

# PERSONAL SECURITY CONTRACTS

## CHAPTER 1: COMMON RULES

### 1:101: Definitions

*For the purposes of this part:*

- (a) A dependent personal security (suretyship guarantee) is a contractual obligation by a security provider to make payment or to render another performance or to pay damages to the creditor that is assumed in order to secure a present or future obligation of the debtor owed to the creditor and that depends upon the validity, terms and extent of the latter obligation;*
- (b) An independent personal security (indemnity/independent guarantee) is a contractual obligation assumed for the purposes of security by a security provider to make payment or to render another performance or to pay damages to the creditor that is expressly or impliedly agreed not to depend upon the validity, terms or extent of another person's obligation owed to the creditor;*
- (c) The security provider is the person who assumes the obligations under the contract of personal security towards the creditor;*
- (d) The debtor is the person who owes the secured obligation, if any, to the creditor;*
- (e) In a co-debtorship for security purposes a security provider obliges itself primarily for purposes of security towards the creditor as a co-debtor for the whole or a part of the secured obligation;*
- (f) A global guarantee is a security that is agreed to cover all the debtor's obligations towards the creditor or the debit balance of a current account or a security of a similar extent;*
- (g) A consumer means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession;*
- (h) Proprietary security covers security rights in all kinds of property, whether movable or immovable, tangible or intangible.*

### 1:102: Scope

- (1) This part applies to any type of contractual personal security, in particular:
  - (a) to suretyship guarantees (dependent personal securities), including binding comfort letters;*
  - (b) to indemnities/independent guarantees (independent personal securities), including stand-by letters of credit; and*
  - (c) to co-debtorship for security purposes ( 1:106).**
- (2) This part does not apply to insurance contracts. In the case of a guarantee insurance, this part applies only if and in so far as the insurer has issued a document containing a personal security in favour of the creditor.*
- (3) This part does not affect the rules on the aval and the security endorsement of negotiable instruments, but does apply to security for obligations resulting from such an aval or security endorsement.*

### **1:103: Freedom of Contract**

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

### **1:104: Creditor's Acceptance**

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

### **1:105: Interpretation**

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

### **1:106: Co-debtorship for Purposes of Security**

*A co-debtorship for security purposes ( 1:101 lit. e) is subject to the rules of chapters 1 and 4 and, subsidiarily, to the rules on plurality of debtors (PECL chapter 10 section 1).*

### **1:107: Several Security Providers: Solidary Liability Towards Creditor**

*(1) To the extent that several providers of personal security have secured the same obligation or the same part of an obligation or have assumed their undertaking for the same security purpose, each security provider assumes within the limits of its undertaking to the creditor solidary liability together with the other security providers. This rule also applies if these security providers in assuming their securities have acted independently.*

*(2) Paragraph 1 applies with appropriate adaptations if proprietary security (1: 101 lit. h) has been provided by the debtor or a third person in addition to the personal security.*

### **1:108: Several Security Providers: Internal Recourse**

*(1) In the cases covered by 1:107 recourse between several providers of personal security or between providers of personal security and of proprietary security ( 1:101 lit. h) is governed by PECL 10:106, subject to the following paragraphs.*

*(2) Subject to paragraph 3, the proportionate share of each security provider for the purposes of PECL 10:106 is determined according to the following rules:*

*(a) Unless the security providers have otherwise agreed, as between themselves each security provider is liable in the same proportion that the maximum risk assumed by that security provider bore to the total of the maximum risks assumed by all the security providers. The relevant time is that of the creation of the last security.*

*(b) For personal security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the amount of the secured claim or, if a current account has been secured, the credit limit is decisive. If the secured claim is not limited, its final balance is decisive.*

*(c) For proprietary security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the asset(s) serving as security is decisive.*

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

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

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

#### **1:109: Several Security Providers: Recourse Against Debtor**

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

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

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

#### **1:110: Subsidiary Application of Rules on Solidary Debtors**

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

### **CHAPTER 2: DEPENDENT PERSONAL SECURITIES (SURETYSHIP GUARANTEES)**

#### **2:101: Presumption for Dependent Personal Security**

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

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

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

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

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

*(a) in an insolvency proceeding;*

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

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

*(3) Except in the case of a global guarantee ( 1:101 lit. f), if an amount has not been fixed for the security and cannot be determined from the agreement of the parties, the security provider's obligation is limited to the amount of the secured obligations at the time the security became effective.*

*(4) Except in the case of a global guarantee ( 1:101 lit. f), any agreement between the creditor and the debtor to increase the extent, to aggravate the terms or to predate the maturity of the secured obligations agreed upon after the security provider's obligation became effective does not affect the latter's obligation.*

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

*(1) As against the creditor, the security provider may invoke any defence of the debtor with respect to the existence, validity, enforceability and terms of the secured obligation, even if it is no longer available to the debtor due to acts or omissions of the debtor occurring after the security became effective.*

*(2) The security provider may not invoke the debtor's right to withhold performance under PECL 9:201 if the debtor is no longer entitled to invoke it.*

*(3) The security provider may not invoke the lack of capacity of the debtor, whether a natural person or a legal entity, or the non-existence of the debtor, if a legal entity, if the relevant facts were known to the security provider at the time when the security became effective.*

*(4) As long as the debtor is entitled to avoid the contract from which the secured obligation arises on a ground other than those mentioned in the preceding paragraph and has not exercised that right, the security provider is entitled to refuse performance.*

*(5) The preceding paragraph applies with appropriate adaptations if the secured obligation is subject to set-off.*

### **2:104: Coverage of Security**

*(1) The security covers, within its maximum amount, if any, not only the principal obligation secured, but also the debtor's ancillary obligations towards the creditor, especially*

*(a) contractual and default interest;*

*(b) damages, a penalty or an agreed payment for non-performance by the debtor; and*

*(c) the reasonable costs of extra-judicial recovery of those items.*

*(2) The costs of legal proceedings and enforcement proceedings against the debtor are covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.*

*(3) A global guarantee ( 1:101 lit. f) covers only obligations which originated in contracts between the debtor and the creditor.*

### **2:105: Solidary Liability of Security Provider**

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

## **2:106: Subsidiary Liability of Security Provider**

*(1) If so agreed, the security provider may invoke as against the creditor the subsidiary character of its liability. A binding comfort letter is presumed to establish only subsidiary liability.*

*(2) Subject to paragraph 3, before demanding performance from the security provider, the creditor must have undertaken appropriate attempts to obtain satisfaction from the debtor and other security providers, if any, securing the same obligation under a personal or proprietary security establishing solidary liability.*

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

## **2:107: Creditor's Obligations of Notification**

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

*(2) In addition, in the case of a global guarantee ( 1:101 lit. f), the creditor must notify the security provider of any agreed increase*

*(a) whenever such increase, starting from the creation of the security, reaches 20 percent of the amount that was so secured at that time; and*

*(b) whenever the secured amount is further increased by 20 percent compared with the secured amount at the date when the last information according to this paragraph was or should have been given.*

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

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

## **2:108: Time Limit for Resort to Security**

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

*(2) If a time limit has been agreed, directly or indirectly, for the resort to a security establishing subsidiary liability for the security provider, the latter is no longer liable after the expiration of the agreed time limit. The security provider remains liable if the creditor*

*(a) after maturity of the secured obligation, but before expiration of the time limit has informed the security provider about its intention to demand performance of the security and has asserted that it has started to undertake appropriate attempts to obtain satisfaction as required according to 2:106 paragraphs 2 and 3; and*

*(b) if demanded by the security provider, informs the security provider every six months about the status of these attempts.*

*(3) If secured obligations fall due upon, or within 14 days before, expiration of the time limit of the security, the request for performance or the information according to paragraphs 1 and 2 may be given earlier than provided for in paragraphs 1 and 2, but no more than 10 days before expiration of the time limit of the security.*

*(4) If the creditor has taken due measures according to the preceding paragraphs, the security provider's maximum liability is restricted to the amount of the secured obligations as defined in 2:104 paragraphs 1 and 2. The relevant time is that at which the agreed time limit expires.*

#### **2:109: Limiting Security Without Time Limit for Secured Obligations**

*(1) Where the scope of a security is not limited to obligations arising within an agreed time limit only, the scope may be limited by any party giving notice of at least three months to the other party. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts.*

*(2) The security provider's maximum liability is limited to the amount of the secured obligations as defined in 2:104 paragraphs 1 and 2 as of the date at which the limitation becomes effective.*

#### **2:110: Creditor's Liability**

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

#### **2:111: Debtor's Relief for the Security Provider**

*(1) A security provider who has provided a security at the debtor's request or with its express or presumed consent, may request relief by the debtor*

*(a) if the debtor has not performed the secured obligation when it became due or is unable to pay or the debtor's assets have been substantially diminished; or*

*(b) if the creditor has brought an action on the security against the security provider.*

*(2) Relief may be granted by furnishing adequate security.*

#### **2:112: Security Provider's Obligations Before Performance**

*(1) Before performance to the creditor, the security provider must notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.*

*(2) If the security provider performs without the request provided for in paragraph 1 or neglects to raise defences communicated by the debtor or known to the security provider from other sources, it is liable as against the debtor for the resulting damage.*

*(3) The security provider's rights against the creditor remain unaffected.*

### **2:113: Security Provider's Rights After Performance**

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

*(2) In case of part performance, the creditor's remaining partial rights against the debtor have priority over the rights to which the security provider has been subrogated.*

*(3) By virtue of the subrogation according to paragraph 1 second sentence, dependent and independent personal and proprietary security rights are transferred by operation of law to the security provider, notwithstanding any contractual restriction or exclusion of transferability agreed by the debtor. Rights against other security providers can only be exercised within the limits of 1:108.*

*(4) Where the debtor due to incapacity is not liable towards the creditor, the security provider may nevertheless claim reimbursement from the debtor to the extent of its enrichment. This rule applies also if a debtor legal entity has not come into existence.*

## **CHAPTER 3: INDEPENDENT PERSONAL SECURITIES (INDEMNITIES/INDEPENDENT GUARANTEES)**

### **3:101: Scope**

*(1) The independence of a security is not prejudiced by a mere general reference to an underlying obligation (including a personal security).*

*(2) The provisions of this part also apply to standby letters of credit.*

### **3:102: Security Provider's Obligations Before Performance**

*(1) The security provider is obliged to perform only if the written demand for performance complies exactly with the terms set out in the security.*

*(2) Immediately upon receipt of a demand for performance, the security provider must inform the debtor that the demand has been received.*

*(3) Unless otherwise agreed, the security provider may invoke defences to which it is entitled as against the creditor.*

*(4) The security provider must without delay and at the latest within seven working days of receipt of a written demand for performance*

*(a) perform in accordance with the demand and immediately inform the debtor; or*

*(b) refuse to perform and immediately inform the creditor and the debtor.*

*(5) The security provider is liable for any damage caused by failure to perform the obligations set out in paragraphs 2 and 4.*

### **3:103: Independent Personal Security on First Demand**

*(1) An independent personal security which is expressed as being due upon first demand or which is in such terms that this can unequivocally be inferred, is subject to 3:102, except as provided hereafter.*

*(2) The security provider is obliged to perform only if the creditor's demand is supported by a declaration in writing by the creditor which expressly confirms that any condition upon which the security becomes due is fulfilled.*

*(3) 3:102 paragraph 3 does not apply.*

### **3:104: Manifestly Abusive or Fraudulent Demand**

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

*(2) If the conditions of the preceding paragraph are fulfilled, the debtor may prohibit*

*(a) performance by the security provider; and*

*(b) issuance or utilization of a demand for performance by the creditor.*

### **3:105: Security Provider's Right to Reclaim**

*(1) The security provider has the right to reclaim the benefits received by the creditor if*  
*(a) the conditions for the creditor's demand were not or subsequently ceased to be fulfilled; or*

*(b) the creditor's demand was manifestly abusive or fraudulent.*

*(2) The security provider's right to reclaim benefits is subject to PECL 4:115 and Book VII.*

### **3:106: Securities With or Without Time Limits**

*(1) If a time limit has been agreed, directly or indirectly, for the resort to a security, the security provider exceptionally remains liable even after expiration of the time limit, provided the creditor had demanded performance according to 3:102 paragraph 1 or 3:103 at a time when it was entitled to and before expiration of the time limit for the security. 2:108 paragraph 3 applies with appropriate adaptations. The security provider's maximum liability is restricted to the amount which the creditor could have demanded as of the date when the time limit expired.*

*(2) Where a security does not provide that the conditions for the liability of the security provider must be fulfilled within an agreed time limit, the security provider may set such a time limit by giving notice of at least three months to the other party. The security provider's maximum liability is restricted to the amount which the creditor could have demanded as of the date set by the security provider. The preceding sentences do not apply if the security is given for specific purposes.*

### **3:107: Transfer of Security**

*The creditor's right to demand performance from a security provider can be transferred by operation of law. It can also be assigned, except in the case of an independent personal security on first demand.*

### **3:108: Security Provider's Rights After Performance**

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

## **CHAPTER 4: SPECIAL RULES FOR PERSONAL SECURITIES OF CONSUMERS**

### **4:101: Scope of Application**

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

### **4:102: Applicable Rules**

- (1) Personal securities subject to this chapter are governed by the rules of chapters 1 and 2, except as otherwise provided in this chapter.*
- (2) The parties may not deviate to the disadvantage of a security provider from the rules of this chapter.*

### **4:103: Creditor's Precontractual Obligation of Information**

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

### **4:104: Door-to-Door Security Transactions**

*The provisions of the Directive of the European Community on Door-to-Door Transactions (85/577 of 20 December 1985) are to be applied to a security which is subject to this chapter.*

#### **4:105: Form**

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

#### **4:106: Nature of Security Provider's Liability**

*Where this chapter applies:*

- (a) an agreement purporting to create a global guarantee ( 1:101 lit. f) is considered as creating a dependent security with a fixed amount to be determined according to 2:102 paragraph 3;*
- (b) the liability of a provider of dependent security is subsidiary within the meaning of 2:106, unless expressly agreed otherwise; and*
- (c) an agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met.*

#### **4:107: Creditor's Obligations of Annual Information**

*(1) Subject to the debtor's consent, the creditor has to inform the security provider annually about the secured amounts of principal, interest and other charges owed by the debtor on the date of the information. The debtor's consent, once given, is irrevocable.*

*(2) 2:107 paragraphs 3 and 4 apply with appropriate adaptations.*

#### **4:108: Limiting Security With Time Limit**

*(1) A security provider who has provided a security whose scope is limited to obligations arising within an agreed time limit only may three years after the security became effective limit its effects by giving notice of at least two months time to the creditor. The preceding sentence does not apply, if the security is restricted to cover specific obligations or obligations arising from specific contracts. The creditor has to inform the debtor immediately.*

*(2) The security provider's maximum liability is determined by 2:109 paragraph 2.*

# PERSONAL SECURITY CONTRACTS

## CHAPTER 1: COMMON RULES

### 1:101: Definitions

*For the purposes of this part:*

- (a) A dependent personal security (suretyship guarantee) is a contractual obligation by a security provider to make payment or to render another performance or to pay damages to the creditor that is assumed in order to secure a present or future obligation of the debtor owed to the creditor and that depends upon the validity, terms and extent of the latter obligation;*
- (b) An independent personal security (indemnity/independent guarantee) is a contractual obligation assumed for the purposes of security by a security provider to make payment or to render another performance or to pay damages to the creditor that is expressly or impliedly agreed not to depend upon the validity, terms or extent of another person's obligation owed to the creditor;*
- (c) The security provider is the person who assumes the obligations under the contract of personal security towards the creditor;*
- (d) The debtor is the person who owes the secured obligation, if any, to the creditor;*
- (e) In a co-debtorship for security purposes a security provider obliges itself primarily for purposes of security towards the creditor as a co-debtor for the whole or a part of the secured obligation;*
- (f) A global guarantee is a security that is agreed to cover all the debtor's obligations towards the creditor or the debit balance of a current account or a security of a similar extent;*
- (g) A consumer means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession;*
- (h) Proprietary security covers security rights in all kinds of property, whether movable or immovable, tangible or intangible.*

### 1:102: Scope

- (1) This part applies to any type of contractual personal security, in particular:
  - (a) to suretyship guarantees (dependent personal securities), including binding comfort letters;*
  - (b) to indemnities/independent guarantees (independent personal securities), including stand-by letters of credit; and*
  - (c) to co-debtorship for security purposes ( 1:106).**
- (2) This part does not apply to insurance contracts. In the case of a guarantee insurance, this part applies only if and in so far as the insurer has issued a document containing a personal security in favour of the creditor.*
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*The parties may exclude the application of any of the rules in this part or derogate from them or vary their effects, except as otherwise provided in chapter 4 of this part.*

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

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

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*A co-debtorship for security purposes ( 1:101 lit. e) is subject to the rules of chapters 1 and 4 and, subsidiarily, to the rules on plurality of debtors (PECL chapter 10 section 1).*

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*(1) To the extent that several providers of personal security have secured the same obligation or the same part of an obligation or have assumed their undertaking for the same security purpose, each security provider assumes within the limits of its undertaking to the creditor solidary liability together with the other security providers. This rule also applies if these security providers in assuming their securities have acted independently.*

*(2) Paragraph 1 applies with appropriate adaptations if proprietary security (1: 101 lit. h) has been provided by the debtor or a third person in addition to the personal security.*

### **1:108: Several Security Providers: Internal Recourse**

*(1) In the cases covered by 1:107 recourse between several providers of personal security or between providers of personal security and of proprietary security ( 1:101 lit. h) is governed by PECL 10:106, subject to the following paragraphs.*

*(2) Subject to paragraph 3, the proportionate share of each security provider for the purposes of PECL 10:106 is determined according to the following rules:*

*(a) Unless the security providers have otherwise agreed, as between themselves each security provider is liable in the same proportion that the maximum risk assumed by that security provider bore to the total of the maximum risks assumed by all the security providers. The relevant time is that of the creation of the last security.*

*(b) For personal security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the amount of the secured claim or, if a current account has been secured, the credit limit is decisive. If the secured claim is not limited, its final balance is decisive.*

*(c) For proprietary security, the maximum risk is determined by the agreed maximum amount of the security. In the absence of an agreed maximum amount, the value of the asset(s) serving as security is decisive.*

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

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

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

#### **1:109: Several Security Providers: Recourse Against Debtor**

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

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

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

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

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

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

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

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

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

*(a) in an insolvency proceeding;*

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

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

*(3) Except in the case of a global guarantee ( 1:101 lit. f), if an amount has not been fixed for the security and cannot be determined from the agreement of the parties, the security provider's obligation is limited to the amount of the secured obligations at the time the security became effective.*

*(4) Except in the case of a global guarantee ( 1:101 lit. f), any agreement between the creditor and the debtor to increase the extent, to aggravate the terms or to predate the maturity of the secured obligations agreed upon after the security provider's obligation became effective does not affect the latter's obligation.*

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

*(1) As against the creditor, the security provider may invoke any defence of the debtor with respect to the existence, validity, enforceability and terms of the secured obligation, even if it is no longer available to the debtor due to acts or omissions of the debtor occurring after the security became effective.*

*(2) The security provider may not invoke the debtor's right to withhold performance under PECL 9:201 if the debtor is no longer entitled to invoke it.*

*(3) The security provider may not invoke the lack of capacity of the debtor, whether a natural person or a legal entity, or the non-existence of the debtor, if a legal entity, if the relevant facts were known to the security provider at the time when the security became effective.*

*(4) As long as the debtor is entitled to avoid the contract from which the secured obligation arises on a ground other than those mentioned in the preceding paragraph and has not exercised that right, the security provider is entitled to refuse performance.*

*(5) The preceding paragraph applies with appropriate adaptations if the secured obligation is subject to set-off.*

### **2:104: Coverage of Security**

*(1) The security covers, within its maximum amount, if any, not only the principal obligation secured, but also the debtor's ancillary obligations towards the creditor, especially*

*(a) contractual and default interest;*

*(b) damages, a penalty or an agreed payment for non-performance by the debtor; and*

*(c) the reasonable costs of extra-judicial recovery of those items.*

*(2) The costs of legal proceedings and enforcement proceedings against the debtor are covered, provided the security provider had been informed about the creditor's intention to undertake such proceedings in sufficient time to enable the security provider to avert those costs.*

*(3) A global guarantee ( 1:101 lit. f) covers only obligations which originated in contracts between the debtor and the creditor.*

### **2:105: Solidary Liability of Security Provider**

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

## **2:106: Subsidiary Liability of Security Provider**

*(1) If so agreed, the security provider may invoke as against the creditor the subsidiary character of its liability. A binding comfort letter is presumed to establish only subsidiary liability.*

*(2) Subject to paragraph 3, before demanding performance from the security provider, the creditor must have undertaken appropriate attempts to obtain satisfaction from the debtor and other security providers, if any, securing the same obligation under a personal or proprietary security establishing solidary liability.*

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

## **2:107: Creditor's Obligations of Notification**

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

*(2) In addition, in the case of a global guarantee ( 1:101 lit. f), the creditor must notify the security provider of any agreed increase*

*(a) whenever such increase, starting from the creation of the security, reaches 20 percent of the amount that was so secured at that time; and*

*(b) whenever the secured amount is further increased by 20 percent compared with the secured amount at the date when the last information according to this paragraph was or should have been given.*

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

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

## **2:108: Time Limit for Resort to Security**

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

*(2) If a time limit has been agreed, directly or indirectly, for the resort to a security establishing subsidiary liability for the security provider, the latter is no longer liable after the expiration of the agreed time limit. The security provider remains liable if the creditor*

*(a) after maturity of the secured obligation, but before expiration of the time limit has informed the security provider about its intention to demand performance of the security and has asserted that it has started to undertake appropriate attempts to obtain satisfaction as required according to 2:106 paragraphs 2 and 3; and*

*(b) if demanded by the security provider, informs the security provider every six months about the status of these attempts.*

*(3) If secured obligations fall due upon, or within 14 days before, expiration of the time limit of the security, the request for performance or the information according to paragraphs 1 and 2 may be given earlier than provided for in paragraphs 1 and 2, but no more than 10 days before expiration of the time limit of the security.*

*(4) If the creditor has taken due measures according to the preceding paragraphs, the security provider's maximum liability is restricted to the amount of the secured obligations as defined in 2:104 paragraphs 1 and 2. The relevant time is that at which the agreed time limit expires.*

#### **2:109: Limiting Security Without Time Limit for Secured Obligations**

*(1) Where the scope of a security is not limited to obligations arising within an agreed time limit only, the scope may be limited by any party giving notice of at least three months to the other party. The preceding sentence does not apply if the security is restricted to cover specific obligations or obligations arising from specific contracts.*

*(2) The security provider's maximum liability is limited to the amount of the secured obligations as defined in 2:104 paragraphs 1 and 2 as of the date at which the limitation becomes effective.*

#### **2:110: Creditor's Liability**

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

#### **2:111: Debtor's Relief for the Security Provider**

*(1) A security provider who has provided a security at the debtor's request or with its express or presumed consent, may request relief by the debtor*

*(a) if the debtor has not performed the secured obligation when it became due or is unable to pay or the debtor's assets have been substantially diminished; or*

*(b) if the creditor has brought an action on the security against the security provider.*

*(2) Relief may be granted by furnishing adequate security.*

#### **2:112: Security Provider's Obligations Before Performance**

*(1) Before performance to the creditor, the security provider must notify the debtor and request information about the outstanding amount of the secured obligation and any defences or counterclaims against it.*

*(2) If the security provider performs without the request provided for in paragraph 1 or neglects to raise defences communicated by the debtor or known to the security provider from other sources, it is liable as against the debtor for the resulting damage.*

*(3) The security provider's rights against the creditor remain unaffected.*

### **2:113: Security Provider's Rights After Performance**

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

*(2) In case of part performance, the creditor's remaining partial rights against the debtor have priority over the rights to which the security provider has been subrogated.*

*(3) By virtue of the subrogation according to paragraph 1 second sentence, dependent and independent personal and proprietary security rights are transferred by operation of law to the security provider, notwithstanding any contractual restriction or exclusion of transferability agreed by the debtor. Rights against other security providers can only be exercised within the limits of 1:108.*

*(4) Where the debtor due to incapacity is not liable towards the creditor, the security provider may nevertheless claim reimbursement from the debtor to the extent of its enrichment. This rule applies also if a debtor legal entity has not come into existence.*

## **CHAPTER 3: INDEPENDENT PERSONAL SECURITIES (INDEMNITIES/INDEPENDENT GUARANTEES)**

### **3:101: Scope**

*(1) The independence of a security is not prejudiced by a mere general reference to an underlying obligation (including a personal security).*

*(2) The provisions of this part also apply to standby letters of credit.*

### **3:102: Security Provider's Obligations Before Performance**

*(1) The security provider is obliged to perform only if the written demand for performance complies exactly with the terms set out in the security.*

*(2) Immediately upon receipt of a demand for performance, the security provider must inform the debtor that the demand has been received.*

*(3) Unless otherwise agreed, the security provider may invoke defences to which it is entitled as against the creditor.*

*(4) The security provider must without delay and at the latest within seven working days of receipt of a written demand for performance*

*(a) perform in accordance with the demand and immediately inform the debtor; or*

*(b) refuse to perform and immediately inform the creditor and the debtor.*

*(5) The security provider is liable for any damage caused by failure to perform the obligations set out in paragraphs 2 and 4.*

### **3:103: Independent Personal Security on First Demand**

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

### **3:104: Manifestly Abusive or Fraudulent Demand**

- (1) In the cases covered by 3:102 and 3:103, a security provider is obliged to comply with a demand for performance, unless it is proved by present evidence that the demand is manifestly abusive or fraudulent.*
- (2) If the conditions of the preceding paragraph are fulfilled, the debtor may prohibit*
  - (a) performance by the security provider; and*
  - (b) issuance or utilization of a demand for performance by the creditor.*

### **3:105: Security Provider's Right to Reclaim**

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

### **3:106: Securities With or Without Time Limits**

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

### **3:107: Transfer of Security**

*The creditor's right to demand performance from a security provider can be transferred by operation of law. It can also be assigned, except in the case of an independent personal security on first demand.*

### **3:108: Security Provider's Rights After Performance**

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

## **CHAPTER 4: SPECIAL RULES FOR PERSONAL SECURITIES OF CONSUMERS**

### **4:101: Scope of Application**

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

### **4:102: Applicable Rules**

- (1) Personal securities subject to this chapter are governed by the rules of chapters 1 and 2, except as otherwise provided in this chapter.*
- (2) The parties may not deviate to the disadvantage of a security provider from the rules of this chapter.*

### **4:103: Creditor's Precontractual Obligation of Information**

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

### **4:104: Door-to-Door Security Transactions**

*The provisions of the Directive of the European Community on Door-to-Door Transactions (85/577 of 20 December 1985) are to be applied to a security which is subject to this chapter.*

#### **4:105: Form**

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

#### **4:106: Nature of Security Provider's Liability**

*Where this chapter applies:*

- (a) an agreement purporting to create a global guarantee ( 1:101 lit. f) is considered as creating a dependent security with a fixed amount to be determined according to 2:102 paragraph 3;*
- (b) the liability of a provider of dependent security is subsidiary within the meaning of 2:106, unless expressly agreed otherwise; and*
- (c) an agreement purporting to create an independent security is considered as creating a dependent security, provided the requirements of the latter are met.*

#### **4:107: Creditor's Obligations of Annual Information**

*(1) Subject to the debtor's consent, the creditor has to inform the security provider annually about the secured amounts of principal, interest and other charges owed by the debtor on the date of the information. The debtor's consent, once given, is irrevocable.*

*(2) 2:107 paragraphs 3 and 4 apply with appropriate adaptations.*

#### **4:108: Limiting Security With Time Limit**

*(1) A security provider who has provided a security whose scope is limited to obligations arising within an agreed time limit only may three years after the security became effective limit its effects by giving notice of at least two months time to the creditor. The preceding sentence does not apply, if the security is restricted to cover specific obligations or obligations arising from specific contracts. The creditor has to inform the debtor immediately.*

*(2) The security provider's maximum liability is determined by 2:109 paragraph 2.*