

Analysis: Impact of French Ordinance relating to guarantees and security in respect of annual information obligation

The Ordinance's extension to grantors of French law security interests in rem is likely to have a practical impact on lenders.

Key Points:

- The obligation of lenders to provide grantors of *cautionnements* (guarantees) of bank loans, etc., with certain information regarding the guaranteed obligations by 31 March each year has been maintained as part of the reform of security interests that came into effect on 1 January 2022.
- The uncertainty as to whether this obligation applies to guarantees granted under a law other than French law but where there is a nexus to France has not been resolved.
- The right to such information has been extended to grantors of French law security *in rem*.

French Ordinance n° 2021-1192 dated 15 September 2021 (the Ordinance¹) was issued on the basis of the law known as the 2019 “loi PACTE”² with a view to modernizing the legal framework applicable to guarantees and security in France. The Ordinance intended to bolster the competitiveness and efficiency of the French legal system with a more useful set of rules applicable to guarantees and security, which for the most part came into effect on 1 January 2022.

The Ordinance did not intend to substantially modify the current French legal regime applicable to guarantees and security, and commentators have already emphasised the limited scope of the Ordinance. However, some modifications regarding the annual information rules benefitting *cautions* (grantors) and the extension of such rules to grantors of certain security interests *in rem* are likely to have a practical impact on lenders.

This Client Alert addresses the annual information obligation, which is relevant in the context of acquisition financing. Notably, it does not cover any changes made by the Ordinance regarding *cautionnements* (guarantees) or security (whether or not *in rem*) granted by natural persons, which is rare in practice in leveraged financing transactions.

Undertaking re annual information of *cautions* (guarantors)

A *cautionnement* is a form of personal guarantee of the payment obligations of a primary obligor, which is regulated by articles 2288 to 2320 of the French Civil Code. It is distinct from *garanties à première demande* (first demand guarantees)³ and *lettres de confort* (letters of comfort),⁴ the regimes of which were not changed by the Ordinance.

The beneficiary of a *cautionnement* (guarantee) must deliver, at its own costs, to the *caution* (guarantor) at the latest on 31 March of each year information relating to the amount of principal, interest, and ancillary amounts due by the debtor under the primary, guaranteed obligation as at 31 December of the immediately preceding year, as well as the date of expiry of its obligations.

This obligation applies where the *cautionnement* (guarantee) is granted by an entity in favour of banks (*établissements de crédit*) or financing companies (*sociétés de financement*) to secure any “financial accommodation” (*concours financier*) granted to a business.⁵

Participants in the leveraged finance market had long hoped that, as part of the reform and modernisation of French security interests law, the above information obligations would be limited to natural persons, or to natural persons acting as consumers/not in the course of their business. However, the Ordinance dashed this hope.

Where the information is not provided as above, the beneficiary of the *cautionnement* (guarantee) loses the right to claim interest and other ancillary amounts that accrued between the period from the date on which the previous information was provided until the date on which the obligation is satisfied. In addition, as between the *caution* (guarantor) and the beneficiary of the *cautionnement* (guarantee), payments of any kind made by the principal debtor to the beneficiary of the *cautionnement* (guarantee) during such period shall reduce *pro tanto* the principal amount guaranteed by the *caution* (guarantor) in priority to interest and other ancillary guaranteed amounts.⁶

This information obligation has existed for decades. It was previously found in several codes and laws,⁷ and the primary relevant change made by the 2021 legal reform has been to include it in a new, single article of the French Civil Code.⁸

Article 2302 of the French Civil Code, which sets out such information undertaking, refers to any *cautionnement* that is granted by an entity in favour of banks (*établissements de crédit*) or financing companies (*sociétés de financement*) to secure any “financial accommodation” (*concours financier*) granted to a business. Although to our knowledge no case law has ever confirmed this point, the references to lenders qualifying as *établissements de crédit* or *sociétés de financement*, as well as to the form of financing that qualifies as *concours financier*, should exclude the application of such information obligation to *cautionnements* granted in the context of a bonds issuance.

Scope of information undertaking in an international context

Market participants often question whether the annual information obligation in favour of *cautions* should apply where, although the guarantee is not governed by French law, it provides in substance for credit support of the same substance as a French law governed *cautionnement*, and there is a nexus to France (e.g., the guarantor is a French company or the lender is a French bank or acting through a branch located in France).

In this respect, the French Minister of Justice gave a statement before the French Parliament in 1985⁹ to the effect that such rules should be considered as forming part of French “international public order”,

which would mean that these rules are to apply to protect French persons where there is a nexus to France, even though the guarantee is not governed by French law. This statement has never been officially contradicted.

Contra, one can argue that the information obligation under article 2302 of the French Civil Code applies to a guarantee obligation that is a *cautionnement* (regulated by articles 2288 to 2330/Chapter 1 of a subsection of the French Civil Code). Indeed, there is consensus that it does not apply to:

- a *garantie à première demande* (first demand guarantee), which is regulated by article 2321 of the French Civil Code and is in a different chapter of that subsection, nor
- a *lettre de confort* (letter of comfort, which catches a wide-ranging variety of contractual credit support features, some of which can be tantamount to guarantee obligations), which is regulated by article 2322 of the French Civil Code and also is in a different chapter of that subsection.

By the same token, it would be expected that a guarantee obligation created under a foreign legal system — even though it may create credit support obligations that in substance are similar to those arising under a French law *cautionnement* — is also not concerned by the information obligation, since by definition it is not regulated by articles 2288 to 2320 of the French Civil Code.

In terms of case law, certain French courts (such as the Colmar Court of Appeal in 2014¹⁰ and the French *Cour de cassation* (Supreme Court) in 2015¹¹) have held, in accordance with Rome I principles, that certain legal requirements applicable to French *cautionnements* are not applicable where the parties have not chosen to govern their contractual relationship by French law and the nexus to France is not sufficient. However, within the French civil law system, these decisions — while of important weight — do not constitute binding precedents, and one cannot rule out that French courts could take a different position on the same issue in the future. Further, scholars have expressed conflicting positions in this respect.¹²

Many market participants believe that this should be the correct position, and that the information obligation should not apply to guarantees that are not governed by French law. However, there is no absolute certainty in this respect.

Extension of information obligation to security providers

The Ordinance extended the information obligation requirement applicable to guarantors to encompass security providers granting security interests *in rem* (i.e., for third-party debt, where the security provider is not otherwise liable for the primary obligation).¹³

The official Report to the President of the French Republic, which accompanies the Ordinance, explains that this extension is justified by the fact that the security is given by the security provider for the debtor's obligations, and thus deserves an equivalent level of protection as if it were acting as *caution* (guarantor).¹⁴

Where the security interest *in rem* is granted under French law, the information obligation should be applicable without any doubt (and without any debate as the one applicable to guarantees subject to foreign law) (cf. above).

The situation is less clear where security *in rem* is granted under a foreign (non-French) law, but there is a nexus with France (such as a French grantor).

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Endnotes

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- ¹ Ordonnance n° 2021-1192 dated 15 September 2021 - <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044044441>. An "ordonnance" (ordinance) is a regulation prepared by the government on the basis of authority delegated to it by Parliament and which will have the force of law.
- ² Law no 2019-486 dated 22 May 2019 "*relative à la croissance et la transformation des entreprises*", article 60 https://www.legifrance.gouv.fr/jorf/article_jo/JORFARTI000038496205.
- ³ Regulated by article 2321 of the French Civil Code.
- ⁴ Regulated by article 2322 of the French Civil Code.
- ⁵ New article 2302 of the French Civil Code.
- ⁶ New article 2302 of the French Civil Code.
- ⁷ Cf. article L. 313-22 of the French Monetary and Financial Code, Law n° 94-126 dated 11 February 1994, article 2293 of the French Civil Code and article L. 333-2 of the French Consumer Code.
- ⁸ New article 2302 of the French Civil Code.

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- ⁹ Statement made before the French Senate (Upper House of Parliament) on 23 May 1985 in relation former article 48 of Law n° 84-148 relating to the anticipation and amicable settlement of companies' difficulties: http://www.senat.fr/comptes-rendus-seances/5eme/pdf/1985/10/q19851003_1825_1874.pdf.
- ¹⁰ Cour d'appel de Colmar, 1re ch. civ., sect. B, 4 juin 2008, n° 1B06/04201, Johann c/ Sparkasse Stauffen Breisach: JurisData n° 2008-367634, relating to the annual information undertaking where no choice of law had been made by the parties in the guarantee agreement and the related credit agreement was governed by German law and credit provided by a German financial institution.
- ¹¹ Cass. 1re civ., 16 sept. 2015, n° 14-10.373: JurisData n° 2015-020553; Bull. civ. I, n° 209; JCP G 2015, 1188, note P. Berlioz, et chron. 1222, n° 1, obs. Ph. Simler; JCP E 2015, 1587, note C. Kleiner et D. Percheron; RD bancaire et fin. 2015, comm. 191, obs. D. Legeais; RD bancaire et fin. 2016, comm. 39, obs. D. Robine; D. 2015, p. 2356, note L. Abadie et J. Lasserre-Capdeville; RDC 2016, p. 80, obs. M. Laazouzi, et p. 129, obs. F. Marchadier, relating to mandatory provisions to be inserted handwriting by the "caution" where the parties had elected Italian law to govern their contractual relationship and the lender was an Italian financial institution.
- ¹² E.g. Jurisclasseur Lexis Fasc. 10, 1st October 2019 (last update: 24 November 2021), considering this information obligation as forming part of French "international public policy rules" and therefore applicable to protect French parties even where the guarantee agreement was not governed by French law.
- ¹³ Article 2325 of the French Civil Code.
- ¹⁴ See <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044044298/>, See Section 1 (*Dispositions générales*).