarantee secured, see our thesis : M. Bourassin, *L'efficacité des garanties personnelles (The efficiency of personal guarantees)*, LGDJ, 2006.

<sup>196</sup> See *supra* 3.1.1, 3.1.2 and 3.1.9.

<sup>197</sup> See *supra* 3.1.7 and 3.1.10.



large number of these stipulations had become formal clauses in standard contracts drawn up by credit establishments.

Since the start of the 1980s, numerous rules of public policy have come about with regard to suretyships and these are in favour of sureties. Essentially, and in particular when the surety is a "natural person" contracting with a "professional creditor", the suretyship regime is no longer non-obligatory but becomes mandatory. The content of the contract no longer depends on the imagination of the parties and the power of the creditor to impose clauses in favour of his payment, but on restrictions imposed by the numerous one-off reforms of the suretyship and the no less numerous rulings by the Cour de Cassation handed down against creditors.

Various clauses, the very terms of which are sometimes dictated by law, now condition the validity of the suretyship<sup>198</sup>.

Other clauses may not be stipulated, under pain of being deemed not written<sup>199</sup>.

This legal and jurisprudential interventionism, greatly influenced by consumer law and, upstream, by the doctrines of contractual solidarism, certainly hinders the efficiency of the suretyship and leads creditors to seek guarantees that provide greater freedom and security.

Since the independent guarantee and the letter of intention are not greatly regulated<sup>200</sup>, they do meet some needs of creditors. But those dispensing credit will not find in them efficient substitutes for the suretyship unless the guarantor acts for professional purposes<sup>201</sup>.

### **3.2.7 Are guarantees issued by family members of the debtor or persons with a close relationship to the debtor governed by special regulations ?**

Neither suretyship common law nor the special texts concerning it feature rules specific to undertakings subscribed by a member of the family or persons with a close relationship to the principal debtor<sup>202</sup>. However there are provisions on securities in patrimonial family law<sup>203</sup>.

In matrimonial regime law, two texts protect guarantor-spouses.

Firstly, article 1415 of the Civil Code, based on the Act n° 85-1372 of 23 December 1985, provides that the suretyship subscribed by a spouse with common property<sup>204</sup>, alone, enables the creditor to seize this spouse's separate property and income but not that common to both<sup>205</sup>. To not limit the

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<sup>198</sup> See *supra* 3.1.6 and 3.1.7 the indications with respect to the amount, duration and joint and several nature of the surety's obligation.

<sup>199</sup> For example, since the Act n° 84-148 of 1st March 1984, article 2314 of the Civil Code (former article 2037) prohibits clauses that prevent the surety, regardless of who this surety is, from being discharged in case of loss, through the fault of the creditor, of a right that should have been transmitted to the surety by subrogation.

In some suretyships, the stipulations of joint and several liability and waiving the benefit of seizure and sale are deemed non written if the amount of the surety's undertaking is not limited (see *supra* 3.1.7).

The Cour de Cassation, for its part, paralyzes clauses indicating that the surety is perfectly aware of the debtor's situation or that the surety dispenses the creditor from having to provide him with information on the debtor, if the creditor stipulated such clauses in the knowledge of the economic difficulties of the debtor (Civ. 1<sup>re</sup>, 13 May 2003, *Bull. civ. I*, n° 114 ; Com. 25 February 2004, n° 01-14114).

In suretyships for future debts, it also deprives clauses of their effect that place debts that come about after the death of the surety, at the charge of the surety's heirs (Com. 13 January 1987, *Bull. civ. IV*, n° 9). On the other protections of these heirs, see *infra* 3.2.7.

<sup>200</sup> See *supra* 2.3, 3.1.1 and 3.1.2.

<sup>201</sup> See *supra* 2.1 and 2.2.

<sup>202</sup> However jurisprudence protects sureties effectively close to the principal debtor by qualifying them most often as "uninformed sureties". See *supra* 2.1, 2.2 and 3.2.1.

<sup>203</sup> On company law that applies to managers or members standing surety, as well as their relations, see *supra* 2.1 and 2.2

<sup>204</sup> Article 1415 appears in the chapter of the Civil Code governing the matrimonial regime of property acquired during marriage. The Cour de Cassation also applies it to sureties married under the universal community regime (Civ. 1<sup>re</sup>, 3 May 2000, *Bull. civ. I*, n° 125).

<sup>205</sup> The creditor often encounters difficulties of proof for if he wishes to seize the account with the income of the surety-spouse, he must overturn the presumption of community posed by article 1402 of the Civil Code.

freedom of the spouses, especially when they run a business, article 1415 does not subordinate the validity of the suretyship to the dual consent of the spouses. But to protect the family patrimony from the dangers of the security<sup>206</sup>, it only authorises seizure of common goods on condition the suretyship was "*contracted with the express consent of the other spouse who, in that case, does not obligate his separate property*".

Furthermore, article 1387-1 of the Civil Code, based on the Act n° 2005-882 of 2 August 2005, features a special extinguishment cause for debts and securities granted by spouses as part of company management. Indeed, at the time of the divorce of these spouses, the court of first instance can decide to discharge the surety-spouse who is not the manager. The reason for this rule is clear : it is to avoid that the spouse, who generously stood surety for the professional activity of his/her partner, be crushed under the weight of the suretyship debt after the divorce. The scope of the discharge of the surety-spouse is however uncertain, for the text does not specify whether this discharge is opposable to the creditor or whether it only affects *intra* conjugal relations. Fortunately some court of first instance and court of appeal jurisdictions favoured this second interpretation, which preserves the creditor's right to proceed and limits the discharge to matrimonial regime liquidation operations<sup>207</sup>.

Inheritance law, for its part, protects the heirs of the surety. In case of decease the surety, article 2294 of the Civil Code states that "*the undertakings of the sureties pass to their heirs*". Since 1982, the Cour de Cassation has tempered this principle of transmission when the suretyship secures future debts : the decease of the surety puts an implicit extinctive term to his cover obligation<sup>208</sup>, in such a way that only the debts that arose before the decease are carried over to the heirs<sup>209</sup>.

Even when thus limited, the transmission of the security may constitute a very heavy charge for the heirs, for, if they accept the succession purely and simply, the suretyship debt will be recovered from their personal patrimony in case of insufficient assets in the estate<sup>210</sup>.

The suretyship also presents a specific danger : it is often unknown to heirs when they accept the succession, not only because the contract is usually drawn up in one original copy<sup>211</sup>, kept by the creditor, but also because there is no central file of personal guarantees<sup>212</sup>.

The reform of inheritance law by the Act n° 2006-728 of 23 June 2006 brought a corrective solution to this lack of knowledge : the discharge, partial or total, of the heir accepting purely and simply the succession (Code Civil, article 786, paragraph 2). The scope of this judicial discharge leads one to wonder : is the heir discharged of the debt itself or only of the obligation to use his own assets to pay it if the estate assets are insufficient ? The doctrine comes down mostly in favour of this second interpretation, which modifies the basis of the right to proceed and not the *quantum* of the debt.

All these texts recently adopted in family patrimonial law reveal to what extent personal securities can give rise to serious conflicts of interest. They classically bring head to head the interests of the guarantor, those of the creditor and those of the principal debtor but they also affect third parties to the initial guarantee operation. Securities law and the numerous laws it borders on must provide solutions to these conflicts.

It is clear that over the last thirty years, French law has tended to cloak the function of guarantees, which is the payment of creditors, and has favoured the protection of guarantors and their relations, even when the guarantee is consented for professional purposes, since the notion of consumer-guarantor is unknown to French law and that the principal legal protection criterion lies in the capacity of the "*natural person*" guarantor.

In other words, and to repeat the title of the report entrusted to us, French law on personal guarantees does not achieve a correct balance between the requirements of business life and that of consumer

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<sup>206</sup> This goal explains that the Cour de Cassation ruled that article 1415 "*is applicable to the first demand guarantee which, like the suretyship, is a personal security, (...) and is therefore of a nature to impoverish the community's patrimony*" (Civ. 1<sup>re</sup>, 20 June 2006, *Bull. civ.* I, n° 313).

<sup>207</sup> Court of first instance of Évreux, 17 November 2006 ; Cour of appeal of Bourges, 24 November 2008.

<sup>208</sup> See *supra* 3.1.7.

<sup>209</sup> Com. 29 June 1982, *Bull. civ.* IV, n° 258.

<sup>210</sup> Civil Code, article 785, paragraph 1.

<sup>211</sup> See *supra* 3.1.3.

<sup>212</sup> See *supra* 1.1.

protection. It is now leaning clearly towards the latter to such an extent that it is compromising the efficiency of all personal guarantees. Let us hope that a future reform will put security and freedom back into the core of personal guarantee law.