International Bank and Other Guarantees Handbook

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Europe

Edited by

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CHAPTER 28
Switzerland

Alexandre Both & Tervel Stoyanov

I INTRODUCTION

A Description of the Legal System in Switzerland

1. Is it a common law system? Civil law system? Other?

2. In a common law system, is there a significant base of judicial precedent governing the law of Guarantees?

The Swiss legal system is based on the civil law tradition. As such, it relies essentially on written legal provisions as a primary source of law. Accordingly, judicial decisions are of less importance than they are in common law jurisdictions. Even though a line of judicial decisions establishing a particular legal practice does carry substantial weight, the common law rule of binding precedent (*stare decisis*) is not applicable as such.

B Use of Guarantees in Switzerland

1. Are Guarantees often used in your jurisdiction and is there an established practice in that respect?

2. Are there any specific problems relating to the use of Guarantees in your jurisdiction, e.g., financial assistance laws?

Under Swiss law, a party to a contractual relationship may undertake to provide the performance of certain obligations or payment of certain amount of money due by a

third person (i.e., the Principal) to its counterparty (i.e., the Beneficiary) by using two main different types of 'guarantee', that is the 'Guarantee' and the 'Suretyship'.

Whether an agreement is a Guarantee or a Suretyship will depend on the specific provisions contained in the agreement, the result of which may have significant consequences, considering that although their nature is similar, their respective form and the way they can be called/enforced changes considerably.[1]

Under Swiss law, a Guarantee creates a primary, so-called stand-alone obligation, as opposed to a Suretyship which creates a secondary (i.e., accessory) obligation. Accordingly, a Guarantee does not depend on the Underlying Obligation for its existence and enforcement, whereas a Suretyship does. If the Underlying Obligation is void or unenforceable, a Guarantee remains valid and enforceable in principle, as opposed to a Suretyship.

Guarantees are often used in Switzerland and especially by banks, in the form of bank Guarantees or, in relation to certain transactions involving groups of companies, parent Guarantees or otherwise intra-group Guarantees. Suretyships are also used in Switzerland, however to a lesser extent.

A bank Guarantee is often used when a bank guarantees its customer's payment obligation. For instance, the bank may commit itself to pay a sum of money to the Beneficiary, in case a third party (the ordering party, usually a bank's customer) does not fulfil its obligation towards the Beneficiary or in case the latter claims such payment.[2] The bank Guarantee is not expressly settled by Swiss law, but rather recognised by both literature and courts as a sui generis contract binding exclusively on the Guarantor and the Beneficiary.[3]

In addition to the largely used bank Guarantee and parent or intra-group Guarantee, other types of guarantees exist, e.g., the performance Guarantee (Article 111 CO; porte-fort; *Vertrag zu Lasten eines Dritten*) (whereby the Guarantor promises to indemnify the Beneficiary if a third party does not perform a specific obligation), the cumulative assumption of debt (*reprise cumulative de dette; kumulative Schuldübernahme*) (whereby the Guarantor agrees to be held jointly and severally liable towards the Beneficiary for the full amount of a third party's obligation) or the comfort letter (*see* below Section II).

A Suretyship is also used in commercial transactions with banks.[4] In export trade, the Suretyship is also a quite common way to guarantee the export credits.[5]

The Suretyship takes in particular the form of the Co-Suretyship, collateral Suretyship or Counter-Suretyship (*see* below Section II).

1. P. Tercier, L. Favre & A. Eigenmann, 'Les autres contrats de sûreté', in *Les contrats spéciaux*, ed. P. Favre & P. Tercier (4th ed., Geneva: Schultess, 2009), N 7183.
2. *Les garanties bancaires en droit suisse* (Geneva: Tavernier/Tschanz, 2010), 10.
3. Swiss Federal Supreme Court ruling, BGE 131 III 511, para. 3; L. Thévenoz, 'Art. 111 CO', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 36.
4. P. Tercier, L. Favre & A. Eigenmann, 'Le cautionnement', in *Les contrats spéciaux*, ed. P. Favre & P. Tercier (4th ed., Geneva: Schultess, 2009), N 6805 et seq.
5. C. Pestalozzi, 'Vorbemerkungen zu Art. 492-512 CO', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 5.

Guarantees and Suretyships are also a typical tool of the loan guarantee cooperatives which have as goal to make it easier for small and medium enterprises (SME) companies to gain access to bank loans. To achieve that, the cooperatives vouch for loan up to CHF 500,000 and provide the banks with Guarantees. Given the importance of the SME for the Swiss economy, the loan guarantee cooperatives are supported by the federal government.[6]

Outside the commercial sector, the institution of the Suretyship is quite unusual.[7]

Apart from the distinction between a Suretyship and a Guarantee, another potentially problematic situation under Swiss law is given when a company guarantees obligations of its parent or sister company by way of a so-called up-stream or cross-stream Guarantee, respectively. Indeed, Swiss corporate law does not provide a full formal legal framework for groups of companies. Consequently, each group company has to be looked at separately as an independent entity.

Basically, the law requires that each legal entity pursues its own corporate scope independently of interests of its shareholders or affiliates. Therefore, even if a company is 100% controlled by another company, its directors have to act within the statutory limits of the company and may not act to the detriment of the company. It follows that a financial assistance among companies of the same group is only possible, under the following conditions:

- The Guarantee shall be within the company's statutory purpose. If a transaction violates the company's statutory purpose, the transaction may be qualified as void and may lead to directors' liability.[8] Generally, to avoid any doubt as to whether the Guarantee falls within the company's statutory purpose, the articles of association state expressly that the Guarantor may grant guarantees in favour of its parent or affiliated companies.
- The contract of Guarantee shall also constitute a benefit for the Guarantor, i.e., the granting of an up/cross-stream Guarantee shall be in the interest of the Guarantor. In particular, the company shall be free to handle for its own interest and not the one of the group. The Guarantor shall then receive adequate corporate benefits as consideration for granting the Guarantee, i.e., the parties shall deal at an arm's length basis, using as far as possible market rates. In relation to intra-group Guarantees and the economical specificities thereof, such consideration may not be effectively assessable; thus it is recommended that the statutory purpose clause of the articles of association of the Guarantor provides that the granting of Guarantees may be achieved without specific consideration.

6. For more details, *see* Report on the results of the hearing concerning the amendment to the Ordinance on Financial Aid for Commercial Guarantee Organisations; The Federal Council's general view of the commercial guarantee system, of May 2015.
7. C. Pestalozzi, 'Vorbemerkungen zu Art. 492-512 CO', N 5-6.
8. Article 754 of the Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: Code of Obligations); (hereinafter: CO).

- In addition, the payment of the Guarantee shall not constitute a prepayment of the equity capital of the company or an unjustifiable repayment of benefits or contributions.
- To address these issues, the amount of the up/cross-stream Guarantee shall be limited to and be covered by the freely distributable funds of the company (such as for a distribution of dividends) and the company's shareholders' meeting shall resolve on and approve the granting of the up/cross-stream Guarantee. It is unclear whether the freely distributable funds have to be available at the company's level at the time the Guarantee is granted or at the time the Guarantee is enforced. Part of the legal doctrine even requires that sufficient freely distributable funds are available at both points in time. Therefore, it should be ensured that neither the granting of the Guarantee, nor the payment under such Guarantee violate the restriction on repayment of restricted equity to the shareholders.
- At the time the Guarantor is required to make a payment under the Guarantee, Swiss withholding taxes of 35 % may be levied if such payments were qualified by the tax authorities as effective or deemed dividend payments by the Guarantor. Notwithstanding provisions to the contrary in the respective agreements, no gross-up or tax indemnity shall apply to withholding taxes on effective or constructive dividend distributions made by a Swiss Guarantor. However, double taxation treaty relief may be available depending on the place of incorporation of the parent company and the structure being implemented.

These rules are also applicable in case of a Suretyship. It results, that the use of Guarantees as financial assistance among companies of the same group is possible and valid, but is submitted to certain rules which have to be observed, otherwise the entire contract may be qualified as void.

C Participation of Switzerland to International Regimes

1. Is Switzerland party to any multilateral treaties related to Guarantees? If so, please provide specific reference and short summary of what the treaty's purpose is.

2. Is Switzerland party to any bilateral treaties related to Guarantees? If so, please provide specific reference and short summary of what the treaty's purpose is.

Switzerland has not ratified any multilateral or bilateral treaty specifically related to Guarantees. Switzerland is however signatory to the Convention Establishing the Multilateral Investment Guarantee Agency (the so-called MIGA), which promotes foreign direct investment into developing countries by providing guarantees to the potential investors and lenders.[9]

9. MIGA, 'Overview', < https://www.miga.org/Pages/Who%20We%20Are/Overview.aspx > , 30 October 2015.

II GENERAL OVERVIEW

1. In the column 'Type of Guarantee', you will find a list, a brief description and a comparison of the different Guarantees and indemnities available in the chapter's jurisdiction (including comfort letters).

2. In the column 'Legal Source of Guarantee', you will find a list, a brief description of the legal source of the Guarantee (was the Guarantee created by a statute, by case law, etc.?).

3. In the column 'Nature of the Guarantor's Undertaking', you will find information in response to the following questions:

- *Does the Guarantor undertake to pay an amount of money or does he undertake to perform an action?*
- *Is it a performance or a payment Guarantee or both?*
- *If it is a payment Guarantee, does the Guarantor undertake to pay for a certain debt, or does he undertakes to indemnify the Beneficiary against potential damage?*
- *Does the Guarantee create a binding obligation on the Guarantor or does it only show a non-binding moral undertaking (such as some type of comfort letters)?*

4. In the column 'Relationship Between the Guarantee and the Underlying Obligation', you will find information in response to the following questions:

- *Please describe the relationship between the Guarantee and the Underlying Obligation and, in particular, please indicate whether the Guarantee is a secondary obligation that is dependent on the continued validity of the Underlying Obligation or a primary obligation independent from the Underlying Obligation?*
- *Is there an obligation for the Guarantor to pay on first demand of the Beneficiary?*
- *Does the Beneficiary have to provide the Guarantor with some documents when calling for the Guarantee?*
- *Can the Guarantor use all the defences the Principal may have in relation to the underlying contract (e.g., an invalid or void contract, damages, etc.)?*

5. In the column 'Comments', you will find information in response to the following questions:

- *Are there criteria which determine the classification of a Guarantee as one type or another?*
- *If so, what are such criteria?*
- *If so, what are the important elements a judge (or arbitrator) will take into account to interpret a contract and classify it as a particular type of Guarantee?*
- *Please state what are the advantages (flexibility, cost efficiency, clarity of its legal framework, etc.) and defaults (cost, heavy procedures, etc.) of each Guarantee. How often and in which circumstances are they used in your jurisdiction?*

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
Guarantee	Article 111 CO. However, this Article only provides a general definition of the Guarantee. Hence, the contract of Guarantee may be qualified as contract 'sui generis'. Accordingly, the case law and especially the literature play a key role in the setting of rules and limitations applicable to the Guarantee.	The Guarantor under the Guarantee guarantees the payment of a specified sum of money upon occurrence (or non-occurrence) of a specified event (including mere demand by the Beneficiary). The Guarantee takes for instance the form of a bank Guarantee or a parent/intragroup Guarantee.	The Guarantee creates a primary, 'stand-alone' contractual obligation. Hence, the Guarantor is not entitled to plead against the Beneficiary the defences open to the Principal, and it is not subrogated by law to the Beneficiary's right against the Principal, once it has satisfied the Beneficiary. Usually, the contract stipulates an obligation for the Guarantor to pay on first demand. However, the parties may agree otherwise. The parties may also decide that the Beneficiary has to provide some specific documents when calling for the Guarantee. A simple declaration may nevertheless be sufficient, if nothing else is provided in the contract.	The main distinction between a Guarantee and a Suretyship is the 'stand-alone' nature of the Guarantee, as opposed to the accessory nature of Suretyship. The Guarantee is also not submitted to the mandatory legal rules of the Suretyship. Hence, the form requirements and the spouse's consent (applicable to Suretyships) are not conditions of validity of a Guarantee agreement. The Beneficiary of a Guarantee is free to call the Guarantor for payment, without proving that it (still) has a credit towards the Principal. The Guarantor may only oppose to the Beneficiary the rights it has according to the Guarantee as opposed to the ones of the Principal may have pursuant to the Underlying Obligation of a Suretyship.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
				The judge classifies the contract (as Guarantee or Suretyship) in accordance with the true and common intention of the parties, which may results from the text of the contract. However, the precise wording used by the parties may only be the key argument in a contract concluded between two legal professionals. Where the contract granting the obligation of a third party refers explicitly to the Underlying Obligation in such a manner that the existence and scope of the first seems to be dependent on the existence and scope of the latter, there is more chances that the parties agreed on a Suretyship. The existence of a 'first-call' clause speaks in favour of a Guarantee. However, there is no general solution and the judge has to take a decision and will qualify the agreement as a Guarantee or a Suretyship on the specific case based on the particular contract.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
				If no conclusion can be reached from the interpretation of the wording, the purpose and the circumstances in which the parties have found the agreement, there is not a clear solution in the literature. According to some authors, it shall be a presumption in favour of a Suretyship. A new trend of some authors is, on the contrary, to plead in favour of the Guarantee, especially in the banking and international trade fields. The main advantages of the Guarantee over the Suretyship are its flexibility and the promptitude of the performance claim. Indeed, the Guarantee contract is not subject to any specific mandatory rule (except from the general ones, applicable to any contract) and the parties can consequently organise their legal relationship without constraint. Usually, the contract provides that the Guarantee's Beneficiary has the

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
				right to claim performance without providing any information concerning its credit against the Principal. For these reasons, the Guarantee is often used between professional parties in financial and trade transactions.
Comfort Letter	In general, the comfort letter qualifies as a 'sui generis' agreement (with features similar to a Guarantee).	The comfort letter may take the form of a binding or non-binding undertaking of the Guarantor to provide for the performance of the Principal's obligations. The specific undertakings are set out in the relevant agreement. The binding/non-binding nature is often left (intentionally) to interpretation.	The comfort letter and similar documents (letter of responsibility, awareness letters, etc.) are legal tools which are not clearly defined by the Swiss legal system. It follows that their relation with the Underlying Obligation, their enforceability, if any, and the rights and defences of the Guarantor derive from the agreement concluded by the parties.	The comfort letter is typically found in trades with corporate groups, where a parent company promises to 'help' one of its subsidiaries in case of default.
Suretyship	Articles 492 et seq. CO	The giver of Suretyship (the 'Surety') undertakes to the	The validity and the scope of the Surety rely on the existence and scope of the Underlying Obligation.	The distinction between a Suretyship and a Guarantee is very important as the validity of a

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
		Beneficiary to provide for the payment of the Principal's liability under the Underlying Obligation.	The Beneficiary shall resort to the Surety only in a subsidiary manner, i.e., only if the Underlying Obligation is due and the Principal, despite of the efforts of the Beneficiary, did not perform. The Beneficiary shall provide some documents when calling for the Suretyship, in order to prove that the conditions of the Surety's obligation to pay are fulfilled (for instance, the proof that the Underlying Obligation is due, and the Principal is bankrupt). Once the Beneficiary has been satisfied, it also has to furnish the Surety with all documents and information necessary for exercise its rights against the Principal. The Surety has not only the right but also the obligation	Suretyship depends on the compliance with several mandatory rules and the Surety may only be called under some specific conditions. On the contrary, the conditions of validity and enforceability of a Guarantee are more flexible. As indicated above, the judge has to qualify the contract and determine whether it qualifies as a Guarantee or a Suretyship based on the common intention of the parties. According to the Federal Supreme Court, the main criterion for the classification of an agreement as Suretyship or Guarantee is the intention to create an accessory or a principal obligation. Other criteria has to be taken into account, such as the parties involved (agreement concluded with banks or in international trades are presumed to be Guarantee agreements), the relation with the Underlying

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
			to use all the defences the Principal may have in relation to the Underlying Obligation. By failing to do so, the Surety loses its right of subrogation and cannot validly claim against the Principal.	Obligation and the wording of the contract (for instance, the use of a specific word, a general waiver of exceptions and objections, the indication of a right of recourse, etc.). These are nevertheless only indicative evidences, and the qualification will rather depend on the specific factual circumstances. Since the validity of a Suretyship is subject to different legal requirements, the parties, and notably the Surety, are protected in different ways. In particular, the rules of form prevent (in theory) the Surety from a rushed undertaking and assure the existence of the essential terms of the contract. Further, the Surety is subrogated by law to the Beneficiary's rights to the extent that it has satisfied him. Obviously, these rules make the contract of Suretyship less flexible than a Guarantee agreement.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
Co-Suretyship	Article 497 CO	Two or more Sureties undertake to the Beneficiary to provide for the payment of the Principal's liability under the Underlying Obligation.	The observations relating to the Suretyship are also valid for the Co-Suretyship.	The observations relating to the Suretyship are also valid for the Co-Suretyship.
Collateral Suretyship	Article 498 CO	The collateral Surety guarantees the performance of the obligation assumed by the primary Surety towards the Beneficiary.	There is no direct relation between the collateral Suretyship and the Underlying Obligation, as the collateral Surety guarantees the payment of the primary Surety and not the one of the Principal. However, the collateral Suretyship is also an ancillary obligation and the rules of the Suretyship must be applied. It follows, that the observations relating to the Suretyship are also valid for the collateral Suretyship. In addition to its own defences, the collateral	The observations relating to the Suretyship are also valid for the collateral Suretyship.

Type of Guarantee	*Legal Source of Guarantee*	*Nature of the Guarantor's Undertaking*	*Relationship Between Guarantee and Underlying Obligation*	*Comments*
			Surety may use the defences of the Principal in relation to the underlying contract and the ones of the primary Surety in relation to the Suretyship agreement.	
Counter-Surety	Article 498 CO	The counter-Surety stands for the right of recourse against the Principal accruing to the primary Surety who honours its commitment.	The counter-Surety is an ancillary obligation of the principal Surety's right of recourse. Hence, the rules of the Suretyship are also valid for the counter-Surety, with the particularity that the Underlying Obligation is the duty of the Principal to pay the principal Surety.	The observations relating to the Suretyship are also valid for the counter-Surety.

III THINGS TO TAKE INTO ACCOUNT WHEN PUTTING IN PLACE A GUARANTEE

A Application of the Guarantee

1 The Quality of the Parties

1. Who can issue the Guarantees available in your jurisdiction? Is the issuance of the Guarantee restricted to certain persons? (legal entities or natural persons, financial institutions, private or public entities, etc.)

In accordance with the general principles of Swiss contract law, any natural or legal person capable of acting has the right to enter into a contract.[10] The law provides certain restrictions. In particular, a contract of Guarantee or Suretyship cannot be validly issued by a natural person who does not have the capacity to act (i.e., a person under age or under guardianship),[11] by a person under deputyship without the deputy's agreement,[12] or by a debtor in case of bankruptcy, composition moratorium or similar proceedings.[13]

With regard in particular to the Suretyship, besides the limitations mentioned above, the agreement of a married person (respectively, registered partner) is only effective if his/her spouse (or registered partner) gave his/her consent in writing.[14]

In case of a legal person, the granting of an up/cross-stream Suretyship and/or Guarantee by a Swiss company to secure obligations of its (direct or indirect) shareholder (i.e., up-stream) or to any of affiliates of its (direct or indirect) shareholder (i.e., cross-stream) is subject to further restrictions. The Guarantor's articles of association contain a group-support clause, and the Guarantee/Suretyship amount shall generally be limited to the freely distributable equity of the Guarantor/Surety, and its shareholders shall approve both the granting of the Guarantee/Suretyship and, to a certain extent, the enforcement of the Guarantee, to the extent such enforcement may qualify as a deemed distribution of dividends, which must be resolved by the shareholders.[15]

In addition, the right to assume an obligation of a third party may be subject to further limitations for the legal persons who are subject to the Federal on Banks and Saving Banks. Indeed, the Supervisory Authority of these institutions (the FINMA) has a broad power to take protective measures (e.g., limitation of the bank's business activities) or restructuring measures, which can have an impact on the Guarantee/Suretyship.[16]

10. M. Biggler-Eggenberger & R. Fankhauser, 'Art. 12 ZGB', in *Zivilgesetzbuch: Basler Kommentar*, ed. H. Honsell et al. (5th ed. Basel: Helbing Lichtenhahn, 2014.), N 11 et seq.
11. Article 13 Swiss Civil Code of 10 December 1907 (hereinafter: CC).
12. Article 395 CC.
13. Articles 204 and 298 para. 2 Federal Act on Debt Enforcement and Bankruptcy (hereinafter: FADEB).
14. Article 494 CO; *see also Les garanties bancaires en droit suisse*, 5 et seq.
15. *See* Section I[B] above.
16. Article 26 Federal Act of 8 November 1934 on Banks and Savings Banks (hereinafter: BankA).

Further restrictions apply under Swiss law and will be discussed in the following specific paragraphs.

2 Nature of the Underlying Obligation

1. Are there restrictions regarding the underlying obligation which may be covered by the Guarantee? In particular:

- *Is it possible to guarantee future liabilities (if so, what are the conditions) or is the Guarantee limited to existing contract?*
- *Is the Guarantee only limited to guaranteeing commercial claims?*
- *Are there special restrictions concerning the underlying obligation when the Guarantor is a company (such as financial assistance rules)?*

Guarantee or Suretyship can generally secure future liabilities. To be valid, however, the secured liabilities must be determined or determinable. The determinability requirement derives from the legal provisions aimed at avoiding that a party's freedom becomes excessively restricted.[17] An excessive restriction leads to the invalidity or partial invalidity of the undertaking. The Swiss Federal Court seems also to request that the future liabilities are sufficiently foreseeable at the time of the conclusion of the Guarantee/Suretyship agreement.[18]

Both Suretyships and Guarantees can secure any kind of liabilities which are of monetary or monetary convertible nature.[19] Neither the Suretyship nor the Guarantees are limited to commercial liabilities.

The rules set out above apply to both contract entered into by natural and legal persons. Under Swiss law, there are no special limitations concerning the nature of the Underlying Obligation in case the Guarantor/Surety is a company. Please see above in respect of the financial assistance rules applicable in Switzerland (*see* Section I[B] above).

B Formation of the Contract

1 Form of the Contract

1. Are there any requirements concerning the form of the contract, such as official deed, handwritten provision, witnesses, language of the contract?

Under Swiss law, the validity of a contract is not subject to compliance with any particular form unless otherwise is required by a special provision or agreed upon by

17. Article 27 CC.
18. Swiss Federal Supreme Court ruling, BGE 142 III 746, which was handed down in respect of a pledge agreement.
19. P. Meier, 'Art. 492', N 36.

the parties.[20] Accordingly, there is no form requirement for the Guarantee and that even if a particular form is prescribed for the Underlying Obligation.[21]

However, the validity of a Suretyship is subject to a specific form, which depends on the person of the Surety and the maximum amount for which it is liable:

- Where the Surety is a legal person, the simple written form is required and the Surety must write at least all the essential terms of the Suretyship and sign the document. According to the law, the maximum amount for which it is liable is one of the essential terms.[22]
- Where the Surety is a natural person and the Suretyship is less than CHF 2,000, then the so-called qualified written form is required. This means that the Surety must indicate both the amount for which he/she is liable and the existence of joint and several liabilities in his/her own hand in the contract of Suretyship (Article 493 paragraph 2). If the Suretyship exceeds the sum of CHF 2,000, the Surety's declaration must additionally be done in the form of a public deed in conformity with the rules in force at the place where the instrument is drawn up.[23]

If the Surety is married (or in a registered partnership) the validity of the Suretyship requires additionally the written consent of his/her spouse (or registered partner) given in advance or simultaneously with the conclusion of the contract.[24] The consent is not necessary, however, in case of a judicial separation.[25]

Subsequent amendments of a Suretyship require the written form, except where the total liability is increased or the Suretyship is transformed from a simple into a joint or several Suretyship.[26] In such case, the amendment is submitted to the form provided by Article 493 paragraphs 2 and 3 CO (*see here above*). Finally, the law expressly provides a special form in two other hypotheses. First, according to Article 509 paragraph 5 CO, the parties may decide within the last year before the expiration of the contract to extent the Suretyship for an additional period of time. The written form is required for the validity of this agreement.[27]

Second, the Surety who agreed on securing a future obligation may decide to revoke its commitment before the Underlying Obligation arises, provided that the financial condition of the Principal has substantively deteriorated since the conclusion of the contract or is substantially worse than the Surety has in good faith assumed; the revocation is valid only if made in written form.[28]

20. *See* Art. 11 CO.
21. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 300.
22. Article 493 para. 1 CO.
23. Article 493 para. 2 CO.
24. S. Giovanoli, 'Art. 494', in *Berner Kommentar: Die Bürgschaft, Spiel und Wette*, ed. S. Giovanoli (2nd ed. Bern: Stämpfli, 1978), N 4, 8.
25. C. Pestalozzi, 'Art. 494', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 4.
26. Article 493 para. 5 CO.
27. Article 509 para. 5 CO.
28. Article 510 para. 1 CO.

If the formal requirements are not complied with, the contract of Suretyship is void.[29]

Given the different formal requirements for the Guarantee and the Suretyship, it is particularly important in the practice that the contractual document is well drafted. One of the reasons is if the parties entered into a contract of Guarantee by signing a written document, the Guarantor may try to challenge the validity of the contract by claiming that the document is a Suretyship. If the court decides for the existence of a Suretyship, the contract is void since it does not comply with the formal requirements of the Suretyship.[30]

2. Are there any registration to be made and stamp or tax duties to be paid in order to make a Guarantee valid and enforceable? If so, on what basis are they calculated?

The validity and enforceability of a Guarantee or Suretyship do not depend on any registration or any payment of any tax duty. Some cantonal administrations[31] however levy a stamp duty on some particular legal acts in connection with a contract of Guarantee or Suretyship. For instance, the execution of a notary deed may be subject to such tax, but also the simple issuing of a Suretyship or Guarantee by a bank.[32]

It is worth noting that regardless of any stamp or similar taxes levied when granting a security in the form of a Guarantee or a Suretyship, the enforcement thereof may however trigger the withholding tax in case of up/cross-stream undertaking qualifying as a deemed dividend; that is in the absence of a consideration to the Guarantor/Surety at arm's length. Indeed, if a Swiss subsidiary has granted an up/cross-stream security interest for a commitment of a related party and if such security is triggered, a payment under such security may be deemed to be a constructive dividend triggering the 35% Swiss Federal withholding tax if the grant of the security interest was not in the interest of the Swiss security provider and did not meet the 'dealing at arm's length standard'. If an up/cross-stream security is triggered and the Swiss subsidiary has to make a payment under such security, it is rather likely that a constructive dividend will be assumed triggering the detrimental Swiss withholding tax consequences.

29. I. Schwenzer, 'Art. 11', *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 16; C. Pestalozzi, 'Art. 493', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 3.
30. *See*, *for instance*, Swiss Federal Supreme Court rulings, BGE 111 II 276; BGE 125 III 305; BGE 131 III 511.
31. That is, the Canton of Geneva, the Canton of Ticino and the Canton of Valais.
32. Team Dokumentation und Steuerinformation Eidgenössische Steuerverwaltung, Steuerinformationen: Die geltenden Steuern von Bund, Kantonen und Gemeinden (Bern: Schweiz Steuerkonferenz SSK, 2015), 41. *See also* Arts 21 et seq. legge del 20 ottobre 1986 sull'imposta di bollo e sugli spettacoli cinematografici (canton of Ticino); 8 et seq. loi du 15 mars 2012 sur les droits de mutation (canton of Valais); art. 100 loi du 9 octobre 1969 sur les droits d'enregistrement (canton of Geneva).

2 Consent Protection

1. Are there some rules regarding the consent of the parties to the contract? How is their consent protected? What are the consequences of a defective/imperfect consent (i.e., mistake, misrepresentation, economic duress, undue influence, etc.)?

According to Article 1 CO, the validity of a contract requires a mutual expression of intent by the parties. Without this consent, the contract is not formed.[33] The consent of the parties is protected and limited by different provisions.

When the parties agree to impossible, unlawful or immoral terms, the contract (or at least the clause) is declared void. This applies to terms which restrict excessively a party's legal personality as well.[34]

Since a valid consent presupposes that the parties agree with full knowledge of the facts, the parties are also protected from errors. For reasons of legitimate expectations, only the party which enters into a contract labouring under a fundamental error is protected.[35] An error is qualified as fundamental when it relates to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be an essential element of the contract.[36] The party in error needs to demonstrate that: (i) it would not have concluded the contract if it has known its error (*conditio sine qua non*); and (ii) a reasonable third party would also not have concluded the contract if it has known the error. A party acting under fundamental error at the conclusion of a contract is not bound by it, provided it declares it to the other party within one year starting from the time of its discovery.[37]

A further rule that limits the parties' consent is the protection against an unfair advantage. The situation presumes a clear discrepancy between performance and consideration and the exploitation of one party of the other's straitened circumstances, inexperience or thoughtlessness for the conclusion of the contract. Where the conditions are fulfilled, the contract is not void, but the party under duress has the right to declare the contract non-enforceable and to demand restitution of any performance already made.[38]

Finally, a party induced to enter into a contract by fraud or under duress is not bound by that contract.[39]

As pointed out above (*see below* Section [B][1]), the law provides several mandatory rules regarding the form of the Suretyship, which have some protecting effect for the parties. Indeed, by the mandatory use of the form of a public deed or, at

33. E. Bucher, 'Art. 1', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 2.
34. Swiss Federal Supreme Court ruling, BGE 109 II 43, para. 3.
35. I. Schwenzer, Art. 23, in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N. 1 et seq.
36. Article 24 para. 1 section 4 CO.
37. Article 31 paras 1 and 2 CO; Swiss Federal Supreme Court Ruling, BGE 84 II 685.
38. C. Huguenin & B. Meise, 'Art. 21', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 1 et seq.
39. I. Schwenzer I., 'Art. 28', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 1 et seq.

least, the obligation to indicate the amount for which it is liable in its own hand, the Surety is (partially) protected from a hasty acceptance of the contract.[40]

3 The Guarantor's Benefit/Consideration

1. Does the law of your jurisdiction take into account the benefit the Guarantor might obtain from the contract? Is it required that the Guarantor gets some benefit in return for the Guarantee?

2. What are the consequences of the lack of any benefit for the Guarantor?

3. When the Guarantor is a company, is corporate benefit required and how is the corporate benefit confirmed?

In general, the lack of any benefit for the Guarantor or the Surety does not affect the validity of the Guarantee or Suretyship (subject to general applicable principles of law, such as the limitation to excessive freedom's restriction, error or duress).[41]

In case of financial assistance between two companies of the same group, however, the situation is different. The qualification of the Guarantee accorded by an affiliate to a third party to guarantee the execution of an obligation of the parent or a sister company of the group will be different if the Guarantor deals at arm's length or not. The answer to this question will depend on the (financial) interest of the Guarantor, and not on the one of the entire corporate group, to participate to the contractual relationship as Guarantor.

If the up/cross-stream Guarantee is granted at arm's length, it will generally be valid and enforceable. If it is not at arm's length and affects restricted capital, certain authors consider that it is partially null and void in the amount exceeding the freely distributable equity. If such Guarantee (not granted at arm's length) is covered by freely distributable equity, it is deemed to be valid and enforceable, but it will 'block' the freely distributable equity in the amount equal to the Guarantee amount; the Guarantor is consequently required to build a reserve amounting to the relevant Guarantee amount, which increases the amount of the restricted capital and limits (future) dividend distributions.

In addition, the granting of up/cross-stream securities may constitute a pay-out of capital; hence if the amount of the Guarantee is covered by unrestricted capital, the contract remains valid, but if the Guarantor's execution qualifies as payment of dividend, the 35% Swiss withholding tax will be triggered. If, on the contrary, there is no sufficient unrestricted capital to cover the amount of the Guarantee, there are good arguments to say that the Guarantor is required to build a reserve in the relevant Guarantee amount. This reserve of course would be part of the restricted capital, thereby limiting (future) dividend distributions and payments under an upstream and

40. Swiss Federal Supreme Court ruling, BGE 129 III 702, para. 2.2; C. Pestalozzi, 'Art. 492', N 1.
41. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 188 et seq.

cross-stream security in favour of a (direct or indirect) parent company or an affiliate. Furthermore, it is worth remembering that any distribution of profits can only be resolved by a formal resolution of the general shareholders' meeting being convened according to the requirements set in its articles of association and the law. An agreement in breach of these rules is void and the distributed amounts have to be returned.[42] These principles also apply to the Suretyship.

The company's benefit may be effective (by payment, proceeds of loan, etc.). In this case, it is calculated using as far as possible market standards (interest, fees, etc.). The obligations under the relevant agreements must also be in adequate relation to the assets of the company and the parent company as well as the affiliates shall have the financial capacity to meet a payment obligation.

The benefit may also come indirectly, that is the company benefits from the loan granted to its parent.

4 Authorisation

1. Are there any rules regarding authorisation of the Guarantee when the Guarantee is issued by a company (e.g., board of directors approval)? If so, what are such rules?

The authorisation to conclude a contract of Guarantee/Suretyship depends on whether or not the transaction contemplated by the Guarantee/Suretyship falls within the non-transferable duties of the duties of the board of directors or the shareholders' meeting. Where the amount is marginal enough to be considered as part of the current business activity of the company, any authorised person of the Company may enter into such contract. Beyond these limits, where the transaction falls within the non-transferable duties of the board of directors, a resolution of the board of directors is necessary. In addition, in case of an up-/cross-stream scenario, a shareholders' resolution is required both prior granting and upon enforcement, when the company does not handle at arm's length (even though it is recommended to always have the shareholders' approval). The articles of associations should also provide for the granting of up/cross-stream Guarantees and securities, otherwise there is a risk that the governing bodies act '*ultra vires*'.

The payment of a Guarantee/Suretyship which does not comply with these rules may be void and the Beneficiaries would, in such case, have to return the benefit received.[43]

42. Article 678 CO; P. Kurer, 'Art. 678', in *Obligationenrecht II: Basler Kommentar*, ed. H. Honsell et al. (4th ed. Basel: Helbing Lichtenhahn, 2007), N 7 et seq.; *see also* L. Glanzmann, 'Konzern-Kreditfinanzierungen aus Sicht der Kreditgebenden Bank', *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarkrecht* 3 (2011): p. 243 et seq.
43. Article 678 CO.

5 Authority

1. What are the rules regarding the authority of the parties to the contract?

2. What are the requirements regarding the authority of the parties when the Guarantor is a company?

The authority of the parties to enter into a contract of Guarantee/Suretyship is generally limited by the principles of civil law. In case of a natural person, only a person who has reached the age of 18 years and capable of judgment (i.e., every person who does not lack the capacity to act rationally by virtue of being under age or because of mental disability, mental disorder, intoxication or similar circumstances) has the capacity to validly conclude a contract.[44]

In case of a legal person, the articles of association and/or the organisation-by-laws determine who is entrusted with the task of representation. If there is no such provision in the articles of association, the law provides applicable subsidiary rules. In respect of the corporation, according to the law, every member of the board of directors can represent the company externally.[45] However, it is common to limit the power of representation of the members of the board (e.g., collective signing power by two); such limitations are recorded in the commercial register. Specific powers of representation can be granted by separate powers of attorney.

C Terms of the Contract

1 Public Order Provisions

1. Does the law of your jurisdiction forbid specific provisions (e.g., public order provisions)?

2. Does the law of your jurisdiction incorporate implied terms into Guarantees?

3. Is it possible to contract out of such implied terms?

As pointed out above, unlawful or immoral terms, or terms which are against the public order (*ordre public*) are forbidden by Swiss law. In general, a contract containing such clause is void. However, Article 20 paragraph 2 CO provides that where the defect pertains only to certain terms, those terms alone are void, unless there is cause to assume that the contract would not have been concluded without these terms.

44. Articles 12–19 CC; 1 CO; E. Bucher, 'Art. 1', N 32 and M. Biggler-Eggenberger & R. Fankhauser, 'Art. 12 ZGB', N 1 et seq.
45. P. Kurer, 'Art. 718', in *Obligationenrecht II: Basler Kommentar*, ed. H. Honsell et al. (4th ed. Basel: Helbing Lichtenhahn, 2007), N 11, 16.

The Supreme Court's case law concerning the unlawful terms is fairly comprehensive. Accordingly, a contract can be qualified as unlawful in case that its object,[46] its conclusion[47] or its purpose[48] is against any rule of the Swiss private or public law, issued from either Federal or Cantonal Authorities.

The criterion of 'public order' is discussed in the literature as there is no agreement concerning its definition and scope. The Courts do not apply this criterion very often.[49]

According to the Supreme Court, under the definition of immoral terms, falls every contractual term which is against the prevailing moral, i.e., any term against the common sense of decency or against the ethical principles and unit of value of the legal system.[50]

The question concerning the validity and the scope of the agreement reached by the parties is a matter of interpretation. Under Swiss law a contract has to be interpreted in accordance with the true and common intention of the parties.[51] The parties may express this intention by explicit statements in the contract or by reference to the applicable legal rules. Alternatively, the parties' intention may be determined by conclusive acts, like, for instance, the minutes of negotiation.

It is also possible, however, that the contract does not give an answer to an issue on a specific case. The Swiss Code of Obligations sets therefore out a catalogue of rules which are in part applicable to any kind of agreement and in part specifically provided for a category of contract.

Accordingly, there are some specific provisions governing notably the conclusion, the enforcement and the termination of the contract of Suretyship. On the other hand, the legal basis of the Guarantee agreement is regulated in one article only (Article 111 CO) and for the remainder, the contract is governed by the general principles of the law.

Subject to some exceptional mandatory rules, the parties are in general free to contract out a legal provision, by finding an express agreement between them.[52] This is in particular true for the Guarantee. In respect of the Suretyship, however, it is worth remembering that a number of provisions set out in the Swiss Code of Obligations are mandatorily applicable and therefore cannot be validly disregarded by the parties.

46. For instance, the perpetration of a criminal offence, *see* Swiss Federal Supreme Court ruling, BGE 117 IV 139.
47. For instance, the agreement to conclude a contract of inheritance, *see* Swiss Federal Supreme Court ruling, BGE 108 II 405.
48. For instance, the agreement of a loan to finance a narcotic business, *see* Swiss Federal Supreme Court ruling, BGE 112 IV 47.
49. *See, for instance,* Swiss Federal Supreme Court rulings, BGE 112 II 450; BGE 130 III 417; BGE 142 III 180.
50. Swiss Federal Supreme Court ruling, BGE 132 III 455, para. 4.1.
51. *See also* Art. 18 CO.
52. E. Bucher, 'Art. 1', N 21.

2 Main Provisions of the Contract

a) Duration of the Guarantee

1. Does the duration of the Guarantee depend on the duration of the underlying obligation?

2. Is it possible for the Guarantee to have an unlimited duration?

As regards the question of the duration of the Suretyship, the applicable legal rules distinguish different situations. The contract of Suretyship can be concluded for a fixed or for an indefinite term. However, if the Surety is a natural person, the Suretyship is extinguished after maximum twenty years from the conclusion of the contract.[53] When the Surety is a legal person, this time limit is not applicable.[54]

If the parties have agree on a fixed-term Suretyship, a period of grace is given by the law to the Beneficiary to assert its claim, and the obligation is extinguished if the Beneficiary fails to assert its claim within four weeks of the expiry of the fixed term and to pursue such claim without significant interruption.[55] If the Underlying Obligation (and consequently the Suretyship) is not payable at the moment when the fixed term is reached, the Surety has to provide real security to be released from liability.[56] Otherwise, the Suretyship remains valid until the Underlying Obligation falls due, and the Beneficiary has four weeks from the maturity date of the Underlying Obligation to assert its claim.[57] Usually, however, the parties agree for a fixed term longer than the maturity date of the Underlying Obligation.[58]

If the parties agree on an indefinite term, the Beneficiary's position is stronger, as it has neither an obligation to pursue the recovery of the debt, nor a time limitation of the Suretyship. To strengthen the Surety's position, the law provides for a protection from a passive behaviour of the Beneficiary.[59] Hence, once the Underlying Obligation falls due, the Surety has the right to request the Beneficiary to start proceedings against the Principal within four weeks and, if the Beneficiary does not comply with such request, the Surety is released from its obligation.[60]

In contrast to the Suretyship, the duration of a Guarantee is not subject to any specific rule. The parties may consequently agree on a limited or an unlimited

53. Article 509 para. 3 CO.
54. C. Pestalozzi, 'Art. 509', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 12.
55. Article 510 para. 3 CO.
56. Article 510 para. 4 CO.
57. C. Pestalozzi, 'Art. 510', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 16.
58. *Les garanties bancaires en droit Suisse*, 40.
59. C. Pestalozzi, 'Art. 511' in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 1.
60. Article 511 CO.

duration.[61] Where the parties do not limit its duration, it is considered that the Guarantee terminates when the reasons for its existence cease to exist or there is no longer any interest in having a Guarantee in place. In addition, the Guarantee is subject to the general rules protecting the person from excessive restrictions of its freedom and to avoid legal uncertainty it is recommended limiting the Guarantee in time.[62]

Where the parties agree on a fixed term, the Guarantor's liability is extinguished on the agreed expiry date or otherwise as agreed in the Guarantee.[63]

b) Amount of the Guarantee

1. Are there some rules concerning the amount of the Guarantee?

2. Does the amount of the Guarantee depend on the amount of the underlying obligation?

3. May the Guarantee be granted for an unlimited amount? Is there an obligation to provide for a maximum amount?

4. Is it necessary for sake of validity and enforceability of the Guarantee that the guaranteed amount be determined when the Guarantee is granted or can it be based on the final amount of the possible damage guaranteed?

5. If a maximum amount is stated, what does this amount include, e.g., interest, default interest, etc.?

6. Is the amount of the Guarantee reduced by each claim made under the Guarantee? If so, can this be prevented by specific wording in the contract?

7. Is the amount of the Guarantee reduced by a payment by the principal as per the underlying obligation?

There are no rules concerning the amount of the Guarantee and its amount does not depend on the Underlying Obligation.[64] Usually, the maximal amount is expressly set out in the Guarantee contract, which also describes the Guarantee extent (e.g. interest, default etc.).[65] If no amount is set out, there is a risk that a court could consider that the

61. B. Kleiner, *Bankgarantie: die Garantie unter besonderer Berücksichtigung des Bankgarantiegeschäftes* (4th ed. Zurich: Schultess, 1990), N 25.01.
62. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 919.
63. Hence, not after a period of grace.
64. C. Lombardini, 'La garantie bancaire', in *Droit bancaire suisse*, ed. C. Lombardini (2nd ed. Zurich/Basel/Geneva: Schultess, 2008), N 63 f.
65. D. Zobl, 'Die Bankgarantie in schweizerischen Recht', in *Personalsicherheiten: Bürgschaft, Bankgarantie, Patronatserklärung und verwandte Sicherungsgeschäfte im nationalen und internationalen Umfeld*, ed. W.Wiegand (Bern: Stämpfli, 1997), 38.

Guarantor excessively limits its freedom.[66] Certain authors take the view that the Guarantor is sufficiently protected from excessive limitations of its freedom when the amount of its liability is determinable.[67] Other authors argue that a Guarantor may provide guarantee for all current or future debts arising out of any Principal's contract only if a maximal amount of liability is fixed in the Guarantee contract.[68]

When a Guarantee is called, any delay or default of the Guarantor/Surety triggers interests. In the absence of an agreement on the interest, the law provides for a minimum of 5%.

The parties should also agree on what is included in the maximal Guarantee amount. For instance, they can determine a fixed amount or a maximal amount which is automatically reduced according to some specific factors. If the contract is silent, however, the amount is considered by certain authors to be fixed;[69] differing interpretation is however possible depending on the circumstances.

The question of whether the Guarantee is reduced by claims made under the Guarantee or by a payment of the Principal depends on the agreed terms.[70] However, unless the contrary is agreed, since the Guarantee is not an accessory obligation, the reduction of the Underlying Obligation does not automatically reduce the guaranteed amount.

With respect to the Suretyship, the parties are free to determine the amount of the Suretyship, but according to mandatory law the maximum amount for which the Surety is liable must be set out in the contract.[71] The Suretyship contract is void if no amount is set out.[72]

As an accessory obligation, the existence and the scope of the Suretyship depend on the existence and the scope of the Underlying Obligations.[73]

The Surety's liability is limited to the maximal amount set out in the contract and the Beneficiary cannot claim more than this sum, even if the Principal would be e.g. liable for default interests.[74] On the contrary, the parties are free to find a contractual agreement in the event that the amount of the Underlying Obligation is less than the limit fixed. If the parties did not set up a regulation, the law provides that the Surety is liable for:[75]

66. *See* Section III[A][2] above.
67. A. Büsser, *Einreden und Einwendungen der Bank als Garantin gegenüber dem Zahlungsanspruch des Begünstigten* (Fribourg: Universitätsverlag Freiburg Schweiz, 1997), N 347; C. Pestalozzi, 'Art. 111', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 1; *see* however also N 29.
68. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 326.
69. C. Lombardini, 'La garantie bancaire', N 42.
70. *See also* D. Zobl, 'Die Bankgarantie in schweizerischen Recht', 45 et seq.
71. Article 493 para. 1 CO.
72. S. Giovanoli, 'Art. 493', in *Berner Kommentar: Die Bürgschaft, Spiel und Wette*, ed. S. Giovanoli (2nd ed. Bern: Stämpfli, 1978), N 19.
73. C. Lombardini, 'La garantie bancaire', N 63 f.
74. C. Pestalozzi, 'Art. 492', N 10.
75. Article 499 CO.

- the amount of the Underlying Obligation, including the legal consequences of any fault or default on the part of the Principal, but not for damage resulting from the extinction of the contract and any contractual penalty, unless this was expressly agreed;
- the costs of debt enforcement proceedings and legal action brought against the Principal, provided that the Surety was given timely opportunity to avoid them by satisfying the Beneficiary, and, where applicable, for the costs of delivering pledges and transferring liens;
- interest at the contractually agreed rate up to a maximum of the interest payable for the current year and the previous year or, where applicable, for the annual payments due for the current year and the previous year.

The Suretyship being an accessory obligation, its amount is linked to the maximum amount of the Underlying Obligation. Hence, a claim under the Suretyship or the total or partial payment of the Underlying Obligation discharges proportionally the Surety from liability.[76] The parties cannot validly waive this rule.[77]

c) Plurality of Guarantors

1. Please describe the liabilities of each Guarantor when there is more than one Guarantor and in particular:

- *What are the applicable rules concerning the action against one of the Guarantors and the recourse of the Guarantor who has paid against the other Guarantors?*
- *Is it necessary to provide in the contract that the Guarantees are joint and several, or is it presumed?*

Guarantees can be several and since the contract of Guarantee is not submitted to any specific rule, the parties are free to stipulate in the contract how the Beneficiary has to claim payment against the co-Guarantors. The same applies to the right of recourse of the co-Guarantor who was called to pay.

In case that the Guarantee contract does not provide otherwise, the legal rules concerning the joint and several debtors are applicable.[78] Co-Guarantors are jointly and severally liable if they together agreed that each of them is liable for the performance of the entire Guarantee.[79] As a consequence the Beneficiary may request full performance from each one of them[80] and the co-Guarantor who pays the Beneficiary has

76. P. Meier, 'Art. 509', N 8.
77. P. Meier, Art. 492, in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 60.
78. Articles 143 et seq. CO.
79. Article 143 para. 1 CO.
80. Article 144 para. 1 CO.

recourse against the others for the excess.[81] However, the rules above apply only if the parties agree to be joint and several debtors.[82] Otherwise, the co-Guarantors are only liable for their own Guarantee undertaking.[83]

The rules applicable to the Suretyship provide on the contrary for a specific regime for the case where more than one Surety participate to the legal relationship.[84] The main rules are the following:

(i) The collateral Surety stands surety to the Beneficiary for the performance of the obligation assumed by the so-called primary Surety; it follows that the collateral Suretyship is subsidiary to both the Underlying Obligation and the primary Suretyship and may be triggered only once the Principal and the primary Surety did not perform their own obligation.[85]

(ii) The counter-Surety stands Surety for the right of recourse against the Principal accruing to the primary Surety who honours its commitment.

(iii) Where two or more persons stand as Sureties for the same Underlying Obligation, the co-Suretyship may take different forms:[86]

- Where the co-Suretyship is a simple co-Suretyship,[87] each of the co-Sureties is liable as simple Surety for its share and as collateral Surety for the shares of the others.
- Where the co-Suretyship takes the form of a joint and several co-Suretyship,[88] each of the co-Sureties is liable for the whole.[89] In such case, the co-Surety who has paid the Beneficiary may claim performance to the other co-Sureties for the excess.
- Where several persons have independently agreed to stand Surety for the same Underlying Obligation, each of them is liable for the whole amount of its own commitment; however, and unless otherwise agreed, the co-Surety who paid has a right of recourse against the other co-Sureties.
- Finally, the parties can also decide that each of them is liable for a share only so that the Beneficiary may only request to each of them the payment of the share for which each co-Surety is liable.[90]

81. Article 148 para. 2 CO.
82. C. Graber, 'Art. 143', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 5.
83. Article 143 para. 2 CO.
84. *See* Art. 497 f. CO.
85. As an exception, if the collateral Surety is agreed on a joint and several liability with the primary Surety, the Beneficiary may resort to him/her before suing the primary Surety, according to Art. 496.
86. *See* Art. 497 CO.
87. That is the case where two or more persons stand surety for a single divisible principal obligation.
88. That is the case where two or more persons assumed joint and several liability by agreement among themselves. Further, the parties may agree to be joint and several liable with the Principal as well.
89. *See* however the exceptions provided by Art. 497 para. 2.
90. P. Meier, 'Art. 497', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 4.

d) Immediate Recourse Against the Guarantor

1. Is the Beneficiary required to exhaust his remedies against the principal before calling on the Guarantee?

2. Should any requirement to proceed against the principal before calling on the Guarantee be waived expressly in the contract or is it provided for by default by the applicable law?

Once the Underlying Obligation is payable, the Suretyship becomes payable and the Beneficiary has a claim against the Principal and the Surety.[91] The Beneficiary's right to call the Suretyship will however depend on the type of Suretyship. In case of a simple Suretyship, the Beneficiary has to proceed against the Principal, before requesting performance to form the Surety. Indeed, the Surety may validly refuse to perform by raising the defence of the *beneficium excussionis personalis* in case that a claim against the Principal is still possible.[92] If the Beneficiary's claim is also secured by pledges, the simple Surety may additionally raise the *beneficium excussionis realis*, and request that the Beneficiary first satisfies its claim from such pledges.[93]

These two benefits are limited in two ways, one procedural and one substantial.

First, the Surety has to raise his/her defences within the proceedings, otherwise the judge does not apply the benefits *ex-officio*.[94] Second, several exceptions to the right to raise the defence of the benefit of discussion are provided by Swiss law.[95]

Where the Surety assumes a joint and several liability, the Beneficiary may usually resort to it before suing the Principal.[96] The joint and several liability remains nevertheless an ancillary obligation. Hence, the execution from the Surety can only be claimed once the Principal is in a 'qualified' default.[97] Furthermore, also the joint and several Surety has a limited *beneficium excussionis realis* and may consequently require that the Beneficiary first satisfies its claim from the pledges (if any), where the following (restrictive) conditions are fulfilled: the pledged chattels and claims are deemed to cover the debt, the contract does not provide that the Beneficiary may resort

91. N.B.: there are two exceptions. First, if the fixed date for the payment of the Underlying Obligation is brought forward following the Principal's bankruptcy, the Beneficiary may not require the payment to the Surety before the date fixed for its payment. Second, if no date for the payment of the Underlying Obligation has been fixed, the Surety's debt is payable only once that he/she becomes a notification, and not when the payment is required to the Principal.
92. Article 495 para. 1 CO.
93. Article 495 para. 2 CO. However, the article provides that this defence is not available when the Principal has been declared bankrupt or under a debt restructuring moratorium.
94. W. Schönenberger, 'Art. 495', in, *Obligationenrecht 1. und 2. Abteilung: Zürcher Kommentar*, ed. W. Schönenberger & P. Gauch (3d ed. Zurich: Schultess, 1973-), N 10.
95. So for instance in case of the Principal's bankruptcy (Arts 175 et seq. SDEBL). *See* Section V[A][2][c].
96. Article 496 para. 1 CO.
97. The Principal did not execute its obligation on expiry of the time limit, within the usual time limits of business operations, and that the Beneficiary called him on to pay, *see Les garanties bancaires en droit suisse*. 21.

to the Surety before realising the pledges and the Principal has not been declared bankrupt or obtained a debt restructuring moratorium.[98]

The qualification of the type of Suretyship depends on the agreement between the parties. When the parties append the words 'joint and several' or an equivalent phrase in the contract, the Beneficiary may directly proceed against the Surety.[99] If, on the contrary, the parties did not specify the nature of the Suretyship, it is assumed that they agreed on a simple Suretyship;[100] hence the Beneficiary has to proceed against the Principal before calling on the Suretyship.

In addition to these requirements, the parties have to take into consideration the formal rules in case that the Surety is a natural person and the amount granted does not exceed the sum of CHF 2,000.[101] Here, the Surety must indicate the clause concerning the existence of a joint and several liability in his own hand, otherwise the clause is void and he/she is liable only as simple Surety.[102]

With respect to the Guarantee, the Beneficiary is not required to proceed against the Principal, before calling on the Guarantee.[103]

In general, the Beneficiary of a bank Guarantee can request the payment from the Guarantor upon the conditions set out in the Guarantee contract being satisfied (e.g., default of the Principal).[104]

D Obligations of the Beneficiary

1. Does the Beneficiary of the Guarantee have any obligations in relation to the Guarantee or towards the Guarantor, notably to do its best efforts to mitigate the damage before calling the Guarantee?

2. Please state all obligations of the Beneficiary as well as the sanction of a failure to perform it and in particular:

- *Shall the Beneficiary preserve the securities or co-Guarantees it may have in respect of the same underlying contract? What is the consequence of a release of a security or an excuse of a co-Guarantor? What are the consequences of other failures of the Beneficiary to preserve such security interests: i.e., variation of these rights, failure to perfect the security, etc.?*
- *Does the law of your jurisdiction require the Beneficiary to disclose certain information to the Guarantor and, if so, at what time: formation of the*

98. Article 496 para. 2 CO.
99. Article 496 para. 1 CO.
100. P. Meier, 'Art. 495', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 2.
101. Since the whole agreement is submitted in the form of a public deed, there is no such problem for the Suretyships for amounts higher than CHF 2'000.
102. P. Meier, 'Art. 496', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 5.
103. Swiss Federal Supreme Court ruling, BGE 131 III 606. para. 4.2.
104. C. Lombardini, 'La garantie bancaire', N 45.

Guarantee, during the Guarantee's life, when the Guarantee is called? What are the consequences of a lack of disclosure?

The duty to do ones best effort to mitigate ones damage is a general principle of law under Swiss law.[105]

Regarding the Suretyship in particular, the Beneficiary has other obligations towards the Surety:[106] the duty to accept satisfaction and the duty to guard and furnish the liens, co-securities and other preferential rights.[107]

In general, if the Beneficiary fails to preserve the security interests or reduce them, its claim against the Surety is reduced by an equal amount,[108] and the Surety is released from its liability and can demand compensation if the Beneficiary has acted in bad faith or with gross negligence.[109]

As regard to the duty to disclose information, the Surety has to analyse the risk incurred by entering into a Suretyship contract. Hence, the Beneficiary is not obliged to furnish any information concerning the Principal or to indicate to the Surety that the subscription of such contract can be risky.[110] A legal exception to this principle is the duty to notify the Principal's bankruptcy or debt restructuring moratorium to the Surety.[111]

Apart from that, the Beneficiary does not have any other duties to inform the Surety before it has been satisfied by the latter. Any act contrary to good faith is, of course, reserved.[112]

The situation is different when the Suretyship is called. Indeed, once it has been satisfied by the Surety, the Beneficiary shall provide all documents and information necessary for the exercise of the Surety's right of recourse against the Principal.[113] If the Beneficiary does not comply with its duty (without just cause), the Surety is released from its obligation and may claim for repayment of what has already been paid and potential damages.[114]

The legal regulations mentioned above do not apply to the Guarantee, thus any obligation of the Beneficiary may only arise from the contract itself. If the assignment of a claim is agreed between the Beneficiary and the Guarantor, the accessory rights of

105. In general, *see* L. Thévenoz, 'Art. 99', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn, 2012), N 17.
106. The Swiss law distinguishes two kinds of obligations: the 'obligations' and the 'incombances'. The difference stays in the fact that the latter are simply sanctioned by the titular's loss of a right. According to the literature, the Beneficiary usually does not have any 'obligations' towards the Surety, but only 'incombances'.
107. *Les garanties bancaires en droit suisse*, 38.
108. Article 503 para. 1 CO, which specifies that the Beneficiary has the right to prove that the damage it caused was less important.
109. Article 503 para. 4 CO.
110. C. Lombardini, 'La garantie bancaire', N 27.
111. Article 505 para. 1 CO.
112. *Les garanties bancaires en droit suisse,* 38. For instance, the Beneficiary may not actively omit to provide information which could be essential for the Guarantor or which are expressly requested by the latter.
113. Article 503 para. 3 CO.
114. Article 503 para. 4 CO.

the claim (for instance, the other securities of the claim) are assigned to the Beneficiary as well.[115] If such clause is included in the contract and the Beneficiary fails to fulfil its obligation, it is liable for the loss incurred by the Guarantor.[116]

As for the Suretyship, there is no obligation for the Beneficiary to indicate to the Guarantor information and risks in connection with the Guarantee.[117] However, the parties may stipulate contractually a duty of the Beneficiary to disclose certain information or a duty can arise from a specific relationship between the parties. Furthermore, the general principle of good faith applies also to the contract of Guarantee.[118] For instance, the Beneficiary's legal duty to notify its claim in bankruptcy to the Surety is not directly valid for the Guarantee, but a similar behaviour may be required pursuant to the principle of good faith.[119]

IV THINGS TO THINK ABOUT WHEN THE GUARANTEE IS IN FORCE

A Modification of the Guaranteed Obligation or of the Parties to the Underlying Obligation

1 Modification of the Underlying Contract

1. How is the Guarantee affected by the extension of the payment date or amount or scope of the guaranteed obligation?

2. How is the Guarantee affected by an acceleration of the underlying obligation?

3. What other variations of the underlying contract may affect the Guarantee?

As primary obligation, the Guarantee is not affected by any modification of the Underlying Obligation, unless the parties agreed otherwise.[120] Usually, the parties find a specific contractual agreement on the question concerning the effects of a variation of the Underlying Obligation.[121]

Since the existence and scope of the Suretyship depends on the Underlying Obligation, if, for instance, the parties to the Underlying Obligation agree on an

115. *Les garanties bancaires en droit suisse*, 39; *see also* Art. 170 CO.
116. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 798.
117. C. Lombardini, 'La garantie bancaire', N 27.
118. *Les* garanties *bancaires en droit suisse*, 39.
119. *Ibid*.
120. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 246.
121. F. Graf von Westphalen, 'Versuche internationaler Vereinheitlichungen', in *Die Bankgarantie im internationalen Handelsverkehr*, ed. F. Graf von Westphalen (3d ed. Frankfurt am Main: Verlag Recht und Wirtschaft, 2005), 141 et seq., 450.

extension of the payment date, the Beneficiary may not proceed against the Surety for performance in terms of the Suretyship contract before that date, as performance at the Underlying Obligation is not yet due.[122]

In case of a modification of the Underlying Obligation, an adjustment of the Suretyship in accordance with the mandatory formal requirements is necessary.[123]

Generally, the simple writing form is required for any amendment of the Suretyship. However, where the total liability is increased or the Suretyship is transformed from a simple into a joint and several liability, the form required will vary according to the general rules of the form.[124] Furthermore, the spouse's consent is a condition to any adjustment of the contract.[125]

The Beneficiary may not proceed against the Surety before the date provided in the Suretyship, even if the parties decide to bring forward the payment date (i.e., an acceleration of the Underlying Obligation), as the amendment is prejudicial to the Surety.[126]

Any other material variation of the Underlying Obligation which may affect the Surety is submitted to the same rules, i.e., it requires an amendment of the Suretyship.[127]

2 Change of the Parties to the Underlying Obligation or to the Guarantee

1. What are the consequences on the Guarantee of a change of the parties to the agreements, such as:

- *a merger or a spin-off of the Beneficiary;*
- *a merger or a spin-off of the principal;*
- *a merger or a spin-off of the Guarantor;*
- *an assignment / a transfer of the underlying contract. Is there a difference between a contractual assignment and an assignment by operation of law?*
- *a change or a cessation of the Guarantor's functions as a manager in the principal entity; or*
- *the death of the Guarantor.*

122. P. Meier, 'Art. 501', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 1.
123. W. Schönenberger, 'Art. 501', in, *Obligationenrecht 1. und 2. Abteilung: Zürcher Kommentar*, ed. W. Schönenberger & P. Gauch (3d ed. Zurich: Schultess, 1973-), N 3.
124. C. Pestalozzi, 'Art. 493', N 17.
125. *Ibid*.
126. Swiss Federal Supreme Court ruling, BGer 4C.114/2003, 15 October 2003, para. 2.2.
127. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 246. For instance, contrary to the general rule, the Surety's consent is necessary if the Underlying Obligation is assumed by a third party and the Principal released, otherwise the contract of Surety is extinguished.

2. Are there any other circumstances where a change of the parties may affect the Guarantee?

Under Swiss law, there is no specific rule concerning the merger or spin-off of one of the parties involved in a Guarantee/Suretyship. Hence, the general rule of the Federal Act on Mergers applies, which generally holds that all the assets and liabilities of the transferring legal person pass by law to the transferee with effect upon the recording of the merger/spin-off in the commercial register.[128] In case of a merger the contracts between the parties of the merger and third parties pass by law (so-called principle of universal succession);[129] hence the contract of Guarantee/Suretyship remains valid. The parties' freedom to avoid the effect of the universal succession by a differing contractual agreement is limited. For instance, the authors argue that a clause in the Guarantee/Suretyship setting the remaining party's acceptance as condition for the assignment of the Guarantee/Suretyship to the transferee does not affect the transfer, but merely allows the remaining party to claim damages for breach of the contract.[130] However, the contract may validly provide a 'change-of-control-clause', according to which the contractual relationship can be terminated immediately or modified accordingly if one of the parties is replaced by a new entity as a result of a merger with another entity.[131]

Where a spin-off takes place, authors consider that the contracts pass to the transferee by operation of law.[132]

The situation may be different where the underlying contract is assigned contractually or by others operations of the law. The effect of a contractual assignment of the Underlying Obligation to a third person depends on the subject (i.e., whether the transferor is the Principal or the Beneficiary) and on the object (i.e., Suretyship or Guarantee) transferred.

The assignment of the Underlying Obligation from a former Beneficiary to a new one leads to the transfer of the Suretyship as well,[133] unless the contract of Suretyship provided specifically otherwise. In this latter case, the Suretyship is terminated with the assignment of the Underlying Obligation.[134] On the other hand, the Surety is released from its obligation when the Principal transfers the Underlying Obligation to another debtor, unless he/she (and his/her spouse) gives his/her written consent before the change has taken place.[135] An acceptation subsequent to the change is considered as a new Suretyship[136] and is only valid if it complies with the mandatory

128. Articles 22, 52 and 73 of the Federal Act on Mergers, Demergers, Transformations and Transfers of Assets and Liabilities.
129. R. Tschäni, T. Gaberthüel & L. Erni, 'Art. 22', in *Fusionsgesetz: Basler Kommentar*, ed. R. Watter et al. (2nd ed. Basel: Helbing Lichtenhahn, 2014), N 9.
130. *Ibid*.
131. *Id.*, N 10.
132. R. Watter & R. Büchi, 'Art. 52', in *Fusionsgesetz: Basler Kommentar*, ed. R. Watter et al. (2nd ed. Basel: Helbing Lichtenhahn, 2014), N 12 et seq.
133. *See* Art. 170 CO.
134. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 950.
135. C. Pestalozzi, 'Art. 493', N 18.
136. Swiss Federal Supreme Court ruling, BGE 60 II 332.

legal requirements. A prior acceptation may be void; for instance, the Surety cannot validly agree to provide performance for any future debtor of the Underlying Obligation without limiting excessively its freedom.[137]

With respect to the Guarantee, the main literature considers that the Guarantee, as primary obligation, is not transferred to the new Beneficiary with the Underlying Obligation.[138] The same applies when the Principal's debt is assumed by a third party.[139] The Guarantor may, however, agree differently in the contract.

In case of an assignment by operation of law, the effect on the Surety or Guarantee is subject to the specific legal provisions of the legal assignment. For instance, with the Guarantor or Surety's death, his/her heirs become by law the new Guarantors/Sureties.[140] It is worth remembering, however, that under Swiss law the heirs have different ways to protect themselves from the *de cujus'* debts,[141] and may therefore be released from the obligation arising out of the Guarantee/Suretyship agreement.

B Release of the Guarantee

1. Should there be some specific language inserted into the text of the Guarantee regarding the duration of the Guarantee or its release?

2. What are the specific actions that need to be taken to render the release of the Guarantee effective? What are the loopholes, if any, when release of the Guarantee is sought?

3. Does the original Guarantee need to be returned to the Guarantor in order for the Guarantee to cease to be effective?

In respect of the Guarantee, the parties are recommended to agree on the duration of the Guarantee, in particular because certain authors suggest that the Beneficiary's claim against the Guarantor shall be limited in time.[142] The parties can do so by setting out a fixed date, in which case the Guarantor is effectively released upon expiration of the term.[143] Alternatively, they can provide that the Guarantee undertaking shall remain in full force and effect until the Underlying Obligation is entirely satisfied. In such a case, the Guarantor will be automatically release upon the satisfaction of the Underlying Obligation. As pointed out above,[144] however, if no fixed date is set, there

137. Swiss Federal Supreme Court rulings, BGE 120 II 35; BGE 67 II 128.
138. *See* H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 952, 959.
139. *Id.*, N 991.
140. A. Hubert-Froidevaux, 'Art. 560', in *Commentaire du droit des successions: (art. 457 CC; art. 11-24 LDFR)*, ed. A. Eigenmann (Bern: Stämpfli, 2012), N 27.
141. *See, for instance, id.*, N 32.
142. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 919.
143. *Id.*, N 903.
144. *See* Section III[C][2][b].

is a risk that the Guarantee undertaking terminates when the reasons for its existence cease to exist or there is no longer any interest in having a Guarantee in place or because its duration qualifies as an excessive restriction of the Guarantor's freedom.[145] With respect to the Suretyship, the duration of the Suretyship will depend on the language inserted into the text of the contract and the circumstances.[146] The Federal Court ruled that, in case of doubt, the Suretyship is considered to last for an indefinite term, as this reflects better the Suretyship's purpose and incidentally depends on the Underlying Obligation.[147]

In the case of a fixed-term Suretyship, it is worth remembering that the Surety's liability is extinguished only after a four-week period following the deadline provided in the contract.[148] The party may agree to reduce the additional period but not to extend it.[149] Generally, there is no need to take specific actions to effect the release of the Surety. However, if at the expiration of the fixed term, the Underlying Obligation is still not due, the Surety may exempt itself from liability only by furnishing real security interest; otherwise the Suretyship remains as if the agreed duration had been for that of the Underlying Obligation.[150]

When Suretyship is concluded for an indefinite term, the Surety's liability will continue for the duration of the Underlying Obligation. Once the Underlying Obligation falls due, or in case that the Underlying Obligation falls due on expiry of a period of notice served by the Beneficiary, the Surety may request the Beneficiary to assert its claim or serve notice against the Principal. In these cases, the release of the Suretyship will be effective, if the Beneficiary does not comply with the Surety's request.

The Suretyship is released if any of the events provided by the general rules of the Swiss contract law is fulfilled, that is:[151]

- the Underlying Obligation is terminated by mean of performance, novation, confusion,[152] set-off or prescription;
- the performance becomes impossible;
- a condition subsequent occurs or a condition precedent does not occur;
- the Suretyship is extinguished by agreement.

Furthermore, the law provides some special rules for the Suretyship:

145. B. Kleiner, *Bankgarantie: die Garantie unter besonderer Berücksichtigung des Bankgarantiegeschäftes*, N 25.01.
146. Swiss Federal Supreme Court ruling, BGE 125 III 435.
147. Swiss Federal Supreme Court ruling, BGE 125 III 435, para. 2a.
148. Article 510 para. 3 CO.
149. Swiss Federal Supreme Court ruling, BGer 4C.114/2003, 15 October 2003.
150. The real security shall be quantitatively and qualitatively sufficient to preserve the Beneficiary from any loss, *see* P. Meier, 'Art. 511', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 20-21.
151. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 873 et seq.
152. With an exception for the account entries, *see* Art. 117 para. 3 CO.

- the Surety entered into a contract on condition that others would stand (co-)Sureties with it for the same Underlying Obligation and the condition is not fulfilled/the co-Sureties are released by the Beneficiary or their undertaking are declared invalid;
- if the Beneficiary fails to fulfil its duty of diligence and duty to release documents and pledges furnished for the purpose of securing the claim under Suretyship;[153]
- where the Beneficiary refuses without just cause to accept payment;
- where the Beneficiary fails to fulfil its duty to notify and to register his claim in bankruptcy and composition proceedings.[154]

Finally, the Surety may require its release from liability in case that the situation vis-à-vis the Principal has substantially deteriorated since the contract was entered into.[155] In some of these cases, the Surety shall require its release with a written declaration.

In all the cases mentioned above the Guarantee/Suretyship ceases immediately to be effective; hence there is no need for subsequent acts such as returning the original document to the Guarantor/Suretyship in order to release this latter from its obligation.

V ENFORCEMENT OF THE GUARANTEES

A The Call Mechanism

1 The Call Procedure

a) Conditions of the Call

1. What are the conditions for calling the Guarantee? (Enforceability of the principal claim, default of the principal, etc.)

Since it is an ancillary obligation, the main condition for calling the Suretyship is both its enforceability and the one of the Underlying Obligation.

As stated above,[156] a distinction between simple and joint and severally Suretyship is necessary. In case of a simple Suretyship, the Beneficiary may only demand performance from the Surety if the Principal has defaulted in the performance of the Underlying Obligation. If the Beneficiary fails to proceed against the Principal or to satisfy its claim from potential pledges before claiming performance to the Surety, this latter may raise the defences accordingly and validly refuse to pay.[157]

With a joint and several Suretyship, the Beneficiary may resort to the Surety before suing the Principal and before realising property given in pledge, provided that

153. For more details, *see* Art. 503 CO.
154. For more details, *see* Art. 505 CO.
155. For more details, *see* Arts 506 and 510 para. 1 CO.
156. *See* Section III[C][2][d].
157. Article 495 paras 1 and 2 CO.

the Principal has defaulted on its debt payments and has been issued with payment reminders to no avail or is manifestly insolvent.[158] Under some conditions enumerated by law,[159] the Beneficiary may also resort to the co-Surety before realising pledged chattels and claims. Even in case of a joint and several Suretyship, the Surety has nevertheless the right to request, in exchange for furnishing real security, the suspension of the debt enforcement proceedings against him until all pledges have been realised and a definitive certificate of loss has been issued against the Principal or a composition agreement has been concluded with the creditors.[160]

Unlike the Suretyship, the Guarantee creates a primary obligation. Once the contractual conditions of the Guarantee call are fulfilled, the Beneficiary has the right to demand performance to the Guarantor regardless of whether the Principal's claim is enforceable.[161]

b) Form of the Call

1. What are the formal requirements when calling the Guarantee? (Disclosure of information to the Guarantor, to the principal, statement of the Beneficiary (statement of default, etc.), formal notice to the Guarantor, writ of execution, etc.)

The parties may stipulate in the contract the formal requirements for calling the Suretyship. If nothing else is provided, the Beneficiary has to prove its right to claim performance by providing one of the following evidences:[162]

- a declaration of the Principal's bankruptcy or debt restructuring moratorium;
- a declaration of the Surety's bankruptcy or debt restructuring moratorium;
- a definitive certificate of loss of the Beneficiary;
- evidence that the Principal has relocated his domicile abroad and can no longer be sued in Switzerland; or
- evidence that legal action against the Principal in foreign courts has been substantially impeded as a result of such relocation.

As stated above, the Beneficiary has further a general duty, according to which it is required to furnish the Surety with documents and information necessary to exercise its rights against the Principal (for instance the contract of Suretyship, the documents related to the insolvency proceedings, judgments, etc.). Where the Beneficiary refuses

158. Article 496 para. 2 CO.
159. These conditions are: the court judged that these are deemed unlikely to cover the debt; where such sequence was agreed by the parties; or where the debtor has been declared bankrupt or obtained a debt restructuring moratorium.
160. *Les garanties bancaires en droit suisse*, 21.
161. *Les garanties bancaires en droit suisse*, 22.
162. P. Meier, 'Art. 495', N 6-13.

without just cause to fulfil its obligation, the Surety is release from its liability and can claim the return of sums already paid and seek compensation for any further damages incurred.[163]

There are no special requirements for calling the Guarantee. The parties may stipulate in the contract requirements, for instance a notice setting out the reasons of the payment, a judgment or an arbitral award, or some other specific documents.[164]

For documentary evidence purposes, it is advisable to provide the notice by means providing with proof of delivery.

c) Time of Calls

1. Can the Guarantor refuse payment until the Beneficiary has exhausted his remedies against the principal? [N.B. this is already covered above.]

2. Can the Guarantor ask the Beneficiary to divide his action between all the Guarantors?

Concerning the question 1, *see* Section III[C][2][d].

The right of the Surety to ask the Beneficiary to divide its action between all the sureties will depend on the relation among the co-Sureties. Hence, in case of a joint and several liability, the Beneficiary may request the total payment from one of the co-Sureties. However, even in this case, the co-Surety has the right to refuse to pay more than its share if the Beneficiary did not initiated the debt enforcement proceedings against the other co-Sureties who may be sued in Switzerland or if the co-Sureties paid their share or furnished real security.[165]

In case of a Guarantee, the right of the Guarantor to ask the Beneficiary to divide its action between all the co-Guarantors will depend on the terms agreed with the Guarantor.

(For more details in relation to multiple Guarantors/Sureties *see* Section IV[C][2][c].)

d) Limitation on the Right to Payment

1. Please expand on the terms extension, reduction of the Guarantor's liability, the effect of insolvency proceedings against the Guarantor, etc.

The limitation on the right to payment of a Suretyship is regulated by different legal provisions. Accordingly, the term extension of the Suretyship is valid only if it complies

163. P. Meier, 'Art. 503', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 26.
164. C. Lombardini, 'La garantie bancaire', N 44 et seq.; D. Zobl, 'Die Bankgarantie in schweizerischen Recht', 37.
165. P. Meier, 'Art. 497', N 19.

with the mandatory legal rules,[166] i.e., exclusively with a written declaration of the parties within the last year before the expiration of the contract. Furthermore, the Suretyship cannot be extended for a period longer than ten years and only one extension is valid. Thus, a natural person can be liable for a maximum of thirty years.[167] However, the parties may agree to enter into a new Suretyship agreement.[168] Whether the spouse's agreement is necessary or not for a valid term extension, is unclear.[169]

The Swiss Code of Obligations also provides for a reduction of the Surety's liability.[170] Accordingly, if the Surety is a natural person, the amount of the Suretyship shall decrease proportionally every year. An amendment of the parties is valid if it complies with the form requirements.[171] The spouse's consent is not necessary.[172]

The effect of insolvency proceedings against the Surety is ruled by both the Code of Obligations and the Law on Debt Collection and Bankruptcy. According to these regulations, the Beneficiary has the right to produce its claim in the Surety's insolvency procedure, even if its claim is not yet enforceable,[173] and such claim is recorded in the schedule of claims. However, the Beneficiary's right to receive the dividends is suspended until the bankrupt estate has the right to exercise the *beneficium excussionis personalis* and/or the *beneficium excussionis realis* of the Surety.[174] According to Article 502 paragraph 3 CO, the bankruptcy estate has to plead the defences open to the Principal against the Beneficiary, otherwise it forfeits its rights of recourse to the extent that such defences would have released it from liability. Once the Beneficiary has been satisfied, the bankruptcy estate is subrogated to its rights against the Principal.[175]

In case of a Guarantee, there are no specific legal provisions. The term extension and the reduction of the Guarantor's liability shall be regarded as an amendment to the contract of Guarantee. Hence, their validity, unless otherwise agreed by the parties, may only depend on the parties' acceptance thereof.

With regard to the effect of insolvency proceedings against the Guarantor, in general, the rules seen above concerning the contract of Surety are also valid for the Guarantee, unless the parties have agreed otherwise. Contrary to the Suretyship, the

166. Article 509 para. 5 in conjunction with Art. 492 CO.
167. C. Pestalozzi, 'Art. 509', N 15. Indeed, the maximum length of a Suretyship given by a natural person allowed by the law is twenty years (Art. 509 para. 3 CO); however, during the final year of this maximum period, the contract of Suretyship can be extended for (maximum) one period of no more than ten years (Art. 509 para. 5 CO).
168. *Ibid*.
169. *See, for instance,* C. Pestalozzi, 'Art. 509', N 15 and opposite opinion in P. Meier, 'Art. 509', N 19.
170. Article 500 CO.
171. S. Giovanoli, 'Art. 500', in *Berner Kommentar: Die Bürgschaft, Spiel und Wette*, ed. S. Giovanoli (2nd ed. Bern: Stämpfli, 1978), N 2.
172. P. Meier, 'Art. 500', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 7.
173. Article 215 FADEB.
174. P. Meier, 'Art. 495', N 13; *see also* Arts 210 and 264 FADEB.
175. Articles 507 CO and 215 para. 2 FADEB; *see also* P. Meier, 'Art. 495', N 13.

Guarantee is a stand-alone obligation and the bankruptcy estate has a right of subrogation only if the contract granted a right of claim to the Guarantor.[176]

2 Defences of the Guarantor

a) The Guarantor's Own Counter-Claims

1. Is the fraud or abuse by Beneficiary in calling the Guarantee punished?

2. How?

Generally, the fraud or abuse may constitute a violation of the contract, an unlawful act and/or an unjust enrichment. Furthermore, the Beneficiary's fraud may (additionally) lead to a criminal prosecution and be punished with a maximum penalty of five years, if the conditions of the Swiss Criminal Code are fulfilled.[177]

Under Swiss law, the violation of a bilateral contract (i.e., a contract creating obligations for both parties) by a party gives the right to its co-contracting party to claim damages for the breach of the contract as well as the termination of the contract if the conditions are fulfilled. The fault of the party who breached the contract is presumed.[178] Usually, the contract of Suretyship/Guarantee creates a unilateral obligation, therefore the Surety/Guarantor is not entitled to such claims. In case that the parties provided contractually some obligations for the Principal, the extent of the Surety/Guarantor's right to claim is however discussed in the literature.[179]

In any case, if the fraud or abuse constitutes an unlawful act, the Guarantor/Surety may, besides any potentially agreed penalty,[180] claim compensation for damages for unlawful act in accordance with Articles 41 et seq. CO. However, the Guarantor/Surety has to prove the Beneficiary's fault.

When the conditions of Articles 41 et seq. CO are not met, but the Beneficiary called the Guarantee without a valid reason, the Beneficiary shall make restitution of the benefit it incurred.[181]

The Surety is also protected by a specific legal provision against the Beneficiary, in case that this latter has abused of its position by not fulfilling its duty to release the

176. *Les garanties bancaires en droit suisse*, 43.
177. *See* Art. 146 of the Swiss Criminal Code.
178. Article 97 para. 1 i.f. CO. L. Thévenoz, 'Introduction aux art. 97-109', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 63-65.
179. *See* S. Giovanoli, 'Art. 492', in *Berner Kommentar: Die Bürgschaft, Spiel und Wette*, ed. S. Giovanoli (2nd ed. Bern: Stämpfli, 1978), N 29; P. Meier, 'Art. 492', N 5; C. Pestalozzi, 'Art. 111', N 7; H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 195 f.
180. The parties may have provided a contractual penalty.
181. Article 62 CO.

required documents and pledges without just cause at the time of calling the Suretyship. In this case, the Surety is released from his/her obligation and can seek compensation for its damages.[182]

b) Counter-Claims Derived from the Underlying Obligation

1. May the Guarantor use all the defences the principal may have in relation to the underlying contract (i.e., set off, defect in the main contract, etc.)? Can these be excluded by specific wording in the contract?

2. Is this right limited to certain defences only?

Since the obligation arising from a Guarantee is independent from the Underlying Obligation, the Guarantor may only use the defences of the contract it personally entered into with the Beneficiary and not the defences connected to the Underlying Obligation.[183] The parties to the Guarantee may, however, agree otherwise.[184]

Since the Suretyship is, by its nature, accessory to the Underlying Obligation, the Surety is entitled to use all the defences the principal may have in relation to the Underlying Obligation.[185] The use of all defences available is not only a right but also an obligation for the Surety. Hence, the Surety who fails to plead defences against the Beneficiary loses its right of recourse against the Principal.[186]

The possibility to exclude such provision with a specific wording in the contract has not been completely clarified yet. On the one hand, the right to use such defences is considered mandatory. On the other hand, the mandatory nature of the corresponding Beneficiary's obligation is supported by the prevailing literature,[187] whereas the question remains unanswered by the Supreme Court.[188]

Article 502 CO provides two limitations of the Surety's right and obligation to use the Principal's means of defence. First, since the main purpose of the Suretyship is precisely to assure the payment in case of insolvency of the Principal, the Surety is not entitled to use the defences based on the insolvency of the principal debtor. Second, when the Principal is not bound by the Underlying Obligation as a result of error,

182. P. Meier, 'Art. 503', N 26.
183. *Les garanties bancaires en droit suisse*, 25.
184. *Ibid*.
185. P. Meier, 'Art. 502', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 5.
186. Articles 502 para. 3 and 507 para. 6 CO. The Surety maintains its right if it can prove that it was unaware of the defences through no fault of its own.
187. P. Tercier, P. Favre & A. Eigenmann, 'Le cautionnement' in *Les contrats spéciaux*, ed. P. Favre & P. Tercier (4th ed. Geneva: Schultess, 2009), N 6961; S. Giovanoli, 'Art. 492', N 87 f.; P. Meier, 'Art. 502', N 1.
188. Swiss Federal Supreme Court ruling, BGE 102 Ia 372; *see also* C. Pestalozzi, 'Art. 502', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 3.

incapacity to conclude a contract or prescription, the Surety is bound by the contract only if it was aware of the defect (error, incapacity or prescription) vitiating the Underlying Obligation at the time of its commitment.[189]

Finally, the Supreme Court ruled that only the Principal may offset the Underlying Obligation with a claim it may have against the Beneficiary.[190] Since Article 121 CO provides the right for the Surety to refuse to execute its obligation to the extent that the Principal has a right of set-off, this latter exception is per se relatively unimportant. However, the prevailing literature proposes to extend this exception to all the Principal's «Gestaltungsrechte (droits formateurs)» (i.e., right to alter the legal relationship, like the right to terminate the contract and the redhibitory action),[191] which would limit the Surety's right to use the Principal's defences.

c) Other Defences

1. Are there other defences available to the Guarantor, which will reduce the Guarantor's undertaking or release the Guarantor?

Any of the rules concerning the consent protection, i.e., the fundamental error, the fraud, the duress and the unfair advantage may be used as defence by both the Guarantor and the Surety.[192] Furthermore, a Guarantor or Surety may use the defences arising in the following situations: the party was incapable to act at the moment of the conclusion of the contract, the contract has never become valid (according to Article 1 CO) or the contract is void because its terms are impossible, immoral or unlawful. Finally, both the Surety and the Guarantor may claim the extinction of their obligation.[193]

In case of a contract of Suretyship a formal defect (as the lack of the mandatory contractual form or the spouse's consent) may also be claimed, in order to be released from the Suretyship.[194]

3 Consequences of the Opening of an Insolvency Proceedings Against the Principal

1. How does the opening of an insolvency proceedings against the principal affect the Guarantee? In particular, what happens if:

– *there is a stay of actions against the principal?*

189. P. Meier, 'Art. 492', N 53.
190. Swiss Federal Supreme Court ruling, BGE 126 III 25.
191. P. Meier, 'Art. 502', N 10-11 C. Pestalozzi, 'Art. 502', N 5.
192. For more details, *see* Section III[B][2].
193. *See also* H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 340.
194. For more details, *see* Section III[B][1].

– *there is a reduction in the debt or it is disclaimed by a liquidator?*
– *a delay of payment is granted to the principal?*

Since a Guarantee is by its nature not accessory to the Underlying Obligation, the opening of an insolvency proceedings against the Principal and the decisions taken by the bankruptcy estate (such as a stay of actions against the Principal, a reduction in the debt or a granting of a delay of payment) have no effect on the Guarantee. The Beneficiary's right to claim performance to the Guarantor will only depend on the wording of the contract.

The situation is slightly different where the parties entered into a Suretyship agreement, as the maturity date of the relevant obligation strictly depends on the maturity date of the Underlying Obligation. Usually, the opening of an insolvency proceedings triggers the Beneficiary's right to resort to the Surety.[195] During the insolvency proceedings, the Beneficiary has, however, also the duties to inform the Surety of the bankruptcy and to safeguard its rights.[196] It follows that, although the Beneficiary can claim performance to the Beneficiary before the end of the insolvency proceedings,[197] it also has to continue the proceedings against the Principal, in order not to reduce the (future) Surety's right of recourse against the Principal. If a stay of actions or a reduction in the debt made by the Beneficiary causes such reduction, the Surety may demand the return of what it already paid and seek compensation for other damages incurred.[198] Since a delay of payment does not affect the Surety's right of recourse, the Principal may grant such delay to the Beneficiary and claim performance to the Surety, once the insolvency proceedings is already started.[199]

4 Claim Against the Principal, Before Payment

1. Is it possible for the Guarantor to claim payment from the principal, before the Guarantee has been called?

There are no rules under Swiss law regarding the Guarantor's claim for payment from the Principal, therefore the parties are free to provide in the contract, that the Guarantor may claim payment before the Guarantee has been called.[200] However, this proceeding is not common: in case of bank Guarantee, the parties may most likely agree on a counter-Guarantee, the pledge of the banking account or the blocking of an amount of money in the account.[201]

195. Article 495 CO.
196. Article 505 para. 2 CO.
197. C. Pestalozzi, 'Art. 495', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 4a.
198. Articles 503 CO and 62 CO.
199. It is worth reminding that the situation is different when a delay of payment is granted before the starting of insolvency proceeding: in this case the Beneficiary cannot resort to the Surety before the end of such additional term, *see* P. Meier, 'Art. 501', N 1.
200. C. Lombardini, 'La garantie bancaire', N 30.
201. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 850; C. Lombardini, 'La garantie bancaire', N 31.

The Surety has two rights of recourse against the Principal: a general one, provided by law, and a special one, the origins of which can be found in the agreement between the parties.[202] As one of the conditions of the general right of recourse is that the Surety satisfied (at least partially) the Beneficiary, the payment claim may only be called, after the Suretyship has been called. On the other hand, the parties may have provided such right of claim contractually. In this case, considering that the contractual right of recourse can validly go further than the legal provisions,[203] the Principal may be obliged to pay the Surety before the Suretyship has been call.

5 Claim Against the Principal, after Payment

1. Once the Guarantor has paid the Beneficiary, what kind of action can the Guarantor take to get reimbursed by the principal? In particular:

- *Does the Guarantor have a right of subrogation? If yes, may this right be waived?*
- *In the event that such right of subrogation exists, does the law of your jurisdiction grant priority to the Beneficiary on the Guarantor for payment by the principal? Should a clause be included in the contract to make effective such priority?*

2. Apart from its right of subrogation, does the Guarantor have another right to obtain reimbursement?

As set out above, the Guarantor's claim against the Principal depends on the wording of the contract. If nothing else is stipulated by the parties in the Guarantee contract, the Guarantor does not have a right of subrogation to the Beneficiary's rights against the Principal.[204] In this case the Guarantor has only a claim against the Principal based on the contract, if any, which was concluded between it and the Principal (agency contract, guarantee credit, partnership agreement, etc.).[205] Usually, however, the contract of Guarantee provides a right of subrogation for the Guarantor, who has consequently two alternative actions against the Principal.[206] In the unlikely event that there is no contract between the Guarantor and the Principal, there is a doctrinal controversy about whether the rules of the liability for the same damage on different grounds, of the unjust enrichment or the ones of the agency without authority are applicable mutatis mutandis to the contract of Guarantee.

202. P. Meier, 'Art. 502', N 2.
203. *See* Art. 507 para. 3 CO, which expressly reserves the claims provided by the contract.
204. C. Pestalozzi, 'Art. 111', N 14.
205. D. Zobl, 'Die Bankgarantie in schweizerischen Recht', 49 et seq.
206. *Id.*, 50.

Unless otherwise agreed by the parties, there is no priority in favour of the Beneficiary for payment by the Principal.

In the case of a Suretyship, the Surety is subrogated to the Beneficiary's rights by law to the extent that it has satisfied the Beneficiary.[207] This right of subrogation provided may not be validly waived by the parties.[208]

According to Article 507 paragraph 1 CO, the Surety has a right of subrogation also in case that it made a valid partial payment;[209] it follows that both the Surety and the Beneficiary may claim payment from the Principal. Under such circumstances, the law expressly provides that the Beneficiary's credit takes precedence over the Surety's one.[210] A contractual clause granting such priority is therefore not necessary. The literature suggests applying the same rule where the Surety paid all his debt, but this payment was not enough for the total satisfaction of the Beneficiary's claim against the Principal.[211]

Apart from its right of subrogation granted by the law, the Surety may also claim reimbursement on the basis of the contract it concluded with the Principal.[212] The choice of claim depends on the case. The contractual basis may provide some advantages like a longer prescriptive period or a broader liability for the procedural costs. On the other hand, the legal right of recourse is usually very interesting for the Surety, as it provides the direct subrogation of the Surety to the Beneficiary's accessory rights as well.[213] The Surety is consequently subrogated to the liens and the securities furnished at the time of conclusion of the contract or obtained from the Principal for securing the claim.[214]

For its part, the Principal may use as defences the exceptions it has according to the contract between itself and the Surety, in addition to the defences resulting from its contractual relationship with the Beneficiary and the defences related to its legal rights of recourse (for instance, the prescription according to Article 507 paragraph 5 CO).[215]

207. Article 507 para. 1 CO.
208. P. Meier, 'Art. 507', in *Code des obligations I: commentaire romand*, ed. L. Thévenoz & F. Werro (2nd ed. Basel: Helbing Lichtenhahn 2012), N 5.
209. *Id.*, N 7; *see also* Art. 504 CO.
210. Article 507 para. 2.
211. P. Meier, 'Art. 507', N 13; H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 836.
212. S. Giovanoli, 'Art. 507', in *Berner Kommentar: Die Bürgschaft, Spiel und Wette*, ed. S. Giovanoli (2nd ed. Bern: Stämpfli, 1978), N 9.
213. H. Develioglu, *Les garanties indépendantes examinées à la lumière des règles relatives au cautionnement*, N 845.
214. Article 507 para. 2 CO; *see also* C. Pestalozzi, 'Art. 507', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 7-8.
215. S. Giovanoli, 'Art. 507', N 8-9.

B Judicial Enforcement

1 Obtaining a Local Judgment

a) Judicial Competency

1. Please briefly state what the applicable rules on determination/choice of jurisdiction are (in order to highlight possible issues in respect to enforcement).

To determine the jurisdiction under Swiss law, it is necessary to establish whether the dispute between the parties includes a relevant connecting factor with a foreign country or not. The relevant nature of the connecting factor may change from a case to another.[216]

If there is no such factor, the Swiss Civil Procedure Code is applicable. The Swiss courts have jurisdiction and the claimant (in case of a Guarantee or Suretyship) may choose to submit its claim before the court at the defendant's domicile or registered office or before the court at the place of the performance of the characteristic obligation.[217] The parties may agree otherwise, and determine a specific or different jurisdiction.[218]

In the case of an international proceeding, Switzerland is party to several multilateral treaties, which are applicable to determine the jurisdiction in a civil proceeding. One of the most important for Switzerland is the treaty concluded with the European States which generally provides that the court at the place of the characteristic performance (i.e., the performance of the Guarantor/Surety) have jurisdiction on the matter.[219] If no treaty is applicable to the topical situation, the International Private Law Act will apply. Where the defendant in a litigation concerning a Guarantee/Suretyship is Swiss, the court at its domicile or registered office have jurisdiction. The same applies in case that the characteristic performance shall be executed in Switzerland. A choice of forum by the parties is reserved.[220]

216. So for instance, the connecting factor may be the nationality, the domicile, the property's location, the place of performance, etc., depending on what the law (or, if validly concluded, the agreement between the parties) provides for the particular relationship between the parties.
217. The place of the performance is here the place of the performance of the Guarantor or the Surety, *see* U. Haas & Y. Strub, 'Art. 31', in *Kurzkommentar ZPO: Schweizerische Zivilprozessordnung*, ed. P. Oberhamme, T. Domej & U. Haas (2nd ed. Basel: Helbling Lichtenhahn, 2013), N 8.
218. Article 35 Swiss Civil Procedure Code of 19 December 2008 e contrario.
219. Article 5.1(a) Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: Lugano Convention).
220. D. Hofmann & O. Kunz, 'Art. 5', in *Lugano Übereinkommen: Basler Kommentar*, ed. C. Oetiker & T. Weibel (Basel: Helbing Lichtenhahn, 2011), N 20; M. Amstutz & M. Wang, 'Art. 112', in *Internationales Privatrecht: Basler Kommentar*, ed. H. Honsell et al. (3d ed. Basel: Helbing Lichtenhahn, 2013), N 14.

b) Emergency Interim Proceedings

1. Is the procedure to enforce a Guarantee lengthy and complex or relatively rapid?

2. Are there any emergency interim proceedings available in your jurisdiction?

Usually, enforcement proceedings before a Swiss court take at least one year and may also last much longer depending on the circumstances of the specific proceedings (e.g., if a second exchange of written submissions is ordered, an instruction hearing is held). The duration of the enforcement proceedings of a Guarantee or Suretyship is also subject to the nature of the agreement reached by the parties.

In case of Suretyships, the proceedings are generally longer as in case of Guarantees, because the Underlying Obligation is also object of the proceedings.

The enforcement proceedings of a Guarantee, however, is much quicker, even more so, if the Guarantee was made, for instance, in the form of a notarised acknowledgement of debt.[221]

In the course of the proceedings, the judge has the right to order the emergency interim measures deemed necessary to protect the Beneficiary's right to be paid (e.g., attachment proceedings), subject to the satisfaction of certain specific legal requirements.[222] Proceedings related to interim measures can last several months before a decision is rendered on the merit.

c) Preservation of the Guarantee

1. What measures are available to the Beneficiary of the Guarantee in order to preserve it?

2. What are the conditions of such preservation?

Since the Guarantor/Surety has an obligation of payment in accordance with the Guarantee/Suretyship, the Beneficiary may claim against it once the obligation is due. The Beneficiary's requirement must comply with the legal and contractual conditions (for instance the obligation to furnish the required documents, to release to the Surety the other securities, etc.) otherwise, its claim is void or the Guarantor/Surety released from its liability.

In case that the Guarantor/Surety does not fulfil its obligation, the Beneficiary shall request to the appropriate office the opening of debt enforcement proceedings

221. A. Rusch & M. Wohlgemuth, 'Bürgschaft mit vollstreckbarer öffentlicher Urkunde?', *Zeitschrift des Bernischen Juristenvereins* 4 (2015): 339 et seq.; Art. 80 FADEB.
222. *See, for instance,* 170 FADEB according to which, in case of an enforcement through bankruptcy proceedings, the judge is free to take any measures he/she thinks may be necessary to protect the creditors' interest.

against its co-contractor within the limitation period.[223] The length and the difficulty of the proceedings will depend on the parties' acts, the provisions of the contract and the documents at the disposal of the Beneficiary.

Finally, Swiss law provides, under specific circumstances, the possibility for the Beneficiary to claim the seizure of the debtor's (i.e., the Guarantor/Surety) assets.[224]

2 Enforcing a Foreign Judgment/Decision

a) Applicable Law

1. Please briefly state what are the requirements of the law of your jurisdiction about choice of law by the parties.

Subject to exceptions specified in the law, the parties are free to choose the applicable law to their contractual relationship. In case that a choice-of-law clause is not set out in the contract, the Guarantee is submitted to the law of the Guarantor.[225]

The parties' choice of law shall be expressly provided in the contract or be clear according to the contract or the circumstances. Otherwise, the applicable law is determined by Swiss law (i.e., either the CO in case of domestic cases or the IPLA for the international cases). As every other term of the contract, the choice-of-law clause must respect the mandatory legal rules applicable to the contract, or else the clause is void and the choice of law will follow the subsidiary rules.[226] For instance, if the clause in a contract of Suretyship does not comply with the form prescribed by the law, the clause will be void.

The Swiss Code of Obligations and the International Private Law Act provide special protections for some categories of parties (the so-called weak parties, like the consumer or the employee), according to which the legal choice of law is mandatory. The contracts of Guarantee or Suretyship, however, are not subject to one of these rules.

b) Recognition of Foreign Judgments and Arbitral Awards

1. What are the conditions for the recognition of foreign judgments or arbitral awards in your jurisdiction?

223. Ten years according to Art. 127 CO; the limitation period is interrupted by the debt enforcement proceeding, *see* Art. 135 CO in conjunction with 67 FADEB; R. Däppen, 'Art. 135', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 6.
224. Articles 271 et seq. FADEB.
225. C. Lombardini, 'La garantie bancaire', N 55.
226. C. Huguenin & B. Meise B., 'Art. 20', in *Obligationenrecht I: Basler Kommentar*, ed. H. Honsell et al. (6th ed. Basel: Helbing Lichtenhahn, 2015), N 62 et seq.

2. Please specify if your country is party to an International Convention concerning enforcement of foreign judgments and arbitral awards (by making reference to and repeating the information already contained in the chart in Section III above as case may be).

In general, the recognition of foreign judgments is subject to a control of the indirect jurisdiction of the foreign court.[227] According to Swiss law, the foreign judgment is therefore recognised, if the foreign authority has jurisdiction, the decision is final and there is no grounds of denial under Swiss law.

The jurisdiction is established in the following cases:[228]

- The jurisdiction is in accordance with a Swiss legal provision (i.e., the IPLA) or, if such provision does not exist, the decision was given at the defendant's domicile.
- In matters involving an economic interest, the parties decided to submit their case to the foreign authority. The agreement between the parties has to be valid in accordance with Swiss law. Furthermore, the court has also jurisdiction in case that the parties had not found an agreement, but the defendant proceeded anyway on the merits without reservation.
- In case of a counterclaim, the jurisdiction of the court which rendered the main decision is given, if there is a nexus between the two claims.

Even in case that the jurisdiction of the foreign authority is established, the decision is however not recognised by the Swiss legal system in the following cases:[229]

(i) The decision is manifestly incompatible with Swiss public policy.
(ii) One of the parties proves:
  - A lack in the notice according to the law of its domicile or habitual residence. The party loses his right in case that he proceeded on the merits without reservation.
  - A violation of fundamental principles pertaining to the Swiss conception of procedural law in the proceedings of the foreign court.
  - The decision is already res judicata or subject to a pending proceedings in Switzerland or in a third State (provided, of course, that the other decision is entitled to recognition).

Although the rules presented above set a comprehensive recognition system of foreign judgments, the IPLA provides expressly that these do not affect the international treaties.[230] Since Switzerland is party to many bilateral and multilateral

227. A. Bucher, 'Art. 26', in *Loi sur le droit international privé: Convention de Lugano: commentaire romand*, ed. A Bucher (Basel: Helbing Lichtenhahn, 2011), N 1.
228. *See* Art. 26 Federal Act of 18 December 1987 on International Private Law (hereinafter: IPLA).
229. *See* Art. 27 IPLA.
230. Article 1 para. 2 IPLA.

treaties,[231] the question concerning the recognition of foreign jurisdiction is often ruled by one of these. In this context, the Lugano Convention plays a main role for Switzerland. This convention provides a simplified system of recognition of jurisdiction applicable to its parties (i.e., the Member States of the European Union, Norway, Island and Switzerland), according to which the recognition of the foreign jurisdiction is granted almost automatically, once that the some formal requirements are fulfilled.[232] The recognition of the foreign judgment can be denied for a reason of substantive law, only during an eventual adversarial proceeding. In this case, the party may prove that:[233]

- the decision is manifestly incompatible with national public policy;
- he did not receive proper notice of the decision;
- the decision is already res judicata in the State or in a third State (provided, of course, that the other decision was entitled to recognition);
- the rules of jurisdiction over insurance or consumer contract, or the rules of exclusive jurisdiction were violated.

Furthermore, other articles of the convention provide some rules for special cases which may be used as defence by the parties during the adversarial proceedings.[234]

Concerning the arbitral awards, Swiss law refers directly to the New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[235] The rules of the convention are therefore also applicable for the recognition of jurisdiction of arbitral courts which are not part of the convention.[236] The other conventions ratified by Switzerland, and especially the Convention de Genève on the Enforcement of Foreign Arbitral Awards, do not play an important role anymore.[237]

The conditions for the recognition of the arbitral awards are directly set up by the New York Convention, that is a duly authenticated original award (or a duly certified copy), the original arbitral clause concluded by the parties (or a duly certified copy) and a translation of these documents, in case that the award was made in a language different from one of the Swiss official languages.[238]

231. *See* list in A. Bucher, 'Introduction aux articles 25-32', in *Loi sur le droit international privé: Convention de Lugano: commentaire romand*, ed. A Bucher (Basel: Helbing Lichtenhahn, 2011), N 2 et seq.
232. A. Bucher, 'Art. 34', in *Loi sur le droit international privé: Convention de Lugano: commentaire romand*, ed. A Bucher (Basel: Helbing Lichtenhahn, 2011), N 3; 'Art. 41' N 1; 'Art. 53' N 1 et seq.
233. *See* Arts 34 et seq. Lugano Convention.
234. *See* in particular Art. 35 New York Arbitration Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: New York Convention) in conjunction with Arts 64 para. 3, 67 para. 4 and 68 New York Convention.
235. *See* Art. 194 IPLA.
236. A. Bucher, 'Art. 194', in *Loi sur le droit international privé: Convention de Lugano: commentaire romand*, ed. A Bucher (Basel: Helbing Lichtenhahn, 2011), N 1.
237. A. Bucher, 'Introduction aux articles 176-194', in *Loi sur le droit international privé: Convention de Lugano: commentaire romand*, ed. A Bucher (Basel: Helbing Lichtenhahn, 2011), N 18.
238. Article IV New York Convention.

The recognition of the award may be refused according to the exhaustive list provided by the New York Convention.[239]

VI ANNEXES

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239. *See* Art. V New York Convention; for the exhaustive nature of the list, *see* BGE 135 III 136.

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