If and within which limits the open-end guarantee is invalid

1. – Once again the Court of Cassation has categorically confirmed the validity of the open-end guarantee.

Against so much certainty, there still remains a huge area of perplexity, shown by the frequency with which the question is raised. This depends on the fact that the state of opinions does not seem, in my humble opinion, the most satisfying; and beyond the opposition of radical theories, the subject deserves new detailed examination and more perspicacious thought. This should hopefully occur in a short period of time and this essay aims to offer a contribution for a new mediation on the subject.

The problem is usually solved with an exclusive regard for banking activity and the guarantees and trust of these corporations, which give life to economic development. However, this presents a major limit because the problem must be set in its most general terms, i.e. whoever is the guaranteed creditor and whatever subjective guarantee or trust it encourages. The problem must be approached with regard to the contractual model in itself, as an institution of common law and not a particular category of business. From the specificity of certain motivations, there comes the suspicion that the solution could be different if the guaranteed creditor were any subject. And this would not be fair or coherent.

2. – The main distinctive features of the open-end guarantee are given by the fact that it guarantees unlimitedly any credit not only in the present, but also in the future, not only direct, but also direct. with a given debtor, even for guarantees stood by him, in the future to the same creditor to guarantee third parties. A further characteristic note is given by the fact

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From « Il Foro italiano », 1985, I, p. 507 and ff. ad from « L'Espressione monetaria nella responsabiltà civile », Cedam 1994.

The above annotates the following decision:

COURT OF CASSATION. Section I, 31.8.1984, no. 4738, President Sandulli, Reportiong Judge Racchi, Public Prosecutor Caristo (Company bankruptcy). INCES v. Credito Lombardo: « The guarantee stood generally in favour of a bank (so-called open-end guarantee) in guarantee of any present and future obligation of the guaranteed debtor is not null by indeterminacy or indeterminableness of the object. The open-end guarantee that contemplates the waiver of the guarantor to forfeiture under article 1957, Civil Code, is not null. »

that the guarantor dispenses the creditor beforehand of the duties of prudence and diligence implicit in articles 1956 and 1957 Civil Code and the duty of information.

The most striking fact is that the guarantor thus assumes any risk of any entity that the creditor, even in the future, may have him rum, with giving credit to the debtor without any consent or authorization (1).

This aspect does not seem to be surmountable with the argument suggested by some of the pronouncements that the guarantor is often interested, directly or through mediation, in the credit obtained from the debtor. Finding a perennial association of interests such as to justify a permanent community of fates, moreover in a one-way direction, of the guarantor and of the guaranteed debtor is a strained interpretation, in the case in which the debtor stands a guarantee through a bond of marriage (2), kinship or friendship (3) or a non-totalitarian shareholder and often not even a director of a company (4). Even where the guarantor is a shareholder and director, it is not certain that he will remain so during the evolution of the guaranteed relationship, nor that there is a harmony of interests or that the mechanism guarantees for the wish shown in the interest of the debtor company holding some consideration of his contrary interest as a guarantor, as the antagonism of interest is in the things. In general, it is not a good rule to transform the limited liability of shareholders into the unlimited one, such as to distort the essence of the modern company of capital (5). The faculty of recession from the guarantee is not even an adequate remedy to a consequence of the kind mentioned above, because until that time the guarantor will respond for every extension of the risk that has been added in the meantime and often the revocation ensues the counter-productive effect of being immediately summoned to return, without extension, the borrowed sums. It is unimaginable how the guarantor, against such an harrow-

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(1) Also G. Stolfi, *In tema di fideiussione generale*, in Riv. dir. civ., 1972, I, pp. 529 ff.

(2) On this point see the review in Rascio, *Fideiussione « omnibus »* in *Dizionario del diritto privato*, edited by N. Irti, *Diritto civile*, Milan, 1980, I, pp. 389 ff. With reference to the guarantee stood by a spouse: Court of Cassation, 15th January 1973, no. 118, *Foro it.*, Rep. 1073, under *Fideiussione*, no. 4.

(3) With a parent: Court of Cassation, 11th October 1960, no. 2647, *Foro it.*, Rep. 1960, under Fideiussione, no. 19, in full in *Banca, borsa, ecc.*, 1960, II, p. 506; and a sister: Court of Florence, 17th December 1962, *Foro it.*, Rep. 1963, entry cit., no. 21.

(4) The minority shareholder often does not decide and is not even informed, although a guarantor. With regard to this particular case: Court of Cassation, 28th April 1975. no. 1631, *Foro it.*, Rep. 1975, entry *Fideiussione*, no. 15.

(5) This is far less appreciable with respect to that of the shareholders of a partnership, which is unlimited towards all creditors and not towards some, such as banks, as in our case. Here, everything is resolved in a race against time to guarantee a chronological precedence on injunctions and mortgage registrations, only then to try to achieve an extension of guarantee, under threats of bankruptcy and revocations.

ing perspective, is induced to leave things as they are and also to run the further risks that the creditor will deem have him run, as he is now the arbitrator of his fate.

3. – The validity of the agreement is evaluated in general and also by the decision under the unlimited profile of a possible nullity due to the indeterminacy or not of the object under article 1346 Civil Code and the potestative character or not of the guaranteed creditor, to extend the risk covered by the guarantor (6).

The validity of the dispensation of the creditor from the limits under articles 1956 and 1957 Civil Code and from the implicit duties of prudence and diligence on which we will dwell below, is taken for granted, from this decision as from others.

The open-end guarantee would in any case be legitimate, according to the decision. even from the different point of view of an independent contract of guarantee, the admissibility of which in our legal system is confirmed.

To follow the order of these subjects, we will begin with that relative to the determinability of the object. The Court, after having said that guarantee can be stood for future debts under article 1938 Civil Code, states precisely that these must. however, be at least determinable if not determined. This is translated into the determinability of the risk of others that the guarantor assumed at his own responsibility and from which the guaranteed party wants to be held harmless, and which is the object of this, as of every agreement of guarantee.

There is no doubt that the risk for non-fulfilment of future debts, must be determined or determinable, equally to the latter: in insurance as well, and even in gambling, the risk is never indeterminable (7).

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(6) The decision above confirms the decision of the Court of Appeal of Milan on 23rd 1982, which in its turn reformed that of the Court of Milan of 6th September 1979, i.e. the decision that had declared null and void the open-end guarantee remained isolated. The validity of this type of guarantee is confirmed, by consolidated case law; Court of Cassation, 5th January 1981, no. 23, *Foro it.*, 1981, I, p. 704; 27th January 1979, no. 615, id., Rep. 1979, under *Fideiussione*, no. 8; 1631/75; 6th February 1975; no. 438, id., Rep. 1975, entry cit., no. 17, amongst the many. On the subject in legal literature: FRAGALI, *Fideiussione*, entry in *Enciclopedia del diritto*, Milan, 1968, XVII, pp. 346 ff.; Id., in *Commentario* edited by Scialoja and Branca, Bologna-Rome, 1962, under articles 1936, 1959; Id., *La fideiussione* generale, in *Banca borse ecc.*, 1971, I, p. 321; RAVAZZONI, *La fideiussione*, Milan, 1967; Id., *Fideiussione*, entry in *Novissimo digesto*, Turin, 1961, VII, p. 274; RESCIGNO, *Il problema della validità delle fideiussioni cosiddette «omnibus»*, in *Banca, borsa ecc.*, 1972, II, p. 92; STOLFI, cit.; DE MARCO SPARANO, *La fideiussione bancaria*, Milan, 1978; SALVESTRONI, *La solidarietà fideiussoria*, Padua, 1977; RASCIO, cit., MACCARONE, *Contratto autonomo di garanzia*, in *Dizionari*, cit., *Diritto commerciale*, Milan, 1981, III, p 379; PORTALE. *Fideiussione e «Garantieverlrag»* in *Le operazioni bancarie*, Milan, 1978, II, p. 1054.

(7) Thus J. HUIZINGA, *Homo ludens*, Turin, 1982, p. 60; VALSECCHI, *Il gioco e la scommessa*,

The Court correctly states that these future debts, of which the risk for non-fulfilment is the question, must be determinable on the basis of a criterion previously agreed by the parties, and capable of « identifying in a rigorously objective way the principle relationship of obligation ». One example in the banking field, in this respect, is given by the guarantee given in guarantee of a letter of credit still to be granted and yet being opened on the basis of a request that has already been put forward. The credit here is future, because it will rise only after the credit has been granted and its use, and yet it is objectively determinable with reference to the request which will also act as a maximum amount.

But can the same be said of a general reference to some unknown credits, for which credit lines, which will be requested and granted in the future, of which nothing is known and that is if, when and for which amounts they will be as in the case of the open-end guarantee?

The court, in line with its constant orientation, replied affirmatively, saying that « the object of the guarantee as far as future debts are concerned, is determinable here *per relationem*, with referent to the object of the obligations which will be taken on towards the bank by the guaranteed debtor » (8). There cannot be agreement with this order of ideas, in my opinion. A general reference « to all the obligations that will arise for the principal debtor! cannot make up a criterion of determination *per relationem*. This is a blank reference to future debts that are to determine themselves and therefore a fine petition of principle. The decision then takes on, as an element of reference for the determinability of this future debt (and of the risk of its non-fulfilment taken on by the guarantor), the content of the juridical agreement from which the aforementioned debt derives. A first remark concerns the time when this determinability must recur. There can be no doubt that both the debt and the risk must be determinable at the present, i.e. at the time when the guarantee is stood (now for them) and not be determinable in the future and when the agreement exists, with that content from which that debt and that risk will arise (then for then).

There must therefore be this requisite in the present, when the guarantee is stood and not in the future, when it operates (argued in accordance with articles 1225, 1346, 1467 Civil Code) (9).

The error in the current opinion is that of understanding the determinability as a mere judgement *a posteriori*, therefore it always recurs, and not

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Milan 1954, pp. 30-32: V. CALANDRA in *Commentario* edited by Scialoja and Branca, Bologna-Rome, 1966, under article 1898, pp. 264 ff.

(8) Amongst the many, Court of Cassation, 4th March 1981, no. 1262, *Foro it.*, Rep. 1981, under Fideiussione, no. 15; Court of Cassation, 23/81 and 615/79 where the concept of determinability is so vague as to write that « in some way (sic!) the limit of the obligation has to be determined ».

(9) Also STOLFI, *op. cit.*, pp. 532, 533, 534 and 537.

as a judgement of posthumous prognosis *ex antea* (i.e. referred to the conclusion of the contract of guarantee) as it must be. This means that the operation of determination *per relationem* will be formulated afterwards. but the determinability must recur beforehand, as is the case of every decision of prognosis. From this point of view, the future determinable debts only in the future, with reference to agreements which will come into existence even at hypothetical level only in the future, cannot be said to be determinable at the present (10).

A further remark is given by the fact that the criterion of determination of the vicarious performance of that foreseen as non-fulfilled by the debtor can be admitted, the hypothetical content of the future related agreement, which is the source of the principal debt. on condition that it is a concrete and specific hypothesis which is neither vague nor indetermined, as such previously agreed by the parties of the contract of guarantee.

The object of the guarantee must otherwise be deemed indeterminable if the hypothesis of the related contract to which it refers, is at the present (11).

Stating otherwise, it cannot be seen what the criterion previous agreed by the parties deemed capable of « identifying in a rigorously objective way » the principle obligation relationship, ends up as being.

The Court, having crossed the threshold, pushes further ahead in the field of indeterminability, to textually write: « the concept of determinability of the guarantee does not entail implications of a subjective or psychological character in the sense that the guarantee has to know, foresee or imagine the guaranteed debt ». How can a credit that cannot even be imagined be said to be determinable? The best confirmation of determinability – and it is evident – is given by the fact that the guaranteed debt can be foreseen or at least imagined by the guarantee who takes on the risk of the non-fulfilment. The guarantor must be able to evaluate the risk that he takes on and thus foresee the consequences of the commitment of harmlessness.

Here we touch on the nexus between determinability and foreseeability. It is hardly surprising that the normal risk of the contract and responsibility for damage from breach of contract in the limit of the foreseeability, also

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(10) For example, the Court of Cassation, 6th February 1975, no. 438, Foro it., 1976, I, p. 2474 cannot be approved where it concludes from the postulate identity of the object of the guarantee and of the principal obligation: « as the indetermination of the object of the guarantee can be inferred only if that of the principal obligation is indeterminable ». This is not valid for the future debt the determinability of which is postponed to the time of the agreement that will give rise to it, whilst that of the guarantee must be anticipated to the time of the contract of guarantee and therefore the parties of the guarantee agreement have to have agreed in advance on the hypothesis of the future agreement, with which content, they refer to.

(11) With respect to the connection between the agreement of guarantee and the principal agreement: G. SCHIZZEROTTO, *Il collegamento negoziale*, Naples, 1983, pp. 119, 121.

understood on the quantitative level if there is negligence and not wilfulness, are correlated terms and that they integrate reciprocally, This is also at the basis of the private self-responsibility in which acting at onés own risk and in the broad sense of impuliability is materialized.

The determinability of the risk is translated into the foreseeability of the consequences.

4. – Let us now go on to see if the guarantee in question reveals a potestative character or not.

It is licit to wonder whether the guarantee « for credits at will of the other parties » (12) according to the phrase *si quoties et quantum Sempronio credere volueris fidejubeo* produces a potestative commitment or not. The decision, in line with the previous ones of the same Court (13) excludes it because giving credit and receiving it would not configure such an activity. Here it is understood that the potestative commitment in equivalent to that referred to the arbitrator of the guaranteed creditor, without even the motivation of a calculation of convenience (14), i.e. on a whim.

This theory is not acceptable because it is excessively reductive. There is a potestative character, in my opinion, generally where a subject is in conditions to have to undergo the effects of the will of the counterpart, according to his mere interest. It is decisive that the person making the choice can make it according to his mere and exclusive interest, determining consequences for another summoned to undergo them. The choice at whim is an aspect of the unquestionableness of a potestative character and is the limit hypothesis. In the case according to article 1355 Civil Code, it is understood in the latter meaning because, as the obliged parties invested with it, he may at the most aim at the freedom from the commitment taken without further consequences, in order to recognize in general its validity, unless the exercise of the whim is not contemplated. The case in which the choice is put ad libitum of the creditor is different, as in the guarantee, because he could extend the commitment of others disproportionately accord-

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(12) Here, considering the gratuitousness, the onerousness does not even act as a counterweight to discretion, as in the so-called supply at will; CORRADO, *La somministrazione*, Turin. 1959, p. 60, note 3.

(13) See, for example, Court of Cassation 23/81.

(14) The error here lines in identifying « potestative » with « merely potestative » i.e. with naked will », « to want or not to want the contract », « unmotivated wish », « beyond every game of interest and convenience », changing it from article 13555 Civil Code (amongst the many Court of Cassation, 3rd October 1973, no. 2484, Foro it., Rep. 1973, entry *Contratto in genere*, p. 625; 2nd September 1971, no. 2602 id., Rep. 1971, entry cit., no. 219(Such a reductive interpretation is not considered as having a meaning, in article 1355, only because the potestative nature is referred here to the debtor and not to the creditor, as is the case of the guarantee, where potestative has to be understood as the agreement referred to the wishes of the creditor, without any other limitation that his mere interest.

ing to his own interest. Invalidity occurs here due to the consequences that derive from the arbitration.

Giving credit in itself is of course not a merely potestative activity with regard to the subjects of the credit relationship who are free to contract it or not, but, on the other hand, it is with regard to the guarantor, at their mercy. Nor does it appear that the guaranteed debtor can describe himself as a third party for the purposes of the delegated *arbitrium*, as can be read in some decisions, as he is the main party interested in extending the context of the guarantee, according to his requirements and his investment and work plans.

5. – These and other pronouncements seem, finally, to exclude the potestative character with the specific argument that the banking activity is alleged to be a precise activity (15). It is too specific to be conclusive in a more general sense. The theory would then have some grounds if granting the credit were to be described as a « precise activity » according to juridical rules and not only technical ones, aimed at the mere interest of the bank (16). Our legal system does not have rules that give a « precise » character to the decision to give credit and prevent its abusive concession (17); the supervision of the public inspectorate is too general to be of significance, without mentioning the perplexities on the making the public and the private bankers equivalent (18).

It is however the logic of giving credit on the basis of a guarantee to exclude that the third party can be guaranteed the containment of the fu-

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(15) Amongst the others, Court of Cassation 615/79; Court of Cassation 23/81.

(16) Even article 218 Bankruptcy Law is understood as having the sole aim of the interest of those granting credit. p. nuvolose, *Il diritto penale del fallimento*, Padua, 1966, p. 405; U. GIULIANI, *La bancarotta*, Milan, 1983, pp. 416 ff.

(17) The excessively general rules as per articles 35, section 2, letters c and d, and article 87 Banking law do not have a meaningful bearing. The debate on the tortious liability of the bank for the abusive concession of credit to damaged third parties, as is admitted in France and in Belgium, is still open. At present, de iure condito the prohibition of abusively granting credit is excluded, as a source of liability towards third parties, although it operates at the level of self-responsibility under article 1227 Civil Code with respect to article 1176, section 2 Civil Code, as well as operating with regard to those third parties who are the guarantors in relation to the special rule of article 1956 Civil Code which has introduced a penalty of private law. On the wider debate in progress on the tortious liability for the abusive granting of credit, see *Funzione bancaria, rischio e responsabilità della banca*, Proceedings of the Conference in Sienna, June 1980; R. CLARIZIA, in *Banca, borsa ecc.*, 1976, I, p. 361; A. NIGRO, in *Giur. comm.*, 1981, I, p. 287; C.M. PRATIS, id.., 1982, I, p. 841.

On the incriminability of the abuse of granting credit, see article 10 of the draft bill approved by the Senate on 21st April 1982. This indicates, however, the growing importance of the public interest.

(18) Court of Cassation, 10th October 1981, Carfi, Foro it., 1981, II, p. 553, with a note by F. CAPRIGLIONE.

ture credit within the limits of what the debtor is worth and no more. The guarantee extends the capacity of indebtedness of the debtor to the conformity of the guarantor. The banker gives credit adjusting himself as necessary on the capital of the guarantee to assess that risk of insolvency that with the indexes of profitability of the ratio gives the proportion of his interest. How can he, at one and the same time, guarantee for the guarantor that the future extensions of credit take into account only what the debtor deserves and not also what the should deserve by the guarantee stood? And how can that open-ended guarantee that due to the numerous dispensations under articles 1955, 1956 and 1957 Civil Code, seems rather oriented in the other direction, be considered finalized for a « precise » concession of credit?

All this appears too contradictory. We certainly do not want to underestimate here the rules of great professionalism and the corpus of regulatory rules supervised by the bank inspectors. However, these rules are for the interest of those granting credit and not those who guarantee it. The fact that they are not observed is shown by the « overlapping » into which the real management of credit is translated every day and which is the main cause of the exaggeration of banking disputes.

The activity that is punished by the revocations of payments, made ont eh return of this « overlapping » (19), and with regard to article 1957 Civil Code, that would deal with forfeiture on available rights, the discipline of which can be modified by the parties under article 2968 Civil Code (20) can certainly not be considered « precise ».

This shows the inadequacy of the subject.

6. – At this stage, let us examine whether articles 1955, 1956 and 1957 can be derogated.

In general the tendency is that they cannot be derogated, maintaining that it is in the faculty of the parties to distribute the risk in a different way from the legal one (21). However, these derogations distort the typical cause of the guarantee, where a justification is offered, from the point of view of an atypical contract (22) or independent contract of guarantee (23).

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(19) Court of Cassation, 18th October, no. 5413. Foro it., 1983, I, p. 69; 29th October 1983; no. 6430, id., Rep. 1983, under *Fallimento*, no. 336.

(20) Court of Cassation, 1631/75; 7th August 1967, no. 2104, *Foro it.*, 1968, I, p. 493 and in *Banca, borsa ecc.*, 1967, II, p. 520. with note by FAVARA, amongst the many.

(21) FRAGALI, entry *Fideiussione*, cit., p. 496; RAVAZZONI, entry *Fideiussione*, cit., p. 56; Cassation 18th October 1960, no. 2811, *Foro it.*, Rep. 1960, entry *Fideiussione*, no. 34; 11th January 1983, no. 183 id., Rep. 1983, entry cit., no. 27; 9th August 1983, no. 5310, ibid. no. 32.

(22) Amongst the others, S. MACCARONE, *La fideiussione bancaria come contratto atipico*, in *Le garanzie reali e personali nei contratti bancari*, Milan, 1976, p. 154. Elsewhere (*Contratto auton-*

The rules under articles 1955, 1956 and 1957 are, on the other hand, in my opinion, compulsory and of public order and any agreement to the contrary is null. They are certainly there to protect the guarantee from the guaranteed creditor.

However, these precepts are not exhausted in the protection of those specific interests of the guarantor that are put at risk by the contrary conduct of articles 1955, 1956 and 1957, but rather they transcend them and oversee the public interest for the respect of the social values of conduct (articles 1175, 1176, section 2, 1227, sections 1 and 2, Civil Code).

Articles 1955, 1956 and 1957 are not limited, as it would be otherwise, to inflicting the non-liability of the guarantor for that part in which the subrogation cannot take place under article 1955 (24) or for that part of the risk run in full awareness by the creditor and exuberant with respect to the financial conditions of the debtor under article 1956 (25) or for that part of the debt which cannot be recovered due to the late and negligent pursuit of the debtor under article 1957 (26).

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omo, cit., p. 395) he considers the open-end guarantee as an atypical hypothesis of the autonomous contract of guarantee.

(23) PORTALE, *Fideiussione e «Garantievertrag»* cit., p. 1052; MACCARONE, *op. ult. cit.*, p. 388.

(24) As it would be if it did not have a nature concerning sanctions.

(25) The impossibility for the creditor to avail himself on the guarantor for the insolvency of the new credit granted in a condition of aggravated risk derives from article 1227, section 1, with reference to the transgression of the due prudence of the *bonus argentarius*, under article 1170, section 2, Civil Code. A banker's sating is «not to run after lost money, not to lose more money» – but article 1956 Civil Code goes further, where «the guarantor for the future obligation is discharged for the whole and not only for the part that he has uncautiously been granted as new credit», as Appe reveals, Bologna, 13th September 1975. *Foro it.*, Rep. 1975, under Fideiussione, no. 22. This profile of a penalty of private law corresponds to the intention of the legislator (ministerial report on the Civil Code under article 766= «as responsibility for the transgression of an obligation of conduct not to give credit», i.e. as a sanction for the abusive granting of credit to those third parties who are the guarantors. Article 1956 Civil Code is a new rule with respect to the code of 1865 and the Chairman of the Legislative Commission, on article 731 of the Ministerial draft, notes that «this article will give rise to many disputes, but it is fair from a moral point of view.» A prior dispensation from the duty of not abusively granting credit nor from the duty of prudence, diligence and self-responsibility under article 1227 Civil Code is not conjecturable. There can be a waiver subsequent to the rights deriving from the discharge, not waiver prior to the discharge.

(26) Failure to pursue the principal debtor in itself would legitimise the failure of recoupment within the limit of the avoidable damage under article 1227, section 2, Civil Code. This is absorbed here by the more serious sanction under article 1957, Civil Code, not susceptible to prior waiver, that also configures a case of penalty of private law, for the infringement of the duty of diligence in taking action against the principal debtor, within the six months from the due date and of diligence in cultivating the subsequent requests, so that the guarantor remains bound, «only as strictly necessary» (U. SAKVESTRONI, *op. cit.*, p. 104). The deemed compatibility of article 1957 with the joint character of the guarantee obligation (Cassation, 2nd March 1976, no. 688), *Foro it.*, Rep. 1976. entry *Fideiussione*, no. 19) shows the inadequacy of the current conception based on forfeiture.

These go beyond these limits and sanction the redemption of the guarantee with the total discharge of the guarantor from all liability for every risk. The sanction is coordinated with the infringement of the duty of correctness and good faith, under article 1175 Civil Code as the report by the Minister of Justice on the Civil Code (27) specified. This is a private penalty under the law which is added to a series of cases (28) where the transgressor has to undergo a disadvantage greater than the advantage which he obtains from the infringement and conversely undamaged, he has an advantage which is greater than the surmised damage. Their aim at provoking a certain type of conduct, such as that wished by the legal model and in which the duty of good faith is performed, is transparent. A prior dispensation from the duty of correctness does not seen conjecturable in the exercise of the law, as it certainly belongs to the public order, to good habits, just as there can be no prior dispensation from the duties of prudence and diligence under article 1176 and that of cooperation article 1227, as Emilio Betti taught (29).

To go into the details of the individual rules, article 1955 is deemed a law that is not available (30).

Article 256 protects the guarantor, in the case of worsening of the risk, as article 1898, section 2, Civil Code, protects the insurer and article 1476 Civil Code the contracting party: the rules are stored in the *rebus suc stantibus*. Here article 1856 inflicts freedom of the guarantor from every risk for punishing the creditor who has granted credit to a debtor, without special authorization, with the awareness of the changed conditions of the debtor, Article 2956 punishes wilful behaviour with a private penalty *ope iuris*; negligence with foresight of the event, which is the most serious type of infringement of articles 1175 and 1187 section 2.

As far as article 1957 is concerned, it is to be excluded that it is reduced to inflicting a forfeiture. the discipline of which would be amendable for the parties. The rule, in this case, would have included the perpetuation of the guarantee once the requests for credit had been put forward within six months from the due date of the obligation. This is not so because the rule adds the infliction of the discharge of the guarantor, if the creditor « does not have them with continued diligence ». This shows that we are not in the presence of forfeiture but of a penalty for negative social values of conduct, including procedural conduct.

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(27) Ministerial report on the Civil Code, under no. 766.

(28) E. Moscati, *Pena di diritto privato*, entry in *Enciclopedia del diritto*, Milan, 1982, XXXII, pp. 770, 773, 775, 778, 779, 783. A certain series of cases is shown on page 779 such as the forfeiture of the benefit of the term, the benefit of inventory etc.

(29) E. Betti, *Teoria generale delle obbligazion*, Milan, 1953 I, pp-, 105, 136, 151.

(30) U. Salestroni, *La solidarietà finanziaria*, cit., p. 52.

7. – Lastly, let us see whether the open-end guarantee is legitimate from the point of view of the independent contract of guarantee or at least of an atypical contract and if they admissible agreements in our legal system. The autonomous contract of guarantee is a residual figure recurring in the exclusive sphere of international contracts for large public works (31). We cannot see how it is possible to generalize the type. Even in its field, this guarantee is still limited to a maximum amount or to precise earnings, so that in our case, we end up by constructing in the abstract a contract other than the one to which reference is made.

In any case, we do not understand the reasons why our legal system should appreciate, in accordance with article 1322, section w, Civil Code, how socially significant such a special type of guarantee is.

It really does not seem that it is possible to recognize the reason in a public interest on the promotion of credit which, without those compulsory limits of precision (32), would transform it into easy credit and therefore a squandering of wealth.

This guarantee, however it is described, as an autonomous contract of guarantee or an atypical contract, is at the antipodes of the basic principles of our legal system and of our custom which is materialized in « acting at onés own risk » and not « at the risk of others » (33). This is at the base of our system of responsibility and private responsibility which is translated into responding for oneself and is based on imputablity (34).

The hypothesis of responsibility for others' facts are residual and even where they are contemplated by articles 2047, 2048 and 2049, they are always reduced to hypotheses of negligent omissions of onés own with respect to duties of supervising others and are materialized in acts by omission. The guarantee we are discussing, if hypothetically valid as an autonomous or atypical contract, would inaugurate a subversive turning point or would codify a different system based on acting « at the risk of others » which, at present, in incompatible with our legal system and with our customs.

These new figures of guarantee do not appear acceptable, precisely where they want to put aside those limits that express disfavour for guaran-

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(31) On the aforementioned contract, amongst the many, PORTALE, *op. cit.*, m pp. 1045 ff., and the bibliography on p. 1075. The admissibility of the institution is controversial in the various legal systems: see MACCARONE, *op. cit.*, pp. 385.388 to which we refer the reader for other aspects as well.

(32) RASCIO, *op. cit.*, p. 387, 457.

(33) E. BETTI, Diritto rmano, Padua, 1935, pp. 258, 385, 411 and 412;Id., *Teoria generale del negozio giuridico*, Turin 1943, p. 104. dified the fault towards ourselves and article 2043 Civil Code towards others.

(34) S. PUGLIATTI, *Autoresponsabilità*, entry in the *Enciclopedia del diritto*, Milan, 1959, IV, pp. 453, 464, correctly identifies how art. 1227 codified the fault towards ourselves and article 2043 Civil Code towards others.

tees with the ruinous consequences, the problem of which dates back to the times of Solomon (35). In this we disagree with the decision.

8. – Let us now draw the conclusions of all this.

Those who oppose the open-end guarantee, which is a radically null and void contract, in each part, so that the guarantor would be totally discharged are generally supported.

The adoption of an autonomous guarantee or atypical contract certainly leads to a conclusion of this kind. However, this is not the opinion of the author of this note, who deems that a classification other than that of the guarantee contract can be given to the agreement.

Article 1419 Civil Code has to be correctly applied in which the saying *utile per inutile non vitiatur* is materialized, thus distinguishing the valid part from the invalid part of the open-end guarantee. We cannot assume that the contracting parties would have entered into the guarantee only if even future unimaginable debts had been guaranteed or put to the potestative nature of others. The commitment of guarantee will thus be valid for the present determined or determinable debts and for the future determinable ones with reference to a request for credit already put forward or to concrete hypotheses or specific operations or within the limit of a certain maximum amount and so on, contemplated in the contract of surety.

No account will be taken of the prior waivers to articles 1955, 1956 and 1957. and thus the special authorization to give credit under article1956 will be requested under article 1956 and the debtor will be pursued within the period and the diligence according to article 1957.

9. – The conclusion we have reached de iure conduto, could appear in first sight as unfavourable to a deserving category of businesses, the banks.

They like nothing better however, than what contributes to valorizing their essence, or to put it better, the soul that distinguishes the banker from who he is not, i.e. the calculation of the risk and the passion of the risk calculated.

Reference is made to the above in:

Foro it., 1986, I, p. 835, note 1, note to Legnano Magistrates' Court, 13th June 1985; see MARICONDA, *Sulla fideiussione e sul contratto autonoma di garanzia*, *Il Corriere Giuridico*, 1987, p. 1157; V. MARICONDA, *Fideiussione omnibus e principio di buona fede: la Cassazione a confronto*, *Foro it.*, 1989, I, pp. 3104, 3105, note 7: M. CORONA, *Ancora sulla validità della c.d. clausola estensiva della fideiussione omnibus*, *Giust. cir.* 1989, pp. 2169, 2173 notes 3 and 17; M. JACUANIELLO-BRUGGI, *La*

(35) CAMPOGRANDE, Trattato della fideiussione, Ruri, 1902, p. 2.

fideiussione omnibus inossidabile Cassazione ed i nuovi modelli ABI, *Giur. it.*, 1989, I, 1, p. 1745; M. OLGIATI, *Si acuisce il contratto tra giudici di merito e Cassazione in tema di fidejussione omnibus*, *Giur. comm.le*, 1989, p. 578, note 20; A. DE MAJO, *La fidejussione omnibus ed il limite della buona fede*, 1989, pp. 2753, 4792, 3756; E. GABRIELLI, *Il pegno anomalo*, Padua p. 50, 1990, M. JACUANIELLO-BRUFFI, *Fideiussione omnibus; chi ha paura dell'art 1956 c.c.*, in *Giur. It.* 1990, 2, pp. 474, 479, 482, notes 68 and 82; M. VALIGNIANI, *Fideiussione bancaria e buona fede*, *Giur. it.*, 1990, 1,2, p. 1138; M. ROMANO, *Validità della fideiussione omnibus in funzione della agevolazione del credito*, in *Giur. it.*, 1990, I, 2, p. 831, note; GIANLUCA SICCHIERO, *L'engineering, la Joint venture, i contratti di informatica*, *I contratti atipici di garanzia.* Turin, 1991, pp. 167, 168, 171, 172, 177, 184, 192; P. TARTAGLIA, *Limiti alla fideiussione omnibus e disciplina della transparency bancaria*, *Foro it.*, 1992, 1, p. 1397, note 1; p. 1398, note 18; *Giust. civ.*, 1990, p. 404, note 1, note to Court of Cassation, 20th July, no. 2287.

Also by the author on the same subject:

- «*Ancora a proposito della validità della fideiussione omnibus con riguardo ai nostri moduli bancari*», in Foro Italiano, 1988, I, p. 1947 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 387.
- «*Sulla fideiussione bancaria e i suoi limiti*». Published in Foro Italiano 1990, I and in L'Espressione Monetaria nella responsabilità civile, Cedam 1994, p. 395.
- «*Sulla inadeguatezza del principio di buona fede a proteggere il fideiussore*», in Giurisprudenza Italiana 1990, I, 1, p. 622 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 409.
- «*Sulla inderogabilità dell'art. 1957 c.c.*» in Giurisprudenza Italiana 1990. I, 1, p. 460 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 415.
- «*Sulle nullità ope legis delle fideiussioni omnibus e sulle relative conseguenze*», in Foro Italiano 1992, I, p. 791 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 421.
- «*Sul carattere interpretativo della norma che vieta la fideiussione omnibus e sulla sua applicazione retrospettiva alle liti pendenti*», in Foro Italiano 1993, I, 2171 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 429.