

Bank guarantee

Imprecise designation of the principal

Par Marie de Gottrau le 28 April 2021

In a ruling [4A 223/2020](#) handed down on 30 October 2020 concerning a bank guarantee, the Federal Court had the opportunity to consider the consequences of an imprecise designation of the principal in the beneficiary's request for payment, and the consequences of the fact that the guarantee designated as a party to the underlying contract not the principal but a sister company of the principal.

An independent guarantee had been issued by a bank based in Austria on the instructions of a limited liability company based in Austria ('aa.bb cc___GmbH, Austria', the principal) in favour of a Swiss public limited company (the beneficiary). The guarantee, for a maximum amount of CHF 233,949.98, had been issued to cover defects arising from a construction contract (the underlying contract) concluded between the beneficiary (the client) and a sister company of the principal ('aa.bb cc___GmbH, Switzerland), based in Switzerland, for the construction of two residential buildings on a plot of land in Switzerland. Payment of the guarantee amount was subject to the submission of a written request from the beneficiary stating that '*our client* has not fulfilled its contractual obligations'.

The beneficiary invoked the guarantee against the bank, claiming that 'aa.bb___ GmbH' had not fulfilled its contractual obligations.

Was the call on the guarantee invalid because the beneficiary's statement did not specify the party that had breached its obligations under the construction contract ?

Under the principle of strict interpretation of guarantees (**Garantiestrenge**), the right to payment under the guarantee is based solely on the wording of the guarantee : the call on the guarantee must fulfil only (but also all) the conditions stipulated in the guarantee clause ([ATF 138 III 241 cons. 3.4](#)).

In this case, while the preamble to the guarantee expressly referred to the underlying contract between the beneficiary and the principal's sister company ('aa.bb cc___GmbH, Switzerland'), the guarantee clause simply stated that the beneficiary had to certify that '*our customer*' (i.e. the bank's customer) had not fulfilled its obligations. The designation of the co-contractor as 'aa.bb___ GmbH' in the beneficiary's payment request was admittedly imprecise. However, the request clearly indicated the guarantee number, the amount of the guarantee and the name of the beneficiary, which corresponded to the wording of the guarantee instrument. Our High Court held that this imprecision could be regarded as a mere spelling mistake, since the

beneficiary's actual intention was to argue that the underlying contract, described in the guarantee, had not been properly performed by the contractor, i.e. the party that had undertaken to construct the two buildings (and not any third party). Consequently, the appeal was formally in accordance with the payment conditions set out in the guarantee.

Could the beneficiary's claim for payment be **manifestly abusive** on the grounds that the beneficiary had **no contractual claim** against the principal ? The Federal Court recalled that the independence of the guarantee from the underlying contract is limited where the claim constitutes an abuse of rights ([Art. 2 para. 2 CC](#)) ; in such a case, the guarantor has the right (but also the obligation, vis-à-vis the principal) to refuse payment ([ATF 138 III 241 cons. 3.2](#) ; [ATF 122 III 321 cons. 4a](#)). In the case in point, the guarantee instrument did indeed relate to the underlying contract for work and services concluded between the beneficiary and a *sister company* of the principal (aa.bb cc____GmbH). The principal claimed that it was not a party to this contract and therefore that the beneficiary had no claim against it which it could invoke in order to invoke the guarantee. However, following the conclusion of the contract for services, the principal had nevertheless behaved as if it were the contractor bound by that contract, so that its actual intention, which was to bind itself to the beneficiary, was established. The Federal Court also held that it was contrary to good faith for the principal to have a guarantee issued to cover the non-performance of the underlying contract and then, when the guarantee was invoked, to claim that it was not bound by that contract. The beneficiary had therefore not abused its right by invoking the guarantee on the basis of defects in the construction project for which the guarantee had been issued.

Finally, the Federal Court examined whether the beneficiary's claim could be considered abusive because it was based on defects that were not covered by the guarantee. The structural analysis of the buildings delivered by the contractor on the basis of the underlying contract was not the responsibility of the principal, since the beneficiary had itself concluded the contracts relating to the structural analysis with third parties. It could therefore have been argued that it was not abusive to invoke the guarantee on the basis of defects relating to the structural analysis. The Federal Court answered in the negative, arguing that the list of defects submitted by the beneficiary to the principal showed various types of defects that did not only concern the structural analysis. In this respect, the invocation of the guarantee was not manifestly abusive.

In conclusion, our High Court found that it was irrelevant whether the beneficiary's claims arising from the underlying contract were formally directed against the principal. What is important for triggering the payment obligation is that the beneficiary's claims arise from the contract referred to in the guarantee instrument as the contract covered by the bank's commitment.

This ruling illustrates the importance of designating the underlying contract in the guarantee instrument. Even if the guarantee is independent, it is always linked to the underlying contract. This is even more so in the case of a first demand guarantee, payable on simple request for payment accompanied by a declaration that the principal has failed to fulfil its obligations, as the reference to the underlying contract in the guarantee makes it possible to determine whether the breach alleged by the beneficiary relates to the latter. Ultimately, it is more important to know what service the bank is required to cover than to know who is liable for that service. It is therefore crucial that the underlying relationship can be clearly identified in the guarantee agreement.

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