Surety guaranteeing payment of a percentage of the purchase price: not as good as it seems

A common hypothetical case of suretyships, the seller is, no doubt, unaware of the drawbacks.

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§ 1. A surety guarantees, ordinarily (collateral security without the benefit of excussion), *x per cent of the debt of the purchase price* owed by the buyer to the seller. Let us assume that this *x per cent* is a considerable part of the contract price, although not the entire contract price. Suretyships, as is known (Art. 1827 CC), are interpreted restrictively and in the present case it must be concluded, after duly interpreting the contract, that the surety is obliged to pay a part of the *purchase price*, not a part *(x per cent)* of the *liability that the seller assumes under the contract*, such as late payment interest or damages resulting from the total termination of the contract due to a breach by the buyer. It is assumed that the buyer is the principal debtor for one hundred per cent of the debt, i.e. the amount of the price is not distributed between the two debtors.

§ 2. The surety must know that, unless otherwise agreed, all payments made by the buyer to the seller are imputed to the unsecured part of the debt, so that such payments will only begin to reduce the debt of the surety once the entire unsecured debt has been settled.

§ 3. The buyer fails to pay the debt when due and the surety is called upon to pay the x per cent that

constitutes his guarantee. This debt is due irrespective of whether the buyer has entered into insolvency proceedings, where the seller has no real possibility of collecting the unsecured balance. The payment will produce a *partial subrogation in the guarantees and ancillary rights* that the seller had against the buyer, although Article 1213 of the Civil Code provides that this subrogated guarantee is of second rank to that of the seller.

§ 4. The surety, having *paid all that he owed*, can bring against the buyer the action for contribution of Article 1828 of the Civil Code without waiting for the seller to collect the rest of the price (even if the buyer has entered into insolvency proceedings, because in this case Article 264 of the Insolvency [Recast] Act would not apply), given that the guarantor has paid *all that he owed and not only part of what he owed*. The surety who paid x per cent of the price cannot, however, be subrogated to the *remaining claim of the seller*, because the surety cannot claim contribution against the debtor at the expense of the price still owed to the seller.

The surety guaranteeing (partial) payment of the price does not secure the debtor's liability

§ 5. The seller is right *not to terminate* the contract of sale for non-payment of the remainder of the price. If he terminates the contract, the suretyship of x per cent of the price is also terminated, there will be no cause for the surety's payments, restitution will be required and the seller cannot claim from the surety any amount for losses caused to the seller by the termination, not even losses for having lost the cover of the suretyship. Therefore, our seller must pursue the effective fulfilment of the contract, within or outside insolvency proceedings of the buyer.

§ 6. Since the seller is bound by the duty of o perform, he is obliged to make the buyer an offer of delivery of the thing (if he still has it) and consignment. However, as immovable property cannot be consigned in manual terms, the seller is *free by consignment* when he appoints a notary and a date to execute the deed, which he will make conditional on the remainder of the price being paid at the time in question.

§ 7. The debtor does not attend the appointment or, if he does attend, does not offer the remaining payment. The transfer of ownership of the property does not take place. An impasse is created, because the seller will not react by terminating the contract. He can only wait. In the meantime, the property remains his property, with all the legal and material costs and risks of ownership, in which the seller no longer has any interest.

§ 8. The seller is not obliged to offer in payment and in a deed to the surety the x per cent of the ownership of the property, because the surety is not subrogated to the delivery claim, which (although conditioned) appertains to the buyer.

§ 9. Finally, it seems that an anomalous situation can be perpetuated *sine die* in which the seller holds x per cent of the *purchase price*, but retains (whether he likes it or not) full ownership of the property.

§ 10. We could imagine a way out as follows: when all the reasonable time limits have elapsed without the buyer having paid, and faced with the threat of the surety filing a claim of restitution for unjust enrichment against the seller, it occurs to the seller to agree with the surety the *abandonment* of the entire property, with or without the surety's commitment to pay the rest of the price still owed. But this strategy is also negative: if such a thing is agreed, the surety must know that he loses the possibility of obtaining restitution of the price. For the seller can only carry out an abandonment if he

explicitly or *implicitly* terminates the contract with the buyer: he will then have to return to the surety everything collected from him as price, unless the latter accepts the transaction, which he will not do without a discount of the total price; and this where the surety has an interest in the property.

§ 11. If the property has already been transferred to the purchaser before payment is made, the situation changes little. The seller will have no interest in settling whether he has collected or can collect the x per cent of the price owed by the surety, but neither does he have to figure out how to prevent the surety from claiming the return of the price for the seller's enrichment.

§ 12. *It will never be in the seller's interest to have a suretyship for part of the purchase price, but a partial suretyship for the debtor's liability arising out of the sale or non-performance.*