CENTRE DE DROIT
BANCAIRE ET FINANCIER

Bank guarantees

The Court of Justice of Geneva recognises a case of abusive appeal

Par Marie de Gottrau le 3 November 2021

In a decision of 24 November 2020 (ACJC/1653/2020), the Court of Justice of Geneva ruled on the validity of a request for payment made under a bank guarantee. The peculiarity of the ruling lies in the fact that the request did not come from the beneficiary itself but from a third-party assignee, which had then merged with the principal. The Court of Justice concluded in essence that, in addition to being formally non-compliant, the appeal to the disputed guarantee was also abusive.

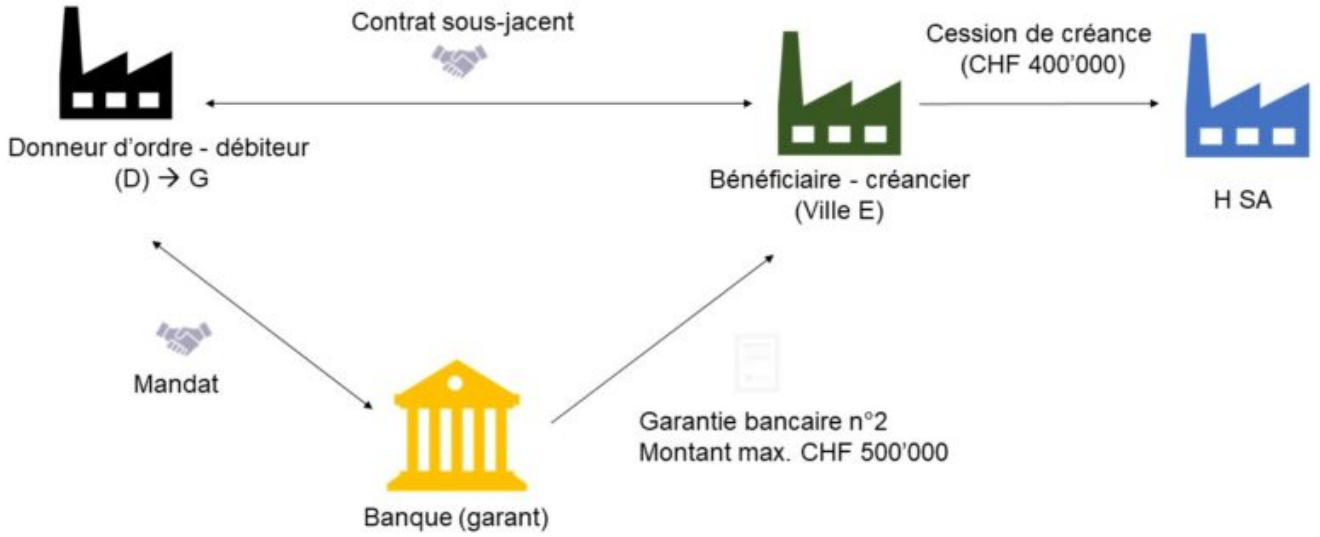
The facts, which are convoluted to say the least, can be summarised as follows :

D ('principal') granted the City E ('City' or 'beneficiary') the right to use its slaughterhouse in exchange for a loan of CHF 500,000 without interest. To guarantee repayment of the loan, D mandated a bank ('guarantor') to issue an independent guarantee ('guarantee no. 1') an amount of CHF 500,000 in favour of the City, payable upon presentation of a written request for payment and a declaration that (a) the easement agreement was terminated on time and (b) the amount demanded under the guarantee was not paid when due.

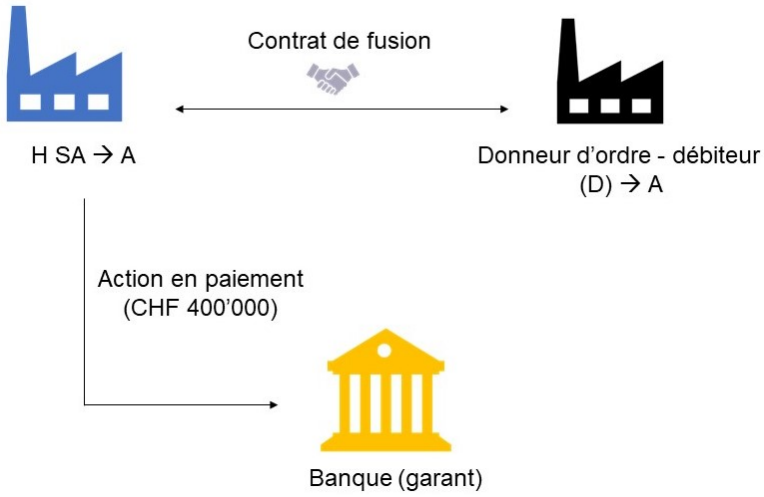
D was then acquired by G, so that a second guarantee ('guarantee no. 2') was issued in favour of the City. The second guarantee essentially repeated the content of the first one but designated G as the contracting party instead of D. Guarantee no. 1 was cancelled.

In view of D's refusal to repay the entire loan after the termination of the easement contract, the City invoked the guarantee for the balance (which amounted to CHF 400,000) with reference to the contract concluded with D. The guarantor refused to pay it on the grounds that the payment terms had not been met, insofar as the underlying contract covered by guarantee no. 2 had been concluded with G, not with D.

The City was then compensated by H SA ('H') in the sum of CHF 400,000. In return, the City assigned to H its claim against D as well as its claim for payment of the guarantee.



H, relying on the aforementioned assignment of claim, sued the guarantor for payment of CHF 400,000. During the first instance proceedings, H merged with D (itself owned by G), which then took over all of H's assets and liabilities. D, now the plaintiff, changed its name to 'A'.



The action having been dismissed, the Court examines on appeal whether the Tribunal was right to refuse to award the amount claimed to A.

The Court begins by recalling the principles governing independent guarantees. Thus the principle of strict formalism requires that, in the relationship between the guarantor and the beneficiary, only the content of the guarantee be taken into consideration. The principle of the prohibition of abuse of rights (art. 2 para. 2 CC) is also invoked as a limitation to the principle of independence, exceptionally allowing the guarantor to refuse the payment of a guarantee when the beneficiary pursues an objective completely unrelated to the basic contract.

Firstly, with regard to determining whether the call on the guarantee was compliant, the Court emphasised that the City should have invoked in its request not the contract concluded with D,

but the one concluded with G, given that guarantee no. 2 had been issued to cover the risk that G would not repay the loan. It adds that the City had indeed been notified of guarantee no. 2, and had not expressed any reservations regarding this new guarantee. Given the independence of the guarantee, it was not for the guarantor to inquire into the actual situation of the legal relationship between the parties before issuing the second guarantee. In particular, it was not supposed to ensure that the City had accepted that G would replace its original debtor (D) under the loan agreement. The Court concluded that it was in accordance with the principle of strict formalism that the guarantor rejected the beneficiary's appeal, which did not refer to the contract covered by the guarantee by incorrectly designating D as the debtor.

Secondly, the Court enquires as to whether A is abusing the law by claiming CHF 400,000 from the guarantor. It notes that since the City has fully recovered its claim arising from the loan agreement (obtaining CHF 100,000 from D and CHF 400,000 from H), the risk covered by guarantee No. 2 has disappeared. Furthermore, after the absorption of H, A finds itself both debtor and creditor in view of the underlying contract. Indeed, A (which is none other than D under its new company name), which has a debt in repayment of the loan balance, has a claim for payment of the loan balance after the merger with H (H having had this claim assigned to it by the City). In short, the Court holds that A cannot demand payment of CHF 400,000 to protect itself against a risk (i.e. that of not being repaid the loan), which would be tantamount to misusing the guarantee for purposes other than those for which it was intended. For this reason, A's behaviour is abusive.

This judgement is unique in that the two parties to the underlying contract have substituted themselves for third parties who intervened in the guarantee call process in place of the latter. The situation is therefore extremely delicate for the guarantor bank, which risks never recovering the sum paid if the guarantee is called. The Court showed common sense and emphasised the importance of the principle of strict formalism, emphasising that changes in the legal relationships that occurred after the issue of the guarantee should not be taken into account. The objection of abuse of rights, although upheld as superfluous, also made it possible here to protect the bank against the actions of A.

That said, it is regrettable that the Court did not examine the question of the standing of A, who acted as claimant and then as appellant even though the guarantee on which she based her claims had been issued in favour of the City.
