Country Report: Italy

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Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships

Edited by
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Preface

This book is the final product of a comparative study which was performed between 2004 and 2009 by a network of 32 scholars from 21 European countries. In its first phase until March 2007, this project was funded by the European Community under the 'Marie Curie Host Fellowships for the Transfer of Knowledge' scheme. The Community support is gratefully acknowledged.

Collective academic works are not easy undertakings. They are the more difficult to coordinate the more persons are involved. We would like to thank all authors of contributions within this volume for their enthusiasm, effort, and patience, which made our mutual cooperation pleasant and fruitful.

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Aurelia Colombi Ciacchi
and Stephen Weatherill
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legislation and soft law has paved the way for a more systematic approach to such legal disputes. The Consumer Credit Act 1995 has granted some cover for the personal guarantor, including protection from a bank’s failure to follow the procedural requirements outlined. This is an important requirement as some of the procedural prerequisites encompass the notice requirements outlined in the undue influence cases. The Law Reform Commission’s push to expand the protection given and the IRFSA response has put both the banks and the consumer on much surer ground, though the clear foundations have not as yet been tested in court. The soft law approach is new to Irish law and whether it will have the desired effect is still open to debate.

10. Proposals in order to improve the protection of non-professional sureties

While the general law of undue influence has been more or less settled, there has not been an abundance of case law over the past 20 years and the case law that has emerged, while having regard to the developing English case law, has not mimicked it entirely. The division between actual and presumed undue influence, while aiding in slotting situations such as suretyships into sub-categories, has not led to a clear statement of the law. The case law itself has focused on the spousal relationship, though it has not settled this issue either. The courts have perhaps not granted as much consideration to the wider context, including possible constitutional ramifications, as has been the case in other legal systems.

During the 20th century, suretyship contracts widely and rapidly developed in the Italian credit market as security devices specifically devoted to enterprise financing. This peculiar role played in Italy by suretyships can be best understood in the light of a general overview of the whole system of security for credit which resulted from the private law codification of 1942.

As is well-known, the Italian codification of private law in 1942 was intended to realize the so-called ‘commercialization’ of private law: the new civil code aimed to cover both private and commercial legal relationships within a single body of rules. Whereas two separate codifications previously existed, the civil and the commercial, each governed by different guidelines,¹ the enactment of the 1942 civil code replaced the commercial codification. This was aimed at more flexible rules of private law, in order to support industrialization and economic growth in general.²

This process also affected the law of suretyship contracts. The set of rules of the 1865 civil code regulating the fideiussione underwent basic changes which ended up reducing the guarantor’s protection in order to render suretyship contracts more ‘credit friendly’. The most striking example of this move is the introduction of the default rule of solidary liability of the surety with the debtor (Article 1944 paragraph 1 CC), whereas the previous rule for civil relationships stated subsidiary liability (Article 1907 CC 1865). While under current Italian law, subsidiary liability must be expressly agreed in the contract (beneficium excussionis; Article 1944 paragraph 2 CC), many European jurisdictions which still preserve the distinction between...
The modernization of the personal security contracts' regime in the 1942 Italian codification was a prudent one: no independent personal security was codified and—according to the system of the code—the guarantor still had recourse to a firm set of protective rules and remedies, which all stem from the principle of accessibility of the security to the secured obligation. This approach clearly bears the strong Roman influence, ie the idea that the guarantor is a disinterested friend of the debtor and therefore needs special protection.

Moreover, in the provision of security for credit, suretyships compete with other security devices, namely with the proprietary ones. In the domain of proprietary security rights, modernization was in general less remarkable than in the field of personal security. The 1942 codification followed the traditional path, adding only a few innovations: the ipoteca is regulated as a typical non-possessor security device.

1 §§ 349 and 343 German Commercial Code; Art 101 Portuguese Commercial Code. In France, case law and scholars acknowledge a presumption of solidarity for commercial suretyships contracts references in U Droobig, Principles of European Law—Study Group on a European Civil Code. Personal Security (München: Sellier, 2007), 240, n. 4. Also old Italian Commercial Codes of 1865 (Art 90) and 1882 (Art 40) stated a presumption of solidarity, excluding the benefit of excepcionis, for the guarantor securing commercial obligations. The qualification of what a commercial suretyship is a contract is, however, assessed differently in various European jurisdictions: Droobig, Personal Security, ibid. From a historical point of view, it has been assessed that the development of the idea of solidarity of the surety in commercial contracts derived from the prevalence gained in the Middle Ages in this sector by elements of Germanic law. Contrary to Roman (Justinian) law, German customs indeed never acknowledged the benefit of excepcionis to the surety: see the historical overview in V Camprond, Trattato della fideiussione nel diritto oderno (Torino: Bocca, 1902), 15 et seq and M Casella, Le garanzie personali in Italia nei secoli XIX e XX, in Le surette personelle (Recueils de la société Bodin pour l’histoire comparative des institutions, 30), III (Bruxelles: Dossin & Toite, 1960), 179 et seq. For an assessment of the law of the European Member States with reference to the prevalence of solidarity in commercial law, see the study by Max Planck Institute for Foreign and Comparative Law in Hamburg, Die Bürgschaft im Recht der Mitgliedstaaten der europäischen Gemeinschaft (La fideiussione nel diritto degli stati membri dell’Unione europea, Parey; Hamburg: Max Planck Institute, 1969), 35.


5 The availability of ipoteca for movables is restricted to a very limited set of assets, namely registered movables and state revenues (Art 2810 paras 2 and 3 CC).

6 Art 2786 para 1 CC.


8 Among the civil law countries of Europe, Germany had a different development during the 20th century: non-possessor security rights grew as efficient security devices for enterprises by way of transfer of ownership for security purposes legitimate poderer legem by case law and scholars: R Serick, Securities in movable in German law. An outline (Deventer: Kluwer, 1990). The major model of non-possessor security right for the financing of enterprises is the North American ‘security interest’ regulated by Art 9 UCC; see, eg, C Cooper (ed), The New Article 9 Uniform Commercial Code, 2nd edn (Chicago: American Bar Association, 2000).


10 Ferrari, ‘Changes to Personal Property Security Law in Italy’ (fn 9 above), 493.

11 A Caldera, ‘La fideiussione omicidi tra tutela del mercato del credito e protezione del fideiussore’ in id. Autonomia contrattuale e garanzie personali (Bari: Cacucci Editore, 1999), 65.

12 The amount of financing granted is between EUR 154.94 and EUR 30,987.41 and repayment is by instalments. Especially during previous years, and as a consequence of the financial liberalization which occurred in Italy at the start of the 1990s (especially by way of Italian Banking Law, Dils 1 Sept 1993 no 385), recourse to classic credit products rapidly increased, involving the use of credit cards, revolving credits, assignment of a percentage of the salary, debt consolidation offers, so-called ‘direct loans’ (credito diretto), ie loans to a specific person without particular designation of use of the granted financing, and so-called ‘finalized loans’ (credito finalizzato), ie loans specifically provided to purchase a certain good or service, offered by the creditor directly at the commercial premises of the seller: Assofin, Civil, Prometea. Consumer credit survey, June 2007, Issue no 22, available at: <http://www.crif.com>.
Furthermore, in the area of lending for the acquisition of immovable assets, suretyship contracts can be used as a supplementary means of security, to increase the amount of financing that can be provided on the basis of a first ranking proprietary security (ipoteca) over the same assets. The picture of the Italian market of security for credit finds support in a set of empirical data concerning the Italian banking system, published by the Bank of Italy in 2005. This analysis shows that at the end of 2003, 47 per cent of credit provided by Italian banks was unsecured, whereas the major part, 53 per cent, was secured. In particular, the 53 per cent of secured credit consisted of 35 per cent of credit secured by proprietary security, and 18 per cent of credit secured by personal security (suretyships). The widespread recourse to proprietary security rights, when compared with personal security, does not really conflict with what has been said above, ie the inadequacy of proprietary security for the enterprises’ needs. Indeed, the data concerning proprietary security is mostly referred to as security over immovable assets, whereas the inefficiency of proprietary security is centred round the area of movable assets. It is for cases in which the entrepreneur has no immovables that personal security is needed and effectively used in practice.

For our purposes, the striking data is that amidst personal security, 72 per cent of the total amount was provided by physical persons to secure obligations of non-financial enterprises or small family enterprises. The Bank of Italy decision no 55 of 2 May 2005 ‘AIB—Condizioni generali di contratto per la Fideicusione a garanzia delle operazioni bancarie’, Bollettino no 17 of 16 May 2005, 97 et seq.

The delibera CICR (decision of the Interministerial Committee on Credit and Savings) of 22 April 1995 establishes that for financing of between 80 per cent and 100 per cent, besides the first ranking mortgage, integrative security must be offered, among which suretyships are expressly included. On 2 April 2005 the Bank of Italy, in its Comunicato Garanzie integrative per il credito fondiario (GU n 76 of 2 April 2005), clarified the requirements that those integrative security devices must have; among these requirements is the ‘first demand’ clause, which allows the ready payment of the security that is required to reduce the credit risk for the creditor.

According to EU Law 609/2000, as modified by Decision of the European Parliament no 822/2007, a suretyship entered into for the purpose of securing eligibility for the application of the provisions of EU law, is not subject to the rules of the law of the State of the creditor, and it is governed by the internal rules of the legal order of the EU. In the context of the CICR decision of 22 April 1995, the Bank of Italy decision no 55 (fn 16 above), n 61.

Suretyships are needed by creditors to reduce the credit risk for the creditor. This is the reason why the following clause is included in the suretyship contracts: "The provider of the suretyship contract must assume the risk for granting credit to a debtor whose patrimonial situation had become more difficult, by way of insolvency, from the provisions of the civil code establishing the guarantor’s protection. Up till 1987, by way of fideicusione omnibus, the security provider essentially:

(1) assumed liability for any present or future obligation of the debtor towards the creditor, without time limits or maximum stipulated amounts;
(2) obliged itself to pay on first demand, ie waiving the right to raise exceptions against the creditor before payment;
(3) waived the right of subrogation against the bank until the latter had been completely satisfied;
(4) assumed the risk for granting credit to a debtor whose patrimonial situation had become more difficult, by way of waiver to Article 1956 CC. This provision stated the creditor’s duty to give express authorization from the guarantor for future obligations before providing new credit to the debtor whose financial position had become worse. In order to limit his liability, the security provider could only terminate the security. Of course, in order to terminate the security only when effectively necessary, the security provider had to obtain information about the debtor’s financial position directly from the debtor, since no duty to keep such information confidential is imposed on the suretyship provider.

For different opinions concerning the relevant criteria for distinguishing between civil and commercial suretyships under the previous regime of separate civil and commercial codes in Italy, see Campogrande, Trattato della fideicusione nel diritto d’Italia (fn 3 above), 77 et seq.

2. Commercial suretyships and consumer suretyships

The scheme of the civil code does not provide for any demarcation between consumer and commercial suretyship contracts. The 1942 code simply regulates a unique set of rules deemed to be applied to any kind of security provider (merchant or consumer, natural or legal person) securing any kind of secured obligation (commercial or civil obligation). Besides that, not even the more recent Italian banking and consumer legislation provides for express rules of protection specifically directed to the consumer security provider.

However, abstract positive law approaches can say very little of the existing dimension of the law in action, especially as regards the credit market. Indeed, Italian banking practice literally transfigured the codal model of suretyships, so that the real demarcation existing in Italy is that between the codal scheme of suretyship—almost never applied in practice—and the banks’ model of suretyship, represented by the Model Contract provided by the Association of Italian Banks (ABI). This is basically the only form of suretyship applied in practice, known under the name of fideicusione omnibus or fideicusione bancaria. This fideicusione bancaria is a type of contract which banks always use when accepting personal securities from natural persons in general, irrespective of whether they are acting as consumers or professionals. The core features of the fideicusione omnibus can be summarized as a massive derogation from the provisions of the civil code establishing the guarantor’s protection.

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See the legislation on transparency of banking services (law of 17 February 1992 no 154) and on consumer credit (law 19 February 1992 no 142) both transposed into the Italian Banking Law (Dlgs 1 September 1993 no 385, Arts 115–128bis) and the Consumer Code, Dlgs of 6 September 2005 no 205, in GU 8 October 2005 no 235, Ordinary Supplement no 162, in force since 23 October 2005. See also section 5.1 below.
informed the guarantor was incumbent upon the bank, not even on the basis of the civil code.22

Through this escape from the civil code, banks achieved the objective of shifting the security provider the risk of the debtor's insolvency, as well as the cost of the debtor's monitoring, to a much greater extent than that resulting from the civil code scheme. The reason for that shift was a calculation of costs and benefits which enabled banks to carry out a remunerative and continued lending, and usually for risky business activities.23

Two points justified (or seemed to justify) this increase in the liability of the security provider:

1. The Italian economic web, built on small and medium-sized enterprises, or even family enterprises, which required suretyship contracts to function as continuing security devices without time limits and to be as flexible as possible in terms of future obligations that could be secured; only these features could have allowed for speedy and continued financing which is so vital for the very existence of small enterprises.

2. The security provider, in this context, could no longer be seen as the disinterested friend of the debtor, whose intervention besides the latter is a mere favour for a single and isolated financing operation. Usually, the security provider is someone who is economically interested in the debtor's business and this puts her/him in the position of being constantly informed of the debtor's financial position. At least it is so in the very frequent cases of suretyships provided by company shareholders or managers, or members of a partnership. A rise in these factual situations justified—from a general perspective—an aggravation of the security provider's position and a relaxation of banks' duties.24

However, as frequent as these factual situations may be, they do not present a complete picture of the Italian credit market. In some circumstances, the security

22 For a more detailed description of the contents of the fideiussione bancaria, see A Calderale, 'Fideiussione omnibus', in Diritto IV, Disciplina Privatistica, Sezione Civile, VIII (Torino: UTET, 1992), 280 et seq. G Macario, Garanzie personali (in 4 above), 366 et seq. Older versions of ABI Model Contracts are published in Banca, Borsa e Titoli di credito (BBTC), 1964, II, 460.


24 A Galasso, 'Perché, come quando la fideiussione omnibus è valida', Contratto e impresa, 1988, 28 et seq.; Calderale, 'La fideiussione omnibus: determinabilità dell’oggetto e forma del contratto' (in 13 above); G Meo, Impresa e contratto nella valutazione dell’attività negoziale. L’esempio della fideiussione omnibus (Milano: Giuffrè, 1991), 99 et seq. Several scholars underlined the connection between fideiussione omnibus and protection of the credit market, because this kind of contract would ease for banks the task of recovering the financing granted to clients, thereby protecting the interests of depositors: G Tucci, 'Tutela del credito e validità della fideiussione omnibus', Foro italiano (Foro ita), 1988, 1, 104 et seq.; M Costanza, 'Fideiussione omnibus: clausole in deroga all’art. 1946, invalidità o inefficacia', Giurisprudenza civile (Gius civ), 1992, 1, 221 et seq. For case law see, eg. Cass 1 August 1987 no 6656, BBTC 1988 II 145; Cass 20 May 1997 no 4469, Giurisprudenza italiana. Maximario (Gius it Mass), 1997; Tribunale Palermo, 25 May 1996, Giurisprudenza di merito (Gius merito), 1997, 746.

25 According to Arts 1175, 1375 CC, parties to a contract have a duty to act in good faith not only during the negotiation phase, but also during the execution of the contract. This means a duty of fairness and mutual loyalty, stemming from Art 2 of the Italian Constitution, which imposes upon each party a duty to safeguard the interests of the counterparty to the extent that this does not significantly prejudice the interests of the acting party. On this point there is an enormous amount of literature and case law; in this case we refer to: A di Majo, L’esecuzione del contratto (Milano: Giuffrè, 1967), 413 et seq. 'Delle obbligazioni in generale', in Commenrario al cod. civ. Scialò-Branca (Bologna-Roma: Zanichelli, 1988), 326; R Sacco, in R Sacco and G De Nova, Il contratto, II, Trattato di diritto civile diretto da R Sacco (Torino: UTET, 1993), 414; A D'Angela, Contratto e operazione economica (Torino: Giappichelli, 1992), 261 et seq. 'Il contratto in generale, vol IV, La buona fede, Trattato di diritto privato diretto da M Bessone (Torino: Giappichelli, 2004), esp 155 et seq. As regards the use of the good faith principle in suretyship contracts, literature and case law have produced relevant materials; see, inter alia, R De Nicola, Nuove garanzie personali e reali (Padova: Cedam, 1998), 395 et seq.; D Marazzolo, La fideiussione omnibus nella giurisprudenza (Milano: Giuffrè, 1999), 25 et seq. G Chieni, M Lascialfari and A Magni, Le garanzie rafforzate del credito, a cura di V Cuffari (Torino: UTET, 2000), 24 et seq. M Viale, Le garanzie bancarie, Trattato di diritto commerciale e di diritto pubblico dell'economia diretto da E De Galdo (Padova: Cedam, 1994), 163 et seq.; F Prodi, Le garanzie personali aspichie, Trattato di diritto commerciale diretto da V Buonocore, Sez II, t. 3 X (Torino: Giappichelli, 2006), 78 et seq. For an account English, see the overview in Gioia, 'In Search of the Effective Protection' (in 4 above), 218 et seq. text and for 27, 28, and 29.

26 Published in Banca, Borsa e Titoli di credito, 1988, 1, 246.
(stated in new Article 1956 CC) to authorize new financing for the debtor in cases of deterioration of the latter’s financial position.

Other changes to the ABI Model Contract were made in February 1995, in order to adapt it to the decision of the Bank of Italy of 13 December 1994, no. 12. In this decision, the Bank of Italy, as supervisory authority in matters of Italian competition law, declared void some contract terms because their inclusion in a model contract by an association of enterprises was regarded as producing a reduction of the rights of security providers, and this reduction was capable of general application throughout the national territory. This would have eliminated for the security provider any concrete possibility of comparing contract terms among different banks. A new decision of the Bank of Italy under the same authority was then issued in May 2005 and consequently, in September 2005, a new amendment of the Model Contract (April 2003) followed, agreed between ABI and 10 Organizations of Consumer Protection. As a result of this layered amending process, the ABI Model Contract, in its current version, no longer contains two kinds of disadvantageous clauses: (a) the clauses derogating to Article 1957 CC, which imposed a time limit on the creditor to judicially demand performance from the surety after maturity of the secured obligation; and (b) the so-called ‘clausole di sopravvenienza’, which stated the validity of the security even in case of voidness of the secured obligation; in such cases the suretyship should secure the right of the bank in getting restitution of the money advanced to the debtor. The softening of the Model Contract, however, by no means precludes the final contract concluded between client and bank from containing such clauses.

However, what deserves special attention here is that the Italian way of protecting security providers has been indifferent to the possible qualifications of the different security providers: in this sense, expert managers of a company or majority shareholders end up enjoying the same protection as a wife who merely wanted to help her husband and had no qualified knowledge of her husband’s business.

This approach has not changed since the last statutory interventions. First, the legislation on transparency of banking services, now incorporated into the Italian banking law of 1993, applies to suretyship contracts and establishes a set of rights for the security provider, qualified as ‘client’ of the bank. Here the qualification of the professional or consumer of the security provider is not relevant.

30 Concerning these two clauses, see Viale, Le garanzie bancarie (in fn 25 above), 8 et seq. 31 These clauses can be individually negotiated between bank and client. The ABI model contract in any case has no binding force for banks: Appello Torino 27 October 1998, BBTC 2001 II 87; Tribunale Milano 25 May 2000, BBTC 2001 II 88; Tribunale Torino 16 October 1997, BBTC 2001 II 87; Tribunale Alba 12 January 1999, Diritto della banca e del mercato finanziario (Dir b merc fin) 1996, 1501; G Falcone, ‘Alcune riflessioni a margine del recente schema di contratto di fideiussione ‘omnibus’ concordato tra la Associazione Bancaria Italiana e alcune associazioni di consumatori’, Dir b merc fin, 2003, 81 et seq. 32 The inefficiency of such an approach is stressed by Calderale, ‘La fideiussione omnibus tra tutela del credito e protezione del fideiussore’ (in fn 13 above), 68. 33 See attachment to Deliberazione CICR of 4 March 2003 (Disciplina della trasparenza delle condizioni contrattuali delle operazioni e dei servizi bancari finanziari), GU of 27 March 2003 no 72.

Secondly, the issue of the possible application of general consumer protection legislation to the consumer security provider has gained some attention. Different opinions on this point can be detected among courts and legal writers, and will be dealt with below (section 5). What is worth emphasizing here is that the last version of the ABI Model Contract of September 2005 establishes that the ‘first requirement’ clause is not applicable—save an agreement to the contrary—when the security provider is a consumer who guarantees a debt of a person who also is a consumer.

The Italian method of ensuring guarantors’ protection leaves some issues unresolved. Its symbol is the mandatory maximum amount now established by Article 1938 CC. General prohibitions as such, however, could prove to be insufficient protective measures. The determination in the contract of a maximum amount of liability for the security provider is no guarantee for the latter if disproportionate maximum amounts are agreed. This means that, in any case, the maximum amount must be determined by making reference to the predictable risk of the debtor’s activity and assets, so that fair behaviour on the part of the bank contracting with the guarantor is always required. The introduction of the general prohibition of suretyships for underdetermined amounts has not undermined the relevance of the good faith principle as control mechanism for the proportionality of the security to be applied by the courts. The weak side of this control mechanism is that it operates ex post and its concrete impact on the whole credit market depends on the degree of prestige.
towards the non-professional guarantor, the violation of which should directly affect the validity of the security. These duties would produce the overall beneficial effect of promoting best practices by banks, thereby reducing cases of exceptional harshness. European law is now moving in this direction, especially since the suggested European Principles on Personal Security actually impose such a precontractual duty, the violation of which is sanctioned by the voidness of the security on demand of the guarantor.39

3. Sureties and indebtedness of individuals and families

i. Credits only guaranteed by sureties of non-professionals

See section 3.ii below.

ii. Guarantors who do not have the financial means to meet the surety obligation

Household indebtedness has been subject to a growing trend in Italy, especially since the financial liberalization at the beginning of the 1990s. In 2006, the general household credit market showed an increase of 10.8 per cent. The consumer credit component has been the liveliest one and has increased by 17 per cent, whilst the household mortgage market has increased by 12.5 per cent.40 Italian family indebtedness at the end of 2006 was 47 per cent of disposable income, amounting to EUR 50 billion. Italian family indebtedness is, however, still quite low when compared to that of other European countries or the USA. As of the end of 2005, the percentage of indebtedness as regards disposable income was 43 per cent for Italy; 66 per cent for

38 Italian case law has been reluctant to develop a theory of standards of fairness for banking practice and the task of monitoring banking activities has been left to legislators: A Calderale, ‘La trasmissibilità agli eredi del fideiussore dei debiti contratti dal debitore principale dopo la morte del garante nell’ordinamento francese, quebecchese ed italiano’, Foro it, 1985, IV, 235 et seq. Criticism of the results of Italian case law in applying general clauses can be found in R Pandolfo, Postazioni ai lavori del Convegno sulle prospettive di riforma del diritto delle obbligazioni in Germania ed in Italia (Roma, 27–28 ottobre 1983); Rivista critica del diritto privato, 1984, 672 et seq; see also A di Majo, ‘Clausole generali e diritto delle obbligazioni’, Rivista critica del diritto privato, 1984, 539 et seq.

39 U Drobnig, Personal Security (in fn 3 above), Art 4:103, 398 et seq. According to Art 4:103 (Creditor’s Precontractual Obligation of Information):

(1) Before a security is granted, the creditor must explain to the intending security provider (a) the general effect of the intended security; and
(2) the special risks to which the security provider may according to the information accessible to the creditor be exposed in view of the financial situation of the debtor.

(2) If the creditor knows or has reason to know that due to a relationship of trust and confidence between the debtor and the security provider there is a significant risk that the security provider is not acting freely or with adequate information, the creditor must ascertain that the security provider has received independent advice.

(3) If the information or independent advice required by the preceding paragraphs is not given at least five days before the security provider signs the offer or the contract of security, the offer can be withdrawn or the contract can be avoided by the security provider within a reasonable time after receipt of the information or the independent advice. For this purpose five working days is regarded as a reasonable time unless the circumstances suggest otherwise.

(4) If contrary to paragraph (1) or (2) no information or independent advice is given, the offer can be withdrawn or the contract can be avoided by the security provider at any time.

(5) Ilimitale.

40 This growing trend is to both segments of consumer credit and mortgage market shows, however, a slight slow down when compared with 2005 data: all data and explanations can be found in Ausfin-Crif-Prometeia, Consumer credit survey, June 2007, Issue no 22, 11, according to data available as of 31 May 2007; 11 et seq.
France; 100 per cent for Germany; 128 per cent for the USA; 148 per cent for the UK. The Bank of Italy stresses that indebtedness is higher in families with high income and is more prevalent in the North; richer families were able to deal with rising interest rates that occurred in 2006 and could therefore afford higher levels of debt. To be sure, the global financial crisis of 2008 has impacted on the Italian household credit market. The weakening of the real estate market and the increase in interest rates resulted in a continuing slowing trend that was already under way in the course of 2007. In the first six months of 2008, total household financial showed a modest increase of 3.6 per cent, compared with 9.2 per cent at the end of 2007.

In the long run, the escalation of households' indebtedness has occurred in connection with two factors:

1. The increase in consumer credit as regards both supply of and demand for credit: new products have been offered to consumers and new segments of clients, such as immigrants, are beginning to gain access to consumer credit;
2. The constantly high number of Italians seeking access to credit to buy houses: as already mentioned, this means of financing is secured by way of mortgage.

All these data suffice to show that Italian indebtedness is not specifically connected to suretyships, and particularly not to an assumed widespread abusive banking practice devoted to requiring 'unfair suretyships' from families.

Certainly banks frequently give credit which is secured by suretyships provided by natural persons, this happening in approximately 72 per cent of cases.


Banks, however, check in advance the financial ability of the guarantor to pay. This means that banks usually require suretyships from natural persons only if the latter own immovables or have some concrete expectation of inheritance, eg because their parents own sufficient immovables which are deemed to become the children's in a certain time (it must be recalled that Italian law provides for mandatory succession rules assuring to children at least a certain percentage of their parents' assets).

Furthermore, banks always require the security provider to submit an income certificate and if his/her assets are insufficient they would not accept the security. The income control of the security provider adds to the normal checks that banks carry out on the prospective debtor, which include recourse to credit reporting systems.

42 Ibid.
45 F Maria, 'Sull'analisi finanziaria di bilancio', Banche et banchieri, 1974, 197 et seq.; F Maimeri, 'Finanziamento delle imprese e riforma societaria (Reggio Calabria: Falzea, 2004), 27 et seq.
46 Ibid.
persons. These suretyships secure the bank only, and place it in a direct advantageous position with respect to the remaining classes of creditors. This strategy of creditor selection operates clearly to the detriment of the weaker creditors and therefore could well be seen as an abuse of the limited liability rules of company law. In fact, the normal way to carry out a business would be to confer sufficient capital on the company in order to allow financing by creditors who would all feel sufficiently secured. Through this means, however, the company’s assets would equally be devoted to satisfying all creditors, including, for instance, creditors whose credit is based on tort law. On the other hand, leaving the company with few assets and compensating this thin capitalization with personal security to banks allows the company to select the creditor who will get satisfaction of its right: in the example just mentioned, the bank wins while creditors in tort recover no damages. A member of the company, or a manager, could well be willing to provide personal security for the company, without necessarily facing the risk of poverty for the rest of his/her life. Indeed, the security provider might gain an economic advantage from the finance provided to the company, in case of good results of the economic activity carried out by the company. This would be different if the company began to run into financial difficulties; the security provider might well have had the time to protect himself by way of fiduciary transfers of a major part of his assets to other persons (to a wife, for instance). In such cases where it seems that debtors adopt abusive practices, not creditors, but banks have recourse to judicial remedies like claiming that the transfer is a sham or fraudulent contract, or that insolvency rules apply, avoiding any transfer made within a short time before the opening of an insolvency procedure. However, all of those remedies end up subjecting the creditor to the major shortcomings of the Italian judiciary system: the inefficiency of debt recovery and enforcement procedures. Indeed, it is well known that in Italy the enforcement of contracts and execution procedures takes a long time, especially in some parts of the national territory, and this prevents the creditor from getting full satisfaction of his/her rights.

On the part of a surety from whom performance has been demanded by the creditor, the following can be said:

51) If the surety pays, there would be no available data on the percentage of cases in which the/ she can get satisfaction by way of subrogation in the creditor’s rights as against the debtor and by way of reimbursement from the debtor, but it can be easily inferred that almost never reverting to the debtor brings positive results for the guarantor.

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(b) If the bank began to carry out execution against the guarantor’s assets, it would find nothing—or very little—to seize, either because the guarantor successfully protected his/her assets, or because there are no assets whatsoever.


52) Italian insolvency law (1 fall, RD 16.3.1942, no 207), Art 64: suspect period for transfers without valuable consideration equal to two years.


56) According to an opinion which seems widespread in banking practice: dotto Sergio Fedrizzi, General Director of MediCreditro Trentino Alto-Adige Spa.
process of getting access to this fund is managed by a consumer protection association (Adiconsum). The money from the fund allows special investment institutions and consumer associations to provide security to banks which finance such people. The Minister of Treasury established a series of guidelines for those institutions to assess the creditworthiness of people requesting this kind of aid. Applicants must be in genuine need and the reason for the indebtedness must be a serious one; the capability of debt repayment must be individuated on the basis of the applicant’s income and assets as well as of the security provided by third parties, especially members of the applicant’s family who agree to provide security. The total amount of debt must be within the limits of the security which can be provided by the investment institutions; ie approximately EUR 25,800. Adiconsum itself, however, stresses the insufficient capitalization of this fund to deal effectively with the problem of over-indebtedness.

Finally, a last crucial point must be addressed: the policy reasons behind the rules governing access to this special fund show how important ‘social solidarity’ is in dealing with over-indebtedness and access to credit. The availability of ‘social capital’, in terms of the willingness of members of the family or friends to help the debtor standing as surety for his/her obligations, is considered a determinant element in assessing the efficiency of a credit system.34 This is why the issue of family suretyships is a delicate one: of course, abusive practices must be punished and possibly prevented, but any remedy against this risk must be well balanced so as not to obstruct this important channel of development in the (Italian) economy.

4. Unfair suretyships of non-professional guarantors

As mentioned above (section 2), the Italian way of addressing the issue of ‘unfair suretyships’ has centred on the assessment of the (in)validity of the fiduciusione omnibus as an agreement securing all present and future obligations of the debtor without maximum stipulated amounts. The problem has been solved by way of legislation, through the introduction of the mandatory rule of the maximum amount in the agreement. Violation of this requirement is sanctioned by voidness of the security (Article 1938 CC). As mentioned already, this legislative solution, however, did not completely dispel any doubts which could arise in respect of fiduciusione omnibus even with maximum amounts, since the latter could be a disproportionate amount in consideration of the patrimonial situation of both surety and debtor. This circumstance still leaves open the issue of a possible voidness of the security if the maximum amount is determined in violation of the good faith principle.35

57 See <http://www.adiconsum.it>.
58 According to the study of C Grant and M Padula, ‘Informal Credit Markets, Judicial Costs and Consumer Credit: Evidence from firm level data’, October 2006, CSEF Working Papers, Centre for Studies in Economics and Finance, University, no 155 (also available at: <http://www.csef.it/WP/wp155.pdf>), in the field of unsecured credit, the availability of informal credit from family and friends is more important than judicial efficiency in providing greater access to credit. 59 See fn 25 above.

Besides this aspect, however, Italy has not had a specific debate on ‘unfair suretyships’ as in the case of some other European countries in the last decades,60 where the focus has been the protection of the non-professional guarantor in various situations which have often been under the scrutiny of case law and scholars. The following possible situations of ‘unfair suretyships’ are therefore dealt with in consideration of the features of the Italian credit market and on the basis of the data emerging from Italian court practice.

i. Suretyships of young children for their parents’ debts

Sometimes children stand as sureties for their parents’ debts. This occurrence is highlighted when consulting case law, although the issue of the fairness of such a surety is nevertheless a matter of explicit decision.61

A distinction must be drawn between suretyships provided by minors and those provided by children in the family who have come of age, even if not—or not fully—financially independent. Children under 18 may not enter into obligations by themselves, but may do so through their parents who are their guardians by law and therefore have the duty to administer their assets and represent them in the related proceedings (CC Article 320). When minors are asked to stand as sureties for their parents debts, a situation of conflict of interest arises for their parents, who should be the persons signing the surety for them. This situation is regulated by Article 320 paragraph 6 CC, which establishes the intervention of a judge to appoint a special guardian for the child (curatore speciale). The guardian should be the person who decides whether or not to enter into the suretyship contract having regard to the interests of the child, and should be responsible for his decision vis-à-vis the judge of the appointment. As case law shows, the suretyship of the minor is often eventually entered into.62

The situation is different where the guarantors are children who have come of age. In such cases, there are no special protective measures to ensure that the guarantor is acting on his/her own free will and is adequately informed when signing the suretyship for his/her parents.

It must be stressed that both these eventualities have never been considered unfair per se, at least not by case law. At first sight it might seem remarkable that not even the lawyers of the minor/child—as it seems—bring to the attention of the court the possible unfairness of such agreements. A plausible explanation for this outcome is that the transaction per se, when entered into, was not disproportionate

60 Eg England, Germany, Austria, France: see detailed national contributions in Colombi Ciacchi (ed), Protection of Non-Professional Sureties in Europe (fn 4 above). However, see S Caranosi, Le fideiusione prestate da parenti e congiunti (Perugia: Università degli Studi, 2007) and F Macaroni, ‘Garanzie personali’ (fn 4 above), 118 et seq.
61 Case law analysis usually centres on matters of procedural law which are not of interest in the present study; see, eg, Cass, plenary sessions, 16 October 1985, no 5073, in Euro ii, 1985, 1, 675; Cass 18 September 1978 no 4178, in Euro ii, 1979, 1, 1991: all decisions based on a single factual situation where the wife, guarantor of her husband’s debts, died, leaving daughters, from whom the father had obtained the prosecution of the security.
62 See case law quoted in fn 61 above.
from an economic point of view. Banks, when requiring and accepting suretyships in general by family members of the debtor do so in consideration of the assets existent in the family as a whole. This means that either the prospective guarantor possesses sufficient assets on his/her own, as to make it useful for the bank to have him/her as surety, or he/she has some expectations of inheritance of assets, eg from grandparents. The ratio of requiring suretyships from children for their parents’ obligations serves to avoid possible sham transactions specifically entered into for purposes of hiding assets from the principal debtor by allocating them to a member of the family. A personal security from the children may assure the creditor that the full assets of the family which existed when signing the principal debt and security, will continue to ensure liability for the repayment of the debt. The same can be said regarding potential inheritance. Children may directly inherit their grandparents’ assets if their parents refuse to accept the inheritance of their parents (Articles 467 et seq CC). The suretyship provided by a son for his parents’ obligations may avoid the risk of strategic refusals of the inheritance by the parents to the detriment of the creditor.

It is true that in order to avoid fraudulent transactions general remedies are established by legislation (like the actio pauliana, eg. Article 2901 CC; Articles 64, 67 1 fall; Article 524 CC). However, two factors must be considered:

(a) the requirements for these remedies to operate are so strict that the protection they offer to the victim of the fraud is sometimes too weak;
(b) all these remedies require the creditor to bring an action to court, which takes time, especially in Italy; a suretyship by a child of the family can overcome this transaction cost with evident advantage to the creditor.

ii. Suretyship agreements between spouses called in after divorce

In Italian practice, the most recurrent factual situation is that of a suretyship—in the form of fideiussione omnibus—provided by a spouse to secure the business activity of the other spouse. Even with respect to this factual situation—which is very close to that analysed in section 4.1 above—there is no case law openly centred on whether or not the formation of the will of the surety was effectively free, bearing in mind the emotional involvement of the guarantor. In brief, such a contract is valid under current Italian law. Possible vitiating factors in the formation of the contract may become relevant at any rate in the judgment on the validity of such a contract, but this would happen according to the general rules regulating mistake (Article 1427 et seq CC), threat (Articles 1434–1436 CC); fraud (Article 1439 CC), or the rules of tort law (Articles 2043 et seq CC), where evidence requirements are very strict. In this respect, it must be added that the existence and relevance of vitiating factors in the formation of the contract is a matter of fact, to be decided by the judge of the merit (first instance and appeal), and not by the judge of law: the Italian Supreme Court is authorized to decide on points of law and not of fact. This basic procedural rule may explain why there is no case law of last instance explicitly dealing with the point of vitiated will in the formation of the suretyship granted by family members. At the same time, the absence of such matters also in the lower courts’ case law means that lawyers are not used to raising the exception of vitiated formation of the suretyship when the surety is called upon by the creditor to fulfil his obligations.

Not only is a suretyship between spouses valid, but also the agreement between the bank and the surety in such cases usually contains a particular clause which is very advantageous for the creditor. Where the matrimonial property is regulated by the regime of common property (comunione legale), in the fideiussione omnibus a clause is inserted, stating a derogation from Article 190 CC. This provision establishes the rights of the creditors to execute personal assets of the other spouse (the one who did not assume the obligation) up to a limit of 50 per cent of the credit, only when the matrimonial property held in common by the spouse is not sufficient to satisfy the creditor. Derogation from this rule allows the creditor to execute directly the personal property of the other spouse under the regime of common matrimonial property, and for the whole of the credit. This clause has been regarded by case law as valid on the basis of the freedom afforded to spouses to dispose of the rights granted them by Article 190 CC.

In addition, the Italian scenario shows that courts have come to another, possibly dangerous, conclusion regarding the special relationship between the surety and the principal debtor carrying out a business. In Italy, the entrepreneur, either an individual or a legal entity, is subject to insolvency; while the natural person is not. Where a spouse stands as surety for the commercial obligations of the other spouse, and it is proved that the suretyship enabled a continuous supply of finance which is indispensable to the business activity, the courts would assume that a hidden company, or partnership, between the two spouses existed, ie the guarantor is regarded as

66 A Benedetti, ".La moglie garante del marito: vero consenso o abuso di intimità familiare?", Trusts and attività fiduciarie, 2000, 208 et seq; GB Perri, La fideiussione e le garanzie personali del credito (Padova: Cedam, 2000), 98.
67 Arts 384 and 65 Code of civil procedure, RD 30 Jan 1941 no 12 (ordinamento giudiziario). In Cass 18 March 2005 no 5974, Mag Gior, 2005 and Guida al diritto, 2005, 17, 49, the action to avoid the suretyship because of the surety’s vitiated consent when signing the contract was raised for the first time in the Supreme Court. However, being a matter of fact and not of law, this point could not be considered by the court.
68 Benedetti, ".La moglie garante del marito" (fn 66 above), 208 and fn 2 stresses the difficulty of identifying the description of factual situations in Italian case law decisions, since these are usually much more devoted to explaining principles of law and procedural rules than the underlying facts. This makes research on unfair suretyship extremely difficult.
65 See, eg, Cass 10 May 1991 no 5244, Gior it, 1994, 1, 1, 672, where the only considered issue is a problem of matrimonial property liability rules.
a (hidden) partner (or shareholder, as the case might be: socio occulto) in the enterprise and consequently is subject to insolvency.\textsuperscript{71} In such cases, the consumer surety could be held solidary liable with all his/her assets to all creditors of the enterprise, and not only to the creditor to whom there is an obligation under the security.\textsuperscript{72} The fact that courts have often applied such assumptions almost automatically, confusing the essence of a suretyship with the nature and effects of a participation in a partnership or company—which on the contrary, are two very different situations—has rightly been the object of strong criticism.\textsuperscript{73} However, legal scholars and some case law opinions underline that additional elements indicating that an implied intention of the parties to carry on such a hidden company must necessarily be present in order to assume such serious consequences. These additional elements could be the sharing of profits or the involvement in the management of the activity by the surety.\textsuperscript{74}

Furthermore, the validity of suretyships between spouses is not affected by a fundamental change in the relationship, such as divorce. Italian law regards suretyships as contracts entered into on the basis of an economic calculation, even when there could be the doubt that the hidden, substantial ground inducing the person to stand as surety is the so-called affectio contiguus, i.e. a subjective, emotional bond to the debtor.

To explain this, the role played by personal motives, subjective aims, and interests in Italian contract law shall firstly be addressed. Under Italian law, the various impulses behind human needs, the impulses which induce people to act, or, in other terms, the subjective motives inducing the parties to enter into a contract, are not relevant from a legal point of view, in so far as they are not stated objectively in the contract. Even in such a case, a certain legal meaning of the motives is acknowledged only when additional requirements are fulfilled: either the motive must trigger a vitiated formation of the contract, so that general rules on this matter apply, allowing the avoidability of the contract; or the motive must be unlawful and it must be proved that it was the only reason for the contract being created by both parties (Article 1345 CC). In the latter case, the whole contract would be unlawful: the recurring declamation in this case being that the causa itself of the contract is vitiated by the motives.\textsuperscript{75} Interestingly enough, even if scholars tried to reassess the role of motives through various techniques,\textsuperscript{76} these attempts also left suretyship contracts between family members untouched. This is true in addition if one considers the doctrine of the so-called presupposizione, which aims to acknowledge the role of a change of circumstances under Italian law. Under the doctrine of presupposizione, if a factual or legal circumstance which, however, is not expressly agreed upon, had been the objective reason for the conclusion of the contract (i.e., the condition for the contract for both parties), and this subsequently ceases, the contract cannot be enforced.\textsuperscript{77} However, in contrast to what has happened in other countries, this theory has found no application whatsoever in the field of suretyships.\textsuperscript{78}

### iii. Suretyships of guarantors unaware of the financial risk

See section 2 above and section 4.iv below.

### iv. ‘Emotionally transmitted debt’

The lack of case law appraisal of the problem of ‘unfair suretyships’ among family members is consistent with the absence of specific case law treatment of personal security contracts entered into without proper awareness by the guarantor. This issue is clearly connected to the aspect of creditors’ information duties. As mentioned above (section 2), the way in which a legal system tackles the problem of duties to inform indicates the degree of protection, in the given system, of the general interest of a fair functioning of the credit market.

An informed surety is one who, when signing the contract, is aware of both the economic and legal consequences of the devised act. Moreover, an informed surety is a surety who, after the formation of the contract and during the relationship with the secured creditor, is placed in a situation whereby he/she is entitled to be informed if the debtor runs into financial difficulties, in order to be able to decide whether or not to limit the security. This suggests distinguishing two main aspects of the problem:

1. how surety awareness is protected in the negotiation phase; and
2. how surety awareness is assured during the execution of the contract.

### I. The negotiation phase

The civil code regulation seems to involve a scheme whereby the information channel runs not from the creditor to the guarantor, but from the debtor to the surety (Articles

\textsuperscript{71} E.g: Cass 14 February 2003 no 2200, Giusti ci 2003, l, 1220; Cass 17 October 1986 no 6087, Mess foro it 1986; Cass 7 June 1974 no 1090, Giurisprudenza commerciale (Giar comm) 1975, 11, 733; Cass 22 February 1957 no 662, BRTC 1957, II, 341.

\textsuperscript{72} This is especially the case if the surety did not act for remuneration and his/her right of recourse against the debtor is excluded: Tribunale Napolesi, 12 December 1996, BRTC 1998 II 84 et seq.

\textsuperscript{73} F Galgano, Il fallimento delle società, vol X, Trattato di diritto commerciale e di diritto pubblico dell'economia, diretto da F Galgano (Padova: Cedam, 1988), 61 et seq, 67 et seq.

\textsuperscript{74} Galgano, Il fallimento delle società (fn 73 above), 64 et seq, 69; Cass 23 December 1982 no 7190, Giur comm, 1983 II, 847; Tribunale Napoli 25 March 1996, Rivista del mortatoio (Riv Notariato), 1996, 1249.

\textsuperscript{75} See, inter alia, R Sacco, in R Sacco and G De Nova, Il contratto, 1, Trattato di diritto civile diretto da R Sacc, 2nd edn (Torino: UTET, 2004), 834 et seq.

\textsuperscript{76} See Sacco, in Sacco and De Nova, Il contratto, I (fn 75 above), 842.
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1952 and 1953 CC). This shows the underlying assumption that the surety is a close friend of the debtor who—due to this closeness—is easily able to get information directly from the interested person. Of course, this scheme cannot work in reality where the surety—whether or not a friend or family member of the debtor—secures the obligations of a person who exercises a business activity, as is primarily the case in Italy.

In the absence of a specific civil code rule aiming to mandate the creditor to inform the guarantor of the financial risk he/she is entering into before signing the contract, the source of possible information channels from the bank to the devised surety must be looked for elsewhere.

In the Italian context, the formal sources of such an information duty are essentially located in: (A) consumer protection law; (B) banking legislation; (C) the good faith principle. In addition, the concrete efficacy of these formal protections must be assessed on the basis of case law approaches to the problem (D).

A. Consumer protection law

Although Italian consumer law does not provide for specific provisions devoted to suretyships, general rules of consumer protection can come into consideration for the protection of the non-professional guarantor in general, and specifically to ensure her/his awareness when entering into a contract.

First, however, one must ascertain when exactly general consumer law is applicable to a surety. This issue could be subject to different opinions. An observation of the case law and literature relating to recent years could—in theory—lead to the conclusion that consumer protection legislation would be applicable to personal securities: (a) where the surety acts as consumer, or (b) where the surety acts as professional, but the principal debtor is a consumer. This last alternative could be attained if the opinion of the courts were developed, the accessibility of the security to the relationship between debtor and creditor could make it possible to apply the rules of consumer protection of the latter relationship to the former. Therefore, consumer protection legislation would not be applicable where the guarantor acts as a professional in order to secure an obligation of another professional, as in the situation of guarantor securities provided by the manager of the company in favour of the latter. However, it is interesting to note that in the last version of the model contract of fideiussione omnibus provided by the Association of Italian Banks (of 26 September 2005), a restriction in the scope of consumer protection to situations where both the surety and the debtor act as consumers was suggested. In the same vein, the limited case law available up to now, has been directed towards achieving the same outcome, i.e. to exclude the application of consumer law when the non-professional surety secures the obligations of a professional.

Should consumer law be applicable to the security, provisions on abusive clauses would also apply (ccode Art. 33–38). The latter articles require that some clauses listed in the law and producing disadvantageous effects for the consumer are valid only if individually negotiated; of course, this rule may in the end result in a requirement of written form for that clause or even in individual approval in writing by the consumer.

B. Banking legislation

The rules on transparency of contractual conditions in the banking sector established by Banking Law (Dlgs no 385/1993), Articles 115–120, also apply to a non-professional guarantor when contracting with banks or financial institutions. According to Article 116, each branch open to the public should have the following displayed to clients: interest rates, prices, expenses for notices, and every other financial condition regarding transactions and services offered, including overdue interest and values used for the computation of interest. Reference to usage is not permitted. The contract must indicate the interest rate and every other price and condition in practice, including, for credit contracts, any increased fees in the case of late payments; also the possibility of a change in the interest rate and any other price and condition to the disadvantage of the client must be expressly indicated in the contract with a clause that the client must individually sign (Article 117). Repeated violations of these rules may lead to suspension of the bank’s activities for no more than 30 days (Article 128 paragraph 5).

Furthermore, the Banking Law contains some rules regarding the form of the contract which could serve as a warning to the surety when signing the contract. While the civil code does not establish any special formal requirement for the validity of the suretyship, the special rules on banking contracts require instead a written document as well as the handing out of a copy to the client (Banking Law, Article 117) for the valid formation of a contract between bank and client (Banking Law, Article 117 paragraph 3).

80 See above, fn 5 above.

81 Cass 13 January 2001 no 334, Foro it 2001, 1, 1589; Cass 13 May 2005 no 10197, Foro It Marc 2005, 1203. See also F Macario, 'Garanzie personali' (fn 4 above), 104 et seq.


83 Falcone, 'Alcune riflessioni' (fn 32 above), 92. See above, fn 29.

84 This model contract has no binding character, though: see above fn 32.

85 See case law quoted in fn 81 above.

86 See case law quoted in fn 81 above.


88 See section 5 below.

89 See section 5 below.

90 Petti, 'La fideiussione e le garanzie personali del credito' (fn 66 above), 486.

91 But other systems do, like Austria (ABGB § 1346 para 2), Germany (RGB § 766), Greece (Art 849 CC), England (Statute of Frauds 1677, s 4; Consumer Credit Act 1974, § 105(1), (5), (7); Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg 3 para 1ld) and Schedule Part IV.

92 Art 1937 CC requires only the express will of the security provider for the valid creation of a personal security. The meaning of 'express will' is not always certain. Gestures and other kinds of traditional communication have been understood as ways of express manifestation. Any legal means of proof are admitted (Cass 26 June 1979 no 961, Gius 1980 I 1545) and even the presumption (Cass 14 July 1936 no 2485, Foro it 1937 1 38; Cass 17 October 1992 no 11413, Gius 1994 I 1649 et seq. Giusi, 'La fideiussione e il mandato di credito' (fn 37 above), 93). Moreover, specific contract terms favouring the party who supplied them require a specific approval in writing by the other party, according to Arts 1341–1342 CC.
C. The good faith principle
The principle of good faith can be regarded as a basis for the creditor's duties to inform in suretyship contracts. However, this principle has been applied much more in connection with the information duties of the creditor after signature of the contract (see section 4.iv.1.B above).

D. Case law
Italian case law appears not to be very sensitive to the issue of the creditor's information duties to the surety in connection with the problem of the initial validity of the security. When the matter comes to judgment, courts tend not to impose any information duty upon the creditor, on the assumption that it is in the interest of the surety to inform herself/himself of the financial situation of the debtor.

II. The execution phase
The flows of information towards the surety are given more attention by the civil code: Article 1956 provides that the surety can terminate the contract if the creditor, without special authorization by the surety, continues to finance the debtor, even if he/she knew of a deterioration of the latter's financial situation. This provision imposes upon the creditor a duty to inform the surety whenever the former knows that the debtor is about to encounter such financial difficulties as to jeopardize the right of the surety to get reimbursement from the debtor. In this way, the formal awareness of the surety of the economic consequences of his/her obligations during the relationship is preserved. However, it is hardly surprising that this clause has constantly been derogated by banking practice and an amount of case law has been produced on the issue of the validity of such derogation, until the law on transparency in the banking services added a new paragraph to CC Article 1956 stating the voidness of the surety's waiver to the rights conferred by this article.

Besides that, annual notifications to clients are imposed by Article 119 Italian Banking Law, in order to provide the client with complete and clear written information regarding the development of the relationship. Article 4 of the last model contract of fideiussione omnibus provided by the Association of Italian Banks (26 September 2006) expressly shows the oscillations that have been behind the affirmation of an information duty of the bank towards the surety: paragraph 1 of this clause states that it is duty of the surety to keep himself informed on the development of the finances of the debtor; paragraph 2 establishes that upon request by the surety, the bank must inform the surety of the outstanding secured amount and, if the debtor consents to it, of other information on the debtor's obligations. Finally, paragraph 3 declares the duty of the bank to give periodical information to the surety (at least once a year, according to Article 119 Italian Banking Law).

A few closing remarks can be made in relation to the issue of sureties' awareness. As regards the negotiation phase, section 4.iv.1 above shows that Italian law has eventually agreed a variety of sources of information duties from the bank to the non-professional surety. These sources, however, all stem from different pieces of legislation, none of them specifically directed to the non-professional surety. This implies that a certain degree of uncertainty can sometimes decrease the protection afforded to the surety, as it is if the applicability of consumer legislation is doubted. A better solution would certainly be to introduce a specific legislative obligation for the bank to inform the non-professional surety in advance, of the consequences of the obligations he/she is assuming, as has been done by the European Principles on Personal Security of the Study Group on a European Civil Code. This would directly protect the surety and, at the same time, secure a better functioning of the credit market in general, stimulating banks to act according to good practices. As to the contractual stage (section 4.iii.1), the existence of specific mandatory provisions in the civil code assuring the surety's awareness as regards any changes in the debtor's financial position assures sufficient protection for the guarantor.

While these observations refer to a formal protection of the surety's awareness, the case is different, of course, when, notwithstanding an effective awareness of the surety, attained by means of the rules indicated above, the surety is compelled to sign the security or to continue the contract on the basis of strong emotional ties towards the debtor. It is a fact that Italian law has developed no special means to protect the surety in these cases. However, it might be worth asking whether the legal system has a right to intervene at all, and—above all—whether, in case of such an intervention, there could be any concrete possibility of success. The German model of surety's protection from emotional bonds, which presumes that family ties and excessive burdens on the surety render the security immoral (save some exceptions where a specific drafting of the contract allows the overcoming of the immorality) is a paternalistic solution; while pretending to protect the freedom of will of the surety, it ends up limiting it significantly. Notwithstanding the manifold appearances of being a system highly sensitive to the problems of 'social justice' and protection of the weak, the German constitutional approach has been revealed as having only a weak impact on banking practice as well as on the actual
relief eventually granted by courts to sureties incapable of facing their contractual obligations. In such cases, one could wonder whether the surety's individual freedom is not better protected by leaving it to his/her own conscience and ultimate decision, provided the system puts in place all necessary tools to ensure (a) transparent information flows concerning the technical consequences of the contract; and (b) adequate means to support cultural and psychological awareness which are indispensable for the individual in order to balance financial with emotional considerations.

v. Manifestly disproportionate suretyships

The Italian civil code provides a specific remedy (Article 1448, azione di rescissione per lezione) to sanction a contract stipulated under certain inequitable circumstances and imposes a disproportion between the promises of the parties; in particular, the value of the promise of one party must have been at least double that of the other party. This disproportion, however, is relevant only if the other party has taken advantage of the state of need of the other party, in order to profit from it. All these requirements show that this remedy is an exceptional one, also because it is applicable only to commutative contracts (where both parties pay a consideration for the promise of the other, and suretyships are not always thus) and only if such disproportion existed at the moment of the formation of the contract and persisted up to the bringing of the action in court. Therefore, it is insufficient to resolve the problem of disproportion in suretyship contracts.

To tackle the issue of disproportionality in suretyships, it is necessary to reference more to the history of fideiussione omniibus in Italy. We pointed out (section 2 above) that the major issue revolving around surety protection in Italy has been the validity of security for future obligations without a maximum amount. Since the legislative introduction of a mandatory maximum amount to be determined in the contract (Article 1938 CC), the problem of avoiding disproportion in these contracts has not yet been fully resolved. It is not clear, indeed, how the maximum amount should be determined, in order to ensure the validity of suretyships. According to legal writers, this amount should be identified on the basis of the principle of good faith, i.e. by making reference to the predictable risk of the debtor's activity and assets, in order to avoid disproportions. This implementation of the good faith principle as the reasonable way of determining the maximum amount is, however, very difficult: case law has not developed a specific set of criteria for this assessment, nor has it precisely indicated the legal consequences of a disproportionately maximum amount.

As mentioned above, consumer law in Italy does not provide for specific provisions protecting the consumer surety. Nevertheless, if applicable to sureties, general consumer law grants them some rights of information, and in particular, exclusion from some contract clauses that are considered abusive.

Some attention must be paid to the provisions on abusive clauses as a major form of protection for consumer sureties. Articles 33 to 38 of the consumer code are applicable to every contract concluded between a consumer and a professional. In the opinion of the Supreme Court, the quality of the debtor extends to the surety, so that for consumer legislation to apply, the debtor must be a consumer. If according to these provisions, a clause within the suretyship contract is abusive, the sanction provided by the consumer code is partial voidness: only the individual clause is void and not the whole contract.

However, it must be noted that the clauses listed in the consumer code Article 33 (former Article 1460bis CC) are not automatically void, but only subject to a rebuttable presumption of abusiveness. Moreover, Article 34 paragraph 4 of the consumer code (former Article 1469ter paragraph 4 CC) states that clauses that have been agreed by individual negotiation with the consumer are valid. Only a few clauses listed in Article 36 paragraph 2 (former Article 1469quinquies paragraph 2 CC) are void notwithstanding individual negotiation. However, in the field of personal security that kind of control has gained very little relevance in court practice until now, as decisions on the issue are rare.

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Finally, the transposition into Italian law of Council Directive 85/577/EEC on doorstep transactions must be considered, ie Dlgs no 50 of 15 January 1992, now integrated in Articles 45–49, 62–67 CC. This regulation does not address the applicability of its rules to personal security contracts, nor exclude it expressly. Case law on the point is insufficient. However, the decision of the Competition Authority of 8 June 2000 no 8353111 states that these rules apply to a suretyship provided by a consumer in favour of a debtor who is also a consumer; the creditor must be a professional. These provisions provide for a right of withdrawal from the contract, to be exercised by the consumer, without penalties, within 10 days from the signing of the contract, as well as the right to written information on the existence of such a right. Article 143 paragraph 1 code establishes the mandatory character of the rights acknowledged by the code to consumers stating that they cannot be waived and any derogation from them is void.

ii. General law of obligations and contracts

General rules of the law of obligations and contract law that are set forth by the Italian CC of 1942 are very important means of controlling both negotiation of the suretyship and development of the relationship between creditor and surety. In this respect, it has been mentioned above how the good faith principle has been applied (see sections 2 and 4.iv.l.C) and it was pointed out that the remedies against the vitiating factors in the phase of contract formation are a very weak means of protecting sureties from risky consequences of family and emotional bonds (see section 4.ii).

iii. Specific provisions concerning suretyship contracts

The civil code regulates suretyship contracts in a specific Chapter (XII) of Part III (specific contracts) of Book IV on contracts. Here the most important provisions are located, providing for basic rights (and duties) of the surety. In order to summarize the outcomes of the various codal rules, the surety’s position is qualified, on the one hand, by the rights of subrogation in the creditor’s rights and reimbursement from the debtor; both of these rights are the essentials of the function of security, so that if they are in some way hindered, there cannot be any suretyship.112 On the other hand, specific protection of the surety is achieved by way of the accessority principle and its manifold consequences.113 However, since these provisions are always derogated from in banking practice (see section 2 above), only those civil code rules that are regarded as mandatory are worth mentioning. From this perspective, besides the preservation of the rights of subrogation and reimbursement, only a few rules can be mentioned: the necessity of a stipulated maximum amount for the security of future obligations (Article 1938); in case of security for future obligations, the rule according to which the surety is no longer liable if the creditor grants new credit to the debtor, although he/she knew of a deterioration in the debtor’s financial position and that this would result in detrimental consequences for the surety (Article 1956). Another rule, expression—once again—of the idea of accessibility, which prohibits the security assumed under more rigorous conditions than those of the secured obligations (Article 1941 paragraph 3) is regarded as mandatory;114 however, it is possible for the parties to negotiate the object of the security in such a way that in fact the prohibition of the so-called fiduciasiones in duriern causas is also strongly attenuated.115 These being the only barriers to the parties’ contractual freedom, it cannot be denied that the protection of the non-professional guarantor provided by the specific rules of the code devoted to suretyships is ineffective.

iv. Family law

Italian family law does not offer specific provisions concerning family members providing personal security. Some provisions protecting the matrimonial community property are derogated from in practice, in a way which favours the liquidity of the security to the creditor’s advantage (Article 190 CC, see section 4.ii above).

v. Consumer insolvency law

As mentioned, consumer insolvency law does not exist under Italian law (see section 3, fn 55 above).

111 Published in Disciplina commercio, 2000, 1119.
112 Right of subrogation: Art 1949; right of reimbursement from the debtor: Art 1950. The surety is no longer liable if, due to the creditor’s act, the subrogation in the creditor’s rights and securities cannot occur (Art 1955). See also Cass 23 April 2004 no 7719, Giust Civ Man 2004, 4; Cass 6 February 2004 no 2301, Rassegna di diritto commerciale, 2005 II 1 et seq; Cass 7 November 2003 no 16705, BBT 2004 II 520. The ratio of preserving the right of the surety to get reimbursement from the debtor justifies—the mandatory rule of Art 1956, according to which the surety is no longer liable if, in case of security for future obligations, the creditor grants new credit to the debtor, although it knew of the deterioration of the debtor’s finances and that this would have produced detrimental results for the surety. Viale, Le garanzie bancarie (fn 25 above), 26 et seq; Cass 21 February 2006 no 3761, Giust Civ Man 2006, 2; Cass 11 January 2006 no 394, Foro It 2006, 9, 2364; Cass 9 March 2005 no 5166, Giust Civ Man 2005, 4; Appello Milano, 6 March 2002, Contratti, 2002, 714.
113 The suretyship is valid only if the secured obligation is valid: Art 1939; the surety can raise against the creditor those exceptions to which the debtor is entitled as against the creditor: Art 1945; the limits of the suretyships are determined as being coincident with those of the secured obligation: Art 1941.
114 Giunti, "La fedesussione e il mandato di credito" (fn 37 above), 141.
115 Details ibid, 146 et seq.
vi. Constitutional Law

Neither academic community nor case law has applied constitutional rules and principles in order to establish the surety’s protection.

vii. Other branches of law

The overview above (section 4.iii and sections 4.iv.l.B and 4.iv.l.I) showed that banking legislation of Dlgs 1 September 1993 no 385 has a major impact on the topic under analysis. This legislation regulates the relationships between a bank, or similar credit institution, and its clients. Hence, it is not specifically devoted to suretyships, but it provides important information and form requirements. What is worth stressing here is that the rights conferred on clients under this legislation can be derogated from only in favour of the client (Article 127 paragraph 1) and whenever the sanction of voidness is imposed (eg for an omission by the bank to stipulate a written contract and to hand out a copy of it to the client, Article 117 paragraph 3), this voidness can be claimed only by the client, not by the bank or other third parties (Article 127 paragraph 2). Moreover, the Bank of Italy has powers of control and compliance in matters relating to banking legislation, and repeated violations of those rules may lead to suspension of the bank’s activities for no more than 30 days (Article 128 paragraph 5).

Besides the role of banking legislation, we have already mentioned the crucial role played by unofficial and non-binding sources of rules, such as the Association of Italian Banks Model Contract, in the field of suretyships. This shows that banking practice—and therefore economic need, much more than legal principles or rules—has been the engine for development beyond the old fashioned rules of the civil code model of suretyship. This, however, has not resulted in a move aimed at guaranteeing more protection for the surety, but towards new means of promoting economic growth for small and medium-sized Italian enterprises (see section 2 above).

6. Impact on the guarantor’s position of changes in the debtor–creditor relationship

The issue of how changes in the relationship between debtor and creditor affect the surety’s position must be dealt with, again, from two perspectives: that of the civil code model, on the one hand, and that of banking practice, on the other. In the civil code scheme of suretyships, the rule of accessibility makes it possible for the surety to benefit from favourable changes in the relationship between creditor and debtor; this finds confirmation, eg, in the possibility of the surety raising those exceptions to which the debtor is entitled as against the creditor (Article 1941). At the same time,

the surety cannot be obliged for a security concluded under conditions which are more onerous than those conditions under the principal obligation (Article 1941). The consequences of the accessibility principle according to the codal scheme of suretyship are reversed in banking practice: the clause of ‘payment on first demand’ bars the possibility of the guarantor raising exceptions of the debtor against the creditor, as well as any other exception, save the exception of voidness of the security.117 It is true that this does not convert the security to an independent security (indemnity), but only postpones the moment when the surety will be able to raise such exception, ie after payment.118 This is an aggravating circumstance, though. In addition, the favourable rule of Article 1941 CC is de facto derogated from in banks’ contracts: here the liability assumed by the surety often goes beyond the liability for the principal obligation: the surety is liable for other obligations assumed by the debtor vis-à-vis the bank, such as obligations as surety for third persons; when the surety limits the contract, he/she is liable not only for the existing obligations at the time of the limitation, but for any other obligations that could subsequently arise in connection with the obligations existing at the mentioned time.119

However, the issue of the potential risks for the guarantor that could arise from changes in the relationships between creditor and debtor has been the object of attention by the legislator who wanted to increase the level of protection afforded to guarantors. As mentioned above, in 1992, a pre-existing civil code rule (Article 1956), requiring the creditor to obtain the guarantor’s consent before granting new financing to the debtor running into financial difficulties, was made mandatory.120 This means that banks can no longer derogate from this rule and, therefore, always have to obtain the guarantor’s consent. This is a beneficial rule in cases in which the guarantor is effectively in need of special protection, as is the case when he/she has no economic interest in the transaction. However, it is not so for cases in which the guarantor is well informed and obtains economic advantage from the finance granted to the debtor.121

117 Giusti (fn 37 above), 147.
118 The first demand clause does not per se define the nature of the contract as an independent personal security; therefore the clause needs to be interpreted with the rest of the contract in order to determine the real will of the parties. Cass 29 April 2004 no 7502, Giusti e Maus 2004, 912; Cass 25 February 2002 no 2742, BBTC 2002 II 653; Cass 23 June 2000 no 8540, Foro padano (Foro pad) 2001 I 242; Cass 21 April 1999 no 3964, Archivio 2000, 222; Cass 14 July 1994 no 6604, BBTC 1995 II 422 and 1 July 1995 no 7345, Giur it 1996 I 620; GB Portale, ‘Le garanzie bancarie internazionali (problemi e questioni)’, BBTC 1998, 1, 1 et seq. 6. Although case law often regarded the first demand clause as a very stark presumption of non-accessority of the contract, legal writers quite unanimously consider the clause compatible with both dependent and independent security contracts: F Bonelli, ‘Le garanzie bancarie “a prima domanda”’ in U Doretta and C Vaccà (eds), Le garanzie contrattuali. Fideiussioni e contratti autonomi di garanzia nella prassi internazionale e nel commercio internazionale (Milano EGEA, 1994), 205–208. Sometimes express contractual terms barring the security provider from invoking exceptions arising from the underlying relationship are required: eg Cass 7 January 2004 no 52, BBTC 2004 II 497 et seq.
119 ABI Model Contract on fideiussioni omnibus of 26 September 2005 (fn 29 above), Art 3 para 2.
120 See section 2 above.
121 Caldería, ‘Fideiussioni omnibus’ (fn 22 above), 286. The need for a differentiated regulation of this aspect depending on the presence/absence of any economic interest of the guarantor is clearly expressed by US writers: BE Lewis, ‘Secondary Obligors and the Restatement Third of Suretyship and Guaranty: For Love or Money’, 63 Brooklin LR, 1997, 861 et seq. Italian case law has re-balanced the
7. Other, not necessarily legal, instruments of protection from unfair suretyships

To a certain extent, protection from unfair suretyships could be achieved by developing recourse to financial advice offered by consumer associations, like Adiconsum, which is the major Italian association active in the field of overindebtedness of consumers. Those associations could support the organization of activities related to financial literacy—especially as 70 per cent of the population claim to be inexperienced in financial matters. Educating people to fully understand the financial consequences of their actions could certainly help to overcome reckless attitudes adopted by consumers, like using revolving consumer credit to finance holidays and clothes, or, to some extent, providing security beyond their own financial prospects. This is a behavioural problem occurring within the society, though, much wider than the more specific issue of unfair suretyships.

8. Assessment of the most effective instruments of protection

Under the current state of the art, the most effective protection to non-professional sureties is offered by banking legislation. This is due to its wide scope of application: it applies to all clients of the bank or credit institution, not only to consumers. Consumer legislation seems weaker because its applicability must be determined and, on this point, even case law opinions are capable of different interpretations which could lead to uncertainty of outcomes; particularly so because it is not specifically devoted to sureties. However, the ample scope of banking legislation allows the most relevant factual situations of the Italian credit market to be included under its umbrella, i.e. cases of natural persons providing security for enterprises. Banking legislation is also relevant in supporting the development of fair practices in banking.

9. Assessment of the overall level of protection

Italy has been described as a country with a low level of protection for non-professional guarantors, because no specific case law, scholarly writing, or legislation on the issue has been developed. Consequently, harmonization—to be possibly attained by way of judicial interpretation—has been suggested, which could approximate Italian law to, for example, the high standards of surety protection afforded under German or Austrian law. These observations, however, must be verified through an assessment of the concrete functioning of the Italian credit market beyond the limits of formal declarations, for appearances can be deceptive. To this end some points can be emphasized:

(i) the statement according to which Italian banks require the signature of the guarantor without properly informing the guarantor, who comes to sign the contract without knowing the consequences of this act, is not true for the generality of suretyships in the Italian credit market. The set of provisions and rules outlined above (section 5), imposing on credit institutions information duties to the client, the written form of the contract, the individual negotiation of potentially disadvantageous clauses, punishment by way of tort law, abusive lending practices, etc makes it highly unlikely that the non-professional surety is (completely) unaware of the legal and economic consequences of his/her act. There are not

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122 See the results of research by Ambrosio—The European House (a consultancy company), together with the Italian Banks' Consortium Patti Chiari, L'educazione finanziaria in Italia. Riflessioni e proposte per migliorare la cultura finanziaria delle famiglie, Cernobbio, 31 March 2007, available at: <www.scuola.partitichiari.it/immaginePub.aspx?id=14558>


124 See section 4.ii.lA and fn 80, 81 above.

125 As mentioned, this happens through the request of an income certificate and the analysis of data banks reporting clients' rating and credit history: section 3, fn 47 above.


127 Gioia, 'In Search of the Effective Protection of the Weak Surety in the Web of the Italian Legal System' (fn 4 above), 217; A Colombi Ciacci, 'Formal and Substantial Disparity in European Sureties Law: A Comparative Summary', in Colombi Ciacci (ed) (fn 4 above), 379 et seq, 385

128 Colombi Ciacci, 'Formal and Substantial Disparity in European Sureties Law: A Comparative Summary' (fn 127 above), 392

129 Gioia, 'In Search of the Effective Protection of the Weak Surety in the Web of the Italian Legal System' (fn 4 above), 192 et seq

130 This individual negotiation is necessary for some standard terms listed in Art 1341 para 2 CC when they are provided by a professional. Reference should also be made to the negotiation of potentially abusive clauses according to Art 34 para 2 coin code, when consumer law is applicable: see section 5.1 above.
sufficient data available to state that banks' standards in the field of suretyships by non-professional guarantors are predatory. Of course, this does not exclude the need for constant control over such practices in order to avoid the deterioration of current standards. In particular, the introduction of specific information duties during the precontractual stage, impacting the validity of the contract, could be useful to improve banking practice in this specific field and, consequently, to reduce the possibility of hardship cases occurring (section 2 above). Besides, further tools could be implemented or developed, increasing consumers' awareness in financial matters in general, such as programmes of financial literacy organized by the government and/or consumer associations (section 7 above).

(2) The lower degree of paternalism exhibited by the Italian system when compared to other European countries is somewhat more complex than a mere expression of the super-power of banks as against weak guarantors in this jurisdiction. It is the attitude of the Italian credit market involving political choices. Indeed, from time to time, a given system, considered in a given socio-economic and historical context, could require the fostering of economic development more than consumer protection. Since the peculiar field of the application of suretyships in Italy serves as security for the continued grant of finance to enterprises, it seems that the prevailing Italian policy choice, up to now, has been to grant privileged access to credit to enterprises rather than a focus on consumer protection. This is hardly a surprise if one recalls the remarks above about the insufficiency of proprietary security, especially over movable assets, in Italy (section 1 above).

The Italian way of increasing guarantors' protection has been through the introduction of a stipulated maximum amount for the validity of any security for future obligations. On the contrary, the task of ensuring the guarantor's substantial protection has been left to case law elaboration of a series of duties and barriers to banks' activities through the good faith principle. However, the results of such case law elaboration have been weak, since Italian judges do not seem to be as well trained as their German counterparts in taking up the task of governing the typical conflicts of the credit market, nor do they seem much inclined to 'legalize' family ties (section 2 above). This consideration might obscure any future for the prospects of judicial harmonization in Europe, in this field, at least as far as can be inferred from the Italian experience. Even if legal cultures in Italy, Germany, or Austria share significant commonalities, Italian judges do not seem equally trained and well equipped to be leading sources of the law in this field. As the story of Italian suretyships law has shown, the balancing between the interests of enterprises and those of sureties is a task which has been undertaken—in the end—by the legislature.  

131 This is why the prospect of a European harmonization by way of directives seems more appropriate, though harmonization should be to a minimum standard, leaving to the individual countries the possibility of maintaining higher standards of protection (in this direction see also CU Schmid, 'Private Suretyships as a Socio-Legal Crucible of Modern Civil Law', in Colombi Ciacci (ed) (fn 6 above), 21 et seq., 41). This is not, however, the path followed by the latest version of the Draft of Consumer Credit Directive of 7 October 2005 (COM(2005) 483 final), which chooses, instead, the opposite principle of maximum harmonization, in order to promote infra-European cross-border consumer credit transactions.

132 See the meaningful report by Rott (fn 78 above), 65 et seq., 68: in many cases of 'unfair sureties' German courts, while developing their 'constitutional approach' requiring substantial control on the content of the contract, ended up denying immorality in actual cases and therefore any relief to the sureties. Such recourse to constitutional interpretation by judges is not indispensable in tackling the problem of unfair suretyships, which should be rather a contract law problem. In this sense see OO Cherednichenko, Fundamental Rights, Contract Law and the Protection of the Weaker Party (Munich 2007), 361 et seq.

133 See remarks under section 2 and fn 39 above.

Finally, it should be considered that even formal protection, if expressed through the proper channels, can produce the positive impact of spreading best practices, which end up increasing protection and this probably with more efficacy than resounding declarations on constitutional principles expressed by judges to elegantly cover concrete ratiocinis decidendi that, on the contrary, carefully consider how important it is, for a given economy, not to restrict banking practices too much.  

10. Proposals in order to improve the protection of non-professional sureties

The remarks made in section 9 above do not, of course, exclude margins of improvement of the Italian credit system in order to minimize the risk of abuses against non-professional guarantors and tackle the problem of growing over-indebtedness. In this direction, a few indispensable measures can be suggested, some of which are specific interventions in the law of suretyships or, more generally, security for credit, while others are more general instruments.

As regards the first measures, the introduction of banks' duties of precontractual information towards non-professional guarantors can be accounted for; this would promote higher standards of awareness by prospective sureties, thereby protecting their general interests in a well-functioning credit market for personal security contracts.  

To this minimum form of legislative intervention, a major law reform could be added in the form of a 'restatement' of Italian suretyships law. This report has shown that the civil code regulation of suretyships has lost its centrality as the source of law for suretyships as actually applied in practice. Since the codal scheme is a recessive one, a law reform designed to organize the sources of regulation on the matter could be advisable and would produce more certainty in the law to the benefit of all law users (banks, debtors, guarantors). Such a 'restatement' should reintroduce a double track of rules for suretyship contracts, depending on the specific function the security is deemed to serve: on the one hand, continued provision of security for the enterprise should be governed by the credit-friendly rules developed by banking practice, provided methods to secure the non-professional surety's formal awareness are clearly established. On the other hand, a single security for a single credit could continue to be regulated according to the traditional rules of the civil code, based on the accessory nature of the security, and a set of protective rules forged on the position of the surety as a disinterested friend of the debtor. This suggestion flows from...
the simple observation of the law in action in the Italian credit market, where the ‘commercialization’ of the civil law in the field of suretyships, implying a single legal regime for all cases of suretyships, did not sufficiently achieve its purposes, ie providing efficient tools to promote access to credit to small and medium-sized enterprises. Since substantial differences in relationships call for a different discipline, a restoration of different regulatory tracks similar to the old division between civil and commercial relationships would be appropriate.

In connection with the above, and from a broader perspective, a reform of the Italian law of proprietary security would certainly impact on the suretyships domain. Providing for more security devices within the market would promote greater competition between security rights and consequently allow the debtor to avoid recourse to ‘unfair suretyships’ through potentially insolvent guarantors. Maximizing the possibilities for enterprises to use their movable assets as objects of securing credit, eg also developing efficient security devices for immaterial assets, would certainly help to tackle the problem of abuse of company law rules in order to strategically select the creditors to be preferred by under-capitalized companies.134

Legislation on consumer insolvency belongs to the second class of measures, aiming to deal with over-indebtedness in general. Italy seems to be in dire need of consumer insolvency procedures, since this mechanism is necessary not only to foster rehabilitation, but also to offer a fresh start for over-indebted consumers, whatever the reason of the over-indebtedness (excessive recourse to consumer credit or imprudent suretyships).

134 See section 3 above.