THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY

STANLEY N. KATZ

EDITOR IN CHIEF

VOLUME 3

Evidence–Labor and Employment Law

OXFORD
UNIVERSITY PRESS
2009

H. D. Tjeenk Willink, 1962. English translation: R. W. Lee, *An Introduction to Roman-Dutch Law* (Oxford, U.K.: Clarendon Press, 1915 [5th ed. 1953]). Standard edition: Eduard M. Meijers, Folke Dovring, and H. F. W. D. Fischer (Leiden, Netherlands: Universitaire Pers Leiden, 1952 [2d ed. 1965]); Grotius, Hugo, *Libri tres de jure belli ac pacis, in quibus ius naturae et gentium, item iuris publici praecipua explicantur*, 1st ed. (Paris, 1625). English translation: Francis W. Kelsey, et al. (Oxford, U.K.: Clarendon Press, 1925). Recent standard edition: Hugo Grotius, *Libri tres de jure belli ac pacis, in quibus ius naturae et gentium, item iuris publici praecipua explicantur*, edited by B. J. A. de Kanter-van Hettinga Tromp, annotationes novas addiderunt R. Feenstra et C. E. Persenaire, adjuvante E. Arps-de Wilde (Aalen, Germany: Scientia Verlag, 1993).

Keessel, D. G. van der. *Theses selectae juris hollandici et zelandici, ad supplendam Hugonis Grotii introductionem ad jurisprudentiam Hollandicam, et definiendas celebriores juris Hollandici controversias, in usum auditorum evulgatae*. Leiden, Netherlands: S. J. Luchtmans, 1800. New edition: Amsterdam, Netherlands: Frederik Muller, 1860. An addition to *Institutiones juris hollandici et belgici*.

BIBLIOGRAPHICAL INFORMATION

Meulen, Jacob ter, and P. J. J. Diermanse. *Bibliographie des écrits imprimés de Hugo Grotius*. The Hague, Netherlands: Martinus Nijhoff, 1950. Reprint, Zutphen, Netherlands: De Jongh, 1995.

Meulen, Jacob ter, and P. J. J. Diermanse. *Bibliographie des écrits sur Hugo Grotius imprimés au XVIIe siècle*. The Hague, Netherlands: Martinus Nijhoff, 1961. There are regular updates of the bibliography on Grotius in the journal *Grotiana*, New Series (Assen, Netherlands: Van Gorcum, 1981–).

BIOGRAPHICAL BACKGROUND

Molhuysen Philip C., et al. *Briefwisseling van Hugo Grotius*. 17 vols. The Hague, Netherlands: Martinus Nijhoff, 1928–2001.

Nellen, H. J. M. *Hugo de Groot, Een leven in strijd om de vrede* 1583–1645. Amsterdam, Netherlands: Balans, 2007.

GROTIUS AND THE CIVIL LAW

Feenstra, Robert. "Grotius en het Europese privaatrecht: nieuwe aspecten van het Grotius-onderzoek in de laatste halve eeuw." *Ars Aequi* 40 (1996): 556–62.

Lauterpacht, Hersch. *Private Law Sources and Analogies of International Law*. London: Longmans, 1927. Reprints, Hamden, Conn.: Archon Books, 1970, and Union, N.J.: Lawbook Exchange, 2002.

LAURENS WINKEL

GUARANTEE. The continental European guarantee insures against some amount of dependent primary debt (accessoriness), subordinate debt (secondary liability), and mostly formally required personal liability. This concept of guarantee has developed since the time of the glossators, through the conglomeration of various Roman personal securities, especially *fideiussio* (a form of suretyship) and *constitutum in debiti alieni* (a promise to pay the debt of a third party). Decisive for this process of development has been the need for a differentiation from alternative possibilities for personal insurance (see § 1344 ABGB). Accessoriness distinguishes the guarantee from independent warranties and transfers of accountability, secondary liability from *pari passu* accountability as a joint debtor. The practical significance of guarantee varies quite a bit from context to context, depending on the real securities available, and also on the habits and traditions of trade and business.

Accessoriness. Whether especially the *fideiussio* in Rome was accessory-like in nature is debated. The glossators assumed a unitary accessoriness. From this, a wide range of individual questions emerged, which have been discussed within the framework of civil law since its reception. Did a *naturalis obligatio* (unenforceable obligation) suffice? Was a guarantee for a future or contingent principal claim permissible? How exactly was the guarantee to describe the principal claim? Was the guarantee to be for a higher sum than the principal obligation up to the point of total or partial severability? Was the guarantor liable for interest payments, *mora* (delay), and *culpa* (negligence)? Could changes be agreed upon regarding place and time or date of payment? What resulted from an error on the part of the guarantor with respect to the cause or debt or the person of the debtor or primary creditor? There developed a broad-ranging casuistic that worked above all with presumptions. The local regulations of continental Europe all took as their starting point the fundamental position of accessoriness, but without attaining a unified treatment of the agreed-upon problem areas (CMBC IV, 10 § 2; ALR I 14 § 251; Art. 2012 CC; § 1351 ABGB; Art. 492 Swiss OR; Art. 1939 Codice Civile). In England, by way of contrast, accessoriness was, above all in practice, traditionally more strictly limited.

Secondary Liability. Justinian ensured on November 4, 535, against older Roman law and the creditor, that the guarantee would have the benefit of discussion (*beneficium excussionis*). This basic position was incorporated into the civil law but slowly, and was for the most part circumvented. Already in the highest Italian *cautelar* practice, the common renunciation-of-discussion forms (*renuniationes*) obviated all calls for the *beneficium*. From individual Justinian exceptions, the glossators developed the fundamental position that a previous plea against the primary debtor was dispensable when being onerous for the creditor. In 1616, Mathias Berlich counted a total of ninety-one concrete individual cases employing this principle. Generally, though, the European codifications took only certain instances as justifying the dispensing with discussion, such as the absence of the debtor, a foreseeable inability, to pay or bankruptcy (ALR I 14 283 ff.; Art. 495 Swiss OR, § 773 BGB). Austria, further still, allowed a simple dunning letter from the primary debtor to suffice (§ 1355). France required that the guarantor demonstrate the solvency of the primary debtor, and held him or her responsible for prepayment of the costs of a process against the primary debtor (Art. 223 CC). Italy rejected the principle of secondary liability entirely, and allowed for only a somewhat equivalent agreement (Art. 1944 Codice Civile). The same was true of the English statute of frauds (Section 4), as well as of commercial law (such as in Germany: Art. 281 ADHGB, § 349 HGB).

Protection of the Guarantor Through Form, Clarification, and Contractual Controls. Already beginning in antiquity, the danger of guarantee was emphasized. The form of the guarantee was a reaction against its dangers. In the first century, the Senate refused women the adoption of guarantees, in order to protect them from the "weakness" of their sex (*propter sexus imbecillitatem*; SC Velleianum, D. 16, 1). In the civil law, this also included soldiers and clerics to some extent. In 517, Anastasius allowed certain groups of businesses a waiver from this clause for the protection of women (C. 4, 29, 21), and Justinian introduced an exception in 530 to allow a woman to take up a guarantee after a two-year waiting period. For this, he had a waiver created, in which the woman was to affirm in a signed public document—verified by three witnesses—that she had received some remuneration for her participation (C. 4, 29, 22 ff.). The glossators built these exceptions up into the SC Velleianum. They developed the civil law doctrine of the general possibility of waivers of the protections afforded by the SC Velleianum. It was required that such a waiver be considered in advance and accepted without duress. For the most part, there were written formulae requiring the presence of witnesses and, to some extent, also instruction from or the custodial involvement of a court. For the bailment of a woman's husband, the doctrine found the so-called *metus reverentialis* (reverential fear) an unacceptable influence on the woman's decision-making. Similarly, in English law, there developed a doctrine of "undue influence." In this manner, the trouble spots in the problem of forbidding intercession in cases of protection were relocated to the question of forms and/or declarations. The general formal obligations for guarantee then disappeared slowly, against this background, from the civil law. In the seventeenth century, the dominant teaching finally gave up its insistence on a *stipulatio* (a formal contract made by question and answer), and allowed even informal guarantees to stand. The codifications, quite in contrast, insisted for the most part on formal requirements. The Codex Maximilianeus Bavaricus Civilis (civil code of the Duchy of Bavaria) erected in 1756 (CMBC IV § 10 § 3 Nr. 1) formal requirements for the "general low citizenry and peasantry," in order to protect them from overreaching. The guarantee was partially covered by the decision that all contracts above a certain value were to be in written form. Following the example of the Roman limit (C. 8, 53, 30: 500 Sesterces), Art. 1141 of the Code Civil and the ALR (I 5 § 131) each also made determinations on contract value (150 francs and 50 taler, respectively). Alongside this, the ALR (I 14 § 203) included the general requirement that guarantees take written form. It was only the ABGB (§ 1349) that used formal requirements to avoid all protections for women. The BGB did not take on civil law's ban on intercession, primarily because the paternalistic approach taken toward women therein no longer fit with the contemporary image. In order to create a certain equivalence, shortly before the close of deliberations of the BGB, a requirement that there be a written form was included, in § 766 BGB. In the twentieth century, this particular solution came to be the general rule. Already in 1881, Switzerland introduced a required written form for guarantees (Art. 491 OR), and Austria followed suit in 1916 (§ 1346 Abs. 2 ABGB). Greece, too (Art. 849 S. 1 ZGB), and the Netherlands (Art. 859 Ans. 1 VIII BW) came to require written forms for guarantee. English law has long required the presentation of a document in claims processes (Section 4 of the Statute of Frauds, 1677). In contrast, though, since as far back as the Middle Ages, no formal requirements for guarantee have been included in commercial law (§ 350 HGB, Art. 109 Code de Commerce, Art. 857 VII BW).

Alongside forms and declarations, in France, the Netherlands, and Germany there developed around the end of the twentieth century a third, court-based solution; this called for court oversight of contracts. Guarantees that put guarantors at an inappropriate disadvantage were and have been declared invalid (Art. 341-4 Code de la Consommation, 1989; Art. 3:40m 3: 44 IV BW; BVerfG, JZ 1994, 409 ff., § 138 BGB).

BIBLIOGRAPHY

Bärmann, Johannes. *Recht der Kreditsicherheiten in europäischen Ländern*. Berlin: Duncker & Humblot, 1976.

European Community Commission. *Die Bürgschaft im Recht der Mitgliedstaaten der Europäischen Gemeinschaft*. Studies of the Max Planck Institute. Hamburg, Germany: Max Planck Institute, 1971.

Girtanner, Wilhelm. *Die Bürgschaft nach gemeinem civilrecht*, 2 vols. Jena: no publisher, 1850–1851.

Haferkamp, Hans-Peter. "§§ 765–778 BGB." In *Historisch-kritischer Kommentar zum BGB*, edited by Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann Tübingen, Germany: Mohr Siebeck, 2009.

"Les sûretés personelles." *Recueils de la société Jean Bodin pour l'histoire comparative des instituions* 28 (1969), 29 (1971), 30 (1974).

Talamanca, Mario. "Fideiussione." In *Encyclopedia del diritto XVII*, pp. 340ff. Milan, Italy, 1968.

Zimmermann, Reinhard. *The Law of Obligation*. Oxford, U.K.: Clarendon Press, 1996.

HANS-PETER HAFERKAMP

Translated from the German by Ira Allen

GUARANTOR IN CHINESE LAW. *See* Contract, *subentry on* Chinese Law.

GUATEMALA. Together with Bolivia, Guatemala is the most ethnically diverse country in Latin America, approximately half its population belonging to twenty-one different ethnolinguistic indigenous groups. Consequently, an overview of Guatemala's legal history must highlight the interaction of customary indigenous laws and state