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FRENCH POLYNESIA

e-mail: sh.andre@mail.pf

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98 717 PUNAAUIA
FRENCH POLYNESIA

Permanent Address
BP 13 993
98 717 PUNAAUIA
FRENCH POLYNESIA

A WELL-INFORMED GUARANTOR?

PIERRE ANDRÉ

A WELL-INFORMED GUARANTOR?

by

Pierre André

A Supervised Research Project submitted in partial fulfillment
of the requirements for the degree of
Master of Laws

School of Law
Faculty of Arts and Law
The University of the South Pacific

June, 2009

DECLARATION OF ORIGINALITY

Statement by Author

I hereby declare that the work contained in this thesis is my own and where I have used the thoughts and works of others I have clearly indicated this.

.....
Pierre Andre
S11020301
12 June 2009

Statement by Supervisor

I hereby confirm that the work contained in this thesis is the work of Pierre Andre unless otherwise stated.

.....
Anita Jowitt
Lecturer in Law
12 June 2009

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ABSTRACT

We intend to make a comparative study of three legal systems into the Pacific area, regarding consumer's credit contracts. As we know, a contract is characterised by the free will of two entities to enter into. The reciprocal obligations are freely defined. So the less the law interferes, the better. But in the countries under consideration (French Polynesia, New Zealand, Fiji), lawmakers agree to provide a stronger protection for the debtor and his guarantor in case of consumers credits contracts. We focus our work on the provisions of three legal systems into the Pacific area aiming at improving the protection of the guarantor in case of consumer's credit contract. The interests of all parties to the contract must be taken in account. The major risks are insufficient protection for the borrower and his guarantor on the one hand, or excessively onerous obligations for the creditor on the other.

We notice that texts were very substantially reworked at the end of the 1990s and the start of the 2000s. Even a country like Fiji in the Pacific region, which remains comparatively at the hedge of globalisation and consumer society, has passed laws with the same purpose as France and New Zealand: to provide better protection for the debtor and his guarantor (when natural persons). A comparative study shows that laws of the three countries provided some similar original safeguards for the guarantor: requirement to disclose information to the guarantor, penalties laid down in the event of non-respect of these requirements, provisions relating to impartial information and independent advice. French law differs from the others legal systems by a greater formalism required on contracting a consumer credit and on disclosing information. But the procedures of consultation of citizens during the drawing up of the law as well as the appointment of an official body to provide impartial information and advice, like in Fiji or New Zealand, seem a better way to improve the protection of the guarantor in small Pacific countries, like French Polynesia or Fiji.

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INTRODUCTION

In the Pacific region, as elsewhere, most borrowers are generally unaware of the real risks associated with the credit market.[1] Nevertheless, the credit market access is becoming increasingly easy for these borrowers (who are overly encouraged to do so by the local financial institutions).[2] We must bear in mind that the credit market remains one of the key factors of modern economic life. Access to residential property nearly always calls for resort to credit, as does the purchase of household equipment. Globally consumer debt levels have been risen markedly in recent years.[3] In order to secure their loan, professional lenders tend to subject the borrower to measures aiming at controlling its assets. Security for the loan generally takes the form of listing some of the borrower's property as security. But security can also take

[1] As noted by Renuart and Thompson "Evaluating the cost of credit and comparison shopping in the modern credit environment can be a daunting task, even for the most sophisticated shoppers. Lenders increasingly unbundle the costs of their loans from the interest rate into an array of fees, outsource their overhead to third parties who add to consumers' costs, and unveil amazingly complex loan products that dazzle and confuse borrowers." In " The truth, the whole truth, and nothing but the truth fulfilling the promise of truth in lending", (2008) *Yale Journal on Regulation* 181.

[2] For instance, the so-called global credit crisis that began to emerge in 2007 has been attributed to sub-prime loans which 'were sold to low-income families attracted by very low "teaser" rates. Many of these loans were made based on borrowers' own accounts of their financial affairs, with no proof required. As interest rates rose and the introductory rates expired, borrowers who had chased the dream of home ownership found themselves unable to afford repayments and started defaulting on the loans", " Anatomy of a global credit crisis" (New Zealand Herald 22 August 2007). I tried

[3] For instance, in September 2007 'total household debt in the United States stood at an all-time high of US$ 13.6 trillion-up 43 per cent in just four years. The bulk of that was made up of mortgages, but consumer credit (car loans, credit cards, etc.) also hit a record last year: US$2.5 trillion, up 19.6 per cent since 2003. … As of November [2007], total household debt in Canada stood at an all-time high of US$1.17 trillion. Consumer debt also hit a record in November: US$365.6 billion. Both figures have climbed a whopping 48 per cent in four years.' (Steve Maich, "The Debt Problem Nobody Talks About", (2008) 121(6) *Macleans* 34.) Within the release n°105 issued 22 March 2005 of the Commerce Commission of New Zealand, according to the Commission Chair 'the latest statistics showed that total household debt had reached $115 billion.' '[S]ince 1990 the average debt level of your typical New Zealand household has risen from $18,800 to $99,000 - a figure set to exceed $100,000 in the March [2007] quarter, for the first time. Factor in that nearly 50 per cent of families are mortgage-free and the amount owed by your average indebted household is probably double that figure.' (Stephen Cook, "The tipping point of debt" (New Zealand Herald 22 April 2007). In French Polynesia : "The bank debt of Polynesian households, made up 57% of mortgages, increased dramatically in recent years, at a rate higher than their income. From 9% on average over the period 2001-2005, this growth is due to a very strong demand for housing loans but also by that for consumer credit in particular to finance cars' purchases. The Polynesian households' debt remains generally solvent if considering developments in payments incidents. These incidents are rather decreasing and the average debt remains below the French one. Nevertheless, the level and trends of dubious claims call to pay attention to the bank debt of households and to their vulnerability." Note de l'Institut d'émission de l'Outre-mer, "L'Endettement bancaire des ménages polynésiens", (dec. 2006). www.ieom.fr.

the form of a personal guarantee given by a third person. This is a means to secure loans by requesting guarantees independent of the borrowers' personal and economic situation. This third person may remain unprepared to fully understand the legal consequences of becoming a guarantor, and may enter into guarantees thinking that he/she will never be called upon to pay the debt. However, things often go wrong, particularly in relation to consumer credit agreements where the guarantor is a private individual who has no business experience. This problem is exacerbated by social conditions in the Pacific. In French Polynesia, for example, someone can hardly refuse to help a relative in obtaining a loan, moreover if he/she can do so only by signing a form. The prominence of oral culture, genuine difficulties in reading a European language and difficulties in understanding technical terms that cannot be clearly translated into the Polynesian language also need to be taken in account.

Under these circumstances, it is difficult to ascertain whether a true balanced contractual relationship, based on mutual understanding of obligations by all parties has been created. So, my central question is: How is it possible to provide comprehensive protection to individuals who act as third party guarantors?

New problems are surging on the credit market and they seem to be focussed mainly on "non business" credit or "consumer credit" and on guarantees provided by individuals, which can be distinguished from credit provided to businesses and guarantees provided by business entities or professional guarantors. So, lawmakers try to solve these problems by establishing new sets of laws aiming at protecting individual rights against the power of professional lenders.

As we know, the term "consumer credit" is used for short term loans to individuals for the purchase of goods used primarily for personal, family, or household purposes. Such goods are not intended for resale or further use in the production of other products.[4] But we must bear in mind that the laws relating to consumer credits give different definitions to this one, depending on the purpose of the credit, but also on the amount of financial commitment or on the type of contract.

[4] http://www.lectlaw.com/def/c112.htm

The contract of guarantee can be defined as the commitment undertaken by one person (the guarantor), for the benefit of a second person (the creditor), to execute the obligation of a third person (the main debtor) in case of the latter's default. More precisely, the operation brings three people together.

In fact, the creditor is in a relation with two debtors: the main debtor and the "back-up" debtor, that is, the guarantor. Legally, the contract of guarantee is a contract entered into between the creditor and the guarantor, a contract secondary to the principal contract

Economically, the contract of guarantee seems closer to a "favour" done to the debtor by the guarantor.[5] In the case of credit contracts, collateral is required a result of the creditor having asymmetric information about the project that the loan is financing. Borrowers are supposed to know more about the project than the creditor. If a guarantee is given, the guarantor takes the risk of misinformation and that of default of the borrower. But unlike the creditor, the guarantor does not take a direct benefit for taking this risk.[6] In practice, the contract of guarantee remains one of the most frequent protections in matter of credit. The guarantee can extend from the principal to the interest of the debt.

Having briefly defined the guarantee and the guarantor, we would like to underline that information of the guarantor is a crucial issue, because it is the basis of a better protection for him or her. So we are now going to try and determine the other notion that is central to this topic: the information of the guarantor. Credit has always relied on trust. Such is the etymological meaning of the word; credit comes from the verb "*credere*" which means to believe, to trust.[7] The basis of the trust is information – the borrower has information about the risk of the project, and the lender, who has limited information about the project but good information about the credit market, trusts that the borrower will repay the loan. However, this trust is not absolute and the lender seeks security in the event of the borrower's default. However the

[5] In principle, and in most cases, the guarantor is not motivated by liberal intentions.
[6] The lender includes a risk premium in the calculation of interest's rates. See J. Atta-Mensah, "Collateral and Credit Supply", *Bank of Canada, Working Paper* 2003-11
[7] See Baumgartner & Ménard, *Dictionnaire étymologique et historique de la langue française* : Le Livre de poche, 1996. The word has the same etymology in English as in French language.

difficulty is that, on the one hand, the third party guarantor knows less of the risk of the project than the borrower, and in the other hand he is supposed to know less than the lender about the credit market and the means to avoid the financial effects of the borrower's default. So, we must first of all notice that the main objective of information is the protection of the guarantor. The correlation between protection and information has been firmly established in law in a number of countries, including France,[8] New Zealand [9] and Fiji.[10] The central question therefore needs to consider exactly what information needs to be provided to the guarantor in order to ensure adequate protection.

In France, the "Scrivener" laws (1978-1979) provide yet a good protection to the guarantors in case of "business" credit contracts. In Common Law countries regulation of finance transactions is generally being left to Common Law principles and other statutes. For example, an unstated policy underlying the Credit Contracts and Consumer Finance Act 2003 in New Zealand is that business and investment finance does not require to be regulated in the same manner as consumer credit. We must have to bear in mind that in case of consumer credit the guarantor is quite often an individual. His information is supposed to be lesser than the information of a "professional" guarantor. So the law tends to provide more protection to this type of guarantor. As a matter of fact the laws relating on consumer credit contains provisions for a better protection for a guarantor acting as a private individual.

I would like to draw a comparison between three recent legislations related with consumer credit and individual guarantors in the Pacific area. I chose to compare mainly the Law of August 1st 2003 on economic initiative for France, which affects French territories in the Pacific, the Credit Contracts and Consumer Finance Act 2003, n°52, Date of assent 13 October 2003, for New Zealand and the Consumer Credit Act 1999, Laws of Fiji, n°12, 19 March 1999 as amended in 2006. To my opinion they demonstrate same concerns about information and protection of individuals acting as guarantors.

[8] Law of August 1st 2003 on economic initiative.
[9] Credit Contracts and Consumer Finance Act 2003, n°52, Date of assent 13 October 2003.
[10] Consumer Credit Act 1999, Laws of Fiji, n°12, 19 March 1999 as amended in 2006.

The reasons of this choice are that Fiji, New Zealand and French Polynesia have Oceanian peoples. They live on islands and the indigenous populations share cultural features.[11] They also underwent European colonization in the XIX° century and it is true that differences exist about ethnic and political situations between the three countries linked with colonial history. In the independent state of New Zealand the indigenous population is a numerical minority. Fiji, an independent state since 1970, has relatively few people from western origin. French Polynesia is no longer a colony but a "Pays d'Outre-mer" (overseas country) with self-government and like Fiji, very few people are from western origin. There are also economic differences. Fiji seems to be better protected by its traditional system, the customary one, and has not entered consumer society in the same way than French Polynesia and New Zealand whose GDP per inhabitant is much higher, have. The broad similarity, that all three countries are Oceanian, may mean some similar approaches are adopted, however the numerous social, economic and political differences may give rise to legal differences. It is those differences that insure the three countries have distinct laws that can be usefully compared.

We can also observe a major distinction on legislation between Common Law countries, like New Zealand and Fiji, or civil law countries like French Polynesia. We Know that civil law always tends to a strong regulation of contractual relationship. In the last twenty years, the French law-maker has regularly intervened to preserve the balance between the professional part of contract and the individual one (borrower or his/her guarantor) In Common Law countries it seems that there is a trend to regulate quite strongly consumer credit while leaving business and investment credit contracts highly deregulated. Again these differences ensure that the three countries have distinct laws that can be usefully compared.

[11] According to the Ministry of Consumer Affairs of New Zealand, there are some differences between Maori people and "Pakeha" regarding credit contracts: "There is evidence that Maori and Pacific Island people are less aware of the Disputes Tribunals and more reluctant to use them than the rest of the population. This is a concern because Maori and Pacific Island people are more highly represented in the lower socio-economic groups Reluctance to use the Tribunals suggests they are less likely to enforce their rights if the lender does not comply with the law." *Review of the Operation of Disputes Tribunals from a Consumer Perspective*, July 1994.

As a starting point, I intend to precisely describe the law in force in the three countries prior to these legislations, regarding personal guarantee. Further, I shall consider the reasons why these three pieces of legislation have evolved and how the French and New Zealand courts have interpreted them in particular by imposing a strict control of the guarantees over the consumer credit market. The study of these different sets of laws will provide the opportunity to stress their respective strengths and weaknesses and give us some directions to try to improve the efficiency of a law about guarantors as natural persons in case of consumer credit contract.

As a starting point, I intend to precisely describe the law in force in France prior to 2003. Then, I shall explain the reasons justifying the enactment of the 1st August 2003 French law on economic initiative. The main contribution of the law therefore rests in the guarantor's awareness of the commitment he has entered into – an objective achieved by the requirement of prescribed wording – in respect of limiting the commitment in duration as well as in its amount, as much as on the measures of information of guarantors *a posteriori*. (I)

As a second point I will consider the law in force in New Zealand prior to 2003 and the Credit Contracts and Consumer Finance Act 2003. Even though New Zealand is a Common Law country, this act is very close to the French one concerning the protection measures for a guarantor in the framework of consumer credit. But legal choices are different between civil law and Common Law for commercial ones. (II)

As a third point I will describe the Fijian legislation, which is very similar from those of other small islands countries in the Region. In Fiji, the Consumer Credit Act, 1999, is aimed at providing a better regulation of the credit business. (III). The stress is put on duties of the professional creditors more than on the protection of individuals. But the Constitution prohibits jail for debtors.

A comparative study of these different sets of laws (IV) will lead to suggest some amendments to make to the current applicable law in French Polynesia (as well as in France), in order to provide a more comprehensive protection to the guarantors.

CHAPTER I: FRANCE

In the last twenty years, the French lawmaker has regularly intervened to preserve the balance in contractual relations: between the protection of the weaker party and the advantages of the “professional” one.

The major laws dealing with consumers credit contracts are The laws of 10 January 1978 and 13 July 1979 relative to consumer credit and mortgages (“Scrivener I and Scrivener II” laws), the law of 23 June 1989 modifying the rushed one of 1978, and the law of 31 December 1989 (called the Neiertz law). This text was setting up a heavy formalism for contracts of guarantees of consumer credit operations, in the form of a handwritten endorsement. A new obligation of information due to the guarantor from the credit institutions, applies to the first difficulty of payment.

The law of 21 July 1994 relative to housing sets up, for contracts of guarantee dealing with residential lease, a handwritten endorsement required “under pain of the contract of guarantee being declared null and void”. The law of 29 July 1998 relative to the fight against exclusion instituted for the benefit of all guarantors an annual obligation of information for which the creditors are liable.

<A> STATE OF THE LAW BEFORE 1 AUGUST 2003 REGARDING PROTECTION AND INFORMATION OF THE GUARANTOR AS A NATURAL PERSON

In France, a specific formalism with regard to contracts of guarantee (guarantor as a natural person) was imposed by the evolution of consumer law, whose worth was later subject to an uncertain line of precedents (discussed below in point 1). This state of the law was characterized by many differences amongst contracts of guarantee, the consequences of which will be examined according to the necessity of post-contractual information of the guarantor (discussed below in point 2).

The system was characterised by an "over-protection" of the guarantor as defined by the "Scrivener" Law dealing with consumer credit contracts. This was opposed to the classical definition of the guarantor as a natural person.

Legal as well as precedential evolutions had threatened the cohesion of contracts of guarantee to the extent of instituting "two rules for contracts of guarantee"; there was in fact a civil contract of guarantee and a business one.

As for all contracts in French law, this dual nature had an influence on the proof of guarantee. This proof in business contracts of guarantee can be made by all means towards the creditor.[12] This freedom of proof tended to keep at bay the ever-stricter formalism imposed by the common right of contracts of guarantee, as in any contract of guarantee made by deed, and supposedly received within a formalism offering enough protection.[13]

Although the proof could be made by all means, contracts of guarantee did not escape the provisions of Article 2292 of the Civil Code in which such a guarantee "is not to be assumed".

[12] Article L.110-3 of the Commercial Code.
[13] See Cass.civ 1ere, 2 July 1991, JCP 1991, éd. E, pan 1024.

A judge could not admit the existence of a tacit contract of guarantee, but only the freedom of proof of an express consent. The commitment of a guarantor can indeed only result from a non-ambiguous expression of will.[14]

Case law has evolved from a formalism *ad validitatem* to a uniquely probatory formalism. During the 1980s, the first Civil Chamber of the Court of Cassation transformed the rules regarding proof of guarantee as a condition of validity of the contract of guarantee. The Court based its decision on Article 1326[15] (requirement of a handwritten mention in case of any simple contract) of the Civil Code to state that in the absence of a complete handwritten note, the commitment was considered null and void (the law of 1 August 2003 adopted this solution).[16]

This accepted solution was criticized by the doctrine, because on the one hand the judge was taking Article 1326 out of its original frame of application and therefore was taking the place of the lawmaker by creating a new case of formalism. On the other hand commentators saw in it a weakening of the law of contracts of guarantee in the sense that this solution did not distinguish between non-professional and professional ("experienced") contracts of guarantee. Formalism hence increased the protection of consent, but at the same time allowed certain "experienced" guarantors to benefit from it when they were in bad faith.[17]

Shortly after establishing this requirement of formalism under pain of the contract of being declared null and void, the first Civil Chamber of the Court of Cassation made a volte-face. As early as 1991, the Court was stating with no ambiguity that an instrument of guarantee with no handwritten endorsement or with an incomplete prescribed wording was not null and void, but only devoid of cogency[18]. An irregular instrument would be *prima facie* evidence and could be completed by any extrinsic element. The Commercial Chamber already considered that the professional

[14] Cass.com. 19 December 1981, bull. Civ. IV, n°447; See also Cass.com; 23 October 1990, ibid. IV, n°257.
[15] (Requirement of a handwritten endorsement) and 2015 of the Civil Code (recognition of the express character of the commitment).
[16] Civ. 1ere, 22 February 1984, JCP 1985 II 20442, note M. Storck.
[17] This criticism is actually one of the main ones against the law of 1 August 2003, but this time, it is not the judges who impose this formalism, but the lawmaker.
[18] Civ, 1ere, 15 October 1991, JCP 1992, II, 21923, note Simler.

functions of the guarantor[19] could constitute the extrinsic element.[20] Judges therefore no longer demanded handwritten notation as a condition of validity of the document, but only as *prima facie* evidence. It is precisely upon the necessity of the handwritten note that lawmakers recently intervened, to return to an extension of formalism from now on required *ad validitatem.*

The precedential debate did not stop with the need for handwritten endorsement. Indeed this handwritten endorsement has another function, which is to specify the commitment of the guarantor for the collaterals of the debt, (mainly: interest) and the rate at which the guarantor will pay them (legal, or conventional).

The first Civil Chamber of the Court of Cassation has long considered that interest and other collaterals were guaranteed only if the guarantor had formally committed to it, simply referring to the printed text of the document was not enough[21]. On the other hand, for the Commercial Chamber, if a guarantor had committed in the document to guarantee the collaterals, it did not really matter if the handwritten endorsement did not cite the interest[22] (extrinsic elements are enough to prove the commitment). We find here the idiosyncratic mode of freedom of proof in Commercial Law.

Positive law saw the first Civil Chamber align its case law with that of the Commercial Chamber.[23] Guarantors are now required to pay the interest on the sums owed at the contractual rate even if the handwritten endorsement does not indicate that rate. It is worth noting that the law of 1 August 2003 does not modify these solutions.

Before August 2003, the annual information to the guarantor[24] only concerned business guarantors. The law of 1 March 1984 required a credit institution which has granted financial assistance to a company to notify the guarantors annually of the amount of the liabilities in principal and collaterals.

[19] Com. 31 May 1994, Bull. Civ. IV, n°191.
[20] Com 1 June 1993, JCP 1993, éd. E, II, 488, note Legeais.
[21] Civ 1re 30 March 1994 RTD Civ. 1994, more recently civ. 1re 29 February 2000 Bull. Civ. I, n°68.
[22] Com. 16 March 1999, JCP 1999. IV. 1867; JCP 1999 I 156 n°1 obs. Simler.
[23] Civ 1re 29 October 2002 (2 types) Juris-Data N°2002-016 102 and 2002-016 097.
[24] Article L.313-22.

The provisions of Article L.313-22 still apply when guarantors stand surety for "business" loans, which means a borrower with an economic activity. This can be a trader, insurance salesmen, an association created for business purpose, or an investment company that rents property. As long as their activity is of an economic nature, it does not matter if it is not for profit.[25]

Article 48 of the law of 1 March 1984, codified in the Monetary and Financial Code under Article L.313-22, has certainly given rise to the highest number of commentaries about the possible divergences between the first Civil Chamber and the Commercial Chamber. But when reading the rulings issued in the last few years by the Court of Cassation we notice a similarity of view on all these chambers. They all agree with the obligation of information of the guarantor. Finally, all guarantors are able to benefit from this particular right to information, including professional guarantors.[26]

As far as the form of the information is concerned, it is free. Proof of the information can be done by any means and the credit institution does not have to prove that the information was effectively received by the guarantor.[27]

Case-law is now similar for both the Commercial Chamber and the Civil Chamber on the question of the duration of this information: the obligation of information continues until the guaranteed debt ends.[28]

The first Civil Chamber as well as the Commercial Chamber have a strict interpretation of the provisions of the law. Thus, this obligation does not apply to *in rem* contracts of guarantee, which constitute a real guarantee.[29] In the same way,

[25] Com. 18 February 1997, Bull. n°53 – Civ 1ere, 12 March 2002, 3 decrees, appeals n°X 99-13.917, A 99-17.209 and Z 99-15.598 to be published..
[26] Civ. 1ere, 27 February 1996, Bull. n°109 – Com. 25 May 1993, Bull. n°203.
[27] Civ. 1ere, 25 November 1997, Bull. n°326 – Civ. 1ere, 25 April 2000, JCP 2000 I n°257 – Com. 17 October 2000, Bull. n°154 – Com. 25 April 2001, Bull. n°73.
[28] Civ. 1ere, 30 March 1994, Bull. n°124 – Civ 1ere, 27 June 1995, Bull. n°282 – Com. 30 November 1993, Bull. n°434 – Com. 25 April 2001, Bull. n°76.
[29] Civ. 1ere, 4 May 1999, Bull. n°144 – Civ. 1ere, 1 February 2000, Bull. n°33 – Com. 12 May 1998, Bull. n°151.

the notion of credit institution is understood only in terms of the law of 24 January 1984.[30]

Finally, the sanction for the non-respect of the obligations provided by Article L.313-22 of the Monetary and Financial Code must apply from the date on which the information is to be provided.[31]

Commentators have not always upheld the similarity of solutions for the sanction for the non-respect of the requirement of disclosure of information by credit institutions. However the latest decisions of these two chambers are very clear: the loss of the right to contractual interest is the only possible sanction.[32]

<B>. PRINCIPLES SET BY THE LAW OF 1 AUGUST 2003

The latest laws promulgated in France are the law L.n°2003-721, of 1 August 2003 for economic incitement (Official Journal 5 August 2003), p. 13449. and the law L.n°2003-710, of 1 August 2003 for town orientation and planning and urban renewal: (Official Journal 2 August 2003). They do not specifically deal with consumer credit but they change the rules for guarantee, even in case of consumers' credit.

On the one hand, Parliament looks like wanting to create a new common law of contracts of guarantee, but on the other hand, the lawmakers only reform the Consumer Code. It would have been easy to remove certain special provisions that appear in the Consumer Code and are now redundant with the new rules.[33] But we can believe that the terms of contracts of guarantee are maintained outside the Civil Code in order to be more easily modified. However, fundamentally, the Civil Code continues to define contracts of guarantee.

[30] Com. 26 October 1999, Bull. n°183 – same position with regards to excessive debt Civ. 1ere 15 June 1999, Bull. n°204.
[31] Com. 17 October 2000, Bull. n°154.
[32] Civ. 1ere, 16 January 2001, Bull. n°76 – Civ. 1ere, 6 November 2001, appeal n°Y 99-12.124 – Com. 25 April 2001, Bull. n°75. This loss does not excuse the guarantor from paying the interests at the legal rate pursuant to article 1153 of the Civil Code (Civ. 1ere, 9 December 1997, Bull. n°359).
[33] We are talking of course about the articles relative to contracts of guarantee in operations of consumer credit.

The provisions will apply to any natural person standing as guarantor (as opposed to legal persons).We can therefore infer that commercial contracts of guarantee, whose guarantor is not a legal person, but a trader, would be excluded from the possibility of having recourse to any kind of proof[34] that appears in the litigation relative to deeds of commerce. Following this logic, one can wonder whether the Court of Commerce will still be competent to acknowledge contracts of guarantee that have a commercial nature insofar as the latter have lost a great part of their specificity.

This would make sense insofar as lawmakers want to try to unify precedents by entrusting the interpretation of all Consumer Code provisions to the Civil Court alone.

The term “natural person as a guarantor” used in the law has two consequences: On the one hand, it reduces the distinction between the varied kinds of contracts of guarantee and on the other hand, non-professional and professional contracts of guarantee are treated equally. This context would seem to bring back the already remote consideration which consists in analyzing this as a “free and friendly” agreement, as contracts of guarantee are by their nature civil acts[35], and that they are generally scrutinized as such.

As case law stands now, and depending on the position of the doctrine, the distinction between civil and commercial contracts of guarantee is no longer necessary; this distinction will henceforth operate with regard to the legal status of persons and not their quality. The new provisions therefore apply to any natural person who commits by private agreement to stand guarantor to a professional creditor.

The contract of guarantee must be agreed “for the benefit of a professional creditor”. This phrase therefore does not concern only contracts of guarantee taken out for the benefit of credit institutions, which are credit professionals, and which therefore have the monopoly of usual activities.

[34] Article L.110-3 of the Commercial Code.
[35] See Cass. Com. 24 November 1966, Bull civ. III, n°456, D. 1967. 65; 23 February 1988, Bull. Civ. IV, n°78.

However, it is surprising that the professional creditor does not have to be a credit professional! The creditor can be a natural or legal person and it is not required that the contract of guarantee be agreed with the professional creditor in the context of his activities!

Henceforth one can imagine a first extensive approach to this text, and a second, stricter one, which would conform more to the current legal system. The extensive approach consists in thinking that it does not matter so much if the contract of guarantee is connected to the professional activity of the creditor.[36] Such an approach does not conform to classic legal traditions and thus authors prefer the other interpretation.

According to commentators, it is necessary to retain a strict interpretation of the law and only apply the new law to professional creditors in the exercise of their professional activity.[37]

Even if the stricter approach seems more appropriate, it might not conform to the will of the lawmaker, who seems to be in favor of extending the protection of the guarantor by the means of information in all cases, as parliamentary debates show. Once again, this analysis can be seen as a questioning of Parliament action.

The law sets a strict formalism in order to extend it to all natural persons standing as guarantors to a professional creditor. This formalism lies firstly in the mandatory respect of a precise handwritten endorsement through which the guarantor must indicate his consent to the guarantee. It must show the maximum amount of the commitment and its duration. One can therefore infer quite safely that undetermined contracts of guarantee will be prohibited, in spite of the provisions of Article 2293 (ex 2016) of the Civil Code that expressly allow indefinite contracts of guarantee.[38] Protective formalism thus continues to rest on the value of a handwritten note and remains much attached to the “act of the hand”. On the face of it, this protective formalism seems praiseworthy, but it seems contradictory of the increasingly

[36] For instance, a lawyer asking for a guarantor to guarantee the payment of the rents of a studio flat he owns should be subject to the new provisions.
[37] In the case of the lawyer, in his capacity as a landlord, he would no longer be considered as a professional and would therefore be exempt from the new provisions.
[38] Article 11 of Law n°2003-721 introducing a new article L.341-2 in the Consumer Code

frequent use of electronic signatures. It remains to reconcile the obligation of a handwritten note to the possibility of recourse to electronic signatures. Some authors even consider it an "obsolete" method since the proof of any commitment, even an unilateral one, can be provided by a digital instrument and lawmakers are about to consider electronic private agreements fully equivalent to those affixed with a handwritten signature.[39]

The main consequence of a regular procedure is of course the payment by the guarantor of the main debtor's debt in case of default of the latter; however, it is also necessary to deal with the consequences in case of contracts of guarantee of joint and several liabilities, also established by a prior handwritten note. The payment made by the guarantor, contrary to that made by the main debtor, only extinguishes his own debt. The debtor remains doubly bound on the basis of two recourses open to the guarantor by Articles 2305 and 2306 of the Civil Code.[40]

The main consequences of an irregular procedure relating to the formation of the contracts are the nullity of the deed and the impossibility to implement the commitment of the guarantor. The lack of information, if coming from the creditor, can be considered as deceitful reluctance and as such can be declared void for deceit in accordance with the Civil Code. It was judged that a contract of guarantee can be declared void for reason of deceit, if it originates from the creditor.[41] So if the creditor has provided inaccurate information, cancellation is incurred. If he had information that, had they been known to the guarantor, would have discouraged him from signing the contract[42], cancellation also results. However, the creditor is not bound to a duty of advice towards the guarantor, but only to a duty of information related to the guarantor's awareness of the extent of his commitment.

[39] Even though this assimilation is already well advanced (see supra, draft law for the confidence in digital economy transposing the directive on electronic commerce).
[40] A recourse qualified as personal is peculiar to the subject of personal guarantees and is rooted in the connection of personal law existing between the debtor and the guarantor; the other recourse, borrowed from the common law of obligations is based on the subrogation of the *solvens* guarantor in the rights of the creditor.
[41] They are not bound to a duty of advice but only of information.
[42] Cass. 1ere civ. 14 November 1995, Bull. Joly 1996, §37; See also Cass. 1ere civ. 13 February 1996, Bull. Civ. I, n°78, D. 1996. somm. 265, obs. L. Aynès RTD civ. 1996. 430, obs. M. Bandrac.

Particular rules apply to contracts of guarantee of joint and several liability. We know that the clause of joint liability must also take up the lawmakers' prescribed words under pain of being declared null and void.[43]

At this stage, it is necessary to make an obvious, yet fundamental distinction.

- In case of a dispute, only a missing or badly written clause of joint liability will be declared void. The deed of the contract of guarantee will remain valid and the guarantor will still be bound to the contract (if the handwriting requirement of the new article L.341-2 is respected).
- The guarantor remains bound to the contract, but the creditor will not be able to invoke any joint liability between the guarantor and the main debtor in a situation of default. The contract of guarantee will hence be a simple contract of guarantee.
- The main consequence of a simple contract of guarantee is a heavier procedure for the creditor in case of litigation. Unlike a jointly and severally liable guarantor, the simple guarantor can claim the benefit of discussion as well as the benefit of division.

This benefit is a hindrance to the creditor. Of course the guarantor is free to waive it. On the one hand, by his right to the benefit of discussion, the guarantor can stop the proceedings of the creditor directed against him and invite him to talk, if presenting a dilatory plea in *limine litis* . It is well established that the creditor has the right to first take legal action against the guarantor so the action remains valid. However as soon as the guarantor invokes this benefit, the prosecutions from the creditor are suspended and the creditor must seize the goods of the main debtor.

If the guarantor still runs the risk of a discussion, he must advance the legal expenses and tell the creditor which of the debtor's goods are easily sizable. On the other hand, where there are several co-guarantors (co-contract of guarantee), the simple guarantor can claim the benefit of division, before raising any substantive question. This will force the creditor to divide his charges between co-guarantors.

[43] Article L.341-5 of the Consumer Code.

This can be advantageous for some guarantors, for each co-guarantor is bound to the whole amount of the debt, which means that solvent guarantors bear the insolvency of the others.

The law of 1 August 2003 extends the scope of the duty of information *a posteriori* which leads to an extension of the sanction for deficit of information during contractual relations The Fight against Exclusion Act of 29 July 1998, added new rules about the information of guarantors. So, what could have appeared as an increased complexity of the system and not a simplification had given rise to criticism.

Far from simplifying this system, the law of 1 August 2003 is adding an obligation of information to the ones that were already accepted. Of course, these criticisms bear more on the place rather than the substance of the laws. The extension of the obligation of information is not wrong because it is undoubtedly one of the best techniques for guarantor protection.

Indeed now: "The professional creditor is bound to inform the guarantor, at the latest on 31 March of each year, of the amount still owing, the deadline of the commitment and possibly the right to revoke if the duration of the guarantee is undetermined". As stated before, as far as the obligation of information a posteriori is concerned, the rule taken up this time is from article L.313-22 of the Monetary and Financial Code (specific to business guarantors: see above), formerly article 48 of the law of 1 March 1984.

Here again, in order to interpret the new provision, it is possible to refer to the great number of precedents relating to Article L.313-22 of the Monetary and Financial Code. We can therefore think that the case-law is also going to give to this rule a broad scope, by imposing the obligation of information until the debt ends.[44]

Here, the consequences of a breach of law requirements are not the same as for "initial" information. Not providing continuous information will not be punished by

[44] See above: Civ. 1ere, 30 March 1994, Bull. n°124 – Civ 1ere, 27 June 1995, Bull. n°282 – Com. 30 November 1993, Bull. n°434 – Com. 25 April 2001, Bull. n°76.

the cancellation of the instrument. The laws only make provision for the loss of the overdue interest by the creditor.

It is important to ask whether a guarantor can claim further damages. The new text expressly makes provision for this: “the guarantor is no longer bound to the payments of penalties or late interest that were due since the previous notice of information until a new notice of information is communicated.”

This loss by the creditor concerns contractual interest; but he should be able to receive the interest at a legal rate from the date at which the guarantor is required to pay, in accordance with recent case-law.[45] Contractual rates, as their name indicates, are rates that are fixed by contract between the professional creditor and his client. These rates may be above the legal rate.[46]

Once more, it is possible to apply by analogy the analysis carried out on information *a priori*. The consequences attached to Article IX can be adapted to the principle that provides to additional damages which might be awarded by professional guarantors. We note indeed that both the Civil Court and the Commercial Court have after a few hesitations opted for a common case law. This case law relies on the solution adopted for the analysis of Article L.313-22 of the Monetary and Financial Code. The guarantor is not entitled to damages based on the responsibility of a creditor at fault[47]. The only sanction incurred is the loss of interest except in case of deceit or major offence.

It seems now appropriate to briefly deal with French Polynesia local characteristics in terms of contracts of guarantee. First of all, it is necessary to recall that the latest texts[48] have not yet been integrated into the local law.

Indeed, only Article L.313-22 of the Monetary and Financial Code[49] is enforceable in French Polynesia as of 4 February 1994.[50] This article makes provision for annual

[45] Civ. 1ere, 9 December 1997, Bull. n°359 based on article 1153 of the Civil Code.
[46] Rates fixed by decree, generally close to the rate of inflation.
[47] Cass. 1ere civ., 10 December 2002: journal of banking and financial law March-April 2003, obs. D.Legeais.
[48] See Appendix B: type of contracts of guarantee in french legislation and enforcement in French Polynesia.

information to natural or legal persons standing as guarantors for business loans. They have to give information about the amount of the liabilities in principal and collateral of the financial assistance awarded.

In addition, it would seem obvious to refer to the original text on the information to guarantors. Article 2016 paragraph 2 of the Civil Code makes provision for the annual information to natural persons standing as guarantors. This information is about the evolution of the guaranteed debt and its collateral, if the agreed contract of guarantee is of undetermined amount. Yet, the aforementioned paragraph comes from Article 101 of the Fight against Exclusion Act of 29 July 1998, which is not a law enforceable in French Polynesia.

Finally, the Economic incitement Act of 1 August 2003 also is not enforceable in French Polynesia. For credit institutions in French Polynesia, it is therefore not an easy task to estimate what degree of information is to be given to the guarantor, so that he is aware of his commitment.

Indeed, even if all the texts are not enforceable, the spirit which guided their elaboration cannot be neglected: a banker is bound to a general obligation of information towards his client.[51] Therefore, can we not imagine the day when a lawyer invokes this obligation even though the aforementioned texts are not yet enforceable in French Polynesia?

Those working in the profession are well aware of that. Hence it is frequent that a banker, in order to protect himself from possible proceedings, asks the guarantor to sign a “notice of information”, whose aim is to reverse the burden of proof. From then on, in case of dispute, the banker will no longer have to prove that he respected his general duty of information. But the client will have to prove that the document he signed was not “explicit” enough. This demonstrates that those in the profession

[49] Note: this text is applicable in its former drafting: that of former article 48 of Law n°84-148 of 1 March 1984 relating to the prevention and the amicable settlement of the difficulties of businesses.
[50] Or one year after its publication in the Official Journal of French Polynesia 1993 n°3 p.35.
[51] An aspect that can be also found in commercial law in the view of a protection of the “non-professional” client against the professionalism of the chosen contractor.

remain aware of their general obligation of information, even in the absence of enforcement of most texts relating to contracts of guarantee.

Indeed, the Act on Economic Initiative of 1 August 2003 contains a transitional provision (which was negotiated by banks, as the reform would have deep consequences on contracts of guarantee regulations). Article 12 thus states the principle of deferred application of provisions (1). It is however necessary to note a moderating element to the immediate application, which is the immediate application of the proportionality principle.

In principle, Articles L.341-2, L.341-3, L.341-5 and L.341-6 of the Consumer Code were to come into effect six months after the publication of the law. These texts therefore came into effect on 4 February 2004.

But, according to Aline Celeyrette for example, some of these provisions will not just apply to contracts of guarantee signed after 4 February 2004, for in the opposite case their content would be contradictory. [52]

On the one hand, according to the reporter of the text at the French Senate[53], Articles L.341-5 and L.341-6 of the Consumer Code have an immediate application, which would result from the fact that these two articles govern contracts of guarantee of unlimited amount as well as those of undetermined duration.

Article L.341-2 of the Consumer Code prohibits *de facto* undetermined contracts of guarantee since it requires the handwritten note to state the amount and the time limit.

This ambiguity between these articles has led A.Ceylerrette to say that Articles L.341-5 and L.341-6 of the Consumer Code are only intended for contracts of guarantee that were signed before the publication of The Law on economic initiative of 1 August 2003.

[52] A.Celeyrette, "La Loi du 1er août 2003 : Une nouvelle donne du cautionnement", http://www.caution-line.org/article

[53] Opinion of the law reporter: Official Journal Senate CR 27 March 2003, p.2119.

Article L.341-2 (regarding the handwritten endorsement necessary at the time of signing) can only apply to new contracts of guarantee since it governs the formation of the contract. The new law will therefore not lead to the cancellation of all contracts of guarantee signed before its coming into effect. So "new" contracts of guarantee will have to respect the imperative formalism of Article L.341-2 and will therefore be contracts of guarantee of determined duration and amount.

Nevertheless, it seems that the Court of Cassation (on just a few cases because of the little time since 2003), makes a very thorough application of the law for the previous contracts and applies the new provisions only to the new ones.

There was however an immediate application of the principle of proportionality. The principle of proportionality must exist between the commitment of the guarantor and his goods and income. This notion can be linked to that of solvency. In fact, the new provisions in Article L.341-2 of the Consumer Code take up once more an existing principle[54], in order to extend it, more particularly, to all professional creditors, broaden it and make it a "general" principle.

Indeed, in the "Nahoum" ruling of 8 October 2002[55], commentators were wondering as to the future of the proportionality principle outside of the strict framework of Article L.313-10.[56]

Thanks to Article L.341-4, the lawmaker puts an end to the disagreement between the Civil and Commercial Chambers, and turns this principle into a principle of general nature. By the text L.341-4, "a professional creditor cannot take advantage of a contract of guarantee signed by a natural person whose commitment was, at the time of signature, manifestly disproportionate to his goods and income, unless the patrimony of the guarantor, when he is called upon, allows him to face his obligation." This provision obliges the judge to examine the situation of the guarantor at two times: at the signature of the commitment and during its implementation.

[54] L.313-10 of the Consumer Code.
[55] Journal of banking and financial law, Nov-Dec 2002, p.319, obs. D.Legeais.
[56] Reserved to credit institutions.

It is worth noting here that the solvency of the guarantor is not a condition of validity as such. Indeed, one can consider that a contract of guarantee will not be deprived of its efficiency if the guarantor can meet his commitment when he is called upon. It will be up to the guarantor to establish the obvious disproportion of his income compared to his commitment, and up to the creditor to possibly demonstrate that the guarantor's resources have increased subsequent to his commitment.

At the end of this first part, we can wonder about the actual will of the French lawmaker to extend new provisions to all guarantors. If that had been his intent, he would have reformed the Civil Code. However, only the Consumer Code has been modified. Yet the wording of the texts induces the reader to give them a general scope. Case-law may limit this general scope in order to clarify the text, or, on the contrary, a judge may refuse to make a distinction where the law does not, if he has to face this issue.[57]

[57] Opinion of the law reporter: Official Journal Senate CR 27 March 2003, p.2119

CHAPTER II: NEW ZEALAND

It is well known that most legal systems in Pacific countries are based on the English legal system.[58] Indeed, during the decolonisation process, the fundamental law of the new States has formally agreed on the implementation of the written laws handed down by the British until they are explicitly abolished.[59] However, few countries of the Pacific region decided to set a deadline for considering the principles of the Common Law and Equity that were in force in Great Britain. Beyond this deadline, the principles were those as laid down in the new State.[60] In New Zealand, the written British law on guarantees, that is to say relevant parts of The Statute of Frauds from Great Britain, was enforced up to 1956. And for a few years, the major point of discussion was: certain deeds, inclusive of protective rights, should they be enacted in writing at a time when the Common Law, in general, makes no provision for such a formality?

<A>. THE FORMER LEGISLATION [61]

The Statute of Frauds and Perjuries (29 Car II, c.3) was enacted in the United Kingdom in 1677. The relevant parts for the contracts of guarantee of the usually named Statute of Frauds were New Zealand law up to 1956. Section 4 lists the deeds which are to be enacted in writing to become enforceable, that is to say:

• Agreements by executors to accept personal liability for the debts of estates they were administering;

• Guarantees;

• Agreements made in consideration of a marriage;

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[58] Y.L.Sage, Emergence et évolution du droit dans les petits états insulaires du Pacifique Sud Anglophone in *Revue juridique polynésienne*, numéro hors série, 2001, pp. 23-46. See for more details, J. Corrin Care, T. Newton, D. Paterson, *Introduction to South Pacific Law*, Cavendish Publishing ltd, 1999.

[59] See for example Part XII of the Constitution of Samoa entitled "Transitional". It states that*: "Subject to the provisions of this Constitution the existing law shall, until repealed by Act, continue in force on and after Independence Day"*. See also the Constitution of Fiji, section 195

[60] JSPL, 2002, Jennifer Corrin Care, Cultures in Conflict; the Role of the Common Law in South Pacific.

[61] Source: Preliminary Paper 30, Repeal of the Contracts enforcement Act 1956, A discussion paper issued by The Law Commission of New Zealand in 1997.

• “any contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them”;
• Agreements to be performed later than within a year from their making.
The formality required was that either the contract, or a note or memorandum of the contract, be in writing signed either by the party against whom enforcement was sought or by that party’s duly authorised agent.

The Contracts Enforcement Act 1956 declared that, except in respect of contracts made before the 1956 Act was passed, section 4 of the 1677 Statute was no longer part of New Zealand law. It re-enacted the requirement of a signed writing for only two of the five classes listed in s 4 of the 1677 Statute; contracts concerning dispositions of land, and guarantees.

The law of contract was modified by the Contract Enforcement Act of 1956 in order to take in account the former reform introduced in English law in 1893 (Sale of Goods Act) and 1925 (Law of Property Act) regarding credit contracts. This Act applies to the contract of guarantee defined as “every *contract by any person to answer to another person for the debt, default, or liability of a third person*”. It stipulates that this type of contracts must be in writing and signed by the party to be bound or by someone lawfully authorized to sign on that party’s behalf.[62] This basic legislation was completed by several Acts like the Hire Purchase Act 1971, the Property Law Act in 1952 amended in 1980 and more particularly, the Credit Contracts Act 1981.[63]

Some specific provisions exist for contracts of guarantee in respect of a minor obligations. The guarantor has exactly the same obligations as if the guarantee applies to an adult. But, the minor can easily invoke before the tribunal a contract that is “oppressive, unfair and unreasonable” to prevent the implementation of the agreement or ask for its cancellation.[64]

[62] Maree Chetwin, Stephen Graw, *An introduction to the law of contract in New Zealand*, Brookers, p.5
[63] So hire purchase, which was not repealed in 1981, was considered as distinct from loans of money.
[64] See Minors’ Contract Act 1969 section 10.

It is worth noting that there was not a specific legislation for guarantees in case of consumers contracts until 1993. The Consumer Guarantees Act provided protection for ordinary consumers but did not deal with contract of guarantee.[65]

The Credit Contracts Act published on 1981 was reformed by the Credit Contract Amendment in 1998 which introduced a duty of disclosure of information to the guarantor. The disclosure requirements of Part II of the Act apply only to *controlled* credit contracts. These are contracts where the lender supplies finance in the course of its trade or business, or where a professional has either brought together the borrower and lender or prepared the contract, and where the amount lent will be less than $250,000. So the Credit Contracts Act places two main responsibilities on lenders. First, lenders must disclose certain information about a credit contract – most importantly, the total cost of credit and the annual finance rate – to borrowers. Secondly, lenders must not take advantage of the imbalance in bargaining power that characterises most consumer-credit relationships by acting in an oppressive manner towards borrowers.

Guarantors of controlled credit contracts also have rights of redress in relation to the disclosure requirements of the Act. Sections 16A, 24A and 25A respectively require that disclosure be made to guarantors; provide that such a disclosure is a prerequisite to any claim being made against a guarantor; and provide for penalties for failure to disclose to guarantors. But disclosure of changes and requested disclosure are not compulsory.[66] Guarantors face similar issues to those arising for borrowers under the Act, particularly in relation to the disclosure provisions.

A controlled credit contract cannot be enforced by the lender, until the lender has made the disclosure required by the Act. This applies to all types of disclosure. Similarly, until the required disclosure has been made, only the borrower can enforce any right to recover property to which the controlled contract relates, or enforce any security under the contract. The Act sets penalties for failure on the lender's part to

[65] Maree Chetwin, Stephen Graw, *An introduction to the law of contract in New Zealand,* p. 203-204

[66] In case of commercial guarantees, the guarantors often complained that creditors failed to make proper disclosure. But the duty of disclosure has always been restrictively interpreted by the Courts: "The *very fact that a creditor seeks a guarantee is sufficient to put the guarantor upon notice that the creditor mistrusts the debtor's credit worthiness".*

disclose information as required. But the Credit Contracts Act's civil penalty regime is designed primarily to promote compliance, rather than compensate the borrower for any losses as a result of a breach. So, no damages claim or compensation is provided for the borrower and even more for the guarantor.

Hence, it is assumed that the legislator has acted in the best interest of the borrower and his guarantor's by providing all relevant information not only for the borrower but also for the guarantor. The information which credit providers must provide consumers is designed to help them make informed choices. This in turn helps promote healthy competition among the credit providers.

However, in 2000, the Ministry of Consumer Affairs for New Zealand, considered that the Law did not provide sufficient transparency with regard to consumer credits: *« Anecdotal evidence and regular complaints gathered by the Ministry and consumer organisations indicate that the Act is regularly breached and that there is a high level of consumer dissatisfaction with this area of law. »*[67] In this Law Review, the Ministry outlined some improvements to better protect consumers rights like to impose penalties in the event of breaches of information disclosure by credit providers or to improve information disclosure to the borrower or to his/her guarantor. The Ministry evokes the United States' Consumer Credit Law that allows lenders to use "model form" contracts in order to minimize their liability. An other means to improve knowledge of legal provisions would be to publish a Consumer Information Standard made under the Fair Trading Act based on the disclosure requirements of the Credit Contracts Act. This Standard would be enforced by the Commerce Commission like the other Consumer Information Standards.

In 1997, the Law Commission launched a consultation procedure with regards to the repeal of the Contracts Enforcement Act of 1956.[68] The issue was to know whether, given the evolution of morals, it was still relevant to maintain the need for the guarantee agreement to be in writing.

[67] See Ministry of Consumer Affairs website, 2000, Consumer Credit Law Review, Part 5, p. 2;
[68] Preliminary Paper 30, Repeal of the Contracts enforcement Act 1956, A discussion paper issued by The Law Commission of New Zealand in 1997.

According to the Law Commission, this obligation did not really serve the objectives for which it was meant and should therefore be removed. These objectives were laid down by Professor LL Fuller of the Harvard University in his article on the advantages of formal specifications for agreements. These objectives are: evidentiary function, cautionary function and channelling function.[69] For the Law Commission though, a signed contract did not necessarily show any better evidence as an oral undertaking, just as it did not show more certainty for the agreement.[70] Nevertheless, one of the reasons given by supporters of the hand-written signature mentioned by the Law Commission remind us the reasons given by the French representatives to support the need of such a signature.[71] According to these New- Zealand supporters, the cautionary function of a written form protects parties from hasty and ill-considered conduct. What professor Fuller describes as the cautionary function of a signed writing is that of giving pause to the intended contracting party, making that party stop and appreciate that, by signing a contract, he or she will become bound to its terms.

But actually for the Law Commission this argument is advanced in the absence of empirical evidence that a person who will enter into an improvident contract orally will be deterred from entering into it by the fact that it is in writing. This is to confer on a requirement of writing a function more properly to be performed by the requirement that for there to be a concluded contract there must be *animus contrahendi* – an intention to create legal relations. According to the Law Commission, experience suggests that, rather than avoiding argument, the statutory requirement has created it. The difficulties were the fact that non-compliance with the statute does not avoid the contract but merely makes it unenforceable, and also the necessity to soften the rigour of the rule invoking equity principles (for example by the doctrine of part performance and by permitting rectification).

But the major difficulty, by a sense, shared by courts and litigants alike, lies on that invocation of the statute is dishonourable. It is this feeling of repugnance that the statute can cause that has resulted in such inventions as the "authenticated signature

[69] LL. Fuller, "Consideration and Form" (1941) 41 Column L Rev 799.cited in Law Commission paper about the Repeal of the contracts Enforcement Act 1956.
[70] See Law Commission Discussion paper about Repeal of the contracts Enforcement Act (1997)
[71] See part I, infra

fiction". Under this fiction the Courts pretend in certain circumstances that a document has been signed by a party when all there is on the document is that party's name either printed or written by the party's agent.[72]

More over, this compulsory written signature creates a difference that is hardly justified between judiciary treatment of the indemnity and that of the guarantee. An indemnity is enforceable even though not evidenced in writing. The Law Commission gives a very clear example: *"the uxorious X who, while shopping with his wife, realises that she wants to take home a purchase but has no means of immediate payment. If X says to the shopkeeper, "I will be responsible for paying you", then X has given an indemnity enforceable even if not in writing. If, however, X says, "I will make sure that my wife pays what is due", then X has given a guarantee enforceable only if in signed writing. Such technical distinctions do the law no credit."*

As a conclusion, this obligation for a deed to be in writing, according to the Law Commission, does not constitute an assurance neither for the borrower nor for the guarantor but instead limits the legal proceedings by preventing recourse to oral evidences while Commonwealth courts are used to such procedures. In the occasional cases where there is no writing or writing insufficient to satisfy the requirements of the Act the provisions in the Act prevent courts from doing justice. In practice instead of the court considering the substantive issue between the parties ("Is there is a concluded contract?"), enormous time and cost is expended on an artificial procedural issue ("Is the signed writing requirement satisfied?"). This distraction does little for the reputation of the legal system as an efficient and rational process for determining disputes.

Summarily, the Law Commission, contrary to the analysis of the French legislator, is not convinced that a hand-written signature provides a better protection to the parties by guaranteeing a better awareness in the commitments made. Reasons that explained the need of a written manuscript in 1677 no longer exist and this

[72] See Law Commission Discussion paper about Repeal of the Contracts Enforcement Law, 1997.

requirement in contract agreements should be removed as it brings in additional difficulties instead.[73]

It is worth noting that, contrary to the contracts of guarantee, the "contracts or sale of land" should, according to the Law Commission, not only be signed by all the parties, but also assemble all the elements found in the contract into a single document, not only to be enforceable but to be valid.

Although the Law Commission does not explicitly make it clear, it appears that the difference in treatment that it recommends for the agreements, which were earlier similarly treated by The Statute of Frauds, is the inequality between parties regarding their own interest to contract and their unequal access to legal information in regards with land issues. The Commission highlights *« In New Zealand it may be argued that there is an unusually great need for the cautionary function. Such an argument could be based on the high proportion of people who own a home that for most (not all of whom are commercially sophisticated) is their single biggest asset and on contracts being procured by a real estate agent with a personal interest in a contract being concluded"*. So for the Law Commission contracts or sale of land must be carefully ruled. But, in the same way, should not be argued that there exists a personal interest for the credit provider to establish a contract of guarantee, as there exists a marked difference in the understanding of the law governing this professional credit provider and the natural person who stands as a guarantor?

However, it is worth noting that the Property Law Act of 2007 (section 366 a) has totally abolished the Contracts Enforcement Act, and not merely the part dealing with contract or sale of land. Hence it seems that the written signature would henceforth not be compulsory except for land issues since the Credit Contracts and Consumer Finance Act of 2003 does not mention any compulsory hand written

[73] See Law Commission Discussion paper, paragraphs 5 and 6: *"The 1677 Statute was enacted at a time of both political upheaval and legal flux. Charles II had been restored to the throne less than 2 decades earlier. It was an extremely litigious age. In actions to enforce contracts the immediate parties were not competent witnesses. Decisions of fact were made by jurors who (particularly in cases involving land claims) were not restricted to evidence but were entitled to take into account their own local knowledge. These factors could lead to verdicts that were of startling perversity but unassailable in law. The formality chosen to overcome the procedural inadequacy of the then law was the requirement that these contracts be proved by signed writing. "*

signature for contracts of guarantee, as for consumer credits contracts as well, contrary to the Property Law Act 2007 which maintains the need of a written signature (s. 9).[74]

<B>. THE CREDIT CONTRACTS AND CONSUMER FINANCE ACT 2003[75]

This Act tries to bring all finance transactions under a single uniform regime. Enforcement process, duties of the creditor, remedies means are the same for all type of credit contracts. But, like in France, debtors and guarantors, in case of consumers credit contracts, get better protection than for business ones. So in any proceeding, if a party claims that a credit contract is a consumer credit one, it is presumed that it is. If not, the debtor (as a natural person) has to make in a separate written document a declaration that the credit is to be used primarily for business or investment purposes, and the debtor has to confirm that he has read and understood the declaration. So the presumption is in favor of the debtor. Moreover, this Act introduces a great change in the interpretation of the duty of disclosure of information for professional creditors in case of credit consumer credit or lease of goods which is treated as a consumer credit contract.

The purpose for this new law was to provide more transparency in dealings between creditors and debtors or their guarantors. Contrary to the French law this allows some flexibility in the way creditors to comply with their obligations.

Nevertheless the Act remains strongly against oppressive conduct by creditors and aims to give a good protection for debtors and guarantors (section 32 sets out standards for disclosing information). The Credit Contracts Act recognises that the relationship between borrower and lender is often unequal. Lenders have greater knowledge and experience in credit contracts and frequently much more economic power or financial ability than their clients. This imbalance of knowledge and power

[74] A written signature can be given by electronic means . See Electronic Transactions Act 2002 (s.2). In the same way, a credit contract can be established by electronic means if some requirements are fulfilled (See Consumer Credit Law Review, Part 4, August 2000). Compulsory disclosure of information, can also be made by electronic means (Credit Contracts and Consumer Finance Act 2003, s.35)

[75] Source: http:/www.legislation.govt.nz. Credit Contracts and Consumer Finance Act 2003, n°52, Date of assent 13 October 2003.

often skews the credit market in favour of lenders. Borrowers, for instance, may not always receive (or understand) the information they need to make an informed choice about a credit deal. Thus, they may be subject to exploitation. The Act attempts to redress this power imbalance by placing various obligations on lenders. Borrowers[76] are entitled to redress when a lender breaks these obligations:

Unlike in France, a unique Act defines credit contracts (section 6) and consumer credit contract (section 11) as a type of it. This one is a contract in which a debtor is a natural person who enters into the contract for personal, domestic or households purposes.

This Act does not include special provisions related to the protection of jointly and severally guarantors. It only stipulates that all co-guarantors must be given the same information than a single one.

The Act requires four types of disclosure either for debtors or guarantors. It is worth to notice that the way key information is disclosed or guarantee is given is carefully described. Disclosure must be in writing in a disclosure statement; and contain the information required by this Act. The statement must be clear, concise and not be *"likely to deceive or mislead a reasonable person"*.[77] Disclosure must be made by giving the disclosure statement to the person to whom disclosure is to be made; or sending the disclosure statement by post or in the case of an electronic communication, sending the disclosure statement to the information system specified by the person for this purpose.

An initial disclosure is needed. If the contract itself must not be disclosed to the guarantor, all relevant information have to be disclosed. Schedule 1 of the Credit Contracts and Consumers Finance Act 2003 describes very thoroughly the key information for a consumer credit contract. The key information are the full name

[76] Guarantors of controlled credit contracts also had rights of redress in relation to the disclosure requirements of the Act. Sections 16A, 24A and 25A respectively: require that disclosure be made to guarantors; provide that such disclosure is a prerequisite to any claim being made against a guarantor; and provide for penalties for failure to disclose to guarantors. Guarantors face similar issues to those arising for borrowers under the Act, particularly in relation to the disclosure provisions. However, it remains unclear whether guarantors are able to avail themselves of the oppression and re-opening provisions of the Act: *Gault on Commercial Law* Brookers: Wellington, at para CC.Intro. 01.

[77] See Credit Contracts and Finance Consumers Act, s. 32-35

and address of creditor, the initial unpaid balance, the subsequent advance, the total advances, the credit limit, the annual interest rate interest, the method of charging interest, the total interest charges, the interest free period, the credit fees and charges, the payments required, the full prepayment, the security interest, the default interest charges and default fees. This document also contains a legal form related to the statement of the debtor's right to cancel

More over the creditor has to disclose any collateral arrangements that the guarantee extends to, like overdraft facilities or a debtor's credit card for example. In general, he must disclose the key information concerning any subsequent consumer credit contract that he enters into with the debtor and to which the guarantee applies. A copy of the terms of the guarantee must be given or sent and the disclosure of Key information must be made to the guarantor or every guarantor before the guarantee is given or within fifteen working days (15) of the day on which the guarantee is given (s.25).

The Act also provides a continuing disclosure to debtors and only in some cases for guarantors. So variation disclosure is needed regarding the guarantor if it increases the debtor's obligation, or if it reduces the time for payment (whatever payment is concerned). It will be done within five working days (5) after the change takes effect. (s.26). The disclosure of changes to the guarantor, either unilateral or not, is compulsory.

Request disclosure is introduced (s.24). Information may be requested about effects of a part prepayment, the amount of any fee or charge, for a charge prepayment and how it is calculated, the unpaid balance, and the amount required for a full prepayment. A guarantor may ask in writing to the creditor to disclose some information, like for example the effect of a part prepayment on the debtor's obligations, the unpaid balance, including the amount of any interest charge outstanding. The creditor must provide this information if he did not do so recently, that is during the three months before he has received the request. The creditor must comply with the request for disclosure within 15 working days of the later of the date that the request is received by the creditor; or the date on which the creditor receives payment of a reasonable fee for the disclosure as specified by the creditor. These

disclosures do not apply for business loans. It is not possible to limit the application of the Act by the inclusion of a contractual term to that effect in the contract in question

Creditors not making proper disclosure cannot enforce contracts against debtors who fail to pay until they make correct disclosure. A breach of disclosure towards the guarantor prohibits enforcement of the guarantee but the credit contract is still enforceable towards the debtor and vice-versa (s. 140). It is worth noting that a failure to comply with request disclosure is not a bar to enforcement action (s. 140). That is because the debtors used the opposite provisions of Credit Contract Act 1981 to delay the creditor realizing its security.

Debtors can also seek statutory damages from creditors for the failure to comply, and the guarantor too in case of consumer credit contracts (s. 88). Nevertheless, the Act provides limitations on the sums that can be asked for, and the calculation of these damages is simplified. In the case of a breach of disclosure, the lesser of $3,000 or 5% of the total of all advances made and agreed to be made under the consumer credit contracts to which the guarantee applies at the time the guarantee is given can be asked by the guarantor (s. 89).

In its report, the Consumer Credit Law Review identified the difficulty for the borrower to be compensated in the event of breach of rules. This new law clearly highlights how borrowers and guarantors can seek remedy from the Courts according to the degree of the breaches. In addition, this law defines the role of the Commerce Commission within the framework of the implementation of this law (s.111) The Commerce Commission has to control the business practices of creditors, supply correct information to borrowers: but it can also suspend any transactions in the event of breach of the provisions of the law.

Like in France the implementation of the text was deferred save for sections covering buy-back of land transactions that took effect from 14 October 2003. For other credit contracts, creditors could choose to switch all existing contracts to comply with the Act after April 1 2005 (s.2). If they elect a date to switch to the new provisions they must, within 5 working days of the day the election is made, notify the debtor or the guarantor in writing that they have made an election. So it seems that, like in France,

professional creditors, found the new provision heavy to comply with and asked for some delay.

Unlike the French law, the New Zealand Act does not make it an obligation for the creditor to do continuing disclosure to the guarantor and a handwritten note with prescribed wording is not required to prove a clear understanding of the terms of the contract by the guarantor. Nevertheless, protection results from a list of disclosure standards the creditor must respect. The New Zealand law also provides for institutional assistance to borrowers via the Commerce Commission which was primarily created by provisions of the Commerce Law (1986).

CHAPTER III: FIJI

Fiji is a plural society with a colonial legal history. The laws presently on the statute books reflect this colonial legacy. However society has changed since colonial times and these changes not only affect values and institutions, but also the very conditions of everyday life. This means that laws from the early 1900s or even the 1950s may not be appropriate for today. This has resulted in laws which may be inappropriate, unfair, outdated, uncertain and expensive.[78]

The Fijian legal framework is characteristic of the law in force in the United Kingdom's former colonial empire. The Fijian Constitution reckons that the Common Law principles, equity rules laws of general application that were in force in January 1875 in England are still enforced in Fiji (Section 195). Presently, it appears that Fijian courts prefer to use the Commonwealth Common Law and especially precedents from Australia and New Zealand. These principles can be amended according to "local circumstances "[79], even if this is not often the case. As regard contracts of guarantee, the law in force in Fiji was enacted in 1881, but it was amended several times during the colonial period, in 1918, 1932 and 1945. It is known as the Indemnity, guarantee and bailment Act. [80]

In 1997, the Fijian legislator started consultations on the need to draft an Act on Consumer credits. In 1998, the Fijian Reform Law Commission prepared a final report and a draft bill. The deliberations were based on a precedent of the Australian State of Queensland. The Consumer Credit Act was voted in 1999[81], but its implementation was deferred for various reasons we will check further on. Finally, a consultation took place in 2005 on the need to amend this Act, so that it meets its objectives more effectively.

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[78] See the Pamphlet published by the law Reform Commission of Fiji to explain its function. (www.lawreform.gov.fj). See also Y.L.Sage, Emergence et évolution du droit dans les petits états insulaires du Pacifique Sud Anglophone in *Revue juridique polynésienne*, numéro hors série, 2001, pp. 23-46. See for more details, J. Corrin Care, T. Newton , D. Paterson, *Introduction to South Pacific Law*, Cavendish Publishing ltd, 1999.

[79] *JSPL*, 2002, Jennifer Corrin Care, Cultures in Conflict; the Role of the Common Law in South Pacific.

[80] See, laws of Fiji, chapter 232, 1978 version

[81] See : www.parliament.gov.fj/legislative/Acts

<A>. THE BASIC LEGISLATION

Like many basic legislations of the insular countries of the South Pacific, the Constitution of Fiji was amended in 1997. The key preoccupation was to enable a joint application of the customary law with Fundamental Human Rights. It should be noticed that the Chapter on the Fijian Bill of Rights, relating to personal liberty contains a special provision forbidding the imprisonment of borrowers or those owing alimony (food allowance to their spouse) if they haven't declared their refusal to settle their debts in spite of having the means.[82] This considerably reduces appeals against borrowers and guarantors who do not fulfil their obligations.

Such a provision at the constitutional level may be surprising, for it provides protection from the highest legal level, letting one to assume that unpaid debts are a crucial issue for Fiji government. We can also assume that the good faith of the borrowers or guarantors is often real. So we would rather think that it is difficult for Fijian citizens to understand the consequence of commitments made and that it is more likely a cultural fact which is at the root of such a provision (misunderstanding of a written agreement).

This act is a model of clarity and legal conciseness, though it applies to all contracts of guarantee, either commercial or not. That is why this Act was enforced so a long time.

The Fiji law seems to display only the basic rules for a contract of guarantee. For instance, It provides the basic rules relating to co-guarantors (named co-sureties) (s.24). Where two or more persons are co-sureties for the same debt or duty, either jointly or severally and whether under the same or different contracts and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable as between themselves to pay each an equal share of the whole debt or of that part of it which remains unpaid by the principal debtor. It makes provision for continuing contracts: "A guarantee which extends to a series of

[82] See Paragraph 2 of The Constitution Amendment Act 1997, chapter IV, paragraph 2: « Paragraph (1) does not permit a court to make an order depriving a person of personal liberty on the ground of failure to pay maintenance or a debt, fine or tax unless the court considers that the person has wilfully refused to pay despite having the means to do so."

transactions is called a continuing guarantee" (s.7). But a continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor. It defines the guarantor's rights, who must be indemnified by the principal debtor in proportion to the sums he duly paid in his place (s. 23).

This text provides also protection for guarantors (named surety) against creditors. The transactions are invalid if the creditor obtain the guarantee by "means of misrepresentation concerning a material part of the transaction" or in "keeping silence as to a material circumstance" for example. If the creditor changes the terms of the contract with the principal debtor, without the surety assent, this discharges the surety as to transactions subsequent to the variance. So creditor has a sort of duty of disclosure. But the only consequence of any act which is inconsistent with the rights of the surety or omission to do any act which his duty to the surety requires him to do, is that the surety is discharged.

The Act contains special provisions as to compulsory written signature with respect to contracts of guarantee. These provisions were introduced in 1918.[83] So no action can be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which such action is to be brought or some memorandum or note thereof is in writing and signed by the party to be charged there or some other person thereunto by him lawfully authorised (section 59). They include special provisions of the Statute of Frauds and Perjuries concerning contracts of guarantee, by what the obligation for these contracts to be in writing was broadly understood as "some memorandum or note in writing."(s.59) However, the commitment in respect to the principal debtor does not require a written document as mentioned in the section: "Anything done or any promise made for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee." Section 60 states that such a promise made in writing can be liable to legal action even if no consideration of such a promise to the principal debtor appears in writing or by necessary inference from a written document.

[83] See, laws of Fiji, chapter 232, 1978 version

These precisions prove the impediments introduced by the compulsory written signature for contracts of guarantee in relation to Common Law principles. Moreover, as in the case of New Zealand legal texts in force before the Credit contract and consumer finance 2003, the indemnity contract, defined by the same act, does not require a hand-written document (s. 2 and 3).

The Moneylender Act is more recent (1978, 1985) and provides that a contract shall not be enforceable *"unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract"* (section 16). The parties must sign such a memorandum before the money is lent or the security given. Section 16 describes information the memorandum has to include. The English version is compulsory even if a vernacular language version exists.[84]

A judgment of 1995 (Development Bank v Moto)[85] stated that the creditor has a duty of information but not of advice or even of explanation and that "*the rights of surety depend rather upon principles of equity than upon the actual contract*". But a commentary on a judgment of the Supreme Court of Fiji (Fiji Development Bank v Navitalai Raqona)[86], underlines that "*in the modern day of transactions, a person* ***should*** *not be bound by an onerous guarantee liability unless he or she has received independent advice before the execution of the guarantee, or has waived the right to independent legal advice*".

So judges seem to refer to fundamental principles more than to very precise legal rules to protect creditors or guarantors (natural persons). But we have to bear in mind that nowadays, Courts highlight the need of a legal advice before the contract of guarantee is signed.

[84] As a comparison, the first Moneylenders ordinance of Kiribati was repealed in 1975 because it was considered by local Moneylenders to be a too complex piece of legislation. The new Act to make provision for the control of money lending of the Republic of Kiribati (1988) is not peculiar to this country. It was modeled on the Fiji Money lenders Ordinance (see above) and on the English texts (Moneylenders Act 1900 to 1927). Its purpose was to enforce a "clearer and considerably simpler" legal text.
[85] FJHC 166;Hbc0055j.95s (22 November 1995); www.pacificLII.org/fj/cases
[86] JSPL, Case Note 2 of volume 5 2001; www.pacificLII.org/fj/cases

<B>. THE CONSUMER CREDIT ACT 1999 [87]

Prior to the enactment of the Consumer Credit Act 1999, credit transactions were regulated mainly by contractual agreements provided by credit providers and there were no legal safeguards for consumers who had no option but to accept the terms and conditions imposed by the credit providers. The Consumer Credit Act sought to remove this imbalance by ensuring that consumers were given adequate disclosure about the terms and conditions of credit contracts to allow them to make an informed choice and to provide consumers with legal protection and avenues of redress.[88]

The Republic of Fiji chose to make special regulations related to Consumer credit contracts. Consumer means a person who acquires goods or services for personal, domestic or household purposes. The Consumer Credit Act of Fiji 1999 "*tries to strike a balance between the inequitable powers that a creditor has in comparison to a debtor and a guarantor."*[89] Nevertheless this Act does not apply to short term loans. It does not apply to the provision of credit limited by the contract to a total period not exceeding 62 days.

The types of credit covered under the Act include: Personal loans, Credit cards, Overdrafts, Housing loans, Mortgages, Consumer Leases, Hire Purchase Agreements, Guarantees, Continuing Credit Accounts. This Act applies to a guarantee if it guarantees obligations under a credit contract; and the guarantor is a natural person. In fact, the Interpretation limits the sense of a "credit contract" to a contract under which credit is or may be provided, being the provision of credit to which this Act applies, that is to say consumer credit contract. In that matter, legislation imposes a greater formalism on contracts' writing. A guarantee of a credit contract must be in writing signed by the guarantor. But the Act does not give more details on the nature and reach of this specific obligation. The regulations may make provision for or with respect to the content of guarantees and the way they are expressed. If the content of guarantee and the way they are expressed do not comply with the legislation, the contract is not enforceable.

[87] N° 15 of 1999, 19 march 1999.
[88] See: http://www.lawreform.gov.fj/
[89] Commentary on a judgment of the Supreme Court of Fiji (Fiji Development Bank v Navitalai Raqona)

The creditor must disclose to every guarantor a copy of the proposed credit contract, a document in the form prescribed by the regulations explaining the rights and obligations of a guarantor before he signs the contract of guarantee. The guarantee is not enforceable unless it complies with these initial disclosure provisions (Section 51).

Within 14 days after a guarantee is signed the creditor must provide to the guarantor a copy of the guarantee he signed and a copy of the credit contract. The guarantor can withdraw if the contract differs from the proposed one, even after credit is provided.

A contract of guarantee may contain a provision about future extension. Nevertheless the creditor must provide a copy of the future credit contract and obtain a written acceptance of the extension of the guarantee by the guarantor, or acceptance in some other form provided for by the regulations. If not, the guarantee is not enforceable. So, in this case, other evidence than a written one can be done to make the contract enforceable.

Written signature, compulsory prior information are similar features of contracts of guarantee in France and Fiji regarding consumer credit.

Continuing disclosure is not compulsory either for the guarantor from part of the credit provider. But in case of changes of interest rates, frequency or time for payment, calculation of interests, the credit provider must give a notice to the debtor or the guarantor within 30 days. The rights of the guarantor are better protected in case of continuing credit contract, [90]or increase in his liabilities, or changes linked to a hardship from part of the debtor. Nowadays, the creditor has to disclose the changes to the guarantor within 30 days or 20 days (according to the Amendment Act 2006).[91] The creditor has to obtain a written acceptance or acceptance in some other form prescribed by the regulations in case of increase of liabilities. The

[90] This implies that the rights of a guarantor were not well protected in case of undetermined guarantee. Nevertheless this type of guarantee is not prohibited
[91]N° 1 of 2006, passed on 22 of March; section 30. See www.parliament.gov.fj/legislative/bills.

guarantor can give notice of limitation of the guarantee in case of continuing credit contract.

A guarantee is void if the amount secured exceeds the amount of the liabilities of the debtor or limits the guarantor's rights to indemnity from the debtor. So the principle of proportionality is well protected in this Act.

In case that, at the time it was entered into or changed (whether or not by agreement), guarantee or change was unjust, a Court may re-open the transaction that gave rise to the guarantee or change. In these circumstances, the Court may have regard to the form of the guarantee and the intelligibility of the language in which it is expressed; whether, and if so when, independent legal or other expert advice was obtained by the guarantor; the extent to which the provisions of the guarantee (before and after any change) and their legal and practical effect were accurately explained to guarantor and whether or not the guarantor understood the provisions and their effect. The Court may examine whether the credit provider took measures to ensure that the debtor, mortgagor or guarantor understood the nature and implications of the transactions and, if so, the adequacy of those measures. If the Court decides that the contract of guarantee is unjust it may relieve the guarantor from payment of any amount in excess or of any amount the Court, having regard to the risk involved and all other circumstances, considers to be reasonably payable. The Court can also decide to compensate damages caused to the guarantor and give judgment for or make an order in favour of a party of such amount as, having regard to the relief (if any) which the court thinks fit to grant, is justly due to that party under the guarantee (s.20 21).

These provisions make a strong obligation for the professional creditor in giving accurate information and being sure that the guarantor well understands the commitments it makes. The Consumer Credit Act not only introduces uniformity, it also requires credit information to be presented in a clear and easy to understand format. Credit providers such as banks, credit unions, finance companies and businesses must inform consumers of their rights and obligations in any sort of credit arrangement. They are required by law to truthfully disclose all relevant information about the arrangements in a written contract, including interest rates, fees,

commissions and all other information that was often hidden in the past. In any case the creditor who contravenes the duty of disclosure commits an offence.

In order to fulfill the role of an independent legal adviser, the Act appointed under section 5 a Consumer Credit Office managed by the Director of Fair Trading and Consumer Affairs, whose position was initially created by the Fair Trading Decree of 1992.[92] The establishment of an official entity vested with wide powers is, as a matter of fact, a way of generating and spreading information independent of professional credit providers and thus balance their powers. The Consumer Credit Office must promote the interests of consumers, collect, examine and disseminate information. It may receive and consider complaints concerning consumers credit contracts or contracts of guarantee related to them. More Over, the Consumer Credit Office may investigate complaints in relation to these matters and take any action in respect of the complaint which the Director considers appropriate. In section 110 the Act provides that The Director of Fair Trading and Consumer Affairs may apply to the Court to become a party to an application in case of a breach of key requirements and, if joined as a party, stands to represent the public interest and the interests of debtors. It is a way to make easier access to justice for the debtor or guarantor.

The Consumer Credit Act is a complex piece of law, and it requires all providers of consumer credit (i.e. credit for personal and household purposes as distinct from commercial or business purposes) to provide certain information and use certain documentation. The Bill took several months to pass through both Houses of Parliament and a sector standing committee, during which time various representations were made to the Minister about the commencement of the Bill. The consumer groups wanted it brought in as soon as possible, while the retail stores wanted it delayed as long as possible.

For these reasons and a change of government in Fiji, the date of enforcement as well as the legal manner of implementing it, was contested. There was an argument for saying that a Minister should not tie his successor's hands by bringing a major Act into force in the last week of his term of office. Actually, the competent Minister,

[92] Fair Trading Decree n° 25 of 1992, www.pacificLII.org/fj/cases

convinced of the importance of this Act, had wished to enforce although the government was in "caretaker" mode.[93] The banks suspended all lending for consumer purposes. They said they could not safely lend on contracts that did not comply with the new Act as they might be unenforceable; and that it would take the banks 2 years to become compliant with the Act.

The solution finally arrived at was for the Minister to exercise his powers, to grant exemptions from the operation of various provisions of the Act (under section 7).[94] Regulations were made which exempted providers of credit from the provisions of the Act listed in the Schedule up to the dates respectively specified. The earliest date specified was 1 March 1999; the latest was 1 July 2000, so in the end the banks were only given 12 months deferment, not the 24 months they had asked for. Interestingly, they found they could become compliant in that time.[95] But the regulations planned in the Act to enforce all the provisions of it were not taken in time.

We can infer from these provisions that this Act aimed to give fundamental protection to the guarantor, by clear notice given to him by the creditor but also by other duties incumbent on the creditor. But continuing disclosure of information, or request disclosure are not mentioned. So this Act seems first aimed to rule more tightly the credit provider business in Fiji, and first to better protect the debtor. The protection of the guarantor is not as complete as that of the principal debtor.

<C>. THE AMENDMENT BILL (2006) [96]

In 2005, it was clear that the main part of the legislation causing problems was the extensive disclosure requirements that must be followed by credit providers both in credit contracts and before consumers enter into credit contracts. In 2002, credit providers were consulted about bringing into force the inoperative parts of the Act

[93] See J.F Wilson: *The commencement conundrum: How the Fiji Islands banking system was brought to a standstill1* ; http://www.opc.gov.au/calc
[94] Commencement Notice (7.5.99) L/N 42/99; Exemption, L/N 83/99 published in an extraordinary Gazette Supplement (24 of June of 1999). www.pacificLII.org/fj/
[95] See commentary of John F. Wilson, Legal Draftsman, Grenada (West Indies); Former First Parliamentary Counsel, Fiji Islands: *The commencement conundrum: How the Fiji Islands banking system was brought to a standstill1*; http://www.opc.gov.au/calc.
[96] N° 1 of 2006 passed on 22 of March; See www.parliament.gov.fj/legislative/bills.

and the introduction of regulations under the Act. However, credit providers made strong representations that before these parts were brought into force and regulations were issued, the entire Act should be thoroughly reviewed.

Advertisements calling for public submissions on the Bill were made in the three daily newspapers on Saturday 10th December 2005. In view of its intention to get wide response from the public, it was agreed that the Committee should participate on the Talkback show on the Fijian and Hindi radio stations, to inform the people about the Bill. The Committee held public hearings.

The Bill extensively amends the Consumer Credit Act 1999 to ensure that it maintains strong consumer protection without imposing onerous or impractical requirements on credit providers. These amendments include matters such as streamlining the processes for the issuing of notices by credit providers and rectifying definitional deficiencies.

An amendment is meant to protect creditors against abusive appeals from debtors. It provides that in the case of a contract document consisting of more than one document, it is sufficient compliance with this section if one of the documents is duly signed and the other documents are referred to in the signed document. (s.6 that amends section 11 of the Act 1999).

A sub-section is added to Section 14 to simplify the pre-contract information required in the case of credits lower than $5000.[97] As a matter of fact, the complexity of the procedure influenced borrowers to resort to money-lenders, whose interest rates are much higher. The information requirements for small credits are defined in a new appendix: Schedule 1A. Similarly, this section indicates that there is an official form defined by regulations for the pre-contract statement provided for by the text.
The information obligations binding the creditor to the guarantor are simplified too. Section 52 states that a copy of the signed guarantee as well as of the agreement or proposed agreement should be provided only once, not later than 14 days after a

[97] Section 8, subsection(9): "Notwithstanding the provisions of subsection (1)(a) of this section and section 15, where a credit provider intends to provide credit in an amount not exceeding $5,000.00, it shall be sufficient compliance with that subsection and that section if the pre-contractual statement and contract document respectively, contain the matters specified in Schedule 1A.

guarantee is signed. Similarly, Section 54 stipulates that these documents should not be provided again in case the guarantee agreement contract is extended. This may be an opportunity to correct some obscurities which can give rise to dishonest interpretations by the guarantor. Finally, Section 53 specifies that changes in the pre-contract statement defining the rights and obligations of the guarantor do not constitute a reason for withdrawing the guarantee.

Section 76 simplifies the obligations of disclosure in case of co-guarantees, only in the case of asking for conditions requested to settle a credit. If not, legal information should be transmitted to all the co-guarantors.

Sections 180 and 181 lay down obligations relating to how official information can be provided . The goal is on one hand to protect the debtor and the guarantor, but also on the other hand to protect the creditor in case of dishonesty shown by the formers. The appropriate address of a debtor, mortgagor, guarantor is an address nominated in writing by that person to the person giving the notice or other document; or if there is no such nomination, the address of the place of residence of that person last known to the person giving the notice or other document.

But a credit provider is relieved from the obligation to give a notice or other document to a person if the credit provider has previously made a reasonable (but unsuccessful) attempt to give a notice or other document in accordance with this Act by leaving it at, or by sending it by post, telex, facsimile or similar facility to the appropriate address of the person. He is also relieved if the credit provider has reasonable grounds for believing that the person can no longer be contacted at that address. A notice or other document may be given to a person by being given to a legal practitioner acting for the person in the matter concerned.

This study shows that the Fijian law has elected to be extremely precise and restrictive in defining the obligations of professional creditors towards guarantors, but only in terms of consumer credits. Moreover, the right to information and protection does not only depend on law provisions and banks. As in New Zealand[98], an institutional body is established, vested with wide range of powers, in order to

[98] S.111 of the Credit Contracts and Consumer Finance Act, n°55, 2003

represent the public interest and the interests of debtors and guarantors, that is to say the Consumer Credit Office.

CHAPTER IV: COMPARATIVE STUDY

Having completed our study about a guarantor as a natural person in three legislative systems, we may notice at first that texts were very substantially reworked at the end of the 1990s and the start of the 2000s. Even a country like Fiji in the Pacific region, which remains comparatively at the hedge of globalisation and consumer society, has passed laws with the same aim as France and New Zealand: to provide better protection and disclosure of information for the debtor, and his guarantor as natural persons. Though 2003 French law about economic incitement did not apply to French Polynesia, banking institutions linked to French banks tend to enforce its provisions.

Faced with the power of professional credit providers and massive spread of excessive debt which impedes natural persons for paying back what they owe, lawmakers have sought to change the balance of rights and obligations between the parties to a contract. It often was done by providing better disclosure of information to the debtor and therefore offering better protection for him and his guarantor. We have already seen that the greatest imbalance between the two parties to a contract often lies on consumer credit matter and that is why, in all three cases, a specific legislation was issued.

<A>. SPECIAL LEGISLATION ABOUT GUARANTEES IN CASE OF CONSUMER CREDITS CONTRACTS:

A contract is characterised by the free will of two entities to enter into. The reciprocal obligations are freely defined.[99] So the less the law interferes, the better. But in the countries under consideration, lawmakers agree to provide a stronger protection for the debtor and his guarantor in case of some kinds of credits contracts. It always seems that the definition of the type of credit allowing a greater legal protection was not easy. The interests of all parties to the contract must be taken in account. The major risks are insufficient protection for the borrower and his guarantor on the one hand, or excessively onerous obligations for the creditor on the other. So, for example, some problems occurred, especially in France, the precedents of civil or commercial courts being contradictory.

At first French lawmakers decided to define specific rule for credit contracts in accordance with their purposes. The "Scrivener" laws, amended in 1994, lay down special rules for consumer and housing loans. All the same, the 2003 Economic Incitement law extends protection and disclosure obligation to all natural persons standing as guarantors, regardless whether the purpose of the contract is a personal or professional one. So it seems that the identity of the guarantor was judged more decisive than the purpose of the contracts to justify special provisions.

The 1981 Credit Contract Act in New Zealand was not specifically aimed at consumer loans but rather at "controlled credit contracts", meaning loans inferior to 250 000 $ made by professional credit providers. A specific law was dealing with Hire purchase contracts (Hire Purchase Act 1971). The 2003 Credit Contracts and Consumer Finance Law[100] defined consumer credit as a special type of credit and precisely specified its purpose in section 11.[101] This section brings together criteria

[99] See Columbia electronic encyclopaedia. "Contract: in law, a promise, enforceable by law, to perform or to refrain from performing some specified act. In a general sense, all civil obligations fall under tort or contract law. Torts are usually characterized as violations of duties that are imposed on all persons and that have been established entirely by law. **In contracts, on the other hand, the parties determine, at least in part, what their obligations to one another will be."**

[100] Public Act 2003 No 52, Date of assent 13 October 2003

[101] A credit contract is a consumer credit contract if (a) the debtor is a natural person; and (b) the debtor enters into the contract primarily for personal, domestic, or household purposes. Moreover, (i) interest charges are or may be payable under the contract; (ii) credit fees are or may be payable under

about the purpose of the credit with criteria about the identity of the contracting parties (natural person for the debtor and professional for the credit provider). Furthermore, short term loans are excluded, that is to say contracts for sale of property or goods where the agreed price must be paid within two months.[102] Protection and disclosure obligations for the guarantor are provided within the framework of consumer credits as defined by this Act, and it is clearly laid down that the guarantor must be a natural person.

In Fiji, the 1999 Consumer Credit Act defines rules about consumer credits in the same accurate way, but excludes short term loans (s.7) as well as loans of great amount, such as those defined by special regulations (subs. 12). This law applies to debtor or guarantor as natural persons (s. 6 and 9). Some kinds of credit providers may fall outside the provisions of the law (s.7). Finally, as we have seen, the 2006 amendment Act simplifies the legal obligations about information disclosure for loans under $5 000.

In that way, legal definition of credit needing a specific kind of contractual protection raises questions. The very purpose of the credit (Contracts about the sale of consumers goods, for instance) seems to be an insufficient criterion. Moreover there are different kinds of credit contracts: hire purchase, housing loans, consumers lease[103], credit cards, continuing credit account. Lawmakers should specify them and foresee special provisions for some ones. For instance the Fiji Consumer Credit Act makes distinctions between sale contracts (part 7), insurance contracts (part 8), Consumers leases (part 9) and hire purchase agreements (part 11). Lawmakers have also tried to take into account the legal status of the creditor (professional), of the borrower, and of the guarantor as well (natural person). So in New Zealand, the

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the contract: (iii) a security interest is or may be taken under the contract. (d) When the contract is entered into, (i) the creditor, or one of the creditors, carries on
a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business); (ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor; (iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person: (iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

[102] *Introduction for creditors*, Credit Contracts and Consumer Finance Act 2003, note from the Ministry of Consumer Affairs, in website: www.consumeraffairs.govt.nz, p.3

[103] See section 16 of the Credit Contract and Consumer Finance Act that defines whether a lease of goods is a consumer credit contract or not for example.

debtor must be a natural person (s.11), but must not be acting as a trustee for a family trust.[104] The same provision can be found in Fiji law[105] . Lawmakers have sometimes specified an upper or lower credit limit.

This brief synthesis would try to demonstrate the difficulty of preserving market rules and requirements of economy at the same time as protecting the weakest parties in consumer credit contracts. Lawmakers have established criteria referring to the purpose of the credit, different types of it, its duration or even its amount. They have also precisely defined the legal status of the debtor or of his guarantor and of the creditor as well.[106] When all is said and done, only the French legislation does not make a distinction for the guarantor (natural person) in case of consumer credit or commercial credit, which however used to be so formerly, regarding to both law and precedents.

On the other hand, the means used in the three legal systems to provide better protection for the debtor and for his guarantor seem very similar. The means most frequently employed are:

- an hand-written mention;
- a prior disclosure, disclosure during the contract;
- the need of impartial advice.

<B>. AN HAND-WRITTEN MENTION AS A WAY OF BETTER PROTECTING THE GUARANTOR

It may be stated that the three legal systems covered by this study show three different historical developments. By tradition, the law on guarantees was part of the written law both in The United Kingdom and France. However, the New Zealand authorities have argued that the requirement for a hand-written mention did not amount to additional protection. On the contrary, in the event of dispute before the courts, the need for a hand-written mention tends to make the burden of proof more

[104] Introduction for creditors, Credit Contracts and Consumer Finance Act 2003, note from the Ministry of Consumer Affairs, in website: www.consumeraffairs.govt.nz, p.3.
[105] See section 7 subs. 9 of the Consumer Credit Act 1999.
[106] The various requests to delay the coming into force of the law are also a proof of the difficulty of finding a balance.

difficult for the parties. They cannot use an oral consent to the contract as a proof. This oral consent is nevertheless the basis of the Common Law for Contract[107]. According to the same authorities, the historical exception in the law on guarantees is no longer justified in the contemporary world. The need of a hand written mention for contracts of guarantee therefore disappeared from New Zealand law when the 1981 law was repealed, except for land property matters.

In Fiji, however, the hand written mention has been maintained for contracts of guarantee, but a long series of precedents make the proof of it more flexible.[108] In the other hand, a credit contract may be oral (section 13 of the 1999 Credit Consumer Act).

French law comes along with a tradition of written law, emphasising the role of a hand written mention. The law provides that the entire sum for which guarantee is given should be written by hand by the person giving a guarantee or his representative. Furthermore, compulsory wording is laid down by law.[109] This requirement has generated some problems over electronic signature value when this way of signing is increasingly common. Under what conditions an electronic signature may be considered to stand for a hand written signature?[110]

The British tradition for understanding that contractual relationships were founded on respect for giving ones word, may lead to the perception of hand written mention as abusive, counterproductive or simply unnecessary. In France, this requirement has been strengthened and is considered to play a great role in the process of disclosing information to the guarantor.

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[107] See Wikipedia Web Site: *"Contrary to common wisdom, an informal exchange of promises can still be binding and legally as valid as a written contract"*. See the importance of the *Animus contrahendi*

[108] Id, In Australia and many, if not all, jurisdictions which have adopted the common law of England, for contracts subject to legislation equivalent to the Statute of Frauds, there is no requirement for the entire contract to be in writing, although there must be a note or memorandum evidencing the contract, which may come into existence after the contract has been formed. The note or memorandum must be signed in some way, and a series of documents may be used in place of a single note or memorandum. It must contain all material terms of the contract, the subject matter and the parties to the contract.

[109] Art. 11 of law 2003-721 on economic initiative

[110] See Annex 1

<C>. THE REQUIREMENT TO DISCLOSE INFORMATION TO THE GUARANTOR

The three existing legal systems make a fundamental point of Initial Disclosure to the guarantor. It is further reinforced in British legal systems by a prior disclosure requirement, linked to the traditional contractual requirements on Common Law[111]. For example, the Fiji 1999 Consumer Credit Contract Act lies down that the guarantor must receive *a copy of any related credit contract or proposed credit contract* (s.51). As we know, in the event of litigation, the established proof of the willingness to conclude a contract is as important as the contract itself.

The three major texts contain a list of key information which absolutely must be provided by the creditor to the debtor and his guarantor under pain of prosecution. Standardised documents are provided as an annex of the main law. It is a way to be sure that contract documents for consumer credit are on the same form. This standard protects borrower and guarantor, as well as the creditor who often worries about the requirement of disclosure and the correct legal manor of fulfilling it. In one hand these forms allow the borrower to be able to compare different credit options more easily. In the other hand, they make easier the proof that the creditor who uses them has fulfilled his obligations to the other party.[112]

It is worth to say that the requirement of continuing disclosure has not been extended to the guarantor benefit in New Zealand and Fiji, although the continuing guarantee is maintained. Nevertheless, at all times the written agreement of the guarantor to an extension of his obligations is always required. In Fiji, in the same way, a law inspired by Commonwealth practice makes provision for a strong disclosure requirement about any changes in the terms of the contract in so far as they extend the obligations of the guarantor, even if these changes are carried out by common agreement (s.56 and 65 of the 1999 Consumer Credit Act). French law makes unlimited guarantee illegal, because, for French lawmakers, it brings risks of

[111] See Wikipedia web site: *"if a party wishes to use a document as the basis of a contract, reasonable notice of its terms must be given to the other party prior to their entry into the contract. "Balmain New Ferry Company Ltd v. Robertson" (1906) 4 CLR 379."*

[112] See especially section 3, Purposes, of the Credit Contracts and Consumer Finance Credit Act, 2003, New Zealand.

misinformation about the obligations undertaken. Furthermore, the need for hand written mention of the sum concerned, written out in full and with a mention of a specific period of time, makes this kind of guarantee *de facto* impossible[113]. Fiji law lays down a Request disclosure procedure (s.173), *"but only for any notice previously given to the debtor, mortgagor or guarantor under this Act"*. This provision is also laid down in France and in New Zealand.

In all these cases, the legal way for disclosing information is laid down very accurately. It is why the 2006 Amendment Act in Fiji made up for omissions in this area which had come to light during legal hearings. Here again the use of new technologies to communicate may impede a good understanding and therefore provide an inadequate protection for the borrower or for his guarantor. These new technologies also may be used to take unfair advantage by the guarantor. For these reasons, specific procedures have been issued to prevent abusive use. In New Zealand for example if the creditor make a disclosure of information electronically, he must be sure that the information is readily accessible for subsequent use. The creditor must also be sure that the debtor has consented to receiving disclosure electronically. It is advisable to clearly inform the debtor of the exact format of the electronic disclosure.[114]

What conclusions may be drawn from the comparison between various provisions for the disclosure obligation in the legal systems under consideration? In every case the disclosure of information appears to be a way of saving the borrower and the guarantor from the imbalance in legal knowledge and financial resources between the parties to the contract. At any event, Fiji and New Zealand lawmakers are equally aware of the need not to increase the obligations on the professional credit provider unduly by extending legal formalities in an unnecessary way. The Fiji and New Zealand laws therefore seem more balanced about rights and obligations of the parties to the contract.

[113] Art. 11 of law 2003-721 on economic initiative
[114] Ministry of Consumers Affairs website, *Introduction for creditors*, p. 12. See also Fiji consumer credit Act, section 181.

<D>. PENALTIES LAID DOWN IN THE EVENT OF THE NON RESPECT OF INFORMATION DISCLOSURE REQUIREMENTS

In Fiji, a contract of guarantee is void only if the total sum of the guarantee is obviously inappropriate (s. 55). In the same way, in France a contract where the amount undertaken is obviously inappropriate is not valid. Furthermore, failure to respect the hand written mention which proves that the key information has been disclosed may lead to the cancellation of the contract of guarantee.[115] In Fiji, the court may reconsider a transaction which appears unjust. Amongst the various questions for the Court to consider are how readable the contract is, and whether the terms of the contract have been understood before signature, or after a change has been made (s.70).

But in all three countries common provision of legal information is the non enforcement of the contract of guarantee, in the event of non disclosure. Section 100 of the New Zealand Credit Contracts and Consumer Finance Act 2003 is quite specific: *"If disclosure is required to be made under section 25 or section 26 no person may enforce the guarantee before disclosure is made"*. In New Zealand, failure to comply with information disclosure by the creditor constitutes an offence (s. 103), though the creditor may always invoke a "reasonable mistake" for his defence (s.106). Fiji law also considers the failure to respect disclosure information to be an offence (s.65). If the key requirements are not fulfilled, the Fiji Consumer Credit Act 1999 states that *"the maximum civil penalty that may be imposed by the court under section 102(2) is all interest charges payable under the contract from the date it was made."*(s.103 (1)a) But *" if a debtor or guarantor satisfies the court that the debtor has suffered a loss as a result of the contravention by a credit provider of a key requirement the court may impose by way of additional civil penalty an amount not less than the loss suffered"*.(s.103(2)) These civil penalties are paid to a fund established specially to this effect (s. 106).

These various laws give the opportunity for the guarantor obtaining damages or compensation in the event of failure of the creditor to comply with the disclosure

[115] Art. 11 of law 2003-721 on economic initiative

obligations. In the New Zealand Act, statutory damages are seen as an "incentive" to comply with the provisions of the Act (s.25). Section 89 limits the amount of statutory damages (cf. s.89) laid down under section 88. In the Fiji Consumer Credit Act, "*a court may, on application by a debtor or a guarantor, order that a credit provider pay to the debtor or guarantor an amount by way of compensation for loss arising from the contravention of a key requirement*" (s. 107). This compensation may be requested if civil penalties have not been granted or denied for the same reason (subs. 3). French legislation makes provision for damages only in the event of failure to fulfil the *a priori* information disclosure requirements.

<E>. PROVISIONS RELATING TO IMPARTIAL INFORMATION AND INDEPENDENT ADVICE

All three legal systems assert the need for disclosure of independent information and impartial advice to offer better protection for the borrower and his guarantor. French lawmakers chose mainly to entrust this obligation to professional credit providers. It seems that French lawmakers rely on their ethical obligations and on a specific system of penalties in the event of failure to disclose objective information. This might be seen as a misunderstanding of the reality of contractual relationships in case of consumer credit. In Fact credit terms are more often disclosed by the seller of consumer goods to the borrower rather than by the credit provider himself, and we can assume that his interests are closer to the seller's one than the borrower's. In France, impartial advice is ultimately provided by consumers' associations, professional credit providers or even by standard leaflets published by a distant and anonymous administration.

Laws inspired by commonwealth practice set in place a new system of official bodies which are closer to the consumer and more likely to provide them truly independent personal advice. These advising duties are expressly laid down by law and entrusted to the New Zealand Commerce Commission and the Fiji Consumer Credit office.

These organisations must also make easier the access to courts and even more apply on behalf of a consumer or his guarantor.[116]

As a final comment, we must say that the consultation procedures put in place into Commonwealth countries are very useful. When the government or the Parliament is aware that they have to make proposal for new legal provisions, whether proposing a new law or amending an existing one, they launch a series of calls to make comments. This seems to be an excellent means to associate citizens with the law-making process. Such procedures are very widespread. For instance in Fiji a commission organize public hearings in every Province, and make a lot of radio and newspaper announcements, allowing the citizens to become aware in advance of the law proposal and react to them. In New Zealand, Ministries ask for submission about their proposal. These procedures therefore constitute an excellent means to educate people in citizenship. This might be tried in French Polynesia and even in France. So everything takes place as if it will be assumed that commercial and financial relationships were understood by everybody in British tradition countries although active citizenship should require education and incentive to participate by the State government.

On the other hand, knowledge of citizenship is taken for granted in France while commercial relationships are viewed with suspicion, leading the lawmakers to try and protect the consumer and his guarantor, and strongly restrain the activities of creditors.

[116] See New Zealand Act (s. 90, 96): *"An application by the Commission under this section may be made by the Commission on behalf of a person or a class of persons."*

CONCLUSION

The different laws we scrutinized set very clearly the connection between information and protection of the guarantor, these two notions being closely linked in order to make the guarantor aware of the extent of his commitment. All lawmakers have contemplated the opportunity to give more protection to the guarantors for some kinds of guarantees, dealing with consumer credit, like they did for borrowers themselves. The aim was to protect natural persons in their daily life. But it was not so easy to give a legal framework for these credit contracts, on both economical and legal basis.

Furthermore it appears that the laws on credit activities are also influenced by political choices. Indeed, under a liberal government, there will be a tendency to limit the control of this type of contractual relationship, whereas in a more "suspicious" conception of a business relationship, the lawmaker will tend to overprotect the "weak" party of the contract, at the risk of the weak party escaping its obligations although he/she is of bad faith. Nevertheless this reinforcement seems like a good thing for creditors because it allows for a more "reliable" guarantee (at least at the level of the solvency of the person standing as guarantor).

This reinforcement can have indirect effects on the financial market and the economic life. Indeed, by trying to reinforce the protection of the guarantor, does the law not risk drying up contracts of guarantee by natural persons? In all countries, alerted by the heavy intervention of lawmakers in contract relationships, banks were able to negotiate a delay to the coming into effect of the demands related to the use of prescribed wording and/or the obligations of information put under their responsibility.[117] Will the law not encourage creditors to develop other forms of guarantee? (Which might be positive). Is it therefore necessary to turn to other forms of securities, whether *in rem* or personal? As the spokesman of the French Senate Commission observed: "by making contracts of guarantee too difficult, one risks of

[117] Law n°2003-721, article 12 which postpones by six months the coming into effect of articles L.341-2, L.341-3, L.341-5 and L.341-6 of the Consumer Code.

discouraging lenders to resort to it, which will lead to credit drying up or to the use of other procedures".[118]

In France, the increased number of laws and their hasty drafting are resulting in the opposite effect than that the lawmakers were eager to achieve: the protection of the citizen. Would it not be better to consider a joint action of "cleaning up" the different codes, with a view to simplify and clarify the law on guarantees? To the contrary**,** New Zealand tried to promulgate a unique legal text for all credit contracts, with general provisions and specific ones depending on the type of credit contracts.

The comparison between the three legal systems gave us some directions to try to improve the efficiency of a law about guarantors as natural persons in case of consumer credit contract:

- To lay down a unique text for all type of credit contracts, with specific sections for some type of contracts in order to avoid contradictory case-law is a wise decision.
- Clear distinction between business or non business purpose for credit contracts seems to be justified; because the balance between the parties to the contract is not the same in these two circumstances;
- Distinction between natural and legal persons standing as guarantors seems also to be justified, for individuals can need more protection by law.
- To appoint an official body to make easier the access to impartial information, to give independent advice and to help people to have access to the courts will be very useful to achieve the goal pointed out by the lawmakers.

As a final comment, we will propose that procedures of information and consultations existing in New Zealand and Fiji during the time of drawing up a law proposal would be extended in France. These procedures could be very efficient in small countries like Fiji or French Polynesia (if independent) to enhance democratic participation of the citizens.

[118] First reading at the Senate, obs. M. J-J Hyest, reporter: account made of the discussions in public sessions on 25, 26 and 27 March 2003.

BIBLIOGRAPHY

BOOKS

AYNES, *Le Cautionnement* : Dalloz, 1991.

E. BAUMGARTNER and P. MENARD, *Dictionnaire étymologique et historique de la langue française* : Le Livre de poche, 1996

W.W.BUCKLAND and A.D.Mc NAIR, *Roman Law and Common Law, A Comparison in outline*: Cambridge University Press, 1965.

BURROWS, FINN and TODD, *Laws of Contract in New Zealand,* LexisNexis, 2002.

BORROWDALE, *Commercial law in New Zealand*: Butterworths, 2000.

CABRILLAC and MOULY, *Droit des sûretés* : Litec, 5e Edition.

A. CERLES, *Le Cautionnement et la banque* : revue banque édition, 2004.

CHETWIN and GRAW, *An Introduction to the Law of Contract in New Zealand*: Thomson Brookers, 2001.

CORRIN CARE, NEWTON and PATERSON, *Introduction to South Pacific Law*: Cavendish Publishing ltd, 1999.

SIMLER and DELEBECQUE, *Droit civil, Les sûretés* : Précis Dalloz, 2e Edition, 1995.

SIMLER and DELEBECQUE, *Droit civil, Les sûretés la publicité foncière* : Précis Dalloz, 3e Edition, 2000.

SIMLER, *Cautionnement et garanties autonomes* : Litec, 1998.

WEBB and BIRKINSHAW, *Credit Contracts and Consumer Finance in New Zealand*: Thomson Brookers, 2004.

GOVERNMENT REPORTS AND PAPERS

Fiji Law Reform Commission, *About the Fiji Law Reform Commission,* http://www.lawreform.gov.fj/common/

Fiji Law Reform Commission, *Final Report & Bill: Consumer Credit, Hire Purchase; Bills of Sale Act & Sale of Goods Act 1998.*

France Senate, *First reading at the Senate*, obs. M.J-J. Hyest, reporter: account made of the discussions in public sessions on 25,26 and 26 March 2003.

New Zealand Law Commission, *Discussion paper: Repeal of the Contracts Enforcement Law*, 1997.

New Zealand Law Commission, *Preliminary Paper 30, Repeal of the Contracts Enforcement Act 1956,* 1997.

New Zealand Ministry of Consumer Affairs, *Consumer Credit Law Review,* Part 4, August 2000

New Zealand Ministry of Consumer Affairs *Consumer Credit Law Review,* Part 5, 2000.

New Zealand Ministry of Consumer Affairs, *Introduction for creditors, Credit Contracts and Consumer Finance Act 2003*, http: www.consumersaffairs.govt.nz.

New Zealand Ministry of Consumer Affairs, *Review of the Operation of Disputes Tribunals from a Consumer Perspective,* 1994.

LEGISLATION AND CASE LAW

France

* Law of 1 March 1984.

* Laws of 10 January 1978 and 13 July 1979 on consumer credit and mortgages ("Scrivener I and Scrivener II" laws).

* Law of 23 June 1989 modifying the rushed one of 1978.

* Law of 31 December 1989 (Neiertz law).

* Law of 11 February 1994 (Madelin law).

*Law of 21 July 1994 on housing.

* Law of 29 July 1998 on the fight against exclusion.

* Law of August 1st 2003 on economic initiative.

Fiji

***** Constitution Amendment Act 1997.

* Indemnity, Guarantee and Bailment Act 1978.

* Moneylenders, 1985.

* Fair Trading Decree n° 25 of 1992.

* Consumer Credit Act 1999, n°12, 19 March 1999.

* Amendment Act 2006, n° 1 of 2006, passed on 22 of March; section 30**.**

Development Bank v Moto, [1995] FJHC 166;Hbc0055j.95s
Development Bank v Navitalai Raqona, [2001] JSPL, Case Note 2 of volume 5 .

Kiribati

* Moneylenders Act 1988 .

New Zealand

* Statute of Frauds, 1677.

* Contracts Enforcement Act 1956.

* Credit Contracts Act 1981.

* Electronic Transactions Act 2002.

* Credit Contracts and Consumer Finance Act 2003, n°52**,** Date of assent 13 October 2003 .

ARTICLES AND WORKING PAPERS

"Anatomy of a global credit crisis", (New Zealand Herald, August 2007).

ATTA-MENSAH, "Collateral and Credit Supply", *Bank of Canada Working Paper* 2003-11.

BONNEAU, note sous : Com., 24 septembre 2003, Bulletin, IV, n° 137, p. 157, (janvier-février 2004)93, *Banque et droit*, p. 57-59.

CORRIN-CARE, "Cultures in Conflict; the Role of the Common Law in South Pacific,"(2002)6 *Journal Of South Pacific Law*, http://paclii.org.vu/fJSPL/vol06/2.shtml.

COOK, "The tipping point of debt", (New Zealand Herald, 22 april 2007).

COUDERT, "Variations sur le thème ou cautionnement et mentions manuscrites du taux des intérêts, " (1991) *Banque et Droit*, p.51.

CROCQ, note sous 1re Civ. 9 juillet 2003, Bulletin, I, n° 167, p. 130, et sous Com., 11 juin 2003, Bulletin, IV, n° 95, p. 105, (janvier-mars 2004) 1, *Revue trimestrielle de droit civil*, p. 124-126.

CROCQ, "Le refus du dol du débiteur principal est la consécration implicite d'un dol à géométrie variable, " note sous Com., 13 novembre 2002, Bull. 2002, IV, n° 161, p. 185, (avril-juin 2003) 2 *Revue trimestrielle de droit civil*, p. 322 .

DELEBECQUE, "Les incidences de la loi du 31 décembre 1989 sur le cautionnement, " D. 1990, chron. p.255.

LEGEAIS, "La réforme du cautionnement par la loi du 29 juillet 1998 relative à la lutte contre les exclusions, " *JCPE*, 1998, p.1724.

MAICH, "The Debt Problem Nobody Talks About,"(2008)121(6) *Macleans* 34

MARTIN, "L'information de la caution, " *Mélanges M. de Juglart*,Litec, 1986, p.155.

Note de l'Institut d'émission de l'Outre-mer, *L'endettement bancaire des ménages polynésiens*, dec. 2006, www.ieom.fr

PIEDELIEVRE, "Les modifications apportées à certains cautionnement par la loi du 31 décembre 1989, " Gaz. Pal., 1990, 1, doctr. p.157.

PLAISANT, "La réforme de la procédure du traitement du surendettement par la loi du 29 juillet 1998 relative à lutte contre les exclusions, " *RTD* com, 1998, p.743.

RENUART and THOMPSON, "The truth, the whole truth and nothing but the truth : fulfilling the promise of truth in lending," (2008) *Yale Journal on Regulation* 181

SAGE, "Emergence et évolution du droit dans les petits états insulaires du Pacifique Sud Anglophone, " (2001)*Revue juridique polynésienne*, numéro hors série, 2001, pp. 23-46.

SHAH, "Case note : Development Bank v Navitalai Raqona," (2001) 5 *Journal of South Pacific Law* http://paclii.org.vu/fJSPL/vol05/19.shtml

SIMLER, "Les solutions de substitution au cautionnement, " *JCPG*, 1990, I, n° 2427.

WILSON, **"**The commencement conundrum: How the Fiji Islands banking system was brought to a standstill," *Commonwealth Association of Legal Counsel* http://www.opc.gov.au/calc/docs/Article_Wilson_CommencementFiji_2001.pdf.

APPENDIX A:
THE PARTIAL CHALLENGING OF PRECEDENTIAL EVOLUTION BY THE USE OF ELECTRONIC SIGNATURES IN FRENCH LAW.

Even before enacting the law on economic initiative, many credit professionals were faced with the problem of the necessity of a handwritten note for the validity of an instrument.

At first, French law-makers did not at all take into account the development of the NTIC[119] and therefore did not make some "electronic" instruments secure.

European authorities therefore took up the project, in 1997, to harmonise European states' legislation on electronic signatures, which on 13 December 1999, led to the publication of Directive 1999/93/CE relative to a community framework for electronic signatures.

Following this European "impulse", French law recognises the complete equivalence of paper and digital media as long as it respects a certain number of conditions.

The new means of communication come up against two obstacles: the safety and authentification of exchanges. How do you know if the person sending a document from a certain address is actually the presumed sender and not a usurper? How can you trust a digital document which can be easily modified after its drafting?

To this end, electronic signatures had to fulfill the same functions as handwritten ones for digital documents, and in a reliable way. This has become reality since the law of 13 March 2000 deeply modified the French law of evidence, by recognizing the complete equivalence of paper and digital media as long as it respects some conditions.

[119] New Technologies of Information and Communication

However, this law is not the only one to establish the right of digital proof: it is in line with the European context and in addition was completed by a regulatory text of 30 March 2001.

Law of 13 March 2000:

French law does not mention any technical considerations. It defines the signature in a general manner, with regard to its functions: "The signature necessary to the perfection of a legal instrument identifies the one who affixes this signature. It demonstrates the parties' consent to the obligations resulting from that instrument."[120] Moreover it substitutes in Article 1326 of the Civil Code the expression "by himself" by the phrase "by his hand". This expression can lead one to assume that it does not matter which device is used by "his hand" so long as the reliability of the commitment can be assumed.

The Civil Code also defines the conditions of equivalence of the paper and digital media as a proof, provided that four conditions are respected:

1- being able to identify the person from whom the electronic writing derives by means of a reliable technique
2- the electronic writing was created in conditions likely to guarantee its integrity
3- the electronic writing was kept in conditions likely to guarantee its integrity
4- using a reliable technique guaranteeing the connection of the electronic signature with the instrument it is attached to.

Going one step further than the European text, the French law introduced the presumption of reliability of the technique used: if the previous four conditions are fulfilled in accordance with the decree of 30 March 2001, then the digital signature will get a presumption of reliability[121], except as otherwise proved. Consequently, an electronic signature does not have to respect the conditions set in the decree in order

[120] Article 1316-4 of the Civil Code.
[121] The limit is that we cannot go as far as thinking that it will be proof of validity, it will have probatory force and no longer be *prima facie* evidence.

to be valid. However in case of difficulty, if the validity of a digital signature is contested, proof will have to be given of its reliability.

The decree of 30 March 2001

This decree is a technical text, which, with a few exceptions, constitutes the transposition of the European directive on electronic signatures. It makes a fine distinction between electronic signatures and secured electronic signatures:

- electronic signatures respect the conditions set in the Civil Code
- secured electronic signatures also conform to the requirements of the decree, and therefore are presumed reliable.

The decree specifies the conditions of implementation of "secured electronic signatures", which get a presumption of reliability. This presumption:

- is established thanks to a secured electronic signature creation system;
- and its verification rests upon the use of a qualified electronic certificate.

Owing to this assimilation of electronic signatures to handwritten signatures, some commentators criticise the words of the text itself. Some authors argue that the notion of handwritten note is no longer justified, for the proof of all commitments, even unilateral, can be provided by a digitalized instrument.

Here it is necessary to remember that there can only be an assimilation between handwritten and electronic signatures provided that not only the conditions set by the texts are respected but also that the guarantor is aware of the extent of the commitment he is signing; this is reminiscent of the classic rules governing the rules of consent in terms of contracts. Furthermore, these strict conditions equally protect the creditor, who rests assured that the affixed electronic signature is real, that it is not a "fake" and can be used as proof in case of a dispute.

APPENDIX B:
TYPE OF CONTRACTS IN FRENCH LEGISLATION AND ENFORCEMENT IN FRENCH POLYNESIA

TYPE OF CONTRACTS OF GUARANTEE	TYPE OF GUARANTEED DEBT	BENEFICIARY OF THE INFORMATION	DATE OF THE INFORMATION	CONTENT OF THE INFORMATION	SANCTION	NOTES
Contract of guarantee agreed upon by a **natural person**	Consumer credit or property credit granted to private individuals	natural person or their heirs	From the first occurrence of non-payment, not adjusted within the month of payability	Default of the main debtor	Loss of the penalties or interests or overdue delays between the date of first occurrence and the date when the information was issued	**Not applicable in French Polynesia**
Indefinite contract of guarantee agreed upon by a natural person (covering the principal, plus interest, fees and collaterals)	**Any type of debt(s)** (limited obligation or the whole of the commitment) including operations of leasing	natural person or their heirs	Annual information at a date agreed on by the parties or failing that, on the anniversary date of the contract	Amount of the guaranteed debt and collaterals	Loss of all the debt collaterals, penalty fees (including late contractual interests) no adjustment possible.	**Not applicable in French Polynesia**
Any contract of guarantee agreed upon by a **natural person** by private agreement	- **Any obligation guaranteed to a professional creditor**	natural person or their heirs	No later than the 31st March of each year	- amount of the principal and interest, commissions and collateral fees	Loss of the overdue interests from the previous information until the date of communication of the new information	- Provisions to come into force 6 months after their publication in the Official Journal of French Polynesia (I.e. on 05/02/04)
	- Whatever the quality of the main debtor or the duration of the cover			- end of the contract if it is of undetermined duration		**Not applicable in French Polynesia**
				- possibility of revocation for commitments of undetermined duration as well as its terms		