



COMMISSION OF THE EUROPEAN COMMUNITIES

# STUDIES

*The suretyship  
in the law of  
the Member States of  
the European Communities*

# The suretyship in the law of the Member States of the European Communities

Study prepared by the  
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## FOREWORD

This study was prepared by a working party of the Max-Planck Institute, in which the following persons worked full- or part-time. The countries for which each of them was responsible are appended in brackets after the names.

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PART ONE

STUDY



## A – Definition of the subject matter

1. *The need for definition.* – While there can be no doubt that the surety is the typical form of personal security, it is not the only one. A whole range of other contractual devices is used to support a claim that needs to be secured. All of them are grouped together under the general head of “personal securities” (“sûretés personnelles”, often called “garanties” or “garanzie” in non-technical language).

Suretyship does not have precisely the same connotation in all the States of the Community. In German and Dutch law, for instance, a distinction is drawn between the surety and the “guarantee”. In Italy, on the other hand, the “guarantee” of German and Dutch law is subsumed under the concept of suretyship.

In this study, therefore, it will be more advisable not to restrict the scope to suretyship in its technical sense in the various national legal systems, but rather to consider it within the general frame of personal securities and to go on to specify the particular forms of personal security which are to be more narrowly examined in it.

2. *The concept of personal security.* – The concept of “personal security” will be construed from the economic rather than the legal point of view in the ensuing sketch of the various forms of personal security. We shall describe the most important legal institutions which can fulfil the same purpose as the suretyship by their economic effect.

The scope of this survey must therefore be broadened because, if the law of suretyship alone were eventually to be harmonized, there might be some danger that commercial practice might resort to kindred legal institutions and so evade regulation which it found inconvenient. Furthermore, we cannot give a reasonable explanation of the concept of personal security unless we have a thorough understanding of the legal institutions akin and similar to it.

3. *The forms of personal security.* – The main forms personal security comparable in law or function to the suretyship are:

- (1) the joint and several debt (paras. 4-9)
- (2) the guarantee (paras. 10-15)
- (3) the guarantee of the bill of exchange or promissory note (para. 16)
- (4) warranty as regards third party (para. 17)

- (5) the del credere (para. 18)
- (6) the credit order (para. 19)
- (7) credit insurance (para. 20)

### (1) THE JOINT AND SEVERAL DEBT

4. *Concept and forms.* – The various forms of joint debt, in which each of a number of debtors ( $D_1, D_2 \dots D_x$ ), at the option of the creditor, guarantees the whole debt, approach most closely to the suretyship. Suretyship and joint debt in fact coincide in the case of a joint suretyship (see para. 85 below) and, to some extent at least, the joint liability of surety and debtor (see para. 53 below). The joint debt may take the most varied forms. It may be agreed from the outset, where  $D_1 - D_x$  jointly and severally undertake to pay the whole debt. But it may also arise subsequently where  $D_2$  undertakes as an obligation of his own in conjunction with  $D_1$  to pay a debt previously contracted by the latter (joinder in a debt = joint guarantee of a debt). The conditions on which  $D_1$  and  $D_2$  guarantee the debt need not necessarily be identical. Thus,  $D_2$  may be liable for the whole sum on the basis of a bill of exchange, whereas  $D_1$  may be liable simply for the money debt.

5. *The prerequisite for a meaningful comparison.* – If any meaningful comparison is to be made between suretyship and joint debt, identifying the typical features of the two forms of security, the substantive circumstances must be presumed to be comparable. We have, therefore, to examine the form of suretyship and the form of joint debt which most resemble one another from the legal and the economic points of view. The suretyship with waiver of the surety's claim for preliminary proceedings against the principal debtor (absolute suretyship) (see para. 52 below for details) must be contrasted with a joint debt where  $D_1$  has to compensate  $D_2$  for costs arising from a claim brought by the creditor.

*Example:* The State makes a loan to a company through a bank. It requires the ‘intermediary’ bank either to furnish an absolute suretyship or to undertake a joint debt in conjunction with the borrower.

6. *There is material coincidence* between suretyship and joint debt with regard to the following particular points. A creditor may demand payment only once. He is therefore satisfied if *one* of the joint debtors (in a joint debt) or the debtor or the surety (in a suretyship) pays the debt.



D : arts. 422, para. 1 and 765, para. 1, 767, para 1, BGB

F. B. L : arts. 1200 and 2011, 2013, para. 1, cc

I : arts. 1292 and 1941, para. 1, 1945, cod. civ.

N : arts. 1316 and 1858, para. 1, 1859, para. 1, 1884, para. 1, BW

*In all these countries, however, the suretyship is extinguished on payment of the principal debt, not as a direct legal consequence — as in the case of a joint debt — but owing to the fact that the suretyship is accessory in character (see para. 57 below).*

If a creditor comes to an agreement to remit the debt of one of the debtors in a joint debt, such remission may release all the others if the parties have so agreed.

F. B. L : art. 1285, cc

N : art. 1476, BW

D : art. 423, BGB

I : art. 1301, para. 1 cod. civ.

*In the case of a suretyship, if the creditor remits the debt of the principal debtor, the surety benefits automatically (see para. 64 below).*

If joint debtor D<sub>1</sub> satisfies the creditor and joint debtor D<sub>2</sub> is obliged to compensate him (as in the case in point), the creditor's claim against D<sub>2</sub> passes to D<sub>1</sub>.

D : art. 426, para. 2, BGB

F. B. L : art. 1251, para. 3, cc

I : art. 1203, para. 3, cod. civ.

N : art. 1438, para. 3, BW

*This is equivalent to the subrogation of the surety who has paid the debt to the creditor's claim (see para. 97 below).*

7. *The differences in law* between suretyship and joint debt are much greater, however. They are mainly due to the fact that suretyship is an undertaking to pay given in the interest of a third party, whereas a joint debt, as a rule at least, is based on the interest of the joint debtor himself as well.

In a country which requires that the suretyship be evidenced in writing in order to diminish the risks attaching to it, as in Germany, it is noteworthy that no formalities are attached to the guarantee of a joint debt.

D : art. 766, BGB has no equivalent in the provisions concerning joint debt.

In the other Member States, however, which have no special formal rules for suretyships, the same general rules apply to joint debt and suretyship (see para. 38 below).

On another point, too, the distinction between joint debt and suretyship is not uniform. In Germany a joint debtor's defences and personal circumstances in principle have effect only for or against himself, whereas

a surety may in principle set up all the debtor's defences, bars and constitutive right.

D : arts. 425, 422, para. 2 and 765, 767, 768, 770, BGB.

The situation is very similar in Italy, though a surety may not avail himself of the defence that the principal debtor was incapable to contract.

I : arts. 1297, para. 1 and 1945, cod. civ.

In the other Roman law countries, however, a joint debtor, like a surety, is debarred only from setting up the defences open to *one* of the other joint debtors or those personal to the principal debtor.

F. B. L : arts. 1208 and 2036, cc

N : arts. 1323 and 1884, BW

German law and Italian law too therefore emphasize the accessory character of suretyship in contrast to joint debt. The other Roman law countries, on the contrary, treat joint debt and suretyship alike as regards this point.

On the other hand, all the Member States draw a distinction between joint debt and suretyship if the creditor voluntarily renounces the rights inherent in his claim. Whereas the surety is released from his obligation in such case, the joint debtor remains bound.

*The rules providing for the extinction of the suretyship in such case (see para. 77 below) have no equivalent as regards joint debt. In France the courts have explicitly refused to extend the relevant legal provision concerning suretyship (art. 2037 cc) to joint debt, Cass. civ. 3.4.1861, D.P. 1861.1.135; Cass. req. 18.2.1861, D.P. 1861.1.388).*

The reason for this distinction between joint debt and suretyship is that the suretyship is subsidiary in relation to the other rights attaching to the security available to the creditor (see para. 113 below for details), and this does not apply to joint debt.

8. *The problems of interpretation* of the question whether the parties contemplated a suretyship or a joint debt are very often hard to solve in particular cases. The German courts seem to have developed fairly precise canons of interpretation, namely, that where the parties have deliberately and on legal advice agreed on a suretyship, they are bound by their agreement.

D : BGH 3.7.1952, BGH26, 385, 396.

If, however, the clauses stipulated by the parties depart from the legal rules governing suretyship, the parties' description of the contract is not conclusive.

D : RG 14.3.1940, DR 1940, 860.

The conclusive question, then, is whether the parties intended to create a separate obligation for  $D_2$  in addition to the debt owed by  $D_1$ , which is to exist independently, irrespective of the outcome of the other debt.

D : BGH 3.7.1952, BGHZ6, 385, 397

I : Rodatà, *Esposizione*, in *Enciclopedia del Diritto XV* (1966) 781, 788; Distaso, *Banco*, *borsa* 1967.1.570 f.

An important pointer to the presumption that an independent debt was contracted by  $D_2$  is the question whether he has a direct legal or economic interest of his own. A purely personal interest, however (e.g. protection of the family) is not a sufficient presumption.

D : OLG München 11.12.1964, MDR 1965, 573; OLG Köln 4.7.1957, MDR 1957, 674

In the event of persisting doubt, the German courts decide for the presumption that it is a suretyship, since this is the normal and less onerous form of personal security. This also applies in Italy.

D : BGH 3.7.1952, BGHZ6, 385, 397; RG 28.9.1917, RGZ90, 415, 417

I : See the canon of interpretation to art. 1371 cod. civ., Rodotà, *op. cit.* 788 73; Distaso, *op. cit.* 571.

9. *Conclusion.* – The foregoing sketch makes it clear that joint debt has certain features in common with the suretyship, but that they clearly differ in other points. From the standpoint of this study, however, there can be no doubt that joint debt does not fall within the scope of the survey. The close relationship between joint debt and suretyship may, however, be usefully borne in mind.

## (2) THE GUARANTEE

10. *Concept.* – The concept of guarantee (*garantie*, *garanzia*) is, unfortunately, unduly broad and imprecise in all the legal systems of the Member States of EEC. Thus, in commercial law guarantee often means a seller's legal liability for defects in the goods sold, or a contractual undertaking to a purchaser by a seller or manufacturer to repair or replace defective goods. The concept of guarantee, however, also covers a guarantee charged on immovable property to secure the payment of a money debt. It also includes a promise by a debtor to pay at least a fixed minimum proportion of a future obligation whose amount is still undetermined (e.g. a guaranteed income or dividend). Obviously, none of these meanings of guarantee is intended in this study.

The definition is more dubious in cases where a third party promises a creditor that he will guarantee pay-

ment by the debtor by making a cash deposit. Examples are guarantees for tendering, for defects of warranty and for performance of contract. In tenders for public works, for instance, the bidder must often guarantee that if he is awarded the contract, he will accept the building contract, that the building erected will be free from defects and that he will duly perform the terms of the contract. In all such cases a third party gives the guarantee on behalf of the builder for the performance of his obligations, i.e. undertakes to pay a certain sum of money if the builder fails to fulfil his obligations. Three considerations recommend the inclusion of these forms of guarantee in this study. First, whether a guarantee or a surety is offered and accepted often depends on extraneous circumstances. Secondly, suretyships and guarantees of this type are often very important, especially in international trade, in the export of goods and construction works. Thirdly, the fact that such guarantees (in contrast to a manufacturer's warranty of his goods) are as a rule given through a third party for consideration and consequently relate to payment in cash, not in kind. In practice, therefore, it is not the debtor's primary obligation to perform which is secured, but his subsidiary obligation to compensate (arising from a breach of contract), i.e. in effect a money debt.

Here we come at last to the function of the guarantee which lies at the heart of this study. Its purpose is to secure vis-à-vis a third party the payment of a (primary) money debt, irrespective of the existence, effects and scope of the secured claim. The guarantor promises unconditionally to stand security to the creditor for the debtor's fulfilment of a pecuniary obligation in the terms of the contract. The guarantee is an abstract promise to pay which serves as a security.

11. *The relation between guarantee and suretyship.* – The remoter relation between guarantee, as described in paragraph 10 above, and suretyship assumes very different forms in the six countries of the European Communities. In Germany and the Netherlands the guarantee is an independent and fairly clearly defined institution existing alongside the suretyship (see para. 12 below). In Italy, on the contrary, the guarantee has developed *within* the suretyship and is simply a suretyship of a particular kind agreed by the parties (see para. 13 below). In France, Belgium and Luxembourg the notion of a non-accessory suretyship of the Italian sort has not yet been canvassed. The notion of an independent guarantee of the German and Dutch type has been considered only in Belgium (see para. 14 below).

12. *The guarantee as an independent and clearly defined security.* – A clear distinction is drawn between the suretyship and the guarantee in the jurisprudence and the literature in Germany and the Netherlands.

In the Netherlands this is based upon art. 1352 BW, which corresponds to art. 1120 of the French Civil Code and governs the warranty as regards a third party (see para. 17 below). The use of terms in Germany, at least, is not, however, always consistent.

*Thus, in German governmental export promotion a distinction is drawn between sureties and guarantees. In the law, however, the two types of security are identical. The difference lies solely in the extraneous circumstance whether the German exporter's customer abroad is a government agency or a private person; in the former case it is a surety, in the latter a guarantee.*

The main difference between the guarantee and the security in Germany and the Netherlands resides in the security's different scope (see para. 29 below for details). The security provided by a suretyship in those two countries is considerably narrower than that of a guarantee. In contrast to the suretyship, the guarantee is not accessory. It does not take effect on the assumption that a secured claim is valid in law (see para. 74 below). In Germany, therefore, the defences which are personal to the principal debtor are debarred in the case of a guarantee — in contrast with suretyship (see para. 75 below).

In German law a guarantor cannot avail himself of clauses still further protecting a surety, e.g. those concerning evidencing in writing (see para. 37 below) and the transfer of the claim after payment (see para. 103 below).

13. *The guarantee as a form of suretyship.* — Italy is the only country in the European Communities which includes the the guarantee in the law of suretyship and leaves it to the parties to adapt by agreed clauses the rules governing suretyship to the particular purposes of a guarantee.

Here reliance is placed on the provision in art. 1939, cod. civ., whereby a security remains valid even if a secured claim is voided by reason of a debtor's incapacity to contract. The judgments of the courts and the literature permit the parties by contractual agreement to breach the principle that a suretyship is accessory in relation to a secured claim in other cases too. Thus, a contract of suretyship whereby the surety promises to pay is valid even if the secured claim is contested or void.

I : Cass. 3.9.1966, Dir. e. giur. 1968, 829 = Banca, borsa 1967.II.38; Fragali 214 ff; id. in Banca, borsa 1967. 1.313, 320 ff.

The Court of Cassation has also confirmed that a surety may assume liability in the same way as the guarantor of a bill of exchange.

I : Cass. 3.9.1966; cf. also Fragali 246; id in Banca, borsa 1967.I.313 ff.

This type of security seems frequently to be used in business transactions.

I : Fragali, Banca, borsa 1967.I.313

It seems likely, too, that in private credit transactions the security generally renounces a defence based on the invalidity of the principal claim.

I : See the standard form of contract of suretyship in Molle 726(g) and the unpublished contract forms of the Italian banks (not printed).

Personal securities of this type are regarded as contracts of suretyship with non-typical content to which the law of suretyship applies, but with the limitations arising from the contractual waiver of the principle of the accessory character of the debt.

I : Cass. 3.9.1966, Dir. e. giur. 1968, 829, 833; Fragali 218  
For the opposite view see Marini, Dir. e. giur. 1968, 830 ff., who regards this kind of promise of security as *promessa del fatto del terzo* and thereby emphasizes that it partakes of the nature of a guarantee.

What is known as the “cauzione fideiussoria” is a special form of guarantee-suretyship in Italian law, which is of considerable practical importance. It is in fact a suretyship despite the elements which pertain to the law of insurance.

I : Cass. 17.7.1957, Giust. civ. 1957.I.1181; Fragali 181; Faschini, Nuova riv. dir. comm. 1957, 232, 236.

In contrast to credit insurance (see para. 20 below), the “cauzione fideiussoria” is a straight example of a personal security. In practice it is used mainly to protect the principal in contracts for public or private works, to secure claims of the State vis-à-vis tax collectors and to ensure the payment of customs duties in the temporary importation of goods.

I : Fragali, Assicurazione del credito, in Enciclopedia del diritto III (1958) 528, 553

With the “cauzione fideiussoria” the person guaranteed may in principle set up the debtor's defences but this seems to be precisely the point where the parties often waive the accessory character of the security.

I : Cf. Cass. 7.9.1968, Mass. Giur. it. 1968, 1058; Trib. L'Aquila 28.5.1966, Rep. Foro it. 1966 S.V. « Fideiussione e mandato di credito » No. 22.

14. *The guarantee (“garantie”) in the Civil Code countries:* In the heartland of the Roman law countries, i.e. France, Belgium and Luxembourg, the notion of an independent guarantee (obligation principale de garantie) has apparently been contemplated only in

Belgium. A Belgian author developed the notion of it as a statement of principle in cases in which a "suretyship" exists, but in which the claim to be secured has not become valid or has disappeared, that is, in which it is not of an accessory character. According to this author, this sort of guarantee would exist in the case of a "suretyship" for a natural obligation, i.e. an obligation arising from a voidable act or for a debt contracted by a person suffering from legal incapacity (art. 2012, para. 2 cc), provided that the guarantor knows that the principal obligation cannot be fully enforced.

B : de Page VI nos. 842 A 3°, 844-5°, 859, 860, 861; also Dekkers II nos. 1342, 1343; cf. in the jurisprudence Cour Gand 10.8.1883, Pas. 1884.II.106. *Obligation to pay the creditor the debt of a third person from which he has been discharged in a composition in avoidance of bankruptcy.*

French legal thinking runs along similar lines in essence, though it does not employ the concept of guarantee. It too recognizes, however, that in such cases it is not a true suretyship that is involved, but a principal obligation of a non-subsidiary character undertaken by the "surety".

F : Veaux Nos. 27, 36; Planiol/Ripert (-Savater) XI no. 1517; Aubry/Rau VI 275; but somewhat hesitant and uncertain about whether it is to be classified as warranty as regards third party or an independent principal obligation.

Neither the Belgian nor the French authors, however, have developed the guarantee into a legal institution which is assimilated to the suretyship as a personal security *sui generis*, capable of satisfying a creditor's enhanced need for security.

Nevertheless, in Belgian banking practice, at least, the guarantee whereby a bank promises to pay a creditor a certain sum on first demand is not uncommon. Promises of this sort are made to certain buyers, especially foreign governments, who are unwilling to accept simply a suretyship.

B : Van Ryn/Heenes IV No. 2561, and especially Heenes, *Les sûretés personnelles dans le droit bancaire belge*, in: *Recueils de la Société Jean Bodin XXX* (1969) 161 f.

These unconditional promises to pay correspond, so far as their economic function is concerned, to the guarantee in German and Dutch law. Van Ryn and Heenes, the only French-speaking authors in Belgium to mention it, give this guarantee the same meaning in law as it has in Germany and the Netherlands, namely an abstract obligation independent of the legal relation underlying it and thus wholly distinct from suretyship.

On the other hand, the "garantie de bonne fin" (or "garantie de bonne exécution"), which is often offered and accepted, especially in tenders for public works, is a true suretyship.

F : Boudinot/Frabot no. 364.

15. *Conclusion*: There are several reasons for including the guarantee in this study, despite the considerable differences between it and suretyship. The economic function of the guarantee and the suretyship is very similar. This is shown by the fact that no distinction is drawn between them in the statistics. But the main point is that it would give a distorted picture of the law if the guarantee in the five legal systems (other than Italy) were excluded and the Italian types of suretyship, which go further than, but are economically equivalent to, the guarantee, were included.

### (3) THE GUARANTEE OF BILL OF EXCHANGE OR PROMISSORY NOTE

16. The term guarantee of bill of exchange or promissory note is characteristic of the differences in the use of terms coloured by national practice as regards suretyship and guarantee. Under the Geneva Uniform Negotiable Instruments Laws, which are applicable in all the EEC Member States, this type of suretyship is expressly declared valid even if the obligation secured by it is void (except where vitiated by formal defect).

Art. 32, para. 2 of Uniform Law on Bills of Exchange

Art. 27, para. 2 of Uniform Law on Cheques

This type of guarantee is definitely considered as a surety (though a special form of it) in France and Italy.

F : Lescot/Roblot, *les effets de commerce I* (1953) 547-548; Planiol/Ripert (-Savater) XI no. 1514, 1527

I : Valeri, *Diritto cambiario italiano II* (1938) 204; Navarrini/Provinciali, *La cambiale e l'assegno bancario* (2nd ed. 1950) 200 (fideiussione cambiaria); different view in Semo, *Trattato di diritto cambiario* (3rd ed. 1963) 455

but is to some extent regarded as a guarantee in Germany and the Netherlands.

D : BGH 13.4.1959, WM 1959, 881, 882; Stranz, *Wechselgesetz* (14th ed. 1952) Notes 1, 2 and 3 to art. 30 WG

N : Molengraaff, *Leidraad bij de beoefening van het Nederlandse Handelsrecht II* (9th ed. 1954) 432, 469; Zevenbergen, *Leerboek van het Nederlandse Recht der Ordenen Toonderpapieren* (4th ed. 1951) 196, 289.

In point of fact, there is no need to deal in this study with the guarantee of bill of exchange or promissory note itself. Though this guarantee is very important in France especially, where credits are very often given in the form of a bill of exchange accepted by the debtor, the law is virtually unified, except for minor details, as regards this guarantee owing to the Geneva Uniform Law, which is applicable in all Member States.

On the other hand, the "aval par acte séparé" customary in France is a suretyship attached to a bill of exchange, not the guarantee of a bill of exchange, and so comes within the scope of this study.

#### (4) BAILMENT

17. In the legal systems of France and the Benelux countries, which follow the French tradition, rules for a particular case of guarantee are established by law. The guarantor promises the creditor that a third party will do a thing. In practice, this is always the approval of a contract which the guarantor made for the third party without having been specifically empowered to do so.

*In Germany a contract of this kind is treated as a contract of guarantee, see RG 2.11.1928, LZ 1929, 327: promise by the purchaser of a piece of land to ensure that the seller pays a commission to the broker.*

If the third party so agrees, the contract becomes binding on him with retroactive effect, while the bailment lapses. On the other hand, if the third party refuses to approve the contract, it loses its effect. In that case the guarantor has to pay compensation by virtue of the bailment.

F. B. L. : see arts. 1120, 1142 cc  
N : arts 1352, 1275 BW: the creditor may, however, choose to demand judicial cancellation of the contract, H.R. 4.5.1951, N.J. 1952 No. 129

The bailment is, therefore, a legally defined contractual obligation whereby one contracting party (the guarantor) promises that a certain third party will be joined with the contract made by a guarantor for a third party. The party accepting the undertaking is secured, therefore, only if the third party fails to make the contract. The bailment does not, however, underwrite an obligation assumed by a third party. Neither does the bailor make himself responsible for default on the terms of an independent contract. The bailment is certainly not a suretyship, therefore, and consequently does not come within the scope of this study.

#### (5) THE DEL CREDERE

18. Certain intermediaries in commercial transactions (such as commission agents and mercantile agents) stand surety to the principal for the execution of a transaction negotiated by them.

B : de Page VI nos. 979 ff  
D : art 86 b, 394 HGB  
F : Hémard II nos. 713-716  
I : art. 1736 cod. civ.  
N : see art. 75 e WvK

The *del credere* is in fact a suretyship or a guarantee, though some authors contest this as a matter of principle where the *del credere* relates to a commission agent.

B : de Page VI Nos. 985 ff  
D : Großkommentar HGB (-Brüggemann), Note 2 to art. 86b HGB; RGRK-HGB (-Ratz), Note 1a to art. 394 HGB  
F : Cass. req. 6.3.1935, p. 1935.1.210 (implicitly)  
I : Minervini, Il mandato, la commissione, la spedizione (2nd ed. 1957) 110  
N : Dorhout Mees, Kort begrip van het Nederlands Handelsrecht (4th ed. 1964) No. 761, 770; Korthals Altes 72 f.

The *del credere* therefore falls within the scope of this survey, though inasmuch as it is of a very special type, it can only be examined incidentally.

#### (6) THE CREDIT ORDER

19. German and Italian law contains specific rules for the credit order. If a creditor gives a credit to a third party in his own name but on instructions from a given principal, the principal is liable to the creditor as surety for default by the third party.

D : art. 778 BGB  
I : art. 1958, para. 1 cod. civ.

There is no corresponding provision for the credit order in the law of the other Member States. This study can, therefore, deal only with the credit order as defined in German and Italian law.

#### (7) CREDIT INSURANCE

20. Credit insurance may perform an economic function similar to that of the suretyship where it secures a creditor against a debtor's default. This is not the

purpose of all branches of credit insurance, however, in particular insurance against breach of trust (in which an employer is insured against damage or loss arising from embezzlement on the part of his employees). On the other hand, insurance for credit on goods, guarantee insurance and "assurance-aval" have precisely the same economic functions as the suretyship.

- B : Fontaine, Essai sur la nature juridique de l'assurance-crédit (1966) no. 103.
- D : von Halem, Kreditversicherung (1964) 31-32
- F : Picard/Bresson, Traité général des assurances terrestres en droit français III (1943) 252
- I : Donati, Trattato del diritto delle assicurazioni private III (1956) nos. 708-710
- N : van Zeggelen, Credietverzekering (1932) 30-31, 41

The fact that the branches of insurance mentioned above have the same economic functions as the suretyship is no justification for bringing a complete account of them within the scope of this study, for that would entail overstepping its limits by far. It is true that it has not infrequently been asserted that credit insurance and suretyship are actually identical in law. But credit insurance lacks the essential element in suretyship, its accessory character. Credit insurance should rather be considered as a contract of guarantee (of a particular sort). Nevertheless, the fact that credit insurance is embedded in the general law of insurance is a conclusive argument against treating it at length in this study.

Certain forms of credit insurance do, of course, directly overlap the law of suretyship. This is true to some degree of guarantee insurance. In Germany, the insurer in this case stands surety for certain obligations of a debtor on the basis of a contract of insurance. The contract of insurance is therefore the legal basis of the suretyship and is given for the performance of its terms. Suretyship of this kind have undoubtedly to be included in this study. In Belgium and France guarantee insurance is a true contract of insurance insuring the policyholder against the non-payment of a claim.

- B : van Ryn IV No. 2561; Frédérique II no. 1271
- F : Hamel/Lagarde (-Jauffret) no. 1271

But since no suretyship in the technical sense is entered into, this form of guarantee insurance is not relevant to this study.

In the French "assurance-aval" the insurer generally furnishes a guarantee of a bill of exchange. This means that the same considerations apply to it as to the German guarantee insurance. The guarantee insurance,

however, lies outside the scope of this survey (see para. 16 above).

This form of credit insurance must, however, be distinguished from another form of it, export credit insurance. In most Member States — with the exception of Germany — it is a true insurance of the exporter against claims in connection with export transactions.

- B : de Page VI 970; Fontaine nos. 88-97
- I : Act of 28.2.1967 no. 131 (G.U. no. 80)
- N : See the policy reproduced in van Zeggelen 100-112

This type of insurance will not be dealt with here. In Germany, however, export claims are secured by suretyships or guarantees.

- D : Schallehn, Garantien und Bürgschaften der Bundesrepublik Deutschland zur Förderung der deutschen Ausfuhr (1955 - Loseblatt)

This last type of security for claims in connection with export transactions falls within the scope of this study.

21. *Summary and use of terms:* From the comparison between the suretyship and the various different forms of personal security there emerges the following definition of the subject-matter of this study:

- (a) the *del credere* and the credit order fall wholly within its scope alongside the suretyship;
- (b) the guarantee and the credit insurance are included in part. Those forms of guarantee in which the guarantor promises the creditor to pay compensation if the debtor fails to fulfil certain obligations or to make certain payments are included. So far as credit insurance is concerned, the study includes guarantee insurance in which the insurer stands surety and the forms of export credit insurance in which export claims are secured by a suretyship or guarantee;
- (c) the study does not deal with the joint debt, the bailment or the guarantee of bill of exchange or promissory note.

The term "personal securities" is used both for the suretyship and for all other forms of personal guarantee of credit covered by this study.

A person who stands surety or furnishes a guarantee or a *del credere* or gives a credit order is termed a "guarantor". A "creditor" is a person who takes a personal security from a guarantor; vis-à-vis the debtor he is also the person entitled to the claim guaranteed by the security.

## B – Applicability and economic significance

22. *Purpose of and limitations on the study of the true state of the law.* – For several reasons it will be best to start with some comments on the actual use and economic significance of the forms of personal security (as the term is used in this study; see para. 21 above) before proceeding to describe them from the standpoint of comparative law. In the first place, the comparison itself will gain appreciably in vividness if the reader approaches it with some knowledge of the actual circumstances in which personal securities are used. Secondly it is even more important that the conclusions on legal policy to be drawn from it should be based upon an exact comprehension of the true legal position. And thirdly, it is a basic postulate, though by no means one invariably observed, that comparisons should not be made without due regard to the true state of the law.

The limitations on a survey of the true state of the law — which is both necessary and desirable — must, however, be defined at the outset. A really thorough survey cannot be given, for one thing, because of the limited time available to the Institute. The Institute had to confine itself to bringing together the most relevant standard forms, instructions and other printed sources of information, supplemented by a certain amount of further information gathered both orally and in writing by means of a questionnaire. It was unable to conduct statistical inquiries of its own, and has simply compiled whatever widely scattered figures were available. This accounts for the regrettable lack of uniformity in the data.

23. *The use of personal securities.* – A survey of the wide and varied extent of the use of personal securities shows that their main uses — though some of them, of course, overlap — are the following:

(a) The suretyship and the guarantee of money debts are undoubtedly the most important examples of the use of personal securities today. The surety secures (or the guarantee guarantees) to a creditor the payment of his money claim against a debtor. Credit institutes are obviously the group in private business most important both as creditors and as guarantors of secured debts. Typical examples are the personal securities for bank credits furnished by parent companies in favour of their subsidiaries, especially if they are situated abroad, by natural persons who are partners in a company in favour of their companies, thus giving the bank some recourse against their personal fortune, and by business associates, acquaintances and rela-

tives among themselves, especially for short- or medium-term loans to private individuals and small businessmen. By entering into suretyships on behalf of their members guarantee funds and similar institutions working on a co-operative basis are also of some importance in all the countries concerned.

Alongside credit in cash, credit connected with the supply of goods or services is often supported by personal securities. Notable here are the suretyships and guarantees furnished by the Federal Republic of Germany to cover export credits (whereas in the other Member States government export promotion is a true credit insurance — see para. 20 above). Advances by a buyer or by a person placing an order for construction work are often secured by suretyships or guarantees. Bank guarantees are also often offered and accepted in the course of foreign trade transactions, especially where documents turn out to be missing or irregular when a letter of credit falls due for payment.

(b) public agencies have a place of their own with regard to suretyship for credit both as guarantors and as guarantees. The suretyships which an importer has to furnish to the fiscal authorities by means of an acceptable surety for the deferred payment of customs duties and other dues are very important from the standpoint of foreign trade in all the member countries, though the importance of suretyships for customs dues and duties is diminishing owing to the lowering of tariffs (within the European Communities and in trade with third countries). The fact remains, however, that the EEC Regulations on the common consignment procedure still use sureties as a technical means for facilitating international transit traffic within the Community.

See arts. 27-38 of the EEC Council Regulation No. 542/69 of 18.3.1969, OJ No. L 77, p. 1

In domestic trade, too, suretyships for the deferred payment of duties and taxes are very common. The fact that the secured claims are claims by public agencies affects the rate of commission, for since, under the law of all the countries concerned, the priority claim to preferential settlement in case of bankruptcy attached to such claims passes to the surety when he has paid (see para. 97 below), he too has a preferential position in action against the debtor. The com-

mission on such suretyships is consequently somewhat lower in all the countries than it is on suretyships for ordinary claims.

Principals who execute public tenders have very often to furnish suretyships or guarantees for their bids and for performance of contract (see para. 10 above).

The public authorities appear as sureties, or sometimes counter sureties, in the government aid granted for certain purposes of economic, structural or social policy. These are usually comparatively minor subsidies, since commercial lenders are able appreciably to lower their interest rates owing to the suretyship furnished by the State.

- (c) Securities for certain transactions by the principal debtor are considerably less important than the various ways in which suretyships for credit operate. In Germany, at least, such securities are generally given in the form of guarantees in order to avoid making them dependent on the secured obligation. Guarantees for tenders, defects of warranty and performance of contract have already been mentioned (see para. 10 above). Here the guarantor has to make himself responsible for the conclusion of a contract or the due performance of its terms by the principal debtor, though the guarantor's obligation is limited to the payment of a sum of money stipulated in the contract.

24. *EEC securities.* — In this study this term denotes personal securities which cross the frontiers of a Member State but remain within the territory of the European Communities. A security crosses the frontier when at least one of the three parties concerned (guarantor, creditor and debtor) is established in another Member State. EEC securities are mainly given in connection with the export of goods and services. As already mentioned, the German Government supports its foreign trade by furnishing suretyships or guarantees for debts incurred abroad (see para. 20 above). In the private sector banks and insurance companies very often furnish suretyships or guarantees in favour of a foreign creditor at the request of a domestic debtor. Domestic parent companies too, very often furnish international securities in favour of their subsidiaries abroad and vice-versa. This class of transaction is frequently found both where a subsidiary applies for a loan from a bank and where the subsidiary of a large international concern floats a loan. In Germany these EEC securities are generally offered and accepted in the form of guarantees. Since they are independent of the principal debt, the guarantor is

debarred from entering a defence that regulations were issued subsequently (such as exchange controls) or a plea of supervening circumstances in the debtor's country of establishment. On the other hand, a non-national is seldom granted a credit abroad against a suretyship entered into by a national.

International securities are given in two forms, direct and indirect. In the former, a domestic guarantor (usually at the request of a principal residing in the same country) gives the security directly to a foreign creditor. If, however the creditor will accept as security only suretyships (or guarantees) of the same nationality as himself — as is almost always the case with public agencies and very often with private creditors too — an indirect course has to be taken. The guarantor requests a correspondent in the creditor's country to furnish the security. Recourse to this correspondent obviously entails additional costs, and foreign principals accordingly incur heavier expenses than domestic principals.

25. *Statistics.* — A few figures will show how very important personal securities are from the economic point of view.

TABLE 1

Volume of obligations contracted in the form of personal securities (selected groups of guarantors; various reference dates 1965-1968)

(in millions of u.a. [= US \$])

Guarantor	Country					
	B	D(*)	F	I	L	N
1. Public authorities	1 690	14 641	5 160	—	43	3 100
2. Financial institutions	222	3 890	4 534	3 026	60	460
3. Insurance companies	—	680	—	—	—	—
4. Guarantee funds	21	118	1 314	—	—	—

(\*) Federal Republic of Germany only (excluding Laender and local authorities).

TABLE 2

Amount per capita of obligations contracted in the form of personal securities (calculated on the basis of population and the data in table 1)

(in u.a. [= US \$])

Guarantor	Country					
	B	D	F	I	L	N
1. Public authorities	178	244	103	—	123	248
2. Financial institutions	23	65	91	57	171	37



It should be noted that these figures represent only a part of the total volume of the obligations contracted in the form of personal securities in the Member States (including, however, guarantees of bills of exchange). Some interesting conclusions may nevertheless be drawn from the tables.

The first point of interest is the surprisingly large volume of total obligations contracted in the form of personal securities. It proves their economic importance. The amount of obligations incurred by public authorities in the form of securities is also striking.

It confirms the notion that the personal securities entered into by them should be included in this study.

It was unfortunately not possible to supply comprehensive data on the quantitative volume of EEC securities (see para. 24 above), since statistics for them do not seem to be generally available. The Federal Republic of Germany has furnished suretyships and guarantees to Germans holding claims against foreign debtors to the amount of about u.a. 102.5 million (about 0.7% of total obligations). The total of EEC securities is on the whole probably not very large, but it is constantly increasing.

## C – Comparative analysis

26. *Structure and method.* – Despite variations in their particular purpose, most of the personal securities considered in this study have a uniform economic purpose, namely to secure a money claim held by a creditor against a third party. They differ only in the particular type of security. The extent of the difference is determined mainly by the differing scope of the coverage desired.

The analysis will be approached from two angles.

First, the institutional standpoint. There is no need to study suretyship, guarantee and the other forms of personal security in detail in each case, for two reasons. In the first place, the terms for and uses of the various forms of security differ considerably from one Member State to another, as explained in paragraphs 3 to 20 above. Secondly, however, all the forms of security to be surveyed here have one and the same purpose, to secure claims against a debtor by means of a personal obligation contracted by a third party. The main questions of law governing the conditions and effects of all these securities arise in the same fashion. It will be best, therefore, to examine and solve all the recurrent questions regarding the forms of personal security at the same time.

Secondly, the geographical standpoint. We shall not, therefore, deal separately with the legislation, but give a comparative study of the legal position in all the Member States on the basis of detailed country studies, not reproduced here. This method will enable us to bring out the elements common to the various legal systems and at the same time to indicate the peculiarities of each.

27. *Arrangement.* – The rules applicable in the Member States of the European Communities to personal securities for claims for payment will be classified in six broad groups, as follows:

- I – Legal character and typical scope of security (paras. 28-29)
- II – Conditions for validity (paras. 30-50)
- III – Scope and extinction of guarantor's liability (paras. 51-94)
- IV – Assignment of secured claim (para. 95)
- V – Recourse of guarantor (paras. 96-116)
- VI – Private international law (paras. 117-119)

### I – LEGAL CHARACTER AND TYPICAL SCOPE OF SECURITY

28. *Legal character.* – The obligation to furnish a suretyship may arise from a contract, from a law or from a judgment. Like that of a contractual suretyship, the purpose of a suretyship based on a law or a judgment is to secure the fulfilment of an obligation assumed by a third person. Thus, in German and Italian law a person who gives another person a credit order is liable to the creditor for any default by the second party (see para. 19 above).

*Contractual securities alone are relevant to this study.*

*Contractual securities include, however, suretyships furnished as a consequence of a legal requirement obliging a debtor to furnish a security. In fulfilling an obligation of this kind, the Roman law countries give preference to the suretyship, whereas it takes second place in Germany, and in Italy the debtor is permitted the option.*

F. B. L.: e.g. arts. 601, 807, 1613 cc

D: art. 232, para. 2 BGB

I: art. 1179 cod. civ.

In the contract of security the guarantor undertakes unilaterally vis-à-vis the creditor to pay him a sum equivalent to the secured claim if the debtor defaults.

D: Staudinger/Brändl, prelim. note 2 to art. 765 BGB

F: Planiol/Ripert (-Savatier) XI no. 1512

B: de Page VI nos. 760, 836 ff

I: Miccio 522

N: Asser/Kamphuisen 760 f

In particular cases, however, the unilateral character of the guarantor's obligation to pay may be waived by special agreement with the creditor. The legal relation between the parties may become a reciprocal contract, especially where the creditor promises the guarantor compensation or other consideration for assuming the obligation to furnish a security.

D: Enneccerus/Lehmann para. 191 I 4

F: Planiol/Ripert (-Savatier) No. 1512

B: de Page VI No. 838

I: Ravazzoni 277

N: Asser/Kamphuisen 761

Thus in all the legal systems concerned mercantile agents and commission agents furnishing a *del credere*

for transactions negotiated by them have a claim on the creditor for a special commission for performing this service.

- D : arts. 86 b, 394, para. 2(2) HGB
- F : J. Cl. Comm. arts. 94-95, fasc. II Nos. 97 ff
- B : de Page VI no. 838
- I : art. 1736 cod. civ.
- N : Korthals Altes 72 f

As a general rule, however, furnishing a security remains a contract which binds the guarantor unilaterally, at any rate vis-à-vis the creditor. This means that the security is, basically, independent of the guarantor's contractual counterclaims against the creditor and, most important, independent of counterclaims against the debtor. In order, however, to put the guarantor on his guard against the dangers of his unilateral obligation, many legal systems make the validity, or at least the possibility of proving the obligation to enter into the suretyship, conditional upon the surety's compliance with certain formalities (see paras. 37-38 below).

The reason for furnishing a personal security is generally to be sought in personal or economic relations between guarantor and debtor. Where personal relations are involved, the guarantor will often furnish the security free of charge as a favour to the debtor, whereas where the relationship is purely economic, the debtor as a rule has to give the guarantor consideration.

However, neither the nature of the legal relation between guarantor and debtor in general nor the question whether a consideration was or was not involved in particular has any effect on the substance of the guarantor's obligation to the creditor. There is no need, therefore, to go into this point in further detail.

29. *Typical scope of security.* – From the institutional standpoint a distinction can be drawn in two of the six countries, depending whether the scope of personal securities is normal or wider than normal.

Where the scope of the suretyship and of the *del credere* in particular is normal. The security promised by the surety does not stretch further than the performance to which the principal debtor is bound. The guarantor is therefore only bound to pay the creditor when and to the extent that the creditor can legally claim payment from the principal debtor. Not only the amount of the surety's obligation (see paras. 57 ff below), but also the rules governing many particular problems depend directly on this typical scope of security.

The scope of security may, however, stretch *further* than the normal scope. This occurs when the guaran-

tor promises unconditionally to hold himself liable for a payment to be made by the debtor, i.e. irrespective of the legal validity or the extent of the debtor's obligation to the creditor. In this case the guarantor has to perform even if the debtor is discharged on legal grounds from his liability to pay (either because the debtor's obligation is void or because he is discharged from it for other reasons). This wider security is provided institutionally by the guarantee in German and Netherlands law. The guarantee in this sense is unknown as a special legal institution in the other Roman law countries. The same result can, however, be obtained, in Italy at least, until the Italian law of suretyship if the parties agree to deprive the surety of the defences which would otherwise be available to him as a result of the relation between principal debtor and creditor (see paras. 57 ff below).

Only in Germany do some authors hold that a guarantor, as distinct from a surety, normally undertakes so broad an obligation only if his own economic interests would be affected if the debtor defaults. In entering into a security wider in scope than the normal the guarantor is as a rule trying to protect his own interests.

D : Enneccerus/Lehmann no. 197 II 2

Accordingly, German law relies on the presence or absence of the guarantor's own interest to decide in case of doubt whether what is involved is a guarantee or simply a suretyship.

D : RGRK - BGB (-Fischer), prelim. note 19 to art. 765 BGB; cf. para. 8 above on the distinction between suretyship and joint debt, in which much the same criteria are used.

Whether the theory of own interest is in fact still applicable today is doubtful, especially in the case of professional guarantors such as banks.

The wide scope of the security provided by the guarantee accounts, as we shall see, for many special features of this institution.

## II – CONDITIONS FOR VALIDITY

30. *Arrangement.* – The general term “conditions for validity” covers all the conditions which must be fulfilled in order to remove any doubt about the legal validity of the guarantor's obligation. These are:

- (1) The capacity to furnish a personal security (paras. 31-36)
- (2) The rules governing form and proof (paras. 37-40)

- (3) Conditions attaching to the secured claim (paras. 41-44)
- (4) Exchange regulations in the case of EEC securities (paras. 45-47)
- (5) Costs and fees (paras. 48-50).

(1) *THE CAPACITY TO FURNISH A PERSONAL SECURITY*

31. *General capacity.* – Since every personal security is a contract, the prerequisite for furnishing a security having legal effect is the general capacity to contract. There is no need to dwell here on the details of a natural person's capacity to contract.

In the Roman law systems, in which corporations' capacity to contract or their organs' power of representation is limited by the objects for which the corporation was created, difficulties may arise if the security is given for a purpose which is not one of those objects.

*F* : For an EEC suretyship see Cass. 20.11.1962, Bull. 1962 I 421, 422; also Cass. 11.10.1965, Bull. 1965 III 441 (in both cases the suretyship was held to be valid).

Moreover, a security furnished without the assent of the board of directors or the board of supervisors may be void.

*F* : arts. 98, para. 2, 128, para. 2 of the Loi sur les sociétés commerciales of 24.7.1966

Article 9, paras. 1 and 2 of the first Directive of the Council of the European Communities on company law.

Directive of 9.3.1968, OJ. L 65, p. 8

prescribes that Member States must provide in their legislation that acts done by the organs of a company which are not within the objects of the company shall be valid. It is true that an exception is stipulated where the powers which the law confers or allows to be conferred on the organs of the company are exceeded, but the law nowhere expressly imposes such an absolute restriction on a board's powers to furnish securities.

*F* : France presents such a case: in that country, a company's administration can be authorized to furnish securities, without asking permission, up to a maximum figure fixed by the board of directors or board of supervisors, arts. 89, 113 of the decree of 23.3.1967.

On the other hand, article 9, para. 1, second sentence of the Directive permits member States to provide that acts done by the organs of a company which exceed the objects of the company shall not be binding

on it if the company proves that the third party knew that the acts were outside those objects or could not in view of the circumstances have been unaware of it. The enforcement legislation in the Roman law countries may be expected to avail itself of this exception, but this legislation is not likely to constitute a serious hindrance to trade.

32. *Admission to practice.* – A special permit is generally required for the admission of the more important professional guarantors, particularly banks and insurance companies, to practice. The requirements for foreign undertakings are as a rule stricter than those for domestic undertakings. We do not, however, have to concern ourselves with this general problem here, since it will be solved in the context of the general programme for the introduction of complete freedom of establishment.

33. *Acceptance as surety.* – Where a public agency requires a suretyship, it is often not satisfied by any and every surety, but specifies that the surety must be a definite person or company approved by it.

See, for example:

*B* : art. 10, para. 1, second phrase, in the Arrêté royal relatif au statut des agences de voyage of 30.6.1966 (M.B. 27.7.1966)

*I* : art. 54, para. 3 of the Regolamento per l'amministrazione del patrimonio dello Stato of 23.5.1924

*D* : paras. 29-31 of the Stundungsordnung of 29.1.1923 (RGBl. I 75)

It is sometimes specified that only nationals may be accepted as sureties.

*D* : art. 29, para. 1 Stundungsordnung

*I* : art. 54, para. 3 Regolamentoo

But even if no such express stipulation is made and the authorities are free to use their own discretion, similar grounds for refusal may obtain owing to general instructions, or else in particular cases.

34. *Restrictions on the capacity to furnish security.* – There seem to be no general restrictions on furnishing personal securities in any of the Member States, but there are a number of particular restrictions (paras. 35-36).

35. *Geographical restrictions.* – Under the law of all six countries a debtor who is legally bound to furnish a suretyship (see para. 28 above) must present a person who is domiciled either in the country

*D* : art. 239, para. 1 BGB

*N* : art. 1864 BW

or even within the jurisdiction of the court of appeal in which the suretyship is to be given.

F. B. L : art. 2018 cc

I : art. 1943, para. 1 cod. civ.; though here it is sufficient for the surety to elect domicile in the jurisdiction.

It should be emphasized that these geographical restrictions apply not only to suretyships furnished in compliance with a legal requirement but also to a suretyship with which a debtor is contractually bound to furnish his creditor unless the parties have agreed in the contract upon the person who is to stand surety.

D : Enneccerus/Nipperdey no. 243 II

F : Aubry/Rau VI 276 f

B : de Page VI nos. 850, 872

I : Fragali 252, 257 (by implication)

N : Pitlo 545

In practice, however, the parties will as a rule agree upon the person who is to stand surety.

N : Asser/Kamphuisen 765

Thus, in the case of suretyships to secure bank credits the usual practice is for banks to ascertain the surety's solvency, as they do in the case of any borrower.

These geographical restrictions, therefore, are *actually* only of importance in the case of suretyships which must be furnished by law (or by court order). The absolute geographical restrictions prescribed in domestic legislation (except in the Italian) seem, however, likely to give rise to objections in the Common Market.

36. *Restrictions on particular persons.* – The law of all six Member States contains prohibitions or restrictions preventing particular persons from furnishing personal securities and in particular from standing surety.

N : A spouse wishing to furnish a security requires the consent of the other spouse unless it is furnished in the course of business, art. 164 a, para. 1(c) BW (= art. 88, para. 1(c) of Book I NBW coming into force on 1.1.1970

F : A limited company may not stand surety for its managing director or his nearest relations, art. 106 of the Loi sur les sociétés commerciales of 24.7.1966; see also art. 51

D : Under the regulations governing the Länder, local or regional authorities may not furnish securities except with permission from the supervisory authorities, see Staudinger/Brändl, *prelim. note 14 to para. 765 BGB.*

A notary may not stand surety in connection with his official business.

In particular cases these prohibitions against standing surety may lead to the unexpected cancellation of a suretyship, since they are little known outside the country concerned. Since such prohibitions are due to the (extremely varied) peculiarities of domestic legislation, it is doubtful whether they can be harmonized.

## (2) THE RULES GOVERNING FORM AND PROOF

37. *Evidence by writing as conditions for validity.* – In German law the promise to stand surety (but not the creditor's acceptance of it) must be evidenced by writing.

D : art. 766, first sentence BGB; similarly art. 86, para. 1, third sentence HGB for mercantile agent's *del credere*; BGH 27.5.1957, BGHZ 24, 297 (a telegram is not necessarily deemed to be evidence by writing)

Any failure to comply with these rules prescribing the form avoids the suretyship.

D : art. 125 BGB

The purpose of these rules is to put the surety on his guard against undertaking a suretyship heedlessly. This accounts for two exceptions. A promise to stand surety given by a merchant in the course of his business does not have to be evidenced by writing (arts. 350, 343 HGB) and in other suretyships the formal defect is cured when the surety pays (art. 766, second sentence BGB).

The German rules have been recommended for the future Netherlands law, but without the special rule for merchants.

N : Handelingen der Nederlandse Juristen-Vereniging 92 (1962) II 58 (by 88 votes to 55)

On the other hand, German law prescribes no rules concerning the written form for the undertaking of other personal securities (except the *del credere* of a mercantile agent). There is no formal requirement for the guarantee, though the guarantor's obligations extend considerably further than those of a surety (see para. 29 above). The remoter cause of this discrepancy is the lack of any legal regulation of the guarantee; the proximate cause is probably the own interest which a guarantor usually (if not always) has in the payment of a secured debt. Some authors, therefore, demand on occasion that the formal requirement be extended to the guarantee.

D : See for example von Caemmerer, *Bankgarantien im Aussenhandel*: Festschrift Otto Riese (1964) 295 ff., 306

In German banking practice, however, guarantees are always evidenced by writing for evidentiary purposes.

38. *Written form for evidentiary purposes.* – The Roman law systems contain a number of formal prescriptions whose infringement does not affect the legal validity of a contract of suretyship, but only (to a varying degree) the extent to which it may be proved.

(a) In the event of dispute, the legal systems of four countries accept only *documentary evidence* for all contracts involving more than very small sums.

*F. B. L.*: art. 1341 cc; the upper limit in France is FF 50 (= u.a 9), in the other two countries Bfrs. 150 (= u.a 3)

*I*: art. 2721, para. 1 cod. civ.; upper limit Lit. 5 000 (= u.a 8)

In France, Belgium and Luxembourg these rules do not, however, apply to persons for whom furnishing securities is a commercial transaction.

*F*: Planiol/Ripert (-Savater) XI no. 1518; Hamel/Lagarde (-Jaufret) II no. 1267

*B*: art. 25 of the Act of 15.12.1872; Frédéricq I No. 2

Suretyships furnished by a merchant in the course of his business are deemed to be commercial transactions.

*F*: Planiol/Ripert (-Savater) XI no. 1511

*B*: de Page VI no. 847

In Italy, however, commercial transactions are not excepted from the formal rules. In their practice the courts have, however, held that in commercial transactions between two merchants their status as merchants suffices to relieve them of the requirement to furnish documentary evidence, under the derogation clause in article 2721, para. 2 cod. civ.

*I*: App. Firenze 15.1.1962, Giur. tosc. 1962, 164; Scardacione 231 with references

Other exceptions apply where a document drawn by the guarantor exists which can bear the presumption that he has assumed the obligation (commencement de preuve, art. 1347 cc, art. 2724 no. 1 cod. civ.) or where a creditor has been unable for material or moral reasons to obtain from the guarantor written proof of his promise (art. 1348 cc, art. 2724, paras. 2 and 3 cod. civ.). A broad interpretation is given to both exceptions. But where art. 1341 cc or art. 2721 cod. civ. are applicable, they preclude parol evidence in court and accordingly, in practice, proof of the guarantor's promise.

The custom in commercial practice is for suretyship to be evidenced by writing.

(b) In France, Belgium, Luxembourg and the Netherlands every promise of a security in which the guarantor gives a unilateral undertaking (see para. 28 above) and which he has not drawn in his own hand must bear the mention "bon" or "approuvé" written in his own hand followed by his signature and the *amount of the security written out in full*.

*F. B. L.*: art. 1326, para. 1 cc

*N*: art. 1915, para. 1 BW

In France, Belgium and Luxembourg, however, this formality is not required of merchants and certain other categories of businessman when promising a security.

*F. B. L.*: art. 1326, para. 2 cc (it is immaterial whether the suretyship itself is or is not a commercial transaction)

*N*: art. 1915, para. 3 BW (but the suretyship must be furnished in the customary course of business)

Failure to comply with this requirement does not affect the validity of the contract, but only the evidentiary force of the instrument.

*F*: Cass. req. 20.10.1896, D.P. 1896.1. 528; Cour Paris 13.2.1925, D.P. 1926.2.3

Since the instrument is deemed to be a "commencement de preuve", however, a creditor may supplement the process of proof by calling witnesses.

*Explicitly:*

*N*: art. 1915, para. 2, 1939, para. 1 BW

*F*: Cass. civ. 26.10.1898, D.P. 1899.1.16; Cour Paris 6.2.1961, D. 1961.361

In France it is controversial whether article 1326 applies to all securities or only to those in which the guarantor has promised a definite sum of money or a definite quantity of goods.

*F*: For the prevailing view to the latter effect: Cass. civ. 10.1.1870, D. 1870.1.61; Cour Douai 27.1.1903, D. 1903.2.234. To the contrary; Cass. req. 16.2.1892, D.P. 1892.1.248

In practice, this formal requirement is often ignored.

39. *Registration for evidentiary purposes.* – In all the Roman law systems all legal instruments whose terminal date is to have effect for third parties must be registered.

*F. B. L.*: art. 1328 cc

*N*: art. 1917 BW

*I*: art. 2704 cod. civ.

Instruments are registered with the fiscal authorities. Commercial transactions are exempted from this re-

quirement in France, Belgium and Luxembourg, but not in Italy and the Netherlands.

F : Cass. req. 9.1.1906, D.P. 1906.1.77

B : Cass. 27.1.1956, Pas. 1956.I.543

If a document is not registered, it lacks a "date certain". This lack of "date certain" has disadvantageous effects wherever the determination of the precise date on which the contract was concluded affects third parties. This risk does not, however, affect contracts of security, which are therefore seldom registered in practice in France, Belgium and the Netherlands (in Italy only when they are produced in court).

40. *Express declaration of promise to stand surety.* — All the legal systems except the German prescribe that the acceptance of a suretyship must be by *express declaration*.

F. B. L. : art. 2015 cc

N : art. 1861 BW

I : art. 1937 cod. civ.

These provisions are unanimously interpreted to mean that an undertaking to stand surety cannot be tacitly inferred from a surety's conduct.

F : Cour Poitiers 23.2.1942, D.A. 1942.95

I : App. Milano 21.12.1954, Foro pad. 1955. II.2; Miccio 527

N : H.R. 7.4.1898, W. no. 7 110; Asser/Kamphuisen 761

The provisions concerning the written form, however, give the surety ample protection in this respect, even though they concern only the evidentiary force.

In German law the question of express declaration can arise only where formal prescriptions obtain (see para. 37 above), i.e. only in the case of a suretyship furnished by a merchant, a guarantee or a *del credere* given by a commission agent. An express declaration of willingness to stand surety is, however, required for a suretyship furnished by a merchant or for a guarantee, as in the Roman law countries.

D : RG 17.9.1906, RGZ 64, 82, 84; BGH 23.5.1960, WH 1960, 879, 881

A tacit agreement or even the custom of the trade at the commission agent's place of establishment suffices, however, for a commission agent's *del credere*.

D : Schlegelberger (-Hefermehl), notes 5 and 7 to art. 394 HGB; RGRK - HGB (-Ratz), note 2 to art. 394 HGB

I : art. 1736 cod. civ.

The expression "express declaration of suretyship" may also mean, however, that the surety must have employed — in writing or orally — the word "suretyship" itself. But no such rule exists anywhere. On the con-

trary, it is sufficient if the surety clearly expresses his intention to ensure that the creditor gets his money.

D : RG 17.9.1906, RGZ 64, 82, 84; Staudinger (-Brändl), prelim. note 12 to art. 765 BGB with references to court decisions

F : Planiol/Ripert (-Savatier) XI no. 1520

B : de Page VI no. 842 B

N : H.R. 7.4.1898, W. no. 7 110; Rb. Amsterdam 14.11.1913, N.J. 1914, 225

I : Cass. 14.2.1964, Banca, borsa 1964. II. 185; App. Trieste 28.4.1962, Rep. Foro it. 162 s.v. « Fideiussione » no. 2

### (3) CONDITIONS ATTACHING TO THE SECURED CLAIM

41. *Principle.* — All Member States require that a *suretyship* shall secure a *specific claim* (or at least a claim that can be specified) by a creditor against a principal debtor. This probably applies also to the guarantee and the *del credere*. It is not necessary, however, for all the details of the secured claim to be established at the time when the surety is furnished.

42. *Security for existing claims.* — None of the six legal systems requires that the origin and amount of the suretyship shall be specified in the case of a suretyship for an existing (as contrasted with a future) claim. On the contrary, a number of claims for varying sums may be secured by a single suretyship. As a rule, however, all these claims must have arisen from a specific business relationship between the creditor and the principal debtor.

D : BGH 10.10.1957, BGHZ 25, 318, 321

F : Planiol/Ripert (-Savatier) XI nos. 1516, 1531

B : de Page VI no. 854 (implicit)

I : Cass. 31.1.1957, Foro it. 1958.I.1519; Fragali 101 f

In the Netherlands, however, there is no such restriction.

In all the countries, the level of the secured claim is allowed to fluctuate, much as in the case of a current account.

D : Staudinger (-Brändl), prelim. note to art. 765 BGB

F : Aubry/Rau VI, p. 820

B : de Page VI no. 854 (implicit)

N : Korthals Altes 76

I : Fragali 101 f

43. *Security for future claims.* — The German and the Italian Codes state expressly that a suretyship designed to secure a future claim is valid.

D : art. 765, para. 2 BGB

I : art. 1938 cod. civ.

As they stand, these legal requirements supply no definite answer to the question whether any and every future claim may be secured or whether at least some specific details must be furnished.

It is universally accepted that suretyship may be given for an open credit which a creditor may make available to a debtor in the future. All that is required in this case is that the debtor of the prospective claim to be secured (and his business relations with the creditor) shall be known.

- D : BGH 10.10.1957, BGHZ 225, 318, 321; art. 86 b, para. 1, second sentence HGB on the commercial agent's *del credere*
- F : Planiol/Ripert (-Savatier) XI nos. 1531 ff
- B : de Page VI nos. 854, 855
- N : cf. Asser/Kamphuisen 766-768
- I : Fragali 194; Molle 182

44. *Security for conditional claims.* – The same rules as those governing future claims (see para. 37 above) apply to suretyships for conditional claims.

One example of a suretyship for a conditional claim is the second suretyship, recognized in law in the Roman law countries and in practice in Germany. The second surety guarantees to the creditor performance by the original surety.

- F. B. L : art. 2014, para. 2 cc
- N : art. 1860 BW
- I : art. 1940 cod. civ.
- D : Soergel/Siebert (-Reimer Schmidt), prelim. note 25 to art. 765 BGB; Staudinger (-Brändl) prelim. note 29 to art. 765 BGB

Another example of a suretyship for a conditional claim is the counter suretyship. The counter surety undertakes to secure the original surety in any action taken by him against the debtor (see paras. 96 ff below).

- D : Soergel/Siebert (-Reimer Schmidt), prelim. note 26 to 765 BGB; Staudinger (-Brändl), prelim. note 30 to art. 765 BGB
- N : Rb. Arnhem 28.4.1938, N.J. 1939 no. 515; Asser/Kamphuisen 764
- I : Fragali 99
- N : See also the 'bank suretyship' in Netherlands law, where the surety gives an unconditional undertaking to the bank, but the bank reserves the right to grant or not to grant the principal debtor the loan for which he has applied, see Asser/Kamphuisen 767

#### (4) EXCHANGE REGULATIONS IN THE CASE OF EEC SECURITIES

45. *Definition.* – Exchange regulations are obviously the most important of the conditions for validity owing to their practical implications. Although they apply

generally to all international securities, they need be considered here only where they relate to EEC securities. We shall not attempt to examine all the details owing to the complexity of the exchange regulations and the very rapid changes in them, but only to describe the situation in broad outline.

46. *Exemption from restrictions.* – Exchange regulations do not in principle apply in Germany and apply only in part in Belgium and Luxembourg to the furnishing and performance of securities.

- D : art. 1 of the Aussenwirtschaftsgesetz. The principle stated therein applies to securities without limitation.
- B. L : No permit is required for furnishing or performing securities for cash payments. The guarantor must, however, obtain the foreign currency for payments abroad on the 'free market', i.e. at a less favourable rate of exchange than on the official market. In certain circumstances, however, he may avail himself of the more favourable rate on the official exchange, but only if he obtains a permit, see para. 47 below (information from Belgian and Luxembourg banks).

47. *Restrictions.* – In most Member States a permit from the exchange control authorities is required for furnishing or performing an EEC security.

The requirement is most rigorous where a permit is required for *furnishing* an EEC security. This applies in Italy and the Netherlands.

- I : An Italian resident may not in principle undertake any obligation to a resident in a foreign State without permission (art. 2, para. 1 of *Decreto-legge* No. 476 of 6.6.1956, G.U. no. 137). Only what are known as 'approved' banks a general authorization to furnish and perform the obligations of suretyship in certain types of transactions with creditors established abroad.
- N : A person established in the Netherlands must obtain a permit if he wishes to give a personal security to a debtor established abroad or for the debt of a debtor established in the Netherlands in favour of a creditor established abroad (art. 19, para. 1 [b] of the *Deviezenbesluit* 1945, Stb. no. F 222). Any transaction contravening this prohibition is null and void, art. 30. In special circumstances, however, a permit may be granted *a posteriori*, art. 7, para. 5.

In France and to some extent in Belgium and Luxembourg, however, no restrictions are placed on furnishing a personal security, but only on the *performance* of it by the guarantor or of the obligations arising from it. The application, however, varies considerably in detail.

- F : A permit must be obtained for all payments by a French national residing abroad or a foreigner residing in France (art. 4 of



Decree No. 68-1021 of 24.11.1968, J.O. p. 11.081).

*B.L.*: The official exchange market be used — though only with a permit — for the performance of obligations arising from securities for the supply of goods or services (see para. 46 above).

There are some exceptions, e.g. in connection with furnishing securities in connection with certain foreign trade transactions.

*I*: Information supplied by Banca Commerciale Italiana, 16.12.1963

#### (5) COSTS AND FEES

48. *Definition* — Although the costs and fees for furnishing personal securities are only of marginal importance, they are worth a mention, for any substantial disparities among the Member States with regard to outlays for personal securities would be likely to impede the operation of a unified money market.

Member States may be classified in two groups. In the first, securities are furnished free of costs and fees (see para. 49), whereas in the second, fees are charged, though they vary considerably from one country to another (see para. 50). It is assumed that in both groups only those formalities must be complied with which are necessary to give the contract of security legal effect.

49. *Exemption*. — Only in Germany and Luxembourg are no fees charged for furnishing personal securities. Save in one special case, no fees are charged in Belgium either, provided that the parties agree not to register the contract (see para. 39 above).

*B*: Stamp duty of Bfrs. 4 (= u.a. 0.08) is chargeable when a debtor assumes liability as a joint debtor with a bank (art. 11, para. 1 of the Code des droits de timbre of 26.6.1947, Pas, 1947, 478, 489, subsequently amended).

50. *Liability to payment*. — Fees may be due either because stamped paper has to be used for all the relevant transactions or because special fees are charged, or both. Since this study is not concerned with the details of the regulations relating to suretyships, but with their general effect, it will be best to survey the situation country by country.

(a) *France*: Since there is no registration in practice (see para. 39 above), stamp duty only is charged.

The amount depends on the format of the document and ranges from FF 5 to FF 20 (u.a. 0.90 - u.a. 3.60).

art. 34, para. 4 of the Loi of 15.3.1963 (J.O. p. 2579) and art. 3 of the Loi of 31.7.1968 (J.O. p. 7515).

(b) *Italy*: The following three cases have to be distinguished in Italy:

(1) Securities in written form given to banks and other trading corporations by third parties are considered to be part of their commercial correspondence and are exempt from fees and stamp duty unless they are produced in court or to similar authorities.

art. 57 of Annex A to Decreto sulla imposta di bollo no. 492 of 25.6.1953 (G.U. 1953 no. 155, Supplement); art. 44 of Annex D to Legge di Registro no. 3269 of 30.12.1923 (G.U. 1924 no. 177, Supplement), amended by art. 1 of Decreto-legge no. 1033 of 23.6.1927 (G.U. no. 149).

(2) Where the contract of security is not drawn in writing a *stamp duty* is charged of Lit. 400 (= u.a. 0.64) per page.

art. 2 of Annex A to Decreto no. 492 of 25.6.1953.

(3) For *registration* (see para. 39 above) a fee of Lit. 20 (= u.a. 0.032) is charged for the first Lit. 1000 (= u.a. 1.60) and Lit. 10 (= u.a. 0.016) for each additional Lit. 1000.

art. 3 of Legge no. 306 of 25.5.1954 (G.U. no. 140).

Where a credit institution gives a security to a public authority at the request of a third party for a period of not more than two years, the following fees are chargeable:

— for a period of not more than one year  
for the first Lit. 1000: Lit. 20  
for each additional Lit. 1000: Lit. 0.5 (= u.a. 0.0008)

— for a period of not more than two years  
for the first Lit. 1000: Lit. 20  
for each additional Lit. 1000: Lit. 1 (= u.a. 0.0016)

art. 3 of Legge no. 306 of 25.5.1954.

(c) *Netherlands*. — The stamp duty on a contract of security drawn on an official form is Fl. 1 (= u.a. 0.276).

art. 34 II (b) of Zegelwet 1914 (Stbl. No. 244), subsequently amended.

The amount of the fee charged does not depend in any of the four countries on whether any of the parties is established in the country or abroad.

### III – EXTENT AND EXTINCTION OF GUARANTOR'S LIABILITY

51. *Definition and arrangement.* – The question of the guarantor's liability leads to the central problem in making rules for personal securities, for upon it depends their value to the creditor and consequently the cardinal question of their usefulness as a means of ensuring him security.

The details of the guarantor's liability are grouped as follows:

- (1) Secondary character of the personal security (paras. 52-56)
- (2) Accessory character of the personal security (paras. 57-75)
- (3) Special grounds for limitations on liability (paras. 76-86)
  - (a) breach of obligation by the creditor (paras. 76-84)
  - (b) plurality of personal securities (paras. 85-86)
- (4) Extinction of guarantor's liability (paras. 87-94)

#### (1) SECONDARY CHARACTER (SUBSIDIARITÄT) OF THE PERSONAL SECURITY

52. *Definition.* – In many cases a creditor feels amply protected when, after taking action against the debtor, he becomes entitled to have recourse to the guarantor after it has been established that proceedings against the debtor will not give him satisfaction, or not entire satisfaction. The personal security is in this case subsidiary to the principal debt. Its subsidiary character may be strengthened by a contractual clause providing that the guarantor's liability shall not begin until it conclusively appears that the creditor has incurred a loss in proceedings against the debtor.

A creditor is, of course, in a far better position if he can exercise the option of direct recourse to the guarantor even though it is not yet established that the debtor will default. If the contract of security is drawn in this way, the advantage to the creditor is that he is relieved of the burden of instituting proceedings and levying distraint on the debtor.

Within these limits, the parties to a contract of security may agree on other conditions too prior to recourse to the guarantor.

53. *The principle of the subsidiary character of suretyship.* – The law of all the countries except Italy recognizes the principle of the subsidiary character of *suretyship*; German law recognizes this principle in the commercial agent's *del credere* as well.

D : art. 771 BGB  
F. B. L. : art. 2021 cc  
N : art. 1868 BW

The counter surety (see para. 44 above) is based precisely upon the idea that recourse to the surety must precede recourse to a counter surety.

B : de Page VI no. 851

In Italy, however, a surety is jointly liable with the debtor, and a creditor may accordingly choose which of the two parties he will proceed against. The surety's liability can be of a subsidiary character only if the parties so agree.

I : art. 1944 cod. civ. The law, however, expressly recognizes the subsidiary character of a counter surety, art. 1948 cod. civ.

The legal situation in the Netherlands is similar in effect; so little use is made of the legal right to require the creditor to proceed first against the principal debtor that it is as a rule presumed to have been renounced and its preservation requires an express stipulation to that effect.

N : Asser/Kamphuisen 755 f., 771; Völlmar 938

In all six countries the technical means whereby the subsidiary character of a personal security can be put into effect is the dilatory claim for a preliminary distraint on the principal debtor. It assumes importance as a true plea only where it is demanded in the course of proceedings.

D : RGRK-BGB (-Fischer) note 2 to art. 771  
F. B. L. : art. 2022 cc  
N : art. 1870 BW  
I : art. 1944, paras. 2 and 3 cod. civ.

If the defence is validly asserted, the proceedings are suspended until it is established that distraint on the principal debtor has been unsuccessful.

D : arts. 771, 772 BGB  
F : Planiol/Ripert (-Savatier) XI no. 1535  
B : de Page VI nos. 909 ff.  
I : Miccio 535; Fragali 287

In German law a surety is in a better position in that he may confine himself to asserting the claim. In the other countries he must do considerably more; he must indicate to the creditor such assets of the principal debtor as offer him a safe expectation of satisfaction and he must, in addition, advance him enough money to enforce the preliminary distraint.

F. B. L.: art. 2033, para. 1 cc

N: art. 1871, para. 1 BW

I: art. 1944, para. 3 cod. civ.

54. *Exceptions.* – The legal principle of the subsidiary character of a surety's liability applied in five Member States of the Community (Italy in the exception) is limited, however, by the fact that the claim for a preliminary distraint may not in many cases be asserted. It may not be invoked:

(a) if the surety renounces.

D: art. 773, para. 1 BGB

F: Mazeaud no. 31; J. Cl. Civil, fasc. c. nos. 39 ff.

B: de Page VI no. 911

N: art. 1869, para. 1 BW

Renunciation may also be expressed implicitly e.g. by entering into a joint suretyship

F. B. L.: art. 2021 cc

N: art. 1869, para. 2 BW

or an absolute suretyship.

D: art. 773, para. 1 BGB

In all five countries banks and other professional acceptors of suretyships as a rule require the surety to renounce the claim for preliminary distraint.

(b) if it is established that *the distraint on the debtor will be unsuccessful* or disproportionately onerous to the creditor.

D: art. 773, paras. 2-4 BGB

F: art. 2023, para. 2. cc; J. Cl. Civil, fasc. c, no. 64; Cass. civ. 21.12.1897, D. 1898.1.262; Aubry/Rau 282

N: art. 1869, para. 4 BW

(c) if the suretyship has been entered into in consequence of a *legal* obligation to furnish security.

D: arts. 232, para. 2, 239, para. 2 BGB

F. B. L.: art. 2043 cc

N: art. 1869, para. 5 BW

(d) In German law, as in French, Belgian and Luxembourg law, where the surety is a *merchant*. (Vollkaufmann).

D: art. 349 HGB

F: Planiol/Ripert (-Savatier) XI no. 1539; Hamel/Lagarde (Jauffret) II no. 1267

B: van Ryn/Heenen IV no. 2561; more rigorously in de Page VI no. 840 D

In Germany the same rule applies to a mercantile agent's liability for a *del credere* if he is a merchant and if he gives the *del credere* in the course of his business.

D: Schlegelberger (Schröder) note 18 to art. 86b HGB

In this, as in any other case where a *del credere* is given by a mercantile agent as an absolute suretyship, the principal must at least have tried to obtain satisfaction from the debtor before he can have recourse to the mercantile agent.

D: Schlegelberger (Schröder), note 18 to art. 86b HGB Großkommentar zum HGB (Brüggemann), note 2 to 86b HGB

In view of all these limitations and especially of the fact that the general custom in commercial transactions is to waive the claim for a preliminary distraint, it may be said that in private credit transactions the surety is not liable subsidiarily, but directly and collaterally with the debtor. Italian law, which lays down this rule as an optional provision, comes closest to the true state of the law in all six Member States. This is confirmed, too, by the fact that the parties' faculty under Italian law expressly to stipulate the subsidiary character of a suretyship has hardly ever been used in commercial transactions.

I: information supplied by several banks

In point of fact, it has been proposed *de lege ferenda* in some of the other States that the subsidiary character of suretyship should be abandoned.

D: opinions furnished by several credit institutions

N: Pels Rijcken 103 f.; de Gaay Fortman 209

55. *Enhanced subsidiary character of suretyship.* – Under the law of suretyship it is also possible, instead of abolishing the subsidiary character of suretyship, to subject recourse to the surety to rules even more rigorous than those prescribed by the law. This occurs when the parties stipulate what is called a guarantee of deficit. In this type of suretyship the surety is obliged to pay after the creditor has proved that he has tried by every means open to him to obtain satisfaction from the debtor's assets and the assets of other guarantors and that he has nevertheless sustained a loss. The surety does not, therefore, have to bring a claim for a preliminary distraint (see para. 53 above) nor to pay himself if it is established that the distraint on the debtor will be unsuccessful or disproportionately onerous to the creditor (see para. 54

above). The precise conditions for recourse to the guarantee of deficit are determined by the clauses agreed by the parties in the contract of suretyship.

- D : Soergel/Siebert (-Reimar Schmidt) prelim. notes 18-23 to art. 765 BGB; Staudinger (-Brändl), prelim. note 21 to art. 765 BGB  
N : H.R. 19.1.1931, N.J. 1931, 1466  
I : Fragali 99, 272

The guarantee of deficit, being the least rigorous form of suretyship, is used, with several variants, in Germany and Italy, especially for suretyships of the public authorities.

56. *Commission agent's del credere and guarantee.* – In German law the demand for preliminary proceedings cannot be entertained in the case of a *commission agent's del credere* so long as he is in possession of the secured claim and the principal consequently has no recourse against the third party. After the secured claim has been transferred to the principal, however, he has the option either of taking recourse first against the third party or of instituting proceedings directly against the commission agent.

- D : Ratz in RGRK - HGB, note 4 to art. 394 HGB

The commission agent's *del credere* is not, therefore, of a subsidiary character.

With the *guarantee*, it is not clearly deducible from German law whether the creditor must have recourse to the debtor before proceeding against the guarantor or whether he may choose the order in which he will proceed. It depends on the individual contract.

- D : Soergel/Siebert (-Reimer Schmidt), prelim. note 36 to art. 765 BGB

There is, therefore, neither a legal rule nor a material presumption for the subsidiary character of the guarantee. In German banking practice the guarantee is typically non-secondary. This applies especially to the "guarantee on first demand".

- D : von Caemmerer 297-304

## (2) ACCESSORY CHARACTER (AKZESSORIETÄT) OF THE PERSONAL SECURITY

57. (a) *Purpose.* – The function of the personal security as a means of supporting a claim implies a certain connection between what happens to the secured claim and what happens to the security. The degree of dependence is determined essentially by the typical scope of the personal security. If the sole purpose of the security is to relieve the creditor from the risk that an obligation *owed* to him will not be met, the guarantor's obligation cannot in principle

extend further than that of the debtor; as a merely accessory obligation it depends upon it and is linked with what happens to it. But if performance is severed to a greater or lesser degree from the debtor's obligation and if it was promised to the creditor independently, the link with the secured claim must necessarily be slackened and may even be relegated completely to the background.

58. (b) *Scope of application.* – The principle of the accessory character of suretyship is imbedded in the *law of suretyship* of all six Member States.

- D : arts. 767, para. 1, 768, 770 BGB  
F.B.L : arts. 2011, 2012, para. 1, 2013, paras. 1 and 3 cc  
N : art. 1857, para. 1, 1859, paras. 1 and 2, second sentence BW  
I : arts. 1939, 1941, paras. 1 and 3 cod. civ.

In the German and Italian concept the principle of the accessory character of suretyship also applies to liability for the mercantile or commission agent's *del credere*.

- D : Schlegelberger (-Schröder), note 18 to art. 86 b; RGRK-HGB (-Ratz), notes 1 a and 5 a to art. 394  
I : Minervini 109; Giordano 213

In France and Belgium, too, the commission agent's obligation is in fact not absolutely dependent upon the obligation of a third party, though the concept of the accessory character of suretyship is not used in this connection.

- B : de Page, VI no. 989; Cour Anvers 5.4.1872, P.A. 1872.1.77: the commission agent is liable, even though the third party contested the principal contract as vitiated by error. For a different view, van Ryn III no. 1813  
F : Goré, La commission 297, 299; Hémard II no. 716; Cour Toulouse 27.11.1869, D.P. 1870.2.118: the commission agent is liable even though the third party was excused from performance on grounds of *force majeure*. For a different view, Ripert/Roblot II no. 2564

It is, however, above all the *guarantee* in German and Netherlands law that is independent of the existence and substance of the secured obligation. The same result can be reached in Italian law under the law of suretyship itself if the surety is severed from the existence and substance of the secured claim by special agreement between the parties (for details see paras. 74-75 below).

59. (c) *Validity.* – The extent of the *general* validity of the legal rules for the accessory character of the surety's liability has already been stated by implication in the description above of their scope of application.

Since a legal extension of a surety's liability beyond the bounds of the secured claim is recognized only

in Italian law (see para. 13 above), the parties may derogate from the rules concerning the accessory character of suretyship only in Italy — despite the provision in art. 1941, para. 3 cod. civ., which in principle bars such derogation.

In all the other Member States, however, it is only outside the law of suretyship that a security with extended scope can be constituted. The legal rules in these countries concerning the accessory character of a surety's liability are, therefore, preemptory. This concept is confirmed in the Roman law countries — except Italy — by the wording of the special rule which expressly governs the "excedent" of the personal security beyond the secured claim. The suretyship is valid, but only to the extent of the secured claim.

*F. B. L.* : art. 2013, para. 3 cc; cf. Planiol/Ripert (-Savatier) no. 1510; Veaux nos. 5, 120; de Page VI no. 837

*N* : art. 1859, para. 2, second sentence BW; cf. van Brakel 396; Rb. Amsterdam 19.4.1926, N.J. 1926, 1377

The corresponding rule in Italian law is, on the contrary, subject to derogation by agreement by the parties, as mentioned above.

In Germany too, where there is no explicit legal rule, the same result is reached in practice as in Italy. The jurisprudence and the literature regard a personal security, which in general meets the conditions for a suretyship, but stretches further than the secured claim in particular respects, as the combination of a suretyship with the independent acknowledgment of a debt or the promise of a guarantee.

*D* : RG 8.2.1937, RGZ 153, 338, 345; RG 16.12.1915, JW 1916, 398; Soergel/Siebert (-Reimer Schmidt), note 11 to art. 765, note 6 to art. 768 BGB; Staudinger (-Brändl), note 22 to art. 765, note 13 to art. 768 BGB

*N* : Asser/Kamphuisen 759 f.; van Brakel 397

60. (d) *Effects Survey*. — The most important of the effects of the accessory character of suretyship are the negative consequences which result in the restriction of the guarantor's obligation to perform. Here it will be convenient to set out the particular effects of certain characteristics of a secured claim upon the guarantor's obligations:

- (aa) Secured claim void *ab initio* (paras. 61-64)
- (bb) Voidability (paras. 65-68)
- (cc) Impediments to performance (paras. 69-70)
- (dd) Other changes in content (paras. 71-73)

Some changes in the content of a secured claim may, however, also extend its content. This extensions is

in some cases carried over to the personal security by virtue of the principle of the accessory character of suretyship (see paras. 71 and 72).

(aa) *Secured claim void ad initio*

61. *Principle*. — In principle, the formation, effects and continuance of the obligation of a collaterally liable guarantor are continuously dependent on the valid formation and continuance of the principal claim. If the principal claim is non-existent or non-executory, the security is invalid from the start. If the principal claim is subsequently extinguished, either with effect *ex nunc* (e.g. by performance or remission). or *ex tunc* (e.g. by avoidance or rescission), the guarantor's obligation is automatically at an end.

*D* : RG. 11. 4. 1906, RGZ 63, 143, 145; OLG Karlsruhe 9.12.1905, OLGE 12, 98; Soergel/Siebert (-Reimer Schmidt), notes 11, 12 to art. 765 BGB

*F. B. L.* : art. 2012, para. 1 cc

*N* : art. 1858, para. 1 BW

*I* : art. 1939 cod. civ.

This general rule, is however, subject to some limitations, such as the debtor's incapacity to contract (see para. 62), and certain other rights of rescission purely personal to him (see para. 63), and, in certain cases, a reduction in the amount of the secured claim (see para. 64).

62. *Incapacity of debtor to contract*. — In the law of most of the countries (except Germany) the guarantor cannot avail himself of a debtor's incapacity to contract (or the nullity or voidability of the secured claim normally resulting from it). This exception to the accessory principle is explicitly stated in all the Roman law countries.

*F. B. L.* : art. 2012, para. 2 cc

*N* : art. 1858, para. 2 BW

*I* : art. 1939 cod. civ.

In Germany, however, a guarantor may avail himself of a debtor's incapacity and accordingly be relieved from performance.

In the Roman law systems the guarantor, therefore, "guarantees" the debtor's capacity to contract — a rule which probably originated in the earlier practice where suretyships were generally entered into by persons with close personal relationships. This rule seems no longer to be consonant with modern conditions. Indeed, in the Netherlands the members of an authoritative association of jurists has voted against the maintenance of the existing rule.

*N* : Handelingen der Nederlanse Juristen-Vereeniging 92 (1962) II 58 ('by a large majority')

63. *Other grounds of invalidity purely personal to a debtor.* – In French, Belgian and Netherlands law the guarantor may not set up defences which are purely personal to the debtor other than his incapacity to contract.

F. B. L.: art. 2036, para. 2 cc  
N: art. 1884, para. 2 BW

These grounds of invalidity are not entirely clear. In the Netherlands it has been held from time to time that error by the debtor or fraud or threat exercised against him (even though the contract is impugned?) may be relied on against the guarantor, but this view has been rebutted by a large majority.

N: Cf. Asser/Kamphuisen 759

64. *Reduction or remission of a secured claim.* – Personal securities are designed to secure a creditor if the debtor becomes insolvent. Hence, in the law of all six countries the surety remains liable in full to the creditor if the debtor's obligation is reduced by a *compulsory composition to close bankruptcy proceedings* relating to the debtor's assets.

D: art. 193 Konkursordnung  
F: art. 49 of the Loi of 13.7.1967  
B. L.: art. 541 c. comm.  
N: art. 160 Faillissementswet  
I: art. 135, para. 2 legge fallimentare

This also applies to a scheme of composition designed to *avoid bankruptcy proceedings*.

D: art. 82, para. 2 Vergleichsordnung  
N: art. 241 Faillissementswet  
I: art. 184, para. 1, second sentence, 2 Legge fallimentare

In France, Belgium and Luxembourg only the joint surety remains liable in a preventive composition.

F: art. 35 of Ordonnance no. 67-820 of 23.9.1967  
B: art. 29 of the Loi coordonnées of 25.9.1946  
L: art. 24 of the Loi of 14.4.1886

These rules designed for the purposes of proceedings in bankruptcy and composition cannot, however, automatically be extended to cover other cases in which a debtor's assets are found to be insufficient from the outset or subsequently. The generally prevailing view is that no reliefs accorded by a law or by a judgment for personal or social reasons to a principal debtor affect the surety's obligations.

F: Cour Aix 8.6.1965, Gaz. Pal. 1966.1.26; Trib. civ. Seine 9.11.1915, D.P. 1916.2.35  
N: Asser/Kamphuisen 774; Pels Rijcken 111 f

The German courts have, however, discharged a surety from his liability in comparable situations — the legal teaching notwithstanding.

D: BGH 3.7.1952; BGHZ 6, 385, 398-395; KG Berlin 19.3.1956, NJW 1956, 1481; for a different view Esser 675; Larenz 323

If a *creditor remits* the whole or part of a secured claim, a surety may in principle claim the benefit. This consequence of the accessory principle is explicitly stated in the Roman law countries,

F. B. L.: art. 1287, para. 1 cc  
N: art. 1478, para. 1, BW  
I: art. 1239, para. 1 cod. civ.

but also recognized in Germany.

D: Staudinger (-Brändl), note 17 (a) to art. 765 BGB with references

Even where a creditor restricts the effect of the remission expressly to the debtor's person and reserves his rights vis-à-vis the surety, the prevailing view is that the surety may claim the benefit.

D: RG 3.1.1916, Warn. 1916 no. 50; see also RG 19.3.1913, JW 1913, 597, 598  
F. B. L.: Baudry-Lacantinerie/Wahl no. 1153; Voirin, note in D.P. 1933.2.1; de Page VI no. 896. See also RG 17.12.1907; JW 1908, 87 in application of French law.  
I: Ravazzoni 281 f.; d'Orazi Flavoni 37 f. For a different view, however, Fragali 486 f., 317, 318 supported by the jurisprudence on the Civil Code of 1865.

(bb) *Voidability of secured claim*

65. *Formulation of the problem.* – If and to the extent that a debtor procures the extinction of a secured claim by exercising one of the constitutive rights attaching to his situation (by, for example, an action for cancellation or by withdrawal), the guarantor's obligation is also extinguished by virtue of the principle of the accessory character of suretyship (see paras. 61-64 above for details). The situation is doubtful, however, where a debtor has available to him such possibilities of cancelling or satisfying a secured claim, but has not (yet) exercised them. Should the guarantor be able to rely on this constitutive right — irrespective of the debtor's conduct — or should he be strictly bound by the debtor's acts (or omissions)? The law of the various countries provides various solutions. In the Roman law countries the guarantor may exercise the debtor's constitutive rights in certain cases, whereas in Germany the guarantor only has a right to refuse performance.

66. *Cancellation by the guarantor.* – Under the general rule applicable in all the Roman law countries (except Italy) the guarantor may avail himself of the defences

of the principal debtor which are not purely personal to him (see para. 63 above). In Italy a guarantor may make use of all a principal debtor's defences (except that of incapacity).

I : art. 1945 cod. civ.

One of the defences within the meaning of these rules is a debtor's faculty to bring about the extinction of the secured claim by an action for cancellation or by exercising similar constitutive rights attaching to him (compensation, however, — see para. 68 below — is not one of them).

F. B. L. : Aubry/Rau VI para. 426 note 17; J. Cl. Civil, fasc. E, no. 44

N : Asser/Kamphuisen 759, 774

I : Fragali 319; Campogrande 323 ff.

Although the exercise of the debtor's constitutive rights is an *individual* right of the guarantor, this right disappears if the debtor renounces it, in particular by confirming the debt.

B : de Page no. 859

I : Campogrande 324

N : Asser/Kamphuisen 757; Pels Rijcken 121

In its future legislation the Netherlands will depart from the rules stated above, since intervention by a guarantor in the legal relation between creditor and debtor is held to be unacceptable and it is considered that an action for cancellation should therefore be strictly personal.

N : Pels Rijcken 119; de Gaay Fortman 214, 215

One legal expert has recommended the adoption of the German system (see para. 67 below),

N : Pels Rijcken 121

while another author demands that the debtor's consent should be required for the surety to exercise his faculty to bring an action for cancellation.

N : de Gaay Fortman 215

67. *Guarantor's right to refuse performance.* — The German law on the subject is based upon the principle that a guarantor should not be able to intervene in a debtor's rights, but it also wishes to protect the guarantor nonetheless during the period in which the debtor's constitutive rights remain pending and equally to preserve his reversionary right to be discharged from his obligations deriving from the exercise of these constitutive rights. Under German law, therefore, the guarantor may refuse to perform as long as the *debtor* keeps his right to bring an action for the cancellation of the secured claim.

D : art. 770, para. 1 BGB

This provision is extended to all the debtor's other constitutive rights, such as his right to modify or reduce at the time of purchase, a legal or contractual right of withdrawal, and so on.

D : Soergel/Siebert (-Reimer Schmidt), note 1 to art. 770 BGB; Palandt (-Thomas), note 4 to art. 770 BGB; Schlegelberger (-Schröder), note 18 to art. 86b HGB; Schlegelberger (-Hefermehl), note 11 to art. 394 HGB

If the debtor's constitutive right is extinguished by the expiration of the time-limit or by his renunciation, the guarantor's right to refuse performance comes to an end *ipso facto*.

D : Soergel/Siebert (-Reimer Schmidt), note 2 to art. 770 BGB; Palandt (-Thomas), note 2 to art. 770 BGB

With regard to the right to refuse performance German law does not, therefore, differ from the systems based on Roman law.

With regard to the action for cancellation a Netherlands author has recommended the adoption of the German system (see para. 66 above).

68. *A special problem: setting off* — Setting off merits separate treatment because different conditions are attached to this form of redeeming a debt in Germany and in the Roman law countries. In Germany set-off requires the simultaneous existence of two claims capable of being set-off (a "situation of set-off") and also that the debtor in one of the two claims shall give notice of set-off. In the Roman law countries, however, the "situation of set-off" alone is necessary and notice given by the debtor is superfluous.

This difference in the treatment of compensation has the following consequences for guarantors:

In the Roman law countries the only question is whether a guarantor can avail himself of the extinction of a secured claim which has occurred because he has set up compensation for a secured claim by a counter-claim against the debtor. In view of the principle of the accessory character of suretyship, one would expect the reply to be in the affirmative. It is, in fact, given by an explicit provision permitting a surety to avail himself of the extinction of a secured claim by compensation.

F. B. L. : art. 1294, para. 1 cc

N : art. 1466, para. 1 BW

I : art. 1247, para. 1 cod. civ.

In Germany, however, compensation is a constitutive right of the debtor, which he may, but need not, exercise. This means that the situation of compen-

sation has to be dealt with *before* the declaration of compensation in precisely the same way as the voidability of the secured claim by any other of the debtor's constitutive rights. German law, indeed, completes this assimilation; for the guarantor may refuse performance if the creditor could satisfy himself by compensating his claim with a secured claim pertaining to the debtor.

D : art. 770, para. 2 BGB

A similar rule has been proposed in the preliminary draft of the new Netherlands Civil Code,

N : art. 6.1.10. 17 prelim. draft NBW

since the intention is to introduce the German construction of compensation in its entirety.

Since the differences in the rules in Germany and in the Roman law countries are determined by the general concept of compensation, a harmonization is hardly to be contemplated — unless the entire law of compensation is to be reframed.

Rules for another particular case are embodied in the law of the Roman law countries. If a creditor owes a debtor a sum of money or several sums of money, he may as a general rule exercise his right to compensation, but in a particular case he may have special reasons for not doing so. This need not necessarily work to the surety's detriment. Under Italian law, if the creditor's own debt has been settled by payment, all the securities guaranteeing the remainder of his claim are discharged from their obligation.

I : art. 1251 cod. civ.

The other Roman law countries arrive at the same result by interpretation of a rule which, however, refers explicitly only to rights and privileges *in rem*.

F.B.L. : art. 1299 cc; see Aubry/Rau IV no. 329, p. 357 note 4, Encyclopédie Dalloz, Répertoire civil s.v. 'Compensation' no. 182  
N : art. 1471 BW; see Pitlo 297

In future this same idea will be given general application in Dutch law. The guarantor will then be discharged from his obligations if the creditor has, culpably and without legal grounds, surrendered a possibility of setting off his claim against the debtor with the secured claim.

N : art. 6.1.10.17, para. 2 prelim. draft NBW

### (cc) *Impediments to exercise of rights*

69. *Principle.* — By virtue of the principle of the accessory character of security, the guarantor may in principle avail himself of those of the debtor's defences

which affect not the existence, but the exercise, of a secured right. The guarantor may in particular exercise the debtor's right to refuse performance on certain grounds either permanently (e.g. if the secured claim is barred by prescription) or temporarily (e.g. by reason of an extension or a lien of retention). As in the case of an action for rescission by the debtor, it is immaterial whether he has already availed himself of all the defences to which he is entitled, for all the relevant rules of the law of suretyship state quite clearly that a guarantor may set up all the defences which appertain to a debtor.

D : art. 768, para. 1, first sentence BGB

F.B.L. : art. 2036, para. 1 cc

N : art. 1884, para. 1 BW

I : art. 1945 cod. civ.

Moreover, in the interest of the guarantor, the rule is generally applied that a debtor's renunciation of the defences available to him does not affect the guarantor's legal position; he may nonetheless set up the debtor's defences.

D : art. 768, para. 2 BGB

F : Aubry/Rau VI p. 284 f. and note 17

B : Cass. 24.5.1901, Pas. 1902. I. 263

N : Asser/Kamphuisen 775 with additional references; for a different view Pels Rijcken 122

I : Fragali 315; Miccio 537 f.

70. *Exceptions.* — A limitation on the accessory character of the debtor's rights arises in the law of France, Belgium and Luxembourg from the special position of what are known to it as defences purely personal to the debtor. A surety cannot avail himself of them.

F.B.L. : art. 2036, para. 2 cc

N : art. 1884, para. 2 BW

One of these purely personal defences within the meaning of this rule is a period of grace granted to a debtor by the judgment of a court.

N : Asser/Kamphuisen 774-775 with references

F.B.L. : de Page no. 882 D; different view Ponsard, Encyclopédie Dalloz, Répertoire de droit civil III (1953) s.v. *Payement* no. 129

On the other hand, if it is the creditor who grants the debtor an extension, the guarantor may avail himself of it.

F : Cour Lyon 6.1.1903, D. 1910.5.1; Planiol/Ripert (-Savatier) no. 1534

B : de Page nos. 882 c, 904

N : H.R. 2.5.1890, W. no. 5871; Asser/Kamphuisen 798

I : see art. 1945 cod. civ.



(dd) *Other changes in content*

71. *Legal changes.* – The content of a secured claim may be changed legally if the debtor impairs it. If a debtor delays payment or is unable to pay or impairs a creditor's claim in any other way, the creditor has the right to bring an action for damages against him. The law in all six countries provides that a personal security shall cover any change — that is to say, any extension — in the content of a secured claim, unless the parties otherwise agreed, and, in particular, if they did not stipulate a maximum amount for the security.

- D* : art. 767, para. 1, p. 2 BGB; Schlegelberger (-Schröder), note 18 to art. 86 b HGB; Schlegelberger (-Hefermehl), note 10 to art. 394 HGB  
*F* : J. Cl. Civil, fasc. B nos. 62, 64 ff.; Planiol/Ripert (-Savatie) XI no. 1531  
*B* : de Page VI no. 868  
*N* : H.R. 17.2.1905, W. no. 8184, Pitlo 541, 544; Korthals Altes 57 f.  
*I* : Miccio 531; Fragali 239 f.; App. Milano 8.7.1938, Rep. Foro It. 1938 s.v. 'Fideiussione' no. 22-23

In the Netherlands some jurists have demanded that in the future legislation an action for damages may not be brought against a surety for the non-performance of a secured claim until the surety himself has received formal notice of default.

- N* : *Handelingen der Nederlandse Juristen-Vereniging* 92 (1962) II 58

72. *Legal extensions.* – In all the countries the personal security extends to certain accessory claims of the creditor against the debtor besides the secured claim, such as the creditor's expenses in suing for the rescission of a secured claim and the costs of proceedings against the debtor.

- D* : art. 767, para. 2 BGB  
*F.B.L.* : art. 2016 cc  
*N* : art. 1862 BW  
*I* : art. 1942 cod. civ.

The Roman law countries also include accessory legal and contractual fees (such as interest and contractual penalties).

- F* : J. Cl. Civil, fasc. B nos. 62, 64 ff.; Planiol/Ripert (-Savatie) XI no. 1531  
*B* : de Page VI no. 868  
*I* : art. 1942 cod. civ.

In Germany, however, the question whether accessory claims are or are not secured depends on the interpretation of the contract of security.

- D* : If the surety knows that interest is to be paid on the secured claim, it is generally

held that the interest is likewise secured:  
RG 2.1.1912, Gruchot 56, 944; Staudinger (-Brändl), note 1 to art. 767 BGB

73. *Extensions by judicial transaction.* – If, however, a debtor extends the scope of a secured claim by a judicial transaction after the contract of security has been made, such aggravation of the obligation may not, by reason of the general principles, fall on the guarantor. This extension of the secured claim does not, therefore, affect the guarantor.

- D* : art. 767, para. 1, p. 3 BGB; Schlegelberger (-Schröder note 10 to art. 86 b HGB  
*F* : Planiol/Ripert (-Savatie) XI no. 1534  
*B* : de Page VI no. 904  
*N* : Korthals Altes 58  
*I* : Cass. 22.1.1958, Banca, Borsa 1959. II. 162 noting approval Poggi 169; Miccio 538

(e) *Non-accessory personal rights*

74. *General significance.* – The close link between the existence and the content of a secured claim, on the one hand, and a personal security founded in the principle of the accessory character of suretyship, on the other, is apposite if the parties intended a security to have its normal scope (see para. 29 above).

If, however, the personal security is to exist independently of the existence and content of the secured claim and its scope is in consequence wider than it would ordinarily be (see para. 29 above), the principle of the accessory character of suretyship has to be abandoned, for it is precisely the absence of a link between the security and the secured claim which permits the extension of the guarantor's liability.

75. *Particular cases.* – The precise significance of the independence of non-accessory rights from the secured claim depends essentially upon the clauses stipulated by the parties in each particular case. A personal security may, therefore, exist irrespective whether the secured claim has come into existence or is still executory.

- I* : Fragali 214 ff.; standard bank contract sub lett. (g) (Molle 729 ff.)  
*N* : Hof Amsterdam 30.12.1910, W. no. 9. 195; Hofman 47, 48

The scope and the exercise of a personal security are typically not affected by the fact that the debtor of a secured claim may enforce claims against the creditor. In principle, therefore, a guarantor is not concerned with the question whether a debtor can put up his defences and what they are.

- D* : BGH 13.4.1959, WM 1959, 881, 884 (Defects in goods delivered do not affect the

guarantee for the payment of the purchase price); BGH 8.3.1967, NJW 1967, 1020, 1021

which would enable the guarantor to exercise his right of discharge against the debtor (see para. 84 below).

### (3) SPECIAL REASONS FOR LIMITING LIABILITY

#### (a) Breach of his obligations by the creditor

76. *Principle.* – Since personal securities are by their nature contracts which in principle impose unilateral obligations upon the guarantor (see para. 28 above), it follows that they confer rights on the creditor, but do not in principle impose obligations upon him. In particular, he is not in principle obliged as guardian of the guarantor's interests to inform him of the debtor's financial position at the time when the contract of suretyship is made nor, if the debtor is in imminent danger of becoming insolvent, to protect him from proceedings by opportune suit or distraint.

- D: BGH 5.12.1962, WM 1963, 25, 27; BGH 7.3.1956, WM 1956, 885, 888  
F: Planiol/Ripert (-Savatier) XI no. 1560  
B: de Page VI nos. 882, 913  
N: Korthals Altes 112  
I: Cass. 11.4.1961, Foro pad. 1961.I.1100; Cass. 29.2.1960, Foro pad. 1960.II.28

This also applies to the relation between a commercial agent who undertakes a *del credere* and the principal.

- D: Soergel/Siebert (-Reimer Schmidt), note 5 to art. 776 BGB; OLG Stuttgart 12.6.1913, Recht 1913 no. 2066

In the law of the six Member States a creditor is in principle under no obligation to bring an action against a guarantor, but there are some exceptions to this, all of them having the same purpose. They are all connected with the following procedure. In suretyship, at any rate, a guarantor who pays is legally subrogated to the creditor's claim against the debtor together with all the accessory rights inherent in it (see para. 97 below). In many cases, only if the guarantor acquires all the creditor's rights has he any assurance of effective recourse to the debtor. In all the legal systems surveyed the guarantor is protected against any arbitrary impairment of this expectation of recourse or any impairment for which the creditor alone is responsible.

This relates mainly to two obligations of the creditor, whose nonobservance may limit the guarantor's liability or extinguish it entirely. The first is the obligation to protect a right or privilege inherent in a secured claim by which the guarantor could have received satisfaction by way of recourse (see para. 77-83 below). The second is, in some legal systems, the obligation to give notice of any extension granted to the debtor

### (1) IMPAIRMENT OF RIGHTS INHERENT IN A SECURITY

77. *Principle.* – Under the law of all six member countries a *surety* is discharged from his obligations if the creditor acts in any way that impairs a right inherent in a secured claim from which the surety could have received satisfaction by means of recourse.

- D: art. 776, first sentence BGB; likewise for the *del credere*; Schlegelberger (-Schröder), note 18 to art. 86 b HGB; Schlegelberger (-Hefermehl), note 13 to art. 394 HGB after transfer to the principal of a claim arising from a transaction by a commission agent.  
F. B. L.: art. 2037 cc  
N: art. 1885 BW  
I: art. 1955 cod. civ.

78. *Protected rights.* – Protected rights are fully defined in the law of all the countries. In the Roman law countries they are termed the creditor's "rights, mortgages and privileges"; in Italy they include the lien.

- F. B. L. N. I.: see the articles cited in para. 77

This terminology is interpreted broadly and is not restricted to the rights guaranteeing preferential payment in bankruptcies. Thus, in France and Belgium a creditor also possesses a lien.

- F: Cass. civ. 8.7.1913, D. 1914.1.241; Planiol/Ripert (-Savatier) XI no. 1559  
B: Cour Liège 6.7.1933, Jur. Liège 1933, 265, de Page VI no. 964 A  
for a different view  
I: Cass. 27.5.1932, Mass. Foro it. 1932 no. 1993

Indeed some French authors hold that article 2037 cc also covers a creditor's right of rescission.

- F: Planiol/Ripert (-Savatier) XI no. 1559; Veaux no. 282

In German law, however, the protected rights are more restricted. They are confined to the real and incorporated rights protecting preferential payment and recourse to a joint surety in a bankruptcy.

- D: art. 776 BGB

The legal safeguards do not include the lien.

- D: Staudinger (-Brändl), note 2 to art. 776 BGB

Another difference relates to the *date* at which the safeguarded rights must have come into being. In the law of France, Belgium, Luxembourg and Italy the rights must have come into being at the time when the suretyship was created or must arise as a legal consequence from the secured claim. For the surety could only have expected to acquire these rights when proceedings were instituted.

- F* : Cass. civ. 27.2.1968, J.C.P. 1968. IV. 58; 5.10.1964, D. 1965.I.42; 8.7.1913, D. 1914.I.241  
*B* : Cour Liège 26.10.1898, Pas. 1898.II.122; Cour Bruxelles 4.12.1929, P.A. 1929, 455; different view, however, de Page VI no. 964 B and Dekkers II 813  
*I* : Cass. 28.3.1938, Giur. it. 1938.I.711, and 25.5.1939, Mass. Foro it. 1939 no. 1752; Fragali 471

German and Netherlands law, however, extend the guarantor's protection to rights which he acquires only after the guarantor has made the contract of suretyship.

- D* : art. 776, second sentence BGB  
*N* : Hof 's-Gravenhage 10.3.1913, N.J. 1913, 336; Hof Amsterdam 28.3.1934, W. no. 12.773; Asser/Kamphuisen 779

79. *Conduct of creditor.* – The circumstances in which a creditor is presumed to have failed to comply with his obligations are not the same in all the countries.

In the *Roman law* countries it is sufficient for the creditor to have impaired his ability to exercise his rights by culpable conduct of any kind, including negligence.

- F* : Cass. civ. 5.6.1945, D. 1946 J. 4 and 3.12.1941, D.A. 1942. 49 (sale of pledge below market price); Cour Paris 27.4.1936, D.H. 1936, 382; J. Cl. Civil, fasc. E. nos. 127 ff.  
*B* : de Page VI no. 963  
*N* : H.R. 9.1.1930, N.J. 1930, 996  
*I* : In Italy it is disputed whether *culpable* conduct is necessary (affirmatively Cass. 28.7.1965, Giust. civ. 1966.I.1180 and 11.7.1942, Mass. Foro it. 1942 No. 1962) or whether merely a casual connection between the creditor's conduct and the injury to the guarantor suffices (affirmatively Cass. 16.2.1937, Mass. Foro it. 1937 no. 373 and 27.7.1939, *ibid.* 1939 no. 2830).

In German law more is required for the acceptance of a presumption that an act by a creditor has caused damage. It is not sufficient for the creditor to have impaired the value of the security; he must have renounced his right, as is expressly stated in article 776 BGB. This article is accordingly construed to mean that the creditor must have impaired the guarantor's expectations of recourse deliberately and by positive act.

Deterioration through mere negligence or toleration of a security's depreciation do not suffice.

- D* : BGH 22.6.1966, NJW 1966, 2009 and 17.9.1959, WM 1960, 51; Soergel/Siebert (-Reimer Schmidt), note 8 to art. 776 BGB

Nevertheless, the Federal Supreme Court held in its judgment of 22.6.1966, mentioned above, that the culpable impairment of a security received by a creditor from the hands of a debtor confers upon the latter the right to claim such damages as can be compensated from the secured claim. A surety may also avail himself of this defence under article 770, para. 2 BGB. It is true that, in contrast with the provisions in the Roman law systems, this defence depends on the creditor's having by his conduct caused damage to the debtor (and not to the surety only).

80. *Extent of relief from liability.* – In five countries (not in the Netherlands) if the creditor has failed to comply with his obligations, the guarantor is relieved only to the extent to which he could have been compensated from the lost security. The value of the security is conclusive; worthless securities are not taken into consideration.

- D* : art. 776, first sentence BGB ('insoweit')  
*F* : Mazeaud no. 24; J. Cl. Civil, fasc. E. nos. 116 ff.  
*B* : de Page VI no. 963  
*I* : Miccio 556; Campogrande 634

On the other hand, in Netherlands law, according to judgments of the courts, which are, however, a matter of controversy, the guarantor is relieved in full, regardless of the extent of the damage he has actually suffered.

- N* : H.R. 31.12.1908, W. no. 8791; H.R. 28.4.1911, W. no. 9179; another view Asser/Kamphuisen 779 f.; Hof 's-Gravenhage 16.6.1930, N.J. 1930 1559; Hof Amsterdam 4.3.1925, W. no. 11.351. A flexible rule is also proposed for the future legislation, see para. 83 below.

81. *Faculty to stipulate exceptions.* – In all the countries the parties may stipulate exceptions from the rule relating to the consequences of a creditor's failure to comply with his obligations.

- D* : RG 27.2.1913, RGZ 81, 414, 421; RG 26.11.1934, HRR 1935 no. 581  
*F* : Planiol/Ripert (-Savatier) no. 1560; Veaux No. 288  
*N* : Asser/Kamphuisen 780 f. with references  
*I* : Ravazzoni 288; Campogrande 629

French and Netherlands banks make regular use of the faculty to stipulate exceptions in their conditions.

- F* : Information supplied by various banks  
*N* : Pels Rijcken 135

In the Netherlands, however, it is held that a creditor may not avail himself of an exceptions clause of this kind against a guarantor if he has deprived him of these rights by fraud.

N : H.R. 21.4.1933, W. no. 12.627

82. *Guarantee.* – In Italy the general rules on suretyship already described also apply to the guarantee (see para. 13 above). In Germany, however, it is doubtful whether the provision in article 776 BGB can be applied to the guarantee by analogy.

D : Affirmative view RGRK-BGB (-Fischer) note 6 to art. 776 BGB; Standinger (-Brändl), note 7 to art. 776 BGB; for a different view Erman (-Wagner), note 3 to art. 776 BGB

If the guarantor knew of the existence of other securities at the time when he *subscribed* the guarantee, the creditor will not as a rule be able arbitrarily to impair his expectations of performance to the detriment of the guarantor by renouncing these claims.

D : RG 16.10.1936, JW 1937, 749, 751; see also RG 11.12.1911, JW 1912, 237, 238

In Germany, the Supreme Court has held that a guarantor may not, however, rely on the renouncement of a security acquired by a creditor *after* the contract of guarantee was made. It does not appear that article 776, second sentence BGB may be applied by analogy, owing to the differences in legal character between the contract of suretyship and the promise of guarantee.

D : RG 29.10.1909, RGZ 72, 138, 142

83. *Projects for law reform.* – During the preparatory work on the law reform in the Netherlands an authoritative association of jurists voted by an overwhelming majority for the elimination of article 1885 BW. In future, the consequence of the impairment of a security by a creditor is not to be the loss of the rights arising from the suretyship; the surety will only be entitled to bring a claim for damages against the creditor.

N : Handelingen der Nederlandse Juristen-Vereeniging 92 (1962) II 58; see also Asser/Kamphuisen 781

This rule will be more flexible than the jurisprudential opinion prevailing at present that the suretyship is totally lost regardless of the extent of the damage suffered by the guarantor (see para. 80 above).

N : See in detail Pels Rijcken 133 f.

## (2) FAILURE TO GIVE NOTICE OF EXTENSION

84. In Belgium the Court of Cassation has in one case discharged from his obligations a surety to whom

a creditor had failed to give notice of an extension which he had granted to the debtor of a secured claim. Under article 2039 cc the surety may in such cases proceed against the debtor to compel him to pay the secured claim (see para. 82 below), but he can only do so if he is given notice of the extension.

B : Cass. 24.2.1967, Pas. 1967.I.792

In France, too, the courts have held in certain judgments that a creditor is bound to notify the surety. These judgments have not, however, crystallized into a jurisprudence and the reasons given for them are not very persuasive.

F : Cass. req. 16.3.1938, D.H. 1938.292; Cour Paris 20.11.1930, Gaz. Pal. 1930.2.1042

In practice French banks ensure that they as creditors are expressly empowered by the surety to extend a secured claim, for this precludes an action for damages.

F : Information supplied by various banks

In the Netherlands the creditor's obligation to notify the surety is rejected on principle.

N : Utrecht 27.12.1933, N.J. 1934, 1655; Asser/Kamphuisen 798

## (b) *Plurality of personal securities*

85. *Principle.* – In the law of all six countries if a number of sureties are given, they are all liable as *joint debtors*, regardless whether they subscribed the suretyship jointly or independently of one another.

D : art. 769 BGB

F. B. L. : art. 2025 cc

N : art. 1873 BW

I : art. 1946 cod. civ.

In Germany, if a number of persons assume one and the same obligation in a *del credere* or a guarantee, they are likewise all liable as joint debtors.

D : arts. 421, 427 BGB

The Roman law countries (except Italy), however, make one exception to the principle of liability as joint debtors.

86. *Exception: right to demand division.* – The law of France, Belgium, Luxembourg and the Netherlands permits each joint surety to stipulate that the creditor shall have recourse to him for his part and portion only.

F. B. L. : art. 2026 cc

N : art. 1874 BW

Such division applies to the deficit caused by an insolvent joint surety, if he becomes insolvent *before* the demand for division was made.

F. B. L.: art. 2026, para. 2 cc  
N: art. 1874, para. 2 BW

On the other hand, it is the creditor who bears the risk of a *subsequent* insolvency. As expressly stated in the rules of law cited above, the parties may stipulate the right to demand division as an exception. It is commonly used in banking practice.

F: Bank standard forms; see also Mazeaud No. 42  
N: Pels Rijcken 163; Asser/Kamphuisen 772 f.

In Germany and Italy, on the other hand, a joint surety is not entitled to demand division as of right, but the parties may stipulate it in the contract.

D: Staudinger (-Brändl), note 4 to art. 769 BGB  
I: Explicitly in art. 1946 cod. civ.

In banking practice suretyships subject to division are very seldom stipulated in the contract.

D. I.: Information supplied by various banks

In Italy if the parties do in fact stipulate a clause of this kind, the applicable rules are in all points similar to those in the other Roman law countries.

I: art. 1947 cod. civ.

The Italian (and German) method, which does not recognize proportionate division as a legal institution, but permits its contractual stipulation, is manifestly most closely akin to the concept applied in practice in all six countries. A Netherlands legal expert has also advocated this rule.

N: Pels Rijcken 163

#### (4) EXTINCTION OF GUARANTOR'S LIABILITY

87. *Survey.* — The extinction of the personal security in the first place follows the general rules laid down in the law of contract in the countries concerned. The security is extinguished by payment of the debt or by compensation. It is unnecessary to go into these rules in detail here.

Secondly, in addition to these facts of the general law of contract there are a number of special grounds for extinction. Some of them have already been considered in connection with the accessory character of the personal security and the various limitations on and exceptions to liability (cf. paras. 61, 64, 66, 68 and 77-84 above).

We have still to describe the effect on the existence of the personal security of expiry of time-limit (paras. 88-90), maturity (para. 91) and extension (para. 92) of a secured claim, deterioration of the debtor's financial position (para. 93) and threat of action against the guarantor (para. 94).

#### (a) *Expiry of time-limit*

##### 88. *Determinate security*

(a) *Interpretation of time-limit.* — If the parties have stipulated a definite time-limit for the duration of the security, the first question which arises is the meaning of time-limit. Is it to mean that the creditor must have asserted or must also have exercised his rights against the surety before the time-limit has expired, or does time-limit simply mean the date determining the amount of the suretyship (in accordance with the state of the secured claim)?

That is a question which has to be decided in the first instance by interpretation of the clauses of the contract of security. If doubts subsist, the German and Netherlands courts tend to hold that the only significance of a time-limit is to establish the amount of the security, but that it does not set a terminal date for the security itself.

D: RG 11.6.1934, HRR 1934 no. 1446; RG 12.6.1913, RGZ 82, 382, 383  
N: Hof Arnhem 24.3.1937, N.J. 1937 no. 1098 and 14.11.1916, N.J. 1917, 874; Korthals Altes 79 note 1

In France, however, the courts tend to decide, in the interest of the surety, in favour of a strict interpretation, to the effect that the surety is extinguished with the expiry of the time-limit.

F: See Cass. comm. 15.11.1965, Bull. 1965. III no. 572; information supplied by banks

(b) *Time-limit as terminal date.* — The latter view, however, puts the creditor at a disadvantage, because it compels him to avail himself of the suretyship sooner than he need. In Germany and Italy legal rules have therefore been developed for such cases — and for such cases alone — in an attempt to reconcile the conflicting interests of creditor and surety.

In a particular case the conflict is resolved in Italy by an "additional time-limit". If the time-limit for the suretyship falls on the date at which the secured claim matures, the surety remains bound by his obligation beyond that date if the creditor has brought an action against the debtor within two months and has pursued the proceedings with due diligence.

I: art. 1957, paras. 2 and 3 cod. civ.

Admittedly, the fact that the action is brought against the debtor, and not against the surety himself, is hard to reconcile with the legal principle of the surety's joint liability (see paras. 53 and 54 above). In banking practice sureties generally abstain from requiring the bank as creditor to enforce this time-limit.

I : Bank standard contract, lett. (f) (Molle 726 ff)

In Germany the creditor is likewise obliged to act, but a rigid "additional time-limit" is not imposed if a surety has guaranteed an existing claim for a determinate period. In that case, on the expiry of the time-limit the creditor must promptly and duly notify the surety that he intends to bring an action against him if the latter cannot invoke a claim for preliminary proceedings against the debtor. If this is done, the surety remains liable. His liability is limited to the extent of the secured claim at the date on which the time-limit expired. If the creditor omits to serve the notice, the surety is discharged from his liability.

D : art. 777, para. 1, second sentence and para. 2 BGB

If the surety can invoke the claim for preliminary proceedings, the creditor must, on the expiry of the time-limit, proceed promptly to recover the debt by a distraint on the debtor's personal property or by enforcing his liens or rights of retention on it, must pursue these proceedings with due diligence and must immediately on their termination notify the surety that he will bring an action against him. Recourse to the surety then remains, but is limited to the extent of the secured claim at the date on which the proceedings ended. Otherwise, the surety is discharged from his obligation.

D : art. 777, para. 1 first sentence and para. 2 BGB

Both rules are applied by analogy to a determinate suretyship for a future claim (provided once more that the time-limit is to signify the termination of the suretyship, not simply the determination of the amount of the suretyship).

D : RG 12.6.1913, RGZ 82, 382, 384 f.; OLG Hamburg 21.2.1934, HRR 1934 no. 1199

The parties may stipulate exceptions to article 777 BGB,

D : Staudinger (-Brändl), note 9 to art. 777 BGB

but this faculty is seldom used in banking practice.

These rules also apply without limitation to the *del credere* of a mercantile or commission agent.

D : Schlegelberger (-Schröder), note 18 to art. 86 b HGB; Schlegelberger (-Hefermehl), note 13 to art. 394 HGB

89. *Indeterminate security.* – The legal systems of all the countries tend to develop special rules to be applied where no time-limit is set for the security. The purpose of these rules is to discharge the guarantor either vis-a-vis the creditor or at least vis-à-vis the debtor. The extinction of an indeterminate suretyship vis-à-vis the creditor is obtained either by notice of termination or by setting a strict terminal date.

The denunciation of an indeterminate suretyship even where the parties did not expressly agree on one has been recognized by the courts in Germany and the Netherlands, in conformity with the general principle that continuing obligations should be determinable. Notice of termination must be given within reasonable time, and it discharges the guarantor only from liability for future claims against the debtor arising after the date on which the denunciation becomes effective.

D : EGH 9.3.1959, WM 1959, 855, 856; RG 19.3.1913, Warn. 1913 no. 289, and 6.2.1911, JW 1911, 447

N : Rb. Zutphen 3.31910, W. no. 8.979; Asser/Kamphuisen 768

Italian banks as creditors accord their sureties a right of denunciation. The notice, however, only becomes effective if the bank has been able to repudiate its contract with the debtor and after the debtor's obligations have been fulfilled.

I : Bank standard contract, lett. (d) (Molle 729)

In banking practice in France, Belgium and Luxembourg banks undertaking suretyships for a plurality of claims which have not yet been established invariably stipulate a right of denunciation.

F : Cf. the 'Formules de Cautonnement destinées aux administrations publiques' nos. NFK 11-770 to 840 published by the Association française de normalisation (AFNOR)

Where banks accept indeterminate sureties, they usually accord the sureties a right of denunciation and sometimes make detailed rules for its exercise.

F : Only one of the eight standard forms for suretyship to secure claims not yet established which the Institute was able to procure from large banks in Belgium, France and Luxembourg contains no denunciation clause in favour of the surety.

If a surety who has undertaken an obligation for an indeterminate period has not expressly reserved the right of denunciation, it is very doubtful whether he can, even for serious reasons, denounce the suretyship with effect for future claims. In the literature some Belgian authors accord the surety this right of denunciation by applying the general principle

— which, however, is very seldom expressly stated — that obligations contracted for an indeterminate period must be determinable.

- B : de Page II no. 763 A *in fine*; VI no. 854; Dekkers II no. 172  
F : R. Savatier. D. 1962. J. 769, 771 (note) and on the general principle: id. Cours de droit civil II (2nd ed. 1949) no. 564; Carbonnier, Droit civil IV (6th ed. 1969) no. 64, p. 212 (prohibition of 'contrats perpétuels'); Durand, preface II to the work by several hands: La tendance à la stabilité du rapport contractuel (1960): Robert, Bischoff, Guyenot, *ibid.* 38 f., 110, 236; Brière de l'Isle, D. 1957. Chron. 153

In the jurisprudence the only known case is a rather old Belgian decision granting a surety who had apparently undertaken an indeterminate obligation the right to denounce the suretyship with effect for the future.

- B : Cour Gaud 9.1.1904, Pas. 1904. II. 158, critical attitude to the reasons given for the decision: de Page VI no. 854

With an indeterminate suretyship the surety has in law only a claim for discharge or a security against the *debtor*. In most of the countries this claim comes into being ten years after the suretyship was undertaken,

- F. B. L.: art. 2032, no. 5 cc  
N : art. 1880, no. 5 BW

but in Italy five years after.

- I : art. 1953, no. 5 cod. civ.

90. *Bar by prescription.* — For all collateral personal securities there are in practice two statutes of limitations. The guarantor's obligation is governed by a statute of its own. The bar by lapse of time is everywhere the same as the general statute of limitations. Almost everywhere it is thirty years,

- D : art. 195 BGB  
F. B. L.: art. 2262 cc  
N : art. 2004 BW

but in Italy ten years.

- I : art. 2946 cod. civ.

If his security is of an accessory character, a guarantor may also plead the statute for the secured claim — which may be valid for a much shorter period — since all the legal systems examined here permit him to avail himself of the debtor's defences (see para. 69 above) for his own protection. Thus, an interruption of the prescription for the secured claim (such as an

action brought against the debtor or an admission of the claim by the debtor) in all the countries is effectual vis-à-vis the surety.

- F. B. L.: art. 2250 cc  
N : art. 2021 BW  
I : art. 1957, para. 4 cod. civ.  
D : But in Germany this view is contested. In favour OLG Kiel 7.3.1933, JW 1933, 2343; see also RG 30.4.1919, Warn. 1919 no. 166; against OLG Kiel 27.9.1906, Seuff. Arch. 62 no. 79; Staudinger (-Brändl), note 2 to art. 768 BGB

In Italy, sureties are protected against indeterminate sureties by a *strict terminal date*. The surety is discharged if the creditor has not brought an action against the debtor within six months after the secured claim has matured and has not pursued the proceedings with due diligence.

- I : art. 1957, para. 1 cod. civ.

### (b) *Maturity of secured claim*

91. In the Roman law countries the surety acquires the right to demand from the *debtor* his discharge from the suretyship when the secured debt falls due.

- F. B. L.: art. 2032, para. 4 cc  
N : art. 1880, para. 4 BW  
I : art. 1953, para. 4 cod. civ.

In Germany the debtor must have already been given formal prior notice.

- D : art. 775, para. 1 no. 3 BGB

In Italy in certain circumstances a surety enjoys additional protection, where a secured claim has matured, by the imposition of a strict terminal date upon the creditor (see para. 90 above).

### (c) *Extension of secured claim*

92. In the Roman law countries (except Italy) a surety may likewise apply to the debtor for discharge from his obligation if the creditor has granted the latter an extension of the secured claim.

- F. B. L.: art. 2039 cc  
N : art. 1887 BW

This protection supplements that accruing to the surety by virtue of the accessory character of suretyship, and he may accordingly demand an extension from the creditor (see para. 69 above).

This additional protection whereby a surety may apply to the debtor to relieve him from his obligations is

intended to protect him against bearing the burden of a suretyship for an unduly protracted period.

B : de Page VI no. 882 c  
N : Asser/Kamphuisen 798

(d) *Deterioration of debtor's financial position*

93. Where a debtor's financial position deteriorates, a guarantor acquires rights vis-à-vis both creditor and debtor. Vis-à-vis the creditor the guarantor manifestly cannot be discharged from his obligations, for the very purpose of a security is to protect a creditor against the risk of a principal debtor's insolvency. German and Italian law, however, provide an exception to this rule where the suretyship was subscribed for a future claim.

In accordance with the German concept, a surety may serve notice that he will terminate his promise of security if the debtor's financial position has deteriorated substantially with the consequent risk to the security's recourse to him before the secured claim has come into force.

D : This right of notification is supported by the general clause in art. 242 BGB and by analogy with art. 610 BGB, see BGH 16.4.1959, WM 1959, 1072, 1074; Soergel/Siebert (-Reimer Schmidt), note 18 to art. 765 BGB; Enneccerus/Lehmann 802

In *Italy* a surety is relieved by the law from a future claim if the creditor subsequently supplies the debtor with credit even though he is aware that his financial position has deteriorated to such an extent that he will find it appreciably harder to meet the secured claim.

I : art. 1956 cod. civ.; cf. Trib. Brescia 8.11.1967, Le Corti di Brescia, Venezia e Trieste 1968, 594 f.

Under article 1956 cod. civ., a surety may, however, consent to the increase in the credit. The article requires a "special permission". The courts have held that the general clause concerning prior consent by the surety in customary Italian banking practice is valid.

I : App. Cagliari 7.3.1957, Banca, borsa 1957, II. 415; Trib. Venezia 16.6.1962, *ibid.* 1963, II. 111; Trib. Firenze 17.12.1962, Giur. it. 1963, I. 2.583, 592

The German rule is stricter, in that notice of the termination of the suretyship is mandatory. In Italian law, on the contrary, the creditor must have been aware of the deterioration in the debtor's financial position and must have provided the additional credit despite that knowledge.

The Italian rule was argued at the proceedings of the Netherlands Association of Jurists concerning the revision of the law of suretyship, but was finally rejected by a large majority, evidently because of its uncertainty.

N : Handelingen der Nederlandse Juristen-Vereeniging 92 (1962) II 59; see on this point Pels Rijcken 137 f. on one side and Gaay Fortman 216 f. on the other.

Beside these special rules providing for the surety's discharge from liability vis-à-vis the creditor for future debts, the law of almost all the countries gives the surety a right to require the *debtor* to discharge him from the suretyship if the latter's financial position has deteriorated. In Germany a substantial deterioration of the debtor's financial position suffices,

D : art. 775, para. 1 no. 1 BGB

whereas in the Roman law countries (except the Netherlands) the debtor must have become insolvent or have gone bankrupt.

F. B. L : art. 2032 no. 2 cc  
I : art. 1953 no. 2 cod. civ.

In the Netherlands the surety's claim to discharge in these circumstances has been abolished.

(e) *Threat of action against the surety*

94. Under all the legal systems surveyed a surety has a claim against a debtor for discharge from his obligations if he is directly threatened with an action based upon the suretyship. This occurs where the creditor brings an action based upon the secured claim against the surety himself

F. B. L : art. 2032 no. 1 cc  
N : art. 1880 no. 1 BW  
I : art. 1953 no. 1 cod. civ.

or where the surety is sentenced to pay by an enforceable judgment.

D : art. 775, para. 1 no. 4 BGB

In Germany, where stricter conditions are imposed on the right to demand discharge than in the Roman law countries, there is a further ground, namely substantial aggravation of the difficulties of the proceedings against the debtor because he has changed his place of domicile, place of business or residence after the suretyship was subscribed.

D : art. 775, para. 1 no. 2 BGB

In commercial practice, however, where no special precaution is needed against a debtor's sudden disap-



pearance and the impossibility of tracing him thereafter, this provision would seem to be significant only in cases of removal to another country.

*D*: Cf. Soergel/Siebert (-Reimer Schmidt), note 3 to art. 775 and note 2 to art. 773 BGB

After the EEC convention on the enforcement of civil and commercial judgments comes into force, however, the provision will probably not be applied even in cases where place of business is transferred from the Federal Republic of Germany to another country member of the European Communities.

#### IV – ASSIGNMENT OF SECURED CLAIM

95. The principle of the accessory character of the personal security (see paras. 57 ff above) applies equally to the assignment of a secured claim. All the countries surveyed here provide for the assignment to the subsequent creditor of any personal security constituted for a secured claim together with the claim itself.

*D*: art. 401 para. 1 BGB  
*F. B. L.*: art. 1692 cc  
*N*: art. 1569 BW; see also art. 6.2.1 para. 1 of preliminary draft NBW  
*I*: art. 1263 para 1 cod. civ.

While the rules for the assignment of a suretyship equally apply to a guarantee in Italian law, in Germany it is held that the guarantee is not an accessory right within the meaning of article 401 BGB.

*D*: RG 29.10.1909, RGZ 72, 138, 141 and 13.4.1905, RGZ 60, 369; Soergel/Siebert (-Reimer Schmidt), prelim. note 36 to art. 765

The parties may, however, agree to assign the rights attaching to a guarantee, and in case of doubt it will be presumed that the assignor of a secured claim has a corresponding obligation.

#### V – GUARANTOR'S CLAIM FOR REPAYMENT

96. *Purpose and main features.* – The purpose of personal securities is not that the debtor shall be discharged finally from his obligations by the guarantor's performance, but simply that the creditor shall have a better expectation of receiving satisfaction. Performance by the guarantor does not, therefore, entail satisfaction, but merely the beginning of an action for repayment and an internal settlement among the parties concerned.

The two main technical means for achieving this purpose are the transfer of the secured claim to the guarantor (paras. 97-103, 110) and the guarantor's claim for reimbursement (paras. 104-110).

#### (1) SUBROGATION TO SECURED CLAIM

97. *Principle.* – The law of all the EEC Member States prescribes that performance by the guarantor legally entails his subrogation to the secured claim together with the accessory rights and privileges inherent in it. Where the guarantor has paid only part of the debt, he is subrogated only to the corresponding part of the secured claim.

*D*: art. 774 BGB in conjunction with arts. 412, 401 BGB  
*F. B. L.*: arts. 2029, 1251 no. 3 cc  
*N*: arts. 1877, 1438 BW  
*I*: arts. 1949, 1203 no. 3, 1204 para. 1 cod. civ.

This rule also applies, despite some doubts which have been canvassed in Germany, to a counter suretyship (see para. 44 above). A counter surety who executes a claim transferred to the original surety in lieu of the debtor thereby acquires all the accessory rights inherent in the secured claim together with the claim itself.

*N*: Hofmann II 484; Rb. Breda 21.6.1927, W, no. 11. 736  
*I*: Fragali 371  
*D*: OLG Oldenburg 8.10.1964, NJW 1965, 253; Soergel/Siebert (-Reimer Schmidt), prelim. note 26 to art. 765 BGB; Staudinger (-Brändl), prelim. note 30 to art. 765 BGB; RGRK - BGB (-Fischer), prelim. note 11 to art. 765 BGB. Other view *cessio legis* RG 3.12.1934, RGZ 146, 67, 70

Where a claim was guaranteed by securities of a non-accessory character (transfer of title for fiduciary purposes, retention of title, cession of a claim previously assigned, guarantee), they are not transferred to the surety by operation of law. The creditor must, however, transfer these rights to the surety if the surety pays.

*D*: Soergel/Siebert (-Reimer Schmidt), note 2 to art. 774 BGB

In the Netherlands the position of non-accessory securities is a matter of controversy.

*N*: In favour of transfer by operation of law Asser/Kamphuisen 785 f. with reference to the jurisprudence; against transfer van Brakel 414 note 129 with references to judgments which hold that it is only the creditor who is bound to transfer the rights

The transfer of all the creditor's rights by the operation of law under German and Italian law applies also to a mercantile agent to whom recourse is had on the basis of the promise of a *del credere*.

D : Schlegelberger (-Schröder), note 18 to para. 86 b HGB

I : Cass. 10.12.1954, Giur. it. 1956. I. 1. 453

Corresponding rules are not needed for the *del credere* commission, because here the guarantor is of course also the creditor of the secured claim. If, however, the commission agent had transferred the claim to the principal before an action was brought against him, it reverts to him by the operation of law when he fulfils the *del credere* obligations.

D : Schlegelberger (-Hefermehl), note 13 to art. 394 HGB

I : Minervini 111

98. *Transfer of rights in the case of joint debt.* – Where a personal security relates to a debt for which a number of persons are jointly liable, the right to have recourse to all the joint debtors is transferred to the guarantor if he intended in accordance with his promise of security to stand surety for *each of them*.

D : BGH 14.7.1966, BGHZ 46, 14, 15

F. B. L. : art. 2030 cc

N : art. 1878 BW

I : art. 1951 cod. civ.

The legal position where the personal security was limited to the obligation of *one of a number of joint debtors* is, however, a matter of controversy. In France and the Netherlands the same rule applies in this case as in the case of a liability assumed for the benefit of all the joint debtors, i.e. the guarantor acquires the creditor's rights against *all* the joint debtors.

F : Cass. civ. 5.7.1896, D.P. 1896. 1. 455 and 26.6.1936, D.H. 1936, 379; Planiol/Ripert (-Savatiér) no. 1541; J.Cl. Civil fasc. D no. 69

N : Asser/Kamphuisen 788

The jurisprudence in Germany and the legal teaching in Belgium hold that a guarantor acquires the claim only against the joint debtor for whom he has agreed to stand surety. He also acquires any claim to compensation which this joint debtor may have against the other joint debtors in their relations with each other (art. 426 para. 2 BGB).

D : BGH 14.7.1966, BGHZ 46, 14, 16

B : de Page VI no. 932

Opinions on this matter differ in Italy.

I : In favour of the French solution: Campo-grande 487; Ravazzoni 291; in favour of the German solution: Fragali 409; Bo 1122

The difference between the two solutions becomes apparent in practice where a joint debtor whose obligation was covered by the personal security becomes insolvent. In the second solution the guarantor has to bear part or the whole of this risk, depending on the extent in relation to the other joint debtors to which he is entitled to repayment. In the first solution the guarantor does not bear this risk, because, being fully subrogated to the creditor's rights, he, like the creditor, has an actionable right against each of the joint debtors.

99. *Defence of debtor.* – By the transfer of his rights to the guarantor the debtor is not deprived of the defences on which he can rely against the creditor, for the guarantor has simply stepped into the creditor's place. This legal consequence is, it is true, stated explicitly only in Germany.

D : arts. 774 para. 1 first sentence 412, 404 BGB; the debtor may also, in certain circumstances, compensate the guarantor with any claim which he himself has against the creditor, see art. 406 BGB

In the Roman law countries, on the other hand, this is the natural consequence of subrogation (see para. 106 below). The debtor has in addition, however, the defences arising out of the legal relation to the guarantor which he may already possess. Here again, this is stated explicitly only in Germany,

D : art. 774 para. 1 third sentence BGB

but it is taken for granted in the other countries too.

I : Fragali 403

N : Korthals Altes 103

100. *Questions arising from concurrence in the case of payment in part by guarantor.* – Where the guarantor has fulfilled his obligation only in part, only the corresponding part of the secured claim passes to him (see para. 97 above). What is the relation between the rights transferred to the guarantor and the rights retained by the creditor (para. 101) and (if the debtor goes bankrupt) the rights of the debtor's creditors in bankruptcy (para. 102)?

101. *Concurrence with creditor.* – The law of most of the countries provides that the guarantor may not enforce to the detriment of the creditor that part of the secured claim to which he has been subrogated.

D : art. 774 para. 1 second sentence BGB

F. B. L. : art. 1252 cc

N : art. 1439 BW

This rule acquires practical significance only where both creditor and guarantor (by virtue of the claim to which he has been subrogated) assert rights to a real security which has been furnished for the secured claim and is not sufficient to satisfy the rights of both. Here the rights of the creditor must be satisfied before the rights of the guarantor.

In Italy, however, the creditor is denied this preferential right. The creditor and the guarantor must divide the security proportionately in accordance with what is due to each of them.

I : art. 1205 cod. civ.; on this Fragali 392

Italian banks and German banks often stipulate, however, that the surety may not enforce his rights to claim repayment until he has fulfilled his obligations.

I : Standard form lett. (i) (Molle 726)

D : Various standard forms for contracts

102. *Concurrence with debtor's creditors in bankruptcy.* - If the debtor has gone bankrupt, a distinction has to be drawn between the following five situations:

(1) Where the surety has executed the *whole* suretyship *before* the adjudication in bankruptcy. Here the surety alone is entitled to enforce the claim transferred to him.

D : Staudinger (-Brändl), prelim. note 44, 3 (a) to art. 765 BGB

N : art. 135, para. 2 first sentence FW

I : Fragali 406

(2) Where the surety has paid *nothing before* the adjudication. Here the surety may declare his conditional right to claim repayment if the creditor does not present the secured claim.

D : Jaeger, note 5 to art. 67 KO; art. 33 VerglO

F : Planiol/Repert (-Savatier) nos. 1540, 1543

B : de Page VI no. 935

In Italy alone the surety is in no circumstances permitted to declare his conditional right to claim repayment.

I : Trib. Trieste 28.7.1959, Foro pad. 1960.1.763; Celoria - Pajardi I 531; Trib. Parma 18.1.1964. In Dir. fall. 1964.II.115 otherwise held, however.

(3) Where the surety has paid *part* of the debt *before* the adjudication. Here creditor and surety both participate in the bankruptcy proceedings each with his own claim.

F : art. 48 para. 2 of loi sur la faillite no. 67-563 of 3.7.1967

B. L. : art. 539, 540 C. comm.

N : art. 135 para. 1 and para. 2 first sentence FW

D : RG 29.12.1939, RGZ 83, 401; Staudinger (-Brändl), note 44, 3(b) to art. 765 BGB

I : art. 62 paras. 1 and 2 Legge fallimentare

In Italy there is, however, a provision that the creditor may have apportioned to him the share of the bankrupt's estate received by the surety if he has not been satisfied by his own share.

I : art. 62 para. 3 Legge fallimentare; Celoria - Pajardi I 530. In banking practice this complication is avoided by stipulating that a surety may not enforce a right to claim repayment until the bank as creditor has been satisfied in full, see model contract lett (i) (Molle 726)

Similarly, the prevailing opinion in Germany is that the creditor has a corresponding claim for payment against the surety apart from the bankruptcy proceedings.

D : Soergel/Siebert (-Reimer Schmidt), note 5 to art. 774 BGB; RGRK - BGB (-Fischer) note 8 to art. 774 BGB; Enneccerus/Lehmann 799; for a different view Jaeger, note 26 to art. 3 KO

(4) Where the surety pays *part* of the secured debt *after* the adjudication. Here, if the creditor has presented his claim in the bankruptcy proceedings, it is held in most of the countries that the surety may take no part in the bankruptcy proceedings until the creditor has been satisfied in full.

D : arts. 68 KO, 32 VerglO; RG 19.9.1902, RGZ 52, 169, 171; Jaeger, note 26a to art. 3 KO

F : art. 46 of loi sur la faillite no. 67-563 of 3.7.1967

B : Nouvelles, Droit commercial IV (1965) no. 1388 with further references

I : art. 61 Legge fallimentare; see Ferrara 247

On the other hand, it is held in the Netherlands that a surety may present his claim in the bankruptcy proceedings.

N : H.R. 9.11.1917, N.J. 1917, 1186; Korthals Altes 104 f.

(5) Where the surety executes the suretyship *in full after* the adjudication. Here the surety is subrogated to the creditor's rights.

D : Staudinger (-Brändl), prelim. note 44, 3(a) to art. 765 BGB

F. B. L. : J.C.I. Commercial, art. 437-614 bis, fasc. 45 no. 52

N : Rb, Utrecht 28.6.1922, W. no. 10. 937; Rb. Breda 9.2.1926, W. no. 11 574; Molengraaff 824

I : Fragali 406

103. *Subrogation to rights in the case of guarantee.* – Whereas the rules of the law of suretyship mentioned above (see para. 13 above) apply to the guarantee in Italian law, they do not apply to it in German and Netherlands law, in which no provision is made for the guarantor's subrogation as of right.

D: Soergel/Siebert (-Reimer Schmidt), prelim. note 36 to art. 765 BGB with references; for a different view Caemmerer 306

N: Drion 101

## (2) CLAIM AGAINST DEBTOR FOR REIMBURSEMENT

104. *Principle.* – Besides the transfer of the secured claim the guarantor has a further means of enforcing his claim to repayment, namely a claim for reimbursement. Express provision is made for this claim in the law of suretyship in all the countries except Germany.

F.B.L.: art. 2028 cc

N: art. 1876 BW

I: art. 1950 cod. civ.

There was no need in German law to make any special provision for this remedy. In the case of a surety or a guarantor who subscribed a security at the debtor's request, a claim for reimbursement arises directly from the rules concerning agency or from the consideration in the contract of agency.

D: arts. 670, 675 BGG; Enneccerus/Lehmann 798

Where the personal security was not furnished at the debtor's request, the surety or guarantor is legally entitled to sue for reimbursement under the rules concerning business conducted without specific agency. Depending whether the claim was or was not secured in accordance with the interest and the express or implied intention of the debtor, the guarantor may demand the reimbursement of the expenses he has incurred, either the full amount or to the extent of the monies had and received by the debtor.

D: arts. 683, 684 BGB

A commission agent or mercantile agent does not as a rule enter into a *del credere* at the debtor's request, but in consequence of his legal relation to the creditor. With securities of this kind an action for reimbursement will therefore almost always be founded only on the provisions concerning business conducted without specific agency.

105. *Scope.* – In contrast with the case of an assigned secured claim, the action for reimbursement covers not only the secured claim and the interest on it but also the reimbursement of any costs and damages incurred by the surety. Such reimbursement is, how-

ever, limited to costs incurred by the surety *after* the date on which he has given the debtor notice that an action is pending against him.

F.B.L.: art. 2028 paras. 2 and 3 cc

N: art. 1876 para. 1 second sentence, arts. 2 and 3 BW

I: art. 1950 paras. 2 and 3 cod. civ.

D: Implicitly in accordance with arts. 670, 675, 683 BGB, see Staudinger (-Brändl), note 1 to art. 774 BGB

106. *Defences of debtor.* – In the Roman law countries a debtor has a defence against a surety with respect to the existence of a secured claim only if the surety has paid without having been sued by the creditor and without giving notice to the debtor of his (imminent) performance.

F.B.L.: art. 2031 para. 2 cc

N: art. 1879 para. 2 BW

I: art. 1952 para. 2 cod. civ. (but in this case no action need be brought)

The purpose of this rule is to ensure that the debtor is not compelled by an action brought against him to perform when he was not obliged vis-à-vis the creditor to do so. The surety must in principle consequently notify the debtor of his intention to perform if he is not to imperil his right to claim repayment. The debtor thereby obtains an opportunity to inform the surety in due time of his rights vis-à-vis the creditor and to compel him to assert them.

N: Pels Rijcken 147, 148

The consequences of any delay caused by the debtor's notification will not, however, be imputable to the surety if the creditor has already brought an action against him and he is threatened with distraint upon his property. But in this case too he is bound to give the debtor notice if he still has the time and opportunity to do so.

B: cf. de Page VI no. 933

A surety against whom a creditor has brought an action will in any case as a rule inform the debtor, thus enabling him to set up a defence against the creditor's action.

At first sight the legal position in Germany appears to be appreciably at variance with the rules of the Roman law system. Against a guarantor's action for reimbursement a debtor can set up only the defences he possesses by virtue of his legal relation with the guarantor. On the other hand, he is debarred from entering any defence against the creditor. In particular, he cannot compensate with any claim against the creditor which he possesses.

D: RG 17.10.1904, RGZ 59, 207, 209, 210 and 3.12.1934, RGZ 146, 67, 71

The guarantor, however, is permitted to claim the reimbursement only of such costs as he considers justified. He may not do so, therefore, if he omits, without good reason, to give the debtor notice of his intention to pay and thereby deprives him of the possibility of either setting up a defence himself or notifying the guarantor.

D: RG 3.12.1934, RGZ 146, 67, 71 and 17.10.1904 RGZ 59, 207, 209-210; Staudinger (-Brändl), note 14 to art. 774 BGB

This also applies where the guarantor is aware of the debtor's rights against a secured claim, but nonetheless pays the debt.

D: OLG Hamburg 24.6.1919, Hans GZ 1920 B 1

No settled rules with regard to this question have, however, been developed, since the conclusive factor is the agreement between the parties and the circumstances of the particular case.

107. *Debtor incapable of contracting.* – In the Roman law countries, in which a suretyship for the claim of a person incapable of contracting is held to be valid (see para. 62 above), the particular question arises of recourse against a “debtor” who is incapable. A person who is incapable is not himself even a “debtor”, because the secured claim could not have come into being, because of his incapacity. In principle, therefore, no recourse to the surety could lie.

B: de Page VI no. 933-7

Italy is the only country to make an exception to this rule on grounds of equity. It permits recourse to the extent that the debtor has derived advantage from performance by the surety.

I: art. 1950 para. 4 cod. civ.

This rule is manifestly the consequence of the other provision in Italian law under which a suretyship is valid despite the debtor's incapacity to contract (see para. 62 above).

108. *Concurrence of claims.* – In contrast to the situation where a transferred claim is realized (see paras. 100-102 above), concurrence between a guarantor's claim to be compensated with rights of the creditor or the creditors in bankruptcy gives rise to no special problems.

(a) *Relation to the creditor.* – If by paying a part of the debt on the basis of his legal relation to the debtor the guarantor acquires a corresponding claim to reimbursement against him, this claim is not disadvantaged as against the creditor's secured claim. The

special rules which confer upon the creditor a preferential right as against the claim *transferred* in part to the surety (see para. 101 above) do not apply to the guarantor's *action for reimbursement*.

D: Staudinger (-Brändl), note 11 to art. 774 BGB

F: Cass. civ. 25.11.1891, D.P. 1892 1. 261; Planiol/Ripert (-Savatier) no. 1540; Veaux nos. 182 f.

N: H.R. 9.11.1917, N.J. 1917, 1186

In Italy the position is the same as that relating to a transferred claim (see para. 101 above).

(b) *Relation to the debtor's creditors in bankruptcy.* – If the guarantor has not satisfied, has satisfied in part or has satisfied the creditor in full before the adjudication of bankruptcy or has satisfied him in part or in full *after* the adjudication, the rules discussed above (para. 102) apply by analogy.

### (3) RELATION OF TRANSFERRED CLAIM TO THE RIGHT REIMBURSEMENT

109. The relation between the secured claim of a creditor transferred to a surety and the right to reimbursement which the surety can claim in the ordinary course by virtue of his legal relation to the debtor is not very clear in some countries.

The two actions differ not only in accordance with their origin, but, in all the countries, in accordance with their scope as well. Thus, the transfer of a secured claim also includes the transfer of the accessory rights inherent in it. On the other hand, these rights are not included in the action for reimbursement, whose scope nevertheless goes further, inasmuch as it may lead to the reimbursement of any costs or damages incurred by the surety.

In Germany a strict distinction is drawn in principle between the two actions. Each of them is governed by its own rules. However, a debtor may, if a surety enforces the transferred claim against him, avail himself of the defences appertaining to him by virtue of his relation to the surety.

D: art. 774 para. 1 third sentence BGB

The surety may merge the two actions or rely on the one or the other.

D: Staudinger (-Brändl), note 1 to art. 774 BGB with references

In the Roman law countries it is also accepted that the subject matter of the two actions is different.

I: Miccio 543; Ravazzoni 291

N: See for example Pels Rijcken 142

In the Netherlands the tendency — strengthened no doubt by the very close formal connection between the two actions in the codes grounded in Roman law — is to extend various legal provisions to cover both actions.

N : Explicitly Asser/Kamphuisen 786, 795

In Belgium it has even been held that the action arising from the transfer of a creditor's secured claim and the action for reimbursement constitute a single right of recourse.

B : de Page VI no. 926

I : Fragali 363 ff. at variance with the prevailing teaching

#### (4) COMMON RULE

110. *Limitation on right to claim repayment.* — In all the countries a surety loses his right to claim repayment if he has omitted to *inform* the debtor that *he has paid* and if the debtor has paid the creditor in ignorance of it (so that the creditor has been paid twice).

D : arts. 774 para. 1 first sentence, 412, 407 para. 1 BGB (for the exercise of the rights arising from a transferred claim); arts. 662, 276 BGB (for the assertion of a right to reimbursement)

F. B. L : art. 2031 para. 1 cc

N : art. 1879 para. 1 BW

I : art. 1952 para. 1 cod. civ.

#### (5) RIGHT OF A GUARANTOR WHO HAS PAID TO DIVISION AGAINST THE OTHER GUARANTORS

111. *Basic premise.* — A guarantor is subrogated to all the accessory rights inherent in the creditor's claim together with the claim (cf. para. 97 above). This rule applies in general where one of a number of guarantors, such as a pledgee, mortgagee or co-surety, pays the creditor. Owing to the accessory character of suretyship and the *del credere* and of many real securities, he acquires the creditor's right to these incorporeal and real rights together with the secured claim.

If there were no rules on division among a plurality of guarantors, the guarantor who first (possibly in a race with the others) paid the creditor would, under the general rules, be able to claim repayment from all the other guarantors. He would accordingly be able to shift to the other guarantors the risk of the debtor's becoming insolvent when the other guarantors enforce their claims to repayment. In order to avert this danger, special rules have been developed in almost

all the countries for division among a number of guarantors, and in particular for division between co-sureties (para. 112) and for division among guarantors furnishing personal securities and guarantors furnishing real securities (para. 113).

112. *Division among co-sureties.* — In Germany and Italy co-sureties must divide each for his part and portion, unless otherwise agreed. This also applies where there is a plurality of *del credere* debtors or where they enter concurrently with sureties. The share of an insolvent personal guarantor is prorated among the rest in accordance with their parts.

D : arts. 774 para. 2, 426 para. 1 BGB

I : art. 1954, 1299 para. 2 cod. civ.

In the Roman law countries (except Italy), however, the prerequisite for the exercise of the right of division with co-sureties is that the surety who has paid must have complied with the conditions (or some of the conditions) which would confer upon him a right vis-à-vis the debtor to discharge from his suretyship.

F. B. L : under art. 2033 para. 2 cc any of the conditions mentioned above (paras. 91 and 93) suffices. For the deferment of division if a co-surety becomes insolvent, see Planiol/Ripert (-Savatier) XI no. 1544

N : art. 1881 para. 1 BW permits division only if an action was brought against the paying surety or the debtor has been adjudged bankrupt. Deferment of the division if a co-surety becomes insolvent is founded on art. 1882 para. 2 taken in conjunction with art. 1329 para. 2 BW

In the Netherlands, however, this limitation on the actionable right for proportionate division against co-sureties is held to be undesirable.

N : Pels Rijcken 164; Gaay Fortman 190, 218

The French rule, on the other hand, leads in practice to the same result as the German and Italian solution, since the maturity of the secured claim is one of the conditions for the right to sue (art. 2032 no. 4 cc). Besides this internal division there is in German, French, Belgian and Luxembourg law the *transfer of the secured claim* to the surety who pays. In itself this transfer would give the surety who has paid a claim for the whole secured debt against one of the other co-sureties. It is not, however, considered desirable that the full force of recourse should be brought to bear on one of the co-sureties.

In general, therefore, the principle of division each for his part and portion mentioned above is applied to the enforcement of a transferred claim as well.

D : arts. 774 para. 2, 426 para. 1 BGB

F. B. L : art. 2033 para. 2 cc; Aubry/Rau VI 293 f.; Planiol/Ripert (-Savatier) no. 1544

In Italy a distinction is drawn between joint suretyship and absolute suretyship. There is no transfer of rights in the former case, but there is in the latter.

I : Cass. 12.7.1962, Foro it. 1962. I. 1445; Fragali 441; Campogrande 539

In the Netherlands the prevailing opinion goes so far as to reject any transfer of rights to the surety who pays, to the detriment of the co-sureties.

N : Hof 's-Gravenhage 22.3.1929, N.J. 1929, 1367; Hof Amsterdam 21.12.1917, W. no. 10. 228; for a different view Asser/Kamphuisen 794 f. with references

113. *Division among guarantors furnishing personal securities and guarantors furnishing real securities.* – In none of the member countries is there an exhaustive regulation of the question whether and how the division is to be made between a guarantor (or guarantors) furnishing personal securities and a guarantor (or guarantors) furnishing real securities after one of them has paid the creditor. A uniform concept has emerged neither in the jurisprudence nor in the literature; the question is everywhere very much a matter of controversy.

In essence, three different views are held; the first is that the division is made in the same way as or similarly to division between co-sureties (para. 114); the second is that guarantors furnishing personal securities have a preferential right over guarantors furnishing real securities (para. 115); and the third that only those guarantors who are unable to demand repayment from the debtor are liable in the first instance to make compensation and that all the guarantors are not drawn into the procedure for setting off until the debtor becomes insolvent (para. 116).

114. *Assimilation with a co-surety* means that the division among the various guarantors takes place each for his part and portion, unless otherwise agreed among them (see para. 112 above). This solution, therefore, places upon all the guarantors an equal burden of the risk that they may be unable to realize their right to claim repayment because the debtor has become insolvent.

F.B.L. : Cour Toulouse 27.12.1911, D. 1913. 2. 65; Planiol/Ripert (-Savatier) XI no. 1546; Colin/Capitant (-Julliot de la Morandière) II no. 1414

D : Wolff/Raiser sec. 140 V 1; Westermann sec. 103 III 5 and 129 IV 2; but see para. 115 below

In a more refined version of this opinion, held mainly in the Netherlands and Italy, guarantors furnishing personal and real securities are not liable each for his

part and portion, but to the amount of the security they have furnished in each case. This view leads to the same result as the other where both suretyship and real security cover the whole of the amount of the secured claim, namely that each guarantor is liable for his part and portion in internal relations with the others. But if the suretyship or the real security, or both, do *not* cover the amount of the secured claim, the internal division is determined in accordance with the amount of the security undertaken in each case.

I : art. 2871 para. 2 cod. civ. expressly prescribes such division in the relation between a mortgagee and a debtor's sureties; see Nicolo/Andrioli/Gorla, Tutela dei diritti, in: Commentario del Codice Civile, published by Scialoja and Branca. VI (2nd ed. 1955) 625. For the transposition of this rule to the claim of a paying surety to the right of reimbursement D'Orazi Flavoni 44

N : Asser/Losecaat Vermeer (-Rutten) 401; Korthaus Altes 169 f.; see also para. 116 below

F : Donnedieu de Vabres, D. 1913.2.65 (note); Voirin, D.P. 1939.1.41, 42 (note); Veaux no. 228

115. *Preferential right of guarantor furnishing personal security over guarantor furnishing real security* means that a surety who has paid can demand compensation from a guarantor furnishing a real security, whereas a guarantor furnishing a real security cannot, if he pays, demand compensation from a surety. The guarantor furnishing a personal security is therefore relieved of the risk of recourse to the debtor, but the guarantor furnishing a real security is not. The notion underlying this view is that a guarantor furnishing a real security has committed himself more heavily than a personal guarantor and that the latter deserves greater protection. This applies in any event where a real security covers the right to demand division. This is the opinion which definitely prevails in Germany.

D : OLG Königsberg 23.11.1920, Seuff. Arch. 76 no. 85; OLG Stuttgart 16.11.1971, Das Recht 1918 no. 83; Soergel/Siebert (-Reimer Schmidt), note 12 to art. 774 BGB; Enneccerus/Lehmann 800; Staudinger (-Sprenge), note 2(b) to art. 1225 BGB; RGRK-BGB (-Kregel), note 6 to art. 1225 BGB

In France and the Netherlands the same view is argued in the special case where after the suretyship has been constituted, a debtor alienates real estate mortgaged for the secured claim and the liability of the third party who owns it is at issue. If the subsequent buyer has not made an entry of satisfaction of the mortgage, he will be liable to compensate the paying surety. But if he himself has paid, then he will not be entitled to compensation from a guarantor furnishing a personal security.

- F : Planiol/Ripert (-Savatier) XI no. 1545; Voirin D.P. 1939.1.41, 42 f. (note); see also Cass. req. 16.3.1938, *ibid.*, and explicitly Cour Lyon 11.5.1934, *ibid.*  
 N : Asser-Losecaat Vermeer (-Rutten) 402

116. *Right to compensation subsidiary to right to repayment.* – The third solution, devised for the future Netherlands legislation, is original. Compensation takes place in two stages; in the first stage only the debtor or the guarantor who (exceptionally) makes himself responsible to the debtor for the secured claim is liable to make compensation.

- N : art. 6.2.8. para. 1 of preliminary draft NBW

The purpose of this provision is to concentrate at the outset the rights to compensation on the debtor and on the guarantors who are responsible to the debtor and are therefore unable themselves to demand repayment from him. It is only when it appears that the right to compensation cannot be realized against the debtor and the “responsible” guarantor that the guarantor who has paid can demand compensation from *all* the guarantors (i.e. even from those who are not “responsible” to the debtor) in accordance with the amount of their obligation to the creditor in each case.

- N : art. 6.2.9 of preliminary draft NBW

## VI – PRIVATE INTERNATIONAL LAW

117. *Status of suretyship and status of secured claim.* – The law applicable to a cross-frontier suretyship (see para. 24 above) is determined in all six countries separately from the law applicable to the secured claim. The principle of the accessory character of suretyship (see para. 57 above) does not, therefore, apply here.

- D : RG 14.4.1932, RGZ 137, 1, 11; RG 23.4.1903, RGZ 54, 311, 315; Staudinger (-Brändl), *prelim.*, note 38 to art. 765 BGB  
 F : Batiffel, *Traité de droit international privé* (4th ed. 1967) no. 610; Fouchard nos. 4 ff.  
 N : Hof 's-Hertogenbosch 19.1.1937, N.J. 1937 no. 871; Hof 's-Gravenhage 28.6.1937, N.J. 1938 no. 47 and 26.6.1914, N.J. 1914, 1257  
 I : Cass. 12.9.1957, Riv. dir. int. 1958, 251; Campogrande 647

The status of the secured claim is not, however, without influence on the suretyship (see para. 119 below).

118. *Status of suretyship.* – The law applicable to the suretyship is in principle determined in accordance

with the same rules as apply to the status of other contractual agreements. The primary consideration must be the (express or tacit) consensual will of the parties.

- D.F.N : See preceding note

- I : art. 25 para. 1 second sentence disp. prel. cod. civ.

If a consensual will of the parties does not appear, there comes a parting of the ways for the determination of the law applicable.

In France the presumption is that the parties intend the suretyship to be governed by the same law as the secured claim.

- F : Cour Paris 21.5.1957, Rev. crit. dip. 1958, 128; Batiffol op. cit.

In Germany and the Netherlands the emphasis falls on the main condition in the contract, which indicates the surety's domicile (at the time when the suretyship was concluded).

- D : RG 14.4.1932, RGZ 137, 1, 11; RG 25.9.1919, RGZ 96, 262, 263; RG 23.4.1903; RGZ 54, 311, 316  
 N : Hof 's-Gravenhage 26.6.1914, N.J. 1914, 1257

In Italy the law of the State of the surety and the creditor applies; if they do not have a common nationality, the law of the place where the contract was made is applicable.

- I : art. 25, para. 1 first sentence disp. prel. cod. civ.; Cass. 4.10.1954, Giur. it. 1955.I.1.899. This decision, however, favoured — but obiter — the extension of the law applicable to the secured claim.

The law applicable to suretyship determines in essence whether and on what conditions the surety has to perform, whether and to what extent this obligation to perform is affected by the secured claim and to what extent the surety has rights of recourse.

119. *Status of secured claim.* – In so far as the scope of the surety's liability is governed by the secured claim, the extent of the debtor's obligation to perform has to be established in accordance with the law applicable to the claim.

- D : RG 11.4.1932, RGZ 137, 1, 11; RG 23.4.1903, RGZ 54, 311, 315 f.  
 F : Fouchard nos. 18 ff.  
 N : Hof 's-Hertogenbosch 19.1.1937, N.J. 1937 no. 871



## D – Analysis of the difference of law

### (1) *Introductory*

120. *Purpose.* – The comparative analysis revealed that the law in the Member States of the European Communities relating to personal securities has a surprising number of points in common. This is undoubtedly due to the common historical roots from which the legal systems of all the Member States have developed. The well-conceived rules for suretyship in Roman law have been retained not only in the Roman law countries but have been adopted to a large extent in Germany too. This concordance ends, of course, as soon as we quit the particular area of the law of suretyship; the guarantee is one example of this.

However gratifying may be this discovery of a large measure of agreement on the principles and on many particular rules, we must now concentrate on the differences of law. For the practical purposes of this study is, of course, to identify these differences and to frame such recommendations as may be derived from them with a view to reconciling them.

121. *Practical effects of the differences of law.* – In its questionnaire (see Foreword) the Institute asked specifically whether the existing differences in the law of suretyship within the European Communities has so far given rise to any practical difficulties. The answer was almost unanimously in the negative. The only real difficulty — mentioned several times — is the exchange control regulation (on this see para. 132), which are not easy to ascertain from outside the country concerned and, moreover, keep changing.

With this single exception, the unanimity in the questionnaire is surprising. But this does not, in the Institute's opinion, reflect the whole truth. And another deduction from experience which emerged from the replies to the questionnaire should also be noted. In practice the creditor of a foreign debtor usually accepts a suretyship or a guarantee offered him as a security only if the guarantor has a place of business or domicile in the creditor's country. Conversely, the debtor will usually be able to find a credit institution or person prepared to undertake a personal security on the customary conditions only in his home country. The general practice is, therefore, for the credit institution in the debtor's country which is chosen as guarantor to instruct a credit institution in the creditor's country to subscribe the security and in some

cases to obtain a counter suretyship or a second suretyship (see para. 44 above) for its own security.

The need to resort to an additional intermediary makes the movement of suretyships within the Community more difficult and more expensive.

In the Institute's opinion, it has two undesirable economic consequences: it increases the expense to the debtor of opening a credit abroad and it hampers competition among professional guarantors in the countries of the Community. Though it is not possible with the sources of data at present available accurately to measure the volume of these economic drawbacks, nevertheless there can be no doubt whatever that these two obstacles to competition do in fact exist.

The economic disadvantages of the present practice with EEC securities can only be surmounted if the reasons for creditors' reluctance to accept foreign guarantors are identified and an effort is made to remove them.

The immediate reason for the preference accorded to domestic sureties is that they are better known to the creditor or that it is at any rate easier and quicker to obtain reliable information on their financial standing. It is unlikely that this handicap on foreign guarantors can be removed by selective measures. It is more likely to be overcome by the experience resulting from a brisk development of trade in general.

The primary reason, however, is that resort to domestic guarantors is simpler than resort to foreign guarantors. An action at law, a distraint in particular, is surer, speedier and cheaper in one's own country than abroad. There are, besides, the uncertainties about the forms of the substantive law of personal securities at the foreign guarantor's place of business. The creditor can, however, by including a jurisdictional clause in the contract ensure that the courts of his own country shall be competent. He can also ensure the application of his own country's law of suretyship by a clause stipulating the law applicable. But some doubt will always remain as to whether these precautions are sufficient and whether a distraint, for example, may not be frustrated by reason of public policy, or, if no jurisdiction was stipulated and agreed, whether the foreign court at the guarantor's place of business may not disregard the choice of the law applicable or refuse to apply the law chosen on the ground that it is at variance with its country's public policy. Whether an international jurist would or would not attach any

great importance to such doubts is immaterial. The very fact that a creditor fears that he will not be able fully to enforce his rights abroad makes him less willing to accept foreign guarantors.

A harmonization of the principles of the law of personal securities may, therefore, contribute to the removal of real or imaginary prejudices against foreign guarantors.

122. *Criteria.* – The Institute has adopted two basic criteria in judging the existing differences of law which have proved their worth in all attempts to unify the law.

*First.* – The criteria that a difference of law does not exist despite the existence of contradictory legal rules where the jurisprudence, the legal teaching or the legal practice in the countries concerned have led to a situation in which agreement has been reached so far as the practical effect is concerned. Furthermore, it is generally accepted that no difference of law exists if the legal position is controversial and if authoritative voices support a view which is to all intents and purposes the same as that held in other countries.

*Second.* – The criteria that a distinction must be drawn between important and unimportant differences of law, the more so in that the Treaties of the European Communities provide only for a harmonization of the law of suretyship, but not for its complete unification. Divergences which seldom occur in practice and which, even when they do occur, have no appreciable economic consequences are to be regarded as negligible. All other differences of law, however, are important and must be tested to see whether and how they can be reconciled.

(2) *Guarantee (paras. 10-15 and passim)*

123. *The differences of law.* – The most obvious example of a discrepancy in law comes to light in the treatment of the guarantee. The difference lies primarily in the theoretical concept, from which legal consequences also derive. Whereas German law and Netherlands law recognize the guarantee as an independent legal institution existing *beside* the suretyship, in France, Belgium and Luxembourg, while the guarantee is conceivable as an independent legal institution alongside the suretyship, very little attention is paid to it, even as a matter of the science of law. Italian legal practice, on the other hand, incorporates the guarantee in the law of suretyship where this is stipulated in the contract. The legal consequence of these varying conceptions is that some uncertainty prevails owing to the absence of specific rules on the legal treatment of the guarantee in Germany and the Netherlands, but the tendency is cautiously to transpose

those principles of the law of suretyship which do not posit the accessory character of the obligation inherent in the security in relation to the secured claim. In Italy, however, all the other provisions of the law of suretyship apply directly to the guarantee as well — i.e. all those except the rules relating to its accessory character.

There is also an important practical difference. Whereas the guarantee is used fairly frequently in Germany and the Netherlands, particularly in connection with foreign trade, it does not seem to be quite so common in Italy. In France, Belgium and Luxembourg the guarantee is evidently virtually unknown to legal practice.

124. *Conclusions.* – The Institute concludes that the situation outlined here has the following consequences. Firstly, the value of EEC securities given in the form of a guarantee in Germany, Italy or the Netherlands must be uncertain in almost any other of the EEC countries, because not even the legal recognition of guarantees subscribed abroad is assured; in Germany and the Netherlands, on the hand, and in Italy, on the other, because in both these groups of countries the basic legal principles differ appreciably.

The second consequence of the situation described is the disadvantage to debtor, creditor and guarantor in France, Belgium and Luxembourg, for no such institution as the guarantee is known in these countries and it is therefore unavailable to them in their own countries.

In view of the important part played by guarantees in the course of trade, particularly foreign trade (see para. 10 above), merchants in these countries labour under a considerable competitive disadvantage. It is conceivable that a foreign contract may well elude the grasp of businesses in these countries because they cannot put up the security which their foreign competitors furnish in the form of a bank guarantee. The fact that they have not yet become alive to this disadvantage does not mean that it does not exist; and this is merely one more argument for the need for equality of opportunity.

The Institute therefore considers that regulation of the guarantee is not only desirable, but necessary and feasible (see Part II, art. 9 below).

(3) *Limited capacity of corporate bodies to contract (para. 31)*

125. Article 9, paragraph 1 of the Directive of the Council of the European Communities on company law undoubtedly does to a large extent harmonize the rules on commercial companies, their limited capacity

to contract and their power of representation. There remain cases, however, especially where Member States avail themselves of the powers conferred upon them by article 9, paragraph 1, second sentence, in which a company's suretyship may have no binding effect even for the future because it has been furnished in breach of the statutory provisions (see para. 31 above for details).

It seems futile, however, to attempt a harmonization of company law which goes further than that achieved by the Council in its first Directive merely for the special purposes of application to the surety. It cannot be said, either, that the other risks constitute any special threat to the existence of suretyship. The Institute's recommendation on this point is, therefore, to await the further harmonization of company law.

(4) *Admission of foreign guarantors to practice*  
(para. 32)

126. The admission of foreign guarantors furnishing suretyships to professional practice is not a special problem of the law of suretyship either and cannot, therefore, be solved in that context. It is rather a question of the general right of establishment, which can only be dealt with in the context of that right. It should, however, be expressly stressed that the prerequisite for admitting foreign guarantors (acting on behalf of foreign debtors, see para. 121 above) to professional practice in the countries of which creditors are nationals, which the Institute considers desirable, is that no obstacles shall be placed in the way of foreigners' furnishing suretyships.

(5) *Acceptance as surety by the public authorities*  
(para. 33)

127. It seems incompatible with the aims of the Common Market that the public authorities should systematically exclude from acceptance as sureties guarantors who are nationals of another Member State or who have their place of business or domicile in it merely on the grounds of their nationality or their circumstances. Whether this exclusion is embodied in general form in legislation or administrative regulations or whether the condition of foreigner is invoked in particular cases in the exercise of administrative discretion is immaterial.

On the other hand, it has to be acknowledged that the systematic exclusion of foreigners as sureties may be founded in certain economic and legal impediments based on the argument that a suretyship furnished by a foreigner is less safe than a suretyship furnished by a national (cf. para. 121 above). In the first place, it is in the nature of things harder to supervise a

foreigner's conduct in business than a national's. And, secondly, there are such legal impediments as the difficulty of enforcing the decision of a domestic court against a foreign surety in his home country. The last-mentioned difficulty will, however, be removed by the EEC Convention on jurisdiction and the enforcement of civil and commercial judgments.

It seems inconsistent with the fact that the public authorities are directly bound by the provisions of the Treaties relating to the European Communities that nationals of other Member States or nationals of Member States with their place of business or domicile in other Member States should not be accepted as sureties merely on the grounds of their nationality or their circumstances (cf. also Treaty of Rome, art. 7).

It is somewhat doubtful whether the proper place for the prohibition of such systematic discrimination by the public authorities is in a measure designed to strengthen intra-Community credit to industry. In the Institute's opinion, however, this means credit which equally benefits industry (and trade?). It would apply perfectly to tax respites. The Institute is therefore proposing a rule to eliminate discrimination by the public authorities against foreign sureties (see Part II, art. 1 below).

(6) *Geographical limitations on "open suretyship"*  
(para. 35)

128. *Differences of law.* – In the legislation of all the Member States there are provisions which prescribe that where there is a statutory, judicial or contractual obligation to furnish a surety, the surety must have a certain relationship to the creditor's country. He is required to have his place of business or domicile either in the creditor's country or even within the jurisdiction of the court of appeal in which the obligation to furnish a surety is to be fulfilled. These rules have the same effect of exclusion as the restrictions on acceptance referred to above (see para. 127).

129. *Conclusion.* – Unlike these restrictions, a contractual obligation to furnish a surety is certainly not founded in an order by a public authority, nor is its purpose primarily to benefit the public authorities. On the other hand, a contractual obligation to furnish a security is extremely rare, for as a rule the creditor makes his acceptance of a security in the form of a suretyship conditional upon the satisfactory results of an investigation of the surety's solvency. There is, therefore, no need to pursue here the study of the contractual obligation to furnish a security.

But even an obligation to furnish security imposed by a law or by a judgment is not imposed primarily to

benefit the public authorities; rather it is designed to protect the interests of creditors of every sort. Its purpose is to protect them and the public authorities alike from the risks outlined above (para. 127) attaching to securities furnished by foreign sureties. But it is recognised that private citizens are not presumed to be directly bound by the Treaties of the European Communities, save where these expressly state otherwise. Yet the legislators who devised these protective provisions are undoubtedly as directly bound by the Treaties as the public authorities in their capacity as creditors.

The question whether it would be advisable to remove these geographical restrictions in the context of a measure for promoting intra-Community industrial credit must be answered in the affirmative, for the same reasons as those set out in paragraph 127 above.

The Institute is therefore proposing that Member States should be prohibited from laying down as the condition for the capacity of sureties furnished in performance of a statutory or judicial obligation to present a security that they must be domiciled in the national territory (see Part II, art. 1 below).

(7) *Particular prohibitions and restrictions relating to suretyships (para. 36)*

130. Some of the prohibitions and restrictions relating to suretyships were mentioned in paragraph 36, but the list is certainly not exhaustive. Such prohibitions and restrictions vary considerably from one country to another, and the very fact that they do so means that very little information about them is available in other countries. This may well lead to undesirable and unforeseen results in intra-Community transactions involving suretyships. A harmonization of these rules with the effect that no restrictions shall be placed on persons with capacity to furnish suretyships would therefore seem desirable in itself.

The Institute considers, however, that such a rule would not be opportune, since it would entail intervention in many areas of the law extraneous to the law of suretyship, such as the law relating to marriage, to the functions of notaries, to local administrations, to the organization of public agencies and the like. The restrictions on suretyship which occur in all these areas are imbedded in the general rules relating to each of them. Owing to the difficulty of foreseeing the consequences, the outright elimination of all restrictions on suretyships therefore appears too dangerous. A further consideration is that the restrictions have evidently not hampered the practice of suretyship in the countries concerned.

(8) *The rules governing form and proof (paras. 37-38)*

131. *Differences of law.* – In German law the general condition for the validity of a suretyship is that the promise to furnish it must be given in writing. A defect of form invalidates the suretyship. This condition does not apply to merchants (Vollkaufleute) nor does it affect the guarantee.

The Roman law countries, on the other hand, require the written form only indirectly. The rule is that suretyships or guarantees (like other contracts) may be evidenced in court only by the production of a written instrument. There are several exceptions to this rule, however, in particular for suretyships and guarantees which are commercial transactions.

The Roman law countries, except Italy, require in addition in the case of suretyship (as also of guarantee, in so far as they recognize it) that the surety enter “bon pour...” on it written in his own hand, but — with the exception of the Netherlands — exempt suretyships and guarantees which are commercial transactions from this formal requirement. Moreover, even if this requirement is not complied with, it is always possible to call witnesses to evidence a suretyship or guarantee. Lastly, the Roman law countries require a suretyship to be undertaken “expressly”; and a similar effect is attained in German law.

There are, therefore, appreciable differences of law among the countries of the Community regarding the important matter of the form and evidencing of suretyship and guarantee.

132. *Conclusion.* – Form and evidencing are important aspects of a legal institution, since the legal existence or the actual execution of contracts depends on their due observance. It is true that in most of the legal systems there are exceptions for suretyships and guarantees given by merchants or undertaken in the course of their business. The Netherlands, which has abolished commercial law as a separate branch of law, has thereby also renounced the liberties as to form mentioned above. In accordance with the universally recognized principle of “lex loci actus” in conflicts of laws, these rules will not in any event apply to cross-frontier securities concluded in a country in which different formal rules apply or in which liberty of form exists. But this rule for conflicts of laws is unsatisfactory even for contracts by correspondence, since a party cannot know on the face of it whether the other party has complied with the rules for form applicable at its place of business. There is also the uncertainty attaching to securities furnished in another country in the course of commercial negotiations. A

merchant on his travels cannot know as a matter of course what the rules are at the place where the negotiations are to be held.

The Institute therefore considers that a uniform rule should be laid down on the form and proof of personal securities (see Part II, art. 2 below).

(9) *Restrictions connected with exchange controls (paras. 45-47)*

133. The restrictions of other EEC States connected with exchange controls (see para. 121 above) are a matter of considerable concern to business. It is, however, possible to take into account the prohibitions relating to exchange control regulations in the country in which the debtor is domiciled by means of a guarantee clause. This destroys the validity of any objections to performing his obligations which a guarantor domiciled outside the debtor's country may found on prohibitions connected with exchange controls in the debtor's country.

There remain, however, the exchange control restrictions which apply at the place of business of the guarantor himself. They are not known to a debtor domiciled in another country. There is a further reason for the practice of "indirect EEC suretyships", namely the inclination of many creditors to accept only a guarantor established in their own country. This practice is as undesirable as it is understandable (see para. 121 above). The exchange control restrictions on undertaking and performing the obligations attaching to a security should therefore be eliminated.

The Institute is, however, refraining from making any proposal of its own on this subject because it does not seem realistic to expect that exchange control restrictions will be eliminated for the isolated area of personal securities. To liberate securities would open the way to abuses (e.g. undertaking a fictitious security obligation and fulfilling it in accordance with a fictitious demand for performance). The desirable removal of exchange control restrictions will therefore be achieved only when the planned general liberalization of exchange regulations comes into effect.

(10) *Costs and fees (paras. 48-50)*

134. The costs and fees for undertaking a security vary from country to country. Total exemption from fees in Belgium, Germany and Luxembourg is at variance with the (insignificant) stamp duty levied in France and the Netherlands. As this is calculated as a small fee per page of the contract of security, it is of no practical importance.

The registration fee charged in Italy is of some importance, however. The rate is 1%. Thus, a charge of 1 600 u.a. is levied for a suretyship for 1.6 million u.a. This is not a "*quantité négligeable*". It should be noted, however, that this registration fee is not charged when the contract of personal security is made, but only when it is produced in court. It is in fact, therefore, a court fee. There is no question at this time of harmonizing court and trial fees. Besides, experience shows that court proceedings for the enforcement of a security obligation are not often instituted.

There is no call, therefore, for any proposal concerning the Italian registration fee.

(11) *Subsidiary character of guarantor's liability (paras. 51-56)*

135. *Differences of law.* - While the law of five countries is founded in the principle of the subsidiary character of suretyship, in Italy, on the contrary, the surety and the debtor are jointly liable. This contradiction in basic principle is, however, reconciled by the fact that in both systems contractual agreement by the parties, which is very frequently used in all the countries, takes precedence over the legal principle. The agreement may lead either to a waiver of the subsidiary character of the liability or to its extension.

German law takes a somewhat broader view of the legal régime of the subsidiary character of suretyship. The surety needs only to enter a claim for a preliminary distraint against the principal debtor. In the Roman law countries he must indicate to the creditor such assets of the principal debtor as offer him a safe expectation of satisfaction and, in addition, he must advance him enough money to enforce the preliminary distraint.

It is agreed as a rule in the case of the guarantee in German law that the guarantor must pay on the creditor's first demand. The parties may, however, agree that the creditor shall first attempt a settlement with the debtor.

136. *Conclusions.* - The divergences in the legal rules will become important only if the parties have not drawn a contract. In the practice of professional guarantors and guarantees, however, this never happens. It is of course open to the parties in other cases to surmount the differences of law by agreement, but this assumes that they are aware of them. Experience shows that merchants who have not taken advice of counsel are usually unaware of these differences. It is therefore conclusive to equality of competition that the initial conditions of contracts of security shall be equalized for all parties in all the countries of the

Community. The subsidiary character of the liability also raises a cardinal question in the case of the contract of security.

On the other hand, the differences within the law relating to the subsidiary character of liability are unimportant.

The Institute, therefore, sees a need for a harmonization of the basic rules on the subsidiary character of the guarantor's liability (see Part II, art. 3 below).

(12) *Validity of suretyship despite incapacity of debtor to contract (para. 62)*

137. In Germany the consequence of the accessory character of suretyship is that a suretyship is void if the debtor of the secured claim does not possess full capacity to contract. On the other hand, in all the Roman law countries there is a special rule that states that the suretyship is valid in this particular case. This difference of law is, however, of too little practical importance from the international point of view to warrant a special rule to overcome it.

(13) *Voidability of secured claim (paras. 65-67)*

138. On this point too Germany contrasts with the Roman law countries; for whereas the latter permit the surety to avail himself of the debtor's defences, Germany gives the surety only a right to refuse performance until the debtor has made his decision on the exercise of his constitutive right. The Roman law countries, therefore, give the surety more protection than Germany does, perhaps even rather too much.

Cases in which a debtor fails to exercise a right he possesses to avoid a contract seldom occur and are of no great importance. It is not necessary, therefore, to make a uniform rule for this situation.

(14) *Compensation with secured claim (para. 68)*

139. *Differences of law.* — In the Roman law countries the surety may set up the defence that a secured claim has been extinguished as a result of a situation in which compensation comes into play.

In Germany, however, where as a general rule a declaration of compensation by the compensating party must also be made when a situation of this sort has arisen, the surety is entitled to refuse performance only after it has arisen. He must therefore wait to see whether the creditor gives notice whether he does or does not intend to compensate. The discrepancy

between these two rules rests on the basic difference in the concept of the operation of compensation and can therefore hardly be overcome within the context of the special case of suretyship.

The Roman law countries also make provision for the special case in which a creditor negligently disregards his right or fails to exercise it in a situation where compensation is available. A creditor who has performed vis-à-vis the debtor in fulfilment of his own obligation where he could have compensated him cannot, as a matter of principle, assert against a third party the rights inherent in the security for the secured claim. No such protective clause exists in Germany.

140. *Conclusions.* — Compensation is an important factor for merchants engaged in continuous business relations. The divergences in this area therefore hamper international trade and should be eliminated so far as possible.

There seems no prospect, however, of bridging over the cleavage in the sphere of the suretyship between compensation by operation of law in the Roman law countries and compensation by declaration in German law. This would require a harmonization of the entire law of compensation. But that is not possible.

It is, however, both advisable and feasible to harmonize the divergences in respect of other forms of a surety's protection against deprivation of the possibility of recourse to compensation. One possible solution is to adopt the legal concepts developed by the Roman law systems (see Part II, art. 4 below).

(15) *Judicial respite for secured claim (para. 70)*

141. In France, Belgium, Luxembourg and the Netherlands the surety cannot avail himself of days of grace awarded to the debtor by a court — though this view is contested. A rule of this kind is not recognized in Germany, however, because there are no days of grace in German law. Any harmonization of this divergence — which is quite small in reality — is doomed to failure by the basic difference in the initial concept.

(16) *Impairment of security by creditor (paras. 77-83)*

142. *Differences of law.* — If the creditor renounces a real security or impairs its value, this imperils or even entirely disappoints the surety's expectation of recourse to the debtor after he has paid the claim secured by the suretyship. All the countries recognize in their legislation the principle that impairment by the creditor

of the rights inherent in a security may lead to the loss of the whole or part of the suretyship. Exceptions, however, exist in certain particular cases.

Thus, there are differences in the scope of the rights inherent in securities which are protected by this principle. Germany limits it strictly to the co-suretyship and to such real or incorporeal rights as entail a preferential settlement where a debtor is adjudged bankrupt.

On the other hand, there is a tendency in France and Belgium to adopt a broader interpretation giving a creditor a lien of retention or even a right of rescission. There are differences, too, in fixing the terminal date. The Roman law countries — except the Netherlands — place limitations on the protection of the rights which arise when a suretyship is constituted, whereas the law in Germany and the Netherlands covers in addition rights which come into being subsequently. Lastly, there are differences relating to the criteria for the appreciation of a creditor's conduct. In the Roman law countries negligence is a sufficient defence, and fault, even partial fault, on the part of the debtor, is ignored. In Germany, on the other hand, the creditor must have formally renounced the rights inherent in the security.

143. *Conclusions.* — All the differences mentioned above concern only details of the relevant rules. It is improbable that these differences can have any important effect upon business and trade. The Institute does not, therefore, see any reason to propose a uniform rule.

(17) *Failure to give notice of extension (para. 84)*

144. Failure by a creditor to give notice of an extension is treated in various ways in the Roman law countries. In Belgium such failure entails the loss of the suretyship, but not in the Netherlands (and other countries). In France the legal position is not clear. This point, too, is not important enough to call for harmonization.

(18) *Determinate security (para. 88a)*

145. Placing a time-limit on a security may have various different meanings. It may mean that the security is to be extinguished at the expiry of the time-limit. If so, the creditor either must have asserted his rights against the guarantor before the expiry of the term or must have enforced them as well. But

time-limit may also mean merely that the guarantor's liability is limited by the state of the secured claim at that date.

Which of these various meanings is given to the term depends on the interpretation of the particular contract. It should not be fixed by a rigid legal rule unless absolutely necessary. The fact that the German and Netherlands courts, on the one hand, and the French courts, on the other, tend to come to different conclusions in cases of doubt is not very material, since it is open to the parties to a contract of security to obviate any doubts by means of an unambiguous clause in the contract and so to preclude any unforeseen results.

The Institute does not, therefore, consider it necessary to propose a uniform rule for this point.

146. *Time-limit immediately extinguishing rights attaching to security (para. 88b).* — By means of interpretation the rights attaching to a determinate security may be construed as terminating in principle on the expiry of the time-limit (see para. 145 above). The question is whether a stipulation in a contract to that effect ought not to be supplemented by legislation prescribing that the creditor should be given a reasonable period after the expiry of the period during which he may assert the rights accruing to him from the security.

In most of the countries the law on the subject contains no explicit rule. German and Italian law contain such provisions, but they differ.

There is an express rule in Italian law only for the case where the time-limit for a suretyship runs until the secured claim has matured. The surety remains bound beyond the term if the creditor brings an action against the debtor within two months and pursues the proceedings with due diligence. This provision may, however, be modified by agreement between the parties, and such agreements are in fact regularly made by professional guarantors. Germany, on the other hand, requires — without setting a strict time-limit — the creditor to give immediate notice of his intention to bring an action against the surety if the surety is primarily liable. In the case of secondary liability the creditor must proceed promptly to recover the debt from the debtor, must pursue these proceedings with due diligence and must immediately on their termination notify the surety that he will bring an action against him. If the creditor fails to comply with these requirements, the surety is discharged from his liability.

The Italian and German provisions bring pressure on the creditor to hasten the liquidation of a determinate suretyship. This is to be welcomed in the surety's

interest. Such pressure is the price to be paid for the extension in the creditor's interest of a determinate suretyship beyond the agreed term. Such extension is to be approved, in the parties' interest, because as a rule it will meet the wishes of both parties. The solution adopted in countries other than Italy and Germany, in which, for lack of legal rules, a determinate suretyship is abruptly extinguished, is not persuasive.

Though it is open to the parties to make their own detailed arrangements for these important consequences of a determinate suretyship, in practice they usually neglect to do so. The Institute considers, therefore, that in view of the discrepancies in the rules on the subject and the important consequences of each of the three solutions, unexpected and undesirable results and, in consequence, disturbances in the normal movement of suretyships in the Community may occur. It therefore seems necessary to provide a uniform dispositive rule in order to overcome these differences of law (see Part II, art. 5 below).

(19) *Indeterminate security (para. 89)*

147. In none of the legal systems is there yet legislation which gives a surety who has bound himself for an indeterminate period a right of denunciation. In the Netherlands and in Germany the courts have, however, developed a right of denunciation by exercising which the surety discharges himself from future claims. In the Roman law countries the legal position is more doubtful. As in the Netherlands, in the case of indeterminate suretyship the surety is given the right to demand discharge or cover from the debtor after the expiry of a certain period. This right accorded to the surety cannot, however, replace a right of denunciation. For if the debtor fails to induce the creditor to discharge the surety from his liability, all that the surety has left is the right to demand cover. Though it is true that the surety's risk is diminished if he receives cover from the debtor, he is still liable to the creditor for future obligations as well. This liability subsists, moreover, if the debtor is unable to provide cover.

The very fact that the surety has at least a claim to discharge against the debtor in the countries in which he cannot denounce an indeterminate suretyship shows that an adequate measure of equality in law has not yet been achieved. The most important creditors in these countries, the banks and public agencies, do as a rule give the surety a right of denunciation of their own accord; but so long as the surety is not given this right in the Roman law countries by legislation or by the settled judgment of the courts, not solely by the form of contract, his legal position is weaker there than it is in Germany and the Netherlands. This

divergence is prejudicial to the international movement of suretyships and therefore warrants attention, because indeterminate suretyships are in common use.

It is therefore proposed that a surety's right to denunciation should be introduced by legislation into every legal system (see Part II, art. 6 below).

(20) *Bar by prescription (para. 90)*

148. *Statute of limitations.* – The statute of limitations for surety obligations is usually thirty years, but ten years in Italy. The difference in time, though considerable, has no great effect upon legal relations in practice, for the rights arising from a security are very seldom likely to be asserted more than ten years after the conclusion of the contract of security. If this should happen in a particular case, it is always possible to interrupt the operation of the statute by bringing an action. A uniform rule on the statute of limitations is not, therefore, necessary.

149. *Strict terminal date.* – In Italy there is in addition to the statute of limitations a special strict terminal date, the purpose of which is to ensure that the creditor asserts his rights against the debtor by way of recourse not later than six months after the secured claim has matured. This terminal date only applies if the right attaching to the security as such was not to terminate at the same time as the secured claim (see paras. 88b and 137 above). The need for a special rule of this sort is not clear. The guarantor can stipulate a time-limit for his obligations and so coordinate it with the maturity of the secured claim. If he has not stipulated a time-limit, he may denounce the contract (see paras. 89 and 138 above). If he has, but has bound himself for more than six months after the maturity of the secured claim, he must comply with his obligation vis-à-vis the creditor. Vis-à-vis the debtor, under most of the legal systems (including the Italian), he is entitled to discharge from the suretyship as soon as the secured claim matures (see paras. 91 above and 150 below).

(21) *Maturity of secured claim (para. 91)*

150. Despite slight differences in the conditions of application, the law of all the countries accords the surety a right to discharge vis-à-vis the debtor if the secured claim matures or if formal notice of default is served on the debtor. These divergences are very slight and do not warrant any special provision.

Similarly, the legal protection offered by Italy in its strict terminal date linked with the maturity of the



secured claim (see para. 149) above does not warrant a proposal.

(22) *Extension of secured claim (para. 92)*

151. The older civil codes, except the German and the Italian, accord the surety a right to discharge against the debtor even if the creditor has granted an extension of the secured claim. This protection of the surety supplements that available to him by virtue of the principle of the accessory character of suretyship and thereby enables him to bring a similar action directly against the creditor. Germany and Italy renounce this protection. The effect of this difference of law is slight, however. It is most improbable that it could seriously affect the movement of suretyships in the Common Market. No uniform rule was therefore considered necessary for the regulation of this matter.

(23) *Deterioration of debtor's financial position (para. 93)*

152. A distinction must be drawn between the rights which a guarantor has against a debtor and those he has against a creditor.

(a) The law of all countries (except the Netherlands) gives the guarantor a right of discharge against the *debtor* in the event of his failure. The conditions are not, however, uniform in all the countries. In Germany a substantial deterioration in the debtor's financial position suffices. In the Roman law countries the debtor must have become insolvent or have been adjudged bankrupt. The Netherlands has actually abolished the right to discharge. These differences in the structure of the right to discharge are, however, less important than they appear at first sight.

The right to discharge in the event of the debtor's failure is important in itself only in cases in which the secured claim has not yet matured. If it has, the surety can demand his discharge from the debtor in any case, either as a matter of course or immediately on giving him formal notice (see para. 150 above). But, in addition, a determinate claim matures before the fixed term if bankruptcy proceedings are started against the debtor's assets (art. 1188 of the French cc; art. 65 para. 1 of the German KO) or if he has become insolvent (art. 1186 of the Italian cod. civ. and the settled judgments of the courts in Belgium and France). In the Roman law countries a right to discharge in the event of the debtor's failure supplementing the right inherent in the maturity of the secured claim is therefore superfluous (see to this effect e.g. Fragali 425). This is obviously the reason why it has been abolished in the Netherlands. In Germany it is impor-

tant in itself only if the debtor's financial position has substantially deteriorated but it has not been possible to apply for his adjudication in bankruptcy and no formal notice of default has been served on him.

It does not seem necessary to devise a harmonized rule, for it would be of practical significance only in this special case.

(b) No country affords a surety a right to discharge from his liability for existing obligations vis-à-vis a *creditor* when the debtor's financial position deteriorates, for this is precisely the risk against which the creditor wished to secure himself by means of the suretyship, and it would be incongruous to refuse him the right to the security or even simply to place a limitation upon it when he actually needs it.

The situation is less clear where the debtor's financial position deteriorates *before* the claim to be guaranteed by the suretyship furnished beforehand has come into being. In two countries, Italy and Germany, the creditor does not have the right in this case to disregard the surety's wishes and interests in reliance on his liability and to substantiate the secured claim by performing vis-à-vis the debtor. He is expected rather to renounce the right in the surety's interest.

The Italian and the German solutions differ in detail, for in Italy the surety is discharged forthwith, whereas the German courts require notice of termination. Furthermore, in Italian law the creditor must have been aware of the deterioration in the debtor's financial position.

The surety's expectation of discharge from liability for future obligations, or at least the possibility of releasing himself from them by giving notice of termination in the event of a substantial deterioration of the debtor's financial position, is a considerable advantage to him. It makes it easier for him to decide whether or not to undertake the suretyship. The divergences between Italian and German law, on the one hand, and the law of the other Member States, on the other, cannot be regarded as so unimportant that there is no need to eliminate them. For this reason an express regulation is proposed (see Part II, art. 7 below).

(24) *Threat of action against the surety (para. 94)*

153. In the law of all the countries a surety threatened by the creditor with imminent action is entitled to claim his discharge from the debtor. The only slight difference lies in the conditions; for whereas a complaint by the creditor suffices in the Roman law

countries, in Germany the surety must be sentenced to pay by an enforceable judgment. The German rule is stricter than the Roman, since some time elapses between the lodging of a complaint and the issue of an enforceable judgment. The debtor, however, will as a rule have already been served formal notice of default by the time the action is brought against the surety, so that the surety can demand discharge from him for this very reason (see paras. 91 and 150 above). Any remaining differences in the surety's legal position are too insignificant to require a harmonization of the law.

The case is rather different with the further rule in Germany which accords a right to discharge if the debtor moves his place of domicile, establishment or residence. This provision is of practical significance only if the domicile or residence is transferred abroad. It seems questionable simply to link a right to discharge with transfer of domicile or residence to another EEC country. The same considerations obtain here, *mutatis mutandis*, as were put forward at another place in connection with similar restrictions on the conclusion of contracts of security (see paras. 127-129 above). The Institute is therefore proposing the elimination of this ground for discharge (see Part II, art. 8 below).

(25) *Transfer of claim in the case of a security constituted for one of a number of joint debtors (para. 98)*

154. If a surety has furnished a personal security for all the joint debtors, it is held in all the countries that the claim on all the joint debtors is transferred to the surety who has paid. In the French and Netherlands view, a similar consequence arises if the security was furnished for only one of a number of joint debtors. In Germany and Belgium, however, some authorities hold that only the claim against those joint debtors for whom the surety had undertaken the security is transferred to the surety who has paid. Opinions differ in Italy.

The discrepancy turns on a small point of detail connected with the execution of the suretyship. The existing difference of law is of no importance for the movement of suretyships within the Community. There is no need, therefore, for a unified rule to cover this point.

(26) *Concurrent rights of guarantor paying in part and debtor's creditors in bankruptcy (para. 102)*

155. *Differences of law.* – The treatment of law of a guarantor who has paid part of a secured debt and wishes to be joined in the debtor's bankruptcy proceedings by virtue of the part of the rights transferred to

him differs from country to country in certain respects. In Italy a surety who has paid nothing before the debtor is adjudicated bankrupt may not declare his conditional claim to recourse at the time of the adjudication if the creditor does not declare the secured claim. If the surety has paid a part of the secured claim before the adjudication, it is agreed in all the countries that he may be joined in the debtor's bankruptcy proceedings with that part of the claim. In the German and Italian view, he must, however, yield any dividend he has collected to the creditor. Lastly, in Netherlands law alone a surety who has paid a part of the secured debt before the adjudication is entitled to declare this partial performance when the debtor is adjudged bankrupt.

156. *Conclusion.* – The importance of all these various divergences in the law of bankruptcy is procedural rather than substantive. For even where a surety may be joined in the debtor's bankruptcy proceedings with the parts of the claim transferred to him and may retain the dividend he has collected, the creditor may seize the surety's right if he has not yet fulfilled the whole of the obligation attaching to the suretyship.

Furthermore, the difference in the treatment of certain details of the surety's recourse is of no importance to the movement of suretyships. A special rule of the law of bankruptcy solely in respect of suretyship, but excluding joint debt, would therefore be meaningless. For all these reasons, the Institute does not contemplate any uniform rule.

(27) *Right of compensation against debtor incapable of contracting (para. 107)*

157. Italy is the only country which gives a surety who has paid a right of compensation even against a debtor incapable of contracting. The debtor is, however, liable only for money had and received as a result of performance by the surety. As it was decided (see para. 137 above) that a rule for the controversial question of the validity of a suretyship for a debtor incapable of contracting was unnecessary, this must certainly apply equally to the particular question arising from the liquidation of such a suretyship discussed here.

(28) *Division among co-sureties (para. 112)*

158. *The right to division among co-sureties* is in effect governed by the same rules in all the countries. The Netherlands rule departs from the common standard, but it will probably be dropped from the future civil code and need not, therefore, be taken into consideration.

On the other hand, there is a difference in the treatment of a *secured claim transferred* to a surety who has paid. Most of the countries distribute the transferred claim in accordance with the co-sureties' shares. Italy does not accept the transfer of rights in the case of a joint (as opposed to an absolute) suretyship. The Netherlands does not permit any transfer of rights to the detriment of co-sureties in any circumstances. It is questionable, however, whether these differences are of any great moment, since all the countries regulate the right of division among co-sureties in much the same way. Italy, though excluding the transfer of rights in the case of joint suretyship, obviously relies on the internal right of division among co-sureties, which is virtually equivalent to a transfer of rights (see para. 109 above). The Netherlands rule is vigorously contested in the Netherlands itself. Consequently, no substantial differences of law are to be found.

(29) *Division among guarantors furnishing personal securities and guarantors furnishing real securities (para. 113)*

159. None of the countries has settled by legislation what rights to division a paying guarantor who furnishes a personal security enjoys vis-à-vis a guarantor (or guarantors) who furnishes a real security where the rights inherent in it cover one and the same claim. Substantially, the differences of law are three. In France the division among the guarantors is effected in accordance with the number of persons involved, in Italy and the Netherlands (and in the opinion of some French writers) in accordance with the amount of the obligation of each. Germany accords preference to guarantors furnishing personal securities over guarantors furnishing real securities; the former can therefore demand division from the latter, but not the reverse. In the future Netherlands legislation the right to division will come into play only secondarily, if the right to compensation by the debtor or a right to subrogation by a guarantor liable to the debtor is unenforceable.

A harmonization of these differences of law does not, however, seem feasible, for several reasons. First, this question bears only on the details of the liquidation of a suretyship. Secondly, this is a case which seldom occurs in practice. The main point, however, is that the whole range of the questions involved cannot be regulated solely for the law of personal securities because they affect the law of real securities as a whole. For these reasons, therefore, the Institute is not recommending a uniform rule for the matter.

(30) *Private international law (paras. 117-119)*

160. *Differences of law.* – In all the Member States the rules of law governing the personal security are

determined separately from the rules applying to the secured claim. These rules are also applicable to the rights attaching to securities affected by the principle of the accessory character of suretyship in substantive law. The operation of this principle becomes visible as soon as the line is drawn between the law applicable to security and that applicable to the secured claim.

In accordance with the general principles of private international law in all the Member States, the system of law applicable to a personal security is determined in the first instance by the common will of the parties. If the parties fail to stipulate the law applicable, resort is had in the second instance to accessory rules, which are quite different in the different countries. In French law the security is presumed to be subject to the same law as the secured claim. In Germany and the Netherlands the principal condition of the contract is taken, meaning here the guarantor's domicile at the time when he assumes the obligations of the security. In Italy, the law of the place where the contract was made applies, unless guarantor and creditor are nationals of the same State.

The system of law governing the personal security is conclusive for the conditions of the surety's obligation to perform, the effects of the secured claim and the rights to recourse after performance. In so far as the scope of the guarantor's obligation to perform is determined by the secured claim in accordance with these principles, the law governing that claim determines the extent of the debtor's obligation to perform.

161. *Conclusions.* – The only difference in private international law lies in the accessory rules applied if the parties have not agreed upon the law applicable. This difference is of course important, since experience shows that not even all professional guarantors or all creditors insert in their standard forms of contract an express clause on the law applicable, much less other parties. It is true that a tacit stipulation of the law applicable can often be inferred from references to certain provisions of domestic law in the standard forms and other types of contract drawn on the basis of counsel's opinion, but even they often fail to mention the law applicable, and it has therefore to be determined by accessory rules. From an abstract point of view some rule relating to conflicts of laws is obviously needed here.

A further question is whether there is a place for a rule on conflicts of laws such as is proposed in Part II of this study alongside the substantive rules. This question must be answered in the affirmative, since the proposals relate to only a few points (ten out of thirty) for which special rules seem particularly necessary, while a score of less important points of difference of law remain to be settled.

The very number of these points recommends the suggestion that in addition to the partial harmonization of the substantive law a supplementary rule should be devised to govern conflicts of laws. This would make it possible to ensure that in each specific case in which a security is constituted any remaining differences of law would at least be appreciated in the various States in a uniform manner in accordance with a single system of law, irrespective of the jurisdiction in which

a party asserts his rights. The need for a uniform rule on conflicts of laws is the greater in that the number of cross-frontier personal securities is constantly increasing and is likely to grow even larger when a unified money market is established.

The Institute is therefore proposing a rule for conflicts of laws where they relate to the law applicable to contracts of security (see Part II, art. 10 below).



PART II

PROPOSALS AND COMMENTARY



Art. 1

*Member States may not declare nationals of another Member State not qualified to act as sureties and may not refuse to accept them as sureties solely because they have their place of business or their domicile in another Member State.*

*Commentary.* 1. Article 1 deals with two types of restriction: rules prescribing restrictive conditions for suretyships offered to public authorities and geographical restrictions on the qualifications of a surety offered by a debtor when bound to do so by law or by a judgment. The affinity between the two types of restriction makes it advisable that the two cases should be covered by a single rule.

2. The systematic exclusion of nationals of Member States solely by reason of their nationality or because they have their place of business or their domicile in another Member State offends the requirement of non-discrimination laid down in the relevant treaties. This treaty obligation is equally binding on Member States irrespective whether they are enacting legislation or accepting suretyships in their capacity as creditors. Furthermore, it is immaterial whether the grounds for non-acceptance are embodied in a provision of the general law or in a directive with mandatory force only for the administrative authorities or whether they are invoked in a particular case in the exercise of administrative discretion. On the other hand, citizens cannot be presumed on the face of it to be directly bound by the treaty clauses prohibiting discrimination. That is why the prohibition is expressly addressed only to the Member States. In any case, contractual obligations to furnish a suretyship are extremely uncommon in practice, since creditors as a rule reserve to themselves the right to investigate the solvency of a surety proposed by a debtor and do not simply accept any or every person offered by him as a surety.

3. The prohibition of discrimination is couched in negative form because the sole target is the refusal of a surety by reason of his foreign nationality or because he has his place or his domicile in another country, without prejudice to any other reasons for refusing to accept such sureties. Until and in so far as the reciprocal recognition and enforcement of judgments among the Member States of EEC is established, the difficulty of enforcing domestic title in the surety's country, for example, may be a legitimate reason for refusal.

Art. 2

(1) *A contract of suretyship shall be valid only if the surety has given the promise of suretyship in writing, by telegram or by telex. The defect of form shall be cured by the surety's fulfilment of his obligations.*

(2) *No formal conditions shall be attached to the promise of a suretyship given by a merchant. Such promise may be proved by oral evidence.*

(3) *For the purposes of this article a merchant means:*

(a) *in Belgium any person engaged in commercial activities;*

(b) *in Germany a "Vollkaufmann";<sup>1</sup>*

(c) *in France any person engaged in commercial activities;*

(d) *in Italy an "imprenditore", but not a "piccolo imprenditore";*

(e) *in Luxembourg any person engaged in commercial activities;*

(f) *in the Netherlands any person who gives a suretyship in the performance of his trade or industry.*

*Alternative:* delete paragraphs (2) and (3) of the above proposal so that article 2 will consist of paragraph (1) only.

*Commentary:* 1. Personal securities (unlike real securities) are always given in the interest of a third person and therefore entail special risks to the personal guarantor. Furthermore, the basic optimism characteristic of most people usually induces the guarantor to hope that he will not be called upon — a hope which, as the experience of every age and every clime demonstrates, is all too often disappointed. For these two reasons the legislation in nearly all the countries has surrounded the subscription of a suretyship with special precautions, such as the written form for promises of suretyship in Germany, and probably in the future Netherlands legislation too, and the entry "*bon pour...*" written in the surety's own hand in the Roman law countries (except Italy). Furthermore, in the Roman law countries (except the Netherlands) there are gen-

<sup>(1)</sup> See Commission document D.G. XIV/B/2. A Vollkaufmann is a merchant bound to comply with all the rules of commercial law. (Handelsgesetzbuch) a 'Registered merchant'.



eral provisions concerning evidencing which in many cases constitute an indirect requirement of the written form. These differences in the domestic legislation give rise to considerable uncertainty about the validity and enforceability of cross-frontier personal securities. Paragraphs (1) and (2) are designed to obviate this uncertainty by requiring the written form for promises of suretyship between private persons, whereas promises of suretyship given in the course of business are exempted from all formalities.

2. It is, of course, possible to adduce a great many good reasons for extending the requirement for the written form (in the simplified form suggested in this draft) to all personal securities (see para. 7 below). The objection to this general extension of the written form is, however, that it would run counter to the trend towards abolishing formalities which has become evident in the commercial law of most of the countries in recent decades. It does not seem necessary or appropriate — since there is no apparent reason to amend the existing rules — for the supranational legislator, at any rate, to run counter to this trend. Another argument in favour of retaining the exemption from formalities in the case of promises of security given by merchants is that, despite the simplified written form provided for in the first sentence of paragraph (2) and despite the general practice of drawing contracts in writing, it is easy to conceive of cases in which a merchant gives a promise of suretyship by word of mouth or by telephone. He should be bound by a promise of that sort.

On the other hand, non-merchants need stronger protection against heedlessly giving personal securities which involve them in risks and place (temporarily, at least) a unilateral burden upon them. This special protection for private guarantors, which is recognized in the law of most of the countries, should be retained.

3. For the protection of non-merchant guarantors the first sentence of paragraph (1) requires that the promise of security shall have been given in writing, by telegram or by telex. The extension of the written form to telegram and telex takes into account a need which has sprung from advances in communications technology. The concept of written form is uniformly construed to mean drawing the promise of security in writing and signing it by hand.

If the written form is construed in this fashion, the entry “bon pour ...” written in the guarantor’s own hand seems superfluous, and with telegram and telex unfeasible to boot.

The practical objection to adopting the procedural provisions on evidencing which exist in some Roman law countries is their complexity, as proved by the numerous exceptions they expressly permit. A further objection is that such rules would introduce a complete

innovation into the procedural law of other countries. The rule proposed in this draft merely adds one more exception to the many to which the rules for evidencing contracts are already subject in the Roman law countries. There is no need to provide for further restrictions under the law of contract *besides* the written form.

Lastly, it is unnecessary to require that a promise of security shall, besides being drawn in writing, be stated expressly, as is prescribed in the Roman law countries.

4. The second sentence in paragraph (1) states that a personal guarantor cures the nullity of a promise of security for defect of form by fulfilling his obligations. The particular purpose is to prevent the creditor from subsequently demanding recovery of the amount paid by the guarantor on the pretext that the latter has performed without good grounds in law because the security was void *ab initio* for defect of form.

5. In commercial transactions promises of security should be exempted both from the requirement for the written form and from the limitations on evidencing them. This is set forth in paragraph (2). In this draft the distinction between promises of security by merchants and by non-merchants turns on the concept of merchant [defined in detail in paragraph (3)] rather than on the concept of commercial transaction. The latter concept is casuistic, in the sense that it may be deduced from the concept of merchant, at any rate so far as giving promises of security is concerned. In Germany the concept of commercial transaction cannot even be defined without a prior definition of merchant. On the other hand, the concept of merchant can be defined fairly easily by reference to the domestic legislation.

The definition of merchant is hampered, however, by the fact that Italy and the Netherlands have merged civil law and commercial law and therefore no longer accord any direct recognition to the concept of merchant. In both legal systems, however, there are secondary connecting links which made it possible to define the concept of merchant fairly precisely.

6. Paragraph (3) refers, in order to obviate any ambiguity, to the definitions of the concept of merchant in the domestic legislation. In Belgium, France and Luxembourg a merchant within the meaning of this draft is any person engaged in commercial activities. In Germany the draft covers a “Vollkaufmann” as defined in articles 1 to 6 HGB (excluding, however, the “Minderkaufmann” of art. 4 HGB). In Italy the provision is linked with the definition of “imprenditore” and “piccolo imprenditore” in articles 2082 and 2083 cod. civ. In the Netherlands the proposal uses the same formulation as article 1915, paragraph 3 of the Burgerlijk Wetboek and article 164a, paragraph

1 (c) of Book I of the Burgerlijk Wetboek, still in force, or the corresponding provision in article 88, paragraph 1 (c) of Book I of the Nieuw Burgerlijk Wetboek, due to come into force on 1 January 1970.

Admittedly, these formulations will not cover every conceivable case. It would appear preferable to use for the legislation of each Member State a concept already imbedded in its law rather than to devise an identical definition — which in any case is hardly feasible. This is the only way to obviate so far as possible any uncertainty about the concept of merchant used in this draft.

7. The following objections may be advanced against the basic notion in the proposed rule, i.e. the distinction between promises of security given by merchants and by non-merchants. In the first place the distinction is complicated, especially since it necessitates the definition of the concept of merchant, which is not construed everywhere in the same way. But final uniformity in the definition is impracticable. Secondly, the distinction reintroduces special rules for merchants into Italian and Netherlands law which these two States had abandoned in the recent past. Thirdly, the practical argument might be put forward that the written form is already preferred as a rule for evidentiary reasons in commercial practice.

Though these arguments are not conclusive (see para. 2 above), they have a certain weight. An alternative is therefore proposed, prescribing a simplified written form for all promises of suretyship. For details see paragraphs 1 to 4 above.

### Art. 3

*(1) A surety shall have the right to demand preliminary proceedings against the principal debtor (non-absolute suretyship) only if the parties have agreed that the creditor must first have recourse to the debtor when a secured claim matures.*

*(2) Where the parties have stipulated a non-absolute suretyship, the surety shall not lose the right to demand preliminary proceedings against the debtor solely because the debtor transfers his domicile or place of business, his establishment or residence to the territory of another Member State.*

*Commentary.* — 1. Five of the six Member States posit as a legal regime the subsidiary liability of the surety in the case of *suretyship*. Consequently, the surety need not perform until the creditor has brought an action against the debtor and until it has appeared that

the proceedings against him are unlikely to be successful. In Italy, however, the surety is jointly liable with the debtor. The parties may agree to derogate from both these basic rules. The conflict between them is mitigated in practice by the fact that all the States except Italy provide for a number of exceptions specified in the law to the basic principle of the subsidiary character of suretyship. Thus, except in the Netherlands, a suretyship furnished by a merchant is always absolute; in all the other five countries the surety is deprived of the right to demand preliminary proceedings where the distraint upon the debtor is likely to be unsuccessful or unduly onerous for the creditor or where the suretyship has been furnished pursuant to an obligation imposed by the operation of law. The main consideration, however, is that in commercial practice the parties nearly always agree to derogate from the principle that a surety is entitled to demand preliminary proceedings, whereas in Italian practice the parties abide by the opposite legal model and practically never stipulate such a clause.

On the other hand, in all the countries the legal regime of the subsidiary character of suretyship may be strengthened by making the surety liable only for losses incurred by the creditor in his action against the debtor.

2. Owing to the legal derogations from the basic principle of the subsidiary character of suretyship and to the fact that parties very often waive the right to demand preliminary proceedings, the Italian system and that of the other Member States approximate closely in practice. The prerequisite for such approximation in fact, however, is in all the countries, except Italy, an express agreement. There is reason to fear that in the movement of suretyships between Italy and the other Member States the differences in the initial legal situation are frequently ignored and that the necessity for a contractual clause is accordingly neglected. Since the priority to be accorded to the surety's liability is a very important matter both for himself and for the creditor, an initial legal situation must be created which shall be uniform in all the Member States.

3. In deciding between the Italian system and that of the other Member States the following considerations militate for the Italian solution. Firstly, it approaches most closely to the true legal situation as known to experience. Secondly, it represents a systems towards which the proposals for law reform in other countries are moving. Thirdly, there is little reason to fear that the abolition of the subsidiary character of suretyship will appreciably worsen the surety's position. For if the debtor has any assets, the creditor will as a rule have recourse to him first in any case. If the debtor does not have sufficient assets, the surety is obliged to perform in accordance with the basic principle of the subsidiary character of suretyship.

The only drawback to the Italian solution is that it makes an agreement for the stricter form of a surety's liability superfluous and does not call the surety's attention to this particular aspect of his obligation. But this precautionary function of the express agreement is in any case greatly diminished by the very common use nowadays of standard forms of contract.

4. Paragraph (1) by making the right to demand preliminary proceedings conditional upon an express agreement assumes the implied principle that a suretyship is in general absolute. It is quite clear that besides the right to demand preliminary proceedings recognized by the law of all the Member States, the parties may stipulate any other forms of subsidiary liability for the surety, whether weaker or stronger, and, in particular, a deficiency guarantee.

5. Paragraph (2) makes provision for a secondary point with regard to the right to demand preliminary proceedings. The proposed provision is modelled on article 773, paragraph 1 (2) of the German Civil Code. In accordance with this provision, the surety is deprived of the right to demand preliminary proceedings if proceedings against the debtor are substantially hampered by the fact that he has moved his domicile, establishment or residence. This provision is now applied in practice only if the debtor transfers his domicile abroad. The automatic application of this provision to a removal to another Member State is at variance, however, with the factual and legal circumstances which already exist or will be created in the fairly near future with regard to legal relations within the European Communities. In particular, the proposed EEC convention on jurisdiction and the enforcement of civil and commercial judgments will make it possible to enforce a judgment rendered against the debtor in another Member State. A legal consequence should no more be attached solely for that reason to the transfer of domicile to another Member State in the case of the liquidation of a suretyship than it should be in that of the constitution of a suretyship (see art. 1 above).

The proposed rule (like article 1) is couched in negative form because it is not intended to affect any other of the reasons for which in the case of a non-absolute suretyship a surety may be deprived of the right to demand preliminary proceedings. As the initial presumption in this draft is the surety's absolute liability, it should also be emphasized that the proposed rule applies only if the parties have stipulated a non-absolute suretyship.

The introduction of the principle of absolute liability proposed in paragraph 1 does not render the rule superfluous, for it is very probable that article 773, paragraph 1 (2) BGB (and the rules connected therewith) will be retained as catch-all legal rules where the parties stipulate a non-absolute suretyship, as has been done in Italy.

#### Art. 4

*Where a creditor has renounced the faculty of setting off a claim secured by a suretyship with a debt owed to him or of asserting his right to compensation, the suretyship shall be extinguished. This shall not apply where a creditor proves that he had good reason for renouncing this faculty.*

*Commentary.* — 1. Questions of compensation play a considerable part in commercial transactions and the rules for it should therefore be as uniform as possible. But the profound divergences between the Roman system of compensation by operation of law and the German system of compensation by declaration militate against a general harmonization of the existing differences within the context of suretyship. The consequences issuing from the two different basic approaches cannot be overcome in isolation within the sphere of the law of suretyship. Any attempt to frame a comprehensive resolution of this problem would be doomed to failure. This draft, therefore, goes no further than the regulation of a particular point where the differences between the two basic approaches have practical effects and yet may readily be overcome.

2. The proposed rule contemplates the following two situations. First, where a creditor has an obligation to a debtor — besides the claim against him secured by the suretyship. Instead of setting off his secured claim against the debtor's claim the creditor pays the debtor.

Second, where a creditor has an obligation to a debtor and, in addition — i.e. besides his claim secured by the suretyship — a further claim against him. Instead of setting it off against his secured claim, he sets it off with the other claim.

A creditor may have good reason for doing this. The claim with which the creditor sets off may not have been secured; or he may, for excusable reasons, have overlooked the fact that he himself had a debt with which he could have set off the claim. It is only fair that the surety should be discharged from his liability, as he is in the Roman law countries, if the creditor has renounced the faculty to compensate without good reason. In other cases, however, his liability should continue.

3. It is inadvisable to take the Italian law as a model for the proposed rule, for it contemplates only the special case where a creditor discharges his own debt by paying it. Only ignorance in good faith of his own debt is recognized as a valid excuse (art. 1251 cod. civ.). On the other hand, a proposal has been made for the future Netherlands legislation which is

far broader in conception (art. 6.1.10.17, para. 2 of preliminary draft NBW). The rule proposed here is based upon it.

4. Article 4 is couched in terms which take equally into account both the Roman law system of compensation by the operation of law and the German system of compensation by declaration. In drafting it attention has been paid to Pels Rijcken's criticism (118 f.) of the wording of the proposed Netherlands article.

#### Art. 5

*(1) Where the liability of a surety terminates on a specified date, he shall nevertheless remain bound beyond that date if the creditor*

*(a) in the case of an absolute suretyship gives the surety immediate notice of his intention to bring an action against him;*

*(b) in the case of a joint suretyship*

*(1) immediately informs the surety that he is not willing to release him from his liability;*

*(2) promptly asserts his rights against the debtor and pursues the action with due diligence;*

*(3) gives the surety notice immediately the proceedings have ended that he intends to bring an action against him.*

*(2) The parties may by agreement stipulate exceptions to this rule.*

*Commentary.* – 1. The rules for the legal consequences of a determinate suretyship differ in the Member States. In all of them the time-limit is established by the will of the parties, which may, where necessary, be discovered by interpretation. If it is found that a determinate suretyship is in fact to terminate concurrently with the specified time-limit, the law of the countries concerned attaches varying consequences to it. Under the law of some of the countries the suretyship terminates forthwith and the creditor loses all his rights unless he has already brought an action against the surety or has already applied for a writ or distraint against him. In other countries a determinate suretyship is extended for a certain period if the creditor takes certain steps to enforce his rights. Italy requires in particular circumstances that an action shall have been brought against the creditor within the two months following the expiry of the time-limit. In Germany a distinction is drawn between the joint and the absolute liability of a surety. With the former, the creditor must notify the surety without culpable

delay that he intends to bring an action against him. With the latter, he must institute proceedings against the debtor with all due diligence and must also give the surety notice of the action which he intends to bring against him as soon as the proceedings for distraint have ended.

2. Because the surety needs to know for how long he remains bound, a uniform, though optional, rule seems to be needed (see para. [2]). This rule provides for the prolongation of the surety's obligations if he immediately takes certain steps to maintain his rights in being. This provision reconciles the conflicting interests of creditor and surety, for it compels the creditor to refrain from prematurely asserting his rights long before the expiry of the time-limit specified for the termination of the suretyship, while it protects the surety's interest not to be bound indefinitely by the suretyship and that it should be liquidated as speedily as possible.

This principle, which is fair to both parties, is formally recognized in the relevant legislation in Germany and Italy.

3. The provision in article 1957, paragraphs 2 and 3 of the Italian Civil Code could not be taken as a model for the rule proposed here, for the following reasons. Firstly, it is expressly restricted to suretyships with a term set to run until the secured claim has matured.

But the rule must also cover the time-limit of all suretyships which are to be valid for a specified period only. Secondly, the substance of the Italian rule is not entirely clear. The requirement that a creditor must bring an action against the *debtor* can hardly be reconciled with the joint liability of surety and debtor specified in the law. Thirdly, a strict time-limit of two months for bringing an action against the debtor seems unduly rigid.

4. The proposed rule applies where it appears from the interpretation of the contract of security that the surety's liability is to end with the expiry of the time-limit specified for the suretyship. The general canons of interpretation are applicable to this rule. This draft is not intended in any way to prejudice such interpretation.

5. As in article 777 of the German Civil Code, a distinction is drawn in the draft between absolute and joint suretyship and different consequences are attached to them. These issue from the nature of absolute and joint suretyship and need not be set out in detail here. The draft rule requires that the creditor shall with all due dispatch declare his intention of bringing an action against the surety and relieves him from any obligation to institute proceedings within a strict time-

limit. The rule amply protects the surety's interests without, however, obliging the creditor to sue, for this, as experience shows, greatly complicates further negotiations. Departing from the German law, it obliges the creditor, even in the case of a joint suretyship, to inform the surety immediately the time-limit has expired whether he intends to hold him to his liability; for here, too, the surety has an interest in knowing as soon as possible whether he is or is not to expect the creditor to take action against him.

6. The proposed rule is to be construed as an expression of the presumptive will of the parties. It is for this reason that they are permitted to stipulate exceptions to the whole or to any part of the proposed rule (see para. 2).

#### Art. 6

(1) *A surety may serve notice with future effect that he will denounce a suretyship contracted for an indeterminate period.*

(2) *A surety shall be discharged by such notice only if the creditor's claim rests upon a payment which he has made after the notice was served and only if such payment was not made as a result of a peremptory legal obligation.*

(3) *A surety may not be deprived of the right to denounce a suretyship.*

(4) *Member States may prescribe that this right of denunciation may not be exercised for a reasonable period after the suretyship was undertaken or only if the circumstances in which the suretyship was undertaken have changed.*

*Commentary.* — 1. The principle that no debtor may be bound by an obligation indefinitely against his will is common to the law of all the countries considered here. It should apply equally to indeterminate suretyships, though no express provision to this effect yet exists in the law of all the countries.

Such suretyships generally serve to secure claims for varying amounts which one of the parties in the course of a commercial relationship, usually a bank, holds against the other party. The surety should be enabled to release himself from this sort of indeterminate suretyship with future effect. He must have this right at all events where the circumstances in which he contracted his obligations have changed. For example, a shareholder who has personally stood surety for his company's debts but has subsequently retired from business, a merchant who has given a suretyship for a person with whom he had commercial relation-

ships but has in the meantime broken them off, or a wife who has made herself responsible for her husband's business debts but has later undergone divorce or legal separation should have the right to denounce. In such cases, at any rate, a creditor is expected to release a surety from his obligation and to demand a fresh security from the debtor or to abstain from granting him further credit.

In all six EEC Member States it is found in practice that a surety who has entered into an indeterminate suretyship needs a right of denunciation. But whereas in Germany and the Netherlands this right is awarded to the surety by the courts regardless of the form of contract, in the Roman law countries he has so far been granted it only because in the general practice relating to contracts he is admitted to have a legitimate interest in the faculty of denouncing the suretyship.

2. It appears that in the six member countries the parties may not agree to deprive the surety of this right of denunciation. For, if that were not so, one of the parties to a contract would not be securely protected against being bound by contractual obligations for an indefinite period. Paragraph (3) states this principle. It may, of course, be modified by domestic legislation within the limits laid down in paragraph (4).

3. A surety who has entered into an indeterminate suretyship may, however, be held to his obligations for a reasonable period. This should deter him from becoming a surety heedlessly and should equally prevent indeterminate suretyships from being depreciated in the eyes of creditors. The term "reasonable period" is vague. It could be made specific only if an arbitrary time-limit were set before the expiry of which the surety would not be entitled to denounce the suretyship.

The question whether the denunciation of an indeterminate suretyship should be permitted only after the expiry of a reasonable period may be left to domestic legislation, and likewise the question whether the period is to be determined by legislation or is to be left to the discretion of the courts. Domestic legislation should also be at liberty to prescribe that a surety shall have a right of denunciation only if the circumstances in which he subscribed the suretyship have changed. The experience of the countries in which banks and public agencies usually give a surety an unconditional and indeterminate right of denunciation shows that this system — which has at least the merit of certainty — is practicable and that it does not give rise to insuperable difficulties.

Member States may also make a provision with similar effect by leaving it to the parties to stipulate the conditions, within certain limits, for the exercise of the right of denunciation.

Lastly, the decision whether such suretyships should not be treated on the same footing as suretyships undertaken for very long periods in order to prevent evasion of the provisions relating to the denunciation of indeterminate suretyships may be left to domestic legislation. No general rule can be posited for the decision of the question whether a period stipulated by the parties is so long that the surety should be entitled to denounce it in any case; it can be decided only in the light of the specific circumstances of the particular case. General legislation to cover this special case of evasion of the general law is therefore hardly feasible. The courts must be left to decide in accordance with the rules for evasion of the general law whether and on what conditions a determinate suretyship may be denounced. In any case, denunciation is permitted under Article 7, irrespective of the duration of a suretyship, where a debtor's financial position has substantially deteriorated. Here is precisely where entitlement to denunciation is of special interest to a surety who has committed himself for a long period.

4. The sole intention in such denunciation is to debar a creditor who has received notice of termination from arbitrarily prolonging a surety's obligation.

The limitation means, first, that the suretyship covers any supervening changes in the amount of the secured obligation which have occurred not as a result of any act by the creditor, such as claims for interest or commission or for the reimbursement of costs or compensation for damages which were incurred only after the suretyship was denounced.

Secondly, the surety is liable for the claims which the creditor has incurred by giving the debtor further credit where he was legally bound to do so and could not terminate his obligation to pay. For instance, the surety would be liable for a claim arising from the redemption of bills of exchange which the creditor had undertaken to redeem and which were put into circulation before the notice of termination was served. Thirdly, if the creditor may for his part avail himself of the denunciation of the suretyship to revoke his promise.

5. The proposed rule relates only to the surety's position vis-à-vis the creditor. It does not preclude the possibility that the surety may be obliged vis-à-vis the debtor by reason of his legal relation to him to refrain from exercising his right to denunciation.

6. If a surety may denounce an indeterminate suretyship, the right he is accorded in the law of most of the countries to require the debtor either to discharge him or to furnish security after the expiration of a certain period loses some of its significance. But it

still keeps it in the case of obligations which arose before the creditor was served with notice of termination, for which the surety therefore remains liable. The rule is not in itself grounds for obliging Member States to deprive the surety of his right to demand either discharge from his obligations or that he be furnished with security against the debtor. Those who frame the domestic legislation should, however, ponder whether it will still be advisable in the future to make special rules for the indeterminate suretyship.

The surety's interest in being enabled to cover his risks after a certain period is almost as strong where he has entered into a determinate suretyship. However, it is doubtful whether this interest should be catered for at the debtor's expense unless his financial position has deteriorated and the surety's risks have been increased in consequence.

#### Art. 7

*(1) A surety may serve notice with future effect that he will denounce a suretyship if the financial position of the debtor has substantially deteriorated after the suretyship was contracted.*

*(2) A surety shall be discharged by such notice only if the creditor's claim rests upon a payment which he has made after the notice was served and only if such payment was not made as a result of a peremptory legal obligation.*

*(3) Member States may prescribe that a surety may not be deprived of his right to denounce a suretyship or that he may be so deprived only on certain conditions.*

*Commentary.* – 1. The basic question whether a surety must remain bound vis-à-vis the creditor by the suretyship with future effect if the debtor's financial position substantially deteriorates is answered in the negative in Italian and German law. The interest of the surety, whose risks have certainly increased owing to the change in the debtor's financial position, not to have to incur this risk for future obligations as well warrants preferential treatment of his interest over the creditor's interest in the maintenance of the surety in his liability for further obligations. The creditor may have to require the debtor to furnish further security if he is to have any further credit or, if the debtor is unwilling or unable to do this, to let the business relations between them lapse or at any rate to refrain from extending them further. This will not work to the creditor's detriment, since the surety will still be liable for his previous obligations; but he will be disappointed in his expectation of benefit. It may be presumed that he will renounce

such benefit, particularly if the surety did not enter into the suretyship for motives of his own interest. A special rule for this case alone is not needed, however; for if the surety has any great economic interest in ensuring that the credit was granted, he will not in any event make use of his right of denunciation. Professional guarantors will nevertheless reserve this right of denunciation at any rate against the possibility of a deterioration in the debtor's financial position. They will, however, renounce the exercise of this right if they have armoured themselves with such strong precautions that they need have no fears for the satisfaction of their right of recourse; for if they have done this, they have no reason to denounce the suretyship.

A *debtor*, too, has no major interest which militates against according the surety a right of denunciation. He might, however, be placed in a difficult position if the creditor took the denunciation of the suretyship as a pretext to refuse him further credit. A debtor can secure himself against this risk by making a contractual agreement with the surety whereby the latter waives the exercise of his right of denunciation.

The *general* right of denunciation available to a surety in the event of a substantial deterioration in a debtor's financial circumstances attenuates the breach in the surety's legal position in the case both of a determinate and of an indeterminate suretyship. It removes a creditor's temptation to circumvent the surety's right of denunciation in the case of an indeterminate suretyship by making a determinate contract, which, however, runs for an exceptionally long term.

2. The prerequisite for the surety's discharge from future obligations is a *denunciation* of the contract. The creditor is not obliged, therefore, to protect the surety's interests by taking action himself. He can consequently rely upon the suretyship so long as the surety has not served notice that he intends to denounce it. This makes the legal situation far clearer, even though, admittedly, the certainty is obtained at the cost of imposing a certain burden upon the surety.

3. The denunciation of the suretyship only has future effects. This limitation must be construed here in the same way as in the case of the denunciation of an indeterminate suretyship (cf. para. 4 of the commentary to art. 6).

4. Member States must be left at liberty to permit or not to permit the *contractual stipulation of the right of denunciation* on the ground of an appreciable deterioration in the debtor's financial position. This right of denunciation represents so great an innovation in the law of most of the countries that all Member States cannot be expected to accept the notion that

no exception to it may be stipulated by agreement between the parties. Each Member State should, however, ensure that the surety is not deprived of the right of denunciation systematically or by the use of standard forms. For countries which cannot bring themselves to impose such a prohibition a provision might be contemplated whereby the waiver of the right of denunciation would in every case have to be declared in a separate special instrument, which could not embody any other clauses agreed by the parties.

5. There is still room for an *action for discharge* against the debtor besides the surety's right of denunciation against the creditor, for since the denunciation puts an end to liability only for future obligations, the action for discharge continues to apply to obligations already existing (cf. para. 6 of the commentary to art. 6 above).

#### Art. 8

*If a debtor transfers his domicile or place of business, establishment or residence to the territory of another Member State, a surety shall not be entitled by this fact alone to demand his discharge from the debtor.*

*Commentary.* - 1. The proposed provision relates to article 775, paragraph 1 (2) of the German Civil Code, whereby a surety may demand his discharge from the debtor if the proceedings against him are substantially hampered if he moves his domicile, establishment or residence. It is now held that *only* a move of the place of business (or domicile) to *another country* can substantially hamper proceedings.

Legal consequences should no more be automatically attached to the transfer of domicile to another country in the case of liquidating a suretyship than in that of contracting it, for the impediment to proceedings formerly caused by such transfer will be largely eliminated by the EEC convention on jurisdiction and the enforcement of civil and commercial judgments and has already been eliminated in part by bilateral agreements. The considerations set out above in connection with article 1 and article 3, paragraph (2) apply equally here.

2. As in article 1 and article 3, paragraph (2), the intention in this draft is simply to ensure that a transfer of the place of business (or residence) shall not be considered as in itself alone hampering legal proceedings. If the proceedings were actually hampered by a transfer of the place of business, because a debtor, for example, suspended his activities in his own country or sold the real property he owned there when he moved, it would be only fair that a surety should be permitted to bring an action for discharge against him.

Art. 9

(1) *A promise of payment given by a guarantor to the creditor of a claim against a third party shall not be invalid solely because the whole or part of it is to be effectual irrespective whether the secured claim exists or whether it is valid or whether the amount of the claim is specified (contract of guarantee).*

(2) *The rules governing suretyship shall apply by analogy to the contract of guarantee, with the exception of those based upon the subsidiary character of a suretyship in relation to a secured credit. The parties may by agreement stipulate exceptions to this rule.*

*Commentary.* – 1. A wholly autonomous regulation of the law of guarantee seems impossible, for two reasons. First, only the jurisprudence of the German courts so far provides enough material to give a general view of the matter, whereas this is not the case in the Netherlands, and even less so in France, Belgium and Luxembourg. Secondly, to separate the law of guarantee from the law of suretyship would conflict with the legal situation in Italy. It therefore seems necessary to align the rules for the guarantee as nearly as possible with the established rules for suretyship, unless the specific character of the guarantee otherwise requires.

2. Owing to the uncertainty of the law in France, Belgium and Luxembourg, the proposed rule must expressly declare the basic validity of the guarantee and make it the main point of the provision. This statement of the validity of the guarantee is couched in negative form because there is no intention in the draft to disregard other grounds for invalidity. It need do no more than eliminate the objections to the validity of the guarantee which may be, and indeed are, deduced from legal provisions as article 2012, paragraph 1 and article 2013, paragraphs 1 and 3 of the French, Belgian and Luxembourg Civil Code.

3. For the purposes of this draft, the provision goes no further than to declare the validity of the guarantee to secure a money claim. It is only within these limits that it seems necessary to devise a harmonization in the interest of a unified money market. That there is no intention of prejudging the validity of guarantees for other claims — which remain, as in the past, subject to the existing provisions in domestic legislation — it is self-evident from the purpose of this draft and does not therefore need to be stated explicitly.

4. Paragraph (2) states the rules which are to be applicable solely to the guarantee. A general regu-

lation of this sort seems to be desirable and necessary, because otherwise uncertainty will continue in the countries in which it is still uncertain whether the guarantee is recognized. The thrust of any possible objection that the proposed rules are unduly rigid is turned by the third sentence, in which contractual agreements between the parties are expressly declared to be permissible.

5. The transposition of the rules of the law of suretyship (except those which rest upon the principle of its subsidiary character) runs along the lines of the general development of law. It is, in particular, compatible with the state of the law in Italy. A comparable trend exists in Germany. It is also justified intrinsically, since guarantee and suretyship are closely akin and differ from one another only in the differences in the scope of the security. Experience in Germany and Italy shows, too, that mixed forms of guarantee and suretyship frequently occur in practice and should so far as possible be subjected to a uniform system of rules. The only way to do this is to apply the law of suretyship as a basic principle.

6. The rule permitting agreement between the parties makes it clear that parties may either exclude and modify the rules governing suretyship or restore (to the extent they wish) the subsidiary character of the guarantee to the whole or to any part of a secured claim.

Art. 10

(1) *A contract constituting a personal security shall be subject to the domestic law of the country agreed by the parties. Such agreement must be embodied in an express clause or must be unambiguously deducible from the terms of the contract.*

(2) *Where the parties have not agreed on the law applicable, the contract of security shall be subject to the domestic law of the country in which the guarantor has his place of business or habitual residence at the time when the contract was made.*

*Commentary.* – 1. In all the Member States the law applicable to a security may be determined by agreement between the parties. Though an express choice of the law applicable is uncommon, many standard forms of contract contain indications that the parties had contemplated a specific system of law, and a tacit choice of the law applicable can therefore be deduced from them. In many other contracts, however, there is nothing to justify such a deduction. This calls for the use of an accessory rule for conflicts of laws,



which, however, differs from country to country. In France the law of the secured claim is applied, in Germany and the Netherlands the law at the guarantor's place of business (or residence), in Italy the law of the common nationality of the parties or else of the place where the contract was made.

These discrepancies with regard to the accessory criterion for the law applicable, which has frequently to be used, will become increasingly evident. They will lead increasingly to results unexpected by and unwelcome to the parties, since the partial unification of the law of personal securities attempted in this draft disregards a considerable number of minor differences of law. The constantly increasing number of cross-frontier securities, too, will make it necessary in an ever-increasing number of cases to determine the law applicable.

2. The rule for conflicts of laws proposed in paragraph (1) is already recognized in all the Member States. The only innovation is the requirement, embodied in the second sentence, that a choice of the law applicable must either be expressly stated or must at least be unambiguously deducible from the terms of the contract of security. This formulation has been taken from article 2, paragraph 2 of the 1955 Hague Convention on the law applicable to international sales of goods, which has already been adopted, with this proviso, by Belgium, France and Italy. It is true that the condition for a tacit choice of law which must *indubitably* be deducible from the terms of the contract has given rise to objections in Germany and has been rejected there on the grounds that it is inappropriate and unduly rigid for international sales of goods. These objections do not hold, however, in the case of a contract of security. Here an unambiguous choice of the law applicable must be required in the interest of the guarantor so that he may be certain what his legal obligations are.

3. Where the parties, as often happens, have not made a choice of the law applicable, an accessory criterion must be established by law. Of the three different solutions adopted by the Member States the application of the law of the place where the contract was made is the least persuasive, for it may be purely a matter of chance and may therefore be devoid of all connection with the contract of security and the parties to it. Application of the law of the secured claim, as practiced in France, has the merit of expediency, because it avoids raising the question of the difference in status between the contract and the

secured claim. On the other hand, by what law the secured claim itself is governed often remains uncertain, and the uncertainty therefore extends to the contract of security as well. Often, too, the guarantor does not know what circumstances have been taken as the criterion for the law applicable to the secured claim. A further objection is that a system of law may be stipulated with which the contract of security and the parties to it have no direct connection.

German and Netherlands law avoids both these drawbacks by applying the law of the guarantor's place of business (or residence) at the time when the contract was made. This formulation rests on the principle, which is being increasingly adopted, that contracts giving rise to obligations shall be subject to the law of characteristic performance in the absence of a choice of the law applicable. In contrast to contracts of exchange, characteristic performance is clearly demonstrable in the case of a contract (usually unilateral) of security, namely, performance by the guarantor. The two fold advantage of practicability and certainty outweighs the disadvantage of severing the connection with the secured claim. This drawback has less weight, indeed, with cross-frontier securities, since in such securities the subsidiary character of the security in relation to the secured claim is absent more often than it is in purely domestic contracts of security. Paragraph (2), therefore, states the law applicable where there is no agreement by the parties along the lines of the rule developed in their judgments by the German and Netherlands courts.

4. Both paragraph (1) (first sentence) and paragraph (2) declare that the *domestic* law chosen by the parties or the law objectively determined is the law applicable. The rules on conflicts of laws embodied in the legislation are expressly excluded, and, in consequence, reference to a court of first or second instance. This rule is consonant with the prevailing international attitude towards the law of contract, though it is not upheld by the German courts.

5. A special provision for the substantive scope of application of the law governing the contract of security does not seem necessary. The question arises in connection with the delimitation between it and the law applicable to the secured claim. If the law applicable to a personal security makes the guarantor's obligations to perform dependent on the extent of the debtor's obligations, it is self-evident that the law applicable to a secured claim is conclusive, and there is, therefore, no need to spell this out.

## ANNEXES



## A - TEXTE DER ZITIERTEN VORSCHRIFTEN

- I. Belgium
- II. Federal Republic of Germany
- III. France
- IV. Italy
- V. Luxembourg
- VI. The Netherlands
- VII. Einheitliches Wechselgesetz
- VIII. Einheitliches Scheckgesetz
- IX. Recht der Europäischen Gemeinschaften

### I. BELGIUM

1. Code civil, siehe Frankreich
2. Code de commerce de 1807

#### *Art. 539*

Si le créancier porteur d'engagements solidaires entre le failli et d'autres coobligés ou garantis par une caution a reçu, avant la faillite, un acompte sur sa créance, il ne sera compris dans la masse que sous la déduction de cet acompte, et conservera, pour ce qui restera dû, ses droits contre les coobligés ou la caution.

#### *Art. 540*

Le coobligé ou la caution qui aura fait le paiement partiel sera compris dans la masse pour tout ce qu'il aura payé à la décharge du failli.

#### *Art. 541*

Nonobstant le concordat, les créanciers conservent leur action pour la totalité de leur créance contre les coobligés du failli.

3. Loi du 15 décembre 1872 comprenant les titres I à IV, livre 1<sup>er</sup>, du code de commerce (Pasinomie 1872, 280).

#### *Art. 25*

Indépendamment des moyens de preuve admis par le droit civil, les engagements commerciaux pourront être constatés par la preuve testimoniale, dans tous les cas où le tribunal croira devoir l'admettre, sauf les exceptions établies pour des cas particuliers.

4. Arrêté du Régent du 26 juin 1947, contenant le Code des droits de timbre (Pasinomie 1947, 478)

#### *Art. 11 § 1* dans la version du 9.5.1959

Sont assujettis à un droit de (2) fr. :

Les actes de prêt ou d'ouverture de crédit consentis par les banquiers et ceux contenant obligation ou reconnaissance de somme ou nantissement au profit de banquiers, lorsqu'ils ne sont pas autrement tarifés.

5. Arrêté royal du 30 juin 1966 relatif au statut des agences de voyages (Pasinomie 1966, 382)

#### *Art. 10 § 1*

Le cautionnement peut être constitué en numéraire ou en valeurs; il peut aussi consister en la caution solidaire d'une banque ou d'une compagnie d'assurance agréées à cette fin par le ministre qui a le tourisme dans ses attributions.

### II. FEDERAL REPUBLIC OF GERMANY

1. Bürgerliches Gesetzbuch von 1896

#### § 125

Ein Rechtsgeschäft, welches der durch Gesetz vorgeschriebenen Form ermangelt, ist nichtig. Der Mangel

der durch Rechtsgeschäft bestimmten Form hat im Zweifel gleichfalls Nichtigkeit zur Folge.

#### § 195

Die regelmäßige Verjährungsfrist beträgt dreißig Jahre.

#### § 232

Wer Sicherheit zu leisten hat, kann dies bewirken durch Hinterlegung von Geld oder Wertpapieren, durch Verpfändung von Forderungen, die in das Reichsschuldbuch oder in das Staatsschuldbuch eines Bundesstaats eingetragen sind,

durch Verpfändung beweglicher Sachen,

durch Bestellung von Schiffshypotheken an Schiffen oder Schiffsbauwerken, die in einem deutschen Schiffsregister oder Schiffsbauregister eingetragen sind,

durch Bestellung von Hypotheken an inländischen Grundstücken,

durch Verpfändung von Forderungen, für die eine Hypothek an einem inländischen Grundstück besteht, oder durch Verpfändung von Grundschulden oder Rentenschulden an inländischen Grundstücken.

Kann die Sicherheit nicht in dieser Weise geleistet werden, so ist die Stellung eines tauglichen Bürgen zulässig.

#### § 239

Ein Bürge ist tauglich, wenn er ein der Höhe der zu leistenden Sicherheit angemessenes Vermögen besitzt und seinen allgemeinen Gerichtsstand im Inland hat.

Die Bürgschaftserklärung muß den Verzicht auf die Einrede der Vorausklage enthalten.

#### § 242

Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.

#### § 269

Ist ein Ort für die Leistung weder bestimmt noch aus den Umständen, insbesondere aus der Natur des Schuldverhältnisses, zu entnehmen, so hat die Leistung an dem Orte zu erfolgen, an welchem der Schuldner zur Zeit der Entstehung des Schuldverhältnisses seinen Wohnsitz hatte.

Ist die Verbindlichkeit im Gewerbebetrieb des Schuldners entstanden, so tritt, wenn der Schuldner seine gewerbliche Niederlassung an einem anderen Orte hatte, der Ort der Niederlassung an die Stelle des Wohnsitzes.

Aus dem Umstand allein, daß der Schuldner die Kosten der Versendung übernommen hat, ist nicht zu entnehmen, daß der Ort, nach welchem die Versendung zu erfolgen hat, der Leistungsort sein soll.

#### § 276

Der Schuldner hat, sofern nicht ein anderes bestimmt ist, Vorsatz und Fahrlässigkeit zu vertreten. Fahrlässig handelt, wer die im Verkehr erforderliche Sorgfalt außer acht läßt. Die Vorschriften der §§ 827, 828 finden Anwendung.

Die Haftung wegen Vorsatzes kann dem Schuldner nicht im voraus erlassen werden.

#### § 401

Mit der abgetretenen Forderung gehen die Hypotheken, Schiffshypotheken oder Pfandrechte, die für sie bestehen, sowie die Rechte aus einer für sie bestellten Bürgschaft auf den neuen Gläubiger über.

Ein mit der Forderung für den Fall der Zwangsvollstreckung oder des Konkurses verbundenes Vorzugsrecht kann auch der neue Gläubiger geltend machen.

#### § 404

Der Schuldner kann dem neuen Gläubiger die Einwendungen entgegensetzen, die zur Zeit der Abtretung der Forderung gegen den bisherigen Gläubiger begründet waren.

#### § 406

Der Schuldner kann eine ihm gegen den bisherigen Gläubiger zustehende Forderung auch dem neuen Gläubiger gegenüber aufrechnen, es sei denn, daß er bei dem Erwerb der Forderung von der Abtretung Kenntnis hatte oder daß die Forderung erst nach der Erlangung der Kenntnis und später als die abgetretene Forderung fällig geworden ist.

#### § 407

Der neue Gläubiger muß eine Leistung, die der Schuldner nach der Abtretung an den bisherigen Gläubiger bewirkt, sowie jedes Rechtsgeschäft, das nach der Abtretung zwischen dem Schuldner und dem bisherigen Gläubiger in Ansehung der Forderung vorgenommen wird, gegen sich gelten lassen, es sei denn, daß der Schuldner die Abtretung bei der Leistung oder der Vornahme des Rechtsgeschäftes kennt.

Ist in einem nach der Abtretung zwischen dem Schuldner und dem bisherigen Gläubiger anhängig gewordenen Rechtsstreit ein rechtskräftiges Urteil über die Forderung ergangen, so muß der neue Gläubiger das Urteil gegen sich gelten lassen, es sei denn, daß der Schuldner die Abtretung bei dem Eintritt der Rechtshängigkeit gekannt hat.

#### § 412

Auf die Übertragung einer Forderung kraft Gesetzes finden die Vorschriften der §§ 399 bis 404, 406 bis 410 entsprechende Anwendung.

#### § 421

Schulden mehrere eine Leistung in der Weise, daß jeder die ganze Leistung zu bewirken verpflichtet, der Gläubiger aber die Leistung nur einmal zu fordern berechtigt ist (Gesamtschuldner), so kann der Gläubiger die Leistung nach seinem Belieben von jedem der Schuldner ganz oder zu einem Teil fordern. Bis zur Bewirkung der ganzen Leistung bleiben sämtliche Schuldner verpflichtet.

#### § 422

Die Erfüllung durch einen Gesamtschuldner wirkt auch für die übrigen Schuldner. Das gleiche gilt von der Leistung an Erfüllungs Statt, der Hinterlegung und der Aufrechnung.

Eine Forderung, die einem Gesamtschuldner zusteht, kann nicht von den übrigen Schuldnern aufgerechnet werden.

#### § 423

Ein zwischen dem Gläubiger und einem Gesamtschuldner vereinbarter Erlaß wirkt auch für die übrigen Schuldner, wenn die Vertragsschließenden das ganze Schuldverhältnis aufheben wollten.

#### § 425

Andere als die in den §§ 422 bis 424 bezeichneten Tatsachen wirken, soweit sich nicht aus dem Schuldverhältnis ein anderes ergibt, nur für und gegen den Gesamtschuldner, in dessen Person sie eintreten.

Dies gilt insbesondere von der Kündigung, dem Verzug, dem Verschulden, von der Unmöglichkeit der Leistung in der Person eines Gesamtschuldners, von der Verjährung, deren Unterbrechung und Hemmung, von der Vereinigung der Forderung mit der Schuld und von dem rechtskräftigen Urteil.

#### § 426

Die Gesamtschuldner sind im Verhältnis zueinander zu gleichen Anteilen verpflichtet, soweit nicht ein anderes bestimmt ist. Kann von einem Gesamtschuldner der auf ihn entfallende Beitrag nicht erlangt werden, so ist der Ausfall von den übrigen zur Ausgleichung verpflichteten Schuldnern zu tragen.

Soweit ein Gesamtschuldner den Gläubiger befriedigt und von den übrigen Schuldnern Ausgleich verlangen kann, geht die Forderung des Gläubigers gegen die übrigen Schuldner auf ihn über. Der Übergang kann nicht zum Nachteil des Gläubigers geltend gemacht werden.

#### § 427

Verpflichten sich mehrere durch Vertrag gemeinschaftlich zu einer teilbaren Leistung, so haften sie im Zweifel als Gesamtschuldner.

#### § 610

Wer die Hingabe eines Darlehens verspricht, kann im Zweifel das Versprechen widerrufen, wenn in den Vermögensverhältnissen des anderen Teiles eine wesentliche Verschlechterung eintritt, durch die der Anspruch auf die Rückerstattung gefährdet wird.

#### § 662

Durch die Annahme eines Auftrags verpflichtet sich der Beauftragte, ein ihm von dem Auftraggeber übertragenes Geschäft für diesen unentgeltlich zu besorgen.

#### § 670

Macht der Beauftragte zum Zwecke der Ausführung des Auftrags Aufwendungen, die er den Umständen nach für erforderlich halten darf, so ist der Auftraggeber zum Ersatz verpflichtet.

#### § 675

Auf einen Dienstvertrag oder einen Werkvertrag, der eine Geschäftsbesorgung zum Gegenstand hat, finden die Vorschriften der §§ 663, 665 bis 670, 672 bis 674 und, wenn dem Verpflichteten das Recht zusteht, ohne Einhaltung einer Kündigungsfrist zu kündigen, auch die Vorschriften des § 671 Absatz 2 entsprechende Anwendung.

#### § 683

Entspricht die Übernahme der Geschäftsführung dem Interesse und dem wirklichen oder dem mutmaßlichen Willen des Geschäftsherrn, so kann der Geschäftsführer wie ein Beauftragter Ersatz seiner Aufwendungen verlangen. In den Fällen des § 679 steht dieser Anspruch dem Geschäftsführer zu, auch wenn die Übernahme der Geschäftsführung mit dem Willen des Geschäftsherrn in Widerspruch steht.

#### § 684

Liegen die Voraussetzungen des § 683 nicht vor, so ist der Geschäftsherr verpflichtet, dem Geschäftsführer alles, was er durch die Geschäftsführung erlangt, nach den Vorschriften über die Herausgabe einer ungerechtfertigten Bereicherung herauszugeben. Genehmigt der Geschäftsherr die Geschäftsführung, so steht dem Geschäftsführer der im § 683 bestimmte Anspruch zu.

#### § 765

Durch den Bürgschaftsvertrag verpflichtet sich der Bürge gegenüber dem Gläubiger eines Dritten, für die Erfüllung der Verbindlichkeit des Dritten einzustehen.

Die Bürgschaft kann auch für eine künftige oder eine bedingte Verbindlichkeit übernommen werden.

#### § 766

Zur Gültigkeit des Bürgschaftsvertrags ist schriftliche Erteilung der Bürgschaftserklärung erforderlich. Soweit der Bürge die Hauptverbindlichkeit erfüllt, wird der Mangel der Form geheilt.

#### § 767

Für die Verpflichtung des Bürgen ist der jeweilige Bestand der Hauptverbindlichkeit maßgebend. Dies gilt insbesondere auch, wenn die Hauptverbindlichkeit durch Verschulden oder Verzug des Hauptschuldners geändert wird. Durch ein Rechtsgeschäft, das der Hauptschuldner nach der Übernahme der Bürgschaft vornimmt, wird die Verpflichtung des Bürgen nicht erweitert.

Der Bürge haftet für die dem Gläubiger von dem Hauptschuldner zu ersetzenden Kosten der Kündigung und der Rechtsverfolgung.

## § 768

Der Bürge kann die dem Hauptschuldner zustehenden Einreden geltend machen. Stirbt der Hauptschuldner, so kann sich der Bürge nicht darauf berufen, daß der Erbe für die Verbindlichkeit nur beschränkt haftet.

Der Bürge verliert eine Einrede nicht dadurch, daß der Hauptschuldner auf sie verzichtet.

## § 769

Verbürgen sich mehrere für dieselbe Verbindlichkeit, so haften sie als Gesamtschuldner, auch wenn sie die Bürgschaft nicht gemeinschaftlich übernehmen.

## § 770

Der Bürge kann die Befriedigung des Gläubigers verweigern, solange dem Hauptschuldner das Recht zusteht, das seiner Verbindlichkeit zugrunde liegende Rechtsgeschäft anzufechten.

Die gleiche Befugnis hat der Bürge, solange sich der Gläubiger durch Aufrechnung gegen eine fällige Forderung des Hauptschuldners befriedigen kann.

## § 771

Der Bürge kann die Befriedigung des Gläubigers verweigern, solange nicht der Gläubiger eine Zwangsvollstreckung gegen den Hauptschuldner ohne Erfolg versucht hat (Einrede der Vorausklage).

## § 772

Besteht die Bürgschaft für eine Geldforderung, so muß die Zwangsvollstreckung in die beweglichen Sachen des Hauptschuldners an seinem Wohnsitz und, wenn der Hauptschuldner an einem anderen Ort eine gewerbliche Niederlassung hat, auch an diesem Ort, in Ermangelung eines Wohnsitzes und einer gewerblichen Niederlassung an seinem Aufenthaltsort versucht werden.

Steht dem Gläubiger ein Pfandrecht oder ein Zurückbehaltungsrecht an einer beweglichen Sache des Hauptschuldners zu, so muß er auch aus dieser Sache Befriedigung suchen. Steht dem Gläubiger ein solches Recht an der Sache auch für eine andere Forderung zu, so gilt dies nur, wenn beide Forderungen durch den Wert der Sache gedeckt werden.

## § 773

Die Einrede der Vorausklage ist ausgeschlossen:

1. wenn der Bürge auf die Einrede verzichtet, insbesondere wenn er sich als Selbstschuldner verbürgt hat;
2. wenn die Rechtsverfolgung gegen den Hauptschuldner infolge einer nach der Übernahme der Bürgschaft eingetretenen Änderung des Wohnsitzes, der gewerblichen Niederlassung oder des Aufenthaltsorts des Hauptschuldners wesentlich erschwert ist;

3. wenn über das Vermögen des Hauptschuldners der Konkurs eröffnet ist;
4. wenn anzunehmen ist, daß die Zwangsvollstreckung in das Vermögen des Hauptschuldners nicht zur Befriedigung des Gläubigers führen wird.

In den Fällen der Nummern 3 und 4 ist die Einrede insoweit zulässig, als sich der Gläubiger aus einer beweglichen Sache des Hauptschuldners befriedigen kann, an der er ein Pfandrecht oder ein Zurückbehaltungsrecht hat; die Vorschrift des § 772 Absatz 2 Satz 2 findet Anwendung.

## § 774

Soweit der Bürge den Gläubiger befriedigt, geht die Forderung des Gläubigers gegen den Hauptschuldner auf ihn über. Der Übergang kann nicht zum Nachteil des Gläubigers geltend gemacht werden. Einwendungen des Hauptschuldners aus einem zwischen ihm und dem Bürgen bestehenden Rechtsverhältnis bleiben unberührt.

Mitbürgen haften einander nur nach § 426.

## § 775

Hat sich der Bürge im Auftrage des Hauptschuldners verbürgt oder stehen ihm nach den Vorschriften über die Geschäftsführung ohne Auftrag wegen der Übernahme der Bürgschaft die Rechte eines Beauftragten gegen den Hauptschuldner zu, so kann er von diesem Befreiung von der Bürgschaft verlangen:

1. wenn sich die Vermögensverhältnisse des Hauptschuldners wesentlich verschlechtert haben;
2. wenn die Rechtsverfolgung gegen den Hauptschuldner infolge einer nach der Übernahme der Bürgschaft eingetretenen Änderung des Wohnsitzes, der gewerblichen Niederlassung oder des Aufenthaltsorts des Hauptschuldners wesentlich erschwert ist;
3. wenn der Hauptschuldner mit der Erfüllung seiner Verbindlichkeit im Verzug ist;
4. wenn der Gläubiger gegen den Bürgen ein vollstreckbares Urteil auf Erfüllung erwirkt hat.

Ist die Hauptverbindlichkeit noch nicht fällig, so kann der Hauptschuldner dem Bürgen, statt ihn zu befreien, Sicherheit leisten.

## § 776

Gibt der Gläubiger ein mit der Forderung verbundenes Vorzugsrecht, eine für sie bestehende Hypothek oder Schiffshypothek, ein für sie bestehendes Pfandrecht oder das Recht gegen einen Mitbürgen auf, so wird der Bürge insoweit frei, als er aus dem aufgegebenen Recht nach § 774 hätte Ersatz erlangen können. Dies gilt auch dann, wenn das aufgegebene Recht erst nach der Übernahme der Bürgschaft entstanden ist.

## § 777

Hat sich der Bürge für eine bestehende Verbindlichkeit auf bestimmte Zeit verbürgt, so wird er nach

dem Ablauf der bestimmten Zeit frei, wenn nicht der Gläubiger die Einziehung der Forderung unverzüglich nach Maßgabe des § 772 betreibt, das Verfahren ohne wesentliche Verzögerung fortsetzt und unverzüglich nach der Beendigung des Verfahrens dem Bürgen anzeigt, daß er ihn in Anspruch nehme. Steht dem Bürgen die Einrede der Vorausklage nicht zu, so wird er nach dem Ablauf der bestimmten Zeit frei, wenn nicht der Gläubiger ihm unverzüglich diese Anzeige macht.

Erfolgt die Anzeige rechtzeitig, so beschränkt sich die Haftung des Bürgen im Falle des Absatzes 1 Satz 1 auf den Umfang, den die Hauptverbindlichkeit zur Zeit der Beendigung des Verfahrens hat, im Falle des Absatzes 1 Satz 2 auf den Umfang, den die Hauptverbindlichkeit bei dem Ablauf der bestimmten Zeit hat.

#### § 778

Wer einen anderen beauftragt, im eigenen Namen und auf eigene Rechnung einem Dritten Kredit zu geben, haftet dem Beauftragten für die aus der Kreditgewährung entstehende Verbindlichkeit des Dritten als Bürge.

#### § 1225

Ist der Verpfänder nicht der persönliche Schuldner, so geht, soweit er den Pfandgläubiger befriedigt, die Forderung auf ihn über. Die für einen Bürgen geltenden Vorschriften des § 774 finden entsprechende Anwendung.

## 2. Handelsgesetzbuch von 1897

### § 1

Kaufmann im Sinne dieses Gesetzbuches ist, wer ein Handelsgewerbe betreibt.

Als Handelsgewerbe gilt jeder Gewerbebetrieb, der eine der nachstehend bezeichneten Arten von Geschäften zum Gegenstand hat:

1. die Anschaffung und Weiterveräußerung von beweglichen Sachen (Waren) oder Wertpapieren, ohne Unterschied, ob die Waren unverändert oder nach einer Bearbeitung oder Verarbeitung weiterveräußert werden;
2. die Übernahme der Bearbeitung oder Verarbeitung von Waren für andere, sofern das Gewerbe nicht handwerksmäßig betrieben wird;
3. die Übernahme von Versicherungen gegen Prämie;
4. Bankier- und Geldwechslergeschäfte;
5. die Übernahme der Beförderung von Gütern oder Reisenden zur See, die Geschäfte der Frachtführer oder der zur Beförderung von Personen zu Lande oder auf Binnengewässern bestimmten Anstalten sowie die Geschäfte der Schleppschiffahrtsunternehmer;

6. die Geschäfte der Kommissionäre, der Spediteure oder der Lagerhalter;
7. die Geschäfte der Handelsvertreter oder Handelsmakler;
8. die Verlagsgeschäfte sowie die sonstigen Geschäfte des Buch- oder Kunsthandels;
9. die Geschäfte der Druckerei, sofern das Gewerbe nicht handwerksmäßig betrieben wird.

### § 2

Ein handwerkliches oder ein sonstiges gewerbliches Unternehmen, dessen Gewerbebetrieb nicht schon nach § 1 Absatz 2 als Handelsgewerbe gilt, das jedoch nach Art und Umfang einen in kaufmännischer Weise eingerichteten Geschäftsbetrieb erfordert, gilt als Handelsgewerbe im Sinne dieses Gesetzbuches, sofern die Firma des Unternehmens in das Handelsregister eingetragen worden ist.

Der Unternehmer ist verpflichtet, die Eintragung nach den für die Eintragung kaufmännischer Firmen geltenden Vorschriften herbeizuführen.

### § 3

Auf den Betrieb der Land- und Forstwirtschaft finden die Vorschriften der §§ 1 und 2 keine Anwendung.

Ist mit dem Betrieb der Land- oder Forstwirtschaft ein Unternehmen verbunden, das nur ein Nebengewerbe des land- oder forstwirtschaftlichen Betriebs darstellt, so findet auf dieses der § 2 mit der Maßgabe Anwendung, daß der Unternehmer berechtigt, aber nicht verpflichtet ist, die Eintragung in das Handelsregister herbeizuführen; werden in dem Nebengewerbe Geschäfte der im § 1 bezeichneten Art geschlossen, so gilt der Betrieb dessenungeachtet nur dann als Handelsgewerbe, wenn der Unternehmer von der Befugnis, seine Firma gemäß § 2 in das Handelsregister eintragen zu lassen, Gebrauch gemacht hat. Ist die Eintragung erfolgt, so findet eine Löschung der Firma nur nach den allgemeinen Vorschriften statt, welche für die Löschung kaufmännischer Firmen gelten.

### § 4

Die Vorschriften über die Firmen, die Handelsbücher und die Prokura finden keine Anwendung auf Personen, deren Gewerbebetrieb nach Art oder Umfang einen in kaufmännischer Weise eingerichteten Geschäftsbetrieb nicht erfordert.

Durch eine Vereinigung zum Betrieb eines Gewerbes, auf welches die bezeichneten Vorschriften keine Anwendung finden, kann eine offene Handelsgesellschaft oder eine Kommanditgesellschaft nicht begründet werden.

### § 5

Ist eine Firma im Handelsregister eingetragen, so kann gegenüber demjenigen, welcher sich auf die Eintragung beruft, nicht geltend gemacht werden, daß das



unter der Firma betriebene Gewerbe kein Handelsgewerbe sei oder daß es zu den in § 4 Absatz 1 bezeichneten Betrieben gehöre.

#### § 6

Die in Betreff der Kaufleute gegebenen Vorschriften finden auch auf die Handelsgesellschaften Anwendung.

Die Rechte und Pflichten eines Vereins, dem das Gesetz ohne Rücksicht auf den Gegenstand des Unternehmens die Eigenschaft eines Kaufmanns beilegt, werden durch die Vorschrift des § 4 Absatz 1 nicht berührt.

#### § 86 b

Verpflichtet sich ein Handelsvertreter, für die Erfüllung der Verbindlichkeit aus einem Geschäft einzustehen, so kann er eine besondere Vergütung (Delkredereprovision) beanspruchen; der Anspruch kann im voraus nicht ausgeschlossen werden. Die Verpflichtung kann nur für ein bestimmtes Geschäft oder für solche Geschäfte mit bestimmten Dritten übernommen werden, die der Handelsvertreter vermittelt oder abschließt. Die Übernahme bedarf der Schriftform.

Der Anspruch auf die Delkredereprovision entsteht mit dem Abschluß des Geschäftes.

Absatz 1 gilt nicht, wenn der Unternehmer oder der Dritte seine Niederlassung oder beim Fehlen einer solchen seinen Wohnsitz im Ausland hat. Er gilt ferner nicht für Geschäfte, zu deren Abschluß und Ausführung der Handelsvertreter unbeschränkt bevollmächtigt ist.

#### § 349

Dem Bürgen steht, wenn die Bürgschaft für ihn ein Handelsgeschäft ist, die Einrede der Vorausklage nicht zu. Das gleiche gilt unter der bezeichneten Voraussetzung für denjenigen, welcher aus einem Kreditauftrag als Bürge haftet.

#### § 350

Auf eine Bürgschaft, ein Schuldversprechen oder ein Schuldanerkenntnis finden, sofern die Bürgschaft auf der Seite des Bürgen, das Versprechen oder das Anerkenntnis auf der Seite des Schuldners ein Handelsgeschäft ist, die Formvorschriften des § 766 Satz 1, des § 780 und des § 781 Satz 1 des Bürgerlichen Gesetzbuchs keine Anwendung.

#### § 394

Der Kommissionär hat für die Erfüllung der Verbindlichkeit des Dritten, mit dem er das Geschäft für Rechnung des Kommittenten abschließt, einzustehen, wenn dies von ihm übernommen oder am Ort seiner Niederlassung Handelsgebrauch ist.

Der Kommissionär, der für den Dritten einzustehen hat, ist dem Kommittenten für die Erfüllung im Zeit-

punkt des Verfalls unmittelbar insoweit verhaftet, als die Erfüllung aus dem Vertragsverhältnis gefordert werden kann. Er kann eine besondere Vergütung (Delkredereprovision) beanspruchen.

### 3. Wechselgesetz vom 21.6.1933 (RGBl. I 399)

#### Art. 30

Die Zahlung der Wechselsumme kann ganz oder teilweise durch Wechselbürgschaft gesichert werden.

Diese Sicherheit kann von einem Dritten oder auch von einer Person geleistet werden, deren Unterschrift sich schon auf dem Wechsel befindet.

### 4. Vergleichsordnung vom 26.2.1935 (RGBl. I 321)

#### § 32

Ein Gläubiger, dem mehrere Personen für dieselbe Leistung auf das Ganze haften, ist bis zu seiner vollen Befriedigung an dem Vergleichsverfahren gegen jeden Schuldner mit dem ganzen Betrag beteiligt, den er zur Zeit der Eröffnung des Verfahrens zu fordern hatte.

#### § 33

Der Gesamtschuldner und der Bürge sind wegen der Forderung, die sie infolge Befriedigung des Gläubigers künftig gegen den Schuldner erwerben könnten, nur dann Vergleichsgläubiger, wenn der Gläubiger mit seiner Forderung am Vergleichsverfahren nicht teilnimmt.

#### § 82

Der Vergleich ist wirksam für und gegen alle Vergleichsgläubiger, auch wenn sie an dem Verfahren nicht teilgenommen oder gegen den Vergleich gestimmt haben.

Die Rechte der Gläubiger gegen Mitschuldner und Bürgen des Schuldners sowie die Rechte aus einem für die Forderung bestehenden Pfandrecht, aus einer für sie bestehenden Hypothek, Grundschuld oder Rentenschuld oder aus einer zu ihrer Sicherung eingetragenen Vormerkung werden, unbeschadet der Vorschrift des § 87, durch den Vergleich nicht berührt. Der Schuldner wird jedoch durch den Vergleich gegenüber dem Mitschuldner, dem Bürgen oder anderen Rückgriffsberechtigten in gleicher Weise befreit wie gegenüber dem Gläubiger.

### 5. Konkursordnung vom 10.2.1877 in der Fassung der Bekanntmachung vom 20.5.1898 (RGBl. 612)

#### § 3

Die Konkursmasse dient zur gemeinschaftlichen Befriedigung aller persönlichen Gläubiger, welche einen zur

Zeit der Eröffnung des Verfahrens begründeten Vermögensanspruch an den Gemeinschuldner haben (Konkursgläubiger).

#### § 67

Forderungen unter aufschiebender Bedingung berechnen nur zu einer Sicherung.

#### § 68

Wird über das Vermögen mehrerer oder einer von mehreren Personen, welche nebeneinander für dieselbe Leistung auf das Ganze haften, das Konkursverfahren eröffnet, so kann der Gläubiger bis zu seiner vollen Befriedigung in jedem Verfahren den Betrag geltend machen, den er zur Zeit der Eröffnung des Verfahrens zu fordern hatte.

#### § 193

Der rechtskräftig bestätigte Zwangsvergleich ist wirksam für und gegen alle nicht bevorrechtigten Konkursgläubiger, auch wenn dieselben an dem Konkursverfahren oder an der Beschlußfassung über den Vergleich nicht teilgenommen oder gegen den Vergleich gestimmt haben. Die Rechte der Gläubiger gegen Mitschuldner und Bürgen des Gemeinschuldners sowie die Rechte aus einem für die Forderung bestehenden Pfandrecht, aus einer für sie bestehenden Hypothek, Grundschuld, Rentenschuld oder Schiffshypothek oder aus einer zu ihrer Sicherung eingetragenen Vormerkung werden durch den Zwangsvergleich nicht berührt.

### 6. Stundungsordnung vom 29.1.1923 (RGBl. I 75)

#### § 29

Kaufleute, die geschäftsmäßig Sicherheit für andere leisten und ihre Hauptniederlassung im Inland haben, können von den Landesfinanzämtern zur Sicherheitsleistung durch Schuldversprechen, Bürgschaft und Wechsel allgemein zugelassen werden (Steuerbürge).

Bei der Zulassung (Abs. 1) ist ein Höchstbetrag (Bürgschaftssumme) festzusetzen. Die gesamten Verbindlichkeiten aus Schuldversprechen, Bürgschaften und Wechseln, die ein Steuerbürge (Abs. 1) gegenüber dem Reich (Geschäftsbereich der Reichsfinanzverwaltung) hat, dürfen nicht über die Bürgschaftssumme hinausgehen.

Die Bestimmungen, die für die Zulassung als Steuerbürge gegeben sind, gelten entsprechend für die Heraufsetzung der Bürgschaftssumme, die für einen Steuerbürgen festgesetzt worden ist.

#### § 30

Für die Zulassung nach § 29 Absatz 1 ist das Landesfinanzamt zuständig, in dessen Bezirk der Steuerbürge seine Hauptniederlassung hat.

Die Zulassung kann nur auf Antrag des Steuerbürgen verfügt werden. Der Antrag ist schriftlich zu stellen. Eine beglaubigte Abschrift aus dem Handelsregister oder Genossenschaftsregister, die den neuesten Stand der den Antragsteller betreffenden Eintragungen wiedergibt, ist beizufügen.

Der Antrag hat zu enthalten:

1. die Bezeichnung des Betrages, den der Antragsteller als Bürgschaftssumme (§ 29 Abs. 2 Satz 1) beansprucht;
2. die Angabe des Gesamtbetrages, in dessen Höhe der Antragsteller (seine Hauptniederlassung und seine Zweigniederlassungen) dem Reich (Geschäftsbereich der Reichsfinanzverwaltung) gegenüber durch Schuldversprechen, Bürgschaften und Wechsel Verbindlichkeiten bereits übernommen hat;
3. die Darlegung der Verhältnisse, die für die Beurteilung der Leistungsfähigkeit des Antragstellers in Betracht kommen; die letzte Bilanz ist beizufügen;
4. eine Erklärung, durch die sich der Antragsteller verpflichtet, Änderungen in seinen Rechtsverhältnissen, die in das Handelsregister oder in das Genossenschaftsregister einzutragen sind, unverzüglich, sobald die Änderung feststeht, spätestens gleichzeitig mit der Anmeldung zum Register, dem für seine Hauptniederlassung zuständigen Hauptzollamt anzuzeigen.

#### § 31

Über den Antrag (§ 30 Abs. 2 Satz 1) soll das Landesfinanzamt in der Regel hören:

1. die Handelskammer, in deren Bezirk der Antragsteller seine Hauptniederlassung hat;
2. die Reichsbankhauptstelle oder Reichsbankstelle, in deren Bezirk der Antragsteller seine Hauptniederlassung hat;
3. das Aufsichtsamt für Privatversicherung, wenn der Antrag von einem Versicherungsunternehmen gestellt worden ist, das der Aufsicht des Aufsichtsamts für Privatversicherung untersteht;
4. den für den Geschäftszweig des Antragstellers zuständigen zentralen Berufsverband (Spitzenverband); bei Genossenschaften, die einem Revisionsverband angehören, tritt dieser an die Stelle des Spitzenverbandes.

Außer den in Absatz 1 bezeichneten Stellen soll in der Regel auch dem Hauptzollamt, in dessen Bezirk der Antragsteller seine Hauptniederlassung hat, Gelegenheit gegeben werden, sich zu dem Antrag zu äußern.

Der Bescheid, den das Landesfinanzamt dem Antragsteller erteilt, ist nicht zu begründen. Soweit dem Antrag stattgegeben wird, ist in der Verfügung die Zurücknahme der Zulassung und die Herabsetzung

der Bürgschaftssumme ausdrücklich vorzubehalten. Soweit das Landesfinanzamt den Antrag ablehnt, kann der Antragsteller die Entscheidung des Reichsministers der Finanzen anrufen; die Anrufung ist nicht an eine Frist gebunden.

Das Landesfinanzamt kann die Verfügung, durch die es einen Kaufmann als Steuerbürgen allgemein zugelassen hat, zurücknehmen, wenn ein wichtiger Grund vorliegt. Entsprechendes gilt für die Herabsetzung der Bürgschaftssumme.

#### 7. Außenwirtschaftsgesetz vom 28.4.1961 (BGBl. I 481)

##### § 1

Der Waren-, Dienstleistungs-, Kapital-, Zahlungs- und sonstige Wirtschaftsverkehr mit fremden Wirtschaftsgebieten sowie der Verkehr mit Auslandswerten und Gold zwischen Gebietsansässigen (Außenwirtschaftsverkehr) ist grundsätzlich frei. Er unterliegt den Beschränkungen, die dieses Gesetz enthält oder die

durch Rechtsverordnung aufgrund dieses Gesetzes vorgeschrieben werden.

Unberührt bleiben Vorschriften in anderen Gesetzen und Rechtsverordnungen, zwischenstaatliche Vereinbarungen, denen die gesetzgebenden Körperschaften in der Form eines Bundesgesetzes zugestimmt haben, sowie Rechtsvorschriften der Organe zwischenstaatlicher Einrichtungen, denen die Bundesrepublik Deutschland Hoheitsrechte übertragen hat.

#### 8. Bundesnotarordnung vom 24.2.1961 (BGBl. I 98)

##### § 14 Absatz 4

Dem Notar ist es verboten, Darlehen sowie Grundstücksgeschäfte zu vermitteln oder im Zusammenhang mit einer Amtshandlung eine Bürgschaft oder sonstige Gewährleistung für einen Beteiligten zu übernehmen. Er hat dafür zu sorgen, daß sich auch die bei ihm beschäftigten Personen nicht mit derartigen Geschäften befassen.

### III. FRANCE

#### 1. Code civil de 1804

##### Art. 601

Il donne caution de jouir en bon père de famille, s'il n'en est dispensé par l'acte constitutif de l'usufruit; cependant les père et mère ayant l'usufruit légal du bien de leurs enfants, le vendeur ou le donateur, sous réserve d'usufruit, ne sont pas tenus de donner caution.

##### Art. 807

Il est tenu, si les créanciers ou autres personnes intéressées l'exigent, de donner caution bonne et solvable de la valeur du mobilier compris dans l'inventaire, et de la portion du prix des immeubles non déléguée aux créanciers hypothécaires.

##### Art. 1120

Néanmoins on peut se porter fort pour un tiers, en promettant le fait de celui-ci; sauf l'indemnité contre celui qui s'est porté fort ou qui a promis de faire ratifier, si le tiers refuse de tenir l'engagement.

##### Art. 1142

Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.

##### Art. 1200

Il y a solidarité de la part des débiteurs, lorsqu'ils sont obligés à une même chose, de manière que chacun puisse être contraint pour la totalité, et que le paye-

ment fait par un seul libère les autres envers le créancier.

##### Art. 1208

Le codébiteur solidaire poursuivi par le créancier peut opposer toutes les exceptions qui résultent de la nature de l'obligation, et toutes celles qui lui sont personnelles, ainsi que celles qui sont communes à tous les codébiteurs.

Il ne peut opposer les exceptions qui sont purement personnelles à quelques-uns des autres codébiteurs.

##### Art. 1251

La subrogation a lieu de plein droit :

1. Au profit de celui qui, étant lui-même créancier, paye un autre créancier qui lui est préférable à raison de ses privilèges ou hypothèques;
2. Au profit de l'acquéreur d'un immeuble, qui emploie le prix de son acquisition au paiement des créanciers auxquels cet héritage était hypothéqué;
3. Au profit de celui qui, étant tenu avec d'autres ou pour d'autres au paiement de la dette, avait intérêt de l'acquitter;
4. Au profit de l'héritier bénéficiaire qui a payé de ses deniers les dettes de la succession.

##### Art. 1252

La subrogation établie par les articles précédents a lieu tant contre les cautions que contre les débiteurs : elle ne peut nuire au créancier lorsqu'il n'a été payé

qu'en partie; en ce cas, il peut exercer ses droits, pour ce qui lui reste dû, par préférence à celui dont il n'a reçu qu'un paiement partiel.

*Art. 1285*

La remise ou décharge conventionnelle au profit de l'un des codébiteurs solidaires libère tous les autres, à moins que le créancier n'ait expressément réservé ses droits contre ces derniers.

Dans ce dernier cas, il ne peut plus répéter la dette que déduction faite de la part de celui auquel il a fait la remise.

*Art. 1287*

La remise ou décharge conventionnelle accordée au débiteur principal libère les cautions;

Celle accordée à la caution ne libère pas le débiteur principal;

Celle accordée à l'une des cautions ne libère pas les autres.

*Art. 1294*

La caution peut opposer la compensation de ce que le créancier doit au débiteur principal;

Mais le débiteur principal ne peut opposer la compensation de ce que le créancier doit à la caution.

Le débiteur solidaire ne peut pareillement opposer la compensation de ce que le créancier doit à son codébiteur.

*Art. 1326*

Le billet ou la promesse sous seing privé, par lequel une seule partie s'engage envers l'autre à lui payer une somme d'argent ou une chose appréciable, doit être écrit en entier de la main de celui qui le souscrit; ou du moins il faut que, outre sa signature, il ait écrit de sa main un bon ou un approuvé, portant en toutes lettres la somme ou la quantité de la chose.

*Art. 1341 dans la version du 21.2.1948*

Il doit être passé acte devant notaires ou sous signatures privées de toutes choses excédant la somme ou la valeur de 50 NF, même pour dépôts volontaires, et il n'est reçu aucune preuve par témoins contre et outre le contenu aux actes, ni sur ce qui serait allégué avoir été dit avant, lors ou depuis les actes, encore qu'il s'agisse d'une somme ou valeur moindre de 50 NF.

*Art. 1347*

Les règles ci-dessus reçoivent exception lorsqu'il existe un commencement de preuve par écrit.

On appelle ainsi tout acte par écrit qui est émané de celui contre lequel la demande est formée, ou de celui qu'il représente, et qui rend vraisemblable le fait allégué.

*Art. 1348*

Elles reçoivent encore exception toutes les fois qu'il n'a pas été possible au créancier de se procurer une preuve littérale de l'obligation qui a été contractée envers lui.

Cette seconde exception s'applique :

1. Aux obligations qui naissent des quasi-contrats et des délits ou quasi-délits;
2. Aux dépôts nécessaires faits en cas d'incendie, ruine, tumulte ou naufrage, et à ceux faits par les voyageurs en logeant dans une hôtellerie, le tout suivant la qualité des personnes et les circonstances du fait;
3. Aux obligations contractées en cas d'accidents imprévus, où l'on ne pourrait pas avoir fait des actes par écrit;
4. Au cas où le créancier a perdu le titre qui lui servait de preuve littérale, par suite d'un cas fortuit, imprévu et résultant d'une force majeure.

*Art. 1613*

Il ne sera pas non plus obligé à la délivrance, quand même il aurait accordé un délai pour le paiement, si, depuis la vente, l'acheteur est tombé en faillite ou en état de déconfiture, en sorte que le vendeur se trouve en danger imminent de perdre le prix; à moins que l'acheteur ne lui donne caution de payer au terme.

*Art. 1692*

La vente ou cession d'une créance comprend les accessoires de la créance, tels que caution, privilège et hypothèque.

*Art. 2011*

Celui qui se rend caution d'une obligation se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même.

*Art. 2012*

Le cautionnement ne peut exister que sur une obligation valable.

On peut néanmoins cautionner une obligation, encore qu'elle pût être annulée par une exception purement personnelle à l'obligé; par exemple, dans le cas de minorité.

*Art. 2013*

Le cautionnement ne peut excéder ce qui est dû par le débiteur, ni être contracté sous des conditions plus onéreuses.

Il peut être contracté pour une partie de la dette seulement, et sous des conditions moins onéreuses.

Le cautionnement qui excède la dette, ou qui est contracté sous des conditions plus onéreuses, n'est point nul: il est seulement réductible à la mesure de l'obligation principale.

#### *Art. 2014*

On peut se rendre caution sans ordre de celui pour lequel on s'oblige, et même à son insu.

On peut aussi se rendre caution, non seulement du débiteur principal, mais encore de celui qui l'a cautionné.

#### *Art. 2015*

Le cautionnement ne se présume point; il doit être exprès, et on ne peut pas l'étendre au-delà des limites dans lesquelles il a été contracté.

#### *Art. 2016*

Le cautionnement indéfini d'une obligation principale s'étend à tous les accessoires de la dette, même aux frais de la première demande, et à tous ceux postérieurs à la dénonciation qui en est faite à la caution.

#### *Art. 2017*

Les engagements des cautions passent à leurs héritiers, à l'exception de la contrainte par corps, si l'engagement était tel que la caution y fût obligée.

#### *Art. 2018*

Le débiteur obligé à fournir une caution doit en présenter une qui ait la capacité de contracter, qui ait un bien suffisant pour répondre de l'objet de l'obligation, et dont le domicile soit dans le ressort de la cour royale (la cour d'appel) où elle doit être donnée.

#### *Art. 2019*

La solvabilité d'une caution ne s'estime qu'eu égard à ses propriétés foncières, excepté en matière de commerce, ou lorsque la dette est modique.

On n'a point égard aux immeubles litigieux, ou dont la discussion deviendrait trop difficile par l'éloignement de leur situation.

#### *Art. 2020*

Lorsque la caution reçue par le créancier, volontairement ou en justice, est ensuite devenue insolvable, il doit en être donné une autre.

Cette règle reçoit exception dans le cas seulement où la caution n'a été donnée qu'en vertu d'une convention par laquelle le créancier a exigé une telle personne pour caution.

#### *Art. 2021*

La caution n'est obligée envers le créancier à le payer qu'à défaut du débiteur, qui doit être préalablement discuté dans ses biens, à moins que la caution n'ait renoncé au bénéfice de discussion, ou à moins qu'elle ne se soit obligée solidairement avec le débiteur; auquel cas l'effet de son engagement se règle par les principes qui ont été établis pour les dettes solidaires.

#### *Art. 2022*

Le créancier n'est obligé de discuter le débiteur principal que lorsque la caution le requiert, sur les premières poursuites dirigées contre elle.

#### *Art. 2023*

La caution qui requiert la discussion doit indiquer au créancier les biens du débiteur principal, et avancer les deniers suffisants pour faire la discussion.

Elle ne doit indiquer ni des biens du débiteur principal situés hors de l'arrondissement de la cour royale (la cour d'appel) du lieu où le paiement doit être fait, ni des biens litigieux, ni ceux hypothéqués à la dette qui ne sont plus en la possession du débiteur.

#### *Art. 2024*

Toutes les fois que la caution a fait l'indication de biens autorisée par l'article précédent, et qu'elle a fourni les deniers suffisants pour la discussion, le créancier est, jusqu'à concurrence des biens indiqués, responsable, à l'égard de la caution, de l'insolvabilité du débiteur principal survenue par le défaut de poursuites.

#### *Art. 2025*

Lorsque plusieurs personnes se sont rendues caution d'un même débiteur pour une même dette, elles sont obligées chacune à toute la dette.

#### *Art. 2026*

Néanmoins chacune d'elles peut, à moins qu'elle n'ait renoncé au bénéfice de division, exiger que le créancier divise préalablement son action, et la réduise à la part et portion de chaque caution.

Lorsque, dans le temps où une des cautions a fait prononcer la division, il y en avait d'insolvables, cette caution est tenue proportionnellement de ces insolvabilités; mais elle ne peut plus être recherchée à raison des insolvabilités survenues depuis la division.

#### *Art. 2027*

Si le créancier a divisé lui-même et volontairement son action, il ne peut revenir contre cette division, quoiqu'il y eût, même antérieurement au temps où il l'a ainsi consentie, des cautions insolvable.

#### *Art. 2028*

La caution qui a payé a son recours contre le débiteur principal, soit que le cautionnement ait été donné au su ou à l'insu du débiteur.

Ce recours a lieu tant pour le principal que pour les intérêts et les frais; néanmoins la caution n'a de recours que pour les frais par elle faits depuis qu'elle a dénoncé au débiteur principal les poursuites dirigées contre elle.

Elle a aussi recours pour les dommages et intérêts, s'il y a lieu.

#### *Art. 2029*

La caution qui a payé la dette est subrogée à tous les droits qu'avait le créancier contre le débiteur.

*Art. 2030*

Lorsqu'il y avait plusieurs débiteurs principaux solidaires d'une même dette, la caution qui les a tous cautionnés a, contre chacun d'eux, le recours pour la répétition du total de ce qu'elle a payé.

*Art. 2031*

La caution qui a payé une première fois n'a point de recours contre le débiteur principal qui a payé une seconde fois, lorsqu'elle ne l'a point averti du paiement par elle fait; sauf son action en répétition contre le créancier.

Lorsque la caution aura payé sans être poursuivie et sans avoir averti le débiteur principal, elle n'aura point de recours contre lui dans le cas où, au moment du paiement, ce débiteur aurait eu des moyens pour faire déclarer la dette éteinte; sauf son action en répétition contre le créancier.

*Art. 2032*

La caution, même avant d'avoir payé, peut agir contre le débiteur, pour être par lui indemnisée:

1. Lorsqu'elle est poursuivie en justice pour le paiement;
2. Lorsque le débiteur a fait faillite, ou est en déconfiture;
3. Lorsque le débiteur s'est obligé de lui rapporter sa décharge dans un certain temps;
4. Lorsque la dette est devenue exigible par l'échéance du terme sous lequel elle avait été contractée;
5. Au bout de dix années, lorsque l'obligation principale n'a point de terme fixe d'échéance, à moins que l'obligation principale, telle qu'une tutelle, ne soit pas de nature à pouvoir être éteinte avant un temps déterminé.

*Art. 2033*

Lorsque plusieurs personnes ont cautionné un même débiteur pour une même dette, la caution qui a acquitté la dette a recours contre les autres cautions, chacune pour sa part et portion;

Mais ce recours n'a lieu que lorsque la caution a payé dans l'un des cas énoncés en l'article précédent.

*Art. 2034*

L'obligation qui résulte du cautionnement s'éteint par les mêmes causes que les autres obligations.

*Art. 2035*

La confusion qui s'opère dans la personne du débiteur principal et de sa caution, lorsqu'ils deviennent héritiers l'un de l'autre, n'éteint point l'action du créancier contre celui qui s'est rendu caution de la caution.

*Art. 2036*

La caution peut opposer au créancier toutes les exceptions qui appartiennent au débiteur principal, et qui sont inhérentes à la dette;

Mais elle ne peut opposer les exceptions qui sont purement personnelles au débiteur.

*Art. 2037*

La caution est déchargée, lorsque la subrogation aux droits, hypothèques et privilèges du créancier ne peut plus, par le fait de ce créancier, s'opérer en faveur de la caution.

*Art. 2038*

L'acceptation volontaire que le créancier a faite d'un immeuble ou d'un effet quelconque en paiement de la dette principale décharge la caution, encore que le créancier vienne à en être évincé.

*Art. 2039*

La simple prorogation de terme, accordée par le créancier au débiteur principal, ne décharge point la caution, qui peut, en ce cas, poursuivre le débiteur pour le forcer au paiement.

*Art. 2040*

Toutes les fois qu'une personne est obligée, par la loi ou par une condamnation, à fournir une caution, la caution offerte doit remplir les conditions prescrites par les articles 2018 et 2019.

Lorsqu'il s'agit d'un cautionnement judiciaire, la caution doit, en outre, être susceptible de contrainte par corps.

*Art. 2041*

Celui qui ne peut pas trouver une caution est reçu à donner à sa place un gage en nantissement suffisant.

*Art. 2042*

La caution judiciaire ne peut point demander la discussion du débiteur principal.

*Art. 2043*

Celui qui a simplement cautionné la caution judiciaire ne peut demander la discussion du débiteur principal et de la caution.

*Art. 2262*

Toutes les actions, tant réelles que personnelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter un titre, ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi.

**2. Loi du 15 mars 1963 portant réforme de l'enregistrement du timbre et de la fiscalité immobilière (JO du 17-3-1963, 2579)**

*Art. 34*

Sont assujettis au timbre d'après la dimension du papier employé, les minutes, originaux, copies, extraits et expéditions des actes et écrits ci-après:

4. Actes portant engagement pour le paiement ou le remboursement de sommes ou valeurs mobilières.

3. Loi du 24 juillet 1966 sur les sociétés commerciales (JO du 26-7-1966, 6402)

*Art. 51*

A peine de nullité du contrat, il est interdit aux gérants ou associés de contracter, sous quelque forme que ce soit, des emprunts auprès de la société, de se faire consentir par elle un découvert, en compte courant ou autrement, ainsi que de faire cautionner ou avaliser par elle leurs engagements envers les tiers. Toutefois, si la société exploite un établissement financier, cette interdiction ne s'applique pas aux opérations courantes de ce commerce conclues à des conditions normales.

Cette interdiction s'applique également aux conjoint, ascendants et descendants des personnes visées à l'alinéa 1 du présent article ainsi qu'à toute personne interposée.

*Art. 98, par. 2* dans la version du 12.7.1967 (n° 67-559)

Les cautions, avals et garanties donnés par des sociétés autres que celles exploitant des établissements bancaires ou financiers font l'objet d'une autorisation du conseil dans les conditions déterminées par décret. Ce décret détermine également les conditions dans lesquelles le dépassement de cette autorisation peut être opposé aux tiers.

*Art. 106*

A peine de nullité du contrat, il est interdit aux administrateurs autres que les personnes morales de contracter, sous quelque forme que ce soit, des emprunts auprès de la société, de se faire consentir par elle un découvert, en compte courant ou autrement, ainsi que de faire cautionner ou avaliser par elle leurs engagements envers les tiers.

Toutefois, si la société exploite un établissement bancaire ou financier, cette interdiction ne s'applique pas aux opérations courantes de ce commerce conclues à des conditions normales.

La même interdiction s'applique aux directeurs généraux et aux représentants permanents des personnes morales administrateurs. Elle s'applique également aux conjoint, ascendants et descendants des personnes visées au présent article ainsi qu'à toute personne interposée.

*Art. 128, par. 2* dans la version du 12.7.1967 (n° 67-559)

Les statuts peuvent subordonner à l'autorisation préalable du conseil de surveillance la conclusion des opérations qu'ils énumèrent. Toutefois, les cautions, avals et garanties, sauf dans les sociétés exploitant un établissement bancaire ou financier, font nécessairement l'objet d'une autorisation du conseil de surveillance dans les conditions déterminées par décret. Ce décret détermine également les conditions dans lesquelles le dépassement de cette autorisation peut être opposé aux tiers.

4. Décret du 23 mars 1967 sur les sociétés commerciales (JO du 24-3-1967, 2843)

*Art. 89*

Le conseil d'administration peut, dans la limite d'un montant total qu'il fixe, autoriser le président à donner des cautions, avals ou garanties au nom de la société. Cette autorisation peut également fixer, par engagement, un montant au-delà duquel la caution, l'aval ou la garantie de la société ne peut être donné. Lorsqu'un engagement dépasse l'un ou l'autre des montants ainsi fixés, l'autorisation du conseil d'administration est requise dans chaque cas.

La durée des autorisations prévues à l'alinéa précédent ne peut être supérieure à un an, quelle que soit la durée des engagements cautionnés, avalisés ou garantis.

Par dérogation aux dispositions de l'alinéa 1 ci-dessus, le président du conseil d'administration peut être autorisé à donner, à l'égard des administrations fiscales et douanières, des cautions, avals ou garanties au nom de la société, sans limite de montant.

Le président du conseil d'administration peut déléguer le pouvoir qu'il a reçu en application des alinéas précédents.

(Décret n° 68-25 dans la version du 2.1.1968).

Si les cautions, avals ou garanties ont été donnés pour un montant total supérieur à la limite fixée pour la période en cours, le dépassement ne peut être opposé aux tiers qui n'en ont pas eu connaissance, à moins que le montant de l'engagement invoqué n'excède, à lui seul, l'une des limites fixées par la décision du conseil d'administration prise en application de l'alinéa 1 ci-dessus.

*Art. 113*

Le conseil de surveillance peut, dans la limite d'un montant total qu'il fixe, autoriser le directoire à donner des cautions, avals ou garanties au nom de la société. Cette autorisation peut également fixer, par engagement, un montant au-delà duquel la caution, l'aval ou la garantie de la société ne peut être donné. Lorsqu'un engagement dépasse l'un ou l'autre des montants ainsi fixés, l'autorisation du conseil de surveillance est requise dans chaque cas.

La durée des autorisations prévues à l'alinéa précédent ne peut être supérieure à un an, quelle que soit la durée des engagements cautionnés, avalisés ou garantis.

Par dérogation aux dispositions de l'alinéa 1 ci-dessus, le directoire peut être autorisé à donner, à l'égard des administrations fiscales et douanières, des cautions, avals ou garanties au nom de la société, sans limite de montant.

Le directoire peut déléguer le pouvoir qu'il a reçu en application des alinéas précédents.

(Décret n° 68-25 dans la version du 2.1.1968).

Si des cautions, avals ou garanties ont été donnés pour un montant total supérieur à la limite fixée pour la période en cours, le dépassement ne peut être opposé aux tiers qui n'en ont pas eu connaissance, à moins que le montant de l'engagement invoqué n'excède, à lui seul, l'une des limites fixées par la décision du conseil de surveillance prise en application de l'alinéa 1 ci-dessus.

5. **Loi du 13 juillet 1967 sur le règlement judiciaire, la liquidation des biens, la faillite personnelle et les banqueroutes (JO du 14-7-1967, 7059)**

*Art. 46*

Le créancier porteur d'engagements souscrits, endossés ou garantis solidairement par deux ou plusieurs

coobligés qui ont cessé leurs paiements, peut produire dans toutes les masses pour la valeur nominale de son titre et participer aux distributions jusqu'à parfait paiement.

*Art. 48*

Si le créancier porteur d'engagements solidairement souscrits par le débiteur en état de règlement judiciaire ou de liquidation des biens, et d'autres coobligés, a reçu un acompte sur sa créance avant la cessation des paiements, il n'est compris dans la masse que sous déduction de cet acompte et conserve, sur ce qui lui reste dû, ses droits contre le coobligé ou la caution.

Le coobligé ou la caution qui a fait le paiement partiel est compris dans la même masse pour tout ce qu'il a payé à la décharge du débiteur.

#### IV. ITALY

1. **Disposizioni sulla legge in generale**  
(Disposizioni preliminari) del 1942

*Art. 25*

Le obbligazioni che nascono da contratto sono regolate dalla legge nazionale dei contraenti, se è comune; altrimenti da quella del luogo nel quale il contratto è stato concluso. È salva in ogni caso la diversa volontà delle parti. Le obbligazioni non contrattuali sono regolate dalla legge del luogo ove è avvenuto il fatto dal quale esse derivano.

2. **Codice civile del 1942**

*Art. 1203*

La surrogazione ha luogo di diritto nei seguenti casi:

- 1) a vantaggio di chi, essendo creditore, ancorché chirografario, paga un altro creditore che ha diritto di essergli preferito in ragione dei suoi privilegi, del suo pegno o delle sue ipoteche;
- 2) a vantaggio dell'acquirente di un immobile che, fino alla concorrenza del prezzo di acquisto, paga uno o più creditori a favore dei quali l'immobile è ipotecato;
- 3) a vantaggio di colui che, essendo tenuto con altri o per altri al pagamento del debito, aveva interesse di soddisfarlo;
- 4) a vantaggio dell'erede con beneficio d'inventario, che paga con danaro proprio i debiti ereditari;
- 5) negli altri casi stabiliti dalla legge.

*Art. 1204*

La surrogazione contemplata nei precedenti articoli ha effetto anche contro i terzi che hanno prestato garanzia per il debitore.

Se il credito è garantito da pegno, si osserva la disposizione del secondo comma dell'art. 1263.

*Art. 1205*

Se il pagamento è parziale, il terzo surrogato e il creditore concorrono nei confronti del debitore in proporzione di quanto è loro dovuto, salvo patto contrario.

*Art. 1239*

La remissione accordata al debitore principale libera i fideiussori.

La remissione accordata a uno dei fideiussori non libera gli altri che per la parte del fideiussore liberato. Tuttavia se gli altri fideiussori hanno consentito la liberazione, essi rimangono obbligati per l'intero.

*Art. 1247*

Il fideiussore può opporre in compensazione il debito che il creditore ha verso il debitore principale.

Lo stesso diritto spetta al terzo che ha costituito un'ipoteca o un pegno.

*Art. 1251*

Chi ha pagato un debito mentre poteva invocare la compensazione non può più valersi, in pregiudizio dei terzi, dei privilegi e delle garanzie a favore del suo credito, salvo che abbia ignorato l'esistenza di questo per giusti motivi.



*Art. 1263*

Per effetto della cessione, il credito è trasferito al cessionario con i privilegi, con le garanzie personali e reali e con gli altri accessori.

Il cedente non può trasferire al cessionario, senza il consenso del costituente, il possesso della cosa ricevuta in pegno; in caso di dissenso, il cedente rimane custode del pegno.

Salvo patto contrario, la cessione non comprende i frutti scaduti.

*Art. 1292*

L'obbligazione è in solido quando più debitori sono obbligati tutti per la medesima prestazione, in modo che ciascuno può essere costretto all'adempimento per la totalità e l'adempimento da parte di uno libera gli altri; oppure quando tra più creditori ciascuno ha diritto di chiedere l'adempimento dell'intera obbligazione e l'adempimento conseguito da uno di essi libera il debitore verso tutti i creditori.

*Art. 1297*

Uno dei debitori in solido non può opporre al creditore le eccezioni personali agli altri debitori.

A uno dei creditori in solido il debitore non può opporre le eccezioni personali agli altri creditori.

*Art. 1299*

Il debitore in solido che ha pagato l'intero debito può ripetere dai condebitori soltanto la parte di ciascuno di essi.

Se uno di questi è insolvente, la perdita si ripartisce per contributo tra gli altri condebitori, compreso quello che ha fatto il pagamento. La stessa norma si applica qualora sia insolvente il condebitore nel cui esclusivo interesse l'obbligazione era stata assunta.

*Art. 1301*

La remissione a favore di uno dei debitori in solido libera anche gli altri debitori, salvo che il creditore abbia riservato il suo diritto verso gli altri, nel qual caso il creditore non può esigere il credito da questi, se non detratta la parte del debitore a favore del quale ha consentito la remissione.

Se la remissione è fatta da uno dei creditori in solido, essa libera il debitore verso gli altri creditori solo per la parte spettante al primo.

*Art. 1371*

Qualora, nonostante l'applicazione delle norme contenute in questo capo il contratto rimanga oscuro, esso deve essere inteso nel senso meno gravoso per l'obbligato, se è a titolo gratuito, e nel senso che realizzi l'equo contemperamento degli interessi delle parti, se è a titolo oneroso.

*Art. 1418*

Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.

Producono nullità del contratto la mancanza di uno dei requisiti indicati dall'art. 1325, l'illiceità della causa, l'illiceità dei motivi nel caso indicato dall'art. 1345 e la mancanza nell'oggetto dei requisiti stabiliti dall'art. 1346.

Il contratto è altresì nullo negli altri casi stabiliti dalla legge.

*Art. 1444*

Il contratto annullabile può essere convalidato dal contraente al quale spetta l'azione di annullamento, mediante un atto che contenga la menzione del contratto e del motivo di annullabilità, e la dichiarazione che s'intende convalidarlo.

Il contratto è pure convalidato, se il contraente al quale spettava l'azione di annullamento vi ha dato volontariamente esecuzione conoscendo il motivo di annullabilità.

*Art. 1467*

Nei contratti a esecuzione continuata o periodica ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall'art. 1458.

La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto.

La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare equamente le condizioni del contratto.

*Art. 1468*

Nell'ipotesi prevista dall'articolo precedente, se si tratta di un contratto nel quale una sola delle parti ha assunto obbligazioni, questa può chiedere una riduzione della sua prestazione ovvero una modificazione nelle modalità di esecuzione, sufficienti per ricondurla ad equità.

*Art. 1736*

Il commissionario che, in virtù di patto o di uso, è tenuto allo star del credere risponde nei confronti del committente per l'esecuzione dell'affare. In tal caso ha diritto, oltre che alla provvigione, a un compenso o a una maggiore provvigione, la quale, in mancanza di patto, si determina secondo gli usi del luogo in cui è compiuto l'affare. In mancanza di usi, provvede il giudice secondo equità.

*Art. 1936*

È fideiussore colui che, obbligandosi personalmente verso il creditore, garantisce l'adempimento di un'obbligazione altrui.

La fideiussione è efficace anche se il debitore non ne ha conoscenza.

*Art. 1937*

La volontà di prestare fideiussione deve essere espressa.

*Art. 1938*

La fideiussione può essere prestata anche per un'obbligazione futura o condizionale.

*Art. 1939*

La fideiussione non è valida se non è valida l'obbligazione principale.

*Art. 1940*

La fideiussione può essere prestata così per il debitore principale, come per il suo fideiussore.

*Art. 1941*

La fideiussione non può eccedere ciò che è dovuto dal debitore, né può essere prestata a condizioni più onerose.

Può prestarsi per una parte soltanto del debito o a condizioni meno onerose.

La fideiussione eccedente il debito o contratta a condizioni più onerose è valida nei limiti dell'obbligazione principale.

*Art. 1942*

Salvo patto contrario, la fideiussione si estende a tutti gli accessori del debito principale, nonché alle spese per la denuncia al fideiussore della causa promossa contro il debitore principale e alle spese successive.

*Art. 1943*

Il debitore obbligato a dare una fideiussione deve presentare persona capace, che possieda beni sufficienti a garantire l'obbligazione e che abbia o elegga domicilio nella giurisdizione della corte di appello in cui la fideiussione si deve prestare. Quando il fideiussore è divenuto insolvente, deve esserne dato un altro, tranne che la fideiussione sia stata prestata dalla persona voluta dal creditore.

*Art. 1944*

Il fideiussore è obbligato in solido col debitore principale al pagamento del debito.

Le parti però possono convenire che il fideiussore non sia tenuto a pagare prima dell'escussione del debitore principale. In tal caso, il fideiussore, che sia convenuto dal creditore e intenda valersi del beneficio dell'escussione, deve indicare i beni del debitore principale da sottoporre all'esecuzione.

Salvo patto contrario, il fideiussore è tenuto ad anticipare le spese necessarie.

*Art. 1945*

Il fideiussore può opporre contro il creditore tutte le eccezioni che spettano al debitore principale, salva quella derivante dall'incapacità.

*Art. 1946*

Se più persone hanno prestato fideiussione per un medesimo debitore e a garanzia di un medesimo debito, ciascuna di esse è obbligata per l'intero debito, salvo che sia stato pattuito il beneficio della divisione.

*Art. 1947*

Se è stato stipulato il beneficio della divisione, ogni fideiussore che sia convenuto per il pagamento dell'intero debito può esigere che il creditore riduca l'azione alla parte da lui dovuta. Se alcuno dei fideiussori era insolvente al tempo in cui un altro ha fatto valere il beneficio della divisione, questi è obbligato per tale insolvenza in proporzione della sua quota, ma non risponde delle insolvenze sopravvenute.

*Art. 1948*

Il fideiussore del fideiussore non è obbligato verso il creditore, se non nel caso in cui il debitore principale e tutti i fideiussori di questo siano insolventi, o siano liberati perché incapaci.

*Art. 1949*

Il fideiussore che ha pagato il debito è surrogato nei diritti che il creditore aveva contro il debitore.

*Art. 1950*

Il fideiussore che ha pagato ha regresso contro il debitore principale, benché questi non fosse consapevole della prestata fideiussione.

Il regresso comprende il capitale, gli interessi e le spese che il fideiussore ha fatto dopo che ha denunciato al debitore principale le istanze proposte contro di lui.

Il fideiussore inoltre ha diritto agli interessi legali sulle somme pagate dal giorno del pagamento. Se il debito principale produceva interessi in misura superiore al saggio legale, il fideiussore ha diritto a questi fino al rimborso del capitale. Se il debitore è incapace, il regresso del fideiussore è ammesso solo nei limiti di ciò che sia stato rivolto a suo vantaggio.

*Art. 1951*

Se vi sono più debitori principali obbligati in solido, il fideiussore che ha garantito per tutti ha regresso contro ciascuno per ripetere integralmente ciò che ha pagato.

*Art. 1952*

Il fideiussore non ha regresso contro il debitore principale se, per avere omesso di denunciargli il pagamento fatto, il debitore ha pagato ugualmente il debito.

Se il fideiussore ha pagato senza averne dato avviso al debitore principale, questi può opporgli le eccezioni che avrebbe potuto opporre al creditore principale all'atto del pagamento. In entrambi i casi è fatta salva al fideiussore l'azione per la ripetizione contro il creditore.

#### *Art. 1953*

Il fideiussore, anche prima di aver pagato, può agire contro il debitore perché questi gli procuri la liberazione o, in mancanza, presti le garanzie necessarie per assicurargli il soddisfacimento delle eventuali ragioni di regresso, nei casi seguenti:

1. quando è convenuto in giudizio per il pagamento;
2. quando il debitore è divenuto insolvente;
3. quando il debitore si è obbligato di liberarlo dalla fideiussione entro un tempo determinato;
4. quando il debito è divenuto esigibile per la scadenza del termine;
5. quando sono decorsi cinque anni, e l'obbligazione principale non ha un termine, purché essa non sia di tal natura da non potersi estinguere prima di un tempo determinato.

#### *Art. 1954*

Se più persone hanno prestato fideiussione per un medesimo debito, il fideiussore che ha pagato ha regresso contro gli altri fideiussori per la loro rispettiva porzione. Se uno di questi è insolvente, si osserva la disposizione del secondo comma dell'art. 1299.

#### *Art. 1955*

La fideiussione si estingue quando, per fatto del creditore, non può avere effetto la surrogazione del fideiussore nei diritti, nel pegno, nelle ipoteche e nei privilegi, del creditore.

#### *Art. 1956*

Il fideiussore per un'obbligazione futura è liberato se il creditore, senza speciale autorizzazione del fideiussore, ha fatto credito al terzo, pur conoscendo che le condizioni patrimoniali di questo erano divenute tali da rendere notevolmente più difficile il soddisfacimento del creditore.

#### *Art. 1957*

Il fideiussore rimane obbligato anche dopo la scadenza dell'obbligazione principale, purché il creditore entro sei mesi abbia proposto le sue istanze contro il debitore e le abbia con diligenza continuate.

La disposizione si applica anche al caso in cui il fideiussore ha espressamente limitato la sua fideiussione allo stesso termine dell'obbligazione principale.

In questo caso però l'istanza contro il debitore deve essere proposta entro due mesi.

L'istanza proposta contro il debitore interrompe la prescrizione anche nei confronti del fideiussore.

#### *Art. 1958*

Se una persona si obbliga verso un'altra, che le ha conferito l'incarico, a fare credito a un terzo, in nome e per conto proprio, quella che ha dato l'incarico risponde come fideiussore di un debito futuro.

Colui che ha accettato l'incarico non può rinunciarvi, ma chi l'ha conferito può revocarlo, salvo l'obbligo di risarcire il danno all'altra parte.

#### *Art. 1959*

Se, dopo l'accettazione dell'incarico, le condizioni patrimoniali di colui che ha conferito o del terzo sono divenute tali da rendere notevolmente più difficile il soddisfacimento del credito, colui che ha accettato l'incarico non può essere costretto ad eseguirlo. Si applica inoltre la disposizione dell'art. 1956.

#### *Art. 2082*

È imprenditore chi esercita professionalmente un'attività economica organizzata al fine della produzione o dello scambio di beni o di servizi.

#### *Art. 2083*

Sono piccoli imprenditori i coltivatori diretti del fondo, gli artigiani, i piccoli commercianti e coloro che esercitano un'attività professionale organizzata prevalentemente con il lavoro proprio e dei componenti della famiglia.

#### *Art. 2624*

Gli amministratori, i direttori generali, i sindaci e i liquidatori che contraggono prestiti sotto qualsiasi forma, sia direttamente sia per interposta persona, con la società che amministrano o con una società che questa controlla o da cui è controllata, o che si fanno prestare da una di tali società garanzie per debiti propri, sono puniti con la reclusione da uno a tre anni e con la multa di L. 16000 a L. 160000.

Per gli amministratori, i direttori generali, i sindaci e i liquidatori delle società che hanno per oggetto l'esercizio del credito si applicano le disposizioni delle leggi speciali.

#### *Art. 2704*

La data della scrittura privata della quale non è autentica la sottoscrizione non è certa e computabile riguardo ai terzi, se non dal giorno in cui la scrittura è stata registrata o dal giorno della morte o della sopravvenuta impossibilità fisica di colui o di uno di coloro che l'hanno sottoscritta o dal giorno in cui il contenuto della scrittura è riprodotto in atti pubblici o, infine, dal giorno in cui si verifica un altro fatto che stabilisca in modo egualmente certo l'anteriorità della formazione del documento.

La data della scrittura privata che contiene dichiarazioni unilaterali non destinate a persona determinata può essere accertata con qualsiasi mezzo di prova.

Per l'accertamento della data nelle quietanze il giudice, tenuto conto delle circostanze, può ammettere qualsiasi mezzo di prova.

#### *Art. 2721*

La prova per testimoni dei contratti non è ammessa quando il valore dell'oggetto eccede le lire cinquemila.

Tuttavia l'autorità giudiziaria può consentire la prova oltre il limite anzidetto, tenuto conto della qualità delle parti, della natura del contratto e di ogni altra circostanza.

#### *Art. 2724*

La prova per testimoni è ammessa in ogni caso:

1. quando vi è un principio di prova per iscritto: questo è costituito da qualsiasi scritto, proveniente dalla persona contro la quale è diretta la domanda o dal suo rappresentante, che faccia apparire verosimile il fatto allegato;
2. quando il contraente è stato nell'impossibilità morale o materiale di procurarsi una prova scritta;
3. quando il contraente ha senza sua colpa perduto il documento che gli forniva la prova.

#### *Art. 2871*

Il terzo datore che ha pagato i creditori iscritti o ha sofferto la espropriazione ha regresso contro il debitore. Se vi sono più debitori obbligati in solido, il terzo che ha costituito la ipoteca a garanzia di tutti ha regresso contro ciascuno per l'intero. Il terzo datore ha regresso contro i fideiussori del debitore. Ha inoltre regresso contro gli altri terzi datori per la loro rispettiva porzione e può esercitare, anche nei confronti dei terzi acquirenti, il subingresso previsto dal secondo comma dell'art. 2866.

#### *Art. 2946*

Salvi i casi in cui la legge dispone diversamente, i diritti si estinguono per prescrizione con il decorso di dieci anni.

### **3. Legge fallimentare del 1942**

#### *Art. 61*

Il creditore di più coobbligati in solido concorre nel fallimento di quelli tra essi che sono falliti, per l'intero credito in capitale e accessori, sino al totale pagamento.

Il regresso tra i coobbligati falliti può essere esercitato solo dopo che il creditore sia stato soddisfatto per l'intero credito.

#### *Art. 62*

Il creditore che, prima della dichiarazione di fallimento, ha ricevuto da un coobbligato in solido col fallito o da un fideiussore una parte del proprio credito, ha diritto di concorrenza nel fallimento per la parte non riscossa.

Il coobbligato che ha diritto di regresso verso il fallito ha diritto di concorrere nel fallimento di questo per la somma pagata.

Tuttavia il creditore ha diritto di farsi assegnare la quota di riparto spettante al coobbligato fino a concorrenza di quanto ancora dovutogli. Resta impregiudicato il diritto verso il coobbligato se il creditore rimane parzialmente insoddisfatto.

#### *Art. 135*

Il concordato omologato è obbligatorio per tutti i creditori anteriori all'apertura del fallimento, compresi quelli che non hanno presentato domanda di ammissione al passivo. A questi però non si estendono le garanzie date nel concordato da terzi.

I creditori conservano la loro azione per l'intero credito contro i coobbligati, i fideiussori del fallito e gli obbligati in via di regresso.

#### *Art. 184*

Il concordato omologato è obbligatorio per tutti i creditori anteriori al decreto di apertura della procedura di concordato. Tuttavia essi conservano impregiudicati i diritti contro i coobbligati, i fideiussori del debitore e gli obbligati in via di regresso.

Salvo patto contrario, il concordato della società ha efficacia nei confronti dei soci illimitatamente responsabili.

### **4. Legge del registro 30-12-1923 n. 3269**

#### *Art. 1*

Gli atti fatti nel regno in forma pubblica e privata, civili e commerciali, stragiudiziali e giudiziali, come pure le trasmissioni della proprietà, dell'usufrutto, dell'uso o godimento di beni o di altro diritto reale, sono soggetti alla registrazione ed al pagamento delle tasse, a norma della presente legge.

Sono pure soggetti a registrazione ed a tassa, in base a denuncia, i contratti verbali di affitto, subaffitto, cessione, retrocessione o risoluzione di affitto di beni immobili, e le rinnovazioni, continuazioni o prolungamenti per tacita riconduzione delle locazioni di beni immobili. In tali casi, la denuncia assume qualità di atto.

Gli altri contratti verbali vanno soggetti a registrazione ed a tassa quando siano enunciati in atti presentati al registro, o servano di base a sentenze di condanna, o negli altri casi previsti dalla legge.

Gli atti formati all'estero sono soggetti a registrazione ed a tassa, quando contengono trasmissioni di proprietà, usufrutto, suo o godimento di beni immobili situati nello Stato, od imposizione sui medesimi di servitù, ipoteche od altri pesi, od affitti, subaffitti, rinnovazioni o riconduzioni, cessioni, retrocessioni o risoluzioni di affitti di beni immobili parimenti situati

nello Stato. Sono comprese tra gli atti fatti all'estero le sentenze definitive pronunciate dai regi consoli, dalle quali deriva alcuna delle trasmissioni od obbligazioni accennate nel presente comma relativamente ad immobili situati nello Stato.

#### Art. 2

La registrazione deve eseguirsi in termine fisso per gli atti ed i trasferimenti indicati nella tariffa, allegato A, e nelle tabelle allegati B e C; e solamente in caso d'uso per gli atti di cui nella tabella allegato D. Si ha caso d'uso agli effetti della presente legge:

1. quando gli atti si presentano o si producono in giudizio davanti l'autorità giudiziaria e nei procedimenti in sede giurisdizionale avanti il consiglio di Stato, la corte dei conti, le giunte provinciali amministrative, i consigli di prefettura ed ogni altra speciale giurisdizione e quando si producono davanti agli arbitri;
2. quando si riportano in tutto o in parte in atti pubblici o privati soggetti a registrazione, delle cancellerie giudiziarie o delle pubbliche amministrazioni o degli enti pubblici.

Art. 54 dell'allegato A nel testo riprodotto nell'articolo 3 della legge 25.5.1954 n. 306

Cauzioni, mallevadorie, fideiussioni anche solidali, di somme e valori prestate da una o più persone cumulativamente per una terza persona; costituzioni di pegno o di ipoteca e promesse d'indennità del pari per terzi:

sulle prime lire 1000 . . . . . L. 20 —  
su ogni lire 1000 in più . . . . . L. 10 —

Fideiussioni prestate a favore di terzi verso pubbliche amministrazioni per periodi non superiori a due anni da aziende od enti di credito contemplati dal regio decreto-legge 12 marzo 1936, n. 375, e successive modificazioni:

a) se prestate per un termine non superiore ad un anno:

sulle prime lire 1000 . . . . . L. 20 —  
su ogni lire 1000 in più . . . . . L. 0,50

b) se prestate per un termine superiore ad un anno ma non a due:

sulle prime lire 1000 . . . . . L. 20 —  
su ogni lire 1000 in più . . . . . L. 1 —

Norma speciale: l'imposta si applica giusta le norme stabilite dall'art. 53 della legge.

Art. 44 dell'allegato D nel testo del decreto-legge del 23.6.1927 n. 1033

Lettere con le quali i commercianti usano scambiare fra loro proposte e accettazioni di affari o che contengono mandati, commissioni od obbligazioni, in quanto abbiano per oggetto atti di commercio, e corrispondenza tra commercianti e non commercianti sempreché abbiano per oggetto atti del commercio esercitato dal commerciante.

Nota 3 (testo dell'articolo 1 D.L. 23.6.1927).

Cessa l'esenzione quando si faccia uso degli atti controindicati, ai termini dell'art. 2 della legge.

È esclusa dalla esenzione e quindi rimane soggetta sin dalla origine al trattamento tributario delle scritture private ordinarie, la corrispondenza commerciale che concerne:

a) obbligazioni nelle quali si assuma di pagare una somma senza indicarne la causa commerciale, e liberazione da obbligazioni di somme costituite o riconosciute mediante scrittura contrattuale o che hanno formato oggetto di riconoscimento giudiziario;

b) l'esistenza di contratti commerciali pei quali sia richiesta dal codice di commercio la prova scritta, di mandati commerciali generali, di mandati di rappresentanza conferiti agli institori; nonché la corrispondenza commerciale che contenga clausole contrattuali aventi per oggetto: costituzione di pegno o di altra garanzia reale su merci e valori quando il credito garantito sia pagabile in un termine superiore a sei mesi; dichiarazioni circa trasferimenti o costituzione di diritti relativi a beni immobili; dichiarazioni circa trasferimenti o costituzione di diritti relativi ad intiere aziende od a quote di aziende commerciali, anche se queste risultino costituite da soli mobili e merci; dichiarazioni relative a quote di partecipazione in società; dichiarazioni relative ad appalti di costruzioni, riparazioni, manutenzioni e trasporti, nonché ad appalti di somministrazioni e di approvvigionamento di merci non rientranti nell'abituale commercio dell'assuntore.

Dalle stesse norme è regolata la corrispondenza commerciale relativa alle note o stabiliti di commissione.

Al testo della « nota » a fianco dell'art. 45 della tabella anzidetta, è sostituito il testo seguente: Occorrendo di dover sottoporre alla registrazione le scritture private controindicate, si applica la tassa di centesimi 20 per ogni 100 lire.

Sono escluse dalla esenzione, e quindi rimangono soggette al trattamento tributario delle scritture private ordinarie, le scritture controindicate che contengano clausole della specie enunciata nella nota al precedente art. 44.

5. Decreto del presidente della Repubblica 25 giugno 1953, n. 492. Nuove norme sulla imposta di bollo.

#### Art. 1

L'imposta di bollo è dovuta sulle carte su cui sono redatti gli atti civili ed amministrativi, giudiziali e stragiudiziali nonché sugli scritti, su registri, stampe e disegni indicati nella annessa tariffa.

Ai fini del presente decreto, sotto la denominazione carta s'intende qualunque materia atta alla compilazione o riproduzione di scritti e disegni che possano valere come atti o documenti.

## Art. 2

La imposta di bollo è dovuta fin dall'origine per gli atti e scritti indicati nella parte I della tariffa e solamente in caso d'uso, per gli atti indicati nella parte II.

Agli effetti del presente decreto costituiscono uso degli atti e scritti, stampe e registri:

- 1) La presentazione o la produzione nei procedimenti civili davanti l'autorità giudiziaria, ordinaria o speciale, e nei procedimenti in sede giurisdizionale amministrativa;
- 2) la presentazione all'ufficio del registro per la registrazione;
- 3) l'inserzione in atti pubblici.

Degli atti e scritti provenienti dall'estero e che se formati nello Stato sarebbero soggetti al bollo sin dall'origine, si fa uso, oltreché nei casi suindicati, quando si presentano ad un ufficio pubblico od in qualunque modo si fanno valere nello Stato anche tra i privati.

Delle cambiali ed altri effetti di commercio emessi all'estero, si fa uso, oltreché nei casi di cui al secondo comma, quando sono presentati, consegnati, trasmessi, quietanzati, accettati, girati, sottoscritti per avallo o altrimenti negoziati nello Stato.

Dei titoli di rendita, delle azioni, delle obbligazioni e di altri analoghi titoli emessi da Stati, provincie e comuni esteri o da società commerciali o da altri enti aventi sede all'estero, si fa uso, oltreché nei casi di cui ai commi secondo e terzo, quando vengono trasferiti o negoziati in qualsiasi modo nello Stato ovvero ne sia fatta enunciazione in atti o scritti pubblici o privati, eccettuati gli inventari.

## Art. 3

Le imposte di bollo sono fisse, graduali e proporzionali.

La imposta fissa colpisce in unica misura gli atti e scritti di una determinata specie con riguardo soltanto alla natura di essi ed è dovuta di regola per ciascun foglio.

La imposta graduale è stabilita in una misura che varia secondo i gradi di una scala riferita al valore o ad altri elementi connaturali all'atto o scritto ovvero alle dimensioni della carta.

La imposta proporzionale è ragguagliata con percentuale costante al valore rappresentato dall'oggetto imponibile.

### Atti e scritti soggetti ad imposta di bollo fino dall'origine

#### Atti civili

Indicazione degli atti soggetti ad imposta	Imposte fisse	Modo di pagamento	Note
Scritture private di ogni specie contenenti: a) contratti di locazione e sublocazione di beni mobili ed immobili e relativi inventari, contratti di abbonamento al servizio telefonico, di somministrazione di acqua, gas ed energia elettrica. Originali e copie: per ogni foglio . . . . .	100	Carta bollata. Per le scritture private di vendite o promesse di vendite di merci, macchine od altri prodotti industriali, per contratti di noleggio di macchine, di cassette di sicurezza e film cinematografici e per le scritture, polizze o domande obbligatorie relative a contratti di abbonamento o di somministrazione di acqua, gas ed energia elettrica l'imposta può essere corrisposta mediante marche o bollo a punzone.  I contratti di locazione e sublocazione di case, di negozi od uffici, oltre che su carta bollata possono essere redatti su carta semplice o su moduli stampati su carta semplice a cura delle parti; in tali ipotesi l'imposta si corrisponde esclusivamente in modo virtuale all'atto della registrazione del contratto nel termine di legge.  Il ministero delle finanze può estendere la disposizione di cui al precedente comma anche ad altri tipi di contratti.	Vedi art. 57 della presente tariffa. Per gli atti di cui contro, redatti su moduli e registri a madre e figlia l'imposta è dovuta anche sulla figlia quando questa rechi la firma della parte che conserva la madre. I contratti di somministrazione di acqua, gas ed energia elettrica devono risultare da scritture, polizze o domande ed essere elencati in appositi registri da conservarsi, insieme ai documenti suddetti, a disposizione dei funzionari dell'amministrazione finanziaria per tre anni.
b) contratti, convenzioni, dichiarazioni, anche unilaterali di volontà che importano costituzione, modificazione, trasferimento, riconoscimento, estinzione o rinuncia di diritti di qualsiasi natura o conferimento di mandati o procure o contenenti descrizioni, constatazioni o inventari destinati a far prova fra le parti che li hanno sottoscritti. Originali e copie: per ogni foglio . . . . .	200		

**Atti e scritti soggetti ad imposta di bollo solamente in caso d'uso**

Indicazione degli atti	Casi d'uso	Imposte fisse	Modo di pagamento	Note
Corrispondenze e dispacci telegrafici: a) inviati o ricevuti da industriali, commercianti, esercenti arti, professioni e mestieri ancorché stampati o redatti su moduli a stampa e che abbiano per oggetto affari della loro industria, commercio, arte, professione o mestiere, nonché lettere, corrispondenze e dispacci ad essi diretti anche da privati sempreché abbiano l'oggetto di cui sopra.	1) Quando si voglia farne uso davanti i seguenti organi giurisdizionali:		Marche da apporsi ed annullarsi esclusivamente dagli uffici del registro	Rimangono soggette al bollo fin dall'origine le lettere:  1) nelle quali si assuma di pagare una somma senza indicarne la causa commerciale;  2) portanti ricevute ordinarie od accreditamenti in conto corrente;  3) portanti liberazione da obbligazioni di somme sostituite o riconosciute mediante scrittura.
	a) Pretori ed ogni altro giudice speciale non indicato nelle lettere seguenti . . . . .	40		
	b) Tribunali, corti di appello, tribunali delle acque pubbliche, commissario degli usi civici, nonché giunte provinciali amministrative e consigli di prefettura in sede giurisdizionale . . . . .	60		
	c) Corte costituzionale, corte di cassazione, tribunale superiore delle acque pubbliche, consiglio di Stato e Corte dei conti in sede giurisdizionale . . . . .	80		
	2) Quando si voglia farne uso negli altri casi previsti dall'art. 2 della legge . . . . .	60		

6. Decreto-legge 6 giugno 1956, n. 476. Nuove norme valutarie e istituzione di un mercato libero di biglietti di Stato e di banca esteri.

**Art. 2**

Ai residenti è fatto divieto di compiere qualsiasi atto idoneo a produrre obbligazioni fra essi e non residenti, esclusi i contratti di vendita di merci per l'esportazione nonché i contratti di acquisto di merci per l'importazione, se non in base ad autorizzazioni ministeriali. Ai residenti è fatto divieto di effettuare esportazioni ed importazioni di merci se non in base ad autorizzazioni ministeriali.

7. Regolamento per l'amministrazione del patrimonio e per la contabilità generale dello Stato.

*Art. 54*, comma 3 del decreto del 22.5.1956, n. 635 del presidente della Repubblica.

Sono ammessi a prestare fideiussione gli istituti di credito di diritto pubblico e le banche d'interesse nazionale nonché le aziende di credito ordinario aventi un patrimonio (capitale versato e riserve) non inferiore a L. 300 000 000 e le casse di risparmio, i monti di credito su pegno di 1ª categoria e le banche popolari aventi un patrimonio non inferiore a L. 100 000 000.

**V. LUXEMBOURG**

1. Code civil, siehe Frankreich

2. Code de commerce, siehe Belgien

3. Loi concernant le concordat préventif de la faillite.

14 avril 1886 (*Ruppert*, Codes du commerce, de l'industrie et du travail [1915]).

**Art. 24**

Le concordat préventif ne profite point aux codébiteurs, ni aux cautions qui ont renoncé au bénéfice de la discussion.

Il est, en tant qu'il n'y est pas dérogé par l'article 36, sans effet relativement: 1° aux impôts et autres charges publiques; 2° aux créances garanties par des privilèges, hypothèques ou nantissements; 3° aux créances dues à titre d'aliments.

## VI. THE NETHERLANDS

### 1. Burgerlijk Wetboek van 1838

#### *Art. 164<sup>a</sup>*

1. Een echtgenoot behoeft de toestemming van de andere echtgenoot voor de volgende handelingen:

a) overeenkomsten tot vervreemding of bezwaring van de woning of van zaken, behorende tot de inboedel van de woning die de echtgenoten tezamen bewonen of die de andere echtgenoot alleen bewoont, alsmede overeenkomsten tot ingebruikgeving en handelingen tot beëindiging van het gebruik van zodanige woning of zodanige zaken.

Onder inboedel wordt hier verstaan het geheel van het huisraad en de tot stoffering en meubilering van de woning dienende roerende zaken, met uitzondering van boekerijen en verzamelingen van voorwerpen van kunst, wetenschap of geschiedkundige aard;

b) giften, met uitzondering van de gebruikelijke, niet-bovenmatige;

c) overeenkomsten, waarbij hij zich, anders dan in de uitoefening van een beroep of bedrijf, als borg of hoofdelijk medeschuldenaar verbindt.

2. Is de andere echtgenoot afwezig of in de onmogelijkheid zijn wil te verklaren, dan kan de beslissing van de kantonrechter worden ingeroepen. Bij weigering van de toestemming kan de beslissing van de rechtbank worden ingeroepen.

#### *Art. 1275*

Alle verbindtenissen om iets te doen of niet te doen, worden opgelost in vergoeding van kosten, schaden en interessen, ingeval de schuldenaar niet aan zijne verplichting voldoet.

#### *Art. 1316*

Er heeft hoofdelijke verbindtenis van de zijde der schuldenaren plaats, wanneer zij allen verplicht zijn tot eene en dezelfde zaak, zoo dat elk hunner voor het geheel kan worden aangesproken, en de voldoening, door een van hen geschied, de overige schuldenaars ten aanzien van den schuldeischer bevrijdt.

#### *Art. 1323*

1. Een hoofdelijke mede-schuldenaar, in regten door den schuldeischer aangesproken zijnde, kan zich bedienen van alle exceptien die uit den aard der verbindtenis voortvloeijen, en van alle die hem persoonlijk eigen zijn, mitsgaders van alle de zoodanige welke aan alle de mede-schuldenaren gemeen zijn.
2. Hij kan zich niet bedienen van zoodanige exceptien die enkel aan de personen van sommige der overige mede-schuldenaren eigen zijn.

#### *Art. 1352*

Niettemin kan men zich voor eenen derde sterk maken of instaan, door te beloven dat dezelve iets doen zal, behoudens de vordering tot schadevergoeding tegen dengenen die voor eenen derde ingestaan of beloofd heeft denzelfden iets te doen bekrachtigen, indien deze derde weigert om de verbindtenis na te komen.

#### *Art. 1438*

Subrogatie heeft plaats uit kracht der wet:

1. Ten behoeve van dengenen die, zelf schuldeischer zijnde, eenen anderen schuldeischer, die, uit hoofde van deszelfs bevoorregte schuld of hypotheek, een beter regt heeft, voldoet;
2. Ten behoeve van den koper van eenig onroerend goed, die den koopprijs daarvan besteedt tot betaling der schuldeischers, aan welke dat goed door hypotheek verbonden was;
3. Ten behoeve van dengenen die, met anderen, of voor anderen, gehouden zijnde tot voldoening van eene schuld, belang had om dezelve te voldoen;
4. Ten behoeve van den erfgenaam, die eenen boedel onder het voorregt van boedelbeschrijving aanvaard hebbende, de schulden der nalatenschap met zijne eigene penningen betaald heeft.

#### *Art. 1439*

De subrogatie, bij de voorgaande artikelen bepaald, heeft plaats zoo wel tegen de borgen als tegen de schuldenaren; dezelve kan den schuldeischer in zijne regten niet verkorten, indien hij slechts gedeeltelijk betaald is; in dit geval, kan hij zijne regten, ten aanzien van hetgeen hem nog verschuldigd blijft, uitoefenen, bij voorkeur boven dengenen van wien hij slechts eene gedeeltelijke voldoening bekomen heeft.

#### *Art. 1466*

1. Een borg kan in vergelijking brengen hetgeen de schuldeischer aan den hoofdschuldenaar verschuldigd is, maar de hoofdschuldenaar kan niet in vergelijking brengen hetgeen de schuldeischer aan den borg verschuldigd is.
2. De hoofdelijke schuldenaar mag insgelijks niet in vergelijking brengen hetgeen door den schuldeischer aan zijnen mede-schuldenaar verschuldigd is.

#### *Art. 1476*

1. De kwijtschelding eener schuld, of het ontslag bij overeenkomst, ten behoeve van eenen der hoofdelijke mede-schuldenaren gegeven, bevrijdt alle de overige, ten ware zich de schuldeischer uitdrukkelijk zijne regten tegen de laatstgemelde mogt hebben voorbehouden.



2. In welk laatste geval, hij de schuld niet verder kan invorderen, dan na aftrek van het aandeel van dengenen aan wien hij de schuld heeft kwijtgescholden.

*Art. 1478*

1. De kwijtschelding eener schuld, of het ontslag bij overeenkomst, aan den hoofdschuldenaar toegestaan, bevrijdt de borgen.
2. De kwijtschelding, aan den borg toegestaan, bevrijdt den hoofdschuldenaar niet.
3. De kwijtschelding, aan eenen der borgen toegestaan, ontslaat de overigen niet.

*Art. 1569*

De verkoop van eene inschuld bevat al wat daartoe behoort, als borgtogten, voorregten en hypotheken.

*Art. 1857*

Borgtogt is eene overeenkomst, waarbij een derde zich, ten behoeve van den schuldeischer, verbindt om aan de verbindtenis van den schuldenaar te voldoen, indien deze niet zelf daaraan voldoet.

*Art. 1858*

1. Geen borgtogt kan bestaan, of er moet eene wettige hoofdverbindtenis zijn.
2. Men kan zich niettemin borg stellen voor eene verbindtenis, al mogt die ook kunnen vernietigd worden door eene exceptie, welke alleen den verbondene in persoon betreft, bij voorbeeld in geval van minderjarigheid.

*Art. 1859*

1. Een borg kan zich tot niets meerder, noch onder meer bezwarende voorwaarden, verbinden, dan waartoe de hoofdschuldenaar verbonden is.
2. Borgtogt kan ook worden aangegaan voor slechts een gedeelte der schuld of onder minder bezwarende voorwaarden. Indien de borgtogt voor meerder dan de schuld, of onder meer bezwarende voorwaarden, is aangegaan, is hij niet geheel van onwaarde, maar bepaalt zich slechts tot datgene hetwelk in de hoofdverbindtenis is begrepen.

*Art. 1860*

1. Men kan zich borg stellen zonder daartoe aangezocht te zijn door dengenen voor wien men zich verbindt, en zelfs buiten zijn weten.
2. Men kan zich ook borg stellen, niet alleen voor den hoofdschuldenaar, maar ook voor deszelfs reeds gestelden borg.

*Art. 1861*

Borgtogt wordt niet voorondersteld, maar moet uitdrukkelijk worden aangegaan; men kan die niet verder uitstrekken dan de bepalingen, onder welke dezelve is aangegaan.

*Art. 1862*

Onbepaalde borgtogt voor eene hoofdverbindtenis strekt zich uit tot alle de gevolgen der schuld, zelfs tot de kosten der tegen den hoofdschuldenaar gedane regtsvordering, en tot alle zoodanige welke gemaakt zijn nadat de borg deswege is aangemaand.

*Art. 1863*

De verbindtenissen der borgen gaan over op hunne erfgenamen.

*Art. 1864*

De schuldenaar die verplicht is borg te stellen moet daartoe zoodanigen persoon aanbieden die de bekwaamheid heeft om zich te verbinden, die genoegzaam goedge is om aan de verbindtenis te kunnen voldoen, en binnen het koninkrijk woonachtig is.

*Art. 1866*

1. Wanneer de borg, die door den schuldeischer vrijwillig, of op regterlijke uitspraak, is aangenomen, naderhand onvermogen is geworden, moet er een nieuwe borg gesteld worden.
2. Deze regel lijdt alleenlijk uitzondering, in geval de borg gesteld is ten gevolge eener overeenkomst, waarbij de schuldeischer eenen bepaalden persoon tot borg gevorderd heeft.

*Art. 1867*

Hij, die door de wet, of ten gevolge van een regterlijk gewijsde, verplicht is eenen borg te stellen, en dien niet mogt kunnen vinden, kan volstaan met, in deszelfs plaats, een pand of hypotheek te geven.

*Art. 1868*

De borg is jegens den schuldeischer niet tot betaling gehouden, dan bij gebreke van den schuldenaar, wiens goederen vooraf moeten uitgewonnen worden.

*Art. 1869*

De borg kan niet vorderen dat des schuldenaars goederen vooraf uitgewonnen worden:

1. Wanneer hij van het voorregt van uitwinning heeft afstand gedaan;
2. Wanneer hij zich hoofdelijk met den hoofdschuldenaar verbonden heeft; in welk geval de gevolgen van deszelfs verbindtenis geregeld worden naar de beginselen welke ten opzichte van hoofdelijke schulden zijn vastgesteld;
3. Indien de schuldenaar eene exceptie kan in het midden brengen, welke hem alleen en persoonlijk betreft;
4. Indien de schuldenaar zich in staat van faillissement of van kennelijk onvermogen bevindt;
5. Ingeval van geregtelijke borgtocht.

*Art. 1870*

De schuldeischer is niet verplicht den hoofdschuldenaar eerst uit te winnen, dan wanneer de borg, op de eerste geregtelijke tegen hem gerigte aanspraak, zulks vordert.

*Art. 1871*

1. De borg die de uitwinning van den hoofdschuldenaar vordert moet aan den schuldeischer de goederen van denzelfden aanwijzen, en de noodige penningen voorschieten om de uitwinning te bewerkstelligen.
2. Hij kan geene aanwijzing doen van goederen, waarover geschil in regten bestaat, noch van de zoodanige welke voor de schuld zijn gehypothekeerd, en waarvan de schuldenaar niet meer in het bezit is, noch eindelijk van goederen buiten het koninkrijk gelegen.

*Art. 1872*

Wanneer de borg, overeenkomstig het voorgaande artikel, eene aanwijzing van goederen gedaan en de noodige penningen tot de uitwinning geschoten heeft, is de schuldeischer, ten beloope der aangewezen goederen, met opzigt tot den borg, verantwoordelijk voor het onvermogen van den hoofdschuldenaar, hetwelk bij gebreke van vervolgingen daarna ontstaan is.

*Art. 1873*

Wanneer verscheiden personen zich tot borgen hebben gesteld voor denzelfden schuldenaar en voor dezelfde schuld, is ieder van hen voor de geheele schuld verbonden.

*Art. 1874*

1. Niettemin kan elk hunner, zoo hij geen afstand heeft gedaan van het voorregt van schuldsplitsing, op de eerste geregtelijke aanspraak, vorderen dat de schuldeischer zijne schuldvordering alvorens verdeele, en dezelve verminderde tot het aandeel van elken deugdelijk verbonden borg.
2. Indien, ten tijde dat een der borgen de schuldsplitsing heeft doen uitspreken, een of meerder medeborgen onvermogen zijn, is die borg, naar evenredigheid van zijn aandeel, gehouden voor de onvermogenen te voldoen; maar hij is niet aansprakelijk, indien derzelve onvermogen na de schuldsplitsing is opgekomen.

*Art. 1875*

Indien de schuldeischer zelf, en vrijwillig, zijne regtsvordering verdeeld heeft, kan hij tegen die schuldsplitsing niet weder opkomen, al waren zelfs eenige der borgen onvermogen, vóór den tijd dat hij de schuld verdeeld heeft.

*Art. 1876*

1. De borg die betaald heeft, heeft zijn verhaal op den hoofdschuldenaar, het zij de borgtogt met of

zonder deszelfs medeweten gesteld zij. Dit verhaal heeft plaats, zoo wel ten aanzien van de hoofdsom, als van de interessen en de kosten.

2. Ten aanzien dier kosten heeft de borg slechts zijn verhaal, voor zoo verre hij tijdig aan den hoofdschuldenaar heeft kennis gegeven van de tegen hem gerigte vervolgingen.
3. De borg heeft ook verhaal tot vergoeding van kosten, schaden en interessen, indien daartoe gronden zijn.

*Art. 1877*

De borg die de schuld betaald heeft treedt van regtswege in alle de regten welke de schuldeischer tegen den schuldenaar gehad heeft.

*Art. 1878*

Indien verscheiden hoofdschuldenaars van dezelfde schuld ieder voor het geheel verbonden waren, heeft degene die zich voor alle tot borg gesteld heeft op een ieder hunner zijn verhaal tot terugvordering van al hetgeen hij betaald heeft.

*Art. 1879*

1. De borg die eenmaal de schuld betaald heeft, heeft geen verhaal op den hoofdschuldenaar die voor de tweede maal betaald heeft, indien hij denzelfden van de door hem gedane betaling geene kennis heeft gegeven; behoudens zijne actie tot terugvordering tegen den schuldeischer.
2. Indien de borg betaald heeft, zonder daartoe in regten te zijn aangesproken, en zonder den hoofdschuldenaar daarvan te hebben verwittigd, heeft hij op dezen geen verhaal, in geval die schuldenaar, op het oogenblik der betaling, gronden mogt hebben gehad om de schuld te doen vervallen verklaren; onverminderd de regtsvordering van den borg tot terugvordering tegen den schuldeischer.

*Art. 1880*

De borg kan, zelfs voordat hij betaald heeft, den schuldenaar aanspreken om door denzelfden schadeloos gesteld, of van zijne verbindtenis ontheven te worden:

1. Indien hij tot betaling in regten vervolgd wordt;
3. Indien de schuldenaar zich verbonden heeft om hem binnen zekeren tijd het ontslag van zijne borgtogt te bezorgen;
4. Indien de schuld opeischbaar is geworden, door het verschijnen van den termijn op welken zij betaalbaar was gesteld;
5. Na verloop van tien jaren, indien de hoofdverbindtenis geenen bepaalden vervaltijd heeft, ten ware de hoofdverbindtenis van dien aard zij, dat zij niet voor eenen bepaalden tijd kan vervallen, zoo als eene voogdij.

*Art. 1881*

1. Indien verscheidene personen zich tot borgen hebben gesteld van denzelfden schuldenaar en ter zake van dezelfde schuld, heeft de borg die de schuld heeft voldaan, in het geval bij no. 1 van het vorige artikel voorzien, als ook wanneer de schuldenaar is verklaard in staat van faillissement, zijn verhaal op de overige borgen, ieder voor zijn aandeel.
2. De bepaling van het tweede lid van artikel 1329 is ten dezen toepasselijk.

*Art. 1882*

De verbindtenis, uit borgtogt voortspruitende, gaat te niet door dezelfde oorzaken, waardoor de overige verbindtenissen eindigen.

*Art. 1883*

De schuldvermenging, welke plaats heeft tusschen den persoon van den hoofdschuldenaar en dien van den borg, wanneer de een erfgenaam wordt van den anderen, vernietigt geenszins de regtsvordering van den schuldeischer tegen dengenen die zich tot borg gesteld heeft van den borg.

*Art. 1884*

1. De borg kan zich tegen den schuldeischer van alle exceptien bedienen, die aan den hoofdschuldenaar toekomen, en tot de schuld zelve behooren.
2. Maar hij kan geene exceptien in het midden brengen, welke alleen den persoon van den schuldenaar betreffen.

*Art. 1885*

De borg is ontslagen, wanneer hij, door toedoen van den schuldeischer, niet meer treden kan in de regten, hypotheeken en voorregten van dien schuldeischer.

*Art. 1886*

De vrijwillige aanneming van eenig onroerend of ander goed, door den schuldeischer in betaling der hoofdschuld gedaan, ontslaat den borg, al ware het ook dat hetzelfde goed naderhand van den schuldeischer wierd uitgewonnen.

*Art. 1887*

Een eenvoudig uitstel van betaling, door den schuldeischer aan den hoofdschuldenaar toegestaan, ontslaat den borg niet; doch deze kan, in dat geval, den schuldenaar vervolgen, om hem tot betaling te noodzaken, of om hem het ontslag van zijnen borgtogt te bezorgen.

*Art. 2004*

Alle regtsvorderingen, zoo wel zakelijke als persoonlijke, verjaren door dertig jaren, zonder dat hij die zich op de verjaring beroept verplicht zij eenigen titel aan te toonen, of dat men hem eenige exceptie, uit zijne kwade trouw ontleend, kunne tegenwerpen.

*Art. 2021*

De beteekening aan den hoofdschuldenaar gedaan, of deszelfs erkenenis, stuit de verjaring tegen den borg.

2. Nieuw Burgerlijk Wetboek Boek I, van 1969

*Art. 88*

1. Een echtgenoot behoeft de toestemming van de andere echtgenoot voor de volgende rechtshandelingen:

a) overeenkomsten tot vervreemding, bezwaring of ingebruikgeving en handelingen tot beëindiging van een door de echtgenoten tezamen of door de andere echtgenoot alleen bewoonde woning of van zaken die bij een zodanige woning of tot de inboedel daarvan behoren. Onder inboedel wordt hier verstaan het geheel van het huisraad en de tot stoffering en meubilering van de woning dienende roerende zaken, met uitzondering van boekerijen en verzamelingen van voorwerpen van kunst, wetenschap of geschiedkundige aard;

b) giften, met uitzondering van de gebruikelijke, niet-bovenmatige;

c) overeenkomsten waarbij hij, anders dan in de uitoefening van een beroep of bedrijf, zich als borg of hoofdelijk medeschuldenaar verbindt, zich voor een derde sterk maakt, of zich tot zekerheidsstelling voor een schuld van een derde verbindt.

2. Is de andere echtgenoot afwezig of in de onmogelijkheid zijn wil te verklaren of weigert hij zijn toestemming, dan kan de beslissing van de kantonrechter worden ingeroepen.

3. Faillissementswet van 30-9-1893

*Art. 135*

1. De schuldeischer, die door borgtocht is verzekerd, komt op voor zijne schuldvordering onder aftrek van hetgeen hij van den borg heeft ontvangen.
2. De borg heeft recht voor hetgeen hij den schuldeischer heeft betaald. Bovendien kan hij voor het bedrag, waarvoor de schuldeischer kan opkomen, voorwaardelijk toegelaten worden, zoolang de schuldeischer zelf niet opkomt.

4. Wetboek van Koophandel van 1838

*Art. 75e*

De handelsagent kan zich voor de verplichtingen, welke voor den derde voortvloeien uit eene door zijne tuschenkomst tot stand gekomen overeenkomst, als borg slechts verbinden ten beloope van het voor die overeenkomst geldend loon.

## 5. Zegelwet 1917 (Stb. n. 244)

### Art. 34

Behoudens de hierna vermelde uitzonderingen, zijn onderworpen:

I. (vervallen bij de wet van 1965)

II. aan een vast recht van een gulden:

- a) akten van schuldbekentenis van geldschulden,
- b) akten van borgtocht voor geldschulden,
- c) akten van verpanding tot zekerheid voor geldschulden.

Het bedrag van een gulden wordt verminderd tot vijftig cent, indien de geldschulden een bedrag van honderd gulden niet te boven gaan en zulks uit het stuk blijkt.

## 6. Deviesensluit 1945

### Art. 7, par. 5

De Nederlandsche Bank kan, indien bijzondere omstandigheden aanwezig zijn, achteraf voor het aangaan van een overeenkomst of het verrichten van een handeling vergunning verleen. Deze vergunning wordt geacht te zijn verleend op het tijdstip van het aangaan van de overeenkomst of het verrichten van de handeling, met dien verstande, dat reeds ingetreden strafbaarheid niet wordt opgeheven.

### Art. 19

1. Het is aan ingezetenen, anders dan krachtens een vergunning, verboden:
  - a) aan een niet-ingezetene, zoomede aan een ingezetene ten gunste van een niet-ingezetene, crediet te verleen;
  - b) aval te geven of borgtocht of andere zekerheid te stellen voor een schuld van een niet-ingezetene of voor een schuld van een ingezetene jegens een niet-ingezetene;
  - c) een beding ten behoeve van een derde, niet-ingezetene, aan te gaan.
2. Het verbod, als bedoeld in het eerste lid onder a, geldt niet ten aanzien van het verleen van gebruikelijk betalingscrediet, noch voor het geven van voorschot wegens vrachten, nevenkosten en soortgelijke prestaties.

### Art. 30

Rechtshandelingen, verricht in strijd met bij of krachtens dit besluit gegeven voorschriften, zijn van rechtswege nietig.

## 7. Ontwerp voor een Nieuw Burgerlijk Wetboek, Boek 6 (1961)

### Art. 6.1.10.17

1. De borg en degene wiens goed voor de schuld van een ander verbonden is, kunnen de opschorting

van hun aansprakelijkheid inroepen, voor zover de schuldeiser bevoegd is zijn vordering met een opeisbare schuld aan de schuldenaar te verrekenen.

2. Zij kunnen de bevrijding van hun aansprakelijkheid inroepen, voor zover de schuldeiser een bevoegdheid tot verrekening met een schuld aan de schuldenaar zonder redelijke grond en door zijn schuld heeft doen verloren gaan.

### Art. 6.2.1

1. Bij overgang van een vordering op een nieuwe schuldeiser verkrijgt deze, behoudens het in artikel 8, eerste lid bepaalde, tevens de rechten van pand en hypotheek, de rechten uit borgtocht en andere aan de vordering verbonden nevenrechten, alsmede de voorrechten.
2. Bij overgang onder bijzondere titel van een vordering verkrijgt de nieuwe schuldeiser het recht op bedongen rente of boete, behalve voor zover de rente achterstallig of de boete reeds verbeurd was op het tijdstip van de overgang. In geval van subrogatie verkrijgt hij het recht op bedongen rente slechts voor zover de rente betrekking heeft op het tijdvak na de overgang.

### Art. 6.2.8

1. In afwijking van het in artikel 1 bepaalde verkrijgt de derde die de vordering voldoet, de rechten van de schuldeiser jegens borgen en jegens personen die niet schuldenaar zijn, slechts voor het breukdeel waarvoor de schuld hun aangaat in hun verhouding tegenover de schuldenaar.
2. De schuldeiser die ten koste van de derde vóór de subrogatie heeft bewilligd in een vermindering van zijn rechten, is verplicht de daardoor voor de derde ontstane schade te vergoeden in de gevallen, bedoeld in het vorige artikel onder a, b en c.

### Art. 6.2.9

1. Wanneer het verhaal krachtens subrogatie onmogelijk blijkt, wordt het onbetaald gebleven gedeelte van de schuld omgeslagen over de gesubrogeerde en de in het eerste lid van het vorige artikel genoemde personen, ongeacht of de schuld hun aangaat, naar evenredigheid van hun aansprakelijkheid jegens de oorspronkelijke schuldeiser op het tijdstip waarop diens vordering werd voldaan.
2. De gesubrogeerde kan van geen der andere bij de omslag betrokken derden een groter bedrag vorderen dan de oorspronkelijke schuldeiser op deze had kunnen verhalen.
3. De omslag vindt niet plaats voor zover de schuld de gesubrogeerde zelf aangaat in zijn verhouding tegenover de schuldenaar.
4. Het in de omslag bijgedragene kan steeds alsnog worden verhaald op hen jegens wie het verhaal krachtens subrogatie onmogelijk was gebleken.

## VII. EINHEITLICHES WECHSELGESETZ VON 1930

### *Art. 32*

Der Wechselbürge haftet in der gleichen Weise wie derjenige, für den er sich verbürgt hat.

Seine Verpflichtungserklärung ist auch gültig, wenn die Verbindlichkeit, für die er sich verbürgt hat,

aus einem anderen Grunde als wegen eines Formfehlers nichtig ist.

Der Wechselbürge, der den Wechsel bezahlt, erwirbt die Rechte aus dem Wechsel gegen denjenigen, für den er sich verbürgt hat, und gegen alle, die diesem wechselfähig haften.

## VIII. EINHEITLICHES SCHECKGESETZ VON 1931

### *Art. 27*

Der Scheckbürge haftet in der gleichen Weise wie derjenige, für den er sich verbürgt hat.

Seine Verpflichtungserklärung ist auch gültig, wenn die Verbindlichkeit, für die er sich verbürgt hat, aus

einem anderen Grunde als wegen eines Formfehlers nichtig ist.

Der Scheckbürge, der den Scheck bezahlt, erwirbt die Rechte aus dem Scheck gegen denjenigen, für den er sich verbürgt hat, und gegen alle, die diesem scheckmäßig haften.

## IX. RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN

### 1. **First Council Directive of 9 March 1968 about law of companies**

#### *Article 9*

1. Acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless acts exceed the powers that the law confers or allows to be conferred on those organs.

However, Member States may provide that the company shall not be bound where such acts are outside the objects of the company, if it proves that the third party knew that the act was outside those objects or could not in view of the circumstances have been unaware of it; disclosure of the statutes shall not of itself be sufficient proof thereof:

2. The limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed.

### 2. **Regulation (EEC) No 542/69 of the Council of 18 March 1969**

#### *Article 27*

1. In order to ensure collection of the duties and other taxes which one of the Member States is authorised to charge in respect of goods passing through its territory in the course of Community transit, the principal shall furnish a guarantee, except as otherwise provided in this Regulation.

2. The guarantee may be comprehensive, covering

a number of Community transit operations, or individual, covering a single Community transit operation.

3. Subject to the provisions of Article 33 (2), the guarantee shall consist of the joint and several guarantee of a natural or legal third person established in the Member State in which the guarantee is provided who is approved as guarantor by that Member State.

#### *Article 28*

1. The person standing as guarantor under the conditions referred to in Article 27 shall be responsible for designating, in each of the Member States through which the goods will be carried in the course of Community transit, a natural or legal third person who also will stand as guarantor for the principal.

Such guarantor must be established in the Member State in question and must undertake, jointly and severally with the principal, to pay the duties and other taxes chargeable in that State.

2. The application of paragraph 1 shall be subject to a qualified majority decision of the Council acting on a proposal from the Commission, as a result of an examination of the conditions under which the Member States have been able to exercise their right of recovery in accordance with Article 36. The Commission shall submit a report on this subject by 31 March 1971 at the latest.

#### *Article 29*

1. Subject to the provisions of Article 32 (2) (a), the guarantee referred to in Article 27 (3) shall be in

the form of one of the specimen guarantees shown as Model I or Model II in Annex F to this Regulation, as appropriate.

2. Where the provisions laid down by law, regulation or administrative action, or common practice so require, each Member State may allow the guarantee to be in a different form, on condition that it has the same legal effects as the documents shown as specimens.

#### *Article 30*

1. A comprehensive guarantee shall be lodged in an office of guarantee.

2. The office of guarantee shall determine the amount of the guarantee, accept the guarantor's undertaking and issue a provisional authorisation allowing the principal to carry out, within the limits of the guarantee, any Community transit operation irrespective of the office of departure.

3. Each person who has obtained provisional authorisation shall be issued with one or more copies of a guarantee certificate in the form shown in Annex G, subject to the conditions laid down by the competent authorities of the Member States.

4. Reference to this certificate shall be made in each T1 declaration.

#### *Article 31*

1. The office of guarantee may revoke the provisional authorisation if the conditions under which it was issued no longer exist.

2. Each Member State shall notify the Member States concerned of any revocation of provisional authorisations.

#### *Article 32*

1. Each Member State may accept that the natural or legal third person standing as guarantor under the conditions laid down in Articles 27 and 28 guarantees, by a single guarantee and for a flat-rate amount of five thousand units of account in respect of each declaration, payment of duties and other charges which may become chargeable in the course of a Community transit operation carried out under his responsibility, whoever the principal may be. If carriage of the goods presents increased risks, having regard in particular to the amount of duties and other charges to which they are liable in one or more Member States, the flat-rate amount shall be fixed at a higher level.

2. The following shall be determined under the procedure laid down in Article 58:

- (a) the model form for the guarantee referred to in paragraph 1;
- (b) the carriage of goods likely to give rise to an increase in the flat-rate amount, and the conditions under which such an increase shall apply;

- (c) the conditions under which it will be established that the guarantee referred to in paragraph 1 shall apply to any particular Community transit operation.

#### *Article 33*

1. An individual guarantee furnished for a single Community transit operation shall be lodged at the office of departure.

2. It may be a cash deposit. In such a case, the amount shall be fixed by the competent authorities of the Member States, and the guarantee must be renewed at each office of transit within the meaning of the first indent of Article 11 (d).

#### *Article 34*

Without prejudice to national provisions prescribing other cases of exemption, the principal shall be exempted by the competent authorities of the Member States from payment of duties and other charges in the case of:

- (a) goods which have been destroyed as a result of force majeure or unavoidable accident duly proven; or
- (b) officially recognised shortages arising from the nature of the goods.

#### *Article 35*

The guarantor shall be released from his obligations towards the Member States through which goods were carried in the course of a Community transit operation when the T1 document has been discharged at the office of departure.

#### *Article 36*

1. When it is found that, in the course of a Community transit operation, an offence or irregularity has been committed in a particular Member State, the recovery of duties or other charges which may be chargeable shall be effected by that Member State in accordance with its provisions laid down by law, regulation or administrative action, without prejudice to the institution of criminal proceedings.

2. If the place of the offence or irregularity cannot be determined, it shall be deemed to have been committed:

- (a) where, in the course of a Community transit operation, the offence or irregularity is detected at an office of transit situated at an internal frontier: in the Member State which the means of transport or the goods have just left;
- (b) where, in the course of a Community transit operation, the offence or irregularity is detected at an office of transit within the meaning of the second indent of Article 11 (d): in the Member State to which that office belongs;

- (c) where, in the course of a Community transit operation, the offence or irregularity is detected in the territory of a Member State elsewhere than at an office of transit: in the Member State in which it is detected;
- (d) where the consignment has not been produced at the office of destination: in the last Member State which the means of transport or the goods are shown by the transit advice notes to have entered;
- (e) where the offence or irregularity is detected after the Community transit operation has been concluded: in the Member State in which it is detected.

*Article 37*

1. The T1 documents issued in accordance with the rules, and the identification measures taken by the customs authorities of one Member State, shall

have the same legal effects in other Member States as the T1 documents issued in accordance with the rules and the identification measures taken by the customs authorities of each of those Member States.

2. The findings of the competent authorities of a Member State made when inspections are carried out under the Community transit procedure shall have the same probative force in other Member States as findings of the competent authorities of each of those Member States.

*Article 38*

Where necessary, the customs authorities of the Member States shall communicate to one another all findings, documents, reports, records of proceedings and information relating to transport operations carried out under the Community transit procedure and to irregularities and offences in connection with that procedure.

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## C - ABBREVIATIONS

ABl.	Amtsblatt
Abs.	Absatz
Anm.	Anmerkung
App.	Corte di appello
Aufl.	Auflage
B	Belgien
Bfr	Belgische Frank
BGB	Bürgerliches Gesetzbuch
BGBL.	Bundesgesetzblatt
BGH	Bundesgerichtshof
BGHZ	Bundesgerichtshof, Entscheidungen in Zivilsachen
Bull.	Bulletin des arrêts de la Cour de Cassation
BW	Burgerlijk Wetboek
Cass.	Cour de Cassation
Cass.	Corte di cassazione
Cass. civ.	Cour de Cassation, Chambres Civiles
Cass. req.	Cour de Cassation, Chambre des Requetes
cc	Code civil
c. comm.	Code de commerce
cod. civ.	codice civile
Cour	Cour d'appel
D.	Recueil Dalloz
D.A.	Recueil analytique Dalloz
ders.	derselbe
D.H.	Recueil hebdomadaire Dalloz
Dir. e giur.	Diritto e giurisprudenza
disp. prel. cod. civ.	- disposizioni sulla legge in generale (preliminari al codice civile)
D.P.	Recueil périodique Dalloz
DR	Deutsches Recht
ebda.	ebenda
EWG	Europäische Wirtschaftsgemeinschaft
EWG-V	Vertrag über die Gründung der Europäischen Wirtschaftsgemeinschaft
F	Frankreich
fasc.	fascicule
FF	französische Francs
Foro it.	Foro italiano
Foro pad.	Foro padano
Fw.	Faillissementswet

Gaz. Pal.	Gazette du Palais
Giur. it.	Giurisprudenza italiana
Giur. tosc.	Giurisprudenza toscana
Giust. civ.	Giustizia civile
Gruchot	Beiträge zur Erläuterung des deutschen Rechts, begründet von Gruchot
G.U.	Gazzetta Ufficiale della Repubblica
hfl.	niederländischer Gulden
HGB	Handelsgesetzbuch
H.R.	Hoge Raad
HRR	Höchstrichterliche Rechtsprechung
I	Italien
J.Cl.Civ.	Juris-Classeur Civil
J.Cl.Comm.	Juris-Classeur Commercial
J.C.P.	Juris-Classeur périodique (Semaine juridique)
J.O.	Journal officiel
Jur. Liège	Jurisprudence de la Cour d'appel de Liège
JW	Juristische Wochenschrift
KG	Kammergericht
KO	Konkursordnung
L	Luxemburg
LZ	Leipziger Zeitschrift für Deutsches Recht
Mass. Foro it.	Massimario del Foro italiano
M.B.	Moniteur Belge
MDR	Monatsschrift für Deutsches Recht
Mio	Million
N	Niederlande
NBW	Nieuw Burgerlijk Wetboek
N.J.	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
no.	numero
Nuova riv. dir. comm.	Nuova rivista di diritto commerciale
OLG	Oberlandesgericht
OLGE	Die Rechtsprechung der Oberlandesgerichte auf dem Gebiete des Zivilrechts
P.A.	Jurisprudence du port d'Anvers
Pas.	Pasinomie, Pasicrisie
Rb.	Rechtbank
RE	Rechnungseinheit(en)
Rep. Foro it.	Repertorio generale annuale del Foro italiano

Rev. crit. d. i. p.	– Revue critique de droit international privé
RG	Reichsgericht
RGBl.	Reichsgesetzblatt
RGZ	Reichsgericht, Entscheidungen in Zivilsachen
Rev. dir. comm.	Rivista del diritto commerciale e del diritto generale delle obbligazioni
Seuff.Arch.	Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten
Stb.	Staatsblad van het Koninkrijk der Nederlanden
Trib.	Tribunale
VerglO	Vergleichsordnung
vgl.	vergleiche
Vorbem.	Vorbemerkung
Warn.	Jahrbuch der Entscheidungen zum Bürgerlichen Gesetzbuch und den Nebengesetzen auf dem Gebiete des Zivil-, Handels- und Prozeßrechts
WG	Wechselgesetz
WM	Wertpapier-Mitteilungen Teil IV B
WvK	Wetboek van Koophandel
W.	Weekblad van het Recht

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<sup>1</sup> The abbreviations after each title indicate the languages in which the documents have been published: f = French, d = German, i = Italian, n = Dutch.

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