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THE INDEPENDENT GUARANTEE CONTRACT IN INTERNATIONAL LEGAL PRACTICE**

IL CONTRATTO AUTONOMO DI GARANZIA INDIPENDENTE NELLA PRATICA GIURIDICA INTERNAZIONALE

Abstract: The present paper analyses the independent guarantee contract. Starting from Germany – where the relevant discussion already began in the 19th century and which is therefore to be regarded as the modern origin of this type of contract – the development of the institute in Italy in the 20th century, driven by international legal relations, will be discussed. Finally, the paper will focus on independent guarantees in international legal transactions, taking a private international law viewpoint and critically reviewing uniform rules in the field, such as the UN Convention on Independent Guarantees and Stand-by Letters of Credit, the Uniform Rules for Demand Guarantees (URDG 758), the International Standby Practices (ISP98), and the Draft Common Frame of Reference.

ABSTRACT: Il presente contributo analizza il contratto autonomo di garanzia. Partendo dalla Germania – dove il dibattito sul rispettivo negozio ebbe inizio già nel XIX secolo e che deve pertanto essere considerata l'origine moderna di questa tipologia contrattuale – verrà esaminato lo sviluppo dell'istituto in Italia nel XX secolo. Infine, l'articolo si concentrerà sulle garanzie autonome nelle transazioni giuridiche internazionali, adottando una prospettiva pratica di diritto internazionale privato e procedendo a una revisione critica delle regole uniformi in materia, quali la UN Convention on Independent Guarantees and Stand-by Letters of Credit, le Uniform Rules for Demand Guarantees (URDG 758), le International Standby Practices (ISP98) e il Draft Common Frame of Reference.

1. Introduction: the unstoppable internationalisation of law

The modern world is characterised by an unprecedented internationalisation, which has – since the early 1990s – increasingly been described by the term *globalisation*.[1] This is expressed not only in the

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[1] Jonathan Michie, *Advanced introduction to globalisation* (Edward Elgar 2017), 2ff.

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global interdependence and mutual dependence of states and international organisations, but also in the fact that individuals are acting transnationally more frequently than ever before in history. They do this in all areas of life, which leads to an increasing cross-border exchange of people, goods, capital and ideas. [2]

Globalisation reveals the worldwide legal pluralism and brings the diversity of the various legal systems to light, [3] which are continuously and increasingly cross-fertilising each other. The growing complexity of international legal relations that follow, will, over time, seemingly lead to global harmonisation and ultimately to the standardisation of the law, driven – among other things – by the pragmatic requirements of the economic and financial world. [4]

However, the need to understand foreign legal systems and the practice of comparative law are by no means an exclusive product of globalisation; rather, they have roots that go back a long way, even if the last few decades have given comparative law and the study of foreign legal systems a new significance. The reciprocal influence of foreign legal systems is particularly evident in commercial and business law. In the following, the *independent guarantee contract* will be analysed as an example of this.

Starting from Germany – where the relevant discussion already began in the 19th century and which is therefore to be regarded as the (modern) origin of this type of contract – the development of the institute in Italy in the 20th century, driven by international legal relations, will also be discussed. Finally, its significance in international legal transactions will be clarified and critically analysed. The structure of the article should therefore not be understood as a thematic delimitation. Rather, the individual sections build on each other.

2. The independent guarantee contract as a product of modern legal practice

In the last century, driven by international trade practice, a number of previously unknown contractual models have emerged in legal transactions, through which new international contractual relationships could be established. From a consumer perspective, product liabilities of producers or guarantees of conformity, to reimburse the price paid or to replace, to repair or service goods if they do not meet specific requirements are to be distinguished from situations in which a third party agrees to guarantee a payment or performance by the debtor of an underlying legal relationship, at times regardless of any fault for the non-performance of the principal debtor. [5] While in business-to-consumer (B2C) scenarios, the European Union provides for a number of rules for the former type of guarantee, [6] the latter have so far not been

[2] Eva-Maria Knoll, Andre Gingrich, Fernand Kreff, 'Globalisation' in Eva-Maria Knoll, Andre Gingrich, Fernand Kreff (eds), *Lexikon der Globalisierung* (transcript 2011) 126.

[3] Jaakko Husa, *Advanced Introduction to Law and Globalisation* (Edward Elgar 2018) 31ff; Andreas Fischer-Lescano and Lars Viellechner, 'Globaler Rechtspluralismus'(2010) APuZ 20, 20ff; Ralf Michaels, 'Welche Globalisierung für das Recht? Which law for globalisation?' (2005) RabelsZ 525, 543f.

[4] On the economic approach driving legal unification Jürgen Basedow, *Uniform law: legal responses to globalisation* (Mohr Siebeck 2024) 52ff.

[5] The manufacturer's guarantee promise in a purchase contract does consequently not constitute an independent guarantee contract but only secures the buyer certain legally established rights for the promised period (such as those mentioned above).

[6] See, eg, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L304/64; Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability

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regulated on the Union level. Securing a legal transaction with appropriate guarantees has, however, always been a natural requirement of economic relationships and is now a necessity in terms of corporate strategy, not only in non-consumer contracts. Guarantees must meet the needs of modern commerce and, in addition to the rapid, unconditional processing of legal transactions, must in particular ensure stability and legal certainty. Transactions without guarantees that can be capitalised promptly and provide efficient cover, entail a higher entrepreneurial risk of not achieving the goals set. This can also be felt by consumers.

International guarantees are believed to have a positive influence on the dynamics of the modern market economy, [7] especially the movement of capital seems to benefit from this. [8]

In the last two centuries, starting in Germany and subsequently, above all, via the United Kingdom with its strong international economic activities, a special guarantee model has been established in cross-border legal transactions, [9] which is characterised by the independence or autonomy of the guarantee promise vis-à-vis the secured principal debt and thus differs from the common, accessory guarantees (such as the surety). [10] Under the Draft Common Frame of Reference (DCFR), an independent guarantee is, for example, defined as

> "*an obligation by a security provider* [11] *which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor"*. [12]

As a form of guarantee that is not (expressly) regulated by law in Germany, Italy, and a number of other jurisdictions, [13] it does in these legal systems dogmatically constitute an expression of private autonomy. [14] The institution of the independent guarantee contract, is, nevertheless, generally characterised by two aspects: (a) the guarantor's obligation to pay on-first-demand, according to which payment by the guarantor must generally be made on the basis of a simple declaration of non-performance or after checking the formal correctness of one or more contractually stipulated documents; [15] (b) the guarantor's

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for defective products [1999] OJ L141/20; Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210/29.

[7] With further references Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 26.

[8] Cass Civ, Sez Un 18.02.2010, 3947, Foro it 2010, I, 2799.

[9] On guarantees with a foreign element in Austria: Andreas Schwartze, 'Kreditsicherung bei Grenzüberschreitung' in Peter Apathy, Gert Iro, Helmut Koziol (eds), *Österreichisches Bankvertragsrecht* VIII.1 (Verlag Österreich 2012) para 6/20ff.

[10] Sang Man Kim, *Payment Methods and Finance for International Law* (Springer 2020) 137ff (Independent Guarantee (Demand Guarantee)); Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 22ff; Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[11] Defined as *"the person who assumes the obligations towards the creditor for the purposes of security"*, see Article IV.G.-1:101 (c) of the Draft Common Frame of Reference (DCFR).

[12] Article IV.G.-1:101 (b) DCFR.

[13] Eg Austria. See Ulrich Drobnig, 'Guarantee, Independent (ch 2: Sources)' (*Max Planck Encyclopedia of European Private Law*, 2012) <https://max-eup2012.mpipriv.de/index.php/Guarantee,_Independent> accessed 2 January 2026. According to Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 18 probably also due to the variety of different manifestations. An attempt to regulate dependent and independent guarantees on the EU scale is made by "Part IV.G. Personal security" in the Draft Common Frame of Reference (DCFR) from 2009, see Jan Schürnbrand, 'Das Recht der Personalsicherheiten im Entwurf des Gemeinsamen Referenzrahmens'(2009) WM 873, 873ff.

[14] Andrea Montanari, 'Garanzia autonoma e autonomia privata' (2017) Banca, borsa, tit cred 347, 347ff.

[15] Roeland IVF Bertrams, *Bank guarantees in international trade* (4th edn, Wolters Kluwer 2013) 46ff. Instructive Franco Bonelli, *Le garanzie bancarie a prima domanda nel commercio internazionale* (Giuffrè 1991).

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waiver of defences regarding the validity, legality, or legal effectiveness of the guaranteed obligation. [16] Due to the lack of accessoriness generally known from guarantee forms such as the surety, the special feature of the institute lies precisely in the contractual independence of the guarantee contract: the guarantee is in these types of cases to be separated from the collateralised obligation. [17] An expression of this is the fact that the independent guarantee contract functions more like an *indemnity* and not – like the surety – a *fulfilment* of the original obligation. According to the German Federal Court of Justice (*Bundesgerichtshof*, BGH), it is characterised by the fact that

> "*the guarantor must pay immediately and can only assert objections to the material justification of the secured claims after payment. All disputes of a factual and legal nature are shifted to the recovery process, provided the creditor does not obviously or demonstrably abuse his formal legal position*." [18]

The independent guarantee contract can thus go beyond the purpose of sureties and cover risks that are due to language barriers, the lack of knowledge of foreign substantive or procedural law, or the disproportionately long duration of foreign legal proceedings – all risks both potentially relevant in business-to-business (B2B) and, to a lesser extent, also business-to-consumer (B2C) relations. [19]

Particularly relevant is the fact that the guarantor waives any defences; at the same time, the special nature of having to perform the guarantee on-first-demand exempts the beneficiary from proving non-performance. [20] The guarantor does therefore guarantee the indemnification of the guarantee holder in the event of non-performance irrespective of fault. [21] This satisfies an important economic interest of business relationships and has the decisive advantage over other guarantees that it does not result in the immobilisation of capital. [22] Problems can, however, arise in this regard, once consumers are involved. [23]

Despite the lack of statutory regulation – a further indication that this form of guarantee constitutes an atypical contract –, it can undoubtedly be assumed that an "independent guarantee" fulfils an interest worthy of protection [24] and a typical social function [25] of legal transactions, simply due to the international spread and general recognition of this form of guarantee in many legal systems. The so-called

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[16] Ulrich Drobnig, 'Guarantee, Independent (ch 3: Implementation)' (*Max Planck Encyclopedia of European Private Law*, 2012) <https://max-eup2012.mpipriv.de/index.php/Guarantee,_Independent> accessed 2 January 2026; Antonio Cetra, 'Contratto autonomo di garanzia' (*Enciclopedia Giuridica Treccani Online*, 2019) <https://www.treccani.it/enciclopedia/contratto-autonomo-di-garanzia_%28Diritto-on-line%29/> (accessed 2 January 2026); Vittorio Cappuccilli and Diego Corapi, 'Garanzie bancarie', in *Enciclopedia Giuridica Treccani* (UTET 1988) 6. On this infra XXX.

[17] For Austria, for example, Andreas Schwartze and Simon Laimer, 'Schuldbeitritt und Kreditauftrag' in Peter Apathy, Gert Iro, Helmut Koziol (eds), *Österreichisches Bankvertragsrecht* VIII.1 (Verlag Österreich 2012) para 3/13 and 3/22.

[18] BGH 10.09.2002, XI ZR 305/01 = NJW 2002, 3627.

[19] Antonio Cetra, 'Contratto autonomo di garanzia' (*Enciclopedia Giuridica Treccani Online*, 2019) <https://www.treccani.it/enciclopedia/contratto-autonomo-di-garanzia_%28Diritto-on-line%29/> (accessed 2 January 2026).

[20] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 23f.

[21] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 18. See Article IV.G.-1:101 (b) DCFR: *"... an obligation by a security provider which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor."*.

[22] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[23] On this *infra*.

[24] See for example Article 1322(1) Codice civile and Cass Civ Sez Un, 01.10.1987, n. 7341, Foro it 1988, I, 103.

[25] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 26 speaks of a *funzione socialmente tipica.*

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independent or *simple* [26] guarantee contract (which also goes by other names, eg in Austria *"genuine guarantee contract"* [*echter Garantievertrag*], [27] in Italy *"autonomous guarantee contract"* [*contratto autonomo di garanzia*] [28]), especially if on-first-demand, has in fact become an integral part of international legal transactions. It is mainly used as a guarantee in supply, construction, and work/service contracts. [29] Guarantees are mainly (but not exclusively) provided by banking institutions (eg with stand-by letters of credit) or insurance companies. [30]

Although the independent guarantee agreement creates a unilateral obligation, [31] a tripartite relationship is created, [32] which consists of (a) a value relationship – between the original/principal debtor and the creditor of the main contract; (b) a cover relationship – between the debtor and (generally a bank functioning as) the guarantor; [33] and (c) a guarantee relationship – between the guarantor (eg bank) and the creditor as beneficiary. [34]

3. The independent guarantee contract under German law

The modern doctrine of the contract of guarantee – in contrast to the surety [35] – is based on the legal doctrines developed in Germany in the second half of the 19th century and is due in particular to the legal philosopher *Rudolf Stammler* (1856–1938). [36] As early as 1886, *Stammler* wrote in the *Archiv für die civilistische Praxis* (AcP), a prominent German legal journal, that guarantee contracts were frequently and widely used [37] and saw them as being characterised by their legal independence. [38]

Despite its apparently German origin (at least from a doctrinal point of view), the independent guarantee contract has not yet been established as a legal institution in the German legal system. The contract

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[26] Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 346.

[27] Carl Stölzle, 'Der Garantievertrag' (1978) AnwBl 103, 103; OGH (Austrian Supreme Court) 1 Ob 84/20i, in ecolex 2021, 206.

[28] Ital: *Contratto autonomo di garanzia.*

[29] See *infra.*

[30] Stephen A. Jones, *Trade and Receivables Finance* (Springer 2018) 295ff (Demand Bank Guarantees); Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 23 and 25.

[31] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 18.

[32] A four-sided relationship can arise if the bank as guarantor secures its position with another guarantee, usually a foreign bank, see Chapter V; on counter-guarantees see Roeland IVF Bertrams, *Bank guarantees in international trade* (4th edn, Wolters Kluwer 2013) 168ff; Luciano Pontiroli, 'Spunti critici e profili ricostruttivi per lo studio delle garanzie bancarie a prima richiesta' in Ugo Draetta and Cesare Vaccà (eds), *Le garanzie contrattuali. Contratti autonomi di garanzia nella prassi interna e nel commercio internazionale* (EGEA 1994) 27; Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 38.

[33] The bank as guarantor can demand repayment and compensation from the debtor after the guarantee has been provided; this can be done, for example, by debiting the amount from an account held by the debtor with the bank, see Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[34] Fulvio Mastropaolo, *I contratti autonomi di garanzia* (Giappichelli 1995) 124ff; Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[35] Carlo d'Orta, *Il contratto autonomo di garanzia. Tra esigenze del mercato ed esercizio del diritto* (Giappichelli 2018) 18f.

[36] *Rudolf Stammler*, 'Der Garantievertrag. Eine civilistische Abhandlung' (1886) AcP 1, 1ff. Carlo d'Orta, *Il contratto autonomo di garanzia. Tra esigenze del mercato ed esercizio del diritto* (Giappichelli 2018) 20ff. provides an overview of the original Roman forms of the contract of guarantee. For details on this and further developments, see again in particular *Rudolf Stammler*, 'Der Garantievertrag. Eine civilistische Abhandlung' (1886) AcP 1, 52ff.

[37] *Rudolf Stammler*, 'Der Garantievertrag. Eine civilistische Abhandlung' (1886) AcP 1, 1ff.

[38] *Rudolf Stammler*, 'Der Garantievertrag. Eine civilistische Abhandlung' (1886) AcP 1, 5.

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is therefore also in Germany based on the freedom of contract pursuant to § 241(1) and § 311(1) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). [39]

The German impulse was soon taken up in Anglo-Saxon legal systems and implemented in a large number of so-called *"bonds"*, which differ in terms of the performance to be guaranteed. [40] Through so-called *"bid bonds*" (also known as *"tender bonds"* or *"tender guarantees*") – found in the event of call for tenders –, the issuing guarantor assumes liability for the contractor's (bidder's) ability to fulfil the tender conditions at all times. [41] *Performance bonds* (also known as "*performance guarantees*" or "*supply guarantees*") cover the risk of non-performance or improper performance of work/service contracts or supply contracts in favour of the contracting company. "*Repayment bonds*" (also known as "*advanced payment bonds*" or "*down-payment guarantees*") serve as a guarantee for the reimbursement of advance price payments already made to the counterparty in the event of the cancellation of the main contract. "*Maintenance bonds*" guarantee the proper functioning of long-term contracts for work and services or supply contracts in the first few years. [42]

It is obvious from the examples just listed that guarantees on-first-demand are mainly used in banking and international trade transactions. However, these also show the variety of existing forms of the guarantee, [43] which might explain why the historical legislator in Germany refrained from a statutory regulation. [44]

However, a guarantee on-first-demand [45] should not be equated across the board with an independent guarantee agreement, [46] because also a surety can be provided with a clause that obliges it to perform on-first-demand. However, this does not mean that the surety loses its legal quality as an accessory loan collateral. The accessoriness is only postponed in the sense that the guarantor can initiate legal proceedings after they have fulfilled the payment obligation in order to check whether the creditor had the right to utilise the guarantee. [47] Whereas in the case of an *independent* guarantee contract, the guarantor must guarantee the beneficiary that a certain actual outcome will occur or that the risk of a certain future loss will not materialise, the BGH describes a guarantee *on-first-demand* as *"more than just security"*, as the creditor has the opportunity *"to obtain liquid funds even if the security event has not occurred"*. [48]

It is not surprising that the BGH attempts to protect inexperienced persons in the case of guarantees on-first-demand (due to the particularly strong position of the beneficiary and the associated risk of

[39] *Susanne Heinemeyer* in MüKoBGB (9th edn, C.H.Beck 2022) Vor § 414 para 23.

[40] Matti S. Kurkela, *Letters of credit and bank guarantees under international trade law* (2nd edn, OUP 2008) 9f: Carlo d'Orta, *Il contratto autonomo di garanzia. Tra esigenze del mercato ed esercizio del diritto* (Giappichelli 2018) 19.

[41] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 44.

[42] For the different types of guarantee, see Roeland IVF Bertrams, *Bank guarantees in international trade* (4th edn, Wolters Kluwer 2013) 35ff; Carlo d'Orta, *Il contratto autonomo di garanzia. Tra esigenze del mercato ed esercizio del diritto* (Giappichelli 2018) 19f; Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 23.

[43] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 26ff. refers to other forms of guarantee, such as the guarantee of characteristics or quality, also from a practical point of view.

[44] Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das deutsche Reich II (1888) 658; Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 18.

[45] Under the URDG 758 (Uniform Rules for Demand Guarantees) known as a "demand guarantee".

[46] BGH 10.9.2002, XI ZR 305/01 = NJW 2002, 3627. For Austria: Andreas Schwartze, 'Die Bürgschaft'in Peter Apathy, Gert Iro, Helmut Koziol (eds), *Österreichisches Bankvertragsrecht* VIII.1 (Verlag Österreich 2012) para 2/14.

[47] Gerd Nobbe, Eva-Maria Derstadt, '§ 70. Bürgschaft'in Jürgen Ellenberger, Hermann-Josef Bunte (eds), *Bankrechtshandbuch* II (6th edn, C.H.Beck 2022) paras 551ff.

[48] BGH 10 September 2002, XI ZR 305/01 = NJW 2002, 3627; see also BGHZ 150, 299 = NJW 2002, 2388.

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abuse), for example by interpreting a guarantee assumed on-first-demand as a simple guarantee.[49] This can become relevant in B2C relations, either when the underlying debtor or the independent guarantor might not act in a professional capacity. The BGH also protects those persons who are surprised by guarantees on-first-demand within the meaning of § 305c (1) BGB (surprising clauses in general terms and conditions), in particular if there is no reason for them in the usual business area in question or if they are unusual.[50] This particularly intends to protect consumers.

Such protection mechanisms might play a secondary role, particularly in international trade practice, due to the prevalence of professional guarantors. The discussion on the (non-)applicability of the test of reasonableness under § 307 BGB in commercial and international transactions also shows that guarantees on-first-demand correspond to the customs and practices applicable in commercial transactions (cf § 310(1) and (2) BGB).[51] This conclusion might, however, not apply in B2C relations, ie once consumers or non-professionals are involved. It is likely that in these scenarios, the latter might be unreasonably disadvantaged when entering guarantees on-first-demand. The control of standard terms (*Allgemeine Geschäftsbedingungen*, AGB) in B2C contexts is under German law designed as a strongly protective system that combines rules on incorporation, interpretation, and substantive fairness. According to §§ 305–305c BGB, standard terms generally only become part of the contract and thus relevant for the legal relationship of the parties, if the trader has given clear notice and the consumer had an actual opportunity to become aware of them;[52] clauses that are unusual or objectively surprising do not become part of the contract, with all ambiguities being interpreted against the drafter.[53] Beyond incorporation, the core of the regime lies in the general fairness clause of § 307 BGB, which invalidates any provision that, contrary to good faith, places the consumer at an unreasonable disadvantage.[54] This assessment focuses both on content and on transparency, requiring that the consumer be able to understand the economic and legal consequences of the clause. The general clause is complemented by two catalogues of typical unfair terms: the "grey list" of § 308 BGB, which establishes a rebuttable presumption of invalidity for certain clauses unless the trader can justify them in the individual case, and the "black list" of § 309 BGB, which renders specified clauses automatically void without any balancing, such as extensive exclusions of liability for personal injury or gross negligence. Renouncing to generally bring any exceptions or claims can thus be incompatible with Germany's consumer protection laws.[55]

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[49] BGH 12.03.1992, IX ZR 141/91 = NJW 1992, 1446; BGH 02.04.1998, IX ZR 79/97 = NJW 1998, 2280; BGH 10.9.2002, XI ZR 305 / 01 = NJW 2002, 3627.

[50] BGH 10.9.2002, XI ZR 305/01 = NJW 2002, 3627; see also on unreasonable disadvantage according to § 307(1) BGB, Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 352f. On this point from an Austrian perspective Andreas Schwartze, 'Die Bürgschaft'in Peter Apathy, Gert Iro, Helmut Koziol (eds), *Österreichisches Bankvertragsrecht* VIII.1 (Verlag Österreich 2012) para 2/14.

[51] Cf Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 353.

[52] § 305(2) BGB.

[53] § 305c(1) and (2) BGB.

[54] § 307(1) BGB.

[55] This is in line with a broader European trend. Sevel jurisdictions started to declare certain forms of guarantees invalid in order to protect weaker parties (especially consumers) from the disproportionate influence and market power of banks. Comparatively, see Aurelia Colombi Ciacchi and Stephen Weatherill, *Regulating Unfair Banking Practices in Europe: The Case of Personal Suretyships* (OUP 2010).

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An additional protection for weaker parties was derived from German case law. It had eg become a practice for banks to conclude guarantee agreements with family members for consumer loans and business loans with medium-sized companies. In many cases, their income and financial circumstances remained unchecked. The German Constitutional Court (*Bundesverfassungsgericht*, BVerfG) held, that in these cases, individuals with low or no income could not validly serve as guarantors for the debts of their family members. [56] This principle could be extended to other scenarios. Some even argued that the principle could apply when the guarantee itself was governed by foreign law, as a kind of public policy exception. [57]

In any case, proof of the realisation of the contractual risk is contrary to the beneficiary's interest in security, which is aimed at rapid settlement. In addition to the rapid and problem-free settlement, the independent guarantee on-first-demand

> "*also fulfils the purpose of reversing the litigation situation and shifting legal or factual disputes, the answer to which is not self-evident, to a possible recovery process between the guarantor and the beneficiary after payment has been made*". [58]

This clearly emphasises the abstraction from the underlying transaction and the characteristic as a non-accessory means of security. [59] According to the established case law of the German Federal Court of Justice (*Bundesgerichtshof*, BGB), in contrast to a surety, the creditor is guaranteed receipt of the payment in any case and also in the event that the principal debtor's obligation does not exist or subsequently ceases to exist. [60] As a guarantee on-first-demand is only linked to formalised payment conditions and excludes substantive law arguments, objections and defences arising from the value relationship and the cover relationship, as well as an analogous application of the provisions on surety law can be ruled out. [61] Nevertheless, the guarantor is only liable on a subsidiary basis when the contractually agreed risk materialises. [62] There can therefore be no question of an abstract liability. [63]

4. The independent guarantee contract under Italian law

The German legal doctrines on the independent guarantee contract can also be found in Italy, at least

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[56] BVerfG 19.10.1993, BVerfGE 89, 214.

[57] Matthias Lehmann, 'Guarantees'in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 864. The Federal Court of Justice emphasized that such an exception would only rarely become relevant, eg when the guarantor would be reduced to subsistence level for an extended period due to the obligation, see BGH, 24.02.1999 – IX ZB 2/98, BGHZ 395, 150.

[58] BGHZ 90, 287 (294) = NJW 1984, 2030; see Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 347 on the further advantage of the acceleration effect in insolvency proceedings.

[59] For the associated non-automatic transfer upon assignment, see Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 23f; for the relevant controversial discussion in Italy, see Andrea Montanari, 'Garanzia autonoma e autonomia privata' (2017) Banca, borsa, tit cred 347, 347ff.

[60] See also BGH 13.06.1996, IX ZR 172 / 95 = NJW 1996, 2569 (2570); BGH 28.10.1954, IV ZR 122 / 54 = WM 1955, 265.

[61] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 paras 21, 22.

[62] Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) 348f; Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 paras 25.

[63] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 20.

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in their basic features: despite its undisputed relevance and prevalence, this type of contract is not regulated by law there either and is to be qualified as a *contratto innominato* or *contratto atipico* (atyptical contract. [64] It therefore falls into the category of contracts that can be concluded by the parties within the meaning of freedom of contract pursuant to Article 1322(2) of the Civil Code (CC), provided that they are aimed at the realisation of interests worthy of protection under the legal system. It is a personal guarantee that is not accessory to the secured obligation, which means that the relevant provisions of the Italian Civil Code regarding suretyship cannot be applied. [65] The introduction of the independent guarantee contract in Italy is due to the practice of international business and legal transactions and owes its development and recognition to legal writings [66] and case law, [67] which have been dealing with the legal institution since the 1970s in particular.

The now unanimous doctrine and case law, [68] which recognises independent guarantee contracts as atypical legal transactions, was preceded by an ongoing discussion about the admissibility of the guarantor's waiver of the assertion of defences. While some assumed that the institution was null and void, especially as the payment by the guarantor to the beneficiary lacked *a causa contractus* or a legal basis within the meaning of Article 1325 CC, others argued that it was a *subspecies* of surety. It was not until the 1970s that the idea of the atypical, independent guarantee finally gained acceptance. [69] Today, it is unequivocal that the rules on surety (*fideiussione*; Arts 1936ff Civil Code) cannot apply to autonomous guarantees by way of analogy. [70]

Some scholars do, however, only consider the necessary *causa* (for an autonomous guarantee) to exist if the purpose of the guarantee was stated; another part of legal scholars, on the other hand, only assumes admissibility if the guarantee promise is preceded by a suitable objective environment in which the guarantee can be realised in accordance with its purpose from the outset. [71]

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[64] The attempt to incorporate the legal institution into the legal system through the draft law *(disegno di legge)* 2284 in 2010 failed; see Andrea Montanari, 'Garanzia autonoma e autonomia privata' (2017) Banca, borsa, tit cred 347, 347ff, who, however, refers to various special laws that provide for guarantees that are particularly close to the independent guarantee; see in particular Article 75 Decreto legislativo 163/2006 in relation to work/service contracts or Articles 38 and 38-bis Decreto del Presidente della Repubblica 633/1972 in relation to VAT paid in excess; see also Article 2464(4) and (6) CC in relation to deposits with a limited liability company.

[65] See Article 1941 CC, according to which the object of the surety corresponds to the obligation guaranteed; Article 1939 CC, according to which the surety is valid only if and to the extent that it is the secured obligation; Article 1945 CC, which grants the guarantor the right to raise all defences to which the debtor himself is entitled; see Antonio Cetra, 'Contratto autonomo di garanzia' (*Enciclopedia Giuridica Treccani Online*, 2019) <https://www.treccani.it/enciclopedia/contratto-autonomo-di-garanzia_%28Diritto-on-line%29/> (accessed 2 January 2026).

[66] The first in-depth analyses go back to *Giuseppe Benedetto Portale*, see in particular Giuseppe Benedetto Portale, 'Nuovi sviluppi del contratto autonomo di garanzia' (1985) Banca, borsa, tit cred 169, 169ff; Giuseppe Benedetto Portale, 'Le garanzie bancarie internazionali (Questioni)' (1988) Banca, borsa, tit cred 1, 1ff; an overview of autonomous guarantee contracts in Italian and international practice can be found in Ugo Draetta and Cesare Vaccà (eds), *Le garanzie contrattuali. Contratti autonomi di garanzia nella prassi interna e nel commercio internazionale* (EGEA 1994).

[67] The first important judgement of the united sections of the Italian Court of Cassation is Cass Civ Sez Un, 01.10.1987, n. 7341, Foro it 1988, I, 103.

[68] See in particular Cass Civ Sez Un, 01.10.1987, n. 7341, Foro it 1988, I, 103; Cass Civ Sez Un, 18.02.2010, n. 3947, Foro it. 2010, I, 2799; Cass Civ Sez III, 20/03/2014, n. 6517, Diritto & Giustizia 2014, 21.

[69] Cass Civ Sez Un, 18 February 2010, n. 3947. Lately, Cass Civ Sez I, 4 December 2024, n. 31105.

[70] Cass Civ Sez Un, 18 February 2010, n. 3947. Lately, Cass Civ Sez I, 4 December 2024, n. 31105.

[71] See in detail Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 32ff.

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In this context, reference should also be made to the discussion on the so-called *causa suffisante/sufficiente*, which gives the *causa* a certain flexibility in the case of unilaterally binding legal transactions, in particular by taking into account the interests of the guarantor (to compensate for the guarantee provided) on the one hand and the secured party (to maintain the economic relationship) on the other. [72] In the field of autonomous guarantees, courts and commentators have thus justified the existence of a valid *causa* by identifying either the guarantor's interest in participating in the underlying transaction or, more frequently, the typical social function of strengthening credit and facilitating the circulation of wealth, thus construing the guarantee as functionally linked to the financed economic operation. The Italian Supreme Court has repeatedly emphasized that the *causa* of the autonomous guarantee lies in the assumption of a risk in exchange for remuneration or other economic utility and in its market-recognized function of ensuring prompt payment, rather than in the debtor's obligation itself, thereby legitimizing its structural autonomy while avoiding an invalidity for lack of cause. [73] Legal writings have accordingly described the guarantee's *causa* as a "typical social cause" emerging from commercial practice and standardized forms, where the reference to the underlying contract operates not as an element of accessory dependence but as a parameter for interpreting the economic purpose of the unilateral undertaking. [74] In this perspective, the sufficiency of cause in unilateral promises and autonomous guarantees is secured not by formal reciprocity but by the recognizability of a socially and economically appreciable function embedded in the overall operation.

The fact that the independent guarantee contract was at times regarded as *a subspecies* of sureties in the past was also reflected in the controversial opinions on the transfer by assignment of the secured claim. However, those in favour of transfer on assignment follow the accessoriness of the surety and therefore do not take sufficient account of the autonomy of this form of guarantee. In principle, therefore, an automatic transfer on assignment cannot be assumed. [75]

The Italian case law does now, however, also assume that the clauses "on-first-demand" and "without objections" generally indicates the independence of the guarantee in the event of doubts about the qualification of a guarantee. [76]

As for the exceptions that can be brought against the party requiring payment, the guarantor can in any case still raise the "*exceptio doli*"-defence against the beneficiary if the request for immediate payment appears to be clearly abusive or fraudulent. [77]

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[72] Cass Civ Sez Un, 18 February 2010, n. 3947, Foro it. 2010, I, 2799; Cass Civ Sez Un, 12 December 2007, n. 26064.

[73] Luigi Gorla, *Il contratto. Problemi fondamentali trattati con il metodo comparativo e casistico. Vol I. Lineamenti generali* (Giuffrè 1954) 82ff; Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 36.

[74] See in general: Cesare Massimo Bianca, *Diritto civile* III (3rd edn, Giuffrè 2019) 409ff; Francesco Galgano, *Il negozio giuridico* (*Trattato di diritto civile e commerciale, Cicu/Messineo*) (Giuffrè 2002) 99ff; Giovanni Battista Ferri, *Causa e tipo nella teoria del negozio giuridico* (Giuffrè 1966).

[75] See Andrea Montanari, 'Garanzia autonoma e autonomia privata' (2017) Banca, borsa, tit cred 347, 347ff; for Germany *Mathias Habersack* in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 23f.

[76] Cass Civ Sez Un, 18 February 2010, n. 3947, Foro it. 2010, I, 2799; Cass Civ Sez VI, 15.12.2014, n. 26327, Urb app 2015, 164; in German law Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 348; the fact that the Uniform Rules for Demand Guarantees (Article 2) – see below at note 110 – also seems to assume this can be seen from the contribution by Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[77] Cass Civ Sez Un, 18 February 2010, n. 3947, Foro it. 2010, I, 2799.

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When a non-professional acts as guarantor (*garante non professionista*), consumer protection may apply through the Codice del Consumo (Legislative Decree no. 206/2005). This requires that the guarantor qualifies as a *consumer*, i.e., a natural person acting for purposes outside his or her trade, business, craft, or profession, and the counterparty is a *professional*.[78] The consumer status can attach to the guarantor independently from the principal debtor's status, focusing on the guarantor's own subjective position and the functional link between the guarantee and the guarantor's personal sphere rather than the commercial nature of the underlying obligation.[79] Consequently, clauses such as *first demand*, *without exceptions*, broad waivers of defenses, jurisdiction clauses, or disproportionate penalty-like provisions might subject to unfair terms scrutiny under Arts 33–36 Codice del Consumo, with the effect of nullity of the unfair clause only (*nullità di protezione*) and its non-binding character for the consumer, while the remainder of the guarantee survives if it can stand without the clause.[80]

5. The growing influence of the common law

Particularly influential in this field are common law systems. This is especially due to relevance of English-speaking jurisdictions in financial matters, such as the capital markets of London or New York. Under the common law terminology, autonomous guarantees describe on-demand (or "first demand") bonds that are treated as an independent undertaking by the issuing bank or as surety to pay the beneficiary upon a conforming demand, separate the underlying (often times construction or supply) contract. This is reflected by the autonomy principle: the bank's obligation is documentary and independent, so disputes about performance, delay, or defects under the primary contract do not normally affect the beneficiary's right to call the bond.[81] The principal judicially recognised limit is the fraud exception: payment may be refused (or restrained) where there is clear evidence that the beneficiary's demand is fraudulent in the sense of knowingly making a dishonest claim.[82] Common law courts set a very high evidential threshold for this exception and are reluctant to interfere with the commercial utility of on-demand instruments.[83] Consequently, applications for injunctions restraining a call or payment succeed only in exceptional cases, typically where fraud is 'clearly established'or where the demand is plainly abusive and unconscionable on strong evidence.[84] The policy rationale is to preserve the reliability and liquidity of demand guarantees in international trade and construction markets: beneficiaries must be able to rely on prompt payment, while applicants face a stringent burden to justify court intervention.

[78] See Art 3(1)(a) and (c) Legislative Decree no. 206/2005.

[79] Cass Civ Sez III, 30 May 2025, n. 14537.

[80] Cass Civ Sez III, 30 May 2025, n. 14537.

[81] Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159 (CA).

[82] Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] QB 159 (CA).

[83] Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC); Czarnikow-Rionda v Standard Bank [1999] 2 Lloyd's Rep. 187.

[84] Simon Carves Ltd v Ensus UK Ltd [2011] EWHC 657 (TCC); Czarnikow-Rionda v Standard Bank [1999] 2 Lloyd's Rep. 187; Cargill International v Bangladesh Sugar and Food Industries Corporation [1996] 2 Lloyd's Rep. 524.

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6. The independent guarantee contract in international legal relations and in international legal practice

6.1. Private international law

a) Non-consumer contracts

Now that the problem areas of the independent guarantee have briefly been highlighted at national level, it seems necessary – due to the relevance in international legal and commercial transactions mentioned above – to consider them from an international perspective.

From a private international law viewpoint, cross-border contractual obligations are in the European Union governed by the Rome I Regulation.[85] Under the latter, parties are (within certain limits and provided that it is not a consumer relationship[86]) free to choose the law they want to govern their contract.[87] Should no choice of law have been made, however, they are referred to the law of the State in which the party effecting the *"characteristic performance of the contract"* has their habitual residence.[88] In the case of an independent guarantee, the characteristic performance is generally considered to be provided by the guarantor (and thus eg points to the law of the seat of the guaranteeing bank).[89] Said law is, however, not to be applied should it be evident that the case is more closely related to another jurisdiction, in which case the law of the latter State is to govern the legal relationship between the parties.[90]

b) Consumer contracts

Special protective measures were set in place to guarantee the interests of consumers in cross-border cases.[91] They have to be assessed both when it comes to the guaranteed relationship and the relationship between guarantor and guaranteed party.[92] In B2C relations, ie when a consumer[93] is involved (eg as a party of the guaranteed relationship or even as the guarantor), the Rome I Regulation refers parties to

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[85] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

[86] Article 6 Rome I. See Matthias Lehmann, 'Guarantees'in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 863 and CJEU C–45/96 *Bayerische Hypotheken– und Wechselbank AG v Edgar Dietzinger* [1998] ECR I–1199.

[87] Article 3 Rome I. On this, Matthias Lehmann, 'Guarantees'in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 862.

[88] Article 4(2) Rome I Regulation.

[89] Matthias Lehmann, 'Guarantees'in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 862f; Christian von Bar and Peter Mankowski, *Internationales Privatrecht* II (2nd edn, C.H.Beck 2019) § 1 Rn. 313. Also, Andreas Köhler in BeckOGK (C.H.Beck 01.12.2024) Art 4 Rom I-VO Rn. 520ff.

[90] Article 4(3) Rome I Regulation.

[91] Article 6 Rome I Regulation.

[92] As these two separate contracts have to be assessed separately from a private international law perspective.

[93] By Art 6(1) Rome I defined as a natural person who concludes a contract for a purpose that can be considered outside their trade or profession. On the consumer definition, see Christoph Perathoner, 'Payment For Online Transactions Through Third-Party-Providers – Problems of International Jurisdiction' (2025) 14 EuCML 59, 60 f. The contract has to fall within the activity of the professional as well.

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the law of the Member State in which the consumer has established their habitual residence. This, however, requires that the professional (eg a bank) pursues their activities in said State or directs them to it.[94] A choice of law still remains possible but cannot deprive the consumer *"of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable"*.[95]

These rules protect consumer-guarantors in cross-border settings. Nevertheless, the CJEU, had also held that "a contract of guarantee concluded by a natural person who is not acting in the course of his trade or profession" would not be safeguarded by the EU's rules on consumer protection "where it guarantees repayment of a debt contracted by another person who, for his part, is acting within the course of his trade or profession."[96] Consequently, a natural person guaranteeing an underlying debt that was contracted by a non-consumer, would not be able to rely on the EU's rules on consumer protection. The decision seems however limited in scope to the rules on the protection against contracts negotiated away from business premises.[97]

The protective measures for consumers do then also not apply in the cases listed in Article 6(4). The potentially applicable exclusions of Article 6(4)(a)[98] and (d)[99] will, however, generally not apply. As for litera (a) (service contract more closely connected to another Member State), the guarantees in question might generally to be supplied at the consumers'habitual residence, excluding the application of Article 6(4)(a). The provision might, however, be applicable, if the consumer acts as a guarantor for a contract, more closely connected to another Member State. Potential relevance might then, at first sight, also be attributed to litera (d) (contracts concerning financial instruments). It is, however, generally considered, that a guarantee contract cannot be qualified as a financial instrument as such. The latter term is defined by Annex I of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) and does not list guarantee contracts.[100]

c) **Formal requirements**

The form of the contract should follow the *lex loci actus*.[101] This follows from Article 11 of the Rome I Regulation. Should the contracting parties be in the same State when entering the contract, the

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[94] See Article 6(1) Rome I. On the term 'to direct', see CJEU Case C–144/09 Pammer; Alpenhof [2010] ECLI:EU:C:2010:740. On this aspect, also Zhen Chen, 'Internet, consumer contracts and private international law: what constitutes targeting activity test?' (2021) 32 Information & Communications Technology Law 23, 23 ff.

[95] See Article 6(2) of the Rome I Regulation.

[96] CJEU C–45/96 *Bayerische Hypotheken– und Wechselbank AG v Edgar Dietzinger* [1998] ECR I–1199.

[97] As CJEU C–45/96 *Bayerische Hypotheken– und Wechselbank AG v Edgar Dietzinger* [1998] ECR I–1199 concerned Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.

[98] '[A] contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence'.

[99] '[R]ights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service'.

[100] See Recital 30 Rome I and *Dieter Martiny* in MüKoBGB (9th edn, C.H.Beck 2025) Article 4 Rome I para 168.

[101] Matthias Lehmann, 'Guarantees'in Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 863.

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latter is considered to be formally, should it satisfy the formal requirements of the State whose law is applicable to the contract.[102] The *lex causae* does consequently also determine the formal validity of the contract. This does generally also apply, should the parties not be in the same place when concluding the contract. However, in this case, the contract can still be considered to be formally valid, should it meet the requirements set out by one of the States in which the parties were either present, or had their habitual residence.[103] An exception to this rule are consumer contracts. Following the *favor consumatoris*, the form of these types of contract is subject to the rules of the habitual residence of the consumer.[104]

6.2. Uniform rules

As for international, uniform rules, different considerations apply. While they do exist, they generally only concern the B2B sector. No specific uniform rules have so far been introduced protecting consumers involved in guarantee relationships. The focus of this subchapter will thus be on the existing uniform rules in business relationships.

A first attempt to regulate independent guarantee contracts was made with the United Nations'Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995).[105] The Convention, however, only entered into force in a handful of states[106] and is therefore from a European perspective only relevant if the law of one of the contracting states is applicable under conflict of law rules of a Member State.[107] More relevant in practice are certain 'soft law' guidelines.[108] Due to the lack of national standardisations in the matter,[109] the private autonomy of the parties plays a major role in this field. Parties can, consequently, draw on some international sources to complete a contract. In particular, reference must be made to the *Uniform Rules for Demand Guarantees* (URDG)[110] of the International Chamber of Commerce in Paris (ICC)[111], which take into account the independent guarantee contract

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[102] Article 11(1) Rome I.

[103] Article 11(2) Rome I.

[104] Article 11(4) Rome I.

[105] See <https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees> accessed 2 January 2026. See on this also below.

[106] Belarus, Ecuador, El Salvador, Gabon, Kuwait, Liberia, Panama, Tunisia. See <https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees/status> accessed 2 January 2026.

[107] Cf Andreas Köhler in BeckOGK (C.H.Beck 01.12.2024) Art 4 Rom I-VO Rn. 520ff.

[108] On the "soft law aspect" see below.

[109] One exception is France, where there has been a statutory provision in Article 2321 of the Civil Code since 2006: "*La garantie autonome est l'engagement par lequel le garantie s'oblige, en considération d'une obligation souscrite par un tiers, à verser une somme soit à première demande, soit suivant des modalités convenues. Le garant n'est pas tenu en cas d'abus ou de fraude manifestes du bénéficiaire ou de collusion de celui-ci avec le donneur d'ordre. Le garant ne peut opposer aucune exception tenant à l'obligation garantie. Sauf convention contraire, cette sûreté ne suit pas l'obligation garantie.*" In English: "An autonomous guarantee is an undertaking by which the guarantor undertakes, in consideration of an obligation entered into by a third party, to pay a sum either on-first-demand or in accordance with agreed terms. The guarantor is not liable in the event of manifest abuse or fraud on the part of the beneficiary or collusion on the part of the beneficiary with the principal. The guarantor may not raise any exception relating to the obligation guaranteed. Unless otherwise agreed, this security does not follow the guaranteed obligation.".

Another exception is Austria in its § 880a ABGB from 1915.

[110] See <https://www.cipcic-bragadin.com/wp-content/uploads/2015/09/ICC-URDG-758.pdf> accessed 2 January 2026.

[111] French: *Chambre de commerce internationale.*

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in Articles 5ff. [112] Although independent guarantee contracts are generally subject to national substantive contract law and the international sources referred to do not constitute a sufficient independent legal basis, [113] recourse to the rules contained in the URDG offers a wide range of private autonomous structuring options. [114] According to Article 1 URDG, an explicit reference in the contract is, however, necessary in any case.

The *Uniform Rules for Demand Guarantees* were first published in 1992 by the International Chamber of Commerce in Paris (URDG 458) and replaced in 2010 by the revised and amended URDG 758. [115] They can be understood as a synthesis of the standards that have developed in international trade practice; in other words, they are elaborated contractual clauses that should (continue to) be applied in international trade practice, [116] but as "soft law" [117] they have to be incorporated into the guarantee contract expressly (Art 1 (a) URDG). While the URDG are becoming increasingly established in international legal transactions and thus also in Italy due to internal legal gaps, [118] their popularity in Germany is limited in view of the content control pursuant to § 307 et seq. of the German Civil Code (BGB), because the UDRG are seen as general terms and conditions. [119]

Overall, referencing the URDG has become particularly popular in construction contracts. This is especially due to certain bond practices of the Fédération Internationale des Ingénieurs Conseils (FIDIC). FIDIC is an international federation of consulting engineers best known for publishing widely used standard forms of construction contracts (such as the Red, Yellow, and Silver Books). [120] In FIDIC-based projects, construction and performance bond practice typically involves contractors providing on-demand or conditional guarantees – usually issued by banks or insurers – in favour of the employer to secure performance, advance payments, or warranty obligations. [121] These bonds function as risk-allocation tools: if the contractor defaults or fails to meet contractual milestones, the employer can call the bond to obtain

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[112] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 29; Christopher R. Seppala, 'The ICC Uniform Rules for Demand Guarantees ("URDG") in Practice: A Decade of Experience' (2001) available online under <https://fidic.org/sites/default/files/3%20The%20ICC%20Uniform%20Rules%20for%20Demand%20Guarantees.pdf> (accessed 2 January 2026).

[113] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 30.

[114] Andrea Montanari, 'Garanzia autonoma e autonomia privata' (2017) Banca, borsa, tit cred 347, 347ff.

[115] George Affaki, Roy Goode, *Guide to ICC uniform rules for demand guarantees URDG 758* (International Chamber of Commerce 2011); Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff; Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 354. See also Roeland IVF Bertrams, *Bank guarantees in international trade* (4th edn, Wolters Kluwer 2013) 28ff; Roy Goode, Herbert Kronke, Ewan McKendrick, *Transnational commercial law. Text, cases and materials* (2nd edn, OUP 2015) 324ff.

[116] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[117] Similar to UCP 600 for decumentary credits, see Andreas Schwartze, 'Austria' in Agatha Brandao de Oliveira, Lauro Gama, Geneviève Saumier (eds), *Soft Law in International Trade Finance* (Brill Nijhoff 2024) 161f.

[118] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[119] Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 354; Abbas Samhat, 'J. Bankgarantie' in MüKoHGB VI.1 (5th edn, C.H.Beck 2024) para 10.

[120] See <https://fidic.org/bookshop> (accessed 2 January 2026).

[121] See already Peter S. O'Driscoll, 'Performance Bonds, Bankers'Guarantees, and the Mareva Injunction' (1985) 7 Northwestern Journal of International Law & Business 380 ff.

Christopher R. Seppala, 'The ICC Uniform Rules for Demand Guarantees ("URDG") in Practice: A Decade of Experience', available online under <https://fidic.org/sites/default/files/3%20The%20ICC%20Uniform%20Rules%20for%20Demand%20Guarantees.pdf> (accessed 2 January 2026).

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prompt payment up to the guaranteed amount, independent of underlying disputes in many jurisdictions. [122] Because FIDIC contracts are used globally in infrastructure and large-scale engineering works, bond wording often aligns with international guarantee standards, especially as URDG practice, and is negotiated to balance employer security with safeguards against abusive or premature calls.

Certain aspects of the URDG can, however, also be problematic outside of construction contracts. Article 5 URDG, for example, emblematically states – in accordance with the legal theory developed – the independence of the guarantee:

> "*A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.*"

If the guarantor is a bank, it is often the case in international legal practice that the bank secures its position once again with a guarantee (usually from a foreign bank). The second bank assumes the guarantee in place of the first, while the first bank guarantees to reimburse the second bank for the guarantee payment (reinsurance). [123] In addition to the original value relationship, which – as indicated – usually relates to a work/service or a delivery, in this case, there are two mandate relationships as a cover relationship and two (independent) guarantee relationships. [124] The relevance of such an *counter-guarantee* [125] is also evident from the URDG, which repeatedly takes this into account.

The fact that the guarantor is exposed to the risk of not being able to recover the amount paid if the debtor turns out to be destitute is particularly problematic in international commercial transactions. The debtor can normally only oppose the guarantor's recovery of the sum if the guarantor provided the guarantee in a case in which he should not have done so according to the underlying contract. [126]

The guarantor also generally waives any defences in the course of performance. The exception (not expressly mentioned in the URDG 758) is – in accordance with the unanimous doctrine and, in particular, internal national principles – the so-called *exceptio doli* (defence of fraudulent intent), [127] which allows the guarantor to waive performance if the beneficiary's claim is obviously unfounded. This is intended to counteract abuse of rights. [128] In particular, in the four-sided relationships mentioned, Italian

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[122] Further reading: Götz-Sebastian Hök, 'Risk allocation in the FIDIC Conditions of Contract (1999) for Construction (Red Book) and the FIDIC Conditions of Contract (1999) for EPC/Turnkey Projects (Silver Book) from the perspective of a German lawyer?', available online under < https://fidic.org/sites/default/files/4%20Risk%20allocation%20in%20the%20FIDIC%20Conditions%20of%20Contract.pdf> (accessed 2 January 2026).

[123] Antonio Cetra, 'Contratto autonomo di garanzia' (*Enciclopedia Giuridica Treccani Online*, 2019) <https://www.treccani.it/enciclopedia/contratto-autonomo-di-garanzia_%28Diritto-on-line%29/> (accessed 2 January 2026); *Mathias Habersack* in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 38.

[124] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 25f.

[125] See above note 32.

[126] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 37f.

[127] On the subject in general, see Claudia Schubert in MüKoBGB (9th edn, C.H.Beck 2022) § 242 paras 224f; Giovanni Meruzzi, *L'Exceptio doli dal diritto civile al diritto commerciale* (Cedam 2005) especially 46ff and Aldo Angelo Dolmetta, 'Exceptio doli generalis'(1998) Banca, borsa, tit cred 147, 152ff. Several examples can be found in Alessandro Daccò, 'Garanzie "astratte". Appalti internazionali ed exceptio doli generalis'(1996) Giur it 59, 59ff.

[128] Mathias Habersack in MüKoBGB (8th edn, C.H.Beck 2020) Vor § 765 para 36f. On the concept of fraud Roeland IVF Bertrams, *Bank guarantees in international trade* (4th edn, Wolters Kluwer 2013) 353ff.

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case law assumes that performance can only be refused by the counter-guarantor (second bank) if the first guarantor bank itself – at least negligently – participated in the abuse. [129]

While it is surprising that the URDG does not contain a relevant provision on the defence of abuse [130] (which is thus left to the internal rules of the jurisdiction in question [131]), it should be noted that Article 15 URDG nevertheless provides, to a certain extent preventively, for a so-called *supporting statement* by which the claim for performance of the guarantee must be justified. However, this is not a necessary proof of non-fulfilment [132] or of the damage that has occurred, which seems incompatible with the autonomous nature of the guarantee contract, but rather a simple additional declaration. [133] The actual relevance of the *supporting statement* therefore remains questionable; nevertheless, a precise specification of the necessary procedure in the contract seems useful in order to maximise its efficiency. Otherwise, the parties may (explicitly) exclude the duty to present such a document (Art 15(c) UDRG), even by declaring with an individual clause that the guarantee has to be paid "on-first-demand". [134]

It should also be criticised that the URDG primarily take into account the non-performance of the debtor as a reason for providing the guarantee, without also including the atypical risks of international trade in a more flexible manner. [135] In fact, the guarantee contract also aims to indemnify the beneficiary against atypical risks in international trade. These are mainly to be assigned to the so-called *factum principis,* for example in the area of currency policy. [136]

In any case, an examination of the scope of the defence of misuse seems necessary, as an overly broad application of such arguments would in particular call into question the independence of the guarantee. [137] The fact that the defence of abuse could also be explicitly regulated by law is shown by Article 2321(2) of the French Civil Code introduced in 2006:

> "*Le garant n'est pas tenu en cas d'abus ou de fraude manifestes du bénéficiaire ou de collusion de celui-ci avec le donneur d'ordre*" [English translation: "The guarantor is not liable in the event of obvious abuse or fraud on the part of the beneficiary or collusion on the part of the beneficiary with the principal debtor"]. [138]

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[129] Tribunale Genova, 12 November 2001, Giur it 2002, 745; Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 41.

[130] Abbas Samhat, 'J. Bankgarantie' in MüKoHGB VI.1 (5th edn, C.H.Beck 2024) para 11. But see Art IV.G.-3:105 (1) DCFR: *"A security provider is not obliged to comply with a demand for performance if it is proved by present evidence that the demand is manifestly abusive or fraudulent."*.

[131] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[132] Although it should be *"indicating in what respect the applicant is in breach of its obligation under the underlying relationship"* (Art 15 (a) UDRG).

[133] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[134] Friedrich Graf von Westphalen, 'Ausgewählte Fragen zu den „Uniform Rules for Demand Guarantees 758" der ICC unter der Lupe des AGB-Rechts'(2022) BB 579, 579ff (in particular at note 83).

[135] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[136] Federico Cappai, 'Le garanzie autonome nel commercio internazionale' (2016) Il Nuovo Diritto delle Società 22, 24.

[137] Giovanni Stella, 'Garanzie autonome e Uniform Rules for Demand Guarantees'(2015) Resp civ prev 370, 370ff.

[138] Interestingly, French law draws a conceptual and functional line between *cautionnement* and the *garantie autonome* by making accessoriness vs. autonomy the decisive criterion. Concerning *cautionnement* (suretyship), the surety remains an accessory security: the surety's obligation is legally dependent on the principal debt. As for the *garantie autonome* of Art 2321(2), it is defined as an independent undertaking to pay, not accessory to the principal debt. The guarantor's obligation is abstract and self-standing. See Laurent Aynés, Pierre Crocq, and Augustin Aynés, *Droit des sûretés* (17 edn, LDGJ 2024) 41ff and 235ff.

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As mentioned above, reference should also be made to the *United Nations Convention on Independent Guarantees and Stand-by Letters of Credit* of 11 December 1995 (in force since 1 January 2000). This covers only international guarantees, when two of the involved parties are situated in different states (Art 4 (1)), if the guarantor's place of business is in one of the few contracting states [139] "or if the rules of private international law lead to the application of the law of a contracting state" (Art 1 (1) (b)). [140] This provides for relevant *exceptions* in the event of abuse in Article 19.

The so-called *ISP98* (*International Standby Practices*, 1998), on the other hand, are a set of standardized practices originally developed in the United States and later published as ICC Publication No. 590 to govern standby letters of credit. [141] It reflects generally accepted banking practice on issues such as compliant demand language, presentation and examination procedures, bank obligations, and mechanics specific to standbys. ISP98 is typically selected when the instrument is, in substance and intention, a standby letter of credit – especially in US-centric or traditional SBLC (standby letters of credit) markets – because it aligns with standby-specific terminology and operational routines. By contrast, URDG 758, is tailored for independent demand guarantees, with clear mechanics for demand, examination, and payment under guarantee structures and wide acceptance in construction, public procurement, and civil-law markets. Practitioners generally choose URDG 758 when the parties want a demand guarantee form rather than a standby letter-of-credit-framework, or where beneficiaries, governing law, or banking networks expect guarantee conventions to apply. The choice of ISP98 versus URDG 758 therefore depends on the nature of the instrument (standby letter of credit versus demand guarantee), market practice, beneficiary preference, and jurisdictional comfort with each set of rules.

6.3. The Draft Common Frame of Reference

Rules on independent guarantees can also be found in the Draft Common Frame of Reference (DCFR). This proposal contains certain principles, definitions, and model rules of European private law. [142] Independent guarantees are under the DCFR defined as

> *"an obligation by a security provider which is assumed in favour of a creditor for the purposes of security and which is expressly or impliedly declared not to depend upon another person's obligation owed to the creditor"* [143].

The basis for the security can be either a contract or any other juridical act. [144] Standby letters of credit, normally issued by banks, are consequently covered and would give the rules practical relevance in B2B relations. Details are laid down in nine separate provisions and summarised below.

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[139] See <https://uncitral.un.org/en/texts/payments/conventions/independent_guarantees/status> (accessed 2 January 2026). However, this does not include Germany, Italy or Austria or any other European or economically relevant state.

[140] Jens-Thomas Füller, 'D.IV: Garantie auf erstes Anfordern' in Carsten Thomas Ebenroth, Karlheinz Boujong, Detlev Joost, Lutz Strohn (eds), *Handelsgesetzbuch* II (4th edn 2020) para 354.

[141] See <https://digitallibrary.un.org/record/413945?v=pdf> (accessed 2 January 2026).

[142] See in this particular area: Jan Schürnbrand, 'Das Recht der Personalsicherheiten im Entwurf des Gemeinsamen Referenzrahmens' (2009) WM 873, 873ff.

[143] Article IV.G.-1:101 (b) DCFR.

[144] Article IV.G.-3:103 (1) DCFR.

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In general, a security provider – ie the person who assumes the obligations towards the creditor for the purposes of security (eg a bank or insurance company) [145] – would under the DCFR be obliged to promptly inform the debtor [146] upon receiving a demand for performance. [147] In doing so, the provider should indicate whether he believes that he is obligated to perform. [148] Similar informational duties apply 1) once the guarantee has been performed after being demanded by a creditor; [149] or 2) when the performance was refused. [150] Should the security provider not have complied with these obligations, their rights *"are reduced by the extent necessary to prevent loss to the debtor as a result of such failure"*. [151]

The provider would generally only have to perform when a written demand strictly complied with the terms of the respective contract. [152] To ensure compliance, any demand must be accompanied by a written declaration of the creditor confirming that the required conditions were met. [153] Should this not have been the case or should the demand itself have been fraudulent, the security provider would be entitled to reclaim the amounts paid. [154] This right follows the rules on unjust enrichment.

When performing the guarantee, [155] security providers would be allowed to raise any defense they have against the creditor unless agreed otherwise. [156] The performance could, generally also, be refused if a demand was manifestly abusive or fraudulent. In this case, the provider would not be required to perform, and the debtor could block the performance or the demand itself. [157]

7. Results

The independent guarantee contract is a type of contract that has arisen from a specific commercial requirement in a particular legal system and has been so successful on an international level due to its practical benefits that it has been adopted by other legal systems and, if not by the legislator itself, then at least by practice, supported by legal writings and case law.

The benefit of the independent guarantee contract for international relations is that it covers a number of risks that a surety cannot cover. While the latter aims to guarantee the fulfilment of the contract, the independent guarantee contract can go beyond this purpose and cover risks that are due to language barriers, lack of knowledge of foreign substantive or procedural law or the disproportionately long duration of foreign legal proceedings, for example. [158] This is also the reason why this type of guarantee is

[145] Article IV.G.-1:101 (c) DCFR.

[146] Ie "*the person who owes the secured obligation, if any, to the creditor, and, in provisions relating to purported obligations, includes an apparent debtor*", see Article IV.G.-1:101 (d) DCFR.

[147] Article IV.G.-3:102 (1)(a) DCFR.

[148] Ibid.

[149] Article IV.G.-3:102 (1)(b) DCFR.

[150] Article IV.G.-3:102 (1)(c) DCFR.

[151] Article IV.G.-3:102 (2) DCFR.

[152] Article IV.G.-3:103 (1) DCFR.

[153] Article IV.G.-3:104 DCFR.

[154] Article IV.G.-3:106 DCFR.

[155] The DCFR further provides a timeframe for the performance: seven days from having received the demand. See Article IV.G.-3:103 (3) DCFR. Other time limits are established under Article IV.G.-3:107 DCFR.

[156] Article IV.G.-3:103 (2) DCFR.

[157] Article IV.G.-3:105 DCFR.

[158] Thomas Fischer, '§ 104. Bankgarantien bei Außenhandelsgeschäften' in Jürgen Ellenberger, Hermann-Josef Bunte (eds), *Bankrechtshandbuch* II (6th edn, C.H.Beck 2022) para 11; Antonio Cetra, 'Contratto autonomo di garanzia' (*Enciclopedia*

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usually issued by professional, qualified and solid economic actors, such as banks. [159] Not always, however. At times, eg in banking law, parties can rely on similar guarantees entered into by non-professionals as well.

It is, however, mostly banks and insurance companies that act as guarantors. The increasingly globally networked banks stand to lose their good international reputation if they fail to fulfil an obligation arising from an independent guarantee agreement. It is precisely this circumstance that makes banks particularly qualified and reliable guarantors. For their part, however, banks also have the advantage of not having to carry out in-depth checks, documentary research or legal reviews with this type of contract, which can often be complicated, time-consuming and, above all, costly in international trade and when different legal systems are involved.

As a result, it can be concluded that the independent guarantee contract, also due to the lack of statutory regulation, [160] represents a special expression of private autonomy. However, this is also associated with problems, particularly with regard to the defence of abuse. Although the comment made by the German BGB legislator in 1900, according to which the guarantee contract *"[eludes] general regulation also because of the diversity of contracts which have a guarantee as their purpose and content"*, [161] still seems relevant, further relevant legislative debate should take place, particularly at an international and European level, especially as decades of national and international legal and business practice have proven that this type of contract is useful and efficient, corresponds to an interest deemed worthy of protection by the legal system and fulfils a typical socio-economic function. An attempt to regulate these kinds of guarantees has already been made by Draft Common Frame of Reference, dating, however, back to 2009. [162] The DCFR rules could, nevertheless, provide a starting point. Especially also, where relevant, in consumer matters. The scope of the DCFR would allow to extend the provisions to B2C relations as well.

However, the suggestion of introducing some uniform rules is not intended to postulate a strict and comprehensive standardisation, but rather to emphasise that cornerstones could maximise the efficiency of the legal institution. Despite the problems alluded to in this article (eg in matters concerning the abuse of the guarantee), it is indeed remarkable how private autonomy in commercial and legal transactions has produced a necessary and efficient independent guarantee that is very popular and widespread.

Giuridica Treccani Online, 2019) <https://www.treccani.it/enciclopedia/contratto-autonomo-di-garanzia_%28Diritto-online%29/> (accessed 2 January 2026).

[159] Giorgio Meo, *Funzione professionale e meritevolezza degli interessi nelle garanzie atipiche* (Giuffrè 1991) 132ff.

[160] Carlo d'Orta, *Il contratto autonomo di garanzia. Tra esigenze del mercato ed esercizio del diritto* (Giappichelli 2018) 23.

[161] Motive zu dem Entwurfe eines bürgerlichen Gesetzbuches für das deutsche Reich II (1888) 658.

[162] See "Part IV.G. Personal security" of the DCFR. Also, Jan Schürnbrand, 'Das Recht der Personalsicherheiten im Entwurf des Gemeinsamen Referenzrahmens'(2009) WM 873, 873ff.

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