

Guarantee as Security for Real Estate Development Loans in Algerian Law: What Effectiveness?

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Received: 21/11/2025 ; Accepted : 26/07/2026 ; Published : 15/08/2026

Abstract:

Banks that extend real estate development loans typically require the involvement of a guarantor, necessitating the execution of a guarantee contract between the guarantor and the lending institution. This contract is traditionally governed by the general rules of law, which may not adequately cater to the unique needs of real estate development loan agreements.

With this in mind, the French legislator introduced some amendments to the provisions of the bank guarantee contract by amending the French Civil Code in 2021, by Order No. 2021-1192, issued on 15 September 2021.

Consequently, it is imperative for the Algerian legislature to reevaluate and tailor the provisions of guarantee contracts within the banking sector specifically for real estate development loans to better address these unique requirements.

Keywords : Real estate development loans; Guarantee contract; Algerian law; French law.

Introduction:

Lending is intrinsically risky; no financial transaction involving loans is devoid of risk. Consequently, banks and financial institutions that provide real estate development loans implement measures to mitigate these risks by demanding adequate securities. A prevailing doctrine under the general rules of law is that all a debtor's assets collectively secure the fulfillment of their financial obligations, a concept known as the general pledge system.

However, this system is fraught with challenges, primarily because the enforceability of the pledge is restricted to assets that the debtor possesses at the time of enforcement, not at the time the credit agreement was established. In scenarios where the debtor's assets are inadequate, all creditors hold equal rights to the debtor's assets and must distribute them proportionally.

Legal frameworks in various jurisdictions have developed mechanisms that complement the general pledge with additional safeguards for creditors, including preventive and enforcement strategies. Nonetheless, these mechanisms often fall short of providing the robust protection required by banks and financial institutions engaged in issuing mortgage loans, which are typically high-risk.

To fortify their positions relative to borrowers, these institutions frequently stipulate additional conditions and assurances that augment the general security framework. In the realm of real estate development loans, there are primarily two categories of guarantees: traditional and innovative.

Despite the evolving nature of guarantee mechanisms, traditional guarantees continue to play a pivotal role. These are broadly categorized into two types: personal guarantees, also referred to as personal sureties, and real guarantees, known in some legal contexts as subordinate real rights. These guarantees are akin to mortgages in the broader legal sense.

Personal guarantees hinge on the principle of involving multiple parties to secure an obligation, thus strengthening the creditor's position by associating another party's liability with that of the debtor. The scope of personal guarantees is generally confined to the surety.

The essence of a surety arrangement is that an individual, separate from the debtor, assures the satisfaction of the debtor's obligations towards the creditor, thereby enhancing the creditor's assurance of recovering their dues.⁽¹⁾ This arrangement entitles the financier to a comprehensive guarantee that extends beyond the borrower's assets to encompass all assets owned by the guarantor.

In instances where the guarantee is designated as personal or ordinary, the guarantor has the option to limit their liability to specific assets, thus establishing a subordinate real right for the creditor over said asset to secure the debt repayment, hence termed a real guarantee⁽²⁾. The primary form of surety intended for securing real estate development loans is the personal surety, wherein one individual commits to another to ensure the satisfaction of a debt.

The establishment of surety in real estate development financing typically adheres to general legal stipulations while incorporating specific nuances. This necessitates an exploration of the efficacy of surety as a security mechanism under Algerian law for such loans ?.

An inductive methodology was utilized, scrutinizing various pertinent legal texts to deduce insights into the legislator's stance on this matter. Initially, it is crucial to discuss the general legal provisions related to the formation of surety (1), followed by an evaluation of how these provisions align with the particularities of real estate development loans (2).

1. The Formation of Surety in Real Estate Development Loans: Personal Surety

Personal surety serves as a form of security that a lending bank may utilize. It is regulated within the general rules outlined in articles (644-673) of the Civil Code,⁽³⁾ with article 644 defining it as: "A surety is a contract by which a person guarantees the fulfillment of an obligation by undertaking to the creditor to satisfy this obligation if the debtor himself does not fulfill it."⁽⁴⁾

The Civil Code provides the exclusive framework for the surety contract, wherein the legislator has codified the provisions of this contract within the general rules, irrespective of the contractual parties or the nature of the underlying obligation. Consequently, the formation of surety in real estate development loans adheres to the modalities specified in the Civil Code. It is imperative that

¹ Saadi, Mohammed Sabri, *Clear Explanation of Civil Law, Personal and Real Securities Contract of Surety*, Algeria, Dar Al-Huda, 2nd Edition, 2011, p.6.

² Said, Dounia, *Guarantees of Real Estate Financing in Egyptian Law*, Doctoral Dissertation, Private Law Specialty, Faculty of Law, Ain Shams University, Egypt, 2016/2017, p. 169.

³ Order No. 75-58, dated September 26, 1975, contains the Civil Code, Official Gazette No. 78, dated September 30, 1975, amended and supplemented, corresponding to Articles L2288 to L2320 of the French Civil Code.

⁴ Article 2288 of the French Civil Code, modified by the Ordinance No. 2021-1192 of September 15, 2021, reforming the law of securities, JORF No. 0216 of September 16, 2021: "The surety is the contract by which a guarantor undertakes towards the creditor to pay the debtor's debt in case of his default. It may be subscribed at the request of the principal debtor or without his request and even without his knowledge."

the essential conditions for its formation are met, encompassing both general conditions (1) and specific conditions (2).

1.1. General Conditions for the Formation of Surety in Real Estate Development Loans:

A surety is a contractual agreement between the guarantor and the creditor, where the guarantor commits to fulfilling the debt if the debtor fails to do so, as delineated in article 644. This contract is formed according to general contractual principles, necessitating the presence of its fundamental elements: consent (A), subject matter (B), and cause (C).

A- Element of Consent:

The formation of a surety contract mandates the mutual consent of the involved parties, the creditor and the guarantor. In the context of real estate development loans, this primarily concerns the guarantor's consent, where the surety contract involves the bank or financial institution as the creditor, and the guarantor to ensure the debt's fulfillment, specifically the repayment of the loan amount should the borrower default.

Thus, the establishment of a surety contract requires the explicit agreement of both the bank and the guarantor.⁽¹⁾ The borrower's (debtor's) consent is not essential; moreover, the surety can be legally binding even without the debtor's knowledge or despite his opposition. This is because the surety is created to safeguard the creditor's interests, in this case, the lending institution, and does not adversely affect the borrower.

The validity of the guarantor's consent is paramount, and it must be free from any defects that could invalidate it. Thus, the surety may be subject to annulment if the guarantor has a fundamental misunderstanding about the nature of the debt they guarantee. For instance, this could occur if the guarantor believes the debt accrues no interest when it does, or that it accrues only minimal interest when in reality it accumulates compound interest, or if they were under the impression that the interest rate was lower than it actually is.⁽²⁾

Moreover, the surety agreement can be annulled if the guarantor's consent is compromised by fraud. This could happen if the bank (creditor) deceitfully misrepresents the debtor's financial stability, or falsely assures the guarantor of additional securities for the debt, which the guarantor relies upon, only to discover later that these assurances are nonexistent or invalid.⁽³⁾

Particularly in the context of real estate development loans, the personal circumstances of the guarantor, who may be closely related to the borrower like a spouse, must be carefully considered. It is conceivable that the guarantor's consent could be compromised by coercion. An example of this would be a situation where a husband, exerting his influence over his wife, coerces her into guaranteeing the debt or loan despite her reluctance to do so. In such cases, the surety may also be voidable due to the defect of coercion.

The principle that surety is a consensual agreement indicates that it generally does not necessitate any specific formalities for its establishment. However, given the potential risks involved for the guarantor, some legal scholars advocate that the guarantor's consent should be explicitly documented rather than implied. This view is reinforced by French legislation, which

¹ Article 647 of Order No. 75-58, contains the Civil Code, amended and supplemented, previous source.

² Awad, Ali Jamal Eddin, *Banking Operations from a Legal Perspective*, Egypt, Dar Al-Nahda Al-Arabiya, 4th Edition, 2008, pp. 973-974.

³ Ibid, p. 974.

mandates that the guarantor's consent must be express. Article 2294 of the French Civil Code articulates that a surety "must not be presumed but must be explicit and cannot be extended beyond the limits within which it was contracted."⁽¹⁾

While Algerian law does not have a direct equivalent to Article 2294 of the French Civil Code, it is understood that the necessity for the explicit expression of the guarantor's consent is addressed by requiring that such consent be documented in writing. According to Article 645 of the Algerian Civil Code, "A surety must be established in writing, even though the original obligation may be proven by other means of evidence."

This stipulation occasionally presents challenges for creditors in proving the existence of a surety contract in the absence of written evidence, which significantly increases the risk of not recovering their rights.⁽²⁾ This concern has been recognized by the Supreme Court, which has upheld decisions by lower courts that have excused guarantors from litigation due to the non-existence of written documentation of the surety contract. Furthermore, such documentation must also be dated to ensure its enforceability against third parties.⁽³⁾

B- Subject Matter of the Obligation:

Through the legislative framework defining surety, it is discerned that the essence of the surety is to guarantee the performance and fulfillment of the principal obligation if the debtor defaults. According to prevailing legal norms, a surety may encompass any obligation, provided it is legitimate and either quantifiable in monetary terms or results in quantifiable damages if unmet.⁽⁴⁾ Specifically, within the realm of real estate loans, the genesis of the surety is invariably the loan agreement, with the surety itself centering on the loan amount for which the guarantor assumes responsibility on behalf of the borrower from the bank.

It is a legal imperative that the obligation underpinning the surety, the guaranteed obligation, must be valid for the surety to be considered enforceable.⁽⁵⁾ This principle is also underlined in French jurisprudence, which predicates the enforceability of a surety on the validity of the underlying obligation. However, it does accommodate the enforceability of the surety even if the debtor lacks adequate resources to fulfill the obligation.⁽⁶⁾

With respect to this research focus, a surety stands valid if the loan agreement between the client and the bank is legally binding. The law does not permit a surety that surpasses the amount owed by the debtor, nor one that imposes conditions more severe than those of the original debt. Conversely, it is permissible to establish a surety for a lesser amount or under less burdensome conditions than those stipulated in the guaranteed debt⁷.

¹ Article 2294 of the French Civil Code: "The suretyship must be express and may not extend beyond the limits within which it was contracted."

² Supreme Court decision, Civil Chamber, File No. 56336, issued on July 13, 1988, (unpublished).

³ Sanhoury, Abdel Razzak, *The Mediator in Explaining Civil Law, Personal and Real Securities*, Volume 10, 3rd Edition, Al-Halabi Legal Publications, Lebanon, 2000, p.80.

⁴ Awad, Ali Jamal Eddin, op. cit, p.978.

⁵ Article 648 of Order No. 75-58, contains the Civil Code, amended and supplemented, following.

⁶ Article 2293 from the French Civil Code: "Suretyship can only exist on a valid obligation. Nevertheless, a person who becomes a guarantor for an individual whom they knew lacked the capacity to contract is bound by their commitment."

⁷ "Article 652 of Order No. 75-58, includes the Civil Code, as amended and supplemented, op. cit."

This stipulation necessitates that the guaranteed obligation be specifically delineated or at least capable of being defined, thus clarifying the parties involved, the creditor and the debtor, and explicitly identifying the nature and valuation of the obligation.

Surety, as a consensual contract, is not contingent upon any particular formalities for its establishment. However, considering the potential risks this contract imposes on the guarantor, some legal theorists advocate for the necessity of explicit, rather than implied, consent from the guarantor. This position is staunchly supported by French law, which mandates that the guarantor's consent to a surety be expressly given. Article 2294 of the French Civil Code asserts: "A surety must not be presumed but must be explicit and cannot be extended beyond the limits within which it was established."

In contrast, Algerian legislation does not parallel Article 2294 of the French Civil Code in demanding an explicit expression of the guarantor's consent. Instead, it compensates by requiring that such consent be documented in writing, as specified in Article 645 of the Civil Code: "A surety must be established in writing, even if the original obligation can be substantiated by other evidence."

Creditors may encounter difficulties in substantiating the surety agreement in the absence of written evidence, which exposes them to the risk of not securing their rights, particularly as Algerian law does not demand explicit consent from the guarantor.⁽¹⁾ This judicial stance was reinforced by the Supreme Court, which has upheld the decisions of lower courts that absolve guarantors from litigation when the surety contract is not documented in writing. Moreover, to ensure enforceability against third parties, such documentation must also be dated.⁽²⁾

C- Element of Cause:

The notion of cause within the context of a surety contract is not explicitly addressed with specific provisions under Algerian law; thus, it is essential to resort to the general principles governing contractual obligations.⁽³⁾ According to these principles, the cause of the contract must be both existent and lawful. The legality of the cause is evaluated based on the motivations driving the guarantor's commitment.

A lawful motivation, such as the intent to provide a service to the debtor, validates the cause of the obligation. Conversely, if the motivation is unlawful, the cause is deemed invalid, rendering the surety void.⁽⁴⁾ The presence of a valid cause is a prerequisite; the guarantor's commitment must be based on a legitimate reason and should not be gratuitous, as obligations devoid of cause are nullified by law. Furthermore, the obligation must be concrete and lawful, as stipulated by Article 98 of the Civil Code

1.2. Specific Conditions for the Formation of Surety in Real Estate Development Loans:

To ensure the effectiveness of a surety, specific conditions are mandated by the legislator. Article 646 of the Civil Code prescribes: "If the debtor commits to providing a guarantor, they must

¹ Si Youssef, Zahia Houria, *Contract of Surety, Algeria*, Dar Al-Amal for Printing Publishing and Distribution, 4th Edition, 2012, pp.60-61.

² Si Youssef, Zahia Houria, *Ibid*, p.61.

³ General provisions related to the cause are regulated in Articles 97 and 98 of Order No. 75-58, contains the Civil Code, amended and supplemented, op. cit.

⁴ Si Youssef, Zahia Houria, op. cit, p.67.

present a solvent person residing in Algeria or, in lieu of a personal guarantor, provide adequate real security." Accordingly, the guarantor must satisfy two explicit conditions: solvency (A) and residency in Algeria (B), along with an implicit third condition, legal capacity (C).

A- Condition of the Guarantor's Solvency:

The law mandates that the guarantor be financially robust, a crucial requirement ensuring their capacity to fulfill the obligation should the original debtor default. The guarantor must possess adequate financial resources and assets to settle the guaranteed debt if necessary.

The responsibility to demonstrate the guarantor's solvency rests with the debtor, who must prove that the guarantor has sufficient movable or immovable assets to cover the debt. The creditor, however, may challenge the adequacy of these assets if they are difficult to liquidate or encumber due to their location, susceptibility to concealment, or other reasons, thereby excluding such assets from being considered reliable security.⁽¹⁾

A significant oversight by the legislator, in this case, is the lack of a requirement for these assets to be located within Algeria. While the guarantor's ownership of movable or immovable assets is necessary, their location within the national boundaries of Algeria is equally crucial.

This is due to potential legal complications, especially in scenarios involving conflict of laws and enforcement procedures if the assets are situated abroad. Despite this, the requirement for the guarantor's residency remains explicitly stated as within Algeria, underscoring the importance of local legal jurisdiction and enforcement capabilities.

B- Residence Requirement in Algeria:

The legal stipulation for a guarantor to reside in Algeria is intended to simplify the creditor's process of recourse should the debtor default on their obligations. It is not obligatory for the guarantor to live in the same domicile as the debtor, nor is there a requirement for the guarantor to hold Algerian nationality. This provokes the inquiry: Can a non-Algerian serve as a guarantor?

According to general legal principles, there is no prohibition against a foreigner serving as a guarantor, provided they reside within Algeria, as the legislative language is broad and inclusive. However, within the specific context of real estate loans, it is uncommon for banks to engage with foreign guarantors, as they typically require the loan applicant or debtor to be of Algerian nationality from the outset. Consequently, it is relatively rare for a non-Algerian to act as a guarantor for such loans.

Importantly, for a bank to exercise its rights against a guarantor, the critical factor is not solely the guarantor's residence within Algeria, but also the location of the guarantor's assets. It is feasible that a guarantor, although resident in Algeria, might possess assets abroad, which necessitates a legislative reassessment to address such scenarios adequately.

C- Condition of Legal Capacity to Enter into a Surety Contract

While not explicitly stated in the previous Article 664, legal capacity is universally recognized by legal scholars as an essential prerequisite for entering into a surety contract. Engaging in such a transactional act requires that the guarantor possesses full legal capacity, which includes being at least nineteen years old and not under any legal restraint; otherwise, the surety is deemed void.

¹ Ahmed Achraf Abdel Wahab, Sayed Ahmed Ibrahim, *The Contract of Surety in Light of Scholars' Views Legislation and Judicial Decisions*, Egypt, Dar Al-Adalah for Publishing and Distribution, 1st Edition, 2018. p.21.

Banks typically verify the full legal capacity of both the guarantor and the borrower or debtor before finalizing a surety contract.

If an individual satisfies the aforementioned criteria, they are validly presented by the debtor as a guarantor. The guarantor must continue to fulfill these conditions throughout the duration of the surety. If any of these conditions cease to be met, such as if the guarantor becomes insolvent or relocates their residence outside of Algeria, the debtor is obliged to provide another guarantor who meets the stipulated criteria, unless the creditor has specified a particular individual for the surety.

In instances where a specific guarantor is mandated by the creditor, the responsibility does not shift to provide an alternative if the original guarantor subsequently fails to meet the necessary conditions.⁽¹⁾

2. Adequacy of Surety Provisions as a Guarantee for Real Estate Development Loans

As defined by the legislator, the activation of the surety contract by the guarantor is contingent upon the debtor's failure to meet the guaranteed obligation. Therefore, the existence of a valid and enforceable primary obligation is a fundamental requirement, involving a contractual relationship between the original debtor, creditor, and the guarantor, where the latter agrees to fulfill the obligation should the primary debtor default.

Suretyship imposes a personal obligation on the guarantor, and this latter obligation is dependent on the original obligation.⁽²⁾ Consequently, the creditor is obliged to demand payment from the original debtor first and to begin execution on their assets before those of the guarantor. Thus, the surety as a bank guarantee does not achieve the desired effectiveness (1). Therefore, banks implement certain measures to enhance this protection, which could compromise the protection afforded to the guarantor in the surety contract (2).

2.1. Adequacy of Surety as a Guarantee for the Bank in the Context of Real Estate Development Loans:

Surety hinges on the principle of engaging multiple parties in the responsibility of fulfilling a financial obligation, thereby enhancing the creditor's security by integrating an additional financial entity into the debtor's liability. At first glance, this arrangement seems to offer a robust guarantee for banks, facilitating enforcement actions against more than one financial entity.

However, the protection provided to the bank under a surety contract, though seemingly substantial, is actually limited. The scope of surety does not extend beyond that of the general guarantee system and carries associated risks. This is illustrated in Article 188 of the Civil Code, which is intended for the satisfaction of the debtor's debts generally and not exclusively for secured debts. If the intent had been to offer a guarantee specific to certain creditors, the phrasing in the legislation would have distinctly mentioned "secured debts."⁽³⁾

The term "all the debtor's assets," as cited in Article 188, implies that the general guarantee encompasses both movable and immovable assets, serving as a security for all creditors without preferential treatment for any specific assets that might belong to the guarantor. Furthermore, the

¹ Ahmed Achraf Abdel Wahab, Sayed Ahmed Ibrahim, Ibid, p.22.

² Saadi, Mohammed Sabri, op. cit, pp.13-14.

³ See, Obagi Mohammed, "The General Guarantee and Its Protection", Journal of Legal and Political Research and Studies, Faculty of Law and Political Science, University of Blida 02, Volume 07, Issue 14, 2018, p. 224, available at: <https://www.asjp.cerist.dz/en/downArticle/272/7/2/52898>, accessed January 3, 2025, at 16:44.

general guarantee does not prevent the guarantor from transferring their assets, which could lead to their removal from the guarantor's financial estate. Consequently, the bank may find itself unable to enforce claims on these assets once they are no longer in the guarantor's possession.

In response to the challenges posed by surety arrangements in the lending sector, legislative measures have been implemented specifically concerning treasury loans. For instance, Article 12 of Executive Decree No. 10-166, as amended by Article 03 of Executive Decree No. 12-425, mandates that loan beneficiaries provide guarantees, which include a joint surety by the spouse if they are acting as guarantors.

This legislation specifically defines the guarantor in terms of being the borrower's spouse and prescribes joint surety as the type of guarantee, which is intended to bolster credit security and ensure the repayment of loans. To further support this initiative, the National Fund for Savings and Provision - Bank has introduced a "joint indebtedness" scheme since June 9, 2003, designed to enhance the financial capacity of borrowers for real estate loans⁽¹⁾. This scheme incorporates income from direct relatives, such as parents, children, siblings, or a spouse with a regular salary, to assist in financing. The contribution structure under this scheme is as follows⁽²⁾

- A spouse contributes 30% of their net salary,
- Other relatives contribute 15% of their net salary.

This arrangement caps the total contributions at 60% of the borrower's income, thereby improving the borrower's financial solvency and facilitating access to higher loan amounts. This multi-party financial support system exemplifies how surety can be strategically used to augment the security and efficacy of real estate development loans, ensuring greater financial stability and compliance with repayment obligations.

2.2. Adequacy of Surety Provisions to Protect the Guarantor in the Field of Real Estate Development Loans:

The cautious approach adopted by credit institutions can paradoxically reduce the protective measures available to their counterparts, effectively favoring their own interests over those of the guarantors. This dynamic is particularly pronounced in the context of surety agreements that lenders utilize as security for real estate development loans. These contracts are deeply influenced by the unique nature of banking agreements, where one of the parties involved is invariably a bank or financial institution. This influence manifests in several ways that collectively diminish the level of protection offered to the guarantor within the lending sphere.

The key issues include the misalignment of the principle of consent foundational to surety agreements in the context of lending (A), the implications of banking secrecy as a mandatory obligation for financial institutions on the guarantor's informed consent (B), the banks' frequent failure to clearly define the extent of the guarantor's obligations (C), and the prohibition on prior claims against the guarantor (D).

¹ Yils Mobarka Lmoulouda Kabab, *The National Fund for Savings and Reserve – Bank and Real Estate Development in the Field of Housing*, Master's Thesis, Private Law Specialty, Faculty of Law, University of Algeria, 2011/2012, p.72.

² Yils Mobarka Lmoulouda Kabab, *Ibid*, p. 72.

A- Non-alignment of the Principle of Consent with the Surety Contract in the Field of Real Estate Development Loans:

It has been established that the Civil Code serves as the primary legal framework governing surety agreements, and guarantors in the banking sector do not enjoy any specific protective regulations. The legislation does not differentiate between a surety agreement made between creditors and guarantors who are on equal footing and an agreement between a professional creditor and a natural person guarantor who lacks professional status.

The surety agreement between the creditor bank and the guarantor is notably defined by the bank's unilateral determination of its terms, akin to a loan agreement between the bank and the debtor being guaranteed. Consequently, the guarantor is left with no choice but to accept the conditions pre-determined by the financial institution. The formation of the surety contract, rooted in the mere exchange of offer and acceptance, underscores its nature as a consensual agreement, as previously indicated.

However, the reliance on mutual consent as the basis for these agreements can adversely affect the guarantor's interests. This reliance tends to expedite the guarantor's decision-making process, leaving inadequate time for careful consideration and reflection before entering into the agreement. It also reduces their vigilance against potential bad faith by the other contracting party, particularly when this party is a bank possessing more experience and greater financial power. Such a disparity allows the bank to dictate all terms of the contract, both fundamental and detailed, resulting in a pronounced imbalance in the surety agreement. Emphasizing formality in these contracts could serve as an effective measure to counteract the adverse effects stemming from the principle of consent.⁽¹⁾

B- The Impact of Banking Secrecy on the Guarantor's Consent:

Banking secrecy mandates that bank employees maintain the confidentiality of client information and refrain from disclosing it to unauthorized parties. This obligation arises because the bank acts as a fiduciary of this information by virtue of its professional role, particularly since the bank-client relationship is fundamentally based on a mutual trust, anchored in the bank's discretion to safeguard its clients' financial secrets.⁽²⁾ Within this framework, questions emerge concerning the scope of the bank's duty to disclose information about the client's (borrower's) circumstances and the specifics of the guaranteed transaction (real estate loan) to the guarantor.

Given the absence of any legal mandate compelling banks to provide guarantors with detailed information about the debtor and the loan process, prevailing legal opinion seeks to address this issue by positing that banks are not required to disclose the internal nuances of the transaction, its progression, or the client's status. This responsibility, it is argued, falls on the guarantor to inquire independently. Even upon such inquiries, the bank must uphold the confidentiality of information

¹ Kodri, Fatima Zahra, "Protection of the Guarantor Dealing with the Bank", Algerian Journal of Legal, Economic, and Political Sciences, Faculty of Law, University of Algeria, Volume 51, Issue 02, 2014, p.216, available at: <https://www.asjp.cerist.dz/en/downloadArticle/32/51/2/87223>, accessed April 10, 2025, at 11:43.

² Siari, Hajer, *The Impact of Banking Secrecy on Combating Money Laundering*, Doctoral Thesis, Private Law Specialty, Faculty of Law, University of the Mentouri Brothers, Constantine, 2018/2019, p. 105.

classified as a professional secret. Disclosure of such details, including account activities, would potentially expose the bank to liability towards the client.⁽¹⁾

Consequently, guarantors must exercise due diligence in investigating all relevant aspects of the surety agreement they intend to enter. They should endeavor to independently verify the debtor's actual financial status without relying on the bank to volunteer this information. This proactive approach becomes particularly crucial given that banking secrecy could be invoked by the bank in any subsequent disputes arising from the guarantor's insufficient understanding of the debtor's financial health, especially since the law does not necessitate a written form for surety contracts, which could otherwise offer some protection to the guarantor at the formation stage of the contract.

The French legislator has acknowledged the necessity of balancing these concerns, as demonstrated by the recent amendment to the Civil Code via Order No. 2021-1192 dated September 15, 2021. This amendment introduces a significant protective measure for guarantors by mandating that professional creditors, including banks, must caution guarantors about the disproportionate nature of the obligations they are undertaking relative to their financial capacities. Failure to adhere to this advisory obligation subjects the professional creditor to sanctions and may result in a forfeiture of their rights under the surety contract proportionate to the harm inflicted on the guarantor.⁽²⁾

C- The Bank's Failure to Define the Scope of the Guarantor's Obligation:

The legislation does not prescribe specific boundaries for a guarantor's responsibilities within the framework of surety contracts. In essence, a surety contract obliges the guarantor to fulfill the debt obligations should the debtor default. Absent a distinct agreement, the surety encompasses the debt's accessories and various incurred expenses. Thus, the guarantor, in dealings with the creditor bank, is bound by the same stipulations as those laid out in general contractual rules. These stipulations mandate that the guarantor assure the entirety of the guaranteed debt, including associated banking interests and costs, a requirement that may appear excessively burdensome to the guarantor.

Contrary to the Algerian legislator, who has not provided specific protections regarding the limits of the guarantor's obligations, especially when the creditor is a professional, the French legislator has determined that the absence of a defined obligation for the guarantor leads to the invalidity of the surety contract. This principle was encapsulated in the text of Article L341-2 of the French Consumer Code, which stated: "Any natural person who commits as a guarantor under a customary contract, considering the creditor as a professional, must precede their signature with a handwritten statement specifying the scope of their commitment in terms of duration and amount."⁽³⁾

However, the aforementioned provisions were repealed with the amendment of the Consumer Law in 2016⁽⁴⁾. In response, several protective measures were enacted to safeguard the guarantor

¹ Awad, Ali Jamal Eddin, op. cit, p. 977.

² Article 2299 of the French Civil Code, created by the Ordinance No. 2021-1192 of September 15, 2021, reforming the law of securities.

³ Article L341-2 of the Consumer Code.

⁴ By Article 34 of the Ordinance No. 2016-301 of March 14, 2016, relating to the legislative part of the Consumer Code, JORF No. 0064 of March 16, 2016.

against the professional creditor, particularly concerning the scope of obligation, as per the amendments to the Civil Code in 2021.

In this context, Article 2300 of the French Civil Code stipulates: "If the guarantor's obligation under the surety contract for the benefit of a professional creditor is disproportionate at the time of entering into the surety contract relative to the secured debt, then the guarantor's obligation must be reduced at the time of the contract's formation to make it proportionate to this debt."⁽¹⁾

The French legislator also mandates that the professional creditor inform the guarantor, who is a natural person, before March 31 of each year and at its expense, of the principal amount of the debt and the interests, as well as all accessories related to the secured debt remaining as of December 31 of the previous year. This requirement ensures that the guarantor is continually aware of the content and scope of their obligations under the surety contract they entered into, under penalty of the sanctions established, particularly the forfeiture of the professional creditor's right to the interest.⁽²⁾

Moreover, the professional creditor is obligated, also at its expense, to remind the guarantor of the remaining duration of their obligation. If the surety is indefinite, the creditor must inform the guarantor of their right to terminate the surety at any time, along with the conditions and requirements for exercising this right, under the same penalties.⁽³⁾

D- Prohibition of Prior Recourse to the Guarantor:

One of the stipulations for the guarantor's recourse against the debtor and other guarantors, if present, is that they must have fulfilled the debt. Although this condition appears logical initially, in practice, it can impede the guarantor's ability to exercise their right to prior recourse⁽⁴⁾. The lack of legal protections in this area is starkly apparent in comparative law, specifically under French law, which acknowledges certain scenarios where the guarantor may require prior recourse, such as in the event of the debtor's bankruptcy or insolvency, when the creditor grants the original debtor a new deadline, or after ten (10) years from the origination of the obligation if it is indefinite.⁽⁵⁾

However, the French legislator amended the previous text's content through Article 04 of Order No. 2021-1192 mentioned above, which repealed the provisions related to prior recourse and instead established the guarantor's right to step into the creditor's rights against the debtor, in cases where the guarantor has fulfilled all or part of the secured debt.⁽⁶⁾

3. Conclusion:

In the realm of real estate development loans, banks typically provide individuals with financial sums intended primarily for the purchase of residential properties. This financing is granted based on the trust the bank places in the loan applicant. Here, trust is construed as the

¹ Article 2300 of the French Civil Code, created by the Ordinance No. 2021-1192 of September 15, 2021 reforming the law of securities.

² Article 2302/01 of the French Civil Code, created by the Ordinance No. 2021-1192 of September 15, 2021 reforming the law of securities.

³ Article 2302/02 of the French Civil Code, created by the Ordinance No. 2021-1192 of September 15, 2021 reforming the law of securities.

⁴ Kodri, Fatima Zahra, op. cit, p. 216.

⁵ Article 2309 of the French Civil Code.

⁶ Article 04 of the Ordinance No. 2021-1192 of September 15, 2021, reforming the law of securities.

confidence a bank holds in a person, exemplified by its provision of a monetary amount for property acquisition.

Despite this foundational trust being crucial in the decision to extend credit, it alone is insufficient for the approval of loans, particularly long-term real estate development loans which are vulnerable to unforeseen circumstances that may jeopardize the lending bank's interests. Consequently, banks often require additional security from loan applicants, including the necessity of a guarantor within the context of a surety contract.

This study highlights that the provisions governing surety agreements do not fully align with the unique characteristics of bank loans, especially those tailored for real estate development, as evidenced by several critical observations:

- _ The legislation does not mandate that a guarantor's assets be located within Algeria, which complicates the enforcement process.
- _ The surety does not extend beyond the typical boundaries of a general guarantee, nor does it encompass associated risks adequately.
- _ The principle of consent foundational to the surety agreement is ill-suited for real estate development loans.
- _ The principle of banking secrecy adversely affects the guarantor's ability to give fully informed consent in the context of these loans.
- _ The banks' failure to clearly define the scope of the guarantor's obligations renders the commitment onerously burdensome.
- _ The lack of an option for prior recourse to the guarantor constitutes a significant impediment and reduces the level of protection available to them.

These points underscore the inadequacy of current legal rules governing surety as a personal guarantee in Algerian law, particularly in the banking sector, where surety contracts are often formed under unequal conditions between professional banks and natural person guarantors.

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