Principles of European Law

Study Group on a European Civil Code

Personal Security
(PEL Pers. Sec.)

prepared by
Ulrich Drobnig

Sellier.
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prepared by
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Foreword

The Study Group on a European Civil Code has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in moveables which are especially relevant for the functioning of the common market. It was founded in 1999 as a successor body to the Commission on European Contract Law, on whose work the Study Group is building.

The two groups pursue identical aims. However, the Study Group has a more far-reaching focus in terms of subject-matter and as an ultimate goal it aspires to a consolidated composite text of the material worked out by itself and the Commission on European Contract Law. Both groups have undertaken to ascertain and formulate European standards of 'patrimonial' law for the Member States of the European Union. The Commission on European Contract has already achieved this for the field of general contract law (*Lando and Beale* [eds.], Principles of European Contract Law, Parts I and II combined and revised, The Hague, 2000; *Lando/Clive/Prüm/Zimmermann* [eds.], Principles of European Contract Law Part III, The Hague, 2003). These Principles of European Contract Law (PECL) are being adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group is itself dovetailing its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations, i. e. the law of tort/delict, the law of unjustified enrichment, and the law of benevolent intervention in another's affairs *(negotiorum gestio)*; and (iii) by developing rules for fundamental questions in the law on mobile assets – in particular transfer of ownership and security for credit.

Like the Commission on European Contract Law's Principles of European Contract Law, the results of the research conducted by the Study Group on a European Civil Code seek to advance the process of Europeanisation of private law. We have undertaken this endeavour on our own personal initiative and merely present the results of a pan-European research project. It is a study in comparative law in so far as we have always taken care to identify the legal position in the Member States of the European Union and to set out the results of this research in the introductions and notes. That of course does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up "sound and fitting" principles, that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe.

The working methods of the Commission on European Contract Law and the Study Group on a European Civil Code are or were likewise quite similar. The Study Group, however, has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader) which undertook the basic comparative legal research, developed the drafts for discussion and

assembled the extensive material required for the notes. Furthermore, to each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests of efficiency – were formed from leading experts in the relevant field of law who are representative of the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined us after the June meeting 2004 in Warsaw. However, due to reasons of time and capacity, it was only occasionally possible to summarise in the notes the current legal position in the new Member States of the EU. We are keen to fill the outstanding gaps (of which we are only too painfully aware) at a later point in time.

Besides its permanent members, other participants in the Co-ordinating Group with voting rights included all the Team Leaders and – when the relevant material was up for discussion – the members of the Advisory Council concerned. The results of the deliberations during the week-long sitting of the Co-ordinating Group were incorporated into the text of the Articles and the commentaries which returned to the agenda for the next meeting of the Co-ordinating Group (or the next but one depending on the work load of the Group and the Team affected). Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible the Articles drafted in English were translated into the other languages either by members of the Team or third parties commissioned for the purpose. The number of languages into which the Articles could be translated admittedly varies considerably from volume to volume. That is in part a consequence of the fact that not all Working Teams were equipped with the same measure of financial support. We also had to resign ourselves to the absence of a perfectly uniform editorial style. Our editing guidelines provided a common basis for scholarly publication, but at the margin had to accommodate preferences of individual teams. However, this should not cause the reader any problems in comprehension.

Work on these Principles had begun long before the European Commission published its Communication on European Contract Law (in 2001), its Action Plan for a more coherent European contract law (in 2003), and its follow-up Communication "European Contract Law and the revision of the *acquis*: the way forward" (in 2004). (All of these early documents concerning European contract law are still available on the Commission's website: http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm). These documents for their part were published before we formed the Network of Excellence, together with other European research groups and institutions, which will collaborate in the preparation of an Academic Common Frame of Reference with the support of funds from the European Community's Sixth Framework Programme. The texts laid before the public by the Study Group on a European Civil Code are therefore not necessarily identical with those which the Network of Excellence will propose to the European Commission. Rather they represent for

the time being texts which the Study Group considers should serve as the starting point for the comprehensive process of discussion and consultation envisaged for the coming years. Whether that process will require any changes to our texts (and, if so, which changes) is something which will have to be weighed up carefully in a spirit of academic independence after a review of the arguments. The political domain can then determine at a later date which of our proposals, if any, it wishes to take up.

In order to leave no room for misunderstanding, it is important to stress that these Principles have been prepared by impartial and independent-minded scholars whose sole interest has been a devotion to the subject-matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimation for promoting harmonisation of the law. Our legitimation is confined to curiosity and an interest in Europe. In other words, the volumes in this series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the current law and introduce possible models for its further development; no less, but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a *Study* Group. The question whether a European Civil Code is or is not desirable is a political one to which each member can only express an individual view.

Osnabrück, January 2007 *Christian v. Bar*

Our Sponsors

The project of the Study Group on a European Civil Code represents a research endeavour in legal science of extraordinary magnitude. Without the generous financial support of many organisations its realisation would not have been possible.

Our thanks go first of all to the *Deutsche Forschungsgemeinschaft (DFG)*, which has supplied the lion's share of the financing including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Coordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO)*. Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO)*, the *Onassis-Foundation*, the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung* and the *Fundação Calouste Gulbenkian*.

In addition we have consistently been able to fall back on funds made available to the respective organisers of the week long sittings of the Coordinating Group by the relevant university or other sources within the country concerned. It is therefore with the deepest gratitude that I must also mention the *Consiglio nazionale forense* (Rom) and the *Istituto di diritto privato* of the *Università di Roma La Sapienza*, which co-financed the meeting in Rome (June 2000). The session in Salzburg (December 2000) was supported by the Austrian *Bundesministerium für Bildung, Wissenschaft und Kultur*, the *Universität Salzburg* and the *Institut für Rechtspolitik* of the *Universität Salzburg*. The discussions in Stockholm (June 2001) were assisted by the *Department of Law, Stockholm University*, the *Supreme Court Justice Edward Cassel's Foundation* and *Stiftelsen Juridisk Fakultetslitteratur (SJF)*. The meeting in Oxford (December 2001) had the support of *Shearman & Sterling*, the *Hulme Trust*, *Berwin Leighton Paisner* and the *Oxford University Press (OUP)*. The session in Valencia (June 2002) was made possible by the *Asociación Nacional de Registradores de la Propiedad, Mercantil y Bienes Muebles*, the *Universitat de València*, the *Ministerio Español de Ciencia y Tecnología*, the *Facultad de Derecho* of the *Universitat de València*, the *Departamento de Derecho Internacional*, *Departamento de Derecho Civil* and the *Departamento de Derecho Mercantil «Manuel Broseta Pont»* of the *Universitat de València*, the law firm *Cuatrecasas*, the *Generalitat Valenciana*, the *Corts Valencianes*, the *Diputación Provincial de Valencia*, the *Ayuntamiento de Valencia*, the *Colegio de Abogados de Valencia* and *Aranzadi Publishing Company*. The subsequent meeting in Oporto (December 2002) was substantially assisted by the *Universidade Católica Portuguesa – Centro Regional do Porto*. For the week long session in Helsinki (June 2003) we were able to rely on funds from *Suomen Kultuurirahasto* (Finnish Cultural Foundation), the *Niilo Helanderin Säätiö* (Niilo Helander Foundation), the *Suomalainen Lakimeisyhdistys* (Finnish Lawyers Association), the *Ministry of Justice* and the *Ministry for Foreign Affairs*, the *Nordea Bank*, *Roschier Holmberg* Attorneys Ltd., *Hannes Snellman* Attorneys Ltd., the *Department of Private Law* and the *Institute of International Commercial Law (KATTI) of Helsinki University*. The session in Leuven (December 2003) was supported by *Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid*, and the *FWO Vlaanderen Fonds voor Wetenschappelijk Onderzoek* (Flanders Scientific Research Fund). The meeting of the Group

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Osnabrück, January 2007 *Christian v. Bar*

Preface to this volume

The rules in this Part, as well as the comments and national notes, are the fruit of years of collective efforts by several groups. The groundwork was laid by a working group at the Max-Planck-Institute for foreign and private international law in Hamburg. The group consisted of young devoted academics coming from various European countries and working part-time on the project whose names appear at p. V. The national notes for the rules of this Part were compiled by these researchers in a co-operative manner: while in respect of the national notes for each individual article of the text one or two members assumed the general responsibility for the overall structure which aspires to be an integrated comparison (the names of these members appear at the end of the notes), the references to the individual legal systems of the member states have been elaborated by the members responsible for the jurisdiction concerned. Special thanks for very active over-all collaboration are due to Ole Böger. The Max-Planck-Institute with its extraordinary library and its other services provided the substantive and intellectual basis for the groundwork.

In addition, we benefited from major inspiration as well as from invaluable oral and written advice from the six members of our Advisory Council. In five two-days sessions held from 2000 to 2005, they brought their academic as well as practical experiences gathered in their home countries to bear on this project and influenced very much the drafting of the rules. Their names also appear at p. V.

The draft rules were also subjected in several sessions to the scrutiny of the members of the Co-ordinating Committee of the Study Group which consists of colleagues from all member states of the EU.

Finally, under the auspices of the EU Commission a session with stakeholders took place in Brussels in April 2005 where practitioners from various circles of business and from groups devoted to consumer protection gave very useful hints.

The national notes purport to state the law as of December 2005, but some later developments could be taken into account.

Hamburg, November 2006 *Ulrich Drobnig*

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Chapter 1:
Common Rules

Article 1:101: Definitions

For the purposes of this Part:

(a) A dependent personal security (suretyship guarantee) is a contractual obligation by a security provider to make payment or to render another performance or to pay damages to the creditor that is assumed in order to secure a present or future obligation of the debtor owed to the creditor and that depends upon the validity, terms and extent of the latter obligation;

(b) An independent personal security (indemnity/independent guarantee) is a contractual obligation assumed for the purposes of security by a security provider to make payment or to render another performance or to pay damages to the creditor that is expressly or impliedly agreed not to depend upon the validity, terms or extent of another person's obligation owed to the creditor;

(c) The security provider is the person who assumes the obligations under the contract of personal security towards the creditor;

(d) The debtor is the person who owes the secured obligation, if any, to the creditor;

(e) In a co-debtorship for security purposes a co-debtor acts as security provider if it obliges itself primarily for purposes of security towards the creditor;

(f) A global security (global guarantee) is a dependent personal security that is agreed to cover all the debtor's obligations towards the creditor or the debit balance of a current account or a security of a similar extent;

(g) A consumer means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession;

(h) Proprietary security covers security rights in all kinds of property, whether movable or immovable, tangible or intangible.

Article 1:102: Scope

(1) This Part applies to any type of contractual personal security, in particular:
  (a) to suretyship guarantees (dependent personal security), including binding comfort letters (Article 1:101 lit. (a));
  (b) to indemnities/independent guarantees (independent personal security), including stand-by letters of credit (Article 1:101 lit. (b)); and
  (c) to co-debtorship for security purposes (Article 1:101 lit. (e)).

(2) This Part does not apply to insurance contracts. In the case of a guarantee insurance, this Part applies only if and in so far as the insurer has issued a document containing a personal security in favour of the creditor.

(3) This Part does not affect the rules on the aval and the security endorsement of negotiable instruments, but does apply to security for obligations resulting from such an aval or security endorsement.

Article 1:103: Freedom of Contract

The parties may exclude the application of any of the rules in this Part or derogate from them or vary their effects, except as otherwise provided in Chapter 4 of this Part.

Article 1:104: Creditor's Acceptance

The creditor is regarded as accepting an offer of security as soon as the offer reaches the creditor, unless the offer requires express acceptance, or the creditor without unreasonable delay rejects it or reserves time for consideration.

Article 1:105: Interpretation

Where there is doubt about the meaning of a term of a security, and this term is supplied by a security provider acting for remuneration, an interpretation of the term against the security provider is to be preferred.

Article 1:106: Co-Debtorship for Security Purposes

A co-debtorship for security purposes (Article 1:101 lit. (e)) is subject to the rules of Chapters 1 and 4 and, subsidiarily, to the rules on plurality of debtors (PECL Chapter 10 Section 1).

Article 1:107: Several Security Providers: Solidary Liability Towards Creditor

(1) To the extent that several providers of personal security have secured the same obligation or the same part of an obligation or have assumed their undertakings for the same security purpose, each security provider assumes within the limits of its undertaking to the creditor solidary liability together with the other security providers. This rule also applies if these security providers in assuming their securities have acted independently.
(2) Paragraph (1) applies with appropriate adaptations if proprietary security (Article 1:101 lit. (h)) has been provided by the debtor or a third person in addition to the personal security.

Article 1:108: Several Security Providers: Internal Recourse

(1) In the cases covered by Article 1:107 recourse between several providers of personal security or between providers of personal security and of proprietary security (Article 1:101 lit. (h)) is governed by PECL Article 10:106, subject to the following paragraphs.
(2) Subject to paragraph (3), the proportionate share of each security provider for the purposes of PECL Article 10:106 is determined according to the following rules:
    (a) Unless the security providers have otherwise agreed, as between themselves each security provider is liable in the same proportion that the maximum risk assumed by that security provider bore to the total of the maximum risks assumed by all the security providers. The relevant time is that of the creation of the last security.
    (b) For personal security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the amount of the secured obligation or, if a current account has been secured, the credit limit is decisive. If the secured obligation is not limited, its final balance is decisive.
    (c) For proprietary security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the asset(s) serving as security is decisive.

(d) If the maximum amount in the case of lit. (b) first sentence or the maximum amount or the value, respectively, in the case of lit. (c) is higher than the amount of the secured obligation at the time of creation of the last security, the latter determines the maximum risk.

(e) In the case of an unlimited personal security securing an unlimited credit (lit. (b) last sentence) the maximum risk of other limited personal or proprietary security rights which exceed the final balance of the secured credit is limited to the latter.

(3) The preceding rules do not apply to proprietary security provided by the debtor and to security providers who, at the time when the creditor was satisfied, were not liable towards the latter.

Article 1:109: Several Security Providers: Recourse Against Debtor

(1) Any security provider who has satisfied a claim for recourse of another security provider is subrogated to this extent to the other security provider's rights against the debtor as acquired under Article 2:113 paragraphs (1) and (3), including proprietary security rights granted by the debtor. Article 2:110 applies with appropriate adaptations.

(2) Where a security provider has recourse against the debtor by virtue of its rights acquired under Article 2:113 paragraphs (1) and (3) or under the preceding paragraph, including proprietary security rights granted by the debtor, every security provider is entitled to its proportionate share, as defined in Article 1:108 paragraph (2) and PECL Article 10:106, of the benefits recovered from the debtor. Article 2:110 applies with appropriate adaptations.

(3) Unless expressly stated to the contrary, the preceding rules do not apply to proprietary security provided by the debtor.

Article 1:110: Subsidiary Application of Rules on Solidary Debtors

If and insofar as the provisions of this Part do not apply, the rules on plurality of debtors in PECL Articles 10:106 to 10:111 are subsidiarily applicable.

Chapter 2:
Dependent Personal Security (Suretyship Guarantees)

Article 2:101: Presumption for Dependent Personal Security

(1) Any undertaking to pay, to render any other performance or to pay damages to the creditor by way of security is presumed to be a dependent security as defined in Article 1:101 lit. (a), unless the creditor shows that it was agreed otherwise.

(2) A binding comfort letter is presumed to be a dependent personal security.

Article 2:102: Terms and Extent of the Security Provider's Obligations

(1) The validity, terms and extent of the obligation of the provider of a dependent personal security depend upon the validity, terms and extent of the debtor's obligation to the creditor.

(2) The security provider's obligation does not exceed the secured obligation. This principle does not apply if the debtor's obligations are reduced or discharged

(a) in an insolvency proceeding;

(b) otherwise, in particular through negotiation or judicial reduction, caused by the debtor's inability to perform because of insolvency; or

(c) by virtue of law due to events affecting the person of the debtor.

(3) Except in the case of a global security (Article 1:101 lit. (f)), if an amount has not been fixed for the security and cannot be determined from the agreement of the parties, the security provider's obligation is limited to the amount of the secured obligations at the time the security became effective.
(4) Except in the case of a global security (Article 1:101 lit. (f)), any agreement between the creditor and the debtor to increase the extent, to aggravate the terms or to predate the maturity of the secured obligations agreed upon after the security provider's obligation became effective does not affect the latter's obligation.

Article 2:103: Debtor's Defences Available to the Security Provider

(1) As against the creditor, the security provider may invoke any defence of the debtor with respect to the existence, validity, enforceability and terms of the secured obligation, even if it is no longer available to the debtor due to acts or omissions of the debtor occurring after the security became effective.
(2) The security provider may not invoke the debtor's right to withhold performance under PECL Article 9:201 if the debtor is no longer entitled to invoke it.
(3) The security provider may not invoke the lack of capacity of the debtor, whether a natural person or a legal entity, or the non-existence of the debtor, if a legal entity, if the relevant facts were known to the security provider at the time when the security became effective.
(4) As long as the debtor is entitled to avoid the contract from which the secured obligation arises on a ground other than those mentioned in the preceding paragraph and has not exercised that right, the security provider is entitled to refuse performance.
(5) The preceding paragraph applies with appropriate adaptations if the secured obligation is subject to set-off.

Article 2:104: Coverage of Security

(1) The security covers, within its maximum amount, if any, not only the principal obligation secured, but also the debtor's ancillary obligations towards the creditor, especially
  (a) contractual and default interest;
  (b) damages, a penalty or an agreed payment for non-performance by the debtor; and
  (c) the reasonable costs of extra-judicial recovery of those items.
(2) The costs of legal proceedings and enforcement proceedings against the debtor are covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.
(3) A global security (Article 1:101 lit. (f)) covers only obligations which originated in contracts between the debtor and the creditor.

Article 2:105: Solidary Liability of Security Provider

Unless otherwise agreed (Article 2:106), the liability of the debtor and the security provider is solidary and, accordingly, the creditor has the choice of claiming solidary performance from the debtor or, within the limits of the security, from the security provider.

Article 2:106: Subsidiary Liability of Security Provider

(1) If so agreed, the security provider may invoke as against the creditor the subsidiary character of its liability. A binding comfort letter is presumed to establish only subsidiary liability.
(2) Subject to paragraph (3), before demanding performance from the security provider, the creditor must have undertaken appropriate attempts to obtain satisfaction from the debtor

and other security providers, if any, securing the same obligation under a personal or proprietary security establishing solidary liability.

(3) The creditor is not required to attempt to obtain satisfaction from the debtor and any other security provider according to the preceding paragraph if and in so far as it is obviously impossible or exceedingly difficult to obtain satisfaction from the person concerned. This exception applies, in particular, if and in so far as an insolvency or equivalent proceeding has been opened against the person concerned or opening of such a proceeding has failed due to insufficient assets, unless a proprietary security provided by that person and for the same obligation is available.

Article 2:107: Creditor's Obligations of Notification

(1) The creditor must notify without undue delay the security provider in case of a non-performance by or inability to pay of the debtor as well as of an extension of maturity; this notification must include information about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the notification. An additional notification of a new event of non-performance need not be given before three months have expired since the previous notification. No notification is required if an event of non-performance merely relates to ancillary obligations of the debtor, unless the total amount of all non-performed secured obligations has reached five percent of the outstanding amount of the secured obligation.

(2) In addition, in the case of a global security (Article 1:101 lit. (f)), the creditor must notify the security provider of any agreed increase
   (a) whenever such increase, starting from the creation of the security, reaches 20 percent of the amount that was so secured at that time; and
   (b) whenever the secured amount is further increased by 20 percent compared with the secured amount at the date when the last information according to this paragraph was or should have been given.

(3) Paragraphs (1) and (2) do not apply, if and in so far as the security provider knows or could reasonably be expected to know the required information.

(4) A creditor who omits or delays any notification required by this Article is liable to the security provider for the damage caused by the omission or delay.

Article 2:108: Time Limit for Resort to Security

(1) If a time limit has been agreed, directly or indirectly, for resort to a security establishing solidary liability for the security provider, the latter is no longer liable after expiration of the agreed time limit. However, the security provider remains liable if the creditor had requested performance from the security provider after maturity of the secured obligation but before expiration of the time limit for the security.

(2) If a time limit has been agreed, directly or indirectly, for resort to a security establishing subsidiary liability for the security provider, the latter is no longer liable after the expiration of the agreed time limit. However, the security provider remains liable if the creditor
   (a) after maturity of the secured obligation, but before expiration of the time limit has informed the security provider about its intention to demand performance of the security and has asserted that it has started to undertake appropriate attempts to obtain satisfaction as required according to Article 2:106 paragraphs (2) and (3); and
   (b) informs the security provider every six months about the status of these attempts, if so demanded by the security provider.

(3) If secured obligations fall due upon, or within 14 days before, expiration of the time limit of the security, the request for performance or the information according to paragraphs (1) and (2) may be given earlier than provided for in paragraphs (1) and (2), but no more than 14 days before expiration of the time limit of the security.
(4) If the creditor has taken due measures according to the preceding paragraphs, the security provider's maximum liability is restricted to the amount of the secured obligations as defined in Article 2:104 paragraphs (1) and (2). The relevant time is that at which the agreed time limit expires.

Article 2:109: Limiting Security Without Time Limit

(1) Where a security does not have an agreed time limit, the security may be limited by any party giving notice of at least three months to the other party. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts.
(2) By virtue of the notice, the scope of the security is limited to the secured principal obligations which are due at the date at which the limitation becomes effective and any secured ancillary obligations as defined in Article 2:104 paragraphs (1) and (2).

Article 2:110: Creditor's Liability

If and in so far as due to the creditor's conduct the security provider cannot be subrogated to the creditor's rights against the debtor and to the creditor's personal and proprietary security rights granted by third persons, or cannot be fully reimbursed from the debtor or from third party security providers, if any, the creditor is liable for the damage caused to the security provider.

Article 2:111: Debtor's Relief for the Security Provider

(1) A security provider who has provided a security at the debtor's request or with its express or presumed consent may request relief by the debtor
  (a) if the debtor has not performed the secured obligation when it became due or is unable to pay or the debtor's assets have been substantially diminished; or
  (b) if the creditor has brought an action on the security against the security provider.
(2) Relief may be granted by furnishing adequate security.

Article 2:112: Security Provider's Obligations Before Performance

(1) Before performance to the creditor, the security provider must notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.
(2) If the security provider performs without the request provided for in paragraph (1) or neglects to raise defences communicated by the debtor or known to the security provider from other sources, it is liable as against the debtor for the resulting damage.
(3) The security provider's rights against the creditor remain unaffected.

Article 2:113: Security Provider's Rights After Performance

(1) If and in so far as the security provider has performed the obligations arising under the security, it may claim reimbursement from the debtor. In addition the security provider is subrogated to the extent indicated in the preceding sentence to the creditor's rights against the debtor. The two claims are concurrent.

(2) In case of part performance, the creditor's remaining partial rights against the debtor have priority over the rights to which the security provider has been subrogated.
(3) By virtue of the subrogation according to paragraph (1) second sentence, dependent and independent personal and proprietary security rights are transferred by operation of law to the security provider, notwithstanding any contractual restriction or exclusion of transferability agreed by the debtor. Rights against other security providers can only be exercised within the limits of Article 1:108.
(4) Where the debtor due to incapacity is not liable towards the creditor, the security provider may nevertheless claim reimbursement from the debtor to the extent of its enrichment. This rule applies also if a debtor legal entity has not come into existence.

Chapter 3:
Independent Personal Security (Indemnities/Independent Guarantees)

Article 3:101: Scope
(1) The independence of a security is not prejudiced by a mere general reference to an underlying obligation (including a personal security).
(2) The provisions of this Chapter also apply to stand-by letters of credit.

Article 3:102: Security Provider's Obligations Before Performance
(1) The security provider is obliged to perform only if the written demand for performance complies exactly with the terms set out in the security.
(2) Immediately upon receipt of a demand for performance, the security provider must inform the debtor that the demand has been received.
(3) Unless otherwise agreed, the security provider may invoke defences to which it is entitled as against the creditor.
(4) The security provider must without delay and at the latest within seven working days of receipt of a written demand for performance
  (a) perform in accordance with the demand and immediately inform the debtor; or
  (b) refuse to perform and immediately inform the creditor and the debtor.
(5) The security provider is liable for any damage caused by failure to perform the obligations set out in paragraphs (2) and (4).

Article 3:103: Independent Personal Security on First Demand
(1) An independent personal security which is expressed as being due upon first demand or which is in such terms that this can unequivocally be inferred, is subject to Article 3:102, except as provided hereafter.
(2) The security provider is obliged to perform only if the creditor's demand is supported by a declaration in writing by the creditor which expressly confirms that any condition upon which the security becomes due is fulfilled.
(3) Article 3:102 paragraph (3) does not apply.

Article 3:104: Manifestly Abusive or Fraudulent Demand
(1) In the cases covered by Articles 3:102 and 3:103, a security provider is obliged to comply with a demand for performance, unless it is proved by present evidence that the demand is manifestly abusive or fraudulent.

(2) If the requirements of the preceding paragraph are fulfilled, the debtor may prohibit
  (a) performance by the security provider; and
  (b) issuance or utilization of a demand for performance by the creditor.

Article 3:105: Security Provider's Right to Reclaim

(1) The security provider has the right to reclaim the benefits received by the creditor if
  (a) the conditions for the creditor's demand were not or subsequently ceased to be fulfilled; or
  (b) the creditor's demand was manifestly abusive or fraudulent.
(2) The security provider's right to reclaim benefits is subject to PECL Article 4:115 and the general rules on unjustified enrichment.

Article 3:106: Security With or Without Time Limits

(1) If a time limit has been agreed, directly or indirectly, for resort to a security, the security provider exceptionally remains liable even after expiration of the time limit, provided the creditor had demanded performance according to Articles 3:102 paragraph (1) or 3:103 at a time when it was entitled to and before expiration of the time limit for the security. Article 2:108 paragraph (3) applies with appropriate adaptations. The security provider's maximum liability is restricted to the amount which the creditor could have demanded as of the date when the time limit expired.
(2) Where a security does not have an agreed time limit, the security provider may set such a time limit by giving notice of at least three months to the other party. The security provider's liability is restricted to the amount which the creditor could have demanded as of the date set by the security provider. The preceding sentences do not apply if the security is given for specific purposes.

Article 3:107: Transfer of Security

The creditor's right to demand performance from a security provider can be assigned, except in the case of an independent personal security on first demand.

Article 3:108: Security Provider's Rights After Performance

Article 2:113 applies with appropriate adaptations to the rights which the security provider may exercise after performance.

Chapter 4:
Special Rules for Personal Security of Consumers

Article 4:101: Scope of Application

(1) Subject to paragraph (2), this Chapter is applicable when a security is assumed by a consumer (Article 1:101 lit. (g)).
(2) This Chapter is not applicable if
  (a) the creditor is also a consumer; or
  (b) the consumer security provider is able to exercise substantial influence upon the debtor where the debtor is not a natural person.

Article 4:102: Applicable Rules

(1) A personal security subject to this Chapter is governed by the rules of Chapters 1 and 2, except as otherwise provided in this Chapter.
(2) The parties may not deviate to the disadvantage of a security provider from the rules of this Part.

Article 4:103: Creditor's Precontractual Obligation of Information

(1) Before a security is granted, the creditor must explain to the intending security provider
  (a) the general effect of the intended security; and
  (b) the special risks to which the security provider may according to the information accessible to the creditor be exposed in view of the financial situation of the debtor.
(2) If the creditor knows or has reason to know that due to a relationship of trust and confidence between the debtor and the security provider there is a significant risk that the security provider is not acting freely or with adequate information, the creditor must ascertain that the security provider has received independent advice.
(3) If the information or independent advice required by the preceding paragraphs is not given at least five days before the security provider signs its offer or the contract of security, the offer can be withdrawn or the contract can be avoided by the security provider within a reasonable time after receipt of the information or the independent advice. For this purpose five working days is regarded as a reasonable time unless the circumstances suggest otherwise.
(4) If contrary to paragraph (1) or (2) no information or independent advice is given, the offer can be withdrawn or the contract can be avoided by the security provider at any time.
(5) If the security provider withdraws its offer or avoids the contract according to the preceding paragraphs, the return of benefits received by the parties is governed by PECL Article 4:115 or by the general rules on unjustified enrichment.

Article 4:104: Door-to-Door Security Transactions

The provisions of the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises are to be applied to a security which is subject to this Chapter.

Article 4:105: Form

The contract of security must be in writing and must be signed by the security provider. A contract of security which does not comply with the requirements of the preceding sentence is void.

Article 4:106: Nature of Security Provider's Liability

Where this Chapter applies:
(a) an agreement purporting to create a security without a maximum amount, whether a global security (Article 1:101 lit. (f)) or not, is considered as creating a dependent security with a fixed amount to be determined according to Article 2:102 paragraph (3);
(b) the liability of a provider of dependent security is subsidiary within the meaning of Article 2:106, unless expressly agreed otherwise; and
(c) an agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met.

Article 4:107: Creditor's Obligations of Annual Information

(1) Subject to the debtor's consent, the creditor has to inform the security provider annually about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the information. The debtor's consent, once given, is irrevocable.
(2) Article 2:107 paragraphs (3) and (4) apply with appropriate adaptations.

Article 4:108: Limiting Security With Time Limit

(1) A security provider who has provided a security with an agreed time limit may three years after the security became effective limit its effects by giving notice of at least three months time to the creditor. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts. The creditor has to inform the debtor immediately.
(2) By virtue of the notice, the scope of the security is limited according to Article 2:109 paragraph (2).

Danish*
Personlige Sikkerheder

Kapitel 1:
Almindelige Regler

Artikel 1:101: Definitioner

Til denne dels formål gælder:

(a) En afhængig personlig sikkerhed (kaution) er en sikkerhedsgivers kontraktlige forpligtelse, til at foretage en betaling til kreditor eller at tilvejebringe en anden ydelse eller at yde erstatning, som er blevet indgået for overfor kreditor at sikre en skyldners nuværende eller fremtidige forpligtelse og som afhænger af gyldigheden, betingelserne og omfanget af den sidstnævnte forpligtelse;

(b) En uafhængig personlig sikkerhed (garanti) er en kontraktlig forpligtelse indgået til sikkerhedsformål af en sikkerhedsgiver, til at foretage en betaling til kreditor eller at tilvejebringe en anden ydelse eller at yde erstatning, angående hvilken der udtrykkelig eller entydigt bliver aftalt, at den ikke afhænger af gyldigheden, betingelsen eller omfanget af en anden persons forpligtelse i forhold til kreditor;

(c) Sikkerhedsgiveren er den person, som påtager sig forpligtelsen i kontrakten om den personlige sikkerhed i forhold til kreditor;

(d) Skyldneren er den person, som skylder den sikrede forpligtelse, såfremt en sådan eksisterer;

(e) Ved et meddebitorforhold til sikkerhedsformål handler meddebitoren som sikkerhedsgiver, hvis denne forpligter sig fortrinsvis til sikkerhedsformål overfor kreditor;

(f) En alskyldserklæring er en afhængig personlig sikkerhed, som jævnfør aftale skal dække alle skyldners forpligtelser i forhold til kreditor eller en løbende kontos debetsaldo eller en sikkerhed med lignende indhold;

(g) En forbruger er enhver naturlig person, som fortrinsvis handler i det øjemed, som ikke står i forbindelse med denne persons erhverv, forretning eller profession;

(h) Tingslige sikkerheder er sikkerheder til alle slags retsgenstande, såvel til løsøre eller fast ejendom som til realkapital eller ikke-realkapital.

Artikel 1:102: Anvendelsesområde

(1) Denne del finder anvendelse på alle slags aftalemæssige personlige sikkerheder, især:
  (a) for kautioner (afhængige personlige sikkerheder) indbefattet bindende hensigtserklæringer (Artikel 1:101 bogstav (a));
  (b) for garantier (uafhængige personlige sikkerheder) indbefattet stand-by kreditiver (stand-by letters of credit) (Artikel 1:101 bogstav (b)); og
  (c) for en meddebitor til sikkerhedsformål (Artikel 1:101 bogstav (e)).

(2) Denne del finder ikke anvendelse på aftaler om forsikring. Ved aftaler om garantiforsikring finder denne del kun anvendelse hvis og såfremt forsikringsgiveren udsteder en garanti i skriftlig form til fordel for kreditor.

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* Oversat af Dr. Malene Stein Poulsen.

(3) Denne del berører ikke reglerne om aval og det til sikkerhedsformål følgende endossement af et negotiabelt værdipapir, men finder dog anvendelse på sikkerheder for forpligtelser der hidrører fra en sådan aval eller et til sikkerhedsformål følgende endossement.

Artikel 1:103: Aftalefrihed

Parterne kan udelukke anvendelsen af enhver bestemmelse i denne del eller afvige fra dem eller ændre deres virkning, bortset fra hvis der er aftalt andet i kapitel 4 i denne del.

Artikel 1:104: Kreditors Accept

Kreditor bliver anset som at have accepteret tilbuddet om sikkerhed, så snart dette tilbud kommer frem til kreditor, såfremt tilbuddet ikke forlanger en udtrykkelig accept eller kreditor afviser det uden urimelig forsinkelse eller udbeder sig betænkningstid.

Artikel 1:105: Fortolkning

I tilfælde af tvivl om betydningen af en sikkerheds betingelser, der er blevet anvendt af en mod vederlag handlende sikkerhedsgiver, er en fortolkning af betingelsen, til ulempe for sikkerhedsgiveren, at foretrække.

Artikel 1:106: Meddebitorforhold til Sikkerhedsformål

På et meddebitorforhold til sikkerhedsformål (Artikel 1:101 bogstav (e)) finder reglerne i kapitlerne 1 og 4 og derforuden reglerne om flere skyldnere (PECL kapitel 10 del 1) anvendelse.

Artikel 1:107: Flertal af Sikkerhedsgivere: Solidarisk Ansvar overfor Kreditor

(1) I den grad at flere personlige sikkerhedsgivere har påtaget sig den samme forpligtelse eller den samme del af en forpligtelse eller et identisk sikringsformål, påtager hver sikkerhedsgiver sig overfor kreditor indenfor grænserne af hans tilsikring et solidarisk ansvar med de andre sikkerhedsgivere. Denne regel finder også anvendelse hvis disse sikkerhedsgivere har rådet hver for sig i påtagelsen af deres sikkerheder.

(2) Stykke 1 finder anvendelse med behørige tilpasninger, hvis den samme forpligtelse, eller den samme del af en forpligtelse, er sikret ikke kun ved en personlig sikkerhed men også ved en tingslig sikkerhed (Artikel 1:101 bogstav (h)) stillet af skyldner eller tredjemænd.

Artikel 1:108: Flertal af Sikkerhedsgivere: Indbyrdes Regres

(1) I de tilfælde der er omfattet af Artikel 1:107 er en regres mellem flere personlige sikkerhedsgivere eller mellem personlige og tingslige sikkerhedsgivere (Artikel 1:101 bogstav (h)) med forbehold af de følgende stykker reguleret af PECL Artikel 10:106.

(2) Med forbehold af stk. (3), bliver hver sikkerhedsgivers forholdsmæssige andel bestemt hensigtsmæssigt efter PECL Artikel 10:106 jævnfør følgende regler:

(a) Hvis sikkerhedsgiverne ikke har besluttet andet, er hver sikkerhedsgiver ansvarlig over for de andre sikkerhedsgivere, i forhold til den del af maksimalbeløbet som sikkerhedsgiveren påtog sig ud af summen af maksimalbeløbene af dem af alle sikkerhedsgiverne påtagede risici. Det afgørende tidspunkt er stiftelsen af den sidste sikkerhed.

(b) For en personlig sikkerhed, er risikoens maksimalbeløb bestemt af sikkerhedens aftalte maksimalbeløb. I mangel af et aftalt maksimalbeløb, er beløbet på den sikrede forpligtelse eller, hvis en løbende konto er blevet sikret, kreditgrænsen afgørende. Hvis den sikrede forpligtelse ikke er begrænset, er dens slutsaldo afgørende.

(c) For en tingslig sikkerhed, er risikoens maksimalbeløb bestemt af sikkerhedens aftalte maksimalbeløb. I mangel af et aftalt maksimalbeløb, er værdien af det aktiv/de aktiva som tjener som sikkerhed afgørende.
(d) Hvis maksimalbeløbet i tilfælde af bogstav (b) første sætning eller maksimalbeløbet henholdsvis værdien i tilfælde af bogstav (c) er højere end beløbet på den sikrede forpligtelse på tidspunktet for opfyldelsen af den sidste sikkerhed, bestemmer den sidste den maksimale risiko.
(e) I tilfælde af en ubegrænset personlig sikkerhed der sikrer en ubegrænset kredit (bogstav (b) sidste sætning), er risikoens maksimalbeløb af andre begrænsede personlige eller tingslige sikkerhedsrettigheder, som overgår slutsaldoen på den sikrede kredit, begrænset til den sidstnævnte.

(3) De forstående regler finder ikke anvendelse på en tingslig sikkerhed, der er givet af skyldneren og for sikkerhedsgivere, som ikke var ansvarlige i forhold til kreditor på det tidspunkt, på hvilket kreditor blev opfyldt.

Artikel 1:109: Flertal af Sikkerhedsgivere: Regres mod Skyldneren

(1) Enhver sikkerhedsgiver som overfor en anden sikkerhedsgiver har opfyldt dennes regreskrav, indtræder i dette omfang i den anden sikkerhedsgivers rettigheder overfor skyldner som opnået gennem Artikel 2:113 stk. (1) og (3), inklusive tingslige sikkerhedsrettigheder stillet af skyldner. Artikel 2:110 finder anvendelse med behørige tilpasninger.
(2) Hvis en sikkerhedsgiver forlanger regres jf. hans opnåede rettigheder efter Artikel 2:113 stk. (1) og (3) eller jf. det forestående stykke, omfattende tingslige sikkerhedsrettigheder, som er stillet af skyldner, så har enhver sikkerhedsgiver ret til hans forholdsmæssige andel, som fastsat i Artikel 1:108 stk. (2) og PECL Artikel 10:106, af de værdier, som sikkerhedsgiveren har vundet tilbage fra skyldneren. Artikel 2:110 finder anvendelse med behørige tilpasninger.
(3) Så vidt det modsatte ikke udtrykkeligt er bestemt, gælder de forestående bestemmelser ikke for tingslige sikkerhedsrettigheder, som er stillet af skyldneren.

Artikel 1:110: Subsidiær Anvendelse af Reglerne om Solidariske Skyldnere

Hvis og så vidt denne dels bestemmelser ikke finder anvendelse, gælder reglerne om flere skyldnere i PECL kapitel 10:106 til 10:111 udfyldende.

Kapitel 2:
Afhængige Personlige Sikkerheder (Kautioner)

Artikel 2:101: Formodning for en Kaution

(1) En forpligtelse, som er indgået som sikkerhed til betaling, til at yde anden opfyldelse eller at yde erstatning til kreditor skal jf. Artikel 1:101 bogstav (a) anses for at være en kaution, med mindre kreditor kan bevise, at andet var aftalt.
(2) En bindende hensigtserklæring bliver formodet at være en kaution.

Artikel 2:102: Betingelser og Omfang af Kautionistens Forpligtelser

(1) Virkningen, betingelserne og omfanget af kautionistens forpligtelse afhænger af virkningen, betingelserne og omfanget af skyldnerens forpligtelse i forhold til kreditor.
(2) Kautionistens forpligtelse overstiger ikke den sikrede forpligtelse. Dette gælder ikke hvis skyldnerens forpligtelser bliver nedsat helt eller delvist

(a) i en insolvenssag;
(b) på anden måde, især på grund af retsmøder eller retslig reduktion, som resultat af skyldnerens manglende evne til at præstere på grund af insolvens; eller
(c) i kraft ad rettens vej grundet årsager der påvirker skyldnerens person.

(3) Med undtagelse af de tilfælde, der falder ind under en kaution med alskyldserklæring (Artikel 1:101 bogstav (f)), er kautionistens forpligtelse begrænset til beløbet af den sikrede forpligtelse til det tidspunkt, da kautionen trådte i kraft, hvis der ikke er blevet fastsat et beløb for kautionen og dette ikke lader sig bestemme ud af aftalen mellem parterne.

(4) Med undtagelse af de tilfælde, der falder ind under en kaution med alskyldserklæring (Artikel 1:101 bogstav (f)), påvirker enhver aftale mellem kreditor og skyldner, der er aftalt efter at kautionistens forpligtelse trådte i kraft, om at forøge omfanget, om at forværre betingelserne eller om at tilbagedatere den sikrede forpligtelses forfaldstid, ikke kautionistens forpligtelser.

Artikel 2:103: Skyldners Forsvar Tilgængelig for Kautionisten

(1) I forhold til kreditor kan kautionisten påberåbe sig ethvert af skyldners forsvar med hensyn til eksistensen, virkningen, håndhævelsen og betingelserne af den sikrede forpligtelse, selv hvis disse ikke mere står skyldner til rådighed på grund af skyldners egne handlinger eller undladelser, som er indtrådt efter sikkerheden trådte i kraft.

(2) Kautionisten kan ikke påberåbe sig skyldners tilbageholdelsesret jævnfør PECL Artikel 9:201, såfremt skyldner ikke længere kan påberåbe sig denne ret.

(3) Kautionisten kan ikke påberåbe sig skyldners manglende myndighed, om det er en naturlig eller en juridisk person, eller skyldners ikke-eksistens som en juridisk person, såfremt de afgørende omstændigheder var kendte for kautionisten, da kautionen trådte i kraft.

(4) Så lang tid skyldneren er berettiget til at annullere kontrakten, fra hvilken den sikrede forpligtelse er opstået, på et andet grundlag end dem i det førnævnte stykke, og ikke har udøvet denne ret, er kautionisten berettiget til at afvise opfyldelse.

(5) Det forgående stykke finder anvendelse med behørige tilpasninger, hvis en modregning i forbindelse med den sikrede forpligtelse er mulig.

Artikel 2:104: Dækning fra Kaution

(1) Kautionen dækker indenfor grænserne af dens maksimalbeløb, hvis noget overhovedet, ikke kun den sikrede hovedforpligtelse, men også skyldnerens øvrige forpligtelser i forhold til kreditor, især
(a) renter og morarenter;
(b) erstatningskrav, en konventionalbod eller en aftalt betaling på grund af skyldners ikke-opfyldelse; og
(c) rimelige omkostninger til den udenretslige gennemførelse af disse krav.

(2) Omkostningerne af retssager og tvangsfuldbyrdelser mod skyldneren bliver dækket, forudsat at kautionisten er blevet informeret rettidigt om kreditors hensigt om at foretage en sådan retssag eller at indlede sådanne foranstaltninger, så at det var muligt for kautionisten at afværge disse udgifter.

(3) En kaution med alskyldserklæring (Artikel 1:101 bogstav (f)) dækker kun forpligtelser, som er opstået ud af aftaler mellem skyldneren og kreditor.

Artikel 2:105: Kautionistens Solidariske Ansvar

Med mindre intet andet er blevet aftalt (Artikel 2:106) er skyldners og kautionistens ansvar solidarisk, og, derfor kan kreditor vælge solidarisk opfyldelse fra skyldner eller indenfor kautionens grænser, fra kautionisten.

Artikel 2:106: Kautionistens Subsidiære Ansvar

(1) Hvis aftalt, kan kautionisten påberåbe sig, at han kun hæfter subsidiært i forhold til kreditor. En bindende hensigtserklæring stifter i tvivlstilfælde kun et subsidiært ansvar.

(2) Med forbehold af stk. (3) skal kreditor, før han kan kræve opfyldelse af kautionisten, have foretaget passende anstrengelser, for at have opnået opfyldelse fra skyldner eller fra andre sikkerhedsgivere, hvis nogen overhovedet, som har påtaget sig en solidarisk personlig eller tingslig sikkerhed for den samme forpligtelse.

(3) Det er ikke påkrævet, at kreditor efter det ovenstående stykke forsøger at opnå fyldestgørelse fra skyldner og enhver anden sikkerhedsgiver, hvis og så vidt det er åbenlyst umuligt eller overordentligt svært, at opnå fyldestgørelse fra den respektive person. Denne undtagelse er især anvendelig, hvis og så vidt en insolvens- eller lignende retssag mod den respektive person bliver indledt, eller hvis indledningen af en sådan retssag mislykkedes på grund af manglende aktiver, udover hvis en af denne person stillede tingslig sikkerhed for den samme forpligtelse er til rådighed.

Artikel 2:107: Kreditors Meddelelsespligter

(1) Kreditor skal omgående give sikkerhedsgiveren meddelelse, hvis skyldneren ikke opfylder sine forpligtelser eller bliver insolvent og ved forlængelse af forfaldstiden af den sikrede forpligtelse; denne meddelelse skal omfatte beløbene på hovedforpligtelsen, renter og andre biforpligtelser, som skyldner skylder på tidspunktet for meddelelsen. En ny meddelelse p.gr.a. endnu en misligholdelse, behøver ikke at finde sted før udløbet af tre måneder siden den foregående meddelelse. En meddelelse er ikke nødvendig, hvis misligholdelsen kun begrænser sig til biforpligtelser mod skyldneren, såfremt det samlede beløb på alle de ikke opfyldte sikrede forpligtelser ikke udgør fem procent af de samlede udestående sikrede forpligtelser.

(2) Derudover, i tilfælde af en kaution med alskyldserklæring (Artikel 1:101 bogstav (f)), skal kreditor meddele kautionisten om enhver aftalt forøgelse
   (a) når denne forøgelse, startende fra skabelsen af kautionen, når op på 20 procent af det beløb, som var sikret på dette tidspunkt; og
   (b) når det sikrede beløb bliver forøget med yderligere 20 procent sammenlignet med det sikrede beløb på det tidspunkt, hvor den sidste meddelelse jf. dette stykke blev eller skulle have været givet.

(3) Stykkerne (1) og (2) finder ikke anvendelse, hvis og såfremt kautionisten har eller kan forventes at have kendskab til de nødvendige informationer.

(4) Undlader eller forsinker en kreditor en påkrævet meddelelse, som bliver forlangt af denne artikel, er han ansvarlig overfor kautionisten for de skader, som opstår på grund af den undladelse eller forsinkelse.

Artikel 2:108: Tidsbegrænsning For at Gøre Kautionen Gældende

(1) Hvis en tidsfrist er blevet aftalt på en direkte eller indirekte måde for at gøre en kaution gældende, der etablerer solidarisk ansvar for kautionisten, er sidstnævnte ikke ansvarlig ud over udløbet af den aftalte periode. Derimod er kautionisten videre ansvarlig, hvis kreditor havde forlangt opfyldelse af kautionisten efter den sikrede forpligtelses forfaldstid, men før udløbet af sikkerhedens tidsfrist.

(2) Hvis en tidsfrist er blevet aftalt på en direkte eller indirekte måde for at gøre en kaution gældende, der etablerer subsidiært ansvar for kautionisten, er sidstnævnte ikke længere ansvarlig efter udløbet af den aftalte tidsfrist. Derimod forbliver kautionisten ansvarlig, hvis kreditor

   (a) efter forpligtelsens forfaldstid, men før udløb af tidsfristen, har informeret kautionisten om sine hensigter om at forlange opfyldelse af kautionen og har forsikret, at han er påbegyndt med de nødvendige anstrengelser for at opnå opfyldelse, som forlangt i Artikel 2:106 stk. (2) og (3); og

   (b) hver sjette måned informerer ham om disse anstrengelsers tilstand, hvis forlangt af kautionisten.

(3) Forfalder sikrede forpligtelser med udløbet af tidsbegrænsningen af kautionen eller forfalder de inden for 14 dage før udløbet af tidsbegrænsningen, så må kravet om opfyldelse eller informationen som følger af stykkerne (1) og (2) finde sted før end bestemt i stykkerne (1) og (2), dog ikke tidligere end 14 dage før udløbet af tidsbegrænsningen af kautionen.

(4) Hvis kreditor har truffet foranstaltninger jævnfør de forgående stykker, er kautionistens maksimale ansvar begrænset til beløbet på den sikrede forpligtelse, som defineret i Artikel 2:104 stk. (1) og (2). Det afgørende tidspunkt er det, hvor den aftalte tidsfrist udløber.

Artikel 2:109: Begrænsning af en Kaution uden Tidsbegrænsning for de Sikrede Forpligtelser

(1) Er der ikke aftalt en tidsfrist for en kaution, så kan kautionen begrænses ved, at hver part opsiger denne over for den anden part under overholdelse af en opsigelsesfrist på mindst tre måneder. Den ovenstående sætning finder ingen anvendelse på kautioner, som kun sikrer bestemte forpligtelser eller forpligtelser ud af bestemte kontrakter.

(2) Ved opsigelsen bliver omfanget af kautionen begrænset til sikrede hovedforpligtelser, som er forfalden på det tidspunkt, hvor opsigelsen træder i kraft og enhver biforpligtelse, som defineret i Artikel 2:104 stk. (1) og (2).

Artikel 2:110: Kreditors Ansvar

Hvis og såfremt kautionisten, på grund af kreditors adfærd, ikke kan indtræde i kreditors rettigheder mod skyldneren og i kreditors personlige og tingslige sikkerhedsrettigheder stillet af tredjemand, eller ikke kan blive fuldkommen erstattet af skyldneren eller af en tredjemandssikkerhedsgiver, hvis nogen overhovedet, er kreditor ansvarlig for den skade, der er opstået for kautionisten.

Artikel 2:111: Skyldners Fritagelse af Kautionisten

(1) En kautionist, som har påtaget en kaution på skyldners anmodning eller med hans udtrykkelige eller formodede samtykke, kan anmode om fritagelse af skyldner,

   (a) hvis skyldner ikke har opfyldt den sikrede forpligtelse da den forfaldt eller ikke er i stand til at betale eller skyldners formue er blevet væsentlig formindsket; eller

   (b) hvis kreditor har anlagt sag vedrørende kautionen mod kautionisten.

(2) Fritagelse kan blive opfyldt ved at levere en adækvat sikkerhed.

Artikel 2:112: Kautionistens Forpligtelser Før Opfyldelse

(1) Før opfyldelse til kreditor, skal kautionisten underrette skyldner og anmode om information om det udestående beløb på den sikrede forpligtelse og om ethvert forsvar eller modkrav imod dette.
(2) Hvis kautionisten opfylder uden anmodningen, som der er taget højde for i stk. (1) eller forsømmer at rejse de forsvar, der er overbragt af skyldner eller som er kendt af kautionisten fra anden side, er kautionisten ansvarlig overfor skyldner for den der igennem opståede skade.
(3) Kautionistens rettigheder overfor kreditor forbliver uberørte.

Artikel 2:113: Kautionistens Rettigheder Efter Opfyldelse

(1) Hvis og så vidt kautionisten har opfyldt kautionsforpligtelsen, kan han forlange erstatning fra skyldner. Derforuden indtræder kautionisten i kreditors rettigheder mod skyldner i den ovenstående sætnings nævnte omfang. De to krav er samtidige.
(2) I tilfælde af en delvis opfyldelse, har kreditors resterende delvise rettigheder mod skyldner forrang over for de rettigheder, i hvilke kautionisten er indtrådt.
(3) I kraft af indtræden jvf. stk. (1), 2. sætning, bliver afhængige og uafhængige personlige og tingslige sikkerhedsrettigheder gennem anvendelse af lov overført til kautionisten, uanset om skyldner har aftalt nogen indskrænkning eller udelukkelse af overførelsesheden. Rettigheder imod andre sikkerhedsgivere kan kun udøves indenfor grænserne af Artikel 1:108.
(4) Hvis skyldner på grund af manglende myndighed ikke er ansvarlig overfor kreditor, kan kautionisten ikke desto mindre forlange regres mod skyldner, i den udstrækning denne er blevet beriget. Denne regel finder også anvendelse, hvis skyldner ikke er retskraftig som juridisk person.

Kapitel 3:
Uafhængige Personlige Sikkerheder (Garantier)

Artikel 3:101: Anvendelsesområde

(1) En bare generel henvisning til en underliggende forpligtelse (inklusive en personlig sikkerhed) har ingen indflydelse på en garantis uafhængighed.
(2) Dette kapitels bestemmelser finder også anvendelse på stand-by kreditiver (stand-by letters of credit).

Artikel 3:102: Garantigivers Pligter Før Opfyldelse

(1) Garantigiver er kun forpligtet til at opfylde, hvis det skriftlige krav på opfyldelse stemmer præcis overens med betingelserne, der er fastsat i garantien.
(2) Garantigiver skal omgående efter modtagelse af et krav på opfyldelse, informere skyldner om, at kravet er blevet modtaget.
(3) Med mindre andet er aftalt, kan garantigiver påberåbe sig forsvar, til hvilke han er berettiget overfor kreditor.
(4) Garantigiver skal ufortøvet og senest indenfor syv arbejdsdage efter modtagelse af et skriftligt krav på fyldestgørelse
    (a) opfylde i overensstemmelse med kravet og omgående informere skyldner; eller
    (b) afvise at opfylde og omgående informere kreditor og skyldner.
(5) Garantigiver er ansvarlig for enhver skade, der er opstået ved forsømmelse af opfyldelse af forpligtelserne jf. stk. (2) og stk. (4).

Artikel 3:103: First Demand Garantier

(1) En garanti, som er betegnet til at forfalde ved first demand eller hvor dette er således formuleret, at dette entydigt kan antages, falder ind under Artikel 3:102, med mindre der efterfølgende ikke bliver foreskrevet andet.
(2) Garantigiver er kun forpligtet til opfyldelse, hvis kreditors krav er vedlagt en skriftlig erklæring fra kreditor, i hvilken han udtrykkelig bekræfter, at enhver betingelse, som gør at garantien forfalder, er opfyldte.
(3) Artikel 3:102 stk. (3) finder ikke anvendelse.

Artikel 3:104: Åbenlyst Groft eller Svigagtigt Krav

(1) I de tilfælde der er dækket af Artiklerne 3:102 og 3:103, er garantigiver forpligtet til at efterkomme et krav på opfyldelse, såfremt det ikke er påvist gennem et eksisterende bevismiddel, at kravet er åbenlyst groft eller svigagtig.
(2) Hvis det foregående stykkes betingelser er opfyldte, kan skyldner forhindre
    (a) at garantigiver opfylder; og
    (b) at kreditor udsteder eller udnytter et krav på opfyldelse.

Artikel 3:105: Garantigivers Krav på Erstatning af Ydelse

(1) Garantigiveren kan forlange erstatning af hans ydelse fra kreditor, hvis
    (a) betingelserne for kreditors krav ikke var opfyldte eller efterfølgende faldt bort; eller
    (b) kreditors krav var åbenlyst groft eller svigagtig.
(2) Garantigivers ret til at forlange erstatning af hans ydelse falder ind under PECL Artikel 4:115 og de almindelige regler om uberettiget berigelse.

Artikel 3:106: Garantier Med eller Uden Tidsbegrænsning

(1) Er der på en direkte eller indirekte måde aftalt en tidsfrist til fremsættelsen af en garanti, så er garantigiver kun ansvarlig udover udløbet af den aftalte tidsfrist, hvis kreditor havde forlangt opfyldelse på et tidspunkt, som lå før udløbet af tidsfristen og på hvilket kravet om opfyldelse bestod, jf. Artiklerne 3:102, stk. (1) eller 3:103. Artikel 2:108 stk. (3) finder anvendelse med behørige tilpasninger. Maksimalbeløbet på garantigivers ansvar er begrænset til den sum, som kreditor på tidspunktet for tidsbegrænsningens udløb kunne forlange.
(2) Er der ikke blevet fastsat en tidsfrist for en garanti, så kan garantigiver gennem tilkendegivelse over for den anden part bestemme en sådan tidsbegrænsning under overholdelse af en opsigelsesfrist på mindst tre måneder. Garantigivers ansvar er begrænset til den sum, som kreditor på det af garantigiver bestemte tidspunkt kunne forlange. Den forestående sætning finder ingen anvendelse på garantier, som er indgået til bestemte sikkerhedsformål.

Artikel 3:107: Overdragelse af en Garanti

Kreditors krav til at forlange opfyldelse fra garantigiveren kan blive overdraget, undtagen i tilfælde af en first demand garanti.

Artikel 3:108: Garantigivers Krav Efter Opfyldelse

Artikel 2:113 finder med behørige tilpasninger anvendelse på de krav, som tilstår garantigiver efter opfyldelse.

Kapitel 4:
Specielle Regler for Personlige Sikkerheder givet af Forbrugere

Artikel 4:101: Anvendelsesområde
(1) Med forbehold af stk. (2) gælder dette kapitel for personlige sikkerheder, der er påtaget af en forbruger (Artikel 1:101 bogstav (g)).
(2) Dette kapitel finder ikke anvendelse, hvis
  (a) kreditor også er en forbruger; eller
  (b) forbruger-sikkerhedsgiveren er i stand til, at udøve væsentlig indflydelse på skyldner, såfremt det ved skyldner ikke drejer sig om en naturlig person.

Artikel 4:102: Anvendelige Bestemmelser
(1) For personlige sikkerheder, som falder ind under dette kapitel, gælder reglerne i kapitlerne 1 og 2, så vidt intet andet er bestemt i dette kapitel.
(2) Parterne må ikke afvige fra reglerne i denne del til ulempe for sikkerhedsgiver.

Artikel 4:103: Kreditors Forpligtelse til Information Før Kontraktindgåelse
(1) Før en sikkerhed bliver bevilliget, skal kreditor forklare den fremtidige sikkerhedsgiver om
  (a) den generelle virkning af den tilsigtede sikkerhed; og
  (b) de særlige risici, som sikkerhedsgiveren på grundlag af de informationer, som kreditor har stillet til rådighed, kan udsættes for i betragtning af skyldnerens økonomiske situation.
(2) Hvis kreditor ved eller har grund til at vide, at der på grund af et tillidsforhold mellem skyldner og sikkerhedsgiver består en ikke ubetydelig fare for, at sikkerhedsgiver ikke handler af egen fri vilje eller på grund af rimelige informationer, skal kreditor forvisse sig om, at sikkerhedsgiveren har modtaget et uafhængigt råd.
(3) Hvis informationen eller det uafhængige råd som forlangt jf. det foregående stykke ikke er givet mindst fem dage før sikkerhedsgiveren underskriver tilbuddet eller aftalen om sikkerhed, kan tilbuddet henholdsvis kontrakten annulleres henholdsvis anfægtes af sikkerhedsgiveren inden for en rimelig tidsfrist, efter modtagelse af informationen eller det uafhængige råd. I denne sammenhæng gælder fem arbejdsdage som en rimelig tidsfrist, med mindre der ikke viser sig noget andet af omstændighederne.
(4) Hvis der i modsætning til stk. (1) og (2) ikke er givet information eller et uafhængigt råd, kan tilbuddet henholdsvis kontrakten til hver en tid annulleres henholdsvis anfægtes af sikkerhedsgiveren.
(5) Bliver sikkerhedsgiverens tilbud annulleret henholdsvis kontrakten anfægtet jf. de foregående stykker, så retter tilbageleveringen af parternes modtagne fordele sig efter PECL Artikel 4:115 eller efter de almindelige regler om uberettiget berigelse.

Artikel 4:104: Dørsalg af Sikkerheder
Bestemmelserne i Rådets direktiv 85/577/EØF af 20. december 1985 om forbrugerbeskyttelse i forbindelse med aftaler indgået uden for fast forretningssted finder anvendelse på sikkerheder, som falder ind under dette kapitel.

Artikel 4:105: Formkrav

Sikkerhedskontrakten skal være skriftlig og underskrives af sikkerhedsgiveren. En sikkerhedskontrakt, som ikke opfylder den foregående sætnings betingelser, er ugyldig.

Artikel 4:106: Sikkerhedsgivers Ansvar

Så vidt dette kapitel finder anvendelse,

(a) gælder en aftale, der skal stifte en sikkerhed uden et maksimalt beløb, uanset om det er en alskyldserklæring (Artikel 1:101 bogstav (f)) eller ikke, som aftale for en kaution med en fast sum, der er at bestemme efter Artikel 2:102 stk. (3);

(b) er en sikkerhedsgiver kun subsidiær ansvarlig indenfor betydningen af Artikel 2:106, såfremt ikke andet bliver udtrykkeligt aftalt; og

(c) gælder en aftale, der skal stifte en garanti, som aftale for en kaution, såfremt forudsætningen for dette er til stede.

Artikel 4:107: Kreditors Årlige Informationspligter

(1) Med forbehold af skyldners samtykke skal kreditor årligt informere sikkerhedsgiveren om de af skyldner på tidspunktet for informationen skyldte sikrede beløb af hovedforpligtelsen, renterne og andre biforpligtelser. Det af skyldner en gang givne samtykke kan ikke annulleres.

(2) Artikel 2:107 stykkerne (3) og (4) gælder med behørige tilpasninger.

Artikel 4:108: Begrænsning af en Tidsbegrænset Sikkerhed

(1) En sikkerhedsgiver, som har overtaget en sikkerhed med en aftalt tidsfrist, kan tre år efter, at sikkerheden trådte i kraft, begrænse dens omfang ved overfor kreditor at give meddelelse om opsigelse med mindst tre måneders frist. Den forestående sætning finder ingen anvendelse på sikkerheder, som kun dækker bestemte forpligtelser eller forpligtelser ud af bestemte kontrakter. Kreditor skal straks informere skyldner om dette.

(2) Omfanget af kautionen bliver ved opsigelsen jf. Artikel 2:109 stk. (2) begrænset.

Dutch*
Persoonlijke zekerheden

Hoofdstuk 1:
Gemeenschappelijke regels

Artikel 1:101: Definities
Voor de toepassing van dit deel:
(a) is een "afhankelijke persoonlijke zekerheid" (borgtocht) een contractuele verbintenis van een zekerheidssteller tot betaling van een geldsom of nakoming van een andere prestatie of tot schadevergoeding aan de schuldeiser, die is aangegaan tot zekerheid van een bestaande of toekomstige verbintenis van de schuldenaar jegens de schuldeiser en die afhankelijk is van de geldigheid, de modaliteiten en de omvang van laatstgenoemde verbintenis;
(b) is een "onafhankelijke persoonlijke zekerheid" (onafhankelijke garantie) een contractuele verbintenis van een zekerheidssteller tot betaling van een geldsom of nakoming van een andere prestatie of tot schadevergoeding aan de schuldeiser, die is aangegaan tot zekerheid, die krachtens een uitdrukkelijke of stilzwijgende overeenkomst niet afhankelijk is van de geldigheid, de modaliteiten en de omvang van een verbintenis van een andere persoon jegens de schuldeiser;
(c) is de "zekerheidssteller" de persoon die de contractuele verbintenissen tot zekerheid aangaat jegens de schuldeiser;
(d) is de "schuldenaar" de persoon die gehouden is tot de gewaarborgde verbintenis jegens de schuldeiser, voor zover er een is;
(e) is er sprake van "medeschuldenaarschap tot zekerheid" wanneer een medeschuldenaar zich hoofdzakelijk tot zekerheid jegens de schuldeiser verbindt;
(f) is een "zekerheid voor alle sommen" een afhankelijke persoonlijke zekerheid waarvan is overeengekomen dat zij alle verbintenissen van de schuldenaar jegens de schuldeiser waarborgt dan wel het debetsaldo van een rekening-courant of die een gelijkaardige omvang heeft;
(g) is een "consument" elke natuurlijke persoon die hoofdzakelijk handelt voor doeleinden niet verbonden met zijn handel, bedrijf of beroep;
(h) omvat "zakelijke zekerheid" zekerheidsrechten op goederen, ongeacht de roerende of onroerende, lichamelijke of onlichamelijke aard ervan.

Artikel 1:102: Toepassingsgebied
(1) Dit deel is van toepassing op alle vormen van persoonlijke zekerheid, en in het bijzonder:
  (a) borgtochten (afhankelijke persoonlijke zekerheid), met inbegrip van bindende patronaatsverklaringen (artikel 1:101 lit. (a));
  (b) onafhankelijke garanties (onafhankelijke persoonlijke zekerheid), met inbegrip van standby kredietbrieven (artikel 1:101 lit. (b)); en
  (c) medeschuldenaarschap tot zekerheid (artikel 1:101 lit. (e)).

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* Vertaald door Professor Matthias Storme (KU Leuven, member of the Coordinating Group).

(2) Dit deel is niet van toepassing op verzekeringsovereenkomsten. In geval van waarborgverzekering is dit hoofdstuk slechts van toepassing voor zover de verzekeraar een document heeft uitgegeven dat een persoonlijke zekerheid ten gunste van de schuldeiser inhoudt.
(3) Dit deel laat de regels betreffende aval en endossement van waardepapieren ten titel van zekerheid onverlet, maar is van toepassing op zekerheden voor de verbintenissen die uit zo'n aval of zekerheidsendossement voortvloeien.

Artikel 1:103: Contractsvrijheid

Partijen kunnen de toepassing van elk van de regels in dit deel uitsluiten, ervan afwijken, of de rechtsgevolgen ervan wijzigen, tenzij Hoofdstuk 4 van dit deel anders bepaalt.

Artikel 1:104: Aanvaarding door de schuldeiser

De schuldeiser wordt geacht een aanbod van zekerheid te aanvaarden zodra dit aanbod hem bereikt, tenzij het aanbod een uitdrukkelijke aanvaarding vereist of de schuldeiser het aanbod zonder onredelijk uitstel verwerpt of tijd vraagt om het in overweging te nemen.

Artikel 1:105: Uitleg

In geval van twijfel over de betekenis van een bepaling van een zekerheid dient deze bij voorkeur te worden uitgelegd in het nadeel van de zekerheidssteller, indien deze is aangebracht door een zekerheidssteller die handelt onder bezwarende titel.

Artikel 1:106: Medeschuldenaarschap tot zekerheid

Een medeschuldenaarschap tot zekerheid (artikel 1:101 lit. (e)) is onderworpen aan de regels van Hoofdstukken 1 en 4 en ondergeschikt aan de regels inzake pluraliteit van schuldenaars (PECL hoofdstuk 10 Afdeling 1).

Artikel 1:107: Pluraliteit van zekerheidsstellers: hoofdelijke verbondenheid jegens de schuldeiser

(1) Voor zover meer dan één steller van persoonlijke zekerheid dezelfde verbintenis of hetzelfde deel van een verbintenis heeft gewaarborgd of een verbintenissen met hetzelfde zekerheidsoogmerk is aangegaan, is elke zekerheidssteller binnen de grenzen van zijn verbintenis jegens de schuldeiser hoofdelijk verbonden met de andere zekerheidsstellers. Deze regel geldt ook indien deze zekerheidsstellers hun verbintenissen tot zekerheid onafhankelijk van elkaar zijn aangegaan.
(2) Lid (1) is van overeenkomstige toepassing indien er bovenop de persoonlijke zekerheid ook een zakelijke zekerheid (artikel 1:101 lit. (h)) is gesteld door de schuldenaar of een derde.

Artikel 1:108: Pluraliteit van zekerheidsstellers: onderling verhaal

(1) In de gevallen van artikel 1:107 wordt het onderling verhaal tussen de stellers van persoonlijke zekerheid of stellers van persoonlijke en zakelijke zekerheid (artikel 1:101 lit. (h)) geregeld door artikel 10:106 PECL, onverminderd de volgende leden.
(2) Onverminderd lid (3) wordt het evenredig aandeel van elke zekerheidssteller voor de toepassing van artikel 10:106 PECL bepaald overeenkomstig de volgende regels:

(a) Tenzij de zekerheidsstellers anders zijn overeengekomen, zijn zij jegens elkaar verbonden om bij te dragen in dezelfde verhouding waarin het maximumrisico aangegaan door die zekerheidssteller staat tot de som van de maximumrisico's aangegaan door alle zekerheidsstellers. Het doorslaggevende tijdstip is dat waarop de laatste zekerheid wordt gesteld.

(b) Bij een persoonlijke zekerheid wordt het maximumrisico bepaald door het overeengekomen maximumbedrag van de zekerheid. Is er geen maximumbedrag overeengekomen, dan geldt het bedrag van de gewaarborgde verbintenis dan wel, indien het debetsaldo van een rekening-courant werd gewaarborgd, de kredietlimiet. Is er geen beperking van de gewaarborgde verbintenis, dan geldt het eindsaldo.

(c) Bij een zakelijke zekerheid wordt het maximumrisico bepaald door het overeengekomen maximumbedrag van de zekerheid. Is er geen maximumbedrag overeengekomen, dan geldt de waarde van de tot zekerheid bezwaarde goederen.

(d) Is het maximumbedrag in geval van lit. (b) eerste zin of het maximumbedrag c.q. de waarde in geval van lit. (c) hoger dan het bedrag van de gewaarborgde verbintenis op het tijdstip van het stellen van de laatste zekerheid, dan bepaalt de laatstgenoemde het maximumrisico.

(e) In het geval van een onbeperkte persoonlijke zekerheid die een onbeperkt krediet waarborgt (lit. (b) laatste zin), is het maximumrisico van andere beperkte persoonlijke of zakelijke zekerheidsrechten die het eindsaldo van het gewaarborgde krediet te boven gaan, beperkt tot dat eindsaldo.

(3) De voorgaande regels gelden niet voor zakelijke zekerheden gesteld door de schuldenaar en voor stellers van zekerheden waarop de schuldeiser op het tijdstip waarop hij werd voldaan geen aanspraak had kunnen maken.

Artikel 1:109: Pluraliteit van zekerheidsstellers: verhaal jegens de schuldenaar

(1) Elke zekerheidssteller die een verhaalsvordering van een andere zekerheidssteller heeft voldaan, is tot beloop van zijn betaling gesubrogeerd in de rechten die die andere zekerheidssteller jegens de schuldenaar heeft verkregen krachtens artikel 2:113 leden (1) en (3), met inbegrip van de zakelijke zekerheden die door de schuldenaar zijn gevestigd. Artikel 2:110 is van overeenkomstige toepassing.

(2) Neemt een zekerheidssteller verhaal op de schuldenaar ingevolge de rechten die hij heeft verkregen krachtens artikel 2:113 leden (1) en (3) of krachtens het vorige lid, daaronder begrepen de zakelijke zekerheden die door de schuldenaar zijn gevestigd, dan is elke zekerheidssteller gerechtigd tot zijn evenredig aandeel, zoals bepaald door artikel 1:108 lid (2) en artikel 10:106 PECL, in hetgeen van de schuldenaar werd gerecupereerd. Artikel 2:110 is van overeenkomstige toepassing.

(3) Tenzij uitdrukkelijk anders bepaald, gelden de voorgaande regels niet voor zakelijke zekerheden gesteld door de schuldenaar.

Artikel 1:110: Subsidiaire toepassing van de de regels inzake hoofdelijke schuldenaars

Subsidiair aan de bepalingen van dit hoofdstuk gelden de regels over pluraliteit van schuldenaars in artikelen 10:106 tot 10:111 PECL.

Hoofdstuk 2:
Afhankelijke persoonlijke zekerheid (Borgtocht)

Artikel 2:101: Vermoeden van borgtocht

(1) Elke verbintenis tot betaling van een geldsom, tot nakoming van een andere prestatie of tot betaling van een schadevergoeding aan de schuldeiser ten titel van zekerheid, wordt vermoed een borgtocht te zijn in de zin van artikel 1:101 lit. (a), tenzij de schuldeiser aantoont dat anders is overeengekomen.
(2) Een bindende patronaatsverklaring wordt vermoed een borgtocht te zijn.

Artikel 2:102: Modaliteiten en omvang van de verbintenissen van de zekerheidssteller

(1) De geldigheid, de modaliteiten en de omvang van de verbintenis van de borg is afhankelijk van de geldigheid, de modaliteiten en de omvang van de verbintenis van de schuldenaar jegens de schuldeiser.
(2) De verbintenis van de borg reikt niet verder dan de gewaarborgde verbintenis. Dit beginsel geldt niet indien de verbintenissen van de schuldenaar verminderd of kwijtgescholden worden:
    (a) in een insolventieprocedure;
    (b) op een andere wijze, in het bijzonder door onderhandeling of gerechtelijke vermindering, wanneer dit voortvloeit uit onmogelijkheid tot nakoming wegens insolventie van schuldenaar; of
    (c) wegens gebeurtenissen betreffende de persoon van de schuldenaar waaraan een rechtsregel een dergelijk gevolg hecht.
(3) Is er geen maximumbedrag vastgesteld voor de zekerheid en kan er evenmin een worden afgeleid uit de overeenkomst van de partijen, dan is de verbintenis van de borg beperkt tot het bedrag van de gewaarborgde verbintenissen op het tijdstip waarop de borgtocht wordt aangegaan, behalve in geval van een borgtocht voor alle sommen (artikel 1:101 lit. (f)).
(4) Een overeenkomst tussen de schuldeiser en de schuldenaar die de omvang van de gewaarborgde verbintenissen vergroot, de modaliteiten ervan verzwaart of de opeisbaarheid ervan vervroegt, overeengekomen nadat de verbintenis van de borg is aangegaan, laat de verbintenis van de borg onverlet, behalve in geval van een borgtocht voor alle sommen (artikel 1:101 lit. (f)).

Artikel 2:103: Verweermiddelen van de schuldenaar waarop de borg zich kan beroepen

(1) De borg kan aan de schuldeiser elk verweermiddel van de schuldenaar tegenwerpen met betrekking tot het bestaan, de geldigheid, de afdwingbaarheid of de modaliteiten van de gewaarborgde verbintenis, ook indien dit door de schuldenaar zelf niet meer kan worden tegengeworpen ingevolge het handelen of nalaten van de schuldenaar nadat de borgtocht is ingegaan.
(2) De borg kan het recht van de schuldenaar om overeenkomstig artikel 9:201 PECL de nakoming op te schorten, niet tegenwerpen wanneer de schuldenaar zelf daartoe niet meer gerechtigd is.

(3) De onbekwaamheid of onbevoegdheid van de schuldenaar, weze het een natuurlijke persoon of een rechtspersoon, of het niet-bestaan de schuldenaar-rechtspersoon kan de borg niet tegenwerpen indien hij de desbetreffende feiten kende op het tijdstip waarop de borgtocht is aangegaan.
(4) Zolang de schuldenaar gerechtigd is om de overeenkomst waaruit de gewaarborgde verbintenis voortvloeit te vernietigen op een andere grond dan deze vermeld in het vorige lid en dat recht niet heeft uitgeoefend, is de borg gerechtigd om nakoming te weigeren.
(5) Het vorige lid is van overeenkomstige toepassing indien de gewaarborgde verbintenis kan worden verrekend met een verbintenis van de schuldeiser.

Artikel 2:104: Dekking van de borgtocht

(1) De borgtocht dekt, binnen zijn maximumbedrag indien er één is, niet enkel de gewaarborgde hoofdverbintenis, maar ook de accessoire verbintenissen van de schuldenaar jegens de schuldeiser, in het bijzonder:
   (a) contractuele en verwijlrente;
   (b) schadevergoeding of het bedrag van een boete- of schadebeding in geval van niet-nakoming door de schuldenaar; en
   (c) de buitengerechtelijke kosten om deze schuldvorderingen te verhalen voor zover zij redelijk zijn.
(2) De kosten van de procedures in rechte en executieprocedures jegens de schuldenaar zijn gedekt mits de borg voldoende tijdig was ingelicht over het voornemen van de schuldeiser om dergelijke procedures in te stellen om hem de mogelijkheid te geven deze kosten te voorkomen.
(3) Een borgtocht voor alle sommen (artikel 1:101 lit. (f)) dekt enkel verbintenissen die ontstaan zijn uit overeenkomsten tussen de schuldenaar en de schuldeiser.

Artikel 2:105: Hoofdelijke verbondenheid van de borg

Tenzij anders overeengekomen (artikel 2:106), zijn de schuldenaar en de borg hoofdelijk verbonden en heeft de schuldeiser dus de keuze om hoofdelijke nakoming te vorderen van de schuldenaar dan wel, binnen de grenzen van de borgtocht, van de borg.

Artikel 2:106: Subsidiaire verbondenheid van de borg

(1) Indien dit is overeengekomen kan de borg jegens de schuldeiser de subsidiaire aard van zijn verbintenis tegenwerpen. Een bindende patronaatsverklaring wordt vermoed slechts een subsidiaire verbondenheid te scheppen.
(2) Onverminderd lid (3) moet de schuldeiser vooraleer nakoming te vorderen van de borg gepaste pogingen ondernomen hebben om voldoening te verkrijgen van de schuldenaar en, zo die er zijn, van andere zekerheidsstellers die de dezelfde verbintenis waarborgen onder een persoonlijke of zakelijke zekerheid die een hoofdelijke verbintenis inhoudt.
(3) De schuldeiser is niet gehouden om te pogen voldoening te bekomen van een schuldenaar of andere zekerheidssteller overeenkomstig het vorige lid voor zover het klaarblijkelijk onmogelijk of buitensporig moeilijk is om voldoening te verkrijgen van de desbetreffende persoon. Deze uitzondering geldt in het bijzonder voor zover een insolventieprocedure of gelijkwaardige procedure werd geopend tegen de desbetreffende persoon dan wel het openen van een dergelijke procedure wegens gebrek aan actief geen doorgang kon vinden, tenzij er een door die persoon voor dezelfde verbintenis gestelde zakelijke zekerheid voorhanden is.

Artikel 2:107: Verplichting tot kennisgeving van de schuldeiser

(1) De schuldeiser moet zonder onnodig uitstel de borg informeren in geval van niet-nakoming door of onvermogen om te betalen van de schuldenaar en over een uitstel van opeisbaarheid. De kennisgeving moet inlichtingen bevatten over het bedrag van de gewaarborgde verbintenis in hoofdsom, rente en andere accessoire verbintenissen verschuldigd door de schuldenaar op de dag van de kennisgeving. Een bijkomende kennisgeving van een nieuwe achterstal in nakoming is niet vereist vooraleer drie maanden zijn verstreken sinds de vorige kennisgeving. Kennisgeving is niet vereist indien de niet-nakoming uitsluitend accessoire verbintenissen van de schuldenaar betreft, tenzij het totale bedrag van alle niet-nagekomen gewaarborgde verbintenissen vijf ten honderd van het uitstaande bedrag van de gewaarborgde verbintenis heeft bereikt.

(2) Bij een borgtocht voor alle sommen (artikel 1:101 lit. (f)) moet de schuldeiser daarenboven de borg in kennis stellen van elke overeengekomen toename:
   (a) wanneer deze toename 20 ten honderd bereikt van het bedrag van de gewaarborgde verbintenis dat door de borgtocht bij het stellen ervan was gewaarborgd; en
   (b) telkens als het bedrag van de gewaarborgde verbintenissen verder oploopt met 20 ten honderd vergeleken met het bedrag van de gewaarborgde verbintenis op de dag waarop de laatste informatie overeenkomstig het vorige lid was gegeven of had moeten zijn gegeven.

(3) Leden (1) en (2) zijn niet van toepassing voor zover de borg de vereiste inlichtingen kende of redelijkerwijs kon worden verwacht te kennen.

(4) De schuldeiser is aansprakelijk voor de schade veroorzaakt door het niet of laattijdig doen van de door dit artikel voorgeschreven kennisgeving.

Artikel 2:108: Termijn voor een beroep op de zekerheid

(1) Is er rechtstreeks of onrechtstreeks een termijn overeengekomen voor beroep op een hoofdelijke borgtocht, dan is de borg niet meer verbonden na het verstrijken van de overeengekomen termijn. De borg blijft evenwel verbonden indien de schuldeiser nakoming heeft gevorderd van de borg tussen het tijdstip van opeisbaarheid van de gewaarborgde verbintenis en het verstrijken van de termijn.

(2) Is er rechtstreeks of onrechtstreeks een termijn overeengekomen voor beroep op een subsidiaire borgtocht, dan is de borg niet meer verbonden na het verstrijken van de overeengekomen termijn. De borg blijft evenwel verbonden indien de schuldeiser
   (a) tussen het tijdstip van opeisbaarheid van de gewaarborgde verbintenis en het verstrijken van de termijn de borg heeft ingelicht van zijn voornemen om nakoming van de borg te vorderen en gesteld heeft dat hij begonnen is met het ondernemen van gepaste pogingen om voldoening te verkrijgen zoals vereist door artikel 2:106 leden (2) en (3); en
   (b) de borg elke zes maanden inlicht over de stand van deze pogingen indien de borg dit vraagt.

(3) Wordt een gewaarborgde verbintenis opeisbaar op of binnen de veertien dagen voor het verstrijken van de termijn van de borgtocht, dan mag het verzoek tot nakoming of de informatie overeenkomstig leden (1) en (2) vroeger worden gegeven dan bepaald in leden (1) en (2), maar niet eerder dan veertien dagen voor het verstrijken van de termijn van de borgtocht.

(4) Indien de schuldeiser de door de vorige leden vereiste maatregelen heeft genomen, dan bedraagt de verbintenis van de borg ten hoogste het bedrag van de gewaarborgde verbintenissen zoals bepaald door artikel 2:104 leden (1) en (2). Het doorslaggevende tijdstip is dat waarop de overeengekomen termijn verstrijkt.

Artikel 2:109: Opzegging van de borgtocht bij gebreke aan termijn

(1) Is de borgtocht niet beperkt door een overeengekomen termijn, dan kan elke partij de borgtocht inperken door deze door middel van een kennisgeving aan de wederpartij op te zeggen met een termijn van minstens drie maanden. Dit geldt niet indien de borgtocht zich ertoe beperkt welbepaalde verbintenissen of verbintenissen uit welbepaalde overeenkomsten te waarborgen.
(2) Door de kennisgeving wordt de verbintenis van de borg beperkt tot de gewaarborgde verbintenissen in hoofdsom op het tijdstip waarop de opzegging uitwerking heeft en de gewaarborgde accessoire verbintenissen zoals bepaald door artikel 2:104 leden (1) en (2).

Artikel 2:110: Aansprakelijkheid van de schuldeiser

Voor zover de borg ten gevolge van de gedraging van de schuldeiser niet is gesubrogeerd in de rechten van de schuldeiser jegens de schuldenaar en in de persoonlijke en zakelijke zekerheden van de schuldeiser jegens derden, of geen volledige terugbetaling kan verkrijgen van de schuldenaar of van derden-zekerheidsstellers, indien er zijn, is de schuldeiser aansprakelijk voor de schade die de borg daardoor heeft geleden.

Artikel 2:111: Vrijwaring van de borg door de schuldenaar

(1) Een borg die zich op verzoek van de schuldenaar of met diens uitdrukkelijke of vermoede toestemming borg heeft gesteld, is gerechtigd om van de schuldenaar te vorderen dat hij hem vrijwaart:
    (a) indien de schuldenaar de gewaarborgde verbintenis niet is nagekomen op de vervaldag, indien hij niet in staat is te betalen of indien zijn activa substantieel zijn verminderd; of
    (b) indien de schuldeiser tegen de borg op grond van de borgtocht een eis in rechte heeft ingesteld.
(2) Vrijwaring kan geschieden door adequate zekerheid te stellen.

Artikel 2:112: Verbintenissen van de borg voor nakoming

(1) Vooraleer na te komen jegens de schuldeiser, moet de borg de schuldenaar in kennis stellen en informeren naar het uitstaande bedrag van de gewaarborgde verbintenis en zijn verweermiddelen of tegenvorderingen.
(2) Komt de borg na zonder zich overeenkomstig lid (1) te informeren of laat hij na een verweermiddel tegen te werpen dat hem door de schuldenaar is meegedeeld of hem uit andere bronnen bekend is, dan is hij jegens de schuldenaar aansprakelijk voor de daardoor veroorzaakte schade.
(3) De rechten van de borg jegens de schuldeiser blijven hierdoor onverlet.

Artikel 2:113: Rechten van de borg na nakoming

(1) Voor zover de borg de uit de borgtocht voortspruitende verbintenissen is nagekomen, kan hij terugbetaling vorderen van de schuldenaar. Daarenboven is de borg in dezelfde mate gesubrogeerd in de rechten van de schuldeiser jegens de schuldenaar. Deze twee schuldvorderingen zijn samenlopend.

(2) In geval van gedeeltelijke nakoming hebben de resterende gedeeltelijke rechten van de schuldeiser jegens de schuldenaar voorrang over de rechten waarin de borg is gesubrogeerd.
(3) Krachtens de subrogatie overeenkomstig lid (1), tweede zin gaan de afhankelijke zowel als onafhankelijke persoonlijke en zakelijke zekerheidsrechten van rechtswege over op de borg, niettegenstaande een door de schuldenaar bedongen conventionele beperking of uitsluiting van de overdraagbaarheid. Rechten jegens andere zekerheidsstellers kunnen slechts binnen de grenzen van artikel 1:108 worden uitgeoefend.
(4) Is de schuldenaar wegens onbekaamheid of onbevoegdheid niet verbonden jegens de schuldeiser, dan kan de borg niettemin terugbetaling vorderen van de schuldenaar tot beloop van diens verrijking. Deze regel geldt ook wanneer de schuldenaar niet geldig als rechtspersoon is opgericht.

Hoofdstuk 3:
Onafhankelijke Persoonlijke Zekerheid (Onafhankelijke garanties)

Artikel 3:101: Toepassingsgebied

(1) De onafhankelijke aard van een zekerheid komt niet in het gedrang door een louter algemene verwijzing naar een onderliggende verbintenis (daaronder begrepen ook een persoonlijke zekerheid).
(2) De bepalingen van dit Hoofdstuk zijn ook van toepassing op standby kredietbrieven.

Artikel 3:102: Verbintenissen van de zekerheidssteller voor nakoming

(1) De zekerheidssteller is slechts tot nakoming verplicht indien een schriftelijk verzoek tot nakoming nauwkeurig beantwoordt aan de in de zekerheid gestelde modaliteiten.
(2) De zekerheidssteller dient dadelijk na de ontvangst van een verzoek tot nakoming aan de schuldenaar mee te delen dat hij dit verzoek heeft ontvangen.
(3) Tenzij anders overeengekomen, mag de zekerheidssteller de verweermiddelen tegenwerpen waartoe hij in verhouding tot de schuldeiser gerechtigd is.
(4) De zekerheidssteller moet zonder uitstel en ten laatste binnen zeven werkdagen na ontvangst van een schriftelijk verzoek tot betaling
    (a) nakomen overeenkomstig het verzoek en de schuldenaar onmiddellijk inlichten; of
    (b) nakoming weigeren en de schuldeiser en de schuldenaar onmiddellijk inlichten.
(5) De zekerheidssteller is aansprakelijk voor de schade veroorzaakt door het niet nakomen van de verplichtingen van lid (2) tot (4).

Artikel 3:103: Onafhankelijke persoonlijke zekerheid op eerste verzoek

(1) Een onafhankelijke persoonlijke zekerheid waarin uitdrukkelijk is bepaald dat zij verschuldigd is op eerste verzoek, of die in zulke bewoordingen is gesteld dat dit daaruit ondubbelzinnig kan worden afgeleid, is onderworpen aan Artikel 3:102, behalve het hierna bepaalde.
(2) De zekerheidssteller is slechts tot nakoming verplicht indien het verzoek van de schuldeiser wordt ondersteund door een schriftelijke verklaring van de schuldeiser, waarin uitdrukkelijk is bevestigd dat alle voorwaarden voor de opeisbaarheid van de zekerheid zijn vervuld.
(3) Artikel 3:102 lid (3) is niet van toepassing.

Artikel 3:104: Kennelijk onrechtmatig of bedrieglijk verzoek

(1) In de gevallen van artikel 3:102 en 3:103 moet de zekerheidssteller een verzoek tot nakoming inwilligen, tenzij door middel van gereed bewijs wordt bewezen dat het verzoek kennelijk onrechtmatig of bedrieglijk is.
(2) Zijn de vereisten van het vorige lid vervuld, dan mag de schuldenaar:
   (a) nakoming door de zekerheidssteller verbieden; en
   (b) het uitbrengen van of het beroep op een verzoek tot nakoming door de schuldeiser verbieden.

Artikel 3:105: Recht op terugvordering van de zekerheidssteller

(1) De zekerheidssteller is gerechtigd om hetgeen de schuldeiser heeft ontvangen terug te vorderen indien:
   (a) de voorwaarden voor het verzoek van de schuldeiser niet waren vervuld of nadien ophielden te zijn vervuld; of
   (b) het verzoek van de schuldeiser kennelijk onrechtmatig of bedrieglijk was.
(2) Het recht van terugvordering van de zekerheidssteller is onderworpen aan artikel 4:115 PECL en de algemene regels inzake ongegronde verrijking.

Artikel 3:106: Zekerheid met en zonder termijnen.

(1) Is er rechtstreeks of onrechtstreeks een termijn overeengekomen voor beroep op een zekerheid, dan blijft de zekerheidssteller bij wijze van uitzondering ook na het verstrijken van de termijn verbonden indien de schuldeiser op een tijdstip waarop hij daartoe gerechtigd was en voor het verstrijken van de termijn om nakoming heeft verzocht overeenkomstig artikel 3:102 lid (1) of 3:103. Artikel 2:108 lid (3) is van overeenkomstige toepassing. De verbintenis van de zekerheidssteller bedraagt ten hoogste het bedrag dat de schuldeiser kon hebben gevorderd op de dag waarop de termijn verstreek.
(2) Is de zekerheid niet beperkt door een overeengekomen termijn, dan kan de zekerheidssteller een dergelijke termijn stellen door middel van een kennisgeving aan de wederpartij die een termijn van minstens drie maanden stelt. De verbintenis van de zekerheidssteller is beperkt tot het bedrag dat de schuldeiser kon hebben gevorderd op de door de zekerheidssteller gestelde vervaldag. De vorige zinnen gelden niet indien de zekerheid is gesteld voor een welbepaald doel.

Artikel 3:107: Overgang van de zekerheid

De overgang van het recht van de schuldeiser om nakoming te vorderen van een zekerheidssteller kan voortvloeien uit een rechtsregel. Het recht kan ook worden overgedragen door middel van een overeenkomst, behalve bij een onafhankelijke persoonlijke zekerheid op eerste verzoek.

Artikel 3:108: Rechten van de zekerheidssteller na nakoming

De rechten die de zekerheidssteller na nakoming kan uitoefenen worden bepaald door overeenkomstige toepassing van Artikel 2:113.

Hoofdstuk 4:
Bijzondere regels voor persoonlijke zekerheid door consumenten

Artikel 4:101: Toepassingsgebied
(1) Onverminderd lid (2) is dit Hoofdstuk van toepassing wanneer een zekerheid wordt aangegaan door een consument (artikel 1:101 lit. (g)).
(2) Dit Hoofdstuk is niet van toepassing indien:
  (a) de schuldeiser ook een consument is; of
  (b) de zekerheidssteller-consument in staat is substantiële invloed uit te oefenen op de schuldenaar en deze schuldenaar geen natuurlijke persoon is.

Artikel 4:102: Toepasselijke regels
(1) Voor zover in dit Hoofdstuk niet anders is bepaald, gelden voor een persoonlijke zekerheid binnen het toepassingsgebied van dit Hoofdstuk de regels van Hoofdstukken 1 en 2.
(2) De partijen kunnen niet ten nadele van een zekerheidssteller afwijken van de regels van dit hoofdstuk.

Artikel 4:103: Precontractuele informatieplicht van de schuldeiser
(1) Voor een zekerheid wordt gesteld, moet de schuldeiser aan de beoogde zekerheidssteller:
  (a) het algemene gevolg van de beoogde zekerheid uitleggen; en
  (b) de bijzondere risico's uitleggen, waaraan de zekerheidssteller volgens de voor de schuldeiser toegankelijk informatie kan zijn blootgesteld in het licht van de financiële situatie van de schuldenaar.
(2) Weet de schuldeiser dat er ingevolge een vertrouwensrelatie tussen de schuldenaar en de zekerheidssteller een betekenisvol risico is dat de zekerheidssteller niet in vrijheid handelt of niet adequaat is geïnformeerd, of beschikt hij over goede gronden om dit te weten, dan moet de schuldeiser er zich van verzekeren dat de zekerheidssteller onafhankelijke raad heeft ontvangen.
(3) Is de door de vorige leden vereiste informatie of onafhankelijke raad niet gegeven ten laatste vijf dagen voor de ondertekening door de zekerheidssteller van zijn aanbod of van de overeenkomst tot zekerheid, dan kan zijn aanbod worden ingetrokken c.q. de overeenkomst worden vernietigd door de zekerheidssteller binnen een redelijke termijn na ontvangst van die informatie of die onafhankelijke raad. Voor de toepassing hiervan geldt een termijn van vijf werkdagen als een redelijke termijn, tenzij de omstandigheden een andere wijzing geven.
(4) Is in strijd met lid (1) of (2) geen informatie of geen onafhankelijke raad gegeven, dan kan de zekerheidssteller het aanbod zonder tijdsbeperking intrekken c.q. de overeenkomst zonder tijdsbeperking vernietigen.
(5) Trekt de zekerheidssteller het aanbod in c.q. vernietigt hij de overeenkomst overeenkomstig de vorige leden, dan wordt de teruggave van hetgeen partijen ontvangen hebben geregeld door artikel 4:115 PECL of de algemene regels inzake ongegronde verrijking.

Artikel 4:104: Buiten de onderneming gesloten zekerheidsovereenkomsten
De bepalingen van Richtlijn 85/577/EEG van de Raad van 20 december 1985 betreffende de bescherming van de consument bij buiten verkoopruimten gesloten overeenkomsten gelden voor zekerheden binnen het toepassingebied van dit Hoofdstuk.

Artikel 4:105: Vormvereisten

De zekerheidsovereenkomst moet schriftelijk worden gesloten en door de zekerheidssteller zijn ondertekend. Een zekerheidsovereenkomst die niet aan deze vereisten beantwoord is nietig.

Artikel 4:106: Aard van de verbondenheid van de zekerheidssteller

Binnen het toepassingsgebied van dit Hoofdstuk:

(a) doet elke overeenkomst die ertoe strekt een zekerheid te scheppen zonder maximumbedrag, zij het een zekerheid voor alle sommen (artikel 1:101 lit. (f)) of niet, slechts een borgtocht (afhankelijke zekerheid) ontstaan die beperkt is tot het bedrag dat overeenkomstig artikel 2:102 lid (3) wordt bepaald;

(b) is de verbintenis van een borg (steller van een afhankelijke zekerheid) subsidiair in de zin van artikel 2:106, tenzij uitdrukkelijk anders is overeengekomen; en

(c) doet een overeenkomst die beoogt een onafhankelijke zekerheid te scheppen slechts een afhankelijke zekerheid ontstaan, en dit mits de vereisten voor deze laatste zijn vervuld.

Artikel 4:107: Verplichting van de schuldeiser tot jaarlijkse informatie

(1) Mits instemming van de schuldenaar, moet de schuldeiser de zekerheidssteller jaarlijks informeren over de gewaarborgde verbintenis in hoofdsom, rente en andere accessoire verbintenissen verschuldigd door de schuldenaar op de dag van de informatie. Een eenmaal gegeven toestemming is onherroepelijk.

(2) Artikel 2:107 leden (3) en (4) zijn van overeenkomstige toepassing.

Artikel 4:108: Opzegging van een zekerheid met een termijn

(1) Is de zekerheid beperkt door een overeengekomen termijn, dan kan de zekerheidssteller vanaf drie jaar na het aangaan van de zekerheid de gevolgen ervan beperken door deze door middel van een kennisgeving aan de wederpartij op te zeggen met een termijn van minstens drie maanden. De vorige zin geldt niet indien de zekerheid zich ertoe beperkt welbepaalde verbintenissen of verbintenissen uit welbepaalde overeenkomsten te waarborgen. De schuldeiser moet de schuldenaar dadelijk informeren.

(2) Door de kennisgeving wordt de verbintenis van de zekerheidssteller beperkt overeenkomstig artikel 2:109 lid (2).

French*
Sûretés personnelles

Chapitre 1:
Règles communes

Article 1:101: Définitions
Aux fins de la présente Partie:
(a) Une sûreté personnelle accessoire (cautionnement) est une obligation contractuelle d'un fournisseur de sûreté qui s'engage à payer une somme d'argent ou à exécuter toute autre prestation, ou à payer des dommages et intérêts au créancier, laquelle obligation est assumée dans le but de garantir une obligation présente ou future du débiteur principal envers le créancier et dépend de la validité, du contenu et de l'étendue de cette dernière obligation.
(b) Une sûreté personnelle autonome (garantie autonome/indépendante) est une obligation contractuelle d'un fournisseur de sûreté qui s'engage, à des fins de sûreté, à payer une somme d'argent ou à exécuter toute autre prestation, ou à payer des dommages et intérêts au créancier, laquelle obligation, de convention expresse ou tacite, ne dépend pas de la validité, du contenu ou de l'étendue de l'obligation d'une autre personne envers le créancier.
(c) Le fournisseur de sûreté est la personne qui assume envers le créancier les obligations découlant du contrat de sûreté personnelle.
(d) Le débiteur principal est la personne qui est tenue de l'obligation garantie envers le créancier, pour autant qu'elle existe.
(e) Dans le cas de pluralité de débiteurs à des fins de sûreté, un co-débiteur agit comme fournisseur de sûreté, si il s'engage lui-même à titre principal à des fins de sûreté envers le créancier.
(f) Une sûreté globale (cautionnement global) est une sûreté personnelle accessoire dont il est convenu qu'elle couvre toutes les obligations du débiteur principal envers le créancier ou le solde débiteur d'un compte courant, ou une sûreté d'une étendue similaire.
(g) Par consommateur, on entend toute personne physique qui agit principalement à des fins qui n'entrent pas dans le cadre de son commerce, de son activité professionnelle ou de sa profession.
(h) Les sûretés réelles au sens large visent les sûretés sous toutes formes de propriété, mobilière ou immobilière, corporelle ou incorporelle.

Article 1:102: Champ d'application
(1) La présente Partie s'applique à tout type de sûreté personnelle contractuelle, en particulier:
(a) aux contrats de cautionnement (sûretés personnelles accessoires), y compris les lettres de confort obligatoires (Article 1:101, lettre (a));

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* Traduction française assurée par Prof. Dr. Sophie Stijns (K.U. Leuven, member of the Coordinating Group) et Prof. Dr. Isabelle Durant (Université catholique de Louvain) et coordonnée par Prof. Dr. Jacques Ghestin (Université Paris I).

(b) aux garanties autonomes (sûretés personnelles autonomes/indépendantes), y compris les lettres de crédit stand-by (Article 1:101, lettre (b)); et
(c) aux codébiteurs engagés à des fins de sûreté (Article 1:101, lettre (e)).

(2) La présente Partie ne s'applique pas aux contrats d'assurance. Dans le cas d'une assurance-cautionnement, la présente Partie s'applique uniquement si, et dans la mesure où, l'assureur a émis un document comprenant une sûreté personnelle en faveur du créancier.

(3) La présente Partie ne porte pas atteinte aux règles relatives à l'aval et à l'endossement à des fins de sûreté d'instruments négociables, mais s'applique aux sûretés attachées aux obligations résultant d'un tel aval ou endossement à des fins de sûreté.

Article 1:103: Liberté contractuelle

Les parties peuvent exclure l'application de tout ou partie des dispositions de la présente Partie ou y déroger ou modifier leurs effets, sauf dispositions contraires du Chapitre 4 de la présente Partie.

Article 1:104: Acceptation du créancier

Le créancier est réputé accepter une offre de sûreté dès que celle-ci lui parvient, à moins qu'elle ne requière une acceptation expresse, que le créancier ne l'ait rejetée sans retard déraisonnable ou qu'il ne se soit réservé un délai de réflexion.

Article 1:105: Interprétation

Lorsqu'existe un doute quant à la signification d'un terme d'un contrat de sûreté et que celui-ci a été inséré par un fournisseur de sûreté rémunéré, il faut, de préférence, interpréter le terme contre ce dernier.

Article 1:106: Codébiteurs à des fins de sûreté

En présence de codébiteurs à des fins de sûreté (Article 1:101, lettre (e)), on applique les règles des Chapitres 1 et 4 et, subsidiairement, celles relatives à la pluralité de débiteurs (PECL, Chapitre 10, Partie 1).

Article 1:107: Pluralité de fournisseurs de sûreté: engagement solidaire envers le créancier

(1) Dans la mesure où plusieurs fournisseurs de sûreté personnelle ont garanti la même obligation ou la même partie d'une obligation ou ont pris des engagements dans un but commun de sûreté, chacun d'eux est tenu solidairement avec les autres fournisseurs de sûreté, dans les limites de son engagement envers le créancier. Cette règle s'applique également si, en accordant la sûreté, ces fournisseurs de sûreté ont agi de manière indépendante.

(2) L'alinéa (1) s'applique moyennant des adaptations appropriées lorsqu'une sûreté réelle au sens large (Article 1:101, lettre (h)) a été fournie par le débiteur principal ou par un tiers en complément d'une sûreté personnelle.

Article 1:108: Pluralité de fournisseurs de sûreté: recours aux fins de contribution

(1) Dans les cas prévus à l'Article 1:107, les recours entre les différents fournisseurs de sûreté personnelle, ou entre les fournisseurs de sûreté personnelle et de sûreté réelle au sens large (Article 1:101, lettre (h)), sont gouvernés par l'Article 10:106 PECL, sous réserve des alinéas suivants.

(2) Sous réserve de l'alinéa (3), pour les besoins de l'Article 10:106 PECL, la part proportionnelle de chaque fournisseur de sûreté est déterminée conformément aux règles suivantes:

(a) A moins que les fournisseurs de sûreté n'en aient décidé autrement, chacun d'eux est tenu envers les autres fournisseurs de sûreté dans le même rapport que celui existant entre le risque maximal que ce fournisseur de sûreté assume et le total des risques maximaux assumés par tous les fournisseurs de sûreté. Le moment à prendre en considération est celui de la constitution de la dernière sûreté.
(b) Pour les sûretés personnelles, le risque maximal est le montant maximal convenu de la sûreté. En l'absence de montant maximal convenu, le montant de l'obligation garantie ou, si un compte courant a été garanti, la limite du crédit est déterminant. Si l'obligation garantie n'est pas limitée, son solde final est déterminant.
(c) Pour les sûretés réelles au sens large, le risque maximal est déterminé par le montant maximal convenu de la sûreté. En l'absence de montant maximal convenu, la valeur du ou des biens servant de sûreté est déterminante.
(d) Si le montant maximal, dans l'hypothèse visée à la lettre (b) première phrase, ou, respectivement, le montant maximal ou la valeur, dans l'hypothèse visée à la lettre (c), est supérieur au montant de l'obligation garantie au moment de la constitution de la dernière sûreté, celui-ci détermine le risque maximal.
(e) Dans l'hypothèse d'une sûreté personnelle illimitée garantissant un crédit illimité (lettre (b) dernière phrase), le risque maximal couvert par les autres sûretés limitées, personnelles ou réelles au sens large, qui excède le solde final du crédit garanti, est limité à ce dernier.

(3) Les règles ci-dessus ne s'appliquent pas aux sûretés réelles au sens large fournies par le débiteur principal ni aux fournisseurs de sûreté qui, au moment où le créancier a été désintéressé, n'étaient plus tenus envers ce dernier.

Article 1:109: Pluralité de fournisseurs de sûreté: recours contre le débiteur principal

(1) Tout fournisseur de sûreté qui, au plan de la contribution, a satisfait au recours d'un autre fournisseur de sûreté, est subrogé dans cette mesure dans les droits de ce dernier contre le débiteur principal, comme prévu à l'Article 2:113, alinéas (1) et (3), y compris dans les droits liés aux sûretés réelles au sens large consenties par le débiteur principal. L'Article 2:110 s'applique moyennant des adaptations appropriées.
(2) Lorsqu'un fournisseur de sûreté exerce un recours contre le débiteur principal en vertu des droits qu'il a acquis par application de l'Article 2:113, alinéas (1) et (3) ou par application de l'alinéa précédent, y compris en vertu des droits liés aux sûretés réelles au sens large consenties par le débiteur principal, chaque fournisseur de sûreté a droit, proportionnellement à sa part telle que définie à l'Article 1:108, alinéa (2) et à l'Article 10:106 PECL, aux avantages recouvrés auprès du débiteur principal. L'Article 2:110 s'applique moyennant des adaptations appropriées.
(3) Sauf disposition expresse contraire, les règles ci-dessus ne s'appliquent pas aux sûretés réelles au sens large fournies par le débiteur principal.

Article 1:110: Application subsidiaire des règles relatives aux débiteurs solidaires

Si, et dans la mesure, où les dispositions de la présente Partie ne s'appliquent pas, les règles relatives à la pluralité de débiteurs prévues aux Articles 10:106 à 10:111 PECL sont applicables à titre subsidiaire.

Chapitre 2:
Sûretés personnelles accessoires (cautionnements)

Article 2:101: Présomption de sûretés personnelles accessoires

(1) Tout engagement de payer une somme d'argent, d'exécuter toute autre prestation ou de payer des dommages et intérêts au créancier, pris à titre de sûreté, est présumé être une sûreté accessoire telle que définie à l'Article 1:101, lettre (a), à moins que le créancier n'établisse qu'il en a été convenu autrement.

(2) Une lettre de confort obligatoire est présumée être une sûreté personnelle accessoire.

Article 2:102: Contenu et étendue des obligations du fournisseur de sûreté

(1) La validité, le contenu et l'étendue de l'obligation du fournisseur d'une sûreté personnelle accessoire dépendent de la validité, du contenu et de l'étendue de l'obligation assumée par le débiteur principal envers le créancier.

(2) L'obligation du fournisseur d'une sûreté n'excède pas l'étendue de l'obligation garantie. Ce principe ne s'applique pas lorsque le débiteur principal voit ses obligations réduites ou lorsqu'il en est déchargé
   (a) dans une procédure d'insolvabilité;
   (b) de toute autre façon, en particulier à la suite d'une négociation ou d'une réduction judiciaire, conséquence de l'impossibilité du débiteur principal de s'exécuter en raison de son insolvabilité; ou
   (c) en vertu de règles de droit du fait d'événements affectant la personne du débiteur principal.

(3) Excepté dans le cas d'un cautionnement global (Article 1:101, lettre (f)), si un plafond n'a pas été fixé pour la sûreté et ne peut être déduit de la convention des parties, l'obligation du fournisseur de sûreté est limitée au montant des obligations garanties au moment où la sûreté prend effet.

(4) Excepté dans le cas d'un cautionnement global (Article 1:101, lettre (f)), aucun accord entre le créancier et le débiteur principal ayant pour objet d'accroître l'étendue, d'aggraver les conditions ou d'anticiper l'échéance des obligations garanties, conclu après que l'obligation du fournisseur de sûreté ait pris effet, n'affecte l'obligation de ce dernier.

Article 2:103: Moyens de défense du débiteur principal opposables par le fournisseur de sûreté

(1) Le fournisseur de sûreté peut invoquer tout moyen de défense du débiteur principal se rapportant à l'existence, à la validité, à l'exigibilité ou aux conditions de l'obligation garantie, même si le débiteur principal n'est plus recevable à s'en prévaloir en raison d'un fait ou d'une omission qui lui est propre, survenu postérieurement à la prise d'effet de la sûreté.

(2) Le fournisseur de sûreté ne peut se prévaloir du droit du débiteur principal de suspendre son exécution prévu à l'Article 9:201 PECL, si le débiteur principal n'est plus en droit de le faire.

(3) Le fournisseur de sûreté ne peut se prévaloir du défaut de capacité du débiteur principal, qu'il soit une personne physique ou une personne morale, ou de l'inexistence du débiteur principal s'il s'agit d'une personne morale, si il connaissait les faits en question au moment où la sûreté a pris effet.

(4) Tant que le débiteur principal est en droit d'annuler le contrat dont découle l'obligation garantie pour un autre fondement que ceux mentionnés à l'alinéa précédent et tant qu'il n'a pas exercé ce droit, le fournisseur de sûreté peut refuser de s'exécuter.
(5) L'alinéa précédent s'applique moyennant des adaptations appropriées lorsque l'obligation garantie est sujette à compensation.

Article 2:104: Etendue de la sûreté

(1) La sûreté s'étend, dans les limites, le cas échéant, du plafond maximal, non seulement à l'obligation principale garantie, mais aussi aux obligations accessoires du débiteur principal envers le créancier, en particulier
  (a) aux intérêts conventionnels et aux intérêts moratoires;
  (b) aux dommages et intérêts, aux pénalités ou aux sommes conventionnellement dues en cas d'inexécution de ses obligations par le débiteur principal; et
  (c) aux frais raisonnables de recouvrement extra-judiciaire de ces sommes.
(2) Les frais des poursuites judiciaires et des mesures d'exécution forcée contre le débiteur principal sont couverts, pourvu que le fournisseur de sûreté ait été informé en temps utile de l'intention du créancier d'engager des poursuites ou d'autres mesures d'exécution, afin de lui permettre d'éviter ces frais.
(3) Un cautionnement global (Article 1:101, lettre (f)) s'étend uniquement aux obligations qui trouvent leur origine dans les contrats conclus entre le débiteur principal et le créancier.

Article 2:105: Engagement solidaire du fournisseur de sûreté

Sauf convention contraire (Article 2:106), les engagements du débiteur principal et du fournisseur de sûreté sont solidaires et, par conséquent, le créancier peut, au choix, exiger, solidairement, l'exécution de la prestation du débiteur principal ou, dans les limites de la sûreté, du fournisseur de celle-ci.

Article 2:106: Engagement subsidiaire du fournisseur de sûreté

(1) Si les parties en sont ainsi convenues, le fournisseur de sûreté peut se prévaloir, envers le créancier, du caractère subsidiaire de son engagement. Une lettre de confort obligatoire est présumée n'engendrer que des obligations subsidiaires.
(2) Sous réserve de l'alinéa (3), avant d'exiger l'exécution de son obligation par le fournisseur de sûreté, le créancier doit avoir entrepris les démarches appropriées pour obtenir satisfaction du débiteur principal et, le cas échéant, des autres fournisseurs de sûreté garantissant la même obligation au moyen d'une sûreté personnelle ou réelle au sens large impliquant un engagement solidaire.
(3) Il n'est pas requis du créancier qu'il tente d'obtenir satisfaction auprès du débiteur principal et de chacun des autres fournisseurs de sûreté conformément à l'alinéa précédent si, et dans la mesure où, il est manifestement impossible ou excessivement difficile d'obtenir satisfaction de la personne concernée. Cette exception s'applique en particulier si, et dans la mesure où, une procédure d'insolvabilité ou une procédure similaire a été ouverte à l'encontre de la personne concernée ou si, et dans la mesure où, l'ouverture d'une telle procédure a échoué en raison d'une insuffisance d'actifs, à moins qu'une sûreté réelle au sens large n'ait été fournie par cette personne pour garantir la même obligation.

Article 2:107: Obligations de notification du créancier

(1) Le créancier doit notifier au fournisseur de sûreté, sans délai excessif, toute inexécution par le débiteur principal ou toute impossibilité de paiement dans son chef, de même que tout report d'échéance; cette notification doit contenir des informations relatives aux montants garantis de l'obligation principale, intérêts et autres obligations accessoires dus par le débiteur principal à la date de la notification. Il n'est pas nécessaire de procéder à une notification additionnelle lorsqu'un nouveau fait d'inexécution survient dans les trois mois de la première notification. Aucune notification n'est requise si le fait d'inexécution concerne seulement des obligations accessoires du débiteur principal, à moins que le montant total de toutes les obligations garanties non exécutées n'ait atteint cinq pour cent du montant de l'obligation garantie restant à payer.

(2) En outre, dans le cas d'un cautionnement global (Article 1:101, lettre (f)), le créancier doit notifier au fournisseur de sûreté toute convention portant accroissement de l'obligation garantie

  (a) chaque fois que pareille augmentation, établie par rapport à la date de constitution de la sûreté, atteint 20 pour cent du montant qui était garanti à ce moment; et

  (b) chaque fois que le montant garanti a augmenté à nouveau de 20 pour cent par rapport au montant garanti à la date à laquelle la dernière information a été ou aurait dû être donnée conformément au présent alinéa.

(3) Les alinéas (1) et (2) ne s'appliquent pas si, et dans la mesure où, le fournisseur de sûreté connaît les informations requises ou si, et dans la mesure où, on peut raisonnablement s'attendre à ce qu'il les connaisse.

(4) Un créancier qui omet de procéder à une notification requise par le présent Article ou tarde à y procéder est tenu, envers le fournisseur de sûreté, de réparer tout dommage causé par cette omission ou ce retard.

Article 2:108: Délai pour l'appel à garantie

(1) Lorsqu'une durée limitée a été convenue, directement ou indirectement, pour le recours à une sûreté impliquant un engagement solidaire du fournisseur de sûreté, celui-ci n'est plus tenu à l'expiration de la période convenue. Cependant, le fournisseur de sûreté reste tenu si le créancier a exigé de lui qu'il s'exécute après l'échéance de l'obligation garantie mais avant l'expiration de la durée convenue pour la sûreté.

(2) Lorsqu'une durée limitée a été convenue, directement ou indirectement, pour le recours à une sûreté impliquant un engagement subsidiaire du fournisseur de sûreté, celui-ci n'est plus tenu à l'expiration de la période convenue. Cependant, le fournisseur de sûreté reste tenu si le créancier

  (a) a informé le fournisseur de sûreté, après l'échéance de l'obligation garantie mais avant l'expiration de la durée convenue, de son intention de demander l'exécution de la sûreté et a déclaré avoir entrepris les tentatives appropriées pour obtenir satisfaction conformément à l'Article 2:106, alinéas (2) et (3); et

  (b) informe le fournisseur de sûreté tous les six mois de l'état de ces tentatives, à la requête de ce dernier.

(3) Si les obligations garanties sont exigibles ou si il reste 14 jours avant l'expiration du délai convenu pour la sûreté, la demande d'exécution ou l'information, requise par les alinéas (1) et (2), peut être transmise plus tôt que ce qui est prévu aux alinéas (1) et (2), mais pas plus de 14 jours avant l'expiration de la durée convenue pour la sûreté.

(4) Si le créancier a pris les mesures requises conformément aux alinéas précédents, l'engagement maximal du fournisseur de sûreté est limité au montant des obligations garanties tel que défini à l'Article 2:104, alinéas (1) et (2). La date à prendre en considération est celle à laquelle la durée convenue expire.

Article 2:109: Limitations de la sûreté sans limite de temps

(1) Lorsqu'une durée limitée n'est pas convenue pour la sûreté, la sûreté peut être limitée par l'une ou l'autre partie en notifiant un préavis d'au moins trois mois à l'autre partie. Cette disposition ne s'applique pas si la sûreté est restreinte à la couverture d'obligations particulières ou d'obligations découlant de contrats particuliers.
(2) En vertu du préavis, l'étendue de la sûreté est limitée aux obligations principales garanties qui sont exigibles au moment où la limitation prend effet, ainsi qu'à toutes les obligations accessoires garanties telles que définies à l'Article 2:104, alinéas (1) et (2).

Article 2:110: Responsabilité du créancier

Si, et dans la mesure où, du fait du comportement du créancier, le fournisseur de sûreté ne peut être subrogé dans les droits du créancier contre le débiteur principal ou dans les droits du créancier liés aux sûretés personnelles et réelles au sens large fournies par des tiers, ou ne peut être intégralement remboursé par le débiteur principal ou par des tiers fournisseurs de sûreté, s'il en existe, le créancier est tenu du dommage causé au fournisseur de sûreté.

Article 2:111: Décharge du fournisseur de sûreté par le débiteur principal

(1) Un fournisseur de sûreté qui a donné celle-ci à la requête du débiteur principal ou avec son consentement exprès ou présumé, peut demander à en être déchargé par le débiteur principal
  (a) si le débiteur principal n'a pas exécuté l'obligation garantie quand elle est devenue exigible ou est dans l'impossibilité de payer ou si les actifs du débiteur principal ont été substantiellement réduits; ou
  (b) si le créancier a introduit une action judiciaire contre le fournisseur de sûreté fondée sur celle-ci.
(2) Décharge peut être accordée en fournissant une sûreté adéquate.

Article 2:112: Obligations du fournisseur de sûreté avant exécution

(1) Avant d'exécuter son obligation envers le créancier, le fournisseur de sûreté doit en informer le débiteur principal et solliciter des informations concernant le montant de l'obligation garantie restant à payer et les moyens de défense ou les exceptions qui pourraient être soulevés.
(2) Si le fournisseur de sûreté s'exécute sans avoir sollicité les informations prescrites à l'alinéa (1) ou néglige de faire valoir les moyens de défense que lui a communiqués le débiteur principal ou dont il a connaissance par d'autres sources, il est tenu envers le débiteur principal de réparer le dommage qui en résulte.
(3) Ces dispositions n'affectent pas les droits du fournisseur de sûreté à l'égard du créancier.

Article 2:113: Droits du fournisseur de sûreté après exécution

(1) Si, et dans la mesure où, le fournisseur de sûreté a exécuté les obligations découlant de celle-ci, il peut en réclamer le remboursement au débiteur principal. En outre, le fournisseur de sûreté est subrogé dans les droits du créancier envers le débiteur principal dans la mesure indiquée dans la phrase précédente. Les deux recours peuvent être exercés de façon cumulative.

(2) En cas d'exécution partielle, les droits résiduels du créancier contre le débiteur principal priment les droits dans lesquels le fournisseur de sûreté a été subrogé.

(3) En vertu de la subrogation visée à l'alinéa (1) deuxième phrase, les droits résultant de sûretés personnelles accessoires et autonomes ou de sûretés réelles au sens large sont transmis de plein droit au fournisseur de sûreté, nonobstant toute restriction ou exclusion conventionnelle de la transmissibilité, acceptée par le débiteur principal. Les recours contre les autres fournisseurs de sûreté ne peuvent être exercés que dans les limites de l'Article 1:108.

(4) Lorsque, en raison d'une incapacité, le débiteur principal n'est pas tenu envers le créancier, le fournisseur de sûreté peut néanmoins réclamer le remboursement au débiteur principal à concurrence de son enrichissement. Cette règle s'applique également quand le débiteur principal est une personne morale qui n'a pas pris naissance.

Chapitre 3:
Sûretés personnelles autonomes
(Garanties autonomes/Garanties indépendantes)

Article 3:101: Champ d'application

(1) On ne peut préjuger du caractère autonome d'une sûreté du simple fait d'une référence générale à une obligation sous-jacente (y compris une sûreté personnelle).

(2) Les dispositions du présent Chapitre s'appliquent également aux lettres de crédit stand-by.

Article 3:102: Obligations du fournisseur de sûreté avant l'exécution

(1) Le fournisseur de sûreté est obligé de s'exécuter uniquement si la demande écrite d'exécution est en tous points conforme aux stipulations du contrat de sûreté.

(2) Immédiatement après avoir reçu une demande d'exécution, le fournisseur de sûreté doit en informer le débiteur principal.

(3) Sauf convention contraire, le fournisseur de sûreté peut invoquer les exceptions personnelles dans ses rapports envers le créancier.

(4) Sans délai et au plus tard dans les sept jours ouvrables de la réception d'une demande écrite d'exécution, le fournisseur de sûreté doit

(a) s'exécuter conformément à la demande et en informer immédiatement le débiteur principal; ou

(b) refuser de s'exécuter et en informer immédiatement le créancier et le débiteur principal.

(5) Le fournisseur de sûreté est tenu de réparer tout dommage causé par un manquement aux obligations visées aux alinéas (2) et (4).

Article 3:103: Sûreté personnelle autonome à première demande

(1) Une sûreté personnelle autonome expressément formulée comme étant due à première demande ou formulée en de tels termes qu'il faut en déduire, sans équivoque possible, que tel est le cas, est régie par l'Article 3:102, sous réserve de ce qui est prévu ci-après.

(2) Le fournisseur de sûreté est obligé de s'exécuter uniquement si la demande du créancier est accompagnée d'une déclaration écrite de ce dernier, qui confirme expressément que toutes les conditions auxquelles la sûreté est due sont remplies.
(3) L'Article 3:102, alinéa (3) n'est pas d'application.

Article 3:104: Demande manifestement abusive ou frauduleuse

(1) Dans les hypothèses visées aux Articles 3:102 et 3:103, un fournisseur de sûreté est obligé de satisfaire à la demande d'exécution, à moins qu'il ne soit établi par une preuve évidente que la demande est manifestement abusive ou frauduleuse.
(2) Si les exigences visées à l'alinéa précédent sont remplies, le débiteur principal peut interdire
(a) l'exécution par le fournisseur de sûreté; et
(b) l'émission ou l'usage d'une demande d'exécution par le créancier.

Article 3:105: Droit de réclamation du fournisseur de sûreté

(1) Le fournisseur de sûreté a le droit de réclamer les avantages perçus par le créancier si
(a) les conditions auxquelles était soumise la demande du créancier n'étaient pas remplies ou, par la suite, ont cessé de l'être; ou si
(b) la demande du créancier était manifestement abusive ou frauduleuse.
(2) Le droit du fournisseur de sûreté de réclamer les avantages est soumis à l'Article 4:115 PECL et aux règles générales sur l'enrichissement sans cause.

Article 3:106: Sûretés avec ou sans limitations de durée

(1) Si une durée limitée a été convenue, directement ou indirectement, pour le recours à la sûreté, par exception, le fournisseur de sûreté demeure tenu même après l'expiration de ce délai, pour autant que le créancier ait demandé l'exécution conformément à l'Article 3:102, alinéa (1) ou 3:103 à un moment où il était en droit de le faire et avant l'expiration de la durée limitée de la sûreté. L'Article 2:108, alinéa (3) s'applique moyennant des adaptations appropriées. L'engagement maximal du fournisseur de sûreté est limité au montant que le créancier aurait pu demander au moment où le délai est venu à expiration.
(2) Lorsqu'une durée limitée n'est pas convenue pour la sûreté, le fournisseur de sûreté peut fixer une telle limite en donnant un préavis d'au moins trois mois à l'autre partie. L'engagement du fournisseur de sûreté est limité au montant que le créancier aurait pu demander à la date d'expiration fixée par le fournisseur de sûreté. Les dispositions qui précèdent ne s'appliquent pas si la sûreté est donnée à des fins particulières.

Article 3:107: Cession de la sûreté

Le droit du créancier de demander l'exécution à un fournisseur de sûreté peut être cédé conventionnellement, excepté dans le cas d'une sûreté personnelle autonome à première demande.

Article 3:108: Droits du fournisseur de sûreté après l'exécution

L'Article 2:113 s'applique moyennant des adaptations appropriées aux droits que le fournisseur de sûreté peut exercer après l'exécution.

Chapitre 4:
Règles particulières applicables aux sûretés personnelles fournies par des consommateurs

Article 4:101: Champ d'application
(1) Sous réserve de ce qui est dit à l'alinéa (2), le présent Chapitre est applicable lorsqu'une sûreté est fournie par un consommateur (Article 1:101, lettre (g)).
(2) Le présent Chapitre n'est pas applicable si
   (a) le créancier est aussi un consommateur; ou si
   (b) le consommateur fournisseur de sûreté est apte à exercer une influence déterminante sur le débiteur principal lorsque celui-ci n'est pas une personne physique.

Article 4:102: Règles applicables
(1) Les sûretés personnelles visées par le présent Chapitre sont régies par les règles des Chapitres 1 et 2, sous réserve de ce qui est prévu dans le présent Chapitre.
(2) Les parties ne peuvent déroger aux règles de la présente Partie au préjudice du fournisseur de sûreté.

Article 4:103: Obligation précontractuelle d'information du créancier
(1) Avant que la sûreté ne soit accordée, le créancier doit expliquer au candidat fournisseur de sûreté
   (a) l'effet général de la sûreté envisagée; et
   (b) les risques particuliers auxquels, au regard de la situation financière du débiteur principal, le fournisseur de sûreté peut, compte tenu des informations accessibles au créancier, être exposé.
(2) Si le créancier sait ou a des raisons de croire qu'en raison d'une relation particulière de confiance entre le débiteur principal et le fournisseur de sûreté, il existe un risque significatif que le fournisseur de sûreté n'agisse pas librement ou ne soit pas correctement informé, le créancier doit s'assurer que le fournisseur de sûreté a reçu un avis indépendant.
(3) Si l'information ou l'avis indépendant requis aux alinéas précédents n'est pas donné au moins cinq jours avant que le fournisseur de sûreté ne signe son offre ou le contrat de sûreté, l'offre peut être retirée ou le contrat annulé par le fournisseur de sûreté dans un délai raisonnable après réception de l'information ou de l'avis indépendant. A cette fin, un délai de cinq jours ouvrables est considéré comme constituant un délai raisonnable, sauf circonstances particulières.
(4) Si, contrairement à l'alinéa (1) ou (2), aucune information ou aucun avis indépendant n'est donné, l'offre peut être retirée ou le contrat annulé par le fournisseur de sûreté à tout moment.
(5) Si le fournisseur de sûreté retire son offre ou annule le contrat conformément aux alinéas précédents, la restitution des avantages reçus par les parties est régie par l'Article 4:115 PECL ou par les règles générales sur l'enrichissement sans cause.

Article 4:104: Contrats de sûreté négociés en dehors des établissements commerciaux

Les dispositions de la Directive du Conseil 85/577/CEE du 20 décembre 1985 concernant la protection des consommateurs dans le cas de contrats négociés en dehors des établissements commerciaux sont applicables aux sûretés soumises au présent Chapitre.

Article 4:105: Forme

Le contrat de sûreté doit être fait par écrit et doit être signé par le fournisseur de sûreté. Un contrat de sûreté qui ne répond pas aux exigences contenues dans la phrase qui précède est nul.

Article 4:106: Nature de l'engagement du fournisseur de sûreté

Lorsque le présent Chapitre s'applique:

(a) un accord tendant à créer une sûreté sans plafond maximal, qu'il s'agisse d'un cautionnement global (Article 1:101, lettre (f)) ou non, est considéré comme créant une sûreté accessoire dont le plafond est déterminé conformément à l'Article 2:102, alinéa (3);

(b) l'engagement du fournisseur d'une sûreté accessoire est subsidiaire au sens de l'Article 2:106, sauf convention contraire expresse; et

(c) un accord tendant à créer une sûreté autonome est considéré comme créant une sûreté accessoire, dès lors que les conditions de cette dernière sont remplies.

Article 4:107: Obligations d'information annuelle du créancier

(1) Annuellement, avec l'accord du débiteur principal, le créancier doit informer le fournisseur de sûreté des montants garantis de l'obligation principale, intérêts et autres obligations accessoires dus par le débiteur principal à la date de l'information. Une fois donné, l'accord du débiteur principal est irrévocable.

(2) L'Article 2:107, alinéas (3) et (4) s'applique moyennant des adaptations appropriées.

Article 4:108: Limitation d'une Sûreté avec durée limitée

(1) Un fournisseur d'une sûreté convenue avec durée limitée peut, mais trois ans seulement après la prise d'effet de la sûreté, limiter ses effets en donnant un préavis d'au moins trois mois au créancier. Cette disposition ne s'applique pas si la sûreté est destinée à couvrir des obligations particulières ou des obligations découlant de contrats particuliers. Le créancier doit informer le débiteur principal sans délai.

(2) En vertu du préavis, l'étendue de la sûreté est limitée de manière telle que définie par l'Article 2:109, alinéa (2).

German*
Persönliche Sicherheiten

Kapitel 1:
Allgemeine Vorschriften

Artikel 1:101: Definitionen

Für die Zwecke dieses Teils gilt:

(a) Eine abhängige persönliche Sicherheit (Bürgschaft) ist eine vertragliche Verpflichtung eines Sicherungsgebers, an den Gläubiger eine Zahlung vorzunehmen oder eine sonstige Leistung zu erbringen oder Schadensersatz zu leisten, die eingegangen wurde, um eine dem Gläubiger geschuldete gegenwärtige oder zukünftige Verpflichtung eines Schuldners zu sichern, und die von der Gültigkeit, den Bedingungen und dem Umfang der letzteren Verpflichtung abhängt;

(b) Eine unabhängige persönliche Sicherheit (Garantie) ist eine von einem Sicherungsgeber zu Sicherungszwecken eingegangene vertragliche Verpflichtung, an den Gläubiger eine Zahlung vorzunehmen oder eine sonstige Leistung zu erbringen oder Schadensersatz zu leisten, hinsichtlich derer ausdrücklich oder schlüssig vereinbart wird, dass sie nicht von der Gültigkeit, den Bedingungen oder dem Umfang der Verpflichtung einer anderen Person gegenüber dem Gläubiger abhängt;

(c) Der Sicherungsgeber ist die Person, welche die Verpflichtungen aus der persönlichen Sicherheit gegenüber dem Gläubiger eingeht;

(d) Der Schuldner ist die Person, welche die gesicherte Verpflichtung schuldet, sofern eine solche vorhanden ist;

(e) Bei einer Gesamtschuld zu Sicherungszwecken handelt ein Gesamtschuldner als Sicherungsgeber, wenn er sich vornehmlich zu Sicherungszwecken gegenüber dem Gläubiger verpflichtet;

(f) Eine Globalsicherheit (Globalbürgschaft) ist eine abhängige persönliche Sicherheit, die vereinbarungsgemäß alle Verpflichtungen des Schuldners gegenüber dem Gläubiger oder den Debetsaldo eines Kontokorrents abdecken soll, oder eine Sicherheit ähnlichen Inhalts;

(g) Ein Verbraucher ist jede natürliche Person, die vornehmlich zu Zwecken handelt, die mit dem Gewerbe, Geschäft oder Beruf dieser Person nicht zusammenhängen;

(h) Dingliche Sicherheiten sind Sicherheiten an Rechtsobjekten aller Art, ob an beweglichen oder unbeweglichen Sachen oder an körperlichen oder unkörperlichen Gegenständen.

Artikel 1:102: Anwendungsbereich

(1) Die Regeln dieses Teils gelten für alle Arten von vertraglichen persönlichen Sicherheiten, insbesondere

(a) für Bürgschaften (abhängige persönliche Sicherheiten) einschließlich bindender Patronatserklärungen (Artikel 1:101 Buchstabe (a));

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* Übersetzt von Ole Böger, LL.M.

(b) für Garantien (unabhängige persönliche Sicherheiten) einschließlich Stand-by Akkreditive (Stand-by Letters of Credit) (Artikel 1:101 Buchstabe (b)); und
(c) für eine Gesamtschuld zu Sicherungszwecken (Artikel 1:101 Buchstabe (e)).

(2) Die Regeln dieses Teils sind nicht anwendbar auf Versicherungsverträge. Sie gelten für Kautionsversicherungsverträge nur, wenn und soweit der Versicherer in schriftlicher Form eine Garantie zugunsten des Gläubigers übernimmt.

(3) Dieser Teil berührt nicht die Regeln über das Aval und ein zu Sicherungszwecken gegebenes Indossament eines begebbaren Wertpapiers, ist jedoch anzuwenden auf Sicherheiten für Verpflichtungen, die sich aus einem solchen Aval oder einem zu Sicherheitszwecken gegebenen Indossament ergeben.

Artikel 1:103: Vertragsfreiheit

Die Parteien können die Anwendung jeder der Bestimmungen dieses Teils ausschließen oder von ihnen abweichen oder ihre Wirkungen ändern, außer soweit in Kapitel 4 dieses Teils etwas anderes bestimmt ist.

Artikel 1:104: Annahme durch den Gläubiger

Ein Angebot einer Sicherheit gilt als vom Gläubiger angenommen, sobald dieses Angebot dem Gläubiger zugeht, sofern nicht das Angebot eine ausdrückliche Annahme verlangt oder der Gläubiger es ohne unangemessene Verzögerung ablehnt oder sich Bedenkzeit ausbittet.

Artikel 1:105: Auslegung

Bestehen Zweifel über die Bedeutung einer Bestimmung einer Sicherheit und ist diese Bestimmung von einem entgeltlich handelnden Sicherungsgeber verwendet worden, ist eine Auslegung dieser Bestimmung zu Lasten des Sicherungsgebers vorzuziehen.

Artikel 1:106: Gesamtschuld zu Sicherungszwecken

Auf eine Gesamtschuld zu Sicherungszwecken (Artikel 1:101 Buchstabe (e)) sind die Regeln der Kapitel 1 und 4 sowie hilfsweise die Regeln über die Mehrheit von Schuldnern (PECL Kapitel 10 Abschnitt 1) anwendbar.

Artikel 1:107: Mehrheit von Sicherungsgebern: Gesamtschuldnerische Haftung gegenüber dem Gläubiger

(1) Soweit mehrere persönliche Sicherungsgeber die Sicherung derselben Verpflichtung oder desselben Teils einer Verpflichtung oder Sicherheiten für denselben Sicherungszweck übernommen haben, übernimmt jeder Sicherungsgeber in den Grenzen der von ihm gegenüber dem Gläubiger eingegangenen Verpflichtung gemeinsam mit den übrigen Sicherungsgebern eine gesamtschuldnerische Haftung. Dies gilt auch, wenn diese Sicherungsgeber ihre Sicherheiten unabhängig voneinander übernommen haben.

(2) Absatz (1) gilt mit den gebotenen Anpassungen, falls zusätzlich zu einer persönlichen Sicherheit vom Schuldner oder von einem Dritten eine dingliche Sicherheit (Artikel 1:101 Buchstabe (h)) bestellt wurde.

Artikel 1:108: Mehrheit von Sicherungsgebern: Rückgriff im Innenverhältnis

(1) In den von Artikel 1:107 geregelten Fällen bestimmt sich der Rückgriff zwischen mehreren persönlichen Sicherungsgebern oder zwischen persönlichen und dinglichen Sicherungsgebern (Artikel 1:101 Buchstabe (h)) vorbehaltlich der nachfolgenden Absätze nach PECL Artikel 10:106.

(2) Vorbehaltlich des Absatzes (3) bestimmt sich der verhältnismäßige Anteil jedes Sicherungsgebers für die Zwecke von PECL Artikel 10:106 nach den folgenden Regeln:
   (a) Sofern die Sicherungsgeber nichts anderes vereinbart haben, haftet jeder Sicherungsgeber gegenüber den anderen danach, in welchem Verhältnis der Höchstbetrag des von diesem Sicherungsgeber eingegangenen Risikos zur Summe der Höchstbeträge der von allen Sicherungsgebern eingegangenen Risiken stand. Maßgebend ist der Zeitpunkt der Begründung der letzten Sicherheit.
   (b) Bei persönlichen Sicherheiten bestimmt sich der Höchstbetrag des Risikos nach dem vereinbarten Höchstbetrag der Sicherheit. Fehlt es an der Vereinbarung eines Höchstbetrages, dann ist die Höhe der gesicherten Verpflichtung oder, sofern ein Kontokorrent gesichert wurde, der Kreditrahmen maßgeblich. Ist die gesicherte Verpflichtung nicht begrenzt, dann ist ihr Schlussstand entscheidend.
   (c) Bei dinglichen Sicherheiten bestimmt sich der Höchstbetrag des Risikos nach dem vereinbarten Höchstbetrag der Sicherheit. Fehlt es an der Vereinbarung eines Höchstbetrages, dann ist der Wert des Sicherungsgutes maßgeblich.
   (d) Ist der Höchstbetrag nach Buchstabe (b) Satz 1 oder jeweils entweder der Höchstbetrag oder der Wert nach Buchstabe (c) größer als die Höhe der gesicherten Verpflichtung zum Zeitpunkt der Begründung der letzten Sicherheit, dann bestimmt die Letztere den Höchstbetrag des Risikos.
   (e) Im Fall einer unbegrenzten persönlichen Sicherheit zur Sicherung eines unbegrenzten Kredits (Buchstabe (b) letzter Satz) ist der Höchstbetrag des Risikos anderer, begrenzter persönlicher oder dinglicher Sicherheiten, welche den Schlussstand des gesicherten Kredits übersteigen, auf Letzteren begrenzt.

(3) Die vorstehenden Bestimmungen gelten nicht für vom Schuldner gewährte dingliche Sicherheiten und für Sicherungsgeber, die zu dem Zeitpunkt, als der Gläubiger befriedigt wurde, dem Gläubiger nicht hafteten.

Artikel 1:109: Mehrheit von Sicherungsgebern: Rückgriff gegen den Schuldner

(1) Auf jeden Sicherungsgeber, der einen Rückgriffsanspruch eines anderen Sicherungsgebers erfüllt hat, gehen in diesem Umfang die nach Artikel 2:113 Absatz (1) und (3) erlangten Rechte des anderen Sicherungsgebers gegen den Schuldner einschließlich vom Schuldner gewährter dinglicher Sicherungsrechte über. Artikel 2:110 gilt mit den gebotenen Anpassungen.

(2) Nimmt ein Sicherungsgeber den Schuldner aus seinen nach Artikel 2:113 Absatz (1) und (3) oder dem vorstehenden Absatz erlangten Rechten einschließlich vom Schuldner gewährter dinglicher Sicherungsrechte auf Rückgriff in Anspruch, so hat jeder Sicherungsgeber einen Anspruch auf seinen nach Artikel 1:108 Absatz (2) und PECL Artikel 10:106 zu bestimmenden Anteil an den Leistungen, die der Sicherungsgeber vom Schuldner erlangt hat. Artikel 2:110 gilt mit den gebotenen Anpassungen.

(3) Soweit nicht ausdrücklich das Gegenteil bestimmt ist, gelten die vorstehenden Bestimmungen nicht für vom Schuldner gewährte dingliche Sicherheiten.

Artikel 1:110: Subsidiäre Anwendung der Regeln über die Gesamtschuld

Falls und soweit die Bestimmungen dieses Teils nicht anwendbar sind, gelten ergänzend die Bestimmungen über die Mehrheit von Schuldnern in PECL Artikel 10:106 bis 10:111.

Kapitel 2:
Abhängige persönliche Sicherheiten (Bürgschaften)

Artikel 2:101: Vermutung für eine Bürgschaft

(1) Eine als Sicherheit eingegangene Verpflichtung zur Zahlung, zur Erbringung einer sonstigen Leistung oder zur Leistung von Schadensersatz an den Gläubiger ist als Bürgschaft im Sinne des Artikels 1:101 Buchstabe (a) anzusehen, wenn nicht der Gläubiger nachweisen kann, dass ein anderes vereinbart wurde.
(2) Bei einer bindenden Patronatserklärung wird vermutet, dass sie eine Bürgschaft ist.

Artikel 2:102: Bedingungen und Umfang der Verpflichtungen des Bürgen

(1) Die Gültigkeit, die Bedingungen und der Umfang der Verpflichtung des Bürgen hängen von der Gültigkeit, den Bedingungen und dem Umfang der Verpflichtung des Schuldners gegenüber dem Gläubiger ab.
(2) Die Verpflichtung des Bürgen übersteigt nicht die gesicherte Verpflichtung. Anderes gilt nur, wenn die Verpflichtungen des Schuldners herabgesetzt werden oder entfallen
   (a) in einem Insolvenzverfahren;
   (b) in anderer Weise, insbesondere aufgrund von Verhandlungen oder durch gerichtliche Reduzierung, als Ergebnis des Unvermögens des Schuldners zur Erfüllung aufgrund von Insolvenz; oder
   (c) von Rechts wegen aufgrund von Ereignissen, welche die Person des Schuldners betreffen.
(3) Außer im Fall einer Globalbürgschaft (Artikel 1:101 Buchstabe (f)) ist die Verpflichtung des Bürgen, wenn ein Umfang für die Bürgschaft nicht festgelegt wurde und nicht auf Grund der Vereinbarung der Parteien bestimmt werden kann, auf den Umfang der gesicherten Verpflichtungen zum Zeitpunkt des Wirksamwerdens der Bürgschaft begrenzt.
(4) Außer im Fall einer Globalbürgschaft (Artikel 1:101 Buchstabe (f)) hat eine Vereinbarung zwischen Gläubiger und Schuldner, den Umfang der gesicherten Verpflichtungen zu erhöhen, ihre Bedingungen zu verschärfen oder ihr Fälligkeitsdatum vorzuverlegen, welche nach Wirksamwerden der Verpflichtung des Bürgen getroffen wurde, keine Auswirkungen auf dessen Verpflichtung.

Artikel 2:103: Dem Bürgen zustehende Verteidigungsmittel des Schuldners

(1) Gegenüber dem Gläubiger kann sich der Bürge auf jedes Verteidigungsmittel des Schuldners in Bezug auf das Bestehen, die Gültigkeit, die Durchsetzbarkeit und die Bedingungen der gesicherten Verpflichtung berufen, auch wenn es dem Schuldner aufgrund von eigenen Handlungen oder Unterlassungen nach Wirksamwerden der Bürgschaft nicht mehr zur Verfügung steht.
(2) Der Bürge kann sich nicht auf das Zurückbehaltungsrecht des Schuldners nach PECL Artikel 9:201 berufen, sofern sich der Schuldner nicht länger auf dieses Recht berufen kann.

(3) Der Bürge kann sich nicht auf eine fehlende Geschäftsfähigkeit des Schuldners, sei es einer natürlichen oder einer juristischen Person, oder die Nichtexistenz des Schuldners als juristische Person berufen, sofern die maßgeblichen Umstände dem Bürgen bekannt waren, als die Bürgschaft wirksam wurde.
(4) Solange der Schuldner berechtigt ist, den Vertrag, der der gesicherten Verpflichtung zugrunde liegt, aus einem anderen Grunde als den in dem vorstehenden Absatz genannten anzufechten, und dieses Recht nicht ausgeübt hat, kann der Bürge die Erfüllung verweigern.
(5) Der vorstehende Absatz gilt mit den gebotenen Anpassungen, wenn hinsichtlich der gesicherten Verpflichtung eine Aufrechnung möglich ist.

Artikel 2:104: Deckung einer Bürgschaft

(1) Die Bürgschaft deckt im Rahmen ihres Höchstbetrages, soweit vorhanden, nicht nur die gesicherte Hauptverpflichtung, sondern auch Nebenverpflichtungen des Schuldners gegenüber dem Gläubiger, insbesondere
  (a) Vertragszinsen und Verzugszinsen;
  (b) Schadensersatzansprüche, eine Vertragsstrafe oder eine vereinbarte Zahlung wegen Nichterfüllung durch den Schuldner; und
  (c) angemessene Kosten der außergerichtlichen Durchsetzung dieser Ansprüche.
(2) Die Kosten von gerichtlichen Verfahren und Zwangsvollstreckungsmaßnahmen gegen den Schuldner werden gedeckt, sofern der Bürge rechtzeitig über die Absicht des Gläubigers informiert wurde, derartige Verfahren oder Maßnahmen einzuleiten, so dass der Bürge in der Lage gewesen wäre, die Entstehung dieser Kosten abzuwenden.
(3) Eine Globalbürgschaft (Artikel 1:101 Buchstabe (f)) deckt nur Verpflichtungen, die aus Verträgen zwischen dem Schuldner und dem Gläubiger entstanden sind.

Artikel 2:105: Gesamtschuldnerische Haftung des Bürgen

Sofern nichts anderes vereinbart wurde (Artikel 2:106), haften Schuldner und Bürge gesamtschuldnerisch, und demgemäß kann der Gläubiger gesamtschuldnerische Erfüllung vom Schuldner oder innerhalb der Grenzen der Bürgschaft vom Bürgen wählen.

Artikel 2:106: Subsidiäre Haftung des Bürgen

(1) Sofern vereinbart, kann sich der Bürge gegenüber dem Gläubiger darauf berufen, dass er nur subsidiär haftet. Eine bindende Patronatserklärung begründet im Zweifel nur eine subsidiäre Haftung.
(2) Vorbehaltlich des Absatzes (3) muss der Gläubiger, bevor er Erfüllung vom Bürgen verlangen kann, angemessene Bemühungen unternommen haben, Befriedigung zu erlangen vom Schuldner oder von anderen Sicherungsgebern, soweit vorhanden, die eine gesamtschuldnerische persönliche oder dingliche Sicherheit für dieselbe Verpflichtung übernommen haben.
(3) Es ist nicht erforderlich, dass der Gläubiger nach dem vorstehenden Absatz versucht, vom Schuldner und von jedem anderen Sicherungsgeber Befriedigung zu erlangen, falls und soweit es offensichtlich unmöglich oder außerordentlich schwierig ist, Befriedigung von der jeweiligen Person zu erlangen. Diese Ausnahme ist insbesondere anwendbar, falls und soweit ein Insolvenz- oder ähnliches Verfahren gegen die jeweilige Person eröffnet wurde, oder wenn die Eröffnung eines solchen Verfahrens mangels genügenden Vermögens scheiterte, außer wenn eine von dieser Person gewährte dingliche Sicherheit für dieselbe Verpflichtung verfügbar ist.

Artikel 2:107: Mitteilungspflichten des Gläubigers

(1) Der Gläubiger muss unverzüglich dem Sicherungsgeber Mitteilung machen, falls der Schuldner seine Pflichten nicht erfüllt oder zahlungsunfähig wird, und bei Verlängerung der Fälligkeit der gesicherten Verpflichtung; in dieser Mitteilung müssen die vom Schuldner zum Zeitpunkt der Mitteilung geschuldeten gesicherten Beträge der Hauptverpflichtung, der Zinsen und anderer Nebenverpflichtungen angegeben werden. Eine erneute Mitteilung wegen einer weiteren Nichterfüllung braucht nicht vor Ablauf von drei Monaten seit der vorhergehenden Mitteilung zu erfolgen. Eine Mitteilung ist nicht erforderlich, wenn sich die Nichterfüllung nur auf Nebenverpflichtungen des Schuldners beschränkt, sofern nicht der Gesamtbetrag aller nicht erfüllten gesicherten Verpflichtungen auf fünf Prozent des Betrages der ausstehenden gesicherten Verpflichtungen angestiegen ist.

(2) Außerdem hat bei einer Globalbürgschaft (Artikel 1:101 Buchstabe (f)) der Gläubiger dem Bürgen jede vereinbarte Erhöhung mitzuteilen,
   (a) wenn diese Erhöhung ausgehend von der Begründung der Sicherheit 20 Prozent des Betrages erreicht, der zu jenem Zeitpunkt in dieser Form gesichert war; und
   (b) wenn der gesicherte Betrag um weitere 20 Prozent erhöht wird im Vergleich zu dem gesicherten Betrag zu dem Zeitpunkt, an dem die letzte Mitteilung nach diesem Absatz gemacht wurde oder hätte gemacht werden sollen.

(3) Die Absätze (1) und (2) sind nicht anwendbar, wenn und soweit der Bürge die verlangten Informationen kennt oder vernünftigerweise angenommen werden kann, dass der Bürge sie kennt.

(4) Unterlässt oder verzögert der Gläubiger eine nach diesem Artikel erforderliche Mitteilung, so haftet er dem Bürgen für die durch seine Unterlassung oder Verzögerung verursachten Schäden.

Artikel 2:108: Befristung für die Geltendmachung der Bürgschaft

(1) Ist in direkter oder indirekter Weise eine Frist für die Geltendmachung einer Bürgschaft vereinbart, die eine gesamtschuldnerische Haftung des Bürgen begründet, dann haftet dieser nicht über den Ablauf der vereinbarten Frist hinaus. Dagegen haftet der Bürge weiter, wenn der Gläubiger nach Fälligkeit der gesicherten Verpflichtung, aber vor dem Ablauf der Frist für die Sicherheit Erfüllung durch den Bürgen verlangt hatte.

(2) Ist in direkter oder indirekter Weise eine Frist für die Geltendmachtung einer Bürgschaft vereinbart, die eine subsidiäre Haftung des Bürgen begründet, dann haftet dieser nicht über den Ablauf der vereinbarten Frist hinaus. Dagegen haftet der Bürge weiter, wenn der Gläubiger
   (a) nach Fälligkeit der gesicherten Verpflichtung, aber vor Ablauf der Frist den Bürgen über seine Absicht, Erfüllung der Bürgschaft zu verlangen, informiert und versichert hat, dass er begonnen hat, die nach Artikel 2:106 Absatz (2) und (3) erforderlichen Bemühungen zur Erlangung der Befriedigung zu unternehmen; und
   (b) den Bürgen, sofern vom Letzteren verlangt, alle sechs Monate über den Stand dieser Bemühungen informiert.

(3) Werden gesicherte Verpflichtungen mit dem Ablauf der Frist für die Bürgschaft oder innerhalb von 14 Tagen davor fällig, dann darf das Erfüllungsverlangen oder die Information gemäß den Absätzen (1) und (2) früher als in den Absätzen (1) und (2) bestimmt erfolgen, allerdings nicht eher als 14 Tage vor Ablauf der Frist für die Bürgschaft.

(4) Hat der Gläubiger die nach den vorstehenden Absätzen gebotenen Handlungen vorgenommen, so ist der Höchstbetrag der Haftung des Bürgen begrenzt auf den nach Artikel 2:104

Absatz (1) und (2) bestimmten Betrag der gesicherten Verpflichtungen. Maßgebend ist der Zeitpunkt, an dem die vereinbarte Frist abläuft.

Artikel 2:109: Beschränkung einer Bürgschaft ohne Befristung

(1) Ist keine Befristung für eine Bürgschaft vereinbart worden, so kann die Bürgschaft durch jeden Beteiligten durch Kündigung gegenüber der anderen Partei mit einer Kündigungsfrist von mindestens drei Monaten beschränkt werden. Der vorstehende Satz findet keine Anwendung auf Bürgschaften, die nur bestimmte Verpflichtungen oder Verpflichtungen aus bestimmten Verträgen sichern.
(2) Durch die Kündigung wird der Umfang der Bürgschaft beschränkt auf gesicherte Hauptverpflichtungen, die zu dem Zeitpunkt, an dem die Kündigung wirksam wird, fällig sind, sowie die nach Artikel 2:104 Absatz (1) und (2) zu bestimmenden gesicherten Nebenverpflichtungen.

Artikel 2:110: Haftung des Gläubigers

Wenn und soweit aufgrund des Verhaltens des Gläubigers der Bürge nicht die Rechte des Gläubigers gegen den Schuldner und die dem Gläubiger von Dritten gewährten persönlichen und dinglichen Sicherungsrechte erlangen kann oder vom Schuldner oder von Drittsicherungsgebern, soweit vorhanden, nicht vollständig Ersatz erlangen kann, haftet der Gläubiger für den dem Bürgen verursachten Schaden.

Artikel 2:111: Freistellung des Bürgen durch den Schuldner

(1) Ein Bürge, der die Bürgschaft auf Verlangen des Schuldners oder mit dessen ausdrücklicher oder mutmaßlicher Zustimmung übernommen hat, kann Freistellung durch den Schuldner verlangen,
   (a) falls der Schuldner die gesicherte Verpflichtung bei Fälligkeit nicht erfüllt hat oder zahlungsunfähig ist oder wenn das Vermögen des Schuldners sich erheblich verringert hat; oder
   (b) falls der Gläubiger den Bürgen aus der Bürgschaft verklagt hat.
(2) Eine Freistellung kann durch Leistung einer angemessenen Sicherheit gewährt werden.

Artikel 2:112: Pflichten des Bürgen vor Erfüllung

(1) Vor Erfüllung an den Gläubiger muss der Bürge den Schuldner benachrichtigen und Informationen über den ausstehenden Betrag der gesicherten Verpflichtung und über Verteidigungsmittel oder Gegenansprüche gegen sie einfordern.
(2) Erfüllt der Bürge ohne die Anfrage nach Absatz (1) oder unterlässt er es, sich auf Verteidigungsmittel zu berufen, die ihm vom Schuldner mitgeteilt wurden oder die ihm anderweitig bekannt sind, so haftet er dem Schuldner für den entstandenen Schaden.
(3) Die Rechte des Bürgen gegen den Gläubiger bleiben unberührt.

Artikel 2:113: Ansprüche des Bürgen nach Erfüllung

(1) Wenn und soweit der Bürge die Bürgschaftsverpflichtung erfüllt hat, kann er Ersatz vom Schuldner verlangen. Zusätzlich gehen in dem im vorstehenden Satz bezeichneten Umfang die Rechte des Gläubigers gegen den Schuldner auf ihn über. Diese beiden Ansprüche bestehen nebeneinander.

(2) Im Fall einer teilweisen Erfüllung haben die verbleibenden Teile der Rechte des Gläubigers gegen den Schuldner Vorrang gegenüber den Rechten, die auf den Bürgen übergegangen sind.
(3) Kraft des Rechtsübergangs gemäß Absatz (1) Satz 2 gehen abhängige und unabhängige persönliche und dingliche Sicherungsrechte von Rechts wegen auf den Bürgen über, und zwar selbst dann, wenn die Übertragbarkeit vom Schuldner vertraglich beschränkt oder ausgeschlossen wurde. Rechte gegen andere Sicherungsgeber können nur in den Grenzen des Artikels 1:108 ausgeübt werden.
(4) Haftet der Schuldner aufgrund mangelnder Geschäftsfähigkeit nicht gegenüber dem Gläubiger, so kann der Bürge dennoch Ersatz vom Schuldner in der Höhe von dessen Bereicherung verlangen. Dies gilt auch, wenn der Schuldner als juristische Person nicht wirksam entstanden ist.

Kapitel 3:
Unabhängige persönliche Sicherheiten (Garantien)

Artikel 3:101: Anwendungsbereich
(1) Die Unabhängigkeit einer Garantie wird nicht durch einen lediglich allgemeinen Hinweis auf eine zugrunde liegende Verpflichtung (einschließlich einer persönlichen Sicherheit) berührt.
(2) Die Bestimmungen dieses Kapitels sind auch anwendbar auf Stand-by Akkreditive (Stand-by Letters of Credit).

Artikel 3:102: Pflichten des Garanten vor Erfüllung
(1) Der Garant ist zur Erfüllung nur verpflichtet, wenn das schriftliche Erfüllungsverlangen genau die in der Garantie festgelegten Bedingungen erfüllt.
(2) Der Garant muss unmittelbar nach Empfang eines Erfüllungsverlangens den Schuldner vom Empfang des Verlangens benachrichtigen.
(3) Soweit nicht anders vereinbart, kann sich der Garant auf Verteidigungsmittel berufen, die ihm gegenüber dem Gläubiger zustehen.
(4) Der Garant muss unverzüglich, spätestens binnen sieben Werktagen ab Empfang eines schriftlichen Erfüllungsverlangens
  (a) gemäß dem Verlangen erfüllen und unverzüglich den Schuldner benachrichtigen; oder
  (b) die Erfüllung ablehnen und unverzüglich den Gläubiger und den Schuldner benachrichtigen.
(5) Der Garant haftet für jeden Schaden, der durch eine Verletzung der Pflichten nach den Absätzen (2) und (4) verursacht wird.

Artikel 3:103: Garantie auf erstes Anfordern
(1) Eine Garantie, die als auf erstes Anfordern fällig bezeichnet wird oder die so formuliert ist, dass dies eindeutig angenommen werden kann, unterliegt Artikel 3:102, soweit nachfolgend nichts anderes bestimmt wird.
(2) Der Garant ist nur zur Erfüllung verpflichtet, wenn dem Verlangen des Gläubigers eine schriftliche Erklärung des Gläubigers beigefügt ist, in welcher er ausdrücklich bestätigt, dass sämtliche Voraussetzungen für die Fälligkeit der Garantie gegeben sind.
(3) Artikel 3:102 Absatz (3) findet keine Anwendung.

Artikel 3:104: Offensichtlich missbräuchliches oder betrügerisches Verlangen

(1) In den Fällen der Artikel 3:102 und 3:103 ist der Garant verpflichtet, einem Erfüllungsverlangen nachzukommen, sofern nicht durch präsente Beweismittel nachgewiesen ist, dass das Verlangen offensichtlich missbräuchlich oder betrügerisch ist.
(2) Sind die Voraussetzungen des vorstehenden Absatzes gegeben, so kann der Schuldner untersagen,
   (a) dass der Garant erfüllt; und
   (b) dass der Gläubiger ein Erfüllungsverlangen ausstellt oder gebraucht.

Artikel 3:105: Anspruch des Garanten auf Rückgewähr der Leistung

(1) Der Garant kann Rückgewähr seiner Leistung vom Gläubiger verlangen, wenn
   (a) die Bedingungen für das Verlangen durch den Gläubiger nicht erfüllt waren oder nachträglich wegfielen; oder
   (b) das Verlangen des Gläubigers offensichtlich missbräuchlich oder betrügerisch war.
(2) Der Anspruch des Garanten auf Rückgewähr seiner Leistung richtet sich nach PECL Artikel 4:115 und den allgemeinen Bestimmungen über die ungerechtfertigte Bereicherung.

Artikel 3:106: Garantien mit oder ohne Befristungen

(1) Ist für eine Garantie in direkter oder indirekter Weise eine Frist für deren Geltendmachung vereinbart, dann haftet der Garant nur dann über den Ablauf der vereinbarten Frist hinaus, wenn der Gläubiger zu einem Zeitpunkt, der vor Ablauf der Frist lag und zu dem ein Anspruch auf Erfüllung bestand, entsprechend den Artikeln 3:102 Absatz (1) und 3:103 Erfüllung verlangt hatte. Artikel 2:108 Absatz (3) gilt mit den gebotenen Anpassungen. Der Höchstbetrag der Haftung des Garanten ist begrenzt auf den Betrag, den der Gläubiger zum Zeitpunkt des Ablaufs der Frist verlangen konnte.
(2) Ist für eine Garantie keine Befristung vereinbart worden, so kann der Garant durch Erklärung gegenüber der anderen Partei unter Beachtung einer Kündigungsfrist von mindestens drei Monaten eine solche Frist festsetzen. Die Haftung des Garanten ist begrenzt auf den Betrag, den der Gläubiger zu dem vom Garanten bestimmten Zeitpunkt verlangen konnte. Der vorstehende Satz findet keine Anwendung auf Garantien, die zu bestimmten Sicherungszwecken eingegangen wurden.

Artikel 3:107: Übertragung einer Garantie

Der Anspruch des Gläubigers gegen den Garanten auf Erfüllung kann durch Vertrag übertragen werden, außer im Fall einer Garantie auf erstes Anfordern.

Artikel 3:108: Ansprüche des Garanten nach Erfüllung

Artikel 2:113 gilt mit den gebotenen Anpassungen auch für die Ansprüche, die dem Garanten nach Erfüllung zustehen.

Kapitel 4:
Besondere Bestimmungen für persönliche Sicherheiten von Verbrauchern

Artikel 4:101: Anwendungsbereich

(1) Vorbehaltlich des Absatzes (2) gilt dieses Kapitel für persönliche Sicherheiten, die von einem Verbraucher (Artikel 1:101 Buchstabe (g)) übernommen wurden.

(2) Dieses Kapitel ist nicht anwendbar, wenn
  (a) der Gläubiger ebenfalls ein Verbraucher ist; oder
  (b) der Verbraucher-Sicherungsgeber in der Lage ist, maßgeblichen Einfluss auf den Schuldner auszuüben, sofern es sich bei dem Schuldner nicht um eine natürliche Person handelt.

Artikel 4:102: Anwendbare Bestimmungen

(1) Für persönliche Sicherheiten, die diesem Kapitel unterliegen, gelten die Regeln der Kapitel 1 und 2, soweit in diesem Kapitel nichts anderes bestimmt wird.
(2) Die Parteien dürfen nicht zum Nachteil des Sicherungsgebers von den Regeln dieses Teils abweichen.

Artikel 4:103: Vorvertragliche Informationspflicht des Gläubigers

(1) Bevor die Sicherheit gewährt wird, hat der Gläubiger den prospektiven Sicherungsgeber aufzuklären über
  (a) die allgemeine Wirkung der beabsichtigten Sicherheit; und
  (b) die spezifischen Risiken, denen der Sicherungsgeber auf der Grundlage der dem Gläubiger verfügbaren Informationen ausgesetzt sein könnte im Hinblick auf die finanzielle Lage des Schuldners.
(2) Falls der Gläubiger weiß oder Grund hat zu wissen, dass aufgrund eines Vertrauensverhältnisses zwischen Schuldner und Sicherungsgeber eine nicht unerhebliche Gefahr besteht, dass der Sicherungsgeber nicht aufgrund freien Willensentschlusses oder aufgrund angemessener Informationen handelt, muss der Gläubiger sich vergewissern, dass der Sicherungsgeber unabhängigen Rat erhalten hat.
(3) Falls die nach den vorstehenden Absätzen erforderlichen Informationen oder der unabhängige Rat nicht mindestens fünf Tage vor der Unterzeichnung des Angebots oder des Sicherungsvertrags durch den Sicherungsgeber erteilt wurden, kann durch den Sicherungsgeber innerhalb einer angemessenen Frist nach Erhalt der Informationen oder des unabhängigen Rates sein Angebot widerrufen bzw. der Vertrag angefochten werden. In diesem Zusammenhang gelten fünf Werktage als angemessene Frist, soweit sich aus den Umständen nichts anderes ergibt.
(4) Werden entgegen Absatz (1) oder (2) keine Informationen oder kein unabhängiger Rat erteilt, so kann das Angebot bzw. der Vertrag jederzeit vom Sicherungsgeber widerrufen bzw. angefochten werden.
(5) Wird entsprechend den vorstehenden Absätzen vom Sicherungsgeber sein Angebot widerrufen bzw. der Vertrag angefochten, dann richtet sich die Rückgewähr der von den Parteien empfangenen Leistungen nach PECL Artikel 4:115 oder nach den allgemeinen Regeln über die ungerechtfertigte Bereicherung.

Artikel 4:104: Haustürgeschäfte über Sicherheiten

Die Bestimmungen der Richtlinie 85/577/EWG des Rates vom 20. Dezember 1985 betreffend den Verbraucherschutz im Falle von außerhalb von Geschäftsräumen geschlossenen Verträgen sind auf Sicherheiten anzuwenden, die diesem Kapitel unterliegen.

Artikel 4:105: Formerfordernisse

Der Sicherungsvertrag muss schriftlich abgeschlossen und vom Sicherungsgeber unterschrieben werden. Ein Sicherungsvertrag, der die Anforderungen des vorstehenden Satzes nicht erfüllt, ist nichtig.

Artikel 4:106: Art der Haftung des Sicherungsgebers

Soweit dieses Kapitel Anwendung findet,

(a) gilt eine Abrede, welche eine Sicherheit ohne Höchstbetrag begründen soll, ob eine Globalbürgschaft (Artikel 1:101 Buchstabe (f)) oder nicht, als Vereinbarung einer Bürgschaft mit einem bestimmten Betrag, der gemäß Artikel 2:102 Absatz (3) zu ermitteln ist;
(b) haftet ein Bürge nur subsidiär im Sinne des Artikel 2:106, sofern nicht ein anderes ausdrücklich vereinbart wird; und
(c) gilt eine Abrede, die eine Garantie begründen soll, als Vereinbarung einer Bürgschaft, sofern deren Voraussetzungen erfüllt sind.

Artikel 4:107: Jährliche Informationspflichten des Gläubigers

(1) Vorbehaltlich der Zustimmung des Schuldners muss der Gläubiger den Sicherungsgeber jährlich informieren über die vom Schuldner zum Zeitpunkt der Information geschuldeten gesicherten Beträge der Hauptverpflichtung, der Zinsen und anderer Nebenverpflichtungen. Die vom Schuldner einmal gegebene Zustimmung ist unwiderruflich.
(2) Artikel 2:107 Absätze (3) und (4) gelten mit den gebotenen Anpassungen.

Artikel 4:108: Beschränkung einer befristeten Sicherheit

(1) Ein Sicherungsgeber, der eine Sicherheit mit einer vereinbarten Befristung übernommen hat, kann drei Jahre nach Wirksamwerden der Sicherheit deren Umfang beschränken, indem er sie unter Beachtung einer Frist von mindestens drei Monaten gegenüber dem Gläubiger kündigt. Der vorstehende Satz findet keine Anwendung auf Sicherheiten, die nur bestimmte Verpflichtungen oder Verpflichtungen aus bestimmten Verträgen sichern. Der Gläubiger muss den Schuldner unverzüglich informieren.
(2) Durch die Kündigung wird der Umfang der Bürgschaft gemäß Artikel 2:109 Absatz (2) beschränkt.

Italian*
Garanzie personali

Capitolo 1:
Disposizioni generali

Articolo 1:101: Definizioni

Ai sensi di questa Parte:

(a) Una garanzia personale dipendente (fideiussione) è un'obbligazione contrattuale di un garante avente ad oggetto il pagamento o un'altra prestazione ovvero il risarcimento dei danni al creditore, assunta al fine di garantire un'obbligazione presente o futura del debitore nei confronti del creditore e dipendente dalla validità, dai termini e dai limiti di quest'ultima obbligazione;

(b) Una garanzia personale indipendente (garanzia autonoma) è un'obbligazione contrattuale assunta da un garante a scopo di garanzia, avente ad oggetto il pagamento o un'altra prestazione o il risarcimento dei danni al creditore, la quale, in virtù di convenzione espressa o tacita, non dipende dalla validità, dai termini o dai limiti di una obbligazione dovuta al creditore da parte di un terzo;

(c) Il garante è il soggetto che assume le obbligazioni derivanti dal contratto di garanzia personale nei confronti del creditore;

(d) Il debitore è il soggetto tenuto all'adempimento dell'obbligazione garantita, se esistente, nei confronti del creditore;

(e) Nell'assunzione cumulativa del debito a scopo di garanzia un condebitore agisce quale garante se si obbliga prevalentemente a scopo di garanzia nei confronti del creditore;

(f) Una garanzia globale (fideiussione omnibus) è una garanzia personale dipendente pattuita per la copertura di tutte le obbligazioni del debitore nei confronti del creditore o del saldo debitorio di un conto corrente, ovvero una garanzia avente una simile estensione oggettiva;

(g) Un consumatore è una persona fisica che agisce primariamente per scopi estranei alla propria attività commerciale o professionale;

(h) Le garanzie reali sono diritti di garanzia costituiti su ogni tipo di diritto reale, mobiliare o immobiliare, corporale o incorporale.

Articolo 1:102: Ambito di applicazione

(1) Questa Parte si applica a qualsiasi tipo di garanzia personale contrattuale, in particolare:
   (a) alle fideiussioni (garanzie personali dipendenti), incluse le lettere di patronage vincolanti (Articolo 1:101 lett. (a));
   (b) alle garanzie autonome (garanzie personali indipendenti), incluse le lettere di credito stand-by (Articolo 1:101 lett. (b)); e
   (c) all'assunzione cumulativa del debito a scopo di garanzia (Articolo 1:101 lett. (e)).

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* Traduzione di Dr. Francesca Fiorentini.

(2) Questa Parte non si applica ai contratti d'assicurazione. Nel caso di un contratto di assicurazione fideiussoria, questa Parte trova applicazione solo se, e nella misura in cui, l'assicuratore abbia emesso un documento contenente una garanzia personale a favore del creditore.
(3) Questa Parte lascia impregiudicate le regole sull'avallo e sulla girata in garanzia dei titoli di credito, ma trova applicazione alle garanzie delle obbligazioni derivanti da tale avallo o girata in garanzia.

Articolo 1:103: Autonomia contrattuale
Le parti possono escludere l'applicazione di ciascuna delle regole di questa Parte, o derogare ad esse, ovvero modificarne gli effetti, eccetto quanto diversamente stabilito nel Capitolo 4 di questa Parte.

Articolo 1:104: Accettazione del creditore
Un'offerta di garanzia si considera accettata al momento della sua recezione da parte del creditore, salvo che l'offerta richieda accettazione espressa, o che il creditore, senza irragionevole ritardo, la rifiuti o si riservi un periodo di tempo per considerarla.

Articolo 1:105: Interpretazione
In caso di dubbio circa il significato di una clausola di una garanzia, e qualora tale clausola sia predisposta da un garante che agisce a titolo oneroso, deve essere preferita un'interpretazione della clausola sfavorevole al garante.

Articolo 1:106: Assunzione cumulativa del debito a scopo di garanzia
L'assunzione cumulativa del debito a scopo di garanzia (Articolo 1:101 lett. (e)) è soggetta alle regole dei Capitoli 1 e 4 e, sussidiariamente, alle regole sulla pluralità dei debitori (PECL Capitolo 10 Sezione 1).

Articolo 1:107: Pluralità di garanti: responsabilità solidale nei confronti del creditore
(1) Nella misura in cui una pluralità di garanti abbia garantito in via personale la medesima obbligazione, o una medesima parte di essa, ovvero diversi garanti abbiano assunto le loro obbligazioni per il medesimo scopo di garanzia, ciascuno di essi assume responsabilità solidale insieme agli altri garanti entro i limiti della propria obbligazione nei confronti del creditore. Questa disposizione si applica anche qualora tali garanti, nel concedere le proprie garanzie, abbiano agito indipendentemente.
(2) Il comma (1) si applica, con gli opportuni adattamenti, qualora il debitore o un terzo abbiano prestato una garanzia reale (Articolo 1:101 lett. (h)) in aggiunta alla garanzia personale.

Articolo 1:108: Pluralità di garanti: regresso interno
(1) Nelle ipotesi disciplinate dall'Articolo 1:107, il regresso tra i diversi garanti a titolo personale, o tra garanti a titolo personale e reale (Articolo 1:101 lett. (h)), è disciplinato dai PECL, Articolo 10:106, salvo quanto previsto dai seguenti commi.
(2) Salvo quanto previsto dal comma (3), la quota proporzionale di ciascun garante, ai sensi dei PECL, Articolo 10:106, è determinata in base alle seguenti regole:
  (a) Salvo diversa pattuizione tra i garanti, per quanto attiene ai rapporti interni, ciascuno è responsabile in proporzione al rapporto tra il valore massimo del rischio assunto da se medesimo e la somma dei rischi assunti da tutti i garanti. Il tempo determinante è quello della costituzione dell'ultima garanzia.

(b) Per le garanzie personali, il valore massimo del rischio è dato dall'ammontare massimo pattuito per la garanzia. In mancanza di un accordo sull'ammontare massimo, è decisivo l'importo dell'obbligazione garantita o, se è stato garantito un conto corrente, il limite di credito. Se l'obbligazione garantita non è limitata, è decisivo il saldo finale.

(c) Per le garanzie reali, il valore massimo del rischio è determinato dall'ammontare massimo accordato per la garanzia. In mancanza di un accordo sull'ammontare massimo, è decisivo il valore dei beni utilizzati come garanzia.

(d) Nel caso in cui l'ammontare massimo di cui alla lett. (b), primo periodo, o, rispettivamente, l'ammontare massimo o il valore di cui alla lett. (c) sia superiore all'importo dell'obbligazione garantita al tempo della costituzione dell'ultima garanzia, quest'ultimo importo determina il valore massimo del rischio.

(e) Nel caso di una garanzia personale illimitata a garanzia di un credito illimitato (lett. (b) ultimo periodo), il valore massimo del rischio derivante dalle altre garanzie limitate personali o reali, che superino il saldo finale del credito garantito, è circoscritto al valore di quest'ultimo.

(3) Le regole precedenti non si applicano alle garanzie reali concesse dal debitore, né ai garanti che, al tempo della soddisfazione del creditore, non erano responsabili nei confronti di quest'ultimo.

Articolo 1:109: Pluralità di garanti: regresso nei confronti del debitore

(1) Il garante che abbia soddisfatto un diritto di regresso di un altro garante è surrogato, in tale misura, nei diritti dell'altro garante nei confronti del debitore, come acquisiti ai sensi dell'Articolo 2:113 commi (1) e (3), inclusi i diritti di garanzia reale concessi dal debitore. L'Articolo 2:110 si applica con gli opportuni adattamenti.

(2) Quando un garante ha regresso nei confronti del debitore in virtù dei diritti acquisiti ai sensi dell'Articolo 2:113 commi (1) e (3), ovvero ai sensi del comma precedente, inclusi i diritti di garanzia reale concessi dal debitore, ciascun garante ha diritto alla propria quota proporzionale di quanto ricavato dal debitore, come definita all'Articolo 1:108 comma (2) e PECL, Articolo 10:106. L'Articolo 2:110 si applica con gli opportuni adattamenti.

(3) Salvo espressa previsione contraria, le regole precedenti non si applicano alle garanzie reali concesse dal debitore.

Articolo 1:110: Applicazione sussidiaria delle disposizioni in materia di debitori solidali

Se, e nella misura in cui, non trovino applicazione le disposizioni di questa Parte, si applicheranno in via sussidiaria le regole in materia di pluralità di debitori di cui ai PECL, Articoli 10:106-10:111.

Capitolo 2:
Garanzie personali dipendenti (fideiussioni)

Articolo 2:101: Presunzione di fideiussione

(1) Si presume che qualsiasi obbligazione di pagamento, di adempimento mediante qualsiasi altra prestazione, o di pagamento di somme a titolo di risarcimento del danno al creditore, assunta a scopo di garanzia, costituisca una fideiussione quale definita all'Articolo 1:101 lett. (a), salvo che il creditore dimostri un diverso accordo.

(2) Si presume che una lettera di patronage vincolante costituisca una fideiussione.

Articolo 2:102: Termini e limiti delle obbligazioni del fideiussore

(1) La validità, i termini e i limiti dell'obbligazione del fideiussore dipendono dalla validità, dai termini e dai limiti dell'obbligazione del debitore nei confronti del creditore.
(2) L'obbligazione del fideiussore non eccede l'obbligazione garantita. Questo principio non si applica se le obbligazioni del debitore sono ridotte o se il debitore è liberato
  (a) in seguito ad una procedura concorsuale;
  (b) in altro modo, in particolare in via convenzionale o mediante riduzione giudiziale a causa dalla difficoltà di adempiere dovuta allo stato d'insolvenza; oppure
  (c) di diritto, a causa di eventi che colpiscano la persona del debitore.
(3) Salvo il caso di fideiussione omnibus (Articolo 1:101 lett. (f)), se non è stato fissato alcun ammontare della fideiussione, e se lo stesso non può essere ricavato dall'accordo delle parti, l'obbligazione del fideiussore è limitata all'importo delle obbligazioni garantite al tempo in cui la garanzia è divenuta efficace.
(4) Salvo il caso di fideiussione omnibus (Articolo 1:101 lett. (f)), qualsiasi accordo fra creditore e debitore, stipulato successivamente al momento in cui è divenuta efficace l'obbligazione del fideiussore e avente lo scopo di accrescere i limiti, di aggravare le condizioni o di anticipare la scadenza delle obbligazioni garantite, non produce effetti sull'obbligazione del fideiussore.

Articolo 2:103: Eccezioni del debitore opponibili dal fideiussore

(1) Nei confronti del creditore, il fideiussore può opporre ogni eccezione spettante al debitore relativa all'esistenza, alla validità, all'esigibilità e ai termini dell'obbligazione garantita, anche qualora dette eccezioni non siano più opponibili dal debitore a causa di atti od omissioni di quest'ultimo che siano avvenuti successivamente al tempo dell'efficacia della garanzia.
(2) Il fideiussore non può eccepire il diritto del debitore di rifiutare la prestazione ai sensi dei PECL, Articolo 9:201, se il debitore non è più legittimato ad invocare il medesimo diritto.
(3) Il fideiussore non può eccepire il difetto di capacità del debitore, sia costui persona fisica o giuridica, o l'inesistenza del soggetto debitore, se persona giuridica, qualora i fatti rilevanti fossero noti al fideiussore al tempo dell'efficacia della garanzia.
(4) In pendenza del termine entro il quale il debitore è legittimato ad annullare il contratto da cui è originata l'obbligazione garantita per motivi diversi da quelli di cui al comma precedente, e qualora il debitore non abbia esercitato tale diritto, il fideiussore è legittimato a rifiutare l'esecuzione della prestazione di garanzia.
(5) Il comma precedente si applica con gli opportuni adattamenti qualora l'obbligazione garantita sia soggetta a compensazione.

Articolo 2:104: Copertura della fideiussione

(1) La fideiussione copre, nei limiti del suo importo massimo, se previsto, non solo l'obbligazione principale garantita, ma anche le obbligazioni accessorie del debitore nei confronti del creditore, in particolare:
  (a) gli interessi contrattuali e di mora;
  (b) i danni, la penale, o un pagamento pattuito, che siano dovuti in caso di inadempimento del debitore; e
  (c) i costi ragionevoli per il recupero extra-giudiziario di queste voci.
(2) I costi dei procedimenti legali e delle procedure esecutive contro il debitore sono coperti a condizione che il fideiussore sia stato informato dell'intenzione del creditore di intraprendere tali procedimenti con un preavviso sufficiente a consentire al fideiussore di evitare tali costi.

(3) La fideiussione omnibus (Articolo 1:101 lett. (f)) copre solo le obbligazioni sorte da contratti conclusi tra il debitore ed il creditore.

Articolo 2:105: Responsabilità solidale del fideiussore

Salva diversa pattuizione (Articolo 2:106), la responsabilità del debitore e del fideiussore è solidale e pertanto il creditore può scegliere di chiedere l'adempimento solidale da parte del debitore o, entro i limiti della fideiussione, da parte del fideiussore.

Articolo 2:106: Responsabilità sussidiaria del fideiussore

(1) Qualora sia stato convenuto tra le parti, il fideiussore può opporre al creditore il carattere sussidiario della propria responsabilità. Si presume che una lettera di patronage vincolante costituisca solo una responsabilità sussidiaria.
(2) Salvo quanto disposto dal comma (3), prima di chiedere l'esecuzione della prestazione del fideiussore, il creditore deve aver tentato in maniera appropriata di ottenere soddisfazione dal debitore e da eventuali altri garanti, se presenti, che garantiscano la medesima obbligazione, in via personale o reale, secondo le regole della responsabilità solidale.
(3) Il creditore non è tenuto a cercare di ottenere soddisfazione dal debitore e da ogni altro garante, ai sensi del comma precedente, se e nella misura in cui sia evidentemente impossibile o eccessivamente difficoltoso ottenere soddisfazione da tali soggetti. Questa eccezione si applica, in particolare, se e nella misura in cui sia iniziata una procedura concorsuale o altra procedura analoga nei confronti di tali soggetti, o se l'apertura di detta procedura non sia possibile per insufficienza dell'attivo, salvo che non sia disponibile una garanzia reale prestata per la medesima obbligazione e dallo stesso soggetto.

Articolo 2:107: Obblighi di informazione da parte del creditore

(1) Il creditore è tenuto a comunicare al fideiussore senza ingiustificato ritardo l'inadempimento o la difficoltà di pagare del debitore, così come la proroga della scadenza dell'obbligazione garantita; la comunicazione deve includere l'informazione sull'ammontare garantito dell'obbligazione principale, degli interessi e delle altre obbligazioni accessorie dovute dal debitore al tempo della comunicazione. Non è necessaria un'ulteriore comunicazione di un nuovo inadempimento prima dello spirare di tre mesi dalla precedente comunicazione. La comunicazione non è richiesta se l'inadempimento si riferisce meramente ad obbligazioni accessorie del debitore, salvo che l'ammontare totale di tutte le obbligazioni garantite non adempiute abbia raggiunto il cinque per cento dell'ammontare dell'obbligazione garantita in essere.
(2) Inoltre, nel caso di fideiussione omnibus (Articolo 1:101 lett. (f)), il creditore è tenuto a comunicare al fideiussore ogni incremento pattuito
  (a) ogni volta che tale incremento, a partire dal tempo della costituzione della fideiussione, raggiunga il 20 per cento dell'ammontare originariamente garantito; e
  (b) ogni volta che l'ammontare garantito abbia subito un ulteriore incremento del 20 per cento rispetto all'ammontare garantito alla data in cui è stata o avrebbe dovuto essere fornita l'ultima informazione ai sensi del presente comma.
(3) I commi (1) e (2) non trovano applicazione se e nella misura in cui il fideiussore conosca, o si possa ragionevolmente presumere che conosca, tali informazioni.
(4) Un creditore che ometta o ritardi ogni comunicazione richiesta ai sensi del presente Articolo è responsabile nei confronti del fideiussore per il danno cagionato dall'omissione o dal ritardo.

Articolo 2:108: Termine per l'esercizio dei diritti derivanti dalla fideiussione

(1) Qualora, direttamente o indirettamente, sia stato pattuito un termine per l'esercizio dei diritti derivanti da una fideiussione con responsabilità solidale del fideiussore, quest'ultimo è liberato dalla propria responsabilità alla scadenza del termine pattuito. Tuttavia, il fideiussore resta responsabile nel caso in cui il creditore abbia richiesto l'esecuzione della prestazione del fideiussore dopo la scadenza dell'obbligazione garantita, ma prima della scadenza del termine della fideiussione.

(2) Qualora, direttamente o indirettamente, sia stato pattuito un termine per l'esercizio dei diritti derivanti da una fideiussione con responsabilità sussidiaria del fideiussore, quest'ultimo è liberato dalla propria responsabilità alla scadenza del termine. Tuttavia il fideiussore resta responsabile nel caso in cui il creditore

   (a) dopo la scadenza dell'obbligazione garantita, ma prima della scadenza del termine, abbia informato il fideiussore della sua intenzione di pretendere l'esecuzione della prestazione di garanzia e abbia dato a quest'ultimo comunicazione di aver intrapreso le istanze opportune per ottenere soddisfazione così come stabilito dall'Articolo 2:106 commi (2) e (3); e

   (b) informi il fideiussore ogni sei mesi sul corso di tali istanze, qualora ciò sia richiesto dal fideiussore medesimo.

(3) Qualora le obbligazioni garantite scadano alla scadenza del termine della fideiussione o nei 14 giorni precedenti, la richiesta di esecuzione della prestazione di garanzia o l'informazione ai sensi dei commi (1) e (2) possono essere forniti prima di quanto previsto nei commi (1) e (2), ma non più tardi di 14 giorni prima della scadenza del termine della fideiussione.

(4) Qualora il creditore abbia adottato le misure dovute ai sensi dei commi precedenti, il limite massimo della responsabilità del fideiussore è ridotto all'ammontare delle obbligazioni garantite come definite dall'Articolo 2:104 commi (1) e (2). Il tempo determinante è quello della scadenza del termine pattuito.

Articolo 2:109: Limitazione della fideiussione senza termine

(1) Qualora non sia pattuito un termine per la fideiussione, ciascuna delle parti può limitarne l'oggetto dandone comunicazione alla controparte con almeno tre mesi di preavviso. Il precedente periodo non trova applicazione se la fideiussione è limitata a coprire obbligazioni specifiche o obbligazioni nascenti da contratti specifici.

(2) La comunicazione limita l'oggetto della fideiussione alle obbligazioni principali garantite che sono dovute alla data dell'efficacia della limitazione e alle obbligazioni accessorie garantite come definite all'Articolo 2:104 commi (1) e (2).

Articolo 2:110: Responsabilità del creditore

Il creditore è responsabile per i danni cagionati al fideiussore, se e nella misura in cui il fideiussore, per fatto imputabile al creditore, non possa essere surrogato né nei diritti del creditore contro il debitore, né nei diritti di garanzia personale e reale concessi al creditore da terzi, oppure se il fideiussore non possa essere interamente rimborsato dal debitore o da eventuali terzi garanti.

Articolo 2:111: Rilievo del fideiussore da parte del debitore

(1) Il fideiussore che abbia assunto una garanzia su richiesta del debitore, ovvero in base ad un consenso espresso o presunto di quest'ultimo, può pretendere il rilievo da parte del debitore

(a) se il debitore non ha adempiuto all'obbligazione garantita allorché esigibile, o se non è in grado di pagare, oppure se il valore del patrimonio del debitore è diminuito in maniera considerevole; ovvero
(b) se il creditore ha fatto valere giudizialmente la garanzia nei confronti del fideiussore.

(2) Il rilievo può essere concesso anche fornendo un'adeguata garanzia.

Articolo 2:112: Obblighi del fideiussore prima dell'esecuzione della prestazione

(1) Prima di eseguire la prestazione nei confronti del creditore, il fideiussore deve darne comunicazione al debitore e richiedere allo stesso informazioni sull'importo non ancora adempiuto dell'obbligazione garantita e su ogni eccezione o pretesa esistente contro di essa.
(2) Se il fideiussore esegue la propria prestazione senza ottemperare a quanto previsto dal comma (1), od omette di sollevare le eccezioni rese note dal debitore, ovvero conosciute dal fideiussore tramite altre fonti, questi è responsabile nei confronti del debitore per il danno cagionato.
(3) I diritti del fideiussore contro il creditore restano impregiudicati.

Articolo 2:113: Diritti del fideiussore in seguito all'esecuzione della prestazione

(1) Se, e nella misura in cui, il fideiussore ha eseguito la prestazione di garanzia cui era tenuto, egli ha regresso nei confronti del debitore. Inoltre, il fideiussore è surrogato, nella misura indicata nel periodo precedente, nei diritti del creditore verso il debitore. Le due pretese sono concorrenti.
(2) In caso di esecuzione parziale della prestazione di garanzia, i diritti parziarii residui del creditore nei confronti del debitore hanno preferenza sui diritti nei quali il fideiussore è stato surrogato.
(3) In seguito alla surrogazione di cui al comma (1), secondo periodo, le garanzie dipendenti e indipendenti, personali e reali sono trasferite di diritto al fideiussore, nonostante qualsiasi limitazione contrattuale o esclusione della cedibilità concordata con il debitore. I diritti nei confronti degli altri garanti possono essere esercitati solo nei limiti di cui all'Articolo 1:108.
(4) Se il debitore, per incapacità, non è responsabile nei confronti del creditore, il fideiussore può tuttavia pretendere dal debitore il rimborso della propria prestazione nei limiti dell'arricchimento di quest'ultimo. Questa disposizione si applica anche nel caso in cui il debitore persona giuridica non sia venuto ad esistenza.

Capitolo 3:
Garanzie personali indipendenti (garanzie autonome)

Articolo 3:101: Ambito di applicazione

(1) L'indipendenza di una garanzia non è pregiudicata da un semplice riferimento generale ad un'obbligazione sottostante (inclusa una garanzia personale).
(2) Le disposizioni di questo Capitolo si applicano anche alle lettere di credito stand-by.

Articolo 3:102: Obblighi del garante prima dell'esecuzione della prestazione

(1) Il garante è tenuto ad eseguire la propria prestazione solo qualora la richiesta scritta di escussione rispetti esattamente le condizioni stabilite nella garanzia.
(2) Immediatamente dopo il ricevimento della richiesta di escussione, il garante deve informare il debitore della recezione della richiesta.

(3) Salvo diverso accordo, il garante può opporre le eccezioni che gli spettano contro il creditore.
(4) Il garante è tenuto senza indugio, e al massimo entro sette giorni lavorativi dal ricevimento della richiesta scritta
  (a) ad eseguire la prestazione secondo i termini della domanda e a informare immediatamente il debitore; o
  (b) a rifiutare l'esecuzione della prestazione e a informare immediatamente il creditore e il debitore.
(5) Il garante è responsabile per ogni danno cagionato dalla violazione degli obblighi di cui ai commi (2) e (4).

Articolo 3:103: Garanzia personale autonoma a prima richiesta

(1) Quando una garanzia personale autonoma è espressamente definita a prima richiesta, o quando ciò possa essere inequivocabilmente dedotto dalle sue condizioni, essa è soggetta all'Articolo 3:102, eccetto quanto stabilito nei commi seguenti.
(2) Il garante è obbligato ad adempiere solo se la richiesta di escussione del creditore è accompagnata da una dichiarazione scritta del creditore la quale espressamente confermi che ogni condizione alla quale è subordinata l'esigibilità della garanzia è soddisfatta.
(3) Non si applica l'Articolo 3:102 comma (3).

Articolo 3:104: Richiesta di escussione manifestamente abusiva o fraudolenta

(1) Nei casi previsti dagli Articoli 3:102 e 3:103, un garante è tenuto ad ottemperare alla richiesta di escussione, salvo che questa risulti manifestamente abusiva o fraudolenta in base a prove liquide.
(2) Se i requisiti del comma precedente sono soddisfatti, il debitore può impedire
  (a) l'esecuzione della prestazione del garante; e
  (b) l'emissione o l'utilizzo di una richiesta di escussione da parte del creditore.

Articolo 3:105: Diritto del garante alla ripetizione

(1) Il garante ha diritto di ripetere dal creditore quanto da costui ricevuto qualora
  (a) le condizioni della richiesta del creditore non si siano realizzate o siano successivamente venute meno; oppure,
  (b) la richiesta del creditore fosse manifestamente abusiva o fraudolenta.
(2) Il diritto del garante alla ripetizione di quanto ricevuto dal creditore è soggetto ai PECL, Articolo 4:115 e alle regole generali in materia di arricchimento senza causa.

Articolo 3:106: Garanzie con o senza limiti temporali

(1) Qualora, direttamente o indirettamente, sia stato pattuito un termine per l'esercizio dei diritti derivanti dalla garanzia, il garante resta eccezionalmente responsabile anche dopo la scadenza del termine, a condizione che il creditore abbia chiesto l'esecuzione della prestazione di garanzia in base agli Articoli 3:102 comma (1) o 3:103, in un tempo in cui ne era legittimato e comunque prima della scadenza del termine della garanzia. Si applica l'Articolo 2:108 comma (3) con gli opportuni adattamenti. L'ammontare massimo della responsabilità del garante è limitato all'importo che il creditore avrebbe potuto chiedere al tempo della scadenza del termine.
(2) Qualora non sia pattuito un termine per la garanzia, il garante può determinare tale termine dandone comunicazione all'altra parte con almeno tre mesi di preavviso. La responsabilità del

garante è limitata all'ammontare che il creditore avrebbe potuto richiedere alla data stabilita dal garante. Il presente comma non si applica se la garanzia è concessa per scopi specifici.

Articolo 3:107: Trasferimento della garanzia

Il diritto del creditore all'esecuzione della prestazione da parte di un garante può essere ceduto in via convenzionale, eccetto che nel caso di garanzia personale indipendente a prima richiesta.

Articolo 3:108: Diritti del garante dopo l'esecuzione della prestazione

L'Articolo 2:113 si applica, con gli opportuni adattamenti, ai diritti che il garante può esercitare dopo l'esecuzione della prestazione di garanzia.

Capitolo 4:
Disposizioni speciali per le garanzie personali dei consumatori

Articolo 4:101: Ambito di applicazione

(1) Salvo quanto previsto dal comma (2), il presente Capitolo si applica quando una garanzia è concessa da un consumatore (Articolo 1:101 lett. (g)).
(2) Questo Capitolo non trova applicazione se
   (a) anche il creditore è un consumatore; o
   (b) il garante consumatore è in grado di esercitare un'influenza rilevante sul debitore, quando il debitore non è una persona fisica.

Articolo 4:102: Disposizioni applicabili

(1) Una garanzia personale disciplinata dal presente Capitolo è soggetta alle regole dei Capitoli 1 e 2, salvo quanto diversamente stabilito in questo Capitolo.
(2) Le parti non possono derogare alle disposizioni di questa Parte in senso sfavorevole al garante.

Articolo 4:103: Obbligo di informazione precontrattuale del creditore

(1) Prima della concessione di una garanzia, il creditore deve rendere noto al futuro garante
   (a) gli effetti generali della garanzia divisata; e
   (b) i rischi specifici ai quali il garante, secondo le informazioni accessibili al creditore, può essere esposto in considerazione della situazione finanziaria del debitore.
(2) Qualora il creditore sappia o abbia ragione di sapere che, a causa di una relazione di fiducia e confidenza tra il debitore ed il garante, vi sia un rischio significativo che il garante non stia agendo liberamente o sulla base di informazioni adeguate, il creditore deve accertarsi che il garante abbia ricevuto una consulenza indipendente.
(3) Qualora l'informazione ovvero la consulenza indipendente di cui ai commi precedenti non sia stata fornita almeno cinque giorni prima della sottoscrizione dell'offerta o del contratto di garanzia da parte del garante, l'offerta può essere revocata, o il contratto annullato dal garante entro un termine ragionevole a partire dal ricevimento dell'informazione o della consulenza indipendente. A tal fine cinque giorni lavorativi sono considerati termine ragionevole, salvo che le circostanze non suggeriscano diversamente.
(4) Qualora, contrariamente ai commi (1) o (2), non sia fornita alcuna informazione o consulenza indipendente, il garante può revocare l'offerta o annullare il contratto in ogni tempo.

(5) Se il garante revoca la sua offerta o annulla il contratto ai sensi dei commi precedenti, la ripetizione di quanto ricevuto dalle parti è disciplinata dai PECL, Articolo 4:115 o dalle disposizioni generali in materia di arricchimento senza causa.

Articolo 4:104: Garanzie negoziate fuori dai locali commerciali

Le disposizioni della direttiva del Consiglio 85/577/CEE del 20 dicembre 1985 a tutela del consumatore in relazione ai contratti negoziati fuori dai locali commerciali si applicano alle garanzie disciplinate da questo Capitolo.

Articolo 4:105: Forma

Il contratto di garanzia deve essere redatto in forma scritta e deve essere sottoscritto dal garante. Un contratto di garanzia che non ottemperi ai predetti requisiti di forma è nullo.

Articolo 4:106: Natura della responsabilità del garante

Quando si applica il presente Capitolo

(a) si considera che un accordo mirante a creare una garanzia senza un ammontare massimo, sia esso una garanzia globale (Articolo 1:101 lett. (f)) o no, crei una garanzia dipendente con un ammontare fisso da determinarsi ai sensi dell'Articolo 2:102 comma (3);
(b) la responsabilità del garante nel caso di garanzia dipendente è sussidiaria ai sensi dell'Articolo 2:106, salvo diversa pattuizione espressa; e
(c) si considera che una clausola mirante a creare una garanzia indipendente crei una garanzia dipendente, se le condizioni di quest'ultima sono soddisfatte.

Articolo 4:107: Obblighi del creditore di informazione annuale

(1) A condizione che il debitore vi consenta, il creditore è tenuto ad informare annualmente il garante circa l'ammontare garantito dell'obbligazione principale, degli interessi, e di altre obbligazioni accessorie dovute dal debitore alla data dell'informazione. Il consenso del debitore, una volta prestato, è irrevocabile.
(2) I commi (3) e (4) dell'Articolo 2:107 si applicano con gli opportuni adattamenti.

Articolo 4:108: Limitazione della garanzia sottoposta a termine

(1) Un garante che abbia concesso una garanzia per la quale sia pattuito un termine, può, trascorsi tre anni dal tempo dell'efficacia della garanzia, limitarne gli effetti dandone comunicazione al creditore con almeno tre mesi di preavviso. Il periodo precedente non trova applicazione se la garanzia è limitata a coprire obbligazioni specifiche, o obbligazioni nascenti da contratti specifici. Il creditore è tenuto a informare immediatamente il debitore.
(2) La comunicazione limita l'oggetto della garanzia ai sensi dell'Articolo 2:109 comma (2).

Spanish*
Garantías personales

Capítulo 1:
Normas generales

Artículo 1:101: Definiciones

En relación con la presente Parte:

(a) Una garantía dependiente (fianza) es una obligación contractual que un garante asume de pagar o efectuar otra prestación o indemnizar daños y perjuicios al acreedor, con el objeto de garantizar una obligación presente o futura del deudor frente al acreedor y que depende de la validez, término y extensión de ésta;

(b) Una garantía personal independiente (garantía autónoma) es una obligación contractual asumida por un garante en garantía del pago u otra prestación o de la indemnización de daños y perjuicios al acreedor, con el acuerdo explícito o implícito de que dicho cumplimiento no dependa de la validez, condiciones o contenido de la obligación de otra persona frente al acreedor;

(c) El garante es la persona que asume las obligaciones del contrato de garantía personal frente al acreedor;

(d) El deudor es la persona que debe la obligación garantizada, en caso de que exista, al acreedor;

(e) En una deuda conjunta con función de garantía el codeudor actúa como garante si se obliga principalmente para prestar frente al acreedor una garantía.

(f) Una garantía global (fianza general) es una garantía personal dependiente que se acuerda para cubrir todas las obligaciones del deudor frente al acreedor o el saldo debido en una cuenta corriente o una garantía de extensión similar;

(g) Consumidor significa cualquier persona física que actúa principalmente en actividades ajenas a su negocio, industria o profesión.

(h) Garantía real comprende derechos de garantía sobre cualquier tipo de derechos reales, ya sea mueble o inmueble, tangible o intangible.

Artículo 1:102: Ámbito de aplicación

(1) Esta Parte se aplica a todo tipo de contratos de garantía personal, en particular:
  (a) a las fianzas (garantías personales dependientes), incluyendo las cartas de patrocinio que contienen una obligación (Artículo 1:101 letra (a));
  (b) a las garantías personales autónomas (garantías personales independientes), incluyendo las cartas de garantía «stand-by» (Artículo 1:101 letra (b)); y
  (c) A la deuda conjunta constituida en función de garantía (Artículo 1:101 letra (e)).

(2) Esta Parte no se aplica a contratos de seguro. Únicamente se aplica a los seguros de caución si el asegurador emite un documento que contenga una garantía personal a favor del acreedor.

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* Traducción por Almudena de la Mata Muñoz.

(3) Esta Parte no afecta las normas sobre el aval y el endoso en garantía de efectos negociables, pero sí es de aplicación a las obligaciones que nazcan de dicho aval o endoso.

Artículo 1:103: Autonomía de la voluntad

Las partes pueden excluir la aplicación de cualesquiera de las normas de esta Parte, derogarlas o alterar sus efectos, salvo que se prevea lo contrario en el Capítulo 4 de esta Parte.

Artículo 1:104: Aceptación del acreedor

La oferta de garantía se tiene por aceptada desde que aquélla llega a poder del acreedor, a menos que la oferta exija aceptación expresa o que el acreedor la rechace sin retraso injustificado o se reserve un tiempo para su consideración.

Artículo 1:105: Interpretación

Siendo dudoso el significado de un término de la garantía, y ese término haya sido incorporado por el titular de una garantía prestada a título oneroso, prevalecerá la interpretación que sea desfavorable para el garante.

Artículo 1:106: Deuda conjunta con función de garantía

La deuda conjunta en garantía (Artículo 1:101 letra (e)) se regula por las normas de los Capítulos 1 y 4 y, subsidiariamente, por las normas sobre pluralidad de deudores (PECL Capítulo 10 Parte 1).

Artículo 1:107: Pluralidad de garantes: Responsabilidad solidaria frente al acreedor

(1) En la medida en que varios sujetos hayan garantizado la misma obligación o la misma parte de una obligación, o hayan asumido sus obligaciones con la misma finalidad de garantía, cada uno es responsable solidariamente con los demás dentro de los límites de su obligación frente al acreedor. Esta norma será también de aplicación aunque cada uno de ellos haya prestado independientemente su garantía.
(2) El párrafo (1) es de aplicación con las debidas adaptaciones cuando el deudor o una tercera persona hayan prestado una garantía real (Artículo 1:101 letra (h)) además de la personal.

Artículo 1:108: Pluralidad de garantes: Regreso interno

(1) En los casos descritos en el Artículo 1:107 el derecho de regreso entre varios obligados por una garantía personal o entre prestadores de garantía personal y de garantía real (Artículo 1:101 letra (h)) se regula por los PECL, Artículo 10:106, con las especificaciones contenidas en los párrafos siguientes.
(2) Con excepción de lo establecido en el párrafo (3), la parte proporcional de cada garante a los efectos de los PECL, Artículo 10:106, se determina conforme a las reglas siguientes:
   (a) Salvo pacto en contrario de los garantes, cada uno será responsable respecto de los demás del riesgo máximo asumido por él en proporción al riesgo máximo total asumido por todos los garantes. El momento relevante será el de la constitución de la última garantía.
   (b) A efectos de la garantía personal, el riesgo máximo es determinado por el montante máximo acordado de la garantía. A falta de acuerdo sobre la cantidad máxima, será decisiva la cuantía de la obligación garantizada o, en caso de una garantía de cuenta corriente, el límite de crédito. Si la obligación garantizada no está limitada, se atenderá al saldo final.

(c) A efectos de una garantía real, el riesgo máximo se determina por la cuantía máxima acordada de la garantía. A falta de un acuerdo sobre la cuantía máxima, el valor de los bienes dados en garantía será determinante.
(d) Si la cuantía máxima en el caso de la letra (b) frase 1 o la cuantía máxima del valor, en el caso de la letra (c), respectivamente, son mayores que la cuantía de la obligación garantizada en el momento de creación de la última garantía, el riesgo máximo se determinará en función de la cuantía de esta obligación.
(e) Tratándose de una garantía personal ilimitada que garantiza un crédito ilimitado (letra (b) in fine), el riesgo máximo asumido por otras garantías limitadas personales o reales que sobrepasen el saldo final del crédito garantizado quedará limitado a dicho saldo.

(3) Las normas anteriores no se aplican a la garantía real prestada por el deudor ni por garantes que en el momento en que el acreedor fue satisfecho no eran deudores de éste.

Artículo 1:109: Pluralidad de garantes: Regreso contra el deudor

(1) Cualquier garante que haya pagado en vía de regreso a otro garante, se subrogará en la medida de su cumplimiento en los derechos de éste contra el deudor, como si los hubiera adquirido de acuerdo con el Artículo 2:113 párrafos (1) y (3), incluyendo las garantías reales prestadas por el deudor. El Artículo 2:110 es de aplicación con las adaptaciones precisas.
(2) En los casos en que un garante pueda ejercer el regreso contra el deudor en virtud de los derechos adquiridos en aplicación del Artículo 2:113 párrafos (1) y (3) ó del párrafo anterior, incluyendo las garantías reales prestadas por el deudor, cualquiera de los garantes tiene derecho a su parte proporcional, como se define en el Artículo 1:108 párrafo (2) y en los PECL, Artículo 10:106, de los beneficios obtenidos del deudor. El Artículo 2:110 es de aplicación con las adaptaciones necesarias.
(3) Salvo pacto expreso en contrario, los preceptos anteriores no son de aplicación a las garantías reales prestadas por el deudor.

Artículo 1:110: Aplicación subsidiaria de las normas de solidaridad de deudores

Si y en la medida en que las normas de esta Parte no resulten aplicables, tendrán aplicación subsidiaria los preceptos de pluralidad de deudores en los PECL Artículos 10:106 a 10:111.

Capítulo 2:
Garantías Personales Dependientes (Fianzas)

Artículo 2:101: Presunción de fianza

(1) Cualquier obligación de pagar o realizar cualquier otro cumplimiento o de indemnizar daños y perjuicios al acreedor a través de una garantía se presume fianza, en los términos definidos en el Artículo 1:101 letra (a), a menos que el acreedor acredite que se había acordado de otra forma.
(2) Una declaración de patrocinio vinculante se presume fianza.

Artículo 2:102: Condiciones y extensión de las obligaciones del fiador

(1) La validez, condiciones y extensión de la fianza dependen de la validez, condiciones y extensión de la obligación del deudor frente al acreedor.
(2) La obligación del fiador no excederá de la obligación garantizada. Este principio no es de aplicación si las obligaciones del deudor son minoradas o el deudor es liberado

(a) en un procedimiento de insolvencia; o
(b) en otro caso, especialmente a través de transacción o de reducción judicial, que tengan su origen en la incapacidad del deudor para cumplir como consecuencia de su insolvencia; o
(c) por circunstancias que afecten a la persona del deudor, cuando así haya sido previsto por una norma.

(3) Excepto en caso de una fianza general (Artículo 1:101 letra (f)), si no se ha fijado cuantía para la fianza y ésta no puede ser determinada en virtud del acuerdo de las partes, la obligación de fianza se limitará al montante de la obligación garantizada en el momento en que la fianza es efectiva.

(4) Excepto en caso de una fianza general (Artículo 1:101 letra (f)), ningún acuerdo entre acreedor y deudor para ampliar el objeto, agravar las condiciones o adelantar la fecha de vencimiento de las obligaciones garantizadas, tomado después de que fuera constituida la fianza, afectará a la obligación del fiador.

Artículo 2:103: Excepciones del deudor oponibles por el fiador

(1) El fiador puede oponer al acreedor cualquier excepción que corresponda al deudor, relativa a la existencia, validez, ejecutabilidad y condiciones de la obligación garantizada, incluso si el deudor no puede ya oponerlas como consecuencia de actos u omisiones propios que hayan tenido lugar después de que la fianza hubiera devenido eficaz.

(2) El fiador no puede invocar el derecho del deudor a rechazar el cumplimiento de acuerdo con los PECL, Artículo 9:201, si el deudor no se halla en disposición de invocar este derecho.

(3) El fiador no puede invocar la falta de capacidad del deudor, sea una persona física o jurídica, o la inexistencia del deudor, en el caso de persona jurídica, si los hechos relevantes eran conocidos del fiador en el momento en que se prestó la fianza.

(4) Si el deudor estuviera legitimado para anular el contrato del que nace la obligación garantizada debido a una causa distinta de las mencionadas en el párrafo anterior y no ha ejercitado ese derecho, el fiador estará legitimado para rechazar el cumplimiento.

(5) El párrafo anterior se aplicará con las adaptaciones necesarias, en caso de que la obligación garantizada sea susceptible de compensación.

Artículo 2:104: Cobertura de la fianza

(1) La fianza cubre, dentro de su límite máximo, en su caso, no sólo la obligación principal, sino también las obligaciones accesorias el deudor frente al acreedor, en especial
(a) los intereses convencionales y los intereses de demora,
(b) la indemnización de daños y perjuicios, la cláusula penal o el pago acordado para el supuesto de falta de cumplimiento por el deudor;
(c) y los costes razonables incurridos para la recuperación extrajudicial de tales partidas.

(2) Estarán incluidas las costas devengadas en procedimientos declarativos o de ejecución contra el deudor, siempre que el fiador haya sido informado de la intención del acreedor de ejercitar dichas medidas procesales o de ejecución con el tiempo suficiente para permitir al garante evitar dichos gastos.

(3) Una fianza general (Artículo 1:101 letra (f)) cubre sólo las obligaciones originadas por contratos entre el deudor y el acreedor.

Artículo 2:105: Responsabilidad solidaria del fiador

Salvo pacto en contrario (Artículo 2:106) deudor y fiador responden solidariamente, y el acreedor podrá exigir el cumplimiento indistintamente del deudor o del fiador, dentro de los límites de la fianza.

Artículo 2:106: Responsabilidad subsidiaria del fiador

(1) Si así se hubiera acordado, el fiador puede invocar frente al acreedor el carácter subsidiario de su obligación. Se presume que una declaración de patrocinio vinculante sólo genera responsabilidad de tipo subsidiario.

(2) Salvo lo dispuesto en el párrafo (3), antes de solicitar el cumplimiento del fiador, el acreedor deberá haber intentado adecuadamente obtener satisfacción del deudor y de otros fiadores, en su caso, que aseguren la misma obligación con una garantía personal o real de forma solidaria.

(3) No se exige al acreedor el intento de obtener satisfacción del deudor ni de cualquier otro garante, de acuerdo con el párrafo anterior, en la medida en que resulte manifiestamente imposible o extremadamente difícil obtener satisfacción del sujeto en cuestión. Esta excepción es de aplicación, en particular, si y en la medida en que se ha abierto un procedimiento de insolvencia o similar contra el sujeto en cuestión; o la apertura de dichos procedimientos no tuvo lugar debido a la insuficiencia de bienes; salvo que exista una garantía real prestada por la misma persona y para la misma obligación.

Artículo 2:107: Deber de información del acreedor

(1) El acreedor debe notificar sin retraso injustificado al fiador de cualquier incumplimiento o imposibilidad de pago del deudor, así como de cualquier extensión en el plazo de vencimiento para el cumplimiento de la obligación garantizada; esta notificación debe incluir información relativa a las cantidades de la obligación principal, intereses y otras obligaciones accesorias debidas por el deudor en la fecha en que se proporciona la información. No será necesaria notificación adicional de un nuevo incumplimiento antes de que transcurran tres meses desde la última notificación. No se requiere notificación si la falta de cumplimiento afecta únicamente a obligaciones accesorias del deudor, a menos que la cantidad total de todas las obligaciones garantizadas incumplidas importe el cinco por ciento de la cantidad principal en que consiste la obligación garantizada.

(2) Además, en el caso de una fianza general (Artículo 1:101 lit (f)), el acreedor debe notificar al garante cualquier incremento acordado
   (a) en el momento en que ese incremento, desde el momento en que se prestó la garantía, alcance el 20 por ciento de la cantidad que fue garantizada originariamente; y
   (b) en el momento en que la cantidad garantizada se continúa incrementando hasta un 20 por ciento de la cantidad garantizada en la fecha en que la última información, de conformidad con este párrafo, fue o debería haber sido facilitada.

(3) Los párrafos (1) y (2) no serán de aplicación, en la medida en que el fiador conociera o pudo razonablemente suponerse que conocía la información requerida.

(4) El acreedor que omite o retrasa la notificación prevista en este artículo responderá ante el fiador por el daño causado por dicha omisión o retraso.

Artículo 2:108: Limite temporal para hacer valer la fianza

(1) Si se ha acordado, directa o indirectamente, un límite temporal para hacer valer una fianza de la que resulta la responsabilidad solidaria del fiador, éste dejará de ser responsable después de

la expiración de la fecha acordada. Sin embargo, el fiador seguirá siguiendo responsable si el acreedor hubiera solicitado el cumplimiento del fiador después del vencimiento de la obligación garantizada, pero antes de la expiración de la fecha límite de la fianza.

(2) Si directa o indirectamente se hubiere acordado un límite temporal para hacer valer una garantía de la que resulte responsabilidad subsidiaria del fiador, éste no responderá después de la expiración de la fecha acordada. Sin embargo, el fiador sigue siendo responsable si el acreedor
   (a) después del vencimiento de la obligación garantizada pero antes de la expiración de la fecha de la fianza, ha informado al fiador de su intención de solicitar el cumplimiento de la fianza y ha afirmado haber iniciado procedimientos adecuados para obtener satisfacción, como se establece en el Artículo 2:106 párrafos (2) y (3); y
   (b) cuando habiendo sido solicitado así por el fiador, informa a éste cada seis meses sobre la situación de los procedimientos.

(3) Si la obligación garantizada vence en el momento de la expiración del limite temporal de la fianza, o dentro de los 14 días anteriores, el requerimiento de cumplimiento o de información de acuerdo con los párrafos (1) y (2) puede tener lugar antes de lo establecido en los párrafos (1) y (2), pero no antes de los 14 días previos al advenimiento del limite temporal de la fianza.

(4) Si el acreedor ha iniciado medidas de acuerdo con lo previsto en los párrafos anteriores, la responsabilidad máxima del fiador se limita a la cuantía de la obligación garantizada y a sus accesorios, como se definen en el artículo 2:104, párrafos (1) y (2). El momento relevante es aquel en el que expira el tiempo límite acordado.

Artículo 2:109: Limitación de las obligaciones garantizadas en la fianza temporalmente indefinida

(1) En la medida en que la fianza no está limitada a un plazo temporal determinado, la fianza puede ser limitada por cualquiera de las partes mediante notificación a la otra parte con al menos tres meses de antelacion. La regla anterior no es de aplicación si la fianza se limita a cubrir obligaciones específicas u obligaciones derivadas de contratos específicos.

(2) En virtud de la notificación la eficacia de la fianza se limita a las obligaciones principales garantizadas que están debidas en la fecha en que la limitación se haga efectiva y a obligaciones accesorias garantizadas como se definen en el Artículo 2:104 párrafos (1) y (2).

Artículo 2:110: Responsabilidad del acreedor

Si y en la medida en que debido a la conducta del acreedor, el fiador no pueda subrogarse en los derechos del acreedor frente al deudor y en las garantías personales o reales prestadas por terceras personas, o no pueda ser totalmente reembolsado por el deudor o por terceros fiadores, en su caso, responderá el acreedor por los daños causados al fiador.

Artículo 2:111: Relevación del fiador por el deudor

(1) El fiador que ha prestado una fianza a petición del deudor o con su consentimiento expreso o tácito puede solicitar la relevación por el deudor
   (a) si el deudor no ha cumplido la obligación garantizada a su vencimiento o no está en disposición de pagar, o los bienes del deudor han disminuido sustancialmente; o
   (b) si el acreedor ha ejercitado una acción para hacer valer la fianza contra el fiador.

(2) La relevación puede tener lugar mediante la prestación de una garantía adecuada.

Artículo 2:112: Deberes del fiador antes del cumplimiento

(1) Antes de cumplir frente al acreedor, el fiador debe notificar al deudor y requerir información sobre la cantidad debida por la obligación garantizada así como sobre cualquier excepción o derecho disponible contra aquél.
(2) Si el fiador cumple sin observar el requisito establecido en el párrafo (1), o se niega a oponer las excepciones comunicadas por el deudor o que fueran conocidas por el fiador por otros medios, responde frente al deudor por el daño resultante.
(3) Los derechos que el fiador tenga contra el acreedor no se verán afectados.

Artículo 2:113: Derechos del fiador después del cumplimiento

(1) Si y en la medida en que el fiador haya cumplido las obligaciones de fianza, podrá requerir rembolso del deudor. Además, el fiador se subroga en la medida indicada en el inciso anterior en los derechos del acreedor frente al deudor. Los dos recursos son concurrentes.
(2) En caso de cumplimiento parcial, los derechos parciales residuales que tenga al acreedor contra el deudor tienen prioridad frente a los derechos en los cuales se ha subrogado el fiador.
(3) Por medio de la subrogación conforme al párrafo (1), segunda frase, las fianzas y garantías autónomas personales y reales se transfieren por ministerio de la ley al fiador, sin perjuicio de cualquier otra restricción contractual o pacto de no ceder acordado con el deudor. Los derechos contra otros garantes sólo pueden ser ejercitados dentro de los límites del Artículo 1:108.
(4) En los casos en que el deudor no responda frente al acreedor por razón de incapacidad, el fiador puede, sin embargo, exigir el reembolso por el deudor en la medida del enriquecimiento de éste. Esta regla se aplica también si el deudor persona jurídica no ha llegado a existir.

Capítulo 3:
Garantías personales independientes (garantías autónomas)

Artículo 3:101: Ámbito de aplicación

(1) La independencia de una garantía no se ve afectada por una mera referencia general a una obligación subyacente (incluyendo una garantía personal).
(2) Los preceptos de este Capítulo también son de aplicación a las cartas de garantía «standby».

Artículo 3:102: Deberes del garante antes del cumplimiento

(1) El garante está obligado a cumplir sólo si el requerimiento escrito de cumplimiento satisface exactamente los términos establecidos en la garantía.
(2) Inmediatamente después de la recepción del requerimiento de cumplimiento, el garante debe informar al deudor.
(3) Salvo pacto en contrario, el garante puede oponer sus propias excepciones al acreedor.
(4) El garante debe sin dilación, como máximo a los siete días hábiles de la recepción del requerimiento por escrito,
    (a) cumplir de acuerdo con lo exigido e inmediatamente informar al deudor, o
    (b) rechazar el cumplimiento e inmediatamente informar al acreedor y al deudor.
(5) El garante es responsable de cualquier daño causado por incumplimiento de los deberes establecidos en los párrafos (2) y (4).

Artículo 3:103: Garantía autónoma a primera demanda

(1) Una garantía autónoma que expresamente es acordada como debida a primera demanda, o en los casos en que esto puede ser inequívocamente deducido de sus términos, está sujeta al Artículo 3:102, excepto en lo aquí previsto.
(2) El garante sólo está obligado a cumplir si la reclamación del acreedor está acompañada por la declaración escrita de éste en la que se confirma expresamente que se han cumplido todas las condiciones de las que depende la efectividad de la garantía.
(3) El Artículo 3:102 párrafo (3) no es de aplicación.

Artículo 3:104: Reclamación manifiestamente abusiva o fraudulenta

(1) En los supuestos regulados en los Artículos 3:102 y 3:103, el garante está obligado a cumplir una reclamación de cumplimiento, a menos que quede probado con evidencia clara que la demanda era manifiestamente abusiva o fraudulenta.
(2) Si se cumplen los requisitos del párrafo anterior, el deudor puede impedir
    (a) el cumplimiento por el garante; y
    (b) la presentación o utilización de una reclamación de cumplimiento por el acreedor.

Artículo 3:105: Derecho de reembolso del garante

(1) El garante tiene derecho a exigir la devolución de los beneficios recibidos por el acreedor siempre que
    (a) no se cumplían los requisitos para que el acreedor reclamara o éstos dejaron de cumplirse posteriormente o
    (b) la reclamación del acreedor hubiera sido manifiestamente abusiva o fraudulenta.
(2) El derecho del garante de reclamar los beneficios está sujeto a los PECL, Artículo 4:115 y a las normas generales sobre enriquecimiento injusto.

Artículo 3:106: Garantías con o sin límites temporales

(1) Si se ha acordado un límite temporal, directa o indirectamente, para la ejecución de una garantía, el garante responderá excepcionalmente incluso después de la expiración del limite temporal, si el acreedor había solicitado el cumplimiento de acuerdo con los Artículos 3:102 párrafo (1) ó 3:103 en un momento en el que tenía el derecho a hacerlo y antes de la llegada del límite temporal de la garantía. El Artículo 2:108 párrafo (3) se aplica con las correspondientes adaptaciones. La responsabilidad máxima del garante se limita a la cantidad que el acreedor le podía haber exigido en el momento de expiración del plazo limite.
(2) En el caso en que la garantía no había un tiempo determinado, el garante puede fijar dicho límite mediante la notificación a la otra parte con un plazo de al menos tres meses. La responsabilidad del garante se limita a la cantidad que el acreedor le podía haber exigido en la fecha fijada por el garante. Las reglas anteriores no serán de aplicación si la garantía fue prestada con una finalidad específica.

Artículo 3:107: Transmisión de garantía

El derecho del acreedor a exigir el cumplimiento por un garante puede ser transmitido por contrato, salvo que se trate de una garantía autónoma a primera demanda.

Artículo 3:108: Derechos del garante después del cumplimiento

El Artículo 2:113 se aplica, con las modificaciones adecuadas, a los derechos que pueda ejercitar el garante contra el deudor después del cumplimiento.

Capítulo 4:
Normas especiales para las garantías personales de los consumidores

Artículo 4:101: Ámbito de aplicación
(1) Salvo en lo establecido en el párrafo (2), este Capítulo es aplicable a las garantías prestadas por un consumidor (Artículo 1:101 letra (g)).
(2) Este Capítulo no se aplicará si
  (a) el acreedor también es consumidor; o
  (b) el consumidor garante es capaz de ejercer influencia sustancial sobre el deudor, cuando éste no sea una persona física.

Artículo 4:102: Normas aplicables
(1) Una garantía personal regulada en este Capítulo está sujeta a las normas de los Capítulos 1 y 2, excepto en lo dispuesto de forma distinta en este Capítulo.
(2) Las partes no pueden modificar las normas de esta Parte en perjuicio del garante.

Artículo 4:103: Deber de información precontractual del acreedor
(1) Antes de la prestación de una garantía, el acreedor debe explicar al futuro garante
  (a) el efecto general de la garantía propuesta; y
  (b) los riesgos especiales a los que, de acuerdo con la información accesible al acreedor, puede estar expuesto el garante teniendo en cuenta a la situación financiera del deudor.
(2) Si el acreedor tiene conocimiento o tiene motivos para saber que, debido a una relación de confianza entre el deudor y el garante, existe un riesgo significativo de que el garante no esté actuando libremente o con la información adecuada, el acreedor deberá asegurarse de que el garante haya recibido consejo independiente.
(3) Si la información o consejo independiente exigido en el párrafo anterior no han sido dados al menos cinco días antes de la firma por el garante de su oferta o contrato de garantía, la oferta puede ser retirada o el contrato puede ser anulado por el garante dentro de un plazo razonable después de la recepción de la información o el consejo independiente. A este efecto se considera razonable el plazo de cinco días hábiles, a menos que de las circunstancias se derive otra cosa.
(4) Si de forma contraria a los párrafos (1) ó (2) no se proporciona información o consejo independiente, la oferta puede ser revocada o el contrato anulado por el garante en cualquier momento.
(5) Si el garante revoca su oferta o anula el contrato de acuerdo con lo establecido en los párrafos anteriores, la devolución de los beneficios recibidos por las partes se regula por los PECL Artículo 4:115 ó por las normas generales del enriquecimiento injusto.

Artículo 4:104: Operaciones de garantía fuera de establecimiento mercantil
Las normas de la Directiva del Consejo 85/577/CEE de 20 Diciembre 1985 sobre la protección del consumidor en relación a las operaciones realizadas fuera de establecimiento mercantil son de aplicación a las garantías reguladas en este Capítulo.

Artículo 4:105: Forma

(1) El contrato de garantía debe realizarse en forma escrita y estar firmado por el garante. El contrato de garantía que no cumpla con los requisitos de la frase anterior es nulo.

Artículo 4:106: Naturaleza de la responsabilidad del garante

En los casos en que esta parte es de aplicación:

(a) un acuerdo que tiene por objeto la creación de una garantía sin cuantía máxima acordada, tanto si es global (Artículo 1:101 letra (f)) como si no, da lugar a una fianza con una cuantía fijada que se determina de acuerdo con el Artículo 2:102 párrafo (3);

(b) la responsabilidad del garante es subsidiaria en los términos del Artículo 2:106, a menos que se haya acordado expresamente lo contrario; y

(c) un acuerdo de constitución de una garantía autónoma será considerado como fianza, si se cumplen los requisitos de la misma.

Artículo 4:107: Obligación del acreedor de prestar información anual

(1) Siempre que el deudor lo consienta, el acreedor debe informar al garante anualmente sobre las cantidades adeudadas en concepto de obligación principal, intereses y otras obligaciones accesorias debidas por el deudor en la fecha de la información. El consentimiento del deudor, una vez prestado, es irrevocable.

(2) Se aplica el Artículo 2:107 párrafo (2) y (4) con las adaptaciones adecuadas.

Artículo 4:108: Limitación de la garantía temporal

(1) Un garante que ha prestado una garantía con un período determinado acordado puede limitar los efectos de la garantía tres años después de que ésta fuese efectiva, mediante notificación al acreedor con al menos tres meses de antelación. La regla anterior no se aplicará si la garantía se limita a cubrir obligaciones específicas u obligaciones que nazcan de contratos específicos. El acreedor deberá informar inmediatamente al deudor.

(2) En virtud de la notificación la eficacia de la garantía está limitada de acuerdo con el Artículo 2:109 párrafo (2).

Principles of European Law on Personal Security

Text with Comments and Notes

Introduction

A. General Remarks

1. By granting personal security, a security provider obliges itself to render a performance, usually by payment of money, to the creditor for the purpose of security. Typically, the purpose of personal security is to secure an underlying obligation that may be directly and expressly connected to the personal security or merely indirectly. Personal security differs from proprietary security which is usually granted by the debtor itself: the latter merely creates a preferential right for the creditor in one or more specific item(s) of its property. By contrast, by assuming a personal security, a third person, the security provider, becomes liable to the creditor with all its assets. It goes without saying that this creates a special risk for the security provider. This risk is commensurate to the utility which such security may constitute for the secured creditor, depending, of course, upon the security provider's potential to pay.

2. The rapid evolution and expansion of modern credit economies has increased the economic demand for as much security as possible; the better and the more comprehensive the security, the lower the creditor's risk and therefore the cost of the credit, as reflected by the interest rate. In addition, by making available a personal security, many debtors who otherwise would not be eligible may have the chance of receiving credit; this applies in particular to many consumers. Consequently, personal security has in recent years as much expanded as proprietary security. In countries, where the latter is restricted due to legal or practical reasons, personal security often may serve as a substitute and may therefore be even more important than the alternative.

3. The enormous expansion of credit in all modern economies would not have been possible without an equally strong expansion of the means of securing these credits, by both personal and proprietary security. The expansion of personal security, in particular, can be observed especially in public credit programmes for promoting credits to small and medium sized enterprises, as well as for exports and investments in foreign countries. In some countries, special institutions for the promotion of such programmes have been created which provide personal security for the commercial credits which small and medium domestic enterprises as well as exporters and investors may receive; the conditions, especially the interest rates of these credits are – thanks to the personal security furnished – clearly lower than those of normal commercial credits. The same phenomenon can be observed in a purely commercial setting if and insofar as satisfactory commercial or private persons or legal entities are willing to assume personal security. The granting of personal security has in recent years often been used also as a substitute for a customer's retaining payments as a security for potential warranty claims against building or other contractors. By offering a third party's personal security, the contractor quickly obtains urgently needed cash. Such personal securities require to be as readily and fully available as the cash which would otherwise have been retained by the customer. This is

the economic reason for the popularity of the personal securities that become due upon "first demand".

4. The granting of personal security is a specific type of contract which is recognised in all member states of the European Community and beyond. Being a contract, it is governed by the general maxim of freedom of contract. The parties therefore are free to develop new types of contractual personal security. Practice shows that such new types – beyond the classical model of the suretyship – have indeed been developed, especially the independent guarantee and the co-debtorship for security purposes, the most recent and still developing invention being the binding comfort letter.

5. One lesson to be learnt from the recent expansion of personal security is that any rule-making in this field, be it by legislation or by informal means such as a restatement, must be flexible, so as to leave room for new developments. In other words, any rule-making must not, in principle, be mandatory. On the other hand, the granting of personal security creates a very considerable risk for the security provider. It assumes an obligation vis-à-vis the creditor and it is liable with all its property. Only security providers who make the providing of personal security their business, such as banks or insurance companies, will assume this risk against a fee or commission, usually to be paid by the debtor. A very great percentage of personal security, however, is granted without a reward: by members or directors of a company with limited liability for securing company debts; by family members for bank credits granted to a spouse, a parent or a child to finance private acquisitions of any kind or the setting up, the expansion or the rescue of a business. Modern experiences in many countries have confirmed the old insight and wisdom that most people without business experience do not recognise the highly risky character of assuming a personal security. Legislators and courts have therefore increasingly intervened by establishing protective rules of a mandatory character for the protection of security givers. Any modern rule-making in the area of personal security would be incomplete and deficient if it would fail to recognise and counter this risk. However, in view of the existing broad range of national varieties to be found in Europe, it is not easy to frame a European common standard in this field (cf. Chapter 4).

6. The purpose of the Rules presented here is to reflect the state of development that has been achieved in our days in the 15 "old" member states of the European Union. In most of these member states, legislation or firm case law exists for the dependent personal security based upon, or at least in accordance with, the old Roman institution of the *fideiussio*. However, everywhere major new developments have taken place, although to different degrees and in divergent directions: one is the creation of a commercial branch in the form of the independent personal security and related instruments. Another, by contrast, is the elaboration of special protective rules for consumer security providers. The present Rules are intended to reflect these developments on a European level. By formulating rules that reflect these divergent modern trends it is hoped to promote practice in all member states and to thus create a level playing field for all interested parties in all member states.

7. The granting of personal security may be subject to conditions established by other branches of the law. There are prohibitions or restrictions of public law or general private

law. In some legal systems the validity of a personal security is sometimes made dependent upon its approval by a third party, *e.g.*, by the security provider's spouse or by the board of management of a company or, in the case of public institutions, by a supervisory authority. The absence of a required approval may nullify the personal security. The rules of this Part do not cover these situations; rather, the applicable national legal systems have to be consulted on any such requirements which typically are regulated in other branches of the law and the consequences of their non-observation.

8. The character and function of a personal security sometimes tends to be mixed up with other legal institutions and therefore needs to be clearly set out. In particular, the term "guarantee" (and its linguistic equivalents) in the GERMANIC countries is there used also in another context, *scil.* as a debtor's express warranty of its due performance. Such express warranties, as a collateral term affirming or strengthening a debtor's contractual main obligations (sometimes called a bilateral guarantee) are outside the scope of this Part. This Part deals only with contracts which serve as security for the performance of obligations owed by a third person, the debtor to the creditor. The security provider usually assumes this personal security upon the request and for the account of the debtor. Economically and to some degree also legally, a trilateral relationship is involved.

9. Close analysis of the various forms of personal security that have developed outside the original historical institution of what in these Rules is called a personal security, *i.e.* suretyship, has revealed that most variations of the traditional suretyship can be reduced to two basic patterns: personal security is either dependent upon the secured obligation – the classical example being the suretyship; or it is independent from any underlying obligation – the typical example being the (new) independent guarantee. While most Continental legal systems have developed specific terms for the two types of personal security (such as *Bürgschaft* and *Garantie*, or *cautionnement* and *garantie indépendante*, etc.), the terms used in the English-speaking countries ((suretyship) guarantee and indemnity) are not as precisely defined. Also another linguistic diversity should be noted: While English law accommodates all types of personal security under the singular of this term (the term "securities" has a meaning of its own), all Continental countries refer to the various types of personal "securities" in the plural. Consequently, these Rules are entitled "Rules on Personal Security", while the translations use the plural form.

10. The present Part is divided into four Chapters, the main division being between Chapters 2 and 3 which deal, respectively, with the two basic types of personal security just mentioned (cf. *supra* no. 9), *i.e.* the dependent and the independent personal security. These two Chapters are preceded by a short Chapter 1 with Common Rules. In this Chapter are to be found definitions, rules on the scope of this Part, rules common to dependent and independent personal securities and a rule on the special institution of the co-debtorship for security purposes (cf. Article 1:106). Finally, Chapter 4 comprises special protective rules for consumers as grantors of personal security.
Chapter 1: Common Rules
Chapter 2: Dependent Personal Security (Suretyship Guarantees)
Chapter 3: Independent Personal Security (Indemnities/Independent Guarantees)
Chapter 4: Special Rules for Personal Security of Consumers

11. In view of the manifold types of personal security that already exist and may further be added in the future, it seems to be preferable to use terms that are as general as possible, such as "personal security", "security provider" etc. throughout this Part. This method has indeed been used in the English version of these rules, allowing only for abstract terms such as "dependent personal security" or "independent personal security" in Chapters 2 and 3, respectively. In the translations of these rules into other languages, however, general terms are used only in Chapters 1 and 4, while in Chapters 2 and 3 the traditional national legal terminology has been applied in order to make the texts more comprehensible for the reader who will inevitably be more acquainted with these terms. Where, as in English and sometimes in some other national legal terminologies, terms that are comparably well-defined and generally accepted are not available, in the English version as well as in some of the translations traditional terms such as "suretyship guarantee" or "indemnity" are indicated only as a traditional variant.

12. The English text of the rules on personal security is the authentic text including the Comments which explain and specify the rules and the National Notes which, presented in a comparative method, indicate the situation in the 15 "old" member states of the European Union. The translations of the rules into some other languages are not authentic although much effort and discussion has been invested in establishing them.

B. Relation to General Contract Law (PECL)

13. Personal security is a specific type of contract, and only the specific features of this type of contract are laid down in the present Principles of European Law on Personal Security. However, for a full understanding of the present Principles, the Principles of European Contract Law (PECL) must be taken into account as an important supplemental set of rules. It goes without saying that it is neither necessary nor feasible to present in the present context a broad survey. A short conspectus of important principles and rules must suffice in order to direct attention to central issues and solutions of potentially relevant points.

14. The Principles of European Contract Law (PECL) were published in two volumes in 2000 and 2003[1] and offer in 17 chapters rules on general European contract law, specifically on the following subjects:

	Chapter(s)
Legal Sources, General Duties of the Parties and Terminology	1
Formation of Contracts	2
Plurality of Parties	10
Authority of Agents	3
Validity and Illegality	4 and 15

[1] *Lando and Beale* (eds.), Principles of European Contract Law. Parts I and II (The Hague, London and Boston 2000); *Lando, Clive, Prüm and Zimmermann* (eds.), Principles of European Contract Law. Part III (The Hague, London, New York 2003).

	Chapter(s)
Interpretation	5
Contents and Effects; Conditions	6 and 16
Performance	7
Non-Performance in General	8
Particular Remedies for Non-Performance; Capitalisation of Interest	9 and 17
Assignment of Claims	11
Substitution of New Debtor and Transfer of Contract	12
Set-Off	13
Prescription	14

If the parties wish to make these rules applicable, they will have to opt for them (PECL Article 1:101). Both the rules of PECL and most of the present rules are subject to party agreement, unless the contrary is expressly said (PECL Article 1:102 and in this Part Article 1:103, except the rules of Chapter 4).

15. For present purposes, it is necessary to distinguish between two different contracts: one is the security agreement under which the debtor of a monetary (or other) obligation obliges itself to provide a personal security to the creditor in order to secure its obligation (*infra* nos. 16-19). The other is the personal security itself which contains the security undertaking of the security provider towards the creditor (*infra* nos. 20-33).

16. The security agreement. This agreement usually is a clause which is contained in the main contract (*e.g.*, a credit contract between creditor and debtor; or an instalment sale between seller and buyer; etc.) and which is the source of the obligation to provide the security. It may also occur that the security agreement is a separate contract. However, the distinction between these two forms does not imply any difference in substance.

17. The security agreement will not be regulated as a specific type of contract; it is a preliminary aspect of both personal and proprietary security rights.

18. The security agreement is fully subject to the rules of general contract law, as laid down in PECL: The General Provisions of PECL, contained in Chapter 1 are applicable, including the principle of freedom of contract (PECL Article 1:102), the incidence of mandatory law (Article 1:103), the relevance of usages and practices (Article 1:105) and the rules on interpretation (Article 1:106 as well as Articles 5:101 to 5:106) and supplementation. The mandatory duty of good faith and fair dealing applies as well as the duty to co-operate (Articles 1:201 and 1:202). Attention should be drawn to the meaning of terms (Articles 1:301 s.) as well as certain technical rules on notice, computation of time and imputed knowledge and intention (Articles 1:303 ss.).

More comprehensive is the contents of each of the following Chapters 2-17, cf. *supra* no. 14.

Judging from published decisions, security agreements rarely seem to give rise to controversies. Critical fact situations that might be imagined may be the failure of the debtor of the obligation to be secured to present any security provider or to present a security provider with adequate means in view of the risk to be covered. Clearly this would be a non-performance within the purview of Chapter 8 which would give rise to the remedies set out in Chapters 8 and 9. While the enforcement of a right to performance (Chapter 9 Section 1) would make little sense, a claim for damages (Chapter 9 Section 5) and, depending upon the circumstances, termination of the security agreement under Chapter 9 Section 3 are realistic remedies.

19. Unlike for the contract of personal security as such (cf. *infra* no. 20), special rules on consumer protection do not appear to be necessary for the security agreement as such. Any terms that might have been agreed by the parties to the disadvantage of a consumer would be reflected, directly or indirectly, in the contract of personal security as such. They would therefore become subject to the special protective rules that are laid down in Chapter 4 of this Part.

20. **The contract of personal security.** The more essential aspects of the contract of personal security are governed by the rules laid down in this Part. However, these rules do not and cannot purport to deal with all aspects of the contract of personal security. Rather, gaps left by these rules are to be filled by recourse to the general rules contained in PECL. For this purpose, general reference is made to preceding no. 14 which offers a first, though very general survey of the fields covered by PECL.

21. With respect to **general aspects** of the contract of personal security, reference is made to *supra* no. 18. Article 1:103 of these rules on personal security is intended to have the same bearing as PECL Article 1:102 and must be understood in the same way.

22. The formation of the contract of personal security is almost completely subject to the general rules on formation of contracts contained in PECL Chapter 2. The only exception in the present Rules is Article 1:104. This exception is due to the fact that, since contracts of personal security as a rule do not create any principal obligation for creditors, the latter often neglect to accept expressly the security provider's offer if it complies with the conditions agreed by the parties and often proposed by the creditor.

23. Since the present Rules do not deal with the authority of agents nor with validity and illegality, the rules of PECL Chapters 3, 4 and 15 dealing with these topics apply fully.

24. The PECL rules in Chapter 5 on interpretation are fully applicable. However, PECL Article 5:103 is supplemented by Article 1:105 of the present Rules which slightly deviates from the corresponding PECL rule.

25. PECL Chapter 6 on contents and effects of contracts has almost no counterpart in the present Rules and is therefore, generally speaking, fully applicable. That is only partially true, though, for PECL Articles 6:104-6:108, since these rules obviously are relevant only for contracts concerning goods or services for a price. Professional security

providers will invariably provide security only against a fee, and they will also fix it expressly. If the fixed price is grossly unreasonable, PECL Article 6:105 offers a remedy.

PECL Article 6:109 on contracts for an indefinite period is with respect to dependent and independent personal securities overruled by Articles 2:109 and 3:106 (2) of the present Rules which deal with limiting dependent and independent security without time limits, respectively.

26. In PECL Chapter 7 on performance some provisions are clearly applicable to the performance of a monetary obligation. This is true especially for Articles 7:101 on the place of performance, 7:107 and 7:108 on the form and currency of payment, 7:109 on the appropriation of performance and 7:111 on non-acceptance of money.

27. PECL Chapters 8 and 9 on non-performance and remedies for non-performance are, of course, highly relevant from a practical point of view. Since there are no counterparts in the present Rules, the two chapters are fully applicable. The very first rule of Chapter 9, *i.e.* Article 9:101 (1) confirms the very basic principle that the creditor is entitled to recover money that is owed and due. While non-payment of a personal security undoubtedly is a fundamental non-performance in the sense of PECL Article 9:301 (1), the remedy of termination of the contract by the creditor does not provide much practical assistance. Rather, the creditor will wish to demand damages under Articles 9:501 ss. or, in the case of delayed payment, interest and damages under Articles 9:508-9:510. Other kinds of non-performance also may give rise to claims for damages.

28. PECL Chapter 10, especially Section 1 on plurality of debtors, is highly relevant for the increasing number of cases where several persons assume security, whether personal or proprietary, for the same monetary obligation. Article 1:107 of the present Rules specifies the more general rule contained in PECL Article 10:101.

The PECL rule in Article 10:106 on recourse between solidary debtors is the basis of Article 1:108 of this Part, as is expressly indicated in paras (1) and (2). These two provisions specify many details for the practical application of PECL Article 10:106.

Apart from the issues of contribution from other solidary debtors, the remaining rules in PECL Articles 10:107 to 10:111 fully apply to solidary security providers.

According to Article 1:106 of the present Rules, a co-debtorship for security purposes is primarily subject to Chapters 1 and 4 of this Part. However, subsidiarily the rules on plurality of debtors in PECL Chapter 10 Section 1 are expressly declared to be applicable.

Even broader is the general reference, if any further gaps require to be filled, which Article 1:110 makes to the rules in PECL Articles 10:106 to 10:111 as subsidiary sources.

29. PECL Chapter 11 on assignment of claims has some limited incidence for personal security rights. It confirms one traditional consequence of an assignment of a secured right, the transfer to the assignee of all "accessory rights securing … performance" (PECL Article 11:201 (1) (b)); obviously this applies to dependent personal security. This rule is

supplemented by Article 11:204 (c) which obliges the assignor to transfer to the assignee all "transferable rights intended to secure performance which are not accessory rights."

30. The reverse case to an assignment of the secured credit is the substitution of a new debtor to replace the original debtor. A personal security granted for the original debtor's obligation is, as a rule, discharged, unless the security provider agrees that its security should remain valid for the creditor (PECL Article 12:102 (3)). If the security provider refuses such agreement, the security will terminate (PECL, Comment C to Article 12:102).

31. A transfer of contract combines according to PECL Article 12:201 (2) an assignment of rights to performance with a substitution of the debtor. That means that the rules in preceding nos. 29 and 30 have to be cumulated.

32. Article 2:103 (4) and (5) of the present Rules allows the security provider to refuse performance in two cases.

First, if the contract from which the secured obligation arises is subject to avoidance by the debtor and the latter has not exercised this right – except if avoidance would be possible according to para (3). What is intended to be covered is mainly avoidance on the ground of a defect of consent by the debtor.

Second, Article 2:103 (5) allows the security provider to refuse performance if the secured obligation is subject to set-off and that set-off has not yet been declared. The Comments to Article 2:103 clarify that the right to declare set-off may be vested in the debtor or the creditor (cf. Comments nos. 13 and 14 to Article 2:103).

33. An issue of great practical importance is finally the problem of prescription of the security. One has to distinguish between the prescription of the secured claim and the prescription of the security proper.

On the first aspect two remarks have to be made. First, if the debtor after creation of the secured claim agrees with the creditor to furnish a personal security, by such an acknowledgement a new period of prescription begins to run (PECL Article 14:401 (1)). The same is true if the debtor concludes a corresponding agreement with a security provider in favour of the creditor. Second, since a provider of dependent security by virtue of the principle of dependency may invoke "any defence of the debtor with respect to … enforceability …" (Article 2:103 (1)), it may invoke the unenforceability of the secured claim, provided the period of prescription of that claim has in fact run. If that condition is fulfilled, the security provider can invoke this defence.

Finally, independent of the prescription of the secured claim, the claim under a personal security has also a prescription period of its own. For this, the rules of PECL Chapter 14 apply fully. The general prescription period is three years (Article 14:201).

Chapter 1:
Common Rules

Article 1:101: Definitions

For the purposes of this Part:

(a) A dependent personal security (suretyship guarantee) is a contractual obligation by a security provider to make payment or to render another performance or to pay damages to the creditor that is assumed in order to secure a present or future obligation of the debtor owed to the creditor and that depends upon the validity, terms and extent of the latter obligation;

(b) An independent personal security (indemnity/independent guarantee) is a contractual obligation assumed for the purposes of security by a security provider to make payment or to render another performance or to pay damages to the creditor that is expressly or impliedly agreed not to depend upon the validity, terms or extent of another person's obligation owed to the creditor;

(c) The security provider is the person who assumes the obligations under the contract of personal security towards the creditor;

(d) The debtor is the person who owes the secured obligation, if any, to the creditor;

(e) In a co-debtorship for security purposes a co-debtor acts as security provider if it obliges itself primarily for purposes of security towards the creditor;

(f) A global security (global guarantee) is a dependent personal security that is agreed to cover all the debtor's obligations towards the creditor or the debit balance of a current account or a security of a similar extent;

(g) A consumer means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession;

(h) Proprietary security covers security rights in all kinds of property, whether movable or immovable, tangible or intangible.

Comments

A. Personal Security – Litt. (a) and (b)

1. Personal security. The term "personal security" as a general term is not familiar to all European countries. It is to be understood as a broad counterpart to the term "proprietary security" (cf. *infra* I). Personal security comprises all those security rights in which a person (be it a natural person or a legal entity) is liable with all its assets in order to secure an obligation of another person, the principal debtor. By contrast, proprietary security if, as is usual (though not necessary) provided by the debtor of the secured claim, exposes the security provider only with respect to the specific encumbered asset(s) to a right for preferential satisfaction of the secured creditor. The contrast to personal security is obvious. This indicates why personal security is very attractive for creditors and plays a very important role in practice. However, as always, that attractiveness for creditors has to be paid for. It is paid for by an equivalent degree of risk for the provider of personal security. One may therefore legitimately expect that the proper protection of providers of personal security is an integral factor of any set of rules on personal security.

2. Two central institutions. Article 1:101 (a) and (b) define the two central contemporary institutions of personal security, *i.e.* the dependent and the independent personal security. Of these two, the dependent personal security is the oldest; its roots go back to ROMAN law *(fideiussio)*. The centuries of practical experience have resulted in national rules that are relatively well settled, although they vary to some degree between the member states. By contrast, the independent personal security is a phenomenon of modern times which in some countries has not been recognised until very late in the twentieth century and which has only exceptionally been sanctioned by legislators. Most other modern functional types of personal security, such as binding comfort letters (Article 2:101 (2)) and stand-by letters of credit (Article 3:101 (2)) are covered by the one or the other of those two central institutions. The only exception is co-debtorship for security purposes (Article 1:101 (e)). According to Article 1:106, such co-debtorship is governed primarily by the rules in Chapters 1 and 4 of the present Part; subsidiarily, the general rules on co-debtorship in PECL Chapter 10 Section 1 apply.

3. Terminology. The terms "dependent" and "independent" personal security are not derived from any national legal system. They have been coined since they express the salient features of the two central institutions. Personal security may either depend upon major aspects of the secured claim – dependent personal security, cf. lit. (a); or it may be independent – at least in legal contemplation – of any possibly underlying claim – independent personal security, cf. lit. (b). The terms "dependent" and "independent" are thought to be both more commonly understandable and more closely connected to the ideas of the parties to the contract of personal security than the term "accessory" employed by PECL (cf. Articles 10:106 and 11:201 (1) (b)), which refers to the consequence rather than the reason for connecting the fate of two claims.

4. Creation of personal securities. In general, the present Rules do not deal with the creation of personal securities. This is left to general contract law, cf. PECL Chapters 2-4 or to applicable national law on the formation and validity of contracts (see also Introduction nos. 21 ss.). However, one major exception is to be found in Chapter 4 of these Rules on personal securities provided by consumers. The process of contracting securities

constitutes one of the sensible areas where the consumer requires special protection, cf. *infra* Articles 4:103-4:105.

5. **Validity of personal securities**. The present Rules do not either deal with validity of a personal security – except indirectly, insofar as the validity of a dependent security may be affected by the invalidity of the secured claim, cf. *infra* nos. 20-23 and Article 2:103 (1). Of course, personal securities as such must not infringe general or specific legal prohibitions (PECL Chapter 15) nor specific restrictions which may be contained in European or national company or matrimonial (property) law.

6. **Location of rules**. Dependent security is dealt with in Chapter 2, the central and broadest Chapter of this Part on personal security. These rules are supplemented by specific provisions on consumer protection in Chapter 4 which are also applicable where consumers assume other types of personal security (cf. Article 4:102 (1)). The rules on independent security can be found in Chapter 3, which in fact will essentially be relevant for personal security granted by business and professional security providers. All three Chapters 2 to 4 are subject to a few general rules set out in Chapter 1.

B. Dependent Personal Security – Lit. (a)

7. **Outline**. The following Comments will deal successively with the term "dependent personal security" (*sub* a), the kinds of security obligation (*sub* b), some special kinds of secured obligations (*sub* c), the nature of the security obligation (*sub* d), and, finally and broadly, the dependency of the security obligation upon the secured obligation (*sub* e).

a. The Term Dependent Security

8. The term "dependent security" does not seem to be used by any national legal system in Europe. Instead, various names are given to designate the basic institution, *i.e.* suretyship or suretyship guarantee, cf. National Notes *sub* II B. Unfortunately, not even in the Anglophone member states the basic term is firmly rooted. For these reasons it was decided to coin the new functional and descriptive term of dependent security.

b. Types of Security Obligation

9. According to Article 1:101 (a) the security may take three forms. In the vast majority of cases, the security provider promises to make a payment of money. In some specific cases, the payment of damages is being promised. The most important example is the issue of a binding comfort letter.

> *Illustration 1*
> A, the majority shareholder of company Z, sends a letter to the major creditors of Z which is in financial straits saying: "I herewith undertake to settle all present and future indebtedness of company Z in order to save it from bankruptcy." If, contrary

to his promise, Z does not abide by his letter, the creditors of Z who have received the above undertaking may sue Z for damages based upon the breach of his undertaking.

A security provider may also promise to make a performance other than the payment of money, such as the delivery of marketable securities or even of other goods.

c. Special Types of Secured Obligations

10. General. In the vast majority of cases, the secured obligation will be a monetary obligation – repayment of a credit, payment of a purchase price or of rent, payment of damages, etc. These obligations – as all secured obligations – may already have come into existence upon assumption of the security obligation or they may arise in future, such as a claim for damages arising upon breach of a contract just concluded. Apart from these "ordinary" monetary obligations, two special types of obligations that may be secured deserve to be mentioned specifically in the following two paragraphs.

11. Obligation arising from a personal or proprietary security. The provider of a personal or a proprietary security may wish to be ensured that, if he or she would in future be pursued on his or her security, recourse against another person is possible. There is no objection against securing such a conditional secured obligation. Counter securities, such as counter guarantees or confirmations of a (stand-by) letter of credit are frequently used in commercial practice.

12. Security for public law claim. Less obvious is the answer to the question whether a private law security may be used to secure a claim rooted in public law. However, the case law of the European Court of Justice and of national courts furnishes ample support for admitting this variety. Two decisions of the European Court rendered in 2003 and 2004 and the underlying references by national courts dealt with dependent securities that may be furnished under the system of sealed cross-border road transport under carnet TIR in order to avoid or delay the payment of customs duties by the transport enterprises.[1] In both cases the European Court held that claims based upon or derived from dependent personal securities granted for such customs duties could be brought under the rules of the Brussels Convention on Jurisdiction in civil and commercial matters of 1968 (now replaced by Regulation no. 44/2001). They qualified as ordinary private law claims since they are not tainted by special considerations of a public law nature – even though possibly exceptions based upon the secured public law claim may be raised by the surety.[2] Cf. also *infra* nos. 14 and 18 and *infra* Article 1:102 Comments nos. 22-25.

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1 The basic traits of the system of suretyships securing claims under carnets TIR are set out in the case *Bundesverband Güterkraftverkehr und Logistik eV (BGL) v. Bundesrepublik Deutschland* (Case C – 78/01) of 23 September 2003, ECR 2003 I 9543 at nos. 6-11. Cf. also *infra* Article 1:102 Comment 23.

2 *Berliner Kindl Brauerei AG v. Siepert* (case no. C-208/98) of 23 March 2000, ECR 2000 I 1741 at p. 1752 s. nos. 36-37; *Préservatrice Foncière TIARD SA v. Staat der Nederlanden* (case no. C-266/

d. Legal Nature of Security

13. The wording of Article 1:101 (a) suggests that a dependent personal security is a contractual obligation of the security provider to make payment or render another performance to the creditor. As a rule, the security provider, especially if not a professional, will not ask or receive any counter-performance from the creditor. By contrast, professional security providers, such as banks or insurance companies, charge a commission for issuing a dependent personal security. Typically, therefore, such security is granted in the framework of a bilateral contract and creates an obligation at least on the part of the security provider. The debtor of the secured obligation as the factual beneficiary of the security is usually indirectly involved under two aspects: In its relationship with the creditor, *e.g.* under a credit agreement, which gives rise to the obligation to be secured, the debtor is usually obliged to engage the provider of a personal security which must fulfil certain minimum conditions set by the creditor. On the other hand, the debtor must ask a security provider to assume a security towards the creditor meeting the latter's conditions. Thus, in fact a triangular relationship comes into being. However, the contents and objectives of each of the three sides of this triangle differ. Two sides can easily be classified as well-known types of bilateral contract: The credit relationship between creditor and debtor (usually including the security agreement, cf. Introduction nos. 16 ss.), and the mandate or service contract between debtor and security provider. What remains, is the third side, that between creditor and security provider: this is the contractual dependent personal security.

14. In the practice of the European Court of Justice occasionally divergent views have been expressed. In the case *Berliner Kindl Brauerei*, Attorney-General *Léger*, invoking a French legal dictionary, expressed the view that a suretyship is a unilateral contract. On the other hand, in the later case of *TIARD* the Court of Justice, invoking "the general principles which stem from the legal systems of the contracting States" regarded a suretyship contract as a "triangular process". Since, however, in fact the Court dealt only with the surety's obligation towards the creditor this may be regarded as a mere *obiter dictum*. By contrast, the last relevant case *Frahuil* implicitly seems to be based on the idea of a trilateral contract. Here the Italian surety company, after having paid the customs duties sought recourse from the French debtor, the importer of the goods. The Court stated that the French debtor was not a party to the suretyship contract. The Court then inquired whether the transport company which had mandated the surety, had done so "for the account of the importer" (no. 25). If the national courts cannot find that the debtor has become a party to the suretyship contract, the national courts in Italy have no jurisdiction under the exceptional head of Art. 5 no. 1 (for contractual claims) of the Brussels Convention.[3]

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01) of 15 May 2003, ECR 2003 I 4867 at p. 4893 no. 36, p. 4895 no. 40 and p. 4896 nos. 41 and 43; *Frahuil SA v. Assitalia SpA* (case no. C-265/02) of 5 Feb. 2004, ECR 2004 I 1543 at p. 1554 no. 21.

3 *Berliner Kindl Brauerei AG v. Siepert* (*supra* fn. 2) at p. 1752 s. nos. 36-37; *Préservatrice Foncière TIARD SA* (*supra* fn. 2) at p. 4891 no. 27; case *Frahuil* (*supra* fn. 2) at p. 1555 no. 25.

e. Dependency

i. The Principle

15. On the reason for choosing the term "dependent" rather than "accessory", cf. *supra* no. 3. Article 1:101 (a) in *fine* enumerates the most important elements to which the dependency between security and secured obligation relates. Mere correspondence of terms and conditions, though, does not suffice to constitute dependency. Rather, the terms of the security must establish a connection with the secured claim.

16. The all-important element of the definition is the verb "depend upon": the basic type of personal security is characterized by the fact that in almost all respects it depends upon the debtor's obligation to the creditor which is secured by the provider of the personal security towards the creditor. The only major exception is to be found in the debtor's insolvency: any reduction or discharge of the debtor's obligation(s) does not affect the security provider's obligation (cf Article 2:102 (2) sent. 2) since this would run counter to the fundamental purpose and function of security. The principle of dependency is not limited to personal security but dominates also proprietary security, both in movables and in immovables. However, today this principle is no longer the only maxim of personal and proprietary security; rather it is more and more supplemented by security rights that are independent from any specific secured obligation.

17. In Chapter 2 on dependent personal security, the principle of dependency informs essential provisions, especially Articles 2:103 on terms and extent of the security provider's obligations and 2:104 on the debtor's defences which the security provider may invoke.

18. In at least three cases, the European Court of Justice has also recognized the principle of dependency as the characteristic element of suretyships: The surety's obligation does not fall due until maturity of the secured obligation and the surety's obligation may not surpass that of the debtor. These statements were made in order to ascertain whether certain Directives on consumer protection or the Brussels Convention of 1968 on jurisdiction in civil and commercial matters were or were not applicable to suretyships.[4]

ii. Reverse Dependency?

19. While the dependency of the personal security upon the secured obligation is generally recognized, one must not overlook that there may also be reverse dependency. A personal security right may for some reason be invalid, *e.g.*, due to a legal prohibition (*infra* nos. 20-23) or disregard of the protective provisions for consumer dependent securities established in Chapter 4 of these Rules or under national law. Such invalidity or avoidance may give rise to the issue whether this may have repercussions on the secured

4 *Préservatrice Foncière TIARD SA* (*supra* fn. 2) at p. 4891 s. no. 29; cf. also p. 4893 no. 34. Earlier in more general form in *Bayerische Hypotheken- und Wechselbank AG v. Dietzinger* (case no. C-45/96) of 17 March 1998, ECR 1998 I 1199 at p. 1221 nos. 18 and 20 and in *Berliner Kindl Brauerei AG* (*supra* fn. 2) at p. 1744 no. 26.

obligation. This issue was alluded to in a decision of the European Court of Justice (*Dietzinger* case, *supra* fn. 4, p. 1221 no. 21). This issue is beyond the reach of the present Rules and must be solved under the applicable national law.

iii. Validity

20. **Elements.** The first element to which the definition of Article 1:101 (a) expressly refers is validity. There cannot be a valid and effective dependent personal security unless the secured claim is valid. The validity of the secured claim may be affected by subjective and objective factors.

21. **Subjective factors** may be the personal qualities of the parties to the transaction from which the claim to be secured arises. One of the parties, if it purports to be a legal entity, may not have come into existence. Or a natural person, due to age or sickness, may be legally incapable to enter into legal transactions. Any incapacity of this kind may under the applicable national law have the consequence of invalidating the underlying transaction and therefore also the claim to be secured. This rule also protects the security provider: After having performed the security, the chances of recovery on its claim for recourse against a debtor who is incapable would be small.

22. There is one exception to this general rule. According to Article 2:103 (3) the security provider may not invoke the debtor's lack of capacity or the non-existence of the debtor legal entity if the relevant facts were known to the security provider at the time when the security became effective. For details, reference is made to the Comments to this provision.

23. **Objective factors** that may affect the validity of the secured claim are illegality or avoidance. These may affect the secured claim or the underlying transaction in which it is rooted. On illegality, cf. PECL Chapter 15; otherwise, the applicable national rules govern the conditions and effects of illegality. On avoidance due to defective consent, cf. PECL Chapter 4; otherwise, the applicable national rules govern the conditions and effects of an avoidance of the contract.

iv. Terms and Extent

24. In practice more important than validity are the terms and extent of the debtor's obligation that is to be covered by the security. "Extent" refers primarily to the amount of money that is usually involved: capital, interest and cost of recovery (cf. Article 2:104). However, in the case of a global security (cf. Article 1:101 (f)) the amount of the secured claim may be open-ended and fluctuating, especially if a current account is secured.

25. The "terms" of the secured obligation cover all its conditions, especially its maturity and other conditions upon which it may depend.

26. "Dependency" of the personal security upon the extent and terms of the secured obligation implies that the latter is not identical with the security obligation. There are two separate obligations, owed by two different persons, the security provider, on the one

hand, and the debtor of the secured obligation, on the other hand. Neither is it necessary that these two obligations are identical in terms of extent and conditions. The security obligation can be lower than the secured obligation and on less extensive terms. By contrast, its amount cannot be higher and on more demanding terms than the secured obligation. Any such surplus would no longer depend upon the secured obligation and is therefore void.

v. Transfer of Secured Obligation

27. One consequence of the principle of dependency is that upon transfer of the secured obligation the attendant security also passes to the transferee. For contractual transfers of obligations, *i.e.* assignments, this has been spelt out in PECL Article 11:201 (1) (b) since dependent securities are "accessory rights securing … performance." One may assume that the same rule obtains upon legal transfers, unless the contrary is provided.

C. Independent Personal Security – Lit. (b)

a. Introductory

28. The independent personal security is a close relative to, but in one decisive respect completely differs from a dependent personal security, defined in preceding lit. (a). The one distinguishing feature is the independence of the security provider's obligation to the creditor in contrast to the dependency of the dependent security on the secured obligation. In all other respects the independent and the dependent personal security share the same features, as the parallel wording of litt. (b) and (a) confirms. In this respect, therefore, reference can be made to *supra* Comments nos. 7-14. On the reason for choosing the term "independent" rather than "non accessory", cf. *supra* no. 3.

29. The detailed rules on independent personal security are to be found in Chapter 3 of these Rules.

b. Special Feature

30. The decisive special feature of the independent personal security is its independence from any other agreement, especially an underlying contract between the creditor and the debtor. This independence is laid down and specified in lit. (b). In particular it is irrelevant for the security provider's obligation whether the underlying obligation (such as a seller's obligation to deliver or a customer's obligation to pay the price under a contract of sale or for services) is valid or not, which terms it contains and the extent of the debtor's obligations.

31. On the other hand, the validity of the security provider's undertaking itself is an indispensable condition for the security provider's obligation to honour its security. Thus

it must have full capacity and its undertaking must have been created without violation of any legal rules or any defects of consent which might give rise to a right of avoidance under PECL Chapter 4 (*supra* nos. 4 s.).

32. The independent character of an independent personal security must be "expressly or impliedly declared". This rule dovetails with Article 2:101 which establishes a presumption for any personal security being a *dependent* security, "unless the creditor shows that it was agreed otherwise." For letters of credit and stand-by letters of credit, UCP 500 (1993) art. 3 and 4 explicitly and broadly emphasize the independence of the "credit" from underlying contracts or the objects of those contracts, such as goods, services and other performances. More succinctly in the same sense is UN Convention on Independent Guarantees of 1995 art. 3. Apart from these specific types of an independent personal security, the latter requires an express or implied declaration. An express declaration can usually be found if the title or body of a personal security contains the words "independent guarantee". An implied declaration of independence can be presumed if an instrument does not make any reference to a secured obligation, as is usual in any dependent personal security; such silence may be treated as an implied declaration of independence.

33. Article 3:101 (1) specifies and confirms the independent character of a security. A merely general reference to an underlying transaction does not impair the independence of an independent undertaking. Usually, an independent security refers to an underlying contract (*e.g.*, of sale or services) or another security (*e.g.*, a default security to the security provided by the bank opening a letter of credit; or a "counter security" to the security issued by the security provider on the instruction of the issuer of the counter security) in order to specify the event upon the occurrence (or non-occurrence) of which performance of the security may be demanded by the creditor. Any such *general* reference to an underlying obligation does not affect the independent character of a security, since the decisive point is that the security provider's obligation to perform is independent of the obligation(s) of the principal as debtor of the underlying contract with the creditor.

c. Advantages and Risks of Independent Undertakings

34. At least for professional security providers, such as banks and insurance companies, the independence of their security undertakings has clear economic advantages: they can easily calculate their risk and this risk is a reliable basis for calculating their charges for assuming this risk. While it seems to be more advantageous to assume a dependent personal security since this allows the security provider to invoke the debtor's exceptions and defences, the administration of these counter-rights is difficult, time consuming and uncertain as to its success.

35. On the other hand, it is precisely the independence of such undertakings which creates a risk for the persons who have caused the issuance of such undertakings in favour of the creditor. Demanding performance of an abstract security or of another independent security does not require the creditor to prove any default on the part of the debtor.

This has invited abusive presentations of independent security instruments. In order to counter such practices, defensive provisions had to be instituted along the lines of Articles 3:103 (2) and 3:104.

D. Security Provider – Lit. (c)

36. This definition requires hardly any comment. The term "security provider" is neutral. It covers any person who is obliged to the creditor under a personal security, whether the latter is dependent or independent in the sense of litt. (a) or (b). A special situation may arise if the security provider wishes to secure its (potential) claim for reimbursement against the debtor. In such a case, the debtor may instruct a fourth party to provide a personal security in favour of the primary security provider. In the case of such a counter security provided by a fourth person to the primary security provider, the roles of the parties change: the primary security provider becomes the creditor of the counter security, who may claim performance of the counter security from the secondary security provider.

E. Debtor – Lit. (d)

37. In cases of dependent personal security (Article 1:101 (a)), two different persons owe obligations to the creditor: One is the debtor of the secured obligation, the other the debtor of the security obligation. The latter is in these Rules called the "security provider" – cf., *supra* no. 36 in order to avoid misunderstanding. By contrast, the obligor of the secured obligation can retain its designation as the – principal – debtor.

38. On the other hand, in an independent personal security (Article 1:101 (b)), only a security provider and a creditor are legally relevant. Since in these cases a secured obligation is not necessary, neither is a debtor, as defined in Article 1:101 (d). The two words "if any" refer to this possible absence of a debtor.

F. Co-Debtorship for Security Purposes – Lit. (e)

a. Policy

39. Co-debtorship for security purposes is, as the name suggests, not a traditional security device but rather a functional one. In order to achieve full protection of those persons who deserve it and to counter creditors' attempts to evade protective provisions for "genuine" security providers, functional devices with security purposes must be covered by these Rules. In some countries, parties sometimes evade mandatory provisions of the national law on personal security (such as a simple or qualified writing) by agreeing on a co-debtorship for security purposes. If, apart from the principal debtor, another person assumes a corresponding obligation towards the creditor, a trilateral relationship comes into being. However, the position of the additional debtor may differ from that of

the principal debtor: while the latter requires a credit for his business or professional activity, the additional debtor may, or may not, have any proper interest in the loan granted by the creditor.

Illustration 2a
A young medical doctor D wishes to acquire for his medical office a very expensive instrument and obtains a credit from his bank. D's wife W is also a medical doctor who also practices in D's medical office. Therefore the bank requires W's co-signature of the credit and security agreement. After D's death in an accident, the bank requests payment of the credit from W who invokes the protective rules for consumer security providers.

Illustration 2b
The facts are as in Illustration 2a, except that W is an artist from a wealthy family.

Must W be treated as a genuine co-debtor or does she deserve to be treated as a mere security provider?

b. Criteria for Distinction

40. Illustrations 2a and 2b suggest that an important, if not the most important criterion is the economic interest which the two obligors have in the granting of the credit. While D's interest is obvious, that of W obviously varies in the two hypothetical cases. It is nil in Illustration 2b, but is as great as that of D in Illustration 2a. In the latter case, W should be treated as a genuine co-obligor, whereas in the former case W clearly qualifies as a mere security provider. The fact that W even in the second case may indirectly benefit from the credit granted to D since the latter's better financial position indirectly will benefit also W, does not meet the requirements of Article 1:101 (e): Decisive is the primary purpose of the assumption of debt (cf. "primarily" for purposes of security). As a co-debtor for security purposes acting primarily for purposes not related to her business or profession, W is in Illustration 2b entitled under Article 1:106 to the protection of a consumer according to Chapter 4 of the Rules. In the final analysis, the creditor's contract(s) with the two obligors must be interpreted in light of all the circumstances.

c. Time of Assumption of Debt Irrelevant

41. The definition in Article 1:101 (e) does not distinguish whether the second obligation had been assumed at the same time as the other (or, possibly, the main) obligation or subsequently. The time element is here as irrelevant as it is for the provision of true personal (or proprietary) security.

d. Applicable Rules

42. Article 1:106 lays down which rules apply to a co-debtorship for security purposes. Most important is the reference in Article 1:106 to Chapter 4 of this Part containing rules for the protection of a co-debtor for security purposes who is a consumer (cf. *infra* nos. 47 ss., especially no. 50).

G. Global Security – Lit. (f)

a. A Type of Dependent Personal Security

43. Most personal securities are limited in the one or the other way: they secure either a specific credit with a specific amount; or several credits for which a total limit is specified; or a credit for a specific purpose for which a maximum limit can be calculated, etc. Or the security itself is limited to a specific amount. For independent personal securities (*supra* lit. (b)), the limitation of the security itself is the only feasible method and is standard use.

44. However, dependent personal securities do not always fit this scheme because the credits which they secure may be open-ended. The parties, at the time of contracting the secured credit, may not yet know which kinds of credits are to be secured. Standard example is a personal security for a current account or for all future indebtedness of a debtor, where the number, nature and kinds of claims to be secured is initially not yet known. By contrast, personal security for a specific claim for which at the time of contracting the security the upper limit is not yet known is not a global security since it is much less risky than the kinds of credit for which a global security is granted.

45. Global security and lack of maximum amount of security distinguished. The existence of a global security does not depend upon the fact that the parties have or have not fixed a maximum amount for the security. A security is not global because no maximum limit has been agreed for the security. A security is global if the kind, source or time of credits to be secured is left open by the parties.

b. Applicable Rules

46. Special rules on global security are to be found in several provisions spread over Chapter 2. According to Articles 2:102 (3) and (4) global security is exempted from certain limits which are placed upon open-ended ordinary dependent security rights. Article 2:104 (3) limits the coverage of global security to obligations which were created by contracts between the creditor and the debtor of the global security. The most important protective consequence is incorporated in Article 2:107 (2) and (3) which impose upon the creditor of a global security duties of information in favour of the security provider. Finally, where a consumer, as defined in Article 1:101 (g), assumes a global security, additional protective rules apply. If the secured amount had not been fixed by the parties, it must have an agreed maximum amount or such a limitation will have to be determined according to Article 2:102 (3) – see Article 4:106 (a).

H. Consumer – Lit. (g)

a. Terminology

47. The term "consumer" is used here in a broader sense than is usual in European law. In the Directives dealing with the protection of the consumer in contracting, the consumer is understood as a contracting party who is the buyer of assets[5] or the receiver of services[6] from a professional seller or a professional provider of services or both.[7] By contrast, in these Rules it is the weak party rather than the professional who may be providing financial services by providing personal security, in whatever form. In view of this important difference it was originally considered to define the non-professional provider of personal security as "a person who requires protection like a consumer". However, in order to avoid such a cumbersome formula and to facilitate terminology, eventually the short term "consumer" was adopted. It appears that the term and its definition reflect the present official approach of the EU Commission.

48. Consumers are only natural persons because they are the ones who typically need protection. Legal entities and also groups without legal personality are therefore excluded, even if they do not pursue economic purposes because as groups they are typically more powerful than individuals.

49. On the other hand, individuals who exercise a trade, business or profession are typically better versed and more experienced than "private" individuals. They can also more easily obtain business or legal advice from trade, business or professional organisations with which most of these people are either associated or to which they can easily have access.

b. Applicable Rules

50. Special protective rules on personal security assumed by consumers are to be found in Chapter 4 of these Rules. Moreover, the rules of Chapter 2 apply to all types of personal security assumed by a consumer (cf. Articles 4:102 (1) and 4:106 (c)).

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5 Article 1 and 3 of Directive 1999/44/EC on the sale of consumer goods of 25 May 1999, OJ EC 1999 L 171 p. 12; Article 2 of Directive 94/47/EC on the protection of purchasers of time-shares in immovables of 26 October 1994, OJ EC 1994 L 280, p. 83.

6 Article 1 para 1 litt. b) and c) of Directive 87/102/EC on consumer credit of 22 December 1986, OJ EC 1987 L 42, p. 48; Article 2 no. 4 of Directive no. 90/314/EC on package travel of 13 June 1990, OJ EC L 158, p. 59.

7 Article 1 of Directive no. 85/577/EC on doorstep transactions of 20 December 1985, OJ EC 1985 L 372, p. 31; Article 2 no. 1 of Directive no. 97/7/EC on contracting in distance contracts of 20 May 1997, OJ EC 1997 L 144, p. 19; Article 2 lit. (d) of Directive 90/619/EEC of 23 September 2002 on distance marketing of consumer financial services, OJ EC 2002 L 271 p. 16.

I. Proprietary Security – Lit. (h)

51. For the application of this Part, proprietary security is defined very broadly. With respect to security in movables, modern phenomena, such as reservation (retention) of ownership (title) and the security transfer of ownership are covered, but also functional equivalents, such as financial leasing and hire-purchase. For the purposes of the present Part, also proprietary security in immovables is comprised.

Proprietary security as such is not covered by this instrument. Nevertheless, for the application of some rules of this Part it is necessary to take into consideration also proprietary security. This applies in particular for Articles 1:107-1:109 which cover multiple security for a secured credit, provided one of the several securities is a personal security.

52. Proprietary security rights provided, not by the debtor of the secured obligation but by a third person, have some similarity with the granting of a personal security and can even be combined with the latter.

> *Illustration 3*
> At the request of D, his brother T provides both a suretyship to creditor C and a mortgage encumbering his private home. D and T are not successful in their common business and are both declared bankrupt. While C has small chances to recover his loan from D or from T on the latter's suretyship, he is well secured by the mortgage on T's private home.

The relationship between C and T with respect to the mortgage resembles that of a suretyship. But that resemblance is more apparent than real. As mortgagor of his private home, T is liable towards C only up to the limit of the mortgage, but not with all its assets, as he is as surety. On the other hand, the mortgage gives C a preference in enforcing his claim as against all of D's unsecured or less secured creditors.

53. The preceding discussion illustrates some fundamental differences between personal and proprietary security. Nevertheless, there are also similarities between proprietary security granted by a third party and personal security. However these similarities become relevant not in the primary relationship between secured creditor and third-party security provider, but in the secondary relationship between third-party security provider and debtor, especially if the third-party proprietary security provider has had to make payment to the creditor. Then he will normally be entitled to claim reimbursement from another security provider or the debtor. These issues will primarily be dealt with by a special Section of the Part on proprietary security; the present Part, however, already contains rules on the internal recourse between the security providers and on the secondary recourse against the debtor (cf. Articles 1:107-1:109).

National Notes

I. Personal Security

1. The term "personal security right" or "contract of personal security", which is central to this Part, is not specifically defined in this Article; neither is there a definition of the term "personal security right" in the legislation of most member states either. However, in FRANCE, the rules of the *Grimaldi* Commission, as adopted by Decree-Law no. 2006-346 of 23 March 2006 on Security, expressly use the notion of personal securities *(sûretés personnelles)* (CC new art. 2287-1) (In the following notes the proposals of the *Grimaldi* Commission are mentioned only insofar as they deviate from the present state of FRENCH law or as they clarify it). In BELGIUM, subtitle 6 of the ConsCredA of 1991 (last modified in 2003) that is entitled "Personal Securities" and its provisions apply to "securities and if applicable to any other form of personal security" (art. 34; similar formulas in arts. 35 and 36 as well as in arts. 33, 38 paras 2, 3 and 97). The ITALIAN Civil Code distinguishes in several places between personal and proprietary securities (CC arts. 156 para 4, 1179, 1828 para 1, 1844 para 1). The AUSTRIAN ConsProtA § 25c and 25d use for personal security the more traditional term "intercession".
2. However, the term "personal security" is often used and defined in legal theory (AUSTRIA: *Harrer*, Sicherungsrechte 5-6; however, most writers use the traditional term "intercession", *e.g.* Koziol and Welser II (*-Welser*) 145 ss. and Schwimann/*Mader and Faber* § 1345 no. 3; GERMANY: *Bülow*, Kreditsicherheiten no. 11, nos. 831 ss., nos. 1543 ss., *Lwowski* no. 14, nos. 78 ss., no. 341 ss.; ITALY: *Fragali*, Garanzia 455 s.; NETHERLANDS: *Snijders and Rank-Berenschot*, Goederenrecht nos. 482-483; PORTUGAL: *Almeida Costa* 763; SPAIN: *Carrasco Perera a.o.* 69).
3. In all member states there are different typical and atypical personal security rights (FRANCE: *Simler* no. 6; ITALY: *Giusti* 1 ss., 295 ss., 315 ss.; *Bonelli*, Le garanzie bancarie 1 ss., 23 ss., 37 ss.; PORTUGAL: *Vaz Serra*, Fiança e figuras 19 ss.; *Menezes Cordeiro*, Direito 604 ss., 616 ss.; SPAIN: *Carrasco Perera a.o.* 69 ss., 307 ss., 337 ss., 373 ss., 435 ss.). They are all covered and held together by the concept of "personal security", which is defined by legal writers as any contractual obligation assumed by a third person (security provider) towards the creditor for the purpose of securing the exact perform-

ance of another person's (the debtor's) obligation towards the creditor or another event. The "personal security" creates a new obligation of the security provider towards the creditor, which often, although not necessarily, has the same content as the underlying (secured) obligation of the debtor, if any (cf. more in details *infra* nos. 19 ss.).

4. In ENGLISH and IRISH law the term 'security' has traditionally been used only in relation to rights over assets (ENGLAND: *Penn and Shea* no. 17-002; IRELAND: *Johnston* 9.01), *i.e.* "real" or "proprietary security" (cf. *infra* nos. 67 ss.). However, at least by some more modern authors it is accepted that the concept of security covers both proprietary security and personal security (ENGLAND: *Goode*, Legal Problems no. 1-06; *Bradgate and White* 321; IRELAND: *White* 511 and 533), the latter term having a meaning comparable to that used in this Part, *i.e.* covering suretyship guarantees, indemnities, stand-by letters of credit and comfort letters (ENGLAND: *Goode*, Legal Problems no. 8-02; *Bradgate and White* 321, 341, 350; IRELAND: *White* 533 ss., 546 s.; cf. *infra* nos. 5 ss. and 11 ss.).

II. *Dependent Personal Security – Lit. (a)*

A. *Origins*

5. In all member states the dependent personal security is the classic and usual form of a third party's undertaking to personally secure another person's debt, by assuming a new personal obligation towards the creditor. Whereas its origins are mostly based on the *fideiussio* of Roman law (in a broad historical and comparative perspective cf. *Zimmermann* 114; BELGIUM: *Van Quickenborne* no. 356; FRANCE: Malaurie and Aynès/*Aynès and Crocq,* Les sûretés no. 103; GERMANY: one branch of intercession of the 19th century *ius commune*, Staudinger/*Horn* no. 1 preceding §§ 765 ss.; GREECE: ErmAK/*Zepos* prec. art. 847-870 no. 7; ITALY: *Campogrande* 12; PORTUGAL: *Almeida Costa* 770; SCOTLAND: Stair/*Eden* nos. 805 s.; SPAIN: *Guilarte Zapatero*, Comentarios 2; NETHERLANDS: *Feenstra* nos. 377-394), in ENGLAND the law of suretyship guarantees or dependent personal securities has developed from common law: The earliest predecessor of the surety was the *borh*, who every man was required to have and who was responsible for its principal's criminal acts (*O'Donovan and Phillips* no. 1-04). However, due to the influence of ROMAN and CANON law on the development of medieval mercantile law and on the system of Equity jurisdiction administered by the ENGLISH chancellors, there are many areas in the law of dependent personal securities which bear significant similarities between ROMAN and COMMON law based systems (*Zimmermann* 144).

B. *Terminology*

6. The term *dependent personal security* is different from the traditional terminology used in the various member states.

7. In ENGLAND and IRELAND *guarantee* is used interchangeably with *suretyship*, both terms often being used in a rather inaccurate way; in SCOTS law the term *caution* or *cautionry* is more common than *guarantee*. In AUSTRIA and GERMANY the term used to denote a dependent personal security is *Bürgschaft*, in DENMARK *kaution*, in FINLAND *takaus*, in SWEDEN *borgen*, in the NETHERLANDS and the Dutch speaking part of BELGIUM *borgtocht*, and in FRANCE as well as in the French speaking part of BEL-

GIUM *cautionnement*. In ITALY, PORTUGAL and SPAIN the term 'guarantee' (*garanzia/garantia/garantía*) is very broad and refers to warranties and guaranties as well as to all kinds of securities (personal and proprietary). The ROMAN origin of the dependent personal security in ITALY, PORTUGAL and SPAIN is also patent in the terminology of the three countries: The terms used for it are *fideiussione* in ITALY, *fiança* in PORTUGAL and *fianza* in SPAIN. The last mentioned terms are considered to be a specification of the more general concept of 'guarantee'. In all these countries another specification of the term 'guarantee' is used to denominate independent personal securities (ITALY: *garanzie autonome*; PORTUGAL: *garantias autónomas*; SPAIN: *garantías autónomas*: cf. *infra* no. 12). In GREECE the dependent personal security is denominated as *eggiisi* (εγγύηση, guarantee), whereas the term used for independent personal security is *eggiodosia* (εγγυοδοσία), which usually appears in form of a *eggiitiki epistoli* (εγγυητική επιστολή, guarantee letter).

C. *Obligations of a Provider of Dependent Personal Security*

8. The obligations of a provider of dependent personal security are strictly determined by the particular connection of the security obligation with the secured obligation (cf. *infra* no. 10). Due to the accessory character of the dependent personal security, in most cases the obligation of the provider of a dependent personal security is considered as having the same content as the secured obligation (cf. *infra* no. 20).
9. The provider of dependent personal security may be obliged (a) to pay a sum of money (cf. *infra* no. 20), (b) to render another performance (cf. *infra* nos. 20, 26 s.) or (c) to pay damages (cf. *infra* nos. 21 ss.).

D. *Main Feature: Accessory Obligation*

10. The essential distinguishing features of a contract of dependent personal security are that the security provider's obligation is established in addition to the secured obligation of the debtor, and that its liability is accessory to the liability of the latter (AUSTRIA: cf. CC §§ 1351, 1363; Schwimann/*Mader and Faber* § 1346 no. 1; BELGIUM, FRANCE and LUXEMBOURG: CC arts. 2011-2013 (since 2006: FRENCH CC arts. 2288-2290); BELGIUM: *Van Quickenborne* no. 18; *R.P.D.B.* no. 1 and no. 6; FRANCE: Cass.civ. 20 Dec. 1983, Bull.civ. 1983 I no. 306 p. 274; LUXEMBOURG: CA Luxembourg 28 Oct. 2003 BankFin 2004, 172; DENMARK: *Pedersen*, Kaution 13; ENGLAND: *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778 (CA); *Goode*, Legal Problems no. 8-02; FINLAND: LDepGuar § 3; RP 189/1998 rd 29 s., 33; GERMANY: BGH 9 July 1998, NJW 1998, 2972, 2973; GREECE: CC art. 850; *Georgiades* § 3 no. 14; ITALY: CC arts. 1936, 1939; *Giusti* 33; NETHERLANDS: CC art. 7:851; *Blomkwist* nos. 8-12; however, *du Perron and Haentjens* Inleiding no. 5 emphasise that suretyship as a species of co-debtorship does not create an obligation separate from that of the debtor, although the law limits this identity, cf. *idem* Art. 851 no. 1, Inleiding no. 7, art. 851 no. 1; PORTUGAL: CC art. 627 para 2; *Almeida Costa* 774; SCOTLAND: Stair/*Eden* no. 835; SPAIN: CC arts. 1822, 1824; *Guilarte Zapatero*, Comentarios 14; SWEDEN: *Walin*, Borgen 89; for the accessority principle as a fundamental principle of security rights – both proprietary and personal – in EUROPEAN law see *van Erp* 309). In principle this implies that the

personal security is dependent on the validity, terms and extent of the principal obligation (principle of co-extensiveness). There are, however, several exceptions within the national systems (cf. *infra* national notes on Art. 2:103).

III. Independent Personal Security – Lit. (b)

A. Origins

11. The independent personal security appeared gradually in the business practice of every EUROPEAN country during the last century, but legal acceptance of independent personal securities as personal security rights took place with a different intensity and speed in each of these countries. In FRANCE the independent personal security is defined and very briefly dealt with in CC new art. 2321 (enacted by DL no. 2006-346 of 23 March 2006). The GERMAN legislator decided expressly not to enact rules on independent personal securities in the Civil Code because of the diversity of their possible types (cf. *Hadding, Häuser and Welter* 682 s.). However, the validity of this instrument of security is not doubted (cf. *infra* nos. 14 ss.).

B. Terminology

12. The term independent guarantee, or an equivalent in the national language, is used in ITALY, PORTUGAL and SPAIN, as well as in FRANCE, BELGIUM and LUXEMBOURG. In these countries qualifying words like *independent*, *abstract* or *autonomous* stress the non-ancillary character of this contract, as distinct from the dependent guarantee (dependent personal security). The GREEK term used – *guarantee letter* – does not contain any such indication. In ENGLAND the term *indemnity* is used. In its broader meaning it describes every obligation imposed on a person by operation of law or by contract to make good a loss suffered by another person – *i.e. inter alia* insurance, guarantee (cf. Halsbury/*Salter* para 345). In a narrower meaning the expression *contract of indemnity* describes a promise to indemnify another person by way of security. AUSTRIA and GERMANY as well as DENMARK, SWEDEN and the NETHERLANDS use special terms for the dependent personal security (*Bürgschaft*, *kaution*, *borgen* and *borgtocht*, respectively: cf. *supra* no. 7) on the one hand and the independent personal security on the other hand (AUSTRIA and GERMANY: G*arantie*, DENMARK and SWEDEN: *garanti*, NETHERLANDS: *garantie*).

C. Obligations of a Provider of Independent Security

13. The obligations of a provider of independent personal security vary according to the parties' determinations in the security agreement as well as to specific rules of the national laws. However, one common element may be underlined: Although here, as well as under a dependent personal security, the security provider can in principle be obliged not only to pay a sum of money, but also to render another performance (cf. *infra* no. 20) or to pay damages (cf. *infra* nos. 21 ss.), in a independent personal security the liability of the security provider is typically regarded as a liability to make good any losses suffered by the creditor and not to perform an obligation having the same content as the debtor's obligation.

D. Main Feature: Independency from a Secured Obligation

a. Overview

14. The essential feature of the independent personal security is that the liability under the latter is (wholly) autonomous of any liability, which may arise as between the debtor and the creditor (AUSTRIA: *Harrer*, Sicherungsrechte 47; BELGIUM: *Simont/Bruyneel* 523; ENGLAND: *Goode*, Commercial Law 799, *Andrews and Millett* no. 1-013; DENMARK: *Pedersen*, Kaution 14; FRANCE: CC new art. 2321 of 2006 (*supra* no. 11) "in consideration of an obligation of a third person"; *Simler* nos. 880 ss.; GERMANY: *Bülow*, Kreditsicherheiten nos. 30 ss.; ITALY: Cass. 1 Oct. 1987, plenary decision, no. 7341, Foro it. 1988 I 3021, where, however, the autonomy of the security from the underlying obligation is defined as 'relative', and not fully; cf. further Cass. 6 Oct. 1989 no. 4006, BBTC 1990 II 553; Cass. 7 June 1991 no. 6496, Fallim 1991, 5007; *Bonelli* 37 ss.; NETHERLANDS: Dutch Business Law nos. 6-45; PORTUGAL: *Almeida Costa and Pinto Monteiro* 18; SCOTLAND: Stair/*Eden* no. 844; SPAIN: TS 27 Oct. 1992, RAJ 1992 no. 8584 and 30 March 2000, RAJ 2000 no. 2314; *Carrasco Perera*, Las nuevas garantías 726 ss.; *Vicent Chuliá* 397; *Sánchez-Calero*, El contrato autónomo 100). In ENGLAND, therefore, it is irrelevant whether the debtor's liability is void (*Wauthier v. Wilson* (1911) 27 TLR 582 (CFI), (1912) 28 TLR 239 (CA); *Yeoman Credit Ltd v. Latter* [1961] 2 AllER 294 (CA)). Equally, the extent and the terms of the debtor's obligation are of no significance, and thus the principle of co-extensiveness is not applicable (*Goulston Discount Co Ltd v. Clark* [1967] 2 QB 493 at 498 (CA)). Equally in SPAIN and ITALY, where the independent personal security has been excluded from the scope of SPANISH CC arts. 1824, 1826 and ITALIAN CC art. 1945, which express the ancillary character of the dependent personal security (SPAIN: TS 27 Oct. 1992, RAJ 1992 no. 8584 and 30 March 2000, RAJ 2000 no. 2314; *Carrasco Perera*, Las nuevas garantías 740 ss.; ITALIAN Cass. 31 July 2002 no. 11368, Giust.civ. 2003 3, 2838; Cass. 21 April 1999 no. 3964, Riv. Notar. 1999, 1271).

b. Theoretical Difficulty in Some Continental Countries

15. At first, this abstract nature of the independent personal security caused difficulties of acceptance in FRANCE, BELGIUM, LUXEMBOURG, ITALY and SPAIN. The validity of an independent personal security was very controversial in these "causalist" countries, where a contract without a "legal cause" is *ex lege* void (ITALY: CC art. 1325 no. 2; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1131; SPANISH CC art. 1261).

16. In FRANCE and BELGIUM the *causa* is nowadays found in the relationship between the security provider and the debtor; independent personal securities can validly be concluded (BELGIUM: *Wymeersch*, Garanties 95; FRANCE: *Contamines-Raynaud* 413 ss.; *Rives-Lange* 301 ss.). In FRANCE the *causa* has also been found in the underlying relationship between the creditor and the debtor (*Stoufflet* no. 50). According to a recent decision of the FRENCH Supreme Court the *causa* exists even if the person who instructs the granting of a security (instructing party) is not the debtor und has merely an economic interest in the conclusion of the underlying contract, without being a party to it (Cass.com. 19 April 2005, Bull.civ. 2005 IV no. 91 p. 94, Petites Affiches 18 May 2005 no. 98 p. 9). In AUSTRIA, if the problem is discussed at all, the *causa* is found

in the combined relationships of the security provider to its principal and of the latter with the creditor (*Koziol,* Garantievertrag 32-35). In PORTUGAL the *causa* is seen in the security function of the contract of independent personal security (STJ 9 Jan. 1997, 402/97 www.dgsi.pt; *Ferrer Correia* 249-250; *Galvão Telles* 288). In ITALY and SPAIN (*Vicent Chuliá* 397) this problem was solved by clearly distinguishing the independence from the lack of *causa*: especially in ITALY, in general terms, the *causa* of the independent personal security is found in the coverage of the risk of non-performance of the underlying obligation (Cass. 6 Oct. 1989 no. 4006, *supra* no. 14; Cass. 26 June 1990 no. 6499, Giur.it. 1991 I 1 446; Cass. 3 Feb. 1999 no. 920, BBTC 2001 II 666; *Calderale*, Fideiussione 203 ss. for an overview of the prevailing doctrines on the *causa* of independent personal securities; *Portale*, Fideiussione 1062 ss.; *Pontiroli*, Garanzia 350). In GREECE, where there has always been a clear distinction between contracts with and without a *causa*, it is very disputed in literature whether the independent personal security is a contract with a *causa* (*Gouskou* 93; *Psychomanis* 368 ss.; distinguishing *Markou* 16 ss.; *Liakopoulos*, NoB 35, 289) or without it (*Dimitriades* 40 ss.). According to the prevailing opinion (*Georgiades* § 6 no. 86) the independent personal security is a contract with *causa*, the *causa* being the creditor's possibility of immediate satisfaction, *i.e.* without court intervention. This purpose is contained in the contract by virtue of the obligatory reference to a certain secured basic legal relationship (*Georgakopoulos*, EED 21, 256; *Psychomanis* 370; *Gouskou* 104).

c. Recognition without Problems

17. Contrary to some of the "causalist" countries, in GERMANY the validity of the abstract nature of the independent personal securities never was controversial. Personal securities are contractual transactions, which implicate the *causa* in themselves (*Bülow*, Kreditsicherheiten no. 31, no. 57).

d. Breakthrough in Case Law

18. In FRANCE independent personal securities were recognised as a contract *sui generis* by the Supreme Court in 1982 (Cass.com. 20 Dec. 1982, Bull.civ. 1982 IV no. 417 p. 348, D. 1983, 365) and by the legislator since 2006 (CC new art. 2321). ITALIAN courts as well as legal writers began already in the late 1970s to recognise independent personal securities as valid security rights (*Portale*, Fideiussione 1043; a first explicit judicial recognition of the validity of independent personal security in ITALY is to be found in Cass. plenary session 1 Oct. 1987 no. 7341, Foro it. 1988 I 3021; cf. further Cass. 6 Oct. 1989 no. 4006, BBTC 1990 II 553). In SPAIN, although this atypical personal security was known and used in practice, courts did not wholly accept their independent nature until 2000 (TS 17 Feb. 2000, RAJ 2000 no. 1162 and TS 30 March 2000, RAJ 2000 no. 2314). In GREECE the institution of independent personal security has been known to practice mostly through the so-called guarantee letter, issued by banks. The wording used to describe these instruments caused great confusion, especially among the courts, which at first considered them as dependent personal securities. Although GREEK courts today recognise the autonomous character of this instrument, they still apply the provisions of GREEK CC arts. 847-870 on the dependent personal security, due to the word "security" and the lack of special provisions (A.P. 862/1996, DEE 2, 1087; A.P.

1433/1998, DEE 5, 507). This opinion has been strongly criticised in the literature (among others *Georgiades* § 6 no. 92 with further references) which prefers the term "security-giving contracts" (*Georgiades* § 5 no. 2 fn. 1), considers independent personal securities to be a special contract (cf. GREEK CC art. 361 regarding the freedom of contract) and denies the application of the provisions on dependent personal securities to these contracts. The situation is similar in the NETHERLANDS, where independent personal securities ("bankgaranties") were developed in financial practice, but only later were discussed by writers. These authors discussed mainly whether these securities were characterised by an abstract nature or not (*Pabbruwe*, Bijzondere bankgarantie 182-183; *contra Smit*, Hoe abstract 489-491). Nowadays, "bankgarantie" is used as a general term, which can cover different kinds of securities, but mostly independent personal securities (*Pabbruwe*, Bankgarantie no. 3). In PORTUGAL the independent personal security was also introduced by financial practice but its main features have subsequently been accepted by the courts (CA Porto 13 Nov. 1990, CJ XV, V-187; CA Lisboa 11 Dec. 1990, CJ XV, V-135) and in the literature (listed in *Menezes Cordeiro*, Direito 606).

IV. Content of the Security Provider's Obligation – Litt. (a) and (b)

19. The main feature of a contract of personal security is the creation of a new personal obligation of the security provider towards the creditor for purposes of security.
The precise content of this obligation of the security provider varies between the legal systems of the member states and depending on the type of personal security in question.

A. Content of the Security Provider's Obligation to Perform Equal to Principal Obligation

20. Especially in the situation of a dependent personal security securing a money debt or a liquidated sum of money, the content of the liability of the security provider is usually understood as an obligation to perform with the same content as the secured obligation (cf. AUSTRIA: Rummel/*Gamerith* §1350 no. 1; ENGLAND: *O'Donovan and Phillips* no. 10-201; FRANCE: *Simler* no. 198; GERMANY: MünchKomm/*Habersack* § 765 no. 77; ITALY: *Giusti* 25 ss.; PORTUGAL: *Vaz Serra*, Fiança e figuras 60; SPAIN: *Carrasco Perera a.o.* 147). Where, however, the secured obligation is for any other performance, such as the obligation of a construction firm to build a house under a building contract, even the security provider under a dependent personal security is according to ENGLISH law not bound to perform in the same way as the original debtor, but only liable for damages for non-performance (cf. *infra* no. 22). By contrast, in ITALIAN and PORTUGUESE law obligations assumed by the dependent personal security provider to render performances, such as supplying or manufacturing goods are regarded as having the same content as the secured obligation if the personal quality of the debtor (security provider or original debtor) is not of prevalent importance for the creditor (ITALY: *Bozzi*, La fideiussione 218 s.; *Giusti* 27; PORTUGAL: *Vaz Serra*, Fiança e figuras 60).

B. Liability of the Security Provider for Damages

21. The liability of a security provider may be for damages in various situations: first, the secured debt might be a liability to pay damages. In such a situation the liability of the

security provider is typically considered as a liability for damages, too (ENGLAND: *O'Donovan and Phillips* no. 10-203; GERMANY: MünchKomm/*Habersack* § 765 nos. 65 and 79; SPAIN: *Carrasco Perera a.o.* 148). In this case the security provider's obligation is equal to that of the secured obligation as described *supra* no. 20.

22. Another situation where a security provider typically may be liable for damages is where the security covers obligations not for the payment of money but for any other performance (cf. AUSTRIA: CC § 1350; Rummel/*Gamerith* § 1350 no. 1; ENGLAND: *O'Donovan and Phillips* no. 10-203; FRANCE: *Simler* no. 911 *e.g.* in the case of a performance guarantee – «*garantie de bonne fin*»). The security provider is typically not able to perform these obligations or the creditor may not be interested in specific performance by the security provider, thus damages are the appropriate remedy. In GERMAN, ITALIAN, PORTUGUESE and SPANISH law this is the case where personal security is provided to secure obligations where the personal performance of the debtor is essential for the creditor (GERMANY: MünchKomm/*Habersack* § 765 no. 79; ITALY: *Giusti* 31 s.; PORTUGAL: *Vaz Serra*, Fiança e figuras 60; SPAIN: *Carrasco Perera a.o.* 148).

23. Also a binding comfort letter is typically understood as creating a liability of the security provider in damages only (cf. ENGLAND: *O'Donovan and Phillips* nos. 1-77 s.; FRANCE: «*garantie indemnitaire*» cf. *Simler* nos. 900 and 1012; GERMANY: „*harte Patronatserklärung*" in Staudinger/*Horn* no. 414 preceding § 765; ITALY: *De Nictolis* 390, 391; PORTUGAL: *Soares da Veiga* 385; SPAIN: *Carrasco Perera*, Las nuevas garantías 634 s.).

24. In the case of an independent personal security, the liability of the security provider is typically regarded as a liability to make good any losses suffered by the creditor (cf. ENGLAND: *Sutton & Co. v. Grey* [1894] QB 285 (CFI); *O'Donovan and Phillips* no. 1-88; GERMANY: Staudinger/*Horn* no. 194 preceding § 765). The rationale for this is obvious: in the case of an independent personal security, there is no (or at least there need not be a) secured obligation, hence the liability of the security provider cannot be regarded as an obligation to perform under the same terms as the principal debtor's obligation.

25. That the security provider's obligation in these situations is regarded as a liability for damages (and not an obligation to perform, which might appear similar in the case of an obligation to pay an amount of money) is not merely a matter of terminology; rather, in ENGLAND this classification is regarded as decisive since it triggers the creditor's duty to mitigate its losses (cf. *O'Donovan and Phillips* no. 10-209).

C. *Obligation of the Security Provider to Procure Performance by the Debtor*

26. In addition to the security provider's liability to perform in case of non-performance of the principal debtor, the security provider is under ENGLISH law also obliged to procure that the principal debtor performs the secured obligation (cf. *Moschi v. Lep Air Services Ltd* [1973] AC 331 (HL); however, this idea has been criticised as outdated by *O'Donovan and Phillips* no. 10-202 citing Commonwealth authorities). Since the security provider typically is not in a position to compel the principal debtor to perform, this liability will usually amount to a liability for damages as described above *sub* nos. 21 ss. (cf. *Andrews and Millett* no. 1-004)

D. Content of the Security Provider's Obligation Subject to Agreement by the Parties

27. Finally, the contract of personal security being in all member states a contract subject to the general rules of contract law, the specific content of the security provider's obligations is subject to the agreement of the parties. Especially in the case of an independent personal security, where there is often no reference to an underlying secured obligation, it is the nature and terms of the individual contract of independent security that are decisive for the extent of the security provider's obligation (cf. ENGLAND: Halsbury/*Salter* para 354; FRANCE: *Simler* nos. 122 ss. and 930 ss.; GERMANY: *Lwowski* no. 177; ITALY: *Mastropaolo* 255 ss.; PORTUGAL: *Soares da Veiga* 358; SPAIN: *Carrasco Perera a.o.* 338).

V. Security Provider – Lit. (c)

A. Definition and Terminology

28. In all EUROPEAN countries the personal security provider is a person who, under the contract of security, assumes a new obligation towards the creditor for the purpose of securing an underlying obligation (secured obligation) or for any other security purpose (cf. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2011 (since 2006: FRENCH CC art. 2288); AUSTRIA: *Harrer*, Sicherungsrechte 5-6; DENMARK: *Gomard*, Obligationsretten 140 s.; *Pedersen*, Kaution 11 ss.; FINLAND: LDepGuar § 2 no. 1; RP 189/1998 rd 29; GERMANY: *Lwowski* no. 34; ITALY: *Fragali*, Garanzia 455; PORTUGAL: *Antunes Varela* II 475 s.; SPAIN: *Díez-Picazo* II 397; SWEDEN: Ccom Chap. 10 § 8; *Walin*, Borgen 24). The terms identifying these persons are mostly derived from specific types of personal security (such as guarantor in ENGLAND and IRELAND, or cautioner in SCOTLAND). In traditional ENGLISH legal terminology, the term used in relation to the persons liable under different types of personal security in general is either guarantor or surety (cf. the title of *Rowlatt's* Law on Principal and Surety).

B. Capacity

29. The requirements for the validity of a security provider's consent are determined by the general rules on capacity (AUSTRIA: CC § 1349, Rummel/*Gamerith*, § 1349 nos. 1-2; FRANCE: *Simler* no. 149; GERMANY: *Lwowski* nos. 37 ss.; ITALY: *Giusti* 94; PORTUGAL: *Almeida Costa* 773). When the debtor is obliged to furnish a provider of personal security, ITALIAN and PORTUGUESE law require, besides the general requirements of capacity, the ability to pay of the provider (ITALIAN CC art. 1943; PORTUGUESE CC art. 633 para 1).

C. Commercial Corporations

30. In all member states commercial corporations can also validly provide personal security. In ITALY, if the provider of personal security is a commercial corporation, the lack of express mention of the activity of providing personal security in the articles and memorandum of the corporation does not influence its capacity to validly provide personal security in favor of third parties. In particular according to CC art. 2384 (as amended by

the reform of ITALIAN company law, DLgs 17 Jan. 2003 no. 6), limitations of the articles and memorandum of the corporation – even if they have been disclosed – cannot be raised against third parties, unless there is evidence of a specific fraud of the third party against the corporation; mere knowledge that the providing of personal security is outside the corporation's object is not sufficient (cf. First Directive on company law of 1968 art. 9). Also in SPAIN the limits of the company's object cannot be invoked against third parties in good faith (Law on share companies, RDL 1564/1989, art. 129 para 2 and Law on Limited Liability Companies of 23 March 1995 no. 2, art. 63 para 2) and SPANISH case law tends to regard in any case the providing of personal security as an activity within the company's object (TS 14 May 1984, RAJ 1984 no. 2411; 12 May 1989, RAJ 1989 no. 4003; *Carrasco Perera a.o.* 115 s.). For FRENCH share companies a distinction is to be made between the obligations of the members of management and those of persons outside of the management. The obligations of the members of management cannot be secured ("*cautionner ou avaliser*") by the company (Ccom arts. L 225-43 and L 225-91). On the contrary, the company can secure the obligations of persons outside of the management by way of "*cautions, avals, garanties*", provided this has been approved by the board of directors (or of the supervisory board in the case of a dual management system; Ccom art. L 225-35 para 4 and art. L 225-68 para 1). Otherwise the security is ineffective (Cass.com. 29 Jan. 1980, Revue des sociétés 1981, 83). However these requirements do not apply to financial institutions (Ccom art. L 225-35 para 4 and art. L 225-68 para 1, Ccom art. L 225-43 para 2 and art. L 225-91 para 3). According to the DANISH Law on share companies (Law no. 324 of 7 May 2000 § 61 para 1) a share company cannot be committed for a dependent obligation which falls outside the purpose of the company, if it can prove that the other party knew or should have known this. Such a rule does not prevent a parent company to provide a security for a subsidiary company. In accordance with § 115 of the same Law, a company may not provide a personal security for shareholders, members of the board or managing directors of the company, or for persons, who are very close to it. The personal security is however binding, if the other party was in good faith. The above stated also applies to a limited liability company in accordance with Law of Limited Liability Companies (L no. 325 of 7 May 2000) §§ 25 and 49 (*Beck Thomsen* 66).

31. As in DENMARK, almost everywhere it is possible and frequent in practice for a commercial corporation to provide personal security – also in the form of binding comfort letters – to another company of the same group (ENGLAND: *Andrews and Millett* no. 14-014; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung no. 425; ITALY: CFI Torino 11 April 2000, Giur.it. 2001 1445; Cass. 5 Dec. 1998 no. 12325, Giur.it. 1999 2317; PORTUGAL: *Soares da Veiga* 379; SPAIN: *Carrasco Perera*, Las nuevas garantías 629).

D. Public Institutions

32. In GERMANY and ITALY also public institutions may provide personal security according to special statutory provisions expressly enabling them to engage in this activity. The particular nature of the security provider does not affect the applicability of the private law rules to the security (GERMANY: Staudinger/*Horn* § 765 nos. 72 s., *Lwowski* no. 56; ITALY: *Bozzi*, La fideiussione 227 s.). In FRANCE the State and territorial authorities may secure the obligations of whatever type of debtors including private debt-

ors (*Simler* no. 67). A special Law (Law no. 82-213 of 2 March 1982 on rights and liberties of territorial authorities – «*relative aux droits et aux libertés des collectivités locales*») expressly permits the granting of personal securities by territorial authorities in favor of private debtors as long as certain conditions are respected. According to FRENCH court practice in principle these contracts are governed by the rules of private law even if the contract concluded between the creditor and the debtor is of public interest (*Tribunal des Conflits* 16 May 1983, GazPal 1985 I 218).

E. Spouses as Security Providers for Third Persons' Debt

33. In the NETHERLANDS, the capacity of spouses to act as security provider securing the obligations of third persons is limited: A spouse, acting for private purposes, can assume a personal security only with the consent of the other spouse; if this consent is lacking, the other spouse can avoid the security (CC arts. 1:88 lit. (c) and 1:89 (1)). Although not a EU member state, it may be remarked that SWITZERLAND knows the same rule (OR art. 494 para 1) which recently (Federal Law of 17 June 2005) has been extended also to married security providers who are registered in the commercial register. According to the law of Navarra (L 1 March 1973 no. 1, art. 61 para 2) the personal security provided by one spouse without the consent of the other can only affect the individual property of the contracting spouse, but not the common property of the family.

VI. Debtor – Lit. (d)

34. In all European legal systems it is accepted that in the case of a dependent personal security the debtor owes the secured obligation on the basis of a legal relationship that differs from the contract of dependent personal security (ENGLAND: *O'Donovan and Phillips* no. 1-20; FRANCE: *Simler* no. 12; GERMANY: *Bülow*, Kreditsicherheiten nos. 835-836; ITALY: *Bozzi*, La fideiussione 215; PORTUGAL: *Almeida Costa* 770; SPAIN: *Carrasco Perera a.o.* 71). On the other hand, the liability of a security provider under an independent personal security is independent from an underlying obligation, hence the existence of a debtor and its obligation is not necessary in the case of an independent security (cf. ENGLAND: Halsbury/*Salter* para 345).
35. The debtor, if there is one, can be a private person or a public institution. In some countries, if the debtor of the secured obligation is a merchant or an entrepreneur, special rules may be applicable. Thus in SPAIN and PORTUGAL a dependent personal security is a mercantile security regulated by the commercial code, and not by the civil code, whenever the secured obligation is an obligation of commercial law, *i.e.* if the debtor of the secured obligation is a merchant (SPAIN: Ccom art. 439; *Carrasco Perera a.o.* 76; cf. CC art. 1822 para 2; PORTUGAL: *Vaz Serra*, Fiança e figuras 29; cf. Ccom art. 101). However, this distinction has little practical relevance and seems to be disregarded by case law (SPAIN: TS 20 Oct. 1989, RAJ 1989 no. 6941; TS 7 March 1992, RAJ 1992 no. 2007). By contrast, in FRANCE the personal security preserves its civil character even if the debtor is a merchant (*Simler* no. 96 ss.).
36. In commercial practice, a debtor is often involved in two separate contracts of personal security at the same time: one (primary) security that was assumed in relation to the debtor's obligation towards its original creditor, and another security in which a second security provider secures any claims for reimbursement that the (primary) se-

curity provider may acquire against the debtor under the primary security. Contracts of security of the second type are typically called counter security (cf. ENGLAND: *Goode*, Commercial Law 1020; *O'Donovan and Phillips* no. 13-61; ITALY: *De Nictolis* 25; Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; SPAIN: *Carrasco Perera a.o.* 367 ss.). Counter securities can be used to secure claims for reimbursement arising both under contracts of dependent personal security (cf. ENGLAND: *Goode*, Commercial Law 1020; FRANCE: *« sous-cautionnement » Simler* nos. 118 ss.; cf. *Grimaldi* Commission's proposal for a CC new art. 2297; ITALY: for the so-called *« fideiussione del regresso »* or *« fideiussione al fideiussore » Giusti* 220; Cass. 13 May 2002 no. 6808, Foro it. 2002 I 2694; SPAIN: *Vazquez Garcia* 478 ss.) and contracts of independent personal security (usually in the international commercial practice: FRANCE: *Simler* nos. 914 ss.; ITALY: Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; SPAIN: *Carrasco Perera a.o.* 367).

VII. Co-Debtorship for Security Purposes – Lit. (e)

37. The first issue that arises is the criterion which has to be used for distinguishing between an "ordinary" co-debtorship on the one hand, and a co-debtorship for security purposes on the other hand. Most legal systems seem to differentiate according to the degree of interest which the co-debtor whose position is at issue has in the economic benefit which the "true" debtor seeks to achieve by incurring its obligation towards the creditor. The lesser this interest is, the more likely this co-debtor will be treated as a mere security provider. The prototype of such a mere security provider (*i.e.*, a co-debtor for security purposes) is a wealthy house wife who has no direct stake in, and only indirectly benefits from, the credit incurred by her husband acting for his business purposes. For details cf. *infra* Art. 1:106 Comment B and national notes IV.

38. In the present field, comparison of the legal systems of the member states is difficult due to the fact that some countries have a broad concept of co-debtorship which comprises both initial and subsequent co-debtorship. This is the case in AUSTRIA, GERMANY and recently also the NETHERLANDS. By contrast, especially the ROMANIC countries distinguish between initial and subsequent co-debtorship. True co-debtorship is limited to the co-debtorship which has been assumed contemporaneously by two debtors towards the creditor. By contrast, subsequent co-debtorship is regarded by some legislators as a technique of settling a pre-existing debt which the co-debtor owes to the primary debtor and which is settled by a promise to pay the primary debtor's obligation to the creditor *(délégation imparfaite)*. In the view of the present Rules this is a possible situation, but it is by no means a necessary condition. Article 1:106 applies if two debtors have incurred obligations towards a creditor on essentially identical terms *(délégation-sûreté)*. By contrast, the time at which they incurred their respective obligations is irrelevant. For details, cf. *infra* Art. 1:106 Comment no. 5 and national notes nos. 5-10.

39. The legal regime to which co-debtorship for security purposes is subjected is split. Primarily, this institution is subject to the rules of Chapters 1 and 4 of this Part: the general rules apply, especially those on recourse between several security providers and as against the debtor. Very importantly, co-debtorship for security purposes is also subject to Chapter 4 on consumer protection of security providers. This Chapter in turn subjects all means of personal security by consumers to the rules of Chapter 2 on de-

pendent personal security subject to the substantive rules established in Chapter 4 itself (cf. Art. 4:102 (1)). All other kinds of co-debtorship for security purposes are governed "subsidiarily" by the rules on plurality of debtors in PECL Chapter 10 Section 1.

VIII. Global Security – Lit. (f)

A. Definition

40. In the legal systems of all member states, personal securities are not only used as security for specific obligations but can be more widely drafted so as to cover for example all obligations arising out of specific creditor-debtor relationships. In BELGIUM, FRANCE and LUXEMBOURG such securities are known as «*cautionnement pur et simple*» or «*indéfini*» or «*cautionnement général (omnibus)*», in AUSTRIA and GERMANY as „*Globalbürgschaft*" (AUSTRIA: *Harrer*, Sicherungsrechte 26; GERMANY: *Bülow*, Kreditsicherheiten no. 843). In ITALY they are called «*fideiussioni omnibus*» (cf. CC art. 1938); in PORTUGAL "*fiança geral*" (cf. CC art. 628 para 2) and in SPAIN «*fianza omnibus*» or "*general*" (cf. CC art. 1825). In ENGLISH legal terminology such securities are called "all accounts" or "all moneys" securities (cf. *O'Donovan and Phillips* nos. 5-79 ss.; *Andrews and Millett* nos. 6-004 s.). According to DANISH terminology these types of securities are called »*alskyldserklæringer*« or »*alskyldskautioner*« (*Pedersen*, Kaution 45 ss.; *Beck Thomsen* 70 s.) and according to FINNISH and SWEDISH terminology »*generell borgen*» (FINLAND: LDepGuar § 2 no. 5; RP 189/1998 rd 30 s.; SWEDEN: *Walin*, Borgen 88 s.).

41. A global security is generally understood as a security covering obligations that are not specifically determined at the conclusion of the contract of security. Thus, global securities are often used to secure future obligations of the debtor or a liability under a current account. As a rule, the security does not expire merely because the debit balance of the account is *nil* at some point of time (cf. ITALY: CC art. 1844 para 1). In FRANCE earlier attempts (cf. *Sargos*, GazPal 1988, I, p. 209 no. 4) to reduce the scope of the global security to the «*cautionnement omnibus*» are taken up again in the *Grimaldi* Commission's proposal for a CC new art. 2302 para 1 sent. 3.

B. Applicable Rules

42. In most countries recently legislators and/or courts have tried to increase the level of protection of the provider of a global security. It seems that only in ENGLAND the validity of continuing dependent securities, such as securities containing "all monies"-clauses has never been doubted and is still current opinion. A great variety of contract clauses is regularly used in dependent securities (cf. the discussion in *O'Donovan and Phillips* nos. 5-79 ss.; *Andrews and Millett* nos. 6-004 s.), which will normally be effective. The only limitation seems to be that debts originally owed by the debtor to a third party but then assigned to the creditor do not normally increase the obligation of the provider of dependent security (*Kova Establishment v. Sasco Investments Ltd* [1998] 2 BCLC 83 (CFI)). AUSTRIAN courts and writers are also still rather liberal. The Supreme Court repeatedly accepted a dependent security for "all" future obligations of the debtor (OGH 1 Dec. 1976, ÖRZ 1977, 169 no. 76; also OGH 18 Feb. 1987, ÖBA 1987, 576; critical because of lack of definiteness Schwimann/*Mader and Faber* § 1353 no. 12). It is regarded as sufficient that the amount of the secured obligation is "determinable" (Rummel/

Gamerith and Faber § 1353 no. 3 and § 1346 no. 2a). Similarly in PORTUGAL, where a dependent security for future obligations is void if its object is undeterminable, *i.e.*, if the provider of a dependent security secures all obligations without reference to their origin or nature (STJ 29 April 1999, 131/99 www.dgsi.pt; STJ 2 Oct. 2001, 3353/01 www.dgsi.pt; STJ 29 Nov. 2001, 3592/01 www.dgsi.pt; *Mendes* 136).

43. The level of protection is considerably higher in FINLAND and ITALY where limitations in the contract of dependent security are required: According to FINNISH LDepGuar § 5 para 1 a "general" dependent security must contain a maximum amount and be limited in time. In the absence of such terms the dependent security provider is only liable for obligations that were assumed together with the security or for previous debts that were known to the provider of the dependent security according to § 5 para 2 (cf. RP 189/1998 rd 36 s.). Similarly, according to ITALIAN CC art. 1938 *in fine* global securities must contain a maximum amount, agreements without this limit being totally invalid (*Giusti* 168). This rule has been introduced by Law no. 154 of 17 Feb. 1992 in order to stop the earlier practice of banks' personal securities for an indeterminate amount (cf. references in *De Nictolis* 207 ss., 332 ss.).

44. In FRANCE protection depends upon the person of the provider of dependent security. A security without a maximum amount *(cautionnement indéfini)* can not be assumed by consumers (ConsC arts. L 313-7 and L 341-2), not even if professional debts are secured (for dependent securities with solidary liability: *Madelin* Act art. 47 II para 1; in general: ConsC art. L 341-2). Also according to BELGIAN ConsCredA art. 34 para 1 a consumer credit can only be secured by a dependent security with specified amount (*Van Quickenborne* no. 196). Apart from these restrictions, global securities are valid in FRANCE, BELGIUM and LUXEMBOURG, provided the secured obligations can be determined (FRANCE: *Simler* no. 202; BELGIUM: *Van Quickenborne* no. 191; LUXEMBOURG: CA Luxembourg 9 July 1996, no. 18403 unpublished). The granting of global securities is, in particular, not considered as being contrary to the requirement of the express engagement of the security provider as prescribed in FRENCH CC art. 2015 – since 2006: CC art. 2292 – (Cass.com. 16 Oct. 1978, JCP G 1978 IV, no. 348). However, from 1983 to 2002 FRENCH court practice tended to restrain the extent of the global security (excluding, contrary to CC art. 2016 (since 2006: CC art. 2293) accessories) if formal requirements were not respected (Cass.civ. 22 June 1983, Bull.civ. 1983 I no. 182 p. 160; Cass.civ. 29 Oct. 2002, D. 2002, 3071). In the NETHERLANDS as well, global securities (usually assumed by banks) are also valid provided the secured obligations can be determined (*Pitlo-Croes* no. 851); however in favor of a non-professional security provider the secured obligation has to be limited by a maximum amount (CC art. 7:858 para 1).

45. The legal situation is still different in GERMANY where case law has changed dramatically (on this development Staudinger/*Horn* § 765 nos. 44-57): Global securities had been considered as in general valid, provided the secured obligations were sufficiently determined (*e.g.* to all existing and future obligations resulting from a specific business relation between debtor and creditor: BGH 10 Oct. 1957, BGHZ 25, 318; BGH 5 April 1990, NJW 1990, 1909; BGH 16 Jan. 1992, NJW 1992, 897). However, since 1995 global securities that are established by general terms and conditions of trade are regarded as in general surprising (GERMAN CC § 305c) and generally as an unreasonable disadvantage or injury for the security provider (CC § 307). Invalidity affects only the corresponding clause (cf. the leading case of BGH 18 May 1995, BGHZ 130, 19; Palandt/

Sprau § 765 no. 20; Erman/*Herrmann* § 765 no. 3; cf. also *Horn*, ZIP 1997, 525; *Trapp*, ZIP 1997, 1279). As an exception, the aforementioned principles are not applied if the provider of a dependent security has considerable influence upon the principal debtor, especially as manager of the latter (BGH 18 May 1995, BGHZ 130, 19, 30; BGH 10 Nov. 1998, ZIP 1998, 2145; BGH 16 Dec. 1999, NJW 2000, 1179, 1182). It is still unclear in how far the assumption of global securities is valid outside the scope of GERMAN CC §§ 305 ss., especially in individually negotiated contracts (cf. Palandt/*Sprau* § 765 no. 7 and Erman/*Herrmann* § 765 no. 3).

46. In GREECE, the issue arises mostly for dependent securities securing the outstanding balance of a current account. The GREEK Supreme Court (1265/1994, DEE 1, 410) differentiated between subsequent new credits and subsequent supplementary credits, which simply increase the amount (limit) of the initial credit. The provider of dependent security is liable, even if it has not provided security for the (increased) credit limit provided by this supplementary credit (quantity criterion). Its liability is restricted, however, to the amount of the initially secured credit (quality criterion). The Supreme Court justified this position in its decision 48/2001 (DEE 2001, 1011 ss., 1012) by asserting that the claims are no longer independent upon integration into the account and the provider of dependent security remains liable for the outstanding balance, regardless of the movements in the account (entering of new claims). This decision is consistent with the prevailing opinion in GREECE on this matter (cf. also A.P.: 412/99, DEE 5, 1031; 984/99, EllDik 1999, 1720 ss.).

IX. *Consumer – Lit. (g)*

47. Throughout the member states, protection for non-professional market participants by special legal provisions is also in the area of personal security typically connected with the classification of these persons as consumers. In these notes, two questions shall be dealt with: first, how is the concept of the consumer defined in the member states (*infra* nos. 49 ss. and 53 ss.); and second, whether it is the security provider or another person who has to be qualified as a consumer in order for the national consumer protection legislation to apply to personal securities given by this security provider (*infra* nos. 63 ss.).

48. Other questions such as the scope of consumer protection legislation in the area of personal securities in the member states or the applicability of general rules and principles of law protecting weaker parties to personal securities are dealt with in the national notes on Art. 4:101.

A. *The Term "Consumer" in the Legislation of the Member States*

a. *The Regulatory Framework*

49. The definition of the term "consumer" differs between the member states quite considerably. Although most consumer legislation is based on EU-Directives, the principle of minimum harmonisation leaves the member states much room to define the term as they think fit. Even worse: In many states there is no coherent definition of who is a consumer, but the consumer can have different shapes under different Laws.

b. Definitions of Consumer Security Providers

50. Only the DUTCH Civil Code and the FINNISH LDepGuar contain special rules concerning personal securities by consumer security providers. The DUTCH Code has laid down special rules for "dependent personal securities other than in a profession or business" in arts. 7:857-7:863. The scope of application of these rules is determined as follows: "The provisions of this section apply to dependent personal securities entered into by a natural person who did not act in the course of its profession or business, nor acted for the benefit of normal exploitation of the business of a share company or a company with limited liability of which it is an officer and in which, alone or with his co-officers, he holds the majority of the shares" (CC art. 7:857). Another general definition is offered by the FINNISH LDepGuar § 2 no. 6: "A private security provider is a natural person, who assumes the personal security". This rule, however, is subject to limitations and does not apply if the security provider is a director, board member, member of the administrative committee or another comparable organ, or if it is a responsible shareholder in the debtor company or foundation or in a parent company thereof; further the rule does not apply if the security provider was a founder of the company, or if it directly or indirectly holds at least 1/3 of the shares in another share company, or if it has a share of ownership or influence in another company by virtue of the voting right resulting from the shareholding (see RP 189/1998 rd 31 s.).

c. Comprehensive Statutory Definitions of a Consumer

51. In AUSTRIA, GERMANY, GREECE, ITALY and SWEDEN there are at least comprehensive general definitions of the term "consumer" with effect for all rules concerning consumer protection. But none of these applies specifically to personal securities. AUSTRIAN ConsProtA § 1 para 1 no. 2 states that a consumer is every person who is not an entrepreneur. On the other hand, the preceding provision of § 1 para 1 no. 1 defines an "entrepreneur" as "everybody who concludes the transaction for the exercise of its enterprise". GERMAN CC § 13 defines the consumer as every natural person who concludes a legal transaction for a purpose that can be attributed neither to its commercial nor to its independent professional activity. The GREEK ConsProtA (Law 2251/1994 as amended in 1999), which contains a detailed regulation of consumer protection in respect of unfair terms, contracts negotiated away from business premises and distance contracts, defines in art. 1 para 4 lit. a) as "consumer" every natural or legal person, if and insofar as it is the final receiver of goods or services it makes use of.

52. In ITALY a new Consumer Code has been introduced by DLgs no. 206 of 6 Sept. 2005, consolidating in a single legislative text all the former different laws on consumer rights which have now been repealed (especially CC arts. 1469*bis*-1469*sexies* and the Law on the Rights of Consumers and Users of 30 July 1998 no. 281). The term consumer is now defined by ConsC art. 3 para 1 lit. a) as any "natural person acting for purposes which are outside its business or professional activity, if any". The new ConsC contains some fundamental, mandatory rights protecting the weak party in a contract. These rights include, among others, the right to adequate information, to transparency, correctness and equal treatment in the contractual relationships regarding services. All contracts entered into by a consumer are governed by its rules, which should be regarded as applicable also to a personal security granted by a consumer (*Alpa* 21). Further, in ITALY

new banking legislation has been introduced (cf. DLgs 1 Sept. 1993 no. 385) fundamentally increasing the protection of bank-customers. This regulation shall also be applicable to most personal securities granted by a consumer in favour of a bank (*Chinè*, I contratti di garanzia 324 ss.). In SWEDEN the general definition of a consumer is laid down in Act on Terms of Contracts in Consumer Relations § 2 para 1 (*Ramberg* 259 ss.).

B. Criteria for Defining the Consumer in General

53. Apart from these differences in the legislative technique, the scope of the term "consumer" differs widely. There are, in general, two aspects which are relevant for the classification of a person as a consumer: First, the term has an objective scope, *i.e.* it deals with the issue whether only natural persons or, additionally, certain legal entities are covered by the notion of consumer. Secondly, the term has a functional scope, *i.e.* a person is regarded as consumer only if it acts for certain purposes.

a. Objective Personal Scope

i. Only Natural Persons

54. In DANISH, DUTCH, FINNISH, GERMAN, ITALIAN and SWEDISH law, the term "consumer" is restricted to natural persons (DANISH Law on Certain Consumer Contracts § 1 *juncto* § 3 para 1 and Contract Law § 38a para 2; DUTCH CC art. 7:857; FINNISH LDepGuar § 2 no. 6, specifically for dependent personal security; GERMAN CC § 13; ITALIAN ConsC art. 3 para 1 lit. a); the ITALIAN Constitutional Court has held that neither the limitation of the notion of consumer to natural persons nor the exclusion of small enterprises or artisans from that notion according to the text of CC art. 1469*bis*, now ConsC art. 3 para 1 lit. a), are in violation of the principle of equality as laid down in Cost. art. 3: Corte Cost. 30 June 1999 no. 282, Foro it. 1999 I 3118; 22 Nov. 2002 no. 469, Giur.cost. 2002, 6; the same was held in relation to the exclusion of the beneficiary of an accident insurance from the notion of consumer by Corte Cost. 16 July 2004 no. 235, Foro it. 2005 I 992; SWEDISH Act on Terms of Contracts in Consumer Relations § 2 para 1).

ii. Including Legal Entities

55. GREEK and SPANISH law extend consumer protection to legal entities (GREEK ConsProtA art. 1 para 5 lit. a); SPAIN: Law 26/84 (ConsProtA) art. 1 para 2). Also in AUSTRIAN law it would seem that a legal entity can be a consumer (*e contrario* ConsProtA § 1 para 2 sent. 2).
56. By contrast, in many member states there is no generally used definition of the term consumer in the consumer legislation. Thus, the term is sometimes restricted to natural persons, sometimes it also covers legal entities.
57. Although in all FRENCH legislation the consumer is described as a natural person, courts and authors commonly understand it as including certain legal persons without professional purpose, *e.g.* non-profit associations, communities of apartment owners or political parties (FRANCE: CA Paris 5 July 1991, JCP E 1991 Pan. no. 988).

58. According to the ENGLISH Unfair Terms in Consumer Contracts Regulations 1999, a consumer is a natural person only (reg. 3 para 1). The ConsCredA is designed for the protection of "individuals". In sec. 189 an individual is defined as including "a partnership or other unincorporated body of persons not consisting entirely of bodies corporate" (in the form amended by sec. 1 of the Consumer Credit Act 2006 (not in force yet) sec. 189 defines "individual" as including "(a) a partnership consisting of two or three persons not all of whom are bodies corporate; and (b) an unincorporated body of persons which does not consist entirely of bodies corporate and is not a partnership").

59. In the BELGIAN ConsCredA a consumer is a natural person (art. 1 para 1). In the Commercial Practices Act, a consumer is defined as a "natural or legal person" (art. 1 para 7). The LUXEMBOURGIAN ConsCredA art. 2 lit. a) defines the consumer as a natural person only; the LUXEMBOURGIAN ConsProtA with rules on unfair contract terms, on the other hand, does not define the term at all. The PORTUGUESE ConsCredA art. 2 para 1 lit. b) defines the consumer as a "singular person", while the ConsProtA (DL 24/96 of 31 July 1996) uses the expression "that one", which is said to include legal entities (*Duarte* 661).

b. Functional Scope

i. Acting outside Trade or Business

60. In accordance with EUROPEAN Directives, in most legal systems consumer protection is dependent on the purpose of a person's dealing. The BELGIAN ConsCredA art. 1 para 1 defines a consumer as "every natural person who […] is acting for purposes which can be supposed to be outside his business, profession or trade" (similar LUXEMBOURGIAN ConsCredA 1993 art. 2 lit. a)). In the BELGIAN Commercial Practices Act, a consumer is defined as "every natural or legal person who exclusively for non-professional purposes acquires or uses marketed products or services" (art. 1 para 7). Equally, the LUXEMBOURGIAN ConsProtA art. 1 opposes "the professional supplier of durable or non-durable consumer goods or services" to the "consumer acting for private purposes." In FRENCH law the consumer is understood as a non-professional, a person without professional purpose (ConsC art. L 132-1). Since 1995 (Cass.civ. 24 Jan. 1995, D. 1995, 327) consumer protection is according to the Supreme Court generally excluded if a "direct relationship with the exercise of professional activities" exists. This criterion had already been introduced by the Law of 23 June 1989 on doorstep transactions (cf. ConsC art. L 121-22). The FRENCH Supreme Court continues to apply the criterion of the "direct relationship" (Cass.civ. 5 March 2002, JCP G 2002, II no. 10123), although it is very controversial among the lower courts. There is no direct relationship according to certain courts if the contract is concluded outside of the ordinary professional sphere of the person who deserves protection or, according to other courts, if the contract is set up outside of the interest of the enterprise (cf. further *Paisant*, JCP G 2003, I no. 121, p. 549 ss.). Under the ENGLISH Unfair Terms in Consumer Contracts Regulations 1999 the consumer has to be "acting for purposes which are outside his trade, business or profession" (reg. 3 para 1). Under the ITALIAN ConsC art. 3 para 1 lit. a) the consumer has to act "outside its business or professional activity, if any". This definition is interpreted strictly by the Supreme Court (Cass. 25 July 2001 no. 10127, Giust.civ. 2002 I 685; Cass. 14 April 2000 no. 4843, Corr.giur. 2001, 524), whereas sometimes courts of

first instance and legal writers regard also as consumers persons that act in matters belonging to their professional or business activity, as long as these matters are outside the ordinary scope of that persons' professional or business activity (CFI Roma 20 Oct. 1999, Giust.civ. 2000 I 2117; *Monteleone* 28).

Similarly, according to the PORTUGUESE ConsCredA the consumer has to act for purposes outside his commercial or professional activity. Under the ConsProtA the goods supplied, the services provided or the rights transferred by a person with a professional economic activity to the consumer must be allocated to a non-professional use. According to the SWEDISH Law on Terms of Contracts in Consumer Relationships § 2 para 1 and the DANISH Law on Certain Consumer Contracts § 3 and ContrA § 38a para 2 a consumer is defined as "a natural person, who is mainly acting for a purpose which is outside business activities" (SWEDEN: *Ramberg* 258 s.) or "who mainly is acting outside its profession" (DENMARK: *Gomard* 29 ss.; *Andersen, Madsen and Nørgaard* 96). Less specific is the AUSTRIAN definition of "non-entrepreneurial activity" (ConsProtA § 1 para 1 no. 2).

61. GREEK and SPANISH law deviate from Council Directive 85/577 Art. 2: in their view protection does not depend on the participation of the consumer in the market "for purposes outside his trade or profession", but on the final receiving of the goods or the services, *i.e.* as long as the consumer is at the end of the economic chain and has no intention to prolong the economic circulation of the goods or services (GREECE: *Skorini-Paparrigopoulou* 80, 82; SPAIN: Law no. 26/1984 (ConsProtA) art. 1 para 3). However, at another place the SPANISH legislator expressly considers the concept of consumer as covering "– according to the EU-Directive – every person acting for purposes which are outside his professional activity, even if he shall not be the final receiver of the goods or services which are the object of the contract." (Introduction VIII para 2, to the SPANISH Law no. 7/1998 on General Contractual Terms (amending the ConsProtA) regarding abusive clauses as required by the EU-Directive 93/13). Under the ENGLISH ConsCredA, protection of the consumer is not dependent upon that person acting outside its trade or business (note that it is the person of the debtor that is relevant for the applicability of the consumer protection provisions under this act in relation to securities provided for agreements regulated under this act, cf. *infra* no. 65): according to the present sec. 8 para. 2, it is decisive only that the amount of the credit does not exceed GBP 25,000. This rule is due to cease to have effect according to sec. 2 para 1 lit. b) of the Consumer Credit Act 2006; once this provision comes into force, all credit agreements with individuals would fall under the ConsCredA regardless of the amount of the credit, subject to certain exemptions. One exemption are credits with an amount exceeding GBP 25,000 entered into by the debtor wholly or predominantly for the purposes of a business carried on, or intended to be carried on, by him (sec. 16B of the ConsCredA, as introduced by sec. 4 of the Consumer Credit Act 2006 (not in force yet)).

ii. Acting outside Independent Professional Activity

62. GERMAN CC § 13 fixes a broader functional scope of the term consumer by excluding not all legal acts in the context of a professional activity but only those pertaining to independent professional activity. Therefore an employee who buys working equipment is regarded as a consumer according to GERMAN consumer law (Palandt/*Heinrichs* § 13

no. 3; Ulmer/Brandner/Hensen/*Ulmer* § 24a no. 23). Problems of differentiation arise if an entrepreneur acts since it can assume the dependent personal security for private or for professional activity. In the absence of any indication in the contract of personal security the differentiation is made according to the entrepreneur's intended purpose as it appears to the other party (Ulmer/Brandner/Hensen/*Ulmer* § 24a no. 24). Even small merchants, farmers, artisans and persons exercising a liberal profession are regarded as entrepreneurs and consequently not as consumers if they act in connection with their profession. This is even true if an employed person concludes a contract for the purpose of establishing a professional activity (BGH 24 Feb. 2005, BGHZ 162, 253, NJW 2005, 1275; this is, however, controversial and there is a contrary provision in CC § 507 for the assumption of a credit for purposes of setting up a profession or business).

C. *Whether Security Provider or Debtor has to be a Consumer*

a. Consumer Security Provider

63. The DUTCH Civil Code focusses on the person of the security provider (CC art. 7:857). In GREECE it is asserted that the security provider enjoys consumer protection even if the secured credit is not granted to a consumer, since the dependent character of the personal security does not preclude the need for protection of the security provider, when he is inexperienced and an amateur (*Georgiades* § 3 no. 100). GERMAN case law on consumer protection in personal security transactions also focuses exclusively on the person of the security provider (Staudinger/*Weick* § 13 no. 49; *Bülow*, Kreditsicherheiten nos. 866-890; *Lwowski* nos. 412-420). On the basis of the above mentioned decision of the European Court of Justice (cf. *supra* Comment B, e, no. 18 fn. 4, *Dietzinger v. Bayerische Hypotheken- und Wechselbank AG*, ECJ 17 March 1998) the GERMAN Federal Supreme Court previously required for the rules on doorstep transactions that both debtor and security provider must be consumers and that the contract creating the secured obligation and the contract of dependent personal security must fall under the rules on doorstep transactions (BGH 14 May 1998, BGHZ 139, 21 at 24 ss.; Palandt/*Heinrichs* § 312 no. 8, but critical; Erman/*Saenger* § 312 no. 29 with further references and *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 463 ss.). Recently, however, the division which now is exclusively competent for security has held that the personal qualification of the debtor is irrelevant (BGH 10 Jan. 2006, BGHZ 165, 363, 367 s.). The GERMAN provisions on general terms and conditions, though, protect everyone – not only consumers – from unfair or surprising general terms and conditions. However, according to CC § 310 para 3 that transposes the EU-Directive on abusive contract clauses, consumers enjoy special protection vis-à-vis entrepreneurs.

64. Formerly, in FRANCE the person of the debtor was the decisive criterion for consumer protection of the provider of a dependent security (ConsC arts. L 311-3 ss., 312-3 ss.). It was not until the Law *Dutreuil* no. 2003-721 of 1 Aug. 2003 that protective consumer legislation turned on the person of the provider of dependent security, even if the debtor was a professional (ConsC arts. L 341-1 to L 341-6). According to the proposals of the *Grimaldi* Commission special protection should be granted equally to all natural persons who assume a dependent security irrespective of the person of the debtor. The only exception would obtain for the application of the principle of proportionality between the amount of the security and the assets and income of the security provider who must

not act for a professional purpose *(à titre non-professionnel)*. According to the proposed CC art. 2305 the engagement of the provider of dependent security must not be manifestly disproportionate to its financial capacity and its income, unless at the time of the requested performance it is able to perform the obligation. However, as a result of the transfer of the protective rules from the Consumer Code to the Civil Code, the natural person who assumes a dependent security for a professional purpose should not be considered as a consumer but as a person requiring special protection.

b. Consumer Debtor of the Secured Obligation

65. A few member states regard as decisive not the person of the security provider but that of the debtor of the secured obligation. In ENGLAND personal securities are only subject to specific consumer credit legislation if the secured debt is a regulated agreement according to ENGLISH ConsCredA 1974 sec. 8 and 15. The decisive criterion is whether the debtor is an individual protected under the provisions of that Act. To consumers securing obligations which are not regulated agreements (in the meaning of these Acts), the more general consumer legislation applies (ENGLAND: UnfContTA 1977, Unfair Terms in Consumer Contracts Regulations 1999). In ENGLISH law it is nowhere discussed whether for the purposes of the ConsCredA, in addition, the security provider also has to fall within the definition of consumer. However, it seems that, since the wording of ConsCredA sec. 189 simply defines the security provider as "the person by whom any security is provided", the security provider does not necessarily have to be a consumer itself for the Act to apply. The situation appears to be similar for the purposes of the application of the IRISH ConsCredA sec. 30 para 1 lit. b. A similar situation can also be found in BELGIAN law, where ConsCredA arts. 34-37 only apply to personal securities granted in order to secure debts arising from a consumer-credit-agreement – without distinguishing between consumer and other security providers. If the debtor is not a consumer, the credit agreement falls beyond the scope of the ConsCredA. Other consumer protective legislation, such as the Commercial Practices Act may apply.

c. Alternative between Solutions a. and b.

66. In ITALY the scope of the legislative provisions on consumer protection together with the criteria developed by case law in the last years seem to lead to the following practical results: Consumer protection legislation will be applicable to personal securities (a) when the security provider acts as consumer; or (b) when the security provider acts as professional, but the principal debtor is a consumer. This last alternative has been developed by the courts (Cass. 11 Jan. 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it.Mass. 2005, 1203): the accessority of the security to the relationship between debtor and creditor makes it possible to apply the rules of consumer protection of the latter relationship to the former (*Palmieri* 1598; *Falcone* 91; *Ruggeri* 685 s.). Therefore, consumer protection legislation will be not applicable when the security provider acts as a professional in order to secure an obligation of another professional, as in the situation of security provided by the manager of the company in favour of the latter (*Falcone* 92). In the model contract of personal security provided by the Association of Italian Banks (version 11 Nov. 2003), however, it is suggested to

restrict the scope of consumer protection to situations where both the security provider and the debtor of the secured obligations act as consumers. This model contract has no binding character though (*Falcone* 91).

X. *Proprietary Security – Lit. (h)*

A. *Definition*

67. The distinction between proprietary and personal security rights is recognized in all European countries. However, a definition of proprietary security is not given in the civil codes, but rather is traditionally left to scholarly writings.

68. In BELGIUM, FRANCE, ITALY, LUXEMBOURG and PORTUGAL the notion of proprietary security right (*sûreté réelle* or *sûreté*, *garanzia reale*) is sometimes used by the legislators (cf. FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1188 «*… le bénéfice du terme lorsque par son fait il a diminué les sûretés qu'il avait données par le contrat à son créancier*»; ITALIAN CC arts. 156 para 4, 506 para 2, 1179, 1828 para 1, 1844 para 1, 2795 paras 2 and 3; PORTUGUESE CC arts. 624, 639, 674 para 3).

B. *Proprietary Rights Granted by Third Persons*

69. In most member states proprietary securities granted by a third party who is not the debtor of the secured obligation are classified as proprietary security rights, although overlappings with the position of the provider of dependent personal security sometimes come to the surface: Rules on dependent personal security are sometimes applicable – by virtue of express legal provision or by analogy – not only to the relationship between the third-party provider of proprietary security and the debtor, but also to the relationship between the third-party provider of proprietary security and the creditor (FINLAND: LDepGuar § 41; RP 189/1998 rd 78 ss.; ITALY: CC arts. 2868-2871 on the effects of land mortgages of a third-party security provider are applicable by analogy to third-party security providers of pledges, *Gorla and Zanelli* 457 ss., 460; PORTUGAL: *Antunes Varela* II 520 fn. 2; SPAIN: *Carrasco Perera a.o.* 478 ss.; for a qualification of the third-party provider of proprietary security as a subject assuming personal liability for the secured debt as an «*obligado sui generis*», whose liability is limited to the specific encumbered asset cf. TS 23 March 2000, RAJ 2000, 2025).

70. In FRANCE, although the term «*cautionnement réel*» seems to refer to a personal security, a third-party proprietary security is considered as a proprietary right as far as the external relationship between the creditor and the security provider is concerned (cf. recently Cass.com. 7 March 2006, Bull.civ. 2006 IV no. 59 p. 59 confirming Cass.ch.-mixte 2 Dec. 2005, Bull.civ. 2005 ch.mixte no. 7 p. 17, JCP G 2005 II no. 10183; *Grimaldi* Commission's proposed art. 2295 «*Le cautionnement réel est une sûreté réelle constituée pour garantir la dette d'autrui*»; *Simler* no. 20). However, it is possible that the provider of a proprietary security in addition also assumes a personal security (Cass.com. 21 March 2006, Bull.civ. 2006 IV no. 72 p. 71).

(Böger/Dr. Fiorentini)

Article 1:102: Scope

(1) This Part applies to any type of contractual personal security, in particular:
  (a) to suretyship guarantees (dependent personal security), including binding comfort letters (Article 1:101 lit. (a));
  (b) to indemnities/independent guarantees (independent personal security), including stand-by letters of credit (Article 1:101 lit. (b)); and
  (c) to co-debtorship for security purposes (Article 1:101 lit. (e)).
(2) This Part does not apply to insurance contracts. In the case of a guarantee insurance, this Part applies only if and in so far as the insurer has issued a document containing a personal security in favour of the creditor.
(3) This Part does not affect the rules on the aval and the security endorsement of negotiable instruments, but does apply to security for obligations resulting from such an aval or security endorsement.

Comments

A. Types of Personal Security Covered

1. Personal security. Paragraph (1) opens with a general formula indicating that this Part covers "any type of personal security". Personal security must be contrasted with proprietary security: in the latter case, the security provider's liability towards the creditor is limited to the encumbered asset. By contrast, in any type of personal security the security provider is liable towards the creditor with all its assets – up to the agreed maximum amount, if any.

2. Types of personal security. The aforementioned general formula is supplemented by an enumeration of three major types of personal security in litt. (a) to (c). However, this enumeration is open-ended, as the words "in particular" indicate. This is necessary in order to make sure that special instruments that may be evolved in future, will be covered if they meet the general criterion laid down in the opening general clause.

3. Suretyship guarantee (dependent personal security). Letter (a) starts out by naming the classical instrument of dependent personal security, *i.e.* "suretyship guarantees". While the basic institution alluded to is well known in all member states, terminology is not uniform; reference is made here to the Introduction no. 9 and Comments on Article 1:101 nos. 3 and 8. The essence of a dependent personal security is that, as a rule, its validity, its extent and its contents depend upon the validity, extent and contents

of the secured obligation (cf. Article 1:101 (a)). The details are covered in Chapter 2. A modern phenomenon of a dependent personal security expressly mentioned in lit. (a) is the binding comfort letter (*infra* nos. 4-7).

4. "Binding" comfort letters. Comfort letters are a recent phenomenon primarily of commercial practice fulfilling a security function outside the traditional scheme of instruments of personal security. Security providers as well as creditors have differing reasons (such as accounting, taxes, fees etc.) to avoid using one of the traditional means of personal security which would achieve the same purpose. One may distinguish a commercial and a non-commercial type. Comfort letters of the commercial type are used in many countries in the framework of corporate financing. As a result of individual negotiation, they are couched in very different terms. So-called comfort letters of a non-commercial type and of a different design are also issued in some countries by individuals in connection with the (temporary) admission of aliens. In these letters the issuer, a citizen and inhabitant, promises, on a form supplied by the public authority, to reimburse public authorities for any financial assistance from public resources that may have to be rendered to the alien during its stay in the country.

5. A preliminary general issue is whether comfort letters are binding. This issue is outside the present Rules and must be solved according to the general rules of interpretation laid down in PECL Chapter 5. The present Rules only apply after it has been determined that a comfort letter *is* binding. Because of the importance of the preliminary issue, in the present context the express qualification as "binding" is called for.

6. Most binding comfort letters, especially those of a commercial type, differ from the usual forms of personal security. The provider undertakes to make payments to the creditor's debtor (usually a subsidiary of the security provider or "its" company) in order to enable it to perform its obligations to the creditor. Practice converts any breach of this promise, especially in the debtor company's insolvency, to a claim for damages by the creditor against the sender of the binding comfort letter.
By contrast, in the non-commercial type of comfort letter the sender promises reimbursement of the public expenses (*supra* no. 4) to the creditor, on the same pattern as in a traditional personal security.

7. The sender of a binding comfort letter will not usually be willing to make payment for the creditor's claims against the debtor, unless the latter is insolvent. Also, the sender will not be willing to pay more or under less favourable conditions than those of the debtor's obligations. These two criteria imply that the rules of Chapters 1 and those of Chapter 2 on dependent personal security apply to binding comfort letters.

8. Independent personal security. Letter (b) deals with independent personal security, the modern branch of the field. Here again we are confronted with some problems of terminology (cf. Introduction no. 9 and Comments on Article 1:101 no. 3).

9. The essential difference from a dependent personal security is that the validity, extent and terms of an independent personal security do not depend upon any secured obligation (cf. Article 1:101 (b)). Rather, the independent security legally stands on its

own feet. Economically, though, typically it secures another person's obligation, lest it would not be a security. The relatively few specific aspects of independent personal security are covered, apart from the general rules in Chapter 1, by Chapter 3. One particular form of independent personal security is the stand-by letter of credit, cf. *infra* nos. 10-12.

10. Stand-by letters of credit. In a "pure" letter of credit a bank promises payment of a sum of money to a creditor if the latter so demands; possibly, the creditor has to present certain documents on which its demand is based. Such letters of credit serve as a primary means of payment for goods sold by the creditor or for another performance made by it, such as work or services.

11. By contrast, stand-by letters of credit serve a security function like an independent personal security (*supra* nos. 8-9). They are issued as a security which may be utilized by the creditor if the condition(s) fixed for its utilization are fulfilled. Even a "pure" letter of credit may in reality have been issued for a security purpose; that would bring it under the present Part.

12. Stand-by letters of credit are subject to Chapters 1 and 3 of this Part.

13. Co-debtorship for security purposes. Recent protective legislation and court practice in some countries, especially that dealing with consumer security providers, extends to debtors who assume an obligation jointly and severally with the "principal debtor", provided this assumption of debt is undertaken for security only. Such a collateral debtor deserves indeed the same protection as a security provider. The term "co-debtorship" covers both an initial co-debtorship and a subsequent assumption of a solidary debt after the "principal" debtor had already incurred its obligation. Co-debtorship for purposes of security is governed by Article 1:106. See also Comments on Article 1:101 (e) and on Article 1:106.

14. Nature of the secured obligation. One aspect of the secured obligation is already covered by Article 1:101 (a): the secured obligation may be present or future. The latter rule implies that it may also be conditional; if subject to a suspensive condition, it will arise as soon as the condition materialises. If the secured obligation is subject to a resolutive condition, it is a present obligation (cf. PECL Articles 16:101 and 16:103).

15. Another aspect of the secured obligation is not expressly spelt out but can be derived from the general term of secured "obligation" which is not qualified. This means that the obligation secured need not only be one for the payment of money, although in practice this will most often be the case. Other examples are a seller's obligations under a sales contract or a building contractor's obligations under a construction contract, etc. Even the performance of a legal act, such as a principal's confirmation of a legal transaction concluded by his representative in the principal's name but without or beyond the authority granted to the representative, may be covered – one of the main applications of the FRENCH, BELGIAN and LUXEMBOURGIAN institution of *porte-fort*.

16. Counter security. The security provider may wish to obtain security for its own claim for reimbursement against the debtor. It may therefore require and obtain a personal security from another security provider. Such a counter (or back-to-back) personal security is subject to all the rules of this Part without necessity of special rules or express mention. After having performed to the original creditor, the first security provider is by virtue of Article 2:113 (1) in the position of the creditor who may, unless duly reimbursed by the debtor, demand performance, according to the terms of the counter security, from the second security provider.

B. Personal Security and Insurance

17. In para (2), the first sentence expressly excludes insurance contracts from the scope of application of the present Rules. In a very broad functional sense third party liability insurance may be regarded as a kind of personal security. However, the general structure of insurance contracts of which those contracts form but a part and the special European rules that are envisaged to govern them exclude even this branch of insurance from the scope of application of this Part.

18. The same general considerations apply to credit insurance, *i.e.* an insurance taken out by the creditor against loss due to his debtors' insolvency. Although functionally very close to a personal security, credit insurance is everywhere regarded as a pure insurance contract and therefore subject to the relevant rules of this branch of the law.

19. Functionally even closer to personal security is guarantee insurance since it is taken out by the debtor, usually on the demand of the creditor and in his favour. Practice and legislation seem to vary considerably from country to country, and this is reflected in differing doctrinal qualifications. These, however, also are highly controversial within some countries, such as GERMANY and SPAIN. In FRANCE, the BENELUX countries, AUSTRIA and apparently also in ENGLAND, guarantee insurance seems to be regarded as a *pure* insurance contract, insuring the creditor against the debtor's insolvency. In other countries, especially in GERMANY, ITALY and SPAIN, perhaps also in the SCANDINAVIAN countries, the insurer issues on the basis of the insurance contract a (dependent or independent) personal security to the creditor; thus an insurance contract and a personal security are combined. Paragraph (2) sent. 2 restricts the application of this Part to this personal security, to the exclusion of the underlying insurance contract.

C. Personal Security and Negotiable Instruments

20. Paragraph (3) makes clear that the rules applicable to the aval of negotiable instruments, especially those governed by the Geneva Uniform Laws on Bills of Exchange (arts. 30-32) and of Cheques (arts. 25-27) of 1930 and 1931, respectively, have precedence over the rules of this Part. The same applies to corresponding national laws which are not governed by the aforementioned Geneva Conventions. This is especially true for

the form of the aval and the avalist's liability. The same precedence is enjoyed by the ENGLISH and IRISH rules on the security endorsement (sec. 56 Bills of Exchange Act) which differ to some degree from those of the Geneva Uniform Laws.

21. However, apart from the aforementioned special rules and the general provisions on negotiable instruments into which those special rules are embedded, para (3) implies that the aval and the security endorsement are two types of personal security; therefore, subsidiarily the rules of this Part apply, as the last half-sentence spells out.

D. Aspects of Public Law

22. In practice, personal security, especially in the form of dependent and independent personal securities, plays an important role in economic law. In this respect, various aspects of public law may become relevant.

23. First, public law rules may establish an obligation, or offer the possibility, to provide personal security, and they may also require specific features for such security. Such public duties and requirements do not, however, affect the legal nature of the personal security that has to be provided. Therefore, the rules of this Part are applicable.

24. Secondly, personal security may be demanded and/or provided in order to secure public obligations, such as taxes or customs duties.

> An example of great practical importance is the international transport of goods under cover of carnets TIR, as regulated by the so-called TIR Convention of 14 November 1975. In essence it provides that border-crossing road transports of goods are exempted from controls and the payment of customs duties if they are made under cover of a carnet TIR. Such carnets are only issued if an approved "guaranteeing association" has provided a carnet TIR. The guaranteeing association is liable, "jointly and severally with the persons" who owe payment of the customs duties (art. 8 para (1)); this liability is subsidiary to that of the debtors (art. 8 para (7)). See also *supra* Article 1:101 Comment nos. 12, 14 and 18.

Again, the rules of this Part are fully applicable. The fact that the secured obligation is governed by public law does not exclude the application of this Part. This is even true for a dependent personal security where the security provider may invoke the debtor's defences, *scil.* possibly even defences rooted in public law.

25. Thirdly, the strongest aspect of public law may become visible if the state or another public authority provides a personal security, especially a dependent security. Depending upon the legal and factual circumstances, such a security may be regarded as one of private law and therefore be subject to these Rules. But even if it is regarded as one of public law, these Rules may be relevant. If and insofar as there are no specific rules on personal security of public law, the rules of this Part may be applicable directly or at least by analogy.

National Notes

1. The scope of personal securities has to be understood as broadly as possible. Not only typical forms of security (established by legislation or firm case law) but atypical personal securities are also regulated by the rules of this Part.

I. Typical Personal Securities

A. Dependent Personal Security – Para (1) Lit. (a)

2. The main typical personal security is the contract of dependent personal security (cf. *supra* national notes on Art. 1:101 nos. 5-10).
3. The rules on dependent personal security have been considered as a kind of general law for personal securities. In most member states the rules on dependent personal security shall be applicable to any kind of personal security if possible according to their nature and unless otherwise agreed (BELGIUM: *Dirix and De Corte* no. 383; FRANCE: Cass.-com. 19 Nov. 1985, JCP E 1986 I no. 1551; GREECE: see *supra* national notes on Art. 1:101 no. 18; ITALY: *Giusti* 8 s.; NETHERLANDS: *du Perron and Haentjens*, Inleiding no. 6 and HR 25 Sept. 1998, NJ 1998 no. 892 *sub* no. 3.4; PORTUGAL: STJ 23 Nov. 1971, RT no. 1867, 23; *Almeida Costa* 763; *Galvão Telles* 278; SPAIN: *Díez-Picazo* 416; *Lacruz Berdejo* 499).
4. By contrast, the rules on dependent personal security *(Bürgschaft)* of the GERMAN CC §§ 765 ss. shall in general not, not even by analogy be applied to other instruments of personal security, especially not to independent personal securities (Palandt/*Sprau* no. 2 preceding § 765; Erman/*Herrmann* no. 21 preceding § 765; but see also Staudinger/*Horn* no. 197 preceding §§ 765 ss. with some qualifications). Similarly, in PORTUGAL they are generally not applied to independent personal securities (STJ 27 Jan. 1993, BolMinJus no. 423, 483; STJ 11 Nov. 1999, 694/99 www.dgsi.pt; *Cortez* 590) nor to the aval (STJ 4 Oct. 2000, 2228/00 www.dgsi.pt; different: STJ 7 May 1993, 83594 www.dgsi.pt).

B. *Independent Personal Security – Para (1) Lit. (b)*

5. See *supra* national notes on Art. 1:101 nos. 11-18 and *infra* national notes on Art. 3:101.

II. *Atypical Personal Securities*

A. *Binding Comfort Letters – Para (1) Lit. (a)*

a. *Origins*

6. The comfort letter as a personal security right is known in the legal practice of most member states. The comfort letter appeared only recently in the practice of FRANCE, PORTUGAL and SPAIN (FRANCE: Cass.com. 21 Dec. 1987, D. 1989, 112; PORTUGAL: CA Lisboa 15 Feb. 2001, 94458/00 www.dgsi.pt; SPAIN: TS 24 Nov. 1978, TS 26 Dec. 1986, TS 14 Nov. 1989, all cited by *Illescas Ortiz* 1295, 1296). In FRENCH literature, the comfort letter was known under various and equivalent denominations like *« lettre d'intention »*, *« lettre de confort »* or *« lettre de patronage »* (*Simler* nos. 1008 ss.). Since Decree-Law no. 2006-346 of 23 March 2006 the comfort letter is recognised as a security by the legislator and the name of *lettre d'intention* prevails (CC new art. 2322). In DANISH law the term comfort letter *(støtteerklæring)* was first introduced in 1986 by *Harboe Wissum* (UfR 1986 B 340 ss.; *Iversen* 15) and there are only very few DANISH decisions (*e.g.* CA Vestre Landsret 21 March 1989, UfR 1989 A 618). In GREECE, although unknown to practice (there is no case law), they have been dealt with in literature, where they are translated with the term "letters declaring interest" (*Velentzas* 381) or "patronic statements" (*Filios* II/1 §126, 81-82; *Georgiades* § 6 no. 19 refers to both). In GERMANY comfort letters are a well known type of personal security nowadays (*Fleischer*, WM 1999, 666). Several GERMAN courts dealt with comfort letters (CA Düsseldorf 26 Jan. 1989, NJW-RR 1989, 1116; CA Karlsruhe 7 Aug. 1992, WM 1992, 2088; BGH 30 Jan. 1992, BGHZ 117, 127 (applying AUSTRIAN law); CA München 24 Jan. 2003, DB 2003, 711; CA Berlin 18 Jan. 2002, WM 2002, 1190).

b. *Binding Character*

7. Whether a comfort letter is legally binding must be ascertained, in view of the great variety of such declarations (GERMANY: examples at *Lwowski* nos. 445-465), by interpretation of the specific instrument (GERMANY: BGH 30 Jan. 1992, BGHZ 117, 127 at 129; CA Berlin 18 Jan. 2002, WM 2002, 1190 at 1191). Whether any legally binding liability (or merely a moral obligation) has been created and what kind of liability has been assumed by the issuer of the comfort letter depends upon the careful interpretation of the wording of the agreement (ITALY: *De Nictolis* 386, 396; Cass. 27 Sept. 1995 no. 10235, BBTC 1997 II 396; PORTUGAL: *Soares da Veiga* 380; SPAIN: *Carrasco Perera*, Las nuevas garantías 636). The same is true in DENMARK and SWEDEN (DENMARK: *Iversen* 151 s.; SWEDEN: HD 25 June 1992, NJA 1992, 375; HD 7 April 1994, NJA 1994, 204; HD 27 Oct. 1995, NJA 1995, 586; *Hellner*, Avtalsrätt 79 s.; *Ramberg* 152 s.).
In ITALY, binding comfort letters are declarations that are considered as being legally binding upon the author of the letter (*Costanza*, Lettere di patronage 485 ss.; *Bozzi*, Le garanzie 347 s.; Cass. 27 Sept. 1995 no. 10235, Arch.civ. 1996 I 3007). In GREECE

binding comfort letters may either have the character of an independent personal security, thus creating for the sender an autonomous contractual obligation (*Velentzas* 383-384), or they may give rise to liability for *culpa in contrahendo* vis-à-vis the receiver of the letter (*Georgiades* § 6 no. 21). According to both opinions, the claim for compensation in favour of the receiver is not necessarily equal to the amount of the enterprise's debt vis-à-vis the creditor as receiver of the letter. It has been accepted in SWEDEN that depending on its wording, in appropriate circumstances a comfort letter can be regarded as binding, thereby constituting a form of dependent personal security (cf. HD 27 Oct. 1995, NJA 1995, 586; *Gorton*, Suretyship 583 fn. 18). In ENGLAND it is asserted that the degree of protection might be less than under a security: the creditor will have to establish a sufficient causal connection between the parent company's failure to do what it promised in the comfort letter and the creditor's loss, which might for instance be doubtful if the subsidiary would have become insolvent anyway (*Andrews and Millett* no. 14-015). In FRANCE the comfort letter is according to the Supreme Court regarded now as binding, irrespective of the nature of the liability assumed by the patron (cf. Cass.com. 9 July 2002, Bull.civ. 2002 IV no. 117 p. 126, Revue des sociétés Jan.-March 2003, 124 ss.: a parent company may be bound towards the creditor by merely an obligation of care), contrary to earlier decisions imposing a liability for result (Cass.com. 26 Jan. 1999, D. 1999, 577, note *Aynès*).

c. Qualification

8. It is not possible to provide a common legal qualification of comfort letters, since the extent and kind of liability supplied by this instrument depend on the concrete agreement of the parties (BELGIUM: *Van Quickenborne* no. 847; FRANCE: The *Grimaldi* Commission's proposal of a CC new art. 2324 mentioned expressly that the terms vary; but this clause was not adopted by the CC new art. 2322 (as inserted by DL no. 2006-346 of 23 March 2006); *Simler* nos. 1009 s.; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung 153; GREECE: *Georgiades* § 6 no. 21; ITALY: Cass. 27 Sept. 1995 no. 10235, Arch. civ. 1996 I 3007; *Mazzoni*, Lettere di patronage 564; *De Nictolis* 386; NETHERLANDS: *Wessels* 7; PORTUGAL: STJ 19 Dec. 2001, 2509/01 www.dgsi.pt; *Soares da Veiga* 380; SPAIN: *Carrasco Perera*, Las nuevas garantías 632). The recent FRENCH provision characterises the contents of a comfort letter in a very general way as "support of the debtor in the performance of its obligation towards its creditor" (CC new art. 2322 of 2006). In appropriate circumstances comfort letters may give the creditor similar rights as a contract of dependent or independent personal security (BELGIUM: *Van Quickenborne* no. 848; ENGLAND: *Chemco Leasing SpA v. Rediffusion plc* [1987] 1 FTLR 201 (CA) where, however, it was refused to impose liability on the parent company for the creditor's lack of compliance with an implied term, cf. *Andrews and Millett* no. 14-015; GERMANY: BGH 30 Jan. 1992, cit. at p. 132; *Lwowski* no. 441; ITALY: CFI Milano 17 Dec. 1994, BBTC 1996 II 346; *De Nictolis* 393; NETHERLANDS: *Blomkwist* 15; *Wessels* 7; PORTUGAL: CA Lisboa 15 Feb. 2001, 94458/00 www.dgsi.pt, treated a comfort letter as an independent personal security; *Menezes Cordeiro*, Direito 624; SPAIN: *Carrasco Perera*, Las nuevas garantías 670). The AUSTRIAN Supreme Court qualified a binding comfort letter in one case as an independent guarantee (OGH 23 March 1988, SZ 61 no. 73 at p. 365). However, in another case in which an Austrian citizen obliged himself to reimburse the Federal government and other public bodies for expenses made to

support a foreigner who, on the basis of this declaration, had been admitted to enter, and stay in, the country, the Supreme Court qualified such a declaration as a suretyship and not an independent guarantee (OGH 23 Feb. 2000, SZ 73 no. 36 at p. 209 s.). In ITALY the similarity between binding comfort letters and the dependent personal security has been stressed, but the prevailing view among the authors is in favour of distinguishing it from the typical dependent personal security (*Di Giovanni* 121 ss.; *Mazzoni*, Le lettere di patronage 480) and the same trend is followed by the courts (Cass. 27 Sept. 1995, no. 10235, cit.). The main difficulty to consider a binding comfort letter fully as a dependent personal security is the absence of an express intention of the parent company to grant security, which is required by ITALIAN CC art. 1937 for the valid creation of dependent personal securities, as well as the nature of the obligation assumed by the promisor, which has not the same content as the principal obligation secured (CA Roma 4 Dec. 1979, BBTC 1981 II 88; *Bozzi*, Le garanzie 350). However, if according to the rules of interpretation, the intention to grant a dependent personal security can be deduced from the wording of the letter, it will have to be considered a dependent personal security (CFI Milano 17 Oct. 1994, BBTC 1995 II 346; for a recent assimilation of a binding comfort letter to a dependent personal security, by way of analogical application to it of CC art. 1938 concerning the necessary maximum amount of the security see CFI Roma 18 Dec. 2002, Giur.mer. 2003, 1661). In FRANCE a binding comfort letter can be considered as a personal security *sui generis (garantie)* mentioned in Ccom art. L 225-35, which seems to differ from a dependent or an independent personal security (Cass.com. 9 July 2002, Revue des sociétés Jan.-March 2003, 124 ss.). In the *Grimaldi* Commission's proposal, as adopted by Decree-Law no. 2006-346 of 23 March 2006, the comfort letter *(lettre d'intention)* constitutes a third category of personal security (cf. new chapter III of title I on personal securities and CC new art. 2322 merely giving a definition). If the company which the issuer of a binding comfort letter had promised vis-à-vis the creditor to support becomes bankrupt, the promisor is liable to the creditor for damages for non-performance of its binding promise (AUSTRIA: OGH 23 March 1988, cit. at p. 365; *Leitner* 522; GERMANY: BGH 30 Jan. 1992, cit. at 132; CA Berlin 18 Jan. 2002, cit. at p. 1191; Staudinger/*Horn* nos. 441 s. preceding §§ 765 ss.) The issuer of the letter and the company which it had promised to support are liable as solidary debtors to the creditor, like a surety and the principal debtor (AUSTRIA: *Harrer* 77; *Leitner* 525; GERMANY: BGH 30 Jan. 1992, cit. at p. 132, 134; Staudinger/*Horn* no. 415 preceding §§ 765 ss.; *Bülow*, Kreditsicherheiten no. 1623).

9. According to a DANISH author (*Gomard* 56 fn. 11) a comfort letter cannot in general be considered to be a personal security and in the opinion of one writer (*Iversen* 25 fn. 31) comfort letters can under no circumstances be similar to personal securities.

B. Stand-by Letters of Credit – Para (1) Lit. (b)

a. Generalities

10. Since stand-by letters of credit are mainly used in international commercial transactions they tend to escape a 'pure' national regulation in most countries. This subject matter is usually governed by the *lex mercatoria* (UCP 500 (1993) and ISP98 of the International

Chamber of Commerce in Paris) and international conventions (UN Convention on Independent Guarantees of 1995); the influence of this 'trans-national' law is often to be found in national laws.

b. Qualification

11. Stand-by letters of credit are similar to independent personal securities (GERMANY: *Schütze* nos. 93 ss.; *Zahn, Eberding and Ehrlich* nos. 8/10 ss.; GREECE: *Georgiades* § 6 no. 26; ITALY: *Costa* 270; *Terrile* 591; *Pontiroli*, Garanzie autonome 233 and 249; *Di Meo* 330; NETHERLANDS: cf. *de Rooy* 1115; *Ebbink* 543; PORTUGAL: *Soares da Veiga* 360). Therefore GERMAN courts apply the principles that have been developed for independent personal securities on first demand also to stand-by letters of credit (CA Frankfurt 18 March 1997, WM 1997, 1893). FRENCH opinion considers that the banker's engagement is autonomous from the underlying contract (*Ripert and Roblot* no. 2386-1) and that a stand-by letter of credit is a genuine personal security (*Simler* no. 870 p. 901).
12. Stand-by letters of credit are mainly used in the UNITED STATES and in international trade so that national court practice in Europe is rare (for GERMANY cf., apart from the aforementioned decision, BGH 26 April 1994, WM 1994, 1063). In ENGLAND and SCOTLAND stand-by letters of credit resemble performance bonds and demand securities, which clearly are securities. They have only been considered in very few ENGLISH decisions (cf. *Offshore International SA v. Banco Central SA* [1977] 1 WLR 399 (CFI); *Hongkong and Shanghai Banking Corporation v. Kloeckner & Co AG* [1990] 2 QB 514 (CFI)). The same principles as in regular letters of credit apply because "in law a standby credit is no different from any other type of credit" (*Jack, Malek and Quest* no. 12.15). In ENGLAND it is highlighted that the differences to demand personal securities "lie in business practice, not in law" (*Goode*, Commercial Law 1018).

C. *Co-Debtorship for Security Purposes – Para (1) Lit. (c)*

13. See *supra* national notes on Art. 1:101 nos. 37-39 and *infra* on Art. 1:106.

III. Credit Insurance and Guarantee Insurance – Para (2)

A. *Credit Insurance*

14. A *credit* insurance, *i.e.* an insurance taken out by the creditor against the loss due to his debtor's insolvency, may in fact create a kind of personal security, but is in some countries regarded as a pure insurance contract (BELGIUM: *Van Quickenborne* nos. 852-860; DENMARK: H 6 May 1991, UfR 1991 A 523; FRANCE: *Simler* nos. 24 s.; *Cerini*, L'assicurazione del credito interno in Francia 539 ss., 558 ss.; GERMANY: *Meyer* 35, with examples of general conditions of insurance concerning credits on goods in the annex; GREECE: cf. Insurance Law 2496/1997 art. 22 para 1; ErmAK/*Zepos* no. 35 preceding art. 847-870; *Rokas* nos. 155-156; ITALY: *Cerini*, L'assicurazione del credito interno in Francia 563; *Fanelli* 27 s.; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 422; NETHERLANDS: *De Vries* 468; PORTUGAL: Law (DL) on Credit and Guarantee Insurance 183/88, last modified in 1999; STJ 9 March 1995, BolMinJus no. 445, 552; however, credit insurance is considered as having the function of a dependent or in-

dependent personal security: *Menezes Cordeiro*, Direito 614; SPAIN: Law 50/1980 of 8 Oct. 1980 on Insurance Contracts arts. 69-72; *Tirado Suárez* 444 ss.; SWEDEN: *Walin*, Borgen 137 ss.).

B. Guarantee Insurance – Para (2) Sent. (2)

15. The *guarantee* insurance is agreed between the debtor and the insurer, which secures vis-à-vis the creditor the payment of the debt in favour of the debtor. This contract is regarded in some countries as an insurance (BELGIUM: *Van Quickenborne* nos. 861-862; FRANCE: controversial, *Simler* no. 25; Larroumet/*François* nos. 16 ss.; SWEDEN: HD 9 Sept. 1999, NJA 1999, 544; *Hellner*, Försäkringsrätt 447; GREECE: cf. Insurance Law 2496/1997 art. 11 *juncto* art. 22 para 2; the guarantee insurance is classified in the Second Part of this Law as a special branch of insurance against damages; *Rokas* no. 154). In GERMANY the basic relationship between the debtor and the insurance company is considered as a special type of an insurance contract that is mostly governed by general terms and conditions concerning guarantee insurance (cf. CA Koblenz 16 Feb. 1996, VersR 1997, 1486; *Meyer* 118 ss.); on the basis of this contract, a security is issued to the creditor (cf. CA Koblenz, as before; *Beuter* no. 409 at p. 412). In ITALY the guarantee insurance is recognized by several provisions of special statutes (*e.g.* RD no. 827 of 23 May 1924, art. 54 as modified in 1948; RDL no. 210 of 7 Aug. 1931, art. 5; RDL no. 1113 of 7 Aug. 1931, art. 1 ss.; DPR 26 Oct. 1972 no. 633, art. 38*bis*; DPR no. 43 of 23 Jan. 1973, art. 87 and L no. 348 of 10 June 1982, art. 1), which, however, do not provide a general regulation. A well-established case law regards the guarantee insurance as a dependent personal security, unless differently agreed by the parties (Cass. 1 June 2004 no. 10486, BBTC 2005 II 481 ss.; Cass. 15 March 2004 no. 5239, Assicurazioni 2004, 231 ss.; Cass. 17 May 2001 no. 6757, Giust.civ. 2002, 729; Cass. 18 May 2001 no. 6823, Giur.it. 2001 I 3174; Cass. 26 June 1990 no. 6499, Giur.it. 1991 I 446; Cass. 17 May 1988 no. 3443, BBTC 1989, 429; recently also CA Milano 14 May 2004, BBTC 2004 II 619 ss. note *Barillà*, Il Garantievertrag 633 ss.), whereas scholarly writings show less uniformity on the point and consider this contract sometimes as an insurance (*Stolfi* 67 ss.; *Barbieri* 502), sometimes as an 'atypical' contract to which the rules governing dependent personal security are substantially applicable, unless differently agreed by the parties (*Volpe Putzolu* 245; *La Torre* 103 ss.; *Lipari* 133 ss.; *Vaccà* 167; *Costanza*, L'assicurazione fideiussoria 2418 ss.; *Bozzi*, Le garanzie 65). It has been noticed that commercial practice usually tends to regulate the internal relationship between insurer and debtor according to the rules on insurance contracts and the outside relationship between insurer and beneficiary of the contract (the creditor) according to the rules on dependent personal security (*Bozzi*, Le garanzie 67 ss.). In PORTUGAL guarantee insurance is regulated by Decree-Law 183/88 (last modified in 1999) arts. 6-14. It is an insurance (STJ 12 March 1996, CJ(ST) IV, I-143), but it is equivalent to a dependent (CA Porto 7 May 1998, 9750894 unpublished) or independent (STJ 9 May 2002, 1014/02 www.dgsi.pt; STJ 28 May 2002, 636/02 www.dgsi.pt) personal security (STJ 19 March 2002, 2832/01 www.dgsi.pt). In SPAIN, however, after much controversy about its legal nature (*Camacho de los Ríos* 81; *Carrasco Perera*, Comentario 653), a mixed approach prevailed, according to which the guarantee insurance (cf. L 50/1980 on Insurance Contracts art. 68) is an insurance contract, from which a security obligation arises (*Carrasco Perera*, Comentario 653) and therefore the rules on personal securities are concurrently

applicable with insurance rules (*Embid Irujo* 1863). A similar approach is followed in SWEDEN: the mandatory rules of the Law on Insurance Contracts prevail but the non-mandatory rules may be replaced by the rules on personal securities (*Walin*, Borgen 137-141). Also in ENGLISH law, it is accepted that insurance contracts, where the insured event is the default by a debtor, are equivalent to a personal security contract (Halsbury/*Salter* para 110).

IV. *The Aval – Para (3)*

A. *Origins*

16. The Uniform Laws of Geneva 1930/1931 on bills of exchange and on cheques regulate these special forms of personal security. Almost all Member States are parties to the Uniform Laws of Geneva, except IRELAND and the UNITED KINGDOM. SPAIN, on the other hand, has signed but not ratified the Uniform Laws. However, Law 19/1985 on bills of exchange, promissory notes and cheques has fully adopted its contents, expressly mentioning the Geneva Conventions in its motives.

B. *Qualification*

17. In some countries, the rules of the civil codes on dependent personal securities cannot apply to the aval; since the avalist is no provider of dependent security, its rights and duties are regulated by the provisions on bills of exchange and cheques (BELGIUM: Cass. 3 April 1981, Arr.Cass. 1980-81, 874; *Van Quickenborne* no. 883; GERMANY: BGH 6 April 1961, BGHZ 35, 19, 21; Scholz/*Lwowski* no. 440; Staudinger/*Horn* no. 423 preceding §§ 765 ss.; GREECE: A.P. 1306/1984, EED 37, 87; CA Athens 8840/1984, EED 37, 300; *Georgiades* § 4 no. 67; NETHERLANDS: *Blomkwist* 15; PORTUGAL: STJ 13 Oct. 1998, 779/98 unpublished; STJ 4 Oct. 2000, 2228/00 www.dgsi.pt; while according to the majority view in the literature the aval is characterised by an imperfect autonomy, its pure autonomy is argued by: *Sendim and Mendes* 13). In ITALY and SPAIN, however, despite the autonomous character, which distinguishes the aval from the dependent personal security, it has been recognised that the aval has a limited accessory character due to its security function. Therefore, the rules on dependent personal securities may apply by analogy (ITALY: for CC art. 1948, 1953, 1955: Cass. 11 Sept. 1953 no. 3026, Foro pad. 1953 I 1273; Cass. 8 June 1976 no. 2090, Giust.civ. 1976 I 1225; Cass. 11 Sept. 1997 no. 8990, Giust.Civ.Mass. 1997, 1688; Cass. 7 May 1998 no. 4618, BBTC 2000 II 118; excluded are CC art. 1956 and 1957: Cass. 8 June 1976 no. 2090, cit.; Cass. 23 March 1994 no. 2782, Foro it. 1994 I 3070; *Angeloni* 32; *Bianchi d'Espinosa* 577; *Tedeschi* 533; SPAIN: *García Cortés* 518). In GREECE it is accepted, that an invalid aval may be converted into a dependent personal security, if the parties would have wished to contract a security, had they known the invalidity of the aval (cf. CC art. 182; *Georgiades* § 4 no. 71 fn. 37). By contrast, in PORTUGAL an aval may not be automatically converted into a dependent personal security for, according to CC art. 628 para 1, the contract of dependent personal security must be based on an explicit declaration; but the aval giver, according to the interpretation of the parties' intention and declaration, can oblige himself also as a provider of security (STJ 17 May 1977, BolMinJus no. 267, 149; CA Lisboa 20 April 1993, CJ XVIII, II-138; STJ 9 Oct. 1997, 123/97 www.dgsi.pt). In

FRANCE the aval is considered like a dependent personal security with primary liability (*Simler* no. 107; Cass.com. 28 Oct. 1952, JCP G 1953, II no. 7588).

18. The ENGLISH, SCOTS and IRISH Bills of Exchange Acts do not specifically provide for a security comparable to the aval. In practice, either a formal security to honour the bill is provided separately or the bill will be endorsed by a "stranger", *i.e.* a person not belonging to the sequence of endorsers (*Jahn* 85); according to the Bills of Exchange Act 1882 sec. 56, such an endorser is liable as (any other) endorser to a holder in due course. Although such an endorsement is in substance a security the Statute of Frauds cannot be set up as a defence to the claim (ENGLAND: *G. + H. Montage GmbH v. Irvani* [1990] 1 WLR 667 (CA); *Banco Atlantico SA v. British Bank of the Middle East* [1990] 2 Lloyd's Rep 504 (CA)).

(Hauck)

Article 1:103: Freedom of Contract

The parties may exclude the application of any of the rules in this Part or derogate from them or vary their effects, except as otherwise provided in Chapter 4 of this Part.

Comments

1. Freedom of contract. Article 1:103 reflects and repeats the essence of PECL Article 1:102 which proclaims the principle of freedom of contract. Strictly speaking, this repetition would be unnecessary since all of the rules of PECL are an integral part of this Part (cf. *supra*, Introduction nos. 13 ss.), unless and insofar as they are derogated from in this Part. However, since this Part will be published separately and practitioners insisted on having clarification of this essential starting point, the practical essence of the freedom of contract, as it applies in the present context, is repeated in Article 1:103. This provision should be interpreted in the same way as PECL Article 1:102.

2. Exclusion of these rules. The first branch of Article 1:103 deals with a situation which does not yet become practical. It is based upon the assumption that the rules of this Part are binding upon the parties, *e.g.* if enacted by national or European legislation. For such a case, the text makes it clear that the rules are not mandatory and can therefore be excluded altogether by the parties.

3. Derogation from these rules. By contrast to what has been said in the preceding comment, the two next clauses of Article 1:103 may become relevant even outside the situation addressed by the first clause.

Illustration
Creditor C and surety S have initially agreed that their mutual relations shall in future be governed by the present Rules. However, the parties agree that S may not invoke Article 2:103 (4) and (5).

4. Specific exception. One major exception from the general power to derogate from the rules of this Part or to vary their effect is contained in Chapter 4 on protection of consumer providers of personal security. The reasons are obvious.

5. General exceptions. In addition to the preceding specific exception, restrictions of the freedom of contract result from the general rules of PECL.

6. Good faith. Firstly, PECL Article 1:201 (1) imposes on the parties the general obligation to act in accordance with good faith and fair dealing; the parties cannot exclude or limit this duty (para (2)).

7. A more specific protective rule is to be found in the chapter on validity of contracts. PECL Article 4:109 offers several remedies for a contract that has been concluded by a "weak" party. Such weakness, which must have existed at the time of conclusion of the contract, may be due to a dependency on or a relationship of trust with the other party; economic distress or urgent needs; or personal weaknesses such as improvidence, ignorance, inexperience or lack in bargaining skills (Article 4:109 (1) (a)). In addition to these objective or subjective factors on the part of the weak person, there must have existed additional subjective factors on the part of the other contracting party: the latter must have known or ought to have known of the aforementioned factors on the part of the weak party and in view of the circumstances and the purpose of the contract must have taken advantage of the weak party's situation "in a way which was grossly unfair" or must have taken an excessive benefit (Article 4:109 (1) (b)).

8. The weak party's primary remedy in the above-mentioned situation is the avoidance of the contract (Article 4:109 (1)). However, alternatively the weak party is entitled to ask a court to adapt the contract so as to bring it in accordance "with what might have been agreed had the requirements of good faith and fair dealing been followed" (Article 4:109 (2)). However, not only the weak party, but also the other contracting party may apply to the court for adaptation of the contract after the weak party has sent a notice of avoidance (Article 4:109 (3)).

National Notes

I. Freedom of Contract

1. Contracts of personal security are regarded as part of the law of contract in all member states (cf. ENGLAND: *Moschi v. Lep Air Services Ltd* [1973] AC 331, 346 (HL); DENMARK: *Pedersen*, Kaution 15; FRANCE: *Simler* nos. 122 ss. for dependent personal security and nos. 930 ss. for independent personal security; GERMANY: *Horn*, Bürgschaften nos. 4 and 7; ITALY: *Sacco*, Autonomia contrattuale 796 ss.; *Roppo* 23 ss.; *Piazza* 5;

NETHERLANDS: *du Perron and Haentjens*, Inleiding no. 3 with references; PORTUGAL: *Almeida Costa* 770 ss.; SPAIN: *Vicent Chuliá* 375 s.; SWEDEN: *Walin*, Borgen 36 ss.). Consequently, the rights and obligations of the parties under these contracts are determined primarily by the agreement of the parties (cf. ENGLAND: *Moschi v. Lep Air Services Ltd* [1973] AC 331, 339 (HL); ITALY: *Giusti* 6 ss., 10 ss.).

II. Specific Mandatory Rules

2. Mandatory rules specifically concerning the contract of personal security – which, however, do have a limited scope of application only – are found in the member states typically in matters concerning consumer protection. For these matters, see *infra* national notes on Arts. 4:101 ss. A noteworthy exception relates to specific formal requirements which in some member states exist for personal securities provided both by consumers and non-consumers (cf. *infra* national notes on Art. 4:105).

III. General Mandatory Rules

3. As another consequence of the fact that contracts of personal security are regarded as part of the law of contract in all member states (cf. *supra* no. 1), mandatory rules of general contract law are applicable to these contracts. Therefore, general mandatory contract law rules on matters such as illegality apply also to personal security contracts (cf. ENGLAND: *O'Donovan and Phillips* nos. 4-66 ss.; ITALY: *Bonelli*, Le garanzie bancarie 86 s.; NETHERLANDS: cf. *supra* no. 1; PORTUGAL: *Almeida Costa* 772; SPAIN: *Roca Trias* 147, 154 ss.).
4. The most important general mandatory rules of general contract law applicable to contracts of personal security are the protective rules of general contract law: throughout the member states, protection in matters such as acting against good morals, mistake, undue influence, duress etc. is usually based on the general mandatory protective rules of contract law and of the law of obligations (cf. AUSTRIA: Schwimann/*Mader and Faber* CC § 1346 nos. 14-31; ENGLAND: *O'Donovan and Phillips* chapter 4; DENMARK: ContrA § 36; *Pedersen*, Kaution 29; FINLAND: ContrA § 36; FRANCE: *Simler* nos. 132 ss.; GERMANY: Staudinger/*Horn* nos. 71-77 preceding §§ 765 ff; IRELAND: *White* 539; ITALY: Sacco and De Nova (*Sacco*) I 22 ss., II 59 ss.; *Roppo* 399 ss., 779 ss., 811 ss., 825 ss.; *Bussani* 97 ss.; PORTUGAL: *Almeida Costa* 88 ss.; SCOTLAND: Stair/*Clark* nos. 891 ss.; SPAIN: *Roca Trias* 154 ss., 156 ss.; *Carrasco Perera a.o.* 106 s.; SWEDEN: ContrA § 36; *Walin*, Borgen 37; see also national notes on Art. 4:101 nos. 16 ss. and on Art. 4:103 nos. 27 ss.).

(Böger)

Article 1:104: Creditor's Acceptance

The creditor is regarded as accepting an offer of security as soon as the offer reaches the creditor, unless the offer requires express acceptance, or the creditor without unreasonable delay rejects it or reserves time for consideration.

Comments

1. **Scope**. Article 1:104 deals only with one small aspect of the creation of a personal security. Special and broad rules for the protection of consumer security providers are contained in Articles 4:103-4:105. Apart from these special rules, formation of contract is governed by the general rules laid down in PECL Chapter 2 (cf. Introduction nos. 13 ss.). However, attention must be drawn to the fact that this Chapter no longer reflects the status which European law has achieved. In particular, the Chapter does not contain or reflect the rules of the EC Directive on unfair terms in consumer contracts of 5 April 1993. Since these are rules of a general nature, it is not appropriate to take them up in a Chapter dealing with one specific type of contract.

2. **Creation of security by contract**. Article 1:104 proceeds from the assumption that a personal security is usually created by contract although exceptionally a mere promise by the security provider may suffice (*infra* no. 11). Deviating from the general rule that a contract is concluded by offer and acceptance, as laid down in PECL Articles 2:201 to 2:210, Article 1:104 presumes acceptance "as soon as the offer reaches the creditor". The term "reaches" is defined in PECL Article 1:303 (3); cf. also paras (5) and (6).

3. **Creditor's presumed acceptance**. An express rule appears to be desirable since the general rules on contracting do not provide sufficient certainty: According to PECL Article 2:204 (2), silence or inactivity does not in itself amount to acceptance; nor suffices affirmative conduct by the creditor, unless it is known to the security provider (cf. PECL Article 2:205). Therefore an express rule is desirable and necessary in order to preclude the security provider from asserting later that it is not bound by the security since its offer had not been accepted. The main rule of Article 1:104 implies that the contract of security is concluded as soon as the security provider's offer reaches the creditor.

4. This departure from the general rules on contracting is justified since the contract on personal security usually creates an obligation only for the security provider in favour of the creditor. Therefore many legal systems do not insist upon an express acceptance by the creditor. This widely accepted rule is, however, expressed by Article 1:104 only as a rebuttable presumption. The presumption is rebutted if one of the events specified in the second part of Article 1:104 occurs.

5. **Exceptions**. According to the second part of Article 1:104, the presumption of acceptance established by the first part of Article 1:104 is rebutted if the offer requires express acceptance or if the creditor without unreasonable delay rejects it or reserves time for consideration. The presumption of acceptance by the creditor can be rebutted only by unambiguous declarations of the creditor.

6. If an express agreement is required, it cannot be implied or derived from an unclear reply by the creditor. In the latter case, no contract has been concluded.

7. The same is true for a rejection of the offer. Such rejection is subject to the general rules on rejection of an offer in PECL Articles 2:203 and 2:208. It must be unambiguous

and must be declared within a reasonable time. The criterion of reasonableness is defined by PECL Article 1:302.

8. If the creditor without unreasonable delay after receipt of the offer of security reserves time for consideration, the creditor must be enabled to examine carefully a complicated security instrument; depending upon the circumstances, it must be allowed the time to consult an advisor. On reasonableness, cf. *supra* no. 7.

9. Express acceptance. The ordinary rules on acceptance apply if the offer of security requires an acceptance or if the creditor has effectively reserved time for consideration. Apart from the preceding two cases, the ordinary rules also apply if the creditor, without being "invited" by the security provider to do so, expressly declares its acceptance within a time limit fixed by the offeror or else within a reasonable time limit. The same is true in case of a late acceptance (PECL Article 2:207). See especially PECL Article 2:208 on modified acceptance.

10. Security by virtue of debtor's contract with security provider. The preceding rules also apply if the debtor contracts with the security provider and the security is expressed as a term of that contract in favour of the creditor (cf. PECL Article 6:110).

11. Creation of security by promise. The fact that a security provider's offer of personal security often is not regarded as calling for an express acceptance (*supra* no. 3) invites drawing the consequence that not even any acceptance of the offer is necessary; rather, a mere promise suffices. This corresponds to the general rule established in PECL Article 2:107, according to which "A promise which is intended to be legally binding without acceptance is binding." A practical example is a binding comfort letter sent by the sole or majority shareholder of a company to all creditors of the latter which is presumed to be a binding dependent security (Article 2:101 (2)). Such "unilateral promises" are subject to the general rules on contracts "with appropriate modifications" (PECL Article 1:107).

12. Commencement of security provider's obligation. Article 1:104 implicitly fixes the time at which the security becomes binding if the creditor does not declare its acceptance. The fixing of this point in time is relevant for securities that may fix their duration by indicating a period only (*e.g.* two years) without indicating a precise date of expiration. Also for the application of Article 1:108 (2) (a) and (d) and Article 2:103 (3) a precise date must be determined.

National Notes

I. Personal Security as Contract

A. Declaration of Creditor's Acceptance Necessary

1. In the BENELUX-countries and in PORTUGAL, the general rules on the formation of contracts apply, in particular the "offer and acceptance" method of the general law of contracts as set out in the respective civil codes. All these countries demand that both the security provider and the creditor expressly agree on the contract of dependent personal security (BELGIUM: *Van Quickenborne* nos. 104-105; NETHERLANDS: *Blomkwist* no. 13 at p. 24; PORTUGAL: STJ 6 June 1990, no.78761 unpublished; *Mesquita* 29; *Costa Gomes* 343). Reference can be made to the notes to PECL Chap. 2 on the formation of contract (section 2: offer and acceptance). In FINLAND, according to *Ekström* 39 s. the creditor must expressly accept the offer of the security provider. Also in GREECE, an essential condition for contracting the security is that the creditor has expressly or tacitly accepted it, hence the mere receipt of the offer by the creditor and subsequent silence or inactivity of the creditor do not make the contract binding (Georgiades-Stathopoulos AK/*Vrellis* art. 847 no. 15; A.P. 682/1995, EEN 1996, 586; A.P. 1197/1992, ETrAksXrD 1993, 385). Not only must the creditor accept, but his declaration of acceptance must also reach the offeror/security provider (cf. GREEK CC art. 192). An exception is made for independent personal securities (cf. *infra* C).
2. In ENGLISH law, as a rule, acceptance must be communicated to the security provider; but a detrimental act of the creditor relying on the security provider's promise to the knowledge of the latter can be sufficient (*Jays v. Sala* (1898) 14 TLR 461 (CFI)); similarly, in appropriate circumstances communication can even be inferred from silence and inactivity on the part of the creditor (*Pope v. Andrews* (1840) 9 C&P 564 = 173 ER 957 (CFI)). Acceptance must be expressly communicated if stipulated for in the offer (*Gaunt v. Hill* (1815) 1 Stark 10 = 171 ER 386 (CFI); *Newport v. Spivey* (1862) 7 LT 328 (CFI)); further, if a time limit is stipulated in the offer, acceptance has to be communicated within that period of time, otherwise within reasonable time (*Payne v. Ives* (1823) 3 Dow & RyKB 664 (CFI)). If the offer is a bilateral one, *i.e.* it is given in consideration of an express promise by the creditor to enter into a transaction with the debtor, thus establishing a binding and enforceable bilateral agreement between creditor and security provider, it is irrevocable even before the creditor has acted upon it (*Greenham Ready Mixed Concrete v. CAS (Industrial Developments) Ltd* (1965) 109 SJ 209 (CFI)).

B. Declaration of Creditor's Acceptance Necessary in Specific Cases

3. In ITALY, the general rules on the formation of contracts based on the "offer and acceptance" method apply to the formation of dependent personal security, when the security creates obligations binding not only the security provider, but also the creditor (CC art. 1326 ss.; *Sacco*, La conclusione dell'accordo 24). In AUSTRIA, the Supreme Court held in one case that an offer of a personal security that had been given by the

private security provider on a form supplied by the creditor, in which the creditor had stipulated that its express acceptance was necessary, but which had not been given, was void although the creditor had granted the credit to be secured (OGH 7 Feb. 1989, ÖBA 1989, 1021 with approving note *Bydlinski*; cf. *idem*, Kreditbürgschaft 36 s.).

C. *Acceptance by Creditor's Act or Behaviour*

4. Pursuant to the principle of DANISH ContrA § 7 a security is binding if the creditor has been informed about it. Consent can also arise from the creditor's silence and inactivity (Andersen, Clausen, Edlund a.o./*Pedersen* 435 s.; *Pedersen*, Kaution 18; *Bryde Andersen* 425; *Højrup* 16 s.). According to the BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2015 (since 2006: FRENCH CC art. 2292) as well as ITALIAN CC art. 1937, PORTUGUESE CC art. 628 and SPANISH CC art. 1827 para 1, the existence of a dependent personal security cannot be presumed, it must expressly be established. But in fact this rule concerns only the offer made by the security provider, which is (usually) the only person binding itself (*Simler* no. 125). In ITALY, the offer made by the security provider can also be expressed by conclusive acts, provided it is possible to infer from them a clear intention (*Giusti* 90). Nevertheless it must be noticed that special rules on the form of the security provider's declaration are given by the ITALIAN Banking Law (DLgs 1 Sept. 1993 no. 385): according to art. 117 para 1, the security provider's offer must be in writing and a copy of it must be handed out to him. This rule applies, whether or not the security provider is a consumer (*Lobuono* 52 s.). In FRANCE the acceptance of the creditor can be given impliedly by any unequivocal act, particularly by bringing judicial proceedings against the provider of security (Cass.com. 13 Nov. 1972, GazPal 1973 1, 144). The consent of the creditor may also be implied, *e.g.* by setting up a counter security or by any advance payment in case of a security for an advance payment (*Simler* no. 933).

5. In AUSTRIA, in the context of the formation of a contract the absence of an express acceptance by the creditor is justified in two ways: First, the security provider's binding offer may be regarded as setting a prolonged period for acceptance. This interpretation suggests itself, in particular, where a definite time period for calling upon the security provider had been agreed upon. In this case, the creditor's demand is to be regarded as his acceptance. Second, according to AUSTRIAN CC § 864 para 1, an offer may be accepted by the offeree acting in accordance with the offer. There may be such a conforming act if the creditor concludes the underlying contract with the debtor in accordance with what had been agreed upon from the beginning by the three parties (Avancini/Iro/*Koziol* 283 no. 3/68; cf. also *infra* D). A DUTCH court has held that the creditor's demand based upon an offered personal security signifies its acceptance (CA Amsterdam 17 Oct. 1988, NJ 1990 no. 339).

6. In SCOTS law there is no definite rule, whether an express acceptance is required or whether the security provider's liability is fixed once the creditor performs towards the debtor (*Wallace v. Gibson* [1895] AC 354 (HL(Sc))). The security provider's obligation may also arise from an undertaking to secure a person's debts which is not addressed to any particular creditor: then anyone who has given credit on the faith of the security is entitled to enforce it, unless the contrary is evident from the terms of the undertaking (*Fortune v. Young* (1918) SC 1 (CA)).

7. According to GREEK law, the creditor's acceptance of the offer of a dependent personal security must be made explicitly or tacitly (Georgiades-Stathopoulos AK/*Vrellis* art. 847 no. 15; A.P. 682/1995, EEN 1996, 586; A.P. 1197/1992, ETrAksXrD 1993, 385; cf. GREEK CC art. 189). Silence, however, constitutes neither acceptance nor rejection, unless this is provided by law or in a Code of Conduct or if the parties have so agreed or it is dictated by good faith and business usages, especially among merchants (*Georgiades*, General Principles § 32 no. 22; *Perakis* § 48 no. 22). It has been ruled however, that the mere fact of receipt of the offer neither constitutes a tacit acceptance, nor can such an acceptance be derived from the circumstances concerning the status of the parties or the nature of the contract that binds them (CA Thessaloniki 1197/1992, EpTrapDik 1993, 385). On the other hand, independent personal securities are almost always considered to have been accepted tacitly by the creditor, *i.e.* by the bank sending the document containing the independent personal security (*Georgiades* § 6 no. 46). Also in SPAIN, the creditor's acceptance may be informal and even tacit (*Carrasco Perera a.o.* 105; TS 20 Jan. 1999, RAJ 1999 no. 3); this is especially important for the creditor in case the security provider had waived its rights (*Guilarte Zapatero*, Comentarios 56).

D. Security Provider's Promise as Acceptance

8. Under ENGLISH common law, if the security provider offers the security at the request of the creditor, it is not necessary that the creditor should notify its acceptance to the security provider (on the authority of the Canadian decision in *Fraser v. Douglas* (1906) 5 WLR 52; cf. *Andrews and Millett* no. 2-002). A similar view is also taken in AUSTRIA: The creditor's demand to the debtor to procure a security is transmitted by the debtor to the security provider who accepts the creditor's offer by issuing the security (Avancini/Iro/*Koziol* 284 no. 3/69).

E. Additional Requirements

9. ENGLISH law additionally requires contracts which are not under seal to be supported by consideration; that the creditor promises to grant a credit to the debtor or to forbear from suing the debtor for a debt already in existence can constitute sufficient consideration in contracts of security (Chitty/*Whittaker* nos. 44-019 – 44-023). The same principles apply in IRISH law (*White* 537 ss.), where however it has been held that the fact that the creditor does not sue the debtor is not necessarily a consideration for the security but might as well be a consequence of the obvious fruitlessness of any attempt to enforce the claim against the debtor (*Commodity Banking Company v. Meehan* [1985] IR 12 (CFI)).

II. Beginning of Security Provider's Obligation

10. In ENGLISH law the commencement of the security provider's obligation under the contract of security depends on the nature of its offer: if it is a unilateral offer (which is not made under seal), the provider of security can revoke it until it has been accepted by the creditor (as to what constitutes acceptance see *supra sub* I; *Daulia Ltd v. Four Millbank Nominees Ltd* [1978] 1 Ch 231, 239 (CA)).

11. Pursuant to DANISH ContrA § 7 a security provider's obligation arises as soon as the creditor has been informed about the offer of security (Karnov/*Lynge Andersen* 5397 fn. 32 s.). According to the law of the BENELUX-countries, the contract of dependent personal security and therefore the security provider's obligation becomes effective with the acceptance by the creditor of the offer to grant the security. According to the emission theory the security contract is concluded in FRANCE, as soon as the creditor dispatches its consent (*Simler* no. 129).

12. Under GERMAN and PORTUGUESE law a contract becomes binding at the moment when the declaration of acceptance of the offeree becomes effective, *i.e.* – if the parties do not act *inter praesentes* – when it reaches the offeror, or in PORTUGAL also when it becomes known to him (cf. GERMAN CC § 130; Palandt/*Heinrichs* § 148 no. 1; PORTUGUESE CC art. 224; *Pires de Lima and Antunes Varela* 214). In GERMANY in the vast majority of dependent personal securities the creditor does not declare its acceptance. Nevertheless, the contract of security is validly concluded since according to GERMAN CC § 151 first sentence a contract is concluded by the acceptance of the offer, which, however, need not be communicated to the offeror, if such notification is not to be expected according to common usage. GERMAN courts have held that such a usage exists for offers that are only beneficial for the offeree as is the case of personal securities (cf. especially BGH 12 Oct. 1999, NJW 2000, 276 with further references for dependent as well as for independent personal securities and assumptions of debt; for a binding comfort letter cf. CA Berlin 18 Jan. 2002, WM 2002, 1190, 1191). It has been considered as sufficient that the creditor retains the (written) declaration of the security provider (cf. for dependent personal security BGH 6 May 1997, NJW 1997, 2233; BGH 30 March 1995, WM 1995, 901). The PORTUGUESE CC art. 234 is similar to GERMAN CC § 151. According to that provision, the contract is concluded as soon as the offeree shows an intention to accept the offer, if according to the terms of the offer, the nature or circumstances of the contract or common usage it is not necessary to require a declaration of acceptance by the creditor. CC art. 234 is considered also to apply to dependent personal securities inserted into a complex financial operation (*Costa Gomes* 365). The acceptance can therefore be inferred from the fact that the bank grants a credit (CA Coimbra 5 July 1989, CJ XIV, IV-50) or retains the declaration of the security provider (STJ 6 June 1990, no.78761 unpublished; STJ 15 Dec. 1998, 747/98 www.dgsi.pt). This rule also applies to independent personal securities (*Pinheiro* 431).

III. Personal Security as Unilateral Contract or Promise

13. In ITALY, the dependent personal security being a contract which usually creates obligations for the security provider only, an offer made by the person obligated is considered a binding contract if the offer has not been rejected by the offeree (CC art. 1333) (*Giusti* 71; *Ravazzoni* 255; *Chianale* 276; Cass. 26 May 1997 no. 4646, Giur.it. 1998, 1135). This particular method of formation of the dependent personal security, however, does not affect its contractual nature (*Sacco and De Nova* I 267-268; *Sacco*, La conclusione dell'accordo 23 ss., 28; *Sacco*, Il contratto 36 ss.; Cass. 27 Sept. 1995 no. 10235, Giur.it. 1996 I 1 738; Cass. 3 April 2001 no. 4888, Giur.it. 2001, 2254; Cass. 25 Sept.

2001 no. 11987, Stud.Iuris 2002, 393). The perfection of the security takes place at the moment the declaration reaches the creditor if the latter does not reject it within a reasonable time according to the nature of the business or the usage.

(Dr. Poulsen)

Article 1:105: Interpretation

Where there is doubt about the meaning of a term of a security, and this term is supplied by a security provider acting for remuneration, an interpretation of the term against the security provider is to be preferred.

Comments

1. General rules. General rules on interpretation of contracts are laid down in PECL Chapter 5, Articles 5:101 ss. and must be followed in the first line. Among these rules, attention must be drawn to the *contra proferentem* rule in Article 5:103. Doubts about the meaning of a term not individually negotiated are resolved by construing that term against the party which supplied it. Although this provision applies only to contract terms that have not been negotiated individually, in practice there are very many such cases: Financial institutions as professional providers of credit mostly use form contracts. However, also if financial institutions act as creditors, they may demand that the security provider's assumption of security be declared on a form supplied by them.

2. Exception. Article 1:105 is intended to supplement PECL Article 5:103 by extending that rule to cases that are not covered by the provisions in PECL. The principle expressed in Article 1:105 is based upon two factors: First, a professional security provider will often draw the document on the security granted by it as much as possible in its own favour, i.e. to the disadvantage of the creditor. Second, if this "natural" advantage is combined with its granting the security for remuneration, the very least that may be expected is that the instrument be drafted in unequivocal terms that are clearly understandable for the creditor. If, however, contrary to this justified expectation doubts remain as to the meaning of a term in the security instrument, then an interpretation of such a term against the security provider is justified.

National Notes

I. The Principle

A. Necessity of Interpretation

1. A contract will have to be interpreted only if the terms of the contract are not clear enough to reveal the intention of the parties (for more details, see national notes to PECL Art. 5:101 – general rules of interpretation).

B. General Rules on Interpretation

2. Most EUROPEAN countries agree that a contract of personal security is, as any contract, primarily to be interpreted according to the common intention of the parties (BELGIUM: *Van Quickenborne* no. 290; ENGLAND, IRELAND and SCOTLAND: *Andrews and Millett* nos. 4-001 ss. (IRISH law is insofar identical to ENGLISH law); Stair/*Eden* no. 909; FRANCE: *Simler* nos. 265 s.; PORTUGUESE CC art. 236 para 2; SPANISH CC art. 1281). Furthermore, according to ITALIAN CC art. 1362 para 1 and SPANISH CC art. 1281 para 2, the interpretation of the parties' declarations shall be governed by the search for their true intention which may deviate from the literal meaning of the words employed by the parties (ITALY: CFI Roma 9 May 1981, BBTC 1982 II 295; SPAIN: TS 28 Feb. 1991, RAJ 1991 no. 1604). In GERMANY and GREECE the declarations contained in personal securities are interpreted according to GERMAN CC §§ 133, 157, GREEK CC art. 173, 200 (GERMANY: BGH 14 Nov. 1991, WM 1992, 177, 178; BGH 13 Oct. 1994, ZIP 1994, 1860, 1862; GREECE: A.P. 311/1993, NoB 42, 985) in the way in which the recipient of the declaration according to *bona fides* could understand them ("receiver's horizon", *Empfängerhorizont*). Since there is normally only an express declaration of the provider of security (cf. national notes on Art. 1:104 nos. 3-7, 13), this declaration and therefore the creditor's understanding of this declaration are decisive (GERMANY: Staudinger/*Horn* § 765 no. 21 with further references). The situation is similar in PORTUGAL (CC art. 236 para 1). If the contract is in writing, its construction can only deviate from the wording of the document, if such an interpretation corresponds to the real intentions of the parties and is not contrary to the objects of the relevant form requirements (CC art. 238; STJ 30 Set. 1999, 543/99 www.dgsi.pt).

C. Strict Interpretation of Contracts on Security

3. In ENGLISH, IRISH and SCOTS law, the general approach of the courts is to construe contracts on security rather strictly so that no liability is imposed on the provider of security which is not clearly and distinctively covered by the agreement (ENGLAND: *Blest v. Brown* (1862) 4 De G.F. & J. 367 (CFI); SCOTLAND: *Tennant & Co v. Bunten* (1859) 21 D 631 (CA)); this approach is even more strictly carried out in case of independent personal securities (*Smith v. South Wales Switchgear Ltd* [1978] 1 AllER 18 (HL)). BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2015 (since 2006: FRENCH CC art. 2292) stipulating that contracts of dependent personal security cannot be extended beyond the limits within which they were contracted, is thought to be an application of the *contra proferentem* rule of CC art. 1162. This means that the terms of the contracts of demand security have to be interpreted strictly (FRANCE: Cass.civ. 15

Nov. 1978, GazPal 1979, 1, Somm.Comm. 96; LUXEMBOURG: *Ravarani*, Jurisprudence récente 901). The same is true for SPAIN (TS 5 Feb. 1992, RAJ 1992 no. 830).

4. The situation is similar under DANISH, FINNISH and SWEDISH law, where the "minimum interpretation rule" provides that the security provider shall benefit from any doubt arising from the terms of the contract (DENMARK: H 18 Feb. 1980, UfR 1980 A 361; H 10 April 2002, UfR 2002 A 1464; *Højrup* 30; *Pedersen*, Kaution 29; SWEDEN: *Walin*, Borgen 144 s.; HD 30 March 1983, NJA 1983, 332). Moreover, according to the FINNISH government's proposition for the LDepGuar (RP 189/1998 rd 38 ss.) *juncto* LDepGuar § 7 the liability of a private, *i.e.* a consumer provider of security can be reduced if the terms of a security are doubtful (see also HD 18 April 1995, KKO 1995:74). Also according to GREEK literature, the security provider's declaration must be interpreted restrictively and, in case of doubt, in favour of the security provider, such interpretation being derived from the accessory nature (*Kaukas* art. 851 § 2, 440) and the altruistic character of the security (*Theodoropoulos* 152 fn. 13).
5. On the other hand, in GERMANY there is no general rule that contracts of security are to be interpreted in favour of the provider of security (Staudinger/*Horn* § 765 no. 23; however, there are certain exceptions from this principle, *idem* no. 24, and *infra* no. 7).

D. Contra Proferentem Rule

6. In ENGLISH and SCOTS law the application of the *contra proferentem* rule to contracts of security is generally accepted if the terms of the contract, as it will most often be, have been drafted by the creditor (ENGLAND: *Eastern Counties Building Society v. Russell* [1947] 2 AllER 734 (CA); SCOTLAND: *Aitken's Trustees v. Bank of Scotland* 1944 SC 270 (CA)). The *contra proferentem* rule was further applied in a case where the provider of security had acted against remuneration and drafted the contract; this agreement was then construed in favour of the creditor (*Mercers of City of London v. New Hampshire Insurance Co* [1992] 2 Lloyd's Rep 365 (CA) *per Parker* L.J. at 368).
7. A *contra proferentem*-rule is also provided by AUSTRIAN CC § 915, BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1162, GERMAN CC § 305c para 2 for general conditions, GREEK ConsProtA art. 2 para 5 sent. 2, ITALIAN CC arts. 1370-1371 and SPANISH CC arts. 1288-1289. The terms of a security are interpreted against the party who supplied the contract (BELGIUM: Cass. 5 Feb. 1998, TBH 1998, 754; *Van Quickenborne* no. 291; RPDB, Cautionnement nos. 66-69; FRANCE: Cass.com. 24 Jan. 1989, JCP G 1989, IV, no. 111; *Simler* no. 265; GERMANY: Staudinger/*Horn* § 765 no. 25; on the rich case law on the control of the contents of printed clauses, cf. Palandt/*Heinrichs* § 307 nos. 93-94 and, broader, *Bülow*, Kreditsicherheiten nos. 913-931; GREECE: *Georgiades* § 3 no. 91; LUXEMBOURG: *Ravarani*, Jurisprudence récente 900-904). The situation is similar under DANISH, FINNISH and SWEDISH law, where according to the "vagueness interpretation rule" vague conditions are interpreted against the party that has issued the conditions (DENMARK: *Højrup* 30; *Pedersen*, Kaution 29; FINLAND: HD 15 Sep. 1992, KKO 1992:115; SWEDEN: *Walin*, Borgen 144 s.). The AUSTRIAN Supreme Court has held that an independent security which had been assumed against remuneration must be interpreted against the security provider (OGH 22 Nov. 1999, ÖBA 2000, 701).

8. In the NETHERLANDS, a *contra proferentem* rule has not been adopted legislatively, but appeared in case law and is thought to derive from the principle of reasonableness and fairness (Asser/*Hartkamp* nos. 287, 283).
9. However, according to GREEK ConsProtA art. 2 para 5 sent. 3 (as added by Law 2741/1999 art. 10 para 24), if the validity of the general term is examined in the context of a collective action, the courts are obliged to interpret the term against the consumer (cf. *Georgiades* § 3 no. 91 fn. 73).

II. Exception

10. A few countries expressly provide, as a final clause of their general rules on interpretation, that gratuitously assumed obligations must be construed narrowly in favour of the obliged party (ITALIAN CC art. 1371; PORTUGUESE CC art. 237; SPANISH CC art. 1289 para 1). This rule will apply to most non-professional securities. By contrast, the interpretation of non-gratuitous transactions should lead to an equilibrium of the mutual performances (same provisions). Accordingly, it is assumed that where a security is assumed against remuneration, the protective interpretation-rule does not apply anymore (BELGIUM: *Van Quickenborne* no. 291; GREECE: *Theodoropoulos* 152 fn. 2). A professional provider of security will mostly formulate the terms of the contract and it will no longer be the vulnerable party (DENMARK: *Pedersen*, Kaution 29 s.; GREECE: *Georgiades* § 3 no. 78).
11. According to DUTCH law, these exceptions probably also apply to dependent personal securities and can be derived from the above-mentioned (*supra* no. 8) principle of reasonableness and fairness (Asser/*Hartkamp* no. 287, 283 *(a fortiori)*).
12. In ENGLISH law the aforementioned principles of strict and *contra proferentem* construction have not been applied to performance bonds because of the traditional view that commercial men are well able to look after themselves and could have refused to assume the bond or increase their price for doing so (*Esal Commodities Ltd v. Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 (CA)). The aspect of remuneration is not in general a decisive factor for the construction of the security as can be seen from the cases in which professional providers of security have been granted the favours of strict construction by classifying the agreements purporting to be "performance bonds" as ordinary securities (*General Surety & Guarantee Co v. Parker Ltd* [1977] 6 Build LR 16 (CFI); *Trafalgar House Construction (Regions) Ltd v. General Surety & Guarantee Co Ltd* [1996] 1 AC 199 (HL)). In SCOTS law securities arising under mercantile transactions are generally construed more liberally, ascertaining "the fair *bona fides* of the transaction" (*Watt v. National Bank of Scotland* (1839) 1 D 827 (CA)).

(Lebon; Dr. Poulsen)

Article 1:106: Co-Debtorship for Security Purposes

A co-debtorship for security purposes (Article 1:101 lit. (e)) is subject to the rules of Chapters 1 and 4 and, subsidiarily, to the rules on plurality of debtors (PECL Chapter 10 Section 1).

Comments

A. General Remark

1. Delimitation. Co-debtorship for security purposes must be delimited from different, though closely similar agreements in which a third person intending to act merely for security purposes is drawn into a relationship between creditor and debtor. Three basic situations may be distinguished: First, the creditor and the third party agree that the latter should be or become a co-debtor for security purposes. Second, the original debtor and the third party agree in favour of the creditor that the third party should become an additional debtor for security purposes; this is a stipulation in favour of the creditor which entitles the creditor to demand performance from the new debtor as well (cf. PECL Article 6:110). By contrast, if the debtor agrees with a third party that the latter should assume the debtor's obligation so that the latter is discharged, this agreement does not bind the creditor unless it agrees. If it agrees, this is a substitution of a new debtor (cf. PECL Chapter 12 Section 1) and not a co-debtorship. Only in the first two cases a co-debtorship for security purposes is created.

2. Legal policy. If, in addition to a principal debtor, another person assumes a corresponding obligation towards the creditor in order to *secure* the principal debtor's obligation, a trilateral situation arises which corresponds to that of a (dependent or independent) personal security. The additional security debtor assumes a function which is similar to that of a security provider. This co-debtorship for security purposes is defined in Article 1:101 (e). While it is certainly not a species of a traditional personal security, it is increasingly realised that functionally it has features of a personal security. For this reason, Article 1:102 (1) (c) includes co-debtorship for the purpose of security into the ambit of this Part.

3. The present Part regards co-debtorship for security purposes as a distinct legal institution. For this reason, it is mentioned expressly and separately in enumerating the major types of personal security in Article 1:102 (1) (c). It partakes of the features both of co-debtorship and of a personal security. Consequently, this institution generally is governed by the rules on co-debtorship; this respects the intention of the parties who have chosen this particular type of transaction for the purposes which they intend to pursue. However, if and insofar as the parties use a co-debtorship for the purpose of providing security for the creditor, this justifies the application of certain basic rules on personal security, especially Chapter 1.

4. If the "securing" co-debtor is a consumer, the special protective rules of Chapter 4 apply. In addition, Article 4:102 (1) refers to Chapter 2 on dependent personal security and in the framework of this reference the rules on dependent personal security become

applicable and are mandatory in favour of the security provider (Article 4:102 (2)). The reason for selecting this regime is that the rules on dependent personal security are – generally speaking – the most protective ones for security providers. For details, cf. *infra* no. 15.

5. Two types of co-debtorship? Co-debtorship for security purposes may exist from the creation of the main obligation.

> *Illustration 1*
> A husband and his wife sign contemporaneously a credit agreement as debtors for financing the husband's business; his wife, a house-wife, merely signs at the special request of the creditor and in order to assist her husband.

It may also be created later if a co-debtor for security purposes subsequently accedes to an already existing obligation of an "ordinary" full debtor. Also the reverse situation would be covered, although it rarely, if ever occurs in practice.

The consequences of this distinction are more linguistic than real. If co-debtorship does not exist from the creation of the obligation to be secured, there is no plurality of debtors and therefore no co-debtorship; it comes into being only at the time when an (additional) debtorship for security purposes is created. The same is true if the sequence of creation is reversed.

B. Criteria for Security Purpose

6. There is no generally recognised criterion for qualifying a co-debtorship as being assumed for the purposes of security. The test must be whether one of the co-debtors has the clearly greater direct interest in the credit extended and therefore is finally to be saddled with it. According to Article 1:101 (e) there is no co-debtorship for security purposes unless one of the debtors obliges itself "primarily" for purposes of security to the creditor. In the final analysis, this depends upon the interpretation of the credit agreement in light of all the circumstances.

7. A major indication for a co-debtorship with security purposes rather than a full co-debtorship is whether the co-debtor has a personal interest in the performance of the contract in which the main obligation is rooted. The fact that the co-debtor's obligation is coterminous with that of the other debtor and that the co-debtor has co-signed the same document as the other debtor cannot be decisive since this would eventually place the result into the hands of the creditor. If doubts remain, it is preferable to assume that the third person has merely assumed a co-debtorship for security purposes. The fact that a house-wife as such indirectly may benefit from the success of her husband's business cannot be relevant and does not suffice to saddle her with full liability.

8. Co-debtorship for security purposes has to be delimited not only from co-debtorship as such, but also from other types of personal security, especially from dependent security. According to Article 2:101 (1), any "undertaking to pay, … to the creditor by way of

security" is presumed to be a dependent personal security as defined in Article 1:101 (a). Therefore the creditor has to show that it was agreed otherwise (Article 2:101 (1) last half-sentence). Consequently, there will only be a co-debtorship for security purposes if the creditor can show that the parties unambiguously agreed upon this specific type of personal security.

C. Co-Debtorship and Personal Security Combined

9. An additional reason for covering co-debtorship is that in some countries the parties sometimes call the person assuming an obligation for security purposes a "co-debtor and security provider". Since these two obligations involve different consequences, the meaning of the instrument, as intended by the parties, will have to be clarified. One possible construction may be that the security provider was meant to provide a dependent security with solidary liability (cf. Article 2:105). Another possible construction is that the combined formula is intended to express the security character of the assumption of debt.

D. Applicable Rules

10. For the reasons set out *supra* no. 3 it is not possible to subject co-debtorship for security purposes to all provisions of this Part because this would disregard the basic differences between co-debtorships for security purposes and dependent as well as independent personal securities and the intentions of the parties who have chosen this particular method of providing security. For this reason, it appears necessary to subject such co-debtorships only to the general rules laid down in Chapter 1 and to the special provisions on consumer personal security laid down in Chapters 4 and 2. For the rest, co-debtorships are governed by the rules on plurality of debtors laid down in PECL Chapter 10, Articles 10:101-10:111.

a. Applicable Rules in Chapter 1

11. According to Article 1:106, a co-debtorship for security purposes is subject primarily to Chapter 1 of this Part. However, only few rules of Chapter 1 appear to be directly relevant for a co-debtorship for security purpose.

12. In applying Articles 1:107-1:109, a co-debtor for security purposes can easily be put on the same level as one of several security providers. This is true for the relationship *inter se* (Article 1:107), recourse among several security providers (Article 1:108) as well as recourse against the debtor whose obligation is secured (Article 1:109).

13. Article 1:110 does not become relevant for a co-debtor for security purposes since Article 1:106 itself already declares PECL Chapter 10 Section 1 to be applicable.

b. Rules in Chapter 4

14. According to Article 1:106, a co-debtorship for security purposes is subject also to Chapter 4 of this Part. Chapter 4 contains the special and mandatory rules for consumers who have provided personal security. The application of these rules to co-debtorships for security purposes assumed by a consumer is explained in the framework of Chapter 4.

c. Rules in Chapter 2

15. For the reasons set out *supra* no. 4, the regime for consumer providers of a co-debtorship for security purposes is split: primarily, the rules of Chapter 2 on dependent personal security apply (cf. Article 4:102 (1)) and they are declared to be mandatory in favour of the consumer provider of security (Article 4:102 (2)). In general, these rules are the most protective ones for the security providers. Generally speaking, they are also more protective than the rules on co-debtorship which do not provide for any consumer protection. However, in a few instances, the regime for co-debtors laid down in PECL Articles 10:101 to 10:111 is more protective than Chapter 2 of the present Part. Where a comparison of the two regimes leads to this conclusion, exceptionally the rules of Chapter 2 are disregarded in favour of the general regime for solidary debtors in the aforementioned rules in PECL. The detailed comparisons are to be found in the Comments to the relevant rules of Chapter 2.

National Notes

I. General

1. In most member states it is generally recognized that solidary co-debtorship, *i.e.* a plurality of debtors who are liable for one and the same obligation towards the creditor, reinforces the position of the latter and may therefore have the function of security for the creditor (*e.g.* for PORTUGAL: *Teles de Menezes Leitão* 165; SPAIN: *Díez-Picazo* II 207). All member states seem to agree that, if two persons contemporaneously agree to assume an identical obligation, even though details may differ, they are co-debtors. By contrast, concepts and even effects differ where a person lateron accedes to an obligation which had earlier on be assumed by another person. Some countries regard both branches as one institution which is essentially subject to identical rules (*e.g.* GERMANY), whereas other countries regard them as two separate, although closely related institutions which are subject to more or less different, but closely related rules (especially the ROMANIC countries).

II. Initial Co-Debtorship

2. In most CONTINENTAL EUROPEAN countries the basic institution of solidary co-debtorship is recognized and regulated by legislative rules as a modality of the obligation which is owed from its inception by several debtors; they are solidarily liable towards the creditor for the performance of one single obligation (AUSTRIA: *Mitschuldner zur ungeteilten Hand*, CC § 896; DANISH Promissory Note Act § 2 par 1 regulates a plurality of debtors without, however, using the term solidary liability. According to Karnov/*Møgelvang-Hansen* 5558 fn. 8 the debtors are solidarily liable towards the creditor *(een for alle og alle for een)*. The term "solidary liability" is used in Law on Bankruptcy § 47 *(solidarisk hæftelse)*; DUTCH CC art. 6:7 para 1 *(hoofdelijke verbintenis)*; GERMANY: *Gesamtschuld*, CC § 421; BELGIUM, FRANCE and LUXEMBOURG: *codébiteurs solidaires*, CC art. 1216; ITALIAN CC arts. 1292-1313, *obbligazioni solidali*; PORTUGUESE CC arts. 512 ss., Ccom art. 100, *obrigações solidárias*; SPANISH CC arts. 1137 ss., Ccom art. 567, *obligación solidaria*; SWEDISH Promissory Note Act § 2 par 1 regulates like the DANISH Promissory Note Act § 2 par 1 a plurality of debtors. According to *Walin*, Lagen om skuldebrev 26, this provision assumes a solidary liability (the provision says, that the debtors are liable "one for all and all for one" *(en för alla och alla för en)*. Like in DENMARK the term "solidary liability" does not occur in the SWEDISH Promissory Note Act § 2 par 1 (the terminology *solidariskt ansvar* for several debtors is however used in the SWEDISH Law on Bankruptcy Chap. 5 §§ 4 ss.); see also PECL Articles 10:101 (1) and 10:102 (1)). Solidary liability exists even if the co-debtors are not liable on the same terms (ITALIAN CC art. 1293; SPANISH CC art. 1140; PECL Article 10:102 (3)). Towards the creditor each co-debtor is liable for the whole obligation, so that the creditor has the free choice to demand performance from anyone of the co-debtors (AUSTRIAN CC § 891; DENMARK: Karnov/*Møgelvang-Hansen* 5558 fn. 8 referring to the Promissory Note Act § 2 concerning plurality of debtors; DUTCH CC art. 6:6 para 1; FRENCH CC arts. 1200 and 1203; GERMAN CC § 421; ITALIAN CC art. 1292; PORTUGUESE CC arts. 512 para 1, 518, 519; SPANISH CC art. 1144; SWEDEN: *Walin*, Lagen om skuldebrev 27; cf. also PECL Article 10:101 (1)); in the internal relationship among co-debtors the obligation is divided into shares, for which statutory law usually establishes a rebuttable presumption that the shares of all co-debtors are equal (AUSTRIAN

CC § 896; GERMAN CC § 426 para 1 sent. 1; ITALIAN CC art. 1298 para 2; PORTUGUESE CC arts. 516, 524; see also PECL Article 10:105 (1)).

3. Some countries differentiate between civil and commercial transactions: While in BELGIUM, FRANCE, LUXEMBOURG, PORTUGAL and SPAIN solidary liability must expressly be agreed by the parties for civil obligations (BELGIUM, FRANCE and LUXEMBOURG: CC art. 1202; PORTUGAL: CC art. 513; SPAIN: CC arts. 1137-1138), for commercial obligations this is in many countries the rule and separate liability must expressly be agreed (*e.g.* FRANCE: Cass.civ. 18 July 1929, D.H. 1929, 556; PORTUGAL: Ccom art. 100). By contrast, in GERMANY and ITALY there is a general presumption in favour of solidary liability (GERMANY: CC § 427; ITALY: CC art. 1294).
4. Solidary co-debtorship for security purposes is more attractive in countries which establish subsidiary liability for dependent personal securities (*e.g.*, AUSTRIAN CC § 1355 s.; FRENCH CC art. 2021 ss.; GERMAN CC §§ 771 ss.; PORTUGUESE CC art. 638; SPANISCH CC art. 1822) than in countries which provide for solidary liability such as ITALY (CC art. 1944 para 1).

III. Subsequent Cumulative Assumption of Another Person's Debt

5. The subsequent cumulative assumption of an already existing debt by an additional debtor is recognized in the various member states in several different forms and is called by different names. However, most of the various forms result in a solidary co-debtorship between the new and the original debtor. This subsequent assumption of another's debt can be considered as a variation of the general category of solidary co-debtorship to which also some specific rules may apply (BELGIUM, FRANCE and LUXEMBOURG: *délégation imparfaite*, CC art. 1275; AUSTRIA, GERMANY and NETHERLANDS: *Schuldbeitritt*, which is mentioned in AUSTRIAN CC § 1347; in the GERMAN and the DUTCH Civil Codes it is not regulated, but is generally recognised, GERMANY: Palandt/*Grüneberg* no. 2 preceding CC § 414; NETHERLANDS: Asser/*Hartkamp* IV 1 no.102; GREEK CC art. 477; ITALIAN CC arts. 1268-1276, for *delegazione*, *espromissione* and *accollo*; PORTUGUESE CC art. 595, for *assunção de dívida*; SPAIN: *Díez-Picazo and Gullón* 591 ss., for *asunción cumulativa de deuda*, *expromisión cumulativa* and *delegación imperfecta*).
6. If this variety of designations and rules is classified according to solutions, three groups can be distinguished: (a) countries in which the cumulative assumption of another person's debt is basically identical with a co-debtorship, except that it comes into being after the first debt had been created: subsequent cumulative co-debtorship; (b) countries which utilize differently named institutions, but which all lead to the practical effect of a subsequent cumulative co-debtorship; and (c) countries in which the cumulative assumption of another person's debt is not only regulated by institutions which differ from co-debtorship, but which also have more or less different practical effects.

A. Subsequent Cumulative Assumption of Another Person's Debt: Regulated as Co-Debtorship

7. In AUSTRIA, GERMANY and the NETHERLANDS, the *Schuldbeitritt* consists of an assumption of co-debtorship subsequent to the creation of the primary debt. The new co-debtor assumes solidary liability towards the creditor. The rules governing this vari-

ety of co-debtorship are the general rules of the 'initial' co-debtorship, except that the new co-debtor assumes the original obligation as to its conditions and extent as existing at the time of its assumption of debt (and not as it was at the time of its creation) (AUSTRIA: Koziol and Welser(*-Welser*) 124, 139; Rummel/Mader *(Faber)* § 1347 no. 1; GERMANY: *Reinicke and Tiedtke*, Kreditsicherung 1 ss.; Staudinger/*Horn* nos. 363 and 369 ss. preceding §§ 765 ss.).

B. *Subsequent Cumulative Assumption of Another Person's Debt: Different Institutions but Identical Results*

8. In BELGIUM, FRANCE and LUXEMBOURG a subsequent cumulative assumption of another person's debt may be created by *délégation imparfaite* (CC art. 1275; BELGIUM: *Van Oevelen* no. 876; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 421): The original debtor "delegates", *i.e.* instructs a third person to pay a debt corresponding to its own obligation towards the creditor. The delegation is 'imperfect' since the original debtor remains liable together with the new debtor; both debtors are solidarily liable towards the creditor (FRANCE: *Simler* no. 35). It seems that, inspite of a differing name for the institution, the practical result is the same that is reached through the AUSTRIAN/GERMAN version of the subsequent cumulative assumption of debt. In FRANCE the security character of a subsequent assumption of debt (*« délégation-sûreté »*: *Cabrillac and Mouly* no. 473-3) is indirectly confirmed by Law no. 75-1334 of 31 Dec. 1975 on subcontracting: The customer has to provide to the subcontractor a personal security *(garantie)* in form of either a dependent personal security or a subsequent (partial) assumption of debt for the subcontractor's claim against the main contractor.

9. The same can be said for PORTUGAL and SPAIN. In PORTUGAL, the subsequent cumulative assumption of another person's debt implies solidary liability of the new debtor together with the original one, unless the creditor releases the old debtor (CC art. 595 para 2; STJ 17 Oct. 1975, RLJ no. 109, 281; CA Lisboa 2 Nov. 2000, 69272/00 www.dgsi.pt; *Vaz Serra*, Assunção de dívida 190; *Teles de Menezes Leitão* 170). In SPAIN, the Civil Code regulates only the substitution of the original debtor by another debtor (CC art. 1205, *novación*). However, the cumulative assumption of another person's debt, as well as the cumulative expromission, are admitted by virtue of the freedom of contract as atypical contracts (CC art. 1255; the first important decision was TS 22 Feb. 1946 cited by *Díez-Picazo* II 842; see then TS 7 Nov. 1986, RAJ 1986 no. 6217; 15 Dec. 1989, RAJ 1989 no. 8832; 22 March 1991, RAJ 1992 no. 2428; *Vicent Chuliá* 389). The liability of the original and the new debtor is solidary (TS 15 Dec. 1989 above and 7 Dec. 1971, RAJ 1971 no. 5154). Some legal writers consider these forms of cumulative assumption of debt as spontaneous personal securities (*Bercovitz Rodríguez Cano a.o.* 633 fn. 74).

C. *Subsequent Cumulative Assumption of Another Person's Debt: Different Institutions and Different Results*

10. In ITALY the general effect of assumption of another's debt may be achieved by the use of three different legal institutions, namely cumulative delegation, cumulative expromission and subsequent assumption of another person's debt *(accollo cumulativo)*. All these institutions have the same general effect, *i.e.* to provide an additional debtor to

the creditor; in this sense they are similar – as to the operative results and economic function – to a dependent personal security (*Casella* 260; *Nicolò* 971) and difficult to be distinguished from it (*Rescigno*, Studi 168; *Rescigno*, Delegazione 952 ss.; *Mancini*, La delegazione 483 ss.). However, their legal structures differ. Under a cumulative delegation a third party agrees with the debtor to perform the latter's obligation to the creditor. The cumulative expromission is an agreement between the third party and the creditor for the assumption of the debtor's obligation by the former, whereas the *accollo cumulativo* is an agreement between the debtor and the third party, through which the latter assumes the debtor's obligation. In all three cases the creditor does not release the debtor, who will remain liable; however, this continued liability is only subsidiary (CC art. 1268 para 2 for the delegation; for the expromission and the subsequent assumption of another one's debt this provision is generally applied by analogy: *Rescigno*, Studi 67; *Mancini*, La delegazione 500, 512; *Ceci* 292; *Rodotà* 787; Cass. 24 May 2004 no. 9982, Giust.civ.Mass. 2004, 1178). Thus, the original debtor's liability, in these cases, while solidary with the liability of the new debtor (CC art. 1272 para 1 and 1273 para 3), is merely subsidiary: the creditor can demand performance from the original debtor only after having demanded it from the new debtor (CC art. 1268 para 2 by analogy). However, the creditor has not to bring execution against the new debtor before demanding performance from the original one (see authors and case law *supra*).

IV. *Criteria for Security Purpose*

A. *Initial Co-Debtorship*

a. Express Agreement of the Parties

11. In the first line, the parties may agree that one of them is to act as co-debtor for security purposes. In ENGLAND, a co-debtor may assume the role of a security provider by virtue of a security agreement with the other debtor: both co-debtors agree internally that one of them is to act as a security provider only, while the whole burden ultimately is to fall on the other debtor (cf. *Goode*, Commercial Law 800; *O'Donovan and Phillips* no. 1-29 s.). This agreement is effective as between the co-debtors from the outset (cf. Halsbury/*Salter* para 103); the creditor, however, is bound to treat the debtor who has assumed the position of a security provider as a security provider only once it became aware of this agreement (cf. *Rouse v. Bradford Banking Co* [1894] AC 586 (HL)); *Goldfarb v. Bartlett* [1920] 1 KB 639 (CFI)). That the co-debtors may in this way unilaterally affect the creditor's position vis-à-vis the debtor who becomes a security provider has met strong criticism in the literature (cf. *Goode*, Commercial Law 800).
12. The AUSTRIAN Supreme Court also recognised an agreement between two solidarily liable co-debtors according to which one of them in future should merely act for security purposes. Since the creditor had not been informed, the new co-debtor for security purposes remained fully liable towards the creditor when the other co-debtor was unable to perform. Upon performance by the co-debtor for security purposes, the creditor's proprietary security rights passed to the performing co-debtor as in the case of performance by a dependent security provider (OGH 28 May 1969, ÖJZ 1969, 551).

b. Interpretation of Contractual Terms

13. FRANCE: For the decision of whether an instrument creates a dependent suretyship or a solidary co-debtorship, FRENCH courts enjoy a considerable degree of freedom according to NCPC art. 12. In a case where a house-wife assumed a loan with which her husband as mere co-debtor financed its business, a first-instance court requalified the loan as a dependent personal security which was void due to lack of the required form (CFI Lons-le-Saulnier 18 Nov. 1997, CCC April 1998 no. 64 with approving note). In another case a plaintiff's claim, although brought on the basis of a dependent security, was allowed as a claim on the basis of co-debtorship (Cass.civ. 22 June 1982, Bull.civ. 1982 I no. 233 p. 199). Where the contract uses the ambiguous term "with solidarity", the appellate court's qualification as co-debtorship was accepted (Cass. 17 Nov. 1999, JCP G 2000 IV no. 1002). In other circumstances, the courts have denied such requalification if the contractual terms were unambiguous (Cass. 10 Dec. 1991, Bull.civ. 1991 I no. 347 p. 227). Two FRENCH cases dealt with clauses on AMEX credit cards issued to employees of a company, on the latter's application for use in the services of the company and reimbursed by the latter; according to a clause of the contract the employee was to become co-debtor vis-à-vis the issuer of the credit card company. After insolvency proceedings over the assets of the two companies had been opened, the courts upheld the credit card company's claims against the employees, although the form for a dependent personal security had not been observed (Cass. Civ. 22 May 1991, Bull.civ. 1991 I no.162 p. 107) or although the creditor had not notified its claim against the company to the latter's insolvency administrator (CA Paris 5 June 1992, JCP E 1993, Pan. no.176).

c. Objective Criteria

14. Without agreement of the parties, in many EUROPEAN legal systems the main criterion for qualifying a co-debtorship as being assumed for security purpose is the absence of a personal interest of the co-debtor as security provider in the performance of the debtor's "secured" obligation to the creditor (BELGIUM, FRANCE and LUXEMBOURG: CC art. 1216; FRANCE: Cass.civ. 21 July 1987, Bull.civ. 1987 I no. 249 p. 182; Cass.civ. 22 May 1991, Bull.civ. 1991 I no. 162 p. 107; *Simler* no. 28: *« co-débiteur non intéressé à la dette »*). The same is true in ITALY; CC art. 1298 para 1 uses the criterion that the contract is concluded in the "exclusive interest" of one of the contracting parties.
15. GERMAN and AUSTRIAN practice have reached similar results. The GERMAN Federal Supreme Court holds that a co-debtor who has personal interests in the granting of the credit and who may influence the decision about the paying out and the use of the loaned money is a co-debtor without security purposes, whereas a co-debtor who does not enjoy equal rights is a debtor for security purposes only; a merely indirect interest is irrelevant (BGH 14 Nov. 2000, BGHZ 146, 37, 41 s.; BGH 4 Dec. 2001, NJW 2002, 744). In AUSTRIA, in cases of doubt, courts and writers similarly use the co-debtor's economic interest in achieving the purposes of the principal debtor as a criterion: if such economic interest is lacking, the co-debtorship is for security purposes only (OGH 19 July 1988, SZ 61 no. 174, ÖBA 1989, 432 note *Bydlinski*; OGH 4 Feb. 1993, ÖBA 1993, 819 note *Bydlinski*; already OGH 30 June 1960, ÖRiZ 1961, 45; *Bydlinski* 27-28). In special cases, even a merely personal reason, such as assistance to a close, but poor

relative in order to enable proper defense in a criminal proceeding, has been recognized as supporting a full-fledged co-debtorship (OGH 19 July 1988, *supra*). By contrast, a merely moral interest in supporting a debt of a dissolved company does not qualify as a cumulative assumption of debt, but is a suretyship (which in this case, due to lack of the required written form, was invalid: OGH 7 April 1976, SZ 49 no. 53). Also under the new DUTCH Civil Code it has been concluded that, where one of the two co-debtors is the only beneficiary under a contract, the other co-debtor may recoup any performance it has rendered to the creditor (Asser*Hartkamp* IV 1 no.117).

B. Subsequent Cumulative Assumption of Another Person's Debt

16. In those EUROPEAN countries where specific legal institutions for the subsequent cumulative assumption of debt are known (cf. *supra* nos. 8-10) it is generally acknowledged that these institutions may function like and can then be considered as a personal security.

17. In GREECE the subsequent cumulative assumption of debt which is the contractual promise of a third party to pay to the creditor the debt of another (cf. CC art. 477), must be distinguished from the promise of a third party to the debtor to discharge the latter (cf. CC art. 478). Several criteria have been proposed for this distinction, including the security purpose: when it is the purpose of the contract to provide security to the creditor and to reinforce the obligations of the original debtor, the contract is to be qualified as personal security, whereas when the intervening third party has its own immediate interest in the performance of the debt and this is perceived by the creditor, then the contract is regarded as a subsequent cumulative assumption of debt (*Georgiades* § 7 no. 61 ss.; ErmAK/*Michaelides-Nouaros* art. 477 no. 11; CA Athens 10465/1978, NoB 27, 979). Cases of doubt are resolved, by GREEK literature, as personal security (ErmAK/*Michaelides-Nouaros*, art. 477 no. 11; *Zepos* A 644); by the courts, however, as a subsequent cumulative assumption of debt (CA Athens 4592/1972, ArchN 25, 138). None of these criteria, however, is deemed satisfactory by a minority opinion (cf. *Kallimopoulos* 1523 ss.).

18. In FRANCE, the cumulative assumption of the debt by a new debtor does not primarily serve a security purpose. Rather, it is mostly used as a simplified means of payment: the new debtor by performing to the creditor performs both its own obligation towards the initial debtor and the debt of the initial debtor towards the creditor (cf. Malaurie and Aynès/*Aynès and Crocq* no. 323; *Cabrillac and Mouly* no. 473-2). But the subsequent cumulative assumption of debt functions as a security if the parties so agree and if the new debtor has no interest in the performance of the obligation towards the creditor (Larroumet/*François* no. 487; Malaurie and Aynès/*Aynès and Crocq* no. 323; *Cabrillac and Mouly* no. 473-3: *« délégation-sûreté »*; *contra Billiau* no. 7 s.: for in this case the subsequent cumulative assumption of debt disappears). Thus FRENCH court practice admits the validity of the cumulative assumption of debt irrespective of any obligation of the new debtor to the initial debtor (Cass.com. 21 June 1994, Bull.civ. 1994 IV no. 225 p. 176; RTD civ. 1995, 113 note *Mestre*).

19. In ITALY the similarity of the institutions of cumulative assumption of another person's debt with a personal security is increased by the fact that the original debtor's liability is merely subsidiary (see *supra* no. 10 and *Cicala* 288 s.). However, the special feature is that the law itself determines the person of the security provider and that against

expectation the original debtor's obligation is reduced to being subsidiary rather than that of the subsequent new debtor. Nevertheless, ITALIAN authors and courts try to distinguish between subsequent assumption of another person's debt, on the one hand, and dependent personal security, on the other hand. They point out the differences in legal structure and in *causa* existing between the two institutions (see *supra* no. 4; Cass. 5 March 1973 no. 609, Giust.civ. 1973 I 937; Cass. 24 March 1979 no. 1715, Giur.it.-Mass. 1979, 456; Cass. 20 Feb. 1982 no. 1081, Foro it.Mass. 1982, 239). One relevant criterion is whether the contract of subsequent cumulative assumption of debt is gratuitous or not. If it is non-gratuitous, it should be qualified as an assumption of a debt together with the existing debtor and not as a dependent personal security (*Di Sabato* 497). If, on the contrary, the subsequent assumption of debt is gratuitous, the creation of a security is the only purpose of the operation and the new co-debtor has no relevant personal interest in the performance of the obligation; it will be qualified as a dependent personal security (*Rescigno*, Delegazione 953).

20. In PORTUGAL, although the subsequent assumption of debt conceptually differs from the contract of dependent personal security, it is recognised that in practice this distinction may become uncertain (*Almeida Costa* 764) because the co-debtor(s) may pretend to assume in substance a personal security (*Vaz Serra*, Note on acordão de 17. 10. 1975, at 294). According to case law, the distinction is a matter of interpretation of the contract, basically depending on the existence of a personal interest of the new debtor in the obligation: in this case, the agreement will be qualified as an assumption of debt; otherwise, and if only a personal interest to help the original debtor is to be detected in the agreement, the latter will be regarded as a personal security (STJ 6 May 2004 no. 2294/03; 12 Dec. 1995 no. 8131/93: www.dgsi.pt).

V. *Co-Debtorship for Security Purposes: Prerequisites and Effects*

A. *Prerequisites*

21. An important attraction of any co-debtorship and therefore also of one for security purposes is a negative one: the validity of such a co-debtorship does not depend upon any formal requirement (cf. the provisions mentioned *supra* no. 2) – as is usually established for a dependent personal security (cf. the court practice cited *infra*, national notes to Art. 4:105 no. 20). However, in AUSTRIA which has most strongly adapted the general rules on co-debtorship to purposes of security, this freedom from form requirements has generally beeen criticised since the risk for co-debtors for security purposes is at least as high, if not even higher than that for a provider of a dependent personal security (AUSTRIA: *Bydlinski* 27, 29, 30 with references); for the same reason, also some GERMAN authors plead for the written form (MünchKomm/*Möschel*, no. 13 preceding § 414; *Harke*, ZBB 2004, 147 ss.), but the majority is against it (Palandt/*Heinrichs* no. 3 preceding § 414 with references).

B. Effects

a. Initial Co-Debtorship

22. In BELGIUM, FRANCE and LUXEMBOURG, the liability of a solidarily liable co-debtor deviates from the merely subsidiary liability of a dependent security provider. Thus even the co-debtor who has no personal interest in the performance of the contract remains liable towards the creditor as a co-debtor (Cass.civ. 21 July 1987, Bull.civ. 1987 I no. 249 p. 182; Cass.civ. 22 May 1991, Bull.civ. 1991 I no. 162 p. 107; *Simler* no. 27). Nor can personal defences of the other co-debtor be raised by the solidary co-debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1208; cf. *Simler* no. 27), also contrary to the rules on dependent personal securities. Further, the solidary co-debtor is not discharged if the creditor by acts or omissions thwarts the co-debtor's right of subrogation into his rights against another co-debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2037-since 2006: FRENCH CC art. 2314 – CA Versailles 20 Feb. 1991, JCP G 1992 I no. 3583 (9), note *Simler*). Only in the internal relationship between the co-debtors the solidarily liable co-debtor, who has no personal interest in the performance of the contract, is expressly considered as a provider of dependent personal security (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1216; cf. *Simler* no. 27) and consequently has full recourse against the other co-debtor for all amounts paid to the creditor.

23. In AUSTRIA and GERMANY, the starting point virtually is the same as in the FRANCOPHONIC countries (preceding no. 22). However, in the two GERMANOPHONIC countries, courts and writers have in varying degrees adapted the general rules on co-debtorship in order to serve more properly the special function of the co-debtorship for security purposes (AUSTRIA: short survey in *Bydlinski* 26-30; GERMANY: broad survey in *Bülow*, Kreditsicherheiten nos. 1579-1607). According to court practice, the co-debtor for security purposes is solidarily liable with the other (full) co-debtor (*contra* in GERMANY: *Bülow*, Kreditsicherheiten no. 1598 for consumer co-debtors against prevailing opinion (cf. MünchKomm/*Habersack* no. 15 preceding § 765)). This differs from the ordinary rule on the merely subsidiary liability of the provider of a dependent security (cf. national notes on Art. 2:106). Personal defences of the co-debtor which have not been raised by it, cannot be invoked by the co-debtor for security purposes (AUSTRIA: *Bydlinski* 28; GERMANY: *Bülow*, Kreditsicherheiten no. 1603), again contrary to the rules on dependent personal security (cf. national notes on Art. 2:103). According to another departure from these latter rules, the co-debtor for security purposes cannot object to the creditor that the latter had prevented or diminished rights on which the co-debtor could have relied upon performance (GERMANY: *Bülow*, Kreditsicherheiten no. 1604), whereas in AUSTRIA the Supreme Court has admitted this exception (OGH 29 April 1992, ÖBA 1993, 64; OGH 14 April 1996, ÖBA 1996, 893). For the internal relationship between the (main) debtor and the debtor acting for security purposes, the general rules on recourse between co-debtors are applicable (GERMANY: *Bülow*, Kreditsicherheiten nos. 1605 s.: the co-debtor for security purposes can fully recover from the (main) debtor, while the latter is not entitled to any recovery).

24. According to the absolutely dominant view in GREECE, the "additional" obligation of the new debtor is joint and several with that of the initial debtor and has no accessory

character: the obligation of the new co-debtor does not depend upon the obligation of the initial debtor, but evolves separately (*Georgiades* § 7 no. 57; *Theodoropoulos* 58; CA Athens 5557/1993, NoB 41, 1097). Hence, the new debtor, in contrast to the provider of personal security (cf. CC art. 851), is not liable for the principal debt at any given point in time. Also as far as reimbursement is concerned, in the case of a subsequent assumption of debt each of the co-debtors is entitled *ex lege* to claim reimbursement from the others, if it has satisfied the creditor (cf. GREEK CC art. 487), even if there is no underlying relationship between the co-debtors (*Zepos* A 313-314). The co-debtor shall be deprived of its right to reimbursement only if this can be deduced from a special underlying relationship (*Tampakis* 426; *Kallimopoulos* 1520). On the contrary, in a contract of security, the provider of personal security is entitled to reimbursement only if such right can be deduced from the underlying relationship (*Georgiades* § 7 no. 59). Hence, the plaintiff co-debtor does not have to prove the existence of the underlying relationship in order to exercise its right to reimbursement or recourse, whereas the defendant co-debtor bears the burden of proving the existence of a special underlying relationship denying any right of recourse and has to rebut the presumption of CC art. 487 (*Tampakis* 427; *contra*, *Zepos* A 315 fn. 3); on the contrary, the plaintiff provider of security must prove the existence of an underlying relationship, if it wants to claim reimbursement or recourse (cf. CC art. 858; *Tampakis* 427).

b. Subsequent Cumulative Assumption of Another Person's Debt

25. In BELGIUM and FRANCE the prohibition to invoke any defence derived from the relationship between the original debtor and the creditor is one of the reasons for denying the *délégation* the character of a dependent personal security (BELGIUM: *Van Quickenborne* nos. 876-877; FRANCE: *Malaurie and Aynès*, Les obligations no. 1295). In FRANCE many authors plead for an exception if in the absence of an agreed definite amount of the debt the new debtor is obliged to pay the debt of the initial debtor (Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 324 relying on Cass.civ. 17 March 1992, JCP G 1992, II no. 21922; *Marty, Raynaud and Jestaz* II no. 435; Planiol and Ripert/*Esmein* no. 269).

26. In GREECE the principle of accessority is to some extent applied and is in cases of subsequent assumption of special importance since the co-debtor assumes the debt in the state and with all the principal debtor's objections as at the time of assumption; the co-debtor may not, however, set off a claim of the principal debtor against the creditor (cf. GREEK CC art. 472 *juncto* 473 para 1 and 2, by an extension of the rules on the assumption of debt in order to discharge the original debtor). Also in GERMANY the subsequent assumption of an obligation is only valid if the primary obligation exists; however, its further fate is not necessarily bound up with that of the primary obligation. It is controversial whether the subsequently assumed obligation depends upon and is subsidiary to the primarily assumed obligation (against Staudinger/*Horn* no. 363 preceding §§ 765 ss.; forcefully *pro*: *Schürnbrand* 118-126; against dependency, but for subsidiarity, generally *Bülow*, Kreditsicherheiten nos. 1598, 1602 s.).

C. *Classification*

a. *Dependent Personal Security*

27. According to DANISH authors referring to the Promissory Note Act § 2 concerning plurality of debtors, "a person who assumes an obligation towards a creditor in order to secure the debtor's obligation is not an additional debtor, but a provider of personal security" (Karnov/*Møgelvang-Hansen* 5558 fn. 8; likewise *Ussing*, Kaution 12 s.) Also in the NETHERLANDS, co-debtorship for security purposes and dependent personal security are closely associated with each other, although proceeding from the other side: According to the new CC art. 7:850 para 3, dependent personal security is subject to the rules on plurality of debtors, except insofar as the code does not establish special rules on dependent personal security!

b. *Independent Personal Security*

28. For several FRENCH authors, the subsequent cumulative assumption of debt constitutes an independent personal security, if the new debtor is obliged to pay a definite sum (Malaurie and Aynès/*Aynès and Crocq,* Les sûretés no. 324; Larroumet/*François* no. 326). Furthermore, the prohibition to raise any exceptions from the underlying relationships confirms the independent character of this assumption of debt (*Cabrillac and Mouly* no.473-4; Malaurie and Aynès/*Aynès and Crocq,* Les sûretés no. 324; further references in *Simler* no. 897). However, protective judicial measures can be invoked by a co-debtor in the case of a subsequent cumulative assumption of debt in order to refuse performance, which is contrary to the first demand character of an independent personal security (*Simler* no. 898). *Simler* has carefully pointed out not only some similarities but also several dissimilarities of a subsequent co-debtorship as compared with an independent personal security (*Simler* nos. 897 s.).

c. *Special Instrument of Security*

29. Under GERMAN law the subsequent cumulative assumption of debt for purposes of security is a special instrument of security that is neither a dependent nor an independent personal security. Contrary to the characteristics of a dependent personal security, the co-debtor assumes vis-à-vis the creditor a personal (primary and independent) obligation as of the time of the assumption (cf. *Reinicke and Tiedtke*, Kreditsicherung 1, 5, 14; it may therefore be called a "semi-accessory security"). The issuer of an independent personal security assumes the responsibility that the original debtor will perform (pay a certain amount of money), whether or not this amount is due. Some voices plead for recognising co-debtorship for security purposes as a special institution, combining characteristics of both (*Schürnbrand* 194-198; *Madaus* 327-329, with proposals for specific legislative rules).

30. In FRANCE, a great authority as *Simler* no. 897 s. seems to tend in the same direction.

VI. *Additional Rules on Plurality of Debtors*

31. Cf. *infra* national notes to Art. 1:107 as well as to Chapters 2 and 4.

(Dr. Fiorentini/Prof. Drobnig)

Article 1:107: Several Security Providers: Solidary Liability Towards Creditor

(1) To the extent that several providers of personal security have secured the same obligation or the same part of an obligation or have assumed their undertakings for the same security purpose, each security provider assumes within the limits of its undertaking to the creditor solidary liability together with the other security providers. This rule also applies if these security providers in assuming their securities have acted independently.
(2) Paragraph (1) applies with appropriate adaptations if proprietary security (Article 1:101 lit. (h)) has been provided by the debtor or a third person in addition to the personal security.

Comments

A. Context and Scope

1. Articles 1:107-1:109 form, as the partly identical titles indicate, a complex, but coherent set of rules dealing with the special problems that arise if there are several security providers. In this situation, the first issue is the kind of liability, that exists between the several security providers towards the creditor – see Article 1:107. The second issue arises after one (or several) creditors have made payments to the creditor: can the payor(s) have recourse against the other security providers and for how much? – see Article 1:108. The third issue is whether and for how much the security providers who have satisfied recourse claims by other security providers can have recourse against the debtor – see Article 1:109. All these provisions apply also to a co-debtorship for security purpose, cf. Article 1:106.

2. Article 1:107 deals with the liability of several security providers vis-à-vis the creditor.

B. Several Providers of Personal Security

3. Basic rule. If several persons assume a personal security in favour of a creditor, each of them might be separately liable towards the creditor or they may be liable solidarily (jointly and severally), each for the full amount of its undertaking, at the choice of the creditor. If A and B are separately liable for 40.000 each and the secured obligation amounts to 40.000, creditor C must demand 20.000 from both A and B (PECL Articles 10:101 (2) and 10:103). By contrast, if they are solidarily liable, C may demand the full amount of 40.000 from either A or B (PECL Articles 10:101 (1) and 10:102 (1)), whoever appears to be more solvent, and can leave the distribution between A and B to their agreement or to a recourse action (PECL Article 10:106 (1)).

4. These rules opt for solidary liability. This corresponds to the expectations of the parties: Each provider of personal security must assume that it will be held fully responsible; and this is also in the interest of the creditor. The principle of solidary liability of several personal security providers seems to be generally recognised. Of course, the parties may agree to deviate from this general rule.

5. There is less unanimity with respect to the question whether solidary liability exists, even if the several contracts of personal security have been assumed independently from each other, especially at various times. However, distinctions as to time or occasions neither make sense nor are they practicable. In reality, all personal security providers are in the same boat and should share the same risk (para (1) sent. 2).

6. "Secured the same obligation" or "the same security purpose". This alternative is based upon the basic distinction in this Part between dependent and independent personal securities (*supra* Introduction no. 9 as well as Article 1:101 (a) and (b)). Obviously, the first part of the pair of words refers to dependent securities and the second part to independent securities.

7. "Within the limits of its undertaking". This formula has both a quantitative and a qualitative meaning.

8. As far as quantity is concerned, a personal security provider may have secured parts only of the same obligation(s); in this case, para (1) only applies, if and insofar as the various part securities cover the same portion of the secured obligation(s). In the latter case, it is presumed that two part security providers are liable as solidary debtors (para (1) sent. 1).

Illustration 1 a
For a credit of 3 million, A assumes a security for 1,5 million and B for 0.5 million. Up to 0.5 million, A and B are liable solidarily.

Illustration 1 b
As in Illustration 1 a, but the debtor has paid 2 million on his debt. The creditor may then demand all of the remaining 1 million from A; or he may demand up to 0,5 million from B and the remaining amount from A; or he may divide his claim in

any other proportion as between A and B, but only within the maxima which A and B, respectively, have agreed as their upper limit of liability.

Illustration 2
For a credit of 3 million, A assumes a security with a maximum amount of 3 million and B a security for any amount surpassing the first 2 million. A and B are solidary debtors for any amount that exceeds 2 million.

9. As far as the quality of the undertaking is concerned, the security provider may have assumed vis-à-vis the creditor not a solidary liability with the debtor but a merely subsidiary liability (cf. Article 2:106); in particular, according to Article 4:106 (b) a security assumed by a consumer creates only a subsidiary liability. The merely subsidiary liability of one or more security providers does not affect the liability of any additional security providers.

C. Personal and Proprietary Security Provider(s)

10. Paragraph (2) deals with the relatively novel issue of a plurality of personal and proprietary security providers.

Illustration 3
C's credit to D is secured by a proprietary security right encumbering the shares of D in company Z and also by a suretyship provided by D's friend F.

Most writers start from the principle that the two groups of security providers should be treated equally. The creditor (and not the law) should be free to choose, according to the circumstances, against whom of the several security providers it prefers to turn first.

11. The minority view would establish primary liability of proprietary and only subsidiary liability of personal security providers. It is based upon the idea that personal security, since it charges all the assets of a person, is more risky and therefore deserves more protection by attaching only a subsidiary liability to it. However, this view is not convincing. In fact, the limits between the impact of the two types of security are fluid, depending upon the circumstances: On the one hand, proprietary security may cover virtually all the security provider's assets while, on the other hand, a personal security for a low amount may in fact burden only a small portion of the security provider's property.

National Notes

I. Types of Liability in Case of Plurality of Providers of Personal Security

A. Overview

1. For the existence and shape of solidary liability in the different member states in general reference is made to the national notes on PECL Art. 10:101 no. 2.
2. The liability of several persons providing personal security for the same debt or part thereof may in all national systems take the different forms described in PECL Art. 10:101: it may be separate (*pro rata*, several) or solidary (*in solidum*, joint and several). Which of these types is applied under the national systems may depend upon several circumstances, which will be discussed in detail below.
3. The exact shape of the solidary liability of providers of security in the case of a plurality of providers of personal security under the national systems is highly diversified: whereas there may be full solidary liability in the meaning of PECL Chapter 10 covering both the external relationship as against the creditor and the internal relationship upon recourse between the providers of security, there may also be a mere external solidarity of the providers of security but separate liability in their internal relationship (for details of the latter, cf. *infra* national notes on Art. 1:108). Art. 1:107 deals only with the external relationship between the creditor on the one side and the providers of security on the other side.

B. Intention of the Parties – Solidary Liability within the Limits of Each Security Provider's Undertaking

4. In general, the intention of the parties as found upon proper construction of the contract is the most important factor (ENGLAND: *Andrews and Millett* no. 4-011; GERMANY: Staudinger/*Horn* § 769 no. 7 with further references: agreement of the parties is possible). In the absence of a contractual stipulation, there are presumptions as to the type of liability applicable (see *infra* nos. 6 ss.).
5. It follows from the general emphasis on the agreement of the parties to the security transaction that the liability of each security provider is restricted to its undertaking and thus the solidarity of several providers of security is limited to that part of the obligation for which at least two of the security providers have assumed liability (AUSTRIA: CC § 1359 first sentence; Schwimann/*Mader and Faber* § 1359 no. 1; DENMARK: *Pedersen*,

Kaution 102; ENGLAND: *Ellesmere Brewery v. Cooper* [1896] 1 QB 75 (CFI); FINLAND: LDepGuar § 31 para 1 *juncto* § 5; RP 189/1998 rd 70; GERMANY: Staudinger/*Horn* § 769 no. 13).

C. *Differentiation between Co-Securities and Independently Assumed Securities*

6. Some countries differentiate between the circumstances of contracting: simultaneously assumed personal securities (co-securities) are treated differently from personal securities that are assumed at different times. In most countries which make that differentiation, the liability of co-providers of security is solidary (ENGLAND/IRELAND: *White v. Tyndall* (1888) 13 App.Cas. 263 (HL(Irl))) for all cases of plurality of sureties. In ENGLAND, if the promise is made simultaneously by two or more providers of security, clear words of severance are necessary to render the security provider's liability separate (cf. *White v. Tyndall* (1888) 13 App.Cas. 263 (HL(Irl)); *The Argo Hellas* [1984] 1 Lloyd's Rep 296, 300 (CFI)). The situation is similar in IRELAND (*Donnelly* 420). By contrast, the liability of the providers of security will be separate if they have acted independently or successively without making reference to the other security provider's promise (*Andrews and Millett* no. 4-011).
7. In ITALY solidary liability is the general rule for co-securities; it arises also when the several security providers, in assuming their obligations, did not act simultaneously, but in the view of a common interest. However, it is possible for the parties to agree on the so-called *beneficium divisionis* (CC art. 1946), *i.e.* the right of the security provider who is solidarily liable to limit its liability to its share of the secured obligation only when being called for the payment of the whole obligation by the creditor (CC art. 1947). If securities are assumed by a plurality of security providers without the intention to realize a common interest, the liability of the several security providers is separate; nevertheless, as in the former case, the security provider who first pays the creditor is subrogated into its rights against the other security providers (Cass. 6 May 2004 no. 685, Riv.Notar. 2005, 333; *Giusti* 210; *Fragali*, Confideiussione 196 s.).
8. In PORTUGAL the rules on solidary debtors (CC art. 518, 527) apply with the necessary exceptions to independently assumed personal securities relating to the same debt, unless the *beneficium divisionis* has been agreed (CC art. 649 para 1). In the case of jointly assumed personal securities, on the other hand, each one of the providers of security can exercise the *beneficium divisionis*. However, each of the providers of security is proportionally liable for the share of the co-provider of security who is insolvent or against whom no demands or executions can be made in PORTUGAL (CC art. 649 paras 2 and 3 *juncto* 640 lit. b).
9. In SPAIN, on the other hand, co-providers of security are separately liable, unless expressly agreed otherwise. CC art. 1837 para 1 establishes the so-called *mancomunidad* in the following terms: "When there are several providers of security of only one debtor and for one debt only, the obligation of responding therefore shall be divided among all. The creditor can only demand from each surety his corresponding share, unless solidarity has been expressly stipulated" (*Lacruz Berdejo* 537; *Guilarte Zapatero*, Notas sobre la cofianza 891 s.; *Díez-Picazo* 446). Again, these rules are not applicable to independently assumed personal securities.

D. *General Presumption in Favour of Solidary Liability Regardless of Circumstances of Contracting*

10. In several countries there is a general presumption for solidary liability (AUSTRIA: for dependent personal securities cf. CC § 1359; for independent personal securities cf. Avancini/Iro/*Koziol* nos. 3/124-3/125; DENMARK: Promissory Note Act §§ 2, 61; Andersen, Clausen, Edlund a.o./*Pedersen* 437 s.; DUTCH CC art. 7:850 para 3 *juncto* art. 6:6 para 2; Asser/*Hartkamp* no. 95 at p. 78; FINLAND: LDepGuar § 3 para 3; HD 3 Jan. 1996, KKO 1996:1; GERMANY: cf. CC § 769 for dependent personal securities; GREEK CC art. 854; SWEDEN: Law of Commerce Chap. 10 § 11 *juncto* Promissory Note Act § 2; *Ekström* 73).
11. This presumption applies regardless of whether the providers of security have acted jointly and whether they had knowledge of the other securities (GERMANY: BGH 24 Sept. 1992, NJW 1992, 2287; Erman/*Ehmann* § 421 no. 46; Erman/*Herrmann* § 769 no. 1) and leads to the application of the general rules on solidary liability (GERMAN CC §§ 421-425; GREEK CC arts. 482-488). According to GREEK opinion, however, there should be no solidarity where there is more than one personal security with a maximum amount which is lower than the total amount of the secured claim (*Georgiades* § 3 nos. 119-120 and § 4 nos. 3-4).
12. A similar presumption applies in the ROMANIC countries. In FRANCE, BELGIUM and LUXEMBOURG (CC art. 2025 (since 2006: FRENCH CC art. 2302)) each of several providers of security can be called upon to pay the whole debt (« *obligation au tout* »). A solidary liability in the strict sense, however, can be presumed only if the providers of security are merchants (FRANCE: Cass.com. 21 April 1980, Bull.civ. 1980 IV no. 158 p. 123; by contrast, Law no. 94-126 of 11 Feb. 1994 art. 47 para 2 *(loi Madelin)* prohibits solidary liability in the case of indefinite security assumed by a natural person guaranteeing a professional debt of an individual enterprise; BELGIUM: *Declerck-Goldfracht* no. 15). However, the creditor is free to demand partial performance from each security provider separately (BELGIAN, FRENCH CC art. 2027 (since 2006: FRENCH CC art. 2304); *Van Quickenborne* no. 390).

E. *Beneficium Divisionis*

13. In most of the ROMANIC countries the providers of security can invoke the *beneficium divisionis* (cf. *supra* no. 7; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2026 (since 2006: FRENCH CC art. 2303)); according to PORTUGUESE CC art. 649, if the security had been assumed in common) resulting in separate liability of the providers of security (*Van Quickenborne* no. 392). In ITALY the *beneficium divisionis* (*supra* no. 7) has to be explicitly agreed upon by the parties (CC art. 1947 para 1), similarly in PORTUGAL, if the personal securities have been independently assumed (CC art. 649 para 1). In the other ROMANIC countries this right is always available unless solidary liability is expressly agreed upon. The situation is similar in SCOTLAND (cf. *Wilson* nos. 28.1, 10.1; *Bell* § 267). The right has to be invoked explicitly (*Van Quickenborne* no. 396) and only the security provider who invokes it benefits from the division (*Van Quickenborne* no. 402). If a co-provider of security is insolvent at the time of invoking the right, the liability of the other providers of security increases proportionally (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2026 para 2 (since 2006: FRENCH CC art. 2303

para 2); ITALIAN CC art. 1947 para 2; *Giusti* 216; PORTUGUESE CC art. 649 para 2 (see *supra* no. 8); SPANISH CC art. 1844 sent. 1).

14. The new DUTCH Civil Code does not provide a *beneficium divisionis* anymore, as it appeared that in practice contracting parties mostly had excluded it. Parties are free, though, to expressly agree on the *beneficium* (*Blomkwist* no. 41 at p. 67-68).

II. *Application to Co-Debtors for Security Purposes*

15. The principles set out above for the case of plurality of providers of security are equally applicable to cases of co-debtorship for security purposes and situations where there is a co-debtor for security purposes besides a security provider. In ENGLISH law, this result follows from the fact that a co-debtor who agrees with the other (principal) debtor to act as surety only is treated as a normal security provider (cf. national notes to Art. 1:106 no. 11). Under GERMAN law co-debtors, like providers of personal security, may agree with the creditor upon the type and details of their liability (cf. *Reinicke and Tiedtke*, Kreditsicherung 15). In the absence of any agreement several co-debtors are solidarily liable (Erman/*Ehmann* § 421 no. 47). See generally as to the type of the security provider's liability under a co-debtorship for security purposes in the different member states notes to Art. 1:106 nos. 22 ss.

III. *Personal and Proprietary Security*

A. *Solidary Liability*

16. In ENGLAND often, even though not always, a person granting proprietary security for another person's debt in the same document also assumes a personal security (*Lingard* 154). Regardless of whether a security provider grants a proprietary security or assumes a personal security, it is regarded as a surety (Halsbury/*Salter* para 105; *Andrews and Millett* no. 1-001). Therefore providers of personal and proprietary security may be solidarily liable. The same is true for FINLAND (LDepGuar § 41 refers for third party proprietary providers of security, *inter alia*, to § 3 para 3, cf. *supra sub* no. 10 ss.). Similarly, in FRANCE and BELGIUM a third party granting proprietary security is known as «*caution réelle/zakelijke borg*» (FRANCE: Cass.com. 7 March 2006, Bull.civ. 2006 IV no. 59 p. 59; Cass.ch.mixte 2 Dec. 2005, Bull.civ. 2005 ch.mixte no. 7 p. 17, JCP G 2005 II no. 10183; the *Grimaldi* Commission's proposed CC art. 2295 («*Le cautionnement réel est une sûreté réelle constituée pour garantir la dette d'autrui*») has not, however, been adopted by the legislation of 2006; *Simler* no. 20; BELGIUM: *T'Kint* no. 718). Such security is regarded as proprietary security in relation to the creditor (FRANCE: Cass.com. 7 March 2006, *supra*, confirming Cass.ch.mixte 2 Dec. 2005, also *supra*; it is possible, however, that the provider of a proprietary security in addition also assumes a personal security: Cass.com. 21 March 2006, Bull.civ. 2006 IV no. 72 p. 71). The exercise of the *beneficium divisionis* is excluded (BELGIUM: *Van Quickenborne* no. 70; FRANCE: *Simler* nos. 22 and 510). Therefore providers of personal and of proprietary security are solidarily liable.

B. *Quasi Solidarity*

17. In GERMAN and SPANISH law the liability of providers of personal and proprietary security is technically not regarded as solidary because of the different content of the obligations or claims. However, the same results are achieved since the courts regard all providers of security as *quasi* solidarily liable (GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183 and 187, confirming BGH 14 July 1988, BGHZ 105, 154, 158; BGH 24 Sept. 1992, NJW 1992, 3228; implicitly approving *e.g.* Palandt/*Heinrichs* § 426 no. 2; different view Erman/*Ehmann* § 421 nos. 40 s.; SPAIN: *Díez-Picazo* 445).

IV. *Ranking of the Creditor's Claims against Different Providers of Security*

A. *Creditor's Free Choice*

18. In most countries the creditor generally has the choice from which of the several providers of personal and proprietary security it will demand performance or payment (AUSTRIA: OGH 20 June 1984, SZ 57 no. 114 565-566; Schwimann/*Mader and Faber* § 1360 no. 1; BELGIUM: *Dirix and De Corte* no. 27; DENMARK: *Rørdam and Carstensen* 40 s.; *Højrup* 52; *Ussing*, Kaution 87; ENGLAND: *Re Bank of Credit and Commerce International S.A.* [1998] AC 214, 222 (HL); *Jackson v. Digby* (1854) 2 WR 540 (HL); FRANCE: the creditor is not obliged to first call upon the «*caution réelle*», Cass.com. 10 Nov. 1981, D. 1982, 417; *Simler* no. 510; GERMANY: BGH 29 April 1997, WM 1997, 1247, 1249; *Reinicke and Tiedtke*, Kreditsicherung 395; ITALY: the principle of free choice of the creditor is clearly expressed only in relation to several providers of personal security: *Ravazzoni* 263; *Giusti* 212; NETHERLANDS: while the principle of free choice is often made subject to the demands of good faith, this has not yet been utilised to negate a creditor's choice, H.R. 24 April 1992, NJ 1992 no. 463 with note *Snijders, H.*, NTBR 1993, 163, 166; CA Hertogenbosch 3 Oct. 1994, NJ 1995 no. 357; SCOTLAND: *Ewart v. Latta* (1865) 37 Sc Jur 418 = 1865 SC 36 (HL (Sc))).

B. *Restrictions*

19. Legal ranking may, however, result from the rules on the subsidiary liability of providers of dependent personal security. Yet these rules are subject to several exceptions so that in practice even the provider of a dependent security with subsidiary liability will very often not be entitled to demand from the creditor the prior enforcement of other securities (for details see national notes to Art. 2:106 nos. 13 ss.).

20. In SWEDEN, if the third party's liability under its security is *subsidiary*, the creditor must *in dubio* first enforce against the debtor's proprietary security (*Walin*, Borgen 150). The legal situation is more uncertain if a third person has granted a proprietary security and another security provider a *subsidiary* personal security. *Walin* seems to prefer that a proprietary security pledged by a third party is fully liable towards providers of personal security, although he also expresses the contrary opinion (317-320). There is no relevant Supreme Court decision (as to the principles, cf. HD 10 Nov. 1981, NJA 1981, 1104). There are, however, cases where a proprietary security provider is treated less favourably than a provider of personal security. *E.g.* in HD 18 Feb. 1987, NJA 1987, 80 primary liability was assumed although a personal security provider *in dubio* is liable only sub-

sidiarily. Many other SCANDINAVIAN authors think that providers of personal and proprietary security in principle shall be treated equally (cf. *Walin*, Borgen 317 fn. 15).

21. In FINLAND a free choice exists in case of a *solidary* personal security and proprietary security granted by the debtor if the parties have agreed on a so-called "supplementary security" (LDepGuar § 2 no. 4). There is such a security if the main purpose of the secured credit is the acquisition or repair of a house or vacation place and this serves as security for the credit (§ 3 para 2). Besides, the parties are free to agree against which of the several providers of security the creditor should turn first.

22. In GREECE, ITALY and SPAIN there is no straightforward rule regarding the relationship between personal and proprietary security (see for ITALY also *supra* no. 18). In GREECE, the creditor in general has the right to choose the security which it deems more suitable for its satisfaction; this right is not without limits and subject to the so-called duty of vigilance, especially if the creditor is a bank (cf. *Doublis*, Metavivasi pistosis 122-123). By contrast, in PORTUGAL the relationship between personal and proprietary security is regulated by CC art. 639, though the parties may agree otherwise. The provider of dependent personal security with *beneficium discussionis* (*i.e.* with subsidiary liability; see *infra* national notes on Art. 2:106 no. 9) may demand from the creditor first to seek satisfaction from a provider of proprietary security securing the same debt and created prior to or contemporaneously with the dependent personal security. However, if the proprietary security also secures other claims of the same creditor, this rule only applies if the value of the proprietary security is sufficient to satisfy all claims. Literally, CC art. 639 only refers to proprietary securities on a contractual basis, but it may be applied to proprietary securities created by operation of law as well (*Almeida Costa* 776).

23. In ENGLAND, the free choice of the creditor from whom to demand performance can in appropriate situations be affected by the equitable doctrine of marshalling. This equitable right serves to ensure that one creditor does not deprive another creditor of his due portion of the debtor's estate. When *e.g.* the creditor demands performance from the provider of personal security, the latter may compel the creditor, if the latter has a claim upon two funds in respect of the secured debt, of only one of which the provider of personal security can avail himself, to resort to the other first (cf. Halsbury/*Salter* para 226; see generally *Ali*, *passim*).

(Bisping/Böger)

Article 1:108: Several Security Providers: Internal Recourse

(1) In the cases covered by Article 1:107 recourse between several providers of personal security or between providers of personal security and of proprietary security (Article 1:101 lit. (h)) is governed by PECL Article 10:106, subject to the following paragraphs.

(2) Subject to paragraph (3), the proportionate share of each security provider for the purposes of PECL Article 10:106 is determined according to the following rules:

(a) Unless the security providers have otherwise agreed, as between themselves each security provider is liable in the same proportion that the maximum risk assumed by that security provider bore to the total of the maximum risks assumed by all the security providers. The relevant time is that of the creation of the last security.
(b) For personal security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the amount of the secured obligation or, if a current account has been secured, the credit limit is decisive. If the secured obligation is not limited, its final balance is decisive.
(c) For proprietary security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the asset(s) serving as security is decisive.
(d) If the maximum amount in the case of lit. (b) first sentence or the maximum amount or the value, respectively, in the case of lit. (c) is higher than the amount of the secured obligation at the time of creation of the last security, the latter determines the maximum risk.
(e) In the case of an unlimited personal security securing an unlimited credit (lit. (b) last sentence) the maximum risk of other limited personal or proprietary security rights which exceed the final balance of the secured credit is limited to the latter.

(3) The preceding rules do not apply to proprietary security provided by the debtor and to security providers who, at the time when the creditor was satisfied, were not liable towards the latter.

Comments*

A. Recourse between Several Security Providers

1. General. Article 1:107 (1) establishes solidary liability of several personal security providers vis-à-vis the creditor. The general rules on recourse between several solidary debtors are well adapted to being applied between several security providers since all security providers are in the same boat. A creditor's decision to demand performance from one security provider rather than another or all is motivated by *its* interests.

* The Comments on Article 1:108 are by Frank Seidel.

B. Shares of Security Providers (para (2) lit. (a))

2. Shares proportionate to maximum risk. Neither PECL Article 10:106 nor other provisions of PECL Chapter 10 determine the size of the individual shares of solidary debtors. Article 10:105 (1) merely presumes that solidary debtors are liable for equal shares, while according to para (2) several persons that have contributed to the same damage are liable *inter se*, as a rule, according to the share with which each contributed to the damage (cf. PECL Article 10:105 Illustration 4). While the latter provision obviously is inapplicable, the rule of para (1) obviously is a rule of thumb which, at least for recourse among security providers is inequitable since those assume often risks of very different extent. If for example A had assumed a personal security for 1.000 and B one for 300 for a credit being initially 1.300, but reduced by payments of the debtor to 500, it seems to be unfair to divide the remaining 500 between A and B equally, so that both would be internally liable for 250. Under Article 1:108 each security provider is internally liable in proportion to the maximum risk it had assumed.

> *Illustration 1*
> For a credit of 3.000 A had assumed a dependent personal security with a maximum amount of 1.000 and B one with a maximum amount of 2.000. The sum of all maximum risks being 3.000 (1.000 of A + 2.000 of B), A's portion is 1/3 and B's 2/3. If the debtor has paid 1.500, A would be internally liable for 500 (1/3 of 1.500) and B for 1.000 (2/3 of 1.500).

3. Agreements on another sharing. However, personal security providers may agree upon another sharing (cf. para (2) lit. (a) at the beginning). For instance, if shareholders of a company with very different holdings had assumed personal securities for a credit granted to their company, it must be possible for them to agree otherwise. But it may be a question of fact whether they wanted to share liability according to the size of their holdings in the company.

4. Time relevant for calculation of maximum risk. As several securities are not always created at the same time and as their value can differ, it is necessary to define the moment that is decisive for the evaluation of the maximum risk. According to lit. (a) sent. 2 the moment of creation of the last security is relevant. This is justified since only at this moment can the maximum total and therefore the proportions be established. The time at which a security is assumed must be determined according to Article 1:104.

> *Illustration 2*
> In January, A had assumed a dependent personal security with a maximum amount of 3.000 for a credit to D of 3.000. In May the creditor and A agree to reduce the maximum amount to 2.000 and in June B assumed a dependent personal security with a maximum amount of 1.000. As the moment of creation of the last security is decisive and in June A is liable up to 2.000 and B up to 1.000, the portions are the same as in Illustration 1.

C. Definition of the Maximum Risk for Personal Security (para (2) lit. (b))

5. Although most personal securities probably are limited by a maximum amount, it is according to these Rules possible to agree upon a dependent personal security without stipulating a maximum amount (cf. Article 2:104). In these cases the maximum risk is determined by the amount of the secured claim or, in case of a current account, by the credit limit at the time of the creation of the last security (lit. (b) sent. 2 and lit. (a) sent. 2) since the amount of the secured credit determines the maximum each personal security provider may be obliged to pay.

Illustration 3
For a current account with a credit limit of 3.000 A had assumed a personal security with a maximum amount of 2.000, whereas B had assumed the debt without limitation for security purpose. Later on the credit limit is extended to 5.000. A and B being solidary debtors only for 3.000, A is insofar internally liable for 2/5 and B for 3/5, the latter being alone additionally liable for the remaining 2.000.

6. If a credit limit does not exist, the final balance of the secured credit is decisive according to lit. (b) sent. 3. This rule is justified by the mere fact that there is no other possible moment to determine the maximum risk.

Illustration 4
A and B had assumed dependent personal securities for all existing and future obligations of D towards C, A agreeing a maximum amount of 1.000 whereas B's security had not been limited. If D in the end owes 9.000, A's portion is 1/10 and B's 9/10.

D. Definition of the Maximum Risk for Proprietary Security (para (2) lit. (c))

7. For those types of proprietary security which can only be created if a maximum amount is agreed (*e.g.* real estate mortgages), the maximum risk can be determined as for personal securities (lit. (c) sent. 1). But in most cases of proprietary security in movables, no agreement of a maximum amount will be necessary. The maximum risk is determined in these cases by the value of the asset(s) serving as security (lit. (c) sent. 2), the moment of creation of the last security being again decisive (lit. (a) sent. 2). If the value of the assets diminishes later on, the proportion is not affected.

Illustration 5
For a credit of 3.000 A had assumed a dependent personal security with a maximum amount of 2.000 and B gave its car as security to the creditor, the value of the car being 2.000 at the time of contracting. Two years later, the debtor has repaid only 1.000 and the creditor has obtained the remaining 2.000 from A. The latter is entitled to demand 1.000 from B as the portion of each security provider is 1/2. If the value of the car is only 500, A will only get this sum since B is not personally obliged.

E. Limitation of the Maximum Risk (para (2) lit. (d))

8. Often the security provider assumes a personal security or creates another security whose maximum amount or value is at the time of contracting higher than the secured credit. In these situations it seems to be appropriate not to limit the maximum risk by the maximum amount or the value but by the amount of the credit since this is the amount the security is liable for.

Illustration 6
For a credit of 3.000 A had assumed a dependent personal security with a maximum amount of 4.000 and B one with a maximum amount of 1.000. If A had to pay 3.000 to the creditor, he may demand payment from B up to 750 (the sum of all securities being 3.000 + 1.000 = 4000 and B's portion being therefore 1/4).

9. However, if the amount of the secured claim is reduced after creation of the last security below the agreed maximum amount of a security, this is irrelevant, since otherwise any payment by the debtor would be mostly to the advantage of the security with the higher risk.

Illustration 7
For a credit of 3.000 A had assumed a dependent personal security with a maximum amount of 1.000 and B one with a maximum amount of 2.000. The debtor has paid 1.500 to the creditor. A's portion remains 1/3 (= 500) and B's 2/3 (=1.000), rather than 10/25 (= 600) and 15/25 (= 900).

F. Special Limitation (para (2) lit. (e))

10. Paragraph (2) lit. (b) last sentence deals with an unlimited credit that is secured by an unlimited personal security; the maximum risk here is determined by the final balance of the credit. This rule can without any problems be applied if only unlimited personal securities are assumed since all security providers are equally liable in this situation.

Illustration 8
A and B had assumed dependent personal securities for all existing and future obligations of D towards C, both securities not being limited by maximum amounts. Independently from what D owes finally, both personal security providers are liable for 1/2 since the final balance determines both maximum risks which are therefore identical.

11. The solution according to lit. (b) is still adequate if an unlimited credit is secured by unlimited personal securities and limited securities, provided that the final balance of the credit is higher than the limitations of the limited securities (cf. Illustration 4). But matters differ if the final balance is lower:

Illustration 9
A and B had assumed dependent personal securities for all existing and future obligations of D towards C; A agreeing a maximum amount of 1.000 whereas B's security had not been limited. If the final balance of the credit is 500, A would according to the rule in lit. (b) be internally liable for ⅔ and B (only) for ⅓.

This solution seems to be unfair because A who only wanted to assume a limited risk is burdened with a higher portion than B who accepted every risk up to the loss of all his assets. Moreover, as is shown by Illustration 8, the situation of A would be better if he also had assumed an unlimited personal security. To prevent this obviously unfair result, lit. (e) limits the maximum risk of the anyway limited security to the final balance of the credit so that finally all security providers are *inter se* equally liable.

G. Exceptions

12. Paragraph (3) contains two exceptions to the preceding rules. The first exception refers to proprietary security rights granted by the debtor. Since it is the debtor who eventually has to reimburse all other security providers, it would make no sense if the debtor as a provider of proprietary security was allowed to participate in the internal recourse of the security providers as provided for in this Article. If the creditor enforces a security created by the debtor, the debtor may not take recourse against the security providers. On the other hand, if a third party security provider satisfies the creditor, the former is as a matter of course entitled to enforce a security right granted by the debtor, into which the third party security provider is subrogated according to Article 2:113 (1) sent. 2 *juncto* para (3).

13. The second exception contained in para (3) relates to security providers who would not have been under any liability towards the creditor. In certain situations for example, a provider of dependent security can refuse payment to the creditor under Article 2:103, while a provider of independent security is not entitled to do so. This position would be undermined if the provider of independent security could after payment to the creditor hold the provider of dependent security internally liable. The same principle applies to a security provider whose liability towards the creditor is only subsidiary: as long as it may invoke the subsidiary character of its liability according to Article 2:106, this security provider is also protected against other security providers' claims for internal recourse.

National Notes

I. Generalia

1. General legal provisions on recourse between several providers of security seem to exist only in DENMARK (Promissory Note Act § 61 *juncto* § 2 para 2 *juncto* Insurance Agreement Act § 42; cf. *Pedersen*, Kaution 97) and the NETHERLANDS (CC art. 7:869 *juncto* art. 6:152). However, the FINNISH LDepGuar of 1999 regulates not only the relationship between providers of dependent personal security (§ 31) and their relationship vis-à-vis providers of proprietary security (§ 30 para 3) but also the right of recourse of third party pledgees (§ 41 *juncto* § 30). As far as general legal provisions on recourse between several debtors exist, these are in GERMANY not directly applicable to providers of security due to the peculiarly narrow concept of solidary liability under GERMAN law which requires an equal basis of the obligations, which does not exist for different types of security providers' obligations (see *supra* national notes to Art. 1:107 no. 17; BGH 29 June 1989, BGHZ 108, 179, 183 and 187). In some countries legal provisions on recourse between all providers of personal security exist (SWEDISH Promissory Note Act § 2 (2) *juncto* Ccom chap. 10 § 11). Nevertheless, in most continental legal systems there are at least legal provisions on recourse between several providers of dependent personal security (AUSTRIAN CC § 1359; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2033 (since 2006: FRENCH CC art. 2310); DUTCH CC art. 7:869; GERMAN CC § 774 para 2; GREEK CC art. 860; ITALIAN CC art. 1954; PORTUGUESE CC art. 650; SPANISH CC art. 1844).
2. For all legal systems two observations can be made: First, freedom of contract prevails also in this part of the law so that the parties are free to deviate from legal provisions on recourse (see *e.g.* AUSTRIA: Schwimann/*Mader and Faber* CC § 1358 nos. 25-26; BELGIUM: *Du Laing* nos. 13, 23; *Van Quickenborne* no. 534; ENGLAND: *Andrews and Millett* nos. 12-001 s.; FINNISH LDepGuar § 30 para 3, 31 para 1 and 2; FRANCE: CA Lyon 13 Oct. 1981, JCP N 1983, II no. 112; CA Riom 2 Oct. 1996 (two decisions), JCP G 1997, I no. 4033 (9); *Simler* no. 636; GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183, 186; GREECE: A.P. 793/1995, NoB 45, 775; ITALY: *Andreani* 704; NETHERLANDS: *du Perron and Haentjens* art. 869 no. 2).
3. Secondly, while the debtor does not have any right of recourse against third party providers of security, (especially proprietary) securities granted by the debtor are fully available to the providers of security after they have performed to the creditor (ENGLAND: *Andrews and Millett* no. 11-024; FINLAND: LDepGuar § 30 para 1; GERMANY: BGH 5 April 2001, NJW 2001, 2327, 2329; ITALY: *Ravazzoni* 269; SCOTLAND: Stair/*Clark* no. 930). However, in FINLAND an exception applies if the debtor's proprietary security by virtue of legislation is liable only subsidiarily (LDepGuar § 30 para 2).

II. Internal Recourse

A. Recourse between Providers of Dependent Security

a. The Principles

4. It is common opinion in most legal systems that several providers of dependent security are in the absence of any special agreement and insofar as they secure the same debt in general internally liable like solidary debtors. This means that a provider of security who paid the creditor, as a rule, has a right of recourse against the other provider(s) of security, irrespective of the circumstances, especially the time of assumption of the dependent personal security. This right arises in ENGLAND independently of any contract and is equitable in nature (*Andrews and Millett* no. 12-001). In most other legal systems this results from the general rules on co-debtorship (AUSTRIAN CC §§ 1359 sent. 2, 896; DENMARK: Promissory Note Act § 61 *juncto* § 2 (2); *Andersen, Møgelvang-Hansen and Ørgaard* 35 ss., 251 s.; *Pedersen*, Kaution 97 s.; DUTCH CC art. 7:869 *juncto* art. 6:152; GERMAN CC §§ 774 para 2, 426; GREEK CC art. 860, 487; ITALIAN CC art. 1954; SCOTLAND: Stair/*Clark* no. 940; SPAIN: CC art. 1844 is applied by the Supreme Court in cases of plurality of securities agreed to be liable solidarily (TS 4 May 1993, RA 1993 no. 3403) as well as of securities as separate obligations (TS 24 May 1994, RA 1994 no. 3741); *Guilarte Zapatero*, Comentarios 258; *Díez-Picazo* 451; SWEDEN: Promissory Note Act § 2 para 2 *juncto* Ccom chap. 10 § 11; *Walin*, Borgen 30; *Walin*, Lagen om skuldebrev 26 ss.). In PORTUGAL, several providers of personal security are internally liable like solidary debtors, but the provider of security with *beneficium divisionis* who pays voluntarily is only entitled to internal recourse after satisfaction has been sought from the debtor (CC art. 650 para 3). Without a reference to the rules on internal recourse between co-debtors, the same result is achieved more directly in BELGIUM, FRANCE and LUXEMBOURG under CC art. 2033 (since 2006: FRENCH CC art. 2310) according to which the provider of personal security who paid the creditor in one of the cases enumerated in CC art. 2032 (since 2006: FRENCH CC art. 2309) has recourse against each of the other providers of security.
5. Only in FINLAND the right to demand recourse depends upon the circumstances, especially the chronological order in which the several dependent personal securities have been established (LDepGuar § 31 para 2): a subsequent provider of security may demand full payment from an earlier provider of security; but an earlier provider of security may not demand anything from a subsequent provider of security.

b. Recourse upon Part Payment

6. Opinion is divided on the question under which circumstances a right of internal recourse arises upon part payment of the secured obligation.
7. In AUSTRIA, BELGIUM, ENGLAND, FINLAND, FRANCE, ITALY, the NETHERLANDS and PORTUGAL a provider of personal security seems to be entitled to recourse upon partial payment to the creditor, provided this payment surpasses its share (AUSTRIA: OGH 23 April 1998, ÖBA 1999, 154 critical note *Bacher*; OGH 23 Feb. 1999, ÖBA 1999, 827 note *Riedler*; *Bydlinski* 105-106; BELGIUM: *Du Laing* no. 3; *Van Quickenborne* no. 530; ENGLAND: *Andrews and Millett* no. 12-004; FINNISH LDepGuar §§ 30

para 1 sent. 2, 31 para 1 – however, subject to the exception in § 31 para 2 (*supra sub* a); FRANCE: Cass.civ. 3 Oct. 1995, JCP N 1996, II no. 1631; *Simler* no. 640; ITALY: *Fragali*, Della fideiussione 446; NETHERLANDS: CFI Haarlem 24 Feb. 1942, N.J. 1942 no. 849 at p. 1270; *Korthals Altes* 340-341; Asser/*Hartkamp* no. 116; PORTUGAL: CC art. 650 para 2; STJ 15 Feb. 2001, 3764/00 www.dgsi.pt). Even more in FRANCE the provider of personal dependent security is entitled to exercise internally its right to recourse before any payment if the creditor has brought an action against it. The reason is that the claim of this provider of personal security against other providers of security is considered to exist since the date of the assumption of the dependent security so that its claim for contribution against a co-provider of security is not affected if the co-provider has become insolvent after assumption of the security (cf. Cass.com. 16 June 2004, Bull.civ. 2004 IV no. 123 p. 126). But a provider of dependent security can demand performance from other providers of security only after having paid (Cass.civ. 15 June 2004, D. 2004, 1972).

8. GERMAN courts are somewhat more favourable to the paying provider of security: As long as it is uncertain to what extent the creditor will demand performance from the providers of security, each provider of personal security is after every partial payment to the creditor generally entitled to demand proportionate recourse from the other security provider(s). It is irrelevant whether the security provider paid more than its internal share as that would have to be calculated on the hypothesis that the creditor demands performance of the full security or less than such share (cf. BGH 21 Feb. 1957, BGHZ 23, 361, 364; BGH 19 Dec. 1985, NJW 1986, 1097, 1097; BGH 15 May 1986, NJW 1986, 3131, 3132). But in the latter case recourse is suspended until the internal share of each security provider is certain if the paying security provider becomes insolvent after payment (BGH 17 March 1982, BGHZ 83, 206, 210). Finally, if the principal debtor is insolvent the paying security provider is entitled to recourse only if it paid more than its internal share (CA Köln 26 Aug. 1994, GmbHR 1995, 51).
9. In GREECE, according to the predominant opinion in literature, in case of part payment the claim of the provider of personal security (security provider or co-debtor for security purpose) for partial recourse competes with the creditor's claim for payment still due: hence, according to CCP art. 977 para 3, 1007 para 1 the creditor and the provider of personal security are to be satisfied *pro rata* (*Georgiades* § 3 no. 164; *Kaukas* 858 § 3, 465-466; ErmAK/*Zepos* art. 858 no. 11; Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 13). However, according to a minority opinion, the claim of the creditor has priority: the predominant opinion would only be justified, if the claims of the creditor and of the provider of personal security vis-à-vis the debtor had the same rank; but this is not so, since the co-debtor remains liable until the whole performance has been furnished (cf. CC art. 482 sent. 2; *Tampakis* 425; on the grounds of good faith *Zepos* A 316), whereas the security provider may still be called upon by the creditor for the payment of the remaining part (*Tampakis* 426; on the grounds of good faith *Theodoropoulos* 217).
10. For a "second-degree" recourse if one (or more) security provider(s) are unable to contribute, cf. notes on PECL Art. 10:106 para 3.

B. *Extension to All Securities*

11. In most countries the principle of full recourse is applied to all third party providers of security as enumerated in the national notes to Art. 1:102 nos. 2-13. All persons granting

security of any kind have a right of recourse against each other. However, the legal basis for this solution differs: in DENMARK, Promissory Note Act § 61 *juncto* § 2 para 2 concerning several providers of personal security as solidary debtors (cf. *Bryde Andersen* 35 ss. and 251 s.; *Pedersen*, Kaution 97 s.) is extended to the relationship between all providers of security according to the principle of the Insurance Agreement Act § 42 (cf. *Pedersen*, Kaution 97).

12. In ENGLAND a person granting proprietary security for another person's debt is regarded as a surety just as a provider of personal security and is thus entitled to the same remedies for its indemnity (*Rowlatt* 6). The principles of equity mentioned *supra* no. 4 are therefore applicable. The same is true in BELGIUM, FRANCE and LUXEMBOURG since CC art. 2033 (since 2006: FRENCH CC art. 2310) applies *mutatis mutandis* to providers of proprietary security (BELGIUM: *Du Laing* no. 7; *Van Quickenborne* no. 527; FRANCE: Cass.civ. 25 Oct. 1977, Bull.civ. 1977 I no. 388 p. 306; CA Paris 13 Jan. 1995, D. 1995, 573). And DUTCH CC art. 7:869 *juncto* art. 6:152 and 6:151 para 2 cover providers both of personal and also of proprietary security ("other sureties and persons who as non-debtors were liable for the obligation", cf. also *Blomkwist* no. 39).

13. In view of the lack of specific legal provisions in GERMANY and GREECE, legal practice had to find solutions on the basis of general principles of law. There was special need for adequate solutions in these countries since the strict application of existing legal provisions would result in an internal liability for "everything" by the first performing security provider and in no liability of any other security provider, which has been considered as arbitrary and unjust (GERMANY: BGH 29 June 1989, BGHZ 108, 179, 183, 186; GREECE: *Karasis* 179-180; ITALY: *Petti* 192). Therefore GERMAN courts apply with the approval of most legal writers the general rules on recourse among solidary debtors on the legal basis of *bona fides* (CC § 242) in all cases of plurality of providers of security, provided that the securities can be regarded as having equal rank (BGH 29 June 1989, BGHZ 108, 179, 183, 186; BGH 24 Sept. 1992, NJW 1992, 3228; *Schlechtriem* 1026-1047; *Bülow*, Ausgleich 62-63; *Graf Lambsdorff and Skora* no. 313; *Schmitz* [a Justice of the Federal Supreme Court]; contrary view: *Reinicke and Tiedtke*, Kreditsicherung nos. 1111-1122; Staudinger/*Horn* § 774 no. 68 who are still of the opinion that providers of dependent personal security are to be privileged). The same solution is sustained by AUSTRIAN courts and writers (OGH 20 June 1984, SZ 57 no. 114 at p. 565-566; OGH 9 Dec. 1987, SZ 60 no. 266 at p. 701; Rummel/*Gammerith* § 1359 no. 7) as well as by the prevailing opinion in GREEK legal literature (cf. with different dogmatic reasons *Georgiades* § 3 nos. 175 ss., 178; *Karakatsanis* 127-129; *Karasis* 187; *Spyridakis* § 80; *Theodoropoulos* 260 ss.; with a different – procedural – approach *Kaukas* arts. 847-848, § 9 *sub* c, § 10; but *contra Filios* II/1 § 128, 90-93; Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 12: providers of personal security must be treated more favourably than mortgagees).

14. Although in SPAIN the strict application of the legal provisions seems to result in the same difficulties and unfairness as in GERMANY and this has been demonstrated by scholars, SPANISH courts until now have not found a satisfactory solution. In literature, however, both solutions have been proposed: the proportional liability of providers of security as well as the privilege of providers of personal security (cf. *Guilarte Zapatero*, Comentarios 219).

15. Under SCOTS law the question of recourse between providers of securities of a different kind is rarely discussed. *Thow's Trustee v. Young* 1910 SC 588, 596 (CA) can probably be understood as indicating that it is in principle possible for a personal security provider to

claim relief from proprietary providers of security (in this case, however, relief was denied because the proprietary security was held not to be granted as security for the same debt).

16. In SWEDEN, *Walin*, Borgen 317 ss., seems to prefer that a third party who has furnished proprietary security normally is fully liable with the encumbered assets towards providers of personal securities, although he finally also expresses the contrary opinion.

C. *Internal Recourse Restricted to Some Providers of Security*

17. In some countries the provisions on recourse between providers of dependent personal security are applied only to some minor extent to other securities.

18. Under PORTUGUESE law, the general rule being the non-solidarity of several obligations (CC art. 513), there is no internal recourse, unless the parties agreed otherwise. By contrast, in commercial obligations there is a general rule of solidarity according to Ccom art. 100.

19. Under FINNISH law the provider of dependent personal security has a right to recourse against a provider of proprietary security only insofar as this has been agreed between the security providers (LDepGuar § 30 para 3; RP 189/1998 rd 69). According to LDepGuar § 41 third persons' proprietary securities are governed by § 30. This means that after payment the provider of proprietary security has, as a rule, a claim for recourse against proprietary security granted by the principal debtor (§ 30 para 1, but see para 2, cf. *supra* no. 3). But it has not, unless otherwise agreed, a right of recourse against another third party provider of proprietary security (§ 30 para 3, cf. *supra* this no.). Since § 41 does not declare § 31 to be applicable, there is also no recourse against providers of dependent personal security.

III. *The Measure of Internal Recourse*

20. Where internal recourse between providers of security is recognised, the question arises how the amount of this recourse shall be calculated.

A. *Party Agreement*

21. As mentioned before (*supra* no. 2), the principle of freedom of contract also applies in this part of the law. Due to this principle providers of security are free to agree upon the internal sharing of their liability (DENMARK: *Pedersen*, Kaution 96 s.; ENGLAND: *Andrews and Millett* no. 12-002; FINNISH LDepGuar § 31; RP 189/1998 rd 69 s.; FRANCE: CA Lyon 13 Oct. 1981, JCP N 1983, II no. 112; CA Riom 2 Oct. 1996 (two decisions), JCP G 1997, I no. 1033 (9); GERMAN CC § 426 para 1, *Schlechtriem* 1039 and *Bülow*, Ausgleich 59, 64; GREEK CC art. 487 para 1 and *Georgiades* § 3 no. 178; *Karakatsanis* 137; *Karasis* 187; *Spyridakis* § 80 no. 2; ITALY: *Fragali*, Della fideiussione 437; PORTUGAL CC art. 516; SCOTLAND: *Gloag and Irvine* 822; SPANISH CC art. 1138; SWEDEN: *Walin*, Borgen 119 s.). But an agreement between the creditor and one or all providers of security that excludes the internal recourse between the providers of security is not valid (GERMAN BGH 14 July 1983, BGHZ 88, 185, 189 for dependent personal securities assumed by standard form contracts).

B. Internal Liability in the Absence of Party Agreement

a. Internal Liability "per capita"

22. According to ITALIAN and SPANISH law, several providers of security are, in the absence of an agreement to the contrary, internally liable *per capita* (ITALIAN CC art. 1954 *juncto* art. 1299 and *Giusti* 243; SPAIN: CC art. 1844 *juncto* art. 1145 para 2 and 3, 1138; TS 2 Dec. 1988, RAJ 1988 no. 9287). Similarly in SCOTLAND there is a presumption for *per capita* liability if the parties have not agreed on a different share to be borne by the providers of security (Stair/*Clark* no. 940).

b. Proportional Internal Liability – cf. Para (2)

23. AUSTRIAN CC § 896, FINNISH LDepGuar § 31 para 1, GERMAN CC § 426, GREEK CC art. 487, ITALIAN CC art. 1298, PORTUGUESE CC art. 516, SPANISH CC art. 1138 and SWEDISH Ccom chap. 10 § 11 provide that co-debtors are liable in equal shares unless there is a "special relationship" between them (AUSTRIAN CC § 896) or it is "otherwise provided" (GERMAN CC § 426) (the situation is similar in DENMARK: *Pedersen*, Kaution 101 s.). The latter is mostly the case since AUSTRIAN and GERMAN courts nowadays consider that the maximum risk assumed by the providers of security is in general the basis for internal recourse (AUSTRIA: OGH 9 Dec. 1987, SZ 60 no. 266 p. 702-703 (at the time of the payor's payment); formerly different OGH 20 June 1984, SZ 57 no. 114 at p. 566; GERMANY: BGH 11 Dec. 1997, BGHZ 137, 292 approving CA Hamm 29 Oct. 1996, WM 1997, 710 for dependent personal securities). According to GERMAN case law the maximum risk of an unlimited dependent personal security is defined by the final balance of the secured credit (BGH 11 Dec. 1997, BGHZ 137, 292, 296 s.). Most writers agree with this (AUSTRIA: Rummel/*Gamerith* § 896 no. 12, but differently in II § 1359 no. 7 a; indirectly also Schwimann/*Mader and Faber* § 1359 nos. 3-4); but some are opposed (GERMANY: *Schlechtriem* 1026-1047 – except if one of several security providers has a special interest in the secured credit 1026-1030, 1047; Staudinger/*Horn* § 774 nos. 55 ss., but rejected by BGH 11 Dec. 1997, BGHZ 137, 292).

24. DUTCH CC art. 7:869 refers to art. 6:152 as the applicable rule on the measure of the internal recourse. The part which has remained unpaid by the debtor is apportioned among the subrogated party and other providers of security or liable "non-debtors" (*i.e.* providers of proprietary security) who are liable in proportion to the amounts for which each party was liable towards the creditor at the time of the payment (CC art. 6:152 para 1), the maximum being the extent of their respective obligation towards the creditor (para 2); cf. also para 3 (*Blomkwist* no. 39).

25. The solution is similar under BELGIAN, ENGLISH, FRENCH and LUXEMBOURGIAN law. If providers of personal security are not liable for equal amounts, they share the burden of the secured debt according to the proportion of their maximum liability (BELGIUM: *Du Laing* nos. 18-20; *Van Quickenborne* nos. 533-539; ENGLAND: *Ellesmere Brewery v. Cooper* [1896] 1 QB 75 (CFI); FRANCE: Cass.civ. 2 Feb. 1982, JCP 1982 II no. 19825; *Simler* nos. 646 ss.; LUXEMBOURG: CFI Luxembourg 8 Oct. 1982, Pas luxemb XXVI (1984-1986) 59); the latter is according to FRENCH writers in cases of unlimited dependent personal securities determined by the final balance of the secured obligation (cf. *Simler* no. 649).

c. *Legal Systems with Uncertain Solution*

26. GREEK courts did not yet deal with this issue and the literature is divided: Whereas some writers are of the opinion that providers of security shall be internally liable in equal shares (*Karasis* 187; *Spyridakis* § 80 no. 2), others argue that only if the value of proprietary security exceeds the value of the secured obligation, the providers of security shall be internally liable in equal shares, but if the value of proprietary security is less than the value of the secured claim, the liability shall be proportional (*Karakatsanis* 134-136; *Theodoropoulos* 263).

IV. *Type of Liability*

27. It is commonly thought that a provider of security who has a right of recourse against its several fellow providers of security cannot seek satisfaction from only one of them, with the consequence that the second would have to proceed afterwards against the third and so on. Rather, the first is obliged to divide its recourse between the remaining providers of security *pro virili parte* (DENMARK: *Pedersen*, Kaution 101 s.; FRANCE: if fellow providers of security are liable for equal amounts CA Poitiers 11 June 1981, D. 1982, 79; for GERMANY in general Palandt/*Grünberg* § 426 no. 6: no solidary liability in the internal relationship of co-debtors).

(Seidel/Hauck)

Article 1:109: Several Security Providers: Recourse Against Debtor

(1) Any security provider who has satisfied a claim for recourse of another security provider is subrogated to this extent to the other security provider's rights against the debtor as acquired under Article 2:113 paragraphs (1) and (3), including proprietary security rights granted by the debtor. Article 2:110 applies with appropriate adaptations.
(2) Where a security provider has recourse against the debtor by virtue of its rights acquired under Article 2:113 paragraphs (1) and (3) or under the preceding paragraph, including proprietary security rights granted by the debtor, every security provider is entitled to its proportionate share, as defined in Article 1:108 paragraph (2) and PECL Article 10:106, of the benefits recovered from the debtor. Article 2:110 applies with appropriate adaptations.
(3) Unless expressly stated to the contrary, the preceding rules do not apply to proprietary security provided by the debtor.

Comments*

A. Rights of Security Provider after Exposure to Internal Recourse

1. General. If one (or several) security provider(s) had been exposed to internal recourse according to Article 1:108 (1) and (2) the next issue is to which rights it (or they) is (or are) entitled against the debtor. This issue is addressed by Article 1:109 (1). It has to be emphasised that this secondary recourse against the debtor is a matter that does not feature prominently in the legal systems of the member states. The reasons are obvious: more often than not the security provider's chances of recovery from the debtor are low because of the latter's insolvency – precisely because it is especially in such situations that the creditor will demand payment from the security provider instead of the debtor. The situation is different in the area of, amongst others, personal securities on first demand. Also here, the effect of these Rules is that several providers of security are solidarily liable (cf. Article 1:107 (1)). However, the creditor typically demands payment from a security provider under such a security not only if the debtor defaults but because this is an easier way of achieving payment. Since in this situation the security provider is held liable by the creditor even though the debtor is solvent, the security provider's rights of recourse against the debtor become more important. Thus, not only the rights of internal recourse between several security providers (cf. Article 1:108) but also the rights of secondary recourse against the debtor in the situation of a plurality of security providers need to be dealt with.

a. Rights against the Debtor

2. General. Paragraph (1) deals with the question to which rights one or more of several security providers is or are entitled against the debtor who had been exposed to recourse by another security provider according to Article 1:108 (1) and (2).

3. Secondary recourse against the debtor. Whenever a security provider performs to the creditor, the former acquires both rights against the debtor according to Article 2:113 (1) sent. 1 and 2 *juncto* para (3) as well as rights against other security providers according to Article 2:113 (1) sent. 2 *juncto* para (3) and Article 1:108 (1). While in principle the security provider can claim reimbursement in full from the debtor, chances of success will typically be higher for proceeding against the other security providers. These are liable to the security provider, who has satisfied the creditor, however, only within the limits of their respective proportionate shares as defined in Article 1:108 (2). Therefore, any se-

* The Comments on Article 1:109 are by Ole Böger, LL.M.

curity provider that has been held internally liable by the security provider who has paid to the creditor may not in turn take recourse against the other security providers on the basis of Article 1:108 (1) and (2), since a right to internal recourse is available only where a solidary debtor has paid more than its proportionate share. The security provider may in this situation only try to be reimbursed by the debtor, either directly (cf. the following paragraphs) or indirectly (on the basis of Article 1:109 (2), cf. *infra* nos. 12 ss.).

4. Subrogation according to Article 1:109 (1) sent. 1. A security provider, who has been held liable by that security provider who had satisfied the creditor, steps into the shoes of that security provider according to the first sentence of para (1); it is subrogated to the rights against the debtor to which that security provider itself had been subrogated on its payment to the creditor (cf. Article 2:113 (1) second sentence). It is also subrogated to those rights against the debtor which the other security provider had acquired under Article 2:113 (1) sent. 1.

5. This subrogation does not follow from any other provision, at least not to the extent provided for here: no rights are conferred to the security provider in question by PECL Article 10:106, since this provision applies only if a solidary debtor has performed more than its share.

6. Extent of the subrogation. The extent, to which a security provider, who is held liable by the security provider who has satisfied the creditor, is subrogated into the latter's rights against the debtor depends upon the extent to which the latter security provider has taken recourse against the former security provider. Since this right to recourse is limited to the other security provider's proportionate share as defined in Article 1:108 (2), this security provider will normally acquire no more than its proportionate share of the rights against the debtor. The security provider who has satisfied the creditor is then entitled to the remaining part. Should the security provider be held liable for less than its proportionate share as defined in Article 1:108 (2), it is subrogated only proportionally to the rights acquired by the other security provider according to Article 2:113 (1) and (3).

7. It is important to stress that Article 1:109 (1) sent. 1 may not only give a security provider a personal claim for reimbursement against the debtor but may also confer an entitlement to proprietary security rights (not, however, to proprietary security rights provided by third persons) insofar as such rights have passed to the security provider who has satisfied the creditor (Article 2:113 (1) and (3)). It is self-evident, however, that Article 1:109 (1) sent. 1 can not confer any entitlement to rights against the debtor or proprietary security rights which the security provider who sought recourse has not acquired by reason of its own performance under the security, but *e.g.* as a counter-security granted by the debtor. The subrogation is limited to rights acquired by the security provider, who seeks recourse from the other security providers, under Article 2:113 (1) and (3).

8. Subrogation to proprietary security rights. It is expressly spelt out in Article 1:109 (1) that there is no subrogation to proprietary security rights provided by third persons. Third party proprietary security aside, however, the reference in Article 1:109 (1) to proprietary security rights granted by the debtor is to be understood in a wide sense. It is meant to

cover not only proprietary security rights that a creditor obtains from the debtor (whether by transfer or by creation of a new proprietary security interest), but also proprietary security rights retained by the creditor on the basis of an agreement with the debtor, such as a retention of ownership. While it is envisaged that the future European Rules on Proprietary Security will cover both types of proprietary security rights (although they might to some extent be subjected to different rules), these provisions are not finally drafted yet. Therefore, it is thought to be preferable at this stage to have a rather broad reference to proprietary security rights irrespective of the method of creation instead of an explicit reference to both distinct types of proprietary security.

b. Liability of Other Security Providers

9. **General.** A security provider who – after having paid the creditor – seeks recourse from the other security providers, may become liable for damages towards the other security providers. This may occur if its conduct makes it impossible for the other security providers to be subrogated to their rights against the debtor, including any proprietary security rights granted by the debtor (cf. *supra* no. 8), or to be fully reimbursed by the debtor (cf. Article 2:110). After the creditor is satisfied only the security provider who has paid the latter is entitled to the latter's rights against the debtor. The other security providers, however, will be subrogated into these rights once they were held internally liable by the security provider who satisfied the creditor, and then these rights against the debtor will be available as means to secure reimbursement from the debtor for these other security providers. Thus the latter have to be protected against any loss or depreciation in value of these rights due to the fault of the security provider who has satisfied the creditor.

10. **Liability according to Article 1:109 (1) sent. 2.** This aim is sought to be achieved by Article 1:109 (1) sent. 2. This provision will apply, *e.g.*, where a security provider releases the debtor or where it fails to realise proprietary securities in due time, which are subsequently lost or depreciated. A security provider who does not timely commence proceedings against the debtor who then becomes insolvent might also in appropriate circumstances be liable towards the other security providers for any losses caused by this delay.

11. **Security providers who may be entitled to damages.** Only those security providers can claim damages under this provision, though, that had been held internally liable by another security provider. Security providers who have neither satisfied the creditor nor have been held liable by another security provider do not suffer any damage by the loss of these rights against the debtor.

B. Other Security Providers' Entitlement to Benefits Recovered from the Debtor

12. **General idea.** The basic principle underlying the provisions about a plurality of security providers is that all security providers securing the same obligation shall share the risk which they assumed in proportion to their individual proportionate shares as defined in Article 1:108 (2) and PECL Article 10:106.

a. Obligation to Share Benefits

13. **General.** One consequence flowing from this principle is that a security provider who has satisfied the creditor under the security is entitled to take recourse against the other security providers up to the extent of their individual proportionate shares according to Article 1:108. On the other hand, where a security provider is able to reduce its burden by taking recourse against the debtor after having paid the creditor or any other security provider by whom it has been held internally liable, this security provider has to share any benefits obtained with the other security providers. Without such participation, individual security providers could effectively reduce their total liability by taking recourse against the debtor to the disadvantage of other security providers who might not be able to get any reimbursement from the debtor, *e.g.* due to an intervening insolvency of the latter.

14. **Security provider's entitlement to share of benefits recovered.** Paragraph (2) achieves this objective by obliging any security provider who has taken recourse against the debtor to share any benefits so obtained with the other security providers in proportion to their individual proportionate shares as defined in Article 1:108 (2) and PECL Article 10:106. Again, no security provider is bound to let the other security providers participate in any benefits acquired *e.g.* under proprietary security rights granted by the debtor as a counter-security to this security provider only. The liability under para (2) sent. 1 arises only where a security provider has recourse against the debtor under the rights conferred by Article 2:113 (1) and (3) or under Article 1:109 (1) or equivalent claims arising from the underlying relationship between security provider and debtor (*e.g.* a mandate). This liability arises in the case of a recourse by virtue of rights which in appropriate circumstances would have been available to the other security providers as well, if they had paid the creditor or had been held internally liable by another security provider, respectively. It should be emphasised that the reference to proprietary security rights granted by the debtor is to be understood in the same broad sense as in para (1), cf. *supra* no. 8.

b. Liability for Damages

15. **Article 1:109 (2) sent. 2.** Sentence 2 of para (2) refers to Article 2:110, thereby creating a liability between co-providers of security where due to the fault of one security provider the other security providers cannot share the full benefits which the former security provider acquired or could have acquired by taking recourse against the debtor under its rights conferred by Article 2:113 (1) and (3) or under Article 1:109 (1). In contrast to Article 1:109 (1) sent. 2, this liability for damages does not protect security providers against loss resulting from not being subrogated into another security provider's rights against the debtor or from not obtaining full satisfaction from the debtor under such rights. Rather, the security provider is protected against losses resulting from rights of participation against another security provider according to para (2) sent. 1 not coming into existence or being limited to a smaller amount than possible if the other security provider would have duly exercised its rights against the debtor.

16. **Situations covered.** The liability provided for in para (2) sent. 2 *juncto* Article 2:110 will typically arise in two different sets of circumstances: in the first situation, a security

provider might fail to exercise its rights against the debtor in time, which then becomes insolvent, or fail to take advantage of proprietary security rights, which subsequently are depreciated. Such conduct would be detrimental to the other security providers as well since in such situations their right to share in any benefits obtained from the debtor could be diminished or become worthless. The reference to Article 2:110 is broad enough, however, to cover also situations, in which a security provider wilfully refrains from exercising any rights against the debtor. A security provider may have personal reasons not to demand reimbursement from the debtor although it is entitled to do so; however, that security provider must be liable for any losses caused to the other security providers by not exercising rights to the benefits of which the other security providers would have been entitled in part.

C. Exception

17. Proprietary security rights provided by debtor excepted. Paragraph (3) contains an exception referring to proprietary security rights provided by the debtor (also in this context, the remarks in no. 8 *supra* apply). In any case, it is the debtor who is liable in the end for the secured obligation, and obviously there is no point in subrogating the debtor into rights against itself.

18. Counter-exceptions. Some provisions in this Article, however, are expressly declared to apply also to proprietary security rights granted by the debtor (para (1) sent. 1 and para (2) sent. 1; see also *supra* no. 8). These provisions are dealing with the exercise of or the subrogation into rights against the debtor, which for the purposes of this Article follows identical rules for personal as well as proprietary security rights.

National Notes

I. General

1. In most countries, it is a well-known principle that after performance towards the creditor, the security provider acquires rights against the debtor. Equally accepted and similarly prominently dealt with in the legal systems of most member states is the principle of an internal recourse between several security providers, which typically follows the idea of sharing the burden between all providers of security for the same

obligation or the same security purpose. In the context of these rules, these matters are dealt with in Arts. 2:113 and 1:108 respectively. The problems dealt with in this article, *i.e.* the distribution of rights against the debtor and of benefits received from the debtor among several security providers, are in fact a direct consequence of those two principles just mentioned. However, the rules governing this particular field of law typically feature much less prominently in the legal systems of the member states and relevant court decisions are scarce.

II. Entitlement of Other Security Providers to Rights against the Debtor

2. The idea of an outright transfer of the rights against the debtor to any security provider who has satisfied another security provider's claim for reimbursement by way of an automatic subrogation as provided for in Art. 1:109 (2) seems to be unknown in most member states.
3. In ENGLAND, however, falling short of a transfer of the legal title in any rights against the debtor, at least an equitable entitlement of co-security providers arises in those rights that the security provider who has satisfied the creditor is subrogated into, *i.e.* the security provider holds these rights in trust for the co-security providers (cf. *Re Arcedeckne; Atkins v. Arcedeckne* (1883) 24 ChD 709 (CFI); *O'Donovan and Phillips* no. 12-335).

III. Entitlement of Other Security Providers to Benefits Received from the Debtor or Third Parties

4. More generally accepted is the principle that benefits received by any of the co-security providers have to be shared with the others.
5. Especially benefits recovered from the debtor are regarded as having to be accounted for in relation to the other security providers. In ENGLAND, this follows, first, from the principle that the rights acquired by the security provider who has satisfied the creditor are held in trust for the other security providers (cf. *supra* nos. 2-3). Second, the equitable doctrine of contribution, *i.e.* the principle of internal recourse between several security providers as dealt with in these rules in Art. 1:108, is thought to demand that all benefits received by a security provider have to be shared *pro tanto* with the co-security providers (the so-called "hotchpot principle", cf. *O'Donovan and Phillips* no. 12-248). Under these principles, benefits received under counter-securities provided by the principal debtor are available to the other security providers even if it had been agreed between the security provider originally entitled to that counter-security and the principal debtor that this counter-security should not be for the benefit of the other security providers (cf. *Steel v. Dixon* (1881) 17 ChD 825 (CFI); *Andrews and Millett* no. 12-017).
6. Benefits received from third parties other than the debtor, however, need not to be shared with the other security providers (cf. *O'Donovan and Phillips* no. 12-249). Especially benefits secured on an individual security provider's own initiative and at its own expenses such as an insurance policy do not fall under the "hotchpot principle" (cf. *Re Albert Life Assurance Co* (1870) LR 11 Eq 164, 172 (CFI); *O'Donovan and Phillips* no. 12-249).

IV. Consequences of Conduct Disadvantageous to Other Security Providers

7. Whereas – in accordance with the approach chosen throughout this Part – in Art. 1:109 conduct by a security provider that is disadvantageous to the other security providers is regarded as giving rise to a liability for damages, ENGLISH law seems to prefer the loss of the right to internal recourse as a consequence of any such conduct. An analogy is drawn to the situation of the creditor holding several security rights, and thus it has been suggested that a security provider loses its right to internal recourse once it gives up any security rights against the debtor (cf. *Rowlatt* 160; *Andrews and Millett* no. 12-017). The idea of rights held in trust for the other security providers, however, makes it seem conceivable that in appropriate circumstances the liability for conduct that is disadvantageous to the other security providers could also be regarded as liability for breach of trust.

(Böger)

Article 1:110: Subsidiary Application of Rules on Solidary Debtors

If and insofar as the provisions of this Part do not apply, the rules on plurality of debtors in PECL Articles 10:106 to 10:111 are subsidiarily applicable.

Comments*

A. General

1. Contracts of personal security and plurality of debtors. Contracts of personal security frequently involve situations where several persons owe similar or even identical obligations to the same creditor. Such situations, which might be described as a plurality of debtors in a non-technical sense, can exist in relation to several debtors owing the same secured obligation, or several security providers securing the same obligation or even under certain circumstances in relation to a debtor owing the secured obligation and a security provider owing an obligation under the contract of personal security that is at least partly identical with the secured obligation.

2. Solidary obligations according to PECL and effect of Article 1:110 in general. The concept of solidary obligations according to PECL Article 10:101 (1) is drafted in rather wide terms. Therefore, a number of situations described in the preceding paragraph would

* The Comments on Article 1:110 are by Ole Böger, LL.M.

fall under the rules on solidary debtors in PECL Chapter 10 Section 1. On the one hand, this result has to be welcomed from the point of view of the law of personal security, since a number of these provisions of PECL Chapter 10 Section 1 fit the needs of this area of law perfectly well, so that a reference to these general provisions replaces the need to spell them out in detail here. On the other hand, the situations of solidary debtors (or: co-debtorship) in the context of personal security often are governed by considerations that are different from those relevant for situations of solidary debtors in general. Therefore the reference to these general rules can only be made with caution: the general rules are applicable only subsidiarily, *i.e.* as long as the rules in this Part do not contain specific provisions concerning the relevant issue.

3. Plurality of debtors of the secured obligation. The reference can be made unconditionally, however, in so far as a plurality of debtors owing the same secured obligation is concerned. The rules on personal security do not contain any specific provisions governing this issue, *i.e.* the effects of events concerning the obligation of one debtor on the obligation of the other debtor(s) are governed by PECL Chapter 10 Section 1 only.

4. Plurality of security providers and co-debtorship between debtor(s) and security provider(s). More important is the reference to the provisions on solidary obligations contained in PECL Chapter 10 Section 1 in the following types of situations, which will be considered in greater detail *infra* in these Comments: firstly, in case of several security providers that are all securing the same obligation towards the creditor (cf. *infra* no. 6 ss.). It has to be emphasised that the provisions on solidary debtors may apply under this heading to providers of dependent and independent security alike, provided that in respect of each security provider concerned the conditions for liability towards the creditor are fulfilled. Secondly, there might be a co-debtorship between debtor(s) on the one hand and security provider(s) on the other hand (cf. *infra* no. 12 ss.). A co-debtorship of this type, however, cannot exist if there is an independent personal security only; even in cases of a dependent personal security, such a co-debtorship between the debtor and the security provider can exist only if the liability of the security provider is solidary or, should the latter's liability be subsidiary, if the special conditions according to Article 2:106 (2) and (3) are fulfilled.

5. Co-debtorship for security purposes. A special situation concerns the co-debtorship for security purposes according to Article 1:106. This provision contains its own reference to PECL Chapter 10 Section 1.

B. Plurality of Security Providers

6. General. The rules on personal security contain in Articles 1:107 to 1:109 rules dealing specifically with a plurality of security providers. Concerning the topics covered by these specific Articles, PECL Chapter 10 Section 1 is applicable only if it is specifically referred to. However, in a number of other situations outside Articles 1:107 to 1:109 these general rules can be applied. It has to be emphasised in this context that the rules of PECL Articles 10:106 to 10:111 are applicable only if the requirements of PECL Article 10:101 (1) are fulfilled, *i.e.* if all debtors concerned are bound to render one and the same

performance and if the creditor may require it from any one of them until full performance has been received. In relation to several security providers, such a co-debtorship arises only under the conditions set out in Article 1:107, especially the conditions for liability towards the creditor must be fulfilled for every security provider concerned.

7. **PECL Article 10:106.** As between several security providers that are solidarily liable, PECL Article 10:106 is applicable by virtue of the express reference contained in Article 1:108 (1) with the qualifications set out in paras (2) and (3).

8. **PECL Article 10:107 (1).** It follows already from Article 2:113 (3) (for providers of independent security, Article 3:108 applies), that a security provider that has performed its obligations under the contract of personal security is subrogated into the creditor's rights against the other security providers. Consequently, these other security providers are no longer liable towards the creditor to the extent to which the former security provider has fulfilled the obligations under the security. Within its scope of application, PECL Article 10:107 (1) serves as a clarification of that implied consequence.

9. **PECL Article 10:107 (2).** This provision is applicable, *i.e.* the merger of debts between one security provider and the creditor discharges the other security providers only for the share of the security provider concerned (this share to be determined according to Article 1:108).

10. **PECL Article 10:108.** If the creditor releases, or reaches a settlement with, one of several providers of dependent security, the consequences are covered by Article 2:110: the liability of the other security providers is not affected, but the creditor is liable in damages towards them; this counter-claim can, obviously, be set off against the other security providers' liability under the contract of dependent personal security. By contrast, there is no specific rule for the effect on the liability of providers of independent personal security; thus, PECL Article 10:108 (1) is applicable. This difference in treatment is due to the fact that independent security should be treated more formalistic than dependent security where a more flexible approach is preferable.

11. **PECL Articles 10:109 to 10:111.** These provisions are generally applicable in the situation of several security providers who are solidarily liable towards the creditor as prescribed by Article 1:108 (1).

C. Co-Debtorship between Debtor(s) and Security Provider(s)

12. **General.** The following Comments concern the situation where a co-debtorship exists between the debtor(s) on the one hand and the security provider(s) on the other hand, *i.e.* where debtor(s) and security provider(s) are solidary debtors as defined in PECL Article 10:101 (1). Apart from the co-debtorship for security purposes, which is dealt with by Article 1:106, such a situation can arise especially where there is a dependent personal security with solidary liability of the security provider, so that the creditor is free to claim performance from the debtor or the security provider as solidary debtors (Article 2:105). In a dependent personal security with subsidiary liability of the security provider,

a co-debtorship exists between the security provider and the debtor only if the special conditions according to Article 2:106 (2) and (3) are fulfilled, *i.e.* if the security provider can no longer invoke the subsidiarity of its liability as a defence against the creditor. There can be no co-debtorship between security provider and debtor, if any, in the case of an independent security: The obligation of a provider of an independent personal security is conceptually distinct from any underlying obligation and thus performance of the former obligation cannot be regarded as "one and the same performance" (PECL Article 10:101 (1)) as that of the latter obligation.

13. **PECL Article 10:106.** If the security provider fulfils its obligation under the contract of personal security, its rights against the debtor are governed by Article 2:113, so that there is no need to have recourse to Article 10:106. If, however, the debtor fulfils the secured obligation, it can be derived from Article 10:106 that the debtor has no claim against the security provider: internally the debtor is of course liable for the whole obligation owed to the creditor so that the internal share of the security provider is nil.

14. **PECL Article 10:107 (1).** This provision is not applicable. If, on the one hand, the security provider performs its obligation towards the creditor, the debtor is not discharged, but Article 2:113 operates so as to subrogate the security provider into the creditor's rights against the debtor. If, on the other hand, the debtor performs its obligation towards the creditor, the security provider may rely on this performance as against the creditor according to Article 2:103 (1). Thus, in this situation the principle of dependency of the secured obligation achieves the same result as PECL Article 10:107 (1). The same principles apply if there is a set-off as between the creditor and either security provider or the debtor.

15. **PECL Article 10:107 (2).** This provision is applicable; it has to be kept in mind, however, that internally the debtor is liable for the whole of the secured obligation. One has to distinguish between two situations: If the merger of debts takes place between the debtor and the creditor, the security provider(s) is (are) discharged completely. If, however, the merger of debts concerns one security provider (as solidary debtor) and the creditor, the debtor remains liable towards the creditor for the whole debt.

16. **PECL Article 10:108.** This provision is only in part applicable. It is not applicable in so far as the consequences of a release by the creditor of the debtor(s) on the liability of the security provider(s) are concerned: in such a situation it follows already from the principle of dependency in Article 2:103 (1) that such a release provides a defence for the security provider vis-à-vis the creditor. If, by contrast, the security provider(s) is (are) released by the creditor, PECL Article 10:108 applies: since the debtor is internally liable for the whole of the secured obligation, the effect of the application of this provision is that the debtor is not discharged towards the creditor.

17. **PECL Article 10:109.** This provision is applicable only if this would not run counter to the principle of dependency as laid down in Article 2:103 (1). Thus, contrary to the rule in Article 10:109 a decision by a court as between the debtor and the creditor may affect the security provider's obligation in so far as according to Article 2:103 (1) the security provider, too, may raise the defence of *res judicata* if it should be available to the debtor. If

a court decides in proceedings between the debtor and the creditor in favour of the debtor – even if only partly – the creditor is barred on the basis of the defence of *res judicata* from bringing another action for the same claim not only against the debtor, but also against the security provider. In other constellations, however, Article 10:109, is applicable, *e.g.* in so far as a court decides against the debtor or in proceedings between the creditor and the security provider.

18. **PECL Article 10:110.** This provision is not applicable in so far as the consequences of a prescription of the creditor's right to performance against the debtor are concerned: in such a situation it follows again from the principle of dependency as laid down in Article 2:103 (1) that the security provider can rely on a prescription of the secured obligation vis-à-vis the creditor. PECL Article 10:110 is applicable, however, as far as the effect of prescription of the creditor's claim against the security provider on the obligation of the debtor towards the creditor is concernced: according to PECL Article 10:110 (a) prescription of the creditor's claim against the security provider does not operate as a defence for the debtor vis-à-vis the creditor.

19. **PECL Article 10:111 (1).** This provision is not applicable. In so far as the possibility of the security provider to invoke a defence of the debtor is concerned, this situation is specifically dealt with in Article 2:103 (1). Since the security provider's obligation is merely an additional claim for the creditor, the debtor may not rely on any defence of the security provider.

20. **PECL Article 10:111 (2).** This provision is not applicable. As between the security provider and the debtor, contribution can only be demanded by the security provider from the debtor (cf. Article 2:113) after the former has fulfilled its obligations towards the creditor. Should the security provider have failed to raise vis-à-vis the creditor any personal defence of the debtor towards the creditor that was available to the security provider according to Article 2:103 (1), the security provider may nevertheless claim full reimbursement according to Article 2:113. The interests of the debtor are protected by the security provider's liability for damages according to Article 2:112 (2).

National Notes

1. It is a common legal technique in many member states to provide for the subsidiary applicability of the rules on plurality of debtors in specific matters of personal security. DUTCH law even provides that "Suretyship is governed by the rules on co-debtorship, except in so far as the present subchapter [on suretyship] does not deviate from them" (CC art. 7:850 para 3; in addition, there are express references to the rules on co-debtorship in arts. 7:866, 7:868 and 7:869).
2. Specific references to the law of co-debtorship can especially be found with respect to the internal relationship between several security providers (cf. AUSTRIA: CC § 1359 second sentence; DENMARK: *Andersen, Møgelvang-Hansen and Ørgaard* 35 ss.; FINLAND: RP 189/1998 rd 7; *Ekström* 73; GERMANY: CC § 774 para 2; BGH 24 September 1992, NJW 1992, 3228; MünchKomm/*Bydlinski* § 426 no. 46; ITALY: CC art. 1954; SWEDEN: *Walin*, Borgen 26 ss.).

3. In several member states, also the relationship between debtor and security provider vis-à-vis the creditor is regarded as a case of plurality of debtors (BELGIUM, FRANCE and LUXEMBOURG: for the security provider with solidary liability: CC art. 2021 (since 2006: FRENCH CC art. 2298); FRANCE: *Simler* nos. 534 ss.; ITALY: CC art. 1944 para 1; *Bozzi*, La fideiussione 252; *Casella* 250; *Giusti* 45; SPAIN: CC art. 1822 para 2; *Carrasco Perera a.o.* 86). In other member states, however, it is thought that the rules on plurality of debtors are not applicable in such situations (cf. GERMANY: MünchKomm/*Bydlinski* § 421 nos. 33 ss.; Staudinger/*Noack* § 421 no. 38; for the contrary view Erman/*Ehmann* § 421 nos. 48 ss.).

(Böger)

Chapter 2:
Dependent Personal Security (Suretyship Guarantees)

Article 2:101: Presumption for Dependent Personal Security

(1) Any undertaking to pay, to render any other performance or to pay damages to the creditor by way of security is presumed to be a dependent security as defined in Article 1:101 lit. (a), unless the creditor shows that it was agreed otherwise.
(2) A binding comfort letter is presumed to be a dependent personal security.

Comments

A. Definition and Central Role

1. Historically and still today, dependent personal security, as defined in Article 1:101 (a), constitutes the core institution of personal security. This becomes even more obvious if one recurs to the different national names for the most important type of dependent personal security in all the member states (to mention only *suretyship*, *cautionnement*, *Bürgschaft* etc.). All other modern types of personal security, be they dependent (such as the binding comfort letter) or independent (such as indemnities/independent guarantees or stand-by letters of credit) have been developed by modifying the one or the other element of the dependent personal security.

B. General Presumption

2. Paragraph (1) establishes a presumption for assuming a dependent personal security. This presumption is based upon the extremely risky nature and implications of any personal security: the security provider becomes liable with all its present and future assets for the liabilities which another person, the debtor, has incurred or may incur in future. By virtue of the dependency upon the secured claim, these risks can to some degree be limited. Therefore any personal security in favour of the creditor of another person is presumed to be dependent and therefore to be subject to Chapter 2.

3. The presumption in favour of a dependent security applies vis-à-vis all other types of personal security including both the independent personal security regulated in Chapter 3 and the co-debtorship for security purposes (cf. Article 1:106). If the parties intend to agree upon an independent personal security or a co-debtorship for security purposes, this must expressly be said or unambiguously result from the agreement of the parties. Otherwise, it will be assumed that the parties intended to agree upon a dependent security, which is in general the most favourable for the security provider.

4. It goes without saying that the presumption in favour of a dependent security should also apply, and for particularly good reasons because of its protective function, to a personal security assumed by a consumer; cf. *infra* nos. 9-11.

C. Binding Comfort Letter

5. For the general description of a "binding comfort letter", cf. Comments nos. 4-7 on Article 1:102.

6. Paragraph (2) establishes merely a presumption as to the classification of a binding comfort letter which can, of course, be rebutted. The presumption is based upon the typical interests pursued by a "patron" in issuing a binding comfort letter of a commercial type: If the promise to the creditor to support financially the debtor (company) is not held, the breach of that promise is sanctioned by an obligation to compensate the creditor for its damage. On the other hand, the "patron" generally will not be willing to be liable for those obligations of the debtor which are subject to objections or defences.

7. The preceding two reasons speak for classifying the binding comfort letter, in the context of the present Rules, as a dependent personal security – unless the contrary is proved.

8. In the case of a non-commercial binding comfort letter where the author promises to reimburse the creditor for any expenses it may incur in assisting the debtor (*supra* Comment no. 4 on Article 1:102), this is the typical straight situation of a dependent personal security.

D. Consumers as Security Providers – General Remarks

9. The rules on consumer protection for providers of personal security must be based, in order to fulfil their purpose of being protective for the security provider, on that regime of personal security which is most protective for security providers. Generally speaking, this is the regime of dependent personal security laid down in Chapter 2. However, sometimes doubts may arise where exceptionally the application of rules on other security devices is, or may seem to be, more protective for the security provider. Such instances have to be analysed in detail.

10. The rules on dependent personal security are not only to be applied to a consumer's dependent personal security, but also to all other types of personal security assumed by a consumer: Specifically, they also apply to a consumer's independent personal security (cf. Article 4:106 (c)) and to a consumer's co-debtorship for security purposes (cf. Article 4:102 (1)).

11. In applying the rules on dependent personal security to any type of personal security provided by a consumer, it is to be noted that in this context the rules on dependent personal security are mandatory and may not be deviated from to the disadvantage of the consumer security provider (Article 4:102 (2)). This purpose is achieved in two ways which, however, converge in the end: If a consumer assumes a dependent personal security, the rules of Chapter 2 are not only directly applicable, but are made mandatory in favour of the consumer by Article 4:102 (2). If a consumer assumes an independent personal security or if it acts as a co-debtor for security purposes the same result is achieved in two steps: firstly, by declaring applicable to these cases the rules of Chapter 2 (cf. Articles 4:106 (c) and 4:102 (1), respectively). On this basis Article 4:102 (2) becomes applicable which, as said *supra*, provides for the mandatory character of the rules on dependent personal security. Thus, even where the presumption of para (1) is rebutted, every personal security by a consumer security provider will be subject to Chapter 2.

National Notes

I. Ordinary Dependent Security

A. No Presumption

1. In most member states no presumption for a dependent personal security exists (as to general principles of construction cf. *supra* national notes to Article 1:105; for the principles of classification of dependent and independent personal securities cf. *supra* national notes to Article 1:101 nos. 5-18).

B. Presumption for a Dependent Security

2. However, in FRANCE if it is doubtful whether a dependent personal security or another kind of personal security has been assumed, the qualification with the weaker effect, *i.e.* a dependent personal security will be chosen (cf. the general rules on interpretation CC art. 1156 ss.; *Simler* no. 895). If the security provider is a consumer, this interpretation guideline is even more strictly respected (*Simler* no. 921; CA Paris 26 Jan. 1993, D. 1993, I.R. 93). Also under GERMAN law, if after applying the principles of interpretation (CC §§ 133, 157) a doubt remains, a dependent personal security is assumed since this is the

regular legal type of personal security and since the security provider is in this way best protected, especially by the formal requirement of a writing according to CC § 766 (cf. Staudinger/*Horn* § 765 no. 24). Similar arguments are used in AUSTRIA, although the dependent personal security does not enjoy better protection by a form requirement since that is applied also to independent personal securities. It is controversial whether banks as providers of security may invoke a presumption in favour of a dependent personal security; but prevailing opinion allows this (cf. Avancini/Iro/*Koziol* no. 3/32, but different at no. 3/25). Also in ITALY the general rules on interpretation of contracts (CC arts. 1362-1371) are applied and these also lead to a presumption in favour of a dependent security since this is the solution which is less onerous for the debtor (*Bonelli*, Le garanzie bancarie 56).

C. *Presumption for an Independent Security*

3. In the area of bank guarantees, especially those employed in international trade, there is a special situation. The "security provider", *i.e.* the bank issuing an independent guarantee, is most interested in being involved as little as possible in the underlying transaction. Therefore, it prefers to perform upon first demand. The only requirement for its duty to perform is that the conditions expressly set out in the mandate to issue the guarantee are fulfilled by the creditor. The debtor of the underlying transaction, very often the buyer/importer, must and can see to it that these conditions are laid down so as to suit its commercial requirements (cf. for GERMANY: *Graf von Westphalen* 5-7; ENGLAND: *Goode*, Commercial Law 1017 ss.; ITALY: *Bonelli*, Le garanzie bancarie 56; NETHERLANDS: *Pabbruwe*, Bankgarantie 1-10). In FRANCE if the principal debt covers non-pecuniary obligations (*e.g.* in the case of building contracts), there is a strong presumption for an independent security (*Simler* no. 924 a)).

II. *Binding Comfort Letters*

4. Most EUROPEAN member states do not share the rule of Art. 2:101 (2). For details on the qualification of binding comfort letters in the various member states see *supra* national notes to Art. 1:102 nos. 6 ss.

(Lebon; Dr. Fiorentini)

Article 2:102: Terms and Extent of the Security Provider's Obligations

(1) The validity, terms and extent of the obligation of the provider of a dependent personal security depend upon the validity, terms and extent of the debtor's obligation to the creditor.
(2) The security provider's obligation does not exceed the secured obligation. This principle does not apply if the debtor's obligations are reduced or discharged
  (a) in an insolvency proceeding;
  (b) otherwise, in particular through negotiation or judicial reduction, caused by the debtor's inability to perform because of insolvency; or
  (c) by virtue of law due to events affecting the person of the debtor.

(3) Except in the case of a global security (Article 1:101 lit. (f)), if an amount has not been fixed for the security and cannot be determined from the agreement of the parties, the security provider's obligation is limited to the amount of the secured obligations at the time the security became effective.
(4) Except in the case of a global security (Article 1:101 lit. (f)), any agreement between the creditor and the debtor to increase the extent, to aggravate the terms or to predate the maturity of the secured obligations agreed upon after the security provider's obligation became effective does not affect the latter's obligation.

Comments

A. The Principle of Dependency

1. Article 2:102 is one of the two principal provisions expressing the guiding idea of a dependent personal security, namely the principle of dependency (or accessority, as it is called in the CONTINENTAL civil law countries); cf. *supra* Article 1:101 (a) and Comments nos. 15-27. Another important rule which is based upon the principle of dependency is Article 2:103.

B. Main Rule – Para (1)

2. The main rule of the first paragraph expresses this basic feature. The security obligation must not exceed the secured obligation. The most important elements are mentioned in para (1), but this enumeration is not intended to be exhaustive. If any feature of the security obligation exceeds the corresponding element of the secured obligation, the security obligation does not become void. Rather, the respective element of the security obligation is reduced correspondingly.

3. One application of the principle of dependency occurs upon the transfer of the secured claim. Due to the practical importance of this phenomenon, this consequence of dependency is usually spelt out explicitly. For contractual transfers of claims, *i.e.* assignments, PECL Article 11:201 (1) (b) provides that "all accessory rights securing such performance" of the assigned claim are transferred to the assignee. This is supplemented for security rights which are not accessory by an obligation of the assignor to transfer such rights to the assignee (PECL Article 11:204 (c)). In addition, legal transfers are often provided for non-contractual transfers of claims, especially in the form of subrogation

into a creditor's rights if a person other than the (principal) debtor performs an obligation of the latter. Examples in the present Rules can be found in Article 2:113 (1) and (3) and provisions which refer to this rule, *e.g.* Articles 1:109 (1) first sentence and 3:108.

4. The principle of dependency of the security right upon the secured claim can not be applied to the reverse situation: the extent and terms of the security may well be more restricted than the secured obligation. There is no reverse dependency with respect to the amount of the secured obligation. Cf., however, the general reservation in Comments on Article 1:101 no. 19.

C. Exceptions – Para (2)

5. **Debtor's insolvency and equivalent events – para (2).** However, the principle of dependency does not apply in the case of necessity for which the security has been designed, namely where the debtor's obligations are reduced or it is even discharged in an insolvency proceeding. Generally speaking, an insolvency proceeding over the debtor's assets does not affect the debtor's liabilities. Even less does this occur when the opening of such proceedings has been refused, for whatever reason, especially due to insufficient assets of the debtor. Therefore, the relevant personal securities are not either affected.

6. However, modern insolvency laws tend to provide more and more for opportunities to discharge insolvent debtors, at least certain classes of debtors (para 2 (a)). Alternatively, the reorganisation of a commercial company and similar arrangements with creditors are provided for in which these may agree to reduce their claims. Nevertheless, the dependent personal securities securing obligations that are reduced or discharged should remain fully effective since they have been agreed upon precisely for the purpose of protecting the secured creditor against the risk of such insolvency (para (2) (b)).

7. The same is true if special laws enacted in times of war or general economic crisis liberate fully or partly national debtors or debtors who have fallen in distress. Such laws may for instance prescribe that debtors must make payments on secured obligations that have fallen due, to a prescribed national institution and that such payments discharge the debtor. Or the secured obligations may simply be declared discharged. Apart from specific legislation, such special rules may also be developed by court practice. Security providers living, or having assets outside these jurisdictions remain liable since they (or their foreign assets) are not subject to such measures which are directed at the person(s) of a circle of more or less closely defined debtors (para (2) (c)). However, even if such laws or practice discharge the debtor, personal security granted to the debtor is not affected since it would run counter to the very purpose of security which is meant to secure the creditor against risks of this kind.

D. Amount of Security

8. Paragraph (3) gives rules on determining the amount of a security if this has not been expressly fixed by the parties, except if the security provider had assumed a global security (Article 1:101 (f)). The amount may either be determined from the agreement of the parties, *e.g.* if a security is provided for the purchase price of a specific new car according to the dealer's price list. If the amount cannot be ascertained in this way, then the amount of the security is equal to the amount of the secured obligation at the time at which the security became effective. The security becomes effective upon its creation if at that time the claim to be secured had already come into existence. By contrast, if the claim to be secured comes into existence only after creation of the security, the latter becomes effective only at this latter point in time. This will generally correspond to the intention of both parties.

9. The question which ancillary obligations of the debtor are covered by the amount of the security, is answered separately by Article 2:104.

10. The last clause of para (3) indirectly confirms the earlier rule that future claims can be secured, although within the limits indicated by this rule (cf. Article 1:101 (a)).

11. A suggestion of requiring, for the protection of security providers, a maximum amount, has not been followed for commercial security providers since it would unduly restrict business practices. However, if a consumer (Article 1:101 (g)) provides a global security or a specific personal security without a fixed maximum amount, such a security is reduced to a fixed amount which is determined by the amount of the secured obligations at the date on which the security became effective (Article 4:106 (a)).

12. Subsequent increases of secured obligation. In the interest of protecting security providers, the extent of their security obligations is, as a rule, fixed to the time at which the security becomes effective; again, this is the presumed intention of both parties. Subsequent increases of the secured obligation, therefore, do not bind the security provider. This applies not only to an outright increase of the amount of the secured obligation; or an aggravation of the payment terms; or to a predating of maturity; but also to the aggravation of other terms of the personal security.

13. An extension of maturity, by contrast, usually will not increase the security provider's burden provided it keeps within the time limit of the security, if any. If exceptionally there is an increase of burden (*e.g.*, if the debtor has become insolvent), the creditor is liable according to Article 2:110.

E. Further Incidents of Dependency

14. Less frequently arising issues of dependency are not expressly regulated in these Rules on personal security. However, solutions can be derived via Article 1:110 from the

general rules on solidary debtors laid down in PECL Chapter 10 Section 1. The Comments *sub* C to Article 1:110 apply to the relationship between debtor and solidarily liable security provider.

F. Consumers as Security Providers

a. Dependent Personal Security

15. Only the application of paras (3) and (4) calls for special explanatory remarks.

16. **Paragraph (3)** is supplemented in favour of consumer providers of a dependent security (as well as in relation to other consumer security providers, cf. *infra* no. 23) by Article 4:106 (a). Specifically this means that the exception spelt out in the first half-sentence of Article 2:102 (3) concerning global securities without a maximum amount is not applicable by virtue of Article 4:106 (a). For further details, cf. the Comments to Article 4:106.

17. **Paragraph (4).** Generally, agreements between creditor and debtor increasing in any respect the burdens of the secured obligation do not affect the security provider. The exception in favour of a global security in para (4) is qualified by Article 4:106 (a): unless a maximum amount had been agreed for the security, the amount covered by the security has to be determined according to Article 2:102 (3). Amendments can only bind the consumer security provider if they do not exceed the maximum limit of the security, which either is agreed by the parties or has to be determined according to Articles 4:106 (a) *juncto* 2:102 (3).

18. **Mandatory rules.** The rules on a consumer's dependent personal security are mandatory in favour of the security provider (cf. Article 4:102 (2)).

b. Other Types of Personal Security

19. **Paragraph (1) and para (2) first sentence.** For consumers who have provided security in any form other than dependent security, Article 2:102 (1) and para (2) first sentence are also binding. For a consumer who has granted an independent personal security this follows from Article 4:106 (c) and for a consumer's co-debtorship for security purposes this follows from Article 4:102 (1). These two provisions declare applicable the rules of Chapter 2 on dependent personal security, and in the present context these rules are mandatory in favour of the consumer security provider (Article 4:102 (2)).

20. For a consumer's co-debtorship for security purposes, additional protective rules are to be found in PECL Articles 10:106 to 10:108 and 10:111. These provisions remain applicable in favour of a consumer co-debtor for security purposes.

21. **Paragraph (2) second sentence.** For independent personal security, the exception to the principle of dependency established by para (2) second sentence merely spells out the general rule: the fate of a possibly underlying claim of the creditor against the debtor in

an insolvency proceeding over the latter's assets is irrelevant for the security provider's liability towards the creditor.

22. The effect of a reduction or discharge of one of several co-debtors as a consequence of an insolvency proceeding over the assets of that co-debtor is nowhere explicitly spelt out. However, it would seem that such partial or full discharge is a personal defence in the sense of PECL Article 10:111 (1) sent. 1 and therefore does not benefit any co-debtor. This result would also be in conformity with the security purpose pursued by a co-debtorship for security purposes. The result conforms to Article 2:102 (2) sent. 2 and therefore is in harmony with the results reached for providers of dependent as well as independent security (*supra* nos. 6 and 21).

23. Paragraphs (3) and (4) are provisions for the protection of the security provider; as such they are applicable for the protection of consumer providers of an independent security or of a co-debtorship for security purposes as well (cf. Articles 4:106 (a) and 4:102 (1), respectively). However, as in the case of a consumer provider of dependent security, paras (3) and (4) apply to the consumer security providers of an independent security or a co-debtorship for security purposes only subject to the specific consumer protection effects of Article 4:106 (a), which is applicable to all types of personal security by consumers. For these effects, cf. *supra* nos. 16-17.

24. Mandatory character. In the present context, the rules of Article 2:102 are mandatory in favour of the consumer, cf. Article 4:102 (2). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in Article 2:102 means the debtor whose obligation is secured.

National Notes

1. In all member states the nature, terms and extent of the dependent personal security depend upon the nature, terms and extent of the secured obligation. This common feature, which has decisive consequences for the regime of dependent personal security, is the principle of dependency. In the national laws, especially of the CONTINENTAL countries, it is better known under the name of accessority. It is everywhere recognized as a general principle of EUROPEAN private law, basically aiming at the protection of the security provider (*van Erp* 309 ss.).

I. Nature of Secured Obligation

A. Any Kind of Obligation

2. By a contract of dependent personal security, the provider of security assumes vis-à-vis the creditor responsibility for the payment of a third person's obligation (GERMAN CC § 765 para 1; GREEK CC art. 847; PORTUGUESE CC art. 627). In general it is possible to grant a dependent personal security for every kind of financial obligation, irrespective of its source or object (GERMANY: Palandt/*Sprau* § 765 no. 17; GREECE: G*eorgiades* § 3 no. 35, PORTUGAL: *Pires de Lima and Antunes Varela* 644). Hence, the dependent personal security can also secure an obligation to hand over a specific object or an obligation to do or not to do something (BELGIUM: *Van Quickenborne* nos. 178-184; FRANCE: *Simler* no. 209 s.; GERMANY: Palandt/*Sprau* § 765 no. 17; GREECE: A.P. 691/1955, A.P. 692/1955, NoB 4, 455 ss.; ITALY: *Fragali*, Della fideiussione 98; G*iusti* 27; NETHERLANDS: *Blomkwist* no. 3; PORTUGAL: *Pires de Lima and Antunes Varela* 644; SCOTLAND: G*loag and Irvine* 645; SPAIN: *Vicent Chuliá* 379) or secure against a "default or miscarriage of another person" (ENGLAND: *Mercers of City of London v. New Hampshire Insurance Co* (1991) JIBFL 144 (CFI); PORTUGAL: *Pires de Lima and Antunes Varela* 644; SPAIN: G*uilarte Zapatero*, Comentarios 89). Which obligation the personal security right secures, depends on the construction of the contract between the parties (DENMARK: *Højrup* 30 ss.; *Pedersen*, Kaution 15 s.; SWEDEN: *Walin*, Borgen 36 ss.).

3. If the dependent personal security secures a monetary obligation, also the security provider's obligation will consist in a monetary obligation of the same content (GREECE: G*eorgiades* § 3 no. 35) and, in some countries, the security provider also has to procure that the debtor performs its obligation (ENGLAND: *Moschi v. Lep Air Services Ltd* [1973] AC 331, 348 (HL); SCOTLAND: *Erskine* III, 3, 61; Stair/*Eden* no. 918).

4. If the dependent personal security is provided in respect of a non-monetary obligation, *e.g.* a non-monetary performance or a forbearance of the debtor, then the security provider is obliged to pay damages to the creditor to the same extent as the debtor for the non-performance of its obligation has to pay, but does not have to perform the debtor's obligation (AUSTRIA: expressly CC § 1350; Schwimann/*Mader and Faber* § 1350 no. 1; DENMARK: *Pedersen*, Kaution 49; ENGLAND: O'*Donovan and Phillips* no. 10-203; FRANCE: *Simler* no. 209; GERMANY: Staudinger/*Horn* no. 14 preceding §§ 765 ff.; GREECE: G*eorgiades* § 3 no. 35; ITALY: G*iusti* 31; SCOTLAND: Stair/*Clark* no. 918), in particular when the non-monetary obligation of the debtor is not fungible (NETHERLANDS: cf. CC art. 7:854; *du Perron and Haentjens* art. 854 no. 1; SPAIN: G*uilarte Zapatero*, Comentarios 89). In GERMANY the same result is achieved by means of interpretation of the contract of security (Palandt/*Sprau* § 765 no. 25). See also national notes on Art. 1:101 nos. 19 ss.

B. *Another Security Provider's Obligation as Secured Obligation*

5. Almost in every member state the secured obligation may be the security engagement of a primary security provider (AUSTRIA: CC § 1348; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2014 para 2 (since 2006: FRENCH CC art. 2291 para 2); ITALIAN CC art. 1948; GERMANY: Staudinger/*Horn* nos. 57-59 preceding § 765; NETHERLANDS: CC art. 7:870; PORTUGUESE CC art. 630; SPANISH CC art. 1823 para 2). But this security *(certification de caution)* is not very often used in FRANCE, because creditors prefer the more practicable securities with solidary liability (*Simler* no. 116).

C. *Future or Conditional Secured Obligation*

a. *The Principle*

6. Future and conditional obligations may be secured in all member states (BELGIUM: *Van Quickenborne* no. 186; DUTCH CC art. 7:851 para 2 for future obligations and art. 6:26 for conditional obligations; ENGLAND: prospective securities, cf. *Andrews and Millett* no. 4-016; FRANCE: (for future obligations) see new CC art. 2301 as proposed by the *Grimaldi* Commission and *Simler* nos. 210 ss.; GERMAN CC § 765 para 2; GREEK CC art. 848; ITALIAN CC art. 1938; PORTUGAL: CC art. 628 para 2; *Almeida Costa* 785; SCOTLAND: Stair/*Eden* no. 835; SPAIN: CC art. 1825; *Guilarte Zapatero*, Comentarios 99 ss.). The parties are free in GERMANY to agree to secure all future obligations that will be created in a specific period of time (*Reinicke* and *Tiedtke* no. 150). In these cases the security provider is liable for all obligations that will fall due in the agreed period of time and, contrary to the case of a security with time limit for the resort to the security (cf. Art. 2:108), the creditor is entitled to demand performance from the security provider even after expiration of the agreed time limit. Regarding global securities, see *supra* national notes to Art. 1:101 nos. 40-46.

b. *Restrictions*

i. *Generally*

7. However, there are general limits regarding a security provided for future claims: In BELGIUM, FRANCE, GERMANY, GREECE, PORTUGAL, SPAIN and the NETHERLANDS there must be enough elements in the contract of security to determine the secured obligation at a later moment (BELGIUM: *Van Quickenborne* nos. 186, 188 and 191; FRANCE: CA Paris 17 Feb. 1998, RD banc 1998, 177; *Simler* no. 210; GERMANY: BGH 30 March 1995, NJW 1995, 1886; Palandt/*Sprau* § 765 no. 7; Erman/*Herrmann* § 765 no. 3; GREECE: CFI Athens 975/1997, EED 48, 704; *Georgiades* § 3 nos. 36, 51-55; ITALY: Cass. 18 July 1997 no. 6635, Giur.it.Mass. 1997, 651; NETHERLANDS: CC art. 7:851 para 2; PORTUGAL: STJ 11 May 2000, 250/00 www.dgsi.pt; SPAIN: CA Santa Cruz de Tenerife 12 Sept. 1994, AC 1994 no. 1517; *Guilarte Zapatero*, Comentarios 82 s.; *Reyes López* 217). The future or conditional claim must be somehow defined in order to prevent an excessive burden upon the security provider (DUTCH CC art. 7:851 para 2: "sufficiently determinable"; *Blomkwist* no. 11; FRANCE: *Simler* no. 210; without

the intention to impose excessive burden, in application of this principle GERMAN modern case law and most writers nowadays, cf. only BGH 18 May 1995, BGHZ 130, 19; *Bülow*, Kreditsicherheiten nos. 840-841; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 21 *in fine*; GREECE: *Georgiades* § 3 no. 36; PORTUGAL: STJ 30 Sep. 1999, 436/99 www.dgsi.pt; SPAIN: *Reyes López* 217). This determination does not have to be precise, but one should be able to identify the legal relationship which may give rise to the future claim. In FRANCE, the interest rates do not have to be mentioned in the contract of security for future obligations, contrary to the case of security for present obligations (Cass.com. 9 March 2004, D. 2004, 2706, note *Aynès*).

8. It suffices that the obligation has come into existence, or that the condition has been fulfilled, at the time when a demand is made against the provider of the security (BELGIUM: *Van Quickenborne* nos. 185-187; GERMANY: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 9; GREECE: *Georgiades* § 3 no. 36; ITALY: CC art. 1938; *Foschini* 465; *Giusti* 156; NETHERLANDS: *Blomkwist* no. 11; *du Perron and Haentjens* art. 851 no. 5; PORTUGAL: *Almeida Costa* 786; SPAIN: CC art. 1825; *Guilarte Zapatero*, Comentarios 80 s.).

9. In the NETHERLANDS the validity of securities for conditional obligation is usually derived from CC art. 6:26, according to which the provisions on unconditional obligations apply to conditional obligations to the extent that the conditional character of the obligation in question permits (*Blomkwist* 24). In SPAIN the performance of the security can only be requested when the secured debt is fixed (CC art. 1825; TS 29 April 1992, RAJ 1992 no. 4470).

10. By contrast, in DENMARK, pursuant to the agreement between the DANISH Consumer Council and the Financial Council a security by a consumer for future and conditional obligations is not allowed.

ii. Maximum Amount for Future Obligations

11. In ITALY dependent personal securities for future obligations must indicate a maximum secured amount (CC art. 1938 as amended 1992); otherwise they are *in toto* void (for an analogical application of that rule to a binding comfort letter see CFI Roma 18 Dec. 2002, Giur.mer. 2003, 1661). Agreements exceeding an indicated maximum amount are *pro tanto* invalid (*De Nictolis* 207 ss.). In the NETHERLANDS, if at the time at which a non-professional party assumes a security the amount of the obligation of the debtor is not yet determined, the security is only valid to the extent of an agreed maximum amount, expressed in money (DUTCH CC art. 7:858 para 1). This provision is mandatory for consumer providers of security (cf. CC art. 7:862 lit. a). In PORTUGAL, the indication of a maximum amount seems to be indispensable (STJ 19 Oct. 1999, BolMinJus no. 490, 262). Furthermore, a dependent personal security that secures a future obligation may be terminated by the security provider before the obligation to be secured has actually come into existence, if the debtor's financial situation deteriorates or if, unless another time has been agreed, five years have passed since it was provided (PORTUGUESE CC art. 654).

II. Extent of the Security Obligation

A. General Rule

12. As a consequence of the principle of dependency, the security provider's liability is no greater than that of the debtor, in terms of amount, time for payment and the conditions under which the debtor is liable. Security obligations exceeding the secured obligations are automatically reduced to the limits of the latter (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2013 (since 2006: FRENCH CC art. 2290); DUTCH CC arts. 7:851 and 7:860; FINNISH LDepGuar § 5 para 2; GERMANY: cf. CC § 767 para 1 sent. 1; Palandt/*Sprau* § 767 no. 1; GREEK CC art. 851; ITALIAN CC art. 1941; PORTUGAL: CC art. 627 para 2 and 631; SPANISH CC art. 1826). The same is true for ENGLISH, IRISH and SCOTS law, where the security provider's liability is said to be co-extensive with the debtor's (ENGLAND: *Andrews and Millett* no. 6-002; IRELAND: *White* 541; SCOTLAND: Stair/*Eden* no. 918).

13. GERMAN CC § 767 para 1 sent. 1 provides that the extent of the secured obligation at any time determines the obligation of the security provider. Consequently, the security provider is bound by modifications, including extensions, of the secured obligation that are not based on agreement between creditor and debtor (cf. GERMAN CC § 767 para 1 sent. 2 and Palandt/*Sprau* § 767 no. 2).

B. Specific Rules

14. In the NETHERLANDS it is stipulated by a provision which is mandatory for consumer sureties (cf. CC art. 7:862 lit. a) that a security provider is not bound by more onerous terms than those by which the debtor is bound, except however to the extent that they concern the manner in which proof of the existence and extent of the obligation of the principal debtor can be made against the security provider (CC art. 7:860; *Blomkwist* no. 26). In SPAIN case law has expressly considered "valid a future security among consumers provided its terms comply with the ConsProtA as well as the General Contractual Terms Act, the secured obligation is determined or determinable and lastly, the security has been expressly agreed" (TS 23 Feb. 2000, RAJ 2000 no. 1242).

C. Consequences of Accessority upon Assignment of Secured Claim

15. As a direct consequence of the accessory character of the dependent security, in most of the European legal systems a dependent security right passes to the assignee automatically with the assignment of the secured obligation. This rule is widespread in European codes and doctrines which state that every accessory right passes to the assignee automatically with the assignment of the principal right, without the need for a separate act of transfer (AUSTRIA: implicitly CC § 1393; OGH 17 March 1987, SZ 60 no. 46 at p. 244; DENMARK: *Ussing*, Kaution 98; BELGIUM, FRANCE and LUXEMBOURG for civil debts: CC art. 1692; FRANCE for professional debts: MonC art. L 313-27 para 3; GERMANY: CC §§ 398, 401; ITALY: CC art. 1263 para 1; NETHERLANDS: CC art. 6:142 and 3:82; PORTUGAL: CC art. 482; SPAIN: CC art. 1528; SWEDEN: *Walin*, Borgen 88 s.). Under ENGLISH law, however, the assignee of the secured claim is entitled to the rights under the dependent security only if the benefit of the security

has been expressly or impliedly assigned along with the secured claim (*O'Donovan and Phillips* no. 10-176).

16. In FRANCE, contrary to the rules on assignment of claims, court practice had held that the dependent personal security can not be transmitted automatically as an accessory contract to the new creditor upon an assignment. Rather, the dependent personal security was extinguished upon sale of a rented building by the secured lessor (Cass.com. 26 Oct. 1999, D. 2000, 224, note *Aynès*) or even after a merger-absorption of the secured creditor (Cass.civ. 28 Sept. 2004, JCP E 2005, no. 14 p. 619). It was considered that firstly the assignment of these contracts is generally not recognised in FRENCH law and that secondly the dependent personal security is concluded in consideration of the person ("*intuitus personae*") and can not be extended outside its limits (CC arts. 2013 and 2015 (since 2006: CC arts. 2290 and 2292)). This opinion has recently been reversed by a plenary decision of the Court of Cassation (for sale of rented buildings: Cass.ass.plén. 6 Dec. 2004, D. 2005, 227, note *Aynès*; also for merger-acquisition: Cass.com. 8 Nov. 2005, in JCP E 2006 II, no. 1000, note *Legeais*). According to the path-breaking decision of December 2004, the change of creditor is not essential for the contract of security in so far as the terms of the engagement of the security provider are the same. The dependent security is considered as a necessary accessory of the contract of rent which is itself by law (cf. CC art. 1743) accessory to a contract of sale of a building.

III. Exception upon Discharge of Debtor in Insolvency Proceedings and Comparable Events

A. Insolvency Proceedings

17. In no European country is the security provider released by virtue of the debtor's insolvency (AUSTRIA: Bankruptcy Act § 151 and Composition Act § 48; BELGIUM: Bankruptcy Act of 8 Aug. 1997, last modified in 2005, arts. 21 § 1 and 35 § 4; however, there is a partial or full discharge of a consumer security provider if its engagement is disproportionate in relation to its income and assets: Judicial Composition Act of 1997 art. 80 para 3; Cass. 16 Nov. 2001, JLMB 2001, 1731; *Lebon*, Borgtocht nos. 1-7; in the context of the Collective Debt Rescheduling Act of 5 July 1998: *Dirix and De Corte* no. 421; DENMARK: *Pedersen*, Kaution 106 ss.; ENGLISH Insolvency Act sec. 281 para 7; FINLAND: LDepGuar § 21, RP 189/1998 rd 58 ss.; FRANCE: Ccom art. L 631-14 II for enterprise insolvency and CC art. 2308 para 2 as proposed by the *Grimaldi* Commission for insolvency of individuals; since Law no. 2005-845 of 26 July 2005 on Safeguard of Enterprises this is true even if the creditor omits to declare its claim at the opening of the insolvency procedure (Ccom art. L 622-26); GERMAN Insolvency Statute § 254 para 2 sent. 1; GREECE: *Filios* II/I § 127, fn. 29 at p. 89; ITALY: Cass. 17 July 2003 no. 11200, Giust.civ.Mass. 2003, 1709 s.; Cass. 27 June 1998 no. 6355, Fallim 1999, 525; LUXEMBOURG: *Ravarani*, Rapport Luxembourgeois 437-438; NETHERLANDS: Bankruptcy Act art. 241, 300 and 340 para 3; SCOTLAND: Bankruptcy (Scotland) Act sec. 60; SWEDEN: *Walin*, Borgen 157 ss.). In SWEDISH law it is required that the creditor has to take all necessary steps to make the debtor pay, but he need not wait for the bankruptcy of the debtor before performance can be claimed from the security provider (*Gorton*, Suretyship 592 fn. 31).

18. Which effect has the avoidance of a performance made by the debtor in the suspecct period and afterwards duly avoided, upon personal security securing the avoided performance? In GERMANY the monetary claim underlying the returned performance is revived and both accessory and non-accessory security rights of any type for the claim are also revived (Frankfurter Kommentar/*Dauernheim* § 144 no. 3; CA Frankfurt/Main 25 Nov. 2003, ZIP 2004, 271). In GREECE it has been held that a security is valid when provided in favour of a bankrupt debtor, even though any unilateral act reducing the latter's property, including an abstract acknowledgement of debt, is null in regard to the creditors when done during the suspect period, since it remains valid between the creditor and the debtor and subsequently the former can turn against the security provider and demand payment of the debt (cf. CA Athens 5511/1975, NoB 24, 85; Georgiades-Stathopoulos AK/*Vrellis* art. 850 no. 12).
19. In GERMANY it is held that even the disappearance of a debtor company, if due to insufficient assets, does not discharge the provider of a dependent security; rather, the security is maintained as an independent obligation and can then be assigned as such (BGH 25 Nov. 1981, BGHZ 82, 323, 327 s.; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 126).

B. Transfer Moratorium

20. The AUSTRIAN Supreme Court has held that an Austrian security provider of a claim against a Hungarian debtor cannot invoke vis-à-vis the Austrian creditor a transfer moratorium issued by the Hungarian government (OGH 5 Sept. 1934, SZ 16 no. 162, p. 451 s.).

C. Voluntary Arrangements between the Debtor and its Creditors

21. According to DUTCH, GERMAN and GREEK statute law as well as PORTUGUESE and SPANISH case law an arrangement between the debtor and its creditors to avoid bankruptcy proceedings or a moratorium as well as a rescheduling agreement of a non-professional debtor do not release the security provider (DUTCH Bankruptcy Act art. 160 and 272 no. 5; GERMAN Statute on Insolvency § 254 para 2 sent. 1; GREECE: cf. Commercial Law art. 643; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 29; PORTUGAL: Insolvency Code arts. 63, 81 para 2 and 245). However, if the creditor has accepted the arrangement, the security provider is released (STJ 19 April 2001, 329/01 www.dgsi.pt; STJ 18 Nov. 1999, 859/99 www.dgsi.pt (no discharge by moratorium); SPAIN: TS 16 Nov. 1991, RAJ 1991 no. 8407; TS 7 June 1983, RAJ 1983 no. 3450; TS 6 Oct. 1986, RAJ 1986 no. 5241). Also from ITALIAN statutory law it can be inferred that a voluntary agreement in bankruptcy between the debtor and its creditors does not release the security provider (L.fall art. 140 para 3; art. 184; cf. Cass. 6 Aug. 2002 no. 11771, Giust.civ.Mass. 2002, 1479). In GERMANY it is expressly provided that, while the security provider is not released vis-à-vis the creditor (cf. *supra*), the debtor is released as against the security provider (Insolvency Statute § 254 para 2 sent. 2), so that recourse against the debtor is excluded. Corresponding rules probably also exist in other countries since otherwise the debtor's (partial) release would not be effective. In GREECE, however, the security provider who pays to the creditor part of the debt,

participates in the insolvency procedure as creditor entitled to partial reimbursement (cf. Commercial Law art. 641 sent. 2; *Georgiades* § 3 no. 213).

22. In ENGLAND voluntary arrangements under Part VIII of the Insolvency Act 1986 regularly release the security provider because they are based on the parties's consent and thus the common law rules on variation of the principal contract (see *below* at IV) apply (*Johnson v. Davies* [1999] Ch 117 (CFI)); only if the creditor expressly reserves his rights against the security provider, the latter will not be released (*Andrews and Millett* no. 9-014). In FRANCE the same solution is in case of partial release of the debtor commonly admitted by court practice (Cass.com. 5 May 2004, Bull.civ. 2004 IV no. 84 p. 87; *contra* for release of debts: Cass.com. 13 Nov. 1996, JCP E 1997, II no. 903, note *Legeais*; *Simler* no. 478), even if the security provider was excluded from the arrangement about debt releases and delays: the principle of good faith in contracting has to be respected. But the Law on Safeguard of Enterprises no. 2005-845 of 26 July 2005 now expressly recognizes the release of the security provider subsequently to the debtor's release in the *procédure de conciliation* (Ccom art. L 611-10 para 3).

D. *No Release of the Security Provider despite Debtor's Discharge*

23. According to FRENCH consumer law the security provider is not discharged even after the partial release of the consumer debtor during the insolvency procedure (*Simler* no. 719). The security provider has only the right to be informed about the opening of this procedure (ConsC art. L 331-3) and may not be deprived of its minimal resources (CC art. 2024 sent. 2 (since 2006: FRENCH CC art. 2301 sent. 2)).

24. The GERMAN Statute on Insolvency allows consumer debtors under certain conditions to obtain release from almost all existing obligations six years after termination of an insolvency procedure (cf. §§ 286-303, especially § 287 para 2 and § 300 para 1). But according to § 301 para 2 sent. 1, security providers may not invoke this release vis-à-vis the creditor, although they have no recourse against the debtor (*ibidem* sent. 2).

25. The BELGIAN legislator is presently preparing an amendment to the Bankruptcy Act under which in specific situations the privilege of a discharged bankrupt trader would be extended to its security provider.

IV. *Agreement Aggravating the Secured Obligation*

A. *Generally*

26. According to AUSTRIAN, BELGIAN, DANISH, FINNISH, FRENCH, GERMAN and LUXEMBOURGIAN law as well as GREEK, ITALIAN and SPANISH case law, agreements between the creditor and the debtor to increase the extent, to aggravate the conditions and terms or to predate the maturity of the secured obligations agreed upon after the security provider had assumed the security do not bind the latter (AUSTRIA: Rummel/*Gamerith* § 1353 no. 4; Schwimann/*Mader and Faber* § 1351 no. 14; DENMARK: *Pedersen*, Kaution 79 s.; FINLAND: LDepGuar § 8 para 1; RP 189/1998 rd 40 s.; FRENCH, BELGIAN and LUXEMBOURGIAN CC arts. 2013 and 2015 (since 2006: FRENCH CC arts. 2290 and 2292); BELGIUM: *Van Quickenborne* no. 241 ss.; FRANCE: *Simler* nos. 462 ss.; GERMAN CC § 767 para 1 sent. 3; GREECE: CA Thessaloniki 2539/1989, Arm 43, 986; *Georgiades* § 3 no. 111; ITALY: CC art. 1941 para 1 and 3; *Giusti* 141

ss., 150 s.; Cass. 20 Feb. 1999 no. 1427, Giur.it. 1999 I 1576; SPAIN: CA Madrid 26 Jan. 1995, AC 1995 no. 148).

27. By contrast, under ENGLISH law any material variation of the terms of the contract for the secured obligation will even discharge the security provider (*Holme v. Brunskill* (1878) 3 QBD 495 (CFI); Chitty/*Whittaker* no 44-089). A security provider will remain liable, however, if it assents to the variation, unless after the variation the contract for the secured obligation is no longer within the general purview of the original dependent security; in this case there must be a new contract of security (cf. *Trade Indemnity Co Ltd v. Workington Harbour and Dock Board* [1937] AC 1 (HL); *Triodos Bank NV v. Dobbs* [2005] 2 CLC 95 (CA)). The same rule as to the discharge of the security provider by reason of a variation of the terms of the contract for the secured obligation applies in IRELAND (*MacEnroe v AIB* [1980] ILRM 171 (SC); *White* 545 s.), unless the variation is limited to a severable part of the contract.

B. Details

28. GERMAN CC § 767 para 1 sent. 3 provides that the obligation of the security provider is not increased by any legal transaction entered into by the debtor after the assumption of the dependent personal security. Consequently, the security provider is not bound by any legal transaction that worsens its position, unless there is only a minor change that does not affect the substance of the secured obligation and that therefore, according to *bona fides*, appears to be reasonable for the security provider (BGH 1 March 1962, WM 1962, 701; Palandt/*Sprau* § 767 no. 3; Erman/*Herrmann* § 767 no. 9). In the NETHERLANDS, a special rule is laid down in CC art. 7:861 para 4. A non-professional security provider is not bound by future obligations arising from a legal act, which the creditor has performed without being obliged to do so, after he had become aware of circumstances which have considerably diminished the possibility of recovering from the debtor. This rule does not apply if the security provider explicitly consented to the legal act or unless this act could not be postponed (*Blomkwist* no. 29).

C. In Particular: Extension of Time

a. Discharge

29. In ENGLAND, IRELAND and SCOTLAND the security provider is also discharged if the creditor gives additional time to the debtor (ENGLAND: *Swire v. Redman* (1876) 1 QBD 536 (CFI); *Andrews and Millett* no. 9-029; IRELAND: *White* 545; SCOTLAND: Stair/*Clark* no. 965), because this would affect the security provider's right to pay off the creditor and then to sue the debtor in the name of the creditor. The security provider remains liable under ENGLISH law, however, if the creditor, when it postpones the debtor's payment date or in cases of a release of the principal debtor, notifies the principal debtor that it reserves its rights against the security provider (cf. *Greene King v. Stanley* [2001] EWCA Civ 1966 (CA); *O'Donovan and Phillips* nos. 6-66 ss.) Also according to SPANISH CC art. 1851 "an extension (of time) granted to the debtor by the creditor without the security provider's consent extinguishes the security". An express consent is not necessary if the security provider already knew about it at the time of assumption of the security (TS 8 May 1984, RAJ 1984 no. 2399). Consequently, the

SPANISH Supreme Court has declared art. 1851 as not applicable in the case of security for future or conditional debts (TS 31 Oct. 1984, RAJ 1984 no. 5153; TS 8 May 1984, RAJ 1984 no. 2399; TS 7 Jan. 1981, RAJ 1981 no. 3399).

b. No Discharge

30. By contrast, according to AUSTRIAN courts and writers an extension of time to the debtor does not release the security provider (OGH 4 May 2005, JBl. 2005, 722, 724 s.; OGH 6 May 1954, ÖJZ 1954, 455 no. 312; Rummel/*Gamerith* § 1353 no. 4). Also according to FRENCH and BELGIAN CC art. 2039 (since 2006: FRENCH CC art. 2316) and PORTUGUESE case law the extension of time granted to the debtor by the creditor does not discharge the security provider (PORTUGAL: STJ 24 Jan. 1989, 77015 www.dgsi.pt). The security provider may also profit from the postponement of the due date, but can equally well waive the right to profit from this postponement (BELGIUM: *Van Quickenborne* nos. 326-329; FRANCE: *Simler* nos. 464 ss.). Pursuant to a minority FRENCH opinion CC art. 2039 (since 2006: FRENCH CC art. 2316) is applied also to the security provider with solidary liability (*Simler* no. 465), although the strict application of the rules on solidarity would exclude this solution (cf. FRENCH and BELGIAN CC art. 2021 (since 2006: FRENCH CC art. 2298)). As CC art. 2039 (since 2006: FRENCH CC art. 2316) is not compulsory, the parties can agree otherwise and discharge the security provider if the latter does not give its consent to the extension of time granted to the debtor by the creditor (*Simler* no. 469).

(de la Mata; Dr. Poulsen)

Article 2:103: Debtor's Defences Available to the Security Provider

(1) As against the creditor, the security provider may invoke any defence of the debtor with respect to the existence, validity, enforceability and terms of the secured obligation, even if it is no longer available to the debtor due to acts or omissions of the debtor occurring after the security became effective.
(2) The security provider may not invoke the debtor's right to withhold performance under PECL Article 9:201 if the debtor is no longer entitled to invoke it.
(3) The security provider may not invoke the lack of capacity of the debtor, whether a natural person or a legal entity, or the non-existence of the debtor, if a legal entity, if the relevant facts were known to the security provider at the time when the security became effective.
(4) As long as the debtor is entitled to avoid the contract from which the secured obligation arises on a ground other than those mentioned in the preceding paragraph and has not exercised that right, the security provider is entitled to refuse performance.
(5) The preceding paragraph applies with appropriate adaptations if the secured obligation is subject to set-off.

Comments

A. General Remark

1. Article 2:103 supplements Article 2:102 by clarifying another aspect of the dependency of the security upon the secured claim, *i.e.* the debtor's defences which are available to the security provider.

B. The Principle – Para (1)

2. The main rule is laid down in the first sentence of para (1): "any defence" available to the debtor may be invoked by the security provider. "Defence" includes any right of the debtor to retain performance (cf., however, para (2) and *infra* no. 8) or to terminate a contract due to non-performance by the creditor. This general rule is in keeping with the principle laid down in Article 2:102 (1).

3. However, an important qualification to the principle of dependency is established by the last half-sentence of para (1): Any defence that originally had existed but which was lost later due to acts or omissions of the debtor can nevertheless be relied upon by the security provider if the loss occurred after the security became effective. Examples are a loss of a defence due to a waiver by the debtor; or the omission to raise the defence before it becomes time-barred. The rationale of this exception is to protect the security provider's expectancy to be able to continue to rely on any defence of the debtor which existed at the time the security became effective.

4. Existence of secured obligation. The secured obligation may not have come into existence, especially if a security had been assumed for a future or a conditional obligation. In such a case, legally the security itself has not come into existence; but still, the appearance of a security, such as a document on a security agreement may be there and the creditor may invoke it. Of course, the apparent security provider can invoke the nullity of the document.

5. Correspondingly, the secured obligation may have arisen but may thereafter have been duly paid by the debtor or a third person. In this case as well, the security provider may counter any possible claim by the creditor by relying on the extinction of the secured obligation.

6. Validity of secured obligation. An invalidity of the secured claim may have a variety of causes, *e.g.* of a personal nature or related to the subject matter of the contract from which the secured claim arises. The debtor may be stricken by an incapacity which is unknown to the security provider (so that para (3) does not apply). The underlying contract may run counter to a legal prohibition and therefore be void (cf. PECL Articles 15:101) or be declared to have no effect (Article 15:102 (1)).

7. Enforceability of the secured obligation. The unenforceability of an obligation usually gives the debtor a right to refuse performance. The most important example are so-called natural obligations, especially if the period of prescription of the secured obligation has run. According to PECL Article 14:501 (1), after expiry of the period of prescription "the debtor is entitled to refuse performance". According to Article 2:103 (1), the security provider may invoke this defence of the debtor, whether or not the debtor itself had already invoked it. If, however, the security provider had already performed the prescribed obligation, it cannot reclaim its performance merely because the period of prescription had expired (Article 14:501 (2)).

C. Right to Withhold Performance – Para (2)

8. The second paragraph specifies the principle expressed in para (1) in two respects. Paragraph (2) assumes that the debtor under the general rules of PECL has had a right to withhold performance to the creditor, *e.g.* because the latter at the time when the security provider had assumed the security had not performed its obligations in time. The provision implies that the security provider may invoke the debtor's right of withholding performance in order to withhold its own performance to the creditor. If later the debtor had performed, then the security provider is no longer allowed to invoke that defence and refuse performance to the creditor. This case differs from the exception dealt with in para (1): In the latter case, the debtor had caused by acts or omissions the loss of defences, whereas para (2) deals with a case where the creditor's act had caused the loss of the debtor's defence.

D. Debtor's Lack of Capacity – Para (3)

9. Many countries establish one exception to the principle, which relates to defects or lack of full capacity of the debtor and, in the case of a debtor legal entity, also the lack of legal personality. However, these incapacities or the non-existence of a legal entity must have been known to the security provider at the time when the security became effective (on the meaning of this term, cf. *supra* Comment no. 8 on Article 2:102). The underlying assumption is that in these cases the security serves the purpose of supplying an important

element to overcome the economic consequences resulting from the debtor's "personal defect". But the provider of the security must have willingly incurred this risk. Paragraph (3) lays down this rule.

10. The consequences which any such lack of full capacity or of legal personality has for the security provider's recourse against the debtor are laid down in Article 2:113 (4).

E. Debtor's Unexercised Rights of Avoidance – Para (4)

11. The common feature of paras (4) and (5) is that the debtor is entitled to exercise rights of avoidance or set-off but has not done so. Since in general the security provider is not entitled to exercise those rights because of their personal character, but, on the other hand, should not suffer from the debtor's passivity, some substitute must be designed.

12. According to para (4), the security provider is entitled to refuse its performance where the debtor has not exercised a right of avoidance to which it is entitled. Examples are a right to avoid the contract which is the basis for a monetary claim by the creditor on the ground of a threat committed by the creditor or a mistake of the debtor. The granting of a right of refusing performance is a compromise: on the one hand, the security provider should not be entitled to exercise the debtor's right of avoidance since this is based upon a personal decision of the debtor but, on the other hand, it should not be disadvantaged by the debtor's non-exercise of a right which by virtue of the principle of dependency is to the security provider's benefit.

F. Unexercised Rights of Set-Off – Para (5)

13. The reasons given in preceding no. 12 apply equally if the debtor has a right of set-off against the creditor's claim but has not exercised it.

14. The same reasons apply as well when the creditor also has a right of set-off against the debtor, as usually happens when the debtor has such a right. They also apply if exceptionally only the creditor is entitled to set off, but not the debtor.

G. Effectuation

15. In order to facilitate the effective realization of the rights enumerated in Article 2:103, the security provider has not only a right towards the secured debtor but has even a duty of inquiry according to Article 2:112 (1). Further, the security provider is obliged to raise defences which were communicated by the debtor or which were otherwise known to the security provider (Article 2:112 (2)).

H. Consumer as Security Provider

a. Dependent Personal Security

16. If a consumer has assumed a dependent personal security, Article 2:103 becomes mandatory in favour of the security provider by virtue of Article 4:102 (2).

b. Other Types of Personal Security

17. **Paragraphs (1) and (2).** From the point of view of a co-debtorship for security purposes, paras (1) and (2) allow a security provider to invoke a defence inherent in the debt even in cases where a co-debtor as such had lost this defence due to acts which it had committed after the security became effective. This rule goes beyond PECL Article 10:111 (1) sent. 1. This "excess" is then partly "corrected" by para (2). Consequently, if applied to a consumer co-debtor for security purposes by virtue of Article 4:102 (1), the combined effect of applying paras (1) and (2) is beneficial for the consumer.

18. If a consumer provides an independent personal security, the same result as set out in preceding no. 17 is achieved by virtue of Article 4:106 (c): the consumer is enabled to invoke defences rooted in an underlying transaction which under the general rules of Chapter 3 the provider of an independent personal security is unable to invoke.

19. **Paragraph (3).** Generally, any form of incapacity or even legal inexistence of the debtor, whether a natural person or legal entity, does not affect the obligations of the provider of an independent personal security towards the creditor. In the light of these considerations, a consumer provider of independent security is by virtue of Article 4:106 (c) bound by Article 2:103 (3), since its position is not worsened by the application of that provision.

20. The position of a consumer co-debtor for security purposes, however, is different. PECL Article 10:111 (1) sent. 1 allows a co-debtor to invoke a defence inherent in the debt; the incapacity of the debtor whose obligation is secured clearly fulfills this criterion. By contrast, the application of Article 2:103 (3), generally speaking, does not allow that co-debtor to invoke those incapacities, so that this provision in effect diminishes its position as compared to that of a non-consumer co-debtor. Nor is this diminution counterbalanced by the requirement of knowledge established in the last half-sentence. The absence of such knowledge in specific cases would benefit both a provider of a dependent personal security and a consumer co-debtor for security purposes.

21. **Paragraphs (4) and (5).** For the consumer security provider of an independent personal security, paras (4) and (5) offer remedies which are not available to it under Chapter 3. Consequently, there can be no objection to the application of these provisions in favour of a consumer provider of an independent personal security according to Article 4:106 (c).

22. The same conclusion applies to a consumer's co-debtorship for security purposes: Paragraph (4) allows a consumer co-debtor for security purposes to invoke a personal

defence of the principal debtor to avoid the contract giving rise to the secured obligation. According to PECL Article 10:111 (1) sent. 1, such a remedy is not available to a co-debtor (cf. Comments on PECL Article 10:111). Paragraph (4) (as applied by virtue of Article 4:102 (1)) therefore improves the position of the consumer co-debtor for security purposes. And para (5) goes beyond PECL Article 10:107 (1) since it allows the co-debtor to rely on the principal debtor's defence of set-off, although that defence had not yet been exercised and, as a personal defence under PECL Article 10:111 (1) sent. 1, cannot be exercised by the co-debtor. By making these defences available to a consumer co-debtor for security purposes, this consumer co-debtor improves its position and may enjoy the benefits to which a consumer is entitled under paras (4) and (5). This improvement is due to the reference to Chapter 2 which is contained in Article 4:102 (1).

23. Mandatory character of consumer protection rules. In all instances in which the provisions of Article 2:103 are applicable, these obtain a mandatory character in favour of the consumer by virtue of Article 4:102 (2).

National Notes

I. General Principle: Extension of Debtor's Defences to the Provider of Dependent Personal Security

1. A primary consequence of the accessority principle is that the liability of the provider of dependent personal security must not be higher than the debtor's (cf. also *supra* national notes to Art. 2:102). Hence, the defences that are personally available to the provider of dependent security are supplemented by the debtor's defences (AUSTRIA: Rummel/*Gamerith* § 1351 no. 6; BELGIUM: *Van Quickenborne* no. 673 ss.; ENGLAND: *O'Donovan and Phillips* no. 11-46; FRANCE: *Simler* no. 656 ss.; cf. GERMAN CC § 767 para 1 sent. 1 and § 768; cf. Palandt/*Sprau* § 768 no. 6; Staudinger/*Horn* § 768 no. 16; GREECE: *Theodoropoulos* 273; ITALY: CC art. 1945; LUXEMBOURG: *Ravarani*, Jurisprudence récente 915; NETHERLANDS: CC art. 7:852; PORTUGAL: CC art. 637 para 1; *Almeida Costa* 774; SCOTLAND: Stair/*Eden* no. 841; SPAIN: *Guilarte Zapatero*, Comentarios 340). The provider of dependent security may raise as against the creditor pleas of the debtor, even if the latter has desisted from raising these defences (GERMAN CC § 768 para 2; PORTUGAL: CC art. 637 para 2; *Almeida Costa* 774; BELGIUM: *Van Quickenborne* no. 674; FRANCE: *contra Simler* no. 231) after creation of the security (cf. GREEK CC art. 853; SPANISH CC art. 1853). However, frequently specific exceptions (*e.g.*, for the case of the debtor's incapacity, *infra* nos. 5-6) or modifications (for rights of avoidance, cf. *infra* nos. 16-19) are provided for.
2. In several countries, the debtor's defences that may be raised are specified by providing that the security provider is entitled to raise the defences that are "inherent" to the secured debt, excluding those that are personal to the debtor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2036 (since 2006: FRENCH CC art. 2313); DUTCH CC art. 7:852 para 1, cf. also *Blomkwist* nos. 17, 32; *du Perron and Haentjens* art. 852 no. 5; GREEK CC art. 853; SPANISH CC art. 1853). "Personal" are those defences of the debtor which are closely connected to its person and, thus, cannot be transferred actively or passively (see *infra* nos. 14-21). Furthermore, it has been held in GREECE that the provider of dependent security is entitled to raise the debtor's defences even if it has no right of recourse vis-à-vis the debtor or has waived the *beneficium discussionis* (cf. CA Athens 6902/1995, EllDik 37, 1398 s.; *Theodoropoulos* 273).The PORTUGUESE CC art. 637 para 1, on the other hand, uses as criterion the compatibility of the invocable defences with the guaranteeing obligation.

II. General Defences

A. Invalidity of the Secured Claim – cf. Para (1)

a. Principle

3. According to AUSTRIAN CC § 1351, BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2012 para 1 (since 2006: FRENCH CC art. 2289 para 1), GREEK CC art. 850, ITALIAN CC art. 1939, PORTUGUESE CC art. 632 para 1 and SPANISH CC art. 1824, a dependent security presupposes a valid principal debt. The same is true for ENGLISH and SCOTS law (cf. *Heald v. O'Connor* [1971] 1 WLR 497 (CFI); *Andrews and Millett* no. 6-019; *Swan v. Bank of Scotland* (1835) 10 Bligh NS 627 = 6 ER 231 (HL(Sc)) and for DUTCH law (*Pitlo-Croes* no. 851) and can be derived indirectly from GERMAN CC

§ 767. In GREECE the secured debt need not be valid at the time of the assumption of the dependent security, but must be so at the time at which the security provider is called to perform its obligation (cf. *Kaukas* 437 fn. 1; ErmAK/*Zepos* art. 850 no.3).

4. As everyone may invoke the "absolute" nullity of a contract, the provider of dependent security can invoke the nullity of the secured debt and therefore of its security (FRANCE: *Simler* no. 227; GREECE: cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 3; ITALY: *Fragali*, Della fideiussione 317; NETHERLANDS: nullity by law *(van rechtswege)*: *Du Perron and Haentjens* art. 852 no. 2; PORTUGAL: CC art. 632 para 1). In some countries, the provider of dependent security may invoke the nullity of the debt, even if it had been aware of this nullity at the time of the assumption of the dependent security (PORTUGAL: *Pires de Lima and Antunes Varela* 649, no exception), except regarding the debtor's lack of legal capacity (cf. *infra* nos. 5-6) and the nullity of the agreement due to excessive interest (GREECE: *Kaukas* 437; CFI Thessaloniki 399/59, Arm 13, 237). By contrast, in other countries, if the provider of dependent security already knew about the nullity of the secured obligation at the time of the security agreement, the security will be valid (SCOTLAND: Stair/*Eden* no. 838; SPAIN: *Carrasco Perera*, Fianza 202). In the latter case, the dependent security may have been assumed in GERMANY for the claim for unjust enrichment which may arise due to the invalidity of the secured obligation, if one party or both had already made performances (*Reinicke* and *Tiedtke*, Bürgschaftsrecht nos. 4 ss.).

b. Exception – Debtor's Incapacity – Para (3)

5. Exceptionally, in many European countries a dependent security is valid even if the debt is defective by reason of any incapacity or limited capacity of the debtor to act legally (especially if it is a minor, cf. AUSTRIAN CC § 1352; FRENCH, BELGIAN and LUXEMBOURGIAN CC arts. 2012 para 2 and 2036 para 2 (since 2006: FRENCH CC arts. 2289 para 2 and 2313 para 2) also BELGIUM: *T' Kint* no. 753, *Van Quickenborne* no. 746; ENGLISH Minors Contracts Act 1987 sec. 2; GREEK CC art. 850 para 2; ITALIAN CC art. 1939 *in fine*; PORTUGUESE CC art. 632 para 2 for incapacity and defective consent of the debtor causing a relative nullity, cf. *Galvão Telles* 279; SCOTLAND: cf. *Stevenson v. Adair* (1872) R 919 (CA); SPANISH CC art. 1824 para 2). In most countries, the provider of dependent security must have been aware at the assumption of the dependent security of the debtor's incapacity or limited capacity to contract (FRANCE: *Simler* no. 219; PORTUGUESE CC art. 632 para 2 *in fine*; SPAIN: *Reyes López* 170). In GREECE the creditor must prove the relevant knowledge of the security provider (cf. *Kaukas* 439; ErmAK/*Zepos* art. 850 no. 10; *Apostolides* art. 850 no. 5); negligent ignorance is not sufficient in this case (same references). Only in AUSTRIA it is provided expressly that a provider of dependent security is bound even if it is unaware of the lack of capacity (CC § 1352); however, this feature of the rule is generally criticised (Rummel/*Gamerith* § 1352 no. 4; Koziol and Welser II (*-Welser*) 139).

6. If a debtor company has acted *ultra vires*, the provider of dependent security (often a director) shall be personally liable (ENGLAND: *Yorkshire Railway Waggon Co v. Maclure* (1881) 19 Ch 478 (CA); it has been said, however, that the liability of the personal security provider should depend upon whether the security was intended to cover the risk of non-payment for the reason of legal incapacity of the debtor, cf. also *Garrard v. James* [1925] Ch 616 (CFI); Chitty/*Whittaker* no. 44-036; after abolition of the doctrine

of *ultra vires* by the Companies Act 1989 secs. 108. 109, 111 this problem is now of little relevance). In FRANCE some court decisions (Cass.civ. 27 April 1976, JCP G 1978, I, no. 2902 (79)) tried to assimilate incapacity to the lack of power (*e.g.* if dependent securities are granted by the manager of a legal person). But since 1980, this assimilation in regard to CC art. 2012 para 2 is no longer admitted (Cass.com. 25 Nov. 1980, JCP G 1981, IV, no. 56).

7. FRENCH and GERMAN courts have dealt with cases in which the debtor, a legal entity, was dissolved after assumption of the personal security. In a case where the assets of the dissolved company passed without liquidation to the sole shareholder, the FRENCH Supreme Court held that the dependent personal security remained valid for obligations that arose before the dissolution (Cass.com. 19 Nov. 2002, Bull.civ. 2002 IV no.175 p.200). More daring is a decision of the GERMAN Federal Supreme Court on a similar set of facts; however, the company had been liquidated and erased from the commercial register. A creditor's claim under a dependent personal security failed; but it did not fail due to the "death" of the debtor company but because the security provider was allowed to invoke the expiration of the period of prescription for the secured claim (BGH 28 Jan. 2003, BGHZ 153, 337, 339 ss., JZ 2003, 1068 with critical note *Tiedtke*; cf. also *supra* Art. 2:102 national notes no. 19).

B. *Unenforceability of the Secured Claim – cf. Para (1)*

8. The provider of dependent security may invoke the defence that the secured claim arose from gaming or betting and is therefore unenforceable (FRANCE: cf. CC art. 1965; *Simler* no. 215; GERMANY: Palandt/*Sprau* § 765 no. 28 with further references; GREECE: CC art. 844, cf. *Kaukas* 444; PORTUGAL: CC art. 1245). There is some authority in ENGLISH law that a provider of dependent security is in certain cases released from liability if the principal contract is unenforceable, *e.g.* for lack of compliance with statutory requirements (*Eldridge and Morris v. Taylor* [1931] 2 KB 416 (CA); *Temperance Loan Fund Ltd v. Rose* [1932] 2 KB 522 (CA): both cases concerning a failure to comply with the Moneylenders Act 1927). This, however, must not be understood as rendering unenforceable every dependent security which is provided for a principal obligation that is unenforceable (cf. *Andrews and Millett* no. 6-027). Rather, the decision has to be made on a case by case basis (*O'Donovan and Phillips* nos. 5-125 s.).

C. *Prescription of the Secured Claim*

9. The provider of dependent personal security may invoke the defence of prescription of the principal debt (AUSTRIA: Schwimann/*Mader and Faber* § 1351 no. 10; FRANCE: *Simler* nos. 689 ss.; GERMANY: Erman/*Herrmann* § 768 no. 4 with further references; see also *supra* no. 7 and the exception in BGH 21 Jan. 1993, BGHZ 121, 173; GREECE: A.P. 601/1985, EllDik 27, 77; ITALY: cf. CC art. 1945; *Fragali*, Della fideiussione 318; Cass. 15 March 2000 no. 2975, BBTC 2001 II 544; SCOTLAND: *Halyburtons v. Graham* (1735) Mor 2073 (CA); SPAIN: *Díez-Picazo* 455). This rule applies also if the prescription period has been completed after the creditor has initiated judicial proceedings against the provider of dependent security, because proceedings against the security provider do not interrupt prescription vis-à-vis the debtor (GERMANY: BGH 12 March 1980, BGHZ 96, 222, 225 ss.; CA Bamberg 14 Jan. 1998, MDR 1998, 796; GREECE:

Georgiades § 3 no. 133). The NETHERLANDS go one step further by declaring the dependent security to be extinguished if the prescription period for the secured claim has expired (CC art. 7:853). In GREECE, the provider of dependent security may exercise the general remedy of third party opposition (CCP art. 583 ss.) against a decision rendered in a trial between the creditor and the debtor, where the debtor did not raise the plea of prescription, and raise this plea itself (*Kaukas* 445). If however the provider of dependent security assumed the dependent security after prescription of the debt, even if the security provider did not know of the prescription (cf. CC art. 272 para 2 sent. 2), then it is not entitled to rely on that prescription (GREECE: *Georgiades* § 3 no. 134). If the claim against the provider of dependent security was declared valid by a final judgement and subsequently the prescription period of the secured debt expires, then the provider of dependent security may raise this defence with the remedy of opposition against the enforcement (cf. GREEK CCP art. 933; *Georgiades* § 3 no. 135).

10. In conformity with this principle, the creditor's demand for payment or the debtor's acknowledgement interrupts prescription also against the provider of dependent security (FRANCE, BELGIUM and LUXEMBOURG: CC art. 2250; BELGIUM: CA Brussels 8 May 1990, BankFin 1990, 463; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 262; GREECE: *Kaukas* 445). In PORTUGAL, however, this interruption does not affect the dependent security unless the creditor informs the provider of the dependent security about the interruption of the prescription of the secured debt. The prescription of the dependent security is considered interrupted by law at the time of this communication (CC art. 636 para 1). Suspension of prescription of the secured debt as well as its waiver do not affect the prescription of the dependent security (CC art. 636 para 2 and 3).

11. By contrast, in ENGLAND it has been held that the prescription of the principal obligation does not release the provider of dependent security from its liability (cf. *Carter v. White* (1884) 25 Ch 666 (CA)).

D. "Res Judicata"

12. The provider of dependent security may invoke the defence of *res judicata* based upon a final judgement for the defendant debtor in a proceeding brought by the creditor, if the decision dismissed the action of the creditor against the debtor as unfounded (GERMANY: cf. *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 535 with further references), unless it regards personal circumstances of the debtor, since these do not affect the liability of the security provider (BELGIUM: *T' Kint* nos. 748, 373; FRANCE: cf. *Simler* nos. 499 for subsidiary liability and no. 541 for solidary liability; GREECE: cf. CCP art. 328, A.P. 1264/1995, EllDik 38, 798; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 2; PORTUGAL: CC art. 635 para 1; SPAIN: *Guilarte Zapatero*, Comentarios 341). In GERMANY the provider of dependent security may rely upon a final judgment between creditor and debtor that is favourable for him, but it is not bound by a final judgment that is disfavourable (Erman/*Herrmann* § 767 no. 6 with further references). The same solution is held by ITALIAN legal writers (*Fragali*, Della fideiussione 318 s.; however, *Ravazzoni* 261 thinks that the security provider is bound also by a final judgment between the debtor and the creditor that is disfavourable for him).

E. Extinction of the Secured Claim

13. The provider of dependent security can raise the defence of extinction of the debt due to whatever reason, especially payment (cf. AUSTRIAN CC § 1363; FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1281 para 2 and art. 2038 (since 2006: FRENCH CC art. 2315); cf. also for BELGIUM: *Van Quickenborne* nos. 680-698 and 707-726; FRANCE: *Simler* nos. 661 ss.; LUXEMBOURG: *Ravarani*, Jurisprudence récente 913-915; ENGLISH and SCOTS law: *Andrews and Millett* no. 9-001, Stair/*Clark* no. 958; GERMAN CC § 767 para 1 sent. 1; GREEK CC art. 851; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 7; ITALIAN CC art. 1945; *Fragali*, Della fideiussione 317; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 1; PORTUGAL: CC art. 651; *Almeida Costa* 784). Under FRENCH, BELGIAN, LUXEMBOURGIAN and PORTUGUESE law, payment may be made by a third party (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 1236 para 2; PORTUGUESE CC art. 767), who will then be subrogated against the provider of the dependent security as well as against the debtor (FRENCH CC art. 1252; PORTUGUESE CC art. 593), except if the third party made this payment in its own interest (cf. FRENCH CC art. 1236 para 2; BELGIUM: *Van Quickenborne* no. 685; FRANCE: *Simler* no. 670). In PORTUGAL the subrogation depends either on the creditor's explicit declaration or on the debtor's explicit consent (CC art. 589, 590). However, a legal subrogation occurs if there is a direct interest of the third party (CC art. 592). If in GREECE a third party, which owns or possesses mortgaged property, provided as additional security, pays the secured debt, it shall be subrogated to the rights of the mortgagee-creditor and the dependent security remains valid, although the principal debt has become extinct by virtue of payment (GREEK CC art. 1298, cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 7). By contrast, under GERMAN law the payment of a third person extinguishes the obligation of the provider of a dependent security (Erman/*Kuckuk* § 267 no. 9).
14. In case of partial performance by the debtor, in some countries the dependent security remains valid for the remaining debt (AUSTRIA: CC § 1363 sent. 1 and Schwimann/*Mader and Faber* § 1363 no.1; GERMAN CC § 767 para 1 sent. 1 and Staudinger/*Horn* § 767 no. 10; BELGIUM: *Van Quickenborne* no. 688; FRANCE: *Simler* no. 673; GREECE: *Kaukas* 446). In BELGIUM, FRANCE and GREECE, a partial performance of the secured obligation shall in the first place be allocated to the non-secured part of the debt (BELGIUM: *Van Quickenborne* no. 689; FRANCE: *Simler* no. 674; GREECE: *Kaukas* 446).

III. Specific Defences

A. Right to Withhold Performance – Para (2)

15. In some European countries, the provider of dependent security can also invoke the debtor's right to withhold performance (defence of *non adimpleti contractus*) in order to force the creditor to furnish its own performance to the debtor (BELGIUM: *T' Kint* no. 749, *Van Quickenborne* no. 732; FRANCE: by analogy to CC art. 1653, *Simler* no. 730; GERMANY: Palandt/*Sprau* § 768 no. 6; GREECE: CC arts. 325 and 374, *Kaukas* 444 fn. 1a, 447; ErmAK/*Zepos* art. 853 no. 7; ITALY: cf. CC art. 1945; PORTUGAL: CC art. 637 para 1). DUTCH law comes to the same result, but by another route: if the debtor

rightfully withholds its performance, the surety provider has the same right (CC art. 7:852 para 3; *du Perron and Haentjens* art. 852 nos. 11-15).

16. The provider of dependent security may also invoke the defence that the debt cannot yet be claimed due to a condition or term set for performance (cf. DUTCH CC art. 7:852 (1); *du Perron and Haentjens* art. 852 no. 2(c), *Pitlo-Croes* no. 852, p. 353-354; BELGIUM: *Van Quickenborne* no. 322 *a fortiori*), unless this defence is considered as related to the person of the debtor (GREECE: *Kaukas* 444; ErmAK/*Zepos* art. 853 no. 11; ITALY: CC art. 1945, cf. also *Giusti* 209 s.).

B. Debtor's Rights of Avoidance – Para (4)

17. The situation seems more complicated if the secured debt is affected by a "relative" nullity which can only be invoked by the contracting parties or one of them. The debtor is then entitled to avoid the contract by invoking this relative nullity. The matter is of great importance, since in some countries the solution will also apply for all other rights of the debtor concerning the effectiveness of the debt, *i.e.* not only for avoidance, but also for other rights such as termination, which do not relate to a relative nullity. One must distinguish as to whether the debtor avoids the contract or whether the provider of dependent security can exercise the respective right:

a. Avoidance by Court Decision

18. If the contract is avoided by virtue of a court decision, then the dependent security as an accessory to the secured debt is also void *ab initio* and the security provider can raise the plea of *res judicata* against the creditor (BELGIUM: *Van Quickenborne* no. 729; FRANCE: *Simler* no. 229; GREECE: *Kaukas* 438; ErmAK/*Zepos* 850 no. 6; ITALY: *Fragali*, Della fideiussione 318; NETHERLANDS: (cf.) *du Perron and Haentjens* art. 852 no. 2e; PORTUGAL: *Almeida Costa* 774; SPAIN: cf. *Guilarte Zapatero*, Comentarios 427 s.). A corresponding rule applies if the contract is avoided by declaration (ENGLAND: *Andrews and Millet* no. 6-024; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 280).

b. Can the Provider of Dependent Security Avoid the Contract?

19. In some countries the provider of dependent security may itself avoid a contract affected by a relative nullity in which the secured obligation is rooted (BELGIUM: *T' Kint* nos. 748, 372; *Van Quickenborne* nos. 729-730; FRANCE: *Simler* no. 230; Cass.civ. 11 May 2005, Bull.civ. 2005 III no. 101 p. 94; ITALY: *Fragali*, Della fideiussione 317; PORTUGAL: CC art. 632 para 2; *Almeida Costa* 774; SPAIN: *Guilarte Zapatero*, Comentarios 340). By contrast, in many other countries the security provider is precluded from avoiding the contract (AUSTRIA: OGH 25 Feb. 2004, ÖJZ 2004, 677; ENGLAND: *Andrews and Millett* no. 6-024; GERMANY: *Reinicke* and *Tiedtke*, Bürgschaftsrecht no. 280; GREECE: cf. CC art. 154; *contra* ErmAK/*Zepos* art. 850 no. 6, 853 no. 5; NETHERLANDS: *Pitlo-Croes* no. 852, p. 355). Especially in GREECE and the NETHERLANDS, this negative solution applies to all rights of the debtor concerning the effectiveness of the debt (GREECE: *Filios* II/1 § 127 at p. 89; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 5). If the debtor ratifies the transaction as valid, the provider of dependent security is not deprived of the right to invoke itself the nullity of the secured

obligation (BELGIUM: *Van Quickenborne* nos. 738-741 and cited references; FRANCE: *contra Simler* no. 231).

20. In still other countries, where the provider of dependent security is not entitled to avoid the contract, it is at least entitled to withhold its performance as long as the debtor may avoid the contract (expressly GERMAN CC § 770 para 1; followed in AUSTRIA invoking the GERMAN provision, cf. Schwimann/*Mader and Faber* § 1351 no. 11 *sub* 1); Rummel/*Gamerith* § 1351 no. 6). When, however, in AUSTRIA and GERMANY the debtor has failed to invoke the defence and is precluded by a final decision from invoking it in future, then the provider of dependent security must perform (cf. AUSTRIA: OGH 27 April 1987, SZ 60 no. 69, p. 362 s.; GERMANY: cf. *Reinicke* and *Tiedtke*, Bürgschaftsrecht nos. 282 ss.). In the NETHERLANDS the provider of dependent security may grant the debtor a reasonable time to exercise the right of avoidance and it is entitled to suspend the performance of its own obligation during that period (CC art. 7:852 para 2; *du Perron and Haentjens* art. 852 nos. 2 and 7; *Pitlo-Croes* no. 852).

C. *Set-off – Para (5)*

21. Three solutions can be distinguished if both the debtor and the creditor are entitled to a set-off, but neither of them has exercised such a right. In some European countries the provider of dependent security may set off the debtor's counter-claim against the creditor, even if the security provider's liability is solidary, since set-off is not considered to be a personal defence of the debtor which the security provider cannot raise vis-à-vis the creditor, and even if it has no right of action and subrogation against the debtor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1294 para 1; BELGIUM: *Van Quickenborne* nos. 699-703; FRANCE: Cass.civ. 1 June 1983, D. 1984, 152, note *Aubert*; also *Simler* no. 686 ss.; ENGLAND: *Bechervaise v. Lewis* (1872) LR 7 CP 372 (CFI); *Murphy v. Glass* (1869) LR 2 PC 408 (PC); FINLAND: cf. LDepGuar § 27 para 2; RP 189/1998 rd 66 ss.; *Håstad* 3 s; GREECE: CC art. 447; cf. *Fragistas* 1371; *Georgiades* § 3 no. 129; SCOTLAND: Stair/*Eden* no. 843). Since in FRANCE the *Grimaldi* Commission proposes to suppress the distinction between personal defences and defences inherent in the debt (proposed new CC art. 2308 para 1), the right of the security provider to set-off the debtor's claims is indirectly confirmed.

22. In other countries, the provider of dependent security has the right to withhold performance, either indefinitely or as long as the possibility of set-off exists (expressly GERMAN CC § 770 para 2; ITALY: *Giusti* 208; PORTUGAL: CC art. 642 para 1; SPAIN: *Guilarte Zapatero*, Comentarios 283). In AUSTRIA opinions are divided, the majority denying the provider of dependent security a right of set-off (OGH 20 Dec. 1991, ÖBA 1992, 660; Schwimann/*Mader and Faber* § 1351 no. 11 *sub* 3) and most writers granting a right of retention (cf. Schwimann/*Mader and Faber* and Rummel/*Gamerith* § 1351 no. 6 *sub* c); *contra* OGH 20 Dec. 1991, *supra*); also in the NETHERLANDS (CC art. 8:150 para 3 *juncto* 6:139 para 1, 2; *du Perron and Haentjens* art. 852 nos. 5, 9).

23. In SWEDEN and DENMARK, however, the provider of dependent security remains fully liable in spite of the set-off situation because the security provider should not be able to "reject the claim because the debtor has other assets, such as a counter-claim" (SWEDEN: HD 7 July 1994, NJA 1994, 474; DENMARK: *Ussing*, Kaution 222 ss.).

IV. Conditions for Invoking these Defences

A. Solidary Liability

24. The right of the provider of dependent security to invoke the defences of the debtor exists, even if the security provider has waived the *beneficium discussionis* (see *infra* national notes on Art. 2:106 nos. 8 ss.) and its liability is solidary (BELGIUM: *Van Quickenborne* nos. 411, 214; GREECE: A.P. 148/1997, NoB 46, 1061). Although according to FRENCH CC art. 2021 (since 2006: FRENCH CC art. 2298) the rules on solidary debtors apply for the solidarily liable provider of dependent security, it is considered first to be a security provider and not a solidary co-debtor. So the defences of set-off and of relative nullity, which according to the broad interpretation given to FRENCH CC art. 1208 are not available to co-debtors, can also be raised by the provider of dependent security who is solidarily liable (FRANCE: *Simler* no. 220).

B. Waiver of Defences and Other Rights by the Debtor

25. If the debtor waives defences, in the narrow, technical sense of the word (cf. *infra* no. 26), the rule in BELGIUM, GERMANY, ITALY and PORTUGAL is that the provider of dependent security can still invoke all defences which are inherent to the secured debt (BELGIUM: T' *Kint* no. 751; *Van Quickenborne* no. 674; GERMANY: CC § 768 para 2; ITALY: *Fragali*, Della fideiussione 315, *Giusti* 206: the provider of dependent personal security acts *iure proprio* when invoking defences; PORTUGAL: CC art. 637 para 2; *Almeida Costa* 779), regardless of the time when the waiver took place. According to GREEK CC art. 853, however, if the debtor waives defences inherent to the debt *prior* to the assumption of the dependent security, then the security provider cannot invoke these defences, because they were not available to the debtor at the time of contracting, even if the security provider had no knowledge of this waiver when it assumed the dependent security (cf. Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 18). If, however, the waiver took place after the assumption of the dependent security, the security provider may invoke the defences originally available to the debtor, despite the waiver (cf. CC art. 853, *Georgiades* § 3 no. 139).

26. By contrast if the debtor waives a right of avoiding the underlying contract or of set-off with respect to the secured obligation, opinions between the member states differ. If the debtor has waived the right to declare a set-off against the creditor demanding performance, then in some countries the provider of dependent security can nevertheless declare a set-off instead of the debtor (BELGIUM: *Van Quickenborne* no. 700; FRANCE: cf. *Simler* no. 686; GREECE: *Georgiades* § 3 no.130, *contra Fragistas* 1372). By contrast, in other countries, these rights are no longer available to the security provider (ENGLAND: *Bechervaise v. Lewis* (1872) LR 7 CP 372 (CFI); *Andrews and Millett* no. 11-006; GERMANY: cf. CC § 770 para 1 (which is to be applied by analogy in the case of a right of set-off, cf. MünchKomm/*Habersack* § 770 no. 6; but the security provider may still rely on this defence as long as the *creditor* is entitled to set-off vis-à-vis the debtor, CC § 770 para 2); SCOTLAND: Stair/*Eden* no. 843).

C. *Waiver by Provider of Dependent Security*

27. The provider of dependent security may waive the right to invoke defences available to the debtor, since the principle of accessority is generally dispositive (BELGIUM: *Van Quickenborne* no. 676, *contra*: *T' Kint* no. 750; GREECE: cf. CC art. 853, CA Athens 635/1986, EllDik 27, 1476). In GREECE and in ITALY this waiver is a standard clause in the General Business Conditions of banks (GREECE: cf. *Kozyris* EEN 1972, 416 ss.; ITALY: *Giusti* 132 ss.). This right to waive defences is restricted, however, by the core of the accessority principle: any waiver of defences available to the debtor in the contract of dependent security may not alter the core of the accessory character of the dependent security, so that defences available to the debtor regarding the existence and validity of the debt cannot be waived by the provider of dependent security, without at the same time transforming the dependent security into another contract (*e.g.* an independent security, promise or acknowledgement or assumption of debt: BELGIUM: *T' Kint* no. 750; *Van Quickenborne* nos. 675-677; FRANCE: *Simler* no. 924; GERMANY: The Federal Supreme Court has recently held that a clause in general business conditions refusing the security provider a right to invoke set-off is at least invalid if the debtor's counter-claim is admited or has been confirmed by final judgment; however it may even be admitted if the debtor is by court decision precluded from invoking a set-off (BGH 16 Jan. 2003, BGHZ 153, 293, 299 s., 301 s.); cf. Erman/*Herrmann* § 768 no. 6; *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 293 ss. and 556 for standard contracts; GREECE: *Georgiades* § 3 no. 140; ITALY: Cass. 17 July 2002 no. 10400, Giust.civ.Mass. 2002, 1257; *Petti* 383 ss. and *Chinè*, I contratti di garanzia 309 ss. on the presumption of nullity of the clause waiving defences when the security provider is a consumer on the basis of ConsC art. 33 para 2, former CC art. 1469*bis* para 2; SPAIN: *Reyes López* 191).

28. Under DUTCH law, however, there may be no derogations to the detriment of the non-professional provider of dependent security from CC art. 7:852 on the possibility of the provider of dependent personal security to invoke the debtor's defences that relate to the existence, content and time of performance of the obligation of the debtor (CC art. 7:862 lit. a)).

V. *Consequences of Not Raising these Defences*

29. Cf. *infra* national notes to Art. 2:112 (2) and (3).

VI. *Defences Unavailable to the Provider of Dependent Security*

A. *Debtor's Personal Defences (cf. supra nos. 2 and 5-6)*

30. In ITALY and in GREECE the provider of dependent security may not invoke the defence arising from the personal agreement to release the debtor, concluded between the latter and the creditor (ITALY: *Fragali*, Della fideiussione 317; GREECE: CC art. 853; *Kaukas* 448; ErmAK/*Zepos* art. 853 no.16). Neither can in GREECE the security provider invoke the right of a donor (debtor) to refuse the performance of the donation if such performance would endanger either its own maintenance or any alimony it owes to another by virtue of law (cf. CC art. 501; Georgiades-Stathopoulos AK/*Vrellis* art. 853

no. 26) or the rescission of a donation made *ultra vires* (cf. CC art. 1836; Georgiades-Stathopoulos AK/*Vrellis* art. 853 no. 26).

B. *Defences Incompatible with the Securing Purpose of a Dependent Security*

31. In addition to the cases mentioned in the national notes to Art. 2:102 nos. 17-23, the following defences are not admitted: a limitation of liability which results from the acceptance of a succession on behalf of the debtor with the benefit of inventory (GREECE: cf. CC art. 1902; *Georgiades* § 3 no. 141; NETHERLANDS: *du Perron and Haentjens* art. 852 no. 5). According to PORTUGUESE CC art. 637 para 2 sent. 2, the provider of dependent security may not invoke those defences of the principal, which are "incompatible with the guaranteeing obligation".

C. *Defences from the Relationship between Provider of Dependent Security and Debtor*

32. Since the creditor is a third party who stands outside the relationship between provider of dependent security and debtor, defences arising from this latter relationship cannot be invoked against it (BELGIUM: *Van Quickenborne* no. 749; GREECE: CFI Pireus 1499/1968, EED 19, 629; ITALY: *Fragali*, Della fideiussione 317).

(Karpathakis/Hauck)

Article 2:104: Coverage of Security

(1) The security covers, within its maximum amount, if any, not only the principal obligation secured, but also the debtor's ancillary obligations towards the creditor, especially
  (a) contractual and default interest;
  (b) damages, a penalty or an agreed payment for non-performance by the debtor; and
  (c) the reasonable costs of extra-judicial recovery of those items.
(2) The costs of legal proceedings and enforcement proceedings against the debtor are covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.
(3) A global security (Article 1:101 lit. (f)) covers only obligations which originated in contracts between the debtor and the creditor.

Comments

A. Survey

1. Article 2:104 (1) and (2) set out those elements of a secured obligation which are, within the financial limits of the dependent security, covered by the latter. By contrast, para (3) excludes for a global security (cf. Article 1:101 (f)) coverage of certain "extraneous" items. Of course, the parties may deviate from any of these restrictions.

B. Principal, Ancillaries and Sums Due Upon Default

2. According to para (1) the dependent security primarily covers, apart from the principal, also contractual interest (lit. (a)) as ancillary obligation. In addition, the normal items that will arise if a debtor defaults will also be covered since a dependent security is designed to cover such consequential damage, unless otherwise agreed. The typical items are
- default interest (lit. (a)); and/or
- damages and/or an agreed sum of money or a penalty (where allowed) which fall due on the debtor's non-performance (lit. (b)); and
- reasonable extra-judicial costs of recovery of the preceding items (lit. (c)).

3. Two items, *scil.* contractual and default interest, are not qualified. Indeed, these items will be determined by fixed rates. These rates may be agreed upon by the parties or, if no agreement had been reached, by law. For default interest, PECL Article 9:508 (1) provides a specific rule: the rate of default interest is determined by the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due. Additional damages may be recovered (Article 9:508 (2)).

4. The same is true for any compensation which the debtor may owe to the creditor upon any non-performance of a contractual obligation. Such compensation may take the form of damages (cf. PECL Article 9:501 ss.) or payment of an agreed sum of money or, where allowed, a penalty.

5. By contrast, extra-judicial costs for recovery of the aforementioned items may only be demanded if they are "reasonable". Where fixed scales for such costs exist, these must be observed. In the absence of such scales, average costs for average efforts must be considered to be reasonable. In both cases, the fixed scales and the reasonableness of average costs must be determined according to the rules and customs prevailing at the place where the services are to be rendered.

C. Costs and Expenses of Legal Proceedings and Executions

6. According to para (2), also costs and expenses of legal proceedings and of judicial executions are covered. However, in this case it is necessary for the creditor to inform the security provider in due time, so that the latter is enabled to avert these expenses by performing the security.

D. Maximum Limit

7. It goes without saying that the aforementioned items of ancillaries in the broadest sense of the word, *i.e.* including all the items covered in preceding nos. 2-6, are secured only within the maximum limit of a security. If this limit is surpassed and the security provider makes full payment to the debtor, the following issue arises: to which parts of the secured obligation should this performance be attributed since the various elements of the secured debt may be subject to differing rules, especially with respecct to prescription. PECL Art. 7:109 (4) provides that a payment is to be appropriated, first to expenses, secondly, to interest, and thirdly, to the principal; however, the creditor may make a different appropriation. Of course, the parties can agree otherwise, *e.g.* by extending the security to cover fully (or partly) all or some of the aforementioned ancillaries.

E. Exclusions and Extensions

8. Items not mentioned in paras (1) and (2) and in the preceding comments are not covered by law. One example is a claim for repayment of a loan on the basis of unjust enrichment by the creditor if, for whatever reason, the secured obligation is void or avoided. Of course, the parties may agree otherwise, cf. Article 1:103. An agreement providing not only for the repayment of a loan according to the terms of the valid loan contract, but also that claims for repayment of any advances made if the loan contract is void shall be secured would not constitute a deviation detrimental to the security provider within the meaning of Article 4:102 (2), since this would rather constitute a definition of the subject matter of the contract of security. Generally, any type of principal obligation can be made the object of dependent security; this would include also restitutionary and other non-contractual obligations. Of course, it has to be ascertained in these situations whether the contractual security might also be affected by the factors resulting in the ineffectiveness of the loan contract.

F. Exclusion of Non-Personal and Non-Contractual Secured Obligations from Global Security

9. In order to limit the risks of global securities, para (3) provides that only contractual obligations directly incurred by the debtor towards the creditor are covered. This provision excludes, in particular, the coverage of claims against the debtor which have

been assigned to the creditor after the global security had been assumed. In addition, non-contractual claims are excluded from global security. Again, the parties are free to agree otherwise, cf. Article 1:103.

G. Consumer as Security Provider

10. Dependent personal security. If a consumer has assumed a dependent personal security, Article 2:104 becomes mandatory in favour of the security provider by virtue of Article 4:102 (2).

11. Other types of personal security. The provisions of Article 2:104 (1) and (2) are fully applicable to a consumer's independent personal security (cf. Article 4:106 (c)) and to a consumer's co-debtorship for security purposes (cf. Article 4:102 (1)). A slight qualification is necessary for the words "if any" in para (1) relating to the indication of a maximum amount of the security. According to Article 4:106 (a), the amount of a consumer security provider's security must always be limited, and the limitation, if the parties have not provided for it, is to be effected according to Article 2:102 (3). Therefore, in the present context the words "if any"are irrelevant.

12. By virtue of the references in Article 4:106 (c) and Article 4:102 (1), also paragraph (3) of Article 2:104 is applicable where a consumer assumes an independent personal security or a co-debtorship for security purposes. As in the case of a consumer provider of a dependent security, an agreement which according to its terms purports to cover all the debtor's obligations towards the creditor or the debit balance of a current account (cf. the definition of a global security in Article 1:101 (f)), is restricted to cover obligations which originated in contracts between the debtor and the creditor. An additional restriction in favour of consumer security providers follows from Article 4:106 (a), according to which global securities of consumers must have a maximum limit, which either has been agreed by the parties or has to be determined according to Articles 4:106 (a) *juncto* 2:102 (3).

13. In the present context, Article 2:104 is mandatory in favour of the consumer debtor, cf. Article 4:102 (2). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in Article 2:104 means the debtor whose obligation is secured.

National Notes

1. In all legal systems a dependent security covers, of course, the secured obligation. But there are some differences regarding the coverage of other claims of the creditor against the debtor.

I. Ancillary Obligations – General Rules

2. BELGIAN, FRENCH, LUXEMBOURGIAN and SPANISH law differentiate between definite and indefinite dependent securities. A dependent security is "indefinite" if only the principal obligation is mentioned in the contract of security, no other limitation (maximum amount) of the security being agreed. By contrast, a dependent security is definite if security provider and creditor have specifically agreed upon the extent of the security (see *e.g.* FRANCE: *Cabrillac/Mouly* 129; BELGIUM: *Van Quickenborne* nos. 257 ss.). An indefinite dependent security secures the principal obligation and all its ancillary obligations (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2016 para 1 (since 2006: FRENCH CC art. 2293 para 1) and SPANISH CC art. 1827 para 2).
3. FRENCH case law originally required for non-commercial dependent securities that the liability for ancillaries must be expressly mentioned in the dependent security provider's hand-written declaration in accordance with FRENCH CC art. 1326 (Cass.civ. 22 June 1983, Banque 1984, 860). The Commercial Chamber of the FRENCH Supreme Court (Cass.com. 16 March 1999, JCP G 1999, I no. 156 (1)), however, held that such a hand-written declaration is not necessary. Despite earlier decisions to the contrary (cf. Cass.-civ. 13 Oct. 1999, JCP G 2000, II no. 1037), the Civil Chamber of the Supreme Court has now accepted the view of the Commercial Chamber (Cass.civ. 29 Oct. 2002, JCP G 2002, II no. 10187, note *Legeais*), CC art. 1326 is no longer applied to the liability for ancillaries. The proposals of the *Grimaldi* Commission would confirm this case law (cf. the proposed CC art. 2300 (1)).
4. In FRENCH consumer legislation, on the other hand, stricter formal requirements were developed (cf. ConsC arts. L 313-7 and L 341-2, see *infra* national notes to Art. 4:105).
5. There are two general rules on ancillary obligations in GREECE: According to CC art. 852, in cases of doubt a provider of dependent security shall not be liable for contractually agreed ancillary obligations which were due and payable at the time the dependent security was provided; and for those contractually agreed ancillary obligations that become due and payable after the assumption he shall be liable only if he was aware of the existence of these obligations (cf. Georgiades-Stathopoulos AK/*Vrellis* art. 852 no. 1).
6. AUSTRIAN writers similarly distinguish between a limited and a full dependent security, only the latter covering also ancillaries. Dependent securities by banks, in favour of banks and generally among merchants are usually full dependent securities (Rummel/*Gamerith* § 1353 no. 5; Schwimann/*Mader and Faber* § 1353 no. 5).

II. Various Heads

A. Contractual Interest – Para (1) Lit. (a)

a. The Principle

i. Legal Systems with a Specific Rule

7. The most extensive rule concerning the coverage of contractual interest seems to be FINNISH LDepGuar § 4 para 1: a provider of dependent security is *ex lege* liable for contractual interest provided the provider of security and the creditor had not agreed otherwise (see also RP 189/1998 rd 35). The same is true for ITALY and PORTUGAL regarding all ancillaries (ITALIAN CC art. 1942; PORTUGUESE CC art. 634; *Almeida Costa* 770). In BELGIUM, FRANCE, LUXEMBOURG and SPAIN, an indefinite dependent security (*supra* no. 2) covers contractual interest of the secured obligation since contractual interest is regarded as an ancillary obligation (cf. BELGIUM: *Van Quickenborne* no. 263; FRANCE: art. 2016 para 1 (since 2006: CC art. 2293 para 1); *Piedelièvre*, Sûretés 26; LUXEMBOURG: *Ravarani*, Jurisprudence récente 901-902; SPAIN: *Guilarte Zapatero*, Comentarios 132). However, nowadays FRENCH CC art. 2016 para 1 (since 2006: CC art. 2293 para 1) is applied to definite dependent securities as well (Cass.com. 16 March 1999, JCP G 1999, I no. 156 (1)). This solution seems to be confirmed by the *Grimaldi* Commission's proposal of a new CC art. 2302, which determines the coverage of the security provider's liability, irrespective of the indefinite or definite character of the dependent securities.

ii. Legal Systems without a Specific Rule

8. In other legal systems there are no relevant statutory provisions. Consequently, the provider of dependent security is only liable for contractual interest if this is at least implicitly stipulated in the contract of security (DENMARK: *Pedersen*, Kaution 48 s.; ENGLAND: *Andrews and Millett* no. 6-010; GERMANY: *Reinicke* and *Tiedtke* no. 21; Palandt/*Sprau* § 765 no. 24; GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 852 no. 1; SWEDEN: *Walin*, Borgen 151 ss.). As far as there are formal requirements in these legal systems, they do not prevent such an extension of liability (cf. *infra* national notes to Art. 4:105). Since for purposes of interpretation especially the surrounding circumstances of the transaction are to be taken into account, contractual interest will often be secured despite the silence of the written agreement (DENMARK: *Pedersen*, Kaution 48 s.; ENGLAND: *Andrews and Millett* no. 6-010; *Fahey v. MSD Speirs Ltd* [1975] 1 NZLR 240 (PC)). In GERMANY and SCOTLAND, it is considered as sufficient that the provider of dependent security knows that the secured obligation bears interest (Erman/*Herrmann* § 765 no. 7 with further references; however critical Staudinger/*Horn* § 765 no. 40; cf. similarly for SCOTS law Stair/*Eden* no. 917). In AUSTRIA a full dependent security (*supra* no. 6) covers contractual interest (Rummel/*Gamerith* § 1353 no. 5). AUSTRIAN law establishes a restrictive rule for contractual interest that is overdue: the provider of dependent security is not liable for those portions of such interest which had already been due for some time when the creditor demanded payment from the security provider

(CC § 1353 sent. 2; cf. the prevailing interpretation of this provision by Schwimann/*Mader and Faber* § 1353 no. 2 and Rummel/*Gamerith* § 1353 no. 5).

b. Implications of Agreed Maximum Amount

9. In ENGLISH and SCOTS law an agreed maximum amount will usually be expressed to relate to the principal sum only and the provider of dependent security is then liable for interest on that sum, unless the maximum is expressed to include interest (ENGLAND: *Dow Banking Corpn v. Mahnakh Spinning and Weaving Corpn and Bank Mellat* [1983] 2 Lloyd's Rep 561 (CFI); SCOTLAND: Stair/*Eden* no. 917). On the other hand, the provider of dependent security is not liable for interest on parts of the secured debt exceeding the agreed maximum of its dependent security (ENGLAND: *Meek v. Wallis* (1872) 27 LT 650 (CFI); SCOTLAND: *Commercial Bank of Scotland Ltd v. Pattison's Trustees* (1891) 18 R (SC) 476 (1 Div)). Also in AUSTRIA and ITALY, an agreed maximum amount without further specification is understood as an absolute limit, excluding liability for any amount of interest surpassing the maximum (AUSTRIA: OGH 8 Jan. 1956, SZ 29 no. 5 p. 11; Schwimann/*Mader and Faber* § 1353 no. 10; ITALY: CFI Roma 5 June 2003, BBTC 2005 II 71). In GREECE again the declaration of the provider of dependent security must be interpreted restrictively since the maximum amount aims to provide a general limit of its liability (*Georgiades* § 3 no. 116 and § 4 no. 30).

10. In GERMANY it is disputed whether an agreed maximum amount covers the principal obligation only or contractually agreed interests as well (BGH 17 March 1994, WM 1994, 1064, 1068: no exclusion of interests; *contra*: *Reinicke/Tiedtke* no. 24). However, general business terms and conditions according to which an agreed maximum amount does not limit the security provider's obligation for contractual interests have been held invalid (BGH 18 July 2002, BGHZ 151, 375, 380 ss.). In BELGIUM, it is thought that, if the parties limit the dependent security to a maximum amount that is lower than the secured debt, the security provider will normally be liable for the ancillaries in the same proportion as he is liable for the secured debt. But parties can agree otherwise (*Van Quickenborne* no. 284).

B. Extra – Judicial Costs of Recovery – Para (1) Lit (c)

11. According to GERMAN CC § 767 para 2 and PORTUGUESE CC art. 634 the provider of dependent security is liable for the expenses of notice which must be paid by the principal debtor to the creditor; the same is true for BELGIUM, FRANCE, ITALY, LUXEMBOURG (CC art. 2016 para 1 (since 2006: FRENCH CC art. 2293 para 1); cf. BELGIUM: *Van Quickenborne* no. 264; FRANCE: *Simler* no. 299; ITALY: *Giusti* 155; LUXEMBOURG: *Ravarani*, Jurisprudence récente 901-902) and GREECE (ErmAK/*Zepos* art. 851 no. 6). By contrast, in SWEDEN the dependent security provider is *in dubio* not liable for the expenses of notice (*Walin*, Borgen 153 s.).

C. Other Ancillary Obligations

12. What has been said above about contractual interest is in GERMANY also true for commissions and costs (GERMANY: Palandt/*Sprau* § 765 no. 24; Staudinger/*Horn*

§ 765 no. 40). FINNISH LDepGuar § 4 para 1 extends the liability of the provider of dependent security to other extra costs if there is no other stipulation in the contract. The same is true in BELGIUM, FRANCE and LUXEMBOURG, since the dependent security covers according to CC art. 2016 (since 2006: FRENCH CC art. 2293) the principal debt and all its ancillaries (BELGIUM: *Van Quickenborne* no. 269; LUXEMBOURG, *Ravarani*, Jurisprudence récente 901; FRANCE: *Simler* no. 304).

D. Obligations due to Debtor's Fault or Default

a. Default Interests; Claims for Damages due to the Debtor's Fault – Para (1) Lit. (a)

13. In most European countries the provider of dependent security is, unless otherwise agreed in the contract of security, especially liable for default interests and for claims for damages due to non-performance of the secured obligation (BELGIUM: *Van Quickenborne* no. 266; ENGLAND: *Moschi v. Lep Air Services* [1973] AC 331 (HL) (this decision is also relied upon in SCOTLAND, cf. Stair/*Eden* no. 918); *Astilleros Espanoles SA v. Bank of America National Trust & Savings Assocn* [1995] 2 Lloyd's Rep 352 (CA); *Andrews and Millett* no. 6-030; FRANCE: ConsC arts. L 313-7 and L 341-2 for consumer securities; Cass.civ. 10 May 1988, Bull.civ. 1988 I no. 134 p. 93; *Simler* no. 300 ss.; GERMANY: BGH 17 May 1994, NJW 1994, 1790; Palandt/*Sprau* § 767 no. 2; Staudinger/*Horn* § 767 no. 25; GREECE: *Georgiades* § 3 no. 115; A.P. 1486/1997, listed in www.dsanet.gr; ITALY: cf. *Giusti* 154; LUXEMBOURG: *Ravarani*, Jurisprudence récente 902; NETHERLANDS: *Blomkwist* no. 19, p. 37; PORTUGUESE CC art. 634; SPAIN: *Guilarte Zapatero*, Comentarios 132). Especially in AUSTRIA, a provider of dependent security under a full dependent security (*supra* no. 6) is liable for default interest (Rummel/*Gamerith* § 1353 no. 5; Schwimman/*Mader and Faber* § 1353 no. 5), but not under a limited dependent security (cf. OGH 24 Sept. 1987, SZ 60 no. 185 at p. 276).
14. This principle applies also to all claims for damages in connection with the secured obligation that are based on an action of the debtor after conclusion of the contract of dependent security (GERMANY: BGH 14 July 1988, NJW 1989, 27; Staudinger/*Horn* § 767 no. 28; GREECE: A.P. 1486/1997, listed in www.dsanet.gr; Georgiades-Stathopoulos AK/*Vrellis* art. 851 no. 9; ITALY: *Giusti* 155; LUXEMBOURG: *Ravarani*, Jurisprudence récente 902; PORTUGAL: *Almeida Costa* 770), even after resolution or annulment of the contract (BELGIUM: *Van Quickenborne* no. 268; FRANCE: Cass.com. 2 Nov. 1994, JCP G 1995 I no. 3851 (13), note *Delebecque and Mouly*; *Simler* no. 303; NETHERLANDS: *Blomkwist* no. 19, p. 37). In GREECE the provider of dependent security is additionally liable for alterations of the principal obligation caused by fortuitous events or by force majeure, provided the debtor bears the respective risk (Georgiades-Stathopoulos AK/*Vrellis* art. 851 no. 9).
15. The legal situation is different in the SCANDINAVIAN countries and in the NETHERLANDS: In DENMARK the provider of dependent security is liable for claims for damages caused by the non-performance of the secured obligation (*Pedersen*, Kaution 49; CA Vestre Landsret 11 Jan. 1971, UfR 1971 A 337) but according to DANISH court practice not for default interest, unless this has been stated in the security agreement (H 18 Jan. 1982, UfR 1982 A 162; CA Vestre Landsret 4 Oct. 1973, UfR 1974 A 198; *Pedersen*, Kaution 49). The same is true for SWEDEN (*Walin*, Borgen 151 ss.). If the contract from which the secured debt arises is terminated owing to delay, a consumer

provider of dependent security is pursuant to the FINNISH LDepGuar § 25 entitled to pay according to the conditions that had prevailed had the debtor not been in delay (RP 189/1998 rd 63).

16. In the NETHERLANDS, the provider of dependent security owes *legal* interests only over the period that it itself is in default, unless the obligation of the debtor arises from a tort or non-performance (CC art. 7:856). There may be no derogations from this rule to the detriment of the non-professional provider of dependent security (CC art. 7:862 lit. a)). Interest and cost owed according to art. 8:856 can be claimed irrespective of the expressed maximum (art. CC 7:858).

b. Penalty for Non-Performance of Contract – Para (1) Lit. (b)

17. In BELGIUM, GERMANY, GREECE, ITALY, LUXEMBOURG and the NETHERLANDS a penalty for non-performance of contract is only covered if this has been stipulated in the contract of dependent security (BELGIUM: CA Brussels 20 Jan. 1982, RW 1982-83, 2397; CFI Brussels 27 Sept. 1971, B.R.H. 1972, 2; *Van Quickenborne* no. 266; GERMANY: BGH 7 June 1982, NJW 1982, 2305; BGH 15 March 1990, WM 1990, 841; GREECE: *Georgiades* § 3 no. 115; ITALY: Cass. 30 May 1963, no. 1468, Giur.it.Mass. 1963, 502; *Giusti* 154; LUXEMBOURG: CA Luxembourg 9 Nov. 1993, Pas luxemb XXIX (1993-95) Jur. 293; *Ravarani*, Jurisprudence récente 902; NETHERLANDS: *Blomkwist* no. 19); in deciding whether this is the case, the principles of interpretation are to be applied (GERMANY: cf. Staudinger/*Horn* § 765 no. 40 and Erman/*Herrmann* § 765 no. 7).

18. In AUSTRIA, under a full dependent security (*supra* no. 6), there is liability also for penalties (Rummel/*Gamerith* § 1353 no. 5; differentiated Schwimann/*Mader and Faber* § 1353 no. 5). In FRANCE since the leading case of October 2002 (Cass.civ. 29 Oct. 2002, JCP G 2002, II no. 10187, note *Legeais*) the Civil and Commercial (cf. Cass.com. 6 Feb. 2001, Bull.civ. 2001 IV no. 29 p. 27) Chambers of the Supreme Court consider the penalty clause as automatically covered by the ancillaries designated by CC art. 2016 para 1 – since 2006: CC art. 2293 para 1 – (Larroumet/*François* no. 161). It seems that in PORTUGUESE and SPANISH law a penalty for non-performance is to be borne by the provider of dependent security as ancillary obligation (PORTUGAL: CC art. 634; *Almeida Costa* 770; SPAIN: CC art. 1827 para 2; *Guilarte Zapatero*, Comentarios 133).

E. Costs and Expenses of Legal and Enforcement Proceedings – Para (2)

19. According to GERMAN CC § 767 para 2, ITALIAN CC art. 1942, PORTUGUESE CC art. 634 and GREEK literature the provider of dependent security is, apart from the expenses of notice (see *supra* no. 11), liable for the expenses of legal action which are owed by the debtor to the creditor. This liability exists regardless of whether the dependent security is solidary or subsidiary and especially does not depend upon any default of the debtor. The provider of dependent security is obliged to pay not only costs that have arisen in a formal proceeding but all costs for recovery owed by the debtor (GERMANY: Staudinger/*Horn* § 767 nos. 33 s.; GREECE: *Georgiades* § 3 no. 115), unless liability is excluded in the contract of dependent security. For a full dependent security (*supra* no. 6), AUSTRIAN law comes to the same results (Rummel/*Gamerith* § 1353 no. 5; Schwimann/*Mader and Faber* § 1353 no. 5).

20. By contrast, in ENGLISH, FRENCH, BELGIAN and LUXEMBOURGIAN, DUTCH and SCOTS law a provider of dependent security is only liable for the costs of a fruitless action against the debtor if the creditor has given notice to the security provider of his intention to sue the debtor (ENGLAND: *Baker v. Garrat* (1825) 3 Bing 56 = 130 ER 434 (CFI); *Colvin v. Buckle* (1841) 8 M&W 680 = 151 ER 1212 (CFI); FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2016 (since 2006: FRENCH CC art. 2293 para 1); FRANCE: CA Pau 9 Febr. 1905, S. 1905, 2, 76; BELGIUM: *Van Quickenborne* no. 264; NETHERLANDS: CC art. 7:856 para 2; SCOTLAND: *Fraser v. Andrew* (1831) 9 S 345 (CA); *Collier v. Beath* (1836) 15 S 195 (CA)). In ENGLAND and SCOTLAND it is further taken into consideration whether upon the true construction of the terms of the security agreement, expenses may fall within the object of the dependent security (ENGLAND: *O'Donovan and Phillips* no. 5-59; SCOTLAND: *Grant v. Fenton* (1853) 15 D 424 (CA)) and whether the expenses incurred were reasonable (SCOTLAND: *Struthers v. Dykes* (1847) 9 D 1437 (CA); Stair/*Eden* no. 916). Similarly, according to SPANISH CC art. 1827 para 2 in cases of indefinite dependent securities those costs of suit are covered which arose after the creditor had demanded payment from the provider of dependent security.

21. According to DANISH law the provider of dependent security is not liable for the procedural costs, unless this has been stated in the dependent security (*Pedersen*, Kaution 49).

F. Claims for Repayment in Case of Nullity of Underlying Contract

22. Express extensions of a dependent personal security to claims for repayment of the capital, if the underlying contract providing for the payment is void, are, generally speaking, recognized (GERMANY: if not expressly agreed, an interpretation of the contract terms is necessary: Staudinger/*Horn* § 765 nos. 82-85 with references; ITALY: in banking practice, such clauses are widely used and valid, if individually negotiated: CA Torino 27 Oct. 1998, BBTC 2001 II 87; CFI Milano 25 May 2000, *ibid.* 88; cf. also national notes on Art. 4:102 no. 4). Whether such extensions can validly be fixed by general conditions, is not free from doubt. In ITALY, a corresponding clause in the model contract drafted by the Italian Bank Association was declared to be void – however, on the basis of a violation of antitrust law (decision of the Bank of Italy no. 55 of 5 May 2005, Bolletino no. 17 of 16 May 2005 p. 97 ss). The GERMAN Federal Supreme Court held a corresponding clause to be compatible with the statutory regime on general clauses (BGH 21 Nov. 1991, NJW 1992, 1234, 1235; approving Staudinger/*Horn* § 765 nos. 87 s.; more differentiating *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 4-12).

23. FRENCH courts have repeatedly held that, even if the credit contract as such is void, the debtor's contractual duty of returning the payment received "survives" the contract; therefore, in that respect also the dependent personal security survives (Cass.com. 2 Nov. 1994, JCP G 1995 I 3851 no. 13 with note *Delebecque and Mouly*; Cass.com. 4 Feb. 1986, JCP G 1986 IV 100).

III. Global Security – Para (3)

A. Liability of a Provider of Dependent Security under a Global Security

24. See *supra* national notes to Art. 1:101 nos. 42-46.

B. Proof of the Secured Claim

25. It has been held in GERMANY and in GREECE that the acknowledgement of the outstanding balance on behalf of the debtor also binds the provider of dependent security: the creditor may rely upon the non-causal acknowledgement of the balance and does not have to assert and prove each account entry, which, along with others, is contained in the outstanding balance (GERMANY: BGH 18 Dec. 2001, ZIP 2002, 297 ss., 298; GREECE: A.P. 1264/1994, EllDik 37, 316; *Chrysanthis* 299). Regardless of such an acknowledgement, the creditor may assert and prove its account claim by asserting and proving all account entries which led to the outstanding balance (GERMANY: BGH 18 Dec. 2001, ZIP 2002, 297 ss., 298; GREECE: A.P. 46/1984, NoB 33, 232; *Kondylis* 39 fn. 103).

(Seidel/Hauck)

Article 2:105: Solidary Liability of Security Provider

Unless otherwise agreed (Article 2:106), the liability of the debtor and the security provider is solidary and, accordingly, the creditor has the choice of claiming solidary performance from the debtor or, within the limits of the security, from the security provider.

Comments

1. Introduction. Articles 2:105 and 2:106 deal with the two basic types of liability of a dependent security provider, which is either solidary (Article 2:105) or subsidiary (Article 2:106).

A. The Principle: Solidary Liability

2. Article 2:105 expresses the basic form of the security provider's liability under these Rules, which is solidary. The term "solidary" which corresponds to "joint and several" in ENGLISH law, is in keeping with the terminology chosen in PECL Chapter 10 Section 1,

especially in Articles 10:101 (1) and 10:102. The creditor may choose to claim full performance from the debtor or the security provider. The creditor may also divide his request and claim one part from the one and the other part from the other person. Technically, in some countries this may not be solidary liability, since the legal bases of the two claims differ; but the effect is comparable in some respects.

3. Solidary liability is established by most modern legislation and has always prevailed in commercial relations. Where older laws provide for the security provider's subsidiary liability, in practice this is usually replaced contractually by solidary liability.

B. Security on First Demand

4. If a suretyship is due on first demand it is a security with solidary liability. Typically, it will be an independent personal security, cf. Article 3:103, unless the parties have expressly designated it as a dependent personal security. However, any first demand security which has been assumed by a consumer, is considered as creating a dependent security, provided the requirements of the latter are met, cf. Article 4:106 (c).

C. Consumer as Security Provider

5. While for ordinary dependent security solidary liability of the security provider is the rule and subsidiary liability the exception, by virtue of Article 4:106 (b) this relationship is reversed for a consumer's dependent security: the latter's liability as a rule is subsidiary; however, the parties may expressly agree otherwise. This reversal is intended to grant better protection to the consumer who assumes a dependent personal security. The details of this subsidiary liability are laid down in Article 2:106.

6. The rule mentioned in preceding no. 5 applies to both a consumer's assumption of an independent personal security (cf. Article 4:106 (c)) as well as to a consumer's co-debtorship for security purposes (cf. Art. 4:102 (1)).

7. Contrary to the general rule of Article 4:102 (2), the basic principle of subsidiary liability may be deviated from by express agreement of the parties. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor whose obligation is secured.

National Notes

I. Solidary Liability as the General Rule

1. According to ITALIAN law, the security provider is solidarily liable with the debtor (CC art. 1944 para 1; *Calderale*, Fideiussione 33 ss.), whereas there had been subsidiary liability under the old CC of 1865 art. 1907. The meaning of solidarity is vividly discussed (see *Giusti* 45 ss.). According to the majority of legal authors as well as the Supreme Court, solidarity of the security means that several persons are liable for the same obligation, so that every one of them can be compelled to render the full performance and the performance by one discharges all others (Cass. 15 Dec. 1970 no. 2683, Giust.civ. 1971 I 569; *Giusti* 50). The securing obligation is due and payable together with the secured debt and the creditor can demand payment from the debtor and/or the security provider, as he wishes. The special features of the solidary security distinguish it from the obligation *in solido*; therefore, not all rules of the latter can be applied to solidary security (*Busnelli* 39 ss.; *di Majo*, Obbligazioni solidali 306 ss.; *Casella* 266 ss.; *Giusti* 50). Solidary liability of security provider and debtor is also the rule in both ENGLISH and SCOTS law: Although the liability under a security in ENGLISH law is contingent on the debtor's default, the creditor is regularly not obliged to take any steps against the debtor before turning to the security provider (*China and South Seas Bank v. Tan* [1990] 1 AC 536 (PC); *Moschi v. Lep Air Services Ltd* [1973] AC 331 (HL)): Contrary to the Roman-based systems, the *beneficium discussionis* (see national notes on Art. 2:106) was never adopted in ENGLISH law (*Andrews and Millett* no. 11-002). In general, the security provider's liability arises once the debtor defaults in the performance of the secured obligation (*Andrews and Millett* no. 7-002; *O'Donovan and Phillips* no. 10-07). A right to compel the creditor first to take steps against the debtor does not even exist in equity (see *Ewart v. Latta* (1865) 37 Sc Jur 418 = 1865 SC 36 (HL (Sc)); this decision in a SCOTTISH case is of highest authority in ENGLAND, too). The situation is similar in IRELAND (*White* 541).
2. SCOTS common law, which is based on Roman law, knew the *beneficium discussionis*. This was abolished by the Mercantile Law Amendment Act (Scotland) 1856 sec. 8 in respect of securities for money debts. The *beneficium discussionis* is still recognized where the secured obligation is one *ad factum praestandum*, *i.e.* if the principal is obliged to perform a certain act. It suffices, however, that the creditor fruitlessly attempts to obtain satisfaction from the debtor; execution against the debtor's estate is not required (Stair/*Clark* nos. 923-926).
3. In the NETHERLANDS, one writer holds a very broad view of solidarity by thinking that solidarity and subsidiarity do not exclude each other; in his view a "subsidiary solidarity" is possible and he regards the dependent personal security as a statutory example for this (*Van Boom* 25-29). However, this is a minority view (cf. *infra* national notes to Art. 2:106 no. 8)

II. Solidary Liability for Commercial Providers of Security

4. AUSTRIAN, GERMAN as well as FRENCH, BELGIAN and LUXEMBOURGIAN and PORTUGUESE law distinguish between commercial and non-commercial providers of dependent personal security. A dependent personal security assumed by a merchant in the exercise of its business is solidary (AUSTRIAN and GERMAN Ccom § 349 *juncto* § 343). It is presumed that any legal act of a merchant is made in the exercise of its

business (GERMAN Ccom § 344). In AUSTRIA suretyships of merchants incurred after the end of 2006 will create a merely subsidiary liability (Law amending commercial law of 27 Oct. 2005 art. I no. 132 abrogates present Ccom § 349 as of 1 Jan. 2007). In FRANCE and LUXEMBOURG the dependent security has a commercial character if the secured debt is of a commercial nature; this follows from the principle of accessority. In addition, a personal interest of the security provider in the secured debt of a commercial nature is required (FRANCE: *Simler* no. 98; LUXEMBOURG: CA Luxembourg 26 June 1985, Pas luxemb XXVI (1984-86) Jur. 352), contrary to BELGIUM (cf. *T'Kint* no. 738). In FRANCE and BELGIUM the presumption of solidary liability which is in general available for commercial debts applies also to a commercial security (FRANCE: since Cass.com. 28 April 1966, Bull.civ. 1966 III no. 209 p. 187; *Simler* no. 364; BELGIUM: since Cass.com. 25 April 1985, Pas belge 1985 I 1044). In PORTUGAL the security provider does not have to be a merchant, the commercial character of the obligation being sufficient (Ccom art. 101). In SPAIN, although there is no relevant legal provision, the Supreme Court has in various decisions assumed solidary liability for commercial providers of security (TS 4 Dec. 1950, RAJ 1951 no. 227; TS 14 Feb. 1997, RAJ 1997 no. 1419 commented by *Marimón Durá*, 2065 ss.). But since there are also Supreme Court decisions to the contrary (TS 5 March 1990, RAJ 1990 no. 1665), the solidary nature of commercial securities cannot be regarded as settled in SPAIN.

III. Subsidiary Liability by Agreement

5. In the aforementioned countries the parties are free to agree that the provider of dependent security be charged only with subsidiary liability. This is expressly stated by ITALIAN CC art. 1944 para 2 (cf. also *Ravazzoni* 262). The same is also true in ENGLAND and SCOTLAND (ENGLAND: *Holl v. Hadley* (1828) 5 Bing 54 = 130 ER 980 (CFI); SCOTLAND: Mercantile Law Amendment Act (Scotland) 1856 sec. 8 at the end: "Provided always that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound before proceeding against him to discuss and do diligence against the principal debtor.").

IV. Subsidiary Liability as the Rule

6. By contrast, in many other countries the security provider's liability is, as a rule, subsidiary to the liability of the principal debtor and solidary liability must be agreed upon or, as an exception, prescribed by law (see *infra* national notes to Art. 2:106).

(Dr. Poulsen)

Article 2:106: Subsidiary Liability of Security Provider

(1) If so agreed, the security provider may invoke as against the creditor the subsidiary character of its liability. A binding comfort letter is presumed to establish only subsidiary liability.

(2) Subject to paragraph (3), before demanding performance from the security provider, the creditor must have undertaken appropriate attempts to obtain satisfaction from the debtor and other security providers, if any, securing the same obligation under a personal or proprietary security establishing solidary liability.
(3) The creditor is not required to attempt to obtain satisfaction from the debtor and any other security provider according to the preceding paragraph if and in so far as it is obviously impossible or exceedingly difficult to obtain satisfaction from the person concerned. This exception applies, in particular, if and in so far as an insolvency or equivalent proceeding has been opened against the person concerned or opening of such a proceeding has failed due to insufficient assets, unless a proprietary security provided by that person and for the same obligation is available.

Comments

A. Subsidiary Liability as Exception – Para (1)

1. Since according to Article 2:105 solidary liability of a provider of dependent security is the rule, subsidiary liability requires an agreement of the parties. In case of doubt the security provider has to prove that its liability is merely subsidiary. Exceptionally, according to Article 4:106 (b) a personal security given by a consumer (Article 1:101 (g)) is always subsidiary.

2. Binding comfort letter. A binding comfort letter is "presumed" to create only subsidiary liability. This presumption is derived from the fact that the author of such a letter does not assume a direct liability to make payment to the creditor; rather, typically it merely promises to see to it that the debtor has sufficient funds to satisfy its obligations towards the beneficiary(ies) of the letter. If it fails to keep this promise, it is merely liable in damages to the creditor. Of course, the presumption of a merely subsidiary liability of the patron can be disproved by the creditor.

B. Effects of Subsidiary Liability – Para (2)

3. The effect of subsidiary liability as intended by these Rules is defined by Article 2:106 (2). In the case of subsidiary liability, the security provider is protected against too early an imposition of liability towards the creditor. Before being allowed to turn against the security provider, the creditor is required to have undertaken appropriate attempts to obtain satisfaction from several other possible sources. It is important to note that the subsidiary nature of a security provider's liability does not only protect it against a pri-

mary demand for performance under the security by the creditor. Rather, subsidiary liability gives also provisional protection against attempts by other security providers who have assumed solidary liability, to hold the security provider with subsidiary liability internally liable on recourse (cf. Article 1:108 (3) second alternative).

4. The appropriate attempts to obtain satisfaction which have to be undertaken by the creditor (or another security provider who might seek internal recourse) before claiming from a security provider with only subsidiary liability consist of the following requirements:

5. Firstly, the creditor must have tried to obtain satisfaction from the debtor. Only after having attempted an execution against the debtor the creditor may turn against the security provider for any obligation of the debtor which is still outstanding. Especially if the debtor has provided a proprietary security right, the creditor must attempt to satisfy the debt from this source.

6. Secondly, the creditor must have tried to enforce any personal or proprietary security rights granted by third parties for the same obligation which are not subsidiary. If another security provider has assumed solidary liability this shows its willingness to answer any demand for payment even though the creditor could well turn *e.g.* against the debtor. It is appropriate that a security provider who has assumed only a subsidiary liability should have to pay only if satisfaction cannot be obtained from a security provider of the "first rank".

C. Exceptions – Para (3)

7. In certain situations, a security provider who is only subsidiarily liable, is nevertheless not entitled to refuse performance to the creditor under the security even though the creditor has not undertaken all or some of the appropriate attempts to obtain satisfaction required under para (2).

8. One self-evident case presents itself where all personal and/or proprietary securities are only subsidiarily liable. Provided that he has undertaken appropriate attempts to obtain satisfaction from the debtor, the creditor is free in its choice to claim performance from any of the security providers since their liability towards the creditor is solidary (Article 1:107 (1)).

9. Other cases, in which it would be pointless to demand that the creditor first undertakes attempts to obtain satisfaction from the debtor or other security providers as required under para (2) before claiming from the security provider with only subsidiary liability are dealt with in para (3). This provision applies where it is obviously impossible or exceedingly difficult to obtain satisfaction from the debtor or other security providers who are solidarily or subsidiarily liable. In such a situation, a waste of time and money by the creditor must be avoided.

10. The most important example of a situation where it is obviously impossible or exceedingly difficult to obtain satisfaction from other persons is given in the second sentence of para (3): insolvency or equivalent proceedings have been opened against the debtor or any other security provider or opening of such a proceeding has failed due to insufficient assets. The mere chance to obtain some quota from the insolvent person's estate does not suffice since such quotas are, generally speaking, low or very low. The creditor may not be referred to such chances since full performance of its claim in the near future to which it is entitled is virtually excluded. And security is meant to prevent just such a result.

11. However, even if insolvency proceedings have been opened, the creditor still has chances of obtaining satisfaction from the insolvent person, if that person had provided proprietary security rights for the creditor; therefore the second sentence of para (3) provides for a counter-exception, where the creditor is not relieved from the requirements of para (2).

12. Other situations falling under para (3) first sentence not expressly mentioned could be cases where the asset which is subject to a proprietary security right is located outside the country of the debtor's (or any other security provider's) residence in a country outside the European Union and enforcement or execution would be difficult and/or time-consuming. Economic equivalents would be cases where the value of the encumbered asset has depreciated and/or where it is clearly inadequate to satisfy the creditor's claim or if the encumbered asset is obviously worthless.

D. Default Security

13. Especially in commercial practice, performance by one security provider is frequently supported by a default security. This is furnished by a second security provider (often one residing in the creditor's country) which is assumed towards the creditor and can be utilised by the latter if the first security provider is unable or unwilling to perform. In this setting, the default security is subsidiary since it may only be invoked if the creditor's attempt to obtain satisfaction from the first security provider has failed.

E. Consumer as Security Provider

14. Contrary to the approach to ordinary dependent security (cf. Articles 2:105 to 2:106) a consumer who assumes a dependent personal security is as a rule liable only subsidiarily; cf. Article 4.106 (b) and also *supra* Comment C to Article 2:105.

15. The rule set out in preceding no. 14 also applies to a consumer who purports to provide an independent security (cf. Article 4:106 (c)) as well as to a consumer who has assumed a co-debtorship for security purposes (cf. Article 4:102 (1)).

16. Contrary to the general rule of Article 4:102 (2), the basic principle of subsidiary liability may be deviated from by express agreement of the parties (cf. Article 4:106 (b)).

And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" means the debtor whose obligation is secured.

National Notes

I. Subsidiary Liability of Security Provider as General Rule

1. In most CONTINENTAL and SCANDINAVIAN member states a dependent personal security establishes without agreement merely a subsidiary liability for the security provider (AUSTRIAN CC § 1355, 1351 para 1 sent. 2; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2011 (since 2006: FRENCH CC art. 2288); FRANCE: *Simler* no. 501 ss.; DENMARK: *Pedersen*, Kaution 32 ss.; *Ussing*, Kaution 78; DUTCH CC art. 7:855 para 1; FINNISH LDepGuar § 3 para 1; RP 189/1998 rd 33; GERMAN CC § 771; GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC art. 1822 para 1; SWEDISH Ccom chap. 10 § 9). In most member states the liability of a security provider who assumes liability for another security provider (collateral or default-security) is also subsidiary (DENMARK: *Pedersen*, Kaution 40 s.; FINLAND: *Nehrman* 355; *Ekström* 27; FRANCE: *Simler* no. 504; GERMANY: Erman/*Herrmann* no. 15 preceding § 765; GREECE: *Georgiades* § 4 nos. 10 s.; ITALY: CC art. 1948; *Bozzi,* La fideiussione 258; SPAIN: CC art. 1836; *Díez-Picazo* 460). This is true equally for BELGIAN, LUXEMBOURGIAN and DUTCH law where the security to secure another security is dealt with as any other security. PORTUGUESE CC art. 643 establishes a two level subsidiary liability of the security provider "*subfiador*" securing another security provider. By contrast, in commercial matters, solidarity is the rule and subsidiarity the exception (cf. *supra* national notes to Art. 2:105 no. 4).

II. Solidary Liability by Agreement

2. In most member countries, the principle of subsidiary liability is in reality very frequently derogated from by the parties.
3. Some countries expressly provide for the possibility of party agreement (AUSTRIAN CC § 1357; FINNISH LDepGuar § 3 para 1; BELGIUM and FRANCE: CC art. 2021 (since 2006: FRENCH CC art. 2298); GERMAN CC § 773 para 1 no. 1; GREEK CC art. 857 lit. a) *juncto* art. 855; *Georgiades* § 3 no. 144; PORTUGUESE CC art. 640 lit. a); SPANISH CC art. 1822 para 2, 1831 no. 1).
4. In these and other countries, very frequently the parties make use of the possibility to agree on solidary liability (AUSTRIA: Schwimann/*Mader and Faber* § 1357 no. 1; SPAIN: *Lacruz Berdejo* 534; *Guilarte Zapatero*, Comentarios 30 ss.; TS 5 Dec. 1991, RAJ 1991 no. 8917 (the most frequent form of dependent personal security in both coun-

tries). This is also true for DANISH law, at least for commercial relationships (*Pedersen*, Kaution 34). On the meaning of solidary liability, cf. *supra* national notes to Art. 2:105.

5. In GERMANY general conditions and terms for dependent personal securities very often provide for solidary liability of the security provider. However, the security provider is protected insofar as the exclusion of subsidiary liability must be in writing and signed by the security provider (CC § 766; BGH 25 Sept. 1968, NJW 1968, 2332), except if the latter is a merchant (cf. Ccom § 350).

6. Although the presumption in SWEDISH legislation (Ccom chap. 10 § 9) is for a subsidiary liability, even when the security provider is a commercial party, the creditor practically always provides for primary liability, also in relation to private persons assuming securities (*contra Walin*, Borgen 29). In BELGIUM, FRANCE and LUXEMBOURG, the subsidiary liability, although an important feature of dependent personal securities is of little practical importance nowadays as parties mostly agree to establish solidary liability for the security provider (BELGIUM: *Van Quickenborne* no. 404; FRANCE: *Simler* no. 512). This solidary liability cannot be presumed (CC art. 1202 para 1). In FRANCE the presumption of solidary liability for commercial debts is applied also to commercial securities since 1966 (Cass.com. 28 April 1966, Bull.civ. 1966 III no. 209 p. 187).

III. Subsidiary Liability – Details

A. Requirements

a. Differing Requirements

7. Subsidiary liability has different meanings in the various countries. One may distinguish between a slight and a strict form of subsidiarity.

b. Slight Subsidiarity

8. In AUSTRIA, the NETHERLANDS and in SCOTLAND for a specific form of security a slight form of subsidiarity applies. The creditor has first to turn to the debtor and demand performance from it (AUSTRIAN CC § 1355; DUTCH CC art. 7:855 para 1; SCOTLAND, cf. *supra* national notes to Art. 2:105 no. 1 ss.), but need not do more than that. In AUSTRIA it is expressly provided that the parties may deviate from this rule also in favour of the provider of dependent security: they may agree upon a "strict" form of subsidiarity (CC § 1356). The same is true in the NETHERLANDS, except if the security provider is a consumer (cf. CC art. 7:862 lit a)). According to DUTCH CC art. 7:855 para 1, the security provider need not perform until the debtor has violated its duty of performance. Therefore the creditor must first demand performance from the debtor; only if the latter does not perform can the creditor address the security provider (*Pitlo/Croes* 358; *Hartlief* 216). Since the creditor has not "the choice of claiming solidary performance from the debtor and/or… security provider", the security provider's liability is subsidiary only (cf. Nieuwenhuis/*Castermans* art. 855 no. 2; Dutch Business Law § 6.05 [2]; *du Perron and Haentjens*, Introduction no. 11 and art. 855 no. 1). The situation is similar in BELGIUM for consumer credits secured by consumer or other security providers. According to BELGIAN ConsCredA the preconditions for the con-

sumer debtor's default are increased: the creditor may only sue the security provider for a consumer credit if the debtor has defaulted at least on two payments or twenty percent of the total sum due or on the last due payment and if the debtor has not performed within one month after the creditor's demand sent by registered letter (ConsCredA art. 36).

c. Strict Subsidiarity

9. In most legal systems of member states in case of a subsidiary dependent personal security the creditor must attempt to obtain satisfaction by execution from the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2021 (since 2006: FRENCH CC art. 2298); DENMARK: *Iversen* 24; *Pedersen*, Kaution 33; *Ussing*, Kaution 85; FINLAND: LDepGuar § 21 lit a); RP 189/1998 rd; GERMAN CC §§ 771 s.; GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC arts. 1830, 1832, 1833 and 1834; SWEDEN: *Walin*, Borgen 157). In all these countries, the security provider's subsidiary liability is not observed *ex officio*, but is an exception that must be raised by the security provider against the creditor (*beneficium excussionis* or *discussionis*; for the use of both terms in ROMAN law sources cf. *Zimmermann* 130 fn. 104; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2022-2024 (since 2006: FRENCH CC arts. 2299-2301); GERMAN CC § 771 (exception of prior legal action against the principal debtor, *Einrede der Vorausklage*); GREEK CC art. 855; PORTUGUESE CC art. 638; SPANISH CC art. 1832). The raising of the exception forces the creditor first to bring action and execution against the debtor (FRANCE: *Simler* no. 501 ss.; GERMANY: Palandt/*Sprau* § 771 no. 1; GREECE: *Georgiades* § 3 no. 144; PORTUGAL: *Almeida Costa* 776).

10. If in ITALY the *beneficium excussionis* has been agreed, the security provider must point out the assets of the debtor to be executed (ITALIAN CC art. 1944 para 2 *in fine*). In particular, under ITALIAN law the *beneficium excussionis* operates only if three conditions are given: a) it must be invoked by the security provider; b) the debtor's assets to be executed must have been pointed out by the security provider and c) unless agreed to the contrary, the security provider has to pay in advance the costs of this execution (*Distaso* 112 ss.; *Ravazzoni* 262 s.). In BELGIUM, FRANCE, LUXEMBOURG and SPAIN, the security provider who has raised the *exceptio discussionis* must indicate to the creditor those assets of the debtor into which an execution can be brought (BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2023-2024 (since 2006: FRENCH CC arts. 2300 and 2301); SPANISH CC art. 1832). The *beneficium discussionis* may also in PORTUGAL be raised with regard to property rights of a third party, which secure the same debt, if they were constituted before or simultaneously with the personal security (CC art. 639). In PORTUGAL the creditor is entitled in any case to demand performance only from the security provider or from the security provider together with the debtor. If performance is demanded from the security provider alone, in case both of solidary and subsidiary liability he has the right to call the debtor upon demand in order to defend or to be condemned together (CC art. 641 para 1). If the security provider omits to do this, a waiver of the *beneficium discussionis* will be presumed, unless the security provider declares the contrary in the proceedings (CC art. 641 para 2; *Pires de Lima and Antunes Varela* 658). Also according to SPANISH CC art. 1834, the creditor can sue the security provider together with the debtor, but the *beneficium discussionis* remains effective even if a judgement is rendered against both of them.

11. When the creditor omits or is negligent in bringing execution against the debtor's assets pointed out to him, it shall be liable, to the extent of the value of these assets, if these are lost in a subsequent insolvency of the debtor. Insofar the security provider is no longer liable (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2024 (since 2006: FRENCH CC art. 2301); *Simler* no. 521; and SPANISH CC art. 1833).
12. In contrast to the aforementioned legal systems, in GERMANY and GREECE the security provider does not have to indicate assets of the debtor to the creditor. The creditor has to attempt execution against the secured debtor (GERMAN CC § 771; GREEK CC art. 855). However, according to GERMAN CC § 772 and GREEK CC art. 856 in most cases of securing money claims compulsory execution must only be attempted into the secured debtor's movables and only into those that are situated at the debtor's domicile or residence (in GERMANY including a place of business). Additionally, the creditor has in general also to seek satisfaction from a pledge or lien on the debtor's movables (para 2 of the previously cited provisions).

B. Exceptions with Respect to Execution

a. Exception Based on Impossibility or Extreme Difficulty of Execution

13. In DENMARK the creditor is not obliged to attempt to obtain satisfaction by execution from the debtor's assets if it either proves that this is impossible or if the security provider admits the impossibility (*Ussing*, Kaution 85; see *Kæstel* 1). In FRANCE, especially if the debtor is overindebted (and even if the security provider is a consumer), the creditor is not obliged to attempt satisfaction by execution from the debtor (*Simler* no. 511). Rather the security provider is liable if the debtor's assets are not sufficient (cf. Cass.com. 17 March 1969, Bull.civ. 1969 IV no. 96 p. 97). According to GREEK CC art. 857, the security provider's liability ceases to be subsidiary, if it is obvious that execution on the debtor's property would not yield results. The situation of obvious inability to pay of the debtor produces a factual impossibility of exercise of the *beneficium excussionis* also in ITALY (*Distaso* 116). Similarly, GERMAN CC § 773 para 1 no. 4 prescribes that "the exception of prior execution against the principal debtor is barred if it must be assumed that compulsory execution on the property of the principal debtor will not lead to the satisfaction of the creditor." However, according to para 2 there is again only subsidiary liability if the creditor can satisfy himself from a pledge or lien which he holds in a movable asset of the debtor.
14. In PORTUGAL the security provider cannot invoke the *beneficium discussionis* if the debtor or the owner of the goods securing the debt cannot be sued or executed within the continental territory or the adjacent islands, due to a fact that arose after the creation of the security (CC art. 640 lit. b)). The same is valid for SPAIN when the debtor cannot be sued within the Kingdom (CC art. 1831 no. 4). In BELGIAN, FRENCH and LUXEMBOURGIAN law, the assets of the debtor to be executed may not be located outside the district of the court of appeal of the place where payment is to be made and may not be subject to a controversy or be pledged for the debt and therefore no longer in possession of the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2023 para 2 (since 2006: FRENCH CC art. 2300 para 2); BELGIUM: *Van Quickenborne* nos. 377-380; RPDB, Cautionnement nos. 237-243; FRANCE: *Simler* no. 518; in FRANCE the requirement of proximity is considered to be anachronistic). These re-

quirements indicate the legislator's intention that only goods which can easily and within a short period of time be executed, can be indicated by the security provider (BELGIUM: *Van Quickenborne* no. 378 at p. 196; *Lebon*, Borgtocht no. 10; FRANCE: *Simler* no. 518). A general exception for executions that are obviously difficult or even without a chance does not exist.

15. By contrast, in SWEDEN and FINLAND there is no exception from the creditor's duty to attempt to obtain satisfaction by execution (SWEDEN: *Walin*, Borgen 157 ss.; FINNISH LDepGuar § 2 no. 2 and § 21; RP 189/1998 rd 30, 58 ss.).

b. Exception in Case of Debtor's Move

16. In GERMANY and GREECE the exception of prior proceeding is excluded if the difficulty of bringing an action against the debtor is materially increased due to a change of domicile, place of business, or place of residence occurring after assumption of the security (GERMAN CC § 773 para 1 no. 2; GREEK CC art. 857 no. 2). The reason for this exception is that the creditor in cases of monetary claims is only required to bring executions against the debtor's assets at its domicile, residence or place of business as at the time of creating the security. In AUSTRIA, subsidiarity cannot be invoked by the security provider if the debtor's residence at this time is unknown, provided that the creditor did not behave negligently (CC § 1356).

c. Exception in Case of Debtor's Insolvency

i. Debtor's Insolvency

17. According to SPANISH CC art. 1831 no. 3 an execution into all of the debtor's assets is not required in case of bankruptcy or insolvency of the debtor. The wording of this provision does not make clear whether an insolvency proceeding must have been opened or whether an obvious factual insolvency would be enough to exclude the *beneficium excussionis*. In case of an obvious factual insolvency, the security provider will not find the property of the debtor that can be sold within Spanish territory and which is sufficient to cover the amount of the debt, which according to art. 1832 sent. 2 must be pointed out. Moreover, according to general case law the creditor should not be compelled to bring suit for claims when it is obvious in advance that this will be useless (cf. TS 30 July 1999, RA 1999 no. 5724; *Carrasco Perera a.o.* 220). As mentioned (*supra* no. 13) the ITALIAN solution is very similar.

ii. Insolvency Proceedings over Debtor's Assets

18. GERMAN CC § 773 para 1 no. 3 and GREEK CC art. 857 no. 3 exclude the exception of prior execution against the principal debtor if bankruptcy proceedings have been instituted against the debtor, unless the creditor can satisfy himself from a security right in a movable of the debtor (para 2). In effect the same rule applies in BELGIUM, FRANCE and LUXEMBOURG. In the latter countries it is thought that the requirements spelt out in CC art. 2023 (since 2006: FRENCH CC art. 2300) express that the *beneficium discussionis* can no longer be invoked if an insolvency or equivalent proceeding has been opened over the debtor's assets, since this foils easy and fast execution against the

debtor's assets (BELGIUM: *Dirix and De Corte* no. 410 at p. 270; *Van Quickenborne* no. 378 at p. 193; *Lebon*, Borgtocht no. 10; FRANCE: Cass.civ. 21 Dec. 1897, DP 1898, 262; *Simler* no. 511). In ITALY with the opening of bankruptcy proceedings against the debtor the possibility for the individual creditor to execute the debtor's assets is barred by law (L.fall art. 51) and in this case it is obviously impossible for the security provider to exercise his *beneficium excussionis* (*Giusti* 187).

19. In SWEDEN the opening of bankruptcy is not enough for a subsidiary security to become due; on the other hand, the creditor need not wait until the bankruptcy proceeding is closed, if and insofar as he can provide some evidence that the bankruptcy will not give him any dividend (*Walin*, Borgen 157 s.). Also in FRANCE the security provider cannot invoke its subsidiary liability if it is clear that the creditor will only obtain partial satisfaction from the debtor's assets (*Simler* no. 511 fn. 384). In AUSTRIA, the opening of insolvency proceedings over the debtor's assets cannot be invoked by a creditor if it has acted negligently (CC § 1356), *e.g.* by failing to file its claim (Schwimann/*Mader and Faber* § 1356 no. 4).

20. According to FINNISH law and DANISH and FRENCH literature the provider of a dependent personal security is liable after *e.g.* an insolvency proceeding over the debtor's assets has been completed without satisfying the creditors (FINNISH LDepGuar § 21; RP 189/1998 rd 58 s.; DENMARK: *Pedersen*, Kaution 33; CFI Herning 6 April 1982, UfR 1983 A 739; FRANCE: in case of insolvency «*liquidation judiciaire*» *Simler* no. 511). In effect the same result has been achieved by a decision of the SWEDISH Supreme Court (HD 23 April 1990, NJA 1990, 245).

iii. Failure of Insolvency Proceeding due to Insufficient Assets of the Debtor

21. In DENMARK and FRANCE the security provider under a dependent personal security is liable if the opening of a proceeding has failed due to insufficient assets of the debtor (DENMARK: *Pedersen*, Kaution 33; CA Søndre Landsret 10 Oct. 1927, UfR 1928 A 194; FRANCE: Cass.com. 8 June 1993, JCP G 1993, II no. 22174; *Simler* nos. 517 and 725; cf. Ccom art. L 643-11 III). Pursuant to BELGIAN and LUXEMBOURGIAN law the debtor regains full disposition over its assets in case the insolvency procedure has failed due to insufficient assets of the debtor; in this case the procedural impediments to an easy and smooth execution disappear. The security provider regains the possibility to invoke the *beneficium discussionis*. An exception to this rule exists where the insolvency proceeding has failed due to insufficient assets of the debtor, but where the debtor has nevertheless been discharged of his debts (*Lebon*, Borgtocht no. 10 *a fortiori*). According to ITALIAN case law, when contracting the *beneficium excussionis* the parties may also choose to subordinate the security provider's liability to a definitive impossibility to pay as certified by the conclusion of the bankruptcy proceeding without the satisfaction of the creditor's rights (Cass. 17 July 1985 no. 4218, Giur.it.Mass. 1985, 803).

(Dr. Poulsen/Dr. Fiorentini)

Article 2:107: Creditor's Obligations of Notification

(1) The creditor must notify without undue delay the security provider in case of a non-performance by or inability to pay of the debtor as well as of an extension of maturity; this notification must include information about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the notification. An additional notification of a new event of non-performance need not be given before three months have expired since the previous notification. No notification is required if an event of non-performance merely relates to ancillary obligations of the debtor, unless the total amount of all non-performed secured obligations has reached five percent of the outstanding amount of the secured obligation.
(2) In addition, in the case of a global security (Article 1:101 lit. (f)), the creditor must notify the security provider of any agreed increase
  (a) whenever such increase, starting from the creation of the security, reaches 20 percent of the amount that was so secured at that time; and
  (b) whenever the secured amount is further increased by 20 percent compared with the secured amount at the date when the last information according to this paragraph was or should have been given.
(3) Paragraphs (1) and (2) do not apply, if and in so far as the security provider knows or could reasonably be expected to know the required information.
(4) A creditor who omits or delays any notification required by this Article is liable to the security provider for the damage caused by the omission or delay.

Comments

A. Information on Debtor's Default – Para (1)

1. General remark. In accordance with modern trends of the law on personal security, these Rules impose obligations also upon the creditor; especially duties of information (Articles 2:107, 2:108 para (2) (b) and 4:107), vis-à-vis consumer providers of security even in the precontractual phase (Article 4:103).

2. According to para (1) the creditor is obliged to inform the provider of a dependent security as soon as any critical situation arises with respect to the secured obligation which may lead to demands upon the security provider. The creditor must, in order to allow the security provider to evaluate its possible risk and take steps against the debtor

according to Article 2:111, inform the security provider about a non-performance or inability to pay of the debtor or an extension of maturity of the secured obligation. In this notification the creditor must indicate the outstanding amounts of principal, interest and other ancillaries (cf. Article 2:104) as of the date at which the information is given. If the default continues, the information must be renewed every three months after the preceding information.

3. According to the third sentence of Article 2:107 (1), a notification is as a rule not required if merely an ancillary obligation has not been performed. The duty of information, however, is revived, if the total of all unperformed secured obligations which are due amounts to five percent or more of the outstanding total of the secured obligations. In other words, while a certain percentage of due, but unpaid ancillary obligations does not call for a reaction by the creditor, the percentage of five percent triggers the duty to report according to para (1).

B. Information by Creditor of Global Security – Para (2)

4. The provider of a global dependent security (cf. Article 1:101 (f)) is not protected by the Rules of Article 2:102 (4) against any increase of the secured amounts or aggravation of other terms of the secured obligation because this would run counter to the essence of a global dependent security. However, the security provider's legitimate interest in knowing the approximate extent of its risk must be satisfied by information about any major increases of the total amount of potential obligations agreed by the creditor. Since information about the actual amount of indebtedness which may change daily is too burdensome, only major increases must be notified. The first "major" increase is fixed at 20 % over the amount of the secured obligations that were secured by the global security at the time of its creation (lit. (a)). Correspondingly, subsequent "major" increases require notification to the security provider if they amount to an additional 20 percent over the secured amount at the time when the preceding information was given or should have been given.

C. Exception for Informed Provider of Dependent Security – Para (3)

5. The duties of information imposed upon the creditor by paras (1) and (2) are unnecessary if and insofar as the security provider is already informed, or can easily inform himself, *e.g.* as the director of the debtor company. The burden of proof for this exception must be borne by the creditor.

D. Sanction – Para (4)

6. The sanction for delaying or omitting altogether the information required under paras (1) and (2) is spelt out in para (4): The creditor must compensate the security provider for any damage that may have been caused to it. Such damage may arise if due to the omitted information the security provider will be unable to obtain relief or satisfac-

tion from the debtor because the latter has in the meantime become insolvent (cf. Articles 2:111 and 2:113). The conditions and details of a claim for damages are laid down in PECL Article 9:501 ss.

E. Consumer as Security Provider

7. Article 2:107 is a provision for the protection of the security provider; as such, it is applicable not only to a dependent security assumed by a consumer security provider but also to a consumer's purported assumption of an independent personal security (cf. Article 4:106 (c)) as well as to a consumer's co-debtorship for security purposes (cf. Article 4:102 (1)).

8. Although there is a specific rule limiting global securities assumed by consumer security providers (Article 4:106 (a)), the additional protection provided for by para (2) fulfils an important role also in the consumer context: The creditor is obliged to inform the consumer security provider of any increase of the secured obligation, even if this does not exceed the maximum limit which in the consumer context a global security must have according to Article 4:106 (a).

9. According to Article 4:102 (2), the rules of Article 2:107 are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in Article 2:107 means the debtor whose obligation is secured.

National Notes

I. General Attitude on Duties of Information

1. Pursuant to the opinion of many FRENCH authors, post-contractual information duties of the creditor vis-à-vis the provider of dependent security seem to be contrary to the unilateral character of the dependent security (cf. *Delebecque* 256; *Simler* nos. 416 ss.). In GERMAN law and in other legal systems such duties are denied by courts and almost all authors (CA Bamberg 13 Dec. 1999, WM 2000, 1582, 1584; MünchKomm/*Habersack*

§ 765 nos. 85, 91; *Schimansky/Bunte/Lwowski/Siol* § 44 nos. 57, 61; *Lwowski* no. 406). Additionally it is argued that the imposition of duties of information would weaken the dependent personal security as a security (CA Köln 7 Feb. 1995, WM 1995, 1965; Staudinger/*Horn* § 765 no. 119). But because of their restricted scope they are tolerated in BELGIUM, DENMARK, FRANCE, ITALY, the NETHERLANDS and SWEDEN.

2. By contrast, FINLAND imposes upon the creditor firstly a general duty of information whenever any provider of dependent security so requests (LDepGuar § 14 para 1). In addition, the creditor must inform consumer providers of dependent security upon request about the debtor's obligations and any circumstances which are relevant for appreciating the debtor's ability to pay, provided the creditor knows these facts, or can easily obtain information (§ 14 para 2). Any violation of these duties which causes damage to the provider of dependent security is sanctioned by a reduction of the security provider's obligation (para 3).

3. In GREECE there is a "soft law" provision in the Hellenic Banker's Code of Conduct of March 1997 of the Hellenic Bank Association. This Code is regarded by writers as general business condition, which can be invoked by third parties, especially consumers. They apply according to one opinion if they were incorporated into the contract or were made accessible to clients (*Karakostas* 23), according to another view in any case, since they were published and a disregard would constitute a misleading advertisement (*Georgakopoulos*, DEE 4, 774). According to the Bankers' Code of Conduct art. 42 para 1, the banks are obliged to inform the provider of dependent security of the contracting parties' rights and obligations under the law and to provide it with all relevant information which is rendered to the debtor (the banks are obliged by law to render the debtor copies of the credit contracts and a detailed report of the debt within 90 days after the latter's request, cf. art. 47 para 3 Law 2873/2000 as replaced by art. 42 Law 2912/2001). Hence, the provider of dependent security is able to request from the bank this aforementioned information (cf. Bankers' Code of Conduct art. 39) and should receive any further information.

4. BELGIAN ConsCredA provides for creditor's specific obligations of notification towards the provider of personal security securing a consumer credit – whithout distinguishing between consumer and other security providers: the creditor has to inform this security provider of the respites of payment granted to the debtor as well as of any modification of the credit contract (ConsCredA art. 35 sent. 2). In FRANCE the creditor of professional claims must remind a consumer provider of dependent security of its right to terminate at any time a dependent security without time limit (*Madelin* Act art. 47 II para 2 *juncto* MonC art. 313-22). According to Law *Dutreuil* no. 2003-721 of 1 Aug. 2003 this obligation also applies to creditors of consumer debts (ConsC art. L 341-6 sent. 2). Moreover, according to FRENCH CC art. 2016 para 2 (since 2006: FRENCH CC art. 2293 para 2) information on the changes in the amount (any increase or decrease) of the secured debt including its collateral obligations should be made to a private provider of dependent security at least once every year. Although the provision applies according to its wording only to indefinite dependent securities, the courts have extended it also to definite dependent securities (Cass.civ. 16 March 1999, D. 1999 I.R. 99). It is irrelevant whether the secured debt is owed by a consumer or a professional, as long as the provider of the dependent security is a consumer. However, in the case of a professional debt of an individual entrepreneur, the consumer provider of dependent security has to be given exact information about the amounts of principal and interest

and not only about the changes in the amount of the debt (*Madelin* Act art. 47 II para 2 *juncto* MonC art. 313-22). The Law *Dutreuil* no. 2003-721 of 1 Aug. 2003 has extended this protection by a duty of detailed information to the consumer provider of dependent security, whether or not the secured debt has a professional character (ConsC art. L 341-6 sent. 1). The *Grimaldi* Commission had proposed to merge these three provisions on a regular duty of information (CC art. 2016 para 2 (since 2006: CC art. 2293 para 2), *Madelin* Act art. 47 II para 2 *juncto* MonC art. L 313-22 and ConsC art. L 341-6 sent. 1) into one provision of the Civil Code (new art. 2307), similar to the existing ConsC art. L 341-6 sent. 1; however, this proposal was not adopted in the revision of 2006.

5. By contrast in GERMANY even a creditor bank is not obliged to inform the provider of dependent security at the end of a year about the remaining balance of the secured debt (Staudinger/*Horn* § 765 no. 121 referring to BGH 26 April 1976, WM 1976, 709, 711).

II. Information on Debtor's Default or Inability to Pay – cf. Para (1)

A. Legal Systems with a Special Information Duty

6. A general obligation to inform about default within one month is established by FINNISH LDepGuar § 4 para 2 (RP 189/1998 rd 35 s.). In the NETHERLANDS, if the creditor gives notice to the debtor to pay, it has to inform the provider of dependent security at the same time (CC art. 7:855 para 2). No deviation from this provision to the disadvantage of a non-professional provider of dependent security is possible (art. 7: 862 lit. a)).

7. In several countries, creditors are bound to inform consumer providers of dependent security about the debtor's default. In AUSTRIA, ENGLAND and FRANCE, a consumer provider of dependent security must be informed about the debtor's default (AUSTRIA: ConsC § 25 b para 2; ENGLAND: ConsCredA sec. 111; FRANCE: ConsC art. L 313-9 sent. 1, Law no. 94-126 of 11 Feb. 1994 *(Loi Madelin)* art. 47 II para 3, and ConsC art. L 341-1 sent. 1). There is a duty of information, irrespective of any breach of the bank's duty of confidentiality, if this information permits the consumer provider of dependent security to exercise its right to recourse before payment according to FRENCH CC art. 2032 (since 2006: FRENCH CC art. 2309) and also to take judicial protective measures (cf. *infra* national notes to art. 2:111). If the secured obligation arises from a consumer credit, the information has to be given in case of a qualified inability of the debtor to pay (*incident de paiement caractérisé*, ConsC art. L 313-9 sent. 1). This implies at least a delay of three months after the debt becomes due (JO débats Assemblée Nationale 8 Dec. 1989, 6153 ss.). By contrast, if the secured obligation arises from any professional contract, the creditor has to inform the consumer provider of dependent security about the default within one month after delay (ConsC art. L 341-1 sent. 1 and Law no. 94-126 of 11 Feb. 1994 (Loi *Madelin*) art. 47 II para 3 sent. 1).

8. In BELGIUM the creditor has to inform the provider of a personal security for a consumer credit if the debtor has defaulted on two payments or at least one fifth of the total sum due (ConsCredA art. 35 sent. 2). Pursuant to the DANISH Consumer Council and the Financial Councils agreement (in force since 1 Jan. 2002), creditor's obligation to inform providers of dependent security within six months in case of a debtor's default of payment will eventually be reduced to three months.

9. Under SWEDISH law the creditor has an obligation to make sure that the right of the provider of dependent security to take recourse is not lost (or loses its value) (cf. HD 16 June 1992, NJA 1992, 351). Therefore, the provider of dependent security must be informed of circumstances which are of importance in this respect (*e.g.* initial doubts about inability to pay, delays), when it cannot be assumed that the provider of a dependent security keeps himself informed. The requirements on banks and other similar creditors are higher than on private creditors (*Walin*, Borgen 53 ss.).

B. Legal Systems without a Special Information Duty

10. No information is required to be given under GREEK, GERMAN, ENGLISH, LUXEMBOURGIAN, PORTUGUESE and SPANISH law.
11. According to GREEK literature, in addition to the obligation of the creditor to refrain from actions, which hinder the debtor from satisfying the creditor or endanger the right of the provider of dependent security to be reimbursed after paying (GREEK CC arts. 862, 863), the principle of *bona fides* (GREEK CC arts. 200, 288) sometimes creates an obligation of the creditor to take positive action, *e.g.* by informing the provider of dependent security of events which worsen the financial situation of the debtor, in order to achieve the same results (*Markou*, DEE 8, 366, 367). Furthermore, according to Banker's Code of Conduct art. 42 § 2 (cf. *supra* no. 3), the banks as creditors must inform the provider of dependent security in case of a realisation of the assumed risks in the future. In GERMANY there may exceptionally be a duty of information derived from the principle of *bona fides* (CC § 242; cf. CA Bamberg 13 Dec. 1999, WM 2000, 1582, 1584; CA Köln 7 Feb. 1995, WM 1996, 1965; *Graf Lambsdorff and Skora* no. 246; *Bülow*, Kreditsicherheiten no. 864 with further references). The requirements are very high since there must be an extremely severe offence against the interests of the provider of dependent security (cf. CA Bamberg 13 Dec. 1999 and CA Köln 7 Feb. 1995). Similarly under ENGLISH law, such a duty to disclose unusual facts is limited to exceptional cases such as fidelity bonds (cf. *Andrews and Millett* nos. 5-018 ss.). In general, however, the creditor has to inform the security provider *e.g.* about the debtor's default only if such a notification is required by the terms of the security (*O'Donovan and Phillips* no. 10-101). Also in LUXEMBOURG some minor duties are imposed upon the creditor, which are based on good faith (*Ravarani*, Jurisprudence récente 916). The creditor may not unnecessarily increase the burden of the security provider. This general guideline can to some extent be specified by a couple of specific duties for the creditor, *e.g.* a duty of information. In PORTUGAL, the creditor must inform any providers of dependent security in case of the debtor's default to pay in order to prevent an increase of their liability according to the principle of *bona fides* (CC art. 762 para 2; cf. STJ 20 April 1999, 162/99 www.dgsi.pt). However, a duty of information does not, in principle, exist in relation to a mere delay of the debtor in payment or any other increase of the risk of the provider of dependent security; at least a violation of such a duty could not lead to a release of the security provider but only to damages, if at all (PORTUGAL: STJ 5 March 2002, 3971/01 www.dgsi.pt; STJ 6 May 1997, 88428 www.dgsi.pt).

C. *Sanctions – cf. Para (4)*

a. *Partial Release of Provider of Dependent Security*

12. In AUSTRIA, FINLAND and FRANCE, if the creditor does not give the required information, the consumer provider of dependent security is discharged from certain collateral obligations, *e.g.* penalties or default interest (AUSTRIA: ConsC § 25 b para 2; FINLAND: LDepGuar § 4 para 2; FRANCE: ConsC arts. L 313-9 sent. 2, L 341-1 sent. 2 and *Madelin* Act art. 47 II para 3). But in FINLAND and FRANCE the creditor loses its ancillary rights only for a limited time, namely until it makes its notification (FINNISH LDepGuar. § 4 para 2 sent. 2; FRENCH ConsC arts. L 313-9 sent. 2, L 341-1 sent. 2 and *Madelin* Act art. 47 II para 3 sent. 2). According to the FINNISH LDepGuar § 4 para 2 sent. 3 the provider of dependent security is also liable in relation to certain ancillary obligations, *e.g.* default interest, if the creditor can prove that the security provider is partly to blame for the delayed payment. The provider of dependent security must cover the aforementioned ancillary obligations from the time it became informed about the delay (RP 189/1998 rd 36). Pursuant to DANISH and SWEDISH law, if a creditor omits what reasonably could have been done by him, the provider of dependent security is relieved/discharged insofar as the omission has reduced the possibility of the provider of dependent security to take recourse against the debtor (DENMARK: H 14 Jan. 1975, UfR 1975 A 168; *Pedersen*, Kaution 67 s.; SWEDEN: the creditor must prove that his omission has not caused such a loss; HD 16 June 1992, NJA 1992, 351; HD 22 April 1993, NJA 1993, 163; HD 13 June 1994, NJA 1994, 381; HD 22 Dec. 1998, NJA 1998, 852).

b. *Damages*

13. The BELGIAN Consumer Credit Act 1991 and the GREEK Bankers' Code of Conduct do not provide any special sanction. The general rules on contractual liability apply (*Van Quickenborne* no. 432). A breach of the provisions of the GREEK Bankers' Code of Conduct due to fault of the bank is regarded as a contractual fault and the bank is obliged to compensate the damage caused thereby (*Georgakopoulos* 775).

III. *Duty of Information in Case of Global Guarantee – cf. Para (2)*

A. *Existence of a Regular Duty of Information*

14. In FINLAND the security provider under a global guarantee must be informed by the creditor every six months about the amount of the debtor's secured obligation (LDepGuar § 13 para 1). In FRANCE a regular, annual information must be given by the creditor to the consumer provider of security of an indefinite dependent security, *i.e.* a global guarantee (CC art. 2016 para 2 (since 2006: CC art. 2293 para 2) or *Madelin* Act art. 47 II para 2 *juncto* MonC art. 313-22). But the scope of these provisions is very reduced, since private persons are prohibited from assuming a security under a global guarantee in relation to consumer credits (ConsC art. L 313-7) as well as professional debts (ConsC art. L 341-2 as introduced by Law *Dutreuil* no. 2003-721 of 1 Aug. 2003). According to the *Grimaldi* Commission's proposal all these rules on information duty in

case of indefinite securities (CC art. 2016 para 2 (since 2006: CC art. 2293 para 2), *Madelin* Act art. 47 II para 2 *juncto* MonC art. 313-22) should be replaced by only one provision in the Civil Code (proposed CC new art. 2307) that establishes a permanent information duty in favour of a security provider requiring special protection, irrespective of the definite or indefinite character of the dependent security. Contrary to former solutions, the *Grimaldi* Commission also would have allowed a natural person requiring special protection to assume a dependent security without time limit (cf. CC new art. 2300). However, none of these proposals was adopted by the reform of 2006. In ITALY a duty of information must be implied since the provider of dependent security in relation to a future obligation is discharged if the creditor has given credit without the authorisation of the security provider although he knew that the financial situation of the debtor had worsened to the point that performance by the debtor had become clearly more difficult (CC art. 1956 – a mandatory provision, cf. para 2). Further, the ITALIAN Banking Law contains general provisions on banking contracts, applicable whether or not the contracting party is a person requiring protection like a consumer according to which the bank has to inform the client clearly and completely once a year about the course of the relationship (DLgs 1 Sept. 1993 no. 385 art. 119 para 1). This Law is held applicable to dependent personal securities (*Chinè*, I contratti di garanzia 327). It is to be noted that in ITALIAN banking practice this rule is usually applied to a global guarantee and that this is the type of dependent personal security mainly requested by banks as creditors.

B. Sanctions – cf. Para (4)

a. Partial Release of Provider of Dependent Security

15. If the creditor omits or delays required information, the consumer provider of dependent security is definitely released from any liability in relation to ancillary obligations (FRENCH CC art. 2016 para 2 (since 2006: CC art. 2293 para 2)). This sanction is very harsh in situations where the creditor is not a professional (FRANCE: *Legeais* no. 14; *Piedelièvre*, Cautionnement et lutte contre l'exclusion no. 8). For this reason, the FRENCH Senate had (unsuccessfully) opposed this provision (JO débats Sénat 8 July 1998, 3718). However, for professional debtors (*Madelin* Act art. 47 II para 2 *juncto* MonC art. L 313-22) the sanction is not so hard since the creditor loses only provisionally the benefit of ancillary rights until it accomplishes its information duty. The *Grimaldi* Commission's proposal to merge these different provisions into one general rule (CC proposed new art. 2307) was not adopted in 2006 (cf. *supra* no. 14).

16. Pursuant to FINNISH LDepGuar § 13 para 2 the liability of a provider of dependent security can be reduced if the creditor neglects his duty of information (RP 189/1998 rd 49).

b. Full Release

17. According to ITALIAN CC art. 1956 para 1 the provider of dependent security for a future obligation will be discharged if the creditor grants credit without specific authorization of the security provider, although he knew that the financial situation of the debtor was such that performance by the debtor had become clearly more difficult. On

the basis of the duty to act in good faith (CC art. 1175 and 1375), ITALIAN case law goes further and recognizes that, even in case of waiver of the right arising for the security provider from CC art. 1956, the security provider is not liable if the creditor grants credit to the debtor knowing that the latter will not be able to repay it (CA Catania 24 March 1999, BBTC 2001 II 699; Cass. 28 Jan. 1998 no. 831, Giur.it. 1998, 1645; Cass. 18 July 1989 no. 3362, BBTC 1989 II 357; Cass. 20 July 1989, no. 3386, Foro it. 1989 I 3100; this trend is supported by scholarly writings: *Sacco*, Il contratto 801; *di Majo* 45 ss.; *Cantillo* 59 ss.).

c. Damages

18. Contrary to earlier decisions, the Commercial Chamber of the FRENCH Supreme Court no longer holds the creditor liable for damages, unless gross negligence has been established (Cass.com. 25 April 2001, JCP E 2001, no. 1276, note *Legeais*).

IV. Exception to the Duty of Information – cf. Para (3)

19. In BELGIUM and LUXEMBOURG, there is no duty of information if the debtor has all the information himself (BELGIUM: *Dirix,* Zekerheidsrechten 318; CA Brussels 11 Sept. 1987, T.B.H. 1989, 7 note *Devos*; LUXEMBOURG: *Ravarani*, Jurisprudence récente 917). On the contrary, in FRANCE a duty to give information is not affected by the fact that the provider of dependent security already knows about the development of the debt (cf. Cass.com. 25 May 1993, JCP G 1993, II no. 22147, note *Croze; Piedelièvre,* Cautionnement et lutte contre l'exclusion no. 8).

(Hauck)

Article 2:108: Time Limit for Resort to Security

(1) If a time limit has been agreed, directly or indirectly, for resort to a security establishing solidary liability for the security provider, the latter is no longer liable after expiration of the agreed time limit. However, the security provider remains liable if the creditor had requested performance from the security provider after maturity of the secured obligation but before expiration of the time limit for the security.

(2) If a time limit has been agreed, directly or indirectly, for resort to a security establishing subsidiary liability for the security provider, the latter is no longer liable after the expiration of the agreed time limit. However, the security provider remains liable if the creditor

  (a) after maturity of the secured obligation, but before expiration of the time limit has informed the security provider about its intention to demand performance of the security and has asserted that it has started to undertake appropriate attempts to obtain satisfaction as required according to Article 2:106 paragraphs (2) and (3); and

  (b) informs the security provider every six months about the status of these attempts, if so demanded by the security provider.

(3) If secured obligations fall due upon, or within 14 days before, expiration of the time limit of the security, the request for performance or the information according to paragraphs (1) and

(2) may be given earlier than provided for in paragraphs (1) and (2), but no more than 14 days before expiration of the time limit of the security.

(4) If the creditor has taken due measures according to the preceding paragraphs, the security provider's maximum liability is restricted to the amount of the secured obligations as defined in Article 2:104 paragraphs (1) and (2). The relevant time is that at which the agreed time limit expires.

Comments*

A. General Remarks

1. Provisions on time limits. Articles 2:108 and 2:109 deal with dependent securities with (Article 2:108) or without (Article 2:109) time limits. While Article 2:108 is applicable where the parties have agreed on a time limit for resort to a security, Article 2:109 provides for a possibility to limit the scope of a security in respect of the coverage of future obligations in cases without an agreed time limit. Article 4:108, which is applicable for consumer security providers only, extends this possibility to certain securities with an agreed time limit.

2. Other consequences of agreed time limits. Not all consequences of agreed time limits are spelt out in Articles 2:108 and 2:109. Depending on the type of time limit in question, a main effect is typically to restrict the scope of a security in respect of the coverage of future obligations. As this consequence directly flows from the agreement of the parties and depends on the terms of this agreement, it appears to be neither necessary nor possible to regulate this effect in the text of the Rules. Cf. also *infra* Comments nos. 22 ss.

* The Comments on Article 2:108 are by Ole Böger, LL.M.

B. Types of Time Limits

3. Common features. While the parties can agree on different types of time limits for their security, such time limits share a common objective as means to limit the security provider's liability, and hence its risk, under the security. Moreover, the existence of any type of agreed time limit for a security typically precludes the possibility to unilaterally limit the security according to Article 2:109. Cf. Comments on Article 2:109 no. 3.

4. Time limits restricting the scope of the security. In one type of time limit, only the scope of the security is limited, *e.g.* the coverage of the security is limited to secured obligations arising, falling due or fulfilling other requirements until expiration of the agreed time limit (such a time limit could for instance be agreed using the following formula: "This security is valid only for secured obligations arising until August 31"). Thus, even if a security provider assumes a security for obligations of the debtor that at the moment of the creation of the security are not yet in existence and whose scope is not known, especially in cases of global securities, its risk might be limited by excluding such obligations that do not arise or do not fall due or fulfil other requirements within a foreseeable period of time, *i.e.* before expiration of the agreed time limit. These effects are dealt with *infra* nos. 22 ss. Such a type of time limit is not subject to Article 2:108, however, since the parties did not agree on a time limit for the creditor's right to rely on the security vis-à-vis the security provider.

5. Time limits for resort to security. The type of time limit covered by Article 2:108 focuses not on the scope of a security, but on the creditor's possibility to resort to the security. By setting a time limit for resort to the security, whether directly (*e.g.* "The creditor may rely on this security until May 31") or indirectly (*e.g.* "This security expires 6 months after maturity of the secured obligation"), the risk assumed by the security provider in relation to the solvency of the debtor is limited to a period of time which is specified in the agreement or can be indirectly determined, *i.e.* until expiration of the agreed time limit in question. However, such a time limit typically also affects the scope of the security, *i.e.* restricts the scope of the security in respect of the coverage of future obligations. Cf. *infra* no. 24.

6. Both types of time limits independent from each other. It has to be emphasised that these two types of time limits are quite independent from each other. A variety of combinations is possible, depending upon the construction of the agreement of the parties: The parties may have agreed on a time limit restricting the scope of the security, but may at the same time not have intended to restrict the possibility to resort to the security. In special cases there might also be a time limit for resort to the security that does not give rise to a restriction of the scope of the security (cf. *infra* no. 24). It is also possible to have two separate agreed time limits for a single security: *e.g.* one restricting the scope of the security to obligations arising until expiration of this time limit, and a second one setting a (subsequent) time limit for resort to the security. In other cases, finally, one and the same reference to a limit may have to be regarded as restricting at the same time the possibility to resort to the security and the scope of the security.

C. Time Limit for Resort to Security

7. Matter of construction. In accordance with preceding no. 6, the existence of a time limit for resort to a security is, unless clearly set out, largely a matter of construction of the parties' agreement. If the parties do not expressly refer to a time limit as being one for resort to a security, the following considerations might be of some assistance.

8. Indication for time limit for resort to security. As a rule of thumb, the fact that the personal security in question covers only existing obligations or specific future obligations will be an indication that an agreed time limit constitutes a time limit for resort to the security. In such cases, there seems to be less of a need for a security provider to protect itself against a liability of an unforeseeable amount on the basis of future obligations of the debtor; rather, it is the additional protection of a time limit for resort to the security which limits the period of time during which the security provider assumes the risk of the debtor's solvency that might be of any interest for the security provider.

9. Date of maturity of secured obligations. A mere reference to the date of maturity of the secured obligations typically does not give rise to a time limit for resort to the security. Otherwise the creditor would lose the protection provided by the personal security if it would not immediately enforce the secured obligation or the security as soon as the secured obligation becomes due.

D. Consequences of Expiration of Time Limit for Resort to Security

10. General rule: extinction of liability. The general rule is that if a time limit has been agreed for resort to a security, the security provider is no longer liable towards the creditor after expiration of the agreed time limit. For contracts of personal security establishing solidary liability, this is provided for in para (1) sent. 1; in cases of subsidiary liability of the security provider para (2) sent. 1 applies. This extinction of liability does not only bar any liability of the security provider under the security for future obligations of the debtor, but it also affects obligations already in existence: the security provider is no longer liable towards the creditor even in relation to obligations covered by its security that have become due by the time the agreed time limit expires.

11. Continuation of liability if additional requirements are fulfilled. The security provider remains liable towards the creditor after the expiration of the agreed time limit only if additional requirements are fulfilled. Generally speaking, only if the creditor has timely acted upon the security in a manner as to hold the security provider liable according to the terms of the security in question the security provider's liability with respect to existing obligations is not extinguished. The details of the requirements to be fulfilled in this respect differ between situations of solidary liability of the security provider and those of subsidiary liability of the latter, cf. *infra* nos. 14 s. and 16 ss.

12. Security provider's maximum liability determined by para (4). Even if the creditor has timely fulfilled the requirements for the continuation of the security provider's liability, this liability is restricted. According to para (4), the security provider's maximum liabil-

ity is limited to the amount of the secured obligations upon expiration of the agreed time limit. Principal and ancillary obligation as defined in Article 2:104 (1) and (2) are covered, however, only within the further limitation of an agreed maximum amount for the security, if any. For the determination of the maximum amount of the liability, any defences available vis-à-vis the creditor at the time at which the agreed time limit expires, have to be taken into account; thus, the amount of secured obligations that are not due yet does not increase the maximum amount of the security provider's liability.

13. Scope of security restricted according to terms of time limit. Also in case of a time limit for resort to the security, there will typically be an additional restriction of the scope of the security according to the terms of the parties' agreement. Cf. *infra* nos. 24 and 27.

E. Continuation of Liability in Case of Solidary Liability

14. Request for performance. If the security provider had assumed solidary liability, the creditor only has to timely request performance from the security provider in order for the latter to remain liable also after expiration of the agreed time limit (para (1) sent. 2). A simple declaration by the creditor suffices; it is not necessary in this context that the creditor commences legal action against the security provider.

15. Time for request. The request is valid only if it is made after maturity of the secured obligation but before expiration of the agreed time limit (para (1) sent. 2). The first requirement, that the request must be made before expiration of the agreed time limit, is the essence of a personal security with a time limit for resort to the security: the security provider assumes the risk of the debtor's solvency only until the agreed time limit; should the creditor at a later point of time discover that due to the debtor's insolvency performance can only be expected from the security provider, this is no longer covered by the terms of this security, even if the secured obligation in question came into existence in time. The second requirement as to the time for the request for performance, *i.e.* that the request must be made after maturity of the secured obligation, has been introduced in order to prevent the request for performance becoming a mere formality for the creditor to be made already at the time of creation of the security: the request can be made in earnest only if the secured obligation is due. Specific provision is made for secured obligations becoming due upon, or within fourteen days before expiration of the time limit, cf. *infra* no. 21.

F. Continuation of Liability in Case of Subsidiary Liability

16. General. If the security provider is subsidiarily liable, it remains liable even after expiration of the agreed time limit only if the creditor has fulfilled stricter requirements than in the case of solidary liability of the security provider. The rationale is obvious: in the situation of subsidiary liability, the security provider is liable towards the creditor only if the latter has fruitlessly attempted to obtain satisfaction from the debtor or other security providers with solidary liability, if any (cf. Article 2:106). If additionally a time

limit for resort to the security has been agreed, it follows that the creditor has to show that these requirements have been fulfilled before expiration of the agreed time limit.

17. Appropriate attempts to obtain satisfaction. According to para (2) (a) the creditor must have started to undertake appropriate attempts to obtain satisfaction as required by Article 2:106 (2) and (3). The reference does not only cover the requirements to obtain satisfaction from the debtor or other security providers with solidary liability as provided for in Article 2:106 (2) but also the exceptions provided for in Article 2:106 (3). Thus, in situations where the security provider may not invoke the subsidiary character of its liability vis-à-vis the creditor even though the latter has not attempted to obtain satisfaction from the debtor or any other security provider, as the case might be, the creditor does not have to start such attempts for the purposes of Article 2:108 (2) (a) either. It has to be emphasised that the attempts required by para (2) (a) need not be completed – for the purposes of this provision (as opposed to Article 2:106) it is sufficient that the creditor has started to undertake such attempts since demanding (fruitless) completion of these attempts to obtain satisfaction from other sources would be too onerous and time-consuming for the creditor.

18. Information required according to para (2) (a). According to para (2) (a) the creditor firstly has to inform the security provider about its intention to demand performance. In contrast to para (1) sent. 2 no request for performance is necessary since in the situation dealt with by para (2) (a) the security provider might still be able to rely on the subsidiary character of its liability. Additionally, the creditor has to assert that it has started to undertake the attempts described in the preceding paragraph.

19. Time for information. As in the situation of solidary liability of the security provider (cf. *supra* no. 15), the information required according to para (2) (a) has to be given after maturity of the secured obligation, but before expiration of the agreed time limit. See also for the situation of the secured obligations becoming due upon, or within fourteen days before expiration of the agreed time limit *infra* no. 21.

20. Information required according to para (2) (b). If the security provider so demands, the creditor also has to inform the security provider every six months about the status of the attempts to obtain satisfaction. This is a continuing obligation, *i.e.* if the creditor should even after expiration of the agreed time limit fail to comply with this requirement until completion of these attempts, then the security provider is no longer liable towards the creditor.

G. Maturity of Secured Obligations Close to Expiration of Time Limit – Para (3)

21. Modification of time for request or information according to paras (1) and (2). In certain situations, the point of time at which the request has to be made or the information to be given according to paras (1) and (2) does not seem practicable: should the secured obligations become due only upon, or within a short period of time before expiration of the agreed time limit, the security provider might have only a very limited possibility to consider its options before having to turn against the security provider in

order to avoid the loss of its rights against the latter. Paragraph (3) applies in these situations and makes sure that the creditor has at least a period of fourteen days to make its request or to inform the security provider before the time limit of the security expires.

H. Time Limit Restricting Scope of Security

22. **Legal basis.** Agreed time limits typically also restrict the scope of the security with respect to the coverage of future obligations. This consequence is not limited to time limits for resort to a security within the meaning of Article 2:108 and it flows directly from the agreement of the parties and is therefore not spelt out in the text of the Rules.

a. Existence of Time Limit Restricting Scope of Security

23. **Matter of construction.** Whether a reference to a time limit in the agreement of the parties is to be regarded as a time limit that restricts the scope of the security with respect to the coverage of future obligations is once more, unless clearly spelt out by the parties, a matter of construction of the agreement. In general every agreement by the parties including a time limit which has the effect of excluding future obligations – whether these are obligations arising or falling due or fulfilling other requirements after a certain date – from the scope of the security, is to be regarded as a time limit in this sense.

24. **Time limits for resort to security.** Time limits for resort to the security do typically also have the effect of restricting the scope of the security in the sense of the preceding paragraph. This follows from the fact that where a creditor is bound to resort to the security before expiration of a certain time limit, the creditor will after that point of time no longer be able to rely on the security in respect of any future obligations. There are, however, exceptions to this rule: agreements of the type "This security for all future indebtedness of the debtor towards the creditor expires in respect of each individual obligation secured 6 months after maturity of that obligation" do not provide for a time limit for the security as a whole, thus such time limits do not restrict the scope of the security with respect to the coverage of future obligations.

25. **Duration of agreement giving rise to secured obligation as time limit.** The mere fact that the agreement from which the secured obligations arise has a time limit should not in itself be regarded as indirectly giving rise to a time limit for the security. It should be noted, however, that even if such securities are regarded as unlimited, in cases where the security is restricted to cover obligations arising from specific contracts the applicability of Article 2:109 is excluded according to para (1) sent. 2, cf. Comments on Article 2:109 no. 9.

b. Restriction of Coverage of Security

26. **Effect of time limit.** The effect of a time limit for the security is that the scope of security is limited accordingly, *i.e.* only those secured obligations are covered which are not excluded by virtue of the agreed time limit. The details depend upon the terms of the parties' agreement: the coverage of the security could be restricted to obligations that

arise or fall due or fulfil other requirements until that time, whatever the terms of the agreed time limit might be. Since Article 2:109 is inapplicable in any of these cases, there is no possibility for the parties on the basis of that provision to unilaterally set an earlier time limit by giving notice (cf., however, the exception provided for in Article 4:108 for consumer security providers).

27. Restriction of scope of security in case of a time limit for resort to security. In the case of a time limit such as "The creditor may resort to this security until August 31" or "This security expires August 31" it might not be easily determinable from the terms of the time limit whether the security is intended to cover secured obligations that have arisen, but are not due yet at that point of time. It is submitted that in general such time limits within the meaning of Article 2:108 will restrict the liability of the security provider to secured obligations that have fallen due since only in respect of such obligations the requirements of para (1) sent. 2 and para (2) sent. 2 can be fulfilled. The additional restriction of the amount of the security provider's maximum liability according to Article 2:108 (4), however, will often make a decision on this point unnecessary.

I. Consumer as Security Provider

28. Applicability to all types of consumer security providers. Chapter 4 does not contain any specific provisions on time limits for resort to security; therefore, Article 2:108 is applicable directly and without modifications to consumer providers of dependent security. The same result is achieved for consumer providers of independent security (cf. Article 4:106 (c)) and for consumer security providers in a co-debtorship for security purposes (cf. Article 4:102 (1)). The application of Article 2:108 to the last-mentioned type of consumer security providers is justified because Article 2:108 is favourable to them insofar as this rule provides legal certainty; otherwise it would be necessary to turn to uncertain general principles of contract law in order to determine the scope and the effect of an agreed time limit for resort to security.

29. Mandatory character. By virtue of Article 4:102 (2), Article 2:108 is mandatory in favour of all types of consumer security providers.

National Notes

I. In General

1. In all member states a distinction has to be made between dependent personal security given for an unlimited time (see *infra* national notes to Art. 2:109) and dependent personal security given for a fixed time. The proper classification of the dependent security is decisive for the determination of the extent of the security provider's obligation.
2. The following national notes deal with what may be designated as dependent security for a fixed time or as security with a time limit for resort to the security right. In FRANCE and GERMANY a dependent security for an existing obligation is usually regarded as meaning a dependent security for a fixed time (FRANCE: *Simler* nos. 771 ss.; GERMANY: BGH 6 May 1997, NJW 1997, 2233), whereas the assumption of a security for future obligations, especially those resulting from a current account, is a hint for the second type (FRANCE: *Simler* no. 771; GERMANY: BGH 17 Dec. 1987, NJW 1988, 908).
3. According to GREEK and PORTUGUESE court practice, the sole fact that the secured claim is limited in time does not restrict the dependent security to the same time limit, as long as the secured claim has not yet been paid (GREECE: A.P. 463/1994, EEN 62, 332; PORTUGAL: STJ 20 April 1999, 162/99 www.dgsi.pt).

II. Dependent Securities with a Time Limit for the Resort to Security

4. Only some continental legal systems provide expressly for dependent securities that have a time limit for resort to the security (AUSTRIAN CC § 1363 sent. 2; FINNISH LDepGuar § 19 para 2; GERMAN CC § 777; GREEK CC art. 866).

A. Agreement on Time Limit

5. Dependent securities may be limited in time by the parties not only by referring to a calendar date but also by referring to an (uncertain) event or a period of time (GERMANY: BGH 6 May 1997, NJW 1997, 2233 and MünchKomm/*Habersack* § 777 no. 7; GREECE: A.P. 463/1994, EEN 62, 335 and *Georgiades* § 3 no. 194).

B. Consequences upon Expiration of Time Limit

6. Most member states seem to agree that the provider of dependent security is discharged from its obligation when the agreed time limit expires and the creditor did not take action against or at least demand performance from the security provider (DENMARK: H 30 April 2001, UfR 2001 A 1543; *Ussing*, Kaution 301; Agreement between the Consumer Council and the Financial Council of 17 Sept. 2001; ENGLAND: *O'Donovan and Phillips* no. 9-24; FINLAND: LDepGuar § 19 para 2; RP 189/1998 rd 57; GERMAN CC § 777 para 1; GREEK CC art. 866; ITALY: *Giusti* 149 and 253 s.; SPAIN: *Guilarte Zapatero*, Comentarios 310; *Carrasco Perera a.o.* 226). GERMAN court practice demands, in addition, that the secured claim must fall due before expiration of the time limit (BGH 14 June 1984, BGHZ 91, 349 at 355 ss.)
7. If however, such conditions precedent to the security provider's liability are fulfilled, under FRENCH and SPANISH law the time limit serves to freeze the continuing liability

of the provider of dependent security to the amount at the expiration of the time limit (FRANCE: *Simler* no. 321 ss.; SPAIN: *Carrasco Perera a.o.* 226). In SPANISH law it depends upon the wording of each particular dependent security whether liabilities incurred within the time limit of a continuing dependent security, but due and payable only after the dependent security came to an end, fall within the ambit of the security provider's liability (*Carrasco Perera a.o.* 226).

8. In BELGIUM and in the NETHERLANDS the expiration of the time limit has the same effect as a unilateral termination of the contract of dependent security by the security provider for the future (BELGIUM: CA Brussels 25 May 1992, JLMB 1993, 870, note *de Patoul* and *Baudoux*; *T'Kint* no. 771; NETHERLANDS: *Blomkwist* no. 16 at p. 30-31). The provider of dependent security is only liable for those obligations that arose before the expiration date (BELGIUM: *T'Kint* no. 771; *Van Quickenborne* no. 253; NETHERLANDS: *Blomkwist* no. 16 at p. 30-31; SPAIN: *Carrasco Perera a.o.* 226).

C. *Preservation of the Liability of the Provider of Dependent Security*

9. The main issues in this context are until which point of time the creditor has to demand performance from the provider of dependent security and in which form.

a. No Differentiation between Solidary and Subsidiary Dependent Securities

10. In AUSTRIA, FINLAND, FRANCE and ITALY, solidary and subsidiary dependent securities are treated equally (AUSTRIAN CC § 1363 sent. 2; FINLAND: RP 189/1998 rd 56; FRANCE: *Simler* no. 488; ITALY: CC art. 1957; *Giusti* 281 s.).

11. In ITALY, the provider of dependent security impliedly limited to the term of the secured obligation remains liable even after maturity of the principal obligation, if the creditor has diligently brought suit against the debtor within six months and has diligently pursued it (ITALIAN CC art. 1957 para 1). This provision is also applied if the provider of dependent security has expressly limited the security to the same term as the secured claim; in this case, however, the debtor must be sued within two months (ITALIAN CC art. 1957 para 2 and 3; *Giusti* 285 ss.). However, ITALIAN courts are agreed that CC art. 1957 does not apply to dependent securities without time limit (Cass. 27 Nov. 2002 no. 16758, Giust.Civ.Mass. 2002, 2059). According to FINNISH LDepGuar § 19 para 2 the creditor loses its rights against the provider of dependent security if it does not demand payment from the latter before expiration of the fixed time. The demand does not have to comply with any form nor does it have to indicate the sum demanded by the creditor (RP 189/1998 rd 57). A corresponding rule has been developed in AUSTRIA, also without distinction as to the type of dependent security (OGH 11 April 1956, ÖJZ 1957, 129 no. 84, *obiter dictum*; Rummel/*Gamerith* § 1363 no. 4). The same is true for SPAIN. Since there are no legal provisions preserving the liability under a dependent security after expiration of the time limit, the creditor must ask for performance before that date (*Carrasco Perera a.o.* 227).

b. Differentiation between Solidary and Subsidiary Dependent Securities

12. Some countries differentiate between solidary and subsidiary dependent securities (GERMAN CC § 777 para 1). Although GREEK CC art. 866 does not contain such a

differentiation, the same results are achieved in GREECE due to the application of the general rules on dependent securities (cf. *Georgiades* § 3 no. 195).

i. Solidary Dependent Security with Time Limit – Para (1)

α. *Immediate Notice*

13. According to GERMAN CC § 777 para 1 sent. 2 in connection with sent. 1, the provider of dependent security under a solidary dependent security in relation to an existing obligation is discharged upon expiration of the fixed time, unless the creditor gives immediately after expiration notice to the provider of the dependent security that it will demand performance from the latter. Although the provision refers to an "existing obligation", it is common opinion that it can be applied to dependent securities for future obligation(s) as well (Erman/*Herrmann* § 777 no. 1; MünchKomm/*Habersack* § 777 no. 5 referring to the genesis of the provision). The creditor's notice does not have to comply with any form nor contain the sum demanded by the creditor (MünchKomm/*Habersack* § 777 no. 11). The creditor has to give the notice immediately which means without culpable delay (GERMAN CC § 121 para 1 sent. 1). Notice can also be given in the creditor's action against the debtor by serving a third party notice upon the security provider (CA Koblenz 14 July 2005, WM 2005, 2035 at 2036). However, the creditor's immediate notice achieves its purpose only if the secured obligation becomes payable before or at the latest at the expiration of the agreed time limit (BGH 29 June 2000, NJW 2000, 3137, 3138; MünchKomm/*Habersack* § 777 no. 5). The parties may waive the requirement of notice but it is highly controversial whether such stipulation is allowed in general conditions and terms (Palandt/*Sprau* § 777 no. 2a).

β. *Legal Action within Time Period*

14. According to GREEK CC art. 866, the creditor has to take legal action for the satisfaction of its claim within one month after the expiration of the fixed period and has to pursue the legal proceedings without delay. Since in the case of a solidary dependent security the creditor can commence legal proceedings directly against the security provider, the creditor has to do so within an one month period after expiration in case of a dependent security for a fixed time, whereas it is not necessary for the provider of dependent security to turn against the debtor as well (A.P. 133/1956, NoB 4, 617 ss.; *Georgiades* § 3 no. 195). Legal action may be taken by commencing a civil action, by raising a defence or by submitting the claim in an insolvency or enforcement proceeding; on the other hand, a simple extra-judicial notice does not suffice (*Georgiades* § 3 no. 195 with further references, cf. fn. 139).

ii. Subsidiary Dependent Security with Time Limit – Para (2)

15. In case of a dependent security with subsidiary liability it is according to GERMAN CC § 777 para 1 sent. 1 not sufficient for the creditor to notify the security provider after expiration of the fixed time that performance will be demanded from it. Rather, the creditor has to proceed immediately after expiration of the fixed time to the collection of the secured claim pursuant to § 772, continue the proceeding without serious delay,

and, after termination of the proceeding, immediately give notice to the security provider that it demands performance from the latter (GERMAN CC § 777 para 1 sent. 1; for details concerning the proceeding according to § 772, see *supra* national notes to Art. 2:106 nos. 7-12). The notice must comply with the same requirements as in the case of a dependent security with solidary liability (see *supra* no. 13).

16. Again, the situation is similar in GREECE: As already said above (cf. *supra* no. 14), the creditor has to take legal action within one month after expiration of the fixed time period and to pursue these proceedings without delay. But contrary to the preceding case, in the case of a subsidiary dependent security the creditor in accordance with the general rules on dependent securities has to commence legal proceedings against the debtor; commencement of legal action directly against the dependent security provider is not sufficient (*Georgiades* § 3 no. 195). If, however, the creditor has an enforceable title against the debtor, the existence of the claim is confirmed and the creditor does not have to take legal action against the debtor or the provider of dependent security (A.P. 210/1993, NoB 42, 399, applying CC art. 866 to an independent security). As to the types of possible proceedings, cf. *supra* no. 14).

17. According to the prevailing FRENCH opinion, if in case of a subsidiary dependent security the *beneficium discussionis* (see *supra* national notes on Art. 2:106) is invoked by the security provider, a prior notice to the debtor to pay is necessary. If the debt is not paid by the debtor, the creditor has to proceed against the provider of the dependent security as well. Proceedings against the debtor alone are not sufficient to force the provider of dependent security to pay, regardless of the solidary or subsidiary character of the dependent security (*Simler* no. 491).

18. Since dependent securities with subsidiary liability in the sense of Art. 2:106 are very rare in ENGLAND and SCOTLAND (cf. *supra* national notes to Art. 2:105 no. 1), the question whether notice by the creditor to the provider of dependent security of its intention to commence or actual commencement of proceedings against the debtor is necessary in order to preserve the liability of the provider of dependent security after expiration of the agreed time limit, does not seem to be discussed anywhere. Given that in these cases proceedings against the debtor are a condition precedent for the accrual of the security provider's liability it would then seem to depend upon the wording of each particular dependent security whether, in the absence of timely proceedings against the debtor, the security provider's liability survives the time limit of the dependent security.

D. Legal Consequences if Expiration has been Avoided

19. In GERMANY, if the creditor has given notice in due time in conformity with the aforementioned rules, the liability of the provider of dependent security is restricted to the amount of the debtor's obligation at the time of expiration of the fixed period in cases of solidary dependent security or at the time of the termination of the proceedings in cases of subsidiary dependent security, respectively (GERMAN CC § 777 para 2). In FRANCE the provider of dependent security is not released after expiration of the fixed time, unless the parties agree otherwise (*Simler* nos. 321 ss.); only the extent of the security provider's liability is limited by the expiration of time.

(Seidel/Hauck)

Article 2:109: Limiting Security Without Time Limit

(1) Where a security does not have an agreed time limit, the security may be limited by any party giving notice of at least three months to the other party. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts.
(2) By virtue of the notice, the scope of the security is limited to the secured principal obligations which are due at the date at which the limitation becomes effective and any secured ancillary obligations as defined in Article 2:104 paragraphs (1) and (2).

Comments*

A. General Remarks

1. Provisions on time limits. Articles 2:108 and 2:109 deal with dependent securities with (Article 2:108) or without (Article 2:109) time limits (cf. Comments on Article 2:108 nos. 1 s.). Article 2:109 applies to such contracts of personal security that do not have a time limit, *i.e.* that cover future secured obligations over an indefinite period. In accordance with the general principle contained in PECL Article 6:109, Article 2:109 provides for a possibility to limit the duration of such a security, *i.e.* to limit the scope of the security to obligations that are due at the time when the limitation becomes effective. An additional provision, Article 4:108, is applicable for consumer security providers only.

2. Limitation of duration of security outside scope of Article 2:109. The duration of a security might be unilaterally limited by any of the parties to the agreement even outside the scope of Article 2:109, *e.g.* where the parties have provided for such a right to limit the duration of a security in their agreement. In such situations, Article 2:109 may nevertheless be applicable in order to determine details or consequences of such a contractual clause.

* The Comments on Article 2:109 are by Ole Böger, LL.M.

B. Security without Agreed Time Limit

3. **Time limit restricting scope of security.** Article 2:109 provides for a possibility to limit the scope of a security in cases where such a restriction does not already follow from a time limit agreed by parties. Whether a security is unlimited in this way must be determined by interpreting the parties' agreement. This issue is dealt with in the Comments on Article 2:108 nos. 22 ss. Generally, the existence of any type of time limit for the security leads to the inapplicability of Article 2:109; the only exception are such time limits that do not affect the security as a whole, *e.g.* time limits that apply to certain secured obligations only (cf. Comments on Article 2:108 no. 24). For consumer security providers, cf. Article 4:108.

C. Limitation by Giving Notice

4. **Declaration by any party sufficient.** Any party may limit the security, *i.e.* limit its scope to secured obligations that are due at the time when the limitation becomes effective (cf. *infra* no. 6) by simple declaration vis-à-vis the other party. An act of the court is not necessary, neither does the party have to show the existence of good reasons. Although Article 2:109 gives both the creditor and the security provider the right to limit the security, in fact it will typically only be the security provider who exercises this right.

5. **Notice period.** The limitation of the security by giving notice can become effective only after a period of at least three months that has to be set by the party giving notice has expired. This minimum length of the period of notice has been introduced in order to protect the interests of the creditor and the debtor: typically, if the security provider limits a security covering future obligations the creditor will immediately stop granting any further credit to the debtor which might cause short-term illiquidity of the latter. The three months period of notice should give the debtor the opportunity to arrange alternative security or credit from another source. The security provider is protected against any undue increases of the secured obligations agreed between debtor and creditor within this period (if covered at all, cf. Article 2:102 (4)) on the basis of the principle of good faith (cf. PECL Article 1:201).

D. Effect of Limitation of Security – Para (2)

6. **Secured principal obligations due at the time the limitation becomes effective.** If notice is given, the scope of the security provider's liability is restricted to secured obligations that are due as of the date at which the limitation becomes effective. The limitation by giving notice in this respect has similar effects to those of an agreed time limit according to which the scope of the security would cover secured obligations that arise or fall due or fulfil other requirements before expiration of the time limit. For the purposes of Article 2:109, it is thought to be preferable to restrict the liability of the security provider to secured principal obligations that are due as of the date at which the limitation becomes effective, since this is the solution that is most favourable to the security provider. More-

over, the creditor is typically able to protect itself: the fact that a dependent personal security is limited according to Article 2:109 will typically give the creditor the right to accelerate the maturity of obligations secured by this security that have arisen but are not yet due, such as a credit paid out to the debtor that under its original terms was repayable at a date after the three months.

7. Secured ancillary obligations covered even though arising or falling due at a later time. The requirement that secured obligations must be due as of the date at which the limitation becomes effective does, however, only apply to the secured principal obligations. Ancillary obligations as defined in Article 2:104 (1) and (2) are covered by the scope of the security even if they arise or fall due at a later point of time. These obligations typically arise and fall due later than the principal obligation; in the absence of an agreement to the contrary it would seem unreasonable that a security should cover a secured principal obligation, but not *e.g.* interest owed by the debtor in respect of that obligation even if accruing only after the limitation of the security became effective, since the source of the obligation to pay interest is the non-payment of the principal obligation.

8. Limitation does not create time limit for resort to security. The limitation of the security according to Article 2:109 does not, however, create a time limit for resort to the security within the meaning of Article 2:108, *i.e.* the security provider remains liable after the limitation of the security even if the creditor does not take any further action until that date. Should the parties also have agreed on a time limit for resort to the security, then this time limit within the meaning of Article 2:108 is not affected by the fact that a party exercises its right according to Article 2:109.

E. Exceptions – Para (1) Second Sentence

9. Cases outside scope of Article 2:109. Paragraph (1) second sentence sets out situations in which the parties may not unilaterally limit the scope of the security by giving notice. If the security is agreed to cover specific obligations or obligations arising from specific contracts the exercise of the right according to Article 2:109 by the security provider would run counter to the interests of the creditor who may have agreed to contract with the debtor only on the basis of the existence of a dependent security and who may not be able to terminate these agreements. The creditor could, for example, have entered into a contract for the lease of an apartment only on the strength of a security provided in relation to the debtor's obligations to pay rent. According to Article 2:109 it is not possible to unilaterally limit the duration of a security in such a situation regardless of whether the lease contract itself has a time limit or is concluded for an indefinite period. The main example of a dependent security not covered by these exceptions (and therefore subject to the parties' right to give notice) is a global security. It is clear that for a security covered by one of these exceptions, recourse to the general principle of PECL Article 6:109 is not possible: *lex specialis derogat legi generali*.

10. Other bases of protection of security provider. In certain situations, the exclusion of the right to limit a security by giving notice might cause hardship to the security provider.

It is assumed, however, that in appropriate circumstances protection for the security provider against an unreasonable duration of a security could be offered on other legal bases: Apart from the possible application of the principles on the change of circumstances (cf. PECL Article 6:111), the creditor might in certain cases be prohibited from relying on a security running over an excessively lengthy period of time on the basis of the principle of good faith (cf. PECL Article 1:201); in other situations it is not inconceivable that the right to relief (Article 2:111) might include a right to demand that the debtor terminates the contract from which the secured obligations arise in order to prevent the creation of new secured obligations which would increase the security provider's liability.

F. Consumer as Security Provider

11. **Applicability to all types of consumer security providers.** Article 2:109 is directly applicable to consumer providers of dependent security and allows them to limit securities given for an unlimited time, subject to the exceptions provided for in para (1) sent. 2. The protection of consumer security providers is supplemented by Article 4:108, which allows the security provider to limit securities with an agreed limit under the conditions set out in that provision. These principles also apply to consumer providers of independent security (cf. Article 4:106 (c)) and to consumer security providers in a co-debtorship for security purposes (cf. Article 4:102 (1)). The application of Article 2:109 to these types of security providers includes the exceptions provided for in para (1) sent. 2 (cf. *supra* nos. 9 s.).

12. **Mandatory character.** By virtue of Article 4:102 (2), Article 2:109 may not be deviated from to the detriment of a consumer security provider in any type of security.

National Notes

I. Limiting Security Without Time Limit for Secured Obligations

A. Limitation of Principal Obligation Extended to Security

1. As a general rule, in all countries even a security whose scope is not specifically restricted to obligations arising within a specified time limit will be interpreted as being limited to the duration of the secured obligation (BELGIUM: *T' Kint* no. 771; ENG-

LAND: *Andrews and Millett* no. 4-019; FRANCE: *Simler* no. 270; GERMANY: Palandt/*Sprau* § 765 no. 13; ITALY: Cass. 8 Feb. 1989 no. 786, Giur.it. 1989 I 1 1517; *Giusti* 251 ss.; SPAIN: *Díez-Picazo* 431). Securities in SWEDEN will not often set out a separate validity time, but the security will be tied to the underlying contract. In relations where a private person is a security provider in relation to a commercial entity there seems to be developing a rule that the security provider's undertaking is limited in time in the above-mentioned sense (although there is not yet any clear and general rule to such effect) (*Gorton*, Suretyship 591).

B. Limitation by the Security Provider

a. Reason for Termination of Security

2. In AUSTRIA, any dependent personal security given for an unlimited time, *i.e.* with a scope that does not only cover obligations arising within an agreed time limit, may be terminated by the security provider giving notice to the creditor (OGH 22 June 1993, ÖBA 1994, 239 (240 requiring a reasonable duration of the security; without this requirement OGH 8 Nov. 1970, JBl, 1971, 257 (258)). Even an "irrevocable" security may be terminated if there is an "important reason" (OGH 28 April 1971, ÖJZ 1971, 522 (523) no. 281).
3. In BELGIUM, DENMARK, FINLAND, FRANCE, ITALY and the NETHERLANDS if a security given for an unlimited time in the above-mentioned sense secures future debts or in case of a global dependent security without time limit, the security provider can also unilaterally terminate the security by giving notice to the creditor (BELGIUM: *T' Kint* no. 771; DENMARK: for future debts, *Pedersen*, Kaution 53; DUTCH CC art. 7:681 para 1 lit. a with effect for future obligations (art. 7:861 para 2); FINLAND: HD 18 March 1997, KKO 1997:31; LDepGuar § 6 para 1 for a global dependent security, including for a current account; FRANCE for all undetermined obligations: cf. *Grimaldi* Commission's proposed art. 2302 para 3 sent. 2; Cass.com. 3 Dec. 1979, JCP G 1980, IV no. 67; *Simler* no. 282; ITALY: according to the general rule of CC art. 1373 para 2 on unilateral withdrawal from the contract; Cass. 15 March 1999 no. 2284, Giust.Civ.Mass. 1999, 565; Cass. 2 July 1998 no. 6473, BBTC 1999 II 657; CFI Milano 15 July 1993, BBTC 1994 II 548; *Petti* 154; moreover, the limitations of CC art. 1957 are not applicable: cf. *supra* national notes to Art. 2:108 no. 11). In BELGIUM the sole requirement is a notice of reasonable length to the other party (CA Bergen 4 Feb. 1986, Pas belge 1986 II 61; *T' Kint* no. 771). However, in LUXEMBOURG, the provider of a dependent security cannot unilaterally terminate a security without such a time limit, if a time limit is fixed in the underlying contract (*e.g. caution réelle* CA Luxembourg 14 May 2003, BankFin 2004 169). In FRANCE the parties can agree on a notice of reasonable length (*Simler* no. 284). If the security provider is a consumer, the creditor of professional claims must remind the consumer security provider annually that it has a right of termination (*Madelin* Act of 11 Feb. 1994, art. 47 II para 2 *juncto* MonC art. 313-22). Since Law no. 2003-721 of 1 Aug. 2003 this obligation has also to be fulfilled for consumer debts (ConsC art. L 341-6 sent 2). But the scope of these provisions is reduced, since it is forbidden for private persons to contract global dependent securities both if they acted as consumers (ConsC art. L 313-7) and if they acted as professionals (ConsC art. L 341-2 introduced by Law no. 2003-721 of 1 Aug. 2003).

4. The security provider's right to terminate a security whose scope is not limited to obligations arising within an agreed time limit by giving notice depends in ENGLISH law on the consideration for the security provider's promise to secure: if the consideration is divisible, the security provider can at any time terminate the security (*Re Crace, Balfour v. Crace* [1902] 1 Ch 733 (CFI)) by giving notice; if the consideration is indivisible, it cannot do so. Thus, a security for the balance of a current account is terminable because the security provider's promise is "divisible as to each advance" and only after the advance is made to the debtor the promise becomes irrevocable (cf. *Coulthart v. Clementson* (1879) 5 QBD 42 (CFI); *Andrews and Millett* no. 8-003). This is achieved by treating the security given for a divisible consideration as a standing offer which is *pro tanto* accepted when a fresh advance is made, since as a general rule every offer may be revoked before it is accepted (Halsbury/*Salter* para 290; *Goode*, Commercial Law 821; cf. also PECL, note 4 on Art. 2:202). The divisibility of the consideration is sometimes difficult to determine; as a rough guide it seems appropriate to examine the nature of the transaction the creditor has entered into in reliance on the security: if that transaction is terminable it is reasonable not to deprive the security provider of its right to revoke the security; if, on the other hand, a transaction is binding on the parties without being terminable for a certain period, it would prejudice the creditor if the security provider could revoke the security and thereby deprive the creditor of its security (Chitty/*Whittaker* no. 44-017). Similarly in SCOTLAND: continuing securities are regarded as containing offers of securities for future advances which then can be revoked before acceptance of each particular offer (*Gloag and Irvine* 857). The security provider can therefore withdraw from the security with effect for a future advance by giving notice to the creditor (Stair/*Clark* no. 980; *Gloag and Irvine* 857). There is no such right, however, where the security is given in respect of the debtor's liability arising in a specific transaction (Stair/*Clark* no. 980).
5. In PORTUGAL the security provider with *beneficium discussionis* (see *supra* national notes on Art. 2:106) may demand that the creditor, once the principal obligation has fallen due, tries to obtain satisfaction from the debtor within two months after the moment the secured obligation fell due (however, this time limit does not run out before one month after the notice to the creditor). The security provider is released from its liability if the creditor does not follow this demand. If the principal debt becomes due only after the creditor has given notice to the debtor, a security provider with *beneficium discussionis* may one year after having assumed the security demand that the creditor takes action against the debtor. Again, the security provider is released if the creditor does not comply with this demand (CC art. 652; *Almeida Costa* 784). It has been held that a contract of dependent personal security is also terminated if the credit is transferred without the security provider's approval (STJ 2 July 1996, 165/96 www.dgsi.pt).
6. In GERMANY and SPAIN there are no statutory provisions on termination of dependent personal securities. Consequently, they are regarded, as a rule, as not terminable (GERMANY: Staudinger/*Horn* § 765 no. 229; Palandt/*Sprau* § 765 no. 16; SPAIN: *Carrasco Perera a.o.* 227). However, some important exceptions are accepted for dependent personal securities securing future obligations without time limit. In GERMANY, the security provider has, based upon the principle of *bona fides* (CC § 242), a right of termination if a dependent personal security has been assumed for future obligations without time limit and if a reasonable time after the assumption of the security has

passed (BGH 10 June 1985, NJW 1986, 252, 253; BGH 22 May 1986, NJW 1986, 2308, 2309; approved in BGH 21 Jan. 1993, NJW-RR 1993, 944, 944 s.; Erman/*Herrmann* § 765 no. 8; MünchKomm/*Habersack* § 765 no. 55; *contra*: *Derleder,* NJW 1986, 102), since long-term relations *(Dauerschuldverhältnisse)* must be terminable to re-establish freedom of contract (cf. CA Düsseldorf 24 Nov. 1998, ZMR 2000, 89; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 130). For the German Supreme Court a minimum period of at least three years seems to be sufficient (BGH 4 July 1985, NJW 1985, 3007, 3008; cf. *Bülow,* Kreditsicherheiten no. 807; Schimansky/Bunte/Lwowski/*Lwowski* appendix to § 91 no. 10). Also in SPAIN a court has invoked the principle of *bona fides* in order to allow termination of a security without time limit (CA Córdoba 12 June 2000, RAJ 2000 no. 2070, cited by *Carrasco Perera a.o.* 228).

7. In GERMANY, apart from expiration of a reasonable period of time, a second ground for termination is recognised: dependent personal securities for future obligations without time limit may also be terminated by the security provider on the basis of the principle of *bona fides* (CC § 242) for grave reason (see only BGH 10 June 1985, NJW 1986, 252, 253; BGH 4 July 1985, NJW 1985, 3007, 3008; Erman/*Herrmann* § 765 no. 8; MünchKomm/*Habersack* § 765 no. 56). In 2002, this case law has been codified in a generalised form for all long-term contracts by CC § 314. Termination is effective immediately (para 1), but it must be exercised within a reasonable period after the security provider received information on the critical event (para 3). A grave reason has been assumed *e.g.* if the debtor's financial situation had seriously worsened (BGH 21 Jan. 1993, NJW-RR 1993, 944, 945), if there were no obligations to secure for a longer period (BGH 22 May 1986, NJW 1986, 2308, 2309) and if a manager or shareholder of a company who in consideration of this had secured the company's obligations leaves the company (BGH 10 June 1985, NJW 1986, 252, 253; CA Celle 5 Oct. 1988, NJW-RR 1989, 548, 548; *Reinicke and Tiedtke*, Bürgschaftsrecht no. 131). The right of termination for grave reason is extended by some authors to dependent personal securities with time limit (MünchKomm/*Habersack* § 765 no. 56; Staudinger/*Horn* § 765 no. 235). Similarly, according to DUTCH CC art. 7:861 para 1 lit. b) a dependent security that secures a future obligation may be terminated after five years even if it is given for a limited time.

8. Also in GREECE, there is no general right of the security provider to terminate a security for an unlimited period. According to GREEK literature, a right of termination is exceptionally admitted on the ground of good faith for securities without a maximum amount securing the outstanding balance of a current account and only if there is a grave reason (*Georgiades* § 4 no. 49; *Chelidonis*, EllDik 1998, 39, 1034, 1036). GREEK CC arts. 867, 868 allow, however, the security provider to set time limits to its unlimited liability. According to art. 867, a security provider who obliged itself for an unlimited period may upon maturity of the secured debt request the creditor to take legal action within one month for the satisfaction of its claim and to pursue the legal proceedings diligently. If the secured debt becomes due and payable only upon notice by the creditor, then according to CC art. 868 the security provider may, at the lapse of one year after he issued the security, demand from the creditor to give notice to the debtor and take legal action within one month as well as to pursue the legal proceedings diligently. In both cases, if the creditor does not comply with the security provider's demand, the latter shall be discharged (*Georgiades* § 3 no. 199).

b. Period of Notice to the Creditor

9. In GERMANY a security provider who has a right of termination (see *supra* nos. 6 s.) must in general set a reasonable period for the notice to take effect, since the security provider has to show consideration for the legitimate interests of both creditor and debtor to enable them to adapt their relationship to the changed situation (BGH 10 June 1985, NJW 1986, 252, 253; BGH 4 July 1985, NJW 1985, 3007, 3008; CA Celle 5 Oct. 1988, NJW-RR 1989, 548, 548). However, the reason for termination has also to be considered (Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 113; Staudinger/*Horn* § 765 no. 232): in cases of termination due to expiry of time for dependent personal securities securing a loan, reference is especially made to GERMAN CC § 489 para 2 concerning the termination of a loan with variable interest; consequently, a period of notice of three months is regularly accepted (CA Celle 5 Oct. 1988, NJW-RR 1989, 548, 548; MünchKomm/*Habersack* § 765 no. 55; cf. also *Derleder*, NJW 1986, 102). In cases of termination for a grave reason, however, a shorter period of notice (CA Celle 5 Oct. 1988, NJW-RR 1989, 548, 548: 4 to 6 weeks) or even immediate termination (BGH 4 July 1985, NJW 1985, 3007, 3008: no opposing interests of debtor and creditor and various reasons for termination; MünchKomm/*Habersack* § 765 no. 56; *Derleder*, NJW 1986, 102) have been accepted due to special circumstances. The new general legislative provision of CC § 314 allows termination with immediate effect (*supra* no. 7).

10. According to GREEK literature, the period of notice must be reasonable, according to the circumstances of each particular case (*Georgiades* § 4 no. 51).

C. Demand of Security Provider against Debtor for Early Recourse

11. For details, cf. *infra* national notes to Art. 2:111.

II. Amount of the Security upon Termination

12. In FRANCE, GERMANY, GREECE, ITALY, the NETHERLANDS and SCOTLAND a security for future or conditional (and global) obligations is limited to those obligations that exist at the time of termination of the security (FRANCE: *Simler* nos. 780 ss.; GERMANY: BGH 10 June 1985, NJW 1986, 252, 253; BGH 22 May 1986, NJW 1986, 2308, 2309; GREECE: *Chelidonis*, EllDik 1998, 39, 1034; ITALY: Cass. 19 June 2001 no. 8324, Giust.civ.Mass. 2001, 1217; Cass. 6 Aug. 1992 no. 9349, Giur.it 1993 I 1, 1255; NETHERLANDS: CC art. 7:861 para 2 – mandatory rule for non-professionals (CC art. 7:862 lit. a), but also applicable to professional providers of security (*Blomkwist* no. 16 at p. 30); SCOTLAND: Stair/*Clark* no. 980; *Gloag and Irvine* 858). In FRANCE and GERMANY, obligations that are created after termination has become effective are not covered, unless these obligations are only ancillary obligations or costs (FRANCE: Cass.civ. 10 May 1988, Bull.civ. 1988 I no. 134 p. 93; GERMANY: CC § 767 para 1 sent. 2 or para 2; MünchKomm/*Habersack* § 765 no. 57). However, in GERMANY the security provider is liable for those obligations that are created after the notice reaches the creditor but before it becomes effective, provided these obligations are not extraordinary (cf. Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 114; *contra*: *Derleder*, NJW 1986, 97, 102). GERMAN CC § 777 is not applicable so that the creditor has not to demand

performance from the security provider before or immediately after termination becomes effective (BGH 4 July 1985, NJW 1985, 3007, 3008).

13. In case of termination, the amount of the security will be determined in AUSTRIA, ITALY and the NETHERLANDS by the date on which the security provider communicates his intention to terminate (AUSTRIA: Schwimann/*Mader and Faber* § 1353 no. 8; ITALY: Cass. 15 March 1999 no. 2284, Giust.Civ.Mass. 1999 565; CA Milano 17 March 1998, BBTC 2000 II 402; CFI Milano 15 July 1993, BBTC 1994 II 548; DUTCH CC art. 7:861 para 2; *du Perron and Haentjens* art. 861 no. 3). By contrast, according to GREEK literature, the termination becomes effective upon expiration of the reasonable period of notice (*Georgiades* § 4 no. 52).

14. Under ENGLISH law, termination of a security will not affect the liability of the security provider as it stands at the date of termination (cf. *Thomas v. Nottingham Inc Football Club* [1972] 1 Ch 596 (CFI); *Andrews and Millett* no. 8-006). It seems that the security provider's liability will also cover new secured obligations arising during the notice period, although there is little authority on this point (cf. *Andrews and Millett* no. 8-009; *O'Donovan and Phillips* no. 9-75). It is also not entirely clear whether the security provider is liable for secured obligations that have been incurred or undertaken before termination of the security but which only accrue at a later date (cf. *O'Donovan and Phillips* nos. 9-72, 9-22 ss.).

(de la Mata; Dr. Poulsen)

Article 2:110: Creditor's Liability

If and in so far as due to the creditor's conduct the security provider cannot be subrogated to the creditor's rights against the debtor and to the creditor's personal and proprietary security rights granted by third persons, or cannot be fully reimbursed from the debtor or from third party security providers, if any, the creditor is liable for the damage caused to the security provider.

Comments

A. Basic Idea

1. Since a security provider usually assumes the security without remuneration, it must, if it is obliged to perform to the creditor, seek reimbursement from the debtor. Article 2:113 makes various rights available to the security provider: a claim for reimbursement according to para (1) first sent. as well as a subrogation into the creditor's

rights against the debtor, both the personal rights (para (1) second sent.) as well as the personal and proprietary rights securing this latter claim (para (3)).

2. Article 2:110 deals with the consequences if, due to the conduct of the creditor, these rights no longer exist or are shortened and therefore cannot pass fully or partly to the security provider, after the latter has performed to the creditor. By implying a duty of the creditor to preserve those rights in favour of the security provider, Article 2:110 sanctions any violation of this duty in favour of the security provider.

B. Details

3. The creditor's duty of preserving of rights in favour of the security provider may be violated in various ways. One typical example is that the creditor delays collection of a claim which is due by the debtor, although it knows that its financial situation is worsening. If the creditor waits until the debtor has become insolvent before demanding payment from the provider of dependent security, the creditor is liable insofar as the security provider cannot be reimbursed from the debtor's insolvent estate. Another example is that the creditor, believing that the debtor will remain solvent, gives up a personal or proprietary security for its claim against the debtor who later, against expectations, becomes bankrupt. A typical instance of violation of the duty of preserving the security right also occurs where the creditor negligently allows a security right for its claim against the debtor to deteriorate or to disappear, especially if, as is usually the case, the encumbered assets are held by the debtor.

4. Which yardstick is appropriate in order to determine how careful the creditor must act in order to avoid incurring the liability imposed by Article 2:110? Does the objective violation of the security provider's interest justify complete or partial loss of the creditor's rights as against the security provider? The reference to the creditor's "*conduct*" seems to indicate this solution. Or should a duty of care be imposed upon the creditor, *i.e.* a culpable act or omission?

5. By choosing as criterion the term "conduct", these Rules have consciously opted for an objective standard. This is justified by the following considerations:

Firstly, creditor and security provider have corresponding rights and obligations, whether or not the security provider is solidarily liable to the creditor or only subsidiarily. The obligations of both parties area closely bound up with each other. Therefore, the creditor is bound to observe the same degree of circumspection in dealing with its rights as any creditor is by law expected to employ in his self-interest and in the interest of the security provider.

Second, to give relevance to any degree of culpability would render more difficult the application of Article 2:110. People may reasonably differ as to the appropriate degree of care that the creditor must be expected to employ.

Third, since many personal security rights are incurred without remuneration (and in the silent hope that the debtor will always be able to pay its debts), security providers deserve special protection. They are protected the better, the stricter the requirements are which the creditor is bound to observe, primarily in its own interest, but at the same time in the interest of the security provider.

6. If the creditor violates its duty of preserving its full rights, the sanction may consist of a *(pro tanto)* discharge of the dependent security provider or by granting the security provider a claim for damages. The latter alternative has been chosen since it allows to grant damages which may surpass the amount of the security; moreover, this approach is more in keeping with the general law of contracts. The conditions and details of a claim for damages are laid down in PECL Article 9:501 ss.

C. Application to Recourse Claims

7. It should be noted that Article 2:110 is also applied with appropriate adaptations in the context of recourse claims as between several security providers. Where a security provider acts so as to deprive another security provider from its possibility of having secondary recourse against the debtor or of sharing any benefits recovered from the debtor, the former security provider will be liable towards the latter, cf. Comments on Article 1:109 nos. 9 ss., 15 s.

D. Consumer as Security Provider

8. Article 2:110 as a rule protecting the security provider applies to a consumer who has provided a dependent personal security, one who has purported to assume an independent personal security (cf. Article 4:106 (c)) as well as to a consumer co-debtor for security purposes (cf. Article 4:102 (1)). According to Article 4:102 (2), the rules of Article 2:110 are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in Article 2:110 means the debtor whose obligation is secured.

National Notes

I. Damages or Discharge

1. The subrogation of the security provider to the creditor's rights against the debtor after the security provider has paid the secured debt, or otherwise performed under the security, is one of the ubiquitous features of the law of dependent personal securities within the different legal systems (see *infra* national notes to Art. 2:113). It is also a common feature that acts of the creditor which deprive the security provider of its right to subrogation, or diminish this right, shall not operate to the disadvantage of the security provider. In this respect two favourable solutions for the security provider are possible: it can either be discharged (fully or *pro tanto*) from liability or be entitled to a claim for damages against the creditor. Most legal systems have opted for discharge of the liability of the provider of personal security (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2037 (since 2006: FRENCH CC art. 2314): full discharge; FRENCH *Grimaldi* Commission's proposal of a new CC art. 2322: discharge *pro tanto*; however, this proposal was not adopted by the legislator of 2006; DENMARK: *Pedersen*, Kaution 85 ss.; ENGLAND: *Andrews and Millett* nos. 9-040 ss.; GERMAN CC § 776; GREEK CC art. 863; cf. *Doublis*, Chrimatodotiseon 238 ss., 240; ITALIAN CC art. 1955; PORTUGUESE CC art. 653; SCOTLAND: Stair/*Clark* nos. 976 s.; SPANISH CC art. 1852; SWEDEN: *Walin*, Borgen 198 s.). Only a few legal systems uphold the liability of the security provider but grant it a right to damages against the creditor (AUSTRIA: CC § 1364 sent. 2; NETHERLANDS: CC art. 7:850 para 3 *juncto* art. 6:12 *juncto* art. 6:154; *Blomkwist* no. 21; there may be no derogations from CC art. 6:154 to the detriment of a non-professional security provider (CC art. 7:862 lit. b); *Blomkwist* no. 30)). The different approaches do not necessarily affect the end result since a security provider may set off its claim for damages against the creditor's claim for performance.

II. General Scope of Creditor's Duties

2. The security provider's right of subrogation may be affected in several ways. The loss of co-providers of personal security or of proprietary security granted by a third party is strictly speaking not the loss of a right, which the creditor already had vis-à-vis the debtor. Due to these losses, however, the security provider's possibilities to be subrogated into the rights the creditor holds as security for the debtor's obligation are diminished or completely lost. Since under most legal systems, as well as under the present Rules, the security provider's right of subrogation comprises third party security – be it personal or proprietary (cf. *infra* national notes to Art. 2:113) – not only detrimental acts of the creditor concerning the secured obligation but moreover detrimental acts concerning third party security fall within the ambit of the relevant rules.
3. In GERMANY, on the other hand, only detrimental acts concerning security rights fall within the ambit of the relevant statutory provision (GERMAN CC § 776) while the legislator denied in general any duty of care (*Diligenzpflichten)* of the creditor vis-à-vis the security provider due to the unilaterally binding character of dependent personal securities (cf. Protokolle II 481); creditors should only be burdened with charges as against themselves *(Obliegenheiten)*, *i.e.* duties which are not enforceable by the security provider, but the creditor has to bear the disadvantages resulting from a breach of such duties (cf. Staudinger/*Horn* § 776 nos. 1, 17; Erman/*Herrmann* § 765 no. 10). As far as

the creditor's acts affect the secured obligation and cause damage to the security provider, the latter is only protected by the principle of *bona fides* (GERMAN CC § 242; cf. only Palandt/*Sprau* § 776 no. 2 and § 768 no. 2). Although the requirements as to the creditor's behaviour in order to establish a liability according to this principle seem to be less severe now, the level of protection of the security provider seems to be still inferior to those legal systems in which a specific statutory provision exists. The situation appears to be similar in ENGLAND and SCOTLAND, cf. *infra* no. 6.

III. Delayed Collection of Secured Claim

4. One situation in which the security provider's subrogated rights against the debtor are affected occurs when the creditor delays collection of a claim from the debtor and the latter's financial situation deteriorates, or it becomes even insolvent.

5. AUSTRIAN law expressly holds the creditor responsible for a delay in demanding performance from the debtor if that delay affects the security provider's claim against the debtor (CC § 1364 sent. 2). Such damage has been assumed if the debtor has become insolvent and the security provider will probably not be able to recover but a small dividend (OGH 7 Dec. 1955, ÖJZ 1956, no. 125 at p. 237). Some aspects of the rule are uncertain, *e.g.* whether the creditor must have acted culpably (formerly the courts did not demand this, *e.g.* OGH 7 Dec. 1955, *supra*, but they seem now to follow the writers' contrary view, cf. OGH 26 May 1987, ÖBA 1987, 924; Rummel/*Gamerith* § 1364 no. 4; Schwimann/*Mader and Faber* § 1364 no. 3). Controversial is also whether solidary providers of security can rely on the provision (denied by OGH 22 Oct. 1935, SZ 17 no. 146 at p. 416 s.; but apparently affirmed now by OGH 26 May 1987, *supra*, and by most writers, *e.g.* Rummel/*Gamerith* § 1346 no. 6). However, the security provider's contributory negligence may diminish its claim; thus CC § 1364 sent. 1 entitles the security provider to demand security from the defaulting debtor (cf. OGH 7 Dec. 1955, ÖJZ 1956, no. 125 at p. 237 (238)).

6. In ENGLAND and SCOTLAND, the delayed collection of the secured claim by the creditor will normally not discharge the security provider (ENGLAND: *Black v. Ottoman Bank* (1862) 15 ER 573, 577 (PC); *O'Donovan and Phillips* no. 8-109; Halsbury/*Salter* para 318; SCOTLAND: *Gloag and Irvine* 865). The reason is that it is the security provider's duty to see that the principal debtor performs its obligations (ENGLAND: *Wright v. Simpson* (1802) 31 ER 1272 (CFI)); moreover, the security provider is entitled at any time to pay off the creditor and then to sue the debtor in the creditor's name (ENGLAND: *Swire v. Redman* (1876) 1 QBD 536 (CFI); *Andrews and Millett* no. 9-029). Should it be agreed as a condition of the security, however, that the creditor uses the utmost efforts to obtain payment from the debtor, a breach of this condition discharges the security provider (ENGLAND: *London Guarantee Co. v. Fearnley* (1880) 5 App.Cas. 911 (HL); *Andrews and Millett* no. 9-036; SCOTLAND: Stair/*Clark* no. 964). The security provider is also discharged from its liability if the creditor agrees with the debtor to give time to the latter (cf. *supra* national notes to Art. 2:102 no. 29). Also according to ITALIAN legal writers on CC art. 1955, a simple delay of the creditor in collecting the secured obligation is not sufficient to discharge the security provider, even if the creditor knew of the debtor's precarious patrimonial situation or if such delay caused a deterioration of the securities (*Fragali*, Della fideiussione 475 s.).

7. In GREECE, there are two relevant provisions: according to CC art. 862, a security provider shall be discharged if by reason of a fault committed by the creditor, the latter cannot be satisfied by the debtor; but according to CC art. 863, a security provider shall be discharged if the creditor has desisted from enforcing securities covering exclusively the creditor's claim, in respect of which the personal security was issued, as a result of which the security provider is damaged. The GREEK Supreme Court held in decision 1230/1997 (DEE 4, 280 ss.) that the creditor's delay of 21 months before initiating legal proceedings against the debtor is a strong indication for gross negligence on the part of the creditor (the security provider had waived the *beneficium* of CC art. 862; this waiver, however, is only valid insofar as the creditor's fault is slight considering that CC art. 332 renders null any prior agreement excluding or limiting liability arising from gross negligence). It is also necessary, however, to show that this delay actually reduced the effectiveness of collecting measures against the debtor (cf. *Doublis*, Chrimatodotiseon, 244, 245).
8. In BELGIUM, FRANCE, LUXEMBOURG, PORTUGAL and SPAIN the security provider is generally discharged as soon as the creditor's responsibility for the loss of priority rights is established (FRANCE: *Simler* nos. 823 ss.; PORTUGAL: *Almeida Costa* 785). Especially if, due to an intervening insolvency of the debtor, the delayed collection of claims leads to a loss of assets, the creditor may be liable (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2024 (since 2006: FRENCH CC art. 2301); PORTUGUESE CC art. 653; SPANISH CC art. 1833). However, in some decisions the security provider has been relieved without proof of the actual loss of priority rights, since the delayed collection of a secured claim by the creditor would constitute a case of inexcusable negligence (FRANCE: cf. Cass.civ. 23 Jan. 1980, D. 1980, I.R. 408; *Simler* no. 826). By contrast, in PORTUGAL an effective loss of the security provider's right must be established and the discharge operates only insofar as the security provider actually suffered losses (*Pires de Lima and Antunes Varela* 671).
9. There is no specific provision in GERMANY concerning this issue. The creditor has according to court practice in general no collateral duties vis-à-vis the security provider and is consequently not obliged to preserve the security provider's rights against the debtor, especially not in execution against the debtor (Erman/*Herrmann* § 765 no. 11; Staudinger/*Horn* § 776 no. 2; critical *Reinicke and Tiedtke*, Bürgschaftsrecht no. 245; see also *supra* no. 3). However, the principle of *bona fides* (CC § 242) applies and the security provider is therefore at least protected against an abuse of rights by the creditor, *i.e.* if the creditor violates the security provider's interests in a grossly negligent way or in bad faith (BGH 5 Dec. 1962, WM 1963, 24, 25; Palandt/*Sprau* § 768 no. 2). This has been assumed when the creditor is responsible for the debtor's economic breakdown and by this prevents the security provider from having recourse against the debtor (BGH 23 Feb. 1984, WM 1984, 586; BGH 7 Feb. 1966, WM 1966, 317). Moreover, the creditor is obliged to act vis-à-vis the debtor as if the secured obligation was not secured in order to preserve its own interests, especially to reduce possible damage (BGH 30 March 1995, NJW 1995, 1886, 1888; BGH 15 July 1999, NJW 1999, 3195, 3197). If one of these exceptional duties is violated the security provider has a claim for damages against the creditor who consequently loses its rights against the security provider (Erman/*Herrmann* § 765 no. 11).

IV. Release of Co-Providers of Security

10. In BELGIAN, FRENCH, DUTCH, ENGLISH and SCOTS law the release of co-providers of security may result in the security provider being either fully or *pro tanto* discharged (BELGIUM: *Van Quickenborne* no. 590 at p. 311; FRANCE: *Simler* no. 854; NETHERLANDS: Asser/*Hartkamp* no. 597). The security provider will be fully discharged if the released security provider's liability was joint or joint and several (*i.e.* "solidary" in the terminology of Art. 1:107) with the liability of the remaining security provider in which case the continued existence of the co-security provider is regarded as a condition of the other security provider's liability (ENGLAND: *Smith v. Wood* [1929] 1 Ch 14 (CA); *Andrews and Millett* no. 9-041; Halsbury/*Salter* para 336; SCOTLAND: Mercantile Amendment Act (Scotland) 1856 sec. 9). If there is no such condition of the security, the discharge will operate *pro tanto* only in so far as the remaining security providers' right of contribution is affected by the release (ENGLAND: *Re Wolmershausen* (1890) 62 LT 541 (CFI); *Ward v. National Bank of New Zealand* (1883) 8 App.Cas. 755 (PC); *O'Donovan and Phillips* no. 8-26; SCOTLAND: *Morgan v. Smart* (1872) 10 M 610, 615 (CA)). There is no discharge if there is no actual release of the co-security provider but *e.g.* merely a covenant not to sue or a giving of time to the co-security provider (ENGLAND: Halsbury/*Salter* para 337; SCOTLAND: Stair/*Clark* no. 976). According to GERMAN CC § 776, if the creditor waives its right against a co-provider of security the other security provider is released insofar as it could have obtained compensation by virtue of the waived right as provided for in § 774. This applies even if the waived right was not created until after the assumption of the security. This leads in general to a proportional release according to § 774 para 2, § 426 para 1; the situation is similar under the FINNISH LDepGuar § 18 para 1 (RP 189/1998 rd 53 s.)
11. According to FRENCH CC arts. 1285 para 2, 1287 para 3 *juncto* 1288, a security provider is either fully or partly discharged (*Simler* nos. 746 and 854) if a co-provider of security is released. SPANISH CC art. 1850 provides for *pro tanto*-discharge in case of release of a co-provider of security. In AUSTRIA it is expressly provided that the release of one security provider does not affect the relationship towards the other providers of security (CC § 1363 sent. 3). This means that a security provider who has performed to the creditor may take recourse also against the security provider released by the creditor (Rummel/*Gamerith* § 1363 no. 5 ss.). By contrast, the prevailing opinion in GREECE does not apply CC art. 863 which effectuates a discharge of the security provider's obligation to the case of a co-provider of security because of the solidary liability of the co-providers of security resulting from CC arts. 854 and 860 (cf. *Doublis*, Chrimatodotiseon, 249 fn. 109). According to PORTUGUESE case law, the release of one co-provider of security has the effect of discharging the other providers of security proportionally to the released security provider's share of the total liability (CA Coimbra 28 Feb. 1989, CJ XIV, I-69).

V. Loss and Deterioration of Proprietary Security Rights Held by Creditor

12. Under BELGIAN, LUXEMBOURGIAN, DUTCH, GREEK and SWEDISH law the position is in general as follows: The creditor may not act or neglect to act so as to worsen the position of the security provider, and if by its act or omission the benefit of a security is lost or diminished, the security provider will be discharged, either wholly or in part

(BELGIUM: *Van Quickenborne* no. 590; GREECE: CC art. 863; A.P. (Plenum) 6/2000, EED 51, 285 ss.; LUXEMBOURG: *Ravarani*, Jurisprudence récente, 918; NETHERLANDS: Asser/*Hartkamp* no. 597; SWEDEN: *Walin*, Borgen 122 ss.). In ENGLAND and SCOTLAND, the security provider is discharged in full if the release of a security by the creditor constitutes a breach of a condition of the security (ENGLAND: *Carter v. White* (1883) 25 ChD 666 (CA); Halsbury/*Salter* para 334; SCOTLAND: *Drummond v. Rannie* (1836) 14 S 437 (CA)). The same consequence applies where the release is agreed between creditor and principal debtor as a variation of the terms of the principal agreement (cf. *O'Donovan and Phillips* no. 8-47; see also *supra* national notes to Art. 2:102 no. 27). If the security provider, however, cannot show that the giving up of a proprietary security amounts to a breach of condition of its security by the creditor, the security provider is only *pro tanto* discharged by this release to the extent that its rights have been impaired (ENGLAND: Halsbury/*Salter* para 334; SCOTLAND: Stair/*Clark* no. 977). Apart from the question of a release of securities, the creditor is also under an equitable duty to maintain securities for the benefit of the security provider; if the creditor violates this duty, the security provider's liability will be reduced to the extent of its losses suffered as a consequence of the creditor's dealings (ENGLAND: *Andrews and Millett* no. 9-041; *O'Donovan and Phillips* no. 8-49; the situation is similar in SCOTLAND: Stair/*Clark* no. 977). The extent of this duty of the creditor, however, has not been exactly defined in the case law yet (ENGLAND: *Andrews and Millett* no. 9-043; *O'Donovan and Phillips* nos. 8-55 ss.). It has been held, however, that the creditor is not under an obligation to enforce securities even though in case of a delayed enforcement of the security less money might be realised from it (*China and South Sea Bank Ltd. v. Tan* [1990] 1 AC 536 (PC)).

13. In FRANCE, if the priority or proprietary rights existing at the time of contracting (*Simler* no. 836) are lost due to the creditor's fault (Cass.ch.mixte 10 June 2005, JCP E 2005, II no. 1088, note *Legeais*; *Simler* no. 842), the security provider is released from liability (CC art. 2037 (since 2006: CC art. 2314)). The *Grimaldi* Commission's proposal to limit the security provider's release to the amount of its damage (CC new art. 2322), in conformity with court practice, sets out in fact a partial discharge; however, the proposal was not adopted by the legislation of 2006. According to court decisions, the security provider is only partially discharged if *e.g.* the value of the lost priority rights is less than the value of the secured obligation (Cass.civ. 9 May 1994, JCP G 1994, IV no. 1730; *Simler* no. 854). Since 1984 (Law no. 84-148 of 1 March 1984 on prevention of enterprises's insolvency) the provision on the security provider's release is mandatory (CC art. 2037 sent. 2 (since 2006: CC art. 2314 sent. 2)). According to the wording of SPANISH CC art. 1852 "the providers of security, even if they are solidary, shall be discharged from their obligation whenever an act of the creditor prevents them from being subrogated in its rights, mortgages, and privileges". Most important legal writers agree on considering as "acts of the creditor" any conduct imputable to the creditor (*Díez-Picazo* 460), including omissions (*Díez-Picazo* 460; *Guilarte Zapatero*, Comentarios 410). The security provider will be discharged even if it has failed to claim anticipated discharge (*Guilarte Zapatero*, Comentarios 412). In any case, the conduct must have taken place before the security provider has performed (*Guilarte Zapatero*, Comentarios 410). The wording of ITALIAN CC art. 1955 is parallel to its SPANISH equivalent, but it does not cover any conduct or any inactivity of the creditor. The act of the creditor must be a culpable violation of a legal or contractual duty (Cass. 6 Feb. 2004 no. 2301,

Giust.civ. 2004, 1479) and must have as consequence the complete loss of a right of the security provider. A mere difficulty for him in exercising this right due to acts of the creditor is not sufficient (*Bozzi*, La fideiussione 267; Cass. 21 Jan. 2000 no. 675, BBTC 2001 II 431). PORTUGUESE CC art. 653 refers explicitly to "positive and negative acts of the creditor" and although it only mentions "rights", it does so with a general meaning, including therefore mortgages and privileges (see *Antunes Varela and Pires de Lima* 671).

14. According to GERMAN CC § 776 if the creditor waives a right of preference attached to its claim or a proprietary security right (cf. *Reinicke and Tiedtke*, Bürgschaftsrecht no. 241 s.; Erman/*Herrmann* § 776 no. 2; partly critical *e.g.* Staudinger/*Horn* § 776 no. 8), the provider of dependent personal security is discharged insofar as it could have obtained satisfaction by virtue of the waived right as provided for in CC § 774. This applies even if the waived right was created after the assumption of the dependent personal security. Contrary to the legal systems mentioned in preceding no. 13, under GERMAN law it is mostly held that only wilful acts of the creditor are sanctioned, excluding mere negligence (Erman/*Herrmann* § 776 no. 4; MünchKomm/*Habersack* § 776 no. 8 with references; however, the author takes a less strict view; *contra*: Staudinger/*Horn* § 776 no. 12). Omissions are not sanctioned either (Erman/*Herrmann* § 776 no. 4; see also BGH 15 July 1999, NJW 1999, 3195, 3197: it is not sufficient if the value of another security diminishes and the creditor does nothing; *contra* Staudinger/*Horn* § 776 no. 12). Concerning the reference to § 774 see again *supra* national notes to Art. 1:108 no. 4: there must be a right of recourse (cf. Staudinger/*Horn* § 776 no. 15). Finally, the waived security right must have an economic value (Erman/*Herrmann* § 776 no. 6).

15. There are contradictory decisions in GREECE on whether the creditor's negligence in respect of proprietary security releases the security provider from liability: the application of CC arts. 862, 863 stipulating the security provider's discharge if due to the creditor's negligence its claim for reimbursement against the debtor has been rendered impossible, has been denied in a case where, due to the creditor's negligence in safeguarding the pledged merchandise, it was received by the debtor and sold to third parties, thus depriving the security provider of any possibility to be satisfied out of the pledged things (A.P. 1260/94, DEE 1, 307 ss. = EllDik 1996, 101 ss.). In an older Supreme Court decision, on the other hand, the creditor was held responsible for not timely selling perishable merchandise, which was eventually destroyed (A.P. 807/72, ND 1973, 235 ss. annotated by *Kalogeras* 260 ss.). In a recent case the creditor negligently returned pledged goods to the debtor. The security provider had waived the benefit of CC art. 863 on release of securities, and the Supreme Court had to answer the question whether or not the loss of securities could be qualified in the context of CC art. 862 as gross negligence of the creditor, resulting in its inability to be satisfied by the security provider. The Supreme Court denied this since the security provider's waiver of discharge due to release of securities by the creditor was exactly intended to enable the latter to waive securities, without losing at the same time the security (A.P. (Plenum) 6/2000, EED 2000, 285 ss., with strong minority opinion of four members; also critical on this position *Chelidonis*, EpiskED 2001, 351 ss.).

16. Again, AUSTRIAN law offers a different solution. CC § 1360 final sent. provides that the creditor is "not allowed" to give up a pledge created by the debtor or a third person before or at the time of assumption of the dependent personal security. In conformity

with the corresponding rule discussed *supra* no. 5, the waiver of the security is effective but the creditor is responsible without fault for the ensuing damage to the provider of dependent personal security (Rummel/*Gamerith* § 1360 no. 2; Schwimann/*Mader and Faber* § 1360 nos. 2, 4). The provision is extended to other security rights, *e.g.* a reservation of title under a contract of sale between creditor and debtor (Rummel/*Gamerith* § 1360 no. 5).

17. A comprehensive duty of care of the creditor vis-à-vis the provider of dependent personal security in AUSTRIAN law is derived from CC § 1364 sent. 2 (*supra* no. 5; OGH 26 May 1987, ÖBA 1987, 924; 14 Apr. 1996, Ecolex 1996, 744). In the latter case the Supreme Court held a creditor liable for the delayed enforcement of a reservation of title in a bus sold to the debtor although such enforcement had been promised.

(Bisping/Böger)

Article 2:111: Debtor's Relief for the Security Provider

(1) A security provider who has provided a security at the debtor's request or with its express or presumed consent, may request relief by the debtor
  (a) if the debtor has not performed the secured obligation when it became due or is unable to pay or the debtor's assets have been substantially diminished; or
  (b) if the creditor has brought an action on the security against the security provider.
(2) Relief may be granted by furnishing adequate security.

Comments

A. The Principle

1. Under certain conditions, the provider of a dependent security may demand relief from the debtor even before the security provider has in fact performed to the creditor (for the latter case, cf. Article 2:113). Such exceptional "preceding" relief presupposes, however, that the security provider had assumed the security upon the demand of the debtor or with his actual or presumed intent (*e.g.*, by virtue of *negotiorum gestio*) – this, of course, will almost always be the case, except in the rare situation of assuming a personal security as a gift to the debtor. In this latter case, any claim of the security provider for relief from the debtor is excluded.

2. In many cases, the provider of a dependent security may not be prepared to assume a security, unless its potential claim for reimbursement against the debtor is secured from

the very beginning, *e.g.* by a personal counter security furnished by a third person or by a proprietary security, furnished either by the debtor or a third person.

B. Conditions

3. The conditions for requesting relief from the debtor are exhaustively enumerated in para (1) (a) and (b). The conditions of lit. (a) refer to the debtor's situation: first, it has not performed the secured obligation upon maturity, since this may easily trigger the creditor's demand upon the security provider; secondly, if the debtor is unable to pay (even if no insolvency proceeding has been opened) because this virtually precludes the creditor's recovery from the debtor; and thirdly, if the debtor's assets have been substantially diminished – a fact that threatens the creditor's chances of successful recovery from the debtor and therefore increases the security provider's risk of being held liable by the creditor on the one hand and of having small chances of recuperating from the debtor, on the other hand. The substantial diminution which is required must be measured by the amount of the creditor's outstanding claims and the chances of realizing its claim for reimbursement from the debtor's assets.

4. Paragraph (1) (b) refers – independently of the conditions *sub* lit. (a) – to an action for performance brought by the creditor against the dependent security giver. This clearly justifies relief by the debtor.

5. The chances of obtaining relief from the debtor personally will usually be small. But the debtor may be able to raise money or at least personal or proprietary security from a third party, *e.g.* a relative or a related company.

C. Form of Relief

6. Since in all the cases mentioned in para (1), the provider of a dependent security has not yet performed to the creditor, the security provider cannot demand payment to itself, although he may offer performance of the personal security to the creditor. Primarily the security provider is entitled to demand security for its future performance to the creditor (cf. para (2)). Such security may be granted by the debtor itself or by any third person on behalf of the debtor; the latter alternative will practically be the rule in the situations covered by para (1) (a) because the debtor itself in these cases usually will not be able to furnish security.

7. If an insolvency proceeding has been opened over the debtor, a claim for relief will in fact be without chances.

D. Consumer as Security Provider

8. Article 2:111 is directly applicable to consumer providers of dependent security. Since Article 2:111 is favourable for consumer security providers, the rule also applies to

consumers who have assumed an independent personal security (cf. Article 4:106 (c)) as well as to consumers who have assumed a co-debtorship for security purposes (cf. Article 4:102 (1)).

9. According to Article 4:102 (2), the rules of Article 2:111 are mandatory in favour of the consumer. And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" in Article 2:111 means the debtor for whom security is being provided.

National Notes

I. Security Provider's Anticipated Recourse

1. In most European countries the provider of dependent security may have before performance a right of anticipated recourse against the debtor (AUSTRIAN CC § 1364; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2032 and 2039 (since 2006: FRENCH CC arts. 2309 and 2316); ENGLAND: *Andrews and Millett* nos. 10-024 ss.; FINNISH LDepGuar § 36 para 2; RP 189/1998 rd 75 s.; GERMAN CC § 775; GREEK CC art. 861; ITALIAN CC art. 1953; PORTUGUESE CC art. 648; SCOTLAND: Stair/*Clark* nos. 936-938; SPANISH CC art. 1843). However, such security provider's recourse is in FRANCE very rarely practiced (*Simler* no. 611). In SPAIN the efficacy of such a right in practice is questioned by the authors (*Guilarte Zapatero*, Comentarios 297).
2. In the NETHERLANDS, the security provider's anticipative recourse has been abrogated by the New Civil Code in 1992.

II. Reasons

3. In BELGIUM, FRANCE and SPAIN it is thought that the provider of dependent security has to be protected against additional risks of the debtor's insolvency, since the assumption of a dependent security is in principle considered as an act of friendship (BELGIUM: *Van Quickenborne* no. 504; FRANCE: *Simler* no. 610; SPAIN: *Guilarte Zapatero*, Comentarios 295 s.). In ENGLISH law the right of the provider of dependent security to anticipated recourse is founded in equity and based on the equitable principle that an anticipated "injury" is to be prevented before it is suffered, "it being unreasonable that a

man should always have such a cloud hang over him" (*Earl Ranelaugh v. Hayes* (1863) 1 Vern 189 = 23 ER 405 (CFI) *per* Lord Keeper *North*, 190). In SCOTS law the right to anticipated relief is based on an implied mandate between debtor and security provider, and the latter is entitled to relief once "liability is threatened to be imposed" on it (*Cuningham v. Montgomerie* (1879) 6 R 1333 (CA) *per* Lord President *Inglis*). GERMAN CC § 775 is intended to protect the provider of dependent security against special risks that may occur after assumption of the security and that may affect the claim for recourse against the debtor (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 426). There is special need for this rule in GERMAN law since the rules on mandate that are generally applicable to the relationship between provider of dependent security and debtor are not suitable for this special situation (cf. *Reinicke and Tiedtke*, Bürgschaftsrecht no. 425; Staudinger/*Horn* § 775 no. 1). Also in ITALIAN law the anticipated security provider's recourse is considered to be an instrument for its protection, mainly based on the principle *rebus sic stantibus*, which allows it to be secured from the debtor's failure to perform or to avoid his own payment (*Giusti* 247).

III. Conditions

A. *Subjective: Dependent Security Assumed with Debtor's Consent*

4. In AUSTRIA, FRANCE, BELGIUM and PORTUGAL the debtor must have agreed to the granting of a dependent security. If the dependent security is assumed without the debtor's consent or without information of the debtor, the security provider has no anticipated recourse against the former (AUSTRIAN CC § 1364 sent. 1; BELGIUM: *Van Quickenborne* no. 510; FRANCE: *Simler* no. 615; PORTUGAL: *Almeida Costa* 782). A presumed intent of the debtor by virtue of *negotiorum gestio* is not sufficient in FRANCE (*Simler* no. 615). Also in ENGLISH law anticipated relief may only be granted if the provider of dependent security had assumed the security on the express or implied request of the debtor (*Andrews and Millett* no. 10-025); the same seems to apply in SCOTS law because no mandate can be implied if the security provider has not acted on the debtor's – at least: implied – request. The situation is similar in GERMANY since according to the wording of § 775 the provider of dependent security does have a claim for release only if it has assumed the security by reason of a mandate of the debtor or if it has the rights of a mandatory against the debtor under the provisions on *negotiorum gestio*; this means that there must be an express or at least implicit mandate of the debtor (CC §§ 670, 683). A mandate is held to exist if a shareholder guarantees the company's obligations; consequently, after leaving the company the shareholder may demand release from the security obligation (Palandt/*Sprau* § 775 no. 1; Staudinger/*Horn* § 775 no. 3). However, if the provider of dependent security cannot claim recourse against the debtor for a legal reason, *e.g.* due to Insolvency Act § 254 para 2 sent. 2, there is no claim for release (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 426 s.).

B. Objective Conditions

a. Debtor's Default or Inability to Pay, Substantial Decrease of Debtor's Property or Proceedings against the Provider of Dependent Security

5. In most European countries, at least two of the above-mentioned cases are dealt with: the debtor's inability to pay and proceedings of the creditor against the provider of dependent security:

i. Debtor's Default – cf. Para (1) Lit. (a)

6. According to GERMAN CC § 775 para 1 no. 3 and GREEK CC art. 861 no. 3 the provider of dependent security can demand from the debtor release from the security if the debtor is in default with the fulfillment of its obligation. It is irrelevant that the creditor extends maturity, unless the security provider has agreed (GERMANY: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 438).

ii. Debtor's Inability to Pay – Para (1) Lit. (a)

7. In FRANCE, BELGIUM and LUXEMBOURG reference is made to the professional or civil insolvency of the debtor (FRENCH, BELGIAN and LUXEMBOURGIAN CC art 2032 no. 2 (since 2006: FRENCH CC art. 2309 no. 2)), in ITALY and SPAIN to its bankruptcy or insolvency (ITALIAN CC art. 1953 para 1 no. 2 speaks of insolvency, meaning any inability to pay: *Giusti* 245 fn. 217; SPANISH CC art. 1843 para 1 no. 2), in PORTUGAL more generally to the increased risk of the provider of dependent security (CC art. 648 lit. b)). As a form of protection of anticipated recourse in FRANCE the *Grimaldi* Commission had proposed that the provider of dependent security will be entitled, before any performance, to declare its future or present claim at the opening of an insolvency proceeding of the debtor (CC new art. 2319 para 3); but this proposal was not adopted by the legislator in 2006. In SCOTS law the security provider can take precautionary measures in case the debtor is *vergens ad inopiam* (declining towards poverty; *Kinloch v. M'Intosh* (1822) 1 S 491 (NE 457) (CA)).

iii. Substantial Decrease of Debtor's Property – cf. Para (1) Lit. (a)

8. According to GERMAN CC § 775 para 1 no. 1 and GREEK CC art. 861 no. 1, the provider of dependent security is protected if the financial position of the debtor has worsened. In addition, the claim for recourse must be endangered which is not the case if this claim is secured *e.g.* by a counter-security (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 435). The same is true in AUSTRIA if the debtor's proprietary situation has so seriously worsened that there is "founded fear of the debtor being unable to pay" (CC § 1365).

iv. Proceedings against the Provider of Dependent Security – Para (1) Lit. (b)

9. According to BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2032 no. 1 (since 2006: FRENCH CC art. 2309 no. 1), ITALIAN CC art. 1953 para 1 no. 1 and SPANISH

CC art. 1843 para 1 no. 1, the provider of dependent security has the right to exercise the right to anticipated security provider's recourse if proceedings are engaged by the creditor against the security provider. By contrast, GERMAN CC § 775 para 1 no. 4, GREEK CC art. 861 no. 4 and PORTUGUESE CC art. 648 lit. a require that the creditor has already obtained an enforceable judgment for satisfaction against the security provider.

b. Other Cases

i. Express Extension of Maturity of the Secured Debt

10. Generally, cf. *supra* national notes to Art. 2:102. In FRANCE, BELGIUM and LUXEMBOURG, the provider of dependent security is entitled to exercise its recourse in case of an express extension of the maturity of the secured debt (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2039 (since 2006: FRENCH CC art. 2316)). The parties can derogate from this provision (BELGIUM: *Van Quickenborne* no. 510; FRANCE: *Simler* no. 469).

ii. Implied Extension

11. In FRANCE, BELGIUM, LUXEMBOURG, ITALY, PORTUGAL and SPAIN the rule on anticipated recourse applies if the debtor had promised to release the provider of dependent security within a certain period of time and this time limit has expired (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2032 no. 3 (since 2006: FRENCH CC art. 2309 no. 3); ITALIAN CC art. 1953 para 1 no. 3; PORTUGUESE CC art. 648 lit. d); SPANISH CC art. 1843 para 1 no. 3) or if the secured debt falls due because the maturity date has been reached (FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2032 no. 4 (since 2006: FRENCH CC art. 2309 no. 4); ITALIAN CC art. 1953 para 1 no. 4; SPANISH CC art. 1843 para 1 no. 4). In AUSTRIAN, ENGLISH and SCOTS law the right of the provider of dependent security to anticipated relief arises once the secured debt is due and the security provider's liability has accrued in the sense that it could be compelled to pay by the creditor (AUSTRIAN CC § 1364 sent. 1). In ENGLAND the provider of dependent security can apply for *quia timet* relief (*Tate v. Crewdson* [1938] Ch 869 (CFI); *Morrison v. Barking Chemicals Co Ltd* [1919] 2 Ch 325 (CFI)), and in SCOTLAND it has an *actio mandati* (*Cuningham v. Montgomerie* (1869) 6 R 1333 (CA); *Scott v. Grahame* (1830) 8 S 749 (CA)). In case of demand securities it is now accepted that the security provider's right to anticipated relief is not dependent on a demand having been made by the creditor (ENGLAND: *Thomas v. Nottingham Inc Football Club* [1972] Ch 596 (CFI); SCOTLAND: Stair/*Clark* no. 936).

iii. Debt Without Time Limit

12. If the principal debt is agreed without time limit, the right to recourse may be exercised under FRENCH, BELGIAN, LUXEMBOURGIAN law after expiration of ten years (CC art. 2032 no. 5 (since 2006: FRENCH CC art. 2309 no. 5)). A similar provision exists in ITALIAN and PORTUGUESE law where, however, only a period of five years must have passed (ITALIAN CC art. 1953 para 1 no. 5; PORTUGUESE CC art. 646 lit. e)). In PORTUGAL this rule applies even to a debt agreed with time limit, if there is a legally

imposed extension of time (CC art. 646 lit. e *in fine*). The same is true under SPANISH CC art. 1843 para 1 no. 4. However, the rule does not apply if according to the nature of the secured obligation it cannot be extinguished but after this period.

iv. Change of Domicile or Residence of Debtor

13. In PORTUGAL, if after the conclusion of the dependent security the debtor cannot be sued or executed within the national territory and its adjacent islands (CC art. 648 lit. c)), the rule on anticipated recourse applies. A similar rule obtains in AUSTRIA (CC § 1365). In GERMANY and GREECE if the taking of legal action against the debtor has become difficult to a substantial degree by reason of a change of its domicile or residence that occurred after the issue of the dependent security, the security provider may demand security from the debtor even before the debt has become due (GERMAN CC § 775 para 1 no. 2, para 2; GREEK CC art. 861 no. 2).

IV. Consequences

A. Damages

14. In FRANCE, BELGIUM and LUXEMBOURG, the provider of dependent security may claim from the debtor compensation for damages (CC art. 2032; (since 2006: FRENCH CC art. 2309)) or it may in case of the extension of time force the debtor to pay (CC art. 2039 (since 2006: FRENCH CC art. 2316)). In practice however, according to the FRENCH majority opinion (*Marty/Raynaud/Jestaz* no. 60; Aubry/Rau/*Ponsard* no. 236) the debtor's liability cannot be enforced since there is no present damage, whereas a minority of FRENCH writers and court decisions maintain that a present damage may well be caused by an undue extension of the security provider's obligation (CA Paris 2 March 1971, GazPal 1971, 2, 824). FRENCH majority opinion considers that the security provider cannot obtain any payment or any reimbursement as compensation for many other reasons: on one hand, there cannot be reimbursement without any payment by the security provider; on the other hand, the payment is mostly impossible due to the debtor's inability to pay. According to BELGIAN opinion, CC art. 2032 tends to avoid damage that would arise from the impossibility of the guarantor-solvens to obtain any recourse from the debtor (*Van Quickenborne* nos. 504-505).

B. Release or Security – cf. Paras (1) and (2)

15. In ITALY, PORTUGAL and SPAIN the provider of dependent security may claim release or require security for its own claims against the debtor (ITALIAN CC art. 1953 para 1; PORTUGUESE CC art. 648 para 1; SPANISH CC art. 1843 para 2). In SPAIN it is asserted that the non-release entitles the provider of dependent security to claim damages but this is also considered inefficient in practice since the damage is difficult to specify and prove (*Guilarte Zapatero*, Comentarios 298, 299). By virtue of the *quia timet* action under ENGLISH law the security provider can either apply for a declaration that he is entitled to be exonerated and an order that the debtor should pay whatever is due to the creditor (*Ascherson v. Tredegar Dry Dock & Wharf Co Ltd* [1909] 2 Ch 401 (CFI)), or for an order that the debtor is to set aside a particular fund to pay the creditor (*Andrews and*

Millett no. 10-025; *O'Donovan and Phillips* nos. 11-147 ss.). In case of a corporate debtor established under the Companies Act 1985, the provider of dependent security can further make a petition for winding-up of the debtor company by virtue of Insolvency Act 1986 sec. 124 para 1. The same principles apply in SCOTLAND (Stair/*Clark* nos. 936 s.). Additionally, in SCOTLAND the security provider is entitled to apply for a court order of precautionary execution into the debtor's estate (*Kinloch v. M'Intosh* (1822) 1 S 491 (NE 457) (CA)).

16. In GERMANY, if the secured obligation is due, the provider of dependent security may demand release from the debtor (cf. Staudinger/*Horn* § 775 no. 4). Contrary to earlier court practice, the GERMAN Supreme Court no longer allows the provider of dependent security to convert its claim for release against the debtor into a claim for reimbursement, not even if the debtor's inability to pay and the security provider's future performance to the creditor are certain (BGH 14 Jan. 1999, BGHZ 140, 270, 272 ss. overruling RG 12 Jan. 1934, RGZ 143, 192, 194). If the debtor, even after being condemned to release the security provider, does nothing, the security provider can pay the creditor and on the basis of the judgment demand these costs from the debtor by means of execution according to CCP § 887 (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 442; Staudinger/*Horn* § 775 no. 5). If the secured obligation is not yet due, the debtor is entitled to give security to the security provider instead of relieving it (CC § 775 para 2).

C. *Security Only – cf. Para (2)*

17. In AUSTRIA, the only remedy available to the provider of dependent security is a demand for security from the debtor (CC §§ 1364 sent. 1, 1365). Security may be furnished primarily by creating a proprietary security right for the security provider, otherwise by a third person's personal security (§§ 1373 s.). Also pursuant to the majority of BELGIAN, FRENCH, PORTUGUESE and SPANISH writers, the furnishing of adequate security (proprietary or personal) is the only remedy that is available and reveals the true nature of the anticipated recourse as a measure of preservation of rights (BELGIUM: *Van Quickenborne* no. 504; FRANCE: cf. *Simler* no. 613 ss.; PORTUGAL: *Pires de Lima and Antunes Varela* 664; SPAIN: *Guilarte Zapatero*, Comentarios 299). As a result of this opinion, according to the FRENCH *Grimaldi* Commission's proposal (CC new art. 2319 para 2) the provider of dependent security may require the furnishing of adequate security; however, the legislator of 2006 did not adopt this proposal. According to GREEK literature, the request for security must be asserted by the provider of dependent security by a legal action or a request to the competent court (Georgiades-Stathopoulos AK/*Vrellis* art. 861 no. 8). According to a minority opinion in GREECE, if the security provider is in a position to know about the worsening of the debtor's financial situation and nevertheless does not exercise this right, then it should share the damage with the creditor, if the latter has been negligent in collecting the debt from the debtor (cf. *Doublis*, Metavivasi pistosis 55 ss., 62).

(Hauck)

Article 2:112: Security Provider's Obligations Before Performance

(1) Before performance to the creditor, the security provider must notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.
(2) If the security provider performs without the request provided for in paragraph (1) or neglects to raise defences communicated by the debtor or known to the security provider from other sources, it is liable as against the debtor for the resulting damage.
(3) The security provider's rights against the creditor remain unaffected.

Comments

A. Basic Idea – Para (1)

1. Article 2:112 imposes certain obligations of inquiry upon the provider of a dependent security in order to enable it to make effectively use of the rights granted by Articles 2:102 and 2:103 to invoke defences that are available to the debtor. While Articles 2:102 and especially 2:103 grant *rights* to the security provider to avoid or diminish its own obligations, Article 2:112 imposes *duties* upon the security provider in order to protect the rights of the debtor.

2. The duty of notification and inquiry imposed by para (1) must be interpreted in the light of the rights pertaining to the debtor that according to Articles 2:102 and 2:103 may be invoked by the provider of a dependent security on the strength of the principle of dependency (or accessority).

B. Sanctions – Para (2)

3. If the provider of a dependent security performs to the creditor without having informed the debtor and made inquiry from him, this does not only contravene his self-interest, but may damage the debtor's rights. The same is true if the security provider neglects to raise debtor's defences which are available to the security provider. In all these cases, any damage suffered by the debtor must be compensated by the security provider. Accordingly, his rights for reimbursement and/or subrogation against the debtor according to Article 2:113 will, in effect, be reduced correspondingly.

4. If the debtor fails to reply to the security provider or gives incomplete or incorrect information, the sanctions indicated by para (2) are not justified. Alternatively, they may be justified only in part if the debtor had given some wrong information, but other information, although correct, had been overlooked or disregarded by the security provider.

5. The sanction imposed by para (2) on the security provider is a claim for damages by the debtor. This claim be reduced in cases where the damage was partly or fully due to the debtor's own negligence (cf. *supra* no. 4). The debtor may set off this claim against the security provider's claim for reimbursement if it has performed to the creditor, cf. PECL Chapter 13.

C. Preservation of Rights as against Creditor – Para (3)

6. Any mistakes which may be committed by the provider of the dependent security vis-à-vis the debtor do not affect the security provider's rights as against the creditor. The conditions and details of a claim for damages are laid down in PECL Article 9:501 ss.

D. Consumer as Security Provider

7. Consumer's dependent personal security. Article 2:112 is directly applicable to consumer providers of a dependent personal security, which are not treated differently from non-consumers in this respect; the only difference is that the provision is mandatory in favour of the consumer security provider according to Article 4:102 (2).

8. Although Article 2:112 does not create rights but imposes obligations upon a security provider, nevertheless these rules also apply to all consumer security providers. They apply directly to consumers who provide a dependent personal security. By virtue of Article 4:106 (c) they also apply to consumer providers of an independent security and by virtue of Article 4:102 (1) to consumer providers of a co-debtorship for security purposes. The obligations laid down in Article 2:112 are necessary ingredients of a well-balanced system of personal security where the security provider also must respect the legitimate interests of the principal debtor. Not the least: the information by the security provider may be beneficial to the latter since in appropriate cases it may prevent or reduce a performance by the security provider if it turns out that the principal debtor has already made partial or even full performance to the creditor or that it disposes of defences of which the security provider also may avail itself (cf. Articles 2:102 (1) and (2) as well as Article 2:103).

National Notes

I. Legal Basis

1. Although there is no general provision or rule in any member state that requires the provider of dependent security to give information to the debtor, all legal systems seem to agree that the security provider should not be reimbursed if it had not informed the debtor and by this omission caused harm. For this reason there are in some countries specific statutory provisions on the security provider's duty to inform the debtor about the creditor's request or about its own intention to perform, in order to prevent unjustified payment (AUSTRIAN CC § 1361; BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para 2 (since 2006: FRENCH CC art. 2308 para 2); GREEK CC art. 859; ITALIAN CC art. 1952 para 2; PORTUGUESE CC art. 645 para 1 and 647; SPANISH CC art. 1840). Furthermore in some countries specific rules exist sanctioning the security provider if it had not notified the debtor of its payment to the creditor and therefore the debtor also pays the creditor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para 1 (since 2006: FRENCH CC art. 2308 para 1); DUTCH CC art. 7:867; ITALIAN CC art. 1952 para 1; PORTUGUESE CC art. 645 para 1; SPANISH CC art. 1842).
2. In GERMANY, however, the legislator expressly rejected such specific provisions (Motive, in: *Mugdan* II 377) so that – in the absence of any contractual stipulation – the solution of these cases must be based upon the principle of *bona fides* (CC § 242) and the underlying relationship (cf. Soergel/*Mühl* § 774 no. 8; Staudinger/*Horn* § 765 no. 106, § 768 no. 41; cf. also already Motive, in: *Mugdan* II 377 s.; similarly BGH 19 Sept. 1985, BGHZ 95, 375, 388).
3. Two countries expressly sanction the provider of dependent security if it does not raise against the creditor defences of the debtor which the security provider knew or ought to have known. In this case GREEK CC art. 859 denies a claim of recourse against the debtor, while DUTCH CC art. 7:868 allows the debtor to raise these defences against the security provider. In all other countries a sanction for this neglect of the debtor's interests must be derived from the general rules concerning the relationship between security provider and debtor.

II. Duty of the Dependent Security Provider to Notify the Debtor

A. Requirements

a. Security Provider's Duty of Information – cf. Para (1)

4. In many countries, the provider of dependent security is held responsible if it had paid the creditor (GERMANY: cf. CC § 670 and MünchKomm/*Habersack* § 774 no. 19) without having notified the debtor and if there were defences the debtor could have raised at the time of the dependent security provider's payment (AUSTRIAN CC § 1361; OGH 19 Oct. 1976, SZ 49 no. 121 at p. 570, 571; GREEK CC art. 859 and Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 2; ITALIAN CC art. 1952 para 2, NETHERLANDS: CC arts. 7:867, 7:868; *Blomkwist* no. 37; PORTUGUESE CC art 647 and SPANISH CC art. 1840). BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para 2 further limits its application to those cases where the provider of dependent security spontaneously paid without being called to pay by the creditor, *i.e.* if the provider of dependent security was not threatened by immediate execution into its assets (BELGIUM: *Van Quickenborne* no. 498; FRANCE: *Simler* no. 606). The security provider is not held responsible for not notifying the debtor of its intention to perform or of the creditor's request for performance, but for not raising the debtor's defences (BELGIUM: *Van Quickenborne* no. 497; FRANCE: *Simler* no. 606). In BELGIUM and FRANCE, the provider of dependent security has to invoke all defences available to the debtor (BELGIUM: *Van Quickenborne* no. 499; FRANCE: cf. Cass.com. 14 Jan. 1963, Banque 1963, 199). Hence, in these countries the provider of dependent security bears indirectly the burden of notifying the debtor. In fact, such notification is the only way for the provider of dependent security to obtain information about possible defences of the debtor against the creditor's claim for performance which the security provider is entitled to raise under the principle of accessority (cf. *supra* national notes to Art. 2:103).
5. According to GREEK CC art. 859, the provider of dependent security who has paid the creditor is held responsible if it had omitted to invoke well-founded defences of the debtor that it knew or ought to know. The debtor can defend itself by proving that the provider of dependent security was or should have been aware of the debtor's defences (GREECE: ErmAK/*Zepos* art. 859 no. 5), whereas the security provider can prove that its lack of knowledge was justifiable (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6). The security provider's duty to obtain information before performing towards the creditor derives from CC art. 859.
6. In GERMANY the provider of dependent security is obliged to respect the debtor's interests as the latter is the principal within the usually existing relationship of mandate between debtor and security provider (BGH 19 Sept. 1985, BGHZ 95, 375, 388 with further references). Therefore, the provider of dependent security is obliged to inform the debtor immediately about the creditor's request for payment and to ask the debtor whether defences exist that it has to invoke (Staudinger/*Horn* § 765 no. 106; Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95; see also BGH 19 Sept. 1985, BGHZ 95, 375, 389 and Palandt/*Sprau* no. 5 preceding § 765). Furthermore, the provider of dependent security has to examine on the basis of *bona fides* whether there is an obvious abuse of rights (Staudinger/*Horn* § 765 no. 107 with further references). However, the duty of the provider of dependent security to inform the debtor does not mean that the security

provider has to ask for the debtor's approval (Staudinger/*Horn* § 765 no. 108; Palandt/*Sprau* no. 5 preceding § 765).

7. There is no such duty of information under ENGLISH law.

b. Notification by the Security Provider

8. It has been held that there is an implied notification of the debtor if the provider of dependent security serves upon the debtor an extra-judicial document asking for information in due time of defences as against the creditor (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6) or a document causing a third party notice in judicial proceedings brought by the creditor (AUSTRIA: OGH 19 Oct. 1976, SZ 49 no. 121 at p. 571).

B. Sanctions – cf. Para (2)

9. In GREECE the failure of the provider of dependent security to fulfil the aforementioned duties before performance – the failure to invoke the debtor's defences, or indirectly also the failure to notify the debtor – deprives the security provider of its right of recourse (CC art. 859). The situation appears to be similar in SCOTLAND (*Maxwell v. Earl of Nithsdale* (1632) Mor 2115; Stair/*Eden* no. 935). Some ROMANIC countries provide the same sanction if the security provider after its payment to the creditor does not inform the debtor and the latter also makes payment to the creditor (cf. BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para 1 (since 2006: FRENCH CC art. 2308 para 1); DUTCH CC art. 7:867; ITALIAN CC art. 1952 para 1; PORTUGUESE CC art. 645 para 1; SPANISH CC art. 1842). Similarly in GERMANY the provider of dependent security who paid the creditor despite the existence of defences against the secured obligation may only claim recourse according to CC § 670 if it could reasonably assume according to the circumstances to be obliged to pay (BGH 19 Sept. 1985, BGHZ 95, 375, 388). The latter is not the case if the provider of dependent security paid without informing the debtor. In BELGIUM, FRANCE and LUXEMBOURG the same harsh sanction applies if the security provider, without demand by the creditor and without notifying the debtor, makes payment to the creditor while the debtor had defences against such performance (CC art. 2031 para 2 (since 2006: FRENCH art. 2308 para 2)).

10. In other cases where the provider of dependent security had not raised defences against the creditor which pertained to the debtor, the security provider retains its right of recourse against the debtor, but the latter may raise those exceptions and defences to which it was entitled vis-à-vis the creditor at the time payment was made (cf. AUSTRIAN CC § 1361; DUTCH CC art. 7:868; ITALIAN CC art. 1952 para 2 and SPANISH CC art. 1840). Whether a provider of dependent security in ENGLAND is entitled to a full recourse against the debtor after having paid the creditor without raising the debtor's defences vis-à-vis the creditor depends upon the circumstances of the case: if the security provider had assumed the security without any request of the debtor, the security provider can only have a restitutionary claim to a reimbursement, which requires that the debtor has received a benefit, *i.e.* the discharge of debts that could have been enforced by the creditor against the debtor (cf. *O'Donovan and Phillips* no. 12-44). If, however, the security was provided at the request of the debtor, it is said to depend upon

the true construction of the agreement between security provider and debtor whether the former is entitled to reimbursement even though the secured obligation was not enforceable against the debtor: if, on the one hand, the security provider is bound to pay if the principal debtor does not, then the security provider has a right to reimbursement even though the secured debt was not enforceable; if, on the other hand, the security provider should pay only such amounts that the debtor himself was legally obliged to pay, then there is no right to reimbursement in such situations (cf. *O'Donovan and Phillips* no. 12-39; there is a rebuttable presumption for the former meaning, cf. *Argo Caribbean Group v. Lewis* [1976] 2 Lloyd's Rep 289 (CA)). It seems that even in this situation the security provider's right to reimbursement by the debtor should not be affected by the fact that the security provider failed to take advantage of a set-off open to the principal debtor since the latter could still assert its claim against the debtor at a later stage (cf. *Andrews and Millett* no. 11-007 at p. 400).

C. *Exclusion: Failure of Debtor to Inform the Provider of Dependent Security*

11. If the debtor, although notified, keeps silent so that the provider of the dependent security cannot or does not raise exceptions of the debtor, then the security provider has done what it could do. In this case, the debtor is precluded from relying – vis-à-vis the security provider – on defences against the creditor's claim (AUSTRIA: OGH 19 Oct. 1976, SZ 49 no. 121 at p. 570, 571; GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 4; *Kaukas* 471; PORTUGAL: CC art. 647). Similarly in GERMANY the security provider who has not been informed by the debtor about the extinction of the secured obligation and who has therefore paid the creditor in good faith has a right of recourse against assignment of its claim for unjust enrichment vis-à-vis the creditor (MünchKomm/*Habersack* § 774 no. 19; *Graf Lambsdorff and Skora* no. 296; cf. Erman/*Herrmann* § 774 no. 12). Not only is the provider of dependent security generally obliged to inform the debtor but also the latter is inversely obliged on the basis of *bona fides* to communicate all defences to the provider of dependent security as mandatory, even without being asked by the latter. The debtor may further be obliged to inform about its financial situation upon the security provider's request (Staudinger/*Horn* § 765 no. 109 with further references). Also in GREECE a duty of the debtor to inform the provider of dependent security about defences may be derived from the principle of good faith, especially if the liability of the provider of dependent security liability is solidary (*Georgiades* § 3 no. 155).

III. *Security Provider's Rights against Creditor – cf. Para (3)*

12. The provider of dependent security remains entitled to reclaim the payment from the creditor (so expressly *e.g.* BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2031 para 2 (since 2006: FRENCH CC art. 2308 para 2) *in fine, action en répétition de l'indû*; DUTCH CC art. 7:867; ITALIAN CC art. 1952 para 3; PORTUGUESE CC art. 645 para 2; SPANISH CC art. 1842 *in fine*).

IV. General Duty of Information

13. Besides the aforementioned specific rules holding the security provider responsible for its omission of notifying the debtor under two specific additional conditions there seem to be no general statutory provisions creating a wider duty of information of the security provider. In GERMANY, however, a more general duty of information may be derived from the relationship between debtor and security provider (cf. Soergel/*Mühl* § 774 no. 8 and the general remarks in BGH 19 Sept. 1985, BGHZ 95, 375, 388).

V. Duty of the Provider of Dependent Security to Invoke Defences

14. The provider of dependent security may not only be obliged to inform the debtor but also to raise all defences of the debtor. According to GREEK CC art. 859 the provider of dependent security who has paid the creditor is deprived of its right to be reimbursed, if it had omitted to invoke well-founded defences of the debtor that it knew or ought to know. In order for a defence to be qualified as well-founded, on the one hand it must be of decisive importance in regard to the validity of the debt, and on the other hand it must be a defence which the provider of dependent security is entitled to invoke as against the creditor, *i.e.* the defence may not be invokable only by the debtor (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 3; see also *supra* national notes to Art. 2:103). Furthermore, the defence must relate to the secured debt, so that the provider of dependent security is not liable if it failed to raise its own personal defences as against the creditor (GREECE: ErmAK/*Zepos* art. 859 no. 6). Hence, in proceedings of the provider of dependent security against the debtor, the latter must assert and prove that the security provider was or should have been aware of the debtor's defences (GREECE: ErmAK/*Zepos* art. 859 no. 5), whereas the provider of dependent security can show that its lack of knowledge was justifiable (GREECE: Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 6). The same rules operate under ITALIAN law on the basis of a general duty of the security provider to act with diligence (*Fragali*, Della fideiussione 380 ss.).

15. Also in GERMANY the provider of dependent security who refrains from invoking a defence against the creditor's demand and pays the creditor loses its right for recourse against the debtor insofar as the defence could have been opposed to the creditor's demand, since the provider of dependent security can not assume, in the context of the underlying mandate relationship, the costs for the payment as necessary in the meaning of CC § 670 (Motive, in: *Mugdan* II 377s.; MünchKomm/*Habersack* § 774 no. 19; unclear Staudinger/*Horn* § 765 no. 110 and § 768 no. 41 who seems to want to grant a claim for damages as well). This is especially true in cases of obvious abuse of rights (Staudinger/*Horn* § 765 no. 107). The defences must be available and provable (Palandt/*Sprau* no. 5 preceding § 765; Staudinger/*Horn* § 765 no. 107; Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95; cf. also BGH 19 Sept. 1985, BGHZ 95, 375, 388 s.) and the provider of dependent security must or ought to know them (Staudinger/*Horn* § 774 no. 34). If the provider of dependent security performed although the secured obligation did not exist, the security provider is entitled to demand repayment from the creditor on the basis of unjust enrichment (MünchKomm/*Habersack* § 774 no. 6; Staudinger/*Horn* § 768 no. 40 with further references).

VI. Waiver of Rights

16. An agreement between the provider of dependent security and the debtor that the former will retain nevertheless and in any case its right of recourse, even if it paid the creditor upon its simple demand, without verifying the validity of the debt, shall be void insofar as the provider of dependent security did not invoke these defences on purpose or due to gross negligence (GREECE: cf. CC art. 332 para 1; Georgiades-Stathopoulos AK/*Vrellis* art. 859 no. 1). On the other hand, if the debtor waives its right to damages, this waiver shall be valid if the provider of dependent security upon instruction by the debtor has also waived as against the creditor its right to invoke defences, especially in cases of securities on first demand (GREECE: *Georgiades* § 3 no. 156).
17. In GERMANY the former general terms and conditions of the banks provided that the bank as provider of dependent security should be entitled to pay the creditor "on the unilateral demand of the creditor". The bank was thus liberated from the duty to ask for information and to invoke defences. This clause has been considered as valid with the restriction that the principles that have been developed for first demand securities (see *infra* national notes to Art. 3:104) shall be applied so that the bank remains obliged to invoke defences in cases of obvious abuse of rights (BGH 17 Jan. 1989, NJW 1989, 1480, 1481; for further details cf. *Graf Lambsdorff and Skora* no. 240 and Schimansky/Bunte/Lwowski/*Schmitz* § 91 no. 95). The clause has now been deleted.

(Karpathakis/Hauck)

Article 2:113: Security Provider's Rights After Performance

(1) If and in so far as the security provider has performed the obligations arising under the security, it may claim reimbursement from the debtor. In addition the security provider is subrogated to the extent indicated in the preceding sentence to the creditor's rights against the debtor. The two claims are concurrent.
(2) In case of part performance, the creditor's remaining partial rights against the debtor have priority over the rights to which the security provider has been subrogated.
(3) By virtue of the subrogation according to paragraph (1) second sentence, dependent and independent personal and proprietary security rights are transferred by operation of law to the security provider, notwithstanding any contractual restriction or exclusion of transferability agreed by the debtor. Rights against other security providers can only be exercised within the limits of Article 1:108.
(4) Where the debtor due to incapacity is not liable towards the creditor, the security provider may nevertheless claim reimbursement from the debtor to the extent of its enrichment. This rule applies also if a debtor legal entity has not come into existence.

Comments

A. Survey

1. Article 2:113 deals with the rights of the security provider after it has fully or partly performed to the creditor. Paragraphs (1) to (3) regulate the "normal" consequences of such performance, whereas para (4) deals with the special case of a performance in favour of a debtor who is incapable.

2. Article 2:113 regulates the ordinary case of a payment by a security provider to the creditor. The situation becomes more complicated if several security providers are involved, and possibly providers both of personal and of proprietary security. Before attempting to recover from the debtor who at this stage usually is insolvent, the security provider who has satisfied the creditor may wish to proceed against one or more of the other security providers since these may be in a better financial position than the debtor. The issues of such recourse against other security providers and, eventually, against the debtor are primarily regulated by Articles 1:108 and 1:109 since they may involve providers not only of personal, but also of proprietary security. Article 2:113 is relevant, however, in that context insofar as it determines which rights against the debtor and against other security providers become available as the basis of this recourse.

B. Two Claims – Para (1)

3. The security provider normally has two claims against the debtor: First, the claim for reimbursement. This will usually be based upon a mandate from the debtor to assume the security on his behalf. In special situations, the security provider may have acted without such mandate as *negotiorum gestor*; then it will be entitled as such for reimbursement. Exceptionally, there may be no claim for reimbursement if providing the security was by way of gift, cf. *infra* no. 8. The amounts to be reimbursed will usually comprise all heads of payments or other performances which the security provider made to the creditor; but see possible deductions according to Article 2:112 (2).

4. Secondly, the security provider is subrogated to all personal (and proprietary rights, cf. para (3)), which the creditor had held against the debtor, especially contractual rights

for payment of the secured obligation or other performance. This rule reflects a general principle of the law of obligations: a stranger who pays or performs an obligation of the debtor obtains the rights of the creditor against the debtor so as to equip it with an optimal remedy for its recourse against the debtor; the provision of PECL Article 7:106, though, does not deal with this aspect of performance by a third party (Comment A to Article 7:106). On the special problems of security rights, cf. *infra* F.

5. Contrary to many legal systems, the last sentence of para (1) allows to cumulate the two claims. Cumulation is useful in order to enable the security provider to obtain full recovery and to make up for any possible insufficiency of the one or the other claim. As was mentioned *supra* no. 3, there are situations where the security provider has no claim against the debtor, for instance where the assumption of the security was intended to be gratuitous, especially if it was motivated by family solidarity. On the other hand, the creditor's original claim against the debtor may have been weakened, especially if the creditor had given up a proprietary security to which it was originally entitled but which it regarded as superfluous for its purposes, cf. Article 2:110.

C. Debtor's Exceptions

6. The debtor may invoke as against the security provider two sets of defences: First, those which it was entitled to invoke vis-à-vis the creditor; this follows from the security provider's subrogation to the creditor's rights against the debtor according to para (1) sent. 2. Secondly, the debtor may invoke defences deriving from his original relationship with the security provider, unless exceptionally there is none (cf. *infra* D).

7. However, the debtor will be precluded from raising a defence which it has against the creditor if it failed to communicate it to the security provider according to Article 2:112 (1) since its own omission caused the damage.

D. Exclusion of Claims

8. The Rules of Article 2:113 presuppose that the security provider did not grant the security gratuitously but that security provider and debtor agreed that the debtor would reimburse the security provider if and to the extent that the latter had performed to the creditor. This is the normal situation. Exceptionally, however, the security provider may have assumed the security without the intention of claiming reimbursement from the debtor. In such a case, the security provider has waived the claim for reimbursement of para (1) first sent. By contrast, while the security provider is subrogated to the creditor's rights against the debtor according to para (1) second sent., it must be regarded as having waived this right as against the debtor, since invoking this right would be inconsistent with its benevolent intention vis-à-vis the debtor. This does not, however, necessarily also exclude recourse claims against other security providers under Article 1:108.

E. Part Performance by Security Provider – Para (2)

9. Where the security provider performs only in part, it is, of course, entitled only to a corresponding part of the rights mentioned in para (1). In order to protect the creditor, those of its partial rights, to which the security provider has not (yet) been subrogated, enjoy preference in case of the debtor's bankruptcy or upon execution by a third person, over those of the security provider (para (2)). This is a general principle in order to protect the priority of an earlier holder of a right as against a junior holder who derives his rights from the former.

F. Subrogation Into Security Rights – Para (3)

10. If and insofar as the security provider has paid to the creditor, it is subrogated to the rights which the creditor holds against the debtor (cf. para (1) sent. 2). Among the rights into which this subrogation takes place are the creditor's "dependent and independent personal and proprietary security rights", as para (3) explicitly confirms. Subrogation into the creditor's dependent security rights is but a consequence of the fact that these rights depend upon the secured claim (cf. *supra* Comment on Article 2:102 no. 3).

11. By contrast, subrogation into the independent personal and proprietary security rights cannot be based upon the principle of dependency. This transfer can, however, be justified by another consideration. The creditor is obliged to transfer independent personal and proprietary security rights after it has been satisfied by the security provider because otherwise it would be unjustly enriched. This obligation is satisfied by para (3) in order to facilitate the transfer of those security rights to the security provider. Interests of other persons are not endangered. There will rarely be such interests of third parties; if there are, *e.g.* security rights in those security rights, they will, of course, be respected and enjoy priority over the rights of the subrogated security provider.

12. Subrogation into the creditor's personal or proprietary security rights presupposes that these are transferable. Transferability of these rights may have been excluded by the debtor or a third person security provider for his protection by an anti-assignment clause. Since the security provider had acted in the debtor's or third person's interest, it would be inequitable if the latter were allowed to invoke such a clause. Therefore, para (3) expressly declares such clauses, if agreed by the security provider, to be inapplicable.

13. Detailed rules on the right of recourse against other security providers and the debtor in the situation of a plurality of security providers are contained in Articles 1:108-1:109.

G. Reimbursement from Incapable Debtor – Para (4)

14. According to Article 2:103 (3), a security provider cannot invoke the lack of capacity of the debtor or the non-existence of the debtor legal entity if the relevant

facts were known to the security provider when the security became effective. This rule deals with the relationship between the creditor and the security provider.

15. Paragraph (4) spells out the consequence which follows from Article 2:113 for the internal relationship between security provider and debtor. Due to the debtor's incapacity, it cannot be made liable by the security provider in the same way as spelt out in para (1). In view of the fact that the security provider knew of the debtor's incapacity or legal non-existence, possibly the assumption of the security was a gratuity so that a claim for reimbursement is excluded (*supra* Comment D). If there is no gratuity, the security provider should at least be entitled to claim any enrichment which the debtor may have received by a performance made by the creditor, *e.g.* the countervalue of a loan received from it.

16. Who is the "debtor" if a legal entity is not only incapable but is even non-existent? A legal entity may be inexistent if its creation was affected by so grave a defect which according to the applicable law prevented it from coming into existence. A legal entity may also have become inexistent if after its valid creation it was dissolved and liquidated, without being continued by another legal entity. In such cases, any other legal entity or natural person(s) who obtained assets of the legal entity must be regarded as being liable with respect to those assets or their value.

H. Consumer as Security Provider

17. Consumer's dependent security. Article 2:113 remains applicable to a dependent security assumed by a consumer; however, the provision becomes mandatory (cf. Article 4:102 (2)).

18. Consumer's independent security. The application of Article 2:113 to any independent personal security is already assured by Article 3:108. This provision requires that application to be subject to "appropriate adaptations". However, in the present context it is not necessary to search for such adaptations since a consumer purporting to assume an independent personal security is according to Article 4:106 (c) treated like a provider of a dependent personal security. Therefore, Article 2:113 fully applies in the same way as it applies to a consumer assuming a dependent personal security, cf. preceding Comment.

19. Consumer co-debtor for security purposes. The application of Article 2:113 to a consumer's co-debtorship for security purposes is legitimate if and insofar as that process does not involve an unequivocal disadvantage for the consumer as compared to its situation under the otherwise applicable rules on solidary debtors (cf. Article 1:106). This has to be examined for each part of Article 2:113.

20. The first sentence of para (1) corresponds, in effect, to PECL 10:106 (1). The correspondence is not absolute since in a true co-debtorship each of the co-debtors, in their internal relationship, bears some portion of liability. By contrast, in the context of a co-debtorship for security purposes, in the end the "secured" co-debtor is fully liable, while the security co-debtor is not liable at all. Therefore, if the creditor had received full

payment from the "secured" co-debtor, the latter cannot claim any reimbursement from the security co-debtor. Vice versa, if the security co-debtor had fully paid the creditor, that co-debtor may demand full reimbursement from the "secured" co-debtor.

21. An equivalent of the second sentence of Article 2:113 (1) and of para (2) is to be found in PECL 10:106 (2). For the application of these rules to para (1) second sentence and to para (2) in the context of a co-debtorship for security purposes, cf. preceding no. 20.

22. Paragraph (3) has a partial equivalent in PECL Article 10:106 (2), as far as accessory security rights are concerned. By contrast, the extension of para (3) to non-accessory security rights is not covered by the aforementioned rule. Rather, under PECL, by analogy to Article 11:204 (c), the creditor will be contractually obliged to transfer "all assignable rights intended to secure performance which are not accessory rights" to the debtor who has made payment. Article 2:113 (3) achieves the same result on a direct route by extending the subrogation according to para (1) second sentence to all security rights, whether or not accessory. Since this effect is beneficial for the consumer co-debtor for security purposes, the application of this rule is unobjectionable from the security co-debtor's point of view.

23. Paragraph (4) is a companion rule to Article 2:103 (3). The latter provision, however, is not applicable to a consumer co-debtor for security purposes (cf. Comment no. 20 on Article 2:103). Consequently, there is no basis for applying para (4). Moreover, in the – probably not infrequent – cases where the security provider is ignorant of the debtor's state, the application of Article 2:113 (4) would at least lead to the same result.

24. Mandatory rules. All the preceding rules are mandatory in favour of the consumer (Article 4:102 (2)). And in the context of a consumer security provider's co-debtorship for security purposes the term "debtor" as used in Article 2:113 refers to the debtor whose obligation is secured.

National Notes

I. Two Claims

1. In most countries, the security provider normally has two claims against the debtor: one for reimbursement derived from the relationship between security provider and debtor; the other based upon the security provider's subrogation to the rights of the creditor against the debtor (AUSTRIAN CC §§ 896 and 1358; BELGIAN, FRENCH and LUXEMBOURGIAN CC arts. 2028 and 2029 (since 2006: FRENCH CC arts. 2305 and 2306); DUTCH CC art. 7:850 para 3 *juncto* art. 6:12 and art. 7:866 (*juncto* art. 6:10); *Blomkwist* no. 34 at p.57; GERMAN CC § 774 para 1 sent. 1 and general rules on mandate or on similar relationships, CC §§ 670, 675, 683, 684; cf. Palandt/*Sprau* § 774 nos. 1-4; GREEK CC art. 858; ITALIAN CC arts. 1949 and 1950; PORTUGUESE CC art. 644 and general rules on mandate or similar relationships, arts. 468, 473, 1167; cf. *Almeida Costa* 780; SPANISH CC arts. 1838 and 1839; TS 13 Febr. 1988 cited by *Díez-Picazo* 442; ENGLAND: *Andrews and Millett* nos. 10-003, 11-017; SCOTLAND: Stair/*Clark* nos. 929, 935 s.).

A. Reimbursement

a. Legal Bases

2. Many countries specifically grant the security provider who has paid off the secured debt a claim for reimbursement against the debtor (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 (since 2006: FRENCH CC art. 2305); DUTCH CC art. 7:866; ITALIAN CC art. 1950; SPANISH CC art. 1838). Although no-one will deny that the ground for this recourse has to be found in the relationship between the security provider and the debtor (BELGIUM: *Van Quickenborne* no. 450; FRANCE: *Simler* no. 558; ITALY: *Fragali*, Fideiussione 370), it is very controversial on which legal ground this recourse can be based. Both the arguments that the recourse can be based upon a mandate which the security provider has been granted or upon the fact that the security provider acted as *negotorium gestor* have been criticized as unconvincing (BELGIUM: *Van Quickenborne* no. 450 and cited references; FRANCE: *Simler* nos. 13 and 558; ITALY: *Fragali*, Fideiussione 374), for in FRANCE the security provider obliges itself towards the creditor without having any intention of representing the debtor and the relationship between the security provider and the debtor is based upon a credit agreement (*Simler* nos. 13 and 558). Admittedly, this is a purely academic question as the instrument of dependent personal security itself gives rise to the recourse: the one who pays another's debt must be enabled to recover the money paid (BELGIUM: *Van Quickenborne* no. 451; FRANCE: cf. Cass.civ. 2 June 1992, JCP G 1992, I no. 3632 (6), note *Billiau*; ITALY: *Bozzi*, La fideiussione 260 s.; NETHERLANDS: *Korthals Altes* 94).
3. Neither the GERMAN, the GREEK nor the PORTUGUESE Civil Codes contain specific rules on reimbursement but only one on subrogation; however, GREEK CC art. 858 mentions the existence of the security provider's claim to be reimbursed as necessary condition for the right of subrogation. Nevertheless, also in these countries the security provider mostly has a claim for reimbursement against the debtor arising from the legal relationship between them that is the legal basis for the security provider's assumption of the security, such as a mandate or – especially in case of nullity of the contract of mandate – *negotiorum gestio* (GERMANY: Erman/*Herrmann* § 774 no. 12; PORTUGAL:

cf. *Almeida Costa* 780). In GERMANY, in all these cases CC § 670 is applicable. This rule grants a claim for reimbursement to the mandatary if for the purpose of the execution of the mandate the mandatary incurs any expense which it may regard as necessary under the circumstances. In PORTUGAL, a distinction is made between a mandatary or *negotiorum gestor* with or without representation, the practical result being here the same for they are all entitled to reimbursement of the indispensable expenses and to indemnity for their loss (CC arts. 1167 litt. c), d), 1182 *in fine*, 468 and 471). Under special circumstances the security provider may even be entitled only to a claim for unjust enrichment according to GERMAN CC § 684 and PORTUGUESE CC art. 473 ss. (GERMANY: Staudinger/*Horn* § 765 no. 104; PORTUGAL: *Almeida Costa* 780). In GREECE as well, the security provider's claim for reimbursement depends on the internal relationship between the former and the debtor, *i.e.* whether the security provider acted as mandatary (GREEK CC art. 722) or as *negotiorum gestor* (cf. GREEK CC art. 736 *juncto* art. 722 or art. 737 *juncto* art. 904; A.P. (Plenum) 10/1992, NoB 41, 70 ss.; *Georgiades* § 3 no. 153).

4. But there is no claim for reimbursement if the security provider assumed the security as a donation or as another form of liberality (GERMANY: cf. Palandt/*Sprau* § 774 no. 2; Staudinger/*Horn* § 765 nos. 103 s.).

5. Similarly in ENGLISH law the security provider has a right to be indemnified by the debtor once it has paid the creditor or otherwise discharged the debt. This right may be based on either of three footings: (i) express agreement; (ii) implied agreement; or (iii) restitution in quasi-contract (*Andrews and Millett* nos. 10-002 s.). In case of an express agreement between security provider and debtor, the extent and nature of the indemnity are determined according to the agreement (*Re Richmond Gate Property Co* [1965] 1 WLR 335 (CFI); *O'Donovan and Phillips* no. 12-01), and there will be no implied or restitutionary right to be indemnified (*Toussaint v. Martinnant* (1787) 2 Term Rep 100 = 100 ER 55 (CFI)). An implied agreement as to indemnification is likely to be accepted if the security provider has assumed the security at the express or implied request of the principal debtor (*Re Debtor* [1937] Ch 156 (CA)). The nature and extent of the debtor's implied promise to indemnify the security provider has to be construed in accordance with the intention of the parties and be ascertained by the court in each particular case (*Andrews and Millett* no. 10-007). It has been held to be effective even though neither the debtor nor the security provider are legally liable because the debtor's promise is presumed to be "pay if I do not", and not "pay if I do not and if I am legally compellable to pay" (*Argo Carribean Group Ltd v. Lewis* [1976] 2 Lloyd's Rep 289 (CA); contrary in IRELAND: *Re Morris, Coneys v. Morris* [1922] 1 IR 82 (CFI), affd [1922] 1 IR 136 (CA)); this presumption may be rebutted (*Sleigh v. Sleigh* (1850) 19 LJEx 345 (CFI)). Indemnification based on a restitutionary right in quasi-contract, on the other hand, is only awarded if the security provider was (i) legally bound to pay under the terms of the security (*Re Cleadon Trust* [1939] 1 Ch 286 (CA)); (ii) has not voluntarily exposed himself to make payment (*Owen v. Tate* [1976] QB 402 (CA)); and (iii) has discharged a legal liability of the debtor (*Garrard v. James* [1925] Ch 616 (CFI); *Re Law Courts Chambers Co Ltd* (1890) 61 LT 669 (CFI); cf. further *Andrews and Millett* nos. 10-008 ss.). The first two conditions are regularly fulfilled if the security provider has acted on the request of the debtor (*Batard v. Hawes* (1853) 2 E&B 287 = 118 ER 775 (CFI)), although then there will be no need for a restitutionary claim since it is likely that an implied agreement will be established.

6. In SCOTS law the security provider's right to relief against the debtor, in the absence of an express agreement to that effect, is based on an implied mandate between debtor and security provider (Stair/*Clark* no. 935) and may be excluded or limited by agreement (*Williamson v. Foulds* 1927 SN 164 (CFI)). If the security provider has acted on the request of the creditor only and without the knowledge of the debtor, the security provider's right of recourse cannot be based upon a contract with the debtor, but may be based upon restitution or subrogation (Stair/*Eden* no. 834). The legal situation seems to be different in GERMANY: If the security provider assumed the security on the basis of a specific relationship to the creditor, especially if the creditor pays a commission to the security provider, the latter performs to the creditor in its own interest so that the rules on *negotiorum gestio* are inapplicable (Staudinger/*Horn* § 765 nos. 104, 132). A claim for unjust enrichment against the debtor might be excluded.
7. According to DANISH and SWEDISH literature and FINNISH law the security provider who has performed the security may claim reimbursement from the debtor (DENMARK: *Pedersen*, Kaution 85 ss.; FINLAND: LDepGuar § 28; RP 189/1998 rd 67 (see also HD 27 Nov. 1986, KKO 1986-II-154; HD 7 June 1994, KKO 1994:47; HD 10 Feb. 1995, KKO 1995:9; SWEDEN: *Walin*, Borgen 198 ss.). The FINNISH LDepGuar § 29 sent. 2 also affords the security provider a recourse unless it had good reasons not to pay, even if the debtor was not liable (RP 189/1998 rd 67 s.).

b. Items Covered

i. Principal, Interests and Costs

8. In most countries the Civil Codes establish the right of recourse of the security provider against the debtor for principal, interest and costs. This is true for BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 para 2 (since 2006: FRENCH CC art. 2305 para 2) and for GREECE, according to the principle arising from the nature of the security, that the security provider may not suffer any damage due to the fulfilment of the obligation assumed by it (*Theodoropoulos* 233). Interest arises automatically – without any notification to the principal debtor – since the moment of the security provider's performance (BELGIUM: *T'Kint* no. 782; France: *Simler* no. 578). Nevertheless, the security provider has only recourse for costs incurred by it after it informed the principal debtor of the proceedings against it (BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 para 2 (since 2006: FRENCH CC art. 2305 para 2); GREECE: *Theodoropoulos* 234). In GREECE the question was raised whether the security provider's claim for interest, in case the sum it paid to the creditor already included interest of the principal debt, violated CC art. 296 para 1 regulating interest on interest (compound interest). The answer was negative, since for the security provider who has paid this part of the debt is spent capital and not interest (CFI Athens 4621/1967, EED 18, 522).
9. In the NETHERLANDS as well, the security provider has a claim against the debtor for the entire amount it paid to the creditor in principal, interests and costs (DUTCH CC art. 7:866 para 1). The security provider, however, cannot derive a claim against the debtor for legal interest over the period in which it has been in default by circumstances personal to it or which it was not reasonable for him to make (DUTCH CC art. 7:866 para 2). According to ITALIAN CC art. 1950 paras 2 and 3 the right of reimbursement comprises the principal, interests and expenses after the security provider has informed

the debtor about the legal action taken against him. The security provider has also the right to the legal interest on the paid sum from the day of performance. If the principal debt bears interests above the legal interest, the security provider has also the right to these sums until reimbursement takes place (*Bozzi*, La fideiussione 261). According to SPANISH CC art. 1838 the indemnification consists of: (1) the total amount of the debt, (2) legal interests on the same from the time the debtor has been notified of the payment, even when it did not produce interest for the creditor, (3) expenses incurred by the security provider after notifying the debtor that payment has been demanded from him, and (4) damages, when appropriate. All this, even when the security has been provided without the knowledge of the debtor.

10. In GERMANY the security provider's claim for reimbursement according to CC § 670 covers all outlays which the security provider may regard as necessary under the circumstances, especially the secured performances that the creditor is entitled to demand from the debtor and that the security provider has paid to the creditor (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 381), *i.e.* regularly the principal debt and the contractual interest thereon. Furthermore, the security provider may demand reimbursement of the costs for a proceeding between itself and the creditor, the costs of legal defence, interest on outlays, the consequential damages of its employment and legal interest on the paid sum (cf. Staudinger/*Horn* § 774 no. 4 and MünchKomm/*Habersack* § 774 nos. 18 s. with further references). In PORTUGAL, according to CC art. 468 or art. 1167 litt. c) and d), the reimbursement covers, with legal interest, the expenses the security provider has considered as indispensable and it may also receive an indemnification for its loss.

11. In ENGLAND, the indemnity usually covers the sum the security provider has paid on the debt (*Davies v. Humphreys* (1840) 6 M&W 153 = 151 ER 361 (CFI); *O'Donovan and Phillips* no. 12-57) and thus comprises interest (*Re Fox, Walker & Co, ex p. Bishop* (1880) 15 ChD 400 (CA)) as well as costs for reasonable legal defences – even if fruitless – against the creditor's call, especially if approved by the debtor or unavoidable (*Garrard v. Cottrell* (1847) 10 QB 678 = 116 ER 258 (CFI); *Pierce v. Williams* (1854) 23 LJEx 322 (CFI). As to the extent of the recourse, SCOTS law is almost identical with ENGLISH law (Stair/*Clark* no. 935).

ii. Damages

12. In most countries also damages, if any, can be recovered by the security provider on the ground of its right of recourse. This is expressly stated by BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 para 3 (since 2006: FRENCH CC art. 2305 para 3) and by SPANISH CC art. 1838 no. 4. The same result is reached by PORTUGUESE law through the application of the rules on *negotiorum gestio* or mandate (respectively, CC art. 468 para 1 and art. 1167 lit. d)), by ENGLISH case law (*Badeley v. Consolidated Bank* (1886) 34 ChD 536 (CFI)) and by legal doctrine in ITALY, also along the line of old CC of 1865 art. 1915 para 3 (*Giusti* 236 s.).

B. *Subrogation*

a. *Legal Bases*

13. According to AUSTRIAN CC § 1358, BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2029 (since 2006: FRENCH CC art. 2306), GERMAN CC § 774 para 1 sent. 1, ITALIAN CC art. 1949, PORTUGUESE CC art. 644 and SPANISH CC art. 1839 a security provider who pays the debt is subrogated to all the rights which the creditor had against the debtor. These provisions are an application of the general rules on subrogation in BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1251 no. 3, GERMAN CC § 412, ITALIAN CC art. 1203 no. 3, PORTUGUESE CC art. 589 ss. and SPANISH CC art. 1210 no. 3. In AUSTRIA, CC § 1358 embodies itself the general rule on subrogation (Rummel/*Gamerith* § 1358 no. 5); it is generally understood, beyond its wording, as providing a statutory, automatic subrogation of the security provider into the creditor's rights against the debtor (Rummel/*Gamerith* § 1358 no. 1). By contrast, according to GREEK CC art. 858 the subrogation claim depends upon the existence of the claim for reimbursement.

14. In the NETHERLANDS, the subrogative recourse of the security provider is not explicitly provided for, but can be derived from CC art. 7:850 para 3 that refers to the general rules on solidary liability; there, CC art. 6:12 para 1 provides for subrogation against the co-debtor(s) (*Blomkwist* no. 34 at p. 57; *du Perron and Haentjens*, art. 7:850 no. 9). In DENMARK and SWEDEN the security provider is subrogated to the rights, which the creditor had against the debtor (DENMARK: *Pedersen*, Kaution 86; SWEDEN: *Walin*, Borgen 198 s.). Pursuant to the FINNISH LDepGuar § 30 para 1 the security provider has the same rights as the creditor against the debtor (RP 189/1998 rd 68). Equally under ENGLISH law the security provider is entitled to stand in the shoes of the creditor by being subrogated in all the creditor's rights against the debtor. The right is equitable – not contractual – in nature and arises out of the relationship of security provider and creditor itself (*Duncan Fox & Co v. North and South Wales Bank* (1880) 6 App.Cas. 1 (HL); see also Mercantile Law Amendment Act 1856, sec. 5; *Andrews and Millett* no. 11-017; *Lord Goff of Chieveley and Jones* no. 3-023; for the details of the dogmatic construction of the right to subrogation cf. *Dieckmann* 200 ss.). The situation is similar in IRELAND: also here the doctrine of subrogation applies in order to prevent the debtor being unjustly enriched (*Highland Finance v. Sacred Heart College* [1992] 1 IR 472 (CFI); *White* 543 s.). In SCOTS law the security provider has the so-called *beneficium cedendarum actionum* by virtue of which it is entitled, on full payment of its obligation, to be put in the creditor's place vis-à-vis the debtor (*Ewart v. Latta* (1863) 1 M 905 (CA); *Gloag and Irvine* 803) and thus to demand from the creditor transfer of the secured claim and any security held for it (*Lowe and Burns v. Greig* (1825) 3 S 543 (NE 375) (CA); *Sligo v. Menzies* (1840) 2 D 1478 (CA); Bankruptcy (Scotland) Act 1985 sec. 60 para 3 *juncto* para 4). In certain situations it can be desirable to demand a formal transfer from the creditor, *e.g.* in order to safeguard the priority of a claim (*Graham v. Gordon* (1842) 4 D 903 (CA); Stair/*Clark* no. 929).

b. Items Covered

15. According to GERMAN CC § 774 para 1 sent. 1 the security provider is subrogated into the creditor's claim against the debtor insofar as it paid off the creditor. The subrogation covers the secured claim and accessory claims that have been secured (cf. *supra* national notes to Art. 2:102), as *e.g.* contractual interest that became due before the security provider's payment. Pursuant to court practice the security provider shall even be subrogated into the claim for contractual interest insofar as the interest becomes due after the security provider's payment (BGH 18 May 1961, BGHZ 35, 172, 174; Staudinger/*Horn* § 774 no. 15; critical: *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 351 s.).
16. Via a subrogative recourse, the security provider can claim the sums mentioned in BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2016 para 1 – since 2006: FRENCH CC art. 2293 para 1 – (BELGIUM: *Van Quickenborne* no. 480; FRANCE: *Simler* no. 593 ss.). According to PORTUGUESE and SPANISH law via subrogation the security provider can also claim the interest and accessories of the credit (PORTUGAL: *Pires de Lima and Antunes Varela* 660; *Almeida Costa* 780; SPAIN: *Díez-Picazo* 441). The security provider cannot claim more than what it effectively paid to the creditor (FRANCE: cf. *Simler* no. 593; NETHERLANDS: *Blomkwist* no. 34 at p. 57; PORTUGUESE CC art. 644; SPAIN: *Guilarte Zapatero*, Comentarios 276). DUTCH CC art. 7:866 para 2 limits the security provider's recourse with respect to legal interest for a period in which it had been for personal reasons in delay with its own performance and for expenses incurred in his personal interest. In ITALY the security provider is subrogated into the rights which the creditor had even after the creation of the security and the scope of the subrogation is the same as indicated by CC art. 1950 para 2 and 3 for the security provider's recourse claim (cf. *supra* no. 9), except for the costs sustained by the security provider after he has informed the debtor of the legal actions taken against him (*Giusti* 230).

C. Relation between the Two Claims

a. Independent Claims

17. All countries recognise the independence of the security provider's claim for reimbursement against the debtor, on the one hand, and of the creditor's rights against the debtor, into which the security provider has been subrogated, on the other hand. Consequently, each of these claims and rights is subject to its proper regime, *e.g.* with respect to prescription (AUSTRIA: OGH 26 March 1987, SZ 60 no. 55 at p. 285 ss.; Rummel/*Gamerith* § 896 nos. 1a, 5, 11; BELGIUM: *T'Kint* no. 781 ss.; FRANCE: *Simler* nos. 555 ss.; GERMANY: MünchKomm/*Habersack* § 774 no. 15; *Graf Lambsdorff and Skora* nos. 296 ss.; GREECE: *Georgiades* § 3 no. 165). In ITALY the distinction between the two actions is still controversial (*Andreani* 710). Some authors are for an identification of the two actions, because the claim for reimbursement is seen as the technical way of exercising the subrogation (so *Fragali*, Fideiussione 375). The prevailing view, however, points out the autonomy of the two figures also because they have different legal base: respectively CC arts. 1949 and 1950 (*Bozzi*, La fideiussione 261).

b. Cumulation of the Claims

18. In most countries the security provider may, but need not cumulate the two claims: it may rely upon one or the other or upon both claims (AUSTRIA: OGH 27 Nov. 1928, SZ 10 no. 332 at p. 803; Schwimann/*Mader and Faber* § 1358 no. 23; ENGLAND: for the independence of the right to subrogation from the security provider's right to reimbursement *Dieckmann* 484 s.; GERMANY: Staudinger/*Horn* § 774 no. 5; GREECE: CFI Thessaloniki 1699/1967, ND 24, 369; *Theodoropoulos* 236; ITALY: *Giusti* 231 ss.; NETHERLANDS: Pitlo/*Croes* no. 866 at p. 374; PORTUGAL: *Almeida Costa* 780; SCOTLAND: *Smithy's Place Ltd v. Blackadder and McMonagle* 1991 SLT 790 (CFI); SPAIN: *Díez-Picazo* 441 with extensive references).
19. On the other hand, in BELGIUM and in FRANCE it is the traditional view that the security provider has to choose between both types of recourse; but several authors plead in favour of allowing the cumulation of both claims (BELGIUM: *Van Quickenborne* nos. 484-489 with further references; FRANCE: *Simler* no. 556; Cass.com. 30 Nov. 1948, GazPal 1949, 1).

II. Debtor's Exceptions

20. According to DUTCH CC art. 7:868, a debtor from whom reimbursement is demanded pursuant to CC art. 6:10 may invoke against the security provider the defences which it had against the creditor at the time the claim for recovery has arisen, unless a different result follows from the relationship between the debtor and the security provider (art. 868 *juncto* art. 6:11 para 4). The same is true under BELGIAN and FRENCH law where the security provider exercises the subrogative recourse, *i.e.* the creditor's recourse against the debtor (BELGIUM: *T'Kint* nos. 783 ss.; FRANCE: Cass.civ. 18 Oct. 2005, D. 2005, 2870 for a plurality of security providers; *Simler* no. 591). The debtor cannot invoke defences that arose after the security provider's claim for reimbursement (*Blomkwist* no. 38). In case of a subrogative recourse, the debtor may invoke all defences it has against the creditor without any limitations against the security provider (*Blomkwist* no. 38 at p. 62-63; *du Perron and Haentjens* art. 868 no. 4). Further the debtor is no more liable according to FRENCH, BELGIAN and LUXEMBOURGIAN CC art. 2031 para 2 (since 2006: FRENCH CC art. 2308 para 2), if the security provider pays without informing the debtor. Under ITALIAN law, if the debtor had the possibility of exemption from its liability by raising an exception to the creditor relating to the secured claim, the security provider's reimbursement is given only if (a) he informed the debtor of its intention to pay and (b) raised the exceptions to the creditor which he knew or had to know acting with due diligence (*Giusti* 237; CC art. 1952 para 2). The same is true in SPAIN, according to CC art. 1840.
21. In GERMANY and in PORTUGAL the debtor may invoke against the security provider's claim for reimbursement only those defences that are based on the internal relationship between these two parties (GERMANY: Palandt/*Sprau* § 774 no. 4; MünchKomm/*Habersack* § 774 no. 15). Against the subrogative claim, however, the debtor may invoke both defences (PORTUGAL: *Pires de Lima and Antunes Varela* 663) arising from the internal relationship with the security provider (GERMAN CC § 774 para 1 sent. 3) as well as those arising from the relationship between debtor and creditor (GERMAN CC §§ 412, 404; cf. Palandt/*Sprau* § 774 no. 4; MünchKomm/*Habersack* § 774 no. 15).

22. In ENGLAND the security provider's right to be indemnified by the debtor is restricted as described above (*supra* no. 5): If no express or implied agreement on the right to indemnity can be established, the security provider can rely only on a restitutionary right based on quasi-contract, which is subject to an existing obligation to pay on its side. Since the right to be indemnified is an independent claim of the security provider, it is subject to any right of set-off which the debtor can raise against him (*Thornton v. Maynard* (1875) LR 10 C.P. 695 (CFI)). In relation to claims based upon subrogation, however, it seems that the debtor cannot rely on a set-off vis-à-vis the security provider (cf. *Andrews and Millett* no. 11-017 citing Commonwealth decisions).
23. According to GREEK CC art. 463 para 1, as applied by analogy (cf. Georgiades-Stathopoulos/*Vrellis* art. 858 no. 8), the debtor may raise as against the security provider acting as assignee under the subrogation – in contrast to the case it is facing the security provider's claim for reimbursement – all the defences, which it (debtor) had as against the creditor arising from the secured obligation which had arisen before the subrogation took place (*i.e.* satisfaction of the security provider).

III. Exclusion of Claims

24. DUTCH, GERMAN, GREEK and ITALIAN law grant the security provider the subrogative claim, unless it is completely or partially excluded by the underlying relationship between security provider and debtor (NETHERLANDS: CC art. 7:868 *juncto* art. 6:11 para 4; GERMANY: Staudinger/*Horn* § 774 nos. 6, 15 and 40; cf. for contractual interest BGH 18 May 1961, BGHZ 35, 172, 174; GREECE: cf. wording of CC art. 858; ITALY: *Bozzi*, La fideiussione 260). Consequently, the security provider cannot rely upon the subrogative claim if it is excluded from recourse according to the internal relationship, *e.g.* in case it did not intend to be reimbursed (BELGIUM: *Van Quickenborne* no. 491; FRANCE: *Simler* nos. 551 and 582; GREECE: Georgiades-Stathopoulos/*Vrellis* art. 859 no. 8).
25. Moreover, the security provider does not have any recourse if the debtor did not gain any profit from the security provider's payment. This happens for instance in case the security provider paid more than the debtor had to pay to the creditor, with reference to the differential amount (SPAIN: *Guilarte Zapatero*, Comentarios 272). Furthermore, reimbursement is excluded if the security provider violates its duty of information or of exercising the debtor's defences (cf. *supra* national notes to Art. 2:112).
26. Reimbursement on the basis of an agreement of indemnity under ENGLISH law is subject to the security provider being requested to assume the security by the debtor. If no agreement (implied or express) to that effect can be established, a right to reimbursement can exist only as a restitutionary claim. The same is true in GERMANY (cf. *supra* no. 10) and SCOTLAND (cf. *supra* no. 6).

IV. Part Performance by Security Provider

27. One has to distinguish again between the claim for reimbursement and subrogation to the creditor's rights.

A. *Claim for Reimbursement*

28. If the security provider performs only in part, it is under BELGIAN, ENGLISH, FRENCH, LUXEMBOURGIAN, ITALIAN and SPANISH law entitled to partial recourse only against the debtor (ENGLAND: *Davies v. Humphreys* (1840) 6 M&W 153 = 151 ER 361 (CFI); *Soutten v. Soutten* (1822) 5 B&Ald 852 = 106 ER 1403 (CFI); FRANCE: *Simler* no. 568; GREECE: *Georgiades* § 3 no. 164; ITALY: *Giusti* 236 fn. 197; SPAIN: *Guilarte Zapatero*, Comentarios 268, 276 and 278).
29. If the security provider bases its recourse claim on BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2028 (since 2006: FRENCH CC art. 2305), a clash between the security provider's claim for reimbursement and the creditor's claim for payment of the residual debt is possible. The creditor does not have any priority over the security provider (BELGIUM: *Van Quickenborne* no. 460; CA Gent 10 Feb. 1883, Pas belge 1883 II 224; CA Luik 13 Feb. 1950, Pas belge 1950 II 100; FRANCE: cf. Insolvency Act of 25 Jan. 1985 art. 60 para 2 integrated into Ccom art. L 622-33 para 2; Cass.civ. 25 Nov. 1891, DP 1892, I, 261; except the parties agree otherwise *Simler* no. 568). The opposite is true in case of a subrogative recourse based on BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 2029 (since 2006: FRENCH CC art. 2306); cf. *infra* no. 30.

B. *Subrogated Claims*

30. In BELGIUM, FRANCE, DENMARK, GERMANY, ITALY and PORTUGAL, even a partial satisfaction of the creditor leads to a corresponding partial subrogation. The creditor, benefiting from the maxim "*nemo censetur subrogasse contra se*", enjoys priority for its remaining claim over the (partial) claims of the security provider into which the latter is subrogated (BELGIUM: *Van Quickenborne* no. 479 p. 248; CA Antwerpen 26 Oct. 1987, Pas belge 1988, II 46; FRANCE: but according to the predominant court practice only if the security provider wants to exercise a priority or a security, which belongs to the creditor: Cass.civ. 28 June 1977, JCP G 1979 II no. 19045, note *Guillot*; *Simler* no. 592; DENMARK: *Pedersen*, Kaution 88, 92; GERMAN CC § 774 para 1 sent. 2; ITALY: *Giusti* 226; PORTUGUESE CC art. 593).
31. In ENGLAND the general rule being that subrogation is only available if the creditor is paid in full, a partial discharge of the secured obligation by the security provider does normally not entitle it to be subrogated to the creditor's rights against the security provider. Thus it is accepted that where there is a security for the whole debt with a limitation on the amount of the security provider's liability, a payment of the security provider which only partly satisfies the creditor does not entitle the security provider to a transfer of a proportionate interest in the creditor's securities (*Re Sass, ex p. National Provincial Bank of England* [1896] 2 QB 12 (CFI); *Andrews and Millett* no. 11-020; *O'Donovan and Phillips* no. 12-273). Where, however, the security provider is a surety for part of the secured debt only, it is subrogated *pro rata* to any rights held by the creditor in respect of that debt after performance of the security (*Hobson v. Bass* (1871) 6 ChApp 792 (CA); *Andrews and Millett* no. 11-020; *O'Donovan and Phillips* no. 12-273). There is ENGLISH authority that subrogation only arises if the creditor has been fully satisfied by the security provider itself (*Re Howe, ex p. Brett* (1871) 6 ChApp 838 (CA); *Ewart v. Latta* (1865) 3 M 36 (HL(Sc))); modern AUSTRALIAN decisions, however, point to the contrary view and argue that the security provider should be *pro tanto* subrogated to

the creditor's rights once it has discharged its own liability, even though another part of the debt was paid by the principal debtor or another security provider (*A. E. Goodwin Ltd v. A. G. Healing Ltd* (1979) 7 ACLR 481; *McColl's Wholesale Pty Ltd v. State Bank (NSW)* Ltd [1984] 3 NSWLR 365 (SCt); *Raffle v. AGC (Advances) Ltd* [1989] ASC 58, 528, all cited by *Andrews and Millett* no. 11-018; *O'Donovan and Phillips* no. 12-272). It is submitted that this view should be followed in ENGLAND too, and the contrary decisions not be followed (*Andrews and Millett* no. 11-018). Furthermore, there is ancient ENGLISH authority to the same effect (*Gedye v. Matson* (1858) 25 Beav 310 = 53 ER 655 (CFI)), which has not been cited in the later ENGLISH decisions. In SCOTLAND the security provider's right to an assignation of the creditor's rights arises only if it has fully paid its obligation (*Ewart v. Latta* (1863) 1 M 905 (CA); Stair/*Clark* no. 933).

32. According to GREEK literature, the claims of the creditor and of the security provider as against the debtor are concurrent and shall be proportionately satisfied (cf. GREEK CCP art. 977 para 3; cf. also the critical approach of *Georgiades* § 3 no. 164).

V. *Subrogation into Security Rights*

33. GERMAN CC § 774 para 1 sent. 1 *juncto* §§ 412, 401 provides that the security provider is not only subrogated into the secured claim but also into the related dependent rights, especially security rights (Staudinger/*Horn* § 774 no. 19). The independent collateral rights are not transferred *ex lege* but the security provider is regularly entitled to demand their transfer (*Reinicke and Tiedtke*, Bürgschaftsrecht no. 358; Staudinger/*Horn* § 774 no. 21 with further references to court practice). Similarly in PORTUGAL, where the security provider acquires the securities and other dependent rights (CC arts. 593 para 2, 594 *juncto* art. 582). According to GREEK CC art. 458 applied by analogy, accessory proprietary rights are also transferred to the security provider which secure the claim, created either before or after the issue of the security, either by the debtor or a third party (Georgiades-Stathopoulos AK/*Vrellis* art. 858 no. 12). The security provider is also subrogated to any judicial acts commenced by the creditor (ErmAK/*Zepos* art. 858 no. 9) as well as to the rights of the creditor against the third party, in the hands of which the creditor garnished a claim belonging to the principal debtor (*Kosadinos* 762-763). The same is true under BELGIAN, FRENCH and LUXEMBOURGIAN CC art. 1250 no. 1 since this subrogation covers all "rights, claims, priorities or mortgages [of the creditor] against the debtor".

34. Also under ITALIAN law the subrogation of the security provider affects all kinds of security rights for the secured claim (CC art. 1955 and, more in general, art. 1204; *Bozzi*, La fideiussione 259).

35. Under ENGLISH law the security provider is subrogated to all the security rights held by the creditor in respect of the secured claim (*Duncan Fox & Co v. North and South Wales Bank* (1880) 6 App.Cas. 1 (HL); *Chatterton v. McLean* [1951] 1 AllER 761 (CFI)), irrespective of whether already existing at the time of assumption of the security (*Forbes v. Jackson* (1882) 19 ChD 615 (CFI); *Pledge v. Buss* (1860) John 663 = 70 ER 585 (CFI)), and whether granted by the debtor or third persons (*Goddard v. Whyte* (1860) 2 Giff 449 = 66 ER 188 (CFI); *Dering v. Winchelsea (Earl)* (1787) 1 CoxEqCas 318 = 29 ER 1184 (CFI)). There are only a few rights a security provider cannot be subrogated into: private insurance policies (*Dalby v. India and London Life Assurance Co* (1854) 15 CB 364 = 139 ER 465 (CFI)), purely personal rights of the creditor (such as the right to seize goods

under a hire-purchase agreement, cf. *Chatterton v. McLean* [1951] 1 AllER 761 (CFI)), and rights wrongfully obtained by the creditor (*Andrews and Millett* no. 11-023). It is doubtful whether the security provider can be subrogated into floating charges (cf. the discussion in *Andrews and Millett* no. 11-022 and *O'Donovan and Phillips* nos. 12-319 s.). Under SCOTS law the security provider is entitled to demand transfer of all security rights held by the creditor over the principal debtor's estate and in relation to co-providers of security against whom there is a right of relief (*Thow's Trustee v. Young* 1910 SC 588 (CA); *Scott v. Young* 1909 1 SLT 47 (CFI); Stair/*Clark* no. 930).

VI. Reimbursement from an Incapable Debtor

36. According to ITALIAN CC art. 1950 para 4 a recourse against the incapable debtor is admitted only if and insofar it has benefited from the security provider's payment. A similar view is held in FRANCE (*Simler* no. 224). According to GREEK literature, the security provider may have a claim for reimbursement; however, it may not be subrogated to the claim of the creditor, because this claim is against a minor and is, hence, void. Furthermore, since the security remains valid, the security provider may not reclaim its performance according to the principles of unjust enrichment (ErmAK/*Zepos* art. 850 nos. 11-12). It is unclear whether under ENGLISH law the security provider has a right to be indemnified from a minor debtor; this question is not dealt with in the Minors Contracts Act 1987; the Law Commission suggested that there should be a right to be indemnified if the minor could have been sued by the creditor under the common law rules (Law Commission Report on Minors' Contracts, Law Commission 134). In other cases where the security provider could not rely on having assumed the liability at the request of the debtor, *e.g.* for lack of authority of the person acting for the company debtor, the security provider was held to have neither a contractual claim for reimbursement nor a restitutionary claim against the debtor (*Re Cleadon Trust* [1939] 1 Ch 286 (CFI); *Andrews and Millett* no. 10-009).

(Lebon; Dr. Poulsen)

Chapter 3:
Independent Personal Security (Indemnities/Independent Guarantees)

Introduction

I. The Institution

As the variety of national terms indicates (*infra* no. 2) and the dearth of statutory provisions confirms (*infra* no. 3), the independent personal security is for most member states a relatively, or even a very, recent phenomenon. However, in the latter part of the 20th century it has become very popular in commerce in general and in international trade and investment in particular.

2. Terminology

a. The Institution

The term independent security, or an equivalent in the national language, is used in ITALY, PORTUGAL and SPAIN, as well as in FRANCE, BELGIUM and LUXEMBOURG. In these countries qualifying words like *independent*, *abstract* or *autonomous* stress the non-ancillary character of this contract, as distinct from the dependent personal security.

By contrast, the GREEK term used – *security letter* – does not contain any such indication. In ENGLAND the term *indemnity* is used. In its broader meaning it describes every obligation imposed on a person by operation of law or by contract to make good a loss suffered by another person – *i.e. inter alia* insurance, security (cf. Halsbury/*Salter* para 345). In a narrower meaning the expression *contract of indemnity* describes a promise to indemnify another person by way of security. Countries with Germanic languages, *i.e.* AUSTRIA and GERMANY as well as DENMARK, SWEDEN and the NETHERLANDS use a special, essentially uniform term for the independent personal security (AUSTRIA and GERMANY: G*arantie*, DENMARK and SWEDEN: *garanti*, NETHERLANDS: *garantie*).

b. The Persons

Even more controversial than the term for the institution are the names of the persons involved in an independent personal security, *i.e.* the person assuming the obligation under the security, the person for whose benefit the obligation is assumed, and a third

person on whose instructions the security is assumed and who typically owes an obligation towards the person benefiting form the security.

(i) Most controversial is especially the name of the third person. The term "(principal) debtor" which corresponds to that of the debtor under a dependent security is in most countries rather rarely used – probably both for historical reasons (the independent security often originating in special – banking – practices) and in order to emphasize the distinction from a dependent security. Instead, the terms "principal" or "instructing party" (and their linguistic equivalents) are most often used. Characteristic for the unsettled terminology are the multiple choices offered by art. 2 (2) (a) and (b) of the UN Convention on Independent Guarantees of 1995 (*infra* no. 4): "customer ("principal/applicant")"; "instructing party".

After careful consideration of the alternatives, it was decided to use the term "debtor". This choice emphasizes the basic structural bond between dependent and independent security; they differ by degree rather by essence. Most frequently, an independent security is in some respects similar to a dependent security intended to secure an underlying obligation. Independence merely means that the security obligation is more or less immune from defences or objections derived from the secured obligation. Despite conceptual differences the economic effects of an independent security are thus closely resembling those of a dependent security.

(ii) The UN Convention on Independent Guarantees uses the double term "guarantor/issuer" for the person who assumes an independent guarantee (cf. arts. 2 (1) and (2) (a), 4 (1), 6 (b), 7 (1) etc.). For the purposes of the present Part and for reasons corresponding to those given in preceding no. (i), these Rules use the general term "security provider" which clearly characterises the function of that person.

(iii) Also the term "beneficiary" which is used in the UN Convention on Independent Guarantees of 1995 (art. 2 (1) and (4), 4 (1) etc.) has been replaced by the term "creditor". Again, this deviation from the specialised terminology employed by the UN Convention is based upon the general considerations set out *supra sub* no. (i).

3. National Laws

There is no comprehensive statutory regime for independent personal security in the different countries, so that in all member states the rules on independent personal security have been developed by case law. An early statutory general clause for an independent personal security offers AUSTRIAN CC § 880a (introduced in 1915). In FRANCE a recent amendment of the Civil Code now recognizes the institution of the independent personal security (CC art. 2321 in the new Book IV title I chapter 2, as inserted in 2006) and regulates three essential aspects. Formerly, there were already a few dispersed provisions on first demand guarantees *(garanties à première demande)* in the Code on public contracts *(code des marchés publics)* arts. 131 ss. of 1992 and models for first demand guarantees were set up by the government regulation of 10 December 1993. BELGIUM and the NETHERLANDS have a few provisions protecting consumers who assume a

personal security, including an independent personal security (BELGIAN Law on consumer credit of 12 June 1991 arts. 34-36, 38, 97; DUTCH CC art. 7:863 *juncto* arts. 7:857-7:862). Also the few statutory provisions in DENMARK, *e.g.* in the AB 92 *(Almindelige betingelser for arbejde og leverancer inden for bygge- og anlægsvirksomhed)* §§ 6, 7, relate to personal security, which has to be given in connection with the erection of a public or a publicly supported building (*Pedersen*, Bankgarantier 34).

By contrast, in ENGLAND such a primary undertaking is known since the early eighteenth century (*Birkmeyr v. Darnell* (1704) 1 Salk 27 (CFI)). In GERMANY the independent personal security – as a contract "*sui generis*", based on freedom of contract – is known at least since the late nineteenth century.

In other countries independent security has been recognised only in the last 25 years, by the SPANISH Supreme Court not before 1992 (TS 27 Oct. 1992, RA 1992 no. 8584), in BELGIUM they first appeared in case law in 1981 (CA Brussels 18 Dec. 1981, BankFin 1982, 99, JT 1982, 358), in ITALY their full admission leads back to Cass. 1 Oct. 1987, plenary decision, no. 7341, Giur. it. 1988 I 1204 and Cass. 6 Oct. 1989 no. 4006, BBTC 1990 II 553.

Similarly in GREECE, independent personal security is regarded as a *sui generis* contract – a variation of the dependent security – excluding the non-cogent CC arts. 853-855. The remaining provisions on the dependent security are hence applied directly (A.P. 585/1989, EED 41, 233, and 593/1989, EED 42, 416 ss.; CA Athens 2023/1988, EED 39, 596, and 3181/1987, EED 39, 598 ss.) or "by analogy" (CA Athens 8320/1989, EED 42, 45 ss., and 4533/1987, EED 39, 44 ss.), without taking fully into consideration the autonomous character of the provider's promise.

In SWEDEN there is some confusion regarding the expression "security". *Bergström* 12 thinks that a security – *e.g.* a bank security – is in fact a dependent security, and the rules on the latter are applied.

4. International Instruments

Since independent personal security is very frequently granted by professional providers of security, especially banks and insurance companies, and is often used in the context of specific types of transactions, those professional security providers or their organizations have developed special contract forms. Some of these have obtained the sanction of bodies like the International Chamber of Commerce and are very widely used in practice. This is especially true of the Uniform Customs and Practice for Documentary Credits 1993 Revision – UCP 500 (1993) (letters of credit). In addition, two sets of uniform rules for independent personal security were elaborated by the International Chamber of Commerce, the Uniform Rules for Contract Guarantees of 1978 and the Uniform Rules for Demand Guarantees of 1991. The essential difference between the two sets of rules is the method by which the creditor has to prove that the condition(s) for the security to become due are fulfilled. According to the rules of 1978, the creditor must present a court judgment, an arbitral award or a declaration by its contracting party (art. 9); by contrast,

under the rules of 1991 an express statement by the creditor suffices (art. 20). Depending on the economic strengths of the parties to an underlying contract, the one or the other of these two sets of rules is being used. On the whole, recourse to the rules of 1991 is much more frequent than to the rules of 1978.

In 1998, the International Standby Practices (ISP98) were issued which had been formulated jointly by The Institute of International Banking Law & Practice and a Commission of the International Chamber of Commerce, Paris (ICC publication 590). The ISP98 are very similar to the UCP 500 (1993), but they reflect those special features which evolved in the application of the UCP to stand-bys. UCP 500 (1993) can still be applied to stand-bys, if the parties so desire. The commercial volume of stand-bys greatly exceeds the amounts of commercial letters of credit.

There is even an international instrument with binding force, *i.e.* the UN Convention on Independent Guarantees and Stand-by Letters of Credit of 1995, which entered into force on 1 January 2000. However, only eight rather small states have so far ratified the Convention (Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama and Tunisia). Furthermore, it only applies to "international undertakings" (art. 4).

Article 3:101: Scope

(1) The independence of a security is not prejudiced by a mere general reference to an underlying obligation (including a personal security).
(2) The provisions of this Chapter also apply to stand-by letters of credit.

Comments

A. General Remark

1. Due to the independence of the independent personal security from any underlying obligation, the rules applying to them are much simpler and can be less numerous than the corresponding rules on the dependent personal security. The latter have to spell out the extent and limits of dependence upon the secured obligation and the technical devices with whose help that dependency is realized. That, obviously, is not necessary for independent personal security since this stands largely on its own feet.

B. Definition

2. The independence from any other agreement, especially an underlying contract between the creditor and the debtor, is laid down and specified in Article 1:101 (b); cf. also Comments on Article 1:101 nos. 28-35. In particular it is irrelevant for the security provider's obligation whether the underlying obligation (such as a seller's obligation to deliver or a buyer's obligation to pay the price under a contract of sale or for services) is valid or not, which terms it contains and the extent of the debtor's obligations. The same independence exists with respect to the contract by which the debtor of the underlying contract instructs the security provider to assume the independent personal security (usually a mandate). The UN Convention on Independent Guarantees of 1995 defines the "Independence of undertaking" in a similarly broad manner (art. 3).

3. On the other hand, the validity of the security provider's undertaking itself is an indispensable condition for the security provider's obligation to honour its security. Thus it must have full capacity and its undertaking must have been created without any defects of consent which might give rise to a right of avoidance under PECL Chapter 4.

4. The independent character of an independent security must be "expressly or impliedly agreed". This rule dovetails with Article 2:101 (1) which establishes a presumption for any security being a dependent security, "unless the creditor shows that it was agreed otherwise." For letters of credit and stand-by letters of credit, UCP 500 (1993) art. 3 and 4 explicitly and broadly emphasize the independence of the "credit" from underlying contracts or the objects of those contracts, such as goods, services and other performances. More succinctly in the same sense is UN Convention on Independent Guaranties art. 3.

C. General Reference to Underlying Obligation Innocuous

5. Paragraph (1) serves to specify the independent character of a security. Usually, an independent security refers to an underlying contract (*e.g.*, of sale or services) or another security (*e.g.*, a "confirming" security to the security given by the bank opening a letter of credit; or a "counter security" to the security issued by the security provider on the instruction of the issuer of the counter security) in order to specify the event upon the occurrence (or non-occurrence) of which performance of the security may be demanded by the creditor. Any such general reference to an underlying obligation does not affect the independent character of a security. The decisive point is that the security provider's obligation to perform is independent of the obligation(s) of the principal as debtor of the underlying contract with the creditor.

D. Stand-by Letters of Credit

6. According to para (2), Chapter 3 applies to stand-by letters of credit. This clarification appears to be useful since the name of this instrument does not reveal its legal character as security. However, the "stand-by" letter of credit at least hints to the security

function which letters of credit may fulfill and which, originally for reasons of AMERICAN internal banking law, this kind of letter of credit does fulfill. This is confirmed by the fact that stand-by letters of credit are also covered by the UN Convention on Independent Guaranties and "Stand-by Letters of Credit" of 1995. Functionally, the same is true for the "genuine" letter of credit, as used in international contract practice, since it secures claims for payment arising from various types of contract; the fact that in practice the security obligation represented by the letter of credit assumes the role of the primary obligation of a means of payment does not detract from its legal function as a mere security. The idea of independence of the security covers even cases where no preceding demand under the underlying contract has been made. Cf. also preceding Comment no. 5.

E. Independent Security of a Consumer

7. According to Article 4:106 (c), a consumer's "agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met." For details, cf. the Comments on that provision.

National Notes

I. Legal Sources

1. While the dependent security is broadly regulated in all Civil Codes of the CONTINENTAL countries, there is almost no legislation on independent security. An "early" exception is AUSTRIAN CC § 880a sent. 2 (enacted in 1916) according to which a security provider is fully liable if the promised performance of a third person is not rendered by the latter. Much more explicit is the new FRENCH regulation of 2006, enacting CC art. 2321 which in four paragraphs deals with essential elements of the independent security.
2. In view of the dearth of legislation, case law and writings are of prime importance everywhere. This is even true for AUSTRIA and FRANCE: for the former country because of the abstract character of the legislative provision; and for FRANCE because of the very recent date of its legislation.

II. Qualification of Instrument as "Independent Security"

A. Generally

3. It is common opinion that the denomination of an agreement as "dependent security" or "independent security" is not conclusive. In all countries, any case of doubt has to be resolved by interpretation of the contract. However, in ENGLAND the designation "indemnity" or "independent guarantee", especially if frequently repeated or used in the heading, indicates the independent character of that security (cf. *Goulston Discount Co Ltd v. Clark* [1967] 2 QB 493 at 498 (CA), *per Danckwerts* LJ; *Western Credit Ltd v. Alberry* [1964] 2 AllER 938 at 940 (CA), *per Davies* LJ; *Heald v. O'Connor* [1971] 2 AllER 1105 at 1110 (CFI); *O'Donovan and Phillips* no. 1-94). The true construction of the contract as a whole, however, may lead to a different conclusion (*Stadium Finance Co Ltd v. Helm* (1965) 109 SJ 471 (CA)). In this respect, it has been said that especially the following factors should be regarded as arguments against interpreting a contract of security as a dependent security: (i) the contract relates to an underlying transaction between parties in different jurisdictions; (ii) the security is issued by a bank; (iii) the security contains an undertaking to pay "on demand" (whether or not "on first demand" or "on written demand"); and (iv) the security does not contain clauses excluding or limiting the defences available to the security provider (*Gold Coast Ltd v. Caja de Ahorros del Mediterranneo* [2002] EWCA Civ 1806 (CA); *Hapgood* 731). While the first three of these factors relate to the factual situations of international commerce in which the independent security is the preferred method of security, the rationale of no. (iv) appears to be as follows: in the case of an independent personal security, the security provider's possibility to avail itself of any defences against the creditor's claim are rather limited in comparison to the situation of a dependent personal security. It is therefore typically the latter situation where the creditor might see a practical need for the exclusion of defences of the security provider.
4. CONTINENTAL legal systems start from the general notion, that the legal nature of a contract is to be determined upon the parties' intention and not by the terms the latter may, often mistakenly, have used (AUSTRIAN CC § 914; FRENCH and BELGIAN CC art. 1156; GERMAN CC §§ 133, 157; GREEK CC art. 173; ITALIAN CC art. 1362; PORTUGUESE CC arts. 236, 238; SPANISH CC art. 1268).
5. In BELGIUM (overview: *Simont/Bruyneel*; *Wymeersch/Dambre/Troch* no. 56, p. 1835-1837), some aspects of a contract for personal security may indicate the independence of that security: the internationality of the contract and the professional acting of the contractors (*Vliegen* nos. 175-193). The question whether a personal security is a unilateral obligation of the security provider or a bilateral agreement, is not yet solved. In the first case, only the intention of the security provider needs to be revealed, in the latter case, the intention of all parties involved. It cannot be denied, however, that the intentions of the creditor will always have to be taken into account, because the exact wording of the personal security will almost always be the result of negotiations between security provider and creditor (*Vliegen* no. 172; *Simont* 102-103).
6. Under GERMAN law the wording of the agreement is not decisive. Nevertheless, it is at least an important indication (CA Hamburg 18 Dec. 1981, WM 1983, 188, 189; *Canaris*, Bankvertragsrecht no. 1124). The use of legal terms even by persons familiar with those terms merely creates a rebuttable presumption (BGH 5 March 1975, WM 1975, 348).

Finally, the motivation and interest of the security provider to assume an independent security is relevant (*Hadding, Häuser, Welter* 702). A major indication for the security provider's intention to assume an independent personal security is the security provider's own economic interest in the transaction (BGH 22 Feb. 1962, WM 1962, 577). If there remains any doubt, the contract is considered to be a dependent personal security in order to protect the security provider (RG 28 Sep. 1917, RGZ 90, 415, 417; BGH 5 March 1975, WM 1975, 348, 349). Similarly in FRANCE, where, in case of doubt, the courts qualify an agreement – even if expressly declared to be independent – as a dependent personal security. Since even a dependent personal security must not be presumed (FRENCH CC art. 2015: since 2006, CC art. 2292), there is even less a presumption for an independent personal security (CA Paris 17 Dec. 1992, JCP E 1993 I no. 243 (39)).

7. AUSTRIAN and PORTUGUESE courts and writers rely on the independent character of a personal security as the decisive criterion for assuming an independent personal security. Personal securities indicating that the security provider waives all objections rooted in the underlying contract are regarded as independent personal securities (AUSTRIA: OGH: 24 Oct. 2000, JBl. 2001, 380; 24 June 1999, ÖBA 2000, 322, 323; 9 Nov. 1993, SZ 66 no. 140 p. 327 and 4 May 1977, SZ 50 no. 66 p. 324; Schwimann/*Apathy* § 880a no. 5; Avancini/Iro/*Koziol* II no. 3/26-3/27; PORTUGAL: CA Lisboa 18 Oct. 1988, CJ XIII, IV-129; CA Porto 13 Nov. 1990, CJ XV, V-187; STJ 1 June 2000, 316/00 www.dgsi.pt; *Galvão Telles* 285; *Ferrer Correia* 252). In other cases, the interests of the parties are considered; an independent personal security is assumed if the creditor was to obtain a strong and secure position (AUSTRIA: OGH 14 July 1992, SZ 65 no. 109 p. 68-69, and 10 April 1991, ÖJZ 1991, 595 no. 134) and especially if the security provider is a bank (OGH 24 June 1999, *supra* this note).

B. Particular Case of First Demand Securities

8. In BELGIUM, the "on first demand clause" can be considered as a rebuttable presumption of independence (*Romain* 33-40; *Simon/Bruyneel* 523); some authors think that the clause cannot validly be added to dependent personal securities (*Van Ransbeek* nos. 15-23; *contra Wymeersch/Dambre/Troch* 1836). Also in FRANCE a personal security on first demand (for payment) is regarded as an independent personal security (*Simler* no. 894). Similarly in DENMARK: "If a personal security is expressed as a personal security on first demand, it is supposed to be an independent personal security" (*Pedersen*, Bankgarantier 140). Also in AUSTRIA, a first-demand clause is a strong indication for an independent guarantee, especially if it is supplemented by a waiver of all defences and exceptions (OGH 26 Aug. 1999, ÖBA 2000, 328).

9. In ITALY, the NETHERLANDS and SPAIN the demand clause does not *per se* define the nature of the contract as independent personal security, therefore the clause needs to be interpreted with the rest of the contract in order to determine the real will of the parties (ITALY: Cass. 20 April 2004 no. 7502, Giust.civ.Mass. 2004, 912; Cass. 25 Feb. 2002 no. 2742, BBTC 2002 II 653; Cass. 23 June 2000 no. 8540, Foro pad. 2001 I 242; Cass. 21 April 1999 no. 3964, Arch. civ. 2000, 222; Cass. 14 July 1994 no. 6604, BBTC 1995 II 422 and 1 July 1995 no. 7345, Giur.it. 1996 I 1 620; *Portale*, Le garanzie bancarie 6; SPAIN: *Carrasco Perera*, Las nuevas garantías 688; *Sánchez-Calero*, El contrato autónomo 145). Although ITALIAN case law often regarded the demand clause as a very stark

presumption of non-ancillarity of the contract, legal doctrine quite unanimously considers the clause compatible both with dependent and independent security contracts (*Bonelli*, Le garanzie contrattuali 205-208). Sometimes ITALIAN case law requires express contractual terms barring the possibility for the security provider to invoke exceptions arising from the underlying relationship (Cass. 7 Jan. 2004 no. 52, BBTC 2004 II 497 ss.). DUTCH writers attach great weight to a "first demand"-clause, especially if it is accompanied by terms indicating that the security provider's duty of performance is independent from any underlying transaction or from any approval by the obligor of that transaction (*Boll* 82-84, *Croiset van Uchelen* 10, both with references to and quotations from case law). However, in one recent case, the Supreme Court denied that a bank guarantee on first demand gave a personal security an independent character (HR 25 Sept. 1998, NJB 1998 no. 892 at p. 5153).

10. In ENGLISH as well as GERMAN law demand clauses are mainly used in independent personal securities; they have, however, been held legally effective in dependent personal securities as well (ENGLAND: *Bradford Old Bank v. Sutcliffe* [1918] 2 KB (CA); *Andrews and Millett* no. 1-011; GERMANY: BGH 2 May 1979, BGHZ 74, 244 for dependent and BGH 12 March 1984, BGHZ 90, 287 for independent personal securities) and are usually stipulated for in bank personal security forms (ENGLAND: *Cresswell, Blair, Hill, Hooley, Phillips and Wood* I E 2068). At least in relation to securities given by security providers other than banks, demand clauses should not necessarily lead to the conclusion that the parties intended to create an independent security if this would be inconsistent with other provisions of the security (ENGLAND: *Marubeni Hong Kong and South China v. Mongolian Government* [2005] 1 WLR 2497 (CA)).

11. According to SWEDISH doctrine personal securities on first demand are considered to be dependent personal securities (*Dalman* 182). According to the FINNISH government's proposition (RP 189/1998 rd 17), the LDepGuar shall be used in many legal matters, so *e.g.* for bank personal securities. However, personal securities on first demand are not covered by the Law (RP 189/1998 rd 29).

12. In GREECE it is accepted that the term "on first demand" may be irrelevant if there are other countervailing terms (*Georgiades* § 6 no. 43).

III. Autonomous Undertaking

13. See national notes on Art. 1:101 *sub* III D.

IV. Reference to Underlying Obligation

14. A mere reference to an underlying obligation does not prejudice the independence of a personal security. Since the occurrence (or non-occurrence) of the event, which justifies the creditor's demand, is usually rooted in the relationship between creditor and debtor, a general reference to that relationship is almost unavoidable. In practice it is the rule; in GREECE (*Georgakopoulos* 256; *Psychomanis* 371; *Gouskou* 104) and FRANCE (CA Besançon 11 April 1991, JCP E 1991, I no. 90 p. 466) it is even obligatory. FRENCH law goes even further and holds valid personal securities with reducible clause (*garanties glissantes*: Cass.com. 5 Dec. 1989, RD banc 1990, 139): The amount of the *garantie glissante* is progressively reduced with the performance of the main contract; it is nevertheless independent, because it constitutes a mere modality of computation. Also in

ITALY it is acknowledged that independent personal security contracts always contain a reference to the underlying obligation (*Bonelli*, Le garanzie bancarie 52 ss.) and that a contract term reducing the security to the amount of the secured obligation does not *per se* impair the independence of the security (CA Milano 15 Oct. 1999, Contratti 2000, 468). According to an eminent GERMAN author (*Canaris*, Bankvertragsrecht no. 1137) reducing clauses (*Reduzierungsklauseln)* have to be admitted as part of the personal security contract and may be raised as defences *(inhaltliche Einwendung)*, although independent personal securities with reducing clauses apparently function like dependent personal securities on first demand (cf. *Hadding* 704, Staudinger/*Horn* no. 240 preceding §§ 765).

15. Also in other countries a general reference to the underlying relationship between creditor and debtor is held not to destroy the independent character of the personal security (AUSTRIA: OGH 9 Nov. 1993, SZ 66 no. 140 p. 328, and 2 Dec. 1975, SZ 48 no. 130 p. 661; Avancini/Iro/*Koziol* no. 3/6; BELGIUM: *Romain* 444-447; ITALY: Cass. 3 Feb. 1999 no. 917, Giust.civ.Mass. 1999, 245; *Mastropaolo* 140 s.; PORTUGAL: CA Lisboa 18 Oct. 1988, CJ XIII, IV-129). In ENGLAND, although the obligation has no reference *in law* to the debt of another (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at 830-831 (CA)), most indemnities contain references to the underlying transaction.

V. *Types of Secured Obligations*

16. All types of obligation may be secured by an independent personal security. Hence, also claims for reimbursement that a (primary) security provider may acquire against the debtor under a primary security may be secured by a so-called counter security. In BELGIUM (*Delierneux* 21-27), GREECE (*Georgiades* § 6 nos. 168 ss.), ENGLAND (*Goode*, Commercial Law 1020), DENMARK (known as *re-garanti*: *Pedersen*, Bankgarantier 17), FRANCE (*Simler* no. 914) and PORTUGAL (*Almeida Costa and Pinto Monteiro* 25) counter-securities are well known and frequently – mostly in an international context – used. The same is true in SPANISH and ITALIAN law (SPAIN: *Sánchez-Calero*, El contrato autónomo 63, 64; ITALY: *Mastropaolo* 145, 318 ss.; Cass. 17 May 2001 no. 6757, Giust.civ.Mass. 2001, 989). The GERMAN Supreme Court had recently to deal with a type of counter security and had no doubt concerning its general validity (BGH 10 Oct. 2000, BGHZ 145, 286).

VI. *Letters of Credit and Stand-by Letters of Credit*

A. *Letters of Credit*

17. Views on the relationship between independent personal securities and letters of credit are to some degree influenced by the differing sources from which the rules governing personal securities have developed. Where, as in most member states, the relevant rules have been developed from the traditional rules on dependent personal securities, the differences from letters of credit tend to be emphasized. Admittedly, a common denominator is the independence of both types of instruments from any underlying transaction (AUSTRIA: Avancini/Iro/*Koziol* II no. 3/46 and *Avancini*/Iro/Koziol II no. 4/15; BELGIUM: *Byttebier* 56; *Van Lier*, JT 1980 no. 24; *Van Quickenborne* no. 904; GERMANY: *Zahn, Eberding and Ehrlich* no. 9/15; ITALY: *Pontiroli*, Il credito documentario 233; CA

Milano 14 Jan. 2004, BBTC 2005 II 419; FRANCE: cf. exceptionally *Ripert and Roblot* no. 2385; NETHERLANDS: Dutch Business Law § 6.05 [4] [a]; *Croiset van Uchelen* 13; PORTUGAL: STJ 17 April 1970, 63029, BolMinJus no. 196, 275; *Cortez* 566-567; SPAIN: *Marimón Durá*, Planteamiento 389 ss., 397 ss.).

18. The major difference, however, are the different purposes: The letter of credit is a technique of payment, while the personal security has a security function (AUSTRIA: *Koziol*, *supra*; ENGLAND: *Goode*, Commercial Law 1017 s.; FRANCE: *Ripert and Roblot* no. 2384; GERMANY: *Zahn, Eberding and Ehrlich* no. 9/14; ITALY: *Pontiroli*, Il credito documentario 12; NETHERLANDS: *Boll* 88; *Mijnssen* 20; PORTUGAL: *Galvão Telles* 284; even though a letter of credit may constitute a firm personal security cf. STJ 17 April 1997, CJ(ST) V, II-53; SPAIN: *Sánchez-Calero*, El contrato autónomo 109 ss.). AUSTRIAN writers emphasize that the different functions imply also some different rules: The letter of credit obligation is primary, while that of the personal security is subsidiary to non-performance of the secured obligation or non-occurrence of the secured event (*Koziol*, *supra*, no. 3/47; *Avancini, supra*, no. 4/15).
19. However, one AUSTRIAN banking expert, while acknowledging the aforementioned legal differences, underlines that these are marginal from an economic point of view; in letter of credit transactions, whose purpose is not payment, even the legal difference disappears completely (*Avancini, supra*, no. 17, no. 4/15), *e.g.* where the letter of credit is intended to secure that another bank accepts or negotiates a bill of exchange drawn by the buyer (*Avancini, supra*, no. 17, no. 4/91, 4/93).
20. DUTCH and ITALIAN writers base the strong resemblance between independent personal securities and letters of credit also on the fact that historically the rules on those personal securities were developed by the courts by using the regime of letters of credit as a model (NETHERLANDS: Dutch Business Law § 6.05 [4] [a]; *Mijnssen* 21; ITALY: CC art. 1530 para 2; *Portale*, Fideiussione 1062 ss.).
21. BELGIAN and ITALIAN legal scholars, besides pointing to the close relationship between letters of credit and independent personal securities, emphasize the differences, which are seen in the different purposes (payment v. security), the documentary character of letters of credit (BELGIUM: *Bertrams* 57; ITALY: *Pontiroli*, Il credito documentario 78) and the fact that letters of credit may only be issued by professional credit institutions (BELGIUM: *Van Lier* no. 2.4). However, the rules on documentary credits are generally used to solve problems resulting from the lack of rules for the independent personal security (ITALY: *De Nictolis* 43).
22. In ENGLAND letters of credit are rather distinct from personal securities (see national notes on Art. 1:102 *sub* II B), dependent or independent. They originated in international trade and mainly operate as a payment technique (*Todd* 6-18), while independent personal securities have evolved in a purely domestic environment and serve a security purpose. It is, however, admitted that letters of credit resemble performance bonds and demand personal securities, which are clearly based on personal securities (*Goode*, Commercial Law 1017).

B. Stand-by Letters of Credit

23. See national notes on Art. 1:102 *sub* II B.

(Bisping/Dr. Fiorentini)

Article 3:102: Security Provider's Obligations Before Performance

(1) The security provider is obliged to perform only if the written demand for performance complies exactly with the terms set out in the security.
(2) Immediately upon receipt of a demand for performance, the security provider must inform the debtor that the demand has been received.
(3) Unless otherwise agreed, the security provider may invoke defences to which it is entitled as against the creditor.
(4) The security provider must without delay and at the latest within seven working days of receipt of a written demand for performance
  (a) perform in accordance with the demand and immediately inform the debtor; or
  (b) refuse to perform and immediately inform the creditor and the debtor.
(5) The security provider is liable for any damage caused by failure to perform the obligations set out in paragraphs (2) and (4).

Comments

A. Introductory

1. Article 3:102 lays down the requirements for a demand for performance (*infra* B) and most of the reasons which the security provider may invoke against such a demand and the procedures which it must observe in this respect. The security provider must examine the creditor's demand for performance (*infra* C) or a demand to extend the security or pay (*infra* D). The security provider has to inform the debtor of the creditor's demand(s) (*infra* E) and it may raise personal objections and defences which it has against the creditor (*infra* F). In case of performance of a demand as well as in case of a refusal to honour the creditor's demand, the security provider has to inform the debtor; in the case of a refusal to perform, also the creditor must be informed (*infra* G). Finally, the remedies for omissions of the security provider are considered (*infra* H).

B. Requirements for Creditor's Demand

2. The creditor's demand for performance must be in writing. This requirement has been established for the sake of legal certainty and because of the high sums of money that are usually involved. The writing must specify the contract of security to which it relates and the amount of money or the quantity and kind of other performance which is demanded. The term "writing" covers "communications made by telegram, telex, telefax and electronic mail and other means of communication capable of providing a readable record of the statement on both sides." (cf. PECL Article 1:301 (b); Directive on e-Commerce 2000/31/EC of 8 June 2000 Article 9 (1)).

3. The creditor's demand must comply with all the terms and conditions laid down in the security for it to become due. One may distinguish between simple and documented demands. A simple demand is one which merely contains a demand for payment of a definite sum of money or an equivalent act, without requiring further written support. By contrast, a so-called documentary demand is one where the demand for payment must be supported by documents, the type and contents of which must strictly comply with the requirements fixed by the security. The UCP 500 (1993) devote almost 20 elaborate provisions to general prescriptions concerning the minimum requirements as to form and substance of various types of documents which the beneficiary typically may have to present for a demand under a letter of credit (articles 20-38) and the ISP98 contain over 20 such provisions (rules 4.01-4.21).

C. Examination of Creditor's Demand

4. The security provider is obliged to examine the creditor's demand for performance. In the interest of the debtor of a possibly underlying obligation on whose instruction usually a security is being issued, the security provider is obliged to carefully investigate whether the creditor's demand strictly satisfies all the terms and conditions of the security. Even if exceptionally the security provider was not instructed by another person, it is in the security provider's own interest to undertake this examination in order to ensure that it does not pay without having ascertained that the conditions for its payment have been fulfilled. The security provider must also check whether any objections may have to be raised with respect to the validity of the security. Any violation of this duty tends to endanger the security provider's claim for recourse against the debtor.

5. The security provider's examination of the demand must take place within a reasonable period of time. Both the UCP 500 (1993) (art. 13 lit. b) and the ISP98 (rule 5.01 (a) (i)) as well as the UN Convention on Independent Guarantees (art. 16 (2)) fix a maximum of seven business days for the reasonable period, unless the parties have agreed otherwise. This maximum appears to be sensible also for Article 3:102 (1). Of course, the parties are free to fix a different time limit (cf. Article 1:103).

6. If the demand or any documents accompanying it do not fully comply with the terms and conditions of the security, the security provider is, vis-à-vis the creditor, not obliged to perform. This rule implies that the security provider, in spite of doubts, may

decide to perform. However, a security provider must take care not to violate its obligations as against the person who has instructed him. If time permits, the security provider should also inform the creditor and ask it to remedy any open point.

D. Creditor's Demand "Extend or Pay"

7. Occasionally a creditor may set forth the alternative demand of "extend or pay". This is to be understood as an offer to the security provider to extend the time limit for the guarantee or, if that offer is rejected, to perform the security. If the security provider accepts the requested extension of time, the demand for performance must be regarded as withdrawn. If the security provider does not accept the requested extension, it must examine the demand for performance according to the rules set out *supra* at C. In the same sense ISP98 rule 3.09.

E. Duty of Information towards Debtor

8. The second paragraph obliges the security provider to inform a debtor who has instructed him of any demand by a creditor and on whether or not it complies with the terms and conditions of the guarantee. The information is not only to be given in order to keep the debtor informed about the creditor's demand from which other consequences may ensue in the relationship between the debtor and the creditor. A more direct purpose of the information is to prevent the risk of double payment by the debtor as well and provoke the debtor to bring to the attention of the security provider any possible objections or doubts concerning the creditor's full compliance with the terms and conditions of the security. Also, the debtor may furnish objections which, exceptionally, may qualify the creditor's demand as manifestly abusive under Article 3:104.

F. Security Provider's Personal Objections and Defences

9. Apart from objections and defences relating to the validity of the security and as to full compliance with its terms and conditions (*supra* B and C), the security provider may also invoke objections and defences to which it is personally entitled as against the creditor. This covers also the security provider's right to set-off a personal monetary claim against the creditor's claim under the security (cf. UN Convention on Independent Guarantees art. 18).

10. Usually, these objections and defences may be rooted in earlier and different legal relationships between the security provider and the creditor. Consequently, it would be irreconcilable with the independence of the security if the security provider would invoke an objection or defence arising from a claim which another person, especially the debtor of an underlying relationship, had assigned to the security provider. It is equally inadmissible for the security provider to set-off with a claim which had been assigned to him by such a debtor. Invoking such defences or asserting such a set-off would run

counter to the independent character of an independent security whose essence is the insulation from any underlying relationship between the creditor and a debtor.

11. The parties may expressly or impliedly exclude other personal objections as well. An exclusion may *e.g.* be implied if the security provider promises "unconditional" performance upon the creditor's demand.

G. Duty of Information on Refusal of Performance

12. If the security provider's examination of the creditor's demand leads it to the conclusion that it must refuse performance of the demand, it must forthwith inform both the creditor and a debtor stating the reasons for refusal. This duty of information serves the purpose of clarifying the situation for the parties directly affected so that they are enabled to consider and prepare any steps which may be appropriate. For instance, the creditor, if time limits allow, may wish to remedy any defect of its demand pointed out by the security provider.

H. Remedies for Security Provider's Omissions

13. The security provider's obligation of careful examination of the creditor's demand is not only meant to protect the security provider himself, but is also intended to protect the interests of a debtor because eventually the latter has to reimburse the security provider. The same is true for the obligation to inform a debtor under paras (2) and (4). The general remedies for non-performance of these obligations are spelt out in PECL Chapters 8 and 9, especially in Chapter 9 Section 5.

14. The same is true if the security provider violates his obligation to inform the creditor under para (4).

I. Cross-References

15. Article 3:104 deals with manifestly abusive or fraudulent demands under an independent security. And Article 3:105 entitles the security provider to request under certain conditions return from the creditor of a performance demanded by, and performed to, it. For details, cf. the Comments to this provision.

National Notes

I. Form of the Demand

1. The demand for performance is in all countries usually made in writing (AUSTRIA: Avancini/Iro/*Koziol* no. 3/85; DENMARK: *Pedersen*, Bankgarantier 17; GREECE: *Georgiades* § 6 no. 115; ITALY: *De Nictolis* 101; NETHERLANDS: *Boll* 110; *Mijnssen* 44; PORTUGAL: *Castelo Branco* 78; SPAIN: *Sánchez-Calero*, El contrato autónomo 349). For commercial personal securities this form is in GERMANY agreed to be a binding commercial usage (cf. Ccom § 346: Staudinger/*Horn* no. 233 preceding §§ 765 ss. for personal security on first demand). BELGIAN and SPANISH authors allow to present a demand orally; however, its evident difficulties of proof do not make it adequate for this contract, being never used in banking practice (*De Marez* no. 97; *Sánchez-Calero*, El contrato autónomo 350).
2. Demands transmitted by any telegraphic or electronic technique have been considered valid by BELGIAN, DUTCH, FRENCH, GERMAN and SPANISH authors (BELGIUM: *De Marez* no. 59; FRANCE: *Simler* no. 962; GERMANY: Staudinger/*Horn* no. 233 preceding §§ 765 ss.; NETHERLANDS: *Mijnssen* 45; SPAIN: *Sánchez-Calero*, El contrato autónomo 349; cf. *Rivero* 443) as well as by the GERMAN Federal Supreme Court (BGH 10 Oct. 2000, WM 2000, 2334, 2337).
3. By contrast, if the security provider had prescribed a specific formal requirement, this has to be observed strictly (AUSTRIA: an agreed "registered letter" cannot be replaced by a telex: OGH 24 March 1988, SZ 61 no. 79, p. 395; and a local authority's letter with an official stamp cannot be replaced by a fax: OGH 5 Dec. 1995, SZ 68 no. 230, p. 749-753; but some writers plead for more flexibility: *e.g.* Avancini/Iro/*Koziol* no. 3/86). Also the DUTCH Supreme Court has insisted on strict observance of the agreed method of demand (a simple letter does not suffice if formal service had been agreed, HR 9 June 1995, NJB 1995 no. 639 at p. 3090).

II. Terms of the Demand

4. The legal systems of most member states have adopted the doctrine of strict compliance *(garantieformalisme)*. It is the duty of the security provider to examine whether the demand and also the documents presented comply exactly with the terms and conditions agreed for the personal security (the AUSTRIAN OGH demands a "pedantical" examination, *e.g.* OGH 5 Dec. 1995, SZ 68 no. 230 p. 750, 751; BELGIUM: *De Marez* 17-25; DENMARK: *Pedersen*, Bankgarantier 69; FRANCE: *Devèze, Couret and Hirigoyen* no. 3688; Cass.com. 21 June 1988, RD banc 1988, 204; GERMANY: MünchKomm/

Habersack no. 30 preceding § 765; BGH 10 Oct. 2000, WM 2000, 2334, 2336: "*Garantiestrenge*"; for documentary credits cf. *Schütze* no. 380; ITALY: *Bonelli*, Le garanzie bancarie 81 ss.; PORTUGAL: *Menezes Cordeiro*, Direito 609; *Galvão Telles* 289; for documentary credits cf. *Calvão da Silva* 18; SPAIN: *Sánchez-Calero*, El contrato autónomo 377). "There is no room for documents which are almost the same, or which will do just as well" (*Equitable Trust Co of New York v. Dawson Partners Ltd* [1927] 27 Lloyd's List Law Rep 49 at 52 (HL)). Also purely terminological deviations may lead to refusal of the demand. In the ENGLISH case of *J. H. Rayner & Co Ltd v. Hambros Bank Ltd* [1943] KB 37 (CA) documents evidencing shipment of "coromandel groundnuts" were required by the credit, but the documents delivered referred to "machine-shelled groundnut kernels". In fact, these are synonyms, but the court held that it was impossible for a banker to know all the different trades he is dealing with. By contrast, the GERMAN Supreme Court and PORTUGUESE authors only require that the content of the creditor's demand for payment has to correspond to the requirements that have been stipulated in the contract of personal security for the demand; but the wording must not be identical, unless otherwise agreed by the parties (GERMANY: BGH 10 Oct. 2000, WM 2000, 2334, 2336; PORTUGAL: *Pinheiro* 449; *Almeida Costa and Pinto Monteiro* 29). Obvious typographical errors are generally disregarded by ENGLISH and FRENCH courts (ENGLAND: cf. *Hing Yip Hing Fat Co Ltd v. Daiwa Bank* [1991] 2 HKLR 35 (Supreme Court of Hong Kong); *Goode*, Commercial Law 977; FRANCE: CFI Paris 27 Sept. 1993, GazPal 1994, 2, Somm.Comm. 464).

5. By contrast, UCP 500 (1993) art. 39 contains a few rules on tolerances regarding strict compliance of the documents presented for the purpose of making a demand with the terms of the personal security, *e.g.* that a deviation of 5% in terms of quantity is permissible unless the contract otherwise states.

6. In AUSTRIA and the NETHERLANDS, the security provider is obliged to inform the creditor if the latter's demand does not comply with the terms of the personal security and to invite the creditor to repair any deficiency, provided time permits to do so; violation of this duty of good faith exposes the security provider to a claim for damages (AUSTRIAN OGH 5 Dec. 1995, SZ 68 no. 230 p. 753 ss.; cf. also Avancini/Iro/*Koziol* no. 3/89; DUTCH HR 9 June 1995, NJB 1995 no. 639 p. 3091; cf. also Dutch Business Law § 6.05 [4] [b]).

III. Time for Examination of the Demand

7. Unless expressly fixed by the parties, the time necessary for the security provider to examine the demand and the documents depend on the circumstances of each case. The criterion of "reasonable delay" sounds satisfactory but has been criticized in SPAIN as being vague (*Sánchez-Calero*, El contrato autónomo 378). In most countries, the "reasonable delay" is in practice thought to be a period between three and seven days after receipt of the demand. The UN-Convention on Independent Guarantees of 1995 art. 16 (2) allows "reasonable time, but not more than seven business days following the day of receipt of the demand …". In DENMARK, GREECE and SPAIN a period of one to three days as established by international banking practice is accepted (DENMARK: *Pedersen*, Bankgarantier 138 ss.; GREECE: *Georgiades* § 6 no. 117; *Gouskou* 136, 149; *contra:* CFI Athens 9790/1992, EED 43, 522; SPAIN: *Sánchez-Calero*, El contrato autónomo 379). In BELGIUM, ENGLAND and GERMANY three (working) days are generally admitted,

being extended to one week depending on the circumstances (BELGIUM: *Schrans* 1176; *De Marez* no. 30; ENGLAND: *Bankers Trust Co v. State of India* [1991] 2 Lloyd's Rep 443 (CA); GERMANY: Staudinger/*Horn* no. 235 preceding §§ 765 ss. for personal security on first demand; *contra Zahn, Eberding and Ehrlich* no. 9/113: one to two days; also UCP 500 (1993) art. 43(a)). In FRANCE the customary reasonable delay has been fixed in one case by an appellate court at five days (CA Paris 10 July 1986, D. 1987, Somm.-Comm. 217). In SWEDEN no concrete time limit has been defined (*Dalman* 202).

IV. *Personal Securities with Time Limit and Creditor's Demand "Extend or Pay"*

8. Personal securities very often are agreed with a time limit aiming at reducing its costs and risks for the security provider. When the time limit is about to expire, creditors often require the security provider to extend it or perform the personal security. This demand is called "extend or pay". If the security provider does not extend, it is obliged to perform, of course only insofar as the demand is in full compliance with the formal requirements of the contract of personal security (BELGIUM: *De Marez* nos. 67-75; GERMANY: BGH 23 Jan. 1996, NJW 1996, 1052; ITALY: *Viale* 206 s.; SPAIN: *Sánchez-Calero*, El contrato autónomo 333). In case of personal securities on first demand a demand "extend or pay" suffices to oblige the security provider to extend or to perform (BELGIUM: *De Marez* nos. 77, 93 and no. 103). In FRANCE the demand "extend or pay" is valid as a demand for payment without discretionary character (CA Paris 9 Jan. 1991, RD banc 1991, 152; *Simler* no. 957; *contra Devèze, Couret and Hirigoyen* no. 3688). However, some other FRENCH courts consider the demand "extend or pay" as a non-serious demand (CA Paris 28 May 1985, D. 1986, I.R. 155) constitutive of abuse because the creditor seems to oblige the security provider to extend the personal security (Cass.com. 24 Jan. 1989, JCP G 1990, II no. 21425). In ITALY if the debtor does not approve the extension of the personal security, the security provider must perform, no other demand of payment being necessary. The request of extension is made by the creditor to the security provider, the latter being obliged to inform the debtor who is the only person entitled to decide whether or not to extend (*Bozzi*, Le garanzie 78). The issue of the abusive character of the "extend or pay" clause might arise depending on the circumstances of the case, *e.g.* if it is proved that the creditor seeks performance of the security only in order to exercise pressure and obtain an extension of the security (CFI Milano, 2 March 1994, Giur.it. 1995 I 308).
9. In ENGLAND in order to extend the personal security, the security provider must without delay inform the party who gave its instructions; it has to suspend payment for a period of time as long as is reasonable for the creditor and the debtor to agree on the extension (*Goode*, Commercial Law 1029). The silence of the security provider or its declaration to inform the debtor about the demand and to return to the subject later have in GERMANY been regarded as insufficient to extend (BGH 23 Jan. 1996, NJW 1996, 1052; *Canaris*, Bankvertragsrecht no. 1128).
10. Especially for the demand "extend or pay" it is of special importance whether the security provider is obliged to inform the creditor about any inaccuracy of the demand. While this issue is not finally settled by GERMAN courts, they seem to favour such a duty, at least if the creditor is obliged to present documents (BGH 23 Jan. 1996, NJW

1996, 1052 referring to UCP 500 (1993) art. 14 d (i) concerning documentary credits; cf. also without this restriction CA Karlsruhe 21 July 1992, WM 1992, 2095 with further references).

V. *Consequences of Non-Compliance with Demand*

11. Any demand which does not exactly comply with the terms and conditions of the personal security is void. According to most laws, if the demand does not comply with the terms and conditions of the personal security, the security provider is not obliged vis-à-vis the creditor to perform the personal security (BELGIUM: *De Marez* nos. 17-25; DENMARK: *Pedersen*, Bankgarantier 69; ENGLAND: *J.H. Rayner Co Ltd v. Hambros Bank Ltd* [1943] KB 37 (CA); *Goode*, Commercial Law 974; GERMAN BGH 12 March 1996, NJW 1996, 1673; Staudinger/*Horn* no. 234 preceding §§ 765; GREECE: *Georgiades* § 6 no. 122; A.P. 342/1970, NoB 18, 1092; PORTUGAL: *Castelo Branco* 79; SPAIN: *Sánchez-Calero*, El contrato autónomo 371 and 381; SWEDEN: *Dalman* 202). The FRENCH Supreme Court held that inconsistencies of the documents required to be presented which could only be clarified by reference to the underlying transaction entitle the bank to refuse performance of a stand-by letter credit (Cass.com. 28 March 2006, D. 2006, 1284). In FRANCE and ITALY the security provider is practically obliged to refuse performance (FRANCE: *Simler* no. 1003; ITALY: *De Nictolis* 102; CFI Bologna 27 Sep. 1984, BBTC 1986 II 339). According to the rules on agency, the negligence of the security provider in performing the duty of examination makes it liable against the debtor (ITALY: *Bozzi*, L'autonomia negoziale 248; SPAIN: *Sánchez-Calero*, El contrato autónomo 381). In BELGIUM if the security provider violates his duty to examine, he may loose its recourse against the debtor or expose himself to counterclaims by the latter (*De Marez* no. 33).

VI. *Security Provider's Duty to Inform Debtor*

12. In most member states the security provider is obliged to inform the debtor of the receipt of a demand for payment by the creditor, together with the required documents when so agreed, and after it has checked its compliance with the terms of the personal security (AUSTRIA: Avancini/Iro/*Koziol* no. 3/57; BELGIUM: *Bertrams* 124-127; *Poullet* 149; *Van Houtte* 306; DENMARK: *Pedersen*, Bankgarantier 68; GREECE: *Liakopoulos*, NoB 35, 290; *Loukopoulos* 737; *Georgiades* § 6 no. 117; ITALY: *Laudisa* 17 s.; *Mastropaolo* 308; NETHERLANDS: *Boll* 118-119; PORTUGAL: *Castelo Branco* 78; SPAIN: *Sánchez-Calero*, El contrato autónomo 365; SWEDEN: *Walin*, Borgen 177, *contra Bergström* 12). In GERMANY it is disputed whether the security provider is always obliged to inform the debtor of any demand (Staudinger/*Horn* no. 332 preceding §§ 765 ss.; cf. BGH 19 Sep. 1985, BGHZ 95, 375, 389 for dependent personal securities); or whether this obligation only exists in case the security provider decides to perform (*Canaris*, Bankvertragsrecht no. 1110; in general *Graf von Westphalen* 235 s.). According to FRENCH banking customs, it is usual to inform the debtor of the demand for performance by the creditor. Some FRENCH authors claim that the security provider has for practical reasons a duty to inform the debtor (*Rives-Lange and Contamines-Raynaud* no. 799; *Gavalda and Stoufflet* no. 18). But there is no legal obligation to do so if the relationship between

the security provider and the debtor is essentially regarded as a credit commitment and not as a mandate (*Simler* no. 965; cf. *Devèze, Couret and Hirigoyen* no. 3689).

13. In most other countries, the duty to inform is a consequence of the agency character of the relationship between the debtor and the security provider. SPANISH CC art. 1720 and Ccom art. 263 establish the obligation to render account to the mandator of the operations, which have taken place in execution of the agency. Moreover, ITALIAN CC arts. 1710 and 1176 and SPANISH CC art. 1719 establish the obligation of the agent to perform the mandate diligently. Some authors have based the duty of information on these rules (ITALY: *Capo* 157). Other ITALIAN authors base it on the principle of good faith in performing the contract (CC art. 1375; *Tommaseo*, Autonomia negoziale 423; *Cassera* 2768). According to the first opinion, the security provider as agent must inform the debtor (as principal) so that the latter will be able to take position as to the demand and take any action necessary as against the security provider or the creditor. This duty has been considered compulsory by SPANISH authors (*Sánchez-Calero*, El contrato autónomo 365). Nevertheless, some ITALIAN writers hold that there is no obligation but merely a right to inform the debtor (*Calderale*, Demand Guarantees 135 ss.). In banking practice this duty is usually derogated from in the contracts. The validity of such clauses has been thoroughly discussed by ITALIAN authors (cf. *De Nictolis* 111). In the banking practice of DENMARK and GREECE usually the debtor waives his right of information (*Pedersen*, Bankgarantier 68; *Georgiades* § 6 no. 70).
14. A duty of information in ENGLISH law may result from the underlying mandate (cf. *Goode*, Commercial Law 981).

VII. Objections and Defences of the Security Provider as against the Creditor

15. In all countries the security provider may invoke personal objections and defences as against the creditor arising from the personal security (BELGIUM: *De Marez* no. 39; DENMARK: *Pedersen*, Bankgarantier 87; FRANCE: *Devèze, Couret and Hirigoyen* no. 3700; GERMANY: Staudinger/*Horn* no. 247 preceding §§ 765 ss.; ITALY: *Bonelli*, Le garanzie bancarie 78 ss.; NETHERLANDS: *Pabbruwe,* Bankgarantie 59 at no. 5; PORTUGAL: *Castelo Branco* 79; SPAIN: TS 27 Oct. 1992, RAJ 8584 no. 1992 and 30 March 2000, RAJ 2314 no. 2000; SWEDEN: *Walin*, Borgen 179 ss.).
16. In several countries objections and defences (set-off, etc.) arising between the security provider and the creditor from any other relationship between these two parties may also be invoked (AUSTRIA: OGH 3 Dec. 1998, ÖBA 1999, 558, 562, although the parties may exclude this, p. 563; Avancini/Iro/*Koziol* no. 3/97; BELGIUM: *Van Quickenborne* no. 566 ss.; ENGLAND: *Hong Kong and Shanghai Banking Corp v. Kloeckner* & Co AG [1990] 2 QB 514 (CFI); *Goode*, Commercial Law 973; GERMANY: Staudinger/*Horn* no. 247 preceding §§ 765 ss.; GREECE: *Liakopoulos,* NoB 35, 297; *Gouskou* 152; ITALY: *Viale* 190; but see with regard to set-off the conflicting decisions: allowing the defence of set-off, Cass. 24 Dec. 1992 no. 13661, Vita not. 1993, 769; *contra*: CA Roma 22 May 2001, GRom. 2002, 14; NETHERLANDS: *Pabbruwe,* Bankgarantie 59 at no. 5; SPAIN: *Sánchez-Calero*, El contrato autónomo 385).
17. However, for set-off restrictions are made in some countries. In GERMANY and some other countries it is common opinion that the security provider is not allowed to set off if this is contrary to the purpose of the personal security so that the security provider is especially prevented from setting off claims, which are derived from the "secured con-

tract" and had been assigned to the security provider (Staudinger/*Horn* no. 248 preceding §§ 765 ss.). This point of view is also shared by some writers in other countries (AUSTRIA: Avancini/Iro/*Koziol* no. 3/97; BELGIUM: *De Marez* nos. 39-44; ITALY: *Mastropaolo* 371; *Villanacci* 101; *Portale*, Le garanzie bancarie 15; NETHERLANDS: *Pabbruwe*, Bankgarantie/borgtocht no. 5 at 59; SPAIN: *Sánchez-Calero*, El contrato autónomo 395). Apart from this restriction, the overwhelming opinion in GERMANY allows set-off provided the counter-claim can be proven easily (Staudinger/*Horn* no. 248 preceding §§ 765 ss. with further references, also to the opposite opinion; *Horn*, Bürgschaften und Garantien no. 535 now even demands that the counter-claim must be rooted in the financing of the transaction secured by the independent security).

VIII. Security Provider's Duty of Information upon Refusal of Payment

18. If the creditor's demand is rejected, the security provider has to inform the creditor as soon as possible in ENGLAND, FRANCE and SPAIN (ENGLAND: *Goode*, Commercial Law 986; FRANCE: *Simler* no. 965; SPAIN: *Sánchez-Calero*, El contrato autónomo 380, 381). Otherwise it may be liable for the damage resulting from late performance. Electronic and telegraphic means may be used (SPAIN: *Sánchez-Calero*, El contrato autónomo 380).

(de la Mata/Dr. Fiorentini)

Article 3:103: Independent Personal Security on First Demand

(1) An independent personal security which is expressed as being due upon first demand or which is in such terms that this can unequivocally be inferred, is subject to Article 3:102, except as provided hereafter.
(2) The security provider is obliged to perform only if the creditor's demand is supported by a declaration in writing by the creditor which expressly confirms that any condition upon which the security becomes due is fulfilled.
(3) Article 3:102 paragraph (3) does not apply.

Comments

A. The Special Feature of a First Demand Security

1. An independent personal security that falls due upon "first demand" enjoys a higher degree of independence than a simple independent security. Being more efficient than a simple independent security, it is also more risky to the security provider who therefore deserves a somewhat better protection. Article 3:103 provides for both these features (*infra* Comments C and D).

B. Applicable Rules

2. Since the independent security on "first demand" is a special type of independent security, the general rules on demand of a security, as laid down in Article 3:102, apply to it. Paragraph (1) so provides by declaring applicable the rules of preceding Article 3:102, subject to the special rules in Article 3:103 (2) and (3).

C. Restriction of Security Provider's Defences

3. As the name of the security "on first demand" indicates, it is the special feature of this particular kind of independent security that the creditor is entitled to a fast and effective satisfaction. Therefore, the security provider's possible defences against its liability must be restricted. The general reference to preceding Article 3:102 covers also the defences contained in that provision, cf. Comment B. In addition, para (3) of the present provision excludes defences to which the security provider in a personal capacity is entitled as against the creditor, including set-off with any counter-claim which the security provider may have against the creditor.

4. On the other hand, the defence of a manifestly abusive demand under Article 3:104 remains available to the security provider since this defence is not rooted in the person of the security provider but, to the contrary, in that of the creditor.

D. Conditions for Creditor's Entitlement

5. As explained in preceding Comment C, a security on first demand restricts the security provider's exceptions against the demand to the very exceptional cases of a fraudulent or abusive demand by the creditor (cf. Article 3:104). By contrast, performance on first demand does not mean that the creditor is only required to present a mere demand. There can also be a first demand guarantee if the creditor is contractually obliged to present additional documents. Such documentary securities and letters of credit are very frequent in practice.

6. In order to curb abusive demands which not infrequently have been made under "first demand" securities, recent practice sometimes requires the creditor to confirm expressly that the condition(s) upon which the security becomes due, is (are) fulfilled. Such an express confirmation must be given in writing by the creditor. While it imposes

no real burden upon an honest creditor, such a declaration may be at least a moral warning to a dishonest person, and it may assist in bringing claims or even criminal prosecutions against a fraudulent creditor. If this declaration is not produced by the creditor, the security provider need not perform. A merely tacit implication of such a confirmation upon the model of the UN Convention on Independent Guarantees of 1995 art. 15 (3) does not appear to provide an effective assurance against fraudulent or abusive demands of performance.

E. Cross-References

7. Special rules deal with manifestly abusive or fraudulent demands under an independent security, cf. Article 3:104; and with the security provider's right to reclaim its performance, cf. Article 3:105.

National Notes

I. Introduction

1. In all European countries, except SWEDEN, personal securities on "first demand" are known and accepted as a special type of independent personal securities, although almost no country has special statutory provisions for this kind of personal security (BELGIUM: *Romain* 437; DENMARK: *Pedersen*, Bankgarantier 140; ENGLAND: *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159 (CA); FRANCE: CC new art. 2321 para 1 of 2006; *Devèze, Couret and Hirigoyen* no. 3652; *Simler* no. 905; GERMANY: BGH 12 March 1984, BGHZ 90, 287; GREECE: *Gouskou* 79; ITALY: *Bonelli*, Le garanzie bancarie 37 ss.; Cass. 17 May 2001 no. 6757, Giust.civ. 2002 I 729; Cass. 1 July 1995 no. 7345, Giur.it. 1996 I 1 p. 620; PORTUGAL: STJ 6 April 2000, 135/00 www.dgsi.pt; SPAIN: TS 27 Oct. 1992, RAJ 1992 no. 8584, TS 17 Feb. 2000, RAJ 2000 no. 1162, TS 30 March 2000, RAJ 2000 no. 2314; *Sánchez-Calero*, El reconocimiento 541 ss.; *Barres Benlloch* 314 s.; *Marimón Durá*, Garantía independiente 479 ss.). By contrast, according to SWEDISH doctrine personal securities on first demand are considered to be dependent personal securities (*Dalman* 182, similar *Bergström* 14). According to this opinion a personal security on first demand is an irregular form of the dependent personal security.
2. An independent personal security on first demand means that the creditor is entitled to performance of the personal security by mere demand upon the security provider who, as a rule, is precluded from invoking objections against the demand. This is how BELGIAN and FRENCH authors define a simple personal security on first demand *(garantie à première demande pure et simple/garantie op eerste eenvoudig verzoek)*; other clauses may

however create further conditions for the personal security, *e.g.* presentation of specified documents can be demanded (*De Marez* no. 78; Malaurie and Aynès/*Aynès and Crocq,* Les sûretés no. 331). The same is true for other countries: according to the principle of freedom of contract, it will be necessary to interpret the clause precisely (DENMARK: *Beck Thomsen* 107 ss.; GERMANY: cf. Staudinger/*Horn* no. 231 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 nos. 40-41; ITALY: *Bonelli,* Le garanzie contrattuali 208 ss.; PORTUGAL: CA Lisboa 11 Dec. 1990, CJ XV, V-134; SPAIN: *Carrasco Perera*, Las nuevas garantías 688 and 716; *Sánchez-Calero,* El contrato autónomo 145). The basic understanding of personal securities on first demand – *i.e.* undertakings predominantly securing payment or performance in international trade – in ENGLISH law is that the security provider is liable on the first written demand for payment (*Goode*, Commercial Law 1019 s.).

II. Creditor's Confirmation of Entitlement

3. There is no unanimity as between the member states as to whether the creditor is required to declare at the time of its call on the personal security that the condition(s) upon which the personal security becomes due, are fulfilled. Some BELGIAN authors find such an obligation to be incompatible with the nature of an independent personal security (for an overview: *De Marez* no. 87; *contra Bertrams* 79; *Prüm* no. 106). However, in all countries, parties are free to stipulate a demand clause. In BELGIUM and FRANCE, this is regarded as a personal security on first demand on justified request (BELGIUM: *De Marez* no. 86; FRANCE: *Devèze, Couret and Hirigoyen* no. 3653).
4. In ENGLAND a "demand guarantee" (*Goode*, Commercial Law 1019 ss.) is payable on a written demand upon the occurrence of a specified event; in this case the beneficiary's demand must state that the event has occurred, see *Esal (Commodities) Ltd v. Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 (CA). It has been argued in a domestic context that in spite of a demand having been expressly stipulated for in a personal security the creditor, by virtue of the primary character of the undertaking of a provider of an independent security, might be entitled to sue the latter without such an additional prior demand (cf. *M.S. Fashions Ltd v. BCCI SA* [1993] Ch 425 (CA); *Esso Petroleum Ltd Co v. Alstonbridge Properties Ltd* [1975] 1 WLR 1474 at 1483 (CFI); *Andrews and Millett* no. 7-006), but this does not seem to be entirely clear (cf. *O'Donovan and Phillips* nos. 10-118 ss.; Halsbury/*Salter* para 195).
5. A DUTCH court has held, that if such a declaration is missing, the security provider does not need to pay (CA Amsterdam 27 Feb. 1992, NJB 1992 no. 735), and in DUTCH practice, this is regularly done (*Pabbruwe*, Bankgarantie/borgtocht no. 1 at 58; *Boll* 110).
6. In GREECE the creditor must simply invite the bank to pay without any further declarations. If along with the first demand clause there is also a clause "if damage was incurred", only then must the creditor declare (or prove or establish by *prima facie* evidence, depending on the contents of the letter) that the secured obligation has not been fulfilled (*Georgiades* § 6 no. 41). This personal security, however, is then conditional and not on first demand, despite the existence of the first demand clause (*Georgiades* § 6 nos. 40-41).

III. Restriction of Security Provider's Objections

7. In all countries, the very limited availability of defences is one of the most prominent advantages of personal securities on first demand. So the security provider cannot raise any exceptions based upon the underlying contract concluded between the beneficiary and the debtor or between the debtor and the security provider (GERMANY: BGH 22 April 1985, BGHZ 94, 167, 170 s. (including such claims if these have been assigned to the security provider); Staudinger/*Horn* nos. 202, 204 preceding §§ 765 ss. However, the court allows a set-off with a liquid counterclaim, p. 171 ss.; approving Staudinger/*Horn* nos. 248 s. preceding §§ 765 ss., but under the additional restriction that the counterclaim must closely relate to the financing of the underlying transaction, cf. *Horn*, Bürgschaften und Garantien no. 535; LUXEMBOURG: CFI Luxembourg 17 June 1982, Pas luxemb XXV (1981-1983) Jur. 450; ENGLAND: *Goode*, Commercial Law 1026 s.). However, the security provider can invoke the invalidity of the personal security, or that the demand on the personal security is not in strict compliance with the letter of the personal security (AUSTRIA: Avancini/Iro/*Koziol* nos. 3/91-3/92; BELGIUM: *De Marez* nos. 17-25 and no. 38; DENMARK: *Pedersen*, Bankgarantier 148; FRANCE: *Devèze, Couret and Hirigoyen* no. 3691; GERMANY: Staudinger/*Horn* nos. 241-249 preceding §§ 765 ss.; MünchKomm/*Habersack* no. 33 preceding § 765; GREECE: *Gouskou* 148-149; PORTUGAL: *Galvão Telles* 289; ITALY: *Bonelli*, Le garanzie bancarie 79 ss.; NETHERLANDS: Bank's refusal to honour a performance bond justified where the necessary expert opinion had not been delivered by agreed expert but by another, since agreed expert had refused to give opinion; however, Supreme Court remanded case in order to examine whether due to changed circumstances contract needed to be adapted: HR 26 March 2004, NJB 2004 no. 309 with approving note by *PVS*; SPAIN: *Carrasco Perera*, Las nuevas garantías 687). In ENGLAND, the doctrine of strict compliance has sometimes been said to be less strictly applied to personal securities on first demand than to documentary credits. In the *Esal* case (*supra* no. 4), this question has been differently answered by the judges and remained unresolved in the end. In *I. E. Contractors Ltd v. Lloyds Bank plc* [1990] 2 Lloyd's Rep 496 (CA) the question was said to be one of careful drafting and, hence, the degree of documentary compliance required may be strict or not so strict depending on the construction of the bond.
8. In AUSTRIA, BELGIUM, ITALY and PORTUGAL the security provider can also invoke the illegality of the underlying agreement. When the contract is *prima facie* illegal, as being contrary to public order or morality, the creditor is not allowed to sue on the contract and therefore, his call on the personal security may not be accepted by the security provider (AUSTRIA: Avancini/Iro/*Koziol* no. 3/91; BELGIUM: *De Marez* no. 36; *Wymeersch*, Bank guarantees no. 4; *Wymeersch, Dambre and Troch* no. 57; *Devos* 29-32; ITALY: Cass. 7 March 2002 no. 3326, BBTC 2002 II 653; CA Milano 12 Feb. 2005, BBTC 2005 II 481 ss.; *Bonelli*, Escussione abusiva 522; PORTUGAL: *Ferrer Correia* 253; *Simões Patrício* 709).
9. In GERMANY it is disputed whether personal objections of the security provider vis-à-vis the creditor, especially the right to set-off, are excluded (cf. *Hadding, Häuser and Welter* 697; Staudinger/*Horn* nos. 248 s. preceding §§ 765 ss.).

(Lebon/Dr. Poulsen)

Article 3:104: Manifestly Abusive or Fraudulent Demand

(1) In the cases covered by articles 3:102 and 3:103, a security provider is obliged to comply with a demand for performance, unless it is proved by present evidence that the demand is manifestly abusive or fraudulent.
(2) If the requirements of the preceding paragraph are fulfilled, the debtor may prohibit
(a) performance by the security provider; and
(b) issuance or utilization of a demand for performance by the creditor.

Comments

A. The Issue

1. Any independent security is, due to its independence from any underlying contractual or other relationship between the creditor and the debtor, a risky undertaking both for the security provider and especially for the debtor. This risk is even higher in the case of a security on first demand. Experience in many countries has shown again and again that some creditors may call for performance by wrongfully asserting that the agreed conditions for a demand are fulfilled.

2. Such unjustified demands, if accepted and performed by the security provider, often place the debtor in a very difficult situation. It may have to reimburse the security provider and then has to seek reimbursement from the creditor. The creditor's place of business, however, may be located in a distant country; enforcement of a judgment, whether obtained locally or abroad, may be subject to similar difficulties.

3. In order to protect debtors against extreme instances of such abuse, courts in many countries have evolved remedies against abusive or fraudulent demands for performance of independent securities. Evidence that either the creditor's assertion about the justification of his demand is wrong or that documents presented by him are falsified, can usually only be adduced by the debtor. Exceptionally, in these cases, the principle of independence of the security is disregarded, and, in addition to the debtor, also the security provider is allowed to rely on the terms of the underlying contract between creditor and debtor.

4. In shaping any such remedies, a carefully defined balance must be struck between the interests of honest creditors and also security providers, who are interested in a smooth, speedy and reliable system of honouring independent securities, on the one

hand; and the prevention of truly abusive or fraudulent demands by unscrupulous creditors, on the other hand. Article 3:104 is based upon the practice that has been developed by the courts of the major trading nations and which has been approved by the majority of writers. Art. 3:104 in essence corresponds to UN Convention on Independent Guarantees of 1995 art. 19.

5. In the following, first the position of the security provider (*infra* B) and then that of the debtor will be considered (*infra* C).

B. Security Provider's Position towards Creditor

a. Basic Rule

6. The basic rule is that the security provider has to comply with a demand for performance, provided this demand strictly complies with the formal and substantive conditions for an effective demand established by the parties and by Articles 3:102 and 3:103. This basic principle is reiterated by the first part of Article 3:104 (1). This basic rule obliging the security provider to perform its promise without regard to doubts or controversies that may have arisen between the creditor and any other party is a consequence of the independence of the security provider's undertaking to the creditor. It serves also the security provider's protection.

b. Exceptions

7. An exception from this basic protective rule is admitted by the second half-sentence of Article 3:104 (1). The grounds why a demand for performance, although on its face complying with the conditions for a demand, may nevertheless be unfounded in substance, derive from the underlying relationship between the creditor and the debtor for whom the security provider acts. Such a recourse to an underlying relationship to which the security provider is not a party, must, of course, be very exceptional; its conditions are therefore very narrowly circumscribed.

8. According to para (1), two conditions must be fulfilled under Article 3:104 (1): First, in substance, there must be a manifest abuse or fraud; and secondly, procedurally, this must be proved by present evidence.

9. The strong terms "abuse" and "fraud" require that the non-compliance of the demand with the terms of the security must be unequivocal, obvious and commercially relevant for the debtor.

> *Illustration:*
> A contract for the sale of 10 000 t coffee provides for "shipment: September". The bill of lading is dated 29 September, whereas in reality shipment took place on 3 October. This is a clear case of fraud: There is a manifest non-performance of the contract of sale since prices vary from month to month.

10. In order to prevent unwarranted allegations of manifest abuse or fraud, the security provider must be able to rely on "present evidence". This will usually have to be furnished by the debtor who had instructed the security provider to issue the security. All means of evidence are admissible, especially documents and witnesses. A restriction to documents only which is sometimes preferred, is difficult to justify; also, the borderline is sometimes doubtful, *e.g.* in the case of affidavits. The weighing of the evidence is a matter for the court which is bound by the relevant procedural rules of the law of the forum.

11. If after honouring the creditor's demand it is found out that this demand had not been justified or was even "manifestly abusive or fraudulent", the security provider is entitled to reclaim its performance from the creditor (cf. *infra* Article 3:105).

C. Security Provider's Position towards Debtor

12. The security provider's position vis-à-vis its debtor differs, of course, from that towards the creditor. Compliance with an obviously abusive demand is a non-performance of the mandate received from the debtor and exposes the security provider to the debtor's remedies, especially a claim for damages. The debtor may set off this claim against the security provider's claim for reimbursement of the money or other performance which the security provider had paid or furnished to the creditor.

13. On the other hand, the security provider is, in principle, obliged to perform its undertaking to the creditor. Refusing to do so by invoking Article 3:104 (1) will almost inevitably expose the security provider to a confrontation with the creditor; the latter often will not easily accept the security provider's objection.

14. In order to extract itself from this dilemma, the security provider may be well advised to turn to the debtor and ask for clarification and instructions. Without the debtor's assistance, the security provider will hardly be able to adduce the necessary proof of the creditor's manifest abuse or fraud. In practice, however, often the debtor may be well aware of the true situation and press the security provider to refuse performance of the security. In such circumstances it may be the debtor who will not only be willing to support the security provider by supplying information and documents; but it will also strongly urge the security provider not to honour the creditor's demand.

D. Debtor's Preventive Remedies

15. According to para (2), if the conditions of para (1) are fulfilled, the debtor is entitled to remedies both against the security provider and the creditor.

16. The remedy against the security provider is in line with the security provider's obligation towards the debtor to refrain from complying with the creditor's demand (cf. *supra* no. 12).

17. The debtor's remedy against the creditor is rooted in the direct relationship between these two parties and the manifestly abusive or fraudulent non-performance of that contract. This rule, in essence, corresponds to the UN Convention on Independent Guarantees of 1995 art. 20. The specific form of court remedies that are available or may be fashioned by the court, is left to the procedural law of the forum state and the discretion of the court. However, three specific remedies mentioned by UN Convention art. 20 paras (1) and (2) should be mentioned here as means of achieving a balance between the contradictory interests of the creditor, on the one hand, and the security provider and/or the debtor, on the other hand:

(1) the security provider may be ordered not to transfer the amount of the creditor's demand to the latter and to hold the amount of the security;

(2) if payment has already been effected, the court may order that the creditor may not dispose of the proceeds;

(3) or/and the person applying for a court order may have to furnish security in a form to be determined by the court.

National Notes

I. Protection against Abuse or Fraud

1. In most EUROPEAN countries the right of the creditor against the security provider under an independent personal security or a letter of credit is subject to the prohibition of abusive exercise of rights. The prohibition of abusive exercise of a right constitutes a basic principle of private law for the exercise of all private rights and is mostly based on the duty of good faith and fair dealing (AUSTRIAN CC § 1295 para 2; GERMAN CC § 242; GREEK CC art. 281; *Georgiades* § 11 nos. 73 ss.; CA Thessaloniki 449/1996, DEE 2, 826; *contra* CFI Patras 1683/1997, DEE 3, 1184; ITALIAN CC art. 1375; *Portale*, Fideiussione 1072 s.; *Nanni* 197 ss.; see also *Gambaro* 5; PORTUGUESE CC art. 334; SPANISH CC art. 7 para 2). While in DENMARK and BELGIUM there is no such statutory general clause, the principle is broadly acknowledged (DENMARK: *Ussing*, Aftaler 27 ss.; BELGIUM: Cass. 10 Sept. 1971, Arr.Cass. 1972, 31; *Van Gerven* nos. 70-72). This prohibition is compulsory and may not be deviated from.
2. The demand of the creditor is always exercised abusively when the secured risk has not occurred and subsequently there is no need for covering any damage caused thereby (GREECE: *Georgiades* § 6 no. 135; ITALY: in such a case there is a defect of *causa* of the

personal security according to Cass. 6 Oct. 1989 no. 4006, Giust. civ. 1990 I 731; CA Milano 12 Feb. 2005, BBTC 2005 II 481 ss.; SPAIN: *Sánchez Calero*, El contrato autónomo 384). Furthermore, there is an abuse of rights when the creditor demands performance from the security provider although vis-à-vis the debtor it is not entitled to demand this security (BGH 10 Feb. 2000, BGHZ 143, 381, 384; BGH 8 March 2001, BGHZ 147, 99 for the special case of a dependent personal security on first demand). It is sometimes said that invoking an abuse of right is invoking an objection from the underlying relationship, contrary to the independent nature of the independent personal security and therefore permissible only in exceptional circumstances as against the creditor (BELGIUM: *De Marez* no. 70; FRANCE: cf. *Simler* nos. 984 ss.; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 292; Staudinger/*Horn* nos. 309 s. preceding §§ 765 ss.; for documentary credits see *Schütze* nos. 427 s.; GREECE: *Georgiades* § 6 no. 136; ITALY: Cass. 19 March 1993 no. 3291, Foro it. 1993 I 2171; SPAIN: *Carrasco Perera*, Las nuevas garantías 741; *Sánchez Calero*, El contrato autónomo 385 and 387; SWEDEN: *Dalman* 199). More correctly, the security provider is only obliged within the limits of its obligation, and it may refuse performance if it can prove that the creditor's assertion that the protected event has occurred is wrong (GREECE: *Georgiades* § 6 no. 136).

3. In ENGLAND, IRELAND, SCOTLAND and the NETHERLANDS, however, the term "fraud" is used instead of "abuse", *i.e.* the personal security may not be called upon if the demand is fraudulent (ENGLAND: *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] 1 AC 168 (HL) (letter of credit); *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159 (CA) (performance bond); IRELAND: *White* 658; NETHERLANDS: Dutch Business Law § 6.05 [4] [e]; *Pabbruwe,* Bankgarantie/borgtocht 54, 58; SCOTLAND: *Centri-Force Engineering Ltd v. Bank of Scotland* 1993 SLT 190 (CFI)). The fraud exception does not apply, however, where the beneficiary only after the demand has been made discovers that the conditions of the personal security are not fulfilled (ENGLAND: *Montrod Ltd v. Grundkötter Fleischvertriebs GmbH* [2002] 1 WLR 1975 (CA)).

4. In other countries the two terms abuse and fraud are cumulatively or alternatively used without distinction. This is so in AUSTRIA, BELGIUM, in FRANCE and in PORTUGAL, where the duty of the security provider not to pay upon a manifestly abusive or fraudulent call on the personal security (AUSTRIA: "firm court practice", OGH 28 June 2005, ÖBA 2006, 62 at 64 and 24 June 2003, ÖBA 2003, 956 at 957; BELGIUM: *Wymeersch, Dambre, Troch* no. 57; FRANCE: *Devèze, Couret and Hirigoyen* nos. 3702 ss.; PORTUGAL: *Galvão Telles* 289; STJ 14 Oct. 2004, CJ(ST) XII, II-55) is considered to be one of the exceptions to the general rule of strict compliance *(garantieformalisme)*. Some FRENCH authors expressly say that "fraud" is equivalent to the "abuse of rights" (*Simler* nos. 985 ss.). In case of counter-securities, the payment is prohibited insofar as the demands of both the creditor and the provider of independent security are "manifestly abusive". This requires either a fraudulent collusion between the creditor and the provider of independent security or a fraudulent intention of the latter (Cass.com. 9 Oct. 2001, Bull.civ. 2001 IV no. 158 p. 149, RTD com 2002, 144). In FRANCE the exceptions to the principle of independence were first very restricted; the FRENCH courts seemed to require a fraudulent intention of the creditor (Cass.com. 11 Dec. 1985, JCP G 1986, II no. 20593). Since 1987, a payment upon a manifestly abusive call may also be refused (Cass.com. 20 Jan. 1987, JCP G 1987, II no. 20764). This court practice is

confirmed by CC, new art. 2321 para 2 of 2006, which requires for the discharge of the security provider a manifest abuse or a manifest fraud of the creditor or a fraudulent collusion between the creditor and the debtor.

5. In DENMARK the demand must be "unwarranted", in order for the security provider to deny payment (*Pedersen*, Bankgarantier 155).

6. Three cases decided in different countries dealt with the consequences of the revolutionary changes and expropriations that occurred in Iran in late 1979. European entrepreneurs working in Iran on constructions projects gave up these activities because they were expelled or otherwise forced to stop work. When their Iranian contracting parties or successors demanded payment under independent performance guaranties, a DUTCH court prohibited this upon the request of the Dutch contractor (CFI Amsterdam 18 Dec. 1980, Schip en Schade 1981 no. 135) and the FINNISH Supreme Court rejected the demand as being unfair (HD 26 Oct. 1992, KKO 1992:145, English translation in *Sisula-Tulokas* 41 ss.); for a related case, but with only a preliminary negative ruling cf. GERMAN BGH 12 March 1984, BGHZ 90, 287.

II. *"Manifestly" Abusive or Fraudulent Demand and Evidence*

A. *"Manifestly" Abusive or Fraudulent Demand*

7. According to most of the aforementioned statutory provisions or generally accepted rules (*supra* no. 1), the abuse of rights must be "manifest". This term implies the gravity of the abuse, on the one hand, and the feasibility of proving it, on the other. Manifest is an abuse if the abusive demand is detectable by anybody, *e.g.* if the underlying claim has been held by court or arbitral decision to be invalid or when the demand is made for reasons of political vengeance (AUSTRIA: letter of personal security accidentally sent to a wrong person who promised return but demands performance, OGH 8 July 1993, SZ 66 part 2 no. 82 p. 21; generally speaking, there must be an evident abuse of right or fraud to be proved by liquid means of evidence: OGH 16 Dec. 1981, SZ 54 no. 189 p. 929; OGH 14 Nov. 1985, JBl. 1985, 424, 426; BELGIUM: "abuse that stares one in the face", *Wymeersch*, Bank guarantees no. 4; *De Marez* no. 35 at 23; FRANCE: *Devèze, Couret and Hirigoyen* no. 3707; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 292; Staudinger/*Horn* no. 313 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 no. 138; ITALY: *Mastropaolo* 307; *Cassera* 2768; CFI Milano 3 May 1984, BBTC 1985 II 85 and 12 Oct. 1985, BBTC 1987 II 57; CA Milano 27 May 1994, BBTC 1995 II 423; CFI Verona 30 Dec. 2003, Giur.mer. 2005, 176; PORTUGAL: STJ 14 Oct. 2004, CJ(ST) XII, II-55; STJ 1 June 1999, 347/99 www.dgsi.pt; *Almeida Costa and Pinto Monteiro* 20-21; the same for documentary credits, GERMANY: *Schütze* no. 429; GREECE: *Georgiades* § 11 nos. 73-77). Concerning personal securities on first demand, only legal or factual objections that exist obviously to everybody are relevant, all other legal or factual problems or questions having to be settled between creditor and debtor (GERMANY: BGH 12 March 1984, BGHZ 90, 287, 239 s.; cf. also BGH 17 Jan. 1989, NJW 1989, 1480, 1481; for dependent personal security cf. recently BGH 5 March 2002, NJW 2002, 1493). Also the ITALIAN Supreme Court tends to restrict the possibility of invoking the *exceptio doli* (Cass. 19 March 1993 no. 3291, Foro it. 1993 I 2171; *De Nictolis* 114).

8. In ENGLISH law the fraud exception applies only if it is "seriously arguable that, on the material available, the only realistic inference is that [the creditor] could not honestly

have believed in the validity of its demands" (*United Trading Corporation SA v. Allied Arab Bank* [1985] 2 Lloyd's Rep 554 (CFI), at 561 *per* Ackner LJ.; see also *Goode*, Commercial Law 992 s.). These strict requirements stem from the fact that the courts are reluctant to interfere with the smooth operation of documentary credits which are regarded as the "life-blood of international commerce" (*R. D. Harbottle (Mercantile) Ltd v. National Westminster Bank Ltd* [1978] QB 146 (CFI), at 155 *per* Kerr J.).

9. In DENMARK it must be proven that the claim is unwarranted (*Pedersen*, Bankgarantier 156).

10. There is neither court practice nor literary opinion on this specification of the abuse and its proof in SPAIN. Authors have merely indicated in general that, in order to preserve the economic function of independent personal securities and their legal nature, objections to the creditor's demand must be limited (*Sánchez Calero*, El contrato autónomo 384; for an in-depth discussion of the topic on the basis of references to foreign countries *Carrasco Perera*, Fianza 216 ss.).

B. *Present Evidence*

11. In some countries the proof can be made with any evidence which is "present" and allowed by law, *i.e.* not only with documents, but also with witnesses or affidavits (ENGLAND: *Etablissement Esefka International Anstalt v. Central Bank of Nigeria* [1979] 1 Lloyd's Rep 445 (CA); GERMANY: Staudinger/*Horn* no. 315 preceding §§ 765 ss.; *contra* CA Köln 7 Aug. 1986, WM 1988, 21, demanding documentary means of evidence; GREECE: *Georgiades* § 6 no. 140; for documentary credits cf. *Georgiades* § 11 no. 75). Furthermore, it suffices *e.g.* that the security provider is informed of the abuse by the debtor or by certain information in the newspapers, or just by certain well-known facts (BELGIUM: *De Marez* no. 29; PORTUGAL: STJ 14 Oct. 2004, CJ(ST) XII, II-55; *Cortez* 513 ss.).

12. In other countries, however, courts admit a manifest fraud or abuse only if based on documentary evidence, *e.g.* a final judgement against the creditor, a certificate of payment from the creditor, because the proof must be beyond doubt (DENMARK: *Pedersen*, Bankgarantier 155); the same in FRANCE, where in only one decision the manifestly abusive call was not proved by documentary evidence, but by the admission of the creditor (CFI Paris 1 Aug. 1984, JCP G 1984, II no. 20526). In ITALY opinions on this point are more fragmented (for the necessity of documentary evidence *Mastropaolo* 307; *Pontiroli*, Garanzie autonome 76 s.; but *contra Bonelli*, Le garanzie bancarie 107, fn. 70; for an overview of the diverging opinions expressed on this point by scholars and courts see *Calderale*, Fideiussione 305 ss.; more recently *Barillà*, L'abuso 93 ss., fn. 15; *Cuccovillo* 103 ss. and CFI Bologna 20 Jan. 2003, BBTC 2005 II 79 on the relevance of testimonial evidence in proceedings for the granting of an interim injunction inhibiting payment by the security provider).

C. *Consequences for Security Provider*

13. In some countries the security provider *is not obliged*, but *can* refuse, or *is only entitled not* to pay the creditor in cases of abusive/fraudulent demand (DENMARK: *Pedersen*, Bankgarantier 155; GERMANY: Staudinger/*Horn* no. 312 preceding §§ 765 ss.; PORTUGAL: CA Lisboa 11 Dec. 1990, CJ XV, V-134; *Almeida Costa and Pinto Monteiro* 21: the security

provider however should not pay and he may loose his right of recourse; in AUSTRIA one writer concludes that the security provider is only entitled to refuse performance if it is fully convinced, on the basis of present evidence, that the conditions summarized *supra* no. 6 have been met; if there is merely a doubt, performance must be made: *Harrer* 67).

14. In other countries the security provider *must* refuse payment because it has the duty to protect the debtor and is thus *obliged* as against the latter to omit payment (BELGIUM: *de Marez* no. 33; FRANCE: *Devèze, Couret and Hirigoyen* no. 3708; however, according to new CC art. 2321 para 2 of 2006 the security provider is not obliged to refuse to pay, it is only entitled to; GREECE: *Georgiades* § 6 no. 143; CFI Athens 9714/1996, EED 49, 45; for documentary credits *Georgiades* § 11 no. 73; ITALY: so according to the prevailing opinion among scholars and courts, often on the basis of the principal-agent relationship existent between debtor and security provider; see for all *De Nictolis* 113; *Calderale* 259 ss.; *Tommaseo*, Autonomia negoziale 425; CFI Torino 27 Sept. 2003, Giur.mer. 2004, 280; CFI Bologna 20 Jan. 2003, BBTC 2005 II 79; CFI Treviso 24 Dec. 1997, Riv.Dir.Civ. 1998 II 443; CFI Roma 26 May 1995, Foro it. 1996 I 1091; SPAIN: *Sánchez Calero*, El contrato autónomo 389). In ENGLAND the security provider may be restrained from performance towards the creditor by an injunction sought by the debtor if clear knowledge of the fraud on the security provider's part can be shown (*Andrews and Millet* no. 16-021; *O'Donovan and Phillips* nos. 13-28 ss.).

15. As to the security provider's claim for return of its performance against the creditor, cf. national notes on Art. 3:105 *sub* IV.

D. Scope of Debtor's Protection

a. As against Both the Security Provider and the Creditor

16. The debtor may take legal action against the creditor: the debtor has a claim arising from its relationship with the creditor that the latter omit to demand performance of the personal security, if the secured risk has not occurred (BELGIUM: *de Marez* no. 39; ENGLAND: *Andrews and Millet* nos. 16-025 ss.; there is some discussion whether the standard of proof for a case of fraud might be lower in such a constellation as opposed to an action against the security provider, cf. *Themehelp Ltd v. West* [1996] QB 84 (CA); see also *O'Donovan and Phillips* nos. 13-38 s.; minority opinion in GREECE: CFI Athens 7913/1998, EED 50, 279; *Georgiades* § 6 no. 148; for documentary credits, *Georgiades* § 11 no. 60; PORTUGAL: *Pinheiro* 461). In the NETHERLANDS and in ITALY often for procedural reasons the debtor enjoins both the security provider and the creditor, the former from performing the personal security, the latter from utilizing it (NETHERLANDS: *Pabbruwe,* Bankgarantie/borgtocht 54, 58; Dutch Business Law § 6.05 [4] [e]; ITALY: CFI Roma 26 Jan. 1996, Foro it. 1996 I 2540; CFI Genova 9 Dec. 1992, Giur.comm. 1993 II 757; however, interim protection of the debtor is rarely claimed against the creditor, especially in international commerce: *Bonelli*, Le garanzie bancarie 153 ss.; see however also *infra*, no. 17).

17. The debtor may demand from the security provider that it make no payment to the creditor. This right can be enforced in court by requesting an interim injunction (AUSTRIA: OGH 16 Dec. 1981, SZ 54 no. 189 at p. 931; GERMANY: *Horn*, Bürgschaften und Garantien nos. 583-591 with case law; ITALY: CCP arts. 700 ss.; *Bonelli*, Le garanzie

bancarie 133 ss.; *Tommaseo*, Autonomia negoziale 426 ss.; *e.g.* CFI Milano 17 July 2003, Foro pad. 2003 I 398; CFI Bologna 20 Jan. 2003, BBTC 2005 II 79; PORTUGAL: STJ 14 Oct. 2004, CJ(ST) XII, II-55).

b. As against the Security Provider Only

18. In other countries, however, the debtor may only prohibit the security provider from making payment if the creditor abuses its rights. This right of the debtor can be enforced by an interim injunction (AUSTRIA: OGH 28 June 2005, ÖBA 2006, 62, 64 ("firm court practice"); 16 Dec. 1981, SZ 54 no. 189 p. 931; FRANCE: *Devèze, Couret and Hirigoyen* no. 3692; *Simler* no. 971; GERMANY: MünchKomm/*Habersack* no. 35 preceding § 765). In some countries however, the debtor is not allowed to intervene in the relationship between security provider and creditor and therefore may not prohibit the security provider from making payment to the creditor (SPAIN: *Sánchez Calero*, El contrato autónomo 391; GREECE: CA Athens 3425/1985, Arm 41, 578; minority opinion in GERMANY: Staudinger/*Horn* nos. 320 ss. and 336 ss. preceding §§ 765 ss.).

c. As against the Creditor Only

19. In DENMARK the debtor is entitled to try to prohibit the calling-up of a manifestly abusive payment only as against the creditor (*Pedersen*, Bankgarantier 65, 148, 155 and 158).

(Karpathakis/Dr. Fiorentini)

Article 3:105: Security Provider's Right to Reclaim

(1) The security provider has the right to reclaim the benefits received by the creditor if
  (a) the conditions for the creditor's demand were not or subsequently ceased to be fulfilled; or
  (b) the creditor's demand was manifestly abusive or fraudulent.
(2) The security provider's right to reclaim benefits is subject to PECL article 4:115 and the general rules on unjustified enrichment.

Comments

A. The Issue

1. In the factually triangular situation of an independent security it is not quite clear who is entitled to request return of a performance that had been made by the security provider on the creditor's demand, although the terms and conditions of the demand had not been fulfilled or later disappeared or the demand was abusive or fraudulent. Is the security provider entitled or rather the debtor or both?

2. National legal systems vary considerably on this issue, using sometimes very fine distinctions in allocating the right to the one or the other party. However, in this field any such distinction does not appear to be practicable since it leaves a margin of uncertainty. Therefore, only the *alternative* between security provider and debtor offers clarity and certainty.

3. Doubts may arise due to the fact that the security provider's performance of the creditor's demand at the same time often will extinguish (or reduce) an obligation of the debtor vis-à-vis the creditor in the framework of an underlying relationship between these two parties. This fact is sometimes invoked as justifying that return of such performances can only be requested by the debtor. However, this thesis overlooks the fact that the security provider's obligation is a separate and independent obligation and usually its content will also differ from the debtor's obligation to the creditor. The security provider only performs *its* obligation; usually, of course, such performance may also extinguish (or reduce) (one of) the debtor's obligation(s) towards the creditor, but this effect is derived from the security agreement between these parties.

4. The better reasons speak for entitling the security provider: The person who performed has the greatest interest in rectifying an unjustified performance. Also, the security provider is more familiar with the circumstances under which it performed and its defences and objections against the creditor's claim which it had been precluded from raising against the creditor. Even more important is the necessity of the security provider's entitlement if the debtor has become bankrupt.

5. However, the security provider often will require the debtor's assistance with respect to the facts or legal rules envisaged by the terms and conditions of the independent security for justifying the creditor's demand. Such assistance is even more important if the conditions for the creditor's demand under the independent security had originally been fulfilled but later disappeared (*infra* D).

6. If the parties feel that it is more convenient to let the debtor bring the claim or an action against the creditor, they are free to agree on an assignment (cf. PECL Chapter 11) of the security provider's claim to the debtor.

7. However, there is an important outer limit to the security provider's entitlement. This follows from the limited scope of application of Article 3:105 laid down in para (1) litt. (a) and (b): The security provider may only invoke the terms of the independent security as against the creditor. By contrast, it is not entitled to invoke the terms of an underlying contract or other legal relationship between the debtor and the creditor. If the

security provider's promise of performance had been invoked and honoured although the debtor had not, or not properly, performed the secured obligation to the creditor, any claim for return of this performance or repayment must be brought by the debtor against the creditor. The only exception to this limitation is the case of an evidently abusive or fraudulent demand according to Article 3:104; but this exception is to be very strictly construed.

B. Terms of Demand Not Fulfilled

8. Upon receiving a demand for performance, the security provider must examine the validity of the independent security and whether the demand exactly complies with the terms and conditions of the independent security; the debtor must be informed of the demand (cf. Article 3:102 (1) and (2)). Nevertheless, due to a misunderstanding or due to temporary absence of a competent person in either the security provider's or the debtor's office it may occur that the security provider erroneously believes to be obliged to perform the creditor's demand and in fact performs. The security provider is then entitled to demand return of the performance made.

Illustration 1
B in France has concluded with S in England a contract of sale for 500 English sheep. On S' demand, B requests X-Bank in London to assume an independent security for payment of the purchase price which may be utilised by S on the day of shipping the sheep to France and on presentation of a veterinary certificate for the sheep. Although S has not presented such a certificate because he did not apply for it, he demands payment. An employee at X-Bank overlooks the absence of the required certificate and therefore honours S' demand for payment. X-Bank may request repayment of the amount paid under the independent security from S.

C. Security Provider's Defence or Counterclaim

9. The security provider may have a defence or a counter-claim against the creditor which it was not permitted to raise or to set off under the terms of the independent security or under an independent security on first demand (cf. Article 3:103 (3)). After having performed the security, it is entitled to request return of the performance made on the basis of those defenses or to raise the counter-claim.

D. Terms of Demand Subsequently Disappeared

10. The justification for a demand that existed at the time of presentation of the security may later have disappeared.

Illustration 2
The basic facts are as in Illustration 1. However, S has applied for and obtained such a certificate, and X-Bank duly makes payment to him. Thereafter, the veterinary certificate is revoked due to the BSE crisis in England.

For the reasons set out in Comment A, the security provider should also in this case be entitled to request return of the performance.

11. It deserves to be mentioned that the provider of independent security is entitled to demand return of its performance only if the conditions of the independent security had not been fulfilled or had later fallen away. If performance of the independent security for reasons rooted only in the underlying relationship never was justified or subsequently is no longer justified, then only the debtor as a party to that contract is entitled to request "return" of the performance.

Illustration 3
As in Illustration 2, but it turns out that the sheep are infected and therefore the French customs authorities refuse entry of the sheep to France. B terminates the contract. Only B and not X-Bank may request repayment of the purchase price from S.

E. Manifestly Abusive or Fraudulent Demand

12. If the provider of independent security for whatever reason performs a demand which fulfills the conditions set out in Article 3:104, it is entitled to request return of the performance made. The reasons correspond to those mentioned in Comment A.

13. However, if the security provider has already been (or may in future be) reimbursed by the debtor for its performance to the creditor, it may be more convenient for the parties to have the claim for repayment brought by the debtor; the security provider may then simply assign its claim against the creditor to the debtor.

F. Consequences Governed by Rules on Unjust Enrichment

14. The conditions set out in the first paragraph of Article 3:105 closely correspond to the basic conditions of a claim for unjust enrichment. It is therefore consistent to refer with respect to the details of the provider's claim for return of the performance to those rules, as exemplified so far for a special set of cases by PECL Article 4:115.

15. In particular, the rules on unjust enrichment may preclude a security provider's claim for return if it knew (or ought to have known) at the time of the creditor's demand that this demand did not comply with the terms and conditions of the independent security or that the demand was manifestly abusive or fraudulent, if and insofar as it had been entitled to raise those defences.

National Notes

I. Restitution if Independent Security is Invalid

1. According to AUSTRIAN, DANISH, GERMAN, GREEK, ITALIAN, PORTUGUESE and SPANISH law, the provider of independent security may claim restitution of its performance from the creditor if the contract of independent security was invalid (AUSTRIA: OGH 11 May 2005, ÖBA 2005, 899, 901; Avancini/Iro/*Koziol* no. 3/156; DENMARK: *Pedersen*, Bankgarantier 72 s.; GERMANY: Staudinger/*Horn* no. 346 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 128; ITALY: Cass. 6 Oct. 1989 no. 4006, Giust.civ. 1990 I 731; *Rossetti* 16; PORTUGAL: *Pinheiro* 455; SPAIN: *Sánchez-Calero*, El contrato autónomo 402).

II. Restitution upon Non-Compliance with Terms of Independent Security – Para (1) Lit. (a)

2. According to GERMAN, GREEK, ITALIAN, PORTUGUESE and SPANISH law, the provider of independent security may claim restitution of its performance from the creditor if there was no right to claim under the independent security because the performance, as effected by the provider of the independent security, was according to the terms of the independent security not owed as to its amount, at this time or to this beneficiary (GERMANY: Staudinger/*Horn* nos. 346 and 244-246 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 128; ITALY: Cass. 6 Oct. 1989 no. 4006, Giust.civ. 1990 I 731; *Viale* 203; *De Nictolis* 196; NETHERLANDS: *Pabbruwe*, Bankgarantie 63; PORTUGAL: *Castelo Branco* 79; *Pinheiro* 455; SPAIN: *Sánchez-Calero*, El contrato autónomo 403). Similarly, in ENGLISH law, the security provider might in appropriate circumstances be entitled to reclaim its performance where it has inadvertently paid against non-conforming documents; it is thought by one eminent writer, however, that such a recovery is limited to situations where the documents presented are totally valueless (cf. *Goode*, Commercial Law 998).

III. Restitution upon Non-Compliance with Terms of Underlying Relationship

3. Apart from cases of a manifestly abusive demand (*infra* no. 6), in GERMANY the provider of independent security may not rely upon the relationship between debtor and creditor, unless, and only insofar as, the security refers to that relationship. However, it is controversial (cf. *Hadding, Häuser and Welter* 729) in how far without such a reference, especially in the case of an independent security on first demand the provider of independent security may rely upon a lack in the underlying relationship. The Federal Supreme Court and the majority of writers today do not in such a case allow the security provider to reclaim its performance from the creditor and merely consider a claim for damages for breach of contract against the debtor (BGH 25 Sep. 1996, ZIP 1997, 275, 277 s.; *contra* Staudinger/*Horn* nos. 347 s. preceding §§ 765 ss.; cf. also *Horn*, FS Brandner 632; *Zahn, Eberding and Ehrlich* no. 9/122). Even less may the provider of independent security reclaim its performance when the debtor performs subsequently (cf. *Canaris*, ZIP 1998, 500 and Bankvertragsrecht no. 1143). Also in AUSTRIA, ENGLAND, FRANCE, ITALY, the NETHERLANDS and PORTUGAL it is the debtor who is entitled to reclaim a payment made under the independent security if that was not justified according to the terms of the underlying agreement with the creditor (AUSTRIA: Avancini/Iro/*Koziol* no. 3/157; OGH 12 Aug. 1996, ÖBA 1997, 64, 66; OGH 16 March 1988, SZ 61 no. 63 p. 327; ENGLAND: *Goode*, Commercial Law 998; FRANCE: *Simler* no. 1002; ITALY: Cass. 6 Oct. 1989 no. 4006, Giust.civ. 1990 I 731; *De Nictolis* 197; NETHERLANDS: Dutch Business Law § 6.05 [4] [b]; *Pabbruwe*, Bankgarantie 63; cf. also CFI Breda 27 April 1993, NJB 1996 no. 99; PORTUGAL: *Galvão Telles* 283).
4. In GREECE, in the case of documentary credits which according to prevailing opinion are regarded as a payment order *lato sensu* according to CC arts. 876 ss., the debtor is entitled to a claim for unjust enrichment if an underlying relationship is lacking or it has been defectively performed (cf. *Georgiades* § 11 no. 65).
5. According to DANISH law, the creditor has to pay back an amount, which has been paid under an independent security if it turns out that the security provider's payment according to the contract between creditor and debtor was in fact unwarranted; normally, both the security provider and/or the debtor are entitled to this claim (see *Pedersen*, Bankgarantier 72 s.).

IV. Restitution upon Manifestly Abusive Demand – Para (1) Lit. (b)

6. According to the law of most member states, the provider of independent security may claim restitution of its performance in cases of manifestly abusive demand (AUSTRIA: Avancini/Iro/*Koziol* no. 3/57; DENMARK: *Andersen, Madsen, Nørgaard*, Aftaler 144; ENGLAND: *Goode*, Commercial Law 997; GERMANY: for an independent security on first demand BGH 10 Nov. 1998, BGHZ 140, 49, 51 s.; Staudinger/*Horn* no. 358 preceding §§ 765 ss.; GREECE: *Demetriades* 77; ITALY: Cass. 6 Oct. 1989 no. 4006, Giust.civ. 1990 I 731; *Bonelli*, Le garanzie bancarie 176; NETHERLANDS: *Pabbruwe*, Bankgarantie 63 s., on the ground that if the creditor's demand is obviously abusive, the security provider is to refuse performance and therefore may not debit the debtor; PORTUGAL: *Ferrer Correia* 257; SPAIN: *Sánchez-Calero*, El contrato autónomo 389; *Carrasco Perera a.o.* 339, 360).

7. However, in AUSTRIA an exception from the preceding rule is made if the security provider performs an independent security, although it knows or ought to know that the creditor's demand is unjustified or abusive. In this case, only the debtor is entitled to reclaim performance from the creditor (OGH 11 May 2005, ÖBA 2005, 899, 902 and 23 June 2005, ÖBA 2005, 902, 904). Also in FRANCE, the debtor is entitled to claim restitution of the performance in case of an unjustified demand (*Simler* no. 1002).

V. *Bases of Security Provider's Claim*

A. *Unjust Enrichment Including Undue Payment – cf. Para (2)*

a. The Rule

8. In several countries, the security provider's claim for restitution is based upon unjust enrichment (AUSTRIA: Avancini/Iro/*Koziol* no. 3/156; DENMARK: cf. also *Vinding Kruse* chap. 8 although there are no general rules on unjust enrichment; GERMANY: MünchKomm/*Habersack* no. 20 preceding § 765; *Hadding, Häuser and Welter* 727 ss.; GREECE: *Georgiades* § 6 nos. 127 ss. and 144, § 11 no. 65; PORTUGAL: *Pinheiro* 455).
9. In BELGIUM, ITALY, the NETHERLANDS and SPAIN, the claim for recovery of the performance can only be based upon the more specific provisions on return of a payment erroneously made but not owed (BELGIUM: CC arts. 1235 para 1 and 1376 ss.: *Vliegen* nos. 252-255; *Dirix*, Obligatoire 264 s.; ITALY: CC art. 2033; *Rossetti* 16; Cass. 6 Oct. 1989 n. 4006, Giust.civ. 1990 I 731; NETHERLANDS: CC art. 6:203 ss.; *Pabbruwe*, Bankgarantie 63 s.; *Croiset van Uchelen* 25, 27; SPANISH CC art. 1895-1901). Undue is a payment if the debt had already been fulfilled, or the debt had been discharged by set-off, or the person accepting the payment was in reality not the creditor, or the one paying (the *solvens*) was not the real debtor (cf. BELGIAN CC art. 1377; SPANISH CC art. 1901). It is not necessary that the *solvens* made a mistake; his fault does not impede a claim for repayment on the ground of undue payment. A mistake will only have to be proved if it is doubtful whether the payment was really undue: *e.g.* if the *solvens* knew that the money was not due but paid, it will have to be found out why the *solvens* really paid and whether the payment was really undue (*Vliegen* no. 252). The consequences of a claim founded on undue payment are stipulated by BELGIAN CC arts. 1377 to 1381, especially in art. 1378: "If there was bad faith on the part of the one who received, he is required to make restitution of the capital as well as interests or fruits from the day of payment". Corresponding provisions are to be found in the NETHERLANDS (CC arts. 6:206, 3:121) and in SPAIN (CC art. 1896 para 1).
10. In ENGLISH law, the security provider's claim against the creditor for recovery of money paid may be based upon a mistake of fact (cf. *Edward Owen Engineering Ltd v. Barclays Bank International Ltd* [1978] QB 159, 170 (CA); *Bank Tejarat v. Hong Kong and Shanghai Banking Corporation* [1995] 1 Lloyd's Rep 239, 244 (CFI)). However, it is argued that a mistake of fact concerning the genuineness or conformity of the documents as a restitutionary basis for the recovery of money will only be available for a security provider against the creditor in cases involving fraud on the latter's part or the tender of documents that are totally valueless. It is thought that the claim for recovery of money

would amount to a rejection of documents which had already been accepted and that this as a matter of policy should be discouraged (cf. *Goode*, Commercial Law 998; *Jack, Malek and Quest* no. 5.81).

11. By contrast, in FRANCE, some authors consider that neither the case law rules on unjust enrichment nor the rules on undue payment (cf. *supra* no. 9) may be applied (see *Simler* no. 1004; Malaurie and Aynès/*Aynès and Crocq* no. 346). The payment is not unjust because it is based on a (independent security) contract. But see *infra* no. 14.

b. Restrictions

12. If the security provider has satisfied the creditor fully knowing the lacking justification of the creditor's demand, especially an abuse, a claim for unjust enrichment may be excluded according to AUSTRIAN CC § 1432, GERMAN CC § 814 and GREEK CC art. 905 (AUSTRIA: OGH 23 June 2005, ÖBA 2005, 902, 904; Avancini/Iro/*Koziol* no. 3/156; GERMANY: Staudinger/*Horn* nos. 349, 358 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 727; GREECE: *Georgiades* § 6 no. 144 and § 11 no. 65 for letter of credit). Similarly, in ITALIAN law the right of restitution of the security provider is excluded if he knew or had evident proof of the abusive character of the demand (CFI Milano 13 Dec. 1990, BBTC 1991 II 588). In SPAIN it is said along the same lines that merely negligent ignorance of the creditor's fraud, due to negligent checking of the tendered documents, does not bar the security provider's right to restitution from the creditor (*Sánchez-Calero*, El contrato autónomo 403). By contrast, in PORTUGAL the decisive element is the security provider's intention to perform, his knowledge of the lack of justification of the creditor's demand being irrelevant (*Pires de Lima and Antunes Varela* 464).

B. Breach of Contract

13. Damages may also be claimed for the creditor's breach of contract (GERMANY: *Horn*, FS Brandner 630). Also in ENGLISH law, there is some discussion whether a creditor presenting non-conforming documents is liable for damages for breach of an implied warranty that the documents are genuine and that there is no latent non-conformity with the terms of the security (cf. *Goode*, Commercial Law 998; for the contrary view see *Jack, Malek and Quest* no. 5.81).

C. Tort

14. Additionally, GERMAN CC § 826 and GREEK CC art. 919 allow the provider of independent security in some cases of abusive demand the right to claim damages for immoral, wilful and malicious injury (GERMANY: Staudinger/*Horn* no. 358 preceding §§ 765 ss.; GREECE: *Georgiades* § 6 no. 144). Also in FRANCE such a claim is considered, especially in cases of manifest abuse (cf. *Simler* no. 1004); of course the creditor's fault has to be proved (see CA Paris 14 March 1988, D. 1989, Somm.Comm. 152).

VI. Cross-Reference

15. On restitution after assignment of the independent security, cf. national notes on Art. 3:107 no. 13.

(Seidel/Hauck)

Article 3:106: Security With or Without Time Limits

(1) If a time limit has been agreed, directly or indirectly, for resort to a security, the security provider exceptionally remains liable even after expiration of the time limit, provided the creditor had demanded performance according to Articles 3:102 paragraph (1) or 3:103 at a time when it was entitled to and before expiration of the time limit for the security. Article 2:108 paragraph (3) applies with appropriate adaptations. The security provider's maximum liability is restricted to the amount which the creditor could have demanded as of the date when the time limit expired.

(2) Where a security does not have an agreed time limit, the security provider may set such a time limit by giving notice of at least three months to the other party. The security provider's liability is restricted to the amount which the creditor could have demanded as of the date set by the security provider. The preceding sentences do not apply if the security is given for specific purposes.

Comments*

A. General Remarks

1. General idea. Within this Part, it is intended that dependent and independent personal securities should follow substantially identical rules as regards the question of agreed time limits and their legal consequences. This approach is in line with the position under international regulations, which at least in relation to matters of time limits for resort to a security subject independent securities to rules similar to the one contained in Article 2:108 of these Rules for dependent securities (cf. UCP 500 (1993) art. 42, UN Convention on Independent Guarantees of 1995 art. 11 (1) (d) *juncto* art. 12 (a)).

2. Content of the rule. Paragraph (1) covers independent securities with an agreed time limit for resort to security, while para (2) deals with the possibility of the security

* The Comments on Article 3:106 are by Ole Böger, LL.M.

provider to limit its liability in cases where the security is given without a time limit. In both paragraphs the rules are drafted in a way closely resembling the provisions of Articles 2:108 and 2:109, respectively. However, minor differences stem from the independent nature of the personal securities covered by this Chapter.

B. Security with Time Limit for Resort to Security – Para (1)

3. Scope. An independent security can be subject to different types of time limits. Some time limits relate to the point of time at which the conditions for liability under the security, if any, must be fulfilled. A time limit for resort to security as covered by para (1), however, exists where the parties have agreed that the security provider ceases to be liable after a certain point of time. This will typically be the case where the parties have used formulas such as "This security expires August 31" or "The security provider is liable under this security only until August 31". Cf. also Comments to Article 2:108 nos. 5 ss.

4. Consequences of expiration of time limit. As follows indirectly from para (1) sent. 1 ("the security provider exceptionally remains liable"), the general rule is that the security provider is no longer liable at all towards the creditor after expiration of the agreed time limit. The security provider remains liable after expiration of the agreed time limit only if the creditor had demanded performance at the proper time (see *infra* no. 5) and in a manner consistent with Articles 3:102 (1) or 3:103, respectively.

5. Time for demand for performance. Obviously, the demand for performance can have the effect of continuing the security provider's liability only if it is made before expiration of the agreed time limit. Moreover, for reasons equivalent to those described *supra* in the Comments to Article 2:108 no. 15, the creditor generally must be entitled to performance at the time of the demand, *i.e.* the additional conditions for liability under the security, if any, must be fulfilled. In situations where these conditions are fulfilled only close to expiration of the agreed time limit, this rule could cause difficulties for the creditor; in order to solve this problem, Article 2:108 (3) is declared applicable with appropriate adaptations. Thus, where the aforementioned conditions (replacing in the context of independent securities the maturity of the secured obligations as referred to in the text of Article 2:108 (3)) are fulfilled at the moment of, or within fourteen days before, expiration of the time limit of the security, the demand for performance under the security may be made earlier than otherwise possible, but no more than fourteen days before expiration of the time limit.

6. Security provider's maximum liability. Even if a demand for performance is made in accordance with the preceding requirements, the security provider's maximum liability is limited to the amount which the creditor could have demanded under the security as of the date when the time limit expired. Subsequent developments cannot increase the security provider's liability; from the agreed time limit itself also follows that the security provider is liable only if and in so far as the conditions for liability under the security are fulfilled until that time.

C. Security without Time Limit – Para (2)

7. **Scope.** Paragraph (2) covers securities that do not have any time limit, *i.e.* neither a time limit for resort to security as covered by para (1) nor any other kind of restriction according to which the liability of the security provider effectively depends upon certain conditions being fulfilled before a certain time. Whether or not a security does have such a time limit, is a matter of construction of the parties' agreement; some general guidelines for interpretation might be found in the Comments to Article 2:108 nos. 23 ss.

8. **Possibility to set time limit.** According to para (2) sent. 1, the provider of an independent security without a time limit may set such a limit by simple declaration with a notice period of at least three months. For the rationale behind this minimum period of notice, cf. Comments to Article 2:109 no. 5.

9. **Effect of limitation.** If the security provider sets a time limit according to para (2), its liability after expiration of this time limit is restricted to the amount which could have been demanded by the creditor at that point of time. In the exceptional case of a non-monetary obligation of the security provider under the security, the extent of that obligation at the moment of expiration of the time limit set by the security provider is decisive. In any case, the security provider is only liable if and in so far as any conditions for liability under the security are fulfilled when the time limit expires. The limitation by the security provider does not, however, give rise to a time limit for resort to the security.

10. **Exceptions.** Paragraph (2) does not apply if the security is given for specific purposes. Similar to Article 2:109, the possibility to limit a security under Article 3:106 (2) is therefore of importance predominantly in situations where the security is assumed in order to secure the creditor against risks that are not exactly specified, resembling a global security, *e.g.* where the security provider undertakes to secure the payment of all demands that the creditor may make against the debtor arising from their business relationship. As under Article 2:109, no recourse to the general principle in PECL Article 6:109 is possible where the special exception in Article 3:106 (2) sent. 3 applies (cf. Comments to Article 2:109 no. 9).

National Notes

I. Independent Securities with a Time Limit for Resort to Security

1. In international commercial practice only rarely independent personal securities are issued without agreed time limits. Often also the meaning of these time limits will be spelt out in detail in the parties' agreement. In the absence of such an agreement, it is a very debated question in the member states especially in relation to time limits for resort to the security whether the equivalent rules on time limits for dependent personal securities are applicable.
2. Most member states seem to embrace the general idea of these Rules by applying substantially identical rules with respect to time limits for resort to security in relation to both dependent and independent security. In a few states, this result is achieved by extending the rules on time limits for dependent securities to independent securities as well (*infra* nos. 3 and 4); others apply identical principles of general contract law concerning this issue in both types of securities (*infra* nos. 5 and 6). Some member states, however, expressly rule out the applicability of these rules and developed rules specific to independent securities (*infra* nos. 7 ss.).

A. Application of Identical Rules for Dependent and Independent Security

a. Recourse to Rules on Time Limits for Dependent Security

3. According to GREEK court practice, CC art. 866 on the time limit for resort to dependent securities applies to independent securities (A.P. (Plenum) 10/1992, NoB 41, 70 ss.); however, it constitutes *jus dispositivum* (A.P. 133/1956, NoB 4, 617-618). On the other hand, some writers deny its application to independent securities (*Gouskou* 90 ss.; *Psychomanis*, NoB 42, 1619 ss.).
4. Some ITALIAN authors think that the rules on the dependent security with a time limit for resort to the security (CC art. 1957) also apply to the independent security (*Bianca* 520; critical *Portale*, Fideiussione 1070 s.); according to CC art. 1957 para 1, the provider of a security with time limit remains liable six months after the secured obligation has fallen due, provided that the creditor within six months commenced and diligently pursued its actions against the debtor. But this is not the majority's view in doctrine and it is not shared by the majority of recent case law (see *infra* no. 11).

b. Application of General Contract Law Rules to Both Types of Personal Security

5. In BELGIUM and PORTUGAL, obligations from dependent as well as independent securities expire according to rules of general contract law. Obviously the termination of the main contract does not affect the existence of the independent security. But the issuer of a security does not have to respond to demands on the security after its expiration (BELGIUM: *T' Kint* nos. 858-859; PORTUGAL: *Castelo Branco* 77; *Pinheiro* 449).
6. Also in SPANISH law, specific rules concerning the time limits for resort to dependent or independent securities do not exist. Therefore, rules of general civil law are applicable to both kinds of contracts. CC art. 1117 provides that "the condition that a certain event will occur within a given time shall extinguish the obligation after the passing of the time, or when it becomes certain that the event will not occur." Therefore, the

issuer of a security with a time limit should no longer be liable after expiration of the agreed time. Regarding specifically the contract of independent security, it has been doubted whether the extinction of the obligation should take place if no demand for performance is received or if terms and conditions of the security (the agreed event) do not occur within the time limit. This problem is solved in international practice by an explicit clause providing an express time limit for resort to the security, so that after expiration of such a time limit a call on the security is no more valid (*Sánchez-Calero*, El contrato autónomo 351).

B. *Application of General Contract Law Rules to Independent Security*

7. According to DANISH literature it is not possible to apply the rules on dependent securities generally to independent securities (*Pedersen*, Kaution 14). The meaning of a time limit in an independent security must be ascertained by interpretation (*Ussing*, Kaution chap. 37; *Pedersen*, Kaution 14 and Bankgarantier 138).

8 Also in ENGLAND, it has been said to be rather doubtful in general whether independent personal securities with time limits follow identical rules as applicable to dependent securities (cf. *City of London v. Reeve & Co Ltd* [2000] C.P.Rep 73 (CFI)). However, the inclusion of a date of expiration is regarded as a vital statement in an independent security, especially in commercial practice (cf. *Goode*, Commercial Law 981); it is thought to be generally accepted practice that a claim for payment under such a security has to be made before it expires (cf. *Gorton*, Independent Guarantees 250).

9. The analogous application of the rules on dependent securities is also excluded in FRANCE (*Simler* nos. 951 ss.). Because of its autonomous character, the duration of the independent security does not depend on the terms of the underlying obligation. Contrary to the dependent security, the expiry of the independent security discharges entirely the provider of independent security from its obligation (*Simler* nos. 952 and 955). Beyond these two basic assertions, rules of general civil law are applicable to the contract of independent security (*Simler* no. 953).

10. In GERMANY independent securities are in general limited in time by the parties (Staudinger/*Horn* no. 205 preceding §§ 765 ss.; *Canaris*, Bankvertragsrecht no. 1126; *Graf von Westphalen* 50, 113). If an express agreement is missing, a limitation may be derived from other contractual stipulations by interpretation as well as from the circumstances (Staudinger/*Horn* no. 207 preceding §§ 765 ss.). Whether the demand has to be made or the secured event has to occur before expiration of the agreed time depends on the stipulation of the parties (*Canaris*, Bankvertragsrecht no. 1126). The corresponding rule for dependent securities in GERMAN CC § 777 is not applicable, so that after expiration of an agreed time the provider of independent security may refuse payment (GERMAN CC §§ 163, 158 para 2; Staudinger/*Horn* no. 205 preceding §§ 765 ss.; cf. also *Hadding, Häuser and Welter* no. 712; in favour of the application of § 777 MünchKomm/*Habersack* no. 19 preceding § 765); consequently, an additional period as according to § 777 para 1 sent. 2 is not available, unless the contract has to be interpreted otherwise (cf. Staudinger/*Horn* no. 206 preceding §§ 765 ss.).

11. In ITALY the majority of recent court decisions (Cass. 21 April 1999 no. 3964, RN 1999 1271; Cass. 1 June 2004 no. 10486, Assicurazioni 2005 177; Cass. 31 July 2002 no. 11368, BBTC 2003 II 245; CFI Milano 2 July 2004, BBTC 2004 II 620) and writers regard the statutory provision of CC art. 1957 para 1 on time limits for dependent personal security

to be inapplicable to independent security (*contra* Bianca 520; cp. also *Portale*, Fideiussione 1070 s.). However, opinions widely diverge as to the alternative solution of the issue. The Supreme Court refers to the interpretation of the contract of security to find out whether the parties wanted or did not want the application of CC art. 1957 to independent security. The opinions of legal writers are quite diverse: According to one opinion based on CC art. 1340, an independent security is subject to a general implicit time limit to be derived from commercial customs; if there is no commercial custom, the time limit shall be derived from the nature of the contract according to CC art. 1374 (*Mastropaolo* 227). Another opinion considers that, unless a time limit has been agreed by the parties, according to CC art. 1183 no. 1 the judge must fix a reasonable one, which could be a six months period, according to art. 4 of the Uniform Rules for Contract Guarantees of 1978 (*Bonelli*, Le garanzie bancarie 61).

II. Independent Securities without a Time Limit

12. In BELGIUM as well as in FRANCE, independent securities without time limits can be terminated by one of the parties after giving notice (BELGIUM: *Vliegen* 202; *contra T'Kint* no. 859; FRANCE: *Simler* no. 952). Without special contractual stipulation, unlimited contracts of independent security may in GERMANY not be terminated in general (Staudinger/*Horn* no. 209 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 713; *Canaris*, Bankvertragsrecht no. 1155). But since securities are long-term relations (*Dauerschuldverhältnisse*, cf. *Hadding, Häuser and Welter* 713; *contra*: *Canaris*, Bankvertragsrecht no. 1133a at p. 772), they must be terminable to re-establish freedom from contract at least under special circumstances: If a security has been assumed for a long period of time or even without any time limit, it may be terminated if there is exceptionally a grave reason. Furthermore, the contract of security may be open to the interpretation that it impliedly contains a right of termination. In both these cases any termination may only be effective *ex nunc* (*Hadding, Häuser and Welter* 713; cf. Staudinger/*Horn* no. 209 preceding §§ 765 ss.). In PORTUGAL the rules for dependent securities are applicable to independent securities without a time limit in respect of an eventual release according to CC art. 648 lit. e) (*Pinheiro* 450).

(Dr. Poulsen)

Article 3:107: Transfer of Security

The creditor's right to demand performance from a security provider can be assigned, except in the case of an independent personal security on first demand.

Comments

A. The Issues

1. One must distinguish between two closely related issues, *i.e.* the transfer of the proceeds of a security by contractual assignment, on the one hand (*infra* no. 2) and the transfer by contractual assignment of the creditor's right to demand performance, on the other hand (*infra* no. 3 ss.).

B. Transferability of Proceeds

2. The transferability or assignability of the proceeds which result from the performance of the independent security upon the creditor's demand, is everywhere affirmed (cf. UN Convention on Independent Guarantees of 1995 art. 10). This is in line with the principle of free disposition. On this, therefore, no rule is needed. The consequences of an assignment are governed by PECL Chapter 11.

C. Transferability of the Demand for Performance

3. Article 3:107 deals only with the second issue which in part is quite controversial and therefore requires regulation.

4. Many international instruments prohibit transfer of the creditor's right to demand performance, unless otherwise agreed by the parties (UN Convention on Independent Guarantees of 1995 art. 9; UCP 500 (1993) art. 48; ICC Rules for Demand Guarantees art. 4; ISP98 rule 6.01 lit. a.). The reason for this deviation from the general principle that one can freely dispose of rights is the fear that a new creditor as transferee of an independent security may abuse the right to demand performance. However, as a general assumption that fear appears to be unfounded. Moreover, to exclude transferability of the right to demand performance practically would prevent the assignee of the claim for proceeds from making use of the assigned right to the proceeds.

5. It goes without saying that the parties may guard against the fear of abuse of the security by agreeing that the right to demand performance is to be not transferable (cf. UCP 500 (1993) art. 48 and ICC Rules for Demand Guarantees art. 4). In the present Rules such a clause is authorized by Article 1:103.

6. The more risky type of an independent security, the security on first demand, is declared to be non-transferable by Article 3:107. This exception is justified by the fact that an independent security on first demand is a rather risky instrument because the security provider may not even invoke its personal defences and exceptions (cf. Article 3:103 (3)). Article 3:107 therefore seeks to strike an adequate balance between the general principle that, as a rule, everybody can freely dispose of its rights, on the one hand, and means of defence against potential risks of abuse, on the other hand. However, the parties may deviate from this rule and allow assignment (cf. Article 1:103).

7. Finally, it is necessary to distinguish between straight and qualified demands for performance. A straight demand is one where the creditor merely needs to put forward its demand, without additional declarations or documents. The assignment of such a straight demand is risky since the assignee merely has to submit the agreed demand for performance. In these cases the debtor and the security provider may wish to protect themselves against abuse of the security by an unknown third person by excluding assignability of the security (*supra* no. 5).

8. The risks of a straight demand for security are avoided or, at least, considerably mitigated, if the independent security is qualified beyond a simple demand for performance. This is achieved if the parties agree that the demand as such must be accompanied by additional documents or declarations which would show that the substantive conditions for invoking the demand are present. The creditor as the direct partner of the debtor in the underlying transaction would be best qualified to produce the agreed-upon documents required by the independent security; by contrast, an assignee of the claim for the proceeds usually will be a stranger to the underlying transaction. The optimal way out of this dilemma would be if the assignee of the proceeds would cooperate with the assignor and require the latter to furnish in case of need the required documents which according to the terms of the security must be produced. In other words, this problem cannot be solved by a general rule, but must be left to the provident agreement between the assignee and the assignor.

9. The problem of realising after an assignment a qualified demand for performance will, of course, be avoided if the assignor does not only assign its claim for proceeds but transfers also the claims arising from the underlying transaction.

National Notes

1. In most member states the contractual transfer of a security is a very controversial issue. The following national notes deal with its several aspects: first, the assignment of the proceeds (*infra* I); then, the assignment of the security right (*infra* II); thereafter, with the assignment of the secured obligation (*infra* III); and finally, with the combined assignment of the security right and of the secured obligation (*infra* IV).

I. Assignability of Proceeds

2. In all member states the assignability of the proceeds of the security contract is admitted unanimously (AUSTRIA: Avancini, Iro and Koziol/*Koziol* II no. 3/107; *Jud*/*Spitzer* 397; DENMARK: *Andersen*, Kaution og bankgarantier 59 s.; ENGLAND: *Jack, Malek and Quest* no. 10.34; GERMANY: BGH 12 March 1984, BGHZ 90, 287, 291; *Graf Westphalen* 149; FRANCE: *Simler* no. 886; ITALY: *Bonelli*, Le garanzie bancarie 68 s.; *Calderale*, Demand guarantees 130; NETHERLANDS: *Pabbruwe*, Bankgarantie 65; SPAIN: *Carrasco Perera a.o.* 366).
3. Even if the parties exclude the assignability of the security right, this prohibition may be interpreted narrowly as allowing the transfer of the right to the proceeds to the assignee (FRANCE: CFI Paris 22 Feb. 1989, D. 1990, Somm.Comm. 204, note *Vasseur*).

II. Assignment of the Security Right

4. Whether an assignment of the security right including the right to demand performance is possible and under which conditions is very controversial. The controversy centers around the issue whether or not that right is a highly personal one and therefore is transferable at all. It is also open to doubt whether the consent of the security provider (*infra* no. 9) and also that of the debtor is required (*infra* no. 10).

A. Assignability Denied

5. BELGIAN, DANISH, FRENCH, GREEK and SWEDISH legal writers do not permit an assignment of the security right (BELGIUM: RPDB, Les garanties bancaires autonomes no. 48 at 568; *Van Malderen* 3203; *Dehouck* 2; *contra*: *Vliegen* 205-207 and 213-215; DENMARK: *Pedersen*, Bankgarantier 85; FRANCE: *Simler* no. 886; GREECE: CC art. 455; *Georgiades* 6 no. 157; *Gouskou* 91 ss.; SWEDEN: *Walin*, Borgen 52, 87). Two reasons are given. First, even an independent security functions like a security and therefore has to be accompanied by transfer of the underlying obligation. Second, the obligation of a provider of an independent security is regarded as highly personal, so that the right to demand its performance cannot be transferred to another creditor without the agreement of the security provider (*infra* no. 9).

B. Assignability Affirmed

6. In ENGLAND and GERMANY, in effect, such a personal character of the security provider's obligation is in general denied. In both countries the right to enforce an independent security is assignable (ENGLAND: cf. *Re Perkins, Poyser v. Beyfus* [1898] 2 Ch 182 (CA); *British Union and National Insurance Company v. Rawson* [1916] 2 Ch 476 (CA); Halsbury/*Salter* para 353; GERMANY: BGH 25 Sept. 1996, ZIP 1997, 275, 278; 20 June 1987, NJW 1987, 2075; 12 March 1984, BGHZ 90, 287, 291; Staudinger/*Horn* no. 225 preceding §§ 765 ss. with further references).

C. *Assignability Controversial*

7. In other countries, the matter is controversial: In AUSTRIA, the Supreme Court has allowed it in two recent cases (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 4; 18 Jan. 2000, SZ 73 no. 10), but an influential writer has severely criticised this position (Avancini/Iro/*Koziol* no. 3/108-3/110). In ITALY, the opinions of writers are divided (against assignability *Dolmetta and Portale* 91 s.; *Laudisa* 16; *pro*, *Bonelli*, Le garanzie contrattuali 233 s.); but the famous Supreme Court decision legitimating independent personal security in ITALIAN law concerned a case where the right to demand performance had been assigned (Cass. plenary decision 1 Oct. 1987 no. 7341, Giur.it. 1988 I, 1, 1204). In the NETHERLANDS, courts and writers are also divided (against transferability CA Amsterdam 21 Feb. 1991, NJB 1992 no. 141; *Boll* 103; *Pabbruwe*, Bankgarantie 66; for transferability CFI Haarlem 12 Jan. 1993, NJB 1995 no. 53; *Mijnssen* 66-69). In PORTUGAL, although case law seems to accept transferability (STJ 17 April 1970, BolMinJus no. 196, 275), writers tend to deny it because of the nature of the obligation (*Pinheiro* 451).

D. *Additional Requirements*

8. Several countries allow assignability if the security provider agrees to it (*infra* no. 9); other voices even demand the debtor's consent (*infra* no. 10).
9. According to FRENCH case law, an assignment is valid if the provider of independent security expressly agrees to the transfer (Cass.com. 7 Jan. 1992, Bull.civ. 1992 IV no. 3 p. 3). This has recently been confirmed by the legislator (CC new art. 2321 para 4 of 2006). The security provider's consent can also be given by the clause "pay to order" in the security contract. A merely implied agreement of the security provider, resulting from the circumstances in the relationship between the security provider and a new creditor, does not seem to be sufficient. According to FRENCH case law the transfer of the security right, in contravention to a clause prohibiting the transfer constitutes a fraud (CA Paris 23 Sept. 1988, D. 1989, Somm.Comm. 156). The security provider is then discharged from the performance of the independent security. In PORTUGAL in the corresponding case of documentary credits an eminent writer considers that the consent of the security provider is always necessary because not only a credit, but the complete contractual position is transferred (*Vaz Serra*, Note on acordão de 16. 6. 1970, at 176).
10. Some DUTCH, ITALIAN and GREEK authors think that an assignment is only valid if the debtor agrees to the transfer (ITALY: when the possibility to transfer the security is convenient for the debtor, its consent suffices according to *Calderale* 236; references in *De Nictolis* 151; GREECE: *Georgiades* 6 no. 157; *Gouskou* 91 ss.; NETHERLANDS: *Ensink* 553 – both debtor and security provider must agree).

E. *Consequences of an Effective Assignment*

11. In GERMANY where an assignment of the security right as such is allowed (*supra* no. 6) it has been held that the assignment does not *per se* also comprise the conditions for invoking the security; however, the assignor is obliged to request the assignee to observe

those conditions and would otherwise be liable for damages (BGH 25 Sept. 1996, ZIP 1997, 275, 278 s.).

12. The GERMAN Supreme Court dealt in one case with the question which counter-claims can be set off after an assignment. It held that counter-claims arising from the relationship between the original creditor and the debtor cannot be set off against the security right, even if such claims had been assigned to the security provider (BGH 22 April 1985, BGHZ 94, 170 s.); by contrast, liquid counter-claims of the security provider can be set off against the assignee's claim under the assigned security right (*ibidem* p. 172 s.).

13. AUSTRIAN courts have dealt with the question from whom the debtor may demand restitution if after the security provider's performance it turns out that the independent security was invalid. Generally, the debtor may claim restitution from the original creditor, *i.e.* the assignor (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 4; and 18 Jan. 2004, SZ 73 no. 10 p. 48 ss. with careful reasoning and broad references). However, if there is a clear case of abuse of rights, especially an obvious disproportion between the assignee's personal interests and the interests of the other persons involved since it is clear that an underlying obligation does not (or no longer) exist and the assignee is aware of its defective title, then restitution must be claimed from the assignee as the new creditor (OGH 23 May 2005, ÖBA 2005, 902, 905 *sub* no. 5 b). These rules correspond to those that apply when no assignment has taken place (cf. national notes on Art. 3:105 no. 7).

III. Assignment of the Secured Obligation

14. For the more frequent case of an assignment of the secured obligation the majority of authorities in ENGLAND, FINLAND, FRANCE, GERMANY and ITALY state that such an assignment does not automatically extend to an independent security. The numerous national provisions and rules under which an assignment extends to *accessory* rights do not apply to an independent security. PECL Art. 11:204 lit. (c) codifies this rule and requires specific assignment (FINLAND: LDepGuar § 9, RP 189/1998 rd 41; FRANCE: CC new art. 2321 para 4 of 2006; earlier: *Simler* no. 887; *contra* Malaurie and Aynès/*Aynès and Crocq*, Les sûretés no. 347 : the transfer of the independent security occurs automatically with the transfer of the underlying obligation; GERMANY: Staudinger/*Horn* no. 227 preceding §§ 765 ss.; *Hadding, Häuser and Welter* 717; but the interpretation of an assignment may show that the transfer is intended to comprise also the rights arising from the independent security (BGH 22 April 1985, BGHZ 94, 167, 169); GREECE: *Gouskou* 91; *Demetriades* 54; ITALY: *Laudisa* 17; in ENGLAND this rule applies both to dependent and independent securities, cf. *O'Donovan and Phillips* no. 10-178).

IV. Combined Assignment of Security Right and Secured Obligation

15. Both AUSTRIAN courts and writers allow a combined transfer of both obligations, the debtor's contractual payment and the security provider's obligation, since this does not aggravate the situation under the independent security with respect to those obligations, as agreed by the parties (OGH 29 Jan. 1997, ÖBA 1997, 826; Avancini/Iro/*Koziol* no. 3/111). FRENCH law allows a combined assignment only if the parties so agree (CC new art. 2321 para 4 of 2006 "*Sauf convention contraire, cette sûreté ne suit pas l'obligation*

garantie"). In the NETHERLANDS, prevailing opinion also allows a combined assignment (CFI Utrecht 10 Sep. 1997, JOR no. 34; *Mijnssen* 69-73; *contra Pabbruwe*, Bankgaranties 66, although with a reservation at 67).

(Hauck/Drobnig)

Article 3:108: Security Provider's Rights After Performance

Article 2:113 applies with appropriate adaptations to the rights which the security provider may exercise after performance.

Comments

A. General Remarks

1. Chapter 3 does not establish explicit rules on the rights which the provider of an independent personal security may exercise after having performed the creditor's demand. Instead, Article 3:108 refers to Article 2:113 which deals with a similar issue, *i.e.* the rights which the provider of a dependent personal security may exercise after performance to the creditor. However, in view of the differences between dependent and independent securities the rules of Article 2:113 are to apply only "with appropriate adaptations".

2. The general justification for this rather novel approach is that the true differences between dependent and independent personal securities reside in the prerequisites for demanding performance from the security provider (cf. Articles 3:102-3:104). However, after the security provider has performed to the creditor, its position towards the debtor and towards other security providers is very akin to that of the provider of a dependent security. In order to simplify and to achieve internal consistency it is justified to apply essentially the same rules to the after-performance stage of both instruments of personal security.

3. These Comments deal successively:
– first, with the security provider's rights against the debtor, *i.e.* its claim for reimbursement against the debtor (*infra* B), its subrogation to the creditor's rights against the debtor (*infra* C) including the creditor's personal and proprietary security rights (*infra* D);
– and second, in case of a mere part performance with the rank of the security provider's rights as against those of the creditor (*infra* E).

4. Cf. also Comment A, especially no. 2, and Comment B on Article 2:113.

B. Security Provider's Claim for Reimbursement

5. The first sentence of Article 2:113 (1) lays down the security provider's right to be reimbursed by the debtor. Obviously, the same right pertains to the provider of independent security who had assumed on the debtor's instruction the security and has performed it.

6. Obviously, a claim for reimbursement presupposes that the security provider furnished the security against a promise to be reimbursed. While this is the normal situation, exceptionally a security may have been granted gratuitously; then, of course, there is no recourse against the debtor. Cf. Comment D on Article 2:113.

7. Another equally peculiar and rare situation is present if the debtor is incapable or, as a purported legal entity, in truth non-existent, cf. Comment G on Article 2:113.

8. The debtor may be able to set off counterclaims against the claim of the provider of an independent security for reimbursement. In particular, the debtor may invoke claims arising from non-performance (in the wide sense of the word) by the security provider (cf. Comment H to Article 3:102).

9. In addition, cf. Comments B to D to Article 2:113.

C. Subrogation to the Creditor's Rights against the Debtor

10. In order to strengthen the position of the provider of a dependent security, the second sentence of Article 2:113 (1) subrogates the provider of a dependent security to the creditor's rights against the debtor. In conformity with the laws of some member states, this subrogation is extended by Article 3:108 *juncto* Article 2:113 (1) to the provider of an independent security.

11. Of course, this subrogation is subject to the same exclusions that affected the creditor's original rights against the debtor. On exclusions, cf. Comment D on Article 2:113.

12. In addition, cf. succeeding Comment D.

D. Subrogation to the Creditor's Personal and Proprietary Security Rights

13. The security provider's subrogation to the creditor's rights against the debtor also extends to the personal and proprietary security rights which the creditor holds against the debtor or a third person. This subrogation comprises both the "dependent and independent personal and proprietary security rights", as Article 2:113 (3) expressly confirms. On the justification for not limiting this rule to dependent security rights, but extending it to independent security rights and further details, cf. Comment F to Article 2:113. Article 3:108 has the specific effect of extending the aforementioned subrogation to providers of an independent security.

E. Creditor's Priority in Case of Part Performance

14. The rule laid down in Article 2:113 (2) applies *mutatis mutandis* also to the case of partial performance of an independent security. Cf. Comment E on Article 2:113.

National Notes

I. Introduction

1. The provider of independent security may acquire two sets of rights by reason of its performance under the security: there may be claims for reimbursement against the debtor (*infra* nos. 2 ss.); and, in addition, the security provider may be subrogated to the creditor's secured claim against the debtor (*infra* nos. 8 ss.) and to the security rights securing this claim (*infra* nos. 13 s.).

II. Reimbursement

A. Legal Bases for Reimbursement

2. The different jurisdictions use four different bases for the right to reimbursement.

a. Mandate

3. In AUSTRIA, GERMANY, GREECE, ITALY, the NETHERLANDS and PORTUGAL the basis is mandate. In GREEK law the provisions on mandate (CC art. 722) are applied by analogy to the relationship between provider of independent security and debtor (*Georgiades* § 6 no. 125). The same is true according to the majority of ITALIAN scholars who base the reimbursement of the provider of independent security on an action *mandati contraria* (*Giusti* 346; for a summary of other views, which mainly apply by analogy the rules on dependent personal security, see *De Nictolis* 95; against this view *Calderale*, Fideiussione 265). In AUSTRIAN, DUTCH, GERMAN and PORTUGUESE law the relevant provisions on the principal's obligation to reimburse the agent's outlays (AUSTRIAN CC § 1042; DUTCH CC art. 7:406 para 1; GERMAN CC § 670; PORTUGUESE CC art. 1167 lit. c) are directly applicable. Therefore the debtor as principal is obliged to reimburse the expenses incurred by the provider of independent security in fulfilling his obligation against the creditor. However, only such expenses are covered which the provider of independent security reasonably could regard as necessary, so that the security provider is not entitled to reimbursement if it did not act as directed by the debtor as principal (Staudinger/*Horn* no. 329 preceding §§ 765 ss.). In AUSTRIA, it has been held that the claim for reimbursement comes into existence, under a suspensive condition, already when the independent security is granted and can therefore be secured as of that time (OGH 6 April 2005, ÖBA 2005, 649, 650).

b. Analogy to Dependent Security

4. In FINLAND and SPAIN the right to reimbursement is based upon an analogy to the relevant specific provisions on dependent securities (FINNISH LDepGuar §§ 28 ss.; SPANISH CC art. 1838; *Sanchez-Calero*, El contrato autónomo 401). Cf. national notes on Art. 2:113 nos. 1 ss.

c. Relationship between Debtor and Provider of Independent Security

5. In BELGIUM, ENGLAND and FRANCE the right to reimbursement is not based on mandate. In BELGIAN and FRENCH law the right is said to arise from the agreement between the debtor and the provider of independent security; the latter performs its own obligation (BELGIUM: RPDB, Les garanties bancaires autonomes no. 173 at 605; *Vliegen* nos. 206, 220-221; *Wymeersch*, Garanties 98; FRANCE: *Simler* no. 995). In ENGLISH law reimbursement is granted because the provider of independent security has acted at the request and for the benefit of the debtor (*Duncan Fox & Co v. North and South Wales Bank* (1880) 6 App.Cas. 1, 13-14 (HL); *Sheffield Corpn v. Barclay* [1905] AC 392 (HL); *O'Donovan and Phillips* no. 12-21; Chitty/*Whittaker* no. 44-114).

d. Operation of Law

6. In DENMARK and SWEDEN the right to reimbursement arises by operation of law without a specific legal justification being named (DENMARK: *Pedersen*, Bankgarantier 70; SWEDEN: *Walin*, Borgen 198).

B. Differences between Dependent and Independent Personal Securities

7. Although the right to reimbursement in the case of an independent security is rather similar to the respective right in the case of a dependent security, there are situations where the solutions may differ in some member states: Firstly, if an independent personal security secures the debt of a minor, the latter will not be under any obligation to indemnify the provider of independent security (ENGLAND: Chitty/*Whittaker* no. 44-114; *O'Donovan and Phillips* no. 12-21; for the position in the case of a dependent personal security cf. national notes to Art. 2:113 no. 36). Secondly, if the obligation of the provider of an independent security surpasses that of the debtor, the security provider has nevertheless a right to full reimbursement (ENGLAND: Chitty/*Whittaker* no. 44-114; *O'Donovan and Phillips* nos. 12-21 s.; FRANCE: *Simler* no. 1001).

III. Subrogation to Creditor's Personal Rights against the Debtor

8. The provider of an independent personal security is not in all member states subrogated to the creditor's personal rights against the debtor, if any; moreover, even where such a subrogation takes place, it is based upon various grounds.

A. No Subrogation unless Stipulated for by the Parties

9. In BELGIUM, GERMANY, the NETHERLANDS, PORTUGAL and SPAIN, according to prevailing opinion there is no subrogation by operation of law. The relevant provisions for dependent personal securities (BELGIAN CC art. 2029; DUTCH CC art. 6:142; GERMAN CC § 774; PORTUGUESE CC art. 644; SPANISH CC art. 1839) are said to be inapplicable to independent personal securities (BELGIUM: RPDB, Les garanties bancaires autonomes no. 173 at 605; *Wymeersch*, Garanties 97; *contra* CFI Gand 12 Feb. 1999, RDC 1999 727, note *Buyle and Delierneux* in a controversial case where an independent security was assumed by a consumer acting outside of any professional activity and intended to grant a dependent security; GERMANY: Staudinger/*Horn* no. 228 preceding §§ 765 ss.; MünchKomm/*Habersack* no. 19 preceding § 765; *contra*: *Canaris* no. 1112; NETHERLANDS: CA Amsterdam 18 Aug. 2000, JOR 2000 no. 205; Dutch Business Law § 6.05 [4] [c]; PORTUGAL: STJ 13 Nov. 1990, CJ XV, V-187; SPAIN: *Sanchez-Calero*, El contrato autónomo 401). In BELGIUM it is not possible either to base subrogation on the general rules on subrogation laid down in CC art. 1251 (RPDB, Les garanties bancaires autonomes no. 174). In GERMANY, however, in most cases the parties will have – impliedly – stipulated for the transfer of the secured obligation; in the absence of such a stipulation the beneficiary may in view of the security purpose be obliged to assign the secured obligation (Staudinger/*Horn* no. 228 preceding §§ 765 ss.).

B. *Subrogation by Analogy to Dependent Personal Security*

10. In AUSTRIA, FRANCE, GREECE and ITALY prevailing opinion bases subrogation on the analogous application of the relevant provisions for dependent personal securities. These provisions may be of a general nature (AUSTRIAN CC § 1358; OGH 9 Dec. 1997, SZ 60 no. 266, p. 694, 698-700; Avancini/Iro/*Koziol* no. 3/64; FRENCH CC art. 1251 no. 3; *pro Simler* no. 1001; *contra Gavalda and Stoufflet* no. 29) or may be specific for dependent personal securities (GREEK CC art. 858; ITALIAN CC art. 1949; but sometimes the subrogation is thought to be based upon the more general provision of CC art. 1203 no. 3: *Portale*, Fideiussione 1071; *Calderale*, Fideiussione 265, 267 s.). In GREEK law, however, there is a subrogation only if the provider of independent security has a right of reimbursement against the debtor or if it can prove justified *negotiorum gestio* (CC art. 736; *Georgiades* § 6 no. 126 no. 19; CA Athens 3573/1970, EEN 38, 655-656).
11. Also in DANISH and SWEDISH law the provider of independent security is subrogated to the creditor's rights against the debtor (DENMARK: *Pedersen*, Kaution 86; SWEDEN: *Walin*, Borgen 183 ss., 198 ss.), since especially in SWEDEN (as well as in FINLAND) the independent personal security is more or less identified with the dependent personal security (cf. *supra* Introduction to Chapter 3 no. 3).

C. *Subrogation by Nature of the Independent Personal Security*

12. In ENGLISH law subrogation results from the nature of the contract of independent personal security and is founded on equitable principles (*Morris v. Ford Motor Co Ltd* [1973] QB 792 (CA)). Subrogation in this context does not amount to an assignment of the (legal) right of action to the security provider (*Morris v. Ford Motor Co Ltd, supra*; *John Edwards & Co v. Motor Union Insurance Co* [1922] 2 KB 249, 253 (CFI)). In the absence of an agreed assignment proper, rights against the debtor can only be pursued in the creditor's name (*Morris v. Ford Motor Co Ltd, supra*; *Esso Petroleum v. Hall Russell & Co* [1989] AC 643, 674 (HL)). The security provider may upon tender of a proper indemnity as to costs compel the creditor to allow the use of its name (*John Edwards & Co v. Motor Union Insurance Co, supra*; *Yorkshire Insurance Co v. Nisbet Shipping Co* [1962] 2 QB 330, 339 (CFI); see generally *O'Donovan and Phillips* nos. 12-357 ss.), either in separate proceedings or by joining the creditor as defendant in the action against the debtor (cf. *Mitchell* 37).

IV. *Subrogation to Security Rights Held by the Creditor*

13. In addition to subrogation to the creditor's personal rights against the debtor, in AUSTRIA, DENMARK, FINLAND and FRANCE the provider of independent security is equally subrogated to the personal and proprietary security rights held by the creditor, as a surety is (AUSTRIA: CC § 1358 sent. 2; DENMARK: *Pedersen*, Bankgarantier 83 ss.; FINLAND: LDepGuar § 30; FRANCE: *Malaurie* and *Aynès*, Les obligations no. 1213). In ENGLAND, the provider of independent security is thought to be in a similar situation (cf. *O'Donovan and Phillips* nos. 12-357 ss.); however, here the provider of independent security cannot enforce the creditor's rights in his own name, but is merely entitled to sue in the name of the creditor, cf. preceding no. 12.

14. According to GREEK CC art. 458 and GERMAN CC §§ 412, 401 – if the secured obligation is transferred according to the preceding rules (*supra* nos. 9 ss.) – the provider of independent security is *ex lege* subrogated only to the accessory security rights held by the creditor (*Georgiades* § 6 no. 126). Independent security rights have to be transferred by agreement of the parties.

V. *Part Performance: Priority of Creditor's Remaining Rights – Art. 2:113 (2)*

15. In case of part performance FRANCE and DENMARK attribute priority to the creditor's remaining rights over the rights of the provider of independent security (FRENCH CC art. 1252; cf. *Simler* nos. 592 and 1001; DENMARK: *Pedersen,* Kaution 87).
16. In GERMANY, opinions on the corresponding application of the relevant provision for dependent security are divided (cf. Staudinger/*Horn* no. 228 preceding §§ 765 ss.), but a majority refuses it. Therefore, in case of partial payment, the relevant rule in CC § 774 para 1 sent. 2 does not apply (Staudinger/*Horn* § 774 no. 61)
17. There is no equivalent to the above-mentioned FRENCH or DANISH rule in ENGLISH law, since it is the prevailing view that subrogation only occurs if the creditor is paid in full (cf. more fully national notes on Art. 2:113 no. 32).

VI. *Application to Documentary Credits*

18. The issuing bank's right to reimbursement in (stand-by) letter of credit transactions is evident (BELGIUM: *De Vuyst* nos. 96-97 at 53-54; ENGLAND: *Goode*, Commercial Law 954; FRANCE: *Ripert and Roblot* no. 2428; GERMAN CC § 670; *Schütze* no. 116; *Canaris* no. 968; GREEK CC art. 722; *Georgiades* § 11 no. 85; PORTUGAL: *Vaz Serra*, Note on acordão de 16. 6. 1970, at 173).
19. It is less clear whether an additional right of subrogation exists. In ENGLISH and GREEK law this question is not discussed since the paying bank acquires a legal pledge on the goods represented by the bill of lading (ENGLAND: *Sale Continuation Ltd v. Austin Taylor* & *Co Ltd* [1968] 2 QB 861 (CFI); *Jack, Malek and Quest* nos. 11.3 s.; GREECE: DL 17 July/18 Aug. 1923 art. 25 § 2). Similarly, in GERMANY subrogation is denied because the bank is regarded as sufficiently secured by the principal's advance (CC § 669) and the security rights agreed upon in the bank's standard terms (*Schütze* no. 118; *Canaris* nos. 968, 970).

(Bisping/Böger)

Chapter 4:
Special Rules for Personal Security of Consumers

Introduction

1. The Issue

The adequate protection of consumers who assume personal securities is one of the most pressing demands in our days. In virtually all member states, although to different degrees, "strong" creditors have pressed economically "weak", especially non-professional debtors to provide security for their credits by furnishing personal security. Typically, this class of debtors is not in a position to appeal to professional security providers. Instead, they may persuade their spouse or parents or children to assume a personal security, even if these persons are in a comparably weak economic position and are likely to lack business experience.

Depending upon the strength and awareness of consumer organizations, the afore-mentioned practices have evoked more or less vivid, numerous and forceful reactions first by the courts and later also legislators. The national laws of the member states have very differently reacted to this issue – from complete non-action on the part both of the courts and the legislators to rather broad enactment of comprehensive and detailed rules, especially in FRANCE. These differences are reflected by the national notes.

Therefore, there is clearly a need to formulate, on the basis of experiences in the member states, appropriate European rules on the protection of "weak" providers of personal security.

Whether these or similar rules should be extended to third party providers of proprietary security is a different matter and may be addressed in future rules on proprietary security.

2. General Protective Rules in the Principles of European Contract Law

Two rules of PECL are relevant in the present context. One is the general rule requiring each party to act in accordance with good faith and fair dealing – a general obligation which cannot be excluded or limited by the parties (PECL Article 1:201). While such a very general obligation does not assist very much in the solution of specific cases, it indicates at least a general attitude which is to inform the application of all rules of PECL (cf. also *infra*).

A specific protective rule is contained in the chapter on the validity of contracts. PECL Article 4:109 deals generally with the protection of a "weak" party. Such weakness, which must have existed at the time of conclusion of the contract, may be due to a dependency on or a relationship of trust with the other party; economic distress or urgent needs; or personal weaknesses such as improvidence, ignorance, inexperience or lack in bargaining skills (Article 4:109 (1) (a)).

In addition to these objective or subjective factors on the part of the weak person, there must have existed additional subjective factors on the part of the other contracting party: the latter must have known or ought to have known of the aforementioned factors on the part of the weak party and in view of the circumstances and the purpose of the contract must have taken advantage of the weak party's situation "in a way which was grossly unfair" or must have taken an excessive benefit (Article 4:109 (1) (b)).

The weak party's primary remedy in the above-mentioned situation is the avoidance of the contract (Article 4:109 (1)). However, alternatively the weak party is entitled to ask a court to adapt the contract so as to bring it in accordance "with what might have been agreed had the requirements of good faith and fair dealing been followed" (Article 4:109 (2)).

After the weak party has sent a notice of avoidance, the other party may apply to the court for adaptation of the contract (Article 4:109 (3)).

3. Specific Protective Rules for Personal Security by Consumers

Following the DUTCH model, it appears to be most useful to collect all special rules on consumer security providers in a separate part in order to facilitate access to those rules. Moreover, in this way a few relevant general rules can best be placed in their proper context. A further advantage is that all rules for "normal" personal securities, especially those for commercial transactions can be presented consecutively and consistently.

These rules specifically designed for the protection of consumer providers of personal security fall into four categories. The first is the definition of the consumer which has been placed into the general introductory rule on definitions (Article 1:101 (g)) and the scope of application of the special protective rules (Article 4:101). In the second category the applicable rules are designated (Article 4:102 and 4:104). The third and most important category is devoted to the protection of the consumer in the course of its assuming the security (Articles 4:103 and 4:105). And the fourth category deals with the restricted effects of a consumer's personal security (Articles 4:106-4:108).

4. Terminology

The definition of the term "consumer" and the reasons for using this term have been set out in Article 1:101 (g) and the Comments to that rule (Comment nos. 49-62 on Article 1:101).

Article 4:101: Scope of Application

(1) Subject to paragraph (2), this Chapter is applicable when a security is assumed by a consumer (Article 1:101 lit. (g)).
(2) This Chapter is not applicable if
  (a) the creditor is also a consumer; or
  (b) the consumer security provider is able to exercise substantial influence upon the debtor where the debtor is not a natural person.

Comments

A. General Remarks

1. Article 4:101 delimits the personal scope of application of the special rules established in Chapter 4 for the protection of consumer providers of personal security.

2. The key term of the "consumer" is defined in Article 1:101 (g) and need not therefore be explained here.

B. Assumption of Personal Security

3. The assumption of a personal security by the security provider as against the creditor is mentioned in Article 1:101 (c). This rule makes clear that the assumption of a personal security is part and consequence of a contract. Since this contract usually – except in certain commercial relations – merely contains obligations of the security provider in favour of the creditor, the latter's acceptance of the terms offered by the security provider often is not explicit and therefore requires special regulation, cf. Article 1:104. As far as the contents of the contract is concerned, this is governed by the general principle of freedom of contract (Article 1:103). Such freedom, however, is strongly limited by Article 4:102 (2); cf. *infra*.

C. Restrictions of the Personal Scope of Application

4. Paragraph (2) of Article 4:101 restricts the application of Chapter 4 in two ways: the Chapter does not apply if either the creditor is also a consumer; or if the security provider can exercise substantial influence upon the debtor provided the latter is not a natural person.

a. The Creditor is Also a Consumer – Para (2) Lit. (a)

5. If not only the security provider, but also the creditor is a consumer, typically there is no necessity of protecting the security provider. The creditor as consumer typically is on the same level of sophistication as the security provider; usually both are weak parties. Therefore, the ordinary contract rules should apply.

6. It would be inadequate to require a typical consumer in the position of the creditor to comply with the special rules of care, duties of information and formality established by Articles 4:103 and 4:105. Due to ignorance of these requirements, many otherwise impeccable contracts of personal security would be void or at least avoidable by the security provider. That risk is inacceptable.

7. Of course, sometimes the creditor, although a consumer, may be more shrewd than the security provider and may therefore "drive a hard bargain" by imposing inequitable terms on the security provider. In such cases, the security provider may invoke the general protective rules of PECL Article 4:109 that were briefly presented in the Introduction to Chapter 4 at no. 2.

b. The Consumer Security Provider with Substantial Influence upon the Debtor (Not a Natural Person) – Para (2) Lit. (b)

8. The exclusion clause of para (2) lit. (b) is inspired by legislation and court practice in some member states. Natural persons who are closely affiliated – whether by legal bonds or by factual influence – with a company, whether or not a legal entity, do not deserve protection like a consumer. Of course, in many cases such persons, in providing a personal security for company obligations, are acting in a commercial capacity, *e.g.* as managers or directors of a company which has taken credit. However, in practice sometimes major non-commercial shareholders of such a company assume a personal security for financial obligations of the company.

9. Paragaph (2) lit. (b) uses the terms "able to exercise". It is not required that the person has in fact exercised substantial influence since it would be difficult for an outsider to determine and prove the exercise of such influence in the case at hand. Rather, decisive is the ability of the security provider to exercise such influence. This ability may rest upon legal grounds, *e.g.* as a holder of the majority of the shares. But it may also be based upon factual circumstances, *e.g.* as the younger and energetic wife of a majority shareholder. Obviously, this is a factual issue which has to be decided in the light of all the relevant facts.

10. On the application of the provision to a case of co-debtorship for security purposes, see Comment no. 13 on Article 1:106.

D. Mandatory Provision

11. According to Article 4:102 (2), Article 4:101 is a mandatory provision in favour of the consumer security provider.

National Notes

I. Scope of Consumer Protection Provisions in the Member States

1. The scope of the consumer protection provisions in the area of personal security differs between the individual member states in at least two ways. Firstly, there are different concepts of "consumer" (cf. national notes on Art. 1:101 nos. 49 ss.). Not only do the member states apply different criteria as to when a person qualifies as a consumer nor is there unanimity in general as to whether the security provider or the debtor has to be a consumer in order for specific consumer protection provisions to apply (cf. especially national notes on Art. 1:101 nos. 63-66). While within the context of these Rules it is the person of the security provider who is decisive, there is also national consumer protection legislation focussing on the person of the debtor. Such legislation is covered insofar as it indirectly provides protection also for the security provider specifically in relation to consumer matters. Secondly, not all member states embrace the general idea of these Rules, *i.e.* to apply the consumer protection provisions to all types of personal securities (on the different levels of protection of consumer security providers in the member states, as well as on future perspectives of European regulation in that subject matter, see the research project by the Centre of European Law and Politics at the University of Bremen – ZERP – in co-operation with the University of Oxford, cf. *Colombi Ciacchi*, Unfair suretyships 281 ss.; *Colombi Ciacchi* (ed.), Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity, Baden-Baden, forthcoming 2007).
2. The AUSTRIAN consumer protection provisions apply to several types of personal security, especially dependent and independent personal securities (ConsProtA §§ 25b para 2, 25c and 25d) as well as assumptions of debt or co-debtorship (§§ 25a

para 1, 25c, 25d). These provisions do not apply to contracts between an employee and an employer (§ 1 para 4); any form of security assumed by an employee securing a monetary obligation of the employer towards its creditors is forbidden and void (KautSchG §§ 1 and 4). However, the courts also apply the exception corresponding to Article 4:102 (1) (b) of these Rules (cf. *infra* no. 32) in the present context: OGH 20 Feb. 2003, ÖBA 2003, 957. For GERMAN parallels, cf. *infra* no. 22.

3. Also in BELGIUM, the main rules applicable to consumer personal securities (ConsCredA arts. 34-37) apply to all personal securities granted in order to secure debts arising from a consumer-credit agreement (not only dependent but also independent personal securities, *Forges* 331 no. 195; *Lettany* 221 no. 253 at 221).

4. Besides the general rules designed to protect the consumer, the most relevant ENGLISH and SCOTS legislation, the ConsCredA and the Consumer Credit (Guarantees and Indemnities) Regulations 1983 (cf. reg. 2), apply to both dependent and independent (*i.e.* indemnities) personal securities. Further, it seems that the assumption of debt for security purposes is equally covered, since "security" is given a very wide meaning in ConsCredA sec. 189. The UnfContTA 1977 contains a specific consumer protection provision in sec. 3, according to which a contractual term which would exclude or reduce one party's liability cannot be relied upon against a consumer (or any other person where the other party deals on its written standard terms of business). However, since the ENGLISH law of personal security typically does not protect the security provider by imposing liabilities on the creditor, but by discharging the security provider, this provision is of limited assistance against typical standard terms used by professional creditors to the disadvantage of the consumer security provider: these terms purport to preserve the liability of the security provider despite the occurrence of certain events which would in the absence of any agreement to the contrary lead to a release of the security provider, but these terms do normally not aim at the restriction or reduction of the liability of the creditor (cf. *O'Donovan and Phillips* nos. 4-160 s.). Whether also the Unfair Terms in Consumer Contracts Regulations 1999 are applicable to security transactions is open to some doubt (cf. *O'Donovan and Phillips* nos. 4-163 ss.; *Andrews and Millett*, nos. 3-036 ss.). Even if these provisions were applicable it is argued that "all monies"-clauses, *i.e.* clauses extending the security provider's obligation to all sums due by the debtor to the creditor – if written in a plain intelligible language – should not be subject to assessment under the Unfair Terms in Consumer Contracts Regulations 1999, since they are said to fall within the ambit of reg. 6 para 2 lit. a) by defining part of the main subject matter of the contract (*Hapgood* 719; for the contrary view see *O'Donovan and Phillips* no. 4-173). The banks, however, have bound themselves in no. 13.4 of the Banking Code (version March 2005) not to take unlimited personal securities by personal customers.

5. In FINLAND the Law on Consumer Protection Chap. 4 §§ 1-4 regulates the protection of consumers. According to Chap. 1 § 2a the provisions in Chap. 4 apply to the Finnish Law on Dependent Personal Securities. The type of a personal security is irrelevant in this context as the Law on Dependent Personal Securities also applies to independent personal securities – but not to those on first demand – (RP 189/1998 rd 17).

6. In FRANCE the consumer legislation, first on Consumer Credit *(Loi Neiertz 1989)* and later on all types of credit *(Loi Dutreuil 2003)* applies to dependent personal securities only (cf. respectively ConsC arts. L 313-7 ss. – in particular art. L 313-10-1 – and L 341-1 ss.).

7. The GERMAN ConsCredA that has been integrated with some modifications into CC §§ 491 ss. as of 1 Jan. 2002 is not applicable to dependent personal securities (BGH 21 April 1998, BGHZ 138, 321; Erman/*Saenger* § 491 no. 21; approvingly: *Reinicke and Tiedtke*, Bürgschaftsrecht no. 476), but by analogy to assumptions of debt for security purposes (BGH 8 Nov. 2005, WM 2006, 81; BGH 5 June 1996, BGHZ 133, 71, 77 ss.). The applicability to independent personal securities is uncertain. The GERMAN Law on the Revocation of Doorstep Transactions, that has now been integrated into CC §§ 312 ss., is according to common opinion of courts and writers generally applicable to dependent personal securities (cf. only Erman/*Saenger* § 312 nos. 28 s. with further references). The applicability to other instruments of personal security is still uncertain (cf. Erman/*Saenger* § 312 no. 30). The Law on General Terms and Conditions that was especially intended to protect from surprising or unfair clauses and has been integrated with some modifications into CC §§ 305 ss. applies to all types of contracts including contracts granting security.
8. It is assumed that the GREEK ConsProtA is to apply to every form of onerous contract (*Georgiades* § 3 no. 85). The personal security is regarded as an onerous contract since the security provider undertakes a burdensome obligation vis-à-vis the creditor (*Georgiades* § 3 no. 102). Hence, the security provider is always considered to be a consumer as defined in ConsProtA art. 1 para 4 lit. a) (except if it assumes the security as part of its profession) and for this reason is deemed to be an amateur and inexperienced, despite the fact that technically the debtor and not the security provider is the "final receiver" of goods or services (*Georgiades* § 3 no. 86). In addition, this wide meaning of the purpose of the ConsProtA speaks for the application of the consumer protective provisions to every form of security.
9. The IRISH ConsCredA covers only "contracts of guarantee" (cf. sec. 2); it seems that this term is to be understood as being restricted to dependent personal securities. Concerning the applicability of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, it seems that this must be subject to the same doubts as in ENGLISH law (cf. *supra* no. 4), since the relevant provisions on the scope of application in the IRISH regulations (reg. 3 para 1) resemble the ENGLISH provisions (reg. 4 para 1).
10. ITALIAN ConsC arts. 33-38 on abusive clauses are applicable to every contract concluded between a consumer and a professional (*Calvo* 69 ss. with reference to the previous CC arts. 1469*bis*-1469*sexies*, which have been replaced by DLgs no. 206 of 6 Sept. 2005, ConsC); therefore they apply to both dependent as well as independent personal securities (*Falcone* 86 ss.). According to the interpretation developed by the Supreme Court, even if the security provider is not a consumer, consumer protection rules should nevertheless apply if the debtor of the secured obligation is a consumer (Cass. 11 Jan. 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it. Mass. 2005, 1203).
11. In the NETHERLANDS, the new Civil Code of 1992 contains in Book 7 both general rules on personal security (arts. 7:850-7:870) and, embedded into these, some specific rules on dependent personal security assumed by consumers (arts. 7:857-7:864).
12. The PORTUGUESE Law on General Contractual Terms (DL no. 446/85 of 25 Oct. 1985) also applies to contracts granting security (STJ 28 May 2002, 1506/02 www.dgsi.pt for contracts of dependent personal security). As to the application of other consumer legislation to security providers there is neither case law nor specific

literature. The Law on the Banks' Duty of Information (DL 220/94 from 23 Aug.), however, expressly excludes in art. 2 lit. a) contracts granting security from its scope.

13. In the SCANDINAVIAN member states other than FINLAND the protection of consumer security providers is hardly regulated (very critical on this *Andersen and Møgelvang-Hansen* 39 ss., 78 ss.). However, the DANISH ContrA §§ 36 and 38a ss. and the SWEDISH ContrA § 36 *juncto* Law on Terms of Contracts in Consumer Relationships § 11 apply to both types of personal securities.

14. Although personal securities are very frequently provided by private persons in SPAIN there are no cases on the application of consumer legislation to personal securities, so that the legal situation is uncertain on this point. Literally, although a consumer security provider is not covered by the concept of consumer of Law no. 26/1984 (ConsProtA), Law no. 26/1991 on Doorstep Transactions and Law no. 7/1998 on General Contract Terms, it does fall under the one provided by the underlying EU-Directives. Again, the literal wording of Law no. 26/1984 art. 1 para 2 and art. 3 would exclude a private security provider – who by giving a personal security aims to benefit the debtor but does not receive a service as a final receiver. Since the extension of the SPANISH consumer legislations to all persons covered by the EU-Directives has been intended by the SPANISH legislator (cf. national notes to Art. 1:101 no. 61) it should be concluded that the EUROPEAN concept of consumer is adopted by SPANISH law and therefore Laws 26/1984, 26/1991 and 7/1998 shall be applicable to the contract of personal security where the security provider does not act for professional or business purposes. On the other hand, a contract of personal security does not fall under the scope of Law no. 7/1995 (ConsCredA) art. 1, the content of which corresponds to the one of Directive 87/102 on Consumer Credit (*Carrasco Perera a.o.* 92).

15. For references on exceptional situations, in which at least some member states do not apply their relevant consumer protection provisions on contracts of personal security although the security provider is a consumer, see *infra* nos. 29 ss.

II. Application of General Rules and Principles of Law

16. In most member states, protection for typically weak parties is apart from specific consumer protection provisions also derived from the application of general rules and principles of law. For protection of typically weak parties through information requirements and similar institutions based upon rules of general application see the national notes to Art. 4:103 nos. 27 ss.

17. The AUSTRIAN Supreme Court has developed three main criteria for determining whether the assumption of a dependent personal security is void as infringing good morals (CC § 879 para 2 no. 4): (1) an obvious discrepancy between the amount of the security and the economic capacity of the security provider; (2) the circumstances of the assumption of the security, including the "thinning" of the free will of the security provider due to family solidarity; and (3) the knowledge or negligent ignorance of these factors on the part of the creditor (leading case: OGH 30 June 1998, SZ 71 no. 117 at p. 125 s.; further OGH 28 June 2000, JBl. 2000, 794, 795). In 1997 the legislator enacted a specific rule for personal securities of consumers which has similar, although less stringent prerequisites, but provides for a judicial right to mitigate the obligation of the security provider (ConsProtA § 25d). On the co-existence of this provision and the former case law, cf. OGH 28 June 2000, *supra*.

18. In BELGIUM the creditor should see to it that the contract of personal security is drafted precisely, since any inaccuracy is interpreted in favour of the security provider, whereas the creditor may also be liable for it (*Van Quickenborne* no. 423). Specifically BELGIAN ConsCredA art. 38 § 3 protects the security provider for a consumer credit whose financial situation has aggravated at the time of the creditor's demand: it can apply to a judge for respites of payment in the same way as a consumer debtor could.
19. Under DANISH law, weak security providers enjoy statutory protection under the general provisions of ContrA §§ 36 and 38a ss.
20. In ENGLISH law, there have been attempts to introduce a broad concept of inequality of bargaining power which was intended to give protection amongst others to security providers in situations where the parties had not met on equal terms (cf. *Lloyds Bank v. Bundy* [1975] QB 326 (CA)). The House of Lords, however, later rejected this general principle (*National Westminster Bank v. Morgan* [1985] AC 686 (HL)). It has been argued, however, that in ENGLISH law situations in which such a principle could be relevant are to a great extent solved on the basis of the principle of undue influence (cf. national notes on Art. 4:103 no. 30). Sometimes also the application of the principle of unconscionability has been suggested, but no decision has been based in relation to securities on this concept yet (cf. *O'Donovan and Phillips* nos. 4-155 ss.).
21. In FRANCE the creditor must ascertain whether the engagement of the provider of dependent security is proportionate to its financial capacity, otherwise damages for contractual liability may fall due (principle of proportionality: Cass.civ. 6 April 2004, Bull.civ. 2004 I no. 110 p. 90). According to FRENCH consumer legislation, the consumer security provider's obligations are not enforceable if the latter's engagement was at the time of contracting obviously disproportional in respect of its financial possibilities unless its assets are sufficient at the time of performance. This protective rule on proportionality applies not only to consumers (ConsC art. L 313-10 for consumer credit), but since the «Loi *Dutreuil*» of August 2003 even if the debtor is a professional (ConsC art. L 341-4 for all credit types). Prior to this Law which extends consumer protection to all debts irrespective of their nature, the creditor could be also liable in the case of excessive engagement, but the provider of dependent security was only partially discharged under CC art. 1382 («*Macron* decision» Cass.com. 17 June 1997, JCP E 1997, II no. 1007, note *Legeais*; Cass.civ. 9 July 2003, JCP 2003, II no. 1590, note *Casey*). The damage suffered was the difference between the amount of the security and the financing capacity of the debtor. The *Grimaldi* Commission proposed to restrict this protective rule to consumers (CC proposed new art. 2305, excluding securities assumed by entrepreneurs cf. «*Nahoum* decision» Cass.com. 8 Oct. 2002, RTD civ 2003, 125 ss.; Cass.com. 25 March 2003, RD banc 2003, 207, note *Legeais*). According to this proposal the liability of the security provider was to be reduced instead of the unenforceability of the security contract or the liability of the creditor. However, this proposal was not enacted by the legislator of 2006.
22. After two interventions of the GERMAN Federal Constitutional Court (BVerfG 19 Oct. 1993, BVerfGE 89, 214 = NJW 1994, 36; BVerfG 5 Aug. 1994, NJW 1994, 2749; for former court practice cf. only *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 174-180) the GERMAN Supreme Court has developed on the basis of the rule on immoral transactions (CC § 138) a specific practice to protect security providers who assume dependent personal securities that by far exceed their financial possibilities because of their personal relationship to the debtor. Unfortunately, the two divisions of the Supreme Court

that were until December 2000 competent for personal security cases were in agreement on this target but not on the extent nor on the methods to achieve it.

23. According to the practice of the now exclusively competent division XI (for the extremely differential practice of division IX see the summaries of *Reinicke and Tiedtke*, Bürgschaftsrecht nos. 182-209; Erman/*Palm* § 138 nos. 90 ss.) dependent personal securities as well as assumptions of debt for security purpose that have been assumed vis-à-vis banks or other commercial or professional credit grantors (BGH 13 Nov. 2001, NJW 2002, 746) are presumed to be immoral if (1) the security provider assumes a personal security to an extent that extremely overcharges its actual and expected future financial situation and (2) if there is a relationship of proximity *(Näheverhältnis)* between debtor and security provider, as *e.g.* parents to children or between spouses (summary in BGH 29 June 1999, NJW 1999, 2584; BGH 4 Dec. 2001, NJW 2002, 744 – with reaction to criticism). It is presumed that under these circumstances the security provider assumed the personal security only on the basis of its emotional closeness to the debtor and that the creditor took advantage of these circumstances fraudulently (BGH 4 Dec. 2001 *supra*). In one case these rules were also applied to a dependent personal security assumed by an employee with a modest salary for a bank credit granted to its employer; the employee provided the security in the hope of protecting its workplace, a hope which quickly failed (BGH 14 Oct. 2003, ZIP 2003, 2193). It is an indication of an extreme overcharge if the security provider will probably not even be able to cover at least the agreed interest for the secured credit (BGH 29 June 1999, NJW 1999, 2588). However, the transaction is not immoral if the security provider receives a direct monetary advantage from the secured credit (BGH 29 June 1999, NJW 1999, 2584, 2588; for details reference is made to *Fischer*, WM 2001, 1056-1059; Erman/*Palm* § 138 nos. 90 ss.) or if it serves as a counter-performance for an employer's legitimate claim for damages caused by an employee in a somewhat elevated position (LAG Köln 12 Dec. 2002, EWiR 2003, 1129). Cf. also *supra* no. 2.

24. In GREECE, protection for weak providers of personal security is based upon the principle of *bona fides* laid down in GREEK CC arts. 281, 178-179, 371-372 and 288 which can also be applied for the protection of consumers (GREECE: *Georgiades* § 3 no. 80).

25. In ITALY, the principle of good faith (CC art. 1375) has been broadly applied to global securities *(fideiussioni omnibus)* by the courts in order to determine the secured obligation before Law of 17 Feb. 1992 no. 154, art. 10 introduced in CC art. 1938 the requirement that a maximum amount for the security must be fixed (Cass. 15 March 1991 no. 2790, Foro it. 1991 I 2060; Cass. 25 Aug. 1992 no. 9839, Foro it. 1993 I 2172; Cass. 7 Oct. 1993 no. 9936, Giust.civ.Mass. 1993, 1449; Cass. 28 March 1994 no. 3003, Giust.civ.Mass. 1994, 405; Cass. 14 June 1999 no. 5872, Giust.civ.Mass. 1999, 1367; *De Nictolis* 222 ss.; 322 ss. with references).

26. In PORTUGAL the principle of *bona fides* laid down in CC arts. 334, 227, 272, 475 etc. is applied also for the protection of consumers (cf. STJ 25 Nov. 1992, 81181 www.dgsi.pt; STJ 22 Feb. 2000, 995/99 www.dgsi.pt).

27. Also the SPANISH CC art. 7 which contains the principle of *bona fides* is applied for the protection of consumers.

28. In SWEDEN the general rules in ContrA § 36 *juncto* Act on Terms of Contracts in Consumer Relationships § 11 are available for the protection of weak providers of security as well.

III. Non-Applicability of Consumer Protection Provisions in Specific Circumstances

29. In certain situations some member states expressly declare – even if the security provider is a consumer – their relevant consumer protection regimes (cf. *supra* nos. 2 ss.) not to be applicable.

A. Non-Applicability if Creditor is also a Consumer

30. The most important AUSTRIAN consumer protection provisions apply only if the creditor is an entrepreneur (§ 3 para 1 ConsProtA for doorstep transactions and §§ 25a-25d ConsProtA for consumer security providers). The special legislation generally prohibiting dependent security to be furnished by an employee in favour of its employer (cf. *supra* no. 2) applies even if the employer is a consumer (§ 1 para 1 KautSchG). The GERMAN special protective rules for doorstep transactions of consumers and for consumer credit debtors apply only if the creditor is an entrepreneur (CC § 312 para 1 and § 491 para 1, respectively). Under ENGLISH and ITALIAN law, however, the applicability of consumer protection provisions to personal security transactions does not depend upon whether the creditor is not also a consumer (for the relevant criteria see national notes to Art. 1:101 no. 65 for ENGLISH law; no. 66 for ITALIAN law). The same is true in FRANCE for some provisions related to secured consumer credit (ConsC arts. L 313-7 to 313-8). But in other cases consumer provisions do not apply if the creditor is also a consumer (for all credit types: ConsC arts. L 341-1 to 341-6 requiring a «*créancier professionnel*»; for consumer credit: ConsC arts. L 313-9 and L 313-10).

B. Non-Applicability if Security Provider Has Special Relationship to Debtor Company

31. In a few countries it is expressly provided that officers of a company who assume a security covering an obligation owed by the company may not be regarded as consumers. This is so in the NETHERLANDS, provided the officer alone or together with its colleagues holds the majority of the shares and provided further it was acting in the normal exercise of the business of the company (DUTCH CC art. 7:857). While there do not seem to be any cases on this provision, some decisions on CC art. 1:88 para 5 are relevant since the latter has the same wording as the second part of art. 7:857. In one case the Supreme Court extended the scope of CC art. 1:88 para 5 to a situation where the officer held all the shares of intermediate holding companies and was also the director of them (HR 11 July 2003, NJ 2004 no. 173 at p. 1459 s. with an express reference to the corresponding provision of CC art. 7:857). In another case the Court held that there is no "normal" exercise of business if a security is granted in the context of an inter-company financial transaction between several companies "owned" by three brothers; the only effect was to redistribute debts between these companies, but it did not secure fresh capital (HR 14 April 2000, NJ 2000 no. 689 at p. 4755). The FINNISH definition of this exception is even broader since it covers, without reference to activity, not only officers but also direct or indirect holders of at least one third of the shares of the debtor company or of a parent company (LDepGuar § 2 no. 6).

32. The AUSTRIAN Supreme Court has held in two cases that the sole shareholder of a company who acts as manager for "its" company in assuming a personal security for an

obligation of the company does not have the status of a consumer (OGH 11 Feb. 2002, SZ 2002 no. 18 at p. 133; OGH 25 June 2003, ÖBA 2004, 143, 145). In one case, even a manager who held 25% of the shares was denied that status as well (OGH 20 Feb. 2003, ÖBA 2003, 957). By contrast, "according to settled case law" the manager of a company who does not hold shares in it is in such cases regarded as a consumer (OGH 24 Nov. 2005, JBl. 2006, 384, 387 with references; OGH 26 Sept. 1991, ÖBA 1992, 578).

33. The GERMAN courts distinguish, in fact, between the assumption of co-debtorships and other ordinary personal security. It is now settled case law of the Federal Supreme Court that the co-debtorship even of a sole shareholder and director for the obligations of the company is subject to the rules on consumer protection (BGH 8 Nov. 2005, WM 2006, 81, 82 ss.; 28 June 2000, BGHZ 144, 370, 380 ss.; 5 June 1996, BGHZ 133, 71, 77 s.). On the other hand, the Court excludes shareholders, directors and other persons that exercise considerable influence on the debtor company from its specific protective practice concerning global guarantees (see *supra* national notes to Art. 1:101 no. 45). Furthermore, the protective practice in favour of close relatives (cf. *supra* nos. 22 s.) generally does not apply to shareholders either since the creditor has a justified interest in involving them into securing a credit granted to the company; only small shareholders – the limit appears to be 10 % – are excepted (BGH 10 Dec. 2002, ZIP 2003, 288 at 289 with numerous references).

34. It may be added that ITALIAN courts have developed another specific consequence of the existence of a special relationship between a (consumer) security provider and the non-consumer debtor: in certain cases where a spouse provides personal security for a business credit of the other spouse and this financial support is proved to be indispensable to the business activity, the courts assume that a *de facto* company between the two spouses exists, *i.e.* the security provider is regarded as a partner (with or even without limitation of personal liability, as the case might be) in the enterprise of the other spouse (Cass. 14 Feb. 2003 no. 2200, Giust.civ. 2003 I 1220); however, additional indications for an implied intention of the parties to create such a *de facto* company must be present, such as the sharing of the profits (Cass. 23 Dec. 1982 no. 7119, Giur.comm. 1983 II 847; CFI Napoli 25 March 1996, Riv.Notar. 1996, 1240; CFI Catania 15 July 1992, Dir.fall. 1993 II 167; *Galgano* 66; *Bronzini* 167). In such cases, insolvency proceedings can be opened also against this *de facto* company, which extend even to the consumer security provider as a partner in this company; in these proceedings, the consumer security provider can be held solidarily liable with all its assets to all the creditors of the enterprise (not only the creditor of the obligation under the security), typically not even limited to the maximum amount of its security. This is particularly true if the security provider did not act for remuneration and its right of recourse against the principal debtor is excluded (CFI Napoli 12 Dec. 1996, BBTC 1998 II 84 ss.).

(Bisping/Böger)

Article 4:102: Applicable Rules

(1) A personal security subject to this Chapter is governed by the rules of Chapters 1 and 2, except as otherwise provided in this Chapter.
(2) The parties may not deviate to the disadvantage of a security provider from the rules of this Part.

Comments

A. Introduction

1. Article 4:102 (1) circumscribes those rules of this Part that apply to personal security provided by consumers, while para (2) fixes and specifies the mandatory character of the applicable rules.

B. Applicable Rules

2. The implied main rule of Article 4:102 (1) is that a consumer's personal security that does not fall under Article 4:101 (2) is, generally speaking, subject to Chapters 1 and 2 of this Part.

3. The applicability of Chapter 1 means that the general rules on personal security contained in that Chapter also apply – subject to any special rules established in Chapter 4 – to personal security assumed by a consumer.

4. In particular, Chapter 4 also applies to a co-debtorship for security purposes. If one (or several) of the co-debtors is (or are) a consumer (as defined in Article 1:101 (g)), Chapter 4 is applicable to that (or those) security provider(s); this is already spelt out in Article 1:106. In addition to Chapter 4 – and subject to its special provisions – also the regime for the protection of the security provider in Chapter 2 applies to a consumer's co-debtorship for security purposes by virtue of the reference to that Chapter which is contained in para (1). The application of Chapter 2 is justified by the fact that the rules on dependent security are the mildest form of security; and this is reinforced by the fact that, when applied to a consumer, those rules may not be derogated from to the disadvantage of the consumer, cf. Article 4:102 (2). By contrast, a general co-debtorship without security purpose is only subject to PECL Chapter 10 Section 1, cf. Article 1:106.

5. Also the set of rules on the rights and obligations of several security providers (Articles 1:107-1:109) apply to consumer security providers, subject, of course, to any

special rules in Chapter 4. It does not seem, however, that Chapter 4 contains any relevant rules.

6. The applicability of Chapter 2 means that the general rules on dependent personal security (as defined in Article 1:101 (a)) also apply to personal security assumed by consumers. Since Chapter 3 on independent personal security is *not* mentioned in Article 4:102 (2), personal security by consumers can only be granted as a dependent personal security. This conclusion is explicitly confirmed by Article 4:106 (c).

7. While, generally speaking, Chapter 2 applies to a consumer's personal security, that general principle is subject to many exceptions. In fact, all the substantive rules of Chapter 4, *i.e.* Articles 4:102 (2)-4:108, derogate from, or supplement, the rules of Chapter 2 on dependent personal security. These supplements and derogations will be set out and explained in the Comments to those rules.

C. Mandatory Character of Chapter 4

8. As is usual for provisions serving the protection of consumers (or other weak parties), Article 4:102 (2) provides that the parties of a personal security may not deviate to the disadvantage of a security provider from the rules of this Part.

9. It is to be noted first, that this prohibition does not only cover Chapter 4, but all the rules on personal security in this Part. Only by extending the protection of the consumer security provider beyond Chapter 4 to all the other Chapters is its full protection assured. Also the negative implication of Article 4:102 (1), namely the non-access of consumers to furnishing independent personal security (cf. *supra* no. 6) is covered.

10. The consumer provider of personal security is protected against any deviation "to the disadvantage of a security provider" from the rules of this Part. Deviations that are favourable for the consumer security provider are allowed; only deviations to its disadvantage are prohibited. It is impossible to give an abstract definition of a disadvantageous deviation and neither is it possible to give a complete catalogue. Two general criteria must in each case be fulfilled: First, the specific instrument or contract or clause must deviate from the specific rules in Chapters 1 to 4. And secondly, this deviation must be to the disadvantage of the consumer security provider. Out of dozens of possibly disadvantageous deviations, two specific cases may be offered for purposes of illustration:

> *Illustration 1*
> According to a very frequently used clause the creditor maintains all its rights against the security provider until the debtor of the secured obligation will have completely performed any outstanding obligation. This clause deviates in case of partial repayment of the credit from Article 2:102 (1) and is therefore void.

Illustration 2
Another clause used in practice provides that the security provider remains liable, even if the creditor, for whatever reasons, should fail to observe all its rights against the debtor or another security provider. This clause deviates from Article 2:110 and is therefore void.

11. Each disadvantageous deviation as such is relevant. It is not possible to "compensate" one negative deviation by another positive deviation in favour of a consumer, since it would be difficult, if not impossible to attach relative weights to the one and the other factor.

12. The consequence of any disadvantageous deviation from the rules of this Part is not spelt out expressly. However, the clear implication of Article 4:102 (2) is that a prohibited deviation is void. This nullity primarily affects the prohibited clause of the contract. In general, the remaining part of the contract continues in effect; that corresponds to the general principle underlying PECL Article 15:103 (1). However, if the balance of the remaining rights and obligations of the parties would be fundamentally affected in favour of one of the parties and it would be unreasonable to uphold the remaining contract, then the entire contract may become void. An abstract formula for the decision whether or not to uphold the remaining contract cannot be offered. Obviously, everything depends upon the circumstances, such as the importance of the prohibited clause and the extent and weight of the remaining rights and obligations of the parties to the contract.

National Notes

I. Mandatory Character of Consumer Protection Legislation

A. Deviation to the Disadvantage of Consumer Security Providers

1. Where specific rules on personal securities provided by consumers have been enacted, they are mandatory as well: All provisions of the relevant AUSTRIAN legislation on consumer protection, including the rules on the protection of consumer security pro-

viders (§§ 29a-29d) are mandatory in favour of the consumer; contractual deviations therefore have no effect (§ 2 para 2 ConsProtA). According to FINNISH LDepGuar § 1 para 3 the provisions of this Law on the rights and duties of private security providers may not be deviated from to the disadvantage of those security providers. BELGIAN ConsCredA arts. 34-37 on the protection of security providers for credits granted to consumers are mandatory (*Forges* no. 193 at p. 330; *Van der Wielen and Wallemacq* 23). One author makes a distinction between professional and non-professional security providers and considers the rules in ConsCredA arts. 34-37 as non-mandatory if the security provider is a professional (*Lettany* no. 252*bis* at p. 221). In FRENCH consumer law no deviations are admitted, even to the advantage of a consumer security provider (cf. for all credit types: ConsC arts. L 341-1 to 341-6, for consumer credit only: ConsC arts. L 313-7 to 313-10). In DUTCH law there may be no deviations to the detriment of the security provider from CC art. 7:852 to art. 7:856 (general provisions on dependent personal securities) and 7:858 to 7:861 (on dependent personal securities by consumers) and from the obligations which pursuant to art. 6:154 the creditor has toward the security provider in view of a possible subrogation (CC art. 7:862).

B. *Deviations to the Disadvantage of Consumers in General*

2. In other countries such restrictions concerning the dispositive rules that aim to protect the security provider do not exist. However, according to the underlying EU-Directives, in most member states general legislation on consumer protection is mandatory in favour of the consumer so that contracts may not deviate from these rules to the disadvantage of the consumer. This is true *e.g.* for legislation on consumer credit (DUTCH CC art. 3:40 *juncto* art. 7:862; *Hartlief* 224; *Blomkwist* 52-53; GERMAN CC § 506; ITALIAN Banking Law art. 127; SWEDISH Law on Terms of Contracts in Consumer Relationships § 11), on doorstep transactions (GERMAN CC § 312f; ITALY: ConsC art. 143, former DLgs 15 January 1992 no. 50 art. 10 para 2) and also for the general laws on consumer protection (AUSTRIAN ConsProtA §§ 2 para 2, 25c; DANISH Law on Certain Consumer Contracts § 28; *Andersen, Madsen and Nørgaard* 96; PORTUGAL: ConsProtA art. 16 para 1; cf. for all consumer protection rules SPANISH CC art. 6 para 2 and 3).
3. Especially the rules on abusive clauses or, more generally, on general terms and conditions may become relevant for a personal security contract whenever they are considered applicable to those contracts (on this specific point see national notes on Art. 4:101 *sub* I). According to the underlying EU-Directive, they provide that abusive clauses are void (ENGLAND and SCOTLAND: Unfair Terms in Consumer Contracts Regulations 1999 reg. 8 para 1; for the discussion on the applicability of these rules to personal securities cf. national notes to Art. 4:101 no. 4; FRENCH ConsC art. L 132-1 para 6; GERMAN CC § 307; PORTUGAL: Law on General Contract Terms art. 15; for consumers cf. also section III arts. 20, 21 and 22; for the applicability of this Law to dependent personal security see STJ 12 Jan. 2006, 3756/05 www.dgsi.pt).
4. Also ITALIAN ConsC art. 36 (former CC art. 1469*quinquies*) establishes that abusive clauses have no effect. However, it must be noted that the clauses listed in ConsC art. 33 (former CC art. 1469*bis*) are not automatically void, but only subject to a rebuttable presumption of abusiveness. Moreover, ConsC art. 34 para 4 (former CC art. 1469*ter* para 4) states that clauses that have been agreed by individual negotiation with the

consumer are valid. Only a few clauses listed in ConsC art. 36 para 2 (former CC art. 1469*quinquies* para 2) are void notwithstanding individual negotiation (for an application of the control of abusive clauses to the model contract of dependent personal security drafted by the Association of Italian Banks see *Petti* 361 ss.; however, in the field of personal security that kind of control has gained very little relevance on court practice until now, for decisions on the issue are scarce: Cass. 11 Jan. 2001 no. 314, Foro it. 2001 I 1589; Cass. 13 May 2005 no. 10107, Foro it. Mass. 2005, 1203). The model contract provided by the Italian Bank Association contained some clauses derogating from the ordinary rules of the civil code for dependent personal securities. The most important one is the clause on 'first demand' on the basis of which the security provider has to pay immediately on the creditor's request, but still maintains the right to raise against it any exception it had against the debtor after payment on the security *(solve et repete)*. According to the Bank of Italy – which supervises the application of antitrust law in the banking sector – this clause of the model contract does not violate antitrust law (Law no. 287 of 10 Oct. 1990 art. 2). Other clauses, however, have to be cancelled from the model contract: *e.g.* the clause extending the liability of the security provider to any other obligation of reimbursement arising from the invalidity of any payment on the secured obligation made to the bank; the clause extending the security provider's liability to the reimbursement obligation of the debtor arising in case of invalidity of the secured obligation; the clause derogating from CC art. 1957 on time limits for the security (Bank of Italy, decision no. 55 of 2 May 2005, www.agcm.it, Bollettino no. 17 of 16 May 2005 p. 97 ss.). Yet, according to ITALIAN case law, this decision does not prohibit that such clauses might be individually contracted between banks and consumer security providers (CA Torino 27 Oct. 1998, BBTC 2001 II 87; CFI Milano 25 May 2000, BBTC 2001 II 88; CFI Torino 16 Oct. 1997, BBTC 2001 II 87; CFI Alba 12 Jan. 1995, Dir.b.merc.fin. 1996 I 501).

5. The SPANISH Law 7/1998 on General Contract Terms art. 8 para 1 establishes the nullity of those general clauses contravening this law to the prejudice of the weak party (adherent). Article 8 para 2 declares that those general clauses which are abusive for a consumer – in any case those listed in art. 10*bis* and in the first additional provision («*disposición adicional primera*») of Law 26/1984 (ConsProtA) – are null and void. Of special relevance for consumer security contracts is no. 18 of the first additional provision to ConsProtA. It states that clauses imposing upon the consumer security provider a disproportionate liability are abusive. However, since the rule adds that financing or security contracts negotiated by financial institutions according to their governing laws are presumed not to be disproportionate, the provision is doomed to have no practical relevance (*Carrasco Perera a.o.* 131).

C. *Consumer's Waiver of Rights*

6. In ENGLAND, FRANCE and ITALY the special laws on consumers' rights contain rules on the waiver of the rights provided therein. In ENGLAND, ConsCredA sec. 173 expressly forbids the so-called "contracting-out", resulting in the nullity of that particular clause. The FRENCH rule on doorstep transactions (ConsC art. L 121-25 para 2) provides for the nullity of any waiver of the consumer's right to withdraw. According to ITALIAN ConsC art. 143 para 1 the waiver of the rights conferred by the ConsC to the consumers is void.

7. GERMAN CC § 312f and § 506 prohibit the previous waiver by a consumer of the rights granted by the relevant rules on the revocation of doorstep transactions and on consumer credits, respectively (cf. Palandt/*Grüneberg* § 312f no. 1 and Palandt/*Putzo* § 506 nos. 2 s.).
8. Although GREEK ConsProtA does not contain an explicit general provision on the mandatory character of the provisions of this Law, it sanctions however with nullity the previous waiver of the right to withdraw from contracts negotiated outside business premises (art. 3 para 4) and from distance contracts (art. 4 para 10). Former GREEK ConsProtA (Law no. 1961/1991) art. 3 para 3 nullified the consumer's waiver of the rights arising from the Law. The lack of such an explicit provision in the new ConsProtA gave rise to doubts regarding the protection of the consumer when it ignored the existence of general terms and conditions waiving all rights arising from the ConsProtA: in this case, the consumer will have already renounced also the right arising from ConsProtA art. 2 para 1, according to which the terms and conditions which it ignored do not bind it (*Alexandridou* 290). These doubts are dispelled by accepting, as it is commonly held in literature, that rules aiming to preserve the interests of the weaker contracting party like those contained in the ConsProtA are mandatory (*Georgiades*, General Principles § 5 no. 19).
9. Also in PORTUGAL similar rules prohibiting the waiver of rights conferred by protective consumer legislation exist (cf. ConsProtA art. 16 para 1 and ConsCredA art. 18 para 1).
10. SPANISH CC art. 6 para 2 allows a voluntary exclusion of applicable law only when this does not contravene public interest or public order nor prejudices third parties. More specifically, SPANISH ConsProtA art. 2 para 3 sent. 1 states that any previous waiver of the consumer's rights contained in the Law shall be void, whereas sent. 2 of the same provision establishes the nullity of acts in "fraud of the law" and refers to CC art. 6 para 4, according to which acts realized under the protection of the text of a norm that seek a result prohibited by the legal order or that is contrary thereto are considered in fraud of the law and shall not prevent the appropriate application of the law sought to be evaded. A similar rule is to be found in the SPANISH Law 26/1991 on Doorstep Transactions. Finally, ConsProtA first additional provision no. 14 declares void any clause not individually contracted with the consumer whereby the latter waives or limits its rights. It has been noticed that this means in effect that the legal regime of dependent personal security – normally non-mandatory – becomes mandatory if the security provider is a consumer. However, the rule is interpreted narrowly, as to state the nullity of consumers' waivers only to those protective rights which are granted them by the law (*Carrasco Perera a.o.* 131).

II. Sanctions in Case of Deviation to the Disadvantage of the Consumer Security Provider or Consumer in General

11. In most member states deviations to the disadvantage of consumer security providers or consumers in general do not result in the nullity of the whole contract. However, consequences of the breach of the prohibition vary according to national practices.

A. *Partial Nullity*

12. In DANISH, DUTCH, FRENCH, GERMAN, ITALIAN and SPANISH law partial nullity does not, as a rule, entail nullity of the whole contract of personal security (DENMARK: *Andersen, Madsen and Nørgaard* 96; DUTCH CC art. 7:862 (*juncto* art. 3:41); *Hartlief* 224; *Blomkwist* 52 s.; FRENCH rules on unfair contract terms integrated into FRENCH ConsC art. L 132-1 para 6, FRENCH rules on all credit types (ConsC art. L 341-3 *juncto* art. L 341-5) and on Consumer Credit (impliedly ConsC art. L 311-18), which stipulate a partial nullity for clauses imposing solidary liability; ITALIAN ConsC art. 36 para 1, former CC art. 1469*quinquies* para 1; *Calvo* 230 ss.; CA Milano 31 Dec. 1999, Giur. milanese 2000, 222 for the partial nullity of the abusive clauses only, in a dependent personal security; SPAIN: *Díez-Picazo and Gullón*, Instituciones 462). The GERMAN Federal Supreme Court also admits partial nullity of a consumer's co-debtorship for security purposes, provided the void part of the transaction can clearly be separated from the valid remaining part (BGH 14 Nov. 2000, BGHZ 146, 37, 47 ss.). Similar in cases of violation of GERMAN CC §§ 305c para 1, 307 and GREEK ConsProtA art. 2 para 1, 6 and 7 (as amended in 1999), *i.e.* when clauses in general terms and conditions are surprising or abusive, these clauses do not become part of the contract or are invalid, respectively (GREECE: *Georgiades* § 3 no. 97). According to GERMAN CC § 139 and GREEK CC art. 181 partial nullity of a legal transaction provokes in general its complete nullity, unless it may be assumed that the legal transaction would have been entered into even without the void part. But in GERMANY the invalidity of one or more clauses in general terms and conditions does not in general affect the validity of the whole contract (CC § 306). By contrast, according to GREEK ConsProtA art. 2 para 8, only the consumer and not the provider of goods or services may, in this case, invoke the nullity of the whole contract (according to *Karakostas* 68, GREEK CC art. 181 on the consequences of partial nullity is not applied in this case). According to PORTUGUESE ConsProtA art. 16 para 3 and DL on General Contract Terms art. 13 the consumer may choose to keep the contract, when some of the clauses are void, the general rules or the rules on the integration of contracts being then applicable. In ENGLAND and SCOTLAND, standard clauses which are "unfair" under the Unfair Terms in Consumer Contracts Regulations 1999 "shall not be binding on the consumer" (reg. 8 para 1); the remaining contract shall continue to bind the parties, if possible without the unfair clause (reg. 8 para 2).

B. *Reduction and Interpretation by the Court*

13. In AUSTRIA the security provider's obligations may be reduced if the latter's assets were obviously insufficient for performing the personal security (ConsProtA § 25d). In FRANCE the same solution had been suggested by the *Grimaldi* Commission for the application of the so-called principle of proportionality (CC proposed new 2305): the engagement of the provider of dependent security acting for private purpose may be reduced if its engagement was manifestly disproportionate to its financial capacity and its income, unless at the time of the requested performance it is able to perform the obligation; however, this proposal, as most others for a reform of the rules on personal security, was not adopted by the legislator in 2006. According to SPANISH Law 26/1984 (ConsProtA) art. 10*bis* para 2, abusive clauses, conditions and stipulations shall be con-

sidered as not included in the contract. The remaining clauses shall be integrated and interpreted by the judge, who shall modify the rights and duties of the parties in case of subsistence of the contract and also the consequences of its eventual invalidity in case of considerable prejudice to the consumer. Law 7/1998 on General Contract Terms art. 9 para 2 makes also reference to the partial nullity (only of the clauses or conditions declared invalid according to the Law) and establishes the duty of the court to clarify the validity of the contract in these cases or to declare the nullity of the whole contract if one of its essential elements (according to SPANISH CC art. 1261 consent, object and cause) is affected by this nullity.

C. *Unenforceability*

14. In FRANCE the professional creditor cannot enforce the security contract if the engagement of the provider of dependent security was manifestly disproportionate to its financial capacity and its income, unless at the time of the requested performance the latter is able to perform the obligation (for consumer credit: ConsC art. L 313-10, even if the debtor is a professional: ConsC art. L 341-4).

III. *Deviations to the Benefit of the Consumer Security Provider or Consumer in General*

15. Deviations to the benefit of the consumer security provider are allowed in DANISH and SPANISH law (DENMARK: Karnov/*Kristoffersen* 5486 fn. 160; SPANISH CC art. 6 para 2). In GERMANY and GREECE, although there is no special provision to that effect, it follows from the general notion of freedom of contract, that deviations which are favourable for the consumer are always possible. In PORTUGAL the same is true (cf. ConsProtA art. 16 para 1; for a specific example see art. 4 para 2). Similarly in SPAIN Law 26/1991 (on doorstep transactions) art. 9 regards as valid contractual clauses which deviate from the law to the advantage of the consumer. In ENGLAND and SCOTLAND, the provisions of the Unfair Terms in Consumer Contracts Regulations 1999 apply only to contractual terms that are detrimental to the consumer (reg. 5 para 1) (but cf. national notes to Art. 4:101 no. 4).
16. Exceptionally the FRENCH rules relating to all credit types (ConsC arts. L 341-1 ss.), to consumer credit (ConsC arts. L 313-7 ss.) and to doorstep transactions (ConsC arts. L 121-23 ss.) exclude any deviations even if they are favourable for the consumer.

(de la Mata/Dr. Fiorentini)

Article 4:103: Creditor's Precontractual Obligation of Information

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

(2) If the creditor knows or has reason to know that due to a relationship of trust and confidence between the debtor and the security provider there is a significant risk that the security provider is not acting freely or with adequate information, the creditor must ascertain that the security provider has received independent advice.
(3) If the information or independent advice required by the preceding paragraphs is not given at least five days before the security provider signs its offer or the contract of security, the offer can be withdrawn or the contract can be avoided by the security provider within a reasonable time after receipt of the information or the independent advice. For this purpose five working days is regarded as a reasonable time unless the circumstances suggest otherwise.
(4) If contrary to paragraph (1) or (2) no information or independent advice is given, the offer can be withdrawn or the contract can be avoided by the security provider at any time.
(5) If the security provider withdraws its offer or avoids the contract according to the preceding paragraphs, the return of benefits received by the parties is governed by PECL Article 4:115 or by the general rules on unjustified enrichment.

Comments

A. Need for Protection

1. In view of the risk which any security provider incurs by assuming a personal security of whatever kind, its interest in self-protection should inspire it to obtain as much information as possible from the debtor about its economic situation. Private persons and even more so business partners often know or at least often will or should be able to find out such information.

2. Experience in virtually all member states shows, however, that there are many private individuals who either close their eyes to the potential risks or who are unable to obtain relevant information. A few legislators and courts in some countries have obliged the creditor in certain circumstances to reveal to the intending security provider the debtor's financial situation. This should make the security provider aware of the risk which it may incur by assuming the personal security. This, again, is a protective rule for consumer security providers, especially close relatives of the debtor who often are ignorant of, or blind to, the debtor's economic situation because they are moved by the desire to help and sentiments of kinship and benevolence. It is therefore necessary to establish specific rules aiming at protecting the security provider by making additional information available to it so that it can better evaluate the risk which it incurs by assuming a personal security.

3. Such assistance is the more necessary since relatives or friends of a private debtor (who very often also is a consumer) usually assume a personal security without remu-

neration. In effect, they "donate" their credit and risk losing major portions of, or even all, their assets.

B. Information and Advice for the Security Provider

a. Creditor's Information

4. Paragraph (1) specifies the information that has to be disclosed by the creditor to the security provider.

5. Letter (a) of para (1) does not deal, like lit. (b), with the subjective risks inherent in the debtor, but with the general objective legal and economic risks that are connected with a dependent personal security. The creditor must start from the assumption that consumer security providers are not familiar with the far-reaching effects of assuming any personal security. In particular, an intending security provider must be made aware that it will assume a potential debt for which it may be liable with all its assets. The practical effects of this abstract rule must clearly be impressed upon the mind of the intending security provider. This must be done in such a way that the latter becomes clearly and fully aware of the very real risk to which it exposes itself by assuming the personal security.

6. Letter (b) of para (1) deals with the special personal risks which are inherent in the financial position of the debtor. Professional creditors usually will be able, either on the basis of earlier dealings with the debtor or else by virtue of investigations, to evaluate the economic capacity of their debtor. All presently available information on the economic potential of the debtor, especially its present assets (whether encumbered or not) and its earning capacity, must be utilised. These data are already relevant for the creditor's decision whether or not to grant a credit to the debtor. On this basis the creditor can and must provide a complete picture of the financial situation of the debtor to the intending security provider.

7. In the case of middle- or even long-term credits, also the investigations on the debtor and consequently the information to the intending security must be even more extensive and careful. Of course, nobody can, and is expected to, make prophecies. However, those potential developments which can be relatively clearly be foreshadowed must also be disclosed. This refers to data like the age and health situation of the debtor and consequences which these may have for its future economic situation.

8. The creditor's obligation of disclosure is qualified by the words "information accessible to the creditor". The qualifying term "accessible" must be understood subjectively as meaning all the relevant information about the debtor of which the creditor disposes at the time of contracting the security. According to the drafting history accessibility does not prejudice the issue whether the relevant information must also be accessible to the security provider. If the creditor due to binding rules of professional, especially bank secrecy is prevented from divulging all relevant information to which *it* has access to the security provider, it must attempt to obtain the debtor's consent for

passing the information to the security provider or must bear the consequences of this subjective inability that are spelt out in paras (3)-(5). Such a disability must be disclosed to the intending security provider so that it can look for other sources or for independent advice according to para (2). An omission of such a disclosure may expose the creditor to the obligation to compensate any damage caused to the security provider.

b. Independent Advice

9. Paragraph (2) deals with a special situation in which the creditor is obliged to ascertain that the intending security provider receives *independent* advice from a third person.

10. Such recourse to a source of independent advice is required if the creditor "knows or has reason to know" that the security provider "is not acting freely or with adequate information" in assuming the security. If the creditor's knowledge is alleged, this will require adequate proof. By contrast, "reason to know" is a mixed issue of law and fact: The interested party must prove the knowledge by the creditor of such facts that allow to draw the inference that the creditor ought to have known of a relationship of trust and confidence between the debtor and the security provider.

11. A relationship of trust and confidence between security provider and debtor as such does not meet the requirement of para (2). There are millions of such relationships, especially in well-functioning (legal or factual) families. The members of such a family may have acquired or preserved personal independence and experience with respect to financial matters, especially by the independent administration of their financial affairs. However, there are probably more families where no member has experience of this kind and of the dimension involved, or only one of the spouses. Experience also suggests that usually children, even if they have reached the age of majority, do not appreciate financial risks of greater dimension. The same may also be true of sick or old people, depending upon the individual circumstances. If both the security provider and the debtor are members of a relationship of the latter type, then there is obviously a significant risk that the security provider is not acting freely or is acting without adequate information.

12. If the requirements mentioned in the preceding two paragraphs are fulfilled, then the creditor must ascertain that the security provider has received "independent advice" with respect to the assumption of the security required by the creditor. In practice this means that the creditor must request the intending security provider to obtain advice from an independent third party. The creditor's legal advisor obviously would not qualify for this purpose. Independent advice may be rendered by consumer organisations or bodies providing legal assistance. In important or complicated cases, advice by independent lawyers may be necessary. The costs will have to be borne by the security provider or the debtor.

C. Sanctions

13. Paragraphs (3) to (5) provide the sanctions if the information required by para (1) or the independent advice required by para (2) have been furnished late or have not been furnished at all. In these circumstances the consumer security provider is regarded as having assumed its security improvidently. These sanctions apply, whether or not the consumer security provider in fact suffered a disadvantage.

14. Paragraphs (3) and (4) deal with two different, although related fact patterns: paragraph (3) applies if the information or independent advice is given, but is not given within the required time limit; by contrast, para (4) applies if no information or independent advice at all is furnished.

15. According to para (3) the information or independent advice required by paras (1) and (2) must be furnished to the security provider "at least five days" before it signs its offer of security or the security contract. Five days should suffice to review the required information or independent advice; in the case of contracts for larger amounts, usually negotiations take more time so that in fact a longer period of time may be available to the security provider.

16. If the required time span of five days is not observed, the consumer security provider can withdraw its offer of security or avoid the security contract within a "reasonable" period after having received the information or independent advice. This span of reasonable time is under normal circumstances five working days; however, the circumstances may suggest a shorter or longer period (sent. 2). This period is more flexible than the corresponding time span fixed by the first sentence, since the intending security provider cannot foresee when it will receive the draft of the offer or contract of security.

17. If no information or independent advice is given, the intending security provider can at any time withdraw its offer or can avoid the contract (para (4)). This rule must be understood in a broad sense: it must also apply if information is given, but turns out to be obviously insufficient so that it is not helpful for the intending security provider or even misleads it as to the circumstances that have been relevant for its decision to assume the security.

18. Paragraph (5) will in practice be of limited relevance. In the early stage it is unlikely that any performances will have been rendered by any of the parties. However, in the cases addressed by para (4), where no information or advice at all has been given and therefore the contract can be avoided at any time, performances may well have been rendered. The return of such performances is governed by the rules of unjustified enrichment as provisionally laid down in PECL Article 4:115.

D. Mandatory Provision

19. According to Article 4:102 (2), Article 4:103 is a mandatory provision in favour of the consumer security provider.

National Notes

I. Different Bases of Creditor's Precontractual Duties of Information

1. Precontractual duties of information of creditors towards consumer providers of security are based upon different legal concepts in the various member states. Some member states have enacted specific consumer protection provisions in order to regulate such information duties (*infra sub* II), very often such information requirements are also derived from the application of general principles of law (*infra sub* III), while sometimes also the rules on error are applied in order to deal with situations in which no precontractual information had been provided by the creditor (*infra sub* IV). In a number of member states, several of these concepts are applied simultaneously; for instance, precontractual information requirements may follow both from special consumer protection provisions and from more general principles.
2. In AUSTRIA, precontractual information requirements follow from special consumer protection provisions (§§ 25a ss. ConsProtA, cf. *infra* no. 18).
3. Precontractual information requirements in BELGIAN law are laid down in special consumer protection provisions (ConsCredA art. 34, cf. *infra* no. 19) and can be derived from general principles of law (cf. *infra* no. 28).
4. In DENMARK, precontractual information requirements are based upon the principle of good faith (ContrA § 36, cf. *infra* no. 29).
5. Under ENGLISH law, there are both precontractual information requirements laid down in special consumer protection provisions (esp. ConsCredA sec. 105 para 5, cf. *infra* no. 20) and precontractual duties of the creditor derived from the principles of undue influence and constructive notice (cf. *infra* no. 30).
6. In FINLAND, precontractual information requirements follow from special consumer protection provisions (LDepGuar § 12, cf. *infra* no. 21) and from the operation of general principles of law (*infra* no. 31).
7. In FRANCE, there are special consumer protection provisions concerning precontractual information requirements (ConsC art. L 313-7 ss., cf. *infra* no. 22), but also duties of the creditor based upon the principle of good faith (cf. *infra* no. 32).
8. GERMAN law bases precontractual information requirements of the creditor primarily upon the principle of good faith, but also upon the rules on mistake (cf. *infra* no. 33).
9. In GREECE, the principle of good faith is regarded as the single basis of precontractual information requirements (cf. *infra* no. 34).

10. In IRELAND, precontractual information requirements follow both from special consumer protection provisions (ConsCredA sec. 30, cf. *infra* no. 23) and from the application of general rules of law (cf. *infra* no. 35).
11. In ITALY, some precontractual information requirements are contained in special consumer protection provisions (ConsC arts. 2, cf. *infra* no. 24), while others follow from legislation applicable for all kinds of security providers and other general rules of law (cf. *infra* no. 36).
12. In LUXEMBOURG, precontractual information requirements can become relevant in limited circumstances for the rules on mistake (cf. *infra* no. 42)
13. In the NETHERLANDS, precontractual information requirements typically are dealt with in connection with the rules on mistake (cf. *infra* no. 43); additionally, some precontractual information requirements based upon general rules of law are suggested (cf. *infra* no. 37).
14. In SCOTLAND, there are both precontractual information requirements which are laid down in special consumer protection provisions (esp. ConsCredA sec. 105 para 5, cf. *infra* nos. 25, 20) and precontractual information requirements of the creditor based upon the principle of good faith (cf. *infra* no. 38).
15. Under SPANISH law, precontractual information requirements follow from the principle of good faith (cf. *infra* no. 39).
16. In SWEDEN, some special consumer protection provisions contain precontractual information requirements (ConsCredA §§ 6, 7, cf. *infra* no. 26), while in other cases such duties of the creditor are based upon general principles (ContrA § 36, cf. *infra* no. 40).

II. Specific Rules on Creditor's Precontractual Duties of Information towards Consumer Security Providers

17. Most member states agree that special protection especially by way of information duties of the creditor must be given to the consumer security provider who more often than not lacks business experience; the degree of protection provided under specific consumer protection rules under the different legal systems, however, varies considerably. For the sanctions in case of a non-compliance with these duties, see generally *infra* nos. 44 ss.
18. AUSTRIA enacted in 1997 a series of interconnected provisions on information duties: § 25a ConsProtA obliges professional credit providers to hand to spouses as co-debtors or one acting as surety a document informing them about the risks of solidary liability; according to § 25b para 2 the provider of a personal security, whether dependent or independent, has to be informed by the creditor about the spouse's default; non-observance of this duty implies that the security provider is not liable for interest and costs that arise after the debtor's default; the most important provision in practice is § 25c: the creditor has to inform a consumer who becomes a co-debtor or a (dependent or independent) security provider about the economic position of the debtor if it is, or should be, aware that the debtor probably will be unable (or only partly able) to pay its obligation (sent. 1). If the creditor omits this information the security provider will only be liable if it would have assumed its obligation in spite of this information (sent. 2). The Supreme Court has held: if the creditor urges assumption of a personal security this indicates its doubts as to the solvency of the debtor (OGH 22 Dec 2003, JBl. 2004, 522 at p. 524; OGH 25 July 2000, SZ 73 no. 121 at p. 68); individual information is required, whereas a general form does not suffice (OGH 26 Jan. 2006, ÖJZ 2006, 454, 455); the

practice of the court is not quite uniform as to whether information by the creditor is required even if the security provider is already informed; prevailing practice supports repetition since this more strongly impresses the security provider (OGH 22 Dec. 2003, JBl. 2004, 522 at 525; OGH 25 July 2000, *supra* at p. 68; discussion and less strict view in OGH 21 July 2005, ÖBA 2006, 206 at 208); no information is necessary if the security provider himself had offered its engagement, participated in the intensive negotiation of the credit and had earlier business experience (OGH 20 Oct. 1999, ÖBA 2000, 527 at p. 531; OGH 22 Oct. 2001, ÖBA 2002, 499 at p. 501); beyond the letter of § 25c, the Supreme Court allows a mere reduction of the security provider's obligation (OGH 25 July 2000, *supra* at p. 69 s.)

19. In BELGIUM, ConsCredA art. 34 lays down a precontractual duty of information in favour of security providers for a credit granted to a consumer, without distinguishing between consumer and other security providers or between different types of personal security. The creditor must furnish gratuitously in advance to the security provider a copy of the security agreement (and then inform it about the conclusion of the credit agreement). It must also inform the security provider in advance about any modification of the credit agreement (ConsCredA art. 34 para 2).

20. In ENGLAND there are special consumer protective laws introducing a precontractual duty of information of the creditor in favour of consumer security providers (in ENGLAND: persons giving security in relation to a transaction falling under the consumer protection legislation, cf. national notes to Art. 1:101 no. 65) only (ConsCredA sec. 105 para 5; Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3). The information to be given must be in writing and it must also contain a warning "YOU MAY HAVE TO PAY INSTEAD" in capital letters (Part IV of the Schedule to the Consumer Credit (Guarantees and Indemnities) Regulations 1983), whereas the creditor has to supply the security provider with a copy of the security instrument and a copy of the underlying regulated agreement and any documents therein referred to within 12 working days (Consumer Credit (Prescribed Periods for Giving Information) Regulations 1983 reg. 2). Moreover, the creditor has to give additional information about creditor and debtor as well as a statement of the security provider's rights and duties under the security (ConsCredA sec. 105 para 5; Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3; cf. *O'Donovan and Phillips* nos. 3-176 s.).

21. In FINLAND LDepGuar § 12 provides a precontractual duty of information in favour of consumer security providers concerning four points: the obligations and specific costs of the dependent personal security assumed; the preconditions for demanding performance from the security provider; and of any other factors that may be of essential importance for the security provider; further, the creditor must inform the consumer security provider about the debtor's obligations and about its financial circumstances (§ 12 paras 1-2; RP 189/1998 rd 44 ss.). The written form is optional for this information; if the information is given in writing, this must take place at the latest on the day before the personal security is assumed (LDepGuar § 12 para 1 sent. 2; RP 189/1998 rd 46).

22. In FRANCE an obligation of information in favour of the consumer security provider is implied: both the nature of the security provider's engagement and the maximum amount of the secured debt must be indicated in the contract of security (for all credit types: ConsC arts. L 341-2 ss.; for consumer credit only: ConsC arts. L 313-7 ss.).

23. In IRELAND, the security provider is entitled under ConsCredA sec. 30 para 1 lit. b to a copy of the document on the agreement from which the secured obligations arise.

24. In ITALY the general rules of consumer protection enacted by Law 30 July 1998 no. 281, now integrated into ConsC, establish the rights of consumers to adequate information and publicity concerning services provided by professionals (art. 2 para 2 lit. c)) and to fairness and equity in contractual relationships (art. 2 para 2 lit. e)); these rules are considered as applicable to consumer security providers (*Petti* 484). Among other rules, ConsC art. 5 para 3 states that information for the consumer should be adequate to the chosen technique of comunication; it has to be expressed clearly and intelligibly, also taking into account the modalities of the conclusion of the contract or the characteristics of the area in which the service operates so as to ensure the consumer's awareness.
25. The situation in SCOTLAND is identical to ENGLISH law (cf. *supra* no. 20).
26. In SWEDEN there are special provisions introducing a precontractual duty of information of the creditor in favour of consumer security providers: The information to be disclosed must be given in writing before the assumption of the personal security (ConsCredA §§ 6, 7). According to the general guidelines of the Swedish Financial Supervisory Authority about securities in consumer relationships (FFFS 2005:3) the creditor has a precontractual duty to furnish information in writing to consumer security providers. The creditor may be obliged to inform the security provider about all circumstances that the latter may truly expect to know, *e.g.* extra costs connected with the personal security (ConsCredA §§ 6, 7). According to the general guidelines about securities in consumer relationships (FFFS 2005:3) the creditor is obliged to inform the security provider about the debtor's economic situation, if this is decreasing for a longer period.

III. Creditor's Precontractual Duties of Information Based upon General Principles

27. In addition to the specific protective rules for consumer security providers, there is typically also some protection through creditors' precontractual duties of information which are based upon general principles of law, especially on the principle of good faith or similar concepts. As a general rule, these information duties, however, will be less strict and only available in limited circumstances. For the sanctions in case of a non-compliance with these duties, see generally *infra* nos. 44 ss.
28. In BELGIUM, the creditor may be obliged to inform the security provider about all circumstances that the latter may truly expect to know, *e.g.* extra costs contained in the personal security (*Cornelis* 63; *Van Quickenborne* no. 423).
29. In DENMARK, a duty to disclose any sort of information about the financial situation of the debtor or the risk that shall be assumed has been acknowledged in literature and in court practice as arising from the principle of good faith (*Pedersen*, Kaution 23 ss.). Thus, a security in favour of a saving bank assumed by a disordered lady for old and future debts of her stepson was found not to be binding on the basis of ContrA § 36 for a lack of information by the bank (CA Vestre Landsret 30 Aug. 1993, UfR 1993 A 949). The intensity of the duty of information depends upon whether the creditor or the debtor has approached the security provider, the creditor's duty being higher in the former situation than in the latter (*Pedersen*, Kaution 23 ss.). *Pedersen*, *ibid.* also points out that where undue influence is exercised against a security provider who is not properly informed a security might be invalid on the basis of ContrA §§ 30, 31 or 33 (fraud).
30. In ENGLISH law, wide-ranging supplementary pre-contractual duties are imposed upon the creditor, especially in cases of a relationship of trust and confidence or an emotional

bond between the security provider and the debtor. In ENGLISH and SCOTS law the existence and exact scope of such duties has been the object of an intense discussion in the past years. While at first it was thought that the legal situation in both jurisdictions followed similar rules (cf. *Smith v. Bank of Scotland* 1997 SC 111 (HL)), it has now become clear that substantial differences exist (cf. *Royal Bank of Scotland v. Wilson* 2003 SCLR 716 (CA); *Thomson v. Royal Bank of Scotland* 2003 SCLR 964 (CFI)). In ENGLISH law, the starting point is that while in certain cases such as the parent – child or solicitor – client relationship there is even an irrebuttable presumption of undue influence between the parties (cf. *O'Donovan and Phillips* no. 4-130), in other non-commercial cases where a security provider can show that it reposed trust and confidence in the debtor and that the assumption of security is not readily explicable by the relationships between the parties and calls for an explanation, there is an evidentiary presumption of undue influence between debtor and security provider (*Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773, 798 (HL)). This evidentiary presumption, which will however not apply merely because of the existence of a marital relationship (same decision at p. 822), will, if not rebutted, give the security provider a valid defence also against the creditor if the latter is found to have actual or constructive notice of this undue influence (*Barclays Bank plc v. O'Brien* [1993] 4 AllER 417 (HL); *Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773, 798 (HL)). At least in relation to securities provided by one spouse to the other, the courts have developed detailed rules which have to be complied with by creditors in order to rebut a presumption of constructive notice. In all cases where a security is provided by one spouse to the other, its business or a company in which they both had some shareholding the creditor "is put on inquiry" (cf. *Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773, 803 (HL)) and has to take steps to bring home to the security provider the risk it is running by standing as surety and advise it to take independent advice (*Barclays Bank plc v. O'Brien* [1993] 4 AllER 417 (HL)). Moreover there are detailed additional duties, for example requiring the creditor, even if the security provider has received legal advice, to inform the security provider that the creditor requires written confirmation from a solicitor acting for the security provider that the solicitor has fully explained to the security provider the nature of the documents of the security transaction and the practical implications; the creditor also has to advise the security provider that it could appoint a solicitor different from the advisor acting also for both spouses and the creditor has to give information about the other spouse's financial affairs either directly to the spouse granting security or to the solicitor acting for that spouse (*Royal Bank of Scotland v. Etridge (No 2)* [2002] 2 AC 773, 803 (HL); cf. also *First National Bank v. Achampong* [2003] EWCA Civ 487 (CA); *Yorkshire Bank v. Tinsley* [2004] 3 AllER 463 (CA)).

31. In FINLAND – like in DENMARK and SWEDEN – a security may be regarded as invalid by reason of undue influence if it has been assumed by a security provider without proper precontractual information on the basis of the general principles of ContrA §§ 30, 31 or 33 (fraud) (see also HD 18 Dec. 1996, KKO 1996:149). At least in this regard, the different Nordic Contract Acts are in all SCANDINAVIAN countries more or less uniform since the early 20th century (cf. *supra* no. 29 and *infra* no. 40).

32. In FRANCE, it has been held that a duty to disclose any sort of information about the financial situation of the debtor or the risk that shall be assumed can arise from the principle of good faith (CA Versailles 9 Nov. 1995, D. 1996, I.R. 17). A banker has to inform the security provider about essential facts which may influence its consent, *e.g.*

the very strained situation of the debtor, otherwise the contract of personal security can be avoided on the basis of deceit (Cass.civ. 26 Nov. 1991, JCP G 1992, IV no. 369; Cass.civ. 8 July 2003 and Cass.civ. 13 May 2003, in D. 2003, 2308 ss., note *Avena-Robardet*) or damages for contractual liability may be claimed (Cass.com. 24 June 2003, D. 2003, 2309 ss., note *Avena-Robardet*). Moreover, the creditor may be obliged to inform the security provider about all circumstances that the latter may truly expect to know, *e.g.* extra costs connected with the personal security (impliedly ConsC art. L 341-2 ss. for all kinds of credit).

33. In GERMANY, the creditor is generally not thought to be obliged to disclose any sort of information about the financial situation of the debtor or the risk that shall be assumed since these risks are well known and generally to be known by all security providers (BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 18 Jan. 1996, NJW 1996, 1274, 1275; BGH 22 Oct. 1987, NJW 1988, 3205, 3206; for further references cf. MünchKomm/*Habersack* § 765 no. 87). Both literature and court practice accept, however, that in appropriate circumstances a duty of information arises from the principle of good faith (only BGH 15 April 1997, NJW 1997, 3230, 3231). Such duty of information is exceptionally assumed by court practice on the basis of *bona fides* if the creditor caused an error of the security provider, which the former could have discovered, concerning the increased risk of the personal security (cf. only BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 17 Oct. 1985, WM 1986, 11, 12; see also CA Oldenburg 22 July 1997, WM 1997, 2076: the creditor knows that the security provider will have to pay; BGH 27 May 2003, ZIP 2003, 1596, 1599: creditor, a bank, asserts to security provider that the security is required only "*pro forma*"). This has recently been extended to cases in which the creditor recognises or ought to recognise that the security provider has fundamentally erroneous ideas about the consequences of its declaration, for whatever reason (cf. BGH 1 July 1999, NJW 1999, 2814; see also BGH 11 Feb. 1999, NJW 1999, 2032). But there is no duty of information if the creditor can assume that the security provider received all important information from the debtor (CA Koblenz 14 March 1996, WM 1997, 719). It has to be noticed that the courts – in accordance with most writers – have continued to extend the duty of information and that this development still continues (cf. CA Bamberg 13 Dec. 1999, WM 2000, 1582, 1585; Staudinger/*Horn* § 765 nos. 184-188).

34. In GREECE, it is thought that the security provider is normally entitled towards the creditor to information about the risk to be assumed (*Georgiades* § 3 no. 72; *Markou*, DEE 8, 363). In some situations it is assumed that such a duty of information might be based upon the principle of good faith (*Georgiades* § 3 no. 72). The creditor is burdened with this duty, if and insofar as the security provider declares that the assumption of the personal security shall depend on the facts made available to the security provider or if that assumption takes place by signing a document containing pre-written general terms and conditions (*Georgiades* § 3 no. 72). According to the GREEK Banker's Code of Conduct art. 42 para 2 (cf. *supra* national notes to Art. 2:107 no. 3), the bank must explicitly mention to the security provider the nature and extent of the obligations or risks which it assumes. Furthermore, the bank is obliged to give the security provider all the information made available to the debtor (art. 42 para 1).

35. In IRELAND, information requirements for the creditor can be derived – as in ENGLISH law – from the operation of the principle of constructive notice in the area of undue influence, *i.e.* a personal security can become unenforceable if it is assumed that

the creditor did have constructive notice of an actual undue influence by the principal debtor on the security provider and if the creditor in such a situation did not undertake special steps to ensure that the security provider obtained independent legal advice (cf. *Ulster Bank Ireland Ltd v. Fitzgerald* [2001] IEHC 159 (CFI); *Bank of Nova Scotia v. Hogan* [1996] 3 IR 239 (SC)). However, the relationship of husband and wife does not in itself give rise to a presumption of undue influence and also constructive notice on the part of the creditor of any such undue influence depended upon the knowledge of at least some factors indicating such undue influence (cf. *Ulster Bank Ireland Ltd v. Fitzgerald* and *Bank of Nova Scotia v. Hogan*, *supra*).

36. In ITALY, the principle of good faith is regarded as a basis for the creditor's duty of information in personal security contracts (*di Majo*, Clausola "omnibus" 45 ss., 52 ss.). The rules on transparency of contractual conditions in the banking sector also apply to consumer security providers when contracting with banks or financial institutions (Banking Law arts. 115-120; *Petti* 484). According to art. 116 at each office open to the public the following must be displayed to clients: interest rates, prices, expenses for notices, and every other financial condition regarding transactions and services offered, including overdue interests and values used for the imputation of interest. Reference to usage is not permitted. The contract must indicate the interest rate and every other price and condition in practice, including, for credit contracts, any increased fees in the case of late payment; also the possibility of a change of the interest rate and any other price and condition to the disadvantage of the client must be expressly indicated in the contract with a clause that the client must individually sign (art. 117). Besides, annual notifications to clients are imposed by art. 119, in order to provide the client with complete and clear written information regarding the development of the relationship. In addition, some ITALIAN legal writers (*Benedetti* 208 ss.; *Petti* 98) point out that undue influence on the security provider without a proper information could be dealt with by recourse to the general remedies protecting the freedom of the individual will in the formation of the contract (CC arts. 1427 ss., mistake; 1434-1436, threat; 1439, fraud) or to the rules of tort law (CC arts. 2043 ss.).

37. In the NETHERLANDS, precontractual information requirements of the creditor outside specific consumer protection provisions are typically derived from the rules on mistake (cf. *infra* no. 43). In addition to this, however, according to one opinion, if a professional creditor knew or should have known that the security provider is being induced to enter into the contract of personal security as the result of special circumstances, such as a state of necessity, dependency, wantonness, abnormal mental condition or inexperience (*Tjittes*, WPNR 2001, 353), or that the security provider is about to incur a liability for debts that exceed its present and expected financial capacity, then the creditor should prevent it from agreeing to the contract of personal security and encourage it to take independent legal advice (*Tjittes*, WPNR 2001, 353, 356).

38. In SCOTLAND, there is as in ENGLISH law a discussion about the imposition of some supplementary pre-contractual duties upon the creditor, especially in cases of a relationship of trust and confidence or an emotional bond between the security provider and the debtor. In SCOTLAND, however, the principle of good faith imposes additional duties on a creditor taking security from a third party security provider only where the circumstances of the case are such as to lead a reasonable man to believe that the security provider did not act freely or fully informed (*Smith v. Bank of Scotland* 1997 SC 111 (HL); *Royal Bank of Scotland v. Wilson* 2003 SCLR 716 (CA)). Moreover, the security provider

has to show that there actually was undue influence or a misrepresentation by the debtor if the security provider wishes to doubt the validity of the security on the ground that the creditor owed (and possibly did not fulfil) these special duties (*Royal Bank of Scotland v. Wilson* 2003 SCLR 716, 735 (CA); *Braithwaite v. Bank of Scotland* 1999 SLT 25, 32 (CFI)). The courts do not prescribe any specific steps for the creditor; it is sufficient that the creditor warns the potential security provider of the consequences of entering into the security and advises it to take independent advice (*Smith v. Bank of Scotland* 1997 SC 111 (HL); *Royal Bank of Scotland v. Wilson* 2003 SCLR 716 (CA)). Once the creditor has been informed that the prospective security provider has received legal advice, it does normally not have to take any further measures, *e.g.* to question whether the advice given was of the requisite quality (*Royal Bank of Scotland v. Wilson* 2003 SCLR 716 (CA)).

39. While it is generally thought in SPAIN that the creditor is not obliged to disclose any sort of information about the financial situation of the debtor or the risk that shall be assumed, such a duty is in appropriate circumstances said to arise from the principle of good faith (*Reyes López* 232 s.). This will especially be the case if the personal security is declared by the security provider to depend upon the facts made available to it or if the personal security is contained in a document with pre-written general terms and conditions (*Reyes López* 232 s.).

40. In SWEDEN, it has been held that on the basis of the general principle of ContrA § 36 a security provider, especially when acting as a non-professional, can be partially freed from its liability if and in so far as it had not been informed by the creditor about special grave financial risks contained in the underlying obligation (HD 20 Aug. 1997, NJA 1997, 524). Moreover, a lack of precontractual information by the creditor might free the security provider from its obligations if this amounts to fraud (ContrA §§ 30, 31 or 33). In HD 5 Feb. 1996, NJA 1996, 19, however, it has been held that a security provider might still be liable despite the creditor's failure to inform the security provider about the disproportionality between the debtor's income and the secured debt if the creditor had given information about the implications and consequences of the security in previous dealings with the creditor concerning the assumption of securities for the same debtor.

IV. *Lack of Precontractual Information by Creditor Causing Error of Security Provider*

41. Some member states use a third method in order to regulate precontractual information requirements for the creditor by allowing the security provider to take recourse to the rules on error if they entered into the contract of personal security without prior information by the creditor. For the consequences of a lack of information in these member states, see also *infra* no. 45.

42. In LUXEMBOURG the dependent security contract can only be avoided for mistake if the solvency of the debtor was a condition for assuming the security (CA Luxembourg 20 March 2002, BankFin 2003, 296).

43. In the NETHERLANDS, since the new Civil Code provisions of 1992 do not deal with the precontractual protection of security providers, the courts continue to take recourse to the general rules on mistake. In 1990, the Supreme Court had held that a consumer security provider may avoid a security for mistake if it had erred in assuming that it

incurred only a small risk of being called upon the security (HR 1 June 1990, NJ 1991 no. 759 at p. 3302). Later, this view seems to have been affirmed in an *obiter dictum* (HR 3 June 1994, NJ 1997 no. 287 at p. 1544). However, an annotator ("CJHB") to the latter case has disagreed on this point and insists that avoidance for mistake is now only admissible if one of the new statutory requirements in CC art. 6:228 is met; in particular, under para 1 lit. b) a contract may be avoided for mistake if the other party (*i.e.* the creditor) knew or ought to have known of the security provider's mistake as to the debtor's solvency but did not enlighten it.

V. *Sanctions*

44. In a few member states, protective statutes also provide for sanctions if statutory rules are violated. In AUSTRIA, a security provider is not bound by its personal security if the required information about the debtor's financial situation has not been given, unless the security provider would have assumed the personal security in spite of such information (ConsProtA § 25c sent. 2). In BELGIUM the obligations of the security provider are discharged if the creditor does not hand over to the (prospective) security provider a copy of the credit contract (ConsCredA art. 97, as amended in 2003). In FRANCE, if the nature of the engagement of the consumer security provider and the maximum amount of the secured claim are not indicated in the contract of personal security, the personal security is void (for all credit types: ConsC arts. L 341-2 ss., for consumer credit only: ConsC arts. L 313-7 ss.).
45. In member states which lack special provisions on the duty of information, courts and writers rely on general rules sanctioning the lack of sufficient information or the furnishing of wrong information. The first case may provoke a mistake on the part of the security provider and thus entitle the latter to avoid the security (DENMARK: *Pedersen*, Kaution 23; FRANCE: cf. *Simler* no. 146; GREECE: A.P. 456/1971, NoB 19, 1245; LUXEMBOURG: CA Luxembourg 20 March 2002, BankFin 2003, 296; NETHERLANDS: HR 1 June 1990, NJ 1991 no. 759 at p. 3302; indirectly confirmed by HR 3 June 1994, NJ 1997 no. 287 at p. 1544; SPAIN: *Reyes López* 232). Also the furnishing of wrong or incomplete information by the creditor may induce a mistake on the part of the security provider (NETHERLANDS: HR 3 June 1994, NJ 1997 no. 287 (professional security provider); *Tjittes*, Bezwaarde Verwanten 59-62 and WPNR 2001, 353). Those general remedies are available also in ITALY, according to general rules; however, there seems to be no case law specifically concerning personal security (see *supra* no. 36 *in fine*). In case of a violation of the special rules in the DANISH agreement between the Consumer Council and the Financial Council concerning precontractual information to be provided by a financial institution, the sanctions are said to depend on the circumstances of the case (*Pedersen*, Kaution 24 s.).
46. In other countries the security provider has a claim for damages resulting from the creditor's *culpa in contrahendo* so that the security provider can not be called upon to make payment (BELGIUM: *Lebon*, Vorlagebeschluss 275; FINNISH LDepGuar § 12 para 3; FRANCE: Cass.civ. 10 May 2005, Bull.civ. 2005 I no. 200 p. 169 on the ground that the creditor had not ascertained the security provider's financial ability to secure payment of a high debt; GERMANY: BGH 10 Jan. 2006, BGHZ 165, 363, 371 invoking *culpa in contrahendo* resulting in a claim for damages and now based upon CC §§ 280 para 1, 311 para 2 no. 1, 249; BGH 15 April 1997, NJW 1997, 3230, 3231; BGH 1 July

1999, NJW 1999, 2814; ITALY: on the basis of CC art. 1337 and 2043; *e multis* cf. Cass. 29 Sept. 2005 no. 19024, Foro it. 2006, 1105; Cass. 5 Aug. 2004 no. 15040, Giust.civ. 2005 I 669; Cass. 16 July 2001 no. 9645, Giust.civ.Mass. 2001, 1404; for an application to dependent personal security Cass. 11 Oct. 1994 no. 8295, Foro it. 1995 I 1903; *Roppo* 177 ss.; *Sacco and De Nova* II 260 s.).

47. In ENGLAND and SCOTLAND, if the creditor does not provide the security provider with a copy of the secured agreement according to ConsCredA sec. 105 para 5, the security is enforceable against the security provider on an order of the court only (ConsCredA sec. 105 para 7; cf. *O'Donovan and Phillips* no. 3-177; *Andrews and Millett* no. 17-005). For the specific sanctions in relation to non-compliance with additional precontractual requirements for the creditor in the situation of relationships of trust and confidence between debtor and security provider see *supra* nos. 30 and 38. Under IRISH law, a security given in relation to a consumer credit agreement is not enforceable if no copy of the credit agreement has been handed over to the security provider (ConsCredA sec. 38).

(Karpathakis/Böger)

Article 4:104: Door-to-Door Security Transactions

The provisions of the Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises are to be applied to a security which is subject to this Chapter.

Comments

A. Scope of Application

1. The Directive on doorstep transactions of 1985 (85/577 of 20 Dec. 1985, OJ 1985 L 372 p. 31) applies to securities granted by consumers since these are (financial) services (cf. Article 1 (1) and (2)).

2. The Directive, however, being of a general character, does not deal with the trilateral relationship which is involved in the assumption of personal security. It leaves open the question whether in such a trilateral relationship not only the security provider must be a consumer. Is the personal quality of the debtor irrelevant or must this also be a consumer? This issue has been addressed by the European Court of Justice requiring that the debtor of the secured transaction must also be a consumer (ECJ 17 March 1998 – C 45/96 [Dietzinger], ECR 1998 I 1199 at 1221 no. 22).

3. This narrow interpretation does not do full justice to the protective requirements of consumer security providers since their protection is made to depend on the fact that *also* another person, *scil.* the debtor, qualifies as a consumer. However, it is necessary to protect all consumer security providers in the process of contracting, regardless of whether or not also the debtor is a consumer. Therefore Article 4:104 provides that the provisions of the Directive are to be applied to a security which is subject to this Chapter, *i.e.* to a personal security which falls into the personal and subject-matter scope of application of the present Rules.

B. Mandatory Provision

4. According to Art. 4:102 (2), Article 4:104 is a mandatory provision in favour of the consumer security provider.

National Notes

I. General

1. The member states have transposed Council Directive 85/577/EEC on doorstep transactions in different ways: either in general legislation on consumer protection or on consumer credit (AUSTRIA: § 3 ConsProtA; BELGIUM: ConsCredA of 12 June 1991 arts. 7-9; DENMARK: Law no. 451 of 9 June 2004 on Certain Consumer Contracts §§ 2, 9, 10, 17, 18, 21 and 25; FINLAND: Law on Consumer Protection of 20 Jan. 1978 Chap. 6 §§ 2, 3, 5, 8-12 and 20-25) or in separate laws on doorstep transactions (ENGLAND and SCOTLAND: Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987; IRELAND: European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989; NETHERLANDS: Law on Doorstep Transactions *(Colportagewet)* of 7 Sept. 1973, as amended; PORTUGAL: DL no. 143 of 26 April 2001; SPAIN: Law no. 26 of 21 Nov. 1991; SWEDEN: Law on Distance- and Homesale of 24 Feb. 2005) or in a Consumer Code (FRANCE: Doorstep Transaction rule of 1972 (Law no. 72-1137 of 22 Dec. 1972), in ConsC arts. L 121-21 to L 121-33; ITALY: DLgs no. 50 of 15 Jan. 1992, now in ConsC arts. 45-49, 62, 63) or even in the Civil Code (GERMANY: the Law on the Revocation of Doorstep Transactions of 1986 has been integrated in 2002 into CC §§ 312, 312a and 312f).

II. Application of the Doorstep Transactions Rules to Security Contracts

2. In FRANCE the scope of the Consumer regulation on doorstep transactions includes since the *Dietzinger* decision of the ECJ (ECJ 17 March 1998 – C 45/96 [*Dietzinger*], ECR 1998 I 1199 at 1221 no. 22) also security contracts, contrary to the former opinion of the FRENCH government which wanted to exclude security contracts from the scope of the doorstep transactions rules since these contracts were not a contract for supply of services such as the (credit) contract concluded between the debtor and the creditor (cf. *Bout, Brusch, Luby and Poillot-Perruzzetto* no. 5580). But the application of doorstep transactions rules is in FRANCE mostly restricted to dependent security contracts (cf. ConsC new art. L 313-10-1 prohibiting the assumption of independent security for consumer debts). Also in ENGLAND and SCOTLAND, the *Dietzinger* decision concerning the applicability of the provisions on doorstep transactions to contracts of personal security is generally accepted, no different interpretation of the ENGLISH and SCOTS regulations themselves is suggested (cf. *Andrews and Millett* no. 3-034). GERMAN courts and writers agree that the provisions of CC §§ 312, 312a and 312f also apply to dependent personal securities (BGH 10 Jan. 2006, BGHZ 165, 363, 367 s. with references; Erman/*Saenger,* § 312 nos. 28 s.). The ITALIAN implementation of the directive does not address the applicability of its rules to personal security contracts, nor excludes it expressly. Case law on the point is scarce. However, the decision of the ITALIAN Competition Authority of 8 June 2000 no. 8353 (Disciplina commercio 2000, 1119) states that these rules apply to a personal security provided by a consumer; but cf. *infra* no. 4. In SCANDINAVIA only in FINLAND the national legislation transposing the doorstep directive covers also personal security contracts (see annex to LDepGuar and Law on Consumer Protection Chap. 1 § 2a).

III. Personal Criteria

A. The Security Provider Must be a Consumer

3. In AUSTRIA, GERMANY, FRANCE, ITALY and SPAIN the person who grants the security must be a consumer (AUSTRIAN ConsProtA § 3 (1); GERMAN CC § 312 (1); FRANCE: cf. *Bout, Brusch, Luby and Poillot-Perruzzetto* no. 5580; ITALY: Competition Authority 8 June 2000 no. 8353, *supra* no. 2; *Petti* 149; SPAIN: *Carrasco Perera a.o.* 92). Also in ENGLAND and SCOTLAND, the regulations implementing the doorstep Directive – which are drafted following closely the EC Directive, *i.e.* which were not extended to factual situations beyond the Directive – are applicable for the protection of consumer security providers only. However, it has been argued in ENGLAND that the specific consumer protection provisions being special statutory embodiments of the – general – unconscionability rules in relation to one particular group of vulnerable contractors, *scil.* consumers, it would be possible that ENGLISH law could give protection resembling that provided by the EC Directive in situations of security providers that would not fall under the European consumer protection provisions (cf. *Bamforth* 416).

B. *Must the Debtor also be a Consumer?*

4. In FRANCE, ITALY, the NETHERLANDS and SPAIN the debtor of the secured obligation must also be a consumer (FRANCE: cf. ConsC arts. L 121-21 ss.; ITALY: ConsC art. 45; Competition Authority 8 June 2000 no. 8353, *supra* no. 2; NETHERLANDS: Hondius and Rijken/*Giesen*, Handelspraktiken at 368; PORTUGAL: DL no. 143/2001 art. 13 para 1; SPAIN: Law no. 26/1991 art. 1 para 1).
5. In other countries the qualification of the debtor of the secured obligation is irrelevant (AUSTRIA: OGH 26 Sept. 1991, ÖBA 1992, 578, 579; in GERMANY this issue was very controversial: the Federal Supreme Court had originally followed the line of the *Dietzinger* – decision of the ECJ (BGH 14 May 1998, BGHZ 139, 21 at 24 ss.) but that met "massive" criticism of writers; recently, the division which now is exclusively competent for personal security has held that the personal qualification of the debtor is irrelevant (BGH 10 Jan. 2006, BGHZ 165, 363, 367 s.).

C. *The Creditor Must be a Professional*

6. In AUSTRIA, FRANCE, GERMANY, ITALY, PORTUGAL and SPAIN the creditor must be a professional (AUSTRIAN ConsProtA § 1 para 1 lit. a) and § 1 para 2; cf. FRENCH ConsC art. L 121-27; GERMAN CC § 312 para 1; ITALIAN ConsC art. 45; PORTUGUESE DL no. 143/2001 art. 13 para 1; SPANISH Law no. 26/1991 art. 1 para 1). Also in ENGLAND, IRELAND and SCOTLAND, protection under the provisions implementing the doorstep Directive depends upon the creditor acting for the purposes of its business (reg. 3 para 1 *juncto* reg. 2 para 1 in both regulations).

(Hauck)

Article 4:105: Form

The contract of security must be in writing and must be signed by the security provider. A contract of security which does not comply with the requirements of the preceding sentence is void.

Comments

A. General Rule and Exception

1. The general rule, from which Article 4:105 creates a restricted exception, is stated in PECL Article 2:101 (2): A contract need not be concluded or evidenced in writing and it can be proved by any means, including witnesses. This principle of freedom from form applies to personal securities as well. Article 4:105 is a (limited) exception to that general rule.

2. The reasons for the rule of Article 4:105 are the same that justify corresponding requirements for assuming personal security, especially dependent personal security enacted in the member states: *i.e.*, warning and protecting the providers of personal security generally and consumer providers of such security in particular.

B. Kinds of Personal Security

3. As to the instruments covered, all types of personal security are covered because otherwise no complete and effective protection of consumers can be achieved. In effect, since independent security as such is not accessible for consumers (see Article 4:106 (c)), primarily the dependent personal security covered by Chapter 2 is affected. In addition, also a co-debtorship for security purposes assumed by a consumer is subject to the rules of Chapter 4, as is expressly spelt out in Article 1:106.

C. All Terms to be in Writing

4. If it is to fulfil its function of clarification and warning, all terms of the contract of security must be in writing. Unwritten terms are void (cf. sent. 2). Such partial nullity may not affect the validity of the written portions of the contract, cf. the rule laid down in PECL Article 15:103; cf. also Article 4:116.

5. An electronic version of the security instrument suffices for these purposes. This follows from the EC Directive on Electronic Commerce 2000/31/EC of 8 June 2000, Article 9 (1).

6. Article 9 (2) of the Directive on E-Commerce allows member states to deviate from the Directive by requiring for a limited number of transactions a conventional writing, lit. (c) of Article 9 (2) allows to make such an exception for contracts of suretyship and collateral securities furnished by consumers. A few major member states have made use of this particular exception. It has been considered whether also the present Rules should provide such an exception. After extensive discussion it was decided that this option should not be used. At present, only few consumers will possess the necessary technical equipment so that, in fact, recourse to the electronic form will be relatively rare. Of course, this may change in future as more and more people may dispose of the equipment and increasing use may be made of it. However, a problem of abuse will barely arise since the assumption of a personal security is an obvious "disadvantage" to the security provider.

D. Signature

7. The writing must be duly signed by the security provider since this makes the written instrument binding upon it. A hand-written signature may be replaced by a qualified electronic signature (EC Directive on Electronic Signatures 1999/93/EC of 13 December 1999, Articles 1 (2) and 5 (1) (a)).

8. As far as the consumer security provider's protection is concerned, the reasons given *supra* no. 6 apply equally. The qualified electronic signature which is required is no less "complicated" than an ordinary hand-written signature so that the general warning effect is equally strong.

E. Mandatory Provision

9. According to Article 4:102 (2), Article 4:105 is a mandatory provision in favour of the consumer security provider.

National Notes

I. Dependent Securities

A. Form in General Required

a. General and Specific Rules

1. In AUSTRIA, GERMANY and GREECE contracts of dependent security by non-merchants must comply with a formal requirement established to warn the security provider (AUSTRIAN OGH 14 May 1985, SZ 58 no. 85 p. 400; GERMAN BGH 17 Feb. 2000, NJW 2000, 1569, 1570 with further references; GREECE: *Georgiades* § 3 no. 60). As of 2007, AUSTRIA will require the written form even for the dependent security of an entrepreneur (Law amending commercial law of 27 Oct. 2005 art. I no. 153 abrogates Ccom § 350; but for bank transactions an equivalent exception has been inserted into Law on banking § 1 para 6). The security provider's declaration must be in writing (AUSTRIAN CC § 1346 para 2; GERMAN CC § 766 and GREEK CC art. 849) which means that the written text of the contract must at the end be signed by the security provider (GERMANY: BGH 20 Nov. 1990, BGHZ 113, 48, 51; less severe BGH 13 Oct. 1994, NJW 1995, 43, 45; GREECE: *Simantiras* 13); the indication of a maximum amount is not necessary. Consequently, dependent securities may be assumed by use of general

conditions and terms of contracts. However, the original of the signed document has to be handed to the creditor since a telefax is not considered as sufficient (GERMANY: BGH 28 Jan. 1993, BGHZ 121, 224; GREECE: *Georgiades* § 3 no. 59, *contra Simantiras* 14 and 20). Furthermore in GERMANY an electronic signature is not accepted for dependent securities (cf. CC § 766 sent. 2, as of 13 July 2001). If these requirements are not met, the declaration is void (expressly GREEK CC art. 849; in the result also AUSTRIA and GERMANY since the provisions cited above declare the required form to be a condition of validity). However, in all three countries the formal defect can be validated by the security provider's performance of the security (AUSTRIA: Schwimann/*Mader and Faber* § 1346 no. 11; GERMAN CC § 766 sent. 3; GREEK CC art. 849 sent. 2).

2. Similarly, the ENGLISH Statute of Frauds 1677 sec. 4 requires that dependent securities, but not independent securities, generally are in writing and signed by the security provider or by another person that is authorised to do so. The fact that the creditor relied upon an oral security in extending credit to the debtor does not prevent the security provider from invoking the lack of form (*Actionstrength Ltd v. International Glass Engineering* [2003] 2 WLR 1060 (HL)). It is sufficient, however, that the offer of a dependent security by the security provider containing the essential terms of the security is made in written form; the acceptance might then be made orally (*J Pereira Fernandes SA v. Mehta* [2006] 1 WLR 1543 (CFI)). Moreover, for the purposes of the Statute of Frauds, an e-mail can suffice as written form; the automatic insertion of the sender's e-mail address in the e-mail by the internet service provider can, however, not be regarded as a signature (cf. *J Pereira Fernandes SA v. Mehta, supra*). In ENGLAND and SCOTLAND, additional formal requirements follow from the ConsCredA 1974: according to sec. 105 para 1 "any security provided in relation to a regulated agreement shall be expressed in writing" and sec. 105 para 5 prescribes that a copy of the document has to be handed over to the consumer security provider. The Consumer Credit (Guarantees and Indemnities) Regulations 1983 contain further detailed provisions regarding the prescribed form and content of security instruments. Thus, the consumer's signature has to be placed in a "signature box" at the end of the document, containing a prescribed warning and clearly distinguishable from the rest of the document (Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 3 para 1 lit. d *juncto* Schedule Part IV). Further, the terms of the security have to be easily legible and of a colour which is readily distinguishable from the colour of the paper (Consumer Credit (Guarantees and Indemnities) Regulations 1983 reg. 4 para 1). By virtue of ConsCredA sec. 105 para 7 lit. b a security granted in contravention of the formal requirements is not enforceable against the security provider except if a court order to enforce it is granted (ConsCredA sec. 127). If such an order is dismissed, ConsCredA sec. 105 para 8 prescribes the application of sec. 106, and thus the security is "treated as never having effect".

3. The situation is similar in IRELAND: also here the Statute of Frauds (Ireland) 1695 sec. 2 contains the general requirement for dependent securities, but not independent securities, to be in writing and signed (cf. *Johnston* 9.06 and 9.17); modern consumer protection legislation contains further formal requirements for securities in relation to consumer transactions (ConsCredA 1995 sec. 30).

4. According to the general rule on proof in FRENCH CC art. 1326 the secured amount must be indicated both in letters and in figures by the security provider as well as the type of liability – whether subsidiary or solidary. For unlimited securities, a maximum amount must be mentioned by the security provider (cf. Cass.civ. 22 Feb. 1984,

JCP 1985, II no. 20442). These requirements were first considered by the Civil Chambers of the French Supreme Court as a condition of validity of the security by combining the general rule on proof in CC art. 1326 with art. 2015 (since 2006: CC art. 2292) which stipulates that a security cannot be presumed (Cass.civ. 30 June 1987, D. 1987, Somm.Comm. 442, note *Aynès*). But since 1989 (Cass.civ. 15 Nov. 1989, D. 1990, 177; Cass.civ. 25 May 2005, Bull.civ. 2005 I no. 228 p.193), the courts regard these writing requirements as a mere condition of proof; if it is not met, the security contract is considered as a mere beginning of proof (Cass.civ. 15 Oct. 1991, JCP G 1992 II 21923, note *Simler*) and other means of evidence such as witnesses are then admitted (*Ferid and Sonnenberger* 512). After adoption of rules on electronic communications and signatures of 13 March 2000, these indications are to be made in electronic form (cf. new version of CC art. 1326).

5. In addition to these general rules, there is specific legislation in FRANCE for securities assumed by consumers. According to the FRENCH ConsC (for all credit types: ConsC arts. L 341-2 to L 341-3, for consumer credit and home owner credit: ConsC arts. L 313-7 to L 313-8), the consumer security provider must write by hand an obligatory formula about the nature and the extent of its obligation, the name of the debtor as well as the type of liability – subsidiary or solidary. The validity of consumer securities depends upon the observance of this qualified written form. No confirmation of the irregular contract seems to be possible (CA Limoges 20 May 1997, CCC 1998 no. 12; *contra* Cass.civ. 28 Nov. 1995, JCP G 1997, I no. 3991, JCP G 1997 I no. 3991, note *Simler and Delebecque*). The admission of electronic signatures by the amended version of CC art. 1326 in 2000 has not changed the situation. Of course, these formal requirements do not apply where a more qualified form, especially a notarial instrument is used (expressly in case of subsidiary liability: ConsC arts. L 313-7 and L 341-2, *a fortiori* in case of solidary liability: cf. Cass.civ. 24 Feb. 2004, Bull.civ. 2004 I no. 60 p. 47). The *Grimaldi* Commission had proposed that protective rules on the form of the consumer security contract were not to be considered as conditions of validity but as mere conditions of proof (CC proposed new art. 2300). In fact, this is based upon the general rules on proof of the amended version of CC art. 1326 (cf. *supra* no. 4) and denies any special protection with respect to form; however, this proposal was not adopted by the legislator of 2006.

6. Under BELGIAN and LUXEMBOURGIAN law contracts of security may only be proved if the requirements of CC art. 1326 are met. Otherwise the security contract may serve as a beginning of proof, as now in FRANCE (cf. *supra* no. 4; BELGIUM: *Van Quickenborne* nos. 292-311; LUXEMBOURG: Cass. Luxembourg 23 March 1989, Pas luxemb XXVII (1987-1989) Jur. 323). In addition, in BELGIUM specific protective legislation exists for providers of personal security securing a consumer credit – without distinguishing between consumer and other security providers: BELGIAN ConsCredA art. 34 para 1 requires to indicate in the security contract the secured amount, which may, however, be increased to cover default interest, but does not cover any penalty or damages caused by non-performance (ConsCredA art. 34 para 1, as amended in 2003). In order to facilitate this, the creditor must hand gratuitously a copy of the credit contract to the potential security provider.

7. Similarly according to DUTCH CC art. 7:859 the dependent security of a consumer can in general only be proved against the security provider by a writing signed by the latter. But the dependent security can be proved by all means of evidence if it has been

established that the security provider has performed it at least in part. In addition, DUTCH CC art. 7:859 (3) extends the preceding two rules to the form of a consumer's agreement to assume a dependent personal security.

8. According to PORTUGUESE CC art. 628 para 1 the dependent security must be assumed in the form required for the secured obligation. If there is no formal requirement for the latter, the same is true for the security, the principle of the freedom from form applying. Even if the parties decide to adopt a stricter form than is legally prescribed, the security provider is not obliged to do the same (STJ 14 June 1972, BolMinJus no. 218, 222; *Vaz Serra,* note STJ 14. 6. 1972).

b. Exceptions

9. In some exceptional cases the security provider may be precluded from invoking a lack of form if that would infringe the principle of good faith (AUSTRIA: Schwimann/*Mader and Faber* § 1346 no. 11; GERMANY: BGH 28 Jan. 1993, BGHZ 121, 224; GREECE: *Georgiades* § 3 no. 66).

10. AUSTRIAN and GERMAN Ccom § 350 state that dependent securities assumed by merchants are valid without observing the form of AUSTRIAN CC § 1346 para 2 or GERMAN CC § 766, respectively; however, as of 2007, the AUSTRIAN exception for merchants will be abrogated (Law amending commercial law of 27 Oct. 2005 art. I no. 133; however, by a subsequent amendment of the Banking Law the exceptional freedom from form in CC § 1346 (2) has been reintroduced for "liabilities assumed by banks in their course of business" cf. Banking Law § 1 para 6). The GREEK Draft of a Commercial Code contains a similar provision in art. 274. It has to be noticed that GERMAN courts do not apply Ccom § 350 to dependent securities assumed by managers, managing directors or shareholders for obligations of their company (BGH 29 Feb. 1996, BGHZ 132, 119, 122; BGH 16 Dec. 1999, NJW 1999, 1179, 1180; critical MünchKomm/*K. Schmidt* HGB § 1 no. 66 with further references).

11. Similarly in LUXEMBOURG the general rule on proof of CC art. 1326 (cf. *supra* no. 6) does not apply to dependent securities granted by merchants (LUXEMBOURG: CA Luxembourg 6 Oct. 1993, Pas luxemb XXIX (1993-1995) Jur. 279). The dependent security has a commercial character if the security provider has its own personal interest in the assumption of the security, even if the security provider is not a merchant (CA Luxembourg 26 June 1985, Pas luxemb XXVI (1984-86) Jur. 352). Such personal interest exists when the manager or the shareholder may by virtue of their shareholding exercise major influence upon the debtor company (CA Luxembourg 20 June 2002, BankFin 2003, 297). A direct or indirect participation in the management of the debtor's affairs is not necessary if any other patrimonial interest of the security provider can be found (CA Luxembourg 22 April 1992 no. 13246 unpublished).

12. In FRANCE, formerly special provisions (Ccom art. L 110-3) and the courts (Cass.com. 2 Oct. 1985, Bull.civ. 1985 IV no. 227 p. 190 for managers and CA Paris 20 Jan. 1999, JCP E 1999 Pan. no. 394 for major shareholders) had carved out exceptions from the general rule of CC art. 1326 (cf. *supra* no. 4). However, a Law of 1 Aug. 2003 has narrowed these exceptions by subjecting small and family enterprises which assume a dependent security to the rules for consumer security providers (cf. ConsC arts. L 341-2 and L 341-3, cf. *supra* no. 5; *Tricot-Chamard* JCP G 2004 I, no. 112, p. 334). The *Grimaldi* Commission had proposed to return to the solution prevailing before that Law (CC

proposed new art. 2300), *i.e.* no form requirement and freedom of proof for security with a commercial character; however, this proposal was not adopted by the legislator of 2006.

B. No Form Required

13. In DENMARK, FINLAND and SWEDEN no particular form is required under the general rule for contracts of dependent securities. According to DANISH and SWEDISH literature a security can even arise by silence and inactivity (DENMARK: *Ekström* 32; Andersen, Clausen, Edlund a.o./*Pedersen* 435 s.; *Pedersen*, Kaution 18; *Bryde Andersen* 425; *Højrup* 16 s.; *Jespersen* 21; SWEDEN: *Walin*, Borgen 36 ss.). According to the SWEDISH Supreme Court case HD 6 May 1961, NJA 1961, 315 silence can create an obligation of a security provider only where the inactivity shows a clear indication of the intention to be bound as security provider. However, in DENMARK and FINLAND contracts on dependent securities are normally made in writing (DENMARK: *Pedersen*, Kaution 18; Andersen, Clausen, Edlund a.o./*Pedersen* 435; FINLAND: *Ekström* 32). The DANISH Law on Financial Business § 48 para 5 requires the written form for a contract on dependent security when the security provider assumes a dependent security in favour of a financial institution as creditor (*Pedersen*, Kaution 19).
14. The general provision of ITALIAN CC art. 1937 requires only the express will of the security provider for the valid creation of a personal security. No form is required, but the will of the security provider must be clearly established. The meaning of "express" will is not always certain. Gestures and other kinds of traditional communication have been understood as ways of express manifestation. Since CC art. 1937 does not require a specific means of proof for the contract of security, any legal means of proof are admitted (Cass. 26 June 1979 no. 4961, Giur.it. 1980 I 1545; *Giusti* 93) and even the presumption (Cass. 14 July 1936 no. 2485, Foro it. 1937 I 38; Cass. 17 Oct. 1992 no. 11413, Giur.it. 1994 I 1649 ss.; *Giusti* 93). However, the general provision of the Civil Code must be read in connection with the special rules on banking contracts, which do apply to personal security and require a written document as well as the handing out of a copy to the client (DLgs no. 385/1993, art. 117) for the valid formation of a contract (art. 117 para 3). Moreover, specific contract terms favouring the party who supplied them require a specific approval in writing by the other party, according to CC arts. 1341-1342. Besides that, whenever consumer protection law applies (cf. national notes to Art. 4:101 no. 10) provisions on abusive clauses apply (ConsC arts. 33-38) requiring that some clauses listed in the law and producing a disadvantageous effect for the consumer are valid only if individually negotiated; of course, this rule may in the end result in a requirement of written form for that clause or even in an individual approval of them in writing by the consumer.
15. SPANISH CC art. 1827 para 1 only requires the express constitution of the contract of security, it does not require a special form. The contract does not have to be in writing or in any other prescribed form, only the will of the dependent security provider must be clearly established (*Guilarte Zapatero*, Comentarios 123 ss.). Nevertheless, business practice requires a writing for reasons of proof and security. Since SPANISH CC art. 1827 does not establish a specific way of proof for the contract of security, any legal means of proof are admitted.

16. Exceptionally and amazingly, in SPAIN a written form is required for commercial securities (Ccom art. 440). A simple letter of the security provider is enough to fulfil this requirement. This provision has been considered as unjustified (*Carrasco Perera a.o.* 77). However, the provision lacks practical importance, since securities use to be created in writing. Only one decision of the SPANISH Supreme Court (TS 17 Dec. 1996, RAJ 1996 no. 9002) has declared void a commercial security because of lack of form. However, no writing is required for extensions of the time limit of a security (TS 8 Oct. 1986, RAJ 1986 no. 5333) and this might be extended to any declaration of the security provider except the creation of the security (*Carrasco Perera a.o.* 77).

II. Independent Securities

17. In AUSTRIA for independent securities of non-merchants the same form as for dependent guarantees (cf. *supra* no. 1) is required. In 1992, the Supreme Court extended that statutory rule to independent securities since these are even more risky for the security provider than a dependent security (OGH 14 July 1992, SZ 65 no. 109 p. 69-73); this is now standing practice of the courts (OGH 14 July 1994, SZ 67 no. 128 p. 56).
18. In FRANCE, no special form is required for independent securities but the rules on proof (CC art. 1326 ss., cf. *supra* no. 4) apply if the security provider is not a merchant but a consumer (*Simler* nos. 931 ss.). Therefore in FRENCH banking practice the contract of independent security is in writing. The same applies to BELGIUM and LUXEMBOURG (cf. *supra* no. 6). It has to be noticed though that what was said about the BELGIAN ConsCredA (cf. *supra* no. 6) also applies to independent securities (ConsCredA art. 34 para 1). Also in the NETHERLANDS, the general rules on dependent securities of consumers apply to independent securities assumed by consumers (CC art. 7:863 *juncto* art. 7:859).
19. The GERMAN and GREEK Civil Codes do not contain any formal requirement for independent securities and, although the matter is disputed, courts do not apply the above mentioned rules of GERMAN CC § 766, GREEK art. 849, respectively, by analogy (Staudinger/*Horn* no. 223 preceding §§ 765 ss.; *Georgiades* § 6 no. 48). Under ENGLISH law the general rule under the Statute of Frauds 1677 sec. 4 that a security is only enforceable if it is in writing is not applicable to indemnities because they are primary undertakings by the security provider (*Andrews and Millett* no. 1-013). However, the formal requirements under modern consumer protection legislation as described above (*supra* no. 2) also apply to independent securities. Also in DENMARK independent securities are mostly drawn up as written documents. However, it is also possible to hand over an independent security by telex or electronic data transfer (*Pedersen*, Bankgarantier 77).

III. Co-Debtorship for Security Purposes

20. The AUSTRIAN, GERMAN and GREEK Civil Codes do not contain any formal requirement for assuming a co-debtorship in general or a co-debtorship for security purposes in particular and the courts do not apply the above mentioned rules of AUSTRIAN, GERMAN and GREEK law (*supra* no. 1) by analogy (AUSTRIA: OGH 4 Feb. 1992, JBl 1993, 657, 658; OGH 4 Oct. 1989, SZ 62 II no. 160 p. 159; OGH 19 July 1988, SZ 61 II no. 174 p. 42; GERMANY: Palandt/*Heinrichs* no. 3 preceding § 414 with further

references; GREECE: A.P. 934/1992, EEN 60, 656; *Georgiades* § 7 no. 13). However, among writers the latter issue is quite controversial (cf. especially in AUSTRIA *Bydlinski* 27, 29, 30 with references; for GERMANY: MünchKomm/*Möschel* no. 13 preceding § 414; *Harke*, ZBB 2004, 147 ss.).

21. In FRANCE, BELGIUM and LUXEMBOURG, if the debtor is a consumer the assumption of debt is an obligation to pay and the general rules on proof (CC art. 1326) apply (cf. *supra* nos. 4 and 6). Since it is a primary undertaking, an assumption of debt for security purposes under ENGLISH law does not require written form (cf. *O'Donovan and Phillips* no. 3-16). For the purposes of the ConsCredA, however, the above mentioned formalities (*supra* no. 2) have to be observed.

IV. Binding Comfort Letters

22. Binding comfort letters are not subject to any formal requirement. However, insofar as the binding comfort letter contains an obligation to pay and the issuer of the letter is a consumer, in FRANCE, BELGIUM and LUXEMBOURG the general rules on proof (CC art. 1326) apply (cf. *supra* nos. 4 and 6; FRANCE: *Simler* no. 1019).

(Seidel/Hauck)

Article 4:106: Nature of Security Provider's Liability

Where this Chapter applies:

(a) an agreement purporting to create a security without a maximum amount, whether a global security (Article 1:101 lit. (f)) or not, is considered as creating a dependent security with a fixed amount to be determined according to Article 2:102 paragraph (3);

(b) the liability of a provider of dependent security is subsidiary within the meaning of Article 2:106, unless expressly agreed otherwise; and

(c) an agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met.

Comments

A. General Remarks

1. Article 4:106 specifically addresses three clauses often utilised in personal securities and adapts these in the interest of protecting the consumer security provider. The remedy of adaptation is being used in order to balance the opposite interests of the parties: that of the creditor in maintaining a security agreed upon and the security provider's interest in being protected against harsh contract clauses.

2. Article 4:106 is mandatory in favour of the consumer with the exception indicated in lit. (b).

B. Security without a Maximum Amount

3. Letter (a) affects a security which does not contain a maximum amount. It is obvious that such a security is particularly risky for the security provider since it does not definitely know the upper limit of its future obligation.

4. Article 4:106 does not nullify such agreements but maintains them, although with a limitation. The unlimited security is converted into a limited security with a fixed amount. This amount is to be determined according to Article 2:102 (3). This rule provides, in essence, that, unless a maximum amount can be determined from the agreement of the parties, the amount of the security is limited to the amount of the secured obligation at the time the security became effective. For details, cf. Article 2:102 (3) and Comments on Article 2:102 nos. 8 s.

C. Subsidiary Liability

5. Letter (b) reverts the general rule on which Articles 2:105 and 2:106 are based: A provider of dependent security is solidarily liable with the debtor of the secured claim, unless subsidiary liability had been agreed upon. The consumer security provider is better protected by the contrary rule: its liability is subsidiary, unless solidary liability has been agreed. The consequences and limits of this subsidiary liability are laid down in Article 2:107 and need not be repeated here.

6. A higher degree of protection for the consumer security provider could, of course, be achieved if any contractual derogation from the basic subsidiary liability would be prohibited. That, however, would go clearly beyond the state of the law in most member states. Nor do there seem to exist practical needs or demands for change. Also in practice, creditors usually turn first against the debtor before considering steps against a security provider.

D. No Independent Security

7. According to lit. (c), an agreement for an independent personal security is converted to a dependent security. The reason for this automatic conversion is the increased risk which an independent security implies: Independence means that the accessority of the dependent security is excluded so that the security provider's obligation may exceed the amount and other terms of the secured obligation, if any, and it may not invoke defences of the debtor (cf. Articles 1:101 (b), 3:102 (3) and 3:103 (3)).

8. In order to avoid complete nullity of a consumer's independent security, lit. (c) provides for the conversion of the independent into a dependent security, provided the conditions of the latter are met. This last clause refers, in particular, to the substantive and formal conditions laid down in Chapters 1, 2 and 4. For instance, since according to the definition of a dependent security in Article 1:101 (a), a dependent security must purport to serve as security for an obligation of the debtor owed to the creditor, a pure payment guarantee without any underlying obligation to be secured could not be converted to a dependent security. This is confirmed by the contents of Chapter 2 on dependent personal security: the application of this Chapter presupposes that there is an obligation to be secured since this is the basis upon which the security "depends".

9. It goes without saying, that, once the conditions of Chapter 4 are met, also the effects of the converted independent security are subject to Chapters 2 and 4.

E. Application to Co-Debtorship for Security Purposes

10. Only litt. (a) and (b) of Article 4:106 may be applicable to co-debtorships for security purpose. By contrast, lit. (c) deals specifically with independent personal security and therefore does not apply to co-debtorship for security purposes.

11. Article 4:106 (a) deals with a case which will rarely occur with a co-debtorship for security purposes, namely one without a maximum amount. In this rare case, the policy expressed in Article 2:102 (3) to which Article 4:106 (a) refers, must be adopted and slightly adapted: The security co-debtor's obligation must be limited to the amount for which the primary full co-debtor was liable at the time when the secondary co-debtorship has been assumed.

12. According to Article 4:106 (b), a consumer security provider's liability is subsidiary (cf. Article 2:106), unless the parties expressly had agreed otherwise. This provision will affect almost all cases of co-debtorship for security purposes, since normally these result in solidary liability (cf. *supra* Article 1:106 Comment nos. 2-3). In order to prosecute the policy of Article 4:106 (b), it will be necessary to distinguish: On the one hand, if the co-debtors had simply agreed on creating a co-debtorhsip (which merely *implies* solidary liability), there is no "express" agreement on solidarity, as required by lit. (b); consequently, the co-debtor for security purposes will then only be charged with subsidiary liability. On the other hand, if they had expressly agreed upon solidary liability, this complies with the requirement of lit. (b).

National Notes

I. Limitation of Security without Maximum Amount – Lit. (a)

1. See *supra* national notes on Art. 1:101 nos. 42-46.
2. In BELGIUM generally, in contracts of personal security that secure consumer credits, the extent of the liability of the security provider – whether being a consumer or not – has to be limited to a specific amount, which may, however, be increased to cover default interest, but does not cover any penalty or damages caused by non-performance (ConsCredA art. 34 para 1, as amended in 2003). Also in the NETHERLANDS, a personal security provided by a consumer is only valid if a maximum amount has been fixed (CC art. 7:858 para 1); however, interest for the debtor's delay in payment and the creditor's costs of action against the debtor may under certain circumstances (cf. national notes on Art. 2:104 no. 16) be added to that maximum (CC art. 7:858 para 2). These provisions are mandatory in favour of a consumer security provider (CC art. 7:862 lit. (a)). According to the FRENCH ConsC (for all credit types: ConsC arts. L 341-2 to L 341-3, for consumer credit and home owner credit: ConsC arts. L 313-7 to L 313-8), the consumer security provider must write by hand the maximum amount (including interest, penalties and – according to case law (Cass.civ. 30 March 1994, Bull.civ. 1994 I no. 230 p. 163; RTD civ 1994, 903) – the percentage rate of charge); otherwise the security contract is void.

II. Subsidiary Liability of the Consumer Security Provider – Lit. (b)

A. Subsidiary Liability is Mandatory

3. In the NETHERLANDS the general rule that the consumer security provider's liability is only subsidiary, is mandatory (CC art. 7:855 para 1 *juncto* art. 7:862 lit. a). The situation is similar in BELGIUM, but there is no distinction between consumer and other security providers. In addition the preconditions for the debtor's default are increased: the creditor may only sue the security provider for a consumer credit if the debtor has defaulted at least on two payments or twenty percent of the total sum due or on the last due payment and if the debtor has not performed within one month after the creditor's demand sent by registered letter (ConsCredA art. 36).

B. *Subsidiary Liability as the Non-Mandatory General Rule*

4. In all other member states there are no special rules on the character of a consumer security provider's liability. This means that the ordinary rules on a security provider's liability apply, but these rules are not mandatory. A non-mandatory subsidiary liability of all providers of dependent security is the rule in almost all member countries (See *supra* national notes to Art. 2:106.).
5. In ENGLAND, IRELAND and SCOTLAND the security provider's liability is solidary unless otherwise agreed (cf. national notes to Art. 2:105 no. 1). The situation is the same in ITALY (CC art. 1944 no. 1). Moreover, clauses establishing the *beneficum excussionis* (see *supra* national notes on Art. 2:106 nos. 9-10) in favour of the security provider – whether or not a consumer – are hardly ever negotiated in banking practice (*Petti* 297 ss.).

III. *Independent Securities or Co-Debtorship Assumed by Consumers – Lit. (c)*

6. Only the NETHERLANDS have a clear solution for the treatment of an independent security assumed by a consumer: All mandatory special provisions for a consumer's dependent security also apply to a consumer's independent personal security (CC art. 7: 863). However, in practice such security instruments by consumers do not seem to be used (*Ensink* 552).
7. In BELGIUM the Consumer Credit Act applies to dependent security and other personal security (ConsCredA arts. 34 ss.), including independent security. However, opinion among BELGIAN writers is split on whether an independent security may be assumed by consumers (*pro: Vliegen* no. 181; *contra: T' Kint* 419 and *Geortay* 858, 862).
8. In FRANCE the recent Decree-Law no. 2006-346 of 23 March 2006 prohibits the assumption of an independent security for consumer debts (ConsC new art. L 313-10-1, irrespective of whether the security provider is a consumer or not). It remains open whether professional debts can be secured by an independent security of a consumer. According to writers (*Simler* no. 920; Malaurie and Aynès/*Aynès and Crocq* no. 339) independent securities granted by a consumer are generally valid, based upon the freedom of contract. But the courts are very restrictive in admitting the validity of such a security and on the ground of consumer protection often annul it (mostly for deceit: CA Paris 16 April 1996, JCP G 1997, I no. 3991 (10) or for error: CA Paris 27 June 1990, JCP E 1991, I no. 119, note *Hassler*). Sometimes the courts convert a consumer's independent security into a dependent security (CA Paris 26 Jan. 1993, D. 1993, I.R. 93) regardless of the intention of the parties. Similarly in a case of co-debtorship where a house-wife assumed a loan with which her husband as mere co-debtor financed its business, a first-instance court requalified the loan as a dependent personal security (CFI Lons-le-Saulnier 18 Nov. 1997, CCC April 1998 no. 64, note *Raymond*), to prevent the circumvention of the mandatory rules of the Consumer Code (*Simler* no. 28).
9. In ENGLAND, the question whether a personal security is a dependent or an independent security is to be decided on the basis of the general rules on interpretation (cf. *Andrews and Millett* no. 1-013); there is no general principle that an independent security can be assumed by non-consumers only (but cf. national notes on Art. 3:101 no. 3). The consumer protection legislation in the ConsCredA covers independent securities

as well (cf. *Andrews and Millett* no. 17-003), see however national notes on Art. 1:101 no. 65).

10. In GERMANY first demand securities may be assumed by consumers if two restrictions are respected: First, securities on first demand provided in standard conditions are binding only upon persons that are familiar with this kind of security so that consumers are excluded (cf. BGH 5 July 1990, NJW-RR 1990, 1265; BGH 2 April 1998, NJW 1998, 2280, 2281; BGH 8 March 2001, BGHZ 147, 99 for dependent and Staudinger/*Horn* nos. 232 and 25 preceding §§ 765 ss. for independent securities). Second, if a first demand security is individually negotiated, the creditor is obliged to inform the provider of security about the special risks linked to this type of security if the security provider is obviously without experience in this matter. If these restrictions are not respected, the security provider is only liable as if it had assumed a dependent security (for dependent securities cf. BGH 2 April 1998, NJW 1998, 2280, 2281; MünchKomm/*Habersack* § 765 no. 100; Palandt/*Sprau* no. 14 preceding § 765).
11. In GREECE, the so-called "guarantee letters", which are independent securities, are usually issued by credit and financing institutions. However, it is generally possible for anyone to issue an independent security (*Georgiades* § 5 nos. 7 ss., § 6 no. 2 fn. 2, 3).
12. In ITALY, in the absence of a specific prohibition it is thought to be possible to create independent securities between private persons (*De Nictolis* 34 and 37). Since the ITALIAN Civil Code covers both civil and commercial law, there is no clear differentiating element between both kinds of contracts. The most important authors, however, underline the commercial character of the independent securities, as opposed to the civil character of the dependent security (*Portale*, Le garanzie bancarie 15).

(Dr. Poulsen/Hauck)

Article 4:107: Creditor's Obligations of Annual Information

(1) Subject to the debtor's consent, the creditor has to inform the security provider annually about the secured amounts of the principal obligation, interest and other ancillary obligations owed by the debtor on the date of the information. The debtor's consent, once given, is irrevocable.
(2) Article 2:107 paragraphs (3) and (4) apply with appropriate adaptations.

Comments

A. Basic Idea

1. For ordinary dependent security, Article 2:107 imposes upon the creditor a limited number of obligations to notify the security provider on certain important changes that affect the secured obligation. Apart from instances of non-performance or inability to pay, these required informations refer to major events affecting the extent of the secured obligation, such as an extension of maturity (Article 2:107 (1)) and major increases of the secured obligations under a global security (Article 2:107 (2)).

2. For personal security assumed by consumers it seems appropriate to extend the basic idea underlying Article 2:107 and to impose an annual information to be furnished to the consumer. Such annual information is apt to remind the consumer periodically of the potential risk which it had assumed which otherwise, especially in the case of long-term credits, might be forgotten. The obligation of annual information does not impose a major burden upon the creditor since business people usually strike such a balance for each account, often at the end of the calendar year or else at the end of the respective business year.

B. Debtor's Consent

3. Contrary to Article 2:107, the annual information under Article 4:107 requires the debtor's consent (para (1) sent. 1). This difference between the two rules is justified by the fact that the two most important items to be communicated under Article 2:107, *i.e.* the debtor's non-performance or inability to pay, concern vital events with respect to the secured obligation; they may trigger the security provider's duty to make payment to the creditor (cf. Article 2:106 (2) and (3)). Because of this importance for the security provider, these notifications must be communicated to the security provider even without the debtor's agreement. By contrast, the periodical, annual information of the security provider refers to the amounts of principal obligation, interest and other ancillary obligations and therefore affects very sensitive data. This justifies it to require the debtor's consent.

4. The second sentence of Article 4:107 (1) supplements the preceding sentence by providing that the debtor's consent, once given, cannot be revoked by the debtor.

C. Scope of Items to be Disclosed

5. The text enumerates the principal obligation, interest and other ancillary obligations that have to be disclosed. It is the amount of each of these items that must be contained in the annual information. It is the sum total of these items that is relevant for the security provider in order to demonstrate its total potential indebtedness.

6. In order to be realistic, the figures to be given by the creditor must be as of the date of the information.

D. Exception

7. By referring to Article 2:107 (3), an exception made by that provision is adopted and incorporated into Article 4:107. The annual information required by Article 4:107 (1) need not be given if and in so far as the security provider already knows that information. The exception also applies if the security provider can reasonably be expected to know that information. Both actual and constructive knowledge may, *e.g.*, be held by a security provider who is the spouse of a director of the indebted company.

E. Sanction

8. Likewise, the cross-reference to Article 2:107 (4) incorporates into Article 4:107 the sanction which that provision establishes. For further details, cf. the Comments to Article 2:107.

F. Mandatory Rule

9. According to Article 4:102 (2), Article 4:107 may not be deviated from to the disadvantage of a security provider who is a consumer.

G. Application to Co-Debtorship for Security Purposes

10. The creditor's duty to report annually on the amount of the debtor's outstanding obligations applies correspondingly to a co-debtorship for security purposes. The creditor must inform the "security debtor" about the obligations of the "real debtor" to the creditor.

National Notes

I. Generalia

1. In the member states, the legal basis for the security provider to obtain information about the secured obligation in the absence of any default of the debtor is sometimes not framed as a duty of the creditor to inform but rather as a duty of the creditor to answer questions (see *infra sub* no. 2). Throughout the following national notes – as regards the duty of information dealt with in this Article as opposed to the creditor's duty of information in the case of a default by the debtor (cf. notes to Art. 2:107) – such a duty to answer questions is considered as being to a large degree functionally equivalent. The only difference is whether or not the security provider has to ask the creditor before the latter is bound to give information in regular intervals.

II. Duty to Inform the Security Provider without Default by Debtor

A. Legal Systems with such a Duty

2. In BELGIUM, the creditor has to inform the provider of security for a consumer credit – whether or not a consumer security provider – about respites of payment granted by the creditor as well as of any amendment of the credit agreement (ConsCredA art. 35 sent. 2). In ENGLAND, the creditor is bound to answer questions of the security provider about the amount for which the security provider is liable under the security (O'*Donovan and Phillips* nos. 4-28, 11-06). The situation is similar in SCOTLAND (*Royal Bank of Scotland v. Greenshields* 1914 SC 259 (CA); Stair/*Eden* no. 898). Under ENGLISH law, the information to be given includes the amount of the secured debt (up to the maximum amount of the security) and any interest charged *(O'Donovan and Phillips ibid.)*. In both ENGLAND and SCOTLAND, even more far-reaching information rights exist under the ConsCredA 1974 (secs. 107-109): here the creditor has to provide *inter alia* copies of the credit agreement and statements showing the total sums already paid by the debtor, payable at the time of the information or becoming payable under the credit agreement (Halsbury/*Worsley, Rosenthal, Bourne and Riley-Smith* para 202). In FINLAND the security provider under a global guarantee must be informed by the creditor every six months about the amount of the debtor's secured obligation (LDepGuar § 13 para 1). According to § 13 para 2 the liability of the security provider of a global guarantee can be reduced if the creditor neglects its duty of information (RP 189/1998 rd 49).
3. In FRANCE three distinct provisions exist, which provide for a duty of information towards the consumer security provider. Firstly, CC art. 2016 para 2 (since 2006: CC art. 2293 para 2) stipulates that information on the changes in the amount (any increase or decrease) of the secured debt including its ancillary obligations should be given to a consumer provider of dependent security at least once every year. Although the provision applies according to its wording only to indefinite dependent securities, the courts have extended it also to definite dependent securities (Cass.civ. 16 March 1999, D. 1999 I.R. 99). Secondly, according to the Consumer Code the provider of dependent security has to be given exact information about the amounts of principal and interest and not only about the changes in the amount of the debt (ConsC art. L 341-6 sent. 1 for all credit types). Finally the *Madelin* Act of 1994 requires the same information but only where a dependent security without a time limit is assumed by a natural person for the

professional purposes of an individual entrepreneur (Art. 47 II para 2 of *Madelin* Act *juncto* MonC art. L 313-22). All these three information duties should have been replaced according to the *Grimaldi* Commission's proposal by one provision to be located in the Civil Code (CC proposed new art. 2307 para 1), which would have been very similar to the present ConsC art. L 341-6; however, this proposal was not adopted by the legislator of 2006. In ITALY, the bank's duty of annual notification to the client to provide it with complete and clear written information regarding the development of the relationship is applicable also to consumer security providers (DLgs no. 385 of 1 September 1993 on Banking Law art. 119; *Petti* 484).

B. Whether Duty Depends upon Security Provider being a Consumer

4. In ENGLAND, the general duty to answer questions as to the amount of the secured debt does not depend upon whether the security provider is a consumer; rather, this duty derives from a general duty of creditors to answer direct questions of security providers and, in answering these questions, to give information honestly and to the best of their ability (*Hamilton v. Watson* (1845) 8 ER 1339 (HL); *O'Donovan and Phillips* no. 4-27). The more far-reaching information duties of the ConsCredA 1974 secs. 107-109 apply only if the security is given in relation to a regulated agreement under this Act (cf. national notes Art. 1:101 no. 65) and if the security itself is also a non-commercial agreement (ConsCredA 1974 secs. 107 para 5, 108 para 5, 109 para 4). In FRANCE it is irrelevant whether the secured debt is owed by a consumer or a professional, as long as the provider of dependent security is a consumer (cf. CC art. 2016 para 2 (since 2006: CC art. 2293 para 2) and ConsC art. L 341-6 sent. 1). Equally, the *Grimaldi* Commission had proposed to require regular information to every natural person, whether acting for private or for professional purposes (CC proposed new art. 2307 para 1); however, this proposal was not adopted by the legislator of 2006. In ITALY the bank's duty of annual information to the client (*supra* no. 3) does not depend upon the qualification of the client as a consumer, for it is a general duty imposed upon banks in their relationship with all kinds of clients (*Petti* 484).

C. Periodicity of Duty to Inform

5. For ENGLISH law it is said that there is a general right to inquire periodically the amount of the secured debt (*O'Donovan and Phillips* nos. 4-28); however, there does not seem to be any case law as to the precise duration of the interval between such inquiries of the security provider. Requests for information according to the ConsCredA 1974 ss. 107-109 can only be made after one month has passed since the last information was given in relation to the same credit agreement (ConsCredA 1974 ss. 107 para 3, 108 para 3, 109 para 2). According to FINNISH LDepGuar § 13 para 1 the security provider under a global guarantee must be informed every six months. In FRANCE this information has to be given every year (cf. CC art. 2016 para 2 (since 2006: CC art. 2293 para 2; ConsC art. L 341-6 sent. 1, art. 47 II para 2 of the *Madelin* Act *juncto* MonC art. L 313-22) and in ITALY at least once a year (Banking Law art. 119, *supra* no. 3).

D. Consent of Debtor

6. It seems that under ENGLISH law the creditor is bound to answer questions of the security provider as to the amount of the secured debt only if the debtor has given permission to do so (cf. *O'Donovan and Phillips* nos. 4-28; *Andrews and Millett* no. 5-026; *Hapgood* 712). The debtor's consent implies the permission for the creditor to answer specific questions of the security provider; thus, the scope of the consent being limited in this way, it seems that the question of revocability of the debtor's consent in relation to information to be given to the security provider does not arise.

E. Sanctions

7. In ENGLAND, a specific sanction exists for the failure to comply with the information requirements under the ConsCredA 1974: according to secs. 107 para 4, 108 para 4 and 109 para 3, the creditor is not entitled to enforce the security while the default continues (cf. *O'Donovan and Phillips* nos. 3-179; *Andrews and Millett* no. 17-008). Similarly in FRANCE, if the creditor does not give the required information, the consumer provider of dependent security is discharged from certain ancillary obligations, *e.g.* penalties or default interest, until the creditor makes its notification (ConsC arts. L 341-6 sent. 3 and MonC art. L 313-22 para 2). By contrast, in case of a global security, if the creditor omits or delays the required information, the consumer provider of dependent security is definitely released from any liability in relation to ancillary obligations (FRENCH CC art. 2016 para 2 (since 2006: CC art. 2293 para 2)). ITALIAN Banking Law art. 127 entrusts the *Ufficio italiano cambi*, a special body of the Bank of Italy, and the Minister of the Economy with the task of controlling banks' compliance with those rules. Repeated violations of these rules may lead to suspension of the bank's activities for no more than thirty days (art. 127 para 5).

III. No Duty to Inform the Security Provider without Default by Debtor

8. In some member states, however, there is no such duty of annual information as provided for in this Article or a corresponding duty to answer questions, cf. the national notes on Art. 2:107 concerning member states that do not impose any information duties on the creditor.

(Böger)

Article 4:108: Limiting Security With Time Limit

(1) A security provider who has provided a security with an agreed time limit may three years after the security became effective limit its effects by giving notice of at least three months time to the creditor. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts. The creditor has to inform the debtor immediately.

(2) By virtue of the notice, the scope of the security is limited according to Article 2:109 paragraph (2).

Comments*

A. General Idea

1. Protection against unforeseeable liability. For providers of dependent or independent security – whether consumers or not – these Rules provide protection by Articles 2:109 and 3:106 (2), respectively, according to which contracts of dependent or independent personal security – with the exceptions mentioned in Articles 2:109 (1) sent. 2 and 3:106 (2) sent. 3 – must have either an agreed time limit or be subject to the possibility of a time limit to be set by any party. For the consumer security provider, however, also securities with an agreed time limit can be regarded as creating an intolerable level of risk: consumer security providers will typically lack business experience; if they assume a security which is agreed to cover unspecified future obligations of the debtor over a period of several years they might not be able to foresee the extent of obligations of the debtor which over the course of time could fall under this security. Article 4:108 provides additional protection for consumer security providers by allowing them to limit the duration of securities with an agreed time limit if these securities run over a period of three years or more.

B. Scope of Application

2. Securities with a time limit. Article 4:108 applies to securities with an agreed time limit only. This limitation may seem to be amazing since the need to limit a security obviously is more pressing if the parties had not agreed upon a time limit. However, this gap is easily explained by the fact that securities without an agreed time limit may be limited as a matter of general principles (cf. *supra* no. 1; note that Article 2:109 is applicable to consumer providers of an independent security and consumer security providers in a co-debtorship for security purposes as well, cf. Articles 4:106 (c) and 4:102 (1), respectively). Whether the agreed time limit in question constitutes a time limit for resort to a security within the meaning of Article 2:108 (cf. Comments on Article 2:108 nos. 7 ss.) is irrelevant for the application of Article 4:108 (for the effects of a limitation according to Article 4:108 in the case of an agreed time limit for resort to the security see *infra* no. 11).

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* The Comments on Article 4:108 are by Ole Böger, LL.M.

3. **Applicability to all types of security.** As in general all provisions in Chapter 4, Article 4:108 is applicable regardless of the type of personal security assumed by the consumer security provider. The fact that in respect of the consequences of the limitation of a security by the consumer security provider, Article 4:108 refers to Article 2:109 in the Chapter on dependent security, does not, however, give rise to any difficulties since the provisions in Chapter 2 are applicable to consumer providers of an independent security and consumer security providers in a co-debtorship for security purposes already by virtue of Articles 4:106 (c) and 4:102 (1), respectively.

4. **Excluded cases.** According to para (1) sent. 2, the right to limit a security on the basis of Article 4:108 does not apply where the security is restricted to cover specific obligations or obligations arising from specific contracts. This exception, which resembles Article 2:109 (1) sent. 2, intends to protect the creditor who may have entered into the contract from which the secured obligations arise only on the strength of the security provided in relation to these obligations. Moreover, the risk of an unforeseeable extent of the consumer security provider's liability appears to be less pressing in these situations as the reference to a specific obligation or a specific contract should make the potential scope of the security more easily determinable even for the consumer security provider. See also Comments on Article 2:109 nos. 9 s.

5. **Scope of application limited by Articles 4:106 (a) *juncto* 2:102 (3).** The scope of application of Article 4:108 is further in effect limited as a result of Article 4:106 (a) to securities with an agreed maximum amount. The right to limit the scope of a security is of interest especially in cases where the security is agreed to cover not only existing, but future obligations as well (cf. Comments on Article 2:108 no. 8). Should a security lack an agreed maximum amount, such a fixed amount will be determined on the basis of Articles 2:102 (3) (for dependent securities other than global securities) and Articles 4:106 (a) *juncto* 2:102 (3) (for all types of securities). Often in cases of securities covering also future obligations the amount of the secured obligations at the time the security becomes effective, *i.e.* normally at the time the security is assumed, will be very low or nil, so that a future limitation on the basis of Article 4:108 will not be of much interest for the security provider in these situations.

C. Limitation of Security by Consumer Security Provider

6. **Limitation by security provider giving notice.** The security may be limited by a simple declaration (cf. Comments on Article 2:109 no. 4); contrary to Article 2:109, only the security provider is entitled to limit the effects of the security according to Article 4:108.

7. **Limitation after minimum period of three years.** A security with an agreed time limit may only be limited by the security provider if at least three years have passed since the security became effective. It is assumed that even the consumer security provider should be able to foresee the risks to be incurred over such a period of limited time, so that the additional protection provided by Article 4:108 does not appear to be necessary in these cases.

8. **Period of notice.** As in Article 2:109, the limitation of the security can become effective only after a period of notice of at least three months has expired. See Comments on Article 2:109 no. 5.

D. Effects of Limitation

9. **Limitation of the scope of the security.** For the limitation of the scope of the security, Article 4:108 (2) refers to Article 2:109 (2). For the effects of the limitation under this provision see Comments on Article 2:109 nos. 6 ss.

10. **Creditor's duty to inform the debtor.** According to Article 4:108 (1) sent. 3, the creditor has to inform the debtor once it receives a notice of limitation of the security by the security provider. This provision is necessary because often not only the creditor, but also the debtor will have relied on the security running until its agreed time limit.

11. **Limitation according to Article 4:108 and agreed time limit for resort to security.** The limitation of the security by the security provider according to Article 4:108 does not in itself create a time limit for resort to the security within the meaning of Article 2:109 (see also Comments on Article 2:109 no. 8). However, should the parties have agreed on such a time limit for resort to the security, its effects will not be affected if the security provider limits the security according to Article 4:108. While the scope of the security will be limited according to Articles 4:108 (2) *juncto* 2:109 (2), the creditor will still be able to resort to this security until expiration of the original time limit agreed by the parties.

National Notes

I. Member States with Specific Rules on Limitation of Securities by Consumer Security Providers

1. The DUTCH regulation of time limits for consumer providers of security is quite elaborate. It is limited, though, to personal security for future obligations of the debtor (CC art. 7:861 para 1). Such a dependent security can be terminated at any time if no time limit had been agreed for it (lit. a); and after five years, if it had been agreed for a limited period (lit. b). In both cases, the security remains valid for obligations that had already arisen at the time of termination (para 2). These rules are mandatory in favour of consumers (CC art. 7:862 lit. a).
2. Under BELGIAN law personal securities for a credit without an agreed time limit assumed by security providers – without distinguishing between consumer and other security providers – are automatically limited to five years. This period of five years can

be prolonged at the end of the period for another five years with the express consent of the consumer security provider (ConsCredA art. 34 para 3, as amended in 2003).

3. In FRANCE consumer security providers are not allowed to assume indefinite dependent personal securities; these must have a time limit but no maximum period has been fixed (for all credit types: ConsC art. L 341-7 and for consumer credit only: ConsC art. L 313-7).

II. Member States without Specific Rules on Limitation of Securities by Consumer Security Providers

4. Under ENGLISH, FINNISH and GERMAN law, the possibilities for security providers to limit the scope of personal securities as described in the national notes to Art. 2:109 follow from general principles (ENGLAND: general equitable rules, cf. *O'Donovan and Phillips* no. 9-43; FINLAND: LDepGuar § 19 para 2; RP 189/1998 rd 57; GERMANY: cf. national notes to Art. 2:109 nos. 6 s.). No special provisions do exist for the limitation of securities by consumer security providers. In ITALY, in the absence of an agreement of the parties to the contrary, as a general rule a security provider may limit its security at any time only if the latter was without time limit (Cass. 6 Aug. 1992 no. 9349, Giur.it 1993 I 1, 1255; *Petti* 154; see *supra*, national notes to Art. 2:109 no. 3), but also this is a general rule which applies independently from the qualification of the security provider as a consumer.

(Böger)

Annexes

Abbreviations

AC	Appeal Cases Law Reports (United Kingdom 1890 ff.); Actualidad Civil (Spain)
ACLR	Australian Current Law Review (Sydney 1969-1971)
Affd	affirmed
AllER	All England Law Reports (London 1. 1936 ff.)
Alm. Del	Almindelig Del (general part)
A. P.	Areios Pagos (Greek Supreme Court in Civil Matters)
App.Cas.	Law Reports, Appeal Cases (1875-1890) cf. AC
Arch.civ.	Archivio civile (Piacenza 1. 1958 ff.)
ArchN	Archeion Nomologicas (Athens 1. 1949 ff.)
Arm	Armenopoulos miniaia nomiki epitheorisis (Thessalonika 1. 1946/47 ff.)
Arr.Cass.	Arresten van het Hof van Cassatie/Bulletin des Arrêts de la Cour de Cassation (Brussels 1967 ff. ; from 1937-1961 under the title „Arresten van het Hof van Verbreking")
art(s).	article(s)
AS	Amtliche Sammlung des Bundesrechts (Switzerland)
B&Ald	Barnewall and Alderson's Reports, King's Bench = ER 106 (London 1817-1822)
BankFin	Bank- en Financiewezen/Revue de la banque (Brussels 1.1936/37 ff.)
Banque	Revue Banque (Paris 1926-1998)
BBTC	Banca, borsa e titoli di credito. Rivista di dottrina e giurisprudenza (Milan 1. 1934 ff.)
BCLC	Butterworths Company Law Cases (London 1. 1983 ff.)
Beav	Beaven's Rolls Court Reports = ER 48-55 (London 1838-1866)
BGBl	Bundesgesetzblatt (Official Gazette, Germany 1950 ff.; Austria 1920-1938, 1945 ff.)
BGH	Bundesgerichtshof (Federal Supreme Court, Germany – before 1990 only for West Germany)
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen (Decisions of the Federal Supreme Court in civil matters, Cologne/Berlin 1. 1951 ff.)
Bing	Bingham's Reports, Common Pleas = ER 130-131 (London 1822-1834)
Bligh NS	Bligh's Reports, New Series = ER 4-6 (London 1827-1837)
BOE	Boletín official del Estado (Official Gazette, Madrid 1. 1936 ff.)
BolMinJus	Boletim do Ministério da Justiça (Bulletin of the Ministry of Justice, Lisbon 1. 1940/41 ff.)
B. R. H.	Belgische Rechtspraak in Handelszaken/Jurisprudence commerciale de Belgique (Antwerp 1968-1982)
BS	Belgisch Staatsblad/Moniteur belge des arrêtés des secrétaires généraux (Official gazette, Brussels 1.1831 ff.)

Build LR	Building Law Reports (London 1.1976 ff)
Bull.civ.	Bulletin des arrêts de la Cour de cassation rendus en matière civile (Bulletin of the Decisions of the Court of Cassation in civil matters, Paris 1804/05, 128.1926 ff.)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court, Germany)
BVerfGE	Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court, Tübingen 1952 ff.)
BW	Burgerlijk Wetboek (the Netherlands)
CA	Court of Appeal (Austria/Germany: Oberlandesgericht/Kammergericht, Landgericht (CA for local courts); Belgium: Hof van Beroep/Cour d'Appel; Denmark: Landsret; England: Court of Appeal, Court of Exchequer Chamber; Finland/Sweden: Hovrätt; France: Cour d'Appel; Greece: Efeteion; Ireland: High Court of Appeal; Italy: Corte d'appello; Netherlands: Hof; Portugal: Relação; Scotland: Inner House – Court of Session –; Spain: Audiencia Provincial)
Cass.	Court of Cassation (Belgium : Hof van Cassatie/Cour de Cassation; France: Cour de Cassation; Italy: Corte Suprema di Cassazione)
Cass.ass. plén.	Cour de Cassation, Assemblée Plénière (France)
Cass.ch.mixte	Cour de Cassation, Chambre mixte (France)
Cass.civ.	Cour de cassation, Chambre Civile (France)
Cass.com.	Cour de cassation, Chambre Commerciale et financière (France)
CB	Common Bench Reports = ER 135-139 (London 1845-1856)
CC	Civil Code
CCC	Contrats, concurrence et consommation (Paris 1. 1991 ff.)
Ccom	Commercial Code
CCP	Code of Civil Procedure
cf.	confer
CFI	Court of First Instance (Austria: Bezirksgericht, Landesgericht; Belgium: Tribunal de première instance – Chambre Civile/Rechtbank van eerste Anleg –, juge de paix (Justice of the Peace); Denmark: Byret (Local Court), Sø- og Handelsret (Maritime and Commercial Court of Copenhagen), Landsret; England: Queen's Bench Division, High Court, King's Bench Division, High Court, Chancery Division, High Court, Court of the Exchequer; France: Tribunal de commerce, Tribunal d'instance, Tribunal de grande instance; Germany: Amtsgericht, Landgericht; Greece: Monomeles Protodikio (One-member first instance Court), Polymeles Protodikio (Multi-member first instance Court), Protodikio (First instance Court); Ireland: High Court; Italy: Tribunale; Netherlands: Arrondissementsrechtbank, Kantongerecht; Scotland: Outer House (Court of Session); Spain: Audiencia Territorial)
Ch	Chancery Division, The Law Reports (London 1.1891 ff.)
Chap.	Chapter
ChApp	Chancery Appeals (London 1865-1875)
ChD	Chancery Division, The Law Reports (London 1. 1875/76-1890)
cit.	cited
CJ	Colectânea de Jurisprudência (Coimbra 1. 1976 ff.)

CJ(ST)	Colectânea de Jurisprudência, Acórdãos do Supremo Tribunal de Justiça (Coimbra 1. 1993 ff.)
CLC	Commercial Law Cases (London 2002 ff.)
Com.	Comment
ConsC	Consumer Code
ConsCredA	Consumer Credit Act
ConsProtA	Consumer Protection Act
ContrA	Contract Act
Contratto e impresa	Contratto e impresa (Padua 1985 ff.)
Corr.giur.	Corriere giuridico (Milan, 1984 ff.)
Corte Cost.	Corte Costituzionale (Italian Constitutional Court)
Cost.	Costituzione della Repubblica Italiana (Italian Constitution, Gaz.Uff. of 27 Dec. 1947 no. 298, edizione straordinaria)
Cox Eq Cas	Cox's Equity Cases = ER 29-30 (London 1745-1797)
C. P.	Cox's Common Pleas Cases (London 1865-1875)
C&P	Carrington and Payne's Reports = ER 171-173 (London 1823-1841)
CPR	Civil Procedure Rules 1998, SI 1998/3132 (England)
C. P.Rep	Civil Procedure Reports (London 2000 ff.)
ctr.	contra
CuadCivJur.	Cuadernos civitas de jurisprudencia civil (Madrid 1983 ff.)
D	Décret (Decree, France); Dunlop's Session Cases (London 1838-1862)
D.	Recueil Dalloz (Paris)
Danno e resp.	Danno e responsabilità. Problemi di responsabilità civile e assicurazioni (Milan, 1996 ff.)
DAOR	Le droit des affaires/Het ondernemingsrecht (Gent 1. 2000/01 ff.)
DCI	Diritto del commercio internazionale (Milan 1987 ff.)
DEE	Dikaio Epicheiriseon kai Etairion (Enterprises and Company Law, Athens 1.1995)
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery = ER 45 (London 1859-1862)
Dir. b.merc.fin.	Diritto della banca e del mercato finanziario (Padua, 1987 ff.)
Dir.fall.	Il diritto fallimentare e delle società commerciali (Padua, 1924 ff.)
Dir.just.	Direito e justiça, Journale de la Faculdade de Direito da Universidade Católica Portuguesa (Lisbon 1980 ff.)
diss.	Dissertation, thesis
DL	Decreto-Lei (Portugal); Decreto legge (Italy); Ordonnance (France); Decree-Law
DLgs	Decreto legislativo (Legislative Decree, Italy)
DNotZ	Deutsche Notar – Zeitschrift (Journal of the German Association of Public Notaries, Munich/Berlin 1. 1901 ff.)
Dow	Dow's Reports, House of Lords = ER 3 (England 1812-1818)
Dow & RyKB	Dowling and Ryland's Reports, King's Bench = ER 171 (England 1822-1827)
D. P.	Dalloz Périodique

DPR	Decreto del Presidente della Repubblica (Decree of the President of the Republic, Italy)
DR	Diário da República (Official Gazette, Lisbon 1. 1976 ff.)
E&B	Ellis and Blackburn's Reports, Queen's Bench = ER 118-120 (London 1852-58)
EC	European Community
ECJ	European Court of Justice (Luxembourg)
ECR	European Court Reports. Reports of cases before the Court of Justice and the Court of First Instance/Court of Justice of the European Communities (Luxembourg 1. 1954 ff.)
ed., eds.	edition, editor, editors
EED	Epitheorissis Egatikou Dikaiou (Review of Commercial Law, Athens 1. 1941 ff.)
EEmpD	Epitheoresis Emporikou Dikaiou (Review of Commercial Law, Athens 1. 1950 ff.)
EEN	Ephimeris Ellinon Nomikon (Journal of Greek Jurists, Athens 1. 1934 ff.)
e. g.	exempli gratia (for example)
EllDik	Elliniki Dikeosini (Greek Justice, Athens 1. 1960 ff.)
E. L.Rev.	European Law Review (London 1975 ff.)
EpTrAksXrD	Epitheoresis Trapeziku Aksiografiku kai Xrimatistiriakou Dikaiou (Review of Banking, Negotiable Instruments and Capital Market Law, Greece)
EpTrD	Epitheoresis Trapeziku Dikaiou (Review of Banking Law, Greece)
ER	English Reports (London 1.1900-176.1930, 177.1979-178.1979)
ERPL	European Review of Private Law (Deventer 1. 1994 ff.)
etc.	et cetera
EvBl	Evidenzblatt der Rechtsmittelentscheidungen (Vienna 1. 1934 ff., included in the ÖJZ since 1946)
EWCA Civ	Court of Appeal Civil Division (neutral citation for English High Court and Court of Appeal cases)
Fallim	(Il) Fallimento e le altre procedure concorsuali (Milan 1979 ff.)
fn.	footnote
Foro it.	Il Foro italiano (Rome, 1876 ff.)
Foro it.Mass.	Il Massimario del Foro italiano. Raccolta quindicinale delle massime delle sentenze della Cassazione civile (Rome 1930 ff.)
Foro pad.	Il Foro padano (Milan 1946 ff.)
FTLR	Financial Times Law Reports (Brentford 1982, 1986-1988)
GazPal	Gazette du Palais (Paris 1.1886 ff.)
GazUff	Gazetta Ufficiale della Repubblica italiana (Official Gazette, Italy)
Giff	Giffard's Chancery Reports = ER 65-66 (London 1857-1865)
Giur.comm.	Giurisprudenza commerciale (Milan 1974 ff.)
Giur.cost.	Giurisprudenza costituzionale (Milan, 1956 ff.)
Giur.it	Giurisprudenza italiana (Turin 1873 ff.)
Giur.it.Mass.	Giurisprudenza italiana. Massimario della Cassazione civile (Turin 1931 ff.)
Giur.mer.	Giurisprudenza di merito (Milan, 1969 ff.)
Giur. milanese	Giurisprudenza milanese (Milan, 1997-2004)

Giust.civ.	Giustizia civile (Milan 1. 1951 ff.)
Giust.civ.Mass.	Giustizia civile. Massimario annotato della Cassazione (Milan 1955 ff.)
GmbHR	GmbH-Rundschau (Cologne 1. 1963-75.1985)
GRom.	Giurisprudenza romana (Milan 1997 ff.)
H	Højesteret (Danish Supreme Court)
HD	Högsta Domstolen (Swedish and Finnish Supreme Courts)
HKLR	Hong Kong Law Reports (1. 1905/06-40. 1956; 1957-1995)
HL	House of Lords (United Kingdom)
HL(Ir)	Law Report of House of Lords for Ireland, see LR
HL(Sc)	Law Reports of House of Lords for Scotland, see LR
H&N	Hurlstone and Norman's Reports = ER 156-158 (London 1856-1862)
HR	Hoge Raad (Supreme Court, the Netherlands)
i. e.	id est (that is to say)
Introd.	Introduction
I. R.	Informations Rapides du Recueil Dalloz (France), see D.
IR	Irish Reports (Dublin 1.1894 ff.)
IRLM	Irish Law Reports Monthly (Dublin 1.1976 ff.)
ISP98	International Standby Practices 1998, entered into force on 1 January 1999
JBl	Juristische Blätter (Vienna 1. 1872 ff.)
J. B. L.	Journal of Business Law (London 1957 ff.)
JCP	Jurisclasseur Periodique – Semaine Juridique
JCP E	Semaine Juridique édition Entreprise (France)
JCP G	Semaine Juridique édition Générale (France)
JCP N	Semaine Juridique éditions Nouvelles (France)
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland (Helsingfors 1. 1936 ff.)
JIBFL	Butterworths Journal of International Banking and Financial Law (London 1986 ff.)
JLMB	Revue de jurisprudence de Liège, Mons et Bruxelles (Liège 94. 1987 ff.)
JO	Journal Officiel de la République française (Official Gazette, Paris 1. 1869 ff.)
John	Johnson's Chancery Reports = ER 70 (London 1859-1860)
JT	Journal des Tribunaux (Brussels 1882 ff.)
KB	King's Bench Division, The Law Reports (London 1.1875/76 ff.)
KG	Kort Geding (Netherlands)
KKO	Korkein oikeus (Finnish Supreme Court)
L	Loi (France); Lov (Denmark); Lag (Finland, Sweden); Legge (Italy): Law
LAG	Landesarbeitsgericht (appellate court for labour matters, Germany)
LDepGuar	Finnish Law on Dependent Guarantees of 19 March 1999, FFS 1999:361
L.fall	Legge fallimentare (Insolvency Law, Italy)
lit.	litera
LJCP	Law Journal Common Pleas (1831-1875)

LJExch	Law Journal, Exchequer (1831-1875)
Lloyd's List Law Rep	Lloyd's List Law Reports (London 1.1919-32.1950)
Lloyd's Rep	Lloyd's Law Reports (London 1.1968 ff.)
LQR	The Law Quaterly Review (London 1. 1885 ff.)
LR	CP Law Reports, Common Pleas (1865-1875); PC Law Reports, Privy Council (1865-1875)
LT	Law Times Reports (London 1859-1947)
Ltd	Limited
M	Macpherson's Session Cases (Scotland 1862-1873)
MDR	Monatsschrift für Deutsches Recht, Zeitschrift für die Zivilrechts-Praxis (Cologne/Hamburg 1.1947 ff.)
MLR	The Modern Law Review (London 1. 1937/38 ff.)
MonC	Code monétaire
Mor	Morison's Dictionary of Decisions, Court of Session (1540-1808)
M&W	Meeson and Welsby's Reports, Exchequer = ER 150-153, (London 1. 1836-16.1847)
NCPC	Nouveau Code de procédure civile (New [French] Code of Civil Procedure)
ND	Neon Dikaion (New Law, Greece)
NGCC	Nuova Giurisprudenza Civile Commentata (Padua 1985 ff.)
NJ	Nederlandse Jurisprudentie (Zwolle 1913 ff.)
NJA	Nytt Juridiskt Arkiv (Stockholm 1. 1874 ff.)
NJB	Nederlands Juristenblad (Zwolle 1. 1926 ff.)
NJW	Neue Juristische Wochenschrift (Munich et al. 1. 1947 ff.)
NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungs-Report (Munich 1. 1986 ff.)
NoB	Nomiko Bima (Law Tribune, Athens 1. 1953 ff.)
no(s).	number(s)
Nov.Dig.it.	Novissimo Digesto italiano (Turin 1957 ff.)
NSWLR	New South Wales Law Reports (Sydney 1971 ff.)
NZLR	New Zealand Law Reports (Wellington 1.1883 ff.)
ÖBA	Österreichisches Bankarchiv (Vienna 1. 1946 ff.)
OGH	Oberster Gerichtshof (Supreme Court, Austria)
ÖJZ	Österreichische Juristen – Zeitung (Vienna 1. 1946 ff.)
OR	Obligationenrecht (Switzerland, Federal Law of 30 March 1911, AS 2 199)
p(p).	page(s)
Pan.	Panorama de la Semaine Juridique (France)
para(s)	paragraph(s)
Pas belge	Pasicrisie belge (Brussels 1813 ff.)
Pas luxemb	Pasicrisie luxembourgeoise (Luxembourg 1881 ff.)
PC	Privy Council (United Kingdom)

QB	Queen's Bench Division Law Reports (London 1. 1890 ff.) Queen's Bench Reports (Adolphus and Ellis New Series) = ER 113-118 (1841-1852)
QBD	Queen's Bench Division Law Reports (London 1875-1890)
R.	Regina or Rex
R	Rettie's Session Cases (Edinburgh 1873-1898)
RAJ	Repertorio Aranzadi de Jurisprudencia (Spain, Pamplona 1. 1930/31, 2. 1934 ff.)
Rass.dir.civ.	Rassegna di diritto civile (Naples, 1980 ff.)
RD	Regio decreto legge (Italy); Real decreto legislativo (Spain): Royal Legislative Decree
RD banc	Revue de droit bancaire et boursier (Paris, 1. 1987 ff.)
RDBB	Revista de derecho bancario y bursatil (Madrid, 1981 ff.)
RDC	Revue de droit commercial belge (Antwerp 1. 1967 ff.)
RDM	Revista de derecho mercantil (Madrid 1946 ff.)
RDP	Revista de derecho privado (Madrid 1914 ff.)
reg.	Regulation
RG	Reichsgericht (Supreme Court of the German Reich, Germany)
RGBl	Reichsgesetzblatt (Official Gazette of the German Reich, Berlin 1871-1945)
RGD	Revista general de derecho (Valencia 1. 1945 ff.)
RGDC	Revue générale de droit civil/Tijdschrift voor Belgisch Burgerlijk Recht (Antwerp 1. 1987 ff.)
RGZ	Amtliche Sammlung der Entscheidungen des Reichsgerichts in Zivilsachen (Decisions of the German Supreme Court in civil matters, Berlin 1. 1872-172.1945)
Riv.Dir.Civ.	Rivista di diritto civile (Padua, 1955 ff.)
Riv.Dir.Com.	Rivista di diritto commerciale e del diritto generale delle obbligazioni (Milan 1903 ff.)
Riv.Notar.	Rivista del Notariato (Milan 1947 ff.)
RLJ	Revista de Legislação e de Jurisprudência (Coimbra 1. 1868/69 ff.)
ROA	Revista da Ordem dos Advogados (Lisbon 1941 ff.)
RP	RP 189/1998 Regeringens proposition till Riksdagen med förslag till lagstiftning om borgen och tredjemanspant (The Government's proposal to the Parliament about legislation on Dependent Guarantees and Third Party's Pledge, Finland)
RPDB	Répertoire pratique du droit belge, Encyclopédie Reeks (Brussels/Paris 1928 ff.)
RT	Revista dos Tribunais (Sao Paulo 1912 ff.)
RTD civ	Revue trimestrielle de droit civil (Paris 1. 1902 ff.)
RTD com	Revue trimestrielle de droit commercial (Paris 1. 1948 ff.)
RvdW	Rechtspraak van de Week (Zwolle 1. 1939 ff.)
RW	Rechtkundig Weekblad (Antwerp 1. 1931/32 ff.)
S	Shaw's Session Cases (Scotland 1821-1838)
S.	Recueil Sirey (see D.)
Salk	Salkeld's Reports = ER 91 (London 1689-1712)

SC	Supreme Court (Ireland); Session Cases, New Series (Edinburgh 1907 ff.)
sch.	schedule(s)
Sc Jur	Scottish Jurist (Edinburgh 1829-1873)
SCLR	Scottish Civil Law Reports (Edinburgh 1987 ff.)
sec(s).	section(s) (England)
sent.	sentence(s)
SJ	Solicitor's Journal (London 1.1857 ff.)
SN	Session Notes (Edinburgh 1925-1948)
Somm.Comm.	Sommaires Commentés (in revue Dalloz Sirey or in Gazette du Palais, France)
SR NSW	New South Wales, State Reports (1901-1970)
s(s).	et sequentias (ff.)
Stark	Starkie's Nisi Prius Reports = 171 ER (London 1814-1823)
Stb	Staatsblad van het Koninkrijk der Nederlanden (Official Gazette, Zwolle 1.1813 ff.)
STJ	Supremo Tribunal de Justiça (Supreme Court, Portugal)
Stud.Iuris	Studium Iuris. Rivista per la formazione nelle professioni giuridiche (Padua, 1995 ff.)
SvJT	Svensk Juristtidning (Stockholm 1. 1916 ff.)
SZ	Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivilsachen (Vienna 1. 1919-20. 1938, 21.1946 ff. with changing titles)
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht/Revue générale de droit civil (Antwerp 1.1987 ff.)
TBH	Tijdschrift voor Belgisch handelsrecht/Revue de droit commercial belge (Antwerp 1. 1967 ff.)
Term Rep	Term Reports (Durnford and East) = ER 99-101 (London 1785-1800)
TLR	Times Law Reports, Annual Digest (London 1. 1884 ff.)
TPR	Tijdschrift voor Privaatrecht (Gent 1.1964 ff.)
TS	Tribunal Supremo (Supreme Court, Spain)
UCP 500 (1993)	Uniform Customs and Practices for Documentary Credits, ICC Publication no. 500, entered into force on 1 January 1994
UfR	Ugeskrift for Retsvæsen (Copenhagen 1. 1867 ff.)
UnfContTA	Unfair Contract Terms Act
v.	versus
Vern	Vernon's Chancery Reports, = ER 23 (London 1680-1719)
VersR	Versicherungsrecht (Karlsruhe 1. 1950 ff.)
Vita not.	Vita notarile (Palermo 1949 ff.)
WLR	The Weekly Law Reports (London 1. 1953 ff.)
WM	Wertpapier-Mitteilungen (Frankfurt am Main et al. 1. 1947 ff.)
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie (Gravenhage 1. 1870 ff.)
WR	The Weekly Reporter (London 1. 1853-1906)
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (Cologne 1. 1980 ff.)

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Zepos, Interpretation of the Civil Code	*Zepos*, Erminia tou astikou kodikos, Arthra 847-872 (Interpretation of the Civil Code, Articles 847-872, quoted with the commentaries by Panagiotis Zepos), Athens 1953
Zepos, Law of Obligations	*Zepos*, Enochikon Dikaion, A. Meros Genikon, 2i Ekd. (Law of Obligations, A. General Part, ed. 2), Athens 1955
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Table of Principles of European Contract Law (PECL)

Note: References in the form "1:101 no. 1" refer to paragraphs of the National Notes to individual Articles of this Part. References in the form "1:101 Com. no. 1" refer to paragraphs of the Comments to these Articles. Finally, references in the form "Introd. Chap. 1" refer to the texts of the Introduction to the respective Chapter of this Part.

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Art. 6:106	Introd. Chap. 1 no. 25
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Art. 6:108	Introd. Chap. 1 no. 25
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Art. 9:301 (1)	Introd. Chap. 1 no. 27
Art. 9:501	Introd. Chap. 1 no. 27; 2:104 Com. no. 4; 2:107 Com. no. 6; 2:110 Com. no. 6; 2:112 Com. no. 6
Art. 9:508	Introd. Chap. 1 no. 27; 2:104 Com. no. 3
Art. 9:509	Introd. Chap. 1 no. 27
Art. 9:510	Introd. Chap. 1 no. 27
Chapter 10 Section 1	Introd. Chap. 1 no. 28; 1:101 Com. no. 2; 1:101 no. 39; 1:106 Com. nos. 10, 13, 15; 1:107 no. 3; 1:108 Com. no. 2; 1:110 Com. nos. 2, 3, 4, 5, 6; 2:102 Com. no. 14; 2:105 Com. no. 2; 4:102 Com. no. 4
Art. 10:101	Introd. Chap. 1 no. 28; 1:106 Com. no. 10; 1:106 no. 2; 1:107 Com. no. 3; 1:107 nos. 1, 2; 1:110 Com. nos. 2, 6, 12; 2:105 Com. no. 2
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Art. 10:108	Introd. Chap. 1 no. 28; 1:110 Com. nos. 10, 16; 2:102 Com. no. 20
Art. 10:109	Introd. Chap. 1 no. 28; 1:110 Com. nos. 11, 17
Art. 10:110	Introd. Chap. 1 no. 28; 1:110 Com. nos. 11, 18
Art. 10:111	Introd. Chap. 1 no. 28; 1:110 Com. nos. 11, 19, 20; 2:102 Com. nos. 20, 22; 2:103 Com. nos. 17, 20, 22
Chapter 11	Introd. Chap. 1 no. 29; 3:105 Com. no. 6; 3:107 Com. no. 2
Art. 11:201 (1) (b)	Introd. Chap. 1 no. 29; 1:101 Com. nos. 3, 27; 2:102 Com. no. 3

Note: References in the form "1:101 no. 1" refer to paragraphs of the National Notes to individual Articles of this Part. References in the form "1:101 Com. no. 1" refer to paragraphs of the Comments to these Articles. Finally, references in the form "Introd. Chap. 1" refer to the texts of the Introduction to the respective Chapter of this Part.

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Directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (no. 94/47 of 26 October 1994, OJ EC 1994 L 280, p. 83) – **Directive on the protection of purchasers of time-shares in immovables of 1994**

Art. 2	1:101 Com. no. 47 fn. 5

Directive on the protection of consumers in respect of distance contracts (no. 97/7 of 20 May 1997, OJ EC 1997 L 144, p. 19) – **Directive on contracting in distance contracts of 1997**

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Directive on certain aspects of the sale of consumer goods and associated guarantees (no. 1999/44 of 25 May 1999, OJ EC 1999 L 171 p. 12) – **Directive on the sale of consumer goods of 1999**

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Directive on a community framework for electronic signatures (no. 1999/93 of 13 December 1999, OJ EC 2000 L 13 p. 12) – **Directive on Electronic Signatures of 1999**

Art. 1 (2)	4:105 Com. no. 7
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Directive on certain legal aspects of information society services, in particular electronic commerce, in the internal market (no. 2000/31 of 8 June 2000, OJ EC 2000 L 178 p. 1) – **Directive on Electronic Commerce of 2000**

	4:105 Com. nos. 5, 6
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Directive concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (no. 90/619/EEC of 23 September 2002, OJ EC 2002 L 271 p. 16) – **Directive on distance marketing of consumer financial services of 2002**

Art. 2 lit. (d)	1:101 Com. no. 47 fn. 7

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Civil Code *(Allgemeines bürgerliches Gesetzbuch)* **of 1811 – CC**

§ 864	1:104 no. 5
§ 879	4:101 no. 17
§ 880a	Introd. Chap. 3 *sub* 3; 3:101 no. 1
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Consumer Protection Act *(Konsumentenschutzgesetz)*
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amended in 1983, 1984, 1985, 1993, 1996, 1997 and 2001 – **ConsProtA**

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§ 2	4:102 nos. 1-2
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§§ 29a-29d	4:102 no. 1

Law Amending Commercial Law *(Handelsrechts-Änderungsgesetz)*
of 27 October 2005 (BGBl. 2005 no. 120)

Art. I no. 132	2:105 no. 4
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Art. I no. 153	4:105 no. 1

Law on Banking *(Bankwesengesetz)* **of 30 July 1993**
(BGBl. 1993 no. 532), as amended by Law Amending Commercial Law *(Handelsrechts-Änderungsgesetz)* of 27 October 2005 (BGBl no. 120)

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Civil Code *(Code Civil/Burgerlijk Wetboek)* **of 1804 – CC**

Art. 1131	1:101 no. 15
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Art. 1162	1:105 nos. 3, 7
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Art. 1275	1:106 nos. 5, 8
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Consumer Credit Act *(Loi relative au crédit à la consommation/ Wet op het consumentenkrediet)* **of 12 June 1991**, BS 9 July 1991 (*errata* BS 6 August 1991); amended by Law of 24 March 2003, BS 2 June 2003 – **ConsCredA**	4: 104 no. 1
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Commercial Practices and Consumer Protection Act *(Loi sur les pratiques du commerce et sur l'information et la protection du consommateur/ Wet betreffende de handelspraktijken en de voorlichting en bescherming van de consument)* **of 14 July 1991**, BS 29 August 1991 (*errata* BS 10 October 1991) – **ConsProtA**	
Art. 1 para 7	1:101 nos. 59, 60
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Bankruptcy Act *(Loi sur les faillites/Wet betreffende het faillissement)* **of 8 August 1997**, BS 28 October 1997;
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Collective Debt Rescheduling Act *(Loi relative au règlement collectif de dettes et à la possibilité de vente de gré à gré de biens immeubles saisis/Wet betreffende de collectieve schuldenregeling en de mogelijkheid van verkoop uit de hand van de in beslag genomen onroerende goederen)* **of 5 July 1998**, BS 31 July 1998; amended by Law of 19 April 2002, BS 7 June 2002

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Denmark

Contract Act *(Aftaleloven)*, Law no. 242 **of 8 May 1917** with frequent amendments (Lovtidende A 1917 p. 614) – **ContrA**

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Insurance Agreement Act *(Forsikringsaftaleloven)*, Law no. 129 **of 15 April 1930** with frequent amendments (Lovtidende A 1930 p. 765)

§ 42	1:108 nos. 1, 11

Promissory Note Act *(Gældsbrevsloven)*, Law no. 146 **of 13 April 1938** with frequent amendments (Lovtidende A 1938 p. 625)

§ 2	1:106 nos. 2, 27; 1:107 no. 10; 1:108 nos. 1, 4, 11
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General Contract Terms for Works and Supply in Constructions and Structural Works *(Almindelige Betingelser for arbejder og leverancer i bygge- og anlægsvirksomhed)*, Law no. 229 **of 29 May 1971** with amendments (Lovtidende A 1971 p. 576) – AB 92

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Law on Bankruptcy *(Konkurslov)*, Law no. 118 **of 4 February 1997** (Lovtidende A 1997 p. 811)	
§ 47	1:106 no. 2
Law on Share Companies *(Lov om aktieselskaber)*, Law no. 324 **of 7 May 2000** (Lovtidende A 2000 p. 2110)	
§ 61	1:101 no. 30
§ 115	1:101 no. 30
Law on Limited Liability Companies *(Lov om anpartsselskaber)*, Law no. 325 **of 7 May 2000** (Lovtidende A 2000 p. 2154)	
§ 25	1:101 no. 30
§ 49	1:101 no. 30
Law on Financial Business *(Lov om finansiel virksomhed)*, Law no 286 **of 4 April 2006** (Lovtidende A 2006 p. 1388)	
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Finland

Contracts Act *(Lag om rättshandlingar på förmögenhetsrättens område)* **of 13 June 1929** with frequent amendments (FFS 1929/228) – **ContrA**	
§ 30	4:103 no. 31
§ 31	4:103 no. 31
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Chap. 1 § 2a	4:101 no. 5; 4:104 no. 2
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France

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Insolvency Act no. 85-98 (*Loi relative au redressement et à la liquidation judiciaires des entreprises)* **of 25 January 1985**, JO no. I-26 of 26 January 1985 p. 1097; integrated now into the new Commercial Code of 2000 (Ccom art. L 620-1 to art. L 628-3)]

Art. 60 para 2	2:113 no. 29

Consumer Credit Act no. 89-1010 (*Loi relative à la prévention et au règlement des difficultés liées au surendettement des particuliers et des familles – Loi Neiertz*) **of 31 December 1989**, JO no. I-26 of 2 January 1990 p. 18; integrated now into ConsC arts. L 311-1 to L 311-37, L 312-1 to L 312-3 and arts. L 313-7 to L 313-10

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Consumer Code *(Code de la consommation)* of 26 July 1993, introduced by Law no. 93-949 **of 26 July 1993**, JO no. 150-175 of 27 July 1993 p. 10538; as amended by Law no. 2003-721 for an economic initiative (*Loi pour l'initiative économique – Loi Dutreuil)* of 1 August 2003, JO no. 176-201 of 5 August 2003, p. 13449 – **ConsC**

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Art. L 132-1	1:101 no. 60; 4:102 nos. 3, 12
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New Commercial Code of 18 September 2000 *(Code de commerce)*, introduced by DL no. 2000-912 of 18 September 2000, JO no. 202-227 of 21 September 2000 p. 14783; as amended by Law no. 2005-845 on Safeguard of Enterprises *(Loi de sauvegarde des entreprises)* of 26 July 2005, JO no. 152-177 of 27 July 2005 p. 12187 – **Ccom**

Art. L 110-3	4:104 no. 12
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Law on Doorstep Transactions – Law on the Revocation of Doorstep Transactions and similar transactions (*Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften)* of 16 January 1986
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Insolvency Statute *(Insolvenzordnung)*
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DL 17 July/13 Aug. 1923 on special provisions for share companies (*Nomothetiko diagtama tis 17 Iouliou/13 Avgoustou 1923 peri eidikon diatakseon epi anonymou etairion*), Kodix Themidos 1923, 583

Art. 25	3:108 no. 19

Civil Code *(Astikos Kodix)* of 1946 – CC

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Draft of a Commercial Code (*Shedio Emporikou Kodike*), **A. Argyriadis (ed.), Athens, 1987**)

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