# AN OVERVIEW OF THE LEGAL REGIME FOR GUARANTEESHIP AS DEBT SECURITY FOR COMMERCIAL BANKS IN NIGERIA

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**Abstract**

This paper examines the legal framework governing guaranteeship as a form of debt security for commercial banks in Nigeria. The motivation for the study arises from the increasing reliance of banks guarantees as credit support mechanisms, juxtaposed with persistent uncertainties in their enforcement and interpretation under Nigerian law. Despite their widespread use, guarantees have been described as flexible yet "slippery," thereby raising critical concerns regarding their reliability as security instruments. The study therefore interrogates the research problem of whether the existing legal regime adequately protects the interests of commercial banks while maintaining fairness to guarantors. The objectives of the study are to examine the nature, features, and categories of guarantees as a unique financial model of debt securities for commercial banks in Nigeria; to analyse the essential ingredients and formal requirements of contracts of guarantee; and to evaluate the effectiveness of the enforcement framework including BOFIA 2020 and the CBN Guidelines 2022. Doctrinal legal methodology is adopted, relying on statutes, case law, and scholarly literature, complemented by analytical and comparative approaches. The study finds that while guarantees remain indispensable in banking practice, there are still legal challenges confronting its application in Nigeria. Consequently, the study concludes with reform suggestions aimed at enhancing certainty, predictability, and effective enforceability guaranteeship in Nigeria.

**Key words:** Commercial banks; Guarantee Contract; Advance credit; debt security.

## Introduction

Guaranteeship is one of the commercial securities that evolved as a mechanism for the protection of a creditor against the insolvency of the debtor (Calnan, 2011: 407; Mayomi, 2016: 376). It arises where a creditor accepts an undertaking of a third party who assumes the responsibility, debt or liability of the principal debtor in the event of default. In other words, the Guarantor accepts the responsibility for a debt owed by someone (the borrower) to someone else (the lender) if the borrower fails to do so (Hogan-Itam, 2017). The Guarantor can then claim the money back from the borrower. Guranteeship may, therefore, serve as policy cover for the creditor against inability of the borrower to pay debt. But much more than an 'insurance policy' in favour of lenders or creditors, guarantees could also be used as tool for ensnaring an unsuspecting "deep pocketed" guarantor into bearing eventual liability for the sins of an untrustworthy party, or instruments used to vouch for the credibility of a party. Besides, it serves as collateral to an underlying contract between the principal debtor and the creditor (Mayomi, 2016: 390). This has been used by parties in different forms of complex bank loans in the bid to create an alternative party to pursue in an event of default in loan repayment.

In the context of commercial banks, one of the widely acknowledged reasons is that commercial bank guarantee evolved in response to market needs to address the risk of non-performing loans (389). In Nigeria, for instance, the available data indicates that at least 11 undisclosed commercial banks exceeded the 5 percent regulatory limit for non-performing loans (NPL) in April 2025 (Egbunike, 2025). As widely reported, "the Non-Performing Loans (NPL) ratio rose to 5.62 percent in April 2025, exceeding the 5 percent prudential threshold, largely due to loan reclassifications following annual risk assessments" (Ibrahim, 2015). Also, a study carried out on the effect of risk on financial performance of listed commercial banks in Nigeria revealed that non-performing loan ratio has a significant impact on the financial performance (Candide-Johnson & Alex-Adedipe, 2016: 430). The study recommended that banks should implement stringent policies and strategies to reduce non-performing loans and improve financial performance as higher NPLs were found to impact performance. According to the study, strict loan monitoring and borrower evaluation can help curb rising NPLs (Egbunike, 2025). One of the ways of achieving effective loan monitoring is efficient functional legal framework to protect bank credits as it is almost impossible to develop the economy of a nation without credit law regime which facilitates the availability of finances for business and investment with regards to good credit guarantee ((Candide-Johnson & Alex-Adedipe, 2016).

While guarantee-ship may be useful in protecting banks against credit risks, it has however been argued that guarantee contract can be too flexible and "very slippery"; and that such contractual protection, without more, might not necessarily transmute a credit transaction into a *secured credit* as the lender may still be exposed to the vagaries of an unsecured creditor in the event of the borrower's insolvency (Udofia, 2017). Also, guarantee imposes cost upon each of the parties to the arrangement. A guarantee is costly to the surety for it exposes him to a risk of loss to which he would not otherwise be exposed. It can even undermine the entire basis upon which the surety has structured his/its commercial dealings (McGuinness, 1995: 7). Similarly, a guarantee imposes cost on the creditor who receives the guarantee. By accepting a guarantee, the creditor becomes involved in two instead of one set of contractual obligations, as a result of which the creditor's freedom may be significantly reduced by the existence of the guarantee (8). In many cases, the principal must pay a substantial direct cost to obtain a guarantee from a commercial guarantor such as a surety company. Even where a guarantee is provided at no direct cost to the principal, there may be a hidden cost to the guarantee. For instances, the principal is exposed to a potential liability to two creditors, rather than one.

It is importance and complex nature of guarantee-ship for commercial banks that prompted this study. That is, an overview of guaranteeship as debt security for commercial banks in Nigeria. The study is useful because the Nigerian banking sector is still experiencing instances of NPLs. While gauranteeship is an available debt security option, it is by its nature complex and costly. The Banks and Other Financial Institutions Act (BOFIA) 2020 recognises enforcement of guarantee in the Nigeria's banking system (BOFIA, 2020: ss. 86 – 94). Alson, the Central Bank of Nigeria (CBN) in reliance on sections 2 and 33-35 of BOFIA 2020, issued the *Guidelines for the Regulation and Supervision of Credit Guarantee Companies in Nigeria 2022*. Nevertheless, there uncertainties regarding how to achieve an effective application of both common law rules and statutory without market distortions. Therefore, a continuous scholarly engagement of the dynamics of guaranteeship will provide useful knowledge for the effective use of guarantee as debt security for commercial banks in Nigeria.

This paper is divided into five main sections, beginning with an introduction in section 1, while section 2 examines the nature, features and categories of guarantee as a unique financial model of debt securities for commercial banks in Nigeria. In section 3, the study analyses the essential ingredients of contract of guarantee as well as the requirement of writing and other rules of execution of contract of guarantee. This is followed by section 4, which is a critique of the enforcement rules of contract of guarantee as debt security for commercial banks in Nigeria, including the requirements of BOFIA 2020 and the CBN *Guidelines for the Regulation and Supervision of Credit Guarantee*
*Companies in Nigeria 2022.* At appropriate instances, the study examines the legal challenges and uncertainties that should concern the policy makers and the judiciary in Nigeria. Section 5 concludes the study with reform suggestions that aim at strengthening the legal regime for guarantee as debt security for commercial banks in Nigeria.

**Nature and critical features of guarantee**

This part of the study will provide an understanding, albeit briefly, of the nature and features of guarantee is useful in assessing the adequacy or otherwise of the extant laws.

**Nature of Guarantee as Debt Security**

As a debt security, guarantee has been variously described and classified as: "ordinary guarantee", "guarantee proper", "performance bonds" and similar bonds such as contract, bid or tender bonds; standby letters of credit and recourse liabilities in factoring and discounting transactions (Wood, 1989: 579). Goode and Gullifer (2017) used the term "suretyship guarantee" to distinguish debt guarantee from other documentary guarantees such as letters of credit and performance bonds. To Goode and Gullifer, "a surety-ship guarantee" is an undertaking to be answerable for the debt or other default of another (2017: 376). Surety's obligations are usually created by contract, and may give rise to primary or secondary liability depending on the context in which the undertaking was issued and the proper construction of the surety's obligations (Mayomi, 2016: 377).

Whereas some scholars/jurists regard guarantee as debt security, others merely regard it as "secondary" or "alternative to security". For instance, Ellenger *et al* (2011: 809) explained that:

> In the context of bank lending, a bank is said to have 'security' where it has proprietary or possessory right in its customer's – or a third party's- property that it may exercise in order to enforce repayment of loans...Other rights which may also 'secure' the payment of the debt, are not generally regarded as 'security' in this sense. Thus, guarantees and indemnities, which are also sometimes described as 'securities' are distinct arrangements under which a third party–the surety–agrees to assume personal liability if the debtor defaults or causes loss to the creditor. The former arrangement is a guarantee; the latter is an indemnity (underlining added)'.

Apparently taking the view that security must be proprietary and/or possessory as implied in the excerpt above, Onamson (2015) characterised "good" security as one which: (i) adheres to the essential qualities of a property (right *in rem*); (ii) is possible in the widest possible range of cases; (iii) is given the widest publicity; (iv) is fair and reasonably affordable; and (v) is easily realizable. If the view that security must be proprietary or possess all the foregoing characteristics is accepted, guarantee may not qualify as "security" strictly speaking. However, taking a more liberal view, Fuller (2009: 75) explained that:

'…the term 'security has traditionally been used to describe'
something which makes the enjoyment or enforcement of a right more secure or certain'. It therefore embraces (a) rights enabling the creditor to look to a third party for satisfaction and (b) rights enabling the creditor to have recourse to particular property in priority to other creditors.

Scholars like Smith (2001) and Philips (2010) are apparently in agreement with the foregoing *liberal* and *functional* view which postulates that security does not have to be "proprietary, possessory or characterised in a particular way", but can be "personal" and *identified* by its actual function. Hence, the Court of Appeal (*Jolimair (Nig) Ltd v. Ecobank, 2019), held to the effect that,* "anything that performs the function of security must be security", a proposition which seems to oppose the general notion that non-proprietary security like guarantee is at best a *secondary* or *alternative to security*. It seems clear that what qualifies "an arrangement" or "a construct" as debt security does not depend on its "class" or "category" but in its *function*. Hence, it is enough if the instrument, arrangement or construct acknowledges a liability in a way that makes its enforcement easier or more convenient. If the liberal view is accepted, then guarantee is "good security" for at least four reasons. First, guarantee can be personal or over assets or both. Second, it is contractually flexible and can be adopted to suit the peculiar needs of any circumstance. Third, like mortgage, pledge, lien etc, guarantee gives a measure of control to the creditor over the course of events relating to the guaranteed debt. Fourth, guarantee provides additional opportunity for debt recovery, and can be appropriated in any manner agreed by the parties in exercise of their contractual freedom (*Access Bank v. NSITF*, 2022).

The diverse views about what qualifies as debt security are best espoused and explained in the various theories of security such as the Grant and Reservation Theories. Grant Theory postulates that for an arrangement to qualify as security, there must be a right granted to one party in the asset of another party to secure payment or performance by the other party or by a third party (Nwobike, 2016: 317). Reservation Theory argues that security is not the transaction but the interest or aggregation of rights which arise from such transaction. To the former, a personal guarantee is not "a good security" unless it is backed by proprietary interest/right. To the latter, a personal guarantee is "a good security" provided it performs the function of a security.

In addition, it must be pointed out that guarantee-ship is contingent in nature. The contingent liability is a liability that arises and/or the amount established only on the occurrence or non-occurrence of one or more uncertain future event (Wood, 1989: 573). Thus, guarantee and other contingencies are either treated as second-class debts or no debts at all. The reason is that sometimes a contingent liability, like guarantee, is a zero liability because there is no real risk that it will accrue. Sometimes, it is near 100 percent liability because there is little doubt that the future uncertain event will in fact occur. Besides, the risk of the contingency occurring will often vary during the currency of the obligation.

More so, in the case of *Salawal Motor House Ltd v. Lawal and Anor* (2000), the court reiterated the law that a guarantor of a loan is technically a debtor because where the principal debtor fails to repay, the guarantor will be called upon to pay the loan so guaranteed. Immediately a guarantor signs the guarantee form, he automatically makes himself liable for the default of the debtor in case of default.

Above all, contract of guarantee should be under seal or it must be supported by valuable consideration else it would be void. In the case of *Bank of West Africa Ltd. v. Fagboyegun* (1961), the claim was bought by the plaintiff bank against the defendant and one Ijalade jointly and severally for £381.5s3d, being the balance

allegedly due in respect of sums granted to Ijalade as overdraft. The defendant had in 1958 executed a document by which he guaranteed the amount already granted to Ijalade as overdraft and other advances that the bank might make to him thereafter. Evidence was led to show that apart from interests and bank charges no further amounts has been debited to the account of Ijalade since the date of the guarantee. It was held by the court that as the contract of guarantee executed by the defendant was not under seal it must be supported by valuable consideration and that mere existence of a debt was not sufficient consideration to support a guarantee and that unless there was some further consideration for promise of the guarantor, his promise was valid. The court further held that the defendant was not liable under the contract of guarantee as no further sum were advanced to Ijalade after the execution of the contract and that the action therefore failed.

**Guarantee-ship and Commercial Banks**

The primary function of guarantee is to provide Security for credit advance by lender, including commercial banks (Nwikpasi, 2015: 34)**.** It is the creditor who draws the most obvious benefit from the existence of a guarantee. In a typical guarantee agreement, the surety promises the creditor that in the event that the principal debtor defaults, the surety will perform the obligation in place of the principal debtor. The benefit of being able to look to two individuals for performance is therefore clear. Hence, as noted earlier, it is in this sense that a guarantee functions as a form of security (McGuinness, 1995: 10).

*Similarly, g*uarantees are highly attractive to creditors in the case of prospective debtors who have no apparent ability to perform the obligation for which the guarantee is sought. For instance, before giving credit to a limited liability company of questionable or unknown worth, it is common for financial institutions such as banks to require the principal shareholders behind the company to provide personal guarantee to the bank in respect of loans to the company by the bank. By obtaining the guarantee, the bank seeks to give substance to corporate man of straw, and avoids *Salomon v. Salomon (1897)* experience relating to separate legal personality. In addition, by insisting upon a personal guarantee from the promoters of a corporation, a creditor can measure the degree of shareholder commitment to a new corporation. This because a shareholder or promoter of a company who is willing to provide a guarantee to the creditor of the company, signals to the creditor that he is committed to the development of the company (McGuinness, 1995: 14 – 15).

*Also, guarantee is a means of transferring goodwill.* The possibility that one person is prepared to add guarantee to an obligation of another person in other to transfer the benefit of his goodwill to that other person is closely related to the concept of adding substance to a man of straw and signalling. Without the guarantee of a person having a superior level of goodwill (i.e. a better credit rating), it may be very difficult or very costly for the debtor to obtain credit (15).

*Furthermore, guarantee could be used to reduce transaction cost.* A creditor may seek a guarantee so as to reduce the transaction costs in enforcing the obligation that is guaranteed. Because guarantee allows the creditor to look to both the surety and the principal, it may be easier for the creditor to obtain performance of the guaranteed obligation (16). In the manner, g*uarantee helps to spread risk.* The provision of a guarantee often enables a creditor to spread the risks to which he is exposed and thereby minimise his chances of loss. If the debtor becomes insolvent, the creditor may still be protected because he may look to the surety for performance. It is only in the unlikely event of the insolvency of both the creditor and surety that the creditor may suffer a loss. Because the chances of such double insolvency are less than the risks of a single insolvency, the provision of a guarantee constitutes a form of risk spreading (19).

**Examination of the Categories of Guarantees**

There are various forms of guarantees that are available for commercial banks, depending on the nature of the advance credit (Nwikpasi, 2015; Hogan-Itam, 2017).

***a.*** **Specific or discrete Guarantee*:*** Under a guarantee of this type, a surety undertakes liability in respect of a particular obligation of the principal, and once the loan is repaid, the liability of the surety is discharged, but it can be revived if the creditor re-advances funds to the principal based on mutual consent or agreement.

***b.*** **Continuing Guarantee:** Continuing guarantee usually covers a series of transactions in respect of which the surety will be liable, subject to any over-all limit. A continuing guarantee is therefore one which extends to a series of transactions, whether or not over a limited period (Andrew & Millet, 2000: 9). In *Heffied V. Meadows* (1789) a guarantee in the following form: *I, A will be answerable for £50 sterling that B, butcher may buy of H"*. It was held to be continuing guarantee on the ground that it appeared that the parties contemplated a continuing supply of stock.

***c.*** **All-Accounts Guarantee:** This type of guarantee extends to contingent liabilities, any balance owed on a running account, and non-debt liabilities, depending on the terms in which it is phrased. It is this type of guarantee that is frequently encountered in bank financing. Many guarantees are widely drafted to include "all and every sum of money which is owing or unpaid in any account whatsoever".

***d.*** **Other types of Guarantees:** Guarantee has also been classified as "pure" or "conditional" guarantee and "revocable" or "irrevocable guarantee". A pure guarantee is an undertaking to procure that the principal debtor performs his obligations, breach of which gives rise to an action for damages (with duty on the part of the creditor to mitigate his loss). A conditional payment guarantee is an undertaking that, if the principal debtor fails to pay, the guarantor will pay the amount instead. In that case, the creditor has a debt claim against the guarantor and there is usually no duty to mitigate.

A guarantee is *irrevocable* if it expressly or impliedly forbids the guarantor to change his mind prior to its full tenure. In the absence of express power by a guarantor to determine a guarantee, the nature of the consideration for the guarantee determines whether it is revocable by notice. In ***Lloyds vs. Harper (1880)*** it was held that where the consideration for the guarantee is given once and for all, the guarantee is from its nature irrevocable by the surety in the absence of express stipulation. Conversely, in ***Coulthart v. Clementson (1879)***, it was held that where the consideration is fragmented or divisible, or supplied from time to time, it is revocable unless the contrary is proved.

**Analysis of essential ingredients of Guarantee**

There are essential ingredients that must be present for a contract of guarantee to be valid and enforceable, and this is demonstrated next.

**Contractual Formation**

Guarantee is contractual (Enyia, 2019: 1-2), and will be validly formed if all the essential elements of contract such as a clear offer, unqualified acceptance, intention to create legal obligations and legal capacity exist. There must be an offer and acceptance (*Neka B.B.B. Manufacturing Co. Ltd v. ACB Ltd (2004),* but no special words or form are necessary to create a contract of guarantee (Statute of Fraud, 1677: s.4). The offer to guarantee will usually be made by the guarantor or his lawfully authorised agent. The offer must be clear and definite. Vague or equivocal statements will not suffice nor will a mere overture to provide a guarantee constitute an offer capable of acceptance because the relationship will only arise if the parties manifest their

intention clearly and unambiguously (*Dane v Mortgage Insurance Corp Ltd (1894)*. The acceptance must also be unequivocal and duly communicated. Acceptance can be, and indeed, is usually by conduct (Phillips, 2010: 54). Unless the guarantee is under seal, it must be supported by consideration. The usual form of consideration is the creditor's action in entering into the principal transaction (for example, the making of advances to the principal or in fidelity guarantee, by the creditor entering into a contract of employment with the principal). Guarantee is invalid if stated to be given for a past consideration. If the consideration for the guarantee is indivisible, or entire, it is not necessary that the advance should be made in full. An offer to be accepted by performance ceases to be revocable once performance has begun. A guarantee will not be binding if the consideration expressed in the instrument is illusory or a sham. Similarly, illegal consideration will not sustain a contract of guarantee. A guarantee to assist one of the parties to break the law is illegal and void (87).

**The Mandatory Requirement of Writing**

While the common law was generally sympathetic to guarantors, it did not demand that contract of guarantee be in writing. The requirement was introduced by section 4 of the Statute of Fraud 1677, which requires that no action could be brought upon a special promise to answer for the debt, default or miscarriage of another unless it, or some memorandum or note thereof is in writing and signed by the party to be charged or that party's lawfully authorised agent. The statute therefore provides two separate ways in which a contract of guarantee may be made enforceable. The first way is by having a written agreement of the guarantee signed by the parties to be charged or their duly authorised agents. The second is by having a note or memorandum of the agreement signed in a similar manner. In the latter case, the guarantee agreement itself may be oral as long as there is written evidence of the agreement to satisfy the statute. The agreement or the written evidence can appear in two or more documents so long as the document containing the guarantor's signature refers expressly or impliedly to other related documents and can be read together (*Central Bank of Nigeria v Igwillo, 2007; A.G. Kaduna State v. Atta, 1986; Leyland (Nig.) Ltd v. Dizengoff W.A. 1990)*.

Unlike the traditional paper-based contracts where parties are able to seat together, negotiate and sign, in modern day commerce, contracts are being formed electronically, including guarantee contract. Some of the legal complexities brought by ICT in contract formation relate to fundamental issues such as parties to a contract, how the offer was made, accepted and communicated (Chikwindo, 2025). Based on the impacts of ICT on global and local transactions, legislative efforts have been made to bridge the gap. For instance, the UN Electronic Communications Convention aims to facilitate the use of electronic communications in international trade by assuring that contracts concluded and exchanged electronically are as valid and enforceable as their traditional paper-based equivalents. The Convention is an enabling treaty which aims to remove certain formal obstacles by establishing equivalence between electronic and written form contracts.

In UK, for instance, the view of the Law Commission is that, where a document is required by law to be in writing and/or to be signed, such requirements can in general be satisfied by certain forms of electronic communication without changes needing to be made to the existing law. In the Commission's view: the requirement of “writing” can be fulfilled by electronic communications that involve visible texts (such as electronic mail or web-site trading, but not electronic data interchange); and the requirement of signature can generally be interpreted as meaning conduct that indicates to a reasonable person an authenticating intention (and thus, in general, digital signatures, scanned manuscript signatures, typing one's name (or initials) at the end of an e-mail and clicking on a website button are all capable of satisfying a signature requirement (Fuller, 2009: 75).

The position in UK is apparently also the position in Nigeria in view of the provisions of sections 84 and 153(1) & (2) of the Evidence Act 2011 on admissibility of computer-generated evidence and presumption as to the authenticity of the content and proper delivery of e-mails or other electronic messages. However, these provisions do not solve all of the problems that may arise from electronic contracts in Nigerian jurisprudence. To effectively address the challenges posed by electronic contracts, Nigeria must enact relevant laws to drive the new trend. Unfortunately, Nigerian legal system is notably backward in this regard.

**Execution of Contract of Guarantee**

Generally, the position of the law is that a document which is not signed does not have any efficacy in law. It is worthless (*N2H Heritage Ltd & Anor V. Lacasera Co. Plc & Ors, 2022; Omega Bank Nigeria Plc V. O.B.C Ltd, 2005; APGA v. Alhaji Umaru Tanko Al-Makura & Ors, 2016)*. Section 4 of the Statute of Fraud accordingly requires that the guarantee or some memorandum or note thereof shall be signed by the party to be charged or by some other person lawfully authorised by him. The "party to be charged" is usually the guarantor. The authority conferred on the agent need not be in writing and may be founded upon a course of dealings between the parties. An agent acting within the scope of his authority can bind the principal, but a guarantee signed without requisite authority will not bind the principal unless he adopts or ratifies it (*Hambro v Burnard, 1904).* In a partnership, a partner may have express, actual or implied authority to sign a guarantee binding the partnership (*Bank of Scotland v Henry Butcher, 2001)*.

A guarantee executed by trustees in favour of a creditor binds the trustees personally unless it is expressly stated that the trustees signed in their capacity as trustees, and disclaim any personal liability. It is however not enough for the trustees to merely contract "as trustees". They must expressly state that the creditor is to only look to the estate for repayment (*Helvetic Investment Corp Pty Ltd v Knight, 1982)*. In deciding whether the intention of the parties was to exclude personal liability of the trustee, the court will consider: the nature, purpose and subject matter of the guarantee; the capacity and duties of the parties to make the contract in one form rather than another; the precise words used in the guarantee; and the circumstances of the case. Unless disallowed by their constitution, corporate bodies can act as sureties in respect of credit advances, and can accordingly execute such a guarantee in the manner prescribed by CAMA or other relevant enactments (CAMA, 2020: s.43(1)).

**Critique of Enforcement rules for guarantee**

It is one thing to execute guarantee agreement, and it is another thing to effectively enforce the guarantee. This aspect of the study will focus on the enforcement rules.

**Cause of Action and Remedy**

Enforcement of contract of guarantee is largely dependent upon two major factors which are "**the validity of the contract of guarantee"** and "**the existence of a payable" loan.** Since a guarantee is generally expressed to be in respect of sums 'payable' by the borrower, a guarantor is not liable where such loan is not legally payable such as where loan is granted to an infant, lunatic or bankrupt persons (Smith, 2001: 361). Generally, the causes of action and remedies available for breach of contract are ordinary action for recovery of debt; specific performance; injunction; interference with contractual relations, restitution, damages and cost. In *Federal Ministry of Health & Ors v. Dascon (Nig) Ltd (2017),* it was held that the option open to a party to a valid contract is an action for an order for specific performance or for damages in breach of contract. In *Dauda v Lagos Building Investment Co. Ltd (2010),* the court held that a breach of contract may entitle the injured party to claim damages, specific performance or an injunction.

In order to successfully enforce a guarantee by an action, the party seeking enforcement will, among others, need to be sure that a cause of action has accrued in his favour, that the action has not become statute barred, the court with jurisdiction in respect of the subject matter, identify the right parties against whom to claim, determine the type of case to present and the mode of commencement (Andrew & Millet, 2000: 231).

**Enforcement Mechanisms**

A creditor can enforce payment by instituting an action in the appropriate court, obtain and execute the judgment. The creditor will need to approach the court, usually by way of undefended list procedure, summary judgment procedure, or the Fast Track Procedure (applicable in Lagos State) - all of which allow accelerated trial of a suit by affidavit evidence. Trial under the summary judgment or undefended list procedure adopts the frontloading system that entails the claimant filing writ of summons, statement of claim, list of witness with their depositions on oath, exhibits, and application for summary judgment, affidavit in support of the application and a written address simultaneously (High Court of Lagos State (Civil Procedure) Rules, 2019: Or.56(2)). The debtor is expected to enter appearance by filling a statement of defence accompanied with an affidavit deposing to any defence, list of witness with their depositions, exhibits and written address. The debtor will only be permitted to defend the proposed statement of defence and/or the affidavit supporting notice of intention to defend discloses a *prima facie* defence. If it does, the court will order the case to be transferred to the general cause list and full trial will be conducted, otherwise the court will give judgment to the creditor. Judgment obtained by the creditor is final but it can be set aside on appeal.

Similarly, The Banks and Other Financial Institutions Act 2020 (BOFIA 2020) is the main law that governs banking operations in Nigeria, including how banks use guarantees as a form of credit security. Although the Act does not specifically define what a bank guarantee is, it clearly recognises guarantees as valid and enforceable obligations within the banking system. For instance, BOFIA section 86 – 94 of the BOFIA 2020 provides a structured framework for resolving banking disputes, including the recovery of loans and the enforcement of securities and guarantees given to banks. This means that guarantees are not just private arrangements—they are supported by statute and can be enforced through specialised legal mechanisms.

In addition, sections 2 and 33 – 35 of the BOFIA 2020 gives wide regulatory powers to the Central Bank of Nigeria (CBN) to oversee banking activities and manage credit risk. Acting under these powers, the CBN issued the *Guidelines for Regulation and Supervision of Credit Guarantee Companies in Nigeria 2022*. These guidelines formally recognise guarantees as binding commitments to repay a debt if the borrower defaults. In practical terms, this strengthens the role of guarantees as tools that help banks manage risk while also encouraging lending and financial stability.

From a legal standpoint, Nigerian courts treat bank guarantees as independent contracts, separate from the main transaction between the borrower and the lender. This means that once a guarantee is issued—especially a demand guarantee—the bank is expected to honour it according to its terms.

It is submitted that the Nigerian courts have adopted a consistently strict approach toward the enforcement of banking obligations arising from guarantee arrangements, thereby reinforcing the commercial reliability of such instruments. This position is evident in *Union Bank of Nigeria Plc v Ajabule* (2012), where the Supreme Court affirmed that obligations undertaken within banking transactions are binding and must be honoured in accordance with their terms. The Court's reasoning reflects a broader judicial policy of preserving the integrity of financial commitments, particularly in the context of credit security. Similarly, in *NDIC v Okem Enterprises Ltd* (2004), the court underscored the enforceability of financial undertakings connected to banking operations, emphasising that such obligations are not to be treated lightly or avoided on tenuous grounds.

Building on this judicial posture, it is further argued that the enactment of the Banks and Other Financial Institutions Act 2020 (BOFIA 2020) has significantly strengthened the legal foundation of bank guarantees in Nigeria. Although BOFIA does not expressly codify the concept of bank guarantees, its provisions—particularly those relating to loan recovery and enforcement of securities—implicitly recognise guarantees as legitimate and enforceable credit instruments. The Act thus complements the common law by providing institutional and regulatory support for the enforcement of such obligations.

Accordingly, bank guarantees in Nigeria should be understood as hybrid legal instruments, combining contractual principles with statutory reinforcement. This dual character enhances their effectiveness as tools of debt security, particularly given the courts' willingness to enforce them strictly, often upon demand and subject only to limited exceptions such as fraud or express contractual qualifications.

However, it is contended that this same strict enforcement regime gives rise to significant legal concerns. In particular, the expansive interpretation of guarantor liability, coupled with evidentiary challenges and occasional judicial inconsistencies, may undermine the equitable balance between creditor protection and guarantor fairness. Therefore, while the current legal framework promotes certainty and commercial efficacy, it also necessitates a more nuanced and coherent approach—both judicially and legislatively—to address the emerging complexities associated with guaranteeship in Nigeria.

**Rules of construction of contract of guarantee**

Where the creditor properly initiates a recovery action in the appropriate court, and serves the Defendant(s), the interpretative jurisdiction of the court is invoked. The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally. The general objective in construing the meaning of a document is to give effect to what the parties intended in the document (McGuinness, 1995: 238-9). According to Lord Greene M.R. in *Hutton v. Watling (1958),* the true construction of a document means no more than that the court puts on it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. The guarantee must be read as a whole, and so far, as possible, its provisions must be given a consistent and intelligible construction by applying the words used by the parties in their plain and ordinary meaning. A departure from the literal meaning of the provisions of the document will be allowed only where a literal interpretation would lead to absurd result or where the literal meaning is plainly repugnant to the intention of the parties.

Also, as a general principle, the courts always interpret a guarantee so that the protection or security which it affords to the creditor is rendered real rather than illusory, and could be viewed as being interpreted against the guarantor as against the traditional inclination of the court to protect the guarantor against predatory creditors. Construing the document against the guarantor is justified only where the surety is responsible for the language in question in which case the approach is merely an application of the principle of contractual construction known as the *contra prefrentum* rule. Where the creditor drafted the guarantee as is usually the case, there would be no reason to construe the document against the surety. If the creditor's standard form of guarantee is ambiguous, the logical approach is to construe the document against the creditor who is the maker. Thus, in some cases, it is

said that guarantees are interpreted against the surety, even though it has been contended that a guarantee should be construed strictly against the creditor. The reconciliation between these two positions is that where the terms of a guarantee are ambiguous, the guarantee will be interpreted according to the *contra preferentum* rule which holds that the construction should be placed upon an ambiguous document is the one which is least favourable to the person who put forward (authored) the document.

The modern approach to guarantees in commercial transactions is to treat them like any other contract, and to construe them accordingly in light of the surrounding matrix of the facts and from the point of view of businessmen entering into them. In *K.Chellaram & Sons Nig. Ltd vs. Jackson* (1969), *and Eastern Counties Building Society vs. Russel* (1947), and *National Bank of Newzealand vs. West* (1977), the court seemed to take a liberal view to hold that where a contract of guarantee is ambiguous as to its scope and object, the proper course is to look at the whole instrument, surrounding circumstances and conduct of the parties with a view to ascertaining the intention at the time the guarantee was given.

**The Doctrine of Co-Extensiveness**

The most important aspect of the nature of a guarantor's liability is that it is co-extensive with the liability of the principal. This means that, as a general rule, the surety's liability is no greater and no less than that of the principal in terms of amount, time for payment and the conditions under which the principal is liable (Andrew & Millet, 2000: 197). Co-extensiveness of liability is one of the essential characteristics of a guarantee that distinguishes it from a contract of indemnity. In *Hartland v. Jukes (1863),* where both the principal and surety gave promissory note to the creditor as security for advances made by the creditor, it was held that no action could be maintained until an advance was made. Also, the guarantee by one surety for "due fulfilment of any obligation" of a charterparty which contained arbitration was held to cover the principal's liability to pay interest and costs ordered by the arbitrators plus the principal award (*Compania Sudamericana de Fletes SA v. African Continental Bank Ltd, 1973; Buns v. Colocotronis ("The Vesso", 1973)*.

Even where there are a valid loan contract and a valid contract of guarantee, the doctrine of co-extensiveness will operate to free the guarantor from liability if, for instance, it is shown that the loan has become unenforceable against the principal debtor for whatever reason. This is because the guarantor's liability is collateral or co-extensive to the principal debtor's liability. The effect is that the guarantor's liability will not arise or attach unless and until there is a default by the principal debtor or until the liability of the principal debtor is ascertained or shown to exist. The doctrine of co-extensiveness requires that the guarantor shall be liable only where and to the extent *the principal debtor is liable*. Where, therefore, the liability of a promissor under an agreement exceeds that of the primary debtor, in that, for example, he may be liable when the primary debtor is not, or for an amount which he is not, then the agreement is not a guarantee, and more likely to be construed as an indemnity.

**Conditions Precedent**

Where a contract of guarantee is premised upon the happening of an event or upon a condition, the guarantee shall not be enforceable unless and until the occurrence of the event or satisfaction of the condition. For instance, if a contract of guarantee expressly requires that a demand is to be made to the surety, the creditor cannot sue the surety until he has made such a demand even if the underlying obligation does not require a demand to be made on the principal (*Re Brown Estate, Brown v, Brown, 1893; Bradford Old Bank v. Sutclife, 1918)*. Even where there is no express provision for a demand to be made on the surety, the need for a demand may still arise. For instance, if the principal obligation is the repayment of a loan made without any fixed repayment date. In such circumstance, repayment on demand will arise by implication or by operation of law.

Where there is a condition precedent to the enforcement of a guarantee, it cannot be enforced legally until such condition has been met. In the case of *Federal Loans Board vs. Moses O. Bakare* (1975), it was held that a conditional liability should be expressly stated in the guarantee contract. However, courts have on several occasions held certain contracts of guarantee to be conditional even when such was not so expressed in the instrument by the parties. In *Ward v. National Bank of Newzealand* (1833), a guarantor executed a contract of guarantee premised on a representation that another party would execute same as a co-surety. It was held that the contract was conditional upon execution of same by the other party. Also, in *Arab Bank (Nigeria) Ltd vs. Dantata (1977),* the Supreme Court held that where a co-surety signs a guarantee on the understanding that another is to join in the signing and that other did not join, an action cannot be maintained against the one who signed unless he waives his objection.

**The Requirement of Notice**

Two types of notices may spring up in the course of construing or enforcing a guarantee contract, namely, "Notice of Default" and "Notice of Revocation". The general law is that the creditor is under no obligation to give notice to the guarantor or to make any formal demand on the guarantor for payment upon default by the principal debtor before initiating an action in court to enforce payment or recovery of the sum advanced and guaranteed. The reason is that the guarantor's liability crystallizes the moment the principal debtor defaults (*Okafor v Emenobi& Anor (2020).*

If the guarantee requires a demand to be made, and the requirement is not waived by the guarantor, the question whether a particular demand meets the contractual requirement is a matter of construction in each case. In other to give effective notice, the surety must comply strictly with the provisions of the contract relating with notice. In *Commercial Bank of Australia Ltd v. Cavanaugh (1980),* the termination clause stated that the guarantee remained in force until determined in relation to future advances by: (i) notice in writing given to, and received by the manager of the time being of the branch where the customer had the account, and (ii) until the guarantors had repaid the full amount guaranteed. The court held that these were cumulative conditions and that receipt of notice by the bank manager was ineffective to terminate the liability of the surety until there had been a payment in full of the customer's outstanding liability.

**The Discharge of a Guarantor**

***a.*** ***Discharge by performance:*** Payment of the principal debt by the principal will discharge the surety (*Western Credit v Aberry, 1964)*. A payment by a co-surety charged with the same liability severally or jointly will also discharge the surety's liability provided that upon construction, the sureties are liable in like terms. If the debtor assigns to the creditor the means by which the debt may be paid (for example, by assigning a judgment debt), such assignment is not considered as payment of the debt which could discharge the guarantor. But if the creditor proceeds to realise and appropriate the assigned asset or collateral security, the guarantor will be discharged.

***b.*** ***Discharge by Appropriation:*** The principal or creditor may appropriate any payment to any subsisting debt of his choice. While appropriation by the principal need not be express, provided that it can be sufficiently shown by the circumstance, appropriation by the creditor must be communicated to the principal to be complete. The creditor may combine, accelerate and appropriate and/or set-off funds kept in different accounts belonging to the principal debtor or the guarantor upon the occurrence of event of default such as entering of a monetary judgment or an order *nisi* against the principal in favour of a third party (***Fidelity Bank Plc V. Okwuowulu& Anor,*** *2012).*

c. ***Discharge by Agreement or by Release:*** If the creditor releases the principal from his debt or obligations by a valid and binding legal agreement, the surety will stand discharged. According to Lord Port in *Mahant Singh v. U Ba Yi (1910),* the two reasons for this rule are that: ***(a)*** since the contract is one of guarantee, the surety's obligation being to pay the debt or perform the obligation of another, once that payment or obligation has been released, there is nothing left in respect of which the surety can be liable, and (d) the effect of the release would deprive the surety of his right to pay off the creditor and sue the principal in the creditor's name.

d. ***Discharge by Extinguishing of the Debt Obligation:*** Where the principal debt has been extinguished by acts of the parties or acts of one of the parties, the guarantor stands discharged (***Man v. Southern Railway Company*** *A.C., 1926)*.

e. ***Discharge by Limitation Law:*** A guarantor could be held discharged where the period allowed for the creditor to bring an action for enforcement has elapsed, or where the court applies a presumption which operates to determine the contract of guarantee or where there is an enforceable agreement not to sue. An action to enforce a guarantee outside the statutorily prescribed time or the time agreed to by the parties is unavailing. In *Aguma* v. *APC &Or (2021)* the Supreme Court held that a time bar gives a time limit during which certain actions or steps should be taken and one is barred from taking action after the period specified in the statute. Any action taken outside the specified time period is of no avail and has no valid effect.

f. ***Discharge by Creditor's or Principal's Repudiatory Breach:*** If the Creditor commits a repudiatory breach of his contract with the principal so that the principal is entitled to treat the contract as at an end, the surety is also entitled to be discharged from further liability (*Watts v. Shuttleworth, 1861)*.

g. ***Discharge by Operation of Law:*** Discharge by operation of law is not really a separate category of discharge, but a description of many instances by which s surety may be discharged from liability. Some of the various instances of discharged include the following (Wood, 1989: 292): (a) foreclosure and subsequent sell by the mortgagee; (b) repossession of hire+purchase property by the creditor; (c) the insolvency of the principal where the surety for interest under a debenture bond issued by a company while the principal sum remains due; (d) estoppel, latches and acquiescence, illegality, mistake, misrepresentation, acts of God and other vitiating elements can also render the contract of guarantee unenforceable.

h. ***Discharge by Alteration of the Principal Contract:*** Where the document is materially altered by the creditor, the surety is discharged. Meanwhile, in *Egbert v. National Crown Bank (1918)*, it was held that the surety remained liable where the creditor illegally, hence, ineffectively increased the interest charged to the principal.

**Rights of a Guarantor**

a. *Right of Indemnity:* The surety is entitled to be fully indemnified to the extent of the loss which he has suffered and no more. In ***Onwukeme v Onwuegbu (1970)*** the plaintiff instituted an action to recover money paid on behalf of the defendant under a guarantee. The court held that the plaintiff was entitled to recover the money. In *Re Parker (1894)* it was also held that a surety who paid the guaranteed debt can prove in the bankruptcy of a co-surety for the whole debt though he cannot get more than his actual due.

b. *Right to Securities in the Creditor's possession:* By virtue of section 5 of the UK Mercantile and Amendment Act 1856, a surety is entitled to every judgment, specialty or other security held by the creditor in respect of the debt guaranteed. Thus, a surety who has paid the guaranteed debt is entitled to be treated as a statutory assignee of the creditor.

c. ***Right to Subrogation****:* In *Craythorne v. Swinburne (1807),* the court held that a surety is entitled to every remedy, which the creditor has against the principal debtor and to enforce every security and all means of payment; to stand in the place of the creditor; not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety.

d. ***Right to Contribution from Co-sureties:*** A surety is entitled to contribution from his co-sureties according to their share whether the sureties are joint, joint and several or several and whether they are liable on the same or different instruments. Co-sureties are liable to equal contribution and if one of them receives any security from the creditor for discharging his liability, the security must, as between the sureties, be brought to account.

e. ***Right to Information:*** Although there is generally no disclosure obligation on the creditor, a guarantor is entitled to be informed of all features of the principal transaction which, under the circumstances, the guarantor would not expect to exist. A failure to disclose such matters amounts to an implied representation that they do not exist (Andrew & Millet, 2000). A guarantor also has a right to periodically enquire from the creditor the amount for which the creditor is liable under the guarantee. Among others, a guarantor is also entitled to demand information about the interest rate charged, if any.

f. ***Right to Notice of Default or to a Demand:*** In general, a guarantor is not entitled to a notice of default. However, a demand upon the guarantor (in addition to the issue of proceedings) may be an essential prerequisite to the enforcement of the guarantee under the collateral agreement until a demand **is made.**

g. ***Right to Marshal Security in the Hands of the Creditor:*** Once a demand is made on him, the surety has the right to compel the creditor to first have recourse to a security held by that creditor before suing him. This right is known as the right of marshalling, and is an equitable right which operates to ensure that one creditor does not act so as to deprive another creditor of due portion of the debtor's estate. But for this right to operate, the creditor should have the security in respect of the guaranteed debt.

**Conclusion and Recommendations**

The analysis is presented in three major divisions – legal, regulatory and enforcement components credit guarantee. On the whole, debt guarantee was defined, analysed, its essential features identified, explained and distinguished from similar legal terms. As against the traditional criticism that credit guarantee creates "secondary liability" which suggests that it provides less security compared to other forms of securities like mortgage or pledge, the study found and opined that guarantee is no less a security arrangement than other forms of security, that being a flexible contract, guarantee presents unique features that could by explored by lending banks to suit diverse needs on a case-by-case basis in a way that no other security arrangement does. But there is the need for legislative and policy reforms to articulate a single and standard legal framework for guarantee-ship in Nigeria in line with current and emerging commercial dynamics.

Creditor rights matter for debt finance. Strengthening the taking and enforcement of secured credit increases borrowers' access to credit, and reduces – *ceteris paribus* – cost of borrowing. Effective insolvency regimes provide a safety net for financially distressed debtors and predictability in recovery for lenders. These in turn stimulate creditors' willingness to advance funds to borrowers (Armour *et al,* 2016: 25). Credit guarantee offers unique advantages, including that: (i) it provides alternative or additional recourse to the creditor; (ii) guarantee can be personal, proprietary or both; (iii) it is flexible; (v) there is no need for registration. While it is not deniable that guarantee comes with costs, it is always safer for lending banks to have one in addition to other security arrangements.

**Recommendations**

*a.* *Legislative Reform:* There is the need for a comprehensive legislation on secured credit transaction part of which should be focused on articulating a comprehensive legal framework for credit guarantees.

***b.*** ***Judicial Reform:*** Guarantees are generally only enforceable by court action or litigation which often takes many years to terminate. A judicial reform which ensures speedy and fair disposal of credit related cases by specially trained and ethics compliant judges can bring the required paradigm shift from dilatory judicial processes to speedy, judicial and judicious disposal of credit related cases, including credit guarantees.

***c.*** ***Lending Banks should deliberately take steps to avoid all forms of lender liability:*** Lender liability comprises all cases in which banks and other financial institutions may incur liability as a result of the lending process or ancillary activities. A breach of a lender's general law or statutory duties affects its ability to recover its loan or enforce its securities against borrowers, guarantors and third-party mortgagors.

***d.*** ***Painstakingly draft guarantee agreement:*** A carefully, skilfully and comprehensively draft guarantee agreement offers surer and stronger protection to the lender than one that is poorly draft hence, weak and prone to pitfalls and enforcement difficulties. A well draft guarantee agreement should, for instance, contain reservation of liability clause which states that the guarantor remains liable regardless the occurrence of an event which he should ordinarily be discharged.

***e.*** ***The Guarantor should seek essential Information prior to execution:*** For safety, the guarantor should carefully read and diligently seek to understand the true nature and content of the guarantee agreement before appending his/its signature. A guarantor that fails to seek and obtain relevant information before signing a guarantee agreement may not be heard to complain afterwards unless there is evidence of misrepresentation.

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