ARTICLE

SECURITY IN REM GRANTED TO SECURE ANOTHER'S DEBT IS NOT A SURETYSHIP

M&A Real Estate and Construction | 29/05/18 |

If the security in rem granted to guarantee another's debt does not involve a personal undertaking to perform another's obligation, the categorization as a suretyship must be excluded and, consequently, the benefit of Article 2314 of the French Civil Code must be ruled out.

Security in rem [such as a real property mortgage, a possessory pledge (*gage*) or a non-possessory pledge) granted to guarantee another's debt is not a suretyship because it does not involve any personal undertaking to perform another's obligation.Article 2314 of the French Civil Code, which, under certain conditions, allows one to obtain a discharge for the guarantee is, therefore, not applicable to it.

This is the lesson of the decision of the third civil chamber of the French Supreme Court handed down on April 12, 2018.

The creation of a security in rem to guarantee another's debt had until then raised the question of the nature of such an undertaking and, therefore, of the possibility of categorizing it as a "suretyship in rem".

Indeed, such a security was traditionally considered to be a hybrid, both a security in rem by the technique used, and a suretyship because this undertaking involved another's debt.

In a decision on May 4, 1991 [1], the first civil chamber of the French Supreme Court had categorized this undertaking as a pure security in rem.

However, the Supreme Court did not clearly distinguish between a suretyship and the creation of a security in rem granted to guarantee another's debt, as notably attested by the use of the term "suretyship in rem", which added to the confusion between these two mechanisms.

The Supreme Court therefore seized the opportunity to again rule on the subject, drawing the conclusions of the exclusively in rem nature of the grantor's undertaking, stating that he cannot assert any of the protective provisions of suretyship if the security in rem does not include any form of a personal undertaking.

In this case, Mr. Y had granted to company A a mortgage on a building belonging to him to guarantee the payment of a sum due to this company by company B.

As company B was placed in court-ordered liquidation, company A asked Mr. Y to enforce the mortgage.In return, Mr. Y served a writ on company A to release the security, invoking the benefit of Article 2314 of the French Civil Code, applicable to suretyship, which provides that:"*the guarantor is discharged, when the subrogation in the creditor's rights, mortgages and liens, due to this creditor, can no longer take place in favor of the guarantor.Any clause to the contrary shall be deemed unwritten.*"

If the discharge of Article 2314 of the French Civil Code had benefited Mr. Y, he would have then been able to obtain the discharge of the real property mortgage granted, consequently putting an end to his guarantee undertaking.

As Mr. Y's claim was dismissed, he appealed the decision to the French Supreme Court, but the Court rejected the appeal and confirmed the Court of Appeal's decision, which, "*correctly ruled that the security in rem granted by Mr. Y to guarantee company B's debt, which did not involve any personal undertaking to perform another's obligation, was not a suretyship, such that Article 2314 of the French Civil Code was not applicable.*"

This outcome is not in itself revolutionary because it is undisputed that the suretyship (as defined in Article 2288 of the French Civil Code) requires the grantor to be personally liable (and often indefinitely) for the debtor's debt whereas a security in rem is based only on assets whose base is defined precisely.

This decision, much talked about and which indisputably appears to be a precedent decision due to the clarity of its holding deserves credit for putting a final end to the confusion around the notion of "suretyship in rem", which does not benefit from the suretyship regime without the grantor's personal undertaking.

The disappearance of the suretyship in rem, therefore, now appears to be a given, and the effects of the security and its regime depend only on the rules applicable to the given security in rem.

Hence, the grantor of the security in rem granted to guarantee another's debt does not enjoy the benefit of discussion or excussion [2] or the information obligation of the act of 1984, or the requirement of proportionality between the amount of the undertaking and the assets and revenue from the guarantee.Conversely, the lapse of the term applicable to the

principal debtor automatically benefits the grantor of the security in rem, whereas it does not benefit the personal guarantor.

---

[1] French Supreme Court, Civ. Div. 1st, May 4, 1999, no. 97-15.378.

[2] French Supreme Court, Civ. Div. 1st, Nov. 25, 2015, no. 14-21.332.

Co-written with the assistance of Thami El Idrissi
