

Disputes over Bank Securities – Recommendable Action in a European Comparison

In international trade, bank securities are essential. Due to the stagnant economic growth in many European countries, many businesses are in distress. As a consequence, trade agreements are not fulfilled and disputes over provided bank securities arise. Knowing what to look out for in such a dispute is crucial. In the following, we compare the legal framework of Germany, France, Italy, and Austria focusing on actionable strategies depending on the type of security and the parties' role.

The German Perspective of the Guarantee Beneficiary, Guarantee Debtor, and Issuing Bank



Alongside documentary collections and bank sureties, bank guarantees in their various forms are a wellestablished instrument to secure payment and performance obligations, particularly in crossborder trade. In Germany, the bank guarantee "on first demand" is the instrument of choice, as it promises quick liquidity. Unlike accessory security instruments, the bank granting a bank guarantee "on first demand" does not review the underlying claim before disbursement; it will only refuse payment in cases of manifest abuse.

Companies in the role of guarantee beneficiaries are, however, well advised not to call upon a first demand guarantee without first reviewing both the contractual prerequisites of the guarantee agreement and those of the underlying principal contract. This approach helps avoid costly and time-consuming follow-up proceedings brought by the guarantee debtor for recovery. In this context, even seemingly minor provisions on the applicable law and international jurisdiction should be carefully reviewed. Parties are often caught off guard by these aspects, for instance, when the beneficiary seeks payment but finds itself confronted with an "unfavorable" legal system at a strategically disadvantageous forum that interprets the concept of abuse of rights in an overly broad manner.

If the beneficiary concludes that the guarantee case has occurred, it should act swiftly and without prior notice to the guarantee debtor by demanding payment of the guarantee amount from the bank. Otherwise, the guarantee debtor could prepare a motion for preliminary injunction.

For the guarantee debtor, seeking preliminary injunction before German courts against either the bank or the contractual partner can be advisable to prevent payment of the guaranteed sum. This may be appropriate where the debtor's own solvency is at risk or where the counterparty is feared to face a liquidity shortfall during a lengthy recovery process. Whether a preliminary injunction is likely to succeed depends on the contractual provisions of the guarantee agreement between the bank and the beneficiary and on the applicable law governing that relationship. The guarantee agreement may contain detailed provisions permitting refusal of payment, such as the requirement of an (arbitral) award against the beneficiary. If, however, the guarantee agreement contains no such provisions, payment under a first demand guarantee can usually be prevented only in cases of abuse of rights, which must be proven with "readily available" evidence. Such abuse might be established, for instance, where the beneficiary and the bank had agreed on the return of the guarantee at a specified date, yet the beneficiary invokes the guarantee after that date. Acting in time is always of the essence, as the guarantee bank will usually arrange for the guaranteed sum to be paid within a few days only.

If the bank has already disbursed the guaranteed sum, the guarantee debtor could challenge the debit to its account where the payment was unauthorized under the terms of the guarantee agreement or in cases of abuse. Moreover, the bank could be liable for damages if it failed to promptly notify the debtor of the claim, thereby depriving the debtor of the opportunity to prevent payment.



From the perspective of the guaranteeing bank, a call on the guarantee presents a dilemma: on the one hand, the bank must fulfill its obligation under the guarantee towards the beneficiary. On the other hand, it must also safeguard its contractual relationship with the debtor and avoid making payments without proper justification, as it would otherwise not be able to lawfully debit its customer's account with the recourse amount. In addition to reviewing the key contractual documents and the parties' correspondence, it will be advisable for the bank to allow a reasonable period to pass before disbursement – particularly to determine whether a preliminary court order prohibiting enforcement of the guarantee is issued. From an economic standpoint, too, restraint often carries less risk, since the beneficiary's potential loss typically consists of the costs of substitute financing (such as loan interest), whereas an unjustified payment could result in a loss of the entire guarantee amount, if recovery later proves impossible.

A Look at France

The bank securities common in Germany also exist under French law. The common instrument for securement of international trade in France is the "*garantie autonome*", which closely resembles the German guarantee "on first demand". Like its German counterpart, the "*garantie autonome*" is independent of the underlying principal contract and aims to provide swift liquidity. The "*garantie autonome*" arises through a unilateral declaration by the guarantor. Care must be taken to distinguish it clearly from a bank surety ("*cautionnement*"), otherwise the security is at risk of re-qualification.

Calls under a "*garantie autonome*" must comply with any formal requirements set out in the guarantee declaration as well as with guarantee conditions agreed in the principal contract. Beyond that, also under French law, payment may only be refused in cases of manifest abuse. According to the French court practice, this is the case, for instance, where the beneficiary itself has failed to perform under the principal contract.

Just as in Germany, French law allows the guarantee debtor to file an emergency application for a preliminary injunction before the *référé* judge to prevent an abusive call. This mechanism



is powerful, as it can significantly delay enforcement of the guarantee, particularly in cases involving substantial amounts or technical disputes, even though court decisions are typically rendered swiftly.

From the beneficiary's perspective, the French system is designed to make guarantees rapidly enforceable, with a clear emphasis on the autonomy of the instrument. In practice, however, the process often requires carefully balancing the interests of the debtor and the bank, and swift payment is not always assured.

From the bank's perspective, while the legal obligation to pay is clear, yet in practice banks act with caution to avoid liability for a wrongful call. They typically notify the debtor upon receiving a demand and may hold off payment briefly to allow the debtor to act, which adds another layer of timing and strategy to the overall process.

Additionally, in case of dispute, it should be noted that French courts have, in some cases, applied French law to disputes over guarantees by reference to French law governing the principal contract, even if the guarantee agreement is expressly governed by another law.

A Look at Italy

Under Italian law, the "*garanzia autonoma*" or "*garanzia a prima richiesta*" is widely used, particularly in public procurement and trade agreements. Like its German and French counterparts, it is non-accessory and thus defences arising from the principal contract cannot prevent payout. Like in France, precise drafting is essential to avoid re-qualification as a surety, increasing exposure to defences under the principal contract. Before payout, Italian banks will only examine two narrowly defined exceptions (*exceptio doli*): bad faith and abuse. As a result, the guarantee debtor is left with little scope for intervention at an early stage. Unlike in Germany and France, preventive relief through preliminary injunctions is rare and subject to strict requirements and very high evidentiary burden of proof. Additionally, Italian courts tend to emphasize the purpose of the "*garanzia autonoma*" as an immediate liquidity instrument, and thus preventive judicial control of guarantee payments is seldom granted. Consequently, legal protection for the debtor is largely reactive, relying on subsequent claims for restitution or damages after payment has been made.

Correspondingly, the autonomous guarantee provides a highly effective and immediate legal safeguard against the risk of non-performance for the guarantee beneficiary. The bank's obligation to pay "on first demand" ensures trust and liquidity without the delays of litigation or proof of breach. Yet this autonomy has limits: the beneficiary must act in good faith and refrain from abusive enforcement, as fraudulent or opportunistic calls may trigger the *exceptio doli* and give rise to liability for damages.

The guaranteeing bank is bound to pay upon first demand, provided the formal requirements are met. While this ensures efficiency in commercial relations, it also exposes the bank to payment risks, especially if the debtor has not fulfilled its obligations. The bank's protection is then limited to cases of *exceptio doli*.

A Look at Austria

In Austria, bank sureties play a minor role, primarily due to a 1% government "stamp fee" on the secured amount,



payable by the guarantee debtor. Not least for this reason, the guarantee "on first demand" is the preferred security in Austrian trade agreements and construction projects. Like the above counterparts, the Austrian version is nonaccessory. In addition, Austria recognizes the so-called "simple guarantee" ("*einfache Garantie*"), which, while generally abstract, requires the beneficiary to prove the occurrence of the secured event before payment. As it is not payable upon first demand, the "simple guarantee" also plays a minor role.

A typical dispute over a guarantee "on first demand" in Austria arises when a construction contractor commissions its bank to issue a guarantee in favor of the client to secure performance. The bank undertakes to pay the client – the beneficiary – upon first written request, without further examination. If the client later demands payment, alleging a defect or delay, the bank must pay swiftly – regardless of whether an actual defect or delay exists. The contractor, as the guarantee debtor, cannot object directly to the bank's payment but must instead pursue legal action against the client. This illustrates the "pay now, sue later" principle central to Austrian law on first demand guarantee.

In disputes over securities, the available remedies, and strategic considerations mirror those under German law. The debtor may seek a preliminary injunction to block payment. For the bank, it remains a matter of debate under Austrian law, whether it must notify the guarantee debtor prior to payout to allow for preliminary injunction. In practice, however, banks typically request a comment from the guarantee debtor before executing payment as part of their contractual duties of diligence and good faith.

Recommended Action in Case of Dispute

The comparison shows that the abstract guarantee "on first demand" and its counterparts are the security instruments of choice across the compared jurisdictions. The parties' available remedies and strategic considerations in the event of a dispute are likewise largely similar:

For the guarantee beneficiary, the key advice is consistent: do not call on the guarantee without carefully reviewing not only the guarantee agreement but also the substantive requirements under the principal contract to avoid costly recovery proceedings. In this context, provisions on applicable law and international jurisdiction should also be carefully reviewed to avoid unwelcome surprises. Once the guarantee event has occurred, the beneficiary should act swiftly, and demand payment of the guarantee sum from the bank before the guarantee debtor can prepare for preliminary injunction.

For guarantee debtors, preliminary injunction before state courts can be an effective means of preventing payment – with the caveat that Italy offers only limited preventive relief. In assessing their position, debtors should closely review the scope of the guarantee, the obligations covered, any time limits, and the conditions for returning the security. Where a call is made at a time when the beneficiary is already obliged to return the guarantee, the debtor may successfully invoke abuse of rights. In practice, they should be aware there usually is only a short time window to prevent payout – making swift action essential.

From the perspective of the issuing bank, beyond a thorough review of the key documents, it may be advisable to wait before disbursing the guaranteed amount to allow for the possibility that an interim court order may intervene in the meantime.

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