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ARTICLE

A Tale of Life and Death of Personal Guarantees in Merger Scenarios: The French Perspective

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Synopsis

In most countries and circumstances, a merger is a complex transaction with plenty of inherent issues and details to be addressed ahead of the merger becoming effective. These issues generally include the analysis of the tax consequences of the merger, the determination of possible filing duties and prior authorisations including from a competition perspective, the need to inform and/or consult the work force and its representatives, reviewing the articles of association of the target's subsidiaries and identifying new shareholder approval provisions, reviewing the loan and leasing facility agreements and determining whether possible acceleration provisions may apply to the contemplated merger and also determining the fate of the guarantees issued by, or to the benefit of, one of the parties to the merger.[2] Regarding guarantees, beyond the transaction per se, advisers and particularly lawyers must consider the proper handling, and quite possibly, the transfer or reiteration of guarantees. Failure to do this may entail a risk of losing the agreed coverage or of a breach of a covenant, leading to potentially adverse consequences for the stakeholders involved.

In this article, the authors focus on the impact of merger on a specific type of personal guarantee, *cautionnement*, ('Guarantee'). This is probably the most commonly used form of guarantee in France and one of the most complex to deal with. A Guarantee can be issued by individuals and/or companies. When issued by individuals, a Guarantee, including a joint and several Guarantee (*cautionnement solidaire*) must contain specific handwritten notation signed off by the Guarantor.[3]

When issued by public limited companies, *sociétés anonymes*, also known under the acronym *SA*, a Guarantee is subject to prior statutory authorisation by its board of directors (*conseil d'administration,* L. 225-35, § 4 of the French *Code de commerce*).[4] When issued by a *société par actions simplifiée* or *SAS*, the articles of association may define whether the Guarantee is subject to any specific authorisation requirements or a decision of the shareholders subject to majority voting conditions provided for in the articles (Article L.227-9, § 1 of the French *Code de commerce*).

The general legal regime of a Guarantee is provided for in law. However, key principles affecting application of the regime have been developed in case law. As well, a number of practical issues are still disputed by various authoritative legal commentators. The impact of a merger on the scope and enforceability of a Guarantee essentially depends on whether the relevant party to the merger is (i) the beneficiary of the Guarantee, (ii) the guarantor, or (iii) the debtor of the guarantor. Each of these situations is addressed below, including suggestions and remedial measures for protection of stakeholders' rights in the case of a merger.

Risks at stake

A Guarantee is often an inherent part of a standard 'security package'. For that reason, its enforceability must be ensured throughout the duration of the debtor's obligations. In a loan facility agreement, if the Guarantee falls away, that will generally constitute an event of default and may trigger acceleration of the secured debt.

French law provides that a guarantor (*la caution,* 'Guarantor') who grants a Guarantee to secure another party's obligation makes a commitment to the creditor to fulfil that obligation if the debtor does not fulfil it

Notes

1 Nataliia is also admitted to the Kiev Bar in Ukraine.

2 This list is only indicative and is not meant to be exhaustive.

3 Non-compliance with this formality results into the Guarantee's invalidity. It is crucial that the notice is handwritten entirely and solely by the Guarantor, otherwise the Guarantee can be invalidated (see the decision of the Cour d'appel d'Amiens of 21 February 2019 n°16/05156).

4 It is up to the beneficiary to verify that the board's approval has been properly given; i.e the beneficiary cannot rely on the so called appearance theory (*théorie de l'apparence*) to consider that the person acting on behalf of a natural person has all due authorisations (Philippe Malaurie, Laurent Aynès Droit des sûretés. 2019 – p.123)

itself (Article 2288 of the French *Code Civil*).[5] At law, a Guarantee is not presumed. It must be express and it cannot be extended beyond the limits within which it was contracted (Article 2292 of the French *Code civil*).[6]

Under French law, a Guarantee is granted with respect to a particular debtor and for the benefit of a particular creditor. Accordingly, it has a strong *intuitu personae* element.[7] A Guarantee can either have a specific or general scope (e.g.: *cautionnement omnibus* which may cover any and all of the debtor's future debts) and is an accessory contract linked to the secured debt.

These parameters, including the debtor's and the creditor's *intuitu personae* situation as well as the nature of the guaranteed obligation, correspondingly limit the Guarantor's liability.[8] Any change to these parameters can impact a Guarantee's scope, which can increase or decrease. It is thus equally important for the creditor, the debtor and the Guarantor to assess the impact that any merger will have on them.

It goes without saying that the stakeholders' interests may be conflicting to some extent:

(i) the creditor will seek to preserve at least the initial coverage,

(ii) the debtor will seek to avoid a default and the consequences thereof under the facility documentation; and

(iii) the Guarantor will want to control and limit the scope of his commitment and possibly reserve his rights to challenge it at a later stage.

General transfer of assets: general rule vs *intuitu personae* component

French law provides for a general rule, whereby in a merger situation (*fusion*), including the absorption by a holding company of its subsidiary as well as in case of a split or demerger (*scission*), the latter's assets and liabilities are all transferred to the absorbing company (*transfert universel de patrimoine* as per Article 1844-4 of the French Civil Code and Articles L 236-1, L 236-3 of the French Code of Commerce). The exceptions to this general rule are related to non-transferable and *intuitu personae* contracts which are not transferred unless otherwise agreed by the relevant parties.

This universal transfer of assets and liabilities is a *sui generis* transmission of rights and duties and differs from a civil law assignment.[9] In practical terms, it results in a substitution of the surviving company in lieu and instead of the target company, with respect to all its assets, rights and obligations.

French law does not expressly deal with how a Guarantee should be treated in such a scenario. On the one hand, being an accessory commitment to the secured obligation, it cannot disappear unless the secured debt is paid or held invalid. On the other hand, its automatic transfer can be constrained by *intuitu personae* considerations.

Based on current case law and the opinion of recognised legal commentators, the fate of a Guarantee will be highly dependent on the persons involved in the merger. It can accordingly remain unaffected, become completely or partially unenforceable, or even in limited circumstances be extended to include the target's debts.

By way of illustration, differences when comparing with other types of guarantees need to be drawn. For example, a *garantie autonome* (an autonomous guarantee, such as a first demand guarantee), being an independent *intuitu personae* obligation, is not transferable with the secured debt unless expressly agreed by the Guarantor (paragraph 4 of Article 2321 of the French *Code Civil*).[10] Conversely, securities *in rem* (like a pledge or a mortgage) are perfectly transferable because they are only linked to the asset used as collateral and not to the debtor or a creditor.

Even though the matter in general may seem rather complicated, there are at least two more or less straightforward scenarios which are addressed below.

The first scenario is where two parties involved in the facility agreement and the issuance of the related Guarantee merge (or one of these parties absorbs another), for instance when:

– the creditor and the Guarantor merge, or

– the creditor and the debtor merge; or

– the debtor and the Guarantor merge.

The Guarantee is thus terminated and simply disappears, due to the so-called *confusion* of the obliged and empowered parties.

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5 'Celui qui se rend caution d'une obligation se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même.'

6 'Le cautionnement ne se présume point ; il doit être exprès, et on ne peut pas l'étendre au-delà des limites dans lesquelles il a été contracté.'

7 *Intuitu personae* is the latin term, commonly used in civil law countries, which refers to a special type or the nature of relationship between the parties.

8 Philippe Malaurie, Laurent Aynès Droit des sûretés. 2019 – p.101

9 The Court of Cassation confirms this understanding systematically. In particular, in the context of a long-term commercial lease it is considered that in case of assignment thereof it is subject to the lessor's approval, which is not the case when the lease contract is transferred via the universal transfer of assets (3rd Civil Chamber of the Cassation court, 9 April 2014 – 13-11.640).

10 The autonomous guarantee is the commitment by which the guarantor undertakes, in view of an obligation entered into by a third party, to pay a sum either on first call or according to agreed terms and conditions.

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An interesting illustration of this can be found in the ruling made by a first instance French court[11] where the Guarantor and the debtor were both physical persons. The Guarantor passed away and the debtor, who was the heir in terms of the deceased's succession, had applied for personal insolvency proceedings.[12] Under French insolvency law, the Guarantor's obligation to cover the guaranteed debt remains unaffected by the commencement of insolvency proceedings against the debtor. As the Guarantor's heir, the debtor should have stepped into the latter's obligations *vis à vis* the creditor. However, since the debtor and the Guarantor had become one and the same person, the creditor was deemed to no longer be in a position to address the Guarantor for the payment owed by the debtor. The *confusion* between the Guarantor and the debtor resulted in the disappearance of the Guarantee.

The second scenario is where the Guarantor, debtor or the creditor is the absorbing company, i.e. where their existence and legal personality are not affected by the merger. In that scenario, the Guarantee remains enforceable on the original terms and conditions and within the initially contracted scope insofar as the guaranteed debtor/beneficiary remains the same.[13] The solution is applicable even in the case when the debtor, absorbing another company, is covered by an unlimited scope Guarantee (*cautionnement omnibus)* under which the Guarantor agrees to cover all and any future debts. This scenario is addressed specifically below.

Other scenarios, for example when the Guarantor, debtor or the creditor is the target, require a more nuanced approach.

The Guarantee is limited to a payment obligation of the pending amounts on the date of the merger when the debtor or the creditor is the target

If the debtor or the creditor is the absorbed legal entity, then, as a result of the *intuitu personae* doctrine, the Guarantee is terminated and is no longer applicable for future debts arising after the merger. However, the Guarantor remains liable for the debts pending on the date of the merger, if they are not paid in a timely manner.

Strictly speaking, a distinction must be made here between the payment obligation, which covers the amount of the guaranteed debt pending on the date of the merger even if the latter is not due yet, and the obligation to cover future debts, arising after the merger.

As per existing court practice, when the debtor is absorbed, the Guarantor is liable for the payment of the debt existing on the date of the merger but is released from his duty to cover future debts. That is because Article 2292 of the French *Code Civil* provides that the Guarantor can be held liable only within the limits of the contracted obligation, which means that the obligation is contracted in respect of a specific debtor. Therefore, when the initial debtor is absorbed and disappears, the Guarantee terminates for the future.[14]

The same solution applies when the beneficiary, i.e. the creditor, is absorbed by a third entity. The Guarantor's liability becomes limited only to the debt that pre-existed the merger date, unless provided otherwise in the initial Guarantee. In that regard, the Guarantee may state that the Guarantor expressly agrees to cover the debts arising after the absorption of the beneficiary.[15] Such an obligation is overly broad and not one that we would recommend accepting from the Guarantor's prospective.

Alternative approaches should be considered to preserve the same scope of the Guarantee in case of the debtor's/creditor's absorption.

As per the court practice referred to above, it is possible to provide in the Guarantee that the Guarantor commits to cover any future evolution of the debt owed after the merger (for example, for interest yet to fall due, or for future credit facility drawdowns).

The other way of solving the issue may consist in reiteration by the Guarantor of the Guarantee's scope for the new debtor/creditor. Reiteration being a simple confirmation of the previously contracted scope, it must be contrasted and not confused with a novation of the Guarantee. A novation introduces new elements into the Guarantor's obligations. If this were not the case, where a new or a novated Guarantee is entered into, it might expose the creditor under certain circumstances to the risk of being set aside in the period (*période suspecte*) leading up to insolvency proceedings that may subsequently be commenced against the Guarantor.

The purpose of the *période suspecte* essentially consists in preventing the debtor from concealing assets or treating one of the creditors in more favorable ways than others.

Pursuant to paragraph 1 of Article L.632-1 of the French Code of Commerce all deeds made without consideration are null and void. Therefore, a Guarantee granted without consideration during this period might

Notes

11 1st chamber, 1st section, The 1st instance court of Dijon, 20 January 2000 – 95/00207.
12 The facts as summarised by the court in its judgement do not specify whether the debtor had applied for insolvency before the death of the Guarantor.
13 Commercial Chamber of the Cassation Court, 5 November 2003 – 00-13.570.
14 For example, the decision of the Commercial Chamber of the Cassation Court, 16 October 2001 – 98-15.501.
15 Commercial Chamber of the Cassation Court, 30 June 2009 – 08-10.719; 8 March 2011 – 10-11.835; 16 September 2014 – 13-17.779; 20 April 2017 – 15-19.851; 22 February 2017 – 14-26704.

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be declared null and void. The issue here is that the creditor may not know about the existence of the *période suspecte*, which commences on the date of cessation of payments. The latter is set in the court's judgement commencing the insolvency proceedings. It may be reconsidered in a subsequent judgement. The cessation of payments date may thus end up being backdated by the court, enabling the court to reconsider the validity of a number of deeds made during that period. As a general rule, the *période suspecte* cannot be backdated by more than 18 months before the date of the insolvency judgement (Article L. 631-8 of the French Code of Commerce). Exceptionally, the court can look back even further in time and declare void deeds that trigger transfer of property and which are made without consideration and concluded up to 6 months before the date of cessation of payments, i.e. up to 24 months before the insolvency judgement (paragraph II of Article L 632-1 of the French Code of Commerce). This means that the absence of insolvency proceedings at the moment the Guarantee is granted does not exclude that it may be declared null and void if later caught by the *période suspecte* provisions.[16]

A Guarantee is often granted by the debtor's MD or holding company. In these scenarios it is generally considered that the Guarantee is deemed to have a commercial interest.[17] Accordingly, it cannot be deemed as having been granted without consideration in terms of Article L.632-1 of the French Code of Commerce.[18] The existence of a commercial interest is a matter of fact for the judge to determine. The facts of each matter can naturally introduce some degree of uncertainty. Considering that there is no abundant court practice in such matters, in our opinion, the risk remains that a newly contracted Guarantee may well be open to challenge if it is concluded during the *période suspecte.*[19] In one case, the Cassation Court ruled that a Guarantee, granted by the director after the court had ordered liquidation of the debtor, was null and void. The reasoning of the Court was that there was no advantage and no commercial interest in the director providing a Guarantee and therefore the deed was granted without proper consideration.[20]

The risk of the Guarantee's scope being extended when the debtor is the absorbing company: the *cautionnement omnibus* case

If the debtor absorbs another legal entity, which is neither the creditor nor the Guarantor, the outcome can be quite unsettling for a Guarantor who has granted a general scope Guarantee (*cautionnement omnibus*). More specifically, the Cassation Court has ruled that the Guarantor's liability in such cases then also extends to the debts of the absorbed company. It has been ruled in that regard that a bank, being the beneficiary of such a security, is not bound in this situation to inform the Guarantor about the extension of its liability.[21]

The Guarantor may therefore want to exclude any such risk by introducing a provision in the Guarantee providing for termination of the Guarantee in the event the debtor absorbs another entity, thereby limiting its payment obligation to the coverage of a specific debt.

The Guarantor is the target of the merger and disappears further to completion of the merger. The Guarantee survives 'the death' of its issuer under certain circumstances

The scenario where the Guarantor is the target is more controversial, because of the absence of (i) specific statutory provisions addressed to this scenario, and (ii) well-established case law.

To the best of our knowledge, the Cassation Court has indeed only ruled in one single matter in this area. The case was addressed to the transfer to the absorbing company of a sub-guarantee (and not strictly speaking a Guarantee), granted by the target (the sub-Guarantor). This decision is a controversial one and has split legal commentators into two camps. In the decision[22] the Cassation Court ruled that in case of a merger and absorption of the Guarantor, when it is established that the sub-guarantee had been granted prior to the merger, then the absorbing entity is bound to comply, as per the terms and conditions of the sub-guarantee,

Notes

16 Article L.632-1 of the French Code of Commerce provides for a list of deeds which are automatically null and void, i,e, the court does not have any statutory discretion with this regard. Under Article L 632-2 the court can invalidate even deeds with commercial consideration if the other party knew about the of cessation of payments.

17 Droit et pratiques des procédures collectives. Dalloz. 2019-2020 – p. 2864.

18 Commercial Chamber of the Cassation Court, 19 November 2013 – 12-23.020 regarding a suretyship constituted without consideration by a subsidiary for its holding company.

19 Please, note that French insolvency law provides for a different approach for real (versus personal) securities like mortgages and pledges registered over assets.

20 Commercial Chamber of the Cassation Court, 17 May 2017 – 15-15746.

21 Commercial Chamber of the Cassation Court, 28 February 2018 – 16-18.692.

22 Commercial Chamber of the Cassation Court 7 January 2014 – 12-20.204, Banque Populaire rive de Paris c/SA Société Européenne de Cautionnement. In this matter Banque Populaire Nord de Paris had agreed to sub-guarantee SA Société Européenne de Cautionnement, which had itself agreed to guarantee Altadis (a tobacco manufacturer and supplier) against a payment failure by Seven, which was a client of Altadis. Further to the failure of Seven and payment by SA Société Européenne de Cautionnement to Altadis, SA Société Européenne de Cautionnement brought a claim against Banque Populaire rive de Paris which had absorbed the sub-guarantor, i.e. Banque Populaire Nord de

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with the commitments of the target. The Court's analysis relied on the concept of the general transmission (*transmission universelle de patrimoine*) including assets and debts, referred to above, without any limitation with regards to future debts.

According to certain doctrinal opinion, the Court failed to expressly distinguish the payment obligation from the coverage obligation and therefore according to commentators in this camp, it is necessary to interpret the decision in light of the existing court practice related to the debtor's and creditor's absorption. In other words, the Guarantee is indeed transferred to the absorbing company but exclusively within the limit of the debts which arose before the date of the merger. On this approach, the absorbing entity stepping into the Guarantor's rights and duties is not bound to cover the debts arising after the absorption of the Guarantor.[23]

According to contrasting doctrinal opinion, this decision sets a 'landslide' approach applicable not only to sub-guarantees but also to Guarantees, as they remain enforceable against the absorbing entity, on the same conditions and within the same scope as agreed by the Guarantor.[24] In other words, in case of absorption of the Guarantor, *intuitu personae* considerations do not affect general transmission of the latter's duties, including the Guarantee.

To be on the safe side, practitioners generally opt for reiteration by the absorbing entity of the initial Guarantee and not for the issuance of a new Guarantee, leaving room for discussions as to possible limitation of the Guarantee.

Closing remarks

A sound risk management of Guarantees in merger transactions requires that each Guarantee be addressed individually. This involves taking into account the identity of the merging parties: the debtor, the creditor or the Guarantor. To limit the risk of any Guarantee being impacted by a merger, contractual arrangements should be introduced in the initial Guarantee, or alternatively, each Guarantee should be reiterated before the merger. When reiterated, each Guarantee's scope should be confirmed without introducing new elements which could result in creating new obligations (novation). Moreover, the risk of any Guarantee being declared null and void during the *période suspecte* in insolvency proceedings should be specifically considered.

As a side note, the stakeholders should also be attentive to possible developments in court practices which may lead to unexpected outcomes.

Notes

Paris and asked the latter to meet the commitments of the target. Banque Populaire rive de Paris argued *inter alia* that following the absorption it is not bound to cover the debts arising after the merger.

23 Pr. Arnaud Reygrobellet et Pr. Daniel Tricot La transmission du cautionnement en cas de fusion-absorption de la caution – Réactions à la Lettre creda-societés n 2014-03 of 27 January 2014.

24 Pr. Dorothée GALLOIS-COCHET– Transmission du cautionnement à l'absorbante de la caution. Droit de Sociétés n 3, March 2014, comm. 45. – p. 30-31 ;Doc, Jérome Chacorac Transmission du cautionnement en cas de fusion-absorption de la caution – Lettre creda-societés n 2014-03 of 27 January 2014.

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