DOES THE CONSUMER GUARANTOR HAVE A RIGHT OF WITHDRAWAL *IURE PROPRIO*? A RECENT GERMAN EXPERIENCE AND A COUNTER-PROPOSAL*

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The reason for doubt

1. Neither Directive 2011/83 nor the Spanish Consumer Law gave any reason to believe that a non-professional guarantor could not be considered a consumer or that, at the very least, the surety contract concluded with the obligee was not subject to the specific consumer regulations. This natural application of consumer law to the surety relationship was called for by the new concept of consumer assumed by art. 3.1 LGDCU. No one then doubted that the regime of unfair terms, for example, or that of unfair commercial practices, were indisputably applicable to the surety relationship, whether or not the guarantor had received (almost always not) compensation paid by the financer for having requested the intercession of the consumer for someone else's debt.

2. A more difficult question was whether the consumer guarantor also had a right of *withdrawal* in the cases in which the LGDCU grants such a right to a consumer, if the guarantor (regardless of what the principal debtor had done) had provided a guarantee outside a commercial establishment or in a form of distance contracting. The understanding that a guarantor can be a consumer, even if the principal debt is not a consumer debt, finally prevailed. However, it was not resolved whether this principle implied that the consumer guarantor was entitled *to exercise its own right of withdrawal,*

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without being conditioned by what the debtor had done or would do with its own right, if it had such right.

3. The case has not had a notable practical repercussion in Spain. The market for consumer bonds is the consumer credit market. It is not usual for this contract to be entered into at a distance or at the debtor's domicile, at least when the debt instrument has to be documented in a notarial policy for enforcement purposes. Much more important would have been the case if the guarantor had had a right of withdrawal *in any form* of consumer credit, or if he could appropriate *iure proprio* the right of art. 28 of the Consumer Credit Law. The semantics and the structure of the Law strengthen the vehement suspicion that the legislator (not even the European legislator, thus STJUE 23 March 2000, As-208/98) has not wanted to recognize to the guarantor this faculty *iure proprio*. It is already relevant that it has not even imposed the need to carry out an evaluation of the solvency of the joint and several guarantors.

4. In principle, there would be no reason to doubt that, where the right of withdrawal is recognized for the consumer in general, the consumer who provides a guarantee can also avail himself of it, provided that the rest of the objective conditions of the law are met. This is inferred from the broad terms of arts. 59, 92 LGDCU and the lack of an express exclusion in arts. 93 and 103. But we also note that arts. 59 bis and 104 distribute the possible universe of "withdrawable" consumer contracts between those for the delivery of goods and those for the provision of services, as if *tertium non datur*. The suretyship does not belong to either of these classes, when it is the consumer who provides it in favor of a professional, with or without consideration. What to do?

The consumerist singularity of the surety bond

5. There are two idiosyncratic features of consumer bonds that could explain why the legislator did not intend to refer to this contract. First, the surety usually does not receive anything from the obligee counterparty, does not perform an act of *consumption* of assets with patrimonial value, and is not the final recipient of an asset generated in the market. Secondly, and as a consequence of the above, the surety's right of withdrawal would be exercised without restitution, because nothing would have to be returned. But the LGDCU considers restitution to be a kind of quasi-natural element of the institution. Of course, it could be objected that this feature is a statistical *factum*, but not a causal presupposition of the figure, and where there is nothing to return - as if the good had been lost by fortuitous event in the possession of the buyer - the withdrawal takes place without restitution. However, I am concerned at this point with the following consideration. The legislator *does not encourage withdrawal*, because all withdrawal entails bilateral costs and social costs; a new good leaves the market and a long shadow is cast over the future

of this almost new good in a circular economy that does not perhaps contemplate a second-hand market for such goods. In weighing up interests, the legislator has taken into account the fact that the consumer *does not always have the necessary incentives to withdraw*. But a consumer who withdraws at no cost from the deposit lodged a few days earlier does not internalize withdrawal costs. We would then say that *ceteris paribus* the surety will withdraw from his obligation with a probability so high that it borders on certainty; he suffers no return costs, everything is for him a gain in withdrawing.

6. The underlying of the surety provided by the consumer is usually a credit contract. If the principal debtor is also a consumer and the other objective conditions for the application of Law 16/2011 are met, the borrower will have a right of withdrawal of art. 28, which will benefit the guarantor if he makes use of the right. But Law 16/2011 does not grant a right of withdrawal to the consumer. As I have said before, how can it be justified that the lender has already transferred the credit to the debtor's account and that he is unexpectedly left without the guarantee of the surety? It would be necessary to recognize to him a right to retrocede the credit, by supervening disappearance of the guarantee. But in what scenario can it be said that the guarantor no longer wants or needs the surety, since in principle all that he receives is indisputably and only a contingent liability, without the consolation of having performed an act of consumption, of having indulged a whim? It is not the time that has elapsed that awakens the repentance of the initial enthusiasm. But those in favor of even recognizing an analogical application of Art. 28 argue with reason that it makes no sense to deprive the guarantor of the right of withdrawal when it would undoubtedly be up to the consumer *to agree to the direct and cumulative assumption* of the borrower's (no longer alien) debt. Let us see.

7. A consumer who cumulatively *assumes as his own* the financial debt of a third party (the father signs as co-debtor of the loan) has the protection of the borrower, because he is the borrower, and is jointly and severally liable for the payment, regardless of the ownership and amount of the right of return or the final destination of the amount credited. STS 417/2020, of July 10, deals with a conflict of this kind, whose reading is advisable. The situation described above is modified if a third-party *insider* of the debtor assumes a financial debt of another party *without context* when the loan or credit has already been drawn down and debited to the account of the borrower debtor. Under these conditions, the assumption of debt must be recharacterized as a guarantee. And then there is no contradiction between the guarantor and the assumer of another's debt, even if the latter materially performs the functions of guarantor. The creditor must expect the borrower debtor to withdraw from the contract, and if the credit has been granted jointly and severally, it is protected by the requirement of unanimity for the exercise of the withdrawal, which cannot take place pro parte. The debtor withdraws as co-borrower, and subject to the need for agreement between the debtors.

The proposals

8. We have held in Ch. 38 of the *Tratado de los Derechos de Garantía*, 4th edition, by CARRASCO, CORDERO Y MARÍN, that the consumer guarantor who meets the appropriate conditions designed in the legal niches enjoys the right of withdrawal under the same conditions as a buyer or final service provider. In the majority German doctrine and case law until 2020 the same interpretation prevailed. However, the German Supreme Court BGHZ 227, 72 has overturned this thesis, holding that § 312 of the German Civil Code only grants this right of withdrawal if there is a synallagmatic performance on the part of the entrepreneur, which is not the case for the professional counterparty to a surety agreement. This was the wording of § 312 (1) in force until 31.12.2021. But also the current wording does not promote the cause of a right of withdrawal in the surety, because the rule today is expressed in this way: *Die Vorschriften der Kapitel 1 und 2 dieses Untertitels sind auf Verbraucherverträge anzuwenden, bei denen sich der Verbraucher zu der Zahlung eines Preises verpflichtet.* That is, the consumer must have paid price, and the surety does not perform a performance similar to the payment of a price. First, because he does not "buy" his obligation to intercede as surety for a price. Second, because he is also not paying a price when he finally has to pay the obligee of the principal, since he fulfills the debt *intercedendi* causa, not *solvendi* causa.

9. In issue 222 of the *Archiv für die civilistische Praxis,* 2022, pp. 604-634, Mathias FERVERS has published an interesting work (*Bürgschaft und Verbraucherschutz: Irrwege und Auswege*) in which he takes a stand both against the doctrine of the Supreme Court and against the opinion that advocates the validity of a right of withdrawal in favor of the surety contracting under the conditions provided for by law (distance and off-premises contracts). I will reflect on the subject on the basis of this work, with which, in the end, I disagree.

Development: why withdraw from the contract?

10. There is no doubt that the guarantor's debit position is more exposed and his asymmetry with the financial counterparty more marked than that of an online buyer, since the latter receives at least a consideration for the price he pays. All that the guarantor receives under this contract is the risk of having to pay without consideration. The position of the guarantor being, on the face of it, more worthy of protection, there seems little justification for depriving him of a right enjoyed by the principal debtor. Unless the former has an alternative remedy.

11. The above comparison between guarantor and online buyer is not fruitful. This is not because the guarantor is not a contracting subject more exposed to contract risk than the counterparty to any bilateral contract, which he is, but because the marketing conditions

that existed for EU law to grant certain contracting parties a right of escape are conditions that are hardly imaginable in the contracting of personal or real guarantees. No sureties are signed at the consumer's home or by clicking on a distance selling portal. In other words, even if the application were granted, even analogically, it would have hardly had any effect on the contractual risk typical of a consumer guarantor. Therefore, it is not possible to bet high on the recognition of an exceptional right which, even if recognized, would have a very marginal impact on the surety bond market.

12. The right of withdrawal protects the consumer as a class because there are types of contracting, it is said, in which the consumer suffers a characteristic risk of dissatisfaction. In the two types of contracting for which withdrawal is provided there is a danger of haste in giving inauthentic contractual consents, weighed down by the compulsion to succumb to the apparent temptation advertised but not contrasted with the fact, by the risk of misrepresentation of the product, by the existence of a singularly coercive environment, and all this makes it advisable for the consumer to have a second chance. But there is no such risk in bailment. In fact, the risk of succumbing to the issuance of an undesirable bond is no greater whether the contract is signed inside or outside the obligee's financial establishment; it is even greater when the obligee is forced to sign in the bank's office. Because the surety's risk is not to be found in the precipitation of the spending impulse or in the physical coercion of the obligee, but in a specific bias of this type of contract, which is that the surety is not able to correctly anticipate the amount of his contractual risk, he incurs in overoptimism, sensibly or insensibly fed by both the obligee and the principal. The bias of underestimating the real risk leads the surety to underestimate the real probability that the day will come when it has to perform for the insolvent debtor. Little can be done to avert this risk by increasing the information duties of the employer. A consumer cannot succumb to the curiosity or fantasy of "buying bonds" in a credit establishment, whether inside or outside the institution. And this is not the most powerful idiosyncrasy as a contract of a surety bond provided by a consumer, but it is the ordinary bond of family or affectivity that unites him with the debtor in the relationship of coverage and that is the driving cause for which the guarantor cannot refuse to intercede. The consumer is not charged for bailing, because the family is not charged. Either he is an *insider* in the business from which the debt arises (e.g. is the spouse of the dominant manager of the family partnership) or is a family member with no involvement in the underlying business (parents or, to a lesser extent, children of the debtor).

13. Under such conditions, it is neither the coercion of the contracting space nor the surrender to a certain spending satisfaction for an imagined product or service that would justify a cooling-off time in the "purchase" decision. For the impulsive reasons that lead to the contracting of a surety bond are not mitigated by time, nor can the surety really act otherwise, even if granted a second chance. Time does not operate to destroy the purchase fantasy, because there was none when bailing. There is no significant before or after the

moment of perfection of the contract. There is no illusion that must be cooled with time. The time can work to intensify the fear of having guaranteed, but the surety is not normally in a position to venture a repentance within 14 days, at least as long as the principal debtor has not done the same, desisting from the purchase or the contracted service; but in this case the surety would not require the availability of a right of repentance of its own, the rule of accessory nature of any bond, which cannot exist without an effective principal obligation, is sufficient for it.

14. No substantial progress would be made even if we proceeded legislatively to create an autonomous right of withdrawal of the surety. Because the irrational motive for which the subject offers himself as surety still exists. The surety will continue to underestimate the risk of a bad outcome; in any case, the "internal pressure" will continue to weigh on him. In the end, the surety will only back out of the contract if it is lucky that the borrower does not sign or withdraws consent.

Pre-contractual waiting times

15. Someone has proposed that, as provided for in Art. 14.1 a) Law 5/2019, and in the Directive from which it derives, the consumer guarantor may not bind himself in any way before a certain period has elapsed. Mathias FERVER seems to agree with this idea, although he does not consider it an optimal solution. In my opinion, the remedy in question would be of little use if it is not properly configured. If the underlying claim has already been contracted, the same compulsion will exist on the surety, who cannot redeem his anxiety or his provoked overoptimism by the fact that fourteen days have passed. And if, as will be appropriate, the lender will not grant the credit until the waiting period has elapsed, and will then demand the joint signature, the situation ends up being the same as if the contract had been entered into presently and without waiver, either, for the guarantor.

16. Let us imagine two ideal possibilities. In the first, the guarantor has a 14-day waiting period and the debtor has a 14-day right of withdrawal under Art. 28 of Law 16/2011, to be counted from "the date of execution of the credit agreement". In the second, the debtor and guarantor have a 14-day waiting period. In the first case, if the lender delays the signing of the credit until the waiting period - which only the guarantor enjoys, in the first case - is exhausted, he will still have to count on the fact that, after the signing of the credit, the debtor has 14 days to withdraw; true, but he will not have to bear the additional risk of the guarantor already withdrawing from his obligation. If the debtor also has a waiting period, the expiry of that period does not deprive him of his right of withdrawal under the legal conditions, but the guarantor remains definitively bound, unless the borrower withdraws from the credit. Therefore, the same could be achieved by

conventional means (if the lender is willing to delay the signature for a few days) as would be the case if we were obstinate in recognizing the guarantor's right to withdraw *iure propio*. It would have enjoyed, equally, a time of reflection, not being unfair for the debtor to have two times of reflection, because the longer the time in which the debtor can withdraw, the better the position of the guarantor.

17. But there is another possibility. The surety provides a surety bond for a debt not yet contracted by the principal debtor (Art. 1852 CC), a debt that will be perfected when the principal debtor is definitively bound. It would be practically the same to the financer if the surety had a waiting period or could have withdrawn within 14 days from the signing of the bond, provided that the surety is already bound when the credit is granted, and without prejudice to the less probable withdrawal of the debtor himself, because he would have to make restitution. The hypothesis is hardly imaginable if the operation has to be documented in a policy. Moreover, it could be objected to this creditor-innocuous withdrawal that there is no sense in a right of withdrawal before the surety has "taken possession of the problem" that lies ahead, which only occurs when the borrower becomes indebted.

18. Unlike the debtor, who signs and receives the money, *changing his position in relation to his initial situation*, the guarantor does not change his position, which has always been the same since he signed the contract, and receives nothing to open his eyes. It is true that it would be a good idea in principle to grant him a waiting period before signing, but from what point would the waiting period start to count? Because the surety can always delay his signature as long as he wants, he is not compelled to sign, not even by pre-contract. If he can take as much time as he wants, it seems unwise for the law to grant him a certain time during which he cannot sign. He has all the time in the world *before signing* and no one is forcing him to sign on a certain date. But perhaps it would make sense if the *dies a quo* were to start to run from an intermediate moment which would be a significant anchor, for example, the moment when the documentation for the signature was already in the office and the parties had been notified. At this point, the surety is closer to its problem and may be able to change its position from what it had happily conceded when the contract was still a long way off, because now the state of affairs is not the same.

19. Under these conditions, the legal recognition of a well-constructed waiting period can become an interesting instrument for the defense of the consumer guarantor, who does not in principle have a right of withdrawal, nor should he have such a right *ceteris paribus*.

Notarial deed

20. Mathias FERVER proposes a remedy consisting in the requirement of notarial form, as in the case of mortgage credit. It is still possible to go further and make the granting of

the deed conditional on the prior "pass of review" by the notary's office in the equivalent terms of art. 15 of Law 5/2019. But I do not believe that the improvement is worthy of the many costs that this solution would entail. The mortgagor (on his own account, which is usually the case) is in a position to freely disassociate himself from his commitment, because he instantly renounces the credit and the mortgage. This mortgagor internalizes the costs of his decision, the loan is not issued and no one is liable for the repayment. But the personal guarantor cannot count on this possibility, because the credit follows its own destiny. Unless debtor and guarantor agree to withdraw in time, the debtor's final release operates on the credit granted; the debtor - of whom the guarantor is an *insider*, and sometimes with personal affection - is already indebted. And if the creditor has not wanted to dispose of the credit before the surety consents, the problem remains the same: there is no surety, but no credit either, and perhaps the first debtor (the daughter who insistently cries out to her parents for a surety) still wants or needs that credit. Finally, as I have already said, the proposal of a notarial public documentation may seem novel in Germany, but not in Spain, because the policy is a requirement for the procedural execution, if the creditor is a financial institution.

Challenging solutions

21. Finally, the consumer guarantor will be left with the meager consolation of perhaps being able to discharge the surety by means of a challenge on the grounds of error or *dolo in contrahendo*. Counterparties have an incentive to give the surety a false impression of the amount of risk they are assuming. Unlike the salesman who wants to place a sofa bed for the consumer, the financial creditor seeking a guarantor has nothing to boast about, because he lacks the product, and can only influence the guarantor's will through understandable reticence and obfuscation of the true risk. The same will happen with the guarantor's *insider* debtor, because many times the cure of his need or whim depends on the fact that he has been able to cajole the guarantor into believing that neither the operation is risky nor the solvency of the debtor is in doubt. *Bah, don't worry, this is a simple formality.*

End

22. But what do we finally do with the right of withdrawal and the guarantor, at least as long as the legislator has not constructed an alternative prior waiting period? In my opinion, if the creditor conveniently compensated the guarantor for the risk he runs (which has never been seen to happen in consumer credit), it is fair and efficient to recognize the guarantor a right of withdrawal, which will normally run parallel in time to that of the principal debtor himself. It is appropriate, as I say, not only because *the surety*

then has something to return (the risk premium), but also because the creditor cannot rightly argue that he is deprived of the fair remuneration of his credit (the surety bond), because the credit is repaid with interest, and the surety bond rewards the risk premium, not the credit.

23. In the rest of the cases, I propose this articulated solution. If the principal borrower does not have a right of withdrawal because it is a commercial debt (in the cases recognized by law), the consumer guarantor must have a right of withdrawal, because this is the fair price that the financier must pay for seeking the intermediation of the debtor's relatives to obtain security for commercial debts. Whoever gives commercial credit must have commercial guarantees or security interests provided by the debtor himself or his non-consumer *insider*. But of course, remember that this will occur only in bonds provided outside the financier's office or by means of remote communication, which is not much to concede either and again proves the scarce practical relevance of the problem discussed. Secondly, if the underlying credit is consumer credit, the surety, *insider* of the debtor, can have no better defenses than those available to the debtor himself. The surety may have a real justification when it is suspected that the patrimonial boundaries between family members are permeable, as they usually are. The obligee who risks losing the surety's security by abandonment could obtain the security lost in another, more burdensome way for the "guarantor": by having the family *insiders* jointly contract the claim and hold the same contractual position and the same basket of risks vis-à-vis the obligee. In other words, that in the concurrence of family insiders in the debt, the legal withdrawal period must count for all equally and no one can be disengaged in other terms or in another way than the nominal debtor is disengaged.