CUATRECASAS, GONÇALVES PEREIRA

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I FRAMEWORK OF AVAL

Legal Framework of Aval

The aval consists of a personal guarantee of obligations that is typical of debt securities – in particular bills of exchange, promissory notes and cheques – and enormously important given how often the same is used in practice in the commercial activity, namely the provision of aval to commercial companies, makers of debt securities.

In order to correctly outline the legal framework of aval, one must take into account the Uniform Law for Bills of Exchange and Promissory Notes (*LULL*) and the Uniform Law for Cheques (*LUC*), which set forth the main traits thereof.

Simply speaking, the aval amounts to the scheme whereby certain assets become liable for the payment of third parties' debts, which means that the avaliseur (the provider of the security) becomes liable – albeit jointly and severally with the person for whom he has become guarantor – as debtor of its own debt, «appropriating» a third party's debt.

Despite the fact that it shares the same origin of the *fiança* (personal security), in terms of the quality of personal guarantee, the aval is different from the latter in two core points: first, because it remains autonomous from the obligation it guarantees, that is, it does not become an accessory obligation of the guaranteed debt; and second, because while the *fiança* may have a subsidiary nature (right of *excussio*), the obligation of the avaliseur is joint and several, as he is liable for the full payment of the security on a par with the other makers.

In conclusion, it is a personal security of hybrid nature, with its own legal framework, some of the general traits of which are close to the legal framework of the *fiança*, while others are close, albeit less strictly, to general guarantees.

Loss of capacity of Partner and maintenance of the security

Judgment of the Supreme Court of Justice No. 4/2013 of 21 January 2013:

To put it briefly into context, this was a case in which the appellant, partner of a private limited liability company became a guarantor and, upon assigning his shares in the company, requested the release of the guarantee provided under the contracts entered into (promissory note), effective from the date of receipt of the communication sent to the appellee to that effect, which he claimed has the same value of a termination.

In this case, the Supreme Court of Justice settled the case law as follows:

«Since the aval was provided without restrictions and unlimitedly, the termination thereof by the avaliseur is not admissible, even if the latter has assigned his share in the guaranteed company.»

This judgment to settle case law addresses the question of the (im)possibility of termination of the aval.

Indeed, since the aval is not a contract, the cessation of its effects does not depend on the simple unilateral statement of intention of the avaliseur; rather the obligation of the avaliseur must remain in place, regardless of the intention expressed after the aval is granted.

We emphasise that, being the aval autonomous and independent from the underlying obligation, the avaliseur does not become liable to the person for whom he has become guarantor, but rather to the holder of the bill of exchange or of the promissory note (depending on the debt security in question), it being irrelevant to the holder of the security whether the underlying relation between the avaliseur and the person for whom he has become guarantor is maintained or not.

Accordingly, the partner avaliseur must bear in mind that, considering that the aval has the nature, characteristics and purposes above, the termination of the same does not put an end to his duty to comply with the obligation to which he is bound, even if he no longer holds the corporate position he had when the aval was provided and without prejudice to the possible right of recourse against the person for whom he has become guarantor.

Therefore, the assignment of the holdings does not release the partner from his obligation as an avaliseur of the company.

Right of recourse between co-avaliseurs

Judgment of the Supreme Court of Justice No. 7/2012 of 17 July 2012:

The subject matter of this judgment was the right of recourse between co-avaliseurs where no agreement concerning such matter had been entered into. In the case under consideration, the global amount had been paid by two co-avaliseurs in the context of enforcement proceedings for the payment of a promissory note. Despite the fact that no agreement was in place concerning the right of recourse, an action against the other co-avaliseurs was brought by the ones who had made the full payment in order to have each avaliseur settle his or her proportional part of the debt.

In this case, the Supreme Court of Justice settled the case law as follows:

«Unless otherwise agreed, there is a right of recourse between avaliseurs in the same promissory note, which follows the legal provisions established for joint and several obligations ».

It should be mentioned that this question is the subject of ample debate both in the doctrine and in the case law, and this because only the liability of the avaliseur to the creditors and the exercise of his right to be reimbursed by the person for whom he has become guarantor are regulated, while the law is silent regarding the internal rules between several avaliseurs, in particularly the possible exercise of the right of recourse.

There are no doubts that the co-avaliseurs can expressly set out the terms and conditions of their responsibility in the scope of their internal relations, as well as the conditions of the possible exercise of the right of recourse. This agreement is only valid between the co-avaliseurs, but is not enforceable against the creditor, who can continue to seek the full payment from any of the co-avaliseurs.

This question has often arisen where no such agreement is in place (the majority of situations). In its last position concerning this matter, the Supreme Court of Justice stated that there are no reasons to exclude the applicability to the exercise of the right of recourse between co-avaliseurs of the legal framework established for joint and several obligations, for which reason the right of recourse between co-avaliseurs does not depend on any express covenant.

This necessarily implies that the right of recourse and the consequent allocation of the liability in accordance with the presumption arising from Article 516 of the Civil Code are both admissible.

In spite of the above, in situations of joint aval, the co-avalists would be well advised to agree on the rules of functioning of the right of recourse, thereby avoiding any possible doubts that may arise should any of the co-avalists wish to exercise his or her right of recourse.

Effects of insolvency on aval

Judgment of the Supreme Court of Justice of 26 February 2013:

In this judgment, the central question was whether the avaliseurs, faced with the intention of the creditor in enforcement proceedings (the Bank) to claim the payment of the promissory note provided to guarantee the obligations arising from a factoring contract, could resort to the plea of the insolvency plan approved in the meantime, which

provided for the recovery of all the claims in an amount lower than the one initially foreseen.

In this case, the Supreme Court of Justice settled the case law as follows:

"It should therefore be concluded that the approval of the insolvency plan of the company maker of the promissory note (…) cannot be relied on by the avaliseurs, the appellants in these proceedings, against whom the Bank that holds the said promissory note brought these enforcement proceedings.

It would not be reasonable to prevent the creditor from bringing an action against the avaliseurs, who are not insolvent, and for whom it is not impossible to comply with the obligations freely assumed, in light of the autonomy of the obligation of the aval provided by them".

The position of the avaliseurs after the approval of the insolvency plan of a company that is the maker of a debt security guaranteed by third parties should then be clarified.

Again, and repeating what was said above, in this situation one must stress the autonomous and independent character of the relation that arises from the aval, which, basically, translates into the obligation to pay the debt security.

This obligation is known as cambial obligation, a relation that is set up to serve as guarantee to the underlying relation, between the debtor and the creditor and to which the avaliseur is totally unrelated.

It is in connection with the underlying relation that the approval of the insolvency plan arises, which fact constitutes a significant change of the contours of this relation. However, the fact that the underlying relation changes does not imply that those effects have any legal effect over the cambial relation, that is, the avaliseurs.

In short, the avaliseur cannot rely on the effects arising from the insolvency plan approved, since it is only the insolvent entity that benefits from those effects, in accordance with the provisions of Article 217(4) of the Code of Insolvency and Recovery of Companies, while the avaliseur remains liable for the entire amount of the debt security.

II NATIONAL LEGISLATION

Regional Regulatory Decree no. 5/2014/M. D.R. (Portuguese official gazette) no. 68, Series I of 2014-04-07

Approves the process of disposal of shares owned by the Autonomous Region of Madeira on SILOMAD - Silos da Madeira, S.A.

Resolution of the Council of Ministers no. 30/2014. D.R. (Portuguese official gazette) no. 69, Series I of 2014-04-08

Approves the specifications of the public tender for the reprivatisation of Empresa Geral do Fomento, S. A., foreseen in the Decree-Law no. 45/2014, of 20 March.

Order no. 4950/2014. D.R. (Portuguese official gazette) no. 69, Series II of 2014-04-08

Granting of the State personal guarantee to the legal obligations entered by EPAL - Empresa Portuguesa das Águas Livres, S. A., with the European Investment Bank for the partial financing of the project "EPAL III".

Decree-Law no. 55/2014. D.R. (Portuguese official gazette) no. 70, Series I of 2014-04-09

Creates the Systemic Sustainability Fund for the Energy Sector.

Order no. 5026/2014. D.R. (Portuguese official gazette) no. 70, Series II of 2014-04-09

Determines the list of agricultural banks participating in the System of Guarantee Fund of Mutual Agricultural Credit.

Order no. 5174-A/2014. D.R. (Portuguese official gazette) no. 71, 2nd Suplement, Series II of 2014-04-10

Declares the strategic interest in the Investment Project of Volkswagen Autoeuropa, Lda. regarding the framework of the investments eligible for financial support of the Innovation Incentives System.

Resolution of the Council of Ministers no. 32/2014. D.R. (Portuguese official gazette) no. 80, Series I of 2014-04-24

Approves certain conditions of the public offering of REN - Redes Energéticas Nacionais, SGPS, S. A., and the specifications of the direct institutional sale.

Resolution of the Legislative Assembly of the Autonomous Region of Azores no. 12/2014/A. D.R. (Portuguese official gazette) no. 80, Series I of 2014-04-24

Recommends the Regional Government to merger the companies TRANSMAÇOR - Transportes Marítimos Açorianos, Lda. and ATLANTICOLINE, S. A.

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