



French report on personal guarantees

Manuella Bourassin

► To cite this version:

| Manuella Bourassin. French report on personal guarantees. 2015. hal-01487000

HAL Id: hal-01487000

<https://hal.parisnanterre.fr/hal-01487000>

Preprint submitted on 10 Mar 2017

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

French report on personal guarantees

by Manuella Bourassin, *Professor, University Paris Ouest Nanterre La Défense,
Director of the Centre of Business Civil Law and Economical Litigation*

Abstract

From the 1980s, to protect sureties deemed to be weakest and/or the most exposed to the dangers of suretyships, French law 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 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. But 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. French law on suretyships has become complex, inaccessible, incomprehensible, incoherent and unpredictable. Besides it 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. So French law on personal guarantees does not achieve a correct balance between the requirements of business life and that of consumer protection. It is now leaning clearly towards the latter to such an extent that it is compromising the efficiency of all personal guarantees. Therefore, a reform must be performed to put security and freedom back into the core of French personal guarantee law. It would be desirable that be set down in the Civil Code, on the one hand, rules common to all personal guarantees and, on the other hand, 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).

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 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 sureties¹.

This suretyship crisis 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

¹ This reminds us of the two logics that govern consumer law today : firstly, protect the weak from the strong and secondly, regulate the market.

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 doctrine², the order n° 2006-346 dated 23 March 2006 that reformed securities mainly focused on real securities³. The suretyship was not modified in any significant way ; only the numbering of the articles in the Civil Code concerning it was changed⁴. 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 regime⁵.

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 guarantees⁶ 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)⁷.

I. The specialization of French law on personal guarantees

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 profession⁸. But suretyships granted by consumers are subject to all rules concerning sureties in general⁹ and 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-borrower¹⁰ 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 debtor¹¹. The field of application of this second body of rules, that overlaps the first¹², 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*

² 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 March 31, 2005.

³ In the enabling statute n° 2005-842 dated July 26, 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.

⁴ Civil Code, articles 2288 to 2320.

⁵ Civil Code, articles 2321 and 2322.

⁶ 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.

⁷ For detailed reform proposals along these lines, consult our article in French in this book and our thesis : M. Bourassin, *L'efficacité des garanties personnelles (The efficiency of personal guarantees)*, LGDJ, 2006, n° 709 à 996.

⁸ A consumer is "*any natural person who is acting for purposes which are outside his or her trade, business, craft or profession*" (Consumer Code).

⁹ 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.

¹⁰ Articles L. 311-11, L. 312-7, L. 312-10 of the Consumer Code, based on the Act n° 78-22 dated January 10, 1978.

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 December 31, 1989.

¹¹ Article L. 341-1 of the Consumer Code, based on the Act n° 98-657 dated July 29, 1998.

Articles L. 341-2 to L. 341-6 of the Consumer Code, based on the Act n° 2003-721 dated August 1, 2003.

¹² 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.

activities"¹³. 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 creditor¹⁴.

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 entrepreneurs¹⁵, 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 interpretation¹⁶ by leaning in the direction most favourable to sureties. Since 2012 it has ruled that the provisions of the Consumer Code on natural person sureties are applicable "*whether they are informed or not*"¹⁷. 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 proceedings¹⁸, or an overindebtedness procedure¹⁹. 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 France²⁰, 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*".

¹³ Civ. 1^{re}, June 25, 2009, *Bull. civ. I*, n° 138 ; Civ. 1^{re}, July 9, 2009, *Bull. civ. I*, n° 173 ; Com. January 10, 2012, *Bull. civ. IV*, n° 2.

¹⁴ E.g. a car salesman or seller of building materials who grants payment facilities to customers and receives suretyships in exchange.

¹⁵ 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.

¹⁶ 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).

¹⁷ Com. January 10, 2012, *Bull. civ. IV*, n° 2 ; Civ. 1^{re}, March 8, 2012, *Bull. civ. I*, n° 53.

¹⁸ 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*".

¹⁹ 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).

²⁰ Subject to the special texts concerning institutional guarantors (credit establishments, mutual guarantee companies, insurance companies).

Furthermore, in jurisprudence, it has been accepted since 1969²¹ 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 has little impact, since there are no provisions specific to commercial suretyships and few rules in common law on commercial deeds concerning suretyships²². The Cour de Cassation however takes into consideration the quality of the surety, layman or "*informed*", 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 suretyship²³ ; the deceit committed by the creditor concerning the financial circumstances of the debtor company²⁴ ; the responsibility of the creditor for wrongful granting of credit to the debtor²⁵ or for failure to warn the surety²⁶.

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 tenant²⁷. 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 company²⁸.

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

²¹ Com. July 7, 1969, *Bull.* n° 269.

²² 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 June 17, 2008 that reformed the limitation abolished these specific limitations. The common law limitation is now 5 years, both for civil and commercial cases.

²³ 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*".

In pursuance of this article, 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. June 19, 1990, *Bull. civ.* IV, n° 180).

²⁴ E. g. Com. December 17, 1996, n° 94-20808 ; Com. April 19, 2005, n° 03-12879.

²⁵ 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. February 15, 1994, *Bull. civ.* IV, n° 60 ; Civ. 3^e, June 22, 2005, n° 03-19694).

²⁶ 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, June 29, 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. March 27, 2012, *Bull. civ.* IV, n° 68). However inexperienced and/or fictitious managers can be indemnified on these grounds (e. g. Com. April 11, 2012, *Bull. civ.* IV, n° 76 ; Com. February 5, 2013, n° 11-26262).

²⁷ Article 22-1-1 of the Act n° 89-462 of July 6, 1989, based on order of March 23, 2006.

²⁸ 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.

companies²⁹) has provisions on personal guarantees. It sets down the powers company representatives must have to obligate a company as guarantor³⁰. In addition, in joint stock companies and limited liability companies, managers³¹ are banned from having these companies secure or endorse their own undertakings to third parties³².

II. The imperfections of French law on personal guarantees

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, French law on personal guarantees does not achieve a correct balance between the requirements of business life and that of consumer protection. It is now leaning clearly towards the latter to such an extent that **it is compromising the efficiency of all personal guarantees**.

The efficiency of a guarantee depends to a great extent on the freedom given to creditors to organise the protection of their interests³³. Traditionally, in the Civil Code, the freedom of the parties was only restricted by the reinforced accessory nature of the suretyship. So creditors could freely choose their sureties, the form of the contract, the scope and terms of the guarantee and deprive sureties of means of defence. 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. Two significant examples can be given.

Form requirements. 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 notary³⁴ or countersigned by a lawyer³⁵, there is no legal requirement to do so³⁶.

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-

²⁹ 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.

³⁰ 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. January 29, 1980, *Bull. civ.* IV, n° 47).

³¹ 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.

³² Commercial Code, articles L. 225-43, L. 225-91, L. 227-12, L. 226-10 and L. 223-21.

³³ 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, Paris, 2006.

³⁴ 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.

³⁵ Deed countersigned by a lawyer was created by the Act n° 2011-331 of March 28, 2011.

³⁶ 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).

borrower³⁷ ; the suretyship securing the obligations arising out of a home rental lease³⁸ ; the suretyship by private contract between a natural person surety and a professional creditor³⁹.

Limitation of the extent of the suretyship. 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 deed⁴⁰ (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 several⁴¹. Since the joint and several suretyship is very protective of the creditors' interests⁴², these creditors are therefore incited to limit the suretyship to "*an expressly and contractually determined global amount*".

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 hand written indication imposed by the article L. 341-2 of the Consumer Code⁴³. Since the Act of 1st August 2003⁴⁴, it is all private contract suretyships signed by a natural person surety in favour of a professional creditor that must comply with this indication.

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

³⁷ Consumer Code, articles 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...".

³⁸ Act of July 6, 1989, article 22-1, from the Act of July 21, 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*".

³⁹ 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".

⁴⁰ 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. July 6, 2010, *Bull. civ. IV*, n° 118).

⁴¹ 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.

⁴² It deprives the surety of the benefit of seizure and sale and the benefit of division (Civil Code, articles 2298 to 2304).

⁴³ This text is applicable to suretyships signed since February 1st 2004.

⁴⁴ 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 December 31, 1989).

or private contract countersigned by a lawyer⁴⁵ ; 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.

This legal 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.

Let us hope that a future reform will put security and freedom back into the core of French personal guarantee law.

⁴⁵ These two types of instruments are dispensed of any handwritten indications required by law (Civil Code, article 1317-1 and the Act of December 31, 1971, article 66-3-3, based on the Act n° 2011-331 of March 28, 2011).